STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2013-000430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PATRICK I. HOGAN,

Defendant-Appellant-Petitioner.

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Did Grant County Sheriff's Deputy Andrew Smith have reasonable suspicion to extend Defendant-Appellant-Petitioner Patrick Hogan's traffic stop into a criminal investigation based on Hogan's physical appearance/actions?

The Circuit Court and Court of Appeals: NO.

II. Was Hogan constructively seized at the time he gave Deputy Smith consent to search his truck according to the motorist seizure test in ***State v. Williams?***

The Circuit Court and Court of Appeals: NO.

III. Even assuming Hogan was not constructively seized, did Deputy Smith's violation of Hogan's 4th Amendment rights impermissibly taint Hogan's consent to search his truck under *State v. Phillips*?

The Circuit Court and Court of Appeals: YES.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In a case important enough to merit this Court's review, oral argument and publication are warranted.

STATEMENT OF THE CASE

Defendant-Appellant-Petitioner Patrick Hogan (hereinafter "Hogan") was charged with drug offenses, felon in possession of a firearm and child neglect after a traffic stop by Grant County Sheriff's Deputy Andrew Smith (hereinafter "Smith" or "Deputy Smith") turned into a criminal investigation and a search of Hogan's truck turned up methamphetamine, meth lab components and pistols. Hogan's trial-level attorney filed two Motions to Suppress the evidence obtained based on the illegality of the extension of the traffic stop. (R 5, D-App. 2-3; R 7, D-App. 4-5) That attorney also filed a Motion to Dismiss based on an argument about spoliation of evidence; Hogan did not appeal the denial of the spoliation motion. (R 6) After a motion hearing and additional briefing on the Motions to Suppress, the trial court found that that Deputy Smith did not have reasonable suspicion to extend the valid traffic stop into a criminal investigation but ruled that the evidence obtained in the search of Hogan's truck should not be suppressed because Smith had let Hogan go from the illegal detention, calling the 16 second break between when Deputy Smith released Hogan and then re-approached him "a complete disjoinder." (R 14, D-App. 000090-91, R 22:4, D-App. 000080-82) Hogan entered a plea deal resolving the charges against him and appealed the judgment of conviction on the grounds that the trial court judge erred in refusing to grant the motion to suppress.

The Court of Appeals affirmed the conviction in an unpublished opinion. ***State v. Hogan***, 2014 WI App ___, 354 Wis. 2d 622, 848 N.W.2d 903 (Ct. App. 2014), D-App. 000093.

STATEMENT OF FACTS

A. The Stop

On May 12, 2012, Defendant-Appellant-Petitioner Hogan was driving his pickup truck in the City of Boscobel, Grant County, Wisconsin. (R 21:2; D-App. 000007) It was a bright, sunny day. (R 22:2; R 8, D-App. 000092) At approximately 6:10 p.m., Deputy Smith observed Hogan and his passenger wife not wearing their seatbelts and pulled them over for that reason. (R 21:2, 10-11, D-App. 000008, 000016-17) A squad car video shows the stop and investigation from the front of Deputy Smith's squad car. (R 8, D-App. 000092)

Hogan's truck passed in front of Deputy Smith's squad car at approximately 00:30 in the video. *Id.* Deputy Smith activates his emergency lights and Hogan's truck pulls over immediately. *Id.* Deputy Smith approaches Hogan's truck, announces he pulled over the truck for seatbelt violations, obtains Hogan's registration and license and returns to his squad car at approximately video time 2:15. *Id.* Deputy Smith "felt that there was something going on", so he walked back to his squad car and called for assistance from the Boscobel Police Department. (R 21:4, D-App. 000010). At approximately the 5:00 minute mark of the video, the other officer, Boscobel Police Officer Dregne, arrives as backup. (R 8; D-App. 000092) The two talk about rumors that Hogan is a "meth cook", lack of local civilian respect for law enforcement, observations of the truck, Hogan and his wife, how soon a drug dog Deputy Smith had asked for might arrive and how smart Hogan might be about giving consent if they asked for it. This discussion lasts a bit over 9 minutes, from roughly 5:00-14:15 of the video. *Id.* Smith asks Hogan to step out of the truck, explains the seatbelt citation and asks him to do field sobriety tests. The two begin the SFST process at approximately 16:45 in the video and finish around 24:38.

At 24:38-24:44 of the video Deputy Smith says Hogan is free to go, tells him to take care of his windshield and to buckle up, and asks Hogan if Hogan has any questions. (R 8, D-App. 000092) Hogan walks back to his truck and Officer

Dregne and Deputy Smith meet at the driver's door area of Smith's squad car. Hogan shuts the truck door behind him at 24:57, just as Deputy Smith begins walking back toward Hogan's truck. *Id.* At 25:00, Smith says "Hey Sir, can I talk to you again?" *Id.* Smith asks for consent to search the truck and Hogan gives permission. *Id.* Smith searches Hogan until approximately 27:20 and then starts searching the truck. *Id.* He finds two pistols, methamphetamine and components for manufacturing methamphetamine in the truck. *Id.* Deputy Smith's squad car emergency lights remained lit throughout the stop. (R 21:14; D-App. 20)

B. Motions to Suppress

Hogan was charged with Possession of Methamphetamine, Manufacturing Methamphetamine, Felon in Possession of a Firearm and Child Neglect. (R 2). Hogan filed two Motions to Suppress alleging Deputy Smith lacked reasonable suspicion to extend the traffic stop into a criminal investigation and therefore all evidence obtained after said extension should be suppressed. (R 5, D-App. 000002-3; R 7, D-App. 000004-5)

At the motion hearing, Deputy Smith testified that when he stopped Hogan for a seatbelt violation, Hogan appeared nervous, shaking, and restricted pupils. (R 21: 2-3, D-App. 000007-8) Smith said that in his experience, restricted pupils are a sign of drug use. (R 21:3, D-App. 000008) On cross, Smith admitted Hogan's driving was not erratic and showed no signs of impairment; that Hogan pulled over right away when Smith activated his lights; that Smith never noticed any odor of intoxicants or drugs; that Smith never observed open intoxicants in the vehicle; that he did not observe any drugs or drug paraphernalia in the truck; and that Hogan did not have slurred speech, or problems balancing. (R 21:10-11, D-App. 000016-17) Smith further admitted he was not a drug recognition expert, that it was a sunny day, and that the sun could have accounted for Hogan's pupils being restricted to what Smith estimated was 3 mm. (R 21:11-12, D-App. 000017-18) Smith confirmed his emergency lights were activated throughout the stop. (R 21:12-14, D-App. 000018-19) Smith confirmed he did not observe any clues of

intoxication on the SFSTs. (R 21:13, D-App. 000019) On redirect, Smith could not remember if he had received training about the significance of pupil size in the training for how to administer field sobriety tests. (R 21:22-23, D-App. 000028-29)

C. Circuit Court Ruling on Motions

After allowing some time for additional briefing by the parties, Grant County Circuit Court Judge Day issued an opinion denying the Motions. (R 22, D-App. 000078-89) First, Judge Day found Deputy Smith's statements about Hogan's pupil size to be unconvincing and insignificant in establishing reasonable suspicion to extend the traffic stop into an OWI investigation. (R 22:2-3, D-App. 000079-80) Deputy Smith thought Hogan's pupils looked small but it was a sunny day, there was some distance between Deputy Smith and Hogan, Deputy Smith seemed somewhat unsure in his testimony about what pupil constriction meant except he thought it was connected with cocaine and possibly other drug use, Deputy Smith conceded he was not a drug recognition expert, and Deputy Smith's delivery of his testimony was unconvincing to Judge Day. *Id.* This left only Deputy Smith's observation that Hogan appeared nervous to justify extending the traffic stop into an OWI investigation. Citing the cases ***State v. Betow***, 226 Wis.2d 90, 593 N.W.2d 499 (Ct. App. 1999) and ***State v. Gammons***, 2001 WI App 36, 241 Wis.2d 296, 625 N.W. 2d 623 (Ct. App. 2001), Judge Day held that Deputy Smith did not have enough to extend the traffic stop into the OWI investigation. (R 22:3, D-App. 000081)

Judge Day, citing the approximately 16 second gap between the release of Hogan and when Deputy Smith re-approaches Hogan to seek consent for a search of the vehicle as "a complete disjoinder as between Deputy Smith and Mr. Hogan." (R 22:4-5, D-App. 000082-83) Judge Day weighed the time between the end of illegal stop and when Deputy Smith asked for a consent search, the fact that consent was sought in a wide-open, outdoor environment, the fact that Deputy Smith was privileged to have stopped Hogan for the initial traffic stop, Deputy

Smith's demeanor toward Hogan at the time he asked for consent and what Judge Day impliedly believed was a lack of flagrancy of the official misconduct. (R 22: 5-8, D-App. 000083-86) Judge Day denied the motions to suppress.

D. Court of Appeals Opinion

Hogan appealed the trial court's denial of the Motions to Suppress, arguing the taint of the illegal detention was still present at the time Hogan gave consent to search. (D-A-P Ct. App. Brief pp. 8-20) The State, in its brief, invited the Court of Appeals to analyze "whether the traffic stop was complete but not terminated, thereby invalidating any voluntary consent to search", citing ***State v. Williams***, 2002 WI 94, ¶4, 255 Wis. 2d 1, 646 N.W.2d 834. (P-R Ct. App. Brief pp. 3, 4-7) The State argued the case could be decided without determining if Deputy Hogan had reasonable suspicion to extend the traffic stop into a criminal investigation and took the unusual step of asking the Court of Appeals for leave to file a supplemental brief addressing the merits of this issue if the Court of Appeals felt it must reach that issue. *Id.*

The Court of Appeals affirmed the Circuit Court. The court applied the motorist seizure analysis from ***State v. Williams*** (in ¶¶9-12 of its opinion) and the taint attenuation analysis from ***State v. Phillips*** (in ¶¶13-19). ***State v. Hogan***, 2014 WI App ___, 354 Wis. 2d 622, 848 N.W.2d 903 (Ct. App. 2014.) The Court of Appeals analogized ***Williams*** to Hogan's stop and did not seem to give any weight to the approximately 15 minute illegal detention of Hogan. Nor did the Court of Appeals address the limiting language in Footnote 8 of ***Williams*** pointing out that the ***Williams*** case did *not* deal with facts involving a Fourth Amendment violation by the officers. ***State v. Williams,*** 2002 WI 94, n. 8, 241 Wis.2d 631, 623 N.W.2d 106.

As to the ***Phillips*** taint attenuation analysis, the court ruled the verbal release of Hogan by Smith would have led a reasonable person in Hogan's position to have believed that he was not obligated to stay and answer additional questions by police. *Id.* ¶17, D-App. 000098. Finally, the Court of Appeals held

that Deputy Smith's violation of Hogan's rights was not conscious or flagrant, citing the exclusionary rule discussion in ***Phillips***. *Id.* ¶18, D-App. 000099 *citing* ***State v. Phillips***, 218 Wis. 2d 180, 209; 577 N.W.2d 794.

ARGUMENT

I. Introduction

A. Standard of Review

This case presents a mixed question of constitutional fact and is subject to a two-part standard of review. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis.2d 52, 621 N.W.2d 891; *see also* ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis.2d 48, 58, 613 N.W.2d 72. The trial court's findings of fact will be given deference unless clearly erroneous. *Id.* Once the historical facts have been determined, this Court applies the law as it sees it without any deference to lower courts' interpretations of the law (*de novo* interpretation and application of law.) *Id.* When the facts are undisputed, appellate courts independently review lower courts' application of constitutional principles to those facts. ***State v. Hindsley***, 2000 WI App 130, ¶22, N.13, 237 Wis. 2d 358, 614 N.W.2d 48.

B. Undisputed Facts

The pertinent facts of this case have been agreed upon at the trial and appellate court levels. The disagreements between the parties focus on the significance to the different facts in running the legal analyses.

II. Notwithstanding the validity of the initial traffic stop, the extension of the stop into an OWI/drug investigation was not supported by reasonable suspicion.

Issues not argued on appeal are ordinarily deemed abandoned. ***Reiman Associates, Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W2d 292 (Ct. App. 1981) The State has not argued the issue of whether Hogan was illegally detained in its Court of Appeals Brief or in its Response in Opposition to Hogan's Petition for Review, but in each document they included language indicating it did not concede that Hogan was illegally detained. Hogan includes

this section of argument in case the State is not deemed to have abandoned this issue and also because this Court is not obligated to accept any facts or law stipulated to by the parties if it believes the parties are mistaken.

Hogan concedes that the initial stop of his truck was supported by reasonable suspicion. The extension of the traffic stop, based on Deputy Smith's suspicion that something was going on with Hogan, was unreasonable. (R 21: 2-3, D-App. 000008-9)

Deputy Smith testified at the suppression motion hearing that he believed restricted pupils are a sign of drug use. (R 21:3, D-App. 000009) However, he also admitted Hogan's driving showed no signs of impairment; that Hogan responded appropriately to his emergency lights; that Smith never noticed any odors of intoxicants or drugs; that he didn't observe open intoxicants, drugs or paraphernalia in the truck; and that Hogan's speech was not slurred, nor did Hogan struggle with balance. (R 21:10-11, D-App. 000016-17) Smith admitted he was not a drug recognition expert, that it was a sunny day and that the sun could have accounted for Hogan's pupils being restricted. (R 21:11-12, D-App. 000017-18) Smith could not remember if he had received training about the significance of pupil size in the training for how to administer field sobriety tests. (R 21:22-23, D-App. 000028-29) Smith further confirmed that Hogan did not show any clues on the field sobriety tests. (R 21:13, D-App. 000019)

The trial court found Deputy Smith's testimony about Hogan's pupil size unconvincing and insignificant for establishing reasonable suspicion to extend the traffic stop into an OWI investigation. (R 22:2-3, D-App. 000080-81) Without Smith's observation being accorded any weight by the judge, all Deputy Smith had for evidence justifying extending Hogan's traffic stop into a criminal investigation was the observation that Hogan appeared nervous. "A stop and detention is constitutionally permissible if the officer has an "articulable suspicion that the person has committed or is about to commit [an offense]..."" ***State v. Betow***, 226 Wis.2d 90, 93-94, 593 N.W.2d 499 (Ct. App. 1999) (internal citation

omitted). However, it is common knowledge that "a suspect may be nervous simply because he has been stopped by the police." *Id.* at 96.

