STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2023AP234-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

EMILY ANNE ERTL,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ONEIDA COUNTY, BRANCH I, THE HONORABLE PATRICK F. O'MEILA PRESIDING, TRIAL COURT CASE NO. 21-CT-64

PETITION OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUE

WHETHER THE LAW ENFORCEMENT OFFICER WHO DETAINED MS. ERTL LACKED A SUFFICIENT BASIS UPON WHICH TO EXPAND THE SCOPE OF MS. ERTL'S INITIAL DETENTION BEYOND ITS ORIGINAL PURPOSE IN VIOLATION OF MS. ERTL'S FOURTH AMENDMENT RIGHTS?

> Trial Court Answered: NO. The circuit court concluded that the officer in this case permissibly extended the scope of Ms. Ertl's initial detention under *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), because Ms. Ertl consented to exit her motor vehicle and perform the requested field sobriety tests since she was "[a]pparently persuaded by the prospect of establishing her innocence, ..." R29 at pp. 1, 10-11; P-App. at 103, 112-13.
>
> Court of Appeals Answered: NO. The court concluded that the focus of the analysis of the question presented should not be on whether the officer had reasonable grounds to request that Mr. Ertl submit to field sobriety testing, but rather, on whether she voluntarily consented to the enlargement of the scope of her detention. Slip Op. at ¶¶ 8-18; P-App. at pp. 104-110.

STATEMENT OF THE CASE

On June 14, 2021, Ms. Ertl was charged in Oneida County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Second Offense, contrary to Wis. Stat. § 346.63(1)(b). R3.

After retaining counsel, Ms. Ertl filed several pretrial motions to suppress evidence. An evidentiary hearing was held on Ms. Ertl's motions on March 23, 2021, at which the State proffered the testimony of a single witness, Officer Alex Schmidt of the Minocqua Police Department. R27 at pp. 6-51. During the hearing, it became apparent that an additional, unforeseen issue arose which the court recognized as relating to "the request [for Ms. Ertl] to exit the vehicle." R27 at 51:19-25.

Based upon the revelation of this unanticipated issue, Ms. Ertl filed a supplemental brief which moved the court for suppression on the ground that Officer Schmidt observed insufficient additional factors to extend the scope of her

initial detention for an inattentive driving violation to include an investigation for an impaired-driving related offense. R28.

After receiving the briefs of the parties, the circuit court issued a written decision denying Ms. Ertl's motion based upon the enlargement of the scope of her detention. R29. The circuit court concluded that Ms. Ertl's consent to perform field sobriety tests was akin to the search of the motor vehicle which was examined in *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), and therefore, did not unreasonably extend the scope of her stop. R29 at pp. 10-11; P-App. at 125-26.

On January 30, 2023, Ms. Ertl entered a plea of no contest to the charge of Operating with a Prohibited Alcohol Concentration-Second Offense. R40 at p.1; P-App. at 117. Based upon her change of plea, the court found Ms. Ertl guilty. R40; P-App. at 117-18.

It is from the adverse judgment of the circuit court that Ms. Ertl now appeals to this Court by Notice of Appeal filed on February 7, 2023. R45.

STATEMENT OF FACTS

On May 19, 2021, at approximately 7:33 in the evening, Officer Alex Schmidt of the Minocqua Police Department received a complaint of an unnamed citizen witness of a "swerving vehicle." R3 at p.3; R27 at 8:20 to 9:12; R29 at p.1.

After Officer Schmidt located the vehicle reported by the witness and followed it, he noted that it made "several lane deviations, ..." R29 at p.1. Ultimately, Officer Schmidt stopped the vehicle which was being operated by Ms. Ertl. R29 at p.10; P-App. at 125. After detaining Ms. Ertl, "Officer Schmidt did not detect signs of intoxication, but requested leave to extend the stop to perform field sobriety testing." *Id*.

