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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2006-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOHN PATRICK WRIGHT,

Defendant-Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, AFFIRMING AN ORDER SUPPRESSING EVIDENCE ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE HANNAH C. DUGAN, PRESIDING

# BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

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## ISSUE PRESENTED

Does asking a lawfully stopped motorist as to whether he is carrying any weapons, in the absence of reasonable suspicion, unlawfully extend a traffic stop?

The trial court, relying on *Rodriquez v. United States*, 135 S. Ct. 1609 (2015), answered yes.

The court of appeals, also relying on *Rodriquez*, and ignoring this Court's holding in *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560, answered yes.

This Court, following its own precedent in *Floyd*, should answer no.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case significant enough for review by this Court, the State requests both oral argument and publication of the opinion.

## INTRODUCTION

On June 15, 2016, at approximately 11:00 p.m., Officer Sardina stopped Wright's vehicle for a defective headlight. Officer Sardina approached the vehicle, advised Wright for the reason for the stop, asked for his driver's license, and inquired as to whether Wright was a carrying concealed weapon (CCW) permit holder and if he had any weapons in the vehicle. Wright told Sardina that he had a loaded gun in his glove compartment and had completed a CCW permit class. Wright gave permission for the gun to be in police possession during the duration of the traffic stop, and a subsequent concealed carry permit check showed that Wright did not have a valid permit. Wright was arrested for the crime of carrying a concealed weapon.

The trial court suppressed the gun evidence, reasoning that questions about weapons and Wright's CCW permit status unreasonably extended the traffic stop. The trial court decision was handed down on June 21, 2017, and therefore did not have the benefit of this Court's holding and analysis in *Floyd* which was filed on July 7, 2017.[1]

The court of appeals, in a one-judge opinion, affirmed the trial court's suppression order, holding that without any reasonable suspicion that Wright posed a safety risk, questions about firearms impermissibly expanded the scope of Wright's traffic stop. Despite *Floyd* being discussed and argued by both parties during briefing, the court of appeals made no mention of *Floyd* and instead relied on *Rodriquez* as support for its holding.

The court of appeals erred. Brief questioning about weapons and Wright's CCW permit status were di minimis intrusions that furthered the important goal of promoting officer safety during a traffic stop. Accordingly, the State asks this Court to reverse both the trial court and the court of appeals and to follow the clear line of reasoning articulated in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and its progeny, and this Court's own precedent in *Floyd*, emphasizing the importance of officer safety concerns in any traffic stop.

[1] On July 11, 2017, the State filed a motion to reconsider, based on *Floyd*, but the trial court entered its suppression order on September 1, 2017 without comment as to the State's reconsideration motion.

## STATEMENT OF THE CASE

On June 15, 2016, at approximately 11:00 p.m., Milwaukee Police Officer Kristopher Sardina stopped Wright's vehicle for a burned-out front headlight. (R. 27:5–6, Pet-App. 105–06.) Sardina made contact with Wright, the vehicle's lone occupant. (R. 27:8, Pet-App. 108.) Sardina introduced himself as a Milwaukee police officer and informed Wright of the reason for the traffic stop. (*Id.*)[2] Sardina asked Wright for his driver's license, and inquired, for officer safety purposes, as to whether Wright was a CCW permit holder and whether he had any weapons in the vehicle. (R. 27:9, Pet-App. 109.) Wright advised that he had just finished his CCW permit class and that he did have a firearm in his glove compartment. (R. 27:10, Pet-App. 110.) With Wright's permission, Sardina's partner retrieved the loaded gun from the glovebox. (R. 27:10–11, Pet-App. 110–11.) Sardina ran a check on Wright's CCW status and discovered that Wright did not have a valid permit. (R. 27:11, Pet-App. 111.) Wright was then arrested for a CCW violation. (R. 27:11–12, Pet-App. 111–12.)

Wright filed a motion to suppress the gun evidence, arguing that the questions about his CCW status and as to whether he was carrying any firearms were beyond the scope of a traffic stop for a defective headlight. (R. 5:1–6, Pet-App. 151–56.) Wright's motion was heard on May 11, 2017.

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[2] At the motion hearing, Wright testified that he was not told about the headlight until after he was arrested for CCW. (R. 27:27, Pet-App. 127.) While the trial court did not make a finding of fact as to this issue, the court of appeals, in its "Background" section, referenced Sardina's testimony as to this point and did not discuss Wright's version of events. *State v. Wright*, No. 2017AP2006-CR, 2018 WL 3005943, ¶ 4 (Wis. Ct. App. June 12, 2018) (unpublished) (Pet-App. 172.) And neither the trial court nor court of appeals opinion hinged on when and where Sardina told Wright about the defective headlights.

(R. 27, Pet-App. 101–50.) On June 21, 2017, the trial court orally granted Wright's motion and suppressed the gun evidence. (R. 29, Pet-App. 158–67.) The trial court, in granting Wright's motion, relied on *Rodriquez v. United States*, 135 S. Ct. 1609 (2015). The trial court reasoned that the *Rodriquez* principles were violated by extending a routine traffic stop to ask about weapons. (R. 29:7–8, Pet-App. 164–65.)

On July 7, 2017, this Court issued its opinion in *State v. Floyd*, holding that *Rodriquez* permits brief questioning about weapons in a traffic stop: "Therefore, because the questions [about weapons] related to officer safety and were negligibly burdensome, they were part of the traffic stop's mission, and so did not cause an extension." *Floyd*, 377 Wis. 2d 394, ¶ 28. On July 11, 2017, the State filed a motion to reconsider in Wright's trial court case, based on this Court's holding in *Floyd*. (R. 13, Pet-App. 168–69.) On September 1, 2017, without hearing or comment on the State's motion to reconsider, the trial court issued its suppression order. The State appealed.

In the court of appeals, both the State and Wright discussed this Court's holding in *Floyd*. The State argued that *Floyd* controls the core issue and permits brief questioning about weapons during routine traffic stops; Wright attempted to distinguish his case to avoid *Floyd*'s orbit. On June 12, 2018, Judge Kessler, in a one-judge opinion, affirmed the trial court's suppression order, relying on *Rodriquez v. United States*. *Wright*, 2018 WL 3005943, ¶¶ 13–16 (Pet-App. 177–78.) The court of appeals made no mention of *Floyd*.

On July 12, 2018, the State petitioned this Court for review and the petition was granted on October 9, 2018.

## STANDARD OF REVIEW

The question of suppressing evidence is one of historical fact. The circuit court's findings of historical fact are held to the clearly erroneous standard. But the circuit court's application of the facts to constitutional principles are reviewed de novo. *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

## ARGUMENT

### Officer Sardina's two questions about weapons did not unlawfully extend the traffic stop.

#### A. Controlling legal principles

The police are entrusted with the responsibility of detecting and apprehending law breakers, and the fulfillment of this role is vital to a democratic society. It is critically important that the police perform this function reasonably and safely. This is not idle philosophy or conjecture, as the need for officer safety when lawfully stopping citizens has been repeatedly articulated in Fourth Amendment jurisprudence since the landmark case of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The *Mimms* Court removed all debate as to the importance of officer safety in performing their duties when it wrote, "We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty." *Mimms*, 434 U.S. at 110. And since *Mimms*, the elevated place of officer safety in the hierarchy of reasonable police needs has been consistently recognized by both the United States Supreme Court and this Court.

