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## **The Preliminary-Hearing Swindle: A Crime Against Procedure**

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# THE PRELIMINARY-HEARING SWINDLE: A CRIME AGAINST PROCEDURE

*Michael D. Cicchini\**

*It is incredibly easy for a prosecutor to file a complaint, thus setting the criminal litigation machinery in motion. But in felony cases, defendants are entitled to a preliminary hearing which serves as a check on prosecutorial power. The “prelim” is an adversarial hearing at which the prosecutor must present evidence and call witnesses who are subject to cross-examination. The prelim’s purpose is to test whether there is probable cause to believe the defendant committed a felony, thus preventing “hasty, malicious, improvident and oppressive prosecutions.”*

*Nearly all states allow prosecutors to use hearsay, with limitations, at the prelim. Given that, a Machiavellian prosecutor wondered, “If hearsay is admissible at the prelim, and if the complaint consists of hearsay, why don’t we just have someone read the complaint at the prelim and dispense with witnesses and evidence entirely?” The judiciary proved to be an eager coconspirator, and the preliminary-hearing swindle was born.*

*This Article demonstrates how, exactly, the swindle works and explains why it is illegal: it defeats all of the policies and purposes underlying the prelim and directly violates clear statutes, case law, and even the Constitution. This Article also explains the intended consequence of the swindle: it is amazingly easy for prosecutors to file and win bind-over in felony cases. In one venue that has implemented the swindle, felony cases have risen from 38 percent to 50 percent of all cases.*

*The swindle is just the most recent, albeit the most severe, form of prosecutorial and judicial abuse of the prelim. Because of this cumulative abuse, felony defendants now have fewer protections than do misdemeanor defendants—the exact opposite of what the law intended. Given this state of affairs, this Article provides a model motion that challenges bind-over after a defective prelim, preserves these issues for appeal, and protects defense counsel from future claims of ineffectiveness.*

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## INTRODUCTION

More than a century ago, the American author Ambrose Bierce described litigation as “a machine which you go into as a pig and come out of as a sausage.”<sup>1</sup> This sausage-making analogy is particularly apt for the modern criminal-justice machinery, which, when set in motion by the prosecutor’s filing of a mere criminal complaint, grinds defendants into metaphorical sausages with unparalleled efficiency.<sup>2</sup>

However, when the prosecutor decides to charge a *felony*, the law provides the defendant with a preliminary hearing, or “prelim.”<sup>3</sup> The prelim is an adversarial hearing, rooted in statute and interpretive case law with attendant constitutional rights; it requires the prosecutor to call witnesses and present evidence to establish probable cause that the defendant committed the felony.<sup>4</sup> Given that it is so easy for a prosecutor to file a complaint, the prelim is designed to put the brakes on the litigation machinery, provide a check on prosecutorial power, and prevent “hasty, malicious, improvident and oppressive prosecutions.”<sup>5</sup>

But as Bierce also warned, the law has only “whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases.”<sup>6</sup> Once again, his cynicism was prescient. Because hearsay is typically allowed, to some extent, at prelims in almost every state, prosecutors began to get creative: “If hearsay is admissible,” they asked, “and if a complaint consists of hearsay, why not just read the complaint at the prelim and dispense with witnesses and evidence entirely?”<sup>7</sup>

Judges embraced this idea, and just like that, the preliminary-hearing swindle was born. With the judiciary’s willingness to disregard statutes, case law, and sometimes even the Constitution—all for the benefit of prosecutors—the prelim can be eliminated in substance and even in form.<sup>8</sup> The prelim, once an adversarial hearing where witnesses testified and were cross-examined, can now be replaced by a

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1. See *infra* Part I; Bierce, *infra* note 12.

2. See *infra* Part I.

3. See *infra* Part II.

4. See *infra* Part II.

5. See *infra* Part II; see *State v. Williams*, 544 N.W.2d 400, 404 (Wis. 1996) (citing *State v. Richer*, 496 N.W.2d 66, 69 (Wis. 1993)).

6. See *infra* Part III; Bierce, *infra* note 12.

7. See *infra* Part IV.

8. See *infra* Part IV.

mere recitation of the prosecutor's untested hearsay allegations in the complaint.<sup>9</sup>

This swindle is possible in any state in which prosecutors are allowed to use hearsay to win bind-over at the prelim.<sup>10</sup> In some states, prosecutors and trial-court judges have tried the swindle, but it has been squelched by the appellate courts; in other states, the swindle has become widely entrenched and, due to the difficulty in appealing prosecutorial and judicial abuses of the prelim, has thus far evaded the appellate courts.<sup>11</sup>

This Article proceeds as follows. Part I demonstrates how easy it is for a prosecutor to file a complaint and set the litigation machinery in motion. Part II explains the features and the underlying purposes of the prelim, such as providing a check on prosecutorial power and protecting felony defendants from baseless prosecutions. Part III discusses how prosecutors and judges are able to evade legal precedent—a practice that historically has allowed other abuses of the prelim and has now culminated in the ultimate abuse: the preliminary-hearing swindle.

Part IV, the heart of this Article, outlines the anatomy of the swindle. It describes how, instead of calling actual witnesses with knowledge of the case, the prosecutor uses a “reader”—a person with no knowledge of the case whatsoever—to essentially read the complaint from the witness stand. This Part then explains how this new, post-swindle prelim fails to satisfy any of the hearing's underlying purposes and how, at best, it merely repeats earlier steps in the criminal process. This Part also discusses the judiciary's complicity in the swindle, as the prosecutor is only able to substitute the complaint for the prelim when judges are willing to ignore statutes, case law, and even the Constitution. This Part then concludes with a discussion of the swindle's consequences, including the tremendous ease with which prosecutors can now charge felonies relative to misdemeanors—the exact opposite of what the law intended.

Given that the prelim has been reduced to a shell of its former self and remains, at best, in form only, Part V discusses potential legal reform, including the complete elimination of the hearing itself—something that, given the past abuses of the prelim that are baked into the

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9. *See infra* Part IV.

10. *See infra* Part IV.

11. *See infra* Part IV.

case law, would paradoxically benefit defendants. Finally, Part VI discusses what defense counsel may be able to do now, given the current state of the law, to protect defendants from the preliminary-hearing swindle. It includes a model motion that could be adapted to challenge bind-over whenever a prosecutor uses a mere reading of the complaint as a substitute for an actual prelim.

### I. THE LITIGATION MACHINE

Ambrose Bierce, the legendary American newspaper editor, columnist, and author, defined “litigation” as “[a] machine which you go into as a pig and come out of as a sausage.”<sup>12</sup> And a “litigant,” he wrote, is “[a] person about to give up his skin for the hope of retaining his bones.”<sup>13</sup> If those cynical definitions do not adequately convey Bierce’s views, the following anecdote leaves little doubt about his contempt for the American legal system:

Upon learning that a San Francisco woman had filed suit against the city for injuries suffered when she fell into an open sewer, Bierce is said to have remarked, “It is surprising that the lady should have consented to go into Court; we should suppose that one adventure in a cesspool would suffice.”<sup>14</sup>

Although Bierce lived and wrote in the mid-1800s to the early 1900s,<sup>15</sup> he would probably have the same disdain toward our modern criminal justice system. He might even feel some sympathy for today’s criminal defendants—litigants who, unlike the consenting personal-injury plaintiff in San Francisco, are dragged into the sausage-making machinery against their will, squealing every step of the way.

Today, it is incredibly easy for the state—a party with tremendous power and comparatively vast resources—to kick-start the criminal justice machinery. All the state must do is file a criminal complaint, which is “a written statement of the essential facts constituting the offense charged” and is based merely on the prosecutor’s “information

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12. AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 54 (The Neal Publ’g Co. 1911).

13. *Id.*

14. J. Gordon Hylton, *The Devil’s Disciple and the Learned Profession: Ambrose Bierce and the Practice of Law in Gilded Age America*, 23 CONN. L. REV. 705, 706 (1991) (internal citation omitted).

15. See J. E. Luebering, *Ambrose Bierce: American Author*, BRITANNICA, (June 20, 2024) <https://www.britannica.com/biography/Ambrose-Bierce> [<https://perma.cc/MC47-VF6B>].

and belief.”<sup>16</sup> In practice, the complaint is typically “based upon hearsay” and, quite often, “evince[s] miserable draftsmanship and confusing syntax.”<sup>17</sup> But to sustain a prosecution, the complaint need only contain barely decipherable information that arguably establishes “probable cause” that the defendant committed the charged crimes.<sup>18</sup> By clearing that embarrassingly low bar, the prosecutor sets the litigation machine into motion. And once moving, it is very difficult to stop.

Standing in stark contrast to the ease with which a prosecutor can file a criminal complaint is the staggering impact the hearsay-based, often error-ridden document has on the defendant. To begin, defending a criminal case will probably require a large outlay for attorney’s fees; those defendants who can’t afford to hire an attorney will be lucky if they are appointed a public defender.<sup>19</sup> And even if their appointed public defender is smart, skilled, and diligent, he or she will probably be grossly overworked, thus limiting the effectiveness of the representation. As one public defender explained, a “high caseload means . . . that I miss filing important motions, that I am unable to properly prepare for every trial, that . . . I plead some of my clients to felony convictions on the day I meet them.”<sup>20</sup> And even if a defendant pays to retain a private attorney, that does not guarantee competent representation—or, in some cases, *any* representation.<sup>21</sup>

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16. WIS. STAT. § 968.01 (West 2024).

17. State *ex rel.* Cullen v. Ceci, 173 N.W.2d 175, 180 (Wis. 1970).

18. *Id.* This is not an exaggeration. In my own experience, the muddier the facts in a complaint, the more the state benefits. When faced with an indecipherable complaint, magistrates have denied my motions to dismiss, citing the principle that any competing inferences—even when caused by the prosecutor’s ineffective draftsmanship, apparently—are resolved in favor of the state. This provides an incentive to draft sloppy, factually muddled complaints. At the very least, it offers no incentive to write clearly.

19. “Lucky” is the correct word. First, just because a defendant cannot afford to hire a lawyer does not mean that he or she will be eligible for a public defender. And second, even for those who are eligible, the right to an attorney is sometimes illusory. For a variety of reasons, not all eligible defendants will actually receive a public defender appointment in a timely manner. See *infra* Section IV.D.2.

20. Tina Peng, *I’m a Public Defender. It’s Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST: OPINIONS (Sept. 3, 2015), [https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html) [<https://perma.cc/3JHQ-YZGA>].

21. See Kevin Mathewson, *Local Lawyer’s House of Cards Falls Over—Harming Clients and Employees*, KENOSHA CNTY. EYE, (Oct. 16, 2023), <https://kenoshacountyeye.com/2023/10/16/local-lawyers-house-of-cards-falls-over-harming-clients-and-employees/> [<https://perma.cc/3J4K-APZ7>].

Unfortunately, the attorney's fees could be just the beginning of the financial hit, as the court may impose a cash bail.<sup>22</sup> Those defendants who cannot afford bail will remain in custody, at least for the duration of their case.<sup>23</sup> Those with enough resources to post bail—thus, in a sense, at least temporarily buying their freedom—could then face onerous non-monetary conditions of release that restrict what they may do, where they may live, and with whom they may associate.<sup>24</sup> Violating one of the bond conditions, even when there is no rational basis for the condition and even when the violation itself is not a criminal act, could result in another criminal prosecution for “bail jumping.”<sup>25</sup>

If the defendant is ultimately convicted, even of a mere misdemeanor crime, “[t]he consequences of these convictions are significant: in addition to the stigma of a criminal record, misdemeanants are often heavily fined or incarcerated, and can lose jobs, housing, or educational opportunities.”<sup>26</sup> On top of those things, other so-called “collateral consequences [of a conviction] have proliferated in recent years and impose disabilities that often dwarf in personal significance the direct consequences of conviction, such as imprisonment.”<sup>27</sup>

This reveals the wisdom in one of Bierce's earlier definitions. Given the tremendous costs that the criminal justice system imposes on the unwilling defendant, one can understand how even a person

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22. This is true even in misdemeanor cases. See Shima B. Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 872 (2018).

23. See Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 879 (2022) (“As many as sixty percent of the half million people currently in jails have not been convicted but are instead detained pretrial.”).

24. See, e.g., Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 146–47 (2021) (“Nonmonetary conditions of release can include . . . drug or alcohol testing, no-contact orders, electronic home monitoring . . . to name a few. Such requirements are frequently imposed as a matter of course on defendants, and they . . . curtail the defendant's liberty in some way.”). In practice, these conditions can be incredibly broad and irrational and often result in defendants losing contact with their family members and residence.

25. See, e.g., WIS. STAT. § 946.49 (West 2024) (criminalizing the failure to comply with bond conditions); see also Amy Johnson, Comment, *The Use of Wisconsin's Bail Jumping Statute: A Legal and Quantitative Analysis*, 2018 WIS. L. REV. 619, 619 (2018) (“The data also suggests that an underlying purpose for filing bail jumping charges may be to create leverage against defendants”).

26. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012).

27. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1103–04 (2013); see also Michael O'Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a “Violent” Crime*, 109 J. CRIM. L. & CRIMINOLOGY 165, 168 (2019) (being convicted of a crime “results in a sharp, multidimensional loss of legal status”).



facing mere misdemeanor charges might cling to the modest “hope of retaining his bones” upon emerging from the litigation machine.<sup>28</sup>

The stakes go up dramatically, of course, when the state charges a defendant with a felony. Quite intuitively, felony charges usually require higher attorney’s fees, will probably carry a higher cash bail, certainly come with more onerous collateral consequences, and, by definition, will carry a much greater potential penalty (or even a mandatory minimum penalty). But a conviction is not even necessary for a felony to be life-ruining. As an Oregon court explained, merely *being charged* with a felony can be disastrous: “A charge that one has committed a felony and should undergo a trial on the charge is, short of a conviction and sentence, the gravest act by which the state confronts one of its citizens. Whether or not a conviction follows, prosecution alone imposes heavy burdens on the defendant.”<sup>29</sup>

Fortunately, though, if a prosecutor wants to put a defendant through the litigation meat-grinder on a *felony* charge, that defendant is entitled to a preliminary hearing. As the next Part explains, this hearing was designed to protect defendants from prosecutors who jump the gun by filing unjustified charges.

