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STATE OF WISCONSIN
IN THE SUPREME COURT

Case Nos: 2012AP1769-CR and 2012AP1770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARTIN P. O'BRIEN, and
KATHLEEN M. O'BRIEN,

Defendant-Appellant-Petitioners.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT-PETITIONERS

ON APPEAL FROM THE DISTRICT II COURT OF APPEALS DECISION, AFFIRMING NON-FINAL ORDERS ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY

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I. The State's use of § 970.038, to present hearsay as its sole evidence to support probable cause, and its preclusion of the defense witness at a preliminary hearing, vitiates the preliminary hearing's check on prosecutorial power.

1. Check on prosecutorial power.

The authority to prosecute an individual is the government power which most threatens personal liberty, for a prosecutor "has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 2141 (1987).

As a check against this immense prosecutorial power, some states, and the federal courts, utilize the citizen grand jury which may have the power to subpoena its own witnesses, investigate the facts, and choose to reject a prosecutor's call for an indictment. Other states utilize preliminary hearings where an independent magistrate ensures there are substantial grounds upon which a prosecution may be based. Still other states provide for a pretrial motion to dismiss at which witnesses may be presented and the court considers the reliability of the state's evidence similar to a preliminary hearing. Even in states that permit hearsay at a preliminary hearing or motion to dismiss hearing, it is usually expressly limited to reliable hearsay. *See 50 State Survey of Grand Jury or Preliminary Hearing Procedures*, in Supplemental Appendix.

Wisconsin employs a preliminary hearing as a check against the prosecutor's power: "[t]he independent screening function of the preliminary examination serves as a check on the prosecutorial power of the executive branch." *State v. Schaefer*, 2008 WI 25, ¶33, 308 Wis. 2d 279, 299, 746 N.W.2d 457. It does so by preventing "hasty, malicious, improvident, and oppressive prosecutions." *State v. Richer*, 174 Wis.2d 231, 496 N.W.2d 66 (1993).

The State completely misses this important check against prosecutorial power, when it argues that because a preliminary hearing is a creature of statute, the legislature is free "to alter the nature" of the hearing, or "even abolish it altogether." State's Brief at 31. Moreover, the legislature has *not* abolished the hearing altogether. Indeed, the protection against hasty or improvident prosecutions is so pronounced that our legislature provided that defendants are entitled to a preliminary hearing *even if already indicted* by a grand jury. *See* § 968.06.

Prosecutors are not free to make a mockery of a hearing the legislature obviously intended to retain. When §970.038 was enacted, the legislature retained the defense right to cross-examine and present its own witnesses. In addition, the legislature left intact § 906.02, which requires that a witness have personal knowledge of the matter testified about. Despite this, prosecutors all over the state have been misusing §970.038, by introducing multiple layers of hearsay, presenting as witnesses mere "readers," who have no personal knowledge and therefore cannot be effectively cross-examined, and seeking bindovers on no higher degree of probable cause than the criminal complaint.[1] To make matters worse, the State in the

[1] *See* examples in the Appendix to *Amici* brief. The State apparently does not dispute that such practices are going on across the state since the enactment of § 970.038.

O'Briens' case avoided any real check on its prosecutorial power by precluding relevant testimony from a defense witness with personal knowledge.

The trial court in this case believed the enactment of §970.038 constrained its judgment so much that the "probable cause hearing [is] *even more perfunctory*, so I'm going to order a bindover." R. 30: 88; APP 254 (emphasis added). With or without hearsay, no court should view a preliminary hearing as merely "perfunctory," especially since it has long been considered a "critical stage" in a criminal prosecution. *State v. Wolverton*, 193 Wis.2d 234, 252, 533 N.W.2d 167 (1995).

While the use of hearsay to establish probable cause at a preliminary hearing is "not unique to Wisconsin," State's Brief at 4, the new statute places Wisconsin in a small minority of states. Indeed, only a handful allow hearsay without apparent restriction at adversarial hearings to determine probable cause to stand trial. (Delaware, Maryland, North Dakota, Utah, Vermont and Wyoming).[2] *See* Survey in Supplemental Appendix. This Court should restrain the potential abuse of prosecutorial power by retaining Wisconsin's historical check on that power that a meaningful preliminary hearing presents.

