STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP756-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

FREDERICK S. SMITH,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, STEPHEN E. EHLKE, JUDGE.

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT-PETITIONER

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. When the reasonable suspicion supporting a lawful traffic stop is dispelled before the police officer makes contact with the vehicle's driver, is it nonetheless reasonable for the officer to make contact with the driver to ask for the driver's name and identification and to explain the basis for the stop?

   The circuit court concluded that an officer may do so, relying on *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462.

   The court of appeals assumed, without deciding, that the officer was permitted to take such action.

   This Court should conclude that an officer may do so pursuant to *State v. Williams* and *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

2. When a police officer encounters a driver during a lawful traffic stop who indicates that the driver's door and window are both broken, is the officer permitted to open the passenger's side door of the vehicle to make face-to-face contact with the driver?

   The circuit court concluded that opening the door, under the circumstances of this case, was reasonable.

   The court of appeals did not decide this issue, but concluded that Smith presented a cogent legal argument that the officer was not permitted to open the door because it was not the least intrusive way to prolong the detention and because opening the door was a Fourth Amendment search.

This Court should conclude that pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); and *State v. Johnson*, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182, an officer can open the door of a lawfully stopped vehicle because it is an incremental, *de minimis* intrusion that does not rise to a separate Fourth Amendment event.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

INTRODUCTION

A police officer stopped defendant-appellant Frederick Smith's vehicle after a records check indicated that the registered owner of the vehicle had a suspended license. When the officer approached the vehicle, he realized that Smith was not the registered owner, who was a woman. When the officer reached the vehicle, Smith indicated that the driver's side door and window were broken. In response, the officer walked around the vehicle and opened the passenger side door to speak with Smith. As soon as the officer made face-to-face contact with Smith, the officer noticed signs of intoxication and eventually arrested Smith for driving while intoxicated.

The issues presented ask this Court to determine if the officer's actions in speaking with Smith and opening the door violated Smith's Fourth Amendment rights to be free from unreasonable searches and seizures. This Court should conclude that the officer did not violate Smith's rights. First, the officer was permitted, as a part of a lawful traffic stop, to make contact with Smith, to explain the basis of the stop,

and to perform "ordinary inquiries" incident to a traffic stop such as a license check. Doing so is a part of the mission of any traffic stop and does not extend the scope of the stop. Second, the officer did not create a separate Fourth Amendment event when the officer opened the passenger door to speak with Smith. The officer acted reasonably by opening the passenger door of a lawfully stopped vehicle to facilitate face-to-face communication. And Smith had no constitutionally protected privacy interest in shielding signs of intoxication from the officer.

Because the officer did not violate Smith's Fourth Amendment rights, this Court should reverse the court of appeals' decision that remanded the case to the circuit court with orders to vacate the judgment of conviction, to allow Smith to withdraw his plea, and to grant Smith's original motion to suppress evidence and statements.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

On April 6, 2014, Sergeant Bernard Gonzalez was parked in his squad car, monitoring the neighborhood around the 2900 block of Worthington Avenue in Madison because of gang-related gunfire that had occurred the night before. (36:5–6, Pet-App. 118–19.) He saw a vehicle stop in the middle of the road and thought it odd that the vehicle did not pull to the curb. (36:6–7, Pet-App. 119–20.)

Sergeant Gonzalez saw someone exit the front passenger side door and walk to a nearby apartment complex. (36:6, Pet-App. 119.) The vehicle pulled away and continued down Worthington Avenue. (36:7, Pet-App. 120.) Sergeant Gonzalez followed the vehicle, and eventually got close enough to read the license plate. (36:7, Pet-App. 120.) He ran a check through the Department of Transportation

database on his squad computer and learned that the vehicle was registered to a woman named Amber Smith, whose driving privileges were suspended. (36:7, Pet-App. 120.) When he learned this information, Sergeant Gonzalez could not see who was driving the vehicle. (36:8, Pet-App. 121.)

Sergeant Gonzalez activated his emergency lights to initiate a traffic stop. (36:8, Pet-App. 121.) The vehicle did not immediately stop. Instead, it continued a short distance into a parking lot. (36:8, Pet-App. 121.) Once the vehicle stopped, Sergeant Gonzalez approached it on foot and saw that the driver was a man, Smith. (36:9, 11, 17–18, Pet-App. 119, 124, 130–31.)[1]

Sergeant Gonzalez testified that he first walked up to the driver's side door, "as [he] would with any traffic stop." (36:9, Pet-App. 122.) When he reached the driver's door, Smith was shrugging his shoulders. (36:9, Pet-App. 122.) Sergeant Gonzalez motioned to Smith to roll down the window or open the door. (36:26, Pet-App. 139.) Smith told Sergeant Gonzalez that he could neither roll down the window nor open the door because it was broken. (36:9, Pet-App. 122.)

Sergeant Gonzalez walked to the front passenger door. (36:9–10, Pet-App. 122–23.) When he reached the door, Sergeant Gonzalez thought that Smith was trying to open it. (36:10, Pet-App. 123.) He testified that Smith leaned over, grabbed the door, and that he and Smith opened the door simultaneously. (36:9–10, Pet-App. 122–23.) Smith, however, testified that he was simply trying to maneuver to the

[1] Amber Smith and Frederick Smith are siblings. (36:30, Pet-App. 143.)

passenger seat and had reached for the pull handle for leverage. (36:31–33, 35, Pet-App. 144–46, 148.)

