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STATE OF WISCONSIN
IN THE SUPREME COURT

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

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

Defendant-Appellant-Petitioners.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONERS

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

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STATEMENT OF ISSUES

1. Must hearsay admitted at a preliminary hearing under newly enacted Sec. 970.038, Wis. Stats., meet a threshold level of reliability before a court can use it to find probable cause, and if so, should this Court provide guidance to the lower courts in making such a reliability determination?

Circuit Court: No.
Court of Appeals: No.

2. At a preliminary hearing, can the State satisfy its burden of showing the higher degree of probable cause needed to bindover a felony for trial by relying solely on a hearsay witness who offers the criminal complaint, for which a lesser degree of probable cause is required?

Circuit Court: Yes.
Court of Appeals: Yes.

3. Can a court rely on the recent enactment of Sec. 970.038, Wis Stats., to limit defense cross-examination of a hearsay witness to the question of whether that witness heard the hearsay, rather than the plausibility of the out-of-court declarant's account of the underlying offense?

Circuit Court: Yes.
Court of Appeals: No, but the court of appeals decision, as a practical matter, eviscerates a defendant's ability to cross examine any hearsay witness at a preliminary hearing.

4. Following the recent enactment of Sec. 970.038, before the defendant can call his own witness at a preliminary hearing, must the defense make an offer of proof that the

testimony will be dispositive to defeat probable cause, rather than simply relevant to the plausibility of the charged offense?

Circuit Court: Yes.
Court of Appeals: Did not address.

5. Did the preliminary hearing court's application of Sec. 970.038, which admitted multiple levels of hearsay and precluded the defendant from calling the out-of-court declarant to test his ability to see, hear and remember the relevant facts pertaining to his story, violate the defendant's right to due process by rendering the preliminary hearing a meaningless exercise?

Circuit Court: No.
Court of Appeals: No.

6. Should this Court rule that a defendant's constitutional right to confront his accusers applies at an adversary-type preliminary hearing such as that granted by Wisconsin statutes?

Circuit Court: Did not address.
Court of Appeals: Did not address.

7. Is a defendant's right to the effective assistance of counsel at a preliminary hearing denied when the state's only evidence offered is the criminal complaint and the defendant is not allowed to cross-examine anyone with personal knowledge?

Circuit Court: No.
Court of Appeals: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Oral argument and publication in this Court is typically granted and is requested by the O'Briens.

STATEMENT OF THE CASE

In July, 2011, the O'Briens' runaway adopted seventeen year old son was apprehended and thereafter made a number of accusations of mistreatment by his parents. This led the State to charge both defendants in a joint criminal complaint (APP 117-27) with numerous counts of child abuse and related offenses alleged to have taken place over eight years involving the seventeen year old and his adopted siblings. Statements from that son formed the sole basis for seven of the ten felony counts.

Before the preliminary examination, both defendants moved to preclude the use of hearsay at that hearing, arguing that they were entitled to confront and cross-examine the primary accuser, their seventeen year old son. The defendants argued that the use of hearsay, pursuant to the recently enacted § 970.038, as the exclusive evidence to support a bindover, given the complex facts and expansive charging period in this case, would violate their constitutional and statutory rights to confrontation, compulsory process and the effective assistance of counsel. The circuit court denied the defense motions.

At the preliminary hearing, the State presented only one witness – a police investigator who had signed the criminal complaint. The State moved the complaint into evidence and rested. (R. 30:13; App. 179). On cross examination, the investigator admitted that the only child she interviewed was the seventeen year old runaway, that the complaint contained significant factual gaps, and that the incidents described were only summaries, not verbatim accounts. (R. 30:16-18; App. 182-

84). Defense counsel tried to get the investigator to fill in the gaps and describe additional facts to provide context regarding the time, place and sequence of events, but the court sustained many of the repeated State's objections that the questions were "discovery." (R. 30: 18, 20-22, 23, 26-27, 28, 40, 47; App. 185, 186-188, 189, 192-193, 194, 206, 213). When the witness was permitted to answer, she was frequently unable to recall any facts not found in the criminal complaint. (R. 30: 19-20, 24, 25, 32-33, 34, 35, 39; App. 185-186, 190, 191, 198-199, 200, 205).

After the State rested, the defendants sought to call the seventeen year old, S.M.O., who was subpoenaed by the defense and was available to testify. The State moved to quash the defense subpoena and demanded an offer of proof of testimony the defense would elicit from the witness that "could defeat probable cause," in other words, an offer of proof that the testimony would be not only *relevant* but *dispositive*. (R. 30: 55-57; App. 221-23).

Defense counsel responded that the proffered witness could describe the details and context of the alleged incidents so that the court could determine whether the alleged physical contacts may have been inadvertent, unintentional or accidental. (R. 30: 60-61; APP 226-27). Counsel argued that she did not intend to challenge the witness's truthfulness or credibility, but that "information about the actual account of what happened" was relevant to the court's decision about whether the story was plausible. *Id.*

The court sustained the State's objection, precluded any testimony from the defense subpoenaed witness, and bound over for trial on all counts. (R. 30: 88; APP 254) Following bindover, both defendants petitioned the court of appeals for interlocutory review, which was granted. The court of appeals affirmed, in a decision dated July 17, 2013 (APP 101-116).

The court of appeals ruled that a defendant has no constitutional "right to confront the adverse witnesses at a preliminary hearing," relying on this Court's brief statement in *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), which, as argued below, misread the United States Supreme Court's decision in *Gerstein v. Pugh*. APP at 110, ¶ 16. The court concluded that the confrontation clause in the Sixth Amendment was "basically a trial right,"and therefore "the question is whether admitting hearsay evidence at the preliminary examination and basing the probable cause finding upon hearsay violates 'the right to a fair *trial* guaranteed by [due process].'" APP 108, ¶ 11, citing *State v. Schaefer*, 308 Wis. 2d 279, ¶ 69.

The court of appeals also rejected the defendants' argument that the preliminary hearing court's rulings truncating cross examination of the State's witness and precluding the defense from calling its subpoenaed witness violated their statutory right to cross examination and compulsory process. The court disagreed with the State's argument that the new statute limited the defendant's ability to call or cross-examine witnesses, instead ruling that the enactment of § 970.038 "left unchanged" those other statutory rights granted the defense in § 970.03 (5). (APP 112, ¶ 21). But the court ruled the preliminary judge properly restricted cross-examination and quashed the defense subpoena. (APP 113, ¶ 22).

The court of appeals concluded that the "new statute does not necessarily make cross-examination a useless exercise," because the plausibility standard "does not require a trial court to ignore blatant credibility problems." (APP 114, at ¶ 24).The court gave no hint of what sort of "blatant credibility" problem would be sufficient to defeat probable cause, other than one peculiar, hypothetical example given by the preliminary hearing court in this case, discussed later in this brief.

Finally, the court of appeals rejected the defendants' argument that the preliminary hearing court's application of the new statute denied the right to effective assistance of counsel because counsel could not effectively test the plausibility of the State's case without a chance to cross-examine a witness with first person knowledge of the allegations. The court concluded that counsel could provide effective assistance at a preliminary examination "regardless of the type of evidence the prosecution introduces there, by demonstrating why the prosecution has failed to show a plausible theory for prosecution." APP. 114, ¶ 25.

