STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CITY OF EAU CLAIRE,
Plaintiff-Appellant,

v.

Appeal No. 2015AP000869

MELISSA BOOTH,
n/k/a/ MELISSA M. BOOTH BRITTON
Defendant, Respondent.

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF EAU CLAIRE COUNTY CASE NO 2014GF804 THE HONORABLE WILLIAM M. GABLER PRESIDING

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STATEMENT OF THE ISSUES

Does a circuit court lack subject matter jurisdiction to enter an Operating While Intoxicated (OWI) 1st offense civil judgment if a defendant has a prior unknown out-of-state OWI conviction?

Trial Court Answered: Yes.

Is a second criminal operating while intoxicated offense charged as a first civil operating while intoxicated ordinance violation an offense known to law?

Trial Court Answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Respondent believes oral argument is unnecessary in this case. Publication is recommended particularly in light of the 2 recent unpublished yet persuasive conflicting Court of Appeals District IV decisions on these issues in *Lowery* (R-APP. 104) and *Navrestad* (R-APP. 110)

STATEMENT OF THE CASE

The material facts of this case have been stipulated and are not in dispute. In 1992 Ms. Booth Britton was convicted of a civil 1st offense OWI in Eau Claire Circuit Court. The Eau Claire City Attorneys' office prosecuted the case. Ms. Booth Britton had been previously convicted of an OWI in Minnesota on April 28, 1990.

On November 13, 2014 she filed a Motion to Vacate her 1992 Eau Claire 1st offense OWI civil judgment pursuant to Wis. Stat. § 806.07(1)(d). This as under Wisconsin law the 1990 Minnesota conviction should have been counted as a prior OWI offense but was not.

The Eau Claire County Circuit Court had already destroyed its records for 1992, but Ms. Britton Booth provided a certified copy of her DMV record along with a certified copy of the original citation from the Wisconsin Department of Transportation which included the date of initial appearance and the date of conviction.

The City opposed the Motion to Vacate arguing waiver and laches under court competency doctrine. Ultimately on April 8, 2015 the Eau Claire Circuit Court granted Ms. Booth Britton's Motion to Vacate the 1992 conviction. The

City of Eau Claire then filed a Notice of Appeal on April 28, 2015. On June 15, 2015 the City filed its Brief of Plaintiff-Appellant with the Wisconsin Court of Appeals District III appealing this ruling and asking that the Circuit Court decision be reversed.

STANDARD OF REVIEW

"[W]hen the facts are not in dispute, whether a judgment is void for lack of jurisdiction is a question of law subject to de novo review." *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN VACATING DEFENDANT BRITTON BOOTH'S 1992 OPERATING WHILE INTOXICATED CONVICTION

The Eau Claire Circuit Court correctly ruled that Ms. Booth Britton is entitled to have her 1992 OWI conviction vacated pursuant to Wis. Stat. § 806.07(1)(d) as the judgment is void. R16 at 3; Defendant-Respondent Appendix, [hereinafter R-APP.] at 103.

The City Attorney's office did not include her prior Minnesota OWI conviction when charging her in 1992 thus she was incorrectly charged civilly for a 1st OWI forfeiture

when she should have been charged criminally for a second offense OWI.

a. The trial court properly relied on *Walworth County v. Rohner*

In doing so Judge Gabler of the Eau Claire Circuit Court relied partly on *Walworth County v Rohner,* 108 Wis. 2d 713, 324 N.W.2d 282 (1982) in which the Wisconsin Supreme Court overturned the trial court and court of appeals decisions which declined to dismiss a second offense OWI improperly charged as a first offense. R-APP. 102, 103.

In *Rohner* the defendant was arrested and issued a citation for drunk driving under the Walworth county ordinance. He had already been convicted of the same offense at the time of issuance and when the case came to trial in 1981 he moved to have the case dismissed arguing the court lacked subject matter jurisdiction to hear a second offense criminal OWI charged as a first offense. *Rohner,* 108 Wis. 2d at 715.

The trial court denied the motion and the defendant pled guilty whereupon the verdict was stayed pending appeal. The Court of Appeals affirmed but the Supreme Court reversed. *Rohner,* 108 Wis. 2d at 716.

In vacating the judgment the Wisconsin Supreme Court stated, "the legislative goal of providing uniform traffic enforcement would be subverted if local governments were allowed to punish second offenders with first offense penalties." *Rohner*, 108 Wis. 2d at 721. "...the trial court was therefore without jurisdiction to proceed under the county ordinance because such a local traffic regulation can have no application to a second or subsequent offense for drunk driving within 5 years." *Rohner*, 108 Wis. 2d at 722.

In making this ruling the Supreme Court pointed out that the statutory language and legislative history don't consider this optional - they find that it is a *required* interpretation of courts: "…§ 346.65(2)(a) …used the mandatory word "shall" in providing the escalating penalties for drunk driving. The use of the word "shall" in the statute has been construed by this court as requiring that criminal penalties be imposed for a second offense. *Rohner*, 108 Wis. 2d at 717 citing *State v Banks*, 105 Wis. 2d at 39.

