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**STATE OF WISCONSIN  
IN SUPREME COURT**

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**Appellate Case No. 2025AP141-CR**

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

-vs-

**MICHAEL R. METON,**

Defendant-Appellant-Petitioner.

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**PETITION FROM A DECISION OF THE COURT OF APPEALS,  
DISTRICT II, ENTERED ON AUGUST 27, 2025, AFFIRMING  
A JUDGMENT OF CONVICTION ENTERED IN  
THE CIRCUIT COURT FOR WINNEBAGO COUNTY,  
BRANCH I, THE HONORABLE TERESA BASILIERE PRESIDING,  
TRIAL COURT CASE NO. 2022-CT-657**

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**PETITION FOR REVIEW**

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**MELOWSKI & SINGH, LLC**

Dennis M. Melowski  
State Bar No. 1021187

524 South Pier Drive  
Sheboygan, Wisconsin 53081  
Tel. 920.208.3800  
Fax 920.395.2443  
[dennis@melowskilaw.com](mailto:dennis@melowskilaw.com)

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## STATEMENT OF THE ISSUE

WHETHER THE STATE'S CONCESSION THAT THE ARRESTING OFFICER UNLAWFULLY ADMINISTERED A PRELIMINARY BREATH TEST IN THIS MATTER SHOULD HAVE RESULTED IN SUPPRESSION OF THE EVIDENCE GATHERED AFTER THE ILLEGAL SEIZURE UNDER THE FRUIT OF THE POISONOUS TREE DOCTRINE?

Trial Court Answered: NO. The circuit court concluded that even in the absence of the preliminary breath test, there was probable cause to arrest Mr. Meton for operating a motor vehicle while under the influence of an intoxicant, and upon so finding, concluded that under the "independent source doctrine," the exclusionary rule and, by extension, the fruit of the poisonous tree doctrine, did not apply. R69 at 3:25 to 5:3; P-App. at 112-14.

Court of Appeals Answered: NO. The court of appeals affirmed the judgment of the lower court on the ground that an "independent source" of untainted evidence existed which established probable cause to arrest Mr. Meton for operating while intoxicated, therefore the officer in this case was authorized to seek a blood test pursuant to Wis. Stat. § 343.305(3)(a) regardless of any ill-obtained breath specimen. Slip Op. at pp. 6-7; P-App. at 106-07.

## STATEMENT OF THE CASE

By amended criminal complaint filed on February 22, 2023, Mr. Meton was charged in Winnebago County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and with Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Second Offense, contrary to Wis. Stat. § 346.63(1)(b). R11.

After retaining counsel, Mr. Meton filed two pretrial motions, including a motion challenging whether the arresting officer in this matter complied with both the Fourth Amendment and Wis. Stat. § 343.303 when he administered a preliminary breath test [hereinafter "PBT"] to Mr. Meton without *requesting* that he submit to the same, but rather, making it appear as though he had no choice in the matter. R14.

At a motion hearing held on January 3, 2024, the parties stipulated that as an evidentiary basis for Mr. Meton's motion, the circuit court could review the video recording of the encounter between Mr. Meton and the arresting officer, thereby eliminating the need for the officer's testimony to be proffered. R70 at 4:15 to 6:8.

After the motion hearing, the State submitted its letter brief in opposition to the application of the fruit of the poisonous tree doctrine to evidence obtained after the unconstitutional seizure of Mr. Meton's breath *vis a vis* the PBT. R34. Mr. Meton submitted a letter brief in reply to the State's brief in which he set forth his position regarding the application of the fruit of the poisonous tree doctrine to the suppression of the PBT result. R35.

By oral decision delivered on February 19, 2024, the circuit court found that Mr. Meton's breath had been seized in violation of the Fourth Amendment, however, it denied Mr. Meton's request that the evidence obtained after the illegal seizure be suppressed as the fruit of the poisonous tree on the ground that the independent source doctrine precluded the application of the fruit of the poisonous tree doctrine to the circumstances of Mr. Meton's case. R69 at 3:25 to 5:3; P-App. at 112-14.

