Incarceration Without Confrontation: An In-Depth Look At *Commonwealth v. Ricker*

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ABSTRACT

A preliminary hearing is a matter of great public importance because it secures the right to be free from erroneous incarceration. Without a fair and impartial process for determining whether or not probable cause exists to support the charges brought, an accused could be imprisoned or made to enter bail unjustly. In *Commonwealth v. Ricker*, the Pennsylvania Superior Court held that the prosecution could establish a prima facie case against the defendant based solely on hearsay evidence at the preliminary hearing. Additionally, the court determined that the presentation of such hearsay evidence did not violate the defendant's constitutional rights under the Confrontation Clause. However, both the United States Constitution and the Pennsylvania Constitution bestow individual rights to citizens during all criminal prosecutions, not just at trial.

This Comment first analyzes the text of the Confrontation Clause provisions of the state and federal constitutions as well as the intent of the Framers in ratifying the Constitution. Next, this Comment discusses the critical nature of preliminary hearings in the criminal adjudicatory process, illustrated by the triggering of other individual rights enumerated in the Sixth Amendment at this stage, including the right to counsel. This Comment then explains why a defendant, who has not had the chance to meet his accusers before trial, has been handicapped by Pennsylvania's process. Finally, this Comment will describe the impediments created by the Pennsylvania Superior Court's erroneous decision of *Ricker* and will further suggest that defendants may have

* J.D. Candidate, Dickinson Law, the Pennsylvania State University, 2017. Special thanks to those of my professors whose teachings and guidance helped me select my topic and/or contributed to my Comment's substantive development, whether they know it or not: Mary Kaye Polacheck, Michael Mogill, and Thomas Place. Thanks also to my family and close friends for their endless support and encouragement. And, a final acknowledgment to those members of the Penn State Law Review whose hard work and advice helped me through the writing and/or publication process: Nicole Jensen, Leslie Dalton, Joseph Carroll, and Ryan Hart.

more success in the future by arguing that their procedural due process rights have been violated.

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I. INTRODUCTION

The failure of a state to provide a fair process for ascertaining the truth at the preliminary hearing stage is a matter of significant public importance.[1] An individual has considerable interest in a preliminary hearing because its main function is to protect an accused from unlawful

1. *See* Commonwealth v. Ricker, 120 A.3d 349, 354 (Pa. Super. Ct. 2015) ("Not only is Appellant's claim capable of evading review, it presents an important constitutional question regarding whether a powerful state governmental entity violates federal and state constitutional principles in allowing a defendant to be restrained of his liberty and bound over for trial based solely on hearsay evidence.").

arrest and detention.[2] Preliminary hearings are a vital part of the adjudicative process. Preliminary hearings seek to prevent a defendant from being imprisoned or being forced to enter bail for a crime that was never committed or for a crime in which the prosecution fails to present evidence of a defendant's involvement.[3] Therefore, without a fair preliminary hearing, an individual could be incarcerated or made to enter bail unjustly.[4]

In *Commonwealth v. Ricker*,[5] the Pennsylvania Superior Court held that the use of solely hearsay evidence[6] to establish a prima facie case against the defendant in a preliminary hearing did not violate the confrontation clauses of the federal or state constitutions.[7] Historically, one of the primary reasons for excluding hearsay testimony is the lack of cross-examination, a mechanism used to cast light on the facts of a case and expose truth.[8] Moreover, the unavailability of witnesses at preliminary hearings deprives defendants of a chance to obtain testimony that could be used to impeach the witnesses at trial, and thereby handicaps defendants' ability to present a defense.[9] Other risks are also associated with the admission of hearsay evidence, including inaccuracy and deception.[10] Although the issue presented in *Ricker* is of great public importance and involves the safeguarding of basic human rights, it often

2. *See* Commonwealth v. Mullen, 333 A.2d 755, 757 (Pa. 1975) (citing Commonwealth *ex rel.* Maisenhelder v. Rundle, 198 A.2d 565 (Pa. 1964) ("The [preliminary] hearing's principal function is to protect an individual's right against unlawful detention.").

3. Commonwealth v. Rashed, 436 A.2d 134, 137 (Pa. 1981) (quoting *Maisenhelder*, 198 A.2d at 567).

4. *See id*.

5. Commonwealth v. Ricker, 120 A.3d 349 (Pa. Super. Ct. 2015).

6. PA.R.E. 801 (defining hearsay as an out-of-court statement offered to prove the truth of the matter asserted).

7. *See Ricker*, 120 A.3d at 355.

8. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 51–52 (1987) ("[T]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable."); *see also* Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."); Pointer v. Texas, 380 U.S. 400, 404 (1965) (reasoning that cross-examination is necessary to protect a defendant in a criminal case).

9. *See* Commonwealth v. Redshaw, 323 A.2d 92, 94 (Pa. Super. Ct. 1974) (quoting Commonwealth v. Brabham, 309 A.2d 824, 827 (Pa. Super. Ct. 1973)) (citing Coleman v. Alabama, 399 U.S. 1, 9 (1970)) ("[T]he skilled interrogation of witnesses by an experienced lawyer [at the preliminary hearing] can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial . . . ."); *see also Ritchie*, 480 U.S. at 61–62 (Blackmun, J., concurring) ("In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness.").

10. *See infra* notes 55–61 and accompanying text.

evades the courts' review because once a defendant is either acquitted or convicted at trial, problems that occurred at the preliminary hearing stage become moot.[11]

Although the court in *Ricker* determined that the defendant's Confrontation Clause rights were not violated, precedent supports a different determination.[12] The Pennsylvania Superior Court instead should have held that, although the rules of evidence have not traditionally been applied with the same rigor during the preliminary hearing stage,[13] establishing a prima facie case against a defendant based on hearsay alone is unconstitutional.[14]

A plain reading of both the federal and state confrontation clauses, as well as the Framers' intent in drafting them, leads to the conclusion that the right of confrontation applies during the entirety of a criminal prosecution, and not just at trial.[15] The time from the arraignment until trial is a crucial time in a criminal proceeding.[16] The right of defendants

11. *See infra* note 137 and accompanying text.

12. *See* District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (adopting a textualist approach to interpret the meaning of the United States Constitution); *Ritchie*, 480 U.S. at 61–62 (Blackmun, J., concurring) (rejecting the notion that a defendant's right to confrontation has no relevance pretrial); Gerstein v. Pugh, 420 U.S. 103, 120 (1975) (reasoning that the pretrial presentation of witness testimony and full exploration of it on cross-examination is important); Coleman v. Alabama, 399 U.S. 1, 9 (1970) (holding that the preliminary hearing is such a critical stage as to constitutionally require the assistance of counsel); Massiah v. United States, 377 U.S. 201, 205 (1964) (defining the time from the arraignment until trial as a crucial time in a criminal proceeding); Commonwealth *ex rel.* Buchanan v. Verbonitz, 581 A.2d 172, 175 (Pa. 1990) (plurality) (holding that a prima facie case had not been established where only hearsay evidence had been presented at the preliminary hearing); Commonwealth v. Nieves, 876 A.2d 423, 427 (Pa. Super. Ct. 2005) (reasoning that a prima facie case had been correctly established where the police officer also testified as to what he observed first hand and not just what he had heard another say); Commonwealth v. Jackson, 849 A.2d 1254, 1257 (Pa. Super. Ct. 2004) (determining that a prima facie case existed where more than just hearsay evidence was offered with regards to every element of the charges); Commonwealth v. Carmody, 799 A.2d 143, 146 (Pa. Super. Ct. 2002) (stating that the use of solely hearsay testimony fails to meet the criteria for evidence upon which the preliminary hearing judge may rely); Commonwealth v. Tyler, 587 A.2d 326, 328 (Pa. Super. Ct. 1991) (distinguishing the *Buchanan* case and holding that a prima facie case had been established where more than hearsay evidence had been offered to support each element of each offense charged).

13. PA. R. CRIM. P. 542 cmt.

14. *See supra* note 12.

15. *See* U.S. CONST. amend. VI; *see also* PA. CONST. art. I, § 9; Commonwealth v. Ricker, 120 A.3d 349, 363 (Pa. Super. Ct. 2015) ("We acknowledge that one of the primary harms sought to be remedied by the federal and Pennsylvania Confrontation Clause was the English practice of using statements taken *pre-trial* to establish guilt at trial without affording the accused an opportunity to cross-examine the witness. Thus, the very reason for the constitutional right was because an accused could not confront those witnesses during the earlier proceedings.") (emphasis added).

16. *Massiah*, 377 U.S. at 205 (citing Powell v. Alabama, 287 U.S. 45, 57 (1932)).

to confront the witnesses against them should be applied with the same exactitude during preliminary hearings as are other fundamental constitutional rights, such as the right to counsel.[17] If defendants are unable to obtain their accusers' pre-trial statements, they may be deprived of valuable impeachment evidence which creates a significant impediment on their ability to conduct an effective cross-examination at trial.[18] Thus, *Ricker* weakens the protections provided by the Confrontation Clause.[19] Finally, the outcome reached by the *Ricker* court denies the accused of a right to procedural due process.[20]

II. BACKGROUND

A. The Preliminary Hearing

In 1915, Pennsylvania first enacted a statute requiring, if a defendant elected, preliminary hearings for certain crimes; although, the case law already recognized preliminary hearings as a right belonging to every individual.[21] Interpreting this statute, Judge Beck of the Pennsylvania Superior Court stated that a preliminary hearing constitutes a "positive legal right" of an accused.[22] Defendants have an interest in a preliminary hearing because it is a vital and integral part of the criminal adjudicative process.[23] In fact, the principal function of a preliminary hearing is to protect an individual's right to be free from unlawful arrest and detention.[24] The use of such a hearing seeks to prevent an accused

17. *See generally Coleman*, 399 U.S. 1.

