STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

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

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

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

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

ON APPEAL FROM 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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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision is warranted because the constitutionality of the recently enacted Wis. Stat. § 970.038 has not been addressed by a Wisconsin appellate court and the issues presented by these appeals likely will recur until they have been resolved by a precedential decision.

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 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] That

[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

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]

Butts and the O'Briens argue that the statute is unconstitutional because it violates their rights to confrontation, compulsory process, and due process. *See* Butts' brief at 3-7; O'Briens' brief at 2. The O'Briens further claim that the statute violates their right to the effective assistance of counsel and that their right to subpoena witnesses and present evidence at a preliminary hearing was violated when the court quashed a defense subpoena of one of their children, S.M.O. *See* O'Briens' brief at 2. Because

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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-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).

none of those arguments has merit, this court should hold that Wis. Stat. § 970.038 is constitutional and should affirm the orders binding over Butts and the O'Briens.

Before addressing the various 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 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. WISCONSIN STAT. § 970.038 DOES NOT VIOLATE A DEFENDANT'S RIGHT TO CONFRONTATION BECAUSE THERE IS NO CONSTITUTIONAL RIGHT TO CONFRONTATION AT A PRELIMINARY HEARING, AND THE STATUTORY RIGHT TO CONFRONTATION IS LIMITED TO THOSE WITNESSES ACTUALLY CALLED TO THE STAND.

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.

The Wisconsin Supreme 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 5-6.

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*. at ¶¶7-17.

The O'Briens dismiss the supreme court's statement in *Mitchell* that defendants do not have a constitutional right to confrontation at preliminary hearings as "mere *dicta*, based on a misreading" of United States Supreme Court case law. *See* O'Briens' brief at 9. The state disagrees with the O'Briens' characterization of *Mitchell*. "'[W]hen a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981) (quoted source omitted). Moreover, regardless of whether the passage in *Mitchell* may be characterized as dictum, the supreme court has held that "the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

The O'Briens similarly dismiss *Padilla*, which they relegate to a footnote in their brief, as "simply repeat[ing] the *dicta* in *Mitchell*." O'Briens' brief at 9 n.1. Again, while the State disagrees with that characterization, this court is bound by *Padilla*. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (holding that the court of appeals may not "overrule, modify or withdraw language from its prior published decisions").

While the O'Briens question the validity of *Mitchell* and *Padilla*, those decisions are 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).

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 recent 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 "suggest it may be time to revisit" the confrontation issue. O'Briens' brief at 10. 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 O'Briens further argue that "[r]egardless of the answer to the constitutional question, there remains a statutory right to confrontation at the preliminary hearing in Wisconsin." O'Briens' brief at 11. As discussed above, *see supra* pp. 7-10, this court held in *Padilla* and *Oliver* that the statutory right to confrontation at a preliminary examination is not violated by the admission of hearsay because that right applies "only [to] those people actually called to the stand," *Padilla*, 110 Wis. 2d at 423; *see also Oliver*, 161 Wis. 2d at 148-49. Although *Padilla* and *Oliver* are controlling decisions that are directly on point, the O'Briens do not mention them in their discussion of the statutory right to confrontation, much less challenge the interpretation of the statutory confrontation right in those decisions. *See* O'Briens' brief at 11-13.

At the time of the *Padilla* decision in 1982, the only statute that permitted the use of hearsay at a preliminary examination was Wis. Stat. § 970.03(11) (1981-82), which allowed the court to admit hearsay "to prove ownership of property or lack of consent to entry to or possession or destruction of property." That statute was not applicable in *Padilla*, as the out-of-court statement at issue there was a child sexual assault victim's statement to her mother. *See Padilla*, 110 Wis. 2d at 416. If the admission in *Padilla* of a victim's out-of-court statement did not impair the statutory right to confront witnesses, even though no statute expressly permitted the use of such statements, it is implausible to argue that the new statute, which expressly permits that practice, somehow violates the statutory right of cross-examination.