It went on to state "If the legislature had intended that the imposition of criminal penalties be discretionary it would have used permissive rather than mandatory

language… Because in Wisconsin only the state has the power to enact and prosecute crimes and criminal penalties are required, the trial court was without jurisdiction to try the defendant under the Walworth county ordinance." *Rohner*, 108 Wis. 2d at 718.

This case clearly controls the outcome for the current case. Similar to Rohner, Booth Britton was incorrectly charged with a first offense civil ordinance violation in 1992 though she had already been convicted of a Minnesota OWI in 1990. The City's current efforts to distinguish *Rohner* from *Booth Britton* in any significant way must fail:

They claim that given the original *Rohner* court was not presented with competency arguments said case is distinguishable. Brief of Plaintiff-Appellant City of Eau Claire, June 15, 2015 [hereinafter Appellant Brief] at 14.

Their claim regarding awareness of arguments on competency appears to be based on the fact *Mikrut* was not decided and published until 2004. *Village of Trempealeau v. Mike R. Mikrut*, 273 Wis. 2d 76, 681 N.W.2d 190 (2004)

However the actual Rohner briefs submitted may have possibly touched on these issues but it not discussed in the decision. But that is unverifiable as the State Law

Librarian has stated the only brief currently available in Archives relating to *Rohner* is the Friend of the Court Brief submitted by then Attorney General Bronson C. La Follette and said brief admittedly does not directly use the word 'competency.' R-APP. 122.

There is value to reviewing briefs the court did to determine and enlighten much the way legislative history provides direction. But sua sponte options of the court as well as the impracticality of striking down stare decisis based on whether an unpublished brief years ago pursued various angles of argument make this argument specious.

The City of Eau Claire also argues that *Rohner* did not involve an unknown out-of-state prior OWI offense, nor did it involve an offense that could not be retried. Appellant Brief at 16. Both of these arguments for distinction must also fail. Caselaw clearly points out that a Minnesota prior conviction must be counted in the same manner as a Wisconsin conviction.

To wit, under Wis. Stat. § 343.307 (2013-2014) prior offenses for other states are to be counted in determining the correct charge for the current OWI alleged offense in

Wisconsin. The portion of said statute pertaining to counting convictions in other states is (1)(d):

> § 343.307 Prior convictions, suspensions or revocations to be counted as offenses. (1) The court shall count the following to determine the length of a revocation under § 343.30 (1q) (b) and to determine the penalty under §§ 114.09 (2) and 346.65 (2): … (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.
>
> § 343.307 (1991-92)(1) The court shall count the following …to determine the penalty under § 345.54(2)…(1)(d): Convictions under the law of another jurisdiction that prohibits refusal of chemical testing or use of a motor vehicle while intoxicated or under the influence of a controlled substance, or a combination thereof, or with an excess or specified range of alcohol concentration, or under the influence of any drug to a degree that renders the person incapable of safely driving, as those or substantially similar terms are used in that jurisdiction's laws.

This statute was revised in 1991 and caselaw adapted accordingly. In 1987 there was a Court of Appeals opinion that stated under this statute, Wis. Stat. § 343.307 (1987-88), in *State v. Mattson*, 140 Wis. 2d 24, 28-29, 409 N.W.2d 138, 140-41 (Ct. App. 1987) Minnesota OWI's were not to be counted in Wisconsin. But in 1991 § 343.307 was amended and since then Minnesota convictions are applicable under

this statute and subsequent years as the new statute only requires other state statutes to prohibit the use of a motor vehicle while intoxicated to be included. *State v White*, 177 Wis. 2d 121, 126, 501 N.W.2d 463 (Ct. App. 1993).

Wisconsin law is clear that they do have an obligation. *Clark County v Rex Potts*[1], 2013 Wisc. App. 2013 WI App 55, 347 Wis. 2d 551, 830 N.W.2d 723 (Wis. Ct. App. 2013)(unpublished opinion) R-APP. 117-121. In 2012 Potts moved to have his Wisconsin 1996 first offense OWI conviction vacated because it failed to account for 2 prior OWI charges in Massachusetts in 1989 and 1993. *Potts* at ¶ 3; R-APP. 118. The trial court upheld the conviction stating under Wis. Stat. § 806.07(2) the motion should have been brought within a reasonable time but it was not. *Potts* at ¶ 4; R-APP. 118. In upholding the decision the trial court stated that Potts 'should not be allowed to benefit from his delay'- but the Court of Appeals rejected this and reversed their ruling quoting the Wisconsin Supreme Court:

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[1] This opinion will not be published. *See* Wis. Stat. § 809.23(1)(b)4. This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

