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STATE OF WISCONSIN

SUPREME COURT

No. 2013AP1581-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD E. HOUGHTON, JR.,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, REVERSING AN ORDER OF THE CIRCUIT COURT FOR WALWORTH COUNTY, JOHN R. RACE, JUDGE.

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT-PETITIONER

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does Wis. Stat. § 346.88(3)(b)[1] prohibit any obstruction to the driver's clear view through the front windshield, or does it prohibit only obstructions that materially interfere with the driver's view through the front windshield?

[1] All citations to Wisconsin Statutes are to the 2001-12 version unless otherwise noted.

The court of appeals concluded, without elaboration, that Wis. Stat. § 346.88(3)(b) does not prohibit any obstruction to the driver's clear view through the front windshield.

2. May an officer stop a vehicle when the officer does not have probable cause, but does have reasonable suspicion, to believe that the operator is violating a traffic law such as Wis. Stat. § 346.88(3)(b)?

   The court of appeals relied on *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), *aff'd by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620 (per curiam), for the conclusion that probable cause was required to stop a vehicle for an observed traffic violation. The court did not consider whether reasonable suspicion was sufficient.

3. Does this Court need to overrule *Longcore* and modify *State v. Brown*, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66, to maintain its consistency in interpreting the protections of Article I, § 11 of the Wisconsin Constitution as analogous to the protections afforded by the Fourth Amendment of the Constitution of the United States?

   The court of appeals noted that if the Supreme Court of the United States affirmed *State v. Heien*, 749 S.E.2d 278 (N.C. 2013),[2] which it did in *Heien v. North Carolina*, 135 S.Ct. 530 (2014), *Longcore* would be called into doubt.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

[2] Certiorari was granted from this per curiam opinion. The Supreme Court of North Carolina's analysis of the mistake of law issue can be found in *State v. Heien*, 737 S.E.2d 351 (N.C. 2012). All subsequent citations to *State v. Heien* will be to that 2012 opinion.

STATEMENT OF THE CASE:
FACTS AND PROCEDURAL HISTORY

The defendant-appellant's, Richard Houghton's, vehicle was stopped after an officer observed that his vehicle had no front license plate, had a pine tree shaped air freshener hanging from the rearview mirror, and had a GPS unit attached to the front windshield (24:5-7; Pet-Ap. 110-12). While the officer was communicating with the passenger of the vehicle, the officer noticed a strong odor of marijuana coming from inside the vehicle (2:2; Pet-Ap. 135). A search revealed, among other items, two partially smoked marijuana cigarettes and zip-lock bags containing marijuana (2:2; Pet-Ap. 135). Houghton was charged with one count of possession with intent to deliver tetrahydrocannabinol, contrary to Wis. Stat. § 961.41(1m)(h)2. (5).

Houghton moved the court to suppress all evidence obtained from the vehicle (8:1). As grounds for the motion, Houghton alleged that the stop of his vehicle was done without probable cause or reasonable suspicion (8:3). Houghton argued that he was not required to have a front license plate as his vehicle was licensed in Michigan, which only issues one plate (8:3-4). Houghton further argued that the air freshener and GPS device did not obstruct his view through the front windshield (8:4).[3]

At the evidentiary hearing, the officer testified that he believed that Wisconsin law required all vehicles to have a front and

[3] The officer also observed a broken side mirror (24:6, 8-9; Pet-Ap. 111, 113-14). Houghton argued that the broken side mirror was also insufficient to warrant a traffic stop (8:3-4). The circuit court found a broken side mirror cannot be the basis for a traffic stop because Wis. Stat. § 347.40(1) only requires one mirror allowing the driver to see 200 feet to the rear (24:26; Pet-Ap. 131). It is undisputed that the other mirrors upon Houghton's vehicle satisfied the requirements of Wis. Stat. § 347.40(1). The State did not pursue any argument as to the broken side mirror below, nor will it here, as the officer testified that it was observed "upon the stop," and therefore, the broken side mirror was observed after the officer decided to stop the vehicle (24:8; Pet-Ap. 113).

a rear license plate (24:10; Pet-Ap. 115). The officer further testified that he believed Wisconsin law prohibited the operation of a vehicle with an air freshener suspended from the rear view mirror, or with a GPS device attached to the front windshield (24:13-15; Pet-Ap. 118-20).

The circuit court concluded that it was reasonable to stop Houghton's vehicle for lack of a front license plate. The court explained:

> . . . I don't believe a traffic officer is required to have at his finger [tips], memorized or on his computer in his squad car the requirements of each . . . state[] . . . [and Canadian province] with respect to front license plates. . . . If he sees a car without a front plate, it's a violation of Wisconsin law. The fact that Michigan doesn't issue front plates would mean . . . the defendant could not be found guilty on that issue; that's a defense. . . . [T]he officer has the right to investigate what he believes to be a violation of Wisconsin licensure law and that is having two plates. Obviously if the - - as in this case the defendant is from Michigan, he doesn't need a front plate, but he is the first officer that has to stop and ascertain that indeed it is a Michigan car. I believe that there is reasonable and [articulable] suspicion here to believe that a crime may be - - or a traffic offense may be committed by the defendant by having only one plate.

(24:24-25; Pet-Ap. 129-30).

