No. 127838

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANGELO CLARK, Defendant-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 1-18-0523. There on appeal from the Circuit Court of Cook County, Illinois, No. 13 CR 16035 (02). Honorable Nicholas Ford, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

I. The investigative alert system, which the Chicago Police Department used as the basis to arrest Angelo Clark at his residence, violated federal and state constitutions, irrespective of the question of whether probable cause existed such that police may have been able to obtain a warrant from a judge.

The State is asking this Court to uphold the Chicago Police Department's ("CPD") electronic "investigative alert" system—an opaque, proxy warrant system, predicated on unsworn statements. The CPD's investigative alert system has already had "a disparate impact on Chicago's African American and Latinx communities." *People v. Bass*, 2021 IL 125434, ¶ 63 (Justice Neville, concurring in part, dissenting in part). Yet, if the State's position is adopted, the police will almost never need to seek an arrest warrant issued by a neutral judge; they can instead choose for themselves whether their own arrests are authorized via their investigative alert system—even when arresting a person at their own home, despite that "[t]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585-586 (1980) (internal citation and quotes omitted). There is no constitutional or practical justification to eviscerate the warrant requirement, as the CPD has done, especially considering that it takes "minutes, if not seconds[,]" to obtain an arrest warrant. (Am. Br. 19-20). This Court should condemn the CPD's brazen and systemic removal of neutral magistrates from the process of obtaining an arrest warrant, particularly given the greater protections against unreasonable seizures afforded by our State constitution, and remand for a new trial.

A. Under federal and Illinois law, police generally must obtain an arrest warrant issued by a neutral magistrate upon a finding of probable cause, prior to arresting a suspect.

The State fundamentally mischaracterizes investigative alerts, in an attempt to avoid the longstanding federal and state constitutional requirement that arrests be made pursuant to judicial warrants, absent exigent circumstances. (St. Br.

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22-24). That is, the State claims that the CPD's investigative alert system does not violate the Fourth Amendment, or Article I, Section 6, of the Illinois Constitution because: (1) computerized investigative alert notifications merely communicate probable cause to arrest a suspect (St. Br. 22-24); and (2) arresting Angelo at his house pursuant to an investigative alert was proper because Officer Kinney purportedly received "non-verbal consent" to enter the residence (St. Br. 16). The former argument ignores that CPD's investigative alert system does not merely communicate probable cause to arrest. It determines it, thereby circumventing the judicial system, without any of the protections required by our federal and state constitutions. And the State's latter argument conflates acquiescence to authority with voluntary consent. The State's arguments should be rejected.

1. The CPD's internal proxy arrest warrant system violates federal and state law where it is not merely a means of communicating probable cause. It is a system for determining it.

The State claims computerized investigative alerts merely "provide a convenient way for one officer to communicate to other officers," and represent a "medium by which a police department disseminates its collective knowledge." (St. Br. 20, 22). And the State cites several cases for the proposition that "warrantless arrests based on probable cause *communicated by investigative alerts* are constitutional." (St. Br. 21) (collecting cases)[1] (emphasis added). Accordingly, the State's arguments hinge upon reducing CPD's proxy warrant system to merely a means of communication.

The State's characterization, however, disregards *how* probable cause to

[1] *People v. Wimberly*, 2023 IL App (1st) 220809; *People v. Streater*, 2023 IL App (1st) 220640; *People v. Little*, 2021 IL App (1st) 181984; *People v. Bahena*, 2020 IL App (1st) 180197; *People v. Simmons*, 2020 IL App (1st) 170650; *People v. Thornton*, 2020 IL App (1st) 170753; *People v. Braswell*, 2019 IL App (1st) 172810.

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arrest is determined, *before* it is "communicated." It therefore ignores the very reason that CPD's investigative alert system violates the federal and State constitutions: it removes that decision from a neutral judiciary, and places it under the purview of the police themselves, irrespective of exigency—and even irrespective of whether police intend to arrest a person at their residence, as they did here. The CPD has thereby created an unconstitutional internal extrajudicial proxy warrant system, predicated on unsworn statements. See *Coolidge v. New Hampshire*, 403 U.S. 443, 450-452 (1971) (search warrant invalid where the statute "permitted a law enforcement officer himself to issue a warrant").

