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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| LAMONT VALENTINE,<br><br>Defendant Below,<br>Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below,<br>Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 15, 2018 |

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

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# APPELLANT'S OPENING BRIEF

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DATED: May 9, 2018

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## NATURE OF THE PROCEEDINGS

Appellant, Lamont Valentine, was arrested on March 19, 2016.[1] On August 1, 2016, a Grand Jury returned an Indictment against Valentine, charging him with one count each of Possession of a Firearm by a Person Prohibited ("PFBPP") and Carrying a Concealed Deadly Weapon ("CCDW").[2]

On December 13, 2016, Valentine filed a Motion to Suppress ("the Motion"), challenging the warrantless search of Valentine's vehicle.[3] The State filed its response on January 4, 2017.[4] On January 6, 2017, the trial court held a hearing on the Motion, requesting supplemental briefing upon conclusion thereof.[5] The defense filed its supplemental brief on January 10, 2011. The State responded one day later.[6] On January 16, 2017, Valentine filed a reply brief with the trial court.[7] The trial court denied the Motion on January 17, 2017, holding that, under

[1] A001.

[2] A001-02.

[3] A004.

[4] A004.

[5] A005.

[6] A005.

[7] A005.

the totality of the circumstances, police had probable cause to conduct a warrantless search of Valentine's vehicle.[8]

Valentine proceeded to a stipulated bench trial on January 18, 2017.[9] The trial court found Valentine guilty of one count of PFBPP.[10]

The parties appeared for sentencing on September 29, 2017, whereupon the court asked for briefing relating to what sentence it had to impose upon Valentine.[11] Valentine filed a sentencing memorandum on October 11, 2017, arguing that he was not subject to the enhanced penalty of Section 1448(e)(1)(c) of Title 11 of the Delaware Criminal Code, as neither of his prior-out-of-state convictions were "the same as or equivalent to" any violent felony enumerated in Section 4201(c), as both contain means of committing the offense that, in Delaware, do not constitute a violent felony.[12]

The State filed its response on November 9, 2017.[13] Therein, the State argued that the underlying facts of Valentine's convictions would constitute violent

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[8] A005.

[9] A006.

[10] A006. The same day, the State entered a *nolle prosequi* as to the CCDW charge. A006.

[11] A006.

[12] A006.

[13] A007.

felonies in Delaware, attaching various documents in support of such argument.[14] The relevant documents upon which the State asked the sentencing court to rely consisted of two arrest warrants and the supporting affidavits of probable cause.[15]

Valentine filed a reply brief on December 4, 2017, contending the sentencing court could not look at the underlying facts of his prior convictions based upon precedent of the Supreme Court of the United States.[16]

The court ruled on December 5, 2017 that upon review of the documents provided by the State, Valentine was subject to a ten-year mandatory prison sentence.[17] On December 8, 2017, the defense filed a Motion for Reargument, challenging the constitutionality of the sentencing court's review of the State-provided documentation.[18]

On December 8, 2017, the sentencing court heard argument on the Motion for Reargument prior to sentencing Valentine, ultimately denying the claim.[19] On

[14] A198-200.

[15] A202-37.

[16] A007; A238-39.

[17] A007; A240-41.

[18] A007; A242-53.

[19] A008.

the charge of PFBPP, Valentine was sentenced to a ten-year mandatory-minimum term of incarceration.

A timely notice of appeal was filed on January 8, 2018. This is Mr. Valentine's Opening Brief.

## SUMMARY OF ARGUMENT

1. The sentencing court erred in imposing a mandatory sentence of ten years where Valentine's prior convictions stemmed from offenses that were not the same as or equivalent to Delaware violent felonies, as they encompassed conduct that do not constitute such crimes in this State. Moreover, the sentencing court, in determining that Valentine's prior convictions served to enhance his sentence under the PFBPP statute, reviewed documentation provided by the State that the Supreme Court of the United States has ruled cannot be reviewed by a sentencing court when assessing whether prior convictions enhance a sentence.

2. The trial court committed reversible error in denying Valentine's Motion to Suppress despite that the totality of the circumstances did not give rise to probable cause to conduct a warrantless search of the defendant's vehicle. Under the Delaware Constitution, the odor of marijuana, standing alone, cannot give rise to search a vehicle as such factor does not point to evidence of criminality due to the recent decriminalization of marijuana. When coupled only with a traffic infraction, the odor of marijuana is insufficient to allow the police to search a vehicle without a warrant.

## STATEMENT OF FACTS

On March 19, 2016, Trooper Lawson of the Delaware State Police conducted a traffic stop of a silver Chrysler sedan speeding on Route 202.[20] Upon approaching the vehicle, Trooper Lawson detected an odor of marijuana, though he had not been trained to determine whether the substance was raw or burnt.[21] After obtaining pertinent documentation from Valentine, the officer returned to his vehicle, whereupon he checked the validity of the license and registration provided to him by the driver.[22] Trooper Lawson, knowing he intended to search Valentine's vehicle, radioed for backup.[23]

Once another officer arrived, Trooper Lawson returned to the sedan and asked Valentine to exit the vehicle so he could be placed into custody while authorities searched the automobile based on the odor of marijuana.[24] After Valentine exited the vehicle, Trooper Lawson began his search, leading to the discovery of a firearm.[25] Prior to conducting the search, Valentine made no

[20] A120.

[21] A122.

[22] A120.

[23] A120.

[24] A120-21.

[25] A121.

admission to the officer about whether he possessed or had previously ingested any controlled substance.[26]

[26] A121.

## ARGUMENT

**CLAIM I. THE SENTENCING COURT ERRED IN ENHANCING VALENTINE'S SENTENCE FOR A PFBPP CONVICTION WHERE THE DEFENDANT'S PRIOR OUT-OF-STATE CONVICTIONS WERE NOT THE SAME AS OR EQUIVALENT TO DELAWARE VIOLENT FELONIES.**

### A. Question Presented

Whether the sentencing court erred in imposing a ten-year mandatory sentence where the offenses underlying Valentine's prior out-of-state convictions were not the same as or equivalent to a Delaware violent felony, and, in so doing, relied upon documentation the Supreme Court has ruled cannot be considered by a sentencing court. This issue was preserved via argument prior to and at sentencing.[27]

### B. Standard and Scope of Review

This Court reviews issues of statutory construction and interpretation *de novo*.[28] The Court reviews a sentence of a criminal defendant for abuse of discretion, finding error where it is clear that the sentencing judge relied on impermissible factors when imposing sentence.[29]

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[27] A006; A191-97; A242-55; A256-60.

[28] *Holland v. State*, 158 A.3d 452 n.27 (Del. 2017) (citing *Fountain v. State*, 139 A.3d 837, 840 (Del. 2016); *CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011)).

[29] *See Fuller v. State*, 860 A.2d 324, 332-33 (Del. 2004) (internal citations omitted).

