

IN THE SUPREME COURT OF FLORIDA

**STATE OF FLORIDA,
PETITIONER,**

vs.

Case No. SC22-524

L.T. Case No. 2D19-3085

**JOSHUA LYLE CRELLER,
RESPONDENT.**

_____ /

**BRIEF OF AMICI CURIAE
THE FLORIDA SHERIFFS ASSOCIATION,
FLORIDA POLICE CHIEFS ASSOCIATION, AND FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,
IN SUPPORT OF PETITIONER,
STATE OF FLORIDA**

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I. INTRODUCTION

The most common encounter between a law enforcement officer and a member of the public is the traffic stop. Most of these stops are conducted by deputy sheriffs, police officers, and troopers of the Florida Highway Patrol (“FHP”). For example, from 2017 through 2021, FHP troopers alone conducted approximately 2,807,034 stops, an average of approximately 1,538 stops daily.¹

These stops occur on interstate highways, urban centers, two-lane country roads, and indeed, every roadway upon which motorists travel. They may be in broad daylight or late at night in remote locations with little visibility. Back up officers may be on scene, a long distance away, or even unavailable.

Conditions may vary but the risks remain. In every stop an officer confronts the unknown: the identity of the driver and any passengers, their participation in criminal activity, whether they are armed with firearms or other weapons, and, whether they harbor the intent on doing harm if confronted or if their criminal conduct is discovered.

¹ Florida Department of Highway Safety and Motor Vehicles internal statistics (Jan. 2017 – Dec. 2021).

The present case begins with such a traffic stop. As apparent from the record in this case, Tampa Police Department officers lawfully performed their duties in stopping, detaining, and ultimately arresting the Respondent, Joshua Lyle Creller. Creller's vehicle was stopped for violating section 316.074(2), Florida Statutes (2018), which prohibits a person from avoiding a traffic signal by driving from one roadway to another roadway. While a uniformed officer was completing a citation and without prolonging the duration of the stop a canine unit officer was requested and arrived on the scene with his dog. After the canine officer identified himself, he asked Creller to exit the vehicle so that the vehicle sweep could be safely conducted. When Creller refused, he was forcibly removed from his vehicle. A search revealed a baggie containing methamphetamine. *Creller v. State*, 336 So.3d 817, 819-20, (Fla. 2d DCA 2022).

The trial court denied Creller's motion to suppress. The court accepted the State's argument that because the duration of the attempted vehicle sweep did not prolong the traffic stop, Creller was not unlawfully detained, and his removal was justified. *Id.* at 821.

The Second District, however, held that Creller's Fourth Amendment rights were violated upon his forcible removal from his

vehicle because the attempted vehicle sweep alone—not the issuance of the traffic citation—gave rise to a threat of officer safety. *Id.* at 824. Citing *Rodriguez v. United States*, 575 U.S. 348 (2015), the court held that the attempted dog sniff deviated from the mission of the traffic stop and could not be justified under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). *Id.* at 823-24.

Until the Second District decided the case at bar, the officers' actions would not have been called into question. The canine sweep was completed within the duration of the traffic stop such that there was no unlawful detention, and Creller was asked to exit his vehicle for officer safety purposes. Neither of these actions are inconsistent with the well-settled opinions of the Supreme Court or Florida appellate courts.

Indeed, as the Second District noted, its opinion directly conflicted with the Fifth District's decision in *Benjamin v. State*, 229 So.3d 442 (Fla. 5th DCA 2017). As in *Creller*, a canine unit was requested to conduct an exterior search of the vehicle while a traffic citation was being written for illegally tinted windows. Benjamin was asked to get out of his vehicle for the dog sniff. When he exited the vehicle, an officer discovered a firearm concealed under the driver's

seat. Benjamin was subsequently arrested for possession of a concealed firearm by a convicted felon. *Benjamin*, 229 So.3d at 442.

