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PROTECTING TAXPAYERS AND CRIME VICTIMS:
THE CASE FOR RESTRICTING UTAH’S PRELIMINARY HEARINGS
TO FELONY OFFENSES

Paul G. Cassell* & Thomas E. Goodwin**

I. INTRODUCTION

When prosecutors file serious criminal charges in Utah, the defendant is entitled to a preliminary hearing.¹ At this hearing, witnesses will testify and be cross-examined to determine if the defendant should be bound over to face trial. For many decades, however, Utah has held such hearings only for felony offenses, not misdemeanors.² In this respect, Utah practice tracked that of the vast majority of other states, which limit the use of preliminary hearings to more serious felony crimes.

The reasons for limiting preliminary hearings to more serious felony cases are easy to understand. Preliminary hearings are costly and time consuming. They can also burden victims of crime with the need to testify and be cross-examined about the details of crimes committed against them. These clear costs are not outweighed by the very limited value that preliminary hearings provide, namely allowing judicial review of a prosecutor’s evidence. For misdemeanor prosecutions, a judge can easily decide the question of probable cause based on the information recounted in the charging document without holding an evidentiary hearing.

Recently Utah suddenly became the only state in the nation to interpret its constitution to *require* preliminary hearings for certain classes of misdemeanors. In *State v. Hernandez*,³ the Utah Supreme Court held that for “Class A” misdemeanors (misdemeanors punishable by up to a year in jail), article I, section 13 of the Utah Constitution required preliminary hearings.⁴ Article I, section 13 provides for preliminary hearings for “[o]ffenses heretofore required to be prosecuted by indictment.”⁵ The court concluded that the phrase “offenses heretofore required to be prosecuted by indictment” referred not only to felony

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¹ UTAH R. CRIM. P. 7(h)(1)–(2).

² See Melinda Rogers, *Court: Some Misdemeanors Deserve Preliminary Hearings*, SALT LAKE TRIB. (Mar. 30, 2011), [www.http://archive.sltrib.com/article.php?id=14302714&itype=storyID&keyword=&qtype=](http://archive.sltrib.com/article.php?id=14302714&itype=storyID&keyword=&qtype=).

³ *State v. Hernandez*, No. 20090080, 2011 WL 5343347 (Utah Nov. 8, 2011).

⁴ *Id.* at *9.

⁵ UTAH CONST. art. I, § 13.

offenses but under Utah's modern classification of offenses, to Class A misdemeanors as well.⁶

The court's analytical approach was quite properly historical. The court noted that the decisive question when interpreting the state constitution is "to ascertain the drafters' intent."⁷ Yet strong arguments suggest that the drafters did not truly intend to require preliminary hearings for Class A misdemeanors.⁸ Section 13 appears to refer to federal law that "heretofore" controlled the Territory of Utah.⁹ At the time the Utah Constitution was drafted, the Fifth Amendment to the U.S. Constitution directed that capital and infamous crimes—felonies—be screened through the requirement of a grand jury indictment.¹⁰ The framers of the Utah Constitution, it can be argued, simply continued this approach and then authorized a new alternative method for screening such felony prosecutions—a preliminary hearing instead of a grand jury. This was the argument the state advanced in *Hernandez*, although the court ultimately found it unpersuasive.¹¹

This Article does not debate the historical accuracy of the court's decision. Rather, it asks whether the decision is sound public policy. This Article concludes that requiring preliminary hearings for Class A misdemeanors is undesirable for two simple reasons. First, the court's decision will result in hundreds of additional preliminary hearings a year, thus imposing substantial costs on taxpayers and burdens on an already overwhelmed criminal justice system. Second, the decision will create substantial hardships for crime victims, who will now be twice subjected to cross-examination by defense attorneys—once at the preliminary hearing and again later at trial. And these costs will generate no significant benefit in return.

As there is no federal constitutional right at stake, the *Hernandez* decision rests solely on an interpretation of the Utah Constitution.¹² The Utah Constitution can, of course, be amended. Because preliminary hearings in misdemeanor cases impose significant costs without compensating benefits, the Utah legislature should send a constitutional amendment to voters to reinstate the modern practice of providing preliminary hearings only for felonies—a practice that served Utah well for over thirty years without significant complaint.

This Article proceeds as follows: Part II provides an overview of preliminary hearings and compares Utah's procedure to other states. Part III reviews the Utah Supreme Court's decision in *State v. Hernandez*. Part IV discusses the decision's consequences for taxpayers, the criminal justice system, and crime victims. Finally, Part V advocates a state constitutional amendment to override the

⁶ *Hernandez*, 2011 WL 5343347, at *3.

⁷ *Id.* at *2.

⁸ See generally Brief of Appellee at 14–15, *Hernandez*, 2011 WL 5343347 (No. 20090080-SC).

⁹ UTAH CONST. art. I, § 13.

¹⁰ U.S. CONST. amend. V.

¹¹ *Hernandez*, 2011 WL 5343347, at *2–3.

¹² See, e.g., *Lem Woon v. Oregon*, 229 U.S. 586 (1913) (holding that the Due Process Clause does not require an examination by a magistrate prior to prosecution).

Hernandez decision and restore Utah’s preliminary hearing practice to its historical form.

II. A BRIEF OVERVIEW OF PRELIMINARY HEARINGS

A. *Screening Charges in the Criminal Justice Process*

When a prosecutor alleges that a defendant should be tried for a crime, an issue arises as to what sort of screening mechanism (if any) should be in place to evaluate the prosecutor’s allegation before the trial. In the federal system, this screening function is performed by grand juries.¹³ Under the *Federal Rules of Criminal Procedure*, an indictment is a sufficient basis for binding a defendant over to face trial.¹⁴ Accordingly, federal prosecutors proceed by way of an indictment.¹⁵ A federal grand jury is comprised of sixteen to twenty-three jurors¹⁶ selected in much the same way a federal trial jury is selected.¹⁷ To indict, the federal system requires twelve affirmative votes. The grand jury, and the grand jury alone, decides whether there is sufficient evidence to charge a defendant with a crime.¹⁸

The indictment process implicates the Fifth Amendment, which provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”¹⁹ The U.S. Supreme Court has interpreted “infamous crime” under the Fifth Amendment to require indictment only for crimes punishable by imprisonment in a penitentiary.²⁰ As a result, because only those persons sentenced to imprisonment for more than one year—that is, only felons—can serve time in a penitentiary, the Fifth Amendment does not require indictment for federal misdemeanors.²¹ In sum, while federal constitutional law requires a grand jury indictment for felony cases, it does not require such grand jury screening for misdemeanors.

¹³ *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 424 (1983) (noting the grand jury’s purpose is to “ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution”).

¹⁴ *See* FED. R. CRIM. P. 5.1(a)(2).

¹⁵ In rare situations, a grand jury cannot meet within fourteen days to review charges against a defendant who has been arrested and is held in custody. In that situation, a federal prosecutor is required to go through a preliminary hearing to continue to hold the defendant. *See id.* at 5.1(c).

