**STATE OF WISCONSIN**
**IN THE SUPREME COURT**

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**ROBERT J. STIETZ,**

**Defendant-Appellant-Petitioner**

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# PETITION FOR REVIEW OF AN UNPUBLISHED DECISION OF THE COURT OF APPEALS DISTRICT IV, DATED AND FILED APRIL 14, 2016

**Appeal No. 2014AP002701 CR**
**Circuit Court Case No. 2012-CF-000093**

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# PETITION FOR REVIEW OF DEFENDANT-APPELLANT-PETITIONER, ROBERT J. STIETZ

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## ISSUES PRESENTED FOR REVIEW

After dusk on the last day of deer hunting season, Bob Stietz was walking just outside the fence line of his partly forested grazing land when two armed men approached him from inside his fenced property. They were shining a light in his eyes and walking through trees and underbrush. Both were dressed in blaze orange. When the two armed men were within arm's reach, they asked Stietz to give up his rifle. He refused. One of the men then grabbed Stietz's rifle and a tussle ensued. When it ended, one of the men held Stietz's rifle and both pointed handguns at Stietz, prompting Stietz to draw his handgun in response and point it at one man or the other. Stietz testified that at that point he was fearful for his life and safety, and drew his handgun because he felt the necessity to protect himself. A standoff ensued, with Stietz not threatening to shoot but explaining that he was acting in self-defense and that he would not lower his handgun until the two men lowered theirs, as they had drawn first.

The armed men turned out to be DNR wardens. Stietz told the jury that he did not know they were wardens at the time; at most, he heard one mumble something about a "warden" and say something about "Green County"— although his land was in Lafayette County. At trial, in spite of Stietz's testimony and those facts, the trial court refused a self-defense instruction on a charge of pointing a firearm at a law enforcement officer, forbade a self-defense argument, and refused an instruction on

the DNR agents trespassing and forbade the argument that the wardens were unknown trespassers.

1. On these facts, did the Court of Appeals deny Stietz's federal and state constitutional rights to present a complete defense of self-defense, and contradict controlling precedent of this Court in State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260 (1977), by weighing Stietz's credibility and requiring more than "some evidence," even if inconsistent, to support a self-defense instruction?

2. On these facts, did the Court of Appeals deny Stietz's federal and state constitutional rights to present a defense by forbidding argument that Stietz was defending himself against two men he reasonably believed were armed trespassers?

3. On these facts, did the Court of Appeals contradict this Court's controlling decision in State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), by foreclosing self-defense against wardens who: (a) the accused did not know were law enforcement officers, on evidence the jury was entitled to credit; (b) were not even claiming to make an arrest, but only were trying to disarm a man without apparent right; and (c) were not acting peaceably in any event, but rather were trying violently to disarm a lawfully armed man?

## REASONS FOR GRANTING REVIEW

Review should be granted based on the following criteria set forth in Section 809.62(1r) of the Wisconsin Statutes:

1. **Section 809.62(1r)(a)**: This case presents a real and significant question of state and federal constitutional law. Every person charged with a criminal offense has a fundamental constitutional right to present a complete defense under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 7 of the Wisconsin Constitution. Few constitutional rights are more fundamental than that of an accused to present a defense. Chambers v. Mississippi, 410 U.S. 284 (1973). The Court of Appeals affirmed the trial court's denial of this fundamental right to Stietz by refusing to permit him a self defense jury instruction or to argue that he was acting in self-defense because he was fearful for his life and safety at the hands of unknown armed men, who also were trespassers. (App. 1-11)

2. **Section 809.62(1r)(d)**: The Court of Appeals decision in this case (App. 1-11) is in conflict with controlling opinions of the Wisconsin Supreme Court and with other court of appeals decisions. In determining whether a defendant in a criminal case is entitled to a self-defense instruction, the controlling authority of the Wisconsin Supreme Court requires the lower court to view the evidence in the light most favorable to the defendant and to the self-defense instruction. State v. Mendoza, supra at 152-53; State v. Jones, 147 Wis. 2d 806, 809, 434 N.W.2d 380 (1989); State

v. Coleman, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996). This controlling Supreme Court authority requires that the instruction must be given if the defendant presents "some" evidence in support of self-defense. The accused is entitled to a jury instruction on his theory of self-defense even though the supporting evidence is "slight, weak, insufficient, inconsistent, or of doubtful credibility." State v. Schuman, 226 Wis. 2d 398, 404 and n.3, 595 N.W.2d 86 (Ct. App. 1999).