In the name of officer safety, *Mimms* permitted the police to ask lawfully stopped motorists to exit the car in any traffic stop. *Mimms*, 434 U.S. at 111. This rule was expanded

to allow officers to order passengers out of the vehicle in *Maryland v. Wilson*, 519 U.S. 408, 411, 414 (1997). Both *Mimms* and *Wilson* justified their holdings on the potential dangers of traffic stops to the police. *Mimms*, 434 U.S. at 110 (30 percent of police shootings occurred when a police officer approached a suspect sitting in an automobile); *Wilson*, 519 U.S. at 413 (referencing statistics that in 1994 there were 5,762 officer assaults and 11 officers killed during traffic stops and pursuits).

In both *Mimms* and *Wilson*, the Court articulated a balancing test to evaluate the propriety of a police safety measure during a traffic stop. The Court balanced the public interest in officer safety against the intrusion into the driver's liberty. *See Mimms*, 434 U.S. at 111; *Wilson*, 519 U.S. at 412. After application of this test, both cases held that the police ordering of occupants out of a vehicle, without suspicion of danger, was an acceptable de minimis intrusion. *Id.*

More recently, the Supreme Court has twice reprised the sentiment that traffic stops are fraught with danger to the police. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009); *Rodriquez v. United States*, 135 S. Ct. 1609, 1616 (2015). The *Rodriquez* Court opined that because of this danger, the police may take negligibly burdensome precautions in order to complete the traffic mission safely. *Rodriquez*, 135 S. Ct. at 1616.

*Mimms*, *Wilson*, *Johnson*, and *Rodriquez*, recognizing the dangers of traffic stops to the police, interpreted negligibly burdensome safety measures to be part and parcel of the traffic stop mission.

The Courts have also recognized that quick questions during a traffic stop are not sufficiently intrusive to transform a legal stop into an illegal seizure. The asking of quick questions about guns and drugs, without reasonable

suspicion, does not unreasonably prolong a traffic stop. *State v. Gaulrapp*, 207 Wis. 2d 600, 608–609, 558 N.W.2d 696 (Ct. App. 1996). The length of time required to ask a question is not sufficiently intrusive to transform a lawful stop, into an unreasonable unlawful one. *State v. Griffith*, 2000 WI 72, ¶ 61, 236 Wis. 2d 48, 613 N.W.2d 72. An officer's inquiries into matters unrelated to the justification for the traffic stop, do not convert the encounter into something other than a lawful seizure, so long as these inquiries do not measurably extend the duration of the stop. *Johnson*, 555 U.S. at 333. For questioning that does not measurably extend the duration of the stop, *Rodriquez* makes no difference to the rule of law in *Gaulrapp*, *Griffith*, and *Johnson*. *Rodriquez* changed the legal terrain as to delaying traffic stops to further an investigatory objective, but it did not overrule *Johnson* as it specifically allows the police to take de minimis precautions in order to complete a traffic stop safely. Thus, the *Mimms* balancing test tips decidedly in the State's favor as there is a strong court recognized public interest in public safety, and the asking of quick questions to further that interest is a negligibly burdensome and permissible intrusion.

In *State v. Floyd*, this Court appropriately applied the legal precedent, holding that quick questions about weapons are negligibly burdensome and permissible. *Floyd*, 377 Wis. 2d 394, ¶ 28. Incident to a traffic stop, the police asked Floyd if he had any weapons on him. After Floyd denied having any, the police then asked if they could search him for their safety. *Floyd*, 377 Wis. 2d 394, ¶ 5. This Court found these questions permissible safety precautions. *Floyd*, 377 Wis. 2d 394, ¶ 28.

This Court's holding did not turn on a reasonable suspicion analysis. While there were factors such as tinted windows, and air fresheners, the Court took pains to insulate the question about weapons from a reasonable suspicion analysis: "The reason we didn't address 'reasonable suspicion'

[relating to question about weapons] is because that is necessary only if Deputy Ruffalo extended the stop. As the first half of our opinion [the portion of opinion dealing with the effect of the question about weapons on the traffic stop] demonstrates, he did not." *Floyd*, 377 Wis. 2d 394, ¶ 28 n.6. The *Floyd* holding is clear; quick questions about weapons are part of the traffic stop, it does not extend the stop, and therefore there is no need for reasonable suspicion to justify the query. In this manner, *Floyd* remained true to *Pennsylvania v. Mimms* and the cases that followed, none of which required reasonable suspicion for the negligibly burdensome safety measures employed by the police during a lawful traffic stop.

### B. Officer Sardina's two quick questions about weapons were connected to officer safety issues, were negligibly burdensome, and thus were part of the traffic stop mission.

There is no dispute that Officer Sardina lawfully stopped Wright's vehicle, and that upon making the stop, Sardina had no particularized suspicion that Wright was carrying firearms or was dangerous. And there is no factual dispute that Sardina asked Wright, during the initial stages of a defective headlight stop, if he had a CCW permit and if he was carrying weapons in the vehicle. The issue is whether these two questions were routine safety inquiries, part of the traffic stop mission, or an impermissible detour extending the traffic stop beyond constitutional limitations.

#### 1. Under *Floyd*, Officer Sardina's brief questions about weapons were constitutionally reasonable.

Here the police, incident to a traffic stop, asked Wright if he had a CCW permit and if he had any weapons in the vehicle. The lone factual differences between this case and

*Floyd* are that in *Floyd* the police asked for consent to search, while here the police asked about Wright's CCW permit status, and *Floyd* had a couple of factors such as air fresheners and tinted windows that might arguably suggest drug activity. But the relevant facts were on all fours: In both instances, the questions asked furthered the legitimate and weighty goal of officer safety in a traffic stop, were quickly asked, and were de minimis intrusions.

Like asking for consent to a safety frisk in *Floyd*, Sardina's query about Wright's CCW status is clearly tethered to safety concerns. In 2011, the Wisconsin Legislature enacted 2011 Act 35 that allowed Wisconsin citizens to apply for concealed carry permits. Thus, many Wisconsin citizens were given the opportunity to carry concealed weapons legally. While this legislative initiative has proven popular,[3] a collateral consequence is the increased likelihood that the police will encounter armed people, increasing the safety risks outlined in *Mimms* and its progeny. Therefore, it is not surprising that there was a provision in the new law that specifically permitted the police, if acting in an official capacity and with lawful authority, to inquire about a subject's CCW permit status, and if applicable to request production of the permit. *See* Wis. Stat. § 175.60(2g)(c). There is no dispute that Officer Sardina was acting in his official capacity and with lawful authority when he stopped Wright. Therefore, Sardina was statutorily entitled to ask Wright about his CCW status, as a matter of course, and doing so did not impermissibly extend the traffic stop mission.

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[3] In 2017 alone, 103,528 Wisconsin citizens applied for a CCW permit and 96,561 were issued. Wis. Dep't of Justice, *DOJ: Annual CCW Statistics Report for calendar year 2017* (2017), https://www.doj.state.wi.us/sites/default/files/dles/ccw/2017%20Annual%20CCW%20Statistical%20Report.pdf. (Pet.-App. 179.)

Both the trial court and the court of appeals erred when they held that questions about weapons during a traffic stop must be linked to reasonable suspicion. Requiring the police to have reasonable suspicion about weapons before they can ask about them unnecessarily leaves the police vulnerable to the surprise attack, and defeats the safety purposes explicitly detailed in *Mimms*, *Wilson*, *Johnson*, and *Floyd*, none of which required reasonable suspicion before a weapons query.

