SUPREME COURT
OF THE
STATE OF WISCONSIN

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CITY OF EAU CLAIRE,
Plaintiff-Appellant,

v.

Appeal No. 2015AP000869

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

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT CITY OF EAU CLAIRE

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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INTRODUCTION

The City of Eau Claire provides this supplemental brief in addition to the briefs previously filed with the Court of Appeals and the Petition for Bypass previously filed with this Court. The City endeavored to avoid unnecessarily repeating content contained in the previously filed briefs or bypass petition and hereby incorporates by reference all arguments contained in its previous briefs.[1]

The City's supplemental brief will address a number of arguments. First, the Court should not overrule *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190, or the wide body of case law which holds that statutory limitations on court authority implicate court competency rather than subject matter jurisdiction. Second, the Court should clarify or distinguish *Walworth Cnty. v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). Third, the Court should disregard Booth Britton's "offense known at law" argument because it is undeveloped and meritless. Lastly, Booth Britton's interpretation of Wisconsin's drunk driving laws leads to absurd results.

[1]For the sake of avoiding unnecessary redundancies the City of Eau Claire did not repeat the statement of the issues, statement of the case, standard of review, and much of the other content and argument included in the City of Eau Claire's previous briefs.

ARGUMENT

I. The Court should not overrule *Mikrut* and the wide body of case law that concludes that statutory limitations on circuit court authority implicate court competency rather than subject matter jurisdiction.

The Court should not overrule *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190, or the wide body of case law which holds that statutory limitations on court authority implicate court competency rather than subject matter jurisdiction.[2] *Mikrut*'s bright line rule produces objective, predictable, and consistent results that were previously absent in Wisconsin's subject matter jurisdiction and court competency jurisprudence. *See In re Commitment of Bush*, 2005 WI 103, ¶ 16, 283 Wis. 2d 90, 103, 699 N.W.2d 80, 87 (Wisconsin's jurisprudence concerning subject matter jurisdiction and court competency was "murky at best."); *see also Miller Brewing Co. v. Labor & Indus. Review Comm'n*, 173 Wis. 2d 700, 706 n. 1, 495 N.W.2d 660, 662 (1993) (noting that Wisconsin courts and commentators have used the terms subject matter jurisdiction and competence in a variety of ways – sometimes interchangeably).

[2]The City of Eau Claire's previous brief lists extensive case law holding that statutory limitations on circuit court authority implicate court competency rather than subject matter jurisdiction.

The advantages of *Mikrut's* bright line rule outweigh the disadvantages. To be sure, *Mikrut*'s bright line rule deprives courts of the flexibility to examine whether differently worded statutes implicate subject matter jurisdiction. There may be instances where allowing courts to treat a defect as jurisdictional will result in the outcome most consistent with the intent of a statutory provision. This case, however, demonstrates that the *Mikrut* approach is more consistent with Wisconsin's jurisprudence encouraging parties to timely raise objections to court authority and more consistent with Wis. Const. art. VII § 8's grant of subject matter jurisdiction.

Timely objections provide parties a fair opportunity to prepare and address objections in a way that most efficiently uses judicial resources. In this case Booth Britton waited 22 years to challenge the authority of the Eau Claire Circuit Court to enter her 1992 OWI 1st offense conviction. During that 22 year period the state likely lost the ability to charge Booth Britton with a criminal OWI charge,[3] most of the files and records related to the 1992 offense were destroyed, the arresting officer no longer has a recollection of the violation, and Booth Britton was convicted of five additional OWI charges. The *Mikrut* approach, which would treat any

[3]*See State v. Strohman*, 2015 WI App 28, 361 Wis. 2d 286, 862 N.W.2d 619 (defendant erroneously charged with civil OWI conviction could not be retried with criminal offense because civil OWI conviction does not toll 3 year statute of limitations on misdemeanor OWI offense) (unpublished and cited for persuasive authority only).

alleged statutory lack of circuit court authority as implicating court competency rather than subject matter jurisdiction, would not reward Booth Britton for her dilatory tactics by completely eliminating her 1992 conviction and would not completely deprive the City of Eau Claire of an opportunity to refile an OWI charge against Booth Britton.

The *Mikrut* bright line rule is also more consistent with Wis. Const. art. VII § 8's grant of subject matter jurisdiction. According to one legal commentator, this section's 1977 amendment "deleted the authority of the legislature and the governor to limit circuit courts' jurisdiction…" Jack Stark, *The Wisconsin State Constitution,* 156-59 (1st ed. 2011). *Mikrut*'s bright line rule is consistent with this interpretation that the constitutional grant of subject matter jurisdiction cannot be revoked by statute.

2. The Court should clarify or distinguish *Rohner.*

The Court should clarify or distinguish *Walworth Cnty. v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). Simply put, *Rohner* does not support Booth Britton's requested outcome in this case. *Rohner* is factually and legally distinguishable from the present case.

First, the Court should clarify *Rohner* by determining that when *Rohner* held that the loss of court authority to enter an OWI 1st offense conviction when a defendant has a valid prior OWI conviction is a loss of court competency rather than a loss of subject matter jurisdiction. *Rohner* did not consider whether charging a 2nd OWI offense as an OWI 1st offense

implicates subject matter jurisdiction *rather than* court competency. *Id.* at 721. When *Rohner* was decided courts did not rigidly distinguish between subject matter jurisdiction and court competency. *See Miller Brewing Co. v. Labor & Indus. Review Comm'n*, 173 Wis. 2d 700, 706, 495 N.W.2d 660, 662 (1993) (noting that "Wisconsin courts and commentators have used the terms 'subject matter jurisdiction' and 'competence' in a variety of ways."). Furthermore, *Rohner* did not even cite or mention Wis. Const. art. VII § 8 in its analysis. Determining that *Rohner* implicated court competency rather than subject matter jurisdiction would create the least disturbance to *Rohner*, *Mikrut*, and other existing case law.

