STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case Nos. 12AP1769-CR and 12AP 1770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARTIN O'BRIEN, and
KATHLEEN O'BRIEN,

Defendant-Appellants.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANTS

On Appeal of a Non-final Order Entered in the Circuit Court
for Walworth County, the Honorable John Race Presiding

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INTRODUCTION

This Court accepted on interlocutory review the Defendant-Appellants' cases after a preliminary hearing and bindover. Specifically, this Court agreed to review the non-final orders of Walworth County Circuit Court Judge John Race, which denied the defense motions to preclude hearsay at the preliminary hearing and granted the state's motion to quash the defense subpoena of a witness at the hearing.

In July, 2011, when the O'Briens' runaway seventeen year old son was apprehended, he made a number of accusations of mistreatment by his parents. This led the State to charge both defendants in a joint criminal complaint with numerous counts of child abuse and related disorderly conduct offenses alleged to have taken place over eight years. Statements from that son formed the sole or primary basis for eight of the ten felony counts.

Before the preliminary examination, both defendants moved to preclude the use of hearsay at that hearing, arguing that they were entitled to confront and cross-examine the primary accuser, their seventeen year old son. The defendants argued that the use of hearsay, pursuant to the recently enacted 2012 Act 285 (creating § 970.038), as the exclusive evidence to support a bindover, given the complex facts and expansive charging period in this case, would violate their constitutional and statutory rights to confrontation, compulsory process and the effective assistance of counsel. The circuit court denied the defense motions.

At the preliminary hearing, the State introduced the criminal complaint as an exhibit and presented only one witness - a police officer who investigated the charges and helped prepare the criminal complaint. The officer had no personal knowledge of any of the alleged offenses and simply testified about hearsay statements in the complaint. When the defense sought to call the defendant's seventeen year old son as a defense witness at the hearing, the State moved to quash the defense subpoenas, arguing that probable cause had already been established through the State's one hearsay witness. The State also argued that § 970.038 effectively nullified the defense right to call any witnesses at the preliminary hearing because once the State established probable cause through its hearsay witness, no defense evidence could defeat probable cause. The court granted the State's motion and ordered both defendants bound over for trial. (App. 220-238).

The recently enacted § 970.038, which says hearsay "is admissible in a preliminary hearing," and that a court "may" base its finding of probable cause "in whole or in part on hearsay," is effective as of April 26, 2012, and applies to all cases charged after the date of enactment. No appellate court has yet ruled on the new statute's effect on a defendant's statutory and constitutional rights to the effective assistance of counsel and to cross-examine and present witnesses at a preliminary hearing.

The defendants ask this Court for a declaration that the State's radical interpretation of § 970.038, Wis. Stats., as applied against these or other defendants, is unsupported by the statute's language or legislative intent, and that the State rendered the preliminary hearing in these cases a functional nullity. Further, the defendants ask this Court to declare the State's use of §970.038 unconstitutional because it violates their constitutional rights to due process, confrontation and compulsory process, and the effective assistance of counsel. In addition, the defendants argue that their right to subpoena witnesses and present evidence at a preliminary hearing was violated when the preliminary hearing court quashed the defense subpoena. They ask this Court to remand for a new preliminary hearing at which the defendants may subpoena their primary accuser and challenge the plausibility of his stories that were used to support the felony counts in this case.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs will fully set forth the facts and the legal authorities governing this court's review of the trial court's order. Publication of the court's decision is warranted because this case involves a matter of first impression in the State of Wisconsin, the application of newly enacted § 970.038, Wis. Stats., and its impact on defendant's rights at a preliminary hearing.

STATEMENT OF THE ISSUES

I. Does the defendant's constitutional right to confrontation and right to the effective assistance of counsel preclude the state at a preliminary hearing from relying exclusively on paraphrased hearsay contained in the criminal complaint to establish probable cause?

Answer by Circuit Court: No.

II. Did the judge misconstrue §970.038 which makes hearsay admissible at the preliminary hearing by interpreting the statute:

A. as requiring the judge to find probable cause based upon any hearsay statement consistent with guilt and removing all discretion to consider the weight or quality of the evidence?

B. as limiting the relevant areas of inquiry at the preliminary hearing to the plausibility of the officer's account of hearing the hearsay statements, and rendering the plausibility of the hearsay account of the crime off-limits?

C. as requiring a defendant who wishes to call a witness to make a preliminary showing that the witness will give specific testimony that will destroy the plausibility of the officer's account of hearing the hearsay?

Answer by Circuit Court: No.

STATEMENT OF THE CASE

On August 3, 2011, the Department of Health and Human Services removed five children from the O'Brien home on suspicion of child abuse after their seventeen year old child, S.M.O.. (dob 7/30/94), who had been taken into custody as a runaway, reported that he and several of his siblings had been abused over the years. (App. 105). Recorded interviews of the children were obtained by a forensic social worker, and police began a criminal investigation concurrent with the child protection evaluation. (App. 105)

Eight and a half months later, on May 17, 2012, a complaint was filed in Walworth County Circuit Court charging Martin and Kathleen O'Brien with ten counts of felony child abuse, in violation of §948.03(2)(b), Wis Stats. and seven counts of disorderly conduct. (App. 101-11). The complaint charged the same broad eight year period for all seventeen counts: "on or about and between January 1, 2004 and December 31, 2011."

The charges involved five of the defendants' ten children, who at the time the complaint was filed were between twelve and seventeen years of age. In eight of the counts, the seventeen year old runaway child, S.M.O., was the primary reporter of alleged physical abuse. (App.108-11). In four of the

counts, S.M.O. alleged other children were abused, however, the alleged victims did not apparently corroborate these allegations. (App. 82-84, 201).