The legislature is presumed to know existing law. *State v. Frankwick*, 229 Wis. 2d 406, 412, 599 N.W.2d 893 (Ct. App. 1999). Accordingly, the legislature is presumed to know when it enacted Wis. Stat. § 970.038 that Wis. Stat. § 970.03(5) provides that a defendant "may cross-examine witnesses against the defendant." The legislature also is presumed to know that this court interpreted that statutory right to cross-examination in *Padilla* to apply only to witnesses actually called to the stand. Moreover, even if Wis. Stat. § 970.03(5) conferred a broader statutory right than the *Padilla* court described, the more recently enacted Wis. Stat. § 970.038 controls. *See Gottsacker Real Estate Co., Inc. v. DOT*, 121 Wis. 2d 264, 270, 359 N.W.2d 164 (Ct. App. 1984).

Wisconsin case law (*Mitchell*, *Padilla*, and *Oliver*) as well as the United States Supreme Court decisions that 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, foreclose the constitutional and statutory confrontation claims asserted by Butts and the O'Briens. Based on that controlling precedent, the court should reject those claims.

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

The O'Briens argue that because they have a Sixth Amendment right to effective assistance of counsel at the preliminary examination, the Sixth Amendment's right to confrontation should apply at the preliminary hearing. *See* O'Briens' brief at 5-8). 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.

At the outset, the State notes that 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,

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

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).

The O'Briens then argue that "[s]ince 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." O'Briens' brief at 8. That is so, they say, because "[d]enying 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." *Id*.

It is at this point that the O'Briens' argument fails, as they 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' position.

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*, our supreme 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 supreme 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 supreme 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 supreme court affirmed that it "operates under the principles adopted by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984)," 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. As the court held in *Wilson*, "[i]t is reasonable for counsel to accept and function within the rules" governing preliminary hearings. *Wilson*, 655 P.2d at 1253. The O'Briens have failed to show that their right to the effective assistance of counsel was violated by requiring their attorneys to operate within the rules governing preliminary examinations.

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

The O'Briens argue that the trial court's "misconstruction" of Wis. Stat. § 970.038 violated their right to due process. *See* O'Briens' brief at 23. They do not appear to be arguing that, as a general principle, due process prohibits a court at a preliminary hearing from basing a probable cause determination on hearsay. The State understands the O'Briens' due process argument to be limited to a claim that the circuit court misinterpreted Wis. Stat. § 970.038 and, as a result, arbitrarily deprived them of their statutory rights under Wis. Stat. § 970.03 to call witnesses. The State addresses that argument in the final section of this brief.

Butts, in contrast, does appear to be arguing 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).

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

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

In the argument heading in his appellate brief, Butts asserts that Wis. Stat. § 970.038 "violates the defendant's right to . . . compulsory process" under the Sixth and Fourteenth Amendments. Butts' brief at 3 (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.

Even if that problem were ignored, Butts' argument still fails. His sole support for his argument is a reference to *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, 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.

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

Schaefer, 308 Wis. 2d 279, ¶67.

Like Butts, the O'Briens argue that "the State's use of §970.038 [is] unconstitutional because it violates their constitutional right[] to . . . compulsory process." O'Briens' brief at 2. Unlike Butts, the O'Briens did seek to call a witness at their preliminary hearing and the court ruled that they would not be permitted to do so (2012AP1769-CR: 30:66; O'Briens' Ap. 216). However, the cases they cite in their brief offer no support for their contention that a defendant has a constitutional right to compulsory process at a preliminary hearing.

The O'Briens cite *Kastigar v. United States*, 406 U.S. 441 (1972), in which the Supreme Court stated that "[t]he 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." *Id.* at 443-44. But the issue before the Court in *Kastigar* did not involve a defendant's right to compulsory process. Rather,

the issue was "whether *the United States Government may compel testimony* from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony." *Id.* at 442 (emphasis added). Other than the statement quoted above, *Kastigar* made no mention of the defendant's Sixth Amendment right to compulsory process, much less discuss the type of proceedings at which that right applies.

