

No. 17-8778

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK S. SMITH

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

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REASONS FOR GRANTING REVIEW

I. Courts are divided over whether police can conduct ordinary inquiries after reasonable suspicion supporting a traffic stop has dissipated.

Wisconsin claims that there is no longer any discord amongst lower courts regarding the question presented in this case because *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), “clearly” resolves that question and permits police to conduct ordinary inquiries—checking a driver’s license, registration, and insurance—during a traffic stop even after reasonable suspicion supporting the stop has dissipated. (Resp. at 11-14). However, *Rodriguez* does not squarely resolve the question presented in this case. Unlike this case, *Rodriguez* involved a traffic stop where the reasonable suspicion that the driver in that case violated a traffic law never dissipated. *Id.* at 1612-13. It was in that context, that this Court stated that police could conduct ordinary inquiries incident to an ongoing traffic stop. *Id.* at 1615. But what *Rodriguez* left unresolved is whether ordinary inquiries are part of *any* traffic stop initially justified by reasonable suspicion of wrongdoing or *only* incident to traffic stops supported by continuous reasonable suspicion of wrongdoing.

Because *Rodriguez* does not *clearly* answer the question presented in this case, the discord amongst lower courts attempting to answer whether police can conduct ordinary inquiries after reasonable suspicion for a traffic

stop has dissipated is exemplified by both pre-*Rodriguez* and post-*Rodriguez* cases.

Here, both parties have shown that some lower courts have held that once reasonable suspicion for a traffic stop dissipated, the police can no longer detain a driver to conduct ordinary inquiries, including license checks. See *State v. Coleman*, 890 N.W.2d 284, 285, 301 (Iowa 2017)¹; *Colorado v. Redinger*, 906 P.2d 81, 85-86 (Colo. 1995); *Florida v. Diaz*, 850 So. 2d 435, 438-439 (Fla. 2003); *Holly v. Indiana*, 918 N.E.2d 323, 326 (Indiana 2009); *Ohio v. Chatton*, 463 N.E.2d 1237, 1240-41 (Ohio 1984); *Utah v. Morris*, 259 P.3d 116, 124 (Utah 2011); *South Dakota v. Hayen*, 751 N.W.2d 306, 307, 311 (South Dakota 2008); *McGaughey v. Oklahoma*, 37 P.3d 130, 141-42 (Oklahoma Crim. App. 2001); *United States v. McSwain*, 29 F.3d 558, 561-62 (10th Cir. 1994); *United States v. Valdez*, 267 F.3d 395, 398 (5th Cir. 2001); *United States v. Jenkins*, 452 F.3d 207, 214 (2d Cir. 2006); *United States v. Edgerton*, 438 F.3d 1043, 1044-45 (10th Cir. 2006); *United States v. Pena-Montes*, 589 F. 3d 1048, 1058 (10th Cir. 2009); *United States v. Trestyn*, 646 F.3d 732, 736, 744 (10th Cir. 2011). (Pet. at 10-17; Resp. at 12-14). Oppositely, other lower courts, like the Wisconsin Supreme

¹ Wisconsin accurately points out that *Coleman* was ultimately decided on state constitutional grounds. *Coleman*, 890 N.W.2d 284 at 301. (Resp. at 13). However, Wisconsin's assertion that the court in *Coleman* explicitly declined to follow *Rodriguez* is misguided. In fact, the *Coleman* court found that there was nothing in the language of *Rodriguez* that contradicted their holding that police cannot conduct ordinary inquiries after reasonable suspicion supporting a stop has dissipated. *Id.* at 299-300.

Court, have disagreed and allow police to conduct ordinary inquiries after reasonable suspicion supporting a traffic stop dissipated. See *Illinois v. Cummings*, 46 N.E.3d 248, 252-253 (Ill. 2016); *Maine v. Gulick*, 759 A.2d 1085, 1088-90 (Me. 2000); *Maine v. Hill*, 606 A.2d 793, 795 (Me. 1992); *Idaho v. Godwin*, 826 P.2d 452, 456-57 (Idaho 1992). (Pet. at 16; Resp. at 12-14).

Due to the disagreement amongst lower courts on whether police can conduct ordinary inquiries during a traffic stop after the reasonable suspicion supporting the stop has dissipated, this Court should grant certiorari.

