STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1813-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ASHLEY JEAN CAMPBELL,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

Respectfully submitted,

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INTRODUCTION

Police in Sawyer County stopped Ashley Jean Campbell's Pontiac for failing to display a front license plate. A brief investigation revealed that Campbell's license was suspended and that the rear license plate displayed on the Pontiac was registered to a different vehicle. During the course of the stop, a second unit arrived with Trace, a drug-sniffing canine. As Trace conducted a sniff around the perimeter of the Pontiac, he jumped into the car through a door that Campbell left open and began scratching at a purse on the floor of the car—a sign that he had detected drugs. A search of the purse revealed a glass jar containing marijuana and a glass smoking pipe. The State charged Campbell with possession of THC and possession of drug paraphernalia. After an unsuccessful motion to suppress, Campbell pleaded no contest to one count and received a fine.

Campbell appealed, arguing that the circuit court erred in applying the "instinct exception" to the case. Under the instinct exception—recognized in several other jurisdictions—a suspect's Fourth Amendment right against unreasonable search and seizure is not violated when a canine conducting a lawful sniff around the perimeter of a vehicle enters the vehicle without the direction or facilitation of his handler and is acting "instinctively." A canine is acting instinctively if it is (a) seeking out an odor that it is trained to seek out; or (b) pursuing a scent that it already detected outside the vehicle. In response, the State acknowledged that no Wisconsin case had yet adopted the instinct exception, but it argued that the court of appeals should adopt the exception as consistent with Fourth Amendment jurisprudence.

In a decision recommended for publication, the court of appeals reversed. The court neither adopted nor rejected the instinct exception, but instead held that even if the instinct exception were to apply in Wisconsin generally, it did not apply to this case because the canine handler—according to

the court—"implicitly encouraged" the canine conducting the sniff to enter the vehicle through an open door. The court arrived at this conclusion after conducting its own review of the dashboard camera footage in the record. The court's conclusion about the officer's "implicit encouragement" for the dog to enter the vehicle conflicted with the circuit court's finding that the dog entered the vehicle without any direction from law enforcement, but it failed to address that conflict, much less conduct the necessary analysis that would warrant disregarding the circuit court's finding.

This Court should grant review to address two related legal issues: one constitutional, and one procedural. First, this Court should address the viability of the "instinct exception" in Wisconsin. It should hold that when a police canine enters a suspect's vehicle instinctively during a legal sniff without an officer's direction, assistance, or encouragement, no Fourth Amendment violation has occurred. Second, this Court should clarify the standard of review applicable to situations where a circuit court's findings of fact are based on a combination of video and testimonial evidence. It should reaffirm that when a circuit court makes a finding of fact based on a combination of testimonial evidence and video evidence, the court of appeals may not substitute its view of the evidence for the circuit court's unless the circuit court's factual finding was clearly erroneous. Here, because the circuit court's finding that the officer did not direct the canine into Campbell's vehicle was not clearly erroneous, the instinct exception applies—this Court should hold that there was no Fourth Amendment violation, and it should reverse the court of appeals' decision.

ISSUES PRESENTED FOR REVIEW

1. Should Wisconsin adopt the "instinct exception," recognized in other jurisdictions, and hold that a suspect's Fourth Amendment right against unreasonable search and seizure is not violated when a canine conducting a lawful sniff

around the perimeter of a vehicle, acting instinctively, enters the vehicle without the handler's direction, facilitation, assistance, or encouragement?

The court of appeals assumed, without deciding, that the instinct exception was valid under Wisconsin law and concluded that the State had failed to demonstrate the applicability of the exception to the facts of this case.

2. Did the court of appeals apply the proper standard of review to the circuit court's decision when it concluded that the instinct exception would not apply because the officer "implicitly encouraged" the dog to enter Campbell's vehicle despite the circuit court's finding that the officer did not direct the dog to enter it?

The court of appeals concluded that the State failed to meet its burden under any formulation of the instinct exception because of the officer's "implicit encouragement," but did not acknowledge any conflict with the circuit court's factual findings or explain why those findings were clearly erroneous.

