No. 128957

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DANTE ANTWAN WEBB, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-21-0726. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 18-CF-305. Honorable William A. Yoder, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

Dante Webb's trial attorney provided ineffective assistance of counsel when he failed to argue in his motion to suppress that the search of the cabin of Webb's tractor trailer was not supported by probable cause, where Webb was stopped for failure to display registration and the search of the cabin was solely supported by a canine alert.

Introduction

The Compassionate Use of Cannabis Pilot Program Act (hereinafter "the Act" or "the Medical Cannabis Act") "somewhat altered the status of cannabis as contraband." *People v. Hill*, 2020 IL 124595, ¶ 18. Put another way, by altering cannabis's contraband status, the Act in turn "somewhat altered" search and seizure rules. At the heart of Webb's case is the question *how* the Act has changed the rules that govern a vehicle search based on a dog alert.

The State's position is that the Act as changed *nothing*. (St. Br. 8-11) And because nothing has changed, the State concludes, Webb's counsel had no new obligations with respect to the suppression motion. (St. Br. 11-13) The State arrives at this position by ignoring the Act and by glancing over the details of this Court's decision in *Hill*. The State skips over the crucial distinction this Court has drawn between the decriminalization of cannabis, which did not change the legal status of cannabis, and its partial legalization, which did. *Hill*, 2020 IL 124595, ¶¶ 32, 35. And the State ignores a central conclusion from *Hill*, namely that officers have probable cause to search when they detect cannabis *and* see a violation of the Act's new rules. *Hill*, 2020 IL 124595, ¶ 35.

In Webb's case, when the dog detected the odor of cannabis, officers had no suspicion that Webb violated the Act, because they did not observe any violation of it. As such, the search of Webb's tractor cabin was unconstitutional. Counsel

should have sought suppression on this basis. Because counsel did not, counsel was ineffective.

A. Law enforcement lacked probable cause to search Webb's tractor trailer.

1. When cannabis is partially legalized, a mere dog alert for cannabis does not establish probable cause.

When police searched Webb's vehicle in 2018, legal users of cannabis were "protect[ed] ... from arrest and prosecution[...]," and were specifically authorized to transport cannabis as long as it was properly packed in a "sealed, tamper-evident medical cannabis container." 410 ILCS 130/1, 130/5(g) (2018); 625 ILCS 5/11-502.1 (a)-(c) (2018). The State does not dispute that police did not know whether Webb was legally in possession of cannabis before they searched the vehicle, and that police had no indication that the cannabis to which the police dog alerted was not properly packaged – the officer neither smelled or saw any cannabis himself. (R. 156) Yet, without engaging at all with the Medical Cannabis Act, the State argues that the dog alert was sufficient to support the search. (R. 9-11, 18-21) The sole reason the State gives for its argument is its claim that this issue has already been decided by this Court in *Hill* and repeatedly confirmed by our appellate courts. (St. Br. 9-11, 18-21) The State is wrong.

According to the State, this Court in *Hill* held that whether someone possesses a medical cannabis license is "irrelevant" to a probable cause analysis, because "someone with a medical license could nevertheless be in possession of cannabis illegally." (St. Br. 22) The State misunderstands *Hill*. This Court never said that whether a person possesses a cannabis license is "irrelevant." Rather, this Court explained that police may encounter circumstances where it is obvious that a person

– even one with a medical cannabis license – violates cannabis laws. Specifically in *Hill*, this Court confronted a situation where it was irrelevant whether *that* defendant had a medical cannabis license. This was because officers saw open cannabis in the back seat – which violates both the Illinois Vehicle Code and the Medical Cannabis Act, even for those who have a medical cannabis license. *Id*. at ¶ 36, citing 625 ILCS 5/11-502.1(b),(c) (2016), and 410 ILCS 130/30(a)(5)(2016). Thus, that evidence of *illegal use of cannabis* under any circumstances – i.e., an improperly packaged cannabis bud in the back of the car – justified the search. *Hill*, 2020 IL 124595, ¶ 35 (cannabis bud in the back seat indicated that "cannabis was in the car and, likely, not properly contained.").