18. Pennsylvania v. Ritchie, 480 U.S. 39, 61–62 (1987) (Blackmun, J., concurring).

19. *Id.* at 71 (Brennan, J., dissenting).

20. *See infra* notes 271–73 and accompanying text.

21. The law was referred to as the Act of May 14, 1915 and codified at 42 PA. CONS. STAT. § 1080 (1915); Commonwealth v. Brabham, 309 A.2d 824, 825 (Pa. Super. Ct. 1973) ("[U]pon a preliminary hearing before a magistrate for the purpose of determining whether a person charged with any crime or misdemeanor against the laws, except murder, manslaughter, arson, rape, mayhem, sodomy, buggery, robbery, or burglary, ought to be committed for trial, the person accused, and all persons on behalf of the person accused, shall be heard if the person accused shall so demand."); *see also* In re Petition of Daily Item, 456 A.2d 580, 584 (Pa. Super. Ct. 1983) (Beck, J., concurring).

22. *Daily Item*, 456 A.2d at 825 (citing Commonwealth v. Hoffman, 152 A.2d 726, 729 (Pa. 1959)); *see also* Commonwealth *ex rel.* Fitzpatrick v. Mirarchi, 392 A.2d 1346, 1349 (Pa. 1978) ("An accused in Pennsylvania, with certain exceptions, has the right to a preliminary hearing.").

23. *See Daily Item*, 456 A.2d at 584.

24. *See* Commonwealth v. McBride, 595 A.2d 589, 591 (Pa. 1991) (citing Commonwealth v. Mullen, 333 A.2d 755, 757 (Pa. 1975)) ("The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention").

from being imprisoned or made to enter bail for a crime for which there exists no evidence of his or her connection.[25]

Although preliminary hearings are considered part of the adversarial process,[26] they are not trials.[27] They are often conducted in front of a magisterial district judge,[28] instead of a Court of Common Pleas judge, and in a magisterial district court instead of a Court of Common Pleas.[29] At a preliminary hearing, the Commonwealth bears the burden to establish a prima facie case against the defendant, that is, to provide evidence supporting each material element of the alleged offense(s) so as to show that a crime has been committed and that the accused is probably the one who committed it.[30] Of course, mere speculation that the defendant was involved in a crime is insufficient to establish a prima facie case;[31] however, the evidence that the Commonwealth presents during a preliminary hearing "need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury."[32]

If the Commonwealth fails to establish a prima facie case against the defendant, he or she will be discharged by the issuing authority.[33] In contrast, when a prima facie case is established, the defendant will be

25. Commonwealth v. Rashed, 436 A.2d 134, 137 (Pa. 1981).

26. Commonwealth *ex rel.* Buchanan v. Verbonitz, 581 A.2d 172, 175 (Pa. 1990) ("A preliminary hearing is an *adversarial proceeding* which is a critical stage in a criminal prosecution.") (emphasis added); *see also see* ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 61 (Vicki Been et al. eds., 2d ed. 2013).

27. *McBride*, 595 A.2d at 591.

28. The two types of judges are distinct. A magisterial district judge need not have attended law school, obtained a Juris Doctor, or be a member of the Commonwealth's bar. *See* Pa.R.J.A. No. 601(a). Court of Common Pleas judges "shall be members of the bar of the Supreme Court." *See* PA. CONST. art. V, § 12.

29. The size of a magisterial district is determined by population and population density, and each district has one magisterial district court headed by one magisterial district judge. *See* PA. CONST. art. V, § 7. In contrast, there is one Court of Common Pleas in each judicial district of the Commonwealth that is presided over by the number of judges allowed by law to include one president judge. *See* PA. CONST. art. V, § 5.

30. *Id. See also* Commonwealth v. Karetny, 880 A.2d 505, 514 (Pa. 2005) (reasoning that a prima facie case exists "when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense").

31. *See McBride*, 595 A.2d at 591 (citing generally Commonwealth v. Wojdak, 466 A.2d 991 (Pa. 1983)).

32. *Karetny*, 880 A.2d at 514; *see also McBride*, 595 A.2d at 591 ("It is not necessary for the Commonwealth to establish at this stage the accused's guilt beyond a reasonable doubt.").

33. PA. R. CRIM. P. 542(D); PA. R. CRIM. P. 543(B). For the definition of "issuing authority," see PA. R. CRIM. P. 103 ("Issuing Authority is any public official having the power and authority of a magistrate, a Philadelphia arraignment court magistrate, or a magisterial district judge.").

held over for court.[34] During the preliminary hearing stage, rules of evidence are not always applied with full rigor.[35] However, problems and risks may arise when using certain types of evidence, including hearsay testimony, during any phase of a criminal prosecution.[36]

B. Problems with the Use of Hearsay Evidence

1. Reasons to Exclude Hearsay Evidence

Scholars and courts often offer three reasons to exclude hearsay from witness testimony.[37] As a general principle, courts express a preference for live testimony over out-of-court statements.[38]

The first and most important reason to exclude hearsay is that opposing counsel cannot cross-examine the declarant.[39] Absent cross-examination, the out-of-court statement presented as evidence on which the trier of fact will most likely rely has not been subjected to this vital "truth-testing technique."[40]

The second reason a court should exclude hearsay evidence is the absence of demeanor evidence.[41] At the time the out-of-court declarant

34. PA. R. CRIM. P. 543(B).

35. PA. R. CRIM. P. 542 cmt.

36. *See infra* notes 37–63 and accompanying text.

37. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 112 (Erwin Chemerinsky et al. eds., 8th ed. 2015); *see also* Maryland v. Craig, 497 U.S. 836, 845–46 (1990) ("[T]he right guaranteed by the Confrontation Clause includes not only a personal examination, but also (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.").

38. *See Craig*, 497 U.S. at 846 ("The combined effect of these elements of confrontation . . . serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.").

39. *See* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (suggesting that cross-examination is vital to the accused); Pointer v. Texas, 380 U.S. 400, 404 (1965) ("Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases."); *see also* MUELLER, *supra* note 37, at 112.

40. *See Pointer*, 380 U.S. at 404 ("And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in *exposing falsehood and bringing out the truth* in the trial of a criminal case.") (emphasis added); *see also* MUELLER, *supra* note 37, at 112.

41. *See Craig*, 497 U.S. at 845 ("[C]ompelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief[.]") (quoting

makes the statement that is later brought into court, the declarant is not under the gaze of the trier of fact.[42] Therefore, the use of hearsay deprives factfinders of the opportunity to consider the speaker's voice inflection, expression, and overall demeanor when assessing the credibility of the declarant's statement.[43]

The third reason for excluding hearsay evidence is the absence of an oath or affirmation.[44] Because the declarant was likely not under oath when he made the statement outside of court, no indication exists that the speaker was under any moral or legal obligation to speak the truth.[45] Of course, the witness on the stand is under oath, but it is the out-of-court statement, made in the absence of the oath, upon which the trier of fact will ultimately rely.[46] If a court does admit hearsay evidence despite these fallbacks, risks arise, which in turn may affect the reliability of the proceeding's outcome.[47]

2. Risks Created by Admitting Hearsay Evidence

Scholars and courts associate four risks of witness inaccuracy with the admission of out-of-court statements.[48] The first risk is one of misperception, which is a function of sensory and mental capacity as

Mattox v. United States, 156 U.S. 237, 242–43 (1895)); *see also* MUELLER, *supra* note 37, at 112.

42. MUELLER, *supra* note 37, at 112.

43. *Id. See also Craig*, 497 U.S. at 846–47 (quoting Ohio v. Roberts, 448 U.S. 56, 63 n.6 (1980)) ("That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.").

44. *See* Pa.R.E. 603; 42 PA. CONS. STAT. § 5901(a)-(b) (1978) ("The affirmation may be administered in any judicial proceeding instead of the oath, and shall have the same effect and consequences, and any witness who desires to affirm shall be permitted to do so."); *see also* MUELLER, *supra* note 37, at 113.

45. Pa.R.E. 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience."); *see also* MUELLER, *supra* note 37, at 113.

46. MUELLER, *supra* note 37, at 113; *see also supra* note 45.

47. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."); *see also* MUELLER, *supra* note 37, at 113.

