STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2020AP345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ANNE E. STRECKENBACH,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT ENTERED IN
THE DISTRICT III COURT OF APPEALS
DATED DECEMBER 7, 2021

PETITION FOR REVIEW AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUE

WHETHER THE ARRESTING OFFICER IN THE INSTANT CASE VIOLATED MS. STRECKENBACH'S RIGHTS UNDER WIS. CONST. ART. I, § 8 WHEN HE EXTENSIVELY INTERROGATED HER PRIOR TO HER FORMAL ARREST?

Circuit Court Answered: NO. The circuit court found that the questions asked of Ms. Streckenbach, while more extensive than those typically asked, were permissible, not unnecessarily prolonged, and not part of a custodial interrogation. R32 at 9:19-22; P-App. at 123.

Appellate Court Answered: NO. The court of appeals concluded that the number of questions asked of Ms. Streckenbach was "moderate" and the nature of the questioning was reasonably related to the purpose of her initial detention. Slip op. at pp. 108-09, ¶¶ 13-15; P-App. at 108-09.

STATEMENT OF THE CASE

Ms. Streckenbach was charged in Outagamie County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle With a Prohibited Alcohol Concentration—Second Offense, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on March 14, 2018. R1; R2; R3.

Ms. Streckenbach retained private counsel and thereafter filed a pretrial motion alleging that her rights as guaranteed under Article I, § 8 of the Wisconsin Constitution, and as further expounded in *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, were violated when the arresting officer in this case extensively interrogated her regarding her consumption of alcohol during her investigatory detention but prior to taking her into formal custody. R10.

A hearing on Ms. Streckenbach's motion was held on May 7, 2019, before the Circuit Court for Outagamie County, the Honorable Nancy J. Krueger presiding. R32. No witnesses were called to testify at the hearing, rather, the State accepted Ms. Streckenbach's statement of the facts of the case when questioned by the court and oral argument only was held on the motion. R32 at 7:1-7. The State's objection to Ms. Streckenbach's motion rested principally upon the fact that Ms. Streckenbach was not in actual custody at the time she was questioned, and therefore, according

to the State, the scope of her pre-arrest interrogation was permissible "specifically to either confirm or dispel the officer's already-established suspicion." R32 at 8:5-7.

At the conclusion of oral argument, the lower court held that "officers are allowed to ask those questions, and I don't believe the questioning was unnecessarily prolonged, and I don't believe it arises to a custodial interrogation at that point. It's basically investigative questions to determine whether or not to do field sobriety testing, ..." R32 at 9:19-24; P-App. at 123.

On January 23, 2020, Ms. Streckenbach entered a plea of no contest to the charge of operating while intoxicated. R27. Thereafter, by Notice of Appeal filed February 18, 2020, she initiated her appeal. R28. On December 7, 2021, the court of appeals issued its adverse decision from which Ms. Streckenbach now petitions this Court for review.

STATEMENT OF FACTS

On March 14, 2018, the above-named Appellant, Anne Streckenbach, was stopped and detained in the City of Appleton, Outagamie County, by Officer Jason Schmitz of the Appleton Police Department for allegedly deviating from her lane of travel. R10 at 2, ¶ 1.

After approaching Ms. Streckenbach, Officer Schmitz allegedly observed indicia of intoxication. R10 at 2, ¶ 2. Based upon this observation, Officer Schmitz intended to ask Ms. Streckenbach to submit to field sobriety testing, however, prior to having her perform the field tests, Officer Schmitz first asked Ms. Streckenbach an extensive series of questions. R10 at 2, ¶ 3.

During the course of his initial contact with Ms. Streckenbach, Officer Schmitz interrogated Ms. Streckenbach by asking her, *inter alia*:

(1) What level of education she achieved;
(2) Whether she wears contacts, and whether they are hard or soft;
(3) What time it currently was without looking at a clock or watch;
(4) What the date was, again without looking;
(5) How many hours of sleep she had;
(6) What time she went to sleep the night before has stop;
(7) What time she woke up that morning;
(8) Whether the number of hours she slept was "normal" for her;
(9) Whether she was under a doctor's care for anything;
(10) Whether she took any medications;
(11) What medications did she take;
(12) When her last dose was taken;
(13) Whether she had been to a dentist within the last 24 hours;

(14) Whether she had any injuries;
(15) Whether she suffered from epilepsy or diabetes;
(16) Where she was going prior to her detention;
(17) How many drinks she consumed before driving;
(18) What kind of drinks had she consumed;
(19) Where she consumed the drinks;
(20) What time she consumed the first drink;
(21) What time she consumed the last drink;
(22) Whether she took any street drugs;
(23) Whether she felt she was under the influence; and
(24) Whether she was operating her motor vehicle at the time she was stopped.

