STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 94-3188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

C & S MANAGEMENT, INC.,
d/b/a CROSSROADS NEWS AGENCY,

Defendant-Appellant,

Appeal From The Order Entered In The Circuit Court For Kenosha County, The Honorable David M. Bastianelli, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

DENYING CORPORATE DEFENDANTS THE RIGHT TO A PRELIMINARY EXAMINATION VIOLATES EQUAL PROTECTION

A. Standard of Review

The state unsuccessfully seeks to avoid strict scrutiny of its statutory discrimination against corporate defendants by distinguishing away the Supreme Court's decision in *Werner v. Milwaukee Solvay Coke Co.*, 252 Wis. 392, 31 N.W.2d 605 (1948). State's Brief at 4-7. Dismissal following a preliminary examination, however, does not simply "discharge the defendant from custody on the existing complaint." *Id.* at 5. Rather, the entire case is dismissed and the defendant

legally cannot be recharged unless the prosecutor "has or discovers additional evidence." Wis. Stat. §970.04.

Accordingly, unless the state withholds noncumulative evidence at the preliminary examination or subsequently discovers such evidence, a favorable decision at a preliminary examination in fact gives a defendant exactly the same benefit as a favorable decision on a dispositive motion for summary judgment. *See Wittke v. State ex rel. Smith*, 80 Wis.2d 332, 259 N.W.2d 515, 519-21 (1977).

> The availability of appeal provides ample opportunity for correction of errors at the preliminary examination. To also sanction further prosecution on the same evidence would contradict the holding that an order of dismissal is a final order, would foster inconsistent rulings, and would undermine the rights of the accused by giving the prosecution the simultaneous right of appeal.

Id., 259 N.W.2d at 520-21.

That denial of a preliminary hearing ultimately may be deemed harmless in a given case if a defendant is convicted upon legally sufficient evidence, State's Brief at 6; *see State v. Webb*, 160 Wis.2d 622, 628, 467 N.W.2d 108, *cert. denied*, 502 U.S. 889 (1991), is irrelevant. The analogous failure to resolve a potentially dispositive summary judgment motion until after trial, as in *Werner*, likewise may be harmless if the motion is and would have been denied.[1] The

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[1] Crossroads notes that there is and was no *statutory right* to summary judgment. *E.g.*, *Herbst v. Hansen*, 46 Wis.2d 697, 176 N.W.2d 380, 383 (1970).

Supreme Court in *Werner* nonetheless found that the failure to resolve such an issue prior to trial violated Article I, Section 9 of the Wisconsin Constitution because the decision could have been in the defendant's favor, thus freeing it from the expense and hardship of a trial. 31 N.W.2d at 606.

The state's suggestion that probable cause can be resolved based upon the face of the criminal complaint without a preliminary examination, State's Brief at 6, is disingenuous at best. Corporations charged with felonies have no statutory right to a criminal complaint. Wis. Stat. §967.05(1). *See also State v. McCredden*, 33 Wis.2d 661, 148 N.W.2d 33, 38 (1967) (review of sworn complaint insufficient substitute for preliminary examination).[2]

D.H. v. State, 76 Wis.2d 286, 251 N.W.2d 196 (1977),

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[2] In *McCredden*, the Supreme Court held that a criminal defendant was denied equal protection when he was committed, without a prior adversary probable cause hearing, under criminal procedure for committal of accused found to be incompetent. 148 N.W.2d at 37-38. Mere review of the sworn criminal complaint was deemed insufficient:

> The court is not unmindful that in the instant case each of the complaints for a warrant were sworn to by the victim before a judge of a court of record sitting as a magistrate. These complaints are entirely adequate to establish grounds for arrest but we hesitate to find them sufficient to support a court finding that it is probable that defendant committed the felonies charged. Complaints for issuance of a warrant may be grounded on an affidavit ... without the affiant having personally appeared before the magistrate. Furthermore, even when the complainant appears personally and is sworn before the magistrate, the proceeding is ex *parte* without the right of cross-examination.

Id. at 38.

did not suggest that the legislature constitutionally could deny expeditious review of juvenile waiver orders. State's Brief at 7. Rather, it relied upon Article I, §9 to establish a review procedure "until the legislature provides otherwise" by establishing an alternative procedure which would accomplish the same goals. 251 N.W.2d at 201.