This Court has inherent and superintending authority to control the course of litigation in the courts of this state, and to ensure that unreliable evidence is not used in court. *See In re Jerrell C.J.*, 2005 WI 105, ¶ 69, 283 Wis. 2d 145, 178, 699 N.W.2d 110, 126, (Abrahamson, C.J. concurrence). For example, the Court has fashioned rules governing the admissibility of polygraph evidence, e.g., *State v. Dean*, 103

[2]Some jurisdictions, use the term "preliminary hearing" when the procedures are actually just detention hearings, distinct from Wisconsin's probable cause to stand trial function.

Wis.2d 228, 307 N.W.2d 628 (1981), and set forth criteria to consider before admitting hypnotically affected testimony. *State v. Armstrong*, 110 Wis.2d 555, 571, n. 23, 329 N.W.2d 386 (1983). Likewise, this Court can fashion rules precluding the unfettered use of multiple levels of unreliable hearsay to support probable cause for a bindover.

The O'Briens suggest rules that would retain the preliminary hearing's function as a check against prosecutorial power. *See* Brief at 9-10.[3] The State complains that such proposed standards are a "wish-list, not statutory construction," State's Brief at 27, yet, the State makes no effort to reconcile its own construction of §970.038 with conflicting statutes requiring a witness's personal knowledge, including § 906.02.

The legislature expects courts will not interpret its laws to create absurd or unreasonable results, and courts should not construe a statute in a manner which creates an anomaly in criminal procedure. *State v. Williams*, 198 Wis. 2d 516, 532, 544 N.W.2d 406, 413 (1996). The problem is not that the new statute creates a lesser standard than existed previously, it is that the State's interpretation of §970.038 creates the absurd result that bindover now requires a lesser degree of probable cause than a complaint. This turns on its head long-standing law which requires a higher degree of probable cause for a bindover. *County of Jefferson v. Renz*, 231 Wis.2d 293, 323, 603 N.W.2d 541, 555 (1999). To avoid such an absurd result, this Court "may insert words into a statute that are necessary or reasonably inferable," *State v. Williams*, 198 Wis. 2d at 534, 544, and thus restore the proper hierarchy of levels of probable cause.

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[3]The standards proposed by the O'Briens are drawn from those used in other states, as well as the 1982 Wisconsin Judicial Council study of preliminary examinations, found in the O'Briens' Appendix at APP 277.

2. Statutory right to call defense witnesses.

Even if the state's use of multiple levels of potentially unreliable hearsay is ruled permissible under §970.038, a preliminary hearing could still function as a check on prosecutorial power if the defense was permitted to fully exercise its right to present witnesses to challenge probable cause under § 970.03(5). A defendant's right to call witnesses, including the alleged victim, to contest probable cause at a preliminary hearing has been approved on many occasions. *Mitchell v. State,* 84 Wis. 2d 325, 336 (1978); *State v. Knudson*, 51 Wis.2d 270, 187 N.W.2d 321(1971); *State v. McCarter*, 36 Wis.2d 608, 153 N.W.2d 527 (1967); *State v. Wilson*, 59 Wis.2d 269, 208 N.W.2d 134(1973); *State v. Hayes*, 46 Wis.2d 93, 175 N.W.2d 625(1970). In the wake of the passage of § 970.038, the O'Briens were denied this right.

This Court has held that at a preliminary examination a defendant "may call witnesses to rebut the plausibility of a witness's story *and* probability that a felony was committed. *State v. Schaefer*, 2008 WI 25, ¶ 35, 308 Wis. 2d at 299 (emphasis added). This is because the primary purpose of the preliminary hearing is to determine whether probable cause exists *that a felony was committed* by these defendants. A "plausible" story that does not establish the elements of a felony offense cannot support bindover. Thus, testimony related to the *elements* of a charged felony is relevant and admissible at the hearing. Further, just as the "essential facts" necessary for probable cause in a complaint include the "six W's," testimony related to those same essential facts is relevant at a preliminary hearing. *See State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 230, 161 N.W.2d 369, 373 (1968) (complaint must include "essential facts" as to who, what, when, where, how and who says so).

O'Brien's counsel explained that she intended to elicit only testimony which directly addressed the offense elements, and was not intended to attack the credibility of the witness:

> It was only our intention to ask questions regarding the actual occurrences or events, including dates of offenses, the place, and other information about the actual account of what happened. We weren't gonna ask about different statements he gave to various other parties or other information that would go directly to the issue of trustworthiness or credibility. We were simply going to take him through his version of these events.

