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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| MARVIN DAVIS,<br><br>Defendant—Below,<br>Appellant<br><br>v.<br><br>STATE OF DELAWARE<br><br>Plaintiff—Below,<br>Appellee. | ) | No. 419, 2022 |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# APPELLANT'S *CORRECTED* OPENING BRIEF

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## NATURE AND STAGE OF PROCEEDINGS

On May 24, 2021, Marvin Davis was indicted on charges of Possession of a Firearm by Person Prohibited, Possession of Ammunition by Person Prohibited, and Carrying a Concealed Deadly Weapon. A1, D.I. #3. The pertinent conduct stems from a gun found in Davis's car during a routine traffic stop on his March 14, 2021. A8—9.

On September 8, 2021, Trial Counsel filed a Motion to Suppress. A10. The State filed its response on September 30, 2021. A41. The trial court held a hearing on October 4, 2021, during which it heard testimony, denied two of Davis's suppression arguments, and declined to rule on a third argument which focused on the Delaware Constitution. A61—153, Ex. A.

Davis was tried before a jury and convicted of the three weapons charges on April 19, 2022. A156 – 192. The State filed a Motion to Declare Defendant an Habitual Offender on September 22, 2022. A4, D.I. 29. On October 7, 2022, Davis was sentenced to 23 years of incarceration followed by probation. Ex. B.

This is Davis's Opening Brief to his timely filed notice of appeal.

## SUMMARY OF ARGUMENT

1. Marvin Davis's Motion to Suppress argued, in part, that Trooper Justin Evans violated the Delaware Constitution when Evans, as a matter of personal routine, ordered Davis to exit his vehicle during a routine traffic stop so that Evans could both frisk Davis and have Davis stand by the police car while Evans ran various DELJIS checks related to the traffic stop. This argument was properly briefed, yet even after Trial Counsel reminded to the trial court about the issue, the trial court declined to rule. As a result of the trial court's inaction, the State was permitted to use the challenged evidence at trial. This Court must reverse.

2. If this Court finds that automatic reversal is not required to remedy the trial court's failure to rule on Davis's Motion to Suppress, it should reverse based on the merits of the motion. The Delaware Constitution does not permit police officers to, as a matter of routine traffic stop practice, order an occupant to exit their car for the purpose of frisking them without individualized reason to believe the occupant is armed and dangerous. Because the discovery of Davis's gun came as a direct result of such an exit order, the trial court erred by failing to suppress the evidence. This Court must reverse.

## STATEMENT OF FACTS

In the evening of March 14, 2021, Delaware State Police Trooper Justin Evans was patrolling in his vehicle near "the Churchmans Road corridor." A60. Trooper Evans pulled behind a white Mercury and, through a DELJIS inquiry, determined the vehicle was not properly registered. A67. Trooper Evans activated his emergency lights and the driver of the Mercury, later identified as Marvin Davis, promptly pulled over into a parking lot. A235,[1] 1:00-1:15. Trooper Evans soon exited his car and approached Davis's front passenger window.

Trooper Evans asked Davis to provide standard documentation: license, registration, and insurance. A71—72. Evans also explained to Davis that he had pulled him over because of the registration status. A235, 2:05-2:10. In turn, Davis informed Trooper Evans that he had just purchased the car (for which he had proof) and had intended on going the next day to the DMV to take care of the requisite registration transfer. A235, 2:10-2:12. Davis also informed Trooper Evans that he had a driver's permit and provided him a photocopy. A73. Trooper Evans had no suspicion that the car was stolen (A95) and testified that if the only infraction had been the registration issue, he would have just given Davis a warning, and told him to go to the DMV. A86—87.

[1] During the suppression hearing the State introduced a video from Trooper Evans MVR. The video is included in the appendix at A235.

After briefly looking at the documents, Trooper Evans decided he would return to his vehicle to make sure there were no warrants or capiases, and to possibly issue Davis a citation. A75. Although Evans believed he saw signs that Davis was nervous about the encounter, those signs did not cause him to fear for his safety or have any impact on the exit order A75—76. Nonetheless, after Trooper Evans returned the unnecessary documents to Davis, he asked Davis to exit the car and accompany him back to his car. A76. Trooper Evans explained that the exit order was simply his "pretty routine" practice to ask every driver out of the car and frisks them. A77; A79 ("I do it almost every traffic stop"). After frisking almost every driver he pulls over, he then orders them to stand at the front of his car, or at his passenger window for the remainder of the stop. A79. Trooper Evans claimed that the frisk is conducted for officer safety and the exit command and location of the driver are ordered to expedite the stop. A79.

