

# Improvident Prosecutions

Michael D. Cicchini\*

*Litigation has been called “a machine which you go into as a pig and come out of as a sausage.” With regard to modern criminal litigation, however, this life-ruining impact is strictly one-sided: the prosecutor files criminal complaints with reckless abandon and without repercussion or personal cost, while defendants bear the life-altering consequences of the litigation and, in many cases, the resulting convictions.*

*But prosecuting a felony accusation isn’t supposed to be that easy and carefree for the government. The preliminary hearing—a pretrial evidentiary hearing to determine probable cause—was designed to serve as a buffer between the government and the citizenry, and “to prevent hasty, malicious, improvident and oppressive prosecutions.” Unfortunately, in today’s assembly-line approach to criminal law, prosecutors and judges have developed many ways to bypass this procedural safeguard and keep the criminal justice machinery humming along.*

*This Article identifies and explains several prosecutorial and judicial abuses of the preliminary hearing, including denying defendants their constitutional right to counsel, using multiple levels of uncorroborated hearsay to win bind-over, preventing the defense from effectively cross-examining the state’s witnesses and calling its own witnesses, and even using the preliminary hearing as prosecutorial weapon to tack-on additional felony counts without probable cause.*

*After identifying and explaining these and other abuses of the preliminary hearing, this Article discusses simple legislative reforms that would prevent such abuse. The Article then analyses and revises a typical preliminary hearing statute to illustrate the ease with which these reforms could be implemented.*

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\* Criminal Defense Lawyer, Cicchini Law Office LLC, Kenosha, Wisconsin. J.D., *summa cum laude*, Marquette University Law School (1999); C.P.A., University of Illinois Board of Examiners (1997); M.B.A., Marquette University Graduate School (1994); B.S., University of Wisconsin—Parkside (1990).

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INTRODUCTION

There is very little to prevent a prosecutor from filing a criminal complaint and pulling a person into the criminal justice system. The mere filing of a complaint—a document that is often based on multiple levels of uncorroborated hearsay—can have a life-altering effect on a defendant, even if the state never wins a conviction. Worse yet, once a complaint is filed, prosecutors have several highly effective tactics for obtaining a plea, even from innocent defendants.<sup>1</sup>

The life-altering impact of a criminal prosecution quickly becomes life-ruining in the case of felony charges. Therefore, in felony cases, the preliminary hearing is intended to be a check on prosecutorial power and to serve as a buffer between the prosecutor and the citizenry. The preliminary hearing is an evidentiary, adversarial hearing where the defense can test the prosecutor’s evidence, present its own evidence, and have a neutral and detached magistrate decide whether there is probable cause to bind the case over for trial.<sup>2</sup>

In broad terms, the preliminary hearing’s purpose is “to prevent hasty, malicious, improvident and oppressive prosecutions” along with the financial and other costs—for both the defendant and the taxpayer—that accompany such cases.<sup>3</sup> For the prosecutor, the hearing “provides a means for testing the complaints of prosecuting witnesses, determining their motives and eliminating accusations based upon misinformation and prejudice.”<sup>4</sup>

Unfortunately, prosecutors and judges have historically found ways to bypass the preliminary hearing. Recently, their abuses have escalated to new heights. In today’s assembly-line approach to criminal law, prosecutors and judges will go to tremendous lengths—including violating the defendant’s basic statutory and constitutional rights—in

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<sup>1</sup> See Part I.

<sup>2</sup> See Part II.

<sup>3</sup> State v. Williams, 544 N.W.2d 400, 404 (Wis. 1996).

<sup>4</sup> Justin Miller, *The Preliminary Hearing*, 15 ABA J. 414, 414 (1929).

order to bind defendants over for trial and keep the criminal justice machinery running smoothly.<sup>5</sup>

Part I of this Article provides an overview of the preliminary hearing’s role within the criminal process. Part II discusses some basic features of the preliminary hearing, including the right to counsel, the permissible use of hearsay evidence, the defense’s right to cross-examine the state’s witnesses and present its own evidence, and the limitations on the prosecutor’s charging decision after bind-over.

Part III then discusses how prosecutors and judges have abused the preliminary hearing. These abuses, which correspond to the various features discussed in Part II, include denying the defendant the constitutional right to counsel, using multiple levels of uncorroborated hearsay to win bind-over, limiting the defense’s cross-examination of the state’s witnesses and preventing it from calling its own witnesses, and adding multiple felony counts without probable cause.

With regard to legal reform, Part III also discusses, in general terms, how each of these abuses could be prevented. Part IV then implements these reform ideas. This Part begins with a typical preliminary hearing statute and proposes additions to, and deletions from, the statutory language. These proposed amendments, which serve as a useful model for many states, would restore meaning and purpose to the hearing while limiting prosecutorial and judicial abuse of the system.

## I. PREVENTING IMPROVIDENT PROSECUTIONS

More than a century ago, the great American author Ambrose Bierce described “litigation” as “[a] machine which you go into as a pig and come out of as a sausage.”<sup>6</sup> And a “litigant,” he wrote, is “[a] person about to give up his skin for the hope of retaining his bones.”<sup>7</sup> With regard to modern criminal litigation, however, the life-ruining impact Bierce described is entirely one-sided. While state prosecutors file criminal complaints with reckless abandon and without personal cost, defendants are lucky to emerge from the litigation machinery even remotely resembling the person who entered.<sup>8</sup>

In other words, to continue with Bierce’s sausage-making theme, it is incredibly easy for the state to file criminal charges and pull a defendant into the criminal justice meat-grinder. A prosecutor merely has to put allegations into a criminal complaint—a written document often based on multiple levels of uncorroborated hearsay—that are sufficient to meet the very low threshold of probable cause.<sup>9</sup> The ease with which a

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<sup>5</sup> See Part III.

<sup>6</sup> Ambrose Bierce, *THE DEVIL’S DICTIONARY* (1911), at <http://xroads.virginia.edu/~Hyper/Bierce/bierce.html#L>.

<sup>7</sup> *Id.*

<sup>8</sup> Even for relatively minor convictions, the collateral consequences can be staggering. See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1103-04 (2013) (“[C]ollateral consequences . . . have proliferated in recent years and impose disabilities that often dwarf in personal significance the direct consequences of conviction, such as imprisonment.”); Michael O’Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a “Violent” Crime*, 108 J. CRIM. L. & CRIMINOLOGY \_\_ (2019) (being convicted of a crime “results in a sharp, multidimensional loss of legal status”).

<sup>9</sup> See Part II.C. for a discussion of probable cause as it relates to criminal complaints and preliminary hearings.

prosecutor can dole out charges is alarming, and it is especially dangerous for innocent defendants. The reason is that, once a case is filed, the prosecutor is typically able to obtain a plea to one or more counts regardless of the defendant's actual guilt or innocence.

This prosecutorial strong-arming is made possible by several litigation tactics, chief among them charge-stacking. For example, if the prosecutor alleges the defendant got into a verbal altercation that culminated in an arm-grab to prevent the complaining witness from calling the police, the prosecutor may be able to file several charges, including: (1) disorderly conduct, (2) battery, (3) false imprisonment, and (4) intimidation of a victim by use of force.<sup>10</sup> “This has become absolutely standard practice. The prosecutor will ‘stack’ charges to build such a scary potential sentence, that even actually innocent people will be intimidated into pleading guilty” to some charges in exchange for dismissal of others.<sup>11</sup>

Another prosecutorial practice is to request cash bail when the defendant first appears in court, which is particularly harmful to indigent defendants. If they are unable to post bail, they will have to remain in custody while the case is pending. Of course, “Prosecutors know that defendants in custody will plead guilty more quickly than those who are out. So they request bail and enjoy the leverage custody gives them. Judges, feeling pressure to move their calendars rapidly, set bail recognizing that defendants in jail resolve their cases more easily.”<sup>12</sup>

A final example is not a tactic per se, but rather a fundamental defect in the criminal justice system. Because most defendants are indigent, most cases are handled by state-funded public defender offices. Unfortunately, states don't take their obligation to provide the *effective* assistance of counsel very seriously, and therefore saddle their public defenders with staggering, sometimes unimaginable workloads. As one public defender explained, “An unconstitutionally 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>13</sup>

The result of this coercive, assembly-line approach to criminal justice is this: many prosecutors' offices efficiently churn out convictions much like a factory churns out its physical product (such as, for example, Bierce's aforementioned “sausage”). However, things aren't supposed to be that easy when the prosecutor charges a *felony*, as

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<sup>10</sup> If the complaining witness is a minor, a false imprisonment conviction may carry mandatory sex-offender registration, even if the defendant's underlying actions had nothing whatsoever to do with sex. See Michael D. Cicchini, *Sex Offender Registries: They're Not Just for Sex Offenders Anymore*, THE LEGAL WATCHDOG (Dec. 4, 2010), at <http://thelegalwatchdog.blogspot.com/2010/12/sex-offender-registries-theyre-not-just.html>.

<sup>11</sup> Mark Godsey, *Prosecutors, Charge Stacking, and Plea Deals*, WRONGFUL CONVICTION BLOG (June 12, 2015), at <https://wrongfulconvictionsblog.org/2015/06/12/prosecutors-charge-stacking-and-plea-deals/>.

<sup>12</sup> John Raphling, *Plead Guilty, Go Home; Plead Not Guilty, Stay in Jail*, L.A. TIMES (May 17, 2017), at <https://www.latimes.com/opinion/op-ed/la-oe-raphling-bail-20170517-story.html>.

<sup>13</sup> Tina Peng, *I'm a Public Defender; It's Impossible for Me to do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015) (emphasis added), [https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8\\_story.html?utm\\_term=.68ec4787af69](https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html?utm_term=.68ec4787af69).

conviction on even a single felony count carries the real risk of an effective life sentence,<sup>14</sup> along with very severe collateral consequences.<sup>15</sup>

Even if a defendant ultimately wins at trial—thus “retaining his bones” and perhaps even a small portion of “his skin,” as Bierce puts it—the financial and emotional costs are still staggering. An Oregon court explained: “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>16</sup> In light of this stark reality, a Wisconsin judge explained the need for a buffer between the government and the citizenry as follows:

[O]ne of the things [the Founders] put in was protection against arbitrary charges being brought by the government, and they demanded that before you could be put on trial for a serious crime, there had to be a grand jury indictment . . . [T]hat was considered a very, very important safeguard to the liberties of the people . . . [T]hen the grand jury got to be misused . . . because the government is always trying to find ways to get more control over people . . . so the grand jury has fallen into disfavor. But the point of it is there was actually an effort by the [F]ounders of our country to put some kind of protection between the . . . oppressive prosecutorial power of the government, and the individual citizens.<sup>17</sup>

With the grand jury system falling into disfavor,<sup>18</sup> this very important check on oppressive prosecutorial power is now commonly provided by the preliminary examination, also known as the preliminary hearing.<sup>19</sup> The preliminary hearing is an

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<sup>14</sup> For example, where I practice law, in the 1980s a class B felony—the most serious charge short of intentional homicide—was punishable by up to 20 years of imprisonment. *See* WIS. STATS. § 939.50(3)(b) (1985-86). Today, that class of crimes is punishable by up to 60 years of imprisonment, which would be an effective life sentence for most adults. *See* WIS. STATS. § 939.50(3)(b) (2017-18).

<sup>15</sup> *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 NYU L. REV. 457, 502 (2010) (“[I]ndividuals incarcerated in the United States face not only more severe collateral consequences, but they also have much more difficulty obtaining relief from those consequences.”).

