No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a defendant's Sixth Amendment right to confrontation apply at an adversarial preliminary hearing that is a "critical stage" in a criminal prosecution?

Are the Sixth Amendment rights to confrontation and the effective assistance of counsel violated when a defendant is bound over for trial following an adversarial preliminary hearing at which the state's only evidence is a hearsay document and the defendant is precluded from cross-examining any witness with personal knowledge of the accusations against him?

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the Wisconsin Court of Appeals and Supreme Court:

Martin P. O'Brien and Kathleen M. O'Brien were the Defendant-Appellant-Petitioners below and they are the petitioners in this action. The State of Wisconsin was the Plaintiff-Respondent below and is the respondent in this action.[1]

[1] A third defendant's case was consolidated with the O'Briens' case in the court of appeals and supreme court, but his case, *State of Wisconsin v. Charles Butts*, 2012AP1863-CR, is not included in this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Martin P. O'Brien and Kathleen M. O'Brien respectfully petition for a writ of certiorari to review the judgment of the Wisconsin Supreme Court in the opinion below.

OPINION BELOW

The opinion of the Wisconsin Supreme Court, dated July 9, 2014, is reported as *State of Wisconsin v. Martin P. O'Brien and Kathleen M. O'Brien*, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8. That opinion is reprinted in the accompanying Appendix at App. 1-42.

JURISDICTION

The Wisconsin Supreme Court entered its decision in this case on July 9, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Although the judgment in the petitioners' case is not final, because it is still pretrial, the federal issue presented has been decided with finality by the highest court of Wisconsin. A conviction resulting from a fair and errorless trial in effect cures any error at preliminary hearing. *State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108, 110 (1991). Thus, the petitioners would be barred from arguing after a conviction that their constitutional rights were violated at the preliminary hearing.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), this Court recognized that there are at least four categories of cases in which jurisdiction is proper even when there are further proceedings anticipated in the state court. One of these exceptions states that this Court may consider cases:

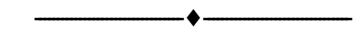
> [W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. . . . [I]n these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

Pennsylvania v. Ritchie, 480 U.S. 39, 47-48, 107 S.Ct. 989, 996, 94 L.Ed.2d 40 (1987), quoting *Cox Broadcasting*, 420 U.S. at 481, 95 S.Ct. at 1039. The petitioners satisfy this standard because the question of their Sixth Amendment right to confrontation and the effective assistance of counsel at a preliminary hearing will not survive for this Court to review, regardless of the outcome. *Id.*

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioners assert that their Sixth Amendment rights to confrontation and to the effective assistance of counsel were violated by the state's exclusive use of hearsay at an adversarial preliminary hearing and by the denial of their right to confront and cross-examine a witness with personal knowledge of the allegations for which they were charged. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970).

The Sixth Amendment to the United States Constitution states: "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 defence."



STATEMENT OF THE CASE

I.

The petitioners, Martin and Kathleen O'Brien, are husband and wife. In 2011, the police apprehended their runaway adopted seventeen-year-old son. Thereafter, their son made a number of accusations that his parents had mistreated or abused him and his adopted siblings. This led the state to charge both defendants in a joint criminal complaint with numerous counts of child abuse and related offenses alleged to have taken place over eight years. Statements from

that one son formed the sole basis for seven of 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 their seventeen-year-old son, the primary accuser. The defendants argued that the use of hearsay, pursuant to Wisconsin's recently enacted Wis. Stat. § 970.038,[2] as the exclusive evidence to support a probable cause bindover for trial, would violate their constitutional rights to confrontation and the effective assistance of counsel. The circuit court denied the defense motions.

At the preliminary hearing, the state presented only one witness – a police investigator who had signed the criminal complaint. She had no personal knowledge of the allegations in the complaint. The state moved the complaint into evidence and rested. (R. 30: 13).[3] On cross-examination, the investigator admitted that the only child she interviewed was the seventeen-year-old runaway, that the complaint contained significant factual gaps, and that the incidents described were only summaries, not verbatim accounts. (R. 30: 16-18).[4] On cross-examination,

[2] Prior to the enactment of this statute, effective April 26, 2012, with few exceptions hearsay was generally inadmissible at preliminary hearings in Wisconsin.

[3] Citations are to the record on appeal in state court.

[4] The criminal complaint was exceedingly sparse on details concerning most of the charges. For example, the entire factual

(Continued on following page)

she was frequently unable to recall facts not contained in the complaint, and was unable to provide context as to time, place and sequence of events. (R. 30: 19-20, 24, 25, 32-33, 34, 35, 39).

After the state rested, the O'Briens sought to present testimony from the seventeen-year-old accuser, whom they had subpoenaed as a witness. The state moved to quash the defense subpoena and demanded an offer of proof of the testimony that the defense would elicit from the witness that "could defeat probable cause." The state demanded a showing that the testimony would be not only relevant but dispositive. (R. 30: 55-57). Defense counsel responded that they believed the defendants' son's testimony was relevant because it would provide context so that the court could determine whether the alleged physical contacts may have been inadvertent, unintentional or accidental. (R. 30: 60-61). The circuit court sustained the state's objection, precluded any testimony from the defendants' witness, and bound over for trial on all counts. (R. 30: 88).

II.

Following bindover, both defendants petitioned the court of appeals for interlocutory review, which

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basis for count ten in the complaint, charging the felony of physical abuse of a child, states "S.M.O. reported that sometime between February and May 2011, Martin O'Brien hit S.M.O. in the chest with a flashlight. S.M.O. stated that the blow caused him pain and numbness in his body."

was granted. The O'Briens renewed their federal constitutional arguments in the court of appeals, but the court of appeals affirmed the lower court. *See State v. O'Brien*, 2013 WI App 97, 349 Wis. 2d 667, 836 N.W.2d 840. The court of appeals ruled that a defendant has no constitutional "right to confront the adverse witnesses at a preliminary hearing," relying on the Wisconsin Supreme Court's brief statement in *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), which, as argued below, misread the United States Supreme Court's decision in *Gerstein v. Pugh*. *See State v. O'Brien*, 2013 WI App 97, ¶ 16, 349 Wis. 2d at 681, 836 N.W.2d at 846. The court of appeals concluded that the Confrontation Clause in the Sixth Amendment was "basically a trial right," and therefore "the question is whether admitting hearsay evidence at the preliminary examination and basing the probable cause finding upon hearsay violates 'the right to a fair *trial* guaranteed by [due process].'" *Id.* at ¶ 11. The court of appeals concluded that "permitting defendants to call and question witnesses to challenge the adequacy and competency of the evidence would serve '[n]either justice nor the concept of a fair trial.'" *Id.* at ¶ 18, quoting *Costello v. United States*, 350 U.S. 359, 363-64, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

The court of appeals also rejected the defendants' argument that the preliminary hearing court's application of the new statute denied the right to effective assistance of counsel. The O'Briens argued that counsel could not effectively test the plausibility of

the state's case without a chance to cross-examine a witness with first person knowledge of the allegations. The court of appeals concluded that "defense counsel can provide effective representation at a preliminary examination regardless of the type of evidence the prosecution introduces there, by demonstrating why the prosecution has failed to show a plausible theory for prosecution. To demand that counsel must be permitted to challenge the competency or reliability of the underlying evidence is a fundamental misunderstanding of the purpose of the preliminary hearing." *State v. O'Brien*, 2013 WI App 97, ¶ 25, 349 Wis. 2d at 685, 836 N.W.2d at 848-49.

III.

The O'Briens then petitioned the Wisconsin Supreme Court for review, which was granted. That court affirmed the court of appeals in a decision issued July 9, 2014. *See* App. 1-42. The Wisconsin Supreme Court noted that its own precedent and that of several other jurisdictions have determined that a defendant's right to confrontation is a trial right and does not apply to preliminary examinations:

> Our caselaw establishes that the Confrontation Clause does not apply to preliminary examinations. *State ex rel. Funmaker v. Klamm*, 106 Wis.2d 624, 634, 317 N.W.2d 458 (1982) (citing *Mitchell v. State*, 84 Wis.2d 325, 336, 267 N.W.2d 349 (1978)) ("There is no constitutional right to confront adverse witnesses at a preliminary examination").

> Our precedent is consistent with that of other jurisdictions which have determined that a defendant's right to confront accusers is a trial right that does not apply to preliminary examinations. *See, e.g.*, *Peterson v. California*, 604 F.3d 1166, 1170 (9th Cir.2010); *State v. Lopez*, 314 P.3d 236, 241-42 (N.M.2013); *Leitch v. Fleming*, 291 Ga. 669, 732 S.E.2d 401, 404 (2012); *State v. Timmerman*, 218 P.3d 590, 594 (Utah 2009); *Sheriff v. Witzenburg*, 122 Nev. 1056, 145 P.3d 1002, 1005 (2006); *Whitman v. Superior Court*, 54 Cal.3d 1063, 2 Cal.Rptr.2d 160, 820 P.2d 262, 270 (1991); *Commonwealth v. Tyler*, 402 Pa.Super. 429, 587 A.2d 326, 328 (1991); *Blevins v. Tihonovich*, 728 P.2d 732, 734 (Colo.1986); *State v. Sherry*, 233 Kan. 920, 667 P.2d 367, 376 (1983); *Wilson v. State*, 655 P.2d 1246, 1250 (Wyo.1982); *People v. Blackman*, 91 Ill.App.3d 130, 46 Ill.Dec. 524, 414 N.E.2d 246, 247-48 (1980).

State v. O'Brien, 2014 WI 54, ¶ 30-31, 354 Wis. 2d 753, 772-73, 850 N.W.2d 8, 17; App. 16-17.

However, Chief Justice Shirley S. Abrahamson, in dissent, disagreed that the confrontation question was so easily dismissed:

> I note that the United States Supreme Court has recognized that certain Sixth Amendment rights, such as the right to counsel, apply to pretrial stages. I am not so quick to conclude, as does the majority opinion, that "the Confrontation Clause does not apply to preliminary examinations." Majority op.,

> ¶30. The United States Supreme Court has begun to take into account that most criminal cases do not go to trial and that constitutional rights traditionally restricted to trial may be applicable to critical pretrial stages:
>
> > The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.
>
> *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012) (internal quotation marks and citations omitted).

State v. O'Brien, 2014 WI 54, ¶ 64, n.3, 354 Wis. 2d 753, 785, 850 N.W.2d 8, 23 (Abrahamson, C.J., dissenting); App. 31.

