No. 124595

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- CHARLES D. HILL Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-18-0041. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 17-CF-896. Honorable Thomas E. Griffith, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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ORAL ARGUMENT REQUESTED

POINT AND AUTHORITIES

When Illinois decriminalized cannabis, it necessarily changed the interpretation and application of Mr. Hill's Fourth Amendment rights.

b. The odor of raw cannabis, alone, did not give the officer probable cause to search Mr. Hill's car because cannabis was decriminalized.

NATURE OF THE CASE

Charles D. Hill appeals from the judgment of the Appellate Court, Fourth Judicial District, reversing the circuit court's grant of Mr. Hill's motion to suppress and remand order for trial.

No issue is raised challenging the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether when Illinois decriminalized cannabis, it necessarily changed the interpretation and application of Mr. Hill's Fourth Amendment rights.

STATUTES AND RULES INVOLVED

720 ILCS 550/4 (2016):

"Any person who violates this Section with respect to:

(a) not more than 10 grams of any substance containing cannabis is guilty of a civil law violation punishable by a minimum fine of $100 and a maximum fine of $200."

STATEMENT OF FACTS

In June 2017, Mr. Charles Hill was charged with one count of unlawful possession of a substance containing less than 15 grams of cocaine. *People v. Hill*, 2019 IL App (4th) 180041, ¶ 1. He was not charged with possessing any amount of cannabis. (C. 8, 17) In October 2017, he filed a motion to suppress evidence, and the trial court granted that motion. *Hill*, 2019 IL App (4th) 180041, ¶ 1. A State appeal challenged the suppression motion, and the appellate court reversed and remanded. *Id*., at ¶ 2. No petition for rehearing was filed. This Court granted leave to appeal on May 22, 2019.

Mr. Hill's charge resulted from the following facts. In May 2017, an officer observed Mr. Hill's car decelerate. *Id*., at ¶ 4. He observed Mr. Hill's passenger reclining in the front passenger seat. *Id*. The officer testified that he knew people to recline in this manner when hiding from the police or gang members. *Id*. The officer pulled alongside Mr. Hill's car to get a better look at the passenger. *Id*. The officer observed that the passenger looked very similar to a fugitive wanted on a traffic warrant; then the officer conducted a stop. *Id*., at ¶ 5.

Shortly after the officer approached Mr. Hill's car, he determined that the passenger was not the fugitive. *Id*.; (R. 18-19) The officer did not remember how long it took to realize that the passenger was not the fugitive. (R. 19) After the police car lights were activated, Mr. Hill pulled over and stopped within the first minute of the video recording from the police car dashboard camera. (Def. Ex. 1 at 0:00-1:00) After another minute, the following exchange occurred: "[Mr. Hill:] What did I do wrong? [Officer:] I thought he was wanted, is why I stopped you, that's why I stopped you. Actually, to tell you the truth, I thought you were somebody

else." *Hill*, 2019 IL App (4th) 180041, ¶ 5; (Def. Ex. 1 at 2:12) Then, 30 seconds later, the officer said he smelled raw cannabis. *Id.*; (Def. Ex. 1 at 2:39) He said, "I see a bud in the back seat, I'll show that to you in a minute." *Id.*; (Def. Ex. 1 at 3:35) While the officer remembered that there was much less than a pound or an ounce in the car, he did not answer whether only residue was recovered; but despite smelling a strong odor of raw cannabis, only residue was found. (R. 21-22); (C. 12, 31)

The search of Mr. Hill's car uncovered a small rock of crack cocaine, which led to Mr. Hill's charge. *Hill*, 2019 IL App (4th) 180041, ¶ 5-6. He filed a motion to suppress on the grounds that the officer did not have reasonable suspicion for the stop or probable cause to search the car. *Id*. The arresting officer testified, and the dashboard camera video was played for the trial court. *Id*., at ¶ 7. In granting the suppression motion, the trial court found that the stop was not justified because the officer had no other corroborating evidence that the passenger was the suspected fugitive. *Id*. The court noted, alternatively, that had it found the stop valid, the subsequent search of the vehicle would have been justified. *Id*. The State's appeal followed. *Id*.

The appellate court found that the officer's suspicions were reasonable and that the trial court erred in requiring that the officer be certain of the passenger's identity, or articulate other corroborating facts. *Id*., at ¶ 28. The court also held that the odor of raw cannabis provided probable cause to search Mr. Hill's car. *Id*., at ¶ 37.

ARGUMENT

When Illinois decriminalized cannabis, it necessarily changed the interpretation and application of Mr. Hill's Fourth Amendment rights.

When the Legislature legalized medical cannabis and then decriminalized small amounts of cannabis, it changed what it meant to possess the drug, and it also affected the power of the police to conduct a search or seizure based on the odor of raw cannabis. When the Legislature decriminalized possession of 10 grams or less of cannabis, it altered the probable cause analysis so that possession of small amounts of cannabis does not provide probable cause to seize or search. 720 ILCS 550/4(a) (2016). Therefore, the officer's decision to search Mr. Charles Hill's car was lacking probable cause because it was based solely on the odor of cannabis.

The Illinois Legislature decriminalized the possession of cannabis by expressing the intent of the people to view possession as merely "a civil law violation[.]" 720 ILCS 550/4(a). Instead of reinterpreting search and seizure law, Illinois law remains rooted in doctrine that is over thirty years old when *any amount* of cannabis was illegal to possess. See *People v. Stout*, 106 Ill.2d 77, 87 (1985) (the odor of cannabis can justifiably provide an officer with probable cause to conduct a search or seizure).

However, this precedent is no longer logical because of the change in cannabis law. The fact that the officer believed the odor of raw cannabis gave him probable cause to search is irrelevant, "what the police say does not necessarily carry the day; 'probable cause' is in the keeping of the magistrate. *** But unless the constitutional standard of 'probable cause' is defined in meticulous ways, the discretion of police and of magistrates alike will become absolute." *U.S. v. Ventresca*,

380 U.S. 102, 117 (1965) (Douglas, J., with Warren, J., dissenting). And so, Mr. Hill asks this Court to suppress the evidence in his case and reconsider old precedent so that legal medical cannabis possessors and civil law violators shall not be subjected to searches or seizures designed to capture criminals.

Standard of Review

A trial court's ruling on a motion to suppress evidence raises mixed questions of law and fact. *People v. Thomas*, 198 Ill.2d 103, 108 (2001). Findings of fact will not be disturbed unless against the manifest weight of the evidence. *People v. Miles*, 343 Ill.App.3d 1026, 1030 (4th Dist. 2003). Factual findings are against the manifest weight of the evidence only if the "opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *People v. Holman*, 402 Ill.App.3d 645, 648 (2nd Dist. 2010). Application of law to the factual findings are reviewed *de novo*. *Holman*, 402 Ill.App.3d at 648. Accordingly, this Court reviews *de novo* the ultimate question of whether the evidence should have been suppressed. *People v. Lee*, 214 Ill.2d 476, 484 (2005); see also, *People v. Gaytan*, 2015 IL 116223, ¶ 18.

Standards of Probable Cause

Both the U.S. and Illinois constitutions protect the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. U.S. Const. amends. IV, XIV; Ill. Const. art. I, § 6. This Court has outlined that brief investigative detentions, or *Terry* stops, must be based on a reasonable, articulable suspicion of criminal activity. *People v. Luedemann*, 222 Ill.2d 530, 544 (2006). Reasonableness under the Fourth Amendment "generally requires a warrant supported by probable cause." *People v. Love*, 199 Ill.2d 269,

275 (2002). But when obtaining a warrant is impractical, "the police must have knowledge of sufficient facts 'to create a reasonable suspicion that the person in question has committed, or is about to commit, a crime.'" *People v. Gonzalez*, 184 Ill.2d 402, 425 (1998) (Heiple, J. dissenting) (quoting *People v. Smithers*, 83 Ill.2d 430, 434 (1980)).

Probable cause is a more exacting standard than the reasonable suspicion necessary to support an investigatory stop. *People v. Lampitok*, 207 Ill.2d 231, 255 (2003). It follows that an officer's good-faith, subjective belief that he or she has sufficient suspicion to justify an intrusion is insufficient to establish probable cause to search. *People v. Dawn*, 2013 IL App (2d) 120025, ¶ 24; see also *Lampitok*, 207 Ill.2d at 255. Under the automobile exception to the warrant requirement, a police officer may conduct a warrantless search of a stopped car so long as the officer has probable cause to believe that the car contains contraband or evidence of criminal activity that law enforcement officers are entitled to seize. *Ornelas v. U.S.*, 517 U.S. 690, 693 (1996); *U.S. v. Ross*, 456 U.S. 796, 807-09 (1982); *People v. James*, 163 Ill.2d 302, 311-12 (1994) (citing *Carroll v. U.S.*, 267 U.S. 132 (1925)).