In response to the exit order, Davis began to "adjust in his seat," which enabled Evans to observe part of a firearm which Davis had been sitting on. A81. Trooper Evans quickly drew his firearm and ordered Davis to put his hands on the roof. Despite his attempt to control the situation, Evans believed Davis twice reached towards the firearm. A235, 3:18—3:50. Davis claimed he was not reaching towards the firearm. In any case, after repeated warnings, Evans was eventually able to deescalate the situation.

Once additional officers arrived, Trooper Evans had Davis exit the car, after which Davis was cuffed and placed in Evans' vehicle. A235, 7:04-8:00. A search of Davis's car revealed a loaded firearm. Davis was prohibited from owning or possessing a firearm and ammunition. A168.

## I. THE TRIAL JUDGE ERRED BY FAILING TO RULE ON DAVIS'S STATE CONSTITUTIONAL SUPPRESSION ARGUMENT EVEN THOUGH IT WAS THOROUGHLY BRIEFED, TIMELY FILED, AND PRESENTED TO THE COURT AT THE SUPPRESSION HEARING.

### *Question Presented*

Whether a trial judge errs by declining to rule on a properly briefed and timely filed suppression argument? A152—153.

### *Scope of Review*

This Court generally reviews the denial of a motion to suppress evidence for abuse of discretion.[2] But the motion to suppress at issue was not denied; it was not ruled on at all. The purely legal question of whether the judge erred by failing to rule on the motion is reviewed *de novo*.[3]

### *Merits of Argument*

Trial Counsel filed a motion to suppress the gun seized in Davis's car which argued, in part, that Trooper Evans violated Del. Const. art. I, § 6 by ordering Davis out of the car in order to frisk and have him remain by the police car for the remainder

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[2] *Smith v. State*, 887 A.2d 470, 472 (Del. 2005).

[3] The instant claim does not hinge on factual disputes, and this court conducts *de novo* reviews of motions to suppress in which "the factual basis . . . is undisputed." *Taylor v. State*, 822 A.2d 1052, 1055 (Del. 2003). Errors of law are reviewed *de novo. Evans v. State*, 212 A.3d 308, 313 (Del. Super. Ct. 2019).

of the investigation.[4] A23—29. At the hearing, after evidence was closed, the judge ruled on some of the suppression issues but did not address the Delaware Constitutional argument. Trial Counsel reminded the trial court about the remaining issue, to which the judge responded "I'm not going to take up that issue at this time. I found that under the United States Constitution that it's satisfied." A92. The Delaware Constitutional argument was never addressed by the trial court, and as a result, the State was permitted to try Davis with the disputed evidence.

A. ***The judge erred by failing to rule on the motion.***

Super. Ct. Crim. R. 12(e) plainly required the trial court to rule on Davis's Delaware Constitutional argument.[5] "A motion made before trial" such as Davis's "*shall* be determined before trial." Despite being specifically reminded by trial counsel at the hearing, the trial judge failed to rule. T92. The rules identify a single exception to this requirement: "good cause." But no such cause exists in this record, so there is no basis to conclude the failure was error free. The judge simply did not rule. She did not ask for supplemental briefing, express any doubt as to the legitimacy of the claim, or identify any reason for not doing so.[6]

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[4] *Holden v. State*, 23 A.3d 843, 847 (Del. 2011) ("A police officer may not conduct a pat down . . . during a traffic stop unless the officer has reasonable suspicion").
[5] Super. Ct. Crim. R. 12(e) ("A motion made before trial *shall* be determined before trial *unless* the court, *for good cause*, orders that it be deferred for determination at the trial of the general issue or until after verdict") (emphasis added).
[6] Counsel does not allege, nor is there any suggestion in this record, that the judge's failure to rule was deliberate.

But the trial court did not just violate its own rules, it defied the *repeated* admonitions from this Court in response to procedures which avoid ruling on objections without "any expeditious purpose," in part, because they prevent "preserv[ation of] both the objection and the basis for the ruling on the record."[7] A "trial judge's adjudicative responsibilities" include ruling on fairly presented issues, and providing "a legal rationale:"[8] the court below did neither.

