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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP938-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

QUAHEEM O. MOORE,

Defendant-Respondent.

PETITION FOR REVIEW AND APPENDIX

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The State of Wisconsin requests review of the court of appeals' decision in *State v. Quaheem O. Moore*, case number 2021AP938-CR (Wis. Ct. App. July 28, 2022). In that decision, the court of appeals upheld an order suppressing evidence of fentanyl and cocaine packaged for distribution obtained in a search of Moore's person during a traffic stop.

The issue on appeal is whether officers had probable cause to search Moore incident to arrest under the totality of the circumstances, which included, among other factors, the "strong" odor of raw marijuana emanating from the cabin of the truck in which Moore had been travelling alone.

In a judge-authored opinion citable in Wisconsin courts, a District IV panel affirmed based on its understanding of this Court's decision in *State v. Secrist*, 224 Wis. 2d 201, 589 N.W.2d 387 (1999). The court suggested that *Secrist* set an evidentiary standard for search and arrest based on the odor of a controlled substance that is substantially more demanding than the constitutional standard of probable cause. Applying this elevated standard, the court concluded that the State had not proven at the suppression hearing that the odor of marijuana was "unmistakable" under *Secrist*. The court also dismissed or declined to address additional objective facts appearing to support probable cause.

STATEMENT OF THE ISSUES

In *Secrist*, 224 Wis. 2d at 217–18, this Court held that "the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons . . . ." The Court continued: "We believe a common sense conclusion when an officer smells the odor of a controlled substance is that a crime has probably been committed." *Secrist*, 224 Wis. 2d at 218. "The strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug." *Id.*

1. Though it granted Moore's motion to suppress, the circuit court found as fact that two officers detected the smell of marijuana emanating from the truck Moore was driving, and that one detected the "strong" odor of marijuana. (R. 16:1, A-App. 101.) Without mentioning these findings, the court of appeals determined on its own (neither party briefed the issue) that the State failed to adequately prove at the hearing that the odor the officers detected was, in fact, marijuana. (Pet-App. 13–14.)

The court of appeals understood *Secrist*'s language about the "unmistakable" odor of marijuana providing probable cause to conduct a search incident to arrest to establish an evidentiary standard. (Pet-App. 13–14.) According to the court, *Secrist* "require[s]" the State to produce evidence of the officer's relevant training and experience to prove that the odor was "unmistakable." (Pet-App. 14.) Because the State did not elicit testimony about the officers' training and experience, the court of appeals concluded that the State did not prove that the odor of marijuana was "unmistakable." (Pet-App. 14.)

The court concluded that the odor of marijuana was not "unmistakable" for an additional reason. Relying on the Assistant District Attorney's assertion in a reply brief that the odor of CBD and marijuana are indistinguishable, the court concluded that officers could have reasonably concluded that the odor they detected was of vaped CBD that Moore might have consumed in the truck.[1] (Pet-App. 15.) Because officers thus had an "innocent explanation" for the odor—it could have been of a legal substance, CBD—the court concluded as a matter of law that the odor of marijuana was not

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[1] A vape pen was found on Moore's person during the initial pat-down search, and Moore told officers that he uses it to vape CBD, not THC. (Pet-App. 17–18.) Moore never told police that he vaped in the truck.

"unmistakable," and thus could not provide grounds for the search and arrest. (Pet-App. 15.) The court failed to consider how the detection, just moments earlier, of the "strong" odor of marijuana might reasonably affect an officer's assessment of whether to accept at face value Moore's assurances that he did not vape marijuana.

Having reached these conclusions, the court then opined that *Secrist* established a standard for search and arrest based on the odor of a controlled substance that is more demanding than probable cause: "[T]here may be tension between *Secrist*'s requirement that the odor of marijuana be 'unmistakable' and the quantum of evidence normally required to establish probable cause." (Pet-App. 16 n.11.)

Did the court of appeals correctly read this Court's decision in *Secrist* to establish a standard of evidence for search and arrest based on the odor of a controlled substance that is more demanding than the constitutional standard of probable cause?

2. The court also addressed whether there was probable cause for the search incident to arrest under the totality of the circumstances. In addition to the "strong" odor of marijuana, two more facts were known to officers at the time.