<sup>16</sup> *State v. Freeland*, 667 P.2d 509, 514 (Or. 1983) (emphasis added).

<sup>17</sup> T’script of Pretrial Conference, *State v. DeCastro*, No. 18-CF-1222 (Kenosha County, Wis.), at 3-4 (on file with author).

<sup>18</sup> Additionally, states are not obligated to use grand juries. “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.” Paul G. Cassell & Thomas E. Goodwin, *Protecting the Taxpayers and Crime Victims: The Case for Restricting Utah’s Preliminary Hearings to Felony Offenses*, 2011 UTAH L. REV. 1377, 1380 (2011) (emphasis added).

<sup>19</sup> *See id.* (“Most . . . states have chosen to review a prosecutor’s decision to file charges by holding a preliminary hearing.”). Even if the Fifth Amendment right were applied to the states through the Fourteenth Amendment, a properly designed preliminary hearing (instead of a grand jury indictment) would pass constitutional muster. In *Hurtado v. California*, 110 U.S. 516, 538 (1884), the Court held that, instead of “the presentment or indictment by a grand jury” the prosecutor may proceed against the defendant “by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution.” This, too, the Court held, complies with “due process of law.” *Id.*

adversarial, evidentiary hearing where the state, and the defense if it wishes, will call witnesses and present evidence.<sup>20</sup> Then, a neutral and detached magistrate determines whether there is probable cause to bind the defendant over for trial.<sup>21</sup> The preliminary hearing is designed to serve many important purposes, including:

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>22</sup>

Unfortunately, just as prosecutors abused the grand jury system, so too are they abusing the preliminary hearing. Often, the judiciary is complicit. And to the extent prosecutors and judges are successful in their efforts, they diminish the hearing's effectiveness in preventing improvident prosecutions. In order to understand these abuses, we must first understand some basic features of the preliminary hearing itself.

## II. PRELIMINARY HEARING BASICS

It is difficult to describe a preliminary hearing with any level of detail. A Michigan court observed that, because these hearings are created by state statute, “there are variations in each state’s preliminary-examination procedures[.]”<sup>23</sup> Nonetheless, the following summary of Utah’s hearing accurately describes the “typical” hearing—to the extent such a creature exists:

[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. However, . . . 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>24</sup>

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<sup>20</sup> See Part II.

<sup>21</sup> While “probable cause” in the preliminary hearing context is defined differently in different states, the probable cause required for bind-over at a preliminary hearing is different from, and higher than, the probable cause required for a criminal complaint. See Part II.C.

<sup>22</sup> *State v. Williams*, 544 N.W.2d 400, 404 (Wis. 1996).

<sup>23</sup> *People v. Lewis*, 903 N.W.2d 816, 819 (Mich. 2017). For a collection of state preliminary hearing statutes, see Cassell & Goodwin, *supra* note 18, at 1395. For a history of the preliminary hearing, see Gary L. Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 MO. L. REV. 281, 284-88 (1970).

<sup>24</sup> Cassell & Goodwin, *supra* note 18, at 1382-83 (internal citations omitted).

Because of jurisdictional variations, however, this Part will draw from Supreme Court case law and the law of several states to discuss, in greater detail, six important features of the preliminary hearing. This will provide the necessary background for the later discussion of prosecutorial and judicial abuses<sup>25</sup> and proposed legal reforms.<sup>26</sup>

*A. Right to Counsel*

To begin, regardless of whether the preliminary hearing itself is merely a statutory right, a constitutional right,<sup>27</sup> or both,<sup>28</sup> the defendant has the constitutional right *to counsel* at the hearing. The Supreme Court of the United States decided this issue in a case originating in Alabama where, at least at that time, “The preliminary hearing [was] not a required step” in the criminal process.<sup>29</sup> Nonetheless, when such a hearing is held, defense counsel would be able to advocate for the client in ways that are consistent with the prevention of improvident prosecutions and the resulting convictions. The Court identified several possible roles of counsel at the hearing:

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>30</sup>

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<sup>25</sup> See Part III.

<sup>26</sup> See Part IV.

<sup>27</sup> See *supra* notes 18 and 19 for a discussion of issues related to the U.S. Constitution. In addition, state constitutions may also require a preliminary hearing. See Cassell & Goodwin, *supra* note 18, at 1377 (discussing Utah’s state constitutional requirement of a preliminary hearing, even for some misdemeanors); John C. Robinson, 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 . . . elevates the right to a preliminary hearing to constitutional status.”); *State v. Freeland*, 667 P.2d 509, 513 (Or. 1983) (state constitution requires either a grand jury indictment or a preliminary hearing).

<sup>28</sup> This is not entirely settled, apparently, as confusion still abounds. Where I practice law, before a defendant may waive the preliminary hearing he must sign a convoluted, court-created form that reads: “I am the defendant . . . and I wish to waive my statutory and *constitutional* rights to a preliminary hearing in this case.” WAIVER OF PRELIM. HR’G FORM, Kenosha County, Wis. (April 2015) (on file with author). However, when defendants refuse to waive and instead attempt to invoke certain rights at the hearing, the courts backtrack, holding “there is no constitutional right to a preliminary hearing.” *State v. Hull*, 867 N.W.2d 419, 426 (Wis. Ct. App. 2015).

<sup>29</sup> *Coleman v. Alabama*, 399 U.S. 1, 8 (1970). Even if the preliminary hearing is not, in itself, a constitutional right, the right to counsel and several other constitutional rights, such as due process, attach. This is an important distinction. However, states do not always agree as to which constitutional rights come into play at the hearing. See Part II.B.

<sup>30</sup> *Coleman*, 399 U.S. at 9. For a discussion of pre-*Coleman* law on the right to counsel, see Edward H. Hunvald, Jr., *The Right to Counsel at the Preliminary Hearing*, 31 MO. L. REV. 109 (1966).

Given this, the Court concluded that the preliminary hearing “is a critical stage of the State’s criminal process at which the accused is as much entitled to such aid of counsel as at the trial itself.”<sup>31</sup> Without counsel, of course, most defendants would have little hope of exposing weaknesses in the state’s case or discovering information that could be used in support of a future trial defense.

### B. *Right of Confrontation*

While it is well-settled that a defendant has the right to counsel at the preliminary hearing—at least in theory if not in practice<sup>32</sup>—courts are far less likely to agree that the defendant has the right of confrontation at the hearing. For example, New Mexico, at least at one time, held that the “Sixth Amendment right to confront witnesses at trial extends to the preliminary examination stage of a criminal prosecution.”<sup>33</sup>

However, “The majority of other states reject constitutional interpretations that would inject confrontation rights into pretrial probable cause determinations” at preliminary hearings.<sup>34</sup> This majority includes Colorado, which explained that “[a] preliminary hearing is limited to matters necessary to a determination of probable cause. The rights of the defendant are therefore curtailed . . . A defendant has no constitutional right to unrestricted confrontation of witnesses[.]”<sup>35</sup>

As the above language suggests, whether there is a right of confrontation will determine the scope of defense counsel’s cross-examination at the hearing; this, in turn, may determine the hearing’s effectiveness in preventing improvident prosecutions. For example, Colorado imposes the following restriction: “defense counsel has no legitimate motive to engage in *credibility inquiries* and may be prohibited from doing so.”<sup>36</sup> The reason is that “the judge’s findings at a preliminary hearing are restricted to a determination of probable cause. A judge may not engage in credibility determinations unless the testimony is incredible as a matter of law.”<sup>37</sup>

One possible interpretation of the above passage is this: only upon a showing that the witness’s *story* is incredible does the *witness’s* credibility become relevant and subject to cross-examination.<sup>38</sup> If the witness’s story itself is plausible, the judge must accept it, thus making the witness’s credibility irrelevant. It is not clear what additional probative value the *witness’s* credibility would have when the witness’s *story* has already been found to be incredible as a matter of law. It would seem, at that point, bind-over

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<sup>31</sup> *Coleman*, 399 U.S. at 10 (internal quotations and citation omitted). See also *People v. Lewis*, 903 N.W.2d 816, 819 (Mich. 2017) (citing *Coleman* and stating that “defendants have a constitutional right to counsel at preliminary examinations in Michigan.”).

<sup>32</sup> See Part III.A.

<sup>33</sup> *State v. Massengill*, 657 P.2d 139, 140 (N.M. Ct. App. 1983). This appears to have been overruled, without any mention of *Massengill* whatsoever, in *State v. Lopez*, 314 P.3d 236 (N.M. 2013) (no state or federal right of confrontation at preliminary hearings).

<sup>34</sup> *Lopez*, 314 P.3d at 241 (citing case law from Connecticut, Nevada, North Dakota, and other states).

<sup>35</sup> *People v. Fry*, 92 P.3d 970, 977 (Colo. 2004); see also *State v. Leshay*, 213 P.3d 1071, 1075 (Kan. 2009) (no constitutional right of confrontation at preliminary hearing); *State v. Timmerman*, 218 P.3d 590, 593 (Utah 2009) (same); *State v. O’Brien*, 850 N.W.2d 8, 17-18 (Wis. 2014) (same).

<sup>36</sup> *Fry*, 92 P.3d at 977 (emphasis added).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (“Testimony is incredible as a matter of law if it is in conflict with nature or fully established or conceded facts.”).



should be denied. That is perhaps why other states, such as New Hampshire, simply hold that a witness’s credibility is off limits at the preliminary hearing.<sup>39</sup>

Regardless of this nuance, in states that deny defendants the right of confrontation—and, more specifically, prohibit cross-examination on matters of witness credibility—there is often “little defense counsel can do to show that probable cause does not exist.”<sup>40</sup> But this does not mean that the preliminary hearing is useless; rather, its value turns in large part on the closely-related issue of whether the state is permitted to use hearsay to establish probable cause.

### *C. Hearsay*

The different approaches to using hearsay at preliminary hearings are to enforce the rule against hearsay, to provide additional hearsay exceptions specifically for the hearing, or to eliminate the rule against hearsay entirely (thus allowing all hearsay). Put another way, the hearing in some ways resembles a bench trial, and “[t]he rules of evidence are ordinarily enforced . . . often with some relaxation of the hearsay rule. Indeed, in some jurisdictions magistrates may bind a defendant over on nothing but hearsay evidence.”<sup>41</sup>

Even when the state is permitted to use hearsay to win bind-over, the preliminary hearing is still *evidentiary* in nature. For example, at Wisconsin preliminary hearings, “A court may base its finding of probable cause . . . in whole or in part on hearsay[.]”<sup>42</sup> However, “The degree of probable cause required for a bindover is greater than that required to support a criminal complaint.”<sup>43</sup> More specifically:

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.<sup>44</sup>

On the one hand, a criminal complaint is merely a “written statement of the essential facts constituting the offense charged.”<sup>45</sup> It is little more than a prosecutor’s cutting-and-pasting of multiple levels of uncorroborated hearsay into a single

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<sup>39</sup> See *Smith v. O’Brien*, 251 A.2d 323, 324 (N.H. 1969) (The magistrate “is not called upon to reconcile any conflicting testimony, or judge the credibility of witnesses.”); see also *State ex rel. Funmaker v. Klamm*, 317 N.W.2d 458, 460-61 (Wis. 1982) (“We have held that . . . the court’s role is simply to ascertain the plausibility of [the witness’s] story”).

<sup>40</sup> *Frye*, 92 P.3d at 977.

