No. 125434

IN THE
SUPREME COURT OF ILLINOIS

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

# BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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## POINTS AND AUTHORITIES

## NATURE OF THE CASE

Defendant Cordell Bass, a passenger in a vehicle stopped for a traffic infraction, was arrested after a name check revealed an "investigative alert" with probable cause for his arrest. Defendant unsuccessfully moved to quash his arrest and suppress his subsequent oral statement to police, and then was convicted of criminal sexual assault in a bench trial.

The People appeal from the appellate court's judgment finding that the trial court erred in denying defendant's motion to quash and reversing his conviction. *People v. Bass*, 2019 IL App (1st) 160640. The appellate court's judgment rested on two distinct bases. First, the appellate majority found that defendant's arrest, although consistent with the Fourth Amendment, violated the warrant clause of article I, section 6 of the Illinois Constitution because it was based on a Chicago Police Department investigative alert, *id.* ¶ 43 ("article I, section 6 provides greater protections than the fourth amendment" and "arrests based solely on investigative alerts, even those supported by probable cause, are unconstitutional under the Illinois Constitution"); *id.* ¶ 71 ("the Illinois Constitution requires, in the ordinary case, a warrant to issue before an arrest can be made"). Second, all three justices found that the request for the passengers' identification during the traffic stop and the subsequent name checks violated the Fourth Amendment because they unlawfully extended the traffic stop. *Id.* ¶¶ 72-78.

## ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court erred in reversing defendant's conviction based on an issue never raised by defendant or briefed by the parties.

2. Whether the appellate court erred by departing from this Court's precedent in holding that the search and seizure provision of article I, section 6 of the Illinois Constitution provides greater protections than the Fourth Amendment and requires that a warrant issue before a valid arrest may be made.

3. Whether, even if the Illinois Constitution prohibits warrantless arrests, the exclusionary rule should not apply to defendant's post-arrest statement because police acted in good-faith reliance on established precedent permitting warrantless arrests.

4. Whether the officers' requests for identification and name checks on the passengers of the stopped vehicle violated the Fourth Amendment, where these requests did not measurably extend the duration of the stop.

## JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court granted the People's petition for leave to appeal on March 25, 2020.

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 6 of the Illinois Constitution of 1970 provides:

> 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.

The Fourth Amendment to the United States Constitution provides:

> 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

Defendant was arrested following an August 2014 traffic stop, during which police ran a "name check" and discovered an "investigative alert with probable cause for [his] arrest." R J18.[1] In September 2014, defendant was charged with criminal sexual assault, *see* 720 ILCS 5/11-1.20(a)(2), in that he "knowingly committed an act of sexual penetration upon T.P. . . . knowing that T.P. was unable to give knowing consent." C37-38.

### A. The circuit court denied defendant's motion to quash his arrest on the investigative alert.

Before trial, defendant filed a motion to quash arrest and suppress his oral statement to police, claiming that the officers exceeded the scope of the stop when they ran the name check, and that pursuant to *People v. Hyland*, 2012 IL App (1st) 110966, the investigative alert could not serve as a valid

[1] The Report of Proceedings is cited as "R[Letter][page number]," and the Common Law record is cited as "C[page number]."

basis for his arrest. C52-54 (motion); R J5. *Hyland* held that where the People presented evidence that the arresting officers relied on an investigative alert, but presented no evidence that the underlying facts in the investigative alert established probable cause to arrest, the circuit court erred when it denied the defendant's motion to quash arrest and suppress evidence. 2012 IL App (1st) 110966, ¶ 25.

The testimony at the hearing on defendant's motion established that he was the front-seat passenger in a van that failed to stop for a red light during the early morning hours of August 13, 2014. R J5-7. Chicago Police Officers Carrero and Serrano curbed the vehicle, and Carrero approached the driver's side, explained why he stopped the van, and asked the driver for his license. R J7. Carrero could not recall whether the driver presented a license, but he asked the driver to get out of the car, which was his usual practice when the driver fails to present a license. R J10.[2]

While Carrero approached the driver's side of the van, Serrano approached the passenger side and asked the passengers to step out. R J15; R J24. Defendant was seated in the front passenger seat. R J14, J23. Carrero could not recall exactly how many people were in the van — he estimated that there were between four and six occupants, R J20 — but he testified that, for officer safety, it was customary to ask all occupants of a

[2] Carrero's arrest report also documented that he ran a LEADS check, but did not specify whether he obtained the driver's name from a driver's license, state ID, or if the driver simply provided his name. R J12.

stopped vehicle to step out of the vehicle so that the officers could view them and their hands. R J16-17. The officers further noted that the van's rear windows were tinted, which made it difficult to see inside. R J16, J25. Serrano obtained defendant's driver's license, R J25, and Carrero conducted "name checks" on the occupants, including defendant, R J17-18.

