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**STATE OF WISCONSIN
IN SUPREME COURT**

Appellate Case No. 2024AP1976-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JEREMY A. SOBOTIK,

Defendant-Appellant-Petitioner.

**PETITION FROM A DECISION OF THE COURT OF APPEALS
ENTERED ON MARCH 19, 2025, AFFIRMING A JUDGMENT OF
CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA
COUNTY, BRANCH V, THE HONORABLE J. ARTHUR MELVIN, III,
PRESIDING, TRIAL COURT CASE NO. 23-CT-160**

PETITION FOR REVIEW

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STATEMENT OF THE ISSUE

WHETHER MR. SOBOTIK’S RIGHT TO BE FREE FROM SELF-INCRIMINATION UNDER ARTICLE I, § 8 OF THE WISCONSIN CONSTITUTION AND *STATE v. KNAPP*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, WAS VIOLATED WHEN HE WAS INTERROGATED BY THE ARRESTING OFFICER IN THIS MATTER?

Trial Court Answered: NO. The circuit court concluded that “this was an investigation into the odor that was emanating from the [Sobotik] vehicle,” and further, since Mr. Sobotik was not under arrest at the time he was interrogated, no violation of his right to be free from self-incrimination occurred. R63 at 7:4 to 8:8; P-App. at 112-121.

Court of Appeals Answered: NO. The court of appeals adopted the circuit court’s reasoning as noted above, and held that since pre-*Miranda*¹ interrogations are permitted during *Terry*²-detentions, and furthermore, since only “five questions” were asked of Mr. Sobotik “over a three-minute period,” his constitutional right to be free from self-incrimination under Article I, § 8 of the Wisconsin Constitution was not violated. Slip Op. ¶¶ 9-17; P-App. at 105-08.

STATEMENT OF THE CASE

By criminal complaint filed on February 9, 2023, Mr. Sobotik was charged in Waukesha County with Operating a Motor Vehicle with a Restricted Controlled Substance in Blood—Third Offense, contrary to Wis. Stat. § 346.63(1)(am). R3.

After retaining counsel, Mr. Sobotik filed several pretrial motions including, *inter alia*, a motion to suppress based upon the arresting officer’s interrogation of him in violation of Article I, § 8 of the Wisconsin Constitution and *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. R15.

A hearing on Mr. Sobotik’s motion was held on September 25, 2023. R25. At the motion hearing, the State offered the testimony of a single witness, Officer Matthew Bublitz, formerly of the Village of Pewaukee Police Department. R25 at pp. 5-38. During the hearing, the court received as Exhibit No.1 the body-camera video recording of Officer Bublitz’s encounter with Mr. Sobotik. R25 at 9:11-22;

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² *Terry v. Ohio*, 392 U.S. 1 (1968).

R51. At the conclusion of the hearing, the Court ordered the parties to submit supplemental briefs. R25 at 40:14 to 42:23.

As ordered, the parties submitted additional briefs. R29; R31. By oral decision delivered on January 3, 2024, the circuit court denied Mr. Sobotik's motion to suppress after finding that "this was an investigation into the odor that was emanating from the [Sobotik] vehicle," and further, since Mr. Sobotik was not under arrest at the time he was interrogated, no violation of his right to be free from self-incrimination occurred. R63 at 7:4 to 8:8; P-App. at 112-21.

After the adverse decision was issued by the circuit court, Mr. Sobotik entered a plea of no contest to the charge of Operating a Motor Vehicle with Restricted Controlled Substance in Blood—Third Offense on September 18, 2024, whereupon the lower court adjudicated him guilty and entered a judgment of conviction against him. R48; P-App. at 110-11.

It is from the adverse judgment of the circuit court that Mr. Sobotik appealed to the court of appeals by Notice of Appeal filed on September 30, 2024. R52. On March 19, 2025, the court of appeals entered its decision affirming the circuit court's judgment. P-App. at 101-09. It is from that decision that Mr. Sobotik now petitions this Court for review.

STATEMENT OF FACTS

On January 13, 2022, Mr. Sobotik was detained in the Village of Pewaukee, Waukesha County, by Officer Matthew Bublitz, formerly of the Pewaukee Village Police Department, for allegedly having been involved in a non-injury property-damage automobile accident. R3 at p.2. The encounter between the officer and Mr. Sobotik was captured on the officer's body-worn video camera. R51.

