

# CHALLENGING HEARSAY AT PRELIMINARY EXAMINATIONS

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## I. THE LAW PERTAINING TO PRELIMINARY EXAMINATIONS OR HEARINGS.

### A. Hearsay Rules

Wis. Stat. § 908.01 **Definitions.** The following definitions apply under this chapter:

- (1) **Statement.** A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (2) **Declarant.** A "declarant" is a person who makes a statement.
- (3) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Wis. Stat. § 908.02 **Hearsay rule.** Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by statute.

Wis. Stat. § 908.03 **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) **PRESENT SENSE IMPRESSION.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (2) **EXCITED UTTERANCE.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) **THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- (4) **STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) **RECORDED RECOLLECTION.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.
- (6) **RECORDS OF REGULARLY CONDUCTED ACTIVITY.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02 (12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (6m) **PATIENT HEALTH CARE RECORDS.**
  - (a) *Definition.* In this subsection:
    1. "Health care provider" has the meanings given in ss. 146.81 (1) and 655.001 (8).
    2. "Patient health care records" has the meaning given in s. 146.81 (4).
  - (b) *Authentication witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer patient health care records into evidence at a trial or hearing does one of the following at least 40 days before the trial or hearing:
    1. Serves upon all appearing parties an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian.
    2. Notifies all appearing parties that an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian is available for inspection

and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

**(bm) Presumption.** Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

**(c) Subpoena limitations.** Patient health care records are subject to subpoena only if one of the following conditions exists:

1. The health care provider is a party to the action.
2. The subpoena is authorized by an ex parte order of a judge for cause shown and upon terms.
3. If upon a properly authorized request of an attorney, the health care provider refuses, fails, or neglects to supply within 2 business days a legible certified duplicate of its records for the fees under s. 146.83 (1f) or (3f), whichever is applicable.

**(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY.** Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

**(8) PUBLIC RECORDS AND REPORTS.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

**(9) RECORDS OF VITAL STATISTICS.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

**(10) ABSENCE OF PUBLIC RECORD OR ENTRY.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with s. 909.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

**(11) RECORDS OF RELIGIOUS ORGANIZATIONS.** Statements of births, marriages, divorces, deaths, whether a child is marital or nonmarital, ancestry, relationship by blood, marriage or adoption, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

**(12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

**(13) FAMILY RECORDS.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

**(14) RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

**(15) STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

**(16) STATEMENTS IN ANCIENT DOCUMENTS.** Statements in a document in existence 20 years or more whose authenticity is established.

**(17) MARKET REPORTS, COMMERCIAL PUBLICATIONS.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

**(18) LEARNED TREATISES.** A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.

**(a)** No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

**(b)** No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

**(c)** The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

**(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this personal or family history.

**(20) REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

**(21) REPUTATION AS TO CHARACTER.** Reputation of a person's character among the person's associates or in the community.

**(22) JUDGMENT OF PREVIOUS CONVICTION.** Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony as defined in ss. 939.60 and 939.62 (3) (b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

**(23) JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

**(24) OTHER EXCEPTIONS.** A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Wis. Stat. § **908.04 Hearsay exceptions; declarant unavailable; definition of unavailability.**

**(1)**"Unavailability as a witness" includes situations in which the declarant:

**(a)** Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

**(b)** Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or

**(c)** Testifies to a lack of memory of the subject matter of the declarant's statement; or

**(d)** Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

**(e)** Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

**(2)** A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

Wis. Stat. § **908.045 Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

**(1) FORMER TESTIMONY.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

**(2) STATEMENT OF RECENT PERCEPTION.** A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

**(3) STATEMENT UNDER BELIEF OF IMPENDING DEATH.** A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

**(4) STATEMENT AGAINST INTEREST.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

**(5) STATEMENT OF PERSONAL OR FAMILY HISTORY OF DECLARANT.** A statement concerning the declarant's own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated.

**(5m) STATEMENT OF PERSONAL OR FAMILY HISTORY OF PERSON OTHER THAN THE DECLARANT.** A statement concerning the birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption or marriage or was so intimately associated with

the other person's family as to be likely to have accurate information concerning the matter declared.

(6) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Wis. Stat. § 908.06 **Attacking and supporting credibility of declarant.** When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Also see Wis. Stat. § 908.08 **Audiovisual recordings of statements of children.**

## **B. Preliminary examination law**

Wis. Stat. § 970.03 **Preliminary examination.**

(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 committed by the defendant.

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(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.

(6) During the preliminary examination, the court may exclude witnesses until they are called to testify, may direct that persons who are expected to be called as witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined.

(7) 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.

(8) If the court finds that it is probable that only a misdemeanor has been committed by the defendant, it shall amend the complaint to conform to the evidence. The action shall then proceed as though it had originated as a misdemeanor action.

(9) 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.

Wis. Stat. § 970.038 **Preliminary examination; hearsay exception.**

(1) Notwithstanding s. 908.02, hearsay is admissible in a preliminary examination under ss. 970.03, 970.032, and 970.035.