The remedy for a violation of Fourth Amendment rights is suppression of the evidence gained as a result of the violation. *Wong Sun v. U.S.*, 371 U.S. 471, 484-85 (1963). "[T]he 'prime purpose' of the exclusionary rule 'is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.'" *People v. Burns*, 2016 IL 118973, ¶ 47 (citing *Illinois v. Krull*, 480 U.S. 340, 347 (1987)).

This Case

Mr. Hill was driving his car when the officer stopped him on suspicion that the passenger was a wanted fugitive. *People v. Hill*, 2019 IL App (4th) 180041, ¶ 5; (R. 18-21) After determining that the passenger was not the wanted fugitive, the officer said he smelled raw cannabis and that he saw a cannabis bud on the backseat of the car. *Id.*; (Def. Ex. 1 at 2:39) Then the officer searched Mr. Hill's car. *Hill*, 2019 IL App (4th) 180041, ¶ 5-6. However, this search was not supported by probable cause because cannabis was legal in some cases, and decriminalized in others.

The officer searched Mr. Hill's car because there are no legitimate privacy interests in possessing contraband. See *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005). But "[t]he expansion of the protections guaranteed by the state constitution can be brought about *** by the enactment of statutes by the General Assembly." *People v. Caballes*, 221 Ill.2d 282, 316-17 (2006). Thus, when the Illinois legislature decriminalized cannabis, it turned the criminal possession of what was previously strictly considered contraband into a mere "civil law violation". 720 ILCS 550/4 (2016).

Effective January 1, 2014, Illinois sanctioned a limited "lawful use of cannabis" when it legalized its use for medical purposes. 410 ILCS 130/7 (2016); 410 ILCS 130 (2014). The Legislature expressed the intent that medical cannabis "may not be seized or forfeited." 410 ILCS 130/25(k) (2014). Thereafter, effective July 29, 2016, Illinois decriminalized the possession of "not more than 10 grams of any substance containing cannabis" by making it "a civil law violation," punishable only by a fine. 720 ILCS 550/4(a) (2016). Before this change, the possession of

any amount of cannabis was a criminal act– the possession of less than 2.5 grams of cannabis was a Class C misdemeanor and the possession of more than 2.5 grams but less than 10 grams was a Class B misdemeanor. 720 ILCS 550/4(a), (b) (2015). But when Mr. Hill was arrested, medical cannabis was legal and the possession of less than 10 grams of cannabis was a "civil law violation", while possession of more than 10 grams remained a crime. 720 ILCS 550/4(a) (2017).

The Illinois legislature was deliberate in its language, stating "[a]ny person who violates this section with respect to: (a) not more than 10 grams of any substance containing cannabis is guilty of a civil law violation punishable by a minimum fine of $100 and a maximum fine of $200." 720 ILCS 550/4(a). A civil law violation is not a criminal offense.

a. The possession of small amounts of cannabis is not contraband and cannot provide an officer with probable cause to search because it was decriminalized.

The change in law should alter the perception of whether cannabis is still contraband and whether its possession is still criminal. For instance, that is what happened in Colorado after it first decriminalized, then legalized cannabis. See *People v. Zuniga*, 372 P.3d 1052, 1059-60 (Colo. 2016); see also *People v. McKnight*, 2019 CO 36, ¶¶ 20, 42. When Mr. Hill filed his petition for leave to appeal, he cited to *Zuniga* and argued against its holding that the odor of cannabis is relevant to the probable cause determination. See *Zuniga*, 372 P.3d at 1059-60. However, the Colorado case law has developed since Mr. Hill filed his petition, and a new Colorado case has highlighted that after the change in law, cannabis was "no longer always 'contraband' under state law." *McKnight*, 2019 CO 36, ¶ 20.

Contraband is defined as "[g]oods that are unlawful to import, export, produce, or possess." Black's Law Dictionary (11th ed. 2019). But when Illinois decriminalized cannabis, the possession of cannabis became a "civil law violation". 720 ILCS 550/4 (2016). And under certain instances, the possession and production of cannabis was not only legal but encouraged under the "Compassionate Use of Medical Cannabis Pilot Program Act" and the "Opioid Alternative Pilot Program." 410 ILCS 130 (2014); 410 ILCS 130/62 (2018). These laws made it so that cannabis could not be contraband because the production and possession of small amounts of cannabis was not in violation of criminal laws.

Under similar evolving logic, the *McKnight* court determined that the use of a drug-detection dog was a search that implicated legitimate privacy interests, and that the officers needed to establish probable cause *before* using a drug dog to search "[b]ecause persons twenty-one or older may lawfully possess marijuana in small amounts, a drug-detection dog that alerts to even the slightest amount of marijuana can no longer be said to detect 'only' contraband." *McKnight*, 2019 CO 36, ¶¶ 20, 42-43. At first glance, it seems like the *McKnight* court is in disagreement with the decision in *Illinois v. Caballes*, 543 U.S. 405, 407-09, that the Fourth Amendment does not require reasonable suspicion to justify using a drug-detection dog to sniff during a traffic stop because there is no privacy interest in contraband. However, the *McKnight* court does not disagree with the holding in *Illinois v. Caballes*; it only disagrees with the definition of contraband. *McKnight*, 2019 CO 36, ¶¶ 27, 42-43, 111. Simply, because the legislature and the courts have determined that cannabis is no longer contraband in Colorado, the use of drug-detection dogs that are trained to alert to the presence of cannabis, as well as to contraband, invades the privacy interests of Coloradans. *Id*.

This Court should similarly alter its conception of contraband because cannabis laws have incorporated a societal shift amongst Illinoisians. Colorado recognized that cannabis was decriminalized, but is now:

> "legalized, regulated, and taxed. Marijuana is now treated like guns, alcohol, and tobacco– while possession of these items is lawful under some circumstances, it remains unlawful under others. [For example] (making it unlawful to knowingly possess a firearm without its serial number or other identifying mark)[.]" *McKnight*, 2019 CO 36, ¶ 42 (citations omitted).

Illinois law follows a similar pattern where sometimes the possession of cannabis is a crime, and sometimes it is not a crime. See 720 ILCS 550/4 (2016) (possession of less than 10 grams of cannabis is a "civil law violation", but more than 10 grams is a crime); 410 ILCS 130/10 (2014) (possession of up to 2.5 ounces of cannabis is legal for a medical use qualifying patient). Cannabis was decriminalized when Mr. Hill was subjected to a search and seizure based on the odor of raw cannabis, but as Illinois law evolves, it too should treat cannabis like guns, alcohol, and tobacco. See *McKnight*, 2019 CO 36, ¶ 42.

This Court should turn to *People v. Thomas*, 2019 IL App (1st) 170474, for guidance on how the Fourth Amendment analysis as to gun possession can be logically applied to cannabis possession. In *Thomas*, police observed the defendant in a common area of an apartment building; the police saw him hand a gun to a friend and then run upstairs and into an apartment. *Thomas*, 2019 IL App (1st) 170474, ¶ 1. In granting the defendant's motion to quash the evidence, the circuit court "ruled that when the police observed defendant with a handgun, they did

not have probable cause to stop, seize, and then arrest defendant" because the law permits "the public to possess guns outside the home[.]" *Id*., at ¶ 12. However, the appellate court reversed because it found that the police observed more than simply a man with a handgun; it found that more facts existed to support a finding of probable cause. *Id*., at ¶¶ 18-19, 34, 38, 40, 45.

The appellate court in *Thomas* found the following facts significant to its finding of probable cause:

- The patrolled area was known for narcotics, rival gangs, and drugs. *Id*., at ¶ 18.
- The defendant and his friend were loitering outside the apartment building. *Id*.
- The defendant and his friend fled after seeing police officers. *Id*.
- The officers followed into an unlocked common area of the apartment complex and observed defendant hand a firearm to his friend, then defendant fled upstairs and into an apartment unit and closed the door. *Id*., at ¶ 34.

While the *Thomas* court reversed the circuit court, it noted that the facts and the totality of the circumstances in that case presented more than mere possession, they suggested criminal activity. *Id*. But here, the officer did not have more facts to suggest anything beyond the possession of a non-criminal amount of cannabis, and the totality of the circumstances did not suggest criminal activity. Instead, the officer assumed that Mr. Hill's possession of cannabis was suggestive of criminal activity. Though the officer said he saw a cannabis bud here, it was not collected

and so the search was based on the fact that he smelled raw cannabis, alone. (R. 21) But Illinois law does permit the possession of small amounts of the drug. See generally, 720 ILCS 550/4(a) (2017); 410 ILCS 130 (2017).

