Unjust Incarceration: Problems Facing Pennsylvania's Preliminary Hearing and How to Reform It

Drew Sheldon
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* Drew Sheldon is a 2018 J.D. candidate at Duquesne University School of Law. He graduated from the University of Pittsburgh in 2014 with a B.A. in History.
I. INTRODUCTION

A pretrial detention1 can be devastating to an innocent party forced to sit in jail awaiting their day in court.2 A way to decrease this devastating risk is to ensure that only prosecutions likely to result in a conviction will result in long-term pretrial incarceration. The importance of a speedy trial is demonstrated by the media frenzy related to Kalief Browder, who was arrested as a sixteen-year-old based on a questionable identification, spent three years in the Rikers Island Jail awaiting trial, and attempted to commit suicide multiple times during his confinement.3 Browder was arrested based on a single identification by the victim, was identified two weeks after the robbery, and the police did not recover any physical evidence.4 Browder’s family believed his mental condition was worn down so greatly during his confinement that he tragically committed suicide after his release.5 Browder’s case stresses the importance of making an accurate pretrial determination of guilt to ensure only those who are most dangerous and likely to have committed crime endure pretrial detention.6 An accurate pretrial determination of guilt likely could have screened out cases like Browder’s that are unlikely to result in a conviction. This article will discuss the constitutional and statutory protections for pretrial detention. Next, it will discuss major problems facing Pennsylvania’s pretrial detention scheme. Finally, it will advocate that Pennsylvania’s current pretrial detention regime, which is based on the Fourth Amendment, does not adequately provide protection against unnecessary confinement.

1. Pretrial detention is defined as: “holding a defendant prior to his trial on criminal charges either because he cannot post the established bail or because he has been denied pretrial release under a pretrial detention statute.” Pretrial detention, BARRON’S LAW DICTIONARY 155 (6th ed. 2010).
4. Id.
6. Id.
II. BACKGROUND ON THE PROTECTIONS AGAINST PRETRIAL CONFINEMENT

Current legal protections against unlawful confinement are largely rooted in the Fourth Amendment. The Fourth Amendment requires both arrests and subsequent long-term detentions to be based on probable cause. Courts prefer that arrests are made after a neutral and detached magistrate determines there is probable cause for an arrest rather than relying on the judgment of a police officer in the “competitive enterprise of ferreting out crime.” However, while there is a preference that arrests be made with a warrant signed by a magistrate, the vast majority of arrests are made pursuant to a warrantless, on-the-scene finding of probable cause by a police officer. Exceptions to the ordinary arrest warrant requirement are premised upon the practical consideration that when time is of the essence, applying for an arrest warrant takes a considerable amount of time and may result in the suspect getting away. But once a suspect is in custody and there is no longer any risk of escape from law enforcement a magistrate’s probable cause determination is necessary.

In the seminal case on pretrial detention, Gerstein v. Pugh, the United States Supreme Court determined the constitutional requirements for pretrial procedures. Prior to this decision, individuals in Florida, where this case was decided, could be arrested solely based on police discretion, i.e. arrested without a warrant, and faced the possibility of being detained for significant periods of time prior to their trial without ever having an opportunity to challenge the existence of the probable cause resulting in their arrest. Before Gerstein, prosecutors in Florida were only required to file an

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7. See Gerstein, 420 U.S. at 111.
8. Id. at 111. Probable cause is defined as: “the existence of facts and circumstances within one’s knowledge and of which one has reasonably trustworthy information, sufficient in themselves to warrant a person of reasonable caution to believe that a crime has been committed.” Probable cause, BARRON’S LAW DICTIONARY 419 (6th ed. 2010).
12. Id. at 114.
13. Id.
15. Id. at 116.
information\textsuperscript{16} to detain individuals prior to trial.\textsuperscript{17} Prosecutors for the State of Florida asserted the mere act of filing an information was a sufficient determination of probable cause to justify incarceration for the entire period of time from arrest until trial.\textsuperscript{18}

In \textit{Gerstein v. Pugh}, the United States Supreme Court held that the Fourth Amendment requires that within forty-eight hours of a warrantless arrest a neutral and detached party must determine that probable cause existed for the arrest in order to justify further detention.\textsuperscript{19} The Court recognized how pretrial detention is often more intrusive than the actual arrest because a suspect risks losing their job, their source(s) of income, and disruption to their family.\textsuperscript{20} The Supreme Court found that a prosecutor filing an information was insufficient to justify long-term incarceration because the prosecutor’s law enforcement responsibilities are “inconsistent with the constitutional role of a neutral and detached magistrate.”\textsuperscript{21}

The Court also found defendants are not entitled to representation by an attorney because probable cause determinations are not adversarial.\textsuperscript{22} Defense counsel is only required at “critical stages” in a criminal proceeding.\textsuperscript{23} A proceeding is considered critical only if there is a chance of losing or sacrificing a constitutional right or impairing the defendant’s defense; here, the Court found that probable cause defendants do not risk losing constitutional rights and consequently do not require representation.\textsuperscript{24} Additionally, the Supreme Court encouraged states to experiment with different types of probable cause determinations,\textsuperscript{25} such as allowing procedures

\begin{itemize}
\item Information is defined as: “a written accusation of a crime signed by the prosecutor, charging a person with the commission of a crime; an alternative to indictment as a means of starting a criminal prosecution.” \textit{Information}, BARRON’S LAW DICTIONARY 269 (6th ed. 2010).
\item \textit{Gerstein}, 420 U.S. at 116-17.
\item Id.
\item Id. at 103.
\item Id. at 114.
\item Id. at 117; see also Shadwick v. City of Tampa, 407 U.S. 345, 348 (1972) (holding “someone independent of the police and prosecution must determine probable cause”).
\item \textit{Gerstein}, 420 U.S at 123.
\item Coleman v. Alabama, 399 U.S. 1, 7 (1970); see, e.g., United States v. Cronic, 466 U.S. 648, 659 (1984) (opining that the trial is a critical stage where defendants must have the opportunity for representation); Gardner v. Florida, 430 U.S. 349, 358 (1977) (establishing defendants must have the opportunity to be represented during sentencing); United States v. Wade, 388 U.S. 218, 237-38 (1967) (recognizing pretrial lineups are critical stages); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding pretrial questioning while charged with a crime is a critical stage); \textit{Hamilton}, 368 U.S. at 54 (finding an arraignment where an insanity defense must be pleaded is a critical stage).
\item \textit{Gerstein}, 420 U.S. at 123-24.
\end{itemize}
like arraignments\textsuperscript{26} and initial bail determinations\textsuperscript{27} to occur at the same time. Finally, while only a single probable cause determination is necessary, jurisdictions can provide greater protection than what is required by the Fourth Amendment by providing multiple pretrial determinations.\textsuperscript{28}

A. \textit{Types of Probable Cause Determinations}

There is no single preferred pretrial procedure for determining probable cause.\textsuperscript{29} Different types of pretrial procedures allow experimentation and flexibility for states.\textsuperscript{30} Common procedures include arrest warrants issued by a magistrate or judge,\textsuperscript{31} indicting grand juries,\textsuperscript{32} and non-adversarial probable cause determinations in front of a magistrate, known as Gerstein hearings.\textsuperscript{33}

