STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014 AP 365-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. **Brown County Case No. 2013 CF 165**

DAVID E. HULL.

Defendant-Appellant.

ON APPEAL FROM A NON-FINAL ORDER ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HON. KENDALL M. KELLEY, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. HULL HAS DEMONSTRATED THAT WIS. STAT. § 970.038 CANNOT BE APPLIED TO HIM BECAUSE, AS TO HIM, IT IS AN EX POST FACTO LAW.

To be clear Hull is no longer asserting that Wis. Stat. § 970.038 is unconstitutional - that issue has been determined. Hull merely asserts the statute cannot be applied to him under the facts of this case because the date of the alleged offense was long before the enactment of Wis. Stat. § 970.038, which is a type of law which cannot be given retroactive application.

The state asserts that Hull must show beyond a reasonable doubt that the new statute violates the *ex post facto* clauses. State's Brief at 4. But the case the state cites, *State ex rel Singh v. Kemper,* only states that the defendant:

> ...bears the burden of establishing a violation of the ex post facto clauses of the United States and *Wisconsin Constitutions.*

State ex rel Singh v. Kemper, 2014 WI App 43, ¶ 9, 353 Wis. 2d 520, 846 N.W.2d 820, 2014 Wisc. App. LEXIS 244.

Whether or not Wis. Stat. § 970.038 can be applied to Hull presents a purely legal question which can only be answered by this court, to wit: does the statute fit within the 4th category of *Calder v. Bull?*[1] Simply stated, does the statute receive less or different testimony than the law required before in order to convict Hull? The answer to this question is "yes" because the law does receive less or different testimony than before, and Hull cannot be convicted unless the state first gets a bind-over at the

[1] "4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder v. Bull,* 3 Dall. 386, 390, 3 U.S. 386, 1 L. Ed. 648 (1798)

preliminary hearing:

> If the court does not find probable cause to believe that a crime has been committed by the defendant, it shall order the defendant discharged forthwith.

Wis. Stats. § 970.03(9).

Many preliminary hearings are waived based upon plea agreements made prior to the preliminary hearing. Indeed, prior to the preliminary hearing in this case the state's plea offer was that if Hull waived the preliminary hearing it would dismiss Count 1, which carries a mandatory minimum sentence of 25 years initial incarceration, if Hull would later then plead to Count 2, second degree sexual assault of a child. R. 44 at 12-3.

Obtaining a bind over at a preliminary hearing by a waiver, or by establishing probable cause at an adversarial hearing, is part and parcel of obtaining a felony criminal conviction in Wisconsin. The vast majority of all criminal cases are settled by plea agreement. See Missouri v. Frye, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379, 2012 U.S. LEXIS 2321. As the court noted in *Frye*, we have a system of pleas, not trials. *Id., and State v. O'Brien*, 2014 WI 54, ¶ 64, 2014 Wisc. LEXIS 463 (Abrahamson, Shirley, C.J., *dissenting*). To find that Wis. Stat. § 970.038 has no part in obtaining convictions one must ignore how the criminal justice system in Wisconsin actually works.

Prior to the enactment of Wis. Stat. § 970.038 the rules of evidence in Chapters 901 to 911 applied to preliminary hearings. *O'Brien*, 2014 WI 54, ¶ 20. Under the latter rules hearsay evidence was inadmissible "...unless permitted by rule or statute." *Id.* Under the new rule, passed after the alleged date of the crime in this case, the state is able to obtain a bind over in whole or in part based upon previously inadmissible hearsay evidence. *Id., citing,*

§ 970.038.[2]

Here, if the state ultimately obtains a conviction in this case it will be because it first was able to establish probable cause at the preliminary hearing based upon double hearsay evidence only admissible due to the retroactive application of Wis. Stat. § 970.038 to the facts of this case.

The state asserts this case is like *Hopt v. Utah*, but it is not because Wis. Stat. § 970.038 does alter:

> ... the degree, or lessen the amount or measure, of the proof necessary to conviction when the crime was committed.

Hopt v. People of the Territory of Utah, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262, 1884 U.S. LEXIS 1719, *rejected on other grounds, Illinois v. Allen*, 397 U.S. 337, 342, 90 S. Ct. 1057, 25 L. Ed. 2d 353, 1970 U.S. LEXIS 55, *citing*, *Diaz v. U.S.,* 223 U.S. 442, 458, 32 S. Ct. 250, 56 L. Ed. 500, 1912 U.S. LEXIS 2246.

In *Hopt* the court, for various reasons not pertinent to this case, reversed and remanded the defendant's first degree murder conviction. *Hopt,* 110 U.S. at 583. The court then went on to address other issues present because they were likely to arise at another trial. *Id.* One such issue was whether or not a prison inmate was a competent witness. *Id.* at 587. At the time of homicide in question an

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[2] The state argues in a footnote that although SJH "...perhaps would have had to testify at the hearing before § 970.038 took effect...." there was no categorical requirement that a victim testify in order for the state to obtain a bind over. State's Brief at 10, n.1. Certainly, in some other case, with some other criminal charge(s), under completely different facts, and combined with an infinite number of other variables, a victim might not have had to testify at somebody else's preliminary hearing, but such conjecture has nothing to do with this case.

inmate was not competent to testify as a witness, but this law was repealed "...after the date of the alleged homicide, but prior to trial..." by the passage of a law intended to create one rule in this regard for both civil and criminal trials. *Id.* at 587-88.

