STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2022AP181-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

THOMAS W. BATTERMAN,

Defendant-Appellant-Petitioner.

PETITION FROM A DECISION OF THE COURT OF APPEALS DATED AND ENTERED ON NOVEMBER 28, 2023

APPEALED FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, BRANCH II, THE HONORABLE MICHAEL H. BLOOM PRESIDING, TRIAL COURT CASE NO. 18-CM-752

PETITION OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT SHOULD HAVE ALLOWED MR. BATTERMAN TO INTRODUCE EVIDENCE AT TRIAL OF HIS PERFORMANCE ON THE FIELD SOBRIETY TESTS TO IMPEACH THE BLOOD TEST RESULT IN AN OPERATING WITH A PROHIBITED ALCOHOL CONCENTRATION PROSECUTION?

Court of Appelas Answered: NO. The court of appeals concluded that since a circuit court has "broad discretion" to control the admissibility of evidence, it did not erroneously exercise its discretion to preclude the admission of the field sobriety test evidence. P-App. at 107-110. Furthermore, the circuit court's decision did not interfere with Mr. Batterman's right to present a defense because this right "is not absolute," and given that the court of appeals determined that the circuit court did not erroneously exercise its discretion, there was no constitutional violation.[1] P-App. at 112-13.

Trial Court Answered: NO. The trial court concluded that evidence of Mr. Batterman's performance on the field sobriety tests was irrelevant because it could not "find that—that the absence of clues [on the field sobriety tests] correlates with a non-prohibited alcohol concentration in the same way that the presence of clues indicates to officers a certain percentage likelihood that there is a prohibited alcohol concentration." R103 at 101:23 to 102:2; P-App. at 106-07.

STATEMENT OF THE CASE

Mr. Batterman was charged in Marathon County with Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a) [hereinafter "OWI"], and Operating a Motor Vehicle with a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b) [hereinafter "PAC"], arising out of an incident which occurred on April 10, 2018. R1.

[1] The court of appeals proffered that Mr. Batterman had waived his constitutional argument on appeal because he had not raised it in the circuit court. P-App. at 111. Nevertheless, the court elected to address Mr. Batterman's argument on the merits. P-App. at 111-12.

Mr. Batterman retained private counsel who entered a plea of Not Guilty on his behalf to both foregoing counts and, on October 19, 2021, a jury trial was held before the Marathon County Circuit Court, the Honorable Michael Bloom presiding. R103.

Immediately prior to trial, the State moved to dismiss the OWI count, and the court granted its motion, dismissing the OWI charge with prejudice. R103 at 85:17 to 86:5. The dismissal of the OWI count, however, gave rise to the question of whether Mr. Batterman would be able to introduce evidence of his performance on the field sobriety tests in order to: (1) give context to why he was arrested and asked to submit to a blood test; (2) avoid the jury speculating about whether he committed another offense, such as operating while intoxicated, prior to his providing a blood sample; and (3) permit Mr. Batterman to proffer that his performance on the field sobriety tests impeached the credibility of the State's blood test results. R103 at 86:14 to 92:13; 96:6 to 98:17; P-App. at 122-28; 129-31.

After entertaining arguments from both parties regarding the admissibility of the field sobriety test evidence, the trial court concluded that: (1) the jury could be adequately instructed not to speculate and (2) it could not conclude that there was any relationship between a person's performance on the field sobriety tests and their alleged alcohol concentration. R103 at 98:18 to 104:4; P-App. at 122-28. Based upon its ruling, evidence of Mr. Batterman's performance on the field sobriety tests was excluded from trial on the ground that it was not relevant. *Id*.

The jury trial proceeded and at the conclusion of the trial Mr. Batterman was found guilty of the PAC charge. R90.

It is from the adverse decision of the lower court that Mr. Batterman appealed to the court of appeals by Notice of Appeal filed on February 3, 2022. R99. By decision dated and released November 28, 2023, the court of appeals affirmed the judgment of the circuit court. P-App. at 101-12. It is from the adverse decision of the court of appeals that Mr. Batterman now petitions this Court for relief.

STATEMENT OF FACTS

On April 10, 2018, Thomas Batterman was stopped and detained in the Village of Rothschild, Marathon County, by Officer Jace Klemm of the Rothschild

Police Department for allegedly operating his motor vehicle in excess of the posted speed limit. R103 at 129:4-7; 129:22-25; 131:12-14.

