No. 125434

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- CORDELL BASS Defendant-Appellee	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-16-0640. There on appeal from the Circuit Court of Cook County, Illinois , No. 14 CR 15846. Honorable Neera Lall Walsh, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

BRIAN L. JOSIAS
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

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ISSUES PRESENTED FOR REVIEW

1. **Whether the investigation into a vehicle's passengers during a routine traffic stop, without reasonable suspicion, deviated from the mission of the stop, and, because the investigation measurably extended the duration of the stop, violated the Fourth Amendment?**
2. **Whether the Chicago Police department's systematic usage of investigative alerts as an end-run around obtaining arrest warrants violates the United States and Illinois' constitution's prohibitions on unreasonable searches and seizures**?

STATUTES AND RULES INVOLVED

Ill. Const. 1970, art. I, § 6.

"The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized."

U.S. Const., amend. IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF FACTS

The statement of facts set forth in the State's brief adequately sets forth most of the facts this Court needs to resolve this matter. To the extent additional facts are noted in Bass's argument, such facts include citation to the record on appeal.

ARGUMENT

I. The investigation into a vehicle's passengers during a routine traffic stop, without reasonable suspicion, deviated from the mission of the stop and, because the investigation measurably extended the duration of the stop, violated the Fourth Amendment.

The police violated the United States and Illinois Constitutions' prohibitions on unreasonable seizures when, during a routine traffic stop, they seized Cordell Bass, a passenger in the stopped vehicle, and, without suspicion, took his license and ran his name through a computer database. As the Appellate Court correctly held, the officers' conduct plainly violated the United States Supreme Court's holding in *Rodriguez v. United States*, 575 U.S. 348 (2015). Under *Rodriguez*, officers cannot convert a traffic stop into a general investigation for criminal activity unrelated to the stop's mission. The stop's mission involves matters related to the traffic violation, the driver, and officer safety. By exceeding the scope of the mission and prolonging the stop beyond what was necessary to address the traffic infraction, the officers violated the constitution.

The State claims that the Appellate Court erred when it unanimously concluded that the investigation of a vehicle' passengers unreasonably extends a routine traffic stop. (St. Br. 27-30, citing *People v. Harris*, 228 Ill. 2d 222 (2008) and *Arizona v. Johnson*, 555 U.S. 323 (2009)). The State reasons that the investigation of the passengers occurred "simultaneously"with the mission of the stop and thus did not "measurably extend[ ] the duration of the stop." (St. Br. 29-30) This argument is belied by the record. By running Bass' name and "some" of the other occupants' names in addition to the driver's name, Chicago Police Officer Carrero necessarily extended the scope of the stop. Regardless, *Rodriguez* clearly

held that police officers cannot act outside of the stop's mission simply because they resolve those matters expeditiously. 575 U.S. at 357. *Rodriguez* also specifically provided that whether officers' unrelated investigative larks occurred "before or after the officer issues a ticket" is immaterial. *Id*. Because the name check added time to the stop and had no relation to the officers' mission, the investigation into Bass was unconstitutional

A. Standard of Review

A motion to suppress evidence presents mixed questions of law and fact. The reviewing court must give deference to the factual findings of the trial court. *People v. Gherna*, 203 Ill. 2d 165, 175 (2003). The court's resolution of the ultimate legal question is reviewed *de novo*. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Where the issue presented on appeal does not turn on any findings of fact or determinations of credibility, the standard of review is *de novo*. *People v. Bunch*, 207 Ill. 2d 7, 12 (2003).

To suppress evidence based upon an illegal seizure in violation of the Fourth Amendment, the burden is on the defendant to show that an illegal seizure has occurred. *People v. Neal*, 109 Ill.2d 216, 218 (1985). A search or seizure without probable cause or reasonable suspicion is unreasonable unless subject to an exemption, but "the burden is on those seeking the exemption to show the need for it." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) *quoting United States v. Jeffers*, 342 U.S. 48, 51 (1951).

B. Absent reasonable suspicion, police cannot prolong a traffic stop with investigations unrelated to the stop's mission.

The United States and Illinois Constitutions protect against unlawful searches

and seizures. U.S. Const. amend. IV, XIV; Ill. Const. 1970, art. I, § 6. Because a traffic stop is analogous to an investigative detention under *Terry v. Ohio,* 392 U.S. 1 (1968), courts generally analyze Fourth Amendment challenges to traffic stops under *Terry* principles. *Rodriguez*, 575 U.S. at 354; *People v. Bunch*, 207 Ill. 2d 7, 13-14 (2003). Under *Terry*, officers may conduct a brief investigatory detention based on reasonable suspicion that a person has committed, or is about to commit, a crime. 392 U.S. at 20-22.

"A seizure for a traffic violation justifies a police investigation *of that violation*." *Rodriguez*, 575 U.S. at 354 (emphasis added). The "tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission.'" *Id*. at 354. The stop's mission includes "ordinary inquires" necessary to address the purpose of the stop. *Rodriguez*, 575 U.S. at 355. Ordinary inquires include checking the driver's license, determining whether there are outstanding warrants for the driver, and determining whether there is valid registration and proof of insurance. *Id*. at 355-56; *see also People v. Cummings*, 2016 IL 115769, ¶7 (*Rodriguez* "drew a bright line against prolonging a stop with inquiries outside the mission of a traffic stop, unless an officer has reasonable suspicion for those inquiries").

Beyond these ordinary inquiries, the Court has identified a "*de minimis*" exception relating to passengers: the police may order passengers out of the vehicle when necessary to ensure officer safety. *Maryland v. Wilson*, 519 U.S. 408, 414 (1997), *citing Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). But this officer safety exception stems from the mission of the stop itself. *Rodriguez*, 575 U.S. at 356. Removal of passengers is a minimally invasive burden necessary to ensure

that officers can safely complete the ordinary inquiries of the driver. *Id.* The *Rodriguez* Court distinguished this step from police conduct aimed at rooting out other criminal conduct. *Id.* (general interest in criminal law enforcement is not related to mission of stop).

A stop that is lawful at its inception may still violate the constitution if it is "prolonged beyond the time reasonably required to complete [its] mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *Rodriguez*, 575 U.S. at 354 (the stop may "last no longer than is necessary to effectuate" its mission). "Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez*, 575 U.S. at 354. Accordingly, police may not "measurably prolong" the stop by engaging in conduct that falls outside the scope of the mission. *Id.* at 355.

Thus, the question before this court is whether obtaining identification from passengers and using that information to run names through a computer database, impermissibly deviates from the mission of the stop and if so, whether the State can prove that doing so did not prolong the stop.

C. Obtaining identification from passengers and running their names through a police computer database is an investigation relating to the general interest in law enforcement, not the mission of the stop.

The mission of a traffic stop is limited to the inquiries necessary for addressing roadway safety, including protecting the officers making those inquiries. But investigations conducted in the name of general criminal law enforcement fall outside the scope of the stop. *Rodriguez*, 575 U.S. at 355-56. Random warrant checks on passengers may further the interests of general law enforcement, but

have nothing to do with the mission of the stop, including officer safety. *United States v. Landeros*, 913 F.3d 862, 868 (9th Cir. 2019) ("A demand for a passenger's identification is not part of the mission of a traffic stop."). Neither of the officers involved in Bass' arrest, nor the State in any of its briefing, has asserted that the name checks on passengers related to the vehicle's alleged failure to obey a red light, prevent further traffic violations, or ensure the safety of the officers.