> "The scope of the officer's inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention – keeping in mind that these factors, like the factors justifying the stop in the first place, must be "particularized" and objective."

State v. Gammons, 2001 WI App 36, 241 Wis.2d 296, 306, 625 N.W. 2d 623 (Ct. App. 2001), *quoting* ***State v. Betow,*** 226 Wis.2d 90, 94.

The Court of Appeals noted "The State does not argue that the police had reasonable suspicion to extend the stop for an OWI investigation." ***State v. Hogan*** n. 1, D-App. 000095-96. The Court of Appeals did not analyze the issue of whether Hogan was in fact illegally detained but tacitly accepts the idea that he was. ***Hogan*** ¶8, D-App. 000095-96.

Americans have a right to be secure in their persons and property against unreasonable intrusions by the government. **U.S.C.A. Const.Amend. 4, W.S.A. Const. Art. 1, §11.** The U.S. Constitution guarantees against violations of these rights by all levels of government. U.S.C.A. Const. Amend. 14, ***Mapp v. Ohio***, 367 U.S. 643, 81 S. Ct. 1684 (1961). To determine if an officer's extension of a traffic stop to run field sobriety tests is valid, "... [a court] must determine whether the officer discovered information subsequent to the initial traffic stop which, when combined with information already acquired, provided reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant." ***State v. Colstad,*** 2003 WI App 25, 260 Wis. 2d 406, 420, 659 N.W.2d 394 (Ct. Ap. 2003.) Deputy Smith, with his lack of relevant knowledge at the time of the stop, did not have this reasonable suspicion to extend the stop and therefore the detention of Hogan beyond the time necessary to issue him a warning or a seatbelt ticket was illegal.

III. Hogan was constructively seized at the time he gave consent to search his vehicle.

A. Wisconsin's motorist seizure legal analysis: *State v. Williams*

Our analysis of whether Hogan was seized at the time he gave consent to search his truck must begin with a look at Wisconsin's lead case for determining whether a motorist suspect was seized at the time the motorist was asked questions or for consent to search the motorist's vehicle. Lawrence Williams was the driver of a vehicle stopped for speeding. ***State v. Williams***, 2002 WI 94, ¶5, 241 Wis.2d 631, 623 N.W.2d 106. Williams, appearing nervous, piqued the state trooper's suspicions when he said he was driving a rental car and wasn't sure who the actual renter was. *Id.* at ¶6. A backup officer was called, with the first trooper radioing he had "a badger going" (meaning the trooper was intending to try to gain the motorists' consent to search the vehicle.) *Id.* at ¶7. The trooper ran Williams' license and determined the license was valid but dispatch noted Williams "had come up a "ten-Zero" on prior offenses", meaning caution should be used. *Id.* at ¶8. The backup officer arrived and the officers together approached Williams' car on either side. *Id.*

Williams was asked to step out of the car and come to the rear. He was told the rental agreement did not allow him to be driving. *Id.* at ¶9. Williams was given back his drivers license and rental papers and a warning citation. *Id.* . The officer said: "This is a warning for speeding, need a signature and we'll get you on your way then." *Id.* Williams signed the warning. *Id.* at ¶11. The officer gave him the citation, asked Williams if he had any questions, Williams said no and that he knew how everything worked. *Id.* The officer said "Good, we'll let you get on your way then." *Id.* They said good bye to each other and turned to walk toward their respective vehicles. *Id.* at ¶12.

After taking a couple steps away from each other, the first trooper swiveled back toward Williams and got Williams' attention. *Id.* He then asked Williams if there were any guns, knives, drugs, or large amounts of money in the car. *Id.*

Williams denied each. *Id.* The trooper then asked for permission to search the car and Williams consented. *Id.* Drugs and a pistol were found and Williams was charged. *Id.* at ¶13.

The ***Williams*** court began its analysis with the general rule that warrantless searches are per se unreasonable under the Fourth Amendment pursuant to ***Katz v. United States,*** 389 U.S. 347, 357, 88 S. Ct. 507 (1967); ***Williams*** at ¶18. One exception to that general rule is if consent is voluntarily given to search. *Id., citing* ***State v. Phillips,*** 218 Wis.2d 180, 196, 577 N.W.2d 794 (1998). Consent searches are not generally constitutionally suspect pursuant to ***Schenckloth v. Bustamonte,*** 422 U.S. 218, 222, 93 S. Ct. 2041 (1973). ***Williams*** at ¶19.

Williams argued that he was illegally "seized" when he gave consent to search the vehicle. *Id.* at ¶20. The court, pursuant to ***U.S. v. Mendenhall,*** determined whether, considering all circumstances, Williams was seized at the time he gave consent to search his vehicle. *Id.* at ¶12-¶35; ***United States v. Mendenhall,*** 446 U.S. 544, 100 S. Ct. 1870 (1980). The inquiry focused not on whether Williams subjectively believed he was seized but whether a reasonable person would have believed he/she was free to leave at the time. *Id.* The court noted the imprecise nature of the ***Mendenhall*** test, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than focus on particular details of that conduct in isolation. *Id.* at ¶23. The court then viewed the surrounding facts of Williams Stop.

The court gave comparatively small weight to the flashing emergency lights of one of the patrol cars (¶33); the fact that both officers were armed or that the backup officer had his hand on the front of his belt (near his weapon) (¶32); the time and location of the stop (¶34); or to the slight change in tone, tenor and speed of the first trooper's speech after he told Williams he was free to go (¶30.) On the other hand, the court gave great weight to the fact that the officer had verbally released Williams after giving him back his rental papers and warning document. *Id.* at ¶27-¶29. Ultimately, however, the court determined that when "considered

in the context of all the circumstances and against the objective, "reasonable person" standard," Williams was not seized at the time he gave consent to search the rental car for purposes of the 4th Amendment. *Id.* at ¶35.

B. Differentiating the *Williams* stop from Hogan's stop

There is one big difference and one small difference between Williams' stop and Hogan's stop. First and foremost, Deputy Smith had illegally extended the traffic stop of Hogan into a criminal investigation and Hogan's quasi-release was at the end of that approximately 15-minute violation of his rights. Second, Hogan was a probationer at the time of his stop. (R 24:9-10)

Hogan acknowledges there are many facts between most motorist stops which at some point turn into criminal investigations, including being similar in many ways to the stop in ***Williams.*** Both Hogan and Williams were validly stopped for traffic violations. (R 21: 2, 10, 11, D-App. 000008, 000016, 000017) Both officers were in law enforcement vehicles, in uniforms, with firearms. (R 8, D-App. 000092) The officers had more or less conversational tones with the suspects. (R 8, D-App. 000092) The emergency lights of at least one law enforcement vehicle remained lit during each stop. (R 21:14, D-App. 000020; R 8, D-App. 000092) Soon after making contact with their respective suspects, the law enforcement officers developed suspicions the motorist suspects were up to something. (R 21:4, D-App. 000010) Both radioed for backup and needed to wait a short time for the backup officer's arrival. (R 8 video 2:30-5:00, D-App. 000092) Both verbally released their suspects. (R 8 video 24:38-24:44, D-App. 000092) In both cases a very brief period of time passed before the officers re-contacted the suspects and asked them to search their vehicles. (R 8 video 24:44-25:00, D-App. 000092) Both suspects gave consent. (R 8 video 25:00-26:00, D-App. 000092) Both officers, in the course of searching the vehicles, found contraband which became the basis of criminal charges. (R 8 video after 27:20, D-App. 000092). This case represents an opportunity for the court to more fully explain to Wisconsin courts why the outcome in ***Williams*** was never intended to

extend to fact patterns involving recent 4th Amendment violations of suspects' rights. ***Williams*** n.8.

C. Application of the *Williams* motorist seizure analysis

To determine whether a motorist suspects was constructively seized for 4th Amendment purposes at the time the suspect answers questions posed by a officer or when the motorist suspect grants consent to search the motorist's vehicle, ***State v. Williams*** instructs Wisconsin courts to ask the fundamental question from ***Mendenhall.*** Would a reasonable motorist suspect, under the totality of the circumstances as they then existed, have felt free to decline an officer's questions or to refuse consent to search the motorist's vehicle and terminate the encounter? If so, then the suspect was not seized and acted voluntarily and the evidence gathered against the suspect as part of the questioning and/or search will be admissible against the motorist. The ***Williams*** court went to pains to point out that the stop in that case was *not* one where the officer impermissibly exceeded the scope of or prolonged the initial seizure in violation of the Fourth Amendment. *Id.* at n. 8. However, ***Williams*** clearly anticipated a case in which an officer *did* wrongfully extend the original stop, violating the suspect's rights, before asking questions or for consent to search the motorist's vehicle. *Id.* This is that case.

The holding from ***Williams*** is under ordinary circumstances, where a motorist suspect's 4th Amendment rights have not been violated by the law enforcement officer conducting the stop, that the officer asking questions at the end of a traffic stop and/or asking for consent to search the suspect's vehicle is acceptable, such that evidence obtained from the suspect answering those questions or from a consent search of the suspect's vehicle will usually be admissible against the suspect. ***Williams*** *synthesizing* ¶35 and n.8. This is *not* that usual case because there was a comparatively long violation of Hogan's 4th Amendment rights almost immediately before the law enforcement officer asked Hogan for consent to search his truck. (R 8)

Applying the ***Williams/Mendenhall*** test to Hogan's stop, this Court should hold that Hogan was seized within the meaning of the 4th Amendment at the time he gave Deputy Smith consent to search his truck and therefore the results of that search should be suppressed. Deputy Smith pulled over Hogan with a marked squad car with his emergency lights. (R 8 00:30-00:45, D-App. 000092) The squad car lights remained lit throughout the stop. (R 21:14; D-App. 000020) Hogan submitted to this show of authority. (R 8 00:30-00:45) Hogan gave Deputy Smith his license and registration information and waited while Smith called for backup and a drug dog and talked with the backup officer about how the officers might investigate their hunch that Williams was up to something. (R 8 video 2:00-14:15) He did field sobriety tests for Deputy Smith. (R 8 video 16:45-24:38) Deputy Smith was in uniform with a gun at the time, as was the backup officer. (R 8) At the end of the field sobriety tests, Deputy Smith verbally released Hogan for 16 seconds, not long enough for him to do anything more than close the door behind him in his truck, before re-approaching him. (R 8 24:38-25:00) Hogan was on probation at the time. (R 24, pp. 9-10) Hogan could not possibly have mentally and emotionally have distanced himself from the very recent violation of his rights at the time Deputy Smith re-approached him and asked for consent to search his vehicle. In the video Hogan is audibly fed up with what he perceives as harassment, even asking Deputy Smith's badge number shortly after he re-approaches him (R 8 25:30-25:35) Any ordinary person, including anyone without something to hide, would assume he/she was not free to go after having been held by Deputy Smith under these circumstances.

The ***Williams*** court noted also that just because a suspect is not told they are free to refuse to answer questions does not mean any response the suspect gives is not voluntary. *Id.* ¶23, citing ***INS v. Delgado***, 466 U.S. 210, 216, 104 S.Ct. 1758 (1984). However, in a case where law enforcement has just finished violating a suspect's 4th Amendment rights before trying to gather more evidence from the suspect, law enforcement efforts to "rehabilitate" themselves in relation

to the suspect, or the failure to do so, *should* be weighed by the courts. By this, we mean that officers who want to get more evidence from suspects whose rights they have just violated should be required to take remedial steps to re-establish an arms-length relationship with suspects who had just had their 4th Amendment rights violated. This rehabilitation effort could take different forms depending on the circumstances, but an advisement of rights with respect to the suspect not being required to answer questions or consent to searches would seem to be the most obvious and powerful way to try to remedy a very recent violation of the suspect's 4th Amendment rights.

Hogan doesn't disagree with the logic or outcome in ***Williams***, but Williams was never wrongfully detained for a comparatively very long time before being quasi-released for a comparatively short time and then re-approached by law enforcement. Deputy Smith made no effort at rehabilitating himself to Hogan, having not recognized the wrong he had done. Deputy Smith's failure to attempt to "level the playing field" so that courts could reasonably tell people in Hogan's position that they need to speak up for their rights *is important*.

It would be unreasonable to assume that reasonable people would be ready and willing to assert their 4th Amendment constitutional rights against a law enforcement officer who had just seconds beforehand finished violating those rights. Even if a person had the ability to quickly run the constitutional law analysis necessary to determine that his rights had just been violated by an officer, that person might reasonably have assumed that the officer's very recent behavior in violating those rights would be predictive of the officer's willingness to cross boundaries, intentionally *or accidentally*, to get what he wants.

We shouldn't require normal people to have knowledge of constitutional case law necessary to determine if their rights have been violated, the brainpower to run a fast analysis of the facts of their situations, the emotional detachment necessary to ignore the circumstances they are facing to run that analysis dispassionately, and the gumption to then stand up to an officer if they determine

the officer had just finished violating their rights. A probationer who could correctly run the same analysis might reasonably think that even if the officer respected his decision to decline consent to search his vehicle, that officer might nonetheless make life uncomfortable for the probationer by telling the probationer's probation officer about the stop and refusal to cooperate.

Most people (correctly) assume professional law enforcement officers receive training and periodic update and refresher classes about constitutional law and the limits on their power and therefore have a comparatively high level of knowledge with respect to constitutional law as part of the evidence-gathering duties of their jobs. If a professional law enforcement officer has just finished violating a motorist's rights, the motorist ought *not* be required to refuse or confront the offending officer at the of the violation or have those rights deemed waived. Letting a trial court judge sort out what factually happened and what is fair to the public and the defendant in a safe, neutral courtroom after *everyone* has had a chance to cool down and run a dispassionate constitutional law analysis would be far fairer.

