STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2020AP000878 CR

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STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

vs.

AVAN NIMMER,

Defendant-Appellant

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ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, REVERSING A DECISION DENYING DEFENDANT'S FOURTH AMENDMENT SUPPRESSION MOTION IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE GLENN YAMAHIRO PRESIDING.

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MARK S. ROSEN
ROSEN AND HOLZMAN
400 W. MORELAND BLVD., SUITE C
WAUKESHA, WI 53188
Attorney for Defendant-Appellant
State Bar No. 1019297
email: roseholz@sbcglobal.net

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## POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted.

## STATEMENT OF THE CASE

The Petitioner's Brief has included a Statement of the Case.

However, Defendant asserts that this Statement is materially incomplete.

On June 17, 2019, Defendant Avan Nimmer had originally been charged in a one Count Criminal Complaint in Milwaukee County. The one Count charged Defendant with Possession of a Firearm by a Felon, contrary to Wis. Stats. Sec. 941.29(1m)(a), and 939.50(3)(g). This was Criminal Case 19 CF 2611. This was a Class G felony which carried a maximum possible penalty of a fine of not more than Twenty Five Thousand Dollars or imprisonment not to exceed ten years or both. (1:1-2). The ten years would consist of a maximum possible initial confinement period of five years, with a maximum possible extended supervision period of also five years.

The Criminal Complaint charged Defendant with possessing a firearm as a felon. According to the Complaint, police officers Boyack and Milone responded to a Shotspotter alert on their portal at approximately 10:04 p.m.. Officer Boyack had prepared the police reports that had formed the basis for the Criminal Complaint. The alert indicated that the shots had been fired at 3390 N. 21st Street, Milwaukee. Upon arrival at the scene, the police saw the Defendant. Defendant had his right hand in his pocket. According to the police, upon seeing the police vehicle, the Defendant started to walk away. One of the officers in the vehicle exited the police car and began approaching the Defendant. At that time, the Defendant began reaching towards his left side and blading his left

side away from the officer. The police officer began patting down the Defendant. The Defendant admitted that he had a firearm on his waistline. The police recovered a firearm. Defendant had previously been convicted of a felony. (1:1-2).

On June 18, 2019, an initial appearance occurred. At that time, the Court Commissioner had informed the Defendant of the charge and the maximum possible penalties. (22:1-2).

On June 25, 2019, the trial court conducted a preliminary hearing. The State's sole witness had been Officer Chad Boyack. After taking testimony and other evidence, probable cause was found and the Defendant was bound over for trial. (23:12).

On June 25, 2019, the State filed an Information charging Defendant with the one Count charged in the Criminal Complaint. This was immediately after the preliminary hearing. (4:1-1). On that date, the Defendant entered a plea of Not Guilty to the one Count. (23:12).

Subsequently, Defendant filed a Motion to Suppress Fruits of Illegal Detention and Frisk. Defendant filed this Motion on July 10, 2019. By this Motion, Defendant had alleged that the police did not have enough evidence to stop Defendant on June 15, 2019. According to the Motion, the police lacked reasonable suspicion to conduct this stop. Defendant sought to suppress any and all physical evidence taken from him at the scene of this detention and arrest. This physical evidence consisted of the firearm indicated

in the Criminal Complaint. (5:1-3).

On August 19, 2019, the trial court had conducted an evidentiary motion hearing on Defendant's Suppression Motion.

On August 19, 2019, the State's sole witness had been police officer Anthony Milone. He testified that on June 15, 2019, he was working as a late power shift officer along with officer Chad Boyack. Milone had been alerted to a Shotspotter call in the area of 3390 N. 21st Street, Milwaukee. The alert arrived at about 10:06 p.m.. At the time, he and Boyack were traveling northbound on North 20th Street from West Hopkins street. Upon receiving the alert, they continued traveling northbound on 20th Street towards the Shotspotter alert, 3390 N. 21st Street, with four rounds having been fired in that location. Upon arrival, they turned west onto West Townsend Street, which is the 3400 block from North 20th Street. At the corner of 21st Street and Townsend, the officers observed the Defendant. At that time, he had his right hand in his right pants pocket. Defendant then turned and looked at the squad and began walking away at an "accelerated pace." (25:6-8). After walking away, Milone observed the Defendant digging around his left side with his left hand. Milone stepped out of the vehicle and began approaching the Defendant. Defendant then began turning his left side away from him. His left hand was not visible. Boyack had then drove past the Defendant and after he drove past him, Boyack had stepped out. The Defendant had then stopped walking. Milone then

conducted a pat down of the Defendant. Defendant had then indicated "the gun is in my waistband, bro'." Milone had then recovered a gun on the left side of the Defendant's waistband. (25:9-10).

