EFiled: Mar 21 2023 01:57PM EDT
Filing ID 69600700
Case Number 419,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN DAVIS,	§	
	§	No. 419, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

STATE'S ANSWERING BRIEF

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Date: March 21, 2023

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NATURE OF PROCEEDINGS

On May 24, 2021, a Superior Court grand jury indicted Marvin Davis on charges of carrying a concealed deadly weapon ("CCDW"), possession of a firearm by a person prohibited ("PFBPP"), and possession of ammunition for a firearm by a person prohibited ("PABPP").[1] Davis moved to suppress certain evidence and statements.[2] The Superior Court held a suppression hearing on October 4, 2021, and denied the motion.[3] Davis then moved to sever his person-prohibited charges for a separate trial.[4] The Superior Court granted the motion, dividing his charges between an "*A* case" (the CCDW charge) and a "*B* case" (the person-prohibited charges).[5]

The *A* case proceeded to trial on April 18, 2022.[6] The jury convicted Davis of CCDW.[7] The next day, the same jury heard evidence in the *B* case.[8] It found Davis guilty of PFBPP and not guilty of PABPP.[9]

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[1] A1, at Docket Item ("D.I.") 3; A8–9.
[2] A2, at D.I. 11.
[3] A2, at D.I. 13; A138–53.
[4] A3, at D.I. 21.
[5] *See* A4, at D.I. 23.
[6] A4, at D.I. 26.
[7] A4, at D.I. 26.
[8] A6, at D.I. 5; A157–64.
[9] A6, at D.I. 5.

The State moved to declare and sentence Davis as a habitual offender.[10] The Superior Court granted the motion and, on October 7, 2022, sentenced Davis: (i) for PFBPP, as a habitual offender, to 25 years at Level V incarceration, suspended after 15 years for 2 years and 6 months of decreasing levels of supervision; and (ii) for CCDW, to 15 years at Level V, suspended after 8 years for 2 years of Level III probation.[11]

Davis filed a timely notice of appeal on November 4, 2022. He filed an opening brief on February 16, 2023. This is the State's answering brief.

[10] A7, at D.I. 10.
[11] Opening Br. Ex. B, at 1–2.

SUMMARY OF ARGUMENT

I. Arguments I and II are denied. The Superior Court complied with the Rules of Criminal Procedure by deciding Davis's motion before trial, even if it did not specifically decide the state constitutional claim. In any event, this Court is able to review that question, which it considers *de novo*, because the necessary record was made under the nearly identical federal constitutional provision. The state constitutional claim is meritless, however. Delaware has an established history of allowing police officers to act in accordance with the federal rule, and Davis has not justified departing from that practice.

STATEMENT OF FACTS

On March 14, 2021, Trooper Justin Evans of the Delaware State Police was on proactive patrol near Churchmans Road in New Castle County.[12] Trooper Evans stopped behind a white Mercury in a left-turn lane and decided to run a DELJIS inquiry on its tags.[13] He discovered that the tag was reported transferred, meaning it had been sold or gifted but not yet been registered by its new owner.[14]

Trooper Evans initiated a traffic stop and approached the vehicle from the passenger side.[15] Davis, the driver and sole occupant, was "trembling uncontrollably" and breathing rapidly.[16] The trooper asked for his license, registration, and insurance, and Davis began collecting his paperwork.[17] Davis informed the trooper that he had a permit.[18] He then provided a copy of the bill of sale and what appeared to be a photocopy of a license.[19] Davis said that he intended to visit the DMV the next day to register the car in his name.[20]

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[12] A66.
[13] A67–69.
[14] A67–70.
[15] A70–72, A76.
[16] A72–73, A75–76.
[17] A71–73.
[18] A73–74.
[19] A73–74.
[20] A73.

Trooper Evans returned the documents he did not need to Davis, who reached out his arm to grab them.[21] His arm was still shaking or trembling as if he were nervous.[22] At that moment, the trooper asked Davis to exit the car.[23] According to Trooper Evans, such exit orders were routine, to promote officer safety by establishing greater control over the situation.[24]

Davis seemed "kind of stuck in his seat" and was taking a prolonged time to exit the vehicle.[25] He was moving around a lot, and Trooper Evans thought Davis may have been trying to get his phone.[26] Trooper Evans told Davis he could bring his phone, he just needed to exit the car.[27] Davis then started to adjust in his seat to get out, and the officer saw the grip or magazine end of a firearm protruding out from underneath his thigh.[28] The trooper asked Davis if it was a firearm, and Davis said it was not.[29] But the trooper knew what a gun looked like, so he drew his own weapon to protect himself.[30] Davis kept reaching toward his right leg