In its opinion below, the Appellate Court found "no safety justification, and the State offered none, for running name checks on the passengers when they are already in control of the officers." *People v. Bass*, 2019 IL 160640, ¶ 76. Likewise, the State before this Court offers no safety justification for the investigation. The State notes that officers may run warrant checks on the driver as a method of ensuring roadway safety, but makes no similar claim for the passengers. (St. Br. 28-29, citing *People v. Cummings*, 2016 IL 115769)

Nor did Officers Carrero and Serrano. The testimony provided at the suppression hearing makes clear that no mission-related issues motivated the investigation of Bass or the other passengers. Officer Serrano testified that he ordered the passengers out of the car after he saw Carrero remove the driver. (R. J24) Carrero testified that the purpose of removing the occupants would have been to ensure officer safety. (R.J10) Serrano testified that he then asked Bass for identification, but he never mentioned safety in connection with the request for Bass' identification. (R. J25) Carrero also ran additional name checks on other passengers but, again, he did not mention safety when he discussed those name checks. (R.J17) Neither Serrano nor Carrero ever testified that the request for

ID or the name checks were done for officer safety.

Indeed, such a claim would be fanciful – the officers admitted that they removed the passengers from the vehicle because, "we can't see them ... [w]e can't see where their hands are ... [w]e like to have them visible" and they only checked "some" of the passengers names. (R. J17) Had officer safety somehow required background checks, it presumably would have required them of *all* passengers. Based on their testimony, the officers had no additional safety concerns once the vehicle's occupants alighted. All occupants were within the officers' sight and under their control. *See Wilson*, 519 U.S. at 414 (explaining that removal of passengers ensures officer safety by separating them from potential weapons). As the Appellate Court found below, obtaining Bass' identification and returning to the police car to run a name check would offer no additional level of officer safety. *Bass*, 2019 Il. App (1st) 1606460, ¶76. Indeed, having one of the officers leave his partner with the four to six occupants of the car while he ran computer searches in the squad car, and thereby prolonging the encounter, "was, if anything, 'inversely related to officer safety.' *Landeros*, 913 F.3d at 868, *quoting United States v. Evans*, 786 F.3d 779, 786 (9th Cir. 2015).

In *Cummings*, this Court held that a request for the driver's license was permissible as part of the officer safety aspect of a traffic stop. 2016 IL 115769, ¶17. There, the police pulled over a car registered to a woman with an outstanding warrant. *Id*. at ¶3. Upon approaching, the officers realized the driver was a man. *Id*. Nevertheless, the officer requested a license and proof of insurance, and upon the defendant's inability to produce a license, arrested him for driving without

a license. *Id*. This Court found the request reasonable. *Id*. at 16. Although the stop did not relate to a traffic violation, a license request and subsequent warrant check could, consistent with *Rodriguez*, promote officer safety. *Cummings*, 2016 IL 115769, ¶14, *citing United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir.2001), *abrogated on other grounds by United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir.2007).

The United States Supreme Court has not authorized similar inquiries directed towards passengers. Officers may remove passengers from the car in order to ensure officer safety. *Wilson*, 519 U.S. at 414. But they may not frisk passengers for weapons absent a reasonable belief the passenger is armed and dangerous. *Arizona v. Johnson*, 555 U.S. 323, 332 (2009). Like a suspicionless frisk, a request for ID and name check goes beyond the steps authorized in *Wilson* to ensure officer safety. Notably, even if this Court believes that a name check is no more intrusive than the detention authorized in *Wilson*, it would still not be permissible if the intent of the officers is to uncover crime, *whether or not* the step may also promote officer safety. *Rodriguez*, 575 U.S. at 356 ("On-scene investigation into other crimes. . . detours from the mission of the stop, as "do safety precautions taken in order to facilitate such detours.")

It is true that in *Harris*, this Court upheld a license request and warrant check of a passenger, after police determined the need to arrest the driver. *Harris*, 228 Ill.2d at 228. But, there the officer explained that checking the passenger's license allowed him to see if the passenger could drive the car away. *Id*. at 226. The officer used the license to run a warrant check, which resulted in the passenger's

arrest. *Id*. This Court approved, finding a lawful initial seizure, which was not "unreasonably" prolonged by the officer's actions, and no invasion of defendant's privacy interests without reasonable suspicion. *Id*. at 238.

Harris pre-dated *Rodriguez*, and focused on the defendant's privacy interests, not the mission and length of the stop, which defendant did not contest. *Id*. at 236. It was clear that the license check was required in order for defendant to safely drive away the car, and the warrant check was part of that inquiry. *Id*. ("Defendant has not argued that the computerized warrant check, conducted at the same time as the officer's check of the status of the driver's license, unreasonably prolonged his seizure.") Thus, *Harris* merely held that the investigation was permissible as long as it did not prolong the stop. *Id*. *Harris*' holding sheds no light on the officers' investigation in this case, and the State does not so argue.

In addition, the State does not argue that the officer-safety rationale extends to passengers. Accordingly, any attempt to extend the *Cummings* holding to passengers has been forfeited. And, because the officers here did not testify that officer safety concerns *alone* (or at all) motivated the warrant checks on the passengers, no such attempt to extend *Cummings* could be made in this case. Accordingly, this Court must conclude that the request for Bass's identification and subsequent computer database search were not related to the mission of the stop.

D. The investigation of matters outside the scope of the stop violated the Fourth Amendment because it measurably prolonged the stop.

Rather than arguing that the investigation into the car's passengers promoted the mission of the stop, the State instead argues that the investigation did not prolong the stop. (St. Br. 29-30) It is true that investigations unrelated to the mission are permissible if the State can show that they do not "measurably extend" the duration of the stop. *Rodriguez*, 575 U.S. at 355. But, the State fails to explain or prove how name checks on the passengers could have been done so quickly as to defy all measurement. The stop lasted longer than it otherwise would have had Officer Carrero stuck to the ordinary inquires authorized by the stop. *See Rodriguez*, 575 U.S. at 354 ("Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.") Therefore, the investigation into Bass violated the Fourth Amendment.

The State makes little attempt to explain how the name checks of the driver and multiple passengers could have been done "simultaneously." Instead, it assumes they were, without evidence or citations to the record. Because it had the burden of establishing the suspicionless investigation did not measurably prolong the stop, *People v. Gipson*, 203 Ill. 2d 298, 306-07 (2003), it cannot rely on a bald assertion that defies logic. Running at least three extra names through a computer system did not take the exact same amount of time as a name check of the driver. Neither the testimony below nor common sense supports this claim.

The record shows that after he stopped the minivan, Officer Carrero asked the driver for his license and asked him to exit the van. (R. J8) Officer Serrano

ordered Bass and the other passengers out of the van. (R. J25) Serrano obtained Bass' driver's license, (R. J24-25) and Carrero performed "name checks" on the driver, Bass, and "some" of the other passengers. (R. J18) When the police conducted a name check on Bass, they learned that there was an active investigative alert stored in their computer system regarding Bass. (R. J18) The police then arrested Bass. (R. J26) Carrero documented the stop and issued the driver a verbal warning. (R.J9-J10)

The State's argument that the name checks took place simultaneously fails on this record and as a matter of logic. Searching a database necessarily requires time to input names into any search interface. Thus, checking additional names in the police database necessarily required additional time to complete. Carrero's investigation into the passengers had to take some time that otherwise would have been devoted to the stop's mission. In sum, the stop took the amount of time needed to complete the mission *plus* the time it took to run at least three additional name checks.

The State may mean to suggest that a warrant check that occurs *during* a traffic stop is appropriate, much like the dog sniff in *Caballes*. But this argument was put to rest by *Rodriguez*, which makes clear that if the officers could have resolved the stop expeditiously, they did not earn "bonus time" to conduct other investigations. 575 U.S. at 357. The stop may last only as long as it takes to complete the mission. *Id*. Officer Carrero did not earn the right to spend time running the passenger's names simply because he ran the driver's name quickly. Once the officer resolved the driver's check, he should have moved on to the verbal warning

and TSS card, and allowed the detained citizens to proceed on their way. Instead, he spent additional time on non-mission-related investigations.