3. **Section 809.62(1r)(d)**: The Court of Appeals decision in this case (App. 1-11) is in conflict with controlling precedent of the Wisconsin Supreme Court in that the Court of Appeals decision abrogated entirely a citizen's right of self-defense even as to armed people not known to be law enforcement officers, and even when those officers are not attempting an arrest and not acting peaceably. The Court of Appeals decision misinterpreted and misapplied the holding in State v. Hobson, supra, at 380. (App. 6, ¶ 14) Hobson did abrogate the common law right to physically resist a peaceable arrest. However, it did not abrogate a completely different right, the right to self-defense in a situation where law enforcement personnel were not attempting an arrest and were not acting peaceably or lawfully when they used unreasonable force to wrest Stietz's rifle away from him, and were not even known to be law enforcement officers by the citizen they accosted.

## STATEMENT OF THE CASE AND FACTS

### A. Nature of the Case.

This Petition seeks review of the decision of the Court of Appeals affirming the judgment of conviction and sentence entered May 28, 2014, in the Circuit Court for Lafayette County, the Honorable James R. Beer, presiding. (R.78a; R.92; App. 1-11, 12-14)

Following a confrontation with two game wardens, Robert Stietz was charged with the following six criminal offenses:

| Count No. | Description of Charge |
|---|---|
| 1 | First-degree recklessly endangering safety |
| 2 | Resisting or obstructing an officer |
| 3 | Resisting or obstructing an officer |
| 4 | Endanger safety/use of a dangerous weapon |
| 5 | Intentionally point firearm at a law enforcement officer |
| 6 | Intentionally point a firearm at a law enforcement officer |

(R.7a) The case was tried to a jury, which acquitted Stietz on four of the counts (Counts 1, 2, 4, and 5) (R.59; R.60; R.62; R.63) and convicted him on Counts 3 and 6 (R.61; R.64), resisting or obstructing an officer, and intentionally pointing a firearm at a law enforcement officer. (R.78a; R.92; App. 12-14)

At trial, Robert Stietz testified that he was walking his fenced-in property during gun deer season looking for trespassers when he encountered two strangers clad in blaze orange on his property. (R.113:92; App. 51) The encounter occurred when it was "fairly dark" (R.112:29), and Stietz testified that he did not know or recognize the two strangers. (R.113:92; App. 51) The strangers approached him and demanded his rifle. When Stietz refused to give it to them, they forcibly wrested it away from him. One of the two strangers then drew a pistol on Stietz and Stietz responded by drawing his pistol on that person. (R.102:35-36; R.113:98-99; App. 57-58) Stietz maintained that he was fearful for his life and acting in self-defense to protect himself. (R113:99; App.58)

Based on that testimony and Stietz's assertion of his right to self-defense, his counsel requested that the jury be instructed on self-defense, either WIS JI-CRIMINAL 800, 810 or an adaptation of those. (R.42; R.107:49-58; App. 15-20, 21-22) The trial court refused the requested self-defense instructions, precluding Stietz's trial counsel from arguing to the jury that he was acting in self-defense and precluding the jury from even considering that defense. (R.107:49-58) The Court of Appeals affirmed the trial court's order denying any instruction to the jury or argument regarding Stietz having acted in self-defense against persons he thought were trespassing on his property and who forcibly took his rifle from him.

Following the verdict, Stietz filed a Motion for Acquittal or a New Trial and supporting brief (R.67; r.70; App. 23-25, 26-43). The trial court denied that motion and imposed a bifurcated sentence that included one year of initial confinement and three years of extended supervision on the felony (Count 6), and two years of consecutive probation on the misdemeanor (Count 3). (R.76; R.78a; R.92; App. 12-14, 44) Stietz has completed serving the prison portion of his sentence but remains subject to extended supervision and probation.