Once Sergeant Gonzalez had face-to-face contact with Smith, he noticed Smith had red, bloodshot eyes. (4:2, Pet-App. 155.) Sergeant Gonzalez also smelled a strong odor of intoxicants coming from the vehicle. (4:2, Pet-App. 155.) Sergeant Gonzalez asked Smith if he had a valid driver's license. (4:2, Pet-App. 155.) Smith replied that he was pretty sure that his license was revoked. (4:3, Pet-App. 156.)

Sergeant Gonzalez had Smith complete field sobriety testing, which Smith failed or refused to complete. (4:3, Pet-App. 156.) Ultimately, Smith was transported to the Dane County Jail where a preliminary breath test revealed that his estimated blood alcohol content was 0.38, almost five times the legal limit. (4:3, Pet-App. 156.)

Smith moved to suppress any evidence found as a result of the stop on the grounds that Sergeant Gonzalez improperly failed to end the stop immediately after he saw that the driver of the vehicle was not a woman. (12:2–3.) The circuit court, relying on *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462, concluded that even though reasonable suspicion had dispelled, Sergeant Gonzalez was permitted to approach and ask Smith for his license. (37:6–7, Pet-App. 109–10.) The court further concluded that Sergeant Gonzalez could open the passenger side door to complete that task. (37:7–8, Pet-App. 110–11.) The court reasoned that "Sergeant Gonzalez was within his rights to seek an identification of Mr. Smith and to look at his license, and . . . what he did in reaction to the situation with the door and the window was reasonable." (37:8, Pet-App. 111.)

Smith pleaded guilty to seventh offense operating while intoxicated. (38:9–10.) He appealed on the ground that the circuit court erred in denying his motion to suppress. *State v. Smith*, No. 2015AP756-CR, 2016 WL 5415968 ¶¶ 1–2 (Wis. Ct. App. Sept. 29, 2016) (unpublished). (Pet-App. 101.) Smith raised two arguments: 1) Sergeant Gonzalez improperly extended the duration of the seizure after reasonable suspicion dissipated, and 2) Sergeant Gonzalez was not permitted to open the passenger door without consent or probable cause. *Id.* ¶¶ 5–6. (Pet-App. 101–02.)

The court of appeals reversed and remanded with directions to vacate the judgment of conviction, to allow Smith to withdraw his plea, and to grant the suppression motion. *Id.* ¶ 13. (Pet-App. 103.) But the court of appeals did not decide either of the issues that Smith presented. Regarding Sergeant Gonzalez's approach to ask for identification, the court "assume[ed], without deciding, that the officer was permitted to continue the stop, that is, continue the seizure, for the purpose of asking for the driver's identification and explaining why the officer initiated the stop." *Id.* ¶ 5. (Pet-App. 101.) Regarding Sergeant Gonzalez's opening the front passenger door, the court reasoned that "Smith has presented a cogent legal argument with authority explaining that the officer's action violates the 'least intrusive means' rule of *Royer*[2] and that the action, revealing as it did the odor in the vehicle, amounts to a non-consensual search." *Id.* ¶ 12. (Pet-App. 103.) The court concluded that "Smith's argument has gone without a meaningful rebuttal" and reversed on that basis. *Id.* ¶ 12. (Pet-App. 103.)

[2] *Florida v. Royer*, 460 U.S. 491 (1983).

The State petitioned this Court to review and now asks that this Court reverse the court of appeals' decision.[3]

STANDARD OF REVIEW

"Whether a defendant's constitutional rights, including his rights under the Fourth Amendment, have been violated is a question of constitutional fact." *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124. "Resolving questions of constitutional fact is a two-step process." *Id.* (citation omitted). This Court will "uphold the circuit court's findings of historical fact unless they are clearly erroneous." *Id.* Then this Court will "independently apply constitutional principles to those facts." *Id.*

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[3] In response to the petition, Smith argued that the State forfeited review of whether Sergeant Gonzalez violated Smith's Fourth Amendment rights by opening the vehicle door because the State did not meaningfully address that issue in the court of appeals. (Smith's Pet. Resp. 10.) While the court of appeals was unhappy with the way that the State responded to Smith's arguments, the State did argue that pursuant to *Williams*, 258 Wis. 2d 395, Sergeant Gonzalez was permitted to make contact with Smith and to request Smith's license even though he realized that Smith was not the registered owner of the vehicle. (State's Ct. App. Br. 7–10.) The State also argued that the fact that Sergeant Gonzalez walked around to the passenger side and opened that door to accomplish those tasks did not alter the analysis because had the driver's door and window been operational, Sergeant Gonzalez would have detected the signs of Smith's intoxication. (State's Ct. App. Br. 7–10.)

The State fully admits that it should have included more authority for its position and more explicitly explained why opening the door did not change the analysis. However, in accepting the State's petition for review, the State assumes this Court wishes to address the merits of the issues presented. If Smith wishes to re-raise a forfeiture argument in his brief, the State will address it in its reply.

ARGUMENT

The United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. 1, § 11. A traffic stop is a seizure within the meaning of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (quoting *Terry*, 392 U.S. at 19). When a police officer performs a traffic stop, the stop must be reasonable under the circumstances to comply with the Fourth Amendment of the United States Constitution and article 1, § 11 of the Wisconsin Constitution. *Post*, 301 Wis. 2d 1, ¶ 10 n.2.

