STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2024AP2559

CITY OF WEST BEND,

Plaintiff-Respondent,

-vs-

LOGAN PATRICK LANG,

Defendant-Appellant-Petitioner.

PETITION FROM A DECISION OF THE COURT OF APPEALS, DISTRICT II, ENTERED ON JUNE 4, 2025, AFFIRMING AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH I, THE HONORABLE RYAN HETZEL PRESIDING, TRIAL COURT CASE NO. 23-TR-744

PETITION OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUE

WHETHER LAW ENFORCEMENT OFFICERS LACKED A REASONABLE SUSPICION TO ENLARGE THE SCOPE OF MR. LANG'S DETENTION IN VIOLATION OF *STATE v. BETOW*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999)?

Trial Court Answered: NO. The circuit court concluded that because, *inter alia*, Mr. Lang was exiting a school parking lot after hours with his headlights extinguished, had a "slight" odor of intoxicants emanating from his vehicle, had "slow" speech, and was "baffled" regarding from where it was he was coming, ample reason existed to enlarge the scope of his detention under *State v. Vaaler*, Case No. 2019AP2174-CR, 394 Wis. 2d 188, 949 N.W.2d 889 (Aug. 6, 2020)(unpublished). R31 at pp. 1-5; P-App. at 110-11.

Court of Appeals Answered: NO. The court of appeals, relying upon the same factors as those identified by the circuit court immediately above, concluded that the totality of the circumstances justified the enlargement of the scope of Mr. Lang's detention. Slip Op. at pp. 5-6; P-App. at 105-06.

STATEMENT OF THE CASE

On March 5, 2023, Mr. Lang was arrested in Washington County for Operating a Motor Vehicle While Under the Influence of an Intoxicant—First Offense, contrary to Wis. Stat. § 346.63(1)(a) as adopted by West Bend Municipal Ordinance No. 7.01, and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—First Offense, contrary to Wis. Stat. § 343.63(1)(b) as adopted by West Bend Municipal Ordinance No. 7.01. R2.

After retaining counsel, Mr. Lang filed pretrial motions including, *inter alia*, a motion to suppress based upon the unconstitutional enlargement of the scope of his detention in violation of the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution. R20. A hearing on Mr. Lang's motions was held on July 28, 2023. R27.

At the evidentiary hearing, the City offered the testimony of Officer Kevin Gall of the West Bend Police Department. R27 at pp. 4-37. During the hearing, the

Court received as Exhibit No.1 a portion of Officer Gall's body-camera footage of his encounter with Mr. Lang. R27 at 22:15-22; R26.

On January 22, 2024, the circuit court issued a written decision denying Mr. Lang's motion, stating that because Mr. Lang exited a school parking lot after hours without his headlights on, had a "slight" odor of intoxicants emanating from his vehicle, had "slow" speech, and was "baffled" regarding from where it was he was coming, sufficient reason existed to enlarge the scope of his detention under *State v. Vaaler*, Case No. 2019AP2174-CR, 394 Wis. 2d 188, 949 N.W.2d 889 (Aug. 6, 2020)(unpublished). R31 at pp. 1-5; P-App. at 110-11.

On December 13, 2024, a trial to the court was held whereat Mr. Lang was found guilty of Operating a Motor Vehicle with a Prohibited Alcohol Concentration—First Offense. R46. On December 17, 2024, the court entered a judgment of conviction against Mr. Lang. R50.

It is from the foregoing adverse judgment of the circuit court that Mr. Lang appealed to the court of appeals by Notice of Appeal filed on December 17, 2024. R48. On June 4, 2025, the court of appeals issued its decision affirming the judgment of the circuit court. P-App. at 101-07. It is from this decision that Mr. Lang now petitions this Court for review.

STATEMENT OF FACTS

On December 19, 2022, Logan Lang was stopped and detained in the City of West Bend, Washington County, by Officer Kevin Gall of the West Bend Police Department for pulling out of a middle school parking lot with his vehicle headlights extinguished. R27 at 7:3-7. The encounter between the officer and Mr. Lang was captured on the officer's body-worn video camera. R26.

After making contact with Mr. Lang, Officer Gall observed a "faint" odor of intoxicants emanating from the Lang vehicle. R27 at 14:13-15. The officer also alleged that Mr. Lang had "slow and slurred" speech. R27 at 12:1. In its findings of fact, however, the circuit did not find Officer Gall's testimony credible on this point, instead concluding "that Mr. Lang's speech was not slurred," but it added that his speech was "slow and deliberate at times." R31 at p.4; P-App. at 113.

