STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP002907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying Post-Conviction Relief Entered in the Circuit Court for Milwaukee County, the Honorable Rebecca F. Dallet, Presiding

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

This Court's February 26, 2014 order asked the parties in this case to address two questions in supplemental briefing: "(1) whether the officer had reasonable suspicion to stop Brown's vehicle because the officer believed that Wis. Stat. § 347.13(1) was violated when not all of the tail light bulbs on Brown's vehicle were working; (2) whether, assuming an officer makes a good faith mistake of law on which the officer makes a traffic stop, does that mistake of law nevertheless require reviewing courts to conclude that the stop was not lawful."

First, the officers here lacked reasonable suspicion to stop Mr. Brown's car for the same reason they lacked probable cause to stop Mr. Brown's car: because Wisconsin Statute § 347.13(1) does not require that every individual bulb comprising one tail lamp be lit in order for the tail lamp as a whole to be "in good working order." While reasonable suspicion is a less demanding standard than probable cause, reasonable suspicion still requires that police be able to point to specific, articulable facts, which, when taken together with rational inferences, reasonably justify the Fourth Amendment seizure. The officers' observations that one bulb in a multiple-bulb tail lamp was unlit did not provide facts together with rational inferences to reasonably believe that Wis. Stat. § 347.13(1) may have been violated, because one unlit bulb in a multiple-bulb tail lamp does not violate the statute where the tail lamp as a whole is sufficient to designate the rear of the car to cars traveling behind it. The State therefore failed to show that the officers had reasonable suspicion to stop the car.

Second, a traffic stop cannot be constitutionally upheld based on an officer's subjective mistake of law—whether or not that mistake was made in good faith. In order for a traffic stop to be upheld, the basis for the stop must be objectively reasonable. An officer's mistaken understanding of the law cannot be objectively reasonable. To hold that Fourth Amendment seizures may be based on an officer's good faith mistake of law would be to overrule Wisconsin precedent, expand the scope of the good faith exception in Wisconsin, and go against the vast majority of jurisdictions that have addressed this question. But even further, to declare that a traffic stop should be upheld when a police officer—tasked to enforce the law—conducts a stop based on his or her own misunderstanding of what the law actually prohibits, would be to undermine the legitimacy and integrity of the police, distort the separation of powers by diminishing legislative authority, and weaken the foundation of a rule-of-law society.

I. The Officers Lacked Reasonable Suspicion to Stop Mr. Brown's Car Based on Their Belief that Wis. Stat. §347.13(1) Was Violated.

The officers here lacked reasonable suspicion to stop Mr. Brown's car based on a belief that Wis. Stat. § 347.13(1) had been violated because of an unlit tail lamp bulb. While, as the Court of Appeals held, the appropriate standard is whether the officers had *probable cause* to stop the car, (*see* Brown Initial Brief at 7, Ct. App. Op., ¶ 15, State's App.108), the officers similarly lacked reasonable suspicion to stop the car based on their incorrect belief that the tail lamp on Mr. Brown's car violated Wis. Stat. § 347.13(1).

The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution protect citizens against unreasonable searches

and seizures. U.S. CONST., Amend. IV and WIS. CONST., Art 1, § 11. The "temporary detention of individuals" during a traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment. ***State v. Popke***, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (citation omitted).

"A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed." ***Popke***, 2009 WI 37, ¶ 11 (quoting ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996)). "Probable cause refers to the 'quantum of evidence which would lead a reasonable police officer to believe' that a traffic violation has occurred…probable cause exists when the officer has 'reasonable grounds to believe that the person is committing or has committed a crime.'" ***Id.***, ¶ 14 (quoting ***Johnson v. State***, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977).

Even if an officer does not have probable cause to justify the stop, a traffic stop may still be lawful if the officer had reasonable suspicion to conduct the traffic stop: "Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed." ***Id.***, ¶ 23 (internal citation omitted). Reasonable suspicion requires that an "officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop. The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***Id.*** (internal citations omitted). Thus, both probable cause and

reasonable suspicion demand an objective analysis of an officer's subjective observations and actions.