So just like in *Thomas*, the officer assumed that Mr. Hill possessed an item which is sometimes a crime and sometimes not a crime. In both the *Thomas* case and Mr. Hill's case, the officers did not know whether a crime had been committed until after further investigation; and in both cases, the officer decided to conduct a search. So, under the same logic of the *Thomas* court, the mere presence of cannabis, or its odor, should not give an officer probable cause to stop, seize, or arrest because the possession of cannabis is not a crime. In *Thomas*, the court:

> "wish[ed] to emphasize that under the current legal landscape, police cannot simply assume a person who possesses a firearm outside the home is involved in criminal activity. Likewise, they cannot use a firearm in partial view, such as a semi-exposed gun protruding from the pant pocket of a person on a public street, alone as probable cause to arrest an individual for illegal possession without first identifying whether the individual has the necessary licenses." *Thomas*, 2019 IL App (1st) 170474, ¶ 40.

Similarly, because cannabis is decriminalized, police cannot assume that a person who possessed cannabis was involved in criminal activity. Likewise, even if cannabis was in plain sight of the officer, this fact alone cannot establish probable cause that a crime had been committed unless the officer believed that the amount in plain sight met the weight requirement for criminal prosecution. See 720 ILCS 550/4 (a), (b) (2017). Since the officer that arrested Mr. Hill did not see an amount

of cannabis that met the weight requirement for a criminal prosecution, he searched under the assumption that a criminal amount of cannabis would be found. An officer who acts on assumptions is not acting with probable cause. See *Dawn*, 2013 IL App (2d) 120025, ¶ 24; see also *Lampitok*, 207 Ill.2d at 255 (an officer's good-faith, subjective belief that he or she has sufficient suspicion to justify an intrusion is insufficient to establish probable cause).

The *Thomas* court found other factors that supported a finding of probable cause, but it also "caution[ed] against an 'arrest first, determine licensure later' method of police patrol." *Thomas*, 2019 IL App (1st) 170474, ¶ 40. But here, the officer did not have more facts and the totality of the circumstances did not suggest criminal activity; instead, the officer assumed that Mr. Hill's possession of cannabis was either a criminal amount or was connected to some other criminal activity. However, this assumption was based on the odor of raw cannabis alone, and officers should not be allowed to search, seize, or arrest first, and save the weighing of the cannabis for later.

Further guidance from a case addressing the intersections between the Fourth Amendment and gun possession can be found in *Commonwealth v. Hicks*, __A.3d __, No. 56 MAP 2017, 2019 WL 2305953 (Pa. 2019). In that case, defendant placed a gun in his waistband before he entered a gas station. *Hicks*,__ A.3d __, No. 56 MAP 2017, 2019 WL 2305953, at 1. The defendant had a license to carry a concealed firearm. *Id.*, at 2. He entered and exited the gas station, and then reentered his car. *Id*. At that moment, the police arrived to apprehend and seize the defendant, and to search his car. *Id*. The officers smelled the odor of alcohol, and eventually arrested the defendant for driving under the influence. *Id*. However,

the court overruled and stressed that the totality of the circumstances did not suggest criminal activity:

> "Unless a police officer has prior knowledge that a specific individual is not permitted to carry a concealed firearm, and absent articulable facts supporting reasonable suspicion that a firearm is being used or intended to be used in a criminal manner, there simply is no justification for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity." *Id.*, at 14.

In overruling the appellate court and vacating the conviction, the Pennsylvania Supreme Court explained that:

> "the question presented ultimately involves a straightforward application of *Terry*. A police officer in the field naturally relies upon his or her common sense when assessing criminal activity. When many people are licensed to do something, and violate no law by doing that thing, common sense dictates that the police officer cannot assume that any given person doing it is breaking the law. Absent some other circumstances giving rise to a suspicion of criminality, a seizure upon that basis alone is unreasonable." *Id.*, at 22.

Here, the officer did not articulate facts to support a probable cause that a crime had been committed or was about to be committed, nor could he articulate facts to suggest that a criminal weight of cannabis was present in the car. Common sense dictates that a police officer cannot assume that a person is breaking the law merely because they possess something that is sometimes permitted, and

other times a crime. The totality of the circumstances did not justify the search of Mr. Hill or his continued seizure.

As summary, the possession of cannabis stopped being contraband when the Legislature decriminalized its possession. The legislature did not intend the possession of small amounts of cannabis to serve as the basis for establishing probable cause to seize or search, and explicitly changed what was once a criminal violation into a "civil law violation". 720 ILCS 550/4(a) (2016). Therefore, because the status of possessing cannabis has changed, its possession should be guided by the precedent from cases addressing similar items, items that when possessed are sometimes criminal and sometimes not, items like guns, alcohol, and tobacco.

b. The odor of raw cannabis, alone, did not give the officer probable cause to search Mr. Hill's car because cannabis was decriminalized.

While *People v. Stout*, says that an officer has probable cause to conduct a search of a vehicle if he smells the odor of cannabis, this precedent should no longer be viewed as controlling in Illinois in light of the change in laws affecting the possession of cannabis. 720 ILCS 550/4(a) (2016); see *Stout*, 106 Ill.2d at 87; see also *James*, 163 Ill.2d at 312 (automobile exception allows for search of car if there is probable cause to believe that it contains evidence of criminal activity); *People v. Jones*, 215 Ill.2d 261, 273-74 (2005) (officer has probable cause if his knowledge of facts and circumstances are sufficient to justify a reasonable person to believe that the defendant has committed a crime). Possession of small amounts of cannabis does not give an officer probable cause to search because possession is not a crime and because cannabis is not contraband. See 720 ILCS 550/4(a). Therefore, unless an officer can articulate facts and circumstances that are sufficient

to justify a reasonable person's belief that a person possesses cannabis that weighs more than a criminal amount, or is participating in some other criminal activity, that officer does not have probable cause to search when the only factor considered is that he smelled the odor of cannabis.

Unless an officer can articulate additional facts that would support the reasonable belief that a suspect has committed an actual crime, an officer does not have individualized suspicion. See *Jones*, 215 Ill.2d at 273-74. An officer cannot weigh the cannabis with his sense of smell, but in order to search, he must articulate other facts that would justify a reasonable person's belief that a crime has been committed; for example, evidence of a scale, bags, paraphernalia, firearms, and cash are all indicative of selling drugs.

"A showing of individualized suspicion is constitutionally required except in the rare case where the privacy interest implicated by the search or seizure is minimal and an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Gonzalez*, 184 Ill.2d at 425 (Heiple, J. dissenting) (citing *King v. Ryan*, 153 Ill.2d 449, 458 (1992) (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989))). Regardless of whether the privacy intrusion here was minimal, the government no longer has an important interest that could be placed in jeopardy by not searching because the government no longer has an interest at all in criminalizing the possession of small amounts of cannabis. 720 ILCS 550/4(a). Therefore, individualized suspicion is required, and merely smelling raw cannabis does not provide probable cause that Mr. Hill possessed a criminal amount of cannabis, or that he had committed or was committing any other crime.

To determine whether the officer had probable cause to search, seize, or arrest, this Court should look to the facts. Shortly after the officer approached Mr. Hill's car, he determined that the passenger was not the fugitive. *Id*. at 18-19. The officer did not remember how long it took to realize that the passenger was not Mr. Lee. *Id*. at 19. Fortunately, the video from his police car makes these facts clear.

After the police car lights were activated, Mr. Hill pulled over and stopped within the first minute of the video. (Def. Ex. 1 at 0:00-1:00) The video does not show Mr. Hill decelerating, as suggested by the officer, nor does it look like he is traveling drastically slower than the surrounding traffic. After another minute, the following exchange occurred: "[Mr. Hill:] What did I do wrong? [Officer:] I thought he was wanted, is why I stopped you, that's why I stopped you. Actually, to tell you the truth, I thought you were somebody else." *Id*. at 2:12. This statement concluded the original purpose for the stop. Then, 30 seconds later, the officer said he smelled raw cannabis. *Id*. at 2:39. He said, "I see a bud in the back seat, I'll show that to you in a minute." *Id*. at 3:35. However, the officer never showed that cannabis bud to Mr. Hill, nor was it ever collected as evidence. While the officer remembered that there was much less than a pound or an ounce in the car, he did not answer whether only residue was recovered; but despite smelling a strong odor of raw cannabis, only residue was found. (R. 21-22); (C. 12, 31) And despite smelling a strong odor of raw cannabis, Mr. Hill was never charged with possession of any amount of cannabis, let alone the "civil law violation" amount that would result from possessing cannabis residue. See 720 ILCS 550/4 (2017).

