STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP001112 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER ANTONJE TEK,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

> This Court should clarify how courts determine whether someone is under arrest and specifically, how "officer safety concerns" factor into the reasonableness analyses courts perform to determine whether someone is under arrest or whether a *Terry* stop has transformed into a *de facto* arrest.

The circuit court determined that "no reasonable person" in Tek's circumstance would believe he were under arrest after Tek gave Rocha "an unreasonable choice" to either handcuff Tek or let him go by stating things like "please let me go" or "I'm about to get picked up."

The court of appeals determined that Tek was not under arrest when Rocha handcuffed him because handcuffs were necessary to "safely proceed" with the investigation given Tek's "nonresponsive and erratic behavior" such as calmly stepping out of the car, following directions to turn around, and telling Rocha that unless he's under arrest, he will leave soon.

CRITERIA FOR REVIEW

This case presents the Court with the opportunity to clarify the reasonableness tests that courts use to determine whether someone is under arrest, whether a *Terry* stop has transformed into a

de facto arrest by the use of restraints such as handcuffs, and how officer safety concerns play a role in those tests.

The various reasonableness tests created by both federal and state precedent are not always clear and sometimes in conflict with each other. Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 Utah L. Rev. 977 (2004). This case involves a number of these reasonableness tests, and as demonstrated by the comparison between the circuit court decision and the court of appeals decision, courts are unsure what the tests are and how to apply them. This petition, recognizes that "reasonable suspicion" and "probable cause" are an essential part of any analysis as to the legality of someone's arrest. However, for purposes of this petition, it will focus on the reasonableness tests associated with when an arrest has occurred.

Here, we are posed with a number of competing reasonableness tests that are a mixture of balancing interests and case-by-case, totality-of-the-circumstances analyses. One, we are asked whether a reasonable person in Tek's position, given the totality of the circumstances, would believe he was under arrest. *State v. Wortman*, 2017 WI App 61, ¶7, 378 Wis. 2d 105, 902 N.W.2d 561. Two, we are asked whether, during a permissible *Terry* stop, the degree of restraints used transformed the stop into a *de facto* arrest. *Florida v. Royer*, 460 U.S. 491, 499 (1983). In performing this second analysis we are asked whether the degree of restraint is reasonable

under the circumstances. *State v. Pickens*, 2012 WI App 5, ¶27, 323 Wis. 2d 266, 779 N.W.2d 1.

One circumstance that may justify the use of restraints during a *Terry* stop is officer safety. *Id.*, ¶32-33. Whether officer safety concerns justify the use of a restraint requires the resolution of two further questions. First, whether the officer's safety concerns are reasonable given the circumstances. *Id.* Second, whether the restraint used was a reasonable degree of restraint. *Id.* This second part seems to employ a balance of the liberty interests of the detainee against officer safety concerns.

Each of these tests ask courts to consider the reasonableness of the police encounter with a citizen, but in different ways. Which test to use, or how they work together is not always clear. And, sometimes, they are in conflict with each other. For example, a reasonable person may still believe they are under arrest when handcuffed under the same circumstances in which an officer has reasonable safety concerns that justify the use of handcuffs.

Is that a stop or an arrest? Which of the tests—the "reasonable person" test or the "*de facto* arrest" test—should courts use to answer that question? And how do courts know when to use which test? Or a combination of the tests? If they use a combination of tests, how do courts know which test overcomes the others?

Another issue is how and when do officer safety concerns factor into these tests. It appears that officers will identify specific safety concerns in the moment. *Id*. But also, reviewing courts will determine whether, given the totality of the circumstances, those concerns were reasonable. *State v. Vorburger*, 2002 WI 105, ¶66, 255 Wis.2d 537, 648 N.W.2d 829. If the court determines that the safety concerns are reasonable, some courts skip the "reasonable person" test. *Id*. Or, they combine the tests in confusing ways. *State v. Blatterman*, 2015 WI 46, ¶28-32, 362 Wis. 2d 138, 846 N.W.2d 26.