Importantly, the State had the burden at the suppression hearing to prove that the stop was lawful. *See* ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973)("Where a violation of the Fourth Amendment right against unreasonable search and seizures is asserted, the burden of proof upon the motion to suppress is upon the state."). The State in this case failed to prove that the officers had either probable cause or reasonable suspicion to stop Mr. Brown's car.

Both Officer Wawrzonek and Officer Feely testified at the suppression hearing that they observed one light on the driver's side of Mr. Brown's car to be unlit. (38:5,26;State's App.122;143). Officer Wawrzonek testified that it was "the driver side tail lamp. There is a wide band and there is actually three light panels on that wide band and one of those panels was out." (38:5;State's App.122). Officer Feely testified that it was the "driver side middle" "tail light" that was out. (38:26;State's App.143). Officer Wawrzonek testified that he and Officer Feely then conducted the traffic stop because of the "defective tail light"; Officer Feely also testified that they then stopped the car for the "defective tail lamp." (38:5,26;State's App.122;143). The circuit court found the officers' testimony to be credible. (39:31;State's App.187).

Thus, this was not a case where the officers made specific factual observations which suggested to them that a violation of Wis. Stat. § 347.13(1) may be occurring, but that they needed to conduct the stop to gain further facts to determine whether a violation had indeed occurred. The facts on this record instead reflect that this was a situation where

both officers saw something which they immediately believed to constitute a traffic offense prior to conducting the stop—specifically, a "defective" tail lamp—and then conducted the stop based on that perceived violation. As the Court of Appeals explained:

> The officers observed that the middle, red light bulb on the rear driver's side of the vehicle was unlit, and stopped the vehicle because they believed that the unlit light bulb constituted an equipment violation. They "did not act upon a suspicion that warranted further investigation, but on [their] observation of a violation being committed in [their] presence.

(Ct. App. Op., ¶ 15)(State's App.108)(citing ***State v. Longcore***, 226 Wis. 2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999)).

Their factual observation that one bulb on a multiple-bulb panel was unlit did not provide an objectively reasonable basis to believe that Wis. Stat. § 347.13(1)—which requires a tail lamp to be in "good working order"—may have been violated, because, for all of the reasons Mr. Brown has argued, *see* Brown Response Brief at 5-16, that statute does not require that every individual bulb be lit for a tail lamp as a whole to be in good working order. The officers therefore lacked reasonable suspicion to stop Mr. Brown's car based on a belief that Wis. Stat. § 347.13(1) had been violated.

II. A Traffic Stop Based on an Officer's Mistake of the Law, Whether or Not in Good Faith, Cannot be Constitutionally Upheld

A. Under ***State v. Longcore***, a traffic stop may not be based on an officer's mistake of law.

Wisconsin law currently holds that a traffic stop cannot be based on an officer's mistaken understanding of the statutes. In ***State v. Longcore***, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (1999), the Court of Appeals held that "a lawful stop cannot be predicated upon a mistake of law." This Court, in a divided *per curiam* decision, affirmed the Court of Appeals' holding. ***State v. Longcore***, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620.[1]

In ***Longcore***, the officer testified that he stopped the car after noticing (1) the car pull out of a parking lot in front of closed businesses at 2am and (2) that the car's rear passenger window was missing and had been replaced by a plastic sheet, which the officer believed to be a violation of the law. 226 Wis. 2d at 4. The circuit court concluded that the first reason was insufficient to justify the stop, which the State did not contest on appeal. ***Id.*** The circuit court, however, concluded that the officer's second reason justified the stop, even if the officer was incorrect about the law and whether his observation constituted a violation. ***Id.***

The Court of Appeals disagreed. ***Id.*** at 5. The Court of Appeals first rejected the notion that "reasonable suspicion