At the time Officer Klemm was following Mr. Batterman, he observed Mr. Batterman make a turn toward a private, gated community. R103 at 132:5-9. Upon observing Mr. Batterman enter this community, Officer Klemm activated his emergency lights and stopped Mr. Batterman. R103 at 132:10-14.

After approaching Mr. Batterman, Officer Klemm observed that he had an odor of intoxicants about his person and glassy eyes. R36 at p.2. Based upon these observations, Officer Klemm asked Mr. Batterman to submit to field sobriety testing. *Id*. Mr. Batterman complied with the officer's request. *Id*.

The first test Mr. Batterman performed was the horizontal gaze nystagmus test. R37 at p.2. Mr. Batterman allegedly exhibited five clues of impairment on this test, however, because it was so grossly mis-administered, he moved to suppress this test prior to trial. R37. Mr. Batterman's motion in this regard was ultimately granted. R48.

The second test Mr. Batterman performed was the walk-and-turn test. R36 at p.2. Mr. Batterman allegedly exhibited only one clue of impairment on this test. R36 at pp. 2-3.

The final test Mr. Batterman performed was the one-leg stand test on which he ostensibly presented with only two clues. R36 at p.2.

Based upon his alleged failure on the field sobriety tests, Mr. Batterman was placed under arrest for Operating a Motor Vehicle While Under the Influence. R1 & R2. Mr. Batterman consented to a blood test and a subsequent analysis of his blood specimen yielded a result of .124 g/100 mL of ethanol. Based upon this result, he was additionally charge with Operating a Motor Vehicle with a Prohibited Alcohol Concentration.

STANDARD OF REVIEW ON APPEAL

The question presented to this Court relates to whether evidence of Mr. Batterman's performance on field sobriety tests should have been admitted at trial

in a prosecution for Operating a Motor Vehicle with a Prohibited Alcohol Concentration to allow Mr. Batterman to impeach the .12 ethanol result because, under his theory of defense, his performance on the field tests was inconsistent with the reported ethanol result. Whether any evidentiary ruling implicates a defendant's constitutional right to present a defense is a "constitutional fact" which merits *de novo* review by this Court. *Michael R.B. v. State*, 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993).

STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW

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

This case presents a substantial question of constitutional law because the court of appeals diluted significant principles of an individual's right to present a defense to the point of rendering the protections afforded by the Fifth, Sixth, and Fourteenth Amendments meaningless. *See* Sections II. & III., *infra*. At some point, deviations from sound constitutional practice reach a threshold which should not be crossed. Mr. Batterman contends that, with respect to impeaching a blood ethanol result with a defendant's performance on the field sobriety tests, preventing him from doing so violated well established principles relating to the accused's right to present a defense. The court of appeals crossed this line when it summarily concluded that simply because the field sobriety test evidence was not "relevant" under an overly-restrictive interpretation of the Rules of Evidence—a conclusion which Mr. Batterman strenuously contests for the reasons set forth below—there was no constitutional violation.

It has long been held that a defendant has a "right to present his own version of events in his own words." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *State v. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777. Failing to recognize this constitutional fact, the court of appeals adopted an incredibly narrow approach to the question presented by Mr. Batterman and concluded that, because the evidence was not "relevant," the right to present a defense was not implicated. In so doing, however, it *never* analyzed whether, under *State v. Pulizzano*, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990), the probative value of the evidence Mr. Batterman sought to admit was substantially outweighed by the danger of unfair prejudice. *See* Section I.B., *infra*. Based upon this erroneous

and incomplete analysis of law, Mr. Batterman's petition presents a real and significant question of constitutional law which merits granting his petition.

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 which directly address whether field sobriety tests can be used to help impeach the reported value of a blood ethanol test result. Mr. Batterman's case presents a unique circumstance in which his right to present a defense has been hamstrung by a rule of relevancy which, for the reasons discussed below, was not properly applied to the circumstances of his case. *See* Section III., *infra*. There needs to be some direction—some recognition—from this Court that a person's performance on field sobriety tests is relevant to their blood alcohol concentration. After all, this is only fair because throughout every county in this State, prosecutors *regularly argue* that the reported alcohol concentration in a particular defendant's blood is consistent with their driving behavior and performance on the divided attention tasks, *i.e.*, field sobriety tests. Failing to address the question presented by Mr. Batterman would make this a "one-way street" which would only permit the prosecution to *bolster* its ethanol evidence while denying the accused the right to *impeach* the same. This is fundamentally unfair.