At the time the police had received the alert on June 15, 2019, they were approximately three blocks away from where the alert had occurred. When they get the alert, they do not get any description of the potential suspect or suspects. The alert does not give any identifying information for who the shooter might have been. The address for the alert is a distance from south of 21st and Townsend. 21st and Townsend is where the police had stopped the Defendant. At 3390 N. 21st Street is the last house on the corner of that intersection and then there is a field, and then there is the sidewalk and Townsend Street. At the time the police saw the Defendant, he was walking west on Townsend, on the southeast corner. At the time the police approached the Defendant, they did not have their flashing lights or sirens on. After the Defendant looked at the vehicle, he did not start to run. (25:13-15). He did not attempt to flee. He never went into a full sprint. While the squad was behind the Defendant, Milone had exited the squad. Milone had to walk past the squad to get to the Defendant. Milone got behind the Defendant. When Milone first got past the Defendant, he was twenty to twenty five feet past Milone. At some point, while Milone was behind the Defendant, Milone told the Defendant to raise his hands. Defendant did raise his hands upon command. As he was

walking away, he had raised his arms when directed to raise his arms. He was just walking away from Milone. (25:16-17). Upon exiting the vehicle, it is possible that Officer Boyack grabbed the Defendant's left wrist. Defendant was seized. Milone then immediately started to pat him down. Defendant then volunteered that he had a firearm in his left waistband. Defendant did not resist. He was cooperative. (25:18-19).

Defendant subsequently testified on his own behalf.

After the evidentiary hearing, and hearing oral arguments, the trial court orally denied Defendant's suppression motion. The court found that the police conduct was completely appropriate in the investigation of the Shotspotter complaint. (25:35-37).

Defendant entered a guilty plea to the one charge in the Information on October 16, 2019. The plea was pursuant to plea negotiations. The plea negotiations were that the State would be recommending eighteen months initial confinement followed by twenty four months extended supervision. (26:2). After conducting a plea colloquy, the trial court found Defendant guilty. (26:2-7).

On October 16, 2019, the trial court conducted a sentencing hearing immediately after the guilty plea hearing. On that date, the trial court sentenced Defendant to four years in the Wisconsin State prison system. This consisted of two years of initial confinement and two years of extended supervision. (26:18). That same day, the trial court issued a Judgment of Conviction. (14:1-

2). Defendant subsequently timely filed his Notice of Intent to Pursue Postconviction Relief. (16:1-1). Defendant then filed his Notice of Appeal in a timely fashion. (20:1-1).

Subsequent to Defendant's filing of his Notice of Appeal, appellate briefing had occurred. Eventually, the Court of Appeals had reversed the trial court's oral decision denying Defendant's Fourth Amendment Suppression Motion. The Petitioner's Brief has indicated such reversal Decision, and has provided the actual Decision. Essentially, the Court had found that the arresting officers had lacked reasonable suspicion to stop the Defendant. This, based upon a totality of the circumstances standard. Further, this, even considering Defendant's alleged conduct of increasing his walking pace, as well as the alleged "blading" conduct. The Court had found that such conduct of supposedly simply increasing one's walking pace is not the equivalent of fleeing a scene. Further, the Court had concluded that Defendant's alleged blading had been insufficient. A security adjustment of one's waistband, as well as the act of movement that would accompany any walking, is legally insufficient. Also, the Court had concluded that simply justifying a search on the basis that "...anyone that the police had encountered within a minute or two of receiving the alert should have been investigated if they were within a couple of blocks of the alleged shots being fired..." had been too broad of a standard. The Court had specifically stated, contrary to the

Petitioner, that all of the supporting facts, taken together, as being legally insufficient to justify the stop, and resulting search. Contrary to the Petitioner, the Court did not apply and consider each fact individually. Instead, the Court had utilized the legally appropriate totality of the circumstances test. The Petitioner's Brief has relied upon this test. However, now, the Petitioner is arguing that this Court should find otherwise, contrary to other well established and well settled case law. This Court should reject this argument.

## ARGUMENT

### I. LAW ENFORCEMENT'S STOP OF DEFENDANT ON JUNE 15, 2019 WAS ILLEGAL AND IMPERMISSIBLE. CONTRARY TO THE TRIAL COURT, THERE WAS INSUFFICIENT REASONABLE SUSPICION TO WARRANT THE STOP. THE TRIAL COURT HAD MATERIALLY ERRED IN REFUSING TO SUPPRESS THE RESULTING SEIZED FIREARM. THE RESPONDENT'S ASSERTION OF THE FACTS IN THIS CASE ARE MATERIALLY INACCURATE, AND THOSE FACTS DO NOT SUPPORT REASONABLE SUSPICION. THE COURT OF APPEALS HAD CORRECTLY REVERSED THIS TRIAL COURT DECISION.