Upon making contact with Mr. Sobotik, Officer Bublitz observed that he had an odor of marijuana emanating from his person. R3 at p.2. When asked how recently he had smoked marijuana, Mr. Sobotik indicated that it had been "a couple of weeks." R3 at p.2. Officer Bublitz then conducted a search of Mr. Sobotik's pick-up truck and located a glass container in one of the pockets of a fishing jacket in the rear seat of the truck which appeared to contain a green leafy substance that the officer believed to be marijuana. R3 at p.2.

After locating what he believed was marijuana, Officer Bublitz reapproached Mr. Sobotik and showed him the glass container, asking "Is this yours?" R51 at

Elapsed Time 19:33, *et seq.* Mr. Sobotik replied, “Yes.” *Id.* Shortly thereafter, Officer Bublitz asked Mr. Sobotik, “So when’s the last time you smoked?” *Id.* at 19:58, *et seq.* Mr. Sobotik responded that it was “about three or four hours ago.” *Id.*

Officer Bublitz then had Mr. Sobotik submit to a battery of field sobriety tests. R3 at p.2. At the conclusion of the field sobriety tests, Officer Bublitz informed Mr. Sobotik that it was illegal in Wisconsin to drive with any restricted controlled substance in one’s system. R51 at 33:24. Immediately thereafter, Officer Bublitz took Mr. Sobotik into formal custody for Operating a Motor Vehicle with a Restricted Controlled Substance. *Id.*; R3 at p.2.

The following facts, adduced from the testimony of Officer Bublitz, are of further relevance to Mr. Sobotik’s petition:

The officer questioned Mr. Sobotik about smoking marijuana (R25 at 11:25 to 12:7);

He based his interrogation of Mr. Sobotik on the fact that he “immediately noticed an odor of marijuana coming from him” (R25 at 23:24 to 24:1; 24:8-11);

The odor he observed was both of burnt marijuana when he spoke with Mr. Sobotik outside of his vehicle, and was of raw marijuana when he spoke with Mr. Sobotik at his vehicle (R25 at 29:2-24; 32:5-8);

After discovering marijuana in Mr. Sobotik’s vehicle, Officer Bublitz confronted Mr. Sobotik with a glass marijuana container he discovered during the search and questioned him about the timing of his marijuana use (R25 at 12:4-20; 31:22-24; 32:17-23);

In addition to interrogating Mr. Sobotik about the timing of his marijuana use, Officer Bublitz also asked Mr. Sobotik how the marijuana got into his vehicle (R25 at 33:5-11); how frequently he smokes marijuana (R25 at 37:2-4); how much marijuana he smoked that day specifically (R25 at 37:5-6); whether the amount he smoked that day was a “normal” amount for him (R25 at 37:7-8); whether he “felt high at the moment” (R25 at 37:9-10); how much time had elapsed between his marijuana use and the time he drove (R25 at 37:11-14);

Given that he did not believe Mr. Sobotik regarding the statements he made about his marijuana consumption, Officer Bublitz further pressed Mr. Sobotik and told him that he “needed to be honest with [him]” (R25 at 33:8-11);

After Officer Bublitz insisted that Mr. Sobotik “be honest,” Mr. Sobotik admitted that the marijuana was his and that he ingested marijuana approximately four to five hours earlier (R25 at 33:12-23); and

Officer Bublitz admitted that he was aware that Wisconsin’s restricted controlled substance

law did not require proof of impairment, but merely that marijuana was in Mr. Sobotik's system (R25 at 35:8-11).

STANDARD OF REVIEW

This petition presents an issue of constitutional law and fact to which this Court applies a two-step standard of review, first determining whether the circuit court's findings of historical fact were clearly erroneous and then independently applying the relevant constitutional principles to those facts. *State v. Dieter*, 2020 WI App 49, ¶ 1, 393 Wis. 2d 796, 948 N.W.2d 431.

STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW

1. Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is a Novel One, the Resolution of Which Will Have Statewide Impact.

The question presented is a novel one because of the unique nature of operating while intoxicated violations. More specifically, law enforcement officers have developed mechanisms by which a decision to arrest a person suspected of an impaired driving violation may be evaluated, including a battery of standardized field sobriety tests and preliminary breath tests. These mechanisms leave no room for discretion, *i.e.*, if a suspect citizen exhibits sufficient indicia of impairment on the tests, custody is a foregone conclusion—and law enforcement officers *know* this. Thus, any effort on the part of the officer to do an “end-run” around the protections afforded by Article I, § 8 of the Wisconsin Constitution by delaying formal custody in order to interrogate the individual is repugnant to the holding in *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, and merits review if only because of the *novelty* of these circumstances.