## C. Merits of Argument

### 1. *The sentencing court improperly found that Valentine's prior out-of-state felony convictions were the same as or equivalent to Delaware violent felonies.*

The sentencing court committed reversible error in sentencing Valentine to any period of mandatory incarceration, as the defendant's prior foreign convictions not "violent felonies" capable of enhancing a PFBPP conviction under Delaware law.

Section 1448 of Title 11 states, in pertinent part, that any person convicted under the PFBPP statute "shall receive a minimum sentence of . . . [t]en years at Level V, if the person has been convicted on 2 or more separate occasions of any violent felony."[30] The statute defines "violent felony" as "any felony so designated by § 4201(c) of this title, or any offense set forth under . . . any other state . . . which is the same as or equivalent to any of the offenses designated as a violent felony by § 4201(c) of this title."[31]

Valentine has two prior felony convictions, both from Pennsylvania.[32] The first resulted from a violation of 35 *Pa. Cons. Stat.* § 780-113(30), which prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a

[30] 11 *Del. C.* § 1448(e)(1)(c).

[31] 11 *Del. C.* § 1448((e)(3).

[32] *See* A203, A223.

controlled substance . . . or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance."[33] Valentine's second conviction stems from a violation of 18 *Pa. Const. Stat.* § 6106(a)(1), which states that "any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person . . . without a valid and lawfully issued license under this chapter commits a felony of the third degree."[34] Neither offense is the same as or equivalent to an offense enumerated within Section 4201(c).

The drug offense for which Valentine was previously convicted simultaneously prohibits two types of conduct: (1) manufacturing, delivering, or possessing with the intent to manufacture or deliver a controlled substance, *or* (2) knowingly creating, delivering, or possessing with the intent to deliver a counterfeit controlled substance.[35] The first class of prohibited conduct—the possession with intent to deliver a controlled substance—is the same as or equivalent to Section 4754(1) of Title 16, which proscribes the "manufacture[ ], deliver[y], or possess[ion] with the intent to manufacture or deliver a controlled substance."[36] If the Pennsylvania statute forbade only such conduct, it would be

[33] 35 *Pa. Cons. Stat.* § 780-113(30).

[34] 18 *Pa. Const. Stat.* § 6106(a)(1).

[35] 35 *Pa. Cons. Stat.* § 780-113(30).

[36] 16 *Del. C.* § 4754(1).

the same as or equivalent to a qualifying Delaware violent felony. The second class of activity illegalized by the Pennsylvania law, however, renders it dissimilar to any Delaware violent felony.

The Pennsylvania statute also proscribes "knowingly creating, delivering, or possessing with the intent to deliver a *counterfeit* controlled substance."[37] Three Delaware statutes illegalize conduct related to a counterfeit controlled substance: Sections 4758, 4763, and 4764 of Title 16. Section 4758 mandates that "[a]ny person who knowingly manufactures, delivers, attempts to manufacture or deliver, or possesses with the intent to manufacture or deliver a counterfeit or purported controlled substance shall be guilty of a class E felony."[38] Section 4763, subject to enumerated exceptions, criminalizes the knowing or intentional possession, use, or consumption of a controlled substance or a counterfeit controlled substance.[39] Similarly, Section 4764 prohibits the knowing or intentional possession, use, or consumption of a controlled substance or a counterfeit controlled substance by persons under the ages of 18 and 21, respectively.[40] Of the three Delaware

[37] 35 *Pa. Cons. Stat.* § 780-113(30) (emphasis added).

[38] 16 *Del. C.* § 4758(a).

[39] 16 *Del. C.* § 4763(a).

[40] 16 *Del. C.* § 4764(a)-(d).

statutes, Section 4758 is most comparable with the conduct prohibited by the Pennsylvania statute for which Valentine was convicted.

35 *Pa. Cons. Stat.* § 780-113(30) criminalizes conduct that Delaware has illegalized via two statutes, Sections 4754(1) and Section 4758 of Title 16. Section 4758 is not classified as a violent felony within Section 4201(c).[41] Therefore, because the Pennsylvania statute under which Valentine was convicted prohibits conduct that, in Delaware, constitutes either a violent *or* a nonviolent felony, it is not the "same as or equivalent to" any offense enumerated by Section 4201(c) as a violent felony. Indeed, the Pennsylvania statute is more severe than Section 4754(1)—a Title 16 offense that is a violent felony in Delaware—as it criminalizes conduct that Section 4754(1) does not. Because the statute illegalizes a broader scope of behavior than any Delaware violent felony—and violation of the Pennsylvania law can constitute the commission of a nonviolent felony in this State—it is not the same as or equivalent to a Delaware qualifying violent felony as defined by the PFBPP statute. The sentencing court erred in holding otherwise.

Valentine's prior firearm conviction similarly stems from violation of a Pennsylvania statute broader than any Delaware violent felony. Such statute prohibits any person from carrying a firearm in any vehicle, or any person from

[41] *See* 11 *Del. C.* § 4201(c).

carrying a firearm concealed on or about his person without a valid, lawfully-issued license.[42]

Section 4201(c) classifies the offense of Carrying a Concealed Deadly Weapon, codified in Section 1442, as a violent felony.[43] Section 1442 states, in pertinent part, that "[a] person is guilty of carrying a concealed deadly weapon when the person carries a concealed deadly weapon upon or about the person without a license to do so."[44] The statute fails to prohibit the mere possession of a firearm in a vehicle.[45]

The Pennsylvania statute not only criminalizes carrying a firearm concealed upon or about one's person, but also prohibits an individual from having a firearm in a vehicle, regardless of whether such weapon is concealed.[46] Thus, in Pennsylvania, even if a firearm is in plain view on the front passenger seat of a vehicle, an individual can be found in violation of the statute without any showing by the Commonwealth that the firearm was concealed.[47]

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[42] 18 *Pa. Const. Stat.* § 6106(a)(1).

[43] 11 *Del. C.* § 4201(c).

[44] 11 *Del. C.* § 1442.

[45] *See id.*

[46] *See* 18 *Pa. Const. Stat.* § 6106(a)(1).

[47] *See, e.g., Com. v. Jones*, 2016 WL 6198646 (Pa. Super. Ct. Oct. 24, 2016) (affirming defendant's conviction under 18 *Pa. Const. Stat.* § 6106(a)(1) where police observed a handgun "on the passenger seat of the vehicle in plain view.").

The Pennsylvania statute under which Valentine was convicted is broader than Section 1442. Mere possession of a plainly visible firearm in a vehicle in Pennsylvania constitutes a felony; such conduct is not prohibited in any fashion in Delaware. Thus, the Pennsylvania statute under which Valentine was convicted is not the same as or equivalent to Section 1442 of Title 11, or any offense enumerated as a violent felony in Section 4201(c). Consequently, the sentencing court erred in finding the conviction enhanced Valentine's sentence.

