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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

City of Lincoln, Plaintiff/Appellee, v. Larry Wayne McCorkell, Defendant/Appellant.	Supreme Court No.: 20200319 Burleigh County Case No.: 08-2020-CR-000533

AMICUS CURIAE BRIEF OF NORTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT/APPELLANT AND REVERSAL OF THE DISTRICT COURT'S ORDER ON DEFENDANT'S MOTION TO SUPPRESS ENTERED ON OCTOBER 16, 2020 AND CRIMINAL JUDGMENT ENTERED ON NOVEMBER 18, 2020 BY THE HONORABLE DAVID E. REICH, SOUTH CENTRAL JUDICIAL DISTRICT

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STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN CASE

[¶ 1] The amicus curiae is the North Dakota Association of Criminal Defense Lawyers ("NDACDL"). The NDACDL is an organization of North Dakota attorneys committed to promoting justice and due process for individuals accused of a crime; fostering integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice within the State of North Dakota. This brief is offered because NDACDL believes the issues before this Court are of importance in their potential to affect the privacy rights of individuals.

STATEMENT OF AUTHORSHIP AND FUNDING

[¶ 2] No party's counsel authored any part of this brief, and no party, party's counsel, or entity other than the amicus curiae, its members, or its counsel contributed money toward the authorship or production of this brief.

LAW AND ARGUMENT

[¶ 3] Law enforcement's legitimate reliance of mistakes of law in initiating traffic stops should be limited and clarified by this Court.

I. Officers cannot rely on unreasonable mistakes of law in making traffic stops.

[¶ 4] The Fourth Amendment of the United States Constitution provides that individuals have the right to be free from unreasonable searches and seizures. Article 1, Section 8 of the North Dakota Constitution also protects individuals from unreasonable searches and seizures.

[¶ 5] Automobile stops constitute seizures and officers must have a reasonable suspicion that the motorist violated the law to effectuate a constitutional stop. *State v. Hirschkorn*, 2016 ND 117, ¶ 13, 881 N.W.2d 244.

[¶ 6] This Court has said:

> When determining whether an officer had reasonable suspicion, we employ an objective standard looking at the totality of the circumstances and taking into consideration the reasonable inferences and deductions an investigating officer may make. *State v. Hall*, 2017 ND 124, ¶ 21, 894 N.W.2d 836. "Whether the facts support a reasonable and articulable suspicion is a question of law." *Id.* "The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity." *State v. Franzen*, 2010 ND 244, ¶ 12, 792 N.W.2d 533.

State v. Cook, 2020 ND 69, ¶ 16, 940 N.W.2d 605.

[¶ 7] In *Hirschkorn*, the main case relied on by the district courts in these cases, the defendant was arrested for driving under the influence. 2016 ND 117, ¶ 2, 881 N.W.2d 244. The officer initiated the stop due to the defendant's failure to signal upon exiting an alley. *Id.* The defendant moved to suppress the evidence obtained from the stop because the law did not require signaling when exiting an alley. *Id.* This Court reversed the district

court's suppression on these grounds, concluding an officer's mistake of fact or law may still provide reasonable suspicion to justify a traffic stop. *Id.* at ¶ 16. This Court concluded:

> [W[e cannot say the deputy's "sloppy study of the laws he is duty-bound to enforce" caused this belief. *Heien*, 135 S.Ct. at 539–40. The district court erred in suppressing evidence obtained from the traffic stop because the deputy's belief the law required drivers to signal prior to exiting alleys was objectively reasonable, giving the deputy the reasonable suspicion necessary to justify the traffic stop.

Id.

[¶ 8] This Court recently affirmed this view of the law in *State v. Bolme*, 2020 ND 255, 952 N.W.2d 75. In *Bolme*, the defendant argued the law did not prohibit driving a vehicle with a cracked windshield, which was the basis of a traffic stop. *Id.* at ¶ 6. This Court agreed and concluded a cracked windshield is not a violation of the law. *Id.* at ¶ 10. However, this Court went on to conclude, in part, that because it had not previously interpreted the statute at issue, the officer's belief was objectively reasonable, and the stop was justified. *Id.* at ¶ 12.