As argued in opening, evidence of unlawfully contained cannabis is the crucial difference between *Hill* and the instant case. (Def. Br. 22-23) Here, there was no evidence that the cannabis the dog detected in Webb's vehicle was improperly packaged, as none was visible to the officers before the search and neither officer testified to smelling any cannabis. (R. 156) Thus, if Webb had a medical cannabis license, there was no indication that he was in violation of the Act or the Vehicle Code, unlike the defendant in *Hill*. *Hill*, 2020 IL 124595, ¶ 35. And, it is undisputed that the police did not know whether Webb violated any other cannabis laws because they never asked him whether he had a license to possess cannabis under the Act. The State glances over these important details, and contrary to the State's argument, this Court's decision in *Hill* did not authorize the search in this case.

Continuing its argument that the issue here has already been decided in *Hill*, the State adds that the search in Webb's case was proper under this Court's 1985 decision in *Stout*, where this Court held that the odor of burnt cannabis was

sufficient to give an officer probable cause to search. *People v. Stout,* 106 Ill. 2d 77, 88 (1985). (St. Br. 11) According to the State, this Court "explicitly left in place its holding that the smell of cannabis, by itself, provided probable cause." (St. Br. 11, citing *Hill*, 2020 IL 124595) The State is again wrong.

That this Court in *Hill* did not "explicitly [leave] in place" *Stout* is evidenced by its clear pronouncement that because *Stout* was not at issue, it was not opining on the validity of *Stout*. *See Hill*, 2020 IL 124595, ¶ 18 ("*[W]e need not address the validity* of *Stout* after the enactment of the [Medical Cannabis Act] and decriminalization of possession of small amounts of cannabis." (emphasis added).) Where the validity of *Stout* was not at issue, this Court indicated that it would not address it. In doing so, it followed its long-standing rule that it will "not render advisory opinions or consider an issue when it will not affect the result." *People v. Brown*, 236 Ill. 2d 175, 195 (2010), citing *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). *Hill*, 2020 IL 124595, ¶ 18.

Contrary to the State's argument, it is plain that under the Medical Cannabis Act – passed in 2014, almost 30 years after *Stout* – *Stout's* blanket rule that an officer's detection of cannabis odor, by itself, gives probable cause to search a vehicle is no longer good law. This is so because the Medical Cannabis Act permits possession of cannabis for those properly licensed, and the Act and the Illinois Vehicle Code both permit transportation of cannabis in a vehicle as long as it is properly packaged. 410 ILCS 130/15, 30(a)(2)(E); 625 ILCS 5/11-502.1(a)-(c) (2018). Contrary to this, at the time *Stout* was decided, there were no exceptions to the blanket prohibition of cannabis – all forms of cannabis possession were illegal. Thus, at the time this Court decided *Stout*, when an officer smelled burning cannabis

emanating from the defendant's car's interior at a routine traffic stop, he was smelling what was guaranteed to be contraband under any circumstance. *Stout*, 106 Ill. 2d at 81.

Not so under the Medical Cannabis Act, and therefore in Webb's case. Under the Act, when an officer encounters the odor of cannabis in a car, it is possible that he is encountering someone who is permitted to transport the cannabis in the vehicle – i.e., he encounters a situation that does not *per se* indicate illegal conduct. 410 ILCS 130/15, 30(a)(2)(E). As such, the Medical Cannabis Act has invalidated the blanket *Stout* rule.

While the State spends almost the entirety of its brief arguing that search and seizure rules remain the same after the partial legalization of cannabis, at the very end of its brief it concedes in a half sentence that legalization has had an impact such that "an officer cannot assume that an individual is illegally possessing cannabis based only on the smell of cannabis." (St. Br. 22) While it makes this concession, the State never acknowledges that the legalization of cannabis in Illinois has fundamentally transformed the search and seizure analysis when it comes to cannabis. (Def. Br. 26, *citing People v. McKnight*, 2019 CO 36, ¶ 58). As argued in opening, when a person carries *legal* cannabis, he or she has a privacy interest in that cannabis. That privacy interest was created by the Medical Cannabis Act and it challenges the general rule that the use of a drug sniffing dog – i.e. using a canine's hypersensitive sense of smell to detect a legalized substance – always exposes contraband in which the person searched has no privacy interest. *Illinois v. Caballes*, 543 Ill. 2d 405, 408-09 (2005) (dog sniff that does not expose "non-contraband items" does not compromise legitimate privacy interest);

