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COURT OF APPEALS

**STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Appellant,**

**v.**

**Appeal No. 2021AP1185-CR**
**Circuit Court Case No. 20CT049**

**RORY D. REVELS,**

**Respondent-Respondent.**

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ON APPEAL FROM THE FINAL ORDER DISMSISING CASE WITH PREJUDICE DUE TO FAILURE TO PRESERVE EVIDENCE ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE PATRICIA A. BARRETT, PRESIDING

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# REPLY BRIEF OF PLAINTIFF-APPELLANT

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# TABLE OF CONTENTS

ARGUMENT .....1

I. The Standard of Review is a Mixed Question of Fact and Law .....1

II. The Record Does not Support Revels' Claim that Officer Meyer's Squad and Body-Worn Camera Video Would Have Provided Relevant Pre-Contact Information .....1

III. *Huggett* is Distinguishable, and Continued Overt Reliance on *Hahn* is Problematic .....5

IV. Officers Meyer and Smith Violated the Letter of the Policy, but Complied with the Spirit of the Policy .....8

CONCLUSION .....9

## TABLE OF AUTHORITIES

**Cases:**

*Arizona v. Youngblood*,
488 U.S. 51 (1988)……...4, 6, 7, 8

*California v. Trombetta*,
467 U.S. 479 (1984)……1, 6, 7, 8

*State v. Amundson*,
69 Wis. 2d 554, 230 N.W.2d 775 (1975)…….....8

*State v. Disch*,
119 Wis. 2d 461, 351 N.W.2d 492 (1984)……..…….9

*State v. Greenwold* (*Greenwold I*),
181 Wis. 2d 881, 512 N.W.2d 237 (Ct. App. 1994)…….6

*State v. Hahn*,
132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986)……1, 5, 6, 7, 8

*State v. Huggett*,
2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675…….5, 6, 7, 8

*State v. Luedtke*,
2014 WI App 79, 355 Wis. 2d 436, 851 N.W.2d 837……..…6

*State v. Luedtke* (*and v. Weissinger)*,
2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592…….…….4, 6, 7

*State v. Munford*,
2010 WI App 168, 330 Wis. 2d 575, 794 N.W.2d 264……..…3

*State v. Weissinger*,
2014 WI App 73, 355 Wis. 2d 546, 851 N.W.2d 780…….7, 8

## ARGUMENT

The State hereby adopts by reference all arguments made in its original brief. The arguments that follow address only the claims asserted by Revels in his response brief.

### I. The Standard of Review is a Mixed Question of Fact and Law

Revels suggests that the Circuit Court's rulings should be viewed purely under the erroneous exercise of discretion standard. *Resp. Brief*, 18 – 19. This is incorrect. As the Court of Appeals noted in *Hahn*, the correct standard is a mixed one:

> Here, there is a mixed question of fact and law. The factual portion concerns what the sheriff did, and the legal questions are whether the state possessed the vehicle and whether the facts meet the legal standard of *Trombetta*. We apply the clearly erroneous standard to the trial court's findings of fact. If we accept the trial court's findings, we review *de novo* the application of the legal standard to those facts.

*State v. Hahn*, 132 Wis. 2d 351, 356-57, 392 N.W.2d 464, 466 (Ct. App. 1986) (internal citations omitted; emphasis in the original).

Further, as the historical facts of this case are not in dispute (rather, just the interpretation of the historical facts is contested), this case is subject to independent appellate review. *See id*. at 356 (further citation omitted).

### II. The Record Does not Support Revels' Claim that Officer Meyer's Squad and Body-Worn Camera Video Would Have Provided Relevant Pre-Contact Information

Revels indicates that the he believes Officer Meyer's squad and body-worn camera video would have shown the circumstances observed by Officer Meyer upon initially observing Revels' truck. *Resp. Brief*, 23. Concerning the squad-camera video, this assertion is misleading; concerning the body-

worn camera video, this assertion is simply wrong. The validity of these assertions cuts against Revels' claims as to the potential or apparent exculpatory value of the videos.