The supreme court also rejected the O'Briens' argument that the state's exclusive use of hearsay evidence denied their right to the effective assistance of counsel because they were unable to cross-examine any witness with personal knowledge of the allegations:

> [W]e determine that the admission of hearsay at a preliminary hearing does not infringe on defendants' right to assistance of counsel. "[T]he constitution does not require that counsel be allowed to play the same role [at a preliminary examination] as counsel at trial. A counsel's role is necessarily limited by the limited scope of the preliminary examination." *Klamm*, 106 Wis.2d at 634, 317 N.W.2d 458. Contrary to petitioners' assertions, the admission of hearsay does not eliminate counsel's ability to provide assistance at a preliminary examination. Counsel retains the ability to cross-examine the witnesses presented by the State, challenge the plausibility of the charges against the defendant, argue that elements are not met, and present witnesses on behalf of the defendant.

Id. at ¶ 43, 354 Wis. 2d 753, 777-78, 850 N.W.2d 8, 19-20; App. 22.[5]

This petition for a writ of certiorari to the Wisconsin Supreme Court is timely filed within ninety days of that court's decision. United States Supreme Court Rule 13.1.

[5] The court also rejected several other grounds raised by the O'Briens which are not at issue in the petition before this Court.

REASONS FOR GRANTING THE WRIT

I. The case presents important questions of federal law that have not been, but should be, settled by this Court.

A. Does the Confrontation Clause apply at an adversarial preliminary hearing that is a "critical stage" in a criminal prosecution?

One of the questions presented here – whether the Sixth Amendment right to confrontation applies in a pretrial setting, particularly at an adversarial preliminary hearing deemed a "critical stage" in a criminal prosecution – has not been decided by this Court. Indeed, whether Confrontation Clause rights may be implicated by events outside of trial has not been directly addressed by this Court since *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), when a majority of the court could not agree on that particular question. *Ritchie* was a plurality opinion in which Justice Blackmun, while concurring in the judgment, said that he refused to join the other four justices specifically because "I do not accept the plurality's conclusion . . . that the Confrontation Clause protects only a defendant's trial rights. . . ." *Id.* at 61. *See also Id*. at 66 (Brennan, J., dissenting) (disagreeing with the plurality of four justices' "narrow reading of the Confrontation Clause as applicable only to events that occur at trial. That interpretation ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself").

In the twenty-seven years since *Ritchie*, this Court has never directly addressed whether the Sixth Amendment's right to confrontation applies in a pretrial setting. But in the last ten years, the Court has reinvigorated the right to confrontation as it applies at a trial, starting with *Crawford v. Washington*, 541 U.S. 36, 49, 124 S.Ct. 1354, 1363, 158 L.Ed.2d 177 (2004), and several decisions that followed, including *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S.Ct. 2705 (2011).

In several recent decisions, this Court has addressed Sixth Amendment rights outside of the trial itself. In *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006), the court applied the Sixth Amendment in the context of the right to counsel of one's choice. The trial 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 right to confrontation through a *Crawford* analysis. 548 U.S. at 145-46. The court ruled that it was not enough that a trial be fair (or as *Crawford* addressed, whether 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.*

This Court has also expanded the application of other Sixth Amendment rights outside of trial, and has signaled its recognition that because so few cases ever go to trial, the pretrial process has become more important in the practical world. *See Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1385 (2012) (Supreme Court recognized that errors before trial may be protected by Sixth Amendment even if they do not affect fairness of trial: "The Sixth Amendment is not so narrow in reach"); *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399, 1407 (2012).

Because so few cases ever actually go to trial, there is now a pressing need to clarify whether the right to confrontation also applies before trial – at least at adversarial preliminary hearings that determine whether there is probable cause to believe the defendant committed a felony and must stand trial. When ninety-four percent of state convictions are the result of guilty pleas, *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1388, 182 L.Ed.2d 398 (2012), it is imperative that the historical protections of the right to confrontation be applied to a proceeding that is the closest to a trial the vast majority of defendants will ever see.

B. Is the right to the effective assistance of counsel at an adversarial preliminary hearing violated when the defendant is precluded from cross-examining any witness with personal knowledge of the accusations against him?

The second question presented by the petitioners has never been addressed by this Court – whether a defendant's right to the effective assistance of counsel at an adversarial preliminary hearing deemed to be a critical stage of the prosecution is violated by precluding defense counsel any opportunity to question a witness with personal knowledge of the allegations.

In a pretrial setting, to provide effective assistance of counsel, a defense attorney must be able to adequately judge the strength of the state's case, prepare for trial and, when appropriate, negotiate the best plea offer under the facts of the case. More than forty years ago, in *Coleman v. Alabama,* 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), 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.

Yet many states, like Wisconsin, are increasingly handcuffing defense counsel at a preliminary hearing so that she is unable to test the strength of the state's case by any effective cross-examination of a witness with personal knowledge of the relevant facts in the case. For example, prosecutors all over the state of

Wisconsin have been misusing Wis. Stat. § 970.038, by introducing multiple layers of hearsay, presenting as witnesses mere "readers" who simply read a complaint into the hearing record and who have no personal knowledge and therefore cannot be effectively cross-examined, and seeking bindovers on no greater degree of probable cause than the criminal complaint. To make matters worse, in the O'Briens' case the state avoided any real check on its prosecutorial power by precluding relevant testimony from a defense witness with personal knowledge of the accusations.

The denial of any right to confrontation at adversarial preliminary hearings and the substitution of unfettered hearsay instead of the testimony from witnesses with personal knowledge of the accusations has rendered defense counsel useless at such hearings, which are nominally "critical stages" in a criminal prosecution. The state courts no longer pay *any* heed to this Court's observations in *Coleman v. Alabama* about the importance of defense counsel's role at a preliminary examination:

> 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. at 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 recognized that effective representation at the critical preliminary hearing stage 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). While a preliminary hearing is a statutory creation, "[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." *Lafler v. Cooper*, 132 S.Ct. 1376, 1387.

The O'Briens assert that the unrestrained use of hearsay employed in their own preliminary hearing denied them their Sixth Amendment right to confront their accuser and deprived them of the right to effective assistance of counsel.

This Court should accept review of this case and rule that a defendant may not be bound over for trial on a felony following an adversarial preliminary hearing unless he is afforded his Sixth Amendment right to confrontation. Further, this Court should rule that at such a hearing a defendant is denied the right to the effective assistance of counsel if he is denied any opportunity to cross-examine a state's witness who has personal knowledge of the underlying allegations.

II. There exists a split of authority among the state courts of last resort as to whether the Sixth Amendment Confrontation Clause applies to state court adversarial hearings that determine whether probable cause exists for a defendant to stand trial on a felony charge.

The present conflict over whether the right to confrontation applies in an adversary preliminary

hearing arises from an unfortunate number of cases where courts undertook little independent analysis and instead relied on erroneous overstatements about this Court's own rulings.

The Wisconsin Supreme Court aligned itself with a number of jurisdictions that have concluded that the right to confront one's accuser is a trial right that does not apply at preliminary hearings. The court relied on a single erroneous statement in its own precedent about one of this Court's prior decisions.

The Wisconsin Supreme Court decision in *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), is often cited for the proposition that the United States Supreme Court has ruled that the constitutional right to confrontation does not apply at a preliminary hearing. However, that portion of the *Mitchell* decision was based on a misreading of *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The full adversarial nature of Wisconsin's preliminary hearing is completely different from the non-adversarial judicial review procedures considered by the *Gerstein* court. Indeed, as argued below, Pennsylvania's court of last resort concluded that *Gerstein* infers that the right to confrontation *does* apply when a preliminary hearing is adversarial. *Com. ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 418-19, 581 A.2d 172, 174-75 (1990), *cert. denied*, 499 U.S. 907, 111 S.Ct. 1108, 113 L.Ed.2d 217 (1991).

In *Gerstein*, the court considered whether the Fourth Amendment required an adversarial proceeding to establish probable cause for pretrial detention

shortly after arrest. The court ruled that because of its "limited function and its nonadversary character, such a probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel." 420 U.S. at 122. However, the supreme court expressly noted the need for a more thorough presentation at the type of adversarial preliminary hearing statutorily provided for in Wisconsin and other states in order "to determine whether the evidence justifies going to trial":

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

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

Thus, *Gerstein* simply does not stand for the proposition that constitutional confrontation rights do not apply at an adversary preliminary hearing of the type employed in Wisconsin, and the *Mitchell* court mistakenly cited it for a holding it did not make. 84 Wis. 2d at 336.

On the other hand, the Supreme Court of Pennsylvania drew a contrary inference from *Gerstein v. Pugh* – the exact opposite of that drawn by Wisconsin courts:

> While the United States Supreme Court has not specifically held that the full panoply of

> constitutional safeguards (i.e., confrontation, cross-examination, and compulsory process) must attend a preliminary hearing, it has inferred as much in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). In *Pugh*, the court held that the right to counsel, confrontation, cross-examination and compulsory process are not essential for a pre-trial detention hearing held pursuant to the Fourth Amendment because such a hearing is not adversarial in nature. The court stated, however, that when a pretrial hearing takes the form of a preliminary hearing and thus, adversary procedures are used, "[t]he 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." *Id.* at 120, 95 S.Ct. at 866, 43 L.Ed.2d at 69.

Com. ex rel. Buchanan v. Verbonitz, 525 Pa. 413, 418-19, 581 A.2d 172, 174-75 (1990), *cert. denied*, 499 U.S. 907, 111 S.Ct. 1108, 113 L.Ed.2d 217 (1991).[6]

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[6] *Buchanan* is sometimes referred to as a "plurality" opinion, because two of the five majority justices decided on more narrow grounds. *See, e.g., Com. v. Fox*, 422 Pa. Super. 224, 233-34, 619 A.2d 327, 332 (1993) ("While the *Buchanan* plurality suggests a right to confront and cross-examine at a preliminary hearing, citing the United States and Pennsylvania constitutions in support thereof, the precise holding in *Buchanan* is that hearsay testimony alone is insufficient to establish a *prima facie* case at a preliminary hearing"). However, all five majority justices of the Pennsylvania Supreme Court agreed in *Buchanan* that this Court's decision in *Gerstein v. Pugh* implied that the

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More recently, Connecticut's highest court noted the disagreement among the states on this issue. The Supreme Court of Connecticut observed just a few years ago:

> The states that grant a criminal defendant an adversarial probable cause hearing under state law have arrived at conflicting conclusions with respect to the applicability of the sixth amendment right to confrontation. Some states have concluded that an adversarial probable cause hearing is a critical stage in the prosecution of the accused at which the full panoply of sixth amendment rights must apply. [citing New Mexico, Pennsylvania, Massachusetts and Utah]. The majority of states, however, have concluded that the sixth amendment right to confrontation "is basically a trial right" that does not apply to preliminary hearings. [citing California, Kansas, Nevada, North Dakota and Wyoming]. . . . In light of our conclusion in the body of this opinion, we need not resolve this conflict in the present case.