McKnight, 2019 CO 36, ¶¶ 33-36, 42-48 (analyzing dog sniff after Colorado legalized marijuana for some adults, and concluding that a sniff from a dog trained to detect cannabis can now reveal lawful activity). (Def. Br. 26-27) The State never acknowledges this fundamental shift and it never discusses the case law Webb has cited.

2. The totality of the circumstances also did not give rise to probable cause

The State does not dispute that, before the dog alerted, police lacked probable cause to search Webb's tractor cabin. The State argues the dog's alert turned the search legal. (St. Br. 11, 17-18) Yet, the State never explains how the dog's alert for cannabis could aid police in the probable cause determination before police found out whether the detected cannabis was legal or not. Rather than giving a legal explanation, the State again argues that this Court in *Hill* has already decided the issue, claiming that this Court "held that the smell of cannabis remained a valid factor within the totality of the circumstances test that could provide probable cause to search." (St. Br. 17-18) The State again misreads *Hill*.

As demonstrated above, this Court in *Hill* did not address the question of whether the mere odor of cannabis after the partial legalization of cannabis under the Medical Cannabis Act could be a factor adding to an officer's suspicion. Instead, in *Hill*, this Court held that evidence of *illegal* cannabis use – i.e., evidence of a transportation violation – was a valid factor in the probable cause analysis. Specifically, this Court found that the loose cannabis bud in the back seat, coupled with a strong odor of burnt cannabis, "indicate[d] that cannabis was in the car and, likely, not properly contained." *Hill*, 2020 IL 124595, ¶ 35. But because it was never faced with the mere odor of cannabis, particularly an odor detected

by a dog instead of one of the responding officers, this Court never decided – and did not imply – that the mere odor of raw cannabis would have been a proper factor to consider. As explained previously, the Court specifically declined to opine on the issue when it declined to address the validity of *Stout*.

In arguing that this issue has already been decided, the State misinterprets *Hill* by conflating this Court's analysis of the effects of the legalization of cannabis and the decriminalization of cannabis. Specifically, the State cites this Court's determination that "the *decriminalization* of possessing small amounts of cannabis did not alter the status of cannabis as contraband," and uses it to argue that the mere odor of cannabis remains a proper factor in the probable cause analysis. (St Br. 11, citing *Hill*, 2020 IL 124595, ¶ 31 (emphasis added)) Yet, the decriminalization of cannabis is not at issue here.

In *Hill*, the defendant relied on two separate statutes to argue that the status of cannabis had been altered: first, the blanket *decriminalization* of small amounts of cannabis then in effect under 720 ILCS 550/4(a) (2016)[1], and second, the *legalization* of cannabis for licensed users under the Medical Cannabis Act. *Hill*, 2020 IL 124595, ¶ 25. This Court in *Hill* reached different conclusions regarding the effects of the two laws on the probable cause analysis. Regarding Section 550/4(a), *i.e.* the decriminalization statute, the Court held that possession of cannabis remained "illegal" and therefore, cannabis remained contraband. *Hill*, 2020 IL 124595, ¶¶ 30-31. However, this Court found that the Medical Cannabis Act's partial *legalization* of cannabis "supported defendant's argument that cannabis is no longer contraband in every circumstance." *Id.* at ¶ 32. And while, as explained

[1]The section made the possession of no more than 10 grams of cannabis a mere civil law violation, punishable by a fine.

above in detail, the Court made clear that officers have probable cause to search a person's vehicle who is clearly in violation of the Medical Cannabis Act – such as when the *Hill* defendant transported open cannabis in a car – this Court also clearly indicated that the Act had altered the calculus for purposes of the probable cause analysis because cannabis was no longer contraband in all circumstances. *Id.* at ¶ 35. The State skips over this crucial distinction.

