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STATE OF WISCONSIN  
IN SUPREME COURT

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Appeal No. 2022AP001438 CR

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State of Wisconsin,

Plaintiff-Respondent,

v.

Kelly A. Monson,

Defendant-Appellant.

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ON REVIEW OF AN ORDER BY THE COURT OF APPEALS, DISTRICT TWO  
AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT  
OF WINNEBAGO COUNTY, THE HONORABLE JOHN A. JORGENSEN PRESIDING

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PETITION FOR REVIEW

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Dated: February 15, 2023

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	ii
I. STATEMENT OF THE ISSUE . . . . .	1
II. REASONS FOR REVIEW PURSUANT TO WIS. STAT. 809.62 (1R) . . . . .	1
III. STATEMENT OF THE CASE . . . . .	1
IV. ARGUMENT: THE COURT OF APPEALS INCORRECTLY APPLIES . . . . . <u>HOGAN</u> TO THE PRESENT CASE BY CONCLUDING THAT "MONSON'S RELIANCE ON <u>HOGAN</u> IS "PATENTLY INAPPROPRIATE." . . . . .	3
V. CONCLUSION . . . . .	6

### I. STATEMENT OF ISSUE

Was the traffic stop of defendant Kelly A. Monson ("Monson") unlawfully extended and that therefore the physical evidence obtained was an unlawful seizure?

The trial court and appellate court answered in the negative.

### II. REASONS FOR REVIEW PURSUANT TO WIS. STAT. 809.62(1R)

A decision by the Wisconsin Supreme Court will help develop, clarify or harmonize the law, and the court of appeals decision is in conflict with State v. Hogan, 364 Wis. 2d 167, 182, 868 N.W. 2d 124 (2015). With facts strikingly similar to the present case, the Hogan case allows this court to reverse the trial court's ruling that the extension of Monson's traffic stop was lawful. The court of appeals in the present case applied Hogan to support the court's denial of Monson's appeal, rather than applying Hogan as Hogan applied itself to support the motorist defendant.

### III. STATEMENT OF THE CASE

The State of Wisconsin ("State") filed a criminal Complaint in Winnebago County Circuit Court against Monson on November 19, 2019 [R4]. The Complaint consisted of two misdemeanors: Operating a Motor Vehicle While Under the Influence—3<sup>rd</sup> Offense,

and Operating With Restricted Controlled Substance in Blood—3rd Offense [Id.].

The Complaint described an incident of April 26, 2019 in which an officer stopped Monson's vehicle, issued her a citation, gave her field sobriety tests and a PBT test [Id. at 2-4]. The Complaint further states that Monson was put under arrest and a search of the vehicle was done [Id. at 5]. A search warrant for blood draw was obtained [Id.]. The forensic results of the blood test showed the presence of Delta9 THC and Methamphetamines [Id. at 6].

Monson's motion to suppress evidence was filed August 5, 2020 [R29]. The hearing for said motion was held April 15, 2021, and the court denied the motion [R66].

Monson's trial counsel filed a letter to the court with request for a competency examination of Monson, and the court ordered same [R54, 56]. On June 21, 2021 the competency report was filed with the court, and Monson was deemed not incompetent to stand trial [R57].

A jury trial was held November 9, 2021 [R117]. The verdict of the jury was guilty for both counts of the Complaint [R85]. The court proceeded to sentencing immediately after the jury trial concluded [Id. at 161]. The court imposed a sentence of 45 days local jail time with Huber privileges, and allowed a

sentence credit of two days [Id. at 165-167]. A Judgment of Conviction was filed on November 9, 2021 [R94]. A Notice of Intent to Seek Postconviction Relief was filed November 23, 2021 [R96].

A Notice of Appeal was filed by the undersigned on August 25, 2022 [R125]. The Index record was received by the Court of Appeals on October 4, 2022 [R132].

All briefs were submitted to the Court of Appeals by December 13, 2022. The Court of Appeals issued its decision on January 18, 2023.

**IV. ARGUMENT: THE COURT OF APPEALS INCORRECTLY APPLIES HOGAN TO THE PRESENT CASE BY CONCLUDING THAT "MONSON'S RELIANCE ON HOGAN IS "PATENTLY INAPPROPRIATE."**

Monson's trial court attorney and the undersigned have argued that Hogan supports the facts of her case. The Court of Appeals quotes the following from Hogan, to conclude that "Monson's reliance on *Hogan* is patently inappropriate:"

"Upon careful examination of the record, we believe the State could have made a valid case that Deputy Smith had reasonable suspicion to pursue field sobriety tests with Patrick Hogan. However, the case the State could have made in circuit court was not made and, consequently, Judge Day's ruling on this point was not error." Decision at 10.