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[1] The State in this case, citing ***Longcore***, acknowledged in its initial brief that "a vehicle stop may not be based on a mistake of law." (State's Initial Brief at 25). The State at oral argument further explained that it was not challenging this holding. This Court should deem any argument to the contrary at this point as forfeited. *See* ***State v. Huebener***, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727.

may extend beyond the relation of articulable facts to the law and encompass an officer's reasonable suspicion of what the law is." ***Id.*** at 6. The Court noted that this rationale was "in the nature of, although not precisely analogous to, the 'good faith' exception to the exclusionary rule." ***Id.*** The Court noted that—at that point—Wisconsin had not adopted a good faith exception to the exclusionary rule. ***Id.*** at 6-7.

The Court further noted that the circuit court was incorrect to conclude that reasonable suspicion was the proper standard, as the officer "did not act upon a suspicion that warranted further investigation, but on his observation of a violation being committed in his presence." ***Id.*** at 8-9. The Court explained that "[i]f the facts would support a violation only under a legal misinterpretation, no violation has occurred, and thus by definition there can be no probable cause that a violation has occurred." ***Id.*** at 9. "We conclude that when an officer relates the facts to a specific offense, it must indeed *be* an offense; a lawful stop cannot be predicated on a mistake of law." ***Id.*** (emphasis in original).

Since ***Longcore***, this Court has adopted the good faith exception to the exclusionary rule in certain limited situations in which police rely on either (1) a warrant issued by an "independent and neutral magistrate," or (2) on well-settled law which is then subsequently overruled. *See* ***State v. Eason***, 2001 WI 98, ¶ 29, 245 Wis. 2d 206, 629 N.W.2d 625; ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517; ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97[2];

[2] The officers' beliefs in this case that the tail lamp was defective could in no way be construed to be in reliance on "clear and settled precedent." In ***Dearborn***, this Court explained that this exception would "not affect the vast majority of cases where neither this court nor the United States Supreme Court have spoken with specificity in a particular fact situation." 2010 WI 84, ¶ 46. This Court has not, up to this point, addressed whether Wis. Stat. § 347.13(1) requires every individual

see also Brown Response Brief at 18-20 (providing a more detailed discussion of the history of the good faith exception in Wisconsin).[3] But these exceptions do not account for an officer relying on his or her own mistake of the law he or she is entrusted to enforce, and the holding of ***Longcore*** remains true: if an officer conducts a traffic stop based on the officer's belief that something he or she has observed is prohibited by statute, but in fact the statutes do not contain such a prohibition, then the officer lacks a lawful basis to conduct the stop and the stop cannot stand.

B. The vast majority of federal circuits and states hold that a traffic stop cannot be based on an officer's mistake of law, regardless of whether that mistake was in good faith.

The majority of federal circuits to address this question, including the Seventh Circuit, have similarly held that a seizure cannot be based on an officer's mistake of law. *See* ***U.S. v. McDonald***, 453 F.3d 958 (7th Cir. 2006); ***U.S. v. Williams***, 740 F.3d 308, 312 (4th Cir. 2014); ***United States v. Miller***, 146 F.3d 274, 278-279 (5th Cir.1998); ***U.S. v. Lopez-Soto***, 205 F.3d 1101, 1106 (9th Cir. 2000); ***U.S. v. Tibbetts***, 396 F.3d 1132, 1138 (10th Cir. 2005); ***U.S. v. Chanthasouxat***, 342 F.3d 1271, 1279 (11th Cir.2003), (all holding that traffic stops cannot be based on a mistake of law,

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bulb comprising one tail lamp to be lit for the lamp to be in "good working order." And prior to this case, there were no published Court of Appeals decisions addressing this question.