To support its argument that the mere odor of cannabis remains a proper factor in the probable cause analysis, the State also cites to the Fourth District Appellate Court decisions in *People v. Mallery*, 2023 IL App (4th) 220528, and *People v. Molina*, 2022 IL App (4th) 220152 (leave to appeal granted, No. 129237). These citations fail. To begin with, the Fourth District Appellate Court's continued insistence that – no matter how far the legislature has legalized cannabis, its mere odor remains sufficient evidence to establish probable cause to search – cannot be squared with this Court's opinion in *Hill*, as explained in detail above. This Court should therefore reject the Fourth District's legal reasoning.

Furthermore, the Fourth District's conclusion that the searches in *Mallery* and *Molina* were proper actually fits within the framework of *Hill* in a way that Webb's case does not. This is so because, like in *Hill*, in both *Mallery* and *Molina* the officers could suspect illegal activity for violating the transportation requirements for cannabis. Specifically, in both cases the search of the vehicle was based on an officer's discovery of the odor of cannabis. *Mallery*, 2023 IL App (4th) 220528, ¶ 3, *Molina*, 2022 IL App (4th) 220152, ¶¶ 4-5. When the searches in *Mallery* and *Molina* occurred in 2022 and 2020, respectively, the portion of the Vehicle Code that regulates transportation of cannabis had been changed to add a new requirement. Beginning in June 2019, cannabis in a vehicle no longer just

has to be stored in a "sealed, tamper-evident medical cannabis container" – instead, the Code now requires it to be stored in a "sealed or resealable, *odor proof*, and child resistant medial cannabis contained that is inaccessible." *Compare* 625 ILCS 5/11-502.15(c) (2018) *and* 625 ILCS 5/11-502.15(c) (eff. Jun. 25, 2019). *Mallery*, 2023 IL App (4th) 220528, ¶ 3, and *Molina*, 2022 IL App (4th) 220152, ¶ 4. Thus, when cannabis odor was detected in *Mallery* and *Molina*, officers had reason to suspect that the cannabis they smelled – even if legally possessed by the car's passengers – was not packaged in "odor-proof" containers. That mispackaging was evidence of criminal conduct. *Hill*, 2020 IL 124595, ¶ 35. Critically, the odor-proof packaging requirement did not exist when the dog alerted in Webb's case. Under the law in effect at that time, the mere odor of cannabis here did not give rise to the suspicion that it was not properly stored in a "sealed, tamper-evident medical cannabis container," as was required then. 625 ILCS 5/11-502.15(c) (2018).

The State argues that Webb is trying to have this Court ignore the police's suspicion of Webb before the canine search. (St. Br. 20) But this is not so. Crucially, the State has not cited a single case in which evidence of possession of a controlled substance *that has not been determined to be legal or illegal* in connection with an officer's general hunch of criminal conduct justified the search of a vehicle. The two cases the State cites, *People v. Jones*, 215 Ill. 2d 261 (2005), and *Illinois v. Gates*, 462 U.S. 213 (1983), do not support the State's argument that the evidence here was sufficient. (St. Br. 19-20) In *Jones*, this Court upheld the search of a vehicle based on an officer's discovery of a "one-hitter box," a box clearly identified by the officer as an item "used as drug paraphernalia and for no other purpose," which the officer reasonably suspected contained cannabis, then an illegal substance. *Jones*, 215 Ill. 2d 275, 281-82. But it is the crux of this case that the officer could

not reasonably suspect the cannabis his dog detected to be an illegal substance until he determined whether the cannabis was *illegal for Webb*. While the State argues that *Jones* allows the detection of the odor of cannabis in this case to be a factor in the analysis of the totality of the circumstances, what differentiates *Jones* from the instant case is the officer's reasonable belief that he was encountering an illegal substance – a step that had not occurred here until the officer determined Webb's status under the Medical Cannabis Act.