1. \textit{Arrest Warrant}

Arrest warrants are generally used when police officers have the luxury of time before an arrest must be made.\textsuperscript{34} An arrest warrant may be issued upon a finding of probable cause by a magistrate.\textsuperscript{35} The arrest warrant is requested by the affiant, usually a police officer, in an affidavit of probable cause.\textsuperscript{36} Affidavits of probable cause must be approved by magistrates.\textsuperscript{37} Despite the requirement for only minimal legal training,\textsuperscript{38} a magistrate’s “determination of probable cause should be paid great deference by reviewing

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\item Arraignment is defined as the “initial step in the criminal process wherein the defendant is formally charged with an offense, i.e., given a copy of the complaint or other accusatory instrument, and informed of his or her constitutional rights . . . . ” \textit{Arraignment}, BARRON'S LAW DICTIONARY 35 (6th ed. 2010).
\item Bail is defined as: “a hearing to determine if a monetary or other form of security may be given to “insure the appearance of the defendant at every state of the proceedings.” \textit{Bail}, BARRON'S LAW DICTIONARY 45 (6th ed. 2010).
\item \textit{Gerstein}, 420 U.S. at 123.
\item Id.
\item PA. R. CRIM. P. 513.
\item \textit{Gerstein}, 420 U.S. at 103.
\item United States v. Watson, 423 U.S. 411, 455 n.22 (1976) (recognizing that an incentive for using search warrants is that the police may continue to collect evidence without penalty if a magistrate initially refuses to sign a search warrant).
\item \textit{Shadwick}, 407 U.S. at 345 n.1.
\item Id.
\item 201 PA. CODE 601 (2015). In Pennsylvania, you do not need to be a member of the bar or even have a law degree to become a magistrate. \textit{Id.} Magistrates who are not lawyers must pass a Minor Judiciary test and take continuing legal education. \textit{Id.}
Therefore, the use of search warrants by police officers is incentivized by the courts as reviewing courts give the magistrates' judgment deference. If magistrates' judgment and analysis of affidavits of probable cause were heavily scrutinized, “police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search.”

2. Grand Jury

Federal constitutional rights require that a grand jury find the existence of probable cause for all criminal indictments. The right to a grand jury only exists for federal criminal prosecutions; the right to a grand jury indictment is not selectively incorporated and thus states are not required to use grand juries. Historically, grand juries:

[Deliberate] in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

41. Gates, 462 U.S. at 236.
42. Grand jury is defined as: “a body of people drawn, selected, and summoned according to law to serve as a constituent part of a court of criminal jurisdiction.” Grand jury, BARRON'S LAW DICTIONARY 239-40 (6th ed. 2010). The purpose of the body “is to investigate and inform on crimes committed within its jurisdiction and to accuse persons of crimes when it has discovered sufficient evidence to warrant holding a person for a trial.” Id.
43. U.S. CONST. amend. V. The founders of the United States believed grand juries were essential to preventing “arbitrary and oppressive” government action. United States v. Calandra, 414 U.S. 338, 342-43 (1974). Consequently, grand juries are given wide latitude in both investigating crime and determining the existence of probable cause. Id.
44. Selective incorporation is defined as: “the process by which certain [] guarantees expressed in the Bill of Rights become applicable to the states through the Fourteenth Amendment.” Selective incorporation, BARRON'S LAW DICTIONARY 490 (6th ed. 2010).
46. Calandra, 414 U.S. at 343 (quoting Blair v. United States, 250 U.S. 273, 282 (1919)).
Grand juries are seen as a way of protecting individuals against “arbitrary and oppressive governmental action.”\textsuperscript{47} Because a grand jury’s deliberations are secret, they are able to avoid many of the inconveniences of a public hearing.\textsuperscript{48} Pennsylvania currently allows indicting grand juries, but only in limited circumstances.\textsuperscript{49} Grand juries are only used when witness intimidation has already occurred.\textsuperscript{50} In that case, a common pleas judge must petition the Supreme Court of Pennsylvania for permission to use a grand jury.\textsuperscript{51} Moreover, the use of the grand jury recognizes the inconvenience of testifying in a criminal trial and the dangerous consequences of witness intimidation.\textsuperscript{52}

3. **Gerstein Hearings**

A Gerstein Hearing refers to a probable cause determination that is required to occur after a warrantless arrest.\textsuperscript{53} An influential Yale Law Review article, published before the decision in *Gerstein v. Pugh*, theorized an analytical framework splitting these types of probable cause determination procedures into two categories: backward looking procedures and forward looking procedures.\textsuperscript{54}

\textit{a) Backward Looking Model}

The backward looking model’s “primary concern is with the legality of the arrest and the validity of the detention of the arrested person.”\textsuperscript{55} Under this model, evidence is presented to a magistrate in the form of affidavit\textsuperscript{56} and cannot be challenged by the defendant.\textsuperscript{57} These procedures are more akin to a request for an arrest warrant rather than an actual trial because of the factual, rather than legal inquiry, the court makes.\textsuperscript{58} The backward looking model

\begin{footnotesize}
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\item[\textsuperscript{47}]Id. at 342-43.
\item[\textsuperscript{48}]Id. at 343. The secret nature of grand jury proceedings avoids the embarrassing stigma of being accused of a crime publically. Id. Further, it allows investigation into incidents when it is not entirely clear a crime even occurred. Id.
\item[\textsuperscript{49}]PA. R. CRIM. P. 556.
\item[\textsuperscript{50}]Id.
\item[\textsuperscript{51}]Id.
\item[\textsuperscript{52}]Id.
\item[\textsuperscript{53}]Gerstein v. Pugh, 420 U.S. 103, 103 (1975).
\item[\textsuperscript{54}]The Function of the Preliminary Hearing in Federal Pretrial Procedure, 83 YALE L.J. 771, 774 (1974).
\item[\textsuperscript{55}]Id. at 775.
\item[\textsuperscript{56}]Affidavit is defined as a “written, ex parte statement made or taken under oath before an officer of the court.” Affidavit, BARRON'S LAW DICTIONARY 18 (6th ed. 2010).
\item[\textsuperscript{57}]The Function of the Preliminary Hearing in Federal Pretrial Procedure, supra note 54, at 776.
\item[\textsuperscript{58}]Id.
\end{itemize}
\end{footnotesize}
is not subject to formal rules of evidence and normally inadmissible evidence like hearsay\textsuperscript{59} is considered in determining if probable cause exists.\textsuperscript{60} Ultimately, these types of procedures are meant to screen out types of illegal detentions\textsuperscript{61} such as: (1) good faith, but still illegal arrests; (2) knowingly illegal arrests; and (3) legal arrests where later evidence reveals the arrestee’s innocence.\textsuperscript{62}

\textit{b) Forward Looking Model}

The forward looking conceptual model inquires into whether there is “sufficient probability of conviction” to warrant further criminal proceedings.\textsuperscript{63} This model envisions that cases unlikely to succeed on their merits can be screened out at an early stage.\textsuperscript{64} Under this model, evidence would be presented to a magistrate who would be required to determine if there was a legal and factual basis for the criminal charges.\textsuperscript{65} If the prosecution successfully demonstrates a basis for the charges, the magistrate could hold the charges over for trial.\textsuperscript{66} Because the goal is to determine if a case would be successful at trial, the forward looking model would not consider hearsay or other evidence likely to be inadmissible at trial.\textsuperscript{67} A forward looking probable cause determination would resemble a trial in that a defendant has the right to counsel, to cross-

\textsuperscript{59} Hearsay is defined as:
a rule that declares not admissible as evidence any statement other than that by a witness while testifying as the hearing and offered into evidence to prove the truth of the matter stated. The reason for the hearsay rule is that the credibility of the witness is the key ingredient in weighing the truth of this statement; so when that statement is made out of court, without benefit of cross-examination and without the witness's demeanor being subject to assessment by the trier of fact, there is generally not adequate basis for determining whether the out-of-court statement is true. \textit{Hearsay, BARRON'S LAW DICTIONARY 246 (6th ed. 2010).}

\textsuperscript{60} \textit{The Function of the Preliminary Hearing in Federal Pretrial Procedure, supra} note 54, at 778. Pennsylvania's preliminary arraignment is an example of a Backward Looking probable cause determination. \textit{See} discussion \textit{infra} 1. Backward Looking – Preliminary Arraignment.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{E.g., Brown v. Illinois, 422 U.S. 590, 592 (1975) (demonstrating where detectives acknowledged an arrest was made, not based on probable cause, but solely for the purpose of questioning an individual during a murder investigation).}

\textsuperscript{63} \textit{The Function of the Preliminary Hearing in Federal Pretrial Procedure, supra} note 54, at 778.

