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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

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**Reply in Support of**
**Supplemental Brief – Appellant**

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## INTRODUCTION

On January 16, 2023, Trooper Tompkins stopped Mr. Wilkins for speeding. After smelling the odor of marijuana and learning that Mr. Wilkins and his passenger were under 21, Trooper Tompkins initiated an investigation (unrelated to the initial basis for the traffic stop) into whether either occupant possessed marijuana contrary to MCL 333.27965(3) – a civil infraction. As part of this investigation, Trooper Tompkins removed Mr. Wilkins from the vehicle and searched him. This was an evidentiary search for marijuana – not a *Terry* pat down for weapons. Finding nothing, Trooper Tompkins removed the passenger from the vehicle, who then told him that she had some "shake" (cannabis residue) in the vehicle. "Given this information, Trooper Tompkins began a search of the vehicle."[1] In the vehicle, he found a pistol giving rise to the pending CCW charge against Mr. Wilkins.

On May 10, 2023, Mr. Wilkins filed a Motion to Dismiss in the trial court and argued that the pistol must be suppressed for two reasons. 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. Thus, all evidence discovered after the traffic stop had been unconstitutionally prolonged (including the pistol found in the vehicle) must be suppressed as fruit of the unreasonable seizure. 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.

On June 9, 2023, the trial court issued its Order denying the Motion to Suppress, and, on September 5, 2024, the Court of Appeals ultimately affirmed the trial's court denial of the Motion to Suppress. 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,"[2] 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."[3] The Court of Appeals also held for what appears to be the first time in Michigan history "that probable cause exists to support a warrantless vehicle search *so long as* facts adequately

[1] Appellant's Appendix, B14.
[2] *Id.* at A11.
[3] *Id.* at A10 (internal quotation omitted).

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support that the suspected activity is generally unlawful,"[4] even if the suspected activity is a mere civil infraction – not a crime.[5]

On October 30, 2024, Mr. Wilkins filed an Application for Leave, and, on March 28, 2025, this Court entered an order 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.*

The parties having filed their supplemental briefs, Mr. Wilkins now submits this reply brief.

[4] *Id.* at A7 (emphasis in original).
[5] *See id.* at A7-A9.

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## REBUTTAL ARGUMENT

### I. THE PROSECUTION CONCEDES THAT THE SEARCH OF MR. WILKINS' PERSON BY TROOPER TOMPKINS EXCEEDED THE PERMISSIBLE SCOPE OF *TERRY*.

Mr. Wilkins answered this Court's first question by arguing that the search of his person exceeded the permissible scope of *Terry* in two ways. First, because Trooper Tompkins did not have reasonable suspicion of criminal activity, his 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. In its supplemental brief, the prosecution now concedes that "the search of Defendant's person exceeded the scope of *Terry v. Ohio*."[6] Specifically, the prosecution concedes "that Trooper Tompkins's full search of Defendant's person exceeded *Terry* and any evidence discovered during that search would be inadmissible."[7]

### II. THE DISCOVERY OF THE PISTOL IN THE VEHICLE WAS CAUSALLY CONNECTED TO THE UNCONSTITUTIONAL SEARCH OF MR. WILKINS' PERSON.

Nevertheless, the prosecution argues that the discovery of the pistol in the vehicle was not causally connected to the search of Mr. Wilkins' person. Specifically, the prosecution argues that

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[6] Plaintiff-Appellee's Supplemental Brief, p. 4.

[7] *Id.* at 2. Although the prosecution concedes that Trooper Tompkins exceeded the scope of *Terry* by conducting a full search of Mr. Wilkins' person, it claims that a limited pat down of Mr. Wilkins for weapons would have been constitutional. *Id.* at 3-4. The prosecution essentially argues that Trooper Tompkins had reasonable suspicion to believe Mr. Wilkins was an armed and dangerous drug trafficker because Mr. Wilkins supposedly denied possessing marijuana despite its odor. *Id.* However, the trial court did not find that Mr. Wilkins denied possessing marijuana, and, even if it had, "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." *People v. Armstrong*, No. 165233, __ Mich. __, 2025 WL 994370, *5 (2025). 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, even when an officer smells the odor of marijuana, it will often be true that marijuana is not present. As such, denying the presence of marijuana post-MRTMA is not suspicious, and it certainly does not establish reasonable suspicion that a person is an armed and dangerous drug trafficker.

