

RECEIVED**01-07-2020****CLERK OF SUPREME COURT
OF WISCONSIN****SUPREME COURT OF WISCONSIN**Appeal No. 2017-AP-774

STATE OF WISCONSIN,**Plaintiff-Respondent,****v.****COURTNEY C. BROWN,****Defendant-Appellant-Petitioner.**

REVIEW OF A DECISION OF THE COURT OF
APPEALS, DISTRICT II, AFFIRMING A FINAL
ORDER OF THE CIRCUIT COURT FOR
FOND DU LAC COUNTY,
CASE NO. 2013-CF-428,
THE HON. DALE ENGLISH, AND
THE HON. RICHARD J. NUSS, PRESIDING

**NON-PARTY BRIEF OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION OF WISCONSIN**

Wis. Stat. § (Rule) 809.19(7)

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INTRODUCTION

What are the constitutional bounds of a traffic stop?

This Court has held that “a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission of issuing a ... ticket.” *State v. Hogan*, 2015 WI 76, ¶ 34, 364 Wis. 2d 167, 868 N.W.2d 124 (internal quotation marks omitted) (quoting *Rodriguez v. United States*, 575 U.S. 348, 354-55 (2015)). It has further held that “the line between traffic stops of proper duration and those that extend into unconstitutional territory [is drawn] according to functional considerations.” *State v. Floyd*, 2017 WI 78, ¶ 22, 377 Wis. 2d 394, 898 N.W.2d 560. Notably, officers may “take certain negligibly burdensome precautions in order to complete [their] mission safely.” *Id.* ¶ 27 (quoting *Rodriguez*, 575 U.S. at 356).

The Court, however, has not clearly required officers to articulate the specific safety concerns that justify extending a stop beyond the time necessary to accomplish its original mission. We urge it to do so here.

Absent such a requirement, the Court is effectively “authorizing and condoning the profiling of persons on something other than ‘additional suspicious factors which are sufficient to give rise to an articulable suspicion’ that the person has or is committing a crime separate and distinct from the minor traffic violation.” *State v. Brown*, 2019 WI App 34, ¶ 32, 388 Wis. 2d 161, 931 N.W.2d 890 (Reilly, J., concurring) (citing *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999)). Race is frequently that “something other”: Studies show that officers are more likely to both pull over and search people of color than White people – in Wisconsin and across the U.S. This pattern holds even though searches of White drivers more frequently result in discovery of contraband.

This case presents the Court with the opportunity to: clarify what the Fourth Amendment requires of police officers during traffic stops; tailor traffic stop jurisprudence so that it is factually relevant to the experiences of both officers and drivers; and take an additional step toward

eliminating unnecessary racial profiling in Wisconsin without sacrificing officer safety. The American Civil Liberties Union of Wisconsin Foundation accordingly urges the Court to hold that only specific, articulable facts supporting a reasonable safety concern may serve as a basis for extending a traffic stop.

ARGUMENT

I. RESEARCH DEMONSTRATES THAT SEARCHES INCIDENT TO A STOP DISPROPORTIONATELY AFFECT PEOPLE OF COLOR.

Police officers are more likely to pull over people of color, particularly Black people, than they are White people. Officers are similarly more likely to search people of color during a traffic stop even though searches of White drivers more frequently uncover contraband. Thus, if unchecked, the practice of extending traffic stops beyond the time necessary to accomplish their original purpose will continue to disproportionately – and improperly – affect people of color.

Nationwide, officers are more likely to pull over Black drivers than they are to pull over White drivers. *See, e.g.,*

Emma Pierson et al., *A Large-scale Analysis of Racial Disparities in Police Stops Across the United States*, Stanford Computational Policy Lab 3-4 (Mar. 13, 2019) [hereinafter *Pierson*].^{1, 2} This Black-White stop disparity is greater for municipal police departments than for state patrols. *Id.* at 4.

In Wisconsin, multi-year data from Milwaukee uncovered that Black and Latino drivers were more likely than White drivers to be subject to traffic stops, both in racially heterogeneous and predominantly White police districts. Declaration of David Abrams, Ex. A. at 4, *Collins v. City of Milwaukee*, No. 17-CV-234 (E.D. Wis. Mar. 26, 2018), Dkt. 85-13 [hereinafter *Abrams*]. After controlling for non-racial and non-ethnic factors, the traffic stop rate for Black drivers remains **more than 500 percent higher** than for White drivers. *Id.*

These disparities extend to police searches of motorists – and cannot be explained by racial differences in so-called

¹ The study included several years of data from Madison and the Wisconsin State Patrol. *See id.* at 3 (Table 1).