Finally, it is irrelevant that the Court applied a rational basis standard to evaluate the old fugitive exception in *Johns v. State*, 14 Wis.2d 119, 109 N.W.2d 490, 492 (1961). State's Brief at 7. The extradition procedure itself provided the prompt determination of probable cause denied here, so Article I, §9's right to justice "promptly and without delay" was not implicated.

B. The Corporate Exception to the Preliminary Examination Requirement is Irrational and Denies Equal Protection Under Any Standard

The state attempts to divine a rational basis for the discriminatory denial of a preliminary examination to corporations from the fact that corporations cannot be incarcerated. State's Brief at 9-22. However, that rationalization neither explains nor justifies denial of a preliminary examination to only one kind of artificial person, a corporation, while granting such an examination as of right to every other type of artificial person similarly charged

with a felony. Crossroads' Brief at 15-19.[3]

The state's observation that defendants charged with misdemeanor are denied preliminary examinations, State's Brief at 11-12, is an accurate but irrelevant red herring. Those charged with misdemeanors plainly are not similarly situated to those charged with felonies. *Cf.* U.S. Const. amend. V (federal right to indictment limited to felony or otherwise "infamous" crimes). And among those natural and artificial persons charged with felonies, and thus similarly situated to the defendant, *only* corporations are denied the right to a preliminary examinations.

The state's misguided attempts to downplay the significant protections of the preliminary examination as outmoded or inapplicable to corporations, State's Brief at 13-14, likewise should not distract the Court from the real issue here. The Supreme Court rejected nearly identical attacks on the importance of the preliminary examination in *State v. Richer*, 174 Wis.2d 231, 496 N.W.2d 66, 68-69 (1993). The United States Supreme Court similarly recognized that, contrary to the state's suggestion, corporations do indeed suffer the humiliation and anxiety involved in a public prosecution. *See United States v. Martin Linen Supply Company*, 430 U.S. 564, 568-70 (1977) (applying underlying

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[3]As noted in Crossroads' opening brief at 5, n. 4, the corporate exception also applies to a new kind of corporation known as a "limited liability company" as well as to more traditional types of corporations such as the defendant.

interests of Double Jeopardy Clause, U.S. Const. amend. V, including avoidance of "embarrassment, expense and ordeal" of a prosecution, in case involving only corporate defendants).

Setting aside these irrelevant distractions, the core of the state's response is its argument "that there is considerable doubt whether an unincorporated association can be charged with a crime of any caliber under Wisconsin law." State's Brief at 16; *see id.* at 16-21. According to the state, denying the preliminary examination to only one form of artificial person, the corporation, does not violate equal protection because corporations are the only kind of artificial person subject to criminal liability. *Id.*

The legislature no doubt would be surprised to hear that some of the most powerful private institutions in the state are immunized from criminal liability simply because they are organized as partnerships, unions or unincorporated associations rather than as corporations. A decision by this Court agreeing with the state's argument also would not be lost on those corporations seeking to minimize their risk of criminal liability. They would simply reorganize in a non-corporate form.

The fact is, however, that the state's argument is not simply absurd, but wrong as well. Unincorporated associations, like corporations, had no legal existence subject to criminal liability apart from their members *under the common law.* State's Brief at 16; *see, e.g., United States v. A&P*

Trucking Co., 358 U.S. 121, 124 (1958); *Vulcan Last Co. v. State*, 194 Wis. 636, 641, 217 N.W. 412 (1928) (corporations). But criminal liability is now defined by statute, not the common law.

The general definition of "person" for use throughout the statutes includes "all partnerships, associations and bodies politic and corporate," Wis. Stat. §990.01(26), and the legislature consistently defines the term "person" for purposes of criminal liability in those or similarly broad terms.[4] Indeed, the very statute under which Crossroads