The Seventh Circuit Court of Appeals considered the issue of whether a foreign statute broader than an arguably comparable state statute could qualify as a prior violent felony for the purpose of sentence enhancement in *United States v. Haney*.[48] The *Haney* defendant was convicted of a firearm offense in Iowa and sentenced under a statutory scheme that enhanced his penalty due to three prior violent felony convictions.[49] Specifically, the *Henry* defendant had previously been convicted of burglary offenses in Illinois, for which "the relevant statute applied not only to buildings but also to vehicles, such as 'housetrailer[s], watercraft, aircraft, motor vehicle[s] . . . [and] railroad car[s]."[50] The Iowa

[48] 840 F.3d 472 (7th Cir. 2016).

[49] *Id*. at 473-74.

[50] *Id*. at 475 (internal citations omitted).

burglary statute was limited to buildings.[51] The Court of Appeals held the defendant's "statute of conviction is broader than generic burglary" and that "neither of [his] burglary convictions are appropriate predicates under" the sentencing scheme.[52]

Valentine's statutes of conviction are comparable to those analyzed in *Haney*. The drug offense is broader as it includes knowingly creating, delivering, or possessing with the intent to deliver a *counterfeit* controlled substance, unlike any comparable Delaware violent felony. The firearm offense is broader as it prohibits possessing a firearm in plain view in a vehicle, conduct that is not criminal in Delaware. Just as the statute at issue in *Haney* could not give rise to a sentence enhancement because it criminalized burglary of vehicles in Illinois—where the comparable Illinois statute only proscribed such behavior in buildings—neither could Valentine's statutes of conviction.

The State contended below that the sentencing court should look to the initial arrest warrant and supporting affidavits of probable related to the prior convictions to conclude Valentine's conduct constituted violation of a Delaware violent felony, relying upon two decisions by this Court in support of its

[51] *Id.*

[52] *Id.*

argument.[53] Both cited cases—*Fletcher v. State*[54] and *Morales v. State*[55]—are inapplicable, however, as each addresses the analysis of out-of-state convictions in determining whether a defendant qualifies as an habitual offender, not whether he is subject to an enhanced sentence under the PFBPP statute. Such distinction is important given the difference in each statute as to the degree of comparability an out-of-state conviction must have to a Delaware violent felony before it can enhance a sentence.

Unlike Section 1448—which requires an out-of-state conviction stem from an offense "which is the same as or equivalent" to a Delaware violent felony—the habitual offender statute simply requires a foreign conviction be "comparable" to an offense enumerated in Section 4201(c).[56] The meaning of each word connotes a different degree of comparison; while "same" and "equivalent" require something

[53] A200.

[54] 409 A.2d 1254 (Del. 1979).

[55] 696 A.2d 390 (Del. 1997).

[56] 11 *Del. C.* § 4214(a) ("Any person who has been 2 times convicted of a Title 11 violent felony . . . as defined in § 4201(c) of this title . . . , and/or *any comparable violent felony as defined by another state* . . . .") (emphasis added). It is worth noting that at the time *Fletcher* and *Morales* were decided, the language of the habitual offender statute were less clear, referencing specific felonies "hereinafter specifically named, under the laws of this State, and/or any other state." *See Morales*, 696 A.2d at 392 n.1. The "comparable" language was not added to Section 4214 until its recent amendment in 2016. *See* S.B. 163, 148th Gen. Assembly, 2nd Reg. Sess. (Del. 2016).

to be identical[57], "comparable" merely necessitates a finding of similarity.[58] Valentine's foreign convictions are similar insofar as they encompass conduct that constitute violent felonies in Delaware, but they are not identical as they are criminalize behavior not contemplated by any violent felony in this State.

In sentencing Valentine to a mandatory term of imprisonment, the sentencing court ruled that the charges underlying the Pennsylvania convictions "meet generally the definition of the Delaware code in regards to both of them as violent felonies."[59] Section 1448 requires out-of-state convictions do more than "generally" match a Delaware violent felony—they must be the same as or equivalent to such illegal conduct. Consequently, the sentencing court erred in finding that such convictions satisfied the requirements of the PFBPP statute.

2. *In finding that Valentine's prior convictions constituted violent felonies under Delaware law, the sentencing court improperly relied upon documentation forbidden by the Supreme Court of the United States.*

The sentencing court improperly determined that Valentine was subject to an enhanced penalty under Section 1448 by reviewing arrest reports and associated

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[57] *See Same (adj)*, Concise Oxford American Dictionary (1st ed. 2006) (defining "same" as "identical; not different; unchanged"; *see also Equivalent (adj)*, Concise Oxford American Dictionary (1st ed. 2006) (defining "equivalent" as "equal in value, amount, function, meaning, etc.").

[58] *Comparable (adj)*, Concise Oxford American Dictionary (1st ed. 2006) (defining "comparable" as "able to be likened to another; similar.").

[59] A260.

affidavits of probable cause when analyzing the defendant's prior convictions, thereby resulting in the imposition of an illegal sentence.

In *Mathis v. United States*, the Supreme Court stated:

> This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. *That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.* He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" or "what the jury in a prior trial must have accepted as the theory of the crime." He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.[60]

In so stating, the *Mathis* Court relied, in part, upon its prior decisions in *Apprendi v. New Jersey*[61] and *Shepard v. United States*.[62] The Supreme Court recognized a distinction between elements of the crime of conviction and the particular facts of a given case:

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[60] *Mathis v. United States*, 136 S.Ct. 2243, 2252 (2016) (internal citations omitted) (emphasis added); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The "statutory maximum" as used in *Apprendi* "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original).

[61] 530 U.S. at 490 (holding that, under the Sixth Amendment, any fact other than a prior conviction that exposes a defendant to an enhanced sentence must be found by a jury, not a judge).

[62] 544 U.S. 13, 25 (2005) (plurality opinion) (holding that a judge cannot exceed merely identifying the prior crime of conviction to ascertain the manner in which a defendant committed that offense).

> "Elements" are the "constituent parts" of a crime's legal definition—the things the prosecution must prove to sustain a conviction. At trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits to when he pleads guilty.[63]

The Court differentiated the elements of a crime from the facts, describing the latter as "mere real-world things—extraneous to the crime's legal requirements . . . having no legal effect [or] consequence."[64] The Court noted that "if the crime of conviction covers any more conduct than the generic offense, then it is not [equivalent to the requisite statute]—*even if the defendant's actual conduct (i.e., the facts of the crime) fits within the generic offense's boundaries*."[65]

The *Mathis* Court indicated that one of the reasons an elements-only analysis was the only constitutional mechanism in which to evaluate prior convictions for the purpose of enhancing a sentence was because:

> [A]n elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to—or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not

[63] 136 S.Ct. at 2248.

[64] *Id*. (internal citations and quotations omitted).

[65] *Id*. (emphasis added).