Gates also does not aid in the analysis here. At issue in *Gates* was the reliability of an informant as a factor in a magistrate's probable cause determination. *Gates*, 462 U.S. at 225. What was *not* at issue in *Gates* was whether, when the magistrate made its probable cause determination, it had reason to believe that *any* articulable criminal conduct had occurred in the first place: the informant there had provided a letter detailing a clearly illegal drug operation. *Id*. In *Gates*, the issue was whether the informant's letter was sufficiently reliable. *Gates* did not address a situation, like here, where the very basic question whether there was any criminal conduct had not been answered.

In arguing that the totality of the circumstance gave officers probable cause to search Webb's tractor trailer, the State also tries to turn Officer Albee's hunch that he was encountering criminal activity into something more. For example, Albee said he was suspicious of Webb because of his demeanor during the traffic stop. (R. 141-42) Yet, as Webb pointed out, Albee's description of Webb as "in a state of panic" and making "animated movements" when Albee came to his trailer cabin was undermined by the audio recording and video footage of Webb during the stop, which do not portray any panic. (Def. Br. 31-33) The State does not acknowledge any of the cases in which courts have acknowledged that it is entirely

normal for a person to be nervous when encountering law enforcement. (Def. Br. 32, citing cases) And it now argues for the first time that Webb's demeanor might have changed from panic to "relaxed" once Albee placed him in his police car. (St. Br. 19) This Court should reject the State's far-fetched speculation. Neither officer testified that Webb's demeanor suddenly changed when he was placed in the police car. The claim that Webb "relaxed" after he was made to abandon his truck and was led through the snow storm into a police car to face further questioning is not only implausible, it is also not supported by the record.

The State does not deny that Officer Albee's suspicion that Webb was involved in criminal activity lacked specificity, which Albee himself acknowledged. (R. 144, acknowledging that he suspected only that Webb was "involved in some type of criminal activity" whether it was "a stolen vehicle or what the case may be.") Rather the State argues that Albee, as an officer with special training, was allowed to make inferences that a civilian may not be able to make. (St. Br. 19, *citing Hill*, 2020 IL 124595, ¶ 24.) What is missing from the State's brief is the same explanation that was also missing from Albee's testimony, namely how the things Albee noticed translated into probable cause to believe that Webb's tractor cabin contained contraband. Albee testified that he noticed Webb's trailer was not fully loaded and that his cabin did not display a logo. (R. 136-37,141) Yet, neither Albee at trial, nor the State now, supply any support for the claim that a partially loaded car trailer or a missing decal (a federal commercial transportation regulation violation) are connected to criminal enterprise.

The State in Webb's case had to demonstrate that the officers who searched Webb's tractor cabin possessed sufficient facts to support probable cause to believe that his vehicle contained contraband. *See People v. DeLuna*, 223 Ill. App. 3d 1,

17 (1st Dist. 2002). While the State lists the various things that made Officer Albee suspicious of Webb, Albee's own testimony confirmed that he could not articulate a suspicion of contraband but rather that he only had a hunch that Webb was "involved in some type of criminal activity" before the dog alerted to cannabis in the tractor trailer. (R. 144) And at the time the officers began their search, they had no idea whether Webb legally possessed the detected cannabis – because they never asked him. The State finds no reason that officers should have done so. Yet, a simple check in the Act's database could have informed officers whether the cannabis detected by the dog in this case indicated criminal behavior or not. 410 ILCS 130/10(x) (2018) (establishing web-based verification system available to law enforcement 24 hours a day). Without the determination that the cannabis was contraband, the officers lacked probable cause to search Webb's vehicle.

C. Trial counsel was ineffective for failing to move to suppress the fruits of the illegal search based on the argument that the dog alert did not give officers probable cause.