\textsuperscript{64} \textit{Id.} at 781.

\textsuperscript{65} \textit{Id.} at 782.

\textsuperscript{66} \textit{Id.} at 781. Holding charges for trial means the charged crimes can be tried at trial. \textit{Id.} Pennsylvania's preliminary hearing is an example of a Forward Looking probable cause determination. \textit{See} discussion \textit{infra} 2. Forward Looking – Preliminary Hearing.

\textsuperscript{67} \textit{Id.} at 779-80.
examine witnesses, and to present affirmative defenses on his behalf.\(^\text{68}\)

**B. Pennsylvania’s Pretrial Procedures**

While the United States Constitution only requires a single probable cause determination prior to trial,\(^\text{69}\) Pennsylvania provides two separate guilt determinations.\(^\text{70}\) The first, a preliminary arraignment, is an ex parte procedure occurring shortly after the arrest where a magistrate determines if probable cause exists.\(^\text{71}\) The preliminary arraignment has many of the characteristics of the backward looking model procedure.\(^\text{72}\) The second, a preliminary hearing, is an adversarial procedure which mimics some of the procedures of an actual trial.\(^\text{73}\) The preliminary hearing shares many of the similarities of the forward looking model procedure.\(^\text{74}\)

1. **Backward Looking - Preliminary Arraignment**

Pennsylvania’s preliminary arraignment is similar to a backward looking procedure.\(^\text{75}\) In Pennsylvania, defendants arrested without a warrant are given a probable cause determination within forty-eight hours of being arrested.\(^\text{76}\) This procedure is described in Pennsylvania Rules of Criminal Procedure Rule 540.\(^\text{77}\) The comment to Rule 540 explains that the preliminary arraignment fulfills the *Gerstein* probable cause requirement that a probable cause determination be made by a neutral and disinterested magistrate within forty-eight hours of a warrantless arrest.\(^\text{78}\)

Pennsylvania’s preliminary arraignment, as proscribed in Pennsylvania Rule of Criminal Procedure 540, combines many necessary pretrial procedures. Necessary pretrial procedures includes presenting the arrestee with the criminal complaint.\(^\text{79}\) If the defendant is arrested with an arrest warrant, they are provided with both the

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\(^{68}\) *Id.* Under the forward looking model, the credibility of witnesses would be at issue since the goal is to test if the case would likely succeed under trial like conditions. *Id.* at 784.

\(^{69}\) *Gerstein*, 420 U.S. at 126.

\(^{70}\) PA. R. CRIM. P. 540; PA. R. CRIM. P. 542.

\(^{71}\) PA. R. CRIM. P. 540.

\(^{72}\) See discussion supra a) Backward Looking Model.

\(^{73}\) PA. R. CRIM. P. 542.

\(^{74}\) See discussion supra b) Forward Looking Model.

\(^{75}\) PA. R. CRIM. P. 540; *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, supra note 54, at 775.


\(^{77}\) PA. R. CRIM. P. 540.

\(^{78}\) PA. R. CRIM. P. 540 cmt.; see Riverside, 500 U.S. at 56.

\(^{79}\) PA. R. CRIM. P. 540(C).
warrant and the affidavit of probable cause used to obtain the arrest warrant.\textsuperscript{80} If a warrantless arrest occurs, a \textit{Gerstein} hearing, probable cause determination is made.\textsuperscript{81} Whether a warrant was issued or not, the magistrate will inform the defendant of the right to secure counsel, the right to have a preliminary hearing, and the opportunity to post bail.\textsuperscript{82}

2. \textbf{Forward Looking - Preliminary Hearing}

Pennsylvania's preliminary hearing is a forward looking procedure because it is meant to prove the Commonwealth has a realistic chance of succeeding on the merits of its case at trial.\textsuperscript{83} The purpose of the preliminary hearing is to protect accused individuals from unlawful detention.\textsuperscript{84} Preliminary hearings must be scheduled to occur within fourteen days of an arrest if the defendant is incarcerated and twenty-one days if the defendant posted bail.\textsuperscript{85}

The Commonwealth is required to establish a prima facie case against the defendant to show the crime was committed by the accused.\textsuperscript{86} Prima facie is a standard lower than reasonable doubt,\textsuperscript{87} but still high enough that a reasonable jury could find each element of the offense.\textsuperscript{88} Probable cause merely requires a showing of “facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime.”\textsuperscript{89} However, a prima facie showing of guilt requires a showing of “each of the material elements of the crime charged” and the “existence of facts which connect the accused to the crime charged.”\textsuperscript{90} Hearsay evidence is admissible at a preliminary hearing and the Commonwealth may introduce hearsay evidence to meet its burden of establishing a prima facie case.\textsuperscript{91} There is no

\begin{itemize}
\item \textsuperscript{80} PA. R. CRIM. P. 540(D).
\item \textsuperscript{81} PA. R. CRIM. P. 540(E).
\item \textsuperscript{82} PA. R. CRIM. P. 540(F).
\item \textsuperscript{83} PA. R. CRIM. P. 542, \textit{The Function of the Preliminary Hearing in Federal Pretrial Procedure, supra} note 54, at 779.
\item \textsuperscript{84} Commonwealth v. Ruza, 511 A.2d 808, 810 (Pa. 1986).
\item \textsuperscript{85} PA. R. CRIM. P. 540.
\item \textsuperscript{86} PA. R. CRIM. P. 542.
\item \textsuperscript{87} Victor v. Nebraska, 511 U.S. 1, 18, 20 (1994) (finding reasonable doubt is "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon").
\item \textsuperscript{88} Commonwealth v. Wojdak, 466 A.2d 991, 996 (Pa. 1983).
\item \textsuperscript{89} Commonwealth v. Rodriguez, 585 A.2d 988, 990 (Pa. 1991).
\end{itemize}
constitutional right, federal or state, to a preliminary hearing. As will be later discussed, the justification for requiring a second pre-trial procedure in the form of a preliminary hearing is eroding away and, as it currently stands, it no longer demonstrates the prosecution’s chance of succeeding on the merits of the case.

III. CURRENT PROBLEMS FACING PENNSYLVANIA’S PRETRIAL PROCEDURES

Pennsylvania’s preliminary arraignment fulfills the federal constitutional obligation to make a determination of probable cause in warrantless arrests. However, the preliminary hearing no longer fulfills the goal of ensuring only meritorious cases reach trial. Rather, the preliminary hearing has become redundant to the preliminary arraignment and acts as a prosecutorial rubberstamp. After discussing the problems facing Pennsylvania’s preliminary arraignments and preliminary hearings, this article will propose certain reforms that can hopefully make these pretrial procedures more efficient for weeding out bad criminal cases.

