STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DONTE QUINTELL MCBRIDE,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

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ISSUES PRESENTED

1. When reviewing a motion to suppress, what is the proper application of the "clearly erroneous" standard of review?

While the court of appeals referenced the clearly erroneous standard, it did not apply it. Rather, it independently reviewed the evidence relied upon by the circuit court, disagreed with the circuit court's findings, and labeled them as clearly erroneous without explaining how or why the evidence was against the great weight and preponderance of the evidence.

2. Was the seizure and subsequent search of McBride constitutional where Officer Rivera observed two people sitting in an unilluminated SUV, which appeared to obstruct traffic, late at night in a high crime area when McBride made furtive movements in response to Officer Rivera's spotlight?

The court of appeals reversed finding that the circuit court's finding that the SUV obstructed traffic was clearly erroneous and holding that none of the facts relied upon by the circuit court individually supported reasonable suspicion.

CRITERIA FOR REVIEW

In modern-day sports, amateur and professional alike, certain calls made on the field by the referee may be video reviewed. However, the call on the field *must* stand unless the video replay shows clearly and indisputably that the call on the field was wrong. If the result of the play is in dispute in any way after the replay, the call on the field remains intact.

Similarly, Wisconsin's appellate courts may review the factual findings made the legal system's on-field referee, i.e., the circuit court. And, just as New York may not reverse a call on the field absent clear and indisputable video evidence,

appellate courts must uphold a circuit court's factual findings unless they are clearly erroneous.

The court of appeals departed from that proper standard of review in this case. Rather than review Officer Rivera's body camera footage with deference to the circuit court's findings and search the record for evidence to support the circuit court's findings, the court of appeals independently reviewed the video, believed it showed something different, and labeled the circuit court's findings clearly erroneous without so much as a reference to what that standard means. In turn, the first issue presented asks this Court to clarify the proper standard for reviewing the evidence relied upon by the circuit court when the reviewing court's standard of review is the clearly erroneous standard. This question is purely legal, and absent this Court's clarification, it is likely that the court of appeals will continue to act as an independent fact finder any time it disagrees with the call that the circuit court made, despite that call being supported by evidence in the record. Wis. Stat. § (Rule) 809.62(1r)(c)3.

The second issue presented asks this Court to again clarify an appellate court's proper review of reasonable suspicion under the Fourth Amendment. The court of appeals' decision is erroneous and contrary to settled law for two reasons. First, it pays only lip service to the totality of the circumstances requirement and instead represents the "divide and conquer" technique that this Court has held is improper. Second, the decision flips how courts review purportedly "innocent behavior" on its head. The court of appeals concluded in several places that McBride's behavior was innocent and not indicative of criminal behavior thereby making Rivera's suspicion unreasonable. That conclusion runs directly contrary to this Court's precedent, which holds that officers need not dispel the possibility of innocent behavior before initiating a stop. Because the court of appeals' decision conflicts with this Court's precedent in two respects,

review is warranted to resolve that conflict. Wis. Stat. § (Rule) 809.62(1r)(d).

STATEMENT OF THE CASE

On the night of October 28, 2018, at approximately 11:15 p.m., City of Milwaukee Police Officers Jose Rivera and Eric Kradecki were performing a routine patrol for the City of Milwaukee Police Department's Anti-Gang Unit. (R. 40:3–5.) While on patrol, the officers observed an SUV parked in an alley near 416 East Locust Street in Milwaukee. (R. 40:5–6.) The SUV had no lights on and was parked in a manner that obstructed traffic. (R. 40:6–7; 43 at 00:00:21.[1]) The squad car approached the SUV from the front. (R. 43 at 00:00:21.)

Officer Rivera, unable to immediately determine whether there were people inside the vehicle due to the time of night and darkness of the alley, illuminated his squad car's spotlight. (R. 40:6–7.; 43 at 00:00:23) Upon illuminating his spotlight, Officer Rivera saw that two individuals occupied the vehicle. (R. 40:7; R. 43 at 00:00:24.) Officer Rivera observed the passenger, McBride, "bend down towards his waist area and begin to reach around in the vehicle." (R. 40:7.) Based on his "experience in training and dealing with similar situations," Officer Rivera testified that such movement is "consistent with someone having illegal narcotics or weapons on their person." (R. 40:8.)

