May 18, 2016

VIA ELECTRONIC MAIL
(GovJudicialAppointments@Wisconsin.gov)
Governor Scott Walker
115 East State Capitol
Madison, WI 53707

Re: Application to Serve on the Wisconsin Supreme Court

Dear Governor Walker:

I eagerly seek the honor and privilege of serving on the Wisconsin Supreme Court. I believe there is much value I can bring as an appointee to the court. If selected, I would dedicate my service to the continuing enhancement of the court (both the Supreme Court itself, as well as the state court system generally), to the sound and proper development of the law, and to serving intelligently and justly all persons affected by the state's courts. Thus, I respectfully ask that you select me to fill the upcoming vacancy occasioned by Justice Prosser's retirement.

For reasons expressed further in my application, I am well qualified to serve as a member of our state's highest court. I believe I possess the temperament, character, intellect, work ethic, and plain old common sense to be an excellent justice. I have a significant breadth of legal experience, dating back to my time in private practice (which included leadership in the state's appellate bar), and now as a judge who has participated in hundreds of appeals since joining the Court of Appeals. I am adaptable, affable, discerning, and work exceedingly well with others, while at the same time remaining steadfast to the important principles I hold. More than anything, I feel that having a strong legal acumen and the ability to communicate effectively will aid me greatly on the Court and, in turn, benefit the people of Wisconsin. In short, I hope to be able to bring to the Supreme Court the same qualities I have now, which traits have engendered a broad spectrum of respect for—and good reputation regarding—my service on the Court of Appeals. The breadth of this support is truly marked, and it crosses as much geography within the state as it does a variety of people.

I promise, if selected, to serve as an intelligent, diligent, ethical and fair justice. I will not advance any personal policy agenda. Rather, my job—just as it is now on the Court of Appeals—would be faithfully to apply and interpret those laws that have been developed through the common law of our courts or enacted by our legislative and executive bodies. I would be impartial, not a policymaker, and have a firm respect for the rule of law.

I thank you kindly for your consideration, and I look forward to the opportunity to further advance my candidacy to serve on our state's Supreme Court.

Sincerely,

s/ Thomas M. Hruz

Thomas M. Hruz

EDUCATION

Marquette University Law School, Milwaukee, Wisconsin
Juris Doctor, *magna cum laude*, May 2002.
Cumulative GPA: 3.75 / 4.0 Class Rank: 5 out of 168

Honors: Dean's List, every semester.
Marquette Law Review, Note & Comment Editor.
2002 Golden Quill Award for Best Student Writing in the *Marquette Law Review*.
Activities: Research Assistant, (then) Professor Joseph D. Kearney.
Institute for Justice, Public Interest Law Summer School, Wash. D.C., 2000.

University of Wisconsin-Madison, La Follette School of Public Affairs, Madison, Wis.
Master of Arts in Public Affairs and Public Policy Analysis, May 1997.
Cumulative GPA: 3.96 / 4.0

University of Wisconsin-Milwaukee, Milwaukee, Wisconsin
Bachelor of Arts in History & Political Science, *summa cum laude*, May 1995.
Cumulative GPA: 3.91 / 4.0
Honors: Graduate of University's Honors Program.
Awarded the 1994 William Renzi Scholarship for the Outstanding History Major.
Awarded the Spring 1994 Milwaukee Foundation-Joseph Derfus Scholarship.
Activities: Vice-president and team member of the UW-Milwaukee Wrestling Club.

LEGAL EXPERIENCE

Wisconsin Court of Appeals, District III, Wausau, Wisconsin
Judge, September 2014 to present.

Meissner Tierney Fisher & Nichols, S.C., Milwaukee, Wisconsin
Attorney, August 2004 to July 2014; Shareholder, January 1, 2009 to July 31, 2014.

- Rated by 2013 *Super Lawyers*® as a "Super Lawyer," and by 2009, 2010, 2011 & 2012 *Super Lawyers*® as a "Rising Star" (awarded to only 2.5% of Wisconsin lawyers among attorneys 40 years old and younger or who have been in practice 10 years or less).
- Recognized as an "Up and Coming" Wisconsin Lawyer by the *Wisconsin Law Journal* (2011).

Marquette University Law School, Milwaukee, Wisconsin
Adjunct Professor of Law, Fall 2012 Semester.
- Teaching one of six sections in the School's Appellate Writing & Advocacy course, which is a mandatory course for students seeking a position in the School's Moot Court program.

Judge John L. Coffey, United States Court of Appeals for the Seventh Circuit, Milwaukee, Wis.
Law Clerk, August 2003 – June 2004.

Justice David T. Prosser, Jr., Wisconsin Supreme Court, Madison, Wisconsin
Law Clerk, 2002 – 2003 Term.

NON-LEGAL WORK EXPERIENCE:

Wisconsin Policy Research Institute, Mequon, Wisconsin
Resident Fellow, June 1998 – May 2001; Adjunct Fellow, June 2001 – July 2002.

Consortium for Policy Research in Education, Madison, Wisconsin
Researcher and Analyst, June 1997 – May 1998.

J.C. Penny Catalog Outlet Store, Milwaukee, Wisconsin
Merchandise Handler, March 1990 – August 1995 (full-time, June 1991 – August 1995).

PROFESSIONAL AFFILIATIONS AND ACTIVITIES:

- State Bar of Wisconsin.
  Appellate Practice Section, Board Member (2009 to 2014); Chairperson (July 2013 to 2014); Secretary (July 2010 to June 2012).
- Marquette Law School Alumni Association, Board Member (2011 to present).
- The Hon. Robert J. Parins Legal Society of Northeast Wisconsin, Member.
- Outagamie County Bar Association, Member.
- Eastern District of Wisconsin Bar Association.
- Federalist Society, Member.
- Seventh Circuit Bar Association, Member.
- St. Thomas More Lawyers Society of Wisconsin, past President.

COMMUNITY ACTIVITIES:

- Board Member, National Alliance on Mental Illness (NAMI) Greater Milwaukee (2005 to 2014).
- Regional Coordinator, State Bar of Wisconsin High School Mock Trial Tournament (2009 to present).
- Milwaukee Bar Association, Tutor, Sarah Scott Middle School Tutoring Program (2004- 2005).
- Yearly Volunteer, Guest House Sandwich Project (2007 to 2014).

(Please attach additional pages as needed to fully respond to questions)

DATE: May 17, 2016

I. Personal Information:

Name (Last, First, Middle Initial) Hruz, Thomas, M.	Telephone Number (Area Code) [redacted]
E-Mail [redacted]	Alternate Number (Area Code) None
County of Appointment n/a - Supreme Court	Current Address 5323 Brookview Dr.
Age 42	City Grand Chute
Place of Birth Milwaukee	County of Residence Outagamie
Driver's License Active in WI? Yes ☒ No ☐	State WI
Wisconsin Bar Number 1041454	Zip Code 54913
Date Admitted to Practice Law in WI May 20, 2002	Year(s) at Current Address .6 (7 months)
Date Admitted to Practice Law in Another State None. All admissions in other states have been on a pro hac vice basis	Are you registered to vote at this address? Yes ☒ No ☐

II. Employment Information

Current Employer Wisconsin Court of Appeals, District 3	Work Address 2100 Stewart Ave., Suite 310
Title Judge	City Wausau
Telephone Number (Area Code) (715) 848-1421	County Marathon
	State WI
	Zip Code 54401

III. Marital Information

Marital Status
Single ☐ Married ☒

If married, please provide the following: Date of marriage, spouse's name, spouse's occupation

June 16, 2001; Kelly Anne Schwartz Hruz; middle school guidance counselor.

If ever divorced, please provide the following: Name, former spouse(s)' occupation, and date of divorce(s)

n/a

Please provide the following for any children and stepchildren: Name, state of residence, and occupation

Name	*State of Residence*	*Occupation*
None	____	____
____	____	____
____	____	____
____	____	____
____	____	____
____	____	____

IV. Residential History

List all previous residences for the past ten years

2693 N. Highway 51, Arbor Vitae, WI 54568 (August 2014 - September 2015)
881 E. Lake Forest Ave., Whitefish Bay, WI 53217 (July 2008 - July 2014)
1619 N. Farwell Ave., Milwaukee, WI 53202 (May 2006 - July 2008)

V. Personal Information Cont.

1) Do you currently have a physical or mental impairment that in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?
   Yes ☐ No ☒
   If yes, explain.
   ____

2) In the past ten years have you unlawfully used controlled substances as defined by federal or state laws?
   Yes ☐ No ☒
   If yes, explain.
   ____

3) Since leaving high school, have you, other than for academic reasons, ever been denied enrollment, disciplined, denied course credit, suspended, expelled, or requested to end your enrollment by any college, university, law school or other institution?
Yes ☐ No ☒
If yes, explain.

4) Have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements or any contractual arrangement?
Yes ☐ No ☒
If yes, explain.

5) Have you ever been held in contempt or otherwise formally reprimanded or sanctioned by a tribunal before which you have appeared?
Yes ☐ No ☒
If yes, explain.

6) Are you delinquent in your mandatory continuing legal education?
Yes ☐ No ☒
If yes, explain.

7) Have you ever been a party to a lawsuit either as a plaintiff or as a defendant?
Yes ☒ No ☐
If yes, please supply the jurisdiction and/or county, case number, nature of the lawsuit, whether you were the plaintiff or defendant, and disposition of each lawsuit.
Milwaukee County Circuit Court, 2004 (unsure of case number). Divorce proceeding, in which I was the respondent/defendant. My wife and I reconciled shortly into the case, the case was dismissed, and we have continued to be married, quite happily, ever since.

8) Has there ever been a formal complaint filed against you, a finding of probable cause, citation, or conviction issued against you?
Yes ☐ No ☒
If yes, explain.

9) Are you presently under investigation by the Wisconsin Judicial Commission, the Supreme Court of Wisconsin, the Office of Lawyer Regulation, or any other equivalent, in any jurisdiction?
Yes ☐ No ☒
If yes, explain.

10) If you are a quasi-judicial officer, have you ever been disciplined or reprimanded by a sitting judge?
Yes ☐ No ☒
If yes, explain.

11) In the past five years, have you ever been cited for a municipal or traffic violation, excluding parking tickets?
Yes ☐ No ☒

If yes, explain.

_____

12) Have you ever failed to timely file your federal or state income tax returns?
Yes ☐ No ☒
If yes, explain.

_____

13) Have you ever paid a tax penalty?
Yes ☐ No ☒
If yes, explain.

14) Has a tax lien ever been filed against you?
Yes ☐ No ☒
If yes, explain.

15) Have you ever filed a personal petition in bankruptcy, or has a petition in bankruptcy been filed against you?
Yes ☐ No ☒
If yes, explain.

16) Have you ever owned more than ten percent of the issued and outstanding shares, or acted as an officer or director, for any corporation by which or against which a petition in bankruptcy has been filed?
Yes ☐ No ☒
If yes, explain.

V. Education

High School Education Information

Name of School Catholic Memorial High School
Address: Street, City, State 601 East College Ave., Waukesha, WI 53186
Degree Earned High School Diploma
GPA (approx) 4.2 (included "weighted" classes); graduated top 10% of class
Dates Attended Aug. 1987 – May 1991

Undergraduate Education Information

Name of School University of Wisconsin, Milwaukee
Address: Street, City, State P.O. Box 413, Milwaukee, WI 53201
Degree Earned Bachelor of Arts (History & Political Science, majors)
GPA 3.91 / 4.0
Dates Attended Sept. 1991 – May 1995

Law School Education Information

Name of School Marquette University Law School
Address: Street, City, State 1215 W. Michigan St., Milwaukee, Wisconsin 53233
Degree Earned Juris Doctor
GPA 3.75 / 4.0
Dates Attended Aug. 1998 – May 2002

List and describe academic scholarships, awards, honor societies, extracurricular involvement, and any other related educational information. Note any leadership positions.

In addition to the schools listed above, I also attended the La Follette School of Public Affairs at the University of Wisconsin, Madison (Sept. 1995 – May 1997), earning a Master of Arts (Public Policy) with a GPA of 3.96 / 4.0

Catholic Memorial: (1) Member of the National Honor Society; (2) Varsity football team, junior and senior years; (3) Varsity wrestling team, sophomore through senior year, co-captain senior year.

