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STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTIN O'BRIEN,	Case No. 2012 AP 1769 CR
KATHLEEN O'BRIEN,	Case No. 2012 AP 1770 CR
and	
CHARLES E. BUTTS,	Case No. 2012 AP 1863 CR

Defendant-Appellant-Petitioners.

Consolidated Appeal of Non-Final Orders from the Circuit Court of Walworth County, Judge John Race Presiding and the Circuit Court of Kenosha County, Judge Anthony Milisaukas Presiding

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NON-PARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER

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DISCUSSION

While the admission of hearsay under WIS. STAT. § 970.038 simplifies the State's presentation of evidence at the preliminary examination, the Court of Appeals believed the new statute did not substantially affect a defendant's rights. "The defense retains the same rights to cross-examine and call witnesses that applied at preliminary examination before enactment of the new law." *State v. O'Brien*, 2013 WI App 97, ¶ 22. The Court of Appeals' conclusion regarding the effect of § 970.038 is more aspirational than realistic, as the facts of these cases demonstrate. In practice, application of § 970.038 has affected the fundamental due process rights of the accused and, in so doing, courts have unwisely ceded authority to the executive branch.

The two cases in this consolidated appeal ask this Court to address whether the Fourteenth Amendment's Due Process clause allows the State to offer a narrator—a witness with little or no personal knowledge of the investigation and who merely reads from the criminal complaint—to summarize evidence in support of a probable cause finding necessary to send a case on for trial. *Amici* believe that the use of such a narrator offends due process because the admission of such testimony removes an important function of the preliminary examination. The preliminary examination acts as a safeguard which benefits the accused and the public.

> The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid for both 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, 69, quoting *Thies v. State*, 178 Wis. 2d 98, 103, 189 N.W.2d. 539, 541(1922). Even recently, this Court repeated that this core purpose of the preliminary examination retains its vitality. *State v. Kleser*, 328 Wis. 2d 42, 68, 786 N.W.2d 144, 157 (2010).

The manner in which the preliminary examinations were conducted here would give the wrongly accused no opportunity short of trial to challenge the legitimacy of the case. And trial may offer no solace because of its inherent hardships and collateral costs. As any number of cases have shown, even the innocent may choose to resolve criminal charges that have no merit to avoid the expenditure of costs or the risks inherent in a criminal trial.[1] "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." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

Too, the under-staffing of prosecutor's offices limits the amount of time a prosecutor may have to exercise her discretion to weed out cases with proof problems. Thus the trial court is the proper (and perhaps only) place where judicial review of charging decisions can occur. Review "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) (Bablitch, J., concurring).

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[1] The case of Christopher Ochoa, now a licensed Wisconsin attorney, is but one example. He plead guilty in Texas to a murder that he did not commit because it spared his life. *See* Innocence Project, KNOW THE CASES (available at http://www.innocenceproject.org/Content/Christopher_Ochoa.php)

Amici believe that the following four points, relating to the preliminary examination, are not controversial. But when these points are considered against the manner in which some Wisconsin courts apply § 970.038 every day, *amici* believe that the proceeding has been rendered meaningless and violates the accused's right to due process. Moreover, the Court of Appeals' interpretation of what due process requires at the preliminary hearing is out-of-step with the process required and that which is afforded in other states.

1. In Wisconsin, when an individual is accused of committing a crime, the State must file a criminal complaint which contains facts sufficient to show a magistrate that there is probable cause to believe that a crime has been committed and that the individual probably committed the crime. WIS. STAT. § 968.02. The criminal complaint may rely on hearsay to demonstrate probable cause, but the complaint also must demonstrate why such hearsay is reliable. *State v. Knudson*, 51 Wis. 2d 270, 187 N.W.2d 321 (1971).

2. Wisconsin affords an individual who has been accused of committing a felony the right to a hearing at which "the duty of the trial court [is] to consider the apparent reliability of the State's evidence [and] ... whether the State has made a plausible showing of probable cause to support binding over the defendant for trial." *State v. O'Brien*, 2013 WI App 97, ¶2, 349 Wis. 2d 667, 836 N.W.2d 840. The right to such a hearing is codified in § 970.03. At this hearing, hearsay is admissible, § 970.038, and the magistrate may base her finding of probable cause "in whole or in part" on hearsay evidence. *Id.* Whether the State has made a sufficient showing at the preliminary examination is a case-by-case determination. *Id.* The court must find probable cause to believe that a crime has been committed by the defendant. WIS. STAT. § 970.03(9).

3. The level of probable cause for binding the individual over for trial is greater than the level of proof required to initiate

criminal proceedings. *Taylor v. State*, 55 Wis. 2d 168, 173, 197 N.W.2d 805 (1972) (noting that a preliminary hearing "may require more by the way of evidence than other preliminary determinations of probable cause"); *County of Jefferson v. Renz*, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999) ("'[P]robable cause' does not refer to a uniform degree of proof, but instead varies in degree at different stages of the proceedings"); and Wiseman, Chiarkas & Blinka, WISCONSIN PRACTICE, at § 8.3 (the difference in probable cause "reflects the very different kinds of evidence that a court will use in making the probable cause determination").

