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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

APPELLANT'S REPLY BRIEF

THE LAW OFFICE OF
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DATED: June 29, 2018

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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.*

In its Answering Brief, the State correctly contends that Section 4214 of the Criminal Code, at the time both *Fletcher v. State*[1] and *Morales v. State*[2] were decided, used the "same as or equivalent to" language present in the Person Prohibited statute[3], as opposed to the "comparable" language presently found in the statute.[4] The State fails to look at *Fletcher* and *Morales* in their entirety, however, and neither are useful to analysis of the instant case.[5]

Fletcher—decided two decades before *Apprendi v. New Jersey*[6] and its progeny—addressed the question of whether an out-of-state conviction, classified

[1] 409 A.2d 1254 (Del. 1979).

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

[3] *See* 11 *Del. C.* § 1448(e)(3).

[4] Ans. Br. at 16.

[5] *Morales* is discussed in subsection (2), *infra*.

[6] 530 U.S. 466 (2000).

by the foreign body as a felony, could serve to enhance the sentence of a defendant under the habitual offender statute when, had the crime occurred in Delaware, the defendant would have been charged as a juvenile and merely adjudicated delinquent.[7] In the trial court, the State, to support the proposition that it merely need prove that "the defendant was convicted of criminal acts which would support a conviction for one of the felonies enumerated in §4214,"[8] relied upon the language in *Fletcher* that "[t]he best and most just method of determining those deserving of [habitual offender status] is to look at the prior conduct of the defendant as it relates to the felonies in the Delaware Criminal Code."[9] This Court did not look at the conduct of the defendant in *Fletcher*, however, and instead looked merely to the age of the defendant at the time the crime leading to the foreign conviction was committed.[10] Ultimately, this Court ruled that "it would be inconsistent with [the intent of the legislature] to allow the use of convictions from other jurisdictions that would have been juvenile offenses in Delaware, and thus not felonies, to support enhanced punishment as an habitual offender."[11] Mr.

[7] 409 A.2d at 1254-55.

[8] A200.

[9] 409 A.2d at 1255.

[10] *Id*.

[11] *Id*. at 1256.

Valentine contends that his foreign convictions were for offenses broader than any Delaware violent felony and could not serve to enhance his sentence under Section 1448; no comparable issue was analyzed or even contemplated in *Fletcher*, and the case is unhelpful to this Court's analysis.

The State also contends in its Answering Brief that Mr. Valentine's discussion of *United States v. Haney*[12] is "not applicable to the facts of this case" because the Seventh Circuit decision "involved the interpretation of the Armed Career Criminal Act" and Mr. Valentine "was sentenced under Delaware law."[13] Such argument is perplexing. *Haney* illustrates the constitutional analysis a court undertakes when comparing statutes from different jurisdictions to determine whether conviction under a broader foreign law is equivalent to a comparable, but narrower, law so as to enhance a sentence.[14] The *Haney* Court applied constitutional jurisprudence of the Supreme Court of the United States in reaching its decision—precedent that also binds state courts in interpreting the same

[12] 840 F.3d 472 (7th Cir. 2016).

[13] Ans. Br. at 14.

[14] *See generally Haney*, 840 F.3d at 474-76.

constitutional provision.[15] *Haney* relied upon *Mathis v. United States*[16] in reaching its decision[17], wherein the High Court applied Sixth Amendment principles in reaching its decision.[18]

Nevertheless, courts other than *Haney* have consistently refused to allow foreign statutes broader than comparable local ordinances to trigger sentence enhancements.[19] The Superior Court of Pennsylvania was confronted with such

