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CIRCUIT COURT
DANE COUNTY, WI
2022CF002481

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No: 2022CF002481

MARK WAGNER,

Defendant.

REPLY TO STATE’S RESPONSE TO
DEFENDANT’S MOTION TO DISMISS

The Defendant Mark Wagner, appearing by Attorneys Michael J. Steinle and Daniel H. Sanders, hereby replies to the State’s Response (Doc. 84) to his Motion to Dismiss based on the State’s substantial alteration of apparently exculpatory evidence of the Hyundai Tucson (vehicle) involved in this matter. (Doc. 80).

1. The State’s Response omits several key points of information about its investigation that is relevant to the issues at hand. The State selectively references what the investigators did not know prior to the replacement of the windows in the Hyundai Tucson. Its response, however, fails to include much information that the investigators knew about apparent exculpatory value of defect 18, which they chose to ignore and then alter and destroy in bad faith.

2. Wagner was charged on September 22, 2022, by the State with Second Degree Recklessly Endangering Safety, alleging that on or about February 3, 2022, he did recklessly endanger the safety of QLW, in violation of Wis. Stat § 941.30(2). (Doc. 2).

The charged offense requires findings of both subjective and objective reasonability.

The State must prove beyond a reasonable doubt that Wagner engaged in criminally reckless conduct. *WI JI-Criminal 1347*. "Criminally reckless conduct" means:

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

Id. "Criminal recklessness" is also defined in Wis. Stat. § 939.24(1) as that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk. The Judicial Council Note to § 939.24, 1987, Senate Bill 191, explains that "[r]ecklessness requires both the creation of an **objectively unreasonable** and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk." Any evidence of a projectile or object striking Wagner's shield at the time he saw Wilson turn toward him, hear a shot, and be knocked backward would clearly be exculpatory given the State's burden to prove Wagner's actions were criminally reckless.

3. On the morning of February 3, 2022, the State's lead investigator, DCSO Detective William Hendrickson made several initial observations at the incident scene. He learned that SA Peskie's rifle, SA Wagner's ballistic shield, and the Halligan tool used to break a window on the Hyundai Tucson (vehicle) were locked in the back of a DCI truck. The shield and the tool were collected as evidence by DCSO Deputy James Plenty. Hendrickson and Plenty looked at the shield and noted various areas of damage

to it but did not determine whether this damage occurred during this incident or at another time. Hendrickson also noted that the area of damage to the shield could possibly have been from projectile contact. *See Declaration of Daniel H. Sanders ("Sanders Dec'l"), Exhibit A.* Deputy Plenty eventually took pictures of the shield and the tool. *See Sanders Dec'l, Exhibits B-E.* Hendrickson and Detective Chris Grunewald also searched the vehicle at the scene for any dangerous weapons but found none. *See Sanders Dec'l, Exhibit F.* Both Deputies Plenty and Greg Leatherberry reported several additional observations at the scene, including evidence of the vehicle's tires spinning and that the driver's side windows of the vehicle were broken out with glass on ground and inside the vehicle. *See Sanders Dec'l, Exhibits B and G.*

4. On the same day during a scene walk-through with SA Peskie, Hendrickson, Plenty, and the District Attorney, Peskie said he was standing on the driver's side parallel to the B-pillar when he fired his weapon. Peskie said he "saw a weapon in the car." Peskie said that after the shooting, DCI SA Novak took his weapon and locked inside SA Dilley's black Ford F150. Peskie confirmed the black rifle in the DCI truck was the one he fired. *Doc. 88.* During another scene walk-through with investigators, DCI SA Mansavage said that as he and other agents approached the scene, he saw a cloud of smoke and heard tires squealing. He saw Wagner holding a shield and standing near driver's door of a silver vehicle. **He saw Wagner backing up and falling backwards over the curb in the roadway.** Mansavage then saw Peskie pointing his rifle toward vehicle. He also heard shots and it appeared shots were going through window. *See Sanders Dec'l, Exhibit H.*

5. Later that day at approximately 5:25 pm, SA Berkley told investigators that during the incident that morning, he exited his truck parked directly behind SA Hale's truck and then approached the vehicle in front of Hale. He saw three agents at the driver's window, one with a shield, one with a rifle, and one with a Halligan tool. Berkley could hear commands to show hands. **One of the agents was attempting to break a window. Berkley then heard shots fired and saw glass coming from inside to out from the vehicle toward the agents. He saw the agent with the shield fall backwards toward the median.** Berkley then heard additional shots and someone said Wagner was shot. *See Sanders Dec'l, Exhibit I.*