STATEMENT OF CRITERIA SUPPORTING REVIEW

This Court's review "will help develop, clarify or harmonize the law" because the issues presented are "question[s] of law of the type that [are] likely to recur unless resolved by the supreme court." *See* Wis. Stat. § (Rule) 809.62(1r)(c)3. Specifically, courts and litigants alike would benefit from clarity on the proper Fourth Amendment analysis to conduct in a situation where a police canine conducting a lawful sniff of a vehicle enters the vehicle without being directed to do so by its handler. Similarly, appellate courts and litigants would benefit from additional clarity on the standard of review that applies to circuit courts' factual findings when those findings are based on both witness testimony and video evidence. Such factual findings need not be limited to those in traffic stop cases; a ruling from this Court could conceivably apply to all types of situations,

from videorecorded custodial interviews to eyewitness recordings of crimes as they occur.

STATEMENT OF THE CASE

On Friday, December 15, 2017, Wisconsin State Trooper Mitch Kraetke was on patrol in Sawyer County when he saw a green Pontiac without a front license plate being driven by someone not wearing a seat belt near the intersection of Highways 27 and 70. (R. 1:2.) Trooper Kraetke initiated a stop of the vehicle, and as he did so, he radioed for assistance from a Sawyer County canine unit. (R. 1:3.) He then made contact with the driver—Campbell—who admitted that she did not have insurance on the vehicle. (R. 1:2.) He returned to his squad car, where he learned that Campbell's driver's license was suspended for failure to pay a forfeiture. (R. 1:3.) Additionally, the rear license plate displayed on the Pontiac did not match the vehicle; it belonged to a 1996 Chevy Trailblazer. (R. 1:3.) After further discussion with Campbell about the plates, Trooper Kraetke returned to his squad car to fill out citations. (R. 1:3.)

Meanwhile, Sergeant Nick Al-Moghrabi of the Sawyer County Sherriff's Office arrived on the scene with his trained canine, Trace. (R. 25:6–7.) Sergeant Al-Moghrabi briefly met with Trooper Kraetke and learned about the situation, then approached the passenger side of Campbell's vehicle and had a conversation with the occupants through the window. (R. 25:7–8, 10, 12.) Campbell and her passenger agreed to step out of the vehicle at the sergeant's direction and moved to the front of Trooper Kraetke's squad car. (R. 25:12.) While that was happening, Sergeant Al-Moghrabi returned to his vehicle and retrieved Trace. (R. 25:4, 12.) The sergeant placed a 6-foot leash on Trace and together they walked to the front of Campbell's vehicle. (R. 25:12.)

At the front of Campbell's vehicle, Sergeant Al-Moghrabi placed Trace in a prescribed stance and gave him the command to begin his scan of the vehicle. (R. 25:12.) A "scan" was defined by Sergeant Al-Moghrabi as allowing the dog to sniff without direction of his handler versus "detailing" where the handler points to specific locations to be sniffed. (R. 25:13–14.) Trace began to scan the front driver's side of the vehicle. (R. 25:14.) As Trace approached the driver's side door, Sergeant Al-Moghrabi noted that Campbell had left the door open. (R. 25:14.) Neither Sergeant Al-Moghrabi nor Trooper Kraetke had directed Ms. Campbell to leave her door open. (R. 25:15, 23.) Trace entered the open driver's side door without the direction of Sergeant Al-Moghrabi and immediately started sniffing intently and scratching at a brown purse on the floor of the vehicle and would not leave it, which Sergeant Al-Moghrabi understood to be an aggressive alert that Trace smelled drugs. (R. 25:16–17, 25.)

Sergeant Al-Moghrabi pulled Trace out of the vehicle and continued with the scan. (R. 25:17.) Upon completing the scan, Sergeant Al-Moghrabi attempted to begin a "detail" of the vehicle, but Trace returned to the open driver's door and entered. (R. 25:17–18.) Again, Trace went straight to the purse and, as it appeared he was about to bite it, Sergeant Al-Moghrabi removed him from the vehicle. (R. 25:18.) After backing out of the vehicle the canine produced a final response by coming to a sit, which Sergeant Al-Moghrabi understood to be a "passive" alert. (R. 25:19, 25.)