[15] *See, e.g., Arthur v. Dunn*, 137 S.Ct. 725, 729 (2017) ("The Constitution is the 'supreme law of the land'—irrespective of contrary state laws. And for more than two centuries it has been axiomatic that this Court—not state courts or legislatures—is the final arbiter of the Federal Constitution.") (internal citations omitted); *Zebroski v. State*, 179 A.3d 855, 861 (Del. 2018) ("On matters of federal constitutional law, we are bound by the [Supreme Court of the United State's] interpretations."); *State v. Jones*, 2004 WL 2190097 at *3 (Del. Super. Ct. Aug. 31, 2004) ("The United States Supreme Court is the final arbiter of the federal Constitution. A Supreme Court constitutional pronouncement is the law of the land; all executive, legislative, and judicial actors, state or federal, must obey it. Moreover, the Supreme Court alone has the power to overrule its precedents. If it were otherwise, the Supreme Court would be neither the highest court in the land nor the final arbiter of the Constitution, leaving the scope and dignity of our constitutional rights subject to conflicting interpretation, and thus perilously uncertain. The doctrine of *stare decisis* embodies these principles.") (internal citations omitted).

[16] 136 S.Ct. 2243 (2016).

[17] *See Haney*, 840 F.3d at 475 (relying repeatedly on *Mathis* in rendering its decision).

[18] *See, e.g., Mathis*, 136 S.Ct. at 2252 (holding that a sentencing court "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

[19] *See, e.g., State v. Stover*, 2016 WL 6077109 at *4-5 (Minn. Oct. 17, 2016) ("The Oklahoma crime matches all of the elements of the Minnesota crime, save for the element that Minnesota requires the instrument to be used in a judicial proceeding. The Minnesota crime is broader because it has a divisible structure where, in addition to executing an instrument to be used in a judicial proceeding, a person can also be guilty by appearing or participating with the intent to defraud a third party.")

question in *Commonwealth v. Vandyke*.[20] The *Vandyke* defendant was convicted of a Pennsylvania statute criminalizing retail theft.[21] The statute made such conduct a misdemeanor, unless it was a third or subsequent offense, whereupon the classification of the crime upgraded to a felony.[22] The government contended that the defendant's prior convictions out of New York for petit larceny qualified as prior offenses, leading to a felony conviction in the trial court.[23] Interestingly, the statute only required prior, out-of-state convictions to be similar—not equivalent—to the Pennsylvania statute.[24] The *Vandyke* court, in assessing the prior convictions, refused to look to the facts of the underlying convictions, instead focusing only on the elements necessary to prove the foreign statute.[25] In rejecting the State's proposed facts-based analysis, the intermediate appellate court cited the State Supreme Court, noting that "the focus is not on the facts underlying a conviction, but rather on the statute that triggered the conviction."[26] Ultimately,

[20] 157 A.3d 525 (Pa. Super. Ct. 2017).

[21] *Id*. at 537.

[22] *Id*. at 537 (quoting 18 *Pa. C.S.* § 3929(a)(1)).

[23] *Id*.

[24] *Id.* at 537-38 (quoting 18 *P.A. C.S.* § 3929(b.1).

[25] *Id*. at 543.

[26] *Id*. at 540 (quoting *Commonwealth v. Northrip*, 985 A.2d 734, 741 (Pa. 2009).

the *Vandyke* Court ruled that the prior out-of-state convictions could not enhance the retail theft conviction to a felony because the foreign statute did not necessarily require theft from a mercantile establishment.[27]

The State contends in its Answering Brief that Mr. Valentine "ignores that he was convicted for PWID *Marijuana*."[28] The Appellee overstates what is in the record, however. The text of the Information does not specify a substance in the body of the Information, and states that Mr. Valentine either possessed with the intent to deliver a controlled substance or a counterfeit controlled substance.[29] The Pennsylvania Sentencing Order does not reference marijuana at all, instead stating that Mr. Valentine was convicted of "Manuf/Del/Poss/W Int Manuf Or Del (F)."[30] That Mr. Valentine could have been convicted of possession with intent to deliver a counterfeit controlled substance—a nonviolent felony in Delaware—precluded the trial court from using the prior conviction to enhance the defendant's sentence.