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[4] *See* Wis. Stat. §§29.99(13) (defining "person[s]" subject to criminal liability for fish and game offenses to include "natural persons, firms, associations, and corporations"); 94.385(13) (defining "person[s]" subject to agricultural seeds regulations and potential criminal liability under Wis. Stat. §94.46(4)(b)); 111.02(10) (defining "person[s]" subject to employment peace provisions and potential criminal liability under Wis. Stat. §111.14); 114.002(18) (defining "person[s]" subject to aeronautics provisions and potential criminal liability under Wis. Stat. §114.27); 125.01(14) (defining "person[s]" subject to alcohol beverage provisions and potential criminal liability under Wis. Stat. ch. 125 & §125.11); 133.02(3) (defining "person[s]" subject to potential criminal liability for antitrust violations under Wis. Stat. ch. 133); 138.10(3)(d) (defining "person[s]" subject to pawnbroker regulations and potential criminal liability under Wis. Stat. §138.10(7)); 144.01(9m) (defining "person[s]" subject, *inter alia*, to air pollution regulations and potential criminal liability under Wis. Stat. §144.426(2)); 144.61(9) (defining "person[s]" subject to hazardous waste regulation and potential criminal liability under Wis. Stat. §144.74(2)); 147.015(11) (defining "person[s]" subject to water pollution regulation and potential criminal liability under Wis. Stat. §147.21(3) & (4)); 177.01(13) (defining "person[s]" subject to Unclaimed Property Act and potential criminal liability under Wis. Stat. §177.34(4)); 218.04(1)(f) (defining "person[s]" subject to collection agency regulation and potential criminal liability under Wis. Stat. §218.04(12)); 445.01(8) (defining "person[s]" subject to funeral director provisions and potential criminal (continued...)

stands charged provides that "'[p]erson' means any individual, partnership, firm, association, corporation or other legal entity." Wis. Stat. §948.11(1)(e).[5]

The legislature likewise has stated expressly that both labor unions and partnerships are legally responsible for the acts of its members. Wis. Stat. §§103.54 (authorizing criminal liability against labor association or organization when organization participates in or ratifies illegal acts of its officers, members or agents); 178.10 (partnership liable for wrongful acts of partner).

The legislature thus has expressly provided for criminal liability for unincorporated artificial persons, and the state's suggestion of doubt to the contrary must fail. Even if the legislature had not spoken so clearly in these

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[4](...continued)
liability under Wis. Stat. §445.15); 450.155(1)(h) (defining "person[s]" subject to criminal liability for contraceptive vending machine advertisements which are "harmful to minors"); 551.02(10) (defining "person[s]" subject to uniform securities law and potential felony liability under Wis. Stat. §551.58(1)). *See also* Wis. Stat. §990.01(26) (general definition of "person" for use throughout the statutes).

[5] The fact that a number of statutory crimes physically cannot be committed by artificial persons, State's Brief at 17, is irrelevant. The definition of "person" does not change simply because some individuals or entities falling within that definition do not or cannot satisfy the *other* statutory requirements for commission of a particular criminal offense. A corporation's or partnership's inability to commit the crime of marrying a blood relative, Wis. Stat. §944.06, arises not from any restrictive definition of "person," but from the inability of artificial persons to marry. The inability of someone with no living blood relatives to commit that offense likewise is based upon the absence of other elements of the offense rather than a lack of "personhood."

other provisions, however, it is plain that such non-corporate entities likewise may be held liable under the criminal code.

The state is correct on one point: it is clear that the legislature used the term "whoever" in Wis. Stat. §939.05 as synonymous with the phrase "any person who." *See* State's Brief at 18. Indeed, the legislature uses both phrases interchangeably throughout the criminal code. There is simply no reasonable basis for believing that the phrase "[w]hoever is concerned in the commission of a crime" in §939.05(1) is any less comprehensive than "[a] person ... concerned in the commission of the crime" in subsection (2). And "person," as already demonstrated, includes associations and partnerships, as well as corporations and natural persons. *E.g.*, Wis. Stat. §990.01(26).

Relying upon *Kenosha School District v. Kenosha Education Ass'n*, 70 Wis.2d 325, 234 N.W.2d 311, 314 (1975), the state nonetheless makes two arguments. First, is claims that Court to have held that unincorporated associations cannot be prosecuted for a crime. Second, it asserts that the terms "whoever" and "person" in §939.05 must be construed more narrowly than the legislature has defined "person" throughout the remainder of the statutes. State's Brief at 18-22.

The state's first claim is directly contrary to the Court's holding in *Kenosha School District*. While that decision reversed imposition of a fine against the teacher's union under one statute, which it construed as applying only

to natural persons, 234 N.W.2d at 314, it expressly upheld imposition of a fine for contempt under Wis. Stat. ch. 295 (1973). 234 N.W.2d at 315-16 (remanding "for an imposition of a fine not to exceed $250"). As conceded by the state, State's Brief at 18-19, conduct punishable by a fine is a crime. Wis. Stat. §939.12. *See also* Wis. Stat. §295.13 (authorizing fine or imprisonment for contempt).

The state also misconstrues the Court's discussion of the meaning of the term "whoever." The first statute addressed, entitled "Penalty for striker," provided that "[w]hoever violates [the statutory ban on municipal employee strikes] after an injunction against such a strike has been issued shall be fined $10." Wis. Stat. §111.70(7). That statute also provided that each day constitutes a separate offense and that "[t]he court shall order that any fine imposed under this subsection be paid by means of a salary deduction at a rate to be determined by the court." *Id.*

In construing this statute, the Court held that it applied only to natural persons. 234 N.W.2d at 314. Focusing on the "plain language" of the latter provision, the Court held that "[i]t cannot be logically argued that this sentence refers to any entity but an individual municipal employee. The association did not receive a salary, and obviously none from the district." *Id.*

The Court also noted that "*[i]t appears to be the rule* that when the word 'whoever' is employed in a statute, it

is considered to refer only to 'persons,' whether natural or corporate, and not to unincorporated associations." *Id.* (emphasis added). The source of the perceived "rule," however, is not some general rule controlling construction of Wisconsin laws but a specific Ohio statutory definition of "whoever." *See State v. Fremont Lodge of Loyal Order of Moose*, 84 N.E.2d 498, 502 (Ohio 1948) and *Village of Bridgeport v. Fraternal Order of Eagles*, 125 N.E.2d 202 (Ohio App. 1954), the authority relied upon in *Kenosha School District*, 234 N.W.2d at 314 n.2.

Wisconsin has no such statutory definition of "whoever." It does, however, have a statutory definition of "person" which includes partnerships and unincorporated associations unless, as the Court found on the specific facts in *Kenosha School District*, "such construction would produce a result inconsistent with the manifest intent of the legislature." Wis. Stat. §990.01(26).

That decision thus did not declare any rule of general applicability on the meaning of "whoever," but rather addressed only its meaning in one particular statute the total context of which limited it to natural persons. It certainly did not require the absurdly cramped interpretation of the criminal code sought by the state here.[6]

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[6] The state's construction of the criminal code is not simply absurd; it is unconstitutional as well. *See State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773 (Tenn. 1911) (statute criminalizing certain acts of corporations but not (continued...)

Also contrary to the state's assertion, State's Brief at 19, the criminal procedure code does provide for prosecution of unincorporated associations. Nothing in that code bars commencement by complaint and summons. *See* Wis. Stat. §§967.05; 968.04(2). Wis. Stat. §968.05 merely applies civil rules for service of the summons upon corporations. Such rules likewise apply to unincorporated entities charged with crimes, as do rules concerning judgment. *See* Wis. Stat. §972.11(a) (applying civil rules in criminal cases).

Finally, the Court cannot merely ignore this arbitrary discrimination as a case of "underinclusiveness." *E.g., O'Brien v. Skinner*, 414 U.S. 524 (1974) (striking underinclusive statute barring some but not all county jail inmates from registering and voting by absentee ballot). This is not a case of simple "mathematical imprecision." Every other similarly situated natural and artificial person is granted a preliminary examination as of right. Nor can a one-shot, century-old act of arbitrary discrimination be deemed a case of "'reform ... one step at a time.'" *Racine Steel Castings v. Harding*, 144 Wis.2d 553, 426 N.W.2d 33, 39 (1988) (citation omitted). This likewise is not a case of "hit[ting] the evil where it is most felt," *id.* (citations and internal quotation marks omitted), as the state has identified no "evil" justifying denial of the preliminary examination, let

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[6](...continued)
those of similarly situated partnerships, firms, associations, or individuals, violates equal protection).

alone any reason to believe that unidentified "evil" to rest most prominently in corporations.

Rather, this case is controlled by the analogous case in *Milwaukee Brewers v. DH&SS*, 130 Wis.2d 79, 387 N.W.2d 254 (1986). The Court there held that, while a statewide need for prison space may justify truncated environmental and judicial review of all new prison construction, it does not justify imposing such truncated review rights only upon challengers in a single, limited part of the state. 387 N.W.2d at 263-65. The state fails even to cite this controlling decision, let alone attempt to distinguish it.

CONCLUSION

The Court accordingly should reverse the trial court and remand this case for a preliminary examination.

Dated at Milwaukee, Wisconsin, April 14, 1995.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a mono-spaced font. The length of this brief is 13 pages.

Robert R. Henak

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