After the adverse decision was issued by the circuit court, Mr. Meton entered a plea of no contest to the charge of Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Second Offense on January 13, 2025. R53; P-App. at 108-09.

It is from the adverse decision of the circuit court that Mr. Meton appealed to the court of appeals by Notice of Appeal filed on January 22, 2025. R60. On August 27, 2025, the court of appeals issued its decision affirming the judgment of the circuit court on the basis of the independent source doctrine, and it is from that decision that Mr. Meton now petitions this Court for review. P-App. at 101-07.

### **STATEMENT OF FACTS**

On December 24, 2022, Michael Meton was detained in the Town of Winchester, Winnebago County, by Deputy Nicholas Erickson of the Winnebago County Sheriff's Office based upon a citizen complaint that the Meton vehicle had been driving erratically. R11 at p.2.

Upon observing that a vehicle which matched the description of that involved in the report was parked in the parking lot of a local establishment known as Antlers, Deputy Erickson approached the vehicle and found Mr. Meton asleep behind the wheel. R11 at p.2.

When the deputy could not rouse Mr. Meton by knocking on the windows of his vehicle, emergency medical personnel were dispatched to the scene. R11 at p.2. Eventually, Mr. Meton was awakened and he exited his vehicle, whereupon Deputy

Erickson detected an odor of intoxicants emanating from the vehicle, and noted that Mr. Meton's eyes were bloodshot and his speech slurred. R11 at p.2. When questioned, Mr. Meton admitted that he had consumed intoxicating beverages earlier that evening and stated that he was tired. R11 at p.2.

At this juncture, Deputy Erickson transported Mr. Meton to another location for field sobriety testing. R11 at p.2. Mr. Meton ostensibly exhibited sufficient clues on the field tests such that he was placed under arrest for operating a motor vehicle while intoxicated. R11 at p.2.

Prior to his formal custody, Deputy Erickson "put [the preliminary breath test device] in front of [Mr. Meton] and said, deep breath, blow for me." R69 at 3:14-15; P-App. at 112. Based upon the deputy's actions, the circuit court concluded that the deputy did not make a "verbal request" that Mr. Meton submit to a breath test, but rather, created "an expectation that [the breath test] would be done." R69 at 3:5-24; P-App. at 112. Based upon its review of the video evidence in this case, the circuit court concluded that "because there was no request as required by Wisconsin Statutes, the Court is going to suppress the PBT." R69 at 3:23-24; P-App. at 112.

Because Mr. Meton contended that the evidence obtained after the unconstitutional seizure of his breath should be suppressed under the fruit of the poisonous tree doctrine, the circuit court continued its ruling by finding that the "independent source" doctrine precluded the application of the fruit of the poisonous tree doctrine and denied that aspect of Mr. Meton's motion. R69 at 3:25 to 5:3; P-App. at 112-14. On review, the court of appeals affirmed this conclusion. P-App. at 101-07.

### **STANDARD OF REVIEW**

This appeal presents an issue of constitutional law premised upon an undisputed set of facts. This Court, therefore, reviews the matter independently of the trial court's determination. *State v. Verstoppen*, 185 Wis. 2d 728, 736, 519 N.W.2d 653 (Ct. App. 1994).

## 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 the “independent source” doctrine has never been applied by any court of supervisory jurisdiction to the seizure of a person’s breath in the context of an operating while intoxicated investigation. Since no decisions exist which explain, describe, or delineate how the seizure of a preliminary breath [hereinafter “PBT”] sample at roadside during an impaired driving investigation is divorced from the probable cause needed to establish a foundation for the seizure of a breath sample under Wis. Stat. § 343.303, the issue presented by Mr. Meton is a novel one with statewide implications, and therefore satisfies Rule 809.62(1r)(c)2. for granting this petition. Restated in common parlance, once cream is poured into coffee, the two cannot be separated because they are no longer “independent” of one another—just as the request for a PBT does not exist apart from, or in addition to, “some alternate line of investigation **independent of the [impaired driving investigation].”** *State v. Schwegler*, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992)(emphasis added).