A. Admission of Hearsay Evidence

In Commonwealth v. Ricker, the Pennsylvania Superior Court decided the Confrontation Clause is not violated where the prosecution proves a prima facie case at a preliminary hearing through hearsay alone. The Confrontation Clause is encompassed in the Sixth Amendment and states, “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.” The Confrontation Clause is meant to guarantee open and fair trials “by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.” Other jurisdictions analyzing this issue have found that the federal Confrontation Clause does not apply to preliminary hearings.

94. McLaughlin, 500 U.S. at 56.
95. Id.
97. U.S. CONST. amend. VI.
Commonwealth v. Ricker demonstrates the consequences of not requiring confrontation at the preliminary hearing. David Edward Ricker was charged with attempted murder, assault of a law enforcement officer, and aggravated assault stemming from a shootout with police. Pennsylvania State Trooper Michael Trotta was dispatched to Ricker’s West Hanover home after a truck, known to be driven by Ricker, allegedly ran over a neighbor’s mailbox and lawn ornament. Ricker’s wife opened the family’s driveway gate and consented for the officers to enter their driveway. Trooper Trotta was warned that Ricker was drunk and carrying a gun but proceeded to drive up to the home where he was confronted by Ricker. At one point Trooper Trotta drew his taser and Ricker slammed the police car door, preventing Trooper Trotta from exiting the vehicle. When Trooper Trotta did leave the vehicle, Ricker drew a handgun. Another Pennsylvania state trooper, Trooper Gingerich, then arrived on the scene. Ricker proceeded to retreat to his garage where he procured an assault rifle. Troopers Trotta and Gingerich drew their guns and demanded Ricker drop his rifle. Ricker refused to comply with the officers’ commands. Trooper Trotta entered the garage where he saw Ricker leveling a rifle towards him. Trooper Trotta then shot Ricker twice with his handgun. Ricker fell to the ground, returned fire, and shot Trooper Trotta multiple times.

Neither Trooper Trotta or Gingerich, the only officers with firsthand knowledge of the event, testified at the preliminary hearing. The Commonwealth was likely trying to insulate Trooper Trotta from cross examination. Trooper Trotta was investigated by a grand jury for shooting Ricker, though he was ultimately

100. Ricker, 120 A.3d at 353.
101. Id.
102. Id. at 351.
103. Id.
104. Id.
105. Id. at 352.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
absolved, because his actions arguably escalated the situation and caused an unnecessary shooting.\textsuperscript{116} Trooper Trotta also had a history of police misconduct which the prosecution likely was trying to avoid, including a September 2013 incident where the state police settled a lawsuit alleging Trooper Trotta strip-searched a man without securing a search warrant.\textsuperscript{117} Additionally, on May 16, 2015 Trooper Trotta was involved in a recorded incident, where a skateboarder was beaten after standing in a roadway and giving the officers the middle finger.\textsuperscript{118} As a result of this incident of police brutality, Trotta’s employment as a trooper was terminated for an unrelated “internal affair” and his partner was charged with official oppression, simple assault, and harassment.\textsuperscript{119} Because of these questionable incidents involving Trooper Trotta, the prosecution was likely trying to avoid scrutiny of his behavior during Ricker’s prosecution.

Instead of Trooper Trotta testifying at the preliminary hearing, the prosecution called Trooper Douglas Kelly who did not witness any first-hand criminal conduct, but instead testified about his second-hand investigation of the shooting and played for the magisterial district court a tape of an interview with Trooper Trotta.\textsuperscript{120} Based solely on the hearsay evidence provided by Trooper Kelly of the event and the taped interview, the magistrate found a prima facie showing of facts for the charges and bound the case for trial.\textsuperscript{121} In response, Ricker filed a pretrial writ of habeas corpus\textsuperscript{122} which the trial court denied.\textsuperscript{123} Ricker alleged he was denied his constitutional right to confront his witnesses because he was only able to cross-examine Trooper Kelly, but not able to cross-examine the taped statement made by Trooper Trotta. Ricker then appealed to the Pennsylvania Superior Court.\textsuperscript{124} Ricker alleged the current rules of Pennsylvania Criminal procedure violated his


\textsuperscript{117} Id.


\textsuperscript{119} Id.

\textsuperscript{120} Ricker, 120 A.3d at 352.

\textsuperscript{121} Id.

\textsuperscript{122} Habeas corpus is defined as a challenge “for obtaining a judicial determination of the legality of an individual’s custody. Technically, it is used in the criminal law context to bring the petitioner before the court to inquire into the legality of his confinement.” \textit{Habeas corpus}, BARRON’S LAW DICTIONARY 243 (6th ed. 2010).

\textsuperscript{123} Id., 120 A.3d at 352.

\textsuperscript{124} Id.
confrontation rights under both the state and federal constitutions. Specifically, Rule 542 of the Pennsylvania Rules of Criminal Procedure regarding hearsay provides:

[h]earsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

The comment to Rule 542 of the Pennsylvania Rules of Criminal Procedure further clarifies the extent to which hearsay is used:

[traditionally] our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a prima facie case. See the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements is not required at the preliminary hearing. But compare Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172 (Pa. 1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a prima facie case).

Ricker primarily relied upon the Pennsylvania Supreme Court plurality decision in Commonwealth v. ex rel. Buchanan v. Verbonitz to argue that the prosecution could not solely use hearsay evidence to advance past the preliminary hearing stage. The

125. Id.
126. PA. R. CRIM. P. 542(E).
127. PA. R. CRIM. P. 542 cmt.
plurality in Buchanan decided “[w]hile the United States Supreme Court has not specifically held that the full panoply of constitutional safeguards (i.e., confrontation, cross-examination, and compulsory process) must attend a preliminary hearing, it has inferred as much in Gerstein v. Pugh.”

However, the inferred right to confrontation that the Buchanan plurality inferred from Gerstein was disapproved by a plurality of the United States Supreme Court in Pennsylvania v. Ritchie just three years earlier. A plurality of the United States Supreme Court in Ritchie held the right of confrontation is a trial right, and does not implicate pretrial discovery. Additionally, the other jurisdictions which have analyzed this question have determined the federal right to confrontation does not prevent the prosecution from advancing past the preliminary hearing while using only hearsay evidence.

The Pennsylvania Supreme Court initially granted Ricker’s appeal but later dismissed the appeal as improvidently granted. Dismissing the appeal meant that the Superior Court’s decision would continue to be controlling law throughout Pennsylvania. The dismissal featured a concurring opinion by Chief Justice Saylor and a dissenting opinion by Justice Wecht. In Saylor’s concurring opinion, the Chief Justice recognized the problems associated with allowing hearsay into preliminary hearings could better be addressed by “refinement in the rulemaking arena” given that the court was presently too “deeply divided concerning the appropriate approach” for resolving the issue with a constitutional analysis.

