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**STATE OF WISCONSIN**
**SUPREME COURT**
**CASE NO(S) 2018AP001730 - CR**

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**STATE OF WISCONSIN,**
**Plaintiff-Respondent,**

**V.**

**BLONG SIMBA VANG,**
**Defendant-Petitioner.**

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**ON PETITION FOR REVIEW OF AN ORDER OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, THE HONORABLE VINCENT R. BISKUPIC, PRESIDING**

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# PETITION FOR REVIEW

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# PETITION FOR REVIEW

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## STATEMENT OF THE ISSUES

1. Did the Court of Appeals erroneously exercise its discretion by holding that the search at issue in this case by applying the less strict minimal privacy standard instead of the stricter standard of probable cause?

Denied by the Court of Appeals.

2. Did the Court of Appeals erroneously exercise its discretion by holding that the search at issue in this case was initiated by school officials when the record is undisputed that school officials neither directed Officer Taschner's activities nor, generally, were even aware of them until the officer

informed them that he did not have an independent basis to search the defendant's vehicle, and the school's allegedly independent investigation and decision did not take place until after that time?

Denied by the Court of Appeals.

## STATEMENT OF CRITERIA SUPPORTING REVIEW

The petitioner believes that review is appropriate under **Wisconsin State Statute** section 809.62(1r)(a), in that a real and significant question of federal or state constitutional law is presented.

In **New Jersey v. T.L.O**., 469 U.S. 325 (1985), the United States Supreme Court weighed the contravening interest of student privacy and "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." **T.L.O**., 469 U.S. at 339 It instructed that a school search is legal when it satisfies the two-prong test: (1) the search must be "justified at its inception," and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." **Id**. at 341-42 (citation omitted). In **State v. Angelia D.B**., 211 Wis. 2d 140, 146, 564 N.W.2d 682 (1997), the Wisconsin Supreme Court applied the less strict minimal privacy standard to a search of a student and concluded that school searches conducted by law enforcement officials in conjunction with public school officials must be based on reasonable grounds, and that the tip from the student informant sufficed to provide those grounds. **Angelia D.B.**, 211 Wis. 2d at 160-62. In **State v. Schloegel**,

2009 WI App 85, 319 Wis.2d 741, 769 N.W.2d 130, the court noted that courts have accepted a variety of scenarios as evidence of reasonableness; for example, a search is reasonable where a student is suspected of violating rules in the school parking lot, the student has received a student handbook regarding vehicle searches parked on school grounds, or when the student has consented to a car search as a condition to being allowed to park in the school parking lot. **Schloegel**, at ¶18. Although the court in **Schloegel** noted that **T.L.O.** did not define school grounds, "school grounds have included areas where school officials have dominion and control, extending the permissible scope of search to students' cars parked on school property." **Schloegel**, at ¶19.

In each of these cases, the school administrators were either acting on a tip that implicated an individual at the school or, in the case of non-students, taking action to maintain school disciplinary standards. As the record shows, that was not the case here. The investigation in this case was initiated by Officer Taschner. School Administration was not involved in any way, and School officials neither directed Officer Taschner's activities nor, with the exception of Mr. Zachow, were, seemingly aware of them, until Officer Taschner chose to inform them of his activities.

Only after Officer Taschner informed school officials that he did not have an independent basis to search the vehicle and that he had no reason to hold onto Mr. Vang, Mr. Thao, and Mr. Her did the school begin its allegedly independent investigation and decide to search Mr. Vang's vehicle.

Courts draw a clear distinction between the aforementioned categories of cases and those cases in which outside law enforcement officers search students as part of an independent investigation or in which school official search students at the request or behest of the outside law enforcement officers and law enforcement agencies. **Angelia D.B.**, 564 N.W.2d at 687. Courts do not apply **T.L.O.** to these cases but instead require the traditional probable cause requirement to justify the search. See, e.g., **F.P. v. State**, 528 So.2d 1253 (Fla. Dist. Ct. App. 1988); **State v. Tywayne H**., 933 P.2d 251 (N.M. Ct. App. 1997), cert. denied, 123 N.M. 83, 934 P.2d. 277 (1997); **In Interest of Thomas B.D**., 486 S.E.2d 498 (S.C. App. Ct. 1997). The reason for this lies in the fact that the purpose of the search conducted by so-called "outside' police officers" is not to maintain discipline, order, or student safety, but to obtain evidence of a crime.