Similarly, that the stop here totaled eight minutes in Officer Serrano's estimation is of no consequence. Under *Rodriguez*, even investigatory efforts that have an incremental or *de minimis* impact on the temporal length of the stop run afoul of the Fourth Amendment. 575 U.S. at 357. The question is whether, without the investigation of the passengers, would the stop have taken something less than eight minutes. It is clear that it would have.

Reasonable inferences based on what the officers did and did not testify to, and logic, compel the conclusion that the driver's name was checked separately from Bass' and the other passengers' names. The State cannot support its claim that the additional checks were done "simultaneously." Because these additional investigations added time to a routine traffic stop, they were unreasonable searches and seizures under *Rodriguez*.

E. Conclusion

Bass established a *prima facie* case that the officers detained and investigated him without reasonable suspicion. Therefore, the State bore the burden of providing evidence that the officers did so as either part of the stop's mission, or that doing so did not measurably extend the stop. *See Gipson*, 203 Ill. 2d 298, 306-07 (2003) (once defendant made prima facie case of warrantless search, State met burden of providing testimony that the search was a routine inventory search). The State did not, and cannot, meet its burden. The police deviated from the traffic-enforcement mission of their stop when they obtained Bass' identification without suspicion

and checked his name in a police-maintained database. The officers' investigation of Bass extended the duration of the stop. The Appellate Court correctly reversed the trial court's denial of his motion to suppress and reversed his conviction. This Court should affirm.

II. The Chicago Police Department's systematic usage of investigative alerts as an end-run around obtaining arrest warrants violates the United States and Illinois' constitution's prohibitions on unreasonable searches and seizures.

The Appellate Court correctly found that the Chicago police officers arrested Bass in violation of his constitutional right to be free from unreasonable seizures. The arresting officers conceded that they had no reason to arrest Bass other than an "investigative alert" that another officer entered into a computer database three weeks earlier. During those three weeks, the police never sought an arrest warrant, nor justified the decision not to seek one.

The Chicago Police Department's investigative alert database is a parallel warrant system with no judiciary. The police have declared themselves sole arbiters of probable cause, subjecting countless citizens to the trauma and humiliation of arrest with no prior judicial input. While it is true that courts have traditionally sanctioned warrantless arrests on an individual basis, primarily based on exigency, no court has granted the power to arrest based on hearsay on a systemic basis. The State now comes to this Court asking for this awesome grant of power – the complete freedom to conduct the extra-judicial arrest of Bass and thousands of other Chicago citizens based only on hearsay, with premeditated disregard for the judiciary's role in the warrant system. The Appellate Court was correct to say no, and this Court should affirm.

A. Bass raised these issues in his opening brief and, accordingly, the court below correctly considered the issue.

The Appellate Court held that based on the unique language of the Illinois Constitution's Warrant Clause, which, unlike the Fourth Amendment, requires

and "affidavit" to obtain a warrant, the investigative alert system violates article 1, section 6 of the Illinois Constitution. The State asserts that the Appellate Court erred when it found arrests predicated on investigative alerts unconstitutional under the Warrant Clause of the Illinois Constitution, because Bass did not advance this "theory" in briefing. The State is wrong.

While Bass did not raise the "affidavit" language, he did directly argue that the arrest violated the Illinois Constitution. In Bass' opening brief filed in the Appellate Court, he specifically, and clearly, cited the Illinois Constitution as a basis for invalidating his warrantless arrest, arguing, "Both the United States and Illinois Constitutions provide for the use of warrants, issued on probable cause and supported by affidavit. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6" (Bass Op. Br. 18) In the course of his argument, Bass relied upon *Illinois* cases from this Court, interpreting the Illinois and United States Constitutions, acknowledging that, "courts have found that, under certain circumstances, warrantless arrests based upon probable cause can comply with both the federal and Illinois constitutions" and citing *People v. Lee*, 214 Ill. 2d 476, 484 (2005) and its reliance on both the United States and Illinois Constitutions. (Bass Op. Br. 20)

Finally, after the Appellate Court reviewed this issue at oral argument and requested supplemental briefing, Bass again argued that his warrantless arrest violated not only the Fourth Amendment to the United States Constitution, but also the privacy clause of the Illinois Constitution. (Bass Supp. Br. 1-6) Accordingly, the State cannot claim that the Appellate Court's decision somehow

blindsided it or that it was deprived of the opportunity to fully present its arguments.

Therefore, from a factual perspective, Bass correctly identified, raised, and argued the issue at hand before the Appellate Court: whether the investigative alert program violates the Illinois Constitution. As a result, the Appellate Court did not have to "search the record for unargued and unbriefed reasons to reverse a trial court judgment." (St. Br. 16, *citing People v. Givens*, 237 Ill. 2d 311, 323 (2010) And, while it is true that Bass did not articulate the *specific* nuances of the legal theory that the majority opinion below emphasized, both Bass' arguments and the Appellate Court's opinion spring from the same source: the provisions of the Illinois Constitution prohibiting unreasonable searches and seizures.

Second, the State's argument is incorrect as a matter of law. The State conflates the disfavored practice of an Appellate Court deciding a case based on an *issue* that has not been raised, with the entirely permissible practice of resolving a raised issue based on a different legal argument or theory than was presented by the parties. (See St. Br. 17, incorrectly alleging that the Appellate Court addressed an "unraised issue.") Bass does not dispute, as the State argues, that it is well settled in Illinois that "a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment."*Givens*, 237 Ill. 2d at 323. However, this rule in no way confines reviewing courts to the binary choice of accepting or rejecting the *exact* arguments made by a party concerning a given issue. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper

construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991).

Givens illustrates the elementary principles involved well and its facts are plainly distinguishable from those present here. In *Givens*, the defendant argued on appeal that trial counsel was ineffective for withdrawing her motion to suppress where the evidence presented at trial cast doubt on the voluntariness of her consent to the search in question. *Givens*, 237 Ill.2d at 322. Yet, on appeal, the Appellate Court determined that trial counsel was ineffective for an entirely different reason, to wit: failing to challenge the search on the basis that the defendant lacked authority to consent. *Id.* In other words, in *Givens*, the Appellate Court decided the case based on an entirely unbriefed *issue*, one that involved different facts than those involved in the original issue raised by the *Givens* defendant - not just a legal theory that diverged slightly from the defendant's initial arguments. *Id.* at 324, 326.

Furthermore, in *Givens,* the defendant effectively conceded that the Appellate Court raised and resolved an issue that she had not identified or argued. *Id.* at 325. Accordingly, instead of claiming that she had raised the issue before the Appellate Court, she argued in this Court that, Appellate Courts "should not *normally* decide on its own initiative an unbriefed issue." *Id.* And, although this Court "agree[d] with the general proposition that a reviewing court does not lack authority to address unbriefed issues and may do so in the appropriate case" it disagreed with the defendant that it was appropriate to apply that principle to her case. *Id.*

Here, in contrast, the Appellate Court did not reach out and identify an issue from whole cloth. Instead, it decided the exact issue Bass raised - the constitutionality of an arrest based on investigative alert - albeit based on different legal reasoning than the argument that Bass advanced.