As testified to by Officer Meyer, it was possible that the squad camera video could have shown Revels' vehicle in motion or with brake lights on and exhaust emanating from the vehicle; however, it also may not have. R39, 50:16-25. Indeed, Officer Meyer indicated that, depending on how long it took him to move from the bank parking lot to behind Revels' vehicle (fifteen to thirty seconds (*id*. at 64:19-25)), the squad camera video would have captured between fifteen seconds of Officer Meyer parked in the parking lot and zero seconds of him parked in the lot. *Id*. at 64-65. If the squad camera captured zero seconds of Officer Meyer being parked in the parking lot, it would not have captured Revels' vehicle in motion (as it would have captured only Officer Meyer's reaction to observing Revels' vehicle). More generously, even if the squad camera video system captured fifteen seconds of Officer Meyer being parked in the parking lot, then the video also would not have shown Revels' truck in motion since the Officer estimated that Revels' truck was stopped in traffic for between thirty and forty-five seconds. Is it possible that the squad video could have shown Revels' truck in motion? Maybe. Is it likely? No. Even the hearsay account of Officer Smith (who may have heard Officer Meyer say he saw Revels' vehicle stopped at a green light for about a minute prior to moving behind it – *id*. at 80) would indicate that Officer Meyer's squad camera video would not have observed Revels' vehicle in motion.

Could the squad video have captured the vehicle running, with lights on, and with brake lamps activated, stopped on the street where Officer Meyer contacted Revels? Yes. But ultimately, none of that information is determinative of the issue in this case as none of that information is exculpatory. Whether those things were true or false has no impact on the

legality of Officer Meyer's contact with Revels' vehicle, which was stopped or parked on a city street (in a no parking zone), facing a green light in the middle of the night.

Revels also asserts that Officer Meyer's body-worn camera video "would provide an accurate and objective picture of what he observed in the moments leading up to and after he activated his emergency lights…" *Resp. Brief*, 24 – 25. This is incorrect. Officer Meyer testified that at the time of his initial contact with Revels, he did not view the contact as a traffic stop (R39, 70:20) which therefore did not necessitate him activating his body-worn camera. Additionally, while there is evidence in the record that the squad camera pre-records thirty seconds prior to activation of the emergency lights (a triggering event – *see id*. at 34), there is no evidence in the record to support the same conclusion for body-worn cameras. Given that most body-worn cameras are worn on an officer's torso, and as Officer Meyer was seated in a squad car, it is illogical to conclude that his body-worn camera—if recording at all—would have captured anything (aside from his steering wheel) prior to Officer Meyer exiting his squad after parking behind Revels.

Any discrepancies between what Officers Meyer and Smith reported would have been revealed by the body-worn camera video of Officer Smith (copies of which were accidentally preserved in triplicate). Officer Smith's video captured his interaction with Officer Meyer and his interactions with Revels including contact at the vehicle, standardized field sobriety testing, and arrest. R39, 92. It is undisputed that Officer Smith's body-worn camera video would be "comparable evidence" to Officer Meyer's, at least once Officer Smith arrived. *See State v. Munford*, 2010 WI App 168, ¶ 21, 330 Wis. 2d 575, 584, 794 N.W.2d 264, 269 (further citation omitted) (In order for a due process violation to have occurred, the defendant must be "unable to obtain comparable evidence by other reasonably available means."). The only non-comparable video lost by the failure to preserve Officer Meyer's

body-worn and squad camera video would be that prior to Officer Smith's arrival; essentially just that outlined above (Officer Meyer's initial contact with Revels). As discussed, this video would have revealed no information that was apparently exculpatory. Additionally, as Officer Smith also contacted Revels while Revels was still seated in his truck, confirmed how much he drank, and spoke with him (R4, 2), this is comparable evidence to that which would have been on Officer Meyer's body-worn camera video. The comparable nature of Officer Smith's body-worn camera video was argued to the circuit court (R42, 30:5 – 17), but never countered by the defense or addressed by the Circuit Court in its ruling. *See, generally,* R42.

Revels notes that Officer Meyer believed his videos would have had value to the case. *Resp. Brief,* 25. They are both correct. Had the videos been preserved, they would have been valuable for the prosecution and the defense. They would have served as inculpatory evidence, showing Revels' guilt, likely helping to direct the case to a negotiated disposition (saving the effort of this litigation and trial for both parties). It is clear that the videos have significantly less exculpatory value than the lost evidence in *Youngblood*, 488 U.S. 51 (1988). There, the Supreme Court described the same sort of evidence being dealt with in this case. It is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id*. at 57. While perhaps the video to this point *could have* been watched (tested) and *could have* shown those things listed above, in all likelihood, the video would have served to further inculpate, not exculpate, Revels. If the evidence was inculpatory, it is difficult to see how it was also apparently exculpatory. *See, e.g., State v. Luedtke,* 2015 WI 42, ¶¶ 54 – 57, 362 Wis. 2d 1, 863 N.W.2d 592 (the Wisconsin Supreme Court held blood samples in an OWI case which tested positive for THC and were then destroyed were more likely to be inculpatory than exculpatory, thus were at most potentially exculpatory

and therefore required bad faith to raise to the level of a due process violation).