State v. Randolph, 284 Conn. 328, 380, 933 A.2d 1158, 1192 (2007) (internal citations omitted).

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right to confrontation and cross-examination are constitutionally protected in an adversarial preliminary hearing. *See Buchanan*, 581 A.2d at 174-75 (Larson, J., Zappala, J. & Papadakos, J.) and *Id.* at 175-76 (Flaherty, J. & Cappy, J.).

Thus, there are clearly conflicting opinions among the supreme courts of the states on this important federal question – whether the right to confrontation applies at those pretrial adversarial hearings deemed to be "critical stages" of a prosecution which may affect important trial rights.

The conflict does not exist among the federal courts because most federal felonies are prosecuted by indictment, to which the right to confrontation does not apply. The grand jury procedure is not an adversarial proceeding and has not been deemed a "critical stage" of the prosecution. However, in those states which employ an adversarial hearing to determine probable cause to stand trial, there are conflicting decisions.

Only this Court can decide which of these conflicting views is right. This Court should accept certiorari to resolve this conflict.

III. This case presents an excellent vehicle for the Court to resolve the conflict on a question of law likely to recur unless resolved by this Court.

It may seem strange that nearly three decades have passed since this Court in *Ritchie* last grappled directly with the question of whether the Sixth Amendment's Confrontation Clause applies only at trial, as some lower courts have ruled, or more broadly, as the amendment itself states, "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 defence." U.S. Constitution, Sixth Amendment (emphasis added).[7] However, that passage of time does not imply a lack of importance, but rather reflects the reality that few cases reach this stage before trial, when the question is ripe for review by this Court.

Approximately 94% of criminal cases do not go to trial,[8] so the opportunities are relatively rare for this Court to decide such exceedingly important questions of federal constitutional law that concern a critical stage of felony prosecutions that well precedes the trial itself.

Unless these federal questions are pursued on interlocutory appeal, as in this case, they will often never reach this Court. That is because most states have held that errors at a preliminary hearing, even of constitutional degree, are harmless if a defendant later has an error-free jury trial, and the error did not prejudice the trial itself. *See, e.g., State v. Webb*, 160

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[7] The question was not precisely the same in *Pennsylvania v. Ritchie*, where the issue did not concern an adversarial probable cause hearing, but instead whether the Confrontation Clause implied a federal right to pretrial discovery. That particular issue need not be resolved in this case, where the question presented concerns only adversarial preliminary hearings that are deemed to be critical stages in a prosecution.

[8] *Missouri v. Frye*, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012).

Wis. 2d 622, 628, 467 N.W.2d 108, 110 (1991); *Com. v. Murray*, 348 Pa. Super. 439, 452, 502 A.2d 624, 630 (1985) ("Logically, a new preliminary hearing is foolish once the evidentiary trial is completed without reversible error"); *People v. Wicks*, 76 N.Y.2d 128, 556 N.E.2d 409, 556 N.Y.S.2d 970 (1990); *State v. Jones*, 290 Kan. 373, 381, 228 P.3d 394, 401 (2010); *but see Lafler v. Cooper*, 132 S.Ct. 1399, 1385 (rejecting government's argument that errors before trial are not cognizant under Sixth Amendment unless they affect fairness of trial itself, as "Sixth Amendment is not so narrow in its reach"). Yet that inability to seek relief after trial does not make it any less likely that the federal questions raised in this petition will recur, since so many state court cases do proceed through preliminary hearings where probable cause to stand trial must be determined. It does, however, illustrate why this case is perfectly situated for this Court to decide the federal questions preserved and presented here.

The O'Briens were denied the chance to cut short this criminal prosecution at the preliminary hearing stage, when the exercise of their right to confront the accuser may have demonstrated the facts upon which the complaint is based are false, distorted and/or misleading, and that their own conduct lacked any criminal intent.

The O'Briens have convinced two levels of appellate courts in Wisconsin that the issues they present are important enough to grant permissive review before they are compelled to suffer the anxiety, public

humiliation and expense of standing trial. Those courts recognized the questions presented were worthy of review even before trial, as a flood of felony cases were implicated by the issues they presented. Likewise, this Court should decide these important federal constitutional questions that are likely to recur in many thousands of cases throughout this country, by accepting certiorari review in this case.

ARGUMENT

I. The admission of hearsay at the preliminary examination and reliance on it as the exclusive basis for a finding of probable cause violated the defendants' constitutional rights to confrontation and the 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 some individual at the preliminary hearing who was a witness to the alleged events, which reportedly occurred over an eight year time period. By allowing the hearsay facts in the complaint to form the sole basis to bind the case over for trial, the court prevented counsel from being able to effectively test the plausibility of the state's evidence at this critical stage.

B. The preliminary hearing serves as a check on prosecutorial power.

The authority to prosecute an individual is the government power which most threatens personal liberty, for a prosecutor "has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 2141 (1987).

As a check against this immense prosecutorial power, some states, and the federal courts, utilize the citizen grand jury which may have the power to subpoena its own witnesses, investigate the facts, and choose to reject a prosecutor's call for an indictment. Other states utilize preliminary hearings where an independent magistrate ensures there are substantial grounds upon which a prosecution may be based. Still other states provide for a pretrial motion to dismiss – at which witnesses may be presented – and the court considers the reliability of the state's evidence similar to a preliminary hearing. Even states that permit hearsay at a preliminary hearing or motion to dismiss hearing usually expressly limit the hearsay to *reliable* hearsay.[9]

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[9] The reply brief and supplemental appendix of the Defendant-Appellant-Petitioners that was filed in the Wisconsin Supreme Court contains a fifty-state survey of grand jury or preliminary

(Continued on following page)

Wisconsin is among those states that provide a full adversarial preliminary hearing. In Wisconsin, like many states, before a citizen may be brought to trial on a felony, 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. Wis. Stat. § 970.03(5). Until very recently, the rules of evidence applied with limited exceptions. Wis. Stat. § 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 Wisconsin Supreme Court in *O'Brien* recognized that as long ago as 1922 it has referred to the importance of preliminary hearings in protecting defendants from unwarranted prosecution:

> The object or purpose of a preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid 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

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hearing procedures, citing statutes or caselaw in each jurisdiction that set forth each state's law in this area of jurisprudence.

> public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.

See State v. O'Brien, 2014 WI 54, ¶ 21, App. 13 (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, the Wisconsin 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)). Indeed, the protection against hasty or improvident prosecutions is so pronounced that Wisconsin's legislature provided that defendants are entitled to a preliminary hearing even if already indicted by a grand jury. *See* Wis. Stat. § 968.06.

Wisconsin's own caselaw recognizes the critical function of its adversary preliminary hearings. Yet after the enactment of Wis. Stat. § 970.038, prosecutors all over the state of Wisconsin have rendered the preliminary hearing's purpose a nullity. Constitutional limitations notwithstanding, prosecutors introduce multiple layers of hearsay, or even present a mere "reader" as the state's sole witness, who has no personal knowledge and therefore is immune to cross-examination.

In the O'Briens' 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 vitiated any "check" on prosecutorial power. The O'Briens were denied their right to subpoena, confront and cross-examine the primary accuser in nearly all the felony counts. There was no other evidence produced by the state from any witness with personal knowledge of the facts alleged to support the felony charges. The state avoided any real check on its prosecutorial power by precluding relevant testimony from a defense witness with personal knowledge. Thus, the determination of probable cause was based solely on the testimony of a hearsay witness whom the defendants could not cross-examine. For all these reasons, the petitioners' constitutional rights to confront and cross-examine witnesses at the preliminary hearing were denied.

C. 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).

1. Effective assistance of counsel.

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 many states' criminal process, an accused is entitled to the assistance of counsel. *Coleman v. Alabama,* 399 U.S. at 9. 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. The *Coleman* court also discussed the importance of having effective counsel at a preliminary hearing stage, because "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." *Id.*

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

This Court recently emphasized the importance of defense counsel's role outside of trial, in part since so many cases will never actually go to trial. This Court imposed on defense counsel the obligation to advise a client that a guilty plea could result in deportation. *Padilla v. Kentucky*, 559 U.S. 356, 374, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010). This Court also observed that "[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri v. Frye*, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012). Thus, the Court stressed defense counsel's duty to "communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id*. at 1407-08.

A broader role for the Sixth Amendment in criminal prosecutions was explained by this Court 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 rejected that argument because 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. The court also noted that defense counsel's role encompassed many decisions that take place outside of the trial, including even the defendant's decision to go to trial or instead take a plea offer. *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 any of his accusers at a preliminary hearing inhibits his ability to determine the strength of the state's case, and affects other key decisions, like whether to demand a trial or seek a plea resolution. Since *Gonzalez-Lopez* recognizes that a denial of a defendant's right to choice of counsel at an early stage of the case is unconstitutional, because it may affect his decision to go to trial, it follows that the ability to confront witnesses will equally impact many crucial pretrial decisions.

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 at the preliminary hearing would ensure the defendant the effective representation of counsel at this critical stage.

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). Sometimes prejudice may be presumed by a restriction on counsel, such as when counsel has been prevented from assisting the accused during a critical stage of the proceeding. *Cronic,* 466 U.S. at 659, n. 25. No specific showing of prejudice is required. The focus is on whether "there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*

The O'Briens submit that the degree to which counsel was handcuffed in their case is presumptively prejudicial. The Wisconsin Supreme Court believed counsel can still be effective despite the state's use of hearsay as a sole means of establishing probable cause. *State v. O'Brien*, 2014 WI 54, ¶ 43, 354 Wis. 2d 753, 777-78, 850 N.W.2d 8, 19-20 ("Counsel retains the ability to cross-examine the witnesses presented

by the State"); App. 22. However, it is impossible to challenge the state's case if only hearsay is presented. Defense counsel can't cross-examine a piece of paper, which is all she is left with if the state presents no witness with direct knowledge of the facts underlying an accusation, and then counsel is precluded from exercising compulsory process to produce such a witness.

2. Right to confrontation.

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 *Crawford* 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 Wisconsin Supreme Court correctly noted that *Crawford* did not address the question of whether the Confrontation Clause applied to preliminary

hearings, because the issue in that case was presented in the context of testimony at a trial. *State v. O'Brien*, 2014 WI 54, ¶ 29, 354 Wis. 2d at 771; App. 16. Nevertheless, the *Crawford* decision did survey the historical underpinnings of the Confrontation Clause, and observed that "by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases," *Crawford*, 541 U.S. 36, 46, 124 S.Ct. 1354, 1361, proceedings not unlike today's preliminary hearings to determine probable cause. *Crawford* also made it clear that the protections of the Confrontation Clause were intended to apply to matters decided by judges as well as juries:

> We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people. . . . They were loath to leave too much discretion in judicial hands.