The foregoing facts are the only ones relied upon by the court below to conclude that no violation of Ms. Ertl's Fourth Amendment rights occurred when Officer Schmidt extended the scope of her stop. The court premised its decision upon *Gaulrapp*, 207 Wis. 2d 600, concluding:

> The instant case is analogous to *Gaulrapp*. Defendant was stopped by law enforcement because of peculiarities in her driving. After stopping the Defendant, Officer Schmidt did not detect signs of intoxication, but requested leave to extend the stop to perform field sobriety testing. This request is not, in itself, an

> unreasonable extension of the stop, any more than requesting to search the driver's vehicle in *Gaulrapp*. After a brief exchange, Defendant agreed to perform the field sobriety testing, as requested. Thus, the extension caused by that testing was consented to by Defendant. Arrest notwithstanding, Defendant was not significantly delayed by the stop, with the questioning and field sobriety testing having been completed in under ten minutes. *Gaulrapp* serves as a closely-mapped template for the conclusion that the extension of the stop was not improper in this case. An officer asked permission to conduct an investigation, which the defendant granted, and the amount of time that the investigation took was bot modest and consented to. Thus, in accordance with *Gaulrapp*, suppression on the basis of an impermissible extension of the scope of the stop is anapposite in the instant case.

R29 at pp. 10-11; P-App. at 125-26.

STANDARD OF REVIEW

The issue presented in this appeal is premised upon whether the circuit court appropriately applied a common law decision involving a constitutional standard to an undisputed set of facts. Because the issue implicates a question involving the Fourth Amendment to uncontested facts, this courts of supervising jurisdiction review the constitutional question *de novo*. *State v. Samuel*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423.

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 significantly diluted principles of constitutional law to the point of rendering the protections afforded by the Fourth Amendment meaningless given the realities inherent in police-citizen contacts. *See* Section I, *infra*. More specifically, the court of appeals acknowledged that under *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), it did "not disagree" that "law enforcement will simply ask everyone to submit to field sobriety tests at every traffic stop, . . . that result is a possibility," nevertheless, the focus should not be on the officer's question but whether the defendant consents. Slip Op. at pp.9-10; P-App. at 109-10. In this way, however, it failed to recognize that the request to consent to field sobriety testing is coming from a law enforcement officer and a lay citizen, because of the

"luster of the badge," may feel that they have no basis to object to such a request. *See, e.g., Bumper v. North Carolina*, 391 U.S. 543 (1968); Section I., *infra*.

In so doing, Ms. Ertl contends that the court of appeals has crossed the line of Fourth Amendment reasonableness to the detriment of the constitutional requirement that "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added). She bases this claim upon the fact that the court of appeal's holding is, in essence, that one can "consent" to an unjustified act of a law enforcement officer. This is antithetical to the Constitution itself. *See* Section I., *infra*.

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

The question presented by Ms. Ertl 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 gravity and pervasiveness of the issue she raises compels review because of the very commonality with which it recurs throughout Wisconsin circuit courts. If no intervention is made by this Court to definitively address the issue Ms. Ertl raises, defendants will repeatedly be denied their Fourth Amendment protections, which is contrary to long-standing principles of constitutional law. *See* Section I, *infra*. This Court should, therefore, intervene to provide direction to courts throughout this State under § 809.62(1r)(c)3. lest this problem occur with a high degree of incidence.

ARGUMENT

I. THE COURT OF APPEALS DECISION SETS A DANGEROUS PRECEDENT WHICH MISAPPREHENDS THE REALITIES INHERENT IN CITIZEN-LAW ENFORCEMENT CONTACTS.

In affirming the decision of the circuit court, the court of appeals expends significant effort explaining that a law enforcement officer, who uncontestedly *lacks* a reasonable suspicion to enlarge the scope of an individual's detention, may yet ask for the person's consent to extend that detention to include an investigation for an impaired-driving related offense and not violate the Fourth Amendment if the

person consents to the expansion of the detention. Slip Op. at p.8 ("[w]e reiterated that 'the nature of the questions asked' is not the proper consideration for Fourth Amendment purposes; the focus is on the question's 'effect on the duration of the seizure'"); D-App. at 108. The court's approach effectively shifts the burden from the government to establish a reasonable suspicion of wrongdoing to the citizen to prove that consent was not "freely and voluntarily" given. *See generally, Florida v. Jimeno*, 500 U.S. 248 (1991)(a seizure is constitutionally reasonable only if the individual with authority over the thing to be seized "freely and voluntarily consents" to the search and/or seizure). The court of appeals' approach ignores two important aspects of citizen-law enforcement encounters.