[3] Additionally, the Court of Appeals recently applied the good faith exception to Wisconsin law enforcement's reliance on law enforcement in Mexico concerning the lawfulness of a search conducted in Mexico. ***State v. Johnson***, 2013 WI App 140, 352 Wis. 2d 98, 841 N.W.2d 302. The Court noted that suppression in that situation would not serve the purpose of the exclusionary rule as it would "not alter the behavior of United States law enforcement officials who have relied on the assurances of foreign authorities that a search is legal." ***Id,*** ¶ 11.

even if the mistake was reasonable); *but see* ***U.S. v. Martin***, 411 F.3d 998, 1001 (8th Cir. 2005)(holding that a traffic stop may be based on an "objectively reasonable" mistake of law); ***U.S. v. Delfin-Colina***, 464 F.3d 392 (3d Cir. 2006)(holding that "[i]n situations where an objective review of the record evidence establishes reasonable grounds to conclude that the stopped individual has in fact violated the traffic-code provision cited by the officer, the stop is constitutional even if the officer is mistaken about the scope of activities actually proscribed by the cited traffic-code provision").

Additionally, the majority of States also hold that an officer's mistake of law cannot provide a lawful basis for a traffic stop. *See* ***J.D.I v. State***, 77 So.3d 610 (Ala. Crim. App. 2011); ***People v. Ramirez***, 44 Cal. Rpt. 3d 813, 816 (Cal. Ct. App. 2006); ***McDonald v. State***, 947 A.2d 1073, 1079 (Del. 2008); ***People v. Cole***, 874 N.E.2d 81, 88 (Ill. Ct. App. 2007); ***Gunn v. State***, 956 N.E.2d 136, 139 (Ind. Ct. App. 2011); ***State v. Louwrens***, 792 N.W.2d 649, 654 (Iowa 2010); ***Martin v. Kan. Dept. of Revenue***, 176 P.2d 938 (Kan.2008); ***Commonwealth v. Bernard***, 84 Mass. App. Ct. 771,— N.E.3d— (Mass. App. Ct. 2014); ***Gilmore v. State***, 42 A.3d 123, 135 (Md. Ct. Spec. App. 2012); ***State v. Anderson***, 683 N.W.2d 818, 822-824 (Minn. 2004); ***State v. Lacasella***, 60 P.3d 975, 980-982 (Mont. 2002); ***Byer v. Jackson***, 661 N.Y.S2d 336, 338 (N.Y. App. Div. 1997); ***Commonwealth v. Rachau***, 670 A.2d 731 (Pa. 1996); ***State v. Duran***, 396 S.W.3d 563, 573 (Tex. Crim. App. 2013).[4] A few states

[4] The Ohio Court of Appeals appears to be divided on this question. *See* ***State v. Babcock***, 993 N.E.2d 1215, 1217-1220 (Ohio Ct. App. 2013)(discussing the conflict in Ohio appellate districts on this question). Additionally, the Oregon Court of Appeals has held that while a traffic stop cannot be based on a mistake of law, a stop may be based on a "mistake as to *which* law the defendant violated" so long as the facts perceived by the officer establish an offense. *See* ***State v. Chilson***, 182

provide that an officer's mistake of law does not automatically invalidate a seizure if the officer's mistake was reasonable. *See* ***Travis v. State***, 959 S.W.2d 32 (1998), *but compare with* ***Hinojosa v. State***, 319 S.W.3d 258, 261, n.3 (Ark. 2009); *see also* ***State v. Rhinelander***, 649 S.E.2d 828, 829-30 (Ga. Ct. App. 2007); ***Harrison v. State***, 800 So.2d 1134, 1138-1139 (Miss. 2001); ***State v. Heien***, 737 S.E.2d 351, 356 (N.C. 2012); ***State v. Hubble***, 206 P.3d 579, 587-588 (N.M. 2009); ***State v. Wright***, 791 N.W.2d 791 (S.D. 2010).

C. The Seventh Circuit in ***U.S. v. McDonald*** held that a traffic stop cannot be based on a mistake of law, whether in good faith or not.