(2) A court may base its finding of probable cause under s. 970.03 (7) or (8), 970.032 (2), or 970.035 in whole or in part on hearsay admitted under sub. (1).

History: 2011 Act 285, effective date April 27, 2012, applies to any preliminary examination held after effective date.

### **Case law excerpts:**

*For a good overview of the history and purpose of the preliminary hearing, see, State v. Dunn, 121 Wis. 2d 389, 359 N.W.2d 151 (1984). Excerpts follow:*

\*393....A defendant may be bound over for trial when the evidence at the preliminary hearing is sufficient to establish probable cause that a felony has been committed and that the defendant probably committed it. Section 970.03(1), Stats.

Although the right to a preliminary \*394 examination was unknown to common law, *State ex rel. Durner v. Huegin*, 110 Wis. 189, 239, 85 N.W. 1046 (1901), the practice of a similar procedure was not.

“At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest.... The justice of the peace would ‘examine’ the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody.”  
*Gerstein v. Pugh*, 420 U.S. 103, 114-15, 95 S.Ct. 854, 863-64, 43 L.Ed.2d 54 (1975) (citations and footnote omitted).

It is clear that the right to a preliminary examination is solely a statutory right. We have stated that, “The right to such an examination stems purely from statute and is not considered a constitutional right.” *State ex rel. Klinkiewicz v. Duffy*, 35 Wis. 2d 369, 373, 151 N.W.2d 63 (1967) (footnote omitted), cited with approval in *State ex rel. Funmaker v. Klamm*, 106 Wis. 2d 624, 633, 317 N.W.2d 458 (1982).

In deciding whether there was probable cause to bind the defendant over for trial, it is helpful to first discuss the purpose of a preliminary examination. Section 970.03(1), Stats., states that the purpose of a preliminary examination is to determine if there is probable cause to believe a felony has been committed by a defendant. Section 970.03(7), then commands the court to bind the defendant over for trial if probable cause is found to exist.

The underlying purpose of the examination is to determine whether the defendant should be subjected to \*395 criminal prosecution and further deprived of his liberty. This theme is echoed in both old and current decisions. In *Thies v. State*, 178 Wis. 98, 189 N.W. 539 (1922), this court said, “The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive \*\*154 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, and 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.” *Id.*, 178 Wis. at 103, 189 N.W. 539.

More recently, in *State v. Hooper*, 101 Wis. 2d 517, 305 N.W.2d 110 (1981), we held that a preliminary examination is “.... intended to be a summary proceeding for the purpose of determining whether there is a reasonable probability that the defendant committed a felony and thus ‘a substantial basis for bringing the prosecution and further denying the accused his right to liberty.’” *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 606, 267 N.W.2d 285 (1978).” *Hooper*, 101 Wis. 2d at 544-45, 305 N.W.2d 110.

The parties in this case disagree as to what quantum of evidence is necessary at a preliminary hearing to establish to a reasonable probability that the defendant committed a felony. The court of appeals held that the probable cause requirement is satisfied if any reasonable inference supports a conclusion that the defendant probably committed a

felony even though there are equally strong inferences to the contrary. In such instance, the state's evidence would not be required to reach the level that guilt is more likely than not. The defendant disagrees with the court of appeals, asserting that a judge at a preliminary hearing must weigh the evidence and choose between conflicting inferences.

\*396 A preliminary hearing may require more by way of evidence than other preliminary determinations of probable cause. *Taylor v. State*, 55 Wis. 2d 168, 173, 197 N.W.2d 805 (1972). Starting with the probable cause that is required for a search warrant, we have held that “the term ‘probable cause’ means less than evidence which would justify condemnation or be competent in a preliminary examination.” *State v. Beal*, 40 Wis. 2d 607, 613, 162 N.W.2d 640 (1968). Second, with respect to the probable cause standard for an arrest, “[t]he evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not,” *State v. Welsh*, 108 Wis. 2d 319, 329, 321 N.W.2d 245 (1982), and “[t]he quantum of evidence necessary for probable cause to arrest is less than that for guilt but is more than bare suspicion,” *State v. Drogsvold*, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (Ct.App. 1981) (citation omitted). Finally, we have held that “The probable cause that is required for a bindover is greater than that required for the issuance of an arrest warrant, but guilt beyond a reasonable doubt need not be proven.” *State v. Berby*, 81 Wis. 2d 677, 683, 260 N.W.2d 798 (1978) (footnote omitted).

The answer to the issue at hand is derived from our previous decisions which have limited the role of an examining judge at a preliminary examination. A preliminary hearing as to probable cause is not a preliminary trial or a full evidentiary trial on the issue of guilt beyond a reasonable doubt. *Hooper*, 101 Wis. 2d at 544, 305 N.W.2d 110, and *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 228, 161 N.W.2d 369 (1968). It is intended to be a summary proceeding to determine \*397 essential or basic facts as to probability. The examining judge is “... concerned with the practical and nontechnical probabilities of everyday life in determining whether there is a substantial basis for bringing the prosecution and further denying the accused his right to liberty.” *Huser*, 84 Wis. 2d at 605-06, 267 N.W.2d 285 (citation omitted).

