STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2012AP1769-CR
2012AP1770-CR
2012AP1863-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
MARTIN P. O'BRIEN,
Defendant-Appellant-Petitioner.

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
KATHLEEN M. O'BRIEN,
Defendant-Appellant-Petitioner.

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
CHARLES E. BUTTS,
Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING NONFINAL ORDERS ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE JOHN R. RACE, PRESIDING, AND THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE ANTHONY G. MILISAUKAS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE 2

ARGUMENT 2

I. STANDARD OF REVIEW. 5

II. THERE IS NO CONSTITUTIONAL RIGHT TO CONFRONTATION AT A PRELIMINARY HEARING. 5

III. THE STATUTE DOES NOT IMPAIR A DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. 14

IV. DUE PROCESS DOES NOT PROHIBIT THE USE OF HEARSAY TO ESTABLISH PROBABLE CAUSE AT A PRELIMINARY HEARING. 21

V. THERE IS NO CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS AT A PRELIMINARY HEARING. 23

VI. THE COURT SHOULD REJECT THE O'BRIENS' SUGGESTION THAT IT IMPOSE ADDITIONAL STANDARDS FOR PRELIMINARY HEARINGS BEYOND THOSE ESTABLISHED BY THE LEGISLATURE. 25

Page

VII. ABSENT SOME CONSTITUTIONAL LIMITATION, THE LEGISLATURE IS FREE TO ALTER THE NATURE OF THE PRELIMINARY HEARING. 30

VIII. THE O'BRIENS' PRELIMINARY HEARING COURT DID NOT MISCONSTRUE § 973.038 TO LIMIT CROSS-EXAMINATION. 32

IX. THE TRIAL COURT PROPERLY BARRED THE O'BRIENS FROM CALLING S.M.O. AS A WITNESS. 39

X. THE O'BRIENS WERE NOT DENIED DUE PROCESS BECAUSE THEY WERE NOT ARBITRARILY DEPRIVED OF THEIR STATUTORY RIGHTS. 44

CONCLUSION 45

CASES CITED

Arneson v. Jezwinski,
206 Wis. 2d 217,
556 N.W.2d 721 (1996) 27

Barber v. Page,
390 U.S. 719 (1968) 10

California v. Green,
399 U.S. 149 (1970) 10

Clean Wisconsin, Inc. v. Pub. Serv. Comm'n,
2005 WI 93, 282 Wis. 2d 250,
700 N.W.2d 768 30

Costello v. United States,
350 U.S. 359 (1956) .....12, passim

Page

Crawford v. Washington,
541 U.S. 36 (2004) 12

Lassa v. Rongstad,
2006 WI 105, 294 Wis. 2d 187,
718 N.W.2d 673 27

Madison Teachers, Inc. v. Walker,
2013 WI 91, 351 Wis. 2d 237,
839 N.W.2d 388 27

Mascarenas v. State,
458 P.2d 789 (N.M. 1969) 13

Mitchell v. State,
84 Wis. 2d 325,
267 N.W.2d 349 (1978) 6, 7

Pennsylvania v. Ritchie,
480 U.S. 39 (1987) 10, 24

People v. Blackman,
414 N.E.2d 246
(Ill. Ct. App. 1980) 11, 22

Peterson v. California,
604 F.3d 1166 (9th Cir. 2010) 11, 12, 22

Quinn v. Town of Dodgeville,
122 Wis. 2d 570,
364 N.W.2d 149 (1985) 5

Schiermeister v. Riskedahl,
449 N.W.2d 566 (N.D. 1989) 5

Sheriff v. Witzenburg,
145 P.3d 1002 (Nev. 2006) 11

Page

State v. Camara,
28 Wis. 2d 365,
137 N.W.2d 1 (1965) 31

State v. Cole,
2003 WI 112, 264 Wis. 2d 520,
665 N.W.2d 328 5

State v. Dunn,
121 Wis. 2d 389,
359 N.W.2d 151 (1984) 20, 43

State v. Franklin,
111 Wis. 2d 681, 331 N.W.2d 633
(Ct. App. 1983) 14

State v. Haught,
371 S.E.2d 54 (W. Va. 1988) 5

State v. Jorgensen,
2003 WI 105, 264 Wis. 2d 157,
667 N.W.2d 318 5

State v. Koch,
175 Wis. 2d 684,
499 N.W.2d 152 (1993) 33

State v. Koenig,
666 N.W.2d 366 (Minn. 2003) 32

State v. Lopez,
314 P.3d 236 (N.M. 2013) 13

State v. Maloney,
2005 WI 74, 281 Wis. 2d 595,
698 N.W.2d 583 19

State v. Massengill,
657 P.2d 139 (N.M. Ct. App. 1983) 13

Page

State v. Moats,
156 Wis. 2d 74,
457 N.W.2d 299 (1990) 4

State v. O'Brien,
2013 WI App 97, 349 Wis. 2d 667,
836 N.W.2d 840 .....19, passim

State v. Oliver,
161 Wis. 2d 140, 467 N.W.2d 211
(Ct. App. 1991) 8, 9

State v. Padilla,
110 Wis. 2d 414, 329 N.W.2d 263
(Ct. App. 1982) .....6, passim

State v. Schaefer,
2008 WI 25, 308 Wis. 2d 279,
746 N.W.2d 457 .....14, passim

State v. Stuart,
2005 WI 47, 279 Wis. 2d 659,
695 N.W.2d 259 34

State v. Timmerman,
218 P.3d 590 (Utah 2009) 11

State v. White,
2008 WI App 96, 312 Wis. 2d 799,
754 N.W.2d 214 ..... 9, 10

State ex rel. Strykowski v. Wilkie,
81 Wis. 2d 491,
261 N.W.2d 434 (1978) 44

Strickland v. Washington,
466 U.S. 668 (1984) 14

Page

United States v. Adeyeye,
359 F.3d 457 (7th Cir. 2004)..... 4

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006)..... 12, 13

Washington v. Texas,
383 U.S. 14 (1967)..... 24

Whitman v. Superior Court,
820 P.2d 262 (1991)..... 26

Wilson v. State,
655 P.2d 1246 (Wyo. 1982) 11, 15, 16, 19

STATUTES CITED

1993 Wis. Act 98, § 145..... 4

Fed. R. Crim. P. 6..... 23

Wis. Stat. § (Rule) 809.19(3)(a) 2

Wis. Stat. § 908.08(3)..... 4

Wis. Stat. § 970.03(11)..... 4

Wis. Stat. § 970.03(14)(b) 4

Wis. Stat. § 970.03(5).....7, passim

Wis. Stat. § 970.038 .....2, passim

Wis. Stat. § 970.038(1)..... 3, 28

Wis. Stat. § 970.038(2)..... 3, 28

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend V 11

Wis. Const. art. VII, § 3 27

ADDITIONAL AUTHORITIES

4 Wayne R. LaFave et al., Criminal Procedure, § 14.4(c) (3rd ed. 2007) 11, 13

9 Wiseman, et al., Wisconsin Practice: Criminal Practice and Procedure § 8.12 (1996) .. 17

49 Minn. Stat. Ann., R. Crim. P. 11.04, subd. 1(b) 31

49 Minn. Stat. Ann., R. Crim. P. 11.04, subd. 1(c) 31

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the briefs of defendants-appellants Martin P. O'Brien, Kathleen M. O'Brien, and Charles E. Butts, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

In these consolidated permissive appeals, defendants-appellants-petitioners Martin P. O'Brien, Kathleen M. O'Brien, and Charles E. Butts challenge the constitutionality of the recently enacted Wis. Stat. § 970.038 (2011-12).[1]

[1]The O'Briens are charged with multiple counts of physical abuse of a child and disorderly conduct (No. 2012AP1769-CR: 16:1-5). They appeal from an order binding them over for trial following a preliminary hearing and denying their motion to preclude the use of hearsay evidence at the preliminary hearing (2012AP1769-CR: 14:1; O'Briens' Ap. 112). They also appeal from an order granting the State's motion to quash a subpoena issued to a witness that the O'Briens wished to call at the preliminary hearing (2012AP1769-CR: 14A:1; O'Briens' Ap. 113).