48. MUELLER, *supra* note 37, at 113; *see also* JACK B. WEINSTEIN & MARGARET B. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 14.04(2) (9th ed. 2011); Schering Corp. v. Pfizer, Inc., 189 F.3d 218, 232 (2d Cir. 1999) ("The hearsay rule is generally said to exclude out-of-court statements offered for the truth of the matter asserted because there are four classes of risk peculiar to this kind of evidence: those of (1) insincerity, (2) faulty perception, (3) faulty memory and (4) faulty narration, each of which decreases the reliability of the inference from the statement made to the conclusion for which it is offered.").

well as physical circumstance and psychological condition.[49] This risk is based on the premise that even well-situated witnesses, who have excellent senses, may misinterpret or misunderstand what they perceive.[50]

The second risk of admitting such statements is faulty memory.[51] The more time that elapses between a witness's original observation of an event and their appearance in court, the greater chance those memory problems may arise.[52] Cross-examination may be useful in highlighting the uncertainties associated with this faulty memory.[53]

The third risk is misstatement, also referred to as the risk of "ambiguity" or "faulty narration."[54] This inaccuracy occurs when the witness meant to say something outside of court, but misspoke.[55] As to this risk, cross-examination is often useful to cure any disparities between statements and intent and achieve clarity as to what the witness really intended to say.[56] Moreover, the oath administered at a hearing or trial reminds witnesses of the need to speak with care when testifying.[57]

Finally, the use of hearsay poses the risk of intentional or unintentional distortion by the witness.[58] The distortion of facts can be subconscious or calculated and intended to fool the trier of fact.[59] The courtroom environment, paired with the oath to testify truthfully, are

49. *See* Semieraro v. Commonwealth Util. Equip. Corp., 544 A.2d 46, 47 (Pa. 1988) (quoting Johnson v. Peoples Cab Co., 126 A.2d 720, 721 (Pa. 1956) ("However, with such a pen-and-ink procedure, there would be no opportunity to check on testimonial defects such as fallacious memory, limited observation, purposeful distortions, and outright fabrication.")); *see also* MUELLER, *supra* note 37, at 113.

50. MUELLER, *supra* note 37, at 113.

51. *See supra* notes 48–49.

52. Pa.R.E. 803(1) cmt. ("The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or *loss of memory*.") (emphasis added); *see also* FED. R. EVID. 803 advisory committee's note to 1973 amendment (citing Owens v. State, 10 A. 210, 212 (1887) ("The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in minds and accurately reflecting them.")); *see also* MUELLER, *supra* note 37, at 113.

53. *Semieraro*, 544 A.2d at 47 ("The great engine of cross-examination would lie unused while error and perjury would travel untrammeledly to an unreliable and often-tainted judgment."); *see also* MUELLER, *supra* note 37, at 114; *see also supra* notes 37–40.

54. MUELLER, *supra* note 37, at 114.

55. *Id. See also supra* note 48.

56. *Id. See also supra* notes 37–40, 53.

57. MUELLER, *supra* note 37, at 114; *see also supra* note 45.

58. *See* FED. R. EVID. 803 advisory committee's note to 1973 amendment ("The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate [or] conscious misrepresentation.").

59. MUELLER, *supra* note 37, at 114.

ordinarily safeguards that suppress the witnesses' aims to deceive.[60] Further, the visible demeanor of the witness on the stand may alert the trier of fact to deception, and cross-examination may expose subconscious distortion and lies.[61]

Hearsay evidence has long been admitted in preliminary hearings in Pennsylvania,[62] but, without more, hearsay has not been sufficient to establish a prima facie case against the defendant.[63]

C. Pennsylvania Law Before PA. R. CRIM. P. 542 (E) and Ricker

1. Earlier Cases Analyzing Similar Issues to Those Presented in *Ricker*

When determining why a court ruled the way it did on a particular issue, one must first look at the state of the law when the court was making its decision.[64] In Pennsylvania, there are several cases that discuss the use of hearsay evidence in preliminary hearings.[65] This issue often evades the court's review.[66] It is clear that pre-*Ricker*, Pennsylvania courts understood hearsay evidence to be *admissible* at preliminary hearings.[67] However, it was admissible only to corroborate other non-hearsay evidence, and was not alone sufficient to establish a prima facie case.[68]

In *Commonwealth ex rel. Buchanan v. Verbonitz*,[69] the issue was whether hearsay evidence, presented at a preliminary hearing as the sole evidence against the accused, was sufficient to establish a prima facie

60. *See* Pa.R.E. 603; *see also* Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'").

61. *See Coy*, 487 U.S. at 1019 ("[E]ven if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions."); *see also* MUELLER, *supra* note 37, at 114.

62. *See infra* note 67 and accompanying text.

63. *See infra* note 68 and accompanying text.

64. *See* Commonwealth v. Porter, 728 A.2d 890, 901 (Pa. 1999) (reasoning that because the state of the law at the time of trial was such that a certain charge was explicitly forbidden, the trial court did not err in not raising the charge *sua sponte*).

65. Commonwealth v. Ricker, 120 A.3d 349, 355 (Pa. Super. Ct. 2015); *see supra* notes 26–47 and accompanying text.

66. *See infra* note 138 and accompanying text.

67. *See* Commonwealth v. Troop, 571 A.2d 1084, 1088 (Pa. Super. Ct. 1990) ("In light of the critical nature of the preliminary hearing in assuring that the state has a legal basis for prosecuting a person, the better course may be for the state, whenever possible, to produce evidence to establish its prima facie case that would also be admissible at trial. However, there is no requirement that the state do so in all instances.").

68. *Ricker*, 120 A.3d at 355 ("Prior to the promulgation of the applicable version of Rule 542(E), hearsay evidence was admissible at a preliminary hearing, but several cases indicated it could not solely be used to establish a prima facie case.").

69. Commonwealth *ex rel*. Buchanan v. Verbonitz, 581 A.2d 172 (Pa. 1990).

case.[70] In *Buchanan*, the only evidence offered by the Commonwealth at the preliminary hearing was the testimony of a police officer relaying what he was told by a third-party victim.[71] The Pennsylvania Supreme Court held that the Commonwealth failed to establish the prima facie case against the defendant.[72] Writing for the plurality of the court, Justice Larsen stated: "Fundamental due process requires that no adjudication be based solely on hearsay evidence. If more than 'rank hearsay' is required in an administrative context, the standard must be higher in a criminal proceeding where a person may be deprived of his liberty."[73] Additionally, the *Buchanan* court stated that a criminal defendant has a right, secured by the Pennsylvania and United States constitutions, as well as the Pennsylvania Rules of Criminal Procedure, to confront and cross-examine the witnesses against him.[74] The court further reasoned that the evidence offered by the Commonwealth was inadmissible hearsay and did not constitute legally competent evidence.[75]

A few months later, in *Commonwealth v. Tyler*,[76] the Pennsylvania Superior Court interpreted and distinguished *Buchanan*.[77] It reasoned that "[i]f the hearsay testimony offered at the preliminary hearing is the only basis for establishing a prima facie case, it fails to meet the criteria for evidence upon which the preliminary hearing judge may rely."[78] In *Tyler*, the court was satisfied that a prima facie existed where the Commonwealth had used non-hearsay evidence to establish its case against the defendant.[79]

70. *Id.* at 173.

71. *See id.*

72. *Id.* (holding that hearsay evidence alone may not be the basis for establishing a prima facie case).

73. *Id.* (quoting Commonwealth, Unemployment Comp. Bd. of Review v. Ceja, 427 A.2d 631, 647 (Pa. 1981) (Flaherty, J., dissenting)).

74. *Id.* at 174.

75. *Id.* (reasoning that the reliance on such evidence violated the defendant's Confrontation Clause rights afforded to him by both the Pennsylvania and United States constitutions); *see also* PA. CONST. art. 1, § 9; *cf.* Coleman v. Alabama, 399 U.S. 1 (1970) (holding that preliminary hearings are a "critical stage" of the prosecution so as to constitutionally require representation by counsel). *But cf.* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (stating that the right to confrontation is "basically a trial right").

76. Commonwealth v. Tyler, 587 A.2d 326 (Pa. Super. Ct. 1991).

77. *Id.* at 328 ("[*Buchanan*] is inapposite here for three reasons. First, there was more than hearsay evidence to establish the prima facie case in the present situation. Second, a trial followed in the present case, during which guilt was established beyond a reasonable doubt, whereas in *Buchanan*, a direct appeal resulted from the trial court's denial of a petition for habeas corpus before trial. Third, appellant has failed procedurally to preserve his claim in proceeding to trial instead of taking a direct appeal from the denial of his petition for writ of habeas corpus, as was done in *Buchanan*.").

78. Commonwealth v. Ricker, 120 A.3d 349, 355 (Pa. Super. Ct. 2015) (citing Commonwealth v. Tyler, 587 A.2d 326, 328–29 (Pa. Super. Ct. 1991)).

79. *See Tyler*, 587 A.2d at 328.

In *Commonwealth v. Carmody*,[80] the habeas court dismissed the defendant's charge of terroristic threats because the charge was supported exclusively by a written statement that the court deemed hearsay evidence.[81] The Pennsylvania Superior Court reversed this decision only because the written document fell within the prior inconsistent statement exception to the hearsay doctrine.[82]

Other cases since *Carmody* have similarly followed the premise that hearsay evidence, although admissible in a preliminary hearing, cannot be used as the sole evidence to establish the prima facie case against the defendant.[83] In *Commonwealth v. Jackson*,[84] the court stated that "[i]n the instant case, there was more than enough non-hearsay evidence to establish a prima facie case."[85] Similarly, in *Commonwealth v. Nieves*,[86] the court determined that because the police officer had actually observed the commission of the offense, there was more than just hearsay evidence and the prima facie case had been appropriately established.[87]

In Pennsylvania, the aforementioned precedent remained unquestioned until the addition and promulgation of a new rule of criminal procedure.[88]

2. The Addition of Pennsylvania Rule of Criminal Procedure 542(E)

Pennsylvania Rule of Criminal Procedure 542[89] establishes the procedural rules that govern preliminary hearings.[90] The aforementioned case law was decided before Pennsylvania Rule of Criminal Procedure 542(E) was promulgated or amended.[91] Pennsylvania Rule of Criminal Procedure 542(E) states:

80. Commonwealth v. Carmody, 799 A.2d 143 (Pa. Super. Ct. 2002).

81. *See id.* at 146.

82. *Id.* at 148.