How does officer safety concerns factor into the tests? And, what happens when, like in this case, an officer does not identify any officer safety concerns? Can a court still determine whether officer safety concerns existed in the moment? And if so, is that a factual finding owed deference? Or is it a legal conclusion reviewed *de novo*? Does any level of officer safety concerns justify any and all restraints? If not, how do courts determine which level of restraint is justified by which level of safety concern?

Given the broad applicability of the Fourth Amendment, challenges to what constitutes "reasonable" are seemingly limitless. In the face of these challenges, courts look to the massive body of Fourth Amendment jurisprudence to find, apply or modify various reasonableness tests. How courts define and redefine these Fourth Amendment tests influence police behavior and future criminal cases, even in ways that are not immediately apparent.

Police stop thousands of people every day, and circuit courts will need clear direction on how to determine whether those police interactions were reasonable.

Thus, this case presents a "real and significant question of federal and state constitutional law" that requires clarification, and "is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." Review is therefore warranted under Wis. Stat. §§ 809.62(1r)(a) and (c)(3).

STATEMENT OF FACTS

Christopher Tek was arrested within seconds of being stopped. The body camera footage showed Tek, calmly stepping out of his car, following police orders to turn around, and repeatedly stating that unless he was under arrest, he would be leaving soon. (22). Rocha handcuffed him for being "uncooperative" and locked him in the back of the squad car. (24:2; App. 4). The circuit court applied the "reasonable person" test and found that "no reasonable person" would believe they were under arrest at the point Tek was handcuffed. (24:3; App. 5). On appeal, the court of appeals followed the frame work of *Blatterman* to apply a "*de facto* arrest" test. *State v. Tek*, No. 2021AP1112-CR, unpublished op., ¶2 (Wis. Ct. App. Sep. 14, 2017). It determined that the use of handcuffs was reasonable to "proceed safely" with an investigation because of Tek's "nonresponsive and erratic behavior" (although neither the officer nor the

circuit court ever identified any safety concerns) and therefore, the stop did not transform into a *de facto* arrest. *Id*., ¶31-33.

The following facts are a more detailed summary of the testimony at the suppression hearing, the circuit court decision, and the court of appeals decision. On June 10, 2018, Officer Benito Rocha of the Janesville Police Department responded to a dispatch report of a car driving on flat tires in a residential neighborhood. (44:10-11; App. 30-31). When Rocha arrived at the location, he saw a car parked on the left side of the road, facing the "wrong" direction, with its lights on. (44:11; App. 31).

Rocha approached the car and began talking to the individual sitting in the driver's seat—Christopher Tek. (44:12; App. 32). When asked if everything was okay, Tek did not initially respond but instead slowly stepped out of the car. (44:29; App. 49). During the next 45 seconds, Rocha and Tek engaged in a straightforward exchange. Rocha asked a series of investigative questions, such as "have you been drinking," and gave a number of orders, such as "turn around." (22:0:46-1:24). Tek repeatedly told Rocha that unless he was handcuffed (or under arrest), he was about to "get picked up." (22:0:46-1:24). Tek also followed Rocha's orders, turning around when asked to. (22:0:46-1:24).

Within those first seconds of speaking to Tek, Rocha handcuffed him, searched his pockets, pulled him away from the car, continued to question him, and

dragged him to the back of the squad car where Tek sat until driven to jail. (22:1:55-2:33). Other officers arrived on scene and continued to investigate. (22:2:40-3:48, 4:52-6:40). Rocha's report noted that he smelled alcohol on Tek's breath after he begun handcuffing him, and only saw flat tires on the car after Tek was secured in the back of the squad car. (23:8-9). Based on the dispatch report and Rocha's personal observations, Rocha concluded that Tek had been intoxicated and driving. (23:9). Rocha turned off his body camera and eventually drove Tek to get his blood drawn and to book him in jail. (23:14). The blood test indicated a blood-alcohol concentration of .162. (23:14).