Searches conducted without a warrant are generally unreasonable. State vs. Matejka, 241 Wis.2d 52, 621 N.W.2d 891 (2001). The State has the burden of proof that a warrantless search was legal. Id. at 60.

Unreasonable seizures are prohibited. An "inchoate and unparticularized suspicion or 'hunch'..." will not suffice. Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Law enforcement officers may only infringe on the individual's interest

to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. State vs. Guzy, 139 Wis.2d 663, 407 N.W.2d 548 (1987).

Evidence seized as the result of illegal search and seizure is to be suppressed by virtue of the exclusionary rule. Wong Sun vs. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); State vs. Knapp, 285 Wis.2d 86, 700 N.W.2d 899 (2005); State vs. Harris, 199 Wis.2d 227, 544 N.W.2d 545 (1996).

The Court of Appeals applies a two step standard of review to the question of whether or not reasonable suspicion exists to justify a stop. The Court will uphold the circuit court's findings of fact unless clearly erroneous. However, the Court of Appeals will determine de novo whether the facts as found demonstrate a constitutional violation. State vs. Williams, 241 Wis.2d 631, 623 N.W.2d 106 (2001). State vs. Kolk, 298 Wis.2d 99, 726 N.W.2d 337 (Ct.App. 2006). Questions of the existence of reasonable suspicion are constitutional facts. Id. at 298 Wis.2d 99 at 107.

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable amount of time when the officer reasonably believes that such person is committing, is about to commit, or has committed a crime. Wis. Stats. 968.24.

An individual has a right to walk away from a police officer.

Without more, backing away from a police officer is not sufficient objective evidence supporting a reasonable suspicion that criminal activity is afoot or that the individual was a threat. Further, an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable particularized suspicion that a person is committing a crime. State vs. Pugh, 345 Wis.2d 832, 826 N.W.2d 418 (Ct.App. 2012), citing Illinois vs. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.ED.2d 570 (2000).

Seeing a suspect in front of a vacant house is insufficient reason to stop him even though: (1) the officer knew that the suspect did not live in the area, (2) the suspect had been previously arrested for selling narcotics, and (3) the police had received a complaint that someone was loitering or drug sales at that house. State vs. Washington, 284 Wis.2d 456, 700 N.W.2d 305 (Ct.App. 2005).

In Pugh, the Court of Appeals had further concluded that Defendant's conduct of "blading" insufficient to constitute reasonable suspicion. This, even coupled with Pugh being near some illegally parked cars and his presence directly to the south of an apartment building that the arresting officers had been personally involved in several drug dealing investigations. In Pugh, the officers first saw him five to ten feet from two cars that were parked below a No Parking sign at the back of an apartment

building. Five seconds after first seeing Pugh, the officer turned his squad spotlight on him. After shining the light on Pugh, who had been walking a little to the south, went back between the cars. The police had then walked over to Pugh and had begun to ask him some questions about what he was doing at the location. Pugh had no information about any drug dealing at the house. The drug house was some fifty feet from where they were standing. The officer never saw Pugh any closer. There were no lights on the drug house. Nevertheless, the police physically seized Pugh. The police testified that Pugh was blading the right side of his body away from them as he was walking away just immediately prior to this physical seizure. State vs. Pugh, 345 Wis.2d 832 at 835-838.

In Pugh, the Court had concluded that Pugh's conduct did not arise to the level of reasonable suspicion. With respect to the "blading," the Court had asked "How does a person walk away from another (as Pugh had the right to do) without turning his or her body to some degree? Calling a movement that would accompany any walking away "blading" adds nothing to the calculus except a false patina of objectivity." Id. at 843. The Court found that the officers had no objective reasonable suspicion to justify a Terry stop, and seizure. Id. at 843-844. This, even with the "blading" conduct, the high crime area, the relatively close proximity to a well known drug house of approximately fifty feet, and Defendant's conduct of walking away upon seeing the police.

In State vs. Washington, the police had been on patrol on the 1600 block of West Locust Street in the city of Milwaukee. This, in order to investigate a specific complaint of loitering and drug sales at an allegedly vacant house. Washington had been in front of that specific house. After one of the police officers recognized him from past encounters, the police had ordered him to stop. Washington stopped initially, but also took a few steps backwards, and allegedly "looked nervous." He then threw his hands up and a towel flew from his hand. At that point, the police pushed him to the ground and seized him. The towel had contained cocaine. State vs. Washington, 280 Wis.2d 456 at 459-460.

In Washington, the Court had concluded that Washington had stopped when ordered to do so. This, even though he had taken a few steps backwards. He stopped when the police had told him to stop. Id. At 469. Further, the Court had found that at the time the police initially pulled over and ordered Washington to stop, they lacked the requisite reasonable suspicion Investigating a vague complaint of loitering and drug sales, and observing Washington in the area near a house that the officer believed to be vacant, even taken in combination with the officer's past experiences with Washington and his knowledge of the area, had not supplied the requisite reasonable suspicion for a valid investigatory stop. People have a right to walk down the street without being subjected to unjustified police stops. Id. at 471. The police had suppressed

the drugs by virtue of the exclusionary rule. Id. at 472.