Hogan asks this court to imagine a few reasonable people representing the spectrum of reasonable people in the state of Wisconsin in Hogan's shoes when watching the squad car video. Ideally this cross section would include a range for traits including ranges of intelligence, education level, assertiveness, socioeconomic status, race, creed, gender, age, disability status, professionals, blue collar workers and non-working people. Using this group of people, what percentage of the population of reasonable people in Wisconsin might have felt comfortable to refuse to answer Deputy Smith's questions or to grant him consent to search when he re-approached that person's vehicle at the 25:00 mark of the video after everything that had happened up to that point? Recognizing different reasonable people would come up with different estimates to answer that question, Hogan submits the numbers would not be high enough to allow this case to hold that most (much less all) reasonable people in Wisconsin finding themselves in his

shoes at the 25:00 point of the video should be expected to stand up to Deputy Smith by refusing to answer his questions, refusing to give him consent to search the truck, and driving away. Considering the totality of the circumstances, most reasonable people would not have felt free to disregard Deputy Smith or to disengage him at the time he re-approached Hogan approximately 25 minutes into the stop and for that reason, Hogan should be found to have been constructively seized for 4th Amendment purposes under the ***Williams*** test and the evidence obtained in the search of his truck should be suppressed.

IV. Even if Hogan is not found to have been constructively seized, the violation of Hogan's 4th Amendment rights impermissibly tainted Hogan's consent.

The factors used in the ***Bermudez/Phillips*** taint analysis are to be used to help courts determine whether evidence which is being objected to was obtained by exploiting "'a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint.'" ***State v. Phillips*** at ¶39, citing ***State v. Anderson***, 165 Wis. 2d 441, 447-48, 477 N.W.2d 277 (1991) and ***Wong Sun v. United States***, 371 U.S. 471, 488, 83 S. Ct. 407 (1963); ***State v. Bermudez***, 221 Wis.2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998), citing ***Wong Sun***.

A. Factor 1: Temporal proximity between the official misconduct and the granting of consent

The first factor of the ***Phillips/Bermudez*** attenuation test is functionally two factors: first, a consideration of the amount of time between the release of the suspect and the time the law enforcement officers again make contact, and second, a consideration of the circumstances at the time.

a. *Time between Hogan's release and Deputy Smith re-approaching him*

The time between when Deputy Smith verbally released Hogan and when he re-approached him, 16 seconds, weighs against attenuation both as an absolute measurement and when considered in context. 16 seconds was not long enough to get back in his vehicle and leave, let alone think about what had just happened with his 25-minute detention or to seriously analyze if he had his rights violated or

why. In context, 16 seconds is only ~1.78% of the time of the approximately 15 minutes of the illegal detention of Hogan and only ~1.10% of the ~24 minute stop. When the ratio of time between a motorist suspect's illegal detention and the time he is arguably released before being re-contacted by law enforcement is approximately 50:1, this first part of the first factor ought to be weighed extremely heavily against a finding of attenuation. On a first date, a person with poor self-awareness who spoke 50 times as long as his/her date would be said to have monopolized the conversation and no one would quibble that the other person got to speak because he/she occasionally got a word in edgewise. Saying Hogan's 16 seconds of quasi-release time after a 24 minute stop including approximately 15 minutes of illegal detention were of any significance would be a similar quibble. The 16 seconds may as well have never happened.

b. *Circumstances at the time of the stop/release*

The stop occurred in the early evening hours of a sunny May day on a moderately-traveled street in Boscobel, Wisconsin. (R 8, D-App. 000092) Deputy Smith pulled over Hogan with his marked patrol car by activating his emergency lights for a seatbelt violation. (R 8 video 00:20-00:30, D-App. 000092) Deputy Smith's tone with Hogan was polite but assertive at times. (R 8, D-App. 000092) Deputy Smith wrongfully extended the seatbelt ticket stop into a drug and OWI investigation without the reasonable suspicion necessary to do so. Smith had Hogan wait in his car while waiting for a drug dog to arrive. (R 8 video 5:00-14:15, D-App. 000092) Smith had Hogan perform field sobriety tests. (R 8 video 16:45-24:38, D-App. 000092) Smith then verbally released Hogan and re-approached him 16 seconds later. (R 8 video 24:44-25:00, D-App. 000092) The emergency lights on Deputy Smith's car remained lit. (R 21, p. 14; R 8, D-App. 000092) Hogan was a probationer at the time. (R 24, pp. 9-10).

Hogan acknowledges the verbal release of a suspect by law enforcement has been given great weight by courts in the past in determining whether a reasonable person would have felt free to leave. *State v. Williams* ¶¶27-29

However, unlike in ***Williams***, the brief release of the suspect in our case occurred in the context of just having been illegally detained for a comparatively long time. Deputy Smith lacked reasonable suspicion to extend the traffic stop into a criminal investigation and had made Hogan sit and then had him do field sobriety tests. (R 8) Hogan was a probationer who had just been illegally detained by Deputy Smith and the squad car lights were still lit when Smith, in his full uniform including his gun, re-approached Hogan 16 seconds after verbally releasing him. Hogan acknowledges the stop occurred under pleasant enough surrounding circumstances (daytime hours on a moderately travelled street in what appears to be a nice town), but when the violation of Hogan's rights occurred so soon before Deputy Smith asked him for consent to search his truck, the surrounding circumstances should be given little weight.

B. Factor 2: The presence of intervening circumstances

The only intervening circumstance between the illegal detention of Hogan and the gathering of the evidence was the 16-second period between when Deputy Smith verbally released Hogan and when Smith re-approached Hogan. (R 8 video 24:44-25:00, D-App. 000092) As previously noted, in context, 16 seconds after an approximately 15-minute illegal detention and at the end of a 24-minute stop is comparatively very small, perhaps a bit less than 2% of the illegal detention time. The Court of Appeals found this break to be significant, holding a reasonable person in Hogan's position would not have believed he was obligated to stay and answer additional police questions. ***State v. Hogan*** 2014 WI App ___, ¶16, 354 Wis. 2d 622, D-App. 000098. However, those 16 seconds passed before Hogan could reasonably process what had just happened or even get situated and pull away in his truck. (R 8 video 24:44-25:00, D-App. 000092) The near-absence of intervening circumstances should weigh heavily against a finding of attenuation of the taint caused by the illegal detention of Hogan and Hogan giving consent to search his truck.

C. Factor 3: The purpose and flagrancy of the official misconduct

It is clear from the conversation between Deputy Smith and the backup officer between 10:25 and 11:25 in the squad car video that the officers are hoping to get consent to search Hogan's truck and that they know they need something more, like a drug dog alert or consent, before they will be able to search. (R 8, D-App. 000092) Because they knew they needed more evidence, they detained Hogan while waiting for a drug dog and then gave Hogan field sobriety tests, all unsuccessfully. (R 8, D-App. 000092)

The purpose of the exclusionary rule is to deter future law enforcement misconduct by eliminating the incentive for law enforcement to violate citizens' rights. ***U.S. v. Fazio***, 914 F.2d 950, 957 (7th Cir. 1990) Courts including the 7th Circuit Court of Appeals have said that because the primary purpose of the exclusionary rule is to deter police misconduct, application of the exclusionary rule does not serve this deterrent function when the police action, though erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights. *Id.* at 958. Hogan, respectfully, believes this is a non-sequitur because certainly if law enforcement understood they would not be able to use evidence wrongfully obtained from suspects, whether the officers were maliciously disregarding the rights of the suspects or not, law enforcement administrators would focus training resources on educating officers to be more scrupulous and knowledgeable about 4th amendment law and officers might tend to give the constitutionality of each of their searches and seizures a bit more thought. As a result, law enforcement as a whole might violate suspects' rights a bit less often, achieving the goal of the exclusionary rule. The deterrent effect of applying the exclusionary rule to cases like this would be to eliminate the benefit to law enforcement of carelessly violating motorists' 4th amendment rights by excluding the evidence which was wrongfully obtained.

The exclusionary rule is not absolute, but instead requires the balancing of the rule's remedial objectives with the substantial social costs exacted by the exclusionary rule. ***State v. Felix***, 2012 WI 36, 339 Wis.2d 670, 690, 811 N.W.2d 775 (2012). Letting lawbreakers escape justice by applying the exclusionary rule to cases of law enforcement overzealousness is frustrating, but to excuse violations of motorists' rights is to invite more of the same. Worse still, failing to apply the exclusionary rule to this case might cause law enforcement agencies to use more aggressive tactics. They would now understand Wisconsin courts won't sanction them for recklessly violating suspects' rights and that they can whitewash 4th Amendment violations or "fix" questionable detentions of suspects through a strategy of "micro-disengagement" with suspects.

V. Proposing a "*Hogan*" analysis

While this case could be decided using the analyses from ***Phillips*** or ***Williams***, Hogan respectfully suggests that what would be most appropriate would be to meld the tests of those cases together. The court could fashion this new test to apply in cases where a motorist is illegally detained, is verbally released and then soon after is re-approached by an officer and asked additional questions and/or for consent to search the motorist's vehicle. Evidence obtained under these circumstances would be presumed to be inadmissible against the suspect motorist unless and until the State is able to clearly establish that the illegal detention of the suspect motorist was not a significant factor in the motorist's decision to answer questions or the decision to grant consent to search the motorist's vehicle.

This test could employ the first two factors of the ***Phillips/Bermudez*** taint attenuation analysis. For the second factor of the ***Phillips*** test, looking at intervening circumstances/events between the violation of the motorist suspect's rights and the gathering of the additional evidence, special attention should be given to any steps taken by law enforcement to rehabilitate themselves with respect to the suspects. For example, if Hogan were allowed to have gone on his way for 5 minutes and the officers called him on the phone and asked he

voluntarily meet with the officers to ask him questions and search his truck, the meaningful length of time apart from the officers might have been deemed sufficient for the rehabilitation of the officers for the earlier violation of Hogan's rights. Or, if Deputy Smith had prefaced his questions after the 16 second release of Hogan by saying "Hogan, just to be clear you are still free to go and you do not need to answer any of these questions if you don't want to. Like I said, you are released, but I would like to ask you some more questions," and then confirmed with Hogan that he understood he was free to leave, a court might reasonably have found Deputy Smith had rehabilitated himself adequately and therefore the evidence gathered against Hogan in the questioning/search would have been admissible.

Hogan would urge the Court to *not* include the third ***Phillips/Bermudez*** taint attenuation analysis factor, the purpose and flagrancy of the official conduct. The ultimate goal of the ***Hogan*** test, like the ***Phillips/Bermudez*** attenuation test, should be to determine whether the state is unfairly benefitting from 'prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint.' The subjective intent of the law enforcement officers is irrelevant to whether the officers are unfairly benefitting from the violation of the suspects' rights. Whether an officer *knew* he had illegally detained a motorist suspect should not be considered as a matter of fairness because if we can't expect law enforcement to have enough knowledge and self-control to observe a motorist suspect's rights, it would be unfair to expect motorists to have the knowledge and bravery to challenge the offending officer in the heat of the moment on the side of the road, with no higher authority (i.e. a judge or law enforcement supervisor) present to rein in the offending officer. The subjective mindset of the officer is not relevant to whether the motorist was unfairly influenced to give consent by the law enforcement officer's misconduct and so it should be ignored.

CONCLUSION

The evidence obtained against Hogan after his illegal detention should not be admissible under the ***Williams*** motorist seizure analysis, the ***Phillips*** taint attenuation analysis or any fair test which this Court might adopt to address fact patterns like Hogan's stop. Hogan respectfully requests the trial court's refusal to suppress evidence obtained against Hogan after his illegal detention by Deputy Smith be reversed.

Dated December 15th, 2014

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SIGNED CERTIFICATE OF WORD/PAGE COUNT

I hereby certify that this reply brief conforms to the rules contained in Wisconsin Statutes §809.19. It is in a proportional serif font (times new roman) with 1.5 line spacing and a 13 point font for the body and headers and 11 point font for quotations. The total word count for this document is 8,211 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: December 15th, 2014.

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK I. HOGAN,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR GRANT COUNTY, CRAIG R. DAY, JUDGE.

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Under Wisconsin Stat. § 346.63(1)(am),[1] it is illegal for a person to drive or operate a motor vehicle with any detectable amount of a restricted controlled substance in his or her blood. When an officer is faced with a driver that is suspected to be a methamphetamine cook, that has constricted pupils

[1] Because Hogan's offenses were committed in 2012, all citations are to Wisconsin Statutes version 2011-12 unless otherwise noted.

and is acting abnormally nervous and shaking, does the officer have sufficient facts to extend a lawful traffic stop to investigate suspected drugged driving?

The circuit court answered no, but did not specifically view the facts in light of Wis. Stat. § 346.63(1)(am).

This question was not presented to the court of appeals.

2. Under Wisconsin law, a person is seized when he or she would not feel free to disregard an officer's question and leave. When Hogan was told, unequivocally, that he was free to leave, was Hogan seized for Fourth Amendment purposes when the officer approached his vehicle sixteen seconds after the traffic stop had concluded and asked, "Can I talk to you again?"

   The circuit court answered no, but did not address the free to leave standard.

   The court of appeals answered no, relying on *State v. Williams*, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834.

3. Under Wisconsin law, a person's voluntary consent to search can be tainted by a prior Fourth Amendment violation if that consent is not attenuated from the violation. If the extension of the traffic stop in this case was unlawful, was the unlawful extension sufficiently attenuated from Hogan's consent to search his vehicle?

   The circuit court answered yes, relying on *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), and *State v. Bermudez*, 221 Wis. 2d 338, 585 N.W.2d 628 (Ct. App. 1998).

