STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DONTE QUINTELL MCBRIDE,

Defendant-Appellant.

ON REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING AND REMANDING THE CIRCUIT COURT'S DECISION AND ORDER DENYING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JONATHAN D. WATTS, PRESIDING

# REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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## INTRODUCTION

McBride's arguments to this Court suffer many of the same flaws as the court of appeals' decision. First, instead of recognizing the record support for the circuit court's factual findings, McBride portrays his and the court of appeals' disagreement with those findings as enough to declare them clearly erroneous. But that has never been the standard, and this Court should reject the argument. Second, like the court of appeals, McBride divides and conquers the facts at hand instead of examining them in their totality. McBride compares his case to a different court of appeals decision, but that comparison only highlights the facts that are missing from his "totality" analysis here. When correctly assessed, the accumulation of facts here would lead any reasonable officer to conclude that a traffic violation was occurring or that McBride was engaged in criminal conduct—either way, the initial seizure was constitutional.

Beyond the initial seizure, McBride makes the unsupported argument that *Mimms* and *Wilson* do not apply to traffic stops in alleys and instead apply to only roadside traffic stops. But a simple examination of the *Mimms* and *Wilson* reasoning easily overcomes that argument. Finally, like he did in the court of appeals, McBride attempts to limit Rivera's probable cause (to arrest or seize the evidence) to only his observation of the unlabeled pill bottle. That argument, however, ignores that probable cause is based on the totality of the circumstances. The totality of the circumstances here supported probable cause to arrest, which also supported a search incident to that arrest. Alternatively, the accumulation of facts supported Rivera's protective search of McBride and the seizure of his contraband under the plain touch doctrine.

Because the interaction here was constitutional, this Court should reverse the decision of the court of appeals.

## ARGUMENT

### I. There were several objectively reasonable bases for the initial seizure of McBride.

#### A. The circuit court's finding that McBride's SUV obstructed traffic was not clearly erroneous.

The parties appear to agree that "[i]t is axiomatic that trial court findings may not be disturbed on appeal unless they are" clearly erroneous. *Wurtz v. Fleischman*, 97 Wis.2d 100, 107, 293 N.W.2d 155 (1980). (State's Br. 21; McBride's Br. 24.) The State and McBride also appear to agree that a factual finding is clearly erroneous *only* when "it is against the great weight and clear preponderance of the evidence." *Phelps v. Physicians Ins. Co. of Wis.,* 2009 WI 74, ¶39, 319 Wis.2d 1, 768 N.W.2d 615 (citation omitted).

The parties' agreement stops in the application of that standard and what it means for a finding to be "against the great weight and clear preponderance of the evidence." Like the court of appeals, McBride ignores that "even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." *Teubel v. Prime Development, Inc.*, 2002 WI App 26, ¶12, 249 Wis.2d 743, 641 N.W.2d 461; *see also State v. Wenk*, 2001 WI App 268, ¶8, 248 Wis.2d 714, 637 N.W.2d 417 ("[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record."). McBride seems to think that as long as there is support for *his* interpretation, the circuit court's findings were clearly erroneous. (McBride's Br. 24-25.) But that is not, nor has it ever been, the proper application of the clearly erroneous standard.

Instead, what matters is only whether the circuit court's findings that the SUV was "partially blocking the alley," was "in an unusual place," was "parked in the middle

of the alley," was "parked in the middle of the alley, obstructing traffic in the alley," and was "in an unusual situation in the alley partially obstructing traffic" were supported by the record. (R.40:46-47; 46:14, 21.) *Phelps*, 319 Wis.2d 1, ¶39. They were, and neither McBride nor the court of appeals acknowledged the record support.

While both McBride and the court of appeals focused on Rivera's cross-examination testimony where he admitted to being able to "maneuver" around the SUV, neither acknowledged Rivera's testimony on direct where he explicitly stated 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. (*Compare* McBride's Br. 25, *with* State's Br. 24.) The circuit court found Rivera credible, (R.46:14), and the reliance on Rivera's cross-examination testimony cannot overcome that finding. *See Welytok v. Ziolkowski*, 2008 WI App 67, ¶28, 312 Wis.2d 435, 752 N.W.2d 359 ("When there is conflicting testimony, the circuit court is the ultimate arbiter of the witnesses' credibility.").