The State also claims that, as to the firearm conviction, it is "clear from the documentation provided to the sentencing court that [Mr.] Valentine was not

[27] *Id*. at 544.

[28] Ans. Br. at 12 (emphasis in original).

[29] A217.

[30] A203.

convicted of carrying a firearm in a vehicle."[31] The State offers nothing but conclusory opinions to support such statement however. Mr. Valentine pled guilty to a violation of 18 *Pa. Cons. Stat.* § 6106.[32] Nothing in the documents provided to the sentencing court established that the probable cause affidavit was incorporated into the plea colloquy or that the facts therein were adopted by Mr. Valentine. The Pennsylvania statute criminalizes conduct that is legal in Delaware—carrying a firearm in plain view in a vehicle. It is broader than Section 1442 of the Delaware Code, and is therefore not the same or equivalent to any Delaware violent felony. The Superior Court erred in holding otherwise.

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.*

In its Answering Brief, the State incredibly argues that interpretations of the Federal Constitution by the Supreme Court of the United States are not applicable in state courts, because the Court in "*Mathis*[33], *Apprendi*[34], and *Shepard*[35] . . .

[31] Ans. Br. at 13.

[32] A229.

[33] *Mathis v. United States*, 136 S.Ct. 2243 (2016).

[34] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[35] *Shepard v. United States*, 544 U.S. 13 (2005).

interpreted the ACCA – a federal law."[36] The State is wrong, both in its assertion as to the precedential value of such holdings and its sweeping proclamation of what the High Court considered in each case. While *Mathis* and *Shepard* did analyze the ACCA through the lens of the Sixth Amendment, *Apprendi* dealt with interpretation of a New Jersey statute under the Fifth and Sixth Amendments vis-à-vis the Due Process Clause of the Fourteenth Amendment.[37]

Subsequent to *Mathis*, a number of state courts began applying its holding in assessing sentence enhancements. The Court of Appeals of Minnesota did so in *State v. Stover*, citing *Mathis* in stating that "[t]o determine whether the Oklahoma conviction constitutes a felony offense in Minnesota, the elements of the out-of-state crime of conviction *must be the same as, or narrower than*, those of the generic crime."[38] A Kansas Court of Appeals similarly relied upon *Mathis* in ruling that "[a] judge can only increase a defendant's sentence beyond the statutory maximum *based on a legal certainty* that the defendant was previously convicted

[36] Ans. Br. at 19.

[37] 530 U.S. at 468 ("'[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' The Fourteenth Amendment commands the same answer in this case involving a state statute.") (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

[38] *State v. Stover*, 2016 WL 6077109 at *4 (Minn. Ct. App. Oct. 17, 2016) (citing *Mathis*, 136 S.Ct. at 2248) (emphasis added).

of a qualifying offense, not the judge's inference (however reasonable) about what the prior factfinder had thought."[39] Pennsylvania also recognized the effect of *Mathis* on state sentence enhancements in the previously-discussed *Vandyke* case, quoting *Mathis* before stating: "We need not discuss at length these precedents; we simply recognize the High Court's expression of Sixth Amendment concerns when a court analyzes anything more than the elements of a crime."[40]

The State contends "[n]othing in *Mathis*, *Apprendi*, and *Shepard* can be construed as the Supreme Court of the United States mandating that state courts similarly employ an 'elements only' test when interpreting and applying state-specific sentence enhancing statutes."[41] Yet, nothing in those decisions serves to restrict the holding only to interpretation of the ACCA or federal law. Instead, the *Mathis* Court specifically held that "[t]he first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means."[42] The Court did not say "a federal court," or "a court

[39] *State v. Dwerlkotte*, 2017 WL 1535230 at *4 (Kan. Ct. App. Apr. 28, 2017) (citing *Mathis*, 136 S.Ct. at 2255 n.6) (emphasis in original).

[40] *Vandyke*, 157 A.3d 535 at 544 (whereupon the Pennsylvania court reversed on statutory construction grounds, but recognized the constitutional infirmity in analyzing the underlying facts of prior convictions rather than looking only to the elements of a foreign statute).

