STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP000173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN GRANDBERRY,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court,
the Honorable Janet Protasiewicz Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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INTRODUCTION

Brian Grandberry was arrested for transporting a handgun in the glove compartment of his car. His actions were in full compliance with the requirements of the "safe transport statute," the law that specifically governs the proper method for transporting a firearm inside a vehicle. WIS. STAT. § 167.31.[1] Nevertheless, Grandberry was charged with and convicted of carrying a concealed weapon, contrary to WIS. STAT. § 941.23 (the "CCW statute").

This Court should vacate Grandberry's conviction and hold that compliance with the safe transport statute precludes liability under the CCW statute. In ***State v. Walls***, 190 Wis. 2d 65, 526 N.W.2d 765 (Ct. App. 1994), the court of appeals recognized (but did not hold) that compliance with the safe transport statute provides safe harbor from prosecution under the CCW statute. This safe harbor rule is the only reasonable way to resolve the conflict between the CCW statute and the safe transport statute. Without this rule, Wisconsin residents who do not have CCW permits would be precluded from transporting a firearm inside a vehicle unless the firearm is placed: (1) above the lower portion of the car's window frame, such as on the dashboard where it is not "concealed"; or (2) in the car's trunk, so that it is out of reach and thus not "carried" for purposes of the CCW statute.

Neither of these options is adequate, however. Transporting a gun on a car's dashboard is ill-advised and unsafe. Also, many vehicles, like pickup trucks and sport utility vehicles (SUVs), do not have trunks. Consequently,

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[1] The safe transport statute is also sometimes referred to as the "transportation restriction statute." (*See Amicus Curiae* Wisconsin Carry, Inc.'s Br. at 4).

without the safe harbor rule recognized in ***Walls***, many Wisconsin gun owners (for example, hunters who do not have CCW permits and drive pickup trucks or SUVs) would have no safe, responsible, and legal way to transport firearms inside their vehicles. Moreover, without the safe harbor rule, the conflict between the CCW statute and safe transport statute would render the CCW statute unconstitutionally vague as applied to the transportation of firearms in vehicles.

ISSUES PRESENTED

1. As a matter of law, is there sufficient evidence to convict a person of violating the CCW statute if the firearm is transported in a vehicle in full compliance with the safe transport statute?

The circuit court found Grandberry guilty of violating the CCW statute based on his stipulation to the facts in the criminal complaint. On appeal, the court of appeals affirmed, holding that the safe transport statute only applies to those who have a CCW permit under WIS. STAT. § 175.60. Since Grandberry did not have a CCW permit, the court of appeals concluded there was sufficient evidence convict him, as the stipulated facts met the elements of the CCW statute.

2. Is the CCW statute void for vagueness as applied to a person like Grandberry who transports a firearm in a vehicle in full compliance with the safe transport statute?

The circuit court denied Grandberry's motion to dismiss the case on the grounds of statutory vagueness. The court of appeals also held that the CCW statute was not unconstitutionally vague as applied to Grandberry.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed both oral argument and publication to be appropriate.

STATEMENT OF THE CASE AND FACTS

The State filed a criminal complaint charging Brian Grandberry with one count of carrying a concealed weapon. The complaint alleged that, on November 9, 2014, police conducted a traffic stop of a car driven by Grandberry. During the stop, one of the officers asked Grandberry if he had any firearms, and Grandberry told him there was a gun in the glove compartment. The officer then asked Grandberry if he had a CCW permit, and Grandberry said that he did. The officers checked the permit database and discovered that Grandberry did not, in fact, have a CCW permit. The officers then opened the glove compartment and discovered a loaded semi-automatic handgun. (2:1).

Grandberry filed a motion to dismiss the case on the grounds that the CCW statute, as applied to him, was void for vagueness. (5). He pointed out that his conduct, while seemly prohibited by the CCW statute, was actually permitted by the safe transport statute, which permits the placement, possession, or transportation of a handgun in a vehicle, even if the handgun is loaded. *See* WIS. STAT. § 167.31(2)(b)1.[2]

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[2] Subsection (2)(b) of the safe transport statute provides as follows:

> (b) Except as provided in sub. (4), no person may place, possess, or transport a firearm, bow, or crossbow in or on a vehicle, unless one of the following applies:

(continued)

Grandberry therefore asserted that the coexistence of these conflicting statutes rendered the CCW statute unconstitutionally vague as applied to him. (5:1-2, 7-8). He also argued that because of the conflict, the CCW statute should be construed to prohibit the prosecution of a person who transports a firearm in a vehicle in compliance with the safe transport statute.[3] (5:1-2, 8-10).

On July 9, 2015, the circuit court, the Honorable Janet Protasiewicz, denied Grandberry's motion in an oral ruling. The court offered the following reasoning in support of its ruling:

> I just cannot imagine how the intent of the legislature would be – the carrying concealed weapon statute from my understanding has not changed in decades and decades. It's remained intact. How the people of this community do not have a right to be protected from people that aren't permit holders from having that weapon in their vehicle. I just don't see it. I don't see that you've proven beyond a reasonable doubt that the statute as applied is unconstitutional either on its face or as applied to Mr. Grandberry.