## II. THE PRELIM: A CHECK ON PROSECUTORIAL POWER

The preliminary hearing—sometimes called the preliminary examination or simply the “prelim”—is an “independent screening” mechanism that “serves as a check on the prosecutorial power of the executive branch.”<sup>30</sup> This makes good sense, as the prosecutor “is too involved in the prosecutorial machinery to make a fair and impartial evaluation” of the case.<sup>31</sup> Invoking Bierce’s imagery, the prelim is a pretrial evidentiary hearing that puts the brakes on the life-ruining, sausage-producing litigation machine.

Today, the prelim is a creature of state statute.<sup>32</sup> (Sometimes, it is a state constitutional right as well, but it is *not* a federal constitutional

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28. Bierce, *supra* note 12, at 54.

29. *State v. Freeland*, 667 P.2d 509, 514 (Or. 1983), *overruled by State v. Savastano*, 309 P.3d 1083, 1085 (Or. 2013).

30. *State v. Schaefer*, 746 N.W.2d 457, 467 (Wis. 2008).

31. See Jacqueline R. Griffin, *The Preliminary Hearing Versus the Grand Jury Indictment: “Wasteful Nonsense of Criminal Jurisprudence” Revisited*, 26 U. FLA. L. REV. 825, 831 (1974).

32. Paul G. Cassell & Thomas E. Goodwin, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah’s Preliminary Hearings to Felony Offenses*, 2011 UTAH L. REV. 1377, 1395–402 (2011) (listing and describing the various state statutes). For a history of the prelim,

right.<sup>33</sup>) Therefore, as a Michigan court explained, “[T]here are variations in each state’s preliminary-examination procedures.”<sup>34</sup> These variations can sometimes be dramatic.<sup>35</sup> Nonetheless, the following description of Utah’s prelim accurately describes the typical hearing:

[T]he preliminary hearing in felony cases is an adversarial proceeding. Generally, the hearing parallels a trial: the state must satisfy its burden to prove the elements of the crime charged . . . by presenting evidence and calling witnesses. The defendant can cross-examine the state’s witnesses, and then present his or her own case by testifying, offering evidence, and calling defense witnesses.<sup>36</sup>

In light of the tremendous burden imposed on an individual who is forced to defend against a felony charge, a Wisconsin court explained that the ultimate purpose of the prelim is

to prevent hasty, malicious, improvident and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, . . . to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.<sup>37</sup>

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including its English origins, see Gary L. Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 MO. L. REV. 281, 284–93 (1970).

33. See Griffin, *supra* note 31, at 825–26 (“[T]he preliminary hearing hovers close to being a matter of constitutional right . . . the Supreme Court of the United States has not yet declared that a citizen has the right to a preliminary hearing.”); State v. Hull, 867 N.W.2d 419, 426 (Wis. Ct. App. 2015) (“[T]here is no constitutional right to a preliminary hearing.”). For an example of the prelim as a state constitutional right, see John C. Robison Jr., *The Determination of Probable Cause in Illinois—Grand Jury or Preliminary Hearing*, 7 LOY. U. CHI. L.J. 931, 938 (1976) (“The Illinois Constitution of 1970 . . . elevates the right to a preliminary hearing to constitutional status.”).

34. People v. Lewis, 903 N.W.2d 816, 819 (Mich. 2017).

35. See Griffin, *supra* note 31, at 825 (explaining that the prelim “runs the gamut from mandatory application to almost total atrophy,” and its “characteristics vary so widely among and within various jurisdictions.”).

36. Cassell & Goodwin, *supra* note 32, at 1382 (internal citations omitted). For a very similar description of Illinois’ preliminary hearing, see also Robison, *supra* note 33, at 944.

37. State v. Williams, 544 N.W.2d 400, 404 (Wis. 1996) (citing State v. Richer, 496 N.W.2d 66, 69 (Wis. 1993)). Because prosecutors aren’t spending their own money, the public expense is an often overlooked problem. See William H. Theis, *Preliminary Hearings in Homicide Cases: A Hearing Delayed Is a Hearing Denied*, 62 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 17, 17 (1971) (discussing how a delay in the prelim “imposes on the public the expense of long incarceration”).

Similarly, in Pennsylvania, the prelim “is a forward looking procedure because it is meant to prove the Commonwealth has a realistic chance of succeeding on the merits of its case at trial. The purpose of the preliminary hearing is to protect accused individuals from unlawful detention.”<sup>38</sup>

Although the prelim parallels a jury trial, a judge or court commissioner conducts the hearing without a jury, and the burden of proof is lower than at trial.<sup>39</sup> For example, in Utah’s prelim, “consistent with its function as a screening mechanism, the standard of proof at the hearing is only *probable cause*—a reasonable belief that an offense has been committed and that the defendant committed it.”<sup>40</sup> Similarly, Pennsylvania requires the government “to establish a *prima facie* case against the defendant to show the crime was committed by the accused. Prima facie is a standard lower than reasonable doubt, but still high enough that a reasonable jury could find each element of the offense.”<sup>41</sup>

Importantly, even in states that use the label “probable cause” to describe the prosecutor’s burden, this standard of proof must not be confused with the probable cause that is needed to sustain a complaint. As a Wisconsin court explained, “The degree of probable cause required for a bind-over [after a prelim] *is greater than that required to support a criminal complaint*.”<sup>42</sup> The distinction is best explained this way:

The differences in the probable cause required to support search warrants, arrests, *criminal complaints*, and *bindovers* [after prelims] should not be understood in terms of differing gradations along some ill-defined continuum. Rather, these differences reflect the very *different kinds of evidence or*

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38. Drew Sheldon, Note, *Unjust Incarceration: Problems Facing Pennsylvania’s Preliminary Hearing and How to Reform It*, 56 DUQ. L. REV. 169, 178 (2018) (citing PA. R. CRIM. P. 542 and Commonwealth v. Ruza, 511 A.2d 808, 810 (Pa. 1986)); see also Mary C. Neary, Note, *People v. Hodge: The Preliminary Hearing as a Critical Stage and More*, 2 PACE L. REV. 285, 298 (1982) (“[In New York] the hearing serves many functions including bail reduction, release from detention where appropriate, and, above all, early screening of improper charges.” (citing People v. Hodge 423 N.E.2d 1060, 1062 (N.Y. 1981))).

39. See Griffin, *supra* note 31, at 827 (“The standard utilized is ‘probable cause’ and the magistrate is the sole arbiter of whether it exists.”).

40. Cassell & Goodwin, *supra* note 32, at 1382–83 (emphasis added) (internal quotations and citations omitted).

41. Sheldon, *supra* note 38, at 178 (emphasis added).

42. State v. O’Brien, 850 N.W.2d 8, 22 (Wis. 2014) (emphasis added).

*information* that a court uses in making the probable-cause determination in various contexts.<sup>43</sup>

In other words, a complaint is nothing more than a prosecutor's cutting and pasting of multiple levels of untested hearsay into a single document.<sup>44</sup> "A preliminary hearing, on the other hand, is a public adversarial hearing conducted in accordance with the rules of evidence."<sup>45</sup> One rule of evidence, the rule against hearsay, is often relaxed; that is, the prosecutor is typically allowed to use hearsay, with limitations, at the prelim.<sup>46</sup> But even when hearsay is allowed, the other rules of evidence still apply.<sup>47</sup>

One such rule is that the witness, including a witness repeating hearsay, must have "personal knowledge" of the things about which he or she testifies.<sup>48</sup> For example, a California court explained that when the state uses a police officer witness to repeat hearsay, he or she "must have sufficient knowledge of the crime or the circumstances under which the out-of-court [hearsay] statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement."<sup>49</sup> Similarly, a Kansas court explained this personal-knowledge requirement by analogizing to affidavits in support of search warrants, which must establish the "affiant's personal knowledge to allow the magistrate to rationally reach an independent decision. We conclude that a similar rule is still appropriate for preliminary examinations."<sup>50</sup>

After this threshold issue of whether the hearsay should even be *admitted* at the prelim, the weight to be given to it and whether it is sufficient to establish probable cause are different issues entirely. As a Wisconsin court warned, "the hearsay nature of evidence may, in an

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43. CHRISTINE M. WISEMAN & MICHAEL TOBIN, CRIMINAL PRACTICE AND PROCEDURE § 8.3 (updated June 2024) (emphasis added).

44. See *supra* Part I.

45. WISEMAN & TOBIN, *supra* note 43, at § 8.3.

46. See Anthony G. Amsterdam & Randy Hertz, *Trial Manual 6 for the Defense of Criminal Cases*, AM. LAW. INST. 1, 233 (2016), [https://www.ali.org/media/filer\\_public/bc/49/bc49442c-9d4d-477d-82c7-b389e7c549d6/trial-manual-complete.pdf](https://www.ali.org/media/filer_public/bc/49/bc49442c-9d4d-477d-82c7-b389e7c549d6/trial-manual-complete.pdf) [<https://perma.cc/V4WS-XNG3>].

47. See *id.*

48. See FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Many states have adopted this rule in their own evidence codes. See, e.g., WIS. STAT. § 906.02 (West 2024).

49. *Bullock v. Superior Court*, 264 Cal Rptr. 3d 699, 707 (Cal. Ct. App. 2020).

50. *State v. Cremer*, 666 P.2d 1200, 1203 (Kan. Ct. App. 1983).

appropriate case, undermine the plausibility of the State's case."<sup>51</sup> That is why "[i]t remains the duty of the trial court to consider the apparent *reliability* of the State's evidence at the preliminary examination in determining whether the State has made a plausible showing of probable cause."<sup>52</sup> And this reliability determination often includes assessing, in some way, the *credibility* of the evidence<sup>53</sup> and even the *motives* of the testifying witnesses and hearsay declarants.<sup>54</sup>

With regard to timing, in order to effectuate the prelim's underlying purposes of preventing the defendant's humiliation, anxiety, and unjust incarceration, the defendant "has the option to assure that the hearing is scheduled expeditiously so that he may be discharged quickly if the government cannot justify its right to go forward."<sup>55</sup> In California, for example, absent a waiver of time limits or a finding of good cause for a delay, the prelim "shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs

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51. State v. O'Brien, 850 N.W.2d 8, 22 (Wis. 2014) (quoting State v. O'Brien, 836 N.W.2d 840, 843 (Wis. 2013)).

52. *Id.* (emphasis added).

53. While the prelim is intended to deal with "probable cause and plausibility (not credibility) . . . [a]t some point, plausibility and credibility elide." *Id.* "The line between plausibility and credibility may be fine; the distinction is one of degree." *Id.* (quoting State v. Dunn, 359 N.W.2d 151 (Wis. 1984)). Further, "The plausibility standard does not require a trial court to ignore blatant credibility problems . . ." *O'Brien*, 836 N.W.2d at 848, *aff'd by O'Brien*, 850 N.W.2d at 25–26. The distinction between credibility and plausibility isn't as difficult as courts try to make it. *See* Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465, 502–03 (2020) (explaining that the judiciary's feigned confusion intentionally "confuses two things: attacking the credibility of the *witness*, which is not permitted, and attacking the witness's *story*, which is permitted."); *see also* David B. Dean, Note, *Criminal Law: Preliminary Examination Potential*, 58 MARQ. L. REV. 159, 166 (1975) (explaining that "the magistrate must weigh the plausibility of the story but not the credibility of the person who tells it").

54. *See* Justin Miller, *The Preliminary Hearing*, 15 A.B.A. J. 414, 414 (1929) (explaining that for the prosecutor, the hearing "provides a means for testing the complaints of prosecuting witnesses, determining their motives and eliminating accusations based upon misinformation or prejudice"); State v. Berby, 260 N.W.2d 798, 803 (Wis. 1978) ("[At the prelim,] evidence of motive is relevant . . . Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it is entitled to."); *O'Brien*, 850 N.W.2d at 22 (explaining how the admissibility of, and weight to be given to, hearsay evidence often turns on "the motivation of the speaker to tell the truth").

55. State v. Schaefer, 746 N.W.2d 457, 467 (Wis. 2008).

later.”<sup>56</sup> Other states have similarly short timelines in which the court must conduct the hearing.<sup>57</sup>

On an equally if not more important procedural matter, the United States Supreme Court has held that, while the prelim itself may not be a constitutional right, it is deemed a “critical stage” of the proceedings, and the defendant therefore has a constitutional right *to counsel* at the hearing.<sup>58</sup> Reiterating some of the above-described purposes of the prelim and introducing some additional ones, the Court held:

First, the lawyer’s skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State’s case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State’s witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.<sup>59</sup>

The prelim’s discovery function, discussed above, is important.<sup>60</sup> As an Arizona court recognized, the hearing’s “principal purpose in

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56. CAL. PENAL CODE § 859(b) (West 2024). As an aside, this illustrates the dramatic differences in language between states, thus making a “national” article on prelims very difficult to write. In comparison to this California statute, in Wisconsin, the defendant pleads *at* the arraignment, so those two events always occur on the *same date*; further, the arraignment, at which time the defendant pleads, is actually held *after* the preliminary hearing, as the defendant is not allowed to enter even a not-guilty plea to a felony unless the court binds the defendant over after the prelim. *See* WIS. STAT. § 971.05.

57. *See, e.g.*, PA. R. CRIM. P. 540 (requiring a hearing within either 14 or 21 days of arrest, depending on whether the defendant is being held in custody); *see also* WIS. STAT. § 970.03–.05 (West 2024) (requiring a hearing within either 10 or 20 days of the initial court appearance, depending on the defendant’s custody status and bail amount).

58. *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)); *accord* *People v. Lewis*, 903 N.W.2d 816, 819 (Mich. 2017) (highlighting the decision in *Coleman* and noting that “defendants have a constitutional right to counsel at preliminary examinations in Michigan.”); *see also* *State ex rel. Funmaker v. Klammer*, 317 N.W.2d 458, 463 (Wis. 1982) (holding that prelims are a “critical stage” of the case at which the defendant has a constitutional right to counsel).