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

The question presented by Mr. Meton 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 Mr. Meton raises compels review because of the very commonality with which it is likely to recur throughout Wisconsin circuit courts. Given that the overwhelming majority of cases involve suspected impaired drivers submitting to preliminary breath tests, and moreover, that these are circumstances in which law enforcement officers often do *not* “request” that the person submit to the test as required by Wis. Stat. § 343.303, if no intervention is made by this Court to definitively address the issue Mr. Meton raises, defendants will repeatedly be denied their right to be free from unreasonable searches and seizures under the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution under circumstances in which the PBT will be viewed “independently” of the underlying facts which

gave rise to its use—and probable cause to arrest the defendant—in the first instance. This Court should intervene to provide direction to courts throughout this State under § 809.62(1r)(c)3. lest confusion exist as to what, if any, “independence” PBT seizures have from the probable cause to arrest the suspected impaired driver in the first place.

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 is in conflict with the decision in *State v. Schwegler*, 170 Wis. 2d 487, 490 N.W.2d 292 (Ct. App. 1992), because *Schwegler* requires that “prior to the unlawful search, the government was pursuing some alternate line of investigation **independent of the misconduct.**” *Id.* at 500 (emphasis added); *see* Section I., *infra*. Since operating while intoxicated investigations are comprised of one continuous chain of events which includes both the “probable cause to arrest” element in the first instance *along with* the “probable cause” necessary to administer a PBT,<sup>1</sup> the indivisibility of these two things renders the independent source doctrine under *Schwegler* moot. Thus, Mr. Meton’s petition should be granted pursuant to § 809.62(1r)(d) because the court of appeals failed to grasp this concept.

## ARGUMENT

### I. THE COURT OF APPEALS’ DECISION FAILS TO ACCOUNT FOR THE ELEMENTS OF THE INDEPENDENT SOURCE DOCTRINE.

Just as the trial court concluded that the independent source doctrine saved the blood ethanol test result from suppression in this case even in the face of an unconstitutional seizure of Mr. Meton’s breath, so too did the court of appeals concur, holding that

although a PBT may be considered by a law enforcement officer in deciding to seek a blood draw, nothing in the statute requires a properly administered PBT before a blood draw may be requested. And, as noted above, no testimony from Erickson or other evidence indicates that he requested a blood draw because of the PBT result.

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<sup>1</sup> *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999).

Once Erickson placed Meton under arrest for OWI, he was authorized to seek a blood draw under WIS. STAT. § 343.305(3)(a). Erickson had probable cause to arrest Meton . . . .

Slip Op. at p.7, ¶¶ 13-14; P-App. at 107.

The court of appeals decision wholly overlooks the responsibility that the party seeking to benefit from the application of the independent source doctrine has to establish its applicability. More particularly, **there are three elements which must be proven by the State before the inevitable discovery exception may be invoked**, and the third of these elements is neither specifically addressed nor examined by the court of appeals *even though* the most important of them is explicitly acknowledged by the court in its reliance on *State v. Van Linn*, 2022 WI 16, 401 Wis. 2d 1, 971 N.W.2d 478. Slip Op. at p.5, ¶ 11; P-App. at 105. That is, the *Van Linn* court recognized that for the independent source doctrine to apply to the circumstances of a case in which there had been ill-gotten evidence, “[t]he doctrine requires law enforcement to have had a reason to look elsewhere for the same information **independent of the unlawful conduct** that led to the suppression decision.” *Van Linn*, 2022 WI 16, ¶ 18 n.8 (emphasis added).

A question naturally arises based upon the *Van Linn* court’s pronouncement as to what constitutes something which is “independent of the unlawful conduct?” Among the seminal cases in Wisconsin which answers this question is *State v. Schwegler*, 170 Wis. 2d 487, 490 N.W.2d 292 (Ct. App. 1992). In *Schwegler*, the Wisconsin Court of Appeals observed that in situations in which law enforcement officers violate a suspect’s Fourth Amendment rights, the ill-gotten evidence may be saved from suppression under the exclusionary rule and the fruit of the poisonous tree doctrine if the State demonstrates **all** of the following:

- (1) a reasonable probability that the evidence would have been discovered by lawful means but for the police misconduct;
- (2) the leads making the discovery inevitable were possessed by the State at the time of the misconduct; and
- (3) **prior to the unlawful search, the government was pursuing some alternate line of investigation independent of the misconduct.**

*Schwegler*, 170 Wis. 2d at 500 (emphasis added).