Butts is charged with multiple counts of sexual assault of a child and child enticement (No. 2012AP1863-

That statute makes hearsay admissible at preliminary hearings, *see* Wis. Stat. § 970.038(1), and permits the court to base a finding of probable cause on hearsay evidence, *see* Wis. Stat. § 970.038(2).[2]

In the court of appeals, the O'Briens' lead argument was that Wis. Stat. § 970.038 is unconstitutional. *See* O'Briens' court of appeals brief at 5-13. In this court, they make that their final argument. *See* O'Briens' brief at 32-38. Because the constitutional challenge to the statute is the common thread between the Butts and O'Brien cases, the State will discuss the constitutional issues first and then discuss the O'Briens' non-constitutional arguments.

Before addressing the constitutional challenges to the new statute, the State notes that prior to the statute's enactment, hearsay was admissible at preliminary hearings in several circumstances. For example, the court could admit hearsay at a preliminary hearing "to prove

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CR: 27:1-2). He also has been bound over for trial following a preliminary hearing (No. 2012AP1863-CR: 32-2:19), but his appeal is from an order entered prior to the preliminary hearing that denied his motion challenging the constitutionality of the statute (No. 2012AP1863-CR: 21:1, 30:1-2; Butts' Ap. 105).

[2]Wisconsin Stat. § 970.038 (2011-12) provides:

> **970.038 (1)** Notwithstanding s. 908.02, hearsay is admissible in a preliminary examination under ss. 970.03, 970.032, and 970.035.
>
> **(2)** A court may base its finding of probable cause under s. 970.03(7) or (8), 970.032(2), or 970.035 in whole or in part on hearsay admitted under sub. (1).

ownership of property or lack of consent to entry to or possession or destruction of property or to prove any element under s. 943.201(2) or 943.203(2)." Wis. Stat. § 970.03(11) (2009-10). And under Wis. Stat. § 970.03(14)(b) (2009-10), the court was required to admit ("the court shall admit") at a preliminary examination "an audiovisual recording of a statement" by a child that satisfied the requirements of Wis. Stat. § 908.08(3); the statute further provided that "[t]he child who makes the statement need not be called as a witness and, under the circumstances specified in s. 908.08(5)(b), may not be compelled to undergo cross-examination."

Section 970.03(14)(b) was enacted nearly twenty years ago, *see* 1993 Wis. Act 98, § 145, and remains the law today, *see* Wis. Stat. § 970.03(14)(b) (2011-12). Thus, while the new statute significantly broadens the circumstances in which hearsay may be admitted at a preliminary hearing to establish probable cause, it does not introduce a new concept to preliminary hearings in Wisconsin, particularly in cases that, like the Butts and O'Briens cases, involve alleged child victims.

It is also worth noting that the use of hearsay to establish probable cause at a preliminary examination is not unique to Wisconsin. "The probable cause finding at a federal preliminary examination may be based upon hearsay evidence in whole or in part." *State v. Moats*, 156 Wis. 2d 74, 118, 457 N.W.2d 299 (1990) (Heffernan, C.J., concurring); *see also United States v. Adeyeye*, 359 F.3d 457, 460-61 (7th Cir. 2004) ("federal law is now clear that a finding of probable cause can be based upon hearsay"). Other states follow the same rule. *See,*

e.g., Schiermeister v. Riskedahl, 449 N.W.2d 566, 569 (N.D. 1989); *State v. Haught*, 371 S.E.2d 54, 61 (W. Va. 1988). The Wisconsin legislature broke no new legal ground when it enacted Wis. Stat. § 970.038.

I. STANDARD OF REVIEW.

The constitutionality of a statute is a question of law that an appellate court reviews *de novo. State v. Jorgensen,* 2003 WI 105, ¶14, 264 Wis. 2d 157, 667 N.W.2d 318.

Legislative enactments are generally entitled to a presumption of constitutionality. *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328. In light of that "strong presumption," a party challenging the constitutionality of a statute "faces a heavy burden" of "prov[ing] that the statute is unconstitutional beyond a reasonable doubt." *Id.* "It is insufficient to merely establish doubt as to an act's constitutionality nor is it sufficient to establish the act is probably constitutional." *Id.* (quoting *Quinn v. Town of Dodgeville,* 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985)). If any doubt remains, this court must uphold the statute as constitutional. *Id.*

II. THERE IS NO CONSTITUTIONAL RIGHT TO CONFRONTATION AT A PRELIMINARY HEARING.

Butts and the O'Briens argue that Wis. Stat. § 970.038 violates their constitutional right to confrontation. That contention fails in light of a

long line of cases that hold that the constitutional right of confrontation is a trial right and that the constitutional right to confrontation is not violated by the use of out-of-court statements at a preliminary examination even if the defendant is unable to cross-examine the declarant.

This court held in *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), that defendants do not have a constitutional right to confront witnesses at preliminary hearings.

> The defendant next argues that the erroneous admission of the hearsay declarations of Hurst at the preliminary examination violated his right to confront the witnesses against him. As the state points out, there is no constitutional right to confront adverse witnesses at a preliminary examination. *Gerstein v. Pugh*, 420 U.S. 103, 119, 120 (1975); *See also*: *Barber v. Page*, 390 U.S. 719, 725 (1968).

Id. at 336. The court did note, however, that in Wisconsin an accused has a statutory right to confront witnesses at the preliminary examination. *See id.*

The court of appeals discussed and applied *Mitchell* in *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (Ct. App. 1982), a case that, like the present cases, involved the use at a preliminary examination of the out-of-court statements of a child victim. In *Padilla*, the defendant was charged with sexual assault of a child. *See id.* at 426. The only witness at the preliminary hearing was the child's mother, who testified about what the child had told her about the assaults. *See id.* at 427.

The court of appeals held that the testimony was admissible as an excited utterance. *See id.* at 418-22. The court then addressed the defendant's claim that even if the child's out-of-court statement was admissible under an exception to the hearsay rule, "there remains a confrontation problem." *Id.* at 422.

Citing *Mitchell*'s "clear" holding, the court of appeals held that "[o]f course, there is no constitutional right to confront witnesses at a preliminary examination." *Id.* at 422-23. The court then addressed the statutory right to cross-examination in Wis. Stat. § 970.03(5). The court held that the statutory right to cross-examination covers only the witnesses who actually testify at the preliminary hearing, not hearsay declarants, and that probable cause may be based on admissible hearsay. *See id.* at 423-26. The court explained:

> At a preliminary examination, the trier of fact's only duty is to find that the story has a plausible basis. *Wilson v. State*, 59 Wis. 2d 269, 294, 208 N.W.2d 134 (1973). The trier of fact, therefore, is not engaged in determining the truthfulness of the state's case but merely whether, *if believed,* the story has a plausible basis in fact. *Vigil v. State*, 76 Wis. 2d 133, 144, 250 N.W.2d 378 (1977). Truthfulness goes to the weight of the evidence, not to admissibility, and is for the jury to determine at trial.
>
> Because truthfulness is not tested at the preliminary examination, we come to the guiding purpose behind cross-examination at the preliminary examination. The witnesses who actually take the stand can be cross-examined as to whether their story is believable, *i.e.,* whether they were in a position to see what they observed, or

> whether they were able to hear what they say they heard. Thus, focusing on the issue in this case, the mother could have been and was tested on the stand to determine if she was actually in a position to hear the hearsay declarant make the out-of-court statement, that is, whether she was believable in relating her story, whether she had a good memory of the hearsay statement and whether she was relating it accurately.
>
> So it is the person taking the stand who must tell a plausible story. As part of the plausible story, hearsay may be used by that person. Whether that person may properly use the hearsay as an aid to telling the story is a question of admissibility. If the hearsay hurdle is met and the hearsay statement is admissible under one of the exceptions to the hearsay rule, it may be used by the witness as a probative building block, rather like a piece of documentary evidence, in telling the story to the magistrate.
>
> We conclude, therefore, that the statute permits cross-examination of only those people actually called to the stand. In telling their story, they may use whatever admissible evidence they can to aid in their telling of the story. Admissible hearsay is just one of those aids.