6. On February 4, 2022, Deputy Leatherberry again searched the vehicle located in a DCSO indoor secure vehicle storage evidence cage in the basement of the PAB. Leatherberry noted a defect to the left door window trim. He reported that the left door was missing glass and portions of glass remained in the track area. He took photographs of defects 17 and 18 to left rear rubber window edge of the vehicle and were believed to be attributable to the Halligan tool used by SA Hawley during the incident. *See Sanders Dec'l, Exhibits J and V and Doc. 86 and Exhibits 5 and 6.* On that same day, Hendrickson initially viewed Trooper Lorbecki's squad video of the incident on February 3, 2022, and noted that he saw white smoke coming from the Hyundai Tucson and SA Wagner falling back into the median. *See Sanders Dec'l, Exhibit K.*

7. During his statement to investigators on February 6, 2022, DNR Warden King said that on the morning of February 3, 2022, as he approached past Hale's truck, he heard Hale's sirens and heard engines revving. He also heard vehicles crunching as

if bumpers were being compressed. He did not hear tires squealing at this time. At Hale's "A" pillar, King saw Hale's arrest team, who he believed to be Wagner, Peskie, and Mansavage, at the driver's side of the vehicle. As he continued to approach in the smoke, King heard commands given to the vehicle. He could not see inside the car due to the heavy tint. **King then heard a series of gunshots. He could not tell who was shooting. King saw Wagner fall back into the median. King thought Wagner had been shot.** Peskie was focused on the front driver's side window with rifle and King saw multiple bullet holes. *See Sanders Dec'l, Exhibit L.*

8. On February 7, 2022, DCSO Deputy Scott Kuntz reported that he attended an internal briefing regarding the investigation. DCSO Lt. Krista Ewers-Hayes asked whether it would be beneficial to take photographs of the Hyundai Tucson from outside and inside from positions of the persons involved. Over the next several days, investigators discussed whether to use the vehicle or a replica vehicle. It was determined that a replica vehicle would be too expensive. It was also decided to use the original vehicle with new windows for the image testing as the original windows had been broken during the incident on February 3, 2022. According to Deputy Kuntz, the DCSO Administration ultimately approved replacement of the original broken windows. *Doc. 94.* Retired Deputy Greg Leatherberry was also at the February 7th meeting described by Deputy Kuntz. He was sure Detectives Mayerhofer and Hendrickson were present as well, along with DCSO Captain Tetzlaff. Captain Tetzlaff really **did not want to use the actual car because of preservation of evidence.**

Ultimately, the District Attorney's Office gave Dane County the "green light" to replace

the windows and tint. Leatherberry was not present for all discussions and meetings on this issue, but knows Captain Tetzlaff had the final approval on the DCSO side. *See Sanders Dec'l, Exhibit U.*

9. During his statement to investigators on February 8, 2022, DCI SA Hawley told investigators that he saw Wagner and Peskie at the driver's door of the vehicle and heard Peskie repeatedly giving orders for Wilson to show his hands. As Hawley got into position at the driver's rear door, he saw Wilson inside leaning to his right. It appeared Wilson's hands were in front of him, but he could not see Wilson's hands. Because Wilson was not following commands, it was Hawley responsibility to breach the rear driver's window with the spiked end of the Halligan tool. **When he made the attempt, the spiked end deflected off the window and became stuck in space between the window and the outside door panel. He had to hit the tool upward to free the tool.** He then swung the tool a second time and shattered the glass of the window. **Through his peripheral vision, Hawley saw Wagner stumble backward in a manner that did not appear purposeful.** Hawley said the stumble appeared as if someone pushed Wagner. *Doc. 90.*

10. During his statement to investigators on February 8, 2022, SA Mansavage said that on the morning of February 3, 2022, as was in a vehicle driving past the scene he saw Wagner, Peskie, and Hawley at the driver's side of a vehicle. **Mansavage heard a loud 'pop' and at the same time saw Wagner fall back over the median.** He then saw Peskie firing his weapon at the car. Mansavage thought Wagner was shot. He did not know who fired first. *See Sanders Dec'l, Exhibit M.*

11. During his statement to investigators on February 9, 2022, DCI SA Wagner said that on the morning of February 3, 2022, DCI SA Mark Wagner was the shield holder of a 4-person arrest team from SA Hale's truck. Hale was the driver for the team, SA Peskie was the rifleman, and SA Hawley had a Halligan tool to be used to break windows. When the SIC maneuver was executed, pinning Wilson's vehicle between two DCI trucks, Wagner, Peskie, and Hawley quickly exited Hale's truck, which had pinned the rear of Wilson's vehicle. With Wagner in the lead with the shield, the team approached the driver's side of Wilson's vehicle. As Wagner was at the driver's door of the vehicle, Wagner saw Wilson moving around in the vehicle and not obeying Wagner's repeated commands to show his hands. Wagner saw Wilson's hands moving toward the center consol and then to the floor between his feet. Wagner made eye contact with Wilson when Wilson turned his head and stared at Wagner. Wilson's hands were still out of view below his seat. Wilson then began to square his shoulders toward Wagner and quickly raise both hands up. **Wagner thought that Wilson had a gun. Wagner then heard a gunshot and felt something hit him and push him backwards. Wagner thought Wilson shot him. He then fired his weapon.** *Doc. 89.*