Crawford v. Washington, 541 U.S. at 67, 124 S.Ct. at 1373.

The contours of *Crawford* are still evolving. This Court should accept this petition and answer the question whether the right to confrontation applies to adversary preliminary examinations such as the one in this case.

3. Confusion in the lower courts.

There is substantial confusion in the lower courts about whether this Court has ever decided whether the Confrontation Clause applies only at trial.

Some lower courts, like the court of appeals in the O'Briens' case, overstate the extent to which this Court has addressed the right to confrontation in a pretrial setting. They rely on isolated references taken out of context in which this Court referred to the right of confrontation as "basically a trial right," citing *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968) (confrontation is "basically a trial right"); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("confrontation is a trial right"); or *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"). However, none of those cases involved preliminary hearings, and the quotation from *Ritchie* came from the plurality opinion, which garnered the support of only four justices.

Barber's oft-cited quote that "[t]he right to confrontation is basically a trial right," is misleading and taken out of context. The court ruled that the failure to afford cross-examination at a trial when it was available violated the Confrontation Clause. The 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.[10]

Similarly, the quote from *Green*, that the "right to confront the witness at the time of trial . . . forms the core values furthered by the Confrontation Clause," is taken out of context. The court in *Green* was concerned with whether a prior inconsistent statement of a witness at a preliminary examination could be admitted when the witness also testified and was cross-examined at trial. 399 U.S. at 164. There was no confrontation problem because the defendant was able to confront and extensively cross-examine the witness at *both* the trial and preliminary hearing. *Id.* at 151, 158.

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

Other courts, like the Wisconsin Supreme Court in the O'Briens' case, reference language from this Court's discussion in *Gerstein v. Pugh*, that due to the limited scope of probable cause determinations, informal proceedings based on "hearsay and written testimony" are sufficient under the Fourth Amendment. *State v. O'Brien*, 2014 WI 54, ¶ 25, 354 Wis. 2d at 771, quoting *Gerstein v. Pugh*, 420 U.S. at 120 (1975); App. 14. However, as discussed earlier, the full adversarial nature of Wisconsin's preliminary hearing is completely different from the non-adversarial judicial review procedures considered by the *Gerstein* court.

It is an overreach to extrapolate from any of these decisions that the Supreme Court has "long held" that the Confrontation Clause does not apply at a preliminary hearing. Indeed, as both the Pennsylvania and Connecticut supreme courts have observed, some courts believe this Court's decisions infer the right *does* apply at an adversary preliminary hearing.

This Court should end the confusion in lower courts about whether the right to confrontation applies outside of the trial itself.

CONCLUSION

The state grossly abused the petitioners' 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 was an all out assault

on the defendants' constitutional rights in this case. This Court should accept this petition for a writ of certiorari and finally establish the role the Sixth Amendment right to effective assistance of counsel and the right to confrontation play in adversary preliminary hearings that clearly affect the future progress or resolution of most state court felony criminal prosecutions in this country.

Dated this 6th day of October, 2014.

Respectfully submitted,

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2014 WI 54

SUPREME COURT OF WISCONSIN

CASE NO.: 2012AP1769-CR, 2012AP1770-CR, 2012AP1863-CR

COMPLETE TITLE: State of Wisconsin,

Plaintiff-Respondent,

v.

Martin P. O'Brien,

Defendant-Appellant-Petitioner.

State of Wisconsin,

Plaintiff-Respondent,

v.

Kathleen M. O'Brien,

Defendant-Appellant-Petitioner.

State of Wisconsin,

Plaintiff-Respondent,

v.

Charles E. Butts,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION
OF THE COURT OF APPEALS
Reported at 349 Wis. 2d 667,
836 N.W.2d 840
(Ct. App. 2013 – Published)
PDC No: 2013 WI 97

OPINION FILED: July 9, 2014

SUBMITTED ON BRIEFS:

ORAL ARGUMENT: March 14, 2014

SOURCE OF APPEAL:

COURT: Circuit/Circuit/Circuit

COUNTY: Walworth/Walworth/Kenosha

JUDGE: John R. Race/James L. Carlson/
Anthony G. Milisauskas

JUSTICES:

CONCURRED:

DISSENTED: ABRAHAMSON, C. J., dissents.
(Opinion filed.)

NOT PARTICIPATING:

ATTORNEYS:

For the defendant-appellant-petitioner Charles E. Butts, there were briefs by *Terry W. Rose* and *Rose & Rose*, Kenosha, and oral argument by *Terry W. Rose*.

For the defendants-appellants-petitioners Martin P. O'Brien and Kathleen M. O'Brien, there were briefs by *Jerome F. Buting* and *Buting, Williams & Stilling, S.C.*, Brookfield; and *Kathleen M. Quinn*, Milwaukee. Oral argument by *Jerome F. Buting*.

For the plaintiff-respondent, the cause was argued by *Jeffrey J. Kassel*, assistant attorney general, with whom on the brief was *J.B. Van Hollen*, attorney general.

An amicus curiae brief was filed by *Marcus J. Berghahn* and *Hurley, Burish & Stanton, S.C.*, Madison; and *Devon M. Lee*, assistant state public defender, on behalf of the Wisconsin Association of Criminal Defense Lawyers and Wisconsin Office of the State Public Defender.

2014 WI 54

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No.2012AP1769, 2012AP1770, 2012AP1863

(L. C. No.2012CF00229, 2012CF000230, 2012CF000466)

STATE OF WISCONSIN: IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Martin P. O'Brien,

Defendant-Appellant-Petitioner.

FILED

JUL 9, 2014

Diane M. Fremgen
Clerk of
Supreme Court

State of Wisconsin,

Plaintiff-Respondent,

v.

Kathleen O'Brien,

Defendant-Appellant-Petitioner.

State of Wisconsin,

Plaintiff-Respondent,

v.

Charles E. Butts,

Defendant-Appellant-Petitioner.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 ANN WALSH BRADLEY, J. The petitioners, Martin and Kathleen O'Brien and Charles Butts,

seek review of a published court of appeals decision that affirmed the circuit courts' determinations that the use of hearsay at the petitioners' preliminary examinations was constitutionally permissible.[1]

¶2 On review, petitioners assert that the newly enacted Wis. Stat. § 970.038 (2011-12),[2] which permits hearsay evidence at preliminary examinations, violates their constitutional rights. Specifically, they argue that the rights to confrontation, compulsory process, effective assistance of counsel, and due process are violated by the application of Wis. Stat. § 970.038 in preliminary examinations.

¶3 We determine that petitioners have failed to meet the heavy burden of showing beyond a reasonable doubt that Wis. Stat. § 970.038 is unconstitutional. The scope of preliminary examinations is limited to determining whether there is probable cause to believe that a defendant has committed a felony. Following precedent, we conclude that there is no constitutional right to confrontation at a preliminary examination. Further, due to the limited scope of preliminary examinations, we determine that the admission of hearsay evidence does not violate petitioners'

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[1] The circuit court orders were consolidated on appeal. *State v. O'Brien*, 2013 WI App 97, 349 Wis. 2d 667, 836 N.W.2d 840 (affirming orders of the circuit court for Walworth County, John R. Race, Judge, and James L. Carlson, Judge, and the circuit court for Kenosha County, Anthony G. Milisaukas, Judge).

[2] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

rights to compulsory process, effective assistance of counsel, or due process.

¶4 Finally, we decline petitioners' invitation to impose new rules limiting the admissibility of hearsay at preliminary examinations. Wisconsin Stat. § 970.038 does not set forth a blanket rule that all hearsay be admitted. Circuit courts remain the evidentiary gatekeepers. They must still consider, on a case-by-case basis, the reliability of the State's hearsay evidence in determining whether it is admissible and assessing whether the State has made a plausible showing of probable cause. Accordingly, we affirm the decision of the court of appeals.

I

¶5 The facts and history in these consolidated cases differ, but they share common issues.

¶6 The complaint against the O'Briens alleges ten counts of child abuse and seven counts of disorderly conduct. It identifies six adopted children, four of whom were siblings the O'Briens adopted from Russia. According to the complaint the allegations were based on the children's reports of various incidents with the O'Briens. The complaint further indicates that some of the allegations were corroborated by statements in Kathleen O'Brien's journal and others were corroborated by the O'Briens' biological daughter.

¶7 Martin O'Brien filed a motion to preclude hearsay evidence at the preliminary examination and Kathleen O'Brien joined in the motion. It challenged the constitutionality of Wis. Stat. § 970.038, which permits hearsay at a preliminary examination. The circuit court denied the motion.

¶8 At the O'Briens' preliminary examination the State presented the testimony of Investigator Domino, who had signed the complaint next to a statement that she was swearing to its accuracy. She had no personal knowledge of the allegations in the complaint. According to her testimony, Domino reviewed the complaint and compared it with police reports and her memory before signing it. She stated that she was present while Ms. Hocking, a social worker from the Walworth County Department of Health and Human Services, interviewed some of the children and that she viewed the other interviews on videotape. Domino also had the opportunity to speak directly with one of the children, S.M.O., in a follow-up interview. After she testified to the basis for the statements in the complaint, the court received the complaint into evidence.

¶9 On cross-examination, Domino clarified that one of the children named in the complaint was not interviewed at all. She acknowledged that the complaint did not contain the complete statement from S.M.O. that provided the factual basis for count one, but was a summary. The other counts were based on the interviews she reviewed. Domino stated that she also reviewed Kathleen O'Brien's journal before

testifying in order to determine the dates of various incidents. Although she provided some additional detail during cross-examination, Domino could not remember enough about the interviews to respond to many of counsels' questions.

¶10 After the State rested, the O'Briens sought to present the testimony of S.M.O., whom they had subpoenaed as a witness. The State objected, arguing that the O'Briens needed to provide an offer of proof before introducing the witness. The O'Briens responded that S.M.O.'s testimony was relevant because it would fill in the gaps in Investigator Domino's story. They explained that if the complete story was disclosed, it may appear that the actions were accidental as opposed to intentional. However, they were not sure what S.M.O. would actually say. The circuit court determined that a claim of accident is a defense, and thus not relevant to a preliminary examination. Accordingly, it sustained the objection. The O'Briens were bound over for trial.