The court of appeals failed to address several other grounds argued by the defendants on appeal, including that the preliminary hearing judge's arbitrary denial or restriction of statutory rights violated constitutional due process. Further, the court of appeals did not address the concern that unfettered use of multiple-level hearsay at a preliminary hearing conflicts with case law that requires a higher degree of probable cause at a preliminary hearing than is required for a criminal complaint.

This Court granted the O'Briens' petition for review on December 5, 2013.

ARGUMENT

I. This Court should construe Sec. 970.038 to require a threshold level of reliability before a court can use it to find probable cause, and should prohibit the use of unreliable multiple layers of hearsay in such a finding.

The court of appeals noted that a majority of cases from other jurisdictions allow bindover determinations to rest upon hearsay, APP 111, ¶ 19, citing, e.g., *Peterson v. California*, 604 F.3d 1166, 1167-68 (9th Cir. 2010). The *Peterson* court relied largely on *Whitman v. Superior Court*, 54 Cal.3d 1063, 820 P.2d 262, 265 (1991). In *Whitman*, the California Supreme Court

concluded that California's scheme did not violate the confrontation clause. But California's law has important protections lacking in § 970.038 which preclude the use of mere readers and multiple hearsay.

Unlike California's law, §970.038, contains no prohibition against hearsay offered through a "mere reader." In the O'Briens' case, the officer on cross-examination was frequently unable to recall any facts not in the complaint, which she admitted did not contain verbatim accounts and had significant factual gaps. (R. 30: 18, 19, 20, 24, 32-33; APP 184, 185, 186, 190, 198-199, 205). Thus, defense counsel was unable to explore either the reliability or plausibility of the hearsay statements.[1]

Even if this Court finds no constitutional bar against hearsay, as argued *infra* at Section VI, then it should construe §970.038 to prohibit a court from making a finding of probable cause based upon multiple layers of hearsay and to ensure at least a modicum of reliability before considering the hearsay in whole or in part in its finding. Notwithstanding the enactment of §970.038, long-standing rules in Wisconsin regarding personal knowledge still apply. *See* § 906.02. Further, § 970.03 is intended to provide a reliable factual basis for a bindover. The lower courts' interpretation of § 970.038 is in conflict with the primary preliminary hearing purpose.

A statutory interpretation is impermissible if it creates a conflict in the statutes and case law. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681

[1]It's worth noting that most of the alleged victims, including the seventeen-year-old son, who provided most of the material for the complaint, were adopted foreign national children, and English was only their secondary language. The plausibility of their accounts and their understanding of English could not be assessed by the preliminary hearing judge because of the use of hearsay.

N.W.2d 110 ("statutory language is interpreted in the context in which it is used; not in isolation but as a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results"). A statute should be construed so as to avoid absurd results. *State v. Peete*, 185 Wis.2d 4, 17, 517 N.W.2d 149 (1994). Further, "there must be a strong showing of legislative intent before we will construe a statute in a manner that would create an anomaly in criminal procedure." *State v. Williams*, 198 Wis. 2d 516, 532, 544 N.W.2d 406, 413 (1996), citing *State v. White*, 97 Wis.2d 193, 198, 295 N.W.2d 346 (1980)."The true meaning of a single section of a statute ..., however precise its language, cannot be ascertained if it be considered apart from related sections...." *Id*. at 534, citing *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 223, 104 S.Ct. 597, 607, 78 L.Ed.2d 420 (1984).

In addition, "when there are conflicting provisions of the statute, they are to be construed so as to harmonize, thereby giving effect to the leading idea behind the statute." *State v. Gould*, 56 Wis. 2d 808, 812, 202 N.W.2d 903, 905 (1973). In this case, the lower courts are letting "the tail" of § 970.038 "wag the dog" of § 970.03. Given the preliminary hearing judge's interpretation of the statute in this case, it is no wonder the judge concluded "the current statute about hearsay evidence creates a probable cause hearing even more perfunctory, so I'm going to order a bindover." (R. 30: 88; APP 254). Under the scheme proposed by the State and embraced by the preliminary hearing judge, the preliminary examination in this case was perfunctory indeed. But there is no evidence that the legislature intended that result. This Court should construe § 970.038 in a manner that gives substance to the leading idea behind §970.03– to prevent hasty, improvident or malicious prosecutions by ensuring a reliable basis of probable cause.

Since the legislature enacted §970.038 two years ago, many prosecutors have used it to render the preliminary hearing

a nullity. *See* APP 288-293.[2] In some courts, like the O'Briens case, this has led to the elimination of testimony from any witness with personal knowledge of the claimed felony conduct in favor of testimony from "reader" or "narrator" witnesses. In one instance the prosecutor called no witness and asked the court to take judicial notice of the criminal complaint.[3] In addition, some courts are, like the O'Briens' case, using §970.038 to prevent defendants from calling witnesses with personal knowledge at preliminary hearings on the grounds that testimony of such witnesses - when called by the defense - is not relevant.[4]

This Court has inherent and superintending authority to control the course of litigation in the courts of this state, and to ensure that unreliable evidence is not used in court. *See State v. Dean*, 103 Wis. 2d 228, 279, 307 N.W.2d 628 (1981) (polygraph evidence not reliable). *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 178, 699 N.W.2d 110, 126, (Abrahamson, C.J. concurrence). Thus, this Court should clarify the implementation of §970.038, and preclude the use of hearsay which is unreliable, multiple-tiered and incomplete.

The O'Briens suggest this Court harmonize the new law with existing statute by imposing the following standard:

(1) to preclude the use of a "mere reader;"

(2) require testimony or a sworn affidavit by a witness with personal knowledge of the alleged crime;

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[2]Attached to this brief as APP 288 to 293 is the appendix filed by amicus State Public Defender to its Nonparty Brief in Support of Petition for Review, "A Survey of How § 970.038 is Applied in Wisconsin's Courts."

[3]See APP 292, Richland County Case 12 CF 52.

[4]*See* APP 291, Rock County Case 13 CF 1275.

(3) any affidavit must contain sufficient underlying facts for a preliminary hearing court to make a reasonable inference that the sources of hearsay are probably truthful, including both the reliability of the declarant and his/her observational opportunity, and must assist the court in assessing the reliability of the statement and the plausibility of the account of the alleged crime;

(4) provide that any hearsay statements and identifying information be provided to the defendant at least 5 days before the preliminary hearing, so that the defendant may exercise his or her right to subpoena the witness to testify.

This procedure would relieve the state of the burden to subpoena witnesses for all preliminary hearings – most of which are waived -- but preserve the defendant's right under §970.03(5) to call the witness in those cases where the defense chooses to challenge the plausibility of the hearsay account.[5]

Also, the statute must be interpreted in the context of 970.03(5), which allows cross-examination and defense witnesses. If the Court allows the routine use of hearsay, the defense must be afforded its right to present defense witnesses – including the hearsay declarant – to counter the hearsay by showing it is not sufficiently reliable for the court to find probable cause, or that the events, when placed in context, may not even constitute a crime. The preliminary hearing judge did neither in the O'Briens' case, so the bindover must be vacated.

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[5]*See*, APP 280-281, and *infra*, Section V.1, for discussion of similar proposed legislation in the 1982 Judicial Council Report of Preliminary Examinations Committee.