Finally, assuming *arguendo*, that Bass did not properly place this issue before the Appellate Court, under Supreme Court Rule 366(a)(5), it was well-within its rights to decide the case on a legal theory it raised *sua sponte.* Ill. S.Ct.R. 366(a)(5) (eff. Feb 1, 1994); see also, *Marconi v. City of Joliet*, 2013 IL App (3d) 110865, ¶ 16 (holding that Supreme Court Rule 366(a)(5) grants the Appellate Court "the discretionary authority to 'enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief'"); *Mid–Century Insurance Co. v. Founders Insurance Co.*, 404 Ill. App. 3d 961, 966 (1st Dist. 2010) ("[U]nder Rule 366, a reviewing court may, in the exercise of its responsibility for a just result, ignore consideration of waiver and decide a case on grounds not properly raised or not raised at all by the parties.") (Internal quotation marks omitted.)); *Ultsch v. Illinois Mun. Ret. Fund*, 226 Ill. 2d 169, 192 (2007) ("the reasons given for a judgment or order are not material if the judgment or order itself is correct ... [i]t is the judgment that is on appeal to a court of review and not what else may have been said by the lower court")

The Appellate Court here did not go on a "fishing expedition" in search of an issue that Bass did not identify. Instead, the Appellate Court correctly determined that the Chicago police practice of systematically avoiding obtaining judicially

scrutinized warrants prior to arresting criminal suspects violated the Illinois Constitution, just as Bass asked it to do.

B. The Chicago police department's investigative alert system usurps the Judiciary's power to issue warrants in violation of the Fourth Amendment to the United States Constitution and the affidavit requirement of Article I, Section 6 of the Illinois Constitution. Accordingly, this Court should affirm the suppression of Bass' statement as the fruit of an illegal arrest made on the basis of an investigative alert.

Both the United States and Illinois Constitutions provide for the use of warrants, issued on probable cause and supported by affidavit. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. See *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963). "The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963). While courts have routinely sanctioned warrantless arrests based on probable cause, the Appellate Court correctly realized that the Chicago Police Department has exploited this reasonable exception to the warrant requirement by creating a *de facto*, parallel warrant system that entirely removes the judiciary from the pre-arrest process. The framers did not envision such a system.

1. Chicago's investigative alert system, which relies on unsworn assertions from police and witnesses to reach non-judicially vetted determinations of probable cause violates the Illinois Constitution's heightened protections against unreasonable searches and seizures.

The Illinois Constitution incorporates, as a minimum standard, the United States' Constitution's strong preference for arrests based on warrants. *Gerstein*

v. Pugh, 420 U.S. 103, 112 (1975) ("[t]o implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible."); *Terry*, 392 U.S. at 20 ("the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure") In addition, Illinois' search and seizure jurisprudence is in limited lockstep with that of the United States Supreme Court. Thus, if justified by language or tradition, this Court may interpret article 1, section 6 as more expansive than the Fourth Amendment. The Appellate Court below correctly found justification here. Even if the Fourth Amendment does not bar the Chicago Police Department's use of investigative alerts as a means to evade pre-arrest judicial examination of its probable cause determinations, Illinois' Constitution does.

In deciding when to exercise its judicial independence, Illinois' limited lockstep doctrine "allow[s] consideration of state tradition and values as reflected by long-standing state case precedent." *People v. Caballes*, 221 Ill. 2d 282, 314 (2006). States have adopted "various methods" for analyzing similar or corresponding provisions of their constitutions. *Id*. at 307. The varying methods range from "lockstep," which *Caballes* described as, "the state court bind[ing] itself to following prior Supreme Court interpretation of the federal constitutional text," to the "primacy" or "primary" approach, which considers decisions of the United States Supreme court to be persuasive, but not binding authority. *Id*. at 307-10.

In *Caballe*s, the defendant urged this Court to adopt the primacy approach. *Id*. at 308-09. Although this Court rejected the defendant's invitation, it likewise

refused to embrace a strict, or true, "lockstep" approach, writing that, although "this court itself has employed [the] term" lockstep, "it is clear that it is an overstatement to describe our approach as being in strict lockstep with the Supreme Court." *Id*. at 309. Instead, *Cabelles* adopted the "limited lockstep approach." *Id*. at 309-10. Under the limited lockstep approach, courts will "'assume the dominance of federal law and focus directly on the gap-filling potential' of the state Constitution." *Id*. at 309.

The State argues that *Caballes* and *People v. Tisler*, 103 Ill. 2d 226 (1984) concluded that article 1, section 6 and the Fourth Amendment should be "construed alike." (St. Br. 19) But both cases did so in the context of the controversy before them, and left open, in accordance with the limited-lockstep doctrine, the possibility for divergent interpretations. In *Caballes*, this Court held that "if federal law provides no relief" it must "turn to the state constitution to determine whether a specific criterion -- for example, unique state history or state experience -- justifies departure from federal precedent.'" *Id*. And although the *Tisler* court ultimately ruled that it would adhere to the United States Supreme Court's interpretation of the Fourth Amendment, it did so only after noting that it was rejecting the defendant's argument, "in this particular context." Id.

*Caballe*s held that justification for departure from federal precedent occurs: (1) where the language of a provision of the Illinois Constitution, or of the debates leading to the provision's enactment, evince the framers' intent that the provision be interpreted differently from similar provisions of the United States Constitution, *see also Tisler*, 103 Ill. 2d at 245; or (2) where there exists a long-standing state

tradition that is in conflict with the United States Supreme Court's interpretation of the United States Constitution. *People v. Krueger*, 175 Ill. 2d 60,75 (1996); *People v. Washington*, 171 Ill. 2d 475, 485-86 (1996). *Caballe*s, 221 Ill. 2d at 310-11, 314. The Appellate Court correctly found both exceptions applicable here.

a. **The text of the Illinois Constitution and its history departs in a critical way from the text of the federal constitution demonstrating the framers' intent that the provision be interpreted differently**.

The State argues that under *Caballes* and *Tisler*, article I, section 6, can provide no more protection to Illinois citizens than the Fourth Amendment. (St. Br. 19) But *Caballes* and *Tisler* merely held that for purposes of the questions presented in those case – for *Caballes*, whether the term "search" encompasses dog sniffs, and for *Tisler*, how to analyze probable cause in a case with a confidential informant – the clauses had the same meaning. Neither directly addressed the significance of Illinois' use of the word "affidavit" as opposed to "oath or affirmation."

As this court established in *Caballes*, the text of the constitution itself provides the starting point for any analysis. Turning then to the text of the Illinois constitution, both Illinois' 1818 and 1848 constitutions departed substantially from the Fourth Amendment to the United States constitution, imposed no warrant limitation or requirement on the State's power to search and seize, and instead only restricted the State's usage of general warrants. Ill. Const. 1818, art. VIII, §7; Ill. Const. 1848, art. XIII, § 7; *People v. Bass*, 2019 IL App (1st) 160640 (2019) ¶49. It was only after Illinois adopted its 1870 constitution that language that substantially tracks the current constitution, and the United States Constitution's,

restrictions on unreasonable searches and seizures was added. *Compare* Ill. Const. 1870, art. II, § 6 *with* Ill. Const. 1970, art. I, § 6.

The new section 6 did not track the Fourth Amendment verbatim. The Fourth Amendment provides that no warrants, "shall issue, but upon probable cause, supported by *[o]ath or affirmation."* U.S. Const., amend IV. (Emphasis added) In contrast, the Illinois constitution of 1870, specifically dictated that "no warrant shall issue without probable cause, supported by *affidavit*." Ill. Const. 1870, art. II, § 6. (Emphasis added) While the initial draft of the 1870 constitution did use "oath or affirmation," the change to "affidavit" was specifically requested during convention's debates. *Journal of the Constitutional Convention of the State of Illinois*, 772-773 (https://hdl.handle.net/2027/uiug.30112120236770)(last visited Nov. 25, 2020).

Finally, under this Court's well-established principles for statutory construction, constitutional and statuary provisions are to be viewed "as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation [and] [e]ach word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *People v. Gutman*, 2011 IL 110338, ¶ 12 (citing *People ex rel Sherman v. Cryns*, 203 Ill. 2d 264, 279-80 (2003)). Moreover, when interpreting the constitution and statutes, the words that are chosen are to be given their plain meaning. Here, an affidavit is not an "oath or affirmation," and holding otherwise would fail to give meaning to the constitutional drafters' choice of the word "affidavit" in lieu of "oath or affirmation."