Also, although the judge at a preliminary examination must ascertain the plausibility of a witness's story and whether, if believed, it would support a bindover, the court cannot delve into the credibility of a witness. *Vigil v. State*, 76 Wis. 2d 133, 144, 250 N.W.2d 378 (1977). The issue as to \*\*155 credence or credibility is a matter that is properly left for the trier of fact. *Hooper*, 101 Wis. 2d at 545, 305 N.W.2d 110, citing *State v. Knudson*, 51 Wis. 2d 270, 280-81, 187 N.W.2d 321 (1971); and *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d at 228, 161 N.W.2d 369.

We recognize that the line between plausibility and credibility may be fine; the distinction is one of degree. We explained in *Wilson v. State*, 59 Wis. 2d 269, 208 N.W.2d 134 (1973),

“The central approach to the role of the magistrate in determining credibility of witnesses is one of degree. In *Knudson*, the defendant was able to attack the credibility of the state's witness through what amounted to a cross-examination of her, but was not allowed to call in other witnesses to show variances in her story. There is a point where attacks on credibility become discovery. That point is crossed when one delves into general trustworthiness of the witness, as opposed to plausibility of the story. Because all that need be established for a bindover is probable cause, all that is needed is a believable account of the defendant's

commission of a felony.” 59 Wis. 2d at 294-95, 208 N.W.2d 134 (emphasis added), cited with approval in *State ex rel. Funmaker*, 106 Wis. 2d at 631, 317 N.W.2d 458.

The focus of the judge at a preliminary hearing is to ascertain whether the facts and the reasonable inferences \*398 drawn therefrom support the conclusion that the defendant probably committed a felony. If inferences must be drawn from undisputed facts, as in this case, only reasonable inferences can be drawn. We stress that a preliminary hearing is not a proper forum to choose between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant. *State ex rel. Evanow*, 40 Wis. 2d at 228, 161 N.W.2d 369. That is the role of the trier of fact at trial. If the hearing judge determines after hearing the evidence that a reasonable inference supports the probable cause determination, the judge should bind the defendant over for trial. Simply stated, probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony.

Requiring an examining judge to bind a defendant over for trial when there exists a set of facts that supports a reasonable inference that the defendant probably committed a felony sufficiently satisfies the purpose for preliminary hearings, i.e., that the accused is not being prosecuted too hastily, improvidently, or maliciously and that there exists a substantial basis for bringing the prosecution. The state agrees, affirming in its brief the screening function of the preliminary hearing, and recognizes that “[i]f the inference that the accused committed a felony is so weak that drawing it still does not establish a plausible account of probable guilt, it is within the discretion of the magistrate to decline to find probable cause to bind him over for trial.”

**Limitations upon right of cross-examination:** Defense counsel should be allowed to cross-examine a state's witness to determine the plausibility of the witness, but not to attack the witness's general trustworthiness. *Wilson v. State*, 59 Wis. 2d 269, 208 N.W.2d 134 (1973).

**Limitations upon right to present evidence:** The purpose of a preliminary examination is limited to an expeditious determination of whether probable cause exists for the state to proceed with felony charges against a defendant. This limited purpose does not permit a criminal defendant to compel discovery in anticipation of the hearing. There is no 6th Amendment right, based on effective assistance of counsel, and no compulsory process right to subpoena police reports and other non-privileged materials prior to the examination. *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457:

¶ 33 The independent screening function of the preliminary examination serves as a check on the prosecutorial power of the executive branch. An accused has the option to assure that the hearing is scheduled expeditiously so that he may be discharged quickly if the government cannot justify its right to go forward. *Klinkiewicz*, 35 Wis. 2d at 373, 151 N.W.2d 63.

¶ 35 Significantly, a defendant may present evidence at a preliminary examination. Wis. Stat. § 970.03(5).<sup>[8]</sup> He may call witnesses to rebut the plausibility of a witness's story and probability that a felony was committed. See *Dunn*, 121 Wis. 2d at 396-98, 359 N.W.2d 151. In this regard, the defendant must have compulsory process to assure the appearance of his witnesses and their relevant evidence.

¶ 37 Because the statutory purpose of the preliminary examination is narrowly focused upon a determination of probable cause, Wis. Stat. § 970.03(1), a defendant's right to present evidence at the hearing is limited to "essential facts as to probability" that the alleged offense occurred. *Knudson*, 51 Wis. 2d at 280, 187 N.W.2d 321 [citation omitted]. This means that although a defendant may subpoena witnesses and evidence for the preliminary examination, *see* Wis. Stat. §§ 973.03(5), 972.11(1), and 885.01, his subpoena may be quashed, a witness may not be allowed to testify, or evidence may be excluded if the defendant is unable to show the relevance of the testimony or evidence to the rebut probable cause.