This Court should also overrule, or at least prevent any further extension of the court of appeals decision in *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (Ct. App. 1982). In that case, the court of appeals allowed hearsay testimony from a young child's mother at the preliminary hearing because the testimony fit a firmly rooted hearsay exception for excited utterance. *Id.* at 418-22. By contrast, the hearsay allowed in the O'Briens' case fit no historically rooted exception, and had no particular indicia of reliability.

The *Padilla* court analyzed whether the hearsay violated the defendant's *statutory* right to confrontation,[6] concluding that "the statute permits cross-examination of only those people actually called to the stand." *Id.* at 424. When *Padilla* was decided, only hearsay exceptions and limited reliable hearsay were allowed at a preliminary hearing. Now, since the enactment of § 970.038, prosecutors all over the state are making a mockery of the preliminary hearing process by putting a single witness on the stand who cannot be effectively cross-examined, thus depriving the court from exercising any role as a check on prosecutorial power, a long-standing purpose of the preliminary hearing.

II. The lower court decisions eliminate the higher degree of probable cause needed for bindover compared to the lower degree needed for a criminal complaint.

The court of appeals failed to address the O'Briens' argument that the preliminary hearing court's rulings were inconsistent with long-standing case law which holds that the

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[6]The *Padilla* court did not analyze whether the *constitutional* right to confrontation should have barred the hearsay, because it deemed the question foreclosed by *Mitchell*. 110 Wis. 2d at 422. As argued *infra*, at Section VI, the O'Briens submit that this Court should reconsider and clarify the *Mitchell* decision.

probable cause required for a bindover must be greater than that necessary in a criminal complaint. *See T.R.B. v. State*, 109 Wis.2d 179, 188, 325 N.W.2d 329 (1982); *County of Jefferson v. Renz*, 231 Wis.2d 293, 323, 603 N.W.2d 541, 555 (1999) *Taylor v. State*, 55 Wis. 2d 168, 173, 197 N.W.2d 805 (1972).

Hearsay is permitted in a criminal complaint only if the complaint includes sufficient underlying facts for a magistrate to make a reasonable inference that the sources of hearsay are probably truthful, including both the reliability of the informant and his/her observational opportunity. *See State ex rel Cullen v. Ceci*, 45 Wis.2d 432, 445, 173 N.W.2d 175 (1970); *State ex rel Evanow v. Seraphim*, 40 Wis.2d 223, 226, 161 N.W.2d 369 (1968); *State v. Knudson*, 51 Wis.2d 270, 274, 187 N.W.2d 321 (1971). Contrast that with the State's and lower courts' interpretation of § 970.038, which would allow double, triple or otherwise unreliable hearsay at a preliminary hearing as the exclusive grounds for probable cause to bindover. Further, by law a complaint must be sworn, § 968.01. But under § 970.038, hearsay is admissible even if unsworn.

This interpretation of the new statute creates the absurd result that a preliminary hearing now has a lesser level of reliability of evidence than a criminal complaint, even though bindover requires a *higher* degree of probable cause than a complaint. It would be nonsensical for the legislature to retain the preliminary hearing process, yet permit a standard of probable cause lower than that required in a criminal complaint. There is no basis to believe the legislature intended to gut the preliminary hearing in this way, and turn it into a pointless exercise involving a presentation of a criminal complaint by the prosecutor and a rubber stamp by the judge. To avoid such an absurd result, this Court "may insert words into a statute that are necessary or reasonably inferable." *State v. Williams*, 198 Wis. 2d 516, 534, 544 N.W.2d 406, 413-14 (1996), citing *State v. Gould*, 56 Wis.2d at 812, 202 N.W.2d 903 (1973).

III. The preliminary hearing court misconstrued §970.038 to restrict cross examination and to permit the defendant to challenge only whether the witness heard the hearsay.

Section 970.03(5) guarantees a citizen accused of a felony offense the right to cross examine the state's witnesses. The O'Briens submit that their preliminary hearing judge was persuaded to limit cross examination based on the prosecutor's theory that once any bit of hearsay had been presented that was "consistent with guilt" the inquiry was over, and the judge had no option but to bind the defendant over. The judge's decision rested on a misconception that since the enactment of §970.038, the only possible relevant area of inquiry for the hearing was the plausibility of *the police witness' account of having heard the hearsay*. The judge repeatedly indicated a belief that upon the introduction of the complaint, the only determination left for him to make was whether the officer testified plausibly about what she heard. *See, e.g.*, R. 30: 58, 60-61, 65; App. 224, 226-27, 231.

Exercising its right to cross-examination, the defense unsuccessfully sought only to introduce relevant additional facts to supplement the State's incomplete version of the story. For example, one allegation in the complaint was that Mr. O'Brien had placed one of the children in a plastic bin and struck the sides of the bin with a stick. Defense counsel attempted to ascertain whether the officer had been told anything about the size of the stick or the rigidity of the bin. The State objected on relevance grounds, saying that "the size of the stick does not defeat probable cause." (R. 30: 37-38; App. 187). Defense counsel explained that the State was required to show probable cause that an injury occurred and whether that was plausible or not would depend on these facts. This was a classic issue of the plausibility of the story.

Defense counsel explained, too, how even limited cross-examination of a witness with knowledge could reveal the implausibility of a one-sentence hearsay summary of an event. Counsel used the example that an account of a person being hit with a flashlight would become incredible, unbelievable, and implausible if the account was expanded to include a claim that during the event, a human sprouted wings and flew. R31: 24, App. 153; R. 30: 59; APP 225.

Defense counsel further sought through questioning to clarify or uncover confusion in the meaning of words attributed by Domino to S.M.O. and B.M.O. – both foreign born. She gave the example that in one context a colloquial phrase such as a person claiming to have thrown "that puppy so hard that it went all the way across the street," in reference to the speaker's having thrown a ball, could out of context be construed as animal abuse. R. 31: 23-24; APP 152-53. Defense counsel, through her questioning sought to elicit facts that could shed light on the meaning of words such as "log" attributed to the hearsay declarant. R. 30: 38; APP 188). Confusion or clarifications of terms attributed to S.M.O. by Domino could have been revealed through cross-examination, or later by testimony from the witness subpoenaed by the defense.

The court of appeals affirmed the preliminary hearing judge, (APP 113, ¶ 22) thereby unduly restricting the defendant's right to cross-examine State's witnesses. Under the view accepted by the court, the State is now permitted to choose how detailed (or how sparse)[7] a hearsay account to present, and the defense is precluded from attempting to elicit evidence on cross-

[7]*See, e.g.*, R. 2: 8; APP 124, wherein the entire factual basis for felony count 10 in the complaint, charging physical abuse of a child, states "S.M.O. reported that sometime between February and May 2011, Martin O'Brien hit S.M.O. in the chest with a flashlight. S.M.O. stated that the blow caused him pain and numbness in his body."

examination to rebut the allegations. This renders a "critical stage" in a criminal proceeding meaningless and deprives the court of the ability to check prosecutorial power.

IV. The lower courts imposed an impossible precondition on the defendants' right to call a witness at a preliminary hearing.

The preliminary hearing judge erroneously denied the O'Briens' right to call a witness at the preliminary hearing. The defense subpoenaed S.M.O. seeking to examine him regarding his account of the alleged offenses. The State's only witness conceded that the complaint contained only a summary with many gaps she could not fill due to lack of memory. (R. 30: 17-18; App. 183-84). At the end of her direct testimony, there were unanswered questions relating to a lack of intent to cause injury, a lack of evidence regarding injury and the plausibility of the stories, all of which the defense should have been allowed to explore. A fair opportunity to challenge the plausibility of each of the ten felony counts was needed because the State expressly asked for an individual finding of probable cause on each count. (R. 30: 68; APP.218).