## III. *Huggett* is Distinguishable, and Continued Overt Reliance on *Hahn* is Problematic

Revels argues that this case is similar to *State v. Huggett*, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675. While *Huggett* deals with the same area law as well as digital recordings, the comparative usefulness ends there. In *Huggett*, law enforcement failed to preserve apparently exculpatory voicemails left on cell phones in a homicide case where self-defense was at issue. *Id*. ¶ 1. Huggett's safety was threatened by the decedent (Peach), who left threatening voicemails on Huggett's and his girlfriend's phones. *Id*. ¶ 2. The same day the voicemails were left, Peach came to Huggett's home, broke down the front door, and entered the home. *Id*. ¶ 3. Huggett shot Peach twice, and Peach ran out of the home. *Id*. He was later found dead in the front yard. *Id*. Huggett pointed out and investigating officers noted the importance of the voicemails during the case's initial investigation. *Id.* ¶ 4. Law enforcement seized the cell phones, but ultimately failed to preserve the voicemails. *Id.* ¶¶ 4-9. The State charged Huggett with second-degree intentional homicide, and Huggett moved to dismiss for failure to preserve the voicemails. *Id*. ¶¶ 1, 10.

In *Huggett*, the State agreed that the missing voicemails were apparently exculpatory. *Id*. ¶ 14.[1] It is clear from the facts in *Huggett* that those recordings were apparently exculpatory. The exculpatory value of *Huggett*'s voicemails is not equivalent to any potential exculpatory value of the squad or body-worn camera video of Officer Meyer in this case. *Huggett*

[1] The district attorney stated, "I'm not going to sit here as an officer of the court, as district attorney, and an advocate for justice and tell the Court that this evidence is not exculpatory or apparently exculpatory." *State v. Huggett*, 2010 WI App 69, ¶ 14.

dealt with the failure to preserve evidence which possessed incontrovertible apparently exculpatory value. This case does not. Indeed, it is the entire thrust of the State's argument that neither of the at-issue videos were apparently exculpatory. Because of the nature of the voicemails in *Huggett*, the court of appeals did not need to discuss the exculpatory value of the recordings. Thus, the *Huggett* opinion is not on-point as the disputed issue in this case is whether the videos were potentially or apparently exculpatory.

While *Huggett* is still valid and controlling law (though not on-point), reliance on *State v. Hahn* for determining the instant issues is somewhat problematic for two reasons. First, the *Hahn* decision relies on outdated Supreme Court precedent. As noted in the State's initial brief, the due process and evidence preservation issue was notably addressed by the U.S. Supreme Court in *California v. Trombetta* (467 U.S. 479 (1984)) and then modified by the Court in *Arizona v. Youngblood* (488 U.S. 51 (1988)). Importantly, the *Youngblood* decision refined the *Trombetta* rule and created the line of precedent that currently exists. In that line of cases, if potentially exculpatory evidence is not preserved, then the defendant must show bad faith on the part of the State to prove a due process violation. *See*, *e.g.*, *State v. Luedtke*, 2014 WI App 79, ¶ 21 *aff'd* 2015 WI 42. This, the *Youngblood* rule, was held to be controlling in Wisconsin as the Wisconsin constitution does not offer greater due process protection than its federal counterpart. *State v. Luedtke*, 2015 WI 42, ¶ 39. Importantly, *Hahn* was decided in 1986, before the *Youngblood* decision was issued (1988), and thus did not utilize the new *Youngblood* framework to analyze the case's issues. This has been pointed out in several Wisconsin cases. For example, in *Huggett*'s note 7, the Court of Appeals wrote:

> While *State v. Hahn*… referred to the evidence's "apparent exculpatory value," that case was decided prior to *Arizona v. Youngblood*…and *Greenwold I*, which discussed *Hahn*. Thus, we recognize *Hahn* was not necessarily distinguishing between potentially

> and apparently exculpatory evidence as those terms are utilized in the subsequent cases.

*State v. Huggett*, 2010 WI App 69, ¶ 19, n. 7 (citations omitted).

The issue is also mentioned in *State v. Weissinger*, where the Court of Appeals noted, "More importantly, the *Hahn* court relied on *California v. Trombetta*, under which the defense had to show that the evidence might be expected to play a significant role in the defense. The *Trombetta* rule was refined by *Youngblood*." *Weissinger*, 2014 WI App 73, ¶ 13, n. 5, 355 Wis. 2d 546, 556, 821 N.W.2d 780, 785 (internal quotations/further citations omitted) *aff'd* 2015 WI 42. Thus, given the age of *Hahn*, the changed legal landscape since the opinion's publishing, and the abundance of more recent on-point precedential cases, Revels' overt reliance on *Hahn* is unwise.