**B. Procedural Status of Case and Dispositions in Circuit Court and Court of Appeals.**

November 25, 2012: Stietz encountered two wardens trespassing on his land. They seized his rifle and drew handguns on him and he responded by drawing his handgun on them.

November 28, 2012: A criminal complaint was filed charging Stietz with the six offenses set out above. (R.7a)

January 22, 2014: Stietz filed proposed jury instructions which included Defendant's Requested Instruction No. 3 (DNR and Trespassing) and Defendant's Requested Instruction No. 5 (Self-Defense: Intentionally Pointing firearm at Law Enforcement Officer). (R.42; App. 15-20)

March 11-15, 2014: Jury selection and jury trial. The trial court refused to give the defendant's requested instructions on the DNR trespassing and on self-defense. The jury found Robert Stietz not guilty on Counts 1, 2, 4 and 5, and guilty on Counts

3 and 6. (R.78a; R.92; App. 12-14)

March 24, 2014: Stietz filed a Motion for Acquittal or a New Trial and supporting brief. (R.67; R.70; App. 23-25, 26-43)

May 12, 2014: A hearing was conducted on Stietz's Motion for Acquittal or a New Trial before Judge James R. Beer, and the motion was denied. (R.76; App. 44)

November 20, 2014: Stietz filed a timely Notice of Appeal from the Judgment of Conviction and Sentence entered on May 28, 2014. (R.94)

April 14, 2016: The Court of Appeals, District IV, in a per curiam decision, affirmed the trial court's judgment. (App. 1-11)

**C. Statement of Facts.**

Robert Stietz was a 64-year old lifelong beef farmer with no prior criminal history. (R.81:2; R.113:101-102; App. 60-61) Together with his wife of 42 years, he owned and farmed a 40 acre parcel outside Gratiot and another 25 acre parcel approximately 12 miles away outside Lamont, in Lafayette County. (R.111:65-66) The latter parcel was completely enclosed by fence and used by Stietz and his wife for pasturing cattle and hunting. That parcel is north of Highway 81 and connected to that highway by an easement from the highway to the parcel's gate. (R.113:69-70, 73).

Trespassers on the uninhabited parcel were a common problem. (R.113:110-111, 138-139; App. 69-70, 97-98) On the last day of gun deer season, Sunday,

November 25, 2012, Bob Stietz was walking his property to check for trespassers, and to check the fence lines since he was planning on pasturing a bull in that field after the close of hunting season. (R.113:136, 142-143; App. 95, 101-102) He was carrying a Weatherby rifle, with the safety on (R.111:193; R.113:92; App. 51), and also was carrying a .357 revolver (R.113:99, 107; App. 58, 66). The revolver was partially loaded but did not have a bullet in the cylinder in front of the barrel for safety reasons. (R.113:113; App. 72) He was wearing a camouflage coat and hat. He was not wearing blaze orange because he was not hunting and was on his own property (R.113:110; App. 69)

Sunset that day was at 4:25 p.m. (R.112:9) The official end of hunting season was 20 minutes after sunset or 4:45 p.m. (R.112:10) As Stietz was heading back toward where he had parked his car along a fence line, two Department of Natural Resources conservation wardens, Frost and Webster, noticed a car sitting along a fence line approximately a quarter mile up into the field. (R.111:165) The wardens drove onto the property and stopped at the vehicle. The wardens did not know if the car had been abandoned or if it belonged to someone who might be hunting in the area. (R.111:166-167) One of the wardens peered into the car and saw an empty rifle case and some buck lure. (R.111:166-167) At the same time, 4:58 p.m. according to the records, the other warden checked the registration of the vehicle and learned that the Chevy sedan was registered to Bob and Sue Stietz. (R.111:169)

Curious, the wardens then decided to walk north onto the Stietz land. They walked through a cattle gate at approximately 5:03 p.m. and continued walking 100 yards or more north into Stietz's land. (R.111:173-174; R.112:13)