When he ran the name checks, Carrero learned of an "active investigative alert with probable cause for [defendant's] arrest." R J18. Carrero read the alert and learned that "there was a victim who was asleep in her bed and awakened by defendant licking her anus." R J19. Defendant was the victim's sister's boyfriend. *Id.* He was spending the night at the victim's home, and the victim did not give defendant permission to do these acts. *Id.* The investigative alert noted that there was probable cause for arrest. *Id.* After they learned defendant's name and discovered the investigative alert with probable cause for arrest, the officers took defendant into custody. *Id.*

The officers did not ticket the driver for the red-light infraction, but Carrera completed a "TSS card" (which, he explained, documents driver information, vehicle information, the reason for the stop, and whether the vehicle was searched). R J9. Finally, he issued the driver a verbal warning. R J10 (Carrera: "The verbal warning would have come last, so there was stuff that preceded that[.]"). Officer Serrano testified that the entire stop lasted approximately eight minutes. R J26.

In addition to this testimony about the traffic stop, the People presented testimony from Detective Dwayne Davis about the basis for the investigative alert. Davis, a 25-year police veteran, testified that he interviewed the victim (T.P.) and her boyfriend on July 29, 2014, the day after defendant's offense. R J38. T.P. told Davis that she had been asleep in bed at home, when someone began to "lick on her buttocks and then mov[e] up into her groin area." R J29. She turned around to discover that it was not her boyfriend, as she had assumed, but defendant who was licking her. *Id.* T.P. did not give defendant consent to lick her. R J32. Defendant was her sister's boyfriend and had been staying in T.P.'s home for several days. R J29. T.P.'s boyfriend, Michael Dunkin, saw defendant coming out of T.P.'s bedroom that morning. *Id.* T.P. and Dunkin also identified defendant from a photo array. R J30-31. Based on this information, on July 31, 2014, Detective Davis issued an investigative alert for defendant. R J30.

At the close of the evidence, defendant's counsel argued that the court should grant the motion to quash and suppress because (1) the request for passenger identification and name checks exceeded the permissible scope of the traffic stop, R J33, and (2) the police "did not have an arrest warrant for Mr. Bass" though they "had ample amount of days to do so," R J34-35. The court denied defendant's motion. It held that the police acted properly when they ordered the occupants out of the van for officer safety purposes and requested passenger identification and conducted the name checks, and that

Detective Davis's testimony supplied sufficient probable cause for defendant's arrest. R J41-42.

### B. At a bench trial, defendant was convicted of criminal sexual assault.

After the court denied defendant's motion to suppress, defendant waived a jury trial, C64; R P4-5, and the matter proceeded to a bench trial in November 2015, where the People presented testimony from T.P., Dunkin, and Detective Davis.

T.P. testified that she was 32 years old and worked as an armed security guard. R P11-12. At the time of defendant's offense, she lived in Chicago with her three children and her boyfriend, Dunkin. R P12-13. Defendant was her sister Tina's boyfriend. R P13. On July 27, 2014, T.P. held a family gathering at her home. R P15. Tina, Tina's three children, and defendant spent the night at T.P.'s home. R P17.

T.P. wore a t-shirt and underwear to bed that evening. *Id.* The next morning, she awoke to the sensation of someone licking her buttocks. R P18, 22. T.P. was lying face-down on the bed and on her right hip, with her buttocks facing the door. R P18. T.P lifted her body to better "feel the sensation" because she believed the source of it was Dunkin. *Id.* She could feel the person's tongue on her buttocks, coming down to her vagina; she felt his tongue on her anus and vagina and felt licking "about four times." R P19; *see also* R P32 (defendant's tongue migrated down from her buttocks to her

vaginal area, where defendant inserted his tongue). T.P. was no longer wearing her underwear, though she had not removed them. *Id.*

T.P. turned over to tell Dunkin that she had to "freshen up," only to discover that it was not Dunkin but defendant. R P21. T.P. "yelled" and "hollered" and called for her sister before she jumped up to retrieve her gun. R P21-22. Dunkin appeared in the doorway and asked what was wrong, and she responded, "This mother fucker was licking my ass." R P22. T.P. never gave defendant consent to lick her. R P23.