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1. The firearm is unloaded or is a handgun.

2. The bow does not have an arrow nocked.

3. The crossbow is not cocked or is unloaded and enclosed in a carrying case.

WIS. STAT. § 167.31(2)(b). None of the exceptions contained in subsection (4) are applicable in this case.

[3] Grandberry further argued that, under the circumstances of this case, a conviction for carrying a concealed weapon would violate his right to bear arms as guaranteed by the Second Amendment to the United States Constitution and Article I, § 25 of the Wisconsin Constitution. (5:2). Grandberry does not raise this argument on appeal.

(14:12; App. 121).

Thereafter, the circuit court conducted a stipulated court trial at the parties' request. Pursuant to this arrangement, Grandberry stipulated to the facts in the criminal complaint, and the court found him guilty of carrying a concealed weapon. (16:1-2). The court subsequently imposed and stayed a sentence of three months in the House of Corrections and placed Grandberry on probation for a period of one year. (16:9).

Grandberry appealed the circuit court's ruling to the court of appeals. (8, 10). On appeal, he argued that there was insufficient evidence to convict him of carrying a concealed weapon, because his conduct fully complied with the safe transport statute and, as such, did not constitute "carrying" a concealed weapon. (Grandberry's Initial COA Br. at 5-11). He also argued, in the alternative, that if a person can be guilty of carrying a concealed weapon even if he fully complies with the safe transport statute, then the CCW statute should be found to be unconstitutionally vague as applied to a person who transports a firearm in a vehicle in compliance with the safe transport statute. (Grandberry's Initial COA Br. at 11-16).

The court of appeals affirmed the judgment of the circuit court in an unpublished opinion.[4] The court first concluded that the safe transport statute, although "not a model of clarity in explaining who exactly falls within its ambit," only applies to those who have a CCW permit under WIS. STAT. § 175.60. (Ct. App. Op. at 5; App. 105). The court therefore found that the safe transport statute did not

[4] Because this is a misdemeanor case, the opinion was issued by one judge pursuant to WIS. STAT. § 752.31(2).

apply to Grandberry, since he did not have a CCW permit. The court also found that the stipulated facts contained in the criminal complaint satisfied the elements of carrying a concealed weapon. It therefore held that there was sufficient evidence to convict Grandberry. (Ct. App. Op. at 5-6; App. 105-06).

In addition, the court of appeals found that Grandberry was subjectively aware that he was required to have a CCW permit in order to lawfully place a firearm in his glove compartment. The court "deduced" this from the fact that Grandberry initially told police that he had a CCW permit when, in fact, he did not have one. The court of appeals therefore held that the CCW statute was not unconstitutionally vague as applied to Grandberry. (Ct. App. Op. at 8; App. 108).

ARGUMENT

The undisputed facts show that Grandberry was transporting a handgun in his vehicle at the time of his arrest. His actions therefore fully complied with the requirements of the safe transport statute. *See* WIS. STAT. § 167.31(2)(b). In ***Walls***, 190 Wis. 2d 65, the court of appeals "recognized that the placement, possession, or transportation of . . . firearms in vehicles as permitted by § 167.31(2)(b), Stats., does not constitute going armed with a concealed weapon." (Wis. Legis. Council Info. Memo., IM-2011-10, at 1 n. 3; App. 124).

Accordingly, if this Court agrees that ***Walls*** correctly interpreted the interplay between the CCW statute and the safe transport statute, then Grandberry's conviction should be vacated on the grounds of insufficiency of the evidence. However, even if this Court now concludes that ***Walls*** was

incorrect, then the conflicting nature of the two statutes renders the CCW statute unconstitutionally vague as applied in this case. If the relationship between the safe transport statute and CCW statute is so confusing and uncertain that the court of appeals in ***Walls*** and/or the Wisconsin Legislative Council previously misconstrued the interplay between the two statutes, then this Court cannot reasonably conclude that a person of ordinary intelligence would have fair notice of how the CCW statute applies to the transportation of firearms inside of vehicles.

Thus, regardless of whether ***Walls*** was correct, Grandberry's conviction should be vacated.

I. As a Matter of Law, There Was Insufficient Evidence to Convict Grandberry of Carrying a Concealed Weapon Because His Conduct Fully Complied with the Safe Transport Statute.

A. General legal principles regarding sufficiency of the evidence and standard of review.

A conviction that is based on insufficient evidence cannot constitutionally stand. ***Jackson v. Virginia***, 443 U.S. 307, 309 (1979). The due process clauses of the United States and Wisconsin constitutions provide individuals with protection from conviction in a criminal case except "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship,*** 397 U.S. 358, 365 (1970); *accord* ***State v. Smith,*** 117 Wis. 2d 399, 415, 344 N.W.2d 711 (Ct. App. 1983).

In Wisconsin, a criminal defendant may challenge the sufficiency of the evidence on appeal regardless of whether he specifically raised the issue at trial. ***State v. Hayes***, 2004 WI 80, ¶ 4, 273 Wis. 2d 1, 681 N.W.2d 203. An appellate

court does not substitute its judgment for the fact-finder, but instead asks whether the evidence, viewed in the light most favorable to the State, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***Id.*** ¶ 56. If the reviewing court concludes the evidence was insufficient, the conviction must be reversed, with a remand to the circuit court for entry of a judgment of acquittal. ***State v. Wulff***, 207 Wis. 2d 143, 144-45, 557 N.W.2d 813 (1997) (citing ***Burks v. United States***, 437 U.S. 1, 18 (1978)).

