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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