Preliminary Examination Reform: In Fairness We Trust, or a Waste of Time and Resources?

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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 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. The potential reform would mandate that defendants proceed directly to trial without a district-court judge reviewing the case.

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 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 and their thoughts and opinions on the current preliminary examination process in Michigan.

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.” 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 the circuit-court level. Specifically, the State must prove that a crime has been committed and that there is probable cause to believe that this accused criminal defendant committed that specific crime.

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

If the preliminary examination does occur, the court must make a probable-cause finding before binding the accused defendant

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3 Id.
4 See id.
9 Id.
Specifically, 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. But 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. Such a dismissal is without prejudice, and the prosecutor may initiate a subsequent prosecution for the same offense.

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 years, before the actual trial is heard by a jury or a judge. Preliminary examinations preserve the witnesses’ testimony while the details of the events in question are still fresh in the witnesses’ minds.

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.

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12 Id.
15 Id. at 33.
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.

**III. Leading Constitution Cases on Preliminary Examinations**

In *Coleman v. Alabama*, the U.S. Supreme Court vacated the petitioner’s conviction for assault with intent to commit murder.\(^{16}\) One of the central questions in *Coleman* was whether an accused is entitled to an attorney during a preliminary examination.\(^{17}\)

The Court had previously held that “a person accused of crime ‘requires the guiding hand of counsel at every step in the proceedings against him.’”\(^{18}\) In particular, counsel is appropriate at “critical stages” of the criminal-justice process.\(^{19}\) The Court also defined a “critical stage” as any time that “substantial prejudice to defendant’s rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.”\(^{20}\)

The Court noted that a preliminary examination is clearly a “critical stage” in the criminal-justice process:

First, the lawyer’s skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State’s case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for 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. 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 trial. 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.\(^{21}\)

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\(^{16}\) *Coleman v. Alabama*, 399 U.S. 1, 3 (1970).

\(^{17}\) *Id.*

\(^{18}\) *Id.* at 7 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

\(^{19}\) *Id.*

\(^{20}\) *Id.* at 9 (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)).

\(^{21}\) *Id.*
Although Coleman did not turn on whether a preliminary examination is required in all criminal prosecutions, the Court’s language unambiguously indicates the importance of these hearings. Without them, all of the “critical” elements that the court enumerated would be gone. Justice Black’s concurrence in Coleman is particularly telling:

The practical importance of the preliminary hearing is discussed in the prevailing opinion, and the considerations outlined there seem to me more than sufficient to compel the conclusion that the preliminary hearing is a “critical stage” of the proceedings during which the accused must be afforded the assistance of counsel if he is to have a meaningful defense at trial as guaranteed by the Bill of Rights.\(^{22}\)

Several years later, in Gerstein v Pugh, Court was presented with an opportunity to decide if an adversarial preliminary hearing is required by the Fourth Amendment\(^ {23} \). While the Court acknowledged that the Fourth Amendment does not require a full adversarial hearing, it did hold that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extend restraint of liberty following arrest.”\(^ {24} \)

In reaching its decision, the Court discussed why police and prosecutor’s cannot make the probable-cause determination without judicial oversight:

Once the suspect is in custody, . . . the reasons that justify dispensing with the magistrate’s neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State’s reasons for taking summary action subside, the suspect’s need for a neutral determination of probable cause increases significantly. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential

\(^{22}\) Id. at 12 (Black, J. concurring).
\(^{23}\) Gerstein v Pugh, 420 U.S. 103, 111 (1975).
\(^{24}\) Id. at 114.
if the *Fourth Amendment* is to furnish meaningful protection from unfounded interference with liberty.\(^{25}\)

Moreover, the Court found historical support for its interpretation of the *Fourth Amendment*:

At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of peace shortly after arrest. 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. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. This is precisely the practice that furnished the current American criminal procedure which immediately followed the adoption of the *Fourth Amendment*.\(^{26}\)

While the Court recognized that the state systems might vary, it notably stated that a state “**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.”\(^{27}\) Looking back some 30 years, the court noted:

“The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.”\(^{28}\)

### IV. Preliminary Examinations in Michigan

Historically, Michigan has recognized the importance of preliminary examinations. The Michigan Constitution of 1835 only allowed for indictment by grand jury, and a preliminary examination was required if a suspect was to be held before the grand jury convened.\(^{29}\) And in 1859, the Michigan Legislature passed Public

\(^{25}\) *Id.*

\(^{26}\) *Id.* at 115-16 (internal citations omitted).

\(^{27}\) *Id.* at 124-25 (footnotes omitted) (emphasis added).

\(^{28}\) *Id.* at 118 (quoting *McNabb v. United States*, 318 U.S. 332, 343 (1943)).

\(^{29}\) See *People v. Duncan*, 388 Mich. 489, 495-96 (1972) (citing Mich. Cons., Art I, §§11, 13, and 14 (1835)).
Act 138, which recognized “the increased importance of the preliminary examination.”

In 1972, People v. Duncan consolidated three cases to decide whether a defendant was entitled to a preliminary examination following an indictment by a grand jury. Looking at a legislative history of preliminary examinations, the court focused on Public Act 175, issued in 1927:

The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal cases 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.

The court acknowledged that “in the absence of a clear statutory provision for a preliminary examination following presentment or an indictment by a grand jury, there has never been such a right.” Still, the court “exercise[d] its inherent power” and concluded that “in all pending cases in which the right to a preliminary examination was asserted prior to trial . . . the right to a preliminary examination shall exist.”

Importantly, the court reasoned that the right to a preliminary examination “ha[d] become recognized as a fundamental right in most criminal cases.” And because “[t]he preliminary examination is keyed to modern methods of investigation carried on by the police and the prosecutors[.] . . . ‘[i]t is a critical stage of our criminal process.’”

But the court also focused on why preliminary examinations are important to both parties. It affords an accused the “opportunity to come face to face with accusers, to question them

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30 Id. at 497.
31 Id. at 495.
33 Id. at 499.
34 Id. at 502.
35 Id.
36 Id. at 502 (quoting People v. Bellanca, 386 Mich. 708, 712 (1972)).
37 Id. at 499-501.
and to have knowledge of the evidence against him.” 38 And “[t]he State may be very much interested in determination 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 the trial.” 39 The American Jurisprudence on Criminal Law sums up the reasoning well:

“The primary purpose of a preliminary hearing is to ascertain whether there is reasonable ground to believe that a crime has been committed and whether there is just cause to believe the defendant committed it. Further purposes are said to be to perpetuate testimony, to determine the amount of bail to be given by the prisoner in case he is held for trial, to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial and of the deprivation of his liberty if there is no probable cause for believing that he is guilty of the crime.” 40

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. 41 In the other corner, championing for justice and fair play (by fighting for 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. 42 Once these opposing sides were formed, questions and arguments began to emerge. The prosecution-based

38 Id. at 500 (quoting In re Palm, 255 Mich. 632, 635 (1931)).
39 Id. (quoting People v. Wilcox, 303 Mich. 287, 295-96 (1942)).
40 Id. at 501 (quoting 21 Am Jur 2d, Criminal Law, §443, pp 446-47).
42 Id.
advocates allege that preliminary examinations are a waste of time and money and place an undue burden on law-enforcement officials and victims. 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.

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. 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.” 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.

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.’” Essentially, the preliminary-examination process “would be retained in those cases in which there is a likely prison sentence.”

Status-quo proponents argue that there are several benefits to preliminary examinations. 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. The defendant, who may have been jailed pending a trial, now has an opportunity to request a bond. Or, if a bond has previously been set, the defendant (usually through his lawyer) can argue for a reduction of the current bond. Also, the defendant’s attorney can schedule a

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43 Powell, supra note 14, at 32.
44 Id. at 34.
45 Id. at 32.
46 Id.
47 Id. at 36.
48 Id. at 32.
49 Id.
50 Id.
51 Id. at 33-34.
pretrial date and can obtain discovery, at least in part, from the prosecutor.\textsuperscript{52}

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.\textsuperscript{53} 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 \textit{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 citizens are summoned to court to serve as prospective jurors. Usually, twelve to fourteen jurors are selected to serve on a jury for a felony trial, but there is no set number as to how many people are summoned to serve as potential jurors. The numbers can exceed 100, depending on the nature of the case.\textsuperscript{54} These 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.\textsuperscript{55} 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 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”\textsuperscript{56} and “that [preliminary examinations] serve to weed out cases that are [either] without merit or overcharged.”\textsuperscript{57} To eliminate preliminary examinations would only serve the purpose of destroying

\textsuperscript{52} Id. at 33.
\textsuperscript{53} Id.
\textsuperscript{55} See generally id.
\textsuperscript{56} Powell, supra note 14, at 33.
\textsuperscript{57} Id.
a system that has provided due-process protections for individuals charged with a felony by aggressive prosecutors.

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. The process would then skip to the district-court screening process and then proceed directly to trial at the circuit court level. 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. 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 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.

58 See generally id. at 32, 35.
59 See generally id.
based on the prosecutor’s inability to meet their burden of proof at a preliminary examination.

But prosecutors argue that maintaining preliminary examinations has “only ancillary or collateral benefits and do not necessitate mandatory district court evidentiary hearings.” 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.” 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. 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.”

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. 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 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

61 Powell, supra note 14, at 36.
62 Id.
63 Id. at 37.
64 Id.
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 spirit 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.65

In October 2011, Michigan Governor Richard Snyder signed Executive Order No. 2011-12, which “establishe[d] a commission to investigate how to improve legal representation provided to low income criminal defendants in Michigan.”66 As part of its directive, “[t]he commission will also make recommendations about how to ensure legal representation provided to low-income residents in the criminal justice system is consistent across the state.” Even though the intent of Executive Order 2011-12 is to assure the improvement of legal representation for low-income individuals charged with criminal offenses, the premise is still the same as the premise of this article: we need to preserve the fairness and due process protections for criminal defendants throughout our justice system and throughout the state of Michigan.

VI. 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.67 These elimination proponents imply that the alleged victims and police have done enough; just leave them alone until the trial starts. But we cannot forget that it is the defendant’s due-process rights that are at stake and that are in need of protection, not law enforcement or anyone else. And would this proposed legislation actually save anyone time and money? More importantly, though, is saving time and money our primary concern, or should our primary concern be American 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 or a waiver was the 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.