Likewise, a decision of this Court will have statewide impact as literally thousands of individuals are annually arrested in Wisconsin for operating while intoxicated violations, during which law enforcement officers conduct extensive interrogations of the suspect drivers prior to their arrest, but *after* they have already concluded that probable cause exists to arrest the individual. In fact, it is *exceptionally rare* for there to be operating while intoxicated prosecutions in which a pre-formal-custody interrogation has *not* occurred, despite the officer *knowing* that custody is imminent. Cases of Mr. Sobotik's ilk arise in all seventy-two Wisconsin

counties, therefore § 809.62(1r)(c)2. is satisfied with respect to the issue presented in this petition being “novel” and having “statewide impact.”

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

The question presented by Mr. Sobotik 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 thousands of arrests for impaired-driving offenses occurring annually in Wisconsin, the gravity and pervasiveness of the issue he raises compels review because of the very commonality with which it is likely to recur throughout Wisconsin circuit courts. If no intervention is made by this Court to definitively address the issue Mr. Sobotik raises, defendants will repeatedly be denied their due process right to be free from self-incrimination when law enforcement officers interrogate them knowing that formal custody is imminent. This Court should 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.

3. *Wis. Stat. § 809.62(1r)(d): The Court of Appeals’ Decision is in Conflict with Other Controlling Opinions.*

As explained more fully below, the court of appeals’ decision in the instant matter is in conflict with *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, because the court of appeals failed to recognize that formal custody was not the *sine qua non* of a violation of Article I, § 8 of the Wisconsin Constitution. See Section I., *infra*. In fact, every factor which forms the basis of Wisconsin’s “custody” test was notably absent in *Knapp*. Nevertheless, the *Knapp* court still found that Knapp’s right to be free from self-incrimination had been violated. For reasons not fathomable to Mr. Sobotik, the court of appeals wholly ignored the factual similarities between *Knapp* and his case.

Additionally, the court of appeals has grossly misunderstood how the *Miranda* rule, and by extension Article I, § 8 of the Wisconsin Constitution, operate. The court of appeals commented that “[t]his court is hard-pressed to understand how Sobotik can assert that five questions over a three-minute interval can be construed as ‘excessive.’” Slip Op. ¶ 13; P-App. at 106-07. As far as Mr. Sobotik

can divine, **there is no requirement** that for a *Miranda* violation to have occurred, a specific number of incriminating questions must be asked or they must be asked over a certain period of time. Even **one** incriminating question, asked in a matter of seconds, is sufficient to violate *Miranda* and Article I, § 8. No federal or state court of supervisory jurisdiction has ever held that two, five, or ten questions must be asked (over some arbitrary period) for the interrogation to give rise to a constitutional violation. Thus, the court of appeals' decision is not only in clear conflict with well-established precedent, the decision bizarrely adopts an analysis heretofore unrecognized in any *Miranda*-related case: improper questions are okay if there are just a few of them and they occur over the course of a few minutes. Therefore, Mr. Sobotik's petition should be granted pursuant to § 809.62(1r)(d).

ARGUMENT

I. THE COURT OF APPEALS NOT ONLY MISAPPLIED THE APPROPRIATE STANDARD IN THIS CASE, BUT ADDITIONALLY, INTERPOSED A CONSIDERATION NOT FOUNDED IN LAW.

In its decision, the court of appeals strains credulity by proffering that the instant matter involved nothing more than an “investigation” into the odor emanating from the Sobotik vehicle in light of the circumstances of this case. As the court of appeals noted in its decision:

When Bublitz first approached Sobotik, he noticed the odor of burnt marijuana on him. The odor of burnt and raw marijuana coming from the vehicle was stronger. Based upon those odors, Bublitz conducted a **probable-cause** search of the pickup truck and located a glass container [which had a label indicating it held cannabis purchased out of state] in Sobotik's fishing jacket which Bublitz believed to contain marijuana

Slip Op. ¶ 3 (footnote incorporated; emphasis added); P-App. at 102. There is monumental tension inherent in the “logic” of the court of appeals decision. More particularly, if a “probable cause” search is being conducted on the Sobotik vehicle, it can only be constitutionally countenanced if “sufficient facts ‘excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.’” *State v. Sloan*, 2007 WI App 146, ¶ 23, 303 Wis. 2d 438, 736 N.W.2d 189 (citation omitted; emphasis omitted). What can be said about “excit[ing] an honest belief in a reasonable mind that . . . a crime” has been committed? It is this:

It is the *same* standard applied to the decision to arrest a suspect. *See State v. Drogsvold*, 104 Wis. 2d 247, 250, 311 N.W.2d 243 (1981), citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The two standards are identical in this regard. Thus, if there is probable cause to believe that the vehicle exception to the Fourth Amendment exists, then there must also be probable cause to believe that the sole occupant of that vehicle has committed the crime which the officer is investigating. It follows from this simple equivalence that the officer would be taking Mr. Sobotik into custody for, at a minimum, a violation of Wis. Stat. § 961.41(3g)(e) which prohibits the possession of tetrahydrocannabinol—especially when one considers that the offending substance was found in Mr. Sobotik’s fishing jacket. It is patently absurd to believe, posit, argue, or otherwise think that Officer Bublitz was simply going to tell Mr. Sobotik “Hey, don’t worry, I know I just found illegal drugs in your vehicle but I’m going to pretend I didn’t. You can be on your way.”

Precisely because formal custody was absolutely a foregone conclusion under the circumstances of this case, *Knapp* comes into play. Since Officer Bublitz’s interrogation of Mr. Sobotik occurred *after* he had probable cause to arrest him, Article I, § 8 of the Wisconsin Constitution should have gone into operation to protect Mr. Sobotik’s right to be free from self-incrimination. This is true because, contrary to the court of appeals focus on whether Mr. Sobotik was “in custody” or was merely being detained for an investigation, misses the mark with respect to the *Knapp* holding.

Formal custody was never the *sine qua non* of the *Knapp* court’s holding, and the court of appeals’ failure to acknowledge the same betrays the flaw in its reasoning. The court of appeals repeatedly characterized Officer Bublitz’s actions in this matter as an “investigation” when, in fact, the interrogation of Mr. Sobotik occurred *after* the “investigation” had been completed and probable cause to arrest had already been clearly established. Slip Op. ¶¶ 9-14; P-App. at 105-07. The *Knapp* court, on the other hand, never made the notion of “custody” central to its decision. Rather, it focused on the officer’s *intention* to eventually take *Knapp* into custody.

Evidence of the *Knapp* court discounting the “custody” issue can be gleaned from the law relating to what constitutes a custody issue. More particularly, the relevant factors relating to whether custody exists were outlined in *State v. Gruen*, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998), and include:

- (1) whether the defendant was handcuffed;

- (2) whether a gun was drawn on the defendant;
- (3) whether a *Terry* frisk was performed;
- (4) the manner in which the defendant was restrained;
- (5) whether the defendant was moved to another location;
- (6) whether the questioning took place in a police vehicle; and
- (7) the number of police officers involved.

Gruen, 218 Wis. 2d at 594-95.

The court of appeals, characterizing Mr. Sobotik’s case as an “investigation,” utterly ignores that the same factors were **not** present in *Knapp*, yet the *Knapp* court still found that a violation of Knapp’s rights had occurred. *Knapp*, 2005 WI 127, ¶¶ 73, 83. Instead, the *Knapp* court focused on the detective’s **intention** to “keep the lines of communication open” with Knapp when the detective interrogated him and seized physical evidence from his bedroom. *Id.* ¶¶ 15, 81-83.

At the time Mr. Knapp’s bloody clothing was seized and he was questioned it is highly relevant to note that Mr. Knapp was in his *bedroom*; had *not* been handcuffed; *no* weapon had been drawn on him; he had *not* been frisked; he had *not* been restrained; he remained *in his home* when evidence was seized rather than being removed to another location; he was *not* questioned in a police vehicle, and only *one* officer was involved in his detention, yet the *Knapp* court found that his right to be free from self-incrimination had still been violated. *Knapp*, 2017 WI 127, ¶¶ 7-8. If this laundry list of factors sounds familiar, it is because it is precisely the same list found in *Gruen* and those which are all absent in Mr. Sobotik’s case as well.

Focusing solely on the notion of “investigation” in this case—in utter disregard of the custody factors **absent** in *Knapp*—the court of appeals ignored the fact that the detective’s conduct in *Knapp* was “especially repugnant” *because it was* “intentional.” The courts below justified Officer Bublitz’s interrogation as part of an “investigation” the result of which *was predestined to end in a formal custody*. *Knapp*, 2005 WI 127, ¶ 75 (internal quotation marks omitted; citation omitted). That is, the *Knapp* court recognized that “the physical evidence here was obtained as a direct result of an **intentional** violation of *Miranda*,” just like Officer Bublitz’s admission that he knew that Wisconsin’s restricted controlled substance law did not require proof of impairment, but merely that marijuana was in Mr. Sobotik’s system. *Id.* ¶ 83 (emphasis added); R25 at 35:8-11.