4. Where the right to a hearing exists, and where that hearing affects an individual's liberty interest, due process requires that the individual have meaningful opportunity to ask questions of the witness. *California v. Trombetta,* 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness"). Even where the credibility of a witness cannot be challenged, *Vigil v. State,* 76 Wis. 2d 133, 144, 250 N.W.2d 378 (1977), testing the plausibility of the witness's statement still requires some adversarial testing; and § 970.03(5) specifically permits cross-examination.

Following the enactment of WIS. STAT. § 970.038, *amici* are aware that at preliminary examinations in some Wisconsin courts, the only witness called by the state to testify has been a witness who reads the criminal complaint into the record and offers no information beyond what is contained in the complaint's four corners.[2] (Not unlike the two

[2] *Amici* in its submission in support of the Petition For Review attached a summary of how, anecdotally at least, some trial courts handled the presentation of evidence post § 970.038; a copy of the same was attached to the appendix of the Defendant-Appellant-Petitioners in 2012AP1769-CR and 2012AP 1770-CR at 288-293.

cases in this consolidated appeal.) Often these witnesses are law enforcement officers. Some have passing familiarity with the facts of the investigation. Other times, a prosecutor may be called upon to be the witness who presents this information at the preliminary examination. Such a narrating witness does not have the personal knowledge of the facts underlying the criminal charges that WIS. STAT. § 906.02 contemplates.

When the State offers nothing more than the criminal complaint at the preliminary examination, through the voice of a narrating stranger, it follows that the accused's ability to cross-examine the witness is limited; the witness has no personal knowledge about the allegations and cannot respond to questions about the hearsay declarant's statements, including the circumstances under which the statement was made. In short, the plausibility of the hearsay statements cannot be tested. The witness is a cipher. And no meaningful opportunity exists for the accused to challenge the sufficiency of the criminal charges. Too, the testimony does not inform why the proffered hearsay is reliable. In effect then, § 970.038 as applied in some Wisconsin courts has transformed the preliminary examination into a second look at the criminal complaint—but one no more searching than the first look.

In other Wisconsin courts reliance on § 970.038 is limited. Recognizing their role in evaluating the evidence, some courts have placed limits on the levels of hearsay a witness is allowed to testify to. For example, in one branch of Wisconsin's 72 circuit courts, a local rule provides that

> Given the legislative history of Wis. Stat. sec. 970.038, the inherent unreliability of hearsay within hearsay, the specific provision of Wis. Stat. sec 970.038(2), and the inherent authority of the Court to control the mode of the proceedings, the court will not base its probable cause

> finding on hearsay more tangential than the first level (i.e., hearsay within hearsay), absent extenuating circumstances.
>
> Parties should be prepared to proceed with direct evidence if the proffered hearsay evidence is not allowed.

Dane County Circuit Court, Branch 11, Policies & Procedures, II.D and E.[3]

Relatedly, following the implementation of § 970.038, some courts have qualified the accused's opportunity to call witnesses, § 970.03(5) notwithstanding, unless counsel first shows how the witness's testimony will dispositively render the previously admitted hearsay implausible. This was the view of the presiding judge in *O'Brien*. In the view of these courts, if the witness's testimony is not dispositive, then it is not relevant. That requirement is a tall order and one which this Court's prior decisions do not support. *See State v. Schaefer*, 2008 WI 25, ¶ 35, 308 Wis. 2d 279, 746 N.W.2d 457 ("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") (internal citations omitted). The relevance (and therefore, admissibility) of the witness's testimony cannot be based on whether it is dispositive; establishing that the previous testimony is implausibile is more nuanced than this approach permits. Further, this approach flips the burden of persuasion, such as it is, at a preliminary examination. This too offends due process.

Amici acknowledge that a preliminary examination is not a full-blown adversary proceeding such as a trial. All the same, due process

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[3] A copy of this Dane County Local Rule was attached to the appendix of the Non-Party Brief filed by the Wisconsin Association of Criminal Defense Lawyers and the Wisconsin Office of State Public Defender in the Court of Appeals.

requires a meaningful opportunity to test the evidence that is presented before a neutral magistrate who then determines whether a plausible account of a criminal offense has been offered. Read together, due process and the accused's statutory right to a preliminary examination do not authorize courts to find probable cause to continue a criminal case to trial on the very same evidence used for initiating the criminal case. That is, although hearsay evidence may be offered in support of probable cause in a criminal complaint and at a preliminary examination as well, the State cannot meet its burden when it calls a witness to testify at the hearing who, while she has read the criminal complaint has no personal knowledge about the facts upon which the felony charge is based.

