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DEFENSE LAWYER DECISION-MAKING AND THE PRELIMINARY HEARING

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ABSTRACT—The defense must make numerous decisions throughout the course of a criminal case. Some decisions—such as whether to move to dismiss a complaint, to challenge an arrest, to challenge a search warrant, or to invoke the right to a preliminary hearing—hinge on the concept of probable cause. Such decisions require a lawyer's training and experience and are therefore traditionally allocated to defense counsel, not the defendant. However, there is one exception: the decision to have or waive the preliminary hearing, or "prelim," is ordinarily left to the defendant. Allocating to the defendant the decision to have or waive the prelim creates numerous problems. This Article therefore argues that such a decision should, like other probable cause-related decisions, normally be allocated to the defense lawyer. To support this claim, this Article mines case law for the criteria used to allocate decisions in other contexts and creates a conceptual framework for the allocation of decision-making authority. It then applies this framework to the decision to have or waive the prelim and demonstrates that, with one exception, this decision should rest with defense counsel rather than the defendant.

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INTRODUCTION: PROBLEMS WAIVING THE PRELIM

In criminal cases, the preliminary hearing, or simply the "prelim," is a pretrial hearing where the prosecutor must demonstrate probable cause that a felony was committed. The format of the prelim varies greatly from state to state.[1] In some states, they are full-blown evidentiary hearings that can take hours, days, or weeks to complete. One famous California prelim even lasted *several months* and resulted in the dismissal of charges for some codefendants and the dismissal of entire cases for others.[2] In stark contrast to California, the Wisconsin prelim is merely a review of the criminal complaint for probable cause—the prosecutor will either have someone read the complaint aloud or simply move the complaint into evidence.[3] That grossly watered-down version of the prelim can be—and regularly is—completed in *five minutes*.[4]

Regardless of where a particular state falls on the preliminary hearing continuum, there are many good reasons to waive, or give up, the prelim.[5] However, the magistrate may require defense counsel to obtain the client's consent by completing a mandatory waiver form before conducting a personal, on-the-record waiver colloquy with the defendant in order to waive

[1] *See infra* Part III.

[2] *See infra* Section III.A; *see also* Rosalio Ahumada, *Record-Setting Murder Prelim Concludes with Carson, 3 Others Held for Trial*, MODESTO BEE (Apr. 10, 2017, 5:31 PM), https://www.modbee.com/news/local/crime/article143847184.html [https://perma.cc/DUN7-HJVK] (explaining how, after the months-long prelim, one defendant had his murder charged dismissed and two others had their entire cases dismissed); Sabra Stafford, *Carson, Turlock Brothers to Stand Trial for Murder in Death of Korey Kauffman*, TURLOCK J. (Apr. 10, 2017, 3:41 PM), https://www.turlockjournal.com/news/crime/carson-turlock-brothers-to-stand-trial-for-murder-in-death-of-korey-kauffman/ [https://perma.cc/G3F2-7XAB] (same).

[3] *See infra* Section III.B; *see also* Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465, 485–511, 511–519 (2020) (discussing the Wisconsin prelim and proposing statutory reform).

[4] *See* Court Record of Events, State v. Nelson, 23-CF-25 (Wis. Cir. Ct., Walworth Cnty.) (the parties made their appearances at 2:12 p.m., the court *held the prelim*, granted bind-over, and even scheduled the next court hearing by 2:17 p.m.—all within *five minutes*), at https://wcca.wicourts.gov/caseDetail.html?caseNo=2023CF000025&countyNo=64&mode=details [https://perma.cc/NE28-B436].

[5] *See infra* Part III. For example, defense counsel may wish to prevent the state from preserving the testimony of a witness for future use at trial in the event the witness later becomes unavailable.

it.[6] Quite counter-productively, this two-step process can be far more complicated than the prelim itself, and it often takes more time than the actual hearing would take.[7]

In Kenosha County, Wisconsin, for example, the prelim waiver form requires counsel to give several warnings to the client.[8] These warnings are often blatantly false, misleading, or (at best) irrelevant. After reading the warnings, then, counsel must explain to the client that they are fictional, inaccurate, or completely inapplicable to the waiver decision. Examples of such warnings in the prelim waiver form, juxtaposed with their corresponding realities, include:

Warning: "I understand that at a preliminary hearing my attorney or I could ask questions of any witnesses called by the [s]tate and I am giving up that right."[9]

Reality: Blatantly false. In Wisconsin, as explained above, the state does not call a *true* witness at the prelim. A "witness," by statute, must have "personal knowledge of the matter" about which he or she testifies.[10] Instead, the prosecutor merely has a person recite the criminal complaint. In some counties, prosecutors will dispense with that minimum level of formality and simply move the document into evidence.[11] Not only is there no "witness," but any questions by defense counsel, to the extent they are even allowed, are necessarily limited to the content of the complaint. Because the prosecutor, magistrate, and defense counsel are all literate, the questions produce nothing beyond what the parties could discern simply by reading the document for themselves.

Warning: "I understand that I give up my right to produce evidence."[12]

Reality: Misleading. Even if the court allows the defense to call a witness, the magistrate will not consider anything the witness says if such testimony contradicts what the state has alleged in the complaint.[13] Still, it rarely even gets to that point as courts typically do not allow the defense to

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[6] *See* WIS. J.I. CRIM. SM-31 ("[I]t is undoubtedly the wise practice to reflect the waiver on the record. The inquiry *ought to be quite brief* when the defendant is represented by counsel.") (emphasis added).