First, during the initial pat-down of Moore, officers found a vape pen that Moore said that he used to vape liquid CBD; he denied using it to vape liquid THC. Second, the officer who executed the traffic stop observed a liquid—later determined not to be alcohol—fly out of the driver's side window as Moore pulled over the truck.

Under the totality of the circumstances, which included the "strong" odor of marijuana and these two, additional objective facts, did officers have probable cause to conduct the search of Moore's person incident to arrest?

STATEMENT OF CRITERIA SUPPORTING REVIEW

1. Review is necessary to address whether the court of appeals misread *Secrist* to require a more demanding quantum of evidence for a search and arrest based on the odor of a controlled substance than the constitutional standard of probable cause. *See* Wis. Stat. § (Rule) 809.62(1r)(d) (review may be appropriate when the court of appeals' decision is in conflict with controlling decisions of this Court). Review would also clarify what the State must show at the suppression hearing to meet its evidentiary burden under *Secrist*. *See* Wis. Stat. § (Rule) 809.62(1r)(c) (review is appropriate when a decision of this Court would clarify the law).

2. Review is also necessary because the court of appeals' opinion is judge-authored and therefore citable in Wisconsin courts. Wis. Stat. § (Rule) 809.23(3). Absent review, judges, lawyers, and law enforcement will wonder whether the court of appeals' reading of *Secrist* is correct. Relying on the court of appeals' decision, defendants will argue that *Secrist* establishes an elevated standard for search and arrest based on the odor of a controlled substance. As a result, courts may well suppress evidence lawfully obtained from a search supported by probable because it does not satisfy the purportedly elevated *Secrist* standard. *See* Wis. Stat. § (Rule) 809.62(1r)(c).

STATEMENT OF THE CASE

In November 2019, Quaheem Moore was charged with possession with intent to deliver fentanyl and possession with intent to deliver cocaine, both as second and subsequent offenses. (Pet-App. 7; R. 5:1–2.) Police stopped Moore's vehicle for speeding. (Pet-App. 4; R. 5:2.) Upon making contact with Moore, officers detected the odor of raw marijuana. (Pet-App. 4–6; R. 5:2.) Officers found baggies of fentanyl and cocaine

packaged for distribution during a search of Moore's person. (Pet-App. 7; R. 5:2–3.)

Moore filed a motion to suppress evidence. (Pet-App. 7; R. 11:1.) Moore argued that, at the time they found the drugs, officers had already completed a protective search for weapons, and the body search was not lawful because officers lacked probable cause to arrest Moore. (R. 11:3–4.) Moore acknowledged that the odor of marijuana may provide grounds to arrest, but argued that officers lacked probable cause to arrest in this case under the totality of the circumstances. (R. 11:3–4.)

The circuit court, the Honorable Nicholas J. Brazeau, Jr., presiding, held an evidentiary hearing on the motion at which the investigating officers testified and a video recording of the stop and investigation from the second officer's body camera was played and received into evidence. (R. 23:1–2.)

At the hearing, City of Marshfield Police Officer Libby Abel testified that she was on patrol on November 17, 2019, when she observed a vehicle that appeared to be speeding. (Pet-App. 4; R. 23:18–19.) The officer testified that, while attempting to make the traffic stop, she observed "some sort of liquid fly out of the driver's window." (Pet-App. 4; R. 23:19.) The vehicle then "hit a curb" while coming to a stop. (Pet-App. 4; R. 23:19.)

Officer Abel testified that she walked up to the vehicle and made contact with the driver, whom she knew as Quaheem Moore from prior contacts. (Pet-App. 4; R. 23:19–20.) The officer asked Moore about the liquid she saw coming from the vehicle and noticed that the inside of the driver's door appeared to be wet. (Pet-App. 5; R. 23:19.) The officer said that Moore had "no explanation really" for the liquid. (R. 23:19–20.) But neither Moore nor the interior of the vehicle smelled of alcohol. (Pet-App. 5; R. 23:25–26.)