B. ***Walls*** recognizes that the transportation of a firearm in a vehicle in compliance with the safe transport statute does not constitute carrying a concealed weapon.

Subject to certain limited exceptions,[5] the CCW statute makes it illegal for a person to carry a concealed and dangerous weapon. WIS. STAT. § 941.23. The offense has the three elements:

1. The defendant carried a dangerous weapon.

2. The defendant was aware of the presence of the weapon.

3. The weapon was concealed.

WIS. JI-CRIMINAL 1335; App. 132.

[5] The CCW statute enumerates certain classes of people who are exempt from the prohibition, such as peace officers, out-of-state law enforcement officers, and individuals with a valid license to carry a concealed weapon under WIS. STAT. § 175.60, among others. *See* WIS. STAT. § 941.23(2).

It is the first element – the "carrying" of a dangerous weapon – that was lacking in this case. The word "carry" means "to go armed with." WIS. STAT. §§ 941.23(1)(ag), 175.60(1)(ag). The phrase "to go armed with," in turn, means that the weapon must have been on the defendant's person or within the defendant's reach. ***Walls***, 190 Wis. 2d at 69.

In ***Walls***, the court of appeals concluded that the lawful placement or transportation of firearms in vehicles, as permitted by the safe transport statute, does not constitute "going armed with" a dangerous weapon. ***Id.*** at 69 n.2, 72. In that case, police discovered a handgun lying on the front passenger seat of a car in which the defendant was a passenger. The parties stipulated to most of the dispositive facts; however, they disagreed about whether the handgun was "concealed" within the meaning of WIS. STAT. § 941.23. ***Id.*** at 67-68. On appeal, the court of appeals held that the handgun was concealed. ***Id.*** at 69.

The court in ***Walls*** noted that the CCW statute "evinces a strong rationale to prevent the carrying of concealed weapons in automobiles, as well as on a person." ***Id.*** at 71. The court therefore concluded that a person is guilty of carrying a concealed weapon in an automobile if: (1) the weapon is inside the vehicle and within the defendant's reach; (2) the defendant is aware of the presence of the weapon; and (3) the weapon is hidden from ordinary view, "meaning it is indiscernible from the ordinary observation of a person located outside and within the immediate vicinity of the vehicle." ***Id.*** at 71-72. Applying this test to the facts of that case, the ***Walls*** court held that the handgun was concealed, because police did not observe the gun until after "inspection" and "examination" of the vehicle. ***Id.*** at 72-73.

The ***Walls*** court, however, placed an important limitation on this holding. It recognized that the possession, placement, or transportation of a firearm inside a vehicle does not constitute "going armed with" a weapon if it is done in a manner that is consistent with the requirements of the safe transport statute. ***Id.*** at 69 n.2, 72. In this regard, the court stated as follows:

> We are mindful "that there is a long tradition of widespread lawful gun ownership by private individuals in this country." ***Staples v. United States***, 511 U.S. 600, [610], 114 S.Ct. 1793, 1799, 128 L.Ed.2d 608 (1994). Thus, our conclusion in this case in no way limits the *lawful* placement, possession, or transportation of, unloaded (or unstrung) and encased, firearms, bows, or crossbows in vehicles as permitted by § 167.31(2)(b), Stats., which provides in part:
>
> > (b) Except as provided in sub. (4), no person may place, possess or transport a firearm, bow or crossbow in or on a vehicle, unless the firearm is *unloaded and encased* or unless the bow or crossbow is unstrung or is enclosed in a carrying case.

Id. at 69 n.2 (emphases in original).

As noted in this passage, the safe transport statute at the time only permitted the placement, possession, or transportation of a firearm in a vehicle if the firearm was "unloaded and encased." *See* WIS. STAT. § 167.31(2)(b) (1993-94). In 2011, however, the legislature amended the statute to permit the placement, possession, or transportation of a firearm in a vehicle so long as "[t]he firearm is unloaded or is a handgun." WIS. STAT. § 167.31(2)(b); *see also* 2011 WIS. ACTS 35 and 51. In light of this amendment, ***Walls*** should now be read as establishing that the "lawful placement, possession, or transportation of [handguns or other

unloaded firearms] as permitted by § 167.31(2)(b)" does not constitute "going armed with" a dangerous weapon. *See* ***Walls***, 190 Wis. 2d at 69 n.2.

There is no principled reason why the statutory amendments would not broaden the ***Walls*** court's conclusion in this manner. The term "dangerous weapon" has always included "any firearm, whether loaded or unloaded." WIS. STAT. § 939.22(10). Moreover, the legislature was presumable aware of the safe harbor rule from ***Walls***, and it took no steps to abrogate it at the time it enacted the 2011 changes to the safe transport statute. *See* ***Schill v. Wisconsin Rapids School Dist.***, 2010 WI 86, ¶ 103, 327 Wis. 2d 572, 786 N.W.2d 177 ("The legislature is presumed to be aware of existing laws and the courts' interpretation of those laws when it enacts a statute."). This indicates that the legislature intended for the safe harbor rule, as broadened by the 2011 amendments, to continue.