¹⁶ 4 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 15.2(g) (3d ed. 2007).

¹⁷ *Id.* § 15.2(a).

¹⁸ *See id.* § 15.1(d).

¹⁹ U.S. CONST. amend. V.

²⁰ *Mackin v. United States*, 117 U.S. 348, 354 (1886).

²¹ 18 U.S.C. § 4083 (2006) (“A sentence for an offense punishable by imprisonment for one year or less shall not be served in a penitentiary without the consent of the defendant.”).

The practice for screening charges is varied among the states. While the Fifth Amendment requires grand jury screening of federal felony offenses, the Supreme Court has not incorporated the Fifth Amendment right to a grand jury indictment as a fundamental right made applicable to the states through the Fourteenth Amendment.²² Therefore, states (including Utah) are not obligated as a matter of federal constitutional law to proceed by indictment. Furthermore, because the U.S. Supreme Court has also held that due process does not require even a neutral review of the decision to prosecute,²³ states are free to craft their own approaches to reviewing a prosecutor's decision to file charges.

In crafting their own approaches, eighteen states have chosen to follow the federal practice and to require a grand jury indictment for felonies ("indictment states").²⁴ Four states require indictment for only the most serious crimes, such as capital offenses or crimes punishable by life imprisonment.²⁵ Twenty-eight states provide for prosecution by indictment *or* information²⁶ ("information states").²⁷

Most information and indictment states have chosen to review a prosecutor's decision to file charges by holding a preliminary hearing.²⁸ As the name suggests, a "preliminary" hearing is a hearing held early in the criminal justice process to make sure that the prosecution possesses sufficient evidence to warrant binding over a defendant to face trial.²⁹ Consistent with this screening function, the burden of proof at a preliminary hearing is not proof beyond a reasonable doubt, as would occur at trial, but rather mere probable cause that the suspect has committed the crime charged.³⁰

²² *Hurtado v. California*, 110 U.S. 516, 538 (1884).

²³ *See Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913) (stating that because the due process clause "does not require the State to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney, is obligatory upon the states").

²⁴ WAYNE R. LAFAVE ET AL., *supra* note 16, § 15.1(d) (Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia).

²⁵ *Id.* § 15.1(e), at 431–32 (Florida, Minnesota, Louisiana, and Rhode Island).

²⁶ An "information" is simply a charging document prepared by a prosecutor.

²⁷ WAYNE R. LAFAVE ET AL., *supra* note 16, § 15.1(g) n.344 (Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming).

²⁸ *See generally infra* Part VI. The "common pattern" in indictment states that provide for preliminary hearings "is to allow bypassing without restriction, as in the Federal system." WAYNE R. LAFAVE ET AL., *supra* note 16, § 14.2(c).

²⁹ WAYNE R. LAFAVE ET AL., *supra* note 16, § 14.1(a).

³⁰ *Id.*

B. Utah Preliminary Hearings before Hernandez

Utah is an “information state”—that is, it follows the majority of states and allows the prosecution to proceed to trial not only by way of a grand jury indictment but also through an information. In some cases, however, Utah requires that the information itself be further reviewed to determine whether sufficient evidence underlies it. Indeed, article I, section 13 of Utah’s constitution provides: “Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment.”³¹ The reference to cases being prosecuted after “examination and commitment by a magistrate” establishes the requirement of a preliminary hearing for certain offenses.³² The offenses for which preliminary hearings are required are those offenses “heretofore required to be prosecuted by indictment.”³³

Before the Utah Supreme Court’s decision in *State v. Hernandez*, article I, section 13 was generally understood to require preliminary hearings only for felony offenses.³⁴ This understanding was consistent with the federal approach, which also required grand jury indictment only for felony offenses.³⁵ For example, in 1978, the Utah legislature created a new division of responsibility between circuit courts and district courts.³⁶ The legislature specifically provided that it was conferring jurisdiction over Class A misdemeanors to circuit courts, making clear that this did not carry with it any right to a preliminary hearing in the circuit courts:

All public offenses triable in the district courts, except cases appealed from justices’ and circuit courts, as well as class A misdemeanors triable in circuit courts, must be prosecuted by information or indictment[;] . . . but preliminary hearings shall not be required for class A misdemeanors triable in circuit courts.³⁷

³¹ UTAH CONST. art. I, § 13.

³² *Id.*

³³ *Id.*

³⁴ Utah practice has also apparently been to hold a preliminary hearing on misdemeanors that are charged in the same information as a felony. For example, if a defendant is charged with aggravated assault against his girlfriend (a felony) and violation of a protective order (a misdemeanor), the preliminary hearing will usually address both charges. *See, e.g.*, *State v. Williams*, 175 P.3d 1029, 1030 (Utah 2007); *State v. Harter*, 155 P.3d 116, 119 (Utah Ct. App. 2007). This Article sets such “mixed” cases aside, and focuses on whether there should be a stand-alone right to preliminary hearing when the information charges only a misdemeanor offense.

³⁵ Compare FED. R. CRIM. P. 7(a)(1) (stating that felonies must be prosecuted by indictment) with *id.* at 58(b)(1) (providing that misdemeanors may be charged with an information).

³⁶ UTAH CODE ANN. § 77-16-1 (West 1978).

³⁷ *Id.*

The understanding that preliminary hearings would not be held for misdemeanor offenses has also long been reflected in the Utah Rules of Criminal Procedure, which require that “all criminal prosecutions whether for felony, misdemeanor or infraction shall be commenced by the filing of an information . . . before a magistrate having jurisdiction of the offense alleged.”³⁸ Utah law defines an information as “an accusation, in writing, charging a person with a public offense.”³⁹ The information must be “sworn to by a person having reason to believe the offense has been committed.”⁴⁰ Furthermore, in the case of a felony or Class A misdemeanor, the prosecuting attorney must “first authorize the filing of [the] information.”⁴¹

Even though Utah had not historically held a preliminary hearing for misdemeanor charges, it still had a mechanism for reviewing prosecutors’ charging decisions in such cases. Under the Utah rules, a magistrate reviewed filed information to determine whether “there [was] probable cause to believe that an offense has been committed and that the accused has committed it.”⁴² If probable cause existed, then the magistrate issued an arrest warrant or summons for the accused to appear.⁴³ Then, in the case of a misdemeanor charge, the magistrate would “call upon the defendant to enter a plea.”⁴⁴

In contrast, in the case of a felony charge, the magistrate would continue and inform the defendant of the right to a preliminary hearing.⁴⁵ The defendant could then choose to either waive the preliminary hearing (with the consent of the prosecutor⁴⁶) or set such a hearing. If the defendant requested a preliminary hearing, the magistrate would schedule the hearing “within a reasonable time, but not later than ten days if the defendant is in custody for the offense charged and not later than thirty days if the defendant is not in custody.”⁴⁷

Under the Utah rules, the preliminary hearing in felony cases is an adversarial proceeding. Generally, the hearing parallels a trial: the state must satisfy its burden to prove the elements of the crime charged and can do so by presenting evidence and calling witnesses.⁴⁸ The defendant can cross-examine the state’s witnesses, and then present his or her own case by testifying, offering evidence, and calling defense witnesses.⁴⁹ However, the preliminary hearing does not reach the ultimate question of guilt beyond a reasonable doubt. Instead, consistent with its function as

³⁸ UTAH R. CRIM. P. 5(a).