*Floyd* points to one conclusion: Officer Sardina's two safety inspired questions about Wright's CCW permit status and weapons were constitutionally reasonable.

### 2. *Rodriquez v. United States* is not on point.

Both the trial court and the court of appeals incorrectly relied on *Rodriquez v. United States* as authority for suppression. In *Rodriquez*, the police, without reasonable suspicion, delayed a traffic stop for approximately eight minutes to accommodate a fishing expedition dog sniff. The State fails to understand how *Rodriquez*'s prohibition against such a delay can be interpreted to overrule substantial precedent permitting police safety measures during a traffic stop. Indeed, *Rodriquez* made clear the distinction between safety and investigatory delays when it wrote, "Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." *Rodriquez*, 135 S. Ct. at 1616. And as this Court aptly noted, *Rodriquez* reinforces the point that officer safety is an integral part of every traffic stop mission. *Floyd*, 377 Wis. 2d 394, ¶¶ 26–27.

The questions asked by Officer Sardina concerning weapons in Wright's vehicle were permissible because they furthered the legitimate and weighty goal of officer safety in a traffic stop, and because they were negligibly burdensome.

They were part of the traffic stop mission and so did not extend the stop. They are lawful under *Mimms* and its progeny, and under this Court's recent holding in *Floyd*. Wright's suppression motion should not have been granted.

## CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court to reverse and remand to the circuit court for proceedings consistent with this opinion.

Dated this 8th day of November, 2018.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,810 words.

Dated this 8th day of November, 2018.

_____
DAVID H. PERLMAN
Assistant Attorney General

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 8th day of November, 2018.

_____
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Case No. 2017AP2006-CR

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STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOHN PATRICK WRIGHT,

Defendant-Respondent.

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On Review of a Decision of the Court of Appeals, District I, Affirming the Order Suppressing Evidence Entered in the Milwaukee County Circuit Court, the Honorable Hannah C. Dugan, Presiding

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# RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-RESPONDENT

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## ISSUE PRESENTED

"Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns." *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015) (citations omitted). Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. *Id.* In this case, the police officer testified that the sole basis for the traffic stop was a defective headlight, and, had nothing else happened, he would have given Mr. Wright a warning. (27:7-8; App.107-108). In fact, the officer testified he had never given a citation for just a headlight violation. (27:8; App.108).

Under these circumstances, does asking a lawfully-stopped motorist whether he has a conceal-carry permit, if he is carrying any weapons, and running a conceal-carry permit check, in the absence of reasonable suspicion, unlawfully extend the traffic stop?

The circuit court said yes, and granted Mr. Wright's suppression motion. The Court of Appeals affirmed, upholding the suppression order. This Court should affirm.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate and has already been scheduled in this case; publication is likewise customary for cases decided by this Court and is requested by Mr. Wright.

## STATEMENT OF THE CASE AND FACTS

John Patrick Wright was charged in the Milwaukee County Circuit Court with carrying a concealed weapon in violation of WIS. STAT. § 941.23(2). He filed a motion to suppress, which was granted by the circuit court after a motion hearing. (5:1-7; 15:1; 27:1-50; 29:1-10; App.101-167). The state appealed, and the Court of Appeals affirmed the order granting suppression. (16:1-3); *State v. Wright*, No.2017AP2006-CR, unpublished slip op. (WI App June 12, 2018). (App.170-178).

Testimony from the suppression hearing established that Mr. Wright was driving home from his parents' home the night of June 15, 2016 when he was stopped by police. (27:6, 23, 25; App.106, 123, 125). Milwaukee Police Officer Kristopher Sardina testified that the sole basis for the traffic stop was a burnt-out headlight. (27:7, 13; App.107, 113). He testified that Mr. Wright promptly pulled over after the squad's siren and lights were activated. (27:13; App.113). As Officer Sardina approached the car, he did not observe Mr. Wright make any furtive movements or blade his body. (27:13; App.113).

A week before this traffic stop, 48-year-old Mr. Wright had completed his training course for his carrying concealed weapon permit ("CCW"). (27:25; App.125). Shortly after he completed his training course, Mr. Wright purchased a firearm. (27:24; App.124). On the very night he was stopped by the Milwaukee police, Mr. Wright had picked up his new firearm from the firearms dealer. (8:1; 27:24; App.124).

Officer Sardina asked Mr. Wright for his driver's license; he did not recall whether he asked Mr. Wright for his registration or proof of insurance. (27:14; App.114). Officer Sardina testified he did not know Mr. Wright from any previous contacts nor was he aware of any prior criminal history, and Mr. Wright did not have any outstanding warrants. (27:15-16; App. 115-16). Further, Officer Sardina did not see a firearm, any bullets, a holster, or any gun paraphernalia. (27:17; App.117).

Officer Sardina testified that, had nothing else happened, he would have given Mr. Wright a warning about the headlight. (27:7-8; App.107-108). In fact, Officer Sardina noted he had never issued a citation for just a headlight violation. (27:8; App.108).

However, following his request for Mr. Wright's driver's license, Officer Sardina continued by inquiring whether Mr. Wright was a CCW permit holder and if he had any weapons in the vehicle. (27:9; App.109). In his testimony, Officer Sardina acknowledged that his questioning of Mr. Wright

regarding the concealed-carry permit and weapons was unrelated to the burnt-out headlight, but explained that he was trained to make this inquiry for "officer safety." (27:9; App.109).

In response to the officer's questions, Mr. Wright told Officer Sardina that he had just finished the CCW permit class, and that he did have a firearm in the vehicle. (27:10; App.110). Officer Sardina asked for permission to remove the firearm for the duration of the stop, and Mr. Wright agreed. (27:10; App.110). After Officer Sardina's partner retrieved the firearm from the glove compartment, Officer Sardina took Mr. Wright's license back to his squad to run his information. (27:11; App.111). Officer Sardina testified he also ran a concealed carry permit check. (27:11; App.111).

Upon determining Mr. Wright did not have a valid concealed carry permit, he was arrested and charged with carrying a concealed weapon in violation of WIS. STAT. § 941.23(2). (27:11-12; 1:2; App.111-12).

Mr. Wright filed a motion to suppress, arguing his traffic stop was unlawfully extended when Officer Sardina asked about the CCW permit, as this inquiry was unrelated to the purpose of the traffic stop. (5:5; App.155). Instead, Mr. Wright argued, the CCW permit question constituted a new investigation into the unlawful possession of weapons, without the basis of reasonable suspicion. (5:5-6; App.155-56).

In its oral ruling, the circuit court held that while the initial traffic stop was lawful, the officer's subsequent actions violated the principles under *Rodriguez*, 135 S.Ct. 1609. (29:7; App.164). The state appealed. (16). The Court of Appeals agreed with the circuit court's reliance on *Rodriguez* in concluding that Officer Sardina's CCW and weapons questions unlawfully extended the traffic stop because the questions were unrelated to the stop, Mr. Wright was not free to leave, and the officer's training materials did not preempt Mr. Wright's constitutional rights. *Wright*, No.2017AP2006-CR, unpublished slip op. ¶11. (App.176).

The state petitioned this Court for review; this Court agreed to review the case on October 9, 2018.