<sup>41</sup> Anthony G. Amsterdam and Randy Hertz, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES, Vol. 1, § 11.8.1 (American Law Institute 2017), [https://www.ali.org/media/filer\\_public/ef/9e/ef9e458e-328b-4c0f-9fb5-a1da47babe4c/trial\\_manual\\_6\\_volume\\_one.pdf](https://www.ali.org/media/filer_public/ef/9e/ef9e458e-328b-4c0f-9fb5-a1da47babe4c/trial_manual_6_volume_one.pdf).

<sup>42</sup> WIS. STATS. § 970.038 (2) (2017-18).

<sup>43</sup> *State v. O’Brien*, 850 N.W.2d 8, 22 (Wis. 2014).

<sup>44</sup> Christine M. Wiseman & Michael Tobin, WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE, § 8.3 (West 2008) (emphasis added).

<sup>45</sup> WIS. STATS. § 968.01 (2017-18).

document.<sup>46</sup> On the other hand, “A preliminary hearing . . . is a *public adversarial hearing conducted in accordance with the rules of evidence*.”<sup>47</sup>

Even when the rule against hearsay is relaxed or eliminated, then, the other “rules of evidence” still apply, including the requirement that the witness have personal knowledge of the things about which he or she testifies.<sup>48</sup> A Kansas court explained this personal knowledge requirement by analogizing to affidavits in support of search warrants. There, the state 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>49</sup> And even when the witness has personal knowledge of the hearsay statements he or she repeats, the court’s bind-over decision is not automatic. Rather, as a Wisconsin court held, “[T]he hearsay nature of evidence may, in an appropriate case, undermine the plausibility of the State’s case.”<sup>50</sup>

In other words, “It 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>51</sup> If the court fails to carry out this important duty, the preliminary hearing would be completely ineffective in preventing improvident prosecutions and meeting its other objectives.

#### D. Discovery

The word discovery has two meanings within the context of preliminary hearings. The first is whether the state has the duty to produce discovery, or at least exculpatory discovery, *before* the hearing. “There is disagreement among the state courts as to whether the disclosure rights assured to defendants at the trial stage . . . apply at a preliminary examination.”<sup>52</sup> Oklahoma, for example, does not require pre-hearing disclosure.<sup>53</sup> California, on the other hand, does, and its reasoning is sound:

The defendant at the hearing still has the right to cross-examine prosecution witnesses as well as to call witnesses who can establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness. To effectuate these rights, it seems necessary to provide defense counsel with exculpatory evidence *pre-hearing*.<sup>54</sup>

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<sup>46</sup> See, e.g., Criminal Complaint, *State v. Harris*, 19-CF-177 (Kenosha County, Wis.) (on file with author), where (1) the prosecutor (a/k/a/ the complainant) *says* that (2) a detective *says* that (3) an officer *says* that (4) the alleged victim (a/k/a the complaining witness) *says* that she was robbed by the defendant.

<sup>47</sup> Wiseman & Tobin, CRIMINAL PRACTICE & PROCEDURE, *supra* note 44, at § 8.3. (emphasis added).

<sup>48</sup> See, e.g., WIS. STATS. § 906.02 (2017-18) (“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.”).

<sup>49</sup> *State v. Cremer*, 666 P.2d 1200, 1203 (Kan. Ct. App. 1983).

<sup>50</sup> *State v. O’Brien*, 850 N.W.2d 8, 22 (Wis. 2014) (quoting the intermediate court of appeals).

<sup>51</sup> *Id.* (emphasis added).

<sup>52</sup> Amsterdam & Hertz, *supra* note 41, at § 11.5.2.

<sup>53</sup> See *State v. Benson*, 661 P.2d 908, 909 (Okla. Ct. App. 1983) (“A motion for disclosure of any exculpatory evidence in possession of the prosecution should be filed as soon as the defendant has been arraigned, *after having been bound over for trial*”).

<sup>54</sup> *People v. Gutierrez*, 214 Cal.App.4th 343, 353 (2013) (emphasis added).

The second meaning of the word discovery is the extent to which a preliminary hearing itself may be used *for* discovery. In order to prevent improvident prosecutions, it seems obvious that the defense—along with the presiding magistrate and even the prosecutor who has ethical duties as a “minister of justice”<sup>55</sup>—should learn as much about the case as possible at this early stage. A New York court discussed this important discovery function:

In a very real sense, as scholars and practitioners agree, since the prosecutor must present proof of every element of the crime . . . the preliminary hearing conceptually and pragmatically may serve as a virtual minitrial . . . Especially because discovery and deposition, by and large, are not available in criminal cases, this in practice may provide the defense with the most valuable *discovery technique* available . . .

Since the hearing provides an occasion for appraising witnesses . . . counsel gain[s] knowledge and insight that will be of invaluable assistance in the preparation and presentation of the client’s defense. Moreover, judicious exercise may be made of the power of subpoena . . . to call to the stand witnesses whom the People have not elected to summon . . .<sup>56</sup>

Similarly, in Tennessee, the court “recognized that the Tennessee preliminary hearing is a ‘critical stage’ of the criminal prosecution and that its importance to the defense as a *discovery tool* could not be ignored.”<sup>57</sup> Likewise, an Arizona court acknowledged that, “Although the formal purpose of the preliminary examination is to establish probable cause to hold the defendant for trial, its principal purpose in practice is to afford defense counsel an opportunity to learn the nature of the prosecutor’s case.”<sup>58</sup>

Given these objectives, defense counsel’s questioning of witnesses at the hearing should not be restricted on the grounds that counsel is improperly seeking discovery. For the same reason, the defense should not be prevented from calling its own witnesses, whether friendly or adverse. In fact, “State law also commonly accords the defense the right to present evidence at a preliminary examination.”<sup>59</sup>

### *E. Charges and Probable Cause*

“Few constitutional principles are more firmly established than a defendant’s right to be heard on the specific charges of which he is accused.”<sup>60</sup> This means that when the

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<sup>55</sup> MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2017) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”).

<sup>56</sup> *People v. Hodge*, 441 N.Y.S.2d 231, 234 (N.Y. 1981) (emphasis added).

<sup>57</sup> *State v. Graves*, 126 S.W.3d 873, 877 (Tenn. 2003) (emphasis added).

<sup>58</sup> *State v. Essman*, 403 P.2d 540, 542 (Ariz. 1965).

<sup>59</sup> *Amsterdam & Hertz*, *supra* note 41, at § 11.5.2 (“When persons whom defense counsel has identified as potential prosecution witnesses refuse to be interviewed by the defense, counsel may want to serve them with defense subpoenas for the slated date of the preliminary examination”). This right is often conveyed by statute. *See, e.g.*, WIS. STATS. § 907.03 (5) (2017-18) (The defendant “may call witnesses on the defendant’s own behalf who then are subject to cross-examination.”).

<sup>60</sup> *Dunn v. United States*, 442 U.S. 100, 106 (1979).

state first files a criminal complaint against the defendant, it must give notice of the crimes with which the defendant is charged and, further, identify the person who is accusing the defendant.<sup>61</sup> These charges, or at least any *felony* charges among them, are then the subject of the preliminary hearing.<sup>62</sup>

If after the preliminary hearing the court binds the defendant over for trial, the charges in the “information”—the charging document that supercedes the criminal complaint in felony actions<sup>63</sup>—should be limited to those for which the magistrate found probable cause at the hearing. A New Mexico court explained:

[B]y requiring that the information conform to the bind-over order, the defendant is assured that his detention is based upon charges of which he has been apprised and which have been reviewed by a neutral authority. . . . [W]here charges have been submitted by criminal information and where those charges were not included in the bind-over order, the defendant has not been afforded due process.<sup>64</sup>

Conversely, “allowing the state to charge a defendant by information with an offense not considered or included in the bind-over order deprives that defendant of his due process rights by subjecting him to criminal prosecution without probable cause.”<sup>65</sup> This makes sense, of course, given that the preliminary hearing serves as a buffer between the prosecutor’s immense power and the citizenry, thus preventing improvident prosecutions. Put another way, given the objectives of the preliminary hearing, it would completely defeat the purpose of the hearing to allow the prosecutor to charge a felony for which the magistrate did not specifically find probable cause.

#### *F. Right to Appeal*

Finally, if the above-described rights are to have any meaning, the defendant must be able to appeal a felony conviction—whether the product of a trial or plea agreement—based on preliminary hearing defects. Therefore, “[M]any state courts will enforce the state-law hearing requirement by reversing a conviction obtained at a trial following an inadequate preliminary examination, *even though the trial itself was otherwise error-free.*”<sup>66</sup>

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<sup>61</sup> See, e.g., *State v. White*, 295 N.W.2d 346, 350 (Wis. 1980) (requiring that the criminal complaint “answer the following five questions before it will be deemed to state probable cause: (1) Who is charged?; (2) *What is the person charged with?*; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged; and (5) *Who says so?*”).

<sup>62</sup> At least one state, Utah, provides a preliminary hearings for some misdemeanors, as these charges can also have life-ruining consequences. See Cassell & Goodwin, *supra* note 18, at 1377 (“the vast majority of other states . . . limit the use of preliminary hearings to more serious felony crimes.”).

<sup>63</sup> With regard to pleadings, state laws vary in their requirements and terminology. However, for our purposes, the “information” is the pleading filed after the preliminary hearing. See, e.g., *State v. Freeland*, 667 P.2d 509, 511 (Or. 1983) (“Oregon law provides that a person may be charged with a felony . . . by a district attorney’s information filed in circuit court after a showing of probable cause in a preliminary hearing”).

<sup>64</sup> *State v. Rodriguez*, 215 P.2d 762, 765-66 (N.M. Ct. App. 2009).

<sup>65</sup> *Id.* at 766.

<sup>66</sup> *Amsterdam & Hertz*, *supra* note 41, at § 11.3 (emphasis added).

For example, in the New Mexico case discussed previously, even though the defendant was convicted of a felony after an error-free trial, his conviction was reversed due to defects at the preliminary hearing stage.<sup>67</sup> To hold otherwise would strip the defendant of meaningful appellate review. This would essentially erase the protections afforded by the preliminary hearing or, at best, would leave them to the whims of the assigned prosecutor and the presiding magistrate.

### III. PROSECUTORIAL AND JUDICIAL ABUSES

Part II discussed several important features of the preliminary hearing. Part III will now demonstrate how, specifically, prosecutors and judges abuse the hearing. For consistency, discussion of these governmental abuses will parallel the various features of the hearing that were described in Part II.

For reasons explained later, abuses at the preliminary hearing stage are less likely to reach the appellate courts than are other forms of prosecutorial or judicial misconduct.<sup>68</sup> Therefore, this Part will draw from some trial-court transcripts and even journalists' reports of newsworthy trial-court events. I will also draw on my own firsthand experience which I have gained in my Wisconsin-focused trial practice.<sup>69</sup>

Wisconsin serves as an excellent case study for three reasons. First, Wisconsin's preliminary hearing laws are very similar to the laws in other states—including Kansas, New Hampshire, Oklahoma, Pennsylvania, and Utah—that are discussed and cited throughout this Article. Second, as demonstrated below, Wisconsin's prosecutors and judges have a propensity for abusing *every aspect* of the hearing, and their boldness has created a goldmine of material from which to draw. Third, because prosecutorial and judicial abuses often implicate two or more interrelated features of the preliminary hearing, a single-jurisdiction analysis provides a more cohesive approach to identifying governmental wrongdoing.