Based upon the intentional violation of *Miranda*, the *Knapp* court emphatically admonished:

It is not too much to expect law enforcement to respect the law and refrain from intentionally violating it. When law enforcement is encouraged to intentionally take unwarranted investigatory shortcuts to obtain convictions, the judicial process is systemically corrupted. To guard against this danger, fair play requires the players to play by the rules, especially those players who enforce the rules.

Knapp, 2005 WI 127, ¶ 81 (footnotes omitted).

Recognizing that custody was not central to the *Knapp* court's holding, the court of appeals characterization of Officer Bublitz's conduct as an "investigation" should have held no water, and worse still, is at odds with reality. Relying upon the self-serving testimony of Officer Bublitz, the court of appeals noted:

[T]here was no deliberate effort to avoid *Mirandizing* Sobotik; Bublitz was properly conducting an investigation. Bublitz testified these were "standard questions that [officers] ask on any OWI investigation, whether it be due to controlled substances or alcohol." **Bublitz further testified that he continued to ask questions after he found the container of marijuana because he still wanted to ascertain how recently Sobotik had smoked before driving and causing the accident.**

Slip Op. ¶ 14 (emphasis added); P-App. at 107. Officer Bublitz's assertion as to the reason underlying his need to further question Mr. Sobotik is at odds with his testimony that he *did not need to establish impairment* to arrest someone for a restricted controlled substances violation. R25 at 35:8-11.

Consider this: An "investigation" is an act designed to *determine* whether a crime has been committed. *Terry*, 392 U.S. at 22; *State v. Chambers*, 55 Wis. 2d 289, 294, 198 N.W.2d 377 (1972). As the Supreme Court stated, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior **even though there is no probable cause to make an arrest.**" *Terry*, 392 U.S. at 22 (emphasis added). The foregoing *Terry* acknowledgment is *not* the circumstance present in this case because no further investigation was necessary.

More specifically, Mr. Sobotik had been involved in an accident, Officer Bublitz "immediately noticed an odor of marijuana coming from" Mr. Sobotik's

person, and he found a container of cannabis in his vehicle. These facts, taken together, are clearly sufficient to establish probable cause to arrest. *Cf. State v. Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996); *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994). There is no need for further “investigation.”

An “investigation” is defined as “an inquiry, whether formal or informal, intended to develop a factual record.”³ In this case, a “factual record” had already been developed which established probable cause to arrest. Officer Bublitz’s actions were, therefore, superfluous, and only one conclusion can then be drawn, to wit: He intended to avoid the application of *Miranda* to gather additional evidence *which was not needed to establish probable cause in the first instance*. This is precisely the same conduct which the *Knapp* court would not sanction as constitutional.

Moreover, Mr. Sobotik takes serious issue with the court of appeals’ “weight” approach when examining unconstitutional interrogations. The court of appeals discounted Mr. Sobotik’s argument because **only “five questions”** were asked of him **“over a three-minute interval,”** as though violations of Article I, § 8 should be reduced to nothing more than a “numbers game.” Slip Op. ¶ 13; P-App. at 107. Tellingly, when making this implied assertion, the court of appeals’ decision cites to no authority which supports its “numbers game” theory (because there is none). **One** incriminating question asked in violation of *Miranda* is sufficient to establish a constitutional violation. If for no other reason, this Court should grant Mr. Sobotik’s petitioner to make it abundantly clear to the courts below that one does not measure the magnitude of a constitutional violation by its frequency or timing. In common parlance, a constitutional violation is a constitutional violation is a constitutional violation.

Based upon the foregoing, Mr. Sobotik urges this Court to accept his petition and make it clear to both the court of appeals and law enforcement officers that the interrogation of suspects is not constitutionally countenanced when custody is imminent, regardless of the number of questions asked or the period of time over which they were put to the accused.

³ <https://www.law.cornell.edu/wex/investigation>.

II. MR. SOBOTIK WAS INTERROGATED IN VIOLATION OF HIS RIGHTS UNDER THE WISCONSIN CONSTITUTION WHEN THE ARRESTING OFFICER EXCEEDED THE SCOPE OF HIS AUTHORITY TO INTERROGATE HIM AFTER HIS INITIAL DETENTION.