A preliminary examination "must also be adequate to fulfill the defendant's constitutional right to know the nature and cause of the charges against which he must defend. Although the preliminary hearing is unquestionably a creature of the legislature, this court has acknowledged that the proceeding implicates certain constitutional rights." *State v. Richer*, 174 Wis. 2d 231, 242-43, 496 N.W.2d 66 (1993), citing *State v. Dunn*, 121 Wis. 2d 389, 394 & n. 6, 359 N.W.2d 151 (1984). But here, at the end of the State's presentation of evidence there was little information elicited which would inform the defendant about the time, place or context of many of the allegations, which were sparsely supported.

The right of a defendant to call witnesses, including the alleged victims, to contest probable cause has been approved on many occasions. *State v. Mitchell,* 84 Wis. 2d 325, 336 (1978); *State v. Knudson*, 51 Wis.2d 270, 187 N.W.2d 321(1971)(defendants were entitled to subpoena adverse witnesses, including the victim); *State v. McCarter*, 36 Wis.2d 608, 153 N.W.2d 527 (1967)(court erred when it denied defense request to call an eyewitness at the preliminary hearing.); *State v. Wilson*, 59 Wis.2d 269, 208 N.W.2d 134(1973)(court erred when it precluded the defense from cross-examining a victim on her description of the suspect as it was relevant to the plausibility of the identification); *State v. Hayes*, 46 Wis.2d 93, 175 N.W.2d 625(1970) (it was error for the preliminary hearing court to restrict the cross-examination of the state witnesses who identified Hayes at the preliminary).

While a defendant may not call witnesses to directly impeach the "general trustworthiness of the witness" by showing inconsistencies in the story or producing polygraph evidence, he is entitled to present evidence to contest the plausibility or believability of the witness' story. *State v. Marshall*, 92 Wis.2d 101, 284 N.W.2d 592 (1979); *State v. Dunn*, 121Wis. 2d 389, 397, 359 N.W.2d 151(1984). Since the state is obligated to establish probable cause as to each element of the offense charged, it is appropriate to challenge evidence regarding each element. *State v. Richer*, 174 Wis.2d 231, 245, 496 N.W.2d 66 (1993); *State v. Schab*, 2000 Wis. App 204, ¶9-10, 238 Wis.2d 598, 617 N.W.2d 872.

Nonetheless, the State objected to the defense calling the witness with personal knowledge of the alleged abuse. The State argued any evidence the defense might present was improper absent an offer of proof establishing how any of the witness' answers would "defeat probable cause," (in other words, an offer of proof that the testimony would be not only relevant but dispositive). (R. 30: 55-57; APP. 221-23). The State also argued

that testimony relating to lack of intent or injury was defensive and irrelevant. The circuit court ultimately agreed. (R. 30: 60-68; APP. 226-34).

The preliminary hearing judge's interpretation of §970.038 as requiring the defense to make an advance showing that the testimony of a proposed witness will be dispositive, before allowing the witness to be called, would nullify §970.03(5). There would be almost no conceivable circumstance in which the defense would be allowed to present evidence, vitiating the defendant's right to present evidence to contest the plausibility of the account given. *Schaefer*, 2008 WI 25, at ¶ 35 ("Significantly, a defendant may present evidence at a preliminary examination. . . . He may call witnesses to rebut the plausibility of a witness's story and probability that a felony was committed").

The court of appeals said "[w]e reject any implication in the prosecutor's argument that the enactment of § 970.038 somehow limited the defense's ability to call or cross-examine witnesses at the preliminary examination. The defense retains the same rights to cross-examine and call witnesses that applied at the preliminary examinations before the enactment of the new law." APP 112-13, ¶ 21-22. Nevertheless, the court of appeals ruled that the circuit court was justified in restricting cross examination and quashing the defense subpoena because the defense could not articulate how the questions or subpoena had any possibility of "bringing to light facts relevant to the

plausibility of the charges." APP 113, ¶ 22.[8] The record proves otherwise.

Contrary to the lower courts' findings, defense counsel *did* articulate that the subpoenaed witness's testimony would put the facts in context, perhaps demonstrating that the alleged contact by the defendants was accidental, not intentional. R. 30: 59-60, 67; APP 225-26, 233.

For instance, Count 10 of the complaint charges Martin O'Brien with hitting S.M.O. in the chest with a flashlight. R2: 8, App. 124. Domino was unable to provide the court with a single fact necessary to support the inference that contact between a flashlight and S.M.O.'s body was anything but an accidental contact.

Martin O'Brien's defense counsel sought to call S.M.O. to testify, in part, about the circumstances of the alleged acts of abuse because S.M.O.'s testimony could have negated the necessary element of intent, by explaining that the flashlight accidentally struck him in the chest when the defendant was in a darkened room. The court may have therefore ruled that the testimony adduced as to that count did not support probable cause. But the court ruled the proffered testimony was not relevant at the preliminary hearing, and quashed the defense subpoena. R. 30: 60-61; APP 226-27.

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[8]Surprisingly, the court of appeals endorsed the circuit court's hypothetical that its decision would have differed if the defense witness testified that "he was in Canada for the entire period of time which is the subject of this investigation," APP 113, ¶ 22. This testimony would merely have been inconsistent with the hearsay statement presented by the State, and therefore presented a credibility dispute that was improper at the preliminary hearing.

In addition, five of the ten felony counts of physical abuse of a child involve accusations made by S.M.O. that he saw Kathleen or Martin victimize children other than S.M.O. Neither of the alleged victims of these allegations corroborate S.M.O.'s accounts of the incidents despite the fact that, if the accounts were plausible, the victims would have had to have been aware of their own victimization.

In Counts 3, 4, and 7, S.M.O. reports that Kathleen and Martin physically abused L.M.O. when Kathleen stabbed L.M.O. in the hand with a pocketknife (Count 3), when Martin picked L.M.O. up by the neck (Count 4), and when Kathleen picked L.M.O. up by the ear causing his ear to tear and to bleed (Count 7). R2: 2-3, 7, 8; App. 118-119, 123-24. Domino confirmed that L.M.O. was interviewed by a social worker and failed to corroborate any of the three instances in which S.M.O. claimed that L.M.O. was abused. R30: 32, 50-51, App. 198, 216-217. It is implausible that L.M.O. could have his hand stabbed, his body suspended by his neck, and his ear torn without being aware of the abuse. Cross-examination could have established that S.M.O.'s view was obstructed and that L.M.O. was lifted by his shirt collar, not his neck. Indeed, if S.M.O. testified, facts could have been elicited that may have undermined the plausibility of each of the summary accounts attributed to S.M.O. as to each of the three counts involving L.M.O.

In Count 6, S.M.O. claimed to have observed Martin strike B.M.O. in the genitals with his knee. R2: 8, App. 124. Domino's testimony added nothing to the information in the complaint. R30: 34, App. 200. She clarified only that B.M.O. did *not* himself report such an incident occurring and there were no facts offered from which a court could infer that an injury took place. Had S.M.O. testified regarding the circumstances, counsel could have elicited testimony to demonstrate that the act occurred during horseplay or sport, and was neither abusive nor painful.