When Officer Gall asked Mr. Lang whether he consumed any intoxicating beverages that evening, Mr. Lang denied having anything to drink. R27 at 14:25 to 15:2; 15:12-24. Based upon these observations, Officer Gall decided he was going to enlarge the scope of Mr. Lang's detention by having him submit to a battery of field sobriety tests, whereupon he contacted his dispatcher to request that a second officer report to the scene of Mr. Lang's detention. R27 at 17:9-16. Shortly thereafter, Mr. Lang was directed to exit his vehicle for field sobriety testing. R27 at 19:16-22.

At this juncture in the evidentiary hearing, the court determined that further testimony was unnecessary. The court decided that when Mr. Lang exited his vehicle to submit to testing, the scope of his initial detention was enlarged to include an investigation into an impaired-driving related offense, and since this was the basis for Mr. Lang's pretrial challenge, "[a]nything [Officer Gall] would find out subsequent to this point is really not relevant . . . ." R27 at 22:2-14. Thus, no further testimony was adduced regarding the administration of field sobriety tests, Mr. Lang's arrest, or his subsequent submission to a blood test.

The foregoing recounting of the facts of Mr. Lang's case were those adduced on direct examination of Officer Gall. There were additional facts to which the officer testified on cross-examination, however, which have a substantial bearing on the issue presented for this Court's review. These include:

> After being detained, when Officer Gall queried Mr. Lang about why he had been stopped in the parking lot of a middle school, Mr. Lang explained that he had pulled over to use his phone to text, and further, Officer Gall admitted that he "had no reason not to believe" Mr. Lang about his reason for being in the school parking lot (R27 at 25:20-25);
>
> Officer Gall conceded that by pulling over to text, Mr. Lang was doing "the smart thing" (R27 at 26:12-17);
>
> As for Mr. Gall's driving behavior, apart from not having his headlamps lit, as he pulled out of the middle school parking lot, Officer Gall testified that he turned into the appropriate lane of travel (R27 at 27:6-8); he was not speeding (R27 at 27:12-15); he did not operate his vehicle in an erratic manner in that he did not swerve, weave, or deviate from his lane (R27 at 27:16-25); and Officer Gall did not observe Mr. Lang failing to signal his exit from the parking lot (R27 at 30:14-20);
>
> When Mr. Lang pulled over in response to the officer's lights, there was nothing unusual about the manner in which he parked or the distance he was from the curb when he stopped (R27 at 31:12-21);

Mr. Lang already had his driver's license out and ready to give to Officer Gall when the officer approached his vehicle (R27 at 31:22-25);

Officer Gall admitted that he never observed any unusual physical movements on the part of Mr. Lang while he was seated in his motor vehicle (R27 at 32:11 to 33:1);

The odor of intoxicants Officer Gall allegedly observed was not emanating from his person, but rather was coming from the *vehicle* in which he was seated (R27 at 34:6-15);

Officer Gall conceded that he did "there were no physical signs of impairment that [he] noticed with [Mr. Lang] prior to having him exit his truck (R27 at 37:9-14); and

Mr. Lang's eyes were neither bloodshot nor glassy (R27 at 37:17-20).

For the reasons set forth below, it is Mr. Lang's contention that the circuit court erred when it concluded that the totality of the circumstances in this case justified Officer Gall's enlargement of the scope of Mr. Lang's detention.

STANDARD OF REVIEW

Regarding Mr. Lang's challenges to whether the scope of his initial detention was unconstitutionally enlarged, this Court "will uphold the circuit court's findings of fact unless they are clearly erroneous, [but] [w]hether a . . . detention meets statutory and constitutional standards, . . . , is a question of law subject to *de novo* review." *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW

1. Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is a Novel One, the Resolution of Which Will Have Statewide Impact.

The question presented is a novel one because no court of supervisory jurisdiction in this State has defined what the term "totality" means as it is used in the "totality of the circumstances" test. There are a handful of decisions from the United States Supreme Court which define it as "the whole picture" or "all" the facts known to law enforcement, but as far as Wisconsin jurisprudence is concerned, there is no common law decision which gives direction to law enforcement officers—or courts, for that matter—as to what "totality" means when applying the test which bears its name. Since no such decisions exist, the issue presented by Mr. Lang is a novel one with statewide implications, and therefore satisfies Rule 809.62(1r)(c)2. for granting this petition.