Although this Part uses a state-specific approach, Wisconsin is not unique. The abuses discussed below are indeed occurring elsewhere, with varying levels of severity and frequency. Some examples from other states, such as Oregon and Pennsylvania, will also be discussed alongside the Wisconsin examples. Whenever and wherever the law has conveyed some right to the citizenry, we can be certain that a prosecutor or judge is violating that right, as “the government is always trying to find ways to get more control over [the] people[.]”<sup>70</sup>

#### A. *Going it Alone*

Part II.A. explained that, even if the preliminary hearing itself is not a constitutional right, the defendant has the constitutional right *to counsel* at the hearing. This right is straightforward, and so is the way that judges abuse it: they simply disregard

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<sup>67</sup> *Rodriguez*, 215 P.2d at 766.

<sup>68</sup> See Part III.F.

<sup>69</sup> Any discussion of my own cases is limited to public information and, further, is done in full compliance with the state bar's (unconstitutional) interpretation of ethics rule 1.9, i.e., I have obtained written releases from my clients. For more on this ethics rule and the traps it poses for unsuspecting lawyers, see Michael D. Cicchini, *On the Absurdity of Model Rule 1.9*, 40 VT. L. REV. 69 (2015).

<sup>70</sup> Transcript of Pretrial Conference, *supra* note 17, at 3.

the Constitution and make defendants represent themselves at the hearing. Courts often do this for financial reasons, as is currently the situation in Wisconsin.

To begin, Wisconsin concedes this point: “there *is* a constitutional right to counsel at the preliminary hearing[.]”<sup>71</sup> However, the State Public Defender (SPD) is frequently unable to appoint counsel due to the low rate of pay it offers private bar attorneys to accept its overflow cases. The private bar rate is \$40 per hour; it is only \$5 per hour more than the original \$35 rate set *in the 1970s*; it is currently the lowest in the country; and it fails even to cover the typical lawyer’s hourly office-overhead rate.<sup>72</sup>

When the SPD is unable to handle a case internally and cannot appoint outside counsel in a timely manner, indigent defendants will appear in court without counsel. When *that* happens:

Judges are supposed to appoint lawyers at *county expense* at \$70 per hour if no other lawyer is available. “If lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40 [per] hour, as is increasingly the case, then judges must appoint a lawyer under [Supreme Court Rule] 81.02, at *county expense*,” the State Supreme Court said in its order declining to increase the \$40 rate.<sup>73</sup>

This, however, does not sit well with the judiciary—a group that can be more concerned with local finances and politics than with the Constitution. In true assembly-line fashion, some judges simply thumb their nose at the law: they make defendants go it alone at their preliminary hearings, without a lawyer, “to keep cases moving.”<sup>74</sup> That trial courts would implement this practice, contrary to the Supreme Court’s clear declaration that it is unconstitutional,<sup>75</sup> demonstrates the judiciary’s utter lack of interest in, and respect for, this law.

This particular judicial practice was recently placed in the spotlight. In one case, an indigent, 18-year-old defendant told the trial judge that he was innocent of the charge and wanted a lawyer to represent him at the preliminary hearing; unfortunately, the SPD

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<sup>71</sup> State ex rel. Funmaker v. Klamm, 317 N.W.2d 458, 463 (Wis. 1982) (emphasis added).

<sup>72</sup> See Danielle Kaeding, *Justice Delayed for Those Who Can Least Afford It?*, WIS. PUBLIC RADIO (Apr. 16, 2018), at <https://www.wpr.org/justice-delayed-those-who-can-least-afford-it>. As I write this Article, Wisconsin’s joint finance committee has approved the increase in the SPD’s private bar rate from \$40 to \$70 per hour. However, this rate increase has still not been approved by the legislature and, even if it is eventually approved, will not take effect until January 1, 2020.

<sup>73</sup> Gretchen Schuldt, *Eighteen-Year-Old Who Hanged Himself in Wood County Jail Didn’t Have a Lawyer When He Should Have; Why Not?*, WIS. JUSTICE INITIATIVE (Sept. 11, 2018) (emphasis added), at <https://www.wjiinc.org/blog/18-year-old-who-hung-himself-in-wood-county-jail-didnt-have-a-lawyer-when-he-should-have-why-not>. The author is quoting *In Re: the Petition to Amend SCR 81.02*, 2018 WI 83, wherein the Court deferred to the legislature on the SPD’s \$40 rate, but decided to increase the county rate from \$70 to \$100 per hour. However, county-elected judges may prevent defense lawyers from ever achieving this theoretical pay raise by switching from hourly-rate case appointments to flat-fee contracts.

<sup>74</sup> Gretchen Schuldt, *Public Defender Knew Defendants Unrepresented in Wood County Prelims; Said Courts Could Repeat Them*, WIS. JUSTICE INITIATIVE (Nov. 20, 2018), at <https://www.wjiinc.org/blog/public-defender-knew-defendants-had-no-lawyers-in-wood-county-prelims-said-courts-could-repeat-them>.

<sup>75</sup> See *Coleman v. Alabama*, 399 U.S. 1, 8 (1970) (holding that the preliminary hearing is a “critical stage” at which the defendant has a Sixth Amendment right to counsel).

was unable to appoint counsel.<sup>76</sup> Nonetheless, it was the judge’s practice to keep the criminal justice machinery humming, so he made the defendant represent himself—constitutional right to counsel notwithstanding.<sup>77</sup> The young defendant expressed confusion after the court bound him over—“I don’t understand how this is enough evidence”—and then committed suicide in jail later that same day.<sup>78</sup>

While “[i]t is impossible to draw a line directly from the young man’s lack of representation to his suicide,” it is obvious that “a lawyer could have helped [him] deal with the overwhelmingly stressful situation he faced[.]”<sup>79</sup> In addition, a lawyer could have also challenged bind-over at the preliminary hearing in an effort to prevent what might have been an improvident prosecution. Even if the lawyer had failed—an admittedly likely outcome, assuming the judiciary’s blatant disregard of the Constitution is a predictor of bind-over decisions—at least the defendant would have known that *someone* was on his side and was fighting for him.

Other judges aren’t quite as brazen when denying defendants their right to counsel. Some will give the defendant a Hobson’s choice: (1) have the preliminary hearing within the statutory timeframe but without a lawyer, or (2) waive time limits and the SPD will probably, eventually, appoint a lawyer. This accomplishes the same objective for the politically-driven judge: he or she avoids dipping into county government funds to pay for the defendant’s constitutionally-guaranteed lawyer.

Unfortunately for the indigent and incarcerated defendant, however, instead of having a hearing within ten days as required by statute<sup>80</sup> he or she may have to wait several weeks, months, or in rare cases even years for the SPD to appoint counsel.<sup>81</sup> Given that the goal of the preliminary hearing is to terminate unwarranted prosecutions *before* they progress too far—that is, “to *prevent* hasty, malicious, improvident and oppressive prosecutions,” and “to *save* the defendant from the humiliation and anxiety involved in public prosecution”<sup>82</sup>—such delays *in* the hearing completely defeat the purpose *of* the hearing.<sup>83</sup>

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<sup>76</sup> See Schuldt, *supra* note 73.

<sup>77</sup> Id.

<sup>78</sup> Id. The deceased defendant’s confusion is understandable. Explaining the preliminary hearing to clients is, by far, the most difficult thing to explain in the entire criminal process. Normally, it is not necessary to explain the hearing unless the client wishes to waive it to preserve a plea offer. Where I practice, waiver requires the completion of a court-created waiver of rights form. This form creates even more confusion as it includes both unnecessary and false—or, at least, very misleading—information. See WAIVER OF PRELIM. HR’G FORM, Kenosha County, Wis. (April 2015) (on file with author).

<sup>79</sup> Id.

<sup>80</sup> WIS. STATS. § 970.03 (2) (2017-18).

<sup>81</sup> See Jonathan Stefonek, *Defendant Stuck without an Attorney, Unwilling to Waive*, PORTAGE DAILY REGISTER (Dec. 4, 2017), at [https://www.wiscnews.com/portagedailyregister/news/defendant-stuck-without-attorney-unwilling-to-waive/article\\_3cf7ab6f-af96-5b5c-8167-4831e24b277d.html](https://www.wiscnews.com/portagedailyregister/news/defendant-stuck-without-attorney-unwilling-to-waive/article_3cf7ab6f-af96-5b5c-8167-4831e24b277d.html); Gretchen Schuldt, *SPD Office, Citing Recruiting Difficulties, Backs Pay Raise for Appointed Defense Lawyers*, WIS. JUSTICE INITIATIVE (May. 2, 2018), at <https://www.wjinc.org/blog/spd-office-citing-recruiting-difficulties-backs-pay-raise-for-appointed-defense-lawyers>.

<sup>82</sup> *State v. Williams*, 544 N.W.2d 400, 404 (Wis. 1996) (emphasis added).

<sup>83</sup> 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) (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.”).

Because the right to counsel and time limits are already clearly-established law, little needs to be done in the way of truly novel legislative reform. The preliminary hearing statute merely has to be amended to reinstruct the judiciary on the right to counsel, the hearing's time limits, and the judge's duty to appoint counsel at county expense when the SPD cannot do so at state expense. The only semi-novel legislative fix would be to amend the statute to indicate that the SPD's failure to appoint counsel is not good cause for extending the hearing's time limits. Such clear language should eliminate the judicial tactic of forcing the defendant into a Hobson's choice of having either a timely hearing or counsel, but not both. These simple legislative reforms appear in Part IV.A.

### *B. Moving the Goalposts*

Part II.B. discussed how defendants (probably) do not have a Sixth Amendment right of confrontation at the preliminary hearing. This often means that defense counsel will be prevented from cross-examining the state's witnesses on matters of credibility. Then, as cases progress, sometimes a witness who testified at the preliminary hearing is no longer available to testify at trial. When that happens, prosecutors may attempt to read into evidence, at trial, the preliminary hearing transcript of the now-absent witness's previous testimony.

The problem with this tactic is that the defendant *does* have a Sixth Amendment right of confrontation *at trial*, which includes the right to challenge the witness's personal credibility—the very thing that was prohibited at the preliminary hearing. Therefore, as a Colorado court held, “Given the limited nature of the preliminary hearing” the “Confrontation Clause precludes the admission of the transcript of a preliminary hearing at a subsequent trial[.]”<sup>84</sup>

Wisconsin courts certainly agree that the defendant does *not* have the right of confrontation at the preliminary hearing; therefore, they limit cross-examination to matters of “the plausibility of the state's case; the credibility of the witnesses is not at issue.”<sup>85</sup> However, despite this restriction on cross-examination, Wisconsin courts are eager to dispense with consistency, clarity, and even fair play. Instead of also prohibiting the state from reading the preliminary hearing transcript at trial in cases where the witness becomes unavailable, Wisconsin trial courts will create a bizarre test that can be manipulated to the prosecutor's benefit.

Trial courts have held, despite the well-settled rule that “the scope of cross-examination is limited to issues of plausibility,”<sup>86</sup> that if defense counsel “*did not attempt to push the boundaries of cross-examination beyond issues of plausibility and into credibility*” at the preliminary hearing, he cannot be heard to complain at trial when the state seeks to introduce the transcript of the preliminary hearing testimony due to the unavailability of the witness.”<sup>87</sup>

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<sup>84</sup> *People v. Fry*, 92 P.3d 970, 977 (Colo. 2004) (internal quotations omitted).

<sup>85</sup> Wiseman & Tobin, *CRIMINAL PRACTICE & PROCEDURE*, *supra* note 44, at § 8.42 (citing *State ex rel. Funmaker v. Klamm*, 317 N.W.2d 458, 460-91 (Wis. 1982)).