Prior to the preliminary hearing, the defendants filed a motion to preclude hearsay at the hearing. Meanwhile, the State moved to quash a defense subpoena compelling S.M.O. to testify at the preliminary hearing.

The court ruled that § 970.038 was constitutional and that hearsay would be admitted at the preliminary hearing in these cases. (App. 112, 148). However, the court initially denied as premature the State's motion to quash the defense subpoena. (App. 122).

Later that day, at the preliminary hearing, the State presented only one witness – a police investigator who had signed the criminal complaint. The State moved the complaint into evidence and rested. (App. 163).

On cross examination, the investigator admitted that the only child she interviewed was the seventeen year old runaway. (App. 166). She never conducted any follow-up interviews with the other children. *Id.* The investigator admitted that the complaint contained significant factual gaps and the incidents described were only summaries, not verbatim accounts. (App. 167-68). Defense counsel tried to get the investigator to fill in the gaps and describe additional facts to provide context regarding the time, place and sequence of the events, but the court sustained repeated State's objections that the questions were "discovery." (App. 169-70). When the witness was permitted to answer, she was frequently unable to recall any facts not found in the criminal complaint. (App. 170, 174-5, 179, 182-84, 189).

After the State rested, the defendants sought to call the seventeen year old, S.M.O., who was reportedly in the courthouse and available to testify. The State renewed its objection to the defense subpoena and argued that the court must consider the State's case in "the light most favorable," and find that probable cause was already established by virtue of the State's one hearsay witness. The prosecutor demanded an offer of proof of testimony they would elicit from the witness that "could defeat probable cause." (App.205-207).

The judge then sustained the State's objection and precluded any testimony from the defendant's seventeen year old accuser. *Id.* 68. On July 26, 2012, the court signed written orders granting the State's motion to quash and

granting a bindover on all ten felony counts. (App.112-13). The defendants both sought leave to appeal the circuit court rulings on the defendants' motion to preclude hearsay at the preliminary hearing and the state's motion to quash the defense subpoena This Court granted review on September 24, 2012.

ARGUMENT

I. The Admission of Hearsay at the Preliminary Examination Pursuant to Wis. Stat. §970.038 and Reliance on It as the Exclusive Basis for a Finding of Probable Cause Violated the Defendants' Constitutional Right to Confrontation and Right to Effective Assistance of Counsel.

A. Introduction.

The O'Briens argue that their right to the *effective* assistance of counsel includes the right to have counsel cross examine individuals at the preliminary hearing who were witnesses to the alleged events, which reportedly occurred over an eight year time period. By allowing the hearsay facts in the complaint to form the basis for the probable cause finding, the court prevented counsel from being able to effectively test the plausibility of the State's evidence at this critical stage.

B. The Sixth Amendment encompasses more than just trial rights.

The Sixth Amendment provides: "In all criminal *prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (emphasis added). The right encompasses more than just rights that are exercised at trial - it includes protections in a pretrial setting that "might settle the accused's fate and reduce the trial to a mere formality." *United States v. Wade*, 388 U.S. 218, 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)

For instance, the Sixth Amendment guarantee encompasses counsel's assistance whenever necessary to assure a meaningful defense. *Id.* at 225. By this language, a defendant is ensured that he "need not stand alone at any stage of the prosecution, formal or informal, in court or out, where counsel's

absence might derogate from the accused's right to a fair trial." *Id*. at 226. The outcomes of those pretrial hearings considered "critical stages" in the prosecution "[hold] significant consequences for the accused" and are stages of the criminal process "where rights are preserved or lost." Christine Holst, *The Confrontation Clause and Pretrial Hearings: a Due Process Solution*, 2010 U. Ill. L. Rev. 1599, 1609 citing *Bell v. Cone*, 535 U.S. 685, 696 (2002); *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050 (1963).

Since a preliminary examination is considered one of those "critical stages" of the Wisconsin criminal process, an accused is entitled to the assistance of counsel. *State v. Wolverton*, 193 Wis.2d 234, 252, 533 N.W.2d 167 (1995); *Coleman v. Alabama,* 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). In *Coleman*, the court held that at an adversarial preliminary hearing the accused must be afforded the assistance of counsel to "meaningfully []cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.* at 7.

It has long been recognized that the right to counsel is defined as the right to effective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), citing *McMahon v. Richardson*, 397 U.S. 759, 771, n. 10 (1970). In *Coleman v. Alabama ,* the Supreme Court discussed the importance of having effective counsel at a preliminary hearing stage:

> Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making

> effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.
>
> The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid [of counsel] ... as at the trial itself.

Coleman v. Alabama, 399 U.S. 1, 7 (1970), citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Although, like Wisconsin, the statutory purpose of the Alabama preliminary hearing process was limited, the *Coleman* court plainly recognized that effective representation at the critical preliminary hearing stage before trial was essential to the fair trial guaranteed by the Sixth Amendment. Because in these types of pretrial hearings the court must determine whether there is sufficient evidence to proceed to trial, "the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony." *Gerstein v. Pugh*, 420 U.S. 103, 123, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

In two recent cases, the Supreme Court discussed the Sixth Amendment in the context of the conduct of the entire defense, rather than the trial alone.

In *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004), the court reinforced the importance and breadth of the right to confrontation, by focusing attention on the framers' view of the Sixth Amendment right to confrontation, rather than whether a judge deemed hearsay to have "indicia of reliability." Simply "admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id*. at 61. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* The court ruled that statements taken by police officers are "testimonial" and are not admissible even if permitted by hearsay statutes unless the witness was unavailable and had been subject to cross-examination. *Id.* at 51-53.