A. *Statement of the Law.*

It is axiomatic that the operator of a motor vehicle stopped by law enforcement officers is detained for Fourth Amendment purposes. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569. These detentions, however, “are meant to be brief interactions with law enforcement officers,” *State v. Floyd*, 2017 WI 78, ¶ 21, 377 Wis. 2d 394, 898 N.W.2d 560, citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

During these “brief interactions,” law enforcement officers are permitted to question the suspected driver. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). This questioning, however, is *not* unlimited with respect to its scope or duration. As the *Berkemer* Court described it, the questioning “means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.” *Id.*

Wisconsin courts have similarly observed that permissible questioning of a person detained during a traffic stop must be “‘reasonably related to the nature of the stop’” *State v. Gammons*, 2001 WI App 36, ¶ 18, 241 Wis. 2d 296, 625 N.W.2d 623, quoting *State v. Betow*, 226 Wis. 2d 90, 93-94, 593 N.W.2d 499 (Ct. App. 1999). There is no case disposed of in either the United States or Wisconsin Supreme Courts which hold that a traffic detention may be used as a law enforcement tool to subject a suspect to a full-blown interrogation prior to taking the person into formal custody. The foregoing statement is especially true in Wisconsin given that the Wisconsin constitutional prohibition against self-incrimination is *not* co-extensive with the Federal Constitutional provision, but rather, extends beyond it.

Instructive on the issue of whether law enforcement officers may circumvent the requirement of providing *Miranda* warnings to a suspect is *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. In *Knapp*, the Wisconsin Supreme Court

examined whether a suspect's right to be free from self-incrimination under Article I, § 8 of the Wisconsin Constitution was co-extensive with the same right as that right is expressed under the Fifth Amendment to the United States Constitution, and further, whether the law enforcement practice of interrogating a suspect before *Miranda* warnings need to be given should be condoned without sanction.

In reaching its conclusion on the first question, the *Knapp* court examined at length the long and well-established rights of the states to interpret their constitutions independent of the protections afforded by the Federal Constitution. Based upon that history, the *Knapp* court stated that Wisconsin was not required to march in "lock step" with the federally established protections found in the U.S. Constitution, but rather would "not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *Id.* at ¶ 59, quoting *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

On the second point, the *Knapp* court used strong language to impress upon law enforcement that it would not tolerate deliberate circumvention of the protections afforded by Article I, § 8 of the Wisconsin Constitution. The court unambiguously stated:

We have recently shown **little tolerance** for those who violate the rule of law. In *State v. Reed*, 2005 WI 53, P36, 280 Wis. 2d 68, 695 N.W.2d 315, we depicted the Fifth Amendment as providing a shield that protects against compelled self-incrimination. By its very nature, the *Miranda* warnings secure the integrity of that shield--and to be sure, **that shield is made of substance, not tinsel**. See *Hoyer*, 180 Wis. at 413. Any shield that can be so easily pierced or cast aside by the very people we entrust to enforce the law fails to serve its own purpose, and is in effect no shield at all. Just as we will not tolerate criminal suspects to lie to the police under the guise of avoiding compelled self-incrimination, **we will not tolerate the police deliberately ignoring *Miranda's* rule as a means of obtaining inculpatory physical evidence. As we have frequently recognized in the past, what is sauce for the goose is also sauce for the gander.**

Knapp, 2005 WI 127, ¶ 72 (citations omitted in part; emphasis added).

Language such as "little tolerance," "that shield is . . . not tinsel," "not tolerate ignoring *Miranda*," and "what is sauce for the goose is also sauce for the

gander,” clearly, ardently, and categorically describe the *Knapp* court’s intention, namely that the rights safeguarded by Article I, § 8 shall not be circumvented.

What is especially telling about the *Knapp* court’s decision is the focus it placed not upon “formal custody,” but rather upon the officer’s *intentions*. More particularly, the facts underlying the *Knapp* decision are especially instructive in this case regarding what constitutes a “deliberate” circumvention of Article I, § 8 of the Wisconsin Constitution. In *Knapp*, a police detective was dispatched to Knapp’s apartment *with an intention to arrest him* based upon an apprehension request made by Knapp’s probation officer. *Knapp*, 2005 WI 127, ¶ 7. At the time the detective went to the Knapp apartment, Mr. Knapp was a suspect in the investigation of a homicide which had occurred in the early morning hours the day before. *Id.* ¶¶ 3-5. With knowledge of the foregoing, when the detective arrived at Mr. Knapp’s apartment, he and Mr. Knapp went into Knapp’s bedroom to permit him to put on some shoes. *Id.* Once in the bedroom, the detective questioned Knapp about the clothes he had been wearing the prior evening. *Id.* ¶ 8. When Knapp pointed to a pile of clothing on the floor, the detective seized them. *Id.*

After he was taken to the police station and further interrogated, a sweatshirt with a blood stain was found among the clothes the detective seized. *Id.* ¶ 9. Given the technology of the day, the blood stain evidence could not be directly linked to the victim of the homicide. *Id.* After a period of twelve years elapsed, DNA technology had sufficiently advanced that it could be determined that the blood on Knapp’s sweatshirt belonged to that of the victim. *Id.* ¶¶ 11-12. Based upon the new analysis of the blood stain, Knapp was charged with the homicide. *Id.* ¶ 13.