Based upon the alerts to the brown purse, Sergeant Al-Moghrabi searched the purse and found marijuana and a glass pipe. (R. 25:20, 23.) The State charged Campbell with two crimes, possession of tetrahydrocannabinols (THC) and possession of drug paraphernalia. (R. 1:1–5.)

Campbell moved to suppress the evidence, arguing that Trace's entry into her car during the sniff violated her Fourth Amendment rights. (R. 10.) The court held an evidentiary hearing on March 28, 2019, and heard testimony from Sergeant Al-Moghrabi. (R. 25.) In addition, the State offered video footage of the encounter into evidence. (R. 30.)

After hearing argument from both parties, the circuit court found that the door to Campbell's vehicle was left open, but not at the direction of Sergeant Al-Moghrabi or Trooper Kraetke. (R. 22:2.) The court further found that Trace "was on a loose leash" and that his entry into Campbell's vehicle occurred "without any direction from" Sergeant Al-Moghrabi. (R. 22:2.) Based on these facts, and relying on *United States v. Guidry*, 817 F.3d 997 (7th Cir. 2016), the court concluded "that there is no 4th Amendment violation here when a dog jumps instinctively through an open car door without any facilitation by its handler." (R. 22:3.) It therefore denied the motion to suppress. (R. 22:3.)

After the court denied the suppression motion, Campbell pleaded no contest to possession of THC. (R. 24:3.) The court found Campbell guilty and ordered her to pay a fine including costs of $673.50. (R. 24:3–4.)

Campbell appealed, and the court of appeals reversed Campbell's conviction and remanded the case to the circuit court with instructions to grant Campbell's motion to suppress. (Pet-App. 3, 21.) The court held that, under any formulation of the instinct exception, the officer here "created the opportunity" for the canine to enter the vehicle and "demonstrated a 'desire to facilitate a canine sniff'" of the interior. (Pet-App. 20.) It based this conclusion on its review of the video, which, it said, showed Sergeant Al-Moghrabi twice stop in front of the open door and prevent Trace from continuing the scan of the vehicle. (Pet-App. 7–8, 20.) Thus, the court held, "even if Wisconsin recognized the instinct exception to the warrant requirement . . . the State failed to

meet its burden of demonstrating that the exception would apply to the circumstances of the canine's searches of Campbell's vehicle." (Pet-App. 20.) Despite not directly answering whether Wisconsin would adopt the instinct exception, the court recommended the decision for publication.[1] (Pet-App. 21.)

ARGUMENT

I. Review is warranted to consider whether Wisconsin should recognize the instinct exception, under which there is no Fourth Amendment violation when a police canine enters a vehicle during a lawful sniff without direction from its handler.

This Court should grant review to consider whether Wisconsin should recognize the instinct exception followed in some other jurisdictions. It is well established that a sniff around a vehicle on a public roadway is not a search, and that analysis should not change if the police dog instinctively enters the vehicle during that process.

A. A police dog conducting a sniff around the perimeter of a vehicle on a public roadway is not a search within the meaning of the Fourth Amendment.

The Fourth Amendment to the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend IV. Article I, Section 11 of the Wisconsin

[1] The court, on its own motion, converted the case from a one-judge appeal to a three-judge panel. (Pet-App. 3.)

Constitution contains a nearly identical prohibition on unreasonable searches and seizures.[2]

When a suspect drives a vehicle on a public roadway, she has a diminished expectation of privacy in that vehicle. *California v. Carney*, 471 U.S. 386, 393 (1985). Among the ways that diminished expectation manifests is the ability of police to conduct a dog sniff around the perimeter of the suspect's vehicle while a traffic stop is ongoing. *See Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

In *Caballes*, an officer stopped Caballes for speeding. While one officer processed the speeding violation, another officer walked a drug-detection dog around Caballes' automobile. *Id.* at 406. The dog alerted to the trunk. *Id.* During a search, officers found marijuana in the trunk. *Id.* In deciding the case, the Supreme Court assumed that the officers lacked a reasonable suspicion that the automobile contained drugs. *Id.* at 407. The Supreme Court nevertheless held that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Id.* at 410.[3]

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[2] "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated." Wis. Const. art. I, § 11. The Wisconsin Supreme Court has regularly held that the protections afforded by this section of the Wisconsin Constitution are identical to those created by the Fourth Amendment, except in extremely limited cases. *See, e.g.*, *State v. Dearborn*, 2010 WI 84, ¶ 14, 327 Wis. 2d 252, 786 N.W.2d 97.