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when Trooper Tompkins searched Mr. Wilkins' person discovery of the pistol through legal means was inevitable.[8] The prosecution is mistaken.

### A. THE PROSECUTION TACITLY ABANDONS THE COURT OF APPEALS' ERRONEOUS ATTENUATION ANALYSIS.

Before addressing inevitable discovery, it is important to note that the prosecution tacitly abandons the Court of Appeals' attenuation analysis. And for good reason, that analysis was erroneous. The fundamental flaw in the Court of Appeals' analysis was that it failed to recognize that the search of Mr. Wilkins' person resulted in two analytically distinct Fourth Amendment violations. The search of Mr. Wilkins was, in and of itself, an unreasonable search. In addition, though, because the search of Mr. Wilkins was an inquiry outside the permissible scope of *Terry* that prolonged the traffic stop, the search also rendered the seizure of Mr. Wilkins unreasonable from that point forward. And not only did the search of the vehicle occur during the unreasonable seizure, but Trooper Tompkins based his decision to search the vehicle on the admission secured from the passenger during the unreasonable seizure. Thus, the pistol was "come at by exploitation of" the unconstitutionally prolonged traffic stop – i.e., the unreasonable seizure. *Wong Sun v. U.S.*, 371 U.S. 471, 487-88 (1963).

### B. THE PROSECUTION FAILS TO DEMONSTRATE THAT THE PISTOL INEVITABLY WOULD HAVE BEEN DISCOVERED THROUGH LEGAL MEANS.

Tacitly abandoning attenuation, the prosecution instead argues inevitable discovery. The inevitable discovery rule permits the admission of evidence obtained in violation of the Fourth Amendment if the prosecution demonstrates that the evidence "inevitably would have been discovered through legal means." *People v. Mahdi*, 317 Mich. App. 446, 469 (2016). In deciding whether the inevitable discovery rule applies, courts consider: "(1) whether the legal means were truly independent, (2) whether the use of the legal means and the discovery by the legal means were truly inevitable, and (3) whether application of the inevitable-discovery doctrine could incentivize police misconduct or significantly weaken the protection provided under the Fourth Amendment." *Id.*

[8] The prosecution did not raise this argument in the trial court. As such, it is unpreserved, and this Court need not consider it. *See People v. Jack*, 336 Mich. App. 316, 319 n.2 (2021). Regardless, the argument is meritless for the reasons discussed below.

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While somewhat underdeveloped, the prosecution seemingly argues that even if the search of Mr. Wilkins' person and his subsequent detention were unconstitutional, the inevitable discovery rule applies to the pistol found in the vehicle, because:

> (1) when Trooper Tompkins searched Mr. Wilkins, he already had authority to search the vehicle (there were "legal means" to search the vehicle);
>
> (2) when Trooper Tompkins searched Mr. Wilkins, it was already certain that he would search the vehicle (the search of the vehicle was "truly inevitable"); and
>
> (3) the search of the vehicle was unrelated to the unlawful search and subsequent detention of Mr. Wilkins (the search of the vehicle was "truly independent").

The prosecution, however, fails to establish any of these necessary conditions for application of the inevitable discovery rule.