## SUMMARY OF ARGUMENT

Asking Mr. Wright if he was a CCW permit holder was a detour aimed at detecting evidence of ordinary criminal wrongdoing and unlawfully prolonged his traffic stop. Officer Sardina testified that the sole basis for Mr. Wright's traffic stop was his observation of a defective headlight. He also testified that he would have given Mr. Wright a warning as he had never given a citation for just a headlight violation. Instead, even though Officer Sardina had no reasonable suspicion of any illegal activity, he unnecessarily delayed carrying out the purpose of the traffic stop—delivering the warning about the defective headlight—by detouring into an admittedly unrelated topic: whether Mr. Wright had

a CCW permit. This detour into unrelated and undiscovered criminal wrongdoing violated the Fourth Amendment, because this questioning and the subsequent permit check, in the absence of reasonable suspicion, went beyond the scope of the original traffic stop mission. Measures outside an officer's traffic stop mission, aimed at detecting evidence of ordinary criminal wrongdoing are unlawful if the tasks tied to the traffic stop reasonably should have been completed.

Here, Mr. Wright was detained for more time than necessary for the officer to deliver his warning about the defective headlight. Officer Sardina's CCW questions impermissibly extended the traffic stop because they were asked in the absence of reasonable suspicion, and because those questions were not a part of the mission of the traffic stop. Rather, Officer Sardina's CCW questions were asked in the hopes of discovering undetected criminal wrongdoing, based on less than a hunch. The Fourth Amendment does not permit this.

## ARGUMENT

### I. Officer Sardina impermissibly extended Mr. Wright's traffic stop because the CCW inquiry was a detour aimed at detecting evidence of unlawful gun possession, and was not reasonably related in scope to the circumstances justifying the traffic stop.

A. Standard of review and relevant law.

Whether evidence should be suppressed is a question of constitutional fact: this Court upholds the circuit court's factual findings unless clearly erroneous, but independently determines whether those facts meet the constitutional standard. *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. While this Court is not bound by the circuit court's decision on questions of law, it benefits from the lower court's analysis. *State v. Kyles*, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449.

A traffic stop is a seizure within the meaning of the Fourth Amendment. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569; U.S. CONST. AMEND. IV; WIS. CONST. ART. I, §11. Wisconsin courts generally follow the United States Supreme Court's interpretation of the Fourth Amendment in construing Article I, §11. *State v. Betterley*, 191 Wis. 2d 406, 416, 529 N.W.2d 216 (1995).

This Court recently explained that "[t]raffic stops are meant to be brief interactions with law enforcement officers, and they may last no longer

than required to address the circumstances that make them necessary." *State v. Floyd*, 2017 WI 78, ¶21, 377 Wis. 2d 394, 898 N.W.2d 560. Traffic stops that exceed the amount of time required to "handle the matter for which the stop was made" violate the Fourth Amendment. *Rodriguez*, 135 S.Ct. at 1612. "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id*. at 1614.

The United States Supreme Court has explained that a traffic stop involves determining whether to issue a traffic ticket, as well as the "ordinary inquiries incident to" the stop, including related safety concerns. *Rodriguez*, 135 S.Ct. at 1614-15. However, both "on-scene investigation into other crimes" and "safety precautions taken in order to facilitate" such investigations impermissibly detour from the traffic-control mission. *Id.* at 1615-16.

### B. Absent reasonable suspicion, police inquiry into whether the subject of a traffic stop is a CCW permit holder is an impermissible on-scene investigation aimed at detecting unlawful gun possession.

"The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary

invasions….'" *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoted sources omitted). Yet, what the state seeks in this case is a bright line rule permitting arbitrary invasions by allowing police officers to ask every driver, stopped in any traffic stop scenario, whether they have a CCW permit and any weapons, and to run a CCW permit check, without any reasonable suspicion. But the Fourth Amendment, fundamentally rooted in reasonableness, is not suited to per se rules—look no further than to the United States Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), the unquestionable cornerstone of Fourth Amendment case law.

In *Terry*, the United States Supreme Court approved of "legitimate and restrained investigative conduct undertaken on the basis of ample factual justification." 392 U.S. at 15. The Court set forth its much-repeated test: "[I]n determining whether the seizure and search were unreasonable, our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, 19-20; *see State v. Smith*, 2018 WI 2, ¶10, 379 Wis. 2d 86, 905 N.W.2d 353.

In fact, the question presented in this case can be answered simply by applying the facts of Mr.

Wright's case to the second prong[1] of *Terry's* test: was the police conduct "reasonably related in scope to the circumstances which justified the interference in the first place?" 392 U.S. at 19-20. The answer, according to the officer's own testimony, is no. (27:9). This Court should therefore affirm the lower courts' decisions and conclude that while the traffic stop in this case began with a constitutional basis, it became unconstitutional when the officer asked questions and conducted a gun permit check unrelated to the defective headlight that had justified the stop, and that instead sought to detect unlawful gun possession, albeit, without reasonable suspicion.

In the half-century that has passed since *Terry* was decided, the United States Supreme Court has had the opportunity to consider a number of variations on the scenario presented in *Terry*. The foundation established first in *Terry*, and developed in case after case over the following decades, played an important role in *Rodriguez*, the case on which the circuit court and court of appeals properly relied in deciding Mr. Wright's case.[2] These and other cases

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[1] The first prong, whether the officer's action was justified at its inception, is not contested in this case.

[2] *Rodriguez* hearkened back to *Terry*, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(officers may order drivers to exit their vehicles for officer safety), *Delaware v. Prouse*, 440 U.S. 648 (1979) (privacy interests of travelers outweighs the state's interest in discretionary spot checks of vehicles), *Florida v. Royer*, 460 U.S. 491, 500 (1983) (the scope of a detention must be carefully tailored to its underlying justification), and *United*

(continued)

make clear that *Terry*'s two-prong test for assessing the constitutionality of investigative detentions is alive and well.[3]

The state tries several tacks to support its request for the bright line rule that every traffic stop may include the CCW inquiry that was conducted in this case, regardless of reasonable suspicion. It asserts that the officer's questions in this case were permissible because, based on this Court's decision in *Floyd*, they were a part of the traffic stop mission. Specifically, the state believes the questions were

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*States v. Sharpe*, 470 U.S. 675 (1985) ("in determining the reasonable duration of a stop, it is appropriate to examine whether the police diligently pursued the investigation"), in addition to more recent cases—*Illinois v. Caballes*, 543 U.S. 405 (2005) (a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket), and *Arizona v. Johnson*, 555 U.S. 323 (2009) (pat down of passengers permitted with reasonable suspicion that the person is armed and dangerous).