> come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.[66]

The Court delineated two approaches for comparing statutes: a categorical approach and a modified categorical approach.[67] Sentencing courts employ the former when two statutes "set[ ] out a single (or 'indivisible') set of elements to define a single crime."[68] A modified categorical approach, however, should be applied when statutes are more complicated and have alternative elements or means of committing an offense.[69]

The Supreme Court again referred back to *Shepard* in governing how a sentencing court properly conducts its analysis under the modified categorical approach, noting that "a sentencing court looks to a *limited class of documents* (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of."[70] The court then must "compare that crime, as the categorical approach commands, with the relevant generic offense."[71]

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[66] *Id*. at 2253.

[67] *Id*. at 2248-49.

[68] *Id*. at 2248.

[69] *Id*. at 2249.

[70] *Id*. (citing *Shepard*, 544 U.S. at 13).

[71] *Id*.

As discussed *supra*, both Pennsylvania statutes under which Valentine was previously convicted include alternate means of violating the statute that, if committed in Delaware, would not qualify as violent felonies. Consequently, the sentencing court was required to apply the modified categorical approach in determining whether either conviction is the same as or equivalent to a violent felony in this State. Nevertheless, the sentencing court considered the initial arrest warrant and supporting affidavits of probable cause in determining that Valentine's prior convictions constituted violent felonies under Delaware law.

Under *Shepard* and *Mathis*, such documents are not within the scope of documents a sentencing court may consider. Instead, a sentencing court should look to the charging document or jury instructions[72] to ascertain whether the statute is the same as or equivalent to a Delaware violent felony. The Information filed by the Commonwealth of Philadelphia County in reference to the relevant charge reads as follows:

> Being a person not registered under the controlled substance, drug, device and cosmetic act, or a practitioner not registered or licensed by the appropriate state board, and not having been authorized by said act to do so, manufactured, delivered, or possessed with intent to manufacture or deliver, a controlled substance, or knowingly created, delivered or possessed with intent to deliver, a counterfeit controlled substance.[73]

[72] Valentine's "drug" conviction was after a jury trial, therefore the other documents enumerated in *Mathis* and *Shepard* do not exist.

[73] A217. The State did not provide the jury instructions to the sentencing court, thus rendering such document incapable of review. *See Stone v. State*, 1994 WL 276984 at *2-3 (Del. Supr.

Under the modified categorical approach, the Information does not establish that Valentine was convicted of an offense the same as or equivalent to a Delaware violent felony. Specifically, the jury need not have determined that Valentine possessed a controlled substance in order to convict, but rather could have been convinced beyond a reasonable doubt that he possessed a *counterfeit* controlled substance with the requisite intent.

The same is true of Valentine's prior firearm conviction. The sentencing court erred in relying upon the affidavit of probable cause to enhance the defendant's sentence, as it was limited to documents such as the Information or a transcript of the plea colloquy in assessing whether the prior conviction was the same as or equivalent to a Delaware violent felony. The charging document alleges that Valentine:

> Carried a firearm in a vehicle, or carried a firearm concealed on or about his person, except in his or her place of abode or fixed place of business, without a valid and lawfully issued license under the uniform firearms act.[74]

Under *Mathis*, the sentencing court was "barred from making a disputed determination about 'what the defendant and state judge must have understood as

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Jun. 14, 1994) (finding that the sentencing court properly found beyond a reasonable doubt, based upon documentary evidence provided by the State, that defendant had the requisite prior convictions to be declared an habitual offender).

[74] A223.

the factual basis of the prior plea.'"[75] The charging document expresses two means of committing the firearm offense—(1) possessing a firearm in a vehicle regardless of whether it is concealed or (2) carrying a firearm concealed on or about one's person. Absent a transcript of the plea colloquy, the sentencing court lacked any documentary evidence it could properly consider to determine whether the prior firearm conviction was equivalent to a Delaware violent felony.

The documentation available to the sentencing court under the modified categorical approach did not support a finding that Valentine had previously been convicted of any offense that was the same as or equivalent to a Delaware violent felony. The sentencing court's reliance upon arrest warrants and affidavits or probable cause was improper, mandating reversal.

[75] *Mathis*, 136 S.Ct. at 2252.

## CLAIM II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED DURING A WARRANTLESS SEARCH OF VALENTINE'S VEHICLE AS THE TOTALITY OF THE CIRCUMSTANCES DID NOT GIVE RISE TO PROBABLE CAUSE.

### A. Question Presented

Whether the trial court committed reversible error when it denied the Motion to Suppress filed by Valentine despite that, subsequent to the decriminalization of marijuana, the totality of the circumstances known to the officer failed to give rise to probable cause that criminality was afoot before he conducted a warrantless search. This issue was preserved via the filing of a Motion to Suppress Evidence.[76]

### B. Standard and Scope of Review

When reviewing the denial of a motion to suppress, this Court reviews legal conclusions made by the trial court *de novo*.[77]

### C. Merits of Argument

Police illegally searched Valentine's vehicle when Trooper Lawson, without a warrant, did so without probable cause. The United States and Delaware Constitutions work in conjunction to protect the rights of ordinary citizens from unreasonable searches and seizures.[78] A warrantless search is generally *per se*

[76] A004; A011-108.

[77] *Bradley v. State*, 51 A.3d 423, 433 (Del. 2012).

[78] U.S. Const. Amend. IV; Del. Const. Art. I, § 6.

unreasonable absent exigent circumstances, unless supported by a warrant.[79] It is well settled in Delaware that "any evidence recovered or derived from an illegal search and seizure" must be excluded from evidence.[80] Once an officer exceeds the scope of his authority and conducts an unreasonable search, the fruits of his search, whether direct or indirect, must be suppressed.[81]

This Court has routinely recognized that the Federal Constitution does not limit constitutional protections within Delaware. Indeed, "the United States Constitution establishes a system of dual sovereignty: a federal government and state governments."[82] Consequently, Delaware, as a State in the Union, has the authority to extend greater protections to its citizens than those afforded by the United States Constitution.

Delaware judges, before ascending to the bench, take an oath "to support and defend both the Constitution of my country [United States] and my State [Delaware]."[83] Thus, Delaware judicial officers recognize that Delaware's

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[79] *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)); *Williams v. State*, 962 A.2d 210, 216 (Del. 2008) (noting that warrantless searches are presumed unreasonable under the Fourth Amendment); *Scott v. State*, 672 A.2d 550, 552 (Del. 1996) (citing *Hanna v. State*, 591 A.2d 158, 162 (Del. 1991)).

[80] *Jones v. State*, 745 A.2d 856, 872-73 (Del. 1999).

[81] *Hicks v. State*, 631 A.2d 6, 12 (Del. 1993).

[82] *Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000) (quoting *Jones*, 745 A.2d at 866).

[83] *Dorsey*, 761 A.2d at 814 (citing Del. Const. Art. XIV, § 1).