Without being allowed to establish the context of the incident, the defense was denied the opportunity to rebut the allegation.

Similarly, in Count 5, S.M.O. accuses Martin of placing a white bucket over B.M.O.'s head and striking the bucket with a "large stick." R2: 8, App. 124. Without firsthand testimony from S.M.O. the court had nothing upon which to infer the size, shape, rigidity, or strength of the bucket or the stick involved, or the force or lack of force of any impact. Neither the criminal complaint nor any testimony provided any fact from which it can be inferred that B.M.O. sustained bodily harm.

In construing the new statute permitting hearsay at a preliminary hearing, the court of appeals said:

> [T]he new statute does not necessarily make cross-examination a useless exercise. The plausibility standard does not require a trial court to ignore blatant credibility problems, but requires it to consider all reasonable inferences that can be drawn from the facts in evidence. . . . We are confident that our trial courts will know implausibility when they see it, hearsay or not, as the hypothetical given by the trial court in O'Briens' case confirms.

APP 114, ¶ 24. However, the court of appeals decision in this case gives the preliminary hearing courts no guidance on how to apply §970.038. It instructs the courts not to ignore "blatant credibility problems" without explaining what that means. APP 114, ¶ 24. Indeed, that advice conflicts with other cases from this Court which hold that credibility of a witness is not an issue to be considered at a preliminary hearing. *State v. Dunn*, 121 Wis. 2d 389, 397, 359 N.W.2d 151, 154 (1984). The circuit court's disjointed reasoning in this case should give this Court no confidence in the ability of the preliminary hearing courts to properly adjudicate cases after the enactment of § 970.038.

In reality, the preliminary hearing court imposed an impossible burden on the defense to present an offer of proof of what the witness would say that would justify its exercise of its statutory right to call witnesses. The standard should not be whether the defense can prove the witness's testimony would *defeat* probable cause. No attorney could be that certain of a witness's testimony ahead of time. Rather, the standard should only be whether defense counsel can make an offer of proof that the sought after testimony will be relevant to rebut the elements of the charged offense. *State v. Schab*, 2000 WI App 204, ¶ 9-10. That would include testimony about the circumstances of the witness's observation ability, sequence of events, and the circumstances and context of the alleged events that could render the claim that a crime occurred implausible, including negating elements of the offense. That is all the O'Briens' counsel sought to present via their defense-subpoenaed witness, so it was improper for the court to quash the subpoena and preclude such testimony at the preliminary hearing.

V. The lower court rulings arbitrarily deprived the defendants of their legitimately expected rights granted by statute.

1. The decision minimizes the importance of a preliminary hearing as a critical stage in Wisconsin and relinquishes its long-standing purpose as a check on prosecutorial power.

A preliminary examination is considered one of those "critical stages" of the Wisconsin criminal process, so an accused is entitled to the assistance of counsel. *State v. Wolverton*, 193 Wis.2d 234, 252, 533 N.W.2d 167 (1995); *Coleman v. Alabama,* 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). The outcomes of those pretrial hearings considered "critical stages" in the prosecution "[hold] significant consequences for the accused" and are stages of the criminal process "where rights are

preserved or lost." Christine Holst, *The Confrontation Clause and Pretrial Hearings: a Due Process Solution*, 2010 U. Ill. L. Rev. 1599, 1609 citing *Bell v. Cone*, 535 U.S. 685, 696 (2002).

The purpose of a preliminary hearing is to prevent "hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based." *State v. Richer*, 174 Wis.2d 231, 496 N.W.2d 66 (1993) (quoting *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539 (1922)). Thus, the preliminary hearing "serves the interest of both the defendant and the state." *Id.* at 241.

More recently, in *State v. Schaefer*, 2008 WI 25, ¶33, 308 Wis. 2d 279, 299, 746 N.W.2d 457, this Court noted: "The independent screening function of the preliminary examination serves as a check on the prosecutorial power of the executive branch." (citing *State ex rel. Klinkiewicz v. Duffy*, 35 Wis.2d 369, 373, 151 N.W.2d 63 (1967)). In states across the country, whether it be by holding a preliminary examination or convening a grand jury, judges and members of the community serve the necessary function of reviewing the prosecutor's charging decision. As one commentator noted, "The prosecutor has a great deal of discretion, and in many areas a prosecutor exercises this discretion with little or no oversight or transparency." Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for A Broken System*, 2006 Wis. L. Rev. 399, 420-21 (2006). Absent a preliminary hearing or grand jury indictment, the power of the government would go unsupervised and unchecked. Justice Bablitch made a compelling case for judicial review of the charging decision through the preliminary hearing process:

> As a former district attorney, this writer can attest to the power that rests with the decision to charge. No one can deny it. But it can be abused, intentionally or unintentionally. The State should not resent judicial review of its charging decisions, it should welcome it. It serves as a check on human fallibilities, on the pressures of an overcrowded calendar, on the pressures emanating from outside forces. It may be inconvenient, but checks and balances are frequently inconvenient, particularly on the person or the institution being checked and balanced.

State v. Williams, 198 Wis. 2d 516, 541, 544 N.W.2d 406, 416 (1996)(J.Bablitch concurring opinion)

Because of the devastating impact of a felony charge, it is essential to maintain a meaningful review of the felony charging decision. Prosecutor offices are overworked and understaffed, so prosecutors may not be able to thoroughly review cases before charging. Cases initiated by the police or citizens may have serious flaws which should be screened early in the process, not at the point of trial. A preliminary hearing should not be perfunctory or so cursory that it precludes review of the prosecutor's screening decision. "To give prosecutors the function of deciding whether or not a statute has been violated is justifiable; to abandon review of that decision is not." James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1547-48 (1981).

In this case, the lower court's endorsement of the State's perfunctory presentation of one hearsay witness to identify the criminal complaint, which contained little detail regarding the majority of the charged felonies, together with its objection to the defense cross examination and presentation of testimony by a properly subpoenaed witness, completely vitiates any "check" on

prosecutorial power, an unwarranted and unwanted result that this Court can remedy.

Moreover, the court of appeals' sanction of this procedure runs counter to Wisconsin's long preliminary hearing history.

Early in their history, many states, including Wisconsin, put criminal procedures in place to protect the rights of the accused to confrontation and to eliminate the *ex parte* examinations of the past. *Crawford v. Washington*, 541 U.S. 36, 49, 124 S.Ct. 1354, 1363, 158 L.Ed.2d 177 (2004). The preliminary hearing has a venerable history in Wisconsin and existed even before the adoption of the state constitution. *Faust v. the State*, 45 Wis. 273, 276 (1878); *Sparkman v. State*, 27 Wis. 2d 92, 99, 133 N.W.2d 776, 780 (1965) (preliminary hearing is "essential step in the criminal process involving felonies").

Chapter 145, Sections 12 to 16, of the Laws of 1849 (APP 284-287) provided for a preliminary examination to test accusations against the citizen accused which was substantially similar to the procedure used in modern times before the current revision. The magistrate would "examine the complainant and the witnesses to support the prosecution, under oath, in the presence of the party charged . . . ." *Id.*, Section 12. The defendant could have the assistance of counsel in cross-examining the prosecution's witnesses and presenting defense witnesses, who would also be sworn and examined. *Id.* Section 13. At the end of the testimony, which was recorded, the magistrate would discharge the defendant if it "shall appear to the magistrate upon *the whole examination* that no offense has been committed, or that there is not probable cause for charging the prisoner with the offense." *Id.* Section 16 (emphasis added).