McBride points to the court of appeals' observation that the "recording 'reflects that the SUV was not in fact parked in the middle of the alley, but rather off to the side.'" (McBride's Br. 25.) Notably, however, neither McBride nor the court of appeals explains what "off to the side" means. Certainly, it cannot mean tucked neatly alongside a garage or parking slab because Rivera's bodycam rebuts that conclusion. As Rivera approaches the SUV, the footage shows that the SUV is stopped a noticeable distance away from two trash cans and toward the alley. (R.43 at 00:00:34.) Rivera's bodycam therefore supports his testimony that the SUV "wasn't parked off to the side," which in turn also supports the circuit court's findings regarding the SUV's positioning.

By failing to acknowledge Rivera's direct testimony, the circuit court's credibility findings, and portions of Rivera's bodycam footage that support those findings, the court of

appeals failed to properly apply the clearly erroneous standard of review. McBride compounds that error in his response. This Court should reaffirm that mere disagreement with factual findings does not lead to their reversal. Instead, reversal requires an absence of support in the record. Because the circuit court's findings were supported by the record, they were not clearly erroneous and should be considered in the Fourth Amendment analyses.

### B. The potential violation of a traffic ordinance was one objectively reasonable basis for the stop.

The State maintains that a reasonable officer could have stopped McBride's SUV to investigate a potential violation of Milwaukee's obstruction ordinance.[1] None of McBride's responses are persuasive.

First, he argues that the driver's presence in the vehicle meant there was no violation, commenting that "the driver remained seated within the SUV and was presumably capable of moving it, should [a large vehicle such as a garbage truck or moving truck] appear." (McBride's Br. 33.) But by making such an argument, he admits that the SUV was "stopped in a manner as to obstruct traffic," and that is what the ordinance prohibits. Milwaukee, Wis. Traffic Code 101-24.2.

Second, he argues that the ordinance does not apply to alleys, (McBride's Br. 31-32), but that interpretation ignores the language of the ordinances and statutes and leads to the unreasonable result of officers not being able to do anything about obstructed alleys and streets.

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[1] It is unclear what "overnight parking" ordinance McBride references in his brief. (McBride's Br. 29.) The State relied on the obstruction ordinance in its opening brief, and not any overnight parking ordinances. (State's Br. 26 (citing Milwaukee, Wis. Traffic Code, 101-24.2 ("Blocking Traffic.")).)

Third, McBride argues that the obstruction ordinance cannot apply to the car on the parking slab because that car does not meet the statutory definition of traffic. (McBride's Br. 35-36.) While the State recognizes that the obstruction ordinance does not apply to that car, McBride's argument proves the State's point that an objectively reasonable basis for stopping the SUV existed. McBride cites Milwaukee, Wis. Traffic Code 101-24.1, which makes it unlawful for "any vehicle to be parked on or blocking the entrance to any private driveway without the consent of the owner of such driveway so as to prevent free passage of vehicles." McBride does not challenge that *his SUV* blocked the car on the parking slab, and a reasonable officer in Rivera's position could have investigated that, too.

At bottom, "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (second alteration in original) (citation omitted). Rivera's actions were justified based on Milwaukee's blocking traffic ordinance. But, even if his actions weren't justified by that ordinance, McBride does not dispute that his SUV blocked the car in the driveway perpendicular to the SUV, which also justified a traffic stop to investigate the blocking a driveway ordinance. Either way, there were two objectively reasonable, traffic-related bases for the stop. Accordingly, this Court should conclude that the initial seizure of McBride was constitutional and reverse the decision of the court of appeals. *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis.2d 234, 868 N.W.2d 143.