In addition to the different meanings ascribed to the words "oath or affirmation" and "affidavit," because the Illinois constitution uses both terms in different sections, a second cannon of construction compels the determination that the Illinois constitution provides additional protections beyond those afforded by the federal constitution. "When [a document] includes particular language in one section ... but omits it in another section of the same [document], courts presume that the legislature acted intentionally and purposely in the inclusion or exclusion, and that the [drafter] intended different meanings and results." *People v. Clark*, 2019 IL 122891, ¶ 23, *reh'g denied* (Oct. 2, 2019) (citations omitted). The Illinois Constitution of 1970, in addition to using the term "affidavit" in the relevant section, also uses the term "affidavit" in other sections to refer to a written document, as opposed to a verbal statement. For example, the Illinois Constitution requires that initiatives to recall the governor be supported by an affidavit, and not an oath or affirmation, when it establishes the rigorous procedures related to recalling the governor. Ill. Const. 1970, art. III, § 6.

In contrast, Article IV, Section 14 of the 1970 Constitution contains the exact same "oath or affirmation" phrase used by the Fourth Amendment when it describes the less formal, but still solemn, procedures Senators shall use when serving as jurors in an impeachment. ("When sitting for that purpose, Senators shall be upon oath, or affirmation, to do justice according to the law.") Likewise, Article XIII, section 3 defines the "oath or affirmation of office" and requires each prospective office holder to "take and subscribe to the following oath or affirmation." *See also*, Ill. Const. 1970, art. I, § 3. ("the liberty of conscience hereby secured shall

not be construed to dispense with oaths or affirmations.")

Thus, the text of the 1970 constitution reveals that its drafters and those who adopted it knew full well and understood both the phrase "oath or affirmation" and the term "affidavit" - and ascribed different meanings to those two terms. Furthermore, the usage of the respective terms in context compels the conclusion that the 1970 constitution considered an affidavit to be more formal than an oath or affirmation and imposed the more rigorous affidavit requirement for critical events that also required the creation of a paper record.

This Court in *Caballes* did note that the 1970 constitution's use of the phrase "supported by affidavit," was "virtually synonymous" with the "oath or affirmation" provision of the Fourth Amendment, and referred to prior decisions holding that the two provisions should be construed, "alike." *Caballes*, 221 Ill. 2d at 291, citing *People v. Castree*, 311 Ill. 392, 395 (1924); *People v. Reynolds*, 350 Ill. 11, 16 (1932); *People v. Grod*, 385 Ill. 584, 592 (1944); *People v. Tillman*, 1 Ill. 2d 525, 529 (1953); and *People v. Jackson*, 22 Ill. 2d 382, 387 (1961). None of these cases, however, undertook a direct textual analysis of the amendment and, importanly, none confronted the ensuing authority that did find significance in the use of the word "affidavit." This authority will be discussed in subsection b, *infra.*

Accordingly while the language of the Illinois Constitution and the Fourth Amendment may be similar, or even "virtually synonymous," it is not accurate to say that it is identical or that they must be integrated in complete lockstep. On the contrary, the fact that the texts diverge supports Bass' argument, and the conclusion of the court below, that the Illinois Constitution's use of the term

"affidavit" provides additional protections above and beyond the federal constitution.

b. Illinois has a long-standing state tradition of interposing protections for its citizens from abusive police practices in excess of those imposed by the United States constitution.

The use of the word "affidavit" instead of "oath or affirmation" led to a state tradition of affording additional protections from insufficient warrants, and from warrantless arrests. In the years following the 1870 constitution, this Court determined that the use of the term "affidavit" amounted to a "step beyond the constitution of the United States." *Lippman v. People*, 175 Ill. 101, 112 (1898). The *Lippman* Court found that the affidavit requirement signaled an intent to involve a "magistrate" in every probable cause determination. *Bass*, 2019 IL App (1st) 160640, *citing Lippman*, 175 Ill. at 113. The additional protections granted through the affidavit requirement serves to limit "the abuse of "executive authority" by imposing judicial review as a check on the State and "to substitute judicial discretion for arbitrary power, so that the security of the citizen and his [or her] property shall not be at the mercy of individuals or officers." *Lippman*,.175 Ill. at 112.

These principles were repeatedly affirmed during the century between the adoption of Illinois 1870 and 1970 constitutions. While *Lippman* involved search warrants, this Court extended the holding to arrests as well. *People v. Elias*, 316 Ill. 376, 382 (1925). The *Elias* Court held "that a complaint or information charging an offense on information and belief does not authorize the issuance of a warrant for the arrest of a person," and that only an affidavit presented to a magistrate

will suffice. *Id.* at 381. The *Elias* Court cited the same preference for judicial scrutiny over arbitrary executive authority, and a desire to not place the security of Illinois citizens at the "mercy of individuals or officers." *Id., citing Lippman*, 175 Ill. at 112. Likewise, in *People v. Clark*, 280 Ill. 160, 167 (1917), this Court concluded that a citizen cannot be arrested "on the unsworn complaint or information of the [s]tate's attorney any more than on the unsworn complaint of a private citizen or on no complaint at all."

This Court likewise held that the affidavit requirement limits the police's ability to commit warrantless arrests. In *People v. McGurn*, the defendant rode in a taxi that was stopped on a Chicago street. 341 Ill. 632, 634 (1930). Two police officers, riding on a streetcar, saw the defendant. *Id.* They did not see the defendant committing a crime and knew only that they had a "standing order" from a superior officer to arrest the defendant. *Id.* at 634-35. The officers got into the taxi, found a gun on the defendant, and arrested him. *Id.*

This Court found the arrest illegal as a matter of state constitutional law. "[U]nder the constitution of this [s]tate no municipality has authority to clothe any officer with the autocratic power to order the summary arrest and incarceration of any citizen without warrant or process of law and thus render the liberty of every one of its citizenry subject to the arbitrary whim of such officer." *Id.* at 638. Even while acknowledging the statutory authority to arrest without a warrant, the court emphasized that an officer "has no authority, upon bare suspicion, or upon mere information derived from others, to arrest a citizen and search his person in order to ascertain whether or not he was [violating the law]." Id. at 642. And

while a commanding officer had ordered the arrest, presumably on that officer's own conclusion of probable cause, this Court found that justification lacking given that the superior officer had no warrant. *Id*. at 638.

McGurn recognized that permitting police officers to supplant the judiciary and authorize fellow officers to conduct arrests was a step too far. To exercise such unchecked power would allow "for officers of the law, urged in some cases by popular clamor, in others by the advice of persons in a position to exert influence, and yet in others by an exaggerated notion of their power and the pride in exploiting it, to disregard the law on the assumption that the end sought to be accomplished will justify the means." *Id*. (internal quotations and citations omitted)

The Appellate Court below found in the foregoing cases a common thread that could be followed back to the 1870 constitution's unique language – the "mere word of an executive branch official fails, on its own, as a substantiate for a finding of probable cause." *Bass*, 2019 IL App (1st) 160640, ¶57. This is the crux of the holding below, yet the State's brief never once mentions the *Lippman*, *Elias, Clark,* and *McGurn* line of cases. The State does remark that the "falsity" of the majority's holding stems from the fact it never identified an "Illinois tradition" that requires a warrant for an arrest. (St. Br. 23) But as illustrated above, the majority identified the tradition. The State simply chose to ignore it.