R10 at 2-3, ¶ 3.

Notably, all of the questions listed above appear verbatim on a form otherwise labelled "Alcohol Influence Report." R32 at 3:9-18; P-App. at 117. This form is typically read to a suspected drunk driver *post*-arrest. In fact, prior to the questions on the Alcohol Influence Report being asked of the person, the suspect is first to be *Mirandized*.[1] The *Miranda* warning is printed verbatim on the form. R10 at 3, ¶ 4.

After allegedly failing the field sobriety tests, Ms. Streckenbach was placed under formal arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R10 at 3, ¶ 5.

STANDARD OF REVIEW ON APPEAL

This appeal presents a question of whether an undisputed set of facts rises to the level of establishing a constitutional violation. As such, this Court upholds the lower court's findings of fact unless they are clearly erroneous, but independently reviews whether those facts meet the constitutional standard. *State v. Samuel*, 2002 WI 34, ¶ 15, 252 Wis. 2d 26, 643 N.W.2d 423.

STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW UNDER WIS. STATS. § 809.62(1r)(a), (1r)(c)2., (1r)(c)3., & (1r)(d).

1. Section 809.62(1r)(a): This Case Presents a Real and Significant Question of Constitutional Law.

Review should be granted in the instant case because it implicates significant and fundamental rights not solely protected under the Fifth Amendment to the

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

United States Constitution, but also under Article I, § 8 of the Wisconsin Constitution which provides broader protection of the right against self-incrimination than does its federal counterpart. *State v. Knapp*, 2005 WI 127, ¶¶ 59 & 72, 285 Wis. 2d 86, 700 N.W.2d 899. As more fully set forth below, Ms. Streckenbach proffers that there is a genuine need to clarify to what extent a law enforcement officer may interrogate a person suspected of operating while intoxicated prior to formal custody. This question impacts not only upon the reasonableness of the questions being asked, but also upon whether the duration of the interrogation itself unreasonably extends the scope of the person's detention beyond what is considered reasonable under Fourth Amendment pursuant to *Berkemer v. McCarty*, 468 U.S. 420 (1984), and its progeny. It is evident, therefore, that "significant" questions of constitutional law are presented under Wis. Stat. § 809.62(1r)(a) because the questions raised by Ms. Streckenbach are not solely confined to the Fifth Amendment, but involve the Fourth Amendment and implicate the unique protections afforded by Article I, § 8 of the Wisconsin Constitution.

Without this Court's guidance to establish a framework which can assist law enforcement officers in determining what is reasonable under the Federal and Wisconsin Constitutions when it comes to interrogating citizens during a *Terry*[2] stop, there will be circumstances in which the pervasiveness of the problem presented by the instant case will adversely affect both a person's right to be free from self-incrimination *and* their right to be only "briefly" detained for the purposes of "determine[ing] identity and . . . obtain[ing] information confirming or dispelling the officer's suspicions." *Berkemer*, 468 U.S. at 439.

2. *Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is a Novel One Which Will Have Statewide Impact.*

There exist no decisions of this Court or the court of appeals which address the issue presented by Ms. Streckenbach, namely: What limitations, if any, does the Wisconsin Constitution place upon the interrogation of individuals detained for operating while intoxicated offenses *prior to* the person being taken into formal custody. The issue presented is therefore, by definition, "novel" and satisfies the criterion set forth in § 809.62(1r)(c)2.. Similarly, there are no common law decisions on tangential issues which describe the elements to be considered when assessing the extent and reasonableness of pre-custodial interrogations as described under *Berkemer*, 468 U.S. 420.

Doubtless, a decision of this Court will have statewide impact as nearly 29,000 individuals per year are arrested in Wisconsin for operating while

[2]*Terry v. Ohio*, 392 U.S. 1 (1968).

intoxicated violations according to Department of Transportation statistics.[3] These cases arise in all seventy-two Wisconsin counties. Based upon "numbers alone," § 809.62(1r)(c)2. is satisfied with respect to Ms. Streckenbach's issue having statewide impact.