59. *Coleman*, 399 U.S. at 9.

60. Griffin, *supra* note 31, at 829 (discussing the hearing’s origins in England). The modern prosecutor often goes to great lengths to prevent the defense from learning anything about the state’s case at a prelim; however, “[i]ronically, the preliminary hearing began essentially as a discovery device.” *Id.*

practice is to afford defense counsel the opportunity to learn the nature of the prosecutor's case."<sup>61</sup> Even pro-prosecutor states have acknowledged this discovery function. For example, while Wisconsin does not give the defense the right to obtain discovery materials *before* the prelim,<sup>62</sup> the discovery function *of* the prelim permits the defense to question witnesses and elicit information that may be used for future pre-trial suppression motions.<sup>63</sup>

A prelim such as the one described in this Part—with all of its features that protect the defendant from unjustified prosecutions—would certainly put the brakes on the litigation machinery, which, as Bierce warned, would otherwise turn litigants from pigs into sausages in record time. But as explained in the next Part, the body of law governing prelims is about as meaningful as legal precedent in general—in other words, not very meaningful at all.

### III. WHO CARES ABOUT PRECEDENT?

Despite all of the grandiose doctrines and principles quoted in the previous Part, defense lawyers know that legal precedent is a soft, flexible concept that is often used against their clients and for the benefit of the state. Yet few of us would be able to explain that as well as Bierce did more than a century ago when he cynically but accurately defined “precedent” as “a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases.”<sup>64</sup>

Bierce's only error, it turns out, was to exclude “a definite statute” from the list of legal authorities that judges will disregard in their

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61. *State v. Essman*, 403 P.2d 540, 542 (Ariz. 1965) (internal citation omitted).

62. *Compare State v. Schaefer*, 746 N.W.2d 457, 468 (Wis. 2008) (defendant not entitled to discovery materials before the prelim), *with People v. Gutierrez*, 153 Cal. Rptr. 3d 832, 839 (Ct. App. 2013) (defendant entitled to discovery materials before the prelim).

63. *See Dean*, *supra* note 53, at 171–72 (discussing the discovery function of Wisconsin's prelim); *Hayes v. State*, 175 N.W.2d 625, 628 (Wis. 1970) (“Hayes had a right on cross-examination to find out the basis for the witnesses' in-court identification so he could . . . move before trial to have the evidence suppressed or at the trial object to the admission [of the evidence.]”), *overruled on other grounds by State v. Russell*, 211 N.W.2d 637 (Wis. 1973). Another purpose of the prelim, although not important for purposes of this Article, is to provide “an opportunity for the accused and his counsel to present evidence and arguments to the magistrate and the prosecutor which may produce a more favorable bail arraignment than otherwise could be expected.” Gary L. Anderson, *Preliminary Hearing—Better Alternatives or More of the Same?*, 35 MO. L. REV. 281, 287 (1970).

64. Bierce, *supra* note 12.

pursuit of doing as they please.<sup>65</sup> For example, Wisconsin’s prelim statute declares, in plain language, that “the court shall order dismissed any count for which it finds there is no probable cause.”<sup>66</sup> That mandate is common in other state statutes as well, and for good reason. As a New Mexico court explained, it ensures that the defendant’s pretrial “detention is based upon charges of which he has been apprised and which have been reviewed by a neutral authority.”<sup>67</sup>

Nonetheless, in a series of strange cases “interpreting” the clearly-worded prelim statute, Wisconsin courts have essentially rewritten it and now permit the state to win bind-over if there is evidence of *any* felony, even if it is not charged in the complaint.<sup>68</sup> In a truly bizarre twist, the court held that the magistrate is supposed to keep the defendant in the dark and not even reveal which felony was relied upon in granting bind-over.<sup>69</sup> Then, after winning bind-over on the unspecified felony residing only in the magistrate’s head, the prosecutor is permitted to tack on additional felonies that are not “wholly unrelated” to the prelim evidence, regardless of whether there is probable cause for any of them.<sup>70</sup>

Wisconsin courts were either oblivious to, or simply didn’t care about, the conundrum they created: despite the prelim’s design and purpose to provide additional protection to those charged with felonies, felony defendants now have *fewer protections* than misdemeanor defendants.<sup>71</sup> Wisconsin’s courts have, amazingly, not only contradicted clear statutory language, but they have transformed the prelim from a defense shield into a state sword—one that allows prosecutors to charge felonies without any showing of probable cause.<sup>72</sup>

The above is just one example of how the prelim has devolved into lawlessness. But the published case law that illuminates these governmental abuses will lag well behind the actual abuses as they happen in the courtroom. The most obvious reason for the delay is that it often takes years for an appeal to work its way through a state’s

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65. *Id.*

66. WIS. STAT. § 970.03–.05 (West 2024).

67. *State v. Rodriguez*, 215 P.3d 762, 765 (N.M. Ct. App. 2009) (citations omitted).

68. WISEMAN & TOBIN, *supra* note 43 (citing *State v. Williams*, 544 N.W.2d 400, 414–15 n. 8 (Wis. 1996)).

69. *Id.* (citing *Williams*, 544 N.W.2d at 414–15).

70. *Id.* (citing *State v. Cotton*, 668 N.W.2d 346, 350 (Wis. Ct. App. 2003)).

71. *See Cicchini*, *supra* note 53, at 506–09.

72. *Id.* at 508–09.



appellate court system.<sup>73</sup> And even more significantly, most prosecutorial and judicial abuses of the prelim will never even be appealed in the first place. There are two reasons for this.

First, as a practical matter, criminal defendants will either be held on a cash bail they cannot post or be subjected to restrictive non-monetary bond conditions.<sup>74</sup> Either way, defendants typically do not want to drag their cases out for months (or years) while their attorneys pursue mid-case, interlocutory appeals which the appellate courts likely will eventually reject without a hearing.<sup>75</sup> Instead, most would prefer either to strike a plea deal or demand a speedy trial to resolve their case one way or the other.

And second, as a legal matter, both a plea resolution and a trial resolution probably foreclose any *post-conviction* appeal of governmental abuse of the prelim. That is, entering a plea could *waive* any post-conviction appellate issue regarding the prelim,<sup>76</sup> and having a trial could *cure* any prelim defect.<sup>77</sup> “Under this rationale, the state has no real incentive to comply with the preliminary hearing requirement, and a convicted party will have no [legal] ground to complain,” except in rare, perhaps unimaginable, circumstances.<sup>78</sup> As a result, the case law is riddled with “situations in which courts have deemed the most

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73. See Kimberly Alderman, *How to Appeal Mid-Litigation Decisions*, WIS. LAWYER (Dec. 1, 2014), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=87&Issue=11&ArticleID=23739> [https://perma.cc/L74N-G5CS].

74. See *supra* Part I.

75. See *Interlocutory Appeal*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/interlocutory\\_appeal](https://www.law.cornell.edu/wex/interlocutory_appeal) [https://perma.cc/4Q3D-KRV7] (“The term ‘interlocutory’ is used to indicate a lack of finality . . . . Interlocutory appeals are extremely rare.”); see also Alderman, *supra* note 73 (“The court is not required to hear an interlocutory appeal and, in fact, this type of appeal is highly disfavored.”).

76. See *Mack v. State*, 286 N.W.2d 563, 566 (Wis. 1980) (“[A] guilty plea, voluntarily and understandingly made constitutes a waiver of non-jurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea.”). There are some exceptions to that rule, but defective prelims are not one of them, as a prelim defect has been deemed non-jurisdictional. See *State v. Webb*, 467 N.W.2d 108, 113 (Wis. 1991) (“The trial court’s subject matter and personal jurisdictions do not depend on the existence of a preliminary examination.”); Robison, *supra* note 33, at 941–42 (“[A] violation of the right to a preliminary hearing is apparently nonjurisdictional in nature.”). For another example of how prelim defects can be waived, but in a very different procedural system, see Neary, *supra* note 38, at 296 (explaining how, in New York, the failure to seek a writ of habeas corpus or mandamus “was regarded as a waiver of any defects”).

77. *Webb*, 467 N.W.2d at 114 (“A defendant who claims error occurred at the preliminary hearing may only obtain relief prior to trial.”). For another example of how prelim errors can be cured, but in a very different system, see Neary, *supra* note 38, at 295 (“A rule had developed in New York that errors at the preliminary hearing were cured upon the return of a valid indictment.”).

78. Griffin, *supra* note 31, at 833 (discussing how subsequent indictment can cure prelim defects, including the defect of a four-plus month delay in holding the hearing).

flagrant irregularities in preliminary hearing procedure insufficient to reverse a conviction.”<sup>79</sup> In sum, when prosecutors and trial-court judges are insulated from appellate review, they behave as if no one is watching.

Most abuses of the prelim, therefore, will remain hidden from the light of day, going undetected by everyone except those defense lawyers with boots on the ground, fighting in the trenches of criminal litigation. And as the next Part explains, prosecutors and trial courts are currently abusing the prelim in a way that is so contrary to law and logic that it would be unimaginable to any thoughtful lawyer operating outside of those ugly trenches. This newest form of abuse is nothing short of a swindle.

#### IV. THE ANATOMY OF A SWINDLE

Several states—including California, Colorado, Florida, Kansas, Nevada, Oregon, Pennsylvania, Utah, Wisconsin, and others—have relaxed the rule against hearsay at the prelim.<sup>80</sup> In other words, the prosecutor *is permitted* to use hearsay to win bind-over, but restrictions apply: for example, sometimes the prosecutor may not rely *exclusively* on hearsay<sup>81</sup> or, in other states, must first demonstrate that the hearsay is *reliable*.<sup>82</sup> This use of hearsay has opened the door for a bold new form of governmental abuse that mocks the prelim and embarrasses those, including some trial-court judges,<sup>83</sup> who have some regard for criminal procedure.

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79. *Id.* at 827.

80. See Amsterdam & Hertz, *supra* note 46, at 233; Bullock v. Superior Court, 264 Cal. Rptr. 3d 699, 707 (Cal. Ct. App. 2020); McDonald v. District Court, 576 P.2d 169, 171 (Colo. 1978); Evans v. Seagraves, 922 So. 2d 318, 319 (Fla. Dist. Ct. App. 2006); State v. Cremer, 666 P.2d 1200, 1203 (Kan. Ct. App. 1983); NEV. REV. STAT. ANN. § 171.196 (West 2015); OR. REV. STAT. § 135.173 (West 2024); Commonwealth v. McClelland, 233 A.3d 717, 722 (Pa. 2020); State v. Lopez, 474 P.3d 949, 963 (Utah 2020); WIS. STAT. § 970.038 (West 2024).

81. See, e.g., Evans, 922 So. 2d at 319 (“[H]earsay testimony . . . does not, by itself, meet the state’s burden at an adversary preliminary hearing”); McClelland, 233 A.3d at 721 (“[T]he Superior Court erred to the extent it concluded hearsay evidence alone is sufficient to establish a prima facie case at a preliminary hearing.”).

82. See, e.g., State v. O’Brien, 850 N.W.2d 8, 22 (Wis. 2014) (“It remains the duty of the trial court to consider the apparent *reliability* of the State’s evidence at the preliminary examination . . .” (emphasis added)).

83. Judge Bruce Schroeder in Wisconsin had serious reservations with the current state of prelims; for his quote on the subject, see Cicchini, *supra* note 53, at 472.

To avoid depreciating the seriousness of this abuse, it should be called what it is: a swindle.<sup>84</sup> The swindle could emerge in any state that allows hearsay in some way; the fewer restrictions there are on the prosecutor's use of hearsay, and the less seriously the courts take those restrictions, the greater the risk this swindle will materialize. For example, in Florida, a prosecutor and trial court judge tried to implement the swindle, but an appellate court appears to have thwarted their conspiracy.<sup>85</sup> At the other end of the spectrum, in Wisconsin, prosecutors and trial-court judges *routinely* use the swindle, and, at least as of this writing, their ongoing abuse has yet to reach the appellate courts.<sup>86</sup>

On a national scale, the preliminary-hearing swindle (which is described below) could currently be widespread but unreported or at least underreported in the appellate courts of the offending states.<sup>87</sup> Despite the tremendous potential for—if not the widespread, ongoing commission of—this swindle, the following sections of this Article will, for the sake of uniformity, describe it as it has unfolded in a single state: Wisconsin. As will soon be obvious, this is not a complex or sophisticated scam; rather, it is a transparent one. And it starts with a character called the reader-witness.

### A. *The Reader-Witness*

First, before explaining the swindle, here is some very brief but necessary context. In Wisconsin, once the legislature made hearsay admissible at the prelim,<sup>88</sup> prosecutors quickly took advantage. Instead of calling the complaining witness (who reported the alleged crime) to testify at the prelim, the prosecutor would simply call an investigating officer to testify.<sup>89</sup> The officer would talk about what he or

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84. The swindle exposed in this Article is not the first, and likely would not be the last, with regard to prelims. For a completely different swindle, see Theis, *supra* note 37, at 19 (explaining how, via a different tactic, “the State’s Attorney has been extremely successful in denying homicide defendants preliminary hearings” and has “protected himself from pre-trial discovery”). For yet another swindle, see Griffin, *supra* note 31, at 839 (“the courts have developed evasive maneuvers . . . [s]imultaneously, the prosecution has developed sophisticated techniques to use the indictment to avoid the preliminary hearing whenever possible.”).

85. See *infra* Part V.

86. See *supra* Part III.

87. See *supra* Part III.

88. See Memorandum from Wis. Legis. On Wis. Council Act 285 (Apr. 23, 2012) (“Act 285 provides that hearsay evidence is admissible at a preliminary hearing.”).