Id. at 423-24.

The court of appeals again addressed this issue in *State v. Oliver*, 161 Wis. 2d 140, 467 N.W.2d 211 (Ct. App. 1991), a case in which the defendant was charged with physical abuse of a four-year-old child. At the preliminary hearing, the child was unable to communicate with the court and the court found that the child was not competent to testify. *Id.* at 142. The court then allowed the child's father to testify that the child told him that the defendant hit him. *Id.*

The court of appeals held that the child's statement was admissible under the residual hearsay exception. *Id*. at 143-48. In the course of that analysis, the court noted that the defendant "did not have a constitutional right of 'confrontation' at his preliminary examination." *Id*. at 146. The court of appeals then addressed and, relying on *Padilla*, rejected the defendant's claim that the admission of the hearsay violated his statutory right to confront the witnesses against him. The court wrote:

> Oliver claims, however, that in declaring that A.S.B. was unavailable as a witness, the trial court denied him his statutory right to "confront" the witnesses against him. Section 970.03(5), Stats., provides: "All witnesses shall be sworn and their testimony reported by a phonographic reporter. The defendant may cross-examine witnesses against him. . . ." In *State v. Padilla,* 110 Wis. 2d 414, 424, 329 N.W.2d 263 (Ct. App. 1982), we held that sec. 970.03(5) "permits cross-examination of only those people actually called to the stand." We reasoned that if hearsay evidence is admissible, it may be used by the witness as a "probative building block" in telling the witness's plausible story to the magistrate. As long as the witness may be cross-examined, the defendant's rights under sec. 970.03(5) are protected. Oliver had no right under the statute to "confront" the hearsay declarant. *See Id.* at 426, 329 N.W.2d at 270.

Id. at 148-49.

Butts' brief does not cite, much less discuss, *Mitchell*, *Padilla* or *Oliver*. Instead, citing *State v. White*, 2008 WI App 96, 312 Wis. 2d 799, 754 N.W.2d 214, he asserts that "[t]he defendant's right to cross-examine witnesses at a preliminary

hearing to test the plausibility of statements of the witness' account is deprived if the State is allowed to offer hearsay evidence with an officer reading the statement of the complainant." Butts' brief at 5.

White does not support Butts' constitutional claim. Describing the *statutory* right to cross-examination, *White* reaffirmed the principle that "[a]lthough the defendant has the right to cross-examine witnesses at a preliminary hearing, Wis. Stat. § 970.03(5), the scope of cross-examination is limited to issues of plausibility of the State's witnesses' accounts." *White*, 312 Wis. 2d 799, ¶13. *White* says nothing about any *constitutional* right to confrontation at the preliminary hearing. *See id*. ¶¶7-17.

The O'Briens argue that this court's holding in *Mitchell* that defendants do not have a constitutional right to confrontation at preliminary hearings "was based on a misreading of *Gerstein v. Pugh*," and ask the court to "revisit *Mitchell* and withdraw that language." O'Briens' brief at 36. But *Mitchell*'s holding is consistent with a long line of United States Supreme Court cases that hold that "the right to confrontation is a *trial* right." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (emphasis in original); *see also California v. Green,* 399 U.S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness *at the time of trial* that forms the core of the values furthered by the Confrontation Clause") (emphasis added); *Barber v. Page,* 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."). As Professor LaFave explains:

> All jurisdictions grant the defense a right to cross-examine those witnesses presented by the prosecution at the

> preliminary hearing. This right is based on local law; 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 *et al.*, *Criminal Procedure*, § 14.4(c), at 352 (3rd ed. 2007) (footnotes omitted).

Consistent with this precedent, courts in other jurisdictions have upheld the constitutionality of statutes comparable to Wis. Stat. § 970.038 as well as the constitutionality of probable cause determinations based on hearsay. *See, e.g., Peterson v. California*, 604 F.3d 1166, 1169-70 (9th Cir. 2010); *People v. Blackman*, 414 N.E.2d 246, 247-48 (Ill. Ct. App. 1980); *Sheriff v. Witzenburg*, 145 P.3d 1002, 1004-05 (Nev. 2006); *Wilson v. State*, 655 P.2d 1246, 1250-54 (Wyo. 1982); *see also State v. Timmerman*, 218 P.3d 590, 594 n.2 (Utah 2009) (collecting cases).

In *Peterson*, the Ninth Circuit considered a challenge to California Proposition 115, which added constitutional and statutory language that permitted a probable cause determination at a preliminary hearing to be based on hearsay evidence presented by a qualified investigative officer. *See Peterson*, 604 F.3d at 1168. Peterson's primary contention was that Proposition 115 deprived him of his Sixth Amendment right to confront witnesses at a preliminary hearing. *See id*. at 1169.

The Ninth Circuit rejected that argument. The court first noted that "the preliminary hearing itself is not constitutionally mandated." *Id.* It observed that, "in the federal system, all felonies are prosecuted by indictment, *see* U.S. Const. amend V, and hearsay is admissible in

proceedings before the grand jury which result in the return of indictments." *Id*. (citing *Costello v. United States,* 350 U.S. 359, 363-64 (1956)). "As the preliminary hearing itself is not constitutionally required," the court concluded, "it follows that there are no constitutionally-required procedures governing the admissibility of hearsay at preliminary hearings." *Id*.

Second, the court observed, "the United States Supreme Court has repeatedly stated that the right to confrontation is basically a trial right." *Id*. The court concluded that "under the Supreme Court's Confrontation Clause jurisprudence, Peterson was entitled to confront witnesses against him at trial, which he did. He was not constitutionally entitled to confront them at his preliminary hearing." *Id*. at 1169-70.

The O'Briens argue that the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), "have reinvigorated Sixth Amendment rights" and that this court therefore "should rule that the constitutional right to confrontation does apply at the adversarial preliminary examinations employed in this state." O'Briens' brief at 37. Neither of those cases, however, has anything to do with the right to confront witnesses at a preliminary hearing, nor do those cases provide any basis for extending the confrontation right outside its established bounds as a trial right. As the Ninth Circuit pointed out in *Peterson* when it rejected a similar argument, "[w]hat was at issue" in *Crawford* "was whether the Confrontation Clause was violated when the record of the statement was introduced *at trial*." *Peterson*, 604 F.3d at 1170; *see Crawford*, 541 U.S. at 38 (question presented was whether a recording

played at trial violated the defendant's Sixth Amendment right to confrontation). *Gonzalez-Lopez* did not involve hearsay or the right to confront witnesses at all; that case addressed the deprivation of the right to counsel of the defendant's choice. *See Gonzalez-Lopez*, 548 U.S. at 142.

The only case cited by the O'Briens that holds that the constitutional right to confrontation applies at preliminary hearings is the New Mexico Court of Appeals' decision in *State v. Massengill*, 657 P.2d 139, 140 (N.M. Ct. App. 1983). In *Massengill*, the court relied on *Mascarenas v. State,* 458 P.2d 789 (N.M. 1969), for the proposition that "[a]n accused's Sixth Amendment right to confront witnesses at trial extends to the preliminary examination stage of a criminal prosecution." *Massengill*, 657 P.2d at 140. However, the New Mexico Supreme Court recently overruled *Mascarenas*, holding that "the right of confrontation in . . . the New Mexico Constitution, as with the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution, applies only at a criminal trial where guilt or innocence is determined." *State v. Lopez*, 314 P.3d 236, 237 (N.M. 2013).

Both Wisconsin case law (*Mitchell*, *Padilla*, and *Oliver*) and decisions of the United States Supreme Court decisions have "long held that cross-examination at a preliminary hearing is not required by the confrontation clause of the Sixth Amendment." *LaFave*, *supra*, § 14.4(c), at 352. Accordingly, the court should reject the defendants' argument that Wis. Stat. § 970.038 violates the constitutional right to confrontation.