[7] *See, e.g.*, State v. Nelson, *supra* note 4 (the prelim itself was completed in fewer than five minutes).

[8] Mandatory Form: Waiver of Right to Preliminary Hearing (Wis. Cir. Ct., Kenosha Cnty.) (on file with the author).

[9] *Id.*

[10] WIS. STAT. § 906.02.

[11] *See infra* Section I.B.

[12] Mandatory Form: Waiver of Right to Preliminary Hearing, *supra* note 8.

[13] *See* State v. Fry, 385 N.W.2d 196, 199 (Wis. Ct. App. 1985) (The prelim "is not . . . a forum to resolve issues of credibility, to choose between conflicting facts or inferences or to weigh the state's evidence against evidence favorable to the defendant.").

call witnesses during the prelim in the first place. Courts have rewritten[14] the clear statutory grant for the defense to call witnesses[15] and therefore defense witnesses are usually barred.

Warning: "I understand that if I waive [the prelim], probable cause will be found that I have committed a felony, and that if it is classified as a violent felony, as defined by law, my DNA will be submitted to the Wisconsin Crime Laboratory for testing."[16]

Reality: Irrelevant at best. Ordering the collection of DNA and its submission to the lab is a "[d]uty of a judge *at the initial appearance*."[17] The initial appearance predates the preliminary hearing.[18] The warning sounds very ominous to defendants, but these matters are past tense as they have nothing to do with the waiver of the prelim.

Warning: "I understand I am waiving my statutory right to a preliminary hearing or constitutional right to indictment by grand jury."[19]

Reality: Blatantly false. The defendant does not have a constitutional right to indictment by grand jury.[20] The defendant is only entitled to a prelim,[21] and that prelim is limited to the magistrate's review of the complaint for probable cause.[22]

It is maddening that judges require attorneys to read—and subsequently correct—these false warnings before the client can agree to waive the prelim. Why make defense lawyers do this? Why must lawyers spend all that time giving the warnings, and then spend even more time explaining why they're not true? Why falsely tell clients that, by waiving the prelim, they are giving up the procedural equivalent of a bar of gold?

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[14] *See* State v. O'Brien, 850 N.W.2d 8, 18 (Wis. 2014) (upholding the circuit court's refusal to allow the defense to call a witness). Paradoxically, the more relevant a witness is with regard to what actually happened at the alleged criminal event, the less relevant the witness is, and the less likely the defense will be allowed to call the witness, *at the preliminary hearing*. This is due to an overzealous application of the rule that the magistrate may not "weigh the state's evidence against evidence favorable to the defendant." Fry, 385 N.W.2d at 199.

[15] WIS. STAT. § 970.03(5) ("The defendant . . . may call witnesses on the defendant's own behalf . . . .").

[16] Mandatory Form: Waiver of Right to Preliminary Hearing, *supra* note 8.

[17] *See* WIS. STAT. § 970.02(1) (emphasis added).

[18] *See* WIS. STAT. § 970.03(2).

[19] Mandatory Form: Waiver of Right to Preliminary Hearing, *supra* note 8.

[20] *See* Paul G. Cassell & Thomas E. Goodwin, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah's Preliminary Hearings to Felony Offenses*, 4 UTAH L. REV. 1377, 1380 (2011) ("While the Fifth Amendment requires grand jury screening of federal felony offenses, the Supreme Court has not incorporated the Fifth Amendment right to a grand jury indictment as a fundamental right made applicable to the states through the Fourteenth Amendment.").

[21] *See* WIS. STAT. § 970.03.

[22] *See infra* Section I.B.

Worse yet, most clients understandably think that the contents of a mandatory court form must be true, meaning defense counsel is either incompetent or working for the state by trying to induce the client to waive the prelim. Why do judges want to create such a rift in the attorney-client relationship just as that relationship begins to form?

These questions spawn a broader question—the basic, fundamental question that inspired this Article: Regardless of the format of the prelim or the accuracy of the warnings in the waiver form, why does *the defendant* get to decide whether to waive the prelim? In other words, why isn't this decision, which involves the legal concept of probable cause, instead allocated to *the defense lawyer?*

I. PROBABLE-CAUSE DECISIONS—WHO GETS TO DECIDE?

The defense must make numerous decisions during the course of a criminal case, including whether to file a motion to dismiss the complaint, whether to challenge the legality of an arrest, whether to challenge the affidavit used to obtain a search warrant, and whether to waive the preliminary hearing. These four decisions only scratch the surface of the seemingly countless decisions the defense must make.[23] The one thing that all four have in common, though, is that they each deal with the legal concept of *probable cause*.