Despite the passage of the Medical Cannabis Act in 2014 and despite this Court's confirmation in *Hill* that the Act had, indeed, altered the "status of cannabis as contraband," the State insists that it was reasonable for counsel not to challenge the search of Webb's tractor trailer cabin on that basis. (St. Br. 6-14) The State argues that Webb's counsel reasonably relied on "well-established precedent," (St. Br. 12), and that counsel was not required to exhibit "clairvoyance" regarding new developments in the law. (St. Br. 7, 13)

Contrary to what the State argues, counsel could not rely on what the State mistakes as precedent and counsel also did not need to see into the future. Counsel's only obligation was to know the law in effect at the time he litigated the motion to suppress. *See, e.g., People v. Fillyaw*, 409 Ill. App. 3d 302, 315 (2d Dist. 2011)

(unfamiliarity with the law constitutes unreasonable performance). In Webb's case that meant that counsel needed to know the Medical Cannabis Act of 2014, and this Court's examination of it in *Hill* in 2020. Under both, a motion to suppress would not only have been meritorious but there was a reasonable probability that it would have been granted. *People v. Henderson*, 2013 IL 114040, ¶ 15 (to meet *Strickland*, motion not argued by counsel must be meritorious and have led to a different result).

The State cites a number of cases which it claims "settled" the rule that "that the smell of cannabis provides probable cause to search a vehicle" remained intact in 2018. (St. Br. 10) To begin with, inasmuch as these decisions are contrary to *Hill*, they should not have controlled Webb's attorney's strategic decisions. *See, e.g. Blumenthal v. Brewer*, 2016 IL 118781, ¶ 61 (lower tribunals are bound by the decisions of the Illinois Supreme Court). *Hill* was published in March of 2020 and announced that the Medical Cannabis Act, enacted four years before Webb's arrest, had indeed altered the status of cannabis as contraband. Counsel's motion to suppress – where he did not raise the Medical Cannabis Act – was argued in the fall of 2020. (Def. Br. 35) Counsel therefore clearly had the benefit of *Hill* before the motion.

And besides, the State is simply wrong in claiming that the appellate courts had "already considered the effect of the medical marijuana statute on probable cause." (St. Br. 9-10) The State here again fails to distinguish between the *legalization* of cannabis and the *decriminalization* of cannabis. The State cites *In re O.S.*, 2018 IL App (1st) 171765, but the court there never even cited to, let alone interpreted or analyzed, the impact of the Medical Cannabis Act on a vehicle search. The defendant in *In re O.S.* based his argument on the decriminalization

of cannabis under 720 ILCS 550/4 (2018). *In re O.S.*, 2018 IL App (1st) 171765, ¶27. And as argued *supra*, it was the partial legalization of cannabis that altered the status of cannabis as contraband, not the decriminalization. *Hill*, 2020 IL 124595, ¶ 18. While the court in *In re O.S.* cited out-of-state cases holding that *their* medical cannabis legislation did not impact the probable cause analysis, those cases are in direct conflict with this Court's pronouncement in *Hill*. *In re O.S.*, 2018 IL App (1st) 171765, ¶ 28 (citing cases).

Additionally, *In re O.S.* was not a canine alert case, and the search of the car there occurred after an officer stopped a car and smelled marijuana emanating from the inside of the car and, crucially, observed a blunt tucked behind a passenger's ear. As discussed in detail above, under the Medical Cannabis Act, officers have reason to suspect a violation of the law when they see cannabis transported outside of a proper container. *Hill*, 2020 IL 124595, ¶ 35. Thus, officers had probable cause to believe that the blunt behind the passenger's ear violated the Medical Cannabis Act. In short, *In re O.S.* was not "well-settled precedent" counsel should have relied on in Webb's case.

Similarly, the Third District Appellate Court's decision the State cites, *People v. Rice*, 2019 IL App (3d) 170134, ¶ 25, only addressed the decriminalization of cannabis, not its legalization under the Medical Cannabis Act. (St. Br. 10) It was therefore not apt. And the Second District Appellate Court's unpublished order in *People v. Wheeler*, 2020 IL App (2d) 180162-U, ¶ 12, cited *In re O.S.* for the proposition that the First District had already "signaled" that the legalization of cannabis in Illinois did not change the probable cause determination of officers. *Wheeler*, 2020 IL App (2d) 180162-U, ¶ 12. (St. Br. 10) Yet, as discussed, *In re O.S.* did not contain any analysis of the Illinois' Medical Cannabis Act and conflicts

with *Hill*. The order in *Wheeler*, an unpublished out-of-district decision, therefore also did not serve counsel as "well-settled precedent." *See* Ill. S. Ct Rule 23(e)(1) (2020) (providing that Rule 23 orders could not be cited and had no precedential value or persuasive authority)[2].