Here, there is no dispute that the stop itself was lawful pursuant to *State v. Newer*, 2007 WI App 236, ¶¶ 5, 7, 306 Wis. 2d 193, 742 N.W.2d 923. (*See* Smith's Pet. Resp. 5.)[4] And as a point of clarification, this case does not concern a mistake of fact or of law. Rather, this case is about what an officer can do after he lawfully stops a vehicle and after reasonable suspicion has dissipated. Both parties agree that the officer is allowed to approach the vehicle and speak to the driver. (Smith's Pet. Resp. 9.) They dispute what an officer may request of the driver, and if the officer is entitled to face-to-face contact with the driver.

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[4] While the State did not argue this below, Sergeant Gonzalez also had justification to stop the vehicle when he saw it stop in the road to let a passenger out. *See* Wis. Stat. § 346.51 ("No person shall . . . stop . . . any vehicle, whether attended or unattended, upon the roadway of any highway outside a . . . residence district when it is practical to . . . stop . . . such vehicle standing off the roadway . . . .")

The State is asking that this Court continue its practice of interpreting the search and seizure provision of the Wisconsin Constitution consistent with the search and seizure provision of the United States Constitution. As argued below, this Court's opinion should clarify that an officer is permitted to perform all "ordinary inquiries" related to a traffic stop as a part of the traffic stop's mission and an officer may perform those inquires by opening the door of a lawfully stopped vehicle to facilitate face-to-face contact.

I. When a police officer performs a lawful traffic stop, but the reasonable suspicion supporting the stop dispells before the officer makes contact with the driver, the officer is nonetheless allowed to make contact to ask for the driver's name and identification and to explain the basis for the stop.

This first issue concerns how to determine the permissible scope and duration of a lawful traffic stop. It asks whether ordinary, traffic-related inquires that occur after reasonable suspicion has dissipated are included in the scope of the stop or if those inquires extend the stop beyond its permissible duration. In deciding this issue, the State is not asking this Court to create a revolutionary new rule of law. Rather, the State is asking that this Court continue its "standard practice" of interpreting the search and seizure provision of the Wisconsin Constitution consistently with the search and seizure provision of the United States Constitution. *State v. Houghton*, 2015 WI 79, ¶ 50, 364 Wis. 2d 234, 868 N.W.2d 143. In doing so, this Court should issue an opinion that clarifies that an officer is permitted to perform all "ordinary inquiries" related to a traffic stop even after reasonable suspicion has dissipated because those inquiries are not an extension of the stop, but rather a part of the original scope or "mission" of the stop.

The Supreme Court of the United States has recently affirmed that "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).[5] "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop'" *Id.* at 1615 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)). "[S]uch inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id*. at 1615 (citations omitted). "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.*

In Wisconsin, the principle that traffic related inquiries are a part of the permissible scope of a lawful traffic stop was explained in *Williams,* 258 Wis. 2d 395. In *Williams* the officer observed a young man driving a few blocks from the scene of the domestic abuse incident. *Id.* ¶ 3. The officer pulled the vehicle over to see if the driver was the domestic abuse suspect. *Id*. He was not. While the parties disputed when the officer realized that Williams was not the suspect, the court determined that even if the officer realized that Williams was not the suspect before she asked him his name and requested identification, it nonetheless was reasonable for the officer to make those requests. *Id.* ¶ 18. Thus, it has been established law in Wisconsin that an officer is permitted to ask for a driver's name and

[5] All of the cases cited by Smith on this issue in his response to the petition for review were decided before *Rodriguez*. (*See generally,* Smith's Pet. Resp. 6–10.)

identification even after reasonable suspicion had dissipated and the officer knows that the driver is not the party that the officer is looking for. *See id.*

To reach its conclusion in *Williams*, the court of appeals relied on *State v. Ellenbecker*, 159 Wis. 2d 91, 464 N.W.2d 427 (Ct. App. 1990). *See Williams*, 258 Wis. 2d 395, ¶¶ 19–23. In *Ellenbecker*, the court of appeals concluded that a request for a driver's identification did not transform a lawful "motorist assist" into an unlawful seizure. *See Williams*, 258 Wis. 2d 395, ¶ 19. There, the court reasoned that "there is a public interest in permitting police to request a driver's license from a motorist with a disabled vehicle and in running a status check on the license." *Ellenbecker*, 159 Wis. 2d at 96–97. "The reason for allowing police to request a driver's license on demand is to deter persons from driving without a valid license, since a license is a statement that the driver can be expected to comply with the state's requirements for safe driving." *Id.* at 98.

The court further reasoned that it is good policy to allow officers to make these inquiries because requesting identification allows officers to make accurate written reports of contacts with citizens. *Ellenbecker*, 159 Wis. 2d at 97. Such reporting is necessary in the event that the citizen later complains about improper behavior on the part of the officer or makes any kind of legal claim against the officer. *Id.*

The court's decision in *Ellenbecker* was based, in part, on the statutory obligation that a driver "have his or her license document in his or her immediate possession at all times when operating a motor vehicle and [to] display the license document upon demand from any judge, justice, or traffic officer." *See* Wis. Stat. § 343.18(1); *Ellenbecker*, 159 Wis. 2d at 97. The court explained that while law

enforcement officers do not have unfettered discretion to stop drivers and request display of their licenses, Wisconsin law plainly requires drivers who are lawfully stopped to produce their license on demand. *See id.*; *see also, Williams*, 258 Wis. 2d 395, ¶¶ 20–22.