For example, defense counsel may file a motion to dismiss when the complaint fails to satisfy "[t]he probable cause or 'essential facts' requirement."[24] Probable cause requires that the facts alleged in the complaint, and reasonable inferences from those facts, sufficiently answer these questions: "Who is charged? What is the person charged with? When and where did the alleged offense take place? Why is this particular person charged? . . . Who says so? . . . How reliable is the informant?"[25]

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[23] For numerous additional examples of decisions that must be made during the defense of a criminal case, see generally Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 764 (2000) (discussing the decision to call a witness); Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. RICH. L. REV. 1089, 1097, 1100 (2016) (mentioning the decision to forego cross-examination, to disclose identities of witnesses, to stipulate to facts, to seek dismissal of indictments, to have the criminal defendant in civilian clothes, to strike improper jury instructions, and more); Steven Zeidman, *What Public Defenders Don't (Have to) Tell Their Clients*, 20 CUNY L. REV. F. 14, 38–39 (2016) (discussing the decision of whether to testify at a grand jury and other strategic decisions that defense counsel may make).

[24] CHRISTINE M. WISEMAN & MICHAEL TOBIN, 9 WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE at § 1:12 (West, 2d ed. 2008).

[25] *Id.*

Similarly, defense counsel may challenge the legality of an arrest when the police did not have probable cause to make the arrest.[26] In this context, "[p]robable cause . . . exists if, at the moment of arrest, an officer acts on facts and circumstances . . . sufficient to warrant a prudent person in believing that the individual to be arrested is committing or has committed an offense."[27]

Likewise, defense counsel may move to suppress evidence obtained pursuant to a search warrant when the warrant was not supported by probable cause.[28] In this situation, probable cause exists when the search-warrant affidavit contains "sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and . . . will be found in the place to be searched."[29]

Finally, the decision whether to waive the preliminary hearing will also hinge predominantly, if not entirely, on an assessment of probable cause. That is, "consistent with its function as a screening mechanism, the standard of proof at the [preliminary] hearing is only *probable cause*—a reasonable belief that an offense has been committed and that the defendant committed it."[30]

As the above four examples reveal, probable cause is a context-specific legal concept. Who, then, should decide whether to challenge the complaint, to move to suppress evidence obtained after a search warrant or an arrest, or to have or waive the prelim—the defendant or the defense lawyer? One view in legal academia is that the defendant should decide: "[T]he theory of client-centered lawyering provides that the client, and not the lawyer, makes all decisions that are likely to have a substantial legal or nonlegal impact on the client's life."[31] This idea "has become the predominant model for teaching lawyering theory, particularly within the context of clinical legal education."[32]

But legal academia should not be confused with the practice of law. In practice, the answer to the question of who gets to make a particular decision is often already decided and is state- or jurisdiction-specific.[33] While there

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[26] *See id.* at § 2:22.

[27] *Id.*

[28] *See id.* at § 19:53.

[29] *Id.* (quoting State v. Starke, 260 N.W.2d 739, 744 (Wis. 1978)).

[30] Cassell & Goodwin, *supra* note 20, at 1383 (emphasis added) (internal quotation marks and citation omitted).

[31] Berger, *supra* note 23, at 1092.

[32] *Id.* at 1093.

[33] *See id.* at 1103 n.56 (discussing the allocation of decisions to the defendant in several states and federal jurisdictions). Further, if a decision has been allocated to defense counsel, he or she cannot simply

are exceptions, a trend has emerged with regard to all four of these probable-cause decisions. The decisions whether to file a motion challenging probable cause (1) in a complaint, (2) for an arrest, and (3) in an affidavit in support of a search warrant require specialized legal knowledge and are therefore typically allocated *to the defense lawyer*, not the defendant.[34]

This common allocation of decision-making authority to the lawyer is probably why more than 82% of defense lawyers surveyed believed that it is ultimately the lawyer's decision when the "lawyer and client disagree" about whether to file a suppression motion.[35] Further, in practice, less than 10% of defense lawyers surveyed obtained their client's consent before "[m]aking the decision to file a suppression motion."[36]

Conversely, the decision to challenge probable cause via the preliminary hearing is usually allocated *to the defendant*. In Virginia, for example, the prelim may only be "waived in writing *by the accused*."[37] In California, "a *defendant* represented by counsel may *when brought before the magistrate* . . . waive the right to an examination before such magistrate."[38] In Pennsylvania, the defendant must "certify in writing" certain understandings in order to waive the prelim—even when represented by counsel.[39] In Wisconsin, the prelim waiver form requires the defendant's signature before a personal, in-court colloquy.[40]

Even when a personal, in-court waiver is not explicitly required, such a practice has often emerged as a matter of custom. While some states, such as

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re-allocate that decision to the defendant. The reason is that "[i]f defense counsel solely defers to a defendant, without exercising his or her professional judgment, on a decision that is for the attorney . . . the defendant is deprived of the expert judgment of counsel to which the Sixth Amendment entitles him or her." Zeidman, *supra* note 23, at 17 (internal punctuation and citation omitted) (emphasis added); *see also* State v. Lee, 689 P.2d 153, 155 (Ariz. 1984) (deciding "whether trial counsel's acquiescence in [defendant's] demand that he call witnesses whose veracity and credibility counsel strongly doubted . . . constitute[s] ineffective assistance of counsel.").

[34] *See* Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 88–89 (2004–05) (motions to exclude or suppress prosecution evidence involve "strategic and tactical decisions" which "should be made by defense counsel after consultation with the client where feasible and appropriate.") (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.2(b) (3d ed. 1993)); *id.* at 89 (lawyer may decline to file a motion to suppress when "there are no plausible grounds for such a motion.") (citing People v. Turner, 10 Cal. Rptr. 2d 358 (Cal. Ct. App. 1992)).

