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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Swartzle, P.J., and K. F. Kelly and Young, JJ.

People of the State of Michigan,

Plaintiff-Appellee,

v.

Freddie Wilkins, III,

Defendant-Appellant.

MSC No. 167737
COA No. 367209
Trial Ct No. 23-02112-FH

Supplemental Brief – Appellant

ORAL ARGUMENT REQUESTED

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INTRODUCTION

On October 30, 2024, Defendant-Appellant, Freddie Wilkins, III, filed an Application for Leave to Appeal (the "Application for Leave"), seeking leave to appeal the opinion issued by the Court of Appeals on September 5, 2024 (the "Opinion").[1] This Court has jurisdiction to hear the appeal because Mr. Wilkins filed his Application for Leave within 56 days of the Opinion. *See* MCR 7.303(B)(1); MCR 7.305(C)(5)(a). In its Opinion, the Court of Appeals affirmed the order issued by the 17th Circuit Court on June 9, 2023 (the "Order"),[2] wherein the Honorable Scott A. Noto denied Mr. Wilkins' Motion to Suppress Evidence (the "Motion to Suppress").

The Court of Appeals held that although Michigan State Trooper James Tompkins exceeded the permissible scope of *Terry* when he searched Mr. Wilkins' person for marijuana during a traffic stop, the pistol later found in the vehicle – i.e., the pistol found after the traffic stop had been unconstitutionally prolonged – should not be suppressed because it was not a "fruit" of the unlawful detention.[3] The Court of Appeals also held for what appears to be the first time in Michigan history that the automobile exception authorizes the warrantless search of a vehicle even if an officer only has probable cause to believe the vehicle contains evidence of a civil infraction – not a crime.[4]

On March 28, 2025, this Court entered an order directing the Clerk to schedule oral argument on the Application for Leave and instructing the parties to file supplemental briefs addressing the following:

> (1) whether the search of the defendant's person by Trooper Tompkins exceeded the permissible scope of *Terry v. Ohio*, 392 US 1, 21, 30-31 (1968); (2) if so, whether the discovery of the recovered weapon was causally connected to the search of the defendant's person; and (3) whether the search of the defendant's vehicle was permissible under the automobile exception to the warrant requirement, where the trooper had probable cause to believe that the defendant was responsible for a civil infraction for possessing marijuana while under 21 years of age contrary to the protections of the Michigan Regulation and Taxation of Marihuana Act, MCL 333.27951 *et seq.*

Mr. Wilkins now submits this Supplement Brief addressing the questions presented by the Court.

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[1] Appellant's Appendix, Appendix A, Opinion.
[2] Appellant's Appendix, Appendix B, Order.
[3] Appellant's Appendix, A8-A11.
[4] *Id.* at A5-A8.

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QUESTIONS PRESENTED

A. DID THE SEARCH OF MR. WILKINS' PERSON BY TROOPER TOMPKINS EXCEED THE PERMISSIBLE SCOPE OF *TERRY*?

Court of Appeals answers, "Yes."

Defendant-Appellant answers, "Yes."

B. IF SO, WAS THE DISCOVERY OF THE RECOVERED WEAPON CAUSALLY CONNECTED TO THE SEARCH OF MR. WILKINS' PERSON?

Court of Appeals answers, "No."

Defendant-Appellant answers, "Yes."

C. ASSUMING TROOPER TOMPKINS HAD PROBABLE CAUSE TO BELIEVE MR. WILKINS WAS RESPONSIBLE FOR A CIVIL INFRACTION FOR POSSESSING MARIJUANA, WAS THE SEARCH OF THE VEHICLE PERMISSIBLE UNDER THE AUTOMOBILE EXCEPTION?

Court of Appeals answers, "Yes."

Defendant-Appellant answers, "No."

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STATEMENT OF FACTS

On January 16, 2023, Trooper Tompkins stopped Mr. Wilkins for speeding.[5] After smelling the odor of marijuana and learning that Mr. Wilkins and his passenger were under 21, Trooper Tompkins initiated an investigation into whether either occupant possessed marijuana in violation of Section 15(3) of the Michigan Regulation and Taxation of Marihuana Act (the "MRTMA").[6] Section 15(3) of the MRTMA makes it a civil infraction for anyone under 21 to possess not more than 2.5 ounces of marijuana.[7]

As part of his investigation, Trooper Tompkins removed Mr. Wilkins from the vehicle and searched him.[8] This was an evidentiary search for marijuana – not a *Terry* pat down for weapons.[9] Finding nothing, Trooper Tompkins then removed the passenger from the vehicle, who told him that she had some "shake" (a small amount of marijuana) in the vehicle.[10] "Given this information, Trooper Tompkins began a search of the vehicle."[11] In the vehicle, Trooper Tompkins found the pistol giving rise to the pending CCW charge against Mr. Wilkins.[12]

On May 10, 2023, Mr. Wilkins filed his Motion to Suppress in the trial court and argued that the pistol must be suppressed for two reasons.[13] First, Mr. Wilkins argued that Trooper Tompkins exceeded the permissible scope of *Terry* when he searched him, and by impermissibly searching him, unconstitutionally prolonged the traffic stop.[14] Thus, all evidence discovered after the traffic stop had been unconstitutionally prolonged must be suppressed.[15] Second, Mr. Wilkins argued that even if Trooper Tompkins did not unconstitutionally prolong the traffic stop, the search of the vehicle was not justified by the automobile exception because Trooper Tompkins was searching for evidence of a civil infraction – not a crime.[16]

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[5] Appellant's Appendix, B13, B14.
[6] *Id.* at B13, B14, B16.
[7] MCL 333.27965(3). A typical "joint" contains about 0.32 grams of marijuana. *See* Christopher Ingraham, *One of the Big Questions in Marijuana Research has been Answered*, WASH. POST (Jul. 7, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/07/scientists-have-finally-figured-out-how-much-weed-is-in-a-joint. Thus, 2.5 ounces of marijuana is equivalent to over 200 typical "joints."
[8] Appellant's Appendix, B14.
[9] *Id.* at B14, B16.
[10] *Id.* at B14.
[11] *Id.*
[12] *Id.*
[13] *See* Motion to Suppress.
[14] *Id.* at ¶¶ 8-10.
[15] *Id.* at ¶¶ 10.
[16] *Id.* at ¶¶ 11, 12.

