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STATE OF WISCONSIN

IN SUPREME COURT

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**City of Cedarburg,**  
*Plaintiff-Appellant,*

*vs.*

Appeal No. 18-AP-1129

**Ries B. Hansen,**  
*Defendant-Respondent.*

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**PLAINTIFF-APPELLANT'S PETITION TO BYPASS**

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Plaintiff-Appellant City of Cedarburg, by its attorneys, hereby petitions this Court pursuant to Wis. Stats. §§ 808.05(1), 809.60(1) to take jurisdiction of this appeal and grant direct review, bypassing the Court of Appeals.

**QUESTION PRESENTED**

This Court held in *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738, that when a circuit court handles a first offense OWI that is mischarged due to an unknown prior offense, it is a defect in the circuit court's competency but not the circuit court's subject matter jurisdiction. *Id.* at ¶ 1. Accordingly, a defendant must timely object to the circuit court's lack of competency or the objection is forfeited. *Id.*

Is the same true when the mischarged OWI is in municipal court?

## SUMMARY OF FACTS AND PROCEDURAL POSTURE

Hansen was arrested for first offense OWI and PAC in the City of Cedarburg (“City”) in May 2005, and issued citations returnable to the Mid-Moraine Municipal Court. (R. 10:3-4.) Hansen, by his attorney, eventually stipulated to a guilty plea. (R. 10:1,6.) However, the City did not know that Hansen had a 2003 drunk driving conviction in Florida. (R. 9:7, R. 22:1-2.)

In 2016, Hansen was arrested and charged with third offense OWI and PAC. (R. 8.) In February 2017, Hansen filed a motion in the Mid-Moraine Municipal Court to have his 2005 conviction vacated as void, arguing that the municipal court lacked subject matter jurisdiction over what should have been a second offense. (R. 11:7-8.) The municipal court denied Hansen’s motion, relying on the rationale of *Booth*. (R. 31.) Hansen appealed to circuit court. (R. 15.) The circuit court reversed the municipal court, holding that the municipal court lacked subject matter jurisdiction. (R. 22.) The City appealed. (R. 26.) Briefing in the Court of Appeals has concluded, as this Petition is being filed simultaneously with the City’s reply brief. This Petition is timely filed within 14 days of the filing of the respondent’s brief. Wis. Stat. § 809.60(1).

## ARGUMENT

### I. Supreme Court review of this case will develop, clarify, and harmonize the law of subject matter jurisdiction and court competency as applied to municipal courts

This Court should grant direct review of this appeal to exercise this Court's functions as a law-developing and law-harmonizing body with respect to a matter of statewide importance. Specifically, this Court should decide whether its decision in *Booth*, 2016 WI 65, which applied the concepts of subject matter jurisdiction and court competency to an "undercharged" OWI citation and conviction in circuit court, applies to or should be extended to the same scenario occurring in a municipal court. This Court should also clarify whether *Booth's* explicit withdrawal of language from *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982) and "any other case" utilizing a jurisdiction-based analysis, acted to withdraw portions of *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 516 N.W.2d 4 (Ct. App. 1994), which relied solely on *Rohner* in holding that an erroneous first offense conviction in municipal court is a "void judgment." *Booth* at ¶ 14, *Jensen* at 98-99.

In *Booth*, this Court revisited the distinction between subject matter jurisdiction and court competency as applied to OWI offenses. The City of Eau Claire prosecuted and convicted Booth for first-offense OWI in 1992 in circuit court; however, Eau Claire did not know that Booth had previously been convicted of OWI in

Minnesota in 1990. *Booth* at ¶ 2. Booth argued her conviction was void because the circuit court lacked subject matter jurisdiction over a first offense OWI that should have been a second offense. *Id.* at ¶ 8. Booth's argument relied on *Rohner*, which held that OWI convictions that were mischarged were void for lack of subject matter jurisdiction. *Rohner*, 108 Wis. 2d at 718.