130. Buchanan, 581 A.2d at 175.
131. Pennsylvania v. Ritchie, 480 U.S. 39, 54 (1987) (plurality). “The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.” Id. Surprisingly, neither the concurrence or dissent in Verbonitz recognized the decision in Ritchie. See generally Buchanan, 581 A.2d 172.
132. Ritchie, 480 U.S. at 52. While the decision in Ritchie was only a plurality, the United States Supreme Court has recognized the Confrontation Clause usually only applies to the trial. See Barber v. Page, 390 U.S. 719, 725 (1968) (finding “[t]he right to confrontation is basically a trial right”).
133. See supra note 99.
134. Commonwealth v. Ricker, 135 A.3d 175 (Pa. 2016), appeal dismissed, 170 A.3d 494 (Pa. 2017). The concurring opinion by Chief Justice Saylor recognized that the case “does not present a suitable vehicle by which to resolve the questions presented” largely because the prosecution did “not rely exclusively on hearsay in addressing the elements of the crimes with which [Ricker] was charged.” Id. at 495, 501-02 (Saylor, C.J., concurring).
135. For example, Chief Justice Saylor recognized the seemingly contradictory function of Rule 573(c), which allows the defendant to “cross-examine witnesses”, with Rule 573(e), which states that “[h]earsay evidence shall be sufficient to establish any element of an offense.” Id. at 507.
136. Id. at 504.
Justice Wecht filed the sole dissenting opinion and argued that while the court only granted allocatur to resolve the confrontation clause issue, the court could still legally decide the appeal on the basis of statutory construction or procedural due process. Additionally, Justice Wecht recognized that “[t]housands of preliminary hearings occur across this Commonwealth each year” and that the Superior Court's decision would consequently be “imposed upon every defendant in this Commonwealth until the best case arrives on our doorstep.”

Thus, the Pennsylvania Supreme Court will likely lack the opportunity to address this issue for the foreseeable future. On October 26, 2017, shortly after the Supreme Court denied the appeal, David Ricker pleaded guilty to aggravated assault, drug possession, and leaving the scene of an accident in exchange for the prosecution withdrawing the count of attempted homicide and was subsequently sentenced to a period of incarceration of five to ten years, thereby ending his consequential impact on Pennsylvania jurisprudence.

B. The Unavailable Witness Farce

Pennsylvania’s laws for preliminary hearings and rules of criminal procedure allowing use of testimony from preliminary hearings creates a perverse incentive for defense attorneys to not adequately represent their clients by not fully cross-examining witnesses in anticipation that the witness may be unavailable at trial. The current laws also create an unintended consequence of discouraging

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137. The question presented that that the Pennsylvania Supreme Court granted allocatur was: “Whether the Pennsylvania Superior Court wrongly held, in a published opinion of first impression, that a defendant does not have a state or federal constitutional right to confront the witness against him at a preliminary hearing and that a prima facie case may be proven by the Commonwealth through hearsay evidence alone, which is what the trial and magisterial district courts concluded in Petitioner's case?” Commonwealth v. Ricker, 135 A.3d 175 (Pa. 2016) (emphasis added).

138. *Ricker*, 170 A.3d at 510-17 (Wecht, J., dissenting). However, a recent Pennsylvania Superior Court case in Commonwealth v. Mc Clelland decided that neither substantive or procedural due process rights are violated by allowing hearsay to prove all the elements of the charged crimes, 165 A.3d 19 (Pa. Super. Ct. 2017). However, McClelland does carry the caveat that “[t]his decision does not suggest that the Commonwealth may satisfy its burden by presenting the testimony of a mouthpiece parroting multiple levels of rank hearsay.” *Id.* at 27. Thus, in Pennsylvania there appears to be at least some constitutional limit on the amount of hearsay that may be used at preliminary hearing.

139. *Ricker*, 170 A.3d at 509 (Wecht, J., dissenting).


prosecutors from objecting to irrelevant questioning in fear that an objection will prevent the admission of the preliminary hearing testimony at trial if the witness were to become unavailable. The Pennsylvania rules of evidence permit at trial, as an exception to the hearsay rule,\footnote{142} the admission of previously recorded testimony from a preliminary hearing, provided that: (1) the witness responsible for that testimony is presently unavailable; (2) the defendant had counsel at the preliminary hearing; and (3) the defendant had a full and fair opportunity to cross-examine the witness during the earlier proceeding.\footnote{143} Problems associated with the admission of preliminary hearing testimony often intersect with the right to cross-examine under the Pennsylvania Constitution\footnote{144} and the United States Constitution.\footnote{145} However, because the credibility of a witness is not at issue during a preliminary hearing,\footnote{146} the nature of the questions the defense attorneys are allowed to ask change and a full and fair opportunity to cross-examine the declarant can be inhibited.\footnote{147}

In Pennsylvania, it is difficult to prove that a defendant did not have an opportunity to fully and fairly cross-examine a witness at a preliminary hearing. Courts will usually only find a defendant lacked such an opportunity when the prosecution fails to disclose to the defense prior to the preliminary hearing that the witness (1) gave prior inconsistent statements to the police, (2) has a criminal conviction that is admissible to attack their credibility,\footnote{148} (3) is

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\textsuperscript{142} PA. R. EVID. 802. Hearsay is ordinarily not admissible during a criminal case. \textit{Id.}; see also Hearsay rule, \textit{BARRON’S LAW DICTIONARY} 246 (6th ed. 2010) (stating that the hearsay rule “declares not admissible as evidence any statement other than that by a witness while testifying at the [current] hearing and offered into evidence to prove the truth of the matter asserted”).


\textsuperscript{144} P.A. CONST. art. I, § 9. “In all criminal prosecutions the accused hath a right to be heard by himself and his counsel . . . [and] to be confronted with the witnesses against him.” \textit{Id.}

\textsuperscript{145} U.S. CONST. amend. VI. “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense.” \textit{Id.} The Confrontation Clause has been interpreted to guarantee the right to cross-examine witnesses. \textit{Pointer v. Texas}, 380 U.S. 400, 406-07 (1965).


\textsuperscript{147} See, \textit{e.g.}, discussion \textit{infra} pp. 19-20 and note 146.

\textsuperscript{148} PA. R. EVID. 609(a). Evidence of prior conviction is admissible “for the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, must be admitted if it involved dishonesty or false statement.” \textit{Id.} However, when the criminal conviction is public record and accessible to the defense, a failure by the prosecution to provide evidence of the conviction to the defendant prior to the preliminary hearing will not deprive the defendant of a full and fair opportunity to cross examine witness. \textit{Commonwealth v. Brown}, 872 A.2d 1139, 1148 (Pa. 2005).
cooperating for a more lenient sentencing, or (4) is under investigation for the same crime currently being litigated. Ultimately, what is important is whether "the defense has been denied access to vital impeachment evidence either at or before the time of the prior proceeding at which that witness testified." However, a failure or inability to impeach a witness through other more subjective means, like questioning perception, memory, or clarity will not prevent the defendant from being provided the opportunity to fully and fairly cross-examine a witness.

The cases of Commonwealth v. Johnson and Commonwealth v. Douglas demonstrate how attorneys are required to arbitrarily ask an undetermined amount of questions, tangentially related to the witnesses’ credibility, in order for the testimony to count as full and fair opportunity to cross-examine. In Commonwealth v. Johnson, a murder prosecution relied upon the admission of preliminary hearing testimony for a witness who was no longer available for trial. During the preliminary hearing the defense attorney attempted, and failed, to elicit testimony regarding the credibility of the key prosecution witness:

BY APPELLEE COUNSEL:

Q. You were aware that Doug had beaten up Vera a number of times; is that correct?

COMMONWEALTH:

Objection.

THE COURT:

Sustained.