R. 30; APP 233. The proposed defense testimony would have covered only the "essential facts" about who, what, when, where and how the alleged offenses occurred. Such questions would clearly have been relevant and admissible if asked by the State, and thus are equally relevant when presented through a defense witness.

Similarly, in her offer of proof, O'Briens' defense counsel indicated that she anticipated "as the complete story comes out, that it may be that actions that may sound intentional, if the complete account isn't taken into consideration, may turn out to be incidental, accidental." R. 30; APP 226. The trial judge erroneously concluded that such testimony was irrelevant because it was "defensive material." *Id.*; APP 226-27. Counsel disagreed, explaining that evidence which disproved intent was relevant at a preliminary hearing because intent was an element in each charge:

> [t]he state has an obligation to prove that there was an intentional act with the intent to cause bodily harm; and so really, if – if we're not

> allowed to explore these events in order to draw out information to contest the elements – and I'm not talking about disciplinary acts, *I'm talking about the elements of the offense* – then really, we're in a position now where our right to call witnesses to fully allow the account to be evaluated is vitiated.

Id., APP 227 (emphasis added). Questions demonstrating a lack of intent would clearly have been proper cross-examination of a state's witness, to attack the probability that any crime, much less a felony, occurred. Such testimony would have been just as relevant if presented by a defense-subpoenaed witness, to show that the alleged contact was either incidental, accidental, unintentional, or did not cause bodily harm.[4] O'Briens' counsel sufficiently articulated that the relevance of the proposed testimony was to rebut the elements of the charged offenses, and thus she should have been permitted to call S.M.O. as a witness.

II. The State's use of hearsay violated the O'Briens' Sixth Amendment right to confrontation.

The State disagrees with, but does not address the rationale of, O'Briens' argument that *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), misread *Gerstein v. Pugh*. Instead, the State merely contends that the United States Supreme Court has "long held" that the Sixth Amendment right to confrontation applies only at trial. State's Brief at 13. The State's analysis of Supreme Court decisions is shallow and overreaching.

None of the three cases the State and court of appeals relied on, *Barber* v. Page, 390 U.S. 719, 725 (1968);

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[4] *See* examples of incidental contact or horseplay in Defense Brief at 18-19.

Pennsylvania v. Ritchie, 480 U.S.39, 52 (1987), and *California v. Green*, 399 U.S. 149, 157 (1970), specifically limited the right to confrontation to the trial setting. The quotation from *Ritchie* came from a mere plurality opinion, where only four justices agreed with that statement. Justice Blackman wrote separately "because I do not accept the plurality's conclusion . . . that the Confrontation Clause protects only a defendant's trial rights." 480 U.S. at 52.

Barber's oft-cited quote that "[t]he right to confrontation is basically a trial right," is misleading and taken out of context. The court ruled that the failure to afford cross-examination at a trial when it was available violated the Confrontation Clause. 390 U.S. at 125. *Barber* did not suggest that the right of confrontation attached *exclusively* at trial.

Similarly, the quote from *Green*, that the "right to confront the witness at the time of trial . . forms the core values furthered by the Confrontation Clause," is taken out of context. The court was concerned with whether a prior inconsistent statement of a witness at a preliminary examination could be admitted when the witness also testified and was cross-examined at trial. 399 U.S. at 164. There was no confrontation problem because the defendant was able to confront and extensively cross-examine the witness at *both* the trial and preliminary hearing. *Id.* at 151, 158.

Thus, to extrapolate from any of these three decisions that the Supreme Court has "long held" that the Confrontation Clause does not apply at a preliminary hearing is overreaching. The same holds true for the citation to LaFave. The only case offered by Professor LaFave says nothing of the sort, and in fact had nothing to do with a preliminary hearing, because that defendant was indicted by a grand jury. *See* O'Briens' Brief at 35.

Therefore, no Supreme Court case has ever ruled the right to confrontation inapplicable at an adversarial preliminary hearing. In fact, *Crawford* suggests otherwise, by noting in its historical review of confrontation that "by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule *even to examinations by justices of the peace* in felony cases." *Crawford*, 541 U.S. 36, 46, 124 S.Ct. 1354, 1361 (emphasis added). For the reasons offered in O'Brien's Brief at 32-37, this Court should withdraw the misleading language in *Mitchell v. State*, 84 Wis. 2d at 336, and rule that the constitutional right to confrontation *does* apply at Wisconsin's adversarial preliminary examination.

III. The O'Briens' statutory right to confrontation was violated.

This Court should overrule or prevent any extension of *State v. Padilla*, and *State v. Oliver* to cases applying §970.038. Those cases, decided before *Crawford*, and involving firmly rooted hearsay exceptions (which contained a recognized degree of reliability), limited a defendant's statutory right to confrontation to only "those people actually called to the stand." *Padilla* 110 Wis. 2d at 424. In *Padilla*, the mother "could have been and was tested on the stand" to determine whether she was in a position to hear the child's excited utterance, whether she had a good memory of it, and "whether she was relating it accurately." *Id.* In stark contrast, the O'Briens' counsel were repeatedly thwarted in their efforts to challenge plausibility because the detective had no independent recall beyond the scant summaries of S.M.O.'s allegations in the complaint.

In *State v. Oliver*, 161 Wis. 2d 140, 467 N.W.2d 211 (Ct. App. 1991),the court of appeals held a four year old child's statement to his father that the defendant hit him was admissible at the preliminary hearing under the residual hearsay exception. *Id.* at 143-48. The court held the statutory right to confrontation

was satisfied because the father was available for cross-examination about physical injuries supporting the allegation as well as the recency of the child's report (three days after the alleged incident). *Id.* at 148-49. In contrast, the accusations made in the O'Briens' case were broadly scattered over an eight year period of time, the detective had faulty memories and no personal knowledge of any injuries.

The rationale of *Padilla* and *Oliver* is no longer valid in the preliminary hearings the prosecution currently conducts. Those cases assumed at least *some* witness would be testifying who could be cross-examined about the context of the accusation and corroborating details like the child's demeanor and visible injuries. They did not contemplate the state would merely call as a "narrating witness" a fellow prosecutor or non-investigating officer to read the criminal complaint into the record, with no further information to establish probable cause for a bindover.[5] *Padilla* and *Oliver* should not stand as authority to justify such a restriction of a defendant's statutory right to cross-examination.

IV. The O'Briens' right to effective assistance of counsel was violated at the preliminary hearing.

Contrary to the State's claim that "*Strickland* provides the relevant standard," State's Brief at 18, in *Schaefer* this Court noted that sometimes prejudice may be presumed by a restriction on counsel, citing *United States v. Cronic*, 466 U.S. 648, 659–60, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). *See Schaefer*, 2008 WI 25 at ¶ 88, 308 Wis. 2d at 323. As argued in O'Briens' Brief at p 38, *Cronic* holds that prejudice is presumed when counsel has been prevented from assisting the accused during a critical stage of the proceeding. *United States v. Cronic*, 466

[5]The *Amici* attached an appendix summarizing several such cases.

U.S. at 659, n. 25. No specific showing of prejudice is required. The focus is on whether "there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*

The degree to which counsel was hand-cuffed in this case is presumptively prejudicial. The court of appeals believed counsel can still be effective by "demonstrating why the prosecution has failed to show a plausible theory for prosecution." APP 114-15, ¶ 25. *Id.* However, it is impossible to make such a demonstration without cross-examining a witness with direct knowledge of the facts underlying an accusation or exercising their compulsory process to produce such a witness.

CONCLUSION

For all of these reasons, the O'Briens ask this Court to reverse the court of appeals decision and the circuit court's bindover, and remand for a new preliminary hearing.

Dated this 11th day of February, 2014.

Respectfully submitted,
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I hereby certify that this Document conforms to the rules contained in § 809.19(8)(b) for a brief produced with a proportional serif font. The length of this document is 2999 words.

Dated this 11th day of February, 2014.

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Dated this 11th day of February, 2014.

/s/
Jerome F. Buting

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STATE OF WISCONSIN,

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SUPPLEMENTAL APPENDIX:
50 STATE SURVEY OF GRAND JURY OR PRELIMINARY HEARING PROCEDURES

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50 State Survey of Grand Jury or Preliminary Hearing Procedures

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Alabama	Yes	Yes	AL R RCRP Rule 12.3	AL ST RCRP, Rule 5.3	Rule 5.3, (a) & (c) Defendant may cross examine witnesses and present evidence. Some forms of reliable hearsay may be used.
Alaska	Yes	Yes	AK ST §12.40.030; AK R RCRP, Rule 6, (q),(p) & (r) Grand jurors may hear defense evidence, may order subpoenas and only limited hearsay is allowed.	AK R RCRP Rule 5.1	Rule 5.1 (b),(c) & (d) Defendant may cross examine witnesses, present evidence and rules of evidence apply except regarding the admission of expert reports.
Arizona	Yes	Yes	AZ ST RCRP Rule 12.1; Grand jurors may request evidence.	AZ ST RCRP Rule 5.1, Right to Preliminary hearing; 5.3, Nature of hearing; Rule 5.4; some limits on use of hearsay	Rule 5.3(a) defendants may cross examine witnesses and review their statements. May only present witness after offer of proof.
Arkansas	Yes	Detention hearing only. AR R RCRP Rule 8.3	AR ST §16-85-511, §16-85-51; AR CONST, Amend. 21, § 1, Prosecution may be by information or indictment		16-85-513 (a) The grand jury should find an indictment when all the evidence before them, taken together, would, in their judgment, if unexplained, warrant a conviction by the trial jury.

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
California	Yes	Yes	CA PENAL §888	CA CONST Art. 1, § 14, Prosecution may be by indictment or information " after examination and commitment by a magistrate, by information"; CA PENAL § 859b	CA PENAL § 859b, 865, 866. Defendant may cross examine witnesses and offer evidence after offer of proof that evidence will negate an element, support affirmative defense, or serve as impeachment. CA PENAL § 872, Testimony of trained officer "relating the statements of declarants made out of court" may be used to establish probable cause.
Colorado	Yes	Yes	CO ST RCRP, Rule 6	CO ST RCRP, Rule 5	Rule 5, (4)(II), Serious felonies and defendants in custody for a felony entitled to hearing. Defendants may cross examine witnesses and offer testimony. Some flexibility in use of rules of evidence.
Connecticut	Very limited	No	CT ST § 54-45		CT ST § 54-46, Prosecution may be by complaint or information
Delaware	Yes	Yes	DE R SUPER CT RCRP, Rule 6	DE ST TI 11 § 5308, DE R SUPER CT RCRP Rule 5.1	Rule 5.1, Defendant may cross examine witnesses and offer testimony. Hearsay is admissible.
Florida	Yes	Detention hearing generally and adversarial hearing if not charged within time limits	FL ST § 905.16	FL ST RCRP, Rule 3.133	Rule 3.133, defendants not charged within 21 days entitled to adversarial preliminary hearing. Defendant may cross examine witnesses and defense witnesses "shall be" examined. Inadmissible hearsay may not form basis for probable cause. *Perry v. Bradshaw*, 43 So.3d 180, 181 (2010).

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Georgia	Yes	Detention Hearing, known as "Commitment Hearing"	GA ST § 17-7-70, felony defendant entitled to indictment by a grand jury with some exceptions. GA ST § 17-7-70.1, unless in custody for set period, 17-7-50.		GA ST, §17-7-28, "Commitment" hearing may be used for offenses which do not require indictment, *Lamberson v. State*, 462 S.E.2d 706, 707 (1995), or "until the grand jury determines whether he should stand trial." *Phillips v. Stynchcombe*, 231 Ga. 430, 432(1), 202 S.E.2d 26 (1973).
Hawaii	Yes	Yes	HI ST § 612-16; HI R PENAL P Rule 6	HI R PENAL P Rule 5(c)(4), Defendant may cross examine witnesses and offer testimony. Hearsay may be used with limitations.	Rule 5(c)(2)(iii). State may establish probable cause through grand jury, preliminary hearing or information with exhibits.
Idaho	Yes	Yes	ID ST § 19-1101; ID ST § 19-1106, Grand jury may order defense evidence.	ID ST § 19-804, Entitlement to preliminary hearing	ID ST § 19-80, 809; Defendant may cross examine witnesses and offer testimony. ID ST § 19-809A Reliable hearsay of witnesses under 10 y.o.a. is admissible.
Illinois	Yes	Yes	725 ILCS 5/112-4	725 ILCS 5/109-3	725 ILCS 5/109-3.1 Illinois Const., Art. I, § 7, "All that is required under Const. Art. 1, § 7 governing indictments and preliminary hearings is that accused be afforded prompt probable-cause determination of validity of charge either at preliminary hearing or by indictment by grand jury..." *People v. Kline*, 1982, 65 Ill. Dec. 843, 92 Ill.2d 490, 442 N.E.2d 154, 725 ILCS 5/111-2