[35] Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 39 (1998).

[36] *Id.* at 36.

[37] VA. CODE CRIM. P. § 19.2-218 (emphasis added).

[38] CAL. PEN. CODE § 860 (emphasis added).

[39] PA. CODE Rule § 541.

[40] *See* Mandatory Form: Waiver of Right to Preliminary Hearing, *supra* note 8; WIS. J.I.-CRIM. SM-31.

Florida[41] and South Carolina,[42] seem to require the defense to affirmatively *request* a prelim, most states take the opposite approach: the court will hold the prelim unless there is an affirmative *waiver*.[43] And for whatever reason, "the preliminary hearing waiver generally is made in open court."[44] This in turn, "forc[es] the lawyer to discuss the question with the client and allow[s] the client a better opportunity to voice an objection" should the lawyer and client disagree on whether to waive the prelim.[45]

This explicit, or sometimes implicit, allocation of decision-making authority to the defendant is likely why more than 78% of defense lawyers surveyed believed that it is ultimately the client's decision when the "lawyer and client disagree" about whether to waive the prelim.[46] And in practice, more than 83% of defense lawyers surveyed "almost always" obtained their client's consent before "[m]aking the decision to waive preliminary hearing."[47]

But why is the decision to have or waive the prelim allocated to the client? Probable cause is probable cause—the various contexts merely alter the type of information used to make the probable-cause determination. (Consider, for example, the differences between an affidavit in support of a search warrant versus live testimony at a preliminary hearing.)[48] Is there any good reason for allocating three probable cause-related decisions to the defense attorney and one—the decision to have or waive the prelim—to the defendant? To answer that question, the next Part develops a conceptual framework for the allocation of decisions between lawyer and client.

II. A CONCEPTUAL FRAMEWORK FOR DECISION-MAKING

Courts have identified several criteria for allocating decision-making authority between the defendant and defense lawyer in contexts other than the prelim. Some are relatively firm, placing a given decision comfortably on either end of the decision-making spectrum. Other criteria are more

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[41] *See* Evans v. Seagraves, 922 So. 2d. 318, 319–20 (Fla. Ct. App. 2006) (describing how the defense "*filed a motion* for adversary preliminary hearing pursuant to Rule 3.133(b)." (emphasis added)).

[42] *See* S.C. CRIM. Rules § 108(a) (the defense must affirmatively request a preliminary hearing).

[43] *See supra* notes 37–40.

[44] Uphoff & Wood, *supra* note 35, at 41.

[45] *Id.*

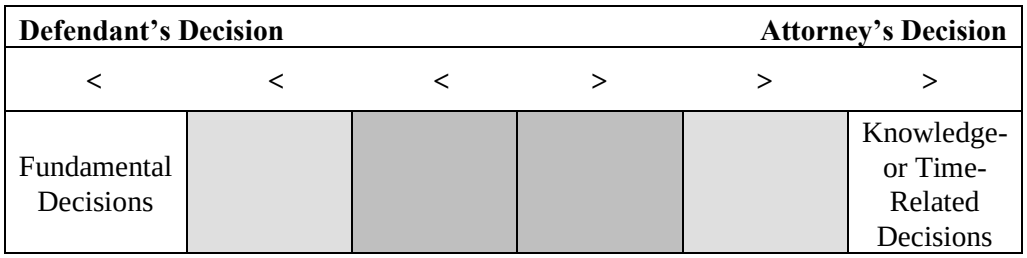
[46] *Id.* at 39.

[47] *Id.* at 36.

[48] WISEMAN & TOBIN, *supra* note 24, at § 8:3 ("The differences in probable cause . . . 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.").

flexible, placing a given decision into the gray area in the middle of the spectrum.

On the far left are those decisions deemed to be "fundamental"; these belong to the defendant. On the far right are those decisions that either require the attorney's specialized knowledge or that must be made quickly in the heat of litigation; these knowledge- or time-related decisions typically belong to the defense lawyer.



Because "fundamental decisions" are incredibly personal in nature, they belong to the defendant.[49] The Supreme Court has held that "the *accused* has the ultimate authority to make certain *fundamental decisions* regarding the case, as to whether to [1] plead guilty, [2] waive a jury, [and] [3] testify in his or her own behalf . . . ."[50]

Although compliance with ethical rules is discussed later, it is noteworthy that most states' ethical rules closely mirror the Court's allocation of decision-making authority for fundamental decisions. "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to [1] a plea to be entered, [2] whether to waive jury trial and [3] whether the client will testify."[51]

Conversely, it is clear that the decisions on the far right end of the spectrum belong to the lawyer. "The more *legally complex* a decision is, the more likely a court is to conclude that the decision must belong to defense counsel, even over the client's objection."[52] Such decisions must often be

[49] Fundamental *decisions* should not be confused with fundamental *rights*. The right of confrontation at trial, for example, is a "fundamental right." Pointer v. Texas, 380 U.S. 400, 403 (1965). However, the *decisions* regarding whether and how to confront a witness are typically allocated to defense counsel.

[50] Jones v. Barnes, 463 U.S. 745, 751 (1983) (emphasis added). *Barnes* also recognized a fourth fundamental decision: whether to "take an appeal." *Id.* This Article, however, is concerned only with trial-level defense and therefore does not address appeals.