83. *See, e.g.*, Commonwealth v. Jackson, 849 A.2d 1254, 1257 (Pa. Super. Ct. 2004); *see generally* Commonwealth v. Nieves, 876 A.2d 423 (Pa. Super. Ct. 2005).

84. Commonwealth v. Jackson, 849 A.2d 1254 (Pa. Super. Ct. 2004).

85. *Id.* at 1257 (citing Commonwealth v. Tyler, 587 A.2d 326, 328 (Pa. Super. Ct. 1991)).

86. Commonwealth v. Nieves, 876 A.2d 423 (Pa. Super. Ct. 2005).

87. *Id.* at 427 (distinguishing the case from *Buchanan*, 581 A.2d 172, where the evidence was merely a reiteration of what a third party victim had told police).

88. *See infra* note 91 and accompanying text.

89. PA. R. CRIM. P. 542.

90. *See generally id.*

91. Commonwealth v. Ricker, 120 A.3d 349, 355 (Pa. Super. Ct. 2015); *see also* 41 Pa. Bull. 834 (2011) (Section (E) was added to Rule 542 on January 27, 2011, effective in 30 days.); *see also* 43 Pa. Bull. 2562 (2013) (Section (E) was amended to reflect its

> Hearsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offence, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.[92]

Additionally, the *Ricker* court looked to the Comment in Section (E) of the rule.[93] The Comment states that Section (E) was revised to reiterate that the laws of evidence have traditionally not been applied in full rigor in all criminal proceedings, including preliminary hearings.[94]

At issue in *Commonwealth v. Ricker* was whether the new Rule 542(E) changed the law by allowing hearsay evidence alone to establish a prima facie case, and, if so, whether Rule 542(E) violates the Confrontation Clause.[95]

D. Analyzing Commonwealth v. Ricker[96]

1. Procedural History

In *Commonwealth v. Ricker*, the district attorney charged David Edward Ricker ("Ricker") with attempted murder, assault of a law enforcement officer, and aggravated assault after he exchanged gunfire with a Pennsylvania State Trooper.[97] On the evening of the incident, Trooper Trotta, of the Pennsylvania State Police, responded to a dispatch call in West Hanover Township concerning loud and fast driving.[98]

When Trooper Trotta arrived on the scene, he encountered a group of people standing partially in the road at the end of a driveway.[99] Trooper Trotta pulled over, and the group pointed out a damaged

current reading on April 25, 2013, effective June 1, 2013); PA. R. CRIM. P. 542, Committee Explanatory Reports.

92. PA. R. CRIM. P. 542(E).

93. *Ricker*, 120 A.3d at 354.

94. PA. R. CRIM. P. 542 cmt.; *but see generally* Commonwealth *ex rel.* Buchanan v. Verbonitz, 581 A.2d 172 (Pa. 1990) (determining that the sole use of hearsay to establish a prima facie case during the preliminary hearing stage violates the Constitutional rights of the accused).

95. *See Ricker*, 120 A.3d at 355 ("Prior to the promulgation of the applicable version of Rule 542(E), hearsay evidence was admissible at a preliminary hearing, but several cases indicated it could not solely be used to establish a prima facie case."); *see also infra* note 131 and accompanying text.

96. The Pennsylvania Supreme Court granted Ricker's allowance of appeal on April 18, 2016. *See* Commonwealth v. Ricker, 135 A.3d 175 (Pa. 2016).

97. *Ricker*, 120 A.3d at 351.

98. *Id.*

99. *Id.*

mailbox and lawn ornament sign.[100] They explained that the items had been damaged when hit by a pickup truck driven by their neighbor, Mr. Ricker; they directed Trooper Trotta to Ricker's driveway.[101]

Trooper Trotta arrived at Ricker's gated driveway and pressed a call button.[102] Ricker's wife came to the end of the driveway and informed Trooper Trotta that her husband was drunk and carrying a firearm.[103] Although she hesitated at first, Ricker's wife eventually opened the driveway gate, allowing the trooper to pull his vehicle to the top of the driveway.[104] At first, Trooper Trotta remained in his vehicle.[105] He saw Ricker emerge from the residence with a large German Shepherd.[106] When Trooper Trotta communicated with then-intoxicated Ricker, informing Ricker that he was suspected of sideswiping his neighbor's mailbox, Ricker became irate, cursed at Trooper Trotta, and demanded that Trooper Trotta get off of Ricker's property.[107] Ricker's wife raised her voice to her husband. Ricker then struck her and pushed her aside.[108] Upon this observation, Trooper Trotta attempted to exit his vehicle and began to draw his taser.[109] Ricker slammed the door of the police cruiser shut and reached inside the vehicle in an attempt to grab the taser.[110] Ricker's wife again interceded, and Trooper Trotta was finally able to exit his police cruiser.[111] Upon exiting, Trooper Trotta observed Ricker remove a small gun from the back of his pants; Trooper Trotta drew his weapon and called for backup.[112] Still waving his firearm, Ricker proceeded toward his house and disappeared into an open three-car garage bay.[113]

Soon thereafter, Trooper Gingerich arrived on the scene and ordered Ricker to come out and show his hands.[114] At this point, Trooper Trotta observed Ricker now holding an assault rifle and demanded that he drop it.[115] Instead, Ricker aimed the weapon at Trooper Trotta. Trotta opened

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 351–52.
106. *Id.* at 351.
107. *Ricker*, 120 A.3d at 352.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

fire and struck Ricker twice.[116] As Ricker fell to the ground, he returned fire, hitting Trooper Trotta multiple times.[117]

Despite being the Commonwealth's only eyewitnesses to the events in question, neither Trooper Trotta nor Trooper Gingerich testified at Ricker's preliminary hearing.[118] Instead, Trooper Kelley testified about his subsequent investigation of the incident where he had conducted a taped interview of Trooper Trotta recounting the events in question.[119] Despite Trooper Trotta's absence from the preliminary hearing, the Commonwealth sought, through Trooper Kelley, to play Trooper Trotta's taped interview for the magistrate judge to provide evidence sufficient to establish a prima facie case.[120] Ricker objected to the hearsay evidence and also requested a continuance in order to afford himself an opportunity to call Trooper Trotta and Trooper Gingerich on his behalf.[121] The magisterial district court judge admitted the hearsay evidence, rejected Ricker's request for a continuance, and bound the charges over[122] for trial.[123] Consequently, Ricker filed a pre-trial writ of habeas corpus,[124] but the trial court denied it without a hearing or presentation of argument.[125] Accordingly, Ricker filed an interlocutory appeal[126] against the trial court's denial of habeas corpus relief, maintaining that it was improper to find a prima facie case against him based entirely on hearsay evidence.[127]

2. The Issues Presented in *Ricker*

On appeal, the Pennsylvania Superior Court identified three main issues for its consideration.[128] Preliminarily, the court had to decide whether it "should hear this interlocutory appeal from the denial of

116. *Id.*
117. *Ricker*, 120 A.3d at 352.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *See* PA. R. CRIM. P. 543(B) ("If the issuing authority finds that the Commonwealth has established a prima facie case that an offense has been committed and the defendant has committed it, the issuing authority shall hold the defendant for court on the offense(s) on which the Commonwealth established a prima facie case."); *see also supra* notes 6–9 and accompanying text.
123. *Ricker*, 120 A.3d at 352.
124. *See* Commonwealth v. Orman, 408 A.2d 518, 519 (Pa. Super. Ct. 1979) ("The proper means for testing the validity of a district justice's determination is for an accused in custody to file a writ of habeas corpus.").
125. *Ricker*, 120 A.3d at 352.
126. *See infra* notes 133–35 and accompanying text.
127. *Ricker*, 120 A.3d at 352.
128. *See id.* at 353.

appellant's habeas corpus petition under the 'exceptional or extraordinary' circumstances exception to the general rule because it entails a matter of great public interest."[129] If the court in *Ricker* found that it had reason to consider the defendant's appeal, it then would turn to the other two issues.[130] The first of these two issues was "[w]hether the Commonwealth may prove a prima facie case at the preliminary hearing exclusively through hearsay evidence," which is what the trial and magisterial district courts permitted in Ricker's case.[131] If the Superior Court concluded that the Commonwealth could prove a prima facie case with only hearsay evidence based on Pennsylvania Rule of Criminal Procedure 542(E), then it would turn to the final issue of whether the rule violates the state and federal constitutional confrontation rights of defendants and long-standing Pennsylvania and U.S. Supreme Court precedent.[132] In order to fully understand the court's reasoning in *Ricker*, the parties' arguments must be examined.

3. The Parties' Arguments

First, Ricker urged the court to find that it had jurisdiction over his interlocutory appeal.[133] Usually, when a court denies a pre-trial writ of habeas corpus, it is not appealable.[134] However, an interlocutory appeal may be considered where exceptional circumstances exist.[135] Ricker contended that exceptional circumstances exist when "(1) the question involved is capable of repetition but likely to evade review or; (2) the question involved is one of public importance."[136] Ricker first noted that once a defendant is either acquitted or convicted at trial, problems that occurred at the preliminary hearing stage become moot.[137] Therefore, Ricker argued that the procedural issues, such as using hearsay evidence to establish a prima facie case, were likely to evade the review of the

129. *Id. See generally* Commonwealth v. Hess, 414 A.2d 1043 (Pa. 1980) (establishing the "exceptional" circumstances exception to the interlocutory appeal).

130. *See Ricker*, 120 A.3d at 353.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id. See also Hess*, 414 A.2d at 1047–48; Commonwealth v. Jackson, 849 A.2d 1254 (Pa. Super. Ct. 2004).