First, there is a long-standing and well-established litany of Fourth Amendment jurisprudence which holds that "[c]onstitutional provisions for the security of persons and property should be **liberally construed**." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> A close and literal construction deprives [Fourth Amendment protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**.

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)(emphasis added).

Time and again the Supreme Court has consistently repeated that the Fourth Amendment "guaranties are to be **liberally construed to prevent impairment of the protection extended**." *Grau v. United States*, 287 U.S. 124, 127 (1932)(emphasis added). The High Court has admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Ultimately, "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added).

By focusing attention on whether the individual who is subject to a ***groundless request*** to submit to further investigation for an imagined offense has "consented" to the same, the precepts identified above—about the court having a

"duty" to "prevent impairment of the [Fourth Amendment's] protection[s]"—are undermined. This is so because it overlooks that not only must the Fourth Amendment be "liberally construed" to protect "the security of persons and property" against "arbitrary invasions,"[1] but also because it utterly ignores the Fourth Amendment's *requirement* that **the particular individual is engaged in some wrongdoing.** *United States v. Cortez*, 499 U.S. 411 (1981). As the *Cortez* Court held, the totality of the circumstances

> must raise a suspicion that the particular individual being stopped **is engaged in wrongdoing**. Chief Justice Warren, speaking for the Court in *Terry v. Ohio, supra*, said '[that] this demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*.'

Cortez, 499 U.S. at 418 (emphasis in original in part, added in part), citing *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661-63 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

Ms. Ertl contends that by focusing on whether she freely and voluntarily consented to the enlargement of the scope of her detention, *without a particularized suspicion that she was engaged in wrongdoing of the type being investigated*, the court of appeals has violated the principle that the Fourth Amendment be "liberally construed in favor of the individual."

Second, but perhaps even more importantly, the court of appeals' decision overlooks the realities inherent in citizen-law enforcement contact. More specifically, when a law enforcement officer makes a "request" of a person to submit to further detention and investigation, the "luster of the badge" will likely legitimize an otherwise illegitimate act and lead the citizen to acquiesce to an implicit claim of law enforcement authority. As the Supreme Court has observed, consent cannot be deemed voluntary if the State proves "no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). While Ms. Ertl concedes that the instant facts do not involve a circumstance in which the officer claimed to have the authority to conduct field sobriety tests, it *does* present a circumstance in which the old saw about "half a dozen of one, six of the other" applies. That is, because the "request" to submit to testing is coming from a law enforcement officer, who is mantled with all the trappings of authority, it is

[1] *State v. Riechl*, 114 Wis. 2d 511, 448-49, 515, 339 N.W.2d 127 (Ct. App. 1983).

extraordinarily unlikely that a "good citizen" is going to *refuse* the officer's request to submit to testing. Certainly, Ms. Ertl will admit that not all citizens are lemmings following one another off a cliff of permitting unconstitutional acts, but the *reality* is that the vast majority will take that dive out of nothing more than a fear that they are obligated to comply with whatever it is a law enforcement officer "requests."

There is yet another danger inherent in the reality of permitting law enforcement officers to make unjustified "requests" of detained individuals, and that relates to how the *officer* will be provided with an incentive to find a way to extend his or her investigation. In the common vernacular, it is the age-old problem of "well, if you have nothing to hide, why not do it?" That is, a law enforcement officer is likely to believe that any citizen who is so bold as to exercise their right to refuse testing is probably doing so because they know they are guilty. After all, it is permissible to construe a person's refusal to perform field sobriety tests as proof of consciousness of guilt. *State v. Babbitt*, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994)("[t]he most plausible reason for a defendant to refuse such a test is the fear that taking the test will expose the defendant's guilt"). In these circumstances, there is an incentive for the law enforcement officer to suddenly amend his or her observations to include assertions of bloodshot eyes, slurred speech, and odor of intoxicants when they first encountered the person. To be clear, Ms. Ertl is not trying to impugn the character of all law enforcement officers, but it would be foolish to believe that *no* law enforcement officer, when later dictating their incident report, will not add these observations to justify their arrest if one is made. In those circumstances in which an arrest is not made because the officer's suspicions were not warranted, the person will be allowed to be on their way and no court will ever know that the officer acted unjustly because there will be no case before it. Either way, the Fourth Amendment's protections are hardly being protected against "any stealthy encroachments thereon."