The evidence in this case is clear. As of the moment that the school administration "initiated" its investigation into an ongoing investigation that had failed to produce any leads, neither the school administration nor Officer Taschner were in possession of information that implicated any of the three individuals who were, at that time, being held by the school. The defendant was not at that time implicated in any violation of the school's disciplinary rules. Officer Taschner wasn't operating on the basis of articulable facts and circumstances when he suggested to the school administration that they possessed the key to his dilemma. The school's "decision", which came about as a direct result of his prodding, was simply

a pretext to allow Officer Taschner to accomplish something that he could not otherwise lawfully accomplish: a search of the defendant's vehicle.

## STATEMENT OF THE CASE

On October 26, 2017 the defendant, Blong Simba Vang, appeared before that branch of the circuit court for Outagamie County presided over by the Honorable Vincent R. Biskupic to enter a plea of guilty to an information charging him with one count of conspiracy to commit child abuse – Intentionally Cause Harm, contrary to Wisconsin Statute sections 948.03(2)(b) and 939.31. (R. 6-1)

On December 18, 2017, the defendant, Blong Simba Vang, again appeared before that branch of the circuit court for Outagamie County presided over by the Honorable Vincent R. Biskupic for sentencing. The court imposed a bifurcated sentence of three years initial confinement and three years of extended supervision in connection with the pled to charge. (R. 49-1-2; A. App. 101-102)

Mr. Vang is currently incarcerated at the Waupun Correctional Institution in Waupun, Wisconsin.

On April 27, 2021, the Court of Appeals, District III, issued a Decision and Order (Pet. App. 101-116) affirming the Judgment of Conviction. This Petition for Review is filed as a result of that Decision.

## ARGUMENT

### 1. The Court of Appeals erroneously exercised its discretion by applying the less strict minimal privacy standard instead of the stricter standard of probable cause

#### A. Standard of Review -- Search and Seizure

The Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution protects persons from unreasonable searches and seizures. **State v. McCray**, 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998). The Fourth Amendment "protects people, not places." **Katz v. United States**, 389 U.S. 347, 351 (1967). "Therefore, one may have Fourth Amendment protection outside of one's home." **McCray**, 220 Wis. 2d at 709. Under both the United States and Wisconsin Constitutions, a warrantless search is per se unreasonable, and evidence derived from it will be suppressed, subject to certain exceptions. **State v. Williams**, 2002 WI 94, ¶18 & n.5, 255 Wis. 2d 1, 646 N.W.2d 834; **State v. Boggess**, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983). These exceptions are "'jealously and carefully drawn,'" and "the burden rests with those seeking exemption from the warrant requirement to prove that the exigencies made that course imperative." **Id**. (citation omitted).

Wisconsin courts have consistently followed the United States Supreme Court's decisions regarding the constitutionality of investigatory searches and seizures. **State v. Richardson**, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Police may, in appropriate circumstances, approach a person for purposes of investigating possible criminal behavior

without probable cause to make an arrest. **Id**. at 138 (citing **Terry v. Ohio**, 392 U.S. 1, 22 (1968)). However, in justifying the intrusion, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." **Terry**, 392 U.S. at 21. Furthermore, on the part of the investigating officer, "[a]n inchoate and unparticularized suspicion or hunch will not suffice." **State v. Fields**, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279; **Brinegar v. United States**, 338 U.S. 160, 174-176 (1949); **State v. Waldner**, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Underscoring the importance of requiring specificity in the facts relied upon by the officer, the Supreme Court of the United States has long held that "'good faith on the part of the arresting officers is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate." **Beck v. Ohio**, 379 U.S. 89, 96-97 (1964)

However, not all encounters with law enforcement officers are "seizures." **Florida v. Bostick**, 501 U.S. 429, 434 (1991). The general rule is that a seizure has occurred when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." **United States v. Mendenhall**, 446 U.S. 544, 552 (1980) (quoting **Terry v. Ohio,** 392 U.S. 1, 19 n.16 (1968)).

A police officer’s actions are judged against a standard of reasonableness, which "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" **State v.**

**Malone**, 2004 WI 108, ¶21, 274 Wis. 2d 540, 638 N.W.2d 1 (quoting **Pennsylvania v. Mimms**, 434 U.S. 106, 109 (1977)).