## II. STATUTORY OBJECTIONS:

*These are objections to make at the preliminary hearing itself. Be sure that the court commissioner allows you to make a sufficient record to preserve these objections for review by motion in the trial court and if necessary on permissive appeal to the court of appeals.*

*All objections to a deficient preliminary hearing must be litigated by a motion challenging the bind-over and then by a petition for a permissive appeal (a/k/a interlocutory appeal) or they are waived. See "V. Interlocutory or permissive appeals" below. If the court of appeals denies your petition for a permissive appeal, the issue is preserved if your client has a trial. All challenges are waived when your client pleads guilty.*

**A. Conflict of Statutes:** There is a conflict between §§ 911.01 and 972.11 (1) that make civil rules of evidence applicable in criminal cases generally and new § 970.038 that allows hearsay in preliminary examinations. *But see State v. Schaefer*, 2008 WI 25:

¶ 47 "[G]enerally where a specific statutory provision leads in one direction and a general statutory provision in another, the specific statutory provision controls." [Citation omitted.] This principle of statutory interpretation aligns with the important qualification in Wis. Stat. § 972.11(1) that a civil practice applies to criminal procedure "unless the context of a section or rule manifestly requires a different construction." Wis. Stat. § 972.11(1) (emphasis added).

Other rules of evidence do apply at preliminary hearings, and are grounds for objection.

**B. Requirement of Personal Knowledge/Foundations:** Under § 906.02, witnesses must have personal knowledge regarding the subject of their testimony. While this would still permit a police officer to testify to what a crime victim told the officer, it would not allow the prosecutor to call a liaison officer to testify that he read another officer's report and the report contains what the witnesses stated when interviewed.

Also see s. 908.08, Audiovisual evidence of child witness, for special foundation requirements.

**C. Authentication.** Chapter 909's rules of authentication and identification of evidence still apply. There must be evidence supporting the finding that the evidence is what the proponent claims.

**D. Identification:** A witness must identify the defendant at a preliminary hearing as the person who probably committed the felony in order for the commissioner to make the requisite

probable cause determination. If the hearsay witness is not able to do this, the client should not be bound over for trial without an objection.

**E. The anti-vouching rule** of *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984) applies. (No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling truth.) *Haseltine* also prohibits a witness from vouching for the truthfulness of out-of-court statements of a non-testifying declarant.

### III. STRATEGIES

**A. Statutory Rights of Cross Examination/Compulsory Process/Presence.** A defendant continues to have the statutory right to be present, § 970.04 (1) (d), to cross examine witnesses who testify at a preliminary hearing, and to call witnesses on his own behalf, § 970.03 (5). That's confrontation.

**B. Subpoena witnesses and other records to attack credibility of hearsay declarant.**

Wis. Stat. § 908.06 **Attacking and supporting credibility of declarant.**

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

### IV. CONSTITUTIONAL CHALLENGES

**A. CONSTITUTIONAL RIGHT TO CONFRONTATION.** Pre-*Crawford* Wisconsin case law incorrectly holds that a defendant's statutory right to cross-examine witnesses does not entitle him to "confront" a hearsay declarant at a preliminary hearing. See e.g. *State v. Padilla*, 110 Wis. 2d 414, 424, 329 N.W.2d 263 (Ct. App. 1982), and *Mitchell v. State*, 84 Wis. 2d 325, 326, 267 N.W.2d 349 (1978). Both cases are based upon, and misread, the holding in *Gerstein v. Pugh*, 420 U. S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975).

The full adversarial nature of the preliminary hearing under ch. 970 is very different from the non-adversarial judicial review procedures considered by the U. S. Supreme Court in *Gerstein*. In *Gerstein*, the court considered whether the Fourth Amendment required an adversarial proceeding to establish probable cause for pretrial detention *shortly after arrest*. The court ruled that because of its "limited function and its nonadversary character, such a probable cause determination is not a critical stage in the prosecution that would require appointed counsel." 420 U.S. at 122. Then the court contrasted that process with the kind of preliminary hearing used in Wisconsin "to determine whether the evidence justifies going to trial:"

When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on

*cross-examination*. This kind of hearing also requires appointment of counsel for indigent defendants.

*Gerstein*, 420 U.S. at 120 (emphasis added.) *Gerstein* simply does not stand for the proposition that constitutional confrontation rights do not apply at an adversary preliminary hearing of the type used in Wisconsin.

## **B. CRAWFORD, RELIABILITY AND CONFRONTATION**

*Crawford v. Washington*, 541 U.S. 36 (2004) transformed the doctrine of the Confrontation Clause. The *Crawford* court noted that even though the Confrontation Clause does not “command[] ...that evidence be reliable,” its “ultimate goal is to ensure the reliability of evidence,” and to achieve that objective, it requires “that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 124 S. Ct. at 1370.

The *Crawford* decision leaves unresolved the question “what standards govern the adequacy of a pretrial opportunity for cross-examination?” We should argue that an opportunity to be *face-to-face* with the accuser/witness is at least presumptively required to satisfy the Confrontation Clause. (The adequacy of the cross-examination allowed at the preliminary hearing is irrelevant to this claim.)