[41] Ans. Br. at 19-20.

[42] *Mathis*, 136 S.Ct. at 2256.

interpreting the ACCA or federal law," but broadened its holding to *any* sentencing court. And, as Justice Kagan noted in *Mathis*, "a good rule of thumb for reading [Supreme Court] decisions is that what they say and what they mean are one and the same."[43]

As referenced in subsection 1 *supra*, this Court's decision in *Morales v. State* does not support the State's contention, and only serves to bolster Mr. Valentine's claim that his Pennsylvania convictions could not enhance his sentence under Section 1448. In *Morales*—decided nineteen years before *Mathis*[44]—this Court ruled that "indictments and docket sheets" were "insufficient to establish defendant's prior convictions for the purpose of [enhancing a defendant's sentence] under the habitual offender statute."[45] At the *Morales* defendant's sentence hearing, the State introduced:

> [C]ertified copies of two indictments from the Commonwealth of Massachusetts. One indictment charged Morales with possession with intent to deliver a narcotic, occurring on July 11, 1977. The other charged him with trafficking 28 grams or more of cocaine, occurring on June 4, 1985. To prove the disposition of the indictments, the State offered docket entries from the Commonwealth of Massachusetts. Concerning the first charge, the docket entry for December 13, 1978, states in pertinent part, "Defendant offers to plead guilty-After hearing Court accepts defendant's offer." Concerning the second underlying offense, to which Morales had pleaded not guilty at

[43] *Id*. at 2254.

[44] 136 S.Ct. 2243 (2016).

[45] 696 A.2d at 392.

> his arraignment, the docket entry for December 27, 1985 states in pertinent part, "Plea Retracted and Plea Guilty Offered and Accepted by the Court." The State was also permitted to enter in evidence, over objection, Morales' National Crime Information Center record, which indicated that Morales had been convicted of trafficking and possession with intent to deliver in Massachusetts.[46]

This Court ruled that such records were "insufficient to establish that Morales pleaded guilty to the charges specified in the indictments," noting that "[w]here a guilty plea forms the basis for an underlying conviction, many courts require the prosecution to provide not only the underlying indictment or information, but also the text of the guilty plea, in order to determine whether the defendant was charged with and admitted to conduct that would establish the felony conviction."[47] In so holding, this Court relied upon a decision out of the Tenth Circuit, *United States v. Barney*[48], noting that the Court "adopt[ed] this standard of proof as appropriate to be used in Delaware by the sentencing judge when considering habitual offender status involving any prior predicate felony convictions."[49] Specifically, this Court adopted the rationale that "where enhancement is sought on the basis of a conviction obtained through a guilty plea, the sentencing court may look to the

[46] *Id*. at 393.

[47] *Id*. at 395.

[48] 955 F.2d 635 (10th Cir. 1990).

[49] *Morales*, 696 A.2d at 395 n.12.

underlying indictment or information and the text of the guilty plea to determine whether the defendant was charged with and admitted conduct which falls within the ambit" of an equivalent statute, but that the sentencing court may not rely upon a presentence report.[50]

Here, consistent with *Morales*, Mr. Valentine contended prior to and at sentencing that "[a]bsent a transcript of the plea colloquy—a document not supplied to the [sentencing court] by the State—[the trial court] lacks any documentary evidence it can properly consider to ascertain whether the prior firearm conviction is equivalent to a Delaware violent felony."[51]

The State also relies upon this Court's 2002 holding in *Brown v. State* for the proposition that "facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to a jury, or proved beyond a reasonable doubt."[52] The reasons why such reliance is misplaced are myriad.

In *Brown*, this Court was confronted with the question of whether a prior conviction could trigger a mandatory sentence of one year under Section 1448 of

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[50] *Barney*, 955 F.2d at 639-40.