Nearly two years after Tek's arrest, the state charged Tek with operating while intoxicated–second offense. (4). Tek filed a motion to suppress the results of his blood draw. (19). The circuit court held a suppression hearing where Rocha testified in addition to his report and body camera footage being entered into evidence. (44; App. 21-81). At the hearing, Tek's trial counsel argued that Tek was under arrest when he was handcuffed within seconds of their interaction, and that Rocha did not have probable cause to arrest Tek at that point, if at all. (44:39-54; App. 59-74). Then, the circuit court issued an oral ruling denying the suppression motion. It determined that Tek was under arrest when Rocha handcuffed him, but, at that point, Rocha had probable cause to arrest Tek for a parking violation—parking on the wrong side of the road. (44:57-58; App. 77-78).

About a week later, the circuit court *sua sponte* issued a new, written decision and order denying the suppression hearing. (24; App.82-85). In this order, the court determined that Tek was not arrested when Rocha handcuffed him. (24:3; App. 84). Instead, an arrest did not occur until Rocha drove Tek away from the scene to jail. (24:3; App. 84). The opinion stated that Tek "presented Rocha with an unreasonable choice" to either arrest or let him go. (24:3; App. 84). "A reasonable person under this situation would recognizing the unreasonable nature of the choice Tek presented, would not consider Rocha's response to be an arrest, but would instead recognize that Rocha intended to detain Tek so that he could start his investigation." (24:3; App. 84). The court made no findings as to officer safety concerns, instead determining that this case was "one of the unique situations when handcuffs were needed" to "start [the police] investigation." (24:3; App.84).

On appeal, Tek argued again that he was under arrest at the point Rocha handcuffed him, and that there was no probable cause to arrest him. *Tek*, No 2021AP1112-CR, ¶1. Tek argued that even if there was reasonable suspicion to temporarily detain him, the detention was transformed into a *de facto* arrest when Rocha handcuffed him. *Id*. Specifically, neither the circuit court nor Rocha ever identified any officer safety concerns, or other reasonable justifications for that level of a restraint. *Id*.

The court of appeals held that Tek was not under arrest when he was handcuffed. *Id*., ¶28-34. It decided that the handcuffs "did not transform the temporary investigatory detention into a warrantless arrest." *Id*. This is because, as the court stated, Tek's behavior "implicated concerns by a reasonable officer that the investigation could not safely proceed" without handcuffs. *Id*. The handcuffs were justified by Tek's "nonresponsive and erratic behavior." *Id*. The court never determined when the temporary detention ended or when Tek was under arrest, nor whether there was probable cause to support his arrest. *Id*.

ARGUMENT

This Court should grant review to clarify how and when do officer safety concerns contribute to the various reasonableness analyses courts use to determine whether someone is under arrest.

A. There are a number of competing reasonableness tests courts would need to employ when determining whether someone is under arrest.

Over decades, courts have created, evolved, and discarded various Fourth Amendment reasonableness tests. Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 Utah L. Rev. 977, 977-78 (2004). The primary surviving tests are mixtures of balancing tests and case-by-case analyses. *Id*. at 1022-1027. In criminal cases, these tests often

ask courts to determine whether the police were acting reasonably. Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from The Supreme Court*, 59 Case W. Res. L. Rev. 1, 3 (2008). Although recently, in determining whether someone is under arrest, courts are asked whether citizens are acting reasonably. *Id*.

In 1980, the Supreme Court issued a new test to determine whether someone is seized within the meaning of the Fourth Amendment. *U.S. v. Mendenhall*, 446 U.S. 544, 553-54. A person is seized only if, in view of all the circumstances, "a reasonable person would have believed that he was not free to leave." *Id*. The circumstances the court considered were things like whether the officers were wearing uniforms, whether they displayed weapons, whether they identified themselves as officers, whether they demanded to see identification, whether they were in a public space, or whether Mendenhall was ever told she was free to leave. *Id*. Ultimately, in weighing all these circumstances, the court determined that Mendenhall did not have any "objective reason to believe she was not free to end conversation and proceed on her way," and therefore, she was not seized. *Id*.