A decision of this Court will have statewide impact as literally **thousands** of individuals are annually arrested in Wisconsin for operating while intoxicated violations which involve the administration of field sobriety tests. In fact, it is *exceptionally rare* for there to be operating while intoxicated prosecutions in which field tests have *not* been administered. Cases like Mr. Batterman's arise in **all** seventy-two Wisconsin counties. Clearly, § 809.62(1r)(c)2. is satisfied with respect to the issue presented in this Petition as 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 Mr. Batterman is likely to recur based upon the numbers alone given the frequency with which individuals are arrested for impaired driving related violations in this State. With **tens-of-thousands** of arrests for impaired driving offenses occurring annually in Wisconsin, the *vast* majority of

those cases will involve the administration of field sobriety tests and concomitantly have reported blood or breath alcohol concentrations. The gravity and pervasiveness of the issue raised herein compels review because of the very frequency with which it recurs daily throughout Wisconsin circuit courts. If no intervention is made by this Court to definitively address the issue Mr. Batterman raises, the justice system will go on repeatedly denying defendants their right to present a defense, contrary to long-standing principles of constitutional law. *See* Section II., *infra*. This Court should, therefore, intervene to provide direction to courts throughout this State under § 809.62(1r)(c)3. lest this problem recur with high frequency.

ARGUMENT

I. INTRODUCTION TO THE ISSUES PRESENTED.

A. The Alleged "Waiver" Issue.

At first blush, it appears that the issue presented by this appeal revolves solely around the question of whether the trial court failed to properly apply Wis. Stat. § 904.01—the Rule of Relevancy—to the facts of this case, *i.e.*, whether the trial court erred when it declined to allow counsel to introduce evidence of Mr. Batterman's performance on the field sobriety tests to impeach the accuracy of his blood test results. While this question *is* at issue, there exists a deeper and far more fundamental question presented by this appeal, namely: Whether the trial court impermissibly interfered with Mr. Batterman's constitutional right to present a defense? The court of appeals, however, did not view the matter in this fashion.

In its decision, the court of appeals separated the relevance issue from the right to present a defense by asserting that Mr. Batterman did not raise the constitutional issue in the circuit court. P-App. at 111. This is a shortsighted and erroneous view of Mr. Batterman's position. Mr. Batterman made it perfectly clear to the circuit court that his performance on the field tests was wholly *inconsistent* with the ethanol result and therefore *impeached* that result. If this is not an explicit formulation of a *theory of defense*, Mr. Batterman is hard pressed to describe what one may look like. Since the right to present a defense was an integral part of his argument, nothing was waived in this matter.

Even assuming, *arguendo*, that the right to present a defense argument was

not "expressly" made in the circuit court, **the court of appeals nevertheless chose to address the same on the merits**, thus preserving the issue for Mr. Batterman on this petition. It is this very issue that forms the core of his argument and for which he now seeks review in this Court.

B. The Court of Appeals' Error.

The court of appeals concluded that Mr. Batterman's constitutional argument failed because the right to present a defense is circumscribed by the fact that it "'only grants defendants the constitutional right to present *relevant evidence* not substantially outweighed by its prejudicial effect.'" P-App. at 111, quoting *State v. Pulizzano*, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990)(emphasis in original). What is notable about the court's reliance on the quote it elected to pick out from the substance of the *Pulizzano* decision is that **it failed to acknowledge the second half of the *Pulizzano* test**—that the relevant evidence "**not [be] substantially outweighed by its prejudicial effect**." If this sounds familiar, it should because it is a restatement of Rule 904.03. *See* Wis. Stat. § 904.03 (2023-24).[2]

Wisconsin Statute § 904.03 provides that in certain circumstances, evidence, though relevant, may yet be excluded if the probative value of that evidence is outweighed by the danger of unfair prejudice. *Id*. This "substantial outweighing" is not a low threshold easily crossed. Of this burden, it has been said:

> ***The bias, then, is squarely on the side of admissibility***. Close cases should be resolved in favor of admission. The judge has no discretion to exclude evidence unless convinced that the probative value is substantially outweighed by the enumerated dangers and considerations: the rule rule does not extend *carte blanche* to exclude relevant evidence arbitrarily.