It is the third element of the *Schwegler* test which the court of appeals failed to appreciate when it reached its conclusion affirming the trial court's decision. Plainly, the third of the above-described prongs requires that law enforcement officers pursued the evidence along some alternate line of investigation *apart from* their misconduct for it to remain admissible. *Id.* What both the trial court and the court of appeals failed to appreciate is that the seizure of a person's breath during an impaired driving investigation is *not* severable from that investigation itself in any meaningful way which makes it "independent" as the *Van Linn* and *Schwegler* courts intended.

From moment one, square one, the investigation in this matter was about Mr. Meton's ability to safely operate his motor vehicle. The investigation pursued by law enforcement officers was designed to look for evidence of Mr. Meton's alleged impairment, and in fact, the authority to request a PBT **as part of that investigation** is authorized both under Wis. Stat. § 343.303 and *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999). It is an unbroken chain of investigative authority which ties the "probable cause to arrest" decision regarding the drunk driving offense *directly* to the use of the PBT. More specifically, § 343.303 provides:

If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) or (2m) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63 (7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. **The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6), 940.09 (1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305 (3).**

Wis. Stat. § 343.303 (2025-26)(emphasis added). The plain language of § 343.303 inextricably binds the decision about "whether or not to . . . request chemical tests" under the implied consent law *directly* to the arrest decision made by law enforcement officers. Thus, the third element of the *Schwegler* test (or *Van Linn* for that matter), as a matter of law, cannot be satisfied by the State because there is no

“alternate line of investigation independent of” the PBT and probable cause to arrest for the underlying operating while intoxicated offense.

Unlike other criminal prosecutions where independent lines of investigation may exist which save ill-gotten evidence from suppression, Mr. Meton’s was never a case about investigating an operating while revoked violation; a criminal kidnapping; a transportation of a scheduled substance across state lines; *etc.* The tools, procedures, and methods employed by law enforcement officers never involved investigative techniques apart from the deputy’s field sobriety test training or drunk driving investigation methodologies, *et al.* This case never involved independent testimony of a confidential informant along some lines unrelated to the drunk driving investigation. Every aspect of every moment of the investigation of this case was, in some form or manner, tied directly to a line of investigation involving the search for proof that Mr. Meton operated a motor vehicle while impaired. It is this very inseparability from that single line of investigation which renders the court of appeals’ application of the inevitable discovery doctrine to the circumstances of this matter anathema. Thus, this Court should accept Mr. Meton’s case for review to clarify the inseparability of the investigation undertaken to discover the evidence in Mr. Meton’s blood from the tainted PBT test.

For purposes of emphasis, since the court of appeals relied upon *Van Linn*, 2022 WI 16, in rendering its decision, it is worth stressing that the *Van Linn* court observed:

It follows that excluding illegally obtained evidence “does not mean that the facts thus obtained become sacred and inaccessible,” provided **the State’s knowledge of them is gained from a source *unrelated* to the State’s illegal conduct.**

That idea is the foundation of the independent-source doctrine. The doctrine is an exception to the exclusionary rule in that it allows for the admissibility of evidence or information tainted by an illegal evidence-gathering activity **when the State otherwise acquires the same information—or “rediscover[s]” it—by lawful means “in a fashion untainted” by that illegal activity.**

*Id.* ¶ 12 (citations omitted; emphasis added). Undoubtedly, the determination of whether the State’s knowledge has been gleaned from a *source unrelated* to the State’s illegal conduct in a fashion *untainted* by that illegal activity presents questions of constitutional fact. By way of example, some of the questions of constitutional fact which are relevant to the independent source inquiry include:

What was the deputy's independent source? Was it truly independent of the underlying investigation or directly related to it? What was the extent of the officer's knowledge at the time of the illegally-seized evidence, and what formed the basis of that knowledge? Was there a temporal break between the tainted investigation and the discovery of the evidence which the State seeks to save from suppression? In the absence of the illegally-obtained evidence, was it even possible for it to be "rediscovered"?