"a motion for relief from a void judgment may be brought at any time, regardless whether the moving party has been dilatory or lackadaisical in his efforts to overturn the judgment." *Neylan v Vorwald*, 124 Wis.3d 85, 97, 368 N.W.2d 638 (1985). *Potts* at ¶ 6; R-APP. 119. Moreover "the circuit court was strictly bound by the decision of the Wisconsin Supreme Court, "regardless of the extent of [its] agreement, or [its] disagreement, with it. *Professional Office Bldgs, Inc. v Royal Indem Co*, 15 Wis. 2d 573, 580-81, 427 N.W.2d 427 (Ct. App. 1988). *Potts* at ¶ 6 fn 2; R-APP. 119. A void judgment is legally invalid and therefore the statutory time limitations do not apply as they only apply to legally valid judgments. *Neylan* at 99. *Potts* at ¶ 6 fn 2; R-APP. 119. Wisconsin courts have maintained this precedent even if a significant amount of time has gone by since judgment and one of the priors is from another state. [No time deadline: *Kohler Co. v. DILHR*, 81 Wis. 2d 11, 25, 259 N.W.2d 695 (1997): "a challenge to a court's subject matter jurisdiction may be brought at any time). *State of Wisconsin v. Randall E. Banks*, 105 Wis. 2d 32 43, 313 N.W.2d 67 (1981) *Neylan v. Vorwald*, 124 Wis. 2d 85, 97 368 N.W.2d 648 (1985) citing *Halbach*: "the court stated when they vacated the void judgment that laches did not apply even if the plaintiff had been dilatory or

lackadaisical in his efforts to overturn the judgment." *Halbach v. Halbach*, 259 Wis. 329, 331, 48 N.W.2d 617 (1951) "'reasonable time' limitation in Wis. Stat. § 806.07(2) does not apply to Motions to vacate void judgments under Wis. Stat. § 806.07(1)(d)." *Village of Trempealeau v. Mike Mikrut*, 273 Wis. 2d 76, 99 681 N.W.2d 190 (2004) citing *Vorwald* at 100].

The Court of Appeals then went on to address the merits of the case finding *Rohner* controlling it also held the government accountable for discovering Potts' Massachusetts charges stating that even if Potts had deliberately failed to disclose the violations they should have been able to discover them on their own and calculate them in their 1996 charging decision. *Potts* at ¶ 12; R-APP. 120. In doing so it cited *State v White*, 177 Wis. 2d 121, 126, 501 N.W.2d 463 (Ct. App. 1993) and State v. Puchacz, 2010 WI App 30, ¶ 30, 323 Wis. 2d 741, 780 N.W.2d 536 then stated "Wisconsin even counts prior offenses committed in states with OWI statutes that differ significantly from our own." *Potts* at ¶ 11; R-APP. 120. They also noted that there is no good faith exception to the general rule that a defendant is entitled to relief from a void judgment and point out that the County cites no

legal authority to support the suggestion that one exists. *Potts* at ¶ 13; R-APP. 120. So they reversed the judgment.

Ms. Booth Britton's prior OWI conviction at issue in this case was in Minnesota. Whether she did or did not disclose to the City Attorney's office her Minnesota conviction makes no difference, the government had a duty to discover it on their own and they did not. Nor do they cite any caselaw supporting the existence of an exception to preclude Ms. Booth Britton's claim because of it. And Wisconsin courts have already discussed Minnesota law with respect to its similarity to the Wisconsin OWI statute as seen in *State v Van Riper* when the Court of Appeals noted that Minnesota OWI laws are substantially similar to Wisconsin's OWI laws. *State v. Van Riper*, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156.

In *Van Riper*, Defendant challenged the admission of the DOT certified drivers record as it included a Minnesota OWI conviction but the Court stated: "That one of Van Riper's convictions occurred in Minnesota does not change our decision. The Minnesota laws governing drunk driving were substantially similar to Wisconsin's OWI laws."[2] "..

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the trial court could reasonably conclude that the Minnesota laws governing drunk driving were substantially similar to Wisconsin's OWI laws."[3] *Van Riper*, 267 Wis. 2d at 770. And though it is too late to pursue a do-over to correct the City's error, policy reasons for vacating a void judgment are stronger than the limited affect this would have on overall Wisconsin prosecution and drunk driving policy. In fact, it may merely strengthen the resolve and knowledge of government officials around the state to ensure that next time they get it right or at the very least are clear on expectations.

II. HEAD-ON BATTLE AT THE COURT OF APPEALS DISTRICT IV

a. *City of Stevens Point v. Lowery*

Just prior to Judge Gabler's *Booth Britton* ruling and considered and cited by him in his opinion (R16 at 2, 3; R-APP. 102, 103) Judge Higginbotham of the Wisconsin Court of Appeals District IV issued an unpublished yet persuasive opinion that followed *Rohner*, distinguished *Mikrut* and remanded this similar case with directions to vacate the

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2010 judgment of conviction for first-offense OWI under Portage County's ordinance because the instant offense was factually a third offense and only the State could prosecute crimes. *City of Stevens Point v. Lowery*, 2014 AP 742, unpublished slip op.(WI App Feb. 5, 2015) R-APP. 104-109.