Meanwhile, Bob Stietz had spied blaze orange in the woods on his land and proceeded to walk toward the cattle gates at the southwest corner of the parcel. (R.113:92; App. 51) The wardens heard a stick snap and turned to see Stietz walking slowly, pausing every few steps. (R.112:175) By then, it was at least 45 minutes after sunset. In Warden Webster's words, when they saw Stietz, it was "very nearly completely dark." (R.111:177; R.112-145) Warden Frost testified that they were separated from Stietz by some brush about 20 yards away. (R.111:177) Warden Frost testified that he shined his flashlight on Stietz and announced from that distance that he was a conservation warden. (R.111:177)

Stietz testified at the trial that there had been problems with trespassers and he was walking his property checking for trespassers. (R:113:93-94, 110, App. 52-53, 69) He had not heard the wardens identify themselves (R.113:122; App. 81) and, after the initial glimpse of blaze orange he had seen from 100 yards or so away, he first noticed them again when they shined the flashlight in his eyes from a distance of 20 or 30 yards. (R.113:125, 141; App. 84, 100) He did not know who they were and assumed they were trespassing hunters. (R.113:92, 123; App. 51, 82) That assumption was consistent with the wardens' blaze orange jackets and their initial

conversation upon approaching Stietz when Webster asked Stietz if he had seen any deer and he replied he had seen seven doe. (R.111:179) At that point, Stietz and the two wardens were standing within arm's reach of each other. (R.111:179)

Webster then asked Stietz if the rifle he was carrying was loaded and Stietz answered that it was. (R.111:180) Frost asked to see the rifle and Stietz refused. Frost asked again if he could see the firearm and stepped toward Stietz and reached for Stietz's rifle. (R.111:180) Frost immediately grabbed the rifle and drove his body towards Stietz trying to take the firearm away from Stietz. (R.111:181) The other warden joined the struggle and grabbed Stietz's rifle, with the barrel swinging around while they wrested it away from him. (R.113:97; App. 56) Frost took the rifle away from Stietz and ended up with it in his hands, falling away to the ground. (R.111:182) Frost then heard Webster yell something and saw him draw his firearm on Stietz. (R.102:35-36; R.111:183) In close succession after Webster drew his handgun, Stietz and Frost also drew their handguns at "about the same time." (R.111:184) At that point, Warden Webster had his handgun pointed at Stietz's upper body with his arms extended at chin height in a two handed grip and a ready stance, as did Frost. (R.111:187) Stietz had his revolver pointed at Webster's upper torso, holding it in his right hand with his right elbow bent. (R.113:17-18, 99; App. 58) Bob Stietz testified that at that point he still did not know who these two people who had accosted him were. (R.113:114; App. 72-73)

A tense but polite standoff followed. (R.111:64-66; R.112:110; R.113:116; App. 75) The wardens told Stietz to drop his gun. Stietz answered by saying that they had drawn on him and he would drop his gun only after they dropped theirs. (R.113:116; App. 75) All agreed that Stietz stated that he was exercising his right to defend himself and his property. (R.112:111, 138; R.113:99; App. 58) Stietz and the wardens also agreed that Stietz never raised his voice or made any threats or used any profanity during this standoff. (R.111:64-65; R.112:110; R.113:116; App. 75) After a minute or two of the mutual entreaties for the others to put their weapons down, Webster used the microphone on his collar to call Lafayette County Dispatch for assistance. (R.111:189; R.112:109; R.113:114; App. 73) All agreed that Stietz made no effort to prevent that. (R.112:67; R.113:114; App. 73) Relieved that witnesses and assistance in the form of sheriff's deputies soon would arrive, Stietz testified at trial that this was the first point in time when he thought the men who were pointing their guns at him were officers of some sort. (R.113:114; App. 73)

Deputy Sheriff Broge arrived shortly at the scene in his squad car and shined his squad car's headlights on Stietz, Frost and Webster. (R.111:189; R.112:167) Deputy Broge initially walked to the area where the wardens were but then returned to his squad car for cover. The two DNR wardens followed him. (R.112:168) Stietz did nothing to obstruct their movement to safe cover and, because the lights from the squad were shining on him, he was blinded and could no longer even see the wardens.