The role of the Sixth Amendment in criminal prosecutions was again addressed two years later in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006), this time in the context of the right to counsel of one's

choice. The district court refused to allow the defendant to hire his attorney of choice, and the government argued that as long as his trial with a different attorney was fair, any error was harmless. The supreme court equated the Sixth Amendment right to counsel with the confrontation right through a *Crawford* analysis. 548 U.S. at 145-46. It was not enough that a trial be fair (or hearsay be deemed "reliable" by a judge), since the Sixth Amendment commands, "not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Id.* at 146. Further, "the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." *Id*. at 150. Many such decisions take place outside of the trial and, indeed, many of them "do not even concern the conduct of the trial at all," but they all have an impact on the defendant's ability to defend himself against government prosecution. *Id.*

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

As the *Coleman* court noted, the fact that the preliminary hearing is limited to a probable cause finding does not render it meaningless. The conduct of that hearing may well be critical to a successful defense at trial. *Coleman*, 399 U.S. at 9. *Coleman* recognized that the conduct of the preliminary hearing may not only result in a finding that the case lacks probable cause but in some cases may assist the attorney in providing effective assistance at trial, or deciding whether to cooperate with the government or plea bargain. *Id.* Honoring the defendant's right to confront and cross-examine fact witnesses and the right to compulsory process to present witnesses at the preliminary hearing would ensure the defendant the effective representation of counsel at this critical stage.

C. The O'Briens were denied their right to confrontation at the preliminary hearing.

To date, the United States Supreme Court has never expressly decided whether the Sixth Amendment right to confrontation applies at a full adversarial preliminary hearing of the type used in Wisconsin. Some Wisconsin appellate court decisions[1] have assumed the right does not apply at a preliminary hearing, based on language originating in *Mitchell v. State*, 84 Wis.2d 325, 336 (1978). However, a careful review of that originating language in *Mitchell* reveals that it was mere *dicta*, based on a misreading of *Gerstein v. Pugh*.

Before a citizen in Wisconsin may be brought to trial a court must conduct an adversarial preliminary examination, at which a panoply of due process rights are statutorily prescribed. At the hearing, witnesses are sworn and testimony is recorded. The defendant may cross-examine witnesses and may call witnesses on his own behalf. § 970.03(5). Until very recently, the rules of evidence applied with limited exceptions. § 970.03(11) (repealed by 2011 Act 285). A magistrate must preside over the preliminary examination and is available to resolve evidentiary issues. *State v. Moats,* 156 Wis.2d 74, 117, 457 N.W.2d 299, 318 (1990) (Heffernan, J. concurrence).

The full adversarial nature of Wisconsin's preliminary hearing is in contrast to the non-adversarial judicial review procedures considered by the United States Supreme Court in *Gerstein*, cited by the court in *Mitchell* as authority for the proposition that there is no right to confrontation at a preliminary hearing in Wisconsin. 84 Wis.2d at 336. *Mitchell* did not analyze this proposition with any detail, and in truth the *Mitchell* court's reference to *Gerstein* was misplaced.

In *Gerstein*, the Supreme Court considered whether the Fourth Amendment required an adversarial proceeding to establish probable cause for pretrial detention shortly after arrest. The court ruled that because of its "limited function and its nonadversary character, such a probable cause

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[1] *See State v. Padilla*, 329 N.W.2d 263, 268, 329 N.W.2d 263 (Ct. App. 1982). *Padilla* simply repeated the *dicta* in *Mitchell* on whether a constitutional right to confrontation applied at a preliminary hearing, without any analysis of the United States Supreme Court case on which *Mitchell's dicta* improperly relied.

determination is not a 'critical stage' in the prosecution that would require appointed counsel." 420 U.S. at 122. However, the court expressly contrasted the sort of preliminary hearing used in Wisconsin in order "to determine whether the evidence justifies going to trial":

> When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused *justifies the presentation of witnesses and full exploration of their testimony on cross-examination*. This kind of hearing also requires appointment of counsel for indigent defendants.

Gerstein v. Pugh, 420 U.S. at 120 (emphasis added). Thus, *Gerstein* simply does not stand for the proposition that constitutional confrontation rights do not apply at an adversary preliminary hearing of the type employed in Wisconsin.

Another supreme court case is sometimes cited for the proposition that confrontation is "basically a trial right." *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968). However, that comment in *Barber* was not intended to address the question whether confrontation rights may be implicated by events outside of trial. In *Barber*, the court held that the failure to call an available witness was not excused by the fact that defense counsel had an opportunity to cross-examine the witness at a preliminary hearing. The court ruled that, since the Confrontation Clause is concerned with providing an opportunity for cross-examination at trial, the failure to afford such an opportunity when it was clearly available violated that Clause. 390 U.S. at 125. Thus, *Barber* did not suggest that the right of confrontation attached exclusively at trial.

Since no Wisconsin cases have carefully analyzed the question of the right to confrontation at a preliminary hearing, and since recent United States Supreme Court rulings, including *Crawford* and *Gonzalez-Lopez*, have re-invigorated Sixth Amendment rights, the defendants suggest it may be time to revisit this question.

But even if this Court accepts the view that *Gerstein v. Pugh* established that there is no constitutional right to confrontation at a preliminary examination – even the type of adversarial preliminary hearing we have in

Wisconsin – that would not dispose of the confrontation issue. Regardless of the answer to the constitutional question, there remains a statutory right to confrontation at the preliminary hearing in Wisconsin. The Mitchell court noted the statutory rights conferred by Chapter 970:

> However, in Wisconsin an accused is by statute given the right to confront witnesses at this stage. He is entitled to be present at the hearing, sec. 971.04(1)(d), Stats., and he "may cross-examine witnesses against him, and may call witnesses on his own behalf who then are subject to cross-examination." Sec. 970.03(5), Stats.
>
> At the preliminary examination the defendant personally confronted and cross-examined the witnesses presented by the state; he was entitled to subpoena adverse witnesses, including the victim Hurst, if he so chose. There was sufficient evidence provided by the personal observation testimony of the arresting officer to support a finding of probable cause without reliance on any of the inadmissible hearsay declarations of Hurst. Therefore, the determination of probable cause was not based on the testimony of a witness whom the defendant could not cross-examine. Under these circumstances the defendant's right of confrontation was not infringed.