Instead, the State comes to the opposite conclusion by noting that courts have upheld warrantless arrests dating back to 1883. (St. Br. 22). But these cases generally involve either exigency or a crime committed, if not in the arresting officer's immediate presence, at least in the course of the arresting officer's

investigation. *See Terry,* 392 U.S. at 20 (warrantless seizures allowed only in those cases involving exigency). For example, in *Cahill v. People*, 106 Ill. 621 (1883), the arrest occurred when an officer chased a gunman immediately after the shooting. In *People v. Wright*, 56 Ill. 2d 523 (1974), the informant told the police that the armed robbery suspect might be tipped off soon, and the officer made the arrest only after defendant let him into his apartment where the officer observed illegal firearms. *Id*. at 527. In *People v. Hightower*, 20 Ill. 2d 361 (1960), the arresting officers were participating in a drug sting with an undercover buyer prior to the arrest. Thus, the officers in all of these cases had direct involvement in criminal investigations of defendants, and in most cases personally observed criminal activity. These cases are a far cry from the instant case and *McGurn*. None dispel the majority's conclusion below that "[t]he mere word of another officer, based on the mere word of another citizen, does not meet the Illinois constitutional threshold for effectuating a lawful arrest." *Bass*, 2019 IL App (1st) 160640, ¶59.

This court in *Caballes* announced its intention to continue following the Fourth Amendment in limited lockstep because the doctrine "was firmly in place before the adoption of the 1970 constitution" and would have been known to the relevant stakeholders who played a role in its drafting and adoption. *Caballes*, 2221 Ill.2d at 292-94. As the court below noted, those same stakeholders are presumed to have been aware of the common law interpretations of the affidavit requirement recounted above. *Bass*, at ¶65. Accordingly, when the drafters of the 1970 constitution chose to carry forward the language from the 1870 constitution, this Court should presume that the drafters accepted the prior limited lockstep

doctrine *in toto*, both the times when the lockstep was rigid and those times this Court accepted departures from lockstep, such as *Lippman* and *McGurn*. *Bass*, at ¶65.

Like *McGurn*, the arresting officer here acted on the word of another officer who acted on the word of a citizen. Unlike *McGurn*, the hearsay was disseminated to the arresting officer as part of a city-wide computer system. The concerns expressed in *McGurn* are only magnified when dealing with the scale and opacity of the City of Chicago's investigative alert system.

c. **The Investigative Alert system undermines the language of article I, section 6, and violates Illinois' tradition of protecting citizens from inadequate warrants and certain warrantless arrests**.

The Chicago Police use two types of investigative alerts. *People v. Bass*, 2019 IL App (1st) 160640, ¶ 31. The type at issue here is called an "Investigative Alert/Probable Cause to Arrest" and it identifies an individual that is "wanted by ... investigative personnel concerning a specific crime, and while an arrest warrant has not been issued, there is probable cause for an arrest." *Id.*

Chicago Police procedures specifically instruct police officers to immediately arrest individuals who are the subject of such an "Investigative Alert/Probable Cause to Arrest." *Id.* at ¶ 32. An investigative alert is "not a fast-acting response to an evolving scenario in the field," and, indeed, "[t]he system parallels the warrant system, in both the time it takes and the deliberation required." *Id.* at ¶ 68. Critically, the investigative alert system cuts the judiciary out of the process and avoids any independent scrutiny of the quality or sufficiency of the investigative

efforts that led to a determination of probable cause, until after the citizen has undergone the trauma and humiliation of arrest.

The City of Chicago as *amicus* for the State, protests that this system is nothing more than an "all-points bulletin." (City of Chicago Br. 7) But the dictionary definition the City cites undermines this claim: the APB is a broadcast to fellow officers that a suspect or car "is being actively sought in connection with a crime." www.merriam-webster.com/dictionary/all-points%20bulletin (Last visited November 10, 2020). An "active" search suggests a sense of exigency which is totally absent in the investigative alert system. This understanding of the APB as an emergency tactic is confirmed by the City's own cases as well. *See Commonwealth v. Walters*, 378 A.2d 1232 (Pa. Super. 1977) (officer who issued APB actively sought "fugitive" defendant for two days, visiting his wife, mother, brother-in-law, and attorney); *State v. Johnson*, 459 S.E. 2d 246 (N.C. 1995) (APB issued when investigating officer arrived at scene shortly after murder and learned defendant shot victim in head before fleeing in blue car). The APB is not used in place of a warrant in the same way investigative alerts are. The APB, and the court cases sanctioning their use, are best understood as falling under the exigency exception to the warrant requirement. The investigative alert is different.

The City does not assert that, once an individual's name is entered in the investigative alert system, there is a broadcast communicating an urgent, active search. Rather, it appears the name remains in a system so that the suspect is subject to arrest whenever that person happens to encounter a Chicago police officer. (City of Chicago Br. 2)

Unlike an investigative alert, an APB is sent during the pursuit and is resolved quickly. If it is not resolved, the police would then obtain a warrant. Neither the State nor the City have provided an example of an APB that is continuously broadcast, for three weeks, until arrest, and it does not claim this would be acceptable without a warrant application in the meantime. But that is exactly what occurs in the investigative alert system.

Although the City asserts that "[i]nvestigative alerts must be audited regularly," (City of Chicago Br. 2), it provides no further information concerning how often these audits are performed, who performs them, what standards are employed, or what the results of a typical audit might be. *See* Chicago Police Department Special Order S04-16, IV.6. The City does not say whether the alert is revisited if an evidentiary development occurs prior to arrest. The Special Order mentions that the alert should be "updated or canceled as necessary," but offers no details as to what would trigger these acts. *Id.* at IV.5. In fact, the only reference to such a triggering development is "the subject of the alert has been apprehended." *Id.* at IV.5, 6. What happens if an officer gathers exculpatory evidence that undermines probable cause? Will the investigative alert be updated or deleted? Will probable cause be recalculated to ensure that citizens aren't unjustly detained? The State and City do not say, and the Special Order does not mandate such a process.

The City also urges this Court to view the investigative alert system as fitting within the tradition of the collective knowledge doctrine. As the majority pointed out below, the collective knowledge doctrine "exists in a world without

investigative alerts." *Bass* at ¶61, citing *Whitely v. Warden*, 401 U.S. 560, 568 (1971) and *United States v. Hensley*, 469 U.S. 221 (1985). *Whitely* involved an officer informing fellow officers that a *warrant* existed for defendant's arrest. 401 U.S. at 568. *Hensley* permits *Terry* stops made based on suspicion gained through a bulletin of another police department. 469 U.S. at 233. Nothing in the majority's opinion affects these holdings.

The only case of this Court cited in support of the City's "collective knowledge" argument is *People v. Peak*, 29 Ill. 2d 343 (1963). There, officers in the process of arresting the defendant's brother on drug charges were standing on the men's back porch. *Id*. at 345. They had just recovered marijuana from the property, and observed the defendant passing through the yard, stopping to pick up a package from a hiding place. *Id*. The brother told the officers on the porch that this package contained marijuana, and these officers told another officer, who "did not appear to hear" the brother's statement, to place the defendant in custody. *Id*. at 345-6 This Court held that "*When the officers are working together under such circumstances* the knowledge of each is the knowledge of all and the arresting officer had the right to rely on the knowledge of the officer giving the command together with his own personal knowledge." *Id*. 348-49 (emphasis added).

