STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001608 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LINSEY NICHOLE HOWARD,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. When denying a motion for reconsideration filed under Wis. Stat. § 809.24, should the court of appeals be required to provide an explanation for its decision?

This issue is being presented for the first time in this petition.

2. Can the State use the results from a concededly invalid field sobriety test to establish probable cause to arrest for an operating while intoxicated offense?

The circuit court concluded there was probable cause to arrest and the court of appeals affirmed.

CRITERIA FOR REVIEW

First, Ms. Howard is asking this Court to accept review and resolve an inconsistency in the Court's prior decisions regarding the requirements that the court of appeals must fulfill in order to properly exercise its discretionary authority.

Under binding precedent, the court of appeals has discretion to grant or deny a motion for reconsideration filed under Wis. Stat. § 809.24. *Estate of Miller v. Storey*, 2017 WI 99, ¶ 26, 378 Wis. 2d 358, 903 N.W.2d 759. Pursuant to this Court's decision in *State v. Scott*, 2018 WI 74,¶ 40, 382 Wis. 2d 476, 914

N.W.2d 141, a legally valid discretionary order requires proof that discretion was, in fact, exercised. *Id*.

However, while *Scott* provides a straightforward answer to the underlying question, this Court's decision in *State v. Jendusa*, 2021 WI 24, 396 Wis. 2d 34, 955 N.W.2d 777, generates uncertainty. In that case, this Court concluded that *Scott's* broad mandate seemingly does not apply to all discretionary orders entered by the court of appeals. *Id*., ¶ 21. This generated a vigorous dissent, which criticized the majority for abandoning the wide-ranging rule it had just promulgated in *Scott*. *Id*., ¶ 44. (Ziegler, C.J., *dissenting*).

Notably, this will be the second time that this Court has been given an opportunity to clarify this area of law. In *State v. X.S.*, this Court accepted a petition for review raising this issue and the State conceded that the court of appeals should be required to explain itself when issuing a discretionary decision. However, this Court's ultimate decision did not resolve or substantively address the matter. *State v. X.S.*, 2022 WI 49, ¶ 55, n.14, 402 Wis. 2d 481, 976 N.W.2d 425. Review is therefore warranted.

In addition to this important issue of appellate procedure, Ms. Howard also asks this Court to review the court of appeals' legally problematic application of the probable cause requirements to her case. Here, police stopped Ms. Howard for a headlight violation and ultimately ended up arresting her based on a

suspicion she was operating while intoxicated—despite a 0.0 PBT result, inability to administer two of three standardized field sobriety tests, Ms. Howard's "passing" a non-standard field sobriety test, and absolutely no odor of intoxicants or illegal drugs and no observation of same inside her vehicle.

Given this body of non-evidence, what tipped the scale was Ms. Howard's alleged "failure" on a horizontal gaze nystagmus (HGN) "test"—a test that was not administered correctly and, in the officer's own words, cannot be considered valid. Despite this testimony, neither the circuit court nor the court of appeals paused before relying on that evidence in finding probable cause.

Simply put, the constitutional requirements imposed on the intrusive actions of law enforcement should matter; citizens should not be arrested based on faulty evidence. Accordingly, this Court should accept review and reverse.

STATEMENT OF FACTS

Following Ms. Howard's arrest, she was ultimately charged with: (1) operating a motor vehicle while under the influence (OWI) as a second offense; (2) possession of drug paraphernalia (a pot pipe) and (3) operating with a detectable amount of a restricted controlled substance (THC) in her blood. (25:1-3).

Counsel filed a motion to suppress, alleging that Ms. Howard's arrest was unsupported by probable cause and hence unlawful. (45).