II. The Wisconsin Supreme Court's decision to allow police to conduct ordinary inquiries after reasonable suspicion supporting a traffic stop has dissipated was wrongly decided.

Surprisingly, Wisconsin chooses to ignore the specific language of this Court's holding in *Rodriguez* and melds it together with this Court's comments about the appropriateness of ordinary inquiries during a traffic stop supported by ongoing reasonable suspicion to justify those same ordinary inquiries in traffic stops unsupported by ongoing reasonable suspicion. (Resp. at 7-10). In *Rodriguez*, this Court specifically held that a traffic stop cannot exceed the "time needed to handle the matter for which the stop was made," and police cannot prolong a stop justified only by an alleged traffic violation beyond the time required to issue a ticket. *Rodriguez*, 135 S. Ct. at 1612. Therefore, once reasonable suspicion of a

traffic violation has dissipated, the traffic stop is handled and the police mission is over, because police do not need additional time to write a ticket. Allowing police to continue with the traffic stop and perform ordinary inquiries after reasonable suspicion supporting the stop has dissipated directly contradicts *Rodriguez*'s holding because this would result in the duration of the stop extending beyond the time needed to handle the traffic violation.

In addition, Wisconsin's assertion that ordinary inquiries during a traffic stop where reasonable suspicion has dissipated are "negligibly burdensome" and "minimally intrusive" is misguided. (Resp. at 8-10). Notably, the cases that Wisconsin cites to in making this claim permit officers to take part in "negligibly burdensome" and "minimally intrusive" actions during a traffic stop when that stop is supported by *ongoing* reasonable suspicion of a traffic violation. See *Delaware v. Prouse*, 440 U.S. 648, 650, 658-659 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 107, 111 (1977); *Rodriguez*, 135 S. Ct. at 1612-13, 1615-16. (Resp. at 8-10). Not in a situation, as here, where reasonable suspicion supporting the stop has dissipated.

When police continue to seize a motorist after reasonable suspicion of a traffic violation dissipates, that person is not free to go because the police have not told the motorist they are free to leave. See *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). Thus, an officer's performance of ordinary

inquiries is not “negligibly burdensome” or “minimally intrusive” in a situation where reasonable suspicion of a traffic violation has dissipated because the officer is depriving the motorist’s liberty without a continuing justification for doing so. *See Florida v. Royer*, 460 U.S. 491, 498 (1983).

Moreover, contrary to Wisconsin’s claims, officer safety, although important, does not suffice as a justification allowing police to conduct ordinary inquiries after the reasonable suspicion supporting a traffic stop has dissipated. (Resp. at 9-11). Once again, the cases Wisconsin cited to that allow officers to take part in certain actions—such as asking a driver to exit their car—during a traffic stop to ensure their safety involved traffic stops supported by *ongoing* reasonable suspicion of a traffic violation. *See Mims*, 434 U.S. at 107, 110; *Rodriguez*, 135 S. Ct. at 1612-13, 1615-16. (Resp. at 9-11).

Prolonging a traffic stop after reasonable suspicion has dissipated—including allowing an officer to ask for identification or order occupants out of a car—actually heightens the danger to police because the continued detention of the driver increases the exposure police have to the driver and potential danger during the traffic stop. If police end the stop after reasonable suspicion has dissipated, and allow the driver to go, any concerns for police safety are eliminated because the driver has left the scene. It is inconsistent and unpersuasive for Wisconsin to argue that concerns for officer safety allow an officer to conduct ordinary inquiries in a

stop unsupported by continuing reasonable suspicion, while also arguing for a result—prolonging a traffic stop after reasonable suspicion supporting the stop has dissipated—that actually *increases* the danger to police.

The decision below creates bad precedent that allows police to restrict a person's liberty without justification. It permits police to continue the detention of a driver beyond the point in which police have reasonable, objective grounds for doing so. *See Royer*, 460 U.S. at 498.

III. This case is an excellent vehicle.

This case is an excellent vehicle for resolving the lower court conflict. The Wisconsin Supreme Court squarely decided the question of whether police can conduct ordinary inquiries after reasonable suspicion supporting a traffic stop has dissipated. (App. A at 110-129, 132-133). And because of the thorough dissenting opinion below, the arguments on both sides have been fully aired. (App. A at 139-159).