151. Id. at 688. Impeachment is defined as: "to call into question the veracity of the witness by means of evidence offered for that purpose, or by showing that the witness is unworthy of belief." Impeachment, BARRON’S LAW DICTIONARY 256 (6th ed. 2010).
153. Commonwealth v. Thompson, 648 A.2d 315, 322 (Pa. 1994) (finding “[t]he Commonwealth may not be deprived of its ability to present inculpatory evidence at trial merely because the defendant, despite having the opportunity to do so, did not cross-examine the witness at the preliminary hearing stage as extensively as he might have done at trial"), abrogated on other grounds by Commonwealth v. Widmer, 744 A.2d 745 (Pa. 2002).
155. Johnson, 758 A.2d at 168.
BY APPELLEE COUNSEL:

Q. Ma’am, after the separation of Doug and Vera, you were aware that Doug had beaten up Vera; is that correct?

COMMONWEALTH:

Objection.

THE COURT:

Sustained.

BY APPELLEE COUNSEL:

Q. While Vera was living at your mom’s house after the separation, did Vera tell you-

THE COURT:

Save it for trial.

BY APPELLEE COUNSEL:

Q. Ma’am, what was your state of mind in regard to Doug and Vera based upon what Vera had told you?

COMMONWEALTH:

Objection.

THE COURT:

Sustained.\(^{156}\)

The defense attorney was asking questions relevant for a trial but irrelevant for a preliminary hearing, so the Commonwealth objected, and the court rightly sustained the objections.\(^ {157}\) At trial, when this key witness became unavailable, the Commonwealth admitted the evidence of the preliminary hearing testimony arguing the defendant was provided a full and fair opportunity to cross-examine the witness.\(^ {158}\) However, the Pennsylvania Superior Court ruled that the testimony was inadmissible because the Commonwealth continually objected to questions regarding credibility and

\(^{156}\) Id. at 172.

\(^{157}\) Id. at 172.

\(^{158}\) Id. at 170.
deprived the defendant of the opportunity to fully and fairly cross-examine the witness.\textsuperscript{159} This demonstrates how the prosecution was punished and the defense was rewarded for how they handled an irrelevant line of questioning.\textsuperscript{160} While the questions bearing on credibility were not relevant at the preliminary hearing and the prosecutor was justified in objecting to the line of questioning, the prosecution was still punished at trial as the testimony was not admissible.

On the other hand, \textit{Commonwealth v. Douglas} demonstrates how when the defense attorney elects not to follow a line of questioning fearing objections from the prosecution, the testimony could still be admissible at trial.\textsuperscript{161} This homicide case hinged upon a key witness to a murder who testified at the preliminary hearing but was later unavailable at the time of trial.\textsuperscript{162} In asserting the defendant was deprived of the opportunity to fully and fairly cross-examine the witness, the defendant pointed to the following transcript from the preliminary hearing:

\begin{quote}
Defense Attorney: Now, you're presently in custody, is that correct?

McLaurin: Yes.

Defense Attorney: For what?

Prosecutor: Objection.

Defense Attorney: Well, are you awaiting trial or have you been sentenced?

Court: As to whether he’s presently in custody, the objection is sustained.

Defense Attorney: I’ll get it on discovery anyhow.\textsuperscript{163}
\end{quote}

This line of questioning was meant to lead towards whether the witness had pending robbery and burglary charges.\textsuperscript{164} Because these preliminary hearing questions bearing upon credibility were objected to by the prosecutor, the defense attorney abandoned the

\textsuperscript{159} Id. at 172, 174.
\textsuperscript{160} Id. at 172, 174; see also Commonwealth v. Carmody, 799 A.2d 143, 149 (Pa. Super. Ct. 2002) (holding that credibility is not at issue during a preliminary hearing).
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
Unjust Incarceration

line of questioning and never asked about the pending charges.\textsuperscript{165} The Pennsylvania Supreme Court ruled that the prior testimony would be admissible because the defense attorney simply “chose not to pursue that line of questioning.”\textsuperscript{166} Here, the defense attorney was required to ask questions, which almost certainly would have been objected to by the prosecutor, for any hope of keeping out the testimony if the witness were to become unavailable at trial. A defendant will only be considered to have been denied the opportunity to fully and fairly cross-examine a witness when the court or Commonwealth causes the denial.\textsuperscript{167} Therefore, if the defense attorney is interested in ensuring the testimony does not become admissible in the case if the witness becomes unavailable at trial, the defense attorney is required to ask irrelevant questions bearing on credibility and be denied an answer.\textsuperscript{168}

\section*{C. Probable Cause v. Prima Facie Legal Standard Confusion}

Pennsylvania Courts of Common Pleas and magistrates diminish the distinction between preliminary arraignments and preliminary hearings by conflating the probable cause\textsuperscript{169} and prima facie legal standards.\textsuperscript{170} In \textit{Commonwealth v. Smith} the Pennsylvania Superior Court conflated prima facie and probable cause by stating “all that was necessary for the Commonwealth to do was to show a prima facie case, i.e., sufficient probable cause to believe that the defendant had committed the offense.”\textsuperscript{171} The Superior Court in \textit{Commonwealth v. Morman} described prima facie as “sufficient probable cause to believe, that the person charged has committed the offence stated.”\textsuperscript{172} Even the Pennsylvania Supreme Court has described preliminary hearings as requiring “sufficient probable cause to believe that the person charged has committed the offense stated.”\textsuperscript{173}

The Philadelphia County District Attorney’s office implemented a rearrest policy in 2000, causing further confusion over the prima

\begin{footnotesize}
\begin{itemize}
\item[165.] \textit{Id.}
\item[166.] \textit{Id.}
\item[167.] \textit{Id.}
\item[168.] \textit{Id.}
\item[169.] Beck \textit{v. Ohio}, 379 U.S. 89, 91 (1964) (finding probable cause is a matter of probability based on whether a prudent person would believe that an individual committed a crime based on reasonably trustworthy facts and circumstances).
\item[170.] \textit{Commonwealth v. Wojdak}, 466 A.2d 991, 996 (Pa. 1983) (finding a prima facie case must show “the existence of each of the material elements of the charge is present”).
\item[173.] Wojdak, 466 A.2d at 996.
\end{itemize}
\end{footnotesize}
facie and probable cause standards. The Philadelphia rearrest policy stated that if a magistrate dismissed charges at a preliminary hearing, police could rearrest the suspect, thus subjecting them to another preliminary arraignment, the need to reacquire money for bail, and another preliminary hearing. This policy was likely an attempt by the district attorney to magistrate shop; the Commonwealth could rearrest until a more prosecution-friendly magistrate received the case. The legal basis for the District Attorney’s practice was based on the idea that since a prima facie case is a higher standard than a probable cause standard, a magistrate finding there was not a prima facie case would not preclude an future arrest based upon probable cause. For an example of this policy, in the Stewart case, a magistrate at a preliminary hearing dismissed the case because of testimony that, even if believed to be credible, would not support a conviction as a matter of law. Despite the magistrate’s ruling, the defendant was immediately rearrested in the courtroom and jailed for an additional two weeks because he could not post bail. Philadelphia’s re-arrest policy, which placed defendants in a legal purgatory, was challenged by a class action suit which argued the policy violated the Fourth Amendment because the subsequent arrests were not based upon probable cause. The federal district court handling the civil rights claim against the district attorney’s office found that the Philadelphia District Attorney was “usurping” the role of the magistrate. The court reasoned that because the magistrate did not find a prima facie case and refused to hold the charges for trial, it was not possible that the re-arrest could be based upon probable cause.