3. Wis. Stat. § 809.62(1r)(c)3.: The Question Presented Is Likely to Recur Unless This Court Intervenes.

The question presented by Ms. Streckenbach is likely to recur based upon the statistics set forth above. With 29,000 operating while intoxicated arrests occurring annually, there undoubtedly will be those cases in which the accused is asked two dozen or more incriminating questions prior to formal custody as Ms. Streckenbach was. Given that the issue, as framed by Ms. Streckenbach, implicates constitutional notions of reasonableness, it is not one which defense counsel will likely "toss aside" in favor of raising other issues in a particular defendant's case. Rather, the gravity and pervasiveness of the issue compels its being raised in the defense of every relevant client lest counsel subject their representation to "ineffectiveness" scrutiny under *Strickland v. Washington*, 466 U.S. 668 (1984). Given the unpleasantness of *Strickland* inquiries, counsel will certainly err on the side of raising these issues unless this Court first intervenes in Ms. Streckenbach's case to answer the question presented definitively.

Until such time as this Court intervenes to establish a clear standard by which the reasonableness of *Terry* questioning may take place, law enforcement officers throughout Wisconsin will continue to take liberties with their interrogations, and frankly, cases like Ms. Streckenbach's where more than two dozen questions were asked will balloon to no end if this Court adopts the logic of the court of appeals.

Finally, the question presented by Ms. Streckenbach is particularly likely to recur in the specific jurisdiction in which she was detained. The City of Appleton itself, apart from the rest of the State, has apparently adopted a policy by which the level of interrogation at issue herein occurs prior to the administration of field sobriety tests in every detention for operating while intoxicated. R32 at 6:12-16; P-App. at 120. Thus, even if this Court discounts the number of cases in which interrogations of the type to which Ms. Streckenbach was subjected will occur across the remainder of the State, at least for the City of Appleton, it appears this number will approach 100% of all operating while intoxicated detentions, thereby satisfying the requirement set forth in § 809.62(1r)(c)3..

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[3] *See* https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx. The statistics for alcohol-related offenses cited herein are from 2015, the most recent year for which the DOT has the same compiled.

ARGUMENT

I. FRAMING THE ISSUES PRESENTED.

Before beginning the analysis of the issue Ms. Streckenbach presents for this Court's review, it is first incumbent upon her to clarify precisely what it is she is alleging.

As a starting point for focusing the issue presented in this Petition, there is one important constitutional notion which must be recalled throughout the entirety of Ms. Streckenbach's argument, namely that when it comes to protecting the right against self-incrimination, the Wisconsin Constitution does not march in "lock step" with the Federal Constitution, but rather affords the citizens of this State greater protections than those which fall under the ambit of the Fifth Amendment. *Knapp*, 2005 WI 127, ¶¶ 59 & 72.

One final point which Ms. Streckenbach wishes to clarify is that she is *not* arguing that she was in constructive custody at the time her interrogation took place as the court of appeals acknowledged. *See* Slip op. at p.7, ¶ 12; P-App. at 107. Rather, she proffers that both the reasonableness of her detention was violated under *Berkemer*, 468 U.S. 420, when the arresting officer engaged in the lengthy interrogation he did **and** that the nature of the interrogation itself was unreasonable under Article I, § 8 of the Wisconsin Constitution.

II. MS. STRECKENBACH WAS INTERROGATED IN VIOLATION OF HER RIGHTS UNDER THE WISCONSIN CONSTITUTION WHEN THE ARRESTING OFFICER EXCEEDED THE SCOPE OF HIS AUTHORITY TO INTERROGATE HER AFTER HER INITIAL DETENTION.

A. Statement of the Law.

Instructive on the issue of whether law enforcement officers may circumvent the requirement of providing *Miranda*[4] warnings to a suspect is *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. In *Knapp*, the Wisconsin Supreme Court examined whether a suspect's right to be free from self-incrimination under Article I, § 8 of the Wisconsin Constitution was co-extensive with the same right as that right is expressed under the Fifth Amendment to the United States Constitution, and

[4]*Miranda v. Arizona*, 384 U.S. 436 (1966).

whether the law enforcement practice of interrogating a suspect before *Miranda* warnings need to be given, should be condoned without sanction.