At a hearing on the motion, the State called only one of two officers involved in the police contact. It did not place any footage of the interaction into evidence. Following the close of evidence, the circuit court made limited factual findings:

- Police stopped Ms. Howard's vehicle for a suspected headlights violation at 12:53 A.M. on a weeknight. (76:59); (App. 13).
- Ms. Howard denied using drugs or alcohol. (76:59); (App. 13).
- Ms. Howard originally stated she was coming from Summerfest, however, she was then corrected by a passenger who stated they were coming from the State Fair. (76:59-60); (App. 13-14).
- An officer administered an HGN test and, although the video was not clear to the court, the officer "felt that he was doing it perhaps his training and perceived that he saw six clues." (76:61); (App. 15). The court therefore ignored the officer's testimony that, if the test is performed incorrectly the result is invalid and that he had performed the test incorrectly in this case. (76:30; 76:33-34). However, the court also concluded the officer "[d]id not

> see horizontal gaze nystagmus or lack of convergence […]." (76:61); (App. 15).
>
> - Ms. Howard failed the "number test." (76:61); (App. 15).
> - Ms. Howard stated she was taking antidepressant medications. (76:61); (App. 15).
> - A PBT showed zero alcohol in her system. (76:61); (App. 15).

Based on these factors, the court concluded there was probable cause to arrest. (76:61); (App. 15).

Ms. Howard appealed, arguing there was insufficient probable cause. Ms. Howard also asserted the court erred when it considered the HGN result as a factor supporting probable cause, given the officer's testimony that it was not a valid test.

The court of appeals affirmed. *State v. Howard*, Appeal No. 2022AP1608-CR, unpublished slip op., (Wis. Ct. App. March 8, 2023). (App. 3). Based on its independent review of the evidence, the court of appeals held that it could not "conclude the circuit court erred in denying Howard's motion to suppress." *Id.*, ¶ 11. (App. 8). In its view, "it was reasonable for the officer to conclude that Howard was probably operating while impaired." *Id.* (App. 8). The court of appeals cited the following evidence in support of that conclusion:

> She was driving in the dark without her headlights on, was confused about where she was coming from and where she was going to, failed the HGN test, appeared nervous, and avoided eye contact. The time of day—12:53 a.m.—was also a proper consideration.

Id. (App. 8).

In addition,

> Confusion and disorientation are also factors that can contribute to the belief that a driver may be impaired. *See State v. Begicevic*, 2004 WI App 57, ¶9, 270 Wis. 2d 675, 678 N.W.2d 293. Here, Howard was confused about where she was coming from and disoriented as to where she was going. Howard's failure on the HGN field sobriety test, inability to follow directions, and inability to successfully complete the number test also support a probable cause determination.

Id., ¶ 12. (App. 8-9).

Notably, the court of appeals did not deal with the biggest dispute between the parties—the weight to be assigned to the HGN test result—in the body of its opinion. Instead, in a footnote it stated that it was not addressing Ms. Howard's complaints about the invalidity of the test because the video of the stop was not placed in the record and, as a result, the court would not consider those arguments under *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). *Id*., ¶ 11 n.5. (App. 8).

Ms. Howard then filed a reconsideration motion, asserting that: (1) the court of appeals misconstrued the facts regarding the HGN test; (2) the court failed to appreciate that Ms. Howard's argument was based on the officer's testimony, and thus wrongly applied the *Pettit* rule; and (3) the court's weighing of probable cause factors shows that it actually double-counted one factor in its analysis. Roughly 24 hours later, the court of appeals summarily denied the motion. (App. 10).

This petition follows.

ARGUMENT

I. This Court should accept review, hold that *Scott* mandates an explanation as to why a motion for reconsideration is being denied, and reverse.

A. The motion to reconsider plays an important role in appellate practice and procedure. Given the special role of the motion to reconsider, the court of appeals must adequately explain itself when ruling on such a motion.

Under Wis. Stat. § 809.24, a party believing that the court of appeals has erred in restating the facts or law in its decision has the right to file a motion for reconsideration within 20 days of the date the written decision is issued. As the Judicial Council Note to Supreme Court Order No. 00-02 asserts,

"[r]econsideration is intended for those rare cases in which the court of appeals overlooks or misapprehends relevant and material facts or law, not for cases in which a party simply disagrees with the court of appeals."