In ***McDonald***, the Seventh Circuit held that a traffic stop cannot be based on an officer's mistake of law—whether that mistake was a "good faith" mistake or not. The Seventh Circuit noted that several other federal circuits before it had concluded that "even a reasonable mistake of law cannot support probable cause or reasonable suspicion," and reached the same conclusion:

> We agree with the majority of circuits to have considered the issue that a police officer's mistake of law cannot support probable cause to conduct a stop. Probable cause only exists when an officer has a reasonable belief that a law has been broken. Law enforcement officials have a certain degree of leeway to conduct searches and seizures, but the flip side of that leeway is that the legal justification must be objectively grounded. *An officer cannot have a reasonable belief that a violation of the law occurred when the acts to*

P.3d 241 (Or. Ct. App. 2008); ***State v. Boatright***, 193 P.3d 78 (Or. Ct. App. 2008).

> *which an officer points as supporting probable cause are not prohibited by law*.

Id. at 961 (internal citations omitted)(emphasis added). In essence, an officer's *subjective* belief that the law prohibits something cannot be *objectively* reasonable if the law does not in fact prohibit that thing.

The Seventh Circuit further explained that this holding—that a traffic stop cannot be based on an officer's mistake of law—remains true whether or not the officer's mistake of law was in "good faith":

> It makes no difference that an officer holds an understandable or 'good faith' belief that a law has been broken. Whether the officer's conduct was reasonable under the circumstances is not the proper inquiry. Rather, the correct question is whether a mistake of law, no matter how reasonable or understandable, can provide the objectively reasonable grounds for providing reasonable suspicion or probable cause. The answer is that it cannot. *A stop based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable.*

Id. at 961-962 (internal citations omitted)(emphasis added).

In ***McDonald***, police had received an anonymous tip claiming that a black man driving a maroon Buick had drugs and a handgun. ***Id.*** at 959. Officers later that evening saw a car which matched the description and followed the car. ***Id.*** One officer testified that as he followed the car, he saw the driver turn on his blinker at a curve in the road, and believed this to be an unnecessary and thus improper use of the turn signal. ***Id.*** at 959-960. He testified that he believed that this violated an Illinois statute prohibiting improper uses of a turn signal, and stopped the car. ***Id.*** The district court ruled that

while the anonymous tip would "probably not have been a sufficient ground" to stop the defendant, the stop was nevertheless warranted because the officer "reasonably believed" that the use of the turn signal violated the state law. ***Id.*** at 960. As the Seventh Circuit explained, "[t]he district court also stated in a footnote that although the statute does not specifically proscribe McDonald's use of the turn signal, 'it could, arguably, be so interpreted.'" ***Id.*** On appeal, McDonald argued that police stopped him based on a mistake of law and that a mistake of law could not support the stop; the Seventh Circuit agreed. ***Id.*** at 960-962.

Importantly, the Seventh Circuit Court noted that "[b]y all indications" the officer "genuinely believed McDonald had violated the law"—that he had tried to consult an Offense Code Book which listed improper use of a turn signal as a violation but did not provide the text of the statute—and even further that "no reported case had addressed whether conduct similar to McDonald's" violated the turn signal statute. ***Id.*** at 962. But even though the officer "may have acted in good faith," the Seventh Circuit held that "[t]o create an exception here would defeat the purpose of the exclusionary rule, *for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey*." ***Id.*** (quoting ***United State v. Lopez-Valdez***, 205 F.3d 1101, 1106 (9th Cir.2000))(emphasis added).

D. Suppressing evidence derived from traffic stops based on an officer's mistake of law serves the purpose of the exclusionary rule to deter negligent police conduct.

