No. 2022AP001555

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**STATE OF WISCONSIN**,
*Plaintiff-Respondent*,

*vs.*

**JUSTIN J. KAHLE**,
*Defendant-Appellant*.

Appeal from the Circuit Court for Waukesha County
The Honorable Judge J. Arthur Melvin III Presiding
Case No. 2021CT000741

# BRIEF OF DEFENDANT-APPELLANT, JUSTIN J. KAHLE

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## ISSUES PRESENTED

### I.

A seizure occurs when, in view of all the circumstances surrounding an encounter with the police, a "reasonable person" would believe that they were not free to leave. A seizure may be effectuated by means of physical force or through an officer's show of authority. Recent Wisconsin cases, relying on dicta in *State v. Young*, 2006 WI 98 ¶ 65, 294 Wis. 2d 1, 717 N.W. 2d 729, have held that under Wisconsin case law, a police spotlight being directed at an individual is "one indic[um] of police authority" but, by itself, "is not necessarily" a "show of authority" that constitutes a seizure. The Supreme Court in *Young* did not reach the issue of whether the use of a spotlight in that case constituted a seizure, but opined that it would be "reluctant to conclude" a seizure occurred. This dicta, combined with the *Young* court's citation with approval to the Idaho Supreme Court case *State v. Baker*, 141 Idaho 163, 107 P. 3d 1214 (2004), has led some Wisconsin courts to believe that the use of a spotlight in a police encounter alone can never be a sufficient show of authority to result in a seizure. *Young* seems to foreclose that assumption by stating that directing a police spotlight at an individual by itself is *not necessarily* a show of authority sufficient to result in a seizure.

Courts have extrapolated from the dicta in *Young* to conclude that a "reasonable person" would feel free to disregard the officer and leave upon being illuminated by a high-intensity police spotlight. This conclusion is logically consistent with the *Young* court's reluctance to find that a seizure had occurred, but is not the basis articulated by the Wisconsin Supreme Court in *Young* nor the Idaho Supreme Court in

*Baker* for their reluctance. *Young* and *Baker* explicitly based the conclusion that the use of police spotlights alone was not necessarily sufficient to constitute a seizure on policy concerns—namely, the courts' desire to avoid finding a seizure where doing so would discourage police conduct that has the dual-purpose of ensuring police safety during interactions with citizens.

A. Does an officer's use of a high-intensity spotlight constitute a seizure where the light is aimed directly at the front windshield of a vehicle, directly at a driver, from one car length away? If not, under what circumstances would an officer's use of a high-intensity spotlight, by itself, constitute a seizure under the Fourth Amendment of the United States Constitution or Article I, Section 11 of the Wisconsin Constitution[1]?

B. How should courts weigh the use of a police spotlight in carrying out an analysis under *Mendenhall, United States v. Mendenhall*, 446 U.S. 544, 552 (1980), where the use of the spotlight, by itself, would lead a reasonable person to believe that they were not free to leave, but holding that a seizure occurred could discourage police use of spotlights in situations where their use might increase officer safety?

**II.**

The Supreme Court of Wisconsin has recognized that the "reasonable person" concept central to the *Mendenhall* analysis is a legal fiction, as the fact that defendants often consent to searches of areas that

[1] As the scope of Article I, Section 11 of the Wisconsin Constitution has been interpreted to largely mirror the Fourth Amendment to the United States Constitution, this brief will reference both as the Fourth Amendment unless specification is necessary in the context.

reveal incriminating evidence demonstrates that people often do *not* feel free to decline an officer's request, even absent a manifest showing of authority. *County of Grant v. Vogt*, 2014 WI 76 ¶31 n.14, 356 Wis. 2d 343, 850 N.W. 2d 253. The *Vogt* court highlighted the inherent tension between the need for an objective standard and the reality that people tend to defer to a symbol of authority no matter how it is manifested, resulting in a "reasonable person" test which bears little resemblance to reality.

A. Is a defendant's right to be free from unreasonable seizures violated by police conduct which would cause a typical, law-abiding citizen to believe they were not free to leave the encounter, even where such conduct would not cause the fictional "reasonable person" —as developed by case law influenced by outcome-determinative policy decision and ungrounded from the expected behavior of actual individuals in society— to believe they were not free to leave?

**III.**

In this case, the trial court focused its analysis entirely on two factors: the positioning of the officer's squad car in relation to Mr. Kahle's truck, and the officer's use of a high-intensity police spotlight aimed directly at Mr. Kahle through the front windshield from approximately one car length away. The court held that the combination of the placement of the squad car and use of the spotlight did not result in Mr. Kahle's seizure. In performing the analysis, the trial court did not make reference to any other factors that have been identified by *Mendenhall* as relevant to the analysis.

A. Did the trial court misapply the law to the facts by failing to analyze the totality of the circumstances, focusing only on two factors?

B. At the point Officer Liu knocked on Mr. Kahle's window, would a reasonable person have believed that they were free to leave in view of all the circumstances surrounding the incident?

## ORAL ARGUMENT AND PUBLICATION

Mr. Kahle welcomes oral arguments and the opportunity for publication in order to provide clarity to this developing area of Fourth Amendment law.

## STATEMENT OF THE CASE

### I. Factual Background.

In the late hours of May 31, 2021, sometime prior to 12:15 a.m., Mr. Kahle parked his pickup truck in the nearly-empty parking lot of a local Pick 'n Save grocery store. (R. 32, 6:18-7:13; A-App. 17). He remained in the parking lot with his running lights on, and sat in his vehicle for a period of time. (R. 32, 15:25-16:5; A-App. 26).The parking lot was well-illuminated, as the store had night-shift stockers working that evening despite the store being closed to the public. (R. 32, 6:22-7:5; A-App. 17).

At approximately 12:15 a.m., while Mr. Kahle was sitting in his vehicle, Officer Aeriond Liu of the Village of Oconomowoc Lake Police Department noticed his truck in the parking lot. (R. 32, 7:6-13; A-App. 18). Officer Liu was on routine patrol driving a marked squad car and dressed in his full police uniform and duty belt, and happened to be in the vicinity of the Pick 'n Save. (R. 32, 13:15-17; 20:4-21:3; A-App. 24). There were no reports regarding Mr. Kahle or his truck driving problematically, no citizen reports or 911 calls reporting his vehicle for parking in the Pick 'n Save lot, and no request for assistance or concern expressed by the overnight stocking staff working at the store that evening. (R. 32, 13:18-14:6; A-App. 24).