The Court of Appeals also concludes that, "But even more important is the fact that, while supportive building block-block facts may have been factually present in *Hogan*, there were not *before* that trial court." Id.

The following is the concern with the Court of Appeals decision regarding Hogan. Just because the Hogan court concluded that the State could have made a case does not make Hogan "patently inappropriate" for Monson to rely upon Hogan. The Hogan court found against the State based upon the following facts that were before the trial court in Hogan (this argument was set forth in Monson's appellate brief):

"There was no evidence and no suspicion that Hogan was driving under the influence of alcohol. There also was no evidence that Hogan's driving had been impaired by drugs. **The deputy's observations suggested that Hogan might have been using drugs and thus might have violated Wis. Stat. § 346.63(1) (am), which makes it illegal for a person to drive or operate a motor vehicle with "a detectable amount of a restricted controlled substance in his or her blood."** As a result, the issue presented to the circuit court was whether there was reasonable suspicion that Hogan had been using controlled substances recently enough that evidence of that use would be detected in his blood."

and

"For a variety of reasons, the circuit court put no stock in the deputy's testimony about restricted pupils as a factor in establishing reasonable suspicion. The deputy did not have definitive information at any point on how drug use might affect pupil size. He referred to his familiarity with a pupilometer card but he did not bring the card to substantiate or supplement his testimony.

**Consequently, the case for reasonable suspicion rests primarily on the deputy's observations that Hogan's upper body was shaking and "he appeared to be very nervous." These points appear in his suppression hearing testimony and are even more prominent in the audio that accompanies the video.**

**Nervousness, anxiety, and tremors are consistent with methamphetamine use. National Highway Traffic Safety Administration, Drugs and Human Performance Fact Sheets, Report No. DOT HS 809 725, at 63 (April 2014). These characteristics, however, may also have innocent explanations. The possibility that innocent explanations may exist for observed behavior does not preclude a finding of reasonable suspicion, but as a practical matter, police cannot expect to conduct field sobriety tests on every motorist who is shaking and nervous when stopped by an officer."**

Hogan at 185-187 (emphasis added) (endnote omitted). See Monson's initial brief at 19-20.

The appellate brief therefore made the following argument:

"The facts of Hogan are strikingly similar to the present case. In both cases, the traffic stop was not due to observed impaired driving. In both cases, the extension of stop was based upon the officer's observations of the motorist. In both cases, the illegal substance was methamphetamine. In Hogan, the officer noticed the motorist as very nervous and shaking with body tremors, as well as noticing restricted pupils. In the present case, the officer noticed bloodshot/glassy eyes, erratic eye movements, nervousness and slurred speech. In both cases, the officers admitted that they did not have drug recognition training, and based their observations on years of work experience.

The Hogan court expressly notes the link between nervousness, anxiety and tremors, and methamphetamine use. But the Hogan court was not willing to allow the officer's observations of same to justify the extension of traffic stop." See Monson's initial brief at 20-21.

The Court of Appeals decision in the present case misapplies Hogan to the present case. The court ignores the similarity of facts that were present before the trial court in Hogan and the present case. Therefore, contrary to the court's conclusion, Hogan supports Monson. It is not "patently inappropriate" for Monson to rely on Hogan.

#### **V. CONCLUSION**

Monson's appeal is supported by the Hogan case. Contrary to the Court of Appeal decision, it is not "patently inappropriate" for Monson to rely on Hogan. The Court of Appeals decision misapplies Hogan to the present case.

Monson request this court to grant her petition for review, and to ultimately reverse the Court of Appeals decision.

Dated this 15<sup>th</sup> day of February 2023.

Andrew H. Morgan (electronically signed)

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Attorney Andrew H. Morgan, W.S.B. 1001491



CERTIFICATION OF BRIEF

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 monospaced word font. The length of this brief is six pages.

Dated this 15<sup>th</sup> day of February 2023.

Andrew H. Morgan (electronically signed)

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Attorney Andrew H. Morgan, W.S.B. 1001491

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief and appendix which complies with the requirements of Rule 809.19(12).

This electronic brief and appendix is identical in context and format to the printed brief and appendix as of this date.

A copy of this certificate has been served with the paper copies of this brief, as well as served upon parties per e-file notice.

Dated this 15<sup>th</sup> day of February 2023.

Andrew H. Morgan (electronically signed)

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INDEX TO APPENDIX

<u>Record Page</u>	<u>Document</u>	<u>Appendix Page</u>
----	Decision of Court of Appeals	101-112
R66	Transcript and decision of trial court motion hearing, held April 15, 2021 regarding suppression of evidence motion.	113-132

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of the brief, is an appendix that complies with Wis. Stat. 809.62(2). I further certify that pursuant to Wis. Stat. 809.19(2) that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using initials instead of full names of 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.

Dated this 15<sup>th</sup> day of February 2023.

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