A preliminary examination is considered a critical stage of the Wisconsin criminal process during which an accused has a Sixth Amendment right to the assistance of counsel. *State v. Wolverton*, 193 Wis. 2d 234, 252, 533 N.W.2d 167 (1995), applying *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

Argue that under *Crawford*, the right to confrontation has been given new life by the court and is applicable to all critical stages of a criminal case including preliminary hearings. Remember that many lower courts, including federal courts, have declined to apply *Crawford* properly in the past: many courts admitted hearsay crime lab analyst evidence violating the right to confrontation until the court issued its ruling in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

## **C. DUE PROCESS IN THE CRIMINAL CONTEXT MUST BE INTERPRETED TO GUARANTEE MORE THAN THE RIGHT TO A FAIR TRIAL. BECAUSE MOST CRIMINAL CASES ARE RESOLVED THROUGH PLEA NEGOTIATIONS, DEFENDANTS ARE ENTITLED TO PRETRIAL PROCEDURES THAT PROTECT THE FAIRNESS AND THE INTEGRITY OF THE PROCESS LEADING TO CONVICTION AND SENTENCING.**

**1. 95% of criminal cases are resolved by plea or settlement and will never make it to trial,** 2 Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541 note 2, at 554; 9 Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 42 (2006).

**2. The court has a duty to review the charging decisions of overworked prosecutors in understaffed offices.** The criminal system places enormous trust in the good faith of prosecutors, with relatively little judicial or public oversight except at trial. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 Yale L. & Pol’y Rev. 1, 22 (2006).

Such enormous trust is undoubtedly based on an assumption that prosecutors are able to give each case the review necessary to make an appropriate, well-reasoned charging decision. But what about a system, like ours, where overworked prosecutors in understaffed offices may be tempted

to act as a rubber stamp for the arresting authority? What about a system that generates canned complaints (via the Protect system) which establish probable cause by reciting boilerplate language or by attaching police reports, rather than by exercising careful review and thoughtful drafting? See, e.g., *State v. Smaxwell*, 235 Wis. 2d 230, 612 N.W.2d 756 (Ct. App. 2000) (body of the complaint contained no description of the events leading to arrest and instead attached an incident report to the complaint).

“People talk about taking away someone's personal freedom as a delicate responsibility but in reality prosecutors spend very little time on each case,” Winnebago County Dist. Atty. Christian Gossett said. *Prosecutors Lament High Caseloads, Low Staffing*, Appleton Post Crescent, February 13, 2012, [www.postcrescent.com](http://www.postcrescent.com).

A 2007 state audit revealed that Wisconsin had 117 fewer prosecutors than needed to adequately handle the existing caseload and that staffing trends were moving in the wrong direction. The audit showed, for example, that the number of prosecutors in the state dropped 4.4% between 2002 and 2006 while the number of cases referred for prosecution increased 11.5%. Wisconsin Legislative Audit Bureau Report 07-9, *Allocation of Prosecutor Positions, Department of Administration*, July 2007, highlights available at: <http://legis.wisconsin.gov/lab/reports/07-9highlights.htm>.

In addition, DAs consider a high turnover rate among ADAs as a major threat to public safety and criminal justice in Wisconsin. An ADA plays a crucial role in deciding when to pursue the prosecution of an individual charged with a crime, when to seek alternatives to incarceration, which penalties and remedial programs to recommend, and when to agree to a plea bargain. The DAs we talked with cite experience and continuity as essential to efficient and effective criminal justice work. Dennis Dresang, et al., *Public Safety and Assistant District Attorney Staffing in Wisconsin*, La Follette School of Public Affairs, University of Wisconsin Madison, October 2011, available at: <http://www.lafollette.wisc.edu/publicservice/ada/ada.pdf>.

In serious cases, the preliminary hearing has historically played an essential procedural role, acting as the judiciary's lone check on the power of the state to bring criminal charges:

“...the purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and 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.” *Thies v. State*, 178 Wis. 2d 98, 103, 189 N.W.2d 539 (1922).

### **3. The importance of the preliminary hearing in the criminal process is emphasized by the higher burden of proof demanded:**

It is well established in our case law that “probable cause” does not refer to a uniform degree of proof, but instead varies in degree at different stages of the proceedings. For example, the probable cause required for issuance of a warrant is less than the probable cause needed to bind a defendant over for trial after a preliminary hearing. [Citations omitted.] See also *Taylor v. State*, 55 Wis. 2d 168, 173, 197 N.W.2d 805 (1972) (noting that a preliminary hearing requires more evidence than other preliminary probable cause determinations). *County of Jefferson v. Renz*, 231 Wis. 2d 293, ¶¶31-32, 603 N.W.2d 541 (1999).

Allowing the same quality of evidence (hearsay evidence) that establishes probable cause for a warrant, or a criminal complaint, to satisfy probable cause at a preliminary hearing, effectively eviscerates the only real check on the power and wisdom of the State until the jury trial stage.

