TOWARDS PRETRIAL CRIMINAL ADJUDICATION

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Abstract: The American criminal justice system faces a crisis of adjudication. Courts rarely decide facts, hear arguments, or hold adversary hearings. Trials are an endangered species. Convictions nearly always happen when defendants plead guilty pursuant to agreements. This crisis of adjudication undermines the system's legitimacy. The rule of law has little purchase in a regime governed by guilty pleas. Legal rights are not asserted. The government's evidence is not tested. The values of neutrality, transparency, and legality are sacrificed as power moves from the courtroom to the prosecutor's office. And punishment leverage, not in-court presentation of evidence, dictates case outcomes. This has created a persistently high risk of wrongful convictions. It has also eroded the rule of law and facilitated the growth of mass incarceration.

To address this crisis, academics and reformers have mostly focused on reviving the criminal jury trial. This Article proposes to reframe criminal procedure to emphasize robust pretrial adjudication. There are a variety of hearings and legal proceedings that can happen before a jury trial. These include grand juries, preliminary hearings, witness depositions, suppression hearings, and bench trials. In most American jurisdictions, these procedures are weak or nonexistent. But in some places, they are powerful. California has an unusually demanding grand jury process. Florida gives defendants broad rights to depose witnesses. North Carolina provides misdemeanor defendants both a bench trial and a subsequent jury trial. This Article examines these and other unique practices to propose a fresh approach to criminal adjudication. It should not be an all-or-nothing proposition that begins and ends with the jury trial. Adjudication is, at its core, the testing of evidence and law, before a neutral tribunal, conducted in public by professionals. And adjudication, thus understood, can be incorporated into the pretrial criminal

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process just as it is in civil cases. Robust pretrial adjudication serves many of the criminal trial's essential functions—producing evidence, creating transparency, imposing burdens, dignifying the parties, and preserving the rule of law. Such procedures can supplement the rarely exercised right to a jury trial. And, if made effective, they can help restore the power of courts in a system that has mostly abandoned adjudication.

INTRODUCTION

Ours is no longer a system of criminal trials. It has not been for at least a century.[1] And with the death of the trial, criminal adjudication has nearly disappeared in the United States. Criminal courts have become guilty-plea-processing machines.[2] Only rarely do lawyers make legal arguments or present evidence in criminal cases.[3] But the legitimacy of the American criminal process, on our

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[1] Scholars point to the beginning of the twentieth century as the period when guilty pleas became the dominant method of conviction in the United States. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6 (1979); William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1455–59 (2020).

[2] *See* John Gramlich, *Only 2% of Federal Criminal Defendants Went to Trial in 2018, and Most Who Did Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/KY6S-FXC6] (showing that in 2018, 90% of federal cases resolved with guilty pleas and 2% went to trial); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in the Federal and State Courts. Does It Matter?*, 101 JUDICATURE, no. 4, Winter 2017, at 26, 32 (showing trial rates in 2015 for four states: California (0.78%); Florida (1.83%); Texas (0.97%); Pennsylvania (1.17%)); *CSP STAT Criminal*, CT. STAT. PROJECT, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal [https://perma.cc/Y8UT-BZRN] (Oct. 2024) (click "Caseload Detail"; then choose "Jury Trial Rate" from the "Select caseload measure" dropdown menu; then choose "2022" from the "Select year" dropdown menu) (providing jury trial rates in 2022 for 20 states, which vary from a low of 0.06% (New Jersey) to a high of 1.33% (Wisconsin), with 19 of the 20 states below 1%).

[3] Aside from trials, the only opportunities for substantive adversary advocacy in the criminal justice system are pretrial proceedings of the kind discussed in this Article (i.e., preliminary hearings, bench trials, and motion hearings like suppression hearings). These are rare occurrences in most jurisdictions. *See, e.g.*, Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 332 n.13 (2004) (citing several studies of suppression motions from the 1970s through the 1990s and concluding that the average estimate suggests they are filed in around 15% of cases, which may or may not lead to an actual hearing); *CSP STAT Criminal*, CT. STAT. PROJECT, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal [https://perma.cc/JSL3-QE4V] (Oct. 2024) (click "Caseload Detail"; then choose "Bench Trial Rate" from the "Select caseload measure" dropdown menu; then choose "2022" from the "Select year" dropdown menu) (providing bench trial rates in 2022 for 22 states, with 19 states conducting bench trials in less than 3% of cases); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1338–52, 1403–09 (2018) (cataloguing how prosecutors in most jurisdictions bypass preliminary hearings with grand juries or other procedural tools). Bail hearings are more common than preliminary hearings, but they are normally quite brief and concern custody status rather than guilt or innocence. *See* Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESS 21, 25–26 (Erik Luna ed., 2017).

current understanding, depends almost entirely on the jury trial. Hence the death of the trial, and the criminal procedural edifice built around it, has also meant the death of foundational adversary values. In a system of guilty pleas, neutral decision-makers do not screen cases. There is no adversarial in-court conflict where the defendant's rights are asserted and the state's evidence questioned. There is no publicly visible accounting of the crime or of the prosecutor's proof. The center of power in criminal cases moves from the judge's courtroom to the prosecutor's conference room (or e-mail account).[4] A guilty-plea-based system sacrifices the dignity of adversary procedure, the law-preserving function of neutral courts, and the impartial sorting of guilt from innocence. In exchange, it provides efficiency. The monumental increase in America's incarcerated population since the 1970s would have been impossible without plea bargains.[5]

Scholars and reform advocates have adopted two basic responses to this long-running legitimacy crisis. One is to rage against the death of the trial and demand its return. Academics have been arguing for decades that we should go back to a system of trials.[6] Criminal justice reformers have periodically pushed for more trials as well.[7] But trials have not returned. And the heavy burden of conducting trials, combined with the sheer number of criminal cases processed each day, makes a restoration of the trial system unlikely.[8] The other response has been to concede the death of the trial and try to build process values into a guilty-plea-based system. Some scholars focus on reforming the plea-bargain process, seeking to make it more transparent or less coercive.[9] The U.S. Su-

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[4] *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2559–62 (2004) (explaining how sentencing laws, prosecutorial charging authority, and judges' desire to clear their dockets all empower prosecutors to dictate case outcomes in a plea-bargain-based system).

[5] *See* Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205, 211–12 (2021); CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 32–34 (2021).

[6] *See, e.g.*, HESSICK, *supra* note 5, at 7; William Ortman, *Plea Bargaining Abolitionism: A History*, 22 OHIO ST. J. CRIM. L. (forthcoming 2025) (manuscript at 29–36) (surveying plea bargain abolitionist thought from the 1970s).

[7] *See, e.g.*, THEA JOHNSON, AM. BAR ASS'N, PLEA BARGAIN TASK FORCE REPORT 14 (Dale Rappaneau ed., 2023) (questioning if jurisdictions conduct enough trials to promote judicial integrity and public participation in the criminal justice system); Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at 5 (calling on criminal defendants to collectively exercise their right to a trial); Clark Neily, Jay Schweikert & James Craven, *Restoring the Jury Trial* (recommending policy changes to increase the number of jury trials across the country), *in* CATO HANDBOOK FOR POLICYMAKERS 119 (2022), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/restoring-jury-trial [https://perma.cc/3QBN-APZQ].

[8] *See* Ortman, *supra* note 6 (manuscript at 20–26) (describing the failure of concerted efforts to end plea bargaining in Texas, Oregon, Alaska, and Michigan).

[9] *See generally, e.g.*, Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973 (2021) (arguing for a more transparent and equitable plea-bargaining system); Kay L. Levine,

preme Court's recent decisions requiring disclosure of immigration consequences and providing a right to effective counsel at plea bargaining are a step in this direction.[10] Some scholars direct their focus toward prosecutors' offices, arguing that they should be the locus of reform efforts.[11] That approach treats criminal law as basically a branch of administrative law, akin to an inquisitorial system, with bureaucratic checks rather than adversarial ones.[12] In a non-adjudicative conviction processing system, after all, the most important decisions are made in the prosecution bureaucracy.

In this Article we propose a different approach. Criminal adjudication does not start and end with jury trials. Adjudication is a trans-procedural phenomenon that can be realized in many ways. At its core, adjudication is the testing of evidence and law, before a neutral tribunal, carried out in public by trained legal experts. These features of adjudication protect the core values of accuracy, due process, accountability, and the rule of law. And they can be realized outside of trial in ways that are unappreciated. Thus, we propose a vision of criminal procedure aimed not at the trial but at the underlying commitment to adjudication. Every step of the criminal process, from initial appearance to disposition, should be understood as an opportunity for adjudication, even (perhaps especially) if a trial never occurs. There are many pre-trial pro-

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Ronald F. Wright, Nancy J. King & Marc L. Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 TEX. A&M L. REV. 653 (2019) (same); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) (same).

[10] *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that counsel must advise clients on immigration consequences of accepting a plea bargain); Lafler v. Cooper, 566 U.S. 156, 162 (2012) (applying the Sixth Amendment's right to effective assistance of counsel to plea negotiations); Missouri v. Frye, 566 U.S. 134, 144 (2012) (same).

[11] *See generally, e.g.*, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019) (arguing for prosecutorial reform to curb mass incarceration); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013) (explaining how prosecutorial practices perpetuate racial disparities in the criminal justice system); Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018) [hereinafter Fish, *Against Adversary Prosecution*] (contending that the prosecutor's role in the criminal justice system should be neutral and not adversarial); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237 (2017) (arguing that the Department of Justice should implement internal regulations to shape prosecutor behavior); Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627 (2021) (reimagining the prosecutor's role as non-adversarial in nature); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002) (arguing for improved prosecutorial screening procedures).

[12] In general terms, this means criminal adjudication is treated as a state-controlled effort to determine the truth, rather than as an adversarial contest between the state and the defendant in which the defendant exercises procedural rights. Some scholars have explicitly adopted this framing. *See generally, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) (arguing for a prosecutorial system based on administrative law that separates advocacy and adjudicative roles); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (asserting that the current plea-bargaining system already has many features in common with an inquisitorial system).

cedures that can perform this function. These include preliminary hearings, grand jury proceedings, witness depositions, suppression hearings, and even bench trials. Such procedures involve (to varying degrees) lawyers for each side presenting and challenging evidence, judges considering legal arguments, and criminal charges getting modified or even dismissed. If such procedures are taken seriously, they can perform many of the same functions as criminal trials. They can screen out bad charges, give defendants and lawyers a clear view of the evidence, provide a neutral forum for legal arguments, create a public record of the case, and satisfy defendants' dignitary interest in challenging the charges against them.

Civil litigation provides a powerful analogy for this approach. Civil trials are just about as rare as criminal trials in the United States.[13] But civil procedure establishes pretrial rules that make civil litigation more robust.[14] Civil parties engage in multiple litigation phases prior to trial, including motions to dismiss for failure to state a claim and motions for summary judgment.[15] They also conduct extensive adversarial discovery, including the use of witness depositions that mimic in-trial testimony.[16] This expansive pretrial process makes civil litigation meaningfully adversarial, even though the great majority of cases end prior to trial. It allows the parties to gather information about the case, screen their claims for quality, test the other side's evidence, engage in confrontation, present arguments to the judge, and receive decisions on pretrial legal issues. Criminal procedure can and should follow this example.

In our current criminal justice system, pretrial hearings are commonly nonexistent or pro forma. Often the hearings do not happen at all.[17] When they do happen, the liberal use of hearsay evidence can render them basically mean-

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[13] *See* SUJA A. THOMAS, THE MISSING AMERICAN JURY 2 (2016) (noting that the jury trial rate in federal civil cases fell from 5.5% in 1962 to 0.8% in 2013, and that the jury trial rate in civil cases in the 22 most populous states fell from 1.8% in 1976 to 0.6% in 2002); *CSP STAT Civil*, CT. STAT. PROJECT, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil [https://perma.cc/PJ4B-LE7D] (Oct. 2024) (click "Caseload Detail"; then choose "Jury Trial Rate" from the "Select caseload measure" dropdown menu; then choose "2022" from the "Select year" dropdown menu) (providing jury trial rates in civil cases for 17 states in 2022, which range from 0.03% to 0.54%, with a median of 0.09%).

[14] *See* Russell M. Gold, *Power Over Procedure*, 57 WAKE FOREST L. REV. 51, 65–105 (2022) (detailing civil procedure's more robust pre-trial procedures for interim relief, claim screening, discovery, appeals, and more, vis-à-vis criminal procedure).

[15] *See, e.g.*, FED. R. CIV. P. 56 (motion for summary judgment where there is no genuine dispute of material fact); *id.* R. 12(b)(6) (motion to dismiss for failure to state a claim on which relief can be granted).

[16] *Id.* R. 30 (procedures for oral deposition); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 545–51 (2012) (observing that depositions and other party-conducted discovery have replaced the civil trial's factfinding function).

[17] *See supra* note 3.

ingless.[18] But this is not universally true. There are some states where pretrial adjudication is a major feature of the criminal justice system, taking up significant court and attorney resources and directing case outcomes. In this Article, we describe several such states. We look at their laws, judicial decisions, and procedural rules. We also examine case data from their criminal courts and conduct interviews with defense lawyers and prosecutors on the ground. And we show that they are exceptional by conducting two fifty-state surveys, which demonstrate that most other states have weak pretrial adjudication processes. By highlighting states with unusually robust pretrial procedures, we show that the criminal justice system can adopt meaningful adversary adjudication despite the decline of the jury trial. We focus on five types of hearings.

First, we explore grand jury proceedings.[19] Grand juries are bodies of ordinary citizens who decide whether to approve formal charges ("indictments") in felony cases. The proof threshold before a grand jury is "probable cause," significantly lower than the "beyond a reasonable doubt" standard in jury trials.[20] Grand jurors hear only from a prosecutor—there is no judge or defense lawyer present.[21] The proceedings are normally kept secret, which prevents defense lawyers from contesting indictments after the fact.[22] And most states allow hearsay testimony before a grand jury, meaning that the prosecutor can have a police officer simply read the grand jurors the arrest report, even if the evidence within was gathered by a different person.[23] Due to the low evidentiary threshold and one-sided nature of the proceedings, grand juries are generally weak checks on prosecutors.[24] As the saying goes, a grand jury would indict a ham sandwich. But a few states are different. In California, for example, the rule against hearsay applies to grand jury proceedings.[25] This means that to

[18] *See* discussion *infra* Parts II & III (discussing how lax hearsay rules at grand jury proceedings and preliminary hearings have turned them into pro forma exercises in which no arresting officers or eyewitnesses are heard from).

[19] *See infra* notes 112–178 and accompanying text.

[20] *See* Kaley v. United States, 571 U.S. 320, 328 (2014) (holding that a defendant cannot challenge a grand jury's determination of probable cause); William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 540–51 (2016) (providing a historical account of how probable cause became the prevailing standard before grand juries).

[21] *See, e.g.*, FED. R. CRIM. P. 6(d) (establishing that only attorneys for the government, witnesses, interpreters, and court reporters may attend a grand jury proceeding).

[22] *See, e.g.*, *id.* R. 6(e)(2) (detailing the secret nature of grand jury proceedings). Some states, however, do have mechanisms for challenging the grand jury's finding after the fact. *See* discussion *infra* Part III.

[23] *See* discussion *infra* Part III & Appendix A.

[24] *See* Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 539–75 (1980) (cataloguing the procedural deficiencies with federal grand juries and proposing that they be reformed to provide more meaningful screening of weak cases).

[25] CAL. PENAL CODE § 939.6(b) (West 2024).

secure an indictment, prosecutors must actually bring in the eyewitnesses to the alleged crime.[26] And in California, defense lawyers can challenge the grand jury's findings after the fact.[27] Unlike in most states, defense lawyers receive the transcripts of California grand jury proceedings and can relitigate them before judges.[28] California's grand jury system thus provides more rigorous case screening than most other states.

Second, we discuss preliminary hearings.[29] These serve a similar function to grand juries—they are initial proceedings that screen criminal charges, and their standard of proof is also "probable cause."[30] But unlike grand juries, preliminary hearings occur in open court with a presiding judge and defense counsel participating.[31] This makes them an ideal form of pretrial adjudication: they involve in-court presentation and challenging of evidence in an adversary proceeding. Most states and the federal system have laws creating a right to a preliminary hearing.[32] Nevertheless, in practice they occur only rarely because prosecutors have a variety of workarounds to avoid preliminary hearings.[33] In the few states where preliminary hearings do happen regularly, they often allow multiple levels of hearsay.[34] This means that prosecutors can simply call a case agent to read the police report, minimizing the case-screening value of the hearing. But California, again, is a notable exception. Preliminary hearings in California happen quite regularly in felony cases.[35] They also provide a meaningful opportunity for adversarial factfinding, because the use of hearsay testimony is limited.[36] Preliminary hearings in California thus give the defendant a chance to hear evidence, challenge witnesses, and have an impartial magistrate decide whether the case goes forward.

Third, we consider witness depositions.[37] A deposition is an out-of-court proceeding where the lawyers for each side ask questions to a witness who is under oath. Depositions are a major feature of civil litigation in the United

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[26] There is a limited exception—sworn law enforcement officers can testify to one level of hearsay, which are statements that the officer directly heard. *Id.* § 939.6(c).

[27] *See id.* § 995 (enumerating instances in which an indictment may be set aside).

[28] For different states' rules, see discussion *infra* Part III & Appendix A.

[29] *See infra* notes 179–275 and accompanying text.

[30] *See* FED. R. CRIM. P. 5.1(e) (detailing the rule that allows defendants to be present and cross-examine witnesses at a preliminary hearing); Ortman, *supra* note 20, at 543–44 (describing preliminary hearing procedure).

[31] FED. R. CRIM. P. 5.1(e).

[32] *See* discussion *infra* Part IV & Appendix B.

[33] *See* Crespo, *supra* note 3, at 1338–52 (describing procedural workarounds to avoid preliminary hearings).

[34] *See* discussion *infra* Part IV & Appendix B.

[35] *See* discussion *infra* Part IV.

[36] *See* CAL. PENAL CODE § 939.6(b) (West 2024) (limiting grand jury evidence to only what would be admissible at trial).

[37] *See infra* notes 276–332 and accompanying text.

States, but they are not widely used in criminal cases.[38] In the states that allow criminal depositions, they are normally permitted only under specific circumstances.[39] Florida, however, is an exception. In Florida, defense lawyers have a statutory right to depose all significant witnesses in felony cases.[40] Consequently, criminal depositions happen as a matter of course.[41] Defendants and their counsel question arresting officers, eyewitnesses, and alleged victims prior to trial, and record the witnesses' answers. This gives both sides a clearer understanding of the evidence. Depositions thus help defendants develop trial defenses, and often convince prosecutors to dismiss cases or offer more lenient plea bargains.

Fourth, we explore bench trials.[42] In our criminal justice system, bench trials are normally seen as an alternative to jury trials.[43] Criminal defendants sometimes waive their right to a jury and instead have a judge act as the fact-finder. A defendant might do this for a variety of reasons.[44] But in North Carolina misdemeanor cases, defendants are entitled to both a bench trial and a full jury trial. That is, they are initially tried in district court before a judge, and then (if convicted) they can demand a full jury trial in superior court on appeal.[45] In the bench trial, all the rules of evidence and constitutional confrontation rights apply and the standard of proof is "beyond a reasonable doubt."[46] And if the defendant exercises their right to a subsequent jury trial, it proceeds de novo: the outcome of the prior bench trial is set aside.[47] In North Carolina's misdemeanor system, these initial bench trials function as a kind of super-preliminary hearing. The defendant gets an initial chance to see the evidence against them and argue their case, and judges can screen out unproven charges (by acquitting them) before they reach a jury.

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[38] *See* Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1108–11 (2014) (noting that all fifty states give civil litigants broad power to depose witnesses, but only a handful of states give criminal defendants similar power to depose witnesses); discussion *infra* Part V.

[39] *See* discussion *infra* Part V.

[40] FLA. R. CRIM. P. 3.220(h).

[41] *See* discussion *infra* Part V (estimating the prevalence of depositions in one Florida county).

[42] *See infra* notes 333–377 and accompanying text.

[43] *See* Guha Krishnamurthi, *The Constitutional Right to a Bench Trial*, 100 N.C. L. REV. 1621, 1637–39 (2022) (explaining the practice in different states—some let defendants unilaterally choose a bench trial rather than a jury trial, while others require the prosecutor's and/or judge's consent).

[44] *See* Lauren M. Ouziel, *Fact-Finder Choice in Felony Courts*, 57 U.C. DAVIS L. REV. 1191, 1250–55 (2023) (describing inducements that encourage bench trials in several jurisdictions, including lower punishment than jury trials, an earlier trial date, judicial signaling of case outcomes, and local practice norms).

[45] N.C. GEN. STAT. § 7A-272 (2024); *id.* § 15A-1201(a).

[46] *See, e.g.*, State v. Jones, 816 S.E.2d 921, 925 (N.C. Ct. App. 2018) (holding, in a bench trial, that the defendant was guilty of assault with a deadly weapon beyond a reasonable doubt).

[47] N.C. GEN. STAT § 15A-1431(b).

Fifth, we analyze suppression hearings.[48] These are pretrial proceedings where the defendant argues that evidence should be excluded because it was illegally obtained. For example, if a search happened without a valid warrant or a statement was taken in violation of *Miranda* rights, the court will hold a hearing and decide whether that evidence can come into trial.[49] These hearings typically involve live witness testimony and cross-examination. In most American jurisdictions, they are pretrial hearings where the defense attorney gets an initial chance to ask questions of government witnesses (usually police officers) and receive a ruling from the judge. In some jurisdictions, like Washington State, the prosecutor even has an affirmative burden to prove their evidence is admissible in a pretrial hearing.[50] This gives the defense and the court an opportunity for robust pretrial adjudication. In some jurisdictions, however, such as San Francisco misdemeanor court, judges do not permit pretrial suppression hearings.[51] If a defendant wants evidence suppressed, they must wait for the trial itself to make their argument. This gives the defendants significantly less pretrial process, limiting their ability to know the state of the evidence or question the government's witnesses before a jury is called.

In highlighting these jurisdictions with unusually robust pretrial hearings, we seek to reframe American criminal procedure. We suggest that criminal litigation should not be collapsed into a single event: the guilty plea or the trial. Rather, it should be spread over multiple proceedings, as it is in civil litigation. Robust pretrial adjudication can significantly improve criminal law. It allows for meaningful adversarial advocacy, which, absent a trial, is lacking. It makes the criminal process more transparent to the public by moving parts of it into open court. And its downstream effects on a case are also significant. All sides get a better picture of the evidence. Hearing actual witness testimony helps with trial preparation and with plea negotiations. If the hearing goes poorly for the prosecutor, they can dismiss charges or offer a lighter plea bargain. On the other hand, if the hearing goes poorly for the defense, they have fair warning of the likely trial outcome. Judges also use pretrial proceedings to screen cases, dismissing them or otherwise resolving them in light of the testimony. Because these pretrial proceedings take time, they can give defendants additional negotiating leverage in the plea bargain market. And, because most of these proceedings involve neutral judges evaluating evidence, hearing legal arguments,

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[48] *See infra* notes 378–404 and accompanying text.

[49] *See, e.g.*, CAL. PENAL CODE § 1538.5 (West 2024) (setting out California's procedure for suppression hearings).

[50] WASH. SUPER. CT. CRIM. R. 3.5(a).

[51] *See* discussion *infra* Part VII; Jeff Adachi & Elizabeth Hilton, Misdemeanor Training Manual: The San Francisco Public Defender's Survival Guide for New Attorneys 19 (updated by Brian Pearlman 2017) (unpublished manual) (on file with authors).

and deciding whether cases will proceed, they can help restore rule-of-law values to the system.

To improve the criminal process in these ways, however, pretrial adjudication must first be made effective. And the utility of these hearings depends not just on the written law, but also on norms and procedures on the ground. In many states, these procedures exist on paper but are rendered meaningless in practice. This happens in three main ways: plea-bargaining norms that cause defendants to systematically waive hearings, procedural workarounds that let prosecutors avoid hearings, and lax evidentiary and review rules that render hearings pointless. Allowing pretrial hearings on paper is one thing, making such hearings meaningful in practice is another. Defendants might have a right to conduct depositions, for example, but this right means little if it is systematically waived in plea negotiations. And a right to a preliminary hearing is rendered useless if prosecutors can regularly circumvent it through simpler procedures. Reformers who seek to create robust pretrial adjudication should thus focus on preventing prosecutorial circumvention, preserving meaningful procedure, and cultivating plea-negotiation norms that allow robust hearings to occur. As we will show, there are several states where significant pretrial adjudication is commonplace. By examining these successes, and comparing them to other states, we will map out the obstacle course reformers must navigate to make pretrial adjudication meaningful.

This Article is organized into eight parts. Parts I and II lay out the basic case for emphasizing pretrial adjudication, describing the legitimacy crisis in American criminal procedure and explaining how strengthened pretrial adjudication might address it.[52] Parts III through VII explore each of the pretrial proceedings—grand juries, preliminary hearings, witness depositions, bench trials, and suppression hearings—in turn, and describe their normal form and highlight jurisdictions where the proceedings are unusually robust.[53] These Parts draw on two original fifty-state surveys of the law of pretrial adjudication in the United States, which chart out laws governing grand juries and preliminary hearings. Part VIII draws on our case studies to tease out the conditions in which serious pretrial adjudication can take root.[54]

I. THE COLLAPSE OF CRIMINAL PROCEDURE

The Constitution guarantees a right to trial by jury in all criminal cases.[55] But starting in the 1800s, the plea bargain began to supplant the jury trial as the

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[52] *See infra* notes 55–111 and accompanying text.
[53] *See infra* notes 112–404 and accompanying text.
[54] *See infra* notes 405–422 and accompanying text.
[55] U.S. CONST. amend. VI.

workhorse of American criminal law.[56] By the turn of the twentieth century, most convictions resulted from guilty pleas.[57] Today even the U.S. Supreme Court acknowledges that we have a system of pleas rather than a system of trials.[58] In the prototypical modern criminal case, the prosecutor files charges and then presents the defense lawyer with a plea-bargain offer. This offer generally trades somewhat lower punishment (either less punitive charges than the prosecutor could otherwise pursue, a lower punishment than might be imposed after trial, or both) for the convenience and certainty of an uncontested conviction. And the defendant nearly always agrees to plead guilty, sometimes right away and sometimes after negotiating.[59]

Plea bargains are much more efficient than trials. Thus, a plea-bargaining regime allows criminal courts to process many more convictions than they could if every case required a jury.[60] But in exchange for this efficiency, a plea-based system sacrifices the values that are supposed to animate American criminal justice. Legal scholars have been critiquing the death of the trial on that basis since the 1970s.[61] Indeed, the conflict between our system's official narrative (adversary legalism) and its practical reality (guilty pleas without litigation) has been a major preoccupation of criminal law scholarship.[62] The collapse of adjudication erodes system values that are necessary to legitimize American criminal justice. Here we identify five such values: neutral evidentiary screening, the rule of law, public transparency, dignity in the legal process, and procedural limits on punishment.

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[56] Several historians trace the initial rise of plea bargaining to the latter part of the nineteenth century. *See, e.g.*, GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 112–13 (2003); MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 13 (2005); Ortman, *supra* note 1, at 1441.

[57] *See* Alschuler, *supra* note 1, at 6.

[58] Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

[59] *See supra* note 2 (showing low trial rates in states and the federal system).

[60] *See* FISHER, *supra* note 56, at 40–44 (arguing that caseload pressure was a factor that led to the rise of plea bargaining in nineteenth-century Massachusetts); HESSICK, *supra* note 5, at 32–34; Alschuler, *supra* note 5, at 211–12.

[61] *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (arguing for the abolition of plea bargaining); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1976) (comparing the law of medieval torture to plea bargaining); Ortman, *supra* note 6 (manuscript at 29–36) (surveying anti-plea-bargaining scholarship in the 1970s).

[62] *See generally* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012); DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW (2016); HESSICK, *supra* note 5; WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Alschuler, *supra* note 61; Langbein, *supra* note 61; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Thea Johnson, *Lying at Plea Bargaining*, 38 GA. STATE L. REV. 673 (2022).

First, the lack of adjudication increases the risk of false convictions by removing neutral factfinders' role in sorting innocent defendants from guilty ones.[63] In a plea-based system, convictions are generated by plea agreements made under the threat of greater punishment. This process leaves no room for neutral factfinders to evaluate evidence and decide whether the charges are true. Rather, in a plea-based system the main evidence screeners are the prosecutors. Prosecutors, however, are adversary lawyers vulnerable to confirmation bias.[64] Their main goal is to secure convictions. They have little incentive to investigate a defendant's claims of innocence after a case has been charged.[65] Indeed, prosecutors sometimes even fail to review the evidence in a case until the defendant has rejected a plea offer and demanded trial.[66] And innocent defendants can rationally decide to plead guilty for any number of reasons. Some plead guilty because they are stuck in custody and a guilty plea is the only way to get out quickly.[67] Some plead guilty to avoid the hassle of repeatedly returning to court.[68] And some plead guilty because they fear worse punishment after

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[63] *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?srsltid=AfmBOopkSeJ_Shyw0fhyB4f73jt5YMiV3B_i0xTmUxfxOGKl9D67biYw [https://perma.cc/3UDV-K68V] (explaining how the pressures inherent in plea bargaining convince a "significant number" of innocent defendants to plead guilty); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2493–96 (2004) (explaining factors that convince innocent defendants to plead guilty during plea negotiations); Lucian E. Dervan, Vanessa A. Edkins & Thea Johnson, *Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas*, 72 AM. U. L. REV. 1919, 1932–37 (2023) (same).