Declaration of Rights is not a "mirror image" of the federal Bill of Rights.[84] Accordingly, to "faithfully discharge the responsibilities of their office," Delaware's judges must analyze the individual rights guaranteed to Delaware's citizens, and not "simply hold[ ] that the Declaration of Rights in Article I of the Delaware Constitution is necessarily in 'lock step' with the United States Supreme Court's construction of the federal Bill of Rights."[85]

In *Sanders v. State*, the State argued that provisions within the Delaware Constitution must mean the same thing as the United States Constitution.[86] This Court rejected the argument, relying on its ability to consider multiple sources when rendering a decision that the United States Supreme Court cannot, such as Delaware's constitution, state statutes, and common law.[87] The Court thoroughly explained the existence and importance of dual sovereignty:

> Although Delaware is bound together with the forty-nine other States in an indivisible federal union, it remains a sovereign State, governed by its own laws and shaped by its own unique heritage. An examination of those laws and that heritage may, from time to time, lead to the conclusion that Delaware's citizens enjoy more rights, more constitutional protections, than the Federal Constitution extends to them. If we were to hold that our Constitution is simply a mirror image of the Federal Constitution, we would be relinquishing an important

[84] *Dorsey*, 761 A.2d at 814 (citing *Claudio v. State*, 585 A.2d 1287, 1289 (Del. 1991)).

[85] *See Dorsey*, 761 A.2d a t 814.

[86] 585 A.2d 117, 144 (Del. 1990).

[87] *See Dorsey*, 761 A.2d at 814.

> incident of this State's sovereignty. In a very real sense, Delaware would become less of a State than its sister States who recognize the independent significance of their Constitutions. Subject to the limits of the Supremacy Clause, no one would argue that our General Assembly should not legislate on subjects such as environmental protection merely because Congress has done so. Similarly, this State's judicial branch should not be foreclosed from interpreting our Constitution merely because the United States Supreme Court has interpreted similar provisions of the Federal Constitution.[88]

In *Jones v. State*, Chief Justice Veasey analyzed the myriad differences between the search and seizure provisions contained within the Delaware Constitution versus the United States Constitution.[89] Delaware adopted its Constitution and Declaration of Rights in September 1776, approximately two months after the Declaration of Independence and fifteen years before the adoption of the federal Bill of Rights.[90] This timing is significant, as it provides insight into the intent behind the draftsmen decision-making process when drafting the Delaware Constitution. To eschew the governmental tyranny to which they had become accustomed, colonial lawyers drafting state constitutions incorporated explicit provisions dealing with the English Common law and included a Declaration of Rights.[91] Those drafting the Delaware Constitution agreed and, in

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[88] *Sanders*, 585 A.2d at 145 (other citations omitted).

[89] 745 A.2d 856, 864-67 (Del. 1999).

[90] *Dorsey*, 761 A.2d at 815.

[91] *Id*. at 815-16.

1776, incorporated Article 25 into the Constitution of this State.[92] Therein, Delaware adopted its first search and seizure protections.[93]

It is well-settled that Article I, § 6 of the Delaware Constitution provides "*different* and *broader* protections than those guaranteed by the Fourth Amendment."[94] This is clear as the search and seizure provision adopted in Delaware's first constitution came fifteen years before the Fourth Amendment to the United States Constitution and resembled the provision used by Delaware's sister state, Pennsylvania.[95]

After the United States Constitution afforded citizens of this nation protection from unreasonable searches and seizures via adoption of the Fourth Amendment, Delaware adopted a second version of its Constitution in 1792.[96] The 1792 Delaware Constitution, rather than mirroring the language of the newly-

[92] *Id*. at 816 (citing the Del. Const. of 1776, art. XXV: "The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, & c. agreed to by this convention.").

[93] *Id*. at 816.

[94] *Id*. at 817 (citing *Jones*, 745 A.2d at 865-66) (emphasis in the original).

[95] *Id*. (citing *Jones*, 745 A.2d at 865-67).

[96] *Dorsey* at 817.

minted Fourth Amendment, continued to march forward with its own search and seizure language.[97]

As the Court in *Jones* and *Dorsey* made clear, although the contrast in verbiage between Article I, Section 6 of the Delaware Constitution and the Fourth Amendment to the United States Constitution appears merely to be textual, the decision by Delaware lawmakers not to adopt the language of the federal Constitution is significant.

Under the United States Constitution, courts have held that the odor of marijuana alone can give rise to probable cause.[98] This Court has not decided whether, under the Delaware Constitution, the mere odor of marijuana creates probable cause.[99] However, the shifting attitudes of Delaware's citizens in their support for the legalization of marijuana furnishes grounds to expand the protections afforded to Delawareans under the Constitution of this State.

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[97] *Id*.

[98] *See, e.g., Fowler v. State*, 2016 WL 5853434 at *1 (Del. Supr. Sept. 29, 2016) (holding that the Superior Court did not err in holding that the odor of marijuana constituted probable cause after refusing to consider the same argument under the Delaware Constitution); *United States v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004) ("[T]he odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place."); *United States v. Winter*, 221 F.3d 1039, 1042 (8th Cir. 2000) (holding that the odor of raw marijuana alone created probable cause).

[99] *See, e.g., Fowler*, 2016 WL 5853434 at *1 (refusing to consider argument that more than the odor of marijuana is required for probable cause under the Delaware Constitution because appellant "failed to discuss or analyze the assertions he makes about the Delaware Constitution—both before the Superior Court and also before this Court.").

Moreover, the General Assembly's passage of the Medical Marijuana Act in 2011[100] and subsequent decriminalization of possession of personal use quantities of marijuana in 2015[101] lessens the likelihood that the odor of marijuana alone predicts criminality, as mere possession of the substance no longer constitutes a crime in the State of Delaware. Accordingly, absent additional facts beyond the scent of marijuana, no probable cause can exist.

Courts within this State have consistently refused to consider mere conclusory allegations that the rights of a defendant were violated under the Delaware Constitution.[102] Instead, to properly raise a state constitutional violation, a party "should include a discussion and analysis of one or more of the following non-exclusive criteria: 'textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes.'"[103] This Court has explained that state constitutional claims can arise under the "public attitudes" criterion when

[100] 16 *Del. C.* §§ 4901A-28A.

[101] 16 *Del. C.* § 4764(c).

[102] *See, e.g., Harris v. State*, 2014 WL 3883433 at *1 (Del. Supr. July 29, 2014) ("This Court has consistently declined to consider state constitutional claims that the appellant has failed to support other than with conclusory allegations.").

[103] *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) (citing *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005)).

"[d]istinctive attitudes of a state's citizenry . . . furnish grounds to expand constitutional rights under state charters."[104] Although Delaware has never relied upon the "public attitudes" criterion in deciding the scope of the Delaware Constitution, other jurisdictions "have pointed to public attitudes as a relevant factor in their deliberations."[105]

Since 1972, marijuana has been classified in Delaware as a Schedule I controlled substance.[106] Mere possession of marijuana has been criminalized in Delaware since at least 1957.[107] Possession alone continued to violate the laws of this State, without exception, until 2011.

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[104] *Jones*, 745 A.2d at 865 (citing *State v. Hunt*, 450 A.2d 952, 962 (N.J. 1982) (Handler, J., concurring)).