Ultimately, the question presented is whether an illegitimate act by an agent of the government may be overlooked by shifting the focus from the officer's actions to the defendant's consent. The court of appeals did "not disagree" that "law enforcement will simply ask everyone to submit to field sobriety tests at every traffic stop, . . . that result is a possibility." Slip Op. at pp.9-10; P-App. at 109-10. This is, quite frankly, a shocking acknowledgement by the court of appeals. But not nearly as shocking as the "so be it" attitude that implicitly accompanies it. If this is truly the case as the court recognized it to be, then the better practice to preserve the rights

guaranteed by the Fourth Amendment is *not* to create opportunities for it to occur, and that is why Ms. Ertl's petition should be granted.

II. THE CIRCUIT AND APPELLATE COURTS MISAPPLIED *GAULRAPP* BY FAILING TO TAKE INTO ACCOUNT *STATE v. GAMMONS*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623.

A. The Fourth Amendment in General.

Because the issue Ms. Ertl raises implicates the Fourth Amendment, the starting point for any analysis of the constitutionality of a seizure must begin with the foundations established by the Fourth Amendment itself. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious police action is not tolerated under the umbrella of the Fourth Amendment. As the Wisconsin Supreme Court noted in *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983), "[t]he basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id*. at 448-49; *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

B. The Gaulrapp *Decision.*

As noted above, both the circuit court and court of appeals premised their conclusions of law on *Gaulrapp*, 207 Wis. 2d 600. It is, therefore, necessary to undertake an examination of the circumstances surrounding the *Gaulrapp* holding to appreciate Ms. Ertl's contention that *Gaulrapp* has been misapplied.

From the outset, it is important to note the narrow and limited issue which the *Gaulrapp* court was asked to address, namely whether the *question* he was asked exceeded the scope of that permitted under *Terry v. Ohio*, 392 U.S. 1 (1968), by being unrelated to the reason for his initial, otherwise justified, detention. *Id*. at 606. Gaulrapp argued that officers "could not ask a question on those topics [unrelated to the reason for the stop] or ask to search." *Gaulrapp*, 207 Wis. 2d at 606.

More particularly, Gaulrapp was stopped for having "a loud muffler that was almost dragging on the roadway." *Id.* at 603. After asking Gaulrapp about where he was coming from, the officer asked him whether he had any drugs or weapons in the car. *Id*. Gaulrapp denied having either, and the officer asked for his consent to search the vehicle. *Id*. After the search, marijuana was found in Gaulrapp's truck and a residue of cocaine was found on his person. *Id*. at 603-04.

Gaulrapp moved to suppress evidence of his drug possession by "focus[ing] on the subject of the question the officers asked rather than its effect on the duration of the seizure . . . ." *Id*. at 609. The court of appeals found that "Gaulrapp's detention was not unreasonably prolonged by the asking of one question. After that question, the detention was prolonged because Gaulrapp consented to the search." *Id.* Based upon this finding, the court of appeals concluded that Gaulrapp's Fourth Amendment rights had not been violated. *Id*.

One distinction the *Gaulrapp* court made which is significant in this case is that "it is the extension of a detention past the point reasonably justified by the initial stop, not the nature of the questions asked, that violates the Fourth Amendment." *Id*. at 609.

C. The Gammons *and* VanBeek *Decisions.*

State v. Gammons, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, a decision issued subsequently to *Gaulrapp*, examined the appropriate application of the holding. *Gammons* involved a circumstance in which Gammons was a passenger in a vehicle detained for not having a rear license plate. *Gammons*, 241 Wis. 2d at 299. The driver of the vehicle was asked by the officer whether "there were any drugs in the vehicle." *Id*. After the driver denied the presence of any drug contraband, the officer asked for permission to search the vehicle, which the driver denied. *Id*. The officer then indicated that "he would get a police dog to sniff around the vehicle and detect any drugs that were present, after which [the driver consented to the] search . . . ." *Id*. Ultimately, after other officers arrived on the scene, cocaine was "found . . . in the area outside the vehicle where Gammons had been positioned," and after he was patted down, marijuana was discovered on his person. *Id.* at 300.