**Compare the standard for assessing the reliability of hearsay in a criminal complaint:** While hearsay relied upon in support of a criminal complaint requires some basis for crediting its reliability, whether the informants are named or not, that requirement is satisfied if the hearsay is based upon observation of the informants. *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 173 N.W.2d 175 (1970).

In other words, the finding of reliability must be based upon something more than what satisfies the probable cause standard for a criminal complaint – what more has the state produced? Is it reliable enough to make it more likely than not that this defendant committed a felony? Remember, almost anything is plausible.

**Absurdity:** *Sec. 970.038 allows the court to find probable cause to hold the accused for trial solely based upon hearsay - evidence that is unreliable by definition and inadmissible at any subsequent trial.*

**4. Criminal due process must guarantee more than the right to a fair trial. It must guarantee fair pretrial procedures that provide for meaningful review of the charging decision and assess whether sufficient evidence exists to justify depriving the defendant of liberty and property interests pending trial.**

The following arguments are excerpts from Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 Yale L. & Pol’y Rev. 1 (Fall 2006) [footnotes omitted]:

**\*2 Procedural due process** seems straightforward...: a person may not constitutionally be deprived of “life, liberty or property” by governmental action without notice and a **meaningful** opportunity to be **heard**.

**\*3**...In **criminal** cases, however, there are respects in which **procedural due process** can apply quite differently. It may surprise those not steeped in the intricacies of **criminal procedure** to learn that **hearing rights** constitutionally required for individuals threatened with adverse government action in civil settings are not necessarily enjoyed by **criminal** defendants. In particular, while the **criminal** trial, when it occurs, is the pinnacle of constitutional “**process**,” it has long been recognized that **criminal** defendants **\*4** constitutionally may be arrested, detained, and suspended from government employment before trial with less **meaningful hearing rights** than comparable deprivations would require in civil litigation. Justice Stewart may best be known for his memorable quote on the difficulty of defining obscenity, but he also originated a pithy observation with respect to **procedural due process** when he complained that under the Court’s different **due process** rules governing the pretrial **process** in civil and **criminal** matters, “the Constitution extends less **procedural** protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, . . . the custody of a refrigerator, . . . the temporary suspension of a public school student, or the suspension of a driver’s license.”

**\*5**...In **criminal** cases, by contrast, there is no constitutional requirement that the defendant be permitted to test the factual basis for the government’s charges prior to the **criminal** trial, even when those **criminal** charges are used to justify imposing restrictions on the defendant’s liberty or property pending trial. The net result of these doctrines is that the main **procedural** event in a

**criminal** case, from a **due process** perspective, is the **criminal** trial. The preliminary steps that occur prior to trial in a **criminal** case--arraignment, bail **hearings** and so on--are largely administrative steps designed to bring the defendant to trial, not **meaningful** adversary proceedings designed to review and test the government's evidence. Instead, the **criminal** defendant's primary constitutional protection with respect to the harms he may suffer in the pretrial **criminal process** is to insist on a (relatively) speedy trial.

#### **\*18 A. Criminal Due Process at Trial**

It is true that at trial, a **criminal** defendant receives an impressive degree of "**process**" constitutionally required to adjudicate his guilt or innocence. Many of these **rights** are provided by the express terms of the Bill of **Rights**. The Sixth Amendment, for example, grants a **criminal** defendant the **right** to a speedy trial, the **right** to trial by jury, the **right** to assistance of counsel, the **right** to compulsory **process**, and the **right** to confront the government's witnesses. The Fifth Amendment grants a **criminal** defendant the **right** against compulsory self-incrimination, and protects the defendant against being placed in jeopardy twice for the same offense. The Fourth Amendment (as judicially interpreted) bars the introduction at his **criminal** trial of evidence seized in violation of the defendant's constitutional **rights**.

But **due process** itself also provides additional protections at trial, both substantive and **procedural**. Beyond the explicit guarantees of the Bill of **Rights** described above, the Supreme Court has found implicit in the constitutional guarantee of "**due process** of law" a number of additional "free-standing" **rights** that attach at a **criminal** trial. Notwithstanding the Court's rhetoric at times suggesting a limited role for freestanding **due process**, the Supreme Court has taken a relatively expansive view of **due process** in the context of a **criminal** trial. Beyond the specific **rights** spelled out in the Bill of **Rights**, for example, it is **due process** that grants the defendant such central protections as the **right** to an unbiased judge, the **right** to a presumption of innocence, the **right** to have the government prove its case beyond a reasonable doubt, and the **right** \*19 to obtain exculpatory evidence in the government's possession. **Due process** also prevents a defendant from being tried when he is mentally incompetent, and from being **criminally** punished without an adjudication of guilt. While none of these **rights** is expressly spelled out in the Constitution, the Court has found each of them constitutionally required as part of the **criminal process** of conviction and punishment that is guaranteed by "**due process**."