[51] A252. *See also* A259 (whereupon Mr. Valentine argued during the sentencing hearing that "unless an affidavit of probable cause is incorporated into a plea colloquy by reference and consent of the defendant, then it cannot be considered by a future Court when sentencing -- in sentencing to determine whether it enhances.").

[52] Ans. Br. at 20 (quoting *Brown v. State*, 2002 WL 31300027 at *1 (Del. Supr. Oct. 10, 2002).

the Criminal Code when the existence of such conviction was found by a judge and not a jury.[53] This Court first looked to *Apprendi* for guidance, but recognized the High Court "did not address the question presented here-whether facts that increase the minimum sentence, but not the statutory maximum, also must be decided by a jury and proved beyond a reasonable doubt."[54] As such, the Court was guided by a then-recent Supreme Court decision, *Harris v. United States*, which held that "a jury need not consider facts that impact the length of a sentence that is less than the statutory maximum."[55] The *Brown* Court, finding *Harris* controlling, affirmed the trial court's sentence comported with the Federal Constitution.[56]

Preliminarily, the sentence at issue in *Brown* differs from the one imposed here. As this Court noted in *Brown*, Possession of a Deadly Weapon by a Person Prohibited is a "class D felony that carries a maximum sentence of eight years. If a person is a prohibited person . . . because of a conviction for a felony involving physical injury or violence to another, then the minimum sentence is one year at Level V."[57] Thus, the one year mandatory prison sentence is within the range of

[53] *Brown*, 2002 WL 31300027 at *1.

[54] *Id*.

[55] *Id*. (discussing *Harris v. United States*, 536 U.S. 545 (2002)).

[56] *Id*.

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

sentences the sentencing court could have legally imposed. Not so here. Mr. Valentine was convicted under the current version of the Person Prohibited statute, which states that such offense is a "class D felony . . . unless the person is eligible for sentencing pursuant to subsection (e) of this section, in which case it is a class C felony."[58] Mr. Valentine was not eligible for the enhanced sentence under subsection (e), meaning the maximum sentence he could have received was eight years in prison.[59] Thus, unlike in *Brown*, the ten-year sentence imposed here could not have been legally imposed by the sentencing court without the sentence enhancement.

Moreover, subsequent to *Brown*, the Supreme Court of the United States clarified what "statutory maximum" meant for *Apprendi* purposes, ruling it "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.*"[60] Based solely on the findings at trial, the sentencing court here only could have sentenced Mr. Valentine to a class D felony, with a maximum prison sentence of eight years.

The fatal reason why the State's reliance on *Brown* is misguided, however, is that the 2002 decision is no longer good law. In deciding *Brown*, this Court

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[58] 11 *Del. C.* § 1448(c).

[59] 11 *Del. C.* § 4205(b)(4).

[60] *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original).

relied exclusively upon *Harris* in rendering its decision.[61] The Supreme Court of the United States, however, explicitly overruled *Harris* in 2013, holding:

> *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi v. New Jersey*, and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Accordingly, *Harris* is overruled.[62]

The State's argument that a mandatory minimum sentence does not trigger *Apprendi* concerns is in direct contravention with Supreme Court precedent, and such contention must be rejected by this Court.

[61] *See generally Brown*, 2002 WL 31300027 at *1 (citing only *Apprendi* and *Brown* while noting that "[t]he *Harris* decision controls the result here.").

[62] *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

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.

The State repeatedly contends in its Answering Brief that it is well-established "that the smell of marijuana alone is sufficient to constitute probable cause for a warrantless search, as long as the odor is articulable and particularized," citing to a number of cases to support such proposition.[63] If Mr. Valentine challenged the search of his vehicle under the Federal Constitution, the State would be correct. Unlike any Delaware case cited by the State, however, Mr. Valentine's challenge to the search of his vehicle is rooted in the protections afforded by the Delaware Constitution, thus making the issue one of first impression for this Court.[64]

As it did in the trial court, the State looks to Section 4764(h) of Title 16, which states that "[n]othing contained herein shall be construed to repeal or modify

[63] Ans. Br. at 24; *see also, e.g.,* Ans. Br. at 28.