[3] *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) ("the stop *and inquiry* must be 'reasonably related in scope to the justification for their initiation.'"); *Royer*, 460 U.S. at 500 ("an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"); *United States v. Hensley*, 469 U.S. 221, 235 (1985) (To assess the constitutionality of an investigative detention, the court must determine whether the facts "justified the length and intrusiveness of the stop and detention that actually occurred"); *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 188 (2004) (an officer may not arrest a suspect for failure to identify himself if the identification request is not reasonably related to the circumstances justifying the stop).

permissible because they were connected to officer safety and were negligibly burdensome. Then, relying on dictum from *Arizona v. Johnson*, the state argues that questions unrelated to the basis for the traffic stop are permissible so long as they do not measurably extend the duration of the stop. For the reasons explained below, these arguments are unpersuasive, and this Court should decline the state's invitation to allow officers to ask every stopped motorist about his or her CCW licensure in every traffic stop.[4]

1. The CCW inquiry was not part of the traffic stop mission.

During Mr. Wright's suppression hearing, the following testimony was elicited:

| | |
|---|---|
| Prosecutor: | Is the only traffic violation that you – that you observed was this burnt out headlamp? |

[4] The state also asserts that the officer was "statutorily entitled to ask Wright about his CCW status, as a matter of course," pursuant to WIS. STAT. § 175.60(2g)(c), because the officer was "acting in his official capacity and with lawful authority when he stopped Wright." (State brief-in-chief p.9). However, if there was no Fourth Amendment basis to extend the traffic stop and to ask questions regarding Mr. Wright's CCW status, then Officer Sardina was not acting with lawful authority, as required by the statute. Moreover, a state statute cannot trump the Fourth Amendment's protections. *See Marbury v. Madison*, 5 U.S. 137 (1803).

| | |
|---|---|
| Officer Sardina: | Yes. |
| Prosecutor: | And if nothing else had happened, would you be more likely to write a ticket or just give a warning or one of those equipment violation notice things? |
| Officer: | I would have given a warning. I've never given a citation for just a headlight. |

(27:7-8).

Officer Sardina's CCW questions and subsequent CCW permit check were not a part of the mission of the traffic stop because those questions did not bear on the decision to issue a traffic ticket for the defective headlight, and because they are not ordinary inquiries incident to a traffic stop. *See Smith*, 379 Wis. 2d 86, ¶19. Instead, the CCW inquiry constituted an impermissible detour into unrelated and unsuspected criminal wrongdoing.

In *Rodriguez*, the United States Supreme Court specifically identified criminal record and outstanding warrant checks as examples of ordinary inquiries incident to the traffic stop: tasks that are connected to the traffic mission and to *related* safety concerns. *Rodriguez*, 135 S.Ct. at 1614-16. *See also* Wayne R. LaFave, 4 *Search and Seizure: A Treatise on the Fourth Amendment* § 9.3(f), at 545 (5th ed. 2012) (Discussing *Rodriguez*, and explaining, "[T]he question is not whether any of the drug-seeking

tactics are themselves Fourth Amendment searches, for the point is that they taint the stop purportedly made only for a traffic violation because they have absolutely *no* relationship to traffic law enforcement."). Asking about a person's CCW status is not on par with the checks the *Rodriguez* court identified.

To illustrate why, follow the CCW question to its logical conclusion and consider the situation in which a driver is lawfully stopped and subsequently asked by an officer if she is a CCW permit holder. Say the driver tells the officer that she is a CCW permit holder. What does that information do? It does not add to reasonable suspicion that she is armed and dangerous in order to justify a frisk for weapons. *See State v. Johnson*, 2007 WI 32, ¶¶21, 33, 299 Wis. 2d 675, 729 N.W.2d 182; *see also Florida v. J.L.*, 529 U.S. 266, 272-73 (2000) ("Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. But an automatic firearm exception to our established reliability analysis would rove too far.").

That the driver is a CCW permit holder also does not amount to the reasonable suspicion that she is otherwise engaged in illegal activity. *See Vill. of Somerset v. Hoffman*, No.2015AP140, unpublished slip op. at ¶20 n.12 (WI App May 17, 2016) (noting "the mere fact a person is carrying a firearm cannot

itself be evidence of criminal or malicious intent.") (Supp.App.206).[5] Nor does the fact that a driver is a CCW permit holder lend itself to reasonable suspicion that this driver even has a gun in the vehicle.

Instead, an officer's questions about guns and having a CCW permit constitute an "[o]n-scene investigation into other crimes" and is a detour from the traffic stop mission. *See Rodriguez*, 135 S.Ct. at 1616. There can be no automatic presumption of illegality where the possession of a firearm is not automatically illegal, due to concealed carry laws and the Second Amendment.[6]

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[5] Cited for persuasive value only, in accordance with WIS. STAT. §§ 809.23(3)(b) and (c).

[6] Last spring, the Indiana Supreme Court held a tip that the defendant was carrying a gun was insufficient to justify an investigatory stop and search of the defendant, and that court concluded police were not permitted under the Fourth Amendment to briefly detain a person to ascertain the legality of a weapon and dispel any suspicion of criminal activity. *Pinner v. State*, 74 N.E.3d 226, 233 (Ind. 2017). The Indiana Supreme Court quoted the United States Supreme Court's observation, "'Were the individual subject to unfettered governmental intrusion every time he [exercised his right to bear arms], the security guaranteed by the Fourth Amendment would be seriously circumscribed.'" 74 N.E.3d at 233 (quoting *Prouse*, 440 U.S. 648, 662-63).

In so holding, the Indiana Supreme Court noted that in a number of other jurisdictions where possession of a weapon is not per se illegal, legislatures and courts have been "reluctant

(continued)

The state argues the CCW inquiry in this case was permissible, pointing to *Rodriguez's* authorization of "negligibly burdensome precautions in order to complete the traffic mission safely." (State's brief-in-chief p.6, 9). But the ordinary inquiries have been justified as incidental to a traffic stop because they, like the traffic code, ensure that vehicles are operated safely and responsibly. *Rodriguez* at 1615-16. Officer Sardina's CCW questions do not serve that same purpose such that they could be deemed part of the ordinary inquiries of a traffic stop.

However, even if this Court agrees with the state that Officer Sardina's questions were in fact a "related safety precaution," it should nevertheless conclude those questions were impermissible because they are the very type of safety precaution *Rodriguez* prohibited—those taken in order to facilitate a detour into other crimes, here, illegal gun possession. 135 S.Ct. at 1616. This aspect of the *Rodriguez* decision is what the state fails to take into account in its argument in this case—that even if the CCW inquiry was a safety precaution, if those questions were asked in order to investigate other crimes, they nevertheless impermissibly detoured from the traffic-control mission. Mr. Wright's stop notably involved no furtive movements, no weapons paraphernalia, and no prior contact or history with Mr. Wright to

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to permit a 'firearm or weapons exception' to the constitutional limitations already imposed by *Terry*." *Id.* (compiling cases).

suggest any problem beyond the defective headlight. (27:13-17; App.113-17).[7]

Because an investigation into other crimes detours from the mission of the traffic stop, an officer may not extend a traffic stop without independent reasonable suspicion of criminal activity. *See Rodriguez*, 135 S.Ct. 1609, 1615-17; *State v. Hogan*, 2015 WI 76, ¶¶35-7, 364 Wis. 2d 167, 868 N.W.2d 124; *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999); *State v. Gammons*, 2001 WI App 36, ¶¶18-19, 241 Wis. 2d 296, 625 N.W.2d 623. Asking Mr. Wright if he was a CCW permit holder was a detour aimed at detecting evidence of ordinary

[7] It is unclear how asking Mr. Wright about a CCW permit, weapons, and running a CCW permit check advances officer safety in a traffic stop containing no reasonable suspicion of any violation other than the defective headlight. *See Smith*, 379 Wis. 2d 86, ¶82 (Kelly, J., dissenting) ("Is it really necessary to point out that concerns over the officer's safety would vanish if he ended the seizure? Or that ending the seizure would make the usual inquiries moot?"); *see also* (27:13-17; App.113-17). Indeed, the Court of Appeals observed, "Sardina testified that Wright pulled over promptly and responsibly, was cooperative, and did not make any furtive movements. There was no claim that Wright appeared nervous or was trying to hide anything. Sardina did not see a firearm in the car, nor did he see anything associated with firearms in the car. Simply put, Sardina could not articulate anything suspicious about the circumstances of the stop 'separate and distinct' from the broken headlight." *Wright*, No.2017AP2006-CR, unpublished slip op. ¶14 (quoted source omitted) (App.177).

criminal wrongdoing and unlawfully prolonged the traffic stop. In contrast to the cases on which the state relies, discussed further below, here, the officer's inquiry about whether Mr. Wright had a CCW permit was not tied to officer safety or carefully tailored to the underlying justification for the traffic stop for the defective headlight. *See Betow*, 226 Wis. 2d 90, 93-94 (noting that, during a traffic stop, a driver may be asked questions "*reasonably related* to the nature of the stop") (emphasis added); *see also Wright*, No.2017AP2006-CR, unpublished slip op. ¶14 (App.177).