[105] *Id*. *See, e.g.*, *Ravin v. State*, 537 P.2d 494, 503-04 (Alaska 1975) ("In Alaska we have also recognized the distinctive nature of the home as a place where the individual's privacy receives special protection. This court has consistently recognized that the home is constitutionally protected from unreasonable searches and seizures, reasoning that the home itself retains a protected status under the Fourth Amendment and Alaska's constitution distinct from that of the occupant's person. The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.") (internal citations omitted); *see also Dist. Attorney v. Watson*, 411 N.E.2d 1274, 1282 (Mass. 1980) (holding the death penalty unconstitutional under Massachusetts constitution as the practice contravened prevailing standards of decency in Massachusetts, evidenced by the absence of executions for over thirty years).

[106] *See* 16 *Del. C.* § 4714(b)(19).

[107] *See, e.g.*, *State v. Miller*, 129 A.2d 548, 548 (Del. Super. 1957) ("The State filed an Information charging defendant with a violation of 16 Del. C. § 4702, in that he did have in his possession marijuana cigarettes.").

On May 13, 2011, Governor Jack Markell signed Senate Bill 17 into law, amending Title 16 to incorporate the Delaware Medical Marijuana Act (hereinafter "the Act").[108] On July 1, 2011, the Act took effect.[109] The Act included significant discussion about the medical benefits of marijuana, noting that the substance's "recorded use as a medicine goes back nearly 5,000 years."[110] Noting that several states[111] had already protected their citizens from prosecution for the usage of marijuana for medicinal purposes, the legislature sought to "join[ ] in this effort for the health and welfare of its citizens."[112] Specifically, the purpose of the Act was to "protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties, and property forfeiture if such patients engage in the medical use of marijuana."[113] The draftsmen of the bill also recognized the importance of protecting citizens even from arrest, noting that since a scant number of marijuana arrests are made under

[108] 16 *Del. C.* §§ 4901A-28A.

[109] 16 *Del. C.* § 4926A.

[110] 16 *Del. C.* § 4901A(a).

[111] Including "Alaska, Arizona, California, Colorado, the District of Columbia, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, New Jersey, Oregon, Vermont, Rhode Island, and Washington . . . ." 16 *Del. C.* § 4901A(e).

[112] *Id*.

[113] 16 *Del. C.* § 4901A(g).

federal statutes, "changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill patients who have a medical need to use marijuana."[114]

The legislature, predicting that governmental reaction to the passage of the Act may be negative, included within it the following provision: "If the Department[115] fails to adopt regulations to implement this chapter within the times provided for in this chapter, any citizen may commence an action in Superior Court to compel the Department to perform the actions mandated pursuant to the provisions of this chapter."[116]

Although the Act became law in 2011, it took years for the first medical marijuana dispensary to open within the State. In the interim, Delaware citizens waited impatiently, contending the State was not implementing the Act in a timely manner.[117] Meanwhile, before the dispensary even opened, hundreds of Delawareans submitted applications to the Department of Health and Social Services to become certified users of medicinal marijuana.[118] Even before the first

[114] 16 *Del. C.* § 4901A(d).

[115] "'Department'" means the Delaware Department of Health and Social Services or its successor agency." 16 *Del. C.* § 4902A(4).

[116] 16 *Del. C.* § 4924A.

[117] A069; A071-72.

[118] A074-77.

cannabis dispensary opened in June 2015, some citizens argued marijuana should simply be legalized.[119]

At the Middletown Hummers Parade on New Year's Day in 2015, participants in the festivities used the forum to make their voices heard, throwing fake marijuana "joints" into the crowd, unequivocally signaling their desire to reform laws in this State related to marijuana.[120] Their actions did not go unnoticed, as Governor Markell, on June 18, 2015, signed House Bill 39 into law, thereby decriminalizing the possession of a personal use quantity[121] of marijuana, as well as private use or consumption of the substance.[122]

Before House Bill 39 was finalized in the General Assembly, the Public Safety & Homeland Security Committee noted that the purpose of the bill was to "reduce barriers to education and employment created when individuals must disclose arrest records; decriminalizing small amounts of marijuana would help these individuals to participate fully in society."[123] The law took effect on

[119] A079.

[120] A081.

[121] "Personal use quantity" is defined as an ounce or less of marijuana in leaf form. 16 *Del. C.* § 4701(33).

[122] 16 *Del. C.* § 4764(c).

[123] May 6, 2015, Delaware Committee Report, 2015 DE H.B. 39 (NS).

December 18, 2015.[124] Today, any person older than twenty-one found to possess an ounce or less of marijuana, or who uses such substance privately, is merely assessed a civil penalty in the amount of $100.00.[125]

Even in the last five years, the public's attitude in favor of legalizing marijuana increased. In a 2014 poll conducted by the University of Delaware, fifty-six percent of Delaware residents stated that marijuana should be legalized for adult recreational use.[126] Only thirty-nine percent opposed such a change.[127] A professor at the University stated that "[i]n all age groups except for those 60 or older, a substantial majority favored legalization."[128] Two years later, the University of Delaware conducted another survey, finding even more Delawareans favored the legalization of marijuana.[129] Whereas fifty-six percent of citizens previously supported such legislation, that number increased to sixty-one percent

[124] *See* 16 *Del. C.* § 4764 (WL 2016).

[125] *Id*.

[126] A084.

[127] A084.

[128] A084.

[129] A087-89.

in 2016.[130] The number of Delaware residents who opposed legalization shrank from thirty-nine percent to thirty-five percent.[131]

State Representative Helene Keeley, who introduced House Bill 39 in the General Assembly, recognized the growing acceptance of marijuana among her constituents, stating "there are a lot of people out there who instead of going home and having a martini or going home and having a glass of wine, they want to go home and they want to take a couple of hits."[132]

Meanwhile, Delawareans continue to voice their support of fully legalizing marijuana. On December 4, 2016, Newark witnessed the third-annual rally sponsored by the Cannabis Bureau of Delaware, timed to coincide with the eighty-third anniversary of the end of Prohibition in the nation.[133]

The public attitude of Delaware's citizenry toward marijuana reveals an unequivocal desire to fully legalize the substance. Such an attitude furnishes ground to expand the protections afforded under the Delaware Constitution, in contrast to its federal counterpart, when assessing the weight given to the mere odor of marijuana in a probable cause analysis.

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[130] A087.

[131] A087.

[132] A096.

[133] A102.

Probable cause is measured by evaluating the totality of the circumstances known to the arresting officer at the time of the search.[134] To establish probable cause, police must have knowledge of facts that suggest, under the totality of the circumstances, "that there is a fair probability that the defendant has committed a crime."[135]

Citizens of this State can legally possess marijuana for medicinal purposes pursuant to the Medical Marijuana Act. Similarly, Title 16 of the Delaware Code allows individuals twenty-one or older to have an ounce or less of marijuana in their possession without exposing themselves to criminal liability.