[51] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2011). Most states have adopted these rules verbatim.

[52] Berger, *supra* note 23, at 1102 (emphasis added).

made under time pressure, thus creating the category of knowledge- or time-related decisions on the decision-making spectrum above.

For example, the decision of whether to file a pretrial motion or to object to hearsay at trial is beyond the grasp of most defendants. Few would understand which course of action is legally appropriate. Also, hearsay issues often require snap judgment given that they may not even surface until mid-trial. In those situations, courts may not even require the attorney to consult with the client before deciding how to respond.

> When decisions must be made in the heat of battle at trial, for example, it will often be unreasonable to expect any consultation before the decision is made and implemented, either because the opportunity for meaningful consultation does not exist or because there is little if anything to be gained by consultation.[53]

Things may become less clear as one moves inward on the decision-making spectrum, but courts have still developed meaningful criteria for allocating decisions to one party or the other. Toward the left, a decision itself may not be fundamental but it could *implicate* a fundamental decision; such a decision should normally be left to the defendant. Toward the right, defendants may want their attorneys to do things that would violate ethical rules; such decisions are normally left to the attorney.

Defendant's Decision					**Attorney's Decision**
<	<	<	>	>	>
Fundamental Decisions	Decision Implicates a Fundamental Decision			Decision Implicates an Ethical Rule	Knowledge- or Time-Related Decisions

Near the left of the spectrum, the implication of a fundamental decision can be controlling. For example, normally it is the attorney's decision whether to file a motion to suppress evidence.[54] But assume that the prosecutor makes the following plea offer to a defendant charged with two counts: "Plead to the misdemeanor and the state will dismiss the felony and recommend a fine. *This offer is void if the defense files any suppression motions*." If defense counsel then decides to file a motion, it would void the

[53] Government of the Virgin Islands v. Weathermax, 77 F.3d 1425, 1437 (3d Cir. 1996). Generally, however, even when the decision is the attorney's and not the client's, the attorney must first consult with the client before making the decision. *See* MODEL RULES OF PRO. CONDUCT r. 1.4(a)(2) (AM. BAR ASS'N 2011).

[54] *See supra* Part I.

offer and implicate the client's fundamental decision to plead guilty. It is technically true that the client could still "plead guilty" if the attorney files and loses the motion—but the plea would be to *both* charges, as the plea offer would be void. Therefore, under these circumstances, the decision *not* to file the suppression motion should be allocated to the client.[55]

On the right side of the spectrum, decisions sometimes implicate ethical rules. For example, assume the client points the attorney to a helpful eyewitness and insists that the attorney call him at trial. During trial preparation, however, the potential witness bluntly informs counsel that he will take the witness stand, take the oath to tell the truth, and then commit perjury to help the defense; in fact, he was nowhere near the scene of the alleged crime. Even if a particular state allocates the decision to call witnesses to the defendant,[56] the decision to call this particular witness would probably be allocated to defense counsel given the ethical duty not to present false testimony.[57]

To complete the decision-making spectrum, case law and other authorities, such as ethical rules, may allocate a decision to the client or the attorney depending on whether it involves the ends (objectives) to be achieved versus the means (strategy) by which to achieve them.[58] Decisions regarding the objectives are typically for the client; decisions regarding the means used to achieve those objectives are typically for the attorney.

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[55] See Missouri v. Frye, 566 U.S. 134, 140 (2012) and Lafler v. Cooper, 566 U.S. 156, 161 (2012) for the allocation of decision-making authority in the plea-bargaining context.

[56] *See generally* Uphoff, *supra* note 23 (discussing the allocation of decision-making authority in the context of deciding which witnesses to call).

[57] MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2011) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."). However, it is not always easy for an attorney to "know" that a witness's testimony is false. *See* Nix v. Whiteside, 475 U.S. 157, 189 (1986) ("Except in the rarest of cases, attorneys who adopt the role of the judge or jury to determine the facts pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.") (Blackmun, J., concurring) (internal quotation marks omitted). Things get even more complicated when the client's right to testify clashes with the attorney's duty not to knowingly present false evidence; sometimes, however, courts offer surprisingly clear guidance. *See, e.g.*, State v. McDowell, 681 N.W.2d 500 (Wis. 2004) (reconciling the client's fundamental decision to testify with the attorney's ethical obligations).

[58] *See* Johnson, *supra* note 34, at 55.

Defendant's Decision					**Attorney's Decision**
<	<	<	>	>	>
Fundamental Decisions	Decision Implicates a Fundamental Decision	Decision Re: Ends (Objective)	Decision Re: Means (Strategy)	Decision Implicates an Ethical Rule	Knowledge- or Time-Related Decisions

More specifically, "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall *consult with the client* as to the means by which they are to be pursued."[59] This leaves the ultimate *decisions* regarding those means to the lawyer after the required consultation.

For example, the client may set as the objective a full acquittal on all counts. Defense counsel would then decide on the best means to achieve that objective, such as pursuing a mistaken identification defense instead of self-defense or calling certain witnesses but not others.[60] Ends and means, though, are not always so easily distinguishable—particularly when the client is footing the bill or wants to protect a third-party witness from testifying.[61]

> Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.[62]

Further, the ends-mean distinction is often trumped by other criteria on the spectrum. For example, in pursuit of the defendant's objective of a full acquittal, defense counsel may decide that the client should testify. However, whether to testify at trial is a fundamental decision reserved for the client.[63] The client's decision not to testify would therefore control, even though his or her testimony is a means to an end. Despite these limitations, however, the ends-mean distinction can, in many instances, be yet another helpful criterion for allocating decisions between the defendant and the defense lawyer.