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In short, the **criminal** trial itself, extending through the sentencing **process**, \*20 is premised on a **due process** model with adversary testing and participatory **rights**. This model reflects the same basic notice-and-hearing values expressed in the Court's **procedural due process** rulings in civil and administrative settings. The same cannot be said, however, when the focus turns to the Supreme Court cases that govern the preliminary stages of the **criminal process**. Here, the Court's constitutional model permits a nonadversary, closed **process** that fails to provide for partisan testing of the government's charges and leaves little room for the defendant's **meaningful** participation. This occurs even though the defendant may have very significant liberty and property interests at stake.

#### **B. Criminal Due Process Before Trial**

In the preliminary stages of the **criminal process**, not surprisingly, very substantial deprivations of the accused person's protected interests can occur. Some harmful effects flow simply from being charged with a **criminal** offense. But the burden of a **criminal** prosecution is rarely limited to an accusation alone. Other burdens frequently follow as part of the preliminary steps taken by the government to bring an alleged offender to justice. The accused is often arrested and,

following arrest, subjected to a litany of bureaucratic **procedures** such as fingerprinting and photographing. More seriously, an accused may be detained in prison pending trial. Based on the **criminal** charge, the government may also seek to seize the defendant's property, to limit his freedom to travel, to suspend his government employment, to bar him from government contracting, or to take other measures to protect governmental interests while the case is pending.

\*21 These are clearly the types of burdens that the Court would normally view as deprivations of "liberty" or "property" sufficient to invoke **procedural due process** protections.... The deprivation of these interests would normally give rise to a **right** to notice and a **hearing** before an impartial decision-maker in the civil context.

This is not always so in the **criminal** context. While the defendant may have extensive **due process hearing rights** at a **criminal** trial and sentencing, the Court has frequently held that **due process** does not necessarily require extending comparable **hearing rights** to the defendant in the initial stages of a **criminal** case. Compared to the **due process** protections routinely afforded to \*22 lesser interests in the civil context, this doctrine is striking. It is not an exaggeration to say that defendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer **meaningful** review **procedures**--that is to say, **procedures** to test the legitimacy of the underlying charges--than **due process** would require in the preliminary stages of a private civil case seeking the return of household goods. The **criminal** system places enormous trust in the good faith of prosecutors, with relatively little judicial or public oversight except at trial.

\*23 ...

More to the point, however, these routine pretrial **criminal hearings** would not satisfy normal **due process** rules because they are not designed to test the issue that is most fundamental from a **due process** perspective--whether sufficient evidence of **criminal** wrongdoing exists to justify depriving the defendant of liberty and property interests pending trial. Instead, these are more properly viewed as administrative steps designed to **process** the case and bring the defendant to trial. Arraignment, for example, is simply an initial court appearance typically limited to such preliminary matters as informing the defendant of the charges and of his **rights**, determining whether counsel should be appointed, or determining how the defendant will plead. Similarly, the focus at a bail **hearing** is narrow. The traditional bail inquiry concerns the risk that the defendant will not appear for trial, and seeks to set bail conditions to ensure the defendant's later appearance. To the extent the judge at a bail **hearing** considers the evidence of the crime, it is simply to determine whether the evidence is so strong that the defendant is unlikely to appear for trial if released, not to make an assessment whether the government has presented sufficient evidence to justify restricting the defendant's liberty or property **rights** pending trial.

\*24 Beyond arraignment and bail, there is a common pretrial **procedure** known as a preliminary **hearing** (or preliminary examination). This is an adversary proceeding, established by statute, that on its face seems to contemplate pretrial judicial review of the sufficiency of the government's evidence. When a preliminary **hearing** is held, it is a judicial **hearing** at which the defendant is present and has **procedural rights**, designed to test whether the government's evidence displays probable cause to support the **criminal** charges--akin in function to a civil **hearing** on a motion seeking pretrial relief, if not quite as protective.

While preliminary **hearings**, if held, provide some opportunity for **criminal** defendants to test the government's evidence, because they are not constitutionally required, they are offered if at all as a matter of legislative grace. ... The net result is that while the \*25 defendant is indeed "**processed**" through the **criminal** justice system, he has no constitutional **right** to the kind of **process** designed to ensure that there is a valid basis for the **criminal** charges on which he may

be arrested, detained, and suspended from employment until he is ultimately tried.

**V. PERMISSIVE OR INTERLOCUTORY APPEALS** (*i.e.*, court of appeals has discretion in deciding whether to hear the appeal.)

The procedure for pursuing a permissive appeal is governed by Wis. Stat. §§ (Rules) 809.50 and 809.52. The criteria the court of appeals applies when deciding whether to entertain a permissive appeal are found in Wis. Stat. § 808.03(2).

**A. Criteria/Entitlement.**

1. Both the State and the defendant are entitled to pursue a permissive appeal. See *State v. Rabe*, 96 Wis. 2d 48, 59-60, 291 N.W.2d 809 (1980).