A party filing a motion for reconsideration must go beyond merely requesting a "do-over," rather, the statute mandates that the moving party must "state with particularity the points of law or fact alleged to be erroneously decided in the decision." Wis. Stat. § 809.24(1). By requiring the moving party to allege specific misstatements, omissions, or legal errors appearing in the decision itself, the statute therefore emphasizes—and encourages—the prompt correction of flawed judicial opinions, rather than mere re-litigation of what was already set forth in the briefs.

This is an especially important procedure in our system of appellate review, under which the court of appeals is tasked with resolving hundreds of often factually complex appeals each year. Without disparaging the overall quality of opinion-writing generally, it is inevitable that mistakes will occur. Given the comparative rarity of review by this Court, coupled with the Court's stated purpose—as a law-development, rather than error-correcting court—it makes sense that a meaningful process of reconsideration is essential to the overall functioning of the appellate framework as a whole.

After all, a party who loses in the court of appeals based on an erroneous statement of fact or law

likely does not qualify for grant of a petition for review; their best shot at obtaining redress is the reconsideration procedure. Accordingly, that procedure needs to be meaningful and not just a *pro forma* exercise.

At the same time, in addition to providing a mechanism for straightforward error correction, the motion for reconsideration can also be an important tool for clarifying and addressing embedded legal errors before first petitioning this Court for review. This is especially helpful in complicated cases where the court of appeals' reasoning may be unclear or otherwise deficient. By filing a motion to reconsider—and obtaining either a meaningful denial or a revised opinion—the appellant will then be in a position to make a "cleaner" presentation of the issues to this Court in a petition for review.

Given the special role and characteristics of the motion to reconsider, it therefore makes sense that the *Scott* rule should apply to an order denying a motion to reconsider. Rather than summarily denying the motion without explication, "the court of appeals should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review." *Scott*, 2018 WI 74, ¶ 40.

Accordingly, the order of the court of appeals must be supported by "evidence that discretion was in fact exercised." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Ideally, this should be demonstrated via a reasoned explication which makes

clear to the reader why the decision at issue is being reached. Given the complexity of most appellate matters, Ms. Howard believes that a formal explanation—even a brief one—will ordinarily be required. The explanation need not be as robust as a formal written decision, however. For example, a defendant who alleges that certain facts have been misconstrued may have their motion denied with an explanation that the controverted facts, even when taken into consideration, do not impact a harmless error analysis given other evidence in the record.

Importantly, asking the court of appeals to adequately explain its reasoning will not create an onerous burden, as reconsideration motions, given the statutory restrictions and the overall quality of judicial opinions generally, should be relatively rare. Moreover, in counsel's experience, the court of appeals customarily responds, at length, to procedural motions with detailed court orders that evince a more robust process of reasoning. Asking the court of appeals to issue a few dozen extra such orders each year will not handicap the orderly administration of justice.

Requiring that the court of appeals be held to account in denying a motion to reconsider will assist the administration of justice in our state and ensure that intellectually rigorous and factually complete opinions are disseminated by what is, in practical terms, the court of last resort for most litigants. By breathing new life into the motion for reconsideration, this Court will enhance public trust and confidence in the appellate process.

B. This issue will continue to recur unless it is addressed by this Court.

As this case shows, the current treatment of motions to reconsider in the court of appeals does not demonstrate that discretion is, in fact, being exercised. Litigants may instead feel that the procedure is a lost cause—a perspective that does not enhance the reputation of the court of appeals and threatens to undermine confidence in our system of appellate review.

Notably, this is not the first petition for review this Court has received regarding this issue. For example, in *State v. Taylor*, Appeal No. 2019AP001770-CR, the petition for review pointed out that the detailed motion to reconsider was denied only a few days after it was filed, using a standardized template without any reasoning.