T.P. called the police, and she met with Detective Davis at the police station the next day, where she identified defendant from a photo array. R P24-26. T.P. also identified defendant in open court. R P27.

Dunkin, T.P.'s boyfriend, corroborated T.P.'s account. When he woke up on the morning after the family get-together, T.P. still wore her t-shirt and underwear. R P43. Dunkin left the bed he shared with T.P. and went to use the bathroom; while he was in the bathroom, he heard T.P. scream, "Oh my God. Oh my God. Tina, Tina." R P45. Dunkin came out of the bathroom, saw defendant in the hallway, and asked him "what the fuck is wrong with [T.P.]?" R P45. Defendant responded, "I made a mistake. I walked in the room. She had no clothes." *Id.* Defendant then "shot out the door." R P46. T.P. screamed that she was "fittin' to kill this bitch" (meaning defendant) and that she woke up to find "this bitch licking [her] ass." *Id.*

Dunkin further testified that they called the police and went to the police station the following day, where he identified defendant from a photo array. R P46-49. Dunkin also made an in-court identification of defendant. R P42.

Detective Davis testified that he was present during defendant's post-arrest interview with Assistant State's Attorney Mark Griffin. R P58. After Griffin read defendant *Miranda* warnings, defendant stated that on the morning of the offense, he had walked Tina downstairs and, when he came back upstairs, he saw T.P. lying in bed. R P58-59. Defendant thought T.P. "looked good," so he went into her bedroom and lifted the sheet, where he noticed that her underwear was down near the middle of her buttocks. *Id.* He started to kiss her buttocks. *Id.* He kissed "along the crease but did not go inside it"; he was headed toward her vagina when she woke up. *Id.* T.P. then jumped up and started yelling about a gun, and defendant left the bedroom and fled the house. R P60. Defendant said that Dunkin had been in the bathroom at the time and that he "did it" because T.P. "looked good" and because he wanted to get back at his girlfriend (T.P.'s sister Tina) for talking to other men. *Id.*

Defendant presented no testimony or evidence. R P70.

The court found defendant guilty of criminal sexual assault. R P80; C66. After denying defendant's post-trial motion, the court proceeded to sentencing. R Q8. In his lengthy statement in allocution, R Q14-22,

defendant admitted that he had kissed T.P. "on the butt twice" but maintained that he did so because he believed that his actions would not be unwanted. R Q20. After considering the statutory factors and the presentence investigation report, the court sentenced defendant to eight years in prison and two years of MSR. R Q24; C107 (sentencing judgment).

**C. The Appellate Court Reversed Defendant's Conviction.**

Defendant appealed, arguing, as relevant here, that (1) the police "unreasonably prolonged" the traffic stop by requesting the passengers' identification and running name checks, *Bass*, 2019 IL App (1st) 160640, ¶ 28; and (2) the investigative alert "constitute[d] an unconstitutional basis on which to arrest him," *id.*

The appellate court reversed, finding that the trial court erred by denying defendant's motion to quash arrest and suppress evidence. *See id.* ¶ 28. The appellate majority ruled that although it was uncontested that defendant's warrantless arrest comported with the Fourth Amendment (because it was supported by probable cause and occurred in public), and although defendant was wrong to invoke the privacy language of article I, section 6 of the Illinois Constitution in his court-ordered supplemental briefing, *id.* ¶ 48, defendant's arrest nonetheless violated article I, section 6's warrant clause — an argument that defendant had never raised — because it was based on the investigative alert, *id.*, ¶ 43 ("arrests based solely on investigative alerts, even those supported by probable cause, are

unconstitutional under the Illinois Constitution"), ¶ 71 (Illinois Constitution "goes 'a step beyond' the United States Constitution and requires, in ordinary cases like Bass's, that a warrant issue before a valid arrest may be made"), *id.* ("We hold an arrest unconstitutional when effectuated on the basis of an investigative alert[.]").

To reach this holding, the majority reasoned that because "the mere word of an executive branch official fails, on its own, as a substantiate for a finding of probable cause," arrests made pursuant to an investigative alert are unconstitutional because the framers of the Illinois Constitution determined that "probable cause must be based, not only on a minimum threshold of sufficient facts, but sufficient facts presented in proper form (a sworn affidavit) to the appropriate person (a neutral magistrate)." *Id.* ¶¶ 57, 62. The majority thus concluded that defendant's arrest was unlawful because "the Illinois Constitution requires, in the ordinary case, a warrant to issue before an arrest can be made." *Id.* ¶ 71.