B. ***This Court should reverse.***

Any remedy other than reversal would encourage similar avoidance of novel questions by trial courts, and effectively force this Court to function as a court of first instance. But as an appellate court, this Court reverses when "a trial court's opinion and its rulings . . . are insufficient to enable this Court

[7] *Alexander v. Cahill*, 829 A.2d 117, 129–30 (Del. 2003); *King v. State*, 355 So. 2d 1148, 1152 (Ala. Crim. App. 1978) ("the absence of an adverse ruling precludes review.")

[8] *Holden*, 23 A.3d at 846–47; *Perez v. State*, 224 A.3d 201 (Del. 2019) ("the Superior Court must make factual determinations and supply a legal rationale for a judicial decision as a matter of law."); *Storey v. Camper*, 401 A.2d 458, 466 (Del. 1979) ("the duty to exercise discretion by a trial judge generally includes the duty to make a record to show what factors the trial judge considered and the reasons for his decision"); *Cannon v. Miller*, 412 A.2d 946, 947 (Del. 1980) ("A judge of our State must understand that the legal requirement of supplying reasons is a matter of judicial ethics as well as a matter of law"); *Husband M v. Wife D*, 399 A.2d 847, 848 (Del. 1979) ("It is an abuse of discretion not to supply reasons for a judicial decision").

meaningfully to review whether . . . those rulings are correct."[9] In this case, the trial court not only failed to provide reasons, it failed to rule entirely.

Reversal is also required to affirm the authority of the rules of criminal procedure. A ruling other than reversal would effectively negate the authority of the rule, which already provides an extremely broad exception ("good cause") for delaying a ruling until trial and provides no discretion which would permit a trial judge to not rule at all.

And finally, reversal is the best remedy to ensure criminal defendants need not wait until their convictions are appealed to have their Delaware Constitutional rights recognized by the courts. Forcing defendants to wait is not just unfair to them, it is a violation of public policy principles recognized by this Court.[10]

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[9] *Wit Cap. Grp., Inc. v. Benning*, 2005 WL 3754559, at *4 (Del. June 20, 2005) (reversing class certification based on trial court's failure to adequately address "the issues of predominance, superiority, typicality, and adequacy of representation").

[10] *Hodsdon v. Superior Ct. In & For New Castle Cnty.*, 239 A.2d 222, 225 (Del. 1968) ("proper administration of criminal justice requires prompt law enforcement.")

## II. THE TRIAL JUDGE ERRED BY FAILING TO RULE THAT THE DELAWARE CONSTITUTION REQUIRES INDIVIDUALIZED REASONING AND ARTICULABLE FACTS TO JUSTIFY THE ADDITIONAL SEIZURE WHICH RESULTS FROM ORDERING A DRIVER OUT OF A CAR TO FRISK THEM AND TO REMAIN OUTSIDE FOR THE ENTIRETY OF A ROUTINE TRAFFIC STOP.

### *Question Presented*

Whether the Delaware Constitution permits law enforcement to order any driver out of a car during a routine traffic stop in order to frisk them for weapons and to remain outside for the entirety of the stop when there is no reason to believe the driver is armed and dangerous. A23—29.

### *Scope of Review*

This Court reviews alleged constitutional violations *de novo.*[11]

### *Merits of Argument*

The Fourth Amendment to the Federal Constitution guarantees the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[12] In similar language,[13] art. I, § 6 of the Delaware Constitution guarantees that the people "shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures."[14] "[T]he United States

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[11] *Wheeler v. State*, 135 A.3d 282, 295 (Del. 2016).
[12] U.S. Const. amend. IV.
[13] *See Rickards v. State,* 77 A.2d 199, 204 (1950).
[14] Del. Const. art. I, § 6.