¶11 The complaint against Butts contains four counts of sexual assault of a child as a persistent repeater and two counts of child enticement as a persistent repeater. The first four counts involved two incidents with A.V. The complaint indicates that the probable cause for those counts was provided by statements from A.V., her mother, and Butts regarding the incident. Counts four and five involved incidents with A.R.E. and her brother. The complaint indicates that the probable cause for those counts was

based on statements from A.R.E., her stepmother, A.R.E.'s mother, and A.R.E.'s stepfather.

¶12 Butts submitted a motion to preclude hearsay at his preliminary examination, arguing that Wis. Stat. § 908.038 violated his constitutional rights. At the motion hearing, the State acknowledged that it intended to rely on the statute and to present a police officer at the preliminary examination who would testify about the children's statements. The children would not be present. The circuit court denied Butts' motion.

¶13 At Butts' preliminary examination the State moved into evidence a transcript from a prior preliminary hearing regarding A.R.E.'s allegations. The State also presented the testimony of Detective Barfoth. She testified that she had been assigned to investigate the case involving A.R.E. Barfoth spoke with A.R.E. who told her about the alleged incident. After Barfoth presented her with a photo lineup, A.R.E. identified Butts. Barfoth also identified a statement given by A.V. and then read it into the record. On cross-examination, Barfoth testified that she was not sure who took the statement from A.V. and that she was not present when the statement was taken.

¶14 The State then moved A.V.'s statement into evidence, rested its case, and asked that Butts be bound over for trial. In response, Butts moved for a dismissal. The court determined that there was probable cause to believe that a felony or felonies

were committed and that Butts committed a felony and bound Butts over for trial.

¶15 The court of appeals accepted and consolidated interlocutory appeals from Butts and the O'Briens challenging the constitutionality of Wis. Stat. § 970.038 on various grounds. In its decision, the court of appeals emphasized the circuit court's duty "to consider the apparent reliability of the State's evidence." *State v. O'Brien*, 2013 WI App 97, ¶2, 349 Wis. 2d 667, 836 N.W.2d 840. Observing that the probable cause determination is made on a case-by-case basis, it acknowledged that "the hearsay nature of evidence may, in an appropriate case, undermine the plausibility of the State's case." *Id.* Ultimately, however, it concluded that the admission of hearsay evidence pursuant to Wis. Stat. § 970.038 presents no blanket constitutional problems.

II

¶16 In this case we are asked to review the constitutionality of newly enacted Wis. Stat. § 970.038 which permits the use of hearsay evidence at a preliminary examination. Although evidentiary rulings are generally deemed a matter for the circuit court's discretion, a constitutional challenge presents a question of law which we review independently of the decisions rendered by the circuit court and the court of appeals. *State v. Muckerheide*, 2007 WI 5, ¶17, 298 Wis. 2d 553, 725 N.W.2d 930; *State v. Quintana*, 2008 WI 33, ¶12, 308 Wis. 2d 615, 748 N.W.2d 447.

¶17 A party challenging the constitutionality of a statute bears the burden of showing beyond a reasonable doubt that the statute violates the constitution. *State v. Williams*, 2012 WI 59, ¶11, 341 Wis. 2d 191, 814 N.W.2d 460. This is a heavy burden as statutes are presumed constitutional and we resolve any reasonable doubt in favor of upholding a challenged statute. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶76, 350 Wis. 2d 554, 835 N.W.2d 160.

III

¶18 Our analysis begins with a brief overview of preliminary examinations. We then address in turn each of the constitutional challenges that the petitioners present, beginning with their challenge based on the Confrontation Clause, followed by their challenges alleging violations of the right to compulsory process, the right to effective assistance of counsel, and the right to due process. Finally, we discuss the petitioners' request that we impose new rules limiting the admissibility of hearsay evidence at preliminary examinations.

A

¶19 A defendant charged with a felony is entitled to a hearing pursuant to Wis. Stat. § 970.03 to determine whether there is probable cause to believe that a felony has been committed by that defendant. This hearing is referred to as a preliminary

examination. The right to a preliminary examination is not constitutionally guaranteed and is solely a statutory right. *State v. Schaefer*, 2008 WI 25, ¶84, 308 Wis. 2d 279, 746 N.W.2d 457; *State v. Dunn*, 121 Wis. 2d 389, 393, 359 N.W.2d 151 (1984); *State v. Camara*, 28 Wis. 2d 365, 370, 137 N.W.2d 1 (1965).

¶20 Traditionally, Wisconsin's rules of evidence, set forth in chs. 901 to 911, Stats., have applied to preliminary examinations. *State v. Moats*, 156 Wis. 2d 74, 85, 457 N.W.2d 299 (1990). Under those rules hearsay is inadmissible unless permitted by rule or statute. Wis. Stat. § 908.02. The legislature recently enacted Wis. Stat. § 970.038 permitting the admission of hearsay evidence at a preliminary examination and permitting a court to make the probable cause determination "in whole or in part" based on hearsay evidence. It 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).

Wis. Stat. § 970.038.

¶21 The court has often referred to the important purpose preliminary examinations serve in protecting defendants and the public from unwarranted prosecution. In essence, they serve as a check on

prosecutorial discretion. For example, as far back as 1922, the court stated:

> The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid 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.

Thies v. State, 178 Wis. 98, 103, 189 N.W. 539 (1922).

¶22 More recently, the court reiterated this point explaining that "[r]equiring a finding of probable cause protects the defendant's due process rights and guards against undue deprivations of the defendant's liberty." *State v. Richer*, 174 Wis. 2d 231, 240, 496 N.W.2d 66 (1993); *see also State v. Hooper*, 101 Wis. 2d 517, 544-45, 305 N.W.2d 110 (1981) (it is the purpose of a preliminary examination to determine whether there is "a substantial basis for bringing the prosecution and further denying the accused his right to liberty.").

¶23 Highlighting the importance of these proceedings, we have referred to them as a "critical stage" in the criminal process. *Schaefer*, 308 Wis. 2d 279, ¶84; *State v. Wolverton*, 193 Wis. 2d 234, 252, 533 N.W.2d 167 (1995) (citing *Coleman v. Alabama*,

399 U.S. 1, 9 (1970)); *see also Gates v. State*, 91 Wis. 2d 512, 522, 283 N.W.2d 474 (Ct. App. 1979).

¶24 The scope of preliminary examinations is narrow. It is limited to determining whether the account presented by the State, if believed, has a plausible basis supporting a probable cause determination. *State v. Padilla*, 110 Wis. 2d 414, 423-24, 329 N.W.2d 263 (Ct. App. 1982); *see also Dunn*, 121 Wis. 2d at 398 ("probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony."). These examinations are intended to be summary in nature and not mini-trials. *Schaefer*, 308 Wis. 2d 279, ¶34; *Dunn*, 121 Wis. 2d at 396-97; *Hooper*, 101 Wis. 2d at 544-45.

¶25 The fact that Wisconsin has preliminary examinations at all exceeds the requirements of the Fourth Amendment. The United States Supreme Court has concluded that although the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to the extended restraint on liberty, adversary proceedings are not necessary. *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975). Due to the limited scope of probable cause determinations, informal proceedings are sufficient. *Id.*

¶26 The *Gerstein* Court further opined that the probable cause determination may be made "on hearsay and written testimony." *Id.* It explained that the value of confrontation and cross-examination "would be too slight to justify holding, as a matter of

constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause." *Id.* at 122.

¶27 With this background, we turn to petitioners' arguments.

B

¶28 The petitioners assert that by permitting the use of hearsay evidence at preliminary examinations, Wis. Stat. § 970.038 violates their rights under the Confrontation Clause. This argument is premised upon the assumption that the Confrontation Clause applies to preliminary examinations. Because we conclude that this underlying assumption is flawed, we must reject petitioners' argument.

¶29 The right to confront one's accuser is found in the Sixth Amendment to the United States Constitution. It provides that:

> 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 defence.

U.S. Const., Amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the Supreme Court determined that the Confrontation Clause prohibits the use of testimonial hearsay at a criminal trial unless

the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. The issue in *Crawford* was presented in the context of a criminal trial and, accordingly, the court did not address whether the Confrontation Clause applied to preliminary hearings.

¶30 However, that issue has been addressed by Wisconsin courts. Our caselaw establishes that the Confrontation Clause does not apply to preliminary examinations. *State ex rel. Funmaker v. Klamm*, 106 Wis. 2d 624, 634, 317 N.W.2d 458 (1982) (citing *Mitchell v. State*, 84 Wis. 2d 325, 336, 267 N.W.2d 349 (1978)) ("There is no constitutional right to confront adverse witnesses at a preliminary examination."); *State v. Oliver*, 161 Wis. 2d 140, 146, 467 N.W.2d 211 (Ct. App. 1991) ("[Defendant] did not have a constitutional right of 'confrontation' at his preliminary examination."); *Padilla*, 110 Wis. 2d at 422 ("Of course, there is no constitutional right to confront a witness at a preliminary examination.").

¶31 Our precedent is consistent with that of other jurisdictions which have determined that a defendant's right to confront accusers is a trial right that does not apply to preliminary examinations. *See*, *e.g.*, *Peterson v. California*, 604 F.3d 1166, 1170 (9th Cir. 2010); *State v. Lopez*, 314 P.3d 236, 241-42 (N.M. 2013); *Leitch v. Fleming*, 732 S.E.2d 401, 404 (Ga. 2012); *State v. Timmerman*, 218 P.3d 590, 594 (Utah 2009); *Sheriff v. Witzenburg*, 145 P.3d 1002, 1005 (Nev. 2006); *Whitman v. Superior Court*, 820 P.2d 262, 270 (Cal. 1991); *Commonwealth v. Tyler*, 587 A. 2d

326, 328 (Pa. Super. Ct. 1991); *Blevins v. Tihonovich*, 728 P.2d 732, 734 (Colo. 1986); *State v. Sherry*, 667 P.2d 367, 376 (Kan. 1983); *Wilson v. State*, 655 P.2d 1246, 1250 (Wyo. 1982); *People v. Blackman*, 414 N.E.2d 246, 247-48 (Ill. App. Ct. 1980).

¶32 Petitioners contend that even if there is no constitutional right to confront witnesses at a preliminary hearing, they have a statutory confrontation right preserved in Wis. Stat. § 970.03(5). That statute provides that "[t]he defendant may cross-examine witnesses against the defendant." Wis. Stat. § 970.03(5).