After observing McBride bend toward his waist and reach around in the vehicle, Officer Rivera approached the SUV, ordering the occupants to show their hands. (R. 40:9; 43 at 00:00:28.) Despite Officer Rivera's order, McBride continued to "reach[] inside of the vehicle." (R. 40:10.) McBride eventually complied with the order. (R. 40:10.)

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[1] Record item 43 is Officer Rivera's body camera footage that the parties and court of appeals relied on below. The State utilizes the hour:minute:second time format for citations to R. 43.

"[B]ecause [McBride's] movements made [him] fear that [McBride] might have a weapon on his person," Officer Rivera opened the passenger's-side door and removed McBride from the SUV. (R. 40:11.) Officer Rivera handcuffed McBride "for [Officer Rivera's] safety with [McBride's] movements because he could [have] be[en] armed or a weapon might [have] be[en] in the vehicle." (R. 40:11.)

When he opened the car door, and prior to removing McBride from the SUV, Officer Rivera observed an orange, unlabeled pill bottle "between the front passenger door and seat." (R. 1:2.) Based on his training and experience, Officer Rivera suspected that McBride "possess[ed] a controlled substance without a prescription." (R. 40:12.) Officer Rivera conducted a pat-down that revealed another unlabeled pill bottle in McBride's front right pocket and a clear, plastic bag that contained a "tan chunky substance," which later proved to be heroin. (R. 1:2; 32:6–7.)

The State charged McBride with one count of possession with intent to deliver a controlled substance (heroin) (>3-10 gram), second and subsequent offense and two counts of possession with intent to deliver narcotics, second and subsequent offense. (R. 6:1–3.)

McBride moved to suppress the drug evidence. (R. 7.) Following briefing and a hearing, the circuit court found Officer Rivera's testimony regarding the furtive movements and the high-crime area credible. (R. 40:43, 46.) The circuit court ultimately denied the motion to suppress, finding that, based on the totality of the circumstances, there was reasonable suspicion to seize and search McBride.[2] (R. 40:50; 46:23.)

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[2] The circuit court did not find that a lack of visible furtive movements from Officer Rivera's bodycam diminished Officer Rivera's testimony. (R. 40:41.) Officer Rivera testified that, while

(continued on next page)

McBride pleaded guilty, and the circuit court accepted his plea and convicted him. (R. 46:51.) The circuit court sentenced McBride to 10 total years with five years of initial confinement and five years of extended supervision. (R. 17:1.) McBride now appeals his judgment of conviction. (R. 29.)

McBride appealed the circuit court's decision denying his motion to suppress, and a majority of the court of appeals reversed, concluding that Rivera did not have reasonable suspicion to seize McBride. *State v. McBride*, No. 2022AP311-CR, 2022 WL 17814269 (Wis. Ct. App. Dec. 20, 2022) (unpublished). (Pet-App. 3–31.) In an authored opinion, the majority referenced five facts relied upon by the circuit court but cast one of them (the SUV's position obstructing traffic) aside as clearly erroneous. *Id.* ¶¶ 22–21 (Pet-App. 8, 10–11). It held that the remaining four facts, i.e., McBride's presence in a high-crime area, the fact that two people sat in the unilluminated SUV, and McBride's movements were insufficient to justify the stop.[3] *Id.* ¶¶ 8–10 (Pet-App. 8–10). Because the majority concluded that the initial stop was not supported by reasonable suspicion, it did not address the remaining issues.

Judge Dugan dissented. *Id.* 24–63. (Dugan, J., dissenting) (Pet-App. 13–30). Judge Dugan first highlighted Rivera's testimony at the suppression hearing because "his testimony is critical to the analysis of the issues on appeal." Id. 25–33 (Pet-App. 13–16). Citing *State v. Colstad*, 2003 WI App 25, 260 N.W.2d 406, 659 N.W.2d 394 and *State v. Neal*,

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the bodycam is in a fixed position facing forward, he was able to move his head around and see the vehicle from a different angle. (R. 40:17.) The circuit court also found that testimony credible. (R. 40:41.) ("It merely is the Court's understanding that a body camera of an officer presents one perspective and view of the circumstances.")

