STATE OF WISCONSIN
IN SUPREME COURT
No. 2011AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

Page

Page

CASES CITED

Page

Page

STATUTES CITED

OTHER AUTHORITIES

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ISSUES PRESENTED

1) Did police officers have probable cause or reasonable suspicion to stop Defendant-Appellant Antonio D. Brown's car based on their observation that one of three bulbs in the car's driver's side tail lamp was not functioning?

The circuit court held the stop was proper. The court of appeals reversed, concluding that a tail lamp with two of three bulbs functioning was "'in good working order'" under Wis. Stat. § 347.13(1). *State v. Brown*, No. 2011AP2907-CR, decision (Ct. App., Dist. I, Jan. 15, 2013) (Pet-Ap. 101-11); s*ee State v. Brown*, 2013 WI App 17, ¶¶ 19-20, 346 Wis. 2d 98, 827 N.W.2d 903.

2) Did police officers have reasonable suspicion to perform the protective search of Brown's car in which they found a gun?

The circuit court determined the search was proper. Brown did not challenge the search in the court of appeals. In its order granting review in this case, this court asked the parties to address "whether *Arizona v. Gant*, 556 U.S. 332 (2009) applies to the fact situation in this case and, if so, how[.]" *State v. Brown*, No. 2011AP2907-CR, order (Wis. Sup. Ct., Oct. 15, 2013).

Arizona v. Gant, 556 U.S. 332 (2009), does not apply to this case because the search of Brown's car was not incident to arrest. Instead, the validity of the search is governed by the principles of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Michigan v. Long*, 463 U.S. 1032 (1983), governing protective searches of vehicles for weapons.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for review by the Wisconsin Supreme Court, both oral argument and publication appear warranted.

STATEMENT OF THE CASE AND FACTS

Brown was convicted on his guilty plea to one count of possession of a firearm by a felon (30; Pet-Ap. 112). The conviction arose from City of Milwaukee Police Officers Michael Wawrzonek and William Feely stopping and searching Brown's car in July 2010, and discovering a gun under the front passenger seat (2:1; 40:13-14 (using complaint as factual basis for Brown's plea)). Brown was in the back seat when the car was stopped (2:1). Willie Lipsey was driving the car, and a female acquaintance of Brown's was in the front passenger seat (39:6; Pet-Ap. 162).

A. Testimony at the hearing on Brown's suppression motion.

Brown moved to suppress the gun on the grounds that police did not have reasonable suspicion or probable cause to stop the car, and that the search violated *Gant* (9).

At the hearing on Brown's motion, Wawrzonek testified that on July 3, 2010, he and Feely were on routine patrol in an area where he had been involved with drug and firearm investigations in the past, describing it as a "hot bed" of violent crime, including shootings and a "high density of armed robberies" (38:4, 6-7; Pet-Ap. 121, 123-24). He said around 9:30 p.m., they observed a 1977 Buick Electra with a "defective tail light," specifically, that one of the three red panels on the car's driver's side tail lamp was out (38:5-6, 10; Pet-Ap. 122-23, 127). He and Feely stopped the vehicle based on the defective lamp, though the car was pulling to the side of the street

and parking as they did so (38:5, 10-11; Pet-Ap. 122, 127-28).

Wawrzonek said there were three people in the car, and Brown was seated alone in the back seat (38:7; Pet-Ap. 124). As they approached, Wawrzonek saw "a lot of movement" from Brown, in particular, that he was bending forward and to his right (38:8; Pet-Ap. 125). He and Feely yelled for the occupants to show their hands, and while the persons in the front seat complied, Brown did not (38:8; Pet-Ap. 125). Instead, Wawrzonek testified, Brown continued to lean forward (38:8; Pet-Ap. 125). As he and Feely approached the car, Feely was able to illuminate the car's interior with a flashlight, and told Wawrzonek that Brown was kicking something underneath the seat (38:9; Pet-Ap. 126). They removed the occupants from the car and Feely searched it, finding the gun (38:9, 20; Pet-Ap. 126, 137).

Feely testified that he and Wawrzonek were on patrol on the night of July 3, 2010, in an area where there had been numerous armed robberies and complaints of drug dealing, when they stopped a 1977 Buick Electra for a "[d]efective tail lamp" (38:25-26; Pet-Ap. 142-43). Feely said the "driver['s] side middle" red tail lamp was out (38:26; Pet-Ap. 143). After the stop, Feely said he illuminated the passenger compartment of the vehicle and saw Brown moving around in the back seat (38:27-28; Pet-Ap. 144-45). Feely testified that as he approached the vehicle, Brown "raised his body off the seat and was making movements and then leaned forward toward the passenger side of the floor board. Then as I moved closer he was making a kicking motion underneath the passenger seat" (38:28; Pet-Ap. 145).

Feely said that he then ordered the occupants to show their hands; the two in the front seat complied, while Brown did not (38:29; Pet-Ap. 146). Feely testified he could see in the car using the light from his flashlight, the spotlight on the squad car, and a street light (38:29-30; Pet-Ap. 146-47). He advised Wawrzonek and another officer who had arrived at the scene that Brown was kicking something underneath the seat (38:29-30; Pet-Ap. 146-47). Feely said he observed Brown kicking a "small wooden object" under the seat, but did not know what it was (38:29; Pet-Ap. 146). Feely testified that Brown eventually raised his hands, and also placed his foot under the front seat so the wooden object was not visible (38:30; Pet-Ap. 147). After the occupants were out of the car, Feely looked under the seat where Brown had kicked the object and discovered a .38 Taurus revolver (38:31; Pet-Ap. 148).

Lipsey testified at the hearing that he was driving Brown's car the night of the stop because Brown was drunk (39:6-7; Pet-Ap. 162-63). He said that before the stop, they had gone to a gas station to get gas (39:7; Pet-Ap. 163). Lipsey said that while there, he saw the tail lamp structure and it was operational (39:7; Pet-Ap. 163). He testified he knew this "because both lights, you have to pull down the license plate to get to the gas. It's in between both of the lights, so you have to pull it down to get to the gas pump" (39:7; Pet-Ap. 163). Lipsey testified he left the car running while he filled it with gas (39:17; Pet-Ap. 173).

Lipsey also identified two photographs of the car's rear lighting (39:8-9; 45, Exs. 3-4; Pet-Ap. 164-65). One shows the entire back end of the

car (45, Ex. 3). Looking at the photo, Lipsey explained that the car "has red lights on both sides, and a white light is the reverse light, and the middle light is a brake light. And it has two lights on the sides, which would be the park lights" (39:8; *see also* 39:15-16; Pet-Ap. 164, 171-72). The other photo shows the driver's side lighting with the plastic lens removed and the light bulbs exposed (45, Ex. 4). The three bulbs closest to the left side of the car are lit, while the one closest to the license plate is not (45, Ex. 4). Lipsey said the first and third lights to the left are "park lights" that are lit when the car is in park, and the middle bulb was a brake light that lights when the brakes are engaged (39:9, *see also* 39:15-16; Pet-Ap. 165, 171-72). Lipsey testified that he knew all of the lights were operational on the night of the stop because he saw them at the gas station (39:7, 9-10; Pet-Ap. 163, 165-66).

Lipsey said that he drove home after leaving the gas station (39:10; Pet-Ap. 166). He testified that as soon as he parked at his residence, there were "police everywhere" and they removed him and the others from the car (39:10-11; Pet-Ap. 166-67).

B. The circuit court's decision.

The court denied Brown's suppression motion (38:28-34; Pet-Ap. 145-51). It first summarized Wawrzonek's, Feely's, and Lipsey's testimony (39:28-31; Pet-Ap. 184-87). It then said it found both officers credible, stating,

> [b]oth officers testified about the defective tail lamp. And I think it's important that

> Officer Wawrzonek specifically said it was one of three lights on the driver's side. In looking at the picture, there are three lights that we're talking about here, that fourth one is the reverse light, as I was told in looking at the pictures. So he specifically is saying that one of those three lights was out.

(39:31-32; Pet-Ap. 187-88).

The court further found that Lipsey's testimony that the lighting was fully operational was not credible:

> I don't think it's credible that Mr. Lipsey remembers whether his lights were working or not at the time. No officer had stopped them to know what day you looked at your lights, and whether or not one of them was out or not makes no sense. . . . I just think people do not pay attention to that type of thing on a regular basis, particularly to a day, and I just don't find that credible.

(39:32; Pet-Ap. 188).

Brown's attorney pointed out to the court that based on Lipsey's testimony, the middle bulb on the tail lamp was a brake light and would not necessarily be illuminated when the tail lamp was on (39:35; Pet-Ap. 191). Thus, he argued, the officers were incorrect in their belief that the tail lamp was defective based on their observation of the unlit bulb (39:35; Pet-Ap. 191). The court reiterated that it did not find credible Lipsey's testimony about which lights were functioning (39:35-36; Pet-Ap. 191-92).

At the plea hearing, the court clarified its findings and addressed the issue raised by

counsel. It said that even if the unlit bulb was a brake light, the officers could still have reasonably believed it should have been lit and stopped Brown's car. Specifically, the court said:

> [I]f the officers even reasonably believed that a light was out even if it's later shown to be not out, it forms the basis of a stop. I thought of that afterwards, that, you know, sometimes an officer could be mistaken given the age of a car as to which lights are supposed to be on and which ones aren't. Just stopping a car based on that, that could give them a basis if they believed that the taillight was out even if it's later to be shown that somehow that that light is supposed to not be on at that time. I don't think it's a fatal flaw in the stop itself if the officers were in fact mistaken. I'm not saying that they were, but I wanted to add that as far as [the] analysis goes in my mind because I did think about that later.

(40:7-8; Pet-Ap. 197-98).

The court also held that Brown's actions after the stop justified searching the car:

> Now, once they get out of the car and they see him moving around and making a specific bending motion forward and to the right, his failure to put his hands in the air when ordered to do so, and specifically seen trying to kick something underneath the seat that Officer Feely described as a wooden object that then they could no longer see I think gives those officers every reason after this stop . . . they have every right at this point to get those people out of the car and to make sure that that's not a weapon.

(39:33; Pet-Ap. 189).

The court also determined that *Gant* did not apply, saying that case did not require the officers to put their safety at risk by not allowing them to check whether there was a weapon in the car

> when a defendant or a person in the back, at the time not a defendant yet, fails to put up his hands, is seem specifically making a motion where that object is, the object is a wooden – like a wooden handle of a gun, and it's kicked under the seat as the officers approach, and the area is known for armed robberies.

(39:33-34; Pet-Ap. 189-90).

The court also said the officers had "every right to believe that there was a weapon or something that could harm them under that seat at that time" (39:34; Pet-Ap. 190). It further noted the limited scope of the search, saying Feely had looked only in the area where he had seen Brown kicking the object (39:34-35; Pet-Ap. 190-91).

C. Brown's postconviction proceedings.

After he pled guilty, Brown filed a motion for postconviction relief in which he argued that the stop was invalid because, even if the officers were correct that one of the tail lamps was defective, it did not amount to a violation of Wis. Stat. § 347.13(1) (28:4-5).[1] That statute provides

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[1] Brown also sought 209 days of sentence credit in his postconviction motion (28:6-7). The circuit court granted him 195 days (29:3-5). In the court of appeals, Brown claimed he was entitled to the full 209 days he had (footnote continued)

"[n]o vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order." Wis. Stat. § 347.13(1).

In particular, Brown argued that the statute did not require that all tail lamps on a vehicle be in good working order, only that two of them meet this requirement (28:4). He claimed that the car had four tail lamps, two on each side of the car (28:4). Brown maintained that even if the middle light was out on the driver's side, the car still had two tail lamps that were lit and in good working order, which is all Wis. Stat. § 347.13(1) requires (28:4-5).

Brown also asserted that his trial counsel was ineffective for not making this argument (28:5-6).

The circuit court denied Brown's motion (29; Pet-Ap. 113-17). It held that even had Brown or his attorney argued there was no violation of Wis. Stat. § 347.13(1), its decision on the suppression motion would have been the same. It stated:

> The court based its decision on the officers' reasonable belief that one of the lights on the vehicle was inoperable or defective. The court referenced the fact that the age of the

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requested, and the State conceded that he was (Brown's court of appeals' brief-in-chief at 8-11; State's court of appeal's brief-in-chief at 3-7). Should Brown continue to request the additional fourteen days of sentence credit in this court, the State will again concede that he should receive it.

> car might have a bearing on an officer's reasonable belief, and even if it is shown later on that a particular light wouldn't necessarily have been operational, it doesn't affect their reasonable belief at the time of the stop. The court's decision was based on the officers' objective viewing of the vehicle, and therefore, reference by counsel to sec. 347.13(1), Stats., would not have altered the outcome of the court's findings and conclusions.

(29:2-3; Pet-Ap. 114-15).

D. The court of appeals' decision.

Brown appealed his conviction and the circuit court's order denying his postconviction motion to the court of appeals (31). On appeal, he argued the officers lacked reasonable suspicion or probable cause to stop the car because its tail lamps were not in violation of Wis. Stat. § 347.13(1), and his trial counsel was ineffective for failing to make this argument about the stop (Brown's court of appeals brief-in-chief at 12-16).

The court of appeals reversed. *See Brown*, 346 Wis. 2d 98, ¶ 1. The court determined that the issue in the case was whether the officers had probable cause to stop the car, rather than reasonable suspicion, because they believed the burned-out tail lamp bulb was an equipment violation. *Id.* ¶ 15. It also noted that Brown was alleging that the officers made a mistake of law in performing the stop because he claimed Wis. Stat. § 347.13(1) does not require all tail lamps be lit. *Id.* ¶ 17. The court held:

¶ 19 The parties agree with the circuit court's finding that the police officers stopped the vehicle because "the middle" rear tail light on the driver's side of the vehicle was unlit. It is undisputed that both the first and the third rear light bulbs on both the driver's side and the passenger's side (totaling four lights) were lit. The driver testified, and his testimony is undisputed, that those four lights were lit whenever the vehicle was in motion, and therefore, they were the lights which designated the rear of the vehicle, to wit, all four of the lights which made up the vehicle's two tail lamps were in working order. [footnote omitted].

¶ 20 Brown argues that even if the second light was unlit and was part of the vehicle's tail lamp, when a vehicle's tail lamp is made up of three lights, and two of those lights are lit, the tail lamp is "in good working order" as required by WIS. STAT. § 347.13(1). As such, Brown contends that the police officers had no basis to stop the vehicle and the stop was unconstitutional. We agree.

¶ 21 A tail lamp with one of three light bulbs unlit does not violate WIS. STAT. § 347.13(1) when it otherwise meets the statutory definition of a tail lamp. The statute does not require that a vehicle's tail lamps be fully functional or in perfect working order. It only requires "good working order." *See id.* Here, the two lit light bulbs making up the driver's side tail lamp satisfied the definition of a tail lamp as "a device to designate the rear of a vehicle by a warning light." *See* WIS. STAT. § 340.01(66). Because the two lit light bulbs on the rear driver's side of the vehicle were sufficient to designate the rear of the vehicle to a vehicle travelling behind it, the officers did not have probable cause of a traffic

> violation and the stop was unconstitutional. The officers mistakenly believed that the law required all of the tail lamps light bulbs to be lit; and "a lawful stop cannot be predicated upon a mistake of law." *See Longcore*, 226 Wis. 2d at 9. As such, we reverse.

Id. ¶¶ 19-21.

SUMMARY OF ARGUMENT

This court should reverse the court of appeals' decision that the stop of Brown's car was unconstitutional. The court's conclusion that under Wis. Stat. § 347.13(1), a tail lamp made up of three lights is in good working order when only two of the lights are lit is wrong. "Good working order" is properly interpreted to mean that the tail lamp is functioning as it is supposed to, that is, with all of its component lights lit. The court of appeals' standard is unworkable and gives little guidance to law enforcement, the public, and courts in determining whether a tail lamp is in good working order. The State's interpretation of § 347.13(1) is clear, consistent with other statutes, the administrative code, a past decision of the court of appeals and decisions of other courts.

Further, this court should conclude that the officers acted properly when they stopped Brown's car. If the officers were correct that the unlit light was part of the tail lamp, then, applying the State's interpretation of Wis. Stat. § 347.13(1), they had probable cause to stop the car because they observed that its tail lamps did not comply with the law. Further, even if the officers were wrong that the unlit light was a tail lamp, they acted reasonably in believing that it was, and had

probable cause or reasonable suspicion to believe the tail lamp was in violation of § 347.13(1).

This court should also conclude that the officers had reasonable suspicion to perform a protective search of the car for weapons pursuant to *Long*, 463 U.S. 1032. That case, and not *Gant*, controls whether the search was constitutional. Under all the circumstances of the stop, the officers could reasonably suspect there was a weapon in Brown's car and undertake a search to ensure their safety.

ARGUMENT

I. THE OFFICERS PROPERLY STOPPED BROWN'S CAR BECAUSE WIS. STAT. § 347.13(1) REQUIRES THAT ALL THE BULBS IN A CAR'S TAIL LAMP BE LIT TO BE IN GOOD WORKING ORDER.

A. Applicable law and standard of review.

1. Traffic stops.

"'The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment.'" *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (quoting *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App.

1996) and citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996)).

"An automobile stop must not be unreasonable under the circumstances." *Popke*, 317 Wis. 2d 118, ¶ 11 (citations omitted). "A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed." *Id.* (internal quotation marks and citations omitted).

"Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that a traffic violation has occurred." *Id*. ¶ 14 (internal quotation marks and citations omitted). The information must lead a reasonable officer to think that guilt is more than a possibility. *Id*. (citation omitted). It does not have to be evidence to establish proof beyond a reasonable doubt or even that guilt is more probable than not. *Id*. (citation omitted).

If probable cause does not exist, law enforcement may still conduct a traffic stop if the totality of the circumstances provides grounds to reasonably suspect that a crime or traffic violation has been or will be committed. *Id*. ¶ 23 (citation omitted). There must be "specific and articulable facts which, taken together with rational inferences from those facts" that reasonably warrant the stop. *Id*. (citing *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634). "The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was

committing, or is about to commit a crime." *Popke*, 317 Wis. 2d 111, ¶ 23 (citation and internal quotation marks omitted). "An officer's inchoate and unparticularized suspicion or hunch, however, will not give rise to reasonable suspicion." *Id.* (internal quotations omitted).

"Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." *Id.* ¶ 10 (citing *State v. Mitchell*, 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992) and *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106). A finding of constitutional fact consists of the circuit court's findings of historical fact, which this court reviews under the clearly erroneous standard, and the application of these facts to constitutional principles, which this court reviews de novo. *Popke*, 317 Wis. 2d 111, ¶ 10 (citation omitted).

2. Statutory interpretation.

"The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238 (citations and internal quotation marks omitted). "[S]tatutory interpretation begins with the language of the statute." *Id.* (citation omitted). "With the exception of technical or specially-defined words, statutory language is given its common and ordinary meaning." *Id.* (citation omitted). If the language is plain, this court's inquiry ends. *Id.* (citation omitted).

Determining a statute's plain meaning requires more than focusing on a single sentence

or a portion of one. *Id.* ¶ 43 (citation omitted). Statutes should be interpreted in the context they are used, "'not in isolation but as part of a whole.'" *Id.* (quoted source omitted). Statutes should also be construed reasonably to avoid absurd results or an interpretation that contravenes the statute's purpose. *Id.* (citation omitted).

Statutory interpretation is a question of law this court reviews de novo. *Id.* ¶ 37 (citation omitted).

B. The court of appeals improperly concluded that a tail lamp with two of three bulbs lit is in good working order under Wis. Stat. § 347.13(1).

1. The court's interpretation is incorrect.

This court should first conclude that the court of appeals improperly interpreted Wis. Stat. § 347.13(1) in holding that the sixty-six percent functional tail lamp in Brown's car was in good working order. Section 347.13(1) provides:

> No person shall operate a motor vehicle, mobile home or trailer or semitrailer upon a highway during hours of darkness unless such motor vehicle, mobile home or trailer or semitrailer is equipped with at least one tail lamp mounted on the rear which, when lighted during hours of darkness, emits a red light plainly visible from a distance of 500 feet to the rear. No tail lamp shall have any type of decorative covering that restricts the amount of light emitted when the tail

> lamp is in use. No vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order. This subsection does not apply to any type of decorative covering originally equipped on the vehicle at the time of manufacture and sale.

The court of appeals interpreted "good working order" in reference to the statutory definition of "tail lamp," which Wis. Stat. § 340.01(66) states is a "device to designate the rear of a vehicle by a warning light." *Brown*, 346 Wis. 2d 98, ¶¶ 18, 21. It concluded that even assuming the unlit bulb was part of the tail lamp, the lamp was in good working order because it designated the rear of Brown's car. *Id*. ¶¶ 20, 21. It also determined that good working order did not mean "fully functional or in perfect working order." *Id*. ¶ 21. Thus, because there was nothing legally wrong with the tail lamp, the court held the officers impermissibly stopped Brown's car based on a mistake of law. *Id*. ¶ 21 (citing *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999).

The court of appeals' interpretation of Wis. Stat. § 347.13(1) is contrary to the plain meaning of the statute's language. "Working order" means "a condition of a machine in which it functions according to its nature and purpose." *Webster's Third New Int'l Dictionary* 2635 (1986). *See State v. Sample*, 215 Wis. 2d 487, 499, 573 N.W.2d 187 (1998) (court may refer to dictionary definitions to establish the common and approved usage of a word in statute, even if it is not ambiguous). The nature of the tail lamp on

Brown's car is that it consists of three individual bulbs. The purpose of the tail lamp is to illuminate the tail end of the car using those three bulbs. When one of those bulbs is not lit, the lamp is not functioning according to its nature or purpose.[2]

The court's interpretation also conflicts with related statutes and administrative code sections. Wisconsin Stat. § 347.06(3) requires that a vehicle's operator keep all required lamps "reasonably clean and in proper working condition." Similarly, the code requires that tail lamps "shall be maintained in proper working condition and in conformity with this section and s. 347.13(1) and (2), Stats." Wis. Admin. Code § Trans. 305.16(2) (2013). A tail lamp with an unlit bulb has not been kept or maintained in proper working condition.

Further, Wis. Stat. § 347.13(4) requires that tail lamps be wired to be lighted whenever headlamps or auxiliary lighting lamps are lighted. And, Wis. Admin. Code § Trans. 305.16(3) requires that in tail lamps "all wiring and connections shall be maintained in good condition." If a defect in the tail lamp's electrical system was the cause of the lamp having an unlit bulb, either or both of these sections would be violated. Yet, under the court of appeals' decision, an officer could not stop

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[2] The MacMillan Dictionary provides a clearer definition, explaining that "working order" means "working correctly, without any problems." *See* http://www.macmillandictionary.com/us/dictionary/american/working-order (last visited Nov. 11, 2013). A tail lamp with an unlit bulb would not satisfy this definition.

a car to investigate whether this is the case if two of the three lights in the tail lamp are operational.

Additionally, the court of appeals' opinion conflicts its earlier decision in *State v. Olson*, No. 2010AP149-CR (Wis. Ct. App., Dist. IV, Aug. 5, 2010) (Pet-Ap. 199-202).[3] In *Olson*, the defendant was stopped driving a car with a total of four lamp light bulbs, two on each side. *Id.* ¶¶ 2, 12. One of bulbs on the right side was burned out. *Id.* The court of appeals held the stop was proper because the officer had probable cause to believe the burnt-out bulb violated Wis. Stat. § 347.13(1). *Id.* ¶¶ 9-12. It noted that the statute did not state that each bulb constituted a tail lamp. *Id.* ¶ 11. The court explained that on Olson's vehicle, the tail lamps consisted of two bulbs located on the right and left sides of the rear end, and that "[t]hese clusters of bulbs function together as a single device," within the meaning of Wis. Stat. § 340.01(66). *Id.* ¶ 11. The court held that because it was undisputed that one of the bulbs on the right lamp was burnt out, that lamp was not in good working order. *Id.* ¶ 12.

Olson conflicts with the court of appeals decision in this case.[4] It holds that a tail lamp

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[3] *Olson* is an unpublished decision issued by a single judge after July 1, 2009, and may be cited for its persuasive authority. Wis. Stat. § 809.23(3)(b). The State has included a copy of the decision in its appendix. Wis. Stat. § 809.23(3)(c).

[4] Two other unpublished court of appeals' decisions reach the same conclusion as *Olson*. Though issued by a (footnote continued)

with a nonfunctional bulb is not in good working order under Wis. Stat. § 347.13(1). Here, the court said that an unlit bulb does not violate § 347.13(1) if the tail lamp is still capable of designating the car's rear end. *Brown*, 346 Wis. 2d 98, ¶ 21. The only apparent way to reconcile the cases is to say a sixty-six percent functional lamp, as in this case, is in good working order, while a fifty percent functional lamp, as in *Olson*, is not. As discussed in the next section, this is a confusing and unworkable standard that offers little guidance to the public, law enforcement, and courts.

Finally, other state courts have interpreted the phrase "good working order" similar to *Olson* in cases involving vehicle lamps. *See People v. Blue*, No. A119530, 2008 WL 3890038, *3 (Cal. Ct. App. Aug. 22, 2008) (Pet-Ap. 203-06) (tail light with bulb that it not functioning is not in good working order even though light may otherwise comply with other requirements of vehicle code); *People v. Bradford*, No. D051227, 2008 WL 2316490, *3-4 (Cal. Ct. App. June 6, 2008) (Pet-Ap. 207-12) ("when a stoplamp is designed to function using two light bulbs, both of those bulbs must be working for the stoplamp to be said to be in good working order"); *State v. Stephan*, 2009 WL 815994 (N.J. Super. A.D. Mar. 31, 2009) (Pet-Ap. 213-15) (tail lights were not in good working order where one light was brighter than the other). This court should follow *Olson* and these cases, and conclude the court of appeals misinterpreted Wis. Stat. § 347.13(1).

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single judge, both decisions were issued before 2009 and are not citable as persuasive authority.

2. The court of appeals' interpretation of Wis. Stat. § 347.13(1) creates a confusing standard.

The court of appeals' interpretation of Wis. Stat. § 347.13(1) also creates a confusing and unreasonable definition of "good working order." The public, law enforcement, and courts will have a difficult time applying the decision to the varieties of tail and other vehicle lamps that are required to be in good working order. *See* Wis. Stat. § 347.14(1) (where vehicle equipped with two stop lamps, they must be maintained in good working order). Requiring that all bulbs in a lamp be functioning provides a simple and clear standard.

Under the court of appeals interpretation of Wis. Stat. § 347.13(1), a tail lamp with sixty-six percent of its bulbs functioning is in good working order as long as it is capable of designating the rear of the vehicle by a warning light. *Brown*, 346 Wis. 2d 98, ¶ 21. Presumably, the lamp would also have to satisfy the requirements listed in § 347.13(1), which mandate that the lamp be mounted on the rear of the vehicle and emit a red light visible from 500 feet during hours of darkness.

The court's interpretation is confusing. It does not explain whether the percentage of functional bulbs is controlling or whether the tail lamp meeting the statutory requirements is what is relevant. If it is the former, the decision does not explain the minimum percentage of bulbs that must be for a lit lamp to be in good working order.

Olson holds that fifty percent is not enough, but it is not precedential, and in any event, the court's decision in this case does not explain what to do about lamps that are between fifty and sixty-six percent functional.

If all that matters is whether the lamp meets the statutory definitions, this too is problematic. Law enforcement would be unable to stop motorists to inform them that a bulb on their tail lamp was not functioning unless the officer made sure that the lamp was not capable of designating the car's rear end from 500 feet away in the dark. Further, it is not obvious that motorists would be willing to ensure their tail lamps met this requirement, which would be more difficult than simply examining whether all tail lamp bulbs were working. Requiring all bulbs to be lit would promote maintenance of vehicle safety equipment in furtherance of the vehicle code's primary purpose of promoting safety on the highways, *see State v. Hart*, 89 Wis. 2d 58, 66, 277 N.W.2d 843 (1979); *see also Ziegler*, 342 Wis. 2d 256, ¶ 43 (statute should be construed to avoid interpretation that contravenes its purpose). The court of appeals' decision is unclear and establishes a confusing standard. This court should reverse it.

3. The officers had probable cause to stop Brown's car.

The court of appeals misinterpreted Wis. Stat. § 347.13(1). All bulbs in a tail lamp must be lit for it to be in "good working order." Thus, if the unlit bulb on Brown's car was part of the tail lamp, Wawrzonek and Feely had probable cause to

stop the car because they observed a violation of § 347.13(1). *Popke*, 317 Wis. 2d 118, ¶ 14. This court should conclude the stop was proper.

C. Even if the officers were mistaken that the bulb was part of the tail lamp, they still could properly stop Brown's car.

This court should also conclude that even if Wawrzonek and Feely were wrong that the unlit bulb was part of the tail lamp, they could still stop Brown's car because they reasonably believed the bulb was part of the tail lamp, and thus, still had probable cause, or at least reasonable suspicion, for the stop under the correct interpretation of Wis. Stat. § 347.13(1).

The circuit court and the court of appeals considered whether the officers were mistaken about the unlit bulb being part of the tail lamp, but did not make a specific finding whether the bulb was part of the tail or brake lamp. The circuit court found credible the officers' testimony that Brown's car had a defective tail lamp (38:5, 26; 39:31-32; Pet-Ap. 122, 143, 187-88). It also found Lipsey's testimony that he observed the tail lights at the gas station not credible, but did not make the same finding about his testimony that the unlit bulb was a brake light (38:35-36; Pet-Ap. 152-53). The court later said that that even if the officers were wrong that the bulb was part of the tail lamp, they still could suspect it was and validly stop the car (40:7-8; Pet-Ap. 197-98). The court of appeals assumed the bulb was part of the tail lamp in construing Wis. Stat. § 347.13(1). *Brown*, 346 Wis. 2d 98, ¶¶ 19 n.5, 20-21.

However, it also noted that the circuit court had not specifically found incredible Lipsey's testimony the bulb was a brake light, only his testimony that about his observations at the gas station. *Brown*, 346 Wis. 2d 98, ¶ 19 n.5.

This court should conclude that, regardless of whether the officers were correct that the bulb was part of the tail lamp, they still could stop Brown's car.

While a vehicle stop may not be based on an officer's mistake of law, *see Longcore*, 226 Wis. 2d at 9, as a general rule, courts decline to apply the exclusionary rule to an officer's good-faith mistake of fact. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990) (to satisfy Fourth Amendment's reasonableness requirement, factual determinations of officer executing a search or seizure under exception to warrant requirement must not always be correct, but rather, must be reasonable); *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000) (upholding stop based on officer's mistake of fact about whether length of crack in windshield was long enough to violate statute).

Although no published Wisconsin decision appears to have addressed the effect of an officer's good-faith mistake of fact on a traffic stop, two recent unpublished decisions from the court of appeals have held that such an error does not invalidate a stop. In *State v. Reierson*, No. 2010AP596-CR (Wis. Ct. App., Dist. IV, Apr. 28, 2011) (Pet-Ap. 216-19), the officer stopped a vehicle for an expired registration based on his misreading of the vehicle's license plate. *Id.* ¶ 3. The court held the officer's good-faith mistake did not invalidate the stop. *Id.* ¶ 11.

Similarly, in *County of Sheboygan v. Bubolz*, Nos. 2010AP2995, 2010AP2996, 2009AP2997 (Wis. Ct. App., Dist. II, Apr. 6, 2011) (Pet-Ap. 220-23), an officer saw a vehicle drive though an area marked with "'Road Closed—Local Traffic Only,'" signs and stopped the driver for failing to obey an official traffic sign. *Id.* ¶ 2. The driver claimed the sign was not official. *Id.* ¶¶ 5, 10. The court of appeals held that even if this was the case, the officer could reasonably believe the sign was official, and had reasonable suspicion to stop the car. *Id.* ¶ 13. This court should follow *Reierson and Bubolz*, and conclude that, an officer may still have probable cause or reasonable suspicion to stop a vehicle even if the officer makes a good-faith mistake about a relevant fact.[5]

Here, Wawrzonek and Feely could reasonably believe the light was part of the tail lamp. Feely testified he was not familiar with Brown's car before the stop (38:26-27; Pet-Ap. 143-44). He said he saw that the middle, driver's side red light was out (38:26; Pet-Ap. 143). Wawrzonek testified one of the three panels on the driver's side was out (38:5; Pet-Ap. 122). They both testified that the stop was for a defective tail lamp (38:5, 26; Pet-Ap. 122, 143). At the time of the stop, Brown's car was more than thirty years' old. In light of the officers' unfamiliarity with the car and its age, it would be reasonable for them to

[5] Both *Reierson* and *Bubolz* are unpublished decisions issued by a single judge after July 1, 2009, and may be cited for their persuasive authority. Wis. Stat. § 809.23(3)(b). The State has included copies of the decisions in its appendix. Wis. Stat. § 809.23(3)(c).

suspect that all three of the lights constituted the tail lamp. Because Wis. Stat. § 347.13(1) requires that all bulbs in a tail lamp be lit for it to be in good working order, the officers reasonably suspected Brown's car was in violation of this statute and could properly stop it.[6]

[6] Although not relevant to whether Wawrzonek and Feely reasonably thought the unlit bulb was part of the tail lamp, Lipsey's testimony at the suppression hearing did not clearly establish that the bulb was part of the brake light. Lipsey testified that he saw all of the driver's side lights operational at the gas station (39:9). He said this while viewing Exhibit 4, which shows the three leftmost bulbs on the driver's side lit, including the one Lipsey claimed was the brake light (39:9; 45, Ex. 4). Thus, for Lipsey's testimony to establish that the unlit bulb was a brake light, not only would the car have had to been running while he put gas in it, but someone would have had to have been pressing the brake pedal while he did so (39:19). Additionally, there was no testimony that someone was pressing the brake pedal when Exhibit 4 was created the week before the hearing (39:8).

Additionally, both Wawrzonek and Lipsey testified that the car was parking when the officers stopped it (38:11; 39:10). It would be likely that a functioning brake light would have come on while this was happening, although there was no testimony at the suppression hearing on the matter.

II. THE OFFICERS HAD REASONABLE SUSPICION TO SEARCH BROWN'S CAR FOR A WEAPON.

A. *Gant* does not apply to this case.

As noted, this court asked the parties to brief whether *Gant* applies to this case and, if so, how. *Gant* does not apply to this case because the search of Brown's car was not incident to an arrest. *See State v. Smiter*, 2011 WI App 15, ¶ 16 n.4, 331 Wis. 2d 431, 793 N.W.2d 920. Instead, the search was a protective search for weapons pursuant to *Long*, 463 U.S. 1032, and one that was justified under the circumstances. *See State v. Williams*, 2010 WI App 39, ¶¶ 22-25, 323 Wis. 2d 460, 781 N.W.2d 495 (*Gant* does not govern protective searches of vehicles for weapons; *Long* is still good law after *Gant*); *State v. Bailey*, 2009 WI App 140, ¶¶ 44-45, 321 Wis. 2d 350, 773 N.W.2d 488 (same).

B. Applicable law and standard of review.

During a traffic stop, an officer may conduct a protective search of the passenger compartment of the vehicle if the officer reasonably suspects the person is dangerous and may gain immediate access to a dangerous weapon. *Long*, 463 U.S. 1049-50. Reasonable suspicion requires that the officer be "'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Johnson* 2007 WI 32,

¶ 21, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *Terry*, 392 U.S. at 21).

> The test is an objective one: "[W]hether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger" because the person may be armed with a weapon and dangerous. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience."

Johnson, 299 Wis .2d 675, ¶ 21 (citation omitted).

Courts resolve the propriety of protective searches on a case-by-case basis, examining the totality of the circumstances. *Id*. ¶ 22. The reasonable suspicion requirement seeks to balance the safety of law enforcement officers with the right of persons to be free from unreasonable government intrusions. *Id*. (citation omitted).

Whether a protective search is valid is a matter of constitutional fact. *Bailey*, 321 Wis. 2d 350, ¶ 26. This court will uphold the trial court's factual findings unless they are clearly erroneous, but independently reviews whether those facts satisfy the constitutional standard. *Id*.