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On June 2, 2023, the trial court heard oral argument on the Motion to Suppress and took the matter under advisement.[17] On June 9, 2023, the trial court issued its Order denying the Motion to Suppress.[18] In its Order, the trial court first made the following findings of fact regarding the circumstances surrounding the warrantless search of the vehicle:

> On January 16, 2023, Michigan State Trooper James Tompkins pulled over a Honda CR-V for speeding on Alpine Avenue near 7 Mile Road. Inside the vehicle was Defendant, who was driving, and a passenger sitting in the front passenger seat. Trooper Tompkins approached the vehicle on the passenger side. The passenger side window was down. As Trooper Tompkins approached, he smelled marijuana. He did not see any marijuana and observed no visible signs that Defendant was intoxicated. The Trooper then continued with the traffic stop, asking why he was speeding, where they were going, and checked their driver's licenses. Upon review of their licenses, he noticed that Defendant and his passenger were both under the age of 21.
>
> Trooper Tompkins returned to his patrol car and requested backup. Once backup arrived, he reapproached the vehicle and asked Defendant to step out of the vehicle. He searched Defendant but did not find anything. Trooper Tompkins then asked the passenger to exit the vehicle. In response to his questions, the passenger admitted she had some "shake" (a small quantity of marijuana) in the vehicle. Given this information, Trooper Tompkins began a search of the vehicle. On the floor by the passenger's seat, he found a backpack, which he searched. Inside the backpack were Ziplock cellophane packages, which are commonly used for marijuana, and a Glock semiautomatic pistol with a loaded magazine. Trooper Tompkins read Defendant his *Miranda* rights, which he waived. Defendant admitted that the firearm was his and that he did not possess a concealed pistol license. Defendant was charged with one count of carrying a concealed weapon.[19]

In its Order, the trial court then held that Trooper Tompkins did not exceed the permissible scope of *Terry* when "he extended the stop" to conduct a marijuana investigation and searched Mr. Wilkins' person as a part of that investigation because "Trooper Tompkins' actions were based on specific, reasonable inferences drawn from the initial smell of marijuana and the age of the vehicle's occupants" – i.e., he had reasonable suspicion "to extend the scope and duration of the stop to determine what amount of marijuana, if any, was present."[20] The trial court also held that because Trooper Tompkins "did not observe any amount of marijuana that would make possession a civil infraction," but rather "smelled and recognized the odor of marijuana," which "did not give … any

[17] Appellant's Appendix, B13.
[18] *Id.* at B17.
[19] *Id.* at B13, B14 (internal citations omitted).
[20] *Id.* at B16.

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indication of the amount of marijuana," Trooper Tompkins "had probable cause under the automobile exception to search the vehicle and its contents."[21]

Believing the trial court had erred, Mr. Wilkins first filed a Motion to Reconsider on June 29, 2023.[22] However, the trial court summarily denied that motion without oral argument on July 21, 2023 in an Order Denying Reconsideration.[23] On August 8, 2023, Mr. Wilkins next filed an Application for Leave to Appeal in the Court of Appeals.[24] However, on December 11, 2023, the Court of Appeals issued an order denying leave to appeal with the Honorable Douglas B. Shapiro dissenting (the "COA Order").[25] On December 21, 2023, Mr. Wilkins then filed an Application for Leave to Appeal in this Court,[26] and, on April 10, 2024, this Court remanded this case to the Court of Appeals for consideration as on leave granted.[27] On September 5, 2024, the Court of Appeals issued its Opinion affirming the trial court's denial of the Motion to Suppress.[28]

In its Opinion, the Court of Appeals held that although "Trooper Tompkins exceeded the permissible scope of *Terry* by performing a pat-down search unjustified by any concerns for officer safety,"[29] the pistol found during the subsequent search of the vehicle "need not be suppressed because it was not derivative of an illegality, i.e., it was not fruit of the poisonous tree."[30] The Court of Appeals also held "that probable cause exists to support a warrantless vehicle search *so long as* facts adequately support that the suspected activity is generally unlawful,"[31] even if the suspected activity is a mere civil infraction – not a crime.[32] On October 30, 2024, Mr. Wilkins filed his second Application for Leave with this Court, and, on March 28, 2025, this Court directed the Clerk to schedule oral argument and instructed the parties to file supplemental briefing.

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[21] *Id.* at B17.
[22] Appellant's Appendix, Appendix C, Register of Actions (23-02112-FH), C22.
[23] *See id.* at C21.
[24] Case Information, COA 367209.
[25] *See* COA Order.
[26] Case Information, MSC 166481.
[27] *Id.*
[28] Appellant's Appendix, App. A.
[29] *Id.* at A11.
[30] *Id.* at A10 (internal quotation omitted).
[31] *Id.* at A7 (emphasis in original).
[32] *See id.* at A7-A9.

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ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE DENIAL OF MR. WILKINS' MOTION TO SUPPRESS.