CPD's investigative alerts are unconstitutional, not simply due to how they are issued, or who they are issued against, but also *how* they are implemented. Specifically, Special Order S04-16 directs field officers to "take the subject into custody if not already in custody"—granting unfettered authority to arrest the suspect *anywhere*. Special Order S04-16 § V (A)(1)(b) (2018). Special Order S04-16 does not require that an arrest warrant be obtained when the suspect will be arrested at his residence. Thus, the State's assertion that an investigative alert "does not purport to authorize" police to arrest a suspect at their home is incorrect. (St. Br. 23).

Here, the police went to two private residences with the intent to arrest Angelo, without speaking to a judge or seeking a warrant, based solely on a police-determined electronic notification of probable cause to arrest. (R. 179, 197-198). Neither the police, nor the State, claimed that exigent circumstances justified a warrantless arrest. To the contrary, police did not issue a "Temporary Want" for Angelo, establishing that they did not believe him to be a flight risk. (Def. Br. 18) (this third type of alert instructs field officers to detain an individual deemed to be a flight risk, for a period of 48 hours, whilst seeking an arrest warrant).

Consequently, this Court should reject the State's attempt to reduce CPD's

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investigative alert system to just a means of communication. As an officer testified in *People v. Smith*, 2022 IL App (1st) 190691, ¶¶ 96-97, the police do not even seek arrest warrants unless the individual has fled the jurisdiction, thus illustrating that CPD's investigative alert system *has*, in practical terms, usurped the role of the neutral magistrate. While a computerized system for communication may be essential for police work, having an internal computerized means of circumventing an individual's constitutional protections is not. Indeed, considering that an officer has to submit information to a police supervisor who makes the probable cause determination and issues the investigative alert, there is no reason that such officer should not also simultaneously submit an affidavit with that information to a neutral judge to request and obtain an arrest warrant. (Am. Br. 19-20) (warrant process may be faster than obtaining an investigative alert). CPD's extrajudicial proxy warrant system is far from simply a means of communication. It is a means to evade judicial oversight.

2. An investigative alert cannot serve as the basis to enter a home to effectuate an arrest.

"The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585-586 (internal quotations omitted). As such, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. Yet here, prompted solely by a computerized investigative alert notification purporting probable cause to arrest Angelo, police went to *two* residences in order to effect that arrest: Angelo's mother's house, and then his aunt's house, upon learning he lived there. (R. 195-197). Police in this case used the digital "investigative alert with probable cause" notification as the basis to arrest Angelo at his home, despite that this was not the equivalent of an arrest warrant issued by a neutral

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magistrate. That practice violates our federal and state constitutions.

The State concedes, as it must, that an unwarranted entry into the home is unconstitutional, absent exigent circumstances or consent. (St. Br. 14). However, the State now claims that Officer Kinney reasonably concluded he was invited into the residence—an argument not raised at the pre-trial suppression hearing or in the appellate court. (St. Br. 16-17) (citing *People v. Henderson*, 142 Ill. 2d 258, 299 (1990), not followed on other grounds in *People v. Terry*, 183 Ill. 2d 298, 304-305 (1998). The State's new theory is not only forfeited, but also a meritless red herring, as an investigative alert is constitutionally insufficient to effect a warrantless arrest whether inside a residence or on its curtilage. See also, *People v. Bonilla*, 2018 IL 122484, ¶ 27 (for the purpose of the Fourth Amendment, area immediately outside apartment door was curtilage); *State v. Walker*, 453 N.W.2d 127, 137-138 (Wisc. 1990) (police must obtain a warrant before entering the home or its curtilage to make an arrest absent probable cause *and* exigent circumstances); *State v. Smith*, 767 So.2d 1, 2 (La. 2000) (defendant's warrantless arrest within curtilage was illegal). Indeed, police needed a warrant, absent exigency or consent.

The State does not argue that any exigency justified Angelo's arrest. Consequently, it maintains that Officer Kinney obtained "non-verbal consent" to enter Angelo's residence. (St. Br. 16). That position is baseless. To justify a warrantless entry into a residence, the State must prove that police obtained *voluntary* consent from either the defendant, or "a third party who has control over the residence." *People v. Henderson*, 142 Ill. 2d 258, 298-299 (1990) (declined to follow on other grounds in *People v. Terry*, 183 Ill. 2d 298, 304-305 (1998)). The State's evidence, however, shows nothing more than that the defendant, at best merely "acquiescence[d] to a claim of lawful authority" after being told he was going to be arrested. *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968); *People v. Davis*, 398 Ill. App. 3d 940, 956-957 (2d Dist. 2010) ("Consent is involuntary

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where it is solely the result of acquiescence or submission to the assertion of lawful police authority.") And if the State attempts to rely on non-verbal conduct to evidence the defendant's alleged consent, that behavior must render the consent "unmistakably clear." *People v. Hayes*, 2018 IL App (5th) 140223, ¶¶ 33-34 (citing *People v. Anthony*, 198 Ill. 2d 194, 202 (2001) (even if the defendant consented to drug testing, consent was not voluntarily given because the record did not establish whether he agreed to take the test, or simply did not feel entitled to refuse it.)). "Acquiescence to apparent authority is not the same thing as consent." *Hayes*, 140223 at ¶ 33.