UWM: (1) Graduate of University's Honors Program; (2) Awarded the 1994 William Renzi Scholarship for the Outstanding History Major; (3) Awarded the Spring 1994 Milwaukee Foundation-Joseph Derfus Scholarship; (4) Vice-president and team member of the UW-Milwaukee Wrestling Club; (5) Fellowship as a Wingspread Scholar; (6) Phi Kappa Phi Honor Society; (7) Golden Key Honor Society; (8) Awarded the 1994 Helen Berry Memorial Scholarship.

Marquette Law School: (1) Editor, Marquette Law Review: (2) Dean's List, every semester; (3) 2002 Golden Quill Award for Best Student Writing in the Marquette Law Review; (4) Recipient of an annual, merit-based scholarship.

VI. MILITARY EXPERIENCE:

List all military service (including Reserves and National Guard).

Service	*Branch*	*Highest Rank*	*Dates*
None			

Type of discharge:

List any awards or honors earned during your service. Also list any citations or charges pursued against you under the Uniform Code of Military Justice.

VII. PROFESSIONAL ADMISSIONS:

List all courts (including state bar admissions) and administrative bodies to which you have been admitted to practice, giving the dates of admission, and, if applicable, whether you have ever been suspended or have resigned.

Court or Administrative Body	*Date of Admission*
Supreme Court of Wisconsin	May 20, 2002
United States District Court for the Eastern District of Wisconsin	August 9, 2004
United States District Court for the Western District of Wisconsin	December 20, 2007
United States Court of Appeals, Seventh Circuit	February 13, 2006

VIII. NON-LEGAL EMPLOYMENT:

List all previous full-time, non-legal jobs or positions held in the past eight years.

Employer	*Position*	*Date*	*Address*
None			

IX. LEGAL EMPLOYMENT:

(If you are a sitting judge, answer the following questions with reference to before you became a judge.)

List the names, dates, and addresses of all legal employment, including law school and volunteer work.

Employer	*Position*	*Date*	*Address*
Meissner Tierney Fisher & Nichols S.C.	Attorney; Shareholder	August 2004 to July 2014; Shareholder Jan. 1, 2009 to July 31, 2014	111 E. Kilbourn Ave., Suite 1900, Milwaukee, WI 53202
Marquette University Law School	Adjunct Faculty	August 2012 - December 2012	1215 W. Michigan St., Milwaukee, Wisconsin 53201
Honorable John L. Coffey, Judge, Seventh Circuit U.S. Court of Appeals	Law Clerk	August 2003 – July 2004	517 E. Wisconsin Ave., Milwaukee, WI 53202
Honorable David T. Prosser, Jr., Justice, Wisconsin Supreme Court	Law Clerk	August 2002 – July 2003	16 East State Capitol P.O. Box 1688 Madison, WI 53701

Describe your legal experience as an advocate in criminal litigation, civil litigation, and administrative proceedings.

While practicing law at Meissner Tierney, I predominantly practiced in the area of civil litigation, often (although by no means exclusively) in the context of business and liability insurance coverage disputes. My cases also included a number of administrative proceedings. I represented a wide range of clients (from Fortune 500 companies, to closely held Wisconsin businesses, to private individuals, and so forth) on a wide range of matters. Indeed, if there was any consistent characteristic of my practice, it was the variety. I litigated cases in federal and state courts both at the trial and appellate levels, and in a number of courts in other states, including Illinois, Indiana and Minnesota. While common of many civil litigators, my actual

trial experience (as opposed to general courtroom experience) was limited. Frankly, in most cases, it was decidedly in my clients' interests not to be exposed to the vagaries of a trial, but rather to reach a negotiated resolution. Still, as part of my appellate practice, I was brought in to observe and work with trial counsel on cases that went through trial, including one involving a nearly two-month trial in the Brown County Circuit Court in 2008.

Through it all, I was a tireless advocate for my clients. I was respectful to opposing counsel, to the courts before which I appeared, to my clients, and to my co-counsel. I practiced with intellect and ethics. While no attorney is successful in every matter or case they have, I do believe, in large part due to my work ethic and abilities, I did very well for my clients, recognizing that their interests are paramount, and succeeding in more matters than I lost.

In your career, how many cases have you tried that resulted in a verdict or judgment?

Jury:	1	Non-jury:	1
Arbitration:	0	Administrative Bodies:	0

How many cases have you litigated on appeal? Provide case names and case numbers. If fewer than twenty cases, describe the nature of each case, your involvement, and each case's disposition.

I litigated many cases on appeal. Two of the more-important ones are described below in my response to the next inquiry in this application, as well as another one in which I argued on behalf of an amicus curiae party (discussed further below) and I incorporate their descriptions herein by reference. In addition, I handled and/or assisted with the following cases on appeal:

1. James R. Marriot v. Opus Group, et al., Seventh Circuit of the U.S. Court of Appeals (Case No. 06-2161), on appeal from the United States District Court for the Eastern District of Wisconsin. In this case, I helped successfully settle a lawsuit seeking substantial damages against clients who, among other defendants, were alleged to have negligently marketed and/or advised the plaintiff regarding certain, sophisticated investment programs aimed at obtaining certain tax benefits. The settlement followed our clients' invocation of a mandatory right to interlocutory appeal of a trial court's decision not to compel arbitration of the claims. I was the principal brief writer for the case, took lead in all discovery in the trial court, and I participated in all Rule 33 settlement conferences conducted by the Seventh Circuit.

2. Plastics Engineering Company v. Liberty Mutual Insurance Company, on appeal from the United States District Court Eastern District of Wisconsin (Case No. 04 C 825), with a decision by the Wisconsin Supreme Court, (Case No. 2008AP333), after transfer by Seventh Circuit Court of Appeals (Case Nos. 06-4397; 07-1041). This was a major appeal in Wisconsin in the context of liability insurance policies, especially in relation to coverage obligations for "long-tailed" claims spanning many years and the rules regarding allocation of liability. I was one of a number of attorneys to work on briefing before both the Seventh Circuit and the Wisconsin Supreme Court, substantially helping to prepare lead counsel for oral arguments in both courts. The Wisconsin Supreme Court adopted an "all sums" approach to the allocation issues, contrary to our arguments, but agreed with us on the issues related to the "stacking" of successive insurance policies under the applicable Wisconsin insurance statute.

3. Gustavo Montalvo v. U.S. Title and Closing Services, LLC (Case No. 2012AP000102). In this appeal before the Wisconsin Court of Appeals, I worked with Bill Stuart from my former firm on drafting a non-party brief for the Wisconsin Land Title Association. The case dealt with issues regarding what third parties (such as title companies) can rely on in terms of the language found in circuit court judgments when reviewing the impact of such judgments on property interests.

4. Gerald J. Barth v. Ford Motor Company (Case No. 2013AP002338). In this appeal before the Wisconsin Court of Appeals, I represented Ford Motor Company seeking reversal of a judgment entered in favor of a consumer who brought a claim under the Lemon Law. We argued, among other things, that statutory language within Wisconsin Lemon Law requiring that a consumer "make the motor vehicle available for repair," such that a particular nonconformity "is subject to repair by the manufacturer," required the consumer to expressly request that the manufacturer (or its authorized dealer) inspect or repair the nonconformity, and to physically present the vehicle to the manufacturer for such purpose. The Court of Appeals disagreed with both our construction of statute and attendant public policy arguments, at least under the facts of the case, and found that the statutory requirement had been met.

5. Acuity v. Chartis Specialty Insurance Company (Case No. 2013AP001303). I worked on this appeal while it was before the Wisconsin Court of Appeals. The case dealt with a complex intersection of insurance coverage law, tort law, and worker's compensation law, and in particular the duties of insurers to defend a claim arising from a workplace accident in which indemnity coverage was available to the tortfeasor from two different lines of insurance policies. Our client's position was that the facts and law of the case allowed for concurrent coverage whereby both insurers shared an equal duty to defend. The Court of Appeals disagreed with our position, but the case was eventually granted review by the Wisconsin Surpeme Court, which ultimately agreed with the merits of our argument and reversed the Court of Appeals.

6. Chase Home Finance, LLC v. Jan R. LaMarche (Case No. 2013AP001051). In this appeal before the Wisconsin Court of Appeals, I worked with Bill Stuart of my former firm representing Chase as the respondent in an appeal from a circuit court's grant of summary judgment on Chase' foreclosure claim (based on the lender's uncured default) and against LaMarche's numerous counterclaims. After briefing was complete, a private resolution was reached and the appeal was voluntarily dismissed.

7. Stephen G. Butcher v. Ameritech Corporation (Case No. 2005AP002355). In this appeal, I worked with a group of attorneys from other firms prosecuting a class action alleging that Ameritech Corporation had collected sales taxes on services that were not telecommunication services and therefore not subject to taxation under the applicable statute. The appeal seeking reversal of the circuit court judgment involved three arguments, but the principal issue related to application of the so-called "voluntary payments" doctrine, a then largely dormant doctrine that the Wisconsin Surpeme Court had resusitated in a different case a few years earlier. The Court of Appeals ultimately agreed with Ameritech and the Wisconsin Department of Revenue in dismissing the complaint as a matter of law. A petition for review to the Wisconsin Supreme

Court was filed, and (with one Justice not participating) it came up one vote short of review being granted.

In addition to the foregoing, there were a number of appeals on which I was very active (including some for which I was the principal brief writer on the initial merits brief) in the months immediately before my appointment to the Court of Appeals (none of which cases were being appealed to District III). These cases included: (a) Miron Construction Company, Inc. v. Schneider Excavating, Inc. (Case No. 2014AP001241); (b) Morgan Drexen, Inc. v. DFI (Case No. 2014AP001268; and (c) David G. Porter v. Ford Motor Company (Case No. 2014AP000975).

Finally, on a number of cases that went up on appeal that other attorneys in my firm handled, I worked with them either reviewing drafts of the briefs, mooting the argument, or otherwise offering insights regarding the courts in which the case appeared

List and describe the three most significant cases in which you were involved; give the case number and citation to reported decisions, if any. Describe the nature of your participation in the case and the reason you believe it to be significant.

1. Samuel C. Johnson 1988 Trust, et al. v. Bayfield County, 649 F.3D 799 (7th Cir. 2011) (Appellate Case Nos. Nos. 09-2876; 09-2879); Western District of Wisconsin, Case No. 06 C 348. In this case, I worked with Bill Stuart of former firm and two other attorneys from other firms, who represented different sets of private property owners, all of whom faced the prospect of a local government putting an ATV/snowmobile trail through the middle of their residences in northern Wisconsin, all without compensation. The case involved an abandoned railroad line which had its tracks removed in 1979, and after which private property owners purchased and built upon that land. Over two decades later, Bayfield County claimed it owned the rights to the land comprising the former right of way. This quiet title action ensued. Having lost on summary judgment in the Western District of Wisconsin, we prevailed before the U.S. Court of Appeals for the Seventh Circuit. Bill and I not only equally shared principal brief-writing responsibilities, we ultimately developed the theory that carried the day on behalf of our clients' and their unique situation relative to the applicable laws at play, including application of complex land-grant acts from the 1800s. This case represents one in a circuit split on these important issues regarding property rights and reversionary interests in the vast miles of abandoned former railroad rights of way across the country.

2. Cargill, Inc. v. Ace American Insurance Company, et al., 784 N.W.2d 341 (Minn. 2010). This was a complex insurance coverage action regarding underlying liabilities related to environmental contamination in Oklahoma and Arkansas. Our client was Liberty Mutual Insurance Company, which was being targeted by its insured, Cargill, to pay all of Cargill's millions of dollars in defense costs in the underlying actions, despite the fact that numerous other insurers, who had also issued policies to Cargill over the nearly 50-year period in which Cargill was alleged to have caused the contamination at issue, all owed a duty to defend Cargill for the claims at issue. On our client's behalf, we obtained summary judgment, with such decision being affirmed by the Minnesota Court of Appeals and then, on other grounds, by the Minnesota Supreme Court. In doing so, my former colleague, Michael Cohen, and I convinced the

Minnesota Supreme Court to overrule a 43-year-old precedent and create new Minnesota law on contribution rights between insurers as to their duty to defend an insured, all in a manner favorable to our client and insurers generally. I was the principal brief writer at each level of court through which we progressed. Despite the direct, adverse precedent facing our client's interests, we were still able to succeed on alternative theories in the trial court and in the intermediate court of appeals, until we reached the State Supreme Court, at which time we successfully convinced the Court to change its longstanding precedent.