The O'Briens also cite *United States v. Nixon*, 418 U.S. 683 (1974), but the issue in that case was whether the President, who was not a party to the case, could invoke executive privilege to resist a subpoena *issued by the government* under the Federal Rules of Criminal Procedure. *See id.* at 686. The constitutional issue before the Court involved a claim of executive privilege under the doctrine of separation of powers. *See id.* at 703-14. In the course of its analysis, the Court did discuss compulsory process, but its discussion addressed the defendant's right to produce evidence *at trial*.

> The right to the production of all evidence *at a criminal trial* similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant *in a criminal trial* the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all

> relevant and admissible evidence be produced.

Id. at 711 (emphasis added).

The O'Briens cite *Pennsylvania v. Ritchie*, though only for its citation to *United States v. Burr*, 25 F. Cas. 30 (C.C. Va. 1807). *See* O'Briens' brief at 25. In *Schaefer*, however, our supreme court stated that the *Burr* decision "has no precedential value for us because it is not a decision by the United States Supreme Court." *Schaefer*, 308 Wis. 2d 279, ¶79. Moreover, as discussed above, the court in *Schaefer* interpreted *Ritchie* to mean that "the Compulsory Process Clause [is directed] toward a defendant's right to the compelled production of evidence in anticipation of *trial,* not in anticipation of a preliminary examination." *Id.*, ¶67.

In addition, the O'Briens cite two decisions from the Fourth Circuit, *United States v. Rivera*, 412 F.3d 562 (4th Cir. 2005), and *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). Neither of those cases aid the O'Briens, because both of those cases involved proceedings involving potential trial evidence. The issue in *Rivera* was whether the defendant was entitled to subpoena a witness for a hearing on a motion in limine to determine whether a hearsay statement would be admissible at trial. *See Rivera*, 412 F.3d at 567-70. The issue in *Moussaoui* was whether the defendant could compel enemy combatant witnesses to appear "for the purpose of deposing them pursuant to Federal Rule of Criminal Procedure 15." *Moussaoui*, 382 F.3d at 456. That rule, much like Wis. Stat. § 967.04, provides that a party to a federal criminal case "may move that a prospective witness be deposed in order to

preserve testimony for trial." Fed. R. Crim. Proc. 15(a)(1).

A Wisconsin defendant's right to compulsory process at a preliminary hearing is statutory, not constitutional. *See Schaefer*, 308 Wis. 2d 279, ¶¶35, 67. That statutory right is limited, however, to "call[ing] witnesses to rebut the plausibility of a witness's story and probability that a felony was committed." *Id.*, ¶35.

Butts does not argue that his statutory right to compulsory process was violated at his preliminary hearing. The O'Briens do make that argument, and the State will address their statutory claim in the final section of this brief.

VI. THE OBRIENS' ARGUMENTS REGARDING THE CONDUCT OF THEIR PRELIMINARY HEARING ARE WITHOUT MERIT.

The O'Briens claim that the circuit court improperly limited their cross-examination of prosecution witness Investigator Lori Domino at the preliminary hearing and erroneously denied their request to call S.M.O. at that hearing based on a "[r]adical [i]nterpretation" of Wis. Stat. § 970.038. O'Briens' brief at 13. They are wrong. The circuit court did not limit the O'Briens' cross-examination of Investigator Domino or quash the O'Briens' subpoena based on a radical interpretation of Wis. Stat. § 970.038 or, for that matter, based on any interpretation of the statute. Rather, the circuit court merely followed established law that predated the adoption of § 970.038 which limits preliminary hearings to establishing and testing plausibility.

A. The circuit court enforced the established limits on the scope of preliminary hearings when it restricted the O'Briens' cross-examination of Investigator Domino.

The Wisconsin Supreme Court has explained the limited nature of preliminary hearings:

> A preliminary hearing is not a preliminary trial or evidentiary trial on the issue of guilt beyond a reasonable doubt. *State v. Dunn*, 121 Wis. 2d 389, 396, 359 N.W.2d 151 (1984). 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) (some 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).

The O'Briens' brief discusses two instances in which the court sustained the prosecutor's objections to cross-examination of Investigator Domino. The State will discuss those rulings in turn.