¶33 Contrary to petitioners' assertions the statute does not create a confrontation right. As the *Padilla* court explained, Wis. Stat. § 970.03(5) does not require the State to present a defendant with hearsay declarants for cross-examination, rather it "permits cross-examination of only those people actually called to the stand." 110 Wis. 2d at 424. This interpretation is supported by the Judicial Council Note (1990) to Wis. Stat. § 970.03 which states "[t]he right to confront one's accusers does not apply to the preliminary examination." Accordingly, we conclude that the petitioners have failed to demonstrate beyond a reasonable doubt that Wis. Stat. § 970.038 violates any constitutional or statutory right to confrontation.

C

¶34 We turn next to petitioners' assertion that Wis. Stat. § 970.038 violates their right to call witnesses pursuant to the compulsory process clause.

We acknowledge that defendants have a right to compulsory process at preliminary hearings. *Schaefer*, 308 Wis. 2d 279, ¶35. However, we determine that this right is not violated by Wis. Stat. § 970.038.

¶35 As noted above, Wis. Stat. § 970.038 permits the use of hearsay at a preliminary examination. However, it does not address or alter the provisions in Wis. Stat. § 970.03(5) authorizing defendants to call witnesses, nor does it prevent them from doing so.[3]

¶36 The O'Briens specifically allege that the circuit court applied Wis. Stat. § 970.038 to justify its narrow view of relevancy and quash their subpoena for S.M.O., thereby infringing on their compulsory process rights. We are not convinced.

¶37 A defendant's right to call witnesses at a preliminary examination is not an unrestricted right. *State v. Knudson*, 51 Wis. 2d 270, 280, 187 N.W.2d 321 (1971). To overcome a motion to quash a subpoena at a preliminary examination, the defendant must be able to show that the evidence is relevant to the probable cause determination.

> [A]lthough a defendant may subpoena witnesses and evidence for the preliminary examination, his subpoena may be quashed,

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[3] Wisconsin Stat. § 970.03(5) states: "All witnesses shall be sworn and their testimony reported by a phonographic reporter. The defendant may cross-examine witnesses against the defendant, and may call witnesses on the defendant's own behalf who then are subject to cross-examination."

> 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. Issues relating to weight and credibility are outside the scope of a preliminary examination. *Id.* at ¶36; *Klamm*, 106 Wis. 2d at 630. It is not intended to serve a discovery function. *Knudson*, 51 Wis. 2d at 281.

¶38 Counsel's statements at the preliminary examination reveal that Martin O'Brien sought to subpoena S.M.O., a child witness, for purposes of discovery. When asked for a proffer as to what S.M.O. would testify about, counsel for Martin O'Brien responded that Investigator Domino's statements were a summary and did not necessarily tell the whole story. Counsel suggested that the victim's statements could have been taken out of context. She explained that the complete story could reveal that certain actions were not intentional. However, she indicated that the victim may not contradict Investigator Domino's testimony, stating "I don't really know." Absent any idea what S.M.O. would testify to, counsel's proffer was insufficient to show that S.M.O.'s testimony would be relevant to the probable cause inquiry.

¶39 Thus, the circuit court quashed the O'Briens' subpoena for the testimony of S.M.O. because the O'Briens were unable to establish that it would be relevant to the probable cause inquiry. The court's

narrow view of admissibility was not based on Wis. Stat. § 970.038. Rather, it was based on the narrow scope of the examination: determining whether there is probable cause to believe that the defendant has committed a felony. *See Schaefer*, 308 Wis. 2d 279, ¶85. Accordingly, we conclude that the petitioners failed to carry their burden of showing beyond a reasonable doubt that Wis. Stat. § 970.038 on its face or in its application violates the right to compulsory process.

D

¶40 We turn now to the impact of Wis. Stat. § 970.038 on a defendant's right to assistance of counsel. It is well established that a preliminary examination is a critical stage of the prosecution at which the defendant is entitled to counsel. *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) ("[T]he 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.'"); *Schaefer*, 308 Wis. 2d 279, ¶84 ("[A] preliminary hearing is a critical stage in the criminal process. Consequently, every defendant charged with a felony in Wisconsin is constitutionally entitled to the assistance of counsel at a preliminary hearing."); *Wolverton*, 193 Wis. 2d at 253 ("[T]he Wisconsin preliminary hearing is undoubtedly a 'critical stage' of the Wisconsin criminal process. Hence, every defendant charged with a felony in Wisconsin is constitutionally

entitled to the assistance of counsel at the preliminary hearing.").

¶41 Petitioners assert that the use of hearsay evidence at a preliminary hearing necessarily precludes the effective assistance of counsel. They contend that where the only evidence the State presents is hearsay, counsel has no ability to effectively argue before the court.

¶42 A similar challenge was addressed in *Schaefer*, 308 Wis. 2d 279. There, the court considered whether the inability of counsel to access police reports and other investigatory materials violated a defendant's right to assistance of counsel at a preliminary hearing. *Id.* at ¶83. It explained that the nature of the proceedings shapes the determination of what constitutes effective assistance of counsel:

> In considering[defendant's]right to effective assistance of counsel at a preliminary examination, we must keep in mind the narrow purpose of the hearing. "[T]he limited scope of the preliminary hearing compresses the contours of the sixth amendment." "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. at ¶85 (internal citations omitted). Given the limited scope of preliminary examinations, the court determined that the inability of counsel to obtain the evidence at issue prior to the preliminary examination did not render him ineffective. *Id.* at ¶91.

¶43 Likewise, here we determine that the admission of hearsay at a preliminary hearing does not infringe on defendants' right to assistance of counsel. "[T]he constitution does not require that counsel be allowed to play the same role [at a preliminary examination] as counsel at trial. A counsel's role is necessarily limited by the limited scope of the preliminary examination." *Klamm*, 106 Wis. 2d at 634. Contrary to petitioners' assertions, the admission of hearsay does not eliminate counsel's ability to provide assistance at a preliminary examination. Counsel retains the ability to cross-examine the witnesses presented by the State, challenge the plausibility of the charges against the defendant, argue that elements are not met, and present witnesses on behalf of the defendant. Wis. Stat. § 970.03.

¶44 The record here reveals that Wis. Stat. § 970.038 did not render counsel ineffective at the preliminary examinations. At the O'Briens' preliminary examination, counsel cross-examined Investigator Domino. They asked probing questions aimed at whether the complaint accurately reflected the reports and interviews Investigator Domino had reviewed. They also made closing arguments about the complainants' failure to identify the defendants, the failure to show injury, and the hearsay declarants' inability to observe all of the alleged abuse. In addition, they objected to the broad timespan alleged in the complaint. These actions demonstrate that the O'Briens' counsel assisted the O'Briens at the

preliminary examination and were not ineffective due to the admission of hearsay.

¶45 Likewise, Butts' counsel was not prevented from assisting Butts at his preliminary examination. He cross-examined Detective Barfoth, asking who took the statement from the alleged victim. He also presented the argument that the statement introduced into evidence was insufficient because it did not identify defendant as the person in the statement. He further argued that there was an insufficient basis for establishing venue. Indeed, the circuit court agreed that venue had not been established for one of the counts, but bound Butts over for trial because it had to determine probable cause on only one of the felony counts. Accordingly, we conclude that the petitioners have failed to demonstrate beyond a reasonable doubt that the introduction of hearsay evidence violated a right to effective assistance of counsel.

E

¶46 We address next the petitioners' argument that the introduction of hearsay at preliminary examinations violates the right to due process. A due process challenge concerns the fairness of governmental action or proceedings. *State ex rel. Lyons v. De Valk*, 47 Wis. 2d 200, 205, 177 N.W.2d 106 (1970). The United States Supreme Court has determined that informal proceedings are sufficient for probable cause determinations and that states have discretion in establishing the procedures for such determinations.

Gerstein, 420 U.S. at 121. Thus, the right to a preliminary examination is solely a statutory right. *Schaefer*, 308 Wis. 2d 279, ¶84; *Dunn*, 121 Wis. 2d 389, 393; *Camara*, 28 Wis. 2d 365, 370.

¶47 Although a defendant is entitled to due process at hearings created by statute, that does not mean that every time a statute creates a right to a hearing, a party is entitled to the full panoply of rights available at a criminal trial. To the contrary, we have repeatedly held that a preliminary hearing is not a preliminary trial or a mini-trial. *Schaefer*, 308 Wis. 2d 279, ¶34; *State v. Stuart*, 2005 WI 47, ¶30, 279 Wis. 2d 659, 695 N.W.2d 259; *Dunn*, 121 Wis. 2d at 396-97.

¶48 Thus, not all the procedural rights available in a criminal trial are available at a preliminary examination. *See*, *e.g.*, *Mitchell*, 84 Wis. 2d at 336 (there is no confrontation right at a preliminary examination); *State v. White*, 2008 WI App 96, ¶13, 312 Wis. 2d 799, 754 N.W.2d 214 (limiting the scope of cross-examination); *Padilla*, 110 Wis. 2d at 424 (limiting the right to cross-examination to only those witnesses called to the stand). As noted above, preliminary examinations are limited in scope to determining whether there is probable cause to believe that a defendant committed a felony. They are not an opportunity to determine the defendant's guilt or innocence.

¶49 Due to this narrow scope, we conclude that the use of hearsay evidence at preliminary

examinations pursuant to Wis. Stat. § 970.038 does not violate due process rights. Defendants retain the ability to challenge the plausibility of hearsay and other evidence presented by the State through cross-examination, the presentation of evidence, and argument to the court. Wis. Stat. § 970.03(5). We agree with the court of appeals that these means are sufficient to address the plausibility of the allegations.

¶50 In the cases at hand, both Butts and the O'Briens had a sufficient opportunity to challenge the probable cause of the charges against them. In their preliminary hearings, they both cross-examined the State's witnesses. Although they did not do so, both Butts and the O'Briens had the opportunity to introduce evidence relevant to the probable cause inquiry. Further, they both made numerous arguments challenging the probable cause for the charges. Because preliminary examinations are limited to determining whether there is a plausible basis to support probable cause, we determine that the examinations they received comported with due process. Accordingly, we determine that the petitioners have failed to show that Wis. Stat. § 970.038 is unconstitutional beyond a reasonable doubt.

IV

¶51 Finally, we decline petitioners' invitation to modify Wis. Stat. § 970.038 by imposing specific rules limiting the admissibility of hearsay at preliminary examinations. Having determined that the

petitioners have failed in their constitutional challenges, we conclude that the proper forum for the requested changes lies with the legislature.

¶52 The petitioners contend that Wis. Stat. § 970.038 strips the defense of the ability to effectuate the purpose of a preliminary examination, which is to safeguard the accused and the public against unwarranted prosecutions. Although Wis. Stat. § 970.038 in a particular case may make the task of the defense more difficult, we are not convinced that the newly enacted statute renders a preliminary hearing a sham, as the petitioners contend. Several procedural and evidentiary safeguards remain unaffected by the passage of the legislation.