84 Wis.2d at 336. But, unlike the hearing afforded the defendant in *Mitchell*, the preliminary hearing afforded the O'Briens was devoid of the statutory right of confrontation required in Wisconsin in Chapter 970..

The purpose of a preliminary hearing is to prevent "hasty, malicious improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based." *State v. Richer*, 174 Wis.2d 231, 496 N.W.2d 66 (1993) (quoting *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539 (1922)). More recently, in *State v. Schaefer*, 2008 WI 25, ¶33, 308 Wis. 2d 279, 299, 746 N.W.2d 457, our supreme court noted: "The independent screening function of the preliminary examination serves as a check on the prosecutorial power of the executive

branch." (citing *State ex rel. Klinkiewicz v. Duffy*, 35 Wis.2d 369, 373, 151 N.W.2d 63 (1967)). In this case, the State's perfunctory presentation of one hearsay witness to identify the criminal complaint, together with its objection to the defense cross examination and presentation of testimony by a properly subpoenaed witness, completely vitiates any "check" on prosecutorial power.

Because the legislature conferred the right to have a preliminary hearing to a criminal defendant, the procedure must include, at a minimum, a statutory right to confrontation in order for the preliminary hearing to be meaningful enough to fulfill the above referenced goals. Until 2010 Act 285, the preliminary hearing statute barred most hearsay evidence, with very few exceptions where the reliability of hearsay was generally uncontested. But as applied by the prosecutor and court in this case, the entire statutory procedure for preliminary hearings has been rendered meaningless. If that was the intent of the legislature it could have repealed Chapter 970 entirely. By failing to do so, the legislature evinced an intent to continue to provide such hearings, presumably for the purposes described in *Richter* and other cases. The court's arbitrary deprivation of the defendants statutory rights also constitutes a violation of the defendants' rights to due process. *See, infra* Section II F.

Here, the O'Briens were denied their right to subpoena, confront and cross-examine S.M.O., the primary accuser in nearly all the felony counts. And, there was no other evidence produced by the State from any witness with personal knowledge of the facts alleged to support the felony charges. Unlike *Mitchell*, the determination of probable cause was based solely on the testimony of a hearsay witness (Domino) whom the defendants could not cross-examine. Thus, for all these reasons, the defendants' statutory rights to confront, cross-examine and subpoena witnesses at the preliminary hearing were denied.

Whatever the parameters of the confrontation right at a preliminary hearing may be, the State grossly abused these defendants' rights to a fair preliminary hearing. The State's reliance solely on hearsay evidence for a bindover and the court's total preclusion of any defense evidence to challenge the plausibility of that hearsay is an all out assault on the defendants' constitutional and statutory rights in this case. As argued below, the defendants right to subpoena witnesses and present defense evidence in court were plainly violated by the State's perfunctory presentation of only hearsay evidence and

the court's erroneous restriction of the defense counsel's cross examination rights.

II. The Court Accepted the Prosecutor's Radical Interpretation of Wis. Stat. §970.038 That Is Unsupported by the Statute's Language and Would Render the Preliminary Hearing a Functional Nullity.

A. Introduction

Even if the application of this statute to this case to allow a bindover based solely on the hearsay contained in the criminal complaint is constitutional, the circuit court incorrectly construed the statute. During the arguments leading up to the preliminary hearing in this case and throughout the hearing the prosecutor made a number of pronouncements about the effect of the new statutory language on the scope and conduct of the preliminary examination. This radical reading of the new statute proposed by the prosecutor and embraced by the court is unsupported by the statutory language and violates basic principles of statutory construction. Further, these extremist propositions in the aggregate result in the reduction of the preliminary hearing to a complete functional nullity.

Newly created §970.038 provides:

> (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).

On its face, the new statute allows the State to elect to present hearsay at a preliminary hearing, and it allows the court to rely upon that hearsay in whole or in part to find probable cause. By inference, the statute relieves the State of the initial burden to present the testimony of a witness with personal knowledge of the crime. That is all it does. The newly enacted statute expressly does not *repeal* or in any way *affect* Wis. Stat. § 970.03 (5), which allows the defendant at a preliminary examination to cross examine the witnesses against him and to call witnesses on his own behalf. If the legislature

intended to limit the statutory right to cross examination, it would presumably have said so. Further, contrary to the State's argument, the new statute does not require the judge to do anything other than admit the hearsay.

B. The prosecutor argued, and the court tacitly accepted, that the new statute *required* the court to find probable cause based on the hearsay contained in the complaint.

The prosecutor called only one police investigator to testify, who did no more than authenticate the criminal complaint and identify the defendants. The complaint was received into evidence, and the hearsay within it was the only evidence introduced regarding the alleged abuse.

The prosecutor argued that the new statute not only required the judge to admit the hearsay, but also required the judge to find probable cause based on it. The prosecutor noted that prior to the enactment of the new statute, the question whether to admit hearsay or not was left to the discretion of the judge. The prosecutor boldly declared:

> The new statute does not have that discretion in it. It merely states: Hearsay is admissible. So now that hearsay is admissible, once it is in the record, then the case law tells this court that the court must take all of the evidence in the light most favorable to the state. And if that hearsay, taken in the light most favorable to the state, is consistent with guilt, the court must then bind over.