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[21] A76.
[22] A76.
[23] A77–78. Trooper Evans did not yet return to his patrol vehicle to verify Davis's documents or check for capiases. A76–77, A79–80.
[24] A77–78.
[25] A80–81.
[26] A81.
[27] A81.
[28] A81.
[29] A81.
[30] A81.

where the gun was, and the trooper had to tell him twice not to reach for it.[31] Trooper Evans called for support, and when additional troopers arrived, they were able to remove Davis from the car safely.[32] They recovered a nine-millimeter firearm with 13 rounds in the magazine from the driver's seat.[33]

Davis asked to call his brother.[34] He told the person on the other end of the line that he needed him to retrieve his vehicle because he got pulled over and had a gun on him.[35]

At trial, the parties stipulated to the fact that, at the time of the traffic stop, Davis was prohibited from owning or possessing a firearm or ammunition.[36]

[31] A82.
[32] A82–83.
[33] A83.
[34] A85.
[35] A85.
[36] A155; A168.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING DAVIS'S MOTION TO SUPPRESS.

Question Presented

Whether the Superior Court abused its discretion by denying Davis's motion to suppress without specifically determining whether, under the Delaware Constitution, a law-enforcement officer may command a driver to exit his vehicle during a traffic stop.

Scope of Review

This Court reviews a trial court's decision to grant or deny a motion to suppress after an evidentiary hearing for abuse of discretion.[37] A trial court abuses its discretion when it exceeds the bounds of reason under the circumstances or when it ignores recognized rules of law or practice in a way that produces injustice.[38] This Court considers legal questions *de novo* and will uphold the trial court's factual findings unless they are clearly erroneous.[39]

[37] *Pendleton v. State*, 990 A.2d 417, 419 (Del. 2010).
[38] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).
[39] *Rivera v. State*, 7 A.3d 961, 966 (Del. 2010).

Merits of Argument

A Delaware state trooper stopped Davis's vehicle for a suspected registration violation. During his initial contact with Davis, the trooper noticed that Davis was unusually nervous, trembling and breathing rapidly. Davis also supplied unusual documentation. The trooper asked Davis to exit the vehicle, and Davis's subsequent movements revealed he was concealing a firearm on the seat underneath his thigh.

Davis moved to suppress the evidence, claiming the trooper unlawfully extended the traffic stop by asking Davis to exit the vehicle.[40] Among other things, he argued that even if *Pennsylvania v. Mimms*[41] controlled the issue under the Fourth Amendment to the United States Constitution, such "exit orders" are inconsistent with the broader protections of Article I, § 6 of the Delaware Constitution.[42] In support of his claim, Davis made arguments concerning the legislative history of the Delaware Constitution, preexisting state law, matters of particular state interest or local concern, and the decisions of other states.[43] The Superior Court denied the motion, finding that the federal constitutional principle controlled and therefore declining to decide the state constitutional issue.[44]

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[40] A13.
[41] 434 U.S. 106 (1977).
[42] A23–29.
[43] A25–29.
[44] A152.

In *Mimms,* two police officers observed Mimms driving a vehicle with an expired license plate.[45] They stopped the vehicle to issue a traffic summons and, upon approaching the vehicle, asked Mimms to exit.[46] When Mimms stepped out of the car, an officer noticed a large bulge under Mimms's jacket that proved to be a loaded firearm.[47] Noting that the touchstone of the Fourth Amendment is reasonableness, the United States Supreme Court considered whether the incremental intrusion of asking a driver to exit the car, when he had already been lawfully detained, was constitutional.[48] The Court concluded that it was, finding the additional intrusion of an exit order to be *de minimis*:

> The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it.[49]

When weighed against the concerns of officer safety, including the officer's ability to control the scene of his lawful activity, the considerations of "[w]hat is at most a mere inconvenience [to the driver] cannot prevail."[50]

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[45] 434 U.S. at 107.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 108–09.
[49] *Id.* at 111.
[50] *Id.* at 109–11.