135. *Hess*, 414 A.2d at 1047–48 ("Where exceptional circumstances exist, an appeal from such an interlocutory order may be considered.").

136. *Ricker*, 120 A.3d at 353 (citing Commonwealth v. Bernhardt, 519 A.2d 417, 420 (Pa. Super. Ct. 1986)); *see also* Commonwealth v. Smith, 486 A.2d 445, 448 (Pa. Super. Ct. 1984); *In re* Estate of Dorone, 502 A.2d 1271, 1274 (Pa. Super. Ct. 1985).

137. *Ricker*, 120 A.3d at 353 (citing Commonwealth v. Sanchez, 82 A.3d 943, 984 (Pa. 2013)) ("Indeed, once a defendant has gone to trial and has been found guilty of the crime or crimes charged, any defect in the preliminary hearing is rendered immaterial.").

court and risk repetition.[138] He observed that the question at issue in *Ricker* was one of first impression and an "issue of great public importance and the safeguarding of basic human rights."[139]

Next, Ricker contended that, even after the addition of Section (E), hearsay evidence was not sufficient to establish a prima facie case against a defendant.[140] Ricker relied on the Superior Court's opinion in *Tyler*, in which the court upheld the magisterial district court's holding that a prima facie case existed when the prosecution presented more than just hearsay evidence against the defendant.[141] Ricker also cited to the Superior Court's footnote in *Carmody*, wherein it noted that, if hearsay testimony is the only evidence presented at a preliminary hearing, the Commonwealth fails to meet the criteria for evidence upon which the judge may rely.[142] Finally, Ricker mentioned the Supreme Court of Pennsylvania's plurality decision in *Buchanan*, where the court reasoned that a prima facie case could not be satisfied by hearsay evidence alone.[143]

Ricker maintained that the magisterial district court violated his state and federal Confrontation Clause rights by not allowing him to cross-examine Trooper Trotta at his preliminary hearing.[144] Ricker contended that, although the Pennsylvania Supreme Court promulgated Rule 542, that fact is not dipositive of whether the Rule violates his constitutional rights.[145] In fact, Rule 542's Comment even states that the Rule in conflict with the Pennsylvania Supreme Court's decision in *Buchanan.*[146]

In response, the Commonwealth requested that the appeal be quashed because Ricker was required to seek an interlocutory appeal by permission.[147] It asserted that no extraordinary circumstances were

138. *See Ricker*, 120 A.3d at 353.
139. *Id.*
140. *Id.* at 355.
141. *Id. See also* Commonwealth v. Tyler, 587 A.2d 326, 328–29 (Pa. Super. Ct. 1991); *supra* notes 60–63 and accompanying text.
142. *Ricker*, 120 A.3d at 355; *see* Commonwealth v. Carmody, 799 A.2d 143, 146 n.2 (Pa. Super. Ct. 2002) ("[I]f the hearsay testimony offered at the preliminary hearing is the only basis for establishing a prima facie case, it fails to meet the criteria for evidence upon which the preliminary hearing judge may rely.") (citing *Tyler*, 587 A.2d 326 at 328.).
143. *Ricker*, 120 A.3d at 355 (citing the Pennsylvania Supreme Court's plurality decision in *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172 (Pa. 1990)).
144. *See id.* ("Appellant's view, allowing hearsay evidence alone to establish a prima facie case of criminal wrongdoing renders a preliminary hearing 'an empty, ceremonial formality in which the judge simply rubber stamps the uncross-examinable testimony of the affiant[.]'") (quoting Appellant's Br. at 40).
145. *Id.*
146. *See id. See also* PA. R. CRIM. P. 542 cmt.
147. *Ricker*, 120 A.3d at 354.

present, as Ricker would still be allowed to confront the witnesses against him at his trial.[148] Moreover, the Commonwealth urged that the right to confrontation is a trial right and does not apply at the preliminary hearing stage.[149]

In response to the second and third issues raised by Ricker, the Commonwealth sought to undermine Ricker's use of precedent. First, the Commonwealth argued that, after the addition of Rule 542(E), a magisterial district judge may find hearsay evidence alone is sufficient to establish any element of the prima facie case against the defendant.[150] The Commonwealth noted that the precedent cases on which Ricker relied were all decided prior to the promulgation of Section (E) and that the *Buchanan* case was only decided by a plurality of the court.[151] Further, the Commonwealth contended that, because the Pennsylvania Supreme Court enacted the rule in question, it should be presumed constitutional.[152]

Subsequently, the Commonwealth disputed that the prima facie case was built upon hearsay evidence alone,[153] because more evidence, including evidence of the victim's wounds, the seizure of marijuana, and Rickers's own statements, was introduced to corroborate the hearsay testimony.[154] Ultimately, the Superior Court agreed with the Commonwealth, finding that hearsay alone was sufficient evidence to establish a prima facie case at a preliminary hearing.[155]

4. The Reasoning and Holding of the *Ricker* Court

The Superior Court first noted that the possibility of an issue evading review does not alone establish extraordinary circumstances on which to hear a case on interlocutory appeal.[156] However, the court ultimately determined that under the precise facts of Ricker, it did have jurisdiction to consider Ricker's interlocutory appeal because the issue featured in *Ricker* raised an important constitutional question.[157]

148. *Id.*
149. *Id.*
150. *Id.* at 355.
151. *Id.* at 355–56.
152. *Id.* at 355.
153. *See id.* at 356.
154. *Id.*
155. *See infra* note 168 and accompanying text.
156. *See Ricker*, 120 A.3d at 354 ("Thus, in order to establish exceptional circumstances, more is required than the issue becoming moot.").
157. *See id.* ("Not only is Appellant's claim capable of evading review, it presents an important constitutional question regarding whether a powerful state governmental entity violates federal and state constitutional principles in allowing a defendant to be restrained of his liberty and bound over for trial based solely on hearsay evidence.").

After the court determined that it had jurisdiction, it considered the preliminary issue of whether more than just hearsay evidence had been presented to establish the prima facie case.[158] The court reasoned that, although the Commonwealth had presented evidence other than hearsay testimony, none of it was sufficient to establish the elements of the crimes charged.[159] The court stated, "Here, the evidence used to meet the material elements of the crimes charged came from the taped statement of Trooper Trotta."[160] Thus, the court agreed with Ricker's assertion that hearsay evidence alone was used by the Commonwealth to prove a prima facie case for each of the offenses charged.[161]

The court proceeded to determine whether the use of hearsay evidence alone could be used to establish a prima facie case under Rule 542(E).[162] First, the court determined that the footnote[163] that Ricker relied upon in *Carmody* was mere dictum.[164] Second, the court stated that the *Tyler* case did not actually support Ricker's position because the *Tyler* court reasoned that *Buchanan* did not apply where non-hearsay evidence established the prima facie case and Tyler did not appeal after his habeas petition was denied by the court.[165] Further, the *Tyler* court had cursorily rejected a Confrontation Clause argument.[166]

Consequently, the court held that Rule 542(E) did not conflict with any binding precedent.[167] It stated that "[a] plain reading of the rule indicates that it permits hearsay evidence to be considered in determining

158. *See id.* at 356.

159. *See id.* ("While the Commonwealth is correct that it introduced non-hearsay evidence at the preliminary hearing, none of that evidence was sufficient to establish the elements of the crimes charged. The seizure of weapons and marijuana was immaterial to the charges. The fact that bullet casings were discovered also is insufficient.").

160. *Id.*

161. *Id.*

162. *Id.*

163. Commonwealth v. Carmody, 799 A.2d 143, 146 n.2 (Pa. Super. Ct. 2002) ("[I]f the hearsay testimony offered at the preliminary hearing is the only basis for establishing a prima facie case, it fails to meet the criteria for evidence upon which the preliminary hearing judge may rely.").

164. *See Ricker*, 120 A.3d at 356 ("The footnote was not necessary to the disposition of the case since the hearsay in question was ultimately determined not to be inadmissible hearsay. Accordingly, the *Carmody* footnote is dicta.").

165. *Id.* at 357.

166. *Id.* (citing Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (plurality), and setting forth that the confrontation right is a trial right. "Thus, *Tyler* does not actually support Appellant's hearsay or constitutional positions.").

167. *Id.*

any material element of a crime."[168] The court found that Rule 542(E) *does* allow hearsay evidence alone to establish a prima facie case.[169]

Next, the court examined Ricker's claim that Section (E) violated the Confrontation Clauses in both the federal and state constitutions.[170] The Pennsylvania Constitution provides: "In all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him[.]"[171] Similarly, the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"[172]

In *Ricker*, the Superior Court stated that, when considering the Pennsylvania Constitution, one should regard "spirit and intention" and examine the "probable intent of the makers."[173] The Pennsylvania Constitution must be interpreted in its popular sense at the time it was adopted.[174] The "ultimate touchstone" is the language of the Constitution itself.[175] Therefore, the words must be construed in their plain and natural meaning, unless the words themselves denote a technical sense.[176]

The *Ricker* court believed that the Framers' probable intent in their formation of the Confrontation Clause was to afford defendants a right to confront their accusers at trial, and not before.[177] During ratification of the early Pennsylvania Constitution,[178] preliminary hearings were held,

168. *Id.* PA. R. CRIM. P. 542(E) ("Hearsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offense.").

169. *See Ricker*, 120 A.3d at 357 (reasoning "If hearsay evidence is sufficient to establish one or more elements of the crime, it follows that, under the rule, it is sufficient to meet all of the elements.").