1. In Count 9 of the criminal complaint, Martin is alleged to have physically abused one of his sons, B.M.O., by placing B.M.O. in a red bin and striking the bin with a log near B.M.O.'s head (2012AP1769-CR: 2:8; O'Briens' Ap. 108). 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 Investigator Domino about whether B.M.O. told her how big that piece of wood was. *See* O'Briens' brief at 19. 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.
>
> 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.

(2012AP1769-CR: 30:37-38; O'Briens' Ap. 187-88.)

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 the size of the stick." O'Briens' brief at 19. Thus, they argue, "[t]his was a classic issue of plausibility." *Id*.

The flaw in that argument is that B.M.O. did not say that Martin hit the bin with a stick; as the court noted, he said that Martin hit the bin with a log (2012AP1769-CR: 30:38; O'Briens' Ap. 188). Had the allegation been that Martin hit the bin with a stick, it is conceivable that the size of the stick would impact the plausibility of B.M.O.'s claim that the blow cause his head to swell – if, for example, B.M.O. had said that Martin hit the bin with a popsicle stick. But B.M.O. said that Martin hit the bin with a log. Even if it were a small log, it would not be implausible that the blow injured B.M.O.

This example demonstrates, moreover, the error in the O'Briens' assertion that the court limited cross-examination based on a "radical interpretation" of Wis. Stat. § 970.038. O'Briens' brief at 13. To the contrary, as the court's citation to *State v. Dunn*, 121 Wis. 2d 389, 359 N.W.2d 151 (1984) 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.

2. The O'Briens argue that the court erred when it sustained the prosecutor's objection when Martin's counsel attempted to question Investigator Domino about a report she had prepared. *See* O'Briens' brief at 19-20. They argue that the additional facts included in the police report were necessary to "complete the picture." *Id*. at 20.

That is not the function of cross-examination at a preliminary hearing. "[T]he scope of that cross-examination is limited to issues of plausibility. . . ." *Stuart*, 279 Wis. 2d 659, ¶30. The O'Briens' brief does not point to anything in Investigator Domino's report that would have called into question the plausibility of their children's allegations of abuse. They have not shown, therefore, that the trial court erred when it precluded the defense from cross-examining Investigator Domino about the contents of her report.

B. The circuit court enforced established limits on the scope of preliminary hearings when it quashed the O'Briens' subpoena of S.M.O.

The O'Briens sought to call S.M.O. to the stand at the preliminary hearing after Investigator Domino testified and the state rested (2012AP1769-CR: 30:54; O'Briens' Ap. 204). The prosecutor asserted that the circuit court should "require an offer of proof before subjecting S.M.O.

to that witness stand" (2012AP1769-CR: 30:55; O'Briens' Ap. 205). 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.

(2012AP1769-CR: 30:55-57; O'Briens' Ap. 205-07.)

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" (2012AP1769-CR: 30:57; O'Briens' Ap. 207). 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" (2012AP1769-CR: 30:57-58; O'Briens' Ap. 207-08).

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?" (2012AP1769-CR: 30:58; O'Briens' Ap. 208). Martin's attorney responded that Investigator 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" (2012AP1769-CR: 30:59-60; O'Briens' Ap. 209-10). 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" (2012AP1769-CR: 30:62-63; Pet-Ap. 212-13). 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" (2012AP1769-CR: 30:62-63; O'Briens' Ap. 212-13).

The circuit court denied the O'Briens' request to call S.M.O. after hearing defense counsels' offers of proof (2012AP1769-CR: 30:60; Pet-Ap. 210). Responding to Martin's attorney's argument, 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" (2012AP1769-CR: 30:63; Pet-Ap. 213).