After being charged, Knapp’s counsel moved to suppress the sweatshirt evidence. *Id.* During counsel’s cross-examination of the detective who seized the sweatshirt, the detective admitted that he did not *Mirandize* Knapp because he wanted to “keep the lines of communication open” and did not want Knapp to exercise his *Miranda* rights. *Id.* ¶ 14.

On appeal, the State conceded that the sweatshirt was seized as part of an *intentional* violation of *Miranda*. *Id.* ¶ 20. In examining whether this deliberate violation of *Miranda* was sanctionable to the point of excluding more than just ill-gotten statements, but rather extended to the suppression of evidence under the exclusionary rule, the *Knapp* court took pains to note that the primary purpose

underlying the exclusionary rule “is to deter future unlawful police conduct. . . .” *Id.* ¶ 22, citing *United States v. Calandra*, 414 U.S. 338, 347 (1974). The *Knapp* court then observed that if the illegality is exploited by the police, derivative evidence is also subject to suppression under the “fruit of the poisonous tree” doctrine. *Id.* ¶ 24, citing *Wong Sun v. United States*, 371 U.S. 471, 485-88, (1963); *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970).

Based upon the foregoing holding, the *Knapp* court found that the detective’s initial conduct was “particularly repugnant”⁴ and concluded:

It is not too much to expect law enforcement to respect the law and refrain from **intentionally** violating it. When law enforcement is encouraged to **intentionally** take unwarranted investigatory shortcuts to obtain convictions, the judicial process is systemically corrupted. To guard against this danger, fair play requires the players to play by the rules, especially those players who enforce the rules.

Here, it is undisputed that physical evidence was obtained as the direct result of an **intentional** *Miranda* violation. Therefore, applying our holding above, the physical evidence is inadmissible.

In summary, we conclude that physical evidence obtained as a direct result of an **intentional** violation of *Miranda* is inadmissible under Article I, Section 8 of the Wisconsin Constitution. We will not allow those we entrust to enforce the law to **intentionally** subvert a suspect’s constitutional rights. As it is undisputed that the physical evidence here was obtained as a direct result of an **intentional** violation of *Miranda*, it is inadmissible.

Id. ¶¶ 81-83 (emphasis added). Clearly, the foregoing holding establishes that a law enforcement officer’s intentions, prior to questioning a suspect, are dispositive of whether Article I, § 8 has been violated.

Similarly, in *Missouri v. Seibert*, 542 U.S. 600 (2004), the United States Supreme Court refused to condone a law enforcement tactic known as “**question first, and warn later.**” *Id.* at 611-14; 616-17. Specifically, Seibert was a suspect in an arson case who was brought to the police station and asked several questions which were intended to lead to incriminating evidence. *Id.* at 604-06. After obtaining the answers they sought, law enforcement officers gave Seibert a twenty-to thirty-minute break and then *Mirandized* her and re-asked the questions they had originally put to her. *Id.* Seibert argued that this technique violated her Fifth Amendment rights, and while the Missouri court of appeals agreed, it also found

⁴ *Knapp*, 2005 WI 127, ¶ 75.

that only the answers to the first series of questions should be suppressed, while the answers to the post-*Miranda* warning questions would remain admissible. *Id.* at 606. The Missouri Supreme Court disagreed, and suppressed all the statements, both those which came before the proper warning and those which came after. *Id.*

The *Seibert* Court ultimately agreed with the Missouri Supreme Court's approach and found distasteful the law enforcement tactic by which a suspect is questioned first, then *Mirandized* and requestioned. *Id.* at 616-17. The U.S. Supreme Court found the Missouri officer's tactic to be nothing more than an "end-run" around the Fifth Amendment which called into question the very voluntariness of the answers to the questions post-*Miranda*. *Id.* at 606-07. The Court held that "by any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* at 610.

B. Application of the Law to the Facts.

It is well settled that "interrogation" means direct questioning by the police, as well as any words or actions on the part of the police that the police should know are reasonably likely to elicit an *incriminating* response from the suspect. *United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001).

