PRELIMINARY EXAMINATION REFORM: IN FAIRNESS WE TRUST, OR A WASTE OF TIME AND RESOURES?

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Table of Contents

I. Introduction

In 2005, Michigan's Attorney General began discussions with legislators on potential ways to eliminate criminal defendants' rights to have a preliminary examination in the state of Michigan.[1] The issue is dormant, but has not been resolved, and discussions continue

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[1] H.R. 4796-4800, 96th Leg., 1st Spec. Sess. (Mi. 2005).

to take place on what reform, if any, Michigan should implement relating to preliminary examinations.[2]

In recent years, and even as this article is being written, there is still concern that efforts are underway to eliminate or scale back preliminary examinations for individuals accused of committing a felony in Michigan.[3] The potential reform would mandate that defendants proceed directly to trial without a district court judge reviewing his or case.[4]

This Article will address Michigan's preliminary-examination process, looking closely at the current law and proposed amendments. Section II of this Article discusses the current Preliminary Examination Process existing in Michigan. Section III analyzes the leading constitutional opinions issued by the United States Supreme Court relating to preliminary examinations. Section IV discusses Michigan's history of preliminary examinations. Section V considers the proposed reform from the perspective of prosecuting attorneys and criminal defense attorneys. Lastly, in Section VI, this Article suggests that the current preliminary examination process in Michigan should stay intact to protect the due-process rights of accused defendants throughout the criminal-justice process and how preliminary examinations are necessary to maintain justice and fair play.

II. Michigan's Preliminary Examination Process

Currently, every criminal defendant charged with a felony in Michigan is entitled to have a preliminary examination or "probable cause hearing."[5] Once a prosecuting attorney has brought criminal charges against a defendant, the State has the burden—at a preliminary examination—of convincing a district-court judge that the defendant should be bound over to stand trial on the felony charge(s) at a circuit court.[6] Specifically, the State must prove that a

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[2] http://www.michiganpolicechiefs.org/legislative.html (follow "Legislative Priorities" hyperlink)

[3] *Id*.

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[5] MCR 6.110 (A) (2011) (Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. . . .).

[6] MCR 6.110 (E) (2011) (If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the

crime has been committed and that there is probable cause to believe that this accused criminal defendant committed that specific crime.[7]

In Michigan, the defendant is entitled to have a preliminary examination within 14 days of arraignment.[8] If the defendant waives the preliminary examination, the court must bind the defendant over for trial on the charges set forth in the information.[9]

If the preliminary examination does occur, the court must make a probable-cause finding before binding the accused defendant over to stand trial.[10] And if, after considering the evidence, the court determines that probable cause exists to believe that an offense (not cognizable by the district court) has been committed and that the defendant committed it, the court must bind the defendant over for trial.[11] If after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the specific defendant committed that specific crime, the court must dismiss the charge(s) and free the wrongfully accused defendant.[12] Such a dismissal is without prejudice, and the

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district court has been committed and that the defendant committed it, the court must bind the defendant over for trial. . . .)

[7] Mich. Comp. Laws 766.13 (2011). (If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause to for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.)

[8] MCR 6.110 (A) (2011) (Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. . . .).

[9] *Id*. (If the court permits the defendant to waive the preliminary examination, it must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint.).

[10] MCR 6.110 (E) (2011) (If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial. . . .).

[11] Mich. Comp. Laws 766.13 (2011). (If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause to for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.)

[12] (If it shall appear to the magistrate at the conclusion of the preliminary examination either than an offense has not been committed or there is not probable cause for charging the defendant therewith, he shall discharge such defendant. . . .)

prosecutor may initiate a subsequent prosecution for the same offense.[13]

There is no set number of witnesses that a prosecutor calls to testify at this stage, but generally, the prosecutor puts on a few witnesses, depending on what evidence and testimony the State believes is necessary to meet its probable-cause burden. At almost all preliminary examinations, the defense attorney conducts a cross-examination of the prosecutor's witnesses. Criminal defense attorneys rarely, if ever, call any witnesses of their own during preliminary examinations. Typically, this is because the burden of proof is on the prosecutor, and the preliminary examination gives opposing counsel an opportunity to hear and observe some of the witnesses that will be testifying if the case proceeds to trial.