The circuit court declined to rule on whether the air freshener and GPS device amounted to a traffic violation, but noted that "there must be a zillion cars driving around with air fresheners and not very many of them would get stopped by the traffic officer. They've got better things to do." (24:25; Pet-Ap. 130). Ultimately, Houghton's suppression motion was denied (24:26; Pet-Ap. 131), and he pleaded guilty to possession with intent to deliver tetrahydrocannabinol, contrary to Wis. Stat. § 961.41(1m)(h)2. (14:1; 25:4).

On appeal Houghton challenged the circuit court's denial of his motion to suppress. Houghton again argued that the stop was unreasonable because it was based on the mistake of law that

Wisconsin required all vehicles to have a front license plate (*see generally* Houghton's Ct. App. Br.). The State conceded in the court of appeals that a traffic stop cannot be based on a mistake of law (*see* State's Ct. App. Br. at 2), but argued that the circuit court's suppression ruling should be upheld as the officer's mistake of law as to the license plate did not invalidate the officer's stop for the obstruction to the driver's clear view through the front windshield (State's Ct. App. Br. at 4-6).

The court of appeals accepted the State's concession, but rejected the State's argument that the stop could be upheld on alternative grounds. The court concluded that the officer needed probable cause to believe that the air freshener and GPS device violated Wis. Stat. § 346.88(3)(b) and, without elaboration, concluded that the facts did not establish probable cause. *State v. Houghton*, No. 2013AP1581-CR, slip op. ¶¶ 7-10 (Ct. App. May 7, 2014) (Pet-Ap. 103-05). The court of appeals reversed and remanded, and the State then petitioned for review.

ARGUMENT

In the sections below, the State asks this Court to overrule *Longcore* and to narrowly modify *Popke*, *Anagnos*, and *Brown*.[4] The State is mindful that this Court generally "adheres to stare decisis to maintain confidence in the reliability of court decisions, promote evenhanded, predictable, and consistent development of legal principles, and contribute to the actual and perceived integrity of the Wisconsin judiciary." *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 93, 295 Wis. 2d 1, 719 N.W.2d 408 (citation omitted). Thus, this Court does not overturn precedent unless there is a strong justification to do so. *State v. Outagamie County Board of Adjustment*, 2001 WI 78, ¶ 29, 244 Wis. 2d 613, 628 N.W.2d 376 (citing *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983)).

[4] *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569; *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675.

Despite this general rule, this Court has recognized that "[s]tare decisis is neither a straightjacket nor an immutable rule." *Johnson Controls v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 100, 264 Wis. 2d 60, 665 N.W.2d 257. There are several criteria for assessing whether to depart from precedent: (1) changes or developments in the law that undermine the rationale of the prior decision; (2) the need to make a decision correspond to newly ascertained facts; (3) the decision has become detrimental to coherence and consistency in the law; (4) the decision is unsound in principle; and (5) the decision is unworkable in practice. *Johnson Controls*, 264 Wis. 2d 60, ¶¶ 98-99.

This case concerns the first and the third criteria. First, the State is asking this Court to declare a single standard by which to judge the reasonableness of a traffic stop. As Fourth Amendment jurisprudence has developed and evolved, it is becoming increasingly apparent that traffic stops are more akin to *Terry* stops, and therefore, the reasonableness of a traffic stop should rest on whether the officer had a reasonable and articulable suspicion that a traffic or criminal violation has been or will be committed. In declaring that reasonable suspicion is the single standard by which to judge the reasonableness of a traffic stop, this Court will need to narrowly modify *Popke*, *Anagnos*, and *Brown.* The *Longcore* decision is also impacted. However, since the State is asking this Court to also declare that a mistake of law is not fatal to whether an officer has a reasonable and articulable suspicion that a traffic or criminal violation has been or will be committed, *Longcore* should be overruled.

Longcore should be overruled to maintain consistency in interpreting the protections of Article I, § 11 of the Wisconsin Constitution as analogous to the protections afforded by the Fourth Amendment of the Constitution of the United States. The Supreme Court of the United States recently interpreted the Fourth Amendment and concluded that a mistake of law is not fatal to the analysis of whether an officer had a reasonable and articulable suspicion to conduct a traffic stop. *Heien*, 135 S.Ct. at 536-39. This Court should now conclude the same, overruling *Longcore* and narrowly modifying *Brown*.

I. Wisconsin Stat. § 346.88(3)(b) prohibits any obstruction to the driver's clear view through the front windshield.

This issue presents a question of statutory interpretation. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659; additional citations omitted). In reviewing the statutory language, the language is given its ordinary meaning unless technically or specially defined. *Kalal*, 271 Wis. 2d 633, ¶ 45.

The language of § 346.88(3)(b) is clear, unambiguous, and reads:

> No person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver's clear view through the front windshield.

The area of view that *any* object cannot obstruct is the clear view through the windshield, not just the driver's immediate or normal field of vision. The statute does not require that the obstruction be material or substantial, rather the statute requires that there be no obstruction.

This plain language interpretation of Wis. Stat. § 346.88(3)(b) is consistent with the rest of the statute. *See Kalal*, 271 Wis. 2d 633, ¶ 49 ("[i]t is certainly not inconsistent with the plain-meaning rule to consider the intrinsic context in which statutory language is used"). Specifically, when read in concert with Wis. Stat. § 346.88(3)(a), "clear view through the front windshield" must be read to encompass all glass space, not just the driver's immediate field of vision. Wis. Stat. § 346.88(3)(a) reads in part:

> No person shall drive any motor vehicle with any sign, poster or other nontransparent material upon the front windshield, front side wings, side windows in the driver's compartment or rear window of such vehicle other than a

> certificate or other sticker issued by order of a governmental agency.

In Wis. Stat. § 346.88(3)(a) nothing that is nontransparent may be placed on the glass itself, with the limited exception of "certificate[s] or sticker[s] issued by order of a government agency." It then follows that the plain reading of § 346.88(3)(b), which applies to objects placed within the vehicle, not just on the glass itself, similarly prohibits any object from obstructing the view through any portion of the front windshield. Therefore, the court of appeals erred when it determined that a GPS device and an air freshener, obstructing the view through the front windshield, were insufficient to establish a violation of Wis. Stat. § 346.88(3)(b).

While it is true that the plain language of Wis. Stat. § 346.88(3)(b) may subject "zillions" of vehicles to valid traffic stops, that fact alone does not mean that an officer cannot stop a vehicle for an observed violation of Wis. Stat. § 346.88(3)(b). *See Whren v. United States*, 517 U.S. 806, 818-19 (1996) (the fact that the vast majority of people could be subjected to a valid traffic stop is not a basis upon which a court could conclude that a particular stop was unreasonable). As a practical matter, "zillions" of vehicles are subject to valid traffic stops very day. For example, it is common for most drivers to travel in excess of the speed limit on any given roadway. One could go so far as to conclude that posted speed limits are perceived by the majority of drivers as the suggested minimum speed one should drive in normal conditions. The fact that nearly everyone exceeds the speed limit does not mean that an officer cannot lawfully stop someone for exceeding the speed limit. Nor does it mean that an officer must observe a vehicle traveling far in excess of the speed limit before a lawful traffic stop can be conducted.

In this case, the court of appeals went beyond the plain language of the statute to invalidate the stop. This Court should unequivocally establish that the current language of Wis. Stat. § 346.88(3)(b) requires that the clear view through the entire front windshield be free from any non-excepted obstruction, and an officer may reasonably stop a vehicle upon observation of an non-excepted obstruction.

II. An officer may stop a vehicle when the officer has a reasonable suspicion that the operator is violating a traffic law.

Whether an officer may stop a vehicle based on a reasonable suspicion that the operator is violating a traffic law is a question of constitutional law subject to de novo review. Currently, under Wisconsin law, there is a dual standard for traffic stops. Some stops are analyzed under a probable cause standard, while others are analyzed under a reasonable suspicion standard. It is clear that probable cause is sufficient for a traffic stop; however, Fourth Amendment jurisprudence does not establish that probable cause is necessary to stop a vehicle for an observed traffic violation. *See* 4 Wayne R. LaFave, *Search and Seizure*, § 9.3(a) at 478 (5th ed. 2012) (citing *United States v. Callarman*, 273 F.3d 1284 (10th Cir. 2001); *United States v. Delfin-Colina*, 464 F.3d 392 (3rd Cir. 2006)). This Court should take this opportunity to explicitly conclude that probable cause is not required and a traffic stop is lawful if the law enforcement officer had a reasonable and articulable suspicion that a traffic or criminal violation has been or will be committed.

A. Reasonable suspicion is the appropriate standard by which to judge the reasonableness of a traffic stop.

Generally, a brief intrusion, like a traffic stop, is reasonable if the officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (footnote omitted). *See also Knowles v. Iowa*, 525 U.S. 113, 117 (1998) ("A routine traffic stop . . . is a relatively brief encounter and 'is more analogous to a so-called "*Terry* stop" . . . than to a formal arrest.'") (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)).

Previously, Wisconsin law was in accord with the conclusion that reasonable suspicion is the standard upon which to judge whether an officer complied with the demands of the Fourth Amendment in conducting a traffic stop. *See State v. Griffin*, 183 Wis. 2d 327, 329-31, 515 N.W.2d 535 (Ct. App. 1994) (the reasonable suspicion standard applies to stops based on an observed license plate violation); *State v. Krier*, 165 Wis. 2d 673, 678, 478

N.W.2d 63 (Ct. App. 1991) (a stop can be based on reasonable suspicion of either a crime or a non-criminal traffic violation).

However, in response to the Supreme Court of the United States' decision in *Whren*, Wisconsin's courts began to question whether reasonable suspicion was the appropriate standard. In *Whren*, the Supreme Court stated that "the decision to stop an automobile is reasonable where the police have *probable cause* to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810 (emphasis added). This dictum raised some doubts as to whether the *Terry* standard, which had been the acceptable standard for years, was still the appropriate standard. *Delfin-Colina*, 464 F.3d at 396. Post *Whren*, the Wisconsin Court of Appeals decided *Gaulrapp* and concluded that a traffic stop is justified "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." *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996).

This was the beginning of Wisconsin's probable cause/reasonable suspicion dichotomy. That dichotomy was addressed by the court of appeals in *Longcore.* In *Longcore,* the court of appeals established that the reasonable suspicion standard is applicable to a traffic stop only if further investigation is needed. *Longcore*, 226 Wis. 2d at 8-9. If an officer initiates a traffic stop based on the observation of a traffic violation committed in the officer's presence, the officer must have probable cause to make the stop. *Id.* Formulated another way: "a vehicle stop based solely on offenses not 'investigatable' cannot be justified by a mere reasonable suspicion, because the purposes of a *Terry* stop do not exist—maintaining the *status quo* while investigating is inapplicable where there is nothing further to investigate." *Commonwealth v. Chase*, 960 A.2d 108, 116 (Pa. 2008).

Roughly three and a half years after *Longcore,* the court of appeals decided *State v. Colstad*, 2003 WI App 25, ¶¶ 10-13, 260 Wis. 2d 406, 659 N.W.2d 394. In *Colstad,* the court rejected the conclusion that there is a dual standard by which to judge the reasonableness of a traffic stop. *Id.* ¶¶ 10-13. The court determined

that it was bound to follow its own precedent in *Griffin* and concluded that reasonable suspicion is the appropriate standard. *Colstad,* 260 Wis. 2d 406, ¶ 13. A few years later, in *Post,* this Court reiterated that reasonable suspicion is the standard to be applied to investigatory stops. *State v. Post*, 2007 WI 60, ¶¶ 9-12, 301 Wis. 2d 1, 733 N.W.2d 634. *Post* did not address, however, if all traffic stops are investigatory.

Two years after *Post*, this Court concluded in *Popke* that probable cause applies to stops based on observed traffic violations and reasonable suspicion applies to stops based on suspected criminal conduct and suspected traffic violations. *State v. Popke*, 2009 WI 37, ¶¶ 10-11, 317 Wis. 2d 118, 765 N.W.2d 569. A similar dual standard was noted and discussed in *State v. Anagnos*, 2012 WI 64, ¶¶ 21, 47-48, 341 Wis. 2d 576, 815 N.W.2d 675. In *Anagnos*, the court concluded that a lawful stop of an observed violation of Wis. Stat. § 346.15 would require probable cause, but the stop could also be upheld on grounds that there was reasonable suspicion to investigate Anagnos's odd driving behavior even though that behavior did not rise to probable cause to believe that an actual traffic violation had occurred. *Id.* ¶¶ 44-47. More recently, in *Brown*, the court concluded that a traffic stop must be supported by probable cause or reasonable suspicion. *Brown*, 355 Wis. 2d 668, ¶ 20. The *Brown* decision did not distinguish between when a traffic stop must be based on probable cause and when a traffic stop can be based on reasonable suspicion.[5] *Brown*, 355 Wis. 2d 668, ¶¶ 15, 20 ("a stop can be based on either probable cause or reasonable suspicion"). If either standard truly applies to a traffic stop, then there is no reason to continue to promulgate the probable cause standard if

[5] The State notes that the *Brown* decision discusses reasonable suspicion and probable cause in the context of criminal behavior. *Brown*, 355 Wis. 2d 668, ¶ 20. That appears to be the product of the quotations chosen for the opinion, and not an indication that criminal behavior has to be suspected for a traffic stop to be lawful. That, of course, cannot be the case as many rules of the road are not crimes. *See* Wis. Stat. § 939.12 (A crime is conduct "punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.").

traffic stops are lawful based on the less stringent reasonable suspicion standard.

Wisconsin is not unique in its application of *Whren*. For example, the North Carolina courts "[i]n the years since *Whren*, . . . occasionally discussed whether a traffic stop was constitutional in terms of probable cause." *State v. Styles*, 665 S.E.2d 438, 440 (N.C. 2008).[6] Like in Wisconsin, in North Carolina, "a distinction [ ] developed . . . by which [the courts] required probable cause for traffic stops made on the basis of a readily observed traffic violation, but reasonable suspicion for stops based on an officer's mere *suspicion* that a traffic violation is being committed." *Id.* (quotations omitted).[7] Ultimately, the Supreme Court of North Carolina, relying on the Third Circuit's analysis in *Delfin-Colina,* concluded that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *Id*.[8] The State is now asking this Court to do the same.

Reasonable suspicion will satisfy the demands of the Fourth Amendment so long as the government's interests outweigh the individual's interest in being free from governmental intrusion. As explained in *United States v. Place:*

> The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription

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[6] *See also, e.g., United States v. Salas*, 756 F.3d 1196, 1200-01 (10th Cir. 2014).

[7] In other jurisdictions it is hard to determine if there really are two separate standards, because in the context of observed traffic violations, both standards are met and courts have not had to confront the question head-on. 4 LaFave, *Search and Seizure,* § 9.3(a) at 475-76.

[8] *See also, e.g., United States v. Lopez-Soto,* 205 F.3d 1101, 1104-05 (9th Cir. 2000) (collecting federal cases).

> against unreasonable searches and seizures." . . . We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

United States v. Place, 462 U.S. 696, 703 (1983) (quotation omitted). *See also Michigan v. Summers*, 452 U.S. 692, 699-700 (1981) (some seizures constitute such limited intrusions on personal security that they are justified by law enforcement interests on less than probable cause as long as police have an articulable basis for suspecting criminal activity).

The reasonable suspicion standard announced in *Terry* is the appropriate standard for traffic stops, because while the "investigatory" function underlying *Terry* may be absent in some cases, a traffic stop – like a *Terry* stop – is a relatively minimal intrusion. "[M]ost traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*." *Berkemer*, 468 U.S. at 439 n.29. A traffic stop is "presumptively temporary and brief. . . . A motorist[ ] . . . [is] obliged to spend a short period of time answering questions and waiting . . . but that in the end he will most likely to be allowed to continue on his way." *Id.* at 437. A traffic stop is generally thought of as only a modest intrusion on the detainee's Fourth Amendment rights. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975). *See also, e.g., State v. Heien*, 737 S.E.2d at 357 (N.C. 2012) ("A routine traffic stop, based on what an officer reasonably perceives to be a violation, is not a substantial interference with the detained individual and is a minimal invasion of privacy.").

On the other hand, traffic laws are designed and implemented to ensure safety. The concern for safety encompasses the driver and the general public. The vehicle itself must be safe to operate and the driver must operate the vehicle safely. "Public safety and the protection of human life is a state interest of the highest order." *State*

v. Miller, 196 Wis. 2d 238, 249, 538 N.W.2d 573 (Ct. App. 1995). As such, the government's interest in conducting traffic stops greatly outweighs the minor inconvenience suffered by a stopped driver and or passenger(s). Further, a *Terry* stop allows law enforcement officers to momentarily freeze the status quo. *Adams v. Williams*, 407 U.S. 143, 146 (1972). This need to maintain the status quo is especially important on the roads and highways. An officer may forever lose his opportunity to halt or investigate unsafe behavior or equipment if he does not stop the vehicle immediately. "[W]e do not want to discourage our police officers from conducting stops for perceived traffic violations." *Heien*, 737 S.E.2d at 357.

Houghton may argue that there is no need to declare a single standard because if an officer has probable cause to believe that a traffic violation has occurred, the officer would necessarily also have reasonable suspicion to believe that the violation had occurred. While that may be true, the reverse is not. Most Wisconsin cases involving the application of the reasonable suspicion standard concern suspicions that must be investigated,[9] but it will not always be clear what is an "investigatable" offense. This case is the perfect example of that. The court of appeals concluded that the stop in this case was invalid because the officer did not have probable cause to believe that Houghton's clear view through the windshield was obstructed. *Houghton*, slip op. ¶¶ 7-10 (Pet-Ap. 103-05). However, if this Court accepts the court of appeals' conclusion that the air freshener and the GPS device obstructing the view through

[9] In *Batt*, the court of appeals applied the reasonable suspicion standard to a suspected traffic violation when Batt was stopped after police received a tip that two vehicles were speeding near a park. *State v. Batt*, 2010 WI App 155, ¶¶ 2, 16-18, 330 Wis. 2d 159, 793 N.W.2d 104. In *Tomaszewski*, the court of appeals applied the reasonable suspicion standard to uphold a stop after an officer observed Tomaszewski following a semi truck within 400 feet and without diming his high-beams. *State v. Tomaszewski*, 2010 WI App 51, ¶¶ 5-11, 324 Wis. 2d 433, 782 N.W.2d 725. In *Newer*, the court of appeals applied the reasonable suspicion standard to uphold a stop when the officer knew the owner of the vehicle had a suspended license, but did not know who was driving the vehicle. *State v. Newer*, 2007 WI App 236, ¶ 2, 306 Wis. 2d 193, 742 N.W.2d 923.

Houghton's windshield did not obstruct the view *enough* to establish a violation of Wis. Stat. § 346.88(3)(b), the court of appeals' conclusion must also be read to mean that an obstruction of greater magnitude would violate Wis. Stat. § 346.88(3)(b).

Therefore, when an officer observes a vehicle with some level of windshield obstruction, it would be necessary for the officer to stop the vehicle to investigate whether the obstruction was sufficient. *See, e.g., Callarman*, 273 F.3d at 1286-87 (when faced with a suspected obstruction to view through the front windshield, the officer needed only a reasonable and articulable suspicion that a crack in the windshield substantially obstructed the driver's view, as required by Kan. Stat. Ann. § 8-1474(b)). It is highly unlikely that an officer would be able to make that determination without further investigation, especially in cases in which the officer observes the obstruction when the vehicle is traveling at any significant rate of speed. More importantly, whether there was reasonable suspicion to believe that driver's view was obstructed does not depend on "whether the observed [obstruction] was, in fact, large enough to constitute a violation of the law." *Callarman*, 273 F.3d at 1287 (citing *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000)).

In order to eliminate confusion, this Court should conclude that reasonable suspicion is the only standard by which to judge whether a traffic stop is reasonable under the circumstances. The State suggests that the court formulate the standard as follows:

"'The temporary detention of individuals during the stop of an automobile by the police . . . constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment.'" *Popke*, 317 Wis. 2d 118, ¶ 11, (quoting *Gaulrapp*, 207 Wis. 2d at 605). Therefore, a traffic stop must be reasonable under the circumstances. *Id.* A traffic stop is reasonable if the law enforcement officer has a reasonable and articulable suspicion that a traffic or criminal violation has been or will be committed. *Brown*, 355 Wis. 2d 668, ¶ 92 (Roggensack, J. dissenting) (citing *Delfin-Colina*, 464 F.3d at 398). A traffic violation that an officer observes in his or her presence will always be sufficient to establish that the traffic stop was reasonable.

This formulation of the standard is consistent with the Fourth Amendment inquiry of whether the officer's actions were objectively reasonable under the circumstances. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). It also encompasses the principle that the reasonable suspicion standard applies even when the officer believes that he or she has all of the facts necessary to issue a citation. If this Court accepts the State's formulation of a standard by which to judge the reasonableness of a traffic stop, the court will need to overrule *Longcore* and narrowly modify *Popke, Anagnos,* and *Brown.*

B. The stop of Houghton's vehicle was lawful because the officer had a reasonable and articulable suspicion that Houghton was violating Wis. Stat. § 346.88(3)(b).

The stop of Houghton's vehicle was reasonable if the officer could point to specific and articulable facts that led the officer, in light of his training and experience, to reasonably suspect that Houghton was violating Wis. Stat. § 346.88(3)(b). *See, e.g., Brown*, 355 Wis. 2d 668, ¶ 92 (Roggensack, J. dissenting) (citing *Delfin-Colina*, 464 F.3d at 398). In reviewing the reasonableness of an officer's suspicions, courts "examin[e] the totality of the circumstances, eschewing bright-line rules and emphasizing instead the fact-specific nature of the reasonableness inquiry." *State v. Sumner*, 2008 WI 94, ¶ 20, 312 Wis. 2d 292, 752 N.W.2d 783.

Under the reasonable suspicion standard, the officer had cause to stop Houghton's vehicle. The officer testified at the suppression hearing that he observed a blue sedan approaching his location (24:6; Pet-Ap. 111). As the vehicle approached, the officer observed an air freshener suspended from the rearview mirror and a GPS device attached to the front windshield (24:6; Pet-Ap. 111). The officer believed that the items obstructed the driver's clear view through the front windshield (24:6; Pet-Ap. 111). When an officer encounters a situation in which a reasonable inference can be drawn that the driver's clear view was obstructed, the officer should be able to perform an investigatory stop without first establishing probable cause for an actual Wis. Stat. § 346.88(3)(b) violation. *See State v. Begicevic*, 2004 WI App 57, ¶ 7, 270 Wis. 2d 675, 678 N.W.2d 293 (citing S*tate v. Waldner*, 206 Wis. 2d 51, 61, 556 N.W.2d 681 (1996))

(when a reasonable inference of both lawful and unlawful behavior can be drawn, it is reasonable for the officer to perform a brief stop). *See also, State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989).

If, upon investigation, the officer found – as did the court of appeals – that the observed obstruction did not amount to a violation of Wis. Stat. § 346.88(3)(b), the result of that investigation does not negate the reasonableness of the stop. Because the stop was reasonable, this Court should reverse the court of appeals' decision and affirm the circuit court's order denying Houghton's motion to suppress.

III. The holding of *Longcore* and *Brown* that a valid traffic stop cannot be based on a mistake of law is inconsistent with the Supreme Court's interpretation of the Fourth Amendment.

"The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry*, 392 U.S. at 19); *see also, Heien*, 135 S.Ct. at 536 (quoting *Riley v. California*, 134 S.Ct. 2473, 2482 (2014)). When a police officer performs a traffic stop, the stop must be reasonable under the circumstances to comply with the Fourth Amendment of the United States Constitution and article 1, § 11 of the Wisconsin Constitution. *Post*, 301 Wis. 2d 1, ¶ 10 n.2. Whether a traffic stop is reasonable when it rests on a mistake of law is a question of constitutional law subject to de novo review.

A. A reasonable suspicion that a traffic or criminal violation has or will occur can be based upon an objectively reasonable mistake of law.

Currently, in Wisconsin, a traffic stop is not reasonable if it is based upon a mistake of law. *Longcore*, 226 Wis. 2d at 8-9; *Brown*, 355 Wis. 2d 668, ¶¶ 42-43. In this case, the State conceded in the court of appeals that a stop cannot be based on a mistake of law. *Houghton*, slip op. ¶ 9 (Pet-Ap. 104). After the State made its concession, but before the court of appeals issued its opinion in this case, certiorari was granted in *Heien*, 135 S.Ct. 530. The court of appeals noted that if

the Supreme Court of the United States affirmed in *Heien*, it would throw *Longcore* in doubt. *Houghton,* slip op. ¶ 9 n.3 (Pet-Ap. 104).

The *Longcore* court concluded that an officer does not have probable cause to conduct a traffic stop when the officer's interpretation of the law is incorrect *and* the observed conduct would not constitute a violation under a correct interpretation of the law. *Longcore,* 226 Wis. 2d at 9. In *Brown,* this Court affirmed and expanded that principle, concluding that "[l]ike probable cause, reasonable suspicion cannot be based on a mistake of law." *Brown*, 355 Wis. 2d 668, ¶ 40 (citing *Rabin v. Flynn*, 725 F.3d 628, 633 (7th Cir. 2013)). The conclusion that a reasonable traffic stop cannot be based on a mistake of law is now inconsistent with the Supreme Court of the United States' interpretation of the Fourth Amendment. *Heien*, 135 S.Ct. at 536.

Heien illustrates that reasonable suspicion is not dependant on the officer's correct understanding of the law. *Heien*, 135 S.Ct. at 536. In *Heien*, an officer noticed a Ford Escort approaching a slower moving vehicle, and subsequently observed that the right rear brake light of the Escort was not functioning properly. *Id.* at 534. The officer decided to stop the vehicle. *Id.* The officer immediately advised the driver "that as long as his license and registration checked out, he would receive only a warning ticket." *Id.* During the course of the stop the officer became suspicious, and after the warning was issued and all documents returned, the officer asked to search the vehicle. *Id.* Consent was given and the search revealed cocaine. *Id.*

Heien, who was the passenger and the owner of the vehicle, filed a motion to suppress all evidence resulting from the search on grounds that the initial stop was an illegal seizure. *Id.* at 535. The trial court concluded that the faulty brake light was sufficient to give rise to a reasonable suspicion to initiate the stop, and that Heien's consent to the search was valid. *Id.* The court of appeals disagreed and concluded that North Carolina does not require all brake lamps to be functional. *Id.* The court of appeals concluded that the officer's justification for the stop was therefore objectively unreasonable. *Id.*

That holding is nearly identical in substance to the holding of *Longcore* and *Brown.*

The Supreme Court of North Carolina disagreed with its court of appeals and concluded that a mistake of law may be objectively reasonable and an officer may act reasonably upon that mistake of law:

> An officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances. As stated above, when an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment. So long as the officer's mistake of law is objectively reasonable, then, the Fourth Amendment would seem not to be violated. Accordingly, requiring an officer to be more than reasonable, mandating that he be perfect, would impose a greater burden than that required under the Fourth Amendment.

Heien, 737 S.E.2d at 356.

The Supreme Court of the United States agreed. The Court reasoned that "reasonable men make mistakes of law" and mistakes of law are "compatible with the concept of reasonable suspicion." *Heien*, 135 S.Ct. at 536. The Court explained:

> Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Heien, 135 S.Ct. at 536.

Importantly, the Court concluded that a "mistake of law relates to the antecedent question of whether it was reasonable for an

officer to suspect that the defendant's conduct was illegal." *Id.* at 539. Therefore, the question is not whether the exclusionary rule should apply, but whether there was a Fourth Amendment violation at all. *Id.* at 538-39 (discussing *Michigan v. DeFillippo*, 443 U.S. 31 (1979)).

If reasonableness is the hallmark of the Fourth Amendment, then there is no basis to demand that an officer always interpret the law flawlessly. *See Heien,* 135 S.Ct. at 539. That, however, does not mean that "an officer can gain . . . advantage through a sloppy study of the laws he is duty-bound to enforce." *Id* at 539-40. The mistake of law must be objectively reasonable. *Id.* at 539. When the facts ascertained by the officer supports a reasonable suspicion that a traffic violation is being committed based on an objectively reasonable mistake of law, then it is reasonable for the officer to conduct a traffic stop. *Id*. at 540. While that mistake of law cannot justify the imposition of criminal liability, it does not follow that the mistake cannot justify the stop. *Id.* This conclusion of the Supreme Court is directly contrary to the *Longcore* court's conclusion 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." *Longcore*, 226 Wis. 2d at 9.

The dissent in *Brown* foresaw the rationale that would be applied by the *Heien* Court. *See Brown*, 355 Wis. 2d 668 ¶¶ 102-05 (Roggensack, J. dissenting). However, the dissent in *Brown* diverged from what would be the Supreme Court's conclusion in *Heien* on a very significant aspect of its Fourth Amendment analysis. It is worth repeating that the *Heien* Court concluded that a "mistake of law relates to the antecedent question of whether it was reasonable for an officer to suspect that the defendant's conduct was illegal." *Heien*, 135 S.Ct. at 539. It is not a question of whether the exclusionary rule should apply. *Cf. Brown*, 355 Wis. 2d 668 ¶ 107 (Roggensack, J. dissenting). The question is whether there was a Fourth Amendment violation at all. *Heien*, 135 S.Ct. at 538-39.

This Court should adopt the Supreme Court's interpretation of the Fourth Amendment and conclude that reasonable suspicion can be based on an objectively reasonable mistake of law. This Court

has repeatedly observed that it ordinarily construes the Wisconsin Constitution's ban on unreasonable searches and seizures coextensively with the Fourth Amendment. *State v. Felix*, 2012 WI 36, ¶ 36 & n.25, 339 Wis. 2d 670, 811 N.W.2d 775 (collecting cases). *See also, State v. Artic*, 2010 WI 83, ¶ 28, 327 Wis. 2d 392, 786 N.W.2d 430; *State v. Denk*, 2008 WI 130, ¶ 35, 315 Wis. 2d 5, 758 N.W.2d 775; *State v. Johnson*, 2007 WI 32, ¶ 20, 299 Wis. 2d 675, 729 N.W.2d 182. Adopting the *Heien* Court's conclusion would recognize the nearly identical wording of the two provisions and accord with the court's customary practice.[10] In concluding that reasonable traffic stops may be based on an objectively reasonable mistake of law, the court will need to overrule *Longcore* and narrowly modify *Brown.*

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[10] Additionally, there are indicators that the drafters of Art. I, § 11 intended it to be the same as the Fourth Amendment. The section was part of the declaration of rights drafted by the constitutional convention in 1847-48. As originally introduced on December 22, 1847, § 11 read:

> 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 to search any place or seize any person or thing shall issue without describing, as near as may be, nor without probable cause, supported by oath or affirmation.

Journal and Debates of the 1847-48 Constitutional Convention, reprinted in State Historical Society of Wisconsin, *The Attainment of Statehood* 228 (M. Quaife ed. 1928).

The committee on revision and arrangement suggested several changes in the declaration of rights. *Id*. at 713-16. Among other things, the committee modified art. I, § 11 to track the language of the Fourth Amendment. *Id*. at 714. The change was made to use words that "conveyed the meaning most fully and as were most generally used in constitutional law." *Id*. at 715. As such, the drafters evinced an intent that Wis. Const. art. I, § 11 was to give Wisconsin citizens the same protection against arbitrary state action that the Fourth Amendment already gave them against arbitrary federal action.

B. The officer in this case had an objectively reasonable belief that Houghton was violating the law.

To be clear, there were two mistakes of law in this case. One that the State submits was reasonable and one that the State submits was not. It was not objectively reasonable for the officer to suspect that Houghton was violating the law by not displaying a front license plate, but it was objectively reasonable to believe that Houghton was violating the law because Houghton's clear view through the front windshield was obstructed.

"The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." *Heien*, 135 S.C.t at 539. "A court tasked with deciding whether an officer's mistake of law can support a seizure [ ] faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake." *Heien*, 135 S.Ct. at 541 (Kagan, J. concurring). The officer's subjective understanding is not at issue. *Heien*, 135 S.Ct. at 539 (citing *Whren*, 517 U.S. at 813).

First, regarding the mistaken belief that Houghton was required to display a front license plate, Wis. Stat. § 341.15(1) provides that "[w]henever 2 registration plates are issued for a vehicle, one plate shall be attached to the front and one to the rear of the vehicle." Both plates must be displayed so they can easily be seen and read. Wis. Stat. § 341.15(2). However, if only one plate is issued, it must be attached to the rear. Wis. Stat. § 341.15(1)(b). *See also State v. Boyd*, 2012 WI App 39, 340 Wis. 2d 168, 811 N.W.2d 853, *review denied*, 2012 WI 77, 342 Wis. 2d 158, 816 N.W.2d 323 (concluding that Wis. Stat. § 341.15 applies to vehicles registered in other jurisdictions).

The mistaken belief that Houghton's vehicle was required by law to have a front license plate is not objectively reasonable. The circuit court concluded that it would be reasonable for an officer to not know if a particular jurisdiction issued only one license plate, and therefore, the officer could stop a vehicle that only displayed one plate (24:24-25; Pet-Ap. 129-30). Such a conclusion considers the

subjective assessment of what the officer believed the law to be. Here, the officer claimed that he believed all vehicles were required to have a front license plate (24:10; Pet-Ap. 115). In other words, the officer did not know the law. However, the officer's subjective understanding of the law is irrelevant and "the government cannot defend an officer's mistaken legal interpretation on the ground that the officer was unaware of or untrained in the law." *Heien*, 135 S.Ct. at 541 (Kagan, J. concurring). The question is whether it is objectively reasonable for an officer to interpreted Wis. Stat. § 341.15 as requiring that Houghton's vehicle display a front license plate. The State believes the answer to that question must be no. The law is clear that if a vehicle is only issued one license plate, only one license plate needs to be displayed. Wis. Stat. § 341.15(1)(b).

It was, however, objectively reasonable for the officer to believe that Wisconsin law required an unobstructed clear view through Houghton's front windshield. The State argued in the court of appeals that the language of Wis. Stat. § 346.88(3)(b) is unambiguous and the statute is violated when there was any obstruction to view through the front windshield (with the limited exception of government issued certificates and stickers). *See* discussion *supra* Part I. The court of appeals did not agree that the language of Wis. Stat. § 346.88(3)(b) was that broad. *Houghton*, slip op. ¶ 10 (Pet-Ap. 104-05). If this Court concludes that the court of appeals' was correct to read Wis. Stat. § 346.88(3)(b) as requiring a particular degree of obstruction, then this Court should also conclude that the plain language of Wis. Stat. § 346.88(3)(b) is ambiguous and it was a objectively reasonable for the officer in this case to believe that Houghton was violating the law.

Wisconsin Stat. § 346.88(3)(b) reads "No person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver's clear view through the front windshield." The statute does not require that the obstruction be material or substantial, rather the statute's language requires no obstruction to the driver's clear view. Therefore, when, as in the case here, an officer encounters a vehicle that has multiple items visible within the space of the front

windshield, it is objectively reasonable for that officer to reasonably suspect that Wis. Sat. § 346.88(3)(b) has been violated.

A law enforcement officer is not a legal technician and will not reasonably know how a court will subsequently interpret a statute in all circumstances. *Brown,* 355 Wis. 2d 668, ¶ 103 (Roggensack, J. dissenting) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). If a court later interprets the law in question to mean something else, so long as the officer's interpretation was reasonable, suppression of evidence obtained from the stop is not warranted. *See Heien*, 737 S.E.2d at 357 ("A *post hoc* judicial interpretation of a substantive traffic law does not determine the reasonableness of a previous traffic stop within the meaning of the state and federal constitutions."); *Brown,* 355 Wis. 2d 668, ¶ 101 (Roggensack, J. dissenting).

When an officer's interpretation of a traffic law, especially one concerned with safety, is reasonable and that reasonable interpretation leads the officer to believe that a violation has occurred, then it was reasonable to stop the vehicle. *Heien*, 135 S.Ct. at 539-40; *Brown,* 355 Wis. 2d 668, ¶¶ 105-06 (Roggensack, J. dissenting) (citing *Heien*, 737 S.E.2d at 356-57). Therefore, even if the officer's suspicion that Houghton was violating Wis. Stat. § 346.88(3)(b) was based on a mistaken interpretation of Wis. Stat. § 346.88(3)(b), the circuit court's order denying Houghton's suppression motion should be affirmed.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court reverse the court of appeals decision and affirm the judgment of conviction and order denying suppression.

Dated this 12th day of February, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,990 words.

Dated this 12th day of February, 2015.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 12th day of February, 2015.

_____
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