3. Columbia Casualty, et al. v. Arjo Wiggins Appleton P.L.C., et al., Wisconsin Court of Appeals (Case No. 2009-AP-000286), on appeal from the Brown County Circuit Court, Wisconsin (Case No. No. 05 CV 36). This was an appeal from a nearly two-month jury trial, which itself was followed by substantial post-trial motion practice. It involved a complex environmental insurance coverage dispute involving PCB contamination of Fox River. I was one of many attorneys involved in developing the various theories on appeal and drafting the appellate briefs. Our client settled out of the case after appellate briefing was complete and before a decision was reached by the Court of Appeals.

X. PRIOR JUDICIAL EXPERIENCE:

Have you ever held a judicial or quasi-judicial office? If so, state the court(s) involved, position held, and dates of service.

Name of Agency/Court	*Position Held*	*Dates*
Wisconsin Court of Appeals	Judge	September 10, 2014 - present

List the names, phone numbers, and addresses of two attorneys who appeared before you on matters of substance.

1. George Burnett, (920) 437-0476, Law Firm of Conway, Olejniczak & Jerry, S.C., 231 South Adams Street, Green Bay, WI 54305.

2. Ryan Steffes, (715) 839-7786, Weld Riley, S.C., 3624 Oakwood Hills Parkway, Eau Claire, WI 54701

Describe the approximate number and nature of cases you have heard during your judicial or quasi-judicial tenure.

I have participated in the review of literally hundreds of cases since I took the bench. As an appellate court to which parties can appeal as a matter of right, I have reviewed, analyzed and decided cases from all areas of the law, including civil, criminal, administrative appeals, family law, and so forth.

Describe the two most significant cases you have heard as a judicial officer. Identify the parties, describe the cases, and explain why you believe them to be significant. Provide the trial dates and names of attorneys involved, if possible.

In terms of appeals before our court in which I have participated, probably two of the most significant are Murr v. State of Wisconsin, 2013AP2828 (Dec. 23, 2014), and New Richmond News v. City of New Richmond, 2014AP1938 (May 10, 2016).

In Murr, private property owners argued against the State and St. Croix County that a longstanding local ordinance governing property use for certain contiguous properties owned by the same person operated as an unconstitutional, uncompensated regulatory taking of property. The parties argued, and we addressed, principally the controlling Wisconsin Supreme Court case law interpreting regulatory takings in the context of contiguous real properties, most notably Zealy v. City of Waukesha, 201 Wis. 2d 365, 548 N.W.2d 528 (1996). We found against the property owners' claims based on the applicable precedent. The Wisconsin Supreme Court denied a petition for review of the case. However, following a petition for writ of certiorari to the U.S. Supreme Court, wherein the property owners changed their focused exclusively to federal constitutional jurisprudence, the Court granted review. It will hear the case early in the coming term. The decision should establish important principles regarding Fifth Amendment Takings Clause jurisprudence in this common context of contiguous properties owned by the same party.

In New Richmond News, a newspaper sought via an open records request copies of unredacted accident and incident police reports from the City of New Richmond. The City had begun redacting portions of the reports for fear that its failure to do so would subject it to significant liability under a federal law, as interpreted by the Seventh Circuit U.S. Court of Appeals in Senne v. Village of Palatine, 695 F.3d 597 (7th Cir. 2012). Addressing numerous and complex arguments involving the intersection of various federal laws and cases with Wisconsin laws (notably the open records law) and cases, we concluded that the newspapers' primary argument was incorrect. Namely, the mere fact that the government agencies at issue have a "function" to respond to open records requests does not overcome the protections of the federal act. However, we also disagreed with the City that an express provision in Wisconsin law requiring disclosure of accident reports did not come within a specific exception in the federal law allowing disclosure of the contested information. The appeal was originally heard on bypass to the Wisconsin Supreme Court, which was equally divided in its vote, requiring the case to return to our court for decision.

XI. PREVIOUS PARTISAN OR NON-PARTISAN POLITICAL INVOLVEMENT:

Have you ever held a position or played a role in a judicial, non-partisan, or partisan political campaign, committee, or organization? If so, please describe your involvement.

In 1994, I served as Chairperson of the "Students for Thompson" organization at the University of Wisconsin, Milwaukee, while I was a student at the University; this was part of the then Governor's reelection campaign.

List all instances in which you ran for elective office. For each instance, list the date of the election (include both primary and general election), the office that you sought, and the outcome of the election. Include your percentage of the vote.

April 5, 2016, Wisconsin Spring Primary Election for a six-year term to the Wisconsin Court of Appeals, District III. Elected with 99.6% of votes (uncontested).

List all judicial or non-partisan candidates that you have publicly endorsed in the last six years.

I endorsed then-Judge Nelson Phillips III in his April 2012 race for the Milwaukee County Circuit Court. I endorsed Judge Rebecca Bradley in her April 2013 election to the Milwaukee County Circuit Court. I endorsed Chief Justice Patience Drake Roggensack in her 2013 re-election to the Wisconsin Supreme Court. I endorsed Judge Laura Gramling Perez in her April 2014 election to the Milwaukee County Circuit Court. I endorsed Justice Rebecca Bradley in her April 2016 election to the Wisconsin Supreme Court.

XII. HONORS, PUBLICATIONS, PROFESSIONAL AND OTHER ACTIVITIES:

List any published books or articles, providing citations and dates.

1. The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Record, 85 Marq. L. Rev. 779 (2002).

2. Recent Revisions to the Wisconsin Fair Employment Act Raise the Stakes for Employers, The Business Journal (Milwaukee), Vol. 27, No. 3 at 43 (Oct. 16, 2009) (co-authored with Michael J. Cohen).

3. Recent Revisions to the Wisconsin Fair Employment Act Raise the Stakes for Probable Cause Determinations, Business Law News, State Bar of Wisconsin, Business Law Section (Sept. 2009).

4. The Twilight Zoning Laws: The Impending Judicial Death of Zoning Variances in Wisconsin, WI: Wisconsin Interest (Spring 2002), Wisconsin Policy Research Institute.

5. The Involuntary Scrapping of Early Retirement Plans in Wisconsin, WI: Wisconsin Interest (Winter 2001), Wisconsin Policy Research Institute.

6. Reaching the Green: Golf's Impact on Wisconsin, WI: Wisconsin Interest (Fall 2004), Wisconsin Policy Research Institute.

7. Rethinking Special Education in Wisconsin, WI: Wisconsin Interest (Fall 2002), Wisconsin Policy Research Institute.

8. Report, The Growth of Special Education in Wisconsin (July 2002), Wisconsin Policy Research Institute.

9. Wisconsin Teacher Compensation: A Bum Deal or a Plum Deal, WI: Wisconsin Interest (Fall 2001), Wisconsin Policy Research Institute.

10. Report, Performance-Based Pay for Teachers in Wisconsin: Options and Opportunities (June 2001), Wisconsin Policy Research Institute.

11. A Vote Against Fraud: Defending Reasonable Measures to Protect The Voting Process in Wisconsin, WI: Wisconsin Interest (Spring 2001), Wisconsin Policy Research Institute.

12. Quality Control: Merit Pay and Why the Teachers' Unions Stand in the Way, WI: Wisconsin Interest (Fall 2000), Wisconsin Policy Research Institute.

13. Report, The Costs and Benefits of Smaller Classes in Wisconsin: A Further Evaluation of the SAGE Program (September 2000), Wisconsin Policy Research Institute.

14. Painting a Different Picture: Why a City of Milwaukee Lawsuit Against the Paint Industry Should Fail, WI: Wisconsin Interest (Summer 2000), Wisconsin Policy Research Institute.

15. Criminals Escaping Affliction: Gerald Turner and Wisconsin's Fair Employment Law, WI: Wisconsin Interest (Winter 2000), Wisconsin Policy Research Institute.

16. Adults or Kids? - Inspecting the Rights, Responsibilities and Privileges of 18- 20 Year Olds, WI: Wisconsin Interest (Fall/Winter 1999), Wisconsin Policy Research Institute.

17. Taking Potshots at the Gun Industry: The Danger in Public Lawsuits Against a Legal Product, WI: Wisconsin Interest (Spring/Summer 1999), Wisconsin Policy Research Institute.

18. Beyond Smoke and Mirrors: A Critical Look at Smaller Class Sizes, WI: Wisconsin Interest (Fall/Winter 1998), Wisconsin Policy Research Institute

List any honors, prizes, or awards you have received, providing dates.

1. In 2013, I was rated as a "Super Lawyer" in Super Lawyers®.

2. I was rated by 2009, 2010, 2011 & 2012 Super Lawyers® as a “Rising Star” (awarded to only 2.5% of Wisconsin lawyers among attorneys 40 years old and younger or who have been in practice 10 years or less).

3. I was recognized as an “Up and Coming” Wisconsin Lawyer by the Wisconsin Law Journal (2011).

4. I was awarded the Golden Quill Award for Best Student Writing in the Marquette Law Review (2001-2002).

List all bar associations and professional societies of which you are a member; give the titles and dates of any office that you may have held in such groups and committees to which you belong or have belonged.

- State Bar of Wisconsin.
  Appellate Practice Section, Member; Board Member (2009 to 2015); Chairperson (July 2013 to June 2014); Secretary (July 2010 to June 2012).
- Seventh Circuit Bar Association, Member.
- St. Thomas More Lawyers Society of Wisconsin, current Member and past President.
- Marquette Law School Alumni Association, Board Member (2011 to present).
- Outagamie County Bar Association, Member.
- Federalist Society.
- The Hon. Robert J. Parins Legal Society of Northeast Wisconsin, Member.
- Eastern District of Wisconsin Bar Association.

Describe any additional involvement in professional or civic organizations, volunteer activities, service in a church or synagogue, or any other activities or hobbies that could be relevant or helpful to consideration of your application.

1. From 2005 to 2014, I served on the Board of Directors of the National Alliance for the Mentally Ill (NAMI), Greater Milwaukee Chapter.

2. After years of having served as a volunteer judge beginning in 2005, since 2009 I have been a co-coordinator for the regional competitions of State Bar of Wisconsin High School Mock Trial Tournament, first in Milwaukee and now in Wausau. In 2016, I also served as one of five judges for the State Finals of the tournament in Madison.

3. I served as a tutor for two semesters for the Milwaukee Bar Association, Sarah Scott Middle School Tutoring Program (Fall 2004 to Spring 2005).

4. In recent years, I have become an avid runner. Since 2008, I have run two full marathons (having trained for a third, but needed to back out two weeks before the run due to injury) and I have run six half-marathons.

Describe any significant pro bono legal work you have performed in the last five years.

In the matter of sanctions imposed in State v. Gregory K. Nielsen, 2011 WI 94, 337 Wis. 2d 302, 805 N.W.2d 353 (Wis. 2011). On behalf of the Appellate Practice Section of the State Bar of Wisconsin, as an amicus curiae party, I helped to persuade the Wisconsin Supreme Court to instruct the Wisconsin Court of Appeals—when that court considers imposing sanctions on an attorney or party for alleged rules violations—to first issue an order to show cause, so that such attorney or party can first attempt to explain why a rules violation should not be found and why sanctions should not be imposed. I was principal author of the amicus curiae brief, and argued before the Supreme Court on behalf of the Section.

Describe any courses on law that you have taught or lectures you have given at bar association conferences, law school forums, or continuing legal education programs.

1. In the fall of 2012, I served as an Adjunct Professor at the Marquette University Law School, teaching one of the six sections in the School's Appellate Writing & Advocacy course.

2. In March 2013, I spoke on "Evidence Rules Outside of Trials" at the Civil Litigation and Evidence in Wisconsin Courts Conference at the Marquette University Law School.

3. Along with my former colleague, William Stuart, I spoke before the Wisconsin Land Title Association at its 2011 Annual Convention regarding an important appellate case on which Mr. Stuart and I worked, Samuel C. Johnson 1988 Trust v. Bayfield County, Wisconsin, addressing issues related to property rights to abandoned railroad rights of way and related title insurance issues.

4. On four occasions during 2010, I presented CLE instruction on "Hiring and Firing Employees, Current Law and Best Practices," as part of a day-long CLE program titled "Representing the Closely Held Business," all as part of a State Bar of Wisconsin CLE Seminar.