The 1969 revisions to the criminal procedure code kept the adversarial preliminary hearing with the same procedural protections in Wisconsin intact. The same year, in *Coleman v.*

Alabama, 399 U.S. 1, 9 (1970), the United States Supreme Court defined the adversarial preliminary hearing as a "critical stage" in a criminal prosecution. *Id*. at 9. In addition to the importance of the reliable probable cause finding early in the process, the court highlighted the benefits to the defendant of an adversarial hearing represented by counsel:

> Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. 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.

Id. at 9.

In 1982, the Wisconsin Judicial Council extensively examined the utility of the adversarial preliminary examination, conducting a series of hearings and listening to many differing opinions on many options for change from altering the procedural protections afforded by the hearing to abolishing it altogether.

The Judicial Council found that the hearing sometimes acted as a valuable discovery tool for prosecutors as well as defense lawyers, allowing the prosecutor to evaluate his witnesses and hear their live testimony, which would sometimes lead the prosecutor and defense to re-assess the case and the decision to settle it or proceed to trial. *See* Report of Preliminary Examinations Committee to Judicial Council April 23, 1982, at APP 263-264.

The Judicial Council recognized a number of problem areas associated with the traditional "full adversary proceeding" including witness inconvenience, manpower requirements, and case delays, *Id.*, APP 262-263, but determined that "alternatives to the screening function do not really exist." *Id.*, APP 273. The Council considered opening the hearing to any and all hearsay but rejected the idea, proposing instead a more modest reform. *Id.*, APP 277. Under this proposal, if the prosecution wanted to use hearsay, it would be required to provide affidavits containing statements of witnesses with "personal knowledge" in advance of the hearing, the affidavits would identify the declarant so that the defense could subpoena the witness and the court would have to make a finding that the defense had a "reasonable opportunity to compel the attendance of the affiant." *Id.*, APP 280-81.

In the O'Briens' case, the court of appeals noted that some states, and the federal government, excuse the requirement of a preliminary hearing if a grand jury indictment issues. APP 109. This is because historically the grand jury has provided at least *some* check on prosecutorial power in states that do not provide for a preliminary hearing. The court of appeals also noted that "some states have abolished the preliminary hearing altogether, or made it optional,"citing *State v. Florence*, 239 N.W.2d 892 (Minn. 1976) and Vermont R. Crim. P. 12. APP 109. However, both Minnesota and Vermont statutes provide, in place of a preliminary hearing, for a pretrial defense motion to dismiss a case, at which a court considers the reliability of the state's

evidence in a manner similar to the check on prosecutorial power that preliminary hearings formerly provided. *See* 49 M.S.A., Rules Crim. Proc., Rules 11.02, 11.04; and Rule 12(d) Vermont Rules of Crim. Procedure.

A number of other states still conduct a traditional preliminary hearing during which testimony is presented and the defendant has a right to cross-examine witnesses and present evidence, including Illinois, Michigan, Missouri and Ohio. *See* 725 ILCS 5/109-3, M.C.L.A. 766, MO Sup. Ct. Rule 22.09, Ohio Sup. Ct. Rule 22.09. Even in states where hearsay is admitted at the hearing, it is often limited to reliable hearsay which may be defined generally, *e.g.* evidence which provides "a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished," as in Iowa, I.C.A. Rule 2.2, or more specifically in a list of defined types of admissible hearsay, as in Utah. *See* Utah R. Evid. 1102.

Thus, the lower courts' interpretation of § 970.038 in this case would gut the protections and oversight provided by statute in this state. It would make Wisconsin an outlier among other states in this country, with essentially nothing but a sham preliminary hearing and no way for a court to ever prevent "hasty, malicious, improvident, and oppressive prosecutions." *Thies v. State*, 178 Wis. at 103.

2. The defendants' statutory rights to confront witnesses and call witnesses on his behalf are violated by the lower court's interpretation of §970.038.

The defendants argue below, *infra* at Section VI, that the *constitutional* right to confrontation should apply at a preliminary hearing, not just at trial, as the court of appeals ruled. However, regardless of the answer to the constitutional question, there

remains a *statutory* right to cross-examine and call witnesses at a preliminary examination in Wisconsin that is reinforced by case law. That statutory right was ignored by the court of appeals in this case.

In *Mitchell v. State*, 84 Wis.2d 325, 336, 267 N.W.2d 349 (1978), the supreme court noted the statutory rights conferred by Chapter 970:

> [I]n Wisconsin an accused is by statute given the right to confront witnesses at this stage. He is entitled to be present at the hearing, sec. 971.04(1)(d), Stats., and he "may cross-examine witnesses against him, and may call witnesses on his own behalf who then are subject to cross-examination." Sec. 970.03(5), Stats.

84 Wis.2d at 336. In *Wilson v. State*, 59 Wis. 2d at 295, the Wisconsin Supreme Court found error when the preliminary hearing court refused to allow the defense to question a witness regarding the description she had given of the assailant. The court found that "the question propounded did not go to the witness's general trustworthiness, but also the plausibility of her description of the defendant, upon which the finding of probable cause rested." Similarly, in this case the O'Briens were prevented from testing the plausibility of the story because of the wholesale use of hearsay, the limits on cross-examination and the quashing of the defense subpoena. Thus, the preliminary hearing afforded the O'Briens was devoid of their rights.

Further, a criminal defendant has the right to compulsory process at the preliminary examination. *State v. Schaefer*, 2008 WI 25, ¶75. The ability of a defendant to present witness testimony at a pretrial hearing may be critical to a successful defense and this right may prevail even in the face of compelling national security concerns. *United States v. Rivera*, 412 F.3d 562, 569 (4th Cir., 2005), citing *United States v. Moussaoui*, 382 F.3d 453 (4th Cir.2004). Given that the defendant has the right to

subpoena witnesses at a preliminary hearing, he "must have compulsory process to assure the appearance of his witnesses and their relevant evidence." *Schaefer*, 2008 WI 25 at ¶35. The right of the defendant to rebut the elements is ensured by statute. *State v. Schab*, 200 WI App 204, at ¶ 9-10.

In this case, defense counsel attempted to elicit information from the investigator without success about the context of the allegations, which were for the most part sparsely described in the state's hearsay exhibit. Counsel stated that the purpose of the cross-examination and the attempt to call the main declarant was to elicit information that would be relevant to the issues of lack of intent to injure, possible accidental contacts and lack of physical injury, all essential elements of the crime of physical abuse of a child. R. 30: 60; APP 226. The defense argued that the brief description in the report could have been taken out of context and be misleading. R. 30: 59; APP 225. The court sustained objections to the attempt to elicit this information and to call the declarant as a witness finding that this information was not relevant to the issue of probable cause but merely defensive material. R. 30: 60-62; APP 226-28. He ruled that S.M.O.'s proposed testimony would have to pertain to the plausibility of the investigator herself rather than the plausibility of the account of the alleged offenses. R. 30: 60, 65; APP226, APP 231.[9]

As applied by the prosecutor and circuit court in this case, now endorsed by the court of appeals, the entire statutory procedure for preliminary hearings has been rendered meaningless. If that was the intent of the legislature it could have repealed Chapter 970 entirely. By failing to do so, the legislature

[9]"So are you telling me that you–you–By examining S.M.O., are you going to find, um, that Ms. Domino made all this up." APP 226.

evinced an intent to continue to provide such hearings, presumably for the purposes described in *Richter* and other cases.