(App.146-47). In the prosecutor's view, then, the State may introduce any kind of hearsay, however sparse or unreliable, and the court has no discretion to do anything but bind the defendant over so long as that hearsay is "consistent with guilt."

This is wrong on multiple levels. First, although the new statute does require the judge to *admit* hearsay, it does not strip the judge of discretion when it comes to the weight or quality of that evidence. Rather, the statute states that "a court *may* base its finding of probable cause . . . in whole or in part on hearsay admitted under sub. (1)." § 970.038 (emphasis added).

The prosecutor's claim that the court must bind the defendant over based on any hearsay statement consistent with guilt stemmed from the prosecutor's misconception that the law requires the judge to take any scrap of hearsay that is offered "in the light most favorable to the state." In fact, this notion has been specifically disavowed by the Wisconsin Supreme Court. *See, State ex rel. Funmaker v. Klamm*, 106 Wis.2d 624, 631, 317 N.W.2d 458, 462 (1982) (judge's statement at preliminary hearing taking evidence in the light most favorable to the state was "an erroneous statement of the law because the state is not entitled to any such presumption. In fact, the state has the burden to show that probable cause exists").

The task of the judge at the preliminary hearing is to "ascertain whether the facts and the reasonable inferences drawn therefrom support the conclusion that the defendant probably committed a felony." *State v. Dunn*, 121 Wis.2d 389, 397-98, 359 N.W.2d 151, 155 (1984).

The judge did not expressly state whether he accepted or rejected the prosecutor's erroneous view of the law, but he at least tacitly accepted it, as indicated by his refusal to allow the defense to cross examine the police witness to fill in the gaps in the hearsay that was offered or to call the one witness with personal knowledge to provide additional evidence clarifying events.

C. The court misconstrued § 970.038 as precluding the defense from calling their accuser as a witness.

Wis. Stat. §970.03(5) guarantees a citizen accused of a felony offense the right to subpoena witnesses and present evidence at a preliminary hearing. *State v. Schaefer*, 2008 WI 25, ¶35. Of course, this includes the right to call the alleged victim. *See, e.g. Mitchell v. State,* 84 Wis.2d at 336 (1978); *State v. McCarter*, 36 Wis.2d 608, 153 N.W.2d 527 (1967); § 970.03(5).

The defense subpoenaed S.M.O. (whose statements formed the primary factual basis for the complaint), seeking to examine him regarding his account of the alleged offenses. The State's police witness conceded that the complaint contained only a summary with many gaps she could not fill due to lack of memory. (App.167-68). At the end of her direct testimony, there were unanswered questions relating to a lack of intent to cause injury, a lack of evidence regarding injury and the plausibility of the stories of several of the

counts. A fair opportunity to challenge the plausibility of each of the ten felony counts was needed because the State had expressly asked for an individual finding of probable cause on each count. (App.143).

Nonetheless, the State objected. The State repeated the erroneous assertion that the court must take the hearsay evidence it had submitted "in the light most favorable to the state." (App.204). The prosecutor opined, therefore, that once the State has proffered some evidence in support of probable cause, any evidence the defense might present was improper absent an offer of proof establishing how any of the witness' answers would "defeat probable cause." (in other words, an offer of proof that the testimony would be not only *relevant* but *dispositive)*. (App.205-07).

The court ultimately agreed. The court did not order the defendant's subpoena quashed on the grounds that it was improper or unduly burdensome. Rather, it appears that the court accepted the prosecutor's theory that the new §970.038 placed new limitations on the defense right to call witnesses. (App. 205-07, 216). The judge's decision also rested on a misconception that since the enactment of §970.038, the only possible relevant area of inquiry for the hearing was the plausibility of *the police witness' account of having heard the hearsay*.

The judge repeatedly indicated a belief that upon the introduction of the complaint, the only determination left for him to make was whether the officer testified plausibly about what she heard. (App.208, 210-11, 215). The court said:

> Ms. Donohoo is asking me to require that you tell me what relevant evidence 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?

(App. 208). *See also* (App. 211) ("the question is: Was the testimony of Officer Domino plausible?"); and (App.215)("I still want to know what is it that you know that S.M.O. will say that would affect the plausibility of Investigator Domino").

The court's ultimate construction of §970.038 as placing limitations on the right to call witnesses under §970.03(5) has no basis in the statute's

language. Section 970.038 says nothing about the right to call witnesses. In enacting the new statute the legislature could have enacted limitations on this right but did not.

Indeed, reading such limitations into §970.038 is contrary to basic tenets of statutory construction because it creates a conflict between §970.038 and §970.03(5). It is axiomatic that a statute must be interpreted so as to harmonize it with existing statutes and avoid reducing another statute to a nullity. *Pella Farmers Mut. Ins. Co. v. Hartland Richmond Town Ins. Co.*, 26 Wis.2d 29, 41, 132 N.W.2d 225, 230 (1965). The court's interpretation of the new statute as requiring the defense to make an advance showing that the testimony of a proposed witness will be dispositive, before allowing the witness to be called, would nullify § 970.03(5).

Similarly, the court's construction of the statute as limiting the defense right to call witnesses to instances in which the witness will destroy the plausibility of the officer's account of hearing hearsay is not supported by the statutory language and would render §970.03(5) meaningless. There would be almost no conceivable circumstance in which the defense would be allowed to present evidence. In fact, the defense is expressly allowed to present evidence to contest the plausibility of the account given. *Schaefer*, 2008 WI 25, at ¶ 30.

