No. 2022AP001555

STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JUSTIN J. KAHLE,
Defendant-Appellant.

PETITION FOR REVIEW

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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.

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 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.

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. The Court of Appeals likewise dismissed these other factors as irrelevant to the analysis.

1) Should trial courts apply the *Mendenhall* analysis faithfully, without consideration of the policy impacts of finding a seizure has

occurred or reliance on a standard recognized as a legal fiction?

The Court of Appeals answered: No.

2) Is a defendant's right to be free from unreasonable seizures under Article I, § 11 of Wisconsin's Constitution 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?

The Court of Appeals answered: No.

3) How should courts weigh the use of a police spotlight in carrying out an analysis under *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?

The Court of Appeals did not address this issue.

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

The Court of Appeals answered: No.

5) 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?

The Court of Appeals answered: Yes.

BRIEF STATEMENT OF CRITERIA FOR REVIEW

1. Section 809.62(1r)(a): This case presents a real and significant question of state and federal constitutional law. Nearly every case involving a police-defendant interaction raises the questions of whether the defendant has been seized for Fourth Amendment purposes, and if so, at what point in the interaction that seizure occurred. These questions are fundamental to the scope of the Fourth Amendment's protections, and often prove determinative in cases involving suppression of evidence. Over the past 43 years, the "reasonable person" analysis has been heavily influenced by outcome-determinative policy considerations. The breadth of the Fourth Amendment's protections has been diminished as a result, chiseled away by each new decision holding that a "reasonable person" would feel free to disregard a police interaction that the average, law-abiding person in today's society would not feel free to disregard. The question before this Court is whether a seizure occurs under Article I, § 11 where an average, law-abiding person would not feel free to disregard a police interaction, even if the legally fictitious "reasonable person" would feel free to do so according to existing Fourth Amendment precedent?

2. Section 809.62(1r)(c): A decision by this Court will help develop and harmonize the law, and the case calls for the application of a new doctrine— or, more specifically, a return to the original *Mendenhall* doctrine prior to the "reasonable person" deviating from the average, law-abiding person. The development of the law has resulted in less protections than were afforded under the original understanding of *Mendenhall*, while purporting to apply the same test. As *Mendenhall* is still the controlling precedent but subsequent decisions purporting to

apply it have reached results that do not comport with the original scope of *Mendenhall*, this Court would help harmonize this apparent disparity. By returning to the original *Mendenhall* analysis and rejecting the legal fiction of the "reasonable person" as it has developed over the decades since, this Court can ensure the original scope of the Fourth Amendment's protections are given full effect, or recognize that Article I, § 11 of the Wisconsin Constitution protects the average, law-abiding person even where the Fourth Amendment's protections have been worn away.

3. Section 809.62(1r)(d): The Court of Appeals' decision in this case is in conflict with other recent Court of Appeals decisions purporting to apply the *Mendenhall* analysis and the dicta in *Young*. Few of these cases have been published, and each has weighed the use of police spotlights slightly differently when considering the totality of the circumstances.

STATEMENT OF THE CASE

This Petition, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § (Rule) 809.62, seeks review of the decision and order of the Court of Appeals District II, in *State of Wisconsin v. Justin Kahle*, case 2022AP1555, filed on June 28, 2023.

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). 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).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).

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). 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). 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).

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

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). There was approximately one car's length between Mr. Kahle's truck and Officer Liu's squad car. (R. 32, 17:5-7). 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). 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).

Once the spotlight was aimed at Mr. Kahle through the windshield, Officer Liu approached the truck. (R. 32, 10:10-19). 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). 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). 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). 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). 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 motion hearing was held on January 31, 2021 during which Officer Liu testified about his interaction with Mr. Kahle. (R. 32). 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).

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).

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).

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 12). 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. In his appeal, Mr. Kahle argued that the *Mendenhall* analysis should be applied faithfully without regard to outcome determinative policy-based considerations, and that the legally fictitious "reasonable person" standard should be abandoned in favor of

a standard which reflects the behavior of average, law-abiding people consistent with evolving societal expectations. He further argued that under either test, he was seized by Officer Liu prior to opening his window.

The Court of Appeals, in an authored but unpublished decision, affirmed the denial of Mr. Kahle's suppression motion and declined to address the arguments Mr. Kahle raised that challenged established precedent. (App. 1-11).