5. In January 2015, I spoke on effective appellate brief-writing practices before the Hon. Robert J. Parins Legal Society of Northeast Wisconsin.

6. In October 2015, I spoke in Wausau as part of a State Bar of Wisconsin Appellate Practice Section seminar regarding best practices in District III of the Wisconsin Court of Appeals.

Describe any other speeches or lectures you have given.

I testified before the Wisconsin Assembly Committee on Labor and Workforce Development on October 12, 2011, and then again before the Senate Committee on Labor, Public Safety and Urban Affairs on October 24, 2011, regarding 2011 Assembly Bill 286 and 2011 Senate Bill 207, respectively, both of which involved proposed changes to the Wisconsin Fair Employment Act so as to permit employers to consider, with certain limitations, felony conviction records in employment decisions. I was asked to speak based on my having authored a Law Review article on precisely this topic in 2002.

XIII. FINANCIAL INVOLVEMENT:

Are you or your spouse now an officer, director, or otherwise engaged in the management of any business enterprise?

Yes ☐ No ☒

If yes, state the name of the enterprise, the nature of the business, the nature of your duties, and you or your spouse’s intended involvement upon your appointment or election to judicial office.

n/a

Describe any business or profession other than the practice of law that you have been engaged in since being admitted to the Bar.

None.

Describe any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind that you have received during the past five years.

None, other than a limited salary related to my adjunct teaching at the Marquette University Law School during the Fall September 2012.

XIV. References

Reference 1

Name	Michael J. Cohen
Address	111 E. Kilbourn Ave., Suite 1900, Milwaukee, WI 53202
Telephone Number	(414) 273-1300

Reference 2

Name	Justice Janine Geske (ret.)
Address	
Telephone Number	(414) 852-3376

Reference 3

Name	Joseph D. Kearney
Address	Marquette University Law School, 1215 W. Michigan St., P.O. Box 1881, Milwaukee, WI 53201
Telephone Number	(414) 288-1955

Reference 4

Name	Robert R. Gagan
Address	O'Neil Cannon Hollman DeJong & Laing, S.C., 716 Pine Street, Green Bay, WI 54301
Telephone Number	(920) 265-2184

XV. ADDITIONAL INFORMATION:

Explain in 500 words or less why you want to become a judge/justice.

There are both extrinsic and intrinsic reasons inspiring me to leave my service as a Wisconsin Court of Appeals judge in order to serve on the Wisconsin Supreme Court.

Externally, I believe there is much value I can bring to the work of the Court. I know that I can serve well the State of Wisconsin, its citizens, its guests, its businesses, its local governments, and all those who are affected by decisions of this State's highest court. I have the temperament, intellect, character, work ethic, respect for all people, and plain old common sense to be an excellent justice. Moreover, as evidenced by the broad base of support, respect and good reputation I have received across the state—especially during my time on the court of appeals—I am uniquely situated to bring a measure of collegiality with me to my service on the Court. Put another way, I will see one of my roles as listening intently to my colleagues—both those on the Supreme Court and those in the bench and bar throughout the state—regarding how best to improve our justice system, which is already great in so many respects. The endeavor is not one bit about me or my aggrandizement, but rather solely for the betterment of our courts, including our Supreme Court, as well as for the sound and proper development of the law.

Internally, being a justice on the supreme court will provide me great personal satisfaction and happiness. I am, fundamentally, an insatiable student of the law. I have a passion for learning it and for helping to make sure it is properly and intelligently developed and applied. And that is done within the context of an adversarial system. Moreover, it is simply a matter of fact that people, including jurists, will disagree on the important legal issues of the day. But it is with intelligent, vigorous yet respectful vetting of those disagreements that, I believe, the Court functions best. This should occur both within the Court's decision-making processes, and then in its published opinions. And while my jurisprudential views are no great mystery and certainly disagreed with by some, what garners respect, I submit, is that, at the end of day, my decisions are—and will continue to be—well reasoned, well written, and thoroughly analyzed. This approach is ingrained in me. To be a part of—and do what I can further to encourage—such a process on the State's highest court would truly be an honor, a privilege, and a challenge eagerly accepted.

In short, I strongly desire to become a justice on the Wisconsin Supreme Court because I believe I can serve well that institution, as well as serving the court system as a whole, including all those who benefit from a properly operated, competent, and fair justice system.

In 500 words or less, name one of the best United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

In my opinion, one of the best Wisconsin Supreme Court decisions in the last thirty years was Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602 (1998). I believe this decision was one of the Wisconsin Supreme Court's best days in terms of recognizing the role of the judiciary with respect to public policy decisions. Certainly, the Milwaukee School Choice Program was, for many reasons, a contentious issue for many people. Reasonable people on both sides debated the merits of the policy. Eventually, its enactment and expansion had received bipartisan support.

In all events, the question before the Court was only one of constitutional dimensions; that is to say, had the legislature and Governor overstepped their bounds in passing a law that operated in the manner the program did. The Court correctly engaged in the subject constitutional and other legal analyses before it, and reached the conclusion that, whatever one might think of the program from a policy standpoint, it was constitutional. As the majority opinion aptly stated: "In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process. This program may be wise or unwise, provident or improvident from an educational or public policy viewpoint. Our individual preferences, however, are not the constitutional standard."

In 500 words or less, name one of the worst United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

In my opinion, one of the worst United States Supreme Court decisions in the last thirty years was Kelo v. City of New London, 545 U.S. 469 (2005). I feel this way because the decision did great violence to an actual, clear provision in the U.S. Constitution (as contrasted with other precedents that have enforced "rights" far less clearly an actual part of the Constitution) all in order to aggrandize governmental interests and certain private party interests over those of other private property owners.

To be sure, legislatures can, and often do, enact public policies that limit private property owners' rights or that properly invoke the doctrine of eminent domain. In the main, whatever one might think of the relative wisdom of those policy decisions, they are properly the province of legislative and executive bodies. But in the Kelo case, the governmental bodies at issue plainly, in my opinion, exceeded constitutional bounds. The notion that a governmental body can exercise its eminent domain power to take property from one private party to give it to another private party, merely because such a taking might (emphasis on "might") be in furtherance of a general "economic development plan," simply does not satisfy the constitutional requirement that there be a “public use” in such a taking.

What's more, the precedent established by the majority in Kelo could be used against any and all types of property owners, to benefit only those private parties best able to gain favor with the applicable governmental body. In the context of the (otherwise) very strong American tradition of private property rights, this is quite a dangerous paradigm. Beyond the foregoing, I would just point to Justice O'Connor's summation of the error in the majority's decision as found in the powerful introduction to her dissent.

In 500 words or less, describe your judicial philosophy.

My judicial philosophy is, for lack of a better term, simple. I see my role as using my intellect, work ethic, analytical skills, and genuine respect for all those affected by decisions of our courts so as to apply the law intelligently and justly. In my mind, judges should not serve to advance any personal agenda or political platform. Rather, my job, both now and, if appointed, as a justice on the Supreme Court, is to apply and interpret those laws that have been developed through the common law of our courts or enacted by our legislative and executive bodies. To be sure, all laws must answer to the dictates of our state and federal constitutions, and jurists must faithfully adjudicate challenges on those grounds, based on the express provisions of those constitutions and, if applicable, binding precedents of the United States Supreme Court. In short, I have a firm respect for the rule of law.

I am an impartial jurist, not a policymaker. It seems to me this is the only proper way to be a judge or justice. Put another way, I am there to diligently read and hear argument from all advocates appearing before the Court, and then to intelligently interpret the law in each case. This is done for the benefit of each party to appear before our court, and to do so on each case's own merits, without prejudgment of the issues or the parties.

In other words, as a judge or a justice, I am there to be a third-party neutral before whom counsel work to advocate on behalf of their clients and attempt to argue in a manner that will support applications of the law that they seek. Importantly, I must also treat each case with the importance and respect to which each party, and each attorney in that case, places on it. Those who appear before our courts deserve such attention, diligence, hard work, and respect—at every level. Yet, in serving on the supreme court—or even on the court of appeals in those cases where our decisions are published—I am conscientious of the fact that the opinions we write greatly affect persons beyond just the parties appearing before the Court. This reality is all the more reason such opinions must be intelligently, clearly and otherwise well written.

If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

I sumitted an application to the Governor's commission in September, 2012 in relation to a vacancy on the Milwaukee County Circuit Court; again in March, 2014 in relation to another vacancy on the Milwaukee County Circuit Court; and again in June, 2014 in relation to a vacancy on the Wisconsin Court of Appeals, District III, which appointment I received and where I serve at this time.

Describe any other information you feel would be helpful to your application.

I believe that, beyond my academic and professional qualifications, I would bring a good personality to the Supreme Court. As I am apt to say, I have blue collar in my blood. I watched as my parents worked hard and sacrificed to provide me, and my three older brothers, with a quality education and sound upbringing as kids. My father worked for over 30 years as an assembler at Allen Bradley, while my mother was a second-shift emergency room nurse at the former Northwest General Hospital in Milwaukee. All the while, they worked and saved so as to enable their dream of eventually moving to northern Wisconsin, which they did 20 years ago. I

paid for my entire undergraduate education, save for the merit scholarships I received, by working fulltime in a stockroom, all the while attending classes full time (and even finding some time to wrestle competitively for two years in college). Indeed, I worked through all my years of schooling.

I was taught by my family and my teachers over the years to treat all people with respect, to give everyone the benefit of the doubt, but also to hold all people accountable for the mistakes they make, recognizing that individuals can later atone for their wrongs. I was also taught and believe that, no matter what one's station in life is, as we mature, we are ultimately responsible for our actions, including the obligation to respect the life, liberty and property of others.

Juxtaposed with my working-class background and no doubt enhanced by my work ethic, I have been able to become plenty bright and well read. I have excellent analytical, research and writing skills. I have tried to surround myself with people who enjoy a robust dialogue and from all different perspectives of issues. I use those opportunities to grow myself intellectually through the mutual challenge of viewpoints, sharpen my own understanding of the principles I hold dear, and do all this in a respectful and productive manner.

Additionally, I have earned the respect of all types of attorneys and judges over my career, including those from all across the state, from a variety of practice areas, and with varying philosophies. This very broad range of support and respect will invariably be an asset to my efforts serving on the Supreme Court and running for election thereto when the time comes.

At the same time, I enjoy unwinding, whether it be throughout northern Wisconsin, at sporting events, on the golf course, during long runs outdoors, or otherwise taking in the simple pleasures and leisures of life. And most of all, I enjoy every minute I spend with my lovely wife, Kelly. While we are not blessed with the ability to have our own children, we find plenty of avenues for caring and love, such as with our extended families, our dear friends, and with others in the community. We hope soon to finally realize our dream of adopting a child.

In short, I think these perspectives and my background, combined with all my other qualities discussed throughout this application, truly would serve me well as a justice on our state's Supreme Court.

Do you wish to request that your application remain confidential to the extent allowed by law?
Yes ☐ No ☒

Note: Such a request does not ensure that your application will remain confidential. In general, you should expect that all materials submitted will be disclosed to the public upon request under the public records law. The Governor's Office will honor such a confidentiality request to the extent the law allows. A request for confidentiality will not adversely affect your application for appointment.

Please remember to upload your first writing sample, second writing sample, resume, signed signature page, and cover letter.

SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

115 EAST STATE CAPITOL
MADISON, WI

WAIVER AND AUTHORIZATION:

I hereby authorize any person acting on behalf of the Governor or his staff to seek information related to my interest in appointment as judge. I further authorize any recipient of a request for information from the Governor or his staff to provide such information for consideration of my application.

5/17/16 (Date)

(Signature of Applicant)

NOTICE OF DISCLOSURE:

I acknowledge and understand that this application and supporting materials, when submitted to the Governor of Wisconsin, generally become public record. I therefore understand that this means my name, the fact that I have applied to be appointed as a judge, and my application materials could be released to the public.

5/17/16 (Date)

(Signature of Applicant)

Please note that under certain, limited circumstances, applications for appointed positions may be exempt from disclosure under the public records law. You must indicate in the online application whether you wish your application to remain confidential to the extent allowed by law.

Such a request does not ensure that your application will remain confidential. In general, you should expect that all materials submitted will be disclosed. The Governor's Office will honor such a confidentiality request to the extent the law allows. A request for confidentiality will not adversely affect your application for appointment.

COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP551 **Cir. Ct. No. 2011CV843**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

C. M. BYE,

PETITIONER-RESPONDENT,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 HRUZ, J. C.M. Bye placed unauthorized fill on wetlands on his property, and then he applied for an after-the-fact water quality certification from the Wisconsin Department of Natural Resources (DNR). Every tribunal to have considered that initial application—including the DNR, the Wisconsin Division of

Hearings and Appeals, and the circuit court—agreed that Bye was not entitled to certification under the law as it existed at the time of his application. However, while Bye's petition for judicial review of the DNR's denial of his application was pending, the Wisconsin legislature changed the law governing wetland permits. The circuit court concluded Bye was entitled to water quality certification under the new law, and it reversed the DNR's decision on that basis.

¶2 We reverse the circuit court's order. Although Bye submitted an application under the new law, that application is not a component of the present judicial review proceeding. It is not in the certified administrative record, and the DNR has not ruled on it. Further, contrary to the circuit court's conclusion, the facts established during the agency proceedings on Bye's initial application did not automatically qualify Bye for a certification permit under the new law. Accordingly, the circuit court erred by ordering water quality certification under the new law at this time. On remand, the circuit court shall enter an order affirming the DNR's decision and dismissing Bye's petition.

BACKGROUND

¶3 In 2005, Bye became the owner of real property located in Lincoln County. Bye graded out a hill and placed unauthorized fill at four points on the property, all in wetland areas. At the direction of the United States Army Corps of Engineers, Bye has since restored all but one of the locations to their natural wetland state. The remaining location, which is known as Site 2, is the subject of this case.

¶4 On November 16, 2009, Bye applied to the DNR for an after-the-fact water quality certification authorizing the fill at Site 2.[1] On May 17, 2010, the DNR denied the permit, finding Bye's proposal would not comply with the standards for water quality certification set forth in the then-applicable versions of WIS. ADMIN. CODE ch. NR 103 and WIS. ADMIN. CODE § NR 299.04. Bye requested a contested case hearing, which was held on June 27, 2011, before an administrative law judge (ALJ) from the Wisconsin Division of Hearings and Appeals.

¶5 In a July 27, 2011 written order, the ALJ upheld the DNR's decision to deny water quality certification for Site 2. He noted "the proposed project would affect 0.0848 acres of wetlands for the purpose of providing tractor and mower access by way of 'a crossing to 55 acres' of property for 'mowing and recreational use,' primarily grouse hunting." The ALJ determined there were "numerous practicable alternatives to the proposed wetland fill," and the fill would have "a significant detrimental direct impact upon preserving the wetland functional value ...." In sum, he concluded the DNR properly denied certification because the fill did not comply with various aspects of the applicable administrative regulations.

¶6 Bye filed a petition for judicial review of the ALJ's decision on August 18, 2011. He asserted the DNR improperly denied water quality

[1] A former DNR employee testified before the Division of Hearings and Appeals that an after-the-fact permit is required "when the work has been started or completed prior to application for the permit." According to this witness, an after-the-fact permit application is reviewed in the same manner as a predevelopment application; that is, the DNR approaches its review as if the project had not been started.

certification.[2] He also alleged the denial amounted to a regulatory taking, a claim he has since abandoned.[3] Pursuant to a scheduling order, Bye's first brief in the case was due on June 29, 2012.

¶7 Before Bye's first brief became due, legislation known as the Wetlands Reform Bill was enacted. *See* 2011 Wis. Act 118. Federal law requires states to certify that any discharges into navigable waters within their jurisdiction comply with state water quality standards enacted under Title 33 of the United States Code. *See* 33 U.S.C. § 1341(a). Discharges into nonnavigable waters, however, were not subject to federal oversight and were regulated only by the DNR under WIS. STAT. § 281.36 (2009-10). It was this type of certification Bye sought in his 2009 application to the DNR. The Wetlands Reform Bill was, in part, designed to establish uniform standards governing discharges into both federal and nonfederal wetlands.

¶8 Accordingly, the Wetlands Reform Bill repealed much of the previous WIS. STAT. § 281.36 and re-created the section to establish two classes of state wetland permits sufficing as federal certification: "general" permits and "individual" permits. *See* 2011 Wis. Act 118, §§ 71-86. General permits are summarily issued for certain categories of discharges that are temporary or affect only a small amount of wetland area. *See* WIS. STAT. § 281.36(3g)(a). As

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[2] By rule, the ALJ's decision becomes the final decision of the DNR. *See* WIS. STAT. § 227.46(3); WIS. ADMIN. CODE § NR 2.155(1) (Mar. 2014).

Unless otherwise noted, all references to the Wisconsin Statutes are to the 2011-12 version.

[3] A regulatory takings claim is not cognizable under WIS. STAT. § 227.57 and was not properly included in Bye's petition for judicial review. *See* WIS. STAT. § 227.53(1)(b).

pertinent to this case, WIS. STAT. § 281.36(3g)(a)9. authorizes the DNR to issue general permits for discharges that are "part of a development for recreational purposes, if the discharge does not affect more than 10,000 square feet of wetland."[4] The legislation also required the DNR to establish "requirements, conditions, and exceptions to ensure that the discharges [authorized by a general permit] will cause only minimal adverse environmental effects ...." WIS. STAT. § 281.36(3g)(d). If a discharge is not authorized under a general wetland permit, or if the DNR is concerned about adverse wetland impacts associated with an application for a general permit, a more rigorous individual permit process is required. *See* WIS. STAT. § 281.36(3m).

¶9 On June 28, 2012, three days before the effective date of the Wetlands Reform Bill, Bye filed his legal brief setting forth his argument for reversal. Bye did not argue he was entitled to water quality certification under the general permit provisions of the new law. Indeed, he conceded the "Wetlands Reform Bill was not in effect for this case at the time of the subject permit application on November 17, 2009." Instead, Bye cited the new law as evidence that his "de minimis" filling would not have a significant adverse wetland impact. The DNR filed a response brief in late September, in part calling on Bye to submit a second application under the new standards established by the Wetlands Reform Bill.

¶10 Bye filed a second application for water quality certification for Site 2 on October 10, 2012. In it, he again acknowledged that the Wetlands

[4] 10,000 square feet is equal to approximately .23 acres. It is undisputed that the area of the Site 2 fill is less than one-tenth of an acre.

Reform Bill was not in effect at the time of his initial permit application. However, he claimed that, under the new law, the issuance of water quality certification was mandatory because "[i]t is undisputed that the Site 2 project ... would only affect ... less than 10,000 square feet [and] ... is a development purely for recreational purposes."

¶11 On October 31, 2012, the parties agreed to stay the judicial review proceeding while the DNR considered Bye's second application under the Wetlands Reform Bill's provisions. The parties stipulated that if the DNR approved the application, the action for judicial review would be moot. However, the DNR had not yet acted on Bye's second application by June of 2013, apparently because it had not finished developing the "requirements, conditions, and exceptions" attendant to general permits under WIS. STAT. § 281.36(3g)(d). Judicial review proceedings therefore resumed without conclusive DNR action on Bye's second application.

¶12 Bye filed a reply brief in the circuit court on July 12, 2013. He raised several arguments for the first time, among them that the circuit court could independently grant water quality certification under the new Wetlands Reform Bill. Bye also filed an affidavit to which he attached his second application, which was still pending before the DNR. Consistent with his second application, Bye argued the issuance of a discharge permit was mandatory because his fill had a recreational purpose and affected less than 10,000 square feet of wetland.

¶13 The circuit court reversed the DNR's decision and granted Bye water quality certification for the Site 2 wetland fill project. The court addressed, and rejected, each of Bye's challenges to the sufficiency of the evidence supporting the DNR's decision on Bye's initial application. It agreed with the

ALJ that the fill violated then-applicable WIS. ADMIN. CODE ch. 103. Nonetheless, the court concluded Bye was entitled to certification under the new law, with the "understanding" that Bye would add culverts to the project to "minimize the impact on the surrounding wildlife."

DISCUSSION

¶14 Appeals from administrative decisions are governed by the standards set forth in WIS. STAT. ch. 227. *See* ***Columbus Milk Producers' Co-op v. Department of Agric.***, 48 Wis. 2d 451, 458, 180 N.W.2d 617 (1970). We must affirm the agency decision unless the petitioner establishes one of the grounds set forth in WIS. STAT. § 227.57(4)-(8). *See* WIS. STAT. § 227.57(2). There is no dispute in this case that the DNR's interpretation and application of water quality standards is entitled to great weight deference. *See* ***Andersen v. DNR***, 2011 WI 19, ¶27, 332 Wis. 2d 41, 796 N.W.2d 1.

¶15 The scope of judicial review in an administrative appeal is the same regardless of whether the case is before the circuit court, the court of appeals, or the supreme court. *See* ***Andersen***, 332 Wis. 2d 41, ¶24; ***Cuna Mut. Ins. Soc. v. DOR***, 120 Wis. 2d 445, 448, 355 N.W.2d 541 (Ct. App. 1984). At each level, courts are to apply the standards set forth in WIS. STAT. § 227.57. *See* ***Andersen***, 332 Wis. 2d 41, ¶24. The agency decision—not the decisions of lower courts—is the focus of the review. *See* ***Richland Sch. Dist. v. DILHR***, 166 Wis. 2d 262, 273, 479 N.W.2d 579 (Ct. App. 1991), *aff'd*, 174 Wis. 2d 878, 498 N.W.2d 826 (1993).

¶16 Setting aside for a moment the issue of whether the circuit court properly granted water quality certification based on the Wetlands Reform Bill, we note that every previous tribunal has concluded that Bye is not entitled to a permit

based on the law in effect at the time of his initial application. Consistent with these determinations, we conclude there is no reason whatsoever to overturn the DNR's findings of fact or conclusions of law.

¶17 This is so because Bye's arguments to this court do not contend that the DNR erred by denying his initial application under then-existing law. Although he did present such arguments before the circuit court, the court specifically rejected Bye's assertion that various facets of the DNR's decision were not supported by substantial evidence. Meanwhile, the court did not address Bye's arguments, first raised in his reply brief in support of his petition for judicial review, that the DNR's decision was arbitrary and capricious, inequitable, and plagued with procedural flaws. Bye has abandoned all such arguments on appeal, thereby conceding the DNR acted appropriately when it denied his application. *See* ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Grp., Inc.***, 2004 WI App 134, ¶16, 275 Wis. 2d 349, 685 N.W.2d 564 (court of appeals will not address undeveloped arguments).

¶18 Instead, Bye asserts he is entitled to water quality certification based on the statutory changes brought about by the Wetlands Reform Bill. He argues the circuit court properly granted him a permit under that legislation, even though it also determined the DNR correctly denied certification. We disagree, because issuing such a certification in this case requires the consideration of matters outside of the administrative record, skirts the exhaustion of administrative remedies and prior resort doctrines, and fails to give due deference to the DNR's authority.

¶19 Judicial review of an agency decision is generally confined to the administrative record. *See* WIS. STAT. § 227.57(1); ***Wisconsin's Envtl. Decade,***

Inc. v. Public Serv. Comm'n, 79 Wis. 2d 409, 422 n.12, 256 N.W.2d 149 (1977). The phrase "record on review" is a term of art within the context of WIS. STAT. ch. 227 and means "that record actually compiled and certified by the agency, which it sends to the circuit court." ***Lake Beulah Mgmt. Dist. v. DNR***, 2011 WI 54, ¶52, 335 Wis. 2d 47, 799 N.W.2d 73.

¶20 Bye's second application is not a part of the record on review. Indeed, it could not have been, as neither the second application, nor the Wetlands Reform Bill, existed at the time the DNR denied Bye's initial application for water quality certification. Only the agency's decision regarding Bye's initial application was before the circuit court and is before this court. We cannot expand the scope of the judicial review proceedings to rule on an application that is not part of the administrative record and on which the DNR had not yet acted.

¶21 Bye asserts, as he did before the circuit court, that his second application is properly within the scope of judicial review, though not as part of the administrative record under review.[5] Bye contends that the parties' stipulation—which brought about the stay in the circuit court proceedings while Bye pursued his second application—also effectively made that application part of the administrative record. We reject this argument because, although the stipulation established the fact that a second application had been submitted, it did not add anything to the administrative record on review.