2. Wis. Stat. § 809.62(1r)(c)3.: The Question Presented Is Likely to Recur Unless This Court Intervenes.

The question presented by Mr. Lang is likely to recur based upon the "numbers alone" given the frequency with which individuals are arrested for impaired driving-related violations in this State. With thousands of arrests for impaired-driving offenses occurring annually in Wisconsin, the gravity and pervasiveness of the issue he raises compels review because of the very commonality with which it is likely to recur throughout Wisconsin circuit courts. If no intervention is made by this Court to definitively address the issue Mr. Lang raises, defendants will repeatedly be denied their right to be free from unreasonable searches and seizures under the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution. This Court should intervene to provide direction to courts throughout this State under § 809.62(1r)(c)3. lest this problem occur with a high degree of incidence.

3. Wis. Stat. § 809.62(1r)(d): The Court of Appeals' Decision is in Conflict with Other Controlling Opinions.

As explained more fully below, the court of appeals' decision in the instant matter is in conflict with decisions of the United States Supreme Court which require that the totality of the circumstances test to be applied to "all" the facts and "the whole picture." *See* Section I., *supra*; *see also*, *United States v. Cortez*, 449 U.S. 411 (1981). Thus, Mr. Lang's petition should be granted pursuant to § 809.62(1r)(d).

ARGUMENT

I. THE COURT OF APPEALS, LIKE THE CIRCUIT COURT, APPLIED A VERSION OF THE "TOTALITY OF THE CIRCUMSTANCES" TEST WHICH CAN ONLY BE CHARACERIZED AS INEQUITABLE AND UNJUST.

Just as the circuit court did, the court of appeals "cherry-picked" facts from the record in this case which served solely to give the *appearance* of culpability on Mr. Lang's part. In essence, the court of appeals transmogrified the **totality** of the

circumstances test to reflect nothing more than an unfairly weighted, "twenty-twenty hindsight," *post hoc* justification for the actions of the officer in the instant matter. Regularly throughout circuit courts in this State, decisions premised upon the **totality** of the circumstances test repeatedly focus on only those facts which tend to inculpate a suspect rather than considering *all* the facts known to law enforcement which include exculpating facts as well. If the **totality** of the circumstances test truly means that the *totality* of the facts known to law enforcement must be considered when making conclusions of law, then a court should not be permitted to "put its finger on one side of the scale."

To illustrate Mr. Lang's point, consider the following hypothetical. If a physician had a patient whom she knew to be six feet tall and weigh 250 pounds, relying on these facts alone, the physician could conclude that her patient was "obese" as determined by his having a Body-Mass Index[1] of 33.9—a full thirty-six percent *over* the high end of what is considered a "healthy" body weight.[2] If the patient's height and weight were examined "with blinders on" to the exclusion of the true **totality** of the patient's circumstances, the physician would be justified in prescribing weight-loss medication for her patient—just as a law enforcement officer's actions to detain someone could be justified if one merely examined inculpating facts alone. There is, however, more to know about this patient than simply those facts which tend to establish his obesity. For example, this patient plays professional football, works out daily, runs a 4.5 forty-yard dash, and can bench press 400 pounds. With this **totality** of the circumstances now fully appreciated, it becomes reasonable to question whether the physician's conclusion that her patient was obese is reasonable under the **totality** of the circumstances—just as it would be reasonable to question whether a law enforcement officer had a reasonable suspicion to believe a violation of the law was afoot in light of the exculpating facts known to him.

Despite the plethora of decisions involving the totality of the circumstances test and how it is applied, it is remarkable that there exists no clear, direct, and unambiguous definition of the concept of "totality" as it is implicated in the test which bears its name. Due to this lack of direction, the totality of the circumstances

[1] The Body-Mass Index, or BMI, is a tool developed by physicians to determine whether a person is considered to be "underweight," to have a healthy" weight, to be "overweight," or finally to be "obese." https://www.nhlbi.nih.gov/calculate-your-bmi

[2] https://www.nhlbi.nih.gov/calculate-your-bmi

test, as it is applied in practice by courts throughout Wisconsin, has devolved into a one-sided examination of facts which constitute only a *part* of the "totality" of the information known to law enforcement officers at the time they decide to detain an individual. In effect, it is the equivalent of looking at only one side of a balance scale to see whether it has moved, rather than noticing that the other side of the scale is also weighted and may be tipped more significantly.

This case presents a substantial question of constitutional law because legal determinations under the "**totality** of the circumstances" test which are premised on an utter disregard for innocent facts that weaken a finding of reasonable suspicion—and instead support an alternate conclusion of innocence—is constitutionally specious and violates the Fourth Amendment's "reasonableness" standard as well as the commonly accepted definition of the word "totality."

At some point, even though it is well settled that "innocent behavior" may support a conclusion that a reasonable suspicion exists to believe a crime is afoot,[3] there must come a moment when a line is impermissibly crossed by construing the "innocent" facts as supporting an incriminating inference—rather than evaluating them for their *counter-indicative* nature—and is so forced and artificial, action must be taken by a court of supervisory jurisdiction to clarify precisely what an examination of the **totality** of the circumstances entails.