On appeal, Davis argues that this Court should decide the issue differently under the Delaware Constitution.[51] He also admonishes the Superior Court for not deciding the state constitutional issue in the first instance, which, according to Davis, violated the Superior Court Rules of Criminal Procedure.[52] He implores this Court to reverse his convictions for that alleged error, separate and apart from the merits of his underlying substantive claim, to ensure that his rights and the rights of future defendants are timely vindicated.[53]

Although the Superior Court should have decided the state constitutional issue when Davis presented it, the court nevertheless did not abuse its discretion by denying the motion to suppress. Delaware has an established history of allowing exit orders during traffic stops, and Davis has not demonstrated they are inconsistent with the broader protections of Article I, § 6. Neither justice nor fairness are served by reversing his felony convictions because the Superior Court did not decide a meritless claim.

[51] Opening Br. 10–24.
[52] Opening Br. 6–9.
[53] Opening Br. 6–9.

A. The Superior Court complied with Criminal Rule 12(e) by denying Davis's suppression motion before trial, and this Court is still able to review the substantive issues presented on appeal.

In his first argument, Davis alleges that the Superior Court violated Criminal Rule 12(e) by not deciding his state constitutional claim.[54] The argument seeks reversal of his felony convictions, not on the merits of the underlying constitutional claim, but for the alleged procedural error and for policy reasons: to discourage avoidance of important legal questions, to affirm the authority of the rules of criminal procedure, and to encourage early affirmation of defendants' constitutional rights.[55] Davis's argument misreads Rule 12(e) and does not otherwise justify the relief he seeks.

The Superior Court held a hearing Davis's suppression motion.[56] After accepting evidence and argument, the court recited its findings of fact.[57] The court then denied the suppression motion under the Fourth Amendment.[58] Davis's trial counsel then alerted the court to its outstanding state constitutional claim, to which the court 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."[59]

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[54] Opening Br. 6–9.
[55] Opening Br. 7–9.
[56] A61.
[57] A138–43.
[58] A143–52.
[59] A152.

Rule 12(e) sets forth the procedure for addressing pretrial motions. It provides that "[a] motion made before trial shall be determined before trial" (except in circumstances not applicable here).[60]

Davis misreads the term "motion" as "issue." Although the Superior Court did not decide the state constitutional issue, it did decide the suppression motion.[61] By denying the motion as a whole, the court implicitly denied all the claims that comprised it. The court therefore complied with Rule 12(e)'s directive to determine pretrial motions before trial.

The Superior Court's technical compliance with the procedural rule does not fill the substantive hole in its opinion, of course. The court's decision not to address the state constitutional issue fails to recognize that the Fourth Amendment sets the floor for Delawareans' constitutional protections against unreasonable searches and seizures, not the ceiling.[62]

In other circumstances, the refusal to decide an issue could hinder this Court's ability to review the matter on appeal. For example, in *Alexander v. Cahill*,[63] the Superior Court directed counsel to attempt to resolve objections

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[60] Super. Ct. Crim. R. 12(e).
[61] A152.
[62] *See Juliano v. State*, 254 A.3d 369, 378 (Del. 2020) ("[T]his Court will, where appropriate, extend our state constitutional prohibition against unreasonable searches and seizures beyond the protections recognized in the United States Supreme Court's Fourth Amendment jurisprudence.").
[63] 829 A.2d 117, 129 (Del. 2003).

amongst themselves, in a separate area of the courtroom. The practice compromised the integrity of the trial process, and it prevented parties from preserving their objections on the record for appeal.[64] In *Storey v. Camper*,[65] the Superior Court granted a new trial "to prevent a manifestation of injustice," without further explanation. The short statement made it "extremely difficult" to review the court's exercise of discretion on appeal.[66] In *Cannon v. Miller*,[67] the Superior Court decided claims and counterclaims after a civil trial without making any findings of fact on the record. In *Husband M v. Wife D*,[68] the Family Court did not explain how it weighed the statutory factors for disposing of marital property, requiring speculation on appeal.

In this case, however, this Court is not so hindered. Davis preserved his state constitutional claim by presenting it in his written motion to suppress.[69] He had the opportunity to submit exhibits with his motion and to offer testimony or other evidence at the suppression hearing.[70] Indeed, Davis makes no claim that the Superior Court prevented him from advancing the claim or putting forward any

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[64] *Id.* at 129–30.
[65] 401 A.2d 458, 459 (Del. 1979).
[66] *Id.* at 466–67.
[67] 412 A.2d 946 (Del. 1980).
[68] 399 A.2d 847, 848 (Del. 1979).
[69] A23–29.
[70] *See* A34; A61–153.

evidence in support of it.[71] The court then made the factual findings necessary to resolve the question under the nearly identical provision of the United States Constitution.[72] All that remained was the legal question of how the state constitutional provision applies to those same facts. And this Court reviews such questions *de novo*.[73]