Gammons was charged with, *inter alia*, possession of cocaine with intent to deliver. *Id*. He filed a motion to suppress evidence on the ground that after the officer approached the vehicle and saw that it had a temporary registration sticker, the officer no longer had a basis to detain him, and therefore, the officer's further investigation exceeded the permissible scope of the initial stop. *Id*. at 303. Recognizing that Gammons could permissibly be requested to provide identification without violating the Fourth Amendment, the *Gammons* court then noted that "whether [the officer] could permissibly ask [the driver] and the others about drugs and to search the vehicle is a closer one, ..." *Id*. at 304.

The State attempted to justify the officer's conduct by relying on *Gaulrapp* while Gammons rested his argument principally upon *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999). *Id*. at 304-06. The State argued that the request to search the vehicle in which Gammons was seated was no different than the question put to Gaulrapp to search his vehicle, *especially* considering that the vehicle was stopped in a "'drug-crime' area; it was 10:00 p.m.; the vehicle was from Illinois; [the officer] had knowledge of prior drug activity by each of the three men in the vehicle; and Gammons appeared to be nervous and uneasy." *Gammons*, 241 Wis. 2d at 307. The *Gammons* court was not persuaded.

In rejecting the State's argument, the *Gammons* court observed that "nothing in the record demonstrate[d] that [the officer] observed Gammons or the others say or do anything that specifically indicated drug use or possession on the night of the stop." *Id*. at 308. Based upon the absence of any nexus to specific and particularized facts that Gammons or the other people in the vehicle were engaged in a criminal activity, the *Gammons* court reflected on the similarity between Gammons' circumstances and those discussed in *Betow*:

> Other than [the officer's] personal knowledge of prior drug activity, the circumstances the State relies on here were all present in *Betow*: an out-of-town vehicle in an area purportedly known for drug activity; a night-time stop; and a nervous suspect. Moreover, the State does not assert that Gammons or Farr gave an implausible story of his whereabouts like the defendant in *Betow*. Finally, nothing in the record demonstrates that Fahrney observed Gammons or the others say or do anything that specifically indicated drug use or possession on the night of the stop.

Id. at 308. Based upon the parallel to *Betow*, the court held that Gammons' Fourth Amendment rights had been violated and ordered the circuit court to grant his motion to suppress. *Id*.

Another case which is on point with Ms. Ertl's is *State v. VanBeek*, 2021 WI 51, 397 Wis. 2d 311, 960 N.W.2d 32. In *VanBeek*, an anonymous citizen reported that a particular vehicle had been parked at an intersection for over an hour and that a person had approached the vehicle with a backpack and left without it. *Id*. ¶ 3. A local law enforcement officer was dispatched to the scene where he approached and questioned the occupants of the target vehicle. *Id*. ¶ 5. Upon questioning, the driver indicated that she was waiting for her boyfriend—the passenger—"to walk." *Id*.

Thereafter, the officer took VanBeek's and her passenger's identification and learned, upon running a check, that VanBeek had overdosed earlier in the year and that the passenger was on supervision. *Id*. ¶ 7. Upon returning to the VanBeek vehicle, the officer questioned them further, even asking the passenger whether he had been drinking. *Id*. ¶¶ 8-10. "Shortly thereafter, the K9 unit arrived, and [the officer] asked VanBeek and [her passenger] to exit the truck." *Id.* ¶ 12. After a search, methamphetamine was found and VanBeek was charged with possession of a controlled substance. *Id*. ¶¶ 12-13.

Van Beek moved to suppress the evidence obtained in her case on the ground that "the stop was extended beyond its initial mission without reasonable suspicion that she [was] committing, had committed or were about to commit a crime." *Id.* ¶ 14. VanBeek's motion was denied and her case was ultimately accepted by the Wisconsin Supreme Court for review. The supreme court reversed the decision of the circuit court, holding that the officer "did not have a reasonable suspicion when he returned to VanBeek's truck, retained her driver's license and continued to question her." *Id.* ¶ 65.