The State and City do not allege that the officers here were working "under such circumstances" as the officers in *Peak* – part of the same investigatory unit working at the same time and at the same residence, with a potential crime committed in some of the officers' presence. Nor does the City or State allege that Officer Carrero relied on both the knowledge he gained from the investigative

alert "together with his own personal knowledge." *Peak*, 29 Ill. 2d at 348. Carrero knew Bass only as a passenger in a vehicle who had done nothing to raise his suspicion. Thus, *Peak* completely undermines the City's argument. *See also*, *United States v. Woods*, 544 F.2d 242, 260 (6th Cir. 1976) (the collective knowledge doctrine only applies where law enforcement agents were in "close communication."); *Commonwealth v. Yong*, 644 Pa. 613, 636, 177 A.3d 876, 890 (2018), *cert. denied sub nom. Yong v. Pennsylvania*, 139 S. Ct. 374, 202 L. Ed. 2d 286 (2018) (adopting the "vertical approach" to the collective knowledge doctrine and holding that a seizure is constitutional where the investigating officer with probable cause or reasonable suspicion "was working with the arresting officer and would have inevitably and imminently ordered that the seizure be effectuated"). The investigative alert system is unlike any "collective knowledge" basis previously authorized by this Court.

Finally, the City disputes the majority's finding that investigative alerts "fail to improve the administration of criminal justice." (City of Chicago Br. 9) The City claims the sharing of knowledge promotes "proactive" law enforcement, and that the written requirement "improves the accuracy" of probable cause determinations, and provides a written record for a reviewing court. (City of Chicago Br. 9-10) The common theme of these arguments is that the investigative alert system is good in all the ways a warrant would be – without the judicial oversight. *Warrants* promote proactive law enforcement – they alert officers to the existence of a judicial finding of probable cause. *Warrants* improve the accuracy of probable cause determinations – they allow judges to double-check the conclusions of the

petitioning officer. *Warrants* ensure a written record for a reviewing court – as shown by the affidavit requirement of section I, article 6.

On the other hand, unlike the warrant system, the investigative alert system is full of bad incentives for police. By creating an investigative alert and then allowing it to lie in wait for an indefinite duration, the police have no incentive to complete their investigation, obtain additional evidence, and remove a potentially dangerous suspect from the street. Instead, they merely create an investigative alert and wait for a random encounter. Furthermore, if police are allowed to run name checks for investigative alerts as part of every *Terry* or traffic stop, or other chance encounter with citizens, and then arrest individuals who are found in their system, police are incentivized to increase those types of interactions. This increases the likelihood of pretextual stops or other dangerous encounters that would not happen if police were armed with a warrant particularly describing the suspect and where to locate him.

In contrast, warrants, in addition to being subject to independent judicial scrutiny, ensuring that arrests are the product of quality investigative work, are required to describe the person to be seized with particularity. *Wong Sun v. United* States, 371 U.S. 471, n. 9 (1963) (the Fourth Amendment's requirement that a warrant particularly describe the person or thing to be seized "applies both to arrest and search warrants.") This reduces the risk of false arrests and dangerous police-citizen encounters. And as a result of being subject to prior judicial scrutiny, warrants provide protection against undesirable suppression of evidence.

Neither the State nor the City, has articulated a *bona fide* reason for why investigative alerts should be preferred over warrants. The City claims in its brief that investigative alerts are issued, "only when the issuing officer can affirmatively demonstrate in advance that the arrest complies with constitutional requirements, by providing both a written description of the facts establishing probable cause for the arrest and a specific identification of the suspect sought." (City of Chicago Br. 8) The City never explains, however, why, if police have the information required to obtain a search warrant, they prefer an investigative alert. The inescapable response to that question is that the police often do not have enough evidence to pass constitutional muster before an independent magistrate. Accordingly, not only does Chicago's use of the investigative alert system violate the Illinois and United States constitutions, its usage is also bad practice because it creates a greater danger of suppression. *United States v. Leon*, 468 U.S. 897, 920-25 (1984) (recognizing that officers can generally rely on a warrant to avoid the exclusionary rule because it involves a neutral magistrate's decision on probable cause).

As the Appellate Court correctly decided below, the Chicago Police Department's use of investigative alerts to support warrantless arrests in non-exigent circumstances violates the Illinois Constitution's prohibition on unreasonable seizures. Accordingly, this Court should affirm the decision below reversing Bass' conviction and remand for a new trial.

2. **A warrantless arrest predicated on a non-judicially vetted entry in a database violates the Fourth Amendment of the United States Constitution**.

Even if this Court finds the Illinois Constitution grants no added protections against investigative alerts, it should still find the scheme unconstitutional under the Fourth Amendment. Under the United States Constitution, a warrantless search or seizure is deemed unreasonable *per se* unless it comes within a specific, well-delineated exceptions to the warrant requirement. "Unreasonable searches or seizures conducted without any warrant at all are condemned." *Payton v. New York*, 445 U.S. 573, 585 (1980). Whenever practicable, police must "obtain advance judicial approval of searches and seizures through the warrant procedure," and "in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." *Terry*, 392 U.S. at 20. Thus, although there are circumstances where the federal constitution permits a warrantless arrest, "[t]o implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the [Supreme] Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975).

In *Gerstein*, the United States Supreme Court expressed a clear preference for arrest warrants, stating that, "[m]aximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest," but, nonetheless, expressed the view that, "such a requirement would constitute an intolerable handicap for legitimate law enforcement." *Gerstein*, 420 U.S. at 113 (internal citations omitted). In *United States. v. Watson*, 423 U.S.

411 (1976), the United States Supreme Court, in a 6-2 decision, held that the Fourth Amendment did not prohibit a warrantless arrest provided that the arresting officer had probable cause to believe that the suspect was guilty of a felony. *U.S. v. Watson*, 423 U.S. at 416-17. The *Watson* court relied upon the "ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." *Id.* at 418-19 (citations omitted).

The United States Supreme Court has never endorsed warrantless arrests made in reliance on a large-scale database maintained as a "warrant-like" substitute -- albeit one wholly removed from judicial scrutiny. Rather, as the dissent in *Watson* noted, in many of the cases the *Watson* majority relied upon, "exigent circumstances were present." *Watson*, 423 U.S. at 438 (Marshall, J, dissenting) Moreover, the database at issue here is a far cry from the practices in place at the time of the founding and, critically, offenses that the modern law classifies as felonies bear little resemblance to their common-law namesakes. *Watson*, 423 U.S. at 440 (Marshall, J, dissenting) (citing Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 541, 572-573 (1924) and 9 Halsbury's Laws of England 450-793 (1909)).

Modern criminal justice computing and communication technology have little in common with the policing practices and criminal justice machinery of founding-era America. It may have been perfectly "reasonable" for a law enforcement officer at the time of the founding to rely on probable cause when making an arrest for a felony offense, because that probable cause was, due to limited communication

technology, inevitably based on personal knowledge. However, modern legislation and technology has so expanded the definition of felony offenses, police communication capabilities, and the scale of police forces, that teleporting the common law's approach into the twenty-first century fails to provide reasonable limitations on arrests. At the time of the founding, because both the population and the size of police forces was much smaller, if a police officer had probable cause to believe an individual committed a felony, that knowledge was likely based on his first-hand and intimate knowledge of the offense itself and the suspect. In contrast, in modern times, police forces and populations - especially in a large metropolis such as Chicago - dwarf those of their founding-era counterparts. In addition, while founding-era law enforcement officers relied primarily on their own senses and information that was transmitted via pen and paper – or quill and ink – today's officers have access to computer technologies that rapidly disseminate information across enormous areas. Accordingly, in modern times, an officer executing a warrantless arrest based only on an entry in a computer database is highly unlikely to be familiar with either the suspect or the circumstances of the offense and, accordingly, has little capability to determine if the arrest is, in fact, reasonable.

