STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN GRANDBERRY,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JANET C. PROTASIEWICZ, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Wisconsin's concealed carry statute (the CCW Statute), Wis. Stat. § 941.23, prohibits individuals who do not have a concealed carry license from going armed with a concealed dangerous weapon. Wisconsin's statute relating to safe transport of weapons in vehicles (the Vehicle Statute), Wis. Stat. § 167.31(2)(b), provides that "no person may place, possess, or transport a firearm . . . in or on a vehicle, unless . . . [t]he firearm is unloaded or is a handgun."[1]

When police stopped Brian Grandberry, they found a loaded handgun in his glove compartment. Does the fact that the Vehicle Statute allows an individual to possess a loaded handgun in a vehicle mean that the evidence was insufficient to convict Grandberry of violating the CCW Statute?

In a trial to the court on stipulated facts, the circuit court found Grandberry guilty of violating the CCW Statute.

The court of appeals held that there was sufficient evidence to convict Grandberry of carrying a concealed weapon.

2. Is the CCW Statute void for vagueness as applied to Grandberry because the Vehicle Statute permitted him to transport a loaded handgun in his car?

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[1] Grandberry refers to Wis. Stat. § 167.31(2)(b) as the "safe transport statute," as the court of appeals did in its decision. In its amicus brief, Wisconsin Carry, Inc., refers to that statute as the "Transportation Restriction Statute." Because this Court recently used the term "Vehicle Statute" to refer to Wis. Stat. § 167.31(2)(b), *see Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 12, 373 Wis. 2d 543, 892 N.W.2d 233, the State will follow this Court's lead and refer to the statute as the Vehicle Statute.

The circuit court and court of appeals held that the CCW Statute is not void for vagueness as applied to Grandberry.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this Court's review, oral argument and publication of the Court's decision are warranted.

INTRODUCTION

Grandberry nominally attacks the sufficiency of the evidence to support the trial court's finding of guilt for carrying a concealed weapon. But whether the undisputed evidence was sufficient to convict him of that offense turns on the interpretation of two statutes, the CCW Statute and the Vehicle Statute, and the application of the undisputed facts to those statutes.

The statutory construction question presented here is whether the Vehicle Statute, which allows a person to transport a loaded handgun in a vehicle, provides an exception to the CCW Statute's requirement that a person obtain a concealed carry license to carry a concealed handgun. It does not.

In 2011, the Legislature created a procedure under which Wisconsin residents may obtain a license to carry a concealed weapon. It also amended the CCW Statute, which previously had excepted only peace officers, to create several other exceptions, including exceptions for concealed carry licensees and individuals carrying concealed weapons in their home or place of business. The Legislature did not, however,

create an exception in the CCW Statute for carrying a concealed weapon in a vehicle.

Grandberry's argument that the Vehicle Statute creates that exception fails for two reasons. First, it requires the Court to write an exception into the CCW Statute that the Legislature did not create. Second, the language of the Vehicle Statute does not bear the construction that Grandberry proposes. The Vehicle Statute says nothing about whether firearms in general or handguns in particular may be concealed in a vehicle; it says only that handguns possessed or transported in a vehicle may be loaded and that other guns must be unloaded.

The CCW Statute is not unconstitutionally void for vagueness as applied to Grandberry. Under the CCW Statute, a person who lacks a concealed carry permit may not have a handgun in a vehicle unless it is out of reach or is not concealed. The Vehicle Statute creates no ambiguity with respect to that prohibition. It allows individuals to transport a loaded handgun in a vehicle but says nothing about where or how the handgun may be transported. Unlike the prior version of the Vehicle Statute, which required that firearms transported in a vehicle be encased—and, therefore, concealed—the present version of the Vehicle Statute simply states that a person may transport a loaded handgun in a vehicle. Because the Vehicle Statute does not state or even suggest that it is permissible to carry a concealed handgun in a vehicle, it does not detract from the fair warning provided by the CCW Statute that Grandberry could not conceal his pistol in the glove compartment unless he had a concealed carry license.

STATEMENT OF THE CASE

I. Statutes involved.[2]

Wis. Stat. § 941.23 Carrying concealed weapon.

> **941.23 Carrying concealed weapon. (1)** In this section:
>
> (ag) "Carry" has the meaning given in s. 175.60 (1) (ag).
>
> . . .
>
> **(2)** Any person, other than one of the following, who carries a concealed and dangerous weapon is guilty of a Class A misdemeanor:
>
> (a) A peace officer. . . .
>
> (b) A qualified out-of-state law enforcement officer. . . .
>
> (c) A former officer. . . .
>
> (d) A licensee, as defined in s. 175.60 (1) (d), or an out-of-state licensee, as defined in s. 175.60 (1) (g), if the dangerous weapon is a weapon, as defined under s. 175.60 (1) (j). . . .
>
> (e) An individual who carries a concealed and dangerous weapon, as defined in s. 175.60 (1) (j), in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies.

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[2] All citations are to the 2013–14 version of the Wisconsin Statutes unless otherwise indicated.

Wis. Stat. § 167.31 Safe use and transportation of firearms and bows.

167.31 Safe use and transportation of firearms and bows. (1) DEFINITIONS. In this section:

. . .

(c) "Firearm" means a weapon that acts by force of gunpowder.

(cm) "Handgun" has the meaning given in s. 175.60(1)(bm).

. . .

(2) PROHIBITIONS; MOTORBOATS AND VEHICLES; HIGHWAYS AND ROADWAYS.

. . .

(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:

1. The firearm is unloaded or is a handgun.

Wis. Stat. § 175.60 License to carry a concealed weapon.

175.60 License to carry a concealed weapon. (1) DEFINITIONS. In this section:

. . .

(ag) "Carry" means to go armed with.

. . .

(bm) "Handgun" means any weapon designed or redesigned, or made or remade, and intended to be fired while held in one hand and to use the energy of an explosive to expel a projectile through a smooth or rifled bore. "Handgun" does not include a machine gun, as defined in s. 941.27(1), a short-barreled rifle, as defined in s. 941.28(1)(b), or a short-barreled shotgun, as defined in s. 941.28(1)(c).

. . .

> (d) "Licensee" means an individual holding a valid license to carry a concealed weapon issued under this section.
>
> . . .
>
> (g) "Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license.