The appellate majority went on to hold, "[f]or the sake of completeness," *id.* ¶ 73, that the request for the passengers' identification during the traffic stop and subsequent name checks violated the Fourth Amendment because these acts unlawfully extended the traffic stop and were not justified by officer safety concerns, *id.* ¶¶ 72-78.[3]

[3] The appellate majority also rejected defendant's challenge to the sufficiency of the evidence, *Bass*, 2019 IL App (1st) 160640, ¶ 26, and declined

In a separate opinion, Justice Mason concurred in the majority's judgment that the identification request and name checks unreasonably extended the length and scope of the traffic stop, but dissented from the majority's judgment regarding the constitutionality of investigative alerts under the warrant clause of the Illinois Constitution. *See id.* ¶ 109 (Mason, J., concurring in part and dissenting in part) (explaining that "the majority decides this case based on a constitutional issue of first impression it raised sua sponte postargument," and that the "majority's decision to reverse Bass's conviction on this self-styled constitutional issue is neither necessary nor appropriate").

The People filed a timely petition for rehearing, and the appellate court issued a modified opinion upon denial of rehearing. Justice Coghlan, who was assigned to the matter after Justice Mason retired, dissented from the denial of rehearing. *See id.* ¶¶ 126 (Coghlan, J., dissenting upon denial of rehearing) (concurring in Justice Mason's "well-reasoned dissent" and "adopt[ing] it in its entirety").

## STANDARDS OF REVIEW

Whether the appellate court erred by (1) reversing defendant's conviction based on an issue never raised by defendant or briefed by the parties, *see People v. Givens*, 237 Ill. 2d 311, 323-30 (2010); (2) declining to

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to address his challenge to the fines and fees imposed by the circuit court because it was remanding for a new trial, *id.* ¶ 96.

find that the search and seizure provisions of our state and federal constitutions are in lockstep, *see People v. Caballes*, 221 Ill. 2d 282, 289 (2006); and (3) declining to hold that the good-faith exception to the exclusionary rule applies, *see People v. Manzo*, 2018 IL 122761, ¶ 67, are all legal questions subject to de novo review.

Whether the trial court erred in denying the motion to suppress evidence is subject to a two-part standard of review: the trial court's findings of historical fact are reviewed for clear error, but "the trial court's ultimate ruling as to whether suppression is warranted" is reviewed de novo. *People v. Harris*, 228 Ill. 2d 222, 230 (2008) (internal citations omitted).

## ARGUMENT

The appellate majority erred when it reversed defendant's conviction based on the unbriefed question of whether the Illinois Constitution's warrant clause prohibited defendant's warrantless arrest. Not only was it error for the majority to reverse defendant's conviction on the basis of an issue defendant never raised and the parties did not brief, but the court's resolution of the question was indisputably wrong. This Court has firmly established — in cases such as *People v. Tisler*, 103 Ill. 2d 226 (1984), and *People v. Caballes*, 221 Ill. 2d 282 (2006) — that article I, section 6's search and seizure provision (which includes the warrant language on which the appellate majority relied) is to be construed in lockstep with the Fourth Amendment. The appellate court erred when it departed from this established precedent. And even if the lockstep

question were not well settled, there would be no basis to depart from lockstep here, for this Court's long-standing precedent permits public, warrantless arrests supported by probable cause under the Illinois Constitution, just as such arrests are permitted under the Fourth Amendment.

Because it is undisputed that probable cause existed to support defendant's arrest in this case, defendant has no viable challenge to the constitutionality of his arrest. And, in any event, given the established precedent permitting warrantless arrests in public so long as those arrests are supported by probable cause, if this Court were to now depart from *Tisler* and *Caballes*, the exclusionary rule should not apply here because the officers acted in good-faith reliance on that established law.

Nor was the appellate court correct to hold that the officers' request for passenger identification and running of name checks violated the Fourth Amendment, because these acts did not measurably extend the duration of the stop. Accordingly, this Court should (1) vacate or reverse that portion of the appellate court's judgment holding that the Illinois Constitution's warrant clause prohibited defendant's warrantless arrest and (2) reverse that portion holding that the request for identification and name checks violated the Fourth Amendment.

## I. The Appellate Court Erred When it Decided a Constitutional Issue of First Impression that Defendant's Counsel Never Raised and the State Never Had an Opportunity to Address.