³⁹ UTAH CODE ANN. § 77-1-3(3) (West 2011).

⁴⁰ UTAH R. CRIM. P. 4(a).

⁴¹ *Id.* at 5(b).

⁴² *Id.* at 6(a).

⁴³ *Id.*

⁴⁴ *Id.* at 7(g).

⁴⁵ *Id.* at 7(h)(1).

⁴⁶ *Id.*

⁴⁷ *Id.* at 7(h)(2).

⁴⁸ *See id.* at 7(i)(1).

⁴⁹ *Id.*

a screening mechanism, the standard of proof at the hearing is only probable cause—“a reasonable belief that an offense has been committed and that the defendant committed it.”⁵⁰ Also, the magistrate’s finding of probable cause “may be based on hearsay in whole or in part,” and the defendant does not have the opportunity to object to unlawfully obtained evidence.⁵¹ If there is a finding of probable cause, the magistrate will bind the defendant over for trial; otherwise, the magistrate must dismiss the charges without prejudice.⁵²

To summarize, before *Hernandez*, Utah law guaranteed every person accused of a crime an initial examination of the prosecutor’s evidence by an impartial judge. However, Utah law extended this additional right for a preliminary hearing only to those charged with felony offense.

C. Preliminary Hearings in Other States

The Appendix in Part VI of this Article surveys the provisions dealing with preliminary hearings in the other forty-nine states. From these provisions, it is clear that a majority of states restrict preliminary hearings to felony charges, just as Utah did before *Hernandez*.⁵³ Some states provide a conditional right to a preliminary hearing if an indictment or information has not been filed, thus allowing prosecutors to bypass the preliminary hearing altogether by filing one of these charging documents.⁵⁴ Still other states allow magistrates to make the probable cause determination without an adversary preliminary hearing by looking at the evidence in the charging documents and supporting affidavits.⁵⁵

Before *Hernandez*, not one state interpreted its constitution to require preliminary hearings for misdemeanors. In fact, it appears that only four states—Nevada, Pennsylvania, South Dakota, and Tennessee—offered a statutory right to a preliminary hearing for some classifications of misdemeanors.⁵⁶

⁵⁰ State v. Clark, 20 P.3d 300, 304 (Utah 2001) (citations omitted).

⁵¹ UTAH R. CRIM. P. 7(i)(2). For discussion of the reasons underlying this language, see Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah’s Victims’ Rights Amendment*, 1994 UTAH L. REV. 1373, 1423–56 (explaining that hearsay evidence is commonly used in preliminary hearings around the country).

⁵² UTAH R. CRIM. P. 7(i)(3).

⁵³ See, e.g., *infra* Part VI.A (Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawai’i, Idaho, Illinois, Kansas, Louisiana, Maryland, Michigan, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Virginia, West Virginia, Wisconsin, and Wyoming).

⁵⁴ See, e.g., *infra* Part VI.A (Delaware, Georgia, Iowa, Kentucky, Massachusetts, Mississippi, New Jersey, North Carolina, and South Carolina).

⁵⁵ See, e.g., *infra* Part VI.A (Arkansas, Indiana, Maine, Minnesota, Montana, Vermont, and Washington).

⁵⁶ See *infra* Part VI.B.

III. *STATE V. HERNANDEZ*

In *State v. Hernandez*, the defendant asked the Utah Supreme Court to reverse the long-settled practice in Utah of providing preliminary hearings only for felony offenses.⁵⁷ The case arose from the following facts, recounted in the prosecution's criminal information:

On November 24, 2007, Hernandez provided Dillon Whitney, a minor, and two of Whitney's friends with alcohol at Hernandez's apartment. Whitney drank a large amount of vodka, and became drunk and "out of it." The two friends left the apartment for a short time. When they returned, they found Whitney lying unconscious at the bottom of a flight of stairs outside the apartment. With Hernandez's help, the two friends carried Whitney back into Hernandez's apartment. Hernandez then told the friends that they could leave and that he would take care of Whitney. Whitney was alive at this time.

The next day, Hernandez called the police and reported a man was "down" outside his apartment. The police responded and found Whitney unconscious, lying near the top of the stairs in front of Hernandez's apartment. Hernandez denied knowing Whitney and lied about whether Whitney had been inside his (Hernandez's) apartment. Hernandez claimed that he found Whitney outside his apartment that morning, unresponsive and with a bump on his head. Whitney was transported to a hospital, where he died. The cause of death was blunt force trauma to the head. The police later found an illegal drug pipe inside Hernandez's apartment, which is located within 1000 feet of a school.⁵⁸

Prosecutors charged Hernandez in a criminal information with four Class A misdemeanors: negligent homicide, obstruction of justice, unlawful sale of or furnishing of alcohol to minors, and possession of drug paraphernalia in a drug free zone.⁵⁹ Hernandez moved for a preliminary hearing. He conceded that the Utah Rules of Criminal Procedure authorized preliminary hearings only for felony offenses.⁶⁰ He argued, however, that article I, section 13 of the state constitution mandated preliminary hearings not only for felonies but also for Class A misdemeanors.⁶¹ After the district court denied the motion, Hernandez was allowed to take an interlocutory appeal to the Utah Supreme Court.⁶²

At the supreme court, the dispute centered on the historical meaning of the phrase "offenses heretofore required to be prosecuted by indictment" in article I,

⁵⁷ *State v. Hernandez*, No. 20090080, 2011 WL 5343347, at *1 (Utah Nov. 8, 2011).

⁵⁸ Information, *State v. Hernandez*, No. 071908841 (3d Dist. Ct. Nov. 30, 2007).

⁵⁹ *Id.*

⁶⁰ Brief of Appellee at 3, *Hernandez*, 2011 WL 5343347 (No. 20090080-SC).