<sup>86</sup> *State v. White*, 754 N.W.2d 214, 219 (Wis. Ct. App. 2008).

<sup>87</sup> Decision & Order, *State v. Peters*, 00-CF-14 and 00-CF-99 (Vernon County, Wis.) (on file with author) (emphasis added).



According to the trial court, then, defense counsel must intentionally violate a well-established rule of procedure and attempt to question the preliminary hearing witness on matters of credibility. If counsel does not, the future right of confrontation at trial could be lost. This conundrum occurs in other states as well. As critics have observed with regard to Pennsylvania's hearing, "[I]f the defense attorney is interested in ensuring the [hearing] testimony does not become admissible in the case if the witness becomes unavailable for trial, the defense attorney is required to ask irrelevant questions bearing on credibility and be denied an answer."<sup>88</sup>

This absurd standard creates several problems. First, how could an inexperienced but conscientious lawyer possibly know that he or she must violate well-established law at a preliminary hearing in order to preserve the client's rights months or years down the road at trial? Would the lawyer later be found "ineffective" for failing to break this procedural rule at the preliminary hearing? Should the lawyer violate the law governing other aspects of criminal practice as well? If so, which ones? And who should decide?

Second, as a practical matter, this rule-breaking requirement would certainly aggravate the presiding magistrate who isn't thinking about trial rights at future trials that might not even take place. Rather, the magistrate is trying to conduct multiple preliminary hearings each day in order to keep the assembly line of criminal convictions moving smoothly. "The large volume of cases of all types processed by each magistrate, particularly in urban areas, is reflected in delay and inability to give more than cursory consideration to individual cases."<sup>89</sup> The magistrate, therefore, wants and expects counsel to abide by well-settled rules of procedure.

Third, intentionally breaking basic procedural rules may also be unethical. Attorneys are required to know the applicable law<sup>90</sup>—in this case, published appellate cases on the scope of cross-examination at preliminary hearings. Attorneys are also ethically obligated to follow well-settled law. The ABA comment to the ethics rule on "meritorious claims and contentions" states: "The advocate has a duty . . . not to abuse legal procedure. *The law, both procedural and substantive, establishes the limits within which an advocate may proceed.*"<sup>91</sup>

This crafty, embarrassing double standard—a mid-game shifting of the confrontation goalposts for the benefit of the prosecutor—demonstrates the lengths to which judges will go to abuse the preliminary hearing. It might not be an abuse to limit the defense's cross-examination of witnesses in the first place; however, it most certainly *is* an abuse to impose rules on defense counsel, and then blame defense counsel for abiding by the very rules the courts have just imposed.

This shifting-the-goalposts tactic also defeats the very purpose of the preliminary hearing. Far from serving as a deterrent to improvident prosecutions, the hearing now becomes a prosecutorial weapon: the rules restrict the defendant's cross-examination of the state's witness, while simultaneously preserving the witness's testimony for the

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<sup>88</sup> Drew Sheldon, *Unjust Incarceration: Problems Facing Pennsylvania's Preliminary Hearing and How to Reform It*, 56 DUQ. L. REV. 169, 189 (2018) (discussing *Commonwealth v. Douglas*, 737 A.2d 1188, 1196 (Pa. 1999)).

<sup>89</sup> Anderson *supra* note 23, at 290.

<sup>90</sup> See, e.g., WIS. SCR 20:1.1 (requiring competence).

<sup>91</sup> WIS. SCR 20:3.1, ABA Cmt. 1 (emphasis added).

prosecutor to use as substantive evidence later at trial (notwithstanding the defendant's Sixth Amendment right of confrontation at the trial).

Fortunately, the legislative fix to this form of abuse is simple. As illustrated in Part IV.C., a clear statutory amendment that prohibits the state's use of preliminary hearing testimony in lieu of live witnesses at trial should put this disingenuous and illegal tactic to rest.

### C. *Quadruple Hearsay*

Part II.C. explained that, in many states, prosecutors may use hearsay to win bind-over at a preliminary hearing. However, that Part also explained that witnesses must have personal knowledge of the hearsay they are repeating; the magistrate must still determine whether the hearsay is reliable; and, most significantly, the probable cause required for bind-over is greater than that needed for a criminal complaint. Wisconsin purportedly subscribes to all of these rules. Nonetheless, Wisconsin prosecutors and courts are currently committing one of the most brazen abuses of any procedural or substantive law anywhere. Their tactic turns the hearing into a sham.

This governmental abuse takes the following form.<sup>92</sup> 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.

Below are some actual examples from preliminary hearing transcripts where the prosecutor was questioning the reader-witness. In these examples, the court ignored the substance of all defense objections and instead repeated the obvious but irrelevant refrain that hearsay is admissible, even though the objections were not related to the state's use of hearsay.

This first objection is based on the reader-witness's complete lack of personal knowledge regarding the hearsay statements contained in the complaint that he is about to regurgitate from the witness stand:

*Prosecutor:* . . . What did [the alleged victim] report to the officers when they arrived?

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<sup>92</sup> This Part of the Article is rooted in my own personal experience battling a relatively new prosecutorial ploy which, to my knowledge, has yet to reach the state appellate courts. I cite to transcripts of preliminary hearings that were held in open and public court in my own cases. I do so with my clients' written consent and in full compliance with even the state bar's unconstitutional interpretation of ethics rule 1.9 on the use or revelation of *public* information relating to the prior representation of a client. See Cicchini, *supra* note 69. On this issue, other states have already held what Wisconsin still refuses to recognize: preventing an attorney from discussing the *public* aspects of his or her closed cases without client consent violates the attorney's First Amendment rights. See *id.*

*Defense counsel:* I just want to make an objection at this point, your Honor. The state's failed to establish personal knowledge of the witness, 906.02, the statute requires that. Although hearsay is allowed, nothing in the legislature's recent actions has eliminated the requirement that the witness have personal knowledge of the incident, so I would object to further testimony from this witness.

*Prosecutor:* I believe that the law says that hearsay is permissible at preliminary hearings and this is currently hearsay.

*Court:* Yeah, and I believe I agree and that I'm going to overrule that objection. . . . [H]earsay is deemed . . . allowable[.]<sup>93</sup>

The next objection, below, challenged the court's finding that the reader-witness identified the defendant as the perpetrator. Of course, the reader-witness has no idea if the person sitting at the defense table is the person whom the complaining witness accused. All the reader-witness can do is say that the person at the defense table is the same person pictured in a booking photo that he viewed before the hearing. This, of course, does nothing even to identify the defendant as the person arrested for, or accused of, the alleged crime, let alone as the real perpetrator. To establish identity, the alleged victim—or possibly an investigating officer if the defendant was arrested on the scene—would have to testify. Nonetheless, the true but completely irrelevant fact that hearsay is admissible somehow serves, once again, to perpetuate the tactic:

*Prosecutor:* And what did the [alleged victim] report had occurred on that date?

*Reader-witness:* She had said on that date that she was in an argument with the defendant, *who I know the defendant is seated at the table there wearing a black shirt because of the booking photo that I seen [sic] of him. . . .*

*Court:* The record will reflect the witness has identified the defendant.

*Defense counsel:* . . . I'll object because he's identifying him based on a booking photo . . .

*Court:* And again, I'll overrule based on hearsay, which is allowable for probable cause circumstances.<sup>94</sup>

The next objection is based on the reader-witness's inability to name the *declarant* of the hearsay he is repeating. That is, if hearsay is to be repeated in court, the

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<sup>93</sup> PRELIM. HR'G T'SCRIPT at 9-10, *State v. Williams*, 18-CF-1179 (Kenosha County, Wis.) (on file with author).

<sup>94</sup> *Id.* at 10-11.

law requires that the conduit for the hearsay statement at least identify the person who allegedly uttered the statement.

*Reader-witness:* . . . Later on, medical personnel would say that they would pull a small piece of glass shard from her right eye.

*Defense counsel:* Objection, unless the hearsay declarant is identified. That is required in a Criminal Complaint, and it certainly should be for a preliminary hearing. So I move to strike . . .

*Prosecutor:* Again, I disagree. Hearsay is admissible. . . .

*Defense counsel:* . . . The State's repeating that hearsay is admissible, but they're ignoring all other rules like identifying the declarant of hearsay or the witness having personal knowledge, so those rules are still in place. You can't just repeat what someone said if you don't know who the person is. The hearsay declarant has to be identified. . . .

*Court:* I believe . . . that's allowed for preliminary hearing purposes with respect to hearsay, so I'll overrule the objection.<sup>95</sup>

Finally, the reader-witness sometimes cannot remember everything he just read in the criminal complaint, which creates problems when the prosecutor asks him questions about the allegations contained within that document. So when things bog down, the prosecutor will try to "refresh" the reader-witness's "recollection" of the incident by having him re-read the complaint from the witness stand. Of course, as the reader-witness had no involvement whatsoever in the investigation of the case, it is impossible to "refresh" a non-existent "recollection":

*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?

*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>96</sup>

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<sup>95</sup> Id. at 12-13.

<sup>96</sup> PRELIM. HR'G T'SCRIPT at 16, *State v. Harris*, 16-CF-413 (Kenosha County, Wis.) (emphasis added) (on file with author). Despite the file number indicating the case was filed in 2016, the preliminary hearing

After reading the above transcript excerpts, several questions may come to mind. Why doesn't the witness-reader simply read the complaint into the record instead of trying to memorize it and then answer the prosecutor's questions about what it contains? Of what relevance is the reader-witness's power of recall to the court's bind-over decision? And why do we even need the reader-witness to read the complaint at all? Why can't the magistrate just read the complaint for him or herself? And why does the magistrate even need to read it? The complaint is already filed (or the defendant wouldn't be in court for a preliminary hearing) so the document is already part of the record. Why doesn't the state just ask for bind-over based on the previously filed complaint? There is literally no substantive difference between that and the sham hearing where the state pays an officer to sit around court for the morning and try to memorize three- or four-level hearsay allegations in criminal complaints.

In each and every one of these hearings I have litigated and of which I am aware, the magistrate bound the defendant over despite the state's use of a reader-witness to repeat multiple levels of hearsay.<sup>97</sup> That is, the reader-witness *says* the complainant (the prosecutor) *says* a detective *says* a reporting officer *says* an alleged victim *says* that he or she was a crime victim of some sort. This is the precise type of improvident prosecution the preliminary hearing was designed to prevent.

This disingenuous and embarrassing reader-witness tactic is so farcical that it creates two logical conundrums for the prosecutors and judges who collude to carry it out. First, if the preliminary hearing requires a *different* and *higher* standard of probable cause than the criminal complaint—which, as Part II.C. explained, it does—then how can the prosecutor win bind-over merely by having a random person memorize the previously-filed complaint and answer questions about it? Second, if the legislature intended the complaint (a document drafted by the prosecutor) to substitute for the preliminary hearing (an adversarial, evidentiary hearing), then why didn't it repeal the preliminary hearing statute instead of merely relaxing one of the numerous, applicable evidentiary rules?

Of course, there are no answers to these questions. But there is a way to cure these prosecutorial and judicial abuses with a simple legislative fix. Much like fixing the judicial abuse of the defendant's right to counsel, this isn't a novel reform; rather, the legislative fix would clearly communicate, in statutory form, several existing legal principles. These statutory additions, set forth in Part IV.B., codify the existing case law on the use of hearsay at preliminary hearings and, further, incorporate by reference

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was not held until 2019, well after the change in the law allowing hearsay, and shortly after prosecutors began using a reader-witness in lieu of a reporting police officer, eyewitness, or alleged victim.