D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 403.01, at p.163 (4th ed. 2017)(footnotes omitted; emphasis in original). Professor Blinka continued that "'[u]fair prejudice' is concerned with appeals to **illegitimate or improper bases** for decision." *Id*. (emphasis added). Clearly, this is no easy burden to satisfy and perhaps this is why it was ignored by the court of appeals in this matter.

[2]Even though Mr. Batterman's offense occurred in 2018, the statutory law at issue has not been amended, revised, repealed, or otherwise substantively changed in the interim. For purposes of judicial economy, therefore, all statutory references throughout his brief will be to the Wisconsin Laws of 2023-2024.

Despite it being part of the *Pulizzano* test and further ensconced in Rule 904.03, the court of appeals utterly disregarded the fact that Mr. Batterman articulated a *legitimate* and *proper* basis for the admission of the field sobriety test evidence. *See* Section III., *infra*.

II. THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH MR. BATTERMAN'S RIGHT TO PRESENT A DEFENSE.

Chief among the concerns Mr. Batterman has with the lower court's exclusion of evidence at trial relating to his performance on the field sobriety tests administered to him by Officer Klemm is that it interfered with his fundamental constitutional right to present a defense.

A thread of long-standing and well-established common law decisions which jealously guard an accused's "right to present a defense" is tightly woven throughout our constitutional jurisprudence.[3] It first emanates from multiple sources within the language of the Bill of Rights, finding its taproot within Fifth, Sixth, Ninth, and Fourteenth Amendment notions of due process and fundamental fairness. The fact that so vast an expanse of constitutional soil is tilled when examining the right to present a defense is evidence of the right's "bedrock" nature.

Among the seminal federal cases which examine the constitutional right to present a defense is *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers*, the defendant, who was charged with homicide, attempted to raise a defense in which he wanted to (1) treat another individual who confessed to the crime with which Chambers was charged as a hostile witness and (2) introduce the testimony of other witnesses who heard this individual confess to the murder. *Id*. at 291-94. The state, however, moved the circuit court to bar Chambers' defense on the grounds that the Mississippi rules of evidence relating to treating an individual as an adverse witness and admitting hearsay evidence barred Chambers from raising either defense since he could not satisfy their substantive prerequisites. *Id*. at 292-93. The trial court concurred with the state, and Chambers appealed his case to the United States Supreme Court. Chambers argued that a state evidentiary rule could not be applied in such a manner as to interfere with his Fourteenth Amendment due process right to present a defense and confront his accusers. *Id*. Relying on *In re Oliver*, 333 U.S. 257 (1948), *inter alia*, the Chambers' Court concluded that Chambers had been denied his due process right to present a defense, and in so

[3]The right to present a defense is not solely a federally guaranteed right, but it is also woven through the tapestry of the Wisconsin Constitution in Article I, §§ 7 & 8(1).

finding, reminded the parties that the most fundamental of trial rights includes the right of an accused to have "an opportunity to be heard in his defense. . . . " *Chambers*, 410 U.S. at 294, quoting *In re Oliver*, 333 U.S. at 273. Thus framed, a state evidentiary rule must fail if it runs afoul of the accused's right to present a defense.

Another significant decision which examined the pervasive importance of the right to present a defense is *Rock v. Arkansas*, 483 U.S. 44 (1987). The accused in *Rock* was charged with the manslaughter of her husband. *Id*. at 45. Because the defendant could not remember the events surrounding the night of her husband's murder, she had her memory hypnotically refreshed. *Id*. at 46. When the prosecution learned that the defendant's testimony had been hypnotically refreshed, it moved the trial court to exclude her testimony under an Arkansas rule of evidence which allowed the witness to testify only to those matters which were actually "remembered." *Id*. at 47. The trial court granted the state's motion, and the case was appealed to the U.S. Supreme Court. *Id*. On appeal, Rock argued that the lower court's ruling interfered with her constitutional right to testify on her own behalf. *Id.* at 49. Noting that "the most important witness for the defense in many criminal cases is the defendant himself," the Supreme Court held that Rock's Sixth Amendment and Fourteenth Amendment rights had been violated when she was precluded from testifying regarding her refreshed recollection of the events. *Id*. at 52. The *Rock* Court observed that an accused enjoys a "right to present his own version of events in his own words." *Id.*