Accordingly, ***Walls*** recognizes that the possession, placement, or transportation of a firearm inside a vehicle in compliance with the safe transport statute, by its very nature, cannot be a violation of the CCW statute. Not only did the court state that its application of the CCW statute to vehicles in that case "in no way limits" a person's ability to possess, place, or transport a weapon inside a vehicle in compliance with the safe transport statute, it specifically emphasized that doing so was "*lawful*," notwithstanding the prohibitions of the CCW statute. ***Walls***, 190 Wis. 2d at 69 n.2. ***Walls*** therefore stands for the proposition that compliance with the safe transport statute provides safe harbor from liability under the CCW statute.

The Wisconsin Legislative Council shares this interpretation of ***Walls***. In an Information Memorandum on

the proposed changes to the safe transport statute in 2011, the Council, construing ***Walls***, specifically stated that the placement, possession, or transportation of a firearm in a vehicle as permitted by the safe transport statute does not constitute "going armed with" a dangerous weapon:

> Wisconsin courts generally do not treat having an unloaded and encased firearm within one's reach as "going armed with" the firearm.
>
> . . . .
>
> For instance, in ***State v. Walls***, 190 Wis. 2d 65 (Ct. Appl. 1994), the Court of Appeals recognized that the placement, possession, or transportation of unloaded and encased firearms in vehicles as permitted by § 167.31(2)(b), Stats., does not constitute going armed with a concealed weapon.

(Wis. Legis. Council Info. Memo., IM-2011-10, at 1 n. 3; App. 124).

In this case, the undisputed facts clearly establish that Grandberry was transporting a handgun in his vehicle at the time of his arrest. (2:1; 16:1-2). Again, such conduct is now expressly authorized by the safe transport statute, even if the handgun is loaded. *See* WIS. STAT. § 167.31(2)(b)1. As a matter of law, therefore, Grandberry's conduct was subject to ***Walls***' safe harbor rule – that is, it did not constitute "carrying" or "going armed with" a dangerous weapon. *See* ***Walls***, 190 Wis. 2d at 69 n.2. Since this is an essential element of the offense of carrying a concealed weapon, there was insufficient evidence to convict Grandberry in this case.

C. ***Walls***' safe harbor rule is the only reasonable way to resolve the conflict between the CCW statute and the safe transport statute.

Walls' safe harbor rule is the only reasonable and appropriate way to interpret the interplay between the safe transport statute and the CCW statute. Without the safe harbor rule, conduct that is expressly permitted by the safe transport statute would be prohibited (or, at the very least, severely limited) by the CCW. When this type of conflict exists between two statutes, this Court should interpret those statutes in a way that resolves the conflict and harmonizes the statutes. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶ 28, 303 Wis. 2d 258, 735 N.W.2d 93 ("If the potential for conflict between the statutes is present, we will read the statutes to avoid such a conflict if a reasonable construction exists.").

In the context of transporting firearms in vehicles, the conflict between the CCW statute and the safe transport statute is real and significant. Wisconsin courts have generally construed the CCW statute broadly, giving liberal interpretations to the terms "concealed" and "going armed with." Again, for example, in ***Walls***, the court of appeals held that a handgun lying on the front passenger seat of a car was concealed. ***Walls***, 190 Wis. 2d at 72-73. This conclusion was apparently due to the fact that the gun was below the lower portion of the car's window frame, and was thus not observable by a person located outside but near the vehicle. *See* ***id***.

Wisconsin courts have also generally considered firearms located anywhere inside the interior portion of a vehicle to be within a defendant's reach and thus "carried" for purposes of the CCW statute. For example, Wisconsin courts

have found that firearms were within a defendant's reach in the following circumstances: where the gun was in a locked glove compartment, ***State v. Fry***, 131 Wis. 2d 153, 182-83, 388 N.W.2d 585 (1986), *overruled on other grounds in* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 972; where the gun was located in the center console of the vehicle, ***State v. Fisher***, 2006 WI 44, ¶ 39, 290 Wis. 2d 121, 714 N.W.2d 495; where the gun was located beneath the driver's seat, ***State v. Cole***, 2003 WI 112, ¶ 3, 264 Wis. 2d 520, 665 N.W.2d 328; and where the gun was located behind and below the back of the driver's seat, ***Mularkey v. State***, 201 Wis. 429, 230 N.W. 76, 77 (1930).

In addition, in the analogous contexts of search incident to arrest, courts from other jurisdictions have found the hatchback or storage area of cars with no trunks to be within the defendant's reach or "grab area." *See, e.g.,* ***United States v. Stegall***, 850 F.3d 981, 985 (8th Cir. 2017) ("the hatchback or rear hatch area of a vehicle is a part of the passenger compartment '[a]s long as an occupant could have reached [that] area while inside the vehicle"); ***United States v. Sain***, 421 F. App'x 591, 594 (6th Cir. 2011) (officer "testified that he could have accessed the hatchback area from inside the vehicle"); ***United States v. Allen***, 469 F.3d 11, 15-16 (1st Cir. 2006) (SUV "equipped with a rear storage area that is clearly reachable without exiting the vehicle"); ***United States v. Mayo***, 394 F.2d 1271, 1277 (9th Cir. 2004) ("the cargo area behind the rear seat of a hatchback vehicle . . . is 'generally, if not inevitably,' accessible to an arrestee from the passenger area of the vehicle"); ***United States v. Arnold***, 388 F.3d 237, 239-41 (7th Cir. 2004) (officer properly pulled down middle armrest between rear seats, which "opened directly into the trunk" and "discovered a loaded handgun that was visible in the immediate space of the trunk"); ***United States v. Olguin-Rivera***, 168 F.3d 1203, 1204-07 (10th Cir.

1999) (court answers in negative question "whether placing a cover over the luggage or cargo area in a sports utility vehicle creates the functional equivalent of a trunk and renders the covered area beyond the permissible scope of an automobile search incident to arrest").

Consequently, the CCW statute effectively prohibits the placement or transportation of a firearm in a vehicle except in the following three circumstances: (1) where the driver or passenger possessing the gun has a concealed carry permit under WIS. STAT. § 175.60; (2) where the gun is placed above the lower portion of the car's window frame, such as on the dashboard; or (3) where the gun is placed in the car's trunk, and thus out of the defendant's reach.

At the same time, however, the safe transport statute – the statute that specifically deals with transporting firearms in vehicles – does not require any of these conditions. Again, it expressly permits the placement, possession, or transportation of a firearm anywhere in a vehicle so long as the firearm is either unloaded or is a handgun. WIS. STAT. § 167.31(2)(b)1. Conduct that is expressly permitted by the safe transport statute therefore appears to be in violation of the CCW statute. This places the two statutes in direct conflict.

The Wisconsin Jury Instruction Committee has acknowledged the conflict between the CCW statute and the safe transport statute. In its comments regarding the CCW statute, the Committee specifically noted that, prior to the 2011 amendments, the safe transport statute's language "implied that a person may possess a firearm in a vehicle if it is unloaded and encased," and that this "may conflict with the

interpretation of § 941.23 in ***State v. Walls***."[6] WIS. JI-CRIMINAL 1335, Comments at 3-4; App. 134-35. The Committee concluded, however, "that resolving this conflict was beyond the scope of the jury instructions." *Id.* at 4; App. 135.

In light of the statutes' conflicting nature, the CCW statute and the safe transport statute should be construed in a manner the resolves the conflict and gives full force and effect to both statutes to the extent possible. *See* ***State v. Fischer***, 2010 WI 6, ¶ 24, 322 Wis. 2d 265, 778 N.W.2d 629 ("When confronted with an apparent conflict between statutes, we construe sections on the same subject matter to harmonize the provisions and to give each full force and effect."). ***Walls***' safe harbor rule accomplishes that goal. It gives full force and effect to both statutes by acknowledging that both apply in the context of vehicles. At the same time, the rule recognizes that transporting a firearm in a vehicle in full compliance with the safe transport statute does not constitute "going armed with" a dangerous weapon as a matter of law. This gives controlling effect to the safe transport statute, while retaining the limitations of CCW statute for firearms transported in violation of the safe transport statute (and thus outside the scope of ***Walls***' safe harbor rule). Giving controlling effect to the safe transport statute in this manner is entirely appropriate, given that it is the more specific statute in the context of vehicles. *See* ***Return of Property in State v. Jones***, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999) ("It is a cardinal rule of statutory

[6] The fact that the safe transport statute has been amended to loosen the restrictions on transporting handguns and long guns inside of vehicles does not negate the conflict between the two statutes. Conduct that is expressly permitted by the safe transport statute is still restricted or prohibited by the CCW statute.

construction that where two conflicting statutes apply to the same subject, the more specific controls.").

This construction is also necessary to avoid gutting the safe transport statute in an unreasonable manner. *See* ***Fischer***, 322 Wis. 2d 265, ¶ 24 (courts will not construe two conflicting statutes "so as to work unreasonable results"). Without the safe harbor rule, the CCW statute would effectively prohibit a person who does not have a CCW permit[7] from placing a firearm in a vehicle unless: (1) the gun is placed on the dashboard or otherwise is above the lower portion of the car's window frame; or (2) the gun is placed in the car's trunk.

Grandberry submits that the first of these possible methods of lawfully transporting a firearm in a vehicle – placing a gun on the car's dashboard – is unreasonable and thus not a realistic possibility at all. Placing a gun on a car's dashboard for purposes of transporting it is ill-advised and unsafe, as the firearm could easily slide or fall from the dashboard when the car is moving.

A person could, in theory, install some type of fixed holster mount in a position located above the car's window line. However, this would require the purchase (or construction) and installation of an additional device. Transporting a gun in this manner would also "advertise" the presence of the gun, thereby making it more susceptible to being stolen. Additionally, many people would no doubt consider this manner to transporting a firearm to be provocative and shocking. It is therefore not a reasonable

[7] Requiring a person to obtain a CCW permit to transport a firearm would also place an economic barrier on a person's Second Amendment rights.

transportation option. *See* ***State v. Hamdan***, 2003 WI 113, ¶ 83, 264 Wis. 2d 433, 665 N.W.2d 785 (a storeowner carrying a handgun openly in the store "would have shocked his visitors, seriously threatened his safety, and was not a reasonable option.")