This petition affords the Court an opportunity to address how the innocent behavior standard is to be applied to Fourth Amendment questions when the circumstances do not merely involve facts that are inherently innocent, but involve facts which *contradict* conclusions of wrongdoing. How must these facts be considered as part of the "totality of the circumstances" test? There are no decisions of this Court which directly address at what point inferences from "innocent conduct" in Fourth Amendment analysis become so strained that they impugn the neutrality and detachment of a tribunal. There needs to be some direction—some standard—by which a line is drawn that keeps a reviewing court from ignoring the patently obvious conclusion that the innocent behavior it contrives as supporting a reasonable suspicion determination is more correctly viewed as undermining it.

[3] *See*, *e.g., United States v. Arvizu,* 534 U.S. 266 (2002).

Until such time as this Court establishes a clear standard that "totality" means **totality** in the relevant test, courts throughout Wisconsin will continue to cherry-pick facts from an officer's testimony which tend only to support an inculpating inference. Because literally thousands of Wisconsin citizens every year come into contact with law enforcement officers under the guise of any number of violations, a clarification by this Court on the question presented will have wide-ranging impact.

There must be some point at which the "inferential pendulum" swings from *supporting* an inference of wrongdoing to *undermining* it. Where this line lies and how to properly determine it is the question Mr. Lang presents for the Court's consideration. At present, this assessment has been left to lower courts without direction, and this has ultimately led to the disfigurement of the test to a degree which is so distorted it is no longer recognizable. Courts do not examine the true "totality" of the circumstances, but rather, look solely at the inferences which support a reasonable suspicion or probable cause determination *no matter how much stronger* the opposite inference may be based upon the innocent facts—the functional equivalent of the hypothetical physician diagnosing her patient as obese.

If the **totality** of the circumstances test is employed as intended when determining whether the individual is objectively manifesting behavior that justifies an investigatory detention, courts should consider everything objectively discernable from the citizen-law enforcement encounter, *i.e.*, "the whole picture." In fact, that is precisely how the Supreme Court characterized it: "[T]he totality of the circumstances—**the whole picture**—must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981)(emphasis added). "Based upon that **whole picture** the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id*. at 417-18 (emphasis added).

Despite recognizing that the totality of the circumstances test involves an examination of the "whole picture" known to law enforcement officers, over time this notion has not simply fallen by the wayside, but has actually metamorphosed into a standard by which any "purely innocent" evidence that counter-indicates the existence of an objective suspicion is either disregarded or, worse still, becomes so contrived that the conclusions drawn from the innocent behavior strain credulity. In

essence, many trial courts have become nothing more than apologists for law enforcement officers at the expense of the Fourth Amendment rights of the accused.

What is remarkable about the abuse of the standard is that the *Cortez* Court enunciated that "the assessment must be based upon **all** of the circumstances." *Id*. at 418 (emphasis added). Yet, in practice, this cautionary note is ignored, just as it was by the circuit court and court of appeals in Mr. Lang's case. *See* Section II. & III., *infra*.

II. A REASONABLE SUSPICION TO EXPAND THE SCOPE OF MR. LANG'S DETENTION DID NOT EXIST UNDER THE TOTALITY OF THE CIRCUMSTANCES.

A. Introduction.

Since the issue involved in this petition centers on the constitutionality of the enlargement of the scope of Mr. Lang's initial detention, it implicates the Fourth Amendment. As such, any analysis of the question presented must begin with the amendment itself. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious police action is not tolerated under the umbrella of the Fourth Amendment. As the Wisconsin Supreme Court noted in *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983), "[t]he basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id*. at 448-49; *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

When applying the protections against unreasonable searches and seizures, both federal and state courts have consistently held that "[c]onstitutional provisions for the security of persons and property should be **liberally construed**." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> A close and literal construction deprives [these protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**.

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)(emphasis added).

The foregoing authority does not stand alone as time and again the Supreme Court has consistently repeated that the Fourth Amendment "guaranties are to be **liberally construed** to prevent impairment of the protection extended." *Grau v. United States*, 287 U.S. 124, 127 (1932)(emphasis added). The Court has further admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Ultimately, "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added).