89. See, e.g., State v. O’Brien, 850 N.W.2d 8, 14, 27 (Wis. 2014). In this multi-count child abuse case, the testifying, investigating officer was present during interviews of the children, and personally interviewed one of the children. *Id.*

she observed upon being summoned, the details of any follow-up investigation, and, more significantly, what the complaining witness told the officer about the incident.<sup>90</sup> This essentially got the allegations into evidence while shielding the complaining witness from cross-examination and even the mere inconvenience of testifying.<sup>91</sup>

While this was an unfortunate change in the law and in prosecutorial practice, it is not the swindle. The swindle is what happened next. A bulb went off in a prosecutor's head, and he or she wondered: "If hearsay is now admissible at the prelim, and if the complaint consists of hearsay, *why can't we just have someone read the complaint at the prelim instead of calling actual witnesses or presenting evidence?*"

Against all odds—and against reason, logic, and several rules of law discussed in the sections below—judges embraced this idea, and the swindle was born. Having been stripped of its substance and even of its form, the prelim now looks like this:

Before the preliminary hearing, the prosecutor will hand the criminal complaint to a police officer who is assigned to the courtroom for the day, and who had nothing whatsoever to do with the investigation of the case that is the subject of the hearing. This officer then reads the complaint to himself and memorizes as much of it as he can. The prosecutor then calls the officer to the witness stand and *asks him questions about what he just read in the complaint*. On cross-examination, this reader-witness freely admits that his entire knowledge of the case is based on what he just read. Then, based solely on this reader-witness's "testimony" about what the prosecutor wrote in the previously-filed complaint, the court binds the defendant over for trial.<sup>92</sup>

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90. *Id.* The investigating officer testified about the children's statements. *Id.*

91. The prosecutor's goal at the prelim should be to test the strength of his or her own case. See Miller, *supra* note 54, at 414 (The prelim "provides a means for testing the complaints of prosecuting witnesses, determining their motives and eliminating accusations based upon misinformation or prejudice"). Unfortunately, however, that mode of thinking has shifted, and the focus is now on winning at all costs. See *State v. Freeland*, 667 P.2d 509, 518 (Or. 1983), *overruled by* *State v. Savastano*, 309 P.3d 1083 (Or. 2013) (stating that the goal "might be to minimize opportunities to cross-examine witnesses, because anyone who has tried cases knows that a past reported statement can be turned into a past inconsistent statement").

92. Cicchini, *supra* note 53, at 493–94.

Before bind-over, the reader-witness—or simply “reader,” as he never witnessed anything—also testifies that the prosecutor showed him a booking photo of unspecified date and origin of the defendant, and the reader therefore knows the defendant’s name.<sup>93</sup> The reader then points to the defendant, who is seated at the defense table, and tells the magistrate the defendant’s name.<sup>94</sup> This somehow qualifies as an in-court identification of the defendant *as the perpetrator*—a hollow, defective tactic discussed later.<sup>95</sup>

And that is the entirety of the state’s case. The court commissioner robotically grants bind-over every time.<sup>96</sup> Of course, when the reader answers the prosecutor’s questions about what the prosecutor’s office wrote in the complaint, the reader cannot remember everything that he just read—particularly when the complaint is longer than a page or two. When memory fails, the reader is allowed to review the complaint again while on the witness stand. The following exchange is from a real-life prelim in which the reader couldn’t remember the complaining witness’s name. It illustrates the hollowness of the new, post-swindle prelim, in which the so-called “witness” has no personal knowledge, and therefore no recollection, of anything:

Prosecutor: Okay. And who was that female that made that report?

Reader-witness: The female that was being robbed her name just slipped. I apologize.

Prosecutor: Just for the record would it refresh your recollection to review the Criminal Complaint?

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93. *Id.* at 495–96.

94. *Id.*

95. *See infra* Section IV.D.1. Sometimes, the person pictured in the booking photo and the defendant may even have *different* dates of birth—an inconsistency that would prevent this sham of an in-court identification procedure from being successful. Nonetheless, the magistrate will brush this problem under the rug and bind the defendant over despite the complete absence of any identification whatsoever. *See* Transcript of Preliminary Hearing at 5, 13–14, 22–24, 26, *State v. Allen* (2021) (No. 21-CF-681) (on file with author).

96. The only cases where the defense has any meaningful chance of winning a prelim is when the complaint contains a single felony charge but does not contain sufficient factual allegations (for the reader-witness to repeat on the witness stand) that would establish the elements of that charge. However, such cases should not even reach the prelim stage to begin with, as the defense lawyer should have filed a motion to dismiss the complaint for lack of probable cause, which, under Wisconsin law, must be filed *before* the prelim. *See infra* Part IV.C.

Reader-witness: That is correct, sir.

Defense counsel: *I'll object. Recollection of what? He has no recollection of anything.*

Court: That is true, but I'll allow.<sup>97</sup>

In order to solve this embarrassing glitch, another bulb went off in another prosecutor's head, and this idea was born: "We know we can win bind-over by having a reader-witness memorize and talk about the complaint; and we know that magistrates are capable of reading for themselves and, in fact, have already read this particular complaint;<sup>98</sup> *so why can't we just move the complaint into evidence and skip the reader-witness entirely?*"

Admittedly, there is a certain Machiavellian ingenuity to this line of thinking and, paradoxically, even a perverse honesty about it. Why bother with the pretense of calling a "witness" who knows nothing about the case and is merely memorizing and regurgitating the contents of the prosecutor's own complaint? And there's certainly an efficiency aspect to taking the swindle this one additional step further down the slippery slope. Why should the litigation machinery be slowed down by the limits of the reader-witness's memory?

In any event, once again and seemingly against all odds, the judiciary embraced the idea of eliminating even the reader-witness. Now, in some counties, the preliminary hearing unfolds like this:

1. State calls Officer [to the witness stand].
2. State asks the Officer to identify the criminal complaint.
3. State moves criminal complaint [into evidence] as exhibit
4. Objection by Defense—overruled by Commissioner.
5. State [via the Officer] identifies client.
6. State rests.<sup>99</sup>

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97. Cicchini, *supra* note 53, at 497 (emphasis added) (quoting Transcript of Preliminary Hearing at 16, State v. Harris (2018) (No. 16-CF-413) (on file with author)).

98. See *infra* Section IV.C. (explaining that, by the time the prelim rolls around, the magistrate has already read the complaint and has already found probable cause in it).

99. E-mail from Tyler Jochman, Attorney, Jochman Law, LLC, to author (Oct. 29, 2023, 7:08 p.m. CST) (on file with author) (discussing the procedure for prelims in Walworth County, Wisconsin).

And just like that, the prosecutor and the judiciary have swindled the defendant out of the preliminary hearing. Today, all phases of the prelim—including the parties putting their appearances on the record, the prosecutor moving the complaint into evidence, the parties’ arguing about bind-over, the court binding the case over, and the court either holding or scheduling the arraignment—are often concluded *in as few as five or six minutes*.<sup>100</sup> The hearing has now been transformed into something far less formidable than a speed bump, thus allowing the litigation machinery, as Bierce called it, to grind pigs into sausages with speed that was previously unimaginable, even to the most hopeful of prosecutors and magistrates.

But efficiency is good, so what is the problem? The problems are deep and many. To begin, and as the next Section explains, the swindle prevents the prelim from fulfilling not just some but *all* of its underlying purposes, thus rendering it substantively meaningless.

### B. The Prelim’s Purposes

Recall that the prelim is supposed to serve “as a *check on the prosecutorial power* of the executive branch.”<sup>101</sup> Thanks to the preliminary-hearing swindle, however, the magistrate now blindly accepts the prosecutor’s word (as typed up in the criminal complaint) as the sole and unchallenged basis for bind-over. This is analogous to an extreme form of regulatory capture, as the economists call it, wherein the party that is supposed to be regulated (here, the prosecutor) actually runs the show.<sup>102</sup> Far from providing a check on the prosecutor’s power, the magistrate now dutifully bows down to the prosecutor.

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100. See, e.g., *Wis. Cir. Ct., Walworth Cnty. Case No. 23-CF-25*, WIS. CIR. CT. ACCESS (Jan. 18, 2023), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2023CF000025&countyNo=64&mode=details> [<https://perma.cc/J6U2-FPRD>]. On April 10, 2023, the parties appeared at the prelim at 2:12 P.M. and the hearing was concluded, bind-over was granted, and the next court hearing was calendared by 2:17 P.M., all within *five minutes*. *Id.*; see also *Wis. Cir. Ct., Walworth Cnty. Case No. 23-CF-40*, WIS. CIR. CT. ACCESS (Jan. 31, 2023), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2023CF000040&countyNo=64&mode=details> [<https://perma.cc/R24C-YWNU>] (On Mar. 24, 2023, the parties appeared at the prelim at 2:19 P.M. and the prelim *and* the arraignment were both held and completed by 2:25 P.M., all within *six minutes* of the defendant appearing in court).

101. *State v. Schaefer*, 746 N.W.2d 457, 467 (Wis. 2008) (emphasis added).

102. See Will Kenton, *Regulatory Capture Definition with Examples*, INVESTOPEDIA (Aug. 1, 2024), <https://www.investopedia.com/terms/r/regulatory-capture.asp> [<https://perma.cc/5QYC-F766>] (“Regulatory capture is an economic theory that says regulatory agencies may come to be dominated by the industries or interests they are charged with regulating.”).

To expand upon Bierce's imagery of a litigation machine, the prelim no longer serves as the brakes on its life-ruining power; the prelim is now more akin to a cruise control button that keeps it running smoothly and at a high rate of speed. In fact, regardless of whether the prosecutor (1) uses a reader-witness to talk about what the prosecutor wrote in the complaint or (2) abandons the pretense of calling a witness and instead simply moves the complaint into evidence, the prelim now fails to fulfill all of its official purposes.<sup>103</sup>

For example, without a witness with personal knowledge of the incident, or at least of the investigation, the defense can no longer meaningfully "cross-examine the state's witnesses."<sup>104</sup> Because the reader-witness's knowledge is intentionally limited to the complaint, he or she, by design, has no information whatsoever to provide.

Most significantly, because the reader-witness knows nothing about the case, the magistrate cannot possibly "discover whether . . . there are substantial grounds upon which a prosecution may be based"<sup>105</sup> or learn whether "the [state] has a realistic chance of succeeding on the merits of its case at trial."<sup>106</sup>

On this important topic, recall that, even when hearsay is admissible, "[i]t remains the duty of the trial court to consider the apparent reliability of the State's evidence at the preliminary examination . . . ."<sup>107</sup> By way of example, "the circumstances of sufficient reliability exist when the speaker is describing an event while seeing it . . . . Sufficient reliability exists when considering the motivation of the speaker to tell the truth."<sup>108</sup> If the State relies too heavily on hearsay, "the hearsay nature of evidence may . . . undermine the plausibility of the State's case."<sup>109</sup> But the reader-witness cannot reveal anything about the case, let alone about the reliability of the hearsay, that the magistrate could not read for him or herself in the complaint. And

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103. See *supra* Part II.

104. Cassell & Goodwin, *supra* note 32, at 1382; see also WIS. STAT. § 970.03 (West 2012) ("The defendant may cross-examine witnesses against the defendant.").

105. State v. Williams, 544 N.W.2d 400, 404 (Wis. 1996) (citing State v. Richer, 496 N.W.2d 66, 69 (Wis. 1993)).

106. Sheldon, *supra* note 38, at 178 (citing PA. R. CRIM. P. 542 and Commonwealth v. Ruza, 511 A.2d 808, 810 (Pa. 1986)).

107. State v. O'Brien, 850 N.W.2d 8, 22 (Wis. 2014).

108. *Id.*; see also State v. Berby, 260 N.W.2d 798, 803 (Wis. 1978) (magistrate may consider motive when deciding whether to grant bind-over).

109. O'Brien, 850 N.W.2d at 22.



if the complaint itself was sufficient to determine reliability, *there wouldn't be the requirement of a prelim.*

In addition, thanks to the swindle, the defense lawyer cannot conduct a “skilled interrogation” that could later be “a vital impeachment tool for use in cross-examination of the State’s witnesses at the trial.”<sup>110</sup> The reason is that the reader-witness would never be allowed to testify at trial, as he or she has no personal knowledge of anything.<sup>111</sup> Similarly, the swindle obliterates the discovery function of the prelim. Because the reader-witness knows nothing beyond what is in the complaint, defense counsel cannot “effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.”<sup>112</sup>

In sum, because the hearing no longer accomplishes a single thing for which it was designed—such as allowing the magistrate to make a probable cause determination and thus preventing unjust incarceration and improvident prosecutions—it cannot possibly serve as any kind of a check on prosecutorial power. And, as the next Section explains, the empty shell of the prelim ritual that remains at the end of the swindle is inadequate for another, often overlooked reason: it is, at best, completely redundant.

### C. *Déjà Vu All Over Again*

Casting the preliminary-hearing swindle in the most generous possible light, the prosecutor and magistrate are using (1) a judicial review of the complaint for probable cause *as a substitute for* (2) an adversarial hearing governed by the rules of evidence (but with a relaxed rule against hearsay). However, those two things are two separate steps in the criminal process, and the magistrate has already reviewed the complaint for probable cause by the time the case reaches the prelim stage.<sup>113</sup> To review the complaint for probable cause a second time (*déjà vu*), in lieu of the prelim, not only duplicates the first step in the two-step process but also effectively erases the preliminary-hearing statute from the code book.

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110. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

111. See WIS. STAT. § 906.02 (West 2024) (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). This rule of evidence also applies at the prelim, but courts simply ignore it.

112. *Coleman*, 399 U.S. at 9.

113. WISEMAN & TOBIN, *supra* note 43, at § 2:4 (citing WIS. STAT. § 968.02 (2) (West 2016) and WIS. STAT. § 968.04 (1) (West 2019)).