This leaves only one reasonable alternative for individuals without a CCW permit: placing the gun in the trunk of a vehicle. However, there are many vehicles that do not have trunks. These include hatchbacks, station wagons, and SUVs.[8] Thus, without ***Walls***' safe harbor rule, Wisconsin gun owners who drive this broad range of popular vehicles would have no safe and legal way of transporting a firearm, even for completely lawful and legitimate reasons like hunting and target practice. Also, those who drive pickup trucks would have to resort to placing their firearms in an unsecured truck bed.[9] As this would make a firearm more susceptible to being damaged or stolen, it is also an unreasonable transportation option.

Construing the safe transport statute and CCW statute in a way that prevents many Wisconsin gun owners from having a safe and legal way of transporting their firearms would be a patently unreasonable result. It would also be counter to legislative intent. The 2011 amendments to the safe transport statute evince an intent by the legislature to make the transportation of firearms (and particularly handguns) less burdensome. This Court should avoid an interpretation that undermines that intent. *See* ***City of***

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[8] Also, some long guns may not even fit in the trunks of smaller vehicles.

[9] A person could, of course, install a truck bed cover with a lock. But again, this would require the purchase and installation of an additional item.

Madison v. Wis. DWD, 2003 WI 76, ¶ 11, 262 Wis. 2d 652, 664 N.W.2d 584 ("In interpreting two statutes that are alleged to be conflict, it is our duty to attempt to harmonize them in a way that will give effect to the legislature's intent in enacting both statutes.").

Moreover, if this Court finds that it is ambiguous or unclear whether compliance with the safe transport statute precludes liability under CCW statute, then the rule of lenity requires that the ambiguity be resolved in Grandberry's favor. The rule of lenity provides generally that ambiguous penal statutes should be interpreted in favor of the defendant. ***State v. Cole***, 2003 WI 59, ¶ 67, 262 Wis. 2d 167, 663 N.W.2d 700. More specifically, the rule comes into play after two conditions are met: (1) the penal statute is ambiguous; and (2) the court is unable to clarify the intent of the legislature by resorting to legislative history. ***Id.*** The rule is a canon of strict construction, which ensures fair warning by applying criminal statutes only to conduct clearly covered. ***State v. Guarnero***, 2015 WI 72, ¶ 26, 363 Wis. 2d 857, 867 N.W.2d 400.

As discussed more fully in Section II below, if conduct that is prohibited by the CCW statute also appears to be permitted by the safe transport statute, then an ordinary person like Grandberry would not have fair notice of the CCW statute's prohibitions with respect to the transportation of firearms in vehicles. Consequently, if this Court concludes that these statutes, when juxtaposed, are indeed confusing and ambiguous, but does not believe that the true intent of the legislature can be discerned from the legislative history, then it should adopt a construction that favors Grandberry. Here, that construction is one that employs the safe harbor rule from ***Walls***. Furthermore, as discussed in Section II of this brief, this construction would have the added benefit of avoiding an

interpretation that would render the CCW statute unconstitutionally vague. *See* ***Hamdan***, 264 Wis. 2d 433, ¶ 26 n.9 ("it is a cardinal rule that courts should avoid interpreting a statute in a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional").

D. The court of appeals erred in concluding that the safe transport statute applies only to those who have a CCW permit.

Instead of adopting ***Walls***' safe harbor rule, the court of appeals invented the novel interpretation that the safe transport statute "only applies to those who have passed the rigorous conditions for obtaining a CCW permit." (Ct. App. Op. at 5; App. 105). This interpretation of the safe transport statute was erroneous. The court of appeals based its conclusion solely on the fact that the safe transport statute makes a single reference to WIS. STAT. § 175.60. In the definition section of the safe transport statute, the term "handgun" is given the meaning contained in WIS. STAT. § 175.60(1)(bm). *See* WIS. STAT. § 167.31(1)(cm).

However, the safe transport statute does not state or imply anywhere in its language that it applies only to those who possess a CCW permit. Rather, it states that "*no person* may place, possess, or transport a firearm, bow, or crossbow in or on a vehicle," unless one of the conditions of the statute are met. WIS. STAT. § 167.31(2)(b) (emphasis added). "No person" clearly means *no person* may violate the safe transport statute. Thus, by its plain terms, the safe transport statute applies to all people, not just those who have a CCW permit. *See* ***State v. Hansen***, 2012 WI 4, ¶ 24, 338 Wis. 2d 243, 808 N.W.2d 390 ("If the language of the statute is clear on its face, that plain meaning is applied.").