Here, Officer Kinney's testimony does not support the State's new theory of consent to enter Clark's home. Kinney testified that on July 22, 2013, he went to two residences to arrest Angelo. (R. 194-195). Kinney first went to Angelo's mother's home, and around 3:00 p.m. Kinney then went to Angelo's aunt's home, where Angelo resided. (R. 194-197). Kinney knocked, and an unknown "male black individual" in his early twenties opened the door. (R. 197). Kinney announced his office and told the unknown individual that he had probable cause to arrest Angelo. (R. 197). Kinney did not ask for permission to enter the residence, and did not enter the residence when the unknown male purportedly pointed to Angelo. (R. 197-198). Rather, while Kinney stood at the threshold of the door and Angelo remained inside, and Kinney told Angelo that he had "a probable cause investigative alert for his arrest, [and] the detectives wanted to speak with him * * * ." (R. 198). Angelo said, "Okay." Kinney entered the home to accompany Angelo as he put on clothes, walked out with Angelo, and then placed Angelo in handcuffs immediate after he exited the residence. (R. 199).

By twice announcing that he was authorized to arrest Angelo, Officer Kinney conveyed that Angelo was under arrest, and that neither Angelo nor the unknown young black male were free to tell Kinney to stay out of the house. (R. 198); see

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Hayes, 2018 IL App (5th) 140223 at ¶¶ 33-34. That point is fatal to the State's position. See *Bumper*, 391 U.S. at 548-549 (the State has the burden to prove voluntary consent, and to disprove mere acquiescence to police authority); *Anthony*, 198 Ill. 2d at 203 (as the facts allowed the "equally valid inference" that the defendant's nonverbal conduct was acquiescence to police authority, and not consent, the State did not meet its burden); *Davis*, 398 Ill. App. 3d at 956-957 ("Consent is involuntary where it is solely the result of acquiescence or submission to the assertion of lawful police authority."); *People v. Cardenas*, 237 Ill. App. 3d 584, 588 (3d Dist. 1992) (consent to search was involuntary where police gave a false impression that they had the authority to search, irrespective of consent).[2]

The State's reliance on *People v. Henderson*, 142 Ill. 2d 258, 299 (1990), and *People v. Sabo*, 724 F.3d 891, 894 (7th Cir. 2013), is misplaced. (St. Br. 16-17). This Court has already chosen not to follow *Henderson* on other grounds. See *People v. Terry*, 183 Ill. 2d 298, 304-305 (1998) (overruling *Henderson* on permissibility of extended term sentence). It is also distinguishable on the issue of non-verbal consent. In *Henderson*, there was no question about whether the person who answered the door, the defendant's mother, had authority to consent to the police entering the home. And the officers in *Henderson* did not announce that they were there to arrest the defendant—which would have indicated that the defendant's mother merely acquiesced to that show of authority. Likewise, in *People v. Sabo*, 724 F.3d 891, 894 (7th Cir. 2013), the defendant himself gave consent for police to enter—and, like *Henderson*, the police in *Sabo* did not announce their intention to arrest the defendant. Thus, *Henderson* and *Sabo* are inapposite, and the State here failed to establish anything more than acquiesence to the show of authority.

3. CPD Special Order S04-16, which directs police officers

[2] Angelo and his mother testified that Kinney forcefully entered the home and physically removed Angelo.

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on the use of investigative alerts, violates the Illinois Constitution.

Illinois has deviated from the Fourth Amendment to provide greater state constitutional protections with regard to the warrant requirement. (Def. Br. 23-24). That point is illustrated by this Court's decisions in *People v. Lippman*, 175 Ill. 101, 112 (1898), and *People v. McGurn*, 341 Ill. 632 (1930); see *People v. Smith*, 2022 IL App (1st) 190691 (relying on *Lippman* and *McGurn*, and finding that Illinois' investigative alert system violates the Illinois Constitution). (Def. Br. 23-24).