In Wisconsin, *State v. George,* 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, is instructive on the paramount importance afforded the right to present a defense. In *George*, the defendant was charged with having illicit sexual contact with a five-year old child named Kayla. *Id*. ¶¶ 7-8. As part of his defense, the defendant wanted to admit evidence that Kayla had prior sexual contact with two other children. *Id.* ¶ 11. The State sought to preclude the defendant from presenting this evidence under Wisconsin's Rape Shield Law. *Id*. ¶ 12. Acknowledging the important and necessary protections the Rape Shield Law provides victims of sexual assault, the Wisconsin Supreme Court nevertheless held that the accused's right to present a defense superseded the statute when it observed that Article I, § 7 of the Wisconsin Constitution "'grant defendants a constitutional right to present evidence.'" *George*, 2002 WI 50, ¶ 14 (citing *State v. Pulizzano*, 145 Wis. 2d 633, 645, 456 N.W.2d 325 (1990)). Stringent protections are rightfully afforded the victims of such heinous crimes as sexual assault, but even the strong public policy underlying the Rape Shield Law cannot survive a confrontation with an accused's right to present a defense because the latter is so fundamental to the guarantee of a fair trial. As the *George* Court noted:

> "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973), or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California v. Trombetta*, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984); . . . . '"

George, 2002 WI 50, ¶ 14 n.8. Too fine a point cannot be made on the *George* Court's observation that if the legislatively-mandated Rape Shield Law does not preclude a defendant's right to present a defense regarding the alleged minor victim's previous sexual encounters, the fact that the circuit court below felt that because Mr. Batterman's defense was not empirically based, it was not germane to Mr. Batterman's attack on the blood test result, would not survive as a reason to preclude Mr. Batterman from presenting a defense.[4] R103 at 103:13-20; P-App. at 108.

The point of all the foregoing cases is that when there is a conflict between a state statute regarding the admission of evidence and the accused's right to present a defense, it is the right to present a defense which must prevail. Presumably, even though the lower court did not expressly mention Rule 904.02—the rule of evidence precluding the admission of irrelevant evidence at trial—the circuit court concluded that evidence of Mr. Batterman's performance on the field sobriety tests was not relevant to whether his blood test result was accurate. For the reasons set forth immediately below, the court's conclusion in this regard was clearly erroneous. Field sobriety test evidence is wholly relevant to whether an ethanol test result is accurate, and the court may not exclude the same without violating Mr. Batterman's constitutional right to present a defense. If a hearsay statute cannot preclude the admission of evidence in a homicide case, a statutory rule against the admission of hypnotically-refreshed testimony cannot bar a defendant's testimony, and a Rape Shield Law cannot exclude evidence of a victim's prior sexual contacts, then surely, evidence of field sobriety testing cannot likewise be barred in a prosecution for operating a motor vehicle with a prohibited alcohol concentration. There is simply no rational bases upon which a valid distinction can be drawn between the foregoing body of law and the instant case if Mr. Batterman's fundamental right to present a defense is to remain intact. The lower court should have considered its decision in

[4]For a more thorough treatment of just how field sobriety tests are relevant to whether a blood test result is accurate (or inaccurate, as the case may be), see Section III., *infra*.

light of Mr. Batterman's right to present a defense, yet it rejected counsel's argument in this regard. This error renders the circuit court's decision—and the court of appeals' approval of the same—reversible.

III. THE FIELD SOBRIETY TEST EVIDENCE IN THE INSTANT CASE WAS RELEVANT AND THEREFORE ADMISSIBLE UNDER RULE 904.01.

Wisconsin Statutes § 904.01 defines "relevant evidence" as evidence which has "***any*** tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01 (2023-24)(emphasis added). The express use of the word "any" in the relevancy statute plainly sets a very low bar for determining whether evidence is admissible.

In his seminal treatise on the Wisconsin Rules of Evidence, Professor Blinka comments that "[r]elevance is not an inherent characteristic of any item of evidence; rather, **it involves the relationship between an item of evidence and the proposition it is offered to prove**." D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 401.1, at pp. 106-07 (4th Ed. 2017)(emphasis added). In terms of "relationships," it cannot be doubted that there is a well-understood and long-standing causal connection between a person's consumption of alcohol and their ability to think clearly and maintain their physical coordination. If no such relationship existed, governments would not have promulgated laws against public drunkenness, impaired operation of a motor vehicle, intoxicated possession of a firearm, *etc*. Given the veracity inherent in this observation, Rule 904.01 permits the admission of evidence which "involves the relationship between" field sobriety tests and an ethanol test result if the former has "***any*** tendency" to impeach (or support, if you are the prosecution) the latter.