Standard of Review

This Court reviews for clear error a trial court's findings of fact and reviews de novo questions of constitutional law. *People v. Trakhtenberg*, 493 Mich. 38, 47 (2012). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made," *People v. Johnson*, 466 Mich. 491, 497-98 (2002), while de novo review "gives no deference to the trial court" but considers the issue "with fresh eyes." *Buchanan v. City Council of Flint*, 231 Mich. App. 536, 542 n. 3 (1998).

Statement of Law

The Fourth Amendment of the U.S. Constitution, along with its counterpart, Article I, Section 11 of the Michigan Constitution, prohibits the police from conducting unreasonable searches and seizures. U.S. CONST. amend IV; MICH. CONST. art. 1, § 11. The Fourth Amendment prohibition against unreasonable searches and seizures is enforceable against the States through the Fourteenth Amendment of the U.S. Constitution. *Mapp v. Ohio*, 367 U.S 643, 655 (1961). Evidence collected during an unreasonable search or seizure ordinarily must be suppressed, *People v. Dagwan*, 269 Mich. App. 338, 342 (2005), along with the "fruit" thereof – i.e., evidence "come at by exploitation of that illegality." *Wong Sun v. U.S.*, 371 U.S. 471, 487-88 (1963).

A search or seizure conducted without a warrant is unreasonable per se under the Fourth Amendment of the U.S. Constitution and violates Article 1, § 11 of the Michigan Constitution unless shown to fall within one of the exceptions to the warrant requirement. *People v. Reed*, 393 Mich. 342, 362 (1975). To overcome a defendant's motion to suppress, the prosecution bears the burden of showing that a warrantless search or seizure fell within a warrant exception, *People v. Armstrong*, No. 165233, ___ Mich. ___, 2025 WL 994370, *3 (2025), or, alternatively, that the exclusionary rule does not apply. *Brown v. Illinois*, 422 U.S. 590, 604 (1975).

i. Terry Stops

One exception to the warrant requirement is an investigatory *Terry* stop. *See People v. Lucynski*, 509 Mich. 618, 625 (2022). "Under *Terry*, an officer can detain a citizen for a brief investigatory stop if the officer has 'reasonable suspicion' that the citizen is engaged in, or is about to be engaged in, criminal activity." *People v. Prude*, 513 Mich. 377, 387 (2024). Likewise, under

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Terry, an officer may extend an otherwise legal traffic stop to investigate a crime unrelated to the basis for the stop if "new facts come to light during the traffic stop that give rise to reasonable suspicion of criminal activity." *People v. Kavanaugh*, 320 Mich. App. 293, 301 (2017). Yet, even when justified at their inception by reasonable suspicion of criminal activity, *Terry* investigations "are limited in both scope and duration." *Johnson v. VanderKooi*, 509 Mich. 524, 539 (2022).

The permissible scope of a *Terry* investigation is limited to: (1) reasonable inquiries aimed at confirming or dispelling an officer's reasonable suspicion of criminal activity; and (2) if (and only if) an officer has reasonable suspicion that the person is also armed and dangerous, a pat down search for weapons. *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 (1993). However, "[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979). Indeed, *Terry* does not allow an officer to conduct "a general exploratory search for whatever evidence of criminal activity he might find." *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *see Sibron v. New York*, 392 U.S. 40, 65-66 (1968) (an evidentiary search of a person during a *Terry* investigation "violates the guarantee of the Fourth Amendment."); *Dickerson*, 508 U.S. at 378 (an evidentiary search during a *Terry* investigation is an "unrelated" inquiry and "condemned").

In regard to duration, "a brief detention such as a *Terry* stop may last no longer than necessary to address the reasons justifying the stop." *Johnson*, 509 Mich. at 540. Accordingly, a stop "remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop." *Rodriguez v. U.S.*, 575 U.S. 348, 355 (2015) (cleaned up). The critical inquiry is whether the unrelated inquiry "'prolongs—i.e., adds time to—'the stop.'" *Id.* at 357. Even if the officer has not yet completed the stop, if police activity outside its permissible scope "causes that completion to be delayed, the delayed detention remains a constitutional violation." *Kavanaugh*, 320 Mich. App. at 301, n. 6; *U.S. v. Blair*, 524 F.3d 740, 752 (6th Cir. 2008) (holding that as soon as the officer "extended the scope and duration of the stop beyond that necessary to issue a citation …. the remainder of the stop violated the Fourth Amendment"); *see also U.S. v. Bonilla*, 357 Fed. Appx. 693, 697 (6th Cir. 2009); *U.S. v. Torres-Ramos*, 536 F.3d 542, 550-51 (6th Cir. 2008).

ii. The Automobile Exception

Another exception to the warrant requirement is the automobile exception, which was first articulated over a century ago in *Carroll v. U.S.*, 267 U.S. 132 (1925). *See Collins v. Virginia*, 584 U.S. 586, 591 (2018). The automobile exception applies "when an automobile or other vehicle is

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stopped and the police have probable cause to believe it contains evidence of a crime." *Colorado v. Bannister*, 449 U.S. 1, 3 (1980). "Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in the stated place." *People v. Brzezinski*, 243 Mich. App. 431, 433 (2000).

Other than the Opinion issued in this case, there appears to be no decision (published or unpublished) from the Court of Appeals or this Court in the over 100 years since *Carroll* extending the automobile exception to searches for evidence of a civil infraction. And, in a comparatively recent decision, the Supreme Judicial Court of Massachusetts has refused to extend the automobile exception to situations where the police only have probable cause to believe a vehicle contains evidence of a civil infraction but not a crime. *See Com. v. Sheridan*, 470 Mass. 752, 757 (2015) ("Absent articulable facts supporting a belief that the vehicle contained an additional, criminal quantity of marijuana, the officers lacked probable cause to believe that a crime was being committed, and the search was impermissible.").