The prosecution first asserts that Trooper Tompkins already had authority to search the vehicle when he searched Mr. Wilkins because "the odor of marijuana coupled with the fact that no one present could legally possess marijuana provided probable cause to believe contraband would be located within Defendant's vehicle."[9] That's incorrect. As this Court held in *Armstrong*, "now that marijuana possession and use is generally legal, the odor of marijuana does not on its own supply a *substantial* basis [i.e., probable cause] for inferring a fair probability that contraband or evidence of illegal activity will be found in a particular place." No. 165233, __ Mich. __, 2025 WL 994370 at *5 (emphasis in original). This should be 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.* Moreover, even if the odor of marijuana established probable cause to believe a person under 21 possessed marijuana, the possession of not more than 2.5 ounces of marijuana by a person under 21 is a civil infraction – not a crime. *See* MCL 333.27965(3). As Mr. Wilkins has argued at length, the automobile exception does not apply in, and should not be extended to, the civil infraction context.

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[9] Plaintiff-Appellee's Supplemental Brief, p. 5. In support of its inevitable discovery argument, the prosecution later asserts that Trooper Tompkins had probable cause to search the vehicle "based on the smell, the underaged Defendant and passenger, their initial denial, and the passenger's admission that some ["shake"] would be in the vehicle." *Id.* at 6. Again, though, the trial court did not find that anyone denied that the vehicle contained marijuana, and, even if it had, such a denial adds nothing to the probable cause analysis. *See* note 7, supra. Further, the trial court found that the passenger told Trooper Tompkins that she had some "shake" in the vehicle ***after*** he searched Mr. Wilkins. Obviously, the prosecution cannot rely on that admission to establish that Trooper Tompkins had authority to search the vehicle when he searched Mr. Wilkins.

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The prosecution also apparently believes that it was certain that Trooper Tompkins would search the vehicle when he searched Mr. Wilkins, and, therefore, the search of the vehicle was "truly inevitable." However, the trial court found that Trooper Tompkins decided to search the vehicle ***after*** the search of Mr. Wilkins' person based on the passenger's ***subsequent*** admission that she had some "shake" in the vehicle: "Given this information, Trooper Tompkins began a search of the vehicle."[10] Accordingly, even if Trooper Tompkins had "legal means" to search the vehicle when he searched Mr. Wilkins' person (he did not), the search of the vehicle was not "truly inevitable." Likewise, any claim by the prosecution that the search of the vehicle was unrelated to the unlawful search and detention of Mr. Wilkins also must fail. To be sure, the search of the vehicle occurred during the unlawful detention of Mr. Wilkins, and, again, Trooper Tompkins based his decision to search the vehicle on the admission secured during that unlawful detention. As such, the search of the vehicle was not "truly independent." In short, the prosecution fails to demonstrate that the pistol inevitably would have been discovered through legal means.[11]

## III. THE PROSECUTION DOES NOT DIRECTLY ANSWER THIS COURT'S THIRD QUESTION BUT INSTEAD "REFRAMES" IT.

According to the prosecution, this Court's third question "assumes a small amount of marijuana, covered by the MRTMA, ignoring both the possibility that the amount would in fact be a criminal amount and the fact that the marijuana at issue was contraband given that no one in the vehicle could legally possess."[12] The prosecution, therefore, does not directly answer this Court's third question but instead "reframes" it as follows:

> Was the search of Defendant's vehicle permissible under the automobile exception to the warrant requirement where the trooper had probable cause to believe the defendant possessed contraband in the form of marijuana, which he could not *legally* possess?[13]

The prosecution then answers its question by arguing that the search of the vehicle was permissible, because: (1) the automobile exception authorizes the warrantless search of a vehicle if there is probable cause to believe it contains "contraband or evidence of a crime,"[14] (2) "[c]ontraband is

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[10] Appellant's Appendix, B14.
[11] Application of the inevitable discovery rule would also "incentivize police misconduct," *Mahdi*, 317 Mich. App. at 469, by encouraging officers to unlawfully prolong *Terry* stops in the hopes of observing evidence or securing an admission justifying an allegedly "unrelated" search.
[12] Plaintiff-Appellee's Supplemental Brief, p. 7.
[13] *Id.* at iv (emphasis in original).
[14] *Id.* at 8.