[5] Typically, a party wishing to present additional evidence would seek permission from the circuit court under WIS. STAT. § 227.56(1). It does not appear Bye did so here. In any event, even if Bye sought to bring his second application before the court under that subsection, the court "could not receive such evidence and decide the petition[] for review on the basis of such evidence but could only order that the additional evidence be taken before [the] DNR upon such terms as the circuit court deemed proper." *See* ***State Public Intervenor v. DNR***, 171 Wis. 2d 243, 245, 490 N.W.2d 770 (Ct. App. 1992).

¶22 Bye also argues his affidavit and the second application attached to it do properly warrant consideration because they relate to an alleged procedural irregularity under WIS. STAT. § 227.57(1). Subsection 227.57(1) states that if a petitioner alleges "irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken ... if proper cause is shown therefor."

¶23 Bye's attempt to expand the administrative record under the guise of procedural irregularity fails for several reasons. First, the "irregularity" he invokes is entirely contrived. Bye characterizes the DNR's argument to be that he never submitted a second application, which Bye argues contravenes the parties' stipulation. To the contrary, it is clear the DNR does not dispute Bye submitted a second application. The DNR merely notes that application is not in the administrative record and cannot be considered by courts tasked with reviewing the DNR's denial of Bye's earlier application. Second, Bye does not allege any "irregularities in procedure *before the agency*," which is solely what the statute addresses. *See* WIS. STAT. § 227.57(1) (emphasis added). Third, even assuming the second application arguably related to some procedural irregularity, it is not the type of evidence that may be added to the record. Subsection 227.57(1) permits the circuit court to take testimony on such alleged irregularities, which was not done here.

¶24 More fundamentally, reviewing courts are not competent to grant water quality certification under the Wetlands Reform Bill in the present case. The DNR, not the circuit court, is vested with authority to issue wetlands discharge permits. *See* WIS. STAT. § 281.36(3g)(a), (3g)(h)1. The DNR's decision is then reviewable within the confines of WIS. STAT. ch. 227. The parties

must complete all administrative processes established by the legislature before they come to court. ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977).

¶25 Known as the exhaustion of administrative remedies doctrine, this rule generally presumes that any procedures established for review of an administrative decision constitute the exclusive remedies available and must be employed before other remedies are used. ***Id.*** Here, Bye did not complete the administrative process attendant to his second application. Instead, judicial review proceedings resumed without official DNR action on Bye's second application.[6] Bye is not entitled to circumvent the administrative process and seek his desired permit directly from reviewing courts.

¶26 Closely related to the exhaustion doctrine is the doctrine of prior resort. It applies "where there has been a total absence of any formal administrative proceedings." ***Helnore v. DNR***, 2005 WI App 46, ¶22, 280 Wis. 2d 211, 694 N.W.2d 730. Here, although the judicial review proceedings were stayed to allow the DNR to consider Bye's second application, it is undisputed the DNR never did so, apparently because it had not yet established the required permit eligibility criteria under the Wetlands Reform Bill. *See* 2011 Wis. Act 118, § 75 (DNR "shall establish requirements, conditions, and exceptions to ensure that the discharges will cause only minimal adverse environmental

[6] As we later explain, the stay in this case did not provide the DNR with an adequate opportunity to address Bye's new application. *See infra*, ¶¶28-30. Bye suggests the DNR acted unreasonably by not addressing his second application immediately, but he does not develop a cognizable legal argument or cite any authority on this point. We shall therefore not consider the issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments and arguments unaccompanied by citation to legal authorities will not be considered).

effects"); WIS. STAT. § 281.36(3g)(d) (same). Accordingly, reviewing courts cannot intervene, because there remains the possibility—indeed, in this case, the necessity—of further administrative action. *See* ***Helnore***, 280 Wis. 2d 211, ¶22.

¶27 Taken collectively, the exhaustion and prior resort doctrines' "'net result is in effect that the administrative agency is entitled to the first and the next-to-the-last word.'" ***Nodell Inv. Corp.***, 78 Wis. 2d at 427 n.13 (quoted source omitted). The DNR received neither in this case as to Bye's second application and the new wetlands law and regulations. A change in the law while judicial review proceedings are pending is not a reason for cutting the DNR out of the process; to the contrary, the DNR must be given the initial opportunity to apply that law in this context of a permit to fill wetlands. The circuit court and this court must confine their review to "conditions as they were" when the DNR issued its denial order. *See* ***Wisconsin's Envtl. Decade***, 79 Wis. 2d at 436, 438 (declining to address the validity of new regulations promulgated after initial administrative decision).[7]

¶28 Bye asserts the DNR need not be given an opportunity to review his second application. He contends a remand to the DNR would be "needless or futile" when the DNR had "already ... assembled a substantial administrative record resulting in fact[ual] findings that happen to support Bye's right to a permit

[7] Citing ***Tift v. Forage King Industries, Inc.***, 108 Wis. 2d 72, 103, 322 N.W.2d 14 (1982) (Callow, J., dissenting), Bye asserts that a "court generally must apply the law as it exists at the time of the court's ruling." In so doing, Bye grossly mischaracterizes the cited decision. ***Tift*** was a product liability action—not a WIS. STAT. ch. 227 petition for judicial review. Further, Bye fails to acknowledge that he cites to the opinion of a dissenting justice. Finally, the dissenting justice's point was that the legislature is best suited to enact limitations on product liability actions—not that the courts and litigants are entitled to avoid the procedure outlined in ch. 227 based on an intervening change in the law.

under the new law." Bye believes he is entitled to water quality certification under the Wetlands Reform Bill as a matter of law because the administrative record established that Site 2 occupies less than 10,000 square feet, and he uses the site for a recreational purpose—namely, hunting.

¶29 It is true that WIS. STAT. § 281.36(3g)(a)9. requires the DNR to issue a wetland general permit for discharges that are "part of a development for recreational purposes, if the discharge does not affect more than 10,000 square feet of wetland." However, that is not all WIS. STAT. § 281.36 says. In issuing wetland general permits, the DNR is also required to "establish requirements, conditions, and exceptions to ensure that the discharges will cause only minimal adverse environmental effects ...." WIS. STAT. § 281.36(3g)(d). Further, there are certain areas—including interdunal wetlands, coastal plain marshes, and boreal rich fens—into which the DNR may prohibit discharges altogether. *See* WIS. STAT. § 281.36(3g)(d)1.-7.

¶30 Thus, it is not true that Bye is entitled to a wetland general permit as a matter of right based on the facts as found by the ALJ. Bye's discharge permit may have been denied altogether, or subject to significant conditions, depending on what "requirements, conditions, and exceptions" the DNR ultimately adopted.[8] Further, Bye does not cite any evidence indicating the DNR determined Site 2 was a suitable location for discharge based on the requirements of WIS. STAT. § 281.36(d)1.-7.

[8] We note that shortly after termination of the stay in this case, the DNR issued a wetland general permit for recreational development that included eligibility criteria and project conditions. *See* WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WETLAND GENERAL PERMIT FOR RECREATIONAL DEVELOPMENT (issued July 19, 2013), *available at* http://dnr.wi.gov/topic/waterways/documents/permitDocs/GPs/GP4.pdf.

¶31 In a final effort to salvage the rationale of the circuit court's ruling, Bye claims its action was justified by several rules within WIS. STAT. ch. 227. None of these rules contravene the principles we have set forth. WISCONSIN STAT. § 227.57(9) gives a reviewing court authority to "provide whatever relief is appropriate irrespective of the original form of the petition." As we have established, the relief awarded by the circuit court in this case was not appropriate. Bye also asserts the DNR's decision was legally incorrect under WIS. STAT. § 227.57(5). However, Bye does not challenge—even as an alternative basis for affirming the circuit court's decision—that the DNR properly denied Bye a permit under then-existing law. Moreover, § 227.57(5) only applies when an agency "has erroneously interpreted a provision of law." Bye overlooks that the DNR never had occasion to interpret the Wetlands Reform Bill, much less erroneously interpret it, because the law did not exist at the time of the DNR's decision. Bye's allusion to WIS. STAT. § 227.57(8), which sets forth the criteria under which a court may reverse an agency's exercise of discretion, is similarly unavailing and inapt, for this same reason.

¶32 Bye is not "left out in the cold," *see* ***Helnore***, 280 Wis. 2d 211, ¶21, with respect to obtaining a permit under the Wetlands Reform Bill. As far as we can discern, based on the record, Bye's second application has never been the subject of formal DNR action and remains pending. If he wishes to pursue that application further, he must follow the proper protocol and obtain a DNR decision, which would then be subject to review as set forth in WIS. STAT. ch. 227.

¶33 Based on the foregoing, we conclude the DNR properly denied Bye's application and its decision should have been affirmed. Accordingly, we reverse the circuit court's order and remand with directions that it enter an order affirming the DNR's decision and dismissing Bye's petition.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

2015 WI APP 46

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2014AP365-CR

Complete Title of Case:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. HULL,

DEFENDANT-APPELLANT.

Opinion Filed:	May 19, 2015
Submitted on Briefs:	December 2, 2014
Oral Argument:	

JUDGES:	Hoover, P.J., Stark and Hruz, JJ.
Concurred:	
Dissented:	

Appellant ATTORNEYS:	On behalf of the defendant-appellant, the cause was submitted on the briefs of *Rick B. Meier* of *Ellis Street Law Office*, Kewaunee.
Respondent ATTORNEYS:	On behalf of the plaintiff-respondent, the cause was submitted on the brief of *J.B. Van Hollen*, attorney general, and *Aaron R. O'Neil*, assistant attorney general.

2015 WI App 46

COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP365-CR
Cir. Ct. No. 2013CF165

STATE OF WISCONSIN IN COURT OF APPEALS

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. HULL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed and cause remanded for further proceedings.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 HRUZ, J. David Hull appeals a nonfinal order denying his motion to dismiss charges arising from an alleged sexual assault of a minor.[1] At the preliminary hearing, the alleged victim's statements were introduced through the testimony of an investigating detective. The testimony was offered pursuant to WIS. STAT. § 970.038, a recently enacted statute that authorizes the admission of hearsay evidence at preliminary hearings.[2]

¶2 Hull contends WIS. STAT. § 970.038 is an unconstitutional ex post facto law, and he also argues the preliminary hearing was improperly terminated without Hull being allowed to call the alleged victim as a witness. We conclude § 970.038 is not an ex post facto law because it affects only the evidence that may be admitted at the preliminary hearing and does not alter the quantum or nature of evidence necessary to convict the defendant. We further conclude the court commissioner properly refused to allow Hull to call the alleged victim to testify at the preliminary hearing because the anticipated testimony was not relevant to the probable cause inquiry. Accordingly, we affirm, and we remand to the circuit court for further proceedings.

BACKGROUND

¶3 On February 8, 2013, the State charged Hull with one count of first-degree sexual assault of a child under age sixteen by use or threat of force or violence, and one count of second-degree sexual assault of a child under age

[1] This court granted leave to appeal a nonfinal order on March 10, 2014.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

sixteen. The alleged victim, S.H., and her mother approached police on January 11, 2012, alleging Hull had sexually assaulted S.H. in a hotel room on the weekend of February 25-27, 2011.

¶4 S.H. made the following allegations during a recorded forensic interview. S.H. and her father attended a taxidermy conference at which Hull was also present. S.H. was fourteen years old at the time. After dinner one night, S.H. returned to her hotel room while her father and Hull went out to drink. S.H. stated her father was an alcoholic. Her father and Hull returned to the hotel room at approximately 11:00 p.m. S.H. said her father was drunk and fell between a bed and the wall before passing out next to S.H. on one of the beds in the room.

¶5 S.H. further alleged that after her father fell asleep, Hull sexually propositioned S.H. several times before taking off nearly all his clothes and kneeling next to her bed. Hull rubbed her back and leg and asked, "So when do you want to hook up?" S.H. resisted Hull's advances, but Hull threw her on the room's other bed and raped her. S.H. screamed for her father during the assault, but he did not wake up until the next morning. The following day, S.H. told her father that Hull touched her the night before, but S.H. did not think her father believed her.