170. *See id.* at 357–58.

171. PA. CONST. art. I, § 9.

172. U.S. CONST. amend. VI.

173. *Ricker*, 120 A.3d at 358 (quoting Commonwealth v. Rose, 81 A.3d 123, 127 (Pa. Super. Ct. 2013)).

174. *See id.* (citing *Rose*, 81 A.3d at 127).

175. *Id.* (citing *Rose*, 81 A.3d at 127).

176. *See id.* (quoting Monongahela Navigation Co. v. Coons, 6 Watts & Serg. 101, 114 (Pa. 1843) ("A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning . . . .")).

177. *Id.* at 363.

178. There have been various Pennsylvania Constitutional Conventions, the last of which occurred in 1968. *See Pennsylvania Constitution: Historical Research*, DUQ. UNIV., http://www.duq.edu/academics/gumberg-library/pa-constitution/historical-research (last visited June 30, 2016). The current Article I, Section 9, and particularly the Confrontation Clause found therein, was created in 2003. *See 1968 Pennsylvania Constitution*, DUQ. UNIV., http://www.duq.edu/academics/gumberg-library/pa-constitution/texts-of-the-constitution/1968#A1S09-2003 (last visited June 30, 2016).

but not constitutionally mandated.[179] The typical practice was that an affidavit, usually written by a victim, would appear before a justice of the peace.[180] The justice of the peace[181] would determine if a warrant would be issued upon sufficient probable cause.[182] After the accused was arrested, the accused would be incarcerated, released on bail, or discharged if the police lacked probable cause.[183] "Information gleaned from these proceedings subsequently came to be used in criminal trials, causing 'frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face.'"[184]

The *Ricker* court cited to the holding[185] in *Commonwealth v. O'Brien*,[186] wherein the defendant was not present for his preliminary hearing.[187] The Pennsylvania Superior Court did, however, acknowledge that one of the primary harms that the adopters of both the federal and state constitutions sought to cure was the "practice of using statements taken pre-trial to establish guilt at trial without affording the accused an opportunity to cross-examine the witness."[188]

In sum, the *Ricker* court agreed with the Commonwealth's assertion that the rule was presumed constitutional because the Supreme Court of Pennsylvania promulgated it.[189] The *Ricker* court interpreted the federal and state constitutions by looking to their text and determining the probable intent of the Framers.[190] Further, the court reasoned that it was not bound by past precedents.[191]

Finally, the *Ricker* court compared preliminary hearings to grand jury proceedings, where the accused does not have a right to confrontation.[192] In ruling against Ricker, the Pennsylvania Superior

179. *Ricker*, 120 A.3d at 358 (citing Commonwealth v. O'Brien, 124 A.2d 666, 669–671 (Pa. Super. Ct. 1956)).

180. *Id.* at 359.

181. A justice of the peace and a magisterial district judge are synonymous; the former is an older title. *See* PA. CONST. art. V, § 7; *see also supra* notes 28–29.

182. *Ricker*, 120 A.3d at 359.

183. *Id.*

184. *Id.* at 358 (citing Crawford v. Washington, 541 U.S. 36, 43 (2004)).

185. *See id*. at 360 (quoting Commonwealth v. O'Brien, 124 A.2d 666, 674 (Pa. Super. Ct. 1956) ("He has no constitutional right to face his accusers at a preliminary hearing."). *But see* Gerstein v. Pugh, 420 U.S. 103, 120 (1975) ("The importance of the issue to both the States and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination.").

186. Commonwealth v. O'Brien, 124 A.2d 666 (Pa. Super. Ct. 1956).

187. *Id.* at 667.

188. *Ricker*, 120 A.3d at 363 ("Thus, the very reason for the constitutional right was because an accused could not confront those witnesses during the earlier proceedings.").

189. *See id.* at 362.

190. *See id.* at 363.

191. *See id.* at 361.

192. *See id.* at 363. *But see* CHERMERINSKY, *supra* note 26, at 61 ("A preliminary hearing is fundamentally different from a grand jury proceeding. Preliminary hearings

Court held that his confrontation rights had not been violated and affirmed the decision of the lower court.[193]

Although the Superior Court of Pennsylvania conducted a thorough and in-depth analysis of all the issues presented by Ricker, further evidence suggests that the Confrontation Clause rights of the accused were in fact violated and that the court reached an improper conclusion.[194]

III. ANALYSIS

A. The Confrontation Clause

1. Analyzing the Text of the Federal and State Confrontation Clauses

When interpreting the meaning of an individual's rights enumerated in the Pennsylvania Constitution, courts must first consider the actual language of the constitution itself.[195] The terms therein should be construed to mean what laymen, not lawyers, would understand them to mean at the time of the Constitution's adoption.[196] Moreover, the United States Supreme Court has stated that when interpreting the United States Constitution, a court must first look to the text as it would be understood by individual citizens.[197] The words are to be understood in their ordinary and plain meaning.[198] Further, due regard should be afforded to the Framers' intent in drafting the clauses found within the document's text.[199]

are more akin to 'mini-trials.' A judge presides over the preliminary hearing; it is an adversarial process.").

193. *See Ricker*, 120 A.3d at 363–64.

194. *See infra* notes 195–262 and accompanying text.

195. *See supra* note 176 and accompanying text; *see also infra* note 198 and accompanying text.

196. *See Ricker*, 120 A.3d at 358 (quoting Commonwealth v. Rose, 81 A.3d 123, 127 (Pa. Super. Ct. 2013)).

197. District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) (adopting a textual analysis approach to interpret the meaning of the Second Amendment to the United States Constitution). *But see Heller*, 554 U.S. at 637 (5-4 decision) (Stevens, J., dissenting) (suggesting that an analysis of history and the Framers' intent would be a better means for interpreting the United States Constitution).

198. *Heller*, 554 U.S. at 576 ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.") (citing United States v. Sprague, 282 U.S. 716, 731 (1931)).

199. *See id.* at 665 (Stevens, J., dissenting) (stating that the "fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made."); *see also Sprague*, 282 U.S. at 731 ("[W]here the intention is clear there is no room for construction and no excuse for interpolation or addition.").

Thus, both the federal and state Constitutions' terms should be interpreted by first looking to the original public meaning of the text.[200] The Pennsylvania Constitution provides:

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage . . . .[201]

The relevant section of the Pennsylvania Constitution above should be read to mean that the accused "hath" the right to "be confronted by the witnesses against him," "[i]n all criminal prosecutions."[202] Therefore, one can reasonably conclude that any ordinary citizen, due to the denotative definition of the words in the sentence, would understand the right of confrontation guaranteed by the Pennsylvania Constitution's Declaration of Rights to apply "[i]n all criminal prosecutions."[203]

The Sixth Amendment of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[204]

Similarly parsed, the United States Constitution would be understood by a layman to provide substantially the same rights to the accused as the Pennsylvania Constitution affords, "[i]n all criminal prosecutions" and not just at trial.[205] The amendment would be read by

200. *See supra* notes 174–76 and accompanying text.

201. PA. CONST. art. I, § 9.

202. *See id.*

203. *See supra* notes 201–02 and accompanying text; *but see* Pennsylvania v. Ritchie, 480 U.S. 39, 52–53 (1987) (plurality) (reasoning that the right to confrontation only applies at the time of trial).

204. U.S. CONST. amend. VI.

205. Because their language is almost identical, laymen would likely understand the state and federal Confrontation Clauses to provide essentially the same protections. However, courts have often interpreted the Pennsylvania Constitution to provide far greater protections to its citizens than the United States Constitution does. *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991) (holding that Article I, Section 8 does not recognize the good faith exception to the exclusionary rule articulated by the Court in *United States v. Leon*, 468 U.S. 897, 922–25 (1984), and providing a four-part test to determine whether the Pennsylvania Constitution provides greater protection than the U.S. Constitution). However, the Pennsylvania Supreme Court

the average citizen, to whom the rights directly apply, as meaning that the "accused" "enjoys" the right to confrontation, "[i]n all criminal prosecutions."[206]

In reading either the Pennsylvania Constitution or the United States Constitution, the majority of the public would most likely understand that, as an accused, they have the right to a speedy and public trial, to be informed of the nature and cause of accusations, to be confronted by the witnesses against them, to a compulsory process for obtaining witnesses, and to assistance of counsel for their defense.[207] In addition, people would likely understand that these rights do not exist only at the trial, but at all stages during the criminal prosecution.[208]

Of course, there exists a counterargument that the phrase "all criminal prosecutions" is different than "all criminal proceedings," and that the former means that all individuals are entitled to confront their accusers at some point during the prosecution, and not necessarily at every stage of the trial.[209] However, even if this assertion is accepted, a defendant's right to confrontation can still be violated at the preliminary hearing stage if his or her inability to cross-examine a witness impedes on his or her ability to effectively conduct cross-examination at trial.[210]

Although an ordinary reading of the confrontation clauses of the federal and state constitutions suggests otherwise, the *Ricker* court ultimately determined that defendants do not have a right to confrontation before trial.[211] *Ricker*'s holding was likely influenced by the court's consideration of the Framers' intent and the rarity of

recently reversed many of its prior, more protective decisions and has increasingly favored uniform interpretations of the two constitutions. *See, e.g.*, Commonwealth v. Gary, 91 A.3d 102, 138 (Pa. 2014) (adopting the federal *per se* exception to the warrant requirement for vehicle searches); Commonwealth v. Batts, 66 A.3d 286, 299 (Pa. 2013) (holding that Pennsylvania's constitutional prohibition against cruel punishment is equivalent to the U.S. Constitution for juvenile sentences). *See generally* Bruce Ledewitz, *Beyond Edmunds: The State Constitutional Legacy of Chief Justice Ronald D. Castille*, 53 DUQ. L. REV. 371 (2015).