III. THE STATUTE DOES NOT IMPAIR A DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The O'Briens argue that allowing a probable cause determination to be based on hearsay denies defendants the right to effective assistance of counsel at the preliminary examination. *See* O'Briens' brief at 37-38. That argument lacks merit because the right to the effective assistance of counsel does not require that the rules governing a proceeding be altered; it requires only that counsel perform within professional norms under the rules that govern that proceeding.

The O'Briens do not claim that their attorneys actually were rendered constitutionally ineffective by the circuit court's application of Wis. Stat. § 970.038. Indeed, they do not even mention the familiar *Strickland*[3] test for finding ineffective assistance, let alone argue that their lawyers were ineffective under the *Strickland* standards.

Instead, they contend that because they have a right to counsel at a preliminary hearing, they also have a right to effective assistance of counsel at the preliminary hearing. So far, so good. *See State v. Schaefer*, 2008 WI 25, ¶84, 308 Wis. 2d 279, 746 N.W.2d 457 (a defendant charged with a felony in Wisconsin is constitutionally entitled to the assistance of counsel at a preliminary hearing); *State v. Franklin*, 111 Wis. 2d 681, 686, 331 N.W.2d 633 (Ct. App. 1983) (the right to the assistance of an attorney includes the right to effective representation).

[3]*Strickland v. Washington*, 466 U.S. 668 (1984).

But the O'Briens do not cite a single case that holds that a statute limiting the scope of a preliminary hearing impairs a defendant's right to the effective assistance of counsel. The State's research has yielded only one case that has addressed that issue. That case is directly on point, and it squarely rejects the O'Briens' contention.

In *Wilson*, 655 P.2d 1246, the defendant argued that "the use of solely hearsay information to support a finding of probable cause at the preliminary hearing resulted in substantial prejudice to [his] right to effective counsel." *Id*. at 1248. The Wyoming Supreme Court held that the right to effective assistance of counsel is not impaired by limiting the scope of a preliminary hearing because the effective assistance of counsel does not require defense counsel to exceed the rules governing a proceeding. The court explained:

> The proper and orderly administration of justice requires reasonable adherence to rules and they should not be relaxed or changed at the whim of this or any other court. *As long as counsel stays within the prescribed rules and professionally, energetically and skillfully devotes himself to the interests of his client, and performs such legal services as would reasonably be rendered by a reasonably competent attorney under the facts and circumstances of the case, the client is receiving effective assistance of counsel. Effective assistance of counsel does not mean nor require the unfettered freedom to go off in every which direction and require different rules than those prescribed by this court. It is reasonable for counsel to accept and function within the rules promulgated by this court.*
>
> The only purpose of a preliminary hearing is to determine if probable cause

> exists to believe that an offense has been committed and that the defendant charged has committed it. It is in no sense a trial. The finding of probable cause determines only the propriety of a trial, complete in every way with every protection that the constitution, laws and decisions of this state have been able to develop and it does not place the accused in jeopardy. There is no constitutional mandate to turn a preliminary hearing into a full trial where all defenses are presented, affirmative and otherwise, in order to thereby secure a complete dismissal of charges. It is not the purpose of the preliminary hearing to establish guilt. While some discovery results as a by-product of the preliminary hearing, that also is not its purpose.

Id. at 1253 (emphasis added; citations omitted).

Although not as squarely on point as *Wilson*, this court rejected a similar argument in *Schaefer*. In *Schaefer*, the circuit court quashed a subpoena duces tecum from the defendant that sought to obtain police investigation reports before his preliminary investigation. *See Schaefer*, 308 Wis. 2d 279, ¶1. The issue before the supreme court was whether a criminal defendant has a statutory or constitutional right to compel the production of police reports and other nonprivileged materials prior to the preliminary examination. *See id.*, ¶¶2-3.

One of the defendant's constitutional arguments was that he was "entitled to subpoena police reports and other investigatory materials to safeguard his right to effective assistance of counsel." *Id.*, ¶83. The court agreed that the preliminary hearing was a critical stage in the criminal process and that every defendant charged with a felony is constitutionally entitled to the

assistance of counsel at a preliminary hearing. *Id*., ¶84. However, the court held, in considering the defendant's right to effective assistance of counsel at a preliminary examination, "we must keep in mind the narrow scope of the hearing." *Id*., ¶85. "'[T]he limited scope of the preliminary hearing compresses the contours of the sixth amendment.'" *Id*. (quoting Wiseman, et al., 9 *Wisconsin Practice: Criminal Practice and Procedure* § 8.12 (1996)). "'In particular, the defendant's right to present evidence and cross-examine the state's witnesses is severely limited by the summary nature of the preliminary hearing.'" *Id.*

The court noted in *Schaefer* that the defendant's argument was "somewhat unusual because he poses a prospective challenge to effective assistance of counsel," as he was arguing "that his defense counsel cannot *be* effective at a future preliminary examination without access to police reports and other similar materials, not that his counsel *was* ineffective in the past for lack of access to such evidence." *Id*., ¶86. "To adopt Schaefer's position," the court observed, "would require us to create a per se rule that defense counsel is ineffective when counsel fails to subpoena police reports and other similar materials prior to a preliminary examination." *Id*.

The court affirmed that it "operates under the principles adopted by the Supreme Court in *Strickland*," under which "the defendant must demonstrate that: (1) defense counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment; and (2) this deficient performance prejudiced the defense so seriously as to deprive the defendant of a fair trial, a trial whose result is reliable." *Schaefer*, 308 Wis. 2d 279, ¶87. The

court held that "[a]n attorney's performance at the preliminary examination does not define the level of performance expected of defense counsel at later stages of the proceeding." *Id.*, ¶91. That is because a "'preliminary hearing is not a full evidentiary trial and [ ] the purpose of a preliminary examination is only to determine whether further criminal proceedings are justified.'" *Id.* (brackets in original; quoted source omitted). The court noted that "[g]iven the limited scope and purpose of the preliminary examination, a defendant's counsel may waive the hearing entirely, or deliberately decline to ask certain questions that would be relevant." *Id.* The court concluded that it could not say that the defendant's counsel "would be hand-cuffed and rendered ineffective by failing to procure police reports prior to [the defendant's] preliminary examination." *Id.*

Schaefer is instructive for three reasons.

First, *Schaefer* holds that when considering a defendant's right to effective assistance of counsel at a preliminary hearing, a court "must keep in mind the narrow scope of the hearing." *Id.*, ¶85.

Second, the court concluded in *Schaefer* that, in light of the limited scope of the preliminary hearing, the defendant's right to the effective assistance of counsel did not require it to create new rights – in *Schaefer*, a new discovery right – to potentially enhance counsel's effectiveness.

Third, the court reaffirmed that *Strickland* provides the relevant standard for evaluating claims that a procedural rule impairs the effective assistance of counsel. In *Schaefer*, that challenge

was prospective, as the preliminary hearing had not yet been held. *See id*., ¶86. In this case, in contrast, a preliminary hearing for the O'Briens has been held. Yet, as the State has noted, the O'Briens do not argue that their counsel was ineffective under the *Strickland* standards.

Under the *Strickland* test, "a lawyer's performance is evaluated under prevailing professional norms." *State v. Maloney*, 2005 WI 74, ¶23 n.11, 281 Wis. 2d 595, 698 N.W.2d 583. "It is reasonable for counsel to accept and function within the rules" governing preliminary hearings. *Wilson*, 655 P.2d at 1253.