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[59] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2011) (emphasis added).

[60] *See* Berger, *supra* note 23, at 1105–06 n.65 (discussing cases allocating the decision to select the theory of defense-to-defense counsel).

[61] *See id.* at 1107 ("Model Rule 1.2 is somewhat less precise than it appears.").

[62] MODEL RULES OF PRO. CONDUCT r. 1.2, cmt. 2 (AM. BAR ASS'N 2011).

[63] *See* Jones v. Barnes, 463 U.S. 745, 751 (1983).

III. APPLYING THE FRAMEWORK TO THE PRELIM

What does the above conceptual framework have to say about how to allocate the decision to have or waive the prelim? Should it belong to the defendant or the defense lawyer? Where should it fall on the spectrum? The answer to these questions depends on what the meaning of the term "prelim" is. The prelim, though, defies a general description. "It would be difficult to name a procedural device whose utilization more completely runs the gamut from mandatory application to almost total atrophy, and whose characteristics vary so widely among and within various jurisdictions."[64]

The subparts below use the two extreme forms of the prelim discussed earlier—as found in California and Wisconsin—along with one complicating procedural factor—the prelim waiver offer—to identify three different types of prelims. The above conceptual framework for decision-making is then applied to each type to determine whether the decision to waive it should rest with the defendant or the defense lawyer.

A. The Original Prelim: Meaningful but Risky

What I'm calling the "original prelim" is the form of the prelim described earlier and used in California and other states, including Utah and Illinois:

> [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.[65]

In other words, the "original prelim" is a full-blown evidentiary hearing. There are many benefits to the defendant of having, rather than waiving, this kind of a hearing: obtaining information that could be used in future suppression motions; identifying weaknesses in the state's case that could reveal favorable trial defenses; locking in testimony that could be used to impeach the state's witnesses at trial; even obtaining the dismissal of a charge or charges for lack of probable cause.[66]

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[64] Jacqueline R. Griffin, *The Preliminary Hearing Versus the Grand Jury Indictment: "Wasteful Nonsense of Criminal Jurisprudence" Revisited*, 26 U. FLA. L. REV. 825, 825 (1974).

[65] Cassell & Goodwin, *supra* note 20, at 1382 (internal citations omitted). For a very similar description of Illinois' preliminary hearing, see John C. Robinson Jr., *The Determination of Probable Cause in Illinois—Grand Jury or Preliminary Hearing*, 7 LOY. U.L.J. 931, 944 (1976).

[66] *See* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (describing the benefits of the original prelim).

On the other hand, there are also many risks to the defendant who has, rather than waives, such a prelim. These include: allowing the prosecutor to preserve the testimony of the state's witnesses for later use (if those witnesses become unavailable for trial); alerting the prosecutor to weaknesses in the state's case that he or she could then correct before trial; and allowing the prosecutor to present evidence that will be used to add additional, transactionally-related (e.g., in time or place) felony charges that were not originally charged.[67]

Applying the conceptual framework for decision-making (moving from left to right along the spectrum) demonstrates that the decision to have or waive the "original prelim" should belong to defense counsel, not the defendant:

Fundamental Decisions. The decision to have or waive the "original prelim" is *not* a fundamental decision.

Decisions that Implicate a Fundamental Decision. The decision to have or waive this prelim does *not* implicate a fundamental decision. The defendant still has the freedom to make all future fundamental decisions unencumbered by defense counsel's decision to have or waive the prelim.

Ends-Means Distinction. The decision to have or waive this prelim is *not* an end (objective). Due to the prelim's potential benefits and risks, it is potentially a means by which the client's objectives could be achieved. For example, if the client's objective is a full acquittal, defense counsel may decide that having the prelim is necessary to lock in a witness' favorable testimony. Conversely, defense counsel may decide that waiving the prelim is advantageous so that the prosecutor is not able to preserve the testimony of a state's witness who may later become unavailable for trial. Such strategy considerations can be numerous.

Decisions that Implicate an Ethical Rule. The decision to have or waive this prelim does not implicate an ethical rule other than the attorney's obligation to render competent representation.[68]

Knowledge- or Time-Related Decisions. While it is unusual that time pressure would prevent defense counsel from obtaining the client's decision about a prelim, this decision requires specialized legal knowledge. In addition to the strategy points discussed earlier, this specialized knowledge includes understanding the procedural aspects of the hearing and the legal concept of probable cause. Most clients will not understand the procedural nuances or the probable-cause standard, let alone be able to identify the

[67] *See* ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES § 11.7.3 (6th ed. 2017), https://www.ali.org/media/filer_public/bc/49/bc49442c-9d4d-477d-82c7-b389e7c549d6/trial-manual-complete.pdf [https://perma.cc/7L8E-4Q77].

[68] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2011).

prelim's potential benefits and risks. If they could, defense lawyers would be unnecessary.[69]

Because the decision to have or waive the "original prelim" is both a decision about the best means or strategy to achieve the client's objectives and one that requires specialized legal knowledge, the conceptual framework would allocate the decision to the defense lawyer, not the defendant.

B. Prelim Version 2.0: Prelim Light

The Wisconsin prelim described earlier is an example of what I'm calling "prelim version 2.0." In 2014, Wisconsin relaxed the rule against hearsay, thus allowing prosecutors the limited use of hearsay at prelims.[70] Shortly thereafter, a Machiavellian prosecutor wondered: "If hearsay is admissible at the prelim, and if the previously filed criminal complaint consists of hearsay, why not just have someone read the complaint at the prelim instead of calling witnesses and presenting evidence?" Despite other rules of law that prohibit such a scheme from taking root,[71] the judiciary proved to be a willing coconspirator and "prelim version 2.0" was born.

Some Wisconsin prosecutors have taken this scam a step further, dispensing with reading the complaint and simply moving the document into evidence instead.[72] In other words, the "original prelim"—which included meaningful cross-examination of witnesses with personal knowledge of the incident—has been replaced by "prelim version 2.0"—which is, at best, a review of the complaint for probable cause.

Applying the conceptual framework for decision-making to this grossly watered-down "prelim version 2.0" demonstrates that the decision whether to waive this form of prelim should *also* belong to defense counsel:

Fundamental Decisions. The decision to have or waive "prelim version 2.0" is *not* a fundamental decision.

Decisions that Implicate a Fundamental Decision. The decision to have or waive this prelim does *not* implicate a fundamental decision.

Ends-Means Distinction. The decision to have or waive this prelim is *not* an end (objective). However, because the state will not call witnesses and

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[69] *See* Johnson, *supra* note 34, at 46 (arguing that, if defendants were as good at deciding legal issues as defense lawyers, then "criminal defense lawyers, as a class, would have little reason to exist.").

[70] *See* State v. O'Brien, 850 N.W.2d 8, 22 (Wis. 2014) (hearsay is admissible if it is deemed reliable).

[71] *See, e.g.*, WIS. STAT. ANN. § 906.02 ("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."); *O'Brien*, 850 N.W.2d at 22 ("The degree of probable cause required for a bindover [after a prelim] is greater than that required to support a criminal complaint.").

[72] *See, e.g.*, State v. Nelson, *supra* note 4 (the prelim without a witness, plus other court-related activities, concluded in five minutes flat).

the magistrate will prevent the defense from calling any witnesses to challenge the complaint,[73] neither can it be said that "prelim version 2.0" is a means to achieve the client's objectives. It appears to be neither an end nor a means; rather, this prelim is just "wasteful nonsense of criminal jurisprudence."[74]

Decisions that Implicate an Ethical Rule. The decision to have or waive this prelim probably does not implicate an ethical rule. Since defense counsel has already reviewed the complaint and has either found probable cause or filed a motion to dismiss the complaint for lack of probable cause,[75] having this prelim is the substantive equivalent of filing a frivolous motion to dismiss the complaint.[76] However, exercising the right to a prelim which is still (at least in form) on the books probably would not be considered frivolous, as that would require the judiciary to first admit that it has rendered the hearing meaningless.

Knowledge- or Time-Related Decisions. Once again, time pressures likely do not apply and the requisite legal knowledge when deciding whether to waive "prelim version 2.0" is reduced due to the hearing's simplicity. However, if the defense decides to have this substance-free prelim, the prosecutor could still add more, transactional charges after bind-over. For that reason alone, the decision to have or waive this prelim requires specialized legal knowledge and should therefore be allocated to the attorney. "Prelim version 2.0" is, both in substance and form, a probable-cause challenge to the complaint and necessarily requires legal knowledge on that concept. Just as the attorney must decide whether to challenge probable cause in other contexts—including challenging the complaint, an arrest, or a search warrant affidavit for lack of probable cause[77]—this decision, too, should rest with the attorney.

Because the decision to have or waive "prelim version 2.0" ultimately requires specialized legal knowledge, it should be allocated to the defense attorney, not the defendant.

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[73] *See supra* notes 13–15 and accompanying text.

[74] Griffin, *supra* note 64.

[75] *See* WIS. STAT. ANN. § 971.31(5)(c) (requiring the defense lawyer to file a motion, when warranted, to dismiss the complaint for lack of probable cause *before* the prelim).

[76] MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2011) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .").

[77] *See supra* Parts I and II.

C. The Preliminary Hearing Waiver Offer

In some cases, regardless of the form the prelim takes, the prosecutor may present the defense with a preliminary hearing waiver offer:

> Like a regular plea offer, a prelim waiver offer may include a charge concession, a sentence concession, or both. The primary difference, as its label indicates, is that the prelim waiver offer is tied to the defendant's waiver of the prelim. For example, a prosecutor may say: "If the defendant waives the prelim, the state would make the following plea offer, which would expire at the final pretrial hearing: plead to count one, the state would recommend probation and dismiss all remaining counts."[78]

In this instance, the form of the prelim is irrelevant; instead, it is the prelim waiver offer that is the key feature. This offer is basically an option contract: by waiving the prelim, the defendant preserves the offer for future consideration but is not obligated to accept it.[79] Applying the conceptual framework for decision-making to this situation produces a more nuanced result.