The trial court granted Benjamin's motion to suppress. *Id.* at 443. On appeal, the Fifth District reversed the suppression order. Citing *Mimms*, the court held that an officer may order a driver to exit the vehicle during a traffic stop, even if the officer does not have a particularized basis to believe that the driver presents a threat to his or her safety. *Id.* at 443-44.

Herein lies the conflict with *Creller*. The Second District held that to be lawful, the removal of the driver must be necessary to ensure officer safety during issuance of a traffic citation. *Creller*, 336 So.3d at 822-24. Because the canine officer requested Creller to get out of the vehicle so that the vehicle sweep could be safely conducted, the court held that it could not be justified under *Mimms*. *Id.* at 824-25. This is a distinction without a difference, and in so ruling the court erred.

The Florida Sheriffs Association, the Florida Police Chiefs Association, and the Florida Department of Highway Safety and Motor Vehicles assert that there are strong policy and legal grounds to reverse *Creller* and to adopt the Fifth District's holding in

Benjamin. The compelling officer safety reasons supporting an officer's request for a driver to leave the vehicle during a traffic stop are the common underpinnings in *Mimms* and *Benjamin*. Respectfully, the *Creller* court erred when it added a requirement for the particularized articulation of officer safety risk during a canine sniff.

The Supreme Court adopted a *per se* rule in *Mimms* that an officer could direct a driver to exit a vehicle. In *Benjamin*, the Fifth District adhered to this bright line rule by holding that an officer could order a driver to exit the vehicle even if the officer did not have a particularized basis that a driver poses a threat to the officer's safety. 229 So.3d at 443-44. Nothing here compels a different result.

The ruling of the Second District not only departs from the Supreme Court's analysis in *Mimms*, but it is logically inconsistent. Assuming that the traffic stop is inherently dangerous, the risks are compounded when a dog sweep is conducted, and illegal drugs or other contraband may potentially be found. At a minimum, the fact of the dog sweep does not lessen the officer safety concerns inherent in the traffic stop, and *Mimms* continues to apply.

The Second District misapplies *Rodriguez* and fails to give proper consideration to the inherent risks confronting officers when a canine unit is called to the scene of a traffic stop. In reviewing the applicable case law in light of the record in this case, it is apparent that the *Creller* opinion must be reversed.

II. TRAFFIC STOPS, AND, IN PARTICULAR, TRAFFIC STOPS WITH VEHICLE SWEEPS, ARE INHERENTLY DANGEROUS TO OFFICERS

There is little debate about the hazardous nature of traffic stops. Courts have uniformly highlighted the risks posed to officers when they approach a driver following the stop of a vehicle.

Traffic stops have been aptly described as “fraught with danger.” *Arizona v. Johnson*, 555 U. S. 323, 330 (2009). In *Mimms*, the Court recognized “the inordinate risk” confronting an officer upon approaching a person seated in an automobile. *Mimms*, 434 U.S. at 110. As support for this conclusion, the Court cited a 1963 study finding that approximately 30% of police shootings occurred when an officer approached a suspect seated in a vehicle.² *Id.*

² Bristow, Police Officer Shootings – A Tactical Evaluation, 54 J. Crim. L. C. & P. S. 93 (1963).

Similarly, in *Maryland v. Wilson*, 519 U.S. 408, 413 (1997), the Court again emphasized that traffic stops may be dangerous encounters. Relying on statistics from the Federal Bureau of Investigation,³ the Court noted that in 1994, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops. *Id.*

Little has changed since these cases were decided. Nationally, according to Federal Bureau of Investigation data, 16 officers were killed during a traffic stop from 2015-2019, representing six percent of all law enforcement officers killed in the line of duty;⁴ 4,687 officers were reported to be assaulted, or eight percent of all officers assaulted.⁵ Traffic stops continue to present uncertain and volatile encounters in which an interaction with a driver may turn from non-eventful to life threatening in a matter of seconds.