Rather, Officer Abel testified that she detected the odor of "raw marijuana" when she made contact with Moore. (Pet-App. 4; R. 23:20.) The officer went back to her squad car to contact the dispatcher, and a second City of Marshfield police officer, Mack Scheppler, arrived to provide assistance. (R. 23:21–22, 27.) The video recording from Officer Scheppler's body camera shows Moore exit the vehicle and Officer Abel conduct a pat-down search of Moore for weapons. (Pet-App. 5; R. 23:21; Ex. 1 at 2 min 15 sec.)[2]

During the pat-down search, Officer Abel found a vaping pen in one of Moore's pockets. The officer then asked Moore, "Is this a THC vape?" (Pet-App. 5; R. 23:15, 21; Ex. 1 at 2:50.) When Moore did not respond, the officer repeated the question, and Moore said, "It's a CBD vape." (Pet-App. 5; R. 23:15, 21; Ex. 1 at 3:05.)

Officer Abel told Moore that she detected an odor of marijuana in the vehicle. (Pet-App. 6; R. 23:20–21; Ex. 1 at 4:20.) When Moore expressed disbelief, Office Scheppler, who made contact with Moore by the passenger's side door shortly before Moore exited the vehicle, said that he also smelled marijuana. (Pet-App. 6; R. 23:13; Ex. 1 at 4:25.) Moore then pulled at the front of his sweatshirt, stepped toward Officer Abel, and said, "You don't smell that shit on me!" (Pet-App. 6; R. 23:11, 28; Ex. 1 at 4:30.) Declining Moore's invitation to smell his sweatshirt up close, the officer stuck her hand out at Moore and said, "I can't smell it right now." (Pet-App. 6; R. 23:28; Ex. 1 at 4:30.)

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[2] The body cam video recording is contained on a CD labelled "Exhibit #1" that was transmitted to the Court as a supplement to the record and was not given a record number by the circuit court. The recording is stored as an MP4 file and should open with most popular media players, including Windows Media Player and Apple QuickTime.

Moore also said that the vehicle was not his, and that he was borrowing it from his brother, who had run it through the car wash earlier that day. (Pet-App. 5; R. 23:27; Ex. 1 at 4:35.) When Officer Abel said that she ran the vehicle's plates and the owner came back as a business, Moore said that his brother was renting the vehicle and let him borrow it. (Ex. 1 at 5:00.)

Officer Abel then told Moore that Officer Scheppler was going to search him. (Pet-App. 6; R. 23:22; Ex. 1 at 5:25.) Office Scheppler added that the search was because of the odor of marijuana. (Pet-App. 6; R. 23:6–7, 22; Ex. 1 at 6:10.) The officer searched Moore's person and discovered that Moore had a substantial amount of cash on him, later determined to be about $400 in total. (R. 5:3; Ex. 1 at 6:15–9:00.) Officer Abel went to search the vehicle. (R. 23:22–23; Ex. 1 at 9:05.)

While Officer Abel was searching the vehicle, Officer Scheppler was standing with Moore outside the vehicle making small talk. (Pet-App. 6; Ex. 1 at 9:05–10:55.) Officer Scheppler testified at the hearing that, as he was talking to Moore, he noticed that "his belt buckle was sitting a little higher on his pants" and that there was a "bulge" in the buckle area of his pants. (Pet-App. 6; R. 23:7.) Officer Scheppler then said to Moore, "Hey, can I just have you put your hands on top of your head? I just want to search one more area." (Ex. 1 at 10:55–11:10.) Moore complied.[3] Officer Scheppler found two plastic baggies, each containing several "bindles" of substances later found to be cocaine and fentanyl. (Pet-App. 7; R. 5:3; 23:7–8, 24–25.)

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[3] Moore responded, "Check me, check me, check me!" extending his arms out to his sides. (Ex. 1 at 11:05.) The State argued in the circuit court that Moore's statement constituted consent to search. The State did not make this argument in the court of appeals and does not make the argument here.

Following briefing, the circuit court issued a decision and order granting Moore's suppression motion. (R. 16:1–4, A-App. 101–04.) The court said that Officer Scheppler's search of Moore's person was not a protective search under *Terry v. Ohio*, 392 U.S. 1 (1968), because the officers said that the search was based on the odor of marijuana, and Officer Abel had already conducted a protective search. (R. 16:2–3, A-App. 102–03.) The court indicated that, to be lawful, the search would have to have been incident to an arrest. (R. 16:2–3, A-App. 102–03.)