It is Mr. Meton's contention, as described above, that there exists no reasonable universe in which one could conclude that the obtaining of a blood specimen in his case was "independent" of what the deputy knew at the time he unlawfully seized Mr. Meton's breath. Everything that led to the illegal seizure of Mr. Meton's breath was tied to *one* investigation for impaired driving. There was no temporal break between the seizure of Mr. Meton's breath and the preceding field sobriety tests or the subsequent blood sampling. The entire extent of the deputy's knowledge at the time was premised upon the deputy's own investigation. There is nothing about the investigation in this matter which can independently be severed from any other part. It is a fabric woven with but one, single thread.

Mr. Meton's arrest for an impaired driving violation was premised upon the whole of what transpired prior to that point, which *included* his acquiescence to a PBT. The act of having Mr. Meton submit to the PBT is a *direct result* of the deputy's suspicion that he was operating a motor vehicle while under the influence of an intoxicant. Simply asserting, as the court of appeals did, that there was "probable cause to arrest" Mr. Meton for operating while intoxicated prior to the administration of the PBT ignores the statutory link between that "probable cause" and the use of the PBT under § 343.303. The PBT was never part of a separate, distinct process or procedure in which the deputy was attempting to ascertain anything else other than evidence of Mr. Meton's alleged impairment. In essence, the court of appeals is pretending that the things which transpired *after* Mr. Meton's arrest are somehow distinct and divisible from what happened prior to his arrest. For example, this case does not present a circumstance in which a person is arrested for a burglary and then, while being booked into the jail for that offense, another officer comes along and realizes the person matches the description of a suspect in a homicide so she has the suspect placed in a line-up for identification by a witness. This hypothetical represents a circumstance in which "a separate and lawful course of events" leads to the discovery of independent evidence, and notably, is nothing like the singular and unbroken course of events to which Mr. Meton was subject.

## II. THE FRUIT OF THE POISONOUS TREE DOCTRINE APPLIES TO EVIDENCE GATHERED AFTER AN ILLEGAL SEIZURE OF A PERSON'S BREATH.

### A. *The Fourth Amendment in General.*

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).

When applying the protections against unreasonable searches and seizures, both federal and state courts have consistently held 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 [these 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).

The foregoing authority does not stand alone as 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 Court has further 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).

It is under the rubric of the foregoing paradigm that the question presented by Mr. Meton in this appeal must be analyzed. Thus, any “close calls”—in the common vernacular—with respect to whether the fruit of the poisonous tree doctrine should have been applied to the evidence obtained after the illegal seizure of Mr. Metons breath should be resolved in his favor.

### ***B. Seizures Under Wis. Stat. § 343.303.***

Pursuant to Wis. Stat. § 343.303, an officer who suspects an individual of operating a motor vehicle while intoxicated may administer a preliminary breath test [hereinafter “PBT”] to that individual upon having “probable cause to believe that the person . . . has violated s. 346.63(1).” Wis. Stat. § 343.303 (2025-26). The “probable cause” referred to in § 343.303 does not rise to the level of “probable cause to arrest,” but rather, means that “quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop . . . but less than the level of proof required to establish probable cause for arrest.” *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999); *see also State v. Fischer*, 2010 WI 6, ¶ 5, 322 Wis. 2d 265, 778 N.W.2d 629.

Notably, the circuit court found in this case that the PBT was not administered in accordance with Wis. Stat. § 343.303. R69 at 3:25 to 5:3; P-App. at 112-14. If the PBT was administered in violation of the law, the question arises as to whether the seizure of Mr. Meton’s breath was a cognizable seizure for Fourth Amendment purposes because if it was, the remedy ought to be suppression of the PBT result under the exclusionary rule *and* suppression of the evidence gathered “downstream” from the illegal seizure under the fruit of the poisonous tree doctrine. *See* Section II.C. to D., *infra*.

***C. Seizures of a Person’s Breath Are Cognizable Seizures for Fourth Amendment Purposes.***

It is axiomatic that the seizure of a person’s breath prior to an arrest implicates the Fourth Amendment. In *Skinner v. Railway Labor Executives’ Assoc.*, 489 U.S. 602 (1989), the United States Supreme Court examined whether a federal regulation which permitted quasi-private railways to obtain breath samples from railroad personnel who were involved in accidents on the railroad implicated Fourth Amendment protections for the suspect workers. *Id.* at 614-15. In holding that the Fourth Amendment *was implicated in the seizure of breath samples* from railroad employees, the High Court stated:

**We are unwilling to conclude, in the context of this facial challenge, that breath and urine tests required by private railroads in reliance on Subpart D will not implicate the Fourth Amendment.**

\* \* \*

We have long recognized that a “compelled intrusio[n] into the body for blood to be analyzed for alcohol content” must be deemed a Fourth Amendment search. *See Schmerber v. California*, 384 U.S. 757, 767-768 (1966). *See also Winston v. Lee*, 470 U.S. 753, 760 (1985). In light of our society’s concern for the security of one’s person, *see, e. g., Terry v. Ohio*, 392 U.S. 1, 9 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee’s privacy interests. *Cf. Arizona v. Hicks*, 480 U.S. 321, 324-325 (1987). Much the same is true of the breath-testing procedures required under Subpart D of the regulations. **Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or “deep lung” breath for chemical analysis, *see, e. g., California v. Trombetta*, 467 U.S. 479, 481 (1984), implicated similar concerns about bodily integrity and, like the blood-alcohol test we**

considered in *Schmerber*, should also be deemed a search, see 1 W. LaFave, Search and Seizure § 2.6(a), p. 463 (1987). See also *Burnett v. Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (4th Cir. 1986), cert. denied, 479 U.S. 986 (1986).

*Skinner*, 489 U.S. at 615, 616-17 (emphasis added).

Wisconsin courts have come to the same conclusion as the *Skinner* Court. In *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), the court of appeals recognized that “the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, . . . .” *Id.* at 623, citing *Waukesha Mem’l Hosp., Inc. v. Baird*, 45 Wis. 2d 629, 173 N.W.2d 700 (1970), and *State v. Bentley*, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979).

Based upon the foregoing authority, it is irrefutable that the protections afforded by the Fourth Amendment extend to the seizure of a person’s breath, and because they do, the sole remaining question relates to what remedy should be imposed for a violation thereof.

#### ***D. Suppression When There Has Been a Fourth Amendment Violation.***

##### **1. The Exclusionary Rule.**

Under the “exclusionary rule,” evidence obtained as a direct result of the infringement of the right to be free from unreasonable searches and seizures is subject to suppression. *State v. Scull*, 2015 WI 22, 361 Wis. 2d 288, 862 N.W.2d 562. As the Wisconsin Supreme Court has observed:

Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment is generally inadmissible in court proceedings. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). The court has explained that “[t]he exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.” *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).

*Scull*, 2015 WI 22, ¶ 20. In this case, the court below did just that, namely it applied the exclusionary rule to the PBT result and suppressed it. The question remained, however, as to whether the court should have gone one step further and suppressed the evidence which came downstream from the illegally obtained breath specimen. This question involves the application of the fruit of the poisonous tree doctrine, which is examined more fully below.

## 2. The “Fruit of the Poisonous Tree” Doctrine.

Not only are the direct products of an illegal search or seizure excluded from evidence, but the indirect or secondary products of a Fourth Amendment violation are excluded as well in order to prevent police exploitation of such violations. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Anderson*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991). In what has famously become known as the “fruit of the poisonous tree” doctrine, evidence which comes to light as a result of exploiting the benefit of an unconstitutional initial search or seizure must be suppressed because the taint from the initial violation flows downstream to all of the subsequently gathered evidence. *Anderson*, 165 Wis. 2d 441; *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970); *see also*, *State ex rel. White Simpson*, 28 Wis. 2d 590, 594, 137 N.W.2d 391 (1965); *Browne v. State*, 24 Wis. 2d 491, 129 N.W.2d 175 (1964).

Typically, the fruit of the poisonous tree doctrine is applied when “the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation, . . . .” *United States v. Crews*, 445 U.S. 463, 471 (1980)(emphasis in original). The doctrine is the functional equivalent of an extension of the exclusionary rule “to the indirect as [well as] the direct products of such [Fourth Amendment] invasions.” *Id.* at 470.

### *E. Application of the Law to the Facts.*

In *Wong Sun*, the United States Supreme Court held that when evidence, either direct or indirect, is discovered as the result of the “exploitation of an illegality,” such as a Fourth Amendment violation, it must be suppressed. *Wong Sun*, 371 U.S. at 487-88. A preliminary breath test, apart from assisting a law enforcement officer in making the probable cause determination, also serves an

additional function in assisting the officer in determining *what form of testing* will subsequently be sought.

For example, Wisconsin prohibits the operation of a motor vehicle while under the influence of controlled substances, controlled substances and alcohol, and while having a detectible amount of a restricted controlled substance in one's system. *See* Wis. Stat. § 346.63(1)(a)-(c) (2025-26). There can be no doubt, based upon the spectrum of prohibited acts set forth in § 346.63(1) that an officer's decision about the form of testing he or she will be requesting is a *direct* function of what the PBT result reveals. That is, if the field sobriety tests indicate impairment, but a PBT result is returned significantly below the legal limit, a law enforcement officer is likely to suspect that substances *other than* ethanol are present in the subject's body. Since each form of testing has its limitations—*e.g.*, an Intoximeter test is not designed to detect the presence of, for example, fentanyl or cocaine—a law enforcement officer faced with a low PBT result will likely choose to request a blood specimen from the accused rather than a breath test in order to confirm his or her suspicions regarding drug use.

Seen in this light, since the PBT result has a *direct* impact on the *type* of evidentiary sample which will be sought, the illegal seizure of Mr. Meton's blood sample cannot be divided or dis severed from the initial taint caused by the unconstitutionally obtained PBT sample. The court of appeals complained that there was no testimony which directly linked the deputy's decision in this case to obtain a blood specimen to the PBT result, however, as explained above, there is no need to have the deputy testify to this fact since, *as a matter of law*, the legislature has bound together the arrest decision and the request for an implied consent test. Wis. Stat. § 343.303 (2025-26). Therefore, the blood test result becomes subject to suppression as the fruit of the poisonous tree. Even if the officer's decision to request a blood test was not the "direct" result of Mr. Meton's PBT, the *Crews* Court admonished that "indirect" connections suffice to invoke the fruit of the poisonous tree doctrine. Either way, the doctrine itself is unavoidable, and this subjects the blood ethanol result obtained in this case to suppression. The court of appeals' election not to apply the fruit of the poisonous tree doctrine was, therefore, in error.

## CONCLUSION

Because the court of appeals failed to recognize that Wis. Stat. § 343.303 indissolubly links the seizure of Mr. Meton’s breath to the deputy’s ascertainment of probable cause to arrest, the “independent source” doctrine could not be applied under either *Van Linn* or *Schwegler*, both of which require an “alternate line of investigation independent of” the ill-obtained evidence, and therefore, suppression of the evidence gathered after the unconstitutional seizure of Mr. Meton’s breath was merited under the fruit of the poisonous tree doctrine.

Dated this 25th day of September, 2025.

Respectfully submitted:

**MELOWSKI & SINGH, LLC**

Electronically signed by:

**Dennis M. Melowski**

State Bar No. 1021187

Attorneys for Michael R. Meton,  
Defendant-Appellant-Petitioner

## CERTIFICATION OF LENGTH

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c). The length of this petition is 6,626 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 petition which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 25th day of September, 2025.

**MELOWSKI & SINGH, LLC**

Electronically signed by:

**Dennis M. Melowski**

State Bar No. 1021187

Attorneys for Michael R. Meton,  
Defendant-Appellant-Petitioner