[3] *Caballes* is consistent with a prior U.S. Supreme Court decision in *United States v. Place*, 462 U.S. 696 (1983), which involved the use of a drug-detection dog on luggage seized at an airport. The Court there held that a trained drug-detection dog's sniff of a person's luggage located in a public place "did not constitute a 'search' within the meaning of the Fourth Amendment." *Id.* at 707.

This Court has followed suit. In *State v. Arias*, 2008 WI 84, ¶ 3, 311 Wis. 2d 358, 752 N.W.2d 748, this Court held "that a dog sniff of the exterior of a vehicle located in a public place does not constitute a search under the Wisconsin Constitution." But this Court went on to recognize that unreasonably prolonging a traffic stop to conduct a canine sniff may violate the prohibition against unreasonable searches and seizures.[4] *Id.* ¶¶ 25, 38.

In 2012, the United States Supreme Court considered the warrantless, surreptitious application of a GPS tracking device to a suspect's vehicle in *United States v. Jones*, 565 U.S. 400, 402 (2012). The Court held that, regardless of whether the defendant had a reasonable expectation of privacy in the undercarriage of his vehicle and/or in his location and travels in that vehicle, the police had conducted a "search" within the meaning of the Fourth Amendment because placing the GPS tracker involved the "physical[ ] occup[ation of] private property for the purpose of obtaining information." *Id.* at 404–05. The Court made clear, however, that the trespass analysis was not the sole consideration when determining whether a government action constituted a search; a suspect's reasonable expectation of privacy could still render government activity a "search" even without trespass. *Id.* at 406–07.

The next year, the Supreme Court revisited the law surrounding dog sniffs in *Florida v. Jardines*, 569 U.S. 1 (2013). In that case, officers entered the curtilage of Jardines' home with a drug-sniffing canine. *Id.* at 3. Based on the canine's alert to the front door, officers obtained a warrant that resulted in the seizure of marijuana and Jardines' prosecution. *Id.* at 3–4.

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[4] The United States Supreme Court confirmed this understanding of the Fourth Amendment in *Rodriguez v. United States*, 575 U.S. 348 (2015).

The Supreme Court held that "[t]he government's use of trained police dogs to investigate *the home and its immediate surroundings* is a 'search' within the meaning of the Fourth Amendment." *Id.* at 11–12 (emphasis added). In reaching this conclusion, the court's decision rested heavily on its analysis that the dog sniff occurred within a constitutionally protected area—the curtilage of Jardines' home. *Id.* at 6–7. While acknowledging that people, including the police, have a customary license to initiate contact with a home's occupants, the Court determined that such a customary license does not embrace the introduction of a trained canine to detect incriminating evidence within the home. *Id.* at 8–9. The Court thus concluded that the introduction of the canine to the curtilage for the purpose of conducting a sniff was a trespassory search violating the Fourth Amendment. *Id.* at 11.

B. A police canine conducting a lawful sniff around a vehicle in a public place does not violate a suspect's Fourth Amendment rights by entering the vehicle without direction or facilitation from its handler.

While the law discussed above provides ample discussion of canine sniffs occurring in public places, one area that remains unsettled in Wisconsin is the constitutional implication when a police canine, without direction from its handler, enters a suspect's vehicle in a public place and immediately indicates the presence of drugs once inside the vehicle. A number of other jurisdictions have considered the question, however, and arrived at what is sometimes called the "instinct exception." These cases generally hold that a police canine's intrusion into a suspect's vehicle does not violate the Fourth Amendment so long as its handler neither directed the canine into the vehicle nor facilitated its entry by, for example, opening a door.