B. The Betow *Standard.*

1. The *Betow* Test Specifically.

Betow provides that once a driver is stopped for a traffic violation, he or she may be detained for purposes reasonably related to the nature of the initial stop,

however, the scope of the original detention may only be enlarged if "additional suspicious factors" come to light which objectively give rise to a reasonable inference that other crimes have been committed. *Id.* at 93-95. The *Betow* court held:

> The key is the "reasonable relationship" between the detention and the reasons for which the stop was made. If such an "articulable suspicion" exists, the person may be temporarily stopped and detained to allow the officer to "investigate the circumstances that provoke suspicion" as long as "the stop and inquiry [are] reasonably related in scope to the justification for their initiation." If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Id. at 94-95, quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1975).

Betow involved a circumstance in which the defendant had been stopped by an officer for speeding. *Betow*, 226 Wis. 2d at 91. When the officer approached Betow's vehicle to speak with him, he observed that Betow appeared to be nervous, gave inconsistent answers to where he was traveling, and that when he was asked for identification, the officer observed that a mushroom was embroidered on the outside of Betow's wallet. *Id*. The officer testified that it was his experience that persons with such wallets often were drug users. *Id*. The officer detained Betow further to await the arrival of a K9 Unit. *Id*. at 93. Ultimately, the *Betow* court found that Betow's right to be free from unreasonable searches and seizures was violated because the mushroom sewn on Betow's wallet, his seemingly inconsistent responses to questions, and his nervous appearance were insufficient grounds to enlarge the scope of Betow's detention beyond the speeding allegation. *Id*. at 98-99. The same principle is applicable to the instant case.

The "additional suspicious factors" referred to by the *Betow* court are examined objectively, *i.e.* the appropriate measure of whether a detention is constitutionally reasonable is an objective test examined under the totality of the circumstances.

> The test is an objective test. 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. An inchoate and unparticularized suspicion or 'hunch'. . . will not suffice.

State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(internal quotations omitted); *United States v. Pavelski,* 789 F.2d 485, 489 (7th Cir. 1986). "When determining if the standard of reasonable suspicion [is] met, those facts known to the officer must be considered together as a totality of the circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990)." *State v. Powers*, 2004 WI App. 143, ¶ 7, 275 Wis. 2d 456, 685 N.W.2d 869.

The United States Supreme Court emphasized the need for an objective suspicion of wrongdoing in *United States v. Cortez*, 499 U.S. 411 (1981). The *Cortez* Court concluded that the totality of the circumstances

> must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio, supra*, said '[that] this demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*.'

Cortez, 499 U.S. at 418 (emphasis in original), citing *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661-63 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

The notion that an investigatory detention is constitutionally justifiable is premised upon there being a particularized basis for suspecting that the person who is detained is engaged in some illegal activity. *Ornelas*, 517 U.S. at 696. A particularized basis is one which requires that there be some nexus, or link, between the officer's action in detaining a suspect and the suspect actually engaging "in wrongdoing."

2. Specific Examples Relating to Expanding the Scope of a Detention.

The instant case presents a circumstance in which an individual is detained based upon his not having his headlamps lit. Upon approaching the person, the detaining officer observes a faint odor of intoxicants emanating *from the vehicle*, however, the officer neither ties the odor directly to Mr. Lang's person nor does he note that the odor was of a moderate or strong nature—notably characterizing it as

"faint." Additionally, the officer does not note any other indicia of impairment, such as Mr. Lang fumbling for his driver's license, avoiding eye contact, having bloodshot or glassy eyes, *etc*. The question arises under this set of circumstances whether sufficient facts have been discovered beyond the reason for the initial detention (the headlamp violation) which would justify an enlargement of the scope of that detention to include an investigation for impaired driving. Fortunately, direction has been given by other courts on this matter, including *State v. Gonzalez*, No. 2013AP2535-CR, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. May 8, 2014)(unpublished); *State v. Meye*, No. 2010AP336-CR, 2010 WI App 120, 329 N.W.2d 272, 789 N.W.2d 755 (Ct. App. July 14, 2010)(unpublished), and *County of Sauk v. Leon*, No. 2010AP1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929 (Ct. App. Nov. 24, 2010)(unpublished).[4]

In *Gonzalez*, the court of appeals examined whether the extension of Ms. Gonzalez's detention to include an investigation for impaired driving was justified under the circumstances of her case. *Id*. ¶ 1. More specifically, Gonzalez was initially detained for having a defective headlight (very similar to the facts of the instant case). *Id*. ¶ 3. After the detaining officer approached Gonzalez's vehicle, he observed that Ms. Gonzalez had an odor of intoxicants about her person, but he did not observe any slurred speech or bloodshot eyes. *Id*. ¶ 4. Nevertheless, the officer had Gonzalez alight from her vehicle to perform field sobriety tests. *Id*. ¶ 5.

