

**SM-31 WAIVER OF PRELIMINARY EXAMINATION**

THE FOLLOWING IS RECOMMENDED FOR USE WHEN A DEFENDANT WITHOUT COUNSEL WISHES TO WAIVE THE PRELIMINARY EXAMINATION. IT WILL ALSO BE NECESSARY TO CONDUCT A WAIVER OF COUNSEL INQUIRY, SEE SM-30.

"Since you are charged with a felony, you are entitled to a preliminary examination if you want one, or you may waive it. A preliminary examination is not a trial, but it is a step in the proceedings against you. Witnesses will be called by the State to testify against you and you have the right to cross-examine them. You will also have the right to present evidence. You are entitled to the assistance of a lawyer if you want one.

The purpose of the preliminary examination is to determine whether probable cause exists. Probable cause means facts, together with reasonable inferences from those facts, which lead a reasonable person to conclude that a felony has probably been committed and that you probably committed it.<sup>1</sup> If the court finds that there is probable cause to believe that you did commit a felony, you will be required to stand trial. If the court does not find probable cause, the charges will be dismissed or reduced or the state may refile."<sup>2</sup>

"Do you understand that?"

"Has anyone made any promise or threat to you to get you to waive the preliminary examination?"

Do you want a preliminary examination?"

IF THE DEFENDANT SAYS THAT HE OR SHE DOES NOT WANT A PRELIMINARY EXAMINATION, THE JUDGE SHOULD MAKE THE FOLLOWING FINDING OF FACT:

"The court finds that the defendant has freely, voluntarily, and understandingly waived (his) (her) right to a preliminary examination."

AFTER THE COURT MAKES THE FINDING OF WAIVER, THE COURT SHOULD BIND THE DEFENDANT OVER FOR TRIAL.

THE COURT SHOULD SET OR REVIEW BAIL IN ACCORDANCE WITH CHAPTER 969 OF THE WISCONSIN STATUTES.

#### COMMENT

SM-31 was originally published in 1987; it consisted of material previously included as part of SM-30, Waiver of Counsel. This revision was approved the Committee in February 2011; it adopted a new format and made minor additions and editorial changes.

There are no Wisconsin cases dealing specifically with the adequacy of a waiver of a preliminary examination. There are cases holding that a guilty plea constitutes an effective waiver of a preliminary, though these predated the days of great concern over adequate documentation of such matters.

The primary reason why there has not been appellate litigation on this issue is probably that the strict waiver standards apply to waivers of constitutional rights. A preliminary examination is not constitutionally required, so arguably a full record of a "knowing and intelligent waiver" is not required either.

Regardless of the legal arguments that can be made, it is undoubtedly the wise practice to reflect the waiver on the record. The inquiry ought to be quite brief when the defendant is represented by counsel. But where the defendant is not represented, a description of the preliminary hearing and an inquiry into the defendant's understanding should be conducted. SM-31 is intended as a guide for this type of inquiry.

The primary case discussing the waiver of the preliminary by entering a guilty plea is State v. Strickland, 27 Wis.2d 623, 633, 135 N.W.2d 295 (1965):

Where a defendant appears by counsel, . . . and enters a plea of guilty without requesting a preliminary hearing, a trial court has the right to assume that the preliminary hearing has been intelligently waived.

Thus, Strickland was based on the assumption that counsel would do his job properly. Strickland used that same assumption to find that the type of plea acceptance colloquy now found in SM-32 should not be required (though it was recommended). As to the guilty plea procedure, Strickland was overruled

in Ernst. Unfortunately, its assumption that the lawyer would do his or her job was explicitly overruled as well.

Even Strickland would impose a duty on the trial judge in cases where the defendant appears without counsel:

However, where a defendant charged with a felony appears without counsel and waives counsel, . . . it is the duty of the court to advise the defendant of his right to a preliminary hearing before proceeding further. 27 Wis.2d 623, 633-34.

1. The definition of probable cause is based on the one provided in the Benchbook, section CR-5. For cases discussing probable cause in the context of the preliminary examination see: State v. Berby, 81 Wis.2d 677 (1978); State v. Beal, 40 Wis.2d 607 (1968); State v. Dunn, 117 Wis.2d 487 (1984); and, State v. Schaefer, 2008 WI 25, 308 Wis.2d 279, 746 N.W.2d 457.

2. If a felony is charged but the preliminary examination discloses that only a misdemeanor was committed, the court shall order the complaint amended to conform to the evidence. § 970.03(8).