In *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989), the Tenth Circuit considered whether an unlawful search had occurred where a police canine jumped in the open hatchback of a suspect's vehicle and "keyed" on a duffle bag, later revealed to contain methaqualone. *Id.* at 361. The court commented that even though there was no problem with the sniff of the exterior of Stone's car, "the dog created a troubling issue under the Fourth Amendment when it entered the hatchback." *Id.* at 363. The court rejected Stone's argument that the dog's entry into the hatchback constituted a search, however, reasoning that police had neither opened the hatchback nor directed the dog inside; the officer "just let [the dog's] leash go and let him go where his nose would take him." *Id.* at 362–64. In so holding, the court distinguished cases involving suspects' homes, noting the "heightened expectation of privacy" one has at home. *Id.* at 363 n.1.

The Tenth Circuit revisited the issue in *United States v. Winningham*, 140 F.3d 1328 (10th Cir. 1998). Like *Stone*, *Winningham* involved a canine sniff occurring within a suspect's vehicle. *Id.* at 1329–30. *Winningham*, however, differed from *Stone* in two key respects. First, the police in *Winningham* opened the door to the suspect's van and evinced a desire to "facilitate" the canine's entry into the van to conduct the sniff by unleashing it as it approached the open door, whereas the canine in *Stone* jumped in the suspect's vehicle of its own accord. *Id.* at 1330–31. Second, the police in *Stone* had reasonable suspicion that Stone was trafficking drugs, while the police in *Winningham* continued to detain the suspect to await a canine for a sniff after reasonable suspicion had abated.[5] *Id.* at 1331. Based on these

[5] The Tenth Circuit's decisions in *Stone* (1989) and *Winningham* (1998) both pre-date the Supreme Court's decisions in *Caballes* (2005) and *Rodriguez* (2015). The latter cases concerned reasonable suspicion in the canine sniff context,

distinctions, the court determined that the outcome of the case turned on the scope of the suspect's consent to the continued detention and sniff. *Id.* The court ultimately concluded that Winningham's consent to the search was involuntary and affirmed the district court's order granting a motion to suppress. *Id.* at 1332–33.

Other circuits have found sniffs similar to the one in *Stone* not to violate the Fourth Amendment. For example, in *United States v. Lyons*, 486 F.3d 367 (8th Cir. 2007), the Eighth Circuit rejected a challenge to a dog sniff where the canine stuck its head through an open passenger-side window before alerting. *Id.* at 373. Noting that the officer "did not create the opportunity for the dog to breach the interior of the vehicle," the court held that, "[a]bsent police misconduct, the instinctive actions of a trained canine do not violate the Fourth Amendment." *Id.* (citing U*nited States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998); *United States v. Lyon*s, 957 F.2d 615, 617 (8th Cir. 1992); *Stone*, 866 F.2d at 364). In 2010, the Third Circuit similarly concluded that there was no Fourth Amendment violation when a dog jumped into a vehicle through an open door "without facilitation by his handler." *United States v. Pierce*, 622 F.3d 209, 214–15 (3d Cir. 2010).

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specifically, whether reasonable suspicion is necessary to conduct a sniff when it does not extend a stop (it is not), and whether reasonable suspicion is necessary to extend a stop for a sniff (it is). *See Illinois v. Caballes*, 543 U.S. 405, 410 (2005); *Rodriguez*, 575 U.S. at 354–57. These were open questions in *Stone* that the court did not reach because it did not need to, given the presence of reasonable suspicion. *See United States v. Stone*, 866 F.2d 359, 363 n.2 (10th Cir. 1989). As for *Winningham*, the abatement of reasonable suspicion and subsequent extension of the stop there would have dictated the outcome under *Rodriguez*. Thus, while *Stone* and *Winningham* can be read as placing an emphasis on the presence of reasonable suspicion, the State would argue that the discussions of reasonable suspicion therein primarily go to the principles later espoused in *Caballes* and *Rodriguez* rather than the applicability of the instinct exception.

More recently, the Seventh Circuit also favorably discussed the "instinct exception," distinguishing *Winningham* because the police there intended to facilitate the dog's entry into the suspect's vehicle by opening the door and removing the leash. *See Guidry*, 817 F.3d at 1006.