⁶¹ *Id.*

⁶² *Id.*

section 13—in other words, “which crimes were required to be prosecuted by indictment up to the adoption of the Utah Constitution”?⁶³ The supreme court considered three possible interpretations. First, the district court read the phrase as referring to specific crimes that were indictable offenses under territorial law.⁶⁴ However, because Hernandez’s alleged crimes did not exist under territorial law, his crimes could not have been “indictable offenses” and thus could not now require a preliminary hearing under article I, section 13.⁶⁵ The supreme court rejected this approach mainly because, under both Utah territorial law and the Fifth Amendment to the U.S. Constitution, “the question of which offenses were indictable . . . was not determined by looking to a list of specific offenses.”⁶⁶ Rather, under both schemes, “the applicability of the indictment requirement [was] based on the severity of the punishment rather than on the elements of any particular offense.”⁶⁷

The state offered a second interpretation. Instead of referring to specific crimes, as the district court found, the state argued that article I, section 13 referred “only to felony offenses because only felony offenses were required to be prosecuted by indictment under the federal constitution,” which was binding on the Utah Territory before statehood.⁶⁸ According to this interpretation, article I, section 13 simply “reflects the framers’ intent that felony offenses could [now] be prosecuted either by way of information or indictment.”⁶⁹ In rejecting this approach, the supreme court recognized that although the federal constitution was indeed binding on the Utah Territory, the territory was free to provide greater protection, which it did by extending the right to prosecution by indictment “to misdemeanors punishable by more than six months in the city or county jail.”⁷⁰

In the end, the defense provided the winning interpretation. Hernandez’s defense attorneys agreed with the state that article I, section 13 did not refer to specific territorial crimes, as the district court had found.⁷¹ But they argued that the provision applied to more than just felonies: it applied to that “class of offenses over which district courts had original jurisdiction under Utah territorial law.”⁷² Under territorial law, district courts had jurisdiction over “indictable offenses”—specifically, “crimes punishable by imprisonment of more than six months.”⁷³ Accordingly, Hernandez argued that, because the Class A misdemeanors he allegedly committed carried a possible penalty of more than six months in jail, the

⁶³ *Hernandez*, 2011 WL 5343347, at *2.

⁶⁴ *Id.* at *1.

⁶⁵ *Id.*

⁶⁶ *Id.* at *6.

⁶⁷ *Id.*

⁶⁸ *Id.* at *3.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See id.* at *1.

⁷² *Id.*

⁷³ *Id.*

Utah Constitution requires prosecution by information and the right to a preliminary hearing.⁷⁴ The supreme court agreed.⁷⁵

The state presented an alternative argument to avoid having to provide full-blown preliminary hearings for Class A misdemeanors. It argued that even if article I, section 13 applies to Class A misdemeanors, the “examination and commitment by a magistrate” requirement could be satisfied by something less than the modern preliminary hearing.⁷⁶ According to the state, the magistrate’s review of the information, already mandated by Utah criminal procedure, satisfied the constitutional requirement.⁷⁷ The Court again rejected the state’s argument, concluding that the language of article I, section 13 contemplates a more searching evidentiary hearing,⁷⁸ and, historically, the procedure for prosecuting indictable offenses in Utah approximates the modern procedure for prosecuting felonies.⁷⁹ Thus, the Court held that article I, section 13 of the Utah Constitution guarantees the right to a modern preliminary hearing for Class A misdemeanors.⁸⁰

IV. THE UNFORTUNATE CONSEQUENCES OF *HERNANDEZ*

As mentioned at the outset, the purpose of this Article is not to contest the merits of the Utah Supreme Court’s historical analysis.⁸¹ Instead, this Article considers the public policy implications of the court’s holding requiring preliminary hearings not only for felony cases but also for Class A misdemeanors. From a cost-benefit perspective, *Hernandez* imposes significant costs on Utah’s criminal justice system. The costs fall into two areas: first, burdens on the criminal justice system in terms of additional expense from holding such hearings; and, second, burdens on crime victims from having to testify at such hearings. Each of these costs is discussed in turn below. Of course, it is possible that *Hernandez* has compensating benefits that outweighs these costs. The concluding section considers—and rejects—this possibility.

A. *The Fiscal Cost to the System and Taxpayers*

The most obvious cost of the *Hernandez* decision is that it will result in a substantial number of additional preliminary hearings each year, costing the Utah criminal justice system and taxpayers alike. While it is too early to give precise numbers on how *Hernandez* has played out in the state’s courtrooms, it is possible to derive a reasonable estimate. As of October 13, 2011, Utah trial courts had

⁷⁴ *Id.*

⁷⁵ *Id.* at *7.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at *7–8.

⁸⁰ *Id.* at *9.

⁸¹ See *supra* notes 63–80 and accompanying text.

handled 5,410 Class A misdemeanors during the year.⁸² Since *Hernandez* was decided some six-and-a-half months earlier (covering about 70 percent of the days in the year), it seems fair to assume that, with a steady calendar, about 70 percent of these cases were decided after *Hernandez*. This means that a total of 3,787 Class A misdemeanors have been processed by Utah's courts after *Hernandez*. Of these cases, 982 were "calendared" for a preliminary hearing—that is, judges reserved room on their calendars for preliminary hearings.⁸³ Not every calendared preliminary hearing is actually held. In many cases, the parties reach some kind of agreement that eliminates the need for such a hearing. A conservative estimate is that 30 percent of calendared preliminary hearings are actually held.⁸⁴ Proceeding on that basis, so far this year since *Hernandez*, Utah judges have held 295 preliminary hearings. Because those hearings cover only part of year (the six-and-a-half months since *Hernandez*), an annual figure estimate can be derived by calculating the number that would be held in a full twelve months—approximately 545 preliminary hearings.

As a cross-check on these numbers, a different calculation method reaches roughly the same conclusion. The Administrative Office of the Court reports that prosecutors file about 8,000 Class A misdemeanors in Utah each year.⁸⁵ Of course, not every filed misdemeanor charge ultimately leads to a preliminary hearing. In some cases, a defendant pleads guilty before a preliminary hearing is ever set. In other cases, the hearing may be set but then waived as part of a plea bargain or other negotiated process. An estimate of the number of hearings held can be derived by assuming that the same percentage of misdemeanor cases will go to preliminary hearing as do felony cases. About 7 to 8 percent of felony cases go to a preliminary hearing, so, assuming misdemeanors will track felonies, the expectation is that approximately 7 to 8 percent of the 8,000 Class A misdemeanors will reach a full preliminary hearing.⁸⁶ On this calculation method, Utah courts should expect to see an additional 560 to 640 preliminary hearings a year as a result of *Hernandez*.⁸⁷ In summary, both calculation methods produce roughly the same estimated annual number of additional preliminary hearings of around 540 to 640.

How much will these additional preliminary hearings cost the courts? The administrative office estimates that Utah courts currently spend 1,450 hours (or 87,000 minutes) a year holding preliminary hearings.⁸⁸ This time costs the courts

⁸² Telephone Interview with Rick Schwermer, Assistant State Court Adm'r, Utah Admin. Office of the Courts (Oct. 13, 2011).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Telephone Interview with Rick Schwermer, Assistant State Court Adm'r, Utah Admin. Office of the Courts (Apr. 25, 2011).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

approximately \$300,000 for judges and support staff.⁸⁹ Thus, based on these figures, one minute of preliminary hearing time costs the state roughly \$3.40.

Assuming that, on average, a full preliminary hearing requires 90 minutes of court time, the 545 to 640 additional preliminary hearings required by *Hernandez* will cost the courts in the neighborhood of \$200,000 per year—\$166,700 on the low end and approximately \$217,600 on the high end.

Of course, the financial costs associated with preliminary hearings are not limited to simply courts (judges and their staffs). Prosecutors must prepare for and attend preliminary hearings. Unlike a judge who can simply evaluate arguments presented during the hearing, the prosecutor must prepare to present the case. This involves subpoenaing witnesses (who must be paid witness fees), meeting with witnesses to review their testimony, and (of course) presenting the testimony at the preliminary hearing. Frequently, the prosecutor at a preliminary hearing is assisted by a “case agent”—that is, by the police officer who has investigated the case. All of this costs the taxpayers money in some form.

On the defense side of the equation, the defendant is often indigent and receives court-appointed counsel at state expense.⁹⁰ The defense attorney must also prepare for the preliminary hearing, although this may often involve less work than the prosecutor’s preparation, as defense attorneys need not build an affirmative case at the preliminary hearing stage. Even so, there are reasons to believe this cost to defense counsel is significant. Since defense attorney time is a limited resource, the time defense attorneys spend at preliminary hearings in misdemeanor cases is necessarily subtracted from other (perhaps more important) work that they might perform.

While it would be difficult to calculate with precision an exact dollar cost for all these expenses, it seems reasonable to estimate that these nonjudicial costs for preliminary hearings would (at least) match the costs to the judiciary. If so, the total direct financial cost to the state annually from *Hernandez* is around \$400,000.

It is important to understand what this figure means. The \$400,000 is simply a (conservative) estimate of the annual cost to the taxpayers of holding preliminary hearings for Class A misdemeanors around the state. But the taxpayers did not suddenly appropriate such a sum the day after the supreme court decided *Hernandez*. Instead, judges, prosecutors, and court-appointed defense counsel all had to divert their time and attention (and judicial funds) away from other matters to conduct the preliminary hearings mandated by *Hernandez*. For judges, this has probably meant delay in resolving other cases. For prosecutors, this has probably meant fewer cases being prosecuted. And for defense attorneys, this has probably meant more attention to misdemeanor preliminary hearings and less attention to

⁸⁹ *Id.*

⁹⁰ U.S. DEP’T. OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, KEEPING DEFENDER WORKLOADS MANAGEABLE 2 (2001) (stating that “in some jurisdictions, public defender offices are appointed [in] as many as 80 percent of all criminal cases”); *see also* UTAH CODE ANN. § 77-32-302 (West 2011) (providing counsel for indigent defendants).

other matters. The cost figure derived above is simply a rough, monetized estimate of how much this diverted time is worth.

B. *The Cost to Crime Victims*

The “cost” figure from the previous section is simply a rough estimate of the direct financial costs to the state from the court decision, to say nothing of indirect costs in time and reprioritization of judicial resources. But other costs need to be considered in evaluating the wisdom of *Hernandez*. Perhaps the most significant of these is the burden to crime victims, who are forced to testify at preliminary hearings. To be sure, a defendant has a constitutional right to confront witnesses against him,⁹¹ and crime victims may have to testify at a defendant’s trial. But the vast majority of criminal cases in Utah (as elsewhere) are resolved by prior negotiations before trial.⁹² Accordingly, the vast majority of crime victims will only have to testify if a preliminary hearing is held in their case.

Testifying at preliminary hearings is often a traumatizing experience for crime victims, particularly since preliminary hearings are generally held shortly after the crime was committed when the pain of the experience is still fresh in the victim’s mind.⁹³ Indeed, in 1994, Utah voters approved a constitutional amendment designed to greatly reduce the situations in which crime victims must testify at preliminary hearings in felony cases.⁹⁴ Utah’s Victims’ Rights Amendment established a series of rights for crime victims in Utah’s criminal justice process, including the right to be notified of court hearings, to attend those hearings, and to speak at appropriate points in the process (including hearings involving bail, plea bargains, and sentencing).⁹⁵ One sometimes-overlooked part of the victims’ rights protections was a provision to allow the use of “reliable hearsay” to establish the basis for binding over a defendant at the preliminary hearing.⁹⁶ The intent of the drafters of this provision was to reduce the trauma that victims suffer by obviating the need for them to testify at preliminary hearings.⁹⁷

The legislative history supporting the provision⁹⁸ established that testifying at preliminary hearings can often be traumatic for crime victims in Utah.⁹⁹ Trauma

⁹¹ U.S. CONST. amend. VI.

⁹² See, e.g., Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Assessment of the Effects of Miranda*, 43 UCLA L. REV. 839, 912 (1996) (reporting that 97% of felony cases sampled in Salt Lake County were resolved before trial).

⁹³ Cassell, *supra* note 51, at 1434–36.

⁹⁴ *Id.* at 1458–60. As initially drafted, the amendment focused on felony offenses. See *id.* at 1421–22. Moreover, at the time the amendment was drafted, preliminary hearings were not held in misdemeanor cases. See *supra* notes 3–5 and accompanying text.

⁹⁵ UTAH CONST. art. I, § 28.

⁹⁶ *Id.* § 12.

⁹⁷ See Cassell, *supra* note 51, at 1440–49.

⁹⁸ The information that follows is drawn from *id.* at 1434–37, which is endorsed as “a statement of the drafters’ intentions” for Utah’s Victims’ Rights Amendment. See *id.* at

was especially severe for victims of rape and for children who have been sexually abused.¹⁰⁰ These victims are forced to recount the details of horrible crimes against them and must endure cross-examination, while the defendant sits nearby as a threatening presence.¹⁰¹ For example, a young female victim of sexual assault was so worried about her testimony at a preliminary hearing that she vomited six times the night before and then again in the prosecutor's office.¹⁰² She testified and was cross-examined for two-and-a-half hours, and was extremely upset throughout.¹⁰³ Compounding these problems is fact that there is no jury present at preliminary hearings. Without a fear of alienating a jury, defense attorneys can conduct aggressive cross-examination designed to traumatize victims and thus discourage them from appearing at trial or encourage them to pressure prosecutors to extend a generous plea offer.¹⁰⁴

While the legislative history from the Victims' Rights Amendment revolved around felony cases, the same sorts of harms to victims can be expected to follow from preliminary hearings in misdemeanor cases. Many significant sex offenses are Class A misdemeanor offenses.¹⁰⁵ The most serious domestic violence offenses are also Class A misdemeanors.¹⁰⁶ Prosecutors for these types of cases now face a serious question: Do they force a victim to undergo the trauma of testifying at a preliminary hearing or, instead, do they offer a generous plea bargain to a defendant? *Hernandez's* creation of additional preliminary hearings that may subject victims to increased judicial procedures and more frequent testimony creates a bargaining chip for defendants that presumably will lead to more favorable dispositions for defendants than they would otherwise receive.

In addition to the trauma of testifying, there is the general uncertainty associated with yet another hearing in the process. A concrete illustration of this concern comes from the impact of *Hernandez* on a recent case in Salt Lake

1373 n.*. The constitutional amendment was approved by the legislature and then sent to the voters for their approval.

⁹⁹ See *id.* at 1434–35 & n.316 (collecting examples).

¹⁰⁰ See *id.* at 1434–35 & n.319 (collecting examples); see also *State v. Kallin*, 877 P.2d 138, 144 (Utah 1994) (noting eleven-year-old sexual assault victim in tears for most of direct and cross-examination at trial).

¹⁰¹ See Cassell, *supra* note 51, at 1435–36 n.320.

¹⁰² *Id.* at 1435–36.

¹⁰³ *Id.* at 1436.

¹⁰⁴ OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, FOUR YEARS LATER: A REPORT ON THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME 14 (1986), available at <https://www.ncjrs.gov/pdffiles1/ovc/102834.pdf> (noting at a preliminary hearing “the defense’s questioning is not restrained by a desire not to alienate the jury, and it is often the most grueling interrogation of the victim, especially the child victim”).

¹⁰⁵ *E.g.*, UTAH CODE ANN. § 76-5-401.1 (West 2011) (sexual abuse of minor); *id.* § 76-5-401.2 (unlawful sexual contact with persons sixteen or seventeen years old); *id.* § 76-9-702.5 (lewdness involving a child); *id.* § 76-9-702 (sexual battery).

¹⁰⁶ *Id.* § 76-5-102 (assault); *id.* § 77-36-2.4 (violation of protective order); *id.* § 76-5-106.5 (stalking).

County. In *State v. Druce*,¹⁰⁷ the defendant was charged with sexual battery and assault—both Class A misdemeanors under Utah law—and commission of domestic violence in the presence of a child.¹⁰⁸ After the supreme court handed down *Hernandez*, the defendant requested a preliminary hearing.¹⁰⁹ The court ordered a preliminary hearing. The state moved to dismiss because its witnesses were unavailable, and the court granted the motion.¹¹⁰ When the state refiled the charges, there was some internal miscommunication with the misdemeanor division of the District Attorney’s office, and the prosecutor was late in contacting the victims.¹¹¹ The adult and child victim, it turned out, had moved to South Dakota.¹¹² At this same time, the prosecutor received a request from defense counsel to stipulate to a continuation of the hearing.¹¹³ Given the inability to subpoena witnesses, the prosecutor left a message agreeing to stipulate but never heard back.¹¹⁴ At the preliminary hearing, defense counsel did not request a continuance after all, and this time the court dismissed the case with prejudice because the victim did not appear at the hearing.¹¹⁵

That afternoon, the prosecutor “received a frantic phone call from the victim” who “had been calling the District Attorney’s office main telephone number but indicated that she was never transferred . . . to discuss her case.”¹¹⁶ Ultimately, to assert her rights, the victim found legal representation from the Utah Crime Victims’ Legal Clinic, which filed a motion to reconsider the dismissal with prejudice.¹¹⁷ The victim argued that her right to be treated fairly was violated by the dismissal.¹¹⁸ After a hearing, the judge agreed, granted the motion for reconsideration,¹¹⁹ and scheduled a preliminary hearing.¹²⁰

It is important to underscore that in this case there was never any real doubt about the sufficiency of the evidence to support a bindover of the defendant to stand trial.¹²¹ Thus, this unfortunate case demonstrates both the resources that the

¹⁰⁷ *Druce*, No. 111904859 (3d Dist. Ct. 2011).

¹⁰⁸ Motion for Reconsideration of Court’s Order to Dismiss with Prejudice and Request for Hearing at 1, *Druce*, No. 111904859 (3d Dist. Ct. 2011).

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 3.

¹¹² *Id.* at 4.

¹¹³ *Id.* at 3.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 4.

¹¹⁶ *Id.*

¹¹⁷ Memorandum in Support of State’s Motion for Reconsideration, Crime Victim’s Rule 60 Motion for Relief from Order at 1, *State v. Druce*, No. 111904859 (3d Dist. Ct. 2011).

¹¹⁸ *Id.* at 2.

¹¹⁹ Minutes, *Druce* (No. 111904859).

¹²⁰ *Id.*

¹²¹ See Pretrial Protective Order, *Druce* (No. 111904859). Indeed, following the preliminary hearing, the judge granted a protective order against the victim “because of the likelihood of repeated violence.” *Id.* The defendant was ultimately convicted of two of the

state must now expend, and the aggravation victims must endure, to bind a misdemeanor case over to trial. Indeed, in this case, the victims (one of whom was a child) had to travel to Utah from South Dakota to testify at the preliminary hearing in front of the very person who is charged with abusing them—and for what possible benefit?

C. *The Lack of Compensating Benefits*

As the previous sections suggest, *Hernandez* imposes real costs on Utah's criminal justice system. To complete any policy analysis, these costs must be assessed against any compensating benefits. But the advantages (if any) of requiring preliminary hearings for misdemeanor are vanishingly thin.

Criminal defendants argue that they receive assistance from the decision, namely the opportunity to scrutinize charges at a preliminary hearing before they are forced to stand trial for Class A misdemeanors. But defendants who are charged with Class A misdemeanors already have review by a magistrate judge of prosecution's criminal information.¹²² The argument that defendants are receiving noticeable benefits from *Hernandez* must accordingly rest on the claim that a preliminary hearing in front of a magistrate is a superior device for screening out meritless Class A misdemeanor charges.

There are good reasons for doubting any such claim. For starters, Utah has long restricted preliminary hearings to felonies.¹²³ It is possible to confirm that before *Hernandez*, no preliminary hearings were held for misdemeanors since at least 1978.¹²⁴ In the more than thirty years that Utah operated under this system, there was no organized effort to change the system (so far as we have been able to determine). For example, there is no record of any proposed change to the Utah Rules of Criminal Procedure or to Utah statutes to make such a change.¹²⁵ If preliminary hearings for misdemeanors were important, one would expect to have seen some suggestion along these lines before the *Hernandez* case. To the contrary, thousands upon thousands of misdemeanor cases moved through the system without preliminary hearings, all, as the fact that the issue was not litigated in Utah's appellate courts for several decades confirms, without documented complaint.

The experience of other states also supports this conclusion. As noted earlier, not a single state, other than Utah, interprets its constitution to require preliminary hearings for misdemeanors.¹²⁶ Indeed, only four of the other forty-nine states

three counts against him, domestic violence assault and domestic violence in the presence of a child (although he was acquitted of sexual battery).

¹²² See *supra* notes 38–44 and accompanying text.

¹²³ See Rogers, *supra* note 2 and accompanying text.

¹²⁴ See *supra* notes 36–37; see also Van Dam v. Morris, 571 P.2d 1325, 1325 (Utah 1977) (providing example of a preliminary hearing for defendant charged with Class A misdemeanor).

¹²⁵ See *supra* notes 36–37 and accompanying text.

¹²⁶ See *supra* Part II.C.

provide a statutory right to preliminary hearings for some classifications of misdemeanor offenses.¹²⁷ Further, there does not appear to be any apparent dissatisfaction with this approach in these other states. For example, we have been unable to find any law review articles or newspaper editorials advocating a change in the process.¹²⁸

In sum, from a public policy perspective, restricting preliminary hearings to felony cases would simply return the world to the way it was in Utah from (at least) 1978 through March 29, 2011—and the way it still is in forty-five of the other forty-nine states. Taxpayers would save money and crime victims would be spared testifying, all with no apparent harm to any other interest. The question then arises as to how to implement such a reform.

V. FIXING *HERNANDEZ*

The solution to the problems created by *Hernandez* is to simply amend Utah's constitution so that it does not require preliminary hearings in misdemeanor cases. Utah's constitution provides an amendment process.¹²⁹ The Utah legislature should send a one-word constitutional amendment to voters to reinstate the conventional practice of providing preliminary hearings for felonies only. Article I, section 13 of the Utah Constitution should be amended by changing one word as follows:

~~Offenses~~Felonies heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

This amendment would limit the requirement for preliminary hearing (or indictment) to situations involving “felony” offenses. The change would create no interpretation issues, as the term “felony” is a well-defined term.¹³⁰ Of course, even with this constitutional change, the state legislature would be free to provide for preliminary hearings in misdemeanors cases through separate legislation if it

¹²⁷ See *supra* Part II.C.

¹²⁸ But cf. John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors* 3 (Washington & Lee Pub. Legal. Stud. Research Paper Series, Paper No. 2011-19, 2011), available at www.ssrn.com/abstract=1953880 (exploring adjudication of misdemeanors and arguing that “the procedural safeguards and due process protections that accompany a criminal prosecution in theory must be applied to those offenses considered petty just as they are to more serious offenses”).

¹²⁹ UTAH CONST. art. XXIII.

¹³⁰ See UTAH CODE ANN. § 76-3-103 (West 2011) (defining “felony” offenses under the Utah Code); BLACK'S LAW DICTIONARY 694 (9th ed. 2009) (defining felony as “serious crime usu. punishable by imprisonment for more than one year or by death”).

thought that such a step was appropriate. The proposed amendment simply eliminates the constitutional requirement for such hearings.

Additionally, the proposed amendment would not have any unpredictable consequences. To the contrary, it simply returns Utah to the practice that served the state well for over thirty years without an apparent problem. And as explained in this Article, such a change would save the state money and spare crime victims needless trauma. Hopefully the legislature will propose such an amendment at the earliest opportunity. Both taxpayers and crime victims would benefit as a result.

APPENDIX

The following is a comprehensive survey undertaken for this Article. It reveals that the vast majority of states restrict preliminary hearings to felonies.

A. States with No Right to Preliminary Hearings for Misdemeanors

Alabama:

ALA. R. CRIM. P. 5.1(a) (“A defendant charged by complaint with the commission of a felony may . . . demand a preliminary hearing.”).

Alaska:

ALASKA R. CRIM. P. 5(e)(2) (“A defendant is entitled to a preliminary examination if the defendant is charged with a felony for which the defendant has not been indicted . . .”).

Arizona:

ARIZ. R. CRIM. P. 5.1(a) (outlining timeline for preliminary hearing “[w]hen a complaint is filed charging the defendant with the commission of a felony”).

Arkansas:

ARK. R. CRIM. P. 8.3(c) (“[T]he judicial officer shall . . . determine by an informal, *non-adversary* hearing whether there is probable cause for detaining the arrested person pending further proceedings.” (emphasis added)); *see also* Barber v. Arkansas, 429 F.2d 20, 22 (8th Cir. 1970) (finding there “is no requirement that a preliminary hearing be afforded to a defendant prosecuted under a felony information” under Arkansas law); Payne v. State, 295 S.W.2d 312, 314 (Ark. 1956) (holding information need not be quashed because it was issued before a preliminary hearing), *rev’d on other grounds*, 356 U.S. 560 (1958).

California:

CAL. PENAL CODE § 738 (West 2008) (“Before an information is filed there must be a preliminary examination . . .”); *id.* § 737 (“All felonies shall be prosecuted by indictment or information.”); *id.* § 740 (“[A]ll misdemeanors . . . must be prosecuted by written complaint . . .”).

Colorado:

COLO. REV. STAT. § 16-5-301(a)(2) (2011) (“Every person accused of a . . . felony by direct information or felony complaint has the right to demand and receive a preliminary hearing . . .”).

Connecticut:

CONN. GEN. STAT. ANN. § 54-46a(a) (West 2009 & Supp. 2011) (providing that no defendant “shall be put to plea or held to trial for any crime punishable by death or life imprisonment” without a preliminary hearing).

Delaware:

DEL. SUPER. CT. CRIM. R. 5(d) (providing that a “preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed . . .”).

Florida:

FLA. R. CRIM. P. 3.133(b)(1) (providing a qualified right “to an adversary preliminary hearing on any felony charge”).

Georgia:

State v. Middlebrooks, 222 S.E.2d 343, 345–46 (Ga. 1976) (holding “that a preliminary hearing is not a required step in a felony prosecution and that once an indictment is obtained there is no judicial oversight or review of the decision to prosecute”).

Hawai‘i:

HAW. R. PEN. P. 5(c) (providing that “a defendant charged with a felony shall not be called upon to plead” but shall have preliminary hearing in accordance with this provision).

Idaho:

IDAHO CRIM. R. 5.1(a) (“[A] defendant, when charged in a complaint with any felony, is entitled to a preliminary hearing.”).

Illinois:

725 ILL. COMP. STAT. ANN. 5/109-3.1(b) (West 2006 & Supp. 2011) (requiring either a preliminary examination or an indictment “for the alleged commission of a felony”).

Indiana:

IND. CODE ANN. § 35-33-7-2(a) (LexisNexis 1998) (providing that “the facts upon which the arrest was made shall be submitted to the judicial officer, ex parte, in a probable cause affidavit” for the judicial officer to determine whether probable cause exists); *see also* *Flowers v. State*, 738 N.E.2d 1051, 1055 (Ind. 2000) (finding court lacks authority to dismiss defective probable cause affidavit).

Iowa:

IOWA R. CRIM. P. 2.2(4)(a) (requiring a preliminary hearing “unless the defendant is indicted . . . or a trial information is filed against the defendant”).

Kansas:

KAN. STAT. ANN. § 22-2902(1) (2010) (“The state and every person charged with a felony shall have a right to a preliminary examination before a magistrate . . .”).

Kentucky:

KY. R. CRIM. P. 3.07 (“A defendant who has not been indicted is entitled to a preliminary hearing . . . when charged with an offense requiring an indictment . . .”).

Louisiana:

LA. CODE CRIM. PROC. ANN. art. 291 (2003) (providing “authority to conduct preliminary examinations of persons accused of felonies”).