DeJesus v. State[74] is instructive. DeJesus made a pretrial motion to dismiss several counts of the indictment on *corpus delicti* grounds.[75] The Superior Court deferred the motion and then forgot to rule on it.[76] Despite the Rule 12(e) violation, this Court found that DeJesus properly placed the issue before the Superior Court and that it could be reviewed on appeal.[77]

Davis, likewise, fairly presented his state constitutional question to the Superior Court, preserving it for appeal.[78] Although the Superior Court should not have refused to decide the issue, such mistakes are properly addressed on direct

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[71] *See* Opening Br. 9.
[72] A138–50; *Flonnory v. State*, 805 A.2d 854, 857 (Del. 2001).
[73] *Rivera*, 7 A.3d at 966.
[74] 655 A.2d 1180, 1198–99 (Del. 1995).
[75] *Id.* at 1198.
[76] *Id.*
[77] *Id.* at 1198–99. *Cf. Perez v. State*, 2019 WL 6954098, at *2 (Del. Dec. 18, 2019) (ruling that, even though the Superior Court did not explain its rationale on an issue reviewed for abuse of discretion, reversal was not required "because the reasons for denial appear[ed] obvious").
[78] *See* Supr. Ct. R. 8.

appeal, even if it delays consideration of important constitutional rights.[79] Davis urges that reversal is necessary as a signal to trial courts that they should timely vindicate defendants' rights,[80] but this Court need not take the serious step of reversing felony convictions just to admonish the trial courts. It can decide the Davis's substantive claim on the merits under his second argument on appeal. And for the reasons stated below, Davis's state constitutional claim fails on the merits.

B. Davis's state constitutional claim is meritless, and consequently, his suppression motion was properly denied.

(1) *The State is not barred from responding to Davis's legal arguments.*

As an initial matter, Davis argues that the State forfeited the right to advance any legal response to his claims that it did not argue below.[81] In this scenario, the State would be limited to arguing that *Loper v. State*[82] controls the state constitutional question, and if *Loper* does not, then the State must acquiesce to Davis's proposed construction of the state constitution.[83]

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[79] *Cf. In re Cooke*, 918 A.2d 1151 (Del. 2007) (declining to command the Superior Court to decide, before trial, the issue of whether the criminal defendant or his counsel had the right to decide which verdict to pursue, even though the Superior Court's decision proved to be error on direct appeal, *see Cooke v. State*, 977 A.2d 803, 817–18, 850–52 (Del. 2009)).
[80] *See* Opening Br. 9.
[81] Opening Br. 22.
[82] 8 A.3d 1169 (Del. 2010).
[83] *See* Opening Br. 22 (citing A53 n.28).

Loper presented a nearly identical question to this Court: whether, under Article I, § 6, the officer's order to exit his vehicle constituted a second seizure that must be independently supported by reasonable suspicion, beyond the justification for the initial traffic stop.[84] But Loper "cited no authority, nor made any cogent legal argument, for why this Court should expand the meaning of 'seizure'" under the Delaware Constitution.[85] This Court, "therefore, decline[d] to address that claim."[86] Then, following *Mimms,* this Court found that Loper was not subject to a second seizure when ordered to exit the vehicle.[87]

In response to Davis's suppression motion, the State took the position that *Loper* controlled Davis's state constitutional claim.[88] The trial prosecutor reiterated that belief during argument on the motion.[89] Believing that *Loper* was controlling precedent, the State did not further engage Davis in arguments in a lower court that questioned the authority of the ruling.[90]

Davis now claims that the State has therefore forfeited any other legal response to his claims. He appears to cite *State v. Abel*[91] in support of his

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[84] *Loper*, 8 A.3d at 1173–74.
[85] *Id.* at 1174.
[86] *Id.* at 1171–72 n.5.
[87] *Id.* at 1174.
[88] A53 n.28.
[89] A126.
[90] *See* A53 n.28.
[91] 68 A.3d 1228, 1232–33 (Del. 2013).

argument.[92] In *Abel*, this Court admonished the State for its "moving target" approach to briefing, advancing new arguments under statutes not previously cited in the court below.[93] Unlike this case, however, *Abel* was a State's appeal.[94] As the appellant seeking relief, the State had a responsibility under Supreme Court Rule 8 to preserve questions by fairly presenting them to the trial court. *Abel* was concerned with how questions arrived before this Court. It does not stand for the proposition that an appellee must be handcuffed in its response to a fairly presented legal question.