As the court of appeals noted in its decision in this case, "defense counsel can provide effective representation 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." *State v. O'Brien*, 2013 WI App 97, ¶25, 349 Wis. 2d 667, 836 N.W.2d 840; O'Briens' Ap. 114. "To demand that counsel must be permitted to challenge the competency or reliability of the underlying evidence is a fundamental misunderstanding of the purpose of the preliminary hearing:

> A preliminary hearing as to probable cause is not a preliminary trial or a full evidentiary trial on the issue of guilt beyond a reasonable doubt. It is intended to be a summary proceeding to determine essential or basic facts as to probability. The examining judge is
>
> ". . . concerned with the practical and nontechnical probabilities of everyday life in determining whether there is a substantial

> basis for bringing the prosecution and further denying the accused his right to liberty."
>
> Also, although the judge at a preliminary examination must ascertain the plausibility of a witness's story and whether, if believed, it would support a bindover, the court cannot delve into the credibility of a witness. The issue as to credence or credibility is a matter that is properly left for the trier of fact. We recognize that the line between plausibility and credibility may be fine; the distinction is one of degree. . . .
>
> ". . . . There is a point where attacks on credibility become discovery. That point is crossed when one delves into general trustworthiness of the witness, as opposed to plausibility of the story. Because all that need be established for a bindover is probable cause, *all that is needed is a believable account of the defendant's commission of a felony."*

Id. (quoting *State v. Dunn*, 121 Wis. 2d 389, 396-97, 359 N.W.2d 151 (1984) (citations omitted)); O'Briens' Ap. 114-15.

The court of appeals correctly held that a defendant's right to the effective assistance of counsel is not violated by requiring his or her attorney to operate within the rules governing preliminary examinations. This court should reject the O'Briens claim that Wis. Stat. § 970.038 violates the constitutional right to effective assistance of counsel.

IV. DUE PROCESS DOES NOT PROHIBIT THE USE OF HEARSAY TO ESTABLISH PROBABLE CAUSE AT A PRELIMINARY HEARING.

Butts argues that the statute on its face violates federal and state constitutional guarantees of due process of law. *See* Butts' brief at 3, 5. That claim is without merit.

One of the issues that the Ninth Circuit addressed in *Peterson* was whether California Proposition 115, which permitted a probable cause determination at a preliminary hearing to be based on hearsay evidence, violated the Fourteenth Amendment's Due Process Clause. The court held that it did not:

> We turn next to Peterson's Fourteenth Amendment due process challenge. In *Hurtado v. California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884), the Supreme Court held that there was no due process right to a grand jury indictment before criminal prosecution in state court. *Id.* at 534-35, 4 S.Ct. 111. In so holding, the *Hurtado* Court recognized that California's substitute for the grand jury indictment–the preliminary hearing–included the right of cross-examination. *See id.* at 538, 4 S.Ct. 111 ("[W]e are unable to say that [California's] substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, *with the right on his part* to the aid of counsel, and *to the cross-examination of the witnesses* produced for the prosecution, is not due process of law." (emphasis added)).

> Peterson argues that *Hurtado requires* the preliminary hearing to include the right of confrontation in order to satisfy the requirements of due process. We disagree with this interpretation, as it would mean the substitute for the grand jury indictment must contain greater procedural protections than the grand jury procedures themselves. *See Costello,* 350 U.S. at 363-64, 76 S.Ct. 406 (holding that hearsay is admissible before grand jury). If the phrase "due process of law" in the Fifth Amendment does not prohibit the use of hearsay in grand jury proceedings, then the same phrase in the Fourteenth Amendment cannot be read to prohibit the use of hearsay evidence at a preliminary hearing. Although *Hurtado* did observe that California's then-existing preliminary hearing procedures included the right to cross-examination, *Hurtado* did not hold that such a right was essential in order to pass due process muster.

Peterson, 604 F.3d at 1170-71.

As the Ninth Circuit noted in *Peterson*, the Supreme Court held in *Costello* that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," *Costello*, 350 U.S. at 362, and that a grand jury indictment may be based exclusively on hearsay, *see id.* at 363. Accordingly, "[i]f the phrase due process of law' in the Fifth Amendment does not prohibit the use of hearsay in grand jury proceedings, then the same phrase in the Fourteenth Amendment cannot be read to prohibit the use of hearsay evidence at a preliminary hearing." *Peterson*, 604 F.3d at 1171; *see also Blackman*, 414 N.E.2d at 248 (due process does not ordinarily prohibit the use of hearsay evidence at a preliminary hearing to establish probable cause).

In their non-party brief, the Wisconsin Association of Criminal Defense Lawyers and the Office of the State Public Defender assert that "due process 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." WACDL and OSPD's non-party brief at 6-7. If that were correct, however, due process also would limit the use of hearsay in a grand jury proceeding. It does not. *See Costello*, 350 U.S. at 362. Indeed, no magistrate presides over the grand jury and the only attorneys present during the presentation of evidence to the grand jury are attorneys for the government. *See* Fed. R. Crim. P. 6.

The Due Process Clause does not prohibit a trial court from basing a probable cause determination on hearsay. Accordingly, the court should reject Butts' challenge to Wis. Stat. § 970.038 on due process grounds.

V. THERE IS NO CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS AT A PRELIMINARY HEARING.

Butts also asserts that Wis. Stat. § 970.038 "violates the defendant's right to . . . compulsory process" under the Sixth and Fourteenth Amendments. Butts' brief at 2 (capitalization omitted). However, the record is devoid of any indication that Butts sought to call any witnesses at his preliminary hearing (2012AP1863-CR: 31:2-5; 32:2-16; 32-1:2-5; 32-2:2-20). To the contrary, when asked at the preliminary hearing if the defense had any witnesses, defense counsel said "no" (2012AP1863-CR:32-2:16). Because he was

not denied the opportunity to call any witnesses, Butts cannot argue that he was denied his right to compulsory process.[4]

Even if that problem were ignored, Butts' argument still fails. His sole support for his argument is a reference to *Schaefer*, 308 Wis. 2d 279, that lacks a pinpoint citation. *See* Butts' brief at 5. But *Schaefer* does not support Butts' claim that a defendant has a constitutional right to compulsory process at a preliminary examination.

This court acknowledged in *Schaefer* that a defendant has a *statutory* right to compulsory process at a preliminary hearing under Wis. Stat. § 970.03(5). *See Schaefer*, 308 Wis. 2d 279, ¶35. However, the court, after discussing the United States Supreme Court's decisions in *Washington v. Texas*, 383 U.S. 14 (1967), and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), held that the *constitutional* right to compulsory process is a trial right that does not apply to preliminary examinations.

> These comments by the Court [in *Washington* and *Ritchie*] point the compass of the Compulsory Process Clause toward a defendant's right to the compelled production of evidence in anticipation of *trial,* not in anticipation of a preliminary examination. Professor LaFave has observed that "[t]he Compulsory Process Clause naturally suggests some constitutional entitlement to *trial evidence*." 5 Wayne R. LaFave, et al.,

[4]In their court of appeals brief, the O'Briens argued that Wis. Stat. § 970.038 violates the constitutional right to compulsory process. *See* O'Briens' court of appeals brief at 2, 25-26. However, they do not make that argument in this court, arguing only that their statutory right to confrontation was impaired. *See* O'Briens' brief at 28-30.

> *Criminal Procedure* § 24.3(a), at 469 (2d ed. 1999) (emphasis added).

Schaefer, 308 Wis. 2d 279, ¶67.

Butts does not argue that his statutory right to compulsory process was violated at his preliminary hearing. Because a Wisconsin defendant's right to compulsory process at a preliminary hearing is statutory, not constitutional, the court should conclude that Wis. Stat. § 970.038 does not violate the constitutional right to compulsory process.

VI. THE COURT SHOULD REJECT THE O'BRIENS' SUGGESTION THAT IT IMPOSE ADDITIONAL STANDARDS FOR PRELIMINARY HEARINGS BEYOND THOSE ESTABLISHED BY THE LEGISLATURE.

The O'Briens ask the court to "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." O'Briens' brief at 6. To that end, they urge the court to create four rules governing preliminary examinations:

> (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;
>
> (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.

O'Briens' brief at 9-10.