More specifically, when a defendant is charged in a criminal complaint, there are four ways he or she can be brought into court: a court-issued summons, a court-issued arrest warrant, a prosecutor-issued summons, or a warrantless police arrest.<sup>114</sup> In each of these situations, the magistrate must review the complaint for probable cause and must do so long before the prelim.<sup>115</sup>

For the court-issued summons, only “[w]hen the complaint has been issued by the district attorney and filed with the court, and when *the judge finds from the complaint . . . that there is probable cause* to believe an offense has been committed by the accused,” may the judge issue a summons to secure the presence of the defendant.<sup>116</sup>

For the court-issued arrest warrant, “The decision *whether a complaint establishes probable cause* for the issuance of an arrest warrant must be made by a judge.”<sup>117</sup> (“Judge” is defined to include a court commissioner.)<sup>118</sup>

For the prosecutor-issued summons, the judge examines the complaint for probable cause *no later than* the initial appearance, which is the first court appearance and predates the preliminary hearing.<sup>119</sup> “[I]t is the practice of many Wisconsin judges to review the complaint *at the initial appearance* in order to ensure that probable cause is stated.”<sup>120</sup>

Finally, for the warrantless arrest, no less than the United States Supreme Court has held that “the Fourth Amendment requires a *judicial determination of probable cause* as a prerequisite to extended restraint of liberty following arrest.”<sup>121</sup> This is why, no later than the initial appearance in all cases, regardless of how the defendant was brought into court, but especially when he or she has been arrested without a warrant, the magistrate examines the complaint “to ensure that probable cause is stated.”<sup>122</sup>

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114. State v. Dabney, 663 N.W.2d 366, 370–71 (Wis. Ct. App. 2003).

115. WIS. STAT. § 970.03 (West 2024).

116. WISEMAN & TOBIN, *supra* note 43, at § 2:4 (emphasis added) (citing WIS. STAT. § 968.02 (2) (West 2024) and WIS. STAT. § 968.04 (1) (West 2024)).

117. *Id.* at § 2:33 (emphasis added).

118. WIS. STAT. § 967.07 (West 2024).

119. WIS. STAT. § 970.03 (2) (West 2024) (requiring that the preliminary hearing be held within 10 or 20 days *after* the initial appearance, depending on the defendant’s custody status and the amount of the bail).

120. WISEMAN & TOBIN, *supra* note 43, at § 3:2 (emphasis added).

121. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (emphasis added).

122. WISEMAN & TOBIN, *supra* note 43, at § 3:2.

Given that the magistrate has already reviewed the criminal complaint for probable cause *long before* the prelim, how can another review of the complaint for probable cause possibly be used *in place of* the prelim? Of course, it cannot be. It is nonsensical. Such a ploy fails even a cursory substance-over-form analysis, and it completely ignores the prelim statute and related statutes, wherein the state's witnesses must have personal knowledge and are subject to meaningful cross-examination.<sup>123</sup>

One might argue that when a magistrate reviews the complaint for probable cause this second time (in lieu of the statutorily required prelim), the defense lawyer is actually present and is allowed to make an argument about why there is no probable cause in the complaint, thus differentiating this review of the complaint from the earlier review of the complaint. However, the law already requires the defense lawyer to review the complaint and file any motions to dismiss it for lack of probable cause before the prelim: "In felony actions, objections based on the insufficiency of the complaint shall be made *prior to the preliminary examination* or waiver thereof or be deemed waived."<sup>124</sup>

Consequently, the magistrate's review of the complaint for probable cause, when substituted for an actual prelim, often becomes the third such review in the case. It's not just *déjà vu*. "It's like *déjà vu* all over again."<sup>125</sup>

And describing the prelim, as this Section has done, as a third review of the complaint is an overgenerous characterization of the post-swindle hearing. In reality, as the next Section explains, the post-swindle prelim is a devolution into chaos and lawlessness—a true legal, and sometimes even constitutional, disaster.

#### D. *With a Little Help from Their Friends*

Granted, the prosecutor who thought of the idea to substitute the complaint for the prelim exhibited a certain level of creativity, as is required even for the simplest of scams. However, this swindle is so hollow that it would not come close to earning a passing mark on a

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123. See *supra* Part II.

124. WIS. STAT. § 971.31(5)(c) (West 2024) (emphasis added).

125. Robert Knapel, *Yogi Berra: 'It's Déjà Vu All Over Again' and His 25 Greatest Quotes*, BLEACHER REPORT (Apr. 6, 2011), <https://bleacherreport.com/articles/657044-yogi-berra-its-deja-vu-all-over-again-and-his-25-greatest-quotes> [<https://perma.cc/HY89-6DYX>] ("Since *déjà vu* is the feeling that one has already had the experience that they are currently having, this must mean that Berra already had the experience twice.").

law school criminal-procedure exam. Consequently, prosecutors needed judges to help turn their dream of a witness-free prelim into a reality—and for reasons unknown, the judiciary was an eager coconspirator.

### 1. Violating Statutes and Case Law

To permit the reader-witness ploy described earlier—wherein an uninvolved person reads, memorizes, and tries to recite the complaint—a magistrate has to completely ignore the rule of evidence requiring the witness to have personal knowledge of the subject matter of his or her testimony.<sup>126</sup> Therefore, when defense counsel objects on grounds of lack of personal knowledge, the pro-state magistrate can only respond that “hearsay is admissible.”<sup>127</sup> First, as explained below, that is not necessarily true. But second, it badly misses the point, as the personal-knowledge requirement is a separate and distinct issue. The witness repeating the hearsay “must have sufficient knowledge of the crime or the circumstances under which the out-of-court [hearsay] statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement.”<sup>128</sup>

A magistrate complicit in the swindle must also ignore his or her duty to evaluate the reliability of the hearsay when deciding not only its admissibility but, if admissible, whether it constitutes probable cause.<sup>129</sup> Instead, the magistrate now blindly accepts the hearsay, and the prosecutor’s untested hearsay allegations are—quite ironically, given the policy and mandates of the case law—the sole basis for bind-over.<sup>130</sup>

To enable the swindle, a magistrate must also ignore the higher standard of probable cause required for a prelim than for a criminal complaint.<sup>131</sup> If the standard were the same, there would be no need

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126. WIS. STAT. § 906.02 (West 2024) (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”).

127. Cicchini, *supra* note 53, at 494–95 (quoting Transcript of Preliminary Hearing at 9–10, *State v. Williams* (Wis. Cir. Ct. Nov. 30, 2018) (No. 18-CF-1179) (on file with author)).

128. *Bullock v. Superior Court*, 264 Cal. Rptr. 3d 699, 707 (Cal. Ct. App. 2020) This is equivalent to Wisconsin’s personal knowledge statute, which is discussed throughout this Article. *See* § 906.02.

129. *State v. O’Brien*, 850 N.W.2d 8, 13 (Wis. 2014) (magistrates “must still consider, on a case-by-case basis, the reliability of the State’s hearsay evidence in determining whether it is admissible and assessing whether the State has made a plausible showing of probable cause”).

130. *See id.*

131. *See supra* Part II.

for a prelim. But, as described earlier, the standard is not the same; it is higher for prelims.<sup>132</sup> It is unfortunate that Wisconsin uses the term “probable cause” rather than, say, Pennsylvania’s term of “prima facie case.”<sup>133</sup> Using the term “probable cause” for the complaint, and then again for the prelim, probably enabled the swindle—at least linguistically. And it is probably what sparked prosecutor-zero’s creativity to dream up this scam in the first place.

Magistrates try to solve this higher-probable-cause dilemma by disingenuously uttering something like this when binding the defendant over after the prelim: “The [reader-witness’s] review of a booking photo constitutes more of a review than just a review of the Criminal Complaint.”<sup>134</sup> This refers to the previously described tactic where the reader-witness testifies that the prosecutor showed him a booking photo of an unknown date and origin, and that is how the reader-witness knows the defendant’s name.<sup>135</sup>

But looking at a booking photo does nothing to satisfy the higher probable-cause standard, which depends on the type of evidence presented (i.e., a witness with personal knowledge who is subjected to meaningful cross-examination).<sup>136</sup> Further, looking at a booking photo of an unknown date and origin will, *at best*, provide the reader-witness with the name of the person seated in the defendant’s chair. It says nothing about when or where that person was arrested, let alone whether that person is the person whom the complaining witness accused of a crime. Looking at a booking photo fails even to establish the identification element at the prelim<sup>137</sup> and certainly does not satisfy the higher standard of probable cause.<sup>138</sup>

## 2. Violating Constitutional Rights

Despite the above abuses, the judiciary plays an even greater, more active role in this preliminary-hearing swindle. Recall that the primary goal of this scam is to transform the prelim from a brake on

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132. *See supra* Part II.

133. *See supra* Part II.

134. Transcript of Preliminary Hearing at 15, *State v. Booker* (Wis. Cir. Ct. Oct. 10, 2023) (No. 23-CF-1549) (on file with author).

135. *See supra* Section IV.A.

136. *See supra* Part II.

137. WIS. STAT. § 970.03(1) (West 2024) (“A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed *by the defendant*.” (emphasis added)).

138. *See supra* Part II.

the litigation machinery into a cruise control button, which ensures the speedy and uninterrupted processing of criminal defendants—or, as Bierce would say, the efficient processing of pigs into sausages.<sup>139</sup> But this processing often runs into a speed bump that is far more formidable than the prelim: the shortage of available criminal defense lawyers, whether public defenders or private bar attorneys.

Although the prelim is not itself a constitutional right, it is a “critical stage” of the proceedings at which the defendant has a constitutional right *to counsel*.<sup>140</sup> And when the public defender’s office is unable to appoint an attorney to an eligible defendant, whether due to a conflict of interest or a shortage of attorneys, the court must appoint a lawyer at the county’s, as opposed to the state’s, expense.<sup>141</sup> Instead of doing this, however, courts offer defendants a Hobson’s choice: waive your right to timely prelim (i.e., within the statutory time period) or waive your right to an attorney and represent yourself.<sup>142</sup> Of course, given its stated purpose of preventing undue humiliation, expense, and incarceration, a prelim delayed is a prelim denied.<sup>143</sup> Therefore, many defendants elect to represent themselves, which, unknown to them, is somewhat analogous to self-diagnosing and treating a medical condition.

This decision to represent oneself, in turn, requires the court to conduct as many as three different colloquies: (1) a colloquy to ensure the defendant is knowingly, intelligently, and voluntarily waiving the right *to counsel*,<sup>144</sup> (2) a colloquy to ensure the defendant is *competent* to represent him or herself, which is a higher standard of competence than that required to assist counsel,<sup>145</sup> and (3) if the defendant elects to testify at the prelim, a colloquy to ensure that the defendant is knowingly, voluntarily, and intelligently waiving the right *to remain silent*.<sup>146</sup>

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139. Bierce, *supra* note 12, at 54.

140. See *supra* Part II.

141. See Order regarding *In re the Petition to Amend SCR 81.02*, 2018 WI 83 (June 27, 2018) (No. 17-06) (citing *State v. Dean*, 471 N.W.2d 310 (Wis. Ct. App. 1991)); Cicchini, *supra* note 53, at 486–87.

142. See Cicchini, *supra* note 53, at 488.

143. See Theis, *supra* note 37, at 17 (“[A delay] imposes great personal expense upon individuals eventually cleared and released as well as upon those who must anxiously wait for the finding that there is some basis for further prosecution.”).

144. See *State v. Klessig*, 564 N.W.2d 716, 721 (Wis. 1997).

145. See *id.* at 724.

146. See *State v. Denson*, 799 N.W.2d 831, 844 (Wis. 2011); WIS. JI-CRIM SM-28 (2012).

As one can imagine, conducting those colloquies would dramatically slow down the speed of the litigation machinery, and could easily turn the five or six minute, post-swindle prelim into a ten- to fifteen-minute colloquy, plus the prelim itself.<sup>147</sup> Therefore, the magistrate will have to short-change, or even eliminate, the mandatory colloquies. For example, with regard to the waiver of counsel, what the law *mandates* is clear:

[T]he circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him. If the circuit court fails to conduct such a colloquy, a reviewing court may *not* find, based on the record, that there was a valid waiver of counsel.<sup>148</sup>

Despite that, actual waivers of counsel typically consist of nothing more than the following, without any discussion of at least two of the four mandatory factors, above, let alone an actual colloquy (i.e., a conversation or question-and-answer session) from which the magistrate could possibly conclude that the defendant's decision of self-representation is a knowing, intelligent, and voluntary one:

THE COURT: So today you have two options. You can ask for additional time, which the Court would grant, or you have the ability to represent yourself and you can have the hearing today without counsel. I don't recommend that due to the fact that this Court would have to treat you as a practicing attorney. I can't give you legal advice and you'd have the option to testify. The State would call their first witness. You would have the ability to cross-examine them. Then, you would have the ability to testify and the State would have the ability to cross-examine you and that's always concerning because individuals like to give their side of the story and unfortunately sometimes they incriminate themselves and the hard thing that I have is I can't stop an individual from talking. I

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147. *See supra* Section IV.A.

148. *Klessig*, 564 N.W.2d at 721–22 (emphasis added).

can't give them legal advice. So it's—so the question today is how do you wish to proceed? Are you willing to—

THE DEFENDANT: I'll represent myself.

THE COURT: You wish to represent yourself, okay. So you wish to have the hearing today then?

(Defendant nods.)

THE COURT: Okay. Counsel [for the state], who's your first witness?<sup>149</sup>

That lecture not only falls short of a colloquy but is defective for other reasons as well. For example, regarding the seriousness of the charges and the range of penalties that could be imposed—factors three and four of the mandatory colloquy—the court completely failed to address these matters and did not even ask the defendant if he had a copy of the complaint, had read it, or had the ability to read.<sup>150</sup> True, addressing all factors would have consumed several minutes; however, it would have been very easy to do. There is even an official, mandatory form to be used in conjunction with the mandatory on-the-record colloquy, which guides the court's questioning and documents the court's compliance with the law.<sup>151</sup> In the above case, the court failed to use it.<sup>152</sup>

The second colloquy is required to ensure that the defendant is competent to represent him or herself—which, again, is a higher

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149. Transcript, No. 23-CF-1549, *supra* note 134, at 2–3. Asking the prosecutor “who’s your first witness?” was merely a pretense, as the magistrate knows the prosecutor calls only one witness, the reader-witness, case after case after case. *See id.*

150. For an even *shorter* lecture by the judge to an unrepresented defendant, see Transcript of Preliminary Hearing at 2–3, *State v. Brown* (Wis. Cir. Ct. Nov. 8, 2023) (No. 23-CF-1667) (on file with author). The lecture in *Brown* didn’t come close to satisfying *any* of the prongs of the mandatory colloquy. *See id.* And in *Brown*, when the prosecutor reminded the magistrate that the defendant has the right to cross-examine the state’s reader-witness before the magistrate binds the defendant over, the magistrate amazingly said, “He doesn’t have the right to cross.” *Id.* at 7. This is nothing short of unbelievable, as the right to cross is both basic and clear. *See* WIS. STAT. § 970.03(5) (West 2024) (“All witnesses shall be sworn . . . . The defendant *may cross-examine witnesses* against the defendant.” (emphasis added)).