Because *Ellenbecker* was a motorist assist case, the court had to determine if the officer's seizure of Ellenbecker, when the officer asked for his license and ran a status check, was reasonable. *See Ellenbecker*, 159 Wis. 2d at 95–96. To do so the court weighed the public interest in permitting police to request a driver's license and to run a status check on the license against the degree and nature of the intrusion. *Id.* at 96–97.[6] The court concluded that "[r]equesting a license and conducting a status check after a lawful contact is but a momentary occurrence. The intrusion is minimal at best. This is especially so . . . where the car was stopped and disabled during the status check of the license." *Id.* at 98. And because the intrusion was so minimal, the court concluded that the seizure was reasonable in light of the many grounds that support the public's interest in permitting an officer to request a driver's license and to run a status check on the license.

As recently as 2014, the court of appeals affirmed that if a driver is lawfully stopped, it is reasonable for an officer to ask for the driver's name and identification, even if suspicion supporting the stop had dissipated. In *State v. Winberg,* which is factually analogous to the case here, the police stopped a vehicle because it was registered to a female

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[6] "In a community caretaker case, reasonableness is determined by balancing the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen." *Ellenbecker*, 159 Wis. 2d at 96 (citation omitted).

owner with a revoked driver's license. *State v. Winberg*, No. 2013AP2661-CR, 2014 WL 2197944, ¶ 3 (Wis. Ct. App. May 28, 2014) (unpublished).[7] (Pet-App. 158.) After the officer stopped the vehicle, but before he made contact with the driver, the officer realized that the driver was a man and therefore not the registered owner. *Id.* (Pet-App. 158.) Winberg argued that as soon as the officer realized that he was not the registered owner, any further contact with him was unlawful. *Id.* ¶ 6. (Pet-App. 159.) The court of appeals disagreed:

> [The officer's] action in making contact with Winberg after he realized that Winberg was not the registered driver was still related in scope to the circumstances justifying the initial stop. As established in *Williams,* if a driver is lawfully stopped, it is reasonable for the officer to ask the driver for his or her name and identification, even if at the time the officer makes this request, the suspicion supporting the stop has been dispelled.

Winberg, 2014 WL 2197944, ¶ 19 (citations omitted). (Pet-App. 161.)

The court of appeals explained that an officer does not have to abandon a traffic stop before making contact with the driver. *Id.* Rather, the officer is prohibited from prolonging the traffic stop to conduct *a separate* investigation absent reasonable suspicion to do so. *Id.* Asking for the driver's name and identification is not *a*

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[7] *Winberg*, an unpublished, one-judge opinion issued after July 1, 2009, is cited as persuasive authority, and the State has included a copy of the decision in its appendix. (Pet-App. 158–62.) Wis. Stat. § (Rule) 809.23(3)(b) and (c).

separate investigation into criminal activity. *Id.* (Pet-App. 161.) Rather, such inquiries are ordinary, traffic related inquiries that are part and parcel to the scope of any lawful traffic stop. *Id.*

The Illinois Supreme Court's decision in *Illinois v. Cummings* is also factually analogous to this case. Cummings, like Smith, argued that the mission of a traffic stop is limited to the purpose of the stop, and the Supreme Court of Illinois initially concluded that an officer was not permitted to extend or expand the scope of the stop to ask for the driver's license after reasonable suspicion had dissipated. *See generally People v. Cummings,* 6 N.E.3d 725 (Ill. 2014) (*Cummings I*). (*See also* Smith's Pet. Resp. 9.)[8] The court, however, rejected that position in light of *Rodriguez* and this Court should do the same here.

In *Cummings*, Derrick Cummings was driving a vehicle registered to a woman named Pearlene Chattic. *People v. Cummings,* 46 N.E.3d 248, 249 (Ill. 2016) (*Cummings II*). An officer encountered the vehicle and initiated a traffic stop because there was a warrant out for Chattic's arrest. *Id.* The officer was unaware that the driver was a man until after he had stopped the vehicle. *Id.* The officer asked Cummings for his driver's license and proof of insurance. *Id.* Cummings responded that he did not have a license and was ultimately cited for driving while his license was suspended. *Id.*

[8] "Gonzalez could have simply said to Smith through the broken window, 'You're free to go . . . I thought you were someone else.' . . . [W]ithout any reasonable suspicion of wrongdoing, an occupant should not be seized any further." (Smith's Pet. Resp. 9.)

After the Supreme Court of Illinois initially determined that the license request impermissibly prolonged the traffic stop, the State of Illinois petitioned for writ of certiorari and while the petition was pending, the Supreme Court decided *Rodriguez*. *See Cummings II,* 46 N.E.3d at 249–50. The Court granted the petition for writ of certiorari and remanded to the Supreme Court of Illinois for further consideration in light of *Rodriguez*. *See Illinois v. Cummings*, 135 S. Ct. 1892 (Mem.) (2015).

On remand, the Supreme Court of Illinois concluded that while the Court in *Rodriguez* drew a bright line against prolonging a stop beyond its original scope or "mission" without reasonable suspicion to do so, the Court also provided "firmer guidance" on what an officer is permitted to do as a part of the original scope or "mission" of a lawful traffic stop. *See Cummings II*, 46 N.E.3d at 250. The Illinois court concluded that pursuant to *Rodriguez*, part of the scope or mission of a traffic stop is traffic enforcement. *Id.* at 251. This is not insignificant given the reasonable suspicion for the stop in *Cummings* was not predicated on a traffic code infraction. *See id.* at 249, 251.