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 (2012AP1769-CR: 30:64-65; Pet-Ap. 214-15). 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" (2012AP1769-CR: 30:66; O'Briens' Ap. 216). After the court confirmed its ruling (2012AP1769-CR: 30:67; O'Briens' Ap. 217), 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.*)

The O'Briens claim that the trial court's decision rested on its belief that "the only possible relevant area of inquiry for the hearing was the plausibility of *the police witness' account of having heard the hearsay*." O'Briens' brief at 16. That is not a fair characterization of the court's rationale or 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" (2012AP1769-CR: 30:58; O'Briens' Ap. 208), the court was not requiring the defense to present evidence that would demonstrate that it was implausible that Investigator Domino had heard what S.M.O. said. Rather, it was requiring an offer of proof that

S.M.O. would provide testimony that would show that S.M.O.'s account of what happened, as recounted by Investigator Domino, was implausible. The court gave an example of testimony by S.M.O. that would go to plausibility: if "S.M.O. could say, 'After I . . . gained my power of flight and . . . grew wings, I was able to observe this entire matter by flying around the room'" (2012AP1769-CR: 30:59; O'Briens' Ap. 209). Such evidence would bear on the plausibility of S.M.O.'s story, not on the plausibility of Investigator Domino's having heard S.M.O. recount that story.

Moreover, even if the court's ruling had been as limiting as the O'Briens claim, that would not have been error, as this court explained in *Padilla*:

> 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.

Padilla, 110 Wis. 2d at 424.

Even at trial, where the full panoply of Sixth Amendment rights applies, the constitution does not require courts to admit irrelevant evidence. *See State v. Pulizzano*, 155 Wis. 2d 633, 646, 456

N.W.2d 325 (1990) ("Confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect."); *Rogers v. State*, 93 Wis. 2d 682, 692-93, 287 N.W.2d 774, 778 (1980) ("the confrontation right secured under the Sixth Amendment does not encompass an obligation upon the courts to allow a party to question witnesses as to irrelevant matters"). 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.

For that reason, the O'Briens' due process claim also fails. The circuit court did not, as they assert, arbitrarily deny them their statutory right to call a witness. *See* O'Briens' brief at 24 (citing *Casteel v. McCaughtry*, 176 Wis. 2d 571, 579, 500 N.W.2d 277 (1993)). That statutory right is limited to the right to present evidence bearing on plausibility. The circuit court precluded the O'Briens from calling S.M.O. as a witness because it determined that they had not shown that S.M.O. would offer any evidence relevant to plausibility.

The circuit court's exclusion of S.M.O.'s testimony, like its limitations on the cross-

examination of Deputy Domino, did not result from the improper application of Wis. Stat. § 970.038 but from a proper application of long-standing rules governing preliminary hearings. Because the O'Briens have failed to show that S.M.O. was prepared to offer any evidence that would "rebut probable cause," *Schaefer*, 308 Wis. 2d 279, ¶37, this court should reject their claim that the circuit court erred when it precluded them from calling S.M.O. as a witness.

The State concludes its response to the O'Briens' arguments by noting that many of their complaints – that a bindover decision based on hearsay "cannot begin to serve the intended purpose of the preliminary hearing," O'Briens' brief at 21; that "sound public policy" requires reversal of the bindover determination, *id*. at 22; that basing a probable cause determination on hearsay "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," *id*. – are arguments that, at bottom, challenge the wisdom of the new statute. However, unless the statute violates some constitutional provision, which it does not, the legislature is free to establish the parameters under which a preliminary hearing is conducted.

The legislature has made the determination that hearsay should be admissible at preliminary hearings, *see* Wis. Stat. § 970.038(1), and that a court may base a finding of probable cause on that hearsay evidence, *see* Wis. Stat. § 970.038(2). While the O'Briens fear that "double, triple or otherwise unreliable" hearsay may serve as the basis for a probable cause determination,

O'Briens' brief at 22, they do not claim that the hearsay admitted at their preliminary hearing was of that sort. The concerns that the O'Briens raise are more properly addressed in a case in which that issue is real rather than hypothetical. This court should conclude that the circuit court did not err when it limited the O'Briens' cross-examination of Investigator Domino or when it precluded them from calling S.M.O. as a witness at their preliminary hearing.

CONCLUSION

For the reasons stated above, the court should affirm the nonfinal orders under review and remand for further proceedings.

Dated this 25th day of January, 2013.

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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 9,892 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

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 25th day of January, 2013.

_____
Jeffrey J. Kassel
Assistant Attorney General