In reaching its conclusion on the first question, the *Knapp* court examined at length the long and well-established rights of the states to interpret their constitutions independent of the protections afforded by the Federal Constitution. Based upon that history, the *Knapp* court stated that Wisconsin was not required to march in "lock step" with the federally established protections found in the U.S. Constitution, but rather would "'not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded.'" *Id.* at ¶ 59, quoting *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

On the second point, the *Knapp* court used strong language to impress upon law enforcement that it would not tolerate deliberate circumvention of the protections afforded by Article I, § 8 of the Wisconsin Constitution. The court unambiguously stated:

> We have recently shown **little tolerance** for those who violate the rule of law. In *State v. Reed*, 2005 WI 53, P36, 280 Wis. 2d 68, 695 N.W.2d 315, we depicted the Fifth Amendment as providing a shield that protects against compelled self-incrimination. By its very nature, the *Miranda* warnings secure the integrity of that shield--and to be sure, **that shield is made of substance, not tinsel**. *See Hoyer*, 180 Wis. at 413. Any shield that can be so easily pierced or cast aside by the very people we entrust to enforce the law fails to serve its own purpose, and is in effect no shield at all. Just as we will not tolerate criminal suspects to lie to the police under the guise of avoiding compelled self-incrimination, **we will not tolerate the police deliberately ignoring *Miranda's* rule as a means of obtaining inculpatory physical evidence. As we have frequently recognized in the past, what is sauce for the goose is also sauce for the gander.**

Knapp, 2005 WI 127, ¶ 72 (citations omitted in part; emphasis added).

Language such as "little tolerance," "that shield is . . . not tinsel," "not tolerate ignoring *Miranda*," and "what is sauce for the goose is also sauce for the gander," clearly, ardently, and categorically describe the *Knapp* court's intention, namely that the rights safeguarded by Article I, § 8 shall not be circumvented.

There are well-established standards to protect an accused's constitutional privilege against compulsory self-incrimination during police interrogation. *See generally Miranda*, 384 U.S. 436. Unless law enforcement officers give certain specified warnings before questioning a person, and follow certain specified procedures during the course of an interrogation, any statement made by the person being interrogated cannot, over his or her objection, be admitted in evidence against them at trial, **even though the statement may in fact be wholly voluntary**. *See Michigan v. Tucker,* 417 U.S. 433, 443 (1974).

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the United States Supreme Court refused to condone a law enforcement tactic known as "question first, then give the warnings." *Id.* at 611. Specifically, Seibert was a suspect in an arson case who was brought to the police station and asked several questions which were intended to lead to incriminating evidence. *Id.* at 604. After obtaining the answers they sought, law enforcement officers gave Seibert a twenty- to thirty-minute break, and then *Mirandized* her and re-asked the questions they had originally put to her. *Id.* at 605. Seibert argued that this technique violated her Fifth Amendment rights, and while the Missouri court of appeals agreed, it also found that only the answers to the first series of questions should be suppressed, while the answers to the post-*Miranda* warning questions would remain admissible. *Id.* at 606. The Missouri Supreme Court disagreed, and suppressed all of the statements, both those which came before the proper warning and those which came after. *Id.*

The *Seibert* Court ultimately agreed with the Missouri Supreme Court's approach and found distasteful the law enforcement tactic by which a suspect is questioned first, then *Mirandized* and requestioned. *Id.* at 613-14. The U.S. Supreme Court found the Missouri officer's tactic to be nothing more than an "end-run" around the Fifth Amendment which called into question the very voluntariness of the answers to the questions post-*Miranda*. *Id.* The Court held that "by any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* at 610.

The Supreme Court went on to further document the insidious nature of the "question first" practice and its exemplar in this regard is worth recounting at length here:

> [I]t is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, **the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content**. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. **Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again**. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. **What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being**

> **of no avail**. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran v. Burbine*, 475 U.S. 412, 424, 89 L. Ed. 2d 410, 106 S. Ct. 1135 (1986). By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Siebert, 542 U.S. at 613-14 (emphasis added).

The foregoing quote summarizes the concerns raised by Ms. Streckenbach quite nicely. If the practice condoned by the court of appeals continues, the chilling affect an officer's questioning will have on the intelligent exercise of the right against self-incrimination will be pervasive. This is precisely why this Court must act to stem this red tide.

B. Application of the Law to the Facts.

The foregoing concerns identified by the *Siebert* Court are cut from the same fabric as Ms. Streckenbach's argument. More specifically, since all of the questions put to her at roadside are the *same* as those asked of her on the Alcohol Influence Report post-arrest, why would she have any inkling that she could invoke the *Miranda* rights read to her just before the Alcohol Influence Report interrogation? Is not this *precisely* the concern identified by the *Siebert* Court when it worried that "[u]pon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again"? The only way in which this Court can safeguard the protections afforded by *Miranda* is to accept Ms. Streckenbach's case for review.

Beyond the *Siebert* problem, there is another issue with regard to the approach taken by the court of appeals in the instant matter. The court of appeals rejected Ms. Streckenbach's argument regarding the self-incrimination issue she raised on the ground that the arresting officer did not create a coercive environment when he questioned her. Slip op. at pp. 6-7, ¶ 11; P-App. at 106-07. This conclusion, however, ignores the *practical* effect of the officer's interrogation. More specifically, if the court of appeals was not willing to draw a line somewhere within the twenty-four interrogatories put to Ms. Streckenbach, *then it is doing nothing more than encouraging law enforcement officers to go even further beyond the questions asked in this case.*

There must exist some point at which roadside questioning crosses the line from being "modest" in design to quickly determine "identity" and "confirm or dispel suspicion" into the realm of unnecessarily burdensome and unconstitutional

interrogation.[5] Ms. Streckenbach's point is perhaps best made by a *reductio ad absurdum* argument. For example, what if, *in addition to the twenty-four questions the officer is already asking a suspect regarding drinking and other issues*, the officer also asks the suspect whether they exercise; how frequently they exercise; when the last time was that they exercised; *et al.*? Of what relevance is this line of questioning? Simply put, the concentration of ethanol in a person's system is a function of what percentage of their mass is muscle as opposed to fat because ethanol is not fat soluble.[6] Thus, this information is "relevant" to the officer's investigation into the issue of whether the confessed number of alcoholic beverages could have raised the suspect's alcohol concentration beyond the prohibited limit. Similarly, it is relevant with respect to how a person might perform on the field sobriety tests because a person who has muscle fatigue from just coming off of a work-out at the gym might not perform as well on the tests, so why would a law enforcement officer not want to have an answer to these questions?

To the foregoing, one could also add a line of questioning regarding whether the person is under the care of a psychologist or psychiatrist; whether they suffer from any mental diseases or disorders; whether they have any cognitive deficits; *et al.*? Of what relevance is this line of questioning? If an officer has a detailed description of whether a person's cognitive abilities are impaired, s/he will better be able to evaluate whether the person will be able to understand instructions given during field sobriety testing. Similarly, in a more incriminating manner, if the accused engages in what the State characterizes as an "after-the-fact rationalization" at trial as to why they could not follow the officer's instructions, the State will have already "pinned the defendant down" on his/her cognitive abilities with this deposition-like line of questioning.

The list of at least thirty questions now put together could grow even larger if one adds to it a line of questioning regarding when the person last ate food; what they had to eat; over how long a period of time they consumed the food; *et al.*? Of what relevance is this line of questioning? It is well known that the rate of absorption of ethanol is affected by not only the amount of food in a person's stomach at the time they consume ethanol, but the type of food as well (fatty foods slow the absorption of ethanol relative to non-fatty foods).

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[5]Again, for emphasis, Wisconsin courts have held that permissible questioning of a person detained during a traffic stop must be "'reasonably related to the nature of the stop . . . .'" *State v. Gammons*, 2001 WI App 36, ¶ 18, 241 Wis. 2d 296, 625 N.W.2d 623, quoting *State v. Betow*, 226 Wis. 2d 90, 93-94, 593 N.W.2d 499 (Ct. App. 1999). If the nature of a stop is due to a suspicion of impaired driving, what reasonable relationship does a visit to the dentist, for example, bear upon this fact?

[6] This is given by what is known as Widmark's formula. *See*, https://en.wikipedia.org/wiki/Blood_alcohol_content.

Based upon the foregoing, Ms. Streckenbach posits that it is reasonable to ask: Where does it end? How many questions is too many? Under the current incarnation of the court of appeals' decision, there is no end. No guidance has been provided by the appellate court's holding, and if anything, the open-ended nature of the appellate court's reasoning actually encourages *further* questioning of the accused.