<sup>97</sup> In Wisconsin, court commissioners often conduct preliminary hearings, at which they permit the state to use reader-witnesses and then bind defendants over without thought, analysis, or even a superficial assessment of the reliability of the hearsay presented. (This practice may be dictated by the judges to whom these commissioners report.) After bind-over, defendants are then allowed to "appeal" a commissioner's decision to the trial court judge. Trial court judges, however, normally rubber stamp the commissioners' decisions. One judge of whom I am aware was, at one time, reversing reader-witness-based bind-over decisions on constitutional grounds. However, upon realizing a possible flaw in his constitutional theory, the judge has reluctantly joined the bind-over parade. While this judge is interested in the constitutional implications of this abusive tactic, he has thus far declined to seriously consider defense motions challenging the tactic based on statutes and state case law, neither of which permit the state to use a reader-witness to win bind-over.

several evidence statutes such as the requirement that a witness have personal knowledge of the matter about which he or she would testify.

#### *D. Shutting Down Discovery*

As Part II.D. explained, discovery has two meanings in the context of the preliminary hearing. First, some states require the prosecutor to provide discovery to the defense *before* the hearing so counsel can effectively terminate improvident prosecutions or effectuate the hearing's other objectives. Second, many states acknowledge that the primary purpose of the hearing is for the defense—along with the court and even the prosecutor—to discover things about the case *through* the hearing.

Other states including Wisconsin, however, take the opposite view: the prosecutor is allowed to withhold discovery materials from the defense until *after* the hearing,<sup>98</sup> and both the court and the prosecutor go to great lengths to prevent the defense from learning anything about the case *during* the hearing. In other words, contrary to the case law of several states (cited in Part II.D.) and contrary even to some of its own case law (discussed below), Wisconsin appellate courts hold that the preliminary hearing is not to be used for discovery.<sup>99</sup>

Wisconsin's approach highlights the dramatic and unfortunate shift over time in the prosecutorial function. To illustrate, consider this excerpt from an article on preliminary hearings written nearly a century ago:

It is well . . . to consider first the purposes which are designed to be served by the preliminary examination. . . . On the part of the people of the state, appearing as plaintiff in the case, the preliminary examination provides a means for testing the complaints of prosecuting witnesses, determining their motives and eliminating accusations based upon misinformation and prejudice. It provides also an opportunity for compelling unfriendly or unwilling witnesses to testify[.]<sup>100</sup>

By comparison, under today's more contemporary, carefree approach to churning out criminal cases, the prosecutor's goals have turned 180-degrees. Prosecutors now want to shield their complaining witnesses—who are immediately anointed “victims” and are provided with a litany “victims' rights”—from all questioning.<sup>101</sup>

This shift in philosophy is pervasive. For example, in response to an Oregon defendant's argument that the prosecutor illegally used a grand jury proceeding instead of a preliminary hearing, a deputy district attorney admitted the following:

[G]uidelines direct that preliminary hearings be avoided whenever possible in prosecutions for rape or sexual attack and cases involving a

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<sup>98</sup> See *State v. Schaefer*, 746 N.W.2d 457 (Wis. 2008).

<sup>99</sup> See *State v. Knudson* 187 N.W.2d 321(Wis. 1971).

<sup>100</sup> Miller, *supra* note 4, at 414.

<sup>101</sup> This victim-centered approach to criminal law was not always en vogue. In a simpler time when a complaining witness was just that—a complaining witness, not yet a victim—prosecutors were more skeptical of uncorroborated allegations and were more respectful of the presumption of innocence. See Anderson, *supra* note 23, at 288-89.

youthful victim. This is done out of consideration for the witness. . . . [Another] consideration 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. Another consideration might be . . . that [assigned] deputy's inadequate time to prepare a case [which] leads to taking it instead to the grand jury.<sup>102</sup>

The above admission more accurately conveys the contemporary prosecutor's mindset. Potential witnesses are already labeled "victims," and it is their convenience that is paramount. The defendant's guilt is already presumed; therefore, if a witness changes his or her story over time, it is not an indicator of the witness's untruthfulness but rather the product the defense lawyer's cross-examination that somehow "turned" the witness's previous version of events "into a past inconsistent statement." Finally, indicative of the sausage-factory approach to producing convictions, the prosecutor thought it perfectly fine to charge a defendant with a felony, yet not be prepared to backup that decision via the use of adversarial testing at a preliminary hearing.

The deputy prosecutor was likely surprised when an Oregon court rejected the above explanation for why the prosecutor used a grand jury instead of a preliminary hearing. It held: "since the decision is made . . . upon logistical and tactical criteria, the choice of procedure is administered purely haphazardly or otherwise on terms that have no satisfactory explanation under [the Oregon constitution]."<sup>103</sup> More specifically for our purposes, that "one person . . . might be afforded a preliminary hearing and another . . . might be denied such a hearing *merely because the assigned deputy did not wish to subject his witnesses to cross-examination*" does not pass constitutional muster.<sup>104</sup>

When cross-examination can't be eliminated entirely, prosecutors often attempt to limit it. To illustrate, assume the prosecutor calls a witness who *does* have some personal knowledge of the case. In this situation, prosecutors are quick to object to any meaningful questioning because, they contend, preliminary hearings are designed to test plausibility not credibility,<sup>105</sup> and defense questions about credibility are merely disguised attempts to obtain discovery.<sup>106</sup> But this prosecutorial argument (which many courts are eager to accept) confuses two things: attacking the credibility of the *witness*, which is not permitted, and attacking the witness's *story*, which is permitted.

It is true that, in many states, the defense is *not* permitted to ask a witness, for example, whether she has been convicted of a crime<sup>107</sup> or whether he recently cheated on

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<sup>102</sup> State v. Freeland, 667 P.2d 509, 519 (Or. 1983).

<sup>103</sup> Id. at 519 (quoting the trial court judge in the case).

<sup>104</sup> Id. (affirming the trial judge and reversing the appellate court) (emphasis added).

<sup>105</sup> See State ex rel. Funmaker v. Klamm, 317 N.W.2d 458, 460-61 (Wis. 1982) ("We have held that the purpose of the preliminary is not to make a final judgment on the credibility of a witness; the court's role is simply to ascertain the plausibility of her story") (internal quotations omitted).

<sup>106</sup> See Wilson v. State, 208 N.W.2d 134 (Wis. 1973) ("There is a point where attacks on credibility become discovery.").

<sup>107</sup> See WIS. STAT. § 906.09 (1) (2017-18) ("For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime").

his taxes,<sup>108</sup> as these both go to the witness's general or personal credibility. However, the defense *is* permitted to challenge the plausibility of the witness's story. And the line that separates the plausibility of the story (which is fair game) from the witness's credibility (which is improper discovery) is only crossed when defense counsel "delves into general trustworthiness of the witness."<sup>109</sup>

Therefore, if a witness testified at the preliminary hearing inconsistently with her prior statements to police—for example, her prior description of the perpetrator—"defense counsel should have been allowed to cross-examine the state's witness on her prior description" of that perpetrator.<sup>110</sup> "This is because the question propounded did not merely go to the witness's general trustworthiness, *but also the plausibility of her description of the defendant, upon which the finding of probable cause rested.*"<sup>111</sup>

The prosecutor may try to label the above question as an attack on the witness's credibility, but that does not make it so.<sup>112</sup> Nor does the above line of questioning constitute improper discovery. In fact, under some often-ignored Wisconsin case law, the witness's *motive* in the case at bar (as opposed to the witness's general credibility) is relevant.<sup>113</sup> On top of that, the defense can even ask questions to lay the foundation for future suppression motions.<sup>114</sup> Neither of these lines of questioning constitute improper discovery, no matter how many times the prosecutor objects.<sup>115</sup>

Another way that prosecutors and courts prevent the defense from learning about the case—while also burying their own heads in the sand—is to prevent the defense from calling its own witnesses. Unlike limiting the cross-examination of government witnesses, which is based on an error of law, preventing defendants from calling their own witnesses not only violates the law but is based on an error in logic.

More specifically, Wisconsin's statute is clear that, at the preliminary hearing, "The defendant may . . . call witnesses on the defendant's own behalf who then are

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<sup>108</sup> See WIS. STAT. § 906.08 (2) (2017-18) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime or an adjudication of delinquency . . . may, . . . if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness").

<sup>109</sup> *Wilson*, 208 N.W.2d 134 at 148.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (emphasis added).

<sup>112</sup> For a discussion of the difference between plausibility of a witness's story and the witness's general credibility or trustworthiness, see David B. Dean, *Criminal Law: Preliminary Examination Potential*, 58 MARQ. L. REV. 159, 165-66 (1975).

<sup>113</sup> See *State v. Berby*, 260 N.W.2d 798, 803 (Wis. 1978) (At the preliminary hearing, "evidence of motive is relevant if it meets the same standards of relevance as other evidence. Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it entitled to.").

<sup>114</sup> See *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 take effective action. If the identification were based upon the police line-up and the line-up were unfair or conducted in a manner which violated his rights, he could move before trial to have the evidence suppressed") (overruled on other grounds by *State v. Taylor*, 210 N.W.2d 873 (Wis. 1973)).

<sup>115</sup> Courts could have avoided all of this confusion—and subsequent prosecutorial and judicial abuse—if they had just used one word (credibility) instead of two words (credibility and plausibility). That is, the rule is more clearly stated as follows: The general *credibility* of the *witness* is off-limits for a preliminary hearing; however, the *credibility* of the witness's *testimony* is subject to cross-examination. As it is, courts are often incapable of distinguishing between credibility and plausibility. See Wiseman & Tobin, *supra* note 44, at § 8.42 ("Wisconsin courts have struggled with this distinction, which has bedeviled Anglo-American criminal procedure for over two hundred years.").



subject to cross-examination.”<sup>116</sup> However, Wisconsin courts often deny defendants the right to call witnesses whenever the state’s evidence first establishes probable cause. The courts’ reasoning is that the defense witness’s testimony would only provide conflicting evidence, and that would merely go to the government witness’s credibility, which is not the issue at the hearing.<sup>117</sup>

The glitch in this reasoning, and the problem with mid-hearing probable cause determinations, is this: the defendant would only be able to exercise his statutory right to call witnesses if the state first failed to establish probable cause; but in that scenario, the defendant would *also* be unable to call witnesses because the case would be dismissed for *lack of* probable cause. The defendant, therefore, would never have the right to call witnesses which is directly at odds with the statute granting that very right.

Some states, such as Arizona, have recognized the logical flaw in the judicial thinking that prohibits defense witnesses from testifying. “A hearing before a magistrate who is so fundamentally mistaken as to the nature and purpose of a preliminary examination, and under such delusions as to his power to set aside the [right to call witnesses] does not afford to the defendant the protection required by the Arizona Constitution.”<sup>118</sup>

Fortunately, the statutory fix for this anti-discovery tactic is incredibly easy to implement. First, the legislature must amend the discovery statute so the defense can obtain limited discovery materials *before* the hearing. This would consist only of easily accessible documents, such as police reports, that are already in the prosecutor’s possession as he or she would have relied upon them when making the earlier decision to charge the defendant. This proposed statutory change is found in Part IV.E.

Second, as the courts are confused over the proper scope of cross-examination, and are seemingly unaware of the logical conundrum they’ve created when prohibiting the defense from calling its own witnesses, the courts need to be reinstructed, via statute, on the proper limits of cross-examination and the proper timing of their probable cause determinations. These proposed statutory changes are found in Part IV.A.