When the accused is stopped from questioning a witness because the witness has no personal knowledge about the information to which he is testifying or, when the State does not present any information beyond what is contained in the criminal complaint, then the preliminary examination loses its purpose and probable cause becomes an even less rigorous standard; it reverts to the standard for the complaint itself. To the extent that the preliminary examination was intended as a check on the power of the executive branch, such a statutory purpose has no meaning when the evidence introduced at a preliminary examination is based wholly on hearsay, not founded on personal knowledge, and cannot be tested through cross-examination. The Court of Appeals noted that, at the preliminary examination, counsel's representation is effective when she "demonstrat[es] why the prosecution has failed to show a plausible theory for prosecution." *O'Brien*, 2013 WI App 97, ¶ 25. In theory, this may be sound. But it does not play out this way in practice. When the only witness who is permitted to testify at the hearing has little independent knowledge of the witness's statement and acknowledges gaps and deficits in her understanding of the case, such testing by counsel cannot be effective.

In principle, the State's exclusive reliance on hearsay to demonstrate probable cause at the preliminary examination is not without risk, as the Court of Appeals noted. "The hearsay nature of evidence may, in an appropriate case, undermine the plausibility of the State's case." *State v. O'Brien*, 2013 WI App 97, ¶2. The admission of hearsay under § 970.038 "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 inference that can be drawn from the facts in evidence." *Id.*, at ¶24. In practice, however, particularly in high volume courts, experience has taught that such admonitions ring hollow, as the examples make clear.[4]

Moreover, the higher level of probable cause needed for bind-over embodies an aspect of reliability. *See O'Brien*, *supra,* ¶2 ("the trial court [must] consider the apparent ***reliability*** of the State's evidence") (emphasis added). How can a neutral magistrate evaluate the reliability of the testimony when all that is presented is a witness who has no personal knowledge of the facts? What about the witness makes her narration of the events plausible? What about the narrator's recitation makes the hearsay reliable? In the case of a witness who only reads the criminal complaint and who does not have personal knowledge about the hearsay declarants—in short, a mere narrator—the answer is nothing.

Reliability is a touchstone of all legal proceedings, especially criminal cases where an individual's liberty is at stake. When a magistrate does not allow the reliability of a witness's statements to be probed, even with the limited purpose of the preliminary examination in mind, the purpose of the proceeding is frustrated. Reliability is appropriately tested when competent witnesses testify at the preliminary hearing

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[4] *See* note 2, *supra*.

because the witness is under oath and the court is able to evaluate them, watch them and hear their recounting of the events described in the criminal complaint. But the judges at the preliminary examinations at issue here foreclosed such a role. When such questioning does not occur, the statements have no more force than the document containing them; and, if no more evidence is offered, the standard for bindover cannot be met.

Permitting such questioning is important, for due process guarantees more than the right to a fair jury trial. Due process must be interpreted to guarantee fair pretrial procedures that provide for meaningful review of the charging decision and assess whether sufficient evidence exists to justify depriving the defendant of liberty and property interests pending trial. As applied by some Wisconsin courts, § 970.038 denies the accused an opportunity for a meaningful review, with some courts applying a standard for relevant testimony that is inconsistent with this Court's cases.

In other states "the exact nature of those procedures varies widely." *O'Brien*, 2013 WI App 97, ¶ 13. Some states have eliminated a preliminary examination, others still rely on an adversary hearing at which an individual accused of a crime has an opportunity to test the plausibility (if not reliability) of the allegations against him before the accused is required to stand trial. A number of other states—even some that eliminated the hearing—provide for other means by which an accused may raise a challenge to the reliability of the evidence. *See* 49 MINN. STAT. R. CRIM. P. RULE 11.02 and 11.04 (omnibus hearing in felony cases); and Rule 12 (d), Vermont RULES OF CRIM. P.

States remain concerned about the reliability of the evidence admitted at a preliminary determination of probable cause. Like Wisconsin, Utah permits the admission of hearsay during that state's version of a preliminary examination. The rule in Utah, however, limits the hearsay admitted to that which is "reliable." Thus statements of a

child victim of physical abuse or a victim of sexual abuse that are (1) promptly reported and (2) recorded in accordance with rules of Criminal Procedure can be admitted at the hearing as reliable. Rule 1102(b)(7), UTAH RULES OF EVID. Further, as it relates to other hearsay declarants, if the declarant's statement is written, recorded, or transcribed verbatim and is made under penalty of perjury, it too may be deemed reliable. Rule 1102(b)(8). Last, the rule allows the defense to seek a continuance in the interest of the efficient administration of justice for the purpose of furnishing additional evidence if the admission of hearsay evidence has substantially and unfairly disadvantaged the defendant. Rule 1102(c). Utah's focus on assuring the reliability of the hearsay evidence properly balances a defendant's due process rights with the interest of the state in processing criminal cases.

In order to continue the important role of trial courts at this critical stage, this Court should require the State, if it seeks to establish probable cause based on hearsay alone, to call witnesses who have personal knowledge of the declarant's statements or the complainant's critical allegations going to elements of the crime. *Amici* urges that this Court to state that trial courts should not permit bindover on the testimony of a narrator who merely reads aloud statements contained in a criminal complaint.

Dated this 21st day of January, 2014.

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RULE 809.19(8)(D) CERTIFICATION

This brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of this brief is 3,000 words.

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Marcus J. Berghahn

RULE 809.19(12)(F) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the paper copy of the brief.

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