Lowery argued 3 years after his conviction in his motion to vacate that his two prior convictions counted as prior offenses under Wis. Stat. § 343.307 and that the City had lacked jurisdiction to prosecute his third OWI as a city ordinance violation. *Lowery* at 2, ¶ 3; R-APP. 105. In doing so he relied on *Rohner* and the Court of Appeals agreed with his analysis. *Lowery* at 2-3, 6, ¶¶ 3, 14; R-APP. 106, 109. The City argued the trial court ruling denying the motion to be vacated should be upheld because *Rohner's* holding was modified by the supreme court's ruling in *Mikrut*. *Lowery* at 5, ¶ 10; R-APP. 108. The City it appears, believes *Mikrut* stands for the proposition that courts hence forth are always to have jurisdiction over everything therefore a finding of lack of jurisdiction would be an impossibility. And that while admittedly prior to the *Mikrut* decision a case such as *Lowery* would fit squarely under a 'lack of jurisdiction' argument - it now

was subject instead to a competency test which is subject to time limitations, thus disqualifying it forever from being vacated as void under § 806.07(1)(d).

But the *Lowery* court rejected their analysis finding their reliance on *Mikrut* 'misplaced.' *Lowery* at 5, ¶ 12; R-APP. 108. Deciding that the crucial distinction is "In *Mikrut*, the supreme court addressed a circuit court's noncompliance with statutory requirements pertaining to the invocation of its subject matter jurisdiction over cases validly before it….Here however, the City's charge of first offense OWI was never valid under *Rohner*, and thus this case was never validly before the circuit court in the first instance." *Lowery* at 5-6, ¶ 12; R-APP. 108-109.

Further it rejected the City's argument that Lowery had forfeited his right to raise an objection as competency challenges are subject to time limits and waiver. In doing so the court stated that the original court never had competency as it never had subject matter jurisdiction and "objections to a court's subject matter jurisdiction may be brought at any time." *Lowery* at 6, ¶ 13; R-APP. 109.

b. State of Wisconsin v. John N. Navrestad

This Opinion directly conflicts with a July 2015 Court of Appeals District IV unpublished yet persuasive ruling by Judge J. David Rice. *State of Wisconsin v. John N. Navrestad*, No. 2014 AP 2273, unpublished slip op. (WI App July 2, 2015) R-APP. 110-116.

Indeed, Judge Rice states this in his Opinion: "I acknowledge that my analysis directly contradicts the analysis in the unpublished *Lowery* decision." *Navrestad* at 5, ¶ 11; R-APP. 114.

The facts are very similar to the case at hand in *Booth Britton*. Navrestad was prosecuted in 1992 in Monroe County and convicted of a first offense OWI ordinance violation though he had a prior countable offense. *Navrestad* at 2, ¶ 2; R-APP. 111. Thus the charge and conviction were incorrect which both Navrestad and the State agreed. But Navrestad argued the error was one of lack of subject matter jurisdiction under *Rohner*, thus there were no time limits to vacate the void judgment under Wis. Stat. § 806.07(1)(d).

The state argued that *Mikrut* limited *Rohner* by saying that "a circuit court is never without subject matter jurisdiction." *Navrestad* at 4, ¶ 8; R-APP. 113 citing *Mikrut*. And the *Navrestad* court agreed finding that though *Mikrut* did not expressly overrule *Rohner* its "pronouncement that a circuit court is 'never without subject matter jurisdiction' is categorical and conflicts with the part of *Rohner* that matters here." *Navrestad* at 4, ¶ 8; R-APP. 113. Given that *Mikrut* was decided by the Wisconsin Supreme Court in 2004 and the *Rohner* decision was decided by the Supreme Court in 1982, the *Navrestad* court stated it had to follow the more recent decision on the issue and find that there was no subject matter jurisdiction problem presented by Navrestad's 1992 conviction. *Naverstad* at 4, ¶ 8; R-APP. 113. In doing so it considered *Bush* which was decided by the Wisconsin Supreme Court in 2005 a year after *Mikrut*, but concluded that it did not overrule *Mikrut* on this point, and instead more narrowly carved out an exception to *Mikrut* in 'the context of facial constitutional challenges…'. *Naverstad* at 5, ¶ 10; R-APP. 114.

Where the court makes its crucial error is when it continues by citing the *Bush* court "If a complaint fails to state an offense known at law, no matter civil or criminal

is before the court, resulting in the court being without jurisdiction in the first instance." And responding "But…a first offense intoxicated driving ordinance violation is an offense known to law. For that matter, in my view there can be no doubt that circuit courts generally have subject matter jurisdiction over all intoxicated driving offenses. Thus I fail to see how *Bush* supports Navrestad's argument." *Navrestad* at 5, ¶ 10; R-APP 14.

We too agree that a first offense intoxicated driving ordinance violation is an offense known at law. And if there were some bond schedule required to be kept that was not and the defendant was required to post a bond and had no prior OWI convictions we agree the matter would entail court competency principles.