² <https://5harad.com/papers/100M-stops.pdf>.

“hit” rates. In Milwaukee, as observed by David Abrams, Professor of Law, Business Economics, and Public Policy at the University of Pennsylvania, Black drivers subjected to traffic stops were about 50 percent more likely to be searched than White drivers. *Abrams* at 5. Yet searches of Black drivers were more than 20 percent less likely to uncover drugs than searches of White drivers. *Id.* (also observing that “rates of drug and weapon discovery during traffic stops are extremely low, occurring in well less than one percent of traffic stops in Milwaukee”).

Other studies of data from Wisconsin and around the country similarly show that “the bar for searching [B]lack and Hispanic drivers is generally lower than for searching White drivers....” *Pierson* at 6; *see also* Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 *Annals of Applied Stat.* 1193, 1203 (2017) (police in North Carolina search Black and Latino drivers more frequently than White drivers, but searches of White drivers more often yield contraband); *Alexander v. Hunt*,

No. 16-CV-192, 2018 WL 3801240, at *2 (D. Vt. Sept. 9, 2018) (describing study “show[ing] that Bennington police officers searched Black drivers at more than five and a half times the rate they searched White drivers, and that a lower percentage of Black than White drivers were found to have committed arrestable offenses after being searched.”); Joshua Chanin et al., *Traffic Enforcement in San Diego, California: An Analysis of SDPD Vehicle Stops in 2014 and 2015* at 59 (Nov. 2016) (in San Diego, CA, 8.65% of Black drivers were searched but only 7.9% had contraband while 5.04% of matched White drivers were searched and 12.4% had contraband);³ Gideon’s Army, *Driving While Black: A Report on Racial Profiling in Metro Nashville Police Department Traffic Stops* 10-11 (2016) (finding significant and increasing racial disparities in both probable cause and consent searches, despite those searches being more likely to

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<https://www.sandiego.gov/sites/default/files/sdpdvehiclestopsfinal.pdf>.

yield incriminating evidence when the driver is White);⁴ Council on Crime and Justice & Institute on Race & Poverty, *Minnesota Racial Profiling Report* (Sept. 22, 2003) at 3 (finding officers in Faribault, Minnesota subjected Latino drivers to discretionary searches at six times the rate of White drivers despite being three times more likely to find contraband in searches of White drivers)⁵; Alexander Weiss Consulting, LLC, *Illinois Traffic Stop Study, 2015 Annual Report*, at 10-12 (2015) (data from state and local Illinois law enforcement agencies showed that a greater percentage of minority drivers are subject to both consent searches and dog sniffs than White drivers, but a greater percentage of White drivers are found with contraband).⁶

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<https://drivingwhileblacknashville.files.wordpress.com/2016/10/driving-while-black-gideons-army.pdf>.

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<https://www.leg.state.mn.us/docs/2003/mandated/030508/www.crimeandjustice.org/Pages/Publications/Reports/Racial%20Profiling%20Study/Faribault-Final.pdf>.

⁶ <http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2015/2015%20ITSS%20Executive%20Summary.pdf>.

Jonathan Blanks, a research associate at the Cato Institute, concludes that such disparate tactics undermine police legitimacy. Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case W. Res. L. Rev. 931 (2016). Thus, “when the stop was for a minor infraction and led to the officer asking prying questions and requesting to search the vehicle, the stops engendered hostility and resentment among all races, but particularly among African Americans and Latinos—who were stopped much more often for investigatory purposes....” *Id.* at 934.

This research confirms the real and disparate effects of police search decisions. Continuing to allow officers to extend traffic stops beyond their original purpose—and particularly to extend them to search drivers and vehicles—without a specific, articulable justification, will only compound these inequalities.

II. ROUTINE TRAFFIC STOPS DO NOT POSE A SERIOUS RISK TO POLICE OFFICERS.

Research shows that routine traffic stops do not pose an inordinate risk to police officers. Pursuant to his expert report filed in *Collins v. City of Milwaukee*, No. 17-CV-234 (E.D. Wis.), Professor Abrams studied all traffic stops conducted by the Milwaukee Police Department between 2011 and 2015. In all, that amounted to 580,816 stops. *Abrams* at 22. Only 2.5 percent of those stops led to a search, and in only 3.2 percent of those searches did police discover a weapon. *Id.* This means police discovered a weapon in only 0.08 percent of all traffic stops in Milwaukee during those years.