   The court of appeals answered yes, also relying on *Phillips* and *Bermudez*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

STATEMENT OF THE CASE

On May 12, 2012, a sunny day, Deputy Smith was stopped at a stop sign when the petitioner, Patrick Hogan, drove past in a pickup truck (21:2; 8:DVD 00:00-30)[2] (Pet-Ap. 8).[3] Deputy Smith plainly observed Hogan and his passenger not wearing seatbelts and initiated a traffic stop (21:2, 10) (Pet-Ap. 8, 16). Deputy Smith approached Hogan's vehicle, asked for Hogan's license and insurance, and immediately explained that he stopped Hogan for a seatbelt violation (8:DVD at 01:00-30). Deputy Smith then returned to his squad car and immediately voiced that Hogan was very nervous, shaking, and that Hogan had constricted pupils (8:DVD at 02:00-03:00). Based on those observations, Deputy Smith suspected that Hogan was impaired on drugs and, for officer safety reasons, called for backup (21:4; 8:DVD at 03:00-30) (Pet-Ap. 10). The backup officer, Officer Dregne, arrived approximately two minutes later (8:DVD at 05:30-06:00). Deputy Smith asked if Officer Dregne knew Hogan, and Officer Dregne immediately responded that Hogan had "961 issues"[4] and was known to drive around doing shake and bakes[5] with a female (21:4; 8:DVD at 05:30-06:30) (Pet-Ap. 10).

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[2] Record 8 is the index list to the suppression hearing and has an attached DVD of the squad car video, which is available in the petitioner's appendix at page 92. All citations to the squad car video will be formatted in 30 second increments as (8:DVD at mm:ss).

[3] The leading zeros from the pagination of the petitioner's appendix are intentionally omitted.

[4] "961 issues" refers to Wis. Stat. § 961, which is the Uniform Controlled Substances Act.

[5] Shake and bake, or one-pot cooking, is a method of producing methamphetamine:

Deputy Smith radioed to see if the K9 unit was available and decided to also issue the passenger of the vehicle a citation for failing to properly wear her seatbelt (8:DVD at 06:30-07:30). Deputy Smith then worked on the citations and engaged in small talk, which was mostly unrelated to Hogan (8:DVD at 07:30-10:30). After not receiving a response from the K9 unit, Deputy Smith announced that, based on his observations of Hogan, he was going to ask Hogan to do field sobriety tests (8:DVD at 10:30-11:00). Shortly thereafter, Deputy Smith received word that the K9 unit was unavailable, and Officer Dregne wondered aloud if Hogan would give consent for a vehicle search (8:DVD at 11:00-30). Deputy Smith declined to speculate and continued to work on the two citations (8:DVD at 11:30-14:00).

When the citations were complete, Deputy Smith approached Hogan's vehicle and said, "Hey Patrick, can I speak with you out here please?" (8:DVD at 14:00-30). Deputy Smith returned all of Hogan's documentation and explained the citation for failure to wear a seatbelt (8:DVD at 14:30-15:30). Deputy Smith then said, "question for you" and explained that he was concerned about Hogan's nervousness and especially Hogan's constricted pupils because that indicated impairment (8:DVD at 15:00-16:00). Hogan asserted that he was not nervous, explained that he used Adderall,[6] and announced that he was upset because he wanted to be left alone so he could go to bed (8:DVD at 15:30-16:00). Deputy Smith

---

> Cooks using this method are able to produce the drug in approximately 30 minutes . . . by mixing, or "shaking," ingredients in easily found containers such as a 2-liter plastic soda bottle, as opposed to using other methods that require hours to heat ingredients. Producers often use the one-pot cook while traveling in vehicles and dispose of waste components along roadsides.

Nat'l Drug Intelligence Ctr., U.S. Dep't of Justice, Product No. 2008-Q0317-006, *National Methamphetamine Threat Assessment 2009*, at 13 (Dec. 2008). Available from the Homeland Security Digital Library at https://www.hsdl.org/?view&did=34482 (R-Ap. 129).

[6] Adderall (amphetamine and dextroamphetamine) is a stimulant and a schedule II controlled substance. Wis. Stat. §§ 961.16(5)(a), (b).

acknowledged Hogan's response, but explained that his observations were not consistent with Hogan taking Adderall and asked Hogan if he would be willing to do field sobriety tests to make sure he was ok (*id*.). Hogan agreed, but was irritated, so Deputy Smith explained that he was only asking, to which Hogan responded that he was willing to do the tests (8:DVD at 16:00-30).

The field sobriety tests took approximately eight minutes (8:DVD at 16:30-24:30). The last field test administered was the alphabet test (8:DVD at 24:00-30). As soon as Hogan said "Z," Deputy Smith told Hogan that he was free to leave, to make sure to buckle up, and to get his windshield fixed (8:DVD at 24:30-25:00).[7] As Deputy Smith walked away he said, "Have a safe day." (*id*.). Hogan walked back to his truck, got into the front driver's seat, and closed the door (*id*.). Deputy Smith and Officer Dregne spoke for a few seconds and decided that Deputy Smith should ask Hogan for consent to search the vehicle (21:5; 8:DVD at 24:30-25:00) (Pet-Ap. 11).

Deputy Smith re-approached Hogan's vehicle and said, "Hey sir, can I talk to you again?" (21:5; 8:DVD at 24:30-25:00) (Pet-Ap. 11). Hogan exited the vehicle without instruction to do so, and Deputy Smith asked if there were any weapons or drugs inside of the vehicle (21:5, 48; 8:DVD at 25:00-30) (Pet-Ap. 11, 54). Hogan responded that he just bought the vehicle the other day, and then Deputy Smith asked, "Can I check?" (8:DVD at 25:00-30). Hogan initially made a hand gesture indicating "go right ahead" (21:48; 8:DVD at 25:00-30) (Pet-Ap. 54); however, Deputy Smith did not search the vehicle at that time and clarified that he was "just asking" (8:DVD at 25:30-26:00). Deputy Smith received Hogan's verbal consent and asked if he could search Hogan's person first, to which Hogan agreed (*id*.). Deputy Smith thanked Hogan for his cooperation and allowed Hogan to return to his vehicle to retrieve a cigarette and a lighter before the search of the vehicle began (8:DVD at 26:30-27:30).

[7] All of Hogan's documentation had been returned before Deputy Smith explained the seatbelt citation (8:DVD at 14:30).

During the search, the officers discovered two loaded pistols, methamphetamine, and components for manufacturing methamphetamine (1:1-3; 21:5-7) (Pet-Ap. 11-13). The methamphetamine components were located approximately one foot from a child sleeping in a car seat located on the rear seat of the vehicle (1:2). One of the loaded pistols was recovered from the rear seat area of the vehicle and was located approximately three feet from the sleeping child (1:3). Hogan was charged with one count of possession of methamphetamine, contrary to Wis. Stat. § 961.41(3g)(g); one count of manufacturing methamphetamine, contrary to Wis. Stat. § 961.41(1)(e)1; one count of possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(2)(a); and one count of child neglect, contrary to Wis. Stat. § 948.21(1)(a) (2:1-2).

Hogan moved to suppress the physical evidence found during the search of his vehicle on grounds that the extension of the traffic stop for field sobriety testing was unlawful (10:1-7) (Pet-Ap. 65-71).[8] An evidentiary hearing was held, at which Deputy Smith testified (*see generally* 21) (Pet-Ap. 6-60). The circuit court concluded that Deputy Smith did not have reasonable suspicion to extend the stop for field sobriety tests, but that the search of the vehicle was lawful because Hogan gave his consent to search after the stop was terminated (*see generally*, 22) (Pet-Ap. 78-89). Pursuant to a plea agreement, Hogan then pled no contest to one count of possession of methamphetamine and one count of child neglect (11:1-2; 23:5). In exchange for the no contest pleas, the State dismissed the count of possession of a firearm by a felon and the count of manufacturing methamphetamine (11:2; 23:30, 10). The State also dismissed an unrelated count of possession of a firearm by a felon in Grant County Circuit Court No. 2012CF161, and the seatbelt citation (23:10).

[8] Hogan also brought a motion to dismiss, arguing spoliation of exculpatory evidence due to the destruction of various items constituting the mobile methamphetamine lab (6). Hogan affirmatively abandoned that argument on appeal (*see* Hogan's Ct. App. Br. at 5).

Hogan appealed his conviction and now seeks review of *State v. Hogan,* No. 2013AP430-CR (Ct. App. May 15, 2014) (R-Ap. 101-08). The court of appeals reviewed whether the circuit court erred in denying Hogan's motion to suppress physical evidence on grounds that Deputy Smith unlawfully extended the scope of the traffic stop when he asked Hogan to perform field sobriety tests. Relying on *State v. Williams*, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834; *State v. Bermudez*, 221 Wis. 2d 338, 585 N.W.2d 628 (Ct. App. 1998); and *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), the court of appeals concluded that Hogan was not seized when he consented to the search of his vehicle and Hogan's consent to search was not tainted by the (presumed) unlawful extension of the traffic stop. *Hogan*, slip op. ¶¶ 9-19 (R-Ap. 104-07). The court of appeals affirmed the judgment of conviction and order denying Hogan's suppression motion. *Hogan*, slip op. ¶ 1 (R-Ap. 101).

ARGUMENT

This Court may affirm the court of appeals decision on alternative grounds. This Court could conclude that Deputy Smith lawfully extended the stop *and* that Hogan was not seized when he consented to the search of his vehicle.[9] Alternatively, this Court could assume that Deputy Smith unlawfully extended the scope of the traffic stop, but conclude that Hogan was not seized when he

[9] In the court of appeals, the State chose not to present this argument. Instead the State argued that the court of appeals need not decide if the circuit court erred in concluding that the traffic stop was unreasonably extended because any unlawful extension did not taint Hogan's consent to search. The State did so for the purpose of argument, but without concession. In doing so, the State did not abandon the argument or concede that Deputy Smith unlawfully extended the scope of the traffic stop. *See State v. Mosely*, 102 Wis. 2d 636, 667 n.19, 307 N.W.2d 200 (1981) ("As a general matter, it is true that we review decisions of the court of appeals rather than unreviewed trial court determinations. Of course we are not, however, precluded from considering any issue inhering in a case without such prior review.").

consented to the search of his vehicle *and* his consent was not tainted by the unlawful extension.

I. This case is subject to a bifurcated standard of review.

All issues concern whether the circuit court appropriately denied Hogan's motion to suppress physical evidence discovered during the search of his vehicle. Upon review of a denial of a motion to suppress physical evidence, findings of historical fact are upheld unless found to be clearly erroneous. Wis. Stat. § 805.17(2); *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277 (citing *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829). The application of constitutional principles to those facts is reviewed de novo. *Id.*

II. Deputy Smith had sufficient specific and articulable facts to extend the traffic stop to investigate whether Hogan was driving with a detectable amount of a restricted controlled substance in his blood.

Drugged driving is prohibited by Wis. Stat. § 346.63(1)(am),[10] which reads:

> **346.63 Operating under influence of intoxicant or other drug**.
>
> (1) No person may drive or operate a motor vehicle while:
>
> . . . .
>
> (am) The person has a detectable amount of a restricted controlled substance in his or her blood.

[10] The Wisconsin Legislature created Wis. Stat. § 346.63(1)(am) in 2003 Wisconsin Act 97, sec. 2. The constitutionality of § 346.63(1)(am) is being challenged in *State of Wisconsin v. Michael R. Luedtke*, Appeal No. 2013AP1737-CR. Briefing in that matter is complete and this Court is scheduled to hear oral argument on February 3, 2015.

"Restricted controlled substance" is defined in Wis. Stat. § 340.01(50m) as any of the following:

> (a) A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.
> (b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
>
> (c) Cocaine or any of its metabolites.
>
> (d) Methamphetamine.
>
> (e) Delta-9-tetrahydrocannabinol.

The offense of driving or operating a vehicle with a restricted controlled substance in the blood (herein after referred to as "drugged driving") does not require proof that the driver was "under the influence" of the restricted controlled substance because "[i]t is often difficult to prove that a person who has used a restricted controlled substance was 'under the influence' of that substance." Don Dyke, Wis. Legislative Council Act Memo: 2003 Wisconsin Act 97, *Operating Vehicle or Going Armed With a Detectable Amount of a Restricted Controlled Substance* (Dec. 16, 2003) (R-Ap. 124).[11]

In enacting Wis. Stat. § 346.63(1)(am), the Legislature was battling a serious threat to public safety and concluded that a per se statute best served that purpose. *See State v. Smet*, 2005 WI App 263, ¶¶ 12-17, 288 Wis. 2d 525, 709 N.W.2d 474. Indeed, the danger posed by drugged driving is immense. In the United States, nearly 10 million people drove under the influence of drugs during a year's time. Tina Wescott Cafaro, *Slipping Through the Cracks: Why Can't We Stop Drugged Driving?*, 32 W. New Eng. L. Rev. 33, 35 (2010). Additionally, "20% of crashes are caused by drugged driving." *Id.* "That translates into 8,600 deaths, 580,000 injuries, and $33 billion in property damage each year in the United States." *Id*.

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[11] Also available at https://docs.legis.wisconsin.gov/2003/related (follow "LC Act Memos" hyperlink; then follow "AB458: LC Act Memo" hyperlink).

This is particularly relevant to the first question before this Court: what is needed to investigate drugged driving when an officer's suspicions arise after the officer encounters a driver stopped for a minor traffic infraction? While many of the Wisconsin Court of Appeals cases addressing Wis. Stat. § 346.63(1)(am) violations concern drivers involved in crashes or drivers exhibiting significant signs of impairment,[12] many violations of Wis. Stat. § 346.63(1)(am) do not occur under those circumstances. In some cases, the impairment is subtle or less pronounced. Unlike alcohol, the impairing effects of drugs are diverse and are not necessarily predictable or recognizable. Several factors influence the effect any particular drug has on a person's ability to drive. These factors include the dose, dosage frequency, route of administration, drug tolerance, and the combined effects of the drug with other drugs or alcohol. National Highway Traffic Safety Administration, *Drugs and Human Performance Fact Sheets*, at 4 (April 2014 (revised)) (R-Ap. 131).[13] Moreover, there are well over 100 enumerated restricted

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[12] *See State v. Weissinger*, 2014 WI App 73, ¶¶ 1-3, 355 Wis. 2d 546, 851 N.W. 780, *review granted,* No. 2013AP218-CR (Oct. 15, 2014) (discovered TCH in Weissinger's blood while investigating a crash in which Weissinger struck and severely injured a motorcyclist); *State v. Luedtke*, 2014 WI App 79, ¶¶ 2-4, 355 Wis. 2d 436, 851 N.W.2d 837 *review granted*, No. 2013AP1737-CR (Oct. 15, 2014) (discovered a cocktail of drugs in Luedtke's blood while investigating a two-car accident); *State v. Mertes*, 2008 WI App 179, ¶¶ 2-3, 315 Wis. 2d 756, 762 N.W.2d 813 (driver and passenger were "passed out" or asleep inside of the vehicle parked at the gas pumps of a Speedway station and blood tests revealed restricted controlled substances); *State v. Hoff*, No. 2011AP2096-CR, slip op. ¶¶ 3-4 (Ct. App. June 26, 2012) (R-Ap. 110-11) (Hoff was found asleep inside his vehicle at a gas station, when he awoke it became apparent that he was disoriented); *State v. Przybylski*, No. 2011AP1-CR, slip op. ¶ 2 (Ct. App. June 1, 2011) (R-Ap. 120) (Przybylski was stopped after the officer observed erratic driving and it was readily apparent that Przybylski was "extremely impaired"). *But see, Smet*, 288 Wis. 2d 525, ¶ 2 (The limited facts presented do not include the facts that lead to probable cause to arrest on suspicion of driving while intoxicated. Smet's blood test revealed the presence of THC.).