These facts do not provide probable cause to search the car. Because the officer did not collect any evidence of actual cannabis, it is a fair assumption that

the officer searched the car based only on the odor of raw cannabis. (R. 21) The other factors considered by the officer were that the car reduced speed when Mr. Hill passed the officer, and that the passenger was reclining behind the door pillar. (R. 14) But these facts are not suggestive of criminal activity and do not satisfy the requirements for probable cause to search.

The appellate court struggled with the question of how an officer who smells cannabis "is left to discern how much cannabis may be present by its smell alone." *Hill*, 2019 IL App (4th) 180041, ¶ 36. The court was unwilling to agree with Mr. Hill's argument because it found that he provided "no rationale for requiring police officers to somehow ascertain the quantity of marijuana before the search in order to determine whether probable cause exists." *Id.* It called such a requirement "unworkable" and stated that "it would lead to an absurd result where police officers, after performing a traffic stop, smelled the odor of cannabis emanating from the vehicle but could not investigate it further unless they knew the amount involved." *Id*.

But, Mr. Hill never suggested the "unworkable" or "absurd result" that the police could not continue their investigation. He argued only that the officer did not articulate a set of facts to justify a constitutional search of his car. The officer could have issued a "civil law violation" ticket for possession based on the presence of the alleged, but uncollected, bud of cannabis and the strong odor. Or, after releasing Mr. Hill from the traffic stop, the officer could have followed the car to gather more information about the suspected cannabis, and perhaps could have caught Mr. Hill in the act of smoking cannabis while driving– though it would seem rather difficult to smoke cannabis residue. But instead, the officer decided to search the car based on the odor of raw cannabis alone.

The decision to search the car based on the odor of raw cannabis, alone, violated Mr. Hill's constitutional rights to be free from unreasonable searches and seizures. Certainly, "officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of *** constitutional guaranties against unreasonable search." *Taylor v. U.S.*, 286 U.S. 1, 6 (1932) (citations omitted). In *Taylor*, officers investigated a garage that was related to several complaints about the odor of whisky production. *Taylor*, 286 U.S. at 5. Though the officers received numerous complaints about the property, they did not obtain a warrant. *Id.*, at 6. In the middle of the night, the officers approached the garage, smelled the odor of whisky, and used a searchlight to look through a small opening where they saw boxes assumed to contain liquor. *Id.*, at 5. The officers then broke into the garage and found 122 cases of whisky. *Id*. During the search, the defendant awoke, came outside, and was arrested. *Id.* The U.S. Supreme Court held that the evidence was obtained unlawfully and should have been suppressed. *Id.*, at 6.

The holding from *Taylor,* that odors alone do not authorize a warrantless search, should apply with equal force to possession of cannabis because cannabis should be regulated just like firearms, alcohol, and tobacco. See *Id*; see also *McKnight*, 2019 CO 36, ¶ 42. The U.S. Supreme Court addressed the prohibition era *Taylor* precedent again in a case where officers received information from a confidential source that people were smoking opium in a hotel room. *Johnson v. U.S.*, 333 U.S. 10, 12 (1948). The officers went to the hotel, recognized the odor of burning opium, and knocked on the door. *Johnson*, 333 U.S. at 12. After a brief conversation at the door, the officers arrested the occupants, searched the room,

and recovered evidence of smoking opium. *Id*. The U.S. Supreme Court reversed the conviction and explained:

> "[t]hat [the *U.S. v. Taylor*] decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant." *Id*., at 13.

But the officers did not have a warrant in either the *Taylor* or *Johnson* cases, and thus, "the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." *Id*., at 16-17.

In comparison to Mr. Hill's case, the officer searched based on the odor of raw cannabis, alone. (R. 21) But because the possession of small amounts of cannabis is not a crime, and because its medical use is legal, the government is forced to "justify the search by the arrest." The officer did not collect any cannabis, nor did the facts or the totality of the circumstances establish probable cause that a crime had been committed. (R. 21-22); (C. 12, 31) Furthermore, while the officer would not have gotten a warrant in this case because the odor emanated from a car, the standard used to determine whether a warrantless search is valid is the same standard used by a magistrate considering the application for a search warrant; and so, the *Taylor* and *Johnson* holdings are applicable. See *Whiteley v. Warden*, 401 U.S. 560, 566 (1971). Moreover, in evaluating whether the officer had enough facts to establish probable cause, this Court should question whether the officer was qualified to know the strong odor of raw cannabis when only cannabis residue

was recovered in evidence. (R. 21-22); (C. 12, 31) And finally, the *Johnson* court clarified its holding that the odor must be "distinctive to identify a forbidden substance," but as addressed in the previous section, cannabis has not been a forbidden substance in Illinois for years. See *Johnson*, 333. U.S. at 13; see also 720 ILCS 550/4(a) (2016); 410 ILCS 130 (2014).

The odor of raw cannabis alone is not enough to support a finding of probable cause that Mr. Hill possessed a criminal amount of the drug. See generally, *Commonwealth v. Cruz*, 459 Mass. 459, 476 (2011) ("Here, no facts were articulated to support probable cause to believe that a *criminal* amount of contraband was present in the car.") (emphasis in original). This new precedent can be rooted in case law that says "[t]he odor of alcohol is frequently cited as a factor contributing to probable cause to arrest for DUI when considered in combination with other indicia of intoxication. However, a trial court is not required to find probable cause based solely on the odor of alcohol." *People v. Boomer*, 325 Ill.App.3d 206, 209 (2nd Dist. 2001). In the *Boomer* case, the appellate court upheld the circuit court's grant of defendant's motion to quash his arrest and to suppress evidence. *Boomer*, 325 Ill.App.3d at 207, 212. The officer responded to an accident involving a motorcyclist and found the defendant injured and lying in a ditch. *Id*., at 208. The defendant could not speak, but nodded that he had been drinking, and the officer noticed the odor of alcohol. *Id*. The defendant was taken to the hospital where he became unresponsive; the officer then requested that the defendant's blood be drawn for testing. *Id*. The officer issued tickets for traffic violations and for driving under the influence of alcohol. *Id*. The circuit court held, and the appellate court agreed, that the officer did not have probable cause to believe a crime had

been committed because there was no other indicia of intoxication beside the odor of alcohol. See *Id*. Similarly, logic demands that a finding of probable cause to search for evidence of criminal possession of cannabis requires more than only the odor of that drug. But the officer here did not articulate any other factor to suggest that a crime had occurred.

The appellate court asked how an officer who smells cannabis "is left to discern how much cannabis may be present by its smell alone." *Hill*, 2019 IL App (4th) 180041, ¶ 36. But just because the answer to this question is difficult, does not mean that officers should have a special exemption to search just because cannabis is involved. After all, this question is not new to the realm of Fourth Amendment analysis; the very nature of search and seizure is that the investigating officers do not know some fact necessary to prosecute.

This Court can again turn to a prohibition era case for guidance on how an officer's investigation of the possession of alcohol can translate to an investigation for the criminal possession of cannabis:

> "If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer

would, admittedly, have been an unlawful invasion of the personal liberty of the defendant." *Carroll*, 267 U.S. at 168 (citations omitted).

Here, the investigating officer smelled the odor of cannabis, but never saw a criminal amount and never articulated sufficient facts to warrant a search based on probable cause. (R. 21) Like in *Carroll*, the officer here searched on the assumption that a crime would be discovered, and so the evidence should be suppressed. See *Wong Sun*, 371 U.S. at 484-85 (the remedy for a violation of Fourth Amendment rights is suppression of the evidence).

Mr. Hill asks this Court to review *Commonwealth v. Overmyer*, 469 Mass. 16 (2014), *Commonwealth v. Cruz*, 459 Mass. 459 (2011), and *People v. Brukner*, 51 Misc.3d 354 (N.Y. Crim. Ct. 2015) for guidance in formulating rules about of how Illinois courts and police officers should address the intersection of evolving cannabis laws and the Fourth Amendment.

The *Overmyer* court was "not confident, *** that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine." *Overmyer*, 469 Mass. at 23. Mr. Hill's case presents this exact question. And while the *Cruz* court found that "the odor of burnt marijuana alone cannot reasonably provide suspicion of criminal activity[,]" Mr. Hill argues only that the odor of raw cannabis, alone, should not provide probable cause to search. See *Cruz*, 459 Mass. at 472; see also *Johnson*, 333 U.S. at 13 (odors alone do not authorize a search without a warrant); *Taylor*, 286 U.S. at 6 (presence of odor indicative of possible crime, by itself, does not override constitutional guarantees); cf. *Boomer*, 325 Ill.App.3d at 209 (finding of probable cause for DUI is not required based on solely the odor of alcohol).