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generally understood to be goods that are unlawful to import, export, produce, or possess,"[15] and (3) "Trooper Tompkins had probable cause to believe that an amount of illegally possessed marijuana … would be found within the vehicle[.]"[16]

Now to the extent the prosecution is arguing that the automobile exception applies because Trooper Tompkins had probable cause to believe that the vehicle contained a criminal amount (i.e., over 2.5 ounces) of marijuana when he searched it, it is mistaken. The odor of marijuana coupled with an admission by an occupant that a vehicle contains some "shake,"[17] i.e., cannabis residue, does not give rise to probable cause to believe a vehicle contains a large amount of marijuana.[18] The prosecution suggests that this conclusion "assumes" Trooper Tompkins was "forced to accept the passenger's claim that she only had a small amount of marijuana," but it does not.[19] All it "assumes" is that someone admitting to having some cannabis residue in a vehicle does not establish probable cause to believe the person possesses over 200 "joints." Trooper Tompkins was free to subjectively accept or reject what the passenger told him; however, what he was not free to do was search the vehicle without objective probable cause to believe it contained a criminal amount of marijuana.

Further, to the extent the prosecution is arguing that the automobile exception authorizes searches for noncriminal amounts of marijuana because it is "contraband," it is also mistaken.

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[15] *Id.* at 9, n.4. Instead of citing to binding authority from the search and seizure context to define "contraband," the prosecution cherry-picks a secondary definition of the term. Like the Court of Appeals, the prosecution simply ignores the common law distinction between contraband and mere "evidence of a crime," *see* Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 2.6(d) (6th ed. 2024), and does not cite, let alone interact with, *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

[16] *Id.* at 9.

[17] The prosecution also claims that when the passenger admitted she had some "shake" in the vehicle, it exposed an earlier "lie about no marijuana being present." *Id.* at 9. There are numerous problems with this claim. First, the trial court did not find that Mr. Wilkins or his passenger denied possessing marijuana. Second, even if the trial court had made that finding, denying that one has "marijuana" is consistent with later admitting to having some "shake" as "marijuana" typically refers to smokeable cannabis and "shake" is slang for cannabis residue. Third, even if the trial court had found that Mr. Wilkins and his passenger denied possessing marijuana and even if that denial was a "lie," it would have been a "lie" about the *unlawful* (albeit noncriminal) possession of marijuana. Thus, *People v. Moorman*, on which the prosecution relies, is readily distinguishable. 331 Mich. App. 481, 488 (2020) ("if defendant's possession was *lawful*, it is reasonable to believe that he would simply admit to marijuana being in the vehicle") (emphasis added).

[18] 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 "joints."

[19] Plaintiff-Appellee's Supplemental Brief, p. 9.

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Contraband, as used in the search and seizure context, means "property the possession of which is a *crime*" (contraband per se) and the "instrumentalities" and "fruits of a *crime*" (derivative contraband). *Hayden*, 387 U.S. 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). Thus, the automobile exception authorizes the warrantless search of a vehicle if there's probable cause to believe it contains: (1) "property the possession of which is a *crime*," (contraband per se), (2) the "instrumentalities" and "fruits or a *crime*" (derivative contraband), or (3) mere "evidence of a *crime*." Simply put, 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*." *Hayden*, 387 U.S. at 307 (emphasis added). In this case, though, there was no nexus to criminal behavior. Thus, the automobile exception was inapplicable, the search of the vehicle was unconstitutional, and the pistol must be suppressed.

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## CONCLUSION

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 the unconstitutionally prolonged traffic stop and unconstitutional vehicle search on January 16, 2023.*

Date: June 16, 2025

Respectfully submitted,

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*According to the word count of the word-processing system used to prepare this reply brief, the "Introduction," "Rebuttal Argument," and "Conclusion" sections of this document contain 3,124 words.