[64] *See, e.g., Law v. State*, 2018 WL 2024868 (Del. Supr. Apr. 30, 2018) (whereupon the Delaware Constitution is not discussed); *Fowler v. State*, 2016 WL 5853434 at *1 (Del. Supr. Sep. 29, 2016) (deeming all arguments under the Delaware Constitution waived as the defendant "failed to discuss or analyze the assertions he makes about the Delaware Constitution"); *State v. Seth*, 2017 WL 2616941 (Del. Super. Ct. June 16, 2017) (whereupon no challenge under the Delaware Constitution is discussed); *State v. Dewitt*, 2017 WL 2209888 (Del. Super. Ct. May 18, 2017) (same); *State v. Faulkner*, 2017 WL 5905576 (Del. Super. Ct. Nov. 30, 2017) (same). The State also cites to federal cases to support its argument, despite that Mr. Valentine's argument is specific to the Delaware Constitution. Ans. Br. at 24-25 n.50. Consequently, such cases are of no use to this Court's analysis, as marijuana is a purely illegal substance under federal law.

any law or procedure regarding search and seizure."[65] The State's interpretation of the statute, however, would render the legislative action unconstitutional. The validity of a warrantless search is assessed under the same standard employed to determine whether a magistrate properly found probable cause to support the issuance of a search warrant.[66] Search warrants within Delaware can issue only in criminal cases.[67] The law regarding search and seizure, as explained by this Court, is that "[p]robable cause is determined by the totality of the circumstances and requires a showing of a probability that *criminal* activity is occurring or has occurred."[68] Prior decisions by this Court dealing with the odor of marijuana as it relates to probable cause—either at a time the substance was purely criminal or through the lens of the Federal Constitution—were applications of that principle to specific fact patterns, not pronouncements regarding the nature of protections against unreasonable searches and seizures. Mere possession or use of marijuana in a personal-use quantity is a civil violation—not a criminal offense—in the State of Delaware.[69] Were a magistrate confronted with facts giving rise to probable

[65] Ans. Br. at 26.

[66] *LeGrande v. State*, 947 A.2d 1103, 1109 (Del. 2008).

[67] 11 *Del. C.* § 2304 (limiting the issuance of search warrants to criminal cases).

[68] *Bease v. State*, 884 A.2d 495, 498 (Del. 2005) (emphasis added).

[69] 16 *Del. C.* § 4764.

cause that only a civil violation had occurred, Delaware law would prohibit issuance of a search warrant. The State seeks to relax that standard, thereby altering the laws related to search and seizure within the State, in direct conflict with section 4764(h).[70]

The State discusses *State v. Senna*[71], a Vermont Supreme Court case, in its Answering Brief.[72] The crux of Mr. Valentine's argument rests upon the 2015 decriminalization of marijuana. *Senna* is plainly inapplicable, as Vermont has not decriminalized cannabis, and has only passed a "medical marijuana" law.[73] The Vermont Supreme Court acknowledges as such, stating "[b]ecause Vermont's 'medical marijuana' law is readily distinguishable from Massachusetts's law decriminalizing the possession of small amounts of marijuana, we need not decide whether the Massachusetts Supreme Judicial Court's reasoning in *Cruz* is persuasive."[74] By decriminalizing cannabis, Delaware has done more than simply

[70] "It has long been an axiom of statutory interpretation that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989).

[71] 79 A.3d 45 (Vt. 2013).

[72] Ans. Br. at 31-32.

[73] *See Senna*, 79 A.3d at 49.

[74] *Id*. (referencing *Commonwealth v. Cruz*, 945 N.E.2d 899 (Mass. 2011)).

legalize medical marijuana, and *Senna* is of little value to the question presented to this Honorable Court.

The State claims that the trial court was correct in considering Mr. Valentine's alleged admission to smoking marijuana prior to the search of the vehicle.[75] First, it is far from clear from the record the timing of Mr. Valentine's admission. At the suppression hearing, Officer Lawson testified that Mr. Valentine made no such admission prior to the search.[76] At Mr. Valentine's preliminary hearing, the officer claimed that Mr. Valentine "did admit later that he had smoked in the car."[77] While Trooper Lawson did claim in his affidavit of probable cause that Mr. Valentine stated that he "smoked earlier," he explicitly disavowed that statement at the suppression hearing.[78]

Appellee contends that the parties stipulated at the suppression hearing that Mr. Valentine admitted to ingesting marijuana prior to the search of the vehicle.[79] The State misapprehends the record. Although the record indicates a discussion

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[75] Ans. Br. at 33.

[76] A121.

[77] A063. The accuracy of such claim is unclear, as Officer Lawson was evasive in the face of cross-examination about the exact timing and substance of Mr. Valentine's statements. It is worth noting that during direct examination, Officer Lawson made no reference to any admission prior to his search of the vehicle at the Preliminary Hearing. *See* A050.

[78] *See* A041, A121.

[79] Ans. Br. at 34 n.36.

about a stipulation of facts was discussed between the parties, no such stipulation was presented to the trial court.[80] The State suggested that the parties could "draft one up, or we can go through this, it won't take very long."[81] The Court said that if the parties were going to stipulate to any facts, they should file a written stipulation the next business day.[82] No such stipulation was filed, and Officer Lawson offered testimony at the hearing.[83]

What the State ignores is that Trooper Lawson formed the intent to search Mr. Valentine's vehicle before any alleged admission occurred.[84] Even assuming *arguendo* that Mr. Valentine did make an admission to ingesting marijuana prior to the search, it was after Trooper Lawson had already extended the scope of the traffic stop without an objective suspicion of *criminal* behavior by asking the driver to exit the vehicle for the purpose of searching the automobile.[85]

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[80] A119.

[81] A119.

[82] A119. The suppression hearing was held on Friday, January 6, 2017. The Court asked that if a stipulation was going to be filed, that it be done by Monday, January 9, 2017. A119.

[83] *See* A005 (whereupon the docket is silent as to the filing of any such stipulation).

[84] A120 ("Per departmental training, I returned to my vehicle and I conducted a license check and then registration check of the vehicle, and I radioed for a second unit in anticipation for a search.").

[85] *See State v. Chandler*, 132 A.2d 133, 140-141 (Del. Super. 2015) ("If the police prolong a suspect's road side detention in order to investigate other possible crimes, it becomes a second detention. The second detention is unconstitutional unless it is based on specific and articulable

The State, for the first time on appeal, contends that the search of Mr. Valentine's vehicle was incident to a lawful arrest.[86] The State does not cite to the record to support such argument, but instead discusses what Trooper Lawson *could have* arrested Mr. Valentine for prior to the illegal search.[87] The record is clear, however, that Mr. Valentine was not arrested by the officer until after the search occurred.[88] Consequently, the search was not incident to arrest—regardless of what the officer hypothetically could have done differently—and this Court should reject the State's argument seeking to justify Trooper Lawson's illegal search.[89]

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facts which, taken together with all rational inferences, raised an objective suspicion of criminal behavior.") (citing *Cummings v. State*, 765 A.2d 945, 948 (Del. 2001)).

[86] Ans. Br. at 34.

[87] Ans. Br. at 34.

[88] A121 (testimony from Trooper Lawson that it was the discovery of the firearm that resulted in arrest). *See also* A039-43 (the affidavit of probable cause demonstrates that Mr. Valentine had not yet been arrested for any offense until after he was in custody and interviewed by the authorities).

[89] *See State v. Seth*, 2017 WL 2616941 at *2 n.5 (rejecting the State's contention that a search was justified as lawfully performed incident to arrest because "the uncontroverted testimony is that the arrest occurred after the search").

CONCLUSION

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

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