The court rejected any argument that the change in the law in question was an *ex post facto* law because:

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

Id. at 589.

The state next relies upon *Thompson v. Missouri*, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204, 1898 U.S. LEXIS 1611. State's Brief at 9. *Thompson* involved the competency of handwriting comparisons which at the time of the alleged commission of the offense were not admissible. The court held that the change in law did not encroach upon "...any of the essential rights belonging to one put on trial for a public offense." *Id. at 388.*

The decision in *Thompson* has been criticized and distinguished in this regard, with a later court writing that:

> Indeed, *Hopt* expressly *distinguished* witness competency laws from those

> laws that "alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." 110 U.S. at 589; see also *id.* at 590 (felon witness law "leaves untouched . . . the amount or degree of proof essential to conviction").

Carmell v. Texas, 529 U.S. 513, 545, 120 S. Ct. 1620, 146 L. Ed. 2d 577, 2000 U.S. LEXIS 3004, *citing Hopt*, 110 U.S. at 589. Thus, it is difficult to see how *Thompson* adds anything to the analysis of the issues in this case.

The *Ex post facto* application of laws involving the 4th category of *Calder v. Bull* has long been disfavored:

> *Calder*'s fourth category addresses this concern precisely. A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof (see *infra*, at 25-28)... All of these legislative changes, in a sense, are mirror images of one another. **In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction.** There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

Carmell v. Texas, 529 U.S. at 532-33 (bold added).

II. IF THE DEFENSE CANNOT CALL A VICTIM AS A WITNESS, AND ALL POSSIBLE QUESTIONS PROFFERED BY THE DEFENSE PERTAIN TO CREDIBILITY, THEN THE PRELIMINARY HEARING IS NOW NOTHING MORE THAN FARCE.

In the second part of its brief the state argues that every question which Hull has posited he would have liked to put to SJH (which the state summarizes at p. 13 of its brief) pertain to credibility. Indeed, the state asserts the proffered questions are "...classic examples of questions challenging credibility..." State's brief at 14. The state cites no authority illustrating or demonstrating the "classic nature" of such questions. The "classic nature" of the proposed questions appears to be nothing more than the writer's opinion that such questions pertain to SJH's credibility. It is easy to assert every question goes **only** to credibility, but more difficult to explain why - other than to assert that it's a "classic example."

The court commissioner below applied a similarly superficial analysis:

> We'll, I think frankly, I think those are all credibility issues. But the one thing that I do see here regarding plausibility is the fact that she's saying she screamed for help and there was somebody else in the room

R. 41 at 28; App. at 146. Yet, questions concerning whether or not she had bruises on her person, a phone, called or sent text messages to someone, was prevented from running out of the room, *et cetera* are of the exact same nature as whether or not she screamed or if anyone heard her scream.

The court commissioner's analysis was superior to the state's in one regard - he was able to think of one

question that a defense lawyer might ask which would pertain to plausibility (even if it somehow also implicates credibility). Here, the state offers no such example. One imagines that any example proffered by the state easily could be argued to pertain to credibility, or discovery, and hence unallowable per the state's argument, and the prior court rulings herein.

In the opinion of the undersigned a "classic example" of a question which goes to credibility is: "Are you a liar?" Or somewhat more elaborately: "Today you say A, B, C, but before you claimed X, Y and Z?"

In fact, the questions which Hull sought to put to SHJ, if he was allowed to subpoena her, are merely questions concerning what happened. The proffered questions only pertain to "credibility" in the sense that the questions are different than the questions put to SJH by the policeman who took her statement. The policemen's questions were not adversarial, yet "...[t]esting the plausibility of the witness's statement still implicates adversarial testing." *O'Brien*, 2014 WI 54, ¶ 53.

Hull's right to subpoena a witness, and cross-examine the witness, is statutory and has been affirmed by the Wisconsin Supreme Court. *O'Brien*, 2014 WI 54, ¶ 34, ¶ 35. See also Wis. Stat. § 970.03. The court emphasized that:

> "[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, 2014 WI 54, ¶ 53, citing, *State v. O'Brien*, 2013 WI App. 97, ¶ 21, 349 Wis. 2d 667, 836 N.W.2d 840, 2013 Wisc. App. LEXIS 586.

For all the foregoing reasons, irrespective of the *ex post facto* issue in this case, the trial court's denial of Hull's motion to dismiss (R. 30, App. at 101) should be reversed.

CONCLUSION

For all the foregoing reasons Hull respectfully requests that this court find that Wis. Stats. § 970.038 cannot be applied to this case. Hull further requests that circuit court's order denying his motion to dismiss the Information be reversed, that the Information be dismissed, and that this matter be remanded with an order granting a new preliminary hearing to be conducted as required by the laws in effect at the time of the alleged commission of the charged crime.

Dated: October 9, 2014.

Respectfully submitted,

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CERTIFICATION ON FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,057 words.

Signed,

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Signed,

_____
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