The court noted that the search of the vehicle was lawful and not contested because the odor of marijuana gives probable cause to search a vehicle. (R. 16:3, A-App. 103.) Further, it acknowledged that the odor of marijuana detected during a traffic stop may give probable cause to arrest the driver and sole occupant of the vehicle, citing *Secrist*, 224 Wis. 2d 201. (R. 16:3, A-App. 103.) But applying the largely undisputed facts to *Secrist*, it concluded that officers did not have probable cause to arrest Moore because the link between Moore and the odor in the vehicle was diminished where the vehicle wasn't Moore's, and the officers didn't detect the smell of marijuana on Moore's person when he was outside the vehicle. (R. 16:3–4, A-App. 103–04.) The court dismissed Officer Abel's testimony that she saw a liquid fly out of the driver's side window because it "was never shown to . . . bear on any question presented in [Moore's] motion." (R. 16:1, A-App. 101.)

The State appealed, arguing that officers had probable cause to conduct a search incident to arrest based on:

- Two officers' detection of the odor of raw marijuana emanating from the truck cabin, pursuant to *Secrist*;
- Moore's possession of a vape pen, which Moore said that he used to consume CBD. Having just detected the odor of raw marijuana, officers could reasonably infer that

Moore was a user of marijuana and used the pen to vape marijuana in liquid form. They were not required to accept at face value Moore's assurances that he vapes only CBD, not THC; and

- Officer Abel's observation of a liquid, later determined not to be alcohol, flying out of the driver's side window as Moore pulled the truck over. This observation supported a strong inference that Moore was attempting to dispose of inculpatory evidence. Where officers detected the odor of marijuana and thus suspected marijuana possession or use, they could reasonably infer that the disposal of the liquid was related to this crime, without necessarily knowing the identity of the liquid; whether it was, for example, "vaping juice" containing THC, or something else.

(State's Opening Br. 13–20.)

Moore, by Attorneys Joshua Hargrove and Tracey Wood, argued that the circuit court properly concluded that officers lacked probable cause to conduct the search. The officers did not detect the odor of marijuana on Moore's person, and thus the link between the strong odor of marijuana emanating from the truck and Moore's person was diminished. (Response Br. 16, 19.)

The court of appeals, District IV, affirmed the suppression order, albeit on different grounds. In a decision authored by Judge Rachel Graham not recommended for publication, the court concluded that the odor of marijuana emanating from the truck was not a sufficient ground for the search under *Secrist* because the State did not prove at the suppression hearing that the odor of marijuana was "unmistakable." (Pet-App. 14.) The State did not make this showing, the court concluded, because it did not present evidence of the officers' training and experience identifying the odor of marijuana. (Pet-App. 14.) The court did not

address the circuit court's finding that both officers did, in fact, detect the odor of marijuana, and that one officer detected the "strong odor" of marijuana coming from the truck cabin. (R. 16:1, A-App. 101.)

The court also concluded that the odor of marijuana was not "unmistakable" as a matter of law because there was an "innocent explanation" for it. (Pet-App. 15–16.) Relying on the State's assertion in a circuit court brief that the odor of vaped CBD and vaped THC smells like marijuana,[4] the court concluded that officers could have reasonably concluded that the odor was from Moore using his vape pen to vape CBD, not marijuana. (Pet-App. 15.) The court held: "The odor cannot be unmistakably that of marijuana if officers are unable to rule out an innocent explanation for the odor." (Pet-App. 16.)

The court next concluded that officers did not have probable cause for a search and arrest based on the totality of the circumstances. As to Officer Abel's observation of a liquid flying out of the driver's side window, the court concluded that the State had forfeited consideration of this fact because it did not argue the fact in the circuit court. (Pet-App. 18.) The court of appeals therefore excluded this fact in deciding whether officers had probable cause to conduct a search under the totality of the circumstances.

The court did consider Moore's possession of the vape pen, but concluded that any inference Moore used the pen to consume marijuana was "objectively unreasonable" where

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[4] The court relied on this assertion by the ADA despite the fact that the State explicitly declined to renew this assertion on appeal. Instead, the State noted that no evidence was presented at the hearing about the odor, if any, of vaped CBD and vaped THC. (State's Opening Br. 16.) Moreover, there's good reason to doubt that liquid CBD or THC vaporized at high temperatures smells identical to raw, unburnt marijuana.