This test was slightly refined in *California v. Hodari D.*, 499 U.S. 621, 628 (1991), and *Florida v. Bostick*, 501 U.S. 429, 439 (1991). The Supreme Court stated that "cases make it clear that a seizure does not occur…[s]o long as a reasonable person would feel free 'to disregard the police and go about his business.'"

Bostik, 501 U.S. 429, 434. And reiterated again in *Drayton*, "[i]f a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *U.S. v. Drayton*, 536 U.S. 194, 201-02 (2002). *Bostik* and *Drayton* also affirm that there is no *per se* rule in this context, but instead the "proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.'" *Id.* at 201. (citation omitted).

Brendlin, in reviewing the history of seizure jurisprudence, noted that this reasonable person test came from previous tests where seizures occur "when an officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement… 'through means intentionally applied.'" *Brendlin v. California*, 551 U.S. 249, 254 (2007). (citations and emphasis omitted).

Building from the force or restraint case law in the 1980s, *Royer* found that a temporary seizure cannot be unreasonably prolonged without probable cause. *Florida v. Royer*, 460 U.S. 491, 500 (1983). In other words, during a legitimate *Terry* stop, "the police [may not] seek to verify their suspicions by means that approach the conditions of arrest." *Id.* at 499. This test, whether the circumstances of the stop have transformed into a *de facto* arrest, is seemingly distinct from the reasonable persons test.

Courts in Wisconsin determine whether an arrest occurred "by questioning whether a 'reasonable person in the defendant's position would have

considered himself or herself to be 'in custody," given the degree of restraint under the circumstances." *Wortman*, 378 Wis. 2d 105, ¶7. (quoting *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *abrogated on other ground by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277).

Wisconsin courts have also used a *Royer*-like test holding that the investigative methods taken during a *Terry* stop must be "the least intrusive means reasonably available to verify or dispel the officer's suspicion" and be limited to the scope of the stop. *State v. Young*, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729. Although the use of handcuffs does not *per se* transform a stop into an arrest, handcuffs and other restrictive measures are only reasonable "when particular facts justify the measure for officer safety or similar concerns." *Pickens*, 323 Wis. 2d., ¶32.

As heavily relied on by the court of appeals decision in this case, *Blatterman* uses a mixture of both tests. 362 Wis. 2d 138, ¶28-32. First, this Court determined whether the stop transformed into a *de facto* arrest. During this analysis, this Court found that the length of time was reasonable and did not transform Blatterman's stop into a *de facto* arrest. *Id.*, ¶28. However, this Court did find that transporting Blatterman away from the scene was outside the scope of the temporary detention and, therefore, must be "supported by probable cause to arrest or by a reasonable exercise of the community caretaker function." *Id*.

Then, this Court appears to begin a "reasonable person" analysis to determine whether Blatterman was under arrest. *Id*., ¶30. In the middle of this, it determined that the level of restraints—handcuffs and transportation to the hospital—were reasonable given the serious risk of harm to both Blatterman and the officers. Neither restraint transformed the stop into a *de facto* arrest. *Id*., ¶31-32. Next, it determined that approaching Blatterman at gunpoint also did not transform the stop into a *de facto* arrest. *Id*. But finally, it concluded that, despite the justifications, a reasonable person in these circumstances would still believe he was under arrest because "his transportation was involuntary, and he had experienced a significant level of force and restraint since the initial stop." *Id*., 33.