And finally, in *Brukner*, the court concluded that the mere odor of cannabis on a pedestrian, without more, does not create reasonable suspicion that a crime has occurred, and consequently does not authorize law enforcement to forcibly stop, frisk, or search the individual following the New York legislature's decriminalization of possession of less than 25 grams of cannabis. *Brukner*, 51 Misc.3d at 369-70. Mr. Hill asks this Court to suppress the evidence discovered from the unlawful search of his car and to follow the reasoning in these cases that a change in cannabis law also requires a change in how 4th Amendment rights are applied. See generally, *Cruz*, 459 Mass. at 464, 470-72. That's what the *Cruz* court held when it noted that "[b]y mandating that possession of such a small quantity of marijuana become a civil violation, not a crime, the voters intended to treat offenders who possess one ounce or less of marijuana differently from perpetrators of drug crimes." *Id*., at 471. The court continued to explain that a change in the law necessitated a change in probable cause analysis when it held that "[w]e conclude that the entire statutory scheme also implicates police conduct in the filed. Ferreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statute." *Id*., at 472.

Conclusion

Mr. Hill "was exposed to the embarrassment and intimidation of being investigated, on a public thoroughfare, for drugs." *Caballes*, 543 U.S. at 421 (Ginsburg, J., with Souter, J., dissenting). Mr. Hill asks this Court to uphold the circuit court's decision to suppress evidence, albeit on other grounds, and to issue guidance to prevent other law-abiding people from suffering the same experience.

When the Legislature first legalized the medical use of cannabis and then decriminalized possession of 10 grams or less of cannabis, it altered the probable cause analysis so that possession of cannabis does not provide cause to seize or search. 410 ILCS 130 (2014); 720 ILCS 550/4(a) (2016). The evolution of cannabis law communicates that the Legislature did not intend the possession of small amounts of cannabis to serve as the basis for establishing probable cause to seize or search. But, the officer searched Mr. Hill's car because there was no legitimate privacy interest in possessing contraband. See *Caballes*, 543 U.S. at 408-09. However, "[t]he expansion of the protections guaranteed by the state constitution can be brought about *** by the enactment of statutes by the General Assembly." *Caballes*, 221 Ill.2d at 316-17. Thus, when the Illinois legislature decriminalized cannabis, it turned the previously criminal possession of contraband into a mere "civil law violation". 720 ILCS 550/4 (2016). Because the law changed, cannabis is "no longer always 'contraband' under state law." *McKnight*, 2019 CO 36, ¶ 20. Because the law changed, the possession of small amounts of cannabis is no longer a fact that provides an officer with probable cause to search or arrest.

CONCLUSION

For the foregoing reasons, Charles D. Hill, petitioner-appellant, respectfully requests that this Court affirm the trial court's suppression of evidence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Zachary A. Rosen, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 28 pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- CHARLES D. HILL Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-18-0041. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 17-CF-896. Honorable Thomas E. Griffith, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Mr. Charles D. Hill, 3231 North Holly Dr., Decatur, IL 62521

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 July 31, 2019, the Brief and Argument 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 in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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APPENDIX TO THE BRIEF

Charles D. Hill, Petitioner

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2019 IL App (4th) 180041

NO. 4-18-0041

FILED
January 25, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. CHARLES D. HILL, Defendant-Appellee.	)	Appeal from the Circuit Court of Macon County No. 17CF896 Honorable Thomas E. Griffith Jr., Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court, with opinion.
Presiding Justice Holder White concurred in the judgment and opinion.
Justice Turner specially concurred, with opinion.

OPINION

¶ 1 In June 2017, the State charged defendant, Charles D. Hill, with one count of unlawful possession of a substance containing less than 15 grams of cocaine. In October 2017, defendant filed a motion to suppress evidence of cocaine located in his car, and the trial court granted the motion.

¶ 2 On appeal, the State argues the trial court erred by granting defendant's motion to suppress evidence. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In May 2017, around 10 a.m., Officer Robert Baker was parked in his squad car on west Route 36 near the 2200 block in Decatur when defendant's Chevrolet Monte Carlo quickly decelerated to well below the speed limit, causing traffic to back up. As the car drove by the officer, he noticed the passenger was reclined in the car with his head mostly obstructed by

the side panel, where the seatbelt is attached, referred to by the officer as the "B panel." Having observed the "drastic speed reduction" and the passenger "leaning back very low in the seat," Officer Baker drove from his parked location in order to get a better look at the passenger. He testified he was aware from his experience as a police officer that people wanted on warrants or concerned about rival gang members frequently ride in the same manner he was observing in order to remain concealed. When he pulled up next to the vehicle, he was able to see the hair, face, skin tone, and apparent build of the passenger and believed him to be Duane Lee, a person he knew to be wanted on a traffic warrant. While waiting for a backup vehicle to arrive on the scene, the officer followed the vehicle. He traveled approximately 30 blocks from when he first saw the car until it was ultimately stopped. It took some time to catch up to the car from his parked position, and believing the passenger to be Duane Lee, he wanted another police vehicle in the vicinity before confronting Lee. In addition, he noted that once he activated his lights to effectuate the stop, it took several blocks for the car to actually come to a stop. In his experience, when this occurs during a traffic stop, the occupants of the vehicle may be concealing or attempting to conceal or destroy contraband. In such instances, he said, one of the most serious concerns is whether an occupant is seeking to retrieve a weapon. Officer Baker testified that all of these facts were being considered by him as he sought to effectuate the traffic stop.

¶ 5 Once a backup squad car was near, Officer Baker initiated a stop of defendant's vehicle. Approaching from the passenger side, he asked the passenger to identify himself and step out of the vehicle. Officer Baker, immediately upon making contact with the passenger, smelled the odor of "raw" cannabis. Upon being asked by defendant, the driver, what defendant did wrong, on the in-car video stipulated into evidence, Officer Baker said, "I thought [the passenger] was wanted, is why I stopped you, that's why I stopped you." Directing his attention

to the passenger, Officer Baker stated, "[A]ctually, to tell you the truth, I thought you were somebody else." Within a matter of approximately 15 seconds, Officer Baker told the occupants he could smell raw cannabis in the car and said he observed a "bud" in the back seat, stating, "I'll show that to you in a minute." After another police car arrived, defendant was asked to exit the vehicle and, after being patted down, to sit on the curb next to the car. A search of the vehicle produced an unspecified amount of cannabis, described by Officer Baker in response to counsel's question as being "much less than a pound or an ounce." In addition, the officers found "a small rock that tested positive for crack cocaine" under the driver's seat. Again, the specific amount was not identified. Defendant was arrested while the passenger, once identified as someone other than the individual wanted on a warrant, was permitted to walk away.

¶ 6 The State charged defendant by information with unlawful possession of a substance containing less than 15 grams of cocaine. 720 ILCS 570/402(c) (West 2016). In October 2017, defendant filed a motion to suppress evidence of the cocaine found in the car, arguing the officer did not have reasonable suspicion for the stop and, alternatively, probable cause to search defendant's car. The trial court conducted a hearing on the motion, and Officer Baker was the only witness called to testify. At the hearing, Officer Baker said he was able to see the entire left side of the passenger's head and neck when he pulled up alongside defendant's car on the driver's side. He believed the person to be Lee based on the hair, face, skin tone, and apparent build of the person he observed in defendant's vehicle. Officer Baker was familiar with Lee from previous observations of him on the street throughout his time as a police officer, as well as his practice of keeping current on persons wanted on warrants. He explained he did this by regularly reviewing the department's records of wanted people in Decatur and then viewing the most recent photos the Decatur Police Department had on those individuals.

¶ 7 During his testimony, the in-car video was admitted and shown to the court. Based on the testimony and the video, the trial court granted the motion to suppress evidence. In its finding, the court concluded there was no bad faith on the part of the officer in stopping the vehicle and noted how the photographs admitted of both the passenger and Lee were "actually quite similar." The trial court found that, when the officer walked up to the vehicle after effectuating the stop, he "wasn't really certain who was seated in the passenger's seat, *i.e.*, he was not certain it was Mr. Lee." Further, the court found that, although there was more than a vague similarity between the passenger and Lee, there was "no other corroborating evidence." The court went on to note that, had it found the stop valid, the subsequent search of the vehicle would have been justified. The court granted the motion to suppress as to any evidence seized as a result of the traffic stop. The State filed a certificate of impairment and appealed pursuant to Illinois Supreme Court Rule 604(a) (eff. July, 1, 2017).

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Traffic Stop

¶ 11 The State argues the trial court erred by granting defendant's motion to suppress evidence obtained pursuant to the stop and search of defendant's car. We agree.