Constitution establishes a minimum, the least protection that a State may provide to its citizens . . . It does not establish a maximum."[15]

In *Pennsylvania v. Mimms* the United States Supreme Court interpreted the Federal Constitution as permitting automatic exit orders during every single routine traffic stops.[16] As argued below, the Delaware Constitution should not be interpreted as permitting that same routine intrusion. The Delaware Constitution provides different and broader protections than the Fourth Amendment to the United States Constitution,[17] and this Court has identified numerous circumstances in which those broader protections apply.[18]

To determine if the broader protections of the Delaware Constitution include the conduct at issue in *Mimms*, this Court will consider the following non-exclusive criteria: "textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes."[19]

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[15] *See Sanders v. State,* 585 A.2d 117, 145 (1990).
[16] *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).
[17] *Juliano v. State*, 254 A.3d 369, 380 (Del. Nov. 12, 2020) ("the Delaware Constitution provides different and broader protections than the Fourth Amendment.")
[18] *Jones v. State*, 745 A.2d 856, 864–69 (Del. 1999) (distinguishing Delaware Constitution from Federal Constitution in finding that, in the former, a seizure occurs without force or submission to authority); *Dorsey v. State*, 761 A.2d 807, 820 (Del. 2000) (rejecting *Leon*'s good faith exception under the Federal Constitution).
[19] *Mathis v. State*, 907 A.2d 145 (Del. 2006).

**A. *Textual language and legislative history.***

As noted above, the textual language of the Delaware and federal provisions is different. More significantly, the legislative history of the Delaware Constitution reveals that the "search and seizure in Delaware reflects [a] commitment to protecting the privacy of its citizens" absent in the Federal Constitution.[20]

**B. *Preexisting State Law.***

**i. An exit order is a meaningful intrusion within the Delaware Constitution.**

Numerous features of preexisting state law are inconsistent with the reasoning and conclusion of *Mimms*. There is no basis to treat an exit order as *per se de minimis* under the Delaware Constitution, even if that is the case under the Federal Constitution. This Court has recognized that the definition of a "seizure" for purposes of the Delaware Constitution is broader than the Federal Constitution's definition. This distinction is significant here because the *Mimms* outcome was premised on balancing the purported safety interest against the severity of the seizure. Just as what is not a seizure under the Federal Constitution may be a seizure under the Delaware Constitution, so too, what is a "*de minimis*" seizure under the Federal Constitution, may be a more significant intrusion under the Delaware Constitution.

[20] *Jones*, 745 A.2d at 866.

The question under Delaware law is whether a "reasonable person in the defendant's position would not have believed that he was free to ignore [the officer's] instructions" and remain in the car.[21] Certainly a car occupant, like Davis, would not feel free to ignore an officer's order to exit their car during a traffic stop. Certainly, the privacy impact of an order to exit a car is just as, if not more, significant than that of an order "to stop and remove [one's] hands from [one's] pockets,"[22] the prototypical example of conduct constituting a seizure under the Delaware Constitution but not the Federal Constitution. Justice Stevens' dissent in *Mimms* shows how an occupant's privacy interest in staying in a car during a stop can be quite high: "A [person] stopped at night may fear for [their] own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed."[23]

Finally, it is noteworthy that one of the primary concerns this Court considered in deciding to differentiate the Delaware Constitutional definition of when a person is "seized" from that of the Federal Constitution is that the latter "would allow a police officer lacking reasonable suspicion to create that suspicion through an unjustified attempted detention."[24] That same concern is implicated in

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[21] *See id.* at 869.
[22] *Id.*
[23] *Mimms* at 120–21 (J. Stevens, J. Brennan, and J. Marshall dissenting).
[24] *Jones*, 745 A.2d at 864.

deciding whether the Delaware Constitution permits the blanket exception for exit orders adopted in *Mimms*.

**ii. Neither *Mimms*, nor the data upon which it is based, provide the individualized concern for officer safety which the Delaware Constitution requires.**

The novelty of *Mimms* is that it permits the intrusion of an exit order (*de minimus* as it may be) without any regard for individual circumstances like the reason for the stop, the location, the time, the driver's compliance, and so on.[25] In contrast, this Court has not previously interpreted the Delaware Constitution to permit this type of blanket generalization. Instead, the Delaware Constitution requires "articulable *individualized* suspicion" specific to the facts of each case.[26] Similarly inconsistent with preexisting state law is *Mimms*' blatantly incorrect generalization about the level of intrusion imposed on the driver.[27] Just as there are surely situations in which an exit order is justified by concerns for officer safety, there are surely situations in which it is not. When safety concerns justify an exit

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[25] *See Mimms* at 121 (dissent) ("Until today the law applicable to seizures of a person has required individualized inquiry into the reason for each intrusion, or some comparable guarantee against arbitrary harassment. . . to eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision . . . and leaves police discretion utterly without limits."). The State's suggestion that in *Loper v. State*, this Court ruled on *Mimms'* applicability to the Delaware Constitution is a misreading and addressed below.