(R.111:190) Shortly after the wardens retreated to the vehicle, Stietz lowered his gun hand, pointing it at the ground, and emptied the cartridges onto the ground. (R.111:193; R.112:169) Other deputies arrived and spoke with Bob Stietz and assured him he would not be gang tackled. (R.112:160-161) Stietz then placed his firearm on the ground and walked out to a squad, where he was placed in handcuffs by the deputies. (R.111:193) The standoff ended peaceably, with no shots having been fired.

Further facts will be set forth as necessary below.

## ARGUMENT

### I. THIS CASE PRESENTS A REAL AND SIGNIFICANT QUESTION OF STATE AND FEDERAL CONSTITUTIONAL LAW, WISCONSIN STATUTE SECTION 809.62(1r)(a)

#### A. Robert Stietz's Constitutional Right to Present a Defense was Denied When the Court Refused to Instruct the Jury on Self-Defense.

The right to present a defense is a fundamental constitutional right. Chambers v. Mississippi, supra. The United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). Stietz was precluded from presenting his proffered defense of self-defense by the rulings of the trial court, which were affirmed by the Court of Appeals.

### B. The Court of Appeals Impermissibly Weighed the Evidence and the Credibility of Stietz Regarding His Assertion of Self-Defense.

The Court of Appeals ruled that it was not persuaded by Stietz's testimony because of possible conflicting interpretations. (Court of Appeals Decision, ¶ 13; App. 6). The Court of Appeals referred to equivocal testimony that one of the persons "kind of said, Green County" and the other "said something warden." Id. The reference to Green County is confusing at best because the Stietz property is in Lafayette County. The statement "something warden" is likewise ambiguous, especially coming from someone whom Stietz believed was a trespassing hunter. It very well could have been "have you seen a warden?"

In reaching its decision, the Court of Appeals engaged in precisely the sort of evaluation of evidence and weighing of credibility of arguably conflicting versions of that evidence which this Court has explicitly prohibited when considering a defendant's request for an instruction on self-defense:

> "[N]either the trial court nor this court may, under the law, look to the "totality" of the evidence, as the state invites us to do, in determining whether the instruction was warranted. To do so would require the court to weigh the evidence – accepting one version of facts, rejecting another – and thus invade the province of the jury."

Mendoza, supra at 152. Mendoza went on to note that a judge may "not weigh the evidence, but determine only whether evidence existed in the record, viewed favorably to the defendant, to warrant the [a self-defense] instruction." Id.

> "Under these tests, the evidence is to be viewed in the most favorable light it will 'reasonably admit of from the standpoint of the accused.'"

Id. Mendoza noted that that test does not permit a "weighing of the evidence by the trial judge." Id.; see also State v. Coleman, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996).

Where the defendant asserts that he was acting in self-defense, that is a question peculiarly within the province of the jury:

> "[T]he question of reasonableness of a person's actions and beliefs, where a claim of self-defense is asserted, is a question peculiarly within the province of the jury."

Maichle v. Jonovic, 69 Wis. 2d 622, 630, 230 N.W.2d 789 (1975). The Court of Appeals improperly usurped the jury's ability to make that determination regarding Stietz. It also improperly sought to resolve perceived inconsistencies in his testimony—in favor of the state, not in favor of a jury trial on his defense.

Stietz's testimony was direct and emphatic that he was in fear of his life and acting in self-defense. His exact words to his jury were:

> "[S]omeone else pulled their pistol out and I was fearful for my life so I drew mine so I would not get shot.
> . . .
> I felt like I was being attacked right at that time.
> . . .
> [A]ll of a sudden I seen the pistol coming up. And I figured, my God, he's going to shoot.
> . . .
> At that very instant I had the pistol in my right pocket and I drew my pistol at the very - - simultaneously. I said, I have the right to protect myself which I am doing at this time.
> . . .
> I was scared, darn scared."

(R.113:89, 96, 98, 99, 116; App. 48, 55, 57, 58, 75)

Stietz's testimony was also clear that at the time of the confrontation, he did not know the two trespassers were wardens. He was concerned about the trespassers in blaze orange. Again, his exact words were:

> "I wondered who was trespassing. This is my thought, I was wondering who was trespassing in my land that I did not know."