In examining the issue Mr. Sobotik puts before this Court, the first question which must be settled is this, namely: Were the questions asked by Officer Bublitz designed to elicit an incriminating response? Since Officer Bublitz allegedly observed indicia of marijuana consumption—which ultimately prompted him to ask Mr. Sobotik to submit to field sobriety testing—the short answer must be "yes," but this case is not just about investigating an operating while intoxicated matter, it is about an officer having probable cause to arrest for a *restricted controlled substance violation*.

Officer Bublitz testified that he was aware that Wisconsin's restricted controlled substance law did not require proof of impairment, but merely that marijuana was in Mr. Sobotik's system. R25 at 35:8-11. Moreover, Officer Bublitz freely admitted that it was *after* discovering marijuana in Mr. Sobotik's vehicle, he

confronted Mr. Sobotik with a glass marijuana container he discovered during the search and questioned him about the timing of his marijuana use. R25 at 12:4-20; 31:22-24; 32:17-23. In addition to interrogating Mr. Sobotik about the timing of his marijuana use, Officer Bublitz also asked Mr. Sobotik how the marijuana got into his vehicle (R25 at 33:5-11); how frequently he smokes marijuana (R25 at 37:2-4); how much marijuana he smoked that day specifically (R25 at 37:5-6); whether the amount he smoked that day was a “normal” amount for him (R25 at 37:7-8); whether he “felt high at the moment” (R25 at 37:9-10); how much time had elapsed between his marijuana use and the time he drove (R25 at 37:11-14). Notably, every one of these questions was put to Mr. Sobotik *after* Officer Bublitz: (1) smelled an odor of marijuana on Mr. Sobotik; (2) observed an odor of marijuana emanating from the Sobotik vehicle; and (3) found the glass container containing marijuana in his vehicle. Since Officer Bublitz knew he did not need to establish impairment to arrest Mr. Sobotik once he found the marijuana in his vehicle and smelled it on his person, the entire interrogation which came thereafter was nothing more than the officer’s deliberate effort to avoid *Mirandizing* Mr. Sobotik.

The point of the foregoing should be evident on its face. The very questions themselves had no reasonable relation to assisting Officer Bublitz in determining whether Mr. Sobotik should be arrested for a restricted controlled substances violation. Officer Bublitz not only had all the proof he needed to take Mr. Sobotik into custody prior to interrogating him, but additionally, had the knowledge that he required nothing more than what he already had within his possession and among his observations to effectuate that arrest *without* further questioning. If this Court permits the kind of interrogation in this case to stand unsanctioned, then it is allowing the very practice of which the *Knapp* court warned to take place in every case, namely an “end-run” around the *Miranda* rule.

In a similar vein, the line of questioning in this case violated the principle of “moderate questioning reasonably related to dispel or confirm an officer’s suspicion” as described in *Berkmer* and *Gammans* because it is of *no relevance whatsoever* to ask Mr. Sobotik how frequently he smokes marijuana and whether the amount he smoked that day was a “normal” amount for him. R25 at 37:2-8. In a prosecution for a strict liability offense such as operating with a restricted controlled substance in one’s blood, these questions are irrelevant and add nothing to the “confirmation calculus” the officer undertook to assess whether there has been a violation of the law.

It is clear that Officer Bublitz went well beyond what can be considered constitutionally reasonable when he asked the litany of questions he did *after* formulating an intention to arrest Mr. Sobotik. It would be patently absurd to conclude that Mr. Sobotik was not going to be taken into formal custody once Officer Bublitz found the marijuana in his vehicle. It cannot reasonably be debated that a law enforcement officer is simply going to allow someone who smells of marijuana—and is in possession of marijuana—to simply “be on their way.” It is clear that Officer Bublitz knew he was going to arrest Mr. Sobotik and elected to “question first, warn later”—the very practice the *Berkemer* and *Knapp* courts found constitutionally offensive. Failing to curtail such law enforcement practices now only opens the door to future abuses.

CONCLUSION

Because Mr. Sobotik was extensively interrogated by the arresting officer in this matter after the officer had formulated an intention to arrest him for a restricted controlled substances violation, Mr. Sobotik’s privilege against self-incrimination as guaranteed by Article I, § 8 of the Wisconsin Constitution was violated, and the court of appeals not only misapplied the *Knapp* holding to the facts of his case, but additionally, interposed a standard which is not constitutionally based, and therefore, requires both correction and direction from this tribunal. Mr. Sobotik respectfully requests that this Court accept his Petition for Review.

Dated this 12th day of April, 2025.

Respectfully submitted:

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CERTIFICATION OF LENGTH

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition. The length of this brief is 6,526 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 12th day of April, 2025.

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