#### *E. Any Felony Will Do*

As Part II.E. explained, due process (and even a layperson’s basic sense of fairness) require the government to give the defendant notice of the charges against him. Even in a mere criminal complaint, the state is required to identify the crimes and make factual allegations sufficient to support each element of each charged crime. Additionally, if the complaint includes one or more felony charges, the state has to present evidence at a preliminary hearing from which the court can find probable cause

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<sup>116</sup> WIS. STAT. § 907.03 (5) (2017-18).

<sup>117</sup> Wisconsin courts routinely deny defendants their statutory right to call the complaining witness—after the state presented a mere hearsay summary of the allegation through a police officer, no less—because the complaining witness’s testimony supposedly cannot impact the magistrate’s probable cause determination. *See, e.g., State v. Hull*, 867 N.W.2d 419, 421 (Wis. Ct. App. 2015) (“the court commissioner properly refused to allow Hull to call the alleged victim to testify at the preliminary hearing because the anticipated testimony was not relevant to the probable cause inquiry”); *State v. O’Brien*, 850 N.W.2d 8, 18 (Wis. 2014) (“To overcome a motion to quash a subpoena at a preliminary examination, the defendant must be able to show that the evidence is relevant to the probable cause determination.”).

<sup>118</sup> *State v. Essman*, 403 P.2d 540, 542 (Ariz. 1965).

for each element of each charged felony. Even in Wisconsin, the preliminary hearing statute is clear: “In multiple count complaints, *the court shall order dismissed any count for which it finds there is no probable cause*. The facts arising out of any count ordered dismissed *shall not be the basis for a count in any information filed*.”<sup>119</sup>

However, the activist Wisconsin appellate courts have violated the plain language of this statute in order to create new law for the benefit of the prosecutor. First, the courts simply dispense with the notice requirement and hold that, when determining whether there is probable cause, the magistrate “is not restricted to the charges set forth in the complaint or argued by counsel during the preliminary hearing. A probable-cause showing of *any* felony will justify bind-over.”<sup>120</sup>

Second, in a truly unimaginable attack on due process and the notice requirement, courts have decided that the magistrate should actually hide the ball from the defendant: the magistrate “does not have to specify the felony” for which he or she found probable cause.<sup>121</sup> “Indeed, the Wisconsin Supreme Court has cautioned that it is both unnecessary and *inadvisable* for the [magistrate] to opine as to exactly what felony was probably committed.”<sup>122</sup>

At this point, obviously, the court has effectively overruled the statute. How could a magistrate “order dismissed any count for which [he or she] finds there is no probable cause” if it is “inadvisable” to reveal which count is the basis for the magistrate’s probable cause determination?

Things get even more convoluted after the magistrate binds the case over on the *any*-felony test. After bind-over, the prosecutor is free to file any charges he or she wishes, even if they are unsupported by factual allegations in the complaint and even if they are unsupported by the evidence presented at the preliminary hearing. To accomplish this, prosecutors rely on the so-called transactional-relation test. As long as the new charges are “not wholly unrelated” to the preliminary hearing evidence, the prosecutor is allowed to add those charges to the subsequently filed “information” (the charging document that supercedes the complaint).<sup>123</sup>

For example, assume that a complaint charges the defendant with a single count of armed robbery committed at a tavern. At the preliminary hearing, the bartender testifies that the defendant pointed a gun at him and demanded money [and he] gave money to the defendant . . . Following bindover [which could be based on *any* felony crime, but the defendant is not entitled to know which one], the prosecution can file a multi-count information charging the defendant with having robbed six different patrons as well as the bartender [even if the magistrate didn’t believe there was probable cause for even a single *robbery*] . . . The additional charges are appropriate even absent a probable-cause showing [in either the complaint or at the preliminary hearing] . . .<sup>124</sup>

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<sup>119</sup> WIS. STATS. § 970.03 (10) (2017-18) (emphasis added).

<sup>120</sup> Wiseman & Tobin, CRIMINAL PRACTICE & PROCEDURE, *supra* note 44, at § 8.3 (emphasis original) (citing Wittke v. State ex rel. Smith, 259 N.W.2d 515 (Wis. 1977)).

<sup>121</sup> *Id.* at § 8.51 (citing State ex rel. Hanna v. Blessinger, 190 N.W.2d 199 (Wis. 1971)).

<sup>122</sup> *Id.* (quoting State v. Williams, 544 N.W.2d 406, 414-15 (1996) (internal quote marks omitted)).

<sup>123</sup> State v. Richer, 496 N.W.2d 66, 74 (Wis. 1993).

<sup>124</sup> Wiseman & Tobin, CRIMINAL PRACTICE & PROCEDURE, *supra* note 44, at § 8.51.

Putting aside the obvious statutory violation for a moment, these abuses create another logical conundrum from which the prosecutor and the court cannot escape. To begin, in all criminal cases, including misdemeanor cases, the complaint must establish probable cause for each charged crime. But when some or all of those charges are felonies, the defendant is entitled to a preliminary hearing designed to provide *additional* protection against improvident prosecutions. However, because of the any-felony rule and the transactional-relation test, defendants in felony cases often have to stand trial on charges for which there was no probable cause in the complaint and no evidence adduced at the preliminary hearing.

The conundrum is this: misdemeanor defendants have *greater* protection against improvident prosecutions than do felony defendants. This was clearly not intended by the legislature. Worse yet, prosecutors and courts have transformed the preliminary hearing from a safeguard *against* improvident prosecutions to a prosecutorial weapon for adding charges without probable cause.

The waters get even muddier in the trenches. I have represented defendants who have waived their preliminary hearings to prevent the introduction of evidence on which the prosecutor could file additional charges not included in the complaint. That is, prosecutors can invoke the transactional-relation test *only* when there is “evidence adduced at the preliminary hearing” to which the new charges can relate.<sup>125</sup> Without such evidence being adduced (because the hearing has been waived), no new charges can be added. Unfortunately, this defense strategy for ensuring even minimal notice and due process has failed. Trial courts still permit the prosecutor to file the additional charges, even when the preliminary hearing is waived and, consequently, there was never any evidence to which the new charges could possibly be transactionally related.

As convoluted as this is—and even an educated reader could be excused for failing to wrap his or her head around that last logic-bending point—reforming the problem is quite simple. Although the existing statute is already clear to any fair-minded reader, legal reform obviously mandates an even clearer statute which specifically requires a probable cause determination for each and every felony count. Such reform is illustrated in Part IV.A.

Successful reform also requires a clear statutory mandate that the prosecutor’s “information” (the document that supercedes the complaint) must conform to the court’s charge-by-charge bind-over decision, thus guaranteeing the felony defendant *at least* the same protection against improvident prosecutions as the misdemeanor defendant. This reform is illustrated in Part IV.D.

#### *F. Defects Waived and Cured*

Part II.F. explained that many states will permit defendants to appeal their convictions based on defects in their preliminary hearings. Without the threat of such a post-conviction (as opposed to interlocutory) appeal, prosecutors and trial-court judges would be free to abuse the hearing without any fear of reversal. When left in the hands of such conviction-minded government agents, the hearing would completely fail to prevent improvident prosecutions. However, other parts of this Article also discussed how

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<sup>125</sup> State v. Cotton, 668 N.W.2d 346, 350 (Wis. Ct. App. 2003).

preliminary hearing defects often do *not* reach the appellate courts. The reason is that some states, including Wisconsin, have created two rules that make it difficult for defendants to file post-conviction appeals based on prosecutorial and judicial abuses of the hearing.

First, Wisconsin courts have adopted the guilty plea waiver rule. That is, after the state violates the defendant's rights at the preliminary hearing, a plea deal with the prosecutor may waive the right to appeal. "The general rule applied in Wisconsin is that 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."<sup>126</sup> Courts have also held that errors at the preliminary hearing stage are non jurisdictional and, therefore, could be deemed waived after entry of a guilty plea.<sup>127</sup>

Second, while most cases resolve by plea bargain, a small percentage will go to trial, and Wisconsin courts have covered this base as well. The rule is that conviction after a jury trial cures any errors at the preliminary hearing. Therefore, "A defendant who claims error occurred at the preliminary hearing may only obtain relief *prior to trial*."<sup>128</sup> What this means is that, if the preliminary hearing was held by a court commissioner, the defendant may "appeal" to the circuit court judge. If that avenue fails, the defendant will have to pursue highly specialized, complicated, and costly forms of relief that are rarely granted.<sup>129</sup> Few lawyers have the time, and few defendants have the money, to pursue one of these fool's errands.

This judicial abuse is, fortunately, easily cured by simple statutory reform. The legislature has already created exceptions to the guilty plea waiver rule, and can easily do so for preliminary hearing abuses. The legislature can also create an exception for the so-called error-free trial rule. The proposed statutory language creating these exceptions appears in Part IV.F. Under this proposed reform, as long as a motion is made at the trial-court level challenging a preliminary hearing defect, the issue would be preserved for post-conviction appellate review.

#### IV. LEGISLATIVE REFORM

The most effective overhaul of the preliminary hearing process would include the proposals advocated by some critics of Pennsylvania's preliminary hearing. That is, to prevent improvident prosecutions, legislative reform would prohibit the state from using hearsay to win bind-over, and would make even general witness credibility a factor in probable cause determinations.<sup>130</sup>

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<sup>126</sup> Mack v. State, 286 N.W.2d 563, 566 (Wis. 1980) (emphasis added).

<sup>127</sup> 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.").

<sup>128</sup> Id. at 114 (emphasis added).

<sup>129</sup> Of the various forms of possible relief identified by the courts, as a trial lawyer (rather than a post-conviction lawyer) I am only somewhat familiar with one of them: the "permissive interlocutory appeal." *Id.* at 112. To my knowledge, appellate courts rarely accept such appeals from defendants, and defense victories at this stage are rarer still. Further, as a practical matter, an incarcerated defendant will not want to spend the several months or years it would take to pursue this avenue of relief.

<sup>130</sup> See Sheldon, *supra* note 88, at 196 (recommending reforms involving hearsay and witness credibility determinations); Courtney M. Kenyon, *Incarceration Without Confrontation: An In-Depth Look at Commonwealth v. Ricker*, 121 PENN. ST. L. REV. 275, 281-84 (arguing against the use of hearsay).

In this Article, however, my goals are less ambitious. I operate under the assumption that such reforms are not politically feasible in today’s pro-government climate, pro-“victim” culture, and factory-like approach to producing convictions. My proposals, therefore, are more modest.

To briefly recap, Part III drew heavily from Wisconsin’s goldmine of abuses—abuses that are mirrored in Oregon, Pennsylvania, and elsewhere—to demonstrate how prosecutors and judges are able to bypass the preliminary hearing. Part III also discussed, in principle, how the legislature could prevent those abuses and restore meaning to the process. The following sections will now outline highly specific legislative reforms to implement the broad reform measures discussed in Part III.

For continuity, the following sections will continue the Wisconsin-focused theme developed in Part III. I will begin with the existing Wisconsin preliminary hearing statute and closely-related statutes, which appear below in plain text. (The gist of these statutes is very similar, in substantial ways, to the laws of several states including Kansas, New Hampshire, Oklahoma, Pennsylvania, and Utah, among others.)

Then, my proposed deletions from the statutes appear as lined-out text, while my proposed additions to the statutes appear in italics. Many of these proposed changes were inspired by the philosophies of courts from other states.<sup>131</sup> These court cases—including cases from Arizona, California, Colorado, New Mexico, New York, and Oregon—have also been discussed throughout this Article.