Gonzalez moved to suppress the evidence obtained after the enlargement of the scope of her detention. *Id*. ¶ 6. The circuit court denied Ms. Gonzalez's motion to suppress evidence on the ground that (1) she had an odor of intoxicants emanating from her *person*, and (2) she had "told an untruth" to the officer because she denied consuming intoxicants *yet the odor was not coming from her vehicle but rather from her person*. *Id*. ¶¶ 1, 7.

The court of appeals reversed the decision of the lower court. *Id*. ¶ 26. In reaching its holding, the *Gonzalez* court examined other decisions of a similar nature which reached the same conclusion as it did. It is worth quoting the *Gonzalez* court at length here because the cases which the *Gonzalez* court examined are relevant to Mr. Lang's case:

[4] The foregoing decisions are limited precedent opinions which may be cited for their persuasive value pursuant to Wis. Stat. § 809.23 (2025-26).

> There appears to be no published case law addressing reasonable suspicion on similar facts. As to the odor of intoxication alone, neither Gonzalez nor the State cites a published case addressing whether the smell of alcohol coming from a **driver** is sufficient to provide reasonable suspicion of intoxicated driving. Gonzalez does, however, identify two unpublished cases that support the conclusion that the odor of alcohol alone is not enough: *State v. Meye*, No. 2010AP336-CR, 2010 WI App 120, 329 N.W.2d 272, 789 N.W.2d 755, unpublished slip op. (WI App July 14, 2010), and *County of Sauk v. Leon*, No. 2010AP 1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929, unpublished slip op. (WI App Nov. 24, 2010). Both cases, in terms of the odor of alcohol and the time of day, are as suspicious or more suspicious than the facts here.
>
> In *Meye*, at 3:23 a.m., a police officer detected a "**strong**" odor of intoxicants coming from two individuals who had just exited a vehicle, but the officer could not determine whether the odor was coming from the driver or the passenger. *Meye*, No. 2010AP336-CR, 2010 WI App 120, ¶ 2, 329 Wis. 2d 272, 789 N.W.2d 755. The officer initiated an investigatory stop of the driver on this basis. *See id*., ¶¶ 2-3. The court in *Meye* rejected the proposition that the odor was enough to provide reasonable suspicion. *Id*., ¶ 6. The court indicated that there were no cases, published or unpublished, in which a court has held that "reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped." *Id*.; *see also*, *State v. Resch*, No. 2010AP2321-CR, 2011 WI App 75, 334 Wis. 2d 147, 799 N.W.2d 929, unpublished slip op., ¶ 19 (WI App Apr. 27, 2011 ("In *Meye*, this court held that the mere odor of intoxicants does not constitute reasonable suspicion that a driver is intoxicated. . . ."). So far as I can tell, the *Meye* court's decision did not hinge on the ambiguity of whether the odor was coming from the driver or passenger. Rather, the court concluded that this ambiguity "exacerbated" "[t]he weakness of this seizure." *See Meye*, 2010AP336-CR, 2010 WI App 120, ¶ 9, 329 Wis. 2d 272, 789 N.W.2d 755.
>
> In *Leon*, at approximately 11:00 p.m., a police officer detected alcohol on the breath of a suspect who admitted to consuming one beer with dinner an hour or two earlier. *See Leon*, No. 2010AP 1593, 2011 WI App 1, ¶¶ 2, 9-10, 330 Wis. 2d 836, 794 N.W.2d 929. The court in *Leon* concluded that the "admission of having consumed one beer with an evening meal, together with an odor [of intoxicants] of unspecified intensity," was not sufficient to provide reasonable suspicion of intoxicated driving. *Id*., ¶ 28.

Gonzalez, 2014 WI App 71, ¶¶ 18-20 (footnotes omitted; emphasis added). As discussed below, the *Gonzalez* court's observations should play a pivotal role in the outcome of Mr. Lang's case.

III. APPLICATION OF THE LAW TO THE FACTS.

The question in the instant petition is whether sufficient objective facts existed under the totality of the circumstances to excite a belief in Officer Gall that Mr. Lang was "engaged in impaired driving." The **totality** of the facts known to the officer at the time he elected to enlarge the scope of Mr. Lang's detention do *not* rise to this level when examined as a **totality**.

First, even though the circuit court characterized Mr. Lang as being "baffled" (an observation adopted by the court of appeals as well), the bulk of the evidence adduced in his case indicates that his mentation was not affected by alcohol. For example, Mr. Lang appropriately responded to Officer Gall's questions and engaged in a cogent conversation without exhibiting any problems. Simply because Mr. Lang was "hesitant"[5] to provide information to the officer is indicative of naught as he is under *no* obligation to provide detailed information to the officer.