Written transcripts of the testimony are taken during the preliminary examination and are prepared for the prosecutor and defense attorney. This allows them to review the testimony to prepare for the trial if the defendant is bound over. This is beneficial to all the parties involved because, in some cases, it could take months, or even up to years, before the actual trial is heard by a jury or a judge.[14] Preliminary examinations preserve the witnesses' testimony while the details of the events in question are still fresh in the witnesses' minds.[15]

In practice, prosecutors in the vast majority of cases are able to meet this low threshold by providing the testimony of various witnesses. Generally, if the defendant is bound over for trial, it is preceded by a pretrial, where procedural discussions take place between all of the parties on when and how the case will proceed. On many occasions, the defense attorney and the prosecutor may still be able to enter into a plea agreement, eliminating the need for trial in its entirety.

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[13] MCR 6.110 (F) (2011) (If, after considering the evidence, the court determines that probable cause does not exist to believe either than an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense. . . .)

[14] Lloyd E. Powell and Jeffrey L. Sauter and Neil F. O'Brien, *Preliminary Examinations*, 85 Mich B J 32, 34 (March 2006).

[15] *Id*. at 33.

III. Leading Constitution Cases on Preliminary Examinations

The leading constitutional case on preliminary examinations is *Coleman* v *Alabama*.[16] In *Coleman*, the "[p]etitioners were convicted in an Alabama Circuit Court of assault with intent to murder . . ."[17] The United States Supreme Court granted certiorari, and it vacated and remanded the previous decision of the Alabama Court of Appeals.[18]

"This Court has held that a person accused of a crime 'requires the guiding hand of counsel at every step in the proceedings,' and that constitutional principle is not limited to the presence of counsel at trial."[19] "[T]o determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witness against him . . ."[20] "It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[21]

"Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the accused against erroneous or improper prosecution."[22] "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."[23] "Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for the use in cross-examination of the State's witness at trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial."[24] "Third, trained counsel can more effectively discover the case the State has against the client and make possible the preparation of a proper defense to meet the case at

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17 *Coleman et al.* v *Alabama*, 399 U.S. 1, 3 (1970).
18 *Id*. at 3 (citing 394 U.S. 916 (1969)).
19 *Id*. at 7 (quoting *Powell* v *Alabama*, 287 U.S. 45, 69 (1932)).
20 *Id*.
21 *Id*. (citing *United States* v *Wade*, 388 U.S. 218, 227 (1967)).
22 *Id*. at 9.
23 *Id*.
24 *Id*.

trial."[25] "Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as necessity for an early psychiatric examination or bail."[26]

In *Coleman*, there was ambiguous testimony provided by the officer in charge at the pretrial hearing; therefore, the United States Supreme Court "accordingly [vacated] the petitioners' convictions and [remanded] the case [back] to the Alabama Courts for such proceedings not inconsistent with this opinion . . ."[27]

In *Gerstein* v *Pugh*, the United States Supreme Court was presented with these two questions: "whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution."[28] The Court held "that the *Fourth Amendment* requires a judicial determination of probable cause as a prerequisite to extend restraint of liberty following arrest."[29] The Court's reasoning is as follows.

"Both the standards and procedures for arrest and detention have been derived from the *Fourth Amendment* and its common-law antecedents."[30] "The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant prudent man in believing that the [suspect] had committed the crime or was committing an offense."[31] "This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime."[32]

"These long prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and unfound

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[25] *Id*.
[26] *Id*.
[27] *Id*. at 11.
[28] *Gerstein* v *Pugh et al*., 420 U.S. 103, 111 (1975).
[29] *Id*. at 114 (emphasis supplied).
[30] *Id*. at 111 (emphasis supplied). See *Cupp* v *Murphy*, 412 U.S. 291, 294-295 (1973); *Ex parte Bollman*, 4 Cranch 75 (1807); *Ex parte Buford*, 3 Cranch 448 (1806).
[31] *Id*. (quoting *Beck* v *Ohio*, 379 U.S. 89, 91 (1964)).
[32] *Id*. at 112.

charges of crime."[33] "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests."[34] "To allow less would be to leave law-abiding citizens at the mercy of officers' whim or caprice."[35]

"Once the suspect is in custody, the reasons that justify dispensing with the magistrate's neutral judgment evaporate."[36] "There is no longer any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate."[37] "And, while the State's reasons for taking summary actions subside, the suspect's needs for a neutral determination of probable cause increases significantly."[38] "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[39] "When the stakes are this high, the detached judgment of a neutral magistrate is essential if the *Fourth Amendment* is to furnish meaningful protection from unfounded interference with liberty."[40]

"This result has historical support in the common law that has guided the interpretation of the *Fourth Amendment*."[41] "At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of peace shortly after arrest."[42] "The justice of peace would 'examine' the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed the crime."[43] "If there was, the suspect would be committed to jail or

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[33] *Id*. (quoting *Brinegar* v *United States*, 338 U.S. 160, 176 (1949)).
[34] *Id*.
[35] *Id*.
[36] *Id*. at 114.
[37] *Id*.
[38] *Id*.
[39] *Id*. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972).
[40] *Id* (emphasis supplied). See *Carroll* v *United States*, 267 U.S. 132, 149 (1925).
[41] *Id*. See 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1762) (internal footnote omitted).
[42] *Id*.
[43] *Id*. at 114-15. (citing 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 223 (1883)) (internal footnote omitted).

bailed pending trial."[44] "If not, he would be discharged from custody."[45] "This practice furnished the model for criminal procedure in America immediately following the adoption of the *Fourth Amendment*,[46] and there are indications that the Framers of the *Bill of Rights* regarded it as a model for a 'reasonable' seizure."[47]

"Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely."[48] "Whatever procedure a State may adopt, it ***must*** provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."[49] "We agree with the Court of Appeals that the *Fourth Amendment* requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment."[50]

In *County of Riverside* v *McLaughlin*, the United States Supreme Court "sought to balance [the] competing concerns by holding that States 'must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.'"[51] The Court stated, "Our purpose in *Gerstein* was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework."[52] "Rather, individual States may choose to comply in different ways."[53]

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[44] *Id*. at 115. (citing 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 223 (1883)) (internal footnote omitted).
[45] *Id*.
[46] *Id*. at 155-116. See *Ex parte Bollman*, *supra*; *Ex parte Buford*, 3 Cranch 448 (1806); *United States* v *Hamilton*, 3 Dall. 17 (1795).
[47] *Id*. at 116. See *Draper* v *United States*, 358, U.S., at 317-320 (DOUGLAS, J., dissenting) (internal footnote omitted).
[48] *Id*. at 123.
[49] *Id*. at 124-25 (internal footnotes omitted) (emphasis added).
[50] *Id*. at 126 (emphasis supplied).
[51] *County of Riverside and Cois Byrd, Sherriff of Riverside County* v *McLaughliln*, *Donald Lee, et al*., 500 U.S. 44, 52 (1991).
[52] *Id*. at 53.
[53] *Id*.

"Our task in this case is to articulate more clearly the boundaries of what is permissible under the *Fourth Amendment*."[54] "Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."[55] "Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes."[56] "In such a case, the arrested individual does not bear the burden of proving an unreasonable delay."[57] "Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance."[58]

"As we have explained, *Gerstein* clearly contemplated reasonable accommodation between legitimate competing concerns."[59] "We do no more than recognize that such accommodation can take place without running afoul of the *Fourth Amendment*."[60] "Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail."[61]

IV. History of Preliminary Examinations in Michigan

The leading case on a criminal defendant's right to a preliminary examination in Michigan is *People v. Duncan*.[62] In *Duncan*, the court stated that "[t]he Michigan Constitution of 1835 provided that criminal felony prosecutions should be initiated exclusively on a presentment or indictment by a grand jury."[63] The

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[54] *Id*. at 56.
[55] *Id*.
[56] *Id*. at 57.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 57-58.
[60] *Id*. at 58.
[61] *Id*.
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[63] *People* v *Duncan*, 388 Mich. 489, 495 (1972). See MI CONST. art. 1, section 11 (No person shall be held to answer for a criminal offence, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or militia when in actual service in time of war or public danger.).

court continued, "[T]he purpose of preliminary examination was to provide for a means for proceeding against an accused *before* presentation of the charge to a grand jury, not afterward."[64]

"In 1859, the Legislature enacted 1859 Public Act ("PA") 138, which provided for prosecutions by information *preceded by a preliminary examination*."[65] "Section 8 of 1859 PA 138 reads as follows: No information shall be filed against any person for any offence, until such person have had a preliminary examination therefore, as provided by law, before a justice of the peace, unless such person shall waive his right to such [a preliminary] examination."[66] This section is now in *MCLA 762.42*.[67] The procedure, *MCLA 762.42*, was initiated to speed up the criminal process.[68] "The only significant change was the statutory recognition of the importance of the preliminary examination."[69]

"A Committee of Inquiry into Criminal Procedure published a report and schedule of revisions of the Code of Criminal Procedure in [the year] 1927."[70] "Their recommendations were incorporated in 1927 PA 175."[71] "Section I of Chapter VI of 1927 PA 175 read:"

> The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair trial and impractical examination.[72]

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[64] *Id*. at 496 (citing *Turner* v *People*, 33 Mich. 363, 370 (1876)) (emphasis supplied).
[65] *Id*. at 496-97 (emphasis added).
[66] *Id*. at 497.
[67] *Id*. See MCLA 767.42 (2011) (An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination.).
[68] *Id*.
[69] *Id*. (internal footnote omitted).
[70] *Id*. at 498.
[71] *Id*.
[72] *Id*.

"This is the same wording as present *MCLA 766.1*."[73] "The clear intent of the amendment was to provide for and stress the need for prompt [preliminary] examinations."[74]

[T]he first Constitution of the State, adopted in 1835, expressly required all criminal prosecutions for felonies to be by presentment or indictment of a grand jury, and, subsequent constitutions being silent on the subject, the mandate still prevails today.[75] The mandate in the Constitution of 1835 limited the legislative power . . . while subsequent Constitutions left the subject free of legislative control, and, therefore, the legislature rightly could and did provide for criminal prosecutions by information.[76] This affords the person being accused a preliminary examination before a magistrate, opportunity to come face to face with his accusers, to question them, and to have knowledge of the evidence against them.[77]

In *People* v *Wilcox*, this Court stated the advantage of a preliminary examination to the people as follows:

> The new criminal code distinctly provides that the State and accused shall be entitled to prompt examination and determination by the examining magistrate in all criminal cases. The State may very much be interested in determining whether or not there is sufficient probable cause to hold a respondent for trial, or it may desire to perpetuate the testimony in the event that a witness shall disappear or die before [a] trial [begins].[78]

The rule is well expressed in *Van Buren* v *United States*:

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[73] *Id*. See MCLA 766.1 (2011). (The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination.).
[74] *Id*.
[75] *Id*. at 500. (quoting *In re Palm*, 255 Mich. 632, 635 (1931)).
[76] *Id*.
[77] *Id*.
[78] *People* v *Wilcox*, 303 Mich. 287, 295-96 (1942).

> The arrested party, sometimes when not guilty, in order to divert suspicion from others, but more frequently when guilty, and in order to aid the escape of confederates in the crime, is quite willing by waiving examination to suppress present inquiry; and oftener still, perhaps, this is done by the accused in the hope of suppressing the evidence against himself, or of gaining some like advantage from delay. An immediate development of the evidence and the testimony is sometimes essential to the ends of justice, and it would be strange indeed if the laws are so framed, or the courts disposed so to interpret them as to deny the government with this important power. Its exercise, unless wantonly abused, as almost any power may be abused, can harm no one.[79]

V. The Pros and Cons of Preliminary Examination Reform

When discussions began on whether to reform or eliminate preliminary examinations in Michigan, various organizations and legal minds took opposing sides. In one corner, championing for the elimination or modification of preliminary examinations, were the following prosecution-focused entities: Michigan's Attorney General, The Prosecuting Attorney's Association of Michigan, The Michigan Association of Chiefs of Police, The Michigan Municipal League, The Michigan Association of Police Organizations, The Fraternal Order of Police, and The Michigan Association of Counties.[80] In the other corner, championing for justice and fair play (by requiring the preliminary examination process in Michigan to remain intact), were the Criminal Defense Attorneys Association of Michigan, the American Civil Liberties Union of Michigan, The Justice Caucus of the American Civil Liberties Union, and the Michigan District Court Judges Association.[81] Once these opposing sides were formed, questions and arguments began to emerge. The prosecution-based

[79] *Van Buren* v *United States*, 36 Fed. 77, 82 (1888).
[80] The above pro-con organization list was taken from the House Legislative Analysis (judiciary committee) in Lansing, MI, discussing House Bills 4796-4800 (2005) on the elimination of preliminary examinations.
[81] *Id*..

advocates allege that preliminary examinations are a waste of time and money and place an undue burden on law-enforcement officials and victims.[82] The pro-defense advocates state that justice and fair play should be the central focus—as the founding fathers of our Constitution had originally intended.[83]

Elimination proponents believe that paying police officers overtime to appear at a preliminary examination and requiring that the crime victims appear in court to testify is somehow a burden on police administrators and victims.[84] The alleged burden on police administrators occur if patrol officers are working outside of their normal work hours (requiring overtime payments) or if officers have to leave their patrol-related duties to appear at a preliminary examination that will be adjourned or, as elimination proponents allege, "is waived 75 percent of the time."[85] The alleged burden on victims arises by the mere fact that the preliminary examination may be adjourned, and the victim may have to appear on another day to testify, thus subjecting them to an alleged undue burden.[86]

But the elimination proponents indicate, however, that the "[preliminary exam] would be retained for the most serious cases, including homicides, assault crimes with a maximum penalty of 10 years or more, major controlled substance crimes, life offenses, and 'serious crimes.'"[87] Essentially, the preliminary-examination process "would be retained in those cases in which there is a likely prison sentence."[88]

Status-quo proponents argue that there are several benefits to preliminary examinations.[89] Outside of the initial felony arraignment, this is the first time the defendant is brought before a judge and the first time he hears testimony from those who are his accusers.[90] The defendant, who may have been jailed pending a trial, now has an

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[82] Lloyd E. Powell and Jeffrey L. Sauter and Neil F. O'Brien, *Preliminary Examinations*, 85 Mich B J 32, 32 (March 2006).
[83] *Id*. at 34.
[84] *Id*. at 32.
[85] *Id*.
[86] *Id*. at 36.
[87] *Id*. at 32.
[88] *Id*.
[89] *Id*. at 32-33.
[90] *Id*. at 32.

opportunity to request a bond.[91] Or, if a bond has previously been set, the defendant (usually through his lawyer) can argue for a reduction of the current bond. The defendant's attorney can schedule a pretrial date and can obtain discovery, at least in part, from the prosecutor.[92]

With these matters handled at a preliminary examination, there is no need to schedule a separate court appearance for the defendant, thus minimizing the pro-elimination proponents' concern of wasting time and money. If the defendant is in custody, which many of those charged with felonies are, jail officials would be required to transport the defendant back and forth to numerous court proceedings, wasting even more time and money. At preliminary examinations, many cases are disposed of and are never bound over for trial.[93] This means that the elimination proponents get exactly what they are trying to get from the proposed reformation. Contrary to what they may argue, the preliminary examination is where the largest savings of time and money actually takes place.

Moreover, if the case were to proceed to trial without a preliminary examination, as the trial date approaches, many potential jurors are summoned to court to serve as prospective jurors. Usually, twelve to fourteen jurors will be selected to serve on a jury for a felony trial, but as many as 70 people will be summoned to serve as potential jurors.[94] Potential jurors are called for the purpose of having a jury pool large enough to replace jurors who are eliminated during the jury-selection process.[95] Plea agreements that may have occurred at a preliminary examination would eliminate the need for this large jury pool. This would save these citizens from taking time off from work and arranging for childcare just to appear in court to potentially serve as a juror. Maintaining preliminary examinations, in essence, serves the public's best interest.

Defense attorneys note that "[t]he judges who preside over the preliminary examinations are the gatekeepers to the criminal justice system"[96] and "that [preliminary examinations] serve to weed out

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[91] *Id*. at 33-34.
[92] *Id*. at 33.
[93] *Id*.
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[96] *Id*.

cases that are [either] without merit or overcharged."[97] To eliminate preliminary examinations would only serve the purpose of destroying a system that has provided due-process protections for individuals charged with a felony by aggressive prosecutors.

VI. The Slippery Slope of Preliminary Examination Reform

If the proposed elimination of preliminary examinations occurs, the safeguards provided by Michigan's currently preliminary examination system would no longer exist. At a minimum, the protections for an accused criminal defendant charged with a felony in Michigan would be substantially limited. The proposed criminal-justice process would start with a police arrest followed by a prosecutor bringing forth charges.[98] The process would then skip directly to the district-court screening process and then directly to trial at the circuit court level.[99] There, a jury of citizens may slightly favor handing down a guilty verdict believing that the defendant must have done **something** wrong—otherwise, an arrest would have never been made, the trial never would have taken place, and they would have never been summoned to jury duty.

Eliminating preliminary examinations would avoid district-court judicial review and take away the checks and balances in place on executive-branch powers. At trial, the circuit court judge, unlike the district court judge, will not make a determination of whether there is probable cause to believe that a crime was committed and that the accused criminal defendant committed that specific crime.[100] The prosecutor will have, in large part, successfully avoided any judicial review that could have reduced or even dismissed the charges against the defendant before the case ever reached the trier of fact. It appears obvious why county prosecutors, the Attorney General, and law-enforcement officials are working so hard to eliminate preliminary examinations for the accused defendant: because they have nothing to gain from the preliminary examinations where the district court judge could reduce or even dismiss the charges that the prosecutor has brought forth against the defendant. Our system of justice has always

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[97] *Id*.

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provided checks and balances, and eliminating the preliminary examination would eliminate those checks and balances.

Obviously, victim exploitation, preserving police resources, and the expenditures related to preliminary examination reform are better selling points to offer for both legislative and public support. But the residual benefits of preliminary examinations cannot be ignored. Eliminating preliminary examinations removes judicial oversight that could serve to free a wrongfully accused defendant based on the prosecutor's inability to meet their burden of proof at a preliminary examination.

Further, prosecutors argue that maintaining preliminary examinations has "only ancillary or collateral benefits and do not necessitate mandatory district court evidentiary hearings."[101] Prosecutors argue that "[s]tatistically, very few cases are 'weeded out' (i.e., charges against the 'actual innocent' are dismissed or reduced) as a result of [preliminary examination] proof problems," and that "a majority of jurisdictions have shown a dismissal rate of less than 0.03 percent because of [a] lack of evidence."[102] Prosecutors continuously argue that government agencies are trying to control costs and deliver the necessary services within their respective jurisdictions and that those government agencies should not be wasting resources on preliminary examinations.[103] Prosecutors acknowledge that "we still have to protect the rights of defendants, but our system is out of balance and now is the time for reform."[104]

Any reform that reduces the fairness in the criminal justice system and favors only those who prosecute must be viewed with the most critical eye for fairness. Keeping citizens safe should be everyone's top priority, and where police overtime is required and necessary for that safety to be assured to citizens, then police officers (through legislative appropriations) should attempt to secure funding for all police services as necessary, including funding for officers to attend preliminary examinations. It is a safety issue for all citizens

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[101] Lloyd E. Powell and Jeffrey L. Sauter and Neil F. O'Brien, *Preliminary Examinations*, 85 Mich B J 32, 36 (March 2006).
[102] *Id*.
[103] *Id*. at 37.
[104] *Id*.

and a due-process issue for those arrested and accused of committing a felony.

In a September 2009 Michigan Bar Journal Article, district court judge Dennis Powers and attorney Dan Allen, focusing primarily on one of the two standards for binding a criminal defendant over for trial stated the following:

> Considering the defendant's rights to liberty and due process, is it the goal of our justice system to force people to stand trial when the prosecution is unable to establish that a crime was [even] committed? That is, should prosecutions be allowed to proceed when a judge is not convinced that it is more likely than not that a crime has even occurred? Preponderance of the evidence is not an incredible or unreasonable burden [for prosecutors to bear]. In fact, given the current state and sprit of the [current] law, in which legislation is being proposed to eliminate this filtering process, it appears to be a necessary and an intended burden.[105]

VII. Conclusion

The stated goal of those in favor of the elimination, or a dramatic scaling back, of the protections offered by preliminary examinations is to save local police agencies time and money and to provide victims with the ability to avoid appearing at preliminary examinations.[106] These elimination proponents imply that the alleged victims and police have done enough; just leave them alone until the trial starts. Perhaps the next step would be not requiring police and crime victims to show up for trial. Or even better yet, let the police arrest criminal defendants, and have the prosecutors charge and convict the defendants, eliminating the need for both judges and juries. But would this proposed legislation actually save everyone both time and money? More importantly, though, is time and money our primary concern, or should our primary concern be American

[105] Honorable Dennis Powers and Dan Allen, *Preliminary Examinations and Probable Cause: What's Wrong Here?*, 88 Mich B J 33, 35 (September 2009).
[106] H.R. 4796-4800, 96th Leg., 1st Spec. Sess. (Mi. 2005).

citizens' due-process rights, as the framers of our Constitution originally intended?

Perhaps this is where the State of Michigan is headed, but the focus should not be on police overtime and the supposed inconvenience of an alleged victim having to attend a court proceeding of someone that they have accused of a crime. These inconveniences do not outweigh a defendant's right to have a fair probable-cause hearing — especially when they face years locked away in prison away from family and friends.

Prosecutors and law-enforcement agencies have nothing (or very little) to gain at the preliminary-examination phase. Without preliminary examinations, a prosecutor will only have to prove his or her case before a jury of their choosing (partially), and not before a district-court judge who may dismiss the charges that a prosecutor has brought forth. But defense attorneys will, on many occasions, use the preliminary-examination testimony of a prosecutor's witnesses at trial for impeachment purposes, if his or her sworn testimony changes from the sworn testimony given at a preliminary examination. The jury, in turn, will then hear several different versions from the same witness of what they allegedly saw or heard. This can have a devastating effect on the credibility of a witness in the eyes of a juror and, ultimately, question the credibility of a prosecutor's overall case against the defendant.

Further, if law-enforcement officials have the time to arrest, book, fingerprint, and incarcerate those suspected of committing a crime, then they need to make time to appear in court at a preliminary examination. And alleged crime victims should want to appear at the preliminary examination because, as prosecutors have pointed out, the examinations are waived 75% of the time—in part because the victim's appearance at the preliminary examination convinced the defendant that a plea was their best option.

As the old adage goes, "If it isn't broken – don't fix it." The state of Michigan should not eliminate the preliminary examination requirement for purposes of judicial economy and police funding; the system isn't broken. This is particularly important because any potential reform would come at the expense of justice and fair play

for citizens who are presumed to be innocent by law until—and if—they are proven guilty.