The O'Briens do not identify the source of any of these new rules. Their first proposed rule, prohibiting the use of a "mere reader," is similar to one adopted in California. In *Whitman v. Superior Court*, 820 P.2d 262 (1991), the California Supreme Court limited the hearsay admissible at preliminary hearings to testimony of an officer who has "sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement." *Id.* at 267. However, the court was construing a statute that provided that notwithstanding the hearsay rule, "the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." *Id*. at 265. That statutory language, the court held, did not permit the testimony of "noninvestigating officers or 'readers.'" *Id*. at 266 (capitalization omitted).[5]

[5]The O'Briens' second proposed rule, which would "require testimony or a sworn affidavit by a witness with

California's limitation on the type of hearsay admissible at a preliminary hearing is based on specific language in its statute. The O'Briens' acknowledge that Wis. Stat. § 970.038, contains no such language. *See* O'Briens' brief at 7. The O'Briens do not cite, and the State is unaware of, any jurisdiction that has imposed restrictions on the use of hearsay at preliminary examination similar to those that they propose absent any limiting statutory language. What the O'Briens have proposed is a wish-list, not statutory construction.

The O'Briens ask the court to impose these rules through the exercise of its superintending authority. Article VII, Section 3 of the Wisconsin Constitution vests this court with broad superintending authority over all Wisconsin courts. *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶16 351 Wis. 2d 237, 839 N.W.2d 388. However, the court's exercise of its superintending power "is limited to situations in which the 'necessities of justice' require it." *Lassa v. Rongstad*, 2006 WI 105, ¶84, 294 Wis. 2d 187, 718 N.W.2d 673 (quoting *Arneson v. Jezwinski,* 206 Wis. 2d 217, 231, 556 N.W.2d 721 (1996)).

The O'Briens' do not explain why the "necessities of justice" require that this court adopt rules governing the use of hearsay at preliminary examinations that the legislature found unnecessary to include. While the new statute makes hearsay admissible at preliminary

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personal knowledge of the alleged crime," is more stringent than the California procedure, which permits testimony by an officer with "sufficient knowledge of the crime *or* the circumstances under which the out-of-court statement was made." *Whitman*, 820 P.2d at 267 (emphasis added).

examinations, *see* Wis. Stat. § 970.038(1), it does not require the circuit court to base a bindover decision on hearsay regardless of the reliability of that hearsay. Instead, the statute provides that the court "*may* base its finding of probable cause . . . in whole or in part on hearsay admitted under sub. (1)." Wis. Stat. § 970.038(2) (emphasis added).

The O'Briens' argument evinces a lack of confidence in a circuit court's ability to employ sound judgment when making a bindover determination. The court of appeals properly gave circuit courts more credit:

> We recognize that criminal defense lawyers would much rather cross-examine the declarant or accuser than a police officer who gives a hearsay account of what the declarant or accuser said. But the 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. Dismissal at the preliminary hearing stage may prove to be infrequent under the new law, but dismissal at the preliminary hearing stage was always infrequent anyway. We are confident that our trial courts will know implausibility when they see it, hearsay or not. . . .

O'Brien, 349 Wis. 2d 667, ¶24; O'Briens' Ap. 114.

The United States Supreme Court rejected a request similar to the one the O'Briens make here in *Costello,* 350 U.S. 359. In *Costello*, the Court held that neither the Fifth Amendment's Grand Jury Clause "nor any other constitutional provision" prohibits a grand jury from returning an "indictment based solely on hearsay." *See id*. at

361-63. The Court then addressed the defendant's request that it use its supervisory powers to limit the type of evidence upon which a grand jury may return an indictment.

> Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

Id. at 363-64.

The O'Briens further argue that "[t]his Court should also overrule, or at least prevent any further extension of the court of appeals decision in *State v. Padilla*." O'Briens' brief at 11. As previously discussed, the court of appeals held in *Padilla* that the statutory right to cross-examination is limited to "those people actually called to the stand." *Padilla*, 110 Wis. 2d at 424.

The O'Briens argue that *Padilla* should be overruled or its holding limited because the hearsay admitted in that case fit a firmly rooted hearsay exception. *See* O'Briens' brief at 11. But they do not present a developed argument why *Padilla*'s interpretation of the statutory right to

cross-examination is correct only if the hearsay comes within a firmly rooted hearsay exception, much less explain why *Padilla* was wrongly decided and should be overruled. This court "will not address undeveloped arguments." *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n,* 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768.

VII. ABSENT SOME CONSTITUTIONAL LIMITATION, THE LEGISLATURE IS FREE TO ALTER THE NATURE OF THE PRELIMINARY HEARING.

In sections II and V.1 of their brief, the O'Briens make the related arguments that "[t]he lower court decisions eliminate the higher degree of probable cause needed for bindover compared to the lower degree needed for a criminal complaint," O'Briens' brief at 11, and that the court of appeals' 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," *id*. at 21.

The O'Briens base this contention on their assertion that Wis. Stat. § 970.038 makes hearsay admissible at a preliminary hearing "even if unsworn." O'Briens' brief at 12. They do not (and cannot) contend that that is what happened at their preliminary hearing, because the evidence was presented through the sworn testimony of a detective (30:5-13; O'Briens' Ap. 171-79).

More importantly, regardless of whether the new statute now permits bindover under a lesser probable cause standard than existed previously, that would be problematic only if it violated some

constitutional requirement. However, "the right to a preliminary examination is not a constitutional right, but a statutory right." *State v. Camara*, 28 Wis. 2d 365, 370, 137 N.W.2d 1 (1965). Absent some constitutional limitation, therefore, the legislature is free to alter the nature of the preliminary hearing as it chooses or even abolish it altogether.

The O'Briens further argue that the court of appeals' decision "minimizes the importance of a preliminary hearing." O'Briens' brief at 21. If the court of appeals' decision did that, it is because that is the effect of the new statute. Because the preliminary hearing is strictly a creature of statute, it is the legislature's prerogative to make the changes it deems appropriate to the type of evidence that may be admitted at the preliminary hearing and used as the basis for a bindover decision.

The O'Briens assert that states such as Minnesota and Vermont 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." O'Briens' brief at 26-27. However, Minnesota's rule, which allows a defendant to file a motion challenging probable cause and permits the prosecutor and the defendant to present evidence at the probable cause hearing, further provides that "[t]he court may find probable cause on the face of the complaint or the entire record, including reliable hearsay." 49 Minn. Stat. Ann., R. Crim. P. 11.04, subd. 1(b), (c).

A procedure that allows the court to find probable cause "on the face of the complaint" is not equivalent to a pre-Wis. Stat. § 970.038 preliminary hearing. But, contrary to the O'Briens' argument that a more limited proceeding undermines the purpose of the preliminary hearing, the Minnesota Supreme Court has held that "[t]he purpose of a probable cause hearing," which is "to 'protect a defendant unjustly or improperly charged from being compelled to stand trial,'" can be accomplished "'without requiring the prosecutor to call any witnesses.'" *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (quoted source omitted).

The court of appeals concluded its decision in this case with the observation that "[i]t matters not whether this rule [Wis. Stat. § 970.038] marks a great change from prior practice in Wisconsin criminal cases, nor whether the change will prove to be an effective or wise one." *O'Brien*, 349 Wis. 2d 667, ¶26; O'Briens' Ap. 115. The statute "is consistent with the federal and state constitutions," the court held, "and is now the law of Wisconsin." *Id*. This court of appeals was correct.

VIII. THE O'BRIENS' PRELIMINARY HEARING COURT DID NOT MISCONSTRUE § 973.038 TO LIMIT CROSS-EXAMINATION.

The O'Briens argue that "[t]he preliminary hearing court misconstrued § 970.038 to restrict cross examination and to permit the defendant to challenge only whether the witness heard the hearsay." O'Briens' brief at 13. The court of appeals rejected that argument. It held that Wis.

Stat. § 970.038 did not change the statutory provisions that authorize the defendant to cross-examine and call witnesses at the preliminary hearing and that the trial court's rulings in this case were not based on the new statute but on established law governing the scope and purpose of preliminary examinations. *O'Brien*, 349 Wis. 2d 667, ¶¶21-23; O'Briens' Ap. 112-14.