¶ 12 "The Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ***.' " *Terry v. Ohio*, 392 U.S. 1, 8 (1968). The fourth amendment of the United States Constitution focuses on "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry*, 392 U.S. at 19. "The law is well settled that stopping a vehicle and detaining its occupants constitute a 'seizure' within the

meaning of the fourth amendment." *People v. Timmsen*, 2016 IL 118181, ¶ 9, 50 N.E.3d 1092. "[A] police officer may conduct a brief, investigatory stop of a person where the officer reasonably believes that the person has committed, or is about to commit, a crime." *Timmsen*, 2016 IL 118181, ¶ 9. The standard for a stop is "reasonable, articulable suspicion." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). "Although 'reasonable, articulable suspicion' is a less demanding standard than probable cause, an officer's suspicion must amount to more than an 'inchoate and unparticularized suspicion or "hunch" ' of criminal activity." *Timmsen*, 2016 IL 118181, ¶ 9 (quoting *Terry*, 392 U.S. at 27). Although clearly "seizures," traffic stops are more like *Terry* investigative detentions than formal arrests and therefore may be reasonable if initially justified and reasonably related in scope to the circumstances that justified the interference in the first place. *People v. Cummings*, 2014 IL 115769, ¶ 15, 46 N.E.3d 248.

¶ 13 We apply an objective standard and consider whether the facts available to the officer at the moment of the seizure or search would "warrant a man of reasonable caution in the belief" that the action was appropriate, considering the totality of the circumstances. (Internal quotation marks omitted.) *Timmsen*, 2016 IL 118181, ¶ 9 (quoting *Terry*, 392 U.S. at 21-22). "[R]easonable suspicion determinations must be made on commonsense judgments and inferences about human behavior." *Timmsen*, 2016 IL 118181, ¶ 14. "A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002). In determining if there was reasonable suspicion for the stop, there is no bright-line rule, but instead the court is to consider the "totality of the circumstances of each case." *Timmsen*, 2016 IL 118181, ¶ 18.

¶ 14 A motion to suppress requires a two-part standard of review. *Timmsen*, 2016 IL 118181, ¶ 11. As to the factual findings, the reviewing court will uphold the trial court's factual

findings unless they are against the manifest weight of the evidence. *People v. Barker*, 369 Ill. App. 3d 670, 673, 867 N.E.2d 1021, 1023 (2007). This deferential standard of review is grounded in the reality that the circuit court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony. *People v. Gherna*, 203 Ill. 2d 165, 175, 784 N.E.2d 799, 805 (2003).

¶ 15 However, the trial court's ultimate legal conclusion as to whether to suppress the evidence is reviewed *de novo*. *Timmsen*, 2016 IL 118181, ¶ 11. "A reviewing court, however, remains free to undertake its own assessment of the facts in relation to the issues and may draw its own conclusions when deciding what relief should be granted." (Internal quotation marks omitted.) *People v. Reedy*, 2015 IL App (3d) 130955, ¶ 16, 39 N.E.3d 318 (quoting *People v. Luedemann*, 222 Ill. 2d 530, 542, 857 N.E.2d 187, 195 (2006)); see also *People v. Hackett*, 2012 IL 111781, ¶ 18, 971 N.E.2d 1058.

¶ 16 This is consistent with the standards set forth by the federal courts. In *Ornelas v. United States*, 517 U.S. 690, 699 (1996), the Supreme Court said:

> "We therefore hold that as a general matter[,] determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."

¶ 17 Under the normal *Terry*-stop analysis, courts look to the " 'reasonable, articulable suspicion' " that a violation of the law has occurred. *People v. Gaytan*, 2015 IL 116223, ¶ 20, 32

N.E.3d 641. In *Gaytan*, the basis for the stop was a minor traffic violation for an apparent partially obstructed license plate. Explaining what "reasonable, articulable suspicion" meant, our supreme court stated that the police officer effectuating a traffic stop "must have a particularized and objective basis for suspecting the particular person stopped was violating the law." (Internal quotation marks omitted.) *Gaytan*, 2015 IL 116223 ¶ 20. The officer's conduct is judged by an objective standard, which analyzes whether the facts available to the officer at the moment of the stop justify the action taken. *Hackett*, 2012 IL 111781, ¶ 29.

¶ 18 The most significant distinction in this case is, however, that there is no need for the officer under these circumstances to be required to analyze and justify the stop based on any suspicion of unlawful behavior. We do not have to surmise whether the actions of the vehicle or occupants were objectively suspicious. In fact, the defendant was apparently doing nothing illegal, other than perhaps rapidly decelerating once the marked police car was observed. This is because the basis for the stop was the result of an objective fact completely removed from the activity; *i.e.*, the outstanding arrest warrant for a person whose appearance was found by the trial court to be "actually quite similar" to the passenger. In *People v. Safunwa*, 299 Ill. App. 3d 707, 710, 701 N.E.2d 1202, 1204 (1998), relied upon by both defendant and the State, albeit for different reasons, the Second District found the trial court made a specific finding, upon close inspection, that the defendant did not resemble the photograph of the fugitive police thought was in the vehicle they stopped. As a result, they held, absent a finding the conclusion was erroneous, they were bound thereby. *Safunwa*, 299 Ill. App. 3d at 711. We have the identical situation in reverse. The trial court had already determined the appearance of the passenger and suspect wanted on a warrant were "quite similar." We should likewise defer to the trial court. The behavior observed by Officer Baker both before and after activating his lights serves only to

buttress the reasonableness of his suspicion. Although the actions of the driver and reclining position of the passenger made them noteworthy to Officer Baker, had the passenger been Duane Lee, that fact alone would have justified the stop. The trial court also noted the officer was not acting in bad faith when he stopped defendant's vehicle. In other words, the officer reasonably believed the passenger to be Duane Lee. How certain does he have to be to execute a brief traffic stop? In *Safunwa*, in spite of the trial court's finding that upon close inspection the defendant did not look like the person wanted on the warrant, the appellate court found the officers reasonably believed defendant was the person wanted on a warrant based upon the similarity in height, weight, age, and similarity of mustache and hair style. *Safunwa*, 299 Ill. App. 3d at 711. The court found the officers were justified in making the stop and requesting identification. "Sufficient probability, rather than certainty, is the touchstone of reasonableness under the fourth amendment." *Safunwa*, 299 Ill. App. 3d at 711 (citing *Hill v. California*, 401 U.S. 797, 803-04 (1971)).

¶ 19 In *Cummings*, 2016 IL 115769, a traffic stop based on an outstanding warrant for the female owner of the vehicle, although initially valid, was rendered in violation of the fourth amendment once the officer approached the van and observed the driver to be a man. In explaining the rationale for its ruling, the Supreme Court noted that although before the stop the officer had determined the registration he initially believed to be expired was, in fact, valid, since he learned of the outstanding arrest warrant for the female owner and could not determine whether the driver was a female, the officer had a "reasonable suspicion" that the driver was subject to seizure. In that case, the only factor making the initial stop valid was the unknown sex of the driver. No other traffic violation had been committed. After remand, the court still

permitted the ordinary inquiries of checking for license and registration in spite of the fact that his reasonable suspicions disappeared as soon as he saw the driver was a male.

¶ 20 *Hill*, 401 U.S. 797, was a clear case of mistaken identity. Police had probable cause to arrest person *A*, they reasonably mistook person *B* for person *A*, and they arrested person *B*. The Supreme Court concluded that, so long as the police had a "reasonable, good-faith belief" the person arrested was the one wanted on the warrant, the arrest was justified. *Hill*, 401 U.S. at 802. Here, we are not talking about a full-blown arrest but merely the "brief detention" inherent in an investigatory traffic stop to check the identification of someone in the vehicle. In *Heien v. North Carolina*, 574 U.S. ___, 135 S. Ct. 530 (2014), cited by the State, the Supreme Court, when discussing "reasonableness," said: "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials ***." *Heien*, 574 U.S. at ___, 135 S. Ct. at 536. "The limit[,]" they said, "is that 'the mistakes must be those of reasonable men.' " *Heien*, 574 U.S. at ___, 135 S. Ct. at 536. Although the mistake in *Heien* related to a mistaken understanding of the law, the court used the same analysis for mistakes of fact. The mistaken fact in the case before us was the actual identity of the passenger; however, the trial court agreed the passenger looked very similar to the person wanted on a warrant and concluded the officer was acting in good faith at the time of the stop.