[13] Full report available at:
http://www.nhtsa.gov/people/injury/research/job185drugs/index.htm

controlled substances, including a variety of synthetic opiates, substances derived from opium, hallucinogenic substances, depressants, and stimulants. *See* Wis. Stat. § 961.14. Many of these substances emit no odor and contain no overt signs of ingestion. For all of these reasons, identifying drivers under the influence of restricted controlled substances can be difficult, and the Legislature recognized this when it adopted the any detectable amount standard in Wis. Stat. § 346.63(1)(am). Don Dyke, *Operating Vehicle or Going Armed with a Detectable Amount of a Restricted Controlled Substance* (R-Ap. 124). The threshold is zero and Wis. Stat. § 346.63(1)(am) requires no signs of impairment or erratic driving. *Smet*, 288 Wis. 2d 525, ¶¶ 12-17. As a result, what an officer must know or observe in order to form a reasonable suspicion that someone may be violating Wis. Stat. § 346.63(1)(am) must be relatively low. In order to enforce Wis. Stat. § 346.63(1)(am), officers need to be able to investigate suspected drugged driving when there are few, or no obvious signs of drug use.

For example, a non-binge user of cocaine may exhibit effects of the drug for only 15-30 minutes after he or she snorted the cocaine. *Drugs and Human Performance Fact Sheets*, at 21 (R-Ap. 134). When encountering a driver under the effects of cocaine, an officer may be able to observe the following signs of cocaine use: dilated pupils, slow reaction to light, talkativeness, irritability, argumentativeness, nervousness, body tremors, redness to the nasal area, and possibly a runny nose. *Id.* at 23 (R-Ap. 136).[14] The signs of cocaine use are not overt and the driver could easily be dismissed as a nervous, irritable driver suffering from a common cold. Similarly, the signs of heroin use are not overt. An officer may be able to observe the following signs of heroin use: constricted pupils, little or no reaction to light, injection marks if exposed, droopy eyelids, drowsiness, and low, raspy, slow speech. *Id.* at 77 (R-Ap. 142). If the

[14] The other effects of cocaine - elevated pulse rate, elevated blood pressure, elevated body temperature, excessive activity, increased alertness, and anxiety – are not effects that an officer could reasonably observe in the normal course of contact with a driver during a routine traffic stop.

driver did not have exposed track marks, he or she could easily be dismissed as someone who was just overly tired.

Like these examples, Deputy Smith was faced with non-overt signs of drug use. He observed constricted pupils, abnormal nervousness, and upper body tremors (21:2-4) (Pet-Ap. 8-10). Deputy Smith, however, did not dismiss these signs. Rather his experience led him to believe that Hogan may have taken illicit drugs (21:3) (Pet-Ap. 9). As addressed in the following sections, this Court should conclude that under the totality of the circumstances, there were sufficient facts to form a reasonable suspicion of drugged driving. Concluding otherwise will hinder Wisconsin's efforts to combat the immense danger posed by drugged drivers, because it will result in officers foregoing investigations when the indicators of drug use are not unique or overt.

A. A lawful traffic stop may be extended to investigate other criminal activity if there is reasonable suspicion to do so.

Hogan concedes that the initial stop of his vehicle was valid because Deputy Smith observed Hogan driving without a seatbelt (Pet'r's Br. at 8). The observed violation of Wis. Stat. § 347.48(2m) was undoubtedly sufficient to stop Hogan's vehicle. *See Whren v. United States*, 517 U.S. 806, 817-18 (1996) ("'[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations,' which afford the 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained") (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55, 659 (1979)).

When an officer is faced with "'additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense [ ] separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun."' *State v. Colstad*, 2003 WI App 25, ¶ 19, 260 Wis. 2d 406, 659 N.W.2d 394 (quoting *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999)). "The validity of the extension is tested

in the same manner, and under the same criteria, as the initial stop." *Id*. The investigatory detention must be based upon a reasonable suspicion that criminal activity is afoot. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634 (citing *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990)). In evaluating whether an extension of a stop is supported by reasonable suspicion, the court considers whether "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the extension. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The court determines reasonableness based on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶ 13. This Court does not restrict its reasonableness analysis to the factors the officer testified to having subjectively weighed in his decision to act. *State v. McGill*, 2000 WI 38, ¶ 24, 234 Wis. 2d 560, 609 N.W.2d 795. In determining whether the officer acted properly, this Court looks to any fact in the record that was known to the officer at the time he acted and that is supported by his testimony. *Id*.

The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. *Post*, 301 Wis. 2d 1, ¶ 13. The officer need not observe any unlawful behavior. *State v. Waldner*, 206 Wis. 2d 51, 56-57, 556 N.W.2d 681 (1996). Rather, "[t]he law allows a police officer to [investigate] based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." *Id*. at 57. An officer may extend a stop with a reasonable inference of unlawful conduct, even if other innocent inferences can be drawn. *Id.* at 60.

B. The facts known to Deputy Smith satisfy the objective standard for reasonable suspicion of drugged driving.

Deputy Smith encountered Hogan on a sunny day in May (21:2, 11) (Pet-Ap. 8, 17). As noted above, he stopped Hogan's vehicle

when he observed that Hogan and Hogan's passenger were not wearing seatbelts (21:2) (Pet-Ap. 8).[15] When Deputy Smith spoke with Hogan, Hogan was immediately informed that he was stopped for a seatbelt violation (21:3; 8:DVD at 01:00-30) (Pet-Ap. 9). Deputy Smith then noticed that Hogan was nervous and had constricted pupils (21:2-3) (Pet-Ap. 8-9). In fact, Hogan appeared very nervous, and his upper body was shaking (21:3-4) (Pet-Ap. 9-10). Based on those observations, Deputy Smith began to suspect that Hogan had used drugs (*id.*).

Deputy Smith called for backup for officer safety reasons because he was unfamiliar with Hogan and knew that an officer would be nearby (21:4) (Pet-Ap. 10). After radioing for backup, Deputy Smith began the process of issuing Hogan a citation for the seatbelt violation (*id.*). Before the citation was complete, the backup officer arrived (8:DVD at 05:00-30). When the backup officer arrived, he informed Deputy Smith that the department had received tips that Hogan was a "shake and bake methamphetamine cooker" and that Hogan had "961 issues" (21:4; 8:DVD at 05:30-06:30) (Pet-Ap. 10).

Deputy Smith then decided to see if a K9 unit was available, and continued to work on the citations (8:DVD at 06:30-10:30).[16] With no response from the K9 unit, Deputy Smith decided to ask Hogan to perform field sobriety tests (8:DVD 10:30-11:00).[17] When both citations were complete, Deputy Smith re-approached Hogan's vehicle (21:4) (Pet-Ap. 10).[18]

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[15] The passenger actually was wearing her seatbelt, but improperly (21:3) (Pet-Ap. 9).

[16] The passenger was also being issued a citation for improperly wearing her seatbelt (8:DVD at 07:00-30).

[17] Ultimately the K9 unit is not available (8:DVD at 11:00-30).

[18] Completing the two citations took approximately eleven minutes. Contrary to the implication in Hogan's brief, the officers were not sitting in the squad discussing if they could get Hogan's consent to search the vehicle and prolonging the stop (Pet'r's Br. at 3). While the backup officer

Deputy Smith asked Hogan to exit the vehicle, returned all of Hogan's documentation, and explained the citation (8:DVD at 14:30-15:30). Deputy Smith then said, "question for you" and explained that constricted pupils and nervousness are sometimes indicators of impaired driving (8:DVD at 15:00-16:00). Hogan admitted that he used Adderall, but denied being nervous (8:DVD at 15:30-16:00).

At that point in time, it was reasonable for Deputy Smith to suspect drugged driving. First, Hogan was unusually nervous for a routine traffic stop. Hogan's nervousness was unusual because there was no mystery about this stop. Deputy Smith was upfront with Hogan and immediately told Hogan that he was only being stopped for a seatbelt violation. In addition, the conditions of the stop would not lead to unusual nervousness. Deputy Smith was friendly, the stop occurred in broad daylight, and there were other people in the vicinity. "[U]nusual nervousness is a legitimate factor to consider in evaluating the totality of the circumstances." *State v. Kyles*, 2004 WI 15, ¶ 54, 269 Wis. 2d 1, 675 N.W.2d 449 (citing *McGill*, 234 Wis. 2d 560, ¶ 29; *State v. Morgan*, 197 Wis. 2d 200, 215, 539 N.W.2d 887 (1995)).

Second, Hogan's upper body was shaking. Shaking (or body tremors) is a sign of drug use. *See, e.g., Drugs and Human Performance Fact Sheets*, at 23 (R-Ap. 136). Third, Hogan's pupils were constricted, also a sign of drug use. *See*, *e.g.*, *id.* at 77 (R-Ap. 142). Fourth, Hogan was suspected to be a methamphetamine cook and was known to have "961 issues." And finally, Hogan attempted to explain away Deputy Smith's observations by claiming that Hogan had ingested Adderall. It is not uncommon for someone to claim that they ingested a legally prescribed substance to cover-up for the ingestion of an illicit one. *See*, *e.g.*, *People v. Conscorn*, 727 N.W.2d 399, 400 (Mich. Ct. App. 2006) (defendant alleged that methamphetamine found in his blood was due to Adderall and Avapro). Under the

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did wonder if Hogan would give consent to search after the K9 was determined to be unavailable (8:DVD at 11:00-30), the majority of the conversation between the officers was unrelated to Hogan (8:DVD at 07:30-10:30).

totality of the circumstances, these facts were sufficient to give rise to reasonable suspicion of drugged driving.

Deputy Smith did not need to observe any improper driving in order to suspect that Hogan had a restricted controlled substance in his blood. *See, e.g., State v. Lange*, 2009 WI 49, ¶ 37, 317 Wis. 2d 383, 766 N.W.2d 551. *See also, State v. Powers*, 2004 WI App 143, ¶ 12 n.2, 275 Wis. 2d 456, 685 N.W.2d 869 ("improper driving is not an element of an OWI offense"). Nor, contrary to Hogan's assertion,[19] did Deputy Smith need to suspect intoxication or impairment, because neither is an element of drugged driving. Further, similar to drunken driving cases, Deputy Smith was not required to ignore the "tremendous potential danger" presented by a drugged driver; s*ee State v. Rutzinski*, 2001 WI 22, ¶¶ 35-36, 241 Wis. 2d 729, 623 N.W.2d 516, especially since there was a young child in the vehicle (21:6) (Pet-Ap. 12). Deputy Smith was also not required to be certain that Hogan had committed drugged driving, or even that Hogan had probably committed drugged driving, in order to investigate. *See*, *e.g.*, *Alabama v. White*, 496 U.S. 325, 330 (1990) (reasonable suspicion is an even less demanding standard than probable cause); *State v. Guzy*, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987) (reasonable suspicion must be sufficiently flexible to allow officers the opportunity to temporarily freeze the situation when failure to act will result in disappearance of potential suspect).

The fact that there may be innocent explanations for Hogan's behavior does not negate reasonable suspicion. *Waldner*, 206 Wis. 2d at 60. Notwithstanding the existence of innocent inferences, Deputy Smith could still objectively and reasonably infer that Hogan was committing drugged driving based on the totality of the circumstances, and therefore, Deputy Smith had the right to

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[19] Hogan relies on *Colstad,* 260 Wis. 2d 406, ¶ 19, for the proposition that Deputy Smith had to suspect that Hogan was under the influence of an intoxicant (Pet'r's Br. at 9). *Colstad* is a drunken driving case. *Colstad*, 260 Wis. 2d 406, ¶ 6. Unlike drunken driving, drugged driving does not have an under the influence element. Wis. Stat. § 346.63(1)(am).

temporarily detain Hogan to resolve any ambiguity. *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729.

The circuit court concluded otherwise because it found Deputy Smith's assessment of Hogan's pupil size to be a "guess" and unsupported by specific training (22:2) (Pet-Ap. 80). Deputy Smith testified that his experience led him to the conclusion that Hogan's constricted pupils were a sign of drug use (21:3) (Pet-Ap. 9). He admitted he was not a drug recognition expert, but knew that some drug use resulted in constricted pupils (21:11-12) (Pet-Ap. 17-18). He observed Hogan's pupils to be about three millimeters and knew a pupil should be four to five millimeters in normal conditions (21:12) (Pet-Ap. 18). Deputy Smith then testified he used pupilometers in the past, but could not remember being specifically trained on their use during field sobriety training (21:22-23) (Pet-Ap. 28-29).[20] Based on his testimony and demeanor, the court refused to consider Deputy Smith's assessment of Hogan's pupil size (22:2-3) (Pet-Ap. 80-81). The circuit court then relied on *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, and *Betow,* 226 Wis. 2d 90, to conclude that nervousness and shaking was not enough to extend the stop.