[26] *Juliano v. State*, 254 A.3d 369, 386 (Del. 2020) (emphasis added).

[27] *Mimms* at 120–21 (dissent) ("Nor is it universally true that the driver's interest in remaining in the car is negligible.")

order, preexisting state law, in particular our codification of the *Terry* standard in 11 *Del. C.* Ch. 23, "provide[s] the police with a sufficient basis to take appropriate protective measures whenever there is any real basis for concern."[28]

Within the Delaware Constitution, generalized safety concerns inherent to a routine traffic stop do not justify the additional seizure of an exit order without a more particularized concern. To conclude otherwise regarding the Federal Constitution, the *Mimms* Court relied on a single study ("the Bristow Study").[29] The Bristow Study is not a source from which this Court can reliably infer a sufficient safety concern in routine traffic stops. The Bristow Study itself warns that the "results must be viewed with the consideration that this is a pilot study, based on a small group of cases."[30] The Bristow Study is over sixty years old and relies on a data set compiled when "[d]ominant policing philosophies" were significantly different than today.[31] As a result, the data does not account for the improved

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[28] *Id.* at 123 (dissent) ("When [sufficient] concern[s that an occupant is armed and dangerous] exist, [officers] should be able to frisk a violator, but I question the need to eliminate the requirement of an articulable justification in each case and to authorize the indiscriminate invasion of the liberty of every citizen stopped for a traffic violation, no matter how petty.")

[29] Allen P. Bristow, *Police Officer Shootings-A* Tactical *Evaluation*, 54 J. CRIM. L. & POLICE SCI. 93 (1963), *available at* https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5143&context=jclc.

[30] *Bristow* at 93.

[31] Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 655—56 (2019)

"protective tools that officers [currently have] at their disposal."[32] Further, scholars have pointed out that the "sample utilized [in the Bristow Study] was haphazard and did not include several cases for unspecified reasons,[7] resulting in a small sample (N=35) of automobile related shootings and fatalities . . . [and for] nearly 25% of the entire sample, [the study] provide[s] no explanation for what occurred."[33] So too, the Bristow Study does not make clear "how many of th[e] shootings involved traffic stops, and specifically traffic stops based only on traffic violations.[34]

Even if the Bristow Study's conclusions were reliable, they speak to the dangers of traffic encounter *relative to other* law enforcement actions; they do not even purport to address the relevant question of how dangerous routine traffic stops are *as an absolute* (*i.e.,* how likely officer safety issues which would be prevented by an exit order come up during routine traffic stops). But there is significant reason to doubt even the most basic point about the relative dangerousness of traffic stops. A more recent and significantly larger data set suggests that officers are actually in *more* danger when the suspect is outside of a vehicle than seated inside,[35] and that "routine traffic stops involve less danger to officers than other types of police

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[32] *Woods*, at 655-56.
[33] Illya Lichtenberg, *"Police Officer Shootings": A Replication of the 1963 Bristow Study*, 54 WILLAMETTE L. REV. 79, 80 (2017).
[34] *Woods* at 707.
[35] *Lichtenberg* at 80 (finding 51.5% of officer shootings in contexts related to traffic stops occurred while the shooter was outside the vehicle, while only 33% occurred while the shooter was inside the vehicle).

encounters."[36] This comports with Justice Stevens' suggestion that in some cases exit orders could actually "aggravate the officer's danger because the fear of a search might cause a serious offender to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed."[37] Finally, the fact that the Delaware State Police do not require, or even have a policy which encourages exit orders (A107) suggests that that they have determined it is not necessarily safer for the officer.

The facts of this case are illustrative: (1) Davis pulled over into a parking lot, thereby completely negating "[t]he hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle;"[38] (2) Trooper Evans spoke to Davis for some time while Davis remained in the car. Prior to the exit order there was no conflict, aggression, or any reason to suspect anyone was in danger; and (3) had Trooper Evans not asked Davis to exit, there is no reason to believe he would have at any point become aware of the gun, to be concerned Davis would use it (nor is there any objective reason to believe Davis would have used it), or to come as close as he did to killing Davis.[39]

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[36] *Woods* at 708.
[37] *Mimms*, 434 U.S. at 119 (dissent).
[38] *Id.* at 111 (majority).
[39] *See id*. at 123 (dissent) ("In this case the offense might well have gone undetected if respondent had not been ordered out of his car, but there is no reason to assume that he otherwise would have shot the officer).