Davis asks this Court to announce a new rule under this State's constitution. It is an important question properly before this Court, and its decision will ultimately benefit from consideration of the competing arguments from both Davis and the State. Davis's attempt to avoid meaningful adversarial testing of his constitutional claim is unavailing.

(2) *Exit orders are consistent with the different and broader protections of Article I, § 6.*

Both the Fourth Amendment and Article I, § 6 guarantee the right of individuals in Delaware to be free from unreasonable searches and seizures.[95] This

[92] *See* Opening Br. 22 & n.59.
[93] 68 A.3d at 1232.
[94] *Id.*
[95] *Flonnory*, 805 A.2d at 857.

Court has noted that the two constitutional provisions "bear a striking linguistic resemblance to each other"[96] and are "nearly identical."[97] They do not, however, carry precisely the same meaning.[98]

In certain respects, Article I, § 6 affords greater protections than the Fourth Amendment. For example, in *Jones v. State*,[99] this Court held that a seizure occurs within the meaning of Article I, § 6 when a reasonable person would believe that he was not free to ignore the police presence, whereas the federal standard required either physical force or submission to the officer's assertion of authority. In *Dorsey v. State*,[100] this Court held that application of the exclusionary rule under Article I, § 6 does not include a good-faith exception to the probable-cause requirement, unlike its federal counterpart.

In *Jones*, this Court set forth a list of non-exclusive criteria that may be considered when construing a Delaware constitutional provision against a similar provision in the United States Constitution: (i) textual language; (ii) legislative history; (iii) preexisting state law; (iv) structural differences; (v) matters of particular state interest or local concern; (vi) state traditions; (vii) public

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[96] *Juliano*, 254 A.3d at 377.
[97] *Flonnory*, 805 A.2d at 857.
[98] *Juliano*, 254 A.3d at 377.
[99] 745 A.2d 856, 862, 869 (Del. 1999) (declining to follow *California v. Hodari D.*, 499 U.S. 621 (1991)).
[100] 761 A.2d 807, 821 (Del. 2000) (distinguishing *United States v. Leon*, 468 U.S. 897 (1984)).

attitudes.[101] To properly present an argument on the meaning of a Delaware constitutional provision against its federal counterpart, a party must discuss and analyze one or more of these or other applicable criteria.[102]

On appeal, Davis identifies four criteria that purportedly support his claim that exit orders are inconsistent with the protections of Article I, § 6: (i) textual language and legislative history; (ii) preexisting state law; (iii) matters of particular state interest or local concern; and (iv) the decisions other state courts.[103] He fails to demonstrate, however, that these criteria justify a departure from the rule in *Mimms* under the Delaware Constitution.

(a) *The textual language and legislative history of Article I, § 6 support the general proposition that it affords different and broader protections than the Fourth Amendment, but not a specific protection against exit orders.*

Davis first points to the textual language and legislative history of the Delaware Constitution as support for his position.[104] His discussion is limited to quoting *Jones* for the proposition that "search and seizure in Delaware reflects a

[101] *Jones*, 745 A.2d at 864–65.
[102] *Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009); *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005).
[103] Opening Br. 12–22.
[104] Opening Br. 12.

commitment to protecting the privacy of its citizens absent in the Federal Constitution."[105]

It is well-established that, as a general matter, Article I, § 6 provides different and broader protection against searches and seizures than the Fourth Amendment.[106] But the state constitutional analysis involves two steps.[107] It must also be determined "whether that broader protection is properly applied to the police conduct . . . challenged in the case before us."[108]

In other words, merely stating the established principle is insufficient to answer the question: this Court must still determine whether the trooper's exit order was consistent or inconsistent with those different and broader protections under Article I, § 6.[109] Davis does not identify any evidence within the text or legislative history that specifically supports his position.[110] For the reasons that follow, the other factors do not support him, either.

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[105] Opening Br. 12 (cleaned up) (citing *Jones*, 745 A.2d at 866).
[106] *Juliano*, 254 A.3d at 377–78.
[107] *Id.* at 379.
[108] *Id.*
[109] *Id.* (discussing *Dorsey*, 761 A.2d 807).
[110] Opening Br. 12.