Indeed, this Court has recognized that the exclusionary rule serves not only to deter constitutional violations caused

by willful police conduct, but also by *negligent* police conduct. *See* ***State v. Gums***, 69 Wis. 2d 513, 517, 230 N.W.2d 813 (1975). This Court has only applied a good faith exception to the exclusionary rule in situations where police have acted in reliance on the independent judiciary—whether in the form of a warrant signed by a judge in a specific case or in reliance on well-settled case law. *See* ***Eason***, 2001 WI 98; ***Ward***, 2000 WI 3; ***Dearborn***, 2010 WI 84. In those situations, this Court has noted that applying the exclusionary rule would not deter misconduct, as the police were acting in reliance of the judiciary's understanding of the law. *See*, *e.g.*, ***Eason***, 2001 WI 98, ¶ 2; ***Ward***, 2000 WI 3, ¶¶ 49-50; ***Dearborn***, 2010 WI 84, ¶ 44.

Unlike those cases in which this Court has applied a good faith exception to the exclusionary rule, an officer who acts based on his or her subjective misunderstanding of the law is not acting in good faith reliance on the mistake of an independent, legally-trained member (or members) of the judiciary whom the officer could understandably expect would know the law.[5] In this situation, the exclusionary rule absolutely serves to deter negligent police action and to encourage police to understand the very law they are enforcing. This Court should therefore not expand the scope of the good faith exception to an officer's own misunderstanding of Wisconsin law.

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[5] Nor is an officer who acts based on his or her subjective misunderstanding of Wisconsin law acting in good faith reliance on a foreign authority's mistaken explanation of foreign law. *See* ***Johnson***, 2013 WI App 140. In applying the good faith exception in such a circumstance, the Court of Appeals noted that "we presume high-ranking Mexican law enforcement personnel know their own laws." ***Id.***, ¶ 13. A Wisconsin law enforcement officer's own mistaken understanding of Wisconsin law is not in good faith reliance on an independent source whom an officer could reasonably expect would know the law.

E. To uphold traffic stops based on an officer's own mistake of law would be to create a double standard by which citizens are required to know the law, but the police—entrusted and empowered to enforce it—are not.

Allowing a Fourth Amendment seizure to derive from a police officer's mistake of law would be to weaken the foundation of a rule-of-law society:

> "Police in a democracy are not merely bureaucrats. They are also…legal officials, that is, people belonging to an institution charged with strengthening the rule of law in society." Lawless seizures by police violate the basic tenet that ours is a "government of laws, and not of men"…Reciprocal expectations of law-abidingness between government and citizens can scarcely be expected to endure if one party—the government—need not uphold its end of the bargain.

Wayne A. Logan, "Police Mistakes of Law," 61 Emory L.J. 69, 91-92 (2011) (quoting Jerome H. Skolnick, "Justice Without Trial: Law Enforcement in Democratic Society 233 (Macmillan Coll. Pub'g Co. 3d ed 1994) and ***Marbury v. Madison***, 5 U.S. (1 Cranch) 137, 163, (1803)).

As the Eleventh Circuit has explained, it would be a "fundamental unfairness" to hold "citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it." ***Chanthasouxat***, 342 F.3d at 1280 (internal citation and quotations omitted). As this Court recently noted in ***State v. Neumann*****,** "Wisconsin employs the mistake of law doctrine which says that every person is presumed to know the law and cannot claim ignorance of it as a defense." 2013 WI 58, ¶ 50, n.29, 348 N.W.2d 455, 832 N.W.2d 560. Just as ignorance of the law is not a legally-accepted justification for Wisconsin

citizens' violations of the statutes, it should not be a legally-accepted justification for trained Wisconsin police officers' violations of the Constitution.

Police have a responsibility to know the laws upon which they act. While police may not be automatically familiar off-hand with every portion of the statutes (here the traffic code), police "fairly can be expected to know the laws that they elect to invoke on street patrol." Logan, "Police Mistakes of Law," 61 Emory L.J. at at 107. Traffic stops based on an officer's mistaken understanding of the law therefore cannot stand, even where the statutes as a whole are voluminous. To uphold "lawless seizures" based on mistakes of law—whether a good faith mistake or not—because the laws are too voluminous for police to know would be a "perverse twist reminiscent of Kafka." ***Id.*** at 84. "Such a view, even if not rejected on democratic-governance concerns alone, would appear especially unjustified given unprecedented improvements in the educational backgrounds of police and ready access to substantive law, including via dashboard computers." ***Id***.