In the present situation, the case for finding that the police had lacked reasonable suspicion to conduct the stop of the Defendant is more persuasive than the facts in either Pugh or Washington. Here, the police had observed the Defendant away from the Shotspotter alert. He was past a field and on a completely different street. This had been a residential area. He was merely walking away. The police did not see any weapon, or have any indication that he was committing, or had committed any crime, specifically any shooting that had led to the alert. He had his hand in his right pocket. Upon the police following him, the Defendant began walking away, but faster. However, he raised his hands upon command. Although he had been "blading" his body, this is a subjective opinion by Milone. As the Court had clearly indicated in Pugh, such purported conduct is insufficient to justify reasonable suspicion. Here, as discussed, unlike the situation in Pugh, Defendant was away from the Shotspotter alert location. Pugh was just south of the alleged drug dealing house, approximately fifty feet away. In Pugh, Pugh had turned and had walked away, getting between two parked cars. Here, Defendant had been walking away, but had raised his hands upon command. Further, unlike Washington, the police had no history with the Defendant. In that case, Washington had taken a few steps backwards, but with his hands raised. Also, in Washington, like here, the police had an

alert as to criminal conduct. However, in both Pugh and Washington, the Court of Appeals had found that the police had found insufficient reasonable suspicion to justify the warrantless stop. The situation here is no different, and under the circumstances, contained even less reasonable suspicion than either of those two cases. The trial court's oral decision conclusion that the police had acted appropriately is materially erroneous. It must be reversed. This, notwithstanding the presence of Shotspotter technology.

Here, the Petitioner's Brief has failed to adequately rebut Defendant's position that the police had lacked sufficient reasonable suspicion to stop the Defendant. The Petitioner has argued that the location where the police had observed the Defendant had been "basically the exact location where the ShotSpotter came in." (Petn.Brf, page 3). The Petitioner has essentially argued that the location of the stop had been the location of the Shot Spotter alert. Although Officer Milone had initially made this statement during his testimony, the word "basically" had couched this location. Further, on cross-examination, Officer Milone had clarified that the location where the police had first observed the Defendant had not been the location of the alert. As Defendant has indicated above, the location of the stop had been south of the alert. The location of the alert had been at 3390 N. 21st Street, which had been the last

house on the corner of the intersection. However, there had been a field and a sidewalk between that spot and Townsend Street. Defendant had been walking west on Townsend. This had been the location of the stop. (25:14-15). Hence, the location of this stop had been away from the alert's location. Furthermore, clearly, this area had been a highly densely residential area. The Petitioner's Brief has failed to adequately indicated these facts. Hence, the Petitioner's reliance upon the location assisting a finding of adequate reasonable suspicion is materially incorrect. Contrary to the Petitioner, the stop had not been the location of the alert. Petitioner's Brief has materially mischaracterized this location, and its highly residential nature.

Also, the Petitioner has indicated essentially that Defendant had fled the police. Petitioner has indicated that Milhone had testified that he had believed that the Defendant had been trying to possibly flee them. (Petn.Brf, page 3). However, such testimony had clearly been equivocal. As indicated herein, the police had never turned on their flashing lights or siren upon observing Defendant. Although Defendant had accelerated his pace, he had never started to run. He never went into a full sprint. Officer Milone had never testified that he had actually fled. Defendant had asked the question "And he didn't attempt to flee, did he?" In response, the officer had merely testified that "...I don't know what his intentions were. He never went into a full sprint." The

Petitioner's Brief has also failed to indicate this testimony. Defendant did raise his hands upon command. He was just walking away from the witness. (25:16-18). Clearly, had Defendant actually fled, Officer Milone would not have been so equivocal. The Court of Appeals had correctly concluded that Defendant's conduct of increasing one's walking pace is not the equivalent of fleeing the scene. See State vs. Young, 294 Wis.2d 1, 717 N.W.2d 729 (2006). (Ct.App. Decision, Para. 28).

Further, Petitioner had relied upon Milone's testimony that the Defendant had bladed the left side of his body away from the witness. The Petitioner had cited this testimony as support for its position that this Terry stop had been legal. (Petn.Brf, page 3). See Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, as discussed, the Court of Appeals Decision in State vs. Pugh has materially rebutted a conclusion that blading provides reasonable suspicion.

Here, crucially, the Petitioner has not argued that any of the law cited by the Court had been erroneous or needs review. Instead, the Petition has argued that the Court had merely considered the relevant facts in isolation. (Petn.Brf, pge 11). However, this is an incorrect analysis of the Court's Decision.