## C. ***Matters of Particular State Interest or Local Concern.***

This Court noted in *State v. Jones* that

> [w]*hen particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law. Moreover, some matters are uniquely appropriate for independent state action.*[40]

### i. Gun laws and traffic laws are not uniform nationally, and as a result, neither are the safety concerns associated with traffic stops.

The issue presented herein implicates matters which are local in character: traffic laws, gun laws,[41] and their associated safety concerns. The Delaware Code[42] and our legislature recognize that "[d]ifferences in local traffic conditions are recognized and it is feasible to adapt rules of the road to fit different local situations."[43] Further, the fact that the evidence which purports to establish the safety concern is "dubious at best" provides further reason for this Court to question whether such concerns apply to our State.[44] Afterall, there is no indication in *Mimms*

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[40] *Jones*, 745 A.2d at 864–65.

[41] Art. I, § 20 of the Delaware Constitution ("Right to Keep and bear arms"); *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 636 (Del. 2017) ("the Delaware provision is intentionally broader than the Second Amendment").

[42] *See e.g.,* 21 *Del. C.* § 4170. Speed limits set by local authorities; 21 *Del. C.* § 4180 (b) (addressing circumstances in which local authority as to parking rules supersede the Delaware Code).

[43] Laws of the State of Delaware, 122 Session of General Assembly Volume LIV, Ch. 16, p. 473 (1963). A35—40.

[44] *Mimms*, 434 U.S. at 117–19 (dissent) (describing how studies relied on by the majority "do not fairly characterize the study" upon which they are based).

or the Bristow Study that the violence which triggered the safety concerns in *Mimms* had even once occurred Delaware.

**ii. Delaware has a particular interest and need to combat racialized policing practices in traffic encounters.**

Our State has expressed, through art. 1 § 21 of our constitution: the equal rights amendment, a particular interest in combatting racial discrimination. A portion of that concern stems from race-based law enforcement practices.[45] Permitting Delaware law enforcement to order any driver out of the car for no reason at all will amplify the frequency in which drivers are ordered to do so for impermissible reasons, like their race. Justice Stevens[46] and legal scholars[47] have recognized this reality. And while there is a general absence of data particular to Delaware law enforcement's impermissible use of race, that reality is a function of law

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[45] *See* Sarah Gamard, *Here's why Delaware just adopted anti-discrimination protections for people of color*, DELAWARE NEWS JOURNAL (Feb. 4, 2021) (noting timing of the amendment and numerous statements from legislatures and the Attorney General reflect concern about race based discrimination by law enforcement), *available at* https://www.delawareonline.com/story/news/politics/2021/02/04/why-delaware-just-added-equal-rights-protections-people-color/4306384001/.

[46] *Mimms*, 434 U.S. at 122 (dissent) ("Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely.")

[47] Stephen E. Henderson, *"Move on" Orders As Fourth Amendment Seizures*, 2008 B.Y.U. L. REV. 1, 42 (2008) ("Another benefit is a potential decrease in discriminatory policing. While there is existing constitutional protection for those ordered to move on because of their race or based on some other constitutionally-protected trait, it is difficult to prove such an equal protection challenge.")

enforcement's decision to keep their practices secretive, and cuts against any claim of a generalized safety concern.[48]

There is no reason to doubt that the frequency of race-based traffic enforcement reflected in extremely large and diverse national data sets exists in our state.[49] In fact, in the limited context that Delaware data has been revealed, it reflected an alarming and *significantly* worse problem of racialized traffic enforcement. Specifically, in *State v. Rose*, the superior court ordered the State to turn over "Safe Streets police reports governing 6/1/2019-5/31/2020, that were (a) authored by the Safe Streets officers involved in [that defendant's] detention/arrest and (b) involved the odor of marijuana."[50] A194. Trial Counsel's analysis of the reports, which was factually undisputed by the State, revealed that of 60 vehicle

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[48] Unlike other concerns related to police transparency, nothing in the Law Enforcement Officer's Bill of Rights prevents the release of this data. *See* 11 *Del. C.* § 9200(c)(12). And, if the State doubts the claims made herein, unlike civilians, they can quite easily obtain the pertinent data. 29 *Del. C.* §§2504(4), 2508 (b).