Apart from this, Mr. Lang responded appropriately to other questions put to him, and moreover, he had his driver's license ready to give the officer upon his approach, indicating a situational *awareness*. It is part of the common stock of knowledge that alcohol does not discriminate. That is, it impairs mentation as well as coordination and when a person is alleged to be "under the influence of an intoxicant," the *absence* of any mental impairment utterly undermines the conclusion that the individual is actually "under the influence." If Mr. Lang's ability to think clearly was truly impaired by the consumption of alcohol, then it is reasonable to ask why this impairment was not exhibited elsewhere throughout Mr. Lang's initial encounter with the officer? In fact, *quite to the contrary*, Officer Gall stated that Mr. Lang had done "the smart thing" by pulling over to text. Clearly, Mr. Lang was thinking reasonably, intelligently, and appropriately by pulling over to text as *the City's own witness* characterized it.

Second, it should be emphasized that the lower court did not find Officer Gall credible on the issue of Mr. Lang's speech being "slurred." The court expressly found that his speech was *not* slurred, and therefore, Officer Gall's assertions become suspect across the board.

[5] R31 at p.4; P-App. at 113.

Third, Officer Gall did not claim to observe that Mr. Lang had bloodshot or glassy eyes—an observation which is made in nearly 100% of all impaired driving prosecutions.

Fourth, there is no allegation that Mr. Lang had any difficulty with his fine motor skills, as is often noted, by fumbling for his driver's license or insurance information.

Fifth, it is patently *unjust* to consider that Mr. Lang being stopped in a school parking lot for the purpose of safely sending texts is indicative of impairment because this conduct is *precisely what society expects and encourages.* Currently, there is a U.S. Department of Transportation media campaign to "Stop the Texts. Stop the Wrecks." because texting is a major factor in numerous motor vehicle accidents. To encourage such behavior, but then use the behavior of the compliant citizen against him for purposes of alleging "impairment," is utterly disingenuous and, frankly, approaches a form of entrapment.

Sixth, regarding Mr. Lang's headlamps not being lit, the *Gonzalez* court was faced with the exact same circumstances, yet it did not put faith in this observation as contributing anything to the notion that Gonzalez was impaired. Regarding the court's characterization that Gonzalez's headlamp was defective while Mr. Lang "failed to notice"[6] his were not, implies a material difference in a driver turning their headlights on and not realizing they have a defective lamp, as compared to a driver who drives during darkness without realizing they have no lights on at all. As much as the court would like to hang its hat on this argument, it is nothing more than a "six of one, half a dozen of the other" position. In other words, *both* drivers in *either* circumstance are hypothetically "unaware" of the conditions under which they are operating their respective vehicles. If this is evidence of impairment, then the driver with only one working headlamp should be aware of this fact and the *Gonzalez* court should have accounted for this in its analysis, however, it did not consider it a relevant or important consideration, *despite* the fact that Gonzalez drove her vehicle with only one working headlamp. Make no mistake, Mr. Lang is not contending that this is an "irrelevant" consideration which should be wholly disregarded. What he *is* proffering, however, is that evidence exists on a *spectrum*. Some evidence is stronger, more telling, or powerful than other evidence. For example, it is far more powerful to find a defendant's DNA on a murder weapon than it is to have a third

[6] R31 at p.4; P-App. at 113.

party testify that the accused was overheard yelling at the victim, "I'm gonna kill you." Certainly, both may be considered, but it is uncontestable that the former is more inculpating than the latter. This same notion is true of the *de minimus* weight the *Gonzalez* court gave to Gonzalez's operation of a vehicle with only one working headlight—**something of which she should have been aware**. In this case, the same *de mimimus* weight ought to be accorded his operation of a vehicle without its headlamps lit *especially* when considered in light of the plethora of additional facts which mitigate against a conclusion that Mr. Lang was impaired. Not every individual who operates a vehicle without its headlamps lit is impaired.

Seventh, the "other" parts of Mr. Lang's driving behavior demonstrate that he was exercising the clear judgment and steady hand necessary to safely operate the vehicle. *See* Wis. JI-Crim. 2668 (Rev. 04/2015). For example, as Mr. Lang pulled out of the middle school parking lot, Officer Gall testified that he turned into the appropriate lane of travel; was not speeding; did not operate his vehicle in an erratic manner in that he did not swerve, weave, or deviate from his lane; and properly signaled his exit from the parking lot. Moreover, when Mr. Lang pulled over in response to the officer's lights, there was nothing unusual about the manner in which he parked his car or the distance he was from the curb when he stopped.