Contrary to the Petitioner, as indicated, the Court of Appeals had considered all of the relevant facts in this matter pursuant to a totality of the circumstances standard. The Court had indicated

that "... Therefore, we conclude that, even taken together, these facts do not support a finding that the officers had reasonable suspicion to stop and frisk Nimmer." (Ct. Appls Decision, Para. 30).

Further, the Petitioner relies upon the Shotspotter alert and the short time that the police had taken to arrive at the scene. However, the Petitioner improperly minimizes that this alert cannot provide a description of any shooter. The alert does not provide any identifying information as to who the shooter might have been. (25:13). Petitioner concedes such a fact. (Petn.Brf, page 7). Yet, the totality of the Petitioner's Brief improperly minimizes it.

The Petitioner has argued that the Supreme Court should give the Shotspotter technology additional weight due to its immediacy in terms of time. However, the Petitioner has failed to adequately indicate how such technology should warrant such additional consideration due to such "immediacy". Such technology is clearly only one of many factors that a Court should consider in determining whether or not reasonable suspicion had been present during a stop. Here, the Court of Appeals had considered the Shotspotter technology as part of a totality of the circumstances analysis. The Court had concluded that this technology, in combination with the other present relevant facts, under such an analysis, insufficient to warrant reasonable suspicion. Hence, contrary to the Petitioner, such technology is not such a novel

process that requires this Supreme Court's reversal; instead, it is merely a fact relevant to a totality of the circumstances consideration. Further, the Petitioner has failed to adequately distinguish how such technology differs from a fact such as a citizen's report about shots fired. Hence, such a report, as such technology, are merely facts relevant to a totality of the circumstances consideration. Importantly, as indicated, such technology cannot specifically identify a suspect. Contrary to the Petitioner, such technology is not a "reliable tip." As discussed, all that such technology indicates is the area of shots fired, the time of such firing, and the number of shots. Without any ability to identify an individual, such technology cannot provide any information concerning the shooter. This, whereas a citizen's report may well provide an actual physical description. Hence, the Petitioner has not adequately rebutted Defendant's position, and the Court's Decision, with respect to the importance of Shotspotter technology. This Court should concur.

Based upon the foregoing, the Petitioner has materially erred in arguing that the facts of this present matter support Reasonable Suspicion. As discussed herein, and essentially contrary to the Petitioner, Officer Milone could not testify that Defendant had tried to flee the police. Further, as discussed herein, Defendant was not at the actual location of the Shot Spotter alert at the time of his stop. Finally, Defendant's "blading" does not support

a finding of reasonable suspicion. This, even in conjunction with the other facts of this case, to include the Shotspotter alert, under a totality of the circumstances standard. Contrary to the Petitioner, the Court's Decision had adequately considered the Shotspotter technology. (Ct.App. Decision, Para. 21). This Court should reject this Respondent's argument that reasonable suspicion had factually existed to support the stop.

Here, as the trial court had done, the Petitioner is utilizing the Shot Spotter alert to justify a wide latitude of ability to justify reasonable suspicion. The Petitioner has argued that the immediacy of that alert had partially justified the police stop of the Defendant. However, such a conclusion is illegal. The legal basis for a determination of reasonable suspicion is not based upon the crime itself, but whether or not reasonable suspicion exists to indicate that an individual has committed, or is committing, that crime. Hence, contrary to the Petitioner and the trial court, this Shotspotter alert is simply one part of a totality of the circumstances analysis. The Petitioner has materially erred in arguing otherwise.

## II. CONTRARY TO THE PETITIONER, THE CASE LAW OF PUGH, LEWIS, GORDON, AND WASHINGTON ARE MATERIALLY APPLICABLE AND RELEVANT TO THE PRESENT SITUATION.

The Petitioner has argued that Defendant's cited case law of

State vs. Pugh, and State vs. Washington, are inapplicable and materially distinguishable from the present situation. Further, the Petitioner has argued that the Court's cited case law of State vs. Gordon, 353 Wis.2d 468, 846 N.W.2d 483 (Ct.App. 2014) and unpublished case of State vs. Lewis, 2017 WI App 56 (Ct.App. 2017) are also inapplicable and distinguishable from the present situation. Petitioner's Brief has provided State vs. Lewis as part of its Appendix. However, this argument is materially erroneous.