In **Illinois v. Caballes**, 543 U.S. 405, 407 (2005), the United States Supreme Court stated that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." However, if during a valid seizure an officer becomes aware of additional suspicious factors that give rise to a reasonable, articulable suspicion that criminal activity is afoot, that officer need not terminate the encounter. **Malone**, 2004 WI 108, ¶24. At this point, the officer may prolong the seizure to conduct a separate, independent investigation. See **id.**

The issue therefore is whether there were articulable facts which would warrant a reasonable police officer to suspect that criminal activity was afoot. See **Waldner**, 206 Wis. 2d at 55-56. When determining whether reasonable suspicion exists, the court of review considers the totality of the circumstances. **State v. Williams**, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. This inquiry must necessarily take into account both the quantity and the quality of the suspicious factors. **Id**.

The defendant asserts that the court in this case failed in its duty to examine the facts of the case in light of the applicable case law. As the court notes, in **New Jersey v. T.L.O**., 469 U.S. 325 (1985), the United States Supreme Court weighed the contravening interest of student privacy and "the substantial interest of teachers and administrators in

maintaining discipline in the classroom and on school grounds." **T.L.O.,** 469 U.S. at 339 It instructed that a school search is legal when it satisfies the two-prong test: (1) the search must be "justified at its inception," and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." **Id.** at 341-42 (citation omitted). In **State v. Angelia D.B**., 211 Wis. 2d 140, 146, 564 N.W.2d 682 (1997), the Wisconsin Supreme Court applied the less strict minimal privacy standard to a search of a student and concluded that school searches conducted by law enforcement officials in conjunction with public school officials must be based on reasonable grounds, and that the tip from the student informant sufficed to provide those grounds. **Angelia D.B**., 211 Wis. 2d at 160-62. In **State v. Schloegel**, 2009 WI App 85, 319 Wis.2d 741, 769 N.W.2d 130, the court noted that courts have accepted a variety of scenarios as evidence of reasonableness; for example, a search is reasonable where a student is suspected of violating rules in the school parking lot, the student has received a student handbook regarding vehicle searches parked on school grounds, or when the student has consented to a car search as a condition to being allowed to park in the school parking lot. **Schloegel**, at ¶18. Although the court in **Schloegel** noted that **T.L.O.** did not define school grounds, “school grounds have included areas where school officials have dominion and control, extending the permissible scope of search to students' cars parked on school property.” **Schloegel**, at ¶19.

In each of the cases cited by the court, however, the school administrators were either acting on a tip that implicated an individual at the school or, in the case of non-students, taking action to maintain school disciplinary standards. The search of the defendant's car at issue here meets neither of these standards.

In the first instance, although it is appropriate that the school be able to address concerns with student behavior, whether as a violation of a school rule or criminal law, no case in the State of Wisconsin has ever applied the lower level of suspicion to a non-student simply because that individual is present on school grounds. **T.L.O**. and its progeny, on their face, speak only to searches of students. Clearly, school officials manifestly do not have the same relationship with non-students as they do with students. Therefore the lower standard has **only** been applied to students under **T.L.O.**

**B. The T.L.O. lower standard of review was not applicable**

This case, of course, clearly involved an investigation of a group of nonstudents. That investigation was initiated by Officer Taschner. He approached Mr. Her and Mr. Hao. He decided to bring them back to the office, and to detain them. He asked Mr. Zachow to assist him in this investigation. (R. 59-13-17; Pet. App. 127-131) He then met Mr. Vang at the school doors, escorted him to the office, began asking him questions, detained him, and initiated the events that led to the search of his vehicle. (R. 59-24-25; Pet. App. 132-133) School officials neither directed Officer Taschner's activities nor, with

the exception of Mr. Zachow, were, seemingly aware of them until he chose to inform them. Officer Taschner, however, had no information prior to his interrogation of the defendant and his companions, and developed no information during the course of that interrogation, which would lead any reasonable person to conclude that these non-students presented a danger to discipline, order, or student safety, other than the extraordinarily specious allegation that their association with LY, who had had prior disciplinary issues, somehow made them a disciplinary concern. Nor, since the defendant and his companions were at all times relevant to this matter, effectively sequestered away from the vehicle, was there any reasonable basis to believe that the vehicle and its contents presented a danger to discipline, order, or student safety.