Because traffic stops are inherently dangerous, officers are trained to minimize the danger to themselves. To this end, as recognized in *Mimms*, *Wilson*, and their progeny, as circumstances

³ Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 71, 33 (1994).

⁴ FBI Law Enforcement Officers Feloniously Killed, <https://ucr.fbi.gov/leoka/2019/tables/table-24.xls>.

⁵ FBI Law Enforcement Officers Assaulted, <https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-83.xls>.

dictate, they may direct a driver or a passenger out of the vehicle pending the completion of the traffic stop.

One reason may be to avoid being struck by oncoming traffic. As the Court noted in *Mimms*, “[r]ather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.” 434 U. S. at 111.

An overriding concern, however, is the stark reality that any traffic stop may erupt in violence against the officer. A vehicle sweep by a canine trained to detect illegal drugs or other contraband hardly alleviates the potential for conflict at the scene. As the Court saliently observed in *Wilson*, “[i]t would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.” 519 U. S. at 414.

It stands to reason that the officer safety justifications for ordering a driver to exit the vehicle during a traffic stop are no less when a canine sniff is involved. Indeed, given the potential for drugs,

weapons, or other contraband to be found, the risk to the officer may be greater and the justification stronger.

There are obvious concerns with allowing a driver to remain in the vehicle while a vehicle sweep by a canine officer is being conducted. If the procedure required by *Creller* were permitted to stand, it would actually *increase risk* to both the officer and the motoring public.

A vehicle sweep requires the full attention of the canine officer. Allowing a driver to remain in the vehicle directly affects the ability of the canine and its handler to do their jobs. The officer will be unnecessarily distracted by keeping an eye on the driver while the dog sniffs the exterior of the vehicle. This distraction from the officer's duties creates a significant risk to the officer's safety.

Prohibiting an officer from instructing a driver to leave the vehicle creates additional concerns for the officer. It would allow a potential criminal suspect to remain behind the while the canine and the officer walked in front of and behind the occupied vehicle. The officer would be vulnerable to being assaulted by the motor vehicle or shot by a firearm concealed within the interior of the vehicle.

Requiring the driver to exit the vehicle pending the vehicle sweep may also avoid a vehicular assault on an officer or a vehicle. If drugs or weapons are discovered, it could trigger a fight or flight response and propel the driver to flee the scene at a high rate of speed upon the moment of alert, endangering the officer and the public.

Requiring the driver to exit the vehicle sweep would obviate any such threat to the officers or the public. *Creller* erroneously concluded that the forced removal of an individual before determination of probable cause for the existence of contraband had been established “and without any evidence that such seizure is necessary to ensure officer safety during issuance of a traffic citation” was objectively unreasonable. *Creller*, 336 So.3d at 824. In doing so, the Court misapplied *Mimms*.

In sum, the underpinnings of the Court’s holdings in *Mimms* and *Wilson* recognize the inherent risks presented to officers in each and every traffic stop and the implicit understanding that ordering a driver to exit the vehicle furthers officer safety. Indeed, the Court thought it “too plain for argument that the State’s proffered justification—the safety of the officer—is both legitimate and weighty.” *Mimms*, 434 U.S. at 110.

Balanced against this paramount interest of protecting the officers is the very modest intrusion to the driver, which the Court has described as “*de minimis*.” *Mimms*, 434 U.S. at 111; *Wilson*, 519 U. S. at 412. In reconciling these competing interests, the Fifth District in *Benjamin* correctly applied *Mimms*’ *per se* rule by holding that an officer may properly order a driver to exit a vehicle even if the officer does not have a particularized basis that the driver was a threat to the officer’s safety. *Benjamin*, 229 So. 3d at 444.

The particularized basis requirement is more akin to the standard to conduct an investigatory detention. *See Terry v. Ohio*, 392 U.S. 1 (1968). However, no such showing is required here under *Mimms* because *Creller* was *already lawfully detained* pursuant to the traffic infraction.