### C. Rivera also had reasonable suspicion to investigate criminal conduct.

Arguing that Rivera lacked reasonable suspicion to investigate criminal activity, McBride claims (1) that

presence in a high-crime area, "without more, is an insufficient basis for reasonable suspicion," (2) that the court of appeals considered the lateness and darkness of the alley because it referenced the time of night in the factual background and because the fact "[t]hat a vehicle's lights are off is plainly only relevant if, in fact, it is dark out," and (3) that his case is sufficiently analogous to *State v. Gordon*, 2014 WI App 44, 353 Wis.2d 468, 846 N.W.2d 483, where the court of appeals also found a lack of reasonable suspicion. (McBride's Br. 28-29.) McBride's arguments are unpersuasive.

As an initial matter, McBride does not dispute the State's argument that the court of appeals misapplied the innocent inferences standard when it focused, not on the reasonableness of Rivera's inference of unlawful conduct, but rather on the "plethora of innocent reasons that two people may sit in a parked car," *State v. McBride*, No. 2021AP311-CR, 2022 WL 17814269, ¶18 (Wis. Ct. App. Dec. 20, 2022) (unpublished). (State's Br. 35.) This Court should deem McBride's failure to respond to that argument a concession that the court of appeals did indeed misapply the "black letter law that 'an officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors'" unlawful conduct. *State v. Moore*, 2023 WI 50, ¶15, 408 Wis.2d 16, 991 N.W.2d 412 (citation omitted); *see Shadley v. Lloyds of London*, 2009 WI App 165, ¶26, 322 Wis.2d 189, 776 N.W.2d 838 ("Arguments not rebutted on appeal are deemed conceded.").

As to the arguments that McBride does make, first, neither the State nor the circuit court relied on McBride's presence in a high-crime area "without more." (McBride's Br. 28.) In fact, the circuit court expressly disavowed such an analysis, explaining, "It's not just the furtive movements [and] it's *not just the high-crime area*." (R.40:46 (emphasis added).) Similarly, the State has maintained that the case is

based on the totality of the circumstances, *not* McBride's presence in a high-crime area "without more."

Next, the court of appeals' reciting a fact in the background is hardly the same as actually utilizing it within a totality of the circumstances analysis. True, the court mentioned the time of night in the background section of its opinion. *McBride*, 2022 WL 17814269, ¶3. But that fact seemed to carry no weight and made no explicit appearance in the majority's reasonable suspicion analysis. *Compare id.* ¶¶17-20 (addressing the high-crime area, that two people sat in the car with the lights off, and McBride's movements), *with id.* ¶¶51-57 (Dugan, J., dissenting) (utilizing all of the facts to explain why Rivera had probable cause to arrest McBride including the time of night and darkness of the alley).

Finally, *Gordon* is distinguishable. There, the court of appeals "distill[ed]" the circuit court's findings to: "(1) Gordon was in a high-crime area; (2) Gordon and his friends 'recognized the police presence'; and, as a result, (3) Gordon patted the outside of his pants pocket." 353 Wis.2d 468, ¶14. Unlike the present case where the lateness of night and dark alley were important facts that played into the analysis, *McBride*, 2022 WL 17814269, ¶56 (Dugan, J., dissenting), *Gordon* appeared not to rely on the time of night or darkness of the area, 353 Wis.2d 468, ¶14. In fact, the court distinguished *Gordon* from another court of appeals case where the fact that the seizure occurred late at night *was* an explicit consideration. *Id.* (citing *State v. Matthews*, 2011 WI App 92, ¶11, 334 Wis.2d 455, 799 N.W.2d 911). Likening this case to *Gordon* works only if one follows the court of appeals' lead and ignores several important facts.

That approach is incorrect. "[N]o court is entitled to pick and choose which evidence to consider when evaluating the *totality* of the circumstances." *Dassey v. Dittmann*, 877 F.3d 297, 320 (7th Cir. 2017). Judge Dugan summarized the

relevant facts of this case, five of which supported reasonable suspicion:

> (1) [T]he stop occurred late at night; (2) in a high-crime area involving drug trafficking; (3) the SUV was parked in a dark alley obstructing traffic; (4) there were two people sitting in the car with the lights out; (5) when Officer Rivera shined the squad spotlight on the SUV, McBride immediately began to make . . . furtive movements . . . .