These cases demonstrate confusion as to what these tests ask of courts. The "reasonable person" test and the "*de facto* arrest" test are seemingly distinct tests that ask courts different things: on one hand, if an objectively reasonable person would believe they were arrested under the circumstances (including the degree of restraint used), on the other hand, whether the degree of restraint is reasonable given the circumstances (such as officer safety concerns or whether it transformed the stop into a *de facto* arrest. Are courts answering these questions separately, as two distinct tests? Or should courts be combining the tests? If courts combine them, how do the tests work together? If they are kept separate, how do courts know when to use one test or the other?

B. It is unclear whether officer safety concerns are a subjective fact or an objective reasonableness test, and how it factors into the overall analysis of whether an arrest occurred.

There are three big cases in Wisconsin that deal with officer safety concerns during a stop or arrest. In these cases, it appears that the officers identified safety concerns in the moment. Then, those concerns were reviewed for reasonableness given the totality of the circumstances. These two parts imply that officer safety could be a subjective fact or an objectively reasonable test. If it can function as both, how do courts know when to give the safety concern deference like any other fact, or to review its reasonableness *de novo*?

In *Vorburger*, a group of officers were investigating the possession of illegal drugs at a motel. 255 Wis. 2d 537, ¶5-25. When Vorburger, his girlfriend (Becker), and another man showed up to the motel room under investigation, they handcuffed each person. *Id*., ¶15. While Becker was being handcuffed, the officer explained to her that it was for the safety of her and the officers. *Id*. Later arguing to suppress evidence obtained after they were detained, Vorburger claimed that Becker's detention was transformed into a *de facto* arrest. *Id*. In part, he argued that the use of handcuffs and the continual presence of one or more officers was an unreasonable level of restraint. *Id*., ¶62. This Court determined that the use of handcuffs and police presence was justified by the risk of harm

to the officers. *Id*., ¶¶63-66. "[T]he officers' concern for their safety and the safety of others is well grounded in the record." *Id*., ¶66. Two of the three detainees were large men—one of whom was a bouncer at a local night club standing at almost 7 feet tall and 265 pounds. *Id*., ¶66. And, the police were attempting to execute a search warrant which can lead to "sudden violence." *Id*., ¶66. (citation omitted).

In *Pickens*, the police were investigating credit card fraud and the renting of hotel rooms with fake or stolen information. 323 Wis. 2d 226, ¶4-9. In the process of their investigation, they determined that the people using the hotel room were involved in illegal drug activity. *Id*. One officer went to the parking garage and found Pickens sleeping in his car. *Id*. After answering questions and refusing to consent to a search of his car, the officer arrested Pickens. *Id*. The officer testified to recognizing Pickens from a police bulletin naming him as a suspect in a shooting. *Id*. The court of appeals concluded that the state failed to show that the level of restraint—handcuffing and securing Pickens in the back of the squad car—was reasonable under the circumstances because the state presented no "specific, articulable facts" to justify that level of restraint. *Id*., ¶33.

In *Blatterman*, the police were investigating a call from Blatterman's distressed wife. 326 Wis. 2d 138, ¶3. She reported that Blatterman intended to burn his house down with gasoline, that he was possibly intoxicated and driving, and that he "mentioned suicide by cop." *Id*. After asking for backup

to conduct a "high-risk stop," several officers stopped Blatterman, drew their weapons, and ordered him to step out of the car with his hands raised. *Id*. ¶5-6. Blatterman began walking towards the officers even after being told to stop or he would be Tased. *Id*. ¶7. Eventually, Blatterman kneeled, two-officers forced him to the ground, and he was handcuffed and searched for weapons. *Id*. Blatterman stated his chest hurt and the officers requested EMS. *Id*. He sat in the squad car while waiting for EMS and was eventually transported to the hospital. *Id*.

As one part of its analysis, this Court determined that the level of restraint used during the stop was justified because of the serious risk of harm to the officers and others. *Id*., ¶32. It found that, the facts caused the officers "concern that their interactions with him could escalate into a violent confrontation." *Id*., ¶31-32. This Court concluded that the restraints didn't transform the stop into a *de facto* arrest. *Id.* However, it did conclude that a reasonable person in Blatterman's circumstances would believe they were under arrest. *Id*.