12. During his statement to investigators on February 9, 2022, DCI SA Peskie said that on the morning of February 3, 2022, **that he saw the muzzle of a gun in Wilson's fist at the same time he saw Wagner fall.** Peskie thought Wilson had killed Wagner. He then fired his weapon. *Doc. 87.*

13. On February 9, 10, 11, and 14, 2022, Deputy Plenty reported that he examined the internal and external defects to the vehicle for evidence of projectiles.

During his examinations, he drilled several holes into the vehicle. Neither of the two reports associated with these examinations mention defect 18 to the driver's side rear window. *See Sanders Dec'l, Exhibits N and O.*

14. On February 16, 2022, DCSO Detective Dan Feeney reported that he was directed to find a replacement vehicle to conduct the re-enactment experiment. Feeney located a vehicle at CarMax in Madison. He told the general manager that window tint would be added to the vehicle and that DCSO would pay for the addition and removal of the tint. The general manager said fine to the addition and removal of tint. Feeney sent CarMax a law enforcement/government agency request form on February 17, 2022. *Doc. 109.*

15. On February 23, 2022, CarMax responded to Feeney and said it would not allow the use of its vehicle. No explanation is provided in the report as to why the request was denied by CarMax. *Doc. 109.* Later that day, Deputy Kuntz reported that he was informed that Feeney could not secure a replica vehicle from CarMax. Kuntz, Leatherberry, Mayerhofer, and Hendrickson again discussed using the actual Hyundai Tucson with replacement windows. They decided to get four (4) replacement windows and then have the front windows tinted to the same specifications as the original windows had been aftermarket. Leatherberry said he would install the glass. *See Doc. 94.* Hendrickson also reported that CarMax declined to allow the requested vehicle to be rented or utilized by DCSO. Hendrickson further reported that "[d]ue to the inability of any other vehicles of similar make, model, color, and specifications, it was the belief that the best way to proceed at this point in time would be getting replacement

windows..." from a parts distributor. The replacement windows would then be taken to TNT Window Tinting to be tinted to the point where they would match the tint on the vehicle at the time of the shooting. The windows would then be installed into the Hyundai Tucson for testing. Hendrickson further reported that in an email at 8:15 pm that day, DA Ozanne approved the plan. Hendrickson then shared DA Ozanne's approval with the investigative team. *See Doc. 93.*

16. On February 24, 2022, DCSO Detective Cheryl Patty contacted the owner of the Hyundai Tucson to return a garage door opener and request consent to keep the vehicle for additional testing. The consent form signed by the owner included: vehicle processing, to include window analysis, video, measurements, and towing as needed to complete processing. *See Sanders Dec'l, Exhibit P.*

17. On February 25, 2022, Deputy Plenty examined the tires on the Hyundai Tucson in the secure storage area of the PAB basement. He noted wear on the tire treads and salt residue that indicated evidence of spinning tires. He completed photographing the tire at 11:20 am. There is no indication in the report as to whether the windows had been replaced yet. *See Sanders Dec'l, Exhibit Q.*

18. On February 26, 2022, investigators placed the shield and guns on stands at approximate locations in relation to the Hyundai Tucson with the replacement windows and tint based on their investigation to date. Detectives Mayerhofer, Hendrickson, and Blanke were present with Deputies Kuntz, Leatherberry, and Plenty, and Lt. Griebler. Kuntz took 24 photographs. *Doc. 94 and Exhibits 9-22.*

19. On May 18, 2022, Detectives Hendrickson and Mayerhofer produced the Hyundai Tucson and the shield for DA Ozanne to personally view and inspect. During the viewing, the windows of the vehicle were not rolled down. On June 3, 2022, Hendrickson again produced the Hyundai Tucson and the shield for DA Ozanne to personally view and inspect. During this viewing, the driver's side windows were rolled down and up for the viewing. On July 28, 2022, Hendrickson and Mayerhofer again produced the Hyundai Tucson and the shield for DA Ozanne to personally view and inspect. During this viewing, the back driver's side window was rolled down and up. *See Sanders Dec'l, Exhibit R.*