Second, the Court should distinguish *Rohner* by determining that the Court only loses authority to enter an OWI 1st offense conviction when the defendant can demonstrate that the prosecution had actual knowledge of the prior conviction, as was the case in *Rohner*. Unlike *Rohner*, the present case involves an unknown out-of-state prior conviction that cannot be retried. *Rohner* sought to constrain the discretion of prosecutors who failed to recognize Wisconsin's strong public policy in favor of strict OWI enforcement. Applying *Rohner* in the manner requested by Booth Britton is not consistent with the purpose of Wisconsin's drunk driving laws.

3. Booth Britton's "offense known at law" argument is undeveloped and meritless.

Booth Britton's "offense known at law" argument is undeveloped and meritless. Even assuming, for the sake of argument, that being charged with a civil offense not known to law deprives a circuit court of subject matter jurisdiction, a 1st offense OWI charge is an "offense known at law." The Court of Appeals in *State v. Navrestad*, 2015 WI App 68, 364 Wis. 2d 759, 869 N.W.2d 170 (unpublished and cited for persuasive authority), succinctly addressed this issue: "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." *Id.* at ¶ 10. Booth Britton concedes that a first offense intoxicated driving ordinance violation is an offense known at law. Booth Britton argues, without support, that Booth Britton was not charged with an OWI 1st offense but rather was charged with a second offense criminal OWI charged as a first offense civil OWI.

Instead of pointing to any cases which support Booth Britton's "offense known at law" argument, Booth Britton engages in an extended discussion of slavery, women's suffrage, and a variety of other unrelated and unhelpful policy issues. Booth Britton's only support for her argument is a citation to *Bush*, 283 Wis. 2d 90 at ¶ 18, which states "[i]f 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."[4]

Booth Britton does not explain, however, how a citation which contains an offense known at law can be converted into an offense not known at law by virtue of (allegedly) being undercharged. Booth Britton also fails to address *Mikrut*, which held that a uniform traffic citation – which is the same type of citation issued for an OWI 1st offense - issued without (alleged) statutory authority implicates court competency rather than subject matter jurisdiction.

4. Booth Britton's interpretation of Wisconsin's drunk driving law leads to absurd results.

Booth Britton's interpretation of Wisconsin's drunk driving law leads to absurd results. *Rohner* repeatedly supported its holding by pointing to Wisconsin's policy of strict enforcement of drunk driving laws. The clear policy of Wisconsin's drunk driving law is "to facilitate the identification of drunken drivers and remove them from the highways." *Rohner*, 108 Wis. 2d at 721 (also noting that "[i]t is clear from the legislative history of sec. 346.65(2)(a) that the legislature is trying to confine those persons who have the dangerous propensity to drive while

[4]*Bush* cites two cases in support of this statement: *Champlain v. State*, 53 Wis.2d 751, 754, 193 N.W.2d 868 (1972); *State v. Lampe*, 26 Wis.2d 646, 648, 133 N.W.2d 349 (1965). Neither of these cases involved an (allegedly) defectively charged citation.

drunk and, thus, prevent them from endangering the lives of themselves and others.").

In addition to the absurd result in the present case, a hypothetical example demonstrates the absurdity of Booth Britton's interpretation. 1st offense OWI defendants in Illinois are regularly sentenced to "supervision," which constitutes a prior "conviction" for Wisconsin OWI purposes. *See State v. List*, 2004 WI App 230, 277 Wis. 2d 836, 691 N.W.2d 366. Supervision convictions, however, are not reported to the national reporting system that the Wisconsin Department of Transportation uses to find prior convictions. Consequently, the prosecution and the Wisconsin Department of Transportation would not know about the prior Illinois supervision conviction. Even if the prosecutor attempted a remedial step and asked the defendant to swear under oath that he had no prior OWI convictions at the time the Wisconsin OWI 1st offense conviction was entered, such a representation would likely be meaningless under Booth Britton's interpretation because subject matter jurisdiction challenges cannot be waived.

The consequence of this hypothetical is that the defendant could wait three years for the criminal OWI statute of limitations to run out, move to vacate the Wisconsin 1st offense OWI on the grounds that the court lacked subject matter jurisdiction based on the prior (unknown) Illinois supervision conviction, and the defendant could not be retried. Such a

result cannot reasonably be reconciled with the purpose of Wisconsin's drunk driving laws.

Additionally, Wisconsin case law contains numerous examples where the issuance of a citation does not preclude a criminal charge arising out of the same facts. For example, the Wisconsin Supreme Court held in *State v. Thierfelder*, 174 Wis. 2d 213, 495 N.W.2d 669 (1993), that the State could pursue a defendant with a felony causing great bodily harm while having a blood alcohol concentration of 0.10% or more charge even if the defendant was previously convicted of a municipal traffic charge of OWI arising out of the same incident. If a municipality is not precluded from pursuing an OWI citation when the defendant has also been charged with an OWI felony out of the same incident, it is unclear why a municipality would be precluded from charging a defendant with an OWI 1st offense when an unknown prior out-of-state OWI exists.

CONCLUSION

For all the foregoing reasons, the Court should reverse the decision of the circuit court.

Dated: 31st day of December, 2015

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

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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. § 809.19(2)(a) and contains: (1) a table of contents; (2) copies of any unpublished opinions cited under 809.23.

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