More to the point, it is very rare for an officer to be attacked during a routine traffic stop. A 2019 Michigan Law Review article demonstrates just how rare. The study underlying the article analyzed traffic stop data from Florida collected over a ten-year period (2005-2014). Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 Mich. L. Rev. 635, 661–662 (2019). Based on the

study's findings, the author made several conservative estimates regarding the dangers police officers face during routine traffic stops: felonious killing of an officer – one in every 6,500,000 stops; assault resulting in serious injury to an officer – one in every 361,111 stops; and assault of an officer – one in every 6,959 stops. *Id.* at 640.

What's more, “[f]or routine traffic stops, the most commonly used weapon against officers [more than 60 percent of the time] was ‘personal weapons’—namely, the driver’s or passenger’s hands, fists, or feet,” while a gun was used in just 1.99 percent of those assaults. *Id.* at 673. It thus is not only rare for officers to be harmed by weapons that could be discovered during a search, but extending stops to order drivers out of their vehicles tends to decrease, not increase, officer safety.

Indeed, the Florida data shows that officers face little risk of violence unless one of a number of aggravating factors is present.

[F]our variables preceded the violence
in most (just under 94%) of the

evaluated cases: (1) the encounter resulted from a criminal enforcement stop rather than a routine traffic stop; (2) the driver refused to submit to the encounter, either by refusing to pull over or by fleeing, on foot or in the vehicle, after initially pulling over; (3) the officer reported noticing clear signs of intoxication upon initial contact with the driver or passenger; or (4) *the officer invoked their authority during the stop in some way beyond asking for basic information, requesting documentation, or running a records check—for instance, ordering drivers out of the car or placing their hands on the drivers.*

Id. at 641 (emphasis added). In other words, it is the “aggressive police act” of extending a stop, *Brown*, 388 Wis. 2d 161, ¶ 34, especially the decision to order a driver out of the car, which tends to put officers in peril.

As Justice Kelly has succinctly noted, “[i]s it really necessary to point out that concerns over the officer's safety would vanish if he ended the seizure?” *State v. Smith*, 2018 WI 2, ¶ 82, 379 Wis. 2d 86, 905 N.W.2d 353 (Kelly, J., dissenting), *cert. denied*, 139 S. Ct. 79 (2018).

III. THE COURT SHOULD REQUIRE OFFICERS TO ARTICULATE A SPECIFIC, REASONABLE SAFETY CONCERN FOR EXTENDING A TRAFFIC STOP BEYOND THE TIME NECESSARY TO ACCOMPLISH ITS ORIGINAL MISSION.

Both this Court and the Supreme Court of the United States have held that police officers may not extend traffic stops beyond the time necessary to accomplish the original purpose. While officers can take reasonable measures to protect themselves, this Court has not yet made clear that they need to identify their safety concerns with any specificity. Requiring officers to articulate why they felt endangered in a given traffic stop setting would square with existing Fourth Amendment case law without making officers less safe.

“[T]he 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*, 575 U.S. at 354; *see also Illinois v. Caballes*, 543 U.S. 405, 407 (2005). An officer may also check “the driver’s license, determin[e] whether there are outstanding warrants against the driver, and

inspect[] the automobile’s registration and proof of insurance;” these “ordinary inquiries” are considered part of the mission of the stop. *Rodriguez*, 575 U.S. at 355.

However, an officer violates the Fourth Amendment by extending the traffic stop beyond the time necessary to accomplish its mission. *Hogan*, 364 Wis. 2d 167, ¶ 34; *see also State v. Wright*, 2019 WI 45, ¶ 28, 386 Wis. 2d 495, 926 N.W.2d 157. This means that an officer violates the Fourth Amendment by measurably extending the duration of a traffic stop in order to attend to baseless or unrelated safety concerns.