Likewise, in *X.S.*, the motion for reconsideration was once again denied in a cursory fashion. Notably, the State conceded that this was improper in its response to the petition for review and in its brief to this Court. Yet, given the nature of the ultimate decision, this Court did not reach the merits of that issue. *X.S.*, 2022 WI 49, ¶ 55, n.14

In each of these cases, a robust motion was filed and, in each case, a rote denial resulted. Clearly, discretion is *not* being exercised in the court of appeals. Unless this Court intervenes to either clarify or resolve the issue, it is inevitable that litigants will continue to have motions denied with identical orders,

only to petition this Court once again for redress. Accordingly, review is warranted.

C. Review is also warranted to resolve the *Scott*/*Jendusa* conflict.

As a final justification for review, Mr. Cloyd draws this Court's attention to the apparent conflict between its decision in *Scott*—uniformly stating that discretionary decisions of the court of appeals are legally untenable unless supported by an explanation—and its more recent decision in *Jendusa*, which created an apparent exception for one subset of discretionary orders.

The result was a close call; three justices of this Court dissented to criticize the majority for what they viewed as a conflict between *Jendusa*'s outcome and the binding language of *Scott*. While there may be sound doctrinal reasons to maintain the *Jendusa* exception, the fundamental tension between the two cases cannot be ignored. At the very least, *Jendusa*'s invocation of a categorical exception appears to invite further piecemeal litigation to determine what kinds of orders are bound by the *Scott* rule and which cases, if any, fall within a *Jendusa*-like exception.

Accordingly, review is warranted to conclusively delineate how the court of appeals is mandated to exercise their discretionary authority.

D. Should this Court accept review and reach the merits, it is clear that the court of appeals did not adequately exercise its discretion.

If this Court accepts review and reaches the merits, it is clear that the court of appeals did not adequately exercise its discretion. Ms. Howard's motion identified three specifically-detailed errors; the order is a simple denial without explanation. Under these circumstances, Ms. Howard is left to guess at the underlying reasoning for the denial; there is no meaningful way to assess the "soundness" of the outcome or the reasoning that preceded it.

Accordingly, this Court should accept review and hold that the court of appeals erroneously exercised its discretion in denying the motion for reconsideration.

II. This Court should accept review, hold that the court of appeals did not correctly apply the probable cause standard, and reverse.

A. The probable cause requirement is a constitutionally significant limitation on the most intrusive of law enforcement conduct—a warrantless arrest.

The Fourth Amendment to the United States Constitution and Article 1, §11 of the Wisconsin Constitution protect Wisconsinites against unlawful intrusions into their privacy and personal liberty. *State v. Sykes*, 2005 WI 48, ¶13, 279 Wis. 2d 742, 695

N.W.2d 277.8 "One way these provisions safeguard against governmental intrusion is by requiring probable cause to arrest." *State v. Anker*, 2014 WI App 107, ¶ 12, 357 Wis. 2d 565, 855 N.W.2d 483 (citation omitted). When an arrest is made without a warrant, as here, the State bears the burden of showing the existence of probable cause. *State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981) (citation omitted).

Probable cause to arrest is "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *Id*. (citation omitted). It does not require proof that guilt is more likely than not. *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994). It is a totality of the circumstances test, to be decided on a case-by-case basis. *Id*. The court considers the facts that were available to police at the time of the arrest, and measures them against an objective standard. *Cheers*, 102 Wis. 2d at 388 (citations omitted).