[64] *See* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 404–08 (2015) (observing that confirmation bias likely explains why prosecutors continued to seek retrial of several defendants exonerated by DNA evidence); D. Kim Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 NE. U. L. REV. 790, 819 (2019) ("[P]rosecutors are trained to prepare a case in such a way as to ensure conviction. Once a decision to prosecute has been made, their training prepares them to consider contrary evidence only for the purpose of responding to and attacking such evidence.").

[65] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1127–30 (2008) (describing the incentives that focus prosecutor attention on securing convictions and not whether a defendant actually committed the crime charged).

[66] *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 282–90 (2011) (explaining why prosecutors with high caseloads often speak to witnesses and dig into the evidence at the last minute before trial, causing *Brady* violations and preventing dismissals against innocent defendants).

[67] *See id.* at 290–91; HESSICK, *supra* note 5, at 61–62 (detailing the case of a defendant who pleaded guilty to a misdemeanor against his lawyer's advice to get out of jail that day, only to be sentenced to prison for a year).

[68] *See* HESSICK, *supra* note 5, at 120–24 (describing the story of a defendant who pled guilty to trespassing in his own apartment building to avoid going back to court); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 27–32 (1979) (observing that some defendants plead guilty to avoid the burden of repeated court appearances).

trial.[69] A criminal justice system that thus procures guilty pleas cannot claim to convict based on neutral evaluation of the evidence.

Second, a system of only guilty pleas sacrifices the rule of law.[70] When there is no adjudication, courts do not hear legal arguments. And when there is no forum for legal arguments the law does not constrain prosecutors, protect defendants, or preserve the system's integrity. Prosecutors are free to break the rules by lying or concealing evidence. Defendants are unable to contest unlawful searches or unconstitutional charges. And sometimes defendants plead guilty to crimes the prosecutor knows they did not commit, or crimes that do not even exist.[71] The law does not develop unless parties litigate, so basic legal questions remain unresolved by judges. Prosecutorial discretion governs case outcomes, and judicially authored legal doctrine falls by the wayside.[72] In short, lack of adjudication renders American criminal justice lawless.

Third, a system without adjudication lacks transparency. Courtrooms are open to the public in the United States, so anyone can watch a criminal trial.[73] The records of court cases are also generally public.[74] In a system without adjudication, however, little of note happens on the record in court. The real decisions are made in private discussions between prosecutors and defense lawyers. These discussions are not transparent.[75] The public normally has no way of learning why prosecutors make the offers they do, or why certain cases reach certain outcomes. This opacity prevents the public from understanding how criminal courts function. It frustrates journalists and scholars who wish to study criminal courts. And it distorts democratic feedback, as voters are left with little idea of how these institutions work.

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[69] *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 180 (2014) (explaining how innocent defendants might plead guilty to avoid the possibility of a harsher sentence at trial).

[70] *See* BROWN, *supra* note 62, at 4 ("Quite literally, proclivities for democratic authority and market processes in criminal procedure make American criminal justice more *lawless*. Instead of legal rules against illegitimate practices, the justice system trusts democratic or market-like mechanisms to prevent them.").

[71] *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 857 (2019).

[72] *See* STUNTZ, *supra* note 62, at 2 ("First, the rule of law collapsed. To a degree that had not been true in America's past, official discretion rather than legal doctrine or juries' judgments came to define criminal justice outcomes.").

[73] Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580 (1980) (holding that there is a constitutional right under the First Amendment for criminal trials to be open to the public).

[74] *See* Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1397–98 (2021) (detailing how certain court documents can be requested and produced).

[75] *See* Turner, *supra* note 9, at 987–92 (explaining the secretive nature of plea bargaining); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410–12 (2003) (describing the negative effects of secretive charge bargaining).

Fourth, a system without adjudication sacrifices the dignitary value of due process.[76] The adversary system is designed to give parties their day in court. Adjudication is supposed to be something the parties participate in, not something that happens to them. Criminal defendants have a right to testify and tell their story.[77] Or, if they choose, to not testify and remain silent.[78] They have a right to attack the government's evidence, and to hear from and cross-examine witnesses against them.[79] And they have a right to the assistance of a competent lawyer in contesting the charges.[80] These due process rights affirm the defendant's inherent dignity before the state. By protecting these rights, criminal courts show that they respect defendants as free and equal members of a liberal society. But if there is no adjudication, there is no dignitary value to criminal procedure. The entire process consists of the defendant acquiescing to a guilty plea.[81] This renders the defendant an object to be processed, not a free subject with equal dignity before the law.

Fifth, a system without adjudication lacks procedural checks on the imposition of punishment. In theory, the criminal justice system is designed to make it burdensome for prosecutors and courts to process convictions. Prosecutors need to gather evidence, identify witnesses, ensure those witnesses come to court, and prove the charges beyond a reasonable doubt. Courts need to impanel and manage juries and dedicate the time and staff necessary to conduct trials. But the current system circumvents these burdens and replaces them with a single, quick, non-adversarial guilty plea. This streamlines prosecution and allows our system to incarcerate many more people than it could if criminal courts regularly heard evidence or decided legal questions.[82]

Scholars critical of our non-adjudicative criminal justice system have developed two main perspectives on how to reform it. One approach is to figure out how to bring back trials. Some scholars call for plea bargaining to be

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[76] *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–52 (1976) (articulating a dignitary theory of procedural due process).

[77] *See* Rock v. Arkansas, 483 U.S. 44, 49–53 (1987) (finding that criminal defendants have the right to testify in their own trials, even if there is concern that their testimony will be unreliable).

[78] U.S. CONST. amend. V.

[79] *Id.* amend. VI.

[80] *Id.*; Strickland v. Washington, 466 U.S. 668, 687 (1984); Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

[81] *Cf.* Bennett Capers, *Bringing Up the Bodies*, 83 U. CHI. LEGAL F. 83, 86–97 (2022) (observing the many ways that the criminal justice system silences defendants, reducing them to inanimate bodies in their own criminal proceedings).

[82] *See supra* note 5 (noting how plea bargaining allows many more defendants to be processed through the criminal justice system than trials).

banned, either partly or fully.[83] A few jurisdictions have actually tried to end plea bargaining, though with limited to no long-term success.[84] Other scholars call for defendants to collectively demand trials,[85] for trials to happen by lottery,[86] for post-trial punishment to be limited so that more cases go to trial,[87] or for trials to become less burdensome so they are more likely to happen.[88] A second approach acknowledges that the trial is dead and tries to improve the plea system by adding in adversarial or bureaucratic checks.[89] Some scholars call for the plea-bargain process to be made more transparent to defendants and to the public.[90] Some call for more evidence to be provided before guilty pleas, for example through earlier discovery or the use of witness testimony at plea proceedings.[91] Other scholars seek more administrative checks—for example,

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[83] *See generally, e.g.*, HESSICK, *supra* note 5; Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978) (calling for full abolition of plea bargaining); Schulhofer, *supra* note 62; Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006) (calling for a partial ban on plea bargaining).

[84] *See* Ortman, *supra* note 6 (manuscript at 22–29) (detailing unsuccessful state efforts to abolish plea bargaining).

[85] Alexander, *supra* note 7.

[86] Kiel Brennan-Marquez, Darryl K. Brown & Stephen E. Henderson, *The Trial Lottery*, 56 WAKE FOREST L. REV. 1, 1 (2021).

[87] *See, e.g.*, Josh Bowers, *Plea Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083, 1121–22 (2016) (describing the coercive nature of the trial penalty).

[88] *See, e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 969–70 (1983) (arguing for a simplification of trial procedures to encourage more trials); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1082–83 (1984) (using the Philadelphia court system, which relies heavily on bench trials instead of plea negotiations, as an example to show how reliance on plea negotiations can be reduced).

[89] Professor Albert Alschuler noted the transition between these approaches: "The time for a crusade to prohibit plea bargaining has passed. Instead, the time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. Their principal mission today should be to make it less awful. Improving the plea bargaining process should be one of their goals." Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 706–07 (2013) (footnote omitted).

[90] *See, e.g.*, Bibas, *supra* note 9, at 1151–52 (advocating for more transparent plea bargaining procedure); Levine et al., *supra* note 9, at 655 (same); Turner, *supra* note 9, at 974 (same); Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434, 436–37 (2019) (same); Russell D. Covey, *Toward a More Comprehensive Plea Bargaining Regulatory Regime*, 101 OR. L. REV. 257, 260–63 (2023) (same); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2176 (2014) (same).

[91] *See, e.g.*, Colin Miller, *The Right to Evidence of Innocence Before Pleading Guilty*, 53 U.C. DAVIS L. REV. 271, 273 (2019) (arguing that defendants have a constitutional right to exculpatory evidence before accepting a plea deal); William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 451 (2021) (arguing that defendants should be able to confront witnesses against them in pre-trial adjudication); Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539, 575–76 (2023) (asserting that defendants need pre-plea discovery to reduce uncertainty inherent in the plea-bargaining process); Mary Prosser, *Reforming Criminal Discovery: Why*

reforming prosecutors' offices to ensure that they process cases more justly,[92] providing greater ethical regulation of prosecutors,[93] or even explicitly adopting an inquisitorial criminal justice system.[94]

These approaches to reform share an assumption that we must either (a) return to a trial-based system or (b) work to improve a system that lacks adversary adjudication. As we argue in the next Part, there is a third option.[95]

II. THE MODEL OF PRETRIAL ADJUDICATION

In American criminal law, there are various pretrial procedures that involve adjudicative work like taking testimony, arguing in court, and deciding whether a case can proceed. These procedures are not nearly as burdensome as trials. One could envision a system where they happened regularly. Unfortunately, in the current state of American criminal justice these pretrial procedures are mostly meaningless. They are either waived in the plea bargain market, avoided through procedural shortcuts, or made impotent by lax evidentiary rules. Strengthening these procedures could help restore adversarial values to the system. And that would provide a middle path between a system of trials and a system of pleas.

In calling for more robust pretrial adjudication in the criminal justice system, it is helpful to compare criminal and civil procedure. As scholars have documented, civil procedure gives parties far more pretrial process.[96] Civil

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Old Objections Must Yield to New Realities, 2006 WIS. L. REV. 541, 546–47 (arguing that earlier discovery would lead to fairer trial and case outcomes).

[92] *See generally, e.g.*, Wright & Miller, *supra* note 11 (arguing for prosecutorial reform in the criminal justice system to ensure better screening of cases); Hasbrouck, *supra* note 11 (same); Davis, *supra* note 11 (same); Barkow, *supra* note 12 (same); BAZELON, *supra* note 11 (same); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225 (2006) (arguing for prosecutorial reform to reduce coercion present in plea bargaining).

[93] *See, e.g.*, Fish, *Against Adversary Prosecution*, *supra* note 11, at 1422 (arguing for prosecutors to become a non-adversarial actor in the criminal justice system); William Ortman, *The Prosecution Bar*, 101 WASH. U. L. REV. 123, 125 (2023) (contending that prosecutors should need a special license).

[94] *See, e.g.*, John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 205 (1979) (examining the inquisitorial German legal system as a potential model for U.S. law); Lynch, *supra* note 12, at 2117–18 (describing the benefits of inquisitorial criminal legal systems).

[95] *See infra* notes 96–111 and accompanying text; *cf.* John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 182 (2015) (observing that criminal trial rights can be unbundled and negotiated over piecemeal, creating a middle path between guilty pleas and full jury trials).

[96] *See, e.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 22 (2006) ("[D]efendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer meaningful review procedures—that is to say, procedures to test the legitimacy of the underlying charges—than due process would require in the preliminary stages of a private civil case seeking the return of household goods."); Ion Meyn, *The Unbearable Lightness of Criminal*

parties litigate motions to dismiss and motions for summary judgment.[97] Indeed, the U.S. Supreme Court has heightened federal civil pleading standards to screen out claims with insufficient support.[98] Civil parties also conduct witness depositions, which allows them to see the witnesses' testimony in advance of trial.[99] And adversary discovery in the civil legal system is robust, requiring parties to provide each other with witnesses, documents, responses to interrogatories, and other evidence.[100] This extensive pretrial process helps civil parties learn about their cases, screen claims, and negotiate settlements. Indeed, trials are about as rare in civil cases as they are in criminal cases.[101] The key difference is that civil settlements typically benefit from pretrial adjudication while criminal plea bargains largely do not.[102]

Numerous scholars have called for the criminal justice system to adopt civil procedure rules that would provide greater due process.[103] Here, we focus instead on strengthening pretrial procedures that already exist in the criminal justice system but have atrophied in most places.[104] Doing so would restore

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Procedure, 42 AM. J. CRIM. L. 39, 41 (2014) (examining how civil litigation affords litigants more pre-trial process than criminal law defendants are entitled to); Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 157 (2018) (noting that criminal law has not followed civil law's path of increasing pre-trial adjudication); Gold, *supra* note 14, at 65–105 (detailing civil procedure's more robust pre-trial procedures); Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1608 (2017) (arguing that plea bargain processes should more closely mirror civil settlement discussions).

[97] FED. R. CIV. P. 56; *id.* R. 12(b)(6).

[98] *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[99] FED. R. CIV. P. 30.

[100] *See* Gold et al., *supra* note 96, at 1633–35 (detailing the civil discovery process).

[101] *See supra* note 13 (noting the low rate of both civil and criminal jury trials in the United States).

[102] Civil settlements are also less limited than criminal settlements. Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1059–60 (2021). For example, civil litigants, as compared to criminal litigants, can enter into settlement agreements more frequently without judicial interference. *Id.*

[103] *See, e.g.*, Gold et al., *supra* note 96, at 1659 (arguing for criminal law to adopt aspects of civil settlement procedure); Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 669 (2011) (arguing for a procedure for defensive summary judgments in criminal law); Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667, 1672–73 (2021) (contending that criminal law should have a formula to prevent excessively punitive sentences, similar to a damage cap in tort law); Russell M. Gold, *Jail as Injunction*, 103 GEO. L.J. 501, 507 (2019) (arguing that the limitations on civil injunctions should also apply to pretrial detention orders); Ortman, *supra* note 93, at 507 (recommending a specialized prosecutor bar).

[104] In making this argument, we build on Peter Arenella's seminal 1980 article, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*. *See generally* Arenella, *supra* note 24. Arenella argued that federal grand juries and state preliminary hearings should use heightened standards of proof to play a more significant role in substantive case screening. *Id.* at 468–70. We build on his insight by conducting a detailed analysis of states with ro-

some of the adversary values we have lost.[105] Pretrial adjudication can improve case screening by providing an inflection point for discovery and a preview of the trial evidence. It can restore rule-of-law values by empowering judges to make pre-trial rulings on legal issues. It can preserve public transparency and defendants' dignity by moving the proceedings into open court and allowing adversary confrontation. And it can limit punishment by slowing down the conviction process and giving defendants more negotiating leverage. Admittedly, a preliminary hearing (or any other pretrial proceeding) does provide less adversary process than a full jury trial. But it provides far more than a guilty plea.

In Parts III through VII, we analyze five different pretrial criminal procedures: grand juries, preliminary hearings, witness depositions, bench trials, and suppression hearings.[106] As we show, in most jurisdictions these procedures provide little meaningful adversary process.[107] But there are outlier states where these procedures are vibrant parts of the criminal justice system. We focus on grand juries and preliminary hearings in California, [108] witness depositions in Florida, [109] bench trials in North Carolina, [110] and suppression hearings in Washington.[111] In these states, pretrial hearings happen regularly and provide meaningful process. These states thus illustrate how pretrial adjudication can help restore the adversarial values that the plea system has abandoned.

III. Grand Juries

Grand juries are groups of ordinary citizens who decide whether a prosecutor has enough evidence to bring formal criminal charges, called "indictments." It is often said that a prosecutor could indict a ham sandwich.[112] This savory idiom captures the conventional wisdom that a prosecutor could induce a grand jury to approve charges against anyone or anything. It need not be so. This Part explores why grand juries give criminal defendants such minimal procedural protections. It also highlights one jurisdiction, California, where

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bust grand juries and preliminary hearings, as well as depositions, bench trials, and suppression hearings, and documenting what makes those states unique.

[105] Which values are served does depend, in part, on the specific procedures adopted. Grand juries, for example, can screen cases for weak evidence but do not provide a forum for in-court advocacy. Similarly, depositions provide access to evidence but involve no case-dispositive judicial rulings.

[106] *See infra* notes 112–404 and accompanying text.

[107] The major exception is suppression hearings, which are generally available as stand-alone hearings in most jurisdictions. *See infra* notes 378–404 and accompanying text.

[108] *See infra* notes 161–178, 241–275 and accompanying text.

[109] *See infra* notes 303–332 and accompanying text.

[110] *See infra* notes 365–377 and accompanying text.

[111] *See infra* notes 398–404 and accompanying text.

[112] The turn of phrase originated in a 1985 statement by the Chief Judge of New York, Sol Wachtler. *In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.), *modified*, 548 N.Y.S.2d 679 (App. Div. 1989).

grand juries provide meaningful pretrial adjudication. In Section A, we offer a brief history of grand juries to show that their case-screening function has diminished over time.[113] In Section B, we provide the results of an original fifty-state survey of modern grand jury laws.[114] This survey focuses on the evidentiary and procedural rules that turn most states' grand juries into rubber stamps: the free admissibility of hearsay and illegally obtained evidence and the absence of any post-indictment review by defense lawyers or judges. Finally, in Section C, we explore California's grand jury process.[115] California, in contrast with most other states, subjects its grand juries to both robust evidentiary rules and extensive post-indictment review. California grand juries thus actually provide substantial pretrial review of criminal charges. If a typical state's grand juries would indict a ham sandwich, California's require a footlong sub with all the trimmings, chips, and a soda.

A. The Twilight of the Grand Jury

Grand juries used to be much more important than they are today.[116] The institution traces its roots to the beginnings of the English common law nearly a millennium ago.[117] Grand juries made their way to the American colonies in the 1600s, becoming an integral part of local legal systems.[118] They were unique institutions, belonging to no particular branch of government and providing direct citizen participation in the administration of justice.[119] Early American grand juries served a number of different public functions, including levying taxes, recommending new laws, and monitoring the performance of government officials.[120] They were also a key community check against prosecutorial overreach, deciding whether criminal cases could proceed to trial.[121]

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[113] *See infra* notes 116–137 and accompanying text.

[114] *See infra* notes 138–160 and accompanying text. *See generally* Appendix A.

[115] *See infra* notes 161–178 and accompanying text.

[116] *See generally* Nino C. Monea, *The Fall of Grand Juries*, 12 NE. U. L. REV. 411 (2020) (discussing the historical role of grand juries in the United States).

[117] R.H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983).

[118] Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. L. REV. 1, 9–10 (1996).

[119] *See* United States v. Navarro-Vargas, 408 F.3d 1184, 1191 (9th Cir. 2005) (en banc) (recounting the early history of colonial grand juries).

[120] *See* Kadish, *supra* note 118, at 10–12 (detailing the public functions of early American grand juries); RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941, at 36–38 (1963) (same).

[121] *See* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1170 (1960) (calling the grand jury "the most celebrated of the pretrial screening devices").

Indeed, grand juries' refusal to enforce British revenue and sedition laws was a factor leading to the Revolutionary War.[122]

After independence, the grand jury was enshrined in the Constitution's Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[123] The U.S. Supreme Court has observed that the grand jury was historically "a primary security to the innocent against hasty, malicious and oppressive persecution," one that "serves the invaluable function in our society of standing between the accuser and the accused."[124] Grand juries initially screened all types of cases, including misdemeanors and felonies.[125] At the time of the Constitution's framing, grand juries usually applied a high standard of review requiring them to be convinced of the defendant's guilt.[126] Later, in the nineteenth century, many jurisdictions also created robust systems of judicial review for grand juries' findings.[127] These allowed defendants to challenge an indictment after the fact, arguing that it was not supported by sufficient evidence. Historically, then, grand juries were an important chokepoint in the criminal process.

In the modern criminal justice system, by contrast, grand juries have become a mere formality. Today, grand juries virtually always agree with the government and issue an indictment.[128] In 2005, in *United States v. Navarro-*

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[122] *See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2343–44 (2008) (observing how colonists used grand juries to shield themselves against unpopular British laws).

[123] U.S. CONST. amend. V.

[124] Wood v. Georgia, 370 U.S. 375, 390 (1962).

[125] *See* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 DUKE L.J. 599, 608–10 (2022) (noting that federal misdemeanors required grand jury indictment until 1930); Monea, *supra* note 116, at 432 (noting that exceptions for petty crimes did not become widespread until after the 1840s).

[126] *See* Ortman, *supra* note 20, at 530–31 (noting a number of different formulations of the burden of proof standard, including "thoroughly persuaded," "well satisfied," "well convinced," "sufficient to convict," etc.).

[127] *See* Goldstein, *supra* note 121, at 1170–71 ("[T]hose requirements were frequently enforced through the granting of motions to quash indictments based on no evidence at all, or no evidence as to an element of the crime, or 'utterly insufficient' evidence.").

[128] *See* Zachary A. Goldfarb, *The Single Chart That Shows That Federal Grand Juries Indict 99.99 Percent of the Time*, WASH. POST (Nov. 24, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/11/24/the-single-chart-that-shows-that-grand-juries-indict-99-99-percent-of-the-time/ [https://perma.cc/38KE-JFYZ] ("From October 2009 to September 2010, U.S. prosecutors pursued 193,000 cases and prosecuted 162,350. Of the more than 30,000 they didn't prosecute, 11 cases were because a grand jury did not return an indictment."); MARK MOTIVANS, U.S. DEP'T OF JUST., NCJ 248470, FEDERAL JUSTICE STATISTICS, 2012—STATISTICAL TABLES 11–12 (2015) (noting that from October 1, 2011 to September 11, 2012, federal prosecutors declined only 14 cases because a grand jury refused to indict). In that same period, 166,339 federal prosecutions were initiated. MOTIVANS, *supra*, at 11–12. Of course, in rare instances prosecutors presenting a case to a grand jury do not ask

Vargas, the Ninth Circuit Court of Appeals observed that grand juries "tend to indict in the overwhelming number of cases brought by prosecutors," and because of this fact "many criticize the modern grand jury as no more than a 'rubber stamp' for the prosecutor."[129] This criticism is valid, because grand juries are no longer set up to meaningfully review cases. The standard of review is now universally set at "probable cause," a low threshold.[130] Judicial review of grand jury decisions has disappeared in most jurisdictions.[131] Because grand jury proceedings are kept secret, defendants cannot use them to preview evidence.[132] Such secrecy also inhibits transparency, shielding prosecutors' presentation of evidence from public scrutiny.[133] Grand juries hear only from the prosecutor and the witnesses the prosecutor calls—no judge or defense lawyer is present.[134] Thus, while grand juries' investigative powers are broad, in practice they are controlled by prosecutors.[135] And evidentiary standards are relaxed in front of a grand jury—hearsay evidence is admissible in

for an indictment. This may be most common in cases where police officers are the target of the investigation. *See, e.g.*, *infra* note 133.

[129] 408 F.3d 1184, 1195 (9th Cir. 2005) (en banc) (footnote omitted).

[130] *See* Ortman, *supra* note 20, at 540–51 (reviewing the history and development of the probable cause standard).

[131] *See* Goldstein, *supra* note 121, at 1170–72 (explaining how grand juries came to operate free from judicial review); discussion *infra* Part III.B (showing that only ten states have procedures to review a grand jury's findings in 2024).

[132] FED. R. CRIM. P. 6(e)(2); Kadish, *supra* note 117, at 12–22. Traditional justifications for grand jury secrecy include:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931).

[133] This can cut both ways. In cases involving police violence, it is common for prosecutors to be accused of pulling punches behind closed doors to avoid indictment. For example, in the high profile killing by police of Breonna Taylor in 2020, a grand jury declined to directly charge anyone for Taylor's killing, leading to public protests. Ultimately, a public dispute between a member of the grand jury and the Kentucky Attorney General led a court to take the "extraordinary action" of releasing some fifteen hours of recorded proceedings. Bill Chappell, *Court Releases Grand Jury Recording in Breonna Taylor Case*, NPR (Oct. 2, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/02/919245689/court-releases-grand-jury-recording-in-breonna-taylor-case [https://perma.cc/KK8S-WTJF].

[134] Monea, *supra* note 116, at 441.

[135] Louis M. Aragon, Note, *The Federal and California Grand Jury Systems: Historical Function, Procedural Differences and Move to Reform*, 5 CRIM. JUST. J. 95, 97 (1981).

most states, as is evidence obtained in violation of the law.[136] This makes the prosecutor's job even easier: they can rely on police officers' written accounts of the investigation to indict.

Taken together, these features of the grand jury basically eliminate its adjudicative value. Grand jurors hear evidence only from the prosecutor, do not necessarily hear from any witnesses to the crime, are tasked only with deciding whether probable cause exists, and neither their decision nor the evidence are subject to later judicial review. Scholars have proposed reforming the grand jury to enhance its case screening function, for example, by heightening the standard of proof, applying rules of evidence, or incorporating adversarial process.[137] Barring such reforms, grand juries in most jurisdictions are little more than speed bumps on the road to conviction.

B. Survey of State and Federal Grand Jury Procedures

To get a more comprehensive view of grand juries' adjudicative value, we surveyed the laws of all fifty states and the federal system. The results of this survey paint a clearer picture of how grand juries operate in the United States and which jurisdictions are outliers. We specifically explored three questions. First, to what extent is hearsay evidence that would be inadmissible at trial admissible before a grand jury? Second, to what extent is illegally obtained evidence that would be inadmissible at trial allowed to be presented to a grand jury? Third, is there a procedure for defendants to challenge the grand jury's finding of probable cause?

1. Admissible Hearsay

The rules limiting hearsay prevent certain out-of-court statements from being admitted as evidence.[138] These rules are designed to ensure that factfinders only hear firsthand accounts of the events in question, letting them evaluate witnesses' demeanor and credibility.[139] Yet most jurisdictions do not apply

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[136] In most states and in federal grand juries, formal rules of evidence do not apply and there are virtually no limits on the evidence a prosecutor can offer the grand jury. *See, e.g.*, FED. R. EVID. 1101(d)(2) (excepting the rules of evidence, aside from privileges, from grand jury proceedings); Appendix A.

[137] *See, e.g.*, Benjamin E. Rosenberg, *Indictments, Grand Juries, and Criminal Justice Reform*, 48 AM. J. CRIM. L. 81, 82 (2020) (arguing for reviving evidentiary and procedural protections in the grand jury indictment process, along with judicial review); Arenella, *supra* note 24, at 558–75 (proposing a number of reforms including banning hearsay, requiring that exculpatory evidence be presented, and giving defendants transcripts of grand jury proceedings); Ortman, *supra* note 20, at 511 (arguing that the standard of proof in grand jury proceedings should be higher than probable cause).

[138] *See, e.g.*, FED. R. EVID. 801(d) (listing exceptions to the hearsay rules).

[139] *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (discussing the Confrontation Clause, testimonial statements, hearsay, and reliability).

hearsay rules to grand jury proceedings. In such jurisdictions, the prosecutor just needs a police report to secure an indictment. When grand juries do not hear from the witnesses who would be brought to a trial, it diminishes the proceedings' adjudicative value. This limitation is compounded by the non-adversarial nature of grand jury proceedings—no one is in the room to object or cross examine witnesses.

Broadly defined, the fifty-state survey results can be organized into three categories. First, the federal government and most states do not apply any hearsay limitations on evidence admissible before grand juries. These jurisdictions include: the federal system, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii,[140] Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.[141] In these forty-two jurisdictions, the standard is typically stated as follows: "The rules of evidence do not apply in proceedings before grand juries."[142] The U.S. Supreme Court has even upheld the validity of an indictment based entirely on hearsay.[143] A federal prosecutor can thus rely solely on out-of-court statements to secure an indictment.

Second, two states allow otherwise inadmissible hearsay to be presented to grand juries in limited categories of cases or special circumstances. In Alaska, hearsay is generally inadmissible in front of a grand jury unless the out-of-court statement is made by a child victim of a sexual offense and certain other conditions are satisfied.[144] Similarly, Nevada has a general prohibition on hearsay but carves out exceptions for child victims of felony sex crimes or physical abuse, and for felony domestic violence victims.[145]

Third, eight states strictly apply the normal hearsay rules to grand jury proceedings with only technical exceptions, if any. These states include Cali-

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[140] *But see* State v. Miyazaki, 645 P.2d 1340, 1344 (Haw. 1982) (disfavoring the use of hearsay before a grand jury but holding that no dismissal of an indictment is appropriate unless a defendant shows that the prosecutor deliberately used hearsay in lieu of better evidence to improve the chances of securing an indictment).