The State's citation to *People v. Watkins*, 2019 IL App (4th) 180605, as another case that Webb's trial counsel could have reasonably relied on, is entirely unavailing because the constitutionality of a search based on the odor of cannabis was not even a legal issue to be decided in that case. (St. Br. 10) At issue in *Watkins* was the summary dismissal of a *pro se* post-conviction petition. As relevant here, the defendant argued in the petition that his counsel was ineffective for failing to challenge the search of his car based on the argument that a radio call for a canine unit unreasonably prolonged the traffic stop. *Watkins*, 2019 IL App (4th) 180605, ¶ 14. The defendant made no argument that the search of his car was unconstitutional based on the dog alert. The State is correct that the court in *Watkins* stated that the police had probable cause to search the car based on a dog alert, but in support of this statement the court cited *People v. Easley*, 288 Ill. App. 3d 487, 492 (3d Dist. 1997), a case that preceded the passage of the Medical Cannabis Act by 17 years. Counsel was obligated to rely on the Medical Cannabis Act and on *Hill*, not to follow outdated case law cited in a case where the issue presented in Webb's case was not even raised.

Missing from the State's claim that trial counsel reasonably relied on these cases and would have had to be "clairvoyant" to file the motion to suppress based on the Medical Cannabis Act is an acknowledgment not only that: (1) the Medical

[2]Ill. Sup. Ct. R. 23 (e)(1)(eff. Jan 1. 2021), in its current version, allows citation to non-precedential orders for persuasive purposes.

Cannabis Act had been passed; and (2) *Hill* had been decided, making clear that the Medical Cannabis Act applied to vehicle searches, but also (3) trial lawyers and appellate lawyers all over Illinois were challenging vehicle searches based on newly passed cannabis legislation – as evidenced by the slew of appellate court decisions in recent years. *See, e.g., In re O.S.*, 2018 IL App (1st) 171765 ¶¶ 4, 27 (trial counsel challenged 2017 search of vehicle based on new cannabis legislation); *Rice*, 2019 IL App (3d) 170134 ¶ 12 (trial counsel challenged 2016 search of vehicle based on new cannabis legislation); *Wheeler*, 2020 IL App (2d) 180162-U (trial counsel challenged 2017 search); *People v. Sims*, 2022 IL App (2d) 200391 (trial counsel challenged 2018 search); *People v. Stribling*, 2022 IL App (3d) 210098 (trial counsel challenged 2018 search); *People v. Hall*, 2023 IL App (4th) 220209 (trial counsel challenged 2020 search); *Molina*, 2022 IL App (4th) 220152, and *People v. Redmond*, 2022 IL App (3d) 210524 (consolidated and leave to appeal granted Mar. 29, 2023, No. 129237) (in each case trial counsel challenged a 2020 search). Familiarity with the Medical Cannabis Act and the decision in *Hill*, which was issued months before Webb's counsel litigated his motion to suppress, was not a matter of predicting the future but a matter of the attorney's diligence and duty to remain apprised of the law.

The State tries to liken Webb's case to cases where counsel was asked to argue an extension of the law, not apply current law. These cases are clearly distinguishable. For example, the State relies on *People v. Bailey*, 232 Ill. 2d 285 (2009). (St. Br. 7, 12-13) Yet, *Bailey* does not concern counsel's obligation to keep up with and know the law. Rather, the issue in *Bailey* was whether, for purposes of *Strickland*'s ineffectiveness analysis, defense counsel has an obligation to argue for a *reasonable expansion* of the law. *Bailey*, 232 Ill. 2d at 298-99. The defendant

in *Bailey* argued that his trial counsel was ineffective for not challenging the search of his client's car based on a more nuanced application of the rule that police may search the car compartment incident to the arrest of only one of the car's occupants. The more nuanced rule was suggested – but not part of the holding – in a concurring opinion by one United States Supreme Court justice. *Id*. at 208. This Court held that counsel has no obligation under *Strickland* to challenge a rule uniformly in place at the time counsel represented the defendant, and counsel was not required to make an argument based on the concurrent opinion and not based on the law in place at the time. *Bailey*, 232 Ill. 2d at 299.