The meaning of probable cause is further illuminated by comparing it to the reasonable suspicion standard required for an investigative stop, which is a less-intrusive seizure. As the United States Supreme Court explained in *Terry v. Ohio*, 392 U.S. 1, 22 (1968), police may temporarily detain and question a person to investigate possible criminal behavior on reasonable suspicion. "Reasonable suspicion" is "suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is

about to commit] a crime. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

Reasonable suspicion is a "lower" standard than probable cause. *Anker*, 2014 WI App 107, ¶ 2, 357 Wis. 2d 565, 855 N.W.2d 483. And this is for good reason. A *Terry* stop is temporary and must last no longer than necessary. *State v. Gruen*, 218 Wis. 2d 581, 590, 582 N.W.2d 728 (Ct. App. 1998) (citation omitted). In addition, the investigative methods taken during a *Terry* stop must be the least intrusive means reasonably available to verify or dispel the officer's suspicion. *Id*. at 590-91. Thus, a *Terry* stop "constitutes only a minor infringement on personal liberty." *Anker*, 357 Wis. 2d 565, ¶14. An arrest is a more significant seizure. It is "'inevitably accompanied by future interference with the individual's freedom of movement . . .'." *Anker*, 357 Wis. 2d 565, ¶¶ 14-17 (citations and quotation marks omitted). Probable cause is essential to a lawful arrest. *State v. Secrist*, 224 Wis.2d 201, 212, 589 N.W.2d 387 (1999).

B. An invalid field sobriety test cannot be used to establish probable cause to arrest.

In this case, both the circuit court and the court of appeals relied on Ms. Howard's "failing" the HGN test in order to establish probable cause to arrest. However, when placed in proper context, the results of that "test" should contribute nothing to the probable cause analysis.

Thus, while Sergeant Morton testified that he observed "clues" of impairment, he also

unambiguously testified that: (1) if the test is not properly administered, it is invalid (76:34); and (2) he did not properly administer the test (76:30-31). Thus, while the court found the video unclear on this second point, (76:60); (App. 14), the video (which was not entered into evidence) simply does not matter in light of the officer's testimony—he did not administer the test correctly and the result is therefore invalid. This is not therefore a scenario where Ms. Howard was asking this court of appeals to ignore the HGN "evidence" on appeal because of newly developed extrinsic considerations, such as its lack of scientific validity or because the test was not administered in accordance with NHTSA standards. Instead, Ms. Howard was relying on the officer's explicit testimony, wherein he conceded that the evidence used to develop probable cause was "invalid" based on his own training and experience.

Thus, as a matter of law, Ms. Howard is asking this Court to entirely disregard concededly "invalid" evidence in assessing whether the constitution permits the warrantless arrest at issue. In so doing, Ms. Howard asks this Court to ratify the unpublished but persuasive approach of the court of appeals in *Village of Little Chute v. Bunnell*, Appeal No. 2012AP1266, ¶ 19, unpublished slip op., (Wis. Ct. App. November 14, 2012). (App. 24).

In *Bunnell*, the court of appeals made clear that the issue of what weight to place on field sobriety tests in assessing probable cause is a mixed question of fact and law. First, the circuit court, as the finder of fact,

needs to determine whether the test was performed correctly. *Id*. (App. 24). However, once the court makes the discretionary, fact-specific determination that a test was performed incorrectly, the court of appeals held that, as a matter of law, an invalid test cannot be used to establish probable cause. *Id*. (App. 24).

That holding makes sense and should be the law of Wisconsin. Field sobriety tests play a central role in determining whether constitutional requirements have been met in OWI and other related cases. Ms. Howard concedes that the law enforcement community training on field sobriety testing is generally excellent and, when those tests are properly conducted, they are strong evidence that a person is likely intoxicated. However, especially with quasi-scientific evidence like the HGN test, the results are only worth considering if the underlying procedure is done correctly. If not, faulty police work producing concededly invalid evidence simply cannot be used to support a "reasonable" State intrusion under the Fourth Amendment.

This case is an excellent vehicle to resolve this issue. Here, the officer's testimony proves that the circuit court erroneously exercised its discretion in choosing to implicitly credit the HGN result, as he testified that an improperly conducted test produces an invalid result. (76:33-34). Following *Bunnell*—and the officer's concession of invalidity—this evidence should not have been included in the probable cause rubric.