The appellate majority erred when it reversed defendant's conviction based on a theory that defendant never presented in any court. In the trial court, defendant argued that his arrest on the investigative alert violated the Fourth Amendment because (1) the request for passenger identification and name checks exceeded the permissible scope of the traffic stop, R J33, and (2) the police "did not have an arrest warrant for Mr. Bass" though they "had ample amount of days to do so," R J34-35. He conceded on appeal that his arrest was supported by sufficient probable cause. *Bass*, 2019 IL App (1st) 160640, ¶ 37. Once the appellate court accepted defendant's (accurate) concession that his public, warrantless arrest did not violate the Fourth Amendment, *id.,* that should have been the end of the court's inquiry.

Apparently dissatisfied with this outcome, the appellate court directed defendant to file a supplemental brief that framed his challenge as arising under the Illinois Constitution. Defendant filed a supplemental brief that challenged his arrest under article I, section 6's privacy language. The appellate majority found no merit to that argument, either, so it reached out to decide the issue under article I, section 6's warrant clause, a theory that defendant *never* raised and that the parties never briefed. *See id.*, ¶ 111 (Mason, J., concurring in part and dissenting in part) (fact that majority solicited postargument briefs "does not change the impropriety of its decision to

act sua sponte"; "Bass, represented by counsel, did not elect to argue the issue of the constitutionality of investigative alerts under the Illinois Constitution and even when invited to, did not advance the rationale the majority now adopts"; "majority's analysis — emanating solely from the majority and not from the advocates — remains 'unargued and unbriefed'").

The appellate court thus contravened the "well settled" rule that "a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment," *People v. Givens*, 237 Ill. 2d 311, 323 (2010); *id.* at 324 (quoting *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (courts "normally decide only questions presented by the parties")), both when it ordered supplemental briefing and later when it rejected the new privacy theory presented in defendant's supplemental brief and decided the issue under the warrant clause, *see People v. Colyar*, 2013 IL 111835, ¶ 59 (courts "rely on the parties to frame the issues for decision," while courts are assigned "the role of neutral arbiter of matters the parties present").

Nor does this case implicate the exception to that general rule because "the issue identified sua sponte by the appellate court did not amount to obvious error controlled by clear precedent." *Givens*, 247 Ill. 2d at 326. On the contrary, as explained in Part II, *infra*, no clear precedent holds that any arrest based on an investigative alert violates the Illinois Constitution's warrant clause. Rather, this Court's precedent holds that the Illinois Constitution's search and seizure clause (including its language about warrants on which the

appellate court relied) should be construed in lockstep with the Fourth Amendment, under which, defendant conceded, his arrest was lawful. Thus, by reaching out to decide an unbriefed issue under circumstances where its holding not only was not dictated by clear precedent but instead contravened clear precedent, the appellate majority plainly ran afoul of this Court's admonition that an appellate court should refrain from deciding unbriefed issues. And, in doing so, the appellate court impermissibly "transform[ed its] role from that of jurist to advocate." *Id.* at 328.

The appellate majority erred when it decided the unbriefed issue for the additional reason that the court's resolution of the appeal did not require it. *People v. White*, 2011 IL 109689, ¶ 144 (reviewing court should not consider issue not essential to disposition of the case or where result will be unaffected regardless of how issue is decided). Although the People dispute the appellate court's resolution of the issue, *see* Part III, *infra*, because all three justices agreed that the passenger warrant checks unlawfully extended the traffic stop, *Bass*, 2019 IL App (1st) 160640, ¶¶ 78, 114 & n.1, the appellate majority was wrong to reach the unbriefed constitutional question, *see id.* ¶ 113 (Mason, J., concurring in part and dissenting in part) ("the majority is unnecessarily addressing a constitutional issue").

Accordingly, this Court should vacate that portion of the appellate court's judgment. *Givens*, 237 Ill. 2d at 330 (where appellate court erred in reversing defendant's conviction based on "a theory never raised by defendant

or addressed by the parties in their appellate briefs," appellate court's analysis "must be vacated").

## II. Investigative Alerts Do Not Violate the Illinois Constitution's Warrant Clause.

Not only did the appellate majority err when it reached out to reverse defendant's conviction based on an unbriefed issue that was wholly unnecessary to its resolution of the appeal, but its resolution of that unbriefed question was plainly wrong.

### A. The lockstep question is settled: the search and seizure clause of article I, section 6, of the Illinois Constitution is to be interