Criminal Law: Preliminary Examination Potential

David B. Dean

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation

Available at: http://scholarship.law.marquette.edu/mulr/vol58/iss1/11

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrians@marquette.edu.
NOTE

PRELIMINARY EXAMINATION POTENTIAL

INTRODUCTION

It is a natural psychological response to the atmosphere produced by recently publicized accounts of both high and low level abuses of law enforcement powers for a person accused of a felony to feel that he is now, more than ever, in a position akin to a modern David facing the Goliath of the criminal justice system—a stroke of luck is the only hope. From the opposing camp the cry of those outraged by ever-increasing crime rates demands swift punishment of criminals and additional controls imposed upon personal freedom. It is not surprising, therefore, that these two groups—those who desire more protection for the accused from the unfettered discretion of the state on the one hand, and those who demand greater state power to control and punish the criminal on the other—are too often pitted against each other, failing to recognize their common goal—an efficient, equitable, and practical system of criminal justice which punishes the guilty without depriving the innocent of their personal liberty. The preliminary examination is a procedural safeguard which, if fairly considered and properly conducted, could serve in a crucial capacity to answer the demands of both interest groups.

Recent developments in the field of criminal justice have emphasized the importance of procedural safeguards in the pre-trial stages of criminal prosecutions. The particular importance of the modern preliminary examination as a critical safeguard has been emphasized continuously. Nevertheless, in practice its import-


3. Mobley, Our Criminal Courts 26 (1930):
While preliminary hearing is ordinarily neglected and despised by commentators, it is in every respect the most important link in the process of administering justice. It might well be concluded with a good deal of justification that so far as effective enforcement of criminal law is concerned the preliminary hearing is more important than the trial itself.

Graham and Letwin, The Preliminary Hearing in Los Angeles: Some Field Findings and
ance is too often overlooked. Until recently, there have been few attempts at identifying and analyzing the nature of the preliminary examination or its possible functional considerations. As a result, the procedure stagnates as a mechanical routine rather than a point of pivotal concern in a criminal prosecution. Several recent developments in this area require attention and analysis.

A recent California decision, *People v. Uhlemann*, represents a progressive attempt at development of the preliminary examination as a more meaningful procedural device by the California court. The thesis of this discussion is that, while not professing this case represents the ultimate solution, *People v. Uhlemann* is a sign of future reconsideration and development in the preliminary hearing; one which should not go unheeded. The purpose of this discussion is to reappraise Wisconsin's present preliminary examination procedure in light of the *Uhlemann* decision, emphasizing its procedural implications, the conflicts it presents to present Wisconsin procedure, and proposing possible changes which could give this procedure a new usefulness and vitality in the Wisconsin criminal process.

**People v. Uhlemann Examined**

The court in *People v. Uhlemann* held:

. . . [N]otwithstanding the rule that a magistrate's dismissal of criminal charges following a preliminary examination does not bar the prosecution from either refiling the same charges before another magistrate, or seeking an indictment based upon those charges, an exception exists where the magistrate's findings of

---


The preliminary hearing has great potential as a check on the exercise of prosecutorial discretion and is an important procedural mechanism within the criminal process.


In most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement - an order holding the defendant for trial.

5. 8 Cal. 3d 348, 105 Cal. Rptr. 21, 503 P.2d 277 (1972).
NOTE

fact affirmatively establish defendant’s innocence, or disclose an absolute defense to the crime charged; absent unusual circumstances, the People should in that situation be barred from initiating further proceedings based upon the charges so dismissed.6

In response to the above statement, Wisconsin would agree that a dismissal of the criminal charges at the preliminary hearing stage does not bar a refiling of those charges by the prosecution,7 but as yet Wisconsin has not ventured so far as to allow the exception granted by this California court.

In reaching this decision the California court formulated several principles which in themselves represent progressive extensions in criminal pre-trial procedure. A closer examination of the court’s reasoning will serve as an explanation of how these extensions were formulated and how they serve as the foundation for the ultimate ruling. A comparison of Wisconsin judicial thought concerning these same concepts will show several conflicts, explaining perhaps why Wisconsin has not yet gone as far as the Uhlemann ruling.

The California court’s major premise centers on the basic purpose of the preliminary hearing: to weed out groundless charges.8 If the district attorney is permitted to totally ignore the factual findings of the magistrate by refiling the same charges, the purpose of the preliminary hearing is completely frustrated. The court, recognizing this fact, stated:

Instead it seems evident to us that the magistrate’s findings must be clothed with enough finality to insure the accused a meaningful preliminary examination and to protect him from needless harassment.9

Supporting this premise as conditions precedent to its validity are two minor premises.

The first supporting premise concerns the role of the magistrate. Ordinarily a magistrate does not make any formal factual findings, but merely determines if there was a crime committed and if there exists probable cause to believe the defendant commit-

7. Wis. STAT. § 970.04 (1971); State ex rel. Beck v. Duffy, 38 Wis. 2d 159, 156 N.W.2d 368 (1968); State ex rel. Klinkiewicz v. Duffy, 35 Wis. 2d 369, 151 N.W.2d 63 (1967); State v. Fish, 20 Wis. 2d 431, 122 N.W.2d 381 (1963).
8. Uhlemann at 283, 8 Cal. 3d ____, 105 Cal. Rptr. at 27, accord Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922).
9. Uhlemann at 283, 8 Cal. 3d ____, 105 Cal. Rptr. at 27.
Therefore the magistrate would have no occasion to form any definite conclusion on the accused's guilt or innocence. Nevertheless, in light of prior California case law, the magistrate is endowed with the power to weigh the evidence, to resolve conflicts, and to give or withhold credence to particular witnesses; and in appropriate cases he should wield this power to preclude further prosecution. Applying this premise to the facts, the magistrate in Uhlemann, when hearing the testimony of the State's witness, found her testimony to be patently incredible and made a factual determination that the defendant was innocent by reason of entrapment. The court emphasized that this was a factual determination based on the magistrate's power to make such a finding, and for this reason was distinguishable from other types of determinations by a magistrate which might dismiss the charge but would not operate on the merits. Based on this distinction, the finding of the magistrate was accorded proper finality.

The second supporting premise concerns the doctrines of res judicata and collateral estoppel. The doctrine of res judicata is normally a bar to further action only after the defendant has been placed in jeopardy. Because the preliminary hearing has never been ruled a hearing in which the requisite amount of jeopardy is present, res judicata does not apply. Yet, the court reasoned that since this procedure was a full adversary hearing, and since under certain circumstances (here relying on their prior extension of the magistrate's power to make a factual determination as to the accused's guilt or innocence requiring finality) it can result in a dismissal on the merits, res judicata and collateral estoppel should apply.

In addition, the court employed another concept to support its ruling. Relying on a particular California statute which granted the state the right to appeal an order dismissing an action at the preliminary examination stage, before jeopardy attaches, the court pointed out that the prosecution was not left without recourse for judicial review of the magistrate's determination; albeit this proce-

10. Id. at 281, 8 Cal. 3d ___, 105 Cal. Rptr. at 25; CAL. PEN. CODE §§ 871, 872 (1972).
13. Id. at 279, 8 Cal. 3d ___, 105 Cal. Rptr. at 23.
14. Id. at 280, 8 Cal. 3d ___, 105 Cal. Rptr. at 24.
15. Id. at 281, 8 Cal. 3d ___, 105 Cal. Rptr. at 25.
16. Id.
17. CAL. PEN. CODE § 1446(1)(a) (1972).
dure of review was more burdensome than merely refiling the charges.\textsuperscript{18}

As remarkable as some of these extensions appear at first glance, they are not without foundation. Commentators on the subject have proposed such extensions to improve the preliminary hearing:

\ldots [T]he judicial role in pre-trial screening involves weighing and judgment rather than a wooden comparison of the testimony with the elements of the crime. Although credibility ordinarily is a matter for the jury, and it is not expected that judges will normally resolve testimonial conflicts at the preliminary hearing, cases do occasionally arise at which a witness's testimony is so weak or contradicted by sufficiently clear facts that the judge should have the power to dismiss the case.\textsuperscript{19}

Magistrates should be required to make more explicit the basis of their decision to facilitate understanding and review.

The prosecutor should be provided a remedy of appeal from decisions of the magistrate. The prosecutor's power to refile charges that have been dismissed and add charges not approved by the magistrate ought to be curtailed.\textsuperscript{20}

By this decision, the California court has implemented these proposals in a commitment to increase the usefulness of the preliminary examination procedure.

\textbf{WISCONSIN'S ANSWER}

Present Wisconsin law prescribes that the accused shall be taken before a judge for an initial appearance within a reasonable time after arrest.\textsuperscript{21} At the initial appearance, the accused is furnished a copy of the complaint. The judge then informs him of the charge against him, his right to counsel, and, in the event he is found to be indigent, his right to have counsel appointed, and his right to a preliminary hearing if he is charged with a felony. The judge will then admit the accused to bail in accordance with chapter 969.\textsuperscript{22}

Recent changes in the applicable Wisconsin Statutes provide that the accused charged with a felony be also informed of the

\begin{itemize}
\item \textsuperscript{18} Uhlemann at 284, n. 7, 8 Cal. 3d \textemdash, 105 Cal. Rptr. at 28, n. 7.
\item \textsuperscript{19} \textit{Model Penal Code of Prearraignment Procedure}, § 330.5(3) p. 91 (Tent. Draft No. 5, 1972).
\item \textsuperscript{20} Graham and Letwin \textit{supra} note 3 at 642.
\item \textsuperscript{21} Wis. Stat. § 970.01(1) (1971).
\item \textsuperscript{22} Wis. Stat. § 970.02 (1971).
\end{itemize}
penalties assigned the particular offense with which he is charged, and the right to a preliminary examination is now afforded to those charged with a felony by indictment or those returned to the state for prosecution through extradition proceedings under chapter 976. The change granting a preliminary examination following an indictment overrules the cases of State ex rel. Welch v. Waukesha Cy. Circuit Br. II and Johns v. State, and effectively precludes the state from avoiding the preliminary examination by going to the grand jury for an indictment as is the practice in the federal courts. In addition, the accused may now only waive his right to a preliminary hearing "in writing or in open court." Barring any such waiver the judge will transfer the action to a county court for the preliminary hearing.

The Wisconsin Supreme Court would agree with the California court that the primary purpose of the preliminary hearing is to weed out unsupportable charges and protect the person charged from oppressive prosecution. But, as previously stated, the court has not clothed this procedure with finality under any circumstances as the California court has done. The reasons for the failure of the Wisconsin Supreme Court to so rule lie partially in the views it has held concerning those very principles which provided the supportive bases for the California court's conclusion. In a number of areas the views of the Wisconsin court conflict with those of the California court.

When faced with the task of attempting to define what the role of the magistrate is in the preliminary hearing, the Wisconsin Supreme Court has confused the issue, using conflicting language. In State v. Knudson, the court spent considerable time justifying the

23. Wis. Laws 1973, ch. 45 §§ 970.02 and 971.02.
24. 52 Wis. 2d 221, 189 N.W.2d 417 (1970); 14 Wis. 2d 119, 109 N.W. 2d 490 (1961).
27. Wis. STAT. § 970.02(5) (1971).
29. 51 Wis.2d 270, 187 N.W.2d 321 (1971).
NOTE

reliability of an informant by applying the two-pronged test established in *Aguilar v. Texas,*\(^{30}\) which provided that when a complaint is based on hearsay information, the officer must establish:

(1) the underlying circumstances from which he concludes that the informant is reliable; and (2) that the underlying circumstances or manner in which the informant obtained his information is reliable.\(^{31}\)

In using this test the court essentially formed a justifiable rationale for believing the witness, simply a standard by which a court could grant or withhold credence to a particular witness. However, the court cited *State ex rel. Evanow v. Seraphim,*\(^{32}\) stating:

... that the issue as to credence or credibility is for the trial. The hearing as to probable cause before the magistrate is not a preliminary trial. It is not the proper forum to debate and determine issues as to credibility and weight of evidence once essential facts as to probability have been established.\(^{33}\)

The question then is how does one determine whether the facts establish probability without weighing the evidence and granting or withholding credence to witnesses. The case of *State ex rel. Hanna v. Blessinger,*\(^{34}\) attempts to answer this question citing *State ex rel. Tessler v. Kubiak,*\(^{35}\) as follows:

The examining magistrate determines if this burden has been met [whether there is competent evidence for the judicial mind to act on in determining the existence of essential facts]. He has the duty of determining the credibility of the witnesses and the weight to be given to their testimony.\(^{36}\)

It appears, therefore, that the court in one instance would allow the magistrate to so tune his ear that he could only hear enough facts to make a lightweight probable cause determination but no substantial findings; whereas the same court, ruling later, would grant the magistrate the same powers granted by the California court - to weigh the evidence and grant or withhold credence to particular witnesses.

The most recent case treating this issue, *Wilson v. State,* at-

\(^{32}\) 40 Wis. 2d 223, 228, 161 N.W.2d 369, 371 (1968).
\(^{34}\) 52 Wis. 2d 448, 190 N.W.2d 199 (1971).
\(^{35}\) 257 Wis. 159, 162, 42 N.W.2d 496, 498 (1950).
\(^{36}\) State ex rel. Hanna v. Blessinger, 52 Wis. 2d 448, 450, 190 N.W. 2d 199, 200 (1971).
tempts to rectify this conflicting position taken by the Wisconsin court:

. . . the magistrate must determine credibility of witnesses if he is to determine that there is credible evidence to support a finding of probable cause. But the determination is merely one of plausability of the story and not general trustworthiness of the witness.

The central approach to the role of the magistrate in determining credibility of witnesses is one of degree. . . . 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 plausability of the story.38

In applying this new formula, the court held that the defense counsel should have been allowed to cross-examine the state’s witness relative to her prior description of the man who shot her husband because the question asked did “not merely go to the witness’s general trustworthiness, but also to the plausability of her description, upon which the finding of probable cause rested.” (Emphasis added.)39

The court, in this its most recent attempt to clarify the scope of the magistrate’s role at the preliminary examination, has succeeded in clouding the issue further by this compromise definition. Under this new formula, the magistrate must weigh the plausability of the story but not the credibility of the person who tells it. Furthermore, in applying the test it appears that if the evidence merely goes to the general credibility of the witness, it may not be considered; but if the evidence goes to the general credibility and also the plausability of the story, then the magistrate may consider it in his determination of probable cause. If magistrates are to perform their function with any judicial certainty and consistency, and if counsel for both prosecution and defense are to know how to properly approach the preliminary examination, a realistic definition of the role of the magistrate is essential.

The recent case of Myers v. Commonwealth40 considered this issue in a realistic fashion. Essentially the case holds that:

Since the examining magistrate’s determination of the minimum quantum of evidence required to find probable cause to bind over is somewhat analogous in function to the court’s ruling on a

37. 59 Wis. 2d 269, 208 N.W.2d 134 (1973).
38. Id. at 294-295, 208 N.W.2d at 148.
39. Id. at 295, 208 N.W.2d at 148.
motion for a directed verdict at trial as to whether there is sufficient evidence to warrant submission of the case to the jury, we have decided to adopt a "directed verdict" rule in defining the minimum quantum of credible evidence necessary to support a bind-over determination.\footnote{\citet{Note41}}

An examination of the court's reasoning reveals several key ingredients contributing to the court's ultimate decision to adopt the "directed verdict" standard.

The first such ingredient was the court's consideration of a proper construction of section 38, chapter 276 of the (1972) Massachusetts General Laws which provided:

\ldots [T]he witness for the prisoner, if any, \textit{shall} be examined on oath, and he may be assisted by counsel in such examination of the witnesses in support of the prosecution. (Emphasis added.)\footnote{\citet{Note42}}

Wisconsin Statute section 970.03(5) (1971) closely parallels this statute.\footnote{\citet{Note43}} The Massachusetts court reasoned that an examination of the purposes and procedure of the preliminary hearing itself was necessary to arrive at a construction which best reflected the purpose for which the statute was enacted.\footnote{\citet{Note44}} In its performance of this task the court applied the rule of \textit{Coleman v. Alabama},\footnote{\citet{Note45}} which held that the preliminary hearing was a "critical stage" in the state's criminal process at which the constitutional safeguard of a right to counsel should obtain.\footnote{\citet{Note46}} The court concluded that since the primary function of the preliminary hearing was to screen out at this "critical stage" of the criminal process those cases which should not go to trial, thereby sparing the accused of unjustified detention and prosecution;\footnote{\citet{Note47}} and since the primary function of the magistrate at this "critical stage" was to determine whether there was sufficient credible evidence to proceed to trial, the role of the magistrate was closely analogous to that of a trial judge ruling on a motion for directed verdict.\footnote{\citet{Note48}}
The second ingredient was the court's consideration of the differing quanta of evidence needed to justify a finding of "probable cause" by a magistrate, (1) at the arrest stage and, (2) at the bind-over stage of criminal procedure. The court concluded that since probable cause to arrest was frequently based upon a variety of circumstances, including hearsay information which may or may not be allowable at trial; and that since at the preliminary hearing a finding of probable cause imposes significantly greater costs upon the accused and the state - namely that of a full trial,

the standard of probable cause to bind over must require a greater quantum of legally competent evidence than the probable cause to arrest finding to insure that the preliminary hearing's screening standard is defined in a was the [sic] effectuate its purpose.49

The standard to be applied according to this rationale was that which a judge ruling upon a motion for directed verdict would apply - whether there was sufficient credible evidence to warrant a jury's finding the accused guilty.50

The Massachusetts court also noted that according to a recent study sponsored by the American Bar Association the "directed verdict" standard of probable cause was the most widespread screening standard used by states which had probable cause hearings.51

Taking all these factors into consideration the court ruled that in order to effectuate the purposes for which the statute was passed and to prevent the preliminary hearing from becoming a hollow ritual, the statute in question must be construed to require an "adversary hearing where the defendant is given a meaningful opportunity to challenge the credibility of the prosecution's witnesses and to raise any affirmative defenses he may have."52

Clearly, a judge utilizing this standard could take the next

49. Id. at 824, ___ Mass. at ___.
50. Id.
51. Id. n. 7.
52. Id. at 825, ___ Mass. at ___. The court further states at page 828:
Our analysis of the purposes (and procedure) of the probable cause hearing leads us to conclude that the defendant must be given the opportunity to cross-examine his accusers and present testimony in his own behalf in order to insure that the hearings vital screening function will be effectuated. Therefore, we hold that c. 276, § 38, grants defendants mandatory statutory rights to cross-examine prosecution witnesses and present testimony in their own behalf before the examining magistrate determines whether there is sufficient legally admissible evidence of the defendant's guilt to justify binding him over for trial.
logical step, and in an appropriate case such as Uhlemann make a
factual determination and dismiss the case on the merits.

There appears to be no rational basis for the refusal of the
Wisconsin Supreme Court to adopt the "directed verdict" standard
in defining the role of the magistrate in preliminary examina-
tions in Wisconsin. County court judges are eminently qualified
to assume such a role as it is part of their daily routine to rule on
motions for directed verdict. Furthermore, problems with hearsay
information should now be reduced to a minimum in light of the
previously discussed two-pronged Aguilar test adopted by the Wis-
consin Supreme Court in State v. Knudson, which already estab-
lished certain standards concerning the quantum of evidence
needed for the magistrate to find probable cause to bind over based
on hearsay information, and the liberal exceptions to the hearsay
rule recently adopted by the Wisconsin Supreme Court in the Wis-
consin Rules of Evidence. Finally, the ever-present fear that
adoption of such standards would transform the preliminary hear-
ing into a mini-trial with disastrous results to an already overbur-
dened criminal justice system is unfounded. Trial strategy would
usually prevent such a result. "Normally defense counsel will be
more concerned at the preliminary with exploring rather than de-
stroying the prosecution's case." But, when the defense believes
his evidence is compelling enough to overcome the prosecution's
case, why preclude him from demonstrating this fact and prevent-
ing the state from procuring a bind-over? In addition, the magis-
trate would possess the same discretion and control over the pro-
ceeding as he would at trial relative to limiting the evidence to the
relevant issues in dispute.

The Wisconsin court's policy in attempting to define the role
of the magistrate has lacked consistency and failed to provide a
realistic standard with which the bench and bar can identify. An
adoption of the "directed verdict" standard would provide a realistic
standard, one which is presently used by judges in conducting

53. See text accompanying footnote 31.
54. See §§ 908.01(4) concerning prior statements of a witness used as substantive evi-
dence; 908.03(1)-(3) regarding hearsay exceptions relating to present sense impressions,
excited utterances, and their existing mental, emotional, or physical conditions; 908.045(1)
relative to hearsay exception concerning former testimony of an unavailable witness; and
908.06 regarding former statements used for impeachment purposes. WISCONSIN RULES OF
EVIDENCE, 56 MARQ. L. REV. 332, 350, 394, 408 (1973); 59 Wis. 2d Rpp. 220, 250, 303,
325, and 328 (1973).
55. Myers at 828, ____ Mass. at ____ .
their daily business, and one with which counsel can identify with certainty.

Wisconsin courts have also refused to allow the principle of res judicata to attach at the preliminary hearing stage. Because determinations made at the preliminary examination never reach the level of ultimate issues of guilt or innocence, res judicata has never been applicable to the preliminary examination stage. This conclusion necessarily follows from the confusion of the role assigned to the magistrate as previously discussed. It is evident that in order to allow res judicata principles to obtain in certain circumstances, the role of the magistrate must be broadened to provide for sufficient findings reaching the ultimate issues of guilt or innocence in specific situations as the Uhlemann case provided.

The applicable Wisconsin appeal statutes are sections 274.05 and 974.05. A defendant may obtain a review of the magistrate's finding of probable cause by first swearing out a writ of habeas corpus followed by a writ of error to review the findings of the habeas corpus hearing. The state, on the other hand, has a more limited right of appeal. If the ruling of the magistrate concerns a motion to suppress evidence, quash an arrest warrant, or suppress a confession or admission, section 974.05 will apply. However, if the order of the magistrate merely concerns dismissal for lack of probable cause, an appeal under this statute will not apply. From a practical point of view, there is no present need for appeal because of the ease with which the state can refile the charges thereby obtaining its review.

**OTHER FUNCTIONS**

A major cause of the present status of the preliminary examination as a useless routine is the entrenched opinion, formed from

58. Legislative Comment - 1969, Wis. Annotations § 974.05 (1970): With one exception, this is former s. 958.12. That exception which is a major change is sub.(1)(d) which permits the state to appeal from an order suppressing evidence, a confession or an arrest warrant. Since these matters normally determine the successful outcome of prosecutions, it is believed the state should be able to take an immediate appeal rather than wasting the time of the court with a hollow trial where the result is preordained by the ruling on the suppression question. For defendant's right in this area, see s. 971.31(10).
Section 958.12 was preceded by Wis. Stat. § 358.12 (1949), Wis. Annotations § 958.12(1960). Under § 358.12, State v. Friedl, 259 Wis. 110, 47 N.W.2d 306 (1951) and State ex rel. Arthur v. Proctor, 255 Wis. 355, 38 N.W.2d 505 (1949), held that appeal from
experience, that the major function of the preliminary is to bind the accused over for further proceedings. Too often the tenor of the hearing is to overlook the accused's rights at this time, because he will have his chance at trial. Too often the preliminary proceeding is viewed as a duplicitous proceeding, the attitude being that any benefits acquired here could just as easily have been obtained by other means.

. . . The courts tend to limit their scope of analysis to the interest of the prosecution, although giving lip service to the phrase that the hearing is held 'primarily for the benefit of the accused.'