[¶ 9] In *Heien v. North Carolina*, 574 U.S. 54 (2014), the United States Supreme Court acknowledged law enforcement mistakes, stating:

> Contrary to the suggestion of Heien and amici, our decision does not discourage officers from learning the law. The Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be objectively reasonable. We do not examine the subjective understanding of the particular officer involved. *Cf. Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). And the inquiry is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation. Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce.
>
> Finally, Heien and amici point to the well-known maxim, "Ignorance of the law is no excuse," and contend that it is fundamentally unfair to let police officers get away with mistakes of law when the citizenry is accorded no such leeway. Though this argument has a certain rhetorical

> appeal, it misconceives the implication of the maxim. The true symmetry is this: Just as an individual generally cannot escape criminal liability based on a mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law. If the law required two working brake lights, Heien could not escape a ticket by claiming he reasonably thought he needed only one; if the law required only one, Sergeant Darisse could not issue a valid ticket by claiming he reasonably thought drivers needed two. But just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop.

Id. at 66-67.

[¶ 10] Justice Kagan, joined by Justice Ginsburg, concurred in *Heien* and elaborated on the important limitations for courts interpreting officer's mistakes. *Id.* at 68-71. First, Justice Kagan emphasizes that an officer's subjective understanding, even if based upon an incorrect memo or training program, is irrelevant to the analysis of objective reasonableness. *Id.* at 69. Second, Justice Kagan notes:

> A court tasked with deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not. As the Solicitor General made the point at oral argument, the statute must pose a "really difficult" or "very hard question of statutory interpretation."

Id. at 70. Justice Kagan also noted the state and Solicitor General argued that cases where the statute poses really difficult questions of statutory interpretation will be "exceedingly rare." *Id.*

[¶ 11] The Seventh Circuit has reasoned, "*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute." *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016) (emphasis added). In *Stanbridge*, the defendant was convicted of possession of methamphetamine after a traffic stop initiated based upon his failure to signal

"continuously for 100 feet before pulling alongside the curb to park." *Id.* at 1033. The Seventh Circuit concluded the Illinois statute was not ambiguous and did not require a signal for 100 feet prior to pulling alongside a curb to park. *Id.* at 1037. The court also concluded the officer was simply wrong about what the statute required, which was ultimately the "sloppy study of the laws" contemplated in *Heien*. *Id.* at 1038. Therefore, the court concluded suppression of the evidence obtained in the traffic stop was appropriate because the officer's incorrect interpretation of an unambiguous statute was not objectively reasonable. *Id.*

[¶ 12] Many Courts have approvingly cited Justice Kagan's approach to mistakes of law and also noted the importance of considering ambiguity, or lack thereof, when assessing an officer's alleged mistake of law. *United States v. McLemore*, 887 F.3d 861, 867 (8th Cir. 2018) (concluding an officer's mistake was not reasonable and quoting Justice Kagan's concurrence that "mistakes about the requirements of the Fourth Amendment violate the Fourth Amendment even when they are reasonable") (citing *Heien*, 574 U.S. at 70, n.1); *United States v. Alvarado-Zarza*, 782 F.3d 246, 250 (5th Cir. 2015) (concluding an officer's incorrect interpretation of an unambiguous statute resulting in a traffic stop was not objectively reasonable); *United States v. Black*, 104 F.Supp.3d 997, 1008 (W.D. Mo. 2015) (concluding an ordinance was unambiguous and the officer's incorrect interpretation of the ordinance was not objectively reasonable, requiring suppression of evidence from a traffic stop); *Arizona v. Stoll*, 370 P.3d 1130, 1135 (Ariz. Ct. App. 2016) (concluding a deputies' traffic stop was objectively unreasonable due to incorrect reading of an unambiguous statute); *Idaho v. Pettit*, 406 P.3d 370, 376 (Idaho Ct. App. 2017) (concluding an officer's mistake of law in initiating a traffic stop for failure to use a turn signal when

remaining on the same highway was objectively reasonable but still merited suppression); *Jones v. Virginia*, 836 S.E.2d 710, 713 (Va. App. 2019) (noting Justice Kagan's concurrence for the proposition that a statute must be "genuinely ambiguous" and require "hard interpretative work" to find a reasonable mistake of law, ultimately concluding a statute about a traffic law was unambiguous requiring suppression of evidence in a traffic stop); *Harris v. Georgia*, 810 S.E.2d 660, 663 (Ga. Ct. App. 2018) (same); *North Carolina v. Eldridge*, 790 S.E.2d 740, 743-744 (N.C. Ct. App. 2016) (same); *Wisconsin v. Houghton*, 868 N.W.2d 143, 158-160 (Wis. 2015) (same).

[¶ 13] A number of law review articles have also tackled this subject and the importance of limitations on law enforcement officer's mistakes following *Heien*. *See* Eang L. Ngov, *Police Ignorance and Mistake of Law Under the Fourth Amendment*, 14 Stan. J. Civ. Rts. & Civ. Liberties 165 (2018) (noting consequences of failing to limit officer's mistakes including (1) disincentives for improvement through acquiring knowledge; (2) fraudulent claims of mistake; (3) underdeterrence of police illegality; (4) potential for abuse: racial profiling and pretextual stops; and (5) procedural fairness and legitimacy); Kit Kinports, *Heien's Mistake of Law*, 68 Ala. L. Rev. 121 (2016) (noting the concerning reach of *Heien* and its potential for encouraging judges to refuse to recognize constitutional violations or suppress evidence); Sarah Ricciardi, *Do You Know Why I Stopped You?: The Future of Traffic Stops in a Post-Heien World*, 47 Conn. L. Rev. 1075 (2015).

[¶ 14] Amicus Curiae is requesting this Court limit the erosion of individual's fourth amendment rights by allowing, and in a way encouraging, law enforcement to initiate traffic stops based on unreasonable interpretations of unambiguous laws.

[¶ 15] Neither *Hirschkorn* or *Bolme* explicitly mention whether the statute was ambiguous or not in this Court's analysis. Instead, in both cases, this Court stated that it had not interpretated the statute at issue previously, effectively excusing the officers' mistakes for that reason. Under a *Heien* analysis, this Court should look to more than whether the officer acted reasonably and instead also engage in a determination of whether the statute the officer relies upon is unambiguous. As noted by Justice Kagan, the situations where a statute is so ambiguous as to excuse a mistake of law should be "exceedingly rare." Further, as a practical matter, this Court cannot interpret each and every statute in the Century Code – and the fact that this Court has not yet interpreted a statute should not be an excuse for law enforcement officer's "sloppy study" of otherwise unambiguous statutes. Therefore, Amicus Curiae asks this Court to consider the ambiguity of a statute, and not whether this Court has previously interpreted such statute, in determining whether an officer acted objectively reasonably in initiating a traffic stop.

II. This Court should revisit the validity of pretextual traffic stops.

[¶ 16] This Court has consistently noted the Supreme Court of the United States' *Whren v. United States* decision as supporting the validity of a traffic stop, even if pretextual, providing a lawful basis to conduct an investigatory stop. 517 U.S. 806 (1996); *see State v. Oliver*, 2006 ND 241, ¶ 6, 724 N.W.2d 114. However, this Court should consider limiting the use of pretextual stops in the context of officer mistakes.

[¶ 17] As noted by Justice Sotomayor in her *Heien* dissent, courts should be concerned about the erosion of individual's rights in enduring traffic stops based upon pretext.

> Traffic stops like those at issue here can be "annoying, frightening, and perhaps humiliating." *Terry*, 392 U.S., at 25, 88 S.Ct. 1868; *see Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). We have nevertheless held that an officer's subjective motivations do not render

> a traffic stop unlawful. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). But we assumed in *Whren* that when an officer acts on pretext, at least that pretext would be the violation of an actual law. *See id.*, at 810, 116 S.Ct. 1769 (discussing the three provisions of the District of Columbia traffic code that the parties accepted the officer had probable cause to believe had been violated). Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) that suggests a law has been violated significantly expands this authority. *Cf. Barlow v. United States*, 7 Pet. 404, 411, 8 L.Ed. 728 (1833) (Story, J.) ("There is scarcely any law which does not admit of some ingenious doubt"). One wonders how a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so.

574 U.S. at 73. This concern has been stated previously by the Fifth Circuit, which said:

> Under the general rule established in *Whren*, a traffic infraction can justify a stop even where the police officer made the stop for a reason other than the occurrence of the traffic infraction. *See Goodwin v. Johnson*, 132 F.3d 162, 173 (5th Cir. 1998). But if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, *the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive*.

United States v. Lopez-Valdez, 178 F.3d 282, 289 (5th Cir. 1999) (emphasis added).

[¶ 18] Several law review articles have also gone through in depth analyses of the effect of pretextual traffic stops and their effects, especially as to racial disparities. *See* Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case W. Res. L. Rev. 931 (2016); Stephen D. Hayden, *"Parking While Black": Pretextual Stops, Racism, Parking, and an Alternative Approach*, 44 S.Ill.U. L.J. 105 (2019). Considering the statistics cited in both these articles and the articles written about *Heien* specifically, there is no doubt that decisions like *Whren* and *Heien* and the expansion of police authority disproportionately affect minorities. This Court should consider these effects when taking up issues of pretextual traffic stops and traffic stops based upon mistakes of law.

[¶ 19] Pretextual traffic stops and officer's claimed mistakes of law likely correlate and raise significant concerns for individual rights and Fourth Amendment protections. An officer's reliance on an incorrect interpretation of an unambiguous statute, in part due a sloppy study of the law, as pretext to initiate a traffic stop raises a serious potential for abuse and infringement of privacy rights. In order to curb these potential abuses for traffic stops based upon pretext, this Court should consider the higher standard and further analysis discussed above in determining whether an officer's mistake of law justifies a traffic stop.

CONCLUSION

[¶ 20] The North Dakota Association of Criminal Defense Lawyers respectfully requests this Court reverse these decisions and conclude law enforcement officers cannot rely on mistakes of unambiguous laws in initiating traffic stops.

Dated this 3rd day of March, 2021.

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CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned hereby certifies the Appellant's Brief is in compliance with N.D.R.App.P. 32 and N.D.R.App. P. 29 and contains 13 pages.

Dated this 3rd day of March, 2021.

O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

City of Lincoln, Plaintiff/Appellee, v. Gary Lee Schuler, Defendant/Appellant.	Supreme Court No.: 20200314 Burleigh County Case No.: 08-2020-CR-00013

City of Lincoln, Plaintiff/Appellee, v. Larry Wayne McCorkell, Defendant/Appellant.	Supreme Court No.: 20200319 Burleigh County Case No.: 08-2020-CR-000533

AFFIDAVIT OF ELECTRONIC SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

¶1. MANDY SEIGEL, being first duly sworn, deposes and says that on March 3, 2021, she served the following documents:

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE NORTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS AND APPELLANTS
AND
AMICUS CURIAE BRIEF OF NORTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS AND APPELLANTS

¶2. by sending a true and correct copy thereof pursuant to N.D.R.Ct. 3.5 by electronic means through e-mail to the parties listed below:

James Martens jwmartens@martenspllc.com

Briana Rummel brummel@vogellaw.com

¶3. To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

¶4. Pursuant to N.D.R.Civ.P 11(a)(2), I declare under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the March 3, 2021 at Fargo, North Dakota.

mandyseigel

MANDY SEIGEL

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

City of Lincoln, Plaintiff/Appellee, v. Larry Wayne McCorkell, Defendant/Appellant.	Supreme Court No.: 20200319 Burleigh County Case No.: 08-2020-CR-00533

AFFIDAVIT OF ELECTRONIC SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

¶1. MANDY SEIGEL, being first duly sworn, deposes and says that on March 5, 2021, she served the following documents:

CORRECTED TITLE PAGE

¶2. by sending a true and correct copy thereof pursuant to N.D.R.Ct. 3.5 by electronic means through e-mail to the parties listed below:

James Marten jwmartens@martenspllc.com

Briana Rummel brummel@vogellaw.com

¶3. To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

¶4. Pursuant to N.D.R.Civ.P 11(a)(2), I declare under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the March 5, 2021 at Fargo, North Dakota.

MANDY SEIGEL