Fundamental Decisions. The decision to have or waive the above prelim is still *not* a fundamental decision.

Decisions that Implicate a Fundamental Decision. The decision to have or waive the prelim *implicates* a fundamental decision. If the defendant wishes to preserve the future option of pleading guilty (to count one, in exchange for the probation recommendation and the dismissal of all remaining counts), he or she would not be able to do so unless the prelim is waived.

Ends-Means Distinction. The decision to have or waive the prelim is still *not* in itself an end (objective). However, the reservation of a future decision to resolve the case for the stated offer *is* an objective—one intertwined with waiving the prelim. Therefore, even if the prelim is still considered a means to achieve the objective, a competent defense lawyer would defer to the client's decision to waive the prelim to preserve the waiver offer if that's what the client wanted.

Decisions that Implicate an Ethical Rule. *If* the client wishes to waive the prelim to preserve the plea offer for future consideration, the decision to have or waive the prelim probably implicates an ethical rule. While the client would not *necessarily* be resolving the case later if he or she waives the prelim now, the waiver is inextricably tied to the potential future resolution.

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

[79] *See id.*

And ethical rules state that "[a] lawyer shall abide by a client's decision whether to settle a matter."[80]

Knowledge- or Time-Related Decisions. Just as with the other two forms of prelim, time pressure likely does not apply but there is a legal-knowledge element involved. However, under the conceptual framework, the need for specialized legal knowledge is trumped by the requirement to preserve the client's ability to make fundamental decisions like pleading guilty[81] and selecting the objective of the representation.[82]

Allocating the decision to have or waive the prelim when coupled with a waiver offer is therefore more complex. If the client wishes to waive the prelim *to preserve the plea offer*, that decision implicates the objective to settle a matter as well as the fundamental decision to plead guilty. Therefore, even if the attorney disagrees with the client, the decision should be allocated to the client in that circumstance.

However, the calculus changes if the client is clear that he or she *does not want to preserve the plea offer*. At that point, regardless of whether the client wants to have or waive the prelim, the only meaningful criteria in the conceptual framework are that the decision requires specialized legal knowledge and that the decision is means- or strategy-related. In either case, those decisions are for the attorney. Because the decision to have or waive the prelim, then, no longer implicates (1) a fundamental decision (as the client does not want to plead guilty pursuant to the waiver offer) or (2) an objective of the representation (as the client does not want to resolve the case for the waiver offer), the decision to have or waive the prelim should once again be allocated to the defense lawyer.

CONCLUSION: LAWYER'S CHOICE (USUALLY)

As a general rule, the conceptual framework developed in this Article would allocate the decision to have or waive the prelim to the defense lawyer, not the defendant.[83] In many situations, like when a given state uses something akin to the watered-down "prelim version 2.0," the decision is usually nothing more than one about whether to challenge probable cause in the complaint.[84] Such a decision involves the attorney's legal knowledge and is allocated to the attorney in every other probable-cause context, including

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[80] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2011); *see also* Missouri v. Frye, 566 U.S. 134, 138 (2012) and Lafler v. Cooper, 566 U.S. 156, 160 (2012) for the allocation of decision-making authority in the plea-bargaining context.

[81] *See* Jones v. Barnes, 463 U.S. 745, 751 (1983).

[82] *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2011).

[83] *See supra* Part III.

[84] *See supra* Section I.B.

whether to file a motion to dismiss the complaint to suppress evidence obtained incident to an arrest or pursuant to a search warrant.[85]

In other situations, like when a given state uses something akin to the "original prelim," the decision to have or waive the hearing is more complicated, requires an even greater level of legal knowledge, and involves intricate strategy considerations for how to best achieve the client's objectives.[86] This situation presents an even stronger indication that the decision to have or waive the prelim belongs to the attorney, not the client. The more legally complex a decision is, the more likely the conceptual framework is to allocate it to defense counsel.[87]

However, when the client wants to *preserve a preliminary hearing waiver offer* (a plea offer), the decision to have or waive the prelim now implicates a fundamental decision (whether to plead guilty) and involves the objective of the representation (whether to resolve the matter short of trial).[88] Because the implication of a fundamental decision will trump other considerations, the conceptual framework would allocate the decision to have or waive the prelim to the client in this limited situation. Absent a desire to preserve the waiver offer, however, the decision to have or waive the hearing would revert to defense counsel.[89]

Given that the decision to have or waive the prelim should almost always belong to the defense lawyer, there would typically be no need for a waiver form (even if its warnings were accurate and relevant) or an on-the-record colloquy (regardless of its length).[90] Only in the rare case where (1) the prosecutor extended a prelim waiver offer to the defendant *and* (2) the defense lawyer indicated to the court that he or she still wished to hold rather than waive the hearing may additional safeguards potentially be appropriate.

In that very unusual situation, and *only* in that situation, should the magistrate inquire whether the defendant agrees with the attorney's decision to have, rather than waive, the prelim. If the defendant disagrees and instead wishes to waive the hearing to preserve the plea offer, then the defendant's decision would control.[91]

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[85] *See supra* Part I.

[86] *See supra* Section I.A.

[87] *See supra* Part II.

[88] *See supra* Part II.

[89] *See supra* Section I.C.

[90] *See supra* Introduction.

[91] *See supra* Section I.C.