In response, the State attempts to avoid the disparity between the Fourth Amendment and Article I, Section 6 of the Illinois Constitution, on the grounds that the textual variance concerns merely what it calls the "warrant clause" and not the "reasonableness clause." (St. Br. 28). It therefore argues that *Lippman* only concerned the manner in which warrants are obtained, and that *McGurn* was decided solely on the lack of probable cause to arrest. (St. Br. 33, 36-37). Finally, the State claims that the legislative history does not indicate an intent to provide greater protections under the Illinois Constitution. (St. Br. 29-32). For the reasons that follow, these arguments should be rejected.

a. The State's novel distinction between "warrant clause" and "reasonableness clause" is baseless.

The State seemingly concedes that the text of Article I, Section 6, provides greater protection than the Fourth Amendment, as it asserts that warrants shall issue based on probable cause supported by "affidavits," as distinct from "oath or affirmation." (St. Br. 33).[3] However, the State argues the higher standard required by the Illinois Constitution only relates to the *process* by which arrest warrants

[3] The State attempts to distinguish *Lippman* on the basis that it purportedly only addressed the warrant clause. (St. Br. 33). However, the State does not argue that *Lippman* was wrongly decided, and this Court in *Lippman* expressly held that Article I, Section 6 went a " step beyond" the Fourth Amendment. 175 Ill. 101, 112 (1898).

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must be obtained, and not whether police need an arrest warrant in the first place. (St. Br. 28, 33). The State's position appears to be that the Illinois Constitution provides citizens greater protections against zealous police officers trying to obtain a judicial warrant, but permits the same officers to bypass the judicial system altogether via Special Order S04-16–denying defendants the judicial safeguards required to obtain an arrest warrant. (Def. Br. 26-28). Thus, the State is asking this Court to embark on an absurd interpretation of Article I, Section 6, in defiance of a longstanding principle of constitutional and statutory interpretation. See *People v. Hanna*, 207 Ill. 2d 486, 498-499 (2003) (the principle that a statute should be interpreted to avoid absurd results is "deeply rooted").

For these reasons, the State's attempt to distinguish *Lippman* is likewise unpersuasive. The State claims that *Lippman* only pertains to the question of how warrants must be obtained, and not the need for an arrest warrant. (St. Br. 33). That argument is born out of the fundamental flaw in the State's characterization of investigative alerts as merely a means of communicating probable cause. (St. Br. 33). Indeed, Special Order S04-16 creates a police-directed system for *determining* whether probable cause exists to arrest a suspect and directs police officers to effect that arrest, without any apparent limitations, transparency, or scrutiny from a neutral magistrate. (*Supra* p. 2-4). Yet, this Court in *Lippman* expressly condemned a statute that allowed search warrants to issue from "a police magistrate" because it "transfer[red] the judicial discretion, which the constitution intended should be exercised by a magistrate, from that officer to the party making the affidavit." 175 Ill. at 112. Individuals should not be afforded even less protection from unreasonable governmental intrusions than property.

Similarly, while the facts in *McGurn* indicated a lack of probable cause to arrest the defendant, this Court was concerned with the issuance of a "standing order" that purported to give field officers unrestricted authority to arrest an

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individual: "Under the constitution of this state no municipality has authority to clothe any officer with the autocratic power to order the summary arrest and incarceration of any citizen without warrant or process of law * * *." *McGurn*, 341 Ill. 2d at 638. The State's attempt to distinguish *McGurn* therefore fails because, contrary to the State's contention, this Court's longstanding precedent establishes that Article I, Section 6, does not permit the CPD to usurp the role of the judiciary, as it has done with its proxy warrant system.

b. The text and legislative history behind Article I, Section 6, provides ample basis to find Special Order S04-16 unconstitutional.

The State claims that the legislative history of Article I, Section 6, indicates that the "affidavit" requirement only addressed the process of obtaining an arrest warrant, and not "*when*" that process must be followed. (St. Br. 30). Angelo and the Amicus, however, documented the legislative history demonstrating otherwise. (Def. Br. 23-24) (Am. Br. 7-10). From the 1869 Constitutional Convention debates to the 1969 Constitutional Convention, the Illinois Legislature deliberately required that arrest warrants be supported by "affidavits," which is understood by this Court as "*a sworn statement in writing* made especially under oath or on affirmation *before an authorized magistrate or officer*." (Am. Br. 7-10) (emphasis provided by Amicus). At the 1969 Constitutional Convention, the Bill of Rights Committee then rejected a proposal that "would have prohibited warrantless arrest or detention 'unless there was probable cause to believe that the person was committing or had committed an offense." (Am. Br. 10) (citation omitted). Had that proposal been adopted, it would have omitted the "affidavit" requirement altogether, as well as the terms "oath or affirmation" found in the Fourth Amendment, thereby arguably justifying the investigative alert system here. (Am. Br. 10) (citation omitted). Therefore, the legislature specifically *rejected* amending Article I, Section 6, in a way that could have allowed for CPD's investigative alert system. Notably,

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the State cites the Amicus brief, but does not respond to this point.

As the text and legislative history of Article I, Section 6, show, this Court should find that, absent exigent circumstances, police must apply for an arrest warrant. If an officer is going to submit information to a police supervisor for an investigative alert, there is no reason that they cannot submit an affidavit with the same information to a neutral judge for an arrest warrant. Both can be done electronically, and thus applying for and obtaining an arrest warrant has no detrimental impact on law enforcement. This Court should find that the Illinois Constitution's greater protections at least requires that step, under such circumstances.

B. Probable cause does not cure the CPD's unconstitutional internal proxy warrant system, which usurps the role of the judiciary.

The State attempts to change the instant constitutional issue—i.e., whether a police department can systematically bypass the judicial warrant system for an internal "investigative alert" system—into simply whether probable cause existed at the time of Angelo's arrest. (St. Br. 17-18). As detailed in Angelo's opening brief, and the arguments above, this Court should not accept the State's invitation to forgo judicial warrants. (Def. Br. 28-30). Absent exigent circumstances, obtaining an arrest warrant would in no way interfere with police work, and having a transparent process and judicial scrutiny prior to issuing a warrant to take away an individual's liberty–especially in their own home is inconsistent with our Constitutional directives. Courts have always favored a transparent process and judicial scrutiny prior to issuing a warrant to deny an individual's liberty–especially in their own home.

C. The good faith exception should not apply to the investigative alert system.

The State does not respond to Angelo's argument that the good faith exception should not apply to the investigative alert system (Def. Br. 30-32), thereby conceding

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the issue. *Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 644 (2d Dist. 1986) (appellee's failure to respond to an argument concedes the issue).

D. Investigative alerts violate Illinois' Separation-of-Powers Clause.

The State's sole response to this argument is to repeat that investigative alerts merely communicate probable cause exists to effectuate an arrest; and that it does not purport to allow officers to arrest a suspect in his home. (St. Br. 24). That view is belied by Special Order S04-16 and the manner in which the CPD acts on investigative alerts. (*Supra* p. 2-4). Consequently, the State offers no meaningful response to this argument. This Court should therefore hold that the CPD has violated Illinois's Separation-of-Powers Clause. (Def. Br. 32-34).

E. The State's forfeiture argument should be rejected.

The State contends that Angelo forfeited "any claim that his arrest was unconstitutional" because he failed to include it in a post-trial motion. (St. Br. 10-11). The State also claims that Angelo did not argue that his arrest was unconstitutional at the hearing on his motion to quash arrest and suppress evidence. (St. Br. 10-11).

But contrary to the State's assertions, Angelo's pre-trial motion cited the Fourth Amendment, Illinois' Article I, Section 6, and *Payton v. New York*, 445 U.S. 573 (1980), which held that the warrantless entry into the home is presumptively unconstitutional. (C. 156-159). Moreover, the issue was properly raised and litigated at the hearing on the motion to quash arrest and suppress evidence. (R. 203-205, 207-209). Accordingly, this Court should address the constitutional violation. *People v. Cregan*, 2014 IL 113600, ¶¶18-20 (on appeal, judicial economy favors addressing a constitutional violation that was litigated at trial, although not included in a post-trial motion). Moreover, the State failed to argue forfeiture in the appellate court, and thus has forfeited that any such contention now. *People v. Lucas,* 231 Ill. 2d 169, 174-175 (2008)

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Alternatively, the constitutional violation may be addressed as plain error. Plain error exists when: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citation omitted); Ill.S.Ct.R. 615(a).

Here, the evidence against Angelo was not overwhelming. The only evidence linking the defendant to the shooters, apart from the illegally obtained statement in which Angelo said he went with the others to make sure they were "Okay," was witness testimony that Angelo was seen walking to and from the scene with the others. (Supp. R. 196-197, 217-218). No one saw Angelo with a gun. And witnesses related that he stood across the street from the shooters and knelt down during the shooting. (Supp. R. 197, 231). There was no evidence that he communicated in any way with the shooters, as one might expect for an alleged "lookout." Presence at the crime scene is not sufficient to establish criminal liability. *People v. Lee*, 214 Ill. 2d 476, 486-487 (2005). Apart from the illegally obtained statement where Angelo explained that he went to the scene with the others to make sure they were "okay," the State did not have even sufficient evidence proving accountability. See *People v. Kadow*, 2021 IL App (4th) 190103, ¶ 35 (illegally obtained statement was critical to corroborating victim's statements, and therefore the evidence was closely balanced).

In sum, the State ignores that CPD's Special Order S04-16 usurps the role of the judiciary by allowing the CPD to make its own internal, unsworn, determination of probable cause, and to disseminate computerized "investigative alerts" that direct officers to arrest an individual, without any limitations. The

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instant case represents a high water mark for just how that process has become, as police here arrested Angelo at his residence, solely on the basis of an internal police computer notification–without consent or exigent circumstances. The investigative alert system, as implemented and applied to this case, without any limitations, violates federal and state constitutional law. Seeking judicial warrants will not delay the police any more than when they seek an investigative alert. This Court should find that without exigent circumstances, probable cause must be determined by a neutral magistrate, based on sworn statements. Thus, this Court should reverse and remand for a new trial.

II. As a 17-year-old offender, Angelo Clark should have been sentenced in 2017 with specific findings relative to his status as a juvenile offender.

Juvenile offenders sentenced on or after January 1, 2016, are entitled to be sentenced under the *Miller* factors set forth in 730 ILCS 5/5-4.5-105(a). See *People v. Reyes*, 2016 IL 119271, ¶ 12 (remanding for resentencing under subsection 5-4.5-105(a), despite the fact that the offense was committed prior to enactment of the statute); *People v. Buffer*, 2019 IL 122327, ¶ 47 (same). As the statute's plain language and this Court's precedent illustrate, the initial"on or after the effective date" clause refers solely to the date of the sentencing hearing, not the date of the offense. The intervening phrase identifies to whom the statute applies: persons "under 18 years of age at the time of the commission of the offense." 730 ILCS 5/5-4.5-105(a). Thus, pursuant to the plain language of subsection 5-4.5-105(a), a remand is required to comply with the statute.

And even if the text of subsection 5-4.5-105(a) was ambiguous, the Statute on Statutes and the principles of statutory interpretation render the statute applicable to Angelo. (Def. Br. 39-44). Critically, subsection 5-4.5-105(a) requires the sentencing court to demonstrate that it considered the mitigating factors set forth therein. That requirement is fatal to the State's argument, as the record

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shows that Judge Ford did not consider *any* of those factors when he simply said he had "mulled" it over and was "mindful" of Angelo's youth. (R. 370-371). Accordingly, Angelo asks this Court to adhere to its precedent and remand the cause for a new sentencing hearing, with instructions for the circuit court to apply the factors prescribed in 730 ILCS 5/5-4.5-105(a).

A. Under this Court's precedent, 730 ILCS 5/5-4.5-105 must apply when sentencing juvenile offenders, like Angelo, on or after January 1, 2016.

The State asserts that this Court has never addressed whether subsection 5-4.5-105(a) applies to juveniles who were sentenced after its enactment, but committed their offenses prior to that date. (St. Br. 43-44). This Court's precedent, however, uniformly refutes that claim (Def. Br. 36-39). In *Reyes* and *Buffer*, this Court specifically ruled that subsection 5-4.5-105(a) applied to the defendant juvenile offenders on remand at their new sentencing hearing, for offenses committed well before the January 2016 effective date. Not only that, *the State agreed* with that interpretation before this Court. *People v. Reyes*, 2016 IL 119271, ¶¶ 12-14 ("*Both the State and defendant agree* that . . . defendnat is entitled, on remand, to be resentenced under . . . section 5-4.5-105"); *People v. Buffer*, 2019 IL 122327, ¶¶ 2, 5, 47 ("[T]he parties *correctly agree* that defendant is entitled on remand to be sentenced under . . . section 5-4.5-1-105) (Italics added).

This Court recognized the same in *Holman* and *Hunter*. *See People v. Holman*, 2017 IL 120655, ¶ 45 (this provision applies to minors who "were sentenced after the statutory amendment became effective on January 1, 2016");*People v. Hunter*, 2017 IL 121306, ¶¶ 54, 55 (defendants were *not* entitled to benefit of 5-4.5-105(a), because "no dispute exist[ed] that defendants *were sentenced well before* the new juvenile sentencing provisions * * * became effective on January 1, 2016"; also reaffirming *Reyes*'s recognition that this provision applies to minors with sentencing hearings after the effective date)(emphasis supplied).