Upon appeal to the Third Circuit, the Court of Appeals found that the re-arrest policy did not violate the Fourth Amendment. The court recognized that a prima facie case at the preliminary hearing created a “different and greater assurance” of guilt than the

175. Stewart, 275 F.3d at 224.
176. See discussion on difference between probable cause and prima facie supra Section II.B.
177. Id. at 236 (McKee, J., concurring).
178. Id. at 236-37.
179. Id. at 224.
181. Id. at *7. Much of the district court’s confusion was likely caused by the “district Attorney [being] unable to articulate any practical distinction between the terms probable cause and prima facie case” in briefing the case. Id. (emphasis added).
182. Stewart, 275 F.3d at 201.
probable cause standard required at preliminary arraignments. The court reasoned it would be reasonable to re-arrest even if a magistrate did not find a prima facie case because the probable cause arrest standard is lower than the magisterial prima facie standard. Just because a higher legal standard was not met, here the prima facie standard, does not preclude a finding that a lower standard could be fulfilled, here the probable cause arrest standard. Further, a prosecutor’s determination of probable cause can consider more inadmissible or unadmitted information than the magistrate’s decision for a prima facie case. Therefore, because the re-arrest policy does not violate the 4th Amendment, the preliminary hearing creates a bizarre scenario where the defendant has everything to lose and no opportunity to win. Even if the defendant does prevent the charges from being held for trial, the defendant can simply be rearrested based on the probable cause from the initial arrest.

D. Reform Outside of Pennsylvania

The State of Wisconsin acts as a case study for how another state has called into question the benefits of preliminary hearings. In 2011, a bill was introduced in the Wisconsin legislature seeking to reform the state’s preliminary hearings. The bill was meant to streamline the procedure by allowing unlimited use of hearsay. Prior to the bill’s passage there was considerable debate regarding the merits of the bill and whether allowing unlimited hearsay would undermine a defendant’s rights by preventing defendants from confronting the testimony of his accusers at preliminary hearings. During the debate over the usefulness of the preliminary hearing, the Wisconsin Attorney General stated he believed reform would not be appropriate because of a perceived lack of utility in the

183. Id. at 229.
184. Id.
185. Id. Prosecutors can consider any information a reasonable prudent man would consider when determining if probable cause exists for an arrest. McKibben v. Schmotzer, 700 A.2d 484, 492 (Pa. 1997).
187. Stewart, 275 F.3d at 229.
188. S.B. 399, 100th Leg., Reg. Sess. (Wis. 2011).
189. Id.
preliminary hearing.\textsuperscript{191} Rather, the Attorney General advocated for the complete elimination of the preliminary hearing.\textsuperscript{192} The Attorney General recognized that the preliminary hearing is statutorily created and is not guaranteed by the state or federal constitution.\textsuperscript{193} The Attorney General alleged the preliminary hearing was an inefficient system where witnesses were required to be subpoenaed to multiple proceedings which were often postponed or waived by the defendant because the threshold for holding charges is so low.\textsuperscript{194} The Attorney General also argued that by eliminating the preliminary hearing, the entire criminal prosecution process would be expedited and the defendant could be provided discovery earlier, because discovery is usually not provided until after the preliminary hearing.\textsuperscript{195} Ultimately, Wisconsin chose to keep the preliminary hearing and passed the bill allowing unlimited use of hearsay.\textsuperscript{196} By allowing unlimited use of hearsay, Wisconsin's preliminary hearing did not provide the defendant with the ability to confront witnesses and diminished the utility of the preliminary hearing as a forward looking procedure meant to screen out cases unlikely to result in a conviction.\textsuperscript{197} The bill eventually survived a constitutional challenge alleging the bill violated the Confrontation Clause in a 2014 case before the Wisconsin Supreme Court.\textsuperscript{198}

\textbf{IV. PROPOSED REMEDIES TO PENNSYLVANIA'S PRETRIAL DETENTION}

While there are many problems facing Pennsylvania's pretrial detention system, preliminary arraignments and preliminary hearings are still great tools for protecting individual rights and ensuring only legitimate cases make it to trial. Rather than abandoning the preliminary hearing as has been proposed in some jurisdictions,\textsuperscript{199} legislative reforms to the preliminary hearing could restore its utility and help prevent defendants from being burdened by a prosecution unlikely to result in a conviction.

\begin{itemize}
\item[192.] Id.
\item[193.] Id.
\item[194.] Id.
\item[195.] Id.
\item[196.] Forward, supra note 190.
\item[197.] See discussion on utility of a forward looking preliminary hearings supra Section II.A.3.b.
\item[198.] State v. O'Brien, 850 N.W.2d 8, 21 (Wis. 2014).
\item[199.] Prepared Remarks, supra note 191.
\end{itemize}
A. ANALYSIS OF PROBLEMS FACING PENNSYLVANIA'S PRETRIAL PROCEDURES

1. Analysis of Use of Hearsay

While confrontation at a preliminary hearing might not be constitutionally required, there are dire consequences for its absence. A lack of confrontation at a preliminary hearing would undermine the purpose of the preliminary hearing; preliminary hearings should ensure accused individuals are not unnecessarily burdened by a prosecution unlikely to succeed on its merits. Admission of hearsay flips the purpose of the preliminary hearing from a forward looking hearing procedure into another backward hearing procedure. If confrontation of witnesses is not required at this early portion of the criminal procedure, the preliminary hearing is essentially fulfilling the same function as the preliminary arraignment, to act as a backwards looking hearing, only determining if the initial arrest was justified. The preliminary hearing will fail to ascertain if the prosecution is likely to succeed in near trial like conditions.

In the Ricker case, if hearsay was not allowed at the preliminary hearing, the prosecution would have struggled to advance the case past the preliminary hearing considering Trooper Trotta's history of dishonesty. But under Pennsylvania's current law, because Trooper Trotta's prerecorded testimony described the elements of the crimes necessary to advance Ricker's preliminary hearing, the prosecution could merely play the prerecorded statement, denying the defendant the ability to cross-examine Trooper Trotta potentially showing Ricker's shooting was in self-defense. A completely incredible witness like Trooper Trotta can have his version of events played over a tape to fulfill each element of a crime and magistrates are not allowed to weigh the credibility of the prerecorded

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200. California v. Green, 399 U.S. 149, 158 (1970). The Court found that confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.
201. Id. (internal footnotes omitted).
202. Id. at 780.
203. Id.
204. Id.
205. See Miller, supra note 116.
Under the current law, the preliminary hearing is essentially a rubberstamp for the prosecution and fails to evidence the prosecution's chances for success beyond what is proven at the preliminary arraignment. The usefulness of the preliminary hearing is questionable especially considering the high social-economic costs it creates for defendants. In addition to monetary costs where defendants are required to pay for attorneys, if defendants miss a preliminary hearing their bond will be forfeited and they will be sent back to jail.

Because the Pennsylvania Supreme Court elected not to decide the issue, the limitless use of hearsay will continue to be allowed and drastically undermine the utility of the preliminary hearing. As previously discussed, Pennsylvania’s preliminary hearing is a forward looking procedure meant to ensure the prosecution is reasonably likely to succeed at trial. By allowing a case to advance past the preliminary hearing when the prosecution has only introduced hearsay evidence, it is difficult to argue only those likely to be convicted would have their cases held for trial.