[141] *See* Appendix A.

[142] *See, e.g.*, MD. R. EVID. 5-101(b)(1) (excepting Maryland's evidence rules, other than those relating to the competency of witnesses, from grand jury proceedings); *see also* Bartram v. State, 374 A.2d 1144, 1148, 1152 (Md. 1977) (holding that Maryland does not require indictments to be returned on legal or competent evidence).

[143] Costello v. United States, 350 U.S. 359, 362–63 (1956).

[144] ALASKA STAT. § 12.40.110(a) (2024) (allowing hearsay statement made by a child victim of sexual offense to be admitted with safeguards and limits); *see also* ALASKA R. CRIM. P. 6(s)(2) (allowing police officers to present one level of hearsay evidence).

[145] NEV. REV. STAT. § 172.135(2) (2024).

fornia, Kansas, Minnesota, New York, North Dakota, Oklahoma, Oregon, and South Dakota. For example, Minnesota law provides that any grand jury indictment "must be based on evidence that would be admissible at trial," except for foundational hearsay, expert reports, certain written sworn statements, and a few other narrow exceptions.[146] North Dakota's statute simply makes the rules of evidence at trial govern admissibility of evidence before a grand jury: "The grand jury shall receive only evidence that would be admissible over objection at the trial of a criminal action . . . ."[147] Similarly, South Dakota mandates that "[t]he rules of evidence shall apply to proceedings before the grand jury."[148] In these states, grand jurors are much more likely to hear from real witnesses of the crime as opposed to only police officers.

2. Illegally Obtained Evidence

Some evidence that is obtained illegally is subject to exclusion before trial. For example, established Fourth and Fifth Amendment violations are typically remedied by excluding physical evidence, observations, or the statements at issue.[149] Most jurisdictions, however, do not have any rule preventing illegally obtained evidence from being admitted before a grand jury.[150] Indeed, in 1974, in *United States v. Calandra*, the U.S. Supreme Court held that, "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination."[151] Similarly, for a representative example of the majority approach to this issue, in 1992, in *State v. Dixon*, a Tennessee Appeals Court held: "The exclusionary rule does not apply to grand jury proceedings."[152] This means prosecutors can use coerced statements, physical evidence obtained without probable cause, and other illegal evidence that would be inadmissible at trial. The inclusion of such evidence undermines the rule-of-law

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[146] MINN. R. CRIM. P. 18.05.

[147] N.D. CENT. CODE § 29-10.1-26(2) (2024).

[148] S.D. CODIFIED LAWS § 23A-5-15 (2024).

[149] *See* discussion *infra* Part VII.

[150] A separate but related inquiry not fully explored here is whether prosecutors are required to—and remedies are available for failure to—present grand juries with exculpatory evidence. For example, the U.S. Department of Justice policy is that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person," even though "failure to follow the Department's policy should not result in dismissal of an indictment." U.S. Dep't of Just., Just. Manual § 9-11.233 (2018), https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.233 [https://perma.cc/2GL3-S3RC].

[151] 414 U.S. 338, 345 (1974) (citations omitted).

[152] 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992) (citing *Calandra*, 414 U.S. at 338).

principles that a strong exclusionary rule furthers. In contrast, only thirteen states have rules that limit what may be presented to "legal" evidence.[153] Statutory language requiring only "legal" evidence stemmed from concerns about the diminishing independence of grand juries vis-à-vis prosecutors.[154] Yet, without some mechanism for the defense to challenge and for the court to review the validity of an indictment, even these rules have no teeth.

3. Challenging the Indictment

A quintessential feature of grand juries is secrecy. But if grand jury proceedings are secret, it is impossible for a court to later review the evidence and process that resulted in the indictment. Unsurprisingly, nearly all jurisdictions do not allow defendants to challenge the validity of an indictment after the fact.[155] By our count, forty states and the federal system have no mechanism to challenge an indictment. Even those states that impose some limits on the kinds of evidence that may be presented to a grand jury generally fail to allow any remedy when the evidentiary rules are violated, illegally obtained evidence is admitted, or an indictment is issued with insufficient evidence. For example, South Dakota mandates that the rules of evidence "shall" apply at grand jury proceedings.[156] Yet the South Dakota Supreme Court eliminated any possible remedy for violations of these rules or others, holding in 2006, in *State v. Carothers*: "Even though the rules of evidence apply to grand jury proceedings, we . . . 'will not inquire into the legality or sufficiency of the evidence upon which an indictment is based.'"[157]

Combined with the grand jury's other limitations, this absence of post-indictment review renders them basically useless as a pretrial screening mechanism. Where there is no transparency, no restriction on evidence, and no vehicle for judicial challenge (either during the taking of evidence or after the fact), there is virtually no adjudicative value. The only exceptional jurisdictions that provide some meaningful vehicle for courts to review the propriety of an indictment are Alaska, California, Colorado, Hawaii, Idaho, Minnesota, Nebras-

[153] *See* Appendix A. These include California, Idaho, Kansas, Minnesota, Nevada, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Washington, and Wisconsin. *Id.*

[154] *See* Goldstein, *supra* note 121, at 1171 (explaining the history of the grand jury).

[155] *See, e.g.*, Commonwealth v. Webster, 337 A.2d 914, 917 (Pa. 1975) ("[T]he inadequacy, incompetency, or even illegality of the evidence presented to the grand jury do not constitute grounds for the quashing of an indictment returned on the basis of such evidence." (first citing *Calandra*, 414 U.S. at 338; then citing Lawn v. United States, 355 U.S. 339 (1958); then citing Costello v. United States, 350 U.S. 359 (1956); then citing Commonwealth v. Dessus, 224 A.2d 188, 190–93 (Pa. 1966); and then citing Commonwealth v. Hirsch, 311 A.2d 679, 682 (Pa. Super. Ct. 1973))).

[156] S.D. CODIFIED LAWS § 23A-5-15 (2024).

[157] 2006 SD 100, ¶ 9, 724 N.W.2d 610, 616 (quoting State v. Vatne, 2003 SD 31, ¶ 14, 659 N.W.2d 380, 384).

ka, Nevada, New York, and North Dakota.[158] In these states, criminal defendants can raise substantive challenges to a grand jury's findings after the fact. In Minnesota, for example, the defense can move to dismiss an indictment if the evidence was not sufficient to establish the charged offense.[159] And in Nebraska, the trial judge is required to dismiss an indictment if it was not supported by the record.[160] In such jurisdictions, the grand jury has at least some adjudicative value, insofar as the defense is provided with transcripts and a judge can review the grand jury's findings. Subsequent review also creates an incentive for the prosecutor to be careful and thorough in the presentation of evidence, and to abide by whatever rules or limits the jurisdiction may have.

C. Grand Juries in California

California's uniquely robust grand jury system is the product of legislation, ballot initiatives, and several decisions of the California Supreme Court. To understand how California's system emerged, it is helpful to recount that history. The California Constitution provides that felony cases can be tried only after a grand jury indictment or a preliminary hearing in front of a magistrate.[161] The prosecutor has complete discretion over which one is used.[162] And the difference between these two paths has major implications for the pretrial adjudication process. As Justice Stanley Mosk of the California Supreme Court explained in the 1975 case, *Johnson v. Superior Court*:

> If prosecution is begun by information the accused immediately becomes entitled to an impressive array of procedural rights, including a preliminary hearing before a neutral and legally knowledgeable magistrate, representation by retained or appointed counsel, the confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence. By contrast, the indictment procedure is distinctive because of its deliberate omission of even minimal safeguards.[163]

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[158] Several states do allow courts to cure purely technical defects in an indictment. *See, e.g.*, OR. REV. STAT. § 135.510 (2024) (allowing the court to set aside an indictment if the document is not found, endorsed, and presented as prescribed by law or if the names of witnesses examined are not properly documented). Such technical challenges, however, do not go to the substance of the grand jury's findings.

[159] MINN. R. CRIM. P. 17.06(2)(1)(a).

[160] NEB. REV. STAT. § 29-1418(3) (2024).

[161] CAL. CONST. art. I, § 14 ("Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.").

[162] This prosecutorial discretion has raised concerns, including from California's Supreme Court. *See, e.g.*, Johnson v. Superior Ct., 539 P.2d 792, 796 (Cal. 1975).

[163] *Id.* at 797 (Mosk, J., concurring) (citations omitted).

In *Johnson*, the court held that because of this discrepancy, the district attorney has a duty to inform the grand jury of any exculpatory evidence of which he or she is aware.[164] Yet that requirement was not enough to level the pretrial playing field.

A few years after *Johnson*, Justice Mosk addressed his broader concerns with California's pretrial adjudication procedure. In 1978, in *Hawkins v. Superior Court*, writing for the majority, Justice Mosk held that prosecution via indictment denies an accused equal protection of the law and other substantial rights which are available in a preliminary hearing.[165] The fact that California already allowed judicial review of an indictment, unlike most states, was not enough to persuade the court. The court held that judicial review of a secret, ex parte hearing was no replacement for an adversarial hearing.[166] Finding an equal protection violation, the court fashioned a remedy: defendants whose cases commenced by way of grand jury indictment would have a right to a subsequent preliminary hearing.[167]

This created a problem for the grand jury system. If a defendant is entitled to a preliminary hearing even after an indictment, then a prosecutor has no incentive to go to a grand jury. Observers described the ruling in *Hawkins* as a "tremendous blow" to the grand jury in California from which "it may not recover,"[168] at least not without major reforms. In 1990, California voters adopted the ballot initiative Proposition 115 (Prop. 115), identified as the "Crime Victims Justice Reform Act." Among other things, Prop. 115 added Section 14.1 to article I of the state constitution, mandating that "[i]f a felony is prosecuted by indictment, there shall be no postindictment preliminary hearing."[169] Thus, Prop. 115 abrogated the holding in *Hawkins* and established that if a grand jury issues an indictment, the defendant is not then entitled to a preliminary hearing, reviving the California grand jury.[170] But Prop. 115 left in place the robust pretrial adjudication procedures missing in other jurisdictions.

Specifically, there are three key procedural protections still operative in California for cases that proceed by way of grand jury indictment. First, the holding in *Johnson* that prosecutors are required to present any exculpatory information in their possession to a grand jury remains good law,[171] and is now

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[164] *Id.* at 796.

[165] 586 P.2d 916, 917 (Cal. 1978), *overruled by constitutional amendment*, CAL. CONST. art. I, § 14, *as recognized in* Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

[166] *Id.* at 919.

[167] *Id.* at 922.

[168] Aragon, *supra* note 135, at 107.

[169] CAL. CONST. art. I, § 14.1; *accord* Bowens v. Superior Ct., 820 P.2d 600, 603 (Cal. 1991).

[170] *Bowens*, 820 P.2d at 603.

[171] When a target of a grand jury investigation is already represented by counsel in California, it is common practice for prosecutors to send a "*Johnson* letter" requesting any exculpatory evidence

codified by statue.[172] Second, state law explicitly requires that any evidence a grand jury receives must be "admissible over objection at the trial," except for foundational hearsay via a sworn peace officer which may only be used to admit documentary evidence.[173] Finally, and critically, state law also provides for multiple layers of judicial review of an indictment.[174] If the defense is to raise arguments about the sufficiency or legality of evidence, instructional error, or any other of the myriad potential challenges to a grand jury indictment, it must have a full transcript of the proceedings. The California Penal Code thus mandates that the defense receive a transcript, at no cost, within ten days of the indictment.[175]

These robust procedures create burdens and risks for prosecutors that do not exist in other jurisdictions. They also dramatically enhance the adjudicative value of grand jury proceedings. A California prosecutor could try to indict a ham sandwich, but they would be prohibited from relying on hearsay, would have to offer available exculpatory evidence, and a judge would consider the ham sandwich's arguments on review. Overall, California's grand jury system advances several of the adversary-adjudication values identified in Part I. It provides more substantial screening of cases because it requires prosecutors to present more exculpatory and eye-witness evidence to the grand jury and subjects that evidence to multiple rounds of review at the grand jury itself and through later defense challenges. It better enforces rule-of-law norms by excluding illegally obtained evidence and providing for judicial review. It provides more transparency by offering the defense and the public a transcript of the proceeding. It slows down the processing of cases by imposing higher logistical burdens on the prosecutor such as the need to call eyewitnesses, present exculpatory evidence, and defend the indictment in court. And while it does not allow in-court confrontation in the form of witness cross-examination, its post-indictment challenges at least somewhat preserve the dignitary value of confrontation.

Bringing a case before a grand jury is a lot of work in California, and is less appealing for prosecutors in most cases than the alternative.[176] Thus, dis-

from the defense. This serves the dual purpose of providing the prosecution with a window into the defense at trial and insulating the grand jury proceeding against attack on the basis of withholding of exculpatory evidence.

[172] CAL. PENAL CODE § 939.71 (West 2024).

[173] *Id.* § 939.6(b)–(c).

[174] *Id.* § 995. A motion to dismiss an indictment under this section is reviewed by a judge of the Superior Court, appealable to the Court of Appeal and state Supreme Court.

[175] *Id.* § 938.1(a).

[176] For example, a prosecutor in California may choose to send a case to a grand jury, or threaten to do so, when a felony case that was initiated by way of arrest and complaint is mired in pre-

trict attorneys in California "generally prefer[] to use the speedier preliminary hearing process."[177] This is notable because, as we will explore in the next Part, the opposite dynamic exists in other states. Prosecutors in most states and the federal system regularly use the grand jury process to avoid having to conduct a preliminary hearing.[178]

IV. PRELIMINARY HEARINGS

In the mid-1800s, U.S. courts began allowing prosecutors to charge defendants using an "information" rather than an indictment.[179] The key difference is that an information triggers review by a preliminary hearing rather than by a grand jury.[180] Preliminary hearings are in-court proceedings that magistrates typically preside over.[181] In a preliminary hearing, the prosecutor must present evidence establishing probable cause that the defendant committed the charged crimes.[182] The defense has an opportunity to present its own evidence and arguments, and to cross-examine the government's witnesses.[183] Courts often describe preliminary hearings as serving a screening function that protects defendants from meritless charges.[184] They were originally intended as a less burdensome and more transparent alternative to grand juries.[185]

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preliminary hearing delays. In other instances, grand juries are a valuable tool for investigations that may or may not result in a criminal case.

[177] *History of the Grand Jury*, SUPERIOR CT. OF CAL. CNTY. OF GLENN., https://www.glenn.courts.ca.gov/divisions/grand-jury/history-grand-jury [https://perma.cc/MS3Y-ZPHV].

[178] *See* discussion *infra* Part IV; Crespo, *supra* note 3, at 1403–09 (cataloguing how prosecutors in most jurisdictions bypass preliminary hearings with grand juries or other procedural tools).

[179] *See* Ortman, *supra* note 20, at 543 (reviewing the history of the preliminary hearing).

[180] The Supreme Court has held that it does not require states to have preliminary hearings prior to trial. Lem Woon v. Oregon, 229 U.S. 586, 590 (1913). Where preliminary hearings are guaranteed under state law, however, they constitute a critical stage triggering the right to counsel. Coleman v. Alabama, 399 U.S. 1, 9–10 (1970).

[181] Commonly, states have magistrates rather than trial judges preside over preliminary hearings. Among other things, this allows those jurisdictions that have a procedure for review of the preliminary hearing to have a trial judge function as an initial reviewer.

[182] Preliminary hearings usually only occur in felony cases. Utah is a notable exception as it requires preliminary hearings even for certain classes of misdemeanors. *See* State v. Hernandez, 2011 UT 70, ¶ 1, 268 P.3d 822; Paul G. Cassell & Thomas E. Goodwin, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah's Preliminary Hearings to Felony Offenses*, 2011 UTAH L. REV. 1377, 1377.

[183] *See, e.g.*, FED. R. CRIM. P. 5.1(e) (outlining procedure for defendants to cross-examine witnesses at preliminary hearings); WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 14.1(a) (4th ed. 2015) (explaining the screening function of a preliminary hearing).

[184] *See, e.g.*, State v. Von Brincken, 476 P.2d 733, 735 (Nev. 1970) (describing the purpose of a preliminary hearing as weeding out "groundless" charges); Holmes v. Dist. Ct., 668 P.2d 11, 15 (Colo. 1983) (en banc) (same); Jones v. Superior Ct., 483 P.2d 1241, 1241 (Cal. 1971).

[185] *See* Ortman, *supra* note 20, at 543.

In many ways, preliminary hearings seem like ideal vehicles for pretrial adjudication. To start, they involve truly adversary procedure. The defendant is present in court, represented by counsel, and able to hear and confront the state's witnesses.[186] A neutral judicial officer decides whether the charges go forward. Preliminary hearings let both parties evaluate witnesses' testimony.[187] This provides crucial information in deciding whether to settle or dismiss charges. It also helps prepare both parties for trial. These are all advantages over the opaque and non-adversarial grand jury process.

In practice, however, the value of preliminary hearings depends on highly variable jurisdiction-specific rules.[188] Section A of this Part focuses on preliminary hearing procedures and mechanisms used to bypass preliminary hearings in all fifty states.[189] In most states prosecutors regularly bypass preliminary hearings entirely, opting instead for documents-only review or grand jury indictments.[190] This allows prosecutors to avoid subjecting their witnesses to cross-examination or giving the defense a preview of the evidence against them. Further, many states have lax procedural rules that permit unlimited hearsay or prevent review of probable cause determinations in preliminary hearings. Such rules limit the procedural benefits of these hearings. Section B takes a deeper look into California's preliminary hearing procedures.[191] In contrast, it provides an example of robust preliminary hearing practice. Prosecutors in California normally opt for preliminary hearings over grand juries. Preliminary hearings thus happen in a substantial percentage of California felony cases. And California's procedural rules are strong enough that preliminary hearings provide meaningful adjudication before trial.

A. Survey of State and Federal Preliminary Hearing Procedures

We conducted a survey of all fifty states and the federal system, looking at their preliminary hearing procedures.[192] We relied on prior surveys to ana-

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[186] *See, e.g.*, CAL. PENAL CODE § 866(a) (West 2024) (allowing defendants to cross-examine witnesses at preliminary hearings); Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465, 475–84 (2020) (discussing the defensive benefits of a preliminary hearing).

[187] Prosecutors should benefit from a more detailed preview of the strengths and weaknesses of their case outside the presence of a jury than the initial charging process allows. Other potential benefits to prosecutors include a preview of defense arguments, adding new charges based on evidence admitted at the hearing, and preservation of testimony for witnesses who may not be available at trial.

[188] *See* Crespo, *supra* note 3, at 1348 ("[T]he structures of [preliminary hearing] review are exceptionally diverse . . . .").

[189] *See infra* notes 192–240 and accompanying text.

[190] *See* Crespo, *supra* note 3, at 1403–09 (cataloguing the states' procedures to bypass preliminary hearings).

[191] *See infra* notes 241–275 and accompanying text.

[192] Full survey on file with authors.

lyze the different mechanisms prosecutors use to bypass preliminary hearings.[193] In addition, we focused on two issues: whether and to what extent hearsay is permitted, and the manner of post-hearing review.

1. Mechanisms to Bypass Preliminary Hearings

U.S. jurisdictions can be grouped into three categories based on whether they require indictments or informations. First, in the federal system and eighteen states, the accused has a right to require that felony charges be indicted by a grand jury.[194] Most of these jurisdictions also provide for preliminary hearings, but allow prosecutors to avoid them by securing an indictment first.[195] Second, in twenty-eight states, the prosecutor can choose whether to proceed by information or indictment.[196] Third, four states require grand jury indictments for the most serious crimes and permit informations for other crimes.[197] Looking at these three types of systems, which collectively seem to treat indictments as the default and informations as a less formal alternative, one might assume that prosecutors prefer preliminary hearings to grand juries. But the opposite dynamic exists in practice—prosecutors generally try to avoid preliminary hearings by opting for less burdensome paths, such as defense waivers, direct filing of charges, and grand juries.[198]

In most jurisdictions, prosecutors can avoid preliminary hearings by choosing an indictment or other charging option. Professor Andrew Crespo has created a helpful typology of these bypass regimes.[199] Only six states give defendants an unqualified right to a preliminary hearing in felony cases, meaning

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[193] *See generally* LAFAVE ET AL., *supra* note 183; Crespo, *supra* note 3.

[194] LAFAVE ET AL., *supra* note 183, § 15.1(d).

[195] *See* Crespo, *supra* note 3, at 1342–44 (detailing the procedure for prosecutors to bypass preliminary hearings). In North Carolina, for example, if an indictment has not been issued, a defendant has a statutory right to a probable cause hearing. N.C. GEN. STAT. § 15A-601(a) (2024). Notwithstanding this right, probable cause hearings rarely happen in practice. *See* JOHN RUBIN, PHILLIP R. DIXON JR. & ALYSON A. GRINE, 1 NORTH CAROLINA DEFENDER MANUAL: PRETRIAL 3-3 to -8 (John Rubin ed., 2013), https://defendermanuals.sog.unc.edu/sites/default/files/pdf/Ch%203%20Probable%20Cause%20Hearings%20Mar.%202018.pdf [https://perma.cc/4ENS-4RQ9]; *see also* FED. R. CRIM. P. 5.1(a) (providing a right to a preliminary hearing in felony cases unless the case is indicted or the defendant waives the right).

[196] LAFAVE ET AL., *supra* note 183, § 15.1(g).

[197] *Id.* § 15.1(d).

[198] *See* Crespo, *supra* note 3, at 1342–44 (highlighting different methods of preliminary hearing bypass); Janine Robben, *Secrecy: A Help or a Hindrance*?, OR. ST. BAR BULL., July 2004, at 13, 13 (citing the president of the Oregon District Attorney's Association for the proposition that all district attorneys in Oregon prefer using grand juries over preliminary hearings).

[199] *See* Crespo, *supra* note 3, at 1403–09 (listing the preliminary hearing bypass rules for each state in a fifty-state survey).

that the hearing must happen unless the defendant chooses to waive it.[200] At the opposite extreme, five states either have no provision for preliminary hearings or permit them only in very narrow circumstances.[201] In the remaining thirty-nine states and the federal system, preliminary hearings exist by law but prosecutors can easily circumvent them. The federal system and thirty-three states have "indictment bypass" systems, meaning that if a prosecutor gets an indictment from a grand jury, the defendant no longer has a right to a preliminary hearing.[202] And the remaining six states have "information bypass" systems, in which the prosecutor can avoid a preliminary hearing by simply filing charging documents directly with the court.[203] Thus, in the great majority of U.S. jurisdictions, prosecutors can choose between preliminary hearings and other (less adversarial) charging mechanisms.[204]

The federal system provides a useful illustration of how prosecutors use bypass rules to avoid preliminary hearings.[205] When one of the authors of this Article was a federal defense lawyer in California, the court he practiced in basically never conducted preliminary hearings in felony cases.[206] The prose-

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[200] *Id.* at 1348. The six states that give defendants an unqualified right to a preliminary hearing in felony cases are Nebraska, North Dakota, Oklahoma, Pennsylvania, Tennessee, and Wisconsin. *Id.* at 1348 n.132.

[201] *Id.* at 1403–08. The five states that have no provision for preliminary hearings or permit them in only very limited circumstances include Arkansas, Connecticut, Indiana, Maine, and Minnesota. *Id.* at 1403–08. Connecticut and Minnesota provide for document-based "papers review" of probable cause, but not for preliminary hearings. *Id.* at 1346, 1404–05. Connecticut only allows preliminary hearings in cases punishable by life imprisonment or the death penalty. CONN. GEN. STAT. § 54-46a(a) (2024).

[202] Crespo, *supra* note 3, at 1403–09. The jurisdictions that have indictment bypass systems include the federal system, Alabama, Alaska, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. *Id.*

[203] *Id.* The states that have information bypass systems are Delaware, Florida, Iowa, Montana, Rhode Island, and Washington. *Id.*; *see also* LAFAVE ET AL., *supra* note 183, § 14.1(a) (discussing bypass systems).

[204] There are also jurisdictions where prosecutors can get multiple bites at the apple, such as by seeking an information after failing to secure an indictment or vice versa. *See, e.g.*, People v. Noline, 917 P.2d 1256, 1261–63 (Colo. 1996) (en banc) (gathering cases); 725 ILL. COMP. STAT. 5/111-2(f) (2024) (allowing a prosecutor to proceed by information after a preliminary hearing); Janet A. Gilboy, *Prosecutors' Discretionary Use of the Grand Jury to Initiate or Reinitiate Prosecution*, 9 AM. BAR FOUND. RSCH. J. 1, 2 (1984) (exploring the practice of conducting a grand jury after a preliminary hearing fails to indict a defendant).

[205] *See* LAFAVE ET AL., *supra* note 183, § 14.2(b) ("In general, the 'prior-indictment' exception [allowing indictment bypass] has been used by federal prosecutors to largely eliminate preliminary hearings. . . . United States Attorneys have been able to utilize that tactic to virtually eliminate preliminary hearings. In other districts, it is not as easy to always obtain indictments within the time limits prescribed by Rule 5.1, and the mooting of preliminary hearings is common, but not inevitable.").

[206] Eric Fish practiced in the U.S. District Court for the Southern District of California from 2017 to 2021. In nearly three-hundred federal felony cases over three and a half years of practice, Fish did

cutors would require defendants to waive the preliminary hearing as a condition of keeping the first plea bargain offer open. And if a defendant chose to reject that plea bargain offer, the prosecutors would immediately go to a grand jury to secure an indictment. Because the federal system has an indictment bypass regime, doing so eliminates the defendant's right to a preliminary hearing.[207] Preliminary hearings were thus cut out of the system entirely.

Prosecutors seek to avoid preliminary hearings for two main reasons. First, they are burdensome. Prosecutors must arrange for their witnesses to come to court and must also dedicate several hours of their own time to the hearing. Second, they are strategically risky. A witness may fail to show up, or may say something under oath that the prosecutor does not anticipate. And defense lawyers get a free look at evidence, a chance to cross-examine the prosecutor's witnesses, and potential ammunition to impeach those witnesses at trial. It is safer, from the prosecutor's perspective, to go before a closed and non-adversarial grand jury.[208] Or, even better, to obtain a defense waiver or file charging documents without a hearing.

This calculus, however, is sometimes reversed. There are circumstances where a prosecutor might prefer to conduct a preliminary hearing. These include situations where the preliminary hearing gives the prosecutor a strategic benefit like preserving testimony of a witness who might be unavailable at trial, or previewing the defense's trial strategy, or where the alternative process is more burdensome.[209] For example, as explained below, California prosecutors usually choose preliminary hearings over the state's unusually burdensome grand jury process.

2. Permitted Hearsay in Preliminary Hearings

Preliminary hearings can also be rendered toothless by liberal use of hearsay testimony. If the prosecutor is allowed to bring in unlimited hearsay, then one police officer can simply read from an investigation report describing the incriminating evidence.[210] And that police officer need not even have been in-

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not participate in any preliminary hearings. He is also not aware of any of his former defense lawyer colleagues having held a preliminary hearing.

[207] FED. R. CRIM. P. 5.1(a).

[208] *See infra* notes 17–24 and accompanying text.

[209] LAFAVE ET AL., *supra* note 183, § 14.2(c) (listing "special circumstances" where a prosecutor might benefit from a preliminary hearing); *see, e.g.*, Crespo, *supra* note 3, at 1348 n.132 (noting that Nebraska's grand jury process is so cumbersome, requiring a petition signed by ten percent of a county's registered voters, that "preliminary hearings are effectively guaranteed").

[210] *See* Crespo, *supra* note 3, at 1349–50 ("In such a regime, a single police officer can simply take the stand and summarize the most inculpatory portions of the case file, thus shielding potentially weak witnesses from cross-examination and perhaps sanitizing their accounts in the process."); Cicchini, *supra* note 186, at 493–99 (describing preliminary hearings where the only witness is a police

volved in the investigation. For example, one of the authors of this Article participated in a preliminary hearing for a violation of supervised release involving allegations of drunk driving on a military base.[211] At this hearing, the only testifying witness was a probation officer who had not been involved in the defendant's arrest. This probation officer's only evidence was a probable cause statement written by a different probation officer that had been filed with the court at the start of the case. The probable cause statement summarized the military police officers' observations of the defendant when he was arrested. The preliminary hearing was rendered basically useless. The only witness had no personal knowledge of the facts at issue and was just reciting information from a document the parties had already read.

Our fifty-state survey reveals a good deal of variation in states' evidence rules at preliminary hearings. At the outset, three states are excluded because they do not hold preliminary hearings.[212] All three of these states also impose no limits on the use of hearsay in grand jury proceedings.