(b) *Preexisting state law does not suggest that Article I, § 6 has a distinctive application to exit orders.*

Davis next claims that "[n]umerous features of preexisting state law are inconsistent with the reasoning and conclusion of *Mimms*."[111] But other than pointing out that the meaning of "seizure" is different under the Delaware Constitution than the United States Constitution,[112] Davis does not actually survey Delaware's statutory or decisional laws.[113] Instead, Davis's argument proceeds to question the wisdom of the United States Supreme Court's decision in *Mimms*, and he urges this Court to reject it.[114]

In *Jones*, this Court explained how the consideration of preexisting state law may inform the meaning of a Delaware constitutional provision: "Previously established bodies of state law may also suggest distinctive state constitutional rights. State law is often responsive to concerns long before they are addressed by constitutional claims. Such preexisting law can help to define the scope of the constitutional right later established."[115]

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[111] Opening Br. 12.
[112] Opening Br. 12.
[113] Davis's only other point that arguably concerns Delaware's preexisting state law is the constitutional requirement of "individualized" suspicion. Opening Br. 14. But this is also a feature of the federal law that he is trying to distinguish. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) ("The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.").
[114] Opening Br. 12–17.
[115] *Jones*, 745 A.2d at 864.

This Court's decisions in *Dorsey* and *Mason v. State*,[116] which rejected a good-faith exception to the probable-cause requirement, illustrate this principle. Delaware law established requirements above and beyond probable cause: "For almost 150 years, a Delaware statute has required more than probable cause for the issuance of a nighttime search warrant."[117] Thus, recognizing the exception in Delaware "would not only be an unprecedented break with more than two hundred years of history in this area of the law, but also would be tantamount to a judicial repeal of a specific Delaware statute."[118] Not only that, Delaware's exclusionary rule pre-dated incorporation of the federal exclusionary rule to the states through the Fourteenth Amendment by 10 years.[119] And the rationale for Delaware's rule was different.[120]

Unlike the federal rule considered and rejected in *Mason* and *Dorsey*, the rule in *Mimms* has been consistent with Delaware law and practice for decades. The Superior Court upheld an exit order under *Mimms* 25 years ago.[121] This Court acknowledged the rule more than 20 years ago.[122] In *Loper*, this Court upheld an exit order under *Mimms*, even when the defendant raised the specter that the rule in

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[116] 534 A.2d 242 (Del. 1987).
[117] *Dorsey*, 761 A.2d at 819 (discussing *Mason*).
[118] *Mason*, 534 A.2d at 255.
[119] *Dorsey*, 761 A.2d at 818.
[120] *Id.* at 818–19.
[121] *Hall v. State*, 1998 WL 281206, at *7 (Del. May 11, 1998).
[122] *Caldwell v. State*, 780 A.2d 1037, 1049 & n.27 (Del. 2001).

Delaware might be different.[123] As recently as recently as this year, this Court applied the *Mimms* rule to uphold an automatic exit order.[124]

Moreover, Delaware statutory law is not at odds with *Mimms*, as it was with the federal rule in *Mason* and *Dorsey*. The laws that permit a police officer to stop a driver for a suspected traffic violation are silent on exit orders.[125] While the statute authorizes a police officer to "demand the person's name, address, business abroad and destination,"[126] it does not require the officer to accept the conditions and situation of the persons involved precisely as the officer finds them upon his initial approach.

Indeed, Davis's rule would give suspects substantially more control over the circumstances of police interactions, allowing them to maintain access to spaces that they have controlled and in which they have possibly concealed weapons. Not only is this inconsistent with Delaware's decades-long applications of *Mimms*, but it would also be inconsistent with how Delaware law enforcement officers are allowed to control other potentially explosive situations. For example, when executing a residential search warrant, officers may briefly detain occupants of the home while conducting the search.[127] The concern for officer safety not a talisman

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[123] *Loper*, 8 A.3d at 1174.
[124] *Lloyd v. State*, 2023 WL 1830811, at *5 & n.30 (Del. Feb. 9, 2023).
[125] 11 *Del. C.* § 1902(a); 21 *Del. C.* § 802.
[126] § 1902(a).
[127] *Hovington v. State*, 616 A.2d 829 (Del. 1992).

that can be simply invoked to defeat constitutional protections, but it is a legitimate and weighty concern.[128] Established Delaware law and practice gives police officers some space to exercise professional judgment in these situations involving only *de minimis* intrusions.