In order to make an adequate appraisal of the overall importance of the preliminary examination, consideration needs to be given to a proper identification and analysis of the other functions frequently overlooked in this procedure.

1. Discovery at Pre-Trial. Although refuted by State v. Knudson, as unnecessary fishing for elements in the state's case, in practice defense counsel must use the preliminary examination as the key to determine what to request under section 971.23.61

2. Freeze Testimony. The preliminary examination provides a chance for direct and cross examination of witnesses to develop the testimony. The transcript may be used at trial as an impeachment tool, or if the witness is unavailable, as substantive evidence. Certainly the preliminary examination imposes much less of a burden upon counsel to obtain testimony than Wisconsin Statute section 967.04 providing for depositions only under certain circumstances. The accused can also make statements on his own behalf

preliminary hearing would not lie. See also Beals v. State, 52 Wis. 2d 599, 191 N.W.2d 221 (1971). Since sub.(1)(d) was the only change in the law it appears that no appeal will lie in the event the magistrate dismisses for lack of probable cause.


60. 51 Wis. 2d 270, 187 N.W.2d 231 (1971).


62. §§ 908.04(1), 908.06 WISCONSIN RULES OF EVIDENCE, 56 MARQ. L. REV. 394, 408 (1973); 59 Wis. 2d Rpp. 325, 328 (1973); see California v. Green, 339 U.S. 149 (1970) regarding confrontation question.

63. See 967.04(1):

If it appears that a prospective witness may be unable to attend or prevented from attending a criminal trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion and notice
if he so chooses.  

3. **Basis for Plea Bargaining.** If each counsel can get a feeling of the case through a preliminary examination, there is a better basis for plea bargaining, e.g., dismiss the action, amend to a misdemeanor, or amend to a lesser included crime.

4. **Motions.** While objections to the sufficiency of the complaint must be made prior to the preliminary hearing, the preliminary examination may provide the basis for motions to suppress evidence, motions under sections 971.23 - 971.25, or objections to the admissibility of a statement made by the defendant, which motions may be made at a later time. Furthermore the defense may, upon notice, wish to petition the judge at the preliminary hearing for alteration in the amount or conditions of the accused's bail.

5. **General Benefit to the Accused.** The preliminary examination could serve as a procedural check on the state's prosecutorial power, preventing unwarranted restraints of an individual's liberty, avoiding the increased anxiety of having to undergo a possible criminal trial, easing the financial burden by ending the action at an early stage, and minimizing the harm to a person's reputation, and generally protecting to a degree against all the inherent hardships imposed upon an accused in a criminal action regardless of ultimate acquittal.

6. **Benefits to the Prosecution.** The preliminary provides an opportunity to test the state’s as well as defendant's witnesses to see how they react to cross-examination. It may expose a weakness in the state's case because of a prejudicial witness or one motivated by an ulterior motive. It may also save needless expense and time consumed in proceeding to trial.

It is readily apparent that the benefits of the preliminary hear-

---

64. See State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 265, 133 N.W.2d 753, 764 (1965), cert. denied, 384 U.S. 1017 (1966) to the effect that by making statements in his own behalf in circumstances such as these does not compromise the defendant's right to refuse to take the stand upon the trial in chief.


ing and the potential role it could play in criminal procedure go far beyond the mere testing of the sufficiency of the evidence.

CONCLUSION

The preliminary examination is a critical procedural safeguard which can offer substantial benefits to both prosecution and defense. It can be a vehicle for many important functional considerations at a criminal prosecution. It is hoped that antiquated and regressive aspects of the preliminary examination will be cast aside in favor of progressive practical changes in the procedure and the attitudes of those it affects. The recent action by the Wisconsin legislature exhibits an attempt in this regard. The recent decisions of *People v. Uhlemann* and *Myers v. Commonwealth* appear to be steps in this direction by other jurisdictions. It is time for Wisconsin to grant its preliminary examination a new vitality consistent with modern justice. A system of law which guarantees "the right of the people to be secure . . . against unreasonable . . . seizures" cannot tolerate less than a wholehearted effort in this matter.

David B. Dean

69. U.S. Const., amend. IV.