Moore told officers that he used it to consume CBD. (Pet-App. 17.)

The State requests review of the court of appeals' decision.

ARGUMENT

Review should be granted to clarify that this Court's longstanding decision in *Secrist did not* establish a standard for search and arrest based on the odor of a controlled substance that is more demanding than the constitutional standard of probable cause.

The court of appeals overread *Secrist* to establish an evidentiary standard for a search and arrest based on the odor of a controlled substance—whether the odor is "unmistakable"—that is distinct from, and more demanding than, the constitutional standard of probable cause. (Pet-App. 14–16.) The court then applied this standard to conclude *sua sponte* that the State did not adequately prove that the odor two officers detected was, in fact, marijuana. (Pet-App. 14–16.)

The court of appeals then appeared to recognize that this standard requires a higher quantum of evidence than probable cause: "[T]here may be tension between *Secrist*'s requirement that the odor of marijuana be 'unmistakable' and the quantum of evidence normally required to establish probable cause." (Pet-App. 16 n.11.) But the court said that it was "not at liberty to disregard" *Secrist*, citing *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.").

The court of appeals misunderstood and misapplied *Secrist* in a decision that is citable in Wisconsin courts. Accordingly, this Court should accept review to clarify that *Secrist* did not establish an evidentiary standard for search

and arrest—the "unmistakability" of an odor of a controlled substance—that is more demanding than probable cause.

A. The *Secrist* decision

In *Secrist*, this Court explained that it is "a common sense conclusion [that] when an officer smells the odor of a controlled substance . . . a crime has probably been committed." 224 Wis. 2d at 218. The probable cause determination "does not require that an officer establish with technical certainty that the controlled substance was used during a specific time." *Id.* "Rather, the officer will have probable cause to arrest when the quantum of evidence within the officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *Id.*

"If under the totality of the circumstances," this Court continued, "a trained and experienced police officer identifies an unmistakable odor of a controlled substance and is able to link that odor to a specific person or persons, the odor of the controlled substance will provide probable cause to arrest." *Secrist*, 224 Wis. 2d at 218. "The strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug." *Id.* "The probability diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor." *Id.*

B. The court of appeals overread *Secrist* to establish "unmistakability" of the odor as the evidentiary test for a search and arrest based on the odor of marijuana.

As shown above, this Court in *Secrist* identified circumstances when an officer's detection of the odor of marijuana provides probable cause for a search incident to

arrest. The officer should be confident that the odor is of marijuana—the odor should be "unmistakable" to the officer. *Secrist*, 224 Wis. 2d at 218. Moreover, the "strong odor" of marijuana that is linked to the driver and sole occupant of a vehicle—the facts of this case—will typically support probable cause for search and arrest. *Secrist*, 224 Wis. 2d at 218.

Whether an odor of marijuana is "unmistakable" or "strong" to an investigating officer is, of course, highly relevant to whether probable cause exists to conduct a search incident to arrest under *Secrist*. But whether an odor is "unmistakable" or "strong" are not constitutional standards like probable cause that are reviewed *de novo* on appeal. *See State v. Wright*, 2019 WI 45, ¶ 22, 386 Wis. 2d 495, 926 N.W.2d 157 (appellate court independently applies constitutional principles to historical facts). They are issues of fact addressed to the circuit court and subject to deferential review. *See id.* (findings of fact must be upheld unless clearly erroneous).

Here, the circuit court granted the motion to suppress based on its conclusion that officers lost probable cause to search Moore when they could not detect the odor of marijuana on his person. (R. 16:3–4, A-App. 103–04.) But consistent with its apparent view that officers initially *had* probable cause to search based on the odor of marijuana emanating from the truck and Moore being the truck's driver and sole occupant, the circuit court found as fact that two officers detected the odor of raw marijuana, and one detected the "strong" odor of marijuana, emanating from the truck cabin. (R. 16:1, A-App. 101.) These findings are not clearly erroneous; they are supported by the hearing testimony of the officers and statements in the body cam video about detecting the odor of marijuana coming from the truck. (R. 23:13, 20–21; Ex. 1 at 4:20–25.)