[3] The majority made no mention of either the time of night or the darkness of the alley in its analysis.

No. 2017AP1397-CR, 2018 WL 1633577 (Wis. Ct. App. Apr. 3, 2018) (unpublished) (Pet-App. 153–55), Judge Dugan concluded that Rivera's testimony and the circuit court's findings that the SUV obstructed traffic in the alley justified the initial seizure as a traffic stop. *McBride*, slip op., ¶¶ 37–39 (Dugan, J., dissenting) (Pet-App. 19–20). Judge Dugan also concluded that (1) removing McBride from the vehicle during that traffic stop was reasonable under United States Supreme Court precedent and (2) the search of McBride's person was constitutional as a search incident to lawful arrest. *Id.* ¶¶ 39–63 (Pet-App. 20–30). To that end, based on the totality of the circumstances, Judge Dugan concluded that the officers had probable cause to arrest McBride when Rivera conducted the pat down of McBride's person. *Id.* ¶¶ 49–58 (Pet-App. 24–29).

Importantly, Judge Dugan in several places in his dissent, reminded the majority that the court is *required* to uphold the circuit court's findings unless clearly erroneous. *Id.* ¶¶ 36 n.4, 56 n.10 (Pet-App. 18–19). Judge Dugan, accordingly, upheld the circuit court's findings that the SUV obstructed traffic and that McBride made furtive movements in response to Rivera's spotlight. *Id.* (Pet-App. 18–19).

ARGUMENT

I. Review is warranted to clarify how courts are to apply the clearly erroneous standard when reviewing a motion to suppress.

A. This Court should clarify that "clearly erroneous" is not based on the court of appeals' independent review of evidence and does not amount to a mere disagreement with the circuit court.

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. The first issue presented asks this Court not to assess whether the circuit court's factual findings pass constitutional muster, but rather, asks this Court to clarify how reviewing courts should determine whether those factual findings are clearly erroneous.

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)). Said differently, 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).

The court of appeals departed from those standards here when it held the circuit court's finding that the SUV obstructed the alley was clearly erroneous.[4] *McBride*, slip op., ¶ 22 (Pet-App. 11). When it denied McBride's motion to suppress, the circuit court made several findings regarding the location of the SUV. The court stated that "[t]here's an inference that the vehicle is partially blocking the alley, and there was later testimony that the vehicle could have been towed or ticketed. . . . So the vehicle is in an unusual place with the lights out." (R. 40:46–47.) The circuit court found "suspicious" "the discovery of [two] occupants in an unilluminated vehicle parked in the middle of the alley." (R. 40:47.) Further, the court found credible Rivera's testimony that there was "a vehicle parked in the middle of the alley, obstructing traffic in the alley, and having no lights on." (R. 46:14.) The court again found those facts to be "suspicious." (R. 46:14.)

The circuit court's findings were supported by the record. Rivera testified that the SUV "wasn't parked off to the side, it was parked right in the alley" and that "it [would] interfere" with two-way traffic. (R. 40:6–7.) The State also played Rivera's body camera footage during the suppression hearing. During that replay, the State paused the footage at 25 seconds. (R. 40:16.) At that point one can see the SUV occupied by McBride parked in the alley; additionally, one can see a car parked on a parking slab perpendicular to the SUV,

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[4] As noted in Judge Dugan's dissent, the majority also seems to call into question the circuit court's findings regarding McBride's furtive movements. *State v. McBride*, No. 2021AP311-CR, 2022 WL 17814269, ¶ 56 n.10 (Wis. Ct. App. Dec. 20, 2022) (unpublished) (Dugan, J., dissenting) (Pet-App. 3–31). The majority stopped short of calling them clearly erroneous, but its discussion is still troubling because it toes the line of reversing factual findings based on its own independent review of evidence.

which would have been physically unable to leave with the SUV in its current position. (R. 43 at 00:00:25.) The State asked Rivera, "So this is how you were describing that the car was impeding the alley?" (R. 40:16.) Rivera answered, "Correct." (R. 40:16.) On cross-examination, Rivera testified that the SUV would "get ticketed or towed if it's obstructing traffic." (R. 40:20.)