It is clear that Officer Schmitz went well beyond what can be considered constitutionally reasonable in the instant case when he asked the litany of questions he did *regardless* of the fact that Ms. Streckenbach was not in "formal custody" at the time which was a concern of the court of appeals. Slip op. at pp. 9-10, ¶ 17; P-App. at 109-10. Failing to curtail such law enforcement practices now only opens the door to future abuses. As demonstrated above, Ms. Streckenbach relies upon the spirit of the *Knapp* decision as much as anything else for the proposition that at some point the Wisconsin Constitution is going to be implicated in protecting a suspect from interrogation under Article I, § 8 when that interrogation goes well beyond the "least intrusive means" necessary to identify a suspect and to confirm or dispel the officer's suspicions. *See* Section III., *infra*. To disregard the clear direction that the *Knapp* court's holding provides undermines the idea that Wisconsin does not march in "lock step" with the federally established protections found in the U.S. Constitution.

C. Additional Considerations.

There is one remaining matter of considerable import which must be addressed: The line of questioning asked in the instant case was designed specifically to do nothing more than avoid the risk of having an individual exercise their *Miranda* rights post-arrest when the law enforcement officer wants to interrogate the person by asking them the questions which appear on the Alcohol Influence Report.

The questions asked of Ms. Streckenbach are somehow "magically" the *exact same questions* which appear on a form called the "Alcohol Influence Report." Notably, once a person is in custody, a law enforcement officer is tasked with the responsibility of asking the questions which appear on that form of the arrestee. Of course, at this point, the individual *is* in "formal custody" and therefore is entitled to *Miranda* warnings. It is telling, however, that a wily or cunning officer who wants to avoid having to inform a person that they may remain silent and not answer the questions on the form *after* arrest can theoretically avoid having to provide the same warning to a person *prior to* formal custody. For the officer, it is all in the timing. He or she can obtain all of the information they are supposed to gather post-arrest *after* informing the person of their *Miranda* rights solely by avoiding the invocation of *Miranda* if they simply ask the questions in the field prior to formal custody—this could otherwise be characterized as the "*Siebert* concern." What a

fantastic scheme for law enforcement—it avoids the risk that the suspect may actually want to remain silent once informed of their right to do so.

Ms. Streckenbach proffers that this is the *exact* type of conduct that the *Knapp* and *Seibert* Courts were worried about, namely the "end-run" around the Fifth Amendment and Article I, § 8 of the Wisconsin Constitution. If the *Knapp* court's holding that the citizens of Wisconsin are afforded greater protections against self-incrimination than those afforded by the Fifth Amendment to the United States Constitution is to mean anything, should it not mean that "end runs" around having to *Mirandize* an individual such as that which occurred in this case are to be condemned? Perhaps this case would yield a different outcome if the questions asked of Ms. Streckenbach were not *precisely* the same questions which appear on the Alcohol Influence Report in the *exact* order in which they appear thereon. The old saw about "walking like a duck and quacking like a duck" should apply here if for no other reason than this.

Further suspicions should be raised by the fact that this is a practice unique to the City of Appleton. R32 at 6:11-16; P-App. at 120. Certainly, if hundreds of law enforcement officers throughout the State of Wisconsin can confirm or dispel their suspicions about whether a person is operating under the influence of an intoxicant by asking a mere three to five questions about what the person had to drink, how many they had, and when the stopped drinking, it cannot be deemed unreasonable to believe something more notorious is going on in the City of Appleton. Does the City of Appleton truly believe that law enforcement officers throughout the State are not going far enough in their pre-custody interrogation of suspected drunk drivers when they only ask the three foregoing questions? Would the city agree to dismiss or amend an operating while intoxicated case on a theory that a law enforcement officer who only asked three questions regarding drinking did not go far enough to permissibly expand the scope of a stop into a full-blown drunk driving investigation? Ms. Streckenbach doubts very much that the answer to this question would come in an affirmative form. If that suspicion is true, then why are Appleton Police Officers being allowed to ask *all* of the questions which appear on the Alcohol Influence Report of the suspect prior to their arrest?