151. *See* CR-226 Waiver of Right to Attorney, WIS. CIR. CT. ACCESS (2019) [https://www.wicourts.gov/forms1/circuit/ccform.jsp?Category=&FormName=CR-226&FormNumber=&StateCite=\[https://perma.cc/44R7-KM3Q\]](https://www.wicourts.gov/forms1/circuit/ccform.jsp?Category=&FormName=CR-226&FormNumber=&StateCite=[https://perma.cc/44R7-KM3Q]).

152. *Id.*



standard than competency to assist counsel—and it must include an inquiry into several factors, including the defendant’s age, education, current mental health condition, and other things.<sup>153</sup> Further, “the circuit court’s determination of a defendant’s competency to proceed pro se *must appear in the record*.”<sup>154</sup> Despite that, the magistrate in the above case made no such inquiries whatsoever before allowing the defendant to proceed pro se at the prelim.<sup>155</sup>

Finally, with regard to the colloquy about waiving the right to remain silent, “A criminal defendant’s constitutional right *not* to testify is a fundamental right that must be waived knowingly, voluntarily, and intelligently.”<sup>156</sup> The magistrate’s questioning on this topic must include asking whether the defendant realizes he has the right to remain silent and that such right is constitutional in origin.<sup>157</sup> It also includes asking, among other questions, whether the defendant’s decision-making has been improperly influenced in any way.<sup>158</sup> Nonetheless, when it came time for the defendant to present his or her case at the prelim, the entirety of the colloquy was as follows:

THE COURT: Counsel—or, sir, do you wish to testify?

THE DEFENDANT: Yeah.

THE COURT: Um, you can stay seated there, raise your right hand.<sup>159</sup>

The defendant was then put under oath, at which time his testimony, given in narrative form, got off to an inauspicious start:

THE DEFENDANT: Well, not to—

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153. See *Klessig*, 564 N.W.2d at 724; WIS. JI-CRIMINAL SM-30.

154. *Klessig*, 564 N.W.2d at 724 (emphasis added).

155. See Transcript, No. 23-CF-1549, *supra* note 134, at 2–3. The proceedings are devoid of any inquiry into competence. See *id.* And once again, Wisconsin’s Form CR-226 *Waiver of Right to Attorney*, *supra* note 151, covers all of the necessary topics and could be used to guide, and document, the court’s on-the-record colloquy, see also WIS. JI-CRIM SM-30 (discussing the competence aspect of waiving counsel).

156. *State v. Denson*, 799 N.W.2d 831, 835 (Wis. 2011) (emphasis added).

157. See WIS. JI-CRIM SM-28 (“And do you understand that you have a constitutional right not to testify?”).

158. See *id.* (“Has anyone made any threats or promises to you to influence your decision?”).

159. Transcript, No. 23-CF-1549, *supra* note 134, at 7.

THE COURT REPORTER: You have to get up to the—close to the microphone. Thank you.

THE DEFENDANT: *Not to incriminate myself . . .*<sup>160</sup>

The defendant then went on a ramble in which, despite his stated intention “[n]ot to incriminate [himself],” he promptly incriminated himself.<sup>161</sup> And for the sake of completeness, the prosecutor then cross-examined him and got him to incriminate himself on the crime’s elements that the defendant inadvertently overlooked during his rambling, narrative-based testimony.<sup>162</sup>

After cross-examination, the defendant added, meaninglessly: “My daddy told me a long time ago it’s better just to tell the truth.”<sup>163</sup> The defendant’s father should have told him never to represent himself in court or testify at a prelim. And, more importantly, the magistrate should have conducted the legally-mandated colloquies before letting him do either.

### *E. Intended Consequences*

The goal of the preliminary-hearing swindle is to keep the litigation machine humming—to make it virtually effort-free for the prosecutor to charge and win bind-over in felony cases. In this regard, the swindle must be considered a tremendous success, as entire prelims and surrounding activities, such as arraignments and future scheduling, can now be completed with no actual witnesses and in as few as five minutes.<sup>164</sup> An intended consequence of the ease with which prosecutors are able to charge felonies is that they can charge many more of them with their existing resources—in Bierce’s terminology, the prosecutor can now grind more pigs through the sausage-making litigation machine.<sup>165</sup>

From 2010, the year before the legislation allowing hearsay at prelims was introduced,<sup>166</sup> through 2022, the last year for which full

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160. *Id.* at 8 (emphasis added).

161. *Id.* at 8–10.

162. *Id.* at 11–14.

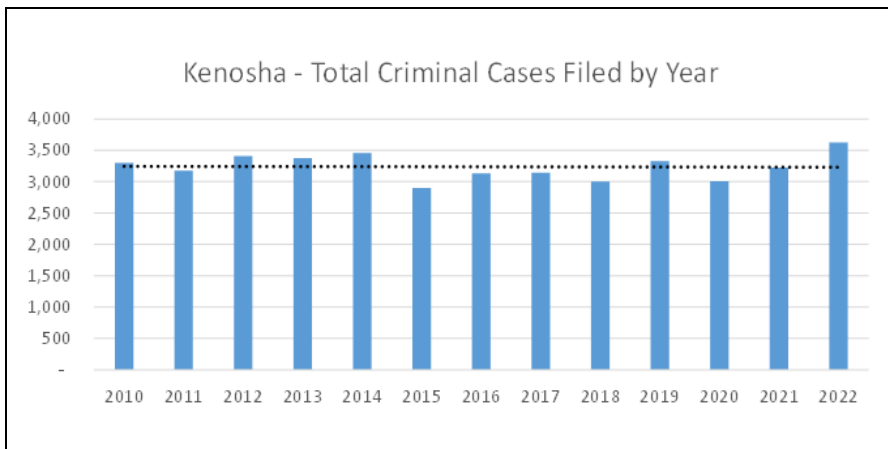
163. *Id.* at 14.

164. *See supra* Section IV.A.

165. Bierce, *supra* note 12.

166. *See supra* Section IV.A.

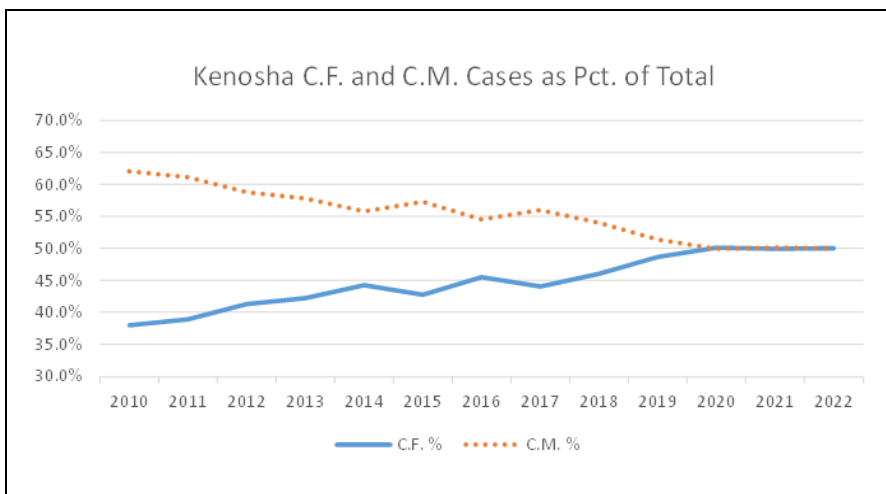
data is currently available, the number of *criminal cases overall* has remained remarkably steady. For example, in Kenosha County, Wisconsin, which has implemented the version of the swindle involving a reader-witness, the prosecutor's office has filed between 3,000 and 3,500 cases every year in that thirteen-year span, except two. In those two years, it filed just under 3,000 cases (2,895 cases in 2015) and just over 3,500 cases (3,622 in 2022).<sup>167</sup>



However, despite the consistency in the number of criminal cases overall, the mix between criminal felony (C.F.) and criminal misdemeanor (C.M.) cases has changed dramatically since it became easier to file felony cases. In 2010, the year before the legislation permitting hearsay was introduced, *less than 38 percent* of Kenosha cases were felonies, and more than 62 percent were misdemeanors. Once the legislation was passed, however, the prosecutor's office soon thereafter began using hearsay at prelims and kept pushing the envelope, eventually implementing the swindle. Consistent with that gradual progression, its percentage of felony cases rose relative to its percentage of

167. This information, and all of the information discussed in this section, is available in a public database that can be accessed in the Clerk of Court's office in Kenosha County, Wisconsin. WISCONSIN'S CIRCUIT COURT ACCESS PROGRAM, <https://wcca.wicourts.gov/case.html> [https://perma.cc/S4Q5-S22S]. All CM (misdemeanor) and CF (felony) cases are numbered, the first in a given year being number one (e.g., 22-CF-1 for the first *felony* case filed in calendar year 2022). The highest numbered felony case is the last *felony* case filed in that year (e.g., 22-CF-1812). (This counting method provides useful estimates for purposes of this Article, but may not be precise. See, e.g., *infra*, note 169.) Adding CM and CF cases equals the total cases. This Article has ignored CT (criminal traffic) cases, which are not impacted by the preliminary-hearing swindle.

misdemeanor cases.<sup>168</sup> In fact, in 2022, the last full year for which data is available, the prosecutor's office filed more felony cases (1,812) than misdemeanor cases (1,810)—an increase from less than 38 percent to just over 50 percent.<sup>169</sup>



A word of caution is warranted here. The above chart and its underlying data do not prove causation. In other words, they do not prove that *because of* the preliminary-hearing swindle, the prosecutor's office now charges more felony cases than misdemeanor cases. The reason is that there could be other causes for the relative increase in felony cases. One possibility, for example, is that Kenoshans have changed their behavior and have been committing more felonies and fewer misdemeanors over that same time span, thus causing the

168. The data cited in this section is, for the most part, also available without going to the Clerk's office, and can be found by searching WISCONSIN'S CIRCUIT COURT ACCESS PROGRAM, *supra* note 167. However, the numbers on CCAP may not precisely match the numbers cited in this Article, as cases on CCAP are no longer available for viewing if they have been dismissed or expunged. See Joe Forward, *Dismissed Criminal, Eviction, Other Cases No Longer Displayed on Court Website After Two Years*, WIS. BAR: INSIDE TRACK (Feb. 21, 2018), <https://www.wisbar.org/NewsPublications/InsideTrack/pages/article.aspx?volume=10&articleid=26182> [<https://perma.cc/HR8J-NHQ8>] ("An expungement . . . removes all records relating to the conviction . . .").

169. As a final caveat, the counting method employed in this Article assumes that every available number was used leading up to the final case number for a given year. See *supra* note 167. However, the prosecutor's office indicated that "in 2019 there was a CCAP error and case numbers 19cf797–19cf906 were not used." E-mail from Carli McNeill, Deputy District Attorney, Kenosha County District Attorney, to author (May 22, 2024, 03:02 CST) (on file with author). If this is accurate, then the number of felonies in the above graph for calendar year 2019 would be overstated.

relative increase. It is possible that this, or another event, is actually the cause of the greater percentage of felony cases and that the ease with which prosecutors can now charge felonies (thanks to the swindle) did not play a role in their actual charging decisions. However, we can conclude with certainty that the above chart and its underlying data are *consistent with* the increased ease of filing felony cases.

In addition to that intended consequence, there are unintended consequences of the swindle as well. One is that, because it is now incredibly easy to win bind-over at a prelim, the prosecutor is not motivated to make a preliminary-hearing waiver offer (a plea offer) to induce the waiver of the prelim and to start plea negotiations.<sup>170</sup> After all, why do today what can be put off until tomorrow? And defense counsel, realizing the uselessness of the hearing, will likely advise the client to waive it, even without such an offer. And even if the defendant refuses to waive and the prosecutor has to hold the hearing, the prelim now involves nothing more than a prosecutor asking a reader-witness what the prosecutor's office wrote in the complaint.<sup>171</sup>

In other words, there is no burden or risk for the prosecutor to have a prelim, so there is no incentive to actually look at his or her case to prepare for the hearing or to make a prelim waiver offer. Consequently, the prosecutor learns nothing about the viability of his or her own case, which defeats one of the purposes of the prelim.<sup>172</sup> The result is that, because prosecutors know little about their cases and therefore do not make plea offers, more defendants will set their cases for trial. Ironically, while the swindle creates great speed and efficiency at the beginning of the felony process and certainly allows the charging of more felony cases, it is probably creating a logjam near the end of the process, as more and more felony cases are stacked up for trial.<sup>173</sup>

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170. See Michael D. Cicchini, *Preliminary-Hearing Waivers and the Contract to Negotiate*, 2023 PEPP. L. REV. 35, 43 (2023).

171. See *supra* Section IV.A.

172. See Anderson, *supra* note 32, at 288 (“The most important benefit for the prosecution is the early opportunity afforded to weed out cases that should go no further.”); Miller, *supra* note 54, at 414 (explaining that the prelim is supposed to give prosecutors “a means for testing the complaints of prosecuting witnesses, determining their motives and eliminating accusations based upon misinformation or prejudice”); Sheldon, *supra* note 38, at 179 (explaining that today’s prelim merely “acts as a prosecutorial rubberstamp” and certainly “no longer fulfills the goal of ensuring only meritorious cases reach trial”).

173. See Sheldon, *supra* note 38, at 198 (describing how the state’s use of hearsay at prelims has caused a shift in preparation from early in the case, as the state no longer has to meaningfully prepare for the prelim, to later in the case, when the state is preparing its untested cases for trial).

