No. 24-484

IN THE

Supreme Court of the United States

MICHIGAN,

Petitioner,

v.

DAVID ALLAN LUCYNSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF IN OPPOSITION

HARALAMBOS D. MIHAS
SMITH MIHAS, PLLC
Counsel of Record
467 Eureka Road, Suite 1
Wyandotte, MI 48198
(734) 692-3033
hdmihas@smithmihas.com

BERNARD A. JOCUNS
JOCUNS LAW FIRM
385 West Nepessing Street
Lapeer, MI 48446

Attorneys for Respondent

130848

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

PREFACE

A police officer followed and eventually seized a motorist who he had an unverified hunch had engaged in an illegal drug transaction with the occupant of another vehicle. The Police Report does not mention the Michigan impeding traffic statute. Six weeks after the incident, the officer testified at the Preliminary Examination that he followed and seized the motorist because he believed that the motorist was impeding traffic, rather than for suspicion of a drug transaction. No actual traffic was on hand to be impeded. No reported state caselaw had interpreted the statute. In a case of first impression, the state supreme court ruled that the seizure was based upon an unreasonable mistake of law because the statute was objectively unambiguous and required actual traffic to impede. The court excluded the resulting evidence (of drunk driving, suspended license and open intoxicants) without further determining that the pretextual, unreasonable mistake of law was also deliberate, reckless, grossly negligent or systemic.

QUESTION PRESENTED

Does An Unreasonable Mistake Of Law Used As Pretext For A Traffic Stop After The Fact Warrant Application Of The Exclusionary Rule?

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INTRODUCTION

In the decade since this Court's decision in *Heien v. North Carolina*, 574 U.S. 54 (2014), no court has ruled that an officer's unreasonable mistake of law permits the resulting evidence to be included at trial.

Prior to the Preliminary Examination (held six weeks after the incident and arrest), Michigan's "impeding traffic" statute (Mich. Comp. Laws § 257.676b) was nowhere to be found in this litigation. It is not mentioned anywhere in the Police Report. The arresting officer never mentioned it to Respondent, Defendant David Lucynski ("Lucynski" or "Respondent"). Instead, the officer's Police Report begins with his inchoate "hunch" about a "drug deal" between Lucynski and the occupant of another vehicle because their vehicles were positioned "police style" nose to tail on a dirt road in the country in the middle of the morning, a common occurrence in that area and part of local custom. Res. App. 8a.

Had the officer truly believed that these two vehicles were "impeding traffic" (traffic was nowhere to be found), ***surely,*** he would have put this in his Police Report.

At the very start of the Preliminary Examination, the Prosecutor asked the officer why he followed Lucynski's vehicle after the two vehicles moved away from their position on the roadway. The officer did not mention anything about a "drug deal." Rather, he singularly cited Michigan's impeding traffic statute as the reason he followed Lucynski onto the driveway of a friend's house. Res. App. 12a-13a.

It strongly appears that this is because a singular "hunch," standing alone, is insufficient to impart reasonable cause to stop a vehicle, and the officer needed a better reason. If so, then the officer's use of Mich. Comp. Laws § 257.676b was merely ***pretextual***, to attempt to justify the stop.

In 2022, the Michigan Supreme Court, no doubt sensing that the officer's use of Mich. Comp. Laws § 257.676 was pretextual, determined that the statute required that "some traffic must have actually been disrupted or blocked" in order to apply. Pet. App. 69a. The *Lucynski* court ruled that this requirement was not ambiguous, and therefore determined that the officer's mistake of law was not objectively reasonable. Pet. App. 73a.

In 2024, the court ruled "that a seizure based on an officer's unreasonable interpretation of the law warrants application of the exclusionary rule," Pet. App. 6a, a ruling that is fully consistent with this Court's prior exclusionary rule jurisprudence, including the two cases most relied upon by Petitioner, *Heien, supra*, and *Herring v. United States*, 555 U.S. 135, 144 (2009), neither of which ruled that unreasonable officer mistakes of law escape application of the exclusionary rule.[1]

Although the court did not needlessly embellish the prepositional noun phrase "unreasonable mistake of law" with the "magic dragon" overlay words of "***d***eliberate," "***r***eckless" or "***g***rossly ***n***egligent," it is palpable that the

1. It should be noted that this case appeared before the Michigan Supreme Court as an interlocutory appeal, and that the court remanded the matter to the trial court for disposition.

officer's pretextual, testimonial use of Mich. Comp. Laws § 257.676 (announced for the first time six weeks after the stop), was "***deliberate***," analogous to premeditation, and not merely negligent.

Even so, it was not necessary for the court to engage in this "second-tier" labeling exercise, because the corollary mistakes of law that do not merit the "dragon" adjectives are the "reasonable" ones. All unreasonable police mistakes of law appear, by definition, to be "egregious," although not every court uses this or similar adjectives (such as the "dragon" ones) to describe them.

Although Petitioner, citing *Herring*, contends that *Lucynski* announced a new rule of law and determined that all unreasonable officer mistakes of law are "deliberate, reckless, or grossly negligent" (thus requiring suppression), the Michigan Supreme Court did not actually make any such ruling. Rather, said court merely ruled that ".... evidence gathered in clear violation of unambiguous law will not be admissible on the basis of explanations justified entirely by a subjective and erroneous misreading of the applicable law[,]" without engaging in a secondary analysis about what "buzzword adjectives" to needlessly overlay onto the "unreasonable" moniker. Pet. App. 8a. By adopting this posture, the Michigan Supreme Court kept the "reasonable / unreasonable" analysis right where *Heien* elevated it to: the *prima facie* of whether an unreasonable officer mistake of law triggers a Fourth Amendment violation.[2]

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2. *Heien, supra*, left open the question of whether an unreasonable mistake of law would in and of itself call for application of the exclusionary rule, or whether a secondary analysis of police culpability would be required to determine the

Therefore, Petitioner's contention that "[t]he idea that every unreasonable mistake of law made by a police officer necessarily constitutes 'deliberate, reckless, or grossly negligent conduct' requiring suppression of evidence conflicts with this Court's case-specific analysis designed to effectuate the sole purpose of the exclusionary rule deterrence of future police misconduct" is simply off the mark. Indeed, it appears that Petitioner is merely attempting to "move the goalposts" and shift the inquiry into a new, two-step process: first, decide if the mistake of law is "reasonable." If so, the exclusionary rule does not apply. That is the current state of the law as announced by this court in *Heien.* But if unreasonable, Petitioner says, put ***some*** unreasonable mistakes in the "still perfectly fine" basket. This effectively overrules *Heien.*

But since *Heien* left open the door as to do about an unreasonable mistake of law, Petitioner now seeks to extend, modify or actually reverse *Heien* to adopt this two-prong test that would only exclude evidence if the

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remedy. Prior to *Heien*, this court, in cases such as *Herring, supra*, 555 U.S. 135, and *Davis v. United States* (2011) 564 U.S. — [131 S.Ct. 2419], confined "[a]ny consideration of the reasonableness of an officer's mistake [it] was ... limited to the separate matter of remedy." (*Heien, supra*, — U.S. at p. — [135 S.Ct. at p. 10].). *Heien* elevated the reasonableness of an officer's mistake, making it determinative of whether the Fourth Amendment had been violated in the first place. However, the State of Michigan now seeks to demote the reasonable / unreasonable inquiry back down to remedy only status, which is actually inconsistent with *Heien.*

Because *Heien* left open whether courts must engage in a two-step analysis (unreasonable but not deliberate, reckless, or grossly or systemically negligent versus unreasonable with one of those qualities), the Michigan Supreme Court's declination to do so is not in derogation of *Heien*, and, in fact, is fully consistent with it.

unreasonable mistake is really, really bad, where "really bad" is confined to behavior that comports to the "magic dragon" buzzwords of "***d***eliberate" (as here), "***r***eckless," or "***g***rossly ***n***egligent."

More generally, in order for the adjective "unreasonable" to maintain any meaning regarding officer mistakes of law whatsoever, Respondent asserts that the "magic dragon" buzzwords (as well as similar adjectives such as "egregious," "malicious" and the like), are ***already subsumed*** within the "unreasonable" penumbra, and, therefore, further judicial inquiry is neither necessary nor desirable. Put differently, when a court determines (as here) that a police mistake of law is "unreasonable," what it is ***actually*** ruling is tantamount to "magic dragon" buzzwords, without stating them outright.

Accordingly, Petitioner's position (that the lower court did not "get it right"), is, with all due deference and respect, simply incorrect. Although it may have made for a more "elegant or tidy read" had the lower court deployed the "magic dragon" buzzwords in its opinion, that it did not do so does not alter the substance of its ruling, which is fully consistent with this Court's Fourth Amendment exclusionary rule jurisprudence.

Although Petitioner labels the Michigan Supreme Court's thoughtful ruling a "misunderstanding" (of this Court's jurisprudence), not a single case exists, either in the state highest courts of record of any of the several states, or in the any of the federal circuit courts, to support Petitioner's contention. Not only did the Michigan Supreme Court not make a "mistake," but Petitioner's new, proposed "two part test" misconstrues both Heien, supra

and Herring, supra. Further, it demotes Heien's landmark ruling into a merely remedial opinion, whereas its citation of and reliance upon Herring is simply misplaced, it being a mistake of fact and not of law, case.

STATEMENT OF THE CASE

This court should decline to impose the new, two part test requested by Petitioner that would impose additional conditions on when the exclusionary rule should exclude evidence from trial when that evidence is the result of an unreasonable mistake of law committed by a police officer.

Currently, and as exposed in this Court's jurisprudence, once a court determines that an officer's mistake of law is unreasonable, it applies the remedy of the exclusionary rule, as such a mistake precisely encapsulates the sole reason for the rule: to deter unreasonable police actions.

There is not a single case in the United States where a court, once it has determined that a police mistake of law is unreasonable, lets the resulting evidence come into trial.

However, Petitioner seeks to relegate the "reasonable / unreasonable" dichotomy down to "remedial" status where it once resided, prior to *Heien*, by imposing the further inquiry of whether or not the unreasonable mistake of law ***was additionally*** "deliberate," "reckless" or "grossly negligent."[3] Respondent counters that these adjectives,

3. For simplicity, Respondent will sometimes refer to these qualities by their acronym of "dragon." Sometimes, courts consider the additional phrase of "systemic negligence" when dealing with administrative mistakes of law, which are not germane here.

sometimes referred to herein as "magic dragon" words, are subsumed within the "unreasonable" category already, and that their needless addition is merely superfluous.

FACTUAL STATEMENT

As set forth by the initial, District Court Judge in this matter (Hon. Jason E. Bitzer), the pertinent facts regarding the reason for the stop of Lucynski's vehicle are as follows:

> Deputy Robinson testified that on January 20, 2020, he was on road patrol in Wisner Township, Tuscola County, State of Michigan. Deputy Robinson testified that at approximately 10:01 a.m. he effectuated a traffic stop on the Defendant, David Allan Lucynski, on Old State Road. *71-A District Court Opinion & Order*, Page 1.
>
> ***
>
> .... Deputy Robinson testified that ***his initial thought*** after observing these vehicles in the roadway ***was that there was potentially an illicit drug transaction taking place.*** *71-A District Court Opinion & Order*, Page 1 (emphasis added).
>
> ***
>
> The Court will first address Deputy Robinson['s] ... ***belief that a drug deal was taking place between the two vehicles.*** Again, Deputy Robinson's testimony was this traffic stop

> was effectuated at approximately 10:00 a.m. in broad daylight on a rural, dirt road. He further testified that he has no prior personal or second-hand knowledge of drug deals taking place on Old State Road. He did not testify that he witnessed an exchange of any items or money between the two vehicles. He did not testify that he witnessed any furtive actions on the part of either vehicle prior to the stop of the Defendant, or any nervous looking occupants of said vehicles prior to the stop of the Defendant. He did not testify that prior to the stop that he was familiar with the vehicles or their occupants and had knowledge of prior drug-related activity on their part.
>
> ***
>
> In summary, ***this belief by Deputy Robinson that the vehicles were engaged in a drug deal was an inchoate or unparticularized suspicion or hunch.*** Therefore, as it relates to this testified reason for the traffic stop of Lucynski, neither probable cause nor reasonable suspicion was present. *71-A District Court Opinion & Order*, Page 3 (emphasis added).

However, at the Preliminary Examination Bind-Over Hearing (from which the above Order emanated), Deputy Robinson, no doubt by now fully realizing that his amorphous belief that Lucynski was engaging a drug deal was merely an inchoate "hunch" and would not support a traffic stop, wholly abandoned the drug deal "rationale" and immediately launched into "impeding traffic" as the ***first*** reason for the stop, which it was not:

> PROSECUTOR WANNIK: And what is it that ***first*** drew you to this particular vehicle with Mr. Lucynski?
>
> THE WITNESS: Deputy Robinson: As I was traveling west on Old State Road, **I noticed two vehicles stopped in the middle of the roadway,** facing opposite directions, so driver side doors/ windows were to each other. Mr. Lucynski was in a, a red Chevy Cobalt, again **they were, they were stopped in the middle of the roadway,** not pulled off to the side or anything like that.
>
> PROSECUTOR WANNIK: **So they were impeding the flow of traffic at the time?**
>
> THE WITNESS: Deputy Robinson: **That's correct.** Preliminary Examination Transcript, Page 7, Lines 1-11 (emphasis added).

The 71-A District Court's Opinion and Order addressed this glaring incongruity, as follows:

> Deputy Robinson testified first that he had stopped Lucynski's vehicle because Lucynski's vehicle was impeding traffic in violation of MCL 257.626b(l). To support that conclusion, Deputy Robinson testified that he observed Lucynski's vehicle stopped on Old State Road having a conversation with an individual in a different vehicle in the opposite lane. Deputy Robinson estimated that when he got approximately eight hundred (800) feet away from where the vehicles were stopped on Old State Road, the vehicles

started to pull away. Further, the Court and Deputy Robinson had the following exchange:

> THE COURT: ***Did you at any time,*** Deputy Robinson, ***see the two vehicles that were idling or stopped on Old State Road actually block, obstruct, impede, or interfere with the normal flow of traffic on Old State Road?***
>
> THE WITNESS: Deputy Robinson: ***No, there were no other vehicles on that stretch, other than us.*** *71-A District Court Opinion & Order*, Page 1 (emphasis added).[4]

Because there was no published Michigan authority on point, the 71-A District Court reviewed a Tennessee case involving a slow-moving vehicle that did not "impede the normal flow of traffic," the 71-A District Court concluded:

> Applying the same, common sense approach to the interpretation of MCL 257.676b(l), this Court finds that a violation of that statute requires a showing that real, not imagined, traffic was actually impeded or obstructed in some way by a person or a vehicle. ***The scant, cursory conclusion of Michigan Court of***

4. The vehicles split up and went their separate ways as the deputy approached. Pet. App. 116-a. Deputy Robinson testified that he followed Lucynski's vehicle merely because he was pointed in the same direction, thereby being more stealthy than he would have been had he accomplished a U-turn to follow the other vehicle.

Appeals in Salters does not offer any insight as to why that panel of the Court of Appeals believed otherwise.[5]

***

Therefore, in comparing the two persuasive authorities cited within this brief, the Court gives more credence to *State of Tennessee v Hannah, supra*, and the plethora of cases from other jurisdictions that are cited within that opinion.

***

Therefore, ***because the testimony of Deputy Robinson was that Lucynski's vehicle was not actually impeding or obstructing any actual traffic, the Court finds that he lacked probable cause or reasonable suspicion to effectuate the traffic stop.*** Therefore, the Court finds that the evidence obtained after the Traffic stop should be excluded from evidence in this matter. Pet. App. 116-a (emphasis added).

MICHIGAN SUPREME COURT RULING

After several rounds of appeals (as noted in the Petition), the Michigan Supreme Court ultimately ruled

5. Nor are there any entries in the record that support that Deputy Robinson had ever even heard of *People v. Salters*, No. 317457, 2014 WL 6602695, at *1 (Mich. Ct. App. Nov. 20, 2014) at any time material hereto, a critical fact duly noted by the Michigan Supreme Court. Pet. App. 7a.

on July 26, 2024 that the exclusionary rule should apply to keep the gleaned evidence (of drunk driving, suspended license and open intoxicants) out of trial:

> [u]sing an unreasonable reading of the law to justify a traffic stop ***is the sort of misconduct that the exclusionary rule is designed to deter.*** Pet. App. 8a.[6] (emphasis added).

The court determined that the use of MCL 257.626b(l) to support the stop was an "***unreasonable*** mistake of law" without further defining precisely what that term means.[7]

Petitioner asserts (in footnote 1 to its Petition) that:

> One might ask ... how the mistake of law here could be considered unreasonable. <u>But the State does not seek this Court's review of [this] decision[ ]</u>. ***It seeks review of the Michigan Supreme Court's holding that a Fourth Amendment violation caused by an unreasonable mistake of law automatically requires suppression of evidence.*** *Id*. (emphasis added).[8]

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6. This proclamation (regarding the exclusionary rule itself) only appeared in the 2024, final pronouncement from the court. Pet. App. 8a.

7. The intermediate Michigan appellate court (Michigan Court of Appeals).

8. In the same footnote (fn 1), Petitioner raises the issue of the point in time of the seizure of Lucynski, but similarly notes that said issue is neither a subject nor an object of relief in this court.

It is this singular decision to which the State of Michigan confines its Petition for Certiorari.

REASONS TO DENY THE PETITION

I. The Michigan Supreme Court's exclusion of evidence in *Lucynski* aligns perfectly with this Court's exclusionary rule jurisprudence.

Respondent respectfully submits that Petitioner's contention that the Michigan Supreme Court's ruling ignores, disregards or is otherwise in conflict or derogation with this Court's exclusionary rule jurisprudence, is misplaced.

A. A pretextual, unreasonable mistake of law concocted weeks after the arrest is exactly the sort of draconian police misconduct that the exclusionary rule is designed to root out.

None of Petitioner's cited police mistake cases contain the "added ingredient" extant in *Lucynski:* the ***pretextual, after the fact*** use of an unreasonable mistake of law to shore up a mere "hunch" of suspected criminal activity.

B. The Michigan Supreme Court engaged in a thorough, fact-intensive investigation of the details of this case prior to crafting the only appropriate remedy for this sort of police abuse.

The Michigan Supreme Court commenced its opinion with language fully demonstrating a fact-intensive approach, stating: "[b]ecause application of the

exclusionary rule is a ***'fact-intensive inquiry,'*** Deputy Robinson's alleged misconduct must be understood in context of the following facts....[]." Pet. App. 14a. Rather than blindly rushing to apply the exclusionary rule as a first option, the Court meticulously dissected the facts to decide that Deputy Robinson's mistake of law was unreasonable. Although the Court did not employ the "magic dragon" buzzwords of ***d***eliberate, ***r***eckless, or ***g***rossly ***n***egligent, these qualities are inherently subsumed within the Court's carefully curated analysis.

The *Lucynski* Court stated:

> Deputy Robinson provided two reasons for the traffic stop: (1) the factually unsupported suspicion that a drug deal took place, which he communicated to defendant during the traffic stop; and (2) a suspected violation of MCL 257.676b(1), ***which he did not mention until the preliminary examination in this case.*** The former reason unquestionably weighs in favor of application of the exclusionary rule. An officer who seizes a person based only on an unsupported, inchoate hunch has acted in clear violation of a defendant's Fourth Amendment rights and, thus, has committed misconduct. Exclusion is warranted in such a circumstance. Pet. App. 4a, *citing People v Soulliere*, 509 Mich. 950, 951, 972 N.W.2d 263 (2022).

Indeed, not only was the Michigan Supreme Court's inquiry "highly fact-intensive," but so was the Michigan 71-A District Court's, where the case originated. In an extremely thoughtful and well-crafted Opinion, 71-A

District Court Judge Jason E. Bitzer explained precisely why Deputy Robinson's drug deal suspicions were merely an inchoate "hunch" incapable of supporting a valid stop. Pet. App. 118a.

As to the second asserted reason for the stop, the Michigan Supreme Court was no less individualized and fact-specific in determining that *Lucynski* did not violate Michigan's impeding traffic statute. Pet. App. 14a.

In sum, neither of these "bookend" Michigan courts utilized the "one size fits all" approach claimed by Petitioner. This exactitude extended to the careful dispensing of two proposed "saving devices" for the stop—the "good faith" exception and an unpublished opinion.

1. Neither The Good Faith Exception Nor The Unpublished *Salters* Case Could Save The Bad Stop.

The Majority opinion in *Lucynski* notes that the Dissent relies heavily upon the unpublished Michigan case of *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396, 2001 WL 765852), to suggest that Deputy Robinson was trained on and relied upon *Salters*, which was 23 years old at the time of the stop. Pet. App. 7a. Inasmuch as the Petition is essentially a rehash of the Dissent, it too, rests upon this reliance. Although the Majority notes that Deputy Robinson did not testify that he relied upon *Salters* nor is there any evidence that he was even aware of it (much less was trained on it), as noted by the Majority in a footnote, the good-faith exception generally applies "where the officer's conduct is

the result of *another* individual's error," ... "because the purpose underlying this good-faith exception is to deter *police* conduct[.]" Pet. App. 5a, *quoting United States v Herrera*, 444 F.3d 1238, 1249-1250 (CA 10, 2006) (emphasis in original).[9]

Accordingly, Respondent respectfully asserts that that neither *Salters* nor the good-faith exception can save Deputy Robinson's stop. This also explains why *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S. Ct. 2627, 2632, 61 L. Ed. 2d 343 (1979), cited by *Heien*, is inapposite: the ordinance at issue at the time of the stop had not yet been declared unconstitutional, so the error did not belong to the policeman.

C. *Lucynski* is consistent with *Heien*.

Petitioner also relies heavily upon *Heien, supra.* Although Petitioner contends that it "accepts" the Michigan Supreme Court's finding that the stop was "unreasonable," it appears that Petitioner is ***simultaneously*** advocating that the stop was "reasonable" under *Heien.*

Lucynski maintains that the Michigan Supreme Court "got it right"—that the stop ***was un***reasonable. *Heien* itself sets internal limits on what sloppy police behavior is excusable, demanding both that an officer's mistake be "objectively reasonable" and that the statute

9. *Heien's* reference to Justice Scalia's "whizzing by Segway" argument [574 U.S. at 66, *citing* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 36–38 (2012)], is not applicable to *Lucynski*, because all indications are that the deputy did not even conceive of his "impeding traffic" rationale for the stop until some six weeks later, at the Preliminary Examination.

be "genuinely ambiguous" in order to justify a stop of a moving vehicle based upon a mistake of law. Neither condition is present in *Lucynski.* As noted in the *Harvard Law Review:*

> Last Term, in *Heien v. North Carolina*, 135 S. Ct. 530 (2014). the Supreme Court held that a police officer's reasonable mistake of law may give rise to the reasonable suspicion needed to justify a traffic stop under the Fourth Amendment. *Id. at 534.* Mindful that an open-ended "reasonableness" test might sow confusion—or worse, abuse—both the majority and concurrence sought to cabin the reasonable-mistake-of-law test with additional qualifiers. Such qualifiers allay some but not all concerns over what the *Heien* test means for judicial administrability and police discretion. *29 Harv. L. Rev. 251* (Nov 10, 2015).

This Court, in *Heien*, framed its analysis as a choice of whether a mistake of law could ***ever*** give rise to reasonable suspicion, and decided this question in the affirmative, believing that same promoted safer roadways and better comported with the Fourth Amendment's primary command that police actions be "reasonable." *Heien* at 356.

Heien held that "[o]fficers in the field must ... quickly resolve legal ambiguities in the field.... *[that permitting] such determinations would* "not discourage officers from learning the law," [because] the "Fourth Amendment tolerates only ... *objectively* reasonable" mistakes [and thus] would not reward "sloppy study of the laws," ... [and that] "just because mistakes of law [by citizens] cannot

justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop ... *Heien*, 135 S. Ct. at 538-40.

Heien's concurrence notes that excusing officer mistakes of the law should be a rare occurrence:

> Justice Kagan concurred [and was] *joined by Justice Ginsburg* to highlight two points: First, "an officer's 'subjective understanding' is irrelevant" to the reasonableness inquiry, meaning that a lack of training or awareness of the law "cannot help to justify a seizure." *Harvard Law Review, supra*, citing *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring).

Justice Kagan also noted that the Heien test is more stringent than the standard needed to achieve governmental immunity:

> .... the Court's test "is more demanding" than what is required under qualified immunity. The latter protects "all but the plainly incompetent or those who knowingly violate the law," ... whereas a court applying *Heien* "faces a straightforward question of statutory construction"—"[i]f the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake." The statute must pose a "very hard question of statutory interpretation," and such cases would be "exceedingly rare ..." *Id.* (internal citation authority omitted).

Lucynski respectfully suggests that his stop was not "exceedingly rare" and, therefore, that the stop was ***un***reasonable, all as properly determined by the Michigan Supreme Court. Inasmuch as certiorari is rarely (if ever) granted merely to "correct lower court mistakes," the Petition should be denied on this basis alone.

Nevertheless, *Lucynski* is fully consistent with *Heien.* First, the Michigan Supreme Court followed *Heien's* "objective" inquiry methodology. Second, the court held the inquiry to a higher standard than the "forgiving" qualified immunity standard.[10] Finally, since a mistake is only reasonable when the statute is "genuinely ambiguous ... or ... 'so doubtful in construction' ... that a reasonable judge could agree with the officer's view" (*Heien, supra)*, the Court determined that the mistake was unreasonable because the statute was not "genuinely ambiguous."

None of these conditions were fulfilled in *Lucynski.* First, Deputy Robinson's inquiry was admitted subjective. Second, there is no indication that he was incompetent. Finally, the statute in question is not ambiguous and, the Michigan Supreme Court properly determined that a straight-forward reading of it demanded the presence of actual traffic to support a violation. This detailed inquiry fully satisfied this Court's "individual" standard. The Michigan Supreme Court's inquiry was hardly the stuff of the "one size fits all" approach that Petitioner claims.

Additionally, Petitioner seeks to have this Court fashion a new, "two-part test" wherein ***some*** "unreasonable" police mistakes of law are tolerated, and ***some*** are not.

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10. *i.e.*, wholly incompetent.

Apart from the sheer administrative nightmare that such an approach would surely foster, the imposition of such a test flies clearly in the face of *Heien's* actual holding, which elevated inquiry into the reasonableness of a police mistake of law from mere "remedial" status to "Fourth Amendment violation determination" status. Accordingly, imposition of the sought-for "two-part test" would essentially demolish *Heien* by demoting the inquiry "down the food chain" to remedial status only, all as more fully set forth herein.

D. *Lucynski* is consistent with *Herring.*

The Petition also relies heavily upon *Herring, supra*, which is ***completely inapplicable*** to *Lucynski*, for several reasons. First, in *Herring*, the police acted in objectively ***reasonable*** reliance on a subsequently invalidated search warrant. In *Lucynski*, the police actions were ***un***reasonable, and Petitioner does not contest this finding by the Michigan Supreme Court.[11]

Second, *Herring* is actually an "attenuation doctrine" case, because the actions were not of the "boots on the ground" police at all, but rather of a physically and

11. Or at least Petitioner, (in footnote 1 to the Petition), ***says*** that it does not contest the Michigan Supreme Court's finding of "unreasonableness." However, a close reading of the Petition "between the lines" suggests that Petitioner is ***actually*** urging this Court to determine that the Michigan Supreme Court "got it wrong" and to label Deputy Robinson's actions as "reasonable," thereby placing them under *Heien* and *Herring's* protective umbrellas. However, when correctly applied, neither case can save Robinson's pretextual, unreasonable mistake of law-laden stop. Neither case is actually on point, all as more fully set forth herein.

chronologically distant warrant affiant and / or issuing magistrate, so the deterrence value of applying the exclusionary rule was minimal. Herring's analogy to *Franks v. Delaware*, 438 U.S. 154 (1978) is revealing—*Franks* is of course, the definitive "defective search warrant" case, rather than a "boots on the ground" case such as *Lucynski.*

Third, the police actions in *Herring* were benign, while those in *Lucynski* were deliberate and premeditated. *Herring* itself recognizes the difference, stating that "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation." *Herring*, 555 U.S. 135 at 146. Such behavior is ***perfectly analogous*** to Deputy Robinson's conduct here in *Lucynski*, as he waited six weeks to devise his pretextual "impeding traffic" ruse to attempt, revealed for the first time only in court, to justify the stop, which was actually based only on an inchoate, unsubstantiated and unverified "hunch" that illegal drug trafficking activity was afoot.

Fourth, *Herring* is perhaps best viewed as a mistake of ***fact*** case, not one of law. The mistaken "fact" is that the warrant was defective, which has precisely nothing to do with a mistake of ***law*** (interpretation of an unambiguous statute) actually committed by a patrol officer in the field. This mistake is easily distinguishable from the unreasonable mistaken interpretation of a statutory law by such a patrolling cop, as here in *Lucynski. Herring* itself, citing *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), noted that police personnel errors

were left open as not likely to benefit from the exclusionary rule. *Herring*, 555 U.S. 135 at 142–43 (2009).

Petitioner's *Herring* argument can be summed up by a quotation from *Herring* itself:

> Petitioner's claim that ***police negligence automatically triggers suppression*** cannot be squared with the principles underlying the exclusionary rule, 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,*** *e.g.*, *Leon*, 468 U.S., at 909–910, 104 S.Ct. 3405, we conclude that when police mistakes are the result of ***negligence such as that described here, rather than systemic***[12] ***error or reckless disregard of constitutional requirements,*** any marginal deterrence does not "pay its 148 way." *Id.*, at 907–908, n. 6, 104 S.Ct. 3405. In such a case, the criminal should not "go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (opinion of the Court by Cardozo, J.) (emphasis added).[13]

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12. It is difficult to conceptualize how the "systemic" prong is applicable ***at all*** to *Lucynski*, save perhaps were rogue police utilizing AI to create fake laws out of whole cloth. Surly, the Exclusionary Rule is applicable in more situations than such a horror story?

13. Perhaps the "constable" reference is more applicable to a magistrate than a "cop on the beat." https://www.indeed.com/career-advice/finding-a-job/constable-vs-police-officer

1. The Actual Holding In *Herring*.

Herring is easily distinguishable from *Lucynski*. *Herring* held:

> Our cases establish that such ***suppression is not an automatic consequence of a Fourth Amendment violation.*** Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of ***isolated negligence attenuated from the arrest.*** We hold that in these circumstances the jury should not be barred from considering all the evidence. *Herring v. United States*, 555 U.S. 135, 137 (2009) (emphasis added).

Herring dealt with a ***reasonable*** mistake of one of fact: a court employee bookkeeping error, not a ***patently absurd*** statutory interpretation error by a cop "on the beat and in the field."[14] In contrast, Deputy Robinson's mistake of law was ***unreasonable.*** Although there is nothing in the record to suggest that the deputy was a serial "law mistaker," this

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14. That such mistakes should be treated differently than actual police errors was noted by Justice Brennan's Dissent in *Herring* itself:

> "Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions." Id., at 15, 115 S.Ct. 1185 (citation omitted). Taken together, these reasons explain why police recordkeeping errors should be treated differently than judicial ones. *Herring*, 555 U.S. 135, 158 (2009) (Dissent, Breyer, J.).

is irrelevant, with "serial" applicable only to institutional, administrative errors. Importantly, this legal mistake was the very reason given for the arrest itself, and therefore, it was not attenuated. Respondent respectfully asserts that even Judges Cardozo and Friendly would bar the evidence.[15]

2. Deterrence Is Achieved Because Deputy Robinson's Unreasonable Mistake Of Law Was Both Pretextual And Concocted After The Fact.

Although *Herring* is inapplicable, Deputy Robin's unreasonable mistake of law fully comports with the following *Herring* requirement:

> 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. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level. *Herring, supra*, 555 U.S. 135 at 144.

Respondent respectfully asserts that the within error ***does*** rise to "that level," inasmuch as Deputy Robinson

15. *See People v. Defore*, 242 N.Y. 13, 24–25, 150 N.E. 585, 588–589 (1926) (famously dealing with "blundering constables" and "slight and unintentional miscalculation[s,]" neither of which are present herein.

concocted the "impeding traffic" ruse six weeks after the arrest and only revealed it in a court hearing at that at time, employing it as a novel, post-factual, pre-textual justification for the stop.

3. The Good-Faith Exception To The Exclusionary Rule Is Inapplicable To Mistake Of Law Cases.

Herring is best viewed as a mistake of fact case, not a mistake of law case. The Eleventh Circuit Court of Appeal (the lower court in *Herring)* found that the good-faith exception to the exclusionary rule as announced in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), was applicable:

> Because the error was merely negligent and attenuated from the arrest, the Eleventh Circuit concluded that the benefit of suppressing the evidence "would be marginal or nonexistent," *ibid.* (internal quotation marks omitted), and the evidence was therefore admissible under the ***good-faith rule*** of *United States v. Leon*, 468 U.S. 897 (1984). *Herring, supra*, 555 U.S. 135, 138–39 (2009) (emphasis added).[16]

However, the good-faith exception is wholly inapplicable in mistake of ***law*** cases, such as *Lucynski*, all as more fully discussed herein.

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16. *See also U.S. v Marsh* (finding no post-*Heien* cases applying or rejecting the good-faith exception to the exclusionary rule for mistakes of law, but finding that, before *Heien*, then-Judge Gorsuch suggested that exclusion might not be the proper remedy in a case involving New Mexico's version of a left-turn law). *United States v. Marsh*, 95 F.4th 464, 474–75 (6th Cir. 2024)

4. Deputy Robinson's Unreasonable Mistake Of Law Was More Than Simple Negligence.

At first blush, in *Herring*, this Court ***appeared*** to set the bar for the exclusion of evidence at the hands of police mistakes of ***law*** at something ***more*** than simple negligence, by stating:

> The court also concluded that this error was negligent, but did not find it to be reckless or deliberate. 492 F.3d, at 1218.[1] That fact is ***crucial*** to our holding that this error is not enough by itself to require "the extreme sanction of exclusion." *Leon, supra*, at 916, 104 S.Ct. 3405. *Herring, supra*, 555 U.S. 135 (2009).

Again, *Herring* is best viewed as a mistake of ***fact*** case, with the mistake being an attenuated clerical error performed by somebody ***other*** than the officer in question (an administrator, perhaps a police officer and perhaps not, but in a different department nonetheless). The Eleventh Circuit determined that this mistake was merely negligent (rather than reckless or deliberate), a determination which this Court deemed "crucial." *Id.* In comparison, Deputy Robinson's mistake of ***law*** in *Lucynski* was ***deliberate and pretextual, unleashed after the fact, reckless and grossly negligent,***[17] all as set forth more fully herein.

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17. It is palpable that Deputy Robinson did not bother to read the unpublished *Salters* opinion, because he would have mentioned it during the Preliminary Examination. This is the epitome of gross negligence when it comes to legal research, the "AI" of an unreasonable legal mistake.

Perhaps more importantly for comparative analysis purposes, this Court determined that the administrative ***factual*** error in *Herring* was reasonable, unlike the unreasonable ***legal*** mistake (of statutory interpretation) in *Lucynski.* Deputy Robinson's unreasonable mistake of law was "post-factual"—he waited several weeks to concoct the pretextual "impeding traffic" ruse, and his ensuring interpretation of the statute was totally uninformed and conducted entirely without research and, therefore, unreasonable. This is the "poster child" of "deliberate" (premeditated, 3 week non-researched deliberation) and reckless (getting the interpretation wrong by insisting that "imaginary" traffic is sufficient). Even if not "poster material," the bar should be set higher for mistakes of law than for those of fact—with less leeway permitted. In this respect, an "unreasonable" mistake of law is akin to an egregious mistake of fact. In short, *Herring* is simply not applicable to *Lucynski.*

II. "Flagrant" police conduct is not required for a finding of an "unreasonable" mistake of law.

Petitioner, citing both *Heien* and *Herring*, further cites several federal and state cases for the proposition that the adjective "flagrant" must be overlaid onto unreasonable police mistakes of law in order for the exclusionary rule to apply. However, none of the offered cases actually so hold. They are:

1. *United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1111 (8th Cir. 2007): *Herrera-Gonzalez* ***predates*** both *Heien* and *Herring*, and the court found the stop to be reasonable and lawful. *Herrera-Gonzalez* is not on point, as

Petitioner has conceded the ***un***reasonableness of the *Lucynski* stop.

2. *Delker v. State*, 50 So. 3d 300, 308 N.W.3d 327, 330 (Miss. 2010), is a mistake of ***fact*** case (bailiwick case), not one of law. *Delker* has nothing to do with statutory interpretation (as in *Lucynski)* at all, but it ***did*** note that *Herring* is a "good-faith" case, which is not applicable to mistake of law cases.

Delker did ***not*** state that a two-part, balancing test was ***required*** once an ***unreasonable mistake of law*** was found. *Delker* did not engage in any "reasonable / unreasonable" analysis, nor even use these words in its opinion. Therefore, *Delker* is not in conflict with *Lucynski.*

3. *State v. Monafo*, 2016-NMCA-092, ¶ 16, 384 P.3d 134, 140: *Monafo* is an attenuation analysis situation, unlike *Lucynski.* The mistake in *Monafo* was later cured in a second stop of the defendant's vehicle. Accordingly, *Monafo* is not directly on point and is not in conflict with *Lucynski.*

4. *State v. Newland*, 2010 UT App 380, ¶¶ 17-19, 253 P.3d 71, 76–77: *Newland* involved a "mistaken," non-consensual (but later consented-to) search of a computer that revealed child pornography. The *Newland* court stated: "[when] police have no 'purpose' in engaging in the misconduct ... suppression

> would have no deterrent value." *Id.* In contrast, Deputy Robinson had "skin in the game"—and outcome. Accordingly, *Newland* is not on point and is not in conflict with *Lucynski.*

III. No cases exist where evidence has not been suppressed after a court has determined that a mistake of law is unreasonable, so certiorari is unnecessary.

The Michigan Supreme Court correctly observed:

> ***the United States Supreme Court has never ruled against exclusion where an unreasonable mistake of law has occurred.*** Nonetheless, our decision here is in accordance with how other jurisdictions have considered unreasonable mistakes and the exclusionary rule. ***Indeed, this Court has not found a case where evidence was gathered on the basis of an officer's unreasonable mistake of law and the exclusionary rule did not apply,*** and neither the prosecution nor its supporting amicus has directed this Court to such a case. Pet. App. 6a (emphasis added).

Accordingly Petitioner, rather than Respondent, seeks to impose a new legal test. *Lucynski* sits properly under existing precedent from this Court.

A. There are no federal cases in conflict with the holding of the Michigan Supreme Court's decision in *Lucynski*.

The following are all of the federal cases regarding "unreasonable mistake of law" and "exclusionary rule." None conflict with this Court's exclusionary rule jurisprudence:

1. *United States v. Sanchez*, 569 F. Supp. 3d 1129, 1145 (D.N.M. 2021) (this case is not directly on point, as no Fourth Amendment violation, but the evidence was excluded anyway). *Sanchez* is not in conflict with *Heien, Herring or Lucynski.*

2. *United States v. Meadows*, 353 F. Supp. 3d 1167, 1175–76 (D. Utah 2018), *aff'd*, 970 F.3d 1338 (10th Cir. 2020): The court found an objectively reasonable mistake of law, and therefore that the exclusionary rule did not apply. *Meadows* is not in conflict with *Heien, Herring or Lucynski.*

3. *United States v. Boatright*, 678 F. Supp. 3d 1014, 1033 (S.D. Ill. 2023): this case only mentions *Heien* in a footnote: Further, the Court finds that Waddington made an unreasonable mistake of law, and thus the stop was still invalid under *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014). Here, the statutory language is unambiguous. The Boatright court found other reasons to invalidate the stop. *Boatright* is not in conflict with *Heien, Herring or Lucynski.*

4. *United States v. Harris*, 102 F. Supp. 3d 1187, 1201 (D. Kan. 2015): This case appears to present a mixed question of mistake of fact and law (consent to search motel room

obtained from one without authority to grant it). *Harris* was decided at or near the time of *Heien.* It correctly declined to apply the good faith exception (among others) to this mistake of law. *Harris* is not in conflict with *Heien, Herring or Lucynski.*

5. *United States v. Phillips*, 430 F. Supp. 3d 463, 475 (N.D. Ill. 2020): although the mistake of law (regarding having to use headlights when parked) was objectively unreasonable, failing to use a turn signal was not, so the evidence (drugs) came in. *Phillips* is not in conflict with *Heien, Herring or Lucynski.*

6. *Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277 (11th Cir. 2016): this case is not on point, as the mistake of law was made by a lawyer in court. *Marshall* is not in conflict with *Heien, Herring or Lucynski.*

7. *United States v. Longoria*, 183 F. Supp. 3d 1164, 1169 (N.D. Fla. 2016): this case merely held that an inchoate "hunch" is not enough for a valid stop. *Longoria* is not in conflict with *Heien, Herring or Lucynski.*

B. There are no state cases in conflict with the holding of the Michigan Supreme Court's decision in *Lucynski*.

Aside from the cases cited by Petitioner, Respondent has found only the following state cases that address unreasonable mistakes of law and the exclusionary rule. None of them are in conflict with this Court's precedent:

1. *People v. Burnett*, 2019 CO 2, 432 P.3d 617: *Burnett* mentions the exclusionary rule, but never reached an

exclusionary rule analysis, as neither of the parties briefed it. *Burnett* is not in conflict with *Lucynski, Heien or Herring.*

2. *Hooks v. United States*, 208 A.3d 741, 750 (D.C. 2019): *Hooks* correctly notes that *Herring* is a mistake of ***fact*** case (the *Herring* police were unaware that a warrant they were serving had been recalled). For mistake of fact cases, the balancing test is appropriate, and the benefit of the exclusionary rule is marginal or non-existent, because court employees, rather than the police, made the error; court employees did (and no evidence of systemic record-keeping errors was extant). *Hooks* is not in conflict with *Lucynski, Heien or Herring.*

3. *Rovin v. State*, No. 198, Sept. Term,2022, 2023 WL 4855950, at *15–17 (Md. Ct. Spec. App. July 31, 2023), *cert. granted*, 486 Md. 146, 303 A.3d 963 (2023), and *aff'd*, 488 Md. 144, 321 A.3d 201 (2024). *Rovin* explains that states "depart" from *Heien* due to previous interpretations of state constitutional or Fourth Amendment analogs that do not tolerate reasonable mistakes of law, or due to independent exclusionary rules that do not allow for good-faith exceptions. *Rovin* is not in conflict with *Lucynski, Heien or Herring.*

4. *Knapp v. State*, 346 So. 3d 1279, 1281 (Fla. Dist. Ct. App. 2022): Applied *Heien* by virtue of *State v. Thomas*, 207 So. 3d 928, 932 n.1 (Fla. 1st DCA 2016) (observing that *Heien* is binding on Florida courts by virtue of the Florida Constitution's conformity clause). *Knapp* is not in conflict with *Lucynski, Heien or Herring.*

5. *State v. Huez*, 240 Ariz. 406, 411, 380 P.3d 103, 108 (Ct. App. 2016):

Huez apparently rests on attenuation analysis, rather than the two-step process advanced by Respondent, *Huez* does not appear to be in conflict with *Lucynski, Heien or Herring.*

6. *People v. Jones*, No. B255728, 2015 WL 1873269, at *7 (Cal. Ct. App. Apr. 23, 2015): *Jones* supports Respondent's contention that *Heien* elevated consideration of the reasonableness of an officer's mistake to "front line" status—as opposed to the "second tier," separate matter of remedy (as advocated for by Respondent herein).

The *Jones* court noted that in pre-*Heien* cases such as *Herring, supra*, 555 U.S. 135, and *Davis v. United States* (2011) 564 U.S. — [131 S.Ct. 2419], ***"[a]ny consideration of the reasonableness of an officer's mistake was ... limited to the separate matter of remedy."*** (*Heien, supra*, — U.S. at p. — [135 S.Ct. at p. 10].). However, *Heien* ***considered "the reasonableness of an officer's mistake to determine whether the Fourth Amendment had been violated <u>in the first place</u>."*** *Id.* (emphasis added).

Heien therefore elevated reasonableness from "remedy only status" to whether a Fourth Amendment violation occurred in the first place. Respondent respectfully asserts that Petitioner seeks to "devalue and demote" reasonableness back down to "remedy only" status. Such a repositioning would also disrupt the internal mathematical / architectural hierarchy of *Heien* itself—and by doing so, render *Heien* essentially meaningless. This is because a court, such as *Jones*, could essentially ***disregard*** *Heien* ("provides little guidance," *supra)*, and engage in a remedial-only two-step analysis, as advanced by Petitioner and as realized by the *Jones* court.

Because *Heien* left open the question of whether an unreasonable mistake of law would ***in and of itself*** call for application of the exclusionary rule or whether a ***secondary analysis*** of police culpability would be required to determine the remedy, the *Jones* court undertook such an analysis and determined that the mistake of law was grossly negligent and that the exclusionary rule should apply to bar the evidence from trial. Such an approach, if a court finds a given conduct to be "unreasonable but not worthy of exclusionary rule treatment," would therefore essentially ***destroy the exclusionary rule itself and take Heien along with it*** by essentially neutralizing its elevation of the reasonable / unreasonable bifurcation and effectively gutting the exclusionary rule's teeth and corrective purpose altogether. The proposed analysis would begin and end with an inquiry into the "dragon" qualities of the behavior: ***d***eliberate, ***r***eckless, ***g***rossly ***n***egligent, and not whether a Fourth Amendment violation occurred. Thus, the new, "unreasonable but not dragon" exception would swallow the (exclusionary) rule. *Jones* is not in conflict with *Lucynski, Heien or Herring.*

7. *State v. Sutherland*, 231 N.J. 429, 431–32, 176 A.3d 775, 776 (2018): *Sutherland* declined to "insert" *Heien* into its analysis because the statue at issue was not ambiguous and the mistake of law was therefore not reasonable. Nevertheless, this case engaged in the "two-part" analysis advanced by Petitioner. Accordingly, this case illustrates that states are free to do so if they want and therefore are not in "derogation" of *Heien*, which left this question open. Similarly, cases that do not engage in the two-part analysis are free to do that as well, and it would be an ***unwarranted intrusion upon states' rights to require them to do so.*** Respondent ***strongly*** urges this Court not to expand the holding of *Heien* in this fashion.

Sutherland also reviewed Justice Kagen's *Heien* Dissent on how "rare" a reasonable mistake of law really is, and reviews state cases that went along with *Heien* or "disregarded" (not defied) it, since their state ***already*** allowed reasonable mistakes of law.

Sutherland poignantly quoted *State v. Puzio*, 379 N.J. Super. 378, 878 A.2d 857 (App. Div. 2005):

> "[i]f officers were permitted to stop vehicles where it is objectively determined that there is no legal basis for their action, '***the potential for abuse of traffic infractions as pretext for effecting stops seems boundless*** and the costs to privacy rights excessive.'" *Id.* at 384, 878 A.2d 857 (quoting *United States v. Lopez–Valdez*, 178 F.3d 282, 289 (5th Cir. 1999)) (emphasis added).

Moreover, *Sutherland* reviewed the reasons that some states have not "followed" *Heien.* But these reasons all involve prior state handling of the matter, rather than a derogation of *Heien. See Sutherland*, 176 A.3d 775 at 782–83. *Sutherland* is not in conflict with *Lucynski, Heien or Herring.*

8. *People v. Owen*, No. 339668, 2019 WL 3312531, at *4 (Mich. Ct. App. July 23, 2019): This unpublished case merely held that it was an unreasonable mistake of law not to know the applicable speed limit. The court did not make further inquiry. *Owen* is not in conflict with *Lucynski, Heien or Herring.*

IV. If a pretextual stop of a motor vehicle can be (as here) based upon a wholesale fabrication of fact or complete misinterpretation of law, the Fourth Amendment is completely eviscerated and rendered totally meaningless.

Lucynski involves a pretextual stop with an added twist: it was concocted after the stop, by some six weeks, and only unleashed during the Preliminary Examination testimony in court. The lone dissenter in *Heien*, Justice Sotomayor, warned of the problem of illusory pretextual stops:

> [the majority's holding] further erod[es] the Fourth Amendment's protection of civil liberties ... When the Court permitted pretextual searches in *Whren v. United States*, 63. 517 U.S. 806 (1996), it assumed that "[the] pretext would be the violation of an actual law." But if the police have "license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation)," innocent citizens will face great difficulty in trying to avoid ... invasive, frightening, and humiliating encounters ... *Id.*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (internal citation authority omitted).

Justice Sotomayor's concern is on full display in the case at bar, and her warning should be heeded: if Deputy Robinson's wholly imagined, pretextual but unleashed only after the fact "impeding traffic" gambit can justify a stop, then so, too, can virtually ***every*** police fantasy.

CONCLUSION

The exclusionary rule is "a remedy necessary to ensure that" the Fourth Amendment's prohibitions "are observed in fact." *Id.*, at 1389; see Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"? 16 Creighton L.Rev. 565, 600 (1983). "The rule's service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable." *Herring*, 555 U.S. 135 at 152 (Ginsburg, J. dissenting). Beyond doubt, a main objective of the rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

But the rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus ***minimizing the risk of seriously undermining popular trust in government."*** *United States v. Calandra*, 414 U.S. 338, 357, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (Brennan, J., dissenting). As Professor Kamisar so eloquently stated:

> [a] principal reason for the exclusionary rule is that "the Court's aid should be denied 'in order to maintain respect for law [and] to preserve the judicial process from contamination'" Kamisar, *supra*, at 604, *quoting Olmstead v. U.S*, 277 U.S. 438 at 484 (1928) (Brandeis, J.,

> dissenting))), *quoted in Herring*, 555 U.S. 135 at 152–53 (Ginsburg, J. dissenting).

In his *Herring* Dissent, Justice Breyer said the following:

> Distinguishing between police recordkeeping errors and judicial ones not only is consistent with our precedent, but also is ***far easier for courts to administer than the Court's case-by-case, multifactored inquiry into the degree of police culpability.*** I therefore would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation.
>
> ***The need for a clear line, and the recognition of such a line in our precedent,*** are further reasons in support of the outcome that Justice GINSBURG's dissent would reach. *Herring*, 555 U.S. 135 at 158–59 (Brennan, J., Dissenting).

Respondent respectfully advocates that courts that have determined that a police mistake of law is unreasonable, have already engaged in enough "multi-faceted analysis" to find ***bad police behavior.*** They do not need to further muck up the proceedings with additional, "second-tier" analysis of ***just how bad*** the police behavior was. Otherwise, citizens may well find themselves defending against anything and everything, up to and including fake, AI laws cooked-up by the police just for the occasion. There should be no such thing as an "unreasonable but otherwise perfectly fine" mistake of law, which is the "bright line" Petitioner advocates.

This would countenance all but the most shameless police misuses of the law, deftly achieved by a classic "slippery slope."

Respectfully submitted,

Haralambos D. Mihas
Smith Mihas, PLLC
Counsel of Record
467 Eureka Road, Suite 1
Wyandotte, MI 48198
(734) 692-3033
hdmihas@smithmihas.com

Bernard A. Jocuns
Jocuns Law Firm
385 West Nepessing Street
Lapeer, MI 48446

Attorneys for Respondent

APPENDIX

TABLE OF APPENDICES

APPENDIX A — EXCERPT OF THE POLICE REPORT, MICHIGAN V. LUCYNSKI, DATED JANUARY 21, 2020

PAGE 1 OF 2
COMPLAINT FELONY

STATE OF MICHIGAN 71B JUDICIAL DISTRICT 54TH JUDICIAL CIRCUIT	CASE NO. 2020000074 DISTRICT: CIRCUIT: 20-0045FD
District Court ORI: MI-MI790015J 440 N. STATE STREET CARO, MI 48723 989-672-3800	Circuit Court ORI: MI-MI790025J 440 N. STATE STREET CARO, MI 48723 989-672-3720
THE PEOPLE OF THE STATE OF MICHIGAN V	Defendant's name and address DAVID ALLAN LUCYNSKI 9774 W. DIXON RD. REESE, MI 48757
Victim or complainant DEP. RYAN ROBINSON	Complaining Witness DET/SGT. JAMES HOOK
Co-defendant(s) (If known)	Date: On or about 01/20/2020
City/Twp./Village Wisner Township	County in Michigan TUSCOLA

Appendix A

Defendant TCN O620206360H	Defendant CTN 79-20000074-01	Defendant SID 1378101H		Defendant DOB 07/01/1965
Police agency report no. 79TCSD 200000240	Charge See below	Maximum penalty		
[ ] A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		Oper./ Chauf. CDL	Vehicle Type	Defendant DLN L-252-135-051-521

Witnesses

DEP. RYAN ROBINSON*	DEP. WILLIAM WEBSTER
DEP. JORDAN WADE*	JUDY ANN LUCYNSKI
GAYLE MCMULLEN*	MSP LAB ANALYST
SHANNON GWIZDALA*	DR. ABDO

STATE OF MICHIGAN, COUNTY OF TUSCOLA

The complaining witness says that on the date and at the location described, the defendant, contrary to law,

COUNT 1: OPERATING WHILE INTOXICATED

did, operate a vehicle upon a highway, Old State Road at or near M-25, while under the influence of a combination of alcoholic liquor and a controlled substance; contrary to MCL 257.625(1). [257.6251-A]

MISDEMEANOR: 93 Days and/or $100.00-$500.00 and/or 360 hours community service; rehabilitative program(s) (see MCL 257.625b(5)); vehicle immobilization mandatory with a prior (see MCL 257.904d); costs of prosecution; reimburse government for emergency response and expenses for prosecuting defendant (see MCL 769.1f)

THIRD OFFENSE NOTICE - FELONY

Take Notice that the defendant was previously convicted of operating while intoxicated on or about 09/22/1988 the 71B District Court, Caro, MI, and of operating impaired on or about 06/24/2002 in the 81st District Court, Standish, MI, and of operating while intoxicated on or about 08/25/2003 in the 71B District Court, Caro, MI.

Therefore, upon conviction, the defendant will be subject to an enhanced sentence under MCL 257.625(9) or MCL 257.625(11), and vehicle forfeiture under MCL 257.625n. [257.6256D]

FELONY: $500.00-$5,000.00; and either 1 to 5 Years, or probation with 30 Days to 1 Year in jail, at least 48 hours to be served consecutively, and 60 to 180 Days community service; rehabilitative program(s) (see MCL 257.625b(5)); costs of prosecution; reimburse government for emergency response and expenses for prosecuting defendant (see MCL 769.1f); mandatory vehicle immobilization of not less than 1 year or more than 3 years. (see MCL 257.904d)

Court shall order law enforcement to collect a DNA identification profiling sample before sentencing or disposition, not taken at arrest.

Appendix A

☐ The complaining witness asks that the defendant be apprehended and dealt with according to law.

Warrant authorized on 01/21/2020 by:
Date

/s/ Erica K. Walle
Erica K. Walle P80987, Prosecuting Official

☐ Security for costs posted

/s/ [Illegible]
Complaining Witness Signature

Subscribed and sworn to before me on _____
Date

_____
Judge/Magistrate/Clerk Bar no.

Appendix A

CR No: 200000240-001	Report Type: Arrest Report	
Officer: TUROBINSONR (41320)	**001**	
E - Evidence (Including Other Seized Property And Tools	1	1
Description Michigan Registration EBS8760	Disposition License Plate Box	Evidence Tag 200000240.001
Recovered Date/Time	Location	
Owner [O33794585] LUCYNSKI, JUDY ANN		

3300 - Blood 5488 [TUROBINSONR (41320)]		
Property Class 88	IBR Type 77 - Other	
UCR Type K - Miscellaneous		
Status E - Evidence (Including Other Seized Property And Tools)	Count 1	Value 1
Description MSP Blood Kit	Disposition	Evidence Tag 200000240.002
Recovered Date/Time	Location	
Owner [A33794545] LUCYNSKI, DAVID ALLAN		
Notes Locker 250 was in use so evidence was placed in Locker 252		

Appendix A

1910 - Marijuana 5410 [TUROBINSONR (41320)]		
Property Class 10	IBR Type 10 - Drugs/Narcotics	
UCR Type K - Miscellaneous		
Status E - Evidence (Including Other Seized Property And Tools)	Count 1	Value 1
Description Suspected Marihuana Cigarette	Disposition Evidence Locker	Evidence Tag 200000240.003
Recovered Date/Time	Location	
Owner [A33794545] LUCYNSKI, DAVID ALLAN		
Notes Locker 250 was in use so evidence was placed in Locker 252		
Drug Information		
Drug Type 05 - Marijuana	Drug Quantity	Drug Measure

Appendix A

<table>
<tr><td colspan="4">3501 - Automobile/Car/Vehicle (not Stolen Or Recovered) 5403 [TUROBINSONR (41320)]</td></tr>
<tr><td>Property Class
03</td><td colspan="3">IBR Type
03 - Automobiles</td></tr>
<tr><td colspan="4">UCR Type
V - Other Vehicle (not Stolen or Recovered)</td></tr>
<tr><td>Status
I - Information Only</td><td>Count
1</td><td colspan="2">Value
1</td></tr>
<tr><td>Manufacturer
CHEVROLET</td><td>Model
COBALT</td><td colspan="2">Serial No.
1G1AD1F53A7184742</td></tr>
<tr><td colspan="2">License No.
EBS8760</td><td colspan="2">Color
RED - Red</td></tr>
<tr><td>Vehicle Year
2010</td><td colspan="3">Body Style
2D - 2 Door</td></tr>
<tr><td>State
MI</td><td colspan="3">License Year
2020</td></tr>
<tr><td>Description
2010 Chevrolet Cobalt Red</td><td colspan="2">Disposition
Left on scene</td><td>Evidence Tag</td></tr>
<tr><td>Recovered Date/ Time</td><td colspan="2">Location</td><td>Owner
[O33794585]
LUCYNSKI, JUDY ANN</td></tr>
</table>

Appendix A

Narrative:

INFORMATION:

On 01/20/20 at approximately 1001hrs, I was on routine patrol in Wisner Township. I was traveling west on Old State Rd in a fully marked patrol car and wearing full uniform. I noticed two vehicles parked in the roadway in front of me facing opposite directions. This is a rural area of the county that does not receive much traffic so I suspected that there might be some sort of criminal activity taking place, such as a drug deal. When the vehicles saw my patrol car, they drove away from each other. I sped up to get behind the red Chevrolet Cobalt that was traveling west on Old State Rd. I was going to make a traffic stop on the vehicle for being stopped on the roadway, but as soon as I got close enough to read the license plate, it turned into 9535 Old State Rd. I quickly ran Michigan Registration EBS8760 that was attached to the vehicle and found the registered owner, Judy Lucynski, lived at 9774 W Dixon Rd. I pulled in the driveway behind the vehicle and a male subject was exiting the car. I asked him if he lived at the address. He stated that the home belonged to a friend. I asked if he had his license on him and he admitted to not having a license. I then asked if that was the reason he pulled in to the driveway and he stated it was. He did maintain however that it was a friend's house.

IDENTIFY DRIVER:

I asked the driver if he had identification on him. He provided me with a Michigan Identification Card that

stated he is David Allan Lucynski. While speaking with him, I detected the odor of intoxicants on his breath and also smelled marihuana. David admitted that he had consumed beer and smoked marihuana at the boat launch just prior to me making contact with him.

LEIN:

I ran David in LEIN using my in car computer and found he is currently denied and revoked. He has 2 priors showing for OWI and 1 prior showing for DWLS on his driving status for plate confiscation purposes. His driving history shows 2 prior OWIs and 3 prior convictions for DWLS. He has no warrants for his arrest.

ADDITIONAL INFORMATION:

I told David that since he had admitting to drinking and smoking marihuana, I was going to administer field sobriety tasks. David complied with my requests and his results can be found on the OWI Field Investigation Report.

VEHICLE SEARCH

After completing my sobriety tasks, I told David I was going to search his vehicle for intoxicants. He stated that there was an open beer and some marihuana. I began searching on the driver's side and found a gold colored liquid in a Speedway cup between the front two seats but designed for the back seat passengers. The liquid looked and smelled like an intoxicating beverage. I poured the

contents on the ground in front of my patrol car and it foamed on the snow. I then saw a burnt suspected marihuana cigarette sitting to the right of the gear shift lever. I retrieved rubber gloves from my patrol car before collecting that as evidence. Nothing else was found to be illegal in the vehicle.

VEHICLE DISPOSITION

I issued a Michigan Temporary License Plate for the vehicle due to David's priors. At his request, I left the keys in the vehicle and rolled up the window. David asked that I contact his mother to pick up the vehicle since it belonged to her. It was left on the scene.

EVIDENCE:

I took the suspected marihuana back to the Sheriff's Office to be used as evidence. I found it weighed approximately .3grams and tested positive for THC using a field test kit. The marihuana was packaged as evidence to be sent to the lab. The license plate was taken to the office as well and placed in the license plate box.

David was taken to McLaren Caro for a blood draw for this incident. The MSP Blood kit was placed into evidence with the suspected marihuana. It should be noted that during this investigation, I was called to have the Department K9 conduct a track. Deputies Alexander and Webster went to the hospital for me while the blood was being collected. I then took the blood and paperwork back from Alexander when I was finished on the other call.

Appendix A

CITATION:

At the office, I issued David citation 20TU00047 for DWLS Subsequent and for Transporting Open Intoxicants. I was not able to issue a citation for OWI 3rd in CLEMIS. The citation was placed in David's property in the jail.

LEIN ENTRY:

I completed the DI-177 for this incident and took it to TCCD for LEIN Entry. The temporary plate was also taken to be entered.

EXTERNAL DOCUMENTS:

DI-177
FSD-93
Consent Form
Michigan Temporary License Plate

OWI FIELD INVESTIGATION REPORT:

Please see attached OWI Field Investigation Report for additional incident details.

STATUS: Cleared by Arrest

APPENDIX B — PRELIMINARY EXAMINATION TRANSCRIPT EXCERPT, FILED MARCH 4, 2020

STATE OF MICHIGAN
IN THE 71B DISTRICT COURT
FOR THE COUNTY OF TUSCOLA

File No: 20-0045FD

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

DAVID ALLAN LUCYNSKI,

Defendant.

Filed March 4, 2020

PRELIMINARY EXAMINATION – EXCERPT
BEFORE: JASON E. BITZER,
DISTRICT COURT JUDGE
Caro, Michigan

* * *

[7]Q And what is it that first drew you to this particular vehicle with Mr. Lucynski?

A As I was traveling west on Old State Road, I noticed two vehicles stopped in the middle of the roadway, facing opposite directions, so driver side

doors/windows were to each other. Mr. Lucynski was in a, a red Chevy Cobalt, again they were, they were stopped in the middle of the roadway, not pulled off to the side or anything like that.

Q So they were impeding the flow of traffic at the time?

A That's correct.

Q And so, upon coming upon this scene, what did you do?

A I continued traveling westbound, with the intention to stop the red Cobalt for impeding traffic. As I got close enough to see a license plate, the vehicle turned southbound into a driveway there.

Q And so it turned off from Old State Road into a personal residence?

A Yes, yes.

Q And did you make contact with the occupants of the red Cobalt?

A Yes, I did.

Q And how may were there?

A There was one.

Q And you identified the driver?

* * *

[43]correctly?

A Yes.

Q And his demeanor, was he – was he combative?

A Not at all.

Q Okay. As a matter of fact, you would say that he was courteous?

A Yes, he was, he was cooperative the entire time.

Q Respectful?

A Yes.

Q Okay.

MR. JOCUNS: Your Honor, I have nothing further for Deputy Robinson.

THE COURT: Okay. Deputy Robinson, quick question before I allow Mr. Wanink to redirect. You stated that when you first witnessed Mr. Lucynski's vehicle, his vehicle was on Old State Road and it was stopped in the road, speaking to another vehicle who was on the opposite side of the road, correct?

THE WITNESS: Yes, the opposite lane, yes.

THE COURT: Opposite lane, thank you. Besides those two vehicles, was there any other vehicle's on Old State Road that you observed at that time?

THE WITNESS: Just my vehicle.

THE COURT: Okay. And you're vehicle was where before Mr. Lucynski's car took off from that fixed [44]location?

THE WITNESS: I would have been to the, to the east of their location, driving west.

THE COURT: And approximately how far away were you from the two parked – well not parked cars, stopped cars in the roadway before Mr. Lucynski's car started to proceed in the direction that his car was facing?

THE WITNESS: Before he pulled away?

THE COURT: Correct.

THE WITNESS: I guess I would say about 800 feet or so.

THE COURT: Did you at any time, Deputy Robinson, see the two vehicles that were idling or stopped and Old State Road actually block, obstruct, impede, or interfere with the normal flow of traffic on Old State Road?

THE WITNESS: No, there were no other vehicles on that stretch, other than us.

THE COURT: Okay, thank you. Mr. Wanink, any redirect based on the Court's questions or Mr. Jocuns questions?

MR. WANINK: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. WANINK:

[45]Q In addition, Deputy Robinson, when you observed these vehicles, did you find the behavior odd?

A Yes.

Q And –

MR. JOCUNS: Your honor, I mean it's a little bit vague in the statement, I mean I have to object here, I don't understand what you mean by, behavior is odd.

MR. WANINK: I just –

THE COURT: Well, he can ask, he can ask that question –

MR. JOCUNS: Okay, thank you, Judge.

Appendix B

THE COURT: – I suspect, Mr. Jocuns, that Mr. Wanink's gonna ask why exactly he considered that behavior to be odd in his next question, but –

MR. WANINK: Yes.

THE COURT: – I may be mistaken by that, but for purposes of the prelim, that objection will be overruled. Mr. Wanink, the question will stand and you can proceed with your next question at this time.

BY MR. WANINK:

Q Deputy Robinson, what was going through your mind as you watched these two vehicles park next to each other, facing in opposite directions, stationary in the middle of the roadway?

[46]A Again, they had driver side window and a driver side, they were obviously communicating. There were no houses along that stretch, they weren't parked in front of any residences. They weren't at the bridge where people commonly stop to fish from the bridge. My initial thought was that there, there may have been a drug deal or something going on, because it was a rural area and no one was around.

Q Have you encountered that kind of situation before?

A Yes.

Q All right. And so, did that also play into the reason why you focused on this red Cobalt?

A Yes.

Q And as a matter of fact, the vehicle was obstructing the flow of traffic at the time?

A When I first saw them, yes.

Q All right, could other cars get through with this red Cobalt sitting in the lane that you were in?

A No.

Q Now, in addition to – and following up on what Mr. Jocuns asked you, the SFST's, the other SFST's, such as the walk-and-turn, things like that, are you also taught, as part of your training to observe their ability, the subjects ability to follow directions?

A Yes.

[47]Q And what can a subjects ability to follow directions or difficulty in following directions tell you as an officer in evaluating whether the person's under the influence?

A It, it tells us that they, they might be impaired if they're not able to divide their attention between multiple things.

Q All right. So, you look for divided attention with regards to how you administer the test and how they performed?

A Yes.

Q Did you observe whether or not the defendant had any difficulty following directions, as you were administering the test?

A Yes.

Q Was that another indicator for you that he may be under the influence?

A Yes.

Q All right, thank you.

MR. WANINK: I have nothing further.

THE COURT: Okay, thank you. Mr. Jocuns, any recross of Deputy Robinson at this time?

MR. JOCUNS: Extremely brief.

RECROSS-EXAMINATION

BY MR. JOCUNS:

[48]Q So, in your 11 years on – as a patrol officer with the Tuscola County Sheriff Department, you've

observed drug deals that would occur in the middle of nowhere?

A I've observed people stopped on the side of the road, here's been other reports that I've read where officers have, have came across drug deals. I've –

Q This is on Old State Road?

A Not on Old State.

Q Oh, okay.

A It's a rural area, is why I suspected it, a rural area with no houses around, nobody else around the area.

Q And you said, no one around the area, right?

A That's correct.

Q Okay. So, and, and you're familiar with rural communities?

A Yes.

Q And a good chunk of Tuscola County, you would say, is rural community?

A Yes.

Q Also a good chunk of the Thumb you would probably say too, right?

A Yes.

Q And so, sometimes when people see each other that they know, is it not uncommon to stop the car, roll down the window and say, hey, yo?

[49]A I wouldn't say that's uncommon.

Q It would be on the – right, so it's, it's not something that you would say is odd then?

A Correct.

Q Okay.

MR. JOCUNS: Nothing further for the witness.

THE COURT: Okay, anything else, Mr. Wanink?

MR. WANINK: No, thank you.

THE COURT: Okay. Thank you, sir, you're all set.

(At 1:07 p.m., witness excused)

(At 1:07 p.m., testimony of deputy ordered transcribed concluded)

* * * * *