Finally, there is one other practical consideration for this Court if it leaves the court of appeals decision unrefined. That is, if the line of questioning approved by the court of appeals is truly "appropriate," then in those jurisdictions in which law enforcement officers do *not* question the individual suspected of operating while intoxicated as extensively as did the officer in the instant case, defense attorneys will be encouraged to file probable cause challenges to their clients' arrest on the ground that the officer did not question the person *thoroughly enough* to determine

whether the individual's performance on the field sobriety tests could be affected by medical conditions such as diabetes, visits to the dentist, the last time the person slept, *etc.*, based upon the court of appeals characterization of these questions as "relevant." Slip op. at pp. 9-10, ¶¶ 14-15; P-App. at 109-10. It cannot be gainsaid that encouraging this practice will only further burden a criminal justice system already taxed to its limits.

III. THE FACT THAT MS. STRECKENBACH WAS DETAINED FOR FOURTH AMENDMENT PURPOSES BUT NOT IN FORMAL CUSTODY AT THE TIME SHE WAS INTERROGATED DOES NOT DISPOSE OF THE ISSUE RAISED HEREIN.

A. Statement of the Law.

It is axiomatic that the operator of a motor vehicle stopped by law enforcement officers is detained for Fourth Amendment purposes. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569. These detentions, however, "are meant to be brief interactions with law enforcement officers, ..." *State v. Floyd*, 2017 WI 78, ¶ 21, 377 Wis. 2d 394, 898 N.W.2d 560, citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

During these "brief interactions," law enforcement officers are permitted to question the suspected driver. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). This questioning, however, is *not* unlimited with respect to its scope or duration. As the *Berkermer* Court described it, the questioning "means that the officer may ask the detainee **a moderate number of questions** to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Id.* (emphasis added).

Wisconsin courts have similarly observed that permissible questioning of a person detained during a traffic stop must be "'reasonably related to the nature of the stop . . . .'" *State v. Gammons*, 2001 WI App 36, ¶ 18, 241 Wis. 2d 296, 625 N.W.2d 623, quoting *State v. Betow*, 226 Wis. 2d 90, 93-94, 593 N.W.2d 499 (Ct. App. 1999). There is no case disposed of in either the United States or Wisconsin Supreme Courts which hold that a traffic detention may be used as a law enforcement tool to subject a suspect to a full-blown interrogation prior to taking the person into formal custody. The foregoing statement is especially true in Wisconsin given that the Wisconsin constitutional prohibition against self-incrimination is *not* co-extensive with the Federal Constitutional provision, but rather, extends beyond it.

B. Application of the Law to the Facts.

Based upon *Berkemer* and *Gammons*, another issue which must be addressed in the instant case is whether the questions being asked of Ms. Streckenbach were

of a "moderate" number designed to "confirm or dispel" the officer's suspicion? As noted above, more than twenty-four (24) questions were asked of Ms. Streckenbach after her detention. If it is true that Officer Schmitz suspected Ms. Streckenbach was operating while intoxicated, surely asking her a few questions regarding whether she drank any intoxicating beverages, how many she had, when she had them, and how large the beverages were is sufficient to confirm or dispel any suspicion of impaired driving.

Make no mistake about Ms. Streckenbach's position in this regard: she is *not* advocating that this Court should create some bright line rule which restricts law enforcement officers who suspect an individual of operating a motor vehicle while impaired to these four questions alone. It is obvious that the circumstances of the detention, including the suspect's responses, may dictate that fewer or even more questions need to be asked. However, interrogating a detained driver with *twenty-four* questions regarding what transpired during the course of their evening and even the twenty-four hours prior well exceeds the bounds of what could reasonably be considered a permissibly "moderate" amount of questioning.

The court of appeals disagreed with Ms. Streckenbach in the foregoing regard because, it held, "each of the questions . . . was relatively brief [and] called for 'yes' or 'no' answers, and none of the questions required answers of more than a few words." Slip op. at p.8, ¶ 13; P-App. at 108. By focusing solely on the *mechanics* of the questions involved, the court of appeals failed to consider *all* of the interrogation in its *entirety*. More specifically, the issue to be addressed in this case should not turn on whether the questions could be answered with a 'yes' or 'no,' or whether the questions were "relatively brief."

Ms. Streckenbach's point in the foregoing regard is best made by analogy. Assume, *arguendo*, that a suspect in a homicide case is being detained and is asked "Did you murder the victim?" This question is brief—only requiring a mere five words to express—and the answer merely calls for a 'yes' or 'no.' If there was a *Miranda* issue surrounding the foregoing interrogation—or a question arising under Article I, § 8 of the Wisconsin Constitution—under the court of appeals approach in this case, because the question was brief and the answer simple, any Fifth Amendment or Wisconsin Constitutional concerns could be disposed of without further inquiry. As this hypothetical demonstrates, it is *not* the mechanical nature of the question and answer which matters, but rather, it is the *overall context* in which the question was being asked. This is what Ms. Streckenbach is petitioning this Court to do, *i.e.*, examine the *context* of her questioning which the court of appeals refused to recognize.