But that aside, now that we know the new, post-swindle prelim completely fails to accomplish *all* of the things the original prelim was intended for, what is next?

## V. THE FUTURE OF THE PRELIM

Should the law of the preliminary hearing be reformed? Or is the prelim better off dead? Reforming the prelim would be incredibly easy but equally unlikely. First, legislatures could simply amend their statutes to make them simple and direct. In Wisconsin, that rewrite has already been done; the legislature merely needs to adopt it.<sup>174</sup> Second, in fairness to the legislature, a rewrite should not even be necessary, as the statutory law, though not perfect, is fairly clear to begin with. Instead, judges should stop playing super-legislature and should instead apply the law in good faith—no more “obfuscation and convoluted logic” for the benefit of the state.<sup>175</sup>

Some judges in some states do use good faith.<sup>176</sup> In Florida, for example, the law is clear that hearsay cannot be the sole basis for bind-over.<sup>177</sup> This is different from but comparable to, Wisconsin’s requirement that, while hearsay *can* be the sole basis for bind-over, it must first be deemed *reliable*.<sup>178</sup> Therefore, when a Florida prosecutor tried to implement a milder version of the swindle described in this Article (i.e., having a police officer repeat hearsay at the prelim to win bind-over), Florida’s court system eventually prevented that nonsense from taking hold.<sup>179</sup>

More specifically, a Florida prosecutor had to prove at the prelim that the defendant was a “habitual traffic offender.”<sup>180</sup> Despite Florida’s clear rule that hearsay cannot be the sole basis for bind-over, the prosecutor decided to push the envelope. Instead of simply obtaining and introducing into evidence the defendant’s driving record, which would have satisfied an exception to the hearsay rule and would have

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174. See Cicchini, *supra* note 53, at 511–19 (rewriting Wisconsin’s prelim statute). For additional reform ideas that largely keep the typical prelim structure intact, see Anderson, *supra* note 32, at 293–300. For more radical reform alternatives, see *id.* at 301–323. For an argument that the magistrate should adopt a “directed verdict” standard at the prelim, see Dean, *supra* note 53, at 169.

175. Griffin, *supra* note 31, at 842.

176. See, e.g., *Evans v. Seagraves*, 922 So. 2d 318, 319 (Fla. Dist. Ct. App. 2006).

177. *Id.*

178. See *State v. O’Brien*, 850 N.W.2d 8, 22 (Wis. 2014).

179. *Davis v. Junior*, 300 So. 3d 307, 308 (Fla. Dist. Ct. App. 2020). The real credit, of course, goes to the defense lawyer or lawyers, who could have just let the swindle go unchecked.

180. *Id.*

been sufficient,<sup>181</sup> the prosecutor had the officer *say* that the defendant's driving record *says* that the defendant was a habitual offender, which constituted hearsay and should not have been sufficient to win bind-over.<sup>182</sup>

Just as the swindle unfolds in Wisconsin, the prosecutor got a little help from his friend: the trial court judge played the role of coconspirator. As the appellate court explained, "The trial court determined that probable cause *existed* that Davis had driven while his license was suspended as a habitual traffic offender . . . . Davis petitioned this Court [the appellate court] for habeas corpus relief" from the defective bind-over.<sup>183</sup>

Then, during the appellate-court proceedings, "The State concede[d] that, at the . . . preliminary hearing, it presented no non-hearsay testimony that Davis's driver's license had been suspended as a habitual traffic offender. Nonetheless, the State suggest[ed] that . . . it may rely exclusively on hearsay evidence in any adversary preliminary hearing"<sup>184</sup>—a contention that was contrary to law and logic, as the swindle always is. Fortunately, the appellate court rejected the state's contention and explained the difference between untested hearsay in a *complaint* and a preliminary hearing which requires actual *evidence*:

In *Evans*, the First District rejected this [prosecutorial] argument, noting that "unlike Rule 3.133(a), Rule 3.133(b) *does not permit the state to rely wholly on a complaint even if sworn* . . . . Rule 3.133(b)(3) provides instead that all witnesses shall be examined in the presence of the defendant and may be cross examined." In addition, our sister court noted that "Rule 3.133(b)(5) provides that the judge shall cause the defendant to be held to answer to the circuit court, only if it appears to the judge '*from the evidence*' that there is probable cause to believe that the defendant has committed the offense." We agree . . . that . . . the State cannot rely solely on hearsay evidence to meet its burden.<sup>185</sup>

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181. *Evans*, 922 So. 2d at 319 ("[H]earsay testimony (*not falling within some exception to the rule excluding hearsay*) does not, by itself, meet the state's burden" (emphasis added)).

182. *Davis*, 300 So. 3d at 308.

183. *Id.* at 308–09 (emphasis added).

184. *Id.* at 309.

185. *Id.* (emphasis added) (internal citations omitted).

From my own perspective—not only as a criminal defense attorney but simply as an attorney—the above Florida case illustrates the type of necessary thought, analysis, and sophistication that makes the law *a profession*. But when I am in court to partake in a post-swindle prelim, I begin each hearing by looking around the courtroom, wondering if others, such as the prosecutor and magistrate, are as embarrassed by this charade as I am. They do not seem to be, which in turn makes me even more embarrassed for the legal profession of which I am a part.

My perspective no doubt colors my answer to the earlier question, which is this: Yes, defendants would be better off if the preliminary hearing was completely eliminated. The reason is that this swindle is just the latest, albeit most severe, iteration in a long history of prosecutorial and judicial abuse. Long before the swindle, these government agents tortured the language of the prelim statute and “transformed the preliminary hearing from a safeguard *against* improvident prosecutions to a prosecutorial weapon for adding charges without probable cause.”<sup>186</sup> As explained earlier, felony defendants therefore have *less* protection than misdemeanor defendants.<sup>187</sup>

And now that the preliminary-hearing swindle has eliminated all possible benefits of the prelim for the defendant, there is no longer any potential value to weigh against the risk that a prosecutor will use the prelim to add charges without probable cause. Therefore, felony defendants would be better protected from prosecutors and would not be worse off in any way if the prelim statutes<sup>188</sup> and related statutes<sup>189</sup> were simply eliminated from the books. Ergo, the prelim must die.

Unlike reforming the prelim to restore its underlying purposes, eliminating it entirely might actually happen. The reason is that prosecutors—those who are supposed to be regulated by but are instead regulating the prelim—have advocated for its elimination.<sup>190</sup> Granted,

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186. See Cicchini, *supra* note 53, at 508–09.

187. See *id.* at 508.

188. WIS. STAT. §§ 970.03–.05 (West 2024).

189. Other statutes, such as the statute requiring the filing of an “information” (the document that supersedes the complaint in felony cases), would also have to be eliminated in order to completely prevent the prosecutor from trying to use the so-called transactional-relation test to add charges without probable cause. WIS. STAT. § 928.01 (West 2024). That is, post-reform, all felony cases would be based only on the complaint, and there would have to be probable cause for each and every charge in the complaint, just as is required in a misdemeanor case.

190. See Anderson, *supra* note 32, at 281 (“Statements have been made, most notably by prosecutors and persons interested in crime control, that the preliminary hearing is a waste of time and



they held this position *before* they dreamed up the swindle, which, from their perspective, has accomplished most, if not all, of their objectives. Nonetheless, prosecutors may still be in favor of eliminating the hearing entirely.

But until the prelim is officially eliminated, as it already has been in substance and to large extent in form, what is the defense lawyer to do when faced with these blatant violations of statutes, case law, and even the Constitution?

## VI. FOR THE DEFENSE BAR: CHALLENGING BIND-OVER

Despite this Article's recommendation for the complete elimination of the prelim, the reality is that the prelim still exists, and defense counsel should not ignore it. To illustrate, assume that defense counsel is appointed or retained to represent a defendant *after* the prelim, at which the defendant not only represented him or herself but, worse yet, foolishly testified.<sup>191</sup> What should defense counsel do?

The following is a sample motion to the trial court which could be used in such a situation. It challenges the commissioner's bind-over decision on several grounds.<sup>192</sup> However, the motion is merely a model or starting point. Counsel must carefully consider the facts of each case and the law of the relevant jurisdiction when deciding the content, form, and timing of any motion or other document. Relevant sources of law may include not only statutes, case law, and state constitutions, but also secondary sources such as instructive materials in pattern jury instructions.<sup>193</sup> Regarding form and timing, local court rules or court-specific scheduling orders may be helpful as well.

Finally, to the extent that counsel decides to use any portion of the document below, he or she must ensure that all sources cited therein are accurate, applicable, and have not been explicitly overruled, or even merely superseded, by more recent law. Because this

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effort."); Bruce Vielmetti, *Van Hollen Supports Elimination of Preliminary Hearings*, MILWAUKEE J.-SENTINEL (Feb. 8, 2012), <https://archive.jsonline.com/blogs/news/138943764.html> [<https://perma.cc/ZWT7-G6H2>] (Wisconsin's Attorney General saying that "[p]reliminary hearings may have served a purpose in 1839, they do no longer").

191. See *supra* Section IV.D.2. for an example of such a case.

192. See WIS. STAT. § 757.69(8) (West 2024) ("Any decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party.").

193. See, e.g., WIS. JI-CRIM SM-28 (2012) (how to conduct a colloquy regarding the defendant's waiver of the right to remain silent); WIS. JI-CRIM SM-30 (2006) (how to conduct a colloquy regarding the defendant's waiver of the right to counsel).

issue of defective bind-over is governed almost exclusively by state law, the following sample document relies heavily upon Wisconsin authorities and would have to be significantly reworked for use elsewhere.

[STATE] and [COUNTY]

[STATE] or [PEOPLE] or [COMMONWEALTH] v.  
[DEFENDANT]

[CASE NUMBER]

**DEFENDANT’S MOTION TO DISMISS  
FELONY COUNT(S) FOR DEFECTIVE BIND-OVER**

The defendant, appearing specially by counsel and reserving the right to challenge the court’s jurisdiction, hereby moves the court to dismiss the felony count(s) in the criminal complaint, and for other relief requested below, due to the magistrate’s defective bind-over after the preliminary hearing (“prelim”).

The defendant brings this motion pursuant to U.S. Const. amends. V and XIV; Wis. Const. art. I, § 8; Wis. Stat. §§ 970.03(1), 971.31(2) and (5), and 757.69(8); and *State v. Dunn*, 121 Wis. 2d 389, 359 N.W.2d 151 (1984), *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 267 N.W.2d 285 (1978), *State v. Berby*, 81 Wis. 2d 677, 260 N.W.2d 798 (1978), and the additional legal authorities provided below.

IN FURTHER SUPPORT, the defendant asserts:

**1. THE COURT FAILED TO ASSESS THE  
RELIABILITY OF THE STATE’S HEARSAY  
EVIDENCE**

a. The transcript reveals that, at the prelim, the state called a police officer who had no role whatsoever in the investigation of this case. This is not the equivalent of calling a

“witness,” who is a person with “personal knowledge of the matter” about which he or she testifies. WIS. STAT. § 906.02.

b. The police-officer reader then read the complaint, memorized as much of it as possible, and repeated its contents when the prosecutor asked the officer what the prosecutor’s office had written in the complaint. The state does this under its overly simplistic theory that the complaint contains hearsay, and hearsay is admissible.

c. However, contrary to common misconceptions, “Wisconsin Stat. § 970.038 does *not* set forth a blanket rule that all hearsay be admitted. Circuit courts [or court commissioners] remain the evidentiary gatekeepers. They must still consider, on a case-by-case basis, the *reliability* of the State’s hearsay evidence in [1] determining whether it is *admissible* and [2] assessing whether the State has made a plausible showing of *probable cause*.” *State v. O’Brien*, 850 N.W.2d 8, 13 (Wis. 2014) (emphasis and bracketed numbers added).

d. In other words, “Reliability is the hallmark of admissible hearsay.” *Id.* at 22. And a finding of reliability is made by evaluating things such as the timing of, and the circumstances surrounding, the hearsay statement, as well as the “motivation of the speaker” that made the hearsay statement. *Id.* (discussing different ways for the commissioner to assess reliability).

e. In our case, the Commissioner completely failed to assess reliability, and instead blindly admitted the state’s allegations in the complaint into evidence. Such blind acceptance of the prosecutor’s word means that the prelim failed to fill its function as a “check on prosecutorial power.” *State v. Schaefer*, 746 N.W.2d 457, 467 (Wis. 2008).

f. In fact, the prelim transcript reveals that the hearsay was not reliable and should not have even been admitted. Further, even if the hearsay was properly admitted, for the reasons set forth above it did not establish probable cause. Once again,

“the hearsay must be sufficiently reliable to make a plausible showing of probable cause to support a bindover for trial.” *O’Brien*, 850 N.W.2d at 22.

g. That is, “the hearsay nature of evidence may, in an appropriate case, undermine the plausibility of the State’s case.” *Id.* Ours is such a case. The prosecutor made no showing of reliability and instead merely had the reader-witness repeat what the prosecutor wrote in the complaint. The “evidence” should not have been blindly accepted by the court. It was insufficient for bind-over, and the court’s bind-over decision was defective.