Nonetheless we assert that a second offense criminal OWI charged as a first offense civil OWI is not an offense known at law. Taken to the extreme by analogy for example purposes: does a judge have the jurisdiction to hear the complaint of someone being treated as a slave[4]: Yes. Does

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[4]Wis. Const. art. I § 2 prohibits slavery, treating a person as an it, so a contrary ruling would always be subject to a motion to vacate. And clearly it is distinguishable in some respects, from *Booth Britton* but it is used for example purposes to easily demonstrate this reasoning as there are no doubt hundreds of possible unconsidered

the judge have the jurisdiction to hear the complaint of someone wanting to try a person as a slave? No.

But yet the Judge has general jurisdiction over people just like a judge can have jurisdiction over OWIs.

What are we losing if we refuse to grant jurisdiction to the latter? Are we in some way turning our back on the person another seeks to try as a slave? Or would allowing jurisdiction in some way validate the label? And does a mischarged criminal OWI treated merely as a competency issue open the door to taking a bite of the proverbial apple of "oh its so close if we could just move it over a tiny bit" which is in some respects an inch away and in another respect a vast canyon. "The concept of competency has been characterized as a "narrower concept" involving "lesser power" than subject matter jurisdiction." *Mikrut* at 89 citing *Village of Shorewood v. Steinberg* at 200. Thus the court should carefully consider whether limiting subject matter jurisdiction in this case in some way diminishes the value of human rights. Are they walking

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unnamed scenarios on a continuum between art. I and the *Booth Britton* scenario that may qualify for future reconsideration under § 806.07(1)(d) but be negatively affected if the Court boldly announces henceforth one matter incorrectly charged as another is subject to future challenges based only on competency law and thus subject to waivers and time limits.

away because of the unsympathetic nature of the circumstances?[5]

In today's politically correct society it is easy to forget that slavery and the holocaust and women's suffrage were within 70-150 short years and still today gays are fighting for their rights to get married. And it is hard to conceive that the insidious venom of past and present prejudices could seep into charging and conviction decisions so disguised as to be able to avoid prosecutorial or judicial misconduct charges in a veneered judicial system such that we would need an open ended time line to challenge such decisions discovered way past competency deadlines. Or at least the hammer of threat to discourage would be violators from taking advantage or conducting sloppy quick work.

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[5] See Wikipedia, https://en.wikipedia.org/wiki/The_Fall (Albert_Camus_novel)(as of July 12, 2015 CST 10:56 PM) Synopsis: ALBERT CAMUS, THE FALL, 25, Vintage Books (1956): Late one night, Clamence comes across a woman leaning over the edge of the bridge. He hesitates for a moment, thinking the sight strange at such an hour and given the barrenness of the streets, but continues on his way. He had only walked a short distance when he heard the distinct sound of a body hitting the water. Clamence stops walking, but does nothing. The sound of screaming was repeated several times, [as it went] I have forgotten what I thought then. "Too late, too far..." or something of the sort. I was still listening as I stood motionless. Then, slowly, in the rain, I went away. I told no one."

It is hard to imagine that in places in the world there are still primitive tribes with no advancement or technology. And it is hard to imagine that even in the United States there are similarly situated people to a certain degree in some shape or form. Such that a ruling of this nature could be misinterpreted by analogy.

And putting aside for the moment the concession that a constitutional amendment or international treaty or federal intercession might circumvent future civil war type competency rulings[6] to prevent this absolute bar of readdressing said rulings - wouldn't it be ideal to have immediate redress available without having to resort to other measures?[7] And given the constitutional slavery prohibition, could it be argued that the *Booth Britton* situation of charging a crime as a civil infraction is more aptly falling under this provision, albeit admittedly

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[6] Which if it did occur would less likely be slavery in its old form but more, given the rapid unfettered progress of technology, along the lines of a person combined with computer chips and technology to create a class of 'hybrids' that may or may not be the ones over or under people.

Seamus Heaney, The Cure at Troy, 2 (Noonday Press) 1991: "History says, Don't hope On this side of the grave, But then, once in a lifetime The longed-for tidal wave Of justice can rise up, And hope and history rhyme."

perhaps at the other end of the continuum, than under *Mikrut* competency analogies to "possible though unproven civil ordinance violations" that could clearly be charged if prerequisites are met? There is no prerequisite that would allow Booth Britton if satisfied to be charged with a first offense civil forfeiture OWI if she has prior OWI convictions within the statutory timeframe.

And as Judge Rice acknowledges by his use of *Mikrut* to knock out the *Navrestad* claim – the facts in *Mikrut* have "nothing to do with intoxicated driving offenses…" *Navrestad* at 4, ¶ 7; R-APP. 13. Thus it is important to cautiously consider the ramifications of deciding a criminal offense charged as a civil offense is one in the same as a civil ordinance violation as contemplated by Article VII, Section 8 of the Wisconsin Constitution.

II. ARTICLE VII SECTION 8 OF THE WISCONSIN CONSTITUTION

Article VII SECTION 8 of the Wisconsin Constitution reads:[Circuit court: jurisdiction.] Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction in the circuit as the

legislature may prescribe by law. The circuit court may issue all writs necessary in aid of its jurisdiction.