Just as important as the foregoing consideration is the fact that the questions should "reasonably relate to the nature of the stop." One wonders of what relevance Ms. Streckenbach's "level of education" is with respect to whether she might be operating a motor vehicle while impaired? Likewise, how important are the

questions regarding what times she went to bed the night before and woke up that morning if the officer is already asking her whether the number of hours of sleep she had was "normal" for her (not that Ms. Streckenbach is even conceding that these questions are permissibly within the scope of reasonable questions if she has already admitted to consuming intoxicants)? Similarly, of what relevance are questions about visiting a dentist "in the last twenty-four hours" if the officer is trying to determine whether Ms. Streckenbach is under the influence of an intoxicant? Perhaps one of the most non-relevant questions asked of Ms. Streckenbach is where she was going. If a law enforcement officer is trying to ascertain whether a person *has operated*—notably, this is the *past* tense—a motor vehicle while under the influence of an intoxicant, what does it matter where the person is headed? So too, why is Ms. Streckenbach being questioned about when her last dose of medication was taken if the medications she is on are *not* contraindicated with the consumption of alcohol? In a strained and dubious manner, the court of appeals attempted to justify a nexus between these inquiries and an officer's acting reasonably. Slip op. at pp. 8-9, ¶ 15; P-App. at 108-09. To this questionable approach, Ms. Streckenbach must respond, "Where does it end?"

The point of the foregoing should be evident on its face. Not only were far more than the few questions necessary to confirm a suspicion that a person might be under the influence of an intoxicant asked, but many of the very questions themselves had no reasonable relation to assisting Officer Schmitz in determining whether she should be asked to perform field sobriety tests. If this Court permits the kind of interrogation which took place to stand in this case, then what is to prohibit a law enforcement officer from questioning a suspect prior to formal custody about who they were out with that night? What their names were? How long they spent with the suspect? After all, these questions are seemingly as relevant as asking about a person's level of education or sleep because in the end, if the case will be going to trial, they would provide the prosecutor with a witness list of individuals whom the prosecutor could contact and interview to better prepare their case.

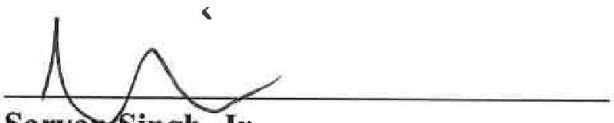
In a similar vein, if this Court finds the line of questioning in this case did not violate the principle of "moderate questioning reasonably related to dispel or confirm an officer's suspicion" as described in the *Berkermer* and *Gammons*, then why would an officer not ask a detainee whether they regularly consume intoxicants? How many times per week or month they do so? What types of beverages they drink when they do so? Again rhetorically, Ms. Streckenbach must ask: Is this not as relevant as inquiring about her level of education or about visiting a dentist within the last twenty-four hours, to which the follow-up inquiry must again be: Where does it end? Ms. Streckenbach hopes that this Court can provide more direction with respect to the questions she presents than did the court of appeals.

CONCLUSION

Ms. Streckenbach respectfully requests that this Court reverse the order of the circuit court denying her motion to suppress based upon a violation of her right against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution.

Dated this 5th day of January, 2022.

Respectfully submitted:
MELOWSKI & SINGH, LLC



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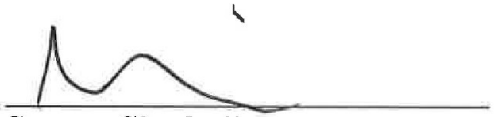
CERTIFICATION

I hereby certify that this petition conforms to the rules set forth in Wis. Stat. §§ 809.62(4) & 809.19(8)(b), (bm), and (c) for a petition for review. The length of this petition is 6,811 words.

I also certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues; and (5) a copy of the decision of the court of appeals. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Supreme Court by first-class mail, or other class of mail that is at least as expeditious, on January 5, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 5th day of January, 2022.

MELOWSKI & SINGH, LLC



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