20-

IN THE SUPREME COURT

OF THE UNITED STATES

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

ANTHONY MICHAEL OWEN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

KYLE BUTLER (P69743)

Ionia County Prosecuting Attorney
100 W. Main Street
Ionia, MI 48846
(616) 527-5302
kbutler@ioniacounty.org

JERROLD SCHROTENBOER (P33223)*

Jackson Chief Appellate Attorney

312 S. Jackson Street
Jackson, MI 49201-2220
(517) 788-4283
jschrotenboer@mijackson.org

QUESTION PRESENTED

Respondent was stopped for speeding in a residential street within the village, on a road with a 25 MPH sign going the other way, where almost all the rest of the village has 25 MPH signs. Five months later, the parties determined that state law set the speed limit at 55 MPH because the village had not modified the speed limit in the manner as then required by state law. The question is:

Should this Court resolve a split on whether *Heien v. North Carolina*, 574 U.S. 54 (2014), applies to situations where the law (once discovered) is clear but the circumstances make applying it uncertain; or, put another way, should the exclusionary rule apply in this situation where there is no deliberate, reckless, or grossly negligent police conduct?

LOWER COURT PROCEEDINGS

Court	Docket Number	Case Caption	Date of Judgment
64A District Court	151272STA	Order Denying Motion to Suppress	11/24/15
8th Circuit Court	15-H-31675-AR	Order Granting Application for Leave to Appeal to Circuit Court and Remanding for Evidentiary Hearing	1/19/16
64A District Court	151272STA	Order Determining Speed Limit	2/12/16
8th Circuit Court	15-H-31675-AR	Remand to District Court	4/14/16
64A District Court	151272STA	Order Suppressing Evidence and Dismissing Case	5/11/16
8th Circuit Court	15-H-31675-AR	Order Affirming Lower Court's Order	8/28/16
64A District Court	151272STA	Remand to District Court for Evidentiary Hearing	11/16/16
8th Circuit Court	15-H-31675-AR	Order Vacating District Court Suppression and Remanding to District Court	2/22/17
64A District Court	151272STA	Order Reinstating Bond and Staying Proceedings Pending Appeal	3/9/17
Court of Appeals	339668	Application for Leave to Appeal Denied	5/22/17
64A District Court	151272STA	Guilty Plea	6/20/17
Court of Appeals	339668	Application for Leave to Appeal Denied	1/30/18
MI Supreme Court	157380	Order Remanding to Court of Appeals for reconsideration	9/12/18
Court of Appeals	339668	Reversed and Remanded	7/23/19
MI Supreme Court	160150	Order Granting Oral Argument on Application for Leave to Appeal	3/23/19
MI Supreme Court	160150	Order Denying Application for Leave to Appeal	12/30/20

TABLE OF CONTENTS

Question Presented ii

Lower Court Proceedings iii

Table of Contents iv

Table of Appendices v

Index of Authorities vi

Petition 1

Opinions Below 1

Jurisdictional Statement 2

Constitutional Provisions Involved 2

Statement of the Case 3

Argument 5

This Court should grant certiorari to resolve a split on whether Heien v. North Carolina, 574 U.S. 54 (2014), applies to situations where the law (once discovered) is clear but the circumstances make applying it uncertain; or, put another way, where there is no deliberate, reckless, or grossly negligent police conduct. 5

Because (1) the stop occurred on a residential street within a village, (2) the road has a 25 MPH sign going the other way, and (3) almost all the rest of the village has 25 MPH signs, the deputy reasonably believed that this road is also 25 MPH rather than 55 MPH both ways. 5

Relief 14

Proof of Service 15

TABLE OF APPENDICES

Order Denying Motion to Suppress 11/24/15 1
Order Granting Application for Leave to Appeal to Circuit Court and Remanding for Evidentiary Hearing 1/19/16 2
Order Determining Speed Limit 2/12/16 3
Remand to District Court 4/14/16 4
Order Suppressing Evidence and Dismissing Case 5/11/16 5
Order Affirming Lower Court's Order 8/28/16 6
Remand to District Court for Evidentiary Hearing 11/16/16 8
Order Vacating District Court Suppression and Remanding 2/22/17 9
Application for Leave to Appeal Denied 5/22/17 10
Order Remanding to Court of Appeals for reconsideration 9/12/18 11
Order Reversed and Remanded 7/23/19 12
Order Denying Application for Leave to Appeal 12/30/20 19
Evidentary Hearing Transcript 10/21/15 21
Evidentary Hearing Transcript 2/8/16 80

INDEX OF AUTHORITIES

Cases

Ashford v. Raby, 951 F.3d 798, 804 (6th Cir. 2020) 11
Brinegar v. United States, 338 U.S. 160, 176 (1949) 6, 8
City of Atwood v. Pinalto, 350 P.3d 1048 (Kan. 2015) 7, 8
Harrison v. State, 800 So. 2d 1134 (Miss. 2001) 7, 8
Heien v. North Carolina, 574 U.S. 54 (2014) 5, 6, 8, 10, 12, 13
Herring v. United States, 555 U.S. 135, 144 (2009) 10, 11
Howse v. Hodous, 953 F.3d 402, 407 (6th Cir. 2020), *cert. denied,* U.S. (2021) .. 11
Illinois v. Rodríguez, 497 U.S. 177, 185-186 (1990) 6
State v. Ware, 145 N.E.3d 973 (Ohio App. 2019) 8
United States v. Alvarado-Zarza, 782 F.3d 246, 250 (5th Cir. 2015) 8
United States v. Blackburn, 2002 WL 32693714 at *4 (N.D. Okla. 2002) 7
United States v. Brooks, 987 F.3d 593, 600 (6th Cir. 2021). 6
United States v. Stanbridge, 813 F.3d 1032, 1037 (7th Cir. 2016) 8

Statutes

Mich. Comp. Laws § 257.625 3
Mich. Comp. Laws § 257.627 9
Mich. Comp. Laws § 28.425k 3
Mich. Comp. Laws § 750.237 3

Constitutional Provisions

28 U.S.C. 1257(a). 2
U.S. Const. amend. IV 2
U.S. Const. amend. XIV 2

20-

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 2020

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

ANTHONY MICHAEL OWEN
Respondent.

PETITION

The State of Michigan asks this Court to issue a writ of certiorari to review the Michigan Court of Appeals' July 23, 2019, opinion, with the Michigan Supreme Court denying discretionary review 4-3 on December 30, 2020.

OPINIONS BELOW

The Michigan Court of Appeals opinion (attached) may be found at 2019 WL 3312531. The Michigan Supreme Court order (attached) may be found at 951 N.W.2d 915 (Mich. 2020).

JURISDICTIONAL STATEMENT

This petition is being filed no more than 90 days after the Michigan Supreme Court issued its order on December 30, 2020. This Court has jurisdiction. 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On June 20, 2017 (after plenty of hearings, appeals, and remands), respondent Anthony Owen entered a conditional guilty plea to impaired driving, Mich. Comp. Laws § 257.625(3), and carrying a concealed firearm while intoxicated, Mich. Comp. Laws § 28.425k(2), in return for petitioner reducing the charge from drunk driving, Mich. Comp. Laws § 257.625, and dismissing possessing a firearm while under the influence, Mich. Comp. Laws § 750.237. Then, on July 24, 2017, Ionia County Circuit Court Judge Robert Sykes denied leave to appeal. The Michigan Court of Appeals did the same thing on January 30, 2018. (6a). The Michigan Supreme Court, however, on September 12, 2018, remanded as on leave granted. 917 N.W.2d 79 (Mich. 2018). (8a). The Michigan Court of Appeals then reversed on July 23, 2019. (10a-16a). Then, on December 30, 2020, the Michigan Supreme Court, with three dissenting, denied leave to appeal, 951 N.W.2d 915 (Mich. 2020).

On September 5, 2015, Ionia County Deputy Derrick Madsen stopped Owen on Parsonage Road in Sanilac for speeding. (October 21, 2015, Evidentiary Hearing Transcript [ETrI], pp. 5-8; 31a-34a). Owen was going 43. (ETrI, p. 8; 34a). Deputy Madsen testified that the speed limit is 25. (ETrI, p. 13; 39a).

Owen had just turned left from Summit Road southbound onto Parsonage. (ETrI, p. 17; 43a). This corner is in a residential neighborhood within the village. (ETrI, p. 17; 43a). Every sign except one in the village is 25. (The only one different, a 40 MPH, is on the other side of town.) Although no sign exists on southbound Parsonage saying "25," (ETrI, p. 10; 36a), a sign saying "25" exists northbound just as the road enters the village. (February 8, 2016, Evidentiary Hearing Transcript [ETrII], p. 25; 60a). Also, an advisory sign on southbound Parsonage (a little ways further south) says "20." (ETrII, p. 20; 57a).

The Michigan Court of Appeals opinion then states what happened after Deputy Madsen stopped Owen:

> The deputy required defendant to perform a series of field sobriety tests and gave him a preliminary breath test, which defendant failed. The deputy placed defendant under arrest. (P. 1, 10a).

As it turned out, however, despite the road being inside the village and the sign going the other way being "25," the speed limit going both ways was "55." (ETrII, p 60; 25a). The hearing that decided the speed limit occurred five months after the traffic stop.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT ON WHETHER *HEIEN V. NORTH CAROLINA*, 574 U.S. 54 (2014), APPLIES TO SITUATIONS WHERE THE LAW (ONCE DISCOVERED) IS CLEAR BUT THE CIRCUMSTANCES MAKE APPLYING IT UNCERTAIN; OR, PUT ANOTHER WAY, WHERE THERE IS NO DELIBERATE, RECKLESS, OR GROSSLY NEGLIGENT POLICE CONDUCT.

BECAUSE (1) THE STOP OCCURRED ON A RESIDENTIAL STREET WITHIN A VILLAGE, (2) THE ROAD HAS A 25 MPH SIGN GOING THE OTHER WAY, AND (3) ALMOST ALL THE REST OF THE VILLAGE HAS 25 MPH SIGNS, THE DEPUTY REASONABLY BELIEVED THAT THIS ROAD IS ALSO 25 MPH RATHER THAN 55 MPH BOTH WAYS.

This Court has never decided whether *Heien v. North Carolina*, 574 U.S. 54 (2014), applies to where the law (once the parties figure it out) turns out to be clear but the officer reasonably believed that under the circumstances that the law was otherwise (the scope of its application). In *Heien*, the law was unclear until the North Carolina courts interpreted it. In the present, case, although the law (once discovered) is clear, the situation make it unclear under the circumstances that the officer faced.

This road has a 25 MPH sign going the other way. The road is inside a village where the speed limit is 25 almost everywhere else. It took the court and the parties five months to figure out that the speed limit going both ways inside the village is really 55, no matter what the sign says, as counterintuitive as it seems. As no one would naturally come to such a conclusion, the deputy made a reasonable mistake when he concluded that the traffic rules in this village made sense—rather than the

other way around. Not only did the Michigan Court of Appeals ignore each of these facts, but it came up with a test that requires officers to know what it took the lower courts five months to figure out. Whether a mistake of law, a mistake of fact, or a hybrid, the decision to stop defendant was reasonable. This Court should grant certiorari.

As pointed out in *Heien*, 574 U.S. 60-61, the Fourth Amendment's ultimate touchstone is reasonableness: "to be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, 'giving them fair leeway for enforcing the law in the community's protection.'" Thus, this Court concluded that a stop may still be good even if no traffic violation occurred. An officer needs nothing more than probable cause at most that a motorist has committed a traffic violation. *United States v. Brooks*, 987 F.3d 593, 600 (6th Cir. 2021). As stated in *Illinois v. Rodríguez*, 497 U.S. 177, 185-186 (1990), "it is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable." Earlier, *Brinegar v. United States*, 338 U.S. 160, 176 (1949), said:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

Here, Deputy Madsen's mistake was reasonable (understandable). Most people (at least most non-lawyers) try to make sense of the law. A law that says that the speed limit on a residential street within a village is 55 even though the sign going the other way is 25 makes no sense (especially where almost the rest of the village is 25). Compounding the matter is the advisory sign saying 20 around an upcoming curve. (ETrII, p. 20). To a reasonable officer looking at the situation, reducing the speed from 25 to 20 makes a lot more sense than from 55 to 20.

Cases quite similar to the present have upheld the stop. In *Harrison v. State*, 800 So. 2d 1134 (Miss. 2001), deputies stopped a car by a construction zone going 67 to 70 on Interstate 55. Despite the 60 MPH sign, the law said that the speed limit was really 70. (The sign applied only when workers were present, which they were not.) With the stop, the deputies found drugs. Because of the sign, they had an objective basis to stop the car despite the mistake of law. 800 So. 2d 1139.

City of Atwood v. Pinalto, 350 P.3d 1048 (Kan. 2015), is also very similar to the present case. There, because a 20 MPH sign had been knocked down, by law, the speed became 30 MPH. The Kansas Supreme Court concluded that the officer had made a mistake of fact.

Likewise, in *United States v. Blackburn*, 2002 WL 32693714 at *4 (N.D. Okla. 2002), the court concluded that an officer could rely on a posted sign even if legally

inaccurate: "the standard for judging the reasonableness of the stop is not whether Mr. Blackburn in fact exceeded the speed limit." Not knowing that the state had not followed the mandatory procedure for reducing the speed limit, the officer reasonably erred in stopping the motorist.

On the other hand, cases like *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016), *United States v. Alvarado-Zarza*, 782 F.3d 246, 250 (5th Cir. 2015), and the Michigan Court of Appeals decision in the present case have concluded that *Heien* requires statutory ambiguity. Although that conclusion may be generally correct, it states too much (and would require the opposite decisions in *Harrison*, *Pinalto*, and *Blackburn*). This broad statement does not account for where, given the circumstances, the statute, though unambiguous on its face, is still ambiguous "in the scope of its application." *State v. Ware*, 145 N.E.3d 973 (Ohio App. 2019).

Call it "mistake of law," "mistake of fact," or some type of hybrid mistake, the mistake in the present case was reasonable. Almost anyone would have made it. A 55 zone in a residential neighborhood in a village with a sign stating 25 the other way is something that just about anyone (even lawyers) would not have readily accepted. Common sense says otherwise. Officer Madsen made a mistake that just about anyone would have made.

And it took some time to figure out what the law is. Even the lawyers involved and the two lowest level courts were not just able to look it up and easily see what it says. Before the most recent amendment, Mich. Comp. Laws § 257.627 did not directly state that the speed limit is 55 (even inside a village). Instead, it said so round about. Subsection (2)(e) fixed the speed limit at "25 miles per hour on a highway segment with 60 or more vehicular access points within ½ mile." Subsection (9) then said that "the speed limit on all trunk line highways and all county highways upon which a minimum speed limit is not otherwise fixed under this act is 55 miles per hour, which shall be known as the 'general speed limit.'" Finely reading the statute and then figuring out that this residential stretch inside a village did not have at least 60 vehicular points requires a lot more than just a cursory reading. After all, it took the legal profession five months to figure it out.

As it is, the Michigan Legislature itself has noticed that common sense really should apply. Since the stop in the present case, the legislature amended the statute that applies in this case. Subsection (2)(e) now says that a driver may not exceed:

> Until January 1, 2024, 25 miles per hour on a highway segment that is part of the local street system as designated by a local jurisdiction and approved by the state transportation commission . . . and that is within land that is zoned for residential use by the governing body of an incorporated city or village . . . unless another speed is fixed and posted.

The legislature changing the law (even if temporarily) at the very least tends to show that Deputy Madsen's conclusions were rational, i.e., reasonable.

Thus, *Heien*'s statement that an officer should not get an advantage "through a sloppy study of the laws," 574 U.S. 67, does not apply here. Since the legal profession took five months to determine the speed limit (under the old law), Deputy Madsen was not "sloppy." And this Court has said that "to trigger the exclusionary rule, police conduct must be *sufficiently deliberate* that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system . . . . the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States,* 555 U.S. 135, 144 (2009).

The Michigan Court of Appeals thus erred in concentrating entirely on what the statute said even if (after careful study) it was unambiguous. By doing so, it not only ignored facts like the 25 MPH sign going the other way on this residential street inside a village, but also failed to realize that the situation is more complicated than it thought. Just because the statute itself is (was) unambiguous is not by itself enough to make the officer's actions unreasonable. An unambiguous law may be ambiguous as applied to certain situations—like the present one.

In other words, the Michigan Court of Appeals said that the deputy should have known in this counterintuitive situation what the lower courts took five months to figure out—that the speed limit is for a residential road inside a village is 55 MPH despite having a 25 MPH sign up (consistent with almost the rest of the village). Thus, even though the following cases deal with somewhat different situations, their underlying concepts apply. The police "spend their time trying to protect the public, not reading case-books." *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020). "In those crucial seconds, officers don't have the time to pull out law books and analyze the fine points of judicial precedent. To avoid 'paralysis by analysis,' qualified immunity protects all but plainly incompetent officers or those who knowingly violate the law." *Howse v. Hodous*, 953 F.3d 402, 407 (6th Cir. 2020), *cert. denied,* U.S. (2021).

In the end, suppressing here accomplishes nothing. It does not have the deterrent value necessary to excluding evidence. This was a mistake, nothing more, nothing pernicious, nothing sloppy. As stated in *Herring v. United States*, 555 U.S. 135, 147 (2009):

> Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rules, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, . . . we conclude that when the police mistakes are the result of negligence such as that described here, rather than systemic error or reckless

> disregard of constitutional requirements, any marginal deterrence does not "pay its way." . . . In such a case, the criminal should not "go free because the constable has blundered."

The Michigan Court of Appeals failed to explain how the officer not figuring out something counterintuitive (that took the lower courts five months to figure out) is either "systemic error or reckless disregard of constitutional requirements."

Therefore, while heavily relying on *Heien*, the dissent in the Michigan Supreme Court correctly analyzed the issue. It first noted that the "Court of Appeals failed to assess the case from the objective perspective of the deputy." 951 N.W.2d 915. It then said that it agreed with the Ionia County Circuit Court's conclusion: that "the deputy's actions were objectively reasonable and [it] highlighted the absence of any indicia of bad faith on the deputy's part." *Id*.

The dissent then looked the facts:

> At the time, the vicinity of the road at which defendant was stopped displayed no southbound-posted speed limit, but there was a northbound-posted speed limit of 25 miles per hour. The 25-miles-per-hour sign was not legally posted, according to the circuit court. The Court of Appeals [agreed], and I accept the premise that the legal speed limit—both northbound and southbound—was 55 miles per hour, and that defendant was driving slower than 55 miles per hour when he was stopped. The sole issue here, accepting the above premise, is whether the traffic stop violated the Fourth Amendment. *Id*.

After reciting the law as pointed out in *Heien*, the dissent concluded that the deputy had acted reasonably:

> In my view, it was objectively reasonable for an officer in the deputy sheriff's position to believe that: (a) the applicable speed limit was 25 miles per hour on northbound Parsonage Road by the explicit posting of such a limit; (b) there was no distinctive traffic, safety, or other signage of southbound Parsonage Road compared to northbound Parsonage Road; and (c) the applicable speed limit statutes in effect at the time, MCL 257.627, MCL 257.628, and MCL 257.629, reflect a single speed limit for a particular "highway segment[] or "highway[]," as those terms may reasonably be understood as contemplating that lanes of travel on a single highway extend in both directions of the highway, and if not otherwise signaled, the speed limit would be the same in both directions. 951 N.W.2d 915-916. (Footnote omitted.)

The dissent than concluded:

> Accordingly, although he was mistaken, it was objectively reasonable for the deputy sheriff to have surmised that the applicable speed limit was 25 miles per hour on southbound Parsonage Road and to therefore stop defendant on the basis of that understanding. 951 N.W.2d 916.

In any event, whether the Michigan Supreme Court dissent or the Michigan Court of Appeals is correct, this Court should resolve any dispute as to what *Heien* means. Does it apply only when the law itself is ambiguous or does it allow for an officer mistakenly applying a statute under circumstances that would say that it would not apply?

RELIEF

ACCORDINGLY, plaintiff asks this Court to grant certiorari and then reverse and remand.

April , 2021

Respectfully submitted,

_____

Jerrold Schrotenboer (P33223)

Jackson County Assistant Prosecuting Attorney

20-

IN THE SUPREME COURT

OF THE UNITED STATES

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

ANTHONY MICHAEL OWEN

Respondent.

PROOF OF SERVICE

The People of the State of Michigan, by and through Prosecuting Attorney Kyle Butler, states that on April ____, 2020, this instrument was Served and Filed. One copy of the below was submitted to the court and served to the Defendant.

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

Dated: _____

_____

KYLE BUTLER (P69743)

Ionia County Prosecuting Attorney
100 W. Main Street
Ionia, MI 48846
(616) 527-5302
kbutler@ioniacounty.org