In reaching its holding, the *VanBeek* court examined *Gammons*. *Id.* ¶ 64. The supreme court characterized *Gammons* thusly:

> In *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, Gammons was a passenger in a car stopped because it did not have a rear license plate. *Id.*, ¶ 2. **After questioning extended beyond the license plate**, Gammons was arrested for possession with intent to deliver cocaine. *Id.* ¶ 1. **He asserted that the officer's questions exceeded the permissible scope of the stop**. *Id.* The court of appeals analyzed the following facts: (1) "an out-of-town vehicle in an area purportedly known for drug activity"; (2) "a night-time stop"; (3) "and a nervous suspect." *Id.*, ¶ 23. The court of appeals held that these facts, taken together, did not form a sufficient basis for reasonable suspicion. *Id.*, ¶ 25. **The court held that because the officer did not have reasonable suspicion of drug activity, "the Fourth Amendment required [the officer] to terminate the stop and allow Gammons and the other men to continue about their business."** *Id.*, ¶ 24. As we set forth above, the State's proffered foundation for reasonable suspicion here is considerably weaker than those in *Betow* and *Gammons*.

VanBeek, 2021 WI 51, ¶ 64 (emphasis added). Based upon the *VanBeek* court's characterization of *Gammons*, it is evident that the *VanBeek* court was concerned about the "proffered foundation" for "the officer's questions" which, in that case, "exceeded the permissible scope of the stop" otherwise the *VanBeek* court would never have favorably relied on *Gammons* in the first instance. This notion is wholly consistent with the Supreme Court's admonishment that, in the context of a traffic stop, "an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Rodriguez v. United States*, 575 U.S. 348, 355 (2015), citing *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).

D. Applying Gammons *and* VanBeek *to the Facts of Ms. Ertl's Case.*

Despite finding that Officer Schmidt observed no signs of impairment upon making contact with Ms. Ertl, the circuit court applied *Gaulrapp* and found that the scope of her initial detention was not impermissibly enlarged because she was asked to consent to field sobriety tests. R29 at pp. 10-11; P-App. at 152-26. In a similar vein, when the court of appeals issued its decision, it too relied on *Gaulrapp* and distinguished Ms. Ertl's reliance on *Gammons* based upon the fact that Gammons refused to consent to the search whereas Ms. Ertl did not, and distinguished *Van Beek* principally upon the fact that the duration of the detention in that cases went well beyond what was reasonable for the violation upon which it was initially premised. Slip Op. at ¶¶ 19-25; P-App. at 110-14.

In its decision, the court of appeals ignored the circuit court's finding that "Officer Schmidt did **not detect signs of intoxication**, . . ." and the role this factual finding might play in the outcome of her case. R29 at p.10 (emphasis added); P-App. at 125. ***Absent any law enforcement justification whatsoever***, the court of appeals held that there was no need to focus on the lack of a justification for the officer's question, but rather on whether Ms. Ertl consented. For the reasons already set forth in Section I., *supra*, Ms. Ertl contends that such an approach serves neither the Fourth Amendment nor promotes legitimate law enforcement practices.

Moreover, the court of appeals distinction of *Van Beek* on "duration" grounds creates a more unworkable standard than does the bright-line approach suggested by Ms. Ertl. More particularly, if the focus of the inquiry in cases such as Ms. Ertl's is going to be on the duration of the detention (as the court of appeals did in distinguishing *Van Beek*) one may ask: How long is too long? For example, if the detention in an offense for speeding is extended by ten minutes, is that a violation of the Fourth Amendment? What if it was nine minutes versus eleven, and so on? The better, far more workable approach is to examine whether the request to enlarge the scope of a person's detention is, *from the first instance*, justified by specific and articulable facts. If not, then consent of the person does not matter.

CONCLUSION

Because the court of appeals failed to preserve the purpose underlying the Fourth Amendment to protect the right of the individual to be free from arbitrary law enforcement actions premised upon *no* suspicion of wrongdoing, and further, because its decision encourages law enforcement practices which promote the stealthy encroachments on Fourth Amendment rights, this Court should grant Ms. Ertl's petition to create a bright-line rule which focuses on the actions of the law enforcement officer rather than placing the burden on the accused to prove that his or her Fourth Amendment rights were violated.

Dated this 14th day of March, 2025.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
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Defendant-Appellant-Petitioner

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,790 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 14th day of March, 2025.

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