20. Mayerhofer's Report 267 (Exhibit E) contradicts the State's Response, Affidavit of William Hendrickson, that the windows were not operational. *Doc. 86.* Hendrickson stated at ¶ 7 that "[f]or purposes of the reenactment, **non-functional replacement windows** were coated with window tint in an effort to match the conditions of the Tucson windows on February 3, 2022." At ¶ 8, Hendrickson further stated that "[w]hen needed, the windows were set into the Tucson to allow documenting visibility into and out of the Tucson." At ¶ 9, Hendrickson stated that "[t]o his knowledge, no efforts were made to restore the windows to full functionality and no efforts were made to replace the seals or molding associated with the windows." *See Doc.86.*

21. On January 4, 2024, Defense Investigator Ray Gibbs and Defense Expert Emmanuel Kapelsohn took photographs of defect 18 on the rear driver's side door of the Hyundai Tucson at the storage lot of the DCSO. *See Sanders Dec'l, Exhibits S and T.*

The January 4, 2024, photographs of defect 18, clearly show the alteration and destruction of the defect that rendered it useless for further examination or analysis.

22. It is clear from the initial investigative steps from the scene of the incident on the morning of February 3, 2022, the investigators believed the 2016 Hyundai Tucson was vital to understanding what occurred that morning. The investigators soon had walk-through statements that indicated SA Wagner may have been shot at from the person inside the car, that something hit his shield and knocked him backwards, and then Wagner and Peskie fired at the vehicle.

23. By the end of the day on February 3, 2022, the investigators knew that there was no weapon inside the Hyundai Tucson, but something hit Wagner's shield and knocked him backwards as shot were fired at the vehicle. In addition to the obvious damage to the vehicle from bullet strikes, the investigators noted damage to the window and door of the rear driver's side window, including the puncture hole marked as defect "18." They also knew there was damage to the shield that Wagner was holding during the incident and noted that a projectile may have caused the damage.

24. Over the course of the next few days after the incident, the investigators continued to examine the vehicle and interview witnesses. Many of whom, including Wagner himself, confirmed that Wagner was knocked back when the shots began. Wagner stated that he thought he had been shot. All of the witness who saw Wagner fall backwards thought he had been shot. The investigators also found no weapon in the vehicle, found no evidence that a projectile came from inside the vehicle out, believed defect 18 was not a bullet strike, believed defects 17 and 18 were likely caused by the

Halligan tool, and believed that the damage to the shield could have been caused by a projectile.

25. By February 7, 2022, the investigators began to discuss the idea of conducting a re-enactment of the incident to determine if the tinted windows of the vehicle could have reflected images. It is clear that the investigative team was concerned about preserving the vehicle given the statement attributed to Captain Tetzlaff and the subsequent efforts to obtain a replacement vehicle. But what efforts were actually made to obtain a replacement vehicle? We are left with cryptic reports about contact with a single dealership in the Madison metro area. No other efforts are reported on or documented by the investigators. The investigators' efforts to preserve the evidence were specious at best.

26. There are no reports that have been provided by the State documenting the **actual** replacement and tinting of the windows. There is no property document that establishes a chain of custody for the replacement windows and tinting. There are no photographs or video of the replacement or tinting process. There is no date or time attributed to when the replacement or tinting took place, It must have occurred between February 23, 2022, after 8:15 pm, when the DA blessed the destruction of the evidence and the early morning of February 26, 2022, when the so-called re-enactment took place. It likely didn't occur until after the consent was obtained on February 24, 2022. The investigators must have thought the replacement was important given that they went to the owner of the vehicle for consent even though they had already drilled into the vehicle at several locations. Given Deputy Plenty's tire examinations of the vehicle at

the PAB on February 25, 2022, were completed at 11:20 am, the “window” for the window replacement as gleaned from the discovery provided to date, narrowed even further. The State has provided no other insight.

27. Prior to the installation of the replacement windows in the Hyundai Tucson, there were several critical investigative issues to be determined in addition to what Wagner, Peskie, or Hawley could have seen inside Wilson’s vehicle. Everything about the vehicle was key to the investigation. In the absence of any weapon inside the vehicle, what would have caused such an impact on Wagner’s shield? The investigators **chose** to ignore that critical question. The so-called re-enactment on February 26, 2022, using undocumented replacement windows and tint, did nothing to further the State’s investigation. All it did was alter and destroy apparent exculpatory evidence vital to the determination of the offense charged. The State’s actions were not negligent. Its actions were conscious and deliberate decisions. As such, the State failed to preserve evidence in violation of Defendant Wagner’s due process rights as is set forth in *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W. 2d, 294, 297 (Ct. App. 1994).

Based on the foregoing, Wagner respectfully requests that the Court grant his Motion to Dismiss.

Dated at Milwaukee, Wisconsin, this 26th day of February 2024.

Respectfully submitted,
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