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This Court was aware of the language of subsection 5-4.5-105(a) in each of these cases. Its precedent illustrates that subsection 5-4.5-105's reference to "on or after January 1, 2016" applies to the date of the sentencing hearing, not the underlying offense. Not only that, but the State *has agreed to this interpretation* before this Court, on more than one occasion. This Court should reject the State's contrary argument here.

B. The Statute on Statutes and principles of statutory interpretation further requires that Angelo should be resentenced pursuant to subsection 5-4.5-105.

The State offers no response to Angelo's argument that if there is any ambiguity about whether subsection 5-4.5-105(a) applies to sentencing hearings after January 1, 2016 (as this Court has repeatedly held), or only to offenses committed after that date, subsection 5-4.5-105 would still apply under the principles of statutory interpretation, and the Statute on Statutes. (Def. Br. 39-44). Consequently, the State has conceded the issue. *Vukusich*, 150 Ill. App. 3d at 644 (appellee's failure to respond to an argument concedes the issue).

Likewise, the State does not address the fact that subsection 5-4.5-105(b) was just amended to make clear that "[t]he trial judge shall specify on the record its consideration of the factors under subsection (a) of this Section," which shows the legislature's clear directive that the sentencing judge create a record to demonstrate that it fully considered these mitigating factors. 730 ILCS 5/5-4.5-105(b) (West 2024); see *People v. Salomon*, 2022 IL 125722, ¶¶ 116-119 (although a subsequent amendment to the statute was not yet in effect, it provided "guidance in ascertaining the legislative intent underlying the former provision"). (Def. Br. 46). The State does not address this point, and therefore concedes it. *Vukusich*, 150 Ill. App. 3d at 644. Accordingly, no further comment is necessary.

Instead, the State erroneously contends that subsection 5-4.5-105(a) is superfluous–claiming that legislature "simply codified" existing common law and

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statutory mitigating factors into the statute. (St. Br. 51). Not only is that not true,[4] it ignores that the legislature's enactment of this juvenile sentencing statute evinced that this pre-existing sentencing law was inadequate to ensure the fair sentencing of minors. *See People v. Gutman*, 2011 IL 110338, ¶ 12 ("the primary objective of statutory construction is to ascertain and give effect to the legislature's intent," as determined by "the language of the statute," which "should not be rendered superfluous").

Subsection 5-4.5-105(a) is a groundbreaking statute that requires sentencing judges to consider, not simply the defendant's age, but rather how the circumstances *attendant* to youth mitigate against harsh sentences for a juvenile offender. (Def. Br. 40-44). Indeed, every factor the State points to must be considered through the lens of youth. And this statute represents "*an agreement* between the public defenders and the state's attorneys" that sentencing courts shall consider these mitigating factors for *all* juvenile offenders in Illinois, irrespective of the sentence they face. 730 ILCS 5/5-4.5-105(a) (West 2017); (Def Br. 41) (discussing House Leader Rep. Barbara Flynn Currie's comments announcing the Bill). The legislature was so enthusiastic about this statute that it enacted it in two separate acts. *See* Pub. Act. 99-0069, 99-0258 (2015). This Court should apply this statute as our legislature intended, and reject the State's argument that it is superfluous.

C. The record does not establish that Judge Ford considered the requisite mitigating youth-related factors in 730 ILCS 5/5-4.5-105 (West 2017).

The State relies on Judge Ford's comment that he was "mindful" of Angelo's youth and had reviewed the PSI, to claim that he fully considered the nine mitigating factors enumerated in subsection 5-4.5-105(a). (St. Br. 52). The State also cites

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[4] For example, the State at one point erroneously conflates an individual's fitness for trial with the juvenile mitigating factor for a minor's ability to assist their defense in light of their youth (St. Br. 50, n.22).

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People v. Davis, 93 Ill. 2d 155, 157, 162 (1982), while claiming that Judge Ford was not required to describe specific sentencing findings. (St. Br. 52-54); but see, *Jones v. Mississippi*, 593 U.S. 98, 120 (2021) ("State's may require sentencers to make extra factual findings before sentencing an offender under 18 * * * "). Notwithstanding, the record must establish that the judge at least fully considered each of the mitigating factors set forth in subsection 5-4.5-105(a). See *People v. Smolley*, 2018 IL App (3d) 150577, ¶ 22 (because "the record does not indicate that the trial court considered the defendant's characteristics of youth before sentencing a juvenile to a *de facto* life sentence, the case should be remanded for a new sentencing hearing[,] where subsection 5-4.5-105 would apply"). That is particularly true after the legislature's latest amendment to this provision, detailed above, articulated that a record be made to ensure all juvenile offenders are fairly sentenced.

