Evaluating Witness Credibility in Preliminary Examinations

What is for the judge to decide, and what is for the jury?

A JUDGE HEARING A PRELIMINARY EXAMINATION IS AUTHORIZED TO ASSESS the credibility of witnesses.[1] At the same time, an examining judge must not invade the province of the jury by refusing to bind a matter over for trial when the evidence conflicts or raises a reasonable doubt of the defendant's guilt.[2] In *People v Yost,* the Michigan Supreme Court acknowledged the obvious "tension" between these two principles but declined to "clarify the interplay" between them.[3]

The purpose of this article is to offer a "bright-line" approach to reconciling these competing principles. The authors contend that an examining judge should not engage in a jury-like evaluation of witness credibility, but instead should accept the testimony unless it is incredible or implausible as a matter of law.[4] Further, guidelines are suggested for evaluating witness credibility in preliminary examinations in three potential scenarios: (1) conflicting single witness testimony, (2) competing lay witness testimony, and (3) competing expert witness testimony.

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Background

In Michigan, a defendant charged with a felony or a two-year misdemeanor has a statutory right to a preliminary examination, unless the defendant has been indicted by a grand jury.[5] The preliminary examination is a "probable cause hearing" at which the district court judge must determine whether a crime was committed and if there is probable cause to believe the defendant committed the crime.[6] The procedure serves, in part, to cut off "groundless" or "unsupported" prosecutions yet leave juries to decide questions of fact at trial.[7] This "weeding out" process properly requires that the gap between the threshold requirement of probable cause and proof beyond a reasonable doubt ("the criminal trial standard") be broad.[8]

In Michigan, a jury may choose to resolve conflicts in testimony by dividing portions of credible testimony from that testimony that it may choose to reject as false.[9] It may also reject a witness' entire testimony because of a single falsehood.[10] In contrast, an examining judge should avoid such an analysis of witness credibility. Instead, for the purpose of the preliminary examination, testimony should be credited unless it is incredible or implausible as a matter of law. Without this limitation, an examining judge could assume the role of the jury and reject entirely the otherwise credible testimony of a witness because of a single inconsistent or untruthful statement.

The Jury's Prerogative in Evaluating Credibility

Michigan is among the overwhelming majority of states that have rejected the maxim of *falsus in uno, falsus in omnibus* in criminal jury instructions on the issue of credibility.[11] That is, a jury may accept portions of a witness' testimony even if it concludes that the witness deliberately lied about another important matter. This issue was first raised in *Knowles,* supra, where the defendant was convicted of larceny based on the testimony of a witness who claimed to have been present and to have committed the crime with the defendant.[12] During the trial, testimony was admitted that indicated that on material issues the witness had previously made statements in direct contradiction to his testimony under oath. Therefore, the defense counsel requested that the jury be instructed to reject all of the witness' testimony if the jury determined that the witness had lied to them on any material matter. The trial judge rejected the proposed instruction and issued a precautionary instruction. After being convicted, the defendant appealed. In finding no error in the court's refusal to give the instruction, the Michigan Supreme Court held:

> *There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the willful falsehood of a witness as to some portions of his testimony… [W]hen the testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the court, to determine… [I]f the testimony produces a clear and undoubted conviction in their minds, they may act upon that conviction, whether the evidence comes from an honest or corrupt source.*[13]

This case forms the basis of *Michigan Standard Jury Instruction 3.6.*[14] Michigan law makes clear that it remains the jury's prerogative to accept those parts of testimony it believes even if the witness deliberately lied about another important aspect of the case.[15]

The Examining Judge's Evaluation of Credibility

To what extent, then, may an examining judge evaluate witness credibility without invading the province of the jury? On this issue, the often-cited case of *People v Paille #2* is instructive.[16] In *Paille #2,* three defendants, two Detroit police officers and a private security guard, were charged with coercing and beating motel occupants in their effort to locate a sniper and his weapon during the 1967 riots in Detroit. The examining judge found the testimony of the motel occupants to be "incredible" such that they "could not possibly convince a disinterested arbiter of facts of their good faith or truthfulness."[17] The judge concluded that the testimony of the motel residents was so deceptive it amounted to "perjury." On appeal, the defendants argued that the examining judge placed "excessive weight on the credibility of the witnesses." However, the Michigan Supreme Court ruled that the judge had not only the right, but also the duty, to pass judgment on the credibility of the witnesses and held that the preliminary examination judge did not abuse his discretion in dismissing the warrant and discharging the defendants.