Mr. Batterman's point in the foregoing regard is perhaps best made by analogy. Assume, *arguendo*, that a law enforcement officer arrests an individual for an operating while intoxicated violation. During the search incident to arrest of the defendant's motor vehicle, the officer locates an open, half-empty bottle of vodka. This vodka bottle represents *direct* evidence that the defendant possessed open intoxicants. On the other hand, it only represents *circumstantial* evidence that the accused was intoxicated while he drove his motor vehicle. Is there any reasonable universe in which a trial court would exclude evidence of the open bottle

of vodka simply because no witness ever saw the defendant *actually* consuming the same? It is doubtful. Obviously, a trial court would permit the State to introduce evidence of the vodka bottle because it has a relationship to an element of the crime being prosecuted and has a "tendency" to establish that the accused was impaired at the time he operated his vehicle. The instant case is no different from this hypothetical. The State was attempting to prove that Mr. Batterman had a prohibited alcohol concentration when he drove, and while his physical coordination and mentation are not *direct* evidence of whether he was above the prohibited alcohol concentration, they at least provide *circumstantial* evidence that the alleged alcohol concentration is not accurate given how well he performed on the tests.

Rule 904.01 "was intended to **broadly** define relevancy." *State v. Hungerford*, 84 Wis. 2d 236, 257, 267 N.W.2d 258 (1978)(emphasis added). As the Wisconsin Supreme Court has observed, "[t]he criterion of relevancy is whether or not the evidence adduced tends to cast **any** light upon the subject of the inquiry," and if so, it is relevant and admissible. *Zdiarstek v. State*, 53 Wis. 2d 420, 428, 192 N.W.2d 833 (1972); *see also, Oseman v. State*, 32 Wis. 2d 523, 526, 145 N.W.2d 766 (1966). In *State v. Alles*, 106 Wis. 2d 368, 316 N.W.2d 378 (1982), the supreme court noted that even if "the evidence introduced at trial may not [be] the most probative evidence available," it is "nevertheless relevant" if it assists the trier of fact at getting to the truth of the matter. *Id*. at 381 n.4.

In fact, Rule 904.01 is to be so broadly construed, it was actually intended to *constrain* a trial court's power to exclude evidence. As Professor Blinka has observed:

> The **expansive definition** of relevancy in Wis. Stats. § 904.01 is the true cornerstone of the Wisconsin Rules of Evidence. Together with Wis. Stats. § 904.02, it represents a mandate that all evidence proffered at trial must be probative of some fact in issue; where the evidence possess such probative value, it should be admitted unless specifically excluded by some other rule. **The overarching purpose of the relevancy provisions in ch. 904 was to limit the power of the trial judge to exclude evidence on relevancy grounds**.

D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 401.1, at p.108 (footnotes omitted; emphasis added).

Apart from the intended breadth Rule 904.01 was to have, proof that field

sobriety tests are relevant regarding whether a person has a prohibited alcohol concentration is borne out by two additional examples. The first of these pertains to § 885.235 which provides that "evidence of the amount of alcohol in the person's blood . . . is admissible on the issue of whether he or she was under the influence of an intoxicant . . . ." Wis. Stat. § 885.235(1g) (2023-24). "Under the influence" is defined as a person being "less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." Wis. JI-Crim. 2663 (Rev. 07/2020). If an alcohol concentration may be used to prove a lack of "clear judgment" and "steady hand," what reason is there to believe that the inverse is not equally true? Mr. Batterman will offer his point in this regard by an example *in extremis*. Suppose that an individual displays zero clues of impairment on all three of the standardized field sobriety tests, but for purposes of this hypothetical, is nevertheless arrested for operating while intoxicated. If the person agrees to submit to a blood test and a later analysis of his blood specimen yields a result of .42 g/100mL (more than *five times* the legal limit), no one could reasonably argue that these two results are intractably at odds with one another. Either there has been a problem with the officer's administration and/or interpretation of the field sobriety tests *or* the laboratory's analysis of the defendant's blood sample is in error. Under the theory adopted by the lower court in this case, if the State elected to proceed merely upon the prohibited alcohol concentration charge, the defendant in this example would not be allowed to impeach the State's blood test result with evidence of his "clear judgment" and "steady hand" during the administration of the field sobriety tests. What sense does this make? If § 885.235 permits the inference of impairment to go in one direction, then surely, § 885.235 provides evidence that the inference could go in the other direction as well.