Finally, Davis argues that exit orders are inconsistent with the rule in *Jones* that a police officer may not create reasonable suspicion through an unjustified attempted detention.[129] This Court previously rejected applying the rationale of *Jones* to exit orders, finding the circumstances inapposite:

> In *Jones*, the police did not have a reasonable and articulable suspicion when they limited the defendant's mobility by ordering him to stop. The police suspicions were triggered by Jones' refusal to obey their order to stop, and his repeated attempts to leave. Here, however, at the time Officer Santiago ordered Loper out of the car, Loper was already lawfully detained as a consequence of the valid traffic stop.[130]

Because Delaware's preexisting statutory and decisional law is consistent with *Mimms*, this criterion does not justify a different result under the Delaware Constitution.

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[128] *Abel*, 68 A.3d at 1238.
[129] Opening Br. 13 (citing *Jones*, 745 A.2d at 864).
[130] *Loper*, 8 A.3d at 1174 (internal footnote omitted).

(c) *Davis does not identify matters of particular state interest or local concern that justify prohibiting exit orders in Delaware.*

Davis contends that matters of particular state interest or local concern indicate that exit orders warrant different treatment under the Delaware Constitution.[131] In *Jones*, this Court explained how this criterion might inform the constitutional analysis:

> A state constitution may also be employed to address matters of peculiar state interest or local concern. When 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.[132]

Davis cites two purported state interests but does not adequately develop either point.

First, Davis contends that exit orders implicate Delaware's traffic and gun laws, which are local in character because these types of laws are not uniform nationally.[133] This, of course, is true for countless scenarios involving any number of categories of law because Delaware is part of a federalist system in which each state passes its own laws. The fact of Delaware's sovereignty justifies an independent construction of its constitution, but it does not explain when the construction might diverge from national principles. Davis does not identify any

[131] Opening Br. 18–21.
[132] *Jones*, 745 A.2d at 865.
[133] Opening Br. 18–19.

particular traffic or gun law of this State that governs a situation or concern peculiar to this State that might cast doubt upon the wisdom of allowing exit orders in this State.

Davis does question, however, whether the safety concerns discussed in *Mimms* "had even once occurred [in] Delaware."[134] He observes that neither *Mimms* nor the Bristow study indicate that they identified relevant incidents occurring in Delaware.[135] But neither *Mimms* nor the Bristow study purported to evaluate Delaware, specifically, or to provide a comprehensive national survey.[136] As a normative matter, Davis does not offer reasons why the risks of violence might be lower in Delaware. As an empirical matter, Davis did not develop this allegation below,[137] and it would be a difficult hypothesis to evaluate even if he did. After all, exit orders have been permitted in Delaware for decades. The practice itself may contribute to reducing the number of violent roadside encounters.

Second, Davis argues that racialized traffic enforcement is "*significantly* worse" in Delaware and that barring exit orders might reduce the incidence of

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[134] Opening Br. 18–19.
[135] Opening Br. 18–19.
[136] *See Mimms*, 434 U.S. at 110; Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J.Crim.L.C. & P.S. 93, 93 (1963) (stating that the study "decided to discontinue the collection of these cases and evaluate those already on hand," ultimately considering a sub-group of 110 incidents).
[137] *See* A26–27.

racist policing.[138] In support of this proposition, Davis attaches a summary of police reports that another defendant, Jeffrey Rose, submitted to the Superior Court in support of his motion to suppress in an unrelated case.[139] The summary purportedly covers police reports from Operation Safe Streets, which operates in the City of Wilmington, over a one-year period.[140] According to Davis, the summary demonstrates the substantial influence of race on traffic stops throughout Delaware.[141]

Davis, who did not argue below that racist policing was a particular local concern in Delaware, did not present the summary of Safe Streets reports to the Superior Court below.[142] It is thus not part of the record of this case and should not be considered by this Court on appeal.[143] Nor is it part of this State's decisional law, as the Superior Court decided the suppression issue in *Rose* on different grounds and did not make any findings of fact regarding Safe Streets reports.[144]

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[138] Opening Br. 19–20 (emphasis in original).
[139] A194–235; *see also State v. Rose*, 2022 WL 2387803, at *3 (Del. Super. Ct. June 30, 2022).
[140] A194.
[141] Opening Br. 21.
[142] *See* A26–27.
[143] Supr. Ct. R. 9(a); *Del. Elec. Co-op, Inc. v. Duphily*, 703 A.2d 1202, 1206–07 (Del. 1997); *Waller v. State*, 395 A.2d 365, 367, n. (Del. 1978).
[144] *Rose*, 2022 WL 2387803, at *4–7.

The other studies Davis cites indicate that the influence of race on traffic stops is a problem throughout the country.[145] This undercuts Davis's own argument that the problem is "peculiar" to Delaware.