Thus, as Illinois has recently concluded, pursuant to *Rodriguez*, there are two parts to the mission of any traffic stop: the initial purpose of the stop and "ordinary inquiries" into traffic enforcement. *See Cummings II*, 46 N.E.3d at 252. Because traffic enforcement is part of the mission of any traffic stop, and because any traffic stop comes with "related safety concerns," officers are permitted to make "ordinary inquiries" such as checking the driver's license, running a warrant check, and inspecting the vehicle's registration and proof of insurance. *Id.* at 251. Officers are allowed to make these "ordinary inquiries" because those inquiries "serve the

same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Rodriguez*, 135 S. Ct. at 1615.

Here, the State asks that this Court clarify that in light of *Rodriguez,* and as previously established in *Williams* and *Ellenbecker*, an officer who performs a lawful traffic stop is permitted to make contact with the driver and make "ordinary inquires" related to traffic enforcement, even after reasonable suspicion supporting the stop has dissipated. These "ordinary inquiries" include such things as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. The State asks this Court to further clarify that an officer does not prolong or extend a lawful traffic stop by performing these inquiries, because the inquiries are a part of the scope or mission of any traffic stop.

II. A police officer does not create a separate Fourth Amendment event by opening the passenger door of a lawfully stopped vehicle to speak to the driver when the driver tells the officer that the driver's side window and door are broken.

As addressed above, a police officer is permitted to approach a lawfully stopped vehicle to explain the basis for the stop to make ordinary, traffic related inquires. Those inquiries are a part of the mission or scope of a lawful traffic stop and are not a separate Fourth Amendment event. The second issue presented requires this Court to determine whether opening the front passenger door of a vehicle to perform these inquiries during a lawful traffic stop somehow

creates a separate Fourth Amendment event. It does not, for two reasons. First, under these circumstances, opening the front passenger door was a reasonable, incremental, *de minimis* intrusion. Second, contrary to Smith's assertion, there is no reasonable expectation that signs of a driver's intoxicated state will remain private when he is behind the wheel of a vehicle.

A. It was reasonable for Sergeant Gonzalez to open the front passenger's side door when Smith said that the driver's side door and window were broken because, in the context of a lawful traffic stop, it was an incremental, *de minimis* intrusion.

The Fourth Amendment prohibits only unreasonable searches and seizures. "Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case." *South Dakota v. Opperman*, 428 U.S. 364, 375 (1976) (internal quotations and citation omitted). And ultimately, reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Mimms*, 434 U.S. at 109.

When a person is lawfully seized during a traffic stop but argues that subsequent police conduct violated the Fourth Amendment, the reasonableness inquiry focuses on that "incremental intrusion." *State v. Griffith*, 2000 WI 72, ¶ 38, 236 Wis. 2d 48, 613 N.W.2d 72 (citing *Mimms*, 434 U.S. at 109). Thus, the issue here is whether the incremental intrusion that resulted from opening the front passenger door was unreasonable. To determine whether the intrusion

was unreasonable, this Court must weigh the public interest served by opening the door against the incremental liberty intrusion that resulted from it. *Id.* (citations omitted).

As implicitly decided in *Mimms,* opening the door was a reasonable, incremental, *de minimis* intrusion when weighed against the legitimate public interest of officer safety. In *Mimms*, the Supreme Court of the United States created a bright-line rule that officers are entitled to have occupants exit a lawfully stopped vehicle even if there is nothing unusual or suspicious about their behavior. *Id.* at 111. It determined that after police lawfully stopped Mimms, the additional intrusion of being ordered out of the vehicle "can only be described as *de minimis." Id.* The incremental intrusion was *de minimis* because:

> The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity."

Id. (quoting *Terry*, 392 U.S. at 17).

The Court concluded that once a vehicle has been lawfully stopped, police may order the occupants out of the vehicle as a matter of course without creating a separate Fourth Amendment event. *Id.*[9] "Establishing a face-to-face

[9] The Court in *Mimms* concluded that there was a separate Fourth Amendment event in that case, but the event was not ordering the driver to exit, it was the subsequent *Terry* frisk, which was supported by reasonable suspicion. *Id.* at 107–08.

confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault." *Id.* at 110. The Court found "it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty." *Id.* And the "mere inconvenience [of getting out of the vehicle] cannot prevail when balanced against legitimate concerns for the officer's safety." *Id.* at 111.

In light of *Mimms*, it must also be true that establishing face-to-face contact through an open door is an incremental, *de minimis* intrusion that does not rise to a separate Fourth Amendment event. The intrusion created by opening a door, but allowing the occupant to remain in the vehicle is extremely minor. And opening the door serves the same purposes as asking the driver to exit the vehicle: the officer is able to better observe the person's movements to mitigate unknown threats.

It must also be true that, in the context of a lawful traffic stop, opening a door of a vehicle to speak to the driver falls within the "least intrusive means reasonably available" because that action is within the permissible scope of the intrusion. In the court of appeals, Smith argued that *Florida v. Royer,* 460 U.S. 491 (1983), required Sergeant Gonzalez to ask if he could open the passenger door or to communicate with Smith solely through the closed window. (Smith's Ct. App. Br. 10–15.) And because Sergeant Gonzalez did not ask, Smith argued that opening the door created a separate Fourth Amendment event. (Smith's Ct. App. Br. 14.) Smith is wrong.

Royer held that when a seizure is predicated on suspicion short of probable cause, the scope of the intrusion on personal liberty permitted during the detention "must be

carefully tailored to its underlying justification." *Royer*, 460 U.S. at 500. And an officer must use the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.*; *see also State v. Arias*, 2008 WI 84, ¶ 32, 311 Wis. 2d 358, 752 N.W.2d 748. However, the scope of the intrusion permitted varies on the facts and circumstances of each case. *Royer*, 460 U.S. at 500.