¶53 Testing the plausibility of the witness's statement still implicates adversarial testing. Wisconsin Stat. § 970.03(5) remains unchanged. It provides that at a preliminary hearing "the defendant may cross-examine witnesses against the defendant, and may call witnesses on the defendant's own behalf. . . ." Wis. Stat. § 970.03 (5). Like the court of appeals, "[w]e reject any implication in the prosecution's arguments before the trial court that the enactment of 970.038 somehow limited the defense's ability to call or cross-examine witnesses at the preliminary examination." *O'Brien*, 349 Wis. 2d 667, ¶21. As discussed above, the right to present witnesses in the O'Briens' case was limited by their inability to show relevancy, not by the provisions of Wis. Stat. § 970.038. *See* ¶¶37-39, *infra.*

¶54 The focus of the circuit court's determination remains the same: whether the State has made a plausible showing of the probable cause necessary to support a bindover for trial. This determination is made on a case-by-case basis.

¶55 Our caselaw regarding the level of a probable cause determination remains unaltered. "Probable cause is not an unvarying standard because each decision at the various stages of the proceedings is an independent determination with the varying burdens of proof." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 308, 603 N.W.2d 541 (1999). The degree of probable cause required for a bindover is greater than that required to support a criminal complaint. *See T.R.B. v. State*, 109 Wis. 2d 179, 188, 325 N.W.2d 329 (1982); *Taylor v. State*, 55 Wis. 2d 168, 173, 197 N.W.2d 805 (1972).

¶56 Newly enacted Wis. Stat. § 970.038 allows a court to make its probable cause determination "in whole or in part" based on hearsay. As the court of appeals observed, however, "[i]t remains the duty of the trial court to consider the apparent reliability of the State's evidence at the preliminary examination in determining whether the State has made a plausible showing of probable cause. . . ." *O'Brien*, 349 Wis. 2d 667, ¶2.

¶57 Reliability is the hallmark of admissible hearsay. Traditionally, the rule against hearsay views out-of-court statements as inherently unreliable. Despite this mistrust, numerous exemptions and

exceptions have developed under the common law that allow for the admission of hearsay into evidence. Subsequently the common law was codified as the Wisconsin Rules of Evidence, Wis. Stat. §§ 901.01-911.02.[4]

¶58 The Wisconsin Rules of Evidence contain 23 exceptions from hearsay for a variety of out-of-court statements that are considered reliable due to the circumstances in which the statements were made. For example, the circumstances of sufficient reliability exist when the speaker is describing an event while seeing it (present sense impression, Wis. Stat. § 908.03(1)) or when describing a startling event while under the stress of the event (excited utterance, Wis. Stat. § 908.03(2)). Sufficient reliability exists when considering the motivation of the speaker to tell the truth (statements made for purposes of medical treatment Wis. Stat. § 908.03(4)). The regular records exception is grounded on the belief that the records are sufficiently reliable because of the need of the maker to keep accurate records and reports (Wis. Stat. § 908.03(6)). Likewise, property records and family records are exceptions from hearsay because they are considered sufficiently reliable (Wis. Stat. § 908.03(13)-(15)).

¶59 The criminal complaint may rely on hearsay to demonstrate probable cause, but the hearsay

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[4] The Wisconsin Rules of Evidence were adopted in 1973. *See* Sup. Ct. Order, 59 Wis. 2d R1 (1973).

must be sufficiently reliable to make a plausible showing of probable cause to support a bindover for trial. *Knudson*, 51 Wis. 2d 270. We agree with the court of appeals that "the hearsay nature of evidence may, in an appropriate case, undermine the plausibility of the State's case." *O'Brien*, 349 Wis. 2d 667, ¶2.

¶60 The court has discretion in determining what evidence is sufficiently reliable. Although newly enacted Wis. Stat. § 970.038 allows for greater use of hearsay at preliminary examinations, it does not eliminate the court's obligation to exercise its judgment. It is the circuit court's role to act as the evidentiary gatekeeper. *Vivid, Inc. v. Fiedler*, 219 Wis. 2d 764, 803, 580 N.W.2d 644 (1998).

V

¶61 In sum, we determine that petitioners have failed to meet the heavy burden of showing beyond a reasonable doubt that Wis. Stat. § 970.038 is unconstitutional. The scope of preliminary examinations is limited to determining whether there is probable cause to believe that a defendant has committed a felony. Following precedent, we conclude that there is no constitutional right to confrontation at a preliminary examination. Further, due to the limited scope of preliminary examinations, we determine that the admission of hearsay evidence does not violate petitioners' rights to compulsory process, effective assistance of counsel, or due process.

¶62 Finally, we decline petitioners' invitation to impose new rules limiting the admissibility of hearsay at preliminary examinations. Wisconsin Stat. § 970.038 does not set forth a blanket rule that all hearsay be admitted. Circuit courts remain the evidentiary gatekeepers. They must still consider, on a case-by-case basis, the reliability of the State's hearsay evidence in determining whether it is admissible and assessing whether the State has made a plausible showing of probable cause. Accordingly, we affirm the decision of the court of appeals.

By the Court. – The decision of the court of appeals is affirmed.

¶63 SHIRLEY S. ABRAHAMSON, C.J. (*dissenting*). The majority opinion and the parties focus on the constitutionality of Wis. Stat. § 970.038, which was enacted in 2011.[1] They address whether § 970.038 violates the defendant's confrontation rights under the United States and Wisconsin Constitutions. The majority opinion and the parties recognize, however, that the legislature has accorded defendants rights in preliminary examinations under Wis. Stat. § 970.03(5). This statute was enacted in its current form in 1969.[2]

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[1] 2011 Wis. Act 285.

[2] Ch. 255, Laws of 1969

¶64 I conclude that the admission of hearsay evidence under new Wis. Stat. § 970.038 should be interpreted in light of the longstanding text of § 970.03(5), which affords defendants statutory rights in preliminary examinations. This court typically decides cases on non-constitutional grounds before it addresses constitutional issues.[3] I conclude the two statutes should be harmonized.

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[3] *See Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104, ¶91, 294 Wis. 2d 441, 717 N.W.2d 803.

Nevertheless, I note that the United States Supreme Court has recognized that certain Sixth Amendment rights, such as the right to counsel, apply to pretrial stages. I am not so quick to conclude, as does the majority opinion, that "the Confrontation Clause does not apply to preliminary examinations." Majority op., ¶30.

The United States Supreme Court has begun to take into account that most criminal cases do not go to trial and that constitutional rights traditionally restricted to trial may be applicable to critical pretrial stages:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (internal quotation marks and citations omitted).

¶65 Recently adopted Wis. Stat. § 970.038 declares that hearsay is generally admissible in preliminary examinations and that a circuit court may base its finding of probable cause in whole or in part on admitted hearsay. This new statute reads in full as follows:

> (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).

¶66 Prior to the recent enactment of Wis. Stat. § 970.038, hearsay evidence was admissible at the preliminary examination only if it fit within one of the exceptions to the hearsay rule enumerated in the Wisconsin Rules of Evidence. *See* majority op., ¶20.

¶67 Wisconsin Stat. § 970.03 governs preliminary examinations. Subsection (5) accords defendants two different rights: to cross-examine witnesses against them and to call witnesses on their behalf.[4]

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[4] "[T]he defendant must have compulsory process to assure the appearance of his witnesses and their relevant evidence." *State v. Schaefer*, 2008 WI 25, ¶35, 308 Wis. 2d 279, 746 N.W.2d 457. The defendant "is by statute given the right to confront witnesses. . . ." *Mitchell v. State*, 84 Wis. 2d 325, 354, 267 N.W.2d 349 (1978).

¶68 Wisconsin Stat. § 970.03(5) reads as follows:

> (5) All witnesses shall be sworn and their testimony reported by a phonographic reporter. The defendant may cross-examine witnesses against the defendant, and may call witnesses on the defendant's own behalf who then are subject to cross-examination.

¶69 When the legislature recently enacted Wis. Stat § 970.038, it left § 970.03(5) unchanged.[5]

¶70 In interpreting multiple statutes, a court interprets them together and harmonizes them to avoid conflict if at all possible.[6] This court attempts to harmonize statutes in a way that will give effect to the legislature's intent in enacting both statutes.[7]

¶71 Additional statutory tools of interpretation aid in interpreting the two statutes at issue in the present cases. Statutes are interpreted to give effect to each word and to avoid redundant and surplus

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[5] 2011 Wisconsin Act 285. *See also* Drafting File for 2011 S.B. 399, *Analysis by the Legislative Reference Bureau of 2011 S.B. 399*, Legislative Reference Bureau, Madison, Wis. (noting that "hearsay evidence is admissible at a preliminary examination" without any reference to Wis. Stat. § 970.03(5)).

[6] *State v. Ray*, 166 Wis. 2d 855, 873, 481 N.W.2d 288 (Ct. App. 1992) (citing *State v. Duffy*, 54 Wis. 2d 61, 64, 194 N.W.2d 624 (1972)).

[7] *City of Madison v. DWD, Equal Rights Div.*, 2003 WI 76, ¶11, 262 Wis. 2d 652, 664 N.W.2d 584; *Byers v. LIRC*, 208 Wis. 2d 388, 395, 561 N.W.2d 678 (1997); *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995).

language.[8] Moreover, words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose.[9] Statutes are interpreted in view of their purpose.[10]

¶72 The purpose of preliminary examinations under Wis. Stat. § 970.03 is to "protect[ ] defendants

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[8] *See*, *e.g.*, *Klemm v. Am. Transmission Co.*, 2011 WI 37, ¶18, 333 Wis. 2d 580, 798 N.W.2d 223; *Pawlowski v. Am. Family Mut. Ins. Co.*, 2009 WI 105, ¶22 n.14, 322 Wis. 2d 21, 777 N.W.2d 67 (citing *Donaldson v. State*, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980) ("A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect.")).

[9] *Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶10, 232 Wis. 2d 587, 605 N.W.2d 515; *Seider v. O'Connell*, 2000 WI 76, ¶32, 236 Wis. 2d 211, 612 N.W.2d 659; *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶¶15, 18, 32, 293 Wis. 2d 123, 717 N.W.2d 258.