2. *Floyd* does not control because it is distinguishable from this case.

The state also argues that the outcome of this case is controlled by this Court's recent decision in *Floyd*, and that the lower courts incorrectly relied on *Rodriguez*. (State's brief-in-chief p.8-11). However, contrary to the state's argument, *Floyd* is distinguishable from this case. *Floyd*, a consent-to-search case, did not involve a wholly unrelated question untethered from the mission of the traffic stop. In *Floyd*, the officer discovered that Floyd's registration was suspended and he pulled him over. 377 Wis. 2d 394, ¶2. When the officer approached Floyd's vehicle, he noticed the windows were tinted and that there were air fresheners in every vent of the vehicle as well as hanging from the rear view mirror. *Id.* at ¶3. The officer believed the area of the stop was a "high crime" part of the city, known for drug and gang activity, and he believed air

fresheners were "often an indicator of drug-related activity because '[u]sually the air fresheners or the amount of them are—is an agent that is used to mask the smell of narcotics.'" *Id.* at ¶3.

The officer asked for Floyd's license and insurance information; Floyd did not have either, but gave the officer a Wisconsin identification card. *Id.* at ¶4. The deputy returned to his vehicle to begin processing the multiple citations, and called for a canine unit. *Id.* at ¶4. After processing the citations, the deputy returned to Floyd's vehicle to explain the citations. *Id.* at ¶5. He asked Mr. Floyd to exit the vehicle, and before he explained the citations, the deputy asked Floyd whether he had any weapons or anything that could harm him. *Id.* at ¶5. Floyd said no. *Id.* The deputy then asked Floyd if he could search him for his safety, and Floyd responded, "Yes, go ahead." *Id.* The officer discovered illegal drugs. *Id.*

This Court explained that, "Generally speaking, an officer is on the proper side of the line so long as the incidents necessary to carry out the purpose of the traffic stop have not been completed, and the officer has not unnecessarily delayed the performance of those incidents." *Id.* at ¶22. It explained Floyd's stop "was not complicated—his vehicle's registration was suspended. Deputy Ruffalo then learned Mr. Floyd had neither insurance nor a valid driver's license. At a minimum, this authorized Deputy Ruffalo to take the time reasonably necessary to draft the appropriate citations and explain them to Mr. Floyd. Until that is done, and so long as Deputy

Ruffalo does not unnecessarily delay the process, the permissible duration of the traffic stop has not elapsed." *Id.* at ¶23.

Mr. Wright's stop was also not complicated. However, unlike in *Floyd*, here, the officer testified that he had never issued a citation for a defective headlight, and only would have delivered a warning about the violation. Instead of delivering a warning, though, Officer Sardina unnecessarily delayed carrying out the purpose of the traffic stop by detouring into an admittedly unrelated topic, aimed not at the traffic stop but rather at uncovering illegal gun possession—asking whether Mr. Wright had a CCW permit, and running a CCW permit check. (27:9; App.124). This unrelated detour is the type against which both *Rodriguez* and *Floyd* cautioned, and violated Mr. Wright's Fourth Amendment rights.

In addition, in *Floyd*, the officer asked whether Mr. Floyd had any weapons or anything that could harm him, and if the officer could perform a search for his safety. *Floyd* is distinguishable from Mr. Wright's case because both questions were closely connected to officer safety. Further, and unlike Mr. Wright's case, *Floyd* involved factors suggesting drug activity. *See State v. Richardson*, 156 Wis. 2d 128, 144, 456 N.W.2d 830 (1990) (discussing general linkage between guns and the business of drug trafficking). In contrast, here Officer Sardina claimed no reasonable suspicion of *any* wrongdoing, drug-related or otherwise. And, there is no indication that the officer's questions about whether Mr. Wright was

a CCW permit holder or had a gun in the car were related to officer safety. *Wright*, No.2017AP2006-CR, unpublished slip op. ¶14 (App.177).

3. Measures outside an officer's traffic stop mission, aimed at detecting evidence of ordinary criminal wrongdoing, are unlawful if the tasks tied to the traffic stop reasonably should have been completed.

The state asserts that "quick questions during a traffic stop are not sufficiently intrusive to transform a legal stop into an illegal seizure," and points to *Arizona v. Johnson*, 555 U.S. 323 (2009), *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), and *State v. Griffith*, 2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72. (State's brief-in-chief p.6-7). As an initial matter, throughout its brief, the state attempts to minimize the officer's conduct in this case, referring to the officer's unrelated actions as simply asking "two quick questions about weapons." However, Officer Sardina testified that he asked Mr. Wright whether he was a CCW permit holder, if he had any weapons in the vehicle, and he ran a CCW permit check. (27:9, 11; App.109, 111).

The state cites to *Johnson* for the proposition that an officer's "inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as these inquiries do not measurably extend

the duration of the stop." (State brief-in-chief p.7). However, in *Johnson*, the United States Supreme Court considered a different type of question than that presented in this case—*Johnson* concerned the constitutionality of the pat down of a passenger in a car that had been stopped because its registration was suspended. 555 U.S. at 327. The question in that case was whether the police had authority to conduct the pat down. *Id.* at 326.

Relying on principles from *Terry*, the Supreme Court concluded that during a routine traffic stop, an officer may pat down a passenger upon reasonable suspicion that they are armed and dangerous. *Id*. at 327. Despite the narrowness of this holding, the state grasps onto an extraneous statement included at the end of the opinion that does not bear on the holding of the case. As mere dictum, that statement should be accorded little weight here. *See* Tracey Maclin, *Anthony Amsterdam's Perspectives on the Fourth Amendment, and What It Teaches about the Good and Bad in Rodriguez v. United States*, 100 MINN. L. REV. 1939, 1973-74 (2016).

The state's reliance on *Gaulrapp* and *Griffith* is also unpersuasive. In *Gaulrapp*, the Wisconsin Court of Appeals held that an officer's questions about drugs and firearms did not transform a legal traffic stop into an illegal detention. 207 Wis. 2d 600, 602. However, Gaulrapp gave police consent to search his person and his vehicle, and the question on appeal concerned the impact of the officer's questions on Gaulrapp's consent. *Id*. at 603, 607-608. Like this

Court concluded in *Floyd*, the Court of Appeals found that Gaulrapp freely and voluntarily gave police consent to search his person and vehicle. *Id*.

Moreover, *Gaulrapp* preceded *Rodriguez*, which explained in no uncertain terms that measures outside an officer's traffic stop mission, aimed at "detect[ing] evidence of ordinary criminal wrongdoing[,]" are unlawful if the tasks tied to the traffic stop reasonably should have been completed. 135 S.Ct. at 1614-15. Thus, to the extent that it is inconsistent with *Rodriguez*, Mr. Wright submits that it is no longer good law, as questions outside the mission of the traffic stop and officer safety are plainly prohibited, and cannot be justified as *de minimis*. *See id.*, 135 S.Ct. at 1615-16 ("Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular.").