¶6 In 2011, at the time of the alleged offense, most hearsay was prohibited at preliminary hearings. *See* WIS. STAT. §§ 908.07, 970.03(11) (2009-10) (hearsay admissible only for limited, specific purposes, such as proving ownership of property). On April 12, 2012, the legislature repealed section 908.07 and subsection 970.03(11) and enacted WIS. STAT. § 970.038. *See* 2011 Wis. Act 285. Section 970.038 made hearsay admissible at preliminary hearings and

authorized courts to find probable cause based on hearsay evidence. By the time Hull was charged, in February 2013, § 970.038 was in effect.[3]

¶7 Hull subpoenaed the alleged victim to testify at the first scheduled preliminary hearing on May 1, 2013. The hearing was rescheduled for June 12, 2013, because the alleged victim was hospitalized following a suicide attempt. In the interim, the State filed a motion to quash the subpoena. The State argued the alleged victim's testimony was not relevant to the probable cause determination and was solicited for the improper purpose of discovery. The State also expressed concern for the alleged victim's mental state should she be compelled to testify.

¶8 Hull's counsel responded that, since the State opposed requiring the alleged victim to testify, it appeared the State would be relying on hearsay under the recently enacted WIS. STAT. § 970.038 to show probable cause. Counsel noted that constitutional challenges to the statute were then pending before this court. Hull also asserted the statute, as applied to his case, constituted an ex post facto violation, because the statute first became effective after the date of the alleged offense.

¶9 The court commissioner decided to bifurcate the preliminary hearing. The State's presentation of evidence would occur during the first portion of the hearing. The commissioner determined hearsay was admissible under WIS. STAT. § 970.038, but he agreed to revisit his ruling if Hull filed a brief providing a legal basis for his ex post facto argument, or if this court invalidated the statute in

[3] The effective date of WIS. STAT. § 970.038 was April 27, 2012. *See* 2011 Wis. Act 285.

the meantime. The commissioner then stated he would proceed as follows: after the State's presentation of evidence, he would entertain any defense requests for an adjournment to subpoena witnesses; then, the second portion of the hearing would be held if he determined additional evidence was necessary.

¶10 On July 17, 2013, this court decided ***State v. O'Brien***, 2013 WI App 97, 349 Wis. 2d 667, 836 N.W.2d 840, *aff'd*, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8, *cert. denied*, 135 S. Ct. 494 (2014), in which we concluded that

> nothing in the State or federal constitutions prohibits allowing the finder of fact at a preliminary examination to consider hearsay evidence and to rely upon hearsay evidence to determine that the State has presented a "believable account of the defendant's commission of a felony." ... WISCONSIN STAT. § 970.038 is consistent with the federal and state constitutions and is now the law of Wisconsin.

Id., ¶26 (no quoted source provided, but apparently quoting ***State v. Dunn***, 121 Wis. 2d 389, 397, 359 N.W.2d 151 (1984)). Specifically, we determined WIS. STAT. § 970.038 did not: (1) violate the defendants' fair trial rights, including the right to due process and the right to confront adverse witnesses; (2) limit the defendants' ability to call or cross-examine witnesses to any greater extent than that ability was already limited by the purpose of the preliminary hearing; or (3) violate the defendants' right to effective assistance of counsel. *See* ***O'Brien***, 349 Wis. 2d 667, ¶¶10-11, 17, 21-22, 25.

¶11 Two days after our ***O'Brien*** decision, the parties attended the next scheduled hearing in this matter. Hull's counsel agreed the only issue left undecided by ***O'Brien*** was whether WIS. STAT. § 970.038 was an ex post facto

law. Hull relied on ***Calder v. Bull***, 3 U.S. 386 (1798), which interpreted the United States Constitution's Ex Post Facto Clause[4] as prohibiting, among other things, any 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." ***Id.*** at 390. Hull reasoned that the purpose of the preliminary hearing was "to convict the defendant" because "[i]f there's no bind over, there can be no conviction."

¶12 The court commissioner disagreed and denied Hull's motion claiming an ex post facto violation. He held that ***Calder*** was "specifically talking about what is necessary to convict [at trial] as opposed to getting a bind over decision ...." The State then called its only witness, police detective Brad Linzmeier, who had investigated the allegations against Hull. Linzmeier testified another officer had taken a written statement from S.H., marked as Exhibit 1, that was consistent with S.H.'s statements during the recorded forensic interview.

¶13 Hull objected to Exhibit 1's admissibility on foundation grounds. Specifically, counsel argued:

> I object to any statements that she makes about the condition of another person, particularly her father, and the fact that he is passed out or that he's drunk. There's no foundation for those hearsay statements. And it doesn't appear that she had personal knowledge of whether he was sleeping or not.

[4] The United States Constitution contains two references to ex post facto laws. The first, located in U.S. CONST. art. I, § 9, prohibits Congress from passing such a law, while the second, located in U.S. CONST. art. I, § 10, prohibits the states from passing such a law. As our case concerns only a state law and not an act of Congress, our use of the "Ex Post Facto Clause" in the singular refers only to the prohibition contained in art. I, § 10.

The court commissioner sustained the objection regarding the alleged victim's observations of the father.

¶14 After the State concluded its presentation, Hull requested an adjournment to subpoena S.H. and her parents. The State opposed the motion, arguing their testimony was not germane to the purpose of the preliminary hearing because it did not go to the plausibility of the State's witnesses' account. Instead, the State claimed the request was either an attempt to "destroy the credibility of the complaining witness" or a "fishing expedition for discovery."

¶15 The court commissioner agreed to allow Hull to subpoena the father. He determined a plausibility issue was raised by S.H.'s statement that she was screaming for her father, who was in the same room but did not wake up at the time. The commissioner deferred a decision on making the alleged victim testify until after the father's testimony, and he rejected Hull's request to require the mother to testify.

¶16 The alleged victim's father testified on August 16, 2013. He acknowledged he had limited memory of the events on the night in question due to the passage of time and his alcohol consumption that night. The father stated he started drinking beer in the afternoon and switched to mixed drinks during the evening. He acknowledged being intoxicated on the date in question. When he returned to the hotel room from the bars, he "went into the bathroom and I believe I came back and flopped down on the bed and passed out or fell asleep ...." He testified on direct examination that he did not hear his daughter scream, and did not believe he would have slept through his daughter's rape. However, he gave the following testimony on cross-examination:

> She could have [screamed]. Like I said, I normally don't drink, and before the show I spent several days up getting my mount for the show. I might have been – I'm a heavy sleeper. Plus with the alcohol. I didn't hear nothing. You know, I still ... it bothers me to this day that I wouldn't have heard anything.

Based on this testimony, the court commissioner concluded it was plausible that the father slept through the assault. Having heard sufficient evidence over the course of the preliminary hearing to find probable cause to believe Hull committed a felony, the court bound Hull over for trial.

¶17 Hull then filed a motion to dismiss the charges, arguing that WIS. STAT. § 970.038 was unconstitutional and that the court commissioner improperly terminated the preliminary hearing without allowing him to call the alleged victim to testify. The circuit court denied Hull's motion in an order entered on February 4, 2014. It concluded that all but Hull's ex post facto argument had been resolved by this court's ***O'Brien*** decision, and that § 970.038 was not an ex post facto law because it "in no way affects the evidence that could be introduced at trial to convict Hull." The court also concluded the court commissioner properly refused to allow Hull to call the alleged victim because her testimony was not relevant and was sought for the improper purposes of obtaining discovery and attacking her credibility.

¶18 Hull petitioned for leave to appeal the nonfinal order. The State, observing that our supreme court had accepted review in ***O'Brien***, did not oppose the petition. We granted Hull's petition on March 10, 2014, and ordered that Hull's brief be filed no later than forty days after the supreme court released its decision in ***O'Brien***.

DISCUSSION

¶19 On July 9, 2014, the supreme court affirmed our ***O'Brien*** decision. *See* ***O'Brien***, 354 Wis. 2d 753, ¶4. The court rejected the petitioners' arguments that WIS. STAT. § 970.038 violated their constitutional rights to confrontation, compulsory process, effective assistance of counsel, and due process. ***Id.***, ¶2. In the wake of ***O'Brien***, Hull's only remaining viable arguments are that (1) the application of WIS. STAT. § 970.038 to his case constituted an ex post facto violation, and (2) the court commissioner improperly terminated the preliminary hearing without permitting him to call the alleged victim as a witness.

I. Ex post facto violation

¶20 We ordinarily review a circuit court's evidentiary rulings for an erroneous exercise of discretion. *See* ***O'Brien***, 354 Wis. 2d 753, ¶16. However, a defendant's constitutional challenge to the application of an evidentiary statute presents a question of law that we review without deference to the circuit court. *See* ***id.*** We presume that duly enacted laws are constitutional. ***State ex rel. Singh v. Kemper***, 2014 WI App 43, ¶9, 353 Wis. 2d 520, 846 N.W.2d 820. Hull bears the heavy burden of establishing beyond a reasonable doubt that WIS. STAT. § 970.038 is unconstitutional. *See* ***id.***; ***State v. Post***, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995).

¶21 Both the United States and Wisconsin Constitutions prohibit ex post facto laws. ***State v. Carpenter***, 197 Wis. 2d 252, 272, 541 N.W.2d 105 (1995) (citing U.S. CONST. art. I, § 9, cl. 3 & § 10, cl. 1; WIS. CONST. art. I, § 12). Believing that the Wisconsin Constitution's protections against ex post facto laws

are more limited than those of the federal constitution, Hull invokes only the protections of the federal constitution in his challenge to WIS. STAT. § 970.038.[5]

¶22 ***Calder*** is the seminal case defining the federal ex post facto clause's reach. ***Calder*** was a civil case; it involved a challenge to a Connecticut law setting aside a judicial decision in a will dispute and ordering a new hearing before the probate court. ***Calder***, 3 U.S. at 386-87. In the course of rejecting the petitioner's argument that the ex post facto clause prohibited the law, Justice Chase expounded upon the clause's proper scope:

> I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 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.

[5] We are skeptical of Hull's interpretation of the case law he cites in support of this view. Hull seems to believe that ***State v. Haines***, 2003 WI 39, 261 Wis. 2d 139, 661 N.W.2d 72 (holding that Wisconsin's ex post facto clause was not violated by retroactive application of amendment to statute of limitations for child sexual assault), excluded laws "alter[ing] the legal rules of evidence ... in order to convict the offender" under ***Calder v. Bull***, 3 U.S. 386, 390 (1798), from the state constitution's reach. However, as we acknowledged when ***Haines*** was before us, Wisconsin courts have generally "taken guidance from the United States Supreme Court's interpretation of the ex post facto clause contained in the United States Constitution." ***State v. Haines***, 2002 WI App 139, ¶8, 256 Wis. 2d 226, 647 N.W.2d 311; *see also* ***State v. Thiel***, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994). Although the supreme court did not mention that changes in evidentiary rules can constitute an ex post facto violation, there was no indication this was an intentional attempt to limit the reach of the state ex post facto clause, or to establish the exclusive types of ex post facto violations cognizable under the Wisconsin constitution. *See* ***Haines***, 261 Wis. 2d 139, ¶9.

Id. at 390. The Supreme Court has consistently reaffirmed its adherence to this construction of the ex post facto clause. *See, e.g.*, ***Peugh v. United States***, 133 S. Ct. 2072, 2081 (2013); ***Carmell v. Texas***, 529 U.S. 513, 521-25 (2000).

¶23 Hull argues WIS. STAT. § 970.038 violates the fourth prohibition, regarding laws that change the legal rules of evidence to admit "less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Hull acknowledges § 970.038 affects only the evidence admissible at the preliminary hearing. To reach his conclusion, then, Hull necessarily argues that preliminary examinations are held "in order to convict the offender." *See* ***Calder***, 3 U.S. at 390. Hull reasons that the State cannot obtain a felony conviction unless a court first finds probable cause at the preliminary examination. Therefore, in Hull's view, the preliminary hearing is as much a part of any resulting conviction as the subsequent trial, such that a change in the evidence admissible at the hearing violates the federal ex post facto clause if the law becomes effective after the offense date.