Rivera's suppression testimony was also consistent with his testimony at McBride's preliminary hearing where he explained that "[i]n the city of Milwaukee, you're not allowed to park your vehicle overnight in the alley. If you do park in the alley, you have to allow 15 feet of clearance for other vehicles to get through." (R. 32:4.) He continued, explaining that "[f]rom my experience living in Milwaukee, no alley is that wide that you can technically park in the alley." (R. 32:4.)

Rather than search the record for evidence that would support the circuit court's factual findings, the court of appeals merely watched Rivera's body camera footage and relied upon Rivera's cross-examination testimony that he did not take any measurements of the alley to decide that the circuit court's finding that the SUV obstructed traffic was clearly erroneous. *McBride*, slip op., ¶ 22 (Pet-App. 11). The court of appeals independently reviewed Rivera's body camera footage and concluded, without explanation, that "the SUV was not in fact parked in the middle of the alley, but rather off to the side with the driver behind the wheel and available to move the SUV." *Id.* (Pet-App. 11).

Whether the court of appeals believed that the SUV was more to the side than in the middle of the alley, however, is merely a competing inference and does not mean that the circuit court's finding that it obstructed traffic was clearly erroneous. Rather, the court of appeals, despite its competing inference, was obligated to search the record for reasons to uphold the circuit court's finding. *Wenk*, 248 Wis. 2d 714, ¶ 8.

Only if such an examination of the record yielded no support for the circuit court's findings could the court of appeals declare them clearly erroneous. *Royster-Clark, Inc.*, 290 Wis. 2d 264, ¶ 12.

The court of appeals, however, did not conduct the proper review, and that choice was contrary to this Court's and published court of appeals precedent. Had it conducted a full review of the record, the court of appeals would have upheld the circuit court's findings based on Rivera's direct testimony, his cross-examination testimony that SUV could have been ticketed or towed, and his preliminary hearing testimony where he explained in more detail how the SUV obstructed traffic. The court of appeals could have found further support for the circuit court's findings if it reviewed specifically the portion of Rivera's body camera footage where there is another car that is very clearly parked in (i.e., obstructed) by McBride's SUV.

This Court should accept review to clarify that it is not merely disagreement upon the court of appeals' independent review of evidence that makes a factual finding clearly erroneous. Rather, this Court should reaffirm that factual findings are not clearly erroneous unless they are contrary to the great weight and clear preponderance of the evidence and that reviewing courts should search the record to uphold circuit courts' factual findings. Here, there is a plethora of record evidence that supported the circuit court's findings, and the court of appeals' decision should be reversed.

B. If the circuit court's finding that the SUV obstructed traffic is reinstated, Rivera had reasonable suspicion to conduct a traffic stop, i.e., the initial seizure.

This Court has held that "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143. As discussed above, the circuit court reasonably found that the SUV obstructed traffic, which is a traffic violation. Milwaukee, Wis. Traffic Code 101-24.2. (2020).[5] (Pet-App. 152.) If this Court grants review, it should, like Judge Dugan conclude that the traffic violation, in and of itself, justified the initial seizure of McBride. *McBride*, slip op., ¶ 37 (Pet-App. 19).

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[5] The court of appeals cast doubt on the State's citation to that Milwaukee traffic ordinance because "the plain language of the ordinance addresses vehicles on a *highway*, not an alley." *McBride*, slip op., ¶ 21 n.6 (Pet-App. 11). Accordingly, the court of appeals "question[ed] whether this ordinance applies here." *Id.* (Pet-App. 11). What the court of appeals failed to acknowledge, however, is that the Milwaukee traffic code incorporates all of the State of Wisconsin's statutorily defined terms for the rules of the road. Milwaukee, Wis. Traffic Code, 101-1.2. (2019) ("The city of Milwaukee adopts s. . . . 340 . . . Wis. Stats., and all subsequent amendments thereto defining and describing regulations with respect to vehicles and pedestrians and traffic . . . ."). (Pet-App. 151.) The legislature defined an alley as "every *highway* within the corporate limits of a city . . . primarily intended to provide access to the rear of [the] property fronting upon another highway and not for the use of through traffic." Wis. Stat. 340.01(2); *see also* Wis. Stat. § 340.01(22) (defining a highway as "all public ways and thoroughfares."). Because an alley is statutorily defined as a highway, the ordinance applies. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[T]echnical or specially-defined words or phrases are given their technical or special definitional meaning.").