And even if a statute is arguably ambiguous, a traffic stop based on an officer's incorrect understanding of that statute still cannot stand. For example, the Seventh Circuit in ***McDonald*** acknowledged that the officer had tried to find clarification on what the relevant statute prohibited, and further noted that no reported case had addressed the statute to clarify what in fact was prohibited. 453 F.3d at 962. Nevertheless, even where the officer "acted in good faith," the Seventh Circuit held that to allow an exception to the exclusionary rule would defeat its very purpose by taking away the incentive for police to make sure they understand the law. ***Id.*** Additionally, to hold otherwise would be to "use the vagueness of a statute *against* a defendant."

Chanathasouxat, 342 F.3d at 1278-1279. The Eleventh Circuit in ***Chanathasouxat*** explained that even though the statutes in question were traffic statutes and thus "not criminal statutes," to uphold a stop based on an officer's incorrect understanding of an arguably ambiguous statute would be to contravene the "fundamental principle that a criminal statute that is so vague that it does not give reasonable notice of what it prohibits violates due process." ***Id.***

F. To uphold traffic stops based on an officer's own mistake of law would be to undermine the legitimacy of the police.

Furthermore, to allow police to conduct traffic stops based on misunderstandings of the law would undercut the legitimacy and integrity of the police. "Branding lawless seizures as constitutionally reasonable, and as a consequence allowing incident searches and other intrusions, can only lessen confidence in the perceived fairness and legitimacy of police, already strained by reports of police fabrications and racial bias." *See* Logan, "Police Mistakes of Law," 61 Emory L.J. at 93. Research shows that the public's perception of justice influences the public's willingness to comply with the law and help police. ***Id.***, n.164 (citing multiple research articles). Indeed, to effectively serve to control crime, police must have the cooperation of the public. *See* Tom R. Tyler & Jeffrey Fagan, "Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?," 6 Ohio St. J. Crim. L. 231 (2008). "Cooperation increases not only when the public views the police as effective in controlling crime and maintaining social order, but also when citizens see the police as legitimate authorities who are entitled to be obeyed." ***Id.*** at 266-267.

G. To uphold traffic stops based on an officer's mistake of law would be to undercut legislative authority and weaken the separation of powers.

Upholding Fourth Amendment seizures based on a police officer's mistaken understanding of the statutes also muddles the separation of powers by taking away legislative authority. As Law Professor Wayne A. Logan has explained, "[s]ince at least the mid-twentieth century, criminal law norms, especially regarding less serious and malum prohibitum behaviors, have been codified by American legislatures, with courts providing secondary yet authoritative interpretive input." ***Id.*** at 95. To uphold traffic stops based on mistakes of law—to give the police not only the power to enforce the law, but further to interpret and broaden it—would be for the judicial branch to approve of an arm of the executive branch (the police) usurping the role of the legislature. *See* ***id.*** And where courts simply need to assess whether an officer's understanding of the statutes seems reasonable, instead of what the statutes indeed proscribe, the judicial branch has less incentive to perform its role of interpreting and clarifying the statutes. ***See id.*** at 95-96.

Ultimately, whether or not an officer's mistake of law is in subjective good faith, or even objectively reasonable, the police are entrusted by the people of Wisconsin to enforce the law. As such, we rightfully expect them to know our laws, particularly when their enforcement involves the restriction of our citizens' liberties. This Court should uphold its precedent and, along with the vast majority of federal circuits and States to address this question, re-affirm that a traffic stop cannot be based on an officer's mistake of law.

CONCLUSION

For these reasons, and the reasons set forth in his Response Brief and at oral argument, Mr. Brown respectfully requests that this Court affirm the decision of the Court of Appeals.

Dated this 19th day of March, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,167 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of March, 2014.

Signed:

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