Eleven states and the federal system have no (or virtually no) limits on the use of hearsay at preliminary hearings.[213] For example, in Wyoming, the rules of evidence do not apply at preliminary hearings,[214] hearsay is allowed,[215] and judges are not even required to determine the reliability of hearsay outside of a trial.[216]

Thirty-one states allow hearsay at preliminary hearings with some meaningful limitations.[217] Those limitations vary considerably. In Alabama, for example, expert reports, documentary evidence, and other out-of-court statements are generally admissible if there are assurances that the witnesses will

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officer who was not involved in the investigation and read the criminal complaint right before the hearing).

[211] This was a preliminary hearing Eric Fish participated in for an out-of-district violation of supervised release, which can take place in the district of arrest. FED. R. CRIM. P. 32.1(a)(5). It was not a new felony case—as noted above, preliminary hearings for felony cases are universally bypassed in the Southern District of California.

[212] The three states that do not hold preliminary hearings under any circumstances are Arkansas, Indiana, and Maine. *See* Appendix B.

[213] The states with little to no limitation on the use of hearsay evidence at preliminary hearings are Delaware, Georgia, Illinois, Kentucky, Maryland, Montana, New Jersey, North Dakota, South Carolina, Washington, and Wyoming. *See* Appendix B.

[214] WYO. R. EVID. 1101(b)(3).

[215] WYO. R. CRIM. P. 5.1(b).

[216] Hennigan v. State, 746 P.2d 360, 369 (Wyo. 1987).

[217] The states that allow hearsay at preliminary hearings with some meaningful limitations include Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin. *See* Appendix B.

be available at trial.[218] Hawaii focuses on convenience: a probable cause determination at a preliminary hearing can consider hearsay evidence "when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."[219] Colorado does not apply the rules of evidence to preliminary hearings,[220] but its courts have been unwilling to allow the prosecution to rely solely on hearsay evidence if the perceiving witness is available to testify.[221] In 2005, in *People v. Huggins*, the Colorado Appeals Court also created guardrails to limit the abuse of hearsay at preliminary hearings.[222] Specifically, "[t]he prosecution satisfies the minimum requirement for nonhearsay if it (1) presents some competent nonhearsay addressing essential elements of the offense, and (2) presents hearsay testimony through a witness who is connected to the offense or its investigation and is not merely reading from a report."[223] These guardrails help preserve the adjudicative value of preliminary hearings, but they are not as rigorous as the rules of evidence.

Finally, in five states the normal rules of evidence apply during preliminary hearings.[224] For example, in Massachusetts, courts do not allow otherwise inadmissible hearsay at preliminary hearings.[225] As the Massachusetts Supreme Judicial Court explained in 1973, in *Myers v. Commonwealth*, the rules of evidence apply because "the primary objective of the probable cause hearing is to screen out those cases where the legally admissible evidence of the defendant's guilt would be insufficient to warrant submission of the case to a jury if it had gone to trial."[226] These sorts of evidentiary standards increase the burden on prosecutors along with the adjudicative value of the proceeding. It is notable, however, that Massachusetts is one of many states that *does* allow otherwise inadmissible hearsay in grand jury proceedings.[227] Indeed, of the five states that apply the rules of evidence at preliminary hearings, all except South Dako-

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[218] ALA. R. CRIM. P. 5.3(c).

[219] HAW. R. PENAL P. 5(c)(6).

[220] COLO. R. EVID. 1101(d)(3).

[221] People v. Horn, 772 P.2d 108, 109 (Colo. 1989) (en banc) (first citing Blevins v. Tihonovich, 728 P.2d 732 (Colo. 1986) (en banc); then citing McDonald v. Dist. Ct., 576 P.2d 169 (Colo. 1978) (en banc), *superseded in part by statute*, Victim Rights Act, 2022 Colo. Sess. Law 969, *as recognized in* People v. Platteel, 2023 CO 18, ¶ 37; then citing Hunter v. Dist. Ct., 543 P.2d 1265 (Colo. 1975) (en banc); and then citing Maestas v. Dist. Ct., 541 P.2d 889 (Colo. 1975) (en banc)).

[222] 220 P.3d 977, 980 (Colo. App. 2009).

[223] *Id.* (citing Whitman v. Superior Ct., 820 P.2d 262, 266–67 (Cal. 1991)).

[224] The five states that apply the normal rules of evidence at preliminary hearings are Massachusetts, Ohio, Rhode Island, South Dakota, and Texas. *See* Appendix B.

[225] MASS. R. CRIM. P. 3(f) editors' note to 2004 amendment; Myers v. Commonwealth, 298 N.E.2d 819, 824 n.6 (Mass. 1973).

[226] 298 N.E.2d at 824 n.6.

[227] MASS. R. EVID. 1101(c)(2)*; see* Appendix A.

ta have no limits on hearsay in front of grand juries.[228] In those four states, then, the evidentiary rules create a structural incentive for prosecutors to favor grand juries over preliminary hearings. If the prosecutor wants to avoid bringing their witnesses to court before trial, they can charge via indictment.

3. Post-Preliminary Hearing Reviews

A third procedural variable is whether a defendant can seek review of a preliminary hearing prior to trial. In states that do permit review, preliminary hearings offer more robust pretrial adjudication because the defendant can contest probable cause before two judicial officers—the magistrate who presides over the hearing and the judge who reviews the hearing. Our fifty-state survey of review procedures for preliminary hearings reveals three basic models: no mechanism for review, a general mechanism for review that may apply to preliminary hearings, and explicit review of preliminary hearings.[229]

Six states have no vehicle to appeal or seek substantive review of a preliminary hearing prior to trial.[230] This means that if a magistrate finds probable cause, no matter how implausibly, the defense cannot challenge that finding. In South Dakota, for example, judges cannot inquire into the sufficiency of a probable cause determination.[231] In 1997, in *State v. Springer-Ertl*, the South Dakota Supreme Court held that a lower court's finding of insufficient probable cause is not a ground for dismissal.[232] Thus, once a South Dakota magistrate has found probable cause, the defense cannot seek review of that determination from a judge.[233] So while South Dakota stands out for its heightened evidentiary standards at preliminary hearings, it limits review of those hearings.[234]

Another twenty-five states have general pretrial motion procedures that may allow review of a preliminary hearing.[235] For example, North Carolina is one of several states that has a specific statute establishing grounds to dismiss

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[228] S.D. CODIFIED LAWS § 23A-5-15 (2024). South Dakota is a rare state with heightened application of the rules of evidence in both grand juries and preliminary hearings. But, as described below, South Dakota does not allow judicial review of a preliminary hearing. *See* Appendix A.

[229] Arkansas, Indiana, and Maine do not have preliminary hearings and thus have no vehicle for review. Crespo, *supra* note 3, at 1404–05.

[230] The six states that have no vehicle to appeal preliminary hearings prior to trial are Georgia, Illinois, New Hampshire, North Dakota, South Carolina, and South Dakota. *See* Appendix B.

[231] State v. Vatne, 2003 SD 31, ¶ 14, 659 N.W.2d 381, 384.

[232] 1997 SD 128, ¶ 7, 570 N.W.2d 39, 40.

[233] State v. Hoekstra, 286 N.W.2d 127, 128 (S.D. 1979).

[234] *See supra* notes 228, 232.

[235] States that allow judicial review of a preliminary hearing include Alaska, Colorado, Connecticut, Delaware, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. *See* Appendix B.

an information.[236] And Alaska is one of many states that has a statutory framework governing pretrial motions to dismiss, but no specific provision for challenging an information.[237] Pretrial review of preliminary hearings in these states may be available.

The remaining sixteen states have specific procedural vehicles to seek pretrial review of a preliminary hearing or to challenge an information.[238] For example, Florida's rule provides a unified procedure for a pretrial motion to dismiss either an indictment or an information.[239] Defense lawyers in Florida can therefore argue in a pretrial motion that the magistrate's finding of probable cause was legally or substantively wrong. In Hawaii, similarly, a defendant can move to dismiss an information after the preliminary hearing on the grounds that it does not establish probable cause.[240] In states like these, the defendant enjoys two levels of pretrial review—the initial preliminary hearing and subsequent review of that hearing for legal and factual errors.

B. Preliminary Hearings in California

California regularly provides robust pretrial adjudication in its felony cases through preliminary hearings. Its approach to preliminary hearings consequently provides a useful case study. This is not because California is a procedural outlier. Its preliminary hearing rules, taken on their own, are well within the heartland of "information state" procedures. Rather, California is unique because its preliminary hearings (1) have real adversarial value[241] and (2) are actually held quite frequently.[242]

In California the rules of evidence generally apply at preliminary hearings with a couple of significant, though limited exceptions.[243] Since the passage of

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[236] N.C. GEN. STAT. § 15A-955 (2024).

[237] *See* ALASKA R. CRIM. P. 12.

[238] States that allow pretrial review of preliminary hearings include Alabama, Arizona, California, Florida, Hawaii, Idaho, Kansas, Maryland, Nevada, New Jersey, Ohio, Oklahoma, Rhode Island, Tennessee, Vermont, and Wisconsin. *See* Appendix B.

[239] FLA. R. CRIM. P. 3.190(b).

[240] HAW. REV. STAT. §§ 806-85 to 86 (2024).

[241] *See* Walker v. Superior Ct., 494 P.3d 2, 18 (Cal. 2021) ("California's criminal preliminary hearing is relatively akin to a 'mini-trial hearing,' even in the wake of Prop. 115, in that its rules potentially increase the rigor of its screening function by generally limiting the prosecution to the use of evidence that would be admissible at trial." (citing LAFAVE ET AL., *supra* note 183, § 14.3(a) n.35)), *as modified on denial of reh'g* (Oct. 13, 2021).

[242] *See* Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 502–03 (1998) ("In order to screen cases, California courts, unlike the federal system, have traditionally placed a heavy emphasis on preliminary hearings in addition to plea bargaining.").

[243] People v. Chapple, 41 Cal. Rptr. 3d 680, 683 (Ct. App. 2006).

Prop. 115 in 1990,[244] one layer of hearsay evidence via a sworn peace officer is admissible at a preliminary hearing.[245] This ability to introduce one layer of hearsay is equally available to the defense and the prosecution.[246] The defense may also, in some circumstances, call the declarant as a witness even if the prosecutor did not.[247] A second way California relaxes the rules of evidence for preliminary hearings is that the best evidence rule does not apply, meaning copies of documents can be used rather than the originals.[248] While these evidentiary exceptions somewhat diminish the adjudicative value of a preliminary hearing, they still permit robust hearings compared to other jurisdictions. For example, a prosecutor in California could not establish probable cause by simply having a case agent summarize a police report.[249]

Moreover, in California, a defendant may choose to combine a motion to suppress evidence with a preliminary hearing.[250] While some defense lawyers may strategically wait to file a motion to suppress until after a preliminary hearing has locked officers into testimony and aided with discovery, there are also advantages to combining the suppression and probable cause hearings. For example, while Prop. 115 allows hearsay through an officer for purposes of establishing probable cause, it does not affect the rules of evidence for a suppression hearing.[251] Combining a suppression hearing with a preliminary hearing could thus broaden the scope of questioning, provide more useful impeachment material for trial, require the prosecutor to call additional witnesses,

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[244] *See supra* note 169 and accompanying text (discussing Prop. 115). Recall that Prop. 115 also eliminated the right to a post-indictment preliminary hearing. Thus, it revived, to a limited extent, the value to prosecutors of grand jury proceedings. Its more significant contribution to helping prosecutors secure criminal charges was allowing hearsay at preliminary hearings.

[245] CAL. CONST. art. I, § 30(b); CAL. PENAL CODE § 872(b) (West 2024). Technically, multiple levels of hearsay are allowed at preliminary hearings when each layer can be justified by some exception, just as at trial. The only way in which the rules of evidence are relaxed for preliminary purposes, however, are to allow *one layer* of hearsay through a peace officer. *See* Tu v. Superior Ct., 7 Cal. Rptr. 2d 758, 760–61 (Ct. App. 1992). *But see* Correa v. Superior Ct., 40 P.2d 739, 741 (Cal. 2002) (allowing peace officers to testify at preliminary hearings to hearsay witness statements even when those statements were obtained through language interpreters).

[246] Nienhouse v. Superior Ct., 49 Cal. Rptr. 2d 573, 577–78 (Ct. App. 1996).

[247] People v. Erwin, 25 Cal. Rptr. 2d 348, 351–52 (Ct. App. 1993).

[248] *See* CAL. PENAL CODE § 872.5 ("[I]n a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.").

[249] *See Tu*, 7 Cal. Rptr. 2d at 760 ("Proposition 115 does not permit a designated 'reader' who has no personal knowledge about the case to testify at a preliminary hearing.").

[250] CAL. PENAL CODE § 1538.5(f)(2). The suppression motion must be noticed at least five court days prior to the hearing. *Id.*

[251] *See* People v. Best, 64 Cal. Rptr. 2d 809, 813 (Ct. App. 1997) (holding that while California Penal Code Section 872(b) "provides that the finding of probable cause following a preliminary examination may be based on certain hearsay statements, it does not create a general exception to the prohibition against the use of hearsay in other proceedings").

and let the defendant challenge the admission of their own inculpatory statements to establish probable cause.[252]

Other statutory rules, rights, and remedies combine to make California's preliminary hearings both frequent and meaningful. For example, both parties have a right to a speedy preliminary hearing, and, absent a waiver or good cause, the magistrate needs to hold a hearing within ten court days of arraignment.[253] When the defendant's right to a speedy hearing is violated, they must be released from custody or the case must be dismissed.[254] Even if a defendant has waived the ten-court-day hearing or is out of custody, the court must, absent a personal waiver, provide a preliminary hearing within sixty calendar days of arraignment or dismiss the case.[255] Similarly, a defendant is entitled to a continuous, uninterrupted (by other court business) hearing and, absent personal waiver or good cause, the violation of this right is remedied by dismissal.[256]

California also provides for robust review of preliminary hearings. Both parties have a statutory right to appeal magistrate decisions at a preliminary hearing on a wide array of technical and substantive grounds.[257] A defendant can use this procedure to challenge the magistrate's finding of probable cause by moving to dismiss before a superior court judge. On the other hand, a prosecutor dissatisfied with a magistrate's dismissal of charges can refile those charges.[258] If the prosecutor elects to refile charges, the defendant's remedy is, again, moving for dismissal before a judge.[259] After receiving such a motion, the judge conducts a review of the preliminary hearing based on the transcript and evidence presented, and decides whether the rules were followed and

[252] *See* People v. Smithson, 94 Cal. Rptr. 2d 170, 178–79 (Ct. App. 2000) (considering an appeal of a combined preliminary hearing and suppression motion).

[253] CAL. PENAL CODE § 859b. One author of this Article, Chesa Boudin, has experience as a public defender and as the elected prosecutor in San Francisco. He found that it is common for even complex and serious cases to proceed to preliminary hearing within the ten-day statutory period.

[254] *Id.*

[255] *Id* § 859b(b)(6). Even "good cause" cannot avoid a dismissal if the sixty-day right to a hearing is violated. People v. Superior Ct., 273 Cal. Rptr. 3d 777, 790 (Ct. App. 2021).

[256] CAL. PENAL CODE § 861(a).

[257] *Id.* §§ 871.5, 995.

[258] *Id.* § 739.

[259] In practice, this shifts power from the court to the prosecutor because a prosecutor can disregard a magistrate's order and force a defendant to file a motion to dismiss upon which a different, superior, judicial officer will rule based on the evidence presented at the hearing. In any of these scenarios, it will be the factual record at the preliminary hearing that determines which charges advance to trial.

probable cause was established.[260] That judge's decision, in turn, can be appealed to the Court of Appeal.[261]

Despite the procedural robustness of California's preliminary hearings, prosecutors still prefer them over grand juries.[262] This is because, as explored earlier, the grand jury process in California is unusually burdensome—it prohibits nearly all hearsay evidence and allows defendants to challenge an indictment after the fact.[263] When one of the authors of this Article was the district attorney of San Francisco, his prosecutors opted for preliminary hearings over grand juries in the vast majority of cases. The San Francisco prosecutors during his tenure mainly used grand juries in cases that had lasted two years or more without a preliminary hearing.[264] For example, in one murder case that he personally presented to a grand jury, the case had been awaiting a preliminary hearing for over three years.[265] In most cases, notifying the defense that the case would be presented to a grand jury was an effective way to advance towards settlement or towards a long-delayed preliminary hearing.[266] Assistant district attorneys in that office, however, almost never wanted to present domestic violence, child abuse, or sexual assault cases to grand juries. This was because California prohibits hearsay in grand jury proceedings, and the attorneys sought to avoid calling vulnerable victims to testify about traumatic events multiple times.[267] Securing an indictment without calling such witnesses to testify be-

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[260] The judicial officer who presides over a preliminary hearing is deemed a "magistrate" even if the officer is a full-fledged superior court judge. 1 MARK B. SIMONS, CALIFORNIA PRELIMINARY EXAMINATIONS AND 995 BENCHBOOK, at Introduction (Matthew Bender ed., 2023).

[261] *See* People v. Laiwa, 669 P.2d 1278, 1281–82 (Cal. 1983) ("[I]t is the magistrate who is the finder of fact; the superior court has none of the foregoing powers, and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer." (citations omitted)).

[262] *See History of the Grand Jury*, *supra* note 177 (explaining why prosecutors in California prefer preliminary hearings to grand jury proceedings).

[263] *See supra* notes 172–174 (detailing the procedure for grand jury proceedings in California).

[264] Grand juries were also used for complex investigations or in some instances to initiate white collar, political corruption, or police violence cases.

[265] Megan Cassidy, *Chesa Boudin, in Policy Shift, Seeks to Clear Case Backlog by Leaning More on Grand Juries for Charges*, S.F. CHRON., https://www.sfchronicle.com/crime/article/In-policy-shift-Boudin-seeks-to-clear-case-15839376.php [https://perma.cc/AMB9-94AM] (Jan. 1, 2021).

[266] Overwhelmingly, defense attorneys did not want to forfeit the opportunity to ask questions, confront witnesses, and make arguments at a preliminary hearing.

[267] By contrast, sexual abuse cases involving allegations of violating California Penal Code Section 288.4 ("to catch a predator" cases) were ideal for grand jury indictments because they could be entered with a single police officer witness. These cases typically involve a police officer posing as a minor in online chatrooms and then meeting an adult for a sexual encounter, at which point the adult would be arrested and charged.

fore the grand jury is often impossible.[268] But the same case could be advanced at a preliminary hearing using hearsay from a police officer who spoke with the victim, thus protecting the victim from having to testify until trial.[269] As this dynamic illustrates, the evidentiary rules are a key variable when prosecutors decide which procedure to use.

While court data is notoriously difficult to obtain,[270] all indications (and the authors of this Article's direct experience) confirm that preliminary hearings are a widespread and common part of criminal practice in California state courts. As early as the mid-1990s California trial courts handled a large volume of preliminary hearings, and the more serious the charge, the more likely the case would require one. According to a 1998 survey of California judges, the median rate of preliminary hearings was "37 percent for nonstrike cases, 67 percent for second-strike cases, and 79 percent for third-strike cases."[271] More recently, in fiscal year 2021–2022, California courts reported that approximately 8,694 of 25,349 cases had received a preliminary hearing, or more than a third of all cases.[272] In San Francisco Superior Court, in 2017, 773 of 3,469 new felony arraignments were arraigned on a post-preliminary hearing information.[273] This means roughly twenty-two percent of commenced cases received a preliminary hearing, including cases that were dismissed or where the defendants accepted misdemeanor plea deals. In one of the author's experience, it is common for a single trial courtroom in California to conduct multiple preliminary hearings in a single day, though hearings in more complex cases can last multiple days.[274] There are numerous judges in larger counties

[268] In the jurisdictions with relaxed evidentiary rules, by contrast, their testimony could be admitted before the grand jury through various layers of hearsay.

[269] In cases where the assigned prosecutors were concerned that a victim or witness might not be available for trial for whatever reason, they would sometimes call them to testify in person at a preliminary hearing, rather than using hearsay, and subject them to confrontation through cross examination to preserve their testimony.

[270] *See, e.g.*, Jonathan Abel, *Going Federal, Staying Stateside: Felons, Firearms, and the "Federalization" of Crime*, 73 AM. U. L. REV. 585, 621 (2024) (describing seventy-five separate in-person trips to the Alameda County, California courthouse to obtain data).

[271] JUD. COUNCIL OF CAL., TRIAL COURT REPORT 25 (1998).

[272] JUD. COUNCIL OF CAL., 2023 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 139 (2023), https://www.courts.ca.gov/documents/2023-Court-Statistics-Report.pdf [https://perma.cc/S4LA-8LKB].

[273] San Francisco Superior Court 2018 Monthly Criminal Arraignment Stats spreadsheet (on file with authors). Note that this metric undercounts the number of hearings as it does not capture any case where, after a preliminary hearing, the magistrate discharged the case or reduced it to a misdemeanor, the prosecutor chose not to file an information, or the defendant failed to appear at arraignment on the information.

[274] During Chesa Boudin's first two years in the felony trial assignment as a public defender, he conducted 53 preliminary hearings while he resolved 147 cases, both pre- and post-hearing through trial and all other dispositions.

whose primary job is to preside over preliminary hearings. Accordingly, there is likely a high degree of variation in local practice across California's fifty-eight counties.[275] But it is clear that California conducts preliminary hearings in a notably large percentage of its felony cases, particularly in light of the relatively robust procedure those hearings provide.

V. WITNESS DEPOSITIONS

A deposition is a proceeding where the lawyers for each side ask questions of a witness under oath. Depositions generally happen outside of the courtroom and without a judge.[276] The lawyers and the witness convene with a court reporter who documents the examination and cross-examination.[277] The idea is to generate an official record of that witness's testimony. This process informs the parties about what the witness will say at trial. It also can preserve the witness's testimony in case they do not ultimately come to trial.[278] Depositions serve a variety of different purposes from the parties' perspective. They help lawyers preview the opponent's evidence, prepare their own witnesses for trial, evaluate the strength of the case, and potentially push the other side towards a settlement.[279]

Depositions are a common feature of civil litigation in the United States.[280] Yet they are exceedingly rare in criminal cases.[281] This is unfortunate because they could be powerful tools of pretrial adjudication. Depositions are unlike our prior two examples (grand juries and preliminary hearings), in that they do not involve a neutral adjudicative body reviewing evidence and screen-

[275] *See, e.g.*, Abel, *supra* note 270, at 667 n.345 (finding about 11% of felony cases filed in Oakland go to a preliminary hearing, and thus have an information filed, from 2017 to 2022: "June 2017 through December 2017: 3,575 felony cases, 424 cases with an information filed; 2018: 5,425 felony cases, 684 cases with an information filed; 2019: 5,435 felony cases, 702 cases with an information filed; 2020: 5,231 felony cases, 546 cases with an information filed; 2021: 5,106 felony cases, 430 cases with an information filed; January through May 2022: 2,059 felony cases filed, 189 cases with an information filed").

[276] *See* 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2112 (3d ed. 2024), Westlaw FPP.

[277] *See* ROGER S. HAYDOCK, FUNDAMENTALS OF LITIGATION PRACTICE ¶ 14:11 (2024) (describing who may be present at a deposition).

[278] *See* Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 856 & n.82 (1995) (distinguishing perpetuation depositions from discovery depositions).

[279] *See* James W. McElhaney, *Objecting at Depositions*, 14 LITIG. 51, 51–52 (1988) ("We use depositions for lots of purposes—to investigate the case, learn what the witnesses will say, prepare them for trial, evaluate our opponent's witnesses, give our own cases a trial run, keep witnesses from changing their stories, and push our opponents toward settlement.").

[280] *See* Dennis R. Suplee, *Depositions: Objectives, Strategies, Tactics, Mechanics and Problems*, 2 REV. LITIG. 255, 257 (1982) ("Depositions are the most important of the pretrial discovery tools.").

[281] *See* Meyn, *supra* note 38, at 1094 (explaining the lack of pretrial investigation procedures in criminal law).

ing charges. Nonetheless, they share many other features with those pretrial proceedings. They involve live testimony from key witnesses, as well as cross-examination and the creation of an official record. They reveal evidence that would otherwise not come out before trial, which helps both sides evaluate the likelihood of conviction.[282] Criminal depositions could help correct the information asymmetry that exists between prosecutors and defense lawyers.[283] And they could also affect case outcomes. If a deposition goes badly for a prosecutor, they may choose to dismiss charges, or offer a more lenient plea deal. If a deposition goes badly for the defense, they then understand more about the downside of going to trial and may plead guilty. For these reasons, academics and legal reformers have called for the widespread use of depositions in criminal cases.[284] Yet few jurisdictions have allowed depositions to serve a meaningful role in criminal litigation.

This Part considers how depositions in criminal cases can improve pretrial adjudication. Section A first presents our review of how the federal system and the states approach criminal depositions.[285] We found that criminal depositions are not commonly used in the United States. Only six states give defendants a broad right to depose witnesses. The remaining forty-four states and the federal system either require a showing of good cause or restrict depositions to narrow circumstances. Section B explores Florida's unique deposition practices.[286] Florida allows the parties to depose important witnesses in basically every felony case.[287] Drawing on interviews with several Florida criminal defense lawyers and elected prosecutors, we show that depositions happen quite frequently there. Florida defense lawyers often use depositions to lock down witnesses' stories,

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[282] Gold et al., *supra* note 96, at 1625 ("The lack of access to evidence often inhibits defendants from forming an accurate, independent assessment of their likelihood of conviction to inform their bargaining positions.").

[283] *See* Bibas, *supra* note 63, at 2493–95.

[284] *See, e.g.*, Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1638–40 (2005) (arguing for judicial deposition of key witnesses to establish a "factual basis for pleas"); Ortman, *supra* note 91, at 451 (proposing a right to depositions in criminal cases under the Sixth Amendment); Ion Meyn, *The Haves of Procedure*, 60 WM. & MARY L. REV. 1765, 1765 (2019) (comparing criminal and civil discovery procedures); Prosser, *supra* note 91, at 607–13 (discussing how criminal depositions can remedy discovery violations and information asymmetries); John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2188–91 (2000) (emphasizing the benefits of discovery depositions in criminal cases); George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 594–600 (2010) (reviewing the frequency of and costs associated with discovery depositions in various jurisdictions). Fifty years ago, the drafters of the Model Penal Code recommended depositions in criminal cases as a matter of right, mainly as a cheaper alternative to preliminary hearings rather than as a supplement to other pretrial adjudication. UNIF. R. CRIM. P. 431 (Approved Draft 1974).

[285] *See infra* notes 288–302 and accompanying text.

[286] *See infra* notes 303–332 and accompanying text.

[287] FLA. R. CRIM. P. 3.220(h)(1).

get a preview of the government's evidence, and convince prosecutors to drop charges or offer better deals. And prosecutors benefit from depositions as well, using them to get a clearer view of the evidence and the likelihood of conviction.

A. Survey of State and Federal Deposition Procedures

To explore how depositions are used in American criminal cases, we surveyed the laws of the fifty states and the federal government.[288] Most states do not, as a matter of course, allow defendants to take depositions of witnesses in criminal cases. For example, one Hawaii court has gone so far as to assert that the "primary object of the [Sixth Amendment's] confrontation guarantee is to prevent the use of depositions . . . in a criminal proceeding."[289] One California court has held that criminal defendants have no right to take depositions of witnesses to aid discovery.[290] Many states do provide for preservation depositions or "conditional examinations" in certain categories of cases with vulnerable material witnesses.[291] But conditional examinations are a narrow tool for preserving evidence in exceptional circumstances and not used for discovery or normal litigation.

Many jurisdictions provide for criminal depositions on paper, but only after a showing of good cause (or a similarly high burden) and with court authorization.[292] This makes depositions rare in practice. For example, New Hampshire only allows depositions after a showing of necessity to preserve testimony or to ensure a fair trial.[293] Texas requires an affidavit stating "good reason" for a deposition before a court will authorize one.[294] And the federal system has a statute providing for material witnesses to be arrested, detained, and held in jail (or made to post bond) "if it is shown that it may become impracticable to secure the presence of the person by subpoena."[295] This law is almost exclu-

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[288] Full survey on file with authors.

[289] State v. Tucker, 861 P.2d 24, 32 (Haw. Ct. App. 1993). *But see* HAW. R. PENAL P. 15(a) (establishing procedures for criminal depositions under "special circumstances").

[290] Everett v. Gordon, 72 Cal. Rptr. 379, 381 (Ct. App. 1968) (first citing People v. Mersino, 46 Cal. Rptr. 821 (Ct. App. 1965); then citing Clark v. Superior Ct., 12 Cal. Rptr. 191 (Dist. Ct. App. 1961); and then citing B.E. WITKIN, CALIFORNIA EVIDENCE § 1056, at 965 (1966)).

[291] *See, e.g.*, CAL. PENAL CODE § 1335 (West 2024) (allowing criminal depositions for material witnesses less likely to attend trial); OKLA. STAT. tit. 22, § 762 (2024) ("When a material witness in any criminal case is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant or the State of Oklahoma may apply for an order that the witness be examined conditionally.").