C. This Court should grant review and adopt the instinct exception.

This Court should adopt the instinct exception. A canine that enters a suspect's vehicle without the direction or facilitation of his handler is likely to be following its instinct by either (a) seeking out an odor that it is trained to seek out, or (b) pursuing a scent that it already detected outside the vehicle. In the latter situation, police actually may have developed probable cause for a search in the moments preceding the dog's entry into the vehicle, but establishing the probable cause may prove difficult after the fact given the rapid succession of events. Under those circumstances, a suspect could invite a Fourth Amendment violation by facilitating a police canine's entry into the vehicle. The Fourth Amendment should not allow a suspect to receive a windfall in the form of excluded evidence simply because the odor of drugs in her vehicle was so prevalent and accessible that a canine went straight to it.

In the former situation, even if a police canine has not yet detected the odor of drugs when it enters the suspect's vehicle, the dog's entry still does not constitute an unreasonable search. Individuals have a lower expectation of privacy in the contents of a vehicle driven on a public roadway, and an even lower expectation of privacy when those contents are illegal drugs. *See Carney*, 471 U.S. at 393; *Caballes*, 543 U.S. at 410. A police canine's brief, unsolicited entry into a vehicle on a public roadway that will uncover only the possession of illegal drugs does not run afoul of the Fourth Amendment given those principles.

To be sure, not every jurisdiction agrees. For example, the Supreme Court of Idaho recently declined to adopt the instinct exception, reasoning that if a dog is following a detected scent into a vehicle, it requires a post hoc conclusion about the dog's behavior rather than an assessment of what was known to officers at the time of the entry. *See State v. Randall*, 496 P.3d 844, 854 (Idaho 2021). If the dog had not yet detected the scent, the court continued, then the dog's entry into the vehicle simply ran afoul of *Jardines* and *Jones*. *See id.*

The reasoning in *Randall* was flawed, however. The *Jardines* Court was particularly concerned with the fact that the dog sniff there took place within the curtilage of the suspect's home. *See Jardines*, 569 U.S. at 11–12. Even though the Court held there that a warrantless, police-directed dog sniff occurring within the curtilage of a suspect's home violates the Fourth Amendment, it does not follow that a dog sniff occurring of the dog's own accord in a vehicle being operated on a public roadway similarly fails constitutional muster.

Moreover, both *Jones* and *Jardines* involved *intentional* trespasses by police. In *Jones*, for example, the Court described the government's action as the "physical[ ] occup[ation of] private property for the purpose of obtaining information." *Jones*, 565 U.S. at 404–05. Instinct exception cases, on the other hand, tend to find no Fourth Amendment violation when the canine's conduct occurred without the facilitation of the handler; that is, when any trespass was not intended by police. To be sure, an officer running a canine around a suspect's vehicle for a sniff is doing so "for the purpose of obtaining information." *See id.* But that is not the purpose of the trespass, nor will a trespass usually be necessary for the officer to obtain the information they seek. Rather, in an instinct exception case, the trespass—if any—occurs independent of the police action.

On balance, the jurisdictions adopting the instinct exception and holding that a suspect's Fourth Amendment right against unreasonable search and seizure is not violated when a canine conducting a lawful sniff around the perimeter of a vehicle, acting instinctively, enters the vehicle without the handler's direction, facilitation, assistance, or encouragement have the correct position. "The touchstone of the Fourth Amendment is reasonableness," *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), and such an entry is simply not unreasonable. This Court should grant review so that it can follow those jurisdictions and recognize the viability of the instinct exception.

II. Review is warranted to clarify the standard of review for review of a circuit court's factual findings arising from a combination of testimonial and videorecorded evidence.

This Court should grant review also to consider whether the court of appeals engaged in a proper review of the record in this case. The court of appeals is not a fact-finding court, yet in this case, the conducted its own review of videorecorded evidence in the record to arrive at a dispositive factual finding not made by the circuit court. This Court should grant review to address that procedure.

A. The court of appeals reviews a circuit court's factual findings related to a motion to suppress under the "clearly erroneous" standard.