Since *Rohner*, the appellate courts have developed additional law clarifying the distinction between subject matter jurisdiction and court competency, most notably *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190. *Booth* harmonized this law, holding that when an erroneous first offense conviction takes place in circuit court, it is a defect in the circuit court's competency but not the circuit court's subject matter jurisdiction. *Id.* at ¶ 14. *Booth* explicitly withdrew language from *Rohner* and "any other case" which analyzes a "mischarged" OWI in terms of subject matter jurisdiction. *Id.*

This facts of this appeal are nearly identical to *Booth*, but for one critical distinction which renders this case appropriate for review by this Court. *Booth* involved a first offense OWI conviction in circuit court; this appeal involves a first offense OWI conviction in municipal court. The fundamental issue in this appeal is the extent to which the rationale of *Booth* can be applied or extended to "mischarged" OWI cases in municipal court. Resolution of that question will require this Court to consider the different

constitutional grants of subject matter jurisdiction to each court. The Wisconsin Constitution grants circuit courts plenary subject matter jurisdiction over “all matters civil and criminal.” WIS. CONST. art. VII, § 8. The constitution grants municipal courts subject matter jurisdiction, but limits it to “actions and proceedings arising under the ordinances of the municipality.” *Id.* at § 14. The City contends that, notwithstanding the difference in the scope of jurisdiction, the question of whether the facts of a particular case comport with the legislature’s statutory scheme is fundamentally a question of competency. *Mikrut* at ¶ 2, *Booth* at ¶ 21.

Because *Booth* dealt specifically with a first offense OWI conviction in circuit court, this Court should clarify whether *Booth*’s express withdrawal of the jurisdiction analysis from *Rohner* was also a withdrawal from *Jensen*, and, accordingly, with applicability to municipal courts. *Rohner* concerned a circuit court prosecution. The only published case involving a mischarged OWI citation in municipal court is *Jensen*, 184 Wis. 2d at 91. *Jensen* did not engage in any analysis of the constitutional differences between the jurisdiction of municipal and circuit courts; *Jensen* simply stated that a mischarged OWI was “null and void” and cited *Rohner* as support. *Jensen* at 99.

Resolution of this appeal requires the development of new law, and potentially further withdrawal from or clarification of existing

precedent. Therefore, review by this Court is warranted, and this Court should grant the City's petition to bypass.

**II. The resolution of this appeal will have statewide impact on an issue likely to recur, because defendants regularly challenge old OWI convictions due to an undiscovered prior offense, often from out of state**

In the OWI context, whether a defect is one of subject matter jurisdiction or competency is not a matter of semantics. A judgment entered without subject matter jurisdiction is void and can be challenged at any time; a challenge to court competency may be forfeited by a failure to timely object. *Booth* at ¶ 25, *Neyland v. Vorwald*, 124 Wis. 2d 85, 368 N.W.2d 648 (1985). *Booth* held that the defendant's 22 year delay between conviction and challenge constituted such a forfeiture. *Booth* at ¶ 25. Accordingly, Booth's 1992 conviction stands. *Id.* at ¶ 15 n. 9. Likewise, the result of this appeal will determine whether Hansen's 2016 OWI arrest will be treated as a third offense, or as a first offense. As *Booth* and this case demonstrate, it is not uncommon for police to be unaware of prior OWI offenses, especially from other states, and it is therefore not uncommon for defendants to lodge challenges to these convictions years or even decades later<sup>1</sup>. These cases also present

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<sup>1</sup> For example, *Booth* noted three prior unpublished cases in the 2013-2015 timeframe, all involving defendants seeking to vacate first-offense OWI convictions. *Booth* at ¶ 13 n.7 (citations omitted.)

significant public policy considerations as they relate to the legislature's mandate to "strictly enforce drunk driving laws." *Booth* at ¶ 15. The *Booth* court noted that a holding which permitted Booth to essentially erase an OWI conviction from her record and prevent it from being counted in the future "would do nothing to further" the legislative policy. *Id.* at ¶ 15 n.9. The same policy concerns exist when a defendant seeks to undo and erase a municipal court OWI conviction.

A decision which squarely addresses this issue with respect to municipal courts is crucial, as municipal courts evenly share the first-offense OWI caseload with circuit courts. There are 237 municipal courts in Wisconsin, including Milwaukee, Madison, and Green Bay. Wisconsin municipal courts handled more than 9,300 OWI and PAC cases in 2016. *See* <https://www.wicourts.gov/publications/statistics/municipal/docs/bycounty16.pdf> (accessed Oct. 23, 2018.) Circuit courts handled more than 8,400 first-offense OWI and PAC cases in the same year. *See* <https://www.wicourts.gov/publications/statistics/circuit/docs/traffictate16.pdf> (accessed Oct. 23, 2018.)

The constitutional, statutory, and policy issues raised by this appeal are highly likely to recur in municipal courts across the state. Therefore, this Court should grant the City's petition to bypass.

## CONCLUSION

For the foregoing reasons, this Court should grant the City's petition to take jurisdiction of this appeal and grant direct review, bypassing the Court of Appeals.

Dated October 23, 2018.

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