Much of the caselaw citing this provision of the Wisconsin Constitution seems to drop the phrase 'Except as otherwise provided by law' and 'in all matters civil and criminal' but interestingly all these cases acknowledge the Wisconsin Constitution is controlling.

For instance, in Judge Gabler's Opinion he concurs though not by case name with *Navrestad's* interpretation of the Supreme Court's statement in *Mikrut* by noting "…it is true that Wisconsin circuit courts have subject matter jurisdiction over absolutely everything…" he then diverges from the *Navrestad* court and goes on to add the qualifier that "a circuit court's jurisdiction still has to be properly invoked in each and every case." R16 at 2; R-APP. 2.

It may just be a matter of semantics that is confusing as many courts seem to: 1) concede that the Wisconsin Constitution is controlling;

2) then quote the Article VII Section 8 of the Wisconsin Constitution without the phrases 'Except as otherwise provided by law' and 'in all matters civil and criminal'

3) state that Article VII means courts are never without subject matter jurisdiction

4) then state that a particular court is without subject matter jurisdiction because it was not properly invoked.

4 seems to contradict with 3. But it may be easier to state it that way then state "In theory courts have subject matter jurisdiction over everything but first you need to show that it is a recognized civil or criminal matter that has not been limited by law."

Do the phrases 'Except as otherwise provided by law' and 'in all matters civil and criminal' act as limiters to the Constitutional subject matter jurisdiction authority granted to courts or did the framers of the constitution merely add the words as window dressing to an intended granting of absolute jurisdiction? Back to the slavery analogy - we would argue that moving a person to an 'it' is the far end of a spectrum to considering a civil ordinance violation the same as a criminal charge.

The City may argue it would clearly be banned as the court is not competent to hear the case. And we would assume this would be across the board throughout the country. But do we not still lose something by granting it subject matter jurisdiction and in theory banning possible

challenges to an incorrect ruling due to time limits? Thus validating slavery so to speak in the interest of judicial efficiency. There are certain matters that should never be allowed to be validated via laches and charging an apple as an orange with no possible way of transforming the apple into an orange is one of them.

The *Booth Britton* trial court did not lose competency to exercise its jurisdiction because it was never validly before the court. A criminal second offense OWI charged as a civil first offense forfeiture is not a valid charge and judgments based on an invalid charge can be voided at any time. An invalid charge is vastly different from an incorrect charge. Wisconsin Stat. § 806.07(1)(d) provides: Relief from judgment or order. (1) On motion and upon such terms as are just the court, subject to subs. (2) and (3) may relieve a party or legal representative from a judgment order or stipulation for the following reasons…(d) The judgment is void.

Subject matter jurisdiction was conferred upon a trial court by Wis. Stat. art. VII § 8 and not by an act of legislature. As such a subject matter jurisdiction analysis is the correct one and no time limits exist to challenge it. Therefore subsection 2 of § 806.07(1)(d)

requiring that a motion be made within "a reasonable time" is inapplicable to this case because a void judgment does not fall within the definition of judgment contemplated by that section. The inherent court authority found in Wis. Stat. art. VII § 2 of the Wisconsin Constitution provides that judicial power shall be vested in a unified court system which gives them the authority to decide the constitutionality of a statute. ["When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time. A judgment or order which is void may be expunged by a court at any time. Such right to expunge a void order or judgment is not limited by statutory requirements for reopening, appealing from, or modifying orders or judgments." *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 98, 516 N.W.2d 4 (Ct. App. 1994) citing *Kohler Co. v. EDILHR*, 81 Wis. 2d 11, 259 N.W.2d 695 (1977).] Further, Article VII, section 8 goes on to provide that "[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within the State." The key interpretive phrase is "all matters civil and criminal". Clearly this phrase indicates a requirement to invocation of subject matter jurisdiction. And any subsequent caselaw including *Village of Trempeleau*

v. *Mikrut*, 273 Wis. 2d 76, 681 N.W.2d 190 (2004) is to be read in conjunction with this section and not interpreted as overruling it. "While it is true that Wisconsin circuit courts have subject matter jurisdiction over absolutely everything, a circuit court's jurisdiction still has to be properly invoked in each and every case." R16 at 2; R-APP. 102. This interpretation is imperative otherwise it leaves open the door to egregious unrecognizable charges that can become valid via laches. At the very least it is a subtle yet palpable removal of a guard at the gate of our liberties.[8]

III. *VILLAGE OF TREMPEALEAU V. MIKRUT* DOES NOT CARVE OUT AN EXCEPTION TO OR OVERTURN *ROHNER* THUS ITS HOLDINGS ARE NOT CONTROLLING IN *BOOTH BRITTON*

The Circuit Court found that the City Attorney's office was wrong in its initial charging decision and that they are wrong in their assertion that their error is protected by laches. R16 at 3; R-APP. 103. In doing so it distinguished *Village of Trempealeau v. Mikrut* from *Rohner* and *Banks* upholding the principle that void and voidable judgments parallel with invalid and incorrect charges, the

[8] This is not to be confused with under or overcharging or plea negotiations in matters where the statute and facts are left open to argument and interpretation. But that is not the case here.

latter being covered by competency and time limitations for challenges: "Since a second offense OWI cannot be prosecuted as a civil action in Wisconsin, the Court Commissioner did not have the proper jurisdiction in the 1992 prosecution to render a civil judgment." R16 at 3; R-APP. 103.

The City argued that the landmark Wisconsin cases regarding invalid mischarged OWIs - *Rohner* and *Banks* - are outdated cases but the Circuit Court disagreed. *County of Walworth v Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982), *State v. Banks, 105 Wis. 2d 32, 313 N.W.2d 67 (1981)*. R11 at 3: "Booth primarily cites cases that are over thirty years old in support of her subject matter jurisdiction argument. These older cases pre-date *Mikrut*, which dramatically changed the ability to challenge subject matter jurisdiction in Wisconsin Courts."

Mikrut is distinguishable from the mischarged 2nd OWI criminal cases as first offense civil matters which can never become proper by fulfillment of a statutory prerequisite. Some might argue that inclusion of the prior OWI in charging is a statutory prerequisite contemplated by competency requirements and subject to waiver but this is incorrect. As once the proper prior convictions are included it ceases to be a 1st offense OWI Civil forfeiture.

It would only be a proper analysis if by adding the prior OWI convictions the original offense would stay charged as a first offense - and that is not possible.

The Court held Mikrut waived the right to challenge the competency of the circuit court because of time limits existing for challenging alleged failures to follow statutory mandates in issuing citations. *Mikrut* at ¶¶15, 16, 21, 31, 38. In doing so it never reached the merits of the arguments by either party.

Additional examples the *Mikrut* court cites as cases falling under the competency umbrella include:

BJN - noncompliance with statutory time limitations. *Mikrut* at ¶ 12 citing *Dep't of Human Servs. V. H.N.*, 162 Wis. 2d 635, 654, 469 N.W.2d 845 (1992) ("*In the Interest of B.J.N.*").

Wall v. Wisconsin DOR - objection to service by regular mail as opposed to the required certified mail waived as department and submitted to court's jurisdiction by filing a Notice of Appearance without making any objection about it first. *Mikrut* at ¶ 21 citing *Wall v Wisconsin DOR*, 157 Wis. 2d 1, 458 N.W.2d 814 (Ct. App. 1990) (But see *Mikrut* ¶ 28 wherein they state they overrule this to the extent that

a notice of appearance should not have precluded a competency challenge.)

Arreola – service failed to provide a statutorily-mandated release plan in a Chapter 980 action, *Mikrut* at ¶ 13 citing *Arreola v State*, 199 Wis. 2d 426, 430-31, 544 N.W.2d 611 (Ct. App. 1996).

Cepukenas – conditions precedent to the modification of a foreign child support order under the Uniform Interstate Family Support Act had not been met. *Mikrut* at ¶ 13 citing *Cepukenas v. Cepukenas*, 221 Wis. 2d 156, 170, 584 N.W.2d 227 (Ct. App. 1998).

Where does *Booth Britton* fit in under these scenarios? It does not. But if for some reason the law is twisted to include it, we would argue that it would be unfair at this late juncture to apply competency waiver time limits and ask that the court provide relief under Wis. Stat. § 806.07(1)(h)and invalidate the 1992 OWI conviction under this catch-all provision. See *Mikrut* at ¶ 35.

A void judgment cannot be validated by waiver no matter when the invalidity of the judgment is discovered. The City has taken the position that their error and the legal avenue to address it was one of competency not subject matter jurisdiction. Thus they claim it is too

late for Booth to attack the error because competency questions are subject to time limits and waiver. Booth asserts that the competency cases the City cites as supporting their position are distinguishable from the matter at hand. `…A distinction must be made between the situation where a court lacks *power* to treat a certain subject matter and the situation where a court may treat the subject generally but there has been a failure to comply with the conditions precedent necessary to acquire jurisdiction. In our opinion, only in the former situation is it correct to say that there is a lack of subject-matter jurisdiction.' *Galloway v. State (1966), 32 Wis. 2d 414, 419, 145 N. W. 2d 761, 147 N. W. 2d 542*

The court did not lose competency to exercise its jurisdiction; an invalid charge is never validly before the court. *State v Bush*, 2005 WI 103, 18, 283 Wis. 2d 90,699 N.W.2d 80. Circuit courts have original jurisdiction over all matters civil and criminal, except as otherwise provided by law. If a complaint fails to state an offense known at law, no matter civil or criminal is before the court, resulting in the court being without jurisdiction in the first instance. *Bush* at 18.

Mikrut involves 'noncompliance with statutory requirements pertaining to the invocation of subject matter jurisdiction of cases validly before it.' *Id.* Here the charge of first offense OWI was not valid and thus the case was never validly before the court in the first instance. *Rohner* 108 WI 2d at 721-22.

In *Mikrut* the defendant was charged with 21 violations of 3 village ordinances for his salvage yard that he owned and operated. He was found guilty of the violations and the judgment was upheld on appeal but he then moved to vacate the judgment arguing the city failed to follow statutory mandates in issuing the citations. Specifically: "1) the village did not adopt a bond schedule for the particular ordinances Mikrut was charged with violating 2) the citations were for ordinance violations that had a direct statutory counterpart contrary to Village ordinance 1-2-1 and 3) the village lacked authority under Wis Stat. § 345.11 to issue uniform traffic citations for ordinance violations of the type charged against Mikrut." *Mikrut*, 273 Wis. 2d at 85.

The important distinction here is that the court had the authority to hear the charged violations, they may have turned out to be voidable because of lost competency but

they did not reach the same level as found in Booth where the court did not have the inherent authority even to hear the charge as such a charge did not validly exist under the law.

Only when the failure to abide by a statutory mandate is "central to the statutory scheme" of which it is a part will the circuit court's competency to proceed be implicated "...The legislative purpose of the statutory scheme must be determined and a decision made about whether it could be fulfilled without strictly following the statutory directive. Many errors in statutory procedure have no effect on the circuit court's competency." *Mikrut*, 273 Wis. 2d at 88 citing *In re Bolig*, 222 Wis. 2d 558, 567-68, 587 N.W.2d 908 (Ct. App. 1998).

Thus the court's competency is not at issue in *Booth* because an invalid charge does not have a statutory mandate or a central statutory scheme.

There has been no waiver, the circuit court was competent to try an OWI case but they lacked subject matter jurisdiction to try an apple as an orange and caselaw is clear there are no time limits for vacating such judgments made by courts exceeding their authority via subject matter jurisdiction

In *Xcel Energy* the WI Supreme court states "…no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever." *Xcel Energy Servs., Inv., v Labor & Indus. Review Comm'n*, 2013 WI 64, 349 Wis. 2d 234, 253, 833 N.W.2d 665, 675. The word 'actions' though followed by 'of any nature whatsoever' clearly does not include invalid charges as found in *Booth*. It then goes on to distinguish *Xcel Energy* as a competency not subject matter jurisdiction case as it involves statutory prerequisites that are not followed.

But said statutory prerequisites considered by this ruling are clearly smaller and noninclusive of invalid charges. Is the City Attorney's action in mischarging a second offense OWI as a first offense OWI a failure to follow the 'statutory requirements' stating a second offense OWI must be charged criminally such that it falls within this *Xcel* mandate? We argue that it is not.

This is where one of the lines is drawn between a competency and subject matter jurisdiction analysis.

The charge was never validly before the court in the first instance thus competency could not be lost. The City Attorney bases its full case on *Village of Trempealeau v Mikrut* and public policy arguments drunk driving. *Mikrut*

is clearly distinguishable as it pertains to noncompliance with statutory requirements over cases validly before the court. But as discussed above the *Booth Britton* case did not lose competency because it was never validly before the court. ["…If a complaint fails to state an offense known at law, no matter civil or criminal is before the court, resulting in the court being without jurisdiction in the first instance." *State v Bush*, 2005 WI 103 ¶ 18, 283 Wis. 2d 90, 699 N.W.2d 80]

Thus under Wis. Stat. § 806.07(1)(d) the judgment is void.

CONCLUSION

We have shown Ms. Booth Britton's 1990 Minnesota OWI conviction should have been counted when determining her 1992 Eau Claire OWI charge but was not. This led to an invalid charge of a second offense OWI criminal offense charged and convicted as a first offense civil OWI. It should be noted that she did not plead guilty to this charge in 1992 and she does not admit guilt to the crime today. She did not show up to the proceedings in 1992 but that should not be interpreted as an admission of guilt. But that is not at issue here. "A party attacking a judgment as void need show no meritorious claim or defense

or other equities on his behalf, he is entitled to have the judgment treated for what it is, a legal nullity…" *Neylan*, 142 Wis. 2d at 99.

Thus, we would request that the Court of Appeals affirm the circuit court ruling that Ms. Booth Britton's 1992 Operating while intoxicated conviction is a void.

Respectfully Submitted,

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CERTIFICATION OF FORM AND LENGTH PURSUANT TO WIS. STAT. § 809.19(8)

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b)and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double-spaced; a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of this brief is 37 pages words.

Dated this 13th day of July, 2015.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief mailed on July 15, 2015.

A copy of this certificate is being filed with the court and served on all opposing parties as of this date.

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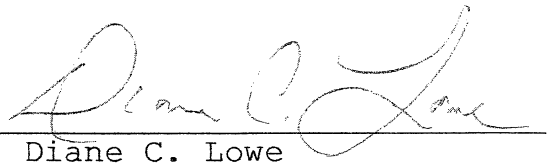
BY: 

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CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals and to the Eau Claire City Attorney's office by first-class mail on July 13, 2015.

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CERTIFICATION OF APPENDIX

I certify that filed with this brief either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 801.19(2)(a) and contains: (1) table of contents; (2) the findings or opinion of the circuit court; (3) copies of any unpublished opinions cited under § 809.23 and (4) any portions of the record essential to an understanding of the issues raised.

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

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