2. Analysis of Unavailability of Witnesses

Under the current legal regime, a level of gamesmanship is introduced into the legal system where prosecutors must selectively choose when to object, on the basis of relevance, to a defense attorney’s questioning regarding credibility. Prosecutors are encouraged to not play by the rules of evidence and allow irrelevant cross-examination in order to not preclude the admission of preliminary hearing testimony if the witness becomes unavailable at trial. Similarly, defense attorneys are encouraged to question witnesses on a topic completely irrelevant to a preliminary hearing, credibility, and any of this testimony can be introduced if the witnesses testify inconsistently at trial. Since the purpose of the preliminary hearing is not to establish credibility, the threat of an objection

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208. See supra note 99 and accompanying text.
210. See also supra notes 157-160 and accompanying text.
211. PA. R. EVID. 804.
whenever a question even remotely relating to credibility is asked hangs over the heads of defense attorneys.\textsuperscript{212}

If a prosecutor were to anticipate the witness was unlikely to appear at trial, either because of old age, sickness, or a reputation for being unreliable, the prosecutor could purposefully not object to questions on credibility and the defendant could be deprived of the opportunity to confront the witness at trial. However, if the prosecutor anticipates the defendant will be available at trial, the prosecutor will be required to object to any question bearing upon credibility or the witness may be subjected to impeachment at trial for testifying inconsistently.\textsuperscript{213} As a result, the preliminary hearing is a charade where the defense attorney is obligated to ask questions outside of the scope of the hearing, the prosecutor is obligated to object to those questions, and the magistrate is obligated to grant the objection.\textsuperscript{214} This type of gamesmanship is unbecoming and unfitting for a fair legal system and should be discouraged as it undermines the justice system and cross-examination as a tool for discovering the truth.\textsuperscript{215}

3. \textit{Analysis of Probable Cause v. Prima Facie Legal Standard Confusion}

If courts are unclear on the definitions of prima facie and probable cause, the reason for two distinct pretrial probability of guilt determinations is drastically undermined. The probable cause determination being made at a preliminary arraignment is supposed to demonstrate the arrest was justified and that there is a likely probability the arrestee committed the crime.\textsuperscript{216} In contrast, a prima facie determination is required at the preliminary hearing because by requiring each element of a crime to be shown, the preliminary hearing should eliminate cases fatally flawed where a required element to a crime cannot be proven.\textsuperscript{217} The incremental increase in the burden of proof required to be shown by the prosecution helps justify prolonged pretrial incarceration.\textsuperscript{218} A failure to appreciate the distinction between the two procedures

\textsuperscript{212} See supra notes 149-152 and accompanying text.
\textsuperscript{213} Pa. R. Evid. 613. A witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness's credibility. \textit{Id.}
\textsuperscript{215} See \textit{California v. Green}, 399 U.S. 149, 158 (1970) (describing cross-examination as "the greatest legal engine ever invented for the discovery of truth").
\textsuperscript{216} \textit{The Function of the Preliminary Hearing in Federal Pretrial Procedure}, supra note 54, at 776.
\textsuperscript{217} \textit{Id.} at 779.
\textsuperscript{218} \textit{Id.} at 784.
undermines the preliminary arraignment’s purpose as a backwards looking procedure meant to determine whether the arrest was justified and the preliminary hearing as a forward looking procedure, ensuring individuals are not needlessly dragged through the criminal justice system in a case destined to fail at trial.\(^{219}\)

**B. Proposed Reforms for Pennsylvania**

Reforms to Pennsylvania’s preliminary hearing should revolve around making the preliminary hearing more like a real trial.\(^{220}\) In order to restore the utility of preliminary hearings, the Pennsylvania legislature could eliminate the use of hearsay at preliminary hearings. Additionally, the legislature could allow magistrates to consider a witness’s credibility while testifying at a preliminary hearing. Finally, grand juries should see greater use to avoid the embarrassing hassle of being criminally investigated.

Legislatively eliminating the use of hearsay at preliminary hearings would instantly resolve many of the issues plaguing the preliminary hearing. A legislative solution is probably the only potential solution because, as previously discussed, the Confrontation Clause is only a trial right and not a pretrial right.\(^{221}\) The use of hearsay at preliminary hearings in Pennsylvania is purely statutory construction and consequently could be restricted by the legislature.\(^{222}\) While eliminating the use of hearsay would increase the burden on the prosecution in preparing for preliminary hearings, it would also ensure the prosecution is not required to prepare for trial for a case unlikely to succeed. As a compromise with the prosecution for a more stringent preliminary hearing, the legislature could extend the deadline for being required to prove a prima facie case at a preliminary hearing.\(^{223}\) By expanding the period of time for the prosecution to prepare for a preliminary hearing, the prosecution could ensure that the witnesses who would actually testify. By passing these reforms, the legislature could ensure a more trial-like and forward-looking preliminary hearing, allowing prosecutors to focus on cases likely to result in a conviction.

\(^{219}\) *Id.* at 775-76, 779.

\(^{220}\) See supra note 135 (describing how Chief Justice Saylor of the Pennsylvania Supreme Court called for “refinement in the rulemaking arena” in light of the *Ricker* decision).


\(^{222}\) PA. R. CRIM. P. 542.

\(^{223}\) See PA. R. CRIM. P. 540. Currently, preliminary hearings must be scheduled within fourteen days if the defendant is incarcerated and twenty-one days if the defendant posted bail. *Id.*
Another legislative solution to reform to the preliminary hearing would be to allow magistrates to consider the credibility of witnesses. Currently, magistrates are not allowed to consider the credibility of witnesses unless the witness is patently unbelievable. By allowing a magistrate to consider the credibility of a witness the preliminary hearing would share more similarities with a trial. Allowing magistrates to recognize the weakness of a case based on the lack of credibility in testifying witnesses would allow weak cases to be dismissed or worked out at an earlier stage in the criminal proceedings. Additionally, because the burden at the preliminary hearing is still a relatively low prima facie standard, the consideration of credibility would not be a major hindrance to prosecutions. Allowing consideration of credibility at preliminary hearings would allow magistrates to not hold the charges for trial, thus saving defendants from the burden of pretrial detention.

Finally, the use of indicting grand juries could be greatly expanded in Pennsylvania. Pennsylvania’s current use of grand juries is greatly limited because they are only allowed to be used when witnesses are being intimidated. A movement towards the expansion of indicting grand juries would encourage witnesses to testify without the coercive pressures of witness intimidation that occurs in an open court proceeding like a preliminary hearing. Additionally, the secretiveness of grand juries would save the innocently accused from the humiliation of being publicly accused of a crime, when no such crime has occurred. All three of these reforms could be accomplished through legislative action and could potentially save individuals time from being erroneously accused of a crime, and save the Commonwealth money from wasted prosecution costs.

V. CONCLUSION

Preliminary hearings in Pennsylvania are not protecting the innocent. Constitutional jurisprudence on pretrial detention does not provide an adequate basis for protecting defendants from unjust prosecutions. In Pennsylvania, the use of hearsay at preliminary hearings and the confusing distinction between probable cause and prima facie undermines the utility of the preliminary hearing as a forward looking pretrial procedure. Additionally, magistrates not weighing credibility at preliminary hearings adds a sense of


225. PA. R. CRIM. P. 556.
gamesmanship not warranted in the truth-finding mission of the
criminal justice system. Presently, resources on prolonged prosecu-
tions are wasted when cases can easily survive a preliminary hear-
ing, but are likely to fail at trial.

Pennsylvania can resolve many of these problems by legislatively
excluding hearsay from preliminary hearings and allowing magis-
trates to consider the credibility of witnesses. Preliminary hearings
will be drastically more useful compared to their current role as a
prosecutorial rubberstamp. Additionally, an expanded use of grand
juries could entirely avoid many of the problems associated with
preliminary hearings. By implementing these reforms and remem-
bering the preliminary hearing’s role as a forward looking screening
procedure, purposeless incarcerations of individuals like Kalief
Browder can be avoided.