Upon noticing Mr. Kahle's truck, Officer Liu went to speak with the night-shift employees outside the Pick 'n Save having a smoke break. (R. 32, 7:1-8l; A-App. 18). He asked them about Mr. Kahle's truck, which they indicated had been in the parking lot for "a while" but otherwise did not express any concern about or interest in. (R. 32, 14:7-20; A-App. 25).

Officer Liu did not ask the employees to clarify what was meant by "a while." (R. 32, 14:21-15:4; A. App. 25).

After speaking with the night-shift employees, Officer Liu returned to his marked squad car, drove it towards Mr. Kahle's truck and parked nose-to-nose with the squad car facing the front of Mr. Kahle's truck. (R. 32, 15:21-17:1; A-App. 26). There was approximately one car's length between Mr. Kahle's truck and Officer Liu's squad car. (R. 32, 17:5-7; A-App. 28). At this point Officer Liu turned on his high-intensity spotlight and shined it directly into Mr. Kahle's windshield; Officer Liu's headlights were also illuminated and pointed at the front of Mr. Kahle's truck. (R. 32, 16:12-17:17, A-App. 27). Officer Liu testified that the purpose of using the spotlight was to illuminate the cabin of the vehicle to ensure that he could safely approach to make contact with the occupants, and that it also served the purpose of disabling the driver by making it impossible to see him as he approach Mr. Kahle's truck. (R. 32, 17:18-25; A-App. 28).

Once the spotlight was aimed at Mr. Kahle through the windshield, Officer Liu approached the truck. (R. 32, 10:10-19; A-App. 21). He was wearing a standard police uniform, with a firearm affixed to his duty belt, and a vest with "Police" in a reflective type on the front and the back. (R. 32, 20:4-21:3; A-App. 31). Officer Liu approached the truck on the passenger's side, and first noticed Mr. Kahle looking out the driver's window waiting for Officer Liu, expecting him to be approaching from that side. (R. 32, 10:18-11:3; A-App. 21). Officer Liu knocked on the passenger-side window to announce himself, and Mr. Kahle at that point opened the passenger-side window to speak with Officer Liu. (R. 32, 10:18-11:13; A-App. 21). Mr. Kahle did not attempt to drive away, put

the vehicle in gear, or otherwise move the vehicle in any manner; Officer Liu testified that the vehicle did not move from where it was parked at any point between his initial observation of the vehicle at 12:15 a.m. and the point that he made contact with Mr. Kahle. (R. 32, 8:22-9:16; A-App, 19). After the window was down and Officer Liu began speaking with Mr. Kahle, he observed signs of intoxication. Mr. Kahle was ultimately arrested on suspicion of operating while under the influence.

## II. Procedural History.

On June 3, 2021, the State filed a criminal complaint charging Mr. Kahle with Operating a Motor Vehicle While Under the Influence – 3rd Offense, in violation of Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)3, and 343.301(1g). (R. 3). On August 4, 2021, the State filed an amended criminal complaint adding Count 2, Operating with Prohibited Blood Alcohol Concentration – 3rd Offense. (R. 13).

On November 8, 2021, Mr. Kahle filed his motion to suppress the fruits of unreasonable search and seizure based on Officer Liu's lack of reasonable suspicion to believe that Mr. Kahle was engaged in illegal activity while parked in the Pick 'n Save parking lot when he seized Mr. Kahle. (R. 15; A-App. 4).

A motion hearing was held on January 31, 2021 during which Officer Liu testified about his interaction with Mr. Kahle. (R. 32; A-App. 12). Officer Liu testified that it was a fair assumption that Mr. Kahle was confused as to the direction he was approaching from because the high-intensity spotlight made it impossible for him to see an approaching officer. (R. 32; 17:18-25; A-App. 28).

The State argued that Mr. Kahle was not seized by Officer Liu and that the contact was a consensual encounter, relying on *Vogt*, 2014. The

State additionally relied on an unpublished opinion, *State v. Mullen*, Nos. 2019AP1187, 2019AP1188, unpublished disp. (WI App. May 20, 2020), 2020 WI App 41, ¶ 2, 392 Wis. 2d 909, 945 N.W. 2d 373. (R. 32; A-App. 12).

Mr. Kahle argued that *Vogt* was factually dissimilar to his encounter with Officer Liu, as *Vogt* did not involve the use of a high-intensity disabling spotlight; that the encounter was more analogous to the unpublished opinion in *State v. Evans*, No. 2020AP286-CR, unpublished disp. (WI App. January 28, 2021), 2021 WI App 14, 396 Wis. 2d 195, 956 N.W. 2d 468, which did involve the use of spotlights and headlights directed at the vehicle; and that Mr. Kahle's encounter was significantly dissimilar to *Mullen*. (R. 32, R. 17). Mr. Kahle additionally argued that the spotlight prevented him from knowing where Officer Liu was such that he could not have safely departed the encounter without the risk of hitting Officer Liu with his truck. (R. 32, R. 17).

Following the motion hearing, the trial court permitted Mr. Kahle to file a supplemental brief to address arguments raised by the State at the motion hearing. That supplemental brief was filed on February 1, 2022. (R. 17; A-App. 6).

On February 25, 2022, the Hon. J. Arthur Melvin, III signed a decision and order denying Mr. Kahle's motion on the basis that Officer Liu's squad placement and spotlight use, taken together, was not a seizure. (R. 18; A-App 1). The court held that the illumination of Mr. Kahle's vehicle cabin with the spotlight was not itself a detention under Wisconsin law, and that the placement of the marked squad vehicle directly in front of and facing Mr. Kahle's truck was not itself a detention. *Id.* The court next considered whether the combination of these two

factors did result in a detention, and held that it did not. *Id.* The court held that Mr. Kahle's ability to safely move his vehicle was not prevented by the use of the disabling spotlight because Mr. Kahle could have pulled away as soon as the officer's squad car pulled up to his truck, prior to the spotlight being illuminated, or alternatively immediately after being illuminated on the assumption that Officer Liu would not have yet exited his vehicle. The court further held that Officer Liu's squad was parked far enough away from Mr. Kahle's truck that it did not prevent him from driving away. *Id.*

The court's decision did not directly perform the required analysis—whether under the totality of the circumstances, a reasonable person would have felt free to leave the encounter. *Id.* The decision discussed only two factors— the use of a high-intensity spotlight and the placement of the squad car— while silent on the numerous other facts that made up the "totality of the circumstances" as they existed for Mr. Kahle. *Id.* The court's decision therefore addressed only a very narrow question: whether the placement of the vehicle and the use of the spotlight, taken together and divorced from any of the remaining facts constituting the "totality of the circumstances," constituted a seizure for Fourth Amendment purposes. The court held that it did not. *Id.*

After Mr. Kahle filed his notice of appeal but prior to briefing, the Court of Appeals, District IV, decided *State v. Christensen*, No. 2022AP-500, unpublished disp., 2022 WI App 55 (WI App. September 9, 2022). In that case, the court upheld the trial court's determination that Christensen was seized by police in nearly identical circumstances to Mr. Kahle's encounter with police.

## STANDARD OF REVIEW

While the Court of Appeals primarily serves an error-correcting function, it necessarily performs a second function under some circumstances, that of law defining and law development. The Court of Appeals' role of defining and developing the law is implicated when the court is required to "adapt [ ] the common law and interpret[ ] the statutes and federal and state constitutions in the cases it decides." *Cook v. Cook*, 208 Wis. 2d 166, 188-89, 560 N.W. 2d 246 (1997).

Whether evidence should have been suppressed is a question of constitutional fact. *State v. Van Beek*, 2021 WI 51, ¶ 22, 397 Wis. 2d 311, 960 N.W. 2d 32 (citing *State v. Coffee*, 2020 WI 53, ¶ 19, 391 Wis. 2d 831, 943 N.W. 2d 845). The reviewing court must "employ a two-step inquiry" to make that determination. *Id.* First, a reviewing court will uphold a circuit court's findings of historic fact unless they are clearly erroneous. *Id.* Second, the reviewing court must independently and objectively examine the facts known to the officer at the time of the alleged seizure, applying constitutional principles to them. *Id.*

## ARGUMENT

### I-A. Mr. Kahle was seized at the moment Officer Liu directed his high-intensity police spotlight through the front windshield directly at Mr. Kahle's face from the distance of one car length.

Mr. Kahle was seized at the moment that Officer Liu's conduct was such that an "innocent reasonable person" would not have felt free to disregard him and leave. In this case, that moment occurred when Officer Liu parked his squad car nose-to-nose with Mr. Kahle's truck with only one car length between them, activated his high-intensity

spotlight, and aimed the beam at Mr. Kahle's windshield.

As the United States Supreme Court has correctly noted, "encounters between citizens and police officers are incredibly rich in diversity." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). They run the gamut from "wholly friendly exchanges of pleasantries" to "hostile confrontations of armed men, involving arrests, injuries, or loss of life." *Id.* A police officer is free to approach a citizen on the street and ask questions of them or request identification without implicating the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). In doing so, an officer may be "as aggressive as the pushy Fuller-brush man at the front door, the insistent panhandler on the street, or the grimacing street-corner car-window squeegee man. All of these social interactions may involve embarrassment and inconvenience, but they do not involve official coercion." *State v. Garcia-Cantu*, 253 S.W. 3d 236, 243 (Tex. Crim. App. 2008).

It is only when the police officer "engages in conduct which a reasonable man would view as threatening or offensive even if performed by another private citizen" that such an encounter becomes a seizure. 4 Wayne R. LaFave, Search and Seizure § 9.4(a), at 427 (4th ed. 2004). It is the display of official authority and the implication that this authority cannot be ignored, avoided, or terminated, that results in a Fourth Amendment seizure. *Garcia-Cantu*, 253 S.W. 3d at 243. The issue is "whether the surroundings and the words or actions of the officer and his associates communicates the message of 'We Who Must Be Obeyed.'" *Id.* In other words, a seizure occurs "when the officer, by means of physical force or a show of authority, has in some way restrained the liberty of a citizen." *Mendenhall*, 446 U.S. at 552. A seizure differs from a search in

that it "deprives the seized individual of dominion over his or her person or property." *State v. Arias*, 2008 WI 84, ¶ 25, 311 N.W. 2d 358, 752 N.W. 2d 748. The conduct of the police during the encounter is the dispositive factor in determining whether a seizure has occurred. *State v. Van Beek*, 2021 WI 51 at ¶43.

When police approach a citizen on the street to attempt to engage in a consensual conversation, that person has the choice to refuse the officer's attempt to converse and retain his privacy, or respond by talking to the officer. *Vogt*, 2014 WI 76 at ¶ 14. "A dutiful officer does not make a mistake by presenting a person with that choice. Only when the officer forecloses the choice by the way in which he exercises his authority – absent reasonable suspicion or probable cause – does he violate the Fourth Amendment." *Id.* In analyzing a police-citizen interaction, a court "must examine the totality of the circumstances, seeking to identify the line between an officer's reasonable attempt to have a consensual conversation and a more consequential attempt to detain an individual." *Id.* at ¶ 3.

The use of a squad car's spotlight is a show of authority that may, depending on the circumstances, suffice to effectuate a seizure. *United States v. Johnson*, 874 F.3d 571, 574 (7th Cir. 2017) (seizure occurred when two squad cars drew up parallel to and behind the defendant's car and shined spotlights on the car, thus "impl[ying] that the occupants were not free to drive away"). Under Wisconsin case law, a police spotlight is "one indici[um] of police authority" but by itself does not necessarily rise to a "'show of authority' that constitutes a seizure." *Young*, 294 Wis. 2d at 1, ¶ 65. While *Young* stood for the proposition that the use of a police spotlight did not *per se* result in a seizure, it did not

foreclose a scenario in which the use of a police spotlight alone was carried out in a way that did result in a seizure. In this case, Officer Liu's use of the police spotlight in this particular manner resulted in Mr. Kahle's seizure.

Mr. Kahle's case is an extreme example of the use of a high-intensity police spotlight, differentiating it from the recent Wisconsin cases that address the use of spotlights. For example, in *Young*, the case that is often cited for the proposition that the use of a spotlight alone is never enough to result in a seizure, an officer driving a marked police vehicle approached a vehicle that was legally parked on the side of the road. *Id.* at ¶ 9. The officer decided to investigate the vehicle, which had 5 occupants who had been sitting in the same spot for nearly 10 minutes. *Id.* There was another car parked behind the suspicious vehicle, so the officer stopped his squad car in the street alongside the car behind Young's vehicle, situating himself behind and to the right of Young's vehicle. The officer then directed his spotlight at the vehicle from behind. *Id.* at 10. The court in *Young* did not decide whether that use of a spotlight was a seizure, as Young fled from the police and was only subdued after a pursuit. However, the Supreme Court opined, in dicta, that it would have been reluctant to find that a seizure had occurred based on the totality of the circumstances and despite the use of the police spotlight. *Id.* at ¶ 69.

Unlike in *Young*, Officer Liu positioned his squad nose-to-nose with Mr. Kahle's truck and directed the high-intensity spotlight beam at Mr. Kahle through the front windshield from a distance of one car length away. *Young* involved the use of a spotlight from the back of the vehicle to illuminate the car Young was riding in, but did not involve directing

the spotlight at Young's face from directly in front of him and in close proximity.

In the unpublished case *State v. Mullen*, relied on by the State, an officer observed Mullen pull into the parking lot of a closed bar at approximately 1:30 a.m. and exit his car. *Mullen*, 2020 WI App 41 at ¶ 2. The officer drove by a second time, then entered the parking lot. *Id.* He parked his squad car behind Mullen's parked vehicle, offset to the left and a "fair amount away" from Mullen's vehicle. *Id.* at ¶ 3. Mullen was out of his vehicle and standing on the curb next to the front of the bar. *Id.* at ¶ 4. The officer activated his high-intensity spotlight and aimed it at Mullen from where the squad was parked, and then approached Mullen on foot. The Court of Appeals ruled that Mullen was not seized in this scenario, despite the use of a high-intensity spotlight.

Unlike Mr. Kahle, Mullen was outside of his vehicle on the curb in front of the bar when the officer illuminated him with a spotlight from a "fair amount away" from Mullen's vehicle. Mullen's vehicle was parked an unspecified distance away from the front of the bar where Mullen was standing. The distance between Mullen and the spotlight was significantly greater than the one car length separating Mr. Kahle from the high-intensity beam.

In the unpublished case *State v. Evans,* the use of spotlight was much more similar to Officer Liu's use. *Evans,* 2021 WI App 14. In *Evans*, the defendant and his girlfriend were parked in their vehicle at approximately 2:30 a.m. in a hotel parking lot. *Id.* at ¶ 5. Evans's car was parked facing a concrete barrier, and next to another parked car on the passenger side. *Id.* An officer on patrol nearby noticed the car and thought it was suspicious enough to investigate further, so he radioed for

another officer patrolling nearby to join him. *Id.* at ¶ 3. The two squad cars converged on Evans's car simultaneously— one officer pulled his squad car up within a few feet of Evans's car, perpendicular to it, so that the front of his squad car was pointed directly at the driver's side door of Evans's vehicle, while the other officer pulled his squad car behind and at an angle to the passenger's side of Evans's car. *Id.* at ¶¶ 6-7. Both officers then activated their spotlights and directed them at Evans's car. *Id.* at ¶ 7.

The Court of Appeals determined that this was a seizure, and emphasized that the use of the spotlights in a mostly empty parking lot was different from the use of spotlights in *Young,* which was on a busy street and served as a warning to passing motorists. *Id.* at ¶ 26. The *Evans* court held that "[a] reasonable person in Evans's position would have interpreted the unexpected, unexplained, simultaneous double spotlights, occurring in the small hours of the morning, as a show of authority, given that the spotlights were not needed to warn passing motorists." *Id.*

In the unpublished case *State v. Christensen*, decided after Mr. Kahle's motion was denied and an appeal was underway, the Court of Appeals determined that a seizure occurred in circumstances remarkably similar to Mr. Kahle's encounter with police, but for the position of the police vehicle and the direction the high-intensity spotlight was aimed. *Christensen*, 2022 WI App 55. In *Christensen*, two officers, in full police uniform and on routine patrol in a single marked police truck, noticed two cars parked next to each other at 6:49 p.m. in November, after it was dark out, near one corner of a parking lot owned by the Department of Natural Resources which provided access to the

Glacial Drumlin Bike Trail. *Id.* at ¶¶ 3-4. The defendant was sitting in the driver's seat of one of the vehicles, and another individual was seated in the passenger seat. *Id.* The lot had a single entrance/exit to the adjoining roadway. *Id.* The area of the lot where the two cars were parked was abutted by trees, preventing the defendant's vehicle from being able to pull forward or to the right. *Id.* at ¶ 5. Upon noticing the vehicles, Sergeant Walters, the officer driving the truck, pulled into the lot and parked the truck approximately 10 feet behind the two parked cars, "inside the entrance" to the lot but not blocking the entrance. *Id.* at ¶6-7. The truck did not completely block the defendant from driving out of the lot, though the officers testified "[i]t would have been tight" and would require the defendant to "back up and pull forward to go around the back side of [the police truck]. *Id.* at ¶ 8. Sergeant Walters aimed his high-intensity police spotlight at the back of defendant's car, but did not activate his blue and red emergency lights. *Id.* at ¶ 9.

Once the defendant's car was illuminated, Officer Pagliaro, the passenger in the police truck, got out of the truck and approached the defendant's car from on the passenger side, announced he was a police officer, and knocked on the front passenger-side window. *Id.* at ¶ 10. The passenger lowered the car window in response to the knock, at which point Officer Pagliaro could smell burnt marijuana coming from inside the car. *Id.* at ¶ 11.

The trial court found that the defendant "was –I'm not going to say cornered, but it would have been very difficult for her to just back out." *Id.* at 16. The court noted that the police truck was marked, the truck's high-intensity spotlight (referred to by the court as a "take-down light"), that two uniformed government agents, both armed, approached the car

leading up to the knock on the window, and that "given all those circumstances, especially the positioning of the vehicle and the either . . . actual or perceived inability [of the defendant] to just [drive] out of that lot, where I land [is that this] was . . . not a consensual contact." *Id.* at ¶ 16. The trial court ordered the suppression of all evidence following the knock on the window, and the State appealed.

The Court of Appeals held that the encounter was a seizure, noting that "I understand [the defendant] to take the position that, given all of the circumstances, a reasonable person in her position would not have felt free to drive away from the lot as of the moment when Paliaro knocked on the window, and that as a result she was seized no later than that moment. I agree with [the defendant]." *Id.* at ¶ 17. The Court specifically noted that the use of a spotlight to illuminate the defendant's car was an indicia of police authority that in this case constituted a relevant show of authority. *Id.* at ¶ 27.

These cases, though unpublished, demonstrate that analyzing police conduct concerning the use of spotlights necessarily involves more than a binary determination of whether a spotlight was used—the proximity to the driver/occupant from which the spotlight is directed, the position of the squad car and spotlight in relation to the driver's vehicle, where the spotlight's beam is directed, and the location and relative surroundings of an encounter are all instructive. Each of these factors influences the degree to which an officer's use of a high-intensity spotlight is a "show of authority."

In Mr. Kahle's case, Officer Liu's use of the high-intensity spotlight was much closer to *Evans* than *Young* or *Mullen*. Like in *Evans*, Officer Liu's spotlight was directed at the driver from close proximity—in *Evans*,

"less than the width of one parking space," and for Mr. Kahle, approximately one car length. *Id.* at ¶ 7. In both *Young* and *Mullen*, the beam originated at least one car length away. Like in *Evans*, Officer Liu's spotlight was aimed directly at the driver—in *Evans*, the spotlight originated immediately perpendicular to the vehicle and came from the direction of the driver's side window, presumably illuminating Evans's face from the left side; Officer Liu aimed his spotlight from the front of the vehicle directly at Mr. Kahle through the windshield, presumably illuminating his face from head-on. While *Mullen* similarly involved a spotlight aimed at the defendant, the location of the squad car suggests that it was aimed at an angle from a much greater distance, not directly into Mullen's face but from one of the sides. In *Young* and *Christensen*, the beam was aimed at the vehicle from the rear and would presumably have illuminated the backs of the occupants' heads.

Like in *Evans, Mullens,* and *Christensen*, Mr. Kahle's encounter with Officer Liu occurred in a mostly-empty parking lot in the late hours of the night (or at least after dark despite being relatively early in *Christensen*). Unlike in *Young,* Officer Liu's use of the spotlight was not to warn passing motorists, as there were none; it served only to disorient and disable Mr. Kahle to allow Officer Liu to approach undetected, and to better illuminate the scene for Officer Liu.

While *Evans* involved two officers using spotlights at the same time, one of the officers was shining his light from behind Evans's vehicle like the officer in *Young*. Mr. Kahle's case is most similar to a situation like *Evans* that did not involve the second officer shining his light from the rear—Officer Liu was a single officer who directed his high-intensity spotlight from a few feet away from Mr. Kahle through the front

windshield and directly into Mr. Kahle's face, arguably even more of a show of authority than being illuminated from the side as in *Evans*. These factors make the show of force much more compelling than the relatively benign use of spotlights from the rear and for the purpose of alerting other motorists at issue in *Young*. While the use of hazard lights or spotlights to illuminate an area for safety purposes is conduct which a reasonable person would not view as "threatening or offensive" if performed by a private citizen, the same cannot be said of directing a high-intensity spotlight from feet away directly at the face of a driver to disable the driver. 4 Wayne R. LaFave, Search and Seizure § 9.4(a), at 427 (4th ed. 2004). Because these differences significantly change how an "innocent reasonable person" would have interpreted the police encounter, Mr. Kahle's case is one which the *Young* court would not have been as reluctant to call a seizure.

Officer Liu's use of a high-intensity police spotlight aimed at Mr. Kahle's face from directly in front of him with only a few feet between his truck and the squad car, and where the use of the spotlight was in an otherwise nearly empty parking lot without the need to warn other motorists was a "show of authority" that would make an innocent reasonable person in Mr. Kahle's position at the moment believe that they were not free to leave. *See, e.g., Evans*, 2021 WI App 14 at ¶ 20; *Christensen*, 2022 WI App 55 at ¶27; *Mendenhall*, 446 U.S. 544. As such, Mr. Kahle was seized at the moment Officer Kahle directed the spotlight at him.

### I-B. Trial courts should apply the *Mendenhall* analysis faithfully without consideration of the policy impacts of finding a seizure has occurred.

The holding in *Young* was not based on an objective analysis of the

impact of police spotlights on a reasonable person, nor what factors of spotlight use should be considered when evaluating spotlight use under *Mendenhall*. Instead, the *Young* court was primarily focused on policy considerations, specifically officer safety, and allowed that consideration to be determinative of whether an innocent reasonable person would feel free to disregard police aiming a high-intensity spotlight at them. The court's reasoning boiled down to "of course a reasonable person would not feel as if they were unable to disregard the police aiming a spotlight at them, because otherwise the rule would lead to less use of the spotlight by police and subject officers to greater risk, and we don't want that."

The *Young* court was presented with a scenario in which the officer did not have the option of pulling up directly behind *Young*'s vehicle because another was parked behind it, which "presented him with two choices. He could park his car at some distance and proceed on foot, or he could stop in the lane of traffic and turn on some warning lights." *Young*, 2006 WI 98 at ¶ 66. The court held that "it would be unreasonable to expect an officer, traveling alone near midnight, in a problem area, to leave his squad car and approach a suspicious car full of people, without being able to see clearly the situation into which he was walking. We think this would ask too much and would discourage effective law enforcement." *Id.* at ¶ 67.

This focus on practical considerations and safety, and not the question of what a reasonable person would do under the circumstances as mandated by *Mendenhall*, was echoed by the court in the unpublished case *Mullen*: "Here, the circuit court expressed concern that a rule that an officer's use of a spotlight creates a per se detention would discourage officers from using such lights when necessary for the safety of others.

The *Baker* court, cited favorably in *Young*, agreed. Here, the officer testified that he was trained to use the light for officer safety, and the circuit court found the use was reasonable." *Mullen*, 2020 WI App 14 at ¶ 23 (citing *State v. Baker*, 141 Idaho 163, 167, 107 P.3d 1214 (Id. 2004).

This policy concern has been the motivating factor behind state courts throughout the country holding that spotlight use alone does not create a seizure: In *Baker,* the Idaho Supreme Court agreed with the Idaho Court of Appeals reasoning for refusing to find that use of a police spotlight creates a per se detention: "Spotlights have the purpose of illuminating an area, enabling the officer to gain more information about the nature of the vehicle, its occupants, and the circumstances that the officer is confronting. The spotlight can significantly enhance officer safety. We agree with the State that an officer is not constitutionally required to choose between a consensual encounter in the dark or turning on a spotlight and thereby effectuating a detention that may not be supported by reasonable suspicion. A rule that an officer's use of a spotlight creates a per se detention would discourage officers from using such lights when necessary for their safety or the safety of others." *Baker*, 141 Idaho at 167.

In rejecting a per se rule that spotlight use was a seizure for Fourth Amendment purposes, the Idaho Supreme Court disregarded the *Mendenhall* analysis and favored a result-driven, means-ends rule that prioritized officer safety. *Baker* is but one of many courts to have taken this approach. *See, e.g., United States v. Clements*, 522 F.3d 790, 792, 795 (7th Cir. 2008) (no seizure where squad car parked fifteen to twenty feet behind defendant's vehicle, and officer "shined a spotlight on the [vehicle] and activated their flashing red and blue lights" before

approaching; the officers were merely "illuminating their flashing lights for identification and safety purposes"); *Commonwealth v. Briand*, 879 N.E. 2d 1270, 1272 (Mass. Ct. App. 2008) (an officer illuminating the area before approaching the vehicle does not constitute a seizure; otherwise, officers would be discouraged from using their lights when necessary for their safety or the safety of others).

Notably absent from these pronouncements on the Fourth Amendment implications of the use of a police spotlight is an analysis of whether an "innocent reasonable person" would feel free to disregard a police spotlight aimed at them and depart from the encounter. This is a departure from the analysis required by *Mendenhall*, a test that determines whether a seizure has occurred by approximating the outer bounds of police conduct that an "innocent reasonable person" would tolerate before feeling like the inherently coercive exercise of police power has interfered with their personal autonomy.

Evaluating police conduct based on the practical or policy implications that flow from court-imposed restrictions on that conduct does not approximate whether a police-citizen encounter is a seizure in any meaningful way, and as such it is divorced from the purpose of the Fourth Amendment. It is a means-end approach which focuses on these concerns instead of evaluating the impact the specific police conduct has on an "innocent reasonable person," and results in courts upholding conduct that *does* cause a reasonable person to believe they are not free to depart from the encounter. This is precisely the type of conduct the Fourth Amendment protects against.

In this case, the trial court relied on Wisconsin authority, based on the dicta in *Young* which was itself premised on policy considerations

and not on the *Mendenhall* analysis, to hold that the use of a spotlight alone is never a seizure. (R. 18; A-App 29). Because the trial court held that the use of a spotlight alone is never a seizure under Wisconsin law, the court did not evaluate the specifics of Officer Liu's spotlight use to determine how it would be interpreted by an "innocent reasonable person." As such, the policy considerations took precedence over the constitutionally-mandated *Mendenhall* test, and the trial court held that Mr. Kahle was not seized.

As demonstrated above, Officer Liu's use of the high-intensity spotlight in this case would have led an "innocent reasonable person" to believe that they were not free to depart from the encounter, but the policy considerations employed by the courts that the trial court relied on resulted in the trial court finding that he was not seized. In this situation, police conduct that would be unconstitutional under a faithful application of *Mendenhall* was upheld. Stated differently, in this case unconstitutional police conduct was given the imprimatur of the court because the line of cases following *Young* elevated police convenience and policy concerns over the constitutional mandate of the Fourth Amendment's prohibition on unreasonable seizures.

### II-A. The use of the "reasonable person" standard for purposes of the *Mendenhall* analysis— recognized as a legal fiction which does not resemble the behavior of the general law-abiding population— permits violations of the Fourth Amendment's and Article I, Section 11's coextensive prohibitions on unreasonable searches and seizures.

One of the consequences of purporting to apply the *Mendenhall* test while allowing practical and policy considerations to influence the results of the analysis is the creation of an "innocent reasonable person" that is widely acknowledged to be a legal fiction, one which does not

actually resemble the behavior of law-abiding members of society. *Mendenhall* asks courts to "step into the shoes of the defendant and determine from a common, objective perspective whether the defendant would have felt free to leave" under the circumstances, but the courts performing this analysis are bound by precedent interpreted to hold that the use of spotlights and other specific police tactics are permissible without evaluating their impact on the defendant. However, instead of acknowledging this disconnect, courts have shoehorned the means-end analysis employed by *Young*, *Baker*, and other cases into the analytical framework of *Mendenhall*. To do this, courts simply proclaim that an "innocent reasonable person" would not be deterred from leaving an encounter with the police despite the use of high-intensity spotlights.

The *Mendenhall* test has thus can be satisfied at the most superficial level: a trial court can claim to be analyzing whether specific police conduct would cause an "innocent reasonable person" to feel unable to leave, point to precedent which held that, for example, police spotlight use alone does not create a seizure per se, and instead of analyzing the use of a spotlight in the particular context to determine whether the outcome would be different in the case at hand, the court can simply defer to the precedent and conclude that an "innocent reasonable person" would not feel unable to leave based on the use of a police spotlight. Because the precedent relied on is treated as establishing a bright-line rule that spotlight use alone does not create a seizure, the court can then conclude that no seizure occurred irrespective of the particular details of how a spotlight was used in the case at hand. This hollow, perfunctory analysis cannot be what the United States Supreme Court envisioned when deciding *Mendenhall*, and cannot

adequately protect the rights secured by the Fourth Amendment.

This inherent flaw with the *Mendenhall* test has been widely recognized by legal scholars and lower courts. For example, Professor Wayne LaFave has opined that "the [Supreme Court] finds a perceived freedom to depart in circumstances when only the most thick-skinned of suspects would think such a choice was open to them." Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment Seizures*, 1991 U. Ill. L. Rev. 729, 739-40 (1991). The Wisconsin Supreme Court in *Vogt* recognized the fictitious nature of the "reasonable person" as developed by caselaw: "To some extent, the "reasonable person" here is a legal fiction. That defendants often consent to searches of areas that reveal incriminating evidence demonstrates that people often do not feel free to decline an officer's request, even absent a manifest show of authority. However, the reasonable person standard is necessary if the inquiry is to remain objective. The value of objective standards in this area cannot be gainsaid because the alternative is to equate the innocuous to the arbitrary and *substantially limit the role of law enforcement in the community*." *Vogt*, 2014 WI 76, ¶ 31, n. 14 (emphasis added).

Instead of recognizing a middle ground – an objective test which is committed to analyzing how a reasonable person, imparted with the social conditioning typical of our society, would actually feel when met with the police conduct at issue, and whether that individual would feel free to disregard the officer and depart under the circumstances – the *Vogt* court rationalized the use of an admittedly fictitious and unrealistic standard. "In most cases it is important for courts conducting a Fourth Amendment seizure analysis to distinguish between a person's

individual predisposition, which might lead the person to consent to an officer's inquiry, and an officer's objective conduct. TO THEIR CREDIT, Citizens and others may feel tethered by social norms to an officer's request and may consent in order to avoid the taboo of disrespecting an officer of the law. However, a person's consent is no less valid simply because an individual is particularly susceptible to social or ethical pressures." *Id.* at ¶ 31 (capitalization in original).

Chief Justice Abrahamson, in her dissent in *Vogt,* recognized the fiction at the heart of the Court's analysis: "Courts across the country have divided when confronted with facts substantially similar to the ones in the instant case. Why? Because courts engage in a fiction in determining whether the mythical reasonable person in the position of the defendant would have believed that he or she was not free to leave." *Id.* at ¶ 70 (Abrahamson, C.J., dissenting). Social science provided empirical evidence of the disconnect between the "reasonable person" and reality—studies prove that the "innocent reasonable person" standard does not generally reflect what real, everyday people think nor how they act when approached by law enforcement officers. *See, e.g.,* David K. Kessler, *Free to Leave: An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim. L. & Criminology 51 (2009) (concluding that the average person does *not* feel free to leave simple interactions with police officers, based on empirical evidence from studying two scenarios in which the United States Supreme Court has held that a reasonable person would feel free to leave, on public sidewalks and buses); Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. Crim. L. & Criminology 437, 439-42 (1988) (describing the

"free to leave" test as artificial, resulting in outcomes "which bear little relationship to the individual's actual freedom to walk away"); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2022 Sup. Ct. Rev. 153 (2002) (criticizing broadly the Court's post-*Mendenhall* jurisprudence as ignorant of human behavior with respect to authority figures, creating a set of non-seizures that nonetheless relied upon the coercive force of law enforcement).

While precedent plays an important role, *Mendenhall* requires an analysis that is necessarily fact-intensive, case-specific, and which looks at the totality of the circumstances. As no two cases are exactly alike, where the Supreme Court of Wisconsin or the United States Supreme Court has held that in a given factual scenario a seizure did not occur, trial courts should evaluate similar but not identical circumstances and reach different conclusions where necessary. In doing so, trial courts should take care not to transform the *Mendenhall* analysis into one that reduces the totality of the circumstances to the factors that most readily can be compared to prior opinions of the court, glossing over any of the factual differences that can't be quickly disposed of through deference to precedent. Only by analyzing the totality of the circumstances as they existed and determining whether those circumstances would lead a reasonable, real-life person to feel free to disregard a police interaction can the court guarantee the full protections of the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution.

While the Supreme Court of Wisconsin typically interprets Article I, Section 11 of the Wisconsin Constitution in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court, it is not required to do so when supplementing the United States Constitution's

protections with additional protections rooted in the Wisconsin Constitution. *Young*, 2006 WI 98 at ¶ 30. When the Wisconsin Supreme Court perceives soundness in the Fourth Amendment jurisprudence of the United States Supreme Court and desires to maintain uniformity in the rules, the court adopts that analysis. *Id.* In this case, the wisdom and soundness of the "innocent reasonable person" standard is lacking, and this Court should deviate from applying federal Fourth Amendment jurisprudence to Article I, Section 11 of the Wisconsin Constitution and ensure that the protections provided by the Wisconsin constitution are not weakened based on the policy and practical considerations that have chipped away at the protections of the Fourth Amendment.

### III-A. The trial court misapplied the law to the facts by limiting the analysis required under *Mendenhall* to two factors, not the totality of the circumstances.

In this case, the trial court did not undertake an analysis of the totality of the circumstances to make the necessary determination under *Mendenhall*, regardless of whether the court applied the fictitious "innocent reasonable person" or a realistic reasonable person test. The court's decision provides a bare recitation of the facts:

> Officer Liu then drove his patrol vehicle to the front of the defendant's truck. He stopped, parking his vehicle about 20 feet in front of the defendant's truck, nose to nose. Officer Liu then used his, court's term, "flood lights," to illuminate the vehicle including the inside of the vehicle. Officer Liu then exits his vehicle, to check on the vehicle. He proceeds to knock on the passenger side window of the vehicle, with his knuckles, to which the defendant first opens his driver's side window, but then the passenger side. For the purposes of this motion, that is the end of the relevant facts of the case.

(R. 18, A-App. 1).

The decision and order identifies two factors identified by Mr. Kahle as important to the determination of whether he was seized by Officer Liu:

> The defense based its motion on the two specific actions of Officer Lui [sic]. First, his decision to pull and park in front of the defendant's vehicle, nose to nose. Second, the decision to illuminate the defendant's vehicle to the point that the defendant was unable to see, specifically see where the officer was, making it unsafe for the defendant to drive away.

*Id.* The trial court then based its analysis on only these two factors, omitting from the analysis many important and relevant facts that, combined with the use of the spotlight and the placement of Officer Liu's vehicle, constitute the totality of the circumstances.

By limiting the analysis to those two specific factors divorced from the totality of the circumstances, the court misapplied the *Mendenhall* analysis. The court failed to take into consideration, for example, the location of the encounter, Officer Liu's appearance, whether Officer Liu was armed, and the absence of other motorists. Each of these factors—when considered together with the use of the high intensity spotlight and the placement of the police squad—changes the nature of the encounter between Mr. Kahle and Officer Liu in a meaningful way for purposes of the *Mendenhall* analysis. Because the analysis did not consider the totality of the circumstances, the court misapplied the law to the facts.

### III-B. A reasonable person would not have believed they were free to disregard the encounter and leave at the point Officer Liu knocked on Mr. Kahle's window.

Under the totality of the circumstances, Officer Liu's actions were a show of authority which, taken together, would have conveyed to a reasonable person[2] that they were not free to disregard Officer Liu and depart the encounter.

The facts in this case are very similar to *Christensen*, and the most

[2] The result of this case is the same under either the fictitious "innocent reasonable person" or a "reasonable person" reflective of typical law-abiding citizens in our society, which Mr. Kahle asserts is the appropriate standard for Article I, Section 11 purposes.

notable difference is the placement of the high-intensity spotlight—in *Christensen* it was aimed at the rear of the vehicle, likely illuminating the passengers but not blinding or disabling them. In this case, Officer Liu was in full police uniform with a reflective tactical vest that read "POLICE," was armed but did not draw his firearm from the holster where it was visible on his duty belt, utilized his high-intensity spotlight from close proximity and aimed it directly at Mr. Kahle's face, parked his police squad nose-to-nose with Mr. Kahle's truck, approached the truck from the passenger's side, and knocked on the window. Each of these factors contributes to the impact of Officer Liu's show of authority. Like *Christensen*, Officer Liu did not literally eliminate any possibility of Mr. Kahle driving away. However, the placement of the police squad, the disabling effect of the high-intensity spotlight, and Mr. Kahle's inability to determine where Officer Liu was and avoid accidentally hitting him, taken together, would cause a reasonable person in Mr. Kahle's circumstances to have an "actual or perceived inability" to drive away from the police.

The *Christensen* court emphasized that the Court of Appeals in *Vogt* did not articulate a rule that "the only way a police vehicle stopping near a parked car can contribute to a seizure is by entirely eliminating any possibility of driving away. *Christensen*, 2022 WI 55, ¶ 26. The *Christensen* court was persuaded by the *Evans* opinion, noting "[d]espite the driver's ability to drive away in *Evans*, the other circumstances of the police cars' approaches created an 'adversarial' interaction that sent a 'strong and unambiguous signal of authority.'" *Id.* at ¶ 27 (internal citations omitted).

The United States Supreme Court has recognized a non-

exhaustive list of factors courts should consider when evaluating whether a reasonable person would feel free to leave an encounter: whether there was an application of force, intimidating movement by the officer, an overwhelming show of force, whether the officer brandished weapons, blocked exits, made threats or issued commands, or used an authoritative tone of voice; *United States v. Drayton*, 536 U.S. 194 (2002); whether the officer was wearing a police uniform; *Mendenhall*, 446 U.S. 544. Wisconsin courts have identified other factors relevant to Mr. Kahle's interaction with Officer Liu: whether the officer's conduct was "adversarial" in nature, *Vogt*, 356 Wis. 2d 343, ¶ 3 (distinguishing an "adversarial" interaction with the "reasonable attempt to have a consensual conversation by knocking on a car window"), and the nature of the use of a police spotlight, *Young*, 294 Wis. 2d 1; *Evans*, 2021 WI App 14; *Mullen*, 2020 WI App 41.

In this case, Officer Liu's first action was to approach Mr. Kahle's vehicle in an "adversarial" nature. He did not "merely pull up behind [Mr. Kahle's] vehicle" as in *Vogt* or *Young*. *Evans*, 2021 WI App 14 at ¶ 23. In *Evans*, the court stated that "[i]n itself, a squad car pulling in across several parking spaces, both close and directly perpendicular to the driver's side of an occupied vehicle, sends a strong and unambiguous signal of authority. It is an "adversarial" move toward the vehicle that differs in kind from the officer's request to communicate in *Vogt*." *Id.* Unlike in *Vogt*, where the officer's conduct reasonably conveyed that the officer was merely trying to make contact with the occupant, here Mr. Kahle would not have known what might happen next after seeing a squad car pull directly up to the front of his truck, nose-to-nose, despite the parking lot being otherwise empty. The head-on approach, like the

perpendicular approach in the unpublished case *Evans*, "served as meaningful amplification of the message of police restraint". *Id.*

After approaching Mr. Kahle's truck in an "adversarial" fashion, Officer Liu immediately directed his high-intensity spotlight through the front windshield at Mr. Kahle. While Officer Liu testified that he did this to ensure his safety, the parking lot was well-illuminated and there were no other motorists nearby who needed to be warned. He also testified that the spotlight served to disable and blind Mr. Kahle to prevent him from knowing where he was approaching from—Mr. Kahle believed that he would be approaching on the driver's side, and was looking out his driver's window waiting for Officer Liu to approach.

After aiming his spotlight at Mr. Kahle, mirroring the facts of *Christensen* identically, Officer Liu exited his squad car, in full police uniform with a reflective tactical vest that read POLICE, and armed with a handgun affixed to his waist. Officer Liu then approached the truck and knocked on the passenger window with his knuckles to "announce himself" which prompted Mr. Kahle to roll down the passenger window. Mr. Kahle was still looking out the driver's window waiting for him to approach at the point that Officer Liu knocked on the passenger window.

Under the totality of the circumstances this encounter was significantly different from *Vogt* and *Young*, which involved squad vehicles parked behind the defendant's vehicle, and involved the same type of restriction on Mr. Kahle's movement as in *Evans*—while Mr. Kahle's vehicle was not physically boxed in such that he was unable to drive away, he was blinded by the high-intensity spotlight such that his ability to drive away would have involved dangerous speculation about

where Officer Liu was. Mr. Kahle had an "actual or perceived inability" to drive away: he had no choice but to stay where he was parked or risk striking Officer Liu with his vehicle. *Christensen*, 2022 WI App 55, ¶ 20. The "adversarial" approach and the use of blinding spotlights were the type of "conduct which a reasonable man would view as threatening or offensive even if performed by another private citizen." 4 Wayne R. LaFave, Search and Seizure § 9.4(a), at 427 (4th ed. 2004). It was also a display of official authority which sent a clear message that "this authority cannot be ignored, avoided, or terminated." *Garcia-Cantu*, 253 S.W. 3d at 243.

As the totality of the circumstances would have conveyed to a reasonable person that they could not ignore, avoid, or terminate the encounter with Officer Liu, Mr. Kahle was seized. The seizure occurred, at the earliest, when Officer Liu directed his high-intensity spotlight at Mr. Kahle through the front windshield, or at the latest, when Officer Liu knocked on Mr. Kahle's passenger window and Mr. Kahle rolled it down in response. As such, Mr. Kahle was unreasonably seized, and all derivative evidence of his unlawful seizure must be suppressed.

## CONCLUSION

Under the totality of the circumstances, Mr. Kahle was seized, either at the point that Officer Liu directed the high-intensity spotlight at his face or at the point Officer Liu knocked on his window. No reasonable person would have felt free to disregard Officer Liu and leave the encounter. This Court, in applying the *Mendenhall* analysis, should apply it faithfully without substituting means-ends analyses which focus on policy and practical considerations, and should do so in a manner which recognizes that the legal fiction of the "innocent reasonable person" as developed through case law fails to protect the interests

secured by the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution, even if that requires deviating from the federal analysis and recognizing the greater protections offered by the Wisconsin Constitution. Based on this analysis, Mr. Kahle is entitled to the suppression of all evidence derivative of his unlawful seizure.

Dated at Waukesha, Wisconsin this 21st day of December, 2022.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 8885 words.

I further certify that filed with 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 at Waukesha, Wisconsin this 21st day of December, 2022.

Electronically signed by Bradley W. Novreske
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