In *Paille #2,* the examining judge essentially found the witnesses' testimony incredible as a matter of law and eliminated any potential conflict in evidence for the jury to resolve. Therefore, in light of *Knowles, Paille #2, Yost,* and legal authority from other jurisdictions, having preliminary examination standards similar to Michigan,[18] the following conclusion becomes apparent: testimony is "incredible or implausible as a matter of law" where no fair-minded jury would believe any portion of the witness' testimony that would be necessary to establish at least an inference of criminal responsibility by the defendant. With this in mind, we now turn to a discussion of three potential preliminary examination scenarios with apparent conflicts.

Evaluating Credibility in Conflicting Single Witness Testimony

A conflict can exist in the preliminary examination testimony of a single witness. This may occur where by impeachment or the witness' own admission, the examining judge is confronted with a material falsehood in the witness' testimony. A conflict arises if other portions of the testimony, which are not implausible, exist from which at least an inference can be drawn establishing the elements of the crime. For example, assume the following facts:

FAST FACTS:

In Michigan, a jury may choose to resolve conflicts in testimony by dividing portions of credible testimony for that testimony that it may choose to reject as false.

Where a conflict in credible evidence exists, a jury must resolve that conflict.

Once a witness is qualified to offer testimony as an expert, an examining judge is required to accept the testimony unless it is incredible or implausible as a matter of law.

Example 1

Defendant is accused of raping his four-year-old niece. At the preliminary examination, the niece testifies using anatomically correct dolls that defendant sexually penetrated her with his penis while at his house. On cross-examination, when asked whether many people had done this to her and whether defense counsel had done this to her, she said "yes." When asked whether defendant did it, she said "no."[19]

In this case, a jury should resolve the conflict in the witness' testimony. The jury could either reject all of the witness' testimony or accept that portion which it finds to be true. If, however, the examining judge rejects the entire testimony of the witness because of the material falsehood, the judge has invaded the province of the jury. The testimony was not completely incredible or implausible as a matter of law, and therefore, the material falsehood is insufficient to prevent the matter from being bound over for trial.[20]

Evaluating Competing Lay Witness Testimony

A defendant who holds a preliminary examination may call witnesses on his or her behalf.[21] In this instance, an examining judge may be confronted with credible testimony, which both supports and undermines the charges. On this issue, the law is clear that where a conflict in credible evidence exists, a jury must resolve that conflict.[22] This is true whether or not witnesses for the opposing party outnumber the credible witness.[23]

A more difficult case arises where, as above, a single prosecution witness testifies falsely on a material issue, but otherwise provides a plausible account that supports the criminal charge. The difference is the additional testimony of a defense witness or witnesses who provide credible evidence that the defendant could not have committed the crime. For instance, re-evaluate Example 1, above, with the additional credible testimony of the niece's parent or guardian who states that the niece has never been to the home of the defendant or that the niece was never left alone with the defendant. Does this still present a conflict, or has the additional testimony rendered the niece's already conflicted testimony implausible or incredible as a matter of law? Under the suggested bright-line approach, this preliminary examination testimony still presents a conflict, which should be resolved by the jury.

Evaluating Competing Expert Witness Testimony

In Michigan, it is well established that the qualifications of an expert to render an opinion is a matter that rests in the discretion of the court.[24] That is, "if the court determines that a recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[25] After an examining judge has properly qualified an expert witness, credibility determinations are generally handled in the same manner as lay witnesses.[26] Therefore, the opinion testimony of a witness qualified as an expert should be credited unless it is incredible or implausible as a matter of law.[27]

A judge at a preliminary examination is duty bound to pass judgment on the credibility of the witnesses, yet he or she must also allow a jury to decide criminal cases where the evidence conflicts.