The ultimate question at a preliminary hearing is whether there is probable cause to believe that the defendant committed the offense, not whether there is probable cause to believe the officer heard what she says she heard. The interpretation proposed by the prosecutor and embraced by the court would limit the scope of the hearing in a way never contemplated by §970.03 or the cases interpreting it.

The result would be a hearing where any hearsay statement (however truncated or unreliable) could be offered, and the only permissible inquiry would be into whether the witness plausibly testified about having heard it. Such a construction would reduce the hearing to a sham proceeding having nothing to do with probable cause to believe the defendant committed a crime. Such an interpretation finds no basis in the statutory language and violates the "cardinal rule" of statutory construction that a statute must be construed to avoid an absurd result. *State v. Mendoza*, 96 Wis. 2d 106, 115, 291 N.W.2d 478 (1980).

D. The court misconstrued the new statute as limiting cross examination, resulting in a violation of the defendants' statutory right to cross examine the witnesses.

The exclusive use of the criminal complaint as hearsay evidence to establish probable cause for a bindover in this case is particularly troublesome. This case involves a series of old allegations dating back one to eight years ago. The facts in the criminal complaint are minimal at best, often giving a sparse and truncated description of an act or acts without any context as to time, place or purpose. Yet the State offered the complaint with little other explanation as the sole basis for bindover.

The defendants simply tried to exercise their rights to compulsory process and to cross examine witnesses as secured by §970.03(5), Wis. Stats. They subpoenaed a witness who all parties agreed had knowledge about the relevant facts, many of which were missing from the summary form of the criminal complaint. Section 970.03(5), *Stats.* provides the defendant with a statutory right to cross examine witnesses. In this case the prosecution's objections and the court's rulings so severely limited cross examination as to violate the statutory right to confrontation.

Practically every attempt by the defense to fill in the gaps that the police witness conceded were in the "summary" of events in the complaint was met with an objection, most of which were sustained. In many instances the objection was that the question called for "discovery." It is worth remembering what constitutes "discovery" in this context. In *Wilson v. State*, 59 Wis.2d 269, 294-95, 208 N.W.2d 134 (1973), the Wisconsin Supreme Court defined "discovery."

> The central approach to the role of the magistrate in determining credibility of witnesses is one of degree. . . . There is a point where attacks on credibility become discovery. That point is crosses when one delves into general trustworthiness of the witness, as opposed to plausibility of the story.

In none of these instances was the defense actually attempting to use the hearing for discovery as prohibited by *Wilson*. The defense was attempting to elicit a more complete account for purposes of determining the plausibility of

the story. None of the questions pertained to the trustworthiness of the officer or even of the hearsay declarant.

It appears that the court was persuaded to limit cross examination based on the prosecutor's theory that once any bit of hearsay had been presented that was "consistent with guilt" the inquiry was over, and the judge had no option but to bind the defendant over. For example, one allegation in the complaint was that Mr. O'Brien had placed one of the children in a plastic bin and struck the sides of the bin with a stick. Defense counsel attempted to ascertain whether the officer had been told anything about the size of the stick. The State objected on relevance grounds, saying that "the size of the stick does not defeat probable cause." (App. 187). Defense counsel explained that the State was required to show probable cause that an injury occurred and whether that was plausible or not would depend on the size of the stick. This was a classic issue of plausibility.

In response, the prosecutor simply reminded the court that the child had said he was injured, which statement was in the criminal complaint that had been introduced. Apparently accepting this as a sufficient reason to preclude further cross examination on the subject, the court sustained the objection (App. 188). Thus, cross examination was foreclosed based on the judge's acceptance of the prosecutor's theory that since the child's statement that he was injured was in the complaint, no further inquiry was relevant or permissible.

Similarly, when the defense introduced the officer's report that contained additional facts told to the officer but not included in the complaint, the prosecutor objected saying:

> I believe that with the court receiving Exhibit No. 1 [the complaint] and the testimony, both on direct and on cross-examination, that the evidence is already in the record to support probable cause of a felony; and this is merely discovery. And even if she can point to a contradiction, it isn't relevant.

(App. 190). In other words, once the State introduced its hearsay, any attempt to introduce additional evidence not contained in that hearsay was improper "discovery." The judge agreed and precluded the defense from examining the officer regarding the facts contained in her report. (App. 191).

The defense sought only to introduce additional facts where the facts that had been introduced by the State through the complaint were admittedly incomplete. But no attempt to complete the picture was permitted. The judge's belief that the officer's plausibility was the only permissible area of inquiry likely contributed to the limitations he placed on the cross- examination. The cross- examination allowed was so truncated as to be meaningless. The judge so unfairly limited cross-examination as to violate the statutory right contained in Wis. Stat. §970.03(5). This was an error of law. *See, e.g. Wilson*, 59 Wis.2d at 295 (court erred when it precluded defense from cross-examining victim on her description of suspect as it was relevant to plausibility of identification); *State v. Hayes*, 46 Wis.2d 93, 175 N.W.2d 625(1970)(*overruled on other grounds*)(preliminary hearing court erred by restricting cross-examination of state witnesses who identified Hayes at the preliminary).

In this case, the court accepted the state's invitation to apply the statute to preclude cross examination aimed at completing the admittedly sketchy picture presented by the summary of hearsay contained in the criminal complaint. In doing so, the court went beyond giving effect to the new statutory provision to allow the state to *present* hearsay. The court allowed the state complete control over *how much or how little* hearsay would be admitted. Under the view accepted by the court, the state is now permitted to choose how detailed (or how sparse) a hearsay account to present, and the defense is precluded from attempting to fill in the gaps with the rest of the hearsay. The whole notion is extraordinary. Under this view, the state could produce nothing more than the testimony of a police officer that "Victim Jones told me that Defendant Smith struck him, causing injury." Any attempt by the defense to inquire into how or with what Smith struck Jones would be met with a relevance objection that would be sustained. Any attempt to cross examine the officer about additional details contained in the officer's report would be similarly fruitless. Unless the defense could conceive of a question bearing on the plausibility of the officer's account that Jones made a statement to this effect, there would be no cross examination, and bindover would be automatic based on the officer's conclusory statement.