II. Factual Background.

On November 9, 2014, Milwaukee Police Officers Cassandra Lindert and Darryl Anderson conducted a stop of a car driven by Grandberry. (R. 2:1.) Grandberry gave the officers his name but said that he did not have his wallet or identification. (*Id.*)

Officer Anderson asked Grandberry if he had any firearms in the car. (*Id.*) Grandberry said that he had one in the glove compartment. (*Id.*) Anderson asked Grandberry if he had a valid concealed carry permit. (*Id.*) Grandberry said that he did but that he did not have it with him. (*Id.*)

The officers searched the concealed carry permit database and determined that Grandberry did not have a valid permit. (*Id.*) They opened the glove compartment and discovered a loaded .45 caliber semiautomatic pistol. (*Id.*)

The officers arrested Grandberry and transported him to the police station. (*Id.*) After his arrest, Grandberry "made unprovoked statements to the effect of, 'The gun in the glove compartment is mine, I took the CCW class but never actually got a permit.'" (*Id.*)

III. Litigation history.

Grandberry was charged with carrying a concealed weapon in violation of Wis. Stat. § 941.23(2). (R. 2:1.) He entered a not guilty plea to the charge. (R. 12:3.)

Grandberry filed a motion to dismiss the complaint. (R. 5:1–11.) He contended that because he possessed a handgun in a vehicle in compliance with Wis. Stat. § 167.31(2)(b), he could not "contemporaneously be prosecuted for conduct prohibited by Wis. Stat. § 941.23." (R. 5:1.) He also argued that although "[o]n its own, each statute appears clear in the conduct that it proscribes," the "confluence of Wisconsin's 'CCW' and 'Safe Transport' statutes renders the former unconstitutionally vague." (R. 5:7; some uppercasing omitted.)

The circuit court denied the motion. (R. 14:12, A-App. 121.) The parties then agreed to a trial to the court based on a stipulation to the facts alleged in the criminal complaint. (R. 16:2–3.) The circuit court found Grandberry guilty based on those facts. (R. 16:3.) The court imposed and stayed a sentence of three months in the House of Correction and placed Grandberry on probation for a year. (R. 9:1, A-App. 109; R. 16:9.)

The court of appeals affirmed Grandberry's conviction. *State v. Grandberry*, No. 2016AP173–CR, 2016 WL 6953728 (Wis. Ct. App. Nov. 29, 2016) (unpublished) (A-App. 101–08). The court of appeals noted that there are three elements to a CCW charge: 1) the defendant carried, that is, went armed with, a dangerous weapon; 2) the defendant was aware of the presence of the weapon; and 3) the weapon was concealed. *Id.* ¶ 5 (A-App. 103.) It observed that Grandberry did not dispute

that his loaded pistol falls within the definition of a dangerous weapon. *Id*. ¶ 6 (A-App. 104.)

The court of appeals then addressed Grandberry's argument that "he did not 'carry' a concealed weapon because he was following the dictates of Wis. Stat. § 167.31(2)(b). . . ." *Id*. The court noted that before the Legislature amended the CCW Statute in 2011 to allow Wisconsin residents to obtain a license to carry concealed weapons, the Vehicle Statute prohibited a person from placing, possessing, or transporting a firearm unless it was unloaded and encased. *See id*. ¶ 8 (citing Wis. Stat. § 167.31 (2009–10) (A-App. 105.) Without a change to the Vehicle Statute, the court of appeals said, a person who possessed a concealed carry permit would not have been able to carry a loaded concealed weapon in a vehicle. *Id*. But, the court held, the amended Vehicle Statute "only applies to those who have passed the rigorous conditions for obtaining a CCW permit." *Id* ¶ 9. The Vehicle Statute does not apply to Grandberry, the court of appeals concluded, because he did not have a CCW permit. *Id*.

The court of appeals then addressed the remaining elements of the offense. It noted that in *State v. Fry*, 131 Wis. 2d 153, 182, 388 N.W.2d 565 (1986), *overruled on other grounds by State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, the supreme court held that "a firearm found in Fry's locked glove compartment was 'within his reach,' establishing the element of CCW that Fry carried a weapon because he 'went armed.'" *Grandberry*, ¶ 11 (quoting *Fry*, 131 Wis. 2d at 182–83) (A-App. 106). Because Grandberry's pistol was in an unlocked glove compartment, the court held, "he 'went armed' because the gun was within his reach." *Id*. And, the court held, the fact that Grandberry's pistol was within a glove compartment met the test for "concealment." *Id*. "Thus,

all three elements of the crime of CCW can be found in the stipulated facts." *Id*.

The court of appeals further held that the CCW Statute was not unconstitutionally vague as applied to Grandberry. *Id*. ¶ 19 (A-App. 108.) The court said that "[t]he vagueness test is concerned with whether the statute sufficiently warns persons 'wishing to obey the law that [their] conduct comes near the proscribed area.'" *Id*. ¶ 17 (quoting *State v. Tronca*, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978)) (A-App. 107). The court held that Grandberry's challenge to the CCW statute failed because "Grandberry knew he was required to have a CCW permit to put a loaded gun in his glove compartment." *Id*. ¶ 18 (A-App. 108.) "This can be deduced," the court of appeals said, "from the fact that he originally lied when he told the police that he had a CCW permit" and later "volunteered that he took a class to obtain a CCW permit but he never actually got one." *Id*.

"Had Grandberry really believed that the [Vehicle Statute] allowed him to carry a loaded gun in his glove compartment," the court said, "he would have had no reason to lie about having a CCW permit." *Id*. "In sum, Grandberry was well aware of the fact he needed a CCW permit in order to take advantage of the [Vehicle Statute], and given his knowledge of the law, his argument that the CCW statute was void for vagueness fails." *Id*. ¶ 19 (A-App. 108.)

STANDARD OF REVIEW

Whether the evidence is sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law subject to this Court's de novo review. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

The interpretation of a statute and its application to a given set of facts are questions of law that this Court likewise reviews de novo. *Tammy W–G. v. Jacob T.*, 2011 WI 30, ¶ 16, 333 Wis. 2d 273, 797 N.W.2d 854.

Whether the application of a statute is constitutional also presents a question of law that the Court reviews independently. *Id*.