In examining *Mimms* and its progeny, it is apparent that in *Creller*, the Second District incorrectly conflated the rationales underlying *Rodriguez* and *Mimms*. There are separate analyses for an officer’s authority to require a driver (or passenger) to exit a vehicle and for detaining a driver to conduct a vehicle sweep. The Fifth District did not improperly stack the holdings in these respective cases. Rather, it harmonized them by determining that it is

objectively reasonable under the Fourth Amendment to direct a motorist to exit the vehicle during an otherwise lawful canine sniff.

III. THE REMOVAL OF CRELLER FROM HIS VEHICLE DID NOT CONSTITUTE AN UNREASONABLE SEIZURE

Fundamentally, a touchstone of a Fourth Amendment analysis is always “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” *Mimms*, 434 U.S. at 108–09, quoting *Terry*, 392 U.S. at 19. Reasonableness requires a balancing between the public interest and the individual’s right to personal security to be free from arbitrary interference by law enforcement officers. *Mimms*, 434 U.S. at 109, citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

In *Mimms*, the Court weighed the interests of officer safety during a traffic stop against the intrusion to a driver. The mere inconvenience to the driver, held the Court, cannot prevail when balanced against legitimate concerns for officer safety. *Mimms*, 434 U.S. at 111. In furtherance of its holding, the Court announced this bright line rule: “[O]nce a motor vehicle has been lawfully detained for a traffic violation, police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of

unreasonable searches and seizures.” *Id.* at 111, fn. 6. By requiring an additional showing before an officer may reasonably order a motorist to exit a vehicle during a canine sweep, the Second District’s holding in *Creller* runs afoul of this bright line rule in *Mimms*.

In *Wilson*, the Court addressed the separate issue of whether an officer may direct a passenger to exit the vehicle. Highlighting the risk posed to the officers during the traffic stop, the Court observed that “the fact that there is more than one occupant of the vehicle *increases the possible sources of harm to the officer.*” *Wilson*, 519 U.S. at 413 (emphasis added). Finding the additional intrusion to the passenger to be “minimal”, the Court held that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. *Id.* at 414-15. Nothing involving a canine sweep requires a different result.

The Second District does not dispute the hazardous nature of traffic stops. Rather, the court conceded in its opinion that the rationale underlying the decisions in *Mimms* and *Wilson* is officer safety, specifically in connection with a traffic stop: “Whether issuing a traffic citation or investigating the presence of contraband, that law

enforcement officers are frequently subjected to dangerous situations during roadside stops is unquestionable.” *Creller*, 336 So.3d at 822.

Nonetheless the court held that the canine officer unreasonably directed Creller to exit his vehicle because he was focused on officer safety during the vehicle sweep with his canine rather than the issuance of the traffic citation. *Id.* at 824. In support of its holding, the Second District seized upon the following caveat from *Rodriguez*: “[T]he government’s officer safety interest stems from the mission of the stop itself . . . On-scene investigation into other crimes . . . detours from that mission.” *Id.* at 823, quoting *Rodriguez*, 575 U.S. at 356.

Taking its cue from *Rodriguez*, the Second District found that the vehicle sweep of Creller’s vehicle detoured from the mission of the traffic stop, *but not its duration*. The Court then held that if the safety issue is not related to the issuance of the traffic citation but rather to the vehicle sweep, a driver cannot be constitutionally required to exit the vehicle: “[I]t is clear that the safety issue was not related to the issuance of the traffic citation but rather to the vehicle sweep . . . Rather, the testimony left no doubt that it was the vehicle sweep

alone—not the issuance of the traffic citation—that gave rise to a threat to officer safety.” *Creller*, 336 So.3d at 822-23.