206. *See* U.S. Const. AMEND. VI.

207. *Id. See also* PA. CONST. art. I, § 9.

208. *See supra* notes 201–06 and accompanying text.

209. *See Prosecution*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("2. A criminal proceeding in which an accused person is tried <the conspiracy trial involved the prosecution of seven defendants>. — Also termed criminal prosecution."); *see also Criminal Prosecution*, BALLENTINE'S LAW DICTIONARY (2010) ("The use of the processes of the law to accuse or charge a person with the commission of a crime, to bring him before a court, to convict him of the offense, and to impose upon him such punishment as is provided by law for the offense.").

210. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 61–62 (1987) (Blackmun, J., concurring) ("In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness.").

211. *See supra* note 177 and accompanying text.

preliminary hearings during the ratification of the Pennsylvania Constitution.[212]

2. The Framers' Intent in Creating the Confrontation Clause

In *Ricker*, the Pennsylvania Superior Court discussed the lengthy history of preliminary hearings in Pennsylvania.[213] In England, preliminary hearings were held to prevent justices of the peace from indiscriminately releasing the accused and for purposes of interrogation.[214] After the hearing's implementation, information was often obtained at preliminary hearings and used against the accused at trial.[215] This prompted frequent demands by the prisoner to meet his accusers before trial.[216] Subsequently, the right to confrontation was born first as a statutory right.[217] Therefore, curing the harms caused by the statements taken *pre-trial* seemed to be the exact and unfettered intention of the Framers when they adopted the confrontation clauses of the federal and state constitutions.[218]

Despite the acknowledged intent of the Framers in formulating the right to confrontation, the *Ricker* court contended that the right did not apply at preliminary hearings because "at the time of the ratification of the federal and early Pennsylvania Constitutions, the phrase 'criminal prosecutions' did not encompass a preliminary hearing."[219] Contrary to this argument, in *District of Columbia v. Heller*,[220] the Court rejected the contention that the Second Amendment protected only the possession of those weapons that were in existence during the eighteenth century.[221]

212. *See supra* note 178 and accompanying text.
213. Commonwealth v. Ricker, 120 A.3d 349, 358–59 (Pa. Super. Ct. 2015).
214. *Id.* at 358.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 363 ("We acknowledge that one of the primary harms sought to be remedied by the federal and Pennsylvania Confrontation Clause was the English practice of using statements taken *pre-trial* to establish guilt at trial without affording the accused an opportunity to cross-examine the witness. Thus, the very reason for the constitutional right was because an accused could not confront those witnesses during the earlier proceedings.") (emphasis added); *but see* Barber v. Page, 390 U.S. 719, 725 (1968) ("[It] is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.").
219. *Ricker*, 120 A.3d at 363.
220. District of Columbia v. Heller, 554 U.S. 570, 576 (2008).
221. *See id.* at 582 ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., Reno v. ACLU, 521 U.S. 844 (1997), and the Fourth Amendment applies to modern forms of search, e.g., Kyllo v. United States, 533 U.S. 27 (2001), the Second Amendment extends, prima facie, to all instruments that

Justice Scalia, writing for the Court, stated that constitutional rights were not to be interpreted in this way.[222] The *Ricker* court used reasoning analogous to that which the court in *Heller* rejected: because preliminary hearings did not exist in full capacity at the time the Constitution was adopted, the protections enumerated in the Sixth Amendment Confrontation Clause were not applicable to such a proceeding.[223] In interpreting the right of confrontation in this prohibited manner, the *Ricker* court denied the defendant a right to crucial pre-trial testimony that would aid his defense.[224]

Despite the Supreme Court's reasoning in *Heller*, the *Ricker* court determined that the right of the defendant to be confronted by his accusers, enumerated in the Sixth Amendment, did not apply during the preliminary hearing stage.[225] However, courts have applied other individual rights within the Sixth Amendment before trial.[226]

3. Comparing Confrontation Clause Rights to Other Rights Enumerated in the Sixth Amendment of the United States Constitution

In *Massiah v. United States*,[227] the Court defined the time from the arraignment until trial as a crucial time in a criminal proceeding.[228] Later, in *Coleman v. Alabama*,[229] the Court held that a preliminary hearing is a "critical stage" of a criminal prosecution so as to constitutionally require the assistance of counsel.[230] The right of the accused to have the representation of counsel for his defense is also provided in the Sixth Amendment of the United States Constitution.[231] In *Coleman*, the United States Supreme Court reasoned that although Alabama law did not require a preliminary hearing,[232] if one was held certain constitutional rights were triggered because the hearing was designed in such a way that handicapped the defendant who did not have the representation of counsel.[233] Pennsylvania has adopted a similar

constitute bearable arms, even those that were not in existence at the time of the founding.").

222. *Id.*
223. *See supra* note 196 and accompanying text.
224. *See infra* notes 251–56 and accompanying text.
225. Commonwealth v. Ricker, 120 A.3d 349, 363 (Pa. Super. Ct. 2015).
226. *See infra* notes 230–31 and accompanying text.
227. Massiah v. United States, 377 U.S. 201 (1964).
228. *Id.* at 205 ("[D]uring perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial . . . .").
229. Coleman v. Alabama, 399 U.S. 1 (1970).
230. *See generally id.*
231. U.S. CONST. amend. VI.
232. *Coleman*, 399 U.S. at 8.
233. *See id.* at 9–10.

design for screening cases before trial, i.e., the adversarial preliminary hearing.[234]

Justice Brennan, writing for the majority of the Court in *Coleman*, offered four reasons why the right to counsel should apply at preliminary hearings.[235] The reasons that the Court provided were as follows:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.[236]

In *Coleman*, the Court suggested that cross-examination and full exploration of the State's case is vital to the accused.[237] Therefore, it likely follows from the Court's reasoning that, in an adversarial preliminary hearing such as the one afforded to defendants by Pennsylvania law, the right of an accused to confront the witnesses against him is of vital importance.[238] Further, defendants who are not afforded this opportunity of confrontation are unconstitutionally deprived of their right to a fair trial.[239] In *Ricker*, because the court admitted the hearsay testimony of Trooper Kelley, the defendant was unable to cross-examine Trooper Trotta or Trooper Gingerich and was harmed as a result.[240] Further, the two troopers were the key witnesses for the state, but they were not under oath at the time they made statements to Trooper Kelley.[241] Ricker also falls victim to the risks associated with the use of hearsay evidence such as misperception of the eyewitnesses, faulty memory or misstatement of the declarants, and the risk of the declarants'

234. PA. R. CRIM. P. 542; *see also* Commonwealth *ex rel.* Buchanan v. Verbonitz, 581 A.2d 172, 175 (Pa. 1990) ("A preliminary hearing is an adversarial proceeding which is a critical stage in a criminal prosecution.").

235. *Coleman*, 399 U.S. at 9.

236. *Id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. *See infra* note 255 and accompanying text; *see also supra* note 232 and accompanying text.

241. *See supra* notes 118–20 and accompanying text.

intentional or accidental distortion of the facts observed.[242] Finally, as suggested by Justice Blackmun, the defendant is now handicapped in preparing his defense due to the absence of preliminary hearing statements from the key eye witnesses to compare with the testimony they present to the trier-of-fact during trial.[243]

4. The Confrontation Clause Rights of the Accused

The right to confrontation enumerated in the Sixth Amendment of the United States Constitution applies to the states by way of the Fourteenth Amendment.[244] A primary interest secured by the Confrontation Clause is the right to cross-examination.[245] The value of cross-examination lies in the ability of a party to expose falsehood and bring out the truth.[246] Therefore, the Court has scrupulously guarded against restrictions imposed on the scope of cross-examination.[247] The Pennsylvania Superior Court has similarly recognized the importance of the parties' ability to cross-examine witnesses at the preliminary hearing stage.[248]

Although a plurality of the Court in *Pennsylvania v. Ritchie*[249] stated that "[t]he right to confrontation is basically a trial right,"[250] Justice Blackmun's concurrence identified that there might well be a confrontation violation if the defendant is denied access to information pretrial that would make an effective cross-examination of a crucial prosecution witness possible.[251] He rejected the notion that the

242. *See supra* notes 48–63 and accompanying text.

243. *See infra* note 251 and accompanying text.

244. *See* Pointer v. Texas, 380 U.S. 400, 403–06 (1965); *see also* U.S. CONST. amend. XIV.

245. Douglas v. Alabama, 380 U.S. 415, 418 (1965).

246. *Pointer*, 380 U.S. at 404; *see also* Ohio v. Roberts, 448 U.S. 56, 65 (1980) (reasoning that the underlying purpose of the Confrontation Clause is to "augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence."); Pennsylvania v. Ritchie, 480 U.S. 39, 52–53 (1987) ("Of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable.").

247. Delaware v. Fensterer, 474 U.S. 15, 18 (1985) (per curiam); *see also Ritchie*, 480 U.S. at 66–67.

248. Commonwealth v. Redshaw, 323 A.2d 92, 94 (Pa. Super. Ct. 1974) ("Plainly the guiding hand of counsel at the preliminary hearing is essential . . . . [T]he lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial.").

249. Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

250. *Id.* at 52–53 (citing Barber v. Page, 390 U.S. 719, 725 (1968)).