It is well established that under the constitutional review standard, appellate courts uphold a circuit court's factual findings unless clearly erroneous and independently applies those factual findings to constitutional principles. *State v. Genous*, 2021 WI 50, ¶ 10, 397 Wis. 2d 293, 961 N.W.2d 41. It has been said that a circuit court's findings "must . . . strike [the court] as wrong with the force of a five-

week-old, unrefrigerated dead fish" to be clearly erroneous. *United States v. Di Mucci*, 879 F.2d 1488, 1494 (7th Cir. 1989) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). Put another way, courts will "defer to the circuit court's findings of fact unless they are unsupported by the record." *Schreiber v. Physicians Ins. Co. of Wis.*, 223 Wis. 2d 417, 426, 588 N.W.2d 26 (1999). Appellate courts affirm findings of fact "'as long as the evidence would permit a reasonable person to make the same finding,' . . . [and courts] search the record not for evidence opposing the circuit court's decision, but for evidence supporting it." *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶ 12, 290 Wis. 2d 264, 714 N.W.2d 530 (citation omitted).

This Court has also explained that "a finding of fact is clearly erroneous when 'it is against the great weight and clear preponderance of the evidence.'" *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 768 N.W.2d 615. "[A] factual finding is *not* clearly erroneous merely because a different fact-finder could draw different inferences from the record." *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417 (emphasis added). Further, even if an appellate court's "independent view of the evidence may [lead it] to a different result, [the court is] *bound to accept* the trial court's inferences unless they are incredible as a matter of law." *Id.* (emphasis added).

These standards recognize the different roles of circuit courts and the court of appeals. The clearly erroneous standard applies in cases "[w]here the underlying facts are in dispute" because "the trial court resolves that dispute by exercising its fact-finding function." *State v. Walli*, 2011 WI App 86, ¶ 14, 334 Wis. 2d 402, 799 N.W.2d 898. This principle remains true even in cases where, like here, "evidence in the record consists of disputed testimony and a video recording." *Id.* ¶ 17.

B. The court of appeals improperly disregarded the standard of review for the circuit court's factual findings; this Court should grant review to clarify that the clearly erroneous standard holds, even when the record contains videorecorded evidence.

In arriving at its conclusion that the instinct exception applied and that there was no Fourth Amendment violation as a result of the dog's entry into Campbell's car, the circuit court made two important findings. First, the court stated that "[a]t the initial search, or the initial sniff of the vehicle the dog, without any direction from the law enforcement officer, jumped into the vehicle that was left open by the passenger." (R. 22:2.) Later on, the court reiterated that there was "[n]o order by the cops to have the dog jump in." (R. 22:3.)

The court of appeals acknowledged the circuit court's finding in recounting the facts of the case. (Pet-App. 9.) However, the court did not revisit that finding in its analysis of the case. Instead, the court reversed after concluding that Al-Moghrabi "encouraged [the dog] to enter Campbell's vehicle through the vehicle's open door." (Pet-App. 19–20.) The court of appeals' replacement of the circuit court's factual finding with its own apparently followed its review of the video evidence in the record. (Pet-App. 7–9.) This departure from the circuit court's factual findings required the court to do more analysis—it needed to explain why the circuit court's finding was clearly erroneous in order to set that finding aside. *See Genous*, 397 Wis. 2d 293, ¶ 10.

This Court should therefore accept review and use the opportunity presented by this case to clarify that the presence of video-recorded evidence in the record still requires the court of appeals to conduct an analysis to determine whether the circuit court's factual finding was clearly erroneous. This is appropriate for two main reasons.

First, both the Wisconsin Constitution and this Court's precedent each establish that the proper role of the court of appeals is error correction, not fact finding. Wis. Const. art. VII, § 5(3); *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). The Wisconsin statutes further define this role. *See* Wis. Stat. § 805.17(2). Similarly, this Court's primary focus is developing the law, not fact finding. *See* Wis. Stat. (Rule) § 809.62(1r). Thus, a holding that video-recorded evidence is subject to deferential review is appropriate for Wisconsin's appellate courts.

Second, this holding would create a clear rule that appellate courts can apply consistently. Not only will this assist the court of appeals, it will also assist litigants to frame issues and focus arguments in their appeals. It would do all of this without eliminating the court of appeals' ability to remedy cases where the circuit court has made a clear error.

CONCLUSION

For the reasons discussed, the State respectfully requests that this Court grant review of the court of appeals' decision in this case.

Dated this 22nd day of February 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 5,482 words.

Dated this 22nd day of February 2024.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of February 2024.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General