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Indiana	Yes	No, but motion to dismiss can be filed and evidentiary hearing held. IN ST 35-34-1-4	Burns Ind. Code Ann. § 35-34-2-3	IN ST 35-34-1-4	IN ST 35-34-1-4, Motion to dismiss information lack of factual basis; must be supported by affidavits and court may hear evidence and is not confined to charging instrument. *Zitlaw v. State*, 880 N.E.2d 724, 728–29 (Ind.Ct.App.2008).
Iowa	Yes	Yes	Iowa Crim. Procedure 2.3	Iowa Crim. Procedure 2.2(4)(b), Hearsay may be used if "there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. The defendant may cross-examine witnesses and may introduce evidence in the defendant's own behalf."	2.2(4)(a), Defendant may be charged by indictment or information or complaint with a preliminary hearing.
Kansas	Yes	Yes	K.S.A. § 22-3001	K.S.A. § 22-2902	K.S.A. § 22-2902(3)..."except for witnesses who are children less than 13 years of age, the witnesses shall be examined in the defendant's presence."...

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Kentucky	Yes	Detention hearing	Ky. RCr Rule 5.02	Ky. RCr 3.07, 3.10, 3.14	Rcr 3.14(2) Procedure for PC hearing. "...the purpose of a preliminary hearing is limited and serves only to determine whether there is sufficient evidence to justify detaining the defendant in jail or under bond until the grand jury has an opportunity to act on the charges. *Delahanty v. Com. ex rel. Maze*, 295 W.W.3d 136 (2009).
Louisiana	Yes	Yes	La.C.Cr.P.Art. 437, 44	La.C.Cr.P.Art. 292, 294	Art. 294, "...the state and the defendant may produce witnesses, who shall be examined in the presence of the defendant and shall be subject to cross-examination." (Juvenile witnesses may be subpoenaed after motion and order)
Maine	Yes	No	15 M.R.S. § 1256, Maine Rules of Crim. Pro., Rule 6		ME R RCRP Rule 7, Defendants may be charged by information or indictment.
Maryland	Yes	Yes	MD Rules, Rule 16-107, 14-110	Md. Rule § 4-221, § 4-103, § 4-102	Md. Rule § 4-221(e) "...The defendant is entitled to cross-examine witnesses but not to present evidence." Rules of evidence do not apply.
Massachusetts	Yes	Yes	Mass. R. Crim. P., Rule 5	M.G.L.A. 276 §38, Mass R. Crim. P.Rule 3	M.G.L.A. 276, Sec. 38 "...examine on oath the complainant and the witnesses for the prosecution, in the presence of the defendant, relative to any material matter connected with such charge...."the witnesses for the prisoner, if any, shall be examined on oath..."

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Michigan	Yes	Yes	MCLA § 767.23	M.C.L.A. 766.4, M.C.L.A.600.2167, Technician reports, if rules followed, do not require a witness.	Preliminary examination is adversary proceeding. *People v. Johnson* (1967) 154 N.W.2d 671, 8 Mich. App. 462.
Minnesota	Yes	No, but alternate probable cause hearing Min. R. Crim. P. 11.02, and 11.04, Hearsay evidence limited to that allowed by Rule 18.05	M.S.A. § 628.61		Min. R. Crim. P. 11.02,(a) and 11.04, "..(b) The prosecutor and defendant may offer evidence at the probable cause hearing..."..."reliable hearsay" may be used. See Rule 18.05 for allowable forms of hearsay.
Mississippi	Yes	Detention hearing	Miss. URCCC Rule 7.02, 7.03	Miss URCCC Rule 6.04	Preliminary hearing to determine probable cause pending grand jury action.
Missouri	Yes	Yes	V.A.M.S. 540.031	V.A.M.S. §544.250, 544.380, 544.376, Hearsay exception for crime lab reports.	Sec. 544.380, "After the examination of the complainant and the witnesses on the part of the prosecution, the witnesses for the accused may be sworn and examined..."
Montana	Yes	Yes	MCA 46-11-310	M.C. A 46-10-105, A defendant is entitled to a preliminary hearing unless he is indicted or the court grants leave to charge by information.	M.C.A. 46-10-202 "All witnesses must be examined in the presence of the defendant. The defendant may cross-examine witnesses against the defendant and may introduce evidence in the defendant's own behalf.
Nebraska	Yes	Yes	Neb. Rev. St. § 29-1407	R.R.S. Neb § 29-1607, § 29-505	Sec. 29-505, "The magistrate, if requested, or if he sees good cause therefor, shall order that the witnesses on both sides be examined each one separate from all the others..."