Creller’s interpretation both ignores the officer safety risks inherent in all traffic stops and conflates two separate legal issues: (1) the duration of the stop, and (2) the “mission” *i.e.* intent of the stop. If the duration is lawful, then the mission is immaterial. The Supreme Court has made it abundantly clear that “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.” *Whren v. U.S.*, 517 U.S. 806, 807 (1996). Succinctly stated, under the analytical rubric of the Fourth Amendment’s objective reasonableness component, the subjective intent of the officer is immaterial. *Brigham City, Utah, v. Stuart*, 547 U.S. 398 (2006).

Applying this well-settled law here, the subjective mission is inconsequential if the conduct is itself objectively reasonable. *Mimms* and *Wilson* unequivocally hold that instructing a motorist or passenger to exit a motor vehicle during an otherwise lawful traffic stop for a routine infraction is objectively reasonable. So too is the officer’s instruction here.

Recognizing that their holding conflicted with *Benjamin*, the court concluded that the Fifth District impermissibly stacked the holdings in *Mimms* and *Rodriguez*. *Creller*, 336 So.3d at 823. The Second District declined to follow this line of reasoning, characterizing it as “an erroneous extension of the carveouts in *Mimms* and *Rodriguez* ...” *Id.*

Parroting *Rodriguez*, the court found that the canine officer deviated from the mission of the traffic stop such that *Creller*’s seizure could not be justified “even if necessitated by officer safety.” *Id.* This is an erroneous and inconsistent application of *Rodriguez* because it ignores the clearly established risks inherent to traffic stops. Equally important, it overlooks the requisite balancing test of the important officer safety factors and the *de minimis* intrusion into the motorist’s rights.

In *Mimms* and *Wilson*, the Court considered an officer’s authority to require a driver and a passenger to exit the vehicle during the traffic stop. In *Rodriguez* the Court addressed the legality of the detention of a driver for a dog sniff beyond the time needed to complete the stop. The Second District blurred the lines between

these cases when it relied on *Rodriguez* in support of its holding that officer safety for a vehicle sweep cannot justify an exit order.

Troubled by the continued detention of the driver in *Rodriguez* after the traffic stop had been completed, the Supreme Court differentiated between officer safety issues related to the completion of a traffic stop and “the Government’s endeavor to detect crime in general or drug trafficking in particular.” *Rodriguez*, 575 U.S. at 357. To this point the Court commented that on-scene investigation into other criminal activities detours from that mission, *in the context of extending the duration of the stop. Id.*

No such extension occurred here. Context matters. Whether the officers deviated from the mission of the traffic stop was secondary to the central issue in that case. The critical question in *Rodriguez* was whether conducting the dog sniff adds time to the traffic stop. *Id.* at 357.

There is no dispute that the vehicle sweep did not prolong Creller’s traffic stop. The Second District concedes as much. *Creller*, 336 So.3d at 821. One of the critical flaws in the court’s analysis is that the common element to both *Mimms* and *Wilson*—officer safety—has escaped the Second District. A vehicle sweep by canine does not

diminish the need to protect an officer during a traffic stop. Different circumstances justify removing a driver or a passenger from the vehicle, but the paramount issue remains officer safety.

The Second District erred by failing to balance the overriding interests of officer safety against the minimal intrusion to the driver and giving due consideration to the safety of the officer. In contrast, the Fifth District, citing *Mimms*, weighed these competing interests in favor of officer safety. *Benjamin*, 229 So.3d at 443.

Creller was asked to exit the vehicle while the dog sniff was being completed for reasons justifiably related to officer safety. As in *Mimms*, standing outside of the vehicle would have amounted to no more than an inconvenience occasioned for the benefit of officer and motorist safety. His forcible removal was not an unreasonable seizure, and the Second District erred in its ruling.

IV. CONCLUSION

The Second District erred in requiring additional articulation of officer safety needs prior to ordering a motorist to exit the car during an otherwise lawful canine sniff. The Florida Sheriffs Association, the Florida Police Chiefs Association, and the Florida Department of

Highway Safety and Motor Vehicles respectfully request that this Court reverse the *Creller* opinion and adopt *Benjamin*.

Respectfully submitted on this 8th day of November 2022.

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