¶24 Hull's argument fails. As an initial matter, it largely misapprehends the nature, purpose and requirements for preliminary hearings. Although preliminary proceedings are a critical stage in the criminal process and are held for the protection of the defendant, ***O'Brien***, 354 Wis. 2d 753, ¶¶21, 23, "[t]he fact that Wisconsin has preliminary examinations at all exceeds the requirements" of the federal constitution, ***id.***, ¶25. There is no constitutional right to a preliminary hearing. ***State v. Schaefer***, 2008 WI 25, ¶32, 308 Wis. 2d 279, 746 N.W.2d 457. The Fourth Amendment does require a judicial determination of probable cause prior to an extended restraint of liberty, but adversary proceedings are not necessary. ***O'Brien***, 354 Wis. 2d 753, ¶25 (citing ***Gerstein v. Pugh***, 420 U.S. 103, 120 (1975)). The preliminary examination as it is presently constituted was

unknown to the common law, and it is a purely statutory creation. ***State v. Friedl***, 259 Wis. 110, 113, 47 N.W.2d 306 (1951); *see also* WIS. STAT. § 970.03.

¶25 A conviction does not necessarily flow from a finding of probable cause at the preliminary examination. The preliminary examination's sole purpose is to "determine whether the defendant should be subjected to criminal prosecution and further deprived of his liberty." ***Dunn***, 121 Wis. 2d at 394-95. The defendant may be bound over for trial "if the evidence adduced at a preliminary examination establishes to a reasonable probability that a crime has been committed and that the defendant probably committed it." ***State ex rel. Huser v. Rasmussen***, 84 Wis. 2d 600, 605, 267 N.W.2d 285 (1978). Unlike a criminal trial, which requires guilt to be proven by a reasonable doubt, the preliminary examination merely involves consideration of "the practical and nontechnical probabilities of everyday life in determining whether there was a substantial basis for bringing the prosecution ...." ***Id.*** at 605-06.

¶26 Accordingly, our courts have repeatedly remarked that the preliminary examination is not the equivalent of a full evidentiary trial establishing guilt. *See* ***Schaefer***, 308 Wis. 2d 279, ¶34 (citing ***Dunn***, 121 Wis. 2d at 396); *see also* ***State ex rel. Huser***, 84 Wis. 2d at 605. Nor is it a mini-trial on the facts. ***Schaefer***, 308 Wis. 2d 279, ¶34. The preliminary examination is not a forum in which to choose between conflicting factors or inferences, or to weigh the state's evidence against evidence favorable to the accused. ***Dunn***, 121 Wis. 2d at 398. In turn, courts are restricted from delving into witness credibility. ***Id.*** at 397 (citing ***Vigil v. State***, 76 Wis. 2d 133, 144, 250 N.W.2d 378 (1977)). If a set of facts supports a reasonable inference that the defendant probably committed a felony, the examining judge must bind the defendant over for trial even if there are other reasonable inferences from the evidence. ***Id.*** at 398. In short, the

preliminary examination is "a summary proceeding to determine essential or basic facts as to probability." ***Id.*** at 396-97.

¶27 While it is certainly true the State must first successfully bind over a defendant in order to later attempt to secure a conviction, that fact is of no moment to our analysis. This basic, procedural reality does nothing to make "less, or different, testimony, than the law required at the time of the commission of the offence, [available] in order *to convict the offender*." ***Calder***, 3 U.S. at 390 (emphasis added). Indeed, Hull fails to provide *any* legal authority—from any jurisdiction—supporting his tenuous proposition. What is material is that WIS. STAT. § 970.038 did not alter either the nature or the quantum of evidence necessary at trial to convict Hull of the charged offenses. All evidentiary rules governing trials in effect before § 970.038's enactment remained so afterwards.[6]

¶28 We conclude a postoffense change in the law making hearsay evidence admissible at a preliminary hearing does not violate a defendant's ex post facto rights. The hearing is not held "in order to convict the offender," but rather to determine if probable cause exists to bind over a defendant for trial, at which the decision whether to convict occurs. Therefore, ex post facto protections do not attach to this change in the evidentiary requirements of such a hearing. Accordingly, Hull has failed to carry his burden of proving WIS. STAT. § 970.038 unconstitutional beyond a reasonable doubt.

[6] As such, this case is not like ***Carmell v. Texas***, 529 U.S. 513 (2000), cited by Hull, in which the United States Supreme Court determined that a Texas law relieving the State of an evidentiary requirement previously necessary to obtain a conviction at trial constituted an ex post facto violation. *See* ***id.*** at 530.

II. Ability to call the alleged victim at the preliminary examination

¶29 Hull next argues the court commissioner improperly terminated the preliminary hearing after finding there was sufficient evidence to make a probable cause determination. Hull summarily contends the court commissioner's action violated his rights to compulsory process, to present evidence, and to the effective assistance of counsel.[7] He asserts that this reduced the preliminary hearing "to farce just as anticipated by [Chief Justice Abrahamson's dissent in ***O'Brien***, 354 Wis. 2d 753, ¶84]."

¶30 We review the issue Hull raises de novo. Both grounds on which the court commissioner based his decision not to allow the alleged victim to testify are subject to our independent review. First, the court commissioner determined the anticipated testimony of the alleged victim was not relevant. Although we treat this decision as discretionary, *see, e.g.*, ***State v. Eison***, 2011 WI App 52, ¶10, 332 Wis. 2d 331, 797 N.W.2d 890 ("Whether evidence is relevant under WIS. STAT. § 904.02 and should be admitted lies within the discretion of the trial court."), where, as here, the denial of admission of proffered evidence implicates a defendant's constitutional rights, the question is one of constitutional fact that we review de novo, *see* ***State v. Wilson***, 2015 WI 48, ¶47, ___ Wis. 2d ___, ___ N.W.2d ___; ***State v. Avery***, 2011 WI App 124, ¶41, 337 Wis. 2d 351, 804 N.W.2d 216. Second, the commissioner determined the State sufficiently established probable cause based on the other testimony adduced at the

[7] Hull addresses these claims collectively, without separate argument regarding each of the constitutional or statutory rights of which he was allegedly deprived. Our analysis rejects the bases for each of Hull's arguments, which are, again, identical.

preliminary examination, which also presents a question of law. *See* ***State v. Lindberg***, 175 Wis. 2d 332, 342, 500 N.W.2d 322 (Ct. App. 1993) (reviewing courts independently determine whether properly admitted evidence, if believed, would permit a reasonable magistrate to conclude the defendant probably committed a felony).

¶31 A defendant has a right to present evidence at a preliminary examination. ***Schaefer***, 308 Wis. 2d 279, ¶35. "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." WIS. STAT. § 970.03(5). Accordingly, the defendant "must have compulsory process [available] to assure the appearance of [any] witness[es] and their relevant evidence." ***Schaefer***, 308 Wis. 2d 279, ¶35.

¶32 In ***O'Brien***, our supreme court concluded, among other issues, WIS. STAT. § 970.038 did not violate the defendants' Sixth Amendment right to call witnesses pursuant to the compulsory process clause. *See* ***O'Brien***, 354 Wis. 2d 753, ¶¶34-39. In doing so, the court observed that nothing in § 970.038 addressed or altered the provisions of WIS. STAT. § 970.03(5), or prohibited the defendants from exercising their rights under that subsection. ***O'Brien***, 354 Wis. 2d 753, ¶35.

¶33 However, the rights granted by WIS. STAT. § 970.03(5) are not unrestricted. ***O'Brien***, 354 Wis. 2d 753, ¶37 (citing ***State v. Knudson***, 51 Wis. 2d 270, 280, 187 N.W.2d 321 (1971)). It is here that Hull's argument fails. To overcome a motion to quash a subpoena in the preliminary hearing context, the defendant "must be able to show that the evidence is relevant to the probable cause determination." ***Id.*** To reiterate, the weight and credibility of the State's evidence is outside the scope of the preliminary examination, and any of the defendant's

evidence directed toward those issues, rather than plausibility of the State's witnesses' accounts or the probability that a felony has been committed, is properly excluded. ***Id.*** (citing ***Schaefer***, 308 Wis. 2d 279, ¶36; ***State ex rel. Funmaker v. Klamm***, 106 Wis. 2d 624, 630, 317 N.W.2d 458 (1982)). This limitation is well-established law. ***Id.***; ***Knudson***, 51 Wis. 2d at 280-81.

¶34 Here, Hull's rationale for requesting S.H.'s testimony amply demonstrates his intent to challenge her credibility and use her testimony for discovery, not to rebut the State's evidence regarding probable cause. In his brief to the court commissioner, Hull proposed a series of questions he would ask the alleged victim if she were to testify, which the parties label an "offer of proof" regarding the necessity of the alleged victim's testimony:

> For example, did the victim scream for help when she was assaulted? Did she run out of the room after she was assaulted and ask for help? Did she have her cell phone with her? Did [the] defendant prevent her from calling for help, waking up her dad, or leaving the hotel room? Did she have sperm on her person, or her clothes? Did she have marks or contusions from the force defendant allegedly used upon her? Were those marks or contusions visible to others? Did she show those marks or contusions to her dad when he said he didn't believe her? Why did she allegedly tell her dad that [the] defendant 'touched' her as opposed to telling him that [the] defendant allegedly raped her? What was her reason for waiting one year to report that a total stranger raped her, *et cetera?*

These questions are tantamount to an assertion that the alleged victim's statements to authorities, to which detective Linzmeier testified, "were a summary and did not necessarily tell the whole story." *See* ***O'Brien***, 354 Wis. 2d 753, ¶38. With one exception, and short of an admission to fabricating the entire incident, none of the

alleged victim's answers to those questions would have diminished the plausibility of her account.[8] *See* ***Wilson v. State***, 59 Wis. 2d 269, 295, 208 N.W.2d 134 (1973) ("[A]ll that is needed is a believable account of the defendant's commission of a felony."). Hull's appellate arguments never explain how the contemplated questions inform the probable cause determination, as the law requires. *See, e.g.*, ***Schaefer***, 308 Wis. 2d 279, ¶37.

¶35 The lone exception was thoroughly and properly vetted by the court commissioner. The court commissioner recognized that S.H.'s allegation that her screams had gone unheard by her father, who was sleeping in the same room, raised a plausibility issue. Accordingly, the commissioner permitted the defense to subpoena the alleged victim's father, who was ambivalent about whether he would have been awoken by screams in the room that night. Although he did not believe he would have slept through the incident, he could not rule out that possibility given that he is a "heavy sleeper," his lack of sleep in the preceding days, and his alcohol use on the night in question. The court commissioner properly determined this testimony eliminated any plausibility concerns.

¶36 Moreover, Hull's attempt at an offer of proof in this case was insufficient. Although he outlined questions he wished to ask the alleged victim, he admitted he did not have access to the victim and, at best, could only "speculate

[8] For instance, the court could not have ruled out a sexual assault based on evidence demonstrating the alleged victim's conduct following the alleged assault (including her decision not to flee), or based on the presence or absence of a cell phone, sperm, or marks or contusions. Even assuming the alleged victim's answers would be favorable to the defense, the answers still would not have eliminated probable cause that an assault had occurred.

about what she might say ...."[9] Absent any idea what the alleged victim would testify to, and given Hull's failure to conceive of questions that went to the plausibility of the alleged victim's account, counsel's proffer was insufficient to show that her anticipated testimony would have been relevant to the probable cause inquiry. *See* ***O'Brien***, 354 Wis. 2d 753, ¶38.

¶37 Hull also generically complains his preliminary hearing was reduced to a "farce" by his inability to call the alleged victim. The precise contours of this argument are unclear, and we ordinarily do not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶38 Nonetheless, we perceive at least two purposes for Hull's "farce" statement. First, Hull may be attempting to give credence to Chief Justice Abrahamson's dissent in ***O'Brien***, where she cautioned that the majority's analysis threatened to reduce the preliminary hearing "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." ***O'Brien***, 354 Wis. 2d 753, ¶84 (Abrahamson, C.J., dissenting). Second, Hull may be attempting to argue, as he did before the court commissioner, that WIS. STAT. § 970.038 violated Hull's right to counsel because there was little Hull could do to challenge the plausibility of the State's case without the alleged victim's testimony.

¶39 Again, Hull's argument in this regard ignores his failure to explain how any testimony he sought was relevant to a plausibility determination. In any

[9] Hull represented that his investigator tried to contact the alleged victim, but her mother refused to allow her to give a statement.

event, and without further opining on the merits, Hull's arguments are misdirected. These matters have been definitively settled by ***O'Brien***, and we have no authority to overrule or modify supreme court precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

By the Court.—Order affirmed and cause remanded for further proceedings.