In 2008, Massachusetts passed legislation decriminalizing the possession of one ounce or less of marijuana within the state.[136] Three years later in *Commonwealth v. Cruz*, the Supreme Judicial Court of Massachusetts was tasked with deciding, in the wake of decriminalization, whether the odor of marijuana alone allowed police to order an individual out of a vehicle.[137] In *Cruz*, police

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[134] *Hovington v. State*, 616 A.2d 829, 833 (Del. 1992).

[135] *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993).

[136] *See Mass. Gen. Laws* ch. 94, § 32L (2008) ("Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification.").

[137] *Com. v. Cruz*, 945 N.E.2d 899 (Mass. 2011).

observed a vehicle parked in front of a fire hydrant—a civil motor vehicle violation—and subsequently pulled up next to the automobile.[138] After a brief exchange, the officers exited their squad car, walked toward the illegally-parked car, whereupon they detected a faint odor of burnt marijuana.[139]

Police described the *Cruz* passengers as "very nervous" and panicked.[140] The driver admitted that he had smoked marijuana "earlier in the day."[141] The driver told police there was nothing else in the vehicle police "should know about."[142] The *Cruz* defendant—the passenger in the vehicle—was also described as nervous and made minimal eye contact with the police.[143] The officers did not see any contraband or weapons within plain view in the car, nor did either passenger make "any furtive gestures or threatening movements."[144] The occupants of the vehicle were not cited for the traffic violation and police did not administer field sobriety tests to ascertain whether the driver was under the

[138] *Id*. at 903.

[139] *Id*.

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Id*.

[144] *Id*.

influence.[145] The officers returned to their vehicle and called for backup.[146] While waiting, the police ordered the occupants out of the vehicle.[147] As the *Cruz* defendant stepped out of the vehicle, the police asked him whether he had "anything on his person," to which he replied that he had "a little rock for myself" in his pocket.[148] Police reached into the defendant's pocket and found crack cocaine.[149]

At the outset of its analysis, the Massachusetts court noted that "[a]lthough we have held in the past that the odor of marijuana alone provides probable cause to believe criminal activity is underway, we now reconsider our jurisprudence in light of the change to our laws."[150] After concluding that the initial interaction between the police and defendant was justified due to the traffic infraction, the court next addressed whether the officers had reasonable suspicion to believe the defendant was engaged in criminal activity.[151] The Court held that when "the

[145] *Id*.

[146] *Id*.

[147] *Id*.

[148] *Id*. at 903-04.

[149] *Id*. at 904.

[150] *Id*. at 904-05 (internal citations omitted).

[151] *Id*. at 906.

penalty scheme for possession of one ounce or less of marijuana changed," so too did "the status of this conduct."[152] The Court discussed the purpose of the statute, noting it "does away with traditional criminal consequences, including the long-term and embarrassing effect that a criminal record has on employment or applying for school loans, demonstrating the intent of the voters to change the societal impact of possessing one ounce or less of marijuana."[153] The court concluded "the entire statutory scheme also implicates police conduct in the field. Ferreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statute."[154] Based on its conclusion that the decriminalization statute changed the status of marijuana possession, the Court ultimately held that "the odor of burnt marijuana alone cannot reasonably provide suspicion of criminal activity to justify an exit order."[155]

The *Cruz* court also addressed the argument that the odor of marijuana nevertheless created probable cause to search.[156] While noting that

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[152] *Id*. at 909.

[153] *Id*. at 910.

[154] *Id*.

[155] *Id*.

[156] *Id*. at 911-14.

decriminalization was not legalization, thereby rendering marijuana contraband despite the recent statutory changes, the court rejected the State's argument that a warrantless search of an automobile may be based on probable cause that contraband is present.[157] Looking at the totality of the circumstances, the court held that the police articulated no facts that would "support probable cause that a *criminal* amount of contraband was present in the car."[158] The court ultimately affirmed the lower court's decision to grant the defendant's motion to suppress.[159]

Three years later, in *Commonwealth v. Overmyer*, the Massachusetts Supreme Judicial Court was confronted with a variation on the question presented in *Cruz*: "whether the smell of unburnt, as opposed to burnt, marijuana suffices to establish probable cause to believe that an automobile contains contraband or evidence of a crime."[160] In *Overmyer*, police responded to the scene of an automobile accident, whereupon they noticed a strong odor of raw marijuana emanating from one of the vehicles involved in the collision.[161] Police asked the

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[157] *Id*. at 911-12.

[158] *Id*. at 913 (emphasis in original).

[159] *Id*. at 914.

[160] *Com. v. Overmyer*, 11 N.E.3d 1054, 1055 (Mass. 2014) (holding that the odor of unburnt marijuana, standing alone, does not give rise to probable cause to search an automobile, but remanding for further fact-finding on whether police had probable cause to arrest the defendant for criminal possession of marijuana on the basis that the amount of marijuana seized from the vehicle with defendant's permission).

[161] *Id*. at 1056.

driver if there was marijuana in the vehicle, and he responded affirmatively.[162] The defendant gave police the keys to the glove compartment of his vehicle, leading to the discovery of a "fat bag" of marijuana.[163] Officers still detected a strong odor of marijuana, however, and suspected that "an unspecified amount of marijuana" was still in the vehicle.[164] Police did not observe any other indicators to support such a conclusion.[165] The driver denied that any more of the substance was in his automobile, but eventually admitted that more marijuana was in the car after police informed him that a canine unit was on its way.[166] Police subsequently searched the vehicle and found two large freezer bags filled with marijuana within a backpack in the backseat.[167]

In analyzing whether police had probable cause to search the vehicle based on odor of marijuana alone, the *Overmyer* court rejected the State's argument that "the discovery of some controlled substances gives probable cause to search for additional controlled substances in the vicinity" insofar as it related to

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[162] *Id*.

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] *Id*.

[167] *Id*.

marijuana.[168] The court also observed that, since marijuana was decriminalized in the State, Massachusetts courts had routinely found that the odor of burnt marijuana alone only pointed to the presence of "*some* marijuana, not necessarily a criminal amount."[169] The court afforded little weight to the officers' description of the marijuana odor as "strong" or "very strong," as "such characterizations of odors as strong or weak are inherently subjective; what one person believes to be a powerful scent may fail to register as potently for another."[170] Moreover, the court was unconvinced that "a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine."[171] Ultimately, the *Overmyer* court ruled the odor of raw marijuana did not justify the search of the back seat of the defendant's vehicle under the automobile exception to the warrant requirement.

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[168] *Id*. at 20.

[169] *Id*. at 1058 (emphasis in original). *See, e.g.*, *Com. v. Pacheco*, 985 N.E.2d 839 (Mass. 2013) (presence of less than one ounce of marijuana in vehicle did not give rise to probable cause to search it for additional marijuana); *Com. v. Jackson*, 985 N.E.2d 853 (Mass. 2013) (observation of defendant with marijuana cigarette did not give rise to probable cause to search); *Com. v. Daniel*, 985 N.E.2d 843 (Mass. 2013) (defendant's voluntary surrender of two bags of marijuana totaling less than one ounce did not give rise to probable cause to search vehicle).