Discussion

A. THE SEARCH OF MR. WILKINS' PERSON BY TROOPER TOMPKINS EXCEEDED THE PERMISSIBLE SCOPE OF *TERRY*.

Trooper Tompkins stopped Mr. Wilkins for a simple traffic violation – speeding. Then, after smelling the odor of marijuana and learning that both occupants of the vehicle were under 21, he initiated an investigation (unrelated to the initial basis for the traffic stop) into whether the occupants of the vehicle were in violation of Section 15(3) of the MRTMA.[33] Section 15(3) of the MRTMA provides that "a person under 21 years of age who possesses not more than 2.5 ounces of marihuana … is responsible for a civil infraction[.]" MCL 333.27965(3)(a).

As part of his investigation of this suspected civil infraction,[34] Trooper Tompkins searched Mr. Wilkins' person. This search of Mr. Wilkins' person by Trooper Tompkins exceeded the permissible scope of *Terry* in two ways. First, because he did not have reasonable suspicion of

[33] The trial court explicitly found that Trooper Tompkins "observed no visible signs that Defendant was intoxicated." Appellant's Appendix, B14.

[34] It is unclear exactly when Trooper Tompkins began his investigation into the smell of marijuana, but the search of Mr. Wilkins' person was part of that investigation. Appellant's Appendix, B16. It is important to note that ***as soon as*** Trooper Tompkins extended the traffic stop to investigate the smell of marijuana he exceeded the scope of *Terry* because, as explained below, he did not have reasonable suspicion of criminal activity. *See Kavanaugh*, 320 Mich. App. at 301, n. 6; *Bonilla*, 357 Fed. Appx. at 697; *Blair*, 524 F.3d at 752; *Torres-Ramos*, 536 F.3d at 551.

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criminal activity, Trooper Tompkins' extension of the traffic stop to investigate the smell of marijuana and his search of Mr. Wilkins' person in furtherance of that investigation exceeded the scope of *Terry*. Second, even if Trooper Tompkins initially had sufficient grounds to extend the traffic stop, his search of Mr. Wilkins' person still exceeded the scope of *Terry* because he did not have reasonable suspicion to believe Mr. Wilkins was armed and dangerous, and, regardless, he conducted an evidentiary search for marijuana – not a *Terry* pat down for weapons.

i. BECAUSE HE DID NOT HAVE REASONABLE SUSPICION OF CRIMINAL ACTIVITY, TROOPER TOMPKINS' EXTENSION OF THE TRAFFIC STOP TO INVESTIGATE THE SMELL OF MARIJUANA AND HIS SEARCH OF MR. WILKINS' PERSON IN FURTHERANCE OF THAT INVESTIGATION EXCEEDED THE SCOPE OF *TERRY*.

In *Terry*, the Supreme Court squarely addressed for the first time "the power of the police to 'stop and frisk'… suspicious persons" when the police lack probable cause to arrest. 392 U.S. at 9-10. Recognizing that the practice presented "serious questions" of constitutional law and "difficult and troublesome issues" regarding a vigorously debated area of police conduct, *id.* at 4, 9-10, the Court framed the question for decision in stark terms: "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest." *Id.* at 15.

To answer that question, the Court first "emphatically" affirmed that an investigatory stop is a seizure and a frisk is a search for Fourth Amendment purposes:

> It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

Id. at 16-17. However, the Court also observed that the constitutionality of an investigatory stop or frisk is not governed by the Warrant Clause of the Fourth Amendment because both involve "swift action predicated upon the on-the-spot observations of the officer on the beat—which

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historically has not been, and as a practical matter could not be, subject to the warrant procedure." *Id.* at 20. Instead, the constitutionality of an investigatory stop and frisk "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.*

In assessing reasonableness, the Court first focused on the governmental interest which potentially justifies investigatory stops, explaining that "there is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails." *Id.* at 20-21. According to the Court, the governmental interest potentially justifying an investigatory stop is "***crime prevention and detection***: it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating ***possibly criminal behavior*** through there is no probable cause to make an arrest." *Id.* at 22 (emphasis added). The Court next identified the governmental interest potentially justifying a frisk – i.e., "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23. The Court then acknowledged the serious "nature and quality of the intrusion on individual rights" involved with an investigatory stop and frisk, noting that the practice "constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[35] *Id.* at 24-25.

After delineating and balancing the public and private interests in play, the Court ultimately concluded that an investigatory stop and frisk is not always unreasonable when the police lack probable cause to arrest; however, the authority of the police to 'stop and frisk' must be "narrowly drawn." *Id.* at 27. In light of the proffered governmental interest justifying the practice, i.e., "crime prevention and detection," *id.* at 28, the Court held that an investigatory stop is constitutional, at least at its inception,[36] when an officer has reasonable suspicion that "***criminal activity***" is afoot. *Id.* at 30 (emphasis added). Similarly, in light of the proffered governmental interest in officer safety, the Court held that a frisk, i.e., "a carefully limited search of the outer clothing … in an

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[35] "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *Id.* at 9 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

[36] The Court recognized that the manner in which an investigatory stop is conducted "is, of course, as vital a part of the inquiry as whether [it was] warranted at all." *Id.* at 28; *see, e.g., Rodriguez*, 575 U.S. at 355 (a "seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop") (cleaned up).

attempt to discover weapons," is constitutional when an officer has reasonable suspicion that a legally detained individual is "armed and presently dangerous." *Id.*

Therefore, pursuant to its clear reasoning and holding, *Terry* explicitly authorizes an officer to initiate an investigatory stop without probable cause only if the officer has reasonable suspicion of "criminal activity." *Id.* at 30. In this case, though, Trooper Tompkins was not even investigating a criminal offense when he "extended the stop" to investigate the smell of marijuana and searched Mr. Wilkins' person in furtherance of that investigation.[37] Trooper Tompkins extended "the scope and duration of the stop" to investigate whether Mr. Wilkins (or his passenger) possessed marijuana in violation of Section 15(3) of the MRTMA,[38] which is a civil infraction – not a crime. *See* MCL 333.27965(3)(a). Thus, the extension of the traffic stop to search Mr. Wilkins' person was outside the explicit scope of *Terry* as Trooper Tompkins did not have reasonable suspicion of criminal activity,[39] and all evidence (including the pistol) discovered thereafter must be suppressed. *See U.S. v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999) ("If the initial traffic stop is illegal or the detention exceeds its proper investigative scope, the seized items must be excluded under the 'fruits of the poisonous tree doctrine.'"); *U.S. v. Warren*, 39 F. Supp. 3d 930, 935 (E.D. Mich. 2014) ("Where a detention is found to exceed its proper investigative scope, any items seized from a resulting unlawful search must be excluded as fruits of the poisonous tree.").

And, to be sure, this Court should not expand the scope of *Terry*. To the contrary, this Court should recognize the clear implication of *Terry's* reasoning and directly hold "that reasonable

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[37] Appellant's Appendix, B16.
[38] *Id.*
[39] An extension of a traffic stop may also be justified when an officer develops ***probable cause*** of a civil infraction during the traffic stop. *See Whren v. U.S.*, 517 U.S. 806, 810 (1996). However, here, Trooper Tompkins did not have probable cause of a violation of Section 15(3) of the MRTMA when he "extended the stop" to investigate "the presence of marijuana … based solely upon its odor." Appellant's Appendix, B16. As this Court explained just last month, "now that marijuana possession and use is generally legal, the odor of marijuana does not on its own supply a *substantial* basis for inferring a fair probability [i.e., probable cause] that contraband or evidence of illegal activity will be found in a particular place." *Armstrong*, No. 165233, ___ Mich. ___, 2025 WL 994370 at *5. This is true even for a person under 21, because "post-MRTMA, the smell of marijuana might just as likely indicate that the person … was simply in the presence of someone else who used marijuana." *Id.* Indeed, "it is widely understood that marijuana gives off a powerful smell that can linger" for hours; therefore, "the smell of marijuana is not particularly probative of *who* is consuming marijuana or *how recently* marijuana has been consumed." *Id.* at 5, n. 10 (internal quotation omitted). Simply put, if the smell of marijuana alone established probable cause, every person under 21 with a parent, sibling, roommate, classmate, co-worker, neighbor, friend, etc., who smoked marijuana in his or her presence, would be subject to repeated investigatory stops at the whim of a police officer. That can't be right.

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suspicion of a *civil* infraction is insufficient to support a *Terry* stop." *Armstrong*, No. 165233, ___ Mich. ___, 2025 WL 994370 at *7, n. 13. Other courts have done similarly. *See, e.g., U.S. v. Collazo*, 818 F.3d 247, 253-54 (6th Cir. 2016) ("an officer must have probable cause to make a stop for a civil infraction") (cleaned up);[40] *State v. Holmes*, 569 N.W.2d 181, 184-86 (Minn. 1997) ("we hold that a police officer who merely has reasonable suspicion that a *parking* violation has occurred cannot seize an individual for the purpose of investigation"); *see also State v. Duncan*, 146 Wash. 2d 166, 175 (2002) ("declining to extend *Terry* to general civil infractions"). In short, *Terry* struck a careful balance between competing interests and authorized investigatory stops on less than probable cause because of the weighty governmental interest in "crime prevention and detection." 392 U.S. at 22. However, when a state classifies a particular activity (like possession of not more than 2.5 ounces of marijuana by an individual under 21 years of age) as a civil infraction rather than a crime, it objectively indicates that the governmental interest at stake is far less weighty, s*ee Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984), especially in comparison to the "sacred" private interest on the other side of the scale. *Terry*, 392 U.S. at 9. Thus, the reasoning of *Terry* does not support, but militates against, authorizing investigatory stops when an officer only has reasonable suspicion of a civil infraction.[41]

ii. EVEN IF TROOPER TOMPKINS INITIALLY HAD SUFFICIENT GROUNDS TO EXTEND THE TRAFFIC STOP, HIS SEARCH OF MR. WILKINS' PERSON STILL EXCEEDED THE SCOPE OF *TERRY* AS HE DID NOT HAVE REASONABLE SUSPICION TO BELIEVE MR. WILKINS WAS ARMED AND DANGEROUS, AND, REGARDLESS, HE CONDUCTED AN EVIDENTIARY SEARCH FOR MARIJUANA – NOT A *TERRY* PAT DOWN FOR WEAPONS.

An investigatory *Terry* stop is lawful at its inception if an officer has reasonable suspicion of criminal activity. *Id.* at 30. However, a *Terry* stop "remains lawful only so long as unrelated inquiries [i.e., police activities outside the permissible scope of a *Terry* investigation] do not

[40] In *Heien v. North Carolina*, the "parties agree[d]" that "officers need only 'reasonable suspicion'" to initiate a traffic stop for a traffic violation, and the Court framed the question for decision accordingly, i.e., "whether reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition." 574 U.S. 54, 60 (2014). However, the parties' agreement in *Heien* appears at odds with *Whren*, wherein the Supreme Court stated: "As a general matter, the decision to stop an automobile is reasonable where the police have ***probable cause*** to believe that a traffic violation has occurred." 517 U.S. at 810 (emphasis added).

