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STATE OF WISCONSIN  
I N S U P R E M E C O U R T  
Case No. 2010AP1113-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON E. GOSS,

Defendant-Appellant-Petitioner.

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ON PETITION FOR REVIEW OF AN UPUBLISHED  
DECISION AND ORDER AND DENIAL OF MOTION  
FOR RECONSIDERATION OF THE WISCONSIN  
COURT OF APPEALS DISTRICT III/IV  
AFFIRMING THE JUDGMENT OF CONVICTION  
ENTERED IN THE CIRCUIT COURT FOR EAU  
CLAIRE COUNTY, THE HONORABLE LISA STARK,  
PRESIDING

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REPLY BRIEF OF DEFENDANT-APPELLANT-  
PETITIONER

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## **ARGUMENT**

The State asks this Court to interpret the requirement of § 343.303 that an officer have "probable cause to believe" a person has violated the OWI laws before requesting a preliminary breath screening test to require no more than the detection of the odor of intoxicants for people who are subject to the .02 prohibited alcohol concentration established by § 340.01(46m)(c) Wis. Stats. The State makes this argument despite admitting that this Court has previously held in *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999) that "probable cause to believe" in § 343.303 means a burden of proof less than the probable cause needed to make an arrest but greater than the mere detection of the presence of alcohol. See Respondent's Brief at 5. Instead of making a consistent application of the statutory language to all non-commercial drivers, the State asks this Court to extend the lower evidentiary threshold that currently applies only to commercial

drivers and apply it to non-commercial drivers who have been convicted of three or more OWI related offenses.

The State argues first that it is illogical to suggest that the requisite "probable cause" to administer a preliminary breath test could change based on the prohibited alcohol concentration that is applicable to the suspect. See Respondent's Brief at 8. No such suggestion has been made. Probable cause is a fluid concept, and a particular set of circumstances might rise to the level probable cause to believe a person is operating at above a .02 BAC, but not to believe that a person is operating at above a .08 BAC. The Petitioner argues, however, that whatever "probable cause" might be required to believe a person is operating at above a .02 BAC, it must be more than "detect[ing] any presence of alcohol." The legislature created this lower threshold of evidence especially for operators of commercial vehicles and chose not to apply it to other drivers.

The State also argues that because Wis. Stat. § 343.303 pre-dates the creation of the .02 PAC threshold in § 340.01(46m)(c), it is improper to conclude that the legislature intended the lower evidentiary threshold to apply only to commercial drivers. See Respondent's Brief at 8. The State does not elaborate, merely stating that it is a "major flaw." Section 343.303 of the Wisconsin Statutes was created by 1981 Wisconsin Act 20, which also predates the special regulations on commercial motor vehicles first established in 1989 Wisconsin Act 105. When the legislature drafted 1989 Act 105, it recognized the importance of giving police a broad authority to require a preliminary breath test from commercial drivers and purposefully amended § 343.303 to create a new, lower threshold of evidence to apply only to commercial drivers.

Notably, the State also argues that "the legislature wished to vigorously regulate habitual OWI offenders in enacting 1999 Wisconsin Act 109," which

created the .02 PAC threshold. Respondent's Brief at 9. As it did in 1989, the legislature created a distinct classification of drivers to regulate - in this case drivers with three or more OWI convictions. The legislature had already demonstrated its willingness and capacity to create separate classes of drivers and apply different thresholds of evidence to each class. Presumably, the legislature would also have been aware of this Court's decision in *County of Jefferson v. Renz* by the time it passed 1999 Wisconsin Act 109 and would have known that "probable cause" had been interpreted to mean more proof than "any presence of an intoxicant." *Renz*, 231 at p. 316. The fact that the legislature declined to amend § 343.303 to specify a lower threshold of evidence for non-commercial drivers with three or more OWI-related convictions despite having done so previously for commercial drivers strongly implies that the legislature did not intend to distinguish between the two classes of non-commercial drivers in § 343.303.

Finally, the State argues that the PAC threshold for commercial drivers is actually .04 and it would therefore be "implausible" to argue that the evidentiary threshold should be higher for a driver whose PAC threshold is .02. Respondent's Brief at 9. The State cites § 346.63(5)(a) in support of its assertion that "[t]he PAC threshold for a commercial driver is .04," but it ignores § 346.63(7), which creates an absolute sobriety requirement (0.0 PAC) for operators of commercial vehicles. In fact, the language of § 343.303 tracks that of § 346.63(7) and not § 346.63(5)(a) when it permits the use of a preliminary breath test on "a person driving or operating or on duty time with respect to a commercial vehicle." Wis. Stats. § 343.303. Contrary to the State's argument, it is entirely plausible to believe that the legislature would distinguish between drivers who are required to be absolutely sober and other drivers, no matter how low the applicable PAC threshold might be.

## CONCLUSION

This Court should refuse the State's invitation to create a new category of drivers for which detecting "any presence" of alcohol is sufficient for the police to require a preliminary breath test when the legislature has declined to do so. The petitioner respectfully asks this Court to reaffirm the reasoning of *County of Jefferson v. Renz*, follow it to its logical conclusion, and hold that the "probable cause" required by § 343.303 means more than merely detecting the smell of alcohol, even when the subject is subjected to the reduced PAC threshold.

Dated this 22<sup>nd</sup> day of June, 2011

Respectfully submitted,

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CERTIFICATION OF ELECTRONIC FILING

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I hereby certify, pursuant to Rule 809.19(12)(f), that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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CERTIFICATION AS TO FORM AND LENGTH

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: monospaced font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of characters per line. The text is 13 point type and the length of the brief is 7 pages (1,024 words).

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