[10] *State v. Hanson*, 2012 WI 4, ¶16, 338 Wis. 2d 243, 255, 808 N.W.2d 390, 396 ("Context and [statutory] purpose are important in discerning the plain meaning of a statute. We favor an interpretation that fulfills the statute's purpose.") (internal quotation marks & citations omitted); *Klemm*, 333 Wis. 2d 580, ¶18 ("An interpretation that fulfills the purpose of the statute is favored over one that undermines the purpose."); *Lagerstrom v. Myrtle Werth Hosp.-Mayo Health System*, 2005 WI 124, ¶51, 285 Wis. 2d 1, 700 N.W.2d 201 (examining "legislative goals" to interpret a statute); *Alberte*, 232 Wis. 2d 587, ¶10 (courts need not adopt a literal or usual meaning of a word when acceptance of that meaning would thwart the obvious purpose of the statute); *United Wis. Ins. Co. v. LIRC*, 229 Wis. 2d 416, 425-26, 600 N.W.2d 186 (Ct. App. 1999) ("Fundamental to an analysis of any statutory interpretation is the ascertainment and advancement of the legislative purpose.").

and the public from unwarranted prosecution," and to function "as a check on prosecutorial discretion." Majority op., ¶21.[11]

¶73 Thus, the new statute allowing hearsay evidence at the preliminary examination, Wis. Stat. § 970.038, must be read to meet the statutory purpose of protecting defendants and the public from unwarranted prosecutions and to give continued vitality to Wis. Stat. § 970.03(5). Section 970.03(5), which grants rights to defendants, is not to be treated as surplusage.

¶74 I agree with the majority opinion that the State is not required under either statute to call witnesses just so a defendant may cross-examine them. Majority op., ¶33.[12]

¶75 I also agree with the majority opinion that the recent enactment of Wis. Stat. § 970.038 does not limit a defendant's ability under § 973.03(5) to call witnesses at the preliminary examination. Majority op., ¶34. A defendant's right to call witnesses is subject to the limits placed upon the trial right to call

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[11] A preliminary examination exists "to protect the accused from hasty, improvident, or malicious prosecution and to discover whether there is a substantial basis for bringing the prosecution and further denying the accused his right to liberty." *State v. Kleser*, 2010 WI 88, ¶55, 328 Wis. 2d 42, 786 N.W.2d 144 (internal quotation marks omitted).

[12] *See State v. Oliver*, 161 Wis. 2d 140, 148-49 467 N.W.2d 211 (Ct. App. 1991); *State v. Padilla*, 110 Wis. 2d 414, 424, 329 N.W.2d 263 (Ct. App. 1982).

witnesses and is constrained by the limited purpose of the preliminary examination.

¶76 The preliminary examination has a narrow focus.[13] Probable cause that a felony was committed, probable cause that the defendant committed the felony, and plausibility are the sole issues at a preliminary examination. Defense counsel is therefore limited to present evidence[14] at the preliminary examination relevant to probable cause and plausibility (not credibility).[15]

¶77 At some point, plausibility and credibility elide. "[T]he line between plausibility and credibility may be fine; the distinction is one of degree."[16]

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[13] *Schaefer*, 308 Wis. 2d 279, ¶34. "[I]ts purpose is merely to determine whether there is sufficient evidence that charges against a defendant should go forward."

[14] "[T]he defense right to call witnesses is subject . . . to a broad discretion of the magistrate to restrict preliminary hearing presentations *in accordance with the limited purposes of that hearing*." 4 Wayne R. LaFave et al., *Criminal Procedure* § 14.4(d), at 359 (3d ed. 2007) (emphasis added).

[15] A defendant "may call witnesses to rebut the plausibility of a witness's story and the probability that a felony was committed. In this regard, the defendant must have compulsory process to assure the appearance of his witnesses and their relevant evidence." *Schaefer*, 308 Wis. 2d 279, ¶35 (citation omitted).

[16] *State v. Dunn*, 121 Wis. 2d 389, 397, 359 N.W.2d 151 (1984); *see also County of Jefferson v. Renz*, 231 Wis. 2d 293, 322, 603 N.W.2d 541 (1999) (citing *Dunn*).

¶78 In *O'Brien*, defense counsel asserted that the defendants wanted to call the hearsay declarant, S.M.O., to test the plausibility of the hearsay statements admitted through the officer's testimony:

> [DEFENSE COUNSEL]:. . . .
>
> For example, one of the allegations in this case is that, um, [the victim hearsay declarant] states that he was hit by his father with a flashlight. What if the rest of the part of that story was . . . his father sprouted wings and flew around the room like a bat and then hit him with a flashlight? The whole story would sound absolutely incredible, unbelievable, and implausible.

¶79 The majority opinion criticizes defense counsel's proffer regarding the relevance of the witnesses the defendant wishes to call. The majority opinion declares that "[a]bsent any idea what S.M.O. would testify to, counsel's proffer was insufficient to show that S.M.O.'s testimony would be relevant to the probable cause inquiry." [17]

¶80 Such a proffer, however, will often be limited. Defense counsel rarely knows at the preliminary examination exactly what a witness (who will testify for the State at trial) will say before the witness takes the stand. When a defendant has no way of knowing exactly what a witness knows or will testify to at the preliminary examination, the law

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[17] Majority op., ¶38.

does not place a significant burden on the defendant to demonstrate relevance.[18] Tools of discovery are limited in pretrial criminal proceedings.[19]

¶81 Considering these difficulties, I would not hold the bar for the proffer as high as the majority opinion does. The proffer here is weak. Nonetheless, the majority opinion's requiring a specific proffer of

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[18] For example, when defendants seek *in camera* review to determine whether disclosure of a confidential informant's identity is appropriate, this court has stated that the burden on the defendant is "not significant" and that "[t]he showing need only be one of a possibility that the informer could supply testimony necessary to a fair determination." *See State v. Green*, 2002 WI 68, ¶24 n.7, 253 Wis. 2d 356, 646 N.W.2d 298 (quoting *State v. Outlaw*, 108 Wis. 2d 112, 125, 321 N.W.2d 145 (1982)).

Similarly, if a defendant seeks to admit evidence in connection with a defense theory, the threshold for admitting such evidence is low, even if the theory itself is "thoroughly discredited." *See State v. Head*, 2002 WI 99, ¶115, 255 Wis. 2d 194, 648 N.W.2d 413 ("[I]f, before trial, the defendant proffers 'some' evidence to support her defense theory and if that evidence, viewed most favorably to her, would allow a jury to conclude that her theory was not disproved beyond a reasonable doubt, the factual basis for her defense theory has been satisfied.").

[19] *See State v. Bowser*, 2009 WI App 114, ¶21, 321 Wis. 2d 221, 772 N.W.2d 666 (noting that despite the broad right to pretrial discovery granted by Wis. Stat. § 971.23(1), "the right to pretrial discovery is tempered by the circuit court's discretion under Wis. Stat. § 971.23(6) to deny, restrict, defer, 'or make other appropriate orders' concerning discovery upon a showing of good cause"); *see also Schaefer*, 308 Wis. 2d 279, ¶77 n.17 ("In Wisconsin, criminal 'discovery' is not entirely the parties' procedure because the scope of discoverable materials is set out in statute and compliance with the statute will be enforced by the court.").

exactly how a witness will specifically rebut a prosecution claim undermines the preliminary examination's purpose of putting the State to its burden and undermines the statutory rights accorded by Wis. Stat. § 970.03(5).

¶82 Under the majority opinion's holding, and with the limited tools of criminal discovery available in pretrial proceedings, how can a defendant ever challenge double or triple hearsay in a police report read by an individual who has never interviewed the hearsay declarant? Does a wrongly accused person, under the majority opinion's reasoning, have any opportunity short of a trial to challenge the plausibility of the State's case?

¶83 I conclude that under the circumstances of *O'Brien*, the offer of proof, although admittedly weak, sufficed to allow the defendant to call the declarant. Of course, the State has the right to object to and argue against the admissibility of any portion of the testimony of witnesses called by the defendant if the testimony is not relevant to plausibility and probable cause.

¶84 If preliminary examinations are to serve as effective roadblocks to frivolous and fraudulent prosecutions, and if they are truly to be a "critical stage" of trial, the preliminary examination cannot be reduced to a farce, in which a defendant has no ability to challenge or rebut the narrative advanced by the State's proffered double and triple hearsay testimony.

¶85 Other states' approaches to this issue are instructive. Colorado has a rule identical to Wis. Stat. § 970.03(5); it does not have a rule identical to § 970.038, but Colorado allows the use of hearsay evidence at the preliminary examination.

¶86 The Colorado Supreme Court determined that it was abuse of discretion for the trial court to prohibit a defendant from calling a prosecution hearsay declarant as a witness, when the witness was available and the probable cause determination rested entirely on the witness's identification and story. *See McDonald v. District Court*, 576 P.2d 169 (Colo. 1978).[20]

¶87 California has provisions similar to the two Wisconsin statutes at issue in the instant cases. Interpreting the California law, a California court declared that the trial court did not err in allowing a defendant to call hearsay declarants as defense witnesses.[21]

¶88 In cases such as the instant cases, in which the prosecution relies on double or triple hearsay for which the defendants' cross-examination of the State's witnesses is meaningless, the plausibility of

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[20] *See also Rex v. Sullivan*, 575 P.2d 408, 411 (Colo. 1978) (holding that "the judge cannot completely curtail cross-examination on testimony vital to the issue of probable cause . . . by refusing to allow the defense counsel to probe the strength of the eyewitness identifications on cross-examination of the [witness]").

[21] *People v. Erwin*, 20 Cal. App. 4th 1542, 1551 (1993).

the State's case cannot be tested without allowing the defendant to call witnesses – either the hearsay declarant or an individual with personal knowledge of the hearsay statement.

¶89 In the instant cases, the State's witnesses were presenting single, double, and triple hearsay. In *O'Brien*, the sole witness of the prosecution, a police investigator, testified to hearsay statements of declarants she personally interviewed but also testified to statements made by declarants to a third party while the investigator was in the room, as well as videotaped hearsay statements made by declarants to an [sic] third party.

¶90 In the *Butts* case, the preliminary examination never took place. The complaint contained statements from multiple hearsay declarants made either in writing or to different police officers. The State averred in Butts that it intended to call a police officer to read the hearsay statements given to the officer by the hearsay declarants. In short, the plausibility of the hearsay statements could not have been tested without the defendant's ability to call the declarant or others as witnesses.

¶91 By failing to value sufficiently the statutory right of the defendant to compel witnesses in his or her defense, the majority opinion renders Wis. Stat. § 970.03(5) surplusage and undermines the statutory purpose of allowing a defendant to test the plausibility of the prosecution's case.

¶92 The texts, the context, and the statutory purposes of both statutes dictate the conclusion that the defendant has the statutory right to cross-examine witnesses to test the plausibility of their testimony and the statutory right to call witnesses, including hearsay declarants, to challenge the plausibility of the State's evidence.

¶93 Accordingly, I dissent.