To the extent that the judge believed that these limitations on the cross examination were mandated by §970.038, this was an erroneous construction of the statute. Section 970.03(5) allows the defense to cross examine the witnesses. Although the new statute allows the state to present its evidence in the form of hearsay, there is nothing in its language that limits the defense

right under §970.03(5) to introduce additional relevant evidence through cross examination. Furthermore, a construction that reads severe limitations on cross examination into §970.038 creates a conflict between it and §970.03 (5) and would essentially render that provision a nullity in violation of well settled rules of statutory construction. *Pella Farmers Mut. Ins. Co. v. Hartland Richmond Town Ins. Co.*, 26 Wis. 2d 29, 41, 132 N.W.2d 225, 230 (1965).

E. The court construed §970.038 in such a way as to render the preliminary examination a functional nullity.

The net result of the prosecutor's radical interpretation of the effects of the new statute and the court's endorsement of it is a preliminary hearing at which the State may present any portion or paraphrase of a hearsay account in its complaint. There is not, under the State's view, any requirement of reliability. The statement may be as sparse as the prosecutor chooses. Nor is there any prohibition on multiple levels of hearsay. As long as the hearsay account the prosecutor has chosen is one in which the defendant has committed a crime, the inquiry is functionally at an end.

Under the State's theory, the judge has no discretion to consider the quality of the evidence or whether it is worthy of reliance on it by the court. Any attempt by the defense to provide the court with a more complete account of events by cross examining the witness about the additional hearsay statements the witness heard meets with a brick wall. Any such attempt is "discovery." The only permissible area of inquiry is whether the witness has testified plausibly about having heard the hearsay. Nor may the defense avail itself of its right under §970.03(5) to call the witness with personal knowledge to complete the account the court has heard. Any attempt to do so hits the same brick wall unless the defense knows precisely what the witness will say and how it will destroy the plausibility of the State witness's account of hearing the hearsay.

Such a hearing cannot begin to serve the intended purpose of the preliminary hearing – the protection of the accused from "hasty, malicious, improvident, and oppressive prosecutions." *Richter*, 174 Wis. 2d 231. Such a hearing cannot serve any "independent screening function" or act as a check on the prosecutor's power. *Schaefer*, 2008 WI at ¶ 33. In such a hearing the defense lawyer (not to mention the judge) is relegated to the role of potted

plant. Such a hearing is a sham. It is not a hearing at all. Section 970.038 cannot reasonably be interpreted to lead to such an absurd result. *State v. Mendoza*, 96 Wis. 2d 106, 115, 291 N.W.2d 478 (1980).

There is a sound policy basis for reversing the circuit court orders. There are undoubtedly many cases in which the eyewitness to the events will not be necessary, such as those where the defendant has confessed to a felony and little more would be needed to establish probable cause for a bindover. However, in more complex cases, where the court requires an adequate knowledge of the account to make a reasoned decision, a witness with direct knowledge of the events should be presented. In cases where the evidence is weaker and probable cause more questionable, the state may hide its weakness behind a cherry-picked and truncated version of the events in a hearsay document, such as the complaint in this case. Accepting this type of document as the sole basis for probable cause defeats the purpose of the preliminary hearing to protect the citizen accused.

Indeed, the State's construction of the new statute would create the absurd result that a preliminary hearing now has a lesser level of reliability of evidence than a criminal complaint, even though bindover requires a higher degree of probable cause than a complaint. *See T.R.B. v. State*, 109 Wis.2d 179, 188, 325 N.W.2d 329 (1982) ("the degree of probable cause required for a bindover is greater than that required to support a complaint"); *County of Jefferson v. Renz*, 231 Wis.2d 293, 323, 603 N.W.2d 541, 555 (1999). By law a complaint must be sworn, § 968.01, but under newly created § 970.038, hearsay is admissible even if unsworn. Hearsay is permitted in a criminal complaint only if the complaint includes sufficient underlying facts for a magistrate to make a reasonable inference that the sources of hearsay are probably truthful, including both the reliability of the informant and his/her observational opportunity. *See State ex rel Cullen v. Ceci*, 45 Wis.2d 432, 445, 173 N.W.2d 175 (1970); *State ex rel Evanow v. Seraphim*, 40 Wis.2d 223, 226, 161 N.W.2d 369 (1968); *State v. Knudson*, 51 Wis.2d 270, 274, 187 N.W.2d 321 (1971). But, the State's interpretation of the newly enacted statute would allow double, triple or otherwise unreliable hearsay at a preliminary hearing as the exclusive grounds for probable cause to bindover. That creates an absurd conflict in the statutes and case law. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110 (statutory language must be interpreted "not in isolation but as part of a whole;

in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results").

There is no basis to believe the legislature intended to gut the preliminary hearing in this way. The legislature could have attempted to eliminate the preliminary hearing altogether. It did not. It is absurd to imagine the legislature intended the judicial system go to the expense of convening these hearings if they are to be such pointless exercises involving a presentation of a criminal complaint by the prosecutor and a rubber stamp by the judge. Rather, § 970.038 must be interpreted in the context of other statutes, and must include some requirement that hearsay be reasonably reliable if it is to be the basis for a finding of probable cause. Also, the statute must be interpreted in the context of 970.03(5), which allows cross-examination and defense witnesses.