In the context of a traffic stop, and as a result of *Mimms,* officers have the authority to order a suspect out of a vehicle as a matter of course. *Mimms*, 434 U.S. at 111. *See also State v. Johnson*, 2007 WI 32, ¶¶ 20, 23, 299 Wis. 2d 675, 729 N.W.2d 182. The only reasonable way a person can get out of a vehicle is by opening a door. So, an officer's authority to order a person to get out of a vehicle is essentially authority to order the person to open the door. *See Mimms*, 434 U.S. at 111. And, in the constitutional sense, it does not matter whether the officer opens the door to talk to the occupant or the occupant opens the door upon the officer's order to do so. The incremental, *de minimis* intrusion on personal liberty that occurs when an officer opens a door to speak to an occupant is within the permissible scope of the underlying seizure because the officer has unfettered authority to demand a face-to-face encounter during a traffic stop. *See Royer*, 460 U.S. at 500; *Mimms*, 434 U.S. at 111.

And even if opening a door is not always the "least intrusive means reasonably available" to achieve a face-to-face encounter, it was here. Based on the facts in this case, Sergeant Gonzalez acted reasonably by opening the door. Sergeant Gonzalez did not just walk up to the passenger side of the vehicle and yank the door open unannounced; he first walked to the driver's side and asked Smith to open that door. (36:9, Pet-App. 122.) Smith was cooperative,

communicative, and told Sergeant Gonzalez that the driver's side door and window were broken. (36:21, Pet-App. 134.)

Not only was he permitted to demand face-to-face contact with Smith, he also had no reason to believe that Smith, in the amount of time it took for Sergeant Gonzalez to walk from the driver's side to the passenger's side of the vehicle, suddenly had decided to refuse to cooperate. As Sergeant Gonzalez walked to the passenger side, Smith was moving to that side of the seat. (36:9, Pet-App. 122.) The only reason for him to do so would be to comply with Sergeant Gonzalez's initial request to open the door or window. Under these circumstances, opening the passenger door was within the permissible scope of the underlying detention because it was the only way to facilitate face-to-face contact with Smith. *See Royer*, 460 U.S. at 500; *Mimms*, 434 U.S. at 111.

B. Sergeant Gonzalez's opening of the passenger door to speak to Smith was not a separate Fourth Amendment event because it did not infringe upon any reasonable expectation of privacy.

In the court of appeals, Smith argued that he had a reasonable expectation that the evidence of intoxication emanating from him—the smell of alcohol, his bloodshot eyes, and his difficulty with coordination—would remain private and hidden from Sergeant Gonzalez. (Smith's Ct. App. Br. 16.) And thus, when Sergeant Gonzalez opened the passenger door, he performed a distinct Fourth Amendment search. The court of appeals decided that Smith's argument was "cogent." *Smith*, 2016 WL 5415968, ¶ 12. It was not.

Not every search implicates the Fourth Amendment. "In assessing when a search is not a search," the United States Supreme Court has concluded that a Fourth

Amendment search occurs only when the government violates a subjective expectation of privacy that society recognizes as reasonable. *Kyllo v. United States*, 533 U.S. 27, 32–33 (2001). "Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Caballes*, 543 U.S. at 408.

Whether an individual had a legitimate expectation of privacy that was invaded by some government action is the threshold question in assessing whether there was an unreasonable search in violation of the constitution. *State v. Milashoski*, 163 Wis. 2d 72, 85, 471 N.W.2d 42 (1991). "The reasonableness of the government's conduct does not even come into question unless and until it is established that the defendant had a legitimate expectation of privacy." *Id.* The defendant bears the burden to prove, by a preponderance of the evidence, that he had an actual, subjective expectation of privacy and that society is willing to recognize that expectation as reasonable. *Id.* Smith cannot meet this burden on either question.

1. Smith did not have a subjective expectation of privacy in the evidence of intoxication emanating from his person nor in remaining in the closed vehicle.

Smith's actions did not exhibit a subjective expectation of privacy in keeping the vehicle door closed to shield from observation the signs of intoxication emanating from his person. And thus, Sergeant Gonzalez did not create a separate Fourth Amendment event when he opened the passenger door. *See Kyllo*, 533 U.S. at 33 (A Fourth Amendment search does not occur if a person has not "manifested a subjective expectation of privacy in the object of the challenged search.").

Smith, after telling Sergeant Gonzalez that the driver's side door and window were broken, either pulled himself into the passenger seat or reached over to open the passenger door. (36:9, Pet-App. 122.) The only reason for Smith to move to the passenger side of the vehicle was to either open the passenger side door or to roll down the passenger side window. Neither of those actions is consistent with Smith holding a subjective expectation that he would remain in the closed vehicle where he could keep Sergeant Gonzalez from observing evidence of his intoxication. If Smith subjectively expected to shield from observation the signs of intoxication emanating from his person and to communicate with Sergeant Gonzalez through the closed window, there would be no reason to move to the functional side of the vehicle.

2. Smith did not have a reasonable expectation of privacy in the evidence of intoxication emanating from his person nor in remaining in the closed vehicle.

Even if Smith did have a subjective expectation of privacy that would allow him to remain in the vehicle and keep Sergeant Gonzalez from learning that he was intoxicated, such an expectation is unreasonable. Consequently, opening the door to speak to Smith was not a separate Fourth Amendment search, and Sergeant Gonzalez could do so as a part of a lawful traffic stop. *See Mimms*, 434 U.S. at 111.