C. Discussion.

The officers had reasonable suspicion to allow Feely to search Brown's car for a weapon. Both officers described the area of the stop as

known for violent crime (38:6-7, 31-32; Pet-Ap. 123-24, 148-49). As the officers approached the car, they observed Brown bending forward and to the right side of the floorboard (38:8, 28; Pet-Ap. 125, 145). Feely yelled for the occupants to show their hands, but Brown did not comply, and Wawrzonek said he continued to lean forward (38:8, 29; Pet-Ap. 125, 146). Feely was able to see in the car, and saw Brown kicking a small wooden object under the front seat (38:29-30; Pet-Ap. 146-47). Brown eventually raised his hands, but kept his foot under the seat so the object was not visible (38:30; Pet-Ap. 147). The officers removed Brown from the car, placed him in handcuffs, and detained him for not complying with the order to show his hands (38:14; Pet-Ap. 131). Feely looked where Brown had kicked the object and found a gun (38:31; Pet-Ap. 148). The circuit court found the officers credible (39:31; Pet-Ap. 187).

The totality of the circumstances justified Feely's protective search of the car. The stop took place at night in what the officers perceived as a high-crime area. The time of day and the area's high-crime status are relevant factors in justifying a protective search. *State v. Kyles*, 2004 WI 15, ¶ 62, 269 Wis. 2d 1, 675 N.W.2d 449; *State v. Morgan*, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995). Brown engaged in repeated furtive movements by leaning forward, suggesting that he was attempting to hide something. Surreptitious movement by a person in a vehicle immediately after a traffic stop may be a substantial factor in establishing reasonable suspicion to believe the occupants have access to weapons. *Johnson*, 299 Wis. 2d 675, ¶ 37.

Once the officers saw Johnson's movements, they ordered him to show his hands. He did not and continued to lean forward. A suspect's refusal to show his hands to police "is an important factor for a court to consider under the totality of the circumstances" in assessing the validity of a frisk. *Kyles*, 269 Wis. 2d 1, ¶ 50. When Feely got close enough to the car, he saw Brown kicking a wooden object under the front seat. Many guns have wooden handles, and it was reasonable for Feely to suspect that the object was a weapon based on this and Brown's attempts to conceal it. Brown continued to try to hide the object after he showed his hands, and this also contributed to the suspicion necessary to support the search.

Further, that Brown was only detained and not under arrest at the time of the search also gave the officers an "immediate safety interest in verifying that [Brown] did not have a gun or other weapon." *Williams*, 323 Wis. 2d 460, ¶ 23. "'In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle'" when the encounter is over. *Id*. (quoting *Gant*, 556 U.S. at 352 (Scalia, J., concurring)). Because the car was stopped for a traffic offense, Brown likely would have been returned to the car, and the officers could make sure he would not have access to a gun when he did so. *See also Long*, 463 U.S. at 1050-52 (search may take place even though suspect detained outside of car; officer remains at risk because full custodial arrest has not yet occurred).

Finally, Feely's search was limited to the area he saw Brown kick the gun. This too shows the search was reasonable. *See Long*, 463 U.S. at

1049 (weapon search must be limited to areas in which weapon may be placed or hidden). The protective search of Brown's car for weapons was supported by reasonable suspicion.

CONCLUSION

Upon the foregoing, the State respectfully requests that this court reverse the decision of the court of appeals.

Dated this 14th day of November, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,029 words.

Dated this 14th day of November, 2013.

_____

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of November, 2013.

_____

AARON R. O'NEIL
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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP002907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying Post-Conviction Relief Entered in the Circuit Court for Milwaukee County, the Honorable Rebecca F. Dallet, Presiding

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BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Did police have a lawful basis to conduct a traffic stop when they observed a tail lamp with two lit bulbs and one unlit bulb, where Wisconsin Statutes define a tail lamp as a "device to designate the rear of a vehicle by a warning light" and require the tail lamp to be in "good working order"?

The circuit court denied Mr. Brown's motion to suppress the evidence obtained as a result of the stop. (39:28-36;State's Appx.185-192). The circuit court further denied Mr. Brown's post-conviction motion challenging the circuit court's ruling on the motion to suppress and presenting an alternative argument that counsel was ineffective for failing to argue specifically that the car was not in violation of Wisconsin Statute Section 347.13(1) (which addresses the requirements for tail lamps). (29;State's Appx.113-117).

The Court of Appeals reversed, holding that "[a] tail lamp with one of three light bulbs unlit does not violate Wis. Stat. § 347.13(1) when it otherwise meets the statutory definition of a tail lamp." (Ct. App. Op., ¶ 21)(State's Appx.110). The Court of Appeals explained that the statute "does not require that a vehicle's tail lamps be fully functional or in perfect working order. It only requires 'good working order.'" ***Id.*** The Court explained that "the two lit light bulbs making up the driver's side tail lamp satisfied the definition of a tail lamp as 'a device to designate the rear of a vehicle by a warning light,'" ***id.*** (citing Wis. Stat. § 340.01(66)), and concluded that the officers therefore lacked probable cause to conduct the stop. ***Id.***

2. Did the search of Mr. Brown's car following the stop implicate ***Arizona v. Gant***?

In its order granting review in this case, this Court asked the parties to address "whether ***Arizona v. Gant***, 556 U.S. 332 (2009), applies to the fact situation in this case and, if so, how[.]" (Wis. Sup. Ct. Order., Oct. 15, 2013). Mr. Brown did argue to the circuit court that the search violated ***Gant***. (9;39:26-27;State's Appx.182-183). The circuit court held that ***Gant*** did not apply to the search. (39:33-35;State's Appx.189-191). Mr. Brown did not challenge the search under ***Gant*** in his post-conviction motion or to the Court of Appeals. *See* (28;Brown Ct. App. Initial and Reply Briefs).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to accept review indicates oral argument and publication are likely warranted.

RELEVANT STATUTE

This case involves the interpretation and application of Wisconsin Statute § 347.13(1)[1], which states:

> No person shall operate a motor vehicle, mobile home or trailer or semitrailer upon a highway during hours of darkness unless such motor vehicle, mobile home or trailer or semitrailer is equipped with at least one tail lamp mounted on the rear which, when lighted during hours of darkness, emits a red light plainly visible from a distance of 500 feet to the rear. No tail lamp shall have any type of decorative covering that restricts the amount of light emitted when the tail lamp is in use. No vehicle originally equipped at the time of manufacture with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order. This subsection does not apply to any type of decorative covering originally equipped on the vehicle at the time of manufacture and sale.

STATEMENT OF THE CASE AND FACTS

The State's statement of the case and facts sufficiently frames the issues in this case. Mr. Brown will include additional relevant facts as needed in the argument section of his brief.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise indicated.

ARGUMENT

This case involves one central question: whether the State established that the tail lamp on the driver's side of Mr. Brown's car, which police saw had two lit bulbs and one unlit bulb, violated the traffic statutes to justify the traffic stop. The answer to this question can be found in the plain language of the statutes. As the Court of Appeals held in this case, the statutes define a tail lamp as a "device to designate the rear of a vehicle by a warning light," and simply require the tail lamp to be in "good working order." (Ct. App. Op., ¶ 18,21)(State's Appx. 109-110)(citing Wis. Stat. § 340.01(66);Wis. Stat. § 347.13(1)). Wisconsin Statute Section 347.13(1) also explains when a tail lamp is in "good working order": requiring that the lamp, "when lighted during hours of darkness, emits a red light plainly visible from a distance of 500 feet to the rear." Wis. Stat. § 347.13(1).

Thus, as the Court of Appeals held, "[a] tail lamp with one of three bulbs unlit does not violate Wis. Stat. § 347.13(1) when it otherwise meets the statutory definition of a tail lamp." (Ct. App. Op., ¶ 21)(State's Appx.110). The Court of Appeals applied the plain language of the statute and held that the tail lamp on Mr. Brown's car satisfied the statutory requirements and that therefore the officers lacked a lawful basis to stop the car. ***Id.***

The State now asks this Court to effectively amend the statutes to impose stricter requirements than what the statutes actually require. In so doing, the State confuses a tail lamp that is in "good working order" with a tail lamp that is in perfect condition. Requiring every component of a tail lamp to be in perfect condition would allow police to conduct traffic stops even when the tail lamp satisfies its role under

the plain language of the statute. This Court should uphold the Court of Appeals' decision.

The State also asks this Court to expand the scope of the good faith exception to apply to mistakes of fact in cases involving warrantless searches and seizures. This record, however, does not support that there was any mistake of fact. Further, such an extension would ignore the core purposes of the exclusionary rule. This Court should therefore decline the State's request to extend the scope of the good faith exception to mistakes of fact.

Lastly, this Court asked the parties to address whether ***Arizona v. Gant*** applies to the facts of this case. Mr. Brown agrees with the State that ***Gant*** does not apply to the facts of this case. Insofar as this Court accepted review of this case to address the application of ***Gant***, this Court should dismiss review of the case as improvidently granted.

I. Police Had No Lawful Basis to Stop the Car as the State Failed to Demonstrate that the Tail Lamp Violated the Statutes.

When reviewing a motion to suppress, an appellate court applies a two-step standard of review. ***State v. Pallone***, 2000 WI 77, ¶ 27, 236 Wis. 2d 162, 613 N.W.2d 568, *cert. denied*, 531 U.S. 1175 (2001) (citations omitted). First, an appellate court will uphold a circuit court's findings of historical facts unless those facts are clearly erroneous. ***Id.*** Second, an appellate court reviews *de novo* the application of constitutional principles to those facts. ***Id.***

"Statutory interpretation is a question of law reviewed de novo." ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶ 9, 288 Wis. 2d 573, 709 N.W.2d 447. Statutory interpretation begins with the plain language of the statute.

State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning." ***Id.*** Because "[c]ontext is important to meaning," "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd results." ***Id.***

The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution protect citizens against unreasonable searches and seizures. U.S. CONST., Amend. IV and WIS. CONST., Art 1, § 11. The "temporary detention of individuals" during a traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment. ***State v. Popke***, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (citation omitted). "A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed." ***Id.*** (quoting ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996)).

"Reasonable suspicion is based upon specific and articulable facts that together with reasonable inferences therefrom reasonably warrant a *suspicion* that an offense has occurred or will occur." ***State v. Longcore***, 226 Wis. 2d 1, 9, 594 N.W.2d 412(Ct. App. 1999), *aff'd* 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620 (citing ***Terry v. Ohio***, 392 U.S. 1 (1968))(emphasis in original). "It is insufficient to support an arrest or search, but permits further investigation." ***Id.*** Probable cause, on the other hand, "looks to the totality of the circumstances facing the officer at the time of arrest to

determine whether the officer could have reasonably believed the defendant had committed, or was committing, an offense." ***Id.***

When an officer conducts a traffic stop based on a specific offense, the purported offense "must indeed *be* an offense; a lawful stop cannot be predicated upon a mistake of law." ***Longcore***, 226 Wis. 2d at 9 (emphasis in original).

As the Court of Appeals explained, the issue in this case requires consideration of whether the officers had probable cause to conduct the stop:

> Here, the officers observed that the middle, red light bulb on the rear driver's side of the vehicle was unlit, and stopped the vehicle because they believed that the unlit light bulb constituted an equipment violation. They 'did not act upon a suspicion that warranted further investigation, but on [their] observation of a violation being committed in [their] presence.' As such, the issue before us is whether the officers had probable cause that a law had been broken supporting the stop, not whether there was reasonable suspicion to support the stop.

(Ct. App. Op., ¶ 15)(State's Appx.108)(internal citations omitted).

A. A tail lamp is in "good working order" under Wis. Stat. § 347.13(1) when it designates the rear of the car by a red light plainly visible from 500 feet to the rear.

Here, the officers had no lawful basis to stop the car. The officers testified that they stopped the car because of a "defective tail light"—specifically, because one of three red lights on the driver's side tail lamp was unlit. (38:5-6,10;

State's Appx.122-23,127).[2] Officer Feely testified that the "driver['s] side middle" red light was out. (38:26;State's Appx.143). The circuit court found the officers credible that they saw that the one of the three red lights was unlit. (39:32;State's Appx.188). Nevertheless, as the Court of Appeals held, the statutes do not require each individual component of one tail lamp to be in perfect condition. (Ct. App. Op., ¶ 21)(State's Appx.110).

Wis. Stat. § 347.13(1) provides, in relevant part, that: "[n]o vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in *good working order*." Wis. Stat. § 347.13(1)(emphasis added). Whether or not police had a lawful basis to stop the car therefore turns on what is required for a tail lamp to be in "good working order."

A "tail lamp" "means a device to designate the rear of a vehicle by a warning light." Wis. Stat. § 340.01(66)(*see also* Wis. Stat. §§340.01, explaining that the definitions in that statute apply to statutory chapters including Chapter 347). So, when is a tail lamp in "good working order"? The plain language of the statute provides the answer:

> No person shall operate a motor vehicle, mobile home or trailer or semitrailer upon a highway during hours of darkness unless such motor vehicle, mobile home or trailer or semitrailer is equipped with at least one tail lamp mounted on the rear *which, when lighted during hours of darkness, emits a red light plainly visible from*

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[2] Included in Mr. Brown's appendix are pictures of the rear of Mr. Brown's car that were admitted at the suppression hearing. (44:1)(Exh.D:3-4)(App.101). These pictures were not taken at the time of the stop, but instead a week before the suppression hearing. (39:31;State's App.187).

> *a distance of 500 feet to the rear*. No tail lamp shall have any type of decorative covering that restricts the amount of light emitted when the tail lamp is in use. *No vehicle originally equipped at the time of manufacture with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order.* This subsection does not apply to any type of decorative covering originally equipped on the vehicle at the time of manufacture and sale.

Wis. Stat. § 347.13(1)(emphasis added). Thus, the statute establishes that a tail lamp is in "good working order" when it gives off a red light which can be plainly seen from up to 500 feet behind the car, and further requires that if a car comes with two tail lamps, both tail lamps must be in "good working order."

The State in this case presented no evidence at the suppression hearing to suggest that the driver's side tail lamp was insufficient to designate the rear of the car to the officers. Instead, the officers testified that they conducted the traffic stop because they believed the driver's side tail lamp to be defective because one of three bulbs comprising the lamp was unlit. (38:5-6,10,26;State's Appx.122-23,127,143). But, as the Court of Appeals held, one unlit bulb does not mean that the tail lamp was not *working* as required by the statute:

> A tail lamp with one of three light bulbs unlit does not violate Wis. Stat. § 347.13(1) when it otherwise meets the statutory definition of a tail lamp. The statute does not require that a vehicle's tail lamps be fully functional or in perfect working order. It only requires "good working order." Here, the two lit light bulbs making up the driver's side tail lamp satisfied the definition of a tail lamp as "a device to designate the rear of a vehicle by a warning light."

(Ct. App. Op., ¶ 21)(State's Appx.110)(internal citations omitted).

B. The State's proposed interpretation confuses a "working" tail lamp with a tail lamp in mint condition.

The State's proposed interpretation confuses "good working order" with perfect condition, and in so doing ignores the statutorily-provided requirements for what it means for a tail lamp to be *working*. If the Legislature wishes to amend the statute to create more stringent requirements for drivers in Wisconsin, that is the prerogative of the Legislature—not this Court. *See., e.g.,* ***It's in the Cards v. Fuschetto***, 193 Wis. 2d 429, 437, 535 N.W.2d 11 (Ct. App. 1995)(noting that the court "will not indulge" in "judicial legislation" in order "to change or amend the statutes").

Is a car not "working" if the radio in the car is broken? The answer to that question depends on what it means for a car to be "working." If "working" simply requires that the car get the driver from point A to point B, then a car that can do so is still "working" regardless of whether the radio is functioning. Similarly, a tail *lamp* may be functioning as required under the statute (to designate the rear of the car) even if a specific individual bulb or component that is part of the lamp is not in perfect condition. Thus, the question is not—as the State attempts to argue—one of percentages (i.e. if 66% of bulbs are lit, is that enough? 50%?)—the question is whether the tail lamp was serving its function as required by the statute: to designate the rear of the car to cars behind it. This is what the Court of Appeals held, (*see* Ct. App. Op., ¶ 21)(State's Appx.110), and it is the proper interpretation of the statute.

The State attempts to point to other portions of Chapter 347 and the Administrative Code to support its proposed standard. *See* State's Brief at 19 (discussing Wis. Stat. § 347.06(3)'s requirement that all lamps must be "reasonably clean and in proper *working* condition" and Administrative Code § 305.16(2) requirement that lamps be "maintained in proper *working* condition")(emphasis added). But here too the State ignores the statutory explanation that *working* condition means a tail lamp that is designating the rear of a car by a red light viewable up to the 500 feet required by the statute. *See* Wis. Stat. § 347.13(1).[3]

Contrary to the State's assertions, the text of other statutes within Chapter 347 (Equipment of Vehicles) instead support the Court of Appeals' interpretation of what is required for a tail lamp to be in "good working order." Wisconsin Statute Section 347.13 is not the only time the phrase "good working order" appears in the Chapter. Stop lamps (brake lamps), brakes themselves, car horns, and windshield wipers must also be in "good working order." *See* Wis. Stats. §§ 347.14(1)(explaining that stop lamps must be in "good working order");340.01(63)(defining stop lamp as "a device giving steady warning light to the rear of a vehicle to indicate the intention of the operator of the vehicle to diminish speed or stop"); 347.36 (explaining that brakes must be in "good working order"); 347.38 (explaining that car horns must be in "good working order"); and 347.42 (explaining that windshield wipers must be in "good working order"). Chapter 347 also requires that all bicycles, motor bicycles, and electric personal assistive mobility devices have

[3] Furthermore, insofar as any portions of the Administrative Code, Chapter 305 (Department of Transportation, Standards for Vehicle Equipment) appear to conflict with the requirements of Chapter 347, Chapter 305 states directly that "[n]othing in this chapter is intended to modify the provisions of ch. 347, Stats." Wis. Stat. § 305.02(7).

a brake that is in "good working condition." Wis. Stat. § 347.489.

Each of these statutes explains what is required for that equipment to be "working." (*See* Wis. Stats. §§ 347.14(1), 347.36, 347.38, 347.42, 347.489). Brakes on a car, for example, "shall be capable of bringing the vehicle or combination of vehicles to a stop, under normal conditions, within 50 feet when traveling at a speed of 20 miles per hour." Wis. Stat. § 347.36. A brake on a bicycle, motor bicycle, or electric personal assistive mobility device must be "adequate to control the movement of and to stop the bicycle, motor bicycle, or electric personal assistive mobility device whenever necessary." Wis. Stat. § 347.489. A brake is thus in "good working" order or condition when it is capable of bringing the vehicle, bicycle, etc., to a stop as set forth in the statute. These statutes do not mandate that the brakes be in mint condition to be in "good working" condition—the statutes require that the brakes be sufficient ("adequate") to perform their required function. Wis. Stat. § 347.489. Wisconsin Statute § 347.13(1) sets forth the same standard for tail lamps.

The Indiana Court of Appeals has reached similar conclusions when interpreting its traffic statutes. In ***Goens v. State***, 943 N.E.2d 829 (Ind. Ct .App. 2011), the Indiana Court of Appeals held that a car's stop lamps (brake lights) were in "good working order" where two of three stop lamps were working. ***Id.*** at 834;(Appx.102-105). The Court noted that as the statute only required one operating stop lamp, the defendant's equipment was in "good working order" where the other two stop lamps were functioning. ***Id.*** Additionally, in ***Kroft v. State***, 992 N.E.2d 818 (Ind. Ct. App. 2013), the Indiana Court of Appeals held that a tail lamp was in "good working order" despite a small hole in the lamp that caused

white light, instead of red, to be illuminated from that hole. ***Id.*** at 822; (Appx.106-108). Indiana, like Wisconsin, requires tail lamps to emit "a red light plainly visible from a distance of five hundred (500) feet to the rear." ***Id.*** at 821; (App.107). Indiana law also requires that a person may not operate a motor vehicle on a highway unless the equipment is in "good working order."[4] ***Id.*** at 822; (App.107). The State in that case argued that police had reasonable suspicion because the tail lamp was not functioning properly as the tail lamp had the small hole which emitted white, not red, light. ***Id.*** at 821; (App.107). The Indiana Court of Appeals disagreed, noting that the officer testified that he pulled the defendant over "simply because there was white light coming out of the tiny hole; he did not testify that he had trouble spotting [the defendant's] Jeep from behind." ***Id.*** at 822; (App.108). The Court concluded that the tail lamp was in compliance with the statute and that therefore police lacked a lawful basis to conduct a traffic stop. ***Id.*** (App.108).

Mr. Brown's case involved a 1977 Buick Electra. (39:28;State's Appx.184). Consider, however, the ramifications of adopting the State's interpretation with the tail lamp designs of modern cars, like the Audi pictured here:

[4] Indiana law also requires that a vehicle "is in a safe mechanical condition that does not endanger the person who drives the vehicle, another occupant of the vehicle, or a person on the highway." ***Id.***

Audi: Light and Design, Car Body Design, http://www.carbodydesign.com/archive/2008/12/02-audi-light-design/ (last visited December 4, 2013). Under the State's theory, if any one of the almost *thirty* tiny lights that comprise one "tail lamp" is not lit, then—even if the lamp is still capable of designating the rear of the car—this tail lamp would not be in "good working order." Police would have probable cause to conduct a traffic stop—a "seizure" under the Fourth Amendment—based on that alone. But this is not what the statute requires, and this Court should uphold the Court of Appeals' plain-language interpretation of Wis. Stat. § 347.13(1).

C. The Court of Appeals' interpretation and the plain language of the statute provide sufficient guidance to police.

The State argues that the Court of Appeals' standard creates an unworkable standard for police, noting that a bright-line standard requiring every component of a tail lamp to be in perfect condition would be much easier for police. (*See* State's Brief at 22-23). But, as this Court has repeatedly recognized, whether an officer has reasonable suspicion or probable cause often cannot—and should not—be answered with a bright line. "The Fourth Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances, *eschewing bright-line rules and emphasizing instead the fact-specific nature of the reasonableness inquiry*." ***State v. Sumner***, 2008 WI 94, ¶ 20, 312 Wis. 2d 292, 752 N.W.2d 783 (emphasis added); *see also, e.g.,* ***State v. Post***, 2007 WI 60, ¶ 18, 301 Wis. 2d 1, 733 N.W.2d 634 (rejecting the State's request to adopt a bright-line rule that a car weaving within one lane provided reasonable suspicion to perform a stop, explaining: "[t]he State asks for a bright-line rule, where this court has

consistently maintained that the determination of reasonable suspicion is based on the totality of circumstances.")

Indeed, it would be less "difficult" for police to discern whether they have lawful authority to conduct a stop if they could pull any driver over at any point for driving a car that is not in perfect, mint condition. (*See* State's Brief at 22, arguing that the Court of Appeals' interpretation will be "difficult" to apply). But that is not what the statutes require, and both the Courts and people of Wisconsin expect police to make decisions that balance the need to protect the public against the constitutional rights of individuals every day.

But even further, the Court of Appeals' interpretation, which reflects the plain language of the statute, *does* provide a clear standard: a tail lamp must "emit[] a red light plainly visible from distance of 500 feet to the rear." Wis. Stat. § 347.13(1); *see also* (Ct. App. Op., ¶ 21)(State's Appx.110)("Here the two lit light bulbs making up the driver's side tail lamp satisfied the definition of a tail lamp as 'a device to designate the rear of a vehicle by a warning light.' Because the two lit light bulbs on the rear driver's side of the vehicle were sufficient to designate the rear of the vehicle to a vehicle travelling behind it, the officers did not have probable cause of a traffic violation and the stop was unconstitutional").[5] If a police officer thus sees a car with a

[5] The Court of Appeals' decision did not specifically state that the plain language of the Wis. Stat. § 347.13(1) requires that the light emitted from the tail lamp be visible from 500 feet to the rear of the car. *See* (Ct. App. Op.). This, however, is implicit in the Court of Appeals' analysis: The Court held that one of three light bulbs unlit "does not violate Wis. Stat. § 347.13(1) when it otherwise meets the statutory definition of a tail lamp." (Ct. App. Op., ¶ 21). The Court also explained that the statutes only require "good working order," and found that the tail lamp at issue satisfied the definition of a tail lamp as a "device to designate the rear of a vehicle by a warning light." ***Id.*** (citing Wis. Stat. § 340.01(66)).

tail lamp that the officer reasonably believes is not emitting a red light viewable from that distance, that police officer would have probable cause to stop the car for a violation of the statute.

The State maintains that this standard—set forth by the plain language of the statute—would be problematic because "it is not obvious that motorists would be willing to ensure their tail lamps met this requirement," and again asserts that this standard would be "more difficult than simply examining whether all tail lamp bulbs are working." (State's Brief at 23). The State further maintains that its proposed standard—which would require "all bulbs to be lit"—would better promote road safety. ***Id.*** But if a tail lamp sufficiently designates the rear of the car to cars traveling behind it from up to 500 feet, and thus satisfies the statutory requirements set forth by the Legislature, then how does that tail lamp jeopardize road safety? And again, the State seeks to impose stricter requirements than what the statutes actually require. Amending the statutes is the prerogative of the Legislature, not this Court.

D. The good faith exception does not apply to the officers' actions.

The State now argues that even if the officers were mistaken—even if there was no malfunction because that bulb was not supposed to be lit—that the good faith exception should apply to the officers' "good-faith mistake of fact." (State's Brief at 24-26). Nevertheless, if this Court agrees with the Court of Appeals' holding that the tail lamp was in "good working order" with two of three bulbs lit, then the officers' belief that they had grounds to conduct a traffic stop based on one of three bulbs being unlit would be a mistake of law (i.e. that the law required all components of the tail lamp

to be in perfect condition), not fact. The State agrees that a traffic stop may not be based on a mistake of law. (*See* State's Brief at 25). Thus, whether the good-faith exception to the exclusionary rule applies in this case would arise *only* if this Court reverses the holding of the Court of Appeals.

Even then, the record in this case does not establish that there was any mistake of fact. As the State acknowledges, there were no specific findings made that the unlit bulb was *not* part of the tail lamp. (*See* State's Brief at 24). The circuit court found credible the officers' testimony that the light was "defective." (39:39;State's Appx.188). Mr. Lipsey—the driver of the car who testified for the defense—testified that the middle light was not part of the tail lamp (but instead a brake light), and that on the day of the stop he observed that all of the lights on the back of the car were operating on the day of the stop. (39:8-9;State's Appx.164-165). The circuit court found incredible his testimony that he noticed that all of the bulbs in the tail lamps were lit on that day, but did not, as the Court of Appeals noted, specifically explain that it found incredible Mr. Lipsey's testimony "as it related to the location and function of each of the lights." (Ct. App. Op., ¶ 19, n.5)(State's Appx.109)(39:28-36;State's Appx. 184-192).

After denying the motion to suppress, the circuit court at Mr. Brown's plea hearing offered supplemental explanation for its rationale, noting: "I know that the officers testified that one of the three lights was out and I found them to be credible and I still do, and I'm not changing anything I said, but there was an issue raised as to the other light and whether or not that light would or wouldn't have been on or off." (40:7;State's Appx.197). The court explained that "if the officers even reasonably believed that a light was out even if it's later shown to be not out, it forms the basis of a stop." ***Id.***

The circuit court noted that it did not "think it's a fatal flaw in the stop itself if the officers were in fact mistaken. I'm not saying that they were, but I wanted to say that as far as analysis goes in my mind because I did think about that later." (40:8;State's Appx.198).

Thus, the record does not establish that there was any actual mistake of fact. The circuit court, in offering its supplemental rationale, noted that it was *not* stating that the officers were mistaken in believing that the unlit bulb was a component of the tail lamp. ***Id.*** And though Mr. Lipsey testified that the unlit bulb was not a part of a tail lamp, the circuit court did not make this specific finding. The State asks this Court to conclude that insofar as the police were incorrect that the unlit bulb was part of the tail lamp, their error was a mistake of fact. But that would require that this Court apply the good faith exception based on a mistake of fact, without a record establishing a mistake of fact. As the State had the burden of demonstrating that the stop was lawful, any failure to demonstrate a mistake of fact was a failure of the State to meet its burden to prove that the stop was lawful. *See* ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973)("Where a violation of the Fourth Amendment right against unreasonable search and seizures is asserted, the burden of proof upon the motion to suppress is upon the state.").

Furthermore, as the State recognizes, it does not appear that either this Court or the Court of Appeals has before held in a published decision that the good faith exception to the exclusionary rule should apply to officers' mistake of fact. (*See* State's Brief at 25). Nevertheless, the State points to two unpublished Court of Appeals' decisions to ask this Court to now extend the good faith exception to officers' mistake of fact. This Court should reject the State's invitation to expand the scope of the good faith exception in

Wisconsin, particularly in a case where the record does not establish that there even was a factual mistake.

Wisconsin first adopted the exclusionary rule in 1923. ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923). Our appellate courts have recognized two purposes to the exclusionary rule: "one, to deter police misconduct; and two, to ensure judicial integrity insofar as the judiciary would refuse to give its imprimatur to police misconduct by relying upon evidence obtained through that misconduct." ***State v. Eason***, 2001 WI 98, ¶ 44, 245 Wis. 2d 206, 629 N.W.2d 625 (citing ***Conrad v. State***, 63 Wis. 2d 616, 636, 218 N.W.2d 252 (1974)). As this Court explained in ***State v. Gums***, 69 Wis. 2d 513, 517, 230 N.W.2d 813 (1975), the "deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful or, at the very least, negligent conduct which has deprived a defendant of a constitutional right." ***Id.***

This Court has held that the good faith exception to the exclusionary rule applies in limited circumstances in which police have relied in good faith on either (1) a warrant issued by an "independent and neutral magistrate," or (2) on well-settled law which is subsequently overruled. *See* ***Eason***, 2001 WI 98, ¶ 29 (adopting for Wisconsin the good faith exception for objectively reasonable reliance upon a facially valid search warrant following the U.S. Supreme Court's articulation of that exception in ***United States v. Leon***, 468 U.S. 897 (1984); ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517; ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 (applying the good faith exception to an officer's reliance on well-settled case law). Central to these holdings was the conclusion that excluding the evidence in these limited situations would not deter police misconduct.

Eason, 2001 WI 98, ¶ 2; ***Ward***, 2000 WI 3, ¶¶ 49-50; ***Dearborn***, 2010 WI 84, ¶ 44.

This Court has also previously held that the Wisconsin Constitution provides greater protections than the U.S. Constitution against the application of the good faith exception. In ***Eason***, 2001 WI 98, this Court adopted the U.S. Supreme Court's holding in ***Leon***, 486 U.S. 897, that evidence need not be suppressed where a police officer relied in good faith on "a search warrant issued by an independent and neutral magistrate." This Court nevertheless went beyond the U.S. Supreme Court and held that, in order for the good faith exception to apply in such cases, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***Eason***, 2001 WI 98, ¶ 63. This Court explained: "While this process was followed in ***Leon***, the United States Supreme Court did not specifically hold that the Fourth Amendment required a significant investigation and review of the warrant application for the good faith exception to apply. However, we hold that Article I, Section 11 of the Wisconsin Constitution requires this process and thus affords additional protection than that which is afforded by the Fourth Amendment." ***Id.***

To extend these limited applications of the good faith exception to an officer's mistake of fact would be to dramatically broaden the scope of the exception in Wisconsin and ignore the purposes of the exclusionary rule: in both of the circumstances where the exception is currently applied, exclusion would not deter police misconduct because the police acted based on legal conclusions made by the independent judiciary (whether relying on a warrant signed

by a judge in the specific case or in reliance on well-settled law). But an officer who mistakes facts is not acting on reliance on an independent judicial determination; the officer is relying on incorrect information, likely due to his or her *own* mistake.

As this Court has recognized, the exclusionary rule serves to deter not only willful misconduct by the police, but also *negligent* conduct. *See* ***Gums***, 69 Wis. 2d at 517. Application of the exclusionary rule in situations where an officer deprives someone of a constitutional right based on a factual mistake deters police negligence and encourages police to be accurate. Indeed, to allow at trial the introduction of evidence obtained through an officer's mistake of fact would be "legitimizing the conduct which produced the evidence." *See* ***Terry***, 392 U.S. at 88.

As Professor LaFave has explained, to extend the good faith exception creates the real risk that "police officers may feel that they have been unleashed and consequently may govern their future conduct by what passed the good faith test in court on a particular occasion rather than on the traditional Fourth Amendment standards of probable cause, exigent circumstances, and the like." 1 Wayne R. LaFave, *Search and Seizure* §1.3(g), at 131 (5th ed. 2012). Even further, as Professor LaFave explains when discussing the dangers of applying the good faith exception to circumstances beyond warrant cases, continuing to expand the good faith exception "would also impose upon suppression judges the heavy burden—indeed, the intolerable burden—of frequently making exceedingly difficult decisions about what constitutes (as it was put in ***Leon***) 'an objectively reasonable belief in the existence of probable cause.'" ***Id.*** at 130.

The State argues that federal courts, including the Seventh Circuit, have upheld searches and seizures based on an officer's "reasonable" mistake of fact. *See* State's Brief at 25. But this Court has in the past recognized that Wisconsin's Constitution provides greater protections than the U.S. Constitution such that the requirements for the good faith exception to apply would be more stringent. *See* ***Eason***, 2001 WI 98, ¶ 63. Ultimately, this Court should reject the State's request to open the door to the good faith exception when police conduct a warrantless traffic stop based on the officer's mistake of fact.

E. Alternatively, Mr. Brown was denied the effective assistance of counsel as counsel failed to argue that police lacked a lawful basis to conduct the stop based on the tail lamp.

Insofar as this Court concludes that trial counsel failed to sufficiently argue that the car did not violate the requirements of Wis. Stat. § 347.13(1), then trial counsel's failure to do so violated Mr. Brown's constitutional right to the effective assistance of counsel. Mr. Brown made this alternative argument to the Court of Appeals; however, the Court of Appeals did not address his ineffective assistance of counsel argument as it reversed on the merits. (*See* Ct. App. Op., ¶ 21)(State's Appx.110). In his response to the State's Petition for Review, Mr. Brown reserved his right to raise the arguments he raised in the Court of Appeals before this Court, including his alternative argument concerning ineffective assistance of counsel. (Brown Response to State's PFR).

Both the United States and Wisconsin constitutions guarantee a criminal defendant the right to the effective assistance of counsel. U.S. Const. amends. VI, XIV, WI

Const. art I, § 7; ***State v. Thiel***, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. To establish the denial of the effective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiencies prejudiced the defense. ***Id.*** (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). The U.S. Supreme Court has explained that when "defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness," "the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986); *see also* ***State v. Cleveland***, 118 Wis. 2d 615, 618, 338 N.W.2d 500.

Here, trial counsel performed deficiently by failing to argue that the officer lacked a basis to stop the car because Wisconsin law does not require that *all* individual components of a tail light be in perfect condition in order for the tail lamp to be in good working order. For the reasons argued above, the State failed to demonstrate that the tail lamp, with two lit bulbs, was not in "good working order." Counsel's failure to make this argument prejudiced Mr. Brown: the officers stopped the car based on a mistake of law. And because a traffic stop cannot lawfully be based on a mistake of law, *see* ***Longcore***, 226 Wis. 2d at 9, the evidence from the search would have to be suppressed. And without the firearm as evidence, the State would not have been able to move forward with the prosecution for felon in possession of a firearm. The case would have been dismissed, and Mr. Brown would not have pled guilty to a dismissed charge. As there is a reasonable probability that the outcome of the case would have been different absent the excludable evidence,

Mr. Brown was prejudiced by his attorney's failure to make this argument. *See* ***Kimmelman***, 477 U.S. 365 at 375.

II. *Arizona v. Gant* Does Not Apply to the Facts of This Case.

This Court further asked the parties to address whether ***Arizona v. Gant***, 556 U.S. 332 (2009), applies to the fact situation in this case and, if so, how Mr. Brown agrees with the State that ***Gant*** does not apply to this case as the facts do not appear to involve a search incident to arrest. Trial counsel did argue that the search violated ***Gant***—an argument the circuit court rejected. (39:26-34;State's Appx.182-190). Mr. Brown did not make an argument to the Court of Appeals about the validity of the search under ***Gant*** and does not make such an argument to this Court. Insofar as this Court granted review to address the application of ***Gant*** to the facts of this case, then this Court should dismiss review of this case as improvidently granted. *See e.g.,* ***State v. Kasmarek***, 2006 WI 123, 297 Wis. 2d 589, 723 N.W.2d 428 (dismissing the petition for review as improvidently granted where the case did not adequately present the issue for which the Court granted review).

In ***Gant***, the U.S. Supreme Court limited previous holdings concerning searches incident to a lawful arrest, holding that police may search a car incident to arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." ***Id.*** at 351. The U.S. Supreme Court declined to extend this decision to apply to other warrantless searches of a car beyond a search incident to arrest:

> Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary c oncerns demand. For instance, ***Michigan v. Long***, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." ***Id.*** at 1049, 103 S. Ct. 3469 (citing ***Terry v. Ohio***, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity, ***United States v. Ross***, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which evidence might be found.

Id. at 346-347.

Since ***Gant***, the Wisconsin Court of Appeals has affirmed that ***Gant*** does not apply to protective searches based on officer safety. *See* ***State v. Williams***, 2010 WI App 39, ¶24, 323 Wis. 2d 460, 781 N.W.2d 495 ("The holding in ***Gant*** is limited to the search incident to arrest exception. The Court in ***Gant*** expressly left intact the other exceptions to the Fourth Amendment warrant requirement, such as ***Terry***. In ***Gant***, the Court specifically preserved the vehicle passenger compartment search when justified by reasonable suspicion under ***Terry*** and ***Long***"); ***State v. Bailey***, 2009 WI App 140, ¶¶ 44-45, 321 Wis. 2d 350 ("There is no dispute that Bailey's case is not a 'search incident to arrest' case. The search in this case was done out of officers' concern for their safety. No arrest had occurred before the search and as noted above, Bailey was very close to his car and would have been released after the tinting citation had been issued. Thus, ***Gant*** does not govern Bailey's case").

Ultimately, as ***Gant*** is limited to searches incident to arrest, the only way in which ***Gant*** would be an issue here is if the officer's search under the seat was pursuant to a lawful arrest. Police in no way had a basis to arrest for the "wooden object" prior to the search; thus, the only way that a lawful arrest could have occurred was if police had arrested Mr. Brown for violating the tail lamp statute. Though the police have lawful authority to arrest someone without a warrant for a traffic violation, *see* Wis. Stat. § 345.22, here the facts do not appear to support the conclusion that Mr. Brown was under arrest for the traffic violation.

According to the officers' testimony, which the circuit court found to be credible, after stopping the car because of the tail lamp in the evening in an area which had numerous armed robbery and drug dealing complaints, they illuminated the spot light on their car and saw Mr. Brown—one of three people in the car, alone in the backseat—bending forward and to his right. (38:6-8,27,39:28-31;State's Appx.123-125,144,184-186). Mr. Brown did not respond to their request to show his hands, and one officer drew his weapon "to a low ready position." (38:8,29,39:29;State's Appx.125,146,185). As they approached the car, Officer Feely saw Mr. Brown raise his body off the seat, lean forward toward the passenger side of the floor board, and then make a kicking motion underneath the passenger seat. (38:9,28-29,39:29-30;State's Appx.126,145-146,185-186). He saw Brown kick a "small wooden object" under the seat, and did not know what this object was. (38:29,39:30;State's Appx.146,186). Mr. Brown pushed his foot under the front seat such that Officer Feely could no longer see the object and put his hands up in the air. (38:30,39:30;State's Appx.147,186).

At this point, the officers[6] removed all three people from the car. (38:9,31,39:30-31;State's Appx.126,148,186-187). Officer Feely looked under the seat where he saw Mr. Brown kicking and found a revolver. (38:31;State's Appx.148). Officer Wawrzonek testified that the occupants were removed from the car and sat down on the curb during the search, and that Mr. Brown was handcuffed because he had not complied with their orders. (38:13-15;State's Appx.130-132). Officer Feely testified that the three occupants of the car were sitting along the curb approximately five feet away from the Buick, and that Mr. Brown may have been handcuffed. (38:34-35;State's Appx.152). The driver of the car, defense witness Mr. Lipsey, testified that all three of the car's occupants were handcuffed during the search. (39:11;State's Appx.167).[7]

The facts are thus indicative of a protective search following the officers' observations, not a search incident to a lawful arrest. ***Gant*** therefore does not apply to the facts of this case. Insofar as this Court took review of this case to address the application of ***Gant***, then this Court should dismiss review of this case as improvidently granted.

The issue in this case is that the *stop*, not the subsequent search, violated Mr. Brown's constitutional rights.

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[6] Officer Feely testified that a third officer had arrived in a separate car by the time they approached Mr. Brown's car. (38:30;State's Appx.147).

[7] The circuit court did not make specific fact-findings concerning where the occupants were located during the search of the car and whether the occupants were handcuffed during the search. (*See* 39:28-36;State's Appx.184-192). Nevertheless, the circuit court found the officers' testimony to be credible. (39:31;State's Appx.187).

The Court of Appeals' decision reflects the plain-language requirements of the statute and should be upheld.[8]

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[8] Mr. Brown also argued post-conviction that he was entitled to a total of 209 days sentence credit, from the date of his arrest to the date of sentencing in this case. (28:6-7). Mr. Brown noted that because his sentence in this case was ordered concurrent, he was entitled to sentence credit up until he started serving a sentence. (28:7). And though his extended supervision was revoked in another case, he argued that he did not actually begin serving that revocation sentence until he arrived at the institution, which occurred after his sentence in this case. (28:7). The circuit court awarded Mr. Brown only 195 days credit, from his arrest until the date his extended supervision was revoked (which occurred before his sentencing in this case). (29:3-5;State's Appx.115-117). Mr. Brown sought the additional 14 days of credit on appeal. (Brown Initial Ct. App. Brief at 8-11). The State conceded to the Court of Appeals that Mr. Brown was entitled to this additional credit. (State's Ct. App. Brief at 3-7). The Court of Appeals noted that the State conceded that Mr. Brown was entitled to this additional credit; however, because the Court of Appeals reversed the judgment of conviction, it did not address whether Mr. Brown was entitled to this additional credit. (Ct. App. Op., ¶22).

Though the State did not specifically ask this Court to address sentence credit in its Petition for Review, the State did note that if the Court granted its petition, it "anticipate[d] fully briefing this issue, for which a decision by this court will provided much-needed clarity to circuit courts." (State's PFR at 15). Brown, in his response to the State's Petition, reserved his right to raise this argument. (Brown Response to PFR). This Court's order directs the parties to address the "issue stated in the petition for review" and whether ***Gant*** applies to the facts of the case. (Wis. SC. Order, 10/15/13). The State in its brief to this Court did not brief the sentence credit issue, but did note that should Mr. Brown "continue to request the additional fourteen days of sentence credit in this court, the State will again concede that he should receive it." (State's Brief at 9-10). Mr. Brown continues to assert that he is entitled to the additional 14 days credit—for a total of 209 days. As this issue does not appear to be before this Court, however, Mr. Brown respectfully requests that, should this Court reverse the Court of Appeals' decision, this Court remand this matter to the Court of Appeals for a decision on Mr. Brown's sentence credit argument.

CONCLUSION

For these reasons, Mr. Brown therefore respectfully requests that this Court affirm the decision of the Court of Appeals. Insofar as this Court granted review for the purpose of addressing the application of ***Gant***, Mr. Brown respectfully requests that this Court dismiss review as improvidently granted.

Dated this 4th day of December, 2013.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,811 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of December, 2013.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 first names and last initials 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.

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A P P E N D I X

I N D E X
T O
A P P E N D I X

STATE OF WISCONSIN
IN SUPREME COURT
No. 2011AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

Page

CASES CITED

STATUTES CITED

Page

OTHER AUTHORITIES

STATE OF WISCONSIN

IN SUPREME COURT

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REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

The State of Wisconsin, Plaintiff-Respondent-Petitioner, files this brief in reply to Defendant-Appellant Antonio D. Brown's brief-in-chief. *See* Wis. Stat. § 809.19(4).

I. THE COURT OF APPEALS MISINTERPRETED WIS. STAT. § 347.13(1) BY HOLDING THAT A TAIL LAMP WITH TWO OF THREE FUNCTIONING BULBS WAS IN "GOOD WORKING ORDER."

A. A tail lamp is in good working order when it is functioning as intended.

The State agrees with Brown that the dispute in this case turns on the definition of "good working order" in Wis. Stat. § 347.13(1) (Brown's brief at 8). Brown argues that the court of appeals correctly determined that good working order must be defined in reference to the statutory definition of a tail lamp, specifically, the requirements that the lamp emit a red light that designates the rear of the vehicle visible from 500 feet during hours of darkness (Brown's brief at 8-10). *See* Wis. Stat. §§ 340.01(66); 347.13(1). Brown contends that because there is no evidence that the tail lamp on his car did not satisfy these requirements, it does not matter that only two of the lamp's three bulbs were working, and the court of appeals correctly held the stop unconstitutional (Brown's brief at 8-10).

This court should reject this argument. As explained in the State's brief-in-chief, "good working order" is properly interpreted to mean functioning according to its nature and purpose (State's brief-in-chief at 18-19). Put another way, a tail lamp is in good working order when it is operating as its manufacturer intended. The tail lamp on Brown's car had three bulbs, which were

meant to function together to illuminate the vehicle's tail end. When one of the bulbs was not working, the tail lamp was not functioning as it was supposed to, and was not in good working order.

B. The State's interpretation of "good working order" does not require tail lamps to be in mint condition.

Brown argues that the State's interpretation of good working order would require tail lamps to be in perfect or mint condition (Brown's brief at 10-14). The State's standard simply requires that vehicle owners replace burned-out bulbs on their vehicle's lamps. This is hardly an onerous condition to impose in exchange for the privilege of operating a vehicle on the public roads. *See State v. Smet*, 2005 WI App 263, ¶ 8, 288 Wis. 2d 525, 709 N.W.2d 474 (driving an automobile is a privilege, not a right, and is subject to reasonable regulation in the interest of public safety and welfare).

Brown also points to other statutes requiring various pieces of vehicle equipment to be in good working order and claims this supports his position (Brown's brief at 11-12). He argues that, like Wis. Stat. § 347.13(1)'s requirement of visibility of a red light from 500 feet, each of these statutes has specifications for each piece of equipment which, in turn establishes what it means for that equipment to be in good working order (Brown's brief at 12).

The State's interpretation of Wis. Stat. § 347.13(1) does not conflict with these statutes.

Brown notes the requirements for motor vehicle brakes, specifically, that they be capable of stopping the vehicle within fifty feet at twenty miles per hour (Brown's brief at 12). Wis. Stat. § 347.36(1). He also points to the requirement that brakes for bicycles, motor bicycles, and personal assistive mobility devices be "'adequate to control the movement of and to stop'" these vehicles "'whenever necessary'" (Brown's brief at 12). Wis. Stat. § 347.489. There is no reason not to believe that brakes that are capable of doing this are functioning as intended, and thus, in good working order under Wis. Stat. § 347.36(3). In contrast, a vehicle light with non-operational bulbs is not functioning as intended, and is not in good working order.

Brown relies on two cases from Indiana to support his definition of good working order. The first, *Goens v. State*, 943 N.E.2d 829 (Ind. Ct. App. 2011), involved a traffic stop where one of a car's three stop lamps was not working. *Id*. at 831. Because Indiana law requires that vehicles have only one stop lamp, the Indiana Court of Appeals found the stop improper. *Id*. at 832-34. The court also rejected the State's alternate argument that the inoperable stop lamp violated Indiana's "good working order statute," finding that the statute did not apply to stop lamps, and even if it did, there was no basis for the stop because only one lamp was required. *Id*. at 834.

Goens is not persuasive. The court addressed the term "good working order" as an afterthought, and its discussion of it cannot be separated from Indiana's requirement that vehicles need just one stop lamp. In contrast, in Wisconsin, if a car has two tail lamps, or stop

lamps for that matter, both must be maintained in good working order. *See* Wis. Stat. §§ 347.13(1); 347.14(1). While Indiana may look to the overall stop lamp system to determine whether it is in good working order, Wisconsin requires an examination of each individual lamp.

The second case, *Kroft v. State*, 992 N.E.2d 818 (Ind. Ct. App. 2013), is also unhelpful. There, police stopped a vehicle because one of its tail lamps had a small hole in it. *Id*. at 820. This allowed some white light to emit from the lamp, and the State claimed a violation of Indiana's statute requiring that tail lamps emit red light. *Id*. at 821. The Indiana Court of Appeals disagreed, saying the statute did not require that the lamp emit only red light, and that the amount of white light emitted was miniscule. *Id*. at 821-22. The court also rejected the State's argument that the hole in the tail lamp violated a different part of the good working order statute that requires vehicles be in "a safe mechanical condition that does not endanger" the driver, passengers, or other people on the highway, finding no evidence that the hole endangered anyone. *Id*. at 822. *Kroft* does not address the definition of "good working order" and has no applicability to this case.[1]

Brown also asks this court to consider the ramifications of adopting the State's position in the context of modern cars, pointing specifically to an Audi with a tail lamp that has almost thirty

[1] The hole in the tail light would likely be a violation in Wisconsin. *See* Wis. Admin. Code § Trans. 305.16(4) (requiring that "[a]ll tail lamp lens and reflectors shall be installed and maintained in proper condition").

bulbs (Brown's brief at 13-14). He argues that under the State's interpretation of Wis. Stat. § 347.13(1), a traffic stop would be justified if one of those bulbs is out (Brown's brief at 14). The State agrees. No one is forced to purchase a car with an intricate tail lamp, and by doing so, the owner takes on the responsibility of maintaining the car in accordance with the law. As, argued, this requires, among other things, that all bulbs in the tail lamps be operational.

C. The court of appeals' decision does not provide guidance to law enforcement, courts, or the public.

Brown next argues that the State is wrong to say the court of appeals' decision sets forth a confusing standard for enforcing Wis. Stat. § 347.13(1). He first criticizes the State's proposed bright-line rule, saying such standards are disfavored in the Fourth Amendment context (Brown's brief at 14). The primary issue here, though, is statutory construction, which will necessarily require the court to establish a bright-line rule when it decides what "good working order" in Wis. Stat. § 347.13(1) means. Brown admits as much when he argues his proposed interpretation of § 347.13(1) provides a clear standard (Brown's brief at 15).

Further, Brown's standard, based on the court of appeals' interpretation of Wis. Stat. § 347.13(1), is not as clear as he claims. Brown argues that so long as a tail lamp is emitting a red light visible from 500 feet to designate the rear of the car, then it is in good working order (Brown's brief at 15-16). Enforcing this standard would be

difficult. How often are police 500 feet from a vehicle they stop, particularly on a city street like the one involved in this case? Brown suggests that if an officer reasonably believes the light is not visible from this distance, he or she can make the stop (Brown's brief at 15-16). What if the officer turns out to be wrong? Brown does not believe officers should be able to make good-faith mistakes of fact in assessing whether to make a traffic stop, so under his interpretation, the stop would be invalid if the light turns out to be visible from 500 feet (Brown's brief at 16-22). In contrast, the State's standard is clearer, and allows officers to stop a vehicle to inform the driver that a tail lamp bulb is burned out, encouraging vehicle maintenance and safety.

Brown contends that the State is wrong that its interpretation promotes road safety because all that is required for a vehicle to have a safe tail lamp is for it to illuminate the car from 500 feet (Brown's brief at 16). But this would encourage drivers to ensure that their tail lamps just met this minimal requirement. Brown's example of the Audi with almost thirty bulbs in its tail lamp is illustrative. As the bulbs burned out, presumably at some point the tail lamp would no longer be sufficient to designate the car from 500 feet. It would be better to require drivers to maintain all of the bulbs and to allow law enforcement to stop and inform them if any are burned out than to allow the tail light to cross the visibility threshold while the car is in motion and threaten public safety.

D. Probable cause or reasonable suspicion can be based on an officer's good-faith mistake of fact.

Brown next asks this court to reject the State's alternative argument that the stop in this case was valid based on the officers' good-faith belief that the unlit bulb was part of the tail lamp, even if that belief was mistaken because the bulb was actually part of the brake lamp (Brown's brief at 16-22). He contends this court should not extend the good-faith exception to the exclusionary rule to mistakes of fact underlying traffic stops (Browns' brief at 18-22).

The State is not asking this court to do anything more than to apply established Fourth Amendment principles in finding that a good-faith mistake of fact can form the basis for a seizure. The touchstone of the Fourth Amendment is reasonableness. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Just because something is wrong does not make it unreasonable. *See Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990). Law enforcement officers are not required to be all-knowing, and if they reasonably rely on apparent facts in making a seizure that later turn out to be wrong, it should not be grounds for suppression.

Further, the State disagrees with Brown's assertion the record does not support a finding that the officers in this case made a good-faith mistake of fact that the unlit bulb was part of the tail lamp (Brown's brief at 17-18). As the circuit court noted, the age of the car and the officers' lack of familiarity with it would allow them to reasonably believe the bulb was part of the tail

lamp (40:7-8). Even if the officers were wrong that the unlit bulb was part of the tail lamp, they could reasonably believe it was and stop Brown's car.

E. Brown's trial counsel was not ineffective.

Brown also argues that his trial counsel was ineffective for not making his current argument about Wis. Stat. § 347.13(1) at the suppression hearing (Brown's brief at 22-24). The reason for this argument appears to be to provide an alternative basis for relief if this court finds that Brown forfeited his claim by not properly raising it while litigating the suppression motion (Brown's brief at 22). The State does not argue that Brown forfeited his claim.

Further, Brown's counsel was not ineffective. Even had counsel argued that Brown's tail lamp complied with Wis. Stat. § 347.13(1), counsel would have been wrong. As such, Brown was not prejudiced by counsel's failure to make this argument during the suppression proceedings. *See State v. Butler*, 2009 WI App 52, ¶ 8, 317 Wis. 2d 515, 768 N.W.2d 46 (counsel not ineffective for failing to make motion that would have been denied).

II. THE STATE AGREES THAT BROWN IS ENTITLED TO THE ADDITIONAL FOURTEEN DAYS OF SENTENCE CREDIT.

Brown is correct that the State has conceded that he is entitled to 209 days of sentence credit, rather than the 195 days he received (Brown's brief at 28). He also notes the State did not brief the issue in its brief-in-chief and asks, should this court reverse on the suppression issue, for remand to the court of appeals to allow it to address the sentence credit claim (Brown's brief at 28).

The State does not object to Brown's proposal, but also does not object to this court addressing the sentence credit issue itself. The State's position on this issue has not changed since this case was before the court of appeals. Undersigned counsel advises the court that he will be prepared to discuss this issue at oral argument, should the court want to address it.

CONCLUSION

Upon the foregoing, the State respectfully requests that this court reverse the decision of the court of appeals.

Dated this 18th day of December, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,252 words.

Dated this 18th day of December, 2013.

_____

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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2011AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Milwaukee County, the Honorable Rebecca F. Dallet Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules, and Statutes

Other Authorities

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2011AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

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Defendant-Appellant.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief to address the law concerning the effect of a police officer's mistakes, whether of law or of fact, on the constitutionality of a traffic stop. It takes no position regarding the interpretation of Wisconsin Statutes §347.13(1).

ARGUMENT

LAWFUL POLICE STOPS OF VEHICLES FOR TRAFFIC OFFENSES MAY BE BASED ON A POLICE OFFICER'S OWN MISTAKE ONLY IF THE MISTAKE IS ONE OF FACT AND IS OBJECTIVELY REASONABLE

When the police stop a driver because they believe a traffic violation has been committed, they must have probable cause to do so. *State v. Longcore*, 226 Wis.2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 233 Wis.2d 278, 607 N.W.2d 620 (2000). Probable cause exists "when the officer has 'reasonable grounds to believe that the person is committing or has committed a crime.'" *State v.*

Popke, 2009 WI 37, ¶14, 317 Wis.2d 118, 765 N.W.2d 569 (quoting *Johnson v. State*, 75 Wis.2d 344, 348, 249 N.W.2d 593 (1977)).

Although police also may make traffic stops in the absence of probable cause when, under the totality of the circumstances, they have grounds "to reasonably suspect that a...traffic violation has been or will be committed," *id*., ¶23, Wisconsin courts analyze stops under this reasonable suspicion standard[1] only when an officer "act[s] upon a suspicion that warrant[s] further investigation," and not when the stop is based upon "his observation of a violation being committed in his presence," *Longcore*, 226 Wis.2d at 8-9.

In other words, the reasonable suspicion standard only applies if objective facts justify further investigation. *See, e.g., State v. Griffin*, 183 Wis. 2d 327, 333-334, 515 N.W.2d 535 (Ct. App.. 1994) (proper to apply reasonable suspicion standard to stop investigating whether vehicle was registered because "license applied for" sign may not have been properly displayed and did not resolve the issue); *State v. Krier*, 165 Wis.2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991) (reasonable suspicion standard applied to stop investigating whether lack of license constituted a civil or criminal offense).

The police, like everyone else, make mistakes, which can figure into a decision to make a traffic stop. The mistakes can be either mistakes of law or of fact and the first step is to distinguish between the two as they are treated differently under the law.

A police officer's *own* mistake of law, not made in reasonable reliance upon the judicial branch, *see, e.g., United States v. Leon*, 468 U.S. 879, 920-923 (1984) (reliance on a search warrant issued by a judicial officer); *State v. Dearborn*, 2010 WI 84, 327 Wis.2d 252, 786 N.W.2d 97 (reliance on this Court's precedent later

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[1] Reasonable suspicion exists when "'the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing or is about to commit a crime,'" *Popke*, 2009 WI 37, ¶23 (quoting *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634).

abrogated by the United States Supreme Court), or on the legislative branch, *see, e.g., Illinois v. Krull*, 480 U.S. 340, 349-350 (1987) (reliance on a statute later held to be unconstitutional), is not a reasonable mistake justifying a stop, even if the mistake is made in good faith. *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006). Despite good faith, "a police officer's mistake of law cannot support probable cause to conduct a stop." *Id*.

By contrast, if the officer's mistake was one of fact, then courts must decide whether the mistake of fact was reasonable. *See United States v. Dowthard*, 500 F.3d 567, 569 (7th Cir. 2007). When a stop is based upon such a mistake, the only question is whether the mistake was reasonable. *McDonald*, 453 F.3d at 962.

A. A Mistake About What Facts Must be Present for a Violation of Traffic Law to Exist is a Mistake of Law, But a Mistake Solely as to Whether an Unilluminated Bulb is Part of a Tail Light is a Mistake of Fact.

The first step in analyzing a case involving a traffic stop premised upon a police error is to determine whether the mistake is one of law or of fact. Courts long have needed to distinguish between determinations of facts and determinations of law. Appellate courts, for example, typically give deference to a circuit court's determination of fact, but not to a circuit court's determination of law. *See, e.g., State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). The usual distinction made is that the question of what happened is a matter of fact while the question whether what happened fulfills a particular standard is a matter of law. *Id*.

A similar distinction exists between errors of law and errors of fact. As the Court of Appeals explained in *County of Sheboygan v. Bubolz*, 2010AP2995, ¶12 (Ct. App. 2011) (unpub) (App. 1-3), a mistake concerning the answer to the question "[w]hat facts were required under the statute in order to be in violation of the statute" is a mistake of law while a mistake concerning the answer to the

question "[w]hat did the officer reasonably perceive the facts to be" is a mistake of fact.

Assuming, for purposes of argument only, that the interpretation of Wisconsin Statutes §347.13(1) of both the Court of Appeals, *see* State's Appendix at 110, ¶21, and the defendant, *see* Brief of Defendant-Appellant at 7-16, are correct, a stop can occur only based upon a mistaken belief as to what the law requires because the status of a particular unilluminated bulb in an otherwise properly visible light is irrelevant. Under this scenario, the stop would be based upon a mistake of law in that the officer did not know what facts were required under the statute to be in violation of the statute. *See Bubolz*, 2010AP2995, ¶12 (App. 2). It would involve applying law to facts, which is a matter of law. *See Weborg v. Jenny*, 2012 WI 67, ¶41, 341 Wis.2d 668, 816 N.W.2d 191.

But, assuming, for purposes of argument only, that the state's interpretation of Wisconsin Statutes §347.13(1) is correct, *see* Brief of Plaintiff-Respondent-Petitioner at 17-21, then there are two possible scenarios. The first is that the police officers were correct that a tail light was malfunctioning in which case there is no mistake at all. The second is that the police officers were mistaken that the unilluminated bulb was part of a tail light. This mistake would be one concerning what the officers perceived the facts to be and would be a mistake of fact. *See Bubolz*, 2010AP2995, ¶12 (App. 2).

B. A Police Officer's Independent Mistake of Law Cannot Provide Reasonable Suspicion or Probable Cause Justifying a Traffic Stop.

If the Court of Appeals and the defendant are correct as to the requirements of §347.13(1), then the officers stopped the defendant based upon a mistake of law. Under current Wisconsin law, and as the state acknowledges here, *see* Brief of Plaintiff-Respondent-Petitioner at 25, a police officer's mistake of law cannot support a constitutional traffic stop. *State v. Longcore*, 226 Wis.2d, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 223 Wis.2d 278,

607 N.W.2d 620. When an officer bases a traffic stop on a specific offense, "it must indeed be an offense; a lawful stop cannot be predicated upon a mistake of law." *Id*. at 9. In such circumstances, although good faith may make a traffic stop *subjectively* reasonable, it fails to meet the requirement that the stop be *objectively* reasonable. *See Dowthard*, 500 F.3d at 569.

The Seventh Circuit, *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006), as well as the majority of federal circuit courts, *United States v. Miller*, 145 F.3d 274, 278-279 (5th Cir. 1998); *United States v. Urrieta*, 520 F.3d 569, 574-575 (6th Cir. 2008); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005); *United States v. Chanathasouxat*, 342 F.3d 1271, 1279 (11th Cir. 2003); *but see United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005), and a majority of states, *see, e.g., People v. Ramirez*, 44 Cal. Rpt. 3d 813, 816 (Ct. App. 2006); *Hilton v. State*, 961 So.2d 284, 298-299 (Fla. 2007); *Martin v. Kan. Dept. of Revenue*, 176 P.3d 938, 948 (Kan. 2008); *State v. Kilmer*, 741 N.W.2d 607, 611-612 (Minn. Ct. App. 2007); *Byer v. Jackson*, 661 N.Y.S.2d 336, 338 (App. Div. 1997); *but see, e.g., Andrews v. State*, 658 S.E.2d 126, 128 (Ga. Ct. App. 2008); *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008); *State v. Greer*, 683 N.E.2d 82, 83 (Ohio. Ct. App. 1996), also hold that even a reasonable mistake of law cannot support either probable cause or reasonable suspicion because such a mistake cannot be objectively reasonable.

From a public policy perspective, requiring police to know the law is essential. Allowing a traffic stop to be based upon any mistake of law, even a good-faith one, "remove[s] the incentive for police to make certain that they understand the law that they are entrusted to enforce and obey." *Lopez-Soto*, 205 F.3d at 1106. Police are officials "charged with strengthening the rule of law in society," Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 233 (Macmillan Coll. Publ'g Co. 3d ed. 1994). Excusing law enforcement mistakes of law, even reasonable ones,

> would provide a strong incentive to police officers to remain ignorant of the language of the laws that they enforce and of the teachings of judicial opinions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct.

People v. Teresinski, 640 P.2d 753, 758 (Cal. 1982).

Fundamental fairness also supports requiring police to actually know the law. *See Chanthasouxat*, 342 F.3d at 1280. Ordinary citizens are required to know the law, even if complex, and ignorance of the law or negligence as to the existence of the law is not a defense, *State v. Collova*, 79 Wis.2d 473, 488, 255 N.W.2d 581, 588 (1977). The training and experience of police officers concerning the law is far superior to that of most ordinary citizens. Thus, "[d]ecency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J dissenting).

More practical reasons for upholding this fundamental fairness include the importance of public perception of justice. Research has shown that the public is far more willing to comply with the law and assist police when citizens believe that police behavior is fair and just. *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities,* 6 Ohio St. J. Crim. L. 231, 253-265 (2008) ("Respondents viewed the police as more legitimate if they made decisions fairly and if they treated people justly.") If a lawless search is held to be reasonable, it undermines confidence in police fairness and justice and reduces the chances of public cooperation. Excluding the fruits of a lawless search therefore will reinforce faith in the police, thereby enhancing public safety rather than reducing it.

In addition, allowing police mistakes of law to form the basis for constitutional traffic stops improperly places the interpretation of law into the hands of the police, rather than the hands of the

judiciary, and encourages vague laws.[2] When mistakes of law need only be reasonable, courts need not, and likely will not, determine whether the police interpretation of the law is actually correct, see, e.g., *United States v. Rodriguez-Lopez,* 444 F.3d 1020, 1022-1023 (8th Cir. 2006) (declining to decide a statutory interpretation issue because the case turned on whether the "belief that the statute was violated was objectively reasonable"). The result will be increased legal confusion as different police departments, and even different officers, interpret the traffic laws differently.

Moreover, unlike the judiciary, police are not neutral and detached decision-makers. Given the pressure to increase their control of crime, they are likely to interpret laws broadly rather than narrowly. One casualty of this tendency toward broader interpretation of laws will be "the familiar Wisconsin rule that 'penal statutes are generally construed strictly to safeguard a defendant's rights.'" *See State v. Rabe,* 96 Wis.2d 48, 69-70, 291 N.W.2d 809 (1980) (citing *Austin v. State*, 86 Wis.2d 213, 223, 271 N.W.2d 672 (1978)).

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[2] This problem of interpretation does not exist when the police rely on a judicially-issued search warrant, *see Leon*, 468 U.S. at 920-923, on this Court's interpretation of law, *Dearborn*, 2010 WI 84 (reliance on case later abrogated by United States Supreme Court), or on the legislative branch, *see, e.g., Illinois v. Krull*, 480 U.S. at 349-350 (reliance on a statute later held to be unconstitutional), so creating a good-faith exception in those circumstances does not implicate the same interests. Similarly, such a limited good-faith exception, because of the role of the opinions of other people than just the police, is less likely to appear unfair or risk having the police broaden the scope of the law.

C. A Police Officer's Mistake of Fact Can Only Provide Reasonable Suspicion or Probable Cause if Objectively Reasonable.

If the state is correct as to the requirements of §347.13(1), then the officers stopped the defendant based upon a mistake of fact. In that situation, the correct analysis requires determining whether the mistake was reasonable. *See United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000). Because the legal test involves objective, not subjective, reasonableness, *see, e.g., State v. Waldner*, 206 Wis.2d 51, 55, 556 N.W.2d 681 (1996), the good faith of a particular officer in making the mistake is irrelevant.

The situation hereis not one in which a police officer could better evaluate the situation after additional investigation. This case is not one in which an officer spotted a windshield crack between seven and ten inches long as a Chevy Blazer was driving on the interstate and could reasonably assume that the crack met the administrative code requirement that it be eight inches long to be considered excessive. *See id*. Such a determination reasonably could be made that precisely only with "[c]areful measurement." *Id*.

Nor is this situation one in which the officer's mistake as to the status of a sign occurred because the status was not readily apparent. In *Bubolz*, 2010AP2995, ¶5 (App. 1) , the officer observed a sign that turned out to be unofficial because it had not been properly authorized. Because the information concerning whether the sign was authorized was contained in a construction contract held by the Department of Transportation, *id*. at ¶4, the officer could not reasonably be expected to know the sign's unofficial status.

Similarly, this case does not involve an obscured license plate number. In *State v. Reierson*, 2010AP596-CR, ¶11 (Ct. App. 2011) (unpub) (App. 4-5), the officer testified that he misread an "8" for a "6" because of the location of a screw or bolt. Because the information was not readily visible, the officer could reasonably have misread the plate.

Here, unlike in those cases, the symmetry of tail lights on cars provides a readily available method for determining whether the unilluminated bulb was likely to be part of a malfunctioning tail light without gathering any additional information. Making such a determination did not require familiarity with an old car or any particular car. It simply required the officers to compare one side of the car to the other. If the same configuration of bulbs was illuminated on one side as on the other, it was not reasonable to assume that the light that was not lit was a tail light. This comparison works regardless whether the vehicle has one bulb on either side, three bulbs on either side, 20 or more LED bulbs on either side, or several red panels on its rear light design of which only some are tail lights.

Because the light configurations on vehicles, regardless of model, are symmetrical, a police officer who sees a light illuminated in a particular position on one side which is not illuminated on the other would have probable cause to believe that a bulb in one tail light is not working. Given the extremely low probability that exactly the same bulb would be out on both sides, a police officer seeing unilluminated lights in the same position on either side could reasonably believe that those lights were not tail lights. The burden of establishing the comparison would, of course, be on the state because the burden of proving that the factual mistake is objectively reasonable is on the state, not on the defendant. *See State v. Post*, 2007 WI 60, ¶12, 301 Wis.2d 1, 733 N.W.2d 634.

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CONCLUSION

For these reasons, WACDL asks that the Court hold that courts presented with arguments that a stop should be found constitutional despite an error by a law enforcement officer must first determine whether the error is one of law or of fact. This Court should further hold that an error in determining what law applies is an error of law. The Court then should re-affirm that, under Wisconsin law, regardless of the good faith of the officer, a mistake of law is not objectively reasonable and stops based upon a mistake of law are unconstitutional. Finally, with regard to traffic stops based upon a mistake of fact, this Court should reaffirm that such stops are constitutional only if the mistake of fact is reasonable and that such a mistake is not reasonable if everything necessary to make the determination of fact was readily available and there was a readily available method of determining the fact.

Dated at Milwaukee, Wisconsin, December 19, 2013.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,999 words.

_____
Ellen Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Ellen Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 19th day of December, 2013, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Ellen Henak

Brown, A. Amicus.wpd

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP002907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying Post-Conviction Relief Entered in the Circuit Court for Milwaukee County, the Honorable Rebecca F. Dallet, Presiding

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

This Court's February 26, 2014 order asked the parties in this case to address two questions in supplemental briefing: "(1) whether the officer had reasonable suspicion to stop Brown's vehicle because the officer believed that Wis. Stat. § 347.13(1) was violated when not all of the tail light bulbs on Brown's vehicle were working; (2) whether, assuming an officer makes a good faith mistake of law on which the officer makes a traffic stop, does that mistake of law nevertheless require reviewing courts to conclude that the stop was not lawful."

First, the officers here lacked reasonable suspicion to stop Mr. Brown's car for the same reason they lacked probable cause to stop Mr. Brown's car: because Wisconsin Statute § 347.13(1) does not require that every individual bulb comprising one tail lamp be lit in order for the tail lamp as a whole to be "in good working order." While reasonable suspicion is a less demanding standard than probable cause, reasonable suspicion still requires that police be able to point to specific, articulable facts, which, when taken together with rational inferences, reasonably justify the Fourth Amendment seizure. The officers' observations that one bulb in a multiple-bulb tail lamp was unlit did not provide facts together with rational inferences to reasonably believe that Wis. Stat. § 347.13(1) may have been violated, because one unlit bulb in a multiple-bulb tail lamp does not violate the statute where the tail lamp as a whole is sufficient to designate the rear of the car to cars traveling behind it. The State therefore failed to show that the officers had reasonable suspicion to stop the car.

Second, a traffic stop cannot be constitutionally upheld based on an officer's subjective mistake of law—whether or not that mistake was made in good faith. In order for a traffic stop to be upheld, the basis for the stop must be objectively reasonable. An officer's mistaken understanding of the law cannot be objectively reasonable. To hold that Fourth Amendment seizures may be based on an officer's good faith mistake of law would be to overrule Wisconsin precedent, expand the scope of the good faith exception in Wisconsin, and go against the vast majority of jurisdictions that have addressed this question. But even further, to declare that a traffic stop should be upheld when a police officer—tasked to enforce the law—conducts a stop based on his or her own misunderstanding of what the law actually prohibits, would be to undermine the legitimacy and integrity of the police, distort the separation of powers by diminishing legislative authority, and weaken the foundation of a rule-of-law society.

I. The Officers Lacked Reasonable Suspicion to Stop Mr. Brown's Car Based on Their Belief that Wis. Stat. §347.13(1) Was Violated.

The officers here lacked reasonable suspicion to stop Mr. Brown's car based on a belief that Wis. Stat. § 347.13(1) had been violated because of an unlit tail lamp bulb. While, as the Court of Appeals held, the appropriate standard is whether the officers had *probable cause* to stop the car, (*see* Brown Initial Brief at 7, Ct. App. Op., ¶ 15, State's App.108), the officers similarly lacked reasonable suspicion to stop the car based on their incorrect belief that the tail lamp on Mr. Brown's car violated Wis. Stat. § 347.13(1).

The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution protect citizens against unreasonable searches

and seizures. U.S. CONST., Amend. IV and WIS. CONST., Art 1, § 11. The "temporary detention of individuals" during a traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment. ***State v. Popke***, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (citation omitted).

"A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed." ***Popke***, 2009 WI 37, ¶ 11 (quoting ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996)). "Probable cause refers to the 'quantum of evidence which would lead a reasonable police officer to believe' that a traffic violation has occurred…probable cause exists when the officer has 'reasonable grounds to believe that the person is committing or has committed a crime.'" ***Id.***, ¶ 14 (quoting ***Johnson v. State***, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977).

Even if an officer does not have probable cause to justify the stop, a traffic stop may still be lawful if the officer had reasonable suspicion to conduct the traffic stop: "Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed." ***Id.***, ¶ 23 (internal citation omitted). Reasonable suspicion requires that an "officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop. The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***Id.*** (internal citations omitted). Thus, both probable cause and

reasonable suspicion demand an objective analysis of an officer's subjective observations and actions.

Importantly, the State had the burden at the suppression hearing to prove that the stop was lawful. *See* ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973)("Where a violation of the Fourth Amendment right against unreasonable search and seizures is asserted, the burden of proof upon the motion to suppress is upon the state."). The State in this case failed to prove that the officers had either probable cause or reasonable suspicion to stop Mr. Brown's car.

Both Officer Wawrzonek and Officer Feely testified at the suppression hearing that they observed one light on the driver's side of Mr. Brown's car to be unlit. (38:5,26;State's App.122;143). Officer Wawrzonek testified that it was "the driver side tail lamp. There is a wide band and there is actually three light panels on that wide band and one of those panels was out." (38:5;State's App.122). Officer Feely testified that it was the "driver side middle" "tail light" that was out. (38:26;State's App.143). Officer Wawrzonek testified that he and Officer Feely then conducted the traffic stop because of the "defective tail light"; Officer Feely also testified that they then stopped the car for the "defective tail lamp." (38:5,26;State's App.122;143). The circuit court found the officers' testimony to be credible. (39:31;State's App.187).

Thus, this was not a case where the officers made specific factual observations which suggested to them that a violation of Wis. Stat. § 347.13(1) may be occurring, but that they needed to conduct the stop to gain further facts to determine whether a violation had indeed occurred. The facts on this record instead reflect that this was a situation where

both officers saw something which they immediately believed to constitute a traffic offense prior to conducting the stop—specifically, a "defective" tail lamp—and then conducted the stop based on that perceived violation. As the Court of Appeals explained:

> The officers observed that the middle, red light bulb on the rear driver's side of the vehicle was unlit, and stopped the vehicle because they believed that the unlit light bulb constituted an equipment violation. They "did not act upon a suspicion that warranted further investigation, but on [their] observation of a violation being committed in [their] presence.

(Ct. App. Op., ¶ 15)(State's App.108)(citing ***State v. Longcore***, 226 Wis. 2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999)).

Their factual observation that one bulb on a multiple-bulb panel was unlit did not provide an objectively reasonable basis to believe that Wis. Stat. § 347.13(1)—which requires a tail lamp to be in "good working order"—may have been violated, because, for all of the reasons Mr. Brown has argued, *see* Brown Response Brief at 5-16, that statute does not require that every individual bulb be lit for a tail lamp as a whole to be in good working order. The officers therefore lacked reasonable suspicion to stop Mr. Brown's car based on a belief that Wis. Stat. § 347.13(1) had been violated.

II. A Traffic Stop Based on an Officer's Mistake of the Law, Whether or Not in Good Faith, Cannot be Constitutionally Upheld

A. Under ***State v. Longcore***, a traffic stop may not be based on an officer's mistake of law.

Wisconsin law currently holds that a traffic stop cannot be based on an officer's mistaken understanding of the statutes. In ***State v. Longcore***, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (1999), the Court of Appeals held that "a lawful stop cannot be predicated upon a mistake of law." This Court, in a divided *per curiam* decision, affirmed the Court of Appeals' holding. ***State v. Longcore***, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620.[1]

In ***Longcore***, the officer testified that he stopped the car after noticing (1) the car pull out of a parking lot in front of closed businesses at 2am and (2) that the car's rear passenger window was missing and had been replaced by a plastic sheet, which the officer believed to be a violation of the law. 226 Wis. 2d at 4. The circuit court concluded that the first reason was insufficient to justify the stop, which the State did not contest on appeal. ***Id.*** The circuit court, however, concluded that the officer's second reason justified the stop, even if the officer was incorrect about the law and whether his observation constituted a violation. ***Id.***

The Court of Appeals disagreed. ***Id.*** at 5. The Court of Appeals first rejected the notion that "reasonable suspicion

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[1] The State in this case, citing ***Longcore***, acknowledged in its initial brief that "a vehicle stop may not be based on a mistake of law." (State's Initial Brief at 25). The State at oral argument further explained that it was not challenging this holding. This Court should deem any argument to the contrary at this point as forfeited. *See* ***State v. Huebener***, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727.

may extend beyond the relation of articulable facts to the law and encompass an officer's reasonable suspicion of what the law is." ***Id.*** at 6. The Court noted that this rationale was "in the nature of, although not precisely analogous to, the 'good faith' exception to the exclusionary rule." ***Id.*** The Court noted that—at that point—Wisconsin had not adopted a good faith exception to the exclusionary rule. ***Id.*** at 6-7.

The Court further noted that the circuit court was incorrect to conclude that reasonable suspicion was the proper standard, as the officer "did not act upon a suspicion that warranted further investigation, but on his observation of a violation being committed in his presence." ***Id.*** at 8-9. The Court explained that "[i]f the facts would support a violation only under a legal misinterpretation, no violation has occurred, and thus by definition there can be no probable cause that a violation has occurred." ***Id.*** at 9. "We conclude that when an officer relates the facts to a specific offense, it must indeed *be* an offense; a lawful stop cannot be predicated on a mistake of law." ***Id.*** (emphasis in original).

Since ***Longcore***, this Court has adopted the good faith exception to the exclusionary rule in certain limited situations in which police rely on either (1) a warrant issued by an "independent and neutral magistrate," or (2) on well-settled law which is then subsequently overruled. *See* ***State v. Eason***, 2001 WI 98, ¶ 29, 245 Wis. 2d 206, 629 N.W.2d 625; ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517; ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97[2];

[2] The officers' beliefs in this case that the tail lamp was defective could in no way be construed to be in reliance on "clear and settled precedent." In ***Dearborn***, this Court explained that this exception would "not affect the vast majority of cases where neither this court nor the United States Supreme Court have spoken with specificity in a particular fact situation." 2010 WI 84, ¶ 46. This Court has not, up to this point, addressed whether Wis. Stat. § 347.13(1) requires every individual

see also Brown Response Brief at 18-20 (providing a more detailed discussion of the history of the good faith exception in Wisconsin).[3] But these exceptions do not account for an officer relying on his or her own mistake of the law he or she is entrusted to enforce, and the holding of ***Longcore*** remains true: if an officer conducts a traffic stop based on the officer's belief that something he or she has observed is prohibited by statute, but in fact the statutes do not contain such a prohibition, then the officer lacks a lawful basis to conduct the stop and the stop cannot stand.

B. The vast majority of federal circuits and states hold that a traffic stop cannot be based on an officer's mistake of law, regardless of whether that mistake was in good faith.

The majority of federal circuits to address this question, including the Seventh Circuit, have similarly held that a seizure cannot be based on an officer's mistake of law. *See* ***U.S. v. McDonald***, 453 F.3d 958 (7th Cir. 2006); ***U.S. v. Williams***, 740 F.3d 308, 312 (4th Cir. 2014); ***United States v. Miller***, 146 F.3d 274, 278-279 (5th Cir.1998); ***U.S. v. Lopez-Soto***, 205 F.3d 1101, 1106 (9th Cir. 2000); ***U.S. v. Tibbetts***, 396 F.3d 1132, 1138 (10th Cir. 2005); ***U.S. v. Chanthasouxat***, 342 F.3d 1271, 1279 (11th Cir.2003), (all holding that traffic stops cannot be based on a mistake of law,

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bulb comprising one tail lamp to be lit for the lamp to be in "good working order." And prior to this case, there were no published Court of Appeals decisions addressing this question.

[3] Additionally, the Court of Appeals recently applied the good faith exception to Wisconsin law enforcement's reliance on law enforcement in Mexico concerning the lawfulness of a search conducted in Mexico. ***State v. Johnson***, 2013 WI App 140, 352 Wis. 2d 98, 841 N.W.2d 302. The Court noted that suppression in that situation would not serve the purpose of the exclusionary rule as it would "not alter the behavior of United States law enforcement officials who have relied on the assurances of foreign authorities that a search is legal." ***Id,*** ¶ 11.

even if the mistake was reasonable); *but see* ***U.S. v. Martin***, 411 F.3d 998, 1001 (8th Cir. 2005)(holding that a traffic stop may be based on an "objectively reasonable" mistake of law); ***U.S. v. Delfin-Colina***, 464 F.3d 392 (3d Cir. 2006)(holding that "[i]n situations where an objective review of the record evidence establishes reasonable grounds to conclude that the stopped individual has in fact violated the traffic-code provision cited by the officer, the stop is constitutional even if the officer is mistaken about the scope of activities actually proscribed by the cited traffic-code provision").

Additionally, the majority of States also hold that an officer's mistake of law cannot provide a lawful basis for a traffic stop. *See* ***J.D.I v. State***, 77 So.3d 610 (Ala. Crim. App. 2011); ***People v. Ramirez***, 44 Cal. Rpt. 3d 813, 816 (Cal. Ct. App. 2006); ***McDonald v. State***, 947 A.2d 1073, 1079 (Del. 2008); ***People v. Cole***, 874 N.E.2d 81, 88 (Ill. Ct. App. 2007); ***Gunn v. State***, 956 N.E.2d 136, 139 (Ind. Ct. App. 2011); ***State v. Louwrens***, 792 N.W.2d 649, 654 (Iowa 2010); ***Martin v. Kan. Dept. of Revenue***, 176 P.2d 938 (Kan.2008); ***Commonwealth v. Bernard***, 84 Mass. App. Ct. 771,— N.E.3d— (Mass. App. Ct. 2014); ***Gilmore v. State***, 42 A.3d 123, 135 (Md. Ct. Spec. App. 2012); ***State v. Anderson***, 683 N.W.2d 818, 822-824 (Minn. 2004); ***State v. Lacasella***, 60 P.3d 975, 980-982 (Mont. 2002); ***Byer v. Jackson***, 661 N.Y.S2d 336, 338 (N.Y. App. Div. 1997); ***Commonwealth v. Rachau***, 670 A.2d 731 (Pa. 1996); ***State v. Duran***, 396 S.W.3d 563, 573 (Tex. Crim. App. 2013).[4] A few states

[4] The Ohio Court of Appeals appears to be divided on this question. *See* ***State v. Babcock***, 993 N.E.2d 1215, 1217-1220 (Ohio Ct. App. 2013)(discussing the conflict in Ohio appellate districts on this question). Additionally, the Oregon Court of Appeals has held that while a traffic stop cannot be based on a mistake of law, a stop may be based on a "mistake as to *which* law the defendant violated" so long as the facts perceived by the officer establish an offense. *See* ***State v. Chilson***, 182

provide that an officer's mistake of law does not automatically invalidate a seizure if the officer's mistake was reasonable. *See* ***Travis v. State***, 959 S.W.2d 32 (1998), *but compare with* ***Hinojosa v. State***, 319 S.W.3d 258, 261, n.3 (Ark. 2009); *see also* ***State v. Rhinelander***, 649 S.E.2d 828, 829-30 (Ga. Ct. App. 2007); ***Harrison v. State***, 800 So.2d 1134, 1138-1139 (Miss. 2001); ***State v. Heien***, 737 S.E.2d 351, 356 (N.C. 2012); ***State v. Hubble***, 206 P.3d 579, 587-588 (N.M. 2009); ***State v. Wright***, 791 N.W.2d 791 (S.D. 2010).

C. The Seventh Circuit in ***U.S. v. McDonald*** held that a traffic stop cannot be based on a mistake of law, whether in good faith or not.

In ***McDonald***, the Seventh Circuit held that a traffic stop cannot be based on an officer's mistake of law—whether that mistake was a "good faith" mistake or not. The Seventh Circuit noted that several other federal circuits before it had concluded that "even a reasonable mistake of law cannot support probable cause or reasonable suspicion," and reached the same conclusion:

> We agree with the majority of circuits to have considered the issue that a police officer's mistake of law cannot support probable cause to conduct a stop. Probable cause only exists when an officer has a reasonable belief that a law has been broken. Law enforcement officials have a certain degree of leeway to conduct searches and seizures, but the flip side of that leeway is that the legal justification must be objectively grounded. *An officer cannot have a reasonable belief that a violation of the law occurred when the acts to*

P.3d 241 (Or. Ct. App. 2008); ***State v. Boatright***, 193 P.3d 78 (Or. Ct. App. 2008).

> *which an officer points as supporting probable cause are not prohibited by law*.

Id. at 961 (internal citations omitted)(emphasis added). In essence, an officer's *subjective* belief that the law prohibits something cannot be *objectively* reasonable if the law does not in fact prohibit that thing.

The Seventh Circuit further explained that this holding—that a traffic stop cannot be based on an officer's mistake of law—remains true whether or not the officer's mistake of law was in "good faith":

> It makes no difference that an officer holds an understandable or 'good faith' belief that a law has been broken. Whether the officer's conduct was reasonable under the circumstances is not the proper inquiry. Rather, the correct question is whether a mistake of law, no matter how reasonable or understandable, can provide the objectively reasonable grounds for providing reasonable suspicion or probable cause. The answer is that it cannot. *A stop based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable.*

Id. at 961-962 (internal citations omitted)(emphasis added).

In ***McDonald***, police had received an anonymous tip claiming that a black man driving a maroon Buick had drugs and a handgun. ***Id.*** at 959. Officers later that evening saw a car which matched the description and followed the car. ***Id.*** One officer testified that as he followed the car, he saw the driver turn on his blinker at a curve in the road, and believed this to be an unnecessary and thus improper use of the turn signal. ***Id.*** at 959-960. He testified that he believed that this violated an Illinois statute prohibiting improper uses of a turn signal, and stopped the car. ***Id.*** The district court ruled that

while the anonymous tip would "probably not have been a sufficient ground" to stop the defendant, the stop was nevertheless warranted because the officer "reasonably believed" that the use of the turn signal violated the state law. ***Id.*** at 960. As the Seventh Circuit explained, "[t]he district court also stated in a footnote that although the statute does not specifically proscribe McDonald's use of the turn signal, 'it could, arguably, be so interpreted.'" ***Id.*** On appeal, McDonald argued that police stopped him based on a mistake of law and that a mistake of law could not support the stop; the Seventh Circuit agreed. ***Id.*** at 960-962.

Importantly, the Seventh Circuit Court noted that "[b]y all indications" the officer "genuinely believed McDonald had violated the law"—that he had tried to consult an Offense Code Book which listed improper use of a turn signal as a violation but did not provide the text of the statute—and even further that "no reported case had addressed whether conduct similar to McDonald's" violated the turn signal statute. ***Id.*** at 962. But even though the officer "may have acted in good faith," the Seventh Circuit held that "[t]o create an exception here would defeat the purpose of the exclusionary rule, *for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey*." ***Id.*** (quoting ***United State v. Lopez-Valdez***, 205 F.3d 1101, 1106 (9th Cir.2000))(emphasis added).

D. Suppressing evidence derived from traffic stops based on an officer's mistake of law serves the purpose of the exclusionary rule to deter negligent police conduct.

Indeed, this Court has recognized that the exclusionary rule serves not only to deter constitutional violations caused

by willful police conduct, but also by *negligent* police conduct. *See* ***State v. Gums***, 69 Wis. 2d 513, 517, 230 N.W.2d 813 (1975). This Court has only applied a good faith exception to the exclusionary rule in situations where police have acted in reliance on the independent judiciary—whether in the form of a warrant signed by a judge in a specific case or in reliance on well-settled case law. *See* ***Eason***, 2001 WI 98; ***Ward***, 2000 WI 3; ***Dearborn***, 2010 WI 84. In those situations, this Court has noted that applying the exclusionary rule would not deter misconduct, as the police were acting in reliance of the judiciary's understanding of the law. *See*, *e.g.*, ***Eason***, 2001 WI 98, ¶ 2; ***Ward***, 2000 WI 3, ¶¶ 49-50; ***Dearborn***, 2010 WI 84, ¶ 44.

Unlike those cases in which this Court has applied a good faith exception to the exclusionary rule, an officer who acts based on his or her subjective misunderstanding of the law is not acting in good faith reliance on the mistake of an independent, legally-trained member (or members) of the judiciary whom the officer could understandably expect would know the law.[5] In this situation, the exclusionary rule absolutely serves to deter negligent police action and to encourage police to understand the very law they are enforcing. This Court should therefore not expand the scope of the good faith exception to an officer's own misunderstanding of Wisconsin law.

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[5] Nor is an officer who acts based on his or her subjective misunderstanding of Wisconsin law acting in good faith reliance on a foreign authority's mistaken explanation of foreign law. *See* ***Johnson***, 2013 WI App 140. In applying the good faith exception in such a circumstance, the Court of Appeals noted that "we presume high-ranking Mexican law enforcement personnel know their own laws." ***Id.***, ¶ 13. A Wisconsin law enforcement officer's own mistaken understanding of Wisconsin law is not in good faith reliance on an independent source whom an officer could reasonably expect would know the law.

E. To uphold traffic stops based on an officer's own mistake of law would be to create a double standard by which citizens are required to know the law, but the police—entrusted and empowered to enforce it—are not.

Allowing a Fourth Amendment seizure to derive from a police officer's mistake of law would be to weaken the foundation of a rule-of-law society:

> "Police in a democracy are not merely bureaucrats. They are also…legal officials, that is, people belonging to an institution charged with strengthening the rule of law in society." Lawless seizures by police violate the basic tenet that ours is a "government of laws, and not of men"…Reciprocal expectations of law-abidingness between government and citizens can scarcely be expected to endure if one party—the government—need not uphold its end of the bargain.

Wayne A. Logan, "Police Mistakes of Law," 61 Emory L.J. 69, 91-92 (2011) (quoting Jerome H. Skolnick, "Justice Without Trial: Law Enforcement in Democratic Society 233 (Macmillan Coll. Pub'g Co. 3d ed 1994) and ***Marbury v. Madison***, 5 U.S. (1 Cranch) 137, 163, (1803)).

As the Eleventh Circuit has explained, it would be a "fundamental unfairness" to hold "citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it." ***Chanthasouxat***, 342 F.3d at 1280 (internal citation and quotations omitted). As this Court recently noted in ***State v. Neumann*****,** "Wisconsin employs the mistake of law doctrine which says that every person is presumed to know the law and cannot claim ignorance of it as a defense." 2013 WI 58, ¶ 50, n.29, 348 N.W.2d 455, 832 N.W.2d 560. Just as ignorance of the law is not a legally-accepted justification for Wisconsin

citizens' violations of the statutes, it should not be a legally-accepted justification for trained Wisconsin police officers' violations of the Constitution.

Police have a responsibility to know the laws upon which they act. While police may not be automatically familiar off-hand with every portion of the statutes (here the traffic code), police "fairly can be expected to know the laws that they elect to invoke on street patrol." Logan, "Police Mistakes of Law," 61 Emory L.J. at at 107. Traffic stops based on an officer's mistaken understanding of the law therefore cannot stand, even where the statutes as a whole are voluminous. To uphold "lawless seizures" based on mistakes of law—whether a good faith mistake or not—because the laws are too voluminous for police to know would be a "perverse twist reminiscent of Kafka." ***Id.*** at 84. "Such a view, even if not rejected on democratic-governance concerns alone, would appear especially unjustified given unprecedented improvements in the educational backgrounds of police and ready access to substantive law, including via dashboard computers." ***Id***.

And even if a statute is arguably ambiguous, a traffic stop based on an officer's incorrect understanding of that statute still cannot stand. For example, the Seventh Circuit in ***McDonald*** acknowledged that the officer had tried to find clarification on what the relevant statute prohibited, and further noted that no reported case had addressed the statute to clarify what in fact was prohibited. 453 F.3d at 962. Nevertheless, even where the officer "acted in good faith," the Seventh Circuit held that to allow an exception to the exclusionary rule would defeat its very purpose by taking away the incentive for police to make sure they understand the law. ***Id.*** Additionally, to hold otherwise would be to "use the vagueness of a statute *against* a defendant."

Chanathasouxat, 342 F.3d at 1278-1279. The Eleventh Circuit in ***Chanathasouxat*** explained that even though the statutes in question were traffic statutes and thus "not criminal statutes," to uphold a stop based on an officer's incorrect understanding of an arguably ambiguous statute would be to contravene the "fundamental principle that a criminal statute that is so vague that it does not give reasonable notice of what it prohibits violates due process." ***Id.***

F. To uphold traffic stops based on an officer's own mistake of law would be to undermine the legitimacy of the police.

Furthermore, to allow police to conduct traffic stops based on misunderstandings of the law would undercut the legitimacy and integrity of the police. "Branding lawless seizures as constitutionally reasonable, and as a consequence allowing incident searches and other intrusions, can only lessen confidence in the perceived fairness and legitimacy of police, already strained by reports of police fabrications and racial bias." *See* Logan, "Police Mistakes of Law," 61 Emory L.J. at 93. Research shows that the public's perception of justice influences the public's willingness to comply with the law and help police. ***Id.***, n.164 (citing multiple research articles). Indeed, to effectively serve to control crime, police must have the cooperation of the public. *See* Tom R. Tyler & Jeffrey Fagan, "Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?," 6 Ohio St. J. Crim. L. 231 (2008). "Cooperation increases not only when the public views the police as effective in controlling crime and maintaining social order, but also when citizens see the police as legitimate authorities who are entitled to be obeyed." ***Id.*** at 266-267.

G. To uphold traffic stops based on an officer's mistake of law would be to undercut legislative authority and weaken the separation of powers.

Upholding Fourth Amendment seizures based on a police officer's mistaken understanding of the statutes also muddles the separation of powers by taking away legislative authority. As Law Professor Wayne A. Logan has explained, "[s]ince at least the mid-twentieth century, criminal law norms, especially regarding less serious and malum prohibitum behaviors, have been codified by American legislatures, with courts providing secondary yet authoritative interpretive input." ***Id.*** at 95. To uphold traffic stops based on mistakes of law—to give the police not only the power to enforce the law, but further to interpret and broaden it—would be for the judicial branch to approve of an arm of the executive branch (the police) usurping the role of the legislature. *See* ***id.*** And where courts simply need to assess whether an officer's understanding of the statutes seems reasonable, instead of what the statutes indeed proscribe, the judicial branch has less incentive to perform its role of interpreting and clarifying the statutes. ***See id.*** at 95-96.

Ultimately, whether or not an officer's mistake of law is in subjective good faith, or even objectively reasonable, the police are entrusted by the people of Wisconsin to enforce the law. As such, we rightfully expect them to know our laws, particularly when their enforcement involves the restriction of our citizens' liberties. This Court should uphold its precedent and, along with the vast majority of federal circuits and States to address this question, re-affirm that a traffic stop cannot be based on an officer's mistake of law.

CONCLUSION

For these reasons, and the reasons set forth in his Response Brief and at oral argument, Mr. Brown respectfully requests that this Court affirm the decision of the Court of Appeals.

Dated this 19th day of March, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,167 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of March, 2014.

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

Page

Page

STATUTES CITED

OTHER AUTHORITY

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SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

The State of Wisconsin, Plaintiff-Respondent-Petitioner, pursuant to this court's order of February 26, 2014, files this supplemental brief addressing the following issues:

1) Whether the officer had reasonable suspicion to stop Brown's vehicle because the officer believed that Wis. Stat. § 347.13(1) was violated when not all the tail light bulbs on Brown's vehicle were working; and

2) Whether, assuming an officer makes a good-faith mistake of law on which the officer makes a traffic stop, does that mistake of law nevertheless require reviewing courts to conclude that the stop was not lawful.

ARGUMENT

I. THE FACTS APPARENT TO THE OFFICERS IN THIS CASE SUPPORT A FINDING OF BOTH PROBABLE CAUSE AND REASONABLE SUSPICION THAT BROWN WAS VIOLATING WIS. STAT. § 347.13(1).

Answering this court's first question, while the State continues to maintain that the officers had probable cause to stop Brown's car, and urges this court to decide the case on this basis, the same facts supporting a finding of probable cause also provided the officers with reasonable suspicion to believe Brown was violating Wis. Stat. § 347.13(1).

Initially, the court of appeals was wrong that the stop of Brown's car could not be based on reasonable suspicion. In *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), *aff'd by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620, the court of

appeals held that when an officer makes a traffic stop based on the observation of a violation committed in the officer's presence, the officer must have probable cause to make the stop. *Longcore*, 226 Wis. 2d at 8-9. In its opinion in this case, the court of appeals relied on this language and held that the issue was whether the officers who stopped Brown had probable cause to believe the law had been broken, not reasonable suspicion. *State v. Brown*, 2013 WI App 17, ¶ 15, 346 Wis. 2d 98, 827 N.W.2d 903. This was because the officers stopped Brown for an observed traffic violation, not to conduct further investigation. *Id.*

With due respect to the court of appeals' decisions in *Longcore* and *Brown*, this is an incorrect statement of Fourth Amendment principles. It is well established that traffic stops may be based on either probable cause to believe a traffic violation has occurred or reasonable suspicion to believe a violation has been, is being, or will be committed. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (citations omitted).

Further, whether these standards have been met is an objective inquiry. *Whren v. United States*, 517 U.S. 806, 813 (1996). The officer's subjective intentions or actual motivations for the stop are irrelevant. *See id.*; *see also State v. Repenshek*, 2004 WI App 229, ¶ 10, 277 Wis. 2d 780, 691 N.W.2d 369. This is true whether the issue is probable cause or reasonable suspicion. *See State v. Kyles*, 2004 WI 15, ¶ 30 n.22, 269 Wis. 2d 1, 675 N.W.2d 449. ""[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not

invalidate the action taken as long as the circumstances, viewed objectively, justify that action."'" *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (quoted sources omitted).

To hold that an officer who stops a vehicle based on the observation of an equipment violation needs probable cause because the officer was not acting on a suspicion warranting further investigation is inconsistent with these principles. That the officer did not make the stop to investigate further does not matter because the officer's subjective intent is irrelevant. Instead, the Fourth Amendment inquiry is whether the officer's actions were objectively reasonable under the circumstances. Put another way, a stop is valid as long as the facts reasonably apparent to the officer would support a finding of probable cause or reasonable suspicion. *Id*. (facts known to officer relevant to probable cause inquiry); *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305 (same with respect to existence of reasonable suspicion).

In this case, as the State has argued, the officers who stopped Brown's car had probable cause to believe its tail lamp was in violation of Wis. Stat. § 347.13(1)'s good working order requirement because only two of its three bulbs were functioning, and all of a lamp's bulbs must be working for the lamp to be in good working order (State's brief-in-chief at 17-24).

The State also argued that even if the officers were wrong that the burned-out bulb on Brown's car was part of the tail lamp, they still had probable cause to stop his car because, given the age of the car and their lack of familiarity with

it, it was reasonable to think the bulb was part of the tail lamp (State's brief-in-chief at 24-27). Even if this later turned out not to be true, the State argued, a good-faith mistake of fact does not invalidate probable cause (State's brief-in-chief at 24-27). *See Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990). This argument was made in anticipation that Brown might claim as he did in the circuit court, or this court might find, that the burned-out bulb was not part of the tail lamp (39:35). While the court of appeals acknowledged that Brown had made this argument in the circuit court, its decision ultimately assumes that the bulb was part of the tail lamp. *Brown*, 346 Wis. 2d 98, ¶¶ 19-21. Brown did not argue the bulb was not part of the tail lamp in his brief in this court. Nonetheless, if this court concludes the bulb was not part of the tail lamp, it should still conclude the stop was proper.

In its brief-in-chief, the State also asserted that the officers had "at least reasonable suspicion" and "the officers reasonably suspected Brown's car was in violation of [Wis. Stat. § 347.13(1)] and could properly stop it" (State's brief-in-chief at 24, 27). While this court should find that the officers had probable cause to perform the stop, it can also conclude that the specific and articulable facts apparent to the officers established reasonable suspicion to believe that Brown's tail lamp did not comply with the statute's good working order requirement. *See State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729.

Again, if all bulbs in a tail lamp must be working to satisfy § 347.13(1), then the officers, upon seeing what appeared to be a burned-out

bulb in Brown's tail lamp, could stop the car to investigate whether the bulb was, in fact, part of the lamp. Their belief that the bulb was part of the tail lamp would be reasonable, given the age of the car and their unfamiliarity with it, and this would permit them to temporarily detain Brown to inquire further and resolve the ambiguity. *Id.*; *State. Waldner*, 206 Wis. 2d 51, 61, 556 N.W.2d 681 (1996). That the officers might reasonably also believe the bulb was not part of the tail lamp would not invalidate the stop because they were not required to rule out innocent behavior before making it. *Young*, 294 Wis. 2d 1, ¶ 21. The officers had reasonable suspicion to stop Brown's car.

II. A TRAFFIC STOP MAY NOT BE BASED ON APPARENT FACTS THAT DO NOT ESTABLISH PROBABLE CAUSE TO BELIEVE A LAW HAS BEEN VIOLATED OR REASONABLE SUSPICION TO BELIEVE A LAW IS BEING, HAS BEEN, OR WILL BE VIOLATED.

The State's arguments that the officers had probable cause and reasonable suspicion to stop Brown's car all depend on the correctness of its interpretation of "good working order" in Wis. Stat. § 347.13(1) requiring that all component bulbs of a tail lamp be functional.

This court's second question to the parties asks if a court is required to conclude a traffic stop is not lawful if the stopping officer bases the stop on a good-faith mistake of law. Thus, this court is asking whether the stop of Brown's car might be

valid even if the State's interpretation of "good working order" is wrong, as long as the stopping officer's incorrect interpretation of Wis. Stat. § 347.13(1) was made in good faith.

The State does not defend the stop of Brown's car on this basis because to do so would directly conflict with the above-stated principle that an officer's subjective reasons for a vehicle stop are irrelevant to the Fourth Amendment analysis. An officer's good-faith mistake of law, or for that matter a bad-faith mistake of law, has no effect on the validity of a traffic stop. What the officer believes the law to be does not matter. Instead, as noted, the inquiry is whether the facts apparent to the officer objectively establish probable cause that a crime has been committed, or reasonable suspicion that the law has been, is being, or will be violated.

The court of appeals' decision in *Repenshek* illustrates this principle. There, an officer testified at a suppression hearing that he arrested Repenshek for "'causing great bodily harm by reckless driving.'" *Repenshek*, 277 Wis. 2d 780, ¶ 8. Repenshek correctly noted that was not an actual crime and argued the officer thus lacked probable cause to arrest him. *Id*. ¶ 9. The court of appeals disagreed, stating that the legality of an arrest does not depend on whether the arresting officer is able to articulate the correct legal basis for the arrest. *Id*. ¶ 10. Even when the officer acts under a mistaken understanding of the crime the officer arrests the person for, reviewing courts objectively determine whether there was probable cause to believe a crime had been committed. *Id*. ¶¶ 11-12. Because the facts established that the officer had probable cause to arrest Repenshek for reckless

driving, the court of appeals concluded the arrest was valid. *Id.* ¶ 12.

While *Repenshek* addresses an officer's mistaken belief about the existence of a law, rather than an officer's error about what an existing law actually prohibits, there is really no difference between the two scenarios for Fourth Amendment purposes.

For example, suppose an officer discovers a gun in a defendant's possession in a search incident to arrest for battery after the officer saw the defendant repeatedly punch another person in the face. The defendant, a felon, is charged with possession of a firearm by a felon and moves to suppress the gun claiming there was no probable cause to arrest him. At the suppression hearing, the officer testifies that he arrested the defendant because he believed the defendant had committed battery, which the officer describes as hitting another individual with enough force to cause an injury.

The officer's description of battery, which actually requires that the defendant cause bodily harm to another with the intent to do so and without the other person's consent, is wrong. *See* Wis. Stat. § 940.19(1). It does not follow, however, that the officer lacked probable cause to arrest the defendant for battery. The officer saw the defendant repeatedly punch the victim, and even if he did not know the actual elements of battery at the time of arrest, the facts he observed still objectively established probable cause that the crime had been committed.

Thus, an officer's mistake of law is irrelevant to whether probable cause or reasonable suspicion exists for a traffic stop. It does not matter that an officer stops someone because the officer believes that the person is violating a law that does not actually exist, or that the officer is wrong about what a particular law actually prohibits. The issue is whether the facts apparent to the officer objectively establish probable cause or reasonable suspicion to support the stop.

Further, the existence of probable cause or reasonable suspicion in the context of a traffic stop depends on the correct interpretation of the statute prohibiting the conduct. Allowing an officer to conduct a vehicle stop based on his or her mistaken interpretation of the law would be inconsistent with the objective inquiry the Fourth Amendment demands. This is true even if a statute is arguably ambiguous or, like many traffic laws, has not been conclusively interpreted by a court. Thus, the State concedes, that if its interpretation of Wis. Stat. § 347.13(1) is wrong, the officers could not have stopped Brown for a violation of this statute.[1]

While the State does not challenge the proposition that the existence of probable cause or

[1] As noted, an officer's incorrect interpretation of the law does not invalidate a traffic stop as long as the facts objectively support a finding of probable cause or reasonable suspicion that any crime or traffic violation had been committed. But, if the only possible way the facts would support a stop under either standard requires a misinterpretation of the law, then the stop is invalid.

reasonable suspicion for a traffic stop depends ultimately on the correct interpretation of the law, it notes that *Longcore* suggests that the officer's subjective beliefs about the law are relevant. *Longcore* stated "[t]he issue is, then, whether an officer has probable cause that a law has been broken when *his* interpretation of the law is incorrect." *Longcore*, 226 Wis. 2d at 9 (emphasis added).[2] This court should clarify that a stopping officer's subjective beliefs about what the law says are irrelevant to the stop, and instead, what matters is whether the facts reasonably apparent to the officer give rise to probable cause or reasonable suspicion that a violation of the law, correctly interpretated, has occurred.

CONCLUSION

Upon the foregoing, and for the reasons stated in its earlier briefs, the State respectfully

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[2] The State acknowledges that it made the same error at oral argument. In the quoted portions of argument in Justice Bradley's dissent to the order requesting supplemental briefing where undersigned counsel said the State was not challenging *Longcore*, counsel said that the stopping officer could not be "wrong about the law" and "the officer had to be correct in his interpretation of the law." *See State v. Brown*, No. 2011AP2907-CR, Feb. 26 2014 order at 5-6 (Bradley, J., dissenting).

requests that this court reverse the court of appeals' decision.

Dated this 19th day of March, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,368 words.

Dated this 19th day of March, 2014.

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AARON R. O'NEIL
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