*McBride*, 2022 WL 17814269, ¶56 (Dugan, J., dissenting). Rivera was entitled to investigate the reasonable suspicion derived from those facts, which made the initial seizure constitutional on those grounds as well.

## II. Rivera's removal, handcuffing, search, and seizure of McBride and his contraband were constitutional.

### A. Rivera could remove McBride from the SUV.[2]

McBride contends that even if the initial seizure was constitutional, Rivera subsequently removing him and handcuffing him "was beyond the permissible bounds of a *Terry* stop." (McBride's Br. 38.) McBride acknowledges that officers may remove drivers and passengers during traffic stops, but he attempts to distinguish his case from *Mimms* and *Wilson* because his case "involved a police seizure of a vehicle in an alley, rather than a traffic stop of a vehicle on a roadside." (McBride's Br. 39.) McBride is wrong.

The *Mimms* rule exists because of the "inordinate risk confronting an officer as he approaches a person seated in an

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[2] Although McBride includes the handcuffing in this section of his brief, he does not develop an argument as to why, under *Mimms* and *Wilson*, the handcuffing was unconstitutional. (McBride's Br. 38, 40.) The State limits the reply in this section to the application of *Mimms* and *Wilson*.

automobile." *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (citing the number of officer homicides that occur during traffic stops). Citing *Terry v. Ohio*, 392 U.S. 1, 23 (1968), the Court stated that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Mimms,* 434 U.S. at 110. The "hazard of accidental injury from passing traffic" was merely another justification for the rule. *Id.* at 111.

The Court's desire to protect officers from violence during traffic stops was further crystalized in *Wilson*. There, the Court held that "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). Mentioning nothing about the risk of passing traffic, the Court reasoned that removal of passengers is justified because "[o]utside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment." *Id.* Indeed, the Court concluded that "the motivation of a passenger to *employ violence* to prevent apprehension . . . is every bit as great as that of the driver." *Id.* (emphasis added).

McBride's attempt to cabin *Mimms* and *Wilson* fails for three reasons. First, his effort to differentiate between traffic stops based on where they occur enjoys no case law support. *See McBride*, 2022 WL 17814269, ¶¶44-48 (Dugan, J., dissenting) (rejecting the same arguments in the court of appeals). Second, his argument fails to acknowledge the overarching principle of officer safety that generated the rules in the first place. *See id.* ¶¶45-47 (Dugan, J., dissenting) (emphasizing the general concerns for officer safety upon which *Mimms* and *Wilson* were based). Third, he suggests that Rivera's subjective motivation for the seizure matters (McBride's Br. 40), but motivation is irrelevant to whether Rivera could validly remove McBride from the car. *Whren v. United States*, 517 U.S. 806, 813 (1996). Under *Mimms* and

*Wilson*, Rivera legally removed McBride, and the removal did not exceed the scope of the seizure.

### B. Rivera could search McBride as a search incident to a lawful arrest.

McBride's only response to Rivera's probable cause to arrest him at the time of the search is that "Rivera lacked probable cause to arrest Mr. McBride for the unlawful possession of a prescription drug based *simply* upon the unlabeled pill bottle in the vehicle." (McBride's Br. 46 (emphasis added).) McBride cites *People v. Alemayehu*, a Colorado Court of Appeals case, and implores this Court to "reject the idea that an unlabeled pill bottle, *in and of itself*, constitutes probable cause for a search or seizure." (McBride's Br. 45 (emphasis added) (citing *People v. Alemayehu*, 494 P.3d 98, ¶47 (Colo. App. 2021)).)

But "[p]robable cause is an objective test that 'requires an examination of the totality of the circumstances.'" *Moore*, 408 Wis.2d 16, ¶8 (citation omitted). This case is not about the mere presence of a pill bottle by itself, and so McBride's "effort to establish bright-line rules . . . misses the mark." *Id.* ¶11; *see also McBride*, 2022 WL 17814269, ¶51 (Dugan, J., dissenting) (rejecting McBride's "just one fact" argument). Instead, "the issue presented here is, examining the totality of the circumstances, whether a reasonable law enforcement officer would believe [McBride] probably committed or was committing a crime." *Moore*, 408 Wis.2d 16, ¶12. *Alemayehu* itself and the cases it collected recognize that proposition. 494 P.3d 98, ¶¶48-49 (recognizing that an unlabeled pill bottle in addition to other "unusual" circumstances may support probable cause).