¶ 21 Nothing *prohibits* us from accepting the trial court's conclusions as part of our *de novo* review. Here, there was nothing unreasonable about the trial court's conclusion the officer was acting in good faith. Unlike those cases where the court is called upon to assess the basis for the officer's suspicions regarding a person's behavior, here, it was simply a matter of "this looks like the guy I know to be wanted on a warrant." The trial court found the officer's belief to be in good faith. When coupled with the court's own recognition that the two

individuals did in fact look very similar, we cannot conclude the stop was unreasonable. When viewing the photographs included in the record, the general physical description and the appearance of the two are similar. Looking closely at them, with sufficient time to analyze each photo, is it possible to say they look different? Of course. But those were not the circumstances facing Officer Baker, and the trial court recognized that. Do we find the trial court's conclusion the two looked very similar was unreasonable under the circumstances? No.

¶ 22. Where the trial court erred was in finding the officer either needed to be certain in his identification or be able to point to other corroborating evidence. This is not a situation involving the need for probable cause. We find no such standard suggested by any of the mistaken identity cases, for good reason. As stated above, unlike those situations where the court is called upon to evaluate the reasonableness of an officer's suspicion of behavior or actions upon which he relied to justify the stop, *i.e.*, the reasonable, articulable suspicion of criminal activity, here the existence or nonexistence of suspicious criminal activity is irrelevant. It is the status of the suspect at issue, not his or her actions. The only question before the court in such a case is whether the officer was reasonable in his belief that the person he saw was the one wanted on the warrant. The Supreme Court has said "certainty" is not required, thereby addressing the first basis upon which the trial court granted the suppression motion. *Hill*, 401 U.S. at 804. As to the second basis, the need for some form of independent corroborative evidence, we also find no case requiring some sort of independent corroboration in order to effectuate a brief traffic stop in order to ascertain the identity of an occupant whom officers reasonably suspect to be wanted on a warrant. It is true that where courts are reviewing whether officers had probable cause to arrest someone suspected as wanted on a warrant, more may be required since we are moving from a brief investigative detention to a full-blown arrest. In

People v. Gordon, 311 Ill. App. 3d 240, 246-48, 723 N.E.2d 1249, 1253-55 (2000), the Second District discussed *Hill*, 401 U.S. 797, within the context of mistaken arrests. It noted how the Supreme Court in *Hill* found that, as long as police had probable cause to arrest one party, a reasonable mistake as to the identity of a second party actually arrested would still constitute a valid arrest. Defendant relies on a definition of "reasonableness" as it relates to probable cause arrests with or without a warrant, as in *People v. Love*, 199 Ill. 2d 269, 275-76, 769 N.E.2d 10, 14-15 (2002), and *People v. Gonzalez*, 184 Ill. 2d 402, 425, 704 N.E.2d 375, 386 (1998) (Heiple, J., dissenting). In addition, defendant argues the level of reasonableness would be different based on the seriousness of the offense, a principle for which we find no support. The court in *Gordon* adopted the language of *Sanders v. United States*, 339 A.2d 373 (D.C. App. 1975), when discussing the standard for determining whether an officer's actions were in "reasonable good faith" in the context of mistaken identity arrests:

> " '[T]he seizure of an individual other than the one against whom the warrant is outstanding is valid if the arresting officer (1) acts in good faith, and (2) has reasonable, articulable grounds to believe that the suspect is the intended arrestee. Should doubt as to the correct identity of the subject of [the] warrant arise, the arresting officer obviously should make immediate reasonable efforts to confirm or deny the applicability of the warrant to the detained individual.' " *Gordon*, 311 Ill. App. 3d at 249 (quoting *Sanders*, 339 A.2d at 379).

¶ 23 In *Hackett*, 2012 IL 111781, our supreme court discussed what was needed to effectuate an investigative traffic stop. Noting how such stops may frequently be supported by

the classic "probable cause" necessary for arrest, the court noted how the less exacting standard of "reasonable, articulable suspicion" was sufficient. (Internal quotation marks omitted.) *Hackett*, 2012 IL 111781, ¶ 20. "A police officer may conduct a brief, investigatory stop of a person where the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Hackett*, 2012 IL 111781, ¶ 20.

¶ 24 Our supreme court has also determined the reasonableness of particular law enforcement practices are to be judged by balancing the promotion of legitimate governmental interests against the intrusion on an individual's fourth amendment interest to be free from arbitrary interference with an individual's personal security. See *People v. Jones*, 215 Ill. 2d 261, 269, 830 N.E.2d 541, 549 (2005).

¶ 25 Here, we already know the trial court found the appearance of the two individuals "quite similar." Further, we know the court concluded the officer was acting in good faith when he stopped the vehicle to ascertain the identity of the passenger, whom he believed to be wanted on an arrest warrant. This would seem to be a legitimate governmental interest in apprehending persons wanted on warrants. To what extent was there interference with the passenger's personal security? Within less than one minute after the initial stop, Officer Baker told the passenger Baker believed him to be someone else. One of the reasons he could not complete his assessment of the passenger's identity earlier was because the passenger was riding low in the seat and leaning back behind the center pillar of the car. The officer was aware that people frequently ride that way when they are seeking to avoid detection. This observation occurred just after Officer Baker noticed the vehicle decelerate rapidly upon coming into view of his marked squad car. Is he required to be right about his suspicions regarding either the reason for such rapid deceleration or the passenger's reason for so riding, or is it enough that these factors contributed

to the officer's suspicion? When discussing the higher standard of probable cause, as opposed to reasonable suspicion, the U.S. Supreme Court said in *Brinegar v. United States*, 338 U.S. 160, 176 (1949), "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."

¶ 26 Almost 50 years later, the Court was still seeking to define the difference between "reasonable suspicion" and "probable cause." In *Ornelas*, 517 U.S. 690, it noted the impossibility of articulating it precisely. "They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (Internal quotation marks omitted.) *Ornelas*, 517 U.S. at 695 (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). The Court said it has described "reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity." *Ornelas*, 517 U.S. at 696. It considered reasonable suspicion a fluid concept to be decided on its own facts and circumstances and found the primary components to be the events leading up to the stop and then the decision whether these historical facts viewed from the standpoint of an objectively reasonable police officer amounted to reasonable suspicion. *Ornelas*, 517 U.S. at 696.

¶ 27 We do not believe there is a specific legal requirement articulated by any published Illinois case requiring an officer under these circumstances to be able to point to some "corroborative facts" other than his reasonable suspicion. In the case before us, the trial court had the additional facts of the unusual driving behavior upon seeing the marked squad car, along with the seating of the passenger to consider. These were relevant to the officer and buttressed his

suspicion the passenger was, in fact, the wanted person he quite similarly resembled. In addition, the trial court had available to it the subsequent actions of the officer before effectuating the stop. Officer Baker was sufficiently certain the passenger was Lee that he wanted another police officer present for backup and followed the vehicle for a full 30 blocks until one arrived. Being familiar with Lee, Officer Baker knew the need for more than one officer necessitated that he call to have someone leave their normal patrol area to assist him. Had he been less certain, it is unlikely he would have bothered. Further, when viewing the photographs, the trial court concluded they were very similar. These are additional objective facts corroborative of Officer Baker's suspicion.

¶ 28 Having concluded the suspicions of the officer were reasonable under the circumstances, the trial court's decision to grant the motion to suppress due to a lack of certainty as to the identity of the passenger or lack of other corroborative facts was erroneous in that it placed an additional burden on the officer seeking to effectuate such a stop for which we can find no support in the law.

¶ 29 B. Probable Cause

¶ 30 Defendant argues that smelling cannabis cannot create probable cause because Illinois decriminalized marijuana possession under 10 grams. We disagree.

¶ 31 "A recognized exception to the fourth amendment's warrant requirement is the 'automobile exception,' which is based on the understanding that automobiles may be readily driven away often rendering it impossible for officers to obtain warrants for their search." *People v. Contreras*, 2014 IL App (1st) 131889, ¶ 28, 22 N.E.3d 368. "Under the automobile exception, law enforcement officers may undertake a warrantless search of a vehicle if there is probable cause to believe that the automobile contains evidence of criminal activity that the officers are

entitled to seize." *People v. James*, 163 Ill. 2d 302, 312, 645 N.E.2d 195, 200 (1994). "Probable cause means more than bare suspicion. Probable cause exists where the arresting officer has knowledge of facts and circumstances that are sufficient to justify a reasonable person to believe that the defendant has committed or is committing a crime." *Jones*, 215 Ill. 2d at 273-74.

¶ 32 Here, Officer Baker searched the car because he detected the odor of "raw" cannabis. Despite defendant's contentions about the state of the law, marijuana possession remains unlawful. "It is unlawful for any person knowingly to possess cannabis." 720 ILCS 550/4 (West 2016). Defendant's primary argument comes from the fact that marijuana has become "decriminalized," as it no longer carries a possible jail sentence. However, "decriminalization" is a misnomer. As the First District stated in *In re O.S.*, 2018 IL App (1st) 171765, ¶ 29, 112 N.E.3d 621, "decriminalization is not synonymous with legalization." It noted that, under Illinois law, the knowing possession of cannabis is still a criminal offense under section 4 of the Cannabis Control Act and that possession of more than 10 grams remains a crime subject to criminal penalties. *O.S.* 2018 IL App (1st) 171765, ¶ 29.