[41] In the alternative, this Court should hold that the smell of marijuana does not establish reasonable suspicion of a civil infraction for the reasons set forth in note 39, *supra*.

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measurably extend the duration of the stop." *Rodriguez,* 575 U.S. at 355 (cleaned up); *Kavanaugh*, 320 Mich. App. at 301, n. 6. The permissible scope of a *Terry* investigation is limited to: (1) reasonable inquiries aimed at confirming or dispelling an officer's reasonable suspicion of criminal activity; and (2) if (and only if) an officer has reasonable suspicion that the person is also armed and dangerous, a pat down search for weapons. *Dickerson*, 508 U.S. at 372-73.

Therefore, although *Terry* authorizes a limited pat down search for weapons if an officer has reasonable suspicion that a legally seized individual is armed and dangerous, *id.*, *Terry* does not authorize an officer to conduct "a general exploratory search for whatever evidence of criminal activity he might find." 392 U.S. at 30. In other words, evidentiary searches are outside the permissible scope of a *Terry* investigation. *See Dickerson*, 508 U.S. at 378 (an evidentiary search during a *Terry* investigation is an "unrelated" inquiry and "condemned"); *Ybarra*, 444 U.S. at 93-94 ("Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons."); *Sibron*, 392 U.S. at 65-66 (an evidentiary search during a *Terry* investigation "violates the guarantee of the Fourth Amendment.").

In this case, Trooper Tompkins initiated a *Terry* stop to investigate the smell of marijuana and extended the "duration of the stop" to search Mr. Wilkins' person.[42] But, as the Court of Appeals held, Trooper Tompkins did not have reasonable suspicion to believe Mr. Wilkins was armed and dangerous when he extended the stop to search him, and, regardless, his search of Mr. Wilkins' person was an evidentiary search for marijuana – not a *Terry* pat-down for weapon:

> [T]he record is lacking any support that Wilkins was armed and posed any danger to Trooper Tompkins, or that the pat-down was reasonably intended to discover hidden weapons. Rather, Trooper Tompkins stated that Wilkins denied having any weapons, and Trooper Tompkins unequivocally testified that the pat-down was to search for marijuana, not weapons. Nothing in the record provides any basis to support that Wilkins was armed or dangerous in any way before the pat-down occurred.[43]

Thus, the search of Mr. Wilkins' person was outside the scope of *Terry*. And because a *Terry* stop "remains lawful only so long as" the police do not prolong its duration by acting outside its permissible scope, *Rodriguez*, 575 U.S. at 355 (cleaned up), even if Trooper Tompkins had

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[42] Appellant's Appendix, B16. The trial court found that Trooper Tompkins' actions were based on two things: (1) the "smell of marijuana," and (2) "the age of the vehicle's occupants." *Id.*

[43] Appellant's Appendix, A10. It is unclear why the Court of Appeals describes the search of Mr. Wilkins' person as a "pat-down." The trial court found that Trooper Tompkins "searched Defendant," *id.* at B16, and Trooper Tompkins offered no testimony that his search of Mr. Wilkins' person was anything other than a full evidentiary search.

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reasonable suspicion of criminal activity to initiate a *Terry* stop, all evidence found after the evidentiary search of Mr. Wilkins' person – i.e., all evidence found after the *Terry* stop had been unconstitutionally prolonged – must be suppressed as a "fruit" of that unlawful detention. *See Wong Sun*, 371 U.S. at 484-85.

B. THE DISCOVERY OF THE PISTOL IN THE VEHILCE WAS CAUSALLY CONNECTED TO THE SEARCH OF MR. WILKINS' PERSON.

Despite concluding that Trooper Tompkins exceeded the permissible scope of *Terry* when he searched Mr. Wilkins's person, the Court of Appeals ultimately held that the pistol found during the subsequent search of the vehicle "need not be suppressed because it was not derivative of an illegality, i.e., it was not fruit of the poisonous tree."[44] Respectively, that's incorrect. "Where a detention is found to exceed its proper investigative scope, any items seized from a resulting unlawful search must be excluded as fruits of the poisonous tree." *Warren*, 39 F. Supp. 3d at 935; *Hill*, 195 F.3d at 264 ("If the initial traffic stop is illegal or the detention exceeds its proper investigative scope, the seized items must be excluded under the 'fruits of the poisonous tree doctrine.'").

The fundamental flaw in the Court of Appeals' attenuation analysis is that it fails to understand that the evidentiary search of Mr. Wilkins' person resulted in two analytically distinct Fourth Amendment violations. First, the evidentiary search of Mr. Wilkins was, in and of itself, an unreasonable search. *See Sibron*, 392 U.S. at 65-66. And as the Court of Appeals noted, the unreasonable search, ***as such***, "did not reveal any evidence, nor did it affect or otherwise lead to the vehicle search principally at issue here." However, because the search of Mr. Wilkins's person was an inquiry outside the permissible scope of *Terry* that prolonged the stop, the search of Mr. Wilkins's person also rendered his continued seizure unreasonable from that point forward. *See Rodriguez*, 575 U.S. at 355 (a "seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop") (cleaned up); *Kavanaugh*, 320 Mich. App. at 301, n. 6 (even if the officer has not yet completed the stop, if police activity outside its permissible scope "causes that completion to be delayed, the delayed detention remains a constitutional violation"); *accord Bonilla*, 357 Fed. Appx. at 696-700; *Blair*, 524 F.3d at 752; *Torres-Ramos*, 536 F.3d at 550-51; *Warren*, 39 F. Supp. 3d at 935-36. And, to be sure, not only did the search of the vehicle occur during the unreasonable seizure of Mr. Wilkins, but Trooper Tompkins based his decision

[44] Appellant's Appendix, A10.

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to search the vehicle on the admission secured from the passenger during the unreasonable seizure. Accordingly, the pistol was "come at by exploitation of" the unconstitutionally prolonged *Terry* investigation – i.e., the unreasonable seizure, *Wong Sun*, 371 U.S. at 487-88, and the Court of Appeals erred by not suppressing it.[45]

C. ASSUMING TROOPER TOMPKINS HAD PROBABLE CAUSE TO BELIEVE THE VEHICLE CONTAINED MARIJUANA THE POSSESSION OF WHICH WAS A CIVIL INFRACTION, THE SEARCH OF THE VEHICLE WAS NOT PERMISSIBLE UNDER THE AUTOMOBILE EXCEPTION.

Even if Trooper Tompkins did not exceed the permissible scope of *Terry* when he searched Mr. Wilkins's person (or even if the pistol subsequently found in the vehicle was not a "fruit" of the unconstitutionally prolonged *Terry* investigation), the subsequent search of the vehicle was not justified by the automobile exception. The automobile exception applies "when an automobile or other vehicle is stopped and the police have probable cause to believe it contains evidence of a crime." *Bannister*, 449 U.S. at 3.[46] Therefore, where (as here) an officer has probable cause to believe a vehicle contains evidence of a civil infraction,[47] a search of the vehicle is not justified by the automobile exception.

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[45] Had the inquiry that prolonged the *Terry* investigation not been an unconstitutional search (i.e., a Fourth Amendment violation itself), the Court of Appeals likely would not have erred. If instead of prolonging the *Terry* stop to search Mr. Wilkin's person, Trooper Tompkins had prolonged it to smoke a cigarette, the Court of Appeals would not have held that because the smoke break "did not reveal any evidence, nor did it affect or otherwise lead to the vehicle search," the pistol need not be suppressed. Rather, it would have held that the smoke break unconstitutionally prolonged the *Terry* stop, and the pistol was a fruit of the unreasonable seizure.

[46] As discussed in note 52, *infra*, there was a historically important distinction in the search and seizure context between "contraband" and mere "evidence of a crime." In short, "contraband" was subject to search and seizure, while mere "evidence of a crime" was not. In 1967, though, the Supreme Court rejected that distinction and held that both were subject to search and seizure. *See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 300-01 (1967). After *Hayden*, the Supreme Court has at times used the phrase "contraband or evidence of a crime" to describe the scope of the automobile exception, *see, e.g., Arkansas v. Sanders*, 442 U.S. 753, 760 (1979), implicitly recognizing the historically relevant distinction between the two categories. However, it has also used the phrase "evidence of a crime" by itself in a broader, non-technical, modern sense that subsumes "contraband." Indeed, the "evidence of a crime" at issue in *Bannister* was wrenches and stolen lug nuts – i.e., derivative contraband. The fact that the Supreme Court has used the phrase "evidence of a crime" in a way that subsumes "contraband" buttresses the argument fleshed out below that there must be a nexus between an item to be searched for and criminal behavior.

[47] Trooper Tompkins had probable cause to believe the vehicle contained evidence of a civil infraction only after "the passenger admitted she had some 'shake' (a small quantity of marijuana) in the vehicle." Appellant's Appendix, B14.

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Nevertheless, in this case, the Court of Appeals held that the search of the vehicle was lawful, because: (1) the automobile exception authorizes the warrantless search of a vehicle if there is probable cause to believe it contains "evidence of a crime *or* contraband,"[48] (2) contraband refers to items "'not legally possessed,'"[49] including items the possession of which is only a civil infraction, and (3) Trooper Tompkins had probable cause to believe the vehicle contained "illegally possessed marijuana,"[50] even if in a noncriminal amount.

The critical premise in the Court of Appeals' syllogism is the second one – its definition of "contraband." In support of the second premise, the Court of Appeals relied on *American Eagle Fireworks v. City of Lansing*, an unpublished, non-precedential, civil case involving 42 USC §1983 and malicious prosecution claims that arose out of the "seizure and destruction of certain fireworks sold by plaintiffs." 1999 WL 33441137, at *1 (Mich. Ct. App. Jun. 18, 1999).[51] Importantly, the underlying possession of fireworks giving rise to *American Eagle* was a crime – not a civil infraction, and the fireworks seized were seized pursuant to a warrant – not a warrant exception. *Id.* at 2. In short, the Court of Appeals decided to expand the automobile exception to the civil infraction context for what appears to be the first time in Michigan history based on a particular exposition of the term "contraband" found in an unpublished, non-binding, civil case in which officers had a warrant and the civil infraction/crime distinction of paramount importance in this case was not even at issue.

Now, had Mr. Wilkins not pointed out binding authority, the Court of Appeals' reliance on *American Eagle* might be easier to understand. However, Mr. Wilkins explicitly cited to *Hayden*, 387 U.S. 294 – a binding Supreme Court decision – to show that "contraband," as used in the warrant exception context, means "property the possession of which is a *crime*" (contraband per se) and the "instrumentalities" and "fruits of a *crime*" (derivative contraband). *Id.* at 295-96 (emphasis added); *see One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 698-99 (1965) (explaining the distinction between contraband per se – i.e., "objects the possession of which, without more, constitutes a *crime*" – and derivative contraband) (emphasis added).

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[48] Appellant's Appendix, A7 (emphasis in original).
[49] *Id.* at A8 (quoting *American Eagle Fireworks v. City of Lansing*, No. 206713, 1999 WL 33441137, *1 (Mich. Ct. App. Jun. 18, 1999)).
[50] *Id.*
[51] "An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority." MCR 7.215(C)(1).