This court has explained the limited nature of preliminary hearings as follows:

> A preliminary hearing is not a preliminary trial or evidentiary trial on the issue of guilt beyond a reasonable doubt. The role of the judge at a preliminary hearing is to determine whether the facts and reasonable inferences that may be drawn from them support the conclusion that the defendant probably committed a felony. The judge is not to choose between conflicting facts or inferences, or weigh the state's evidence against evidence favorable to the defendant. Probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony.

State v. Koch, 175 Wis. 2d 684, 704, 499 N.W.2d 152 (1993) (citations omitted).

Consistent with the limited scope of the preliminary hearing, the statutory right to cross-examination at the preliminary hearing likewise is limited.

> In Wisconsin, a defendant has a statutory right at a preliminary hearing to cross-examine witnesses against him. Wis. Stat. § 970.03(5). However, the scope of that cross-examination is limited to issues of plausibility, not credibility. This is because the preliminary hearing "is intended to be a

> summary proceeding to determine essential or basic facts" relating to probable cause, not a "full evidentiary trial on the issue of guilt beyond a reasonable doubt."
>
> Cross-examination at a preliminary examination is not to be used "for the purpose of exploring the general trustworthiness of the witness." Indeed, "[t]hat kind of attack is off limits in a preliminary hearing setting."

State v. Stuart, 2005 WI 47, ¶¶30-31, 279 Wis. 2d 659, 695 N.W.2d 259 (citations and footnote omitted).

Applying these principles, the court of appeals in this case explained why the trial court did not misconstrue Wis. Stat. § 970.038 to improperly limit the O'Briens statutory rights to cross-examination and to call witnesses.

> The defense retains the same rights to cross-examine and call witnesses that applied at preliminary examinations before the enactment of the new law. But the scope of those rights is limited by the scope and purpose of the preliminary examination, i.e., the facts relevant to establishing plausibility of the charges, which are "'essential facts as to probability' that the alleged offense occurred." *Schaefer*, 308 Wis. 2d 279, ¶37 (citation omitted). Thus,
>
> > although a defendant may subpoena witnesses and evidence for the preliminary examination . . . his subpoena may be quashed, a witness may not be allowed to testify, or evidence may be excluded if the defendant is unable to show the relevance of the testimony or evidence to rebut the probable cause.

> *Id*. In the O'Briens' case, the trial court followed this rule in sustaining objections to certain questions on cross-examination and in quashing the defense subpoena of the alleged victim whose accusations formed much of the basis of the charges against the O'Briens. Contrary to the defendants' arguments, the trial court did not reason that the changed law limited the defense right to discovery, but rather that the defense could not articulate how the questions or the subpoena had any possibility of bringing to light facts relevant to the plausibility of the charges. As the court explained, its decision may have been different "if [the witness the defense wished to call] testified that he was in Canada for the entire period of time which is the subject of this investigation." But instead, the defense could offer no indication "that relevant information [would] be given."
>
> Thus, WIS. STAT. § 970.038 had no impact on the defendants' rights to subpoena witnesses or conduct cross-examination regarding facts relevant to the plausibility of the State's case, either facially or in these particular instances.

O'Brien, 349 Wis. 2d 667, ¶¶22-23; O'Briens' Ap. 113.

In an attempt to refute the court of appeals' reasoning, the O'Briens point to an instance in which they claim that the circuit court improperly limited cross-examination based on the new statute. *See* O'Briens' brief at 13-14. Unfortunately, their discussion does not fully reflect what took place at the preliminary hearing.

In Count 9 of the criminal complaint, Martin O'Brien is alleged to have physically abused one of his sons, B.M.O., by placing B.M.O. in a bin and striking the bin with a log near B.M.O.'s head (2:8;

O'Briens' Ap. 124).[6] The complaint alleged that B.M.O. said that his head swelled from being struck indirectly through the bin (*id*.).

In their brief, the O'Briens assert that the complaint alleged that Martin struck the bin with a "stick" and that the court erred when it sustained the prosecutor's objection to a question Martin's counsel asked an officer about whether the officer had been told anything about the size of the "stick." *See* O'Briens' brief at 13. To demonstrate why that claim is wrong, the State will quote the relevant portion of the transcript:

> Q. Okay. Now, he indicated that Mr. O'Brien took a log and struck the bin. Um, what did he tell you about the size of this piece of wood? Did he describe it to you, or did he show you how big it was or what it looked like?
>
> MS. DONOHOO [the prosecutor]: I'm going to object on relevance grounds. The size of the stick does not defeat probable cause.
>
> THE COURT: Sustained.
>
> MS. STILLING [Martin's counsel]: Well, judge, I -- the state does have to show that an injury occurred. And whether it's plausible that an injury would occur by striking a somewhat hard plastic surface with some sort of stick, the size of the stick is going to be relevant to whether or not it's plausible.
>
> THE COURT: Well, it's described as a log.

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[6]This and all subsequent references to the record are to the records in the O'Briens' appeals.

> MS. DONOHOO: The child reports, and it's in evidence in Count 9 on page eight, that the child's head swelled from being struck indirectly through the red bin.
>
> THE COURT: Sustained.
>
> MS. DONOHOO: Thank you.
>
> MS. STILLING: But the question whether that's a plausible account would still depend on what this -- how big the stick was. I -- I would argue --
>
> MS DONOHOO: I think that's challenging credibility, judge --
>
> THE COURT: It is, indeed.
>
> MS. DONOHOO: -- and not relevant.
>
> THE COURT: State v. Dunn.

(30:37-38; O'Briens' Ap. 203-04.)

The O'Briens argue 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." O'Briens' brief at 13. Thus, they argue, "[t]his was a classic issue of plausibility of the story." *Id*.

The flaw in that argument is that B.M.O. did not say that Martin hit the bin with a stick; as the circuit court noted, he said that Martin hit the bin with a log (30:38; O'Briens' Ap. 204). Even if it were a small log, it would not be implausible that the blow injured B.M.O.

The example chosen by the O'Briens demonstrates the error in their assertion that the court limited cross-examination based on a misconstruction of Wis. Stat. § 970.038. To the contrary, as the trial court's citation to *Dunn* demonstrates, the court did nothing more than enforce the limitations on cross-examination at preliminary hearings that existed prior to the enactment of the statute.

The O'Briens also argue that they sought through questioning of Detective Domino "to clarify or uncover confusion in the meaning of words attributed by Domino to S.M.O. and B.M.O. – both foreign born." O'Briens' brief at 14. They note that defense counsel gave an example of a colloquial phrase that, out of context, could be construed as animal abuse. *Id*. However, they do not identify any colloquial words or phrases that Detective Domino attributed to the children that might be misused or misconstrued by a non-native English speaker, nor do they identify anything in the record that suggests that S.M.O. or B.M.O. were not proficient in the English language. That dog won't hunt.

The O'Briens also contend that the court of appeals "ignored" their statutory right to cross-examine and call witnesses at a preliminary hearing. *See* O'Briens' brief at 28. The court of appeals did no such thing. Rather, it cited long-established Wisconsin law that holds that the statutory right to confrontation "extends 'only [to] those people actually called to the stand,' not to other people whose out-of-court statements are referred to in the court proceedings." Slip op. ¶16; O'Briens' Ap. 110 (quoting *Padilla*, 110 Wis. 2d at 424). Both the trial court and the court of appeals properly applied established law when they

limited cross-examination of Detective Domino, and, as discussed in the next section of this brief, prohibited the O'Briens from calling one of the alleged victims as a witness at the preliminary hearing.

IX. THE TRIAL COURT PROPERLY BARRED THE O'BRIENS FROM CALLING S.M.O. AS A WITNESS.

In sections IV and V.2, the O'Briens make the related arguments that the trial court "imposed an impossible precondition" on their right to call a witness at the preliminary hearing, O'Briens' brief at 15, and that the court of appeals "ignored" their statutory right to confrontation at a preliminary hearing, O'Briens' brief at 28. Those arguments are not supported by the record.

Two of the charges against the O'Briens allege that they physically abused their child, S.M.O. (2:1-2; O'Briens' Ap. 117-18). The O'Briens argue that the circuit court erroneously denied their right to call S.M.O. as a witness at the preliminary hearing. *See* O'Briens' brief at 18.

At the preliminary hearing, Detective Lori Domino testified that she was present when a forensic interviewer from the Walworth County Department of Health and Human Services interviewed S.M.O. and that she subsequently spoke with S.M.O. directly (30:9-10; O'Briens' Ap. 175-76). She also testified the allegations in the complaint were based on her personal knowledge of the interviews conducted by the forensic interviewer and her own discussions with S.M.O. (30:10-11, 16; O'Briens' Ap. 176-77, 182).

After the State rested, the O'Briens sought to call S.M.O. as a witness (30:53-54; O'Briens' Ap. 219-20). The prosecutor asked the court to "require an offer of proof before subjecting S.M.O. to that witness stand" (30:55; O'Briens' Ap. 221). The prosecutor argued:

> What relevant question could S.M.O. answer to defeat probable cause? And this court has the authority, the right, and I think the duty to a child victim to require the defense to give an offer of proof. What do they intend to elicit from S.M.O. that could defeat probable cause? If they can make a good faith showing as to a relevant question to be asked of him, then I would not object; but I don't believe they can.
>
> * * *
>
> The only thing that's relevant is plausibility, and I don't believe that these defense attorneys can make a good faith showing and an offer of proof to your honor to summarize what testimony they expect to bring out of S.M.O. taking the stand that would make the evidence produced by the state implausible; thus, it's not relevant, and it's just harassing this young child.

(30:55-57; O'Briens' Ap. 221-23.)

Defense counsel responded that the prosecutor was arguing that "the defense no longer has an opportunity to call witnesses because anything they might say would simply be in contradiction to what the state's evidence is" (30:57; O'Briens' Ap. 223). The circuit court rejected defense counsel's characterization of the prosecutor's argument. The court said that the prosecutor was just maintaining that it "must require an offer of proof to show that [S.M.O.'s testimony] is relevant" (*id.*). The court explained

that it was "not saying there's an absolute bar against calling witness" and that, for example, testimony that S.M.O. was in Canada during the alleged abuse "maybe [ ] would be a very relevant question to ask" (30:57-58; O'Briens' Ap. 223-24).

The circuit court asked defense counsel: "what relevant evidence do you believe that S.M.O. can give today that would, um, contradict or dispute the – the plausibility of the testimony as given by Investigator Domino?" (30:58; O'Briens' Ap. 224). Martin's attorney responded that Domino's account was a "summary" with "gaps" and that "if the complete account isn't taken into consideration, may turn out to be incidental, accidental. I mean, just – I'm not saying he will necessarily contradict what he said. I don't really know" (30:59-60; O'Briens' Ap. 225-26). Kathleen's attorney added that a "vice" of Wis. Stat. § 970.038 was that it "allows the state to, in fact, introduce a piece of paper that in all respects we can't cross-examine" (30:62-63; O'Briens' Ap. 228-29). He asked the circuit court to "level the playing field" and "[a]llow us to call a witness so we can get a complete story" (30:63; O'Briens' Ap. 229).

Martin's attorney argued "that it may be that actions that may sound intentional, if the complete account isn't taken in consideration, may turn out to be incidental, accidental" (30:60; O'Briens' Ap. 226). Tellingly, counsel acknowledged, "I'm not saying he will necessarily contradict what he said. I don't really know" (*id.*).

In response, the court stated that establishing the "events were accidental" was "not relevant" because a "[p]reliminary hearing is not the time to present defensive material" (*id.*). The

court also noted Kathleen's attorney seemed to be "asking for a full exposition of the facts" (30:63; O'Briens' Ap. 229).

The court gave defense counsel two more opportunities to provide an offer of proof about "relevant" testimony S.M.O. could provide, but they failed to do so (30:64-65; O'Briens' Ap. 230-31). After Martin's lawyer told the court that "[w]e don't know exactly what S.M.O. is going to say that's going to render parts of the statement implausible or destroy the probable cause issue as to one of the elements of the complaint," the court agreed with the prosecutor that the O'Briens were engaging in a "fishing expedition" (30:66; O'Briens' Ap. 232). After the court confirmed its ruling (30:67; O'Briens' Ap. 233), Martin's lawyer then made an additional comment to "clarify the record," explaining that the purpose of S.M.O.'s testimony would be to "take him through his version of these events to get a complete statement pursuant to the rule of completeness and I think fundamental fairness" (*id.*).

In their brief in this court, the O'Briens argue that had S.M.O. testified, their counsel may have elicited testimony that undermined the plausibility of the accounts attributed to him that formed the basis for several of the counts involving abuse of the O'Briens' other children. *See* O'Briens' brief at 19-20. But the O'Briens did not specifically reference those counts when they argued in the circuit court that they should be allowed to call S.M.O. as a witness (30:53-68; O'Briens' Ap. 219-234). Moreover, even if they had, the fact remains that they made no offer of proof that S.M.O. would provide testimony that rendered his prior statements implausible.

The O'Briens claim that the trial court's decision rested on its "interpretation of § 970.038 as requiring the defense to make an advance showing that the testimony of a proposed witness will be dispositive." O'Briens' brief at 17. That is not a fair characterization of the court's rationale or its ruling. When the court said to defense counsel, "[the prosecutor] is asking me to require that you tell me what relevant evidence do you believe that S.M.O. can give today that would . . . contradict or dispute the -- the plausibility of the testimony as given by Investigator Domino" (30:58; O'Briens' Ap. 224), the court was not requiring the defense to present evidence that would be "dispositive," nor was it basing that question on the new statute. Rather, the court was simply asking for an offer of proof that S.M.O. would provide testimony that bore on the plausibility of the account that S.M.O. gave to the forensic interviewer and Detective Domino. That has long been the proper standard by which the admissibility of evidence at a preliminary hearing is determined. *See Dunn*, 121 Wis. 2d at 397.

The circuit court asked the O'Briens to explain what evidence they intended to elicit from S.M.O. that would go to plausibility – the only evidence that would be relevant at a preliminary hearing, *see Dunn*, 121 Wis. 2d at 397-98 – and they were unable to do so. "[A]lthough a defendant may subpoena witnesses and evidence for the preliminary examination, . . . his subpoena may be quashed, a witness may not be allowed to testify, or evidence may be excluded if the defendant is unable to show the relevance of the testimony or evidence to the [sic] rebut probable cause." *Schaefer*, 308 Wis. 2d 279, ¶37. That is what happened here.

X. THE O'BRIENS WERE NOT DENIED DUE PROCESS BECAUSE THEY WERE NOT ARBITRARILY DEPRIVED OF THEIR STATUTORY RIGHTS.

In their final argument, the O'Briens assert that their right to due process was violated at the preliminary hearing because "[o]nce a right has been conferred by statute, an individual is entitled to full enjoyment of that right" and that the "arbitrary deprivation" of their statutory rights violates due process. O'Briens' brief at 30. But, for the reasons discussed above, the O'Briens' statutory rights were not impaired in this case. Moreover, even if the O'Briens were correct that the new statute impairs certain statutorily granted procedural rights, that would not constitute an "arbitrary" denial of those rights, as it would have resulted from duly enacted legislation. "[L]itigants have no vested rights in particular rules of evidence." *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 528, 261 N.W.2d 434 (1978).

The O'Briens' due process argument adds nothing to their cause. Either their statutory rights were violated at the preliminary hearing or they were not. Clothing their statutory claims in due process garb needlessly muddles the issue.

CONCLUSION

For the reasons stated above, the court should affirm the decision of the court of appeals.

Dated this 24th day of January, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,891 words.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of January, 2014.

_____
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