Thus, for all these reasons, the defendants' statutory rights to confront, cross-examine and subpoena witnesses at the preliminary hearing were denied.

3. The arbitrary deprivation of the defendants' statutory rights violates due process.

The court of appeals did not address the defendants' argument that their rights at the preliminary hearing were arbitrarily denied in violation of due process. The circuit court's incorrect interpretation that the only relevant issue was whether the officer *heard* the hearsay to which she testified, and the court's requirement that the defendant demonstrate exactly what the witness would say to defeat probable cause, arbitrarily denied or restricted the defendants' statutory rights granted under § 970.03(5) to cross-examine the state's witness and to present witnesses of his own.

Once a right has been conferred by statute, an individual is entitled to the full enjoyment of that right. *State v. Dresel*, 136 Wis.2d 461, 463, 401 N.W.2d 855, 856 (Ct. App. 1987). When a state grants criminal defendants certain statutory rights, it may create a substantial and legitimate expectation on their part that they will not be deprived of their liberty in violation of such rights. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).[10] The arbitrary deprivation of a liberty interest that state law provides is a violation of Fourteenth

[10]A defendant's liberty interest is implicated by a criminal prosecution even when the defendant is not in custody pending the trial. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863 (1975).

Amendment procedural due process. *Casteel v. McCaughtry*, 176 Wis.2d 571, 579, 500 N.W.2d 277, 281, *cert. denied*, 510 U.S. 924, 114 S. Ct. 327, 126 L.Ed.2d 273 (1993) ("Protected liberty interests 'may arise from two sources—the Due Process Clause itself and the laws of the States." citing *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908, 104 L.Ed.2d 506 (1989); *see also, Aki-Khuam v. Davis*, 339 F.3d 521, 529 (7th Cir. 2003)(court's denial of the full use of peremptory strikes guaranteed by statute violated Fourteenth Amendment).

The legislature in Wisconsin created an adversary preliminary hearing in felony prosecutions, and granted to the defense not only the right to cross examine state witnesses, but also to call their own witnesses. § 970.03(5). Clearly, that grant of statutory compulsory process at a preliminary hearing was intended to ensure that the defense, as well as the prosecution, has the opportunity to present evidence to ensure that decisions are not made on a partial or truncated version of the events. This is a recognition that even in a pretrial setting important decisions are frequently made that can affect the overall course of the case. The Court in *Coleman v. Alabama*, 399 U.S. 1, 10 (1970), ruled that the preliminary hearing protects the indigent accused against an erroneous or improper prosecution, and noted that the limited finding of probable cause does not render the proceeding meaningless. The conduct of that hearing may well be critical to a successful defense at trial. *Coleman*, 399 U.S. at 9.

The preliminary hearing court's decision to quash the subpoena deprived the defendants of their statutory right to the use of compulsory process to elicit testimony that was relevant to the proceeding, would have provided context to the sparse and truncated hearsay statements regarding the allegations and provided an opportunity to rebut the allegations at this critical stage of the prosecution. By cutting off cross-examination of the detective and quashing the defense subpoena of a relevant

witness the judge arbitrarily denied the O'Briens their statutory rights under Chapter 970, and their Fourteenth Amendment right to due process, and deprived them of a fair hearing.

VI. The Use of Hearsay at the Preliminary Hearing Violated the O'Briens' Constitutional Rights.

A. Confrontation.

The court of appeals assumed that the Sixth Amendment right of confrontation does not apply at Wisconsin's preliminary examination. APP 107-08. However, many proponents of this position lack support or overstate the Supreme Court's prior rulings.

The Sixth Amendment itself expressly applies in "all criminal *prosecutions*," not just at trial. The right includes protections in a pretrial setting that "might settle the accused's fate and reduce the trial to a mere formality." *United States v. Wade*, 388 U.S. 218, 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The Sixth Amendment right to the effective assistance of counsel attaches well before trial, indeed at any "critical stage." *See United States v. Wade*, 388 U.S. 218, 226-27 (1967). This guarantee is not limited to procedures directly affecting the actual determination of guilt. *Kimmelman v. Morrison*, 477 U.S. 365, 379, 106 S.Ct. 2574, 2586 (1986); *Lafler v. Cooper*, __ U.S. __, 132 S.Ct. 1376, 1388 (2012).

Thus, Sixth Amendment rights are not simply trial rights; they also apply to those critical stages of a criminal prosecution in which key decisions are made and rights may be lost forever. The pretrial stages of the prosecution may be even more important than the trial which may never take place. Over the years, courts have increasingly acknowledged the important role of the pretrial stages of a criminal case and the necessity of applying the Sixth Amendment to pretrial events. *State ex rel.*

Steven v. Cir. Ct. Manitowoc Cty., 141 Wis. 2d 239, 249, 414 N.W.2d 831 (1987) (Sixth Amendment right to a public trial applied to preliminary hearings, overruling *State ex rel. Kennon v. Hanley*, 249 Wis. 399, 24 N.W.2d 683 (1946)); *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) citing *Gannett Co. V. DePasquale*, 443 U.S. 368, 397, 99 S.Ct. 2898, 61 L.Ed.2d 698 (1979)(Sixth Amendment public trial right applied to pretrial suppression hearings, stating "...suppression hearings are often as important as the trial" as the suppression hearing may be the only trial because most defendants plead guilty); *State v. Wolverton*, 193 Wis. 2d 234, 251, 533 N.W.2d 167 (1995) (Sixth Amendment right to counsel applies to preliminary hearing).

More recently, the United States Supreme Court has been expanding the Sixth Amendment's application both in and outside of trial, and has signaled its recognition that because so few cases ever go to trial, the pretrial process has become more important in the practical world. *See Lafler v. Cooper*, __ U.S. __, 132 S.Ct. 1376, 1388 (2012); *Missouri v. Frye*, ___ U.S.__, 132 S.Ct. 1399, 1407 (2012) ("Because ours is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process").

In four recent cases, the Supreme Court discussed the Sixth Amendment in the context of the conduct of the entire defense, rather than the trial alone. *See*, *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004) (right to confrontation); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006), (it was not harmless error to deny counsel of choice in pretrial setting because many decisions "do not even concern the conduct of the trial at all," but they all have an impact on the defendant's ability to defend himself against government prosecution); *Lafler v. Cooper*, __ U.S. __, 132 S.Ct.

1376, 1388 (2012); *Missouri v. Frye*, ___ U.S.__, 132 S.Ct. 1399, 1407 (2012) (plea negotiations).

As the Sixth Amendment right to counsel applies before trial, because it may affect a defendant's decision whether even to go to trial, so should the Sixth Amendment right to confrontation apply at an adversarial preliminary hearing. Denying a defendant the right to confront his accusers at a preliminary hearing inhibits his ability to determine the strength of the state's case, and affects other key decisions. As *Gonzalez-Lopez* says a denial of his right to choice of counsel at this stage is unconstitutional, because it may affect his decision to go to trial, it must also be unconstitutional to deny him the right to confront witnesses at this stage, which may *equally* affect his decision whether to demand a trial, or seek a plea resolution.

The State dismisses *Crawford*, because it did not specifically address confrontation in a preliminary hearing. It is true hearsay at a preliminary hearing was not an issue in *Crawford*, but neither were surrogate forensic lab certifications, yet the Court recently expanded *Crawford's* analysis to apply to them. *Bullcoming v. New Mexico*, 564 U.S. __, 131 S.Ct. 2705 (2011). Moreover, *Crawford* focused on the historical underpinnings of the Confrontation Clause, and observed that "by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases." *Crawford*, 541 U.S. 36, 46, 124 S.Ct. 1354, 1361.

So far, neither the United States Supreme Court nor any Wisconsin appellate court has yet decided whether *Crawford* applies to preliminary examinations. This Court recognized that "[w]ith the *Crawford* decision, a new day has dawned for Confrontation Clause jurisprudence." *State v. Stuart*, 2005 WI 47, ¶ 26, 279 Wis. 2d 659, 671, 695 N.W.2d 259, 265, quoting

State v. Hale, 277 Wis.2d 593, ¶ 52, 691 N.W.2d 637. Therefore, the contours of *Crawford* are still evolving.

The State below cited Professor LaFave's statement that the Supreme Court has "long held that cross-examination at a preliminary hearing is not required by the confrontation clause of the Sixth Amendment." 4 Wayne R. LaFave, *Criminal Procedure*, § 14.4(c), at 352 (3rd ed. 2007). However, LaFave's treatise cites only one very old Supreme Court case, *Goldsby v. U.S.*, 160 U.S. 70, 16 S.Ct. 216 (1895), which does *not* support his proposition. The right to confrontation at a preliminary hearing was never at issue in *Goldsby* because the defendant was indicted by grand jury and had no preliminary hearing. 160 U.S. at 72-74.

Similarly, the court of appeals in the O'Briens' case also overstates the extent to which the Supreme Court has addressed the right to confrontation in a pretrial setting. The court of appeals relied on isolated references in some cases by the United States Supreme Court which have referred to the right of confrontation as "basically a trial right." APP 107, ¶ 10, citing *Barber v. Page*, 390 U.S. 719, 725 (1968) and *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("confrontation is a trial right"). However, neither *Barber* nor *Ritchie* involved preliminary hearings, and the quotation from *Ritchie* came from a mere plurality opinion, where only four justices agreed with that statement. The court in *Barber* did not address the question of whether confrontation rights may be implicated by events outside of trial. The court ruled that the failure to afford cross-examination at a trial when it was available violated the Confrontation Clause. 390 U.S. at 125. *Barber* did not suggest that the right of confrontation attached exclusively at trial.

Therefore, contrary to the erroneous quotation in LaFave's treatise, the Supreme Court has *never* decided whether the right to confrontation applies to a preliminary hearing, and there is a

split in state courts. *See, e.g., State v. Timmerman*, 218 P.3d 590, 593 (Utah 2009) (Sixth Amendment confrontation does not apply); *cf. State v. Massengill*, 99 N.M. 283, 657 P.2d 139, 140 (Ct. App.1983) (confrontation right extends to preliminary examinations).

The court of appeals in the O'Briens' case also referenced language from this Court's discussion in *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), about the constitutional right to confrontation at a preliminary hearing. The defendants submit that portion of the *Mitchell* decision was based on a misreading of *Gerstein v. Pugh*, and urges this Court to revisit *Mitchell* and withdraw that language. The full adversarial nature of Wisconsin's preliminary hearing is completely different from the non-adversarial judicial review procedures considered by the United States Supreme Court in *Gerstein*. *Mitchell* did not analyze this proposition with any detail, and in truth the *Mitchell* court's reference to *Gerstein* was misplaced.

In *Gerstein*, the Supreme Court considered whether the Fourth Amendment required an adversarial proceeding to establish probable cause for pretrial detention shortly after arrest. The court ruled that because of its "limited function and its nonadversary character, such a probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel." 420 U.S. at 122. However, the supreme court expressly contrasted the need for a more thorough presentation at the type of adversarial preliminary hearing statutorily provided for in Wisconsin in order "to determine whether the evidence justifies going to trial":

> When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused *justifies the presentation of witnesses and full exploration of their testimony on cross-*

> *examination*. This kind of hearing also requires appointment of counsel for indigent defendants.

Gerstein v. Pugh, 420 U.S. at 120 (emphasis added).

Thus, *Gerstein* simply does not stand for the proposition that constitutional confrontation rights do not apply at an adversary preliminary hearing of the type employed in Wisconsin, and the *Mitchell* court mistakenly cited it for a holding it did not make. 84 Wis.2d at 336. This Court should order that misleading language withdrawn from *Mitchell* and other cases citing it.[11] Given recent United States Supreme Court rulings, including *Crawford* and *Gonzalez-Lopez*, which have re-invigorated Sixth Amendment rights, this Court should rule that the constitutional right to confrontation does apply at the adversarial preliminary examinations employed in this state.

B. Effective Assistance of Counsel

A defendant has the right to the effective assistance of counsel at a preliminary hearing. In *Coleman v. Alabama*, the court held that at an adversarial preliminary hearing the accused must be afforded the assistance of counsel to "*meaningfully* []cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." 399 U.S. at 7 (emphasis added), citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932). Although, like Wisconsin, the statutory purpose of the Alabama preliminary hearing process was limited, the *Coleman* court plainly recognized that effective representation at the critical preliminary hearing stage before trial was essential to the fair trial guaranteed by the Sixth Amendment. Thus, prejudice is

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[11] *E.g.*, *State v. Padilla*, 110 Wis. 2d 414, 422, 329 N.W.2d 263 (Ct. App. 1982); *State v. Oliver*, 161 Wis. 2d 140, 146, 467 N.W.2d 211 (Ct. App. 1991).

presumed when counsel has been prevented from assisting the accused during a critical stage of the proceeding. *United States v. Cronic*, 466 U.S. 648, 659, n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The court of appeals rejected the defendants' argument that the use of hearsay at a preliminary hearing precludes the effective assistance of counsel. APP 114-15, ¶ 25. The court ruled that counsel can still be effective without having any ability to cross-examine the accuser, by "demonstrating why the prosecution has failed to show a plausible theory for prosecution." *Id.* However, the court failed to explain how counsel would accomplish this feat without cross-examination of any person with direct knowledge of the facts underlying an accusation or the ability to exercise their compulsory process to produce such a witness. Where the State's only hearsay evidence is the criminal complaint itself, the preliminary hearing is a sham, because counsel can no more effectively argue to the court against the State's "theory for prosecution" than she could at the initial appearance when handed a copy of the criminal complaint, where the state has a lower degree of probable cause to satisfy.

Contrary to the court of appeals' assertion, it *is* the obligation of the defense "to challenge the competency or reliability of the underlying evidence" at a preliminary examination. APP 114. The court's statement to the contrary represents a fundamental misunderstanding of the purpose of the preliminary hearing. More accurate is the court's observation that "it remains the duty of the trial court to consider the *apparent reliability* of the State's evidence at the preliminary hearing in determining whether the State has made a plausible showing of probable cause" to support the bindover. APP 103, ¶ 2 (emphasis added). If reliability is a question for the trial court, then surely the effective assistance of defense counsel demands that counsel be permitted to challenge it with all the tools the statute provides.

CONCLUSION

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

Dated this 6th day of January, 2014.

Respectfully submitted,
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