Each of these cases considered officer safety as part of its overall analysis of whether the defendant was under arrest. But, none provide a clear outline as to how officer safety concerns factor into the overall analysis. In each case, the officers identified concerns or risks in the moment. Does that mean officer safety is a subjective fact owed deference like any other factual finding? The courts also reviewed the officer's concerns for reasonableness. Does that mean officer

safety is a legal conclusion reviewed *de novo* for reasonableness given the totality of the circumstances?

Furthermore, the cases do not make specific findings as to whether the degree of restraint is proportionally reasonable to the reasonable officer safety concerns. However, the *de facto* arrest test asks whether "such measures" are reasonable given "the particular circumstances." *Vorburger*, 255 Wis. 2d 537, ¶65. Do officer safety concerns justify any and all uses of restraints? If not, how do courts determine whether the severity of the safety concern justify the intrusiveness of the restraint? Are courts balancing the interests of the state with the liberty interests of the citizen? Or is it a totality-of-the-circumstances analysis? Is there a difference between those tests?

C. Tek's case presents the court with the opportunity to clarify how courts should determine whether someone is under arrest.

The facts of Tek's case present two important questions: when is Tek under arrest, and how does officer safety play a role in the analysis, if at all? Although the circuit court and the court of appeals ultimately determined Tek was not arrested when he was handcuffed, the analyses used different legal tests in different ways. This Court should offer courts clarity on the legal standards needed to answer these questions.

Tek was handcuffed within seconds of interacting with Rocha. (44:30-32; App. 50-52). Rocha never identified any "specific, articulable facts that justify handcuffing and securing" Tek in the back of a squad car. *Pickens*, 323 Wis. 2d 226, ¶33. And, none of his behavior is analogous to the risky behavior identified in *Vorburger, Pickens,* or *Blatterman*. (22:0:46-1:24).

Rocha and the circuit court characterized Tek as "confrontational and uncooperative," but did not implicate any safety concerns. (24:2; App. 83). Departing from that finding, the court of appeals characterized Tek's behavior as "implicat[ing] concerns by a reasonable officer that the investigation could not safely proceed" without handcuffs. *Tek*, No. 2021AP1112-CR, ¶32. And, that handcuffs were justified "by Tek's unprompted exiting of the car, nonresponsiveness to questions, continuous movement, and persistent agitated insistence that he was about to be picked up." *Tek*, No. 2021AP1112-CR, ¶33.

The circuit court used a "reasonable person" test to determine that Tek was acting unreasonably, and no reasonable person in Tek's position would believe they were under arrest after acting unreasonably. (24:3; App. 84). However, the court of appeals attempted to follow the *Blatterman* framework to determine Tek was not under arrest because the investigative detention was not transformed into an arrest. *Tek*, No. 2021AP1112-CR, ¶28. But, as demonstrated above, *Blatterman* confuses the tests,

and does not provide clarity as to how officer safety factors into those tests. 362 Wis. 2d 138, ¶28-34.

Whether someone is under arrest implicates both state and federal constitutional law. While the Fourth Amendment cases are often fact-oriented, this case asks this Court to do more than apply the facts to well established case law. Courts (and police and defendants alike) need clarity as to how to determine whether someone is under arrest, and how officer safety concerns contribute to the analysis. Review is therefore warranted under Wis. Stat. §§ 809.62(1r)(a) and (c)(3).

CONCLUSION

For the reasons stated above, Christopher Tek respectfully requests that this Court grant review of the court of appeals' decision denying his requested relief.

Dated this 2nd day of May, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 4,393 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after 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 2nd day of May, 2022.

Signed:

MEGAN ELIZABETH LYENIS
Assistant State Public Defender