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Nevada	Yes	Yes	N.R.S. 172.175	Nev. Rev. Stat. Ann. § 171.196; 171.197, Very limited use of hearsay allowed; 171.1965, State must provide discovery before preliminary hearing.	N.R.S. 171.196, (5), "The defendant may cross-examine witnesses against him or her and may introduce evidence in his or her own behalf."
New Hampshire	Yes	Yes	N.H. Rev. Stat. § 601:1	RSA 596-A:4	RSA 596-A:4, "The accused may cross-examine the witnesses against him and may introduce evidence in his own behalf."
New Jersey	Yes	No	N.J.S.A. Const. Art. 1, ¶ 8, N.J.S.A. 2B:21-1		Grand jury is impaneled in each county. Constitutional right to indictment.
New Mexico	Yes	Yes	N.M. Const. art. II, sec. 14; N. M. S. A. 1978, § 31-6-11	N.M. Const. art. II, sec. 14; NMRA, Rule 5-302(A), "...subpoenas shall be issued for any witnesses required by the district attorney or the defendant. The witnesses shall be examined in the defendant's presence and may be cross-examined."	*State v. White*, 232 P3d 450, 454 (2010); adversarial hearing; *State v. Lopez*, 314 P.3d 236, 242 (2013), overruling *State v. Mascarenas*, 458 P.2d 789 (1969), holds confrontation right does not apply at preliminary hearing but reserves question whether hearsay not admitted under specific court rule is admissible.
New York	Yes	Detention hearing	McKinney's Const. Art. 1, § 6; McKinney's CPL § 190.25	McKinney's CPL § 180.10; §180.60 (Adversarial probable cause hearing pending grand jury)	*Chandler v. Moscicki*, 2003, 253 F.Supp.2d 478. (Right to indictment by grand jury)

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
North Carolina	Yes	Yes	N.C.G.S.A. Art. I, § 22; N.C.G.S.A. § 15A-623; §15A-628	N.C.G.S.A. § 15A-611	N.C.G.S.A. § 15A-611(a)(3)Defendant may call witnesses; (b) non-hearsay evidence required with limited exceptions.
North Dakota	Yes	Yes	NDCC Const. Art. 1, § 10; NDCC, 29-01-01; NDCC, 29-10.1-01	N.D.R.Crim.P., Rule 5.1	Defendants may cross-examine witnesses and present evidence. Hearsay is admissible.
Ohio	Yes	Yes	Rule 6, OH ST RCRP, Rule 6	OH ST RCRP, Rule 5	Crim. R. Rule 5(B)(2) Defendant has "full right of cross-examination," "conducted under the rules of evidence," defendant may offer evidence.
Oklahoma	Yes	Yes	OK ST T. 22 § 331, § 338	OK ST T. 22 § 258; § 259	Sec. 258- "The witnesses must be examined in the presence of the defendant, and may be cross-examined by him"; Sec. 259- defense may present witnesses if relevant
Oregon	Yes	Yes	OR CONST Art. VII , § 5; OR ST § 132.310	OR CONST Art. VII , § 5; OR ST § 135.090; OR ST § 135.125	OR ST § 135.090 Defendant may cross-examine state witnesses. OR ST §135.125 Defendant may produce witnesses.
Pennsylvania	Yes	Yes	PA ST 42 Pa.C.S.A. § 4548, Grand jury may issue subpoenas.	PA ST RCRP Rule 542	Preliminary hearing is adversarial. Hearsay is allowed but "hearsay evidence alone may not be the basis for establishing a prima facie case", *Com. V. Jackson*, 849 A.2d 1254, (2004).