Moreover, the safe transport statute regulates not just the transportation of handguns, but also the transportation of long guns, bows, and crossbows, none of which are weapons for which a person can have a CCW permit. *See* WIS. STAT. § 175.60(1)(j). Given this reality, the logic of the court of appeals' interpretation breaks down. Under the court of appeals' interpretation, CCW permit holders who have passed the "rigorous conditions" for obtaining a CCW permit would be prohibited from transporting loaded long guns and bows with arrows nocked in their vehicles. But non-permit holders would be free to do so if the safe transport statute does not apply to them. It is simply illogical to construe the safe transport statute in such a manner.

II. The Conflicting Nature of the CCW Statute and the Safe Transport Statute Renders the CCW Statute Void for Vagueness as Applied to Grandberry.

Grandberry further argues that if the court of appeals is correct that the safe transport statute only applies to individuals who have a CCW permit (or if compliance with the safe transport statute does not otherwise preclude liability under the CCW statute), then the CCW statute should be found to be unconstitutionally vague as applied to a person who transports a firearm in a vehicle in a manner seemingly consistent with the safe transport statute. If conduct that is prohibited by the CCW statute also appears to be permitted by the safe transport statute, then an ordinary person like Grandberry would not have fair notice of the CCW statute's prohibitions with respect to the transportation of firearms in vehicles. This Court should therefore find that the CCW statute is void for vagueness under the facts of this case.

A. Standard of review and general legal principles regarding statutory vagueness and as-applied constitutional challenges.

On appeal, the constitutional validity of a statute presents a question of law that this Court reviews *de novo*. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). Legislative enactments are presumed to be constitutional, and a challenger must demonstrate that it is invalid beyond a reasonable doubt. ***Id.***

An as-applied challenge is a claim that a statute is unconstitutional as it relates to the facts of a particular case or to a particular party. ***State v. Smith***, 2010 WI 16, ¶ 10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90. A court assesses the merits of such a challenge by considering the facts of the particular case in front of it, not hypothetical facts in other situations. ***Hamdan***, 264 Wis. 2d 433, ¶ 43.

It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." ***United States v. Batchelder***, 442 U.S. 114, 123 (1979). Thus, a statute is void for vagueness if it does not provide "fair notice" of the prohibited conduct or an objective standard for enforcement of violations. ***Pittman***, 174 Wis. 2d at 276-77. Stated another way, a statute is void if it is so vague that one who is intent on obeying the law cannot tell when his conduct comes near the proscribed area or if a trier of fact must apply its own standards of culpability rather than those set out in the statute. ***Giaccio v. Pennsylvania***, 382 U.S. 399, 402-03 (1966); ***State v. Propanz***, 112 Wis. 2d 166, 172-73, 332 N.W.2d 750 (1983). The standard has also been described as "whether the statute or ordinance is so obscure that men of ordinary intelligence must necessarily guess as to its meaning and

differ as to its applicability." ***City of Milwaukee v. Wilson***, 96 Wis. 2d 11, 16, 291 N.W.2d 452 (1980). This test is identical under both the United States Constitution and the Wisconsin Constitution. ***County of Kenosha v. C & S Management, Inc.***, 223 Wis. 2d 373, 393-94, 588 N.W.2d 236 (1999).

Normally, a statute need have only "a reasonable degree of clarity"; however, a statute that infringes on a constitutionally protected right, such as the right to bear arms, requires more exacting precision, and a more stringent vagueness test applies. *See* ***Dog Federation of Wis., Inc. v. City of South Milwaukee***, 178 Wis. 2d 353, 360, 504 N.W.2d 375 (1993) (citing ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.***, 455 U.S. 489, 499 (1982)). The United States Supreme Court "has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." ***Village of Hoffman Estates***, 455 U.S. at 498-99 (citing ***Barenblatt v. United States***, 360 U.S. 137 (1959) (Black, J. with whom Warren, C.J., and Douglas, J., joined, dissenting)).

B. The CCW statute is unconstitutionally vague as applied to a person who complies with the safe transport statute.

Viewed separately, the CCW statute and the safe transport statute appear clear. But read together, they create unconstitutional vagueness.

Again, the CCW statute effectively prohibits the placement or transportation of a firearm in a vehicle except in the following three circumstances: (1) where the driver or passenger possessing the gun has a CCW permit; (2) where the gun is placed above the lower portion of the car's window

frame, such as on the dashboard; or (3) where the gun is placed in the car's trunk.

The safe transport statute, however, does not require any of these conditions. It permits the placement, possession, or transportation of a firearm in a vehicle if the firearm is either unloaded or is a handgun. WIS. STAT. § 167.31(2)(b)1. This begs the obvious question: if a person cannot legally transport a firearm in a vehicle unless the firearm is placed on the dashboard, placed in the trunk, or the owner has a CCW permit, why doesn't the safe transport statute say so?

Grandberry asserts that a person of ordinary intelligence would logically expect to find these types of specific requirements in the safe transport statute if they existed, as the safe transport statute specifically prescribes the proper method of transporting a firearm inside a vehicle. He further asserts that an ordinary person, reading both the CCW statute and the safe transport statute together, would not reasonably know that he was required to place a firearm on the dashboard, in the trunk, or have a concealed carry permit in order to lawfully transport the weapon in his vehicle. Rather, the plain reading of the safe transport statute would lead a reasonable person to believe that he could lawfully transport a firearm in any place inside a vehicle, so long as the firearm is either unloaded or is a handgun.