The Petitioner has indicated that in State vs. Pugh, the police were merely on patrol and there had not been any active incident that they were investigating. This, as opposed to the present situation where there had been an actual Spot Shotter alert, and a level of immediacy. (Petn.Brf., page 14). However, this argument is materially erroneous. In Pugh, Pugh had been approximately fifty feet away from the location of the expected criminal activity, the drug house located at 4463 N. Hopkins. He was in the rear of 4475 N. Hopkins, an apartment building. The officer who had testified at the suppression hearing had testified that he and his partner "had been personally involved in several investigations regarding drug dealing from that 4463 N. Hopkins address." Further, even at 4475 N. Hopkins, Pugh had parked his car under a no parking sign. Pugh had never indicated that he had permission to park there. Finally, Pugh's conduct had involved more than mere blading. When the police first saw Pugh, he was five to

ten feet from two cars that were parked below a no parking sign at the back of the apartment building. However, when the police shined their lights on him, he had changed his direction from walking a little to the south to going back between the cars, essentially clearly to hide. The police first saw Pugh at about 11:00 p.m.. State vs. Pugh, 345 Wis.2d 832 at 835-836.

In Pugh, contrary to Petitioner, the testimony had involved Pugh's involvement in more than the drug house located at 4463 N. Hopkins. The testimony had involved him parking his car illegally. The Court in Pugh had cited other case law to support a legal conclusion that a Terry stop may be justified to investigate a forfeiture offense. Id. at 840-841 citing State vs. Griffin, 183 Wis.2d 327, 333-334, 515 N.W.2d 535, 538 (Ct.App. 1994). Petitioner has failed to indicate this critical fact. Further, contrary to the Respondent, the Court had indicated that Pugh's conduct of walking away, not the blading, had prompted the police to seize him. Id. at 841. Petitioner has failed to note that Pugh had walked away from the police upon noting their presence, and before being stopped by them. Hence, contrary to Petitioner, Pugh had involved far more than mere blading, and there had been factually more than this mere blading in that case. There had been walking away from the police upon initially noting their presence, and the forfeiture offense violation. Nevertheless, as in this case, the Court had indicated that backing away from a police officer, and an individual's

presence in an area of expected criminal activity, even together as in Pugh, are insufficient to support reasonable suspicion to justify a Terry stop. State vs. Pugh, 345 Wis.2d 832 at 842-843. Further, as litigated above, the blading does not add any reasonable suspicion.

In the present matter, the police officer's reasonable suspicion had been based upon Defendant's walking away "in an accelerated manner", an area of expected criminal activity in a residential area, and his blading. However, as discussed previously, Officer Milone did not testify that the walking away had amounted to actual fleeing. This, even in response to actual questioning as to that matter. Nevertheless, as discussed herein and in the Court of Appeals' Decision itself, Pugh holds that all three of these factors, even taken together and cumulatively, do not support reasonable suspicion. Petitioner has materially erred in indicating that Defendant has misinterpreted and misapplied Pugh, and that this case does not support his position. On the contrary, this case is thoroughly dispositive both factually and legally with respect to this present matter. Based upon this case and its facts, the police did not legally have reasonable suspicion to conduct a Terry stop upon the Defendant.

Similarly, the Petitioner has materially erred in indicating that Washington does not assist the Defendant. In that case, similar to this present case, Washington had walked back a few

steps upon the stop. True, he had initially stopped. However, he then had taken a few steps backwards. State vs. Washington, 284 Wis.2d 456 at 459-460. In that case, the Court had found that such conduct had not constituted fleeing. He did not run. Id. at 471-472. Here, as discussed herein, Officer Milone had never testified that Defendant had fled. This, even upon a direct cross-examination question by the Defendant. Similar to Washington, Defendant had never run. Further, in Washington, Washington was directly in front of a house that police had been investigating for drug dealing. There had been a complaint about loitering. Id. at 459. As discussed previously with respect to Pugh, reasonable suspicion that an individual is committing, or has committed, a forfeiture offense may constitute reasonable suspicion for a Terry stop. All that Washington had been doing had been walking down the street. Importantly, unlike here, Washington had been walking down the street right in front of the area of criminal activity in question. Here, Defendant had been walking somewhat south of the area of the alert, with a sidewalk and a field between him and that alert spot. This, as previously discussed, in a residential area. Milone had testified that there were houses in that area. (25:14). Once again, Petitioner's Brief has failed to note that this area had been highly residential. As in Washington, Defendant was simply walking away from law enforcement. True, the present situation involves Defendant allegedly blading his left side away from the police.

However, Pugh has materially rebutted that fact as being a ground for reasonable suspicion, as discussed herein. As the Court had indicated in Washington, Defendant had a right to walk down the street without being subjected to the unjustified police stop. Id. at 471. Accordingly, contrary to the Petitioner, Washington does assist the Defendant and is highly applicable and relevant to the present situation.

As in the present case, the police had been investigating a specific crime in Washington. As the Court of Appeals' had concluded in the present matter, Washington provides the principle that when officers are investigating a specific crime, the mere presence of an individual in the area where that crime is suspected of having been committed, even if the individual is known to have previously committed a related crime, is still insufficient to meet the reasonable suspicion standard. (Ct.App. Decision, Para. 25). Contrary to the Petitioner, such is the situation here.