[49] A recent Stanford University study of nearly 100 million traffic stops from 21 state patrol agencies and 29 municipal police departments between the years of 2001 and 2017 concluded that, on average, black drivers are 20% more likely than white drivers to be pulled over. E. Person, *et al*, *A large-scale analysis of racial disparities in police stops across the United States*, Vol 4. NATURE HUMAN BEHAVIOUR 736 (July 2020), *available at* https://5harad.com/papers/100M-stops.pdf; *see* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551 (1997) ("From the New Jersey Turnpike to the I-95 corridor between Delaware and Florida, empirical studies strongly suggest that police single out minority, particularly African-American, motorists for traffic stops.") (relying on Florida, Maryland, and New Jersey data).

[50] *State v. Rose*, Case No. 1911004775, D.I.#50, October 21, 2021, Letter From Thomas Foley, Esq. To Judge LeGrow (J. LeGrow, NCC Super. Ct, 2021).

stops which fit the relevant criteria (57) stops involved a black motorist; (1) involved a motorist whose race was redacted, but the arrested subject is black; (1) involved a Hispanic motorist, and (1) involved a white motorist with a black passenger. A195. Moreover, the data obtained in *Rose* likely underestimates the influence of race on traffic stops because it only includes those stops which resulted in arrests.

**D.** ***Numerous other states have interpreted their state constitution's fourth amendment analogs as providing more protection than Mimms.***

To determine the extent of our constitution's protections, this Court has considered how other states have interpreted their respective fourth amendment analogs.[51] Numerous states –including some whose state constitutional search and seizure rules have previously been relied on by this Court to interpret ours[52] – have refused to read their constitutions as consistent with *Mimms*.[53] The Massachusetts Supreme Court declined to adopt *Mimms* under its state constitution because it found that "a reasonably prudent man in the policeman's position would [not] be warranted in the belief that the safety of the police or that of other persons was in danger" in every single routine traffic stop.[54] The Hawaii Supreme Court, interpreted its State

[51] *Jones v. State*, 745 A.2d 856, 864 (Del. 1999) ("A number of states have likewise interpreted *Hodari D.* as inconsistent with . . . their state constitutions").
[52] *Id.* at n. 35 (relying on the Hawaii and Minnesota Supreme Courts' interpretation of their, respective, State constitutions).
[53] However, some states have found their state constitutions to be consistent with *Mimms*. *See e.g., State v. Dukes,* 209 Conn. 547 A.2d 10 (Conn. 1988) (holding state constitution permits police to issue exit orders for all lawfully stopped vehicles).
[54] *Com. v. Gonsalves*, 711 N.E.2d 108, 111 (Mass. 1999).

Constitution, which like ours is privacy focused, as more protective than the standard established in *Mimms*.[55] The Vermont Supreme Court held that "an order to exit one's vehicle is a 'further seizure' within the meaning of" the Vermont Constitution, and thus required an additional individualized justification beyond that inherent to a routine traffic stop.[56] The Minnesota[57] and Montana[58] Supreme Courts have likewise interpreted their State Constitutions as providing more expansive protections than that reflected in *Mimms*.

The State specifically and affirmatively declined to address any portion of the above analysis (A53, n. 28), so this Court should consider any such additional arguments forfeited on appeal.[59]

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[55] *State v. Kim*, 711 P.2d 1291, 1294 (Haw. 1985) (interpreting art. I, sec. 7 of Hawaii Constitution).
[56] *State v. Sprague*, 824 A.2d 539 (Vt. 2003) (interpreting Vt. Const. Ch. I, art. XI).
[57] *State v. Stevenson*, 2022 WL 3152587, at *6 (Minn. Ct. App. Aug. 8, 2022) (holding that opening a car door is an additional intrusion which, under art. I, sec. 10 of the Minnesota Constitution requires individualized justification not inherent to a routine traffic stop).
[58] Considering, and implicitly declining to interpret art. II, sec. 11 of the Montana Constitution consistently with *Mimms*, and instead, holding that the challenged exit order was justified to reasonably investigate the officer's reasonable suspicion that "in addition to the traffic violation, Roy was committing an offense involving marijuana." *State v. Roy*, 2013 MT 51, ¶ 18, 369 Mont. 173, 180, 296 P.3d 1169, 1174 ("Reid was justified in requiring Roy to exit the vehicle so as to separate him from the masking effect of the vehicle deodorizer").
[59] *Id.* at 1232–33 (holding that Supreme Court Rule 8 prohibited the State from arguing, on appeal, that a disputed search was justified by any theory other than that presented to the trial judge).