The circumstances in *Bailey* are not comparable because – as argued extensively above – Webb's attorney did not need to argue for a change in search and seizure law. He was obligated to rely on the 2014 enactment of the Medical Cannabis Act and this Court's clear pronouncement in *Hill* that the Act had "somewhat altered the status" of cannabis as contraband. It was diligence, rather than clairvoyance, that was required of Webb's counsel.

The State's reference to *People v. Hartfield*, 232 Ill. App 3d 198 (1st Dist. 1992), an appeal from the second-stage dismissal of a post-conviction petition is similarly unavailing. (St. Br. 13) In *Hartfield*, the First District Appellate Court held that counsel was not obligated to make a *Batson*-challenge during jury selection before *Batson v. Kentucky*, 476 U.S. 79 (1986), was ever decided. Rather, the court held that counsel properly relied in her professional judgment on *Swain v. Alabama*, 380 U.S. 202 (1965), which *Batson* later overruled. It is in this context that the First District Appellate Court used the language cited by the State, that counsel could not "have known which way the wind would blow two years after the trial, despite longstanding Illinois and Federal precedent to the contrary," and that

requiring her to know "would be tantamount to imposing a duty of clairvoyance." *Hartfield*, 232 Ill. App. 3d at 208. Yet, again, the Medical Cannabis Act, the law that "somewhat altered the status of cannabis as contraband," had been passed in 2014. *Hill* was decided in 2020 before the motion to suppress. And there was no "longstanding Illinois and Federal precedent to the contrary." The circumstances in *Bailey* are not comparable.

Finally, the State repeatedly cites *People v. Eubanks*, 2021 IL 126271 (St. Br. 7, 12), a case that has nothing to do with whether defense attorneys must keep up with the enactment of laws, read decisions that interpret them, and apply these developments promptly to the circumstances of their clients' cases. At issue in *Eubanks* was defense counsel's failure to file a motion to suppress the defendant's inculpatory statement based on Illinois Supreme Court Rule 402(f). *Eubanks*, 2021 IL 126271, ¶ 21. This Court did not even consider counsel's performance in failing to utilize the rule, but skipped ahead to analyzing whether the defendant was prejudiced. *Id.* ¶ 31. *Eubanks* does not help the State's argument that counsel had an obligation to base his argument on the established law at the time, i.e. the Medical Cannabis Act and *Hill*.

Conclusion

When Webb's vehicle was searched in 2018, four years after the partial legalization of cannabis under the Medical Cannabis Act, a dog alert for cannabis, coupled with an officer's mere hunch that a person was involved in "some type of criminal activity," was not enough to provide probable cause to justify the search. Like other trial attorneys throughout Illinois, Webb's counsel had an obligation to file a meritorious motion to suppress the cannabis found in Webb's tractor cabin

based on the police's lack of probable cause. That motion would have been successful and led to the suppression of the central evidence the physical evidence introduced by the State at trial: the cannabis. Without the cannabis, the State could not have sustained its burden of proof at trial. This Court should hold that counsel was ineffective and reverse Webb's convictions. Moreover, because the State cannot prevail on retrial without the evidence that should have been suppressed, this Court should reverse Webb's convictions outright. *People v. Williams*, 2020 IL App (1st) 172992, ¶ 12; *People v. Litwin*, 2015 IL App (3d) 140429, ¶ 46.

CONCLUSION

For the foregoing reasons, Dante Antwan Webb, Defendant-Appellant, respectfully requests that this Court reverse his conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Miriam Sierig
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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DANTE ANTWAN WEBB, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-21-0726. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 18-CF-305. Honorable William A. Yoder, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 10, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Erika J. Roman
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