Footnotes are often included along with the proposed changes, below, to provide citation to existing case law where a proposed change codifies such law. (These footnotes would appear instead as case annotations in an annotated statute.) The portions of the statutes that are irrelevant for purposes of this Article are simply ignored.

A. *970.03 Preliminary Examination*<sup>132</sup>

This statute is the primary statute relating to preliminary hearings. For our purposes, it includes subs (1), (2), (5), and (7) – (9). The proposed amendments to these sections are intended, primarily, to prevent the prosecutorial and judicial abuses described in Parts III.A., III.D., and III.E of this Article.

- (1) 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

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<sup>131</sup> The philosophies expressed by those courts may not reflect the current law in those states, as court cases can be superceded by new legislation or even new court decisions.

<sup>132</sup> WIS. STATS. §970.03 (2017-18). Excluded from sub (1) of the statute is the language relating to bail revocation hearings, as such hearings are not relevant for our purposes. The following sections of the statute have also been excluded as they, too, are irrelevant for purposes of this Article: sub (3), which refers to the timing of the arraignment; sub (4), which refers to courtroom closures; sub (6), which refers to the exclusion and separation of witnesses before testifying; sub (10), which is pro-defendant but would be unnecessary in light of the proposed additions; sub (12), which refers to laboratory reports; sub (13) which refers to telephonic testimony; and sub (14) which refers to special rules for child witnesses. Sub (12) may also be irrelevant given the recent statutory amendment admitting hearsay evidence. Sub (11) does not currently exist in the statute.

committed by the defendant. *The defendant has the right to counsel at the preliminary examination.*<sup>133</sup>

(2) The preliminary examination shall be commenced within 20 days after the initial appearance of the defendant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of \$500. On stipulation of the parties or on motion and for cause, the court may extend such time.

(a) *The inability of the State Public Defender (SPD) to appoint counsel for qualifying indigent defendants does not constitute good cause to extend the 10- and 20-day time limits.*

(b) *If the SPD is unable to appoint counsel, the court shall appoint advocate counsel for the defendant at county expense.*<sup>134</sup>

(5) All witnesses shall be sworn and their testimony reported by a phonographic reporter. The defendant may cross-examine witnesses against the defendant, and may call witnesses on the defendant's own behalf who then are subject to cross-examination.

(a) *The defendant may not cross-examine or examine witnesses for purposes of attacking a witness's general credibility.*

(b) *Nothing in this section prevents the defendant from cross-examining or examining witnesses for any other lawful purpose, including attacking the reliability of the state's evidence,<sup>135</sup> challenging the plausibility of a witness's testimony,<sup>136</sup> impeaching a witness with prior inconsistent statements,<sup>137</sup> questioning a witness's motive,<sup>138</sup> laying the foundation for future suppression motions,<sup>139</sup> or establishing affirmative defenses.<sup>140</sup>*

(c) *The court shall not make a finding of probable cause or a bind-over decision until the defendant has cross-examined the state's witnesses and called any defense witnesses.*

(7) *The court shall make a probable cause determination as to each felony count in the complaint. ~~If the court finds probable cause to believe that a felony has been committed by the defendant, it shall bind the defendant over for trial.~~*

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<sup>133</sup> Coleman v. Alabama, 399 U.S. 1, 8 (1970).

<sup>134</sup> In re the Petition to Amend SCR 81.02, 2018 WI 83 (“If lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40/hour, as is increasingly the case, then judges must appoint a lawyer under SCR 81.02, at county expense.”).

<sup>135</sup> 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”).

<sup>136</sup> State ex rel. Funmaker v. Klamm, 317 N.W.2d 458, 460-61 (Wis. 1982).

<sup>137</sup> Wilson v. State, 208 N.W.2d 134, 48 (Wis. 1973) (prior inconsistent statements about an element of the crime or the perpetrator's identity go to plausibility and are relevant to the probable cause determination).

<sup>138</sup> State v. Berby, 260 N.W.2d 798, 803 (Wis. 1978) (“Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it entitled to.”).

<sup>139</sup> Hayes v. State, 175 N.W.2d 625, 628 (Wis. 1970) (questioning permitted to lay foundation for future suppression motions).

<sup>140</sup> When facts are raised with regard to affirmative defenses, the state has the burden to disprove them. Affirmative defenses are relevant even at the pleadings stage, and are also relevant at preliminary hearings where a higher standard and mode of proof is required. For affirmative defenses at the pleadings stage, *see, e.g., Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008).

(8) *With regard to each felony count*, if the court finds that it is probable that only a misdemeanor has been committed by the defendant, it shall amend ~~the complaint that count~~ to conform to the evidence. ~~The action shall then proceed as though it had originated as a misdemeanor action.~~

(9) *With regard to each felony count*, if the court does not find probable cause to believe that a crime has been committed by the defendant, it shall ~~order the defendant discharged forthwith~~ dismiss that count.

B. *970.038 Preliminary Examination; Hearsay Exception* <sup>141</sup>

This is the statute that made hearsay admissible at the preliminary hearing. The proposed amendments, including the additions of subs (3) – (5), are intended to prevent the prosecutorial and judicial abuses described in Part III.C. of this Article.

(1) Notwithstanding s. 908.02 [the evidentiary rule against hearsay], hearsay is admissible in a preliminary examination under ss. 970.03 . . .

(2) A court may base its finding of probable cause under s. 970.03 . . . in whole or in part on hearsay admitted under sub. (1). *It remains the duty of the 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. The hearsay nature of evidence may undermine the plausibility of the state's case.*<sup>142</sup>

(3) *Unless otherwise provided by law, all other rules of evidence continue to apply at the preliminary examination, including s. 906.02 requiring the witness to have personal knowledge of matters about which he or she would testify.*

(4) *Notwithstanding the admissibility of hearsay for preliminary examinations as stated in sub (1), hearsay within hearsay must satisfy an exception to the rule against hearsay as required by s. 908.05 before it may be admitted at a preliminary examination.*

(5) *Notwithstanding the prohibition on attacking a witness's general credibility, the general credibility of a hearsay declarant may be attacked under s. 908.06.*

C. *970.039 Preliminary Examination; Use of Testimony at Trial* <sup>143</sup>

This proposed amendment takes the form of a newly created statute that would prevent the prosecutorial and judicial abuses described in Part III.B. of this Article.

(1) *The state may not introduce a witness's preliminary examination testimony in lieu of testimony at the defendant's trial.*

<sup>141</sup> WIS. STATS. §970.038 (2017-18).

<sup>142</sup> State v. O'Brien, 850 N.W.2d 8, 22 (Wis. 2014).

<sup>143</sup> This would be a newly created statute, which could be numbered WIS. STATS. § 970.039.

(2) *Nothing herein limits the otherwise lawful use of such preliminary examination testimony at trial by either party, including for purposes of impeachment under s. 906.13.*

D. *971.01 Filing of the Information* <sup>144</sup>

This is the statute that governs the filing of the “information,” the pleading that supercedes the criminal complaint in felony actions. The proposed amendments are consistent with the amendments to 970.03 (7) – (9) and are intended to prevent the prosecutorial and judicial abuses described in Part III.E. of this Article.

(1) ~~The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial and, subject to s. 970.03 (10), shall file an information according to the evidence on such examination~~ subscribing his or her name thereto. *The counts in the information shall conform to the court’s probable cause determination of each count under ss. 970.03 (7), (8), and (9). The information may not include any counts that were not originally included in the complaint, except for counts that were originally charged as felonies but amended to misdemeanors by the court under s. 970.03 (8).*<sup>145</sup>

E. *971.23 Discovery and Inspection* <sup>146</sup>

This is the statute governing the prosecutor’s discovery obligations to the defense. The proposed amendment takes the form of an entirely new subsection that is intended to prevent the prosecutorial and judicial abuses described in Part III.D. of this Article.

(2) *WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT FOR PURPOSES OF THE PRELIMINARY EXAMINATION. On the date of the defendant’s initial appearance, the district attorney shall disclose to the defendant or his or her attorney all of the following materials and information:*

- (a) *Written law enforcement reports documenting the investigation of the alleged crime with which the defendant is charged.*
- (b) *Written or recorded statements concerning the alleged crime made by witnesses, alleged victims, and defendants.*
- (c) *All exculpatory evidence.*

F. *971.31 Motions before Trial* <sup>147</sup>

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<sup>144</sup> WIS. STATS. §971.01 (2017-18).

<sup>145</sup> This rule already exists in statute. See WIS. STATS. §971.03 (10) (“In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause. The facts arising out of any count ordered dismissed shall not be the basis for a count in any information”). However, as explained earlier, the courts have disregarded this statute in several convoluted decisions.

<sup>146</sup> WIS. STATS. §971.23 (2017-18). The proposed text would be a newly created section within that statute.

<sup>147</sup> WIS. STATS. §971.31 (2017-18). The proposed text would be a newly created section within that statute.



Finally, this proposed amendment takes the form of a newly created subsection that would preserve the defendant's right to appeal, after a conviction, any claims of error at the preliminary hearing. This is designed to prevent *all* prosecutorial and judicial abuses. Without the threat of an appeal, prosecutors and judges are free to abuse the preliminary hearing without consequence, as described in Part III.F. of this Article.

*(14) A defendant's claim of error at a preliminary examination, including claim of alleged error in the court's bind-over decision under s. 973.03 (7), (8), or (9), may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon (a) a no contest, guilty, or Alford plea, or (b) a judge's or jury's verdict of guilt following an error-free trial.*

#### CONCLUSION

The preliminary hearing was designed to prevent improvident prosecutions, an objective that brings tremendous benefits for innocent defendants, the taxpayers who must fund the criminal justice system, and even prosecutors who, theoretically, have a dual role as agent of the state and minister of justice.<sup>148</sup> However, prosecutorial and judicial abuses have decimated the preliminary hearing, turning it into nothing more than a speed bump on the prosecutor's road to obtaining a criminal conviction.<sup>149</sup>

These prosecutorial and judicial abuses of the preliminary hearing include denying defendants their constitutional right to counsel,<sup>150</sup> using multiple levels of uncorroborated hearsay to obtain bind-over,<sup>151</sup> preventing defendants from cross-examining the state's witnesses at the hearing<sup>152</sup> while simultaneously preserving the witnesses' testimony for later use at trial,<sup>153</sup> preventing the defense from calling its own witnesses or learning anything substantial about the state's case,<sup>154</sup> and using the hearing as a prosecutorial weapon to add charges without probable cause<sup>155</sup>—all the while shielding these prosecutorial and judicial abuses from post-conviction appeal by the defendant.<sup>156</sup>

Despite the seriousness of these prosecutorial and judicial abuses, the legislative fix is incredibly easy to implement. This Article proposed several very specific, simple revisions to a typical preliminary hearing statute and some closely-related statutes. These changes more clearly communicate the legislature's original intent and, more significantly, advance the primary objective of the preliminary hearing which is to prevent improvident prosecutions.<sup>157</sup>

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<sup>148</sup> See Parts I and II.

<sup>149</sup> See Part III.

<sup>150</sup> See Part III.A.

<sup>151</sup> See Part III.C.

<sup>152</sup> See Part III.D.

<sup>153</sup> See Part III.B.

<sup>154</sup> See Part III.D.

<sup>155</sup> See Part III.E.

<sup>156</sup> See Part III.F.

<sup>157</sup> See Part IV.