As for *Griffith*, on which the state relies to assert that the length of time required to ask a question is not sufficiently intrusive to transform a lawful stop into an unreasonable, unlawful one, the questions asked in that case are not comparable to Officer Sardina's CCW inquiry here. In *Griffith*, this Court applied the *Terry* test and concluded the officer had the authority to ask the passenger his name and date of birth. 236 Wis. 2d 48, ¶¶26, 38, 64; *cf. State v. Hogan*, 2015 WI 76, ¶¶35-7, 364 Wis. 2d 167, 868

N.W.2d 124; *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999); *State v. Gammons*, 2001 WI App 36, ¶¶18-19, 241 Wis. 2d 296, 625 N.W.2d. In contrast, in this case, the officer asked questions and ran a gun permit check—actions that were wholly unrelated to the initial justification for the traffic stop.

Further, *Rodriguez* unequivocally instructed that while an officer "*may* conduct certain unrelated checks during an otherwise lawful traffic stop…he may not do so in a way that prolongs the stop, *absent the reasonable suspicion ordinarily demanded* to justify detaining an individual." 135 S.Ct. 1609, 1615 (emphasis added). And, importantly, *Rodriguez* explicitly rejected the argument that an officer may "incrementally" prolong a stop to conduct unrelated tasks so long as the overall duration of the stop remained reasonable. *Id.* at 1616.

In so rejecting, the Supreme Court observed the government's argument was equivalent to allowing an expeditious officer, who had completed all traffic-related tasks in a timely fashion, to "earn bonus time to pursue an unrelated criminal investigation." *Id.* Thus, it does not matter whether the unrelated investigation occurs before or after the officer issues a ticket, but whether engaging in an unrelated inquiry adds time to the stop. *Id.* Accordingly, under *Rodriguez*, even a *de minimis* extension is too long an extension if it is unrelated to the mission of the traffic stop and prolongs the stop beyond the time

needed to complete the mission—here, delivering a warning about the headlight. *Id.*

In this case, in which the stop was solely based on the defective headlight and in which the officer's intention was only to give a warning, asking unrelated questions about Mr. Wright's CCW status and running the CCW permit check added time to the stop, impermissibly extending it. *See Hogan*, 364 Wis. 2d 167, ¶35 ("An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion."); *see also Rodriguez*, 135 S.Ct. 1609, 1614 ("Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."). Officer Sardina's authority for the seizure ended when the tasks tied to the traffic infraction reasonably should have been completed.

On a broader scale, the state's request to endorse officer inquiry into every stopped motorist's CCW status is troubling given the large number of traffic stops that occur each year, and the enormous discretion involved not only in the decision whether to stop a vehicle but also how to execute the stop. *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 ("Since virtually everyone violates traffic laws at least occasionally, the upshot of [four rulings decided in the 1997 Term] is that police officers, if they are patient, can eventually pull over anyone they choose, order the driver and all

passengers out of the car, and then ask for permission to search the vehicle without first making clear the detention is over."); *See also* Maclin, *Anthony Amsterdam's Perspectives on the Fourth Amendment, and What It Teaches about the Good and Bad in Rodriguez v. United States*, 100 MINN. L. REV. 1939, 1950 ("police interrogation of motorists about subjects unrelated to the reason for the traffic stop provides police with unchecked discretion to pursue criminal investigation and is beyond the scope of an ordinary traffic stop"); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 235–36 (1989); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544, 546–47 (1997).

However, the simple application of *Terry*'s test, as recently repeated in *Rodriguez*, cleanly resolves the question presented in this case, while simultaneously providing straightforward guidance for the police, citizens, lower courts, and practitioners in future cases. *See State v. Brown*, No.2017AP774-CR, *certification* by Wisconsin Court of Appeals (WI App Nov. 21, 2018) (Supp.App.207-220). This Court should therefore apply the *Terry* test, and conclude that the officer's actions in this case were not constitutionally reasonable because they were not "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19-20.

## CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals.

Dated this 28th day of November, 2018.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,898 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 28th day of November, 2018.

Signed:

CARLY M. CUSACK
Assistant State Public Defender

## CERTIFICATION AS TO SUPPLEMENTAL 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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 28th day of November, 2018.

Signed:

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# SUPPLEMENTAL APPENDIX

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2006-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOHN PATRICK WRIGHT,

Defendant-Respondent.

ON REVIEW OF A DECISION OF
THE COURT OF APPEALS, DISTRICT I,
AFFIRMING AN ORDER SUPPRESSING EVIDENCE
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE HANNAH C. DUGAN, PRESIDING

# REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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## ARGUMENT

### I. *State v. Floyd* held that officer safety is an integral part of every traffic stop mission and controls the outcome of this case.

Neither the court of appeals nor Wright properly accounted for this Court's holding in *Floyd*, as it related to the issue of asking about weapons during a routine traffic stop. The court of appeals completely ignored *Floyd* and the first 12 pages of Wright's argument fail to discuss it. (Wright's Br. 6–18.) This avoidance is puzzling as *Floyd* dealt extensively with the lone issue in this case: whether questions about weapons during a traffic stop are part and parcel of the stop or an impermissible detour. And *Floyd* gives clear direction to resolving this issue, holding that questions about weapons and consent to search are negligibly burdensome precautions to ensure officer safety, and therefore properly part of the traffic stop mission and not an unconstitutional extension of it. *State v. Floyd*, 2017 WI 78, ¶¶ 27–28, 377 Wis. 2d 394, 898 N.W.2d 560.

Wright argues at length that police questions about weapons and his CCW permit status should be interpreted as an improper attempt to investigate, without reasonable suspicion, criminal wrongdoing. This argument only holds if questions about weapons to a lawfully stopped motorist are viewed as an investigation into the criminal offense of carrying a concealed weapon. But this type of analysis was rejected by this Court when Floyd similarly argued that questions about weapons were an impermissible investigatory detour: "Although Mr. Floyd's argument incorporates the principle that the "mission" of the traffic stop defines its acceptable duration, he *does not account for how the officer's safety fits within that mission*." *Floyd*, 377 Wis. 2d 394, ¶ 26 (emphasis added). This Court concluded that the questions about weapons and the request to search for

weapons were related to officer safety and thus part of the original traffic stop mission. *Id.* ¶ 28.

When Wright finally gets around to discussing *Floyd*, he tries to avoid its orbit. He does this in three ways: (1) attempts to dismiss *Floyd* as a consent-to-search case. (Wright's Br. 18), (2) argues that while Floyd involved a suspended registration, this case involved the unlikely to be ticketed matter of a defective headlight (Wright's Br. 20), and (3) notes that *Floyd* had factors pointing to reasonable suspicion of drug dealing whereas here there was no suspicion of wrongdoing. (*Id.*) All three attempts to distinguish *Floyd* fail.

Wright's portrayal of *Floyd* as a consent-to-search case misses the mark. To be sure, the validity of Floyd's consent to search his person was at issue, but the core of the opinion, and the first issue discussed, was the constitutionality of the traffic stop: was the stop improperly extended prior to Floyd's granting consent to search. Indeed, the *Floyd* majority hammered this point home when it noted that its holding that the police did not extend the stop was based on police interactions with Floyd before he consented to the search, that almost half of the opinion's analysis discussed whether asking about weapons and asking for consent to search were part and parcel of the traffic stop mission, or an impermissible investigative detour. *Floyd*, 377 Wis. 2d 394, ¶ 28 n.6. *Floyd*, dealt primarily with the propriety of asking questions about weapons during a traffic stop and is thus on point.