In addition to the five facts summarized by Judge Dugan above, the following facts, when considered in their totality, supported probable cause to arrest McBride:

> (6) when Officer Rivera opened the car door, he immediately saw the pill bottle on the floor of the SUV and it did not have a label on it; (7) the fact that the pill bottle was located on the floor of the SUV between the passenger seat and the passenger door was consistent with McBride's furtive movements leaning down toward his waist and consistent with someone hiding contraband; (8) the circuit court's finding that there is "a fair inference that people don't drive around in their cars with pill bottles on the floor board or in between the door and the passenger seat, that there was actually something that was related to the furtive movement"; (9) that McBride continued to make the furtive movements as Officer [Rivera] was getting out of the squad car; and (10) the pill bottle had green pills in it, that based on his training and experience Officer Rivera believed were oxycodone.

*McBride*, 2022 WL 17814269, ¶56 (Dugan, J., dissenting) (footnote omitted). Those cumulative facts would have led any reasonable officer to conclude that McBride was probably committing a crime, which supported probable cause to arrest. The search incident to that arrest was therefore constitutional.

### C. Alternatively, Rivera could conduct a *Terry*-style protective search, which included handcuffing McBride, and he could seize the items uncovered under the plain touch doctrine.

Finally, McBride contends that Rivera's protective search and handcuffing were "objectively unreasonable." (McBride's Br. 43.) He further argues that Rivera could not have seized the drugs in his pocket based on the plain touch doctrine because Rivera did not have probable cause that the pill bottle in his pocket was incriminating in nature. (McBride's Br. 40-44.)

Arguing that Rivera could not have had reasonable suspicion that he may have been armed, McBride makes the categorical assertion that "the presence of an individual or

individuals, sitting in a parked car, in a high-crime area at night without the lights on is not suspicious." (McBride's Br. 41.) He also claims that "an individual mak[ing] a suspicious movement, either upon noticing police presence or in response to a spotlight[,] is also not suspicious." (McBride's Br. 42.)

How an admittedly suspicious movement is simultaneously *not* suspicious is unclear, and McBride does not explain. Beyond that, a suspicious bending movement toward the floor of a car in response to police presence while being in a totally unilluminated car late at night, in a dark alley, in a high-crime area may lead an officer to reasonably believe "that his safety and that of others was in danger." *State v. McGill*, 2000 WI 38, ¶23, 234 Wis.2d 560, 609 N.W.2d 795. This is especially true where a trained officer like Rivera possesses experience that allows him to "draw[] inferences and make[] deductions that might well elude an untrained person." *State v. Genous*, 2021 WI 50, ¶8, 397 Wis.2d 293, 961 N.W.2d 41 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). The totality of the circumstances outlined in Section I.C. justified Rivera's protective search and handcuffing of McBride. (State's Br. 40-41.)

Lastly, McBride's argument that Rivera lacked probable cause to know that the pills were incriminating fails for the same reason that his argument against Rivera's probable cause to arrest failed. Instead of grappling with the totality of the circumstances, McBride again cites *Alemayehu* and argues that "pill bottles themselves, even unlabeled ones, are not apparently incriminating." (McBride's Br. 43.) That is not how probable cause works. To the contrary, whether a reasonable officer would have probable cause that an item is incriminating in nature is assessed based on the totality of the circumstances. *State v. Sutton*, 2012 WI App 7, ¶10, 338 Wis.2d 338, 808 N.W.2d 411. The totality of the circumstances discussed above also supported probable cause that the pill

bottle in McBride's jacket pocket was contraband. (State's Br. 43.)

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals.

Dated this 14th day of August 2023.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 3,697 words.

Dated this 14th day of August 2023.

Electronically signed by:

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## 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 14th day of August 2023.

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