Given the court's interpretation of the statute in this case, it is no wonder that the court concluded with the observation that "the current statute about hearsay evidence creates a probable cause hearing even more perfunctory, so I'm going to order a bindover." (App.238). Under the scheme proposed by the State and embraced by the court, the preliminary examination in this case was perfunctory indeed. But there is no evidence that the legislature intended that result.

F. The court's misconstruction of the statute violated due process and deprived the defendants of their right to compulsory process.

The court construed the statute in such a way as to deny the defendants their statutory rights to call witnesses and cross examine the witnesses against them. Further, the court construed the statute in such a way as to render the preliminary hearing a meaningless exercise in violation of the right to a preliminary hearing conferred upon the defendants by §970.03. This arbitrary denial of the defendants' statutory rights under §970.03 violated the defendants' Fourteenth Amendment right to due process.

Once a right has been conferred by statute, an individual is entitled to the full enjoyment of that right. *State v. Dresel*, 136 Wis.2d 461, 463, 401 N.W.2d 855, 856 (Ct. App. 1987). The arbitrary denial or restriction of a statutory right may violate the due process clause of the Fourteenth

Amendment. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 459-60, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). When a state grants criminal defendants certain statutory rights, it may create "a substantial and legitimate expectation" on their part that they will not be deprived of their liberty in violation of such rights. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).[2] The arbitrary deprivation of a liberty interest that state law provides is a violation of Fourteenth Amendment procedural due process. *Casteel v. McCaughtry*, 176 Wis.2d 571, 579, 500 N.W.2d 277, 281, *cert. denied*, 510 U.S. 924, 114 S. Ct. 327, 126 L.Ed.2d 273 (1993).

The right of a defendant to call witnesses to contest probable cause has been approved on many occasions. *Mitchell v. State*, 84 Wis. 2d at 336, 267 N.W.2d at 355 (defendant "was entitled to subpoena adverse witnesses, including the victim"); *State v. McCarter*, 36 Wis.2d 608, 153 N.W.2d 527 (1967) (court erred when it denied defense request to call an eyewitness at the preliminary hearing); *State v. Knudson*, 51 Wis.2d 270, 187 N.W.2d 321(1971), (defendant permitted to call victim as a witness at the preliminary hearing over the state's objection); *State v. Wilson*, 59 Wis.2d 269, 208 N.W.2d 134 (1973) (court erred when it precluded the defense from cross-examining a victim on her description of the suspect as it was relevant to the plausibility of the identification); *State v. Hayes*, 46 Wis.2d 93, 175 N.W.2d 625(1970) (it was error for the preliminary hearing court to restrict the cross-examination of the state witnesses who identified Hayes at the preliminary). While a defendant may not call witnesses to directly impeach the "general trustworthiness of the witness," such as by showing variances in her story, he is entitled to present evidence to contest the plausibility or believability of the witness' story. *State v. Dunn*, 121Wis. 2d 389, 397, 359 N.W.2d 151(1984).

Judge Race's rulings in the O'Briens' cases thus arbitrarily denied the defendants the exercise of a statutorily granted right, in violation of their rights to due process. For this reason, as well, the bindover must be reversed and remanded for a new preliminary hearing that comports with the defendants' full statutory and constitutional rights.

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

Finally, above and beyond their statutory rights protected by the Fourteenth Amendment, the O'Briens have a constitutional right to compulsory process founded in the Sixth Amendment of the United States Constitution and Article 1, Section 7 of the Wisconsin Constitution. The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor. *Kastigar v. United States*, 406 U.S. 441, 443-444, 92 S.Ct. 1653, 1655-1656, 32 L.Ed.2d 212 (1972). As the Supreme Court explained in discussing why even the President of the United States is not immune from subpoena:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987) citing *U S v. Burr*, 25 F.Cas. 30,C.C.Va. (1807) ("Chief Justice Marshall, who presided as trial judge, ruled that Burr's compulsory process rights entitled him to serve a subpoena on President Jefferson, requesting the production of allegedly incriminating evidence.")

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

appearance of his witnesses and their relevant evidence." *Schaefer*, 2008 WI 25 at ¶35.

The preliminary hearing court's decision to quash the subpoena deprived the defendants of their constitutional right to the use of compulsory process to elicit testimony that was relevant to the proceeding, would have provided context to the sparse and truncated hearsay statements regarding the allegations and provided an opportunity to rebut the allegations.

CONCLUSION

The O'Briens submit that their statutory and constitutional rights to confrontation, cross examination and compulsory process, and the effective assistance of counsel at the preliminary hearing were violated. Further, the trial court erred in directing a bindover based solely on hearsay evidence and in prohibiting the defendants from conducting a meaningful cross examination of the hearsay witness and from calling a witness to testify on their behalf. This Court should reverse the trial court's decisions denying the defendant's motions to preclude use of hearsay and granting the State's motion to quash subpoena, vacate the bindover and remand the case for a new preliminary examination.

Dated at Brookfield, Wisconsin, this 7th day of January, 2013.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this Document conforms to the rules contained in § 809.50 (1) for a petition and memorandum produced with a proportional serif font. The length of this document is 9664.

Dated this 7th day of January, 2013.

Kathleen B. Stilling

APPENDIX CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as part of this petition, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record necessary to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of January, 2013.

Respectfully submitted,
BUTING, WILLIAMS & STILLING, S.C.

By:_____
Kathleen B. Stilling
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Attorney for Petitioner

CERTIFICATE OF COMPLIANCE WITH 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 s. 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 7th day of January, 2013.

_____
Kathleen B. Stilling

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 7th day of January, 2013.

_____
Kathleen B. Stilling

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