Also, as indicated, the Court of Appeals' had relied upon State vs. Gordon and State vs. Lewis. However, contrary to the Petitioner, both of these cases are materially relevant and applicable to the present situation.

True, in State vs. Gordon, the police had been on routine patrol investigation. There had not been any allegation of a specific crime having been recently committed. However, the issue in that case had been related to Gordon's "security adjustment" of

his waistband upon "recognizing police presence", and his physical presence in a "high crime" area. State vs. Gordon, 353 Wis.2d 468 at 478-479. However, the Court of Appeals in that case had rejected these criteria, collectively, as a justification for the stop. The "routine mantra" of the high crime area has the tendency to condemn a whole population to police intrusion that would not happen in other parts of the community. Citing U.S. Supreme Court case law, an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. Id. at 489 citing Illinois vs. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

Further, the Gordon Court had dismissed the contentions that Gordon's "awareness of police presence" and his "security adjustment," individually or collectively, had justified a finding of reasonable suspicion. With respect to "police presence," the Court had found that such a factor would be present in any case where police had executed a Terry stop. Looking at police officers driving through one's neighborhood adds nothing by itself. Id. at 481. Further, with respect to the "security adjustment" factor, many folks, most innocent of any nefarious purpose, may occasionally pat the outside of their clothing to ensure that they have not lost their possessions. Further, the security adjustment, even in conjunction with the high crime area and recognizing police

presence, is still far too common to support the requisite individualized suspicion. Id. at 489-490.

Finally, as the Court of Appeals had discussed in this present matter, Lewis is materially precedential and relevant here. Unlike Washington, Pugh, and Gordon, this case had directly involved a gunshot complaint. State vs. Lewis, Paras. 1-2. The Petitioner has indicated such a fact. However, the Petitioner has dismissed the relevance of this case due to the State, in that case, conceding that the police had lacked reasonable suspicion to stop Lewis, and that "...Lewis was not running, was not looking over his shoulder for police, and did not match the description of the one suspect that the police had information about." (Petn.Brf, page 17). However, the State's concession in that case is irrelevant to any objective consideration of reasonable suspicion. Further, contrary to the Petitioner, Defendant in the present matter was not running either. Also, as in Gordon, simply observing police is an immaterial factor, collectively or individually. Finally, although the description of the shooter in Lewis might not have matched his description, here there was no description at all. Simply, Defendant was merely walking down the street, a bit of distance away from the scene of the alert. As the Lewis Court had correctly concluded, the sole basis for Lewis's stop had been that he had been walking in the general area of the shots fired report with his hand on the waistband of his pants. Such is the situation here,

although Defendant had apparently picked up the pace of his walk, but without fleeing. Hence, contrary to the Petitioner, the Court in the present matter had correctly relied upon Lewis.

Based upon the foregoing, and contrary to the Petitioner, Washington, Pugh, Gordon, and Lewis are highly applicable and relevant to the present situation and this present matter.

## III. THE PETITIONER'S CITED CASE LAW IS BOTH FACTUALLY AND LEGALLY INAPPLICABLE TO THE PRESENT SITUATION. HENCE, THIS CITED LAW IS NOT RELEVANT TO THE PRESENT SITUATION SO AS TO MANDATE REVERSAL OF THE COURT OF APPEALS' DECISION.

Here, the Petitioner cites different unpublished cases to support its position that there are inconsistent rulings in the area of reasonable suspicion and Spotshotter. This, to justify its position that Supreme Court reversal is warranted. However, contrary to the Petitioner, this cited case law is not factually and legally inconsistent with the present situation. Instead, all of this case law is merely an application of already existing and well-established case law to the relative facts of each case. Further, each of these cases are materially distinguishable from the present situation.

First, the Petitioner cites State vs. Tally-Clayborne, 2016 AP 1912-CR, 2017 WL 467647 (Ct.App. Oct. 17, 2017). In that case, law enforcement had responded to the area in question and had found Tally-Clayborne and two other individuals. The officers had been

responding to the sound of gunshots. The officers had stopped these three individuals. However, critically to this analysis, Tally-Clayborne had started to walk away while reaching for his waistband while the police had been conducting pat downs of the two other individuals. This, only after the initial stop. The police had already stopped these three individuals. The police had asked all three individuals to show their hands. The individuals had provided information to the police. The police then began patting down the two companions, and only then did Tally-Clayborne start to walk away. (Paras. 2, 5). The Court had found critical that Tally-Clayborne had started to walk away from the police while the police were patting down the two other individuals. This, only after the initial stop of all three individuals. (Paras. 10-11).