The State acknowledges that the circuit court's credibility determination is virtually unassailable. *State v. Oswald*, 2000 WI App 3, ¶ 47, 232 Wis. 2d 103, 606 N.W.2d 238. However, Deputy Smith's observation of Hogan's pupils should not be completely disregarded. The circuit court concluded that Deputy Smith was not sure what constricted pupils meant, and the court was not convinced that a someone could detect a difference in pupil size of two millimeters with the naked eye (22:2) (Pet-Ap. 80). The court did not conclude that Deputy Smith could not detect pupil size; it was only dubious about it (22:2) (Pet-Ap. 80). Therefore, instead of ignoring the observation completely, it should not be given weight in and of itself.

[20] A pupilometer is attached for the court's reference (R-Ap. 151).

Further, this case is distinguishable from both *Gammons* and *Betow*. In *Gammons*, the officer stopped the vehicle because he could not see a rear license plate. *Gammons*, 241 Wis. 2d 296, ¶ 2. Once the officer approached the vehicle, he saw that the vehicle had a temporary registration sticker. *Id.* Nonetheless, the officer asked for identification of all the occupants and then ran a license check and warrant check on the driver and passengers. *Id.* After completing the check and alleviating the officer's suspicions about the plates, the officer asked for consent to search the vehicle. *Id.* ¶ 3. When consent was denied, the officer threatened to have a K9 sniff the vehicle. *Id*. ¶ 3. The *Gammons* court concluded that once the officer had completed the investigation for the traffic stop and consent to search was denied, there was no basis to continue the detention. *Id*. ¶¶ 24-25.

In *Betow*, Betow was stopped for speeding. *Betow*, 226 Wis. 2d at 92. Betow appeared nervous, and his wallet had a picture of a mushroom on it. *Id.* After running a check on the vehicle and the driver, the officer focused his inquiry on drug activity because he was suspicious of the picture of a mushroom on Betow's wallet. *Id*. The officer asked Betow about the wallet and then asked Betow for permission to search his car, which Betow refused. *Id.* Nevertheless, the officer continued to detain Betow and conducted a K9 sniff. *Id*. at 92-93. The court held that the K9 sniff was impermissible because it unreasonably prolonged the traffic stop and it was not supported by reasonable suspicion. *Id*. at 95-98.

Unlike the case here, in *Betow* and *Gammons,* both defendants initially rebuffed the officers' requests to search. There was also no unusual nervousness. *See Betow,* 226 Wis. 2d at 96; *Gammons*, 241 Wis. 2d 296, ¶ 23. And the court in *Betow,* expressly acknowledged that unusual nervousness can form part of the basis for reasonable suspicion. *Betow,* 226 Wis. 2d at 96. Further, unlike *Betow* and *Gammons,* here Hogan was shaking, a physical indictor of drug use. Hogan was also suspected of being a "shake and bake"

cooker, a method known for cooking for personal use.[21] Deputy Smith may not have been 100% confident that Hogan had committed the crime of drugged driving, but based on his twelve and half years of experience, he had enough to reasonably suspect as much (21:2) (Pet-Ap. 8). Therefore, he could lawfully extend the scope of the initial stop to investigate. *Colstad*, 260 Wis. 2d 406, ¶ 19.

C. The investigation into drugged driving was short, reasonable, and only included field sobriety testing.

An investigatory detention must be supported by reasonable suspicion, must be temporary, and must last no longer than is necessary to effectuate the purpose of the detention. *Florida v. Royer*, 460 U.S. 491, 500 (1983). A brief investigatory detention based on reasonable suspicion is lawful when the length and scope of the detention are reasonable under the totality of the circumstances. *State v. Wilkens*, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (Ct. App. 1990). "A hard and fast time limit rule has been rejected." *Wilkens*, 159 Wis. 2d at 626 (citing *United States v. Place*, 462 U.S. 696, 709 (1983)). Instead, the court considers "'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.'" *Id.* (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

Here, Deputy Smith immediately began to administer the field sobriety tests after Hogan agreed to perform them (8:DVD at 16:30). The tests lasted approximately eight minutes (8:DVD at 16:30-24:30). The tests revealed that Hogan was not impaired, and as soon as Hogan completed the last test, Deputy Smith told Hogan that he was free to leave (21:5) (Pet-Ap. 11). In other words, immediately

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[21] "The DEA also acknowledged the advent of small capacity laboratories, referred to as 'shake-and-bake' or 'one-pot', allowing for personal quantity production using legal quantities of purchased pseudoephedrine tablets." Albert W. Brzecko, et al, *The Advent of a New Pseudoephedrine Product to Combat Methamphetamine Abuse*, 39(5) Am. J. Drug & Alcohol Abuse 285 (2013) (R-Ap. 145). Available at: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3793278/

after Deputy Smith suspicions were expelled, he terminated the detention. Therefore, under the totality of the circumstances, this short detention was reasonable and no longer than necessary.

III. Hogan's consent to search his vehicle was wholly valid because he was not seized when he consented to the search.

There is no dispute that the temporary detention of Hogan during the traffic stop was a seizure within the meaning of the Fourth Amendment. There is also no dispute that Hogan provided consent to search his vehicle. This issue concerns whether the traffic stop was complete but not terminated, thereby invalidating any voluntary consent to search. *Williams*, 255 Wis. 2d 1, ¶ 4. The Fourth Amendment does not prohibit asking for consent to search so long as a reasonable person would feel free to disregard the request. *State v. Griffith*, 2000 WI 72, ¶ 39, 236 Wis. 2d 48, 613 N.W.2d 72. S*ee also, Florida v. Bostick*, 501 U.S. 429, 434-35 (1991). Hogan argues that he would not have felt free to disregard Deputy's Smith request to search because he was constructively seized at the time (Pet'r's Br. at 10, 14). If that was the case, Hogan's consent to search was not valid. *See Williams*, 255 Wis. 2d 1, ¶¶ 19-20; *State v. Luebeck*, 2006 WI App 87, ¶ 14, 292 Wis. 2d 748, 715 N.W.2d 639; *State v. Jones*, 2005 WI App 26, ¶ 9, 278 Wis. 2d 774, 693 N.W.2d 104 (consent to search is valid unless given while illegally seized). However, contrary to Hogan's assertion, he was not seized when he consented to the search because a reasonable person would have felt free to decline Deputy Smith's request and leave.

A. Hogan's subsequent encounter with Deputy Smith was not a seizure if a reasonable person would have felt free to leave.

Determining if a person was seized is governed by *United States v. Mendenhall*, 446 U.S. 544 (1980). *Young*, 294 Wis. 2d 1, ¶ 37.[22]

[22] *Mendenhall* is the appropriate test for cases in which there was a submission to authority, i.e., when flight was not a factor. *Young*, 294 Wis. 2d 1, ¶ 37.

In *Mendenhall*, the Supreme Court found "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554.

> Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. (citing *Terry*, 392 U.S. at 19 n.16; *Dunaway v. New York*, 442 U.S. 200, 207 & n.6 (1979)). "[O]therwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Mendenhall*, 446 U.S. at 555. "If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure." *Young*, 294 Wis. 2d 1, ¶ 37.

"'[M]ost citizens will respond to a police request,' [but] 'the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.'" *Young*, 294 Wis. 2d 1, ¶ 37 (quoting *Williams*, 255 Wis. 2d 1, ¶ 23). The *Mendenhall* test is objective. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). "The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Id.* (citation omitted). The objective "reasonable person" test presupposes a reasonable, innocent person. *Bostick*, 501 U.S. at 438. Doing so "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Chesternut*, 486 U.S. at 574. The test is "designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Id.* at 573.

B. A reasonable person would have felt free to leave, and therefore, Hogan was not seized when he consented to the search of his vehicle.

The circuit court concluded that Hogan was free to leave any time after Deputy Smith terminated contact, but Hogan chose to speak with Deputy Smith and voluntarily consented to the search of his vehicle (21:47-48; 22:1) (Pet-Ap. 53-54, 79). The court of appeals agreed. *Hogan*, slip op. ¶¶ 10-12 (R-Ap. 104-05). Everything about the encounter supports the conclusion that Hogan was not seized when he consented to the search. The encounter occurred outside on a sunny day and Deputy Smith used a non-threatening, friendly tone. *Hogan*, slip op. ¶ 12 (R-Ap. 104-05). There was no new show of authority.[23] When Deputy Smith re-approached Hogan, he did so alone and the back-up officer remained at the squad until Hogan exited his vehicle (8:DVD at 24:30-25:00). As the court of appeals concluded, based on the totality of the circumstances, "[t]here was nothing about the questioning or any other circumstances of the encounter that would have led a reasonable person to believe he or she was not free to leave at that point." *Hogan*, slip op. ¶ 12 (R-Ap. 104-05).

The court of appeals was guided in *Williams*, in which it was determined that the seizure ended when the officer issued the warning, returned Williams' license, and communicated that Williams was free to leave. *Williams*, 255 Wis. 2d 1, ¶¶ 29-35. The officer in *Williams* took only a couple of steps away from Williams' vehicle before reengaging in a non-threatening manner. *Id*. ¶ 12. And even though the officer re-approached Williams almost immediately after the traffic stop had ended, that action did not amount to a continuation of the initial seizure. *Id.* ¶¶ 29-35. Rather, the court concluded that the officer had initiated a new, consensual encounter. *Id*.

[23] While the squad lights were still activated, that was because Deputy Smith had not yet re-entered his squad car (8:DVD at 24:30-25:00).

Hogan asserts that his case differs from *Williams* because he was a probationer at the time of the stop, and because Deputy Smith impermissibly extended the scope of the stop when he had Hogan perform field sobriety tests (Pet'r's Br. at 12). This Court should not be persuaded that Hogan's situation differs from *Williams* in any way that requires distinction. First, Hogan's status as a probationer is irrelevant. The free to leave standard presupposes a reasonable innocent person and is objective, not subjective. *Bostick*, 501 U.S. at 438. As the *Chesternut* court explained, "[w]hile the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." *Chesternut*, 486 U.S. at 573-74 (emphasis added). Therefore it does not matter if Hogan personally believed that he was free to leave. Likewise, it does not matter if Hogan had the ability to determine whether Deputy Smith had lawfully asked Hogan to perform field sobriety tests.[24] The standard is whether a reasonable person would have felt free to leave at the time Deputy Smith re-approached Hogan and asked if he could speak with him again. *Williams,* 255 Wis. 2d 1, ¶ 28.

Second, the extension of the stop does not distinguish this case from *Williams*. Hogan asserts that, "[t]he *Williams* court went to pains to point out that the stop in that case was *not* one where the officer impermissibly exceeded the scope of or prolonged the initial seizure in violation of the Fourth Amendment. *Id.* at n. 8." (Pet'r's Br. at 13). Hogan misunderstands the point of footnote 8 in the *Williams* opinion, which distinguishes cases in which officers asked questions not related to the scope of the traffic stop *before* the stop had concluded. *Williams*, 255 Wis. 2d 1, ¶ 27 & n.8. Like *Williams*, this case involves an officer's request to search a vehicle after the conclusion of the traffic stop. *Williams*, 255 Wis. 2d 1, ¶ 27.

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[24] If the State is following Hogan's logic, Hogan asserts that in assessing whether a person would feel free to leave, the court should consider whether the person was able to determine if all prior contact with the officer was lawful (Pet'r's Br. at 15-16).

This case is very similar to *Williams*, and this Court should conclude that like Williams, Hogan voluntarily consented to the search of his vehicle. *Williams* illustrates that the relatively brief disengagement, 16 seconds, is sufficient to create a new consensual encounter. *Williams*, 255 Wis. 2d 1, ¶¶ 29-35. As the circuit court explained, "[i]t's a reasonably brief period of time, but it is a complete disjoinder . . . Deputy Smith completely terminates the contact. That is significant" (22:4) (Pet-Ap. 82). The fact that Deputy Smith returned all of Hogan's documentation is also significant to the inquiry whether a reasonable person would feel free to leave. *See Luebeck*, 292 Wis. 2d 748, ¶ 16.

All of Hogan's documentation was returned (8:DVD at 14:00-15:00). Hogan was told, unequivocally, that he was free to leave (21:5; 8:DVD at 24:30-25:00) (Pet-Ap. 11). There was a complete termination of contact between Hogan and Deputy Smith (22:4) (Pet-Ap. 82). Hogan returned to his vehicle, got into the front seat, and shut the door (8:DVD at 24:41-49). When Deputy Smith re-approached Hogan, he did so in a non-threatening manner and asked to speak with Hogan in a non-threatening voice (22:4-5) (Pet-Ap. 82-83). Hogan agreed (22:5) (Pet-Ap. 83). Deputy Smith asked if he could search the vehicle (*id*). Hogan gave clear verbal consent to do so (21:48; 22:5) (Pet-Ap. 54, 83).

Like in *Williams,* the seizure ended when the officer completely terminated contact with Hogan and told him he was free to leave. *Williams,* 255 Wis. 2d 1, ¶ 29. Deputy Smith "did nothing, verbally or physically, to compel [Hogan] to stay. That [Hogan] stayed, and answered the questions, and gave consent to search, is not constitutionally suspect, and does not give rise to an inference that he must have been compelled to do so." *Williams,* 255 Wis. 2d 1, ¶ 29 (citing *Mendenhall*, 446 U.S. at 555-56). When Deputy Smith re-approached and asked Hogan if he could speak to him, that created a new contact, a consensual encounter. *Williams*, 255 Wis. 2d 1, ¶ 35. A reasonable person would have felt free to disregard Deputy Smith's request and leave. Hogan did not do so, and instead affirmatively consented to the search of his vehicle. The search, a

valid consent search, does not offend the Fourth Amendment and Hogan's suppression motion was properly denied.[25]

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[25] In the court of appeals, the State noted that Hogan appeared to concede that if he was not seized at the time he gave consent, that his consent to search was voluntarily given (State's Ct. App. Br. at 8). The same tactic was taken by the defendant in *Williams*, 255 Wis. 2d 1, ¶ 23 n.7. Indeed, "a consensual encounter is simply the *voluntary cooperation* of a private citizen in response to non-coercive questioning by a law enforcement officer." *United States v. Gigley*, 213 F.3d 509, 514 (10th Cir. 2000) (emphasis added). The court of appeals concluded that there was no argument that consent was involuntary absent the seizure. *Hogan*, slip op. ¶ 20 (R-Ap. 108). There is still no explicit argument by Hogan that his consent was involuntary absent the seizure. However, it will be addressed briefly since the State bears the burden of proving voluntary consent. *State v. Artic*, 2010 WI 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430 (citations omitted).