II. Review is warranted to make clear the Fourth Amendment principles that reviewing courts are to abide by when undertaking a reasonable suspicion analysis.

A. This Court should once again clarify that reasonable suspicion is based on the totality of the circumstances and that officers are not required to dispense of the possibility of reasonable behavior before initiating a stop.

It is well-settled that "[a] reasonable suspicion determination is based on the totality of the circumstances." *Genous*, 397 Wis. 2d 293, ¶ 9; *see State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996); *State v. Young*, 2006 WI 98, ¶ 75, 294 Wis. 2d 1, 717 N.W.2d 729; *State v. Post*, 2007 WI 60, ¶ 18, 301 Wis. 2d 1, 733 N.W.2d 634; *State v. Nimmer*, 2022 WI 47, ¶ 24, 402 Wis. 2d 416, 975 N.W.2d 598; *State v. Richey*, 2022 WI 106, ¶ 9, __ Wis. 2d ___, __ N.W.2d __. Reviewing courts "focus not on isolated, independent fact, but on 'the whole picture' viewed together." *Genous*, 397 Wis. 2d 293, ¶ 9 (citation omitted). Said differently, "the building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn." *Waldner*, 206 Wis. 2d at 58. "[A] point is reached where the sum of the *whole* is greater than the sum of its individual parts." *Id.* (emphasis added).

It is equally well-settled that "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Id.* at 59; *see also Young*, 294 Wis. 2d 1, ¶ 59 ("An officer need not dispel all innocent inferences before conducting an investigatory stop."). "[A] trained officer draws inferences and makes deductions . . . that might well elude an untrained person." *Genous*, 397 Wis. 2d 293, ¶ 8 (alterations in original) (citation omitted). In turn, "if *any*

reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry." *Young*, 294 Wis. 2d 1, ¶ 21 (emphasis added) (citation omitted).

The court of appeals' decision here runs contrary to both of those well-settled principles.

1. The court of appeals divided and conquered some facts and totally ignored others.

First, the court of appeals undertook the sort of "divide and conquer" analysis that this Court expressly rejected two years ago in *Genous*, 397 Wis. 2d 293, ¶ 12 (citation omitted). The court of appeals isolated the following facts: (1) McBride's presence in a high-crime area; (2) the SUV having its lights off; (3) the two people sitting inside the SUV; and (4) that McBride moved in response to seeing Officer Rivera's spotlight. *McBride*, slip op., ¶¶ 16–20 (Pet-App. 8–10).

The court of appeals first noted that "the State cannot justify a warrantless search or seizure with nothing more than a recitation that the person was in a 'high-crime' area." *Id.* ¶ 17. (Pet-App. 8.) True, but McBride's presence in a high crime area *wasn't* the only justification for the stop—rather it was *one* of many justifications of the stop, and it should be validly considered in the totality of the circumstances. *State v. Kyles*, 2004 WI 15, ¶ 67, 269 Wis. 2d 1, 675 N.W.2d 449.

The court of appeals further failed to "see how the presence of two people in the parked SUV without its lights on supports a reasonable suspicion that McBride was engaged in criminal activity." *McBride*, slip op., ¶ 18 (Pet-App. 9). But that is misrepresentative of the facts. This was not a case where two people were merely sitting in a parked SUV without the lights on. Instead, it was late at night and dark

outside. (R. 40:5–6.) Further, the alley was dark despite there being streetlights, and the SUV had no lights on at all when Rivera approached in his squad car. (R. 40:6; 46:14 (the circuit court finding that "Rivera illuminated the darkened [SUV]" and it was "a darkened situation . . . suddenly . . . lightened by the" spotlight); 43 00:00:21–23.) The court of appeals made no reference to the time of night, the darkness of the alley, or the fully dark and unilluminated SUV that Rivera observed. *Compare McBride*, slip op., ¶¶ 17–20 (majority's analysis with no reference to the rest of the facts) *with id.* ¶¶ 26, 29, 53, 54 (Dugan, J., dissenting) (acknowledging the time of night and darkness of the alley and utilizing those facts in his probable cause analysis) (Pet-App. 14–15, 26).