[292] ARIZ. R. CRIM. P. 15.3(a); NEB. REV. STAT. § 29-1917(1) (2024); N.H. REV. STAT. ANN. § 517:13(II) (2024); OHIO REV. CODE ANN. § 2945.50 (LexisNexis 2024); TEX. CODE CRIM. PROC. ANN. art. 39.02 (West 2024).

[293] N.H. REV. STAT. ANN. § 517:13(II).

[294] TEX. CODE CRIM. PROC. ANN. art. 39.02.

[295] 18 U.S.C. § 3144.

sively used in immigrant-smuggling cases where the immigrants are held as witnesses against the accused smugglers.[296] While thousands of immigrant witnesses are kept in jail under this law, actual depositions are rare. Prosecutors have strong leverage to require defendants to waive depositions as part of plea deals because they can charge mandatory minimums.[297]

Only six states afford criminal defendants a broad right to depose witnesses in the case against them: Florida, Indiana, Iowa, Missouri, North Dakota, and Vermont.[298] In North Dakota, for example, state rules authorize either party to depose any person except the defendant and shifts the burden to potential deponents to seek court intervention if they wish to avoid being deposed.[299] North Dakota even provides for a party to force compliance with a deposition request on pain of incarceration for up to six hours.[300] Missouri has similarly liberal criminal deposition laws, letting defendants use them in "any criminal case" and applying the same rules as used in civil depositions.[301] And Vermont lets the prosecutor or the defense conduct witness depositions at any time after the information or indictment is filed, subject to any protective orders the court imposes.[302] We will now examine Florida's deposition practice in more depth.

B. Witness Depositions in Florida

Florida provides a useful case study because it creates a general right to criminal depositions, those depositions happen frequently,[303] and it is a popu-

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[296] *See* Sarah Cutler, Steve Eder & Robert Gebeloff, *Jailed by the Thousands, Without Charges, to Act as Witnesses*, N.Y. TIMES (Oct. 3, 2023), https://www.nytimes.com/2023/10/03/us/doj-immigrant-witnesses-border.html [https://perma.cc/Q5FW-T795] (noting that 104,000 people have been held as federal material witnesses since 2003, "almost exclusively" in human-smuggling cases involving the Mexican border).

[297] Immigrant-smuggling defendants rarely go to trial. *See id.* ("About 1 percent of the more than 30,000 human-smuggling cases over the past decade went to trial . . . ."). In Fish's experience, prosecutors in these cases commonly offer a non-mandatory minimum plea deal in exchange for a rapid guilty plea that waives the right to witness depositions. *See* 8 U.S.C. § 1324(a)(2)(B)(iii) (three- and five-year mandatory minimums for crimes involving immigrant smuggling).

[298] FLA. R. CRIM. P. 3.220(h)(1); IND. CODE § 35-37-4-3 (2024); IOWA R. CRIM. P. 2.5(3), 2.4(5), 2.13(a); MO. R. CRIM. P. 25.12(a); N.D. R. CRIM. P. 15(a); VT. R. CRIM. P. 15(a).

[299] N.D. R. CRIM. P. 15(a).

[300] *Id.* R. 15(b).

[301] MO. R. CRIM. P. 25.12(a); *see* H. Morley Swingle, *Depositions in Criminal Cases in Missouri*, 60 J. MO. BAR 128, 129 (2004) (providing a detailed exploration of depositions in Missouri).

[302] VT. R. CRIM. P. 15(a).

[303] Phone Interview with Elizabeth Rose London, Assistant Pub. Def., Sixth Jud. Cir., Fla. (Dec. 13, 2023); Phone Interview with James Rubin, Manager, Broward Cnty. Pub. Def., and Katerine Lopez, Chief Assistant, Broward Cnty. Pub. Def. (Jan. 4, 2024); E-mail from Monique Worrell, Elected State's Att'y, Ninth Jud. Circuit, Fla. to Chesa Boudin, Exec. Dir., U.C. Berkeley's Crim. L. & Just. Ctr. (Feb. 16, 2024) (on file with authors); Phone Interview with Aramis Ayala, Former Elected State's Att'y, Ninth Jud. Cir., Fla. (Feb. 9, 2024); *see also* John F. Yetter, *Discovery Depositions in*

lous state.[304] When the Florida Supreme Court first issued comprehensive criminal procedure rules in 1968, it created a process for discovery depositions.[305] At that time, however, depositions required a showing of good cause.[306] In 1972, the rules were updated to provide essentially unlimited depositions without leave of the court.[307] In 1988, a coalition of law enforcement and crime victim advocates unsuccessfully tried to abolish the practice.[308] A few years later, they tried and failed again.[309] Pushing back on these repeal efforts, the Florida Supreme Court's Commission on Criminal Discovery wrote that depositions "make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process."[310] The court appreciated that this form of pretrial discovery occurs outside of the courtroom and does not take up judges' time.[311]

Florida's criminal deposition rules mirror its civil deposition rules.[312] These rules ensure that depositions are easy to arrange and useful after the fact. For example, they provide that "[a]ny deposition taken under this rule may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness."[313] A defendant seeking to depose a law enforcement officer, one of the most common types of witness for the prosecution, need not issue a subpoena but can simply send an e-mail with five days'

Florida Criminal Proceedings: Should They Survive?, 16 FLA. ST. U. L. REV. 675, 681–87 (1988) (gathering criticisms of Florida's practice of allowing criminal depositions).

304 Florida operates in contrast to the other states with depositions as of right. *See* Thomas, *supra* note 284, at 592–93 ("A discovery process that might work just fine in Vermont could pose an administrative nightmare in a more populous state. Indeed, of the six states that permit defendants to depose all prosecution witnesses, four of them are primarily rural—Iowa, Missouri, North Dakota, and Vermont.").

305 Yetter, *supra* note 303, at 680.

306 FLA. R. CRIM. P. 1.220(f) (1968).

307 Yetter, *supra* note 303, at 681; FLA. R. CRIM. P. 3.220(d) (1972).

308 *See generally* Meyn, *supra* note 284 (explaining the coalition's opposition to depositions in criminal cases).

309 Ortman, *supra* note 91, at 497–98; *see also* Howard Dimmig, *Deposition Reform: Is the Cure Worse Than the Problem?*, FLA. BAR J., July/Aug. 1997, at 52, 52, https://www.floridabar.org/the-florida-bar-journal/deposition-reform-is-the-cure-worse-than-the-problem/ [https://perma.cc/XL6Z-Y8EN] (criticizing the 1996 amendments); Yetter, *supra* note 303, at 681–84 (reviewing the 1988 repeal efforts and arguments).

310 Yetter, *supra* note 303, at 695.

311 A later effort to abolish criminal depositions succeeded only in restricting depositions without leave of the court to felonies, and in making it more difficult to depose certain kinds of (usually non-essential) witnesses. Dimmig, *supra* note 309, at 54.

312 *Compare* FLA. R. CRIM. P. 3.220(h)(1), *with* FLA. R. CIV. P. 1.310. There are some significant differences between criminal and civil depositions in Florida. For example, given the vulnerable nature of some victim-witnesses, victim-witnesses are entitled to have an advocate at their depositions. FLA. STAT. § 960.001(1)(q) (2024). Also, in a departure from civil discovery, Florida generally prohibits the criminal defendant from being physically present at the deposition. FLA. R. CRIM. P. 3.220(h)(7).

313 FLA. R. CRIM. P. 3.220(h)(1).

notice.[314] If a subpoenaed witness fails to show up, the court may hold them in contempt.[315] And their refusal to be deposed, often a good indicator of their likelihood of showing up at trial, is a valuable piece of information for the parties.[316]

As with other pretrial procedures, criminal depositions can be waived during the plea-negotiation process.[317] In federal immigrant-smuggling cases, for instance, defendants almost always waive their right to depose detained witnesses because prosecutors require it as a condition of plea offers.[318] But that dynamic does not seem to prevail in Florida, where depositions happen frequently.[319] Florida prosecutors do not usually penalize defendants for conducting pretrial depositions, for example by revoking a plea bargain offer. This is because depositions have become a normal part of the courtroom culture, and prosecutors see them as providing benefits for both sides.[320] The major

[314] *Id.* R. 3.220(h)(5).

[315] *Id.* R. 3.220(h)(1).

[316] Phone Interview with Aramis Ayala, *supra* note 303. Similarly, in Vermont, another state with robust pretrial deposition rights, practiced prosecutors value depositions, in part because they give a preview of which witnesses will actually come to testify at trial. E-mail from Sarah F. George, Chittenden Cnty. State's Att'y, to Chesa Boudin, Exec. Dir., U.C. Berkeley's Crim. L. & Just. Ctr. (Feb. 4, 2024) (on file with the authors).

[317] *See* Ortman, *supra* note 91, at 495 n.270.

[318] *See supra* notes 295–297 and accompanying text (explaining the practice of waiving depositions in human-smuggling cases).

[319] Phone Interview with Elizabeth Rose London, *supra* note 303; Phone Interview with James Rubin and Katerine Lopez, *supra* note 303; Phone Interview with Prya Murad, Principal, Prya Murad L., PLLC, & Fac. Member, Nat'l Inst. of Trial Advoc. (Feb. 4, 2024). Similarly, in Vermont, depositions are a regular part of the practice: approximately "one or two depositions are done in 60–75% of violent felonies." E-mail from Sarah F. George to Chesa Boudin, *supra* note 316.

[320] Phone Interview with Elizabeth Rose London, *supra* note 303; *see also* Phone Interview with Prya Murad, *supra* note 319 (confirming that prosecutors almost never punish an attorney's clients for taking a deposition except if she seeks to depose a child victim or similarly vulnerable victim); Phone Interview with Aramis Ayala, *supra* note 303 (explaining that prosecutors sometimes offer a "discount" for early resolution but that depositions are a normal, accepted, and valued part of pretrial litigation with reciprocal benefits and with the possibility to make the case much stronger or weaker for either side); E-mail from Monique Worrell to Chesa Boudin, *supra* note 303 (explaining that it is wrong to punish people for asserting their rights and that depositions are often needed to reveal the truth for both sides). *But see* Phone Interview with James Rubin and Katerine Lopez, *supra* note 303 (explaining that in cases with particularly vulnerable victims, such as sexual assaults, prosecutors will sometimes take plea offers off the table if the defense deposes the victim and if the victim attends and testifies well at the deposition). These reciprocal benefits are not limited to Florida. Vermont is another state with a broad right to criminal depositions. According to Sarah F. George, elected State's Attorney for Chittenden County in Burlington, Vermont, depositions are "absolutely" helpful for the prosecution "in that you get a preview of what issues or weaknesses defense counsel sees in your case . . . . They are helpful in that you are able to hear your witnesses['] testimony first hand and gauge their credibility, especially as to how they respond to questioning by defense counsel . . . . All these benefits help to know whether you should resolve the case, dismiss the case, or go to trial on the case. You wouldn't necessarily know any of these things if you didn't have the depositions." E-mail from Sarah F. George to Chesa Boudin, *supra* note 316. State's Attorney George also does not have a "deposition penalty" except sometimes in cases where defendants depose a child victim in a sexual

exception is that prosecutors will often take a plea bargain off the table if the defense lawyer deposes an especially vulnerable victim, such as a child victim in a sexual abuse case.[321]

There is also substantial variation in practice norms from one Florida county to another. For example, some counties' judges regularly allow depositions in misdemeanor cases while other counties' judges do not.[322] In addition, while some counties prefer the efficiency of remote depositions conducted by video, Broward County's public defenders only take depositions in person.[323] Nevertheless, Broward County's public defenders conduct a significant number of depositions: from November 1, 2023 through January 31, 2024, that office scheduled 3,444 depositions in 1,339 cases, or an average of more than 2.5 depositions per case.[324]

Practitioners in Florida—prosecution and defense—see a lot of benefits to depositions. They help with trial preparation by previewing testimony and potential impeachment evidence.[325] They provide mitigating information for sentencing.[326] They also inform attorneys which witnesses are likely to show up at trial.[327] And all this information is useful for plea negotiations. As one public defender explained it, every trial case will definitely have depositions—sometimes one, sometimes fifteen—but not all cases with depositions end up going to trial.[328] The Broward County public defenders estimate that when depositions happen, they affect a case's outcome about half of the time.[329] A case that was going to trial might end up dismissed if a key deposition goes

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assault case. She notes, however, that if defense counsel treats any victim badly during a deposition, the victim "may no longer support a particular resolution. We sometimes have to weigh that input differently and it may ultimately impact the outcome. It's somewhat of an indirect punishment for the defendant." *Id.*

321 Phone Interview with James Rubin and Katerine Lopez, *supra* note 303; Phone Interview with Prya Murad, *supra* note 319.

322 In misdemeanor cases, depositions can only be taken after a showing of good cause and a court order. FLA. R. CRIM. P. 3.220(h)(1)(D). Whether or not judges grant deposition requests in misdemeanor cases seems to vary by county. *Compare* Phone Interview with Elizabeth Rose London, *supra* note 303 (reporting that judges in Pinellas County rarely grant depositions for misdemeanors), *with* Phone Interview with James Rubin and Katerine Lopez, *supra* note 303 (reporting that judges in Broward County regularly grant depositions for misdemeanors, while judges in Miami-Dade County do not).

323 Phone Interview with James Rubin and Katerine Lopez, *supra* note 303.

324 E-mail from Katerine S. Lopez, Chief Assistant, Broward Cnty. Pub. Def., to Chesa Boudin, Exec. Dir., U.C. Berkeley's Crim. L. & Just. Ctr. (Feb. 19, 2024) (on file with the authors).

325 Phone Interview with Aramis Ayala, *supra* note 303 (explaining that it is hard for either side to be fully prepared for or committed to trial without depositions).

326 Phone Interview with James Rubin and Katerine Lopez, *supra* note 303.

327 *Id.*; Phone Interview with Aramis Ayala, *supra* note 303; Phone Interview with Elizabeth Rose London, *supra* note 303.

328 Phone Interview with Elizabeth Rose London, *supra* note 303.

329 Phone Interview with James Rubin and Katerine Lopez, *supra* note 303.

poorly for the prosecution, or pleading out if it goes poorly for the defense. One former public defender in South Florida observed that a lot of strategizing goes into deciding who—and who not—to depose.[330] Depositions inform not just trial strategy and settlement negotiations, but also other litigation stages like motions to suppress evidence.[331] And depositions are such a common and important feature of litigation that some criminal defense offices use them to evaluate lawyers for promotion.[332]

Florida provides a real-world example of how pretrial litigation can provide robust adversary process. Depositions, when they actually happen, make the criminal process meaningfully adversarial, allow for confrontation of witnesses, test the strength of charges and cases, and foster more informed negotiations. In Florida, law enforcement's efforts to curtail depositions failed thanks to the value that lawyers and judges place on them. While there are expenses associated with expanding pretrial adjudication, there are also clear benefits to the administration of justice.

VI. PRELIMINARY BENCH TRIALS

A bench trial is normally an alternative to a jury trial. In most states and the federal system, a defendant can waive their right to a jury and elect instead to have a judge be the factfinder.[333] Some states let the defendant make this choice unilaterally, while others require the prosecutor's consent.[334] A defendant might choose a bench trial for a few reasons—sometimes a judge signals that they will give a lighter sentence after a bench trial, and sometimes a defense is more likely to succeed before a judge than a jury.[335] In some jurisdictions, bench trials even outnumber jury trials.[336] They have all the procedural trappings and evidence rules of a normal trial, but with the judge acting as jury.

Bench trials are thus not normally thought of as pretrial adjudication—they are the trial itself. But not always. In some states, misdemeanor defendants can have both a bench trial and a jury trial in the same case. This means a case is initially sent to a judge for a bench trial. Then, if the defendant is convicted at the bench trial, they have a right to a de novo jury trial.[337] If they as-

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[330] Phone Interview with Prya Murad, *supra* note 319.

[331] *Id.*

[332] *Id.*

[333] Krishnamurthi, *supra* note 43, at 1637–39.

[334] *Id.* at 1638.

[335] Ouziel, *supra* note 44, at 1257.

[336] *Id.* at 1221–36 (describing bench trials in Chicago and Philadelphia, where they make up the overwhelming majority of trials).

[337] David A. Harris, *Justice Rationed in the Pursuit of Efficiency: De Novo Trials in the Criminal Courts*, 24 CONN. L. REV. 381, 383 (1992).

sert this right, the jury decides the case afresh as if the bench trial never happened.[338] In such systems, bench trials function like preliminary hearings. They are in-court proceedings where the parties present testimony and arguments to a judge, and the judge decides on the charges' validity. An acquittal ends the case, while a conviction lets the defendant try again in front of a jury. Here we refer to these bench trials as "preliminary bench trials," reflecting the fact that they occur before a hypothetical jury trial.

In theory, preliminary bench trials should have much to offer our project of enhancing pretrial adjudication.[339] Bench trials, since they are full trials, should be more procedurally robust than grand juries or preliminary hearings. Trials involve a higher burden of proof: "beyond a reasonable doubt" rather than "probable cause." They also apply the rules of evidence, including the rule against hearsay testimony. But, as we shall see, in practice preliminary bench trials are not always models of due process.

In this Part, we contrast two different real-world examples of preliminary bench trials.[340] First, in Section A, we discuss their use in municipal courts.[341] These are court systems operated by city governments that use preliminary bench trials to decide misdemeanor cases. Municipal courts have exceptionally summary procedural rules. They commonly lack lawyers, operate in a highly informal fashion, and function mostly as a barrier between misdemeanor defendants and real jury trials.[342] Second, in Section B, we discuss North Carolina's more robust system of preliminary bench trials.[343] In North Carolina, preliminary bench trials are treated as normal bench trials. There are prosecutors, defense lawyers, and professional judges, the rules of evidence apply, and the burden of proof is beyond a reasonable doubt.[344]

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[338] *See* Colten v. Kentucky, 407 U.S. 104, 113 (1972) ("[N]either the judge nor jury that determines guilt or fixes a penalty in the trial de novo is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance.").

[339] *Cf.* Schulhofer, *supra* note 88, at 1037 (proposing a system where cases are processed through bench trials rather than guilty pleas).

[340] *See infra* notes 341–377 and accompanying text.

[341] *See infra* notes 345–364 and accompanying text.

[342] *See* Harris, *supra* note 337, at 383–90 (discussing problematic aspects of municipal court justice); Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 985–90, 1012–14 (2021) (same); Samuel P. Newton, Teresa L. Welch & Neal G. Hamilton, *No Justice in Utah's Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to Protect Defendants in Utah's Infamous Local Courts*, 2012 UTAH ONLAW 27, 60–63, https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1031&context=onlaw [https://perma.cc/JAQ6-GST5] (same); Class Action Complaint at 1–2, Bairefoot v. City of Beaufort, 312 F. Supp. 3d 503 (D.S.C. 2018) (No. 9:17-cv-2759-RMG) (class action lawsuit by the ACLU against a South Carolina city that denies defendants the right to an attorney in its municipal court system).

[343] *See infra* notes 365–377 and accompanying text.

[344] *See, e.g.*, State v. Jones, 816 S.E.2d 921, 925 (N.C. Ct. App. 2018) (following regular trial rules in a preliminary bench trial).

A. Summary Bench Trials in Municipal Courts

Municipal courts are low-level judicial systems run by cities and towns. They normally function as stand-alone courts, and not as part of the larger state judiciary.[345] Municipal courts have criminal jurisdiction over misdemeanors and local ordinance violations, and collectively they process over 3.5 million criminal cases per year.[346] It is estimated that there are over 7,500 of them operating in thirty different states.[347]

Misdemeanor prosecutions in municipal courts are quite informal when compared to normal criminal courts. Municipal courts do not conduct jury trials, but instead process their criminal cases through bench trials.[348] The judges who preside at these bench trials are not necessarily lawyers—most states with municipal court systems allow layperson judges.[349] Nor are the prosecutors necessarily lawyers: several states allow the arresting police officers to act as prosecutors.[350] It is also common to have cases prosecuted by part-time prosecutors who have other municipal jobs like judge or city counselor.[351] And there are usually no court-appointed defense lawyers.[352] Indeed, in many municipal courts people are convicted of misdemeanors without any lawyers present in the courtroom.[353] The proceedings themselves are also quite summary. There is ordinarily no official transcript or other record of a municipal court bench trial.[354] Judges ignore the rules of evidence and operate through fast-paced, informal court procedures.[355] Given the frequent absence of attorneys, it is difficult to pursue legal arguments at all in these courts.[356] There is no appellate review of municipal courts' legal rulings, because the appeals become de novo jury trials.[357] And the bureaucrats who operate these court systems are preoccupied with using them to bring money into the municipal coffers, generally through fines levied on the defendants.[358] These court systems thus, for the most part, lack even the basic procedural safeguards of ordinary criminal

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[345] Natapoff, *supra* note 342, at 974; *see id.* at 1056–60.

[346] *Id.* at 965.

[347] *Id.* at 966. This statistic comes from Professor Alexandra Natapoff's seminal article, *Criminal Municipal Courts*, describing municipal court systems in the United States. *See generally id.*

[348] *Id.* at 997.

[349] *Id.* at 1056–60.

[350] *Id.* at 1002.

[351] *Id.* at 968.

[352] *Id.*

[353] *Id.* at 985, 1002–03.

[354] *Id.* at 1012.

[355] *Id.* at 1012–14; Harris, *supra* note 337, at 418–19.

[356] Newton et al., *supra* note 342, at 60–63.

[357] Natapoff, *supra* note 342, at 1003–05.

[358] *Id.* at 982–91.

courts.[359] Several scholars have criticized municipal courts as lawless and corrupt and have called for their abolition.[360]

Appellate review for municipal courts happens through de novo jury trials. This means that if a defendant loses their bench trial in a municipal court, they can file an appeal and receive a full jury trial in the ordinary state court system. In a sense, then, a municipal court bench trial could be seen as a pretrial hearing before the ultimate jury trial in a higher court. But this is not how it works in practice. Very few misdemeanor convictions in these courts are ever appealed.[361] A variety of factors including high guilty plea rates, lack of counsel, short sentence duration, and the hassle of the misdemeanor process prevent such appeals from happening.[362] And even though bench trials are highly informal, they do not necessarily occur at high rates. For example, in Salt Lake City, Utah's municipal court system, called "Justice Court," the bench trial rate is less than three percent.[363] The de novo appeal procedure is thus used rarely in practice. But it does provide cover for municipal court systems' lawlessness. In 1976, in *North v. Russell*, the U.S. Supreme Court upheld this kind of system by ruling that a trial before a non-lawyer judge did not violate the Due Process Clause since the defendant had the right to a trial de novo before a lawyer judge.[364] The de novo appeal process thus formally legitimizes a system that functionally lacks basic due process.

Municipal courts represent, in a sense, the inverse of our thesis. We argue that an expansion of pretrial procedure can bring meaningful adversary process back to the criminal justice system. But in municipal courts, informal pretrial procedures end up removing even basic safeguards like defense lawyers and

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[359] Professor Natapoff's description of Seattle's municipal court system suggests that it may be an exception. *Id.* at 986. It seems to embrace more formality and robust process than other jurisdictions, akin to North Carolina's preliminary bench trial system. *Id.*

[360] *See, e.g.*, Harris, *supra* note 337, at 418–19, 422–24 (recommending specific reforms of municipal courts); Newton et al., *supra* note 342, at 66–67 (calling for the abolition of municipal courts); Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 214 (2021) (same); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 HARV. L. REV. F. 200, 210 (2021) (calling for municipal court reform).

[361] *See* Natapoff, *supra* note 342, at 1005 (noting the low rate of appeal for misdemeanor convictions); Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1939–41 (2019) (observing that the rate of appeals in misdemeanor cases is very low, estimating about one appeal for every 1,250 convictions).

[362] *See* King & Heise, *supra* note 361, at 1942–48 (reviewing reasons why the misdemeanor appeal rate is so low); Harris, *supra* note 337, at 403–08 (same).

[363] HESSICK, *supra* note 5, at 185. Hessick also notes that the dismissal rate in Justice Court is 45.6%, which is higher than the baseline misdemeanor dismissal rate in Utah's district courts of 35%. *Id.* Hessick interviewed local public defenders who attributed this higher dismissal rate to an increased risk of cases going to bench trial. *Id.*

[364] *See* 427 U.S. 328, 339 (1976) (finding no due process violation for trials before non-lawyer judges, in this case before a coal miner with only a high school education and no legal training).

legally trained judges. We turn now to a more helpful case study: a state where preliminary bench trials are treated as real trials.

B. Preliminary Bench Trials in North Carolina

In North Carolina, all misdemeanor cases are initially set for a preliminary bench trial before a district court judge.[365] If the defendant loses this bench trial, they have the right to take the case to superior court for a full jury trial. Unlike in municipal court systems, North Carolina's misdemeanor bench trials are real trials.[366] The judges are lawyers. Prosecutors and defense counsel are present. The rules of evidence apply, including the rule against hearsay testimony. Legal arguments such as suppression motions are given a hearing.[367] Nevertheless, since the only form of appeal is a de novo trial, district judges' rulings are not subject to traditional appellate review.[368] And no official transcript of the bench trial is provided by the court (although the lawyers can create their own).[369] Beyond those two limitations, North Carolina's preliminary bench trials are the same as ordinary bench trials. North Carolina is not the only jurisdiction to use preliminary bench trials with de novo appeals. Maryland has a similar system, as did Massachusetts prior to 1994, and as have several other states either currently or previously.[370] But North Carolina is our focus.

To get a better understanding of how North Carolina's preliminary bench trials work, we interviewed attorney Daniel Spiegel.[371] Mr. Spiegel practiced as both a prosecutor and a defense attorney in North Carolina. Most relevant for our inquiry, he worked as a misdemeanor public defender in Charlotte from 2010 to 2013. He confirmed that bench trials were very common in Charlotte's misdemeanor courts. Cases he took to bench trials included drunk driving charges, marijuana charges, larceny charges, assault charges, and others. These bench trials also happen relatively quickly. For most misdemeanor cases, they involve only one or two government witnesses (usually police officers) and

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[365] *See* N.C. GEN. STAT. § 7A-272(a) (2024) ("[T]he district court has exclusive, original jurisdiction for the trial of criminal actions . . . below the grade of felony . . . ."); *id.* § 15A-1201(a) ("In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court . . . .").

[366] Phone Interview with Daniel Spiegel, Assistant Professor of Gov't, Univ. of N.C. (Jan. 22, 2024) (noting that in North Carolina misdemeanor bench trials, all normal evidence rules apply, the standard of proof is beyond a reasonable doubt, and the proceedings are treated as a normal trial).

[367] *Id.* (noting that suppression hearings are held concurrent with bench trials).

[368] *Id.*; *see also* Binny Miller, *Visibility and Accountability: Shining a Light on Proceedings in Misdemeanor Two-Tier Court Systems*, 63 ST. LOUIS U. L.J. 191, 193–94 (2019) (describing and criticizing the lack of meaningful review in de novo appeal systems).

[369] Phone Interview with Daniel Spiegel, *supra* note 366.

[370] Miller, *supra* note 368, at 193–95 (describing de novo appeal systems in Maryland, Massachusetts, and Missouri).

[371] Phone Interview with Daniel Spiegel, *supra* note 366.

take less than half of a court day. Most bench trials are over in a single day, although a small number of more complicated cases take more time. If the defense lawyer has a motion to argue (such as a Fourth Amendment issue), this is heard at the same time as the bench trial.[372] And the district court judges are incentivized to give relatively light sentences compared to what the defendant is likely to get on appeal. This encourages defendants to accept the outcome of the bench trial and not seek a de novo jury trial.[373] The relatively quick nature of these bench trials has allowed a culture where they are accepted as a regular occurrence. Prosecutors can technically circumvent the preliminary bench trial by presenting a case to a grand jury and sending it straight to superior court.[374] But this grand jury process is (perhaps counterintuitively) more burdensome than a quick bench trial, so prosecutors rarely exercise this workaround.[375]

North Carolina provides an excellent illustration of pretrial adjudication's benefits. The state has created a pretrial process in which defendants in misdemeanor cases can access meaningful adversary adjudication. Bench trials happen there with some frequency.[376] And the credible threat of a bench trial provides other system benefits, like more opportunities to present legal arguments to a judge and more rigorous case screening by prosecutors. Several prominent criminal justice scholars have called for the simplification and streamlining of trials, arguing that if trials are quicker they are more likely to actually happen.[377] It seems that North Carolina has pursued this vision in a unique way. Rather than streamlining jury trials, North Carolina has created a pretrial system of bench trials.

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[372] The same practice exists in San Francisco misdemeanor cases. *See* discussion *infra* Part VII.B.

[373] The flip side of this dynamic is that the judges on appeal have an incentive to impose a harsher sentence to discourage appeals. *See* Miller, *supra* note 368, at 198 (describing a Maryland case where the judge increased a sentence from sixty days to eighteen months to punish a defendant for bringing a de novo appeal). This is quite similar to the operational logic of the plea bargain system, just with an appeal tax instead of a trial tax. The major difference is that a defendant deterred by the appeal tax has received a bench trial, whereas a defendant who pleads guilty to avoid the trial tax has not.