The totality of the circumstances is considered in determining whether Hogan voluntarily consented to the search. *See Artic*, 327 Wis. 2d 392, ¶ 33 (enumerating a non-exclusive list); *Phillips*, 218 Wis. 2d at 198. Here, Deputy Smith used no deception, trickery, or misrepresentation. Deputy Smith was upfront with Hogan about the purpose of the stop, the reasons for the field sobriety tests, and the objectives of the search (21:3, 5; 8:DVD at 01:00-30; 15:00-30; 25:00-30) (Pet-Ap. 9, 11). Deputy Smith did not threaten, physically intimidate, or attempted to punish Hogan in any way. The conditions surrounding the search were congenial, non-threatening, and co-operative. Deputy Smith was friendly, the stop occurred in broad daylight, and there were other people in the vicinity (21:2; 22:5) (Pet-Ap. 8, 83); *(see generally* 8:DVD). Hogan was not alone, he was not isolated, and he was free to leave at any time. He responded co-operatively and without hesitation. He did not appear to be fearful or intimidated. Deputy Smith did not tell Hogan he was free to withhold his consent to search; however, Deputy Smith did tell Hogan, after Hogan initially consented, that Deputy Smith "was just asking" (8:DVD at 25:30-26:00). In doing so, Deputy Smith gave Hogan the opportunity to reconsider. The fact that Deputy Smith gave Hogan the opportunity to reconsider favors the conclusion that consent was voluntarily given. *See Williams*, 255 Wis. 2d 1, ¶ 23 n.7 (Wisconsin has refused to adopt a requirement that officers must advise a person of a right to refuse consent.) (collecting cases of the Supreme Court of the United States). Under the totality of the circumstances, Hogan voluntarily consented to the search of his vehicle.

IV. Even if this Court finds the traffic stop was unlawfully extended, there is no basis to exclude the evidence discovered after Hogan voluntarily consented to the search of his vehicle.

If this Court was to conclude that Deputy Smith conducted field sobriety testing without the requisite cause and impermissibly extended the scope of the initial seizure, "the question still remains whether evidence sought to be suppressed was obtained by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *State v. Artic*, 2010 WI 83, ¶ 64, 327 Wis. 2d 392, 786 N.W.2d 430 (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)) (quotation marks omitted).

The first question is whether Deputy Smith obtained evidence from an exploitation of an illegality. This requires a link between Deputy Smith's conduct and the discovery of the challenged evidence. *Wong Sun*, 371 U.S. at 487-88. Attenuation is a distinct inquiry only performed after a finding that the evidence came to light at the exploitation of an illegality. *New York v. Harris,* 495 U.S. 14, 19 (1990). "The object of attenuation analysis is to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Artic*, 327 Wis. 2d 392, ¶ 65 (quotation omitted).

A. The search of Hogan's vehicle did not result from the exploitation of the extension of the traffic stop.

Wong Sun explains that there is no automatic rule requiring the exclusion of evidence even if the acquisition of the evidence was immediately preceded by an illegality that put the defendant in the control of the police. In *Wong Sun*, the Court said that the exclusionary rule "has traditionally barred from trial" evidence "obtained either *during or as a direct result*" of an illegality. *Wong Sun*, 371 U.S. at 485 (emphasis added). Neither is applicable here.

Hogan was not in the presence of Deputy Smith due to an illegality. Hogan came to be in the presence of Deputy Smith due to a lawful traffic stop. That traffic stop was extended to investigate

drugged driving, but that investigation had ended and Hogan was released. Deputy Smith then initiated a consensual encounter with Hogan. It was the actions during that consensual encounter that Hogan complains of. The consensual encounter was not a but-for result of the extension of the traffic stop. It was a but-for result of the initial traffic stop. If the extension never happened, Deputy Smith would have been in the same exact position to create the consensual encounter with Hogan.

Like in *Murray*, but for different reasons, if the court invokes the exclusionary rule in this case it would "put the police . . . not in the *same* position they would have occupied if no violation occurred, but in a *worse* one." *Murray v. United States*, *487* U.S. 533, 541 (1988). The difference between *Murray* and the case here is that *Murray* concerned the application of the independent source doctrine; however the principle is the same. If the illegality did not contribute to the position that Deputy Smith was in to lawfully obtain the evidence, then the evidence was not a result of the exploitation of that illegality. But-for causality is a necessary condition for suppression, *Hudson v. Michigan*, 547 U.S. 586, 592 (2006), and it is not present in this case. Therefore, even if the traffic stop was unlawfully extended there is no basis to suppress the physical evidence found after Hogan voluntarily consented to the search of his vehicle.

B. Even if this Court concludes that Deputy Smith exploited the extension of the stop to gain Hogan's consent, all of the attenuation factors favor the conclusion that Hogan's consent was not tainted by Deputy Smith's conduct.

"[B]ut-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson*, 547 U.S. at 592. "[B]ut-for cause, or 'causation in the logical sense alone,' can be too attenuated to justify exclusion." *Id* (quoting *United States v. Ceccolini*, 435 U.S. 268, 274 (1978)). To determine whether causation is too attenuated to justify exclusion, the courts look to three factors: (1) temporal proximity; (2) presence of intervening circumstances; and (3) the

purpose and flagrancy of the official misconduct. *Artic,* 327 Wis. 2d 392, ¶ 66.

First, looking to the issue of temporal proximity, the court of appeals correctly concluded that while there was only 16 seconds between the end of the traffic stop and the new encounter, that is not dispositive. *Hogan*, slip op. ¶ 15 (R-Ap. 106). Regardless of the close temporal proximity, the non-custodial and non-threatening conditions of the encounter support the conclusion that any taint created by the extension of the traffic stop had dissipated. *See Artic*, 327 Wis. 2d 392, ¶ 73; *State v. Richter*, 2000 WI 58, ¶ 46, 235 Wis. 2d 524, 612 N.W.2d 29 (citing *Phillips*, 218 Wis. 2d at 206). The traffic stop lasted only 24 minutes and the entire interaction occurred outside during the day. *Hogan*, slip op. ¶ 16 (R-Ap. 106). Hogan was clearly told he was free to leave and Deputy Smith did not use threatening or authoritative tones when asking for consent to search. After consent was given, Deputy Smith allowed Hogan to return to his vehicle before it was searched to retrieve items, and thanked Hogan for his co-operation (8:DVD at 26:30-27:30). The totality of the circumstances mitigated any impact of the relatively short disengagement. *Artic*, 327 Wis. 2d 392, ¶ 73.

Second, there was an intervening circumstance in this case. "This factor concerns whether the defendant acted of free will unaffected by the initial illegality." *Artic*, 327 Wis. 2d 392, ¶ 79 (quotation omitted). The court of appeals correctly relied on *Phillips*, 218 Wis. 2d at 208-09, to conclude that Deputy Smith informing Hogan that he was free to leave, was sufficient. *Hogan*, slip op. ¶ 17 (R-Ap. 106-07). This is not a case in which constitutionally impressible conduct pervades the entire stop. Deputy Smith did not utilize the impermissible extension of the stop in any manner. It was *completely* disjoined from the request to search the vehicle (22:3-4) (Pet-Ap. 81-82). Hogan was unequivocally told that he was free to leave. Hogan consented to the new contact (22:5) (Pet-Ap. 83). His consent was an act of free will. Hogan was free to leave and to otherwise refuse any additional interaction with Deputy Smith. He chose not to do so.

Third, in looking at the entire context of the stop, the misconduct in this case was not purposeful or flagrant. "This factor is 'particularly' important because it is tied to the rationale of the exclusionary rule itself." *Phillips*, 218 Wis. 2d at 209. Deputy Smith lawfully stopped Hogan for a seatbelt violation (22:6) (Pet-Ap. 84). In interacting with Hogan, Deputy Smith suspected Hogan had taken illicit drugs and requested that Hogan perform field sobriety tests (21:3-4) (Pet-Ap. 109-10). Hogan agreed to perform the tests (*id*.). While the extension was found to be unreasonable, and therefore unlawful under the Fourth Amendment, it is not the type of flagrant misconduct that warrants suppression (22:8) (Pet-Ap. 86). *See Herring v. United States*, 555 U.S. 135, 141 (2009) ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." (citations omitted)). Respectfully, Deputy Smith properly disengaged from Hogan after the field sobriety tests revealed Hogan was not impaired. While Deputy Smith may have been incorrect in his assessment of reasonable suspicion for field sobriety testing, Deputy Smith did not prolong the stop any further. The court of appeals correctly concluded that there is no evidence in this case that Deputy Smith acted purposefully to unlawfully extend the stop, and no evidence that the stop was extended to pressure Hogan into consenting to a search of his vehicle. *Hogan*, slip op. ¶ 18 (R-Ap. 107).

Because Hogan was not seized at the time he consented to the search of his vehicle and all three factors in the attenuation analysis support concluding that Hogan's consent to search was not tainted, the court of appeals correctly concluded that the circuit court properly denied Hogan's motion to suppress.

C. This Court should reject Hogan's request to create a new test for attenuation specific to motorists.

Hogan disagrees that the exclusionary rule should focus on the purpose and flagrancy of the misconduct in question (Pet'r's Br. at 20-21). He urges that the court adopt a rule that presumes that all consent searches that occur after an unlawful extension of a traffic stop are involuntarily and the evidence inadmissible unless the State

can prove that the prior detention did not factor into the motorist decision to consent to the search (Pet'r's Br. at 21). He purports that his test melds *Williams* and *Phillips* and proposes the elimination of the purposeful and flagrant factor from the *Phillips* analysis. (Pet'r's Br. at 22). This Court should decline to adopt Hogan's proposed test. It is unnecessary and directly in conflict with the purpose of the exclusionary rule.

First, there is no reason to "meld" *Williams* and *Phillips.* Those cases resolve different issues. *Williams* concerns whether a motorist is seized, a constitutional question. *Williams*, 255 Wis. 2d 1, ¶ 1. The attenuation analysis in *Phillips*, concerns the application of a judicially created remedy for Fourth Amendment violations. *See*, *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W. 2d 97 (the exclusionary rule is a judicially created remedy, not a right). Because the cases address separate issues there is no reason to combine them. It would only result in confusing already complex areas of the law.

Second, as to Hogan's assertion that evidence should be presumed inadmissible, the law already presumes evidence obtained by a consent search inadmissible unless consent is proven voluntary. *See Artic*, 327 Wis. 2d 392, ¶¶ 29-32. There is no need to create a new standard specific to motorists. Third, the application of the exclusionary rule should remain restricted to cases in which the remedial objectives of the rule are best served. *See Dearborn*, 327 Wis. 2d 252, ¶ 35, (citing *Herring*, 555 U.S. at 140-41; *Arizona v. Evans*, 514 U.S. 1, 10-11 (1995)). Not all Fourth Amendment violations should result in exclusion of evidence. *Dearborn*, 327 Wis. 2d 252, ¶ 35. (citing *Herring*, 555 U.S. at 140-41). Exclusion is not the default, it is the last resort. *Id.*

It is well settled that "[t]he application of the exclusionary rule should focus on its efficacy in deterring future Fourth Amendment violations." *Id*. Hogan asserts that if this Court removed the purposeful and flagrant misconduct element from its analysis of whether evidence should be suppressed, officers would be even more diligent (Pet'r's Br. at 20, 22). While that may be true, "[b]roadly defined, the exclusionary rule is not applied when the

officers conducting an illegal search 'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.'" *Dearborn*, 327 Wis. 2d 252, ¶ 33 (citing *United States v. Leon*, 468 U.S. 897, 918 (1984)). Hogan's proposition is asking this Court to depart from its own precedent and decades of United States Supreme Court precedent, all because it is the only way that he can establish that exclusion is proper in this case.

> "To trigger the exclusionary rule, police conduct must be *sufficiently deliberate* that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter *deliberate, reckless, or grossly negligent conduct,* or in some circumstances recurring or systemic negligence."

Id. ¶ 36 (quoting *Herring*, 555 U.S. at 144) (emphasis added). Not only is Hogan's proposal 100% in conflict with the purpose of the exclusionary rule, if this Court adopts Hogan's proposed test, it will undoubtedly result in a flood of alleged unlawful traffic stop extensions seeking the suppression of evidence completely unrelated to the unlawful conduct. This flood would occur because the "[t]he cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card." *Hudson*, 547 U.S. at 595.

In addition to advocating for a new rule, Hogan suggests that this Court should adopt sub-factors to be applied in the intervening circumstances factor of the *Phillips*/*Bermudez* test (Pet'r's Br. at 21). Hogan invites this Court to conclude that if an unlawful extension of a traffic stop occurs, the officer should either be required to let the motorist leave, or required to clearly communicate to the motorist that the motorist can disregard any further questions or requests before a new consensual encounter can be formed (Pet'r's Br. at 22). This Court should also decline that invitation.

First, allowing the motorist to leave before recreating a new consensual encounter is simply impractical. For example, the motorist could be from a different city, state, or even country. Even if the motorist resides in the area of the stop, the officer may have no

means of contacting the motorist after the motorist leaves. Second, there has been a clear and strong refusal to adopt a requirement that officers must advise a person of a right to refuse consent. *Williams*, 255 Wis. 2d 1, ¶ 23 n.7 (citing *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218, 232-33 (1973); *United States v. Drayton*, 536 U.S. 194 (2002)). Whether a person is informed they are free to decline a request to search is a factor in evaluating the voluntariness of the consent, but it has never been and should not be determinative. *Drayton*, 536 U.S. at 206-07. It is not determinative because voluntariness is evaluated under the totality of the circumstances. *Id.* Hogan has not provided a sufficient reason to depart from this well settled and consistently reaffirmed principle. *See id.* at 207 ("the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning") (citing *Robinette*, 519 U.S. at 39-40; *Bustamonte*, 412 U.S. at 227). "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *Id.*

In sum, there is no need for a separate attenuation test to be applied to motorist. Adopting Hogan's proposed test is unnecessary, contrary to clearly established law, and would result in an unnecessary flood of complex litigation. Rather than adopting a new test, this Court should apply clearly established law to the facts of this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals decision affirming the judgment of conviction and order denying suppression.