(R.113:126; App. 85). Stietz testified he did not see the DNR patch on the shoulder of the blaze orange jacket, which is plausible both because it was dark (a fact ignored by the Court of Appeals), because the men were shining a light at him (R.111:177), and because in Stietz's words, "I wasn't looking at their shoulders." (R.113:126; App. 85). Stietz testified that he first knew these two individuals were wardens only after the initial confrontation, when one of the persons called for backup. (R.113:114; App. 73).

Stietz's testimony went well beyond the "some evidence in support of self-defense standard" and far surpassed the threshold of "slight, weak, insufficient, inconsistent or doubtful credibility" standard of State v. Schuman, supra, which entitled Stietz to a jury instruction on self-defense.

### C. Stietz's Ability to Present a Complete Defense Was Further Hindered by the Refusal to Give a Requested Instruction Regarding Trespass by the DNR Wardens.

The Court of Appeals erroneously conflated two separate and distinct legal concepts: 1) a common law trespass onto another's land; and 2) a search in violation of the Fourth Amendment. (Court of Appeals Decision, ¶¶ 15-18). The former

implicates a property right, while the latter is a constitutional right. The only time the "open fields doctrine" comes into play is in the context of a motion to suppress the fruits of a warrantless search as violative of the Fourth Amendment. Stietz made no such motion and there never was any issue regarding open fields. The Court of Appeals' reliance on that doctrine was without any foundation in the record and clearly erroneous. Oliver v. United States, 466 U.S. 170, 183 (1984), made it clear that a trespass onto land is not coextensive with a search upon an open field in the constitutional sense. The law of trespass has much wider application than the rights conferred by the Fourth Amendment:

> "The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment."

Id. at 183-184. In short, the law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests.

The import of the fact that the wardens were trespassing on Stietz's land is twofold: 1) it substantiates the reasonableness of Stietz's fear for his safety; and 2) it negates one of the elements of resisting or obstructing an officer, namely that the officer must be doing an act in an official capacity and with lawful authority. Section 946.41(1), Stats. It also would tend to negate the requirement of Section 941.20(1m)(b), Stats., that the officer was acting in an official capacity. See also

WIS-JI CRIMINAL 1322(a), and WIS-JI CRIMINAL 915. See State v. Barrett, 96 Wis. 2d 174, 181, 291 N.W.2d 498 (1980), which held that a deputy sheriff conducting a traffic stop in a neighboring county was not acting in his official capacity once he crossed the county line. By analogy, once the conservation wardens crossed the line and trespassed onto Stietz's fenced in property, at least with no probable cause, permission, or other reason better than curiosity, they were not acting with lawful authority.

In addition to confusing the Fourth Amendment concept of open fields with the common law of trespass, the Court of Appeals decision presented absolutely no legal authority which would have permitted the wardens to trespass onto the Stietz property. DNR wardens do not have *carte blanche* to enter the private property of another by virtue of their employment. The controlling statutory provisions, Chapter 29 of the Wisconsin Statutes, give no such authority. Admittedly, while Section 29.924(5), Stats., does allow agents of the department to enter private lands in certain circumstances, none of those circumstances were present here (for example, there is no allegation that the trespass was motivated by a concern regarding a "dead or diseased animal"). In any case, that provision—the only such statute possibly exempting the DNR agents from trespass—explicitly requires DNR wardens to make "reasonable efforts to notify the owner or occupant" before entering, which is a clear acknowledgment of that individual's superseding privacy right and authority to

exclude others, including agents of the State, if they so choose. No such notification by the wardens was even attempted.

The entry also is not justifiable under the arrest provision of Section 29.921, Stats. That subsection grants a limited arrest power to DNR wardens when confronted with probable cause that certain offenses have been committed. However, the record discloses no probable cause to arrest Stietz at the time agents chose to trespass, or at any time before they accosted Stietz and grabbed his rifle.

The Wisconsin Administrative Code similarly gives no authority permitting wardens to trespass on private property. In fact, at least one provision implicitly concedes that DNR agents are capable of trespass. WIS. ADMIN. CODE NR § 1.49(1).