[374] N.C. GEN. STAT. § 7A-271(a) (2024).

[375] Phone Interview with Daniel Spiegel, *supra* note 366; RUBIN ET AL., *supra* note 195, at 8-20, 8-22 ("If the prosecution wants to charge a new misdemeanor, it must start again in district court except in the rare circumstance in which the grand jury initiates a misdemeanor prosecution by presentment in superior court.").

[376] *See Caseload Dispositions*, N.C. JUD. BRANCH, https://data.nccourts.gov/explore/dataset/caseload-disposition [https://perma.cc/EF89-LFSS] (showing 11,773 misdemeanor bench trials in North Carolina for 2023–2024).

[377] *See generally, e.g.*, Alschuler, *supra* note 88 (arguing for a simplification of trial procedures to encourage more trials); Schulhofer, *supra* note 88 (using the Philadelphia court system as an example of speedy trials).

VII. Suppression Hearings

Motions to suppress evidence are one of the most commonly filed pre-trial motions in criminal cases.[378] They often lead to adversarial hearings before a judge featuring live confrontation of witnesses, usually police officers. The official purpose of these hearings is to decide whether evidence will be excluded from the trial. But more broadly, hearings on suppression motions are also an important form of pre-trial adjudication. They serve not only the immediate goal of possible suppression of evidence, but also the broader goals of previewing the government's case, permitting in-court advocacy, and empowering judges in the criminal process. Section A of this Part discusses the use of suppression hearings as pretrial adjudication.[379] Section B explores two illustrations, one from San Francisco's misdemeanor docket and the other from Washington State, showing how procedural rules and local practice culture can strengthen or diminish the value of these hearings.[380]

A. The Adjudicative Value of Suppression Hearings

Motions to suppress argue that a government actor obtained evidence in violation of the defendant's constitutional rights. As a remedy, these motions seek exclusion of evidence derived from the challenged search or interview. Suppression motions can seek to exclude physical evidence, a defendant's inculpatory statements, and even observations of law enforcement officers.[381] Let's consider, for example, a common misdemeanor charge in many jurisdictions: driving under the influence of alcohol (DUI). Most such cases commence with a traffic stop, followed by questioning, then field sobriety tests, then some kind of chemical test (breath, blood, or both), followed by arrest. If a defendant in such a case files a motion to suppress, they might argue the initial traffic stop was illegal, in which case a successful motion could result in all subsequent parts of the investigation being inadmissible. Or the defendant might argue that some subsequent search, for example the blood draw, was illegal, in which case a win would simply mean the prosecution could not introduce the blood evidence.

Depending on the particulars of the motion, the prosecution may need to call one or numerous live witnesses for a hearing. For instance, it may need to call multiple witnesses in cases involving complex investigations where sever-

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[378] *See, e.g.*, *Pre-Trial Motions*, OFFICES OF THE U.S. ATTORNEYS: U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/pretrial-motions [https://perma.cc/6Y3C-S2L9] (listing suppression motions as one of just three examples of "common pre-trial motions").

[379] *See infra* notes 381–386 and accompanying text.

[380] *See infra* notes 387–404 and accompanying text.

[381] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

al officers relied on each other's work to justify a detention, arrest, and search.[382] In our DUI hypothetical, a suppression motion challenging the traffic stop would require calling the arresting officer, while a motion based on the blood draw might require calling the phlebotomist. These witnesses are questioned under oath by both parties about how the evidence was obtained.

Hearings on suppression motions can be a significant step in pre-trial adjudication. They create a forum for adversary advocacy in open court, with both sets of lawyers present, questioning witnesses, and arguing before a judge. They give the defense an opportunity to hear police officers' testimony about how evidence was gathered in the case. They also let the defense cross-examine those officers to challenge the legality of their actions. This provides a clearer picture of how the police decided that the defendant had committed a crime. It also locks the witnesses into specific details and lets the lawyers evaluate their credibility face to face. In the DUI hypothetical, a defense attorney at a suppression hearing might cross-examine the officer about how the defendant was driving or how she performed on field sobriety tests. If the motion fails and the case proceeds to trial, the officer would be locked into their prior sworn testimony.

The information revealed in a suppression hearing helps both sides evaluate the strengths and weaknesses of their case ahead of trial. If the government's case looks worse after a hearing, this might lead to a dismissal or more favorable plea terms. Similarly, judges can use their power over suppression hearings to encourage prosecutors to settle cases.[383] Suppression hearings can also preserve rule-of-law values by providing a forum for the judge to ensure the government's investigation was lawful. And they impose significant procedural burdens on both prosecutors and the court. The prosecutor needs to arrange for all the relevant witnesses to be available to testify. Courts need to assign judges, court staff, and courtrooms to conduct these hearings. Suppression hearings thus slow down the processing of cases and provide defendants with further negotiating leverage.

The timing of a suppression hearing matters a great deal. Depending on local rules and the case management practices of the court, a motion to suppress could potentially be held at any point between arraignment and trial. For example, in California a court can hear suppression motions concurrent with trial, at a standalone "special" suppression hearing, or concurrent with a pre-

[382] Multiple witnesses might even be called in simpler cases. *See, e.g.*, United States v. Russell, 664 F.3d 1279, 1280 (9th Cir. 2012) (calling three police officers as witnesses in a narcotics possession case).

[383] *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 325–27 (2016) (observing that judges often participate directly in plea negotiations, using their power to encourage the parties to settle).

liminary hearing.[384] Holding a suppression hearing concurrent with a preliminary hearing may be more efficient for prosecutors and the court, since it avoids duplication.[385] Holding a suppression hearing concurrent with trial essentially requires the defense to reject all plea offers if they want to challenge the legality of the evidence. This also prevents a suppression hearing from being used to preview the evidence or influence the plea-bargaining process.[386] Standalone suppression hearings impose a greater burden on the prosecutor and the court, and ensure the defense will benefit from the hearing prior to trial. The more suppression hearings are practically available to the defense, the more value they hold for pretrial adjudication.

B. Suppression Hearings in San Francisco and Washington

As is often the case in criminal law, local courthouse culture can matter as much or more than case law or statutes.[387] This Section presents two examples of local practices at opposite ends of the pretrial adjudication spectrum. San Francisco County's Superior Court makes it all but impossible for motions to suppress to get a hearing ahead of trial in misdemeanor cases.[388] Washington State courts, on the other hand, force prosecutors to affirmatively prove that certain categories of evidence are admissible ahead of trial.[389]

1. San Francisco: Misdemeanor Suppression Hearings Concurrent with Trials

In San Francisco Superior Court, the judges' long-standing practice is to deny suppression hearings until the case is sent to a courtroom for trial.[390] This means that to argue that evidence should be excluded from trial, a defendant must reject all plea bargain offers and actually go to trial. This arrangement nearly eliminates the adjudicative value of a suppression hearing. Because the

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[384] CAL. PENAL CODE § 1538.5(f) (West 2024).

[385] Holding both hearings at once can be advantageous to the defense as well. It could, for example, avoid punitive outcomes if the prosecution or the court seeks to punish defendants for increasing the work burden, or it could broaden the scope of permissible questioning at a preliminary hearing to include issues not related to probable cause but rather to the detention, arrest, search, and seizure of a defendant.

[386] In the DUI hypothetical, if the defense is forced to wait until trial to have the motion to suppress hearing, their trial strategy cannot be informed by the arresting officer's testimony about field sobriety tests, for example, nor would they have time to obtain a transcript of the suppression hearing for impeachment purposes.

[387] *See* Alissa Pollitz Worden, Sarah J. McLean & Megan Kennedy, *Sidestepping Justice? Adjournments in Contemplation of Dismissal in Misdemeanor Court*, 76 ALB. L. REV. 1713, 1739 n.116 (2012/2013) (gathering sources on the impact of local courthouse culture on sentencing practices).

[388] *See infra* notes 390–397 and accompanying text.

[389] *See infra* notes 398–404 and accompanying text.

[390] As discussed in Part IV.B, this is also the practice in North Carolina's misdemeanor bench trial system.

vast majority of cases do not ever make it to trial, almost no defendants will receive the benefit of a suppression hearing.

When one of this Article's authors was defending misdemeanor cases in San Francisco, he represented a young man accused of DUI.[391] Because police found the defendant asleep behind the wheel of his parked car, and because the phlebotomist who poked him at least four times with the needle while he was strapped to a gurney and refused consent was fired shortly thereafter, there were strong grounds for a motion to suppress on the basis that his arrest and blood draw were unlawful.[392] It was not a good trial case for other reasons, so the goal was to have a stand-alone suppression hearing to argue the constitutional violation. With this in mind, the defense team filed a motion to suppress shortly after arraignment but the court, consistent with local practice, refused to offer a hearing prior to trial.[393] The defense team set the case for trial, simply in the hopes of obtaining a suppression hearing.[394] During the thirty-day statutory period allowed for speedy trial,[395] the defendant violated one of the terms of his pretrial release and the judge threatened to remand him into custody if he did not accept the prosecutor's plea deal on the spot.[396] The defendant pled guilty and waived not only his right to trial but also his right to a suppression hearing.[397] This case illustrates how denying a pretrial suppression hearing effectively prevents a defendant from asserting their constitutional rights.

When a suppression hearing is held in advance of trial, it can provide robust pretrial adjudication. But such a hearing cannot provide a meaningful preview of the evidence if it is held at the same time as the trial itself. The defense lawyer is also deprived of the ability to get an official transcript of the testimony, which can be invaluable for cross-examination or impeachment at trial. And a suppression hearing held during the trial cannot realistically influence the plea-negotiation process, because by the time trial has arrived that process will be over.

2. Washington State: Automatic *Miranda* Hearings Initiated by the Prosecutor

Washington State offers a stark contrast to San Francisco. In Washington, there is a rule of court that shifts the burden to the prosecution to prove the admissibility of any of the defendant's statements that the prosecution seeks to admit at trial.[398] Rule of Court 3.5, first adopted in 1973, creates a procedure

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[391] Contemporaneous notes taken by Chesa Boudin and other case details on file with authors.
[392] *Id.*
[393] *Id.*
[394] *Id.*
[395] CAL. PENAL CODE § 1382(a)(3) (West 2024).
[396] Contemporaneous notes taken by Chesa Boudin and other case details on file with authors.
[397] *Id.*
[398] WASH. SUPER. CT. CRIM. R. 3.5(a).

for determining the admissibility of any inculpatory statement by a defendant.[399] The court "shall hold" such a hearing and a defendant "may, but need not, testify at the hearing."[400] If the defendant does choose to testify at the hearing, they do not waive their right to remain silent during the trial, and no mention of the admissibility hearing or their testimony can be made to the jury.[401] The rule further requires that the court provide a recording or transcription of the hearing to the defendant, and make a detailed written ruling on the issues.[402]

This rule, and the fact that it is actually enforced and litigated as a matter of practice, makes pretrial adjudication in Washington considerably stronger.[403] Because the rule automatically requires such a hearing, even defendants with incompetent or overwhelmed defense attorneys will still receive a hearing if no motion is filed. The defense cannot unintentionally forfeit the right to such a hearing, because it is the prosecution's burden to prove admissibility of any statements it seeks to introduce. Indeed, the defense gets the benefit of these hearings even for statements whose admissibility is not being contested.[404] And in contrast to San Francisco's practice, which makes it virtually impossible for the parties to obtain transcripts of suppression hearings ahead of trial, Washington's rule requires that recordings or transcripts be made available.

These two jurisdictions illustrate how local practices can either enhance or undermine pretrial adjudication. Pretrial adjudication is only valuable if it actually happens before trial. If it is rolled into the trial process, as in San Francisco, then we are back in a non-adjudicative guilty plea system. On the other hand, if pretrial adjudication is made automatic as in Washington, then it provides a more meaningful check. It gives defense lawyers an automatic opportunity to see and challenge the government's evidence prior to the trial, and gives judges an automatic opportunity to rule on legal arguments and screen out bad charges.

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[399] *Id.* R. 3.5.

[400] *Id.* R. 3.5(a)–(b).

[401] *Id.* R. 3.5(b).

[402] *Id.* R. 3.5(a), (c).

[403] As one, admittedly imperfect, heuristic to measure the extent to which the hearings that Rule 3.5 provides for are actually being litigated, compare the number of citing cases to each of several rules of criminal procedure as of March 30, 2025 on Westlaw: 3.5 (the rule at issue here) has 1,675 citing cases. By contrast, Rule 3.6 (regarding suppression hearings and duty of court) has 1,488 citing cases, Rule 4.1 (regarding arraignment) has 133 citing cases, Rule 4.2 (regarding pleas) has 956 citing cases, Rule 4.4 (regarding severance of offenses and defendants) has 395 citing cases, and Rule 4.7 (regarding discovery) has 750.

[404] *See, e.g.*, Eaglespeaker v. Connell, No. C22-5151-MJP-SKV, 2022 WL 17569728, at *2 (W.D. Wash. Nov. 2, 2022) ("At [the close of the CrR 3.5 hearing], the defense did not object to the admission of the statements that Eaglespeaker made at the time of his arrest . . . ."), *report and recommendation adopted*, No. C22-5151-MJP-SKV, 2022 WL 17551141 (W.D. Wash. Nov. 9, 2022).

VIII. PRETRIAL ADJUDICATION IN PRACTICE

Our case studies illustrate that meaningful pretrial adjudication is not only possible, but also that it exists in at least a few states. And where these more robust procedures exist, not just on paper but also in practice, they make the criminal justice system more fair, more lawful, and more accurate. To be clear, we are not arguing that any of these proceedings can or should replace jury trials. But given the long-standing and apparently immutable reality that jury trials are going the way of the dodo, more robust pretrial process is preferable to a system of "meet 'em and plead 'em."[405] Pretrial adjudication can slow down case processing. It can give defendants the chance to appear in court and confront the evidence against them. It can increase the quality of evidence (or at least root out false, erroneous, or illegally obtained evidence), bring the law to bear on case outcomes, and facilitate intensive case screening by judges and lawyers.

But an important question remains: how do we ensure that the robust versions of these proceedings actually happen? For every state we highlighted as a model of pretrial criminal procedure, there are many more states where such procedure is nonexistent, is typically waived, or is rendered meaningless through lax evidentiary or procedural rules. The specific hearings we have emphasized are islands of pretrial adjudication in a roaring river of case-processing efficiency. We should study these islands to figure out why they are not swept away.

The goal is to create a norm where these kinds of hearings happen regularly, if not in every case. But for pretrial adjudication to succeed, it must survive pressure from powerful system insiders who want to sacrifice process for efficiency.[406] Even when a strong rule exists on paper by statute, rule, or court order, there are myriad ways it can be rendered meaningless or as rare as a jury trial.[407] The procedures we highlight are common in specific jurisdictions because those jurisdictions have successfully navigated three obstacles: (1) lax procedural and evidentiary rules that render pretrial adjudication ineffectual; (2) summary workarounds that let prosecutors avoid robust pretrial adjudication; and (3) plea-bargain practice that threatens to swallow the pretrial process just as it does the trial.

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[405] CeCelia Valentine, *Meet 'Em and Plead 'Em: Is This the Best Practice?*, 37 CHAMPION 18, 18 (2013).

[406] Justice system stakeholders including judges, prosecutors, and defense attorneys often prefer the process to move quickly and efficiently. *See, e.g.*, Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 78–79 n.75 (1993) (listing eleven studies that describe cooperative relationships between adversarial stakeholders that occur at the expense of the defendant and the public interest in process).

[407] *See, e.g.*, discussion *supra* Part VII.B.1 (discussing the limitations on obtaining a hearing on a motion to suppress in San Francisco's misdemeanor docket).

In many jurisdictions and for many pretrial hearings, lax procedural and evidentiary rules prevent meaningful adversary process. For example, grand juries cannot check the power of the state or the veracity of accusations where, as in most states, there are no limits on the use of hearsay or illegal evidence, no one other than the prosecutor appears, and there is no mechanism for review.[408] Similarly, preliminary hearings do not really help with case screening if prosecutors can use multiple levels of hearsay to shield all the potential trial witnesses from testifying.[409] And preliminary bench trials actually undermine due process where, as in many municipal courts, they lack even the trappings of legality like professional judges, defense lawyers, or rules of evidence.[410] Just creating these types of pretrial proceedings is insufficient. They must be implemented in a way that gives them actual power.

Procedural hydraulics create a second obstacle to robust pretrial adjudication. When procedural rules allow for multiple pathways and one option is more burdensome, prosecutors will generally opt for the less exacting alternative. Though the pathways are often complex, the basic incentives are straightforward. In most jurisdictions, grand juries are a less burdensome path to establish probable cause than preliminary hearings. Thus, to the extent that prosecutors are given a choice, they opt for grand juries. California exhibits a unique reversal of this dynamic, because it has unusually burdensome grand jury procedures.[411] California is therefore an outlier jurisdiction where preliminary hearings occur in high volume and actually have adjudicative value.[412] Similarly, in North Carolina, prosecutors could send misdemeanor cases straight to superior court with a grand jury procedure, but generally opt instead for misdemeanor bench trials in district court.[413] While the particular legal history and practice culture varies significantly between jurisdictions, the key is to design pretrial adjudication in ways that avoid prosecutors substituting less robust alternatives as a bypass. Having multiple pathways that prosecutors can choose from, as in California and North Carolina, is not fatal as long as there are robust rules in both alternatives.

Finally, perhaps the most intense and constant pressure on islands of pretrial adjudication is the plea-bargain market. In every jurisdiction, there is a risk that any procedural right, no matter how robust if exercised, will be systematically waived in plea deals. Theoretically, any of the procedures outlined in this Article could be swallowed up by the plea-bargain system. Pressure

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[408] *See* discussion *supra* Part III.B; Appendix A.
[409] *See* discussion *supra* Part IV.A; Appendix B.
[410] *See* discussion *supra* Part VI.A.
[411] *See* discussion *supra* Part II.C.
[412] *See* discussion *supra* Part III.B.
[413] *See* discussion *supra* Part VI.B.

from judges, prosecutors, or even defense attorneys can leave defendants, especially those in pretrial detention, unable to avail themselves of pretrial procedure. In Florida, for example, prosecutors and defense attorneys from across the state agreed that asserting the right to depose certain vulnerable victims, such as in child sex cases, would generally result in withdrawal of any plea offer.[414] Thus, there is an understanding and a culture of not deposing these victims except in cases that are all but certain to go to trial.[415] Similarly, in San Francisco misdemeanor court, obtaining a hearing on a motion to suppress evidence generally requires actually going to trial.[416] This effectively removes suppression hearings from most defendants' reach.

While there is always a risk of plea-bargain pressures swallowing pretrial adjudication, there are various factors that can safeguard against this outcome on a system-wide basis. First, all the procedures discussed in this Article are substantially less burdensome than jury trials. Even California's preliminary hearings and North Carolina's bench trials regularly happen in a single court session. The system should thus be better able to accommodate these procedures than full jury trials. Second, even after these procedures occur, the prosecutor and the court still have an incentive to offer a deal to avoid trial. Threats to pull or worsen a plea offer are not always credible, particularly where there is a widespread practice of defendants asserting procedural rights in that jurisdiction. A prosecutor may threaten to pull an offer if a defendant mandates a deposition, but after the deposition, the prosecutor still wants to incentivize a guilty plea to avoid trial. Third, often meaningful pretrial adjudication weakens the government's case, resulting in dismissal or less punitive plea deals. For example, a prosecutor can threaten to pull a plea deal if a defendant insists on deposing a victim, but if the victim does not show up to the deposition, there is a high chance the case will get dismissed entirely.[417] Fourth, prosecutors and judges actually find some of these procedures useful. Prosecutors would much rather learn via a deposition,[418] grand jury, preliminary hearing, or suppression hearing that an investigating officer is "testilying,"[419] than end up embarrassed

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[414] Phone Interview with Elizabeth Rose London, *supra* note 303; Phone Interview with James Rubin and Katerine Lopez, *supra* note 303; Phone Interview with Prya Murad, *supra* note 319; Phone Interview with Aramis Ayala, *supra* note 303.

[415] *See supra* note 414 and accompanying text (highlighting attorneys' views that making a victim take a deposition in a sexual assault case could disadvantage their clients).

[416] *See* discussion *supra* Part VII.B.

[417] This is not just hypothetical, but an actual example used by a former elected prosecutor describing the benefits of depositions for the prosecution. Phone Interview with Aramis Ayala, *supra* note 303.

[418] E-mail from Monique Worrell to Chesa Boudin, *supra* note 303.

[419] Joseph Goldstein, *Police 'Testilying' Remains a Problem. Here Is How the Criminal Justice System Could Reduce It.*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/nyregion/police-lying-new-york.html [https://perma.cc/32RY-CVRQ].

in front of a jury. Trial judges, for their part, would also prefer that the parties are well prepared to present evidence at a trial, which is impossible if there has been no pretrial discovery or adjudication of legal issues. And judges and prosecutors, to the extent their job is to sort innocent defendants from guilty ones, have an interest in the case screening function that these procedures serve.

Robust pretrial adjudication can significantly improve a system of pleas. If every case ended up in front of a jury, pretrial adjudication would mostly just help the parties in preparing for trial. In our current system where almost no cases end up in front of a jury, however, pretrial adjudication is imperative to preserve the rule of law and the adversarial system.[420] But this does not mean these hearings need to happen in every case. Even in an ideal system with lots of pretrial adjudication, hearings will sometimes be waived in the defendant's best interest. For example, if a defendant is in custody, they may want to waive a preliminary proceeding to reduce their jail time. Indeed, the more pretrial adjudication that is readily available, the more easily a defendant can choose which procedures are mostly likely to be productive and which can be waived for a benefit.[421] Frequent pretrial hearings, therefore, can improve the system even if they don't happen in every case.

Where pretrial adjudication happens regularly, it not only informs decision-making by the parties—it also empowers judges to impact case outcomes. Judges can use their leverage over hearings to push parties towards reasonable plea agreements.[422] Judges can also screen out unsupported charges or narrow the scope of evidence. The very fact that these procedures are available, and the credible threat that they might occur, helps re-judicialize a process that is currently dominated by prosecutors. It also empowers defense lawyers because it allows them to make arguments before a neutral tribunal, not just directly to the prosecutor. If pretrial adjudication becomes widespread, defendants can once again have their day in court.

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[420] It is unlikely that expanding pretrial adjudication would meaningfully decrease the paltry number of cases that go to trial now. To the extent that pretrial adjudication provides prosecutors with reason to dismiss or substantially improve a plea deal, however, that is likely a net positive for the system. To the extent that pretrial adjudication provides the defense with a reason to avoid the risk of trial, that is also likely a net positive. Civil litigation operates by the same logic: discovering more information, earlier, is better.

[421] *Cf.* Rappaport, *supra* note 95, at 182.

[422] For example, in San Francisco Superior Court, the judge assigned to handle felony settlement conferences is often the same judge assigned to rule on motions to set aside informations after a preliminary hearing. Some judges will intentionally withhold ruling on a dispositive motion for an extended period of time so that there is risk and leverage to facilitate settlement.

Conclusion

The United States has an adversary criminal justice system with no adversary criminal justice. It is a strange paradox. Our system's theory of legitimacy is that defendants are given rights and process to contest the government's charges in open court. But that doesn't actually happen. Almost everyone pleads guilty without meaningful adversary proceedings, because the system is designed to make them do so. So, what do you do when a system's legitimizing idea has been abandoned by reality? Jury trials do not seem to be coming back any time soon. And the main reform proposals—trying to make guilty pleas transparent, treating prosecutors as adjudicators, etc.—adopt a more inquisitorial vision of legitimacy. Give up on fighting your case in open court. Your lot is to be processed into jail by a well-meaning prosecution bureaucracy. But don't worry, your lawyer will explain very clearly why pleading guilty is your best option.

We are not ready to give up on the adversary system. If the United States is going to have criminal courts, they should do more than just process guilty pleas. They should hold the occasional hearing where evidence is presented, arguments are made, and legal questions are decided. This does happen in the civil justice system. Civil procedure has largely abandoned trials, too. But they have been replaced with extensive pretrial litigation that serves most of the same functions as trials. Can criminal procedure replicate this move? Civil defendants do, admittedly, have better lobbyists than criminal defendants. But there is some hope. Thanks to the laboratories of experimentation amongst the fifty states, there are real-world models of pretrial adjudication at hand. These models have demonstrated that grand juries don't have to be rubber stamps, that criminal discovery can involve depositions, that preliminary hearings can be like mini-trials, and that bench trials can be like preliminary hearings. These procedures, and others like them, could provide the blueprint for a program of reform. It is possible for the criminal justice system to value more than just efficiency.

APPENDIX A: GRAND JURY PROCEEDINGS

State	Source of Authority		Procedure		
	Statute or Court Rule	**Case Law**	**Hearsay Admissibility**	**Illegally Obtained Evidence (IOE) Admissibility**	**Challenging the Indictment for Sufficiency & Competency of Evidence**
Federal	FED. R. EVID. 1101(d)(2) (hearsay)	United States v. Calandra, 414 U.S. 338, 345 (1974) (IOE); Costello v. United States, 350 U.S. 359, 363 (1956) (hearsay); United States v. Blue, 384 U.S. 251, 255 (1966) (IOE); Midland Asphalt Corp. v. United States, 489 U.S. 794, 802 (1989) (challenge)	Admissible	Admissible	Not Challengeable[423]
AL	ALA. CODE § 12-16-200 (2024) (hearsay); ALA. R. CRIM. P. 12.8(f) (hearsay and IOE)	Coral v. State, 628 So. 2d 954, 964 (Ala. Crim. App. 1992) (hearsay); Wabbington v. State, 446 So. 2d 665, 667 (Ala. Crim. App. 1983) (challenge)	Admissible	Admissible	"Ordinarily" Not Challengeable
AK	ALASKA R. CRIM. P. 6(s)(2) (hearsay)	Mohn v. State, 584 P.2d 40, 42 (Alaska 1978) (court left IOE unaddressed); Nelson v. State, 628 P.2d 884, 890 (Alaska 1981) (challenge)	Admissible (with compelling justification or from child victim)	Unclear	Challengeable

NOTE: Because not all platforms support tables, these Appendices are archived at https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/66-4/boudin-fish.pdf [https://perma.cc/CU9Z-SN7Y].

[423] *See* United States v. Mechanik, 475 U.S. 66, 70 (1986) (holding that a conviction by petit jury renders errors at the grand jury stage harmless and therefore not amenable to post-conviction review).

AZ		Franzi v. Superior Ct., 679 P.2d 1043, 1052 (Ariz. 1984) (hearsay); State v. Cousino, 500 P.2d 1146, 1148 (Ariz. Ct. App. 1972) (hearsay); State *ex rel.* Berger v. Myers, 495 P.2d 844, 846 (Ariz. 1972) (IOE); State v. Jacobson, 524 P.2d 962, 964 (Ariz. Ct. App. 1974) (challenge)	Admissible	Admissible	Not Challengeable[424]
AR	ARK. R. EVID. 1101(b)(2) (hearsay); ARK. CODE ANN. § 16-85-706 (2024) (challenge)	McDonald v. State, 244 S.W. 20, 22 (Ark. 1922) (IOE)	Admissible	Admissible[425]	Not Challengeable
CA	CAL. PENAL CODE § 939.6(b) (West 2024) (hearsay and IOE); *id.* § 938.1 (challenge)		Inadmissible (except for establishing foundation through a peace officer)	Inadmissible	Challengeable
CO	COLO. R. EVID. 1101(d)(2) (hearsay)	People *ex rel.* Dunbar v. Dist. Ct., 500 P.2d 819, 820 (Colo. 1972) (IOE)	Admissible	Admissible[426]	Challengeable[427]

424 A defendant may challenge an indictment for denial of a substantial procedural right or insufficient number of qualified grand jurors, ARIZ. R. CRIM. P. 12.9, or if the allegations charged in the indictment do not constitute a crime. Mejak v. Granville, 136 P.3d 874, 875 (Ariz. 2006).

425 "When the grand jury has returned an indictment accusing a person of crime without hearing any legal evidence, such a proceeding upon the part of the grand jury does not deprive the accused of any right guaranteed to him under the Constitution." McDonald v. State, 244 S.W. 20, 22 (Ark. 1922).

426 *See* People *ex rel.* Dunbar v. Dist., 500 P.2d 819, 820 (Colo. 1972) (holding that grand jury proceedings were free of technical rules and illegally obtained evidence is not required to be suppressed or excluded from grand juries).

427 Colorado law states:

> The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.

CT		State v. Fasset, 16 Conn. 457, 471–72 (1844) (hearsay); State v. Avcollie, 453 A.2d 418, 421 (Conn. 1982) (IOE); State v. McGann, 506 A.2d 109, 112 (Conn. 1986) (challenge)	Admissible	Admissible	Not Challengeable
DE	DEL. R. EVID. 1101(b)(2) (hearsay)	State v. Jenkins, 277 A.2d 703, 707 (Del. Super. Ct. 1971) (IOE); Steigler v. Superior Ct., 252 A.2d 300, 304 (Del. 1969) (challenge)	Admissible	Likely Admissible[428]	Not Challengeable
FL	FLA. STAT. § 90.103 (2024) (hearsay and IOE)	State v. Schroeder, 112 So. 2d 257, 259 (Fla. 1959) (challenge); *In re* Grand Jury Investigation, 287 So. 2d 43, 48 (Fla. 1973) (IOE); *In re* Spring Term (1977), Pinellas Cnty. Grand Jury, 357 So. 2d 770, 771 (Fla. Dist. Ct. App. 1978) (IOE)	Admissible	Admissible (absent statutory requirement)[429]	Not Challengeable

COLO. REV. STAT. ANN. § 16-5-204(4)(k) (2024).

[428] *See* State v. Jenkins, 277 A.2d 703, 707 (Del. Super. Ct. 1971) (quoting United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964) (first citing Lawn v. United States, 355 U.S. 339 (1958); and then citing Costello v. United States, 350 U.S. 359, 363 (1956))) (suggesting indictment based on illegally obtained evidence may be admissible in grand jury hearings).

[429] The only situation where evidence alleged to have been seized illegally has been ruled an improper subject of grand jury inquiry has been where legislation expressly provides that such evidence may not be considered by the grand jury. *In re* Spring Term (1977), Pinellas Cnty. Grand Jury, 357 So. 2d 770, 771 (Fla. Dist. Ct. App. 1978). Section 934.06 of the Florida Statutes specifically states that evidence obtained as a result of a violation of Chapter 934 may not be presented for a grand jury's consideration. FLA. STAT. § 934.06 (2024); *In re* Grand Jury Investigation, 287 So. 2d 43, 48 (Fla. 1973).

GA		Anderson v. State, 365 S.E.2d 421, 426 (Ga. 1988) (hearsay); First Nat'l Bank & Tr. Co. v. State, 227 S.E.2d 20, 20 (Ga. 1976) (challenge)	Admissible	Admissible	Not Challengeable
HI	HAW. R. EVID. 1101(d)(2) (hearsay)	State v. Wilson, 519 P.2d 228, 232 (Haw. 1974) (Ogata, J., dissenting) (IOE)[430]; State v. Ontai, 929 P.2d 69, 77 (Haw. 1996) (challenge)	Admissible	Admissible	Challengeable (for insufficient evidence)[431]
ID	IDAHO R. EVID. 101(b) (hearsay and IOE); IDAHO CODE § 19-1105 (2024) (hearsay and IOE)	State v. Edmonson, 743 P.2d 459, 465 (Idaho 1987) (hearsay, IOE, and challenge); State v. Jones, 873 P.2d 122, 128 (Idaho 1994) (challenge)	Inadmissible[432]	Inadmissible[433]	Challengeable[434]

[430] "Even had the evidence sought to be suppressed been seized unconstitutionally, it was nonetheless admissible in the deliberations of the grand jury. The exclusionary rule did not apply." State v. Wilson, 519 P.2d 228, 232 (Haw. 1974) (Ogata, J., dissenting).

[431] *See* State v. Ganal, 917 P.2d 370, 379 (Haw. 1996) (writing that while reviewing an indictment's sufficiency of evidence to establish probable cause, every legitimate inference must be drawn "in favor of the indictment").

[432] Idaho law states:

> In the investigation of a charge for the purpose of either presentment or indictment, the grand jury can receive any evidence that is given by witnesses produced and sworn before them except as hereinafter provided, furnished by legal documentary evidence, the deposition of a witness in the cases provided by this code or legally admissible hearsay.

IDAHO CODE § 19-1105 (2024).

[433] *Id.*

[434] In 1994, in *State v. Jones*, the Supreme Court of Idaho stated:

> [I]nquiry into the propriety of the grand jury proceeding is two-fold. First, we must determine whether, independent of any inadmissible evidence, the grand jury received legally sufficient evidence to support a finding of probable cause. Second, we must dismiss the indictment if, despite an adequate finding of probable cause, the prosecutorial misconduct in submitting the illegal evidence was so egregious as to be prejudicial.

873 P.2d 122, 128 (Idaho 1994) (citation omitted), *overruled on other grounds by* State v. Montgomery, 408 P.3d 38 (Idaho 2017).

IL		People v. Jones, 166 N.E.2d 1, 7 (Ill. 1960) (hearsay); People v. J.H., 554 N.E.2d 961, 965 (Ill. 1990) (IOE); People v. Nolan, 2019 IL App (2d) 180354, ¶¶ 10–13 (challenge); People v. Basile, 2022 IL App (2d) 210740, ¶ 14 (challenge), *rev'd*, 2024 IL 129026	Admissible	Admissible	Challengeable (for prosecutorial misconduct)[435]
IN	IND. R. EVID. 101(d)(2) (hearsay)	King v. State, 139 N.E.2d 547, 551 (Ind. 1957) (IOE); State *ex rel.* Pollard v. Crim. Ct., N.E.2d 573, 585 (Ind. 1975) (IOE); Hubbard v. State, 313 N.E.2d 346, 348 (Ind. 1974) (challenge)	Admissible	Admissible	Not Challengeable
IA	IOWA R. EVID. 5.1101(c)(2) (hearsay); IOWA R. CRIM. P. 2.4(5) (challenge)	State v. Hall, 235 N.W.2d 702, 712 (Iowa 1975) (IOE); State v. Doss, 355 N.W.2d 874, 880 (Iowa 1984) (challenge)	Admissible	Admissible (unless privileged)	Not Challengeable (except for prejudice)[436]
KS	KAN. STAT. ANN. § 60-402 (2024) (hearsay); *id.* § 22-3003 (hearsay and IOE); *id.* § 22-3208 (challenge)	State v. Turner, 333 P.3d 155, 169–70 (Kan. 2014) (IOE and challenge)	Inadmissible	Inadmissible	Challengeable

[435] *See* People v. Nolan, 2019 IL App (2d) 180354, ¶¶ 10–13 (ruling that while a defendant may not challenge the sufficiency of the evidence considered by a grand jury as long as some evidence was presented, a defendant may challenge an indictment that was procured through prosecutorial misconduct).

[436] *See* IOWA R. CRIM. P. 2.4(5) (providing that proceedings will not be affected by any defect in the indictment that does not prejudice a substantial right of the defendant).

KY	KY. R. EVID. 1101(d)(2) (hearsay and IOE); KY. R. CRIM. P. 5.10 (challenge)	Tinsley v. Million, 399 F.3d 796, 815 (6th Cir. 2005) (hearsay); Jackson v. Commonwealth, 20 S.W.3d 906, 908 (Ky. 2000) (challenge)	Admissible	Admissible (unless privileged)	Not Challengeable
LA	LA. CODE EVID. ANN. art. 1101(C)(6) (2024) (hearsay); LA. CODE CRIM. PROC. ANN. art. 442 (2024) (IOE); *id.* art. 533 (challenge)	State v. Antoine, 344 So. 2d 666, 666 (La. 1977) (hearsay)	Admissible	Admissible	Not Challengeable
ME	ME. R. EVID. 101(b)(2) (hearsay and IOE)	Halacy v. Steen, 670 A.2d 1371, 1375 (Me. 1996) (hearsay); State v. St. Clair, 418 A.2d 184, 186 n.2 (Me. 1980) (IOE); State v. Marshall, 491 A.2d 554, 557 (Me. 1985) (challenge); State v. Douglas, 114 A.2d 253, 256 (Me. 1955) (challenge)	Admissible	Admissible (unless privileged)	Not Challengeable

MD	MD. R. EVID. 5-101(b)(1) (hearsay); MD. CODE ANN., CTS. & JUD. PROC. § 10-412 (LexisNexis 2024) (IOE)	Casey v. State, 722 A.2d 385, 393–94 (Md. Ct. Spec. App. 1999) (IOE and challenge); Steffey v. State, 573 A.2d 70, 74 (Md. Ct. Spec. App. 1990) (IOE and challenge); Bartram v. State, 364 A.2d 1119, 1157 (Md. Ct. Spec. App. 1976) (hearsay and challenge)	Admissible	Admissible (absent statutory requirement)[437]	Not Challengeable
MA	MASS. R. EVID. 1101(c)(2) (hearsay)	Commonwealth v. Gibson, 333 N.E.2d 400, 404 (Mass. 1975) (IOE); Commonwealth v. Thompson, 696 N.E.2d 105, 111 (Mass. 1998) (challenge); Commonwealth v. McCarthy, 430 N.E.2d 1195, 1197 (Mass. 1982) (challenge)	Admissible	Admissible	Not Challengeable (except in extraordinary circumstances)[438]

[437] Evidence seized in violation of Maryland's wiretap and electronic surveillance statute is inadmissible in a grand jury hearing. MD. CODE ANN., CTS. & JUD. PROC. § 10-412 (LexisNexis 2024). But, a defendant is not entitled to a dismissal of an indictment, even though it was returned by a grand jury that received evidence from a wiretap conceded to have been unlawful. Casey v. State, 722 A.2d 385, 393–94 (Md. Ct. Spec. App. 1999).

[438] *See* Commonwealth v. Thompson, 696 N.E.2d 105, 111 (Mass. 1998) ("[C]ourt[s] should not inquire into the quality of evidence heard by a grand jury unless 'extraordinary circumstances' obtain . . . ." (quoting Commonwealth v. Lammi, 37 N.E.2d 250, 254 (Mass. 1941))); Commonwealth v. Buono, 142 N.E.3d 14, 21–22 (Mass. 2020) (holding that a special statute of limitations for sex crimes against a child that requires corroborating evidence for charge brought more than twenty-seven years after the commission of the offense is an exception to the rule that courts will not review the competency or sufficiency of the evidence before the grand jury and requiring the prosecution to present corroborating evidence to the grand jury).

MI	MICH. R. EVID. 1101(b)(2) (hearsay and IOE); MICH. COMP. LAWS § 767.74 (2024) (challenge)	People v. Hoffman, 518 N.W.2d 817, 828 (Mich. Ct. App. 1994) (IOE)	Admissible	Likely Admissible[439]	Not Challengeable
MN	MINN. R. EVID. 1101(b)(2) (hearsay); MINN. R. CRIM. P. 18.05 (hearsay and IOE); *id.* R. 17.06 (challenge)	State v. Plevell, 889 N.W.2d 584, 588 (Minn. Ct. App. 2017) (hearsay); State v. Greenleaf, 591 N.W.2d 488, 498 (Minn. 1999) (IOE and challenge)	Admissible (if foundational, presentable at trial, expert reports, regarding property crimes, signed statements from unavailable witnesses, or oral summaries of documents)[440]	Inadmissible	Challengeable[441]
MS	MISS. R. EVID. 1101(b)(2) (hearsay)	Welch v. State, 8 So. 673, 673 (Miss. 1891) (IOE and challenge); State v. Matthews, 218 So. 2d 743, 744 (Miss. 1969) (challenge)	Admissible	Admissible	Not Challengeable

[439] While there is no direct case law, IOE is presumed admissible as other incompetent evidence is admissible. *See* People v. Hoffman, 518 N.W.2d 817, 828 (Mich. Ct. App. 1994) (holding that because a grand jury is not constrained by the rules of evidence, it can consider incompetent evidence in the form of polygraph results).

[440] MINN. R. CRIM. P. 18.05.

[441] A motion to dismiss an indictment may be made if the evidence admissible before the grand jury was not sufficient to establish an offense charged or any lesser or other included offense. *Id.* 17.06. *But see* State v. Greenleaf, 591 N.W.2d 488, 498 (Minn. 1999) (holding that presumption of regularity attaches to the indictment and it is a rare case where an indictment will be invalidated).

MO		State v. Tressler, 503 S.W.2d 13, 15–17 (Mo. 1973) (hearsay); State v. Stapleton, 539 S.W.2d 655, 658 (Mo. Ct. App. 1976) (IOE); State v. Burkhart, 615 S.W.2d 565, 568 (Mo. Ct. App. 1981) (challenge)	Admissible	Admissible	Not Challengeable
MT	MONT. R. EVID. 101(c)(2) (hearsay)	State v. Thorsness, 528 P.2d 692, 695–96 (Mont. 1974) (IOE); *In re* Secret Grand Jury Inquiry, John & Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 992 (Mont. 1976) (IOE and challenge)	Admissible	Questionable[442]	Grounds for Review Not Established[443]
NE	NEB. REV. STAT. § 27-1101(4) (2024) (hearsay and IOE); *id.* § 29-1418(3) (challenge)	State v. Schrader, 244 N.W.2d 498, 503 (Neb. 1976) (IOE)	Admissible	Admissible	Challengeable (for insufficient evidence)[444]

[442] *See* State v. Thorsness, 528 P.2d 692, 695–96 (Mont. 1974) (holding that illegally seized evidence may be used in grand jury proceedings). *But see* MONT. CODE ANN. § 46-11-314 (2024) ("In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses produced and sworn before it or that furnished by legal evidence or the deposition of a witness.").

[443] *See In re* Secret Grand Jury Inquiry, John & Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 992 (Mont. 1976) (adopting *United States v. Calandra*'s perspective on independence of grand jury from judiciary). *But see* MONT. CODE ANN. § 46-11-314 (establishing higher bar for grand jury evidence than *Calandra*).

[444] Nebraska law states:

> The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.

NEB. REV. STAT. § 29-1418(3) (2024).

NV	NEV. REV. STAT. § 172.135 (2024) (hearsay and IOE); *id.* § 172.155(2) (challenge)	Gathrite v. Eighth Jud. Dist. Ct., 451 P.3d 891, 895 (Nev. 2019) (IOE); Sheriff v. Miley, 663 P.2d 343, 344 (Nev. 1983) (challenge)	Inadmissible (with certain exceptions)[445]	Inadmissible[446]	Challengeable (for insufficient evidence)[447]
NH	N.H. R. EVID. 1101(d)(2) (hearsay)	State v. St. Arnault, 317 A.2d 789, 791 (N.H. 1974) (hearsay); State v. Blake, 305 A.2d 300, 303 (N.H. 1973) (IOE); State v. Williams, 708 A.2d 55, 57 (N.H. 1998) (challenge)	Admissible	Admissible	Not Challengeable
NJ	N.J. R. EVID. 101(a)(3)(D) (hearsay)	State v. Sugar, 417 A.2d 474, 486 (N.J. 1980) (IOE); State v. Price, 260 A.2d 877, 879 (N.J. Super. Ct. Law Div. 1970) (challenge)	Admissible	Inadmissible	Challengeable[448]

[445] Section 172.135 of the Nevada Code provides that hearsay evidence is inadmissible at a grand jury hearing unless: (1) it is an expert's report or an affidavit of a property crime victim; (2) it is a statement made by the alleged victim of the following offenses: (a) a sexual offense committed against a child who is under the age of sixteen years if the offense is punishable as a felony; (b) abuse of a child under the age of sixteen years and the offense is punishable as a felony; and (c) domestic violence that is punishable as a felony which resulted in substantial bodily harm to the alleged victim; or (3) a prior inconsistent statement by a grand jury witness. NEV. REV. STAT. § 172.135(2) (2024).

[446] "[T]he grand jury can receive none but legal evidence . . . ." *Id.*; *accord* Gathrite v. Eighth Jud. Dist. Ct., 451 P.3d 891, 895 (Nev. 2019) (holding that evidence that has been suppressed because it was obtained in violation of a defendant's constitutional rights is not "legal evidence" that may be presented to the grand jury, because such evidence is not admissible).

[447] The defendant may object to the sufficiency of the evidence to sustain the indictment only by application for a writ of habeas corpus. NEV. REV. STAT. § 172.155(2). *But see* Sheriff v. Miley, 663 P.2d 343, 344 (Nev. 1983) ("In grand jury proceedings, the state need only show that a crime has been committed and that the accused probably committed it. The finding of probable cause to support a criminal charge may be based on 'slight, even "marginal" evidence . . . .'" (quoting Sheriff v. Hodes, 606 P.2d 178, 180 (Nev. 1980))).

[448] "An indictment should be quashed only when palpably deficient." State v. Price, 260 A.2d 877, 879 (N.J. Super. Ct. Law Div. 1970) (citing State v. Riley, 235 A.2d 503 (Monmouth County Ct. 1967), *aff'd*, 244 A.2d 513 (N.J. Super. Ct. App. Div. 1968)). "If the evidence is either tainted or incompetent in some fashion, defendant has adequate legal remedies at a later stage in the proceedings against him. While a grand jury cannot be permitted to indict upon mere whim or caprice, it is only required to find that a crime was committed and that the accused person should

NM	N.M. STAT. ANN. § 31-6-11(A) (2024) (hearsay and challenge)	Buzbee v. Donnelly, 634 P.2d 1244, 1254 (N.M. 1981) (IOE)	Admissible	Admissible	Not Challengeable
NY	N.Y. Code Crim. Proc. § 190.30(1) (McKinney 2024) (hearsay); *id.* § 210.20(1) (challenge)	People v. McGrath, 385 N.E.2d 541, 544 (N.Y. 1978) (IOE); People v. Estenson, 476 N.Y.S.2d 39, 40 (App. Div. 1984) (IOE); People v. Sanoguet, 597 N.Y.S.2d 854, 857 (Sup. Ct. 1993) (challenge)	Inadmissible (except for expert reports, property crime authentication, sex offender registry, videotaped child witness, and certain business records)	Admissible	Challengeable (for insufficient evidence)[449]
NC	N.C. R. EVID. 1101(b)(2) (hearsay and IOE)	State v. Turner, 150 S.E.2d 406, 409–10 (N.C. 1966) (IOE and challenge)	Admissible	Admissible	Challengeable (for wholly incompetent evidence)[450]
ND	N.D. CENT. CODE § 29-10.1-26(2) (hearsay, IOE, and challenge)	State v. Nordquist, 309 N.W.2d 109, 116 (N.D. 1981) (challenge)	Inadmissible	Inadmissible (but not grounds for dismissing indictment)[451]	Challengeable

be required to stand trial on the charge." *Id.* at 879–80 (first citing *Riley*, 235 A.2d at 503; and then citing Rosetty v. Twp. Comm., 197 A.2d 600 (N.J. Super. Ct. Law Div. 1964), *aff'd*, 232 A.2d 455 (N.J. Super. Ct. App. Div. 1967)).

[449] An indictment may be dismissed if "[t]he evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense . . . ." N.Y. CODE CRIM. PROC. LAW § 210.20(1)(b) (McKinney 2024). Evidence is legally sufficient if, unexplained and uncontradicted, it would support a conviction. People v. Sanoguet, 597 N.Y.S.2d 854, 857 (Sup. Ct. 1993).

[450] *See* State v. Turner, 150 S.E.2d 406, 410 (N.C. 1966) (ruling that indictment may be challenged if there is no competent evidence).

[451] "[T]he fact the evidence inadmissible at the trial was received by the grand jury does not render the indictment void if sufficient competent evidence to support the indictment was received by the grand jury." N.D. CENT. CODE § 29-10.1-26 (2024).

OH	OHIO R. EVID. 101(D)(2) (hearsay)	Villasino v. Maxwell, 190 N.E.2d 265, 266 (Ohio 1963) (IOE); State v. Selby, 126 N.E.2d 606, 607 (Ohio Ct. C.P. 1955) (challenge)	Admissible	Admissible	Not Challengeable
OK	OKLA. STAT. tit. 12, § 2103 (2024) (hearsay); *id.* tit. 22, § 333 (hearsay and IOE)	Shivers v. Territory, 74 P. 899, 900 (Okla. 1903) (challenge)	Likely Inadmissible (except for written testimony of preliminary hearing witnesses or sworn testimony from district attorney)[452]	Likely Inadmissible[453]	Challengeable
OR	OR. REV. STAT. § 132.320(1) (2024) (hearsay and IOE)	State v. Stout, 749 P.2d 1174, 1178 (Or. 1988) (hearsay); State v. O'Brien, 774 P.2d 1109, 1111 (Or. Ct. App. 1989) (challenge)	Inadmissible (with specific exceptions)[454]	Inadmissible (but not grounds for dismissing indictment)[455]	Not Challengeable

[452] There is no direct case law regarding whether rules of evidence apply, grand jury hearings are not called out in the list of proceedings exempted from the Oklahoma Evidence Code, OKLA. STAT. tit. 12, § 2103 (2024), and the statute explicitly allowing for hearsay in grand jury proceedings was repealed. *Id.* § 3102, *repealed by* H.B. 1939, 48th Leg., 2d Reg. Sess. (Okla. 2002). Title 22, Section 333 of the Oklahoma Code provides that "the grand jury may receive the written testimony of the witnesses taken in a preliminary examination of the same charge, and also the sworn testimony prepared by the district attorney without bringing those witnesses before them, and may hear evidence given by witnesses produced and sworn before them, and may also receive legal documentary evidence." *Id.* tit. 22, § 333 (2024).

[453] *Id.* tit. 12, §2103.

[454] Section 132.320 of the Oregon Statutes provides that the grand jury cannot receive any evidence that would be inadmissible in a trial except: an expert report, an affidavit from witness with good cause to be unable to appear, a peace officer's affidavit regarding defendant's driving with suspended record, live-telecommunication testimony, an affidavit from a court officer regarding defendant's failure to appear, testimony from a peace officer regarding information from another officer's investigatory report, sex offender registration information regarding defendant's failure to register, an affidavit from a peace officer regarding defendant operating under the influence, an affidavit of a representative of a financial institution for authenticating records, and a statement of an underage victim or person with disabilities such that they cannot understand or participate in hearings. OR. REV. STAT. § 132.320 (2024). *But see* State v. Stout, 749 P.2d 1174, 1178 (Or. 1988) (holding that presentation of hearsay evidence to grand jury, in violation of grand jury evidentiary statute, did not warrant setting aside the indictment, as grand

PA		Commonwealth v. Dessus, 224 A.2d 188, 191 (Pa. 1966) (hearsay); Commonwealth v. Padden, 50 A.2d 722, 724 (Pa. Super. Ct. 1947) (IOE); Commonwealth v. Webster, 337 A.2d 914, 917 (Pa. 1975) (challenge)	Admissible	Inadmissible (but not grounds for dismissing indictment)	Not Challengeable
RI	R.I. R. EVID. 101(b)(2) (hearsay)	State v. Stone, 924 A.2d 773, 782 (R.I. 2007) (IOE); State v. Acquisto, 463 A.2d 122, 127 (R.I. 1983) (challenge)	Admissible	Admissible	Not Challengeable
SC	S.C. R. EVID. 1101(d)(2) (hearsay)	State v. Williams, 210 S.E.2d 298, 301 (S.C. 1974) (hearsay, IOE, and challenge)	Admissible	Admissible	Not Challengeable
SD	S.D. CODIFIED LAWS § 23A-5-15 (2024) (hearsay and IOE)	State v. Carothers, 2006 S.D. 100, ¶ 9, 724 N.W.2d 610, 616 (hearsay, IOE, and challenge)	Inadmissible (but not grounds for dismissing indictment)[456]	Inadmissible (but not grounds for dismissing indictment)[457]	Not Challengeable

jury evidentiary statute did not demonstrate legislature's intent to override interpretation that another statute provided exclusive grounds for setting aside an indictment).

[455] *See* OR. REV. STAT. § 132.320. *But see* State v. O'Brien, 774 P.2d 1109, 1111 (Or. Ct. App. 1989) (listing the exclusive grounds for setting aside an indictment).

[456] *See* State v. Carothers, 2006 S.D. 100, ¶ 9, 724 N.W.2d 610, 616 (holding that though the rules of evidence apply to grand jury proceedings, courts will not inquire into the legality or sufficiency of the evidence upon which an indictment is based).

[457] *Id.*

TN		State v. Marks, 464 S.W.2d 326, 328 (Tenn. Crim. App. 1970) (hearsay); State v. Dixon, 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992) (IOE); State v. Gonzales, 638 S.W.2d 841, 845 (Tenn. Crim. App. 1982) (challenge)	Admissible	Admissible	Not Challengeable
TX	TEX. R. EVID. 101(e)(2) (hearsay)	Albarqawi v. State, 626 S.W.2d 136, 138 (Tex. App. 1981) (IOE); Alejandro v. State, 725 S.W.2d 510, 513 (Tex. App. 1987) (IOE); Dean v. State, 749 S.W.2d 80, 82 (Tex. Crim. App. 1988) (en banc) (challenge); Carpenter v. State, 477 S.W.2d 22, 23 (Tex. Crim. App. 1972) (challenge)	Admissible	Admissible	Not Challengeable
UT	UTAH CODE ANN. § 77-10a-13(5)(a) (LexisNexis 2024) (hearsay and IOE); *id.* § 77-10a-14(2) (hearsay and challenge); *id.* § 77-10a-10 (IOE); UTAH R. CRIM. P. 12 (challenge)		Admissible (if reliable hearsay)[458]	Likely Admissible[459]	Challengeable

[458] *See* UTAH CODE ANN. § 77-10a-13(5)(a) (LexisNexis 2024) (providing that a grand jury may receive hearsay evidence only under the same provisions and limitations that apply to preliminary hearings, which require reliable indicators for hearsay to be presented); *see also id.* § 77-10a-14(2) (establishing that an indictment may not be returned solely on the basis of incompetent hearsay).

[459] No case law addresses this issue, but the Utah Code of Criminal Procedure requires that the grand jury "receive evidence without regard for the formal rules of evidence," *id.* § 77-10a-

VT	VT. R. EVID. 1101(b)(2) (hearsay and IOE); VT. R. CRIM. P. 12 (challenge)	State v. Bullock, 2017 VT 7, ¶ 8, 204 Vt. 623, 624, 165 A.3d 143, 145 (challenge)	Admissible	Admissible	Challengeable
VA	VA. SUP. CT. R. 2:1101(c) (hearsay and IOE)	Wadley v. Commonwealth, 35 S.E. 452, 453 (Va. 1900) (challenge)	Likely Admissible[460]	Unclear[461]	Not Challengeable[462]
WA	WA. R. EVID. 1101(c)(2) (hearsay); WASH. REV. CODE § 10.40.110 (2024) (challenge)	State v. White, 640 P.2d 1061, 1072 (Wash. 1982) (en banc) (IOE) , *superseded by statute*, Obstructing a Law Enforcement Officer, 1994 Wash. Sess. Laws 936, *as recognized in* State v. Graham, 927 P.2d 227, 230 n.2 (Wash. 1996) (en banc); State v. Bogardus, 78 P. 942, 944 (1904) (challenge)	Admissible	Likely Inadmissible[463]	Limited Challenge

13(5)(a), and necessitates that the grand jury find "credible evidence of each material element of any crime charged before returning an indictment." *Id.* § 77-10a-10(4).

[460] A grand jury may consider the testimony of a witness who was not an eyewitness to the alleged criminal activity; moreover, a grand jury may consider the testimony of an officer, not involved in the case, who testifies from the report of an investigating police officer. In both cases, the grand jury may return a sufficient indictment based solely upon such testimony. 1990 Va. Op. Att'y Gen. No. 137 (1990), 1990 WL 511460.

[461] The Rules of Supreme Court of Virginia state that adherence to the Rules of Evidence is permissive, not mandatory, in criminal proceedings other than trials, preliminary hearings, and sentencing proceedings before a jury; grand jury hearings are presumably included in "criminal proceedings other than trial." VA. SUP. CT. R. 2:1101(c).

[462] *See* Wadley v. Commonwealth., 35 S.E. 452, 453 (Va. 1900) (holding that the sufficiency of the proof upon which a grand jury finds an indictment cannot be inquired into on a motion to quash the indictment).

[463] *See* State v. White, 640 P.2d 1061, 1070, 1072 (Wash. 1982) (en banc) (indicating that exclusionary rule has broader reach under Washington Constitution than under U.S. Constitution due to state privacy protections), *superseded by statute*, Obstructing a Law Enforcement Officer, 1994 Wash. Sess. Laws 936, *as recognized in* State v. Graham, 927 P.2d 227, 230 n.2 (Wash. 1996) (en banc).

WV	W. VA. R. EVID. 1101(b)(2) (hearsay)	State v. Slie, 213 S.E.2d 109, 114 (W. Va. 1975) (IOE and challenge)	Admissible	Admissible	Not Challengeable
WI	WIS. R. EVID. 911.01(4)(b) (hearsay)	State v. Moats, 457 N.W.2d 299, 305 (Wis. 1990) (IOE); State *ex rel.* Sieloff v. Golz, 258 N.W.2d 700, 711 (Wis. 1977) (challenge)	Admissible	Likely Inadmissible[464]	Not Challengeable
WY	WYO. R. EVID. 1101(b)(2) (hearsay and IOE)	Hennigan v. State, 746 P.2d 360, 371 (Wyo. 1987) (challenge)	Unclear[465]	Unclear	Not Challengeable

[464] "A prosecution is not abated or barred even when tainted evidence has been submitted to a grand jury." State v. Moats, 457 N.W.2d 299, 305 (Wis. 1990) (citing United States v. Rundle, 383 F.2d 421, 424 (3d Cir. 1967)). "The Wisconsin Constitution, like the fifth amendment, does not dictate the kind of evidence that must necessarily be presented at a pretrial procedure. Likewise, Wisconsin case law stands in accord . . . ." *Id.* at 305–06 (footnote omitted).