**2. The Court of Appeals erroneously exercised its discretion by holding that the search at issue in this case was initiated by school officials when the record is undisputed that school officials neither directed Officer Taschner's activities nor, generally, were even aware of them until the officer informed them that he did not have an independent basis to search the defendant's vehicle, and the school's allegedly independent investigation and decision did not take place until after that time**

The investigation in this case was initiated by Officer Taschner. He approached Mr. Her and Mr. Hao. He decided to bring them back to the office, and to detain them. He asked Mr. Zachow to assist him in this investigation. (R. 59-13-17; Pet. App. 127-131) He then met Mr. Vang at the school doors, escorted him to the office, began asking him questions,

detained him, and initiated the events that led to the search of his vehicle. (R. 59-24-25; Pet. App. 132-133) School officials neither directed Officer Taschner's activities nor, with the exception of Mr. Zachow, were, seemingly aware of them until he chose to inform them. Officer Taschner, however, had no information prior to his interrogation of the defendant and his companions, and developed no information during the course of that interrogation, which would lead any reasonable person to conclude that these non-students presented a danger to discipline, order, or student safety, other than the extraordinarily specious allegation that their association with LY, who had had prior disciplinary issues, somehow made them a disciplinary concern. Nor, since the defendant and his companions were at all times relevant to this matter, effectively sequestered away from the vehicle, was there any reasonable basis to believe that the vehicle and its contents presented a danger to discipline, order, or student safety. Had Officer Taschner possessed such evidence of course, he would have been in a position to seek a warrant to search the defendant's vehicle. Because he did not possess such evidence, he was required to approach school officials to see if they would be willing to give him a pretext for his search.

The facts of this case, and the testimony at the hearing, clearly demonstrate that:

> Officer Taschner requested that other officers report to the school to provide him additional cover while he conducted his investigation. (Mot. Hr'g Tr. 25:18-26:4.)
>
> One of the additional officers had a canine unit, so Officer Taschner asked him to conduct a

> dog sniff of the outside of Vang's vehicle. (Mot. Hr'g Tr. 26:7-9.) The dog did not alert for the presence of illegal drugs. (Mot. Hr'g Tr. 26:19-21.)
> (R. 40-2; Pet. App. 120 )

The facts are clear: additional police were called to the scene by Officer Taschner, not by school officials. Officer Taschner, on his own initiative, directed one of these officers to carry out a dog sniff of the defendant's vehicle. When that sniff failed to produce any results, Officer Taschner informed school officials that he did not have an independent basis to search the vehicle and that he had no reason to hold onto Mr. Vang, Mr. Thao, and Mr. Her. The school's allegedly independent investigation and decision to search Mr. Vang's vehicle did not take place until after Officer Taschner informed school officials that he lacked a basis to proceed. (R. 59-25-30: Pet. App. 133-138)

It must be recognized that courts draw a clear distinction between the aforementioned categories of cases and those cases in which outside law enforcement officers search students as part of an independent investigation or in which school official search students at the request or behest of the outside law enforcement officers and law enforcement agencies. **Angelia D.B**., 564 N.W.2d at 687. As noted above, Courts do not apply T.L.O. to these cases but instead require the traditional probable cause requirement to justify the search. See, e.g., **F.P. v. State**, 528 So.2d 1253 (Fla. Dist. Ct. App. 1988); **State v. Tywayne H**., 933 P.2d 251 (N.M. Ct. App. 1997), cert. denied, 123 N.M. 83, 934 P.2d. 277 (1997); **In**

**Interest of Thomas B.D**., 486 S.E.2d 498 (S.C. App. Ct. 1997). The reason for this lies in the fact that the purpose of the search conducted by so-called "outside' police officers" is not to maintain discipline, order, or student safety, but to obtain evidence of a crime. **Josue T**., 989 P.2d at 436-37.

The evidence is clear. The police here were not "acting on a tip" involving a student or a non-student when they conducted a dog sniff of the defendant's car. They were not acting to maintain discipline, order, or student safety – the transcript is empty of any indication that Officer Taschner, any other police officer, or any school official had any basis for believing that the defendant's presence on school grounds implicated these concerns. Put bluntly, the canine sniff was in furtherance of an attempt to find probable cause for a search of the defendant's vehicle. When that failed, when it appeared that Officer Taschner would have to let the defendant and his companions go, the officer and school officials, acting in concert, employed the standard of lower level of suspicion as a pretext to circumvent the requirement of probable cause and allow Officer Taschner do what he was otherwise unable to do: search the defendant's vehicle for evidence of a crime.

## CONCLUSION

For all of the above reasons the defendant-petitioner requests that this Court grant his Petition for Review.

_____
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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a proportionally spaced font. The length of the brief is 3,256 words.

_____
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## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.1 9(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials

instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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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 18th day of May, 2021.

_____
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