Where the officers corroborated each other's detection of the odor, the circuit court had ample basis on which to rely

on the officers' testimony. *See Secrist*, 224 Wis. 2d at 216 (noting that corroboration by another officer "can be helpful in firming up the reasonableness of the officer's judgments"). Though the circuit court did not make an explicit finding that the odor of marijuana was "unmistakable" as to either or both of the officers, the court's findings of fact are consistent with such a determination. The circuit court believed the officers' unambiguous testimony that they detected the odor of marijuana. (R. 16:1, A-App. 101.)

To address whether the odor of marijuana emanating from the vehicle provided probable cause to conduct the search, the court of appeals should have started with the circuit court's findings and the evidence supporting those findings. Instead, the court erred by conducting an independent review of the question of whether the odor was "unmistakable" to the officers, treating an issue of fact as one of law. (Pet-App. 16.) The court then misread certain language in *Secrist* to "require[ ]," in all cases, evidence of the officers' training and experience to prove that the odor of marijuana was "unmistakable." (Pet-App. 11, 14.) Because the State did not elicit such testimony at the hearing, the court of appeals concluded, without consideration of the circuit court's findings, that the evidence failed to show that the odor of marijuana was sufficient to justify a search.

Review would thus clarify for Wisconsin courts the standard of review applicable to an order granting or denying suppression following a search and arrest based on an officer's detection of the odor of a controlled substance.

C. The court of appeals' conclusion that an "innocent explanation" for the odor of a controlled substance automatically defeats the ground for a search is contrary to established law.

As noted, the court of appeals also concluded that there was another reason that the odor of marijuana could not be "unmistakable": there was an "innocent explanation" for it. Noting that the State asserted in the circuit court (but not on appeal) that the odor of vaped CBD and marijuana are indistinguishable, the court determined that the odor the officers detected may well have been of CBD that Moore could have vaped in the truck. (Pet-App. 15.) The court then held, as a matter of law, that when officers cannot rule out an "innocent explanation" for an odor, that odor of a controlled substance cannot be "unmistakable"— it cannot provide legal grounds for a search. (Pet-App. 15.)

As an initial matter, Moore said nothing to police about using his vape pen in the truck, and no evidence was presented at the hearing about the odor, if any, of vaped CBD. But setting these facts aside, the court's legal conclusion that any "innocent explanation" for an odor of a controlled substance—even, as here, a *theoretical* explanation not even offered by the suspect—automatically undermines probable cause for search and arrest is contrary to established Fourth Amendment principles. "[A]n officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause." *State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125; *see also State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985). Indeed, where officers had just detected the odor of marijuana coming from Moore's vehicle, they were not required to take at face value Moore's statements that he used the pen to consume CBD only, not marijuana.

This further illustrates how the court of appeals misread *Secrist* to require something more than probable cause whenever a search is based on the odor of a controlled substance.

In sum, review is necessary to clarify that this Court's longstanding decision in *Secrist* did not establish an evidentiary standard for search and arrest based on the odor of a controlled substance that demands more than the constitutional standard of probable cause.

* * * *

The court of appeals' decision misreads and misapplies *Secrist* in a manner that is already affecting cases around the state and is all but certain to affect many more. Review is necessary to prevent courts from applying the court of appeals' decision to invalidate lawful searches that are supported by probable cause—but are not supported by the court of appeals' more demanding standard for search and arrest based on the odor of marijuana.

Under established Fourth Amendment law, including *Secrist*, probable cause existed to search and arrest Moore based on the totality of the circumstances: (1) Two officers' detection of the odor of raw marijuana emanating from the truck Moore was travelling in alone; (2) the officers' discovery of a vape pen on Moore's person, which, taken with the odor of marijuana detected from the truck cabin, could reasonably lead to the inference that Moore used the pen to vape marijuana in liquid form; and (3) an officer's observation of a liquid, determined not be alcohol, apparently being disposed of out of the driver's side window as Moore pulled the truck over to comply with the stop. Those facts supported probable cause to warrant a search of Moore incident to arrest.

CONCLUSION

This Court should grant review and reverse the decision of the court of appeals.

Dated this 29th day of August 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 4,914 words.

Dated this 29th day of August 2022.

Lorynn L. Limoges (STATE BAR #1094053) for Jacob Wittwer

JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 29th day of August 2022.

Lorynn L. Limoges (STATE BAR# 1094053) for Jacob Wittwer

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