## **2. THE STATE FAILED TO SATISFY THE HIGHER STANDARD OF PROBABLE CAUSE REQUIRED FOR A PRELIM**

a. It is unfortunate that a single term, “probable cause,” is used both when assessing the sufficiency of the complaint and determining whether to grant bind-over after a prelim. The repeated use of this term may have sparked the idea for the abuse of the prelim that we are now seeing.

b. However, the law is more nuanced, and the term means different things in the two settings: “The degree of probable cause required for a bind over is *greater than that required to support a complaint.*” *O’Brien*, 850 N.W.2d at 22 (emphasis added).

c. This is best explained as follows: “The differences in the probable cause required to support search warrants, arrests, *criminal complaints*, and *bindovers* should not be understood in terms of differing gradations along some ill-defined continuum. Rather, these differences reflect the very *different kinds of evidence or information* that a court uses in making the probable-cause determination in various contexts.” Wiseman & Tobin, WIS. PRACTICE SERIES: CRIM. PRACTICE & PROCEDURE § 8:3 (West, 2008) (emphasis added).

d. On the one hand, a criminal complaint is merely a “written statement of the essential facts constituting the offense charged.” WIS. STAT. § 968.01 (2). It is little more than a prosecutor’s assistant cutting and pasting multiple levels of uncorroborated hearsay into a single document. On the other hand, a prelim “is a public *adversarial hearing conducted in accordance with the rules of evidence*.” Wiseman & Tobin, *supra* at § 8:3 (emphasis added). And even though the use of hearsay has been relaxed, as explained above such hearsay still must be *reliable* before it is admissible and certainly before it may be used to bind the defendant over.

e. In our case, when the reader-witness, by design, has no personal knowledge of the case but instead merely recites the contents of the complaint, the state has, *necessarily and by definition*, failed to satisfy the higher standard of probable cause required for a prelim than for a complaint. Bind-over was therefore defective.

### **3. THE COURT MAY NOT SUBSTITUTE YET ANOTHER REVIEW OF THE COMPLAINT FOR THE PRELIM**

a. The prelim in our case was replaced with a review of the criminal complaint for probable cause. However, that document was already reviewed by the magistrate at least once, long before the prelim.

b. More specifically, whether the defendant was brought into court via a court-issued summons, a court-issued arrest warrant, a prosecutor-issued summons, or a warrantless arrest, statute and case law require a judicial review of the complaint for probable cause *before* the prelim. For example, with regard to warrantless arrests, see *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“[T]he Fourth Amendment requires a *judicial determination of probable cause* as a prerequisite to extended restraint of liberty following arrest.” (emphasis added)).

c. Further, the defense lawyer must review the complaint for probable cause and file any motions to dismiss it *before* the prelim. “In felony actions, objections based on the insufficiency of the complaint shall be made *prior to the preliminary examination* or waiver thereof *or be deemed waived*.” Wis. Stat. § 971.31 (5) (c) (emphasis added).

d. How, then, can a second (or third) judicial review of the same complaint satisfy the requirement of the preliminary hearing? Of course, it cannot. Rather, the magistrate’s review of the complaint for probable cause, when substituted for an actual prelim, is not just *déjà vu* but often “*déjà vu* all over again,” i.e., the third such review. More importantly, such a practice is the equivalent of erasing the legislature’s prelim statute from the statute book. Bind-over was therefore defective.

#### **4. THE PROSECUTOR FAILED TO IDENTIFY THE DEFENDANT AS THE PERPETRATOR OF A CRIME**

a. In order to grant bind-over, there must be “probable cause to believe that a felony has been committed *by that defendant*.” *O’Brien*, 850 N.W.2d at 15 (emphasis added).

b. As the prelim transcript reveals, however, the reader-witness who testified merely looked at a booking photo of unidentified date and origin, supposedly picturing the defendant, to learn the defendant’s name. The reader then pointed to the defendant and told the magistrate the defendant’s name.

c. However, knowing the defendant’s name falls well short of identifying the defendant as the person accused of committing the crime, let alone as the perpetrator of the crime.

d. Put another way, to uphold this bind-over, the court must answer this question: An officer with no involvement in the case whatsoever knew the defendant’s name after looking at a booking photo of unidentified date and origin, *but how does that establish that the defendant is the person who committed*

*the crime?* Of course, it does not, and bind-over was therefore defective.

## 5. THE COURT FAILED TO CONDUCT A WAIVER-OF-COUNSEL COLLOQUY

a. In our case, the magistrate accepted the defendant's waiver of counsel. However, "When a defendant seeks to proceed pro se, the circuit court must [e]nsure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se. If these conditions are not satisfied, the circuit court must prevent the defendant from representing himself . . . ." *State v. Klessig*, 564 N.W.2d 716, 720 (Wis. 1997).

b. With regard to the **first** prong: "Nonwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent, and voluntary." *Id.* at 721. Further, "The State has the burden of overcoming the presumption of nonwaiver." *Id.*

c. "[W]e mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel." *Id.* This colloquy "must ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." *Id.*

d. There is no end-around this colloquy. "If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel." *Id.* at 721–22 (emphasis added).

e. In our case, the very limited information the court conveyed to the defendant does not even constitute a "colloquy" in any sense of the word and certainly falls well short of the *required* colloquy.

f. With regard to the **second** prong: Even if there had been a waiver colloquy, which there wasn't, the defendant was not competent to represent himself. "In Wisconsin, there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial." *Id.* at 724.

g. "Accordingly, the circuit court's determination of a defendant's competency to proceed pro se *must appear in the record.*" *Id.* (emphasis added). The case law sets forth the numerous factors for the court to consider, including the defendant's education level and current mental health status. *See id.* In our case, however, the court did not consider any of them or conduct *any* inquiry or colloquy on the record.

h. These two colloquies are both mandatory, even at the prelim. "The preliminary hearing is considered to be a 'critical stage' of prosecution; thus, a defendant is constitutionally entitled to the assistance of counsel." Wiseman & Tobin, *supra* at § 8:12 (citing *State ex rel. Funmaker v. Klammer*, 106 Wis. 2d 624, 634 (1982)). While "[t]he defendant can waive the right to the assistance of counsel at the preliminary hearing," such waiver must be "made knowingly, voluntarily, and intelligently." *Id.*

i. There is even a mandatory form, State Form CR-226, which is designed to document and supplement both of the above mandatory in-court colloquies. This form was not used. The bind-over decision was therefore grossly defective and in violation of the defendant's constitutional rights.

j. Finally, with regard to the arraignment that immediately followed the prelim in this case, the federal and state constitutional rights to counsel attach at the initiation of "adversarial judicial proceedings," which, in Wisconsin, is "when the prosecutor files a criminal complaint with the circuit court, representing the government's formal commitment to prosecute." *Id.* (citing *Davis v. U.S.*, 512 U.S. 452, 456–57



(1994)). Therefore, because the arraignment immediately followed the prelim, the defendant was denied the right counsel at the arraignment as well.

## **6. THE COURT FAILED TO CONDUCT A COLLOQUY ON THE RIGHT TO REMAIN SILENT**

a. The defendant testified and was cross-examined by the state without the benefit of counsel and without any inquiry by the court to ensure that his waiver of the right to remain silent was a knowing, intelligent, and voluntary waiver.

b. “A criminal defendant’s constitutional right not to testify is a fundamental right that must be waived knowingly, voluntarily, and intelligently.” *State v. Denson*, 799 N.W.2d 831, 835 (Wis. 2011). The proper colloquy is found in WIS. J.I. CRIM. SM-28.

c. This colloquy is always strongly encouraged, but it is not required *when the defendant has counsel*. “Defense counsel has the primary responsibility for advising the defendant of his or her corollary rights to testify and not to testify and for explaining the tactical implications of both . . . . In that sense, we believe it unlikely that a competent defense counsel would allow a defendant to take the stand without a full explanation of the right to remain silent and the possible consequences of waiving that right.” *Denson*, 799 N.W.2d at 844.

d. However, in our case, the defendant did not have counsel, did not knowingly, voluntarily, and intelligently waive the right to counsel, and was not competent to represent himself at the prelim; therefore, without any colloquy by the court, the defendant did not knowingly, voluntarily, and intelligently waive the right to remain silent at the prelim. The bind-over decision was therefore grossly defective and in violation of the defendant’s constitutional rights.

## **7. THE FELONY COUNT(S) MUST BE DISMISSED AND THE DEFENDANT’S STATEMENT MUST BE SUPPRESSED**

a. Because the prelim bind-over was defective and because a valid bind-over is needed for a felony, all felony count(s) must be dismissed or amended to misdemeanors. *See State v. Hooper*, 305 N.W.2d 110 (Wis. 1981).

b. Finally, due to the violation of the defendant’s fundamental constitutional rights as outlined above, the defense moves to exclude from trial (on the remaining misdemeanor counts) the state’s use of the defendant’s prelim testimony for all purposes. That is, absent a “knowing and intelligent” waiver of the right to counsel, uncounseled statements of the accused made “after the right to counsel has attached violate the accused’s Sixth Amendment rights *and cannot be admitted at trial.*” *State v. Anson*, 654 N.W.2d 48, ¶12 (Wis. Ct. App. 2002) (emphasis added). Violations of the Fifth Amendment right to remain silent also mandate suppression. *See State ex rel. Goodchild v. Burke*, 133 N.W.2d 753 (Wis. 1965).

[DATE]

[DEFENSE COUNSEL’S SIGNATURE BLOCK]

While the above motion is well-grounded in law and logic and *should* put the brakes on what Bierce called the litigation machinery, defense counsel should not get too hopeful when filing such a motion. As discussed earlier, the judiciary has embraced, and is even an integral part of, the preliminary-hearing swindle. And if judges are letting the above statutory and constitutional violations occur in the first place, there is only a small chance they will correct such violations after the fact.

Nonetheless, even given that dismal situation, the above motion can still accomplish two things. First, it lets judges and prosecutors know that their lawlessness is not going unnoticed by defense counsel;

this could possibly have a deterrent effect. And second, and perhaps more importantly, it protects defense counsel.

If defense counsel does nothing in the face of governmental misconduct at the trial-court level, and the defendant later appeals, appellate courts will often blame defense counsel for failing to monitor the prosecutor<sup>194</sup> and perform the trial judge's duties.<sup>195</sup> That is, the defense lawyer may be unfairly required to do three jobs in one: his or her own, the prosecutor's, and the judge's. Appellate courts often employ this tactic, and impose this burden on defense counsel, in order to protect state actors and uphold convictions.<sup>196</sup> By filing a motion like the one in this Article, however, appellate courts might still insulate prosecutors and judges from consequences, but at least they would not be able to shift the blame to defense counsel when doing so.

### CONCLUSION

If criminal litigation is a meat-grinding machine,<sup>197</sup> then the preliminary hearing, or prelim, is supposed to serve as the brakes on that machine, slowing down the speed with which it processes defendants into metaphorical sausages.<sup>198</sup> However, prosecutors and judges have found a way to bypass the prelim in substance and sometimes even in form.<sup>199</sup> In doing so, they have swindled defendants out of the benefits of the prelim and have turned the hearing into something more akin to a cruise control button than a brake, as defendants are now being ground-up with unparalleled speed.<sup>200</sup>

The preliminary-hearing swindle is not complex but transparent. In essence, it began with a Machiavellian prosecutor wondering: "If hearsay is admissible at the prelim, and if the criminal complaint

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194. See, e.g., *Jordan v. Hepp*, 831 F.3d 837, 847–48 (7th Cir. 2016). When evaluating a case of prosecutorial misconduct, instead of blaming the prosecutor for cheating, the appellate court blamed defense counsel for failing "to object to any of the prosecutor's improper statements". *Id.*

195. See, e.g., *Harris v. Thompson*, 698 F.3d 609, 613 (7th Cir. 2012). Even though the defense lawyer performed his own duties effectively, and despite the trial judge's "glaring failure" at the relevant hearing, the appellate court nonetheless blamed the defense lawyer "for the failure to correct the judge's mistake," thus branding defense counsel deficient. *Id.*

196. See Michael D. Cicchini, *Constraining Strickland*, 7 TEX. A&M L. REV. 351, 357 (2020) ("[C]ourts now routinely apply *Strickland* to shift blame to defense counsel for prosecutorial and even judicial misconduct—two things for which the *Strickland* test was never intended and is ill-suited to do.").

197. See *supra* Part I.

198. See *supra* Part II.

199. See *supra* Section IV.A.

200. See *supra* Section IV.A.

consists of hearsay, why not just read the complaint at the hearing instead of calling a witness or presenting evidence?”<sup>201</sup> The judiciary embraced the idea, and, just like that, the swindle was born. Prosecutors have now successfully substituted a mere reading of the complaint for an adversarial, evidentiary hearing.<sup>202</sup>

In addition to violating statutes, case law, and the Constitution,<sup>203</sup> this swindle defeats every imaginable underlying purpose of the prelim.<sup>204</sup> Most significantly, instead of providing a check on prosecutorial power, the judiciary now bows down to that power, blindly accepting whatever the prosecutor has written in the complaint.<sup>205</sup> The swindle also prevents defense counsel from meaningfully cross-examining actual witnesses, discovering information about the case, and preparing a defense for trial.<sup>206</sup> Not surprisingly, the swindle also permits prosecutors to file felony cases with tremendous ease and in greater numbers—the exact opposite of what the law intended.<sup>207</sup>

Because earlier prosecutorial and judicial abuses of the prelim are already baked into the case law, and because the swindle has eliminated any possible benefit of holding the prelim, defendants would, paradoxically, be better off if the prelim statute was repealed and the hearing was completely eliminated.<sup>208</sup> But unless and until that happens, defense counsel must somehow effectively operate within the existing, disastrous, and lawless system.

Toward that end, this Article provides a model motion for counsel to use to challenge bind-over after a defective prelim.<sup>209</sup> It assumes a situation where counsel was appointed or retained *after* the defendant’s prelim at which the defendant represented him or herself without counsel, and it raises several challenges to bind-over, including the magistrate’s failure to consider the reliability of the hearsay, the state’s failure to meet the higher standard of probable cause, the state’s failure to identify the defendant as the perpetrator, and the court’s failure to

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201. *See supra* Section IV.A.

202. *See supra* Section IV.A.

203. *See supra* Section IV.D.

204. *See supra* Section IV.B.

205. *See supra* Section IV.B.

206. *See supra* Section IV.B.

207. *See supra* Section IV.E.

208. *See supra* Part V.

209. *See supra* Part VI.

conduct the necessary colloquies before allowing the defendant to represent him or herself and testify in his or her own behalf.<sup>210</sup>

In addition to seeking relief at the trial-court level, such a motion would also preserve these issues for appellate review; further, in the event of an appeal, a motion like the one provided in this Article would prevent the appellate court from blaming the defense lawyer for not monitoring the prosecutor's conduct or correcting the magistrate's errors.<sup>211</sup>

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210. *See supra* Part VI.

211. *See supra* Part VI.