The second example relates to the "real world" method of prosecuting operating while intoxicated related offenses. More specifically, in summarizing cases to juries during closing argument, prosecutors will *frequently* argue that the test result introduced during the State's case-in-chief must be an accurate reflection of the defendant's blood alcohol concentration because the defendant would not have performed as poorly on the field sobriety tests as s/he did *unless* the person was, in fact, at the introduced alcohol concentration. Put in lay terms, the State will often proffer to the jury that "the test result must be accurate or why else would Ms. 'X' have exhibited so many clues of impairment during the field sobriety tests?"

What is telling about the foregoing example is that it represents a "two-way

street." That is, if an individual's performance on the field sobriety tests can be used to bolster the accuracy of a blood or breath test result during the State's closing argument, the reverse proposition should be equally arguable. It would be patently unfair—and moreover, disingenuous—to permit the State "to have its cake and eat it too" by allowing it to argue that the field sobriety tests buttress, support, or reinforce the blood or breath test result, but then not permit the defendant to proffer that the blood or breath test result must not be accurate given how well the defendant performed during the administration of the field tests. Exemplary performance on the field tests is ***counter indicative*** of a high test result, and is, therefore, relevant evidence.

It is well known that a jury is permitted to draw upon the "common stock of knowledge" when rendering a verdict. For at least ninety-years or more, things which are of "common knowledge" need not be specifically proved. *See generally*, *Christiansen v. Schenkenberg*, 204 Wis. 323, 329, 236 N.W. 109 (1931). Insofar as the "common stock of knowledge" relates to the Rule of relevancy, Professor Blinka has observed that "[r]elevancy, then, is 'coextensive with the ingenuity of counsel' in the use of proof. Perhaps it is more useful to think of relevancy as coextensive with **rational thought and common sense**." D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 401.1, at p.108 (emphasis added).

Thus, when a jury retires to deliberate on a prohibited alcohol concentration offense where the returned value is .124 g/100mL of ethanol—more than fifty percent above the prohibited limit of .08 g/100mL—if it has been permitted to hear evidence of the accused's physical coordination and mentation which is inconsistent with this result, one of the conclusions it may permissibly draw is that the inconsistency between the two elements of each party's case is due to the test result's inaccuracy. This is a permissible conclusion because, as part of the common stock of knowledge, it is well known that the higher an ethanol test result climbs, the far more likely it becomes that the individual will exhibit outward signs of impairment, such as demonstrating poor coordination on field sobriety tests or difficulty in thinking clearly. When evidence of poor coordination and mentation does *not* exist, then the common stock of knowledge allows for an inference, *inter alia*, that the test result may not be accurate.

That the foregoing "common sense" conclusion is true became evident during the lower court's *voir dire* of the jury panel in this case. During its *voir dire*,

the court asked the prospective jurors, "Would anyone have a hard time convicting the defendant of operating with a prohibited alcohol content if they didn't see any signs of impairment?" R103 at 12:2-4. One of the prospective jurors raised his hand and commented, "**Yeah. I understand the limited amount, but if you can pass all the tests, and you can see everything just fine, I don't see why he should be charged**." R103 at 12:6-9. Clearly, this juror understands the point made by Mr. Batterman above, *i.e.*, a person's performance on the field sobriety tests is relevant evidence of whether the test result is accurate. Remarkably, however, the court of appeals took no notice of, nor made any acknowledgment, of the logic inherent in this lay person's opinion. Instead, it adopted an extreme position that no such relationship was proved by Mr. Batterman. If the prospective juror's opinion is not evidence of Mr. Batterman's point, what would be?

In the same vein, after the jury had retired for deliberations, it sent a handwritten note to the judge inquiring, "Can we ask, did [Mr. Batterman] ask for [a] Breathalyzer or to walk the line?" R103 at 246:24 to 247:1 (emphasis added). The jurors' request for further clarification regarding the administration of a walk-and-turn test evidences that it was considering whether the blood test result was, in fact, accurate, and provides proof of its concern regarding whether Mr. Batterman's test result was consistent with his behavior. The outcome of the trial below may have been far different if the jurors had been able to consider evidence of the field sobriety tests as it related to Mr. Batterman's blood alcohol concentration result. Again, the jury was attempting to draw upon the "common stock of knowledge" when rendering its verdict, and because of the lower court's ruling, was impeded in its effort to do so.