[465] While the Wyoming Code states that the rules of evidence, except for those relating to privileges, do not apply in grand jury hearings, WYO. R. EVID. 1101(b)(2), the specific statute allowing for an indictment to be based on "hearsay evidence in whole or in part" was deleted by order of the court in 2001. WYO. R. CRIM. P. 7, editor's notes.

APPENDIX B: PRELIMINARY HEARING PROCEEDINGS

State	SOURCE OF AUTHORITY		Hearsay Admissibility	Challenge Procedure
	Statute or Court Rule	**Case Law**		
Federal	FED. R. CRIM. P. 5.1(3) (hearsay); [466] 28 U.S.C. § 1651 (challenge)[467]	United States v. King, 482 F.2d 768, 771 (D.C. Cir. 1973) (challenge); *In re* April 1977 Grand Jury Subpoenas, 573 F.2d 936, 940 (6th Cir. 1978) (challenge) [468]	Generally Admissible	May Allow for Pretrial Challenge (defendant may file interlocutory appeal for a writ of mandamus to review the district court's probable cause finding and grant such extraordinary relief as necessary to correct the error)
AL	ALA. R. CRIM. P. 5.3(c) (hearsay); *id.* R. 15.2 (motion to dismiss)		Certain Hearsay Admissible (expert reports, documentary evidence if predicate available at trial and hearsay has factual support, or testimony from a credible witness who will be available at trial)	Allows for Pretrial Challenge (motion to dismiss for insufficient preliminary hearing)
AK	ALASKA R. CRIM. P. 5.1 (hearsay); *id.* R. 12 (motion to dismiss)		Certain Hearsay Admissible (expert reports)	May Allow for Pretrial Challenge (motion to dismiss for defects in the information)

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[466] The 2002 amendments removed the clause explicitly providing for the use of hearsay in preliminary hearings because the advisory committee believed that federal law already made clear that hearsay is permitted in preliminary hearings. The committee "did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence." FED. R. CRIM. P. 5.1 advisory committee's notes to 2002 amendments.

[467] The All Writs Act, 28 U.S.C. § 1651, confers jurisdiction upon the court of appeals to review the district court's probable cause finding and grant such extraordinary relief as necessary to correct the error. *In re* April 1977 Grand Jury Subpoenas, 573 F.2d 936, 940 (6th Cir. 1978).

[468] *In re April 1977 Grand Jury Subpoenas*, 573 F.2d at 940.

AZ	ARIZ. R. CRIM. P. 5.4(c)(3) (hearsay); *id.* R. 5.5 (pre-trial review)		Certain Hearsay Admissible (expert reports, documentary evidence if foundation available at trial and hearsay has factual support, or testimony from a declarant who will be available at trial)	Allows for Pretrial Challenge (provides pre-trial review of probable cause finding)
AR	No Adversarial Preliminary Probable Cause Hearing Offered[469]			
CA	CAL. EVID. CODE §§ 300, 1370 (West 2024) (hearsay); CAL. PENAL CODE §§ 872(b), 872.5 (hearsay); *id.* § 995 (motion to set aside)	*Ex parte* Plummer, 180 P.2d 771, 774 (Cal. Dist. Ct. App. 1947) (challenge)	Certain Hearsay Admissible (Proposition 115 testimony by officers,[470] writing supported by other evidence, and statements of victim of physical violence)	Allows for Pretrial Challenge (motion to set aside for lack of probable cause)
CO	COLO. R. EVID. 1101(d)(3) (hearsay); COLO. R. CRIM. P. 5(a)(4) (hearsay); *id.* R. 12 (motion to dismiss)	People v. Horn, 772 P.2d 108, 109 (Colo. 1989) (en banc) (hearsay); People v. Huggins, 220 P.3d 977, 980 (Colo. App. 2009) (hearsay)	Certain Hearsay Admissible (in conjunction with some non-hearsay evidence)	May Allow for Pretrial Challenge (motion to dismiss for defects in the information)
CT	CONN. GEN. STAT. § 54-46a(b) (hearsay)[471]		Certain Hearsay Admissible (expert reports and authenticating chain of custody)	May Allow for Pretrial Challenge (motion to dismiss for insufficient evidence)[472]

[469] Adversarial preliminary hearings are not required. Arkansas uses the same standard as a warrant when preliminary hearings are used—that is, if "from the affidavit, recorded testimony, or other information" it appears "there is reasonable cause to believe that the person has committed an offense." ARK. R. CRIM. P. 8.3(c); *id.* R. 4.1(e). Determination of probable cause to detain is done by a magistrate at defendant's first appearance in an "informal, non-adversary hearing" (a *Gerstein* review). *Id.* R. 8.3. In 2005, the traditional adversarial preliminary hearing process was repealed. *See* S.B. 984, 85th Gen. Assemb., Reg. Sess. § 502 (Ark. 2005). Even before 2005, Arkansas did not require a preliminary hearing as a prerequisite to prosecuting a felony by information. *See generally* Penton v. State, 109 S.W.2d 131 (Ark. 1937).

[470] Under Proposition 115, an officer can testify in court regarding their investigation and the information shared with them. Officers are restricted to testifying only to one level of hearsay, meaning they cannot testify to information that a person heard from another person unless certain exceptions apply. *See* CAL. PENAL CODE § 872(b) (West 2024).

[471] Preliminary hearings are only provided for felonies punishable by death or life

DE	DEL. SUPER. CT. CRIM. R. 5.1(a) (hearsay); *id.* R. 12 (motion to dismiss)	Schramm v. State, 366 A.2d 1185, 1192 (Del. 1976) (hearsay)	Hearsay Generally Admissible (dependent on judge's reliability discretion)	May Allow for Pretrial Challenge (motion to dismiss for defects in the information)
FL	FLA. R. CRIM. P. 3.133(b)(5) (hearsay); *id.* R. 3.190(b) (challenge)	Perry v. Bradshaw, 43 So. 3d 180, 181 (Fla. Dist. Ct. App. 2010) (hearsay); Davis v. Junior, 300 So. 3d 307, 309 (Fla. Dist. Ct. App. 2020) (hearsay)	Certain Hearsay Admissible (must be supported by non-hearsay evidence) [473]	Allows for Pretrial Challenge (motion to dismiss may challenge substance of the information)
GA	GA. CODE ANN. § 17-7-28 (2024) (hearsay); GA. UNIF. SUPER. CT. R. 26.2 (B)(1) (hearsay)	Bethel v. Fleming, 713 S.E.2d 900, 906 (Ga. Ct. App. 2011) (hearsay), *vacated*, 741 S.E.2d 662 (Ga. Ct. App. 2013) (mem.)	Hearsay Generally Admissible at Commitment Hearing (to determine probable cause before pre-trial detention)	No Pretrial Challenge
HI	HAW. R. PENAL P. 5(c)(6) (hearsay); HAW. REV. STAT. § 806-86 (2024) (challenge)		Certain Hearsay Admissible (if direct testimony is unavailable or "demonstrably inconvenient" to have direct witnesses)	Allows for Pretrial Challenge (motion to dismiss for lack of probable cause)
ID	IDAHO R. CRIM. P. 5.1(b) (hearsay); *id.* R. 12 (challenge)		Certain Hearsay Admissible (to show property ownership, medical facts, court judgments, and reports of scientific examinations)	Allows for Pretrial Challenge (motion to dismiss the information for lack of probable cause)

imprisonment. CONN. GEN. STAT. § 54-46a(a) (2024).

[472] There is no specific procedure to challenge a preliminary hearing, but Connecticut Practice Book Section 41-8 provides for filing a pre-trial motion to dismiss for insufficiency of evidence or cause. CONN. PRACTICE BOOK § 41-8 (2024).

[473] The Florida Supreme Court has not addressed hearsay in preliminary hearings, but the lower courts that have ruled on the issue are in consensus. *See, e.g.*, Larioszambrana v. State, 390 So. 3d 681, 684 (Fla. Dist. Ct. App. 2024) ("The law is clear that the State may not rely exclusively on inadmissible hearsay to establish probable cause in an adversary preliminary hearing . . . . However, inadmissible hearsay evidence may be considered by the trial court at an adversary preliminary hearing so long as there is admissible evidence presented to support a finding of probable cause." (citing Davis v. Junior, 300 So. 3d 307, 308 (Fla. Dist. Ct. App. 2020))).

IL	ILL. R. EVID. 1101(b)(3) (hearsay); 725 ILL. COMP. STAT. 5/114-1 (2024) (challenge)	People v. Blackman, 414 N.E.2d 246, 248 (Ill. App. Ct. 1980) (hearsay)	Hearsay Generally Admissible (rules of evidence do not apply and hearsay admissible)	May Allow for Pretrial Challenge (motion to dismiss if the information is based solely upon the testimony of an incompetent witness)
IN	No Preliminary Probable Cause Hearing Offered[474]			
IA	IOWA R. CRIM. P. 2.2(4)(c) (hearsay); *id.* R. 2.11(4) (challenge); IOWA R. EVID. 5.1101(c)(4) (hearsay)		Certain Hearsay Admissible (rules of evidence do not apply to criminal preliminary hearing, and hearsay with a factual basis allowed if credible)	May Allow for Pretrial Challenge (motion to dismiss the information)
KS	KAN. STAT. ANN. § 60-402 (2024) (hearsay); *id.* § 22-2902(c) (hearsay); *id.* § 22-3208 (challenge)	State v. Cremer, 676 P.2d 59, 64 (Kan. 1984) (hearsay); State v. Lashley, 664 P.2d 1358, 1364 (Kan. 1983) (challenge)	Certain Hearsay Admissible (rules of evidence apply but hearsay admissible if victim is under thirteen)	Allows for Pretrial Challenge (motion to dismiss to challenge the sufficiency of a preliminary examination)
KY	KY. R. CRIM. P. 3.14 (hearsay); *id.* R. 8.16 (challenge); *id.* R. 8.18 (challenge); KY. R. EVID. 1101(d)(5) (hearsay);		Hearsay Generally Admissible (rules of evidence do not apply and hearsay is permitted)	May Allow for Pretrial Challenge (motion to dismiss the information)
LA	LA. CODE EVID. ANN. art. 1101(C)(1) (2024) (hearsay); LA. CODE CRIM. PROC. ANN. art. 521 (2024) (challenge); *id.* art. 532 (challenge)	State v. Antoine, 344 So. 2d 666, 666 (La. 1977) (hearsay); State v. Sims, 2019-1602, pp. 5–6 (La. App. 1 Cir. 9/2/20), 312 So. 3d 616, 620 (challenge)	Certain Hearsay Admissible (witnesses must be available for full-cross examination)	May Allow for Pretrial Challenge[475]

[474] Indiana has several provisions directing a magistrate to determine probable cause, but all involve an ex parte determination. IND. CODE §§ 35-33-2-1, -7-2, -7-3.5 (2024). While previously Indiana required a "preliminary hearing[] for the purpose of binding over," *see* State *ex rel.* Hale v. Marion Cnty. Mun. Ct., 127 N.E.2d 897, 898 (Ind. 1955); *accord* Davis v. Bible, 33 N.E. 910, 910 (Ind. 1893), currently, Indiana does not mandate the submission of a probable cause affidavit as a prerequisite for filing an information unless it serves as the basis for an arrest. State v. Palmer, 496 N.E.2d 1337, 1337 (Ind. Ct. App. 1986). Furthermore, case law provides that the sufficiency of evidence is a trial matter and cannot be used to question an indictment or information. Shutz v. State, 413 N.E.2d 913, 916 (Ind. 1981).

[475] Articles 521 through 523 of the Louisiana Code of Criminal Procedure provide procedure

ME	No Preliminary Probable Cause Hearing Offered[476]			
MD	MD. R. CRIM. P. 4-221(d) (hearsay); *id.* R. 4-251 (challenge); *id.* R. 4-252 (challenge)		Hearsay Generally Admissible (rules of evidence do not apply to preliminary hearings)[477]	Allows for Pretrial Challenge (motion to dismiss for lack of probable cause)
MA	MASS. R. CRIM. P. 3(f) (hearsay); *id.* R. 13 (challenge)	Myers v. Commonwealth, 298 N.E.2d 819, 848–49 (Mass. 1973) (hearsay); Paquette v. Commonwealth, 795 N.E.2d 521, 533 (Mass. 2003) (hearsay)	Rules of Evidence Apply Without Exception (bind-over hearings do not allow hearsay)	May Allow for Pretrial Challenge (motion to dismiss)
MI	MICH. COMP. LAWS § 766.11b (2024) (hearsay); *id.* §§ 767.2, .74 (challenge)	People v. Usher, 328 N.W.2d 628, 630 (Mich. Ct. App. 1982) (hearsay), *overruled in part on other grounds*, People v. Perry, 594 N.W.2d 477 (Mich. 1999)	Certain Hearsay Admissible (rules of evidence apply to preliminary hearings, but hearsay allowed for lab reports, certified copies of government or court orders, and non-investigative law enforcement reports)	May Allow for Pretrial Challenge (motion to quash the information)[478]
MN	MINN. R. CRIM. P. 11.04(1)(c) (hearsay); *id.* R. 10.01–10.03 (challenge)	State v. Florence, 239 N.W.2d 892, 895 (Minn. 1976) (hearsay); State v. Suspitsyn, 941 N.W.2d 423, 427 (Minn. Ct. App. 2020) (hearsay)	Certain Hearsay Admissible (no preliminary hearing, but "reliable hearsay" is permitted in probable cause motion hearings)[479]	May Allow for Pretrial Challenge (motion to dismiss may be filed after omnibus hearing)

and pretrial motions after discovery begins, LA. CODE CRIM. PROC. ANN. arts. 521–523 (2024), and Articles 531 through 538 provide procedure and grounds for a motion to quash. *Id.* arts. 531–538. Case law allows for, but does not specify, a motion to challenge a pretrial hearing for lack of probable cause. *See* State v. Sims, 2019-1602 (La. App. 1 Cir. 9/2/20), 312 So. 3d 616, 620.

[476] Maine repealed its statutory provisions providing for preliminary hearings in 1965. *See* Act Effective Dec. 1, 1965, 1965 Me. Laws 455.

[477] *See* 59 Md. Op. Att'y Gen. 182–83 (1974) (noting that hearsay is permitted in preliminary hearings).

[478] The term "indictment" is to be treated as also referring to charges made by the filing of an information. MICH. COMP. LAWS § 767.2 (2024).

[479] In 1975, Minnesota replaced preliminary hearing screening with an omnibus hearing, at

MS	MISS. R. CRIM. P. 6.2(c) (hearsay); *id.* R. 16.1 (challenge); MISS. R. EVID. 1101(b)(4) (hearsay)		Certain Hearsay Admissible (rules of evidence do not apply to probable cause hearings, and hearsay is admissible if source is credible and the information has a factual basis)	May Allow for Pretrial Challenge (motion to dismiss)
MO	MO. REV. STAT. § 544.280 (2024) (hearsay); *id.* § 544.376 (hearsay); *id.* §§ 545.300, .830 (challenge)		Certain Hearsay Admissible (rules of evidence apply, but certified copies of laboratory analysis reports are admissible)[480]	May Allow for Pretrial Challenge (motion to quash)[481]
MT	MONT. R. EVID. 101(c)(3) (hearsay); MONT. CODE ANN. § 46-13-101 (2024) (challenge); *id.* § 46-13-401 (challenge)		Hearsay Generally Admissible (rules of evidence do not apply to preliminary hearings)	May Allow for Pretrial Challenge (procedure for pretrial motions, but motions to dismiss may only be initiated by the state or the court)
NE	NEB. REV. STAT. § 27-1101(4)(b) (2024) (hearsay); *id.* § 29-1808 (challenge)	State v. Betancourt-Garcia, 967 N.W.2d 111, 124 (Neb. 2021) (hearsay); State v. Johnson, 842 N.W.2d 63, 66 (Neb. 2014) (hearsay)	Certain Hearsay Admissible (rules of evidence do not apply to preliminary hearings, but hearsay must be reliable)	May Allow for Pretrial Challenge (motion to quash for defects in charging institution)

which the defendant could challenge in the trial court whether the charging instrument was supported by probable cause. *See* MINN. R. CRIM. P. 11.01–.10.

[480] Section 544.376 of the Missouri Revised Statutes provides that certified copies of laboratory analysis reports are admissible if served upon the defendant ten days before the hearing. MO. REV. STAT. § 544.376 (2024). Additionally, the analyst preparing the report may be interviewed by defense counsel upon notice to the prosecutor. *Id.*

[481] Missouri does not offer a specific rule outlining provisions for a motion to dismiss an information, but Section 545.300 specifies that any time prior to trial, the court may grant the State leave to amend an information that is insufficient or incorrect. *Id.* § 545.300.

NV	NEV. REV. STAT. §§ 171.196–.197 (hearsay); *id.* §§ 174.105, .075 (challenge)	Grace v. Eighth Jud. Dist. Ct., 375 P.3d 1017, 1019 (Nev. 2016) (hearsay)	Certain Hearsay Admissible (rules of evidence apply to preliminary hearings, but hearsay evidence from a child abuse victim is permitted and the State may provide affidavits from victims of a property or financial crime if they are located over one hundred miles away)[482]	Allows for Pretrial Challenge (motion to dismiss for insufficient evidence)
NH	N.H. R. EVID. 1101(d)(3) (hearsay); N.H. REV. STAT. ANN. § 599:1 (2024) (challenge)	State v. St. Arnault, 317 A.2d 789, 791 (N.H. 1974) (hearsay and challenge)	Certain Hearsay Admissible (rules of evidence do not apply to preliminary hearings, and credible hearsay is admissible)	No Pretrial Challenge[483]
NJ	N.J. CT. R. 3:4-3(a) (hearsay); *id.* R. 3:10-2 (challenge); N.J. R. EVID. 101(3)(D) (hearsay); N.J. STAT. ANN. § 2A:162-19(e) (West 2024) (hearsay)	State v. Ingram, 165 A.3d 797, 805–06 (N.J. 2017) (hearsay)	Hearsay Generally Admissible (rules of evidence relaxed in probable cause hearings)[484]	May Allow for Pretrial Challenge (motion to dismiss for defects in institution of the prosecution)

[482] If defendant can show a dispute of fact in the State's affidavit, the State must provide the witness for cross-examination. NEV. REV. STAT. § 171.197(4) (2024).

[483] There is no provision for challenging a preliminary hearing, but Section 599:1 of the New Hampshire Revised Statutes provides for a de novo trial in the superior court if convicted of a class A misdemeanor in the circuit court. N.H. REV. STAT. ANN. § 599:1 (2024). *State v. St. Arnault* suggests that this provision can also be used to appeal felony preliminary hearings binding-over defendants to the superior court. *See* 317 A.2d 789, 791 (N.H. 1974).

[484] Section 2A:162-19(e) of the New Jersey Annotated Statutes, N.J. STAT. ANN. § 2A:162-19(e) (2024), and *State v. Ingram*, 165 A.3d 797, 805–06 (N.J. 2017), suggest that hearsay is admissible in all probable cause hearings.

NM	N.M. R. CRIM. P. 5-302(B)(2) (hearsay); N.M. R. CRIM. P. MAGISTRATE CTS. 6-202.1 (hearsay); *id.* R. 6-304 (challenge)		Certain Hearsay Admissible (rules of evidence apply in preliminary examinations; hearsay exemptions for forensic interviews of a minor or incompetent witness at a safe house and lab reports)	May Allow for Pretrial Challenge (motion to dismiss)
NY	N.Y. CRIM. PROC. LAW §§ 180.60(8), 190.30 (McKinney 2024) (hearsay); *id.* § 170.35 (challenge)		Certain Hearsay Admissible (exceptions include reports of experts and technicians in professional and scientific fields, property crime testimony, and records of a sex offender)	May Allow for Pretrial Challenge (motion to dismiss the information if insufficient or defective)
NC	N.C. R. EVID. 1101(b)(3) (hearsay); N.C. GEN. STAT. § 15A-611(b) (2024) (hearsay); *id.* § 15A-954 (challenge)		Certain Hearsay Admissible (rules of evidence do not apply, but proving probable cause requires non-hearsay evidence; exceptions include to show ownership or value of property, to authenticate, and for experts' reports)	May Allow for Pretrial Challenge (motion to dismiss)
ND	N.D. R. EVID. 1101(d)(3) (hearsay); N.D. R. CRIM. P. 5.1(a) (hearsay); *id.* R. 12 (challenge)	State v. Brown, 2021 ND 226, ¶ 7, 967 N.W.2d 797, 800 (hearsay); State v. Morrissey, 295 N.W.2d 307, 310 (N.D. 1980) (challenge)	Hearsay Generally Admissible (rules of evidence do not apply to probable cause hearings)	No Pretrial Challenge (review limited to jurisdictional defects)
OH	OHIO R. CRIM. P. 5(B)(2) (hearsay); *id.* R. 12 (challenge)		Rules of Evidence Apply Without Exception	Allows for Pretrial Challenge (motion to dismiss for defects in prosecution)

OK	OKLA. STAT. tit. 12, §§ 2103, 2803.1 (2024) (hearsay); *id.* tit. 63, § 949 (2024) (hearsay); *id.* tit. 22, §§ 504.1, 524 (2024) (challenge)	State v. Juarez, 2013 OK CR 6, ¶ 9, 299 P.3d 870, 873 (hearsay)	Certain Hearsay Admissible (rules of evidence apply; exceptions include stipulated lab reports)[485]	Allows for Pretrial Challenge (motion to quash for insufficient evidence)[486]
OR	OR. REV. STAT. § 135.173 (2024) (hearsay); *id.* § 135.520 (challenge)		Certain Hearsay Admissible (rules of evidence apply, but hearsay is admissible if reliable and testifying would impose an unreasonable burden)	May Allow for Pretrial Challenge (motion to set aside or dismiss)
PA	PA. R. CRIM. P. 542(e) (hearsay); *id.* R. 578 (challenge)	Commonwealth v. McClelland, 233 A.3d 717, 734 (Pa. 2020) (hearsay); Commonwealth v. Munson, 261 A.3d 530, 536 n.8 (Pa. Super. Ct. 2021) (hearsay); Commonwealth v. Harris, 269 A.3d 534, 547 (Pa. Super. Ct. 2022) (hearsay), *aff'd*, 315 A.3d 26 (2024)	Certain Hearsay Admissible (admissible in preliminary hearings but cannot be the sole basis of the case)	May Allow for Pretrial Challenge (omnibus motion)
RI	R.I. SUPER. CT. CRIM. R. 5(c) (hearsay); R.I. R. EVID. 101(b) (hearsay); 12 R.I. GEN. LAWS §§ 12-12-1.7, -1.9 (challenge)		Rules of Evidence Apply Without Exception	Allows for Pretrial Challenge (motion to dismiss on failure to show probable cause)

[485] Oklahoma has a general hearsay exception for children testifying about abuse. OKLA. STAT. tit. 12, § 2803.1 (2024).

[486] Section 524 of the Oklahoma Statutes provides an opportunity for a preliminary hearing after a felony indictment, which appears to be a separate procedure from the initial preliminary examination. *Id.* tit. 22, § 258 (2024).

SC	S.C. R. EVID. 1101(d)(3) (hearsay); S.C. CODE ANN. § 17-19-90 (2024) (challenge)	State v. Jones, 259 S.E.2d 120, 122 (S.C. 1979) (hearsay); State v. Massey, 844 S.E.2d 667, 671 (S.C. 2020) (challenge)	Hearsay Generally Admissible (rules of evidence do not apply and hearsay is admissible)	No Pretrial Challenge (sufficiency of the evidence cannot be challenged by a pretrial motion)
SD	S.D. CODIFIED LAWS § 23A-4-6 (2024) (hearsay); *id.* § 23A-8-2 (challenge)	State v. Vatne, 2003 S.D. 31, ¶¶ 14–15, 659 N.W.2d 380, 384 (challenge)	Rules of Evidence Apply Without Exception	No Pretrial Challenge (exclusive grounds for pretrial dismissal do not include defects in the preliminary hearing)
TN	TENN. R. CRIM. P. 5.1 (hearsay); *id.* R. 12 (challenge)	Waugh v. State, 564 S.W.2d 654, 659–60 (Tenn. 1978) (hearsay)	Certain Hearsay Admissible (to prove property ownership and written expert report admissible)	Allows for Pretrial Challenge (motion to dismiss for defects in prosecution)
TX	TEX. CODE CRIM. PROC. ANN. art. 16.01 (West 2024) (hearsay); *id.* art. 16.07 (hearsay); *id.* art. 28.01 (challenge); TEX. R. EVID. 101 (hearsay)	Garcia v. State, 775 S.W.2d 879, 881 (Tex. App. 1989) (hearsay); Bell v. State, 442 S.W.2d 716 (Tex. Crim. App. 1969) (challenge)	Rules of Evidence Apply Without Exception (rules of evidence do not apply in preliminary hold-over hearings, but the rules apply, and hearsay is not permitted, in preliminary examining hearings)	May Allow for Pretrial Challenge (court has discretion hear challenges to the form or substance of the information pre-trial)
UT	UTAH R. EVID. 1102 (hearsay); UTAH R. CRIM. P. 7B(b) (hearsay); *id.* R. 12 (challenge)	State v. Timmerman, 2009 UT 58, ¶ 16, 218 P.3d 590, 595–96 (hearsay)	Certain Hearsay Admissible (reliable hearsay is admissible in preliminary hearings and includes foundations for authenticity, lab reports, police statements, child victim statements, and statements under oath; probable cause cannot be based solely on hearsay under oath)	May Allow for Pretrial Challenge (motions to quash and dismiss)

VT	VT. R. CRIM. P. 5(c) (hearsay); *id.* R. 4(b) (hearsay); *id.* R. 12 (challenge)	State v. Rooney, 788 A.2d 490, 491–92 (Vt. 2001) (challenge)	Certain Hearsay Admissible (preliminary hearings are only provided for warrantless arrests, and hearsay is admissible if reliable and factually based)	Allows for Pretrial Challenge (defendant may file a motion for challenging the prosecution's ability to prove elements of the case)
VA	VA. CODE ANN. §§ 19.2-183, -187, -188 (hearsay); *id.* § 19.2-266.2 (challenge)		Certain Hearsay Admissible (rules of evidence apply; exceptions for lab reports and medical examiner testimony)	May Allow for Pretrial Challenge (allows for challenges to an information on procedural or constitutional grounds)
WA	WASH. R. EVID. 1101(c)(3) (hearsay); WASH. SUPER. CT. CRIM. R. 3.2.1 (hearsay);[487] *id.* R. 8.3 (challenge)		Certain Hearsay Admissible (rules of evidence do not apply to preliminary hearings)	May Allow for Pretrial Challenge (motion to dismiss based on insufficient evidence to establish a prima facie case)
WV	W. VA. CODE § 62-1-8 (2024) (hearsay); W. VA. R. CRIM. P. 5.1(a) (hearsay); *id.* R. 12 (challenge)	State v. Haught, 371 S.E.2d 54, 60–62 (W. Va. 1988) (hearsay); Peyatt v. Kopp, 428 S.E.2d 535, 538 (W. Va. 1993) (hearsay)	Certain Hearsay Admissible (hearsay from a credible source is admissible in a preliminary hearing if it has factual basis and direct testimony would be unreasonably burdensome)	May Allow for Pretrial Challenge (motion to dismiss)
WI	WIS. STAT. §§ 970.03, .038 (2024) (hearsay); *id.* § 971.31 (challenge)	State v. O'Brien, 2014 WI 54, ¶¶ 61–62, 354 Wis. 2d 753, 850 N.W.2d 8 (hearsay); Wold v. State, 204 N.W.2d 482, 485 (Wis. 1973) (challenge)	Certain Hearsay Admissible (courts must consider reliability; specific hearsay exceptions include lab reports, fingerprint reports, and the recorded testimony of a child under sixteen)	Allows for Pretrial Challenge (motion to dismiss challenging sufficiency of the preliminary examination)

[487] *See* WASH. CRIM. R. CT. LTD. J. 3.2.1(b) ("The written or recorded evidence considered by the court may be hearsay in whole or part. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations.").

WY	WYO. R. CRIM. P. 5.1(b) (hearsay); *id.* R. 12 (challenge); WYO. R. EVID. 1101(b)(3) (hearsay)	Hennigan v. State, 746 P.2d 360, 369 (Wyo. 1987) (hearsay)	Hearsay Generally Admissible (rules of evidence do not apply)	May Allow for Pretrial Challenge (motion to dismiss)