(d) *More states follow the* Mimms *rule than not.*

Davis next urges this Court to consider "how other states have interpreted their respective fourth amendment analogs."[146] He points to five other states—Massachusetts, Hawaii, Vermont, Minnesota, and Montana—that have interpreted their states constitutions as providing more-expansive protection than *Mimms*.[147] Yet, vastly more states continue to apply *Mimms* unabated, and many of those states have even construed their state constitutions consistently with *Mimms* when fairly presented with the question.[148]

In fact, if Delaware diverted from *Mimms*, it would be only the state in the mid-Atlantic region—from Rhode Island[149] through North Carolina[150]—to do so.

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[145] Opening Br. 20 n.49.
[146] Opening Br. 21.
[147] Opening Br. 21–22.
[148] *See generally Massachusetts v. Gonsalves*, 711 N.E.2d 108, 114 & n.7 (Mass. 1999) (recognizing that many more states that have accepted *Mimms* than rejected it and identifying them).
[149] *Rhode Island v. Milette*, 727 A.2d 1236 (R.I. 1999); *Rhode Island v. Collodo*, 661 A.2d 62 (R.I. 1995).
[150] *North Carolina v. Bullock*, 805 S.E.2d 671, 676 (N.C. 2017).

That includes Connecticut,[151] New York,[152] New Jersey,[153] Pennsylvania,[154] Maryland,[155] and Virginia.[156] Delaware would be an outlier in its own region, despite no relevant local concerns peculiar to Delaware being identified.

(3) *The trooper's exit order was not a second seizure requiring additional justification under Article I, § 6.*

In connection with his discussion of the constitutional criteria, Davis relies on the argument that the definition of "seizure" is different under the Delaware Constitution.[157] But the difference does not dictate that Article I, § 6 should apply differently here, to exit orders.

An exit order generally is not considered a "second seizure." Davis contends "the *Mimms* Court certainly did *not* hold" that an exit order is not a seizure under the Fourth Amendment.[158] Yet, neither the Supreme Court in *Mimms* nor this Court in *Flowers v. State*,[159] the case Davis cites for its description of *Mimms*, refer to the exit order as a "seizure." Both use the term "intrusion"

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[151] *Connecticut v. Dukes*, 547 A.2d 10 (Conn. 1988).
[152] *New York v. Robinson*, 543 N.E.2d 733 (N.Y. 1989).
[153] *New Jersey v. Smith*, 637 A.2d 158, 163–64 (N.J. 1994).
[154] *Pennsylvania v. Freeman*, 757 A.2d 903, 907 n.4 (Pa. 2000); *Pennsylvania v. Sierra*, 723 A.2d 644, 648 n.6 (Pa. 1999).
[155] *Manning v. Maryland*, 2022 WL 1124839, at *6–7 (Md. Apr. 15, 2022).
[156] *McCain v. Virginia*, 659 S.E.2d 512, 516–17 (Va. 2008).
[157] Opening Br. 12; *see also Jones*, 745 A.2d at 862, 869.
[158] Opening Br. 24 (emphasis in original).
[159] 195 A.3d 18, 28 n.39 (Del. 2018).

instead[160]—a seemingly purposeful choice. Indeed, this Court in *Loper* stated definitively that a driver is "not subject to a 'second seizure' when the police order[] him to exit his car."[161] Davis attempts to sweep aside this ruling as dictum,[162] but it was necessary for this Court's decision under the Fourth Amendment and thus holds precedential value for defining whether a seizure occurs under it. And because the concern in *Jones*—that police may use attempted unlawful exercises of authority to manufacture a lawful detention[163]—is not present in the circumstances of exit orders, as this Court observed in *Loper*,[164] the holding in *Jones* does not justify a departure from *Mimms* here. In any event, the holding in *Mimms* was primarily rested on the *de minimis* nature of the exit order, not the procedural semantics of how it unfolds.

In sum, Davis has failed to demonstrate that Article I, § 6 forbids exit orders where the Fourth Amendment allows them.

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[160] *Mimms*, 434 U.S. at 111; *Flowers*, 195 A.3d at 28 n.39.
[161] 8 A.3d at 1174.
[162] Opening Br. 23–24.
[163] *Jones*,745 A.2d at 863–64.
[164] *Loper*, 8 A.3d at 1173–74.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: March 21, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN DAVIS,	§	
	§	No. 419, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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Date: March 21, 2023

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