As traffic stops are similar to *Terry* stops, *Wright*, 386 Wis. 2d 495, ¶ 23, courts should require police officers to articulate the reasons, including safety concerns, for initiating and extending a traffic stop. In *Terry*, the United States Supreme Court held that “in justifying the particular intrusion *the police officer must be able to point to specific and articulable facts* which, taken together with rational inferences from those facts, reasonably warrant that

intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (emphasis added). Therefore, if an officer justifies extending a traffic stop by the need to attend to safety concerns, the officer must be required to set forth those concerns, and the concerns must be plausible. While reasonable and particular safety concerns can undoubtedly justify an extension, a generic “officer safety” rationale cannot. *Cf. Blanks, Thin Blue Lies*, *supra*, at 941 (“By definition, police officers only try to gain consent to search a car when the officers lack the probable cause to suspect criminal activity. Therefore, the use of deception to gain that consent must be used against a presumptively innocent person, subverting the principle and spirit of Fourth Amendment protections.”).

Other jurisdictions have “repeatedly rejected generalized, unsubstantiated claims related to officer safety as a basis for extending a traffic stop.” *State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017); *see also United States v. Smith*, 37 F. Supp. 3d 806, 812–13 (M.D. La. 2014); *United States v. Henderson*, 463 F.3d 27, 45–47 (1st Cir. 2006); *State*

v. McCaulley, 161 Ohio App. 3d 568, 2005-Ohio-2864, 831 N.E.2d 474, ¶¶ 10-12. This Court should follow suit and require officers to articulate the specific, reasonable safety concerns for extending a traffic stop beyond the time necessary to accomplish the original purpose.

IV. OFFICER DEERING EXTENDED A ROUTINE TRAFFIC STOP BEYOND THE TIME NECESSARY TO ACCOMPLISH ITS ORIGINAL PURPOSE, IN VIOLATION OF MR. BROWN'S FOURTH AMENDMENT RIGHTS.

Officer Deering engaged in activities unrelated to the mission of this routine traffic stop. Deering pulled over Mr. Brown – a Black man - for running a stop sign and later learned he was not wearing a seat belt. *Brown*, 388 Wis. 2d 161, ¶¶ 3-9. Deering then proceeded to ask Brown questions unrelated to stop signs or seat belts. *Id.* Upon returning to his squad car, Deering inquired about the availability of a drug-sniffing dog. *Id.* Deering later asked Brown to exit his vehicle, walked him to the squad car, and asked him to place his hands behind his back, not so Deering could better explain the warning Brown was about to receive, but so he could ask

Brown to consent to a search. *Id.* These activities are not related to Brown's traffic violations, nor are they included in the "ordinary inquiries" permitted by *Rodriguez*.

These activities were also unrelated to Officer Deering's safety. Officer Deering did not have, much less could he articulate, any safety concerns; instead, he admitted that that there were no signs Brown had a weapon in his possession and that he did not consider the stop high-risk. *Id.* Deering did not even inquire whether Brown had weapons on him until *after* he walked Brown to the squad car. *Id.* Moreover, the additional "safety officer[s]" on scene never made contact with Brown. *Id.*

When Officer Deering approached Mr. Brown's vehicle for the second time, he had both Brown's license and a warning for the violations in his possession. *Id.* He could have returned the license, issued and explained the warning, and concluded the stop safely. He did not.

Taken together, Officer Deering's actions extending the stop were unrelated to the purpose of the stop, did not fall

into the allowable “ordinary inquiries,” and had no bearing on his safety. *See id.* ¶ 31 (Reilly, J., concurring) (“We should have the intellectual honesty to call the “mission” [of the Brown traffic stop] what it is—an independent, but unconstitutional ground to continue an investigation and not a mission to protect officer safety.”) Moreover, the research discussed above suggests that Deering made himself statistically less safe by ordering Brown out of the vehicle.

For no constitutionally justifiable reason, those actions measurably extended the traffic stop beyond the time necessary to accomplish its original purpose. As such, Mr. Brown was searched during an unlawful detention. Therefore, this Court should suppress any discoveries made during that search. To rule otherwise would be to allow extensions of traffic stops based on an officer safety rationale, when the officer admitted that his safety was not at risk.

CONCLUSION

For the reasons set forth above, the American Civil Liberties Union of Wisconsin Foundation urges the Court to

reverse the decision of the Court of Appeals and hold that traffic stops may not be extended for officer safety purposes unless the officer can articulate specific, reasonable safety concerns for doing so.

Dated: January 7, 2020

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CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,852 words.

Dated this 7th day of January, 2020.

s/ Kendall W. Harrison

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**CERTIFICATION OF COMPLIANCE WITH
RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, 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 7th day of January, 2020.

s/ Kendall W. Harrison

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CERTIFICATE OF SERVICE

I certify that on January 7, 2020 three true and correct
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