In the end, a performance which is inconsistent with the blood test result is evidence that the reported alcohol concentration is not accurate. Mr. Batterman was not permitted to draw upon such an inference despite its relevancy to the question at issue, and this violated not only his constitutional right to present a defense, but violated Rule 904.01 as well.

IV. INCONSISTENCY IN THE COURT'S LOGIC.

There is a final observation Mr. Batterman would make regarding the lower court's ruling in this matter. The court precluded the admission of any testimony that related to the field sobriety tests on the ground that it could not "find that—that

the absence of clues [on the field sobriety tests] correlates with a non-prohibited alcohol concentration in the same way that the presence of clues indicates to officers a certain percentage likelihood that there is a prohibited alcohol concentration." R103 at 101:23 to 102:2; D-App at 106-07. There is an inherent tension in the court's logic, however, and in the fact that the court of appeals adopted the same approach.

More specifically, the court's statement acknowledges that "the presence of clues indicates . . . a certain percentage likelihood that there is a prohibited alcohol concentration." *Id*. The lower court's recognition of the truth inherent in this observation is supported by NHTSA's *DWI Detection and Standardized Field Sobriety Testing (SFST) Manual*, which repeatedly provides ***specific*** percentages of the chance that an individual has an alcohol concentration above .08 based not only upon a subject's performance on each of the standardized tests individually, but on the tests collectively as well. NHTSA Manual, Session VIII, at pp. 9-22.

The problem inherent in the court's ruling is that if there is a correlation between the clues exhibited and a person having "a certain percentage likelihood that there is a prohibited alcohol concentration," the lower court should have understood that its recognition of this "side of the coin" ***must include*** the acknowledgement of the opposite side of the coin, namely that despite the exhibited number of clues, there always exists a percentage possibility that the alcohol concentration is ***not*** correlated to the number of observed clues because ***none*** of the field sobriety tests are 100% accurate.

For example, NHTSA claims that the horizontal gaze nystagmus test is correct 88% of the time in predicting an alcohol concentration above .08. NHTSA Manual, Session VII, at p.9. If this is true, one must conclude that in twelve percent of cases the clues do ***not*** correlate to an alcohol concentration above .08. Similar percentages regarding the relationship between observed clues and alcohol concentration on the other standardized field tests are also claimed by NHTSA.[5] Obviously, the fewer clues displayed on any test, the less likely it is that a person's alcohol concentration will be above the prohibited limit. Thus, the lower court's assertion that it "could not conclude that the absence of clues [on the field sobriety

[5]For the walk-and-turn test, NHTSA claims a 79% accuracy rate "at detecting subjects at or above 0.08 BAC." NHTSA Manual, Session VII, at p.17. The one-leg stand test allegedly has an 83% accuracy rate "at detecting subjects at or above 0.08 BAC." *Id.* at p.22.

tests] correlates with a non-prohibited alcohol concentration" cannot be true. The proof of this conclusion is in the pudding in that NHTSA has described a correlation between the number of clues displayed and a subject's alcohol concentration being at or above .08. Since NHTSA has established a threshold number of clues for making this determination, then any number of clues fewer than the requisite number established by NHTSA for establishing that a person has an alcohol concentration above .08 must necessarily diminish that chance, thereby demonstrating the inconsistency inherent in the lower court's logic when it claimed it could not conclude "that the absence of clues [on the field sobriety tests] correlates with a non-prohibited alcohol concentration." This contradiction is inherent in, and must follow from, the court's recognition that "the presence of clues indicates . . . a certain percentage likelihood that there is a prohibited alcohol concentration."

Distinct and apart from the constitutional and relevancy problems identified in Sections II. & III., *supra*, the court of appeal's imprimatur of approval on the circuit court's "logic" in excluding evidence of the field sobriety tests in this case cannot be resolved with itself. As such, this Court should accept this petition and reverse the decision of the court of appeals.

CONCLUSION

Mr. Batterman respectfully requests that this Court reverse the decision of the court of appeals on the grounds that Mr. Batterman's fundamental right to present a defense was impermissibly denied when evidence of his performance on the field sobriety tests was excluded at trial.

Dated this 19th day of December, 2023.

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CERTIFICATION OF LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 6,761 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 19th day of December, 2023.

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