**E.** ***An exit order during a routine traffic stop is generally an additional seizure.***

The sole argument made by the State below in response to Davis's State Constitutional claim is that the issue is controlled by *State v. Loper*, which the State reads as holding that, as a matter of Delaware Constitutional law, an exit order can never be second seizure. A51. This argument is flawed in numerous regards. **First**, *Loper* did not so hold. *Loper* rejected a similar state constitutional claim (as it often does)[60] because "Loper [] cited no authority, nor made any cogent legal argument."[61] In contrast, Davis has done both.[62] **Second**, since the *Loper* Court's ruling rested on that defendant's procedurally deficient briefing, as opposed to a rejection of the merits, the statement upon which the State relies – "he was not subject to a "second seizure" when the police ordered him to exit his car"[63]–is dictum without any

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[60] *See e.g., Ortiz v. State*, 869 A.2d 285, 290–91 (Del. 2005) ("Ortiz simply referred . . . the Delaware Constitution . . . summarily . . . Therefore, that alleged violation . . . will not be addressed because it was not fully and fairly presented"); *Wallace v. State*, 956 A.2d 630, 637 (Del. 2008) ("conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal.").

[61] *Loper v. State*, 8 A.3d 1169, 1174 (Del. 2010).

[62] *See supra* pp. 12—22.

[63] *Loper*, 8 A.3d at 1174. This Court has on numerous occasions referenced *Loper*'s statement that an exit order is not a second seizure, and often highlighted that takeaway is limited to a seizure within the fourth amendment. *Lloyd v. State*, 2023 WL 1830811, at *5 (Del. Feb. 9, 2023) ("Police officers may order the driver or a passenger to exit the car after a valid traffic stop, and that order is not a 'seizure' under the Fourth Amendment."); *Backus v. State*, 202 A.3d 1126 (Del. 2019) ("once a motor vehicle has been lawfully detained for a traffic violation, the police officer may order the driver to get out of the vehicle without violating the Fourth Amendment."); *Cannon v. State*, 199 A.3d 619 (Del. 2018) (an exit order "does not amount to a 'second' seizure under the Fourth Amendment"); *Cropper v. State*, 123

precedential value.[64] And **thirdly,** an exit order is a seizure under the Fourth Amendment and the *Mimms* Court certainly did **not** hold otherwise. Instead, it held that an exit order is a "*de minimis* seizure"[65] which was permitted, not because the order was not a seizure or required no justification (as the State suggests), but because it was justified by the theory that routine traffic stops necessarily present a level of danger to officers which can be alleviated by an exit order.[66] However, as argued above, that theory is based on unreliable data, and is inconsistent with the Delaware Constitution's insistence on individualized analyses.

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A.3d 940, 944–45 (Del. 2015) ("the police may order the driver or a passenger to exit the car after a valid traffic stop, and that order is not a 'seizure' under the Fourth Amendment."). *But see Tann v. State*, 21 A.3d 23, 26 (Del. 2011) (referencing *Loper*'s treatment of exit orders in a way that could be read as referring to the Delaware Constitution).

[64] *Gatz Properties, LLC v. Auriga Cap. Corp.,* 59 A.3d 1206, 1218 (Del. 2012); *State ex rel. Smith v. Carey*, 112 A.2d 26, 28 (1955) ("a court should refrain from dicta upon constitutional questions. We therefore do not reach the merits.")

[65] *See Flowers v. State*, 195 A.3d 18, 28 n. 39(Del. 2018) (describing *Mimms* as holding that "an order to exit car a permissible '*de minimis*' intrusion after car is lawfully detained after traffic violations").

[66] *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) ("we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimis*.")

## CONCLUSION

Because Defendant could not have been convicted without the disputed evidence, and for the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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