Eighth, *unlike* the *Leon* case where the defendant *admitted* to consuming a beer earlier in the evening, there is *no* such admission by Mr. Lang prior to his being asked to alight from his vehicle. Even in the face of the admission by the defendant in *Leon*, coupled with the odor of an intoxicant, the court of appeals still did *not* find that a reasonable suspicion existed to enlarge the scope of Leon's detention. Mr. Lang's denial regarding the consumption of intoxicating beverages not only carries little weight under *Leon*, but additionally, the *Gonzalez* court disregarded the same as having any impact upon its conclusion under circumstances which are ostensibly akin to Mr. Lang's. More specifically, the officer in *Gonzalez* proffered that because he smelled an odor of intoxicants emanating from the defendant, she must have told an untruth when she denied drinking. The lower court in *Gonzalez* used this "untruth" in support of its decision to deny Gonzalez's motion. On appeal, however, the *Gonzalez* court did *not* conclude that this "untruth" played any significant role in the outcome of its decision. Notably, Mr. Lang's circumstances are even *more* favorable than those in *Gonzalez* because in that case, the odor was tied directly to Gonzalez's *person*, whereas here, the odor could only be tied to Mr. Lang's *vehicle*.

Finally, it is worth noting that the *strength* of the odor emanating from Mr. Lang's vehicle is not a damning observation. As noted above, in *Gonzalez* the court relied on an earlier decision rendered in *Meye* and commented:

> The court in *Meye* rejected the proposition that the odor was enough to provide reasonable suspicion. *Id*., ¶ 6. The court indicated that there were no cases, published or unpublished, in which a court has held that "reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped." *Id*.; *see also*, *State v. Resch*, No. 2010AP2321-CR, 2011 WI App 75, 334 Wis. 2d 147, 799 N.W.2d 929, unpublished slip op., ¶ 19 (WI App Apr. 27, 2011)("In *Meye*, this court held that the mere odor of intoxicants does not constitute reasonable suspicion that a driver is intoxicated . . . .").

Gonzalez, 2014 WI App 71, ¶ 19 (footnotes omitted). In this case, the odor of intoxicants was not characterized as being either "strong" or "moderate"—Officer Gall merely characterized it as "faint." Moreover, Officer Gall could not even tie his alleged observation of an odor of intoxicants directly to Mr. Lang's person. He states that it emanated from Mr. Lang's "vehicle." Even if there was an odor, the *Gonzalez* court observed that it is *not* illegal to consume intoxicants and drive a motor vehicle in Wisconsin. *Gonzalez*, 2014 WI App 71, ¶ 13. It is only illegal to consume a sufficient amount of an intoxicating beverage to become impaired which is illegal. Viewed in this light, the observed odor in this case adds nothing to the *Betow* determination.

This brings the Court full circle to the **totality** of the circumstances known to Officer Gall at the time he elected to enlarge the scope of Mr. Lang's detention. Since the ostensibly inculpating observations made by the officer carry little water, while the remainder of the circumstances overwhelmingly mitigate *against* a conclusion that Mr. Lang was impaired, it was error for the courts below to fail to consider the **totality**, or "the whole picture," of how closely his case parallels *Betow*, and this Court should grant this petition to "set the record straight" on how the notion of "totality" is to be applied under the test bearing its name.

In reaching the opposite conclusion of that suggested by Mr. Lang, the circuit court (but not the court of appeals) relied upon *State v. Vaaler*, No. 2019AP2174-CR, ___ WI App ___, 394 Wis. 2d 188, 949 N.W.2d 889 (Ct. App. Aug. 6, 2020)(unpublished). *Vaaler*, however, is distinguishable from the instant case in that additional facts existed therein which are not present in Mr. Lang's case. More

specifically, the *Vaaler* court noted that there was "an open can of beer in the vehicle's center console well within Vaaler's reach." *Id*. ¶ 5. Not only that, but it was determined that this can of beer "was approximately one-half full" *and* that it took *two* questions from the officer before the passenger finally claimed the beer was hers. *Id*. None of these facts are present in Mr. Lang's case, and therefore, the circuit court's conclusion that *Vaaler* was instructive is simply not true.

CONCLUSION

Because both the court of appeals and the circuit court ignored or unreasonably discounted the facts of Mr. Lang's case which mitigated against any conclusion that he was impaired, the courts below violated "the whole picture" standard enunciated by the United States Supreme Court in *Cortez.* Further, since this Court has not issued a decision which defines, describes, or delimits what is meant by the term "totality" in the totality of the circumstances test, reason exists to grant Mr. Lang's petition for review.

Dated this 4th day of July, 2025.

Respectfully submitted:

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CERTIFICATION OF LENGTH

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c). The length of this brief is 7,322 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 4th day of July, 2025.

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