Wright argues that *Floyd* is distinguishable as it was spawned from a suspended registration violation, whereas in this case the basis for the stop was a defective headlight, a violation not likely to result in the issuance of a citation. He argues that since the officer was not going to issue a ticket, any police action not connected to a broken headlight was an impermissible detour. The State fails to see any relevant

difference between whether a lawful traffic stop is likely to result in the issuance of a citation or not, in relation to queries about weapons. In either case the police have a traffic stop mission, to cite or to warn, and are entitled to perform all functions incident to the mission. *Floyd* makes clear that one of these functions is to ask the motorists questions related to officer safety, such as questions about weapons.

Wright notes that there were suspicious factors present in *Floyd* that are not present in his case. He points out that the tinted windows and air-fresheners present in *Floyd* have long been linked to drug activity and weaponry. (Wright's Br. 18–20.) He suggests that *Floyd*'s holding turned on suspicious factors because they made the stop more dangerous. But *Floyd*'s holding did not depend on the existence of suspicious facts. Indeed, this Court explained the independence of its holding from a reasonable suspicion analysis: "The reason we didn't address 'reasonable suspicion' [relating to questions about weapons] is because that is necessary only if Deputy Ruffalo extended the stop. As the first half of our opinion [the portion of the opinion dealing with the effect of questions about weapons on the traffic stop] demonstrates, he did not." *Floyd*, 377 Wis. 2d 394, ¶ 28 n.6. The suspicious factors present in *Floyd* had no bearing on the holding of *Floyd* that the State relies on here: questions about weapons are negligibly burdensome and are permissible incident to any traffic stop.[1]

[1] Wright seeks support for his reasonable suspicion requirement argument in *Pinner v. State*, 74 N.E.3d 226 (Ind. 2017) (Wright's Br. 15 n.6.) But *Pinner* is way off base—it involved whether there was sufficient reasonable suspicion of unlawful gun possession to trigger a seizure. Here, there is no dispute about the propriety of the initial seizure; the issue is whether a lawful stop is impermissibly extended by questions about weapons. This issue was not addressed by *Pinner*.

Wright's attempt to avoid *Floyd*'s glare, result in his flawed central theme. He argues that the fundamental principles of the landmark case of *Terry v. Ohio*, 392 U.S. 1 (1968) control this case in his favor. Wright frequently refers to the "Terry test": "[I]n determining whether the seizure and search were unreasonable, our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." (Wright's Br. 9 (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. at 19–20); Wright's Br. 10–12, 22–23, 26.) He concludes that the test invalidated questions about weapons because they were not related to a traffic stop for a defective headlight. But traffic stop questions about weapons fit neatly into the *Terry* test, rather than violate it as Wright asserts.

Floyd made the same argument Wright makes here when he argued that questions about weapons were not within the scope of a stop for suspended registration, and this Court rejected it: "Although Mr. Floyd's argument [that the traffic stop should have ended with the issuance of a citation and before any questions about weapons] incorporates the principle that the "mission" of the traffic stop defines its acceptable duration, he does not account for how the *officer's safety fits within that mission*." *Floyd*, 377 Wis. 2d 394, ¶¶ 25–26 (emphasis added). This Court then made clear that officer safety concerns are within the scope of every traffic stop: "That [the inherent dangerous nature of traffic stops] makes officer safety an integral part of every traffic stop's mission." *Floyd*, 377 Wis. 2d 394, ¶ 26.

The court of appeals completely ignored *Floyd*. Its opinion and Wright's argument are in direct conflict with this Court's holding that officer safety concerns are an integral part of every traffic stop mission, regardless of the presence

of suspicious factors, and permitting negligibly burdensome precautions to ensure officer safety during the stop.

## II. Questions about weapons and Wright's CCW permit status were safety related.

Wright argues that the questions about weapons and his CCW permit status were not motivated by safety concerns but rather were an unlawful attempt, without reasonable suspicion, to investigate a possible CCW violation. It beggars belief to argue that asking a motorist about whether he is armed is not tethered to officer safety concerns. Wright likely understands this as he almost exclusively limits his objection to the CCW permit inquiry and almost never mentions the propriety of the question about his being armed. But these two questions cannot be parceled out, one being permissible and the other not. To do so would lead to an illogical holding of permitting one question about weapons, and if it is answered in the affirmative, to forbid the police to check if the weapon is being lawfully carried.

The propriety of asking about weapons and Wright's CCW status in tandem is underscored by our state statute permitting the police to ask about a person's CCW status if the officer is acting in an official capacity and with lawful authority. In a footnote, Wright attempts to dodge this statute by arguing that the officer was not acting with his lawful authority. (Wright's Br. 12 n.4.) There is no dispute that at the time Officer Sardina asked Wright about weapons and his CCW permit status, Wright was lawfully stopped. So, Wright's argument boils down to this flawed reasoning: the police are not protected by a statute permitting an inquiry into a lawfully stopped person's CCW permit status because inquiring about that status transforms a lawful stop into an unlawful one. Without any development, Wright also suggests that the statute might be unconstitutional. *Id.* This Court

should not consider such an argument but, even if it was properly presented, it should be rejected as a statute allowing an inquiry to a lawfully seized person carrying a concealed weapon does not violate Fourth Amendment protections.

Wright claims there was no indication that Officer Sardina's questions about his CCW permit and weapons were related to officer safety. (Wright's Br. 20–21.) Wright misreads the record. When asked why he inquired about weapons and Wright's CCW permit status, Officer Sardina explained that he did so for officer safety purposes. (R. 27:9.) Sardina's questions about weapons were safety related, constitutionally and statutorily permitted, and incident to the traffic stop mission.

## III. *Rodriquez v. United States* does not advance Wright's argument that Officer Sardina's questions about weapons were an impermissible investigatory detour from the traffic stop.

Wright argued that the State failed to appreciate that *Rodriquez v. United States*, 135 S. Ct. 1609 (2015) prohibited Sardina's questions even if the questions are viewed as safety related. (Wright's Br. 16.) Wright's premise is that *Rodriquez* interpreted safety measures as an improper extension of a stop if they were employed to facilitate improper police detours from the traffic stop mission. While this might be true, *Rodriquez*'s holding is not applicable here, as questions about weapons during a traffic stop, unlike possible safety accommodations for dog sniffs, are not facilitating an impermissible detour but rather are negligibly burdensome safety precautions incident to the stop itself. This is how this Court interpreted *Rodriquez* when it cited it for support for the proposition that officer safety is an integral part of every traffic stop mission. *Floyd*, 377 Wis. 2d 394, ¶ 26. Thus, *Rodriquez*'s ban on measures to accommodate an impermissible investigatory detour are not impactful here.

*Rodriquez* is not on point and to the extent it is, it supports the State's position and this Court's holding in *Floyd*.

## CONCLUSION

The State asks this Court to reverse the court of appeals affirmance of the trial court's granting Wright's motion to suppress.

Dated this 13th day of December, 2018.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,921 words.

Dated this 13th day of December, 2018.

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

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

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

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

Dated this 13th day of December, 2018.

_____
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