ARGUMENT

A. This case presents a real and significant question of state and federal constitutional law, namely whether Article I, § 11 of Wisconsin's Constitution should be interpreted to provide greater protection than the Fourth Amendment when determining when a seizure has occurred.

1. Trial courts should apply the *Mendenhall* analysis faithfully, without consideration of the policy impacts of finding a seizure has occurred.

Every case involving a traffic stop or police-motorist interaction raises the question of whether the motorist has been seized for Fourth Amendment purposes, and if so, at what point in the interaction that seizure occurred. These questions are fundamental to the scope of the Fourth Amendment's protections, and often prove determinative in cases involving suppression of evidence.

In 1980, the United States Supreme Court decided *United States v. Mendenhall*, 446 U.S. 544 (1980), establishing an analysis to determine at what point a police-citizen interaction becomes a seizure implicating the Fourth Amendment. That decision established that the Fourth Amendment's protections are triggered "when the officer, by means of physical force or a show of authority, has in some way restrained the

liberty of a citizen." *Id.* at 552. The relevant inquiry under this analysis is whether a "reasonable person would have believed that he was not free to leave." *Id.*

In the decades following the *Mendenhall* decision, the "reasonable person" as described by courts has become so dissimilar to what we would expect of an average, law-abiding citizen in today's society such that this Court has recognized the "reasonable person" as a legal fiction. *See, e.g., Vogt*, 2014 WI 76 ¶31 n.14. As a result, courts are holding that no seizure has occurred under the "reasonable person" standard where an average, law-abiding citizen "would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 552.

"To sum up, there are countless interactions or encounters among police and members of the community. Not all encounters are seizures, and these non-seizure encounters are not governed by the Fourth Amendment. Other interactions or encounters are seizures and are subject to Fourth Amendment criteria. Fourth Amendment jurisprudence focuses on the line between seizures and mere encounters as well as *the reasonableness of the police/citizen interactions* that do constitute seizures." *Vogt*, 2014 WI 76 ¶ 26 (emphasis added). However, in applying this reasonableness standard, modern Fourth Amendment jurisprudence is highly deferential, resulting in decisions that usually uphold challenged government action.[1] Fourth amendment reasonableness balancing has largely become a process "in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales." *United States v. Montoya De Hernandez*, 473 U.S. 531,

[1] *See, e.g., Illinois v. Lidster*, 540 U.S. 419 (2004); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Execs. Ass'n,* 489 U.S. 602 (1989); *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *United States v. Martinez- Fuerte*, 428 U.S. 543 (1976); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

558 (Brennan, J., dissenting). This was not the intent of the Founders, nor is it consistent with reasonableness. Trial courts should not allow policy considerations to influence the outcome of the "reasonable person" analysis.

2. 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 and Article I, § 11's prohibitions on unreasonable seizures.

Whether an interaction is reasonable now depends on whether reasonableness is being measured from the perspective of society's general expectations or from the perspective of the fictitious "reasonable person" as developed in the case law; these two perspectives have little in common. The Fourth Amendment's original purpose was to protect the public from the government's exercise of police powers in ways that were inconsistent with societal expectations of privacy and reasonableness. The "reasonable person" standard no longer serves that purpose and should be reconsidered or restored to reflect the evolving societal expectations surrounding police/citizen interactions. To the extent the Fourth Amendment has itself been diluted and eroded by court decisions narrowing the bounds of its protection, Article I, § 11 of the Wisconsin Constitution should be interpreted to step in and restore that protection where it has waned. The current approach creates a category of police/citizen interactions that have been deemed "reasonable" by courts but which would not be considered reasonable based on societal expectations. These interactions should be recognized for what they are – violations of the Fourth Amendment and Article I, § 11 that have been given the court's blessing through a resort to fictitious standards.

In this case, the Court of Appeals rejected Mr. Kahle's invitation to apply the "reasonable person" test in a way that reflected societal expectations and the "tendency of people to defer to a symbol of authority no matter how it is manifested." *Vogt*, 356 Wis. 2d 343, ¶ 31 (footnote omitted). The court, reciting *Vogt*, stated that "a person's consent is no less valid simply because an individual is particularly susceptible to social or ethical pressures." *Id.* It is precisely the social and ethical pressures of modern society that should be in the forefront of this Court's analysis, as those societal expectations are what give definition to inherently amorphous terms like "reasonableness." And, especially given the modern recognition and national attention given to police violence, societal expectations are evolving regarding police/citizen interaction. The "reasonable person" must evolve with those expectations.

This Court has the opportunity to address the question head-on: Has the scope of the Fourth Amendment's protections been diminished through the application of the "reasonable person" standard in a fictitious manner, and if so, will Article I, § 11 of the Wisconsin Constitution stand firm and provide protection consistent with societal expectations about police/citizen interactions?

B. A decision by this court will help to harmonize and develop the law and provide guidance to Courts of Appeals to prevent inconsistent outcomes.

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

Even ignoring the problems with the existing "reasonable person" standard," the Court of Appeals' application of this standard to situations involving police use of high-intensity spotlights has been

inconsistent and has injected uncertainty into the law.

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. It is simply unrealistic that a private, law-abiding citizen would drive away from a police vehicle pulled nose-to-nose with their own vehicle with an officer aiming a high-intensity spotlight at the driver. That does not comport with societal expectations regarding police/citizen interactions. Despite that, the Court of Appeals concluded that the fictitious "reasonable person" would not be deterred and would feel free to depart from the interaction.

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. 2006 WI 98 ¶ 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*, 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 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. *Id.* at ¶¶ 3-4. Upon noticing the vehicles, the officers 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. The officer 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 the second officer 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 Court of Appeals held that the encounter was a seizure. 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.

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.

In this case, the Court of Appeals held that the facts of Mr. Kahle's case were more akin to those in *Mullen* and *Vogt,* rather than those in *Christensen* and *Evans*, "because a reasonable person in Kahle's position could have driven away and disregarded the officer" such that there was no seizure implicating the Fourth Amendment prior to Officer Liu smelling the odor of intoxicants.

4. The trial court misapplied the law to the facts by limited 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.

The Court of Appeals rejected this argument, asserting that "the only additional details Kahle points to are Officer Liu's "full police uniform," including his holstered firearm, Lui's act of knocking on the side window, and the unsupported assertion that Liu approached in an adversarial

manner." Mr. Kahle raised each of these as factors that the Court must consider as part of the totality of the circumstances and asserted that Officer Liu's vehicle placement and headlight use was adversarial – head on, with the vehicles nose-to-nose and a spotlight aimed at Mr. Kahle's face. The Court nonetheless stated that these factors did not change the analysis.

5. 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 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.

[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.

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.

The Court of Appeals, however, held that Officer Liu's use of a

spotlight to illuminate Kahle's vehicle (conveniently omitting the fact that it was not Mr. Kahle's vehicle being illuminated so much as Mr. Kahle's face) did not amount to a seizure as there "was no effort to block Kahle from leaving the parking lot and no significant show of force or coercion." The Court concluded that on these facts, a reasonable person would have felt free to leave and could have done so.

This case demonstrates the extent to which "the judicial thumb apparently will be planted firmly on the law enforcement side of the scales." *United States v. Montoya De Hernandez*, 473 U.S. 531, 558 (Brennan, J., dissenting). No reasonable person would respond to an officer pulling nose-to-nose with their vehicle and aiming a high-intensity spotlight at their face by simply starting the vehicle, shifting into reverse, and departing. It is only though resort to the fictitious "reasonable person" that a court could reach such a conclusion.

CONCLUSION

This case presents this Court with the opportunity to address a growing chasm between the fictitious "reasonable person" and an actual, average law-abiding citizen in today's society, recognizing the evolving societal expectations of police/citizen interactions. The development of Fourth Amendment jurisprudence surrounding "reasonableness" has resulted in a deference to law enforcement activities that undermines the protections of the Fourth Amendment. Courts have struggled to apply the standard in a consistent and predictable way. To the extent that the Fourth Amendment has been diminished by these developments, this Court must determine whether Article I, § 11 will likewise retreat. In either case, the totality of the circumstances demonstrates that Mr. Kahle was seized at the point that Officer Liu directed a high-intensity spotlight at his face from one car's length away.

Mr. Kahle respectfully requests that this Court grant review.

Dated at Waukesha, Wisconsin this 26th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief as required by Wis. Stat. § 809.62(4). The length of this petition is 7369 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 Court of Appeals and circuit court; (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.

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 26th day of July, 2023.

Electronically signed by Bradley W. Novreske
State Bar No. 1106967

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