Because placing and transporting a handgun or other unloaded firearm in a vehicle is expressly authorized by the safe transport statute, an ordinary person would not reasonably expect that, unless he puts the firearm in the trunk, places it on the dashboard, or has a concealed carry permit, the very act of placing a firearm in a vehicle unlawfully conceals it. Thus, as applied to a person who possesses, places, or transports a firearm in a vehicle in compliance with

the safe transport statute, the CCW statute fails to provide fair notice of its prohibitions. It is therefore unconstitutionally vague.

Moreover, the conclusion that the CCW statute is void for vagueness is only strengthened if this Court determines that ***Walls*** was incorrect or that the Wisconsin Legislative Council[10] misinterpreted that decision. If the court of appeals and/or the Legislative Council were previously unable to correctly interpret the interplay between the CCW statute and the safe transport statute, how could a person of ordinary intelligence be expected to do so? If ***Walls*** was incorrect, it highlights the conflicting nature of the CCW statute and the safe transport statute, and demonstrates that when the statutes are read together, they create unconstitutional vagueness.

The court of appeals, however, concluded that the CCW statute was not void for vagueness, because it found that Grandberry was subjectively aware that he needed a CCW permit in order put a loaded handgun in his glove compartment. (Ct. App. Op. at 8; App. 108). The court of appeals based this conclusion on the fact that Grandberry

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[10] In its Information Memorandum, the Legislative Council also stated that the proposed amendment to the safe transport statute would "allow the placement, possession, and transportation of handguns in a number of different types of vehicles . . . . However, if a person is not a [CCW] licensee, the handgun cannot be concealed in the vehicle." (Wis. Legis. Council Info. Memo., IM-2011-10, at 8; App. 131). This statement appears to be inconsistent with the Council's previously noted statement recognizing that the placement, possession, or transportation of "firearms in vehicles as permitted by § 167.31(2)(b), Stats., does not constitute going armed with a concealed weapon." (Wis. Legis. Council Info. Memo., IM-2011-10, at 1 n. 3; App. 124). Grandberry perceives no rational way to reconcile these inconsistent statements. At any rate, the inconsistency simply reinforces the notion that the safe transport statute and the CCW statute, when read together, are confusing to the point where they create unconstitutional vagueness.

inaccurately told police that he had a CCW permit after first being asked if he had one. (Ct. App. Op. at 8; App. 108). The court of appeals' reasoning in this respect is flawed for two reasons. First, Grandberry's statement did not actually show that he "was well aware of the fact he needed a CCW permit in order to take advantage of the safe transport statute." (*See* Ct. App. Op. at 8; App. 108). At most, his statement shows that he was confused about whether he needed a CCW permit to keep a handgun in his glove compartment. It is a stretch to conclude that this statement showed Grandberry was "well aware" of the complex interplay between the CCW statute and the safe transport statute. [11]

Second, even if Grandberry was aware that his conduct was prohibited by the CCW statute, his subjective understanding is irrelevant. The test for determining whether a statute is unconstitutionally vague is an objective one. A statute is void for vagueness if, because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited, *persons of ordinary intelligence* do not have fair notice of the prohibition because they cannot discern when the region of proscribed conduct is neared, or those who enforce the laws and adjudicate guilt lack objective standards and may operate arbitrarily. ***Pittman***, 174 Wis. 2d at 276; ***Propanz***, 112 Wis. 2d at 172-73.

Here, when read together, the safe transport statute and CCW statute are ambiguous to the point where they create

[11] Moreover, given the novel and illogical nature of the court of appeals' interpretation of the safe transport statute, it is difficult to believe that anyone could be "well aware" of that specific construction, i.e., that one needs a CCW permit in order for the safe transport statute to apply.

unconstitutional vagueness under this objective standard. This is not a case where a statute simply contains some degree of ambiguity that can be resolved by the "ordinary process of statutory construction," thereby giving "practical or sensible meaning . . . to the law." *See* ***State v. Smith***, 215 Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997). When read in conjunction with the safe transport statute, the CCW statute's prohibitions are so vague and uncertain with respect to the placement, possession, and transportation of firearms inside of vehicles that people of ordinary intelligence do not have fair notice of the conduct that is actually prohibited. This is especially true in light of the more stringent vagueness test that applies to criminal statutes like the CCW statute, which infringe on constitutionally protected rights. *See* ***Village of Hoffman Estates***, 455 U.S. at 498-99; ***Dog Federation of Wis., Inc.***, 178 Wis. 2d at 360. This Court should therefore hold that the CCW statute is void for vagueness as applied to Grandberry.

CONCLUSION

For the foregoing reasons, Brian Grandberry respectfully requests that this Court reverse the judgment of the circuit court on the grounds of insufficiency of the evidence and remand the case to the circuit court with directions to enter a judgment of acquittal. In the alternative, Grandberry requests that this Court reverse the judgment of the circuit court, declare WIS. STAT. § 941.23, as applied to Grandberry, to be unconstitutionally vague, and remand the matter to the circuit court for entry of a judgment of dismissal.

Dated this 12th day of April 2017.

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 7,149 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 12th day of April 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 12th day of April 2017.

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