Additionally, for multiple reasons, Wisconsin's concern that this case is a poor vehicle for deciding the question presented because the officer in this case had ongoing reasonable suspicion that Mr. Smith broke two other laws is unwarranted. (Resp. at 15-16). First, the Wisconsin Supreme Court did not find that there was ongoing reasonable suspicion that Mr. Smith violated Wis. Stat. §346.51(1) by illegally parking. (Resp. at 15; App. A at 110). Instead, the court assumed that reasonable suspicion dissipated when the officer realized Mr. Smith was not the female registered owner of the car

with a suspended license and made its decision regarding the appropriateness of ordinary inquiries under those facts. (App. A at 110-129, 132-133). Importantly, whether Mr. Smith violated Wis. Stat. §346.51 involves questions of fact that were never raised or resolved in the trial court and never argued in the Wisconsin Court of Appeals. (App. B at 160-165; App. D at 169-176; App. E at 181-215). Therefore, under Wisconsin precedent, the argument that Mr. Smith violated Wis. Stat. §346.51, which created an ongoing reasonable suspicion of wrongdoing, was forfeited for appeal and has no bearing on the Wisconsin Supreme Court's decision and analysis in this case or whether this case is a good vehicle for deciding the question presented. *See Wirth v. Ehly*, 287 N.W.2d 140, 145-46 (Wis. 1980) (superseded on other grounds); *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 279 N.W.2d 493, 498-99 (Wis. Ct. App. 1979).

Second, Sergeant Gonzalez did not have reasonable suspicion that Mr. Smith was operating while intoxicated in violation of Wis. Stat. §346.63(1)(a) until *after* the officer began the process of conducting ordinary inquiries. (Resp. at 15-16; App. A at 105-106; App. E at 186, 194-195). After Sergeant Gonzalez realized that Mr. Smith was not the female registered owner of the car with an invalid license, he successfully communicated with Mr. Smith without having to repeat himself through the inoperable driver's side window of Mr. Smith's car, and then he walked around to the passenger side of the car and opened the door. (App. A at 105-106; App. E at 186-187,

194-196, 198-199, 203). It was only after Mr. Smith's passenger side door was opened that Sergeant Gonzalez saw the signs of Mr. Smith's intoxication. (App. A at 107). The only possible justification Sergeant Gonzalez had for walking around to the passenger side of the car and prolonging the traffic stop after reasonable suspicion that Mr. Smith had an invalid license dissipated was to conduct ordinary inquiries. And in fact, while at the opened passenger side door, Sergeant Gonzalez asked Mr. Smith for his license. (App. A at 107). Had Sergeant Gonzalez told Mr. Smith he was free to go through the driver's side window immediately after reasonable suspicion of a traffic violation had dissipated and left, he would not have developed a reasonable suspicion that Mr. Smith was operating while intoxicated.

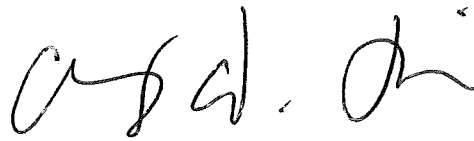
The issue in this case is important because it arises often. As the survey of cases cited above demonstrates, it is not uncommon for reasonable suspicion to dissipate during a traffic stop. It is also important because of the high stakes for both law enforcement and the public. For citizens, the question is whether their liberty can continue to be curtailed after reasonable suspicion for a traffic stop has vanished merely because the stop was initially justified. For law enforcement, it is difficult for officers to know with certainty that they are working within the bounds of the Fourth Amendment during a traffic stop. A decision from this Court would inform police, with certainty, whether they have to tell a driver stopped for a traffic

violation they are free to go once they realize there is no violation or other reasonable suspicion of wrongdoing, or if they can continue to seize the driver and run a check on their license.

CONCLUSION

Mr. Frederick S. Smith respectfully requests that this Court grant his petition for certiorari.

Dated this 17th day of August, 2018.

A handwritten signature in black ink, appearing to read "C.D. Sobic", written over a horizontal line.

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