2. Permissive appeals are strongly disfavored, especially in criminal prosecutions. See *State v. Jenich*, 94 Wis. 2d 74, 80, 288 N.W.2d 114 (1980); *State ex rel. A.E. v. Circuit Court for Green Lake County*, 94 Wis. 2d 98, 101, 288 N.W.2d 125 (1980); *State v. Borowski*, 164 Wis. 2d 730, 735, 476 N.W.2d 316 (Ct. App. 1991).

3. Wis. Stat. § (Rule) 808.03(2) sets forth the criteria for permissive appeals:

Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

- (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
- (b) Protect the petitioner from substantial or irreparable injury; or
- (c) Clarify an issue of general importance in the administration of justice.

4. Case law pertaining to appeals of preliminary hearing decisions:

Appellate review of a preliminary hearing is limited to determining whether the record contains competent evidence to support the examining magistrate's exercise of judgment. Although motive is not an element of any crime and does not of itself establish guilt or innocence, evidence of motive may be given as much weight as the fact finder deems it is entitled to at the preliminary hearing or trial. *State v. Berby*, 81 Wis. 2d 677, 260 N.W.2d 798 (1978).

Standard of Review: If any reasonable inference supports a conclusion that the defendant probably committed a crime, the magistrate must bind over the defendant. *State v. Dunn*, 117 Wis. 2d 487, 345 N.W.2d 69 (Ct. App. 1984); *aff'd*. 121 Wis. 2d 389, 359 N.W.2d 151 (1984).

The state has the right to appeal a dismissal when it believes an error of law was committed. An uncorroborated confession alone was sufficient to support a probable cause finding. *State v. Fry*, 129 Wis. 2d 301, 385 N.W.2d 196 (Ct. App. 1985).

A defendant claiming error at a preliminary examination may obtain relief only prior to trial; the defendant may seek interlocutory review from the court of appeals under s. 809.50. *State v. Webb*, 160 Wis. 2d 622, 467 N.W.2d 108 (1991).

If a bindover decision is made by a court commissioner or circuit judge, review must be by a motion to dismiss brought in circuit court. Habeas corpus is not available to review a bindover. *Dowe v. Waukesha County Circuit Ct.* 184 Wis. 2d 724, 516 N.W.2d 714 (1994).

## **B. Procedure for Seeking Permissive Appeal.**

See generally Wis. Stat. §§ (Rules) 809.50 and 809.52.

1. Leave to appeal must be sought by filing a petition and supporting memorandum in the court of appeals. Filing occurs when the clerk receives the document. Service upon a party occurs when the document is placed in the regular US mail, properly addressed, with adequate postage. Wis. Stat. § (Rule) 801.14 (1), (2) and (4), and 809.80 (2)(a).

2. To be appealable under this procedure, a judgment or order must first be entered (i.e., filed) in accordance with Wis. Stat. § 806.06(1)(b) or Wis. Stat. § 807.11(2).

3. The petition must include “[a] copy of the judgment or order sought to be reviewed,” Wis. Stat. § (Rule) 809.50(1)(d).

4. 14-day time limit. An appeal from a nonfinal judgment or order must begin “within 14 days after the entry of the judgment or order” appealed from, Wis. Stat. § (Rule) 809.50(1). You do count Saturdays, Sundays, or holidays. Wis. Stat. § 801.15(1)(b).

5. The petition and supporting memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. Wis. Stat. § (Rule) 809.50(1).

6. A statement must be appended to the petition attesting to the type of font used (monospaced or proportional serif). If a proportional serif font is used, the statement must include a word count. Wis. Stat. § (Rule) 809.50(4).

7. The petition or memorandum must contain:

- a. a statement of issues presented;
- b. a statement of the facts necessary to understand the issues;
- c. a statement showing that an immediate appeal will materially advance the termination of the litigation or clarify further proceedings, protect a party from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice; and
- d. a copy of the judgment or order sought to be reviewed.

See Wis. Stat. § (Rule) 809.50(1).

8. The opposing party must file any response and supporting memorandum within 14 days of service of the petition. Wis. Stat. § (Rule) 809.50(2). The response and memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. Wis. Stat. § (Rule) 809.50(2). Attach a statement on font and length as described in subsection 6 above.

9. The petitioner may seek temporary relief from the court of appeals pending disposition of the petition. See Wis. Stat. § (Rule) 809.52. Generally, relief should be sought from the circuit court first.

10. The order granting leave to appeal has the effect of the filing of a notice of appeal. Wis. Stat. § (Rule) 809.50(3).

**C. Suggestions on Content of Petition for Permissive Appeal.**

As a practical matter, the petition should contain everything the court would need to decide the case on appeal. Include a discussion of the merits (legal and factual) sufficient to demonstrate to the court that the petitioner is likely to prevail on appeal. Also, emphasize why an appeal later is an insufficient remedy.

In addition, because the court will have no record before it, relevant portions of the transcripts, motions, orders, exhibits, etc., must be attached to the petition or response. If the petition is inadequate in this regard, the court is likely to deny it rather than order supplementation. If necessary portions of the record cannot be obtained in time, set forth the essential facts in an affidavit.