Smith is not challenging a physical search of the interior of the vehicle; he had a legitimate (though limited) expectation that his personal effects in the interior would remain private, and they did. *Cardwell v. Lewis*, 417 U.S. 583, 591–92 (1974). He is also not challenging a physical

search of his person, in which he also had a reasonable expectation of privacy that would have required some articulable facts for Sergeant Gonzalez to invade. *See Mimms*, 434 U.S. at 11–12 (once an occupant is out of a vehicle, the propriety of a frisk is controlled by the standard set in *Terry v. Ohio*).

What Smith is actually claiming is that he had a reasonable expectation that the evidence of intoxication, emanating from his person, would remain inside the vehicle. (Smith Ct. App. Br. 16.) Neither this Court nor the Supreme Court of the United States has ever recognized such a privacy interest, and it can hardly be said that society would recognize that expectation as reasonable. *Cf. Caballes*, 543 U.S. at 408–09 (the hope "that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable") (punctuation and citation omitted). *See also, State v. Scull*, 2015 WI 22, ¶¶ 26–27, 361 Wis. 2d 288, 862 N.W.2d 562 (recognizing that dog sniffs of vehicles that reveal only drugs are not searches because there is no constitutionally protected interest in possessing contraband). And, as explained above, Smith had no reasonable expectation of privacy that would have allowed him to keep his person inside the vehicle. Thus, in the context of a lawful traffic stop, it is constitutionally irrelevant who opened the door because opening the door did not reveal anything Smith had a legitimate expectation of privacy in.

Several other jurisdictions have reached this conclusion. In Utah, an officer approached a parked and idling vehicle that the officer believed may have been involved in a reckless driving incident. *State v. James*, 13 P.3d 576, 577 (Utah 2000). The officer opened the driver's side door and asked the driver, Douglas James, to get out of the vehicle. *Id.* at 577–78. James failed a sobriety test and

was ultimately convicted of driving under the influence of an intoxicant. *Id.* The Utah Court of Appeals ruled that by opening the door, the officer performed an illegal search. *Id.* The Utah Supreme Court reversed. *Id.* The court noted that "[t]he court of appeals' analysis overlooks the fundamental distinction between detention and questioning of James himself (a procedure specifically authorized by *Mimms*) and a search for physical items of evidence not in plain view." *Id.* at 580. The court concluded that:

> Causing the door to be opened in some manner was a reasonable and practical means for obtaining compliance with [the officer's] authority to lawfully require James to step from the vehicle. As such, the opening of the door was an incidental factor in the investigation of James's impaired physical condition, and not an independent search of the vehicle. To draw distinctions as to who actually opened the door and the nature of any conversation or notification occurring beforehand would elevate form over substance.

Id.

Similarly, in Idaho, police observed several traffic violations but by the time they caught up to the vehicle, it was lawfully parked on the shoulder with its lights and engine off. *State v. Irwin*, 137 P.3d 1024, 1025 (Idaho Ct. App. 2006). On further inspection, the officers saw the occupant curled up on the floor behind the front seats. *Id.* One of the officers opened the passenger door of the vehicle and ordered the individual, Leanna Irwin, to come out. *Id.* While talking to Irwin, the officers became suspicious that she had been driving under the influence and arrested her after she failed several sobriety tests. *Id.* Irwin claimed that the officer's opening the door without first verbally ordering her out of the vehicle or attempting to speak to her solely

through the vehicle window constituted an illegal search. *Id.* at 1027.

The court rejected that argument, noting that requiring the officers to first attempt to communicate solely through the window was "utterly at odds with the rule that police officers may order the occupants out of lawfully stopped vehicles." *Id.* at 1028. The court also determined that the officers were not required to verbally order Irwin out of the vehicle before opening the door, "because an officer's action of opening a car door before directing the occupant to exit is no more intrusive than a verbal command followed by the occupant's opening the door." *Id.* "Either way, the door will be opened and the officer will see inside." *Id.* The court concluded that because officers have "clear authority to order people out of vehicles during a roadside stop, it is constitutionally irrelevant whether the officer or the occupant opens the car door to enable the occupant to exit." *Id.*

Likewise, the Minnesota Supreme Court observed that "there is little practical difference between ordering a driver to open his door and get out of his car, on the one hand, and opening the door for the driver and telling him to get out, on the other." *State v. Ferrise*, 269 N.W.2d 888, 890 (Minn. 1978). The court concluded that without any verbal commands to the passenger beforehand, the officer was permitted to open the passenger door to ask the passenger to verify the driver's name. *Id.* at 891.

Like the Utah, Idaho, and Minnesota courts, this Court should conclude that opening the door of a lawfully stopped vehicle to speak to an occupant is not a separate Fourth Amendment search. When an officer opens a vehicle door to speak to the occupant, nothing is revealed that would

not be revealed if the occupant opened the door, thus nothing is revealed that the occupant has a constitutionally protected interest in keeping hidden. This Court should also reject the argument that an officer must first attempt to communicate solely through the window because expecting an officer to yell at a driver through a closed window is impractical and illogical. As the Idaho court correctly noted, both positions are "utterly at odds with the rule that police officers may order the occupants out of lawfully stopped vehicles." *Irwin*, 137 P.3d at 1028.