C. Without the HGN result, there is no probable cause to arrest.

Beginning with Ms. Howard's driving, the record is clear there was no evidence of speeding, erratic driving, weaving, sudden acceleration or deceleration, early or other inappropriate stopping or signaling, or any other conventionally suspicious driving behaviors. While Ms. Howard was traveling without headlights, that traffic violation does not independently justify an arrest and contributes only slightly to the probable cause analysis.

And, while the time of night is a relevant consideration, it is obviously not dispositive, especially considering that people can lawfully use public streets at all hours of the day.

Upon being pulled over by police, there was also no evidence that Ms. Howard admitted to drinking or using illegal drugs. There was also no evidence that Ms. Howard had any of the usual physical signs of impairment such as red, glassy, or watery eyes, flushed skin, or excessive perspiration. There was also no odor of intoxicants or illegal drugs coming from her person or her vehicle. The State has never alleged that she was in any way uncooperative during the initial law enforcement contact and, aside from the single mistake about her point of origin, there was nothing else "unusual" about her conduct. (76:24).

And, while Ms. Howard was nervous and hesitant to make eye contact with the armed law enforcement officer pulling her over at 1:00 in the

morning, this fact alone is worth negligible weight in the overall probable cause analysis. Because nervousness is a routine occurrence in almost every traffic stop, it is only "unusual" nervousness that "may indicate wrongdoing." *State v. Sumner*, 2008 WI 94, ¶ 38, 312 Wis. 2d 292, 752 N.W.2d 783. Here, Sergeant Morton never testified whether Ms. Howard's "nervousness" was normal or abnormal based on his experience; in fact, he gave almost no descriptive details enabling review of that alleged behavior.

Following the initial contact with Ms. Howard, police ran her license, presumably to check for prior offenses. However, the record does not disclose that the officer ever discovered her prior OWI; without knowledge of that offense, it cannot be considered in the probable cause analysis. *See State v. Blatterman*, 2015 WI 46, ¶ 38, 362 Wis. 2d 138, 864 N.W.2d 26 (officer's actual knowledge of driving record is a factor in probable cause analysis).

After Ms. Howard was asked to exit her vehicle, police would have had an opportunity to see whether there were any open beverage containers, drugs, or paraphernalia in plain view. Nothing was observed. (76:23-24). And, despite standing near the car as Ms. Howard exited it, Sergeant Morton was clear that he did not smell any marijuana. (76:23-24).

Police did not gather much in the way of useful evidence after Ms. Howard exited the car, either. At no point in Sergeant Morton's testimony did he ever claim that Ms. Howard was unsteady on her feet, that she

was clumsy or otherwise lacking in hand-eye coordination. Moreover, tests designed to gather evidence of that nature—the one-leg stand and the walk and turn—were not administered. For at least one test—the convergence test—the State did not put the results into this record and, for another, the alphabet test, Ms. Howard "passed." (76:11). Finally, there was also no suggestive PBT result; in fact, that test revealed zero alcohol in Ms. Howard's system. (76:34).

Despite this impressive body of non-evidence, both the circuit court and the court of appeals discerned that police were authorized to arrest Ms. Howard without a warrant. In reaching that conclusion, both courts relied heavily on ambiguous and inherently weak evidence—time of night, confusion, nervousness, and the like—the kind of innocuous facts which will present themselves over and over in vehicle seizure cases involving potentially lost motorists suddenly encountering armed agents of the State.

Accordingly, there was no probable cause and the lower courts erred in concluding otherwise. This Court must accept review and reverse.

CONCLUSION

For the reasons set forth herein, Ms. Howard asks this Court to accept review and reverse.

Dated this 4th day of April, 2023.

Respectfully submitted,

Electronically signed by Christopher P. August

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 4,435 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 4th day of April, 2023.

Signed:
Electronically signed by
Christopher P. August
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Assistant State Public Defender