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Rhode Island	Yes	No, but defendant can move to dismiss and have evidentiary probable cause hearing.	RI R SUPER CT RCRP Rule 6		RI ST § 12-12-1.7, RI ST § 12-12-1.8; RI R SUPER CT RCRP Rule 9.1, A defendant may move to dismiss an information and present evidence challenging probable cause. The state is prohibited from supplementing the information and exhibits without court approval.
South Carolina	Yes	Detention hearing, SC R RCRP Rule 2.	S.C. CONST Art. I, § 11, SC ST §17-19-10, SC ST §14-7-1550; Grand Jury may subpoena witnesses	SC R RCRP Rule 2; SC ST § 22-5-320 Probable cause (detention) hearing. Defendant may cross examine state's witnesses and argue but not present evidence.	The law requires presentment of a grand jury as a condition precedent to the trial of a crime, excepting certain minor offenses. *Anderson v. State*, 527 S.E.2d 398, 401(2000).
South Dakota	Yes	Yes	SDCL § 23A-5-9	SD ST § 23A-4-3; SD ST § 23A-4-6	SD ST §23A-4-6; The defendant may cross examine witnesses, present evidence, and the rules of evidence apply
Tennessee	Yes	Detention hearing prior to grand jury indictment.	TN Const. Art. 1, § 14, "There is also an absolute right to a criminal accusation by a grand jury." *State v. Brackett*, 869 S.W.2d 936, 938(1993)	TN R RCRP Rule 5.1; TN R RCRP Rule 5; If probable cause is found, the case is bound over to the grand jury.	TN R RCRP Rule 5.1, Defendant may cross-examine witnesses and present evidence and no inadmissible hearsay allowed except proof of ownership and expert reports.

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Texas	Yes	Detention hearing (called "examining trial") prior to grand jury indictment.	Vernon's Ann.Texas Const. Art. 1, §10; Vernon's Ann.Texas C.C.P. Art. 1.05, "No person shall be held to answer for a felony unless on indictment of a grand jury."*Duron v. State*, 956 S.W.2d 547, 550 (Tex.Crim.App. 1997)		TX CRIM PRO Art. 16.01, 16.06, 16.07 Defendant may cross-examine witnesses and rules of evidence apply at detention hearing.
Utah	Yes	Yes	UT ST §77-10a-3	U.C.A. 1953, Const. Art. 1, § 12, 13; Class A misdemeanors and felonies entitled to preliminary hearing. UT R RCRP Rule 7	UT R RCRP Rule 7; Defendant may cross examine witnesses and present evidence. Hearsay is admissible.
Vermont	Yes	No, but "paper review" for probable cause required, before warrant or summons, and court may order testimony before deciding.	VT R RCRP Rule 6		VT R RCRP Rule 4(b); govern a judicial PC paper review. "The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided that there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished." (Court can order officers and witnesses to give testimony before decision).

STATE	GRAND JURY	PRELIM. HEARING	GRAND JURY CITATION	PRELIM. HEARING CITATION	NOTES
Virginia	Yes	Yes	VA ST §19.2-191	VA ST § 19.2-183;	VA ST § 19.2-183; "...hear testimony presented for and against the accused in accordance with the rules of evidence applicable to criminal trials." Analyst reports may be admitted.
Washington	Yes	No	WA ST 10.27.030		WA CONST Art. 1, § 25, Offenses may be prosecuted by information or indictment.
West Virginia	Yes	Yes	WV ST § 52-2-7; WV R RCRP, Rule 6	WV ST § 62-1-8; Defendant may cross examine witnesses, present evidence and the rules of evidence apply.	W. Va. R.Crim.P., Rule 7, A defendant may be prosecuted by information if he waives prosecution by indictment.
Wisconsin	Yes	Yes	WI ST 968.06; "Upon indictment by a grand jury a complaint shall be issued, as provided by s. 968.02, upon the person named in the indictment and the person shall be entitled to a preliminary hearing under s. 970.03..."	WI ST 970.03, preliminary hearing required even if grand jury indicts. § 968.06.	970.038 Hearsay is admissible.
Wyoming	Yes	Yes	WY ST § 7-5-202	WY ST §7-8-105, "In all cases triable in district court, except upon indictment, the defendant is entitled to a preliminary hearing."	WY R RCRP Rule 5.1 Defendant may cross examine and present evidence but hearsay is admissible.