A conflict in expert testimony at the preliminary examination may exist where a judge qualifies two or more experts who then offer opposing expert opinions on the same subject matter. This was the case in two recent opinions of the Michigan Supreme Court, *People v Yost,* supra and *People v Richardson.*[28] In both cases, after qualifying medical personnel rendered expert testimony, the district judges rejected the expert testimony as either "not credible" or that, which "lacked credibility" and refused to bind the cases over for trial.[29]

In *Yost,* the circuit court judge found that the medical opinion, which was rejected by the district court, was not "incredible or unbelievable" and that the matter should have been bound over for trial because of the competing expert testimony.[30] The circuit court decision was affirmed by the Michigan Court of Appeals and in affirming its decision the Michigan Supreme Court said:

> *In sum, we agree with the circuit court that the expert testimony in tandem with the circumstantial evidence . . . was sufficient to warrant a bindover. We conclude that the magistrate failed to give any weight to Dr. Evans' [the prosecution's] expert testimony when he should have . . . and gave undue weight to [one of the defendant's experts].*[31]

Similarly, in *Richardson,* the Michigan Supreme Court found that the examining judge had improperly made a credibility choice between the competing medical experts and "invaded the jury's domain."[32]

Once a witness is qualified to offer testimony as an expert, an examining judge is required to accept the testimony unless it is incredible or implausible as a matter of law. Therefore, the rejection of a qualified expert's opinion should be rarely justifiable. There may be a basis for rejecting an expert opinion, which is based upon a significant factual assumption that turns out to be false. For example, consider a preliminary examination where one medical expert in a murder case bases his opinion that the victim did not die of a stroke on the factual assumption that the victim never had high blood pressure. However, the victim's medical records, the authenticity and admissibility of which are unchallenged, demonstrate that the victim did in fact have a history of high blood pressure. In this case, the factual assumption upon which the expert opinion is based has been proven false, and that expert opinion may now be deemed incredible or implausible as a matter of law.

Conclusion

A judge at a preliminary examination is duty bound to pass judgment on the credibility of the witnesses, yet he or she must also allow a jury to decide criminal cases where the evidence conflicts. The tension between these principles can be reconciled by crediting witness testimony unless it is incredible or implausible as a matter of law. This bright-line rule provides guidance to district court judges and attorneys in evaluating witness credibility at preliminary examinations. It also

preserves a jury's right to meticulously evaluate witness credibility and retains the examining judge's discretion to terminate unsupported or groundless prosecutions. ✦

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Footnotes

1. *People v Yost,* 468 Mich 122; 659 NW2d 604 (2003) and *People v Paille #2,* 383 Mich 621, 627; 178 NW2d 465 (1970).
2. *Yost* at 128; *People v Goecke,* 457 Mich 442, 469–470; 579 NW2d 868 (1998).
3. *Yost,* at n 8.
4. This standard is followed in Colorado and is similar to the standard used in Wisconsin. See, *Hunter v District Court,* 543 P2d 1265 (Colo 1975) and *State v Sorenson,* 449 NW2d 280 (Wis App 1989).
5. MCL 766.1; MSA 28.919. A defendant indicted by a grand jury is not entitled to a preliminary examination. *People v Glass,* 464 Mich 266; 627 NW2d 261 (2001) overruling *People v Duncan,* 388 Mich 489; 201 NW2d 629 (1972).
6. MCL 766.13; MSA 28.931.
7. *People v Duncan,* 388 Mich 489, 501; 201 NW2d 629 (1972).
8. *People v Justice* (After Remand), 454 Mich 334, 344; 562 NW2d 652 (1997).
9. *People v Knowles,* 15 Mich 408, 412 (1867).
10. CJI2d 3.6.
11. Literally interpreted the maxim means "false in one thing, false in everything." Georgia is the only state that follows this maxim. See, 4 ALR2d 1077 and 2003 updates.
12. See, note 11.
13. *Knowles,* supra at 412.
14. CJI2d 3.6, Commentary.
15. Id.
16. 383 Mich 621; 178 NW2d 465 (1970).
17. Id. at 624.
18. See note 4.
19. This example was taken from *State v Sorenson,* supra at note 4.
20. On these facts, the Wisconsin Supreme Court affirmed the examining judge's bind-over of the defendant, and a jury found defendant guilty of first-degree sexual assault.
21. MCL 766.12; MSA 28.930.
22. *Yost* at 128.
23. All questions of conflicting evidence must be left for the trier of fact. *People v King,* 412 Mich 145; 312 NW2d 629 (1981).
24. *Mulholland v DEC International Corp,* 432 Mich 395, 402; 443 NW2d 240 (1989).
25. MRE 702.
26. *Yost* at 128.
27. *Yost* at 130–133.
28. *People v Richardson,* 469 Mich 916; 669 NW2d 797 (2003).
29. *Yost* at 129 and *Richardson,* 669 NW2d at 800.
30. *Yost* at 130.
31. Id. at 133.
32. *Richardson,* 669 NW2d at 798.