¶ 33 In *People v. Stout*, 106 Ill. 2d 77, 477 N.E.2d 498 (1985), our supreme court said an officer has probable cause to conduct a search of a vehicle if he smells the odor of a controlled substance coming from the vehicle and it is shown he has the necessary training and experience to detect controlled substances. "[D]istinctive odors can be persuasive evidence of probable cause. A police officer's detection of controlled substances by their smell has been held to be a permissible method of establishing probable cause." *Stout*, 106 Ill. 2d at 87. The court went on to point out there was no additional corroboration necessary "where a trained and experienced police officer detects the odor of cannabis emanating from a defendant's vehicle." *Stout*, 106 Ill. 2d at 88.

¶ 34 In *People v. Williams*, 2013 IL App (4th) 110857, ¶ 32, 990 N.E.2d 916, this court noted that although cases involving probable cause based on "sense of smell" may not be as numerous as those where probable cause is based on what is visually observed, those involving "an individual's sense of smell can be of the 'most persuasive character' [citation], particularly in cases involving cannabis."

¶ 35 In *People v. Smith*, 2012 IL App (2d) 120307, 982 N.E.2d 234, the Second District addressed the issue of "fresh" versus "burnt" cannabis and found no basis for distinguishing the two when determining whether the smell may form the basis for probable cause for a police officer's subsequent search. In *Smith*, the officer testified, as he approached the driver's side of the vehicle, he smelled "a slight odor of cannabis" coming from inside the vehicle, which he said smelled "fresh." (Internal quotation marks omitted.) *Smith*, 2012 IL App (2d) 120307, ¶ 2. Based on his experience, he believed it to be cannabis and conducted a "K-9" sniff of the vehicle. *Smith*, 2012 IL App (2d) 120307, ¶ 3. The court considered the language of *Stout*, quoted above, and found, as do we, there was no modifier preceding cannabis and there was no reasonable basis to limit its holding only to "burnt" cannabis. *Smith*, 2012 IL App (2d) 120307, ¶ 16. The *Smith* court pointed to a long list of cases outside Illinois involving raw versus burnt cannabis in which "the smell of marijuana [is] alone sufficient to furnish probable cause to search a vehicle without a warrant." (Internal quotation marks omitted.) *Smith*, 2012 IL App (2d) 120307, ¶ 19.

¶ 36 Defendant argues that, since Illinois has decriminalized small quantities of cannabis, the smell of cannabis alone cannot support probable cause for a warrantless search. What he fails to do is explain how a police officer, confronted with the obvious odor of cannabis when he first approaches a vehicle, is left to discern how much cannabis may be present by its

smell alone. In *O.S.*, the court noted the majority of jurisdictions addressing this issue have found "decriminalization is not synonymous with legalization and that the odor of marijuana remains indicative of criminal activity despite the passage of statutes decriminalizing the possession of smaller amounts of cannabis." *O.S.*, 2018 IL App (1st) 171765, ¶ 28. The State noted the court in *O.S.* found that even in Colorado, where possession of an ounce of cannabis has been *legalized*, not merely decriminalized, the state supreme court still considers the odor of marijuana to be relevant to a probable cause determination and can support an inference that a crime is ongoing, even though possession of an ounce or less is legal. We find their reasoning just as applicable here because a "substantial number of other marijuana-related activities remain unlawful." *People v. Zuniga*, 2016 CO 52, ¶ 23, 372 P.3d 1052. It was for that reason they concluded "the odor of marijuana is still suggestive of criminal activity." *Zuniga*, 2016 CO 52, ¶ 23. Defendant provides no rationale for requiring police officers to somehow ascertain the quantity of marijuana before the search in order to determine whether probable cause exists. In fact, such a requirement would be unworkable and contrary to the current body of law. It would lead to an absurd result where police officers, after performing a traffic stop, smelled the odor of cannabis emanating from the vehicle but could not investigate it further unless they knew the amount involved.

¶ 37 Here, as the trial court concluded, the search was clearly justified upon establishing probable cause for the search. Once Officer Baker smelled the odor of cannabis, probable cause for the search existed. The fact that he almost immediately observed cannabis in plain view was merely an added bonus.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we reverse and remand for further proceedings consistent with this opinion. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 40 Reversed and remanded.

¶ 41 JUSTICE TURNER, specially concurring:

¶ 42 While I agree with the result reached by the majority in this case, I cannot agree with the complexity of the majority's analysis and must specially concur. Based on the trial court's factual findings, the standard of review, and prevailing law, the trial court erred in granting defendant's motion to suppress.

¶ 43 The court based its decision on its finding Officer Baker was not certain the passenger in defendant's vehicle was Duane Lee, an individual wanted on an outstanding warrant. The trial court noted Officer Baker did not have corroborating information to rely upon in concluding the passenger was Lee.

¶ 44 According to our supreme court, "[t]he law is well settled that stopping a vehicle and detaining its occupants constitute a 'seizure' within the meaning of the fourth amendment. [Citations.] Such a seizure is analyzed pursuant to the principles set forth in *Terry*, 392 U.S. 1." *Timmsen*, 2016 IL 118181, ¶ 9. "Pursuant to *Terry*, a police officer may conduct a brief, investigatory stop of a person where the officer reasonably believes that the person has committed, or is about to commit, a crime." *Timmsen*, 2016 IL 118181, ¶ 9. A reasonable belief an individual in a car has an outstanding warrant for his arrest also justifies a brief, investigatory stop of the vehicle. *Safunwa*, 299 Ill. App. 3d at 709-11.

¶ 45 Officer Baker, whom the court found was not acting in bad faith, did not need to be absolutely certain the passenger in defendant's car was Lee. Baker provided sufficient articulable facts justifying the brief stop of defendant's vehicle. According to Baker's testimony, defendant's car rapidly decelerated as it approached his squad car. The passenger in the front seat of the vehicle was reclined way back so he was very low in the car. Based on his experience as a police officer, Baker testified some individuals who are trying to avoid detection, either by law enforcement because of outstanding warrants or rival gangs, often sit like this. Baker was also able to get a good look at the passenger when he pulled his squad car alongside defendant's vehicle. After seeing the passenger's hair, face, skin tone, and build, Baker believed the passenger was Lee. The trial court agreed the appearances of the passenger and Lee were similar.

¶ 46 Although Officer Baker was wrong in identifying the passenger as Lee, his belief was reasonable based on the totality of the circumstances in this case. As a result, Officer Baker's stop of defendant's car was justified.

¶ 47 Further, Officer Baker was not required to end the stop once he determined the passenger was not Lee. Officer Baker testified he smelled raw cannabis once he made contact with defendant's passenger, which justified the continuation of the stop. Baker also observed a "bud" in the backseat of the car, which added additional justification for the stop's continuation.

¶ 48 As to the majority's determination Officer Baker's warrantless search of defendant's vehicle was justified, I agree Baker had probable cause to search defendant's vehicle following the lawful stop. As the majority noted, Officer Baker smelled raw cannabis when he made contact with the passenger in defendant's car and saw a "bud" in the car. In addition to these two factors relied on by the majority, Officer Baker also testified defendant did not immediately stop his vehicle when Officer Baker activated his police lights, which can be

indicative of an attempt by individuals in the car to conceal, attempt to conceal, or destroy contraband or attempt to retrieve a weapon.

¶ 49 Accordingly, like the majority, I agree the trial court erred in granting defendant's motion to suppress evidence.

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT OF ILLINOIS

MACON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	NO. 17-CF-896
	)	
CHARLES D. HILL,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

An appeal under Illinois Supreme Court Rule 604(a)(1) is taken from the order described below from the Circuit Court of Macon County, Illinois to the Appellate Court for the Fourth District of the State of Illinois.

Appellant's Name: Macon County State's Attorney

Appellant's Address: 253 East Wood Street, 4th Floor, Decatur, Illinois 62523

Name of Appellant's Attorney of Appeal: State's Attorney's Appellate Prosecutor

Address: 725 South Second Street, Springfield, Illinois 62704

Date of Order: December 20, 2017

If appeal is not from a conviction, nature of order appealed from: Order granting defendant's Motion to Suppress Evidence Illegally Seized.

THE PEOPLE OF THE STATE OF ILLINOIS

BY: _____
Christina Mullison, Assistant Macon County State's Attorney

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