Finally, the court of appeals concluded that, even if it accepted the circuit court's finding that McBride moved in response to Rivera's spotlight,[6] "this does not establish reasonable suspicion that criminal activity was afoot. If anything, McBride's movement in response to a bright spotlight being shined into the car is far less suspicious than the 'security adjustment' in *Gordon*." *McBride*, slip op., ¶ 20 (Pet-App. 10). The court continued, "Permitting a seizure based on a person's movement in response to a bright spotlight shining into a car where the only other facts are that the area is high-crime and two people are sitting in a parked car with the lights off in an alley simply is not enough to establish reasonable suspicion." *Id.* (Pet-App. 10). But again, those are *not* the only facts, and the court of appeals failed to assess the entire picture known to Rivera. The court of appeals assessment, which is inconsistent with Fourth Amendment principles, should be reversed.

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[6] It should also be noted that the circuit court did not merely find that McBride moved in response to the spotlight. Rather, the court found that McBride made *furtive* movements consistent with concealing contraband. (R. 40:47–48, 49 ("His furtive movements are in response to being detected by the police.").)

2. The court of appeals flipped the innocent inferences jurisprudence on its head.

The court of appeals second error is equally as evident throughout the decision. In describing why two people sitting in a car with the lights off does not equate to reasonable suspicion, the court of appeals reasoned that "[t]here are a plethora of innocent reasons that two people may sit in a parked car, such as waiting for a friend or family member." *Id.* ¶ 18 (Pet-App. 9). And, while the court acknowledged that officers do not need to dispel of innocent behavior to initiate a stop, it concluded that any inference of unlawful conduct from two people sitting in a parked car was unreasonable. *Id.* (Pet-App. 9). The court of appeals did not, however, explain *why* the inference of unlawful conduct, in conjunction with all of the other facts was unreasonable. *Compare id. with Young*, 294 Wis. 2d 1, ¶¶ 59, 64.

The court of appeals' decision again ran contrary to *Waldner* and *Young* when it concluded that McBride's movement was merely that, "movement in response to a bright spotlight shining into the car." *McBride*, slip op., ¶ 20 (Pet-App. 10). The court of appeals at no point referred to McBride's movements as furtive despite the circuit court's finding as such and Rivera's testimony, which supported that finding. Implicit in the court of appeals' decision is that McBride's movements, if they existed, were *not* furtive, and instead were reasonable, innocent movements in response to a police spotlight. But again, Rivera was not required to dispel of that possibility before initiating the stop. Requiring the opposite, as it appears the majority below does, is the antithesis of good police work where officers are "often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly involving." *State v. Smith*, 2018 WI 2, ¶ 32 n.18, 379 Wis. 2d 86, 905 N.W.2d 353 (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)); *see also*

Terry v. Ohio, 392 U.S. 1, 23 (1968) ("[I]t would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.").

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While this second issue may, at first blush, seem to be nothing more than error correction, the errors are significant. This Court's review is necessary not because the court of appeals' holding was erroneous and the State disagrees with it. Review is instead necessary because the court of appeals' decision runs contrary to this Court's and its own precedent in two respects. Review is therefore warranted to correct that inconsistent application of Fourth Amendment principles. This Court should accept review to clarify the appropriate level of inquiry under clearly erroneous review and again clarify both that reasonable suspicion is based on the *totality* of the circumstance (not just the ones a reviewing court believes necessary to come to its conclusion) and that officers are not required to dispel of innocent behavior before initiating a stop.

CONCLUSION

The State respectfully asks this Court to grant this petition.

Dated this 18th day of January 2023.

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 4690 words.

KIERAN M. O'DAY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 18th day of January 2023.

KIERAN M. O'DAY
Assistant Attorney General