Maine:

ME. R. CRIM. P. 7(a) (Class A, B, and C crimes require indictment, unless waived); *id.* at 5(a)(2) (Class D and E crimes require probable cause determination by court according to Rule 4A when arrest is made without warrant); *id.* at 4A(a) (requires court to determine whether probable cause exists to believe crime has been committed). The probable cause determination under Rule 4A does not appear to be an adversarial preliminary hearing, as the acceptable evidence is

limited to the sworn complaint, affidavits, and sworn oral statements capable of review by the court. *Id.* at 4A(b).

Maryland:

MD. CODE ANN., CRIM. PROC. § 4-221(a) (West 2002) (“A defendant charged with a felony . . . may request a preliminary hearing . . .”).

Massachusetts:

MASS. R. CRIM. P. 3(f) (stating defendants charged “with an offense as to which they have the right to be proceeded against by indictment . . . have the right to a probable cause hearing, unless an indictment has been returned for the same offense.”).

Michigan:

MICH. COMP. LAWS SERV. § 766.4 (LexisNexis 2002 & Supp. 2011) (“[T]he magistrate before whom any person is arraigned on a charge of having committed a felony shall set a day for a preliminary examination . . .”).

Minnesota:

MINN. R. CRIM. P. 4.03(1) (requiring “a probable cause determination” for warrantless arrests). A signed complaint establishing the facts of the crime satisfies the probable cause requirement in Rule 4.03. *See Id.* at 4.03(3). Minnesota law also provides for an Omnibus Hearing for those defendants charged with a felony or gross misdemeanor who do not plead guilty, *id.* at 11, but the purpose of that hearing is to prepare for trial, and thus its scope is broader than the traditional preliminary hearing, *see id.* at 11.02.

Mississippi:

Mayfield v. State, 612 So.2d 1120, 1129 (Miss. 1992) (holding “that once a defendant has been indicted by a grand jury, the right to a preliminary hearing is deemed waived”).

Missouri:

MO. ANN. STAT. § 544.250 (West 2002 & Supp. 2011) (preventing the filing of “any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination”).

Montana:

MONT. CODE ANN. § 46-10-105(2)–(3) (2010) (requiring a preliminary examination unless “the district court has granted leave to file an information” or “an indictment has been returned”); *id.* § 46-11-201 (“If it appears [from affidavit] that there is probable cause to believe that an offense has been committed by the defendant, the judge or chief justice shall grant leave to file the information . . .”).

Nebraska:

NEB. REV. STAT. ANN. § 29-504 (Lexis Nexis 2009) (requiring preliminary examination “[w]hen the complaint is for a felony”).

New Hampshire:

N.H. REV. STAT. ANN. § 601:1 (2007) (“No person shall be tried for any offense, the punishment of which may be death or imprisonment for more than one year, unless upon an indictment . . .”).

New Jersey:

N.J. R. CRIM. P. 3:4-3(a) (requiring probable cause hearing if an indictment has not been returned).

New Mexico:

State v. Greyeyes, 734 P.2d 789, 792 (N.M. Ct. App. 1987) (“An accused has no right to a preliminary hearing on a misdemeanor charge.”).

New York:

N.Y. CRIM. PROC. LAW § 180.10(1) (providing that “[u]pon the defendant’s arraignment . . . upon a felony complaint” the court must inform the defendant of his right to a hearing to determine the sufficiency of the evidence against him).

North Carolina:

State v. Lester, 240 S.E.2d 391, 396 (N.C. 1978) (holding probable cause hearing only necessary when “no indictment has been returned by a grand jury”).

North Dakota:

N.D. R. CRIM. P. 5(b)(2) (“If the defendant is charged with a felony, the magistrate must inform the defendant . . . of the defendant’s right to a preliminary examination . . .”).

Ohio:

OHIO R. CRIM. P. 5(A)(4) (requiring judge or magistrate to inform the defendant “[o]f his right to a preliminary hearing in a felony case”).

Oklahoma:

OKLA. STAT. ANN. tit. 22, § 258 (2003 & Supp. 2012) (“There shall be no preliminary examinations in misdemeanor cases.”).

Oregon:

OR. REV. STAT. § 135.070(2) (2011) (requiring the magistrate to inform defendant of the right to a preliminary hearing when the defendant is charged with “having committed a crime punishable as a felony”).

Rhode Island:

R.I. DIST. R. CRIM. P. 5(c) (requiring a preliminary hearing for defendants charged with felonies); *see id.* at 9 (no requirement for preliminary hearing for defendants charged with misdemeanors).

South Carolina:

S.C. R. CRIM. P. 2(b) (providing that a “[preliminary] hearing shall not be held . . . if the defendant is indicted by a grand jury”).

Texas:

TEX. CODE CRIM. PROC. ANN. art. 16.01 (West 2005 & Supp. 2011) (“The accused in any felony case shall have the right to an examining trial before indictment in the county having jurisdiction of the offense . . .”).

Vermont:

VT. R. CRIM. P. 5(c) (requiring a probable cause determination “in the manner provided . . . for issuance of summons or warrant”).

Virginia:

VA. CODE ANN. § 19.2-183(B) (2008 & Supp. 2011) (“In felony cases, the accused shall not be called upon to plead, but he may cross-examine any witness[,] . . . introduce witnesses in his own behalf, and testify in his own behalf.”).

Washington:

WASH. REV. CODE. ANN. § 10.37.010 (West 2002) (“No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.”).

West Virginia:

W. VA. CODE ANN. § 62-1-8 (LexisNexis 2005) (requiring those offenses presented by indictment to be preceded by preliminary examination); *id.* § 62-2-1 (requiring prosecution of a felony to be by indictment).

Wisconsin:

WIS. STAT. ANN. § 971.02 (West 1998) (“If the defendant is charged with a felony in any complaint . . . no information or indictment shall be filed until the defendant has had a preliminary examination . . .”).

Wyoming:

WYO. STAT. ANN. § 5-9-129 (2011) (“Circuit courts have original jurisdiction in all misdemeanor criminal cases.”); WYO. R. CRIM. P. 5.1(a) (“In all cases required to be tried in the district court, except upon indictment, the defendant shall be entitled to a preliminary examination . . .”).

*B. States with a Statutory Right to Preliminary Hearings
for Some Classifications of Misdemeanors*

Nevada:

NEV. REV. STAT. ANN. § 171.202 (LexisNexis 2011) (requiring district attorney to conduct “preliminary examinations where a felony or gross misdemeanor is charged”).

Pennsylvania:

PA. R. CRIM. P. 540(E)(2) (requiring “issuing authority” to inform defendant “of the right to have a preliminary hearing”). While this rule does not distinguish between felonies and misdemeanors, a contact at the Pennsylvania Office of Attorney General confirmed that the rule applies to misdemeanor defendants. Telephone Interview with an Attorney at the Pa. Office of Attorney Gen. (Jan. 4, 2012).

South Dakota:

S.D. R. CRIM. P. 5(c) (“No defendant is entitled to a preliminary hearing unless charged with an offense punishable as a felony or class 1 misdemeanor.”).

Tennessee:

TENN. R. CRIM. P. 5(e)(1) (“Any defendant arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony . . . is entitled to a preliminary hearing.”).