Here, the record showed that Judge Ford did not conduct the juvenile sentencing hearing our legislature envisioned. His vague assertion that he was "mindful" of Angelo's youth does not establish that he evaluated and applied each of the nine statutory mitigating factors. (R. 370-371). Indeed, there was absolutely no discussion from Judge Ford regarding any of these complete factors; his comments were instead "woefully insufficient to suggest the relevant factors were considered here." *People v. Clark*, 2021 IL App (1st) 180523-U, ¶ 150 (Justice Mikva, dissenting in part); *c.f.*, *People v. Clark*, 119 Ill. 2d 1, 18 (1987) (remanding for a new juvenile transfer hearing, because "record . . . demonstrates that the juvenile judge gave virtually no consideration" to statutory youth factors governing juvenile transfers to adult court).

It is not clear that Judge Ford understood that subsection 5-4.5-105(a) even applied to Angelo, as he did not so much as mention this statute at sentencing. And nothing in the record shows that the court knew it existed, or if it did, that

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it applied here. This point is particularly salient considering that the appellate court in this case erroneously concluded that it did *not* apply here, despite this Court's repeated precedent to the contrary. *Clark*, 2021 IL App (1st) 180523-U, ¶ 130. On this record, this Court cannot presume that Judge Ford applied this statute and considered each of the juvenile mitigating factors, as our legislature mandated. Thus, the State's attempt to salvage Angelo's 32-year sentence should be rejected.

D. The error was properly preserved.

The instant error was preserved. (C. 173); (Def. Br. 47-48). Alternatively, Judge Ford's failure to consider the requisite factors in mitigation should be redressed under either prong of plain error review. (Def. Br. 47-49). Nothing in the State's response alters that analysis.

Here, the sentencing evidence was more than "closely balanced" because Angelo, barely 17 at the time of the offense and unarmed, was found accountable for the shooter's actions where he walked to the scene with them, knelt down across the street from them, and told police that he was went to the scene merely to make sure the others were "okay." (Supp. R. 635). His background included considerable childhood trauma—including an attempted suicide by hanging at the age of 15, after which he spent two weeks in the hospital to treat his depression. (Sec. C. 6); see (Def. Br. 48), citing *People v. Martin*, 119 Ill. 2d 419, 458 (1988) ("The evidence presented at the sentencing hearing was not simply closely balanced, it strongly favored leniency for the defendant."). Additionally, this Court in *Martin* held that a sentencing court's failure to consider mitigating factors constitutes second-prong plain error as well. (Def. Br. 49). Accordingly, Angelo's 32-year aggregate sentence violates 730 ILCS 5/5-4.5-105(a) and this Court should remand the cause for resentencing.

In sum, this Court has repeatedly recognized that juvenile offenders sentenced

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on or after January 1, 2016, like Angelo, are entitled to be sentenced under the *Miller* factors set forth in 730 ILCS 5-4.5-105(a). The State has failed to offer any compelling reason for this Court to overrule its precedent. The purpose of subsection 5-4.5-105(a) was to implement the newly evolving law concerning juveniles espoused in *Miller v. Alabama,* 567 U.S. 460 (2012), and to expand its protections, by requiring courts to sentence *all* juvenile offenders in a manner that takes into proper account their age and attending circumstances, based on what courts now know about how brain development affects their culpability and potential for rehabilitation. Angelo asks this Court to adhere to its precedent and remand the cause for a new sentencing hearing, with instructions for the circuit court to properly apply the factors prescribed in 730 ILCS 5/5-4.5-105(a).

CONCLUSION

For the foregoing reasons, Angelo Clark, Defendant-Appellant, respectfully requests that this Court reverse his conviction and remand for a new trial, under Issue I; and remand for a new sentencing hearing, under Issue II.

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/Todd T. McHenry
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No. 127838

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANGELO CLARK, Defendant-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 1-18-0523. There on appeal from the Circuit Court of Cook County, Illinois , No. 13 CR 16035 (02). Honorable Nicholas Ford, 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 May 24, 2024, 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.

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