251. *Id.* at 61–62 (Blackmun, J., concurring).

Confrontation Clause protects only the trial rights of a defendant and has no relevance pretrial.[252]

Dissenting in *Ritchie*, Justice Brennan also offered that "[t]he creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself."[253] Moreover, he contended that allowing the defendant the ability to compare statements made pretrial with those made at the trial itself was essential to testing a witness's reliability and accuracy of recounting events.[254] Denial of access to the witnesses' prior statements handicaps the defendant in a way that strikes at the heart of cross-examination.[255] In *Ricker*, the defendant is now without pre-trial statements from the prosecution's key eyewitnesses.[256]

Similarly, in *Gerstein v. Pugh*,[257] the Court suggested that a right to confront witnesses exists at the type of preliminary hearing used in Pennsylvania.[258] The Court held that the Fourth Amendment requires that probable cause is established before the liberty of a defendant is further restrained following arrest.[259] Therefore, the importance of the issue justifies the presentation of witnesses and full exploration of their testimony on cross-examination.[260]

Although the defendant in *Ricker* did not advance a due process claim, there exists another argument against the sole use of hearsay evidence in establishing a prima facie case at a preliminary hearing.[261] It has been suggested that this may be a better avenue for argument as it evades the Confrontation Clause argument altogether.[262]

5. The Due Process Clause: A Better Avenue for Argument?

In *Ricker*, the defendant failed to raise or develop an argument as to whether the procedure of admitting hearsay evidence as the sole means of establishing the prima facie case violates the due process clauses of the Pennsylvania and federal constitutions.[263] An argument that Ricker's procedural due process rights were violated would have been a more

252. *Id.* at 61.
253. *Id.* at 71 (Brennan, J., dissenting).
254. *Id.*
255. *Id.*
256. *See supra* notes 118–23 and accompanying text.
257. Gerstein v. Pugh, 420 U.S. 103 (1975).
258. Commonwealth v. Ricker, 120 A.3d 349, 362 (Pa. Super. Ct. 2015).
259. *Gerstein*, 420 U.S. at 114.
260. *Id.* at 120.
261. *See infra* note 264 and accompanying text; *see also Ricker*, 120 A.3d at 355.
262. *See infra* note 279 and accompanying text.
263. *See Ricker*, 120 A.3d at 355.

persuasive assertion.[264] However, the overarching outcome sought by defendants like Ricker may not be achieved, because the due process standard for the admission of hearsay is lower than the Confrontation Clause standard for the admission of hearsay outlined in *Crawford v. Washington*.[265]

The right of confrontation has long been recognized as essential to due process.[266] Based on the idea of fundamental fairness, the Due Process Clause of the Fourteenth Amendment acts as an independent limit on the procedural actions of a state in charging and convicting a criminal defendant.[267] Due process seeks procedural fairness for the accused irrespective of whether the process challenged is prohibited by the guarantees in the Bill of Rights.[268] Therefore, the procedural limitations of due process act independently of those enumerated in the Bill of Rights, including the Confrontation Clause of the Sixth Amendment.[269] To determine whether a procedure is a violation of due process, courts usually apply a "totality of the circumstances" test, as the Court did in *Chambers v. Mississippi*.[270]

In *Chambers*, the Court held that the defendant's due process rights had been violated when Mississippi's rules of evidence did not allow him to cross-examine his hostile defense witnesses or call subsequent witnesses for his defense.[271] The Court determined that when considering all the circumstances, the defendant had been denied the right to a fundamentally fair trial.[272] This finding of unconstitutionality rested on on due process grounds and not on whether the Mississippi rules of evidence violated the confrontation rights enumerated in the Sixth Amendment.[273]

264. *See* Christine Holst, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599, 1627 (2010) ("Therefore, the due process approach seems to be the best way to reconcile the need to protect a defendant's rights prior to trial with conflicting Supreme Court precedent regarding the applicability of the Confrontation Clause at pretrial hearings.").

265. *Id.* at 1626 ("It is unlikely, for example, that many defendants will be successful in challenging hearsay testimony at pretrial hearings under the due process approach unless it is so unreliable that its admission is considered fundamentally unfair. But if the Court's test in *Crawford* were applied, a defendant would have a much better chance of preventing hearsay evidence from being considered at a pretrial hearing.").

266. Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

267. Holst, *supra* note 264, at 1623; *see also* U.S. CONST. amend. XIV, § 1.

268. Holst, *supra* note 264, at 1623 (citing Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring)).

269. *Id.*

270. Chambers v. Mississippi, 410 U.S. 284 (1973).

271. Holst, *supra* note 264, at 1624 (citing *Chambers*, 410 U.S. at 294, 302).

272. *Id.*

273. *Id.*

As in *Chambers*, courts could apply a due process analysis to the use of hearsay evidence at preliminary hearings and thereby surpass the Confrontation Clause question which the defendant raised in *Ricker*.[274] In taking this approach, courts can avoid wading through the inconsistencies of the United States Supreme Court precedent concerning the Confrontation Clause and preliminary hearings.[275] Instead, courts may avoid an "all or nothing approach" by taking into consideration any factors deemed relevant to the procedural fairness of the process used in the case currently at bench.[276]

Although the Court has indicated that the categories of infractions that are to be considered to violate "fundamental fairness" should be construed narrowly,[277] it has also acknowledged that the right to confrontation is essential to due process.[278] The due process approach at least gives defendants a chance to challenge limitations on their ability to confront witnesses where the court has ruled that the right to confrontation does not apply.[279]

IV. CONCLUSION

When taking the text within the confrontation clauses of the Pennsylvania Constitution and the United States Constitution in their ordinary and plain meaning, an average citizen would understand the accused to be afforded the rights therein during the entirety of the criminal prosecution and not just at trial.[280] To interpret the rights otherwise, because the historical "criminal prosecution" did not encompass preliminary hearings, is to engage in reasoning deemed improper by the United States Supreme Court.[281] Moreover, one of the primary purposes of the Framers in creating the right of confrontation was to cure the harms caused by statements taken *pre-trial* without cross-examination.[282]

274. *Id. See generally* Commonwealth v. Ricker, 120 A.3d 349 (Pa. Super. Ct. 2015).
275. Holst, *supra* note 264, at 1625.
276. *Id.*
277. *Id.* at 1626 (citing Dowling v. United States, 493 U.S. 342, 352 (1990)).
278. *Id. See also* Commonwealth v. Mignogna, 585 A.2d 1, 4 (Pa. Super. Ct. 1990) ("While we agree with appellant's assertion that a preliminary hearing is a critical stage of the criminal process and that such hearings are not to become 'hearsay mills,' a defendant must establish the existence of actual prejudice arising from a denial of due process at the preliminary hearing in order to be afforded the remedy of discharge.").
279. Holst, *supra* note 264, at 1627.
280. *See supra* notes 207–08 and accompanying text.
281. *See supra* note 221 and accompanying text.
282. *See supra* notes 215–18 and accompanying text.

The Court has interpreted preliminary hearings to be such a crucial part of the criminal adjudicatory process as to trigger other individual constitutional rights.[283] The Court has also suggested that, in order to satisfy the probable cause standard that accompanies a preliminary hearing, the importance of the defendant's rights to a fair criminal prosecution justifies the presentation of witnesses and full exploration of their testimony on cross-examination.[284] Otherwise, defendants may be handicapped in preparing their defense and confronted by the risks that coincide with the use of hearsay evidence,[285] as Ricker was when he was denied the opportunity to cross-examine the testimony of two key witnesses for the Commonwealth.[286] Further, Ricker's defense was handicapped because of the loss of available information pre-trial which would allow him to effectively cross-examine key government witnesses at trial.[287] Although some precedent provides that the right of confrontation is only a trial right,[288] Justice Brennan reasons that even if an impediment on cross-examination is not erected at the trial itself, such impediment may still undermine the protections of the Confrontation Clause.[289]

Because precedent on the application of the Confrontation Clause pretrial is convoluted, a better possibility for argument may be the Due Process Clause.[290] An argument that the defendant has been denied fair process surpasses a defendant's need to show the violation of a particular liberty within the Bill of Rights.[291]

To find that a prima facie case may be established based on hearsay evidence alone would be to accept the contention that preliminary hearings are nothing more than ceremonial formalities as Ricker has stated.[292] The accused may be incarcerated at length while awaiting trial or made to furnish bail without confronting his accusers.[293]

Hearsay evidence alone cannot be sufficient to establish a prima facie case against the accused at a preliminary hearing. The Framers of both the federal and state constitutions afforded criminal defendants fundamental rights for a reason: to prevent such injustices, as

283. *See supra* note 233 and accompanying text.
284. *See supra* note 260 and accompanying text.
285. *See supra* notes 254–55 and accompanying text.
286. *See supra* note 256 and accompanying text.
287. *See supra* note 251 and accompanying text.
288. *See supra* note 250 and accompanying text.
289. *See supra* note 253 and accompanying text.
290. *See supra* notes 274–75 and accompanying text.
291. *See supra* note 268 and accompanying text.
292. *See supra* note 144 and accompanying text.
293. *See supra* note 25 and accompanying text.

exemplified in *Ricker*.[294] Ordering incarceration or bailment, in any capacity or amount, without first affording defendants the right to confront their accusers cuts to the core of the confrontation clauses and the very purpose for which they were created.[295]

294. *See* PA. CONST. art. I, § 9; *see also* U.S. CONST. amend. VI.
295. *See supra* notes 215–18 and accompanying text.