The second problem with reliance on *Hahn* is the same problem as with *Huggett*: there was no argument in *Hahn* as to whether the lost evidence was apparently exculpatory. The consolidated appellant in *Luedtke* (named Weissinger) made the same claim as Revels makes here (that *Hahn* is controlling); however, the Wisconsin Supreme Court rejected that claim, noting that

> reliance on [*Hahn*], is misplaced. The evidence destroyed by the State in *Hahn* had apparent exculpatory value. By contrast, Weissinger's blood had, at most, *potential* exculpatory value because, as explained above, the fact that her blood sample tested positive for THC indicated that her blood sample was inculpatory. Absent bad faith, destruction of evidence that merely has *potential* exculpatory value does not violate due process.

*State v. Luedtke (*and *Weissinger)*, 2015 WI 42, ¶ 57.

What is more, that case primarily focused on the "exclusive possession" claims concerning the at-issue vehicle. It did not focus its discussion on if and/or whether the vehicle was potentially or apparently exculpatory, likely because the distinction did not yet legally matter. Therefore, the *Hahn* case is not controlling here because it is based on outdated precedent and, like *Huggett*, is not on-point.

## IV. Officers Meyer and Smith Violated the Letter of the Policy, but Complied with its Spirit

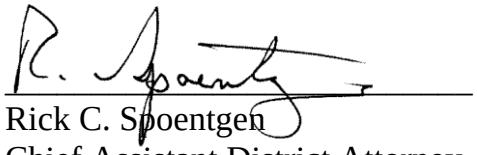
Revels argues and the Circuit Court noted (R42, 35:8) that both Officers Meyer and Smith committed flagrant policy violations by failing to properly download the squad and body-worn camera video in this case. Revels then again cites *Huggett* and *Hahn*, and adds *State v. Amundson*, 69 Wis. 2d 554, 230 N.W.2d 775 (1975) in support of the proposition that discretionary dismissal is appropriate for the loss of potentially exculpatory evidence. *Resp. Brief*, 33 – 35. As discussed *supra*, this is not the state of the law. *Huggett* and *Hahn* have been discussed above, and *Amundson* fits the same analysis as *Hahn*, being decided in 1975, well-before *Trombetta* or *Youngblood*. Thus, reliance on *Amundson*, like *Hahn*, is unwise and is not on-point.

It is admitted that both Officers violated the exact verbiage of departmental policy. It should be undisputed, however, that they were acting consistent with departmental practice. Discussing how videos are preserved in multiple-officer cases, Chief Schauf testified: "It can be the practice that each individual does it, but generally one officer that is the lead officer for the case will download them all onto one storage device." R39, 31: 19 – 22. It is further clear from the record that Officer Smith (the lead case officer), meant, attempted to, and thought he had download the three relevant videos in this case, including those from Officer Meyer's squad and body-worn cameras. *Id*. at 86 – 92. There was neither "official animus" nor "conscious efforts" made to suppress the video in this matter (as is required for a finding of bad faith, a prerequisite to a finding of the denial of due process for loss of potentially exculpatory evidence). *See State v. Weissinger*, 2014 WI App 73, ¶ 10 (further citation omitted). It was, as Officer Smith indicated, a simple mistake. *Id.* Here, the Officers' actions did not comport with the language of

the policy, but they did comport with departmental practice. Officer Smith tried to do the right thing and preserve the videos, he just made a mistake. Due process requires fundamental fairness, but it does not require perfection. Law enforcement officers are fallible human beings and they will sometimes forget or lose things. "A defendant is entitled to a fair trial but not a perfect one." *State v. Disch*, 119 Wis. 2d 461, 469, 351 N.W.2d 492, 496 (1984).

## CONCLUSION

For the reasons outlined above, the State respectfully requests that the Court of Appeals find that Officer Meyer's body-worn and squad camera videos were potentially exculpatory, thereby necessitating a finding of bad faith prior to dismissal. The State further requests that the Court of Appeals find that no bad faith has been shown, that dismissal is inappropriate, and remand this case for further proceedings consistent with that ruling.



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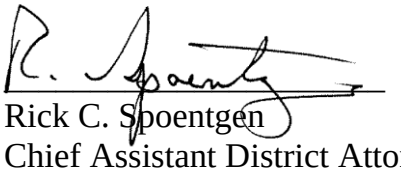
## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2856 words.

Dated this 17th day of September, 2021.



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