Dated this 15th day of January, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,548 words.

Dated this 15th day of January, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of January, 2015.

_____

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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2013-000430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PATRICK I. HOGAN,

Defendant-Appellant-Petitioner.

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I. THE TRIAL COURT JUDGE'S RULING ON DEFENDANT-APPELLANT PETITIONER PATRICK HOGAN'S MOTION TO SUPPRESS LEFT LITTLE ROOM FOR INTERPRETATION AS TO DEPUTY SMITH'S LACK OF REASONABLE SUSPICION

The State argues that the trial court judge got it wrong in deciding Deputy Smith lacked reasonable suspicion to extend the traffic stop into a criminal investigation, focusing its argument on the possibility that Hogan may have been driving with a detectable amount of a restricted controlled substance in his blood pursuant to W.S.A. §346.63(1)(am). Resp't's Br. at 8-20. The trial court judge's ruling on this issue is unusually clear and articulate in addressing why the trial court ruled the way it did and a fair reading of ***State v. Betow*** and ***State v. Gammons*** ought not disturb the trial court's ruling.

A. **Pupils**

Deputy Smith claimed Hogan had restricted pupils, perhaps to 3mm at the time of the stop. (21:12, D-App. 000018) He believed his training had taught him that in normal light the normal pupil size for an adult male is 4-5mm. *Id.* He admitted if it was sunny the pupils would be restricted and acknowledged it was a sunny day. *Id.* Deputy Smith thought he remembered that one indication of drug use was restricted pupils but acknowledged he wasn't a DRE and didn't know what methamphetamine did to pupils. *Id.*

In his ruling, the trial court judge called the pupil restriction issue "troublesome," saying:

> "Deputy Smith's demeanor when he describes the pupil issue has the flavor of a guess. He concedes that he's not a drug detection expert. When asked what pupil restriction means, he offers this almost off the cuff response that well it can mean cocaine.
>
> It is clear from his demeanor, from the timing of his responses, from the tone and tenor and lack of confidence in his voice, that he's not real sure what it all means. And frankly I'm dubious that you can detect, with the naked eye, from three, four, six, eight feet – whatever it is – a one or two millimeter difference in the size of somebody's pupils. An an officer that is untrained in what it means is not entitled to extend the stop based upon his hunch about what it might be.

> And so I can't attribute any power or persuasive force to Deputy Smith's observation of the pupils. It doesn't mean anything on this record with what Deputy Smith knows about it.
>
> And so we then slide that observation into irrelevance. And we're left with a guy who gets pulled over for a seat belt and is nervous and shaky..."

(R 22:3, D-App. 000081). For reference, "the normal pupil size in adults varies from 2 to 4 mm in diameter in bright light to 4 to 8 mm in the dark..." *Clinical Methods: The History, Physical, and Laboratory Examinations. 3rd Edition*, Chapter 58 The Pupils, by Robert H. Spector, http://www.ncbi.nlm.nih.gov/books/NBK381/ Methamphetamine, like other stimulants, cause pupils to dilate. http://www.narconon.org/drug-abuse/signs-symptoms-meth-use.html. It is worth noting that many common physical symptoms suggesting a person is not well can apparently be considered a possible indication of drug use. *Narcanon drug abuse symptoms chart.* http://www.narconon.org/drug-abuse/signs-chart.html. Even a drug recognition expert would not have been able to tease any importance out of Hogan's 3mm pupils, assuming Deputy Smith was accurately relating what he saw, because 3 mm is right in the middle of the range of pupil sizes for bright light like the sunny day everyone agrees it was. Paradoxically perhaps, even if it had not been a sunny day and Deputy Smith had been a DRE, Hogan's restricted pupils should have been treated as a contraindication to any hunch Smith may have developed about Hogan being under the influence of methamphetamine or of possibly having a detectable amount of methamphetamine in his blood because if Hogan was under the influence of methamphetamine we would have expected Hogan's pupils to have been dilated. *Id.*

B. Shaking and Appearing Nervous

Deputy Smith claims Hogan appeared nervous when he approached him (R 21:9, D-App. 000015), very nervous (R 21:10, D-App. 000016), nervous *Id.* (further down the page), and nervous (R21:11). In addition to Deputy Smith's testimony, we're able to see and hear how nervous or ordinary Hogan appeared in the squad car video. (R 8; D-App. 000092). Deputy Smith says Hogan's upper body was shaking, though shaking does not appear visibly in the video. *Id.*

Without restricted pupils meaning anything in context, and with Hogan only appearing nervous and possibly shaking, and no indications of poor driving behavior or

other criminal activity, Deputy Smith had no reasonable suspicion to extend the traffic stop into any other investigation.

II. DEPUTY SMITH'S EXTENSION OF THE TRAFFIC STOP WAS AIMED AT DRUG POSSESSION AND/OR DISTRIBUTION OFFENSES

Deputy Smith's first stop of Hogan began with asking for Hogan's license and registration and calling for backup after he suspected something was going on with Hogan. (8:DVD at 00:30-3:15, D-App. 000092) After Deputy Smith arrives at the 5:00 mark of the squad car video. Smith talks to the backup officer about his observations from 5:00-6:15. The backup officer relates that he's heard Hogan has drug issues and that he might be a "shake and bake" method methamphetamine cook. At ~6:50 of the video Deputy Smith radios for a K9 unit, presumably to sniff Hogan's truck for the odor of drugs. At ~7:00 the backup officer indicates to Smith he wouldn't be surprised if there was a bottle in the back cooking (methamphetamine) right now. Deputy Smith gets a radio or phone message from someone else and tells the person he is dealing with 961 issues (meaning Chapter 961 of the Wisconsin Statutes, a chapter describing drug possession, manufacture and distribution criminal offenses.) At 8:30 of the video the backup officer starts talking to Deputy Smith about local civilian disrespect for law enforcement and the two talk about this topic for approximately 90 seconds. At 10:00 Deputy Smith and the backup officer talk about how edgy Hogan's wife (passenger) was. They talk about Hogan and his wife needing to wear seatbelts, their windshield being cracked, and when the drug dog might arrive. Finally, at 10:45 of the video, Deputy Smith says he's going to ask Hogan to do field sobriety tests based on his observation. At 11:20 of the video Deputy Smith gets a radio message seeming to indicate the drug dog's handler can't be located. The backup officer wonders aloud whether Hogan would grant consent to search his truck at 11:15 of the video.

Deputy Smith did not have reasonable suspicion to extend the traffic stop into any kind of criminal investigation. Hogan had not engaged in any erratic driving behavior, had regular size pupils for bright light, and may have appeared somewhere between nervous and very nervous and may or may not have been shaking. There was no reasonable suspicion that Hogan was under the influence of any restricted controlled substance or that he had any in his blood considering Deputy Smith's uncertainty and lack of knowledge regarding symptoms of drug use and the seeming lack of evidence

which would suggest Hogan was under the influence of any controlled substances. Even if the state is still allowed to argue reasonable suspicion existed after not arguing it at the Court of Appeals, and then even if this court were to find reasonable suspicion existed for operating under the influence of an intoxicant for having a detectable amount of a restricted controlled substance in his blood, the video indicates Deputy Smith wrongfully extended the traffic stop primarily to do a drug possession/manufacture investigation. To the extent Deputy Smith extended the traffic stop to investigate Hogan for offenses for which Deputy Smith lacked reasonable suspicion to investigate before moving on to the OWI investigation, Hogan's 4th Amendment rights were still violated.

III. HOGAN WAS STILL IN THE PRESENCE OF DEPUTY SMITH AS THE RESULT OF AN ILLEGALITY AT THE TIME DEPUTY SMITH RE-APPROACHED AND ASKED FOR CONSENT TO SEARCH HIS TRUCK

The State argues the search of Hogan's truck did not result from Smith's extension of the traffic stop. Resp't's Br. at 26-27. Contrary to their assertion, Hogan was still in Deputy Smith's presence at the time Deputy Smith re-approached Hogan and asked for consent because of Deputy Smith's illegal extension of the seatbelt stop into a criminal investigation. Had Deputy Smith not called for a drug dog and backup and chatted with the backup officer while waiting or then gave Hogan field sobriety tests, Hogan would have left Smith's presence perhaps 15 minutes before the 25:00 minute mark of the video. Hogan acknowledges he was validly pulled over for a seatbelt violation, but a valid traffic stop does not give law enforcement carte blanche to extend a stop to look for evidence of other offenses. Assuming this Court decides Deputy Smith did violate Hogan's 4th Amendment rights by wrongfully extending Hogan's detention, Hogan was detained longer than he should have been and he was only around the extra length of time to answer a request to search his truck because of Smith's illegality. This court should not guess at whether a suspect might have given consent to search the truck but for the illegal detention of the suspect and there is no way the State should be given the benefit of the doubt when law enforcement's illegal detention of a suspect is the reason all we can do is guess as to the answer.

The State cites ***Murray v. United States***, 487 U.S. 533, 541 (1988) for the idea that the application of the exclusionary rule should not put law enforcement in a worse position than they were before the violation. Resp't's Br. at 27. As the State notes,

Murray was concerned with application of the independent source doctrine. The contents of a drug distribution-related building which law enforcement had enough evidence to obtain a search warrant to raid based on evidence obtained elsewhere was admissible thanks to that other information and a later-obtained search warrant. In this case we have an officer illegally extending a traffic stop into a drug investigation, releasing the suspect for a minimal time and then asking for consent to search. We'll never know what Hogan might have said to a request for consent to search his truck but-for the violation of his 4th Amendment rights but Hogan's newly frustrated/hostile tone and his asking Deputy Smith for his name and badge number in response to what he apparently perceived to be law enforcement harassment in the seconds after being asked for consent to search the truck suggests Deputy Smith's earlier detention of Hogan did have some impact on him. (8:DVD time 25:00-26:00, D-App 000092)

IV. GRANTING SUPPRESSION OF THE EVIDENCE AGAINST A PERSON IN HOGAN'S SITUATION IS NOT ONLY APPROPRIATE BUT NECESSARY AS A BULLWARK AGAINST LAW ENFORCEMENT OVERZEALOUSNESS

The State claims that the only way for this Court to grant exclusion is to go against its own precedent and decades of Unite States Supreme Court precedent. This is simply not the case. Exclusion can and should be granted if this Court applies the analysis of ***State v. Williams*** or ***U.S. v. Mendenhall*** to traffic stop cases where an officer violated a suspect's 4th Amendment violations shortly before asking that suspect for consent to search his/her vehicle and determines that suspects in that situation will often not feel free to leave. Alternatively, exclusion can and should be granted if this Court gives appropriate weight to the three ***State v. Phillips*** and ***Brown v. Illinois*** taint attenuation factors in determining whether the evidence came at the exploitation of the illegal law enforcement activity or was sufficiently attenuated so as to dissipate the taint from that illegality. ***State v. Wong Sun***, 371 U.S. 471, 488 (1963). Finally, exclusion can and should be granted under any fair test this court may wish to adopt as a further development of its search and seizure jurisprudence. It is the State who appears to be asking the Court to read the above-listed cases so narrowly that exclusion can only be granted if a court finds that officers' actions were sufficiently deliberate or flagrant to offset the price paid by the justice system, ignoring the fact that these cases' tests already

are calibrated to take the interests of the public and the courts against allowing lawbreakers to escape justice into account. The exclusionary rule requires the balancing of the benefits of the rule's remedial objectives with the costs it exacts. ***State v. Felix***, 2012 WI 36, 339 Wis. 2d 670, 690, 811 N.W.2d 775 (2012).

According to CCAP records accumulated by CourtTracker (Part of Madison-based Court Data Technologies, LLC), there were 11,584 Wisconsin Statutes Chapter 961 (drug offense) charges filed in 10,043 cases in Wisconsin Circuit Courts in calendar year 2014. Allowing that these numbers may be slightly low or slightly high, granting or not granting suppression in one case is a drop in the bucket and unimportant in the larger sense except for the message this Court's opinion sends. What is important is articulating and applying the rules fairly so that the public can trust their 4th Amendment rights are safeguarded against law enforcement overreaching, so that law enforcement knows they need to be fair with suspects, and so that the trial courts of the state know what analysis to run when a motorist suspect is validly stopped, has the traffic stop wrongfully extended, is verbally released and is then almost immediately asked questions or for consent to search his/her vehicle. Hogan doubts a flood of cases with fact patterns similar to his exist or have ever existed and trusts that any opinion authored by this Court will be narrow and manageable enough that it will not result in the floodgates of litigation problem the State fears. Resp't's Br. at 31.

V. HOGAN'S SUGGESTIONS FOR A RULE FOR CASES LIKE HIS ARE ONLY SUGGESTIONS AND ARE NOT AS RIGID AS THE STATE INDICATES

This Court could decide this case using the ***Williams*** motorist seizure analysis, the ***Phillips*** taint attenuation analysis, or may fashion a new rule. Hogan has offered a few thoughts for consideration in drafting any such rule in his brief on pp.21-22 including taking into account any steps which law enforcement might take to "rehabilitate" themselves to a suspect whose 4th Amendment rights the officers have just violated before asking that suspect questions or for consent to search the suspect's vehicle. Some of the more obvious ways to do that would be to verbally remind the suspect that he is free to go or to refuse to answer questions, or to actually allow the suspect to have meaningful time and space apart from the officer sufficient to counteract the taint of the officer's violation of the suspect's 4th Amendment rights. No hard and fast rule about

any particular rehabilitative steps would be appropriate but a court should consider any steps taken by officers to rehabilitate themselves to a suspect or the failure to do so under circumstances like the ones we are addressing.

Dated January 26, 2014

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SIGNED CERTIFICATE OF WORD/PAGE COUNT

I hereby certify that this reply brief conforms to the rules contained in Wisconsin Statutes §809.19. It is in a proportional serif font (times new roman) with 1.5 line spacing and a 13 point font for the body and headers and 11 point font for quotations. The total word count for this document is 2995 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: January 26, 2014.

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