Here, unlike the situation in Tally-Clayborne, Defendant had not had two other companions, and where all had already been stopped. This, before pat downs. Clearly, the police had wanted to pat down all three, but Tally-Clayborne had just walked away while reaching for his waistband. This, only after the initial stop and having watched the police pat down his companions. In the present situation, the Court had found that Defendant had not stopped first, with other stopped companions, and then had walked away when the police had begun to pat down the companions. Here, Defendant had just continued to walk, without any initial stop. Defendant had not stopped, realized that he would be caught with a firearm, and

then attempted to walk away to avoid a patdown. This distinction, based upon the Court's Decision in Tally-Clayborne, is crucial to an analysis of how the current matter relates to that case.

The Petitioner also cites the case of State vs. Norton, 2019 AP 1796-CR, 2020 WL 2049123 (Ct.App. April 14, 2020). However, the facts of that case are even more distinguishable from the present situation than the facts in Tally-Clayborne. In Norton, police had responded to a caller that had heard rapid fire gunshots in the area. Upon arriving at the area, police officers had observed a car parked. The officers had used the squad spotlight to see into the vehicle. They had then observed two individuals inside of the car. According to officers, the man in the driver's seat, later identified as Norton, became "startled" when the spotlight illuminated the car, and began "moving as if he was placing something, or trying to place something behind his back." Also, as the officers had approached the vehicle, one of them observed a clear plastic baggie containing a "green, leafy plant-like substance" that he had believed to be marijuana. He then opened the door and could smell marijuana. Based upon these observations, the officers ordered Norton out of the vehicle, and they patted him down. (Paras. 4-5).

In Norton, the Court found critical that Norton's reaction to the police shining their spotlight into the car. This reaction was the furtive movements cited in Paragraphs 4 and 5 of the Norton

Decision. The officers had been responding to a shots fired call, and the furtive movements led them to be concerned that Norton may have been trying to conceal a firearm due to this call. (Para. 17). The testifying officer indicated that Norton's movement was suspicious because normally someone confronted with a bright spotlight would put a hand up to block the light, as opposed to reaching behind his or her back. This is a specific reasonable inference. Officers need to see a person's hands so that they can determine whether the individual is reaching for a gun. (Para. 20-21).

Clearly, the facts of Norton are materially different from the present situation. This present situation did not involve Defendant being in a car, and then making furtive gestures consistent with attempting to place something in the back of the car, consistent with the shots fired call. Here, Defendant was just walking away from the police, and had his hand on his left side waistband. Hence, like Tally-Clayborne, the facts of Norton are materially distinguishable from the present situation.

In the present matter, the Court of Appeals had simply applied relevant and applicable law to the present situation in determining this case. This, just as the Courts had done in Tally-Clayborne, and Norton. All of these Courts had determined, based upon the facts and the well established law, whether or not reasonable suspicion had existed in their respective situations. As discussed,

the facts in the present matter materially differ from the facts of these two other non-published cases cited by the Petitioner. Under the law and the applicable standards, this analysis and set of circumstances does not require, nor legally warrant, Supreme Court reversal. Further, as discussed, the Petitioner has not argued that any of the Court's and the Defendant's relied-upon case law requires review or reconsideration.

Importantly, and relevant to the Petitioner's Brief, none of that Brief's cited case law had involved Shotspotter alerts. Yet, the Petitioner cites Shotspotter technology to attempt to justify the Court reversing the Court of Appeals' Decision. Hence, the Petitioner does not cite any case law, or legal reasoning, in order to support this position. Instead, the case law that the Petitioner relies upon does not involve such technology.

## CONCLUSION

WHEREFORE, For the Reasons indicated above, AVAN NIMMER, by and through his attorney Mark S. Rosen of the Law Offices of Rosen and Holzman, Ltd, hereby requests that this Honorable Court affirm the Decision of the Court of Appeals. Contrary to the trial court, the determination of reasonable suspicion requires individualized suspicion, not generalized stopping of anyone in the area of a Shotspotter alert. The presence of Shotspotter technology does not

negate this legal requirement of individualized suspicion. Here, as discussed individualized suspicion did not exist, as the Court of Appeals had correctly concluded.

Dated this 1st day of June, 2021.

Respectfully Submitted,

Mark S. Rosen
State Bar No. 1019297

Rosen and Holzman
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188
ATTN: Mark S. Rosen
(262) 544-5804
email:roseholz@sbcglobal.net

CERTIFICATION

I hereby certify that the Defendant-Appellant's Supreme Court Brief in the matter of State of Wisconsin vs. Avan Nimmer, 2020 AP 000878 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is thirty two (32) pages.

Dated this 1st day of June, 2021, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Defendant-Appellant's Supreme Court Brief in the matter of State of Wisconsin vs. Avan Nimmer, Case No. 2020 AP 000878 CR is identical to the text of the paper brief in this same case.

Dated this 1st day of June, 2021, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant