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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP1581-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD E. HOUGHTON, JR.,

Defendant-Appellant.

On Review of a Decision of The Court of Appeals, District II, Reversing, an Order of The Walworth County Circuit Court, The Honorable John R. Race, Presiding

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AMICUS CURIAE BRIEF OF THE OFFICE OF THE WISCONSIN STATE PUBLIC DEFENDER

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INTRODUCTION

On July 16, 2014, this Court in ***State v. Antonio Brown***, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66, affirmed the longstanding Wisconsin principle that "a lawful traffic stop cannot be predicated on a mistake of law." ***Brown***, 2014 WI 69, ¶ 22. In so doing, this Court considered the fact that a "substantial majority" of both federal circuits and other states to address this question had reached the same conclusion. ***Id.***, ¶¶ 23-25. Approximately five months later, the United States Supreme Court adopted the minority position, holding that a traffic stop may be predicated on an objectively reasonable mistake of law. ***Heien v. North Carolina***, 135 S.Ct. 530 (2014). The Office of the State Public Defender submits this non-party brief to address why, despite the United States Supreme Court's more recent decision in ***Heien***, this Court should re-affirm its recent decision and hold that a traffic stop may not be predicated on a mistake of law under Article I, Section 11 of the Wisconsin Constitution.

ARGUMENT

I. This Court Should Adhere to the Clear Constitutional Standard Which it Affirmed Less Than a Year Ago and, Just as in ***State v. Eason***, Hold that Article I, Section 11 of the Wisconsin Constitution Provides Greater Protections than the Fourth Amendment.

This Court now faces a direct conflict between two legal principles, both of which it generally follows: the principle of adhering to its own precedent versus the principle of interpreting Article I § 11 of the Wisconsin Constitution consistently with the U.S. Supreme Court's interpretation of

the Fourth Amendment. *See, e.g.,* ***Schultz v. Natwick***, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266 ("Ordinarily, of course, we adhere to the principle of stare decisis. Fidelity to precedent ensures that existing law will not be abandoned lightly"); ***State v. Artic***, 2010 WI 83, ¶ 28, 327 Wis. 2d 392, 786 N.W.2d 430 ("The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. This court ordinarily construes the protections of these provisions coextensively")(internal citations omitted).

Albeit rare, this Court has before held that Article I, Section 11 provides greater protections than the Fourth Amendment. In ***State v. Eason***, this Court held that the good faith exception to the exclusionary rule applies where police act in objectively reasonable reliance on a facially valid search warrant issued by a detached and neutral magistrate. 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625. This Court explained that the United States Supreme Court, in ***United States v. Leon***, 468 U.S. 897 (1984), had "formulated a good faith exception" "under similar circumstances," and determined that it was time "for this court to add a chapter to its volume of law on the exclusionary rule, based upon a good faith exception that was adopted by ***Leon***." ***Id.***, ¶ 27.

Nevertheless, in so doing, this Court concluded that "Article I, Section 11 of the Wisconsin Constitution guarantees more protection than the Fourth Amendment provides under the good faith exception as adopted in ***Leon***." ***Id.***, ¶ 60. This Court acknowledged concerns that application of the good faith exception would undermine the exclusionary rule, and considered the fact that "[w]here a warrant has been issued, the attendant costs in obtaining the warrant diminishes the likelihood that the police are engaged in some sort of harassment or fishing expedition." ***Id.***, ¶ 61. This Court

therefore imposed additional requirements to ensure that police action to obtain a warrant is based on significant investigation and *understanding of the law***:** this Court held that for the good faith exception to apply, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***Id.***, ¶ 63.

Just as this Court in ***Eason*** held that our Wisconsin Constitution imposes greater protections than the Fourth Amendment to ensure that police action is driven by an understanding of the law, this Court should here re-affirm Wisconsin's longstanding principle that a traffic stop may not be based on a mistake of law—a standard which also upholds and encourages police knowledge of the law.

As this Court has recognized:

> It is always conceivable that the Supreme Court could interpret the fourth amendment in a way that undermines the protection Wisconsin citizens have from unreasonable searches and seizures under article I, section 11, Wisconsin Constitution. This would necessitate that we require greater protection to be afforded under the state constitution than is recognized under the fourth amendment.

State v. Fry, 131 Wis. 2d 153, 174, 388 N.W.2d 565 (1986), *reversed on other grounds by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97.

This Court very recently held that our Wisconsin Constitution provides our citizens with the right to be free from traffic stops based on an officer's mistake of law. ***Brown***, 2014 WI 69, ¶ 22. To now—less than a year later—

hold that our constitution in fact does not provide our citizens with this protection, because the United States Supreme Court has now held that the Fourth Amendment provides less protection, would be to wholly undermine the very protection that this Court so recently affirmed.[1]

II. Adhering to ***Brown*** and ***Longcore*** Upholds the Rights of Wisconsin Citizens While Also Benefiting Wisconsin Police.

This Court has explained that one of the reasons that it generally interprets Article I, Section 11 of the Wisconsin Constitution coextensively with the U.S. Supreme Court's interpretation of the Fourth Amendment is to prevent police confusion over "differing standards." ***Eason***, 2001 WI 98, ¶ 47, citing ***Fry***, 131 Wis. 2d at 173-74. To interpret our state constitution consistently with the ***Heien*** decision, however, would instead be to cause *more* confusion for police.

Overruling this Court's precedent and adopting the ***Heien*** standard would have the "perverse effect of preventing or delaying the clarification of the law." ***Heien***, 135 S.Ct. at 544 (J. Sotomayor, dissenting). This Court has held repeatedly that reviewing courts should decide cases on the narrowest possible grounds. *See, e.g.,* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997)("An appellate court should decide cases on the narrowest grounds possible"); ***State v. Tolliver***; 2014 WI 85, ¶ 12, 356 Wis. 2d 642, 851

[1] The State in its brief to this Court suggests that if this Court adopts the ***Heien*** standard, it would be overruling ***Longcore*** but only "narrowly modifying" ***Brown***. (State's Initial Brief at 6). On the contrary, the State is asking this Court to *overturn* ***Brown***'s holding that a traffic stop may not be based on a mistake of law. While to do so would not change ***Brown***'s holding concerning the requirements of Wisconsin tail lamp statute, it would indeed overrule this Court's clear pronouncement in ***Brown*** that a mistake of law cannot provide the basis for a traffic stop.

N.W.2d 251. If the question presented is not what the law actually makes illegal, but whether the officer's interpretation was objectively reasonable, "courts need not interpret statutory language but can instead simply decide whether an officer's interpretation was reasonable." ***Heien***, 135 S.Ct. at 544 (J. Sotomayor, dissenting). As Justice Sotomayor aptly notes in her dissent in ***Heien***:

> Indeed, had this very case arisen after the North Carolina Supreme Court announced its rule, the North Carolina Court of Appeals would not have had the occasion to interpret the statute at issue. Similarly, courts in the Eighth Circuit, which has been the only Circuit to include police mistakes of law in the reasonableness inquiry, have observed that they need not decide interpretive questions under their approach. *See, e.g.,* ***United States v. Rodriguez-Lopez***, 444 F.3d 1020, 1022-1023 (C.A.8 2006).

Id. (J. Sotomayor, dissenting). Adopting the ***Heien*** standard would provide less clarity to police about the very statutes that they may find unclear or complicated.

Overruling ***Brown*** and ***Longcore*** and adopting ***Heien*** would also undermine the public perception, and accordingly the efficacy, of our Wisconsin police. The "over-all legitimacy of the police depends much more on citizens' perceptions of how the police treat them than on their perceptions of police success in reducing crime." Catherine Gallagher et al., *The Public Image of the Police: Final Report to the International Association of Chiefs of Police*, George Mason University, Administration of Justice Program (2001), http://www.theiacp.org/The-Public-Image-of-the-Police. Importantly, studies also show that the "public's perceptions of how police treat them appear to affect their willingness to obey the law and obey the police." ***Id.***

Traffic stops are one of the most frequent ways that our citizens come into contact with police. According to the U.S. Department of Justice, in the year 2011, nearly 63 million Americans age 16 and older had face-to-face contact with police. U.S. Dep't of Justice, Bureau of Justice Statistics, *Police Behavior During Traffic and Street Stops***,** *2011*, at 1 (2013), *available online at* http://www.bjs.gov/content/pub/pdf/pbtss11.pdf. This study found that traffic stops were a more common form of police contact than street stops; indeed, "[a]bout 10% of the 212.3 million U.S. drivers age 16 or older were stopped while operating a motor vehicle during their most recent contact with police." ***Id.*** at 3. Traffic stops thus present an important point of direct contact between police and citizens.

As only a small percentage of traffic stops result in arrest, *see* U.S. Dep't of Justice, *Police Behavior*, at 7 (explaining that in 2011 only 1% of all stopped drivers were arrested during the stop), the extent of police authority to conduct traffic stops does not just implicate the rights of criminal defendants—it implicates the rights of all drivers in the State of Wisconsin. Do we want our citizens to have to "shoulder the burden of" of a trained police officer's mistaken understanding of the law he or she is designed to enforce and uphold? *See* ***Heien***, 135 S.Ct. at 546 (J. Sotomayor, dissenting). And, if a citizen has indeed done nothing illegal to warrant the stop, what can a citizen do to avoid such an intrusion on his or her privacy rights? ***Id.*** at 544 (J. Sotomayor, dissenting) ("One wonders how a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so").

The bottom line is, under the standard articulated in ***Heien***, a police officer who does *not* know the law will have

more potential ability to impinge on an individual's constitutional protections against search and seizure than an officer who *does* know the law. Where police treatment of individuals plays such an important role in the public's perception of police, and the public's perception of police plays such an important role in the public's willingness to obey police, to open the door to allow traffic stops based on mistakes of law would be to undermine the public's perception of police and, in turn, make their job harder.

III. Adopting the ***Heien*** Standard Would Lead to the Inconsistent Application of Constitutional Protections and Open the Door to Extensive Litigation.

This Court has to look no further than the case at hand to see how easily the ***Heien*** standard would lead to inconsistent applications of our constitutional protections against unreasonable search and seizure. The officer in this case stopped Mr. Houghton's car after observing, among other things, that it had no front license plate. (Ct. App. Op., ¶ 2). The circuit court acknowledged that Mr. Houghton had not actually violated any law, because, as a "Michigan resident, Houghton was issued only one license plate, which he attached to the rear of his vehicle in accordance with § 341.15(1)(b)." (Ct. App. Op., ¶ 4). The court nevertheless concluded that the officer's mistake *was* reasonable: "I don't believe a traffic officer is required to have at his finger types [sic], memorized or on his computer in his squad car the requirements of each of the…states with respect to front license plates and the Canadian provinces." (Ct. App. Op., ¶ 4).

But now the State asserts to this Court that the officer's mistake of law concerning the license plate requirements was *not* reasonable: "The question is whether it

is objectively reasonable for an officer to interpreted [sic] as requiring that Houghton's vehicle display a front license plate. The State believes the answer is no." (State Initial Brief at 23). This case alone thus reveals that trained legal minds can easily reach opposite conclusions about what was or was not a reasonable mistake. This Court should not abandon a clear, consistent rule in favor of a rule that will lead to inconsistent application of our citizens' protections against unreasonable search and seizure.

Overruling ***Longcore*** and ***Brown*** and adopting the rationale of ***Heien*** would also lead to a barrage of litigation to clarify what "objectively reasonable" actually means in practice. The U.S. Supreme Court in ***Heien*** concluded that its test does not "examine the subjective understanding of the particular officer involved," 135 S. Ct. at 539, but this does not explain how an officer's misunderstanding should be objectively evaluated. Consider the license plate mistake of law in this case: When evaluating the objective reasonableness of the officer's mistake, should a court take into account the location of the police department? For example, is it more reasonable for an officer in Milwaukee County to fail to understand that Michigan only issues one license plate (and that, in turn, Wisconsin law does not require Michigan drivers to have two license plates) than it is for an officer in Marinette County, which borders Michigan?

And to what extent, if any, does the officer's training and experience level factor into a court's analysis of the objective reasonableness of the mistake? Indeed, the Eighth Circuit, which adopted the minority position prior to ***Heien*****,** has held that "evidence of police manuals or training materials" would be relevant to assess whether an officer's mistake was objectively reasonable. ***United States v. Washington***, 455 F.3d 824, 828 (8th Cir. 2006). Will defense

attorneys need to subpoena an officer's training records to determine whether a reasonable officer in that officer's position should have understood a particular law? Will supervising officers need to testify to explain the standard level of education provided about a particular law?[2]

In her concurrence in ***Heien***, Justice Kagan states that courts will simply have to assess statutory construction—whether the law is "so doubtful in construction that a reasonable judge could agree with the officer's view." ***Heien***, 135 S.Ct. at 541 (J. Kagan, concurring)(internal quotation omitted). But would the location of the court or the court's understanding of police practices in that particular area factor into the judge's review of the statute and evaluation of the officer's interpretation? These are only a few of the many questions which would arise if this Court adopted the ***Heien*** standard.

The rule affirmed by this Court in ***Brown*** sets forth a clear standard for courts to follow: if a traffic stop is based on an officer's mistake of law, the stop is not lawful. This standard benefits Wisconsin citizens, police, and courts, and this Court should hold that—under our Wisconsin constitution—a traffic stop may not be based on a mistake of law.

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[2] In her concurrence in ***Heien***, Justice Kagan explains that because an officer's subjective understanding is irrelevant to their analysis, the government could not argue that an officer's mistake of law was objectively reasonable because he or she was "unaware of or untrained in the law," or relied on an "incorrect memo or training program." ***Id.*** Indeed, such arguments would go to the *subjective* understanding of the particular officer. But if police have been trained to interpret a potentially ambiguous statute in the legally correct way, would that not factor into the objective reasonableness of the officer's mistake?

CONCLUSION

For the foregoing reasons, the Office of the State Public Defender respectfully requests that this Court adhere to its recent holding in ***State v. Antonio Brown*** and hold that a traffic stop may not be predicated on a mistake of law under Article I, Section 11 of the Wisconsin Constitution.

Dated this 10th day of April, 2015.

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 2,695 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 parties.

Dated this 10th day of April, 2015.

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