Case law also implicitly acknowledges that DNR agents can be trespassers. As early as 1948, the Wisconsin Supreme Court wrote:

> "The rule is that where an authority given by law is exceeded, the officer loses the benefit of his justification, and the law holds him a trespasser *ab initio* although to a certain extent he acted under the authority given."

Wallner v. Fidelity & Deposit Co. of Maryland, 253 Wis. 66, 70, 33 N.W.2d 215 (1948). That rule applies to these two wardens precisely. In entering fenced private land out of curiosity, they exceeded their authority, became trespassers pure and simple, and lost their cloak of lawful authority.

Even the conclusory assertion at ¶ 18 of the Court of Appeals decision (App. 7-8) that the wardens had reasonable suspicion that somebody may have been hunting

illegally is both unsupported by the record and devoid of a legal basis for the wardens to trespass. The wardens themselves admitted that they went onto Stietz's land only out of "curiosity" (R.111:166-167, 173-174; R.112:13); they had no reasonable suspicion, much less probable cause, to think that any crime had been committed when they confronted and forcibly disarmed Stietz. Even if there was a suspicion of illegal hunting,* that would have been at best a civil infraction which does not rise to the level of probable cause that might justify an entry onto Stietz's land.

## II. THE COURT OF APPEALS DECISION IN RULING THAT THERE IS NO RIGHT TO SELF-DEFENSE WHEN ACCOSTED BY A LAW ENFORCEMENT AGENT IS IN DIRECT CONFLICT WITH THE CONTROLLING OPINION IN STATE V. HOBSON, WISCONSIN STATUTE SECTION 809.62(1r)(d)

The Court of Appeals also predicated its denial of a self-defense instruction on State v. Hobson, 215 Wis. 2d 350, 380, 577 N.W.2d 825 (1998) (App. 6, ¶ 14). The Court of Appeals confused and combined the concepts of resisting an arrest with the right to self-defense and ignored the clear language of Hobson distinguishing those doctrines.

The narrow and only issue decided by Hobson was whether to abrogate the common law privilege to forcibly resist an unlawful arrest in the absence of unreasonable force by the arresting officer. Id. at ¶ 2. Hobson went to great lengths

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* Any such suspicion was undermined, not advanced, by the hunting items in the car. Someone hunting would have taken the items with him, not left them in the car where they were of no use in hunting.

to limit its decision to that issue alone, and answered just two questions: "Whether a common law privilege to forcibly resist unlawful arrest, in the absence of unreasonable force, has existed in Wisconsin until now" and "if that privilege exists, whether it should continue to be recognized or should be abrogated." Id. at ¶ 11. Hobson explicitly limited its holding to those two questions and "underscore[d] the unusual procedural history" of the case, emphasizing its "conclusion in this case is limited to the narrow and peculiar procedural facts presented." Id. at ¶ 10, fn7.

The Court of Appeals decision rests on its misinterpretation of Hobson and the unsupportable contention that it controls here. (App. 6, ¶ 14) That reliance is misplaced and conflated two separate and distinct legal doctrines: The common law privilege to forcibly resist a peaceable arrest, and the right to self-defense. Only the former was abrogated in Hobson.

The right to self-defense on the other hand retains unquestionable vitality, remaining not only "the first law of nature" but a basic right enshrined in law from ancient times to the present. District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010).

Hobson emphasized that the common law privilege to resist an unlawful arrest and the right of self-defense now embodied in Section 939.48, Stats., have no bearing on each other. "[T]he legislature codified a right to self-defense distinguishable from the right to resist an unlawful arrest." Hobson, supra, at fn17; State v. Reinwand, 147

Wis. 2d 192, 433 N.W.2d 27 (Ct. App. 1988) ("self-defense codified in Section 939.48 is separate from the common law right to forcibly resist an unlawful arrest"). The Court of Appeals now in effect invalidated the statutory right to self-defense, at least when armed strangers later turn out to be law enforcement officers. That goes well beyond Hobson and squarely conflict with it. Hobson, supra at n.17.