ARGUMENT

I. There was sufficient evidence to support Grandberry's conviction for carrying a concealed weapon.

A. A driver "carries" a concealed weapon when the weapon is in the vehicle's glove compartment.

The elements of the crime of carrying a concealed weapon are: (1) the defendant "carried," that is, went armed with, a dangerous weapon, which means that the dangerous weapon was on the defendant's person or within his reach; (2) the defendant was aware of the presence of the weapon; and (3) the weapon was concealed, meaning hidden from ordinary view. *See State v. Fry*, 131 Wis. 2d 153, 182, 388 N.W.2d 565 *overruled on other grounds by State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97; Wis. JI-Criminal 1335 (2012) (A-App. 132).[3] The only element in dispute in this case is the

[3] As the Jury Instruction Committee notes, 2011 Wis. Act 35 changed the definition of the offense from "goes armed with" a concealed dangerous weapon to "carries" a concealed dangerous weapon. *See* Wis. JI-Criminal 1335, Comment 4 (A-App. 135). As amended by Act 35, Wis. Stat. § 941.23(1)(ag) states that "carry" has the meaning given in section 175.60(1)(ag), which defines "carry" as "to go armed with."

first, whether Grandberry "carried" or "went armed with" the handgun that was in his glove compartment. (Grandberry's Br. 9.)

In *Fry*, the police searched a car that the defendant was driving and found a weapon in the glove compartment. *See Fry*, 131 Wis. 2d at 156–59. The defendant argued that the evidence was insufficient to show that he went armed with a concealed weapon based on his testimony that the glove compartment in which the weapon was found would not open while the passenger's seat was occupied. *Id*. at 182. That testimony, he argued, precluded a finding that the weapon was "within his reach," as required by *Mularkey v. State,* 201 Wis. 429, 230 N.W. 76 (1930). *See Fry*, 131 Wis. 2d at 182.

This Court said that "[t]he only element at issue in this case is whether the gun in the defendant's glove compartment was within his reach." *Id*. at 182. The Court held that there was sufficient evidence because the jury "reasonably could have found it unreasonable to believe that the glove compartment in the defendant's automobile could not be opened when the passenger seat was occupied; the jury could conclude that this did not comport with common sense and their general experiences in every day affairs of life, on which they could rely." *Id*. at 183.

Fry establishes that evidence that there was a weapon in a vehicle's glove compartment is sufficient to establish that the driver went armed with that weapon. Under *Fry*, therefore, there was sufficient evidence in this case that Grandberry went armed with a dangerous weapon when he drove with a loaded handgun in his glove compartment.

Grandberry does not attempt to distinguish *Fry*. Nor does he argue that *Fry* was wrongly decided. Indeed, his brief

only mentions *Fry* in passing, in a string citation of cases that have discussed the "going armed" element as applied to vehicle drivers. (Grandberry's Br. 14.)

Instead, Grandberry argues that 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 [Vehicle Statute] provides safe harbor from prosecution under the CCW statute" (Grandberry's Br. 1). He contends that "*Walls'* safe harbor rule is the only reasonable way to resolve the conflict between the CCW statute and the [Vehicle] [S]tatute" (*Id*. at 13.) In the following sections of this brief, the State will explain why Grandberry's arguments that the Vehicle Statute permits an individual who lacks a concealed carry license to carry a concealed handgun in a vehicle are wrong and why there is no conflict between the CCW Statute and the Vehicle Statute.

B. The Vehicle Statute does not provide a "safe harbor" from prosecution for carrying a concealed weapon in a vehicle.

In 2011, the Legislature made three changes to Wisconsin's weapons laws that are relevant to this case.

First, the Legislature created a new procedure that allows Wisconsin residents to obtain a license to carry a concealed weapon. *See* 2011 Wis. Act 35, § 38 (creating Wis. Stat. § 175.60).

Second, the Legislature amended the CCW Statute. Before the amendment, the CCW Statute provided that "[a]ny person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor." Wis. Stat. § 941.23 (2009–10); *see State v. Fisher*, 2006 WI 44,

¶ 6, 290 Wis. 2d 121, 714 N.W.2d 495. The 2011 legislation amended the CCW Statute to provide some exceptions to the general prohibition against carrying a concealed dangerous weapons, including exceptions for persons who have a Wisconsin concealed carry license, persons who have certain out-of-state concealed carry licenses, and individuals who carry a concealed weapon in their dwelling or place of business or on land that they own, lease, or legally occupy. *See* 2011 Wis. Act 35, § 50 (amending Wis. Stat. § 941.23).

Third, the Legislature amended the Vehicle Statute. Before that amendment, the Vehicle Statute provided, with exceptions not relevant here, that "no person may place, possess or transport a firearm . . . in or on a vehicle, unless the firearm is unloaded and encased . . . ." Wis. Stat. § 167.31(2)(b) (2009–10); *see Walls*, 190 Wis. 2d at 69 n.2. The 2011 legislation amended the Vehicle Statute to provide, again with exceptions not relevant here, that "no person may place, possess, or transport a firearm . . . in or on a vehicle, unless one of the following applies: 1. The firearm is unloaded or is a handgun." *See* 2011 Wis. Act 35, § 31; 2011 Wis. Act. 51, § 11 (amending Wis. Stat. § 167.31(2)(b)).

As a result of these statutory changes, there is no longer a blanket prohibition against carrying a concealed weapon by persons other than peace officers. Wisconsin residents may now obtain a license to carry a concealed weapon under Wis. Stat. § 175.60. The amendment to the CCW Statute reflects the new concealed carry licensing procedure by excepting concealed carry licensees from the prohibition against carrying a concealed weapon. The amendment to the Vehicle Statute means that persons possessing or transporting a handgun in a vehicle, including concealed carry licensees, do not have to unload the handgun.

But while the Legislature amended the CCW Statute to create exceptions for concealed carry licensees and out-of-state licensees, and also created an exception for persons carrying a concealed weapon in their own home or business or on their own land, it did not create an exception for persons carrying a concealed weapon in a vehicle. Grandberry's argument that the Vehicle Statute provides such an exception asks this Court to write an exception into the CCW Statute that the Legislature did not include when it amended the CCW Statute.

Grandberry bases his contention that the Vehicle Statute creates an exception to the CCW Statute on a footnote in *Walls*. (Grandberry's Br. 10.) To the extent that *Walls* could be read as having recognized, in Grandberry's words, a "safe harbor," the court of appeals was wrong. But more importantly, even if the court in *Walls* had concluded that the prior version of the Vehicle Statute provided a safe harbor, and even if that was a correct interpretation of the prior version of the Vehicle Statute, the current version of the Vehicle Statute does not authorize a person without a concealed carry license to carry a concealed handgun in a vehicle.

The defendant in *Walls* was in the front passenger seat when police stopped the car in which he was riding. *See Walls*, 190 Wis. 2d at 67–68. After the defendant and the driver got out of the car, the officers saw a handgun on the front seat. *Id*. at 68. In a trial to the court, the parties stipulated to the facts and the trial court concluded that it would reach a verdict solely on the question whether the handgun was "concealed" within the meaning of the CCW Statute. *Id*. The trial court determined that regardless of whether the police could see the handgun lying on the front seat during their

inspection, the gun was concealed to "ordinary observation" as the car travelled down the street before being stopped. *Id*.

The court of appeals held that the evidence was sufficient to support the conviction. *Id*. at 67. The court said that "[b]ecause we determine that the statute evinces a strong rationale to prevent the carrying of concealed weapons in automobiles, as well as on a person, we conclude that a person is guilty of carrying a concealed weapon in an automobile where: (1) the weapon is located inside a vehicle and is within the defendant's reach; (2) the defendant is aware of the presence of the weapon; and (3) the weapon is concealed, or 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 (citing *Fry,* 131 Wis. 2d at 182).

To its summary of the elements of carrying a concealed weapon in an automobile, the court of appeals added a "but see" citation to footnote two of its opinion. *See id*. at 72. In that footnote, the court stated that its "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 . . . ." *Id*. at 69 n.2.

Grandberry reads this footnote to have "recognized" that compliance with the Vehicle Statute provides a safe harbor from prosecution under the CCW Statute. (Grandberry's Br. 1.) He is not alone in that reading of the *Walls* footnote. A 2011 Wisconsin Legislative Council Information Memorandum discussing the proposed changes to Wisconsin's concealed carry laws cites *Walls* for the proposition that "Wisconsin courts generally do not treat having an unloaded and encased firearm within one's reach

as 'going armed with' the firearm." Wis. Legis. Council Info. Memo. IM-2011-10, *Carrying and Possessing Firearms in Wisconsin*, at 1 (July 1, 2011) ("Legis. Council Info. Memo") (A-App. 124). But the memorandum did not provide any analysis to support that opinion; it simply stated that in *Walls*, "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." *Id.* at 1 n.3 (A-App. 124.)

On the other hand, the Wisconsin Criminal Jury Instructions Committee expressed doubt that compliance with the prior version of the Vehicle Statute precluded a conviction under the CCW Statute. In response to an inquiry about the relationship between the CCW Statute and the prior version of the Vehicle Statute, the Committee said that the "impli[cation] that a person may possess a firearm in a vehicle if it is unloaded and encased . . . may conflict with the interpretation of § 941.23 in . . . *Walls* . . . ." Comment, Wis. JI-Criminal 1335 (2012), at 3 (A-App. 134).

The Committee "concluded that resolving this conflict was beyond the scope of the jury instructions." *Id.* at 4 (A-App. 135.) It also noted that the Vehicle Statute had been amended by 2011 Wis. Acts 35 and 51. *Id.*

The argument that the prior version of the Vehicle Statute created a safe harbor from prosecution under the CCW Statute—though erroneous, in the State's view—finds some support in the language of the prior statute. The previous version of the Vehicle Statute required that a firearm be "encased" when transported. *See* Wis. Stat. § 167.31(2)(b) (2009–10). To comply with that version of the Vehicle Statute, therefore, the firearm had to be concealed.

It does not follow, however, that compliance with the prior version of the Vehicle Statute trumped the CCW Statute. A person transporting a firearm in a vehicle was governed by both statutes. To comply with the earlier version of the Vehicle Statute, a person had to encase the firearm. To comply with the CCW Statute, the enclosed firearm must be placed out of reach. A person complying with the prior version of the Vehicle Statute was not required to violate the CCW Statute because the encased weapon could be transported lawfully out of reach.

But regardless of whether the prior version of the Vehicle Statute created a safe harbor from CCW prosecution for a person who carried an encased and unloaded firearm in a vehicle, there is nothing in the language of the current version of the Vehicle Statute that can be construed to authorize carrying a concealed handgun in a vehicle without a concealed carry license. Unlike the prior version of the statute, which required that a firearm transported in a vehicle be encased—and, therefore, concealed—the current version of the Vehicle Statute says nothing about how a handgun must be transported in a vehicle. Rather, it simply states that, unlike a long gun, which must be unloaded when possessed or transported in a vehicle, a handgun possessed or transported in a vehicle may be loaded. *See* Wis. Stat. § 167.31(2)(b) ("no person may place, possess, or transport a firearm . . . in or on a vehicle, unless . . . [t]he firearm is unloaded or is a handgun").

Grandberry contends that in light of the 2011 amendment to the Vehicle Statute, "*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." (Grandberry's Br. 10–11.) "There

is," he asserts, "no principled reason why the statutory amendments would not broaden the *Walls* court's conclusion in this manner." (*Id*. at 11.)

But there is a principled reason for not applying the purported *Walls* safe harbor to the amended CCW and Vehicle Statutes. That reason is found in the plain language of those statutes. The current version of the Vehicle Statute, unlike the prior version cited in *Walls*, does not require that a firearm transported in a vehicle be encased and therefore concealed. The prior version of the Vehicle Statute would have required Grandberry to encase his pistol, but the current version of the statute did not require him to do anything. Grandberry did not "comply" with the Vehicle Statute (*see* Grandberry's Br. 1, 7) because that statute imposed no requirements with which he had to comply. And while the Legislature amended the CCW Statute to provide several exceptions to the prohibition against carrying a concealed weapon, it did not include an exception for weapons transported in vehicles.

The court of appeals held that the Vehicle Statute "only applies to those who have passed the rigorous conditions for obtaining a CCW permit." *Grandberry*, 2016 WL 6953728, ¶ 9 (A-App. 105). The court of appeals reached that conclusion because the Vehicle Statute, in Wis. Stat. § 167.31(cm), "make[s] a specific reference to Wis. Stat. § 175.60, which is the detailed statute setting out the requirements to obtain a concealed carry permit." *Id*. For that reason, the court of appeals held, the Vehicle Statute "only applies to those who have passed the rigorous conditions for obtaining a CCW permit." *Id*.

The State agrees with Grandberry and his amicus that the court of appeals erred on that point. (*See* Grandberry's Br.

20–21; Amicus Br. 10–11.) The Vehicle Statute says that "no person" may transport a firearm in a vehicle unless it is unloaded or a handgun. The fact that the Vehicle Statute defines "handgun" by reference to the definition of "handgun" in the concealed carry licensing statute, *see* Wis. Stat. §§ 167.31(1)(cm), 175.60(1)(bm), does not mean that the Vehicle Statute itself applies only to persons who have obtained a concealed carry license.

But the State's argument does not rely on the court of appeals' overly narrow reading of the Vehicle Statute. The Vehicle Statute allows individuals to possess or transport a loaded handgun in a vehicle, but it does not require that it be encased and says nothing about where it must be placed. The CCW Statute requires individuals who lack a concealed carry license to transport a handgun out of reach or unconcealed. That Grandberry's possession of a loaded handgun was permissible under the Vehicle Statute did not exempt him from the CCW Statute's requirement that, because he lacked a concealed carry license, his gun must have been unconcealed or out of his reach.

C. There is no conflict between the CCW Statute and the Vehicle Statute.

Grandberry argues that without a safe harbor rule, "conduct that is expressly permitted by the [Vehicle Statute] would be prohibited (or, at the very least, severely limited) by the CCW [Statute]." (Grandberry's Br. 13.) He acknowledges that a driver or passenger who lacks a CCW license would not run afoul of the CCW Statute if he or she placed the gun in the trunk. (*Id*. 15.) But, he argues, that option is not available to someone who drives an SUV or hatchback that lacks a trunk. (*Id*. 14–15.)

Grandberry's theory is that a weapon is "within reach" for purposes of the CCW Statute if it is "located anywhere inside the interior portion of a vehicle," regardless of whether the occupant of the vehicle actually is able to reach the weapon from where the occupant is sitting. (Grandberry's Br. 13.) Case law interpreting the CCW Statute does not support that contention. In all of the reported cases involving individuals convicted of possessing a concealed weapon in a vehicle, the concealed weapon was within the person's reach from the person's actual location in the vehicle.

- *State v. Powell*, 2012 WI App 33, ¶¶ 1–2, 340 Wis. 2d 423, 812 N.W.2d 520 (passenger convicted of CCW; handgun in passenger's pocket).

- *State v. Fisher*, 290 Wis. 2d 121, ¶ 1 (driver convicted of CCW; gun in vehicle's center console).

- *State v. Cole*, 2003 WI 112, ¶¶ 2–3, 264 Wis. 2d 520, 665 N.W.2d 328 (front-seat passenger convicted of CCW; gun in glove compartment).

- *State v. Perez*, 2001 WI 79, ¶¶ 2–4, 244 Wis. 2d 582, 628 N.W.2d 820 (driver of van convicted of CCW; handgun on floor next to driver, other guns "on the floor within the driver's reach").

- *State v. Fry*, 131 Wis. 2d at 156 (driver convicted of CCW; gun in glove compartment).

- *Mularkey v. State*, 201 Wis. at 430 (driver convicted of CCW; gun "was on a small shelf behind, and about five inches below, the back of the seat").

The same is true for all of the unreported court of appeals decisions that may be cited as persuasive authority under Wis. Stat. § (Rule) 809.23(3)(b).[4]

- *State v. Joy*, No. 2015AP960-CR, 2016 WL 3982552, ¶¶ 2, 7, 9 (Wis. Ct. App. July 26, 2016) (unpublished) (driver charged with CCW and going armed with a firearm while intoxicated, convicted of the latter charge; officer who approached truck "observed an open can of beer in the cup holder and an uncased shotgun 'sitting across the seat'") (R-App. 101–104).

- *State v. Griffin*, No. 2015AP1271-CR, 2016 WL 820835, ¶¶ 1, 8 (Wis. Ct. App. Mar. 3, 2016) (unpublished) (driver convicted of CCW; gun in the pocket behind the passenger seat of the car) (R-App. 105–108), *review denied*, 2016 WI 81, 371 Wis. 2d 614, 887 N.W.2d 896.

- *State v. Austin*, No. 2011AP2953-CR, 2012 WL 3288182, ¶¶ 1, 5 (Wis. Ct. App. Aug. 14, 2012) (unpublished) (driver convicted of CCW; gun in glove box) (R-App. 109–113).

- *State v. Little*, No. 2011AP1740-CR, 2012 WL 221086, ¶¶ 1–2 (Wis. Ct. App. Jan. 26, 2012) (unpublished) (driver convicted of CCW; pistol under the driver's seat) (R-App. 114–117).[5]

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[4] As required by Wis. Stat. § (Rule) 809.23(3)(c), copies of these unpublished decisions are appended to this brief.

[5] The court of appeals' decision in *Little* does not say where the gun was located, but Little's appellate brief states that it was under the driver's seat. *See* Brief of Defendant-Appellant at 8, *State v. Little*, No. 2011AP1740-CR, 2012 WL 221086, ¶¶ 1–2 (Wis. Ct. App. Jan. 26, 2012).

- *State v. Flowers*, No. 2011AP1757-CR, 2011 WL 6156961, ¶¶ 1–2 (Wis. Ct. App. Dec. 13, 2011) (unpublished) (driver convicted of CCW; handgun in driver's purse on passenger floorboard)(R-App. 118–121).

- *State v.* Thompson, No. 2010AP3146-CR, 2011 WL 2535519, ¶¶ 1–2 (Wis. Ct. App. June 28, 2011) (unpublished) (driver convicted of CCW; gun in his pocket). (R-App. 122–125).

Grandberry is wrong, therefore, when he argues "without *Walls*' safe harbor rule, Wisconsin gun owners who drive this broad range of popular vehicles"—hatchbacks, station wagons, and SUVs — "would have no safe and legal way of transporting a firearm, even for completely lawful and legitimate reasons like hunting and target practice." (Grandberry's Br. 18.) Drivers of those vehicles who lack a CCW license may place their firearms in the rear cargo area of their vehicles. Because the firearm would be out of reach there, the driver would not be liable for "carrying" a concealed weapon. And, of course, drivers may now do what they could not have done when the court of appeals decided *Walls*—obtain a concealed carry license under Wis. Stat. § 175.60.[6]

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[6] Amicus Wisconsin Carry, Inc., argues that "there remains tension between the CCW Statute and the [Vehicle] Statute, even for a Licensee." (Amicus Br. 7.) That is so, it contends, because "a cocked crossbow, for example, must be encased before putting it in a car (in order to comply with the [Vehicle] Statute), but to do so is to conceal it (in violation of the CCW Statute)." (*Id.*) But while an encased crossbow is concealed, a person transporting an encased crossbow does not, as Wisconsin Carry suggests, automatically violate the CCW Statute, because there is an additional element to the offense—the concealed weapon must be within reach. *See Fry*, 131 Wis. 2d at 182. Transporting an encased crossbow out of reach does not violate the CCW Statute.

Grandberry argues that construing the CCW and Vehicle Statutes in this manner would be "counter to legislative intent" because "[t]he 2011 amendments to the [Vehicle Statute] evince an intent by the legislature to make the transportation of firearms (and particularly handguns) less burdensome." (Grandberry's Br. 18.) But the amendment to the Vehicle Statute did not occur in a vacuum. It was one part of legislation that gave Wisconsin residents the ability to obtain a concealed carry license, the right to carry a concealed weapon in the person's home or place of business without a concealed carry license, and the right to carry a concealed weapon elsewhere with a concealed carry license.

The weapons that a concealed carry licensee may now carry concealed are a handgun, an electric weapon, and a billy club. *See* Wis. Stat. §§ 175.60(1)(j), (2g)(a). The amendment to the Vehicle Statute made it possible for a licensee to carry a concealed loaded handgun in his or her vehicle. Requiring someone who wishes to carry a concealed weapon in a vehicle to obtain a concealed carry license is not contrary to the Legislature's intent when the primary purpose of the 2011 legislation was to allow Wisconsin residents to carry concealed weapons outside their home, business, or property *if* they obtain a concealed carry license. Had the Legislature wished to create an additional exception to the CCW Statute for persons transporting a concealed weapon in a vehicle, "it would have done so." *Indus. to Indus., Inc. v. Hillsman Modular Molding, Inc.*, 2002 WI 51, ¶ 19, 252 Wis. 2d 544, 644 N.W.2d 236.

To support his argument that without the safe harbor of the Vehicle Statute, an individual who lacks a concealed carry license will violate the CCW Statute by placing a handgun in the rear cargo area of a hatchback or SUV,

Grandberry cites cases involving searches of vehicles incident to arrest. (Grandberry's Br. 14–15.) That comparison is inapt.

In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile." *Id.* at 460 (footnote omitted).[7] So, in situations where police have searched a hatchback or SUV incident to arrest and found evidence in the rear cargo area, the issue has been whether the cargo area is part of the "passenger compartment." *See United States v. Stegall*, 850 F.3d 981, 985 (8th Cir. 2017); *United States v. Allen*, 469 F.3d 11, 15 (1st Cir. 2006). To answer that question, courts have looked to whether an occupant could have reached that area while inside the vehicle. *See Stegall*, 850 F.3d at 985; *see also Allen*, 469 F.3d at 15–16 (police properly searched rear storage area of medium-sized SUV because that area was reachable without exiting the vehicle).

In the search-incident-to-arrest situation, therefore, the issue is whether a vehicle's occupant could have reached the cargo area from the passenger compartment. In the context of the CCW Statute, in contrast, a person "carries" a concealed weapon only if the weapon is within reach of that person from where the person is in the vehicle. A person does not "carry" a weapon in a hatchback or SUV if he or she has to climb over

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[7] In *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court narrowed *Belton* to situations in which the person arrested is unsecured and within reaching distance of the passenger compartment at the time of the search. *See State v. Forbush*, 2011 WI 25, ¶ 98, 332 Wis. 2d 620, 796 N.W.2d 741.

the front seat to be able to reach it in the rear cargo compartment.

Amicus Wisconsin Carry, Inc., argues that because the Legislature is presumed to have been aware of the *Walls* safe harbor when it amended the CCW and Vehicle Statutes in 2011 and "took no steps to abrogate either the 'outside the vehicle' test for concealment[8] or the *Walls* Safe Harbor," the Legislature "was content for courts to apply the onerous 'outside the vehicle' test *provided* that the *Walls* Safe Harbor continued to apply as well." (Amicus Br. 7.) That argument would make sense if the Legislature had not amended the Vehicle Statute, because that was the very statute that purportedly provided the safe harbor. But if *Walls* did create a safe harbor from prosecution under the CCW Statute based on the Vehicle Statute, it was because of the Vehicle Statute's requirement that firearms transported in a vehicle be encased. When the Legislature amended the Vehicle Statute in 2011 to remove that requirement, it eliminated the arguable basis in that statute's language for the contention that the statute creates a safe harbor.

There is no conflict between the Vehicle Statute and the CCW Statute. Under the Vehicle Statute, any person may transport a handgun, whether loaded or unloaded, in a vehicle. Under the CCW Statute, persons who have a concealed carry license may carry their handgun in a concealed manner, but persons who lack a concealed carry

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[8] The "'outside the vehicle' test for concealment" refers to the *Walls* court's holding that a weapon is concealed if it is "indiscernible from the ordinary observation of a person located outside and within the immediate vicinity of the vehicle." *Walls*, 190 Wis. 2d at 72.

license must place the gun out of reach if it is concealed. *See Fry*, 131 Wis. 2d at 182. Grandberry violated the CCW Statute because he lacked a concealed carry license and his pistol was within his reach and concealed in the glove compartment.

D. The rule of lenity does not require construing the Vehicle Statute to provide an exception to the CCW Statute.

Grandberry further argues that "if this Court finds that it is ambiguous or unclear whether compliance with the [Vehicle Statute] precludes liability under [the] CCW statute, then the rule of lenity requires that the ambiguity be resolved in Grandberry's favor." (Grandberry's Br. 19.) The Court should reject that argument because the Vehicle Statute does not render the CCW Statute ambiguous.

"The rule of lenity provides that when doubt exists as to the meaning of a criminal statute, 'a court should apply the rule of lenity and interpret the statute in favor of the accused.'" *State v. Guarnero*, 2015 WI 72, ¶ 26, 363 Wis. 2d 857, 867 N.W.2d 400 (citation omitted), *cert. denied*, 136 S. Ct. 2539 (2016). "Stated otherwise, the rule of lenity is a canon of strict construction, ensuring fair warning by applying criminal statutes to 'conduct clearly covered.'" *Id.* (quoting *United States v. Lanier,* 520 U.S. 259, 266 (1997)).

"[T]he rule of lenity 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 resort to legislative history." *State v. Cole,* 2003 WI 59, ¶ 67, 262 Wis. 2d 167, 663 N.W.2d 700. The rule applies only "if a 'grievous ambiguity' remains after a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must 'simply guess'

at the meaning of the statute." *Guarnero*, 363 Wis. 2d 857, ¶ 27 (quoting *United States v. Castleman*, 134 S.Ct. 1405, 1416 (2014)).

Grandberry does not contend that the CCW Statute, standing alone, is ambiguous. (*See* Grandberry's Br. 23 ("Viewed separately, the CCW statute and the [Vehicle Statute] appear clear.")) Rather, he says that "if this Court concludes that [the CCW Statute and the Vehicle Statute], 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." (Grandberry's Br. 19.)

In the previous section of this brief, the State explained why the two statutes, when juxtaposed, are not confusing or ambiguous. Under the Vehicle Statute, any person may transport a handgun, whether loaded or unloaded, in a vehicle. Under the CCW Statute, persons who have a concealed carry license may transport the handgun in a concealed manner, while persons who lack a concealed carry license must transport the handgun unconcealed or out of their reach.

Were this Court to find the statutes ambiguous, the legislative history of the 2011 revisions to the CCW and Vehicle Statutes support the State's reading of those statutes. The Legislative Council Information Memorandum discussing the 2011 statutory amendments to the state's weapons statutes specifically addresses the interplay between the CCW Statute and the Vehicle Statute. The memorandum includes a series of questions and answers under the heading, "People Who Do Not Obtain Concealed Carry Licenses." *See* Legis. Council Info. Memo. at 7 (some capitalization omitted) (A-App. 130). One of those questions and answers states:

> **Does the bill allow me to place, possess, or transport a loaded, unencased handgun in a vehicle?**
>
> As described above, the bill does allow the placement, possession, and transportation of handguns in a number of different types of vehicles, regardless of whether a person is a licensee. However, *if a person is not a licensee, the handgun cannot be concealed in the vehicle* and, as noted above, Wisconsin courts have taken a broad view of what constitutes the concealment of a firearm in a vehicle.

Id. at 8 (emphasis added) (A-App. 131).[9]

Grandberry contends that the Legislative Council's answer to that question is inconsistent with an earlier statement in the same memorandum that *Walls* held 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." (*See* Grandberry's Br. 25 n.10.) Grandberry says that he "perceives no rational way to reconcile these inconsistent statements."

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[9] This Court has consulted Legislative Council Information Memoranda when ascertaining legislative intent. *See, e.g., Hempel v. City of Baraboo*, 2005 WI 120, ¶¶ 49–52, 284 Wis. 2d 162, 699 N.W.2d 551.

Amicus Wisconsin Carry, Inc., cites a different memorandum prepared by the Wisconsin Legislative Council. (Amicus Br. 14.) That memorandum describes the provisions of the pending 2011 weapons legislation, including changes to the CCW Statute and the Vehicle Statute. *See* Wisconsin Legislative Council Amendment Memo, 2011 Senate Bill 93/Senate Substitute Amendment 2, as Amended, at 1–2, 16–17 (June 15, 2011) (Amicus App. 1–2, 16–17). But unlike the Information Memorandum quoted above, the Amendment Memo cited by Wisconsin Carry does not discuss the relationship between the two statues. *See id*. at 1–18 (Amicus App. 1–18).

But those statements are not inconsistent. In one statement, the Legislative Council described the law as it existed at the time of the *Walls* decision; in the other, the Council described the law as modified by the 2011 statutory amendments.

There is no ambiguity, much less a "grievous ambiguity," in the CCW Statute, whether read alone or in conjunction with the Vehicle Statute. Accordingly, the rule of lenity does not apply here. *See Guarnero*, 363 Wis. 2d 857, ¶ 27.

II. The CCW Statute is not void for vagueness as applied to Grandberry.

A. Applicable legal standards.

Statutes are generally presumed to be constitutional. *Tammy W–G.,* 333 Wis. 2d 273, ¶ 46. "In an as-applied challenge, the constitutionality of the statute itself is not attacked; accordingly, the presumption that the statute is constitutional applies, just as it does in a facial challenge." *Id.* ¶ 47. "However, in as-applied challenges, '[w]hile [courts] presume a statute is constitutional, [they] do not presume that the State applies statutes in a constitutional manner.'" *Id.* ¶ 48 (quoting *Society Ins. v. LIRC*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385). "Therefore, in an as-applied challenge, neither party faces a presumption that the statute was constitutionally applied." *Id.*

Courts apply a two-part analysis for determining whether a statute is void for vagueness: first, the statute must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited; and second, the statute must provide standards for those who enforce the laws and adjudicate guilt.

See State v. McManus, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989). Only the first prong of the analysis—fair notice—is at issue in this case. (Grandberry's Br. 21–27.)

"The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons 'wishing to obey the law that [their] . . . conduct comes near the proscribed area.'" *State v. Pittman,* 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993) (quoting *State v. Tronca,* 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978)). "The challenged statute, however, 'need not define with absolute clarity and precision what is and what is not unlawful conduct.'" *Id*. at 276–77 (quoting *State v. Hurd,* 135 Wis. 2d 266, 272, 400 N.W.2d 42 (Ct. App. 1986)). "A statute is not void for vagueness simply because 'there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'" *Id.* at 277 (quoting *State v. Courtney,* 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976)). Rather, "[t]he ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared . . . ."" *Id*. (quoting *Courtney,* 74 Wis. 2d at 711).

Grandberry argues that while "[n]ormally, a statute need have only 'a reasonable degree of clarity,' . . . 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." (Grandberry's Br. 23.) But this Court should reject Grandberry's reference to the constitutional right to bear arms because his petition for review explicitly disclaimed any argument 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." (Pet. 5 n.2.) Moreover, Grandberry's assertion

that the CCW Statute infringes on his constitutional right to bear arms is wholly undeveloped and lacks any citation to legal authority. "Typically, this court does not address undeveloped arguments . . . ." *State v. Bentdahl*, 2013 WI 106, ¶ 5, 351 Wis. 2d 739, 840 N.W.2d 704.[10]

B. The CCW Statute is not unconstitutionally vague as applied to Grandberry.

Whether read alone on in conjunction with the Vehicle Statute, the CCW Statute provides fair warning about the conduct it prohibits. Under the CCW Statute, a person who lacks a concealed carry permit may not have a handgun in a vehicle unless it is out of reach or is not concealed. The Vehicle Statute allows individuals to transport a handgun in a vehicle, whether loaded or unloaded, but says nothing about the manner in which the handgun may be transported. Because the current version of the Vehicle Statute, unlike its predecessor, does not require that a handgun be encased—and, therefore, concealed—the Vehicle Statute does not suggest to the reader that it is permissible to go armed with a concealed handgun in a vehicle.

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[10] Had Grandberry preserved and properly argued that applying the CCW Statute to him infringed upon his right to bear arms, the State would respond by noting that this Court has held that the prior version of the CCW Statute, which flatly prohibited anyone other than peace officers from carrying a concealed weapon, did not violate the state constitutional right to bear arms in Article I, Section 25 of the Wisconsin Constitution on its face or as applied to the driver of a vehicle. *See Cole*, 264 Wis. 2d 520, ¶ 50. Under current law, Grandberry could have obtained a concealed carry license that would have permitted him to carry his pistol in the glove compartment. Without a concealed carry license, Grandberry is in the same situation as the defendant in *Cole*.

Grandberry argues that "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 [Vehicle Statute] say so?" (Grandberry's Br. 24.) He says that "a person of ordinary intelligence would logically expect to find these types of specific requirements in the [Vehicle Statute] if they existed, as the [Vehicle Statute] specifically prescribes the proper method of transporting a firearm inside a vehicle." (*Id*.)

The flaw in that argument is that the Vehicle Statute does not "specifically prescribe[ ] the proper method of transporting a firearm inside a vehicle." The previous version of the Vehicle Statute did, as it required that firearms be unloaded and encased, *see* Wis. Stat. § 167.31(2)(b) (2009–10), thus mandating that transported firearms be concealed. But the current version of the Vehicle Statute says nothing about where or how a handgun should or should not be transported; it simply allows a person to place, possess, or transport a loaded handgun in a vehicle.[11]

In a similar vein, Grandberry argues that "[b]ecause placing and transporting a handgun or other unloaded

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[11] The current version of Vehicle Statute requires that long guns be unloaded, but does not require that they be encased. *See* Wis. Stat. § 167.31(2)(b). Even if there were a potential argument that the CCW Statute is void for vagueness as applied to transporting long guns in a vehicle, that has no bearing on the resolution of Grandberry's as-applied challenge. 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. Pocian*, 2012 WI App 58, ¶ 6, 341 Wis. 2d 380, 814 N.W.2d 894. In an as-applied challenge, therefore, a person may not challenge a statute on the grounds that it may be unconstitutional as applied to others. *See Cole*, 264 Wis. 2d 520, ¶ 47.

firearm in a vehicle is expressly authorized by the [Vehicle 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." (Grandberry's Br. 24.) But that argument erroneously assumes that the Vehicle Statute prescribes where a firearm may be placed in a vehicle; it does not. And that argument also makes the unjustified assumption that a person wishing to comply with the law would not consult the CCW Statute, which has no exception for transporting a concealed weapon in a vehicle.

Grandberry further argues that "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 misinterpreted that decision." (*Id*. at 25 (footnote omitted).) "If the court of appeals and/or the Legislative Council were previously unable to correctly interpret the interplay between the CCW statute and the [Vehicle Statute]," he asks, "how could a person of ordinary intelligence be expected to do so?" (*Id*.)

But *Walls* and the Legislative Council's interpretation of *Walls* did not involve the current version of the statutes. Regardless of whether the court of appeals correctly interpreted the prior versions of the CCW and Vehicle Statutes in *Walls* or whether the Legislative Council correctly read *Walls*, the issue in this case is whether the current version of the Vehicle Statute renders the current version of the CCW Statute so ambiguous that the CCW Statute fails to provide adequate notice. On that point, the Legislative Council Information Memorandum correctly describes the interplay between the two amended statutes. Addressing the issue of whether the new legislation allows a person who lacks

a concealed carry license to "place, possess, or transport a loaded, unencased handgun in a vehicle," the memorandum states that while "the bill does allow the placement, possession, and transportation of handguns in a number of different types of vehicles, regardless of whether a person is a licensee[,] . . . if a person is not a licensee, the handgun cannot be concealed in the vehicle . . . ." Legis. Council Info. Memo. at 8 (A-App. 131).

The court of appeals held that the CCW Statute was not unconstitutionally vague as applied to Grandberry because his statements to the police demonstrated that he knew he had to have a license to carry his pistol concealed in the glove compartment. *Grandberry*, ¶¶ 18–19 (A-App. 108.) Grandberry argues that his statements to the police—including his false statement that he had a concealed carry license, (R. 2:1)—shows at most that "that he was confused about whether he needed a CCW permit to keep a handgun in his glove compartment." (Grandberry's Br. 26.) But why would Grandberry have lied about having a concealed carry license unless he knew he needed one to carry his pistol in the glove compartment?

Grandberry also argues that the court of appeals erred by basing its decision on his subjective understanding. (*Id.*) He argues that the void-for-vagueness determination depends not on whether he had notice but on whether a person of ordinary intelligence has fair notice of the law. (*Id.*)

Grandberry is correct that the first prong of the vagueness test requires that a statute "be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited." *McManus*, 152 Wis. 2d at 135. But while a defendant's lack of knowledge "does not enhance a vagueness challenge" under

that standard, "the knowledge possessed by a particular defendant may undermine a vagueness challenge." *State v. Parmley*, 2010 WI App 79, ¶¶ 27–28, 325 Wis. 2d 769, 785 N.W.2d 655 (quoting *State v. Jason B.*, 729 A.2d 760, 770 (Conn. 1999)). Grandberry's claim that the CCW and Vehicle Statutes failed to provide him with fair notice that he needed a concealed carry license to carry his pistol concealed in the glove compartment is undermined by evidence that he knew he needed a license.

As the Legislative Council correctly explained, the amended Vehicle Statute "allow[s] the placement, possession, and transportation of handguns in a number of different types of vehicles, regardless of whether a person is a licensee," but "if a person is not a licensee, the handgun cannot be concealed in the vehicle. . . ." Legis. Council Info. Memo. at 8 (A-App. 131). Because the CCW Statute provides fair notice to Grandberry that his conduct was prohibited, and because the Vehicle Statute contains no language to the contrary, this Court should conclude that the CCW Statute is not void for vagueness.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the court of appeals.

Dated this 16th day of May, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 9,666 words.

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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.

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Dated this 16th day of May, 2017.

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Supplemental Appendix
State of Wisconsin v. Brian Grandberry
Case No. 2016AP173-CR

Description of document — Page(s)

State v. Joy, No. 2015AP960–CR, 2016 WL 3982552
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State v. Thompson, No. 2010AP3146–CR, 2011 WL 2535519
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APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

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