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Then, relying on *Hayden*, Mr. Wilkins argued that the automobile exception authorizes the warrantless search of a vehicle if there is probable cause to believe it contains: (1) "property the possession of which is a *crime*," (contraband per se), (2) the "instrumentalities" and "fruits of a *crime*" (derivative contraband), or (3) mere "evidence of a *crime*."[52] Only this interpretation of the phrase 'contraband or evidence of a crime' makes sense of the requirement in *Hayden* that there must be "a nexus—automatically provided in the case of fruits, instrumentalities or contraband [per se]—between the item to be seized and *criminal behavior*." 387 U.S. at 307 (emphasis added). And because in this case there was no nexus to criminal behavior, the automobile exception was inapplicable, the search of the vehicle was unconstitutional, and the pistol must be suppressed. *See Sheridan*, 470 Mass. at 757. The Court of Appeals simply ignored *Hayden* and its implications – not even citing it in its Opinion and instead relied on *American Eagle* (which, in addition to its other problems, did not even address the civil infraction/crime distinction).

Moreover, not only did the Court of Appeals ignore *Hayden*, it also ignored three additional reasons offered by Mr. Wilkins for why the automobile exception does not apply in, and should not be extended to, the civil infraction context. First, "[i]n delineating the constitutional safeguards applicable in particular contexts," a court must weigh "the public interest against the Fourth

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[52] As explained in note 47, *supra*, historically, "contraband" was subject to search and seizure, while mere "evidence of a crime" was not. *See* Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 2.6(d) (6th ed. 2024); *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765). In 1967, though, the Supreme Court rejected "the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment." *Hayden*, 387 U.S. at 300-01. Thus, the phrase "contraband or evidence of a crime," when used to describe the automobile exception, simply indicates that not just items that are criminal to possess (contraband per se) and instrumentalities and fruits of crime (derivative contraband) are subject to search and seizure, but so is mere "evidence of a crime," even though that was not always the case. Consistent with the foregoing, it appears that the phrase "contraband or evidence of a crime" was never used by the Supreme Court until after *Hayden*.

It is also important to note that interpretating "contraband" in the phrase "contraband or evidence of a crime" to include items that are ***not*** criminal to possess would create an irrational asymmetry. Indeed, if "contraband" means anything unlawful to possess (even if merely a civil infraction), why does the phrase purport to only authorize searches for "evidence of a crime" and not also evidence of a civil infraction? The question is critical as *Hayden* noted, "Nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband. … Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. … Indeed, the distinction is wholly irrational[.]" *Id.* at 301. The fact that the phrase only references "evidence of a crime," and not also evidence of a civil infraction, confirms that "contraband" means "property the possession of which a *crime*" (contraband per se) and "instrumentalities" and "fruits or a *crime*" (derivative contraband), *Id.* at 295-96 (emphasis added).

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Amendment interest of the individual." *U.S. v. Martinez-Fuerte*, 428 U.S 543, 555 (1976). And, unlike when it criminalizes an activity, when a state classifies a particular activity (like possession of not more than 2.5 ounces of marijuana by an individual under 21 years of age) as a civil infraction, it objectively indicates that the public interest at stake is negligible. *See Welsh*, 466 U.S. at 754. On the other hand, "a motorist's privacy interest in his vehicle," although less substantial than in his home, "is nevertheless important." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). Given the negligible public interest and the "important" personal interest at stake, extension of the automobile exception from the criminal context to the civil context is unwarranted.

Second, the extension of the automobile exception to the civil infraction context would have far reaching consequences. Indeed, if the Opinion is not reversed and the automobile exception is extended to situations where the police only have probable cause to believe a vehicle contains evidence of a civil infraction, that decision will not be cabined to individuals under 21 years of age suspected of possessing not more than 2.5 ounces of marijuana. It will apply to all civil infractions. For example, a motorist suspected of speeding may have his vehicle's black box seized and searched. Or, a motorist suspected of texting while driving may have his phone seized and searched. Or, a motorist suspected of rolling through a stop sign may have his dash cam seized and searched. In short, the expansion of the automobile exception to civil infractions will vastly curtail personal privacy in a manner totally at odds with the reasonable expectation of this State's citizens.

Third, exceptions to the warrant requirement are "jealously and carefully drawn." *Jones v. U.S.*, 357 U.S. 493, 499 (1958). Accordingly, it is not surprising that the Supreme Judicial Court of Massachusetts has refused to extend the automobile exception to situations where the police only have probable cause to believe the vehicle contains evidence of a civil infraction but not a crime. *See Sheridan*, 470 Mass. at 757. The Court of Appeals, though, recast the "jealously and carefully drawn" parameters of the automobile exception and did not even interact with *Sheridan*. Unlike the Court of Appeals, this Court should follow the lead of Massachusetts' highest court and explicitly refuse to greatly expand the "jealously and carefully drawn" automobile exception over a century after *Carroll*.

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RELIEF REQUESTED

Mr. Wilkins requests that this Court vacate the Opinion issued by Court of Appeals on September 5, 2024 and the Order issued by the 17th Circuit Court on June 9, 2023, and remand this case to the trial court with instructions that it enter an order suppressing all evidence (including the pistol) discovered by the People during of the unconstitutionally prolonged traffic stop and unconstitutional vehicle search on January 16, 2023.*

Date: May 9, 2025

Respectfully submitted,

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*According to the word count of the word-processing system used to prepare this Supplemental Brief, the "Introduction," "Statement of Facts," "Argument," and "Relief Requested" sections of this document contain 7,867 words.