Requiring the Chicago Police to seek arrest warrants prior to arresting individuals such as Bass would result in a more appropriate balance between citizens' privacy and liberty interests and the legitimate interests of law enforcement. Obviously, citizens would benefit from fewer intrusions into their "sacred sphere of personal privacy" and would feel confident that the "abrupt and intrusive ...

authority [would] be granted to public officials only on a guarded basis." *Watson*, 423 U.S. at 446-47 (Marshall, J, dissenting). Moreover, requiring police to obtain a warrant, or to identify an exigent circumstance that prevents the application for a warrant, would impose a minimal burden on police. Indeed, as discussed above, the procedures that the Chicago Police utilize when creating investigative alerts are already nearly as burdensome as obtaining a judicially vetted arrest warrant, if not more so, but without the benefit of an independent constraint on the executive branch. Finally, requiring police to obtain arrest warrants prior to arrests would also substantially reduce or eliminate the risk of courts suppressing evidence obtained as a result of warrantless arrests.

For these reasons, this Court should recognize that a more correct interpretation of the Fourth Amendment compels the conclusion that a warrantless arrest made in the absence of exigent circumstances, like a search conducted under similar circumstances, represents an unreasonable intrusion of the privacy and liberty interests of the public. Even if the Illinois Constitution should be interpreted in total lockstep with the federal constitution, this Court should find that warrantless arrests based only on investigative alerts are inconsistent with the United States and Illinois Constitutions, unless exigent circumstances justify the arrest or the failure to obtain a warrant. Accordingly, this Court should affirm the Appellate Court's decision reversing the trial court's denial of Bass' motion to suppress his post-arrest statement and remand his case for a new trial.

C. **The good-faith exception does not apply to Bass' arrest**.

Finally, the State argues that the good-faith exception should apply because the officers who arrested Bass acted with an objectively reasonable good-faith belief that their conduct was lawful. (St. Br. 25) First, the State fails to argue that the good-faith exception should apply to the unlawful extension of the stop as argued in Issue I, *supra*, and argues only that the police acted in good faith with respect to their reliance on the investigative alert. (St. Br. 24-27) By failing to argue that the good-faith exception should apply to the unlawful extension of the stop, the State has forfeited any arguments to the contrary and offered an implicit concession on that issue. *People. v. McKown*, 236 Ill. 2d 278, 308 (2010). The unlawful extension of the stop to allow officers to run a name check provides a separate basis for suppressing Bass' post-arrest statements. Accordingly, even if this Court determines that the good-faith exception applies to the Chicago Police Department's use of investigative alerts in lieu of warrants, this Court should still affirm the Appellate Court's reversal of Bass's conviction.

Likewise, to the extent that the use of the investigative alert provided an independent basis for invalidating Bass' arrest and suppressing his post-arrest statement, the State forfeited that argument by failing to raise it below. *Garza v. Navistar Intern. Transp. Corp.*, 172 Ill. 2d 373, 383 (1996) ("[w]here [a party] in the appellate court fails to raise an issue in that court, this court will not address it.") (quoting *Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 209 (1983)). Moreover, even if the State did not forfeit its good faith argument, the exception is inapplicable here.

First, the State has failed, either here or below, to satisfy its burden to prove that the good-faith exception should apply. *People v. Turnage*, 162 Ill. 2d 299, 313 (1994) ("As the defendant has satisfied his burden of proving a violation of his Fourth Amendment rights . . . the burden shifts to the prosecution to prove that exclusion of the evidence is not necessary because of the good-faith exception.")

Second, the State asserts that there is no "question that the officers could rely on the investigative alert" and cites several cases to supports its argument (St. Br. 26) The State is incorrect. The cases cited by the State either are completely inapposite as they involved officers determining probable cause through their own investigative work or are little more than applications of the collective knowledge doctrine in its narrowest form and involved arrests based on a warrant.

For example, in the first case cited by the State, *People v. Tisler*, 103 Ill. 2d 226 (1984), the arresting officer personally performed the investigation that supplied probable cause to arrest. *Tisler*, 103 Ill. 2d at 231-32. Moreover, the officer in *Tisler* did precisely what the officers here did not do: he sought a warrant from a judge and *only* proceeded to make a warrantless arrest because the tip concerned an impending crime and, because it was a Saturday, he was unable to get a warrant after repeated attempts. *Id.* at 233. Since the officer knew that Judges' offices were closed on Saturdays, and because of the urgency involved, he initially attempted to follow a back-up procedure of contacting an assistant State's Attorney for help in obtaining a warrant. *Id.* at 232-33. It was only after the officer tried, and failed, to reach *two* assistant State's Attorneys at both their homes and offices

that he proceeded to arrest the defendant without a warrant. *Id.* In other words, exigent circumstances guided the officer's actions.

Likewise, the second case cited by the State, *Whiteley v. Warden Wyo. State Penitentiary*, 401 U.S. 560 (1971) in no way endorsed the practice of performing a warrantless arrest based on an entry in a computer database. Again, the officers in *Whiteley* did what the officers here did not: brought their evidence of probable cause before a neutral magistrate and obtained a warrant *prior* to arresting the defendant. *Whiteley*, 401 U.S. at 562-63. Finally, *People v. McGee*, 2015 IL App (1st) 130367, specifically dealt with whether an arresting officer needed to testify at a motion to suppress when the defendant was arrested based on an investigative alert and did not establish definitively that warrantless arrests predicated on an investigative alert comported with either the Illinois or the United States' constitutions. *McGee*, 2015 IL App (1st) 130367, ¶¶ 46-50.

In addition, as discussed above, because the police conduct which resulted in Bass' arrest amounted to a systematic and egregious effort to circumvent the protections afforded to citizens by both the United States and Illinois constitutions, the good-faith exception should not be applied. As the very case cited by the State in its opening brief, *People v. LeFlore*, 2015 IL 116799, teaches, "[i]n order for exclusion of the evidence to apply, the deterrent benefit of suppression must outweigh the "substantial social costs." *People v. LeFlore*, 2015 IL 116799, ¶ 23, (citing *United States v. Leon*, 468 U.S. 897, 907 (1984). Of great importance here, *LeFlore* and its antecedents provide that the good-faith exception is applicable when police "conduct involved only simple, isolated negligence." *Id.* ¶ 24 (citations

omitted) In contrast, where police engage in systematic conduct, as is the case here with the Chicago Police Department's use of investigative alerts, the exclusionary rule is a well-fashioned tool to deter continued violations of the rights of citizens.

Because the State forfeited any argument applying the good-faith exception and failed to carry its burden of proof that the exception should apply to police use of investigative alerts in lieu of arrest warrants, this Court should reject its invitation to apply the good-faith exception to Bass' arrest. Further, to the extent that the State has cleared the bar for this Court to apply the good-faith exception, the exception should not be applied. Bass' arrest resulted from the Chicago Police Department's sustained and systematic efforts to avoid pre-arrest judicial scrutiny of probable causes determinations in an inexcusable end-run around both the Illinois and United States Constitution's pellucidly stated arrest warrant requirement. Officers did not make an isolated or unique mistake when they arrested Bass and, in order to deter the Chicago Police Department and its officers from future violations of citizens' constitutional rights, this Court should refuse to apply the good-faith exception and affirm the Appellate Court's decision reversing Bass' conviction and remanding for a new trial.

CONCLUSION

For the foregoing reasons, Cordell Bass, defendant-appellee, respectfully requests that this Court affirm the Appellate Court's decision reversing the trial court's denial of Bass' motion to suppress, reversing his conviction, and remanding for a new trial.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

BRIAN L. JOSIAS
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 47 pages.

/s/Brian L. Josias
BRIAN L. JOSIAS
Assistant Appellate Defender

No. 125434

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- CORDELL BASS Defendant-Appellee	)	Appeal from the Appellate Court of Illinois, No. 1-16-0640. There on appeal from the Circuit Court of Cook County, Illinois , No. 14 CR 15846. Honorable Neera Lall Walsh, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Cordell Bass, Register No. R47334, Western Illinois Correctional Center, 2500 Rt. 99, Mt. Sterling, IL 62353

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 8, 2020, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/ Alicia Corona
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at 1stdistrict.eserve@osad.state.il.us