STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2016AP173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRIAN GRANDBERRY,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ARGUMENT

I. There Was Insufficient Evidence to Convict Grandberry of Carrying a Concealed Weapon.

A. ***Walls*** recognizes that the safe transport statute creates safe harbor from liability under the CCW statute.

Grandberry argues that, in ***State v. Walls***, 190 Wis. 2d 65, 526 N.W.2d 765 (Ct. App. 1994), the court of appeals recognized that compliance with the safe transport statute, WIS. STAT. § 167.31, provides safe harbor from prosecution under the CCW statute, WIS. STAT. § 941.23. (Grandberry's Initial Br. at 8-12).

In response, the State does not offer any alternative reading of ***Walls***. In fact, it acknowledges that the Wisconsin Legislative Council shares Grandberry's interpretation of ***Walls***. (State's Resp. Br. at 15-16). The State also concedes that the court of appeals erred in this case by holding that the safe transport statute "only applies to those who have passed the rigorous conditions for obtaining a CCW permit." (*Id.* at 18-19).

Instead, the State argues that ***Walls***' safe harbor rule was premised solely on the language in the pre-2011 version of the safe transport statute, which required "that firearms transported in a vehicle be encased—and, therefore, concealed." (*Id.* at 3, 25). According to the State, "[w]hen the Legislature amended the [safe transport statute] in 2011 to remove that requirement, it eliminated the arguable basis in that statute's language for the contention that the statute creates safe harbor." (*Id.* at 25). This argument finds no support in the actual language of ***Walls***, however.

In ***Walls***, the court of appeals never stated, or even suggested, that its safe harbor rule was crafted as a remedy for the statutory tension caused by the safe transport statute's requirement that firearms be encased, and thereby concealed. Rather, court of appeals stated:

> We are mindful "that there is a long tradition of widespread lawful gun ownership by private individuals in this country." 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. . . .

Walls, 190 Wis. 2d at 69 n.2. (emphasis in original; internal citation omitted).

This language suggests that the safe harbor rule is grounded in the long and widespread tradition of lawful gun ownership in this country, and that it is designed to ensure that those individuals who are a part of this tradition do not face criminal liability for transporting firearms in vehicles, provided they do so in the manner specifically prescribed for firearm transportation, i.e., in compliance with the safe transport statute.

The Legislative Council's Memorandum construing ***Walls*** also reflects this reasoning. Nowhere in the memo does the Legislative Council suggest that ***Walls***' safe harbor rule is premised on the fact that the prior version of the safe transport statute required that firearms be encased. Instead, the memo states that ***Walls*** recognizes that the "transportation of unloaded and encased firearms in vehicles as permitted by § 167.31(2)(b) does not constitute going armed with a concealed weapon." (Wis. Legis. Council Info. Memo., IM-2011-10, at 1 n.3; App. 124). This suggests that transporting

a firearm in a manner consistent with the safe transport statute, by its very nature, is not a violation of the CCW statute.

Because the safe harbor rule is not based on the pre-2011 language of the safe transport statute requiring that firearms be encased, there is no principled reason why the 2011 amendments to the statute should not alter the safe harbor rule in a like manner. The legislature was presumably aware of the safe harbor rule at the time it amended the safe transport statute. *See* ***Schill v. Wis. Rapids School Dist.***, 2010 WI 86, ¶ 103, 327 Wis. 2d 572, 786 N.W.2d 177. And not only did the legislature take no steps to abrogate the rule, it broadened the statutory language on which the rule is based.

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

The State argues that there is no conflict between the CCW statute and the current version of the safe transport statute because, according to the State, the safe transport statute "says nothing about how a handgun must be transported in a vehicle." (State's Resp. Br. at 17). The State therefore reasons that Grandberry did not "comply" with the safe transport statute because "that statute imposed no requirements with which he had to comply." (*Id.* at 18.). This argument is based on a flawed construction of the safe transport statute.

Reasonably construed, the safe transport statute regulates how all guns—including handguns—are to be transported in vehicles. The statute specifically prohibits the transportation of any firearm in a vehicle, "unless . . . the firearm is unloaded or is a handgun." WIS. STAT.

§ 167.31(2)(b). Stated another way, the law permits the transportation of long guns in vehicles if they are unloaded, and it permits the transportation of handguns in vehicles, even if they are loaded. Grandberry transported a loaded handgun in his vehicle. He therefore "complied" with the safe transport statute.

Because the safe transport statute expressly permits the transportation of handguns and other unloaded firearms in vehicles, and because it places no additional restrictions on how or where these weapons should be kept inside vehicles, its language suggests that firearms may be transported in any place inside vehicles so long as they are either unloaded or a handgun. This places the safe transport statute in direct conflict with the CCW statute, as the CCW statute precludes the transportation of firearms in vehicles except in the following circumstances: (1) where the driver has a concealed carry permit; (2) where the gun is placed on the car's dashboard; or (3) where the gun is placed in the car's trunk. (*See* Grandberry's Initial Br. at 13-14). Conduct that is expressly permitted by the safe transport statute therefore appears to be prohibited by the CCW statute.

Walls' safe harbor rule is the only sensible way to resolve this conflict. Without the safe harbor rule, the CCW statute would prohibit people who do not have CCW permits from transporting firearms in vehicles unless the firearm is: (1) placed on the car's dashboard; or (2) placed in the car's trunk. Neither of these options is adequate, however. Placing a gun on a car's dashboard is unsafe and many vehicles, like pickup trucks, sport utility vehicles (SUVs), and hatchbacks, do not have trunks. Thus, without the safe harbor rule, people who drive these types of vehicles would not have a safe and legal way of transporting their firearms.

The State, quite sensibly, does not dispute the fact that placing a gun on a car's dashboard is an unreasonable way of transporting it. The State, however, insists that gun owners who drive SUVs and hatchbacks may lawfully place their firearms in the rear cargo area because doing so would place the firearm out of the driver's reach. (State's Resp. Br. at 22). The State cites no cases that support this conclusion, however.

Instead, the State cites a number of cases in which defendants were convicted of violating the CCW statute for having firearms inside the passenger areas—but not inside the cargo areas—of vehicles. (*Id.* at 20-22). But these cases say nothing about whether the cargo area of a car is actually within a driver's reach for purposes of the CCW statute.

By contrast, as noted in Grandberry's initial brief, there are numerous cases from the search incident to arrest context that are instructive. (Grandberry's Initial Br. at 14-15). These cases hold that the rear cargo area of a car is part of the grab area or lunge area "'which an arrestee might reach in order to grab a weapon.'" *See* ***New York v. Belton***, 453 U.S. 454, 460 (1981) (citing ***Chimel v. California***, 395 U.S. 752, 763 (1969)), *holding limited by* ***Arizona v. Gant***, 556 U.S. 332 (2009).

The State claims these cases are distinguishable because, in search incident to arrest cases, the issue is "whether a vehicle's occupant could have reached the cargo area from the passenger compartment," whereas, in CCW cases, the issue is whether "the weapon is within reach of that person from where the person is in the vehicle." (State's Resp. Br. at 24). This attempt at hairsplitting does not advance the State's argument.

Search incident to arrest cases are applicable here because the question in those cases is whether an item was in the area within a defendant's immediate control, which is just another way of asking whether an item was *within a defendant's reach*. In ***Chimel***, the Supreme Court held that the search incident to arrest exception applies not only an arrestee's person, but also to "the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763. The Court further described this area as "the area into which an arrestee might *reach* in order to grab a weapon or evidentiary items." ***Id.*** (emphasis added).

In ***Belton***, the Court applied this rule in the vehicle context, holding that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might *reach* in order to grab a weapon or evidentiary ite[m].'" 453 U.S. at 460 (emphasis added; citing ***Chimel***, 395 U.S. at 763). The Court noted that "[i]t follows from this conclusion that the police may also examine the contents of any container found within the passenger compartment, for if the passenger compartment is *within reach* of the arrestee, so also will containers in it be *within his reach*." ***Id.*** (emphasis added). Thus, like CCW cases, search incident to arrest cases look at whether an item was "within a defendant's reach."

The State insists that "[a] person does not 'carry' a weapon in a hatchback or SUV if he or she has to climb over the front seat to be able to reach it in the rear cargo compartment." (State's Resp. Br. at 24-25). This interpretation is overly narrow, however, as it would limit the area that is "within a defendant's reach" to his arm's-length

reach from whatever fixed position he occupies at any given moment, thereby excluding areas that a defendant could reach with little (or even some) difficulty by moving or lunging into a nearby area included within the "relatively narrow compass of the passenger compartment." *See* ***Belton***, 453 U.S. at 460. This narrow interpretation is inconsistent with this Court's precedent, which has rejected the notion that a "weapon must be available for immediate use" to be "within the defendant's reach." *See* ***State v. Asfoor***, 75 Wis. 2d 411, 433-34, 249 N.W.2d 529 (1977); *see also* ***State v. Fry***, 131 Wis. 2d 153, 388 N.W.2d 565 (1986) (defendant convicted of violating CCW statute where gun was in locked glove compartment), *overruled on other grounds in* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 972.

And, even if the State's narrow interpretation is correct, the safe harbor rule would still be necessary to ensure that many Wisconsin gun owners have a safe and legal way of transporting their firearms. Even under the State's construction, the rear cargo area of an SUV would be easily reachable by a person riding in the back seat. Thus, under the State's interpretation, hunters seated in the back seat of an SUV would be subject to potential criminal liability for carrying their guns behind them in the SUV's cargo area. Hunters who drive pickup trucks would also be subject to criminal liability, as the entire cab of a pickup truck is clearly within the driver's reach.[1] Furthermore, the hatchback area of many smaller vehicles[2] might also be found to be within a driver's reach in certain cases.[3]

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[1] As noted in Grandberry's initial brief, placing a firearm in an unsecured truck bed is not a reasonable transportation option. (Grandberry's Initial Br. at 18).

[2] Some smaller hatchbacks include the Fiat 500, Chevy Spark, Toyota Prius, Honda Fit, and Ford Focus. Images of some of these (contined)

Thus, even under the State's construction, without ***Walls***' safe harbor rule, many Wisconsin gun owners would not have a safe and legal way of transporting their firearms, either alone or with a rear-seat passenger accompanying them. Construing the safe transport statute and the CCW statute in such a manner would therefore work an unreasonable result.

Such a construction would also run counter to legislative intent, as the 2011 amendments to the safe transport statute reflect an intent to make firearm transportation in vehicles less, not more, burdensome. Certainly, the legislature did not intend to require that everyone who drives a pickup truck or hatchback vehicle must obtain a CCW permit to transport a firearm. As the State rightly concedes, the 2011 statutory amendments that relaxed the requirements of the safe transport statute apply to all people, not just those who have a CCW permit. (State's Resp. Br. at 18-19).

The State asserts that if the legislature had "wished to create an additional exception to the CCW Statute for persons transporting a concealed weapon in a vehicle, 'it would have done so.'" (*Id.* at 23). But again, this overlooks the fact that ***Walls*** had already created a safe harbor exception, which the legislature was presumably aware of at the time it amended the safe transport statute.

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vehicles are included in the appendix to this brief. (Supp. App. 101-103).

[3] It is possible that a reasonable jury might conclude that the hatchback area of a car is not within a defendant's reach. However, that is not to say that a jury would necessarily, or even likely, reach that conclusion. Grandberry also finds it difficult to believe that, in a CCW case involving a gun in the hatchback area of a car, the State would admit that the gun was outside the driver's reach as a matter of law.

This Court should therefore hold that compliance with the safe transport statute provides safe harbor from criminal liability under the CCW statute.

II. As Applied to Grandberry, the CCW Statute Is Void for Vagueness.

The State argues that Granberry's vagueness claim is defeated by the fact that he inaccurately told police that he had a CCW permit, because "knowledge possessed by a particular defendant may undermine a vagueness challenge." (State's Resp. Br. at 34-35). This quoted passage originates from a Connecticut case, ***State v. DeFrancesco***, 668 A.2d 348 (Conn. 1995).[4]

DeFrancesco involved a Connecticut statute prohibiting the possession of dangerous animals. There, the defendant testified at trial that she had specialized knowledge regarding exotic cats, including their behavioral characteristics and ancestry. The Connecticut Supreme Court, "[m]indful of this defendant's heightened knowledge of exotic cats," found that the statute sufficiently warned and notified the defendant that possession of her three exotic cats was prohibited. ***Id.*** at 358-59.

This case is distinguishable from ***DeFrancesco***. Unlike ***DeFrancesco***, there was no testimony or other evidence that Grandberry possessed a heightened knowledge regarding firearms or the lawful method for transportation them. It would thus be pure speculation to conclude that

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[4] The State quotes this passage from ***State v. Parmley***, 2010 WI App 79, 325 Wis. 2d 769, 785, N.W.2d 655, which quoted it from ***State v. Jason B.***, 729 A.2d 760 (Conn. 1999). ***Jason B.***, in turn, cited ***State v. DeFrancesco***, 668 A.2d 348 (Conn. 1995), as support for the passage. The passage was not germane to the holdings of ***Parmley*** or ***Jason B.***

Grandberry knew he needed a CCW permit to lawfully keep a handgun in his glove compartment. His false statement to police better reflects confusion on his part, rather than a firm understanding of a complicated area of law. This is particularly true given that Grandberry initially answered truthfully when police asked him if he had any firearms in his vehicle. Only thereafter when the officer asked Grandberry if he had a CCW permit—thereby implying that a permit was required—did Grandberry say he had one.

In any case, the ***DeFrancesco*** decision is ill-considered, and this Court should not follow it. As noted above, the decision's reasoning invites speculation about what a particular defendant knows or does not know. It also requires the application of different vagueness tests for different individuals, thereby creating the appearance of arbitrary results. Furthermore, the ruling is inconsistent with the standard objective test typically applied in vagueness cases, which examines whether "persons of ordinary intelligence" have fair notice of a statute's prohibitions. The test should remain a purely objective one that is uniformly applied in all cases, regardless of whether a defendant possesses heightened knowledge or a lack of knowledge. Grandberry therefore urges this Court to reject the ruling and reasoning from ***DeFrancesco***.

Accordingly, when read in conjunction with the safe transport statute, the CCW statute is so vague and ambiguous with respect to the transportation of firearms in vehicles that people of ordinary intelligence do not have fair notice of the conduct that is actually prohibited. This is especially true given the more exacting vagueness test that applies to statutes that threaten the exercise of constitutionally protected rights. *See* ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.***, 455 U.S. 489, 499 (1982). This heightened

vagueness test should apply not only to laws that directly violate constitutional rights, but also to laws like the CCW statute that simply regulate the exercise of those rights. *See* ***Grayned v. City of Rockford***, 408 U.S. 104, 109 (1972) ("Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.").

CONCLUSION

For these reasons, the judgment of conviction should be reversed and the case remanded for entry of a judgment of acquittal. In the alternative, the judgment should be reversed, WIS. STAT. § 941.23 declared unconstitutionally vague as applied to Grandberry, and the case remanded for entry of a judgment of dismissal.

Dated this 31st day of May 2017.

Respectfully submitted,

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LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant Appellant-Petitioner

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 3,000 words.

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I hereby certify that:

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Dated this 31st day of May 2017.

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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