[170] *Overmyer*, 11 N.E.3d at 1059 (citing Doty, Wudarski, Marshall, & Hastings, *Marijuana Odor Perception: Studies Modeled from Probable Cause Cases*, 28 Law & Hum. Behav. 223, 232 (2004) (identifying traits such as gender and age that may influence ability to smell)).

[171] *Id*.

A number of other jurisdictions have similarly held that the odor of marijuana alone does not create probable cause to conduct a warrantless search.[172]

Just as the Massachusetts decriminalization statute required police to point to specific, articulable facts that a criminal amount of marijuana was present in a vehicle to give rise to probable cause, so too must the Delaware statute. Here, Trooper Lawson detected the odor of marijuana, but was unable to ascertain whether the odor was that of raw or burnt marijuana. The State can point to no additional facts that tend to suggest Valentine had been or was currently engaged in criminal behavior. Just as in *Cruz* and *Overmyer*, the absence of additional facts that would support the conclusion that Valentine was in possession of a criminal amount of marijuana. Moreover, Delaware citizens are afforded even greater access to marijuana under the Medical Marijuana Act. Despite that legislative mandate, Trooper Lawson took no steps to ascertain whether Valentine was in lawful possession of marijuana for medical purposes prior to searching the vehicle.

[172] *See, e.g., State v. Steelman*, 93 S.W.3d 102, 108 (Tex. Crim. App. 2002) (*en banc*) ("The odor of marijuana, standing alone, does not authorize a warrantless search and seizure in a home."); *State v. Jones*, 1998 WL 515939 at *3 (Ohio Ct. App. Aug. 3, 1998) (holding that "suspicious odors must be confirmed by tangible evidence in order to justify a search"); *State v. Fisher*, 1997 WL 799912 at *2-3 (Ohio Ct. App. Dec. 26, 1997) (holding that odor of marijuana could lead to a finding of probable cause only in conjunction with other factors); *State v. Schoendaller*, 578 P.2d 730, 734 (Mont. 1978) ("[T]o hold that an odor alone, absent evidence of visible contents, is deemed equivalent to plain view might very easily mislead police officers into fruitless invasions of privacy where there is no contraband.").

Additionally, in a memorandum issued by the State Prosecutor to the Delaware Chiefs of Police one week before House Bill 39 took effect, the Office of the Attorney General itself acknowledged that "[o]fficers must recognize that the designation of some 'simple possession' offenses as civil may impact the scope of an investigation."[173] The State specifically instructed Delaware law enforcement officers that an investigation may continue if "the facts and circumstances surrounding the encounter prompt a reasonable suspicion of criminal activity (*i.e.*, possession of more than a 'personal use quantity' of marijuana)."[174]

The trial court, in ruling on Valentine's Motion to Suppress, did not specifically state whether it found that, under the Delaware Constitution, the odor of marijuana alone could not give rise to probable cause.[175] Nevertheless, the trial court tacitly accepted the premise of the argument, as it ultimately engaged in a totality of the circumstances analysis after discussing the positions of other states which have legalized marijuana on the issue, holding:

> In light of the cases discussed above, and Delaware precedent this Court finds that when viewing the totality of the circumstances, Trooper Lawson had probable cause to search Defendant's vehicle. Defendant was driving over 30 miles per hour above the posted speed limit, Trooper Lawson testified that he smelled marijuana when he approached the Defendant's vehicle, and Defendant admitted to

[173] A105.

[174] A105 (emphasis in original removed).

[175] A164-65.

> smoking marijuana earlier in the evening. Thus, Trooper Lawson had probable cause to search Defendant's vehicle.[176]

The trial court's decision was faulty for two reasons.

The Delaware precedent referred to by the trial court was *Fowler v. State*, a case decided by this Court in 2016.[177] There, this court upheld a search conducted by police of the vehicle in which the *Fowler* defendant was a passenger after officers detected the odor of marijuana.[178] *Fowler* is inapposite to the present issue for multiple reasons. First, the *Fowler* defendant was arrested prior to the decriminalization of marijuana.[179] Second, *Fowler* was decided strictly under the federal Constitution, as the defendant failed to articulate a viable claim under the Delaware Constitution.[180] Finally, the language employed by this Court in *Fowler* tends to demonstrate that, while the odor of marijuana alone was enough to search the *Fowler* defendant's vehicle, such a rule does not govern every case. Specifically, the Court described marijuana as "a *typically* illegal substance *particularly* when used in a moving vehicle."[181] Use of the word "typically"

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[176] A165 (citing *Fowler v. State*, 2016 WL 5853434 (Del. Sept. 29, 2016)).

[177] *Fowler v. State*, 2016 WL 5853434 (Del. Sept. 29, 2016).

[178] *Id.* at *1.

[179] *Id*. at *1.

[180] *Id*. at *1.

[181] *Id*. (emphasis added).

denotes recognition that marijuana does not always suggest criminality. Moreover, while use of marijuana in a moving vehicle is a crime—just as it was when the *Fowler* defendant was arrested—Trooper Lawson was unable to articulate any facts that would suggest that Valentine was using marijuana while operating his automobile.

In conducting its totality of the circumstances analysis, the trial court pointed to three facts which gave rise to probable cause supporting the warrantless search: (1) Valentine was speeding, (2) Trooper Lawson detected the odor of marijuana, and (3) Valentine admitted to smoking marijuana earlier in the evening.[182] The third factor was unsupported by the record, however, as Trooper Lawson testified at the suppression hearing that Valentine did not make any admissions to the police about ingesting any controlled substance prior to the search.[183] Upon later questioning, the officer wavered, testifying that he could not remember whether Valentine made an admission to smoking marijuana prior to searching the vehicle.[184] At no point during the hearing did the officer state that Valentine made any such statement to him, however. In fact, Trooper Lawson testified that he intended to search the vehicle after initially detecting the odor of

[182] A165.

[183] A121.

[184] A124.

marijuana, before returning to Valentine with his license and registration and removing the driver from the vehicle.[185]

Prior to the search, Trooper Lawson only knew that Valentine had been speeding and an odor of marijuana was emanating from the vehicle. Just as the odor of alcohol and a traffic violation, standing alone, do not constitute probable cause to arrest a driver for a DUI offense[186], neither can such facts create probable cause to search a vehicle without a warrant.[187] The trial court erred in finding that the totality of the circumstances gave rise to probable cause, and such error mandates reversal.

[185] A120.

[186] *See Lefebvre v. State*, 19 A.3d 287, 293 (Del. 2011).

[187] *See generally LeGrande v. State*, 947 A.2d 1103, 1109 (Del. 2008) ("The analysis of whether there is probable cause to issue a search warrant is parallel to the legal analysis for warrantless arrest.").

## CONCLUSION

For the reasons stated herein, Mr. Valentine respectfully requests that this Honorable Court reverse his convictions and remand the case for a new trial.

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