That is not to say that an officer may open a vehicle door for any purpose and at any time without running afoul of the Fourth Amendment. It is undisputed that motorists have a legitimate, albeit lowered, expectation that the interior of a vehicle will not be physically searched by police and that the personal effects it contains will not be seized. *Cardwell*, 417 U.S. at 591–92. For example, during a traffic stop of a single occupant vehicle, the officer could not walk up to the unoccupied rear of the vehicle and open the rear door to inspect the interior of the vehicle. However, as the Utah court noted in *James*, it is important not to overlook the fundamental distinction between the detention and questioning of the defendant himself and a physical search of the passenger compartment for evidence. *See James*, 13 P.3d at 580. The former is not a search because it does not infringe on a legitimate expectation of privacy; the latter does, thus it is a search subject to the Fourth Amendment.

To reiterate, the State is not arguing that it is constitutionally permissible for an officer to open a door during a lawful traffic stop for any purpose beyond the detention and questioning of the occupant. But when a vehicle has been lawfully stopped, the occupant does not

have a constitutionally protected interest in keeping himself and any evidence of intoxication naturally emanating from his person inside of the vehicle. Consequently when, as here, the officer opens the door only to lawfully question an occupant, the officer does not create a separate Fourth Amendment event.

In sum, Sergeant Gonzalez had the right to face-to-face contact with Smith, and he did not open the vehicle door to search the passenger compartment for physical evidence. He opened the vehicle door to facilitate the "ordinary inquires" related to a lawful traffic stop. Smith had no legitimate expectation of privacy that would allow him to remain in the vehicle, behind the barrier of the vehicle's door and closed window. Because Smith had no legitimate expectation of privacy in doing so, Sergeant Gonzalez's opening of the door was not a separate Fourth Amendment search and there is no basis for the circuit court to suppress evidence.

III. Sergeant Gonzalez would have inevitably discovered that Smith was driving while intoxicated.

Even if this Court determines that there was an illegal search here, the evidence of Smith's intoxication and his statements should not be suppressed. Exclusion is a judicial remedy intended to deter the government from obtaining evidence as a result of a constitutional violation. *See State v. Eason*, 2001 WI 98, ¶¶ 39–45, 245 Wis. 2d 206, 629 N.W.2d 625. But not all violations require the exclusion of the evidence. *Id.* ¶ 43. Exclusion is appropriate only "when the benefits of deterring police misconduct 'outweigh the

substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system.'" *State v. Jackson*, 2016 WI 56, ¶ 46, 369 Wis. 2d 673, 882 N.W.2d 422 (citations omitted).

In *Nix v. Williams*, the United States Supreme Court adopted an inevitable discovery exception to the exclusionary rule. *Nix v. Williams*, 467 U.S. 431 (1984). Under this exception, evidence is admissible if the prosecution establishes by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered by lawful means even if no constitutional violation had taken place. *Id*. at 434–44. The doctrine is designed to put the police in the same position, not a worse position, than they would have been in if no police error or misconduct occurred. *Williams*, 467 U.S. at 443–44. *See also, Jackson*, 369 Wis. 2d 673, ¶ 66.

The inevitable discovery doctrine applies here because there is no series of events which would have prevented a face-to-face discussion between Smith and Sergeant Gonzalez after the vehicle was lawfully stopped. Therefore, there is no possibility that Sergeant Gonzalez would not have noticed Smith's intoxication absent the alleged illegal search. After telling Sergeant Gonzalez that the driver's side window and door were broken, Smith moved to the passenger side of the vehicle. (36:9, Pet-App. 122.) Practically, the only reason to do so would be to either open the passenger door or the passenger window. And even if Smith did not intend to open either the door or the window, Sergeant Gonzalez had unfettered authority to order Smith out of the vehicle. *Mimms*, 434 U.S. at 111. Had Smith rolled the window down, Sergeant Gonzalez would have observed

signs of intoxication. Had Smith opened the door, Sergeant Gonzalez would have observed signs of intoxication. Had Smith exited the vehicle upon command, Sergeant Gonzalez would have observed signs of intoxication.

There is no dispute that Smith was extremely intoxicated. Smith's blood alcohol content was 0.38, nearly five times the legal limit. (4:3, Pet-App. 156.) Sergeant Gonzalez immediately noticed the strong smell of alcohol and Smith's red, bloodshot eyes. (4:2, Pet-App. 155; 36:11, Pet-App. 124.) When Sergeant Gonzalez commented after Smith's blood test that Smith's blood was "80 proof" Smith joked that it was "more like 90!" (4:3, Pet-App. 156.) And Smith admitted at the suppression hearing that he was "very drunk" that night. (36:34.)

The fact is, once Smith was legally stopped, Sergeant Gonzalez had the authority to require Smith to speak to him face-to-face. There is simply no possible way that Sergeant Gonzalez would not have discovered that Smith was extremely drunk. Thus, if this Court determines that an illegal search occurred when Sergeant Gonzalez opened the passenger door, the evidence of Smith's intoxication is nonetheless admissible because it inevitably would have been discovered. Because the evidence in this case is admissible, the circuit court did not err in denying his motion to suppress and there is no basis upon which to allow Smith to withdraw his guilty plea.

CONCLUSION

For the foregoing reasons, the State asks that this Court reverse the court of appeals decision and affirm Smith's judgment of conviction.

Dated this 22nd day of February, 2017.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 8028 words.

_____
TIFFANY M. WINTER
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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).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 22nd day of February, 2017.

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TIFFANY M. WINTER
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Frederick S. Smith
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a appendix.

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, 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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TIFFANY M. WINTER
Assistant Attorney General

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