Finally, the other circumstances of the instant case render it factually distinguishable from Hobson. Hobson knew she was dealing with a uniformed police officer. In contrast, when Stietz encountered the wardens, he was unsure who they were because it was dark out (R.111:177; R.112:29), they were some distance away (R.111:177; R.113:125, 141; App. 84, 100), and they shined a flashlight in his eyes (R.111:177, 179; R.113:125, 141; App. 84, 100). They were not wearing military style uniforms, but blaze orange jackets (R.113:92; App. 51), typical of what every hunter wears, albeit adorned with a shoulder patch which presumably would not be visible to someone they were facing. Their blaze orange caps with a logo were probably not readable by Stietz in the dark and with a light in his eyes. Stietz testified that he first knew they were officers of some sort only after the confrontation, when Webster radioed for backup. (R.111.189; R.112:109; R.113:114; App. 73)

Neither of the two linchpins of Hobson, an arrest and an absence of unreasonable force, was present here. Hobson involved the arrest of the defendant, whereas the wardens here admittedly were not attempting to arrest Stietz. They only

went onto Stietz's land out of "curiosity" (R.111:166-167, 173-174; R.112:13) and had no reasonable suspicion, much less probable cause, to think that any crime had been committed when they confronted and forcibly disarmed Stietz. At most, they were investigating the possibility of a DNR Administrative Code violation of after-hours hunting, which is a civil forfeiture. That hunch or possibility was uncorroborated and unsubstantiated by their observations when they circumnavigated the property and heard no shots and saw no hunting, and refuted by Stietz's immediate statement to them that he was not hunting but merely looking for trespassers. (R.113:92; App. 51) Again, the fact that hunting equipment was in the car decreased reasons for suspicion, not increased them.

The other major distinction between Hobson and this case is the fact that Hobson dealt with a peaceable arrest, quite different than this case, where wardens physically assaulted Stietz, grabbed him by his shirt and forcibly took his gun. (R.102:35-36; R.113:98-99; App. 57, 58) Hobson did not abrogate a person's common law right to use force when resisting an arrest where an officer uses unreasonable force. Hobson, supra at ¶¶46, 60-61, fn17. ("The majority opinion does not abrogate a person's common law right to use force when resisting an arrest in which a law enforcement officer uses unreasonable force"). The Court of Appeals decision is in direct conflict with Hobson.

## CONCLUSION

The record in this case makes it amply clear that Stietz's fundamental federal

and state constitutional rights to present a complete defense were violated. A jury acquitted on most of the six counts; it well might have acquitted at least on the remaining felony had it been allowed to consider Stietz's valid defense. The Court of Appeals decision affirming that violation is in conflict with controlling opinions of the U.S. Supreme Court and this Supreme Court, in particular State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260 (1977), and State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998). For that matter, it is contrary to State v. Schuman, 226 Wis. 2d 398, 595 N.W.2d 86 (Ct. App. 1999), as well.

For those reasons, Robert Stietz respectfully requests that this Court accept this Petition for Review pursuant to Sections 809.62(1r)(a) and 809.62(1r)(d), Stats.

Respectfully submitted this 12th day of May, 2016.

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## CERTIFICATION

In accord with Wis. Stats. § (Rule) 809.62(4)(a), I certify that this brief satisfies the form and length requirements for a Petition for Review prepared using a proportional serif font, with a length of 6,016 words.


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**CERTIFICATION OF COMPLIANCE**
**WITH RULES 809.62(4)(b) AND 809.19(12), STATS.**

I hereby certify that I have submitted an electronic copy of this brief, excluding the Appendix, which complies with the requirements of Section 809.19(12), Stats.

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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


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## CERTIFICATION REGARDING APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.62(2)(f), Stats., and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the Court of Appeals; (3) the judgments, orders, findings of fact, conclusions or law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the Petition; (4) any other portions of the record necessary for an understanding of the Petition; and (5) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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**CERTIFICATION OF COMPLIANCE**
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I hereby certify that I have submitted an electronic copy of the Appendix, which complies with the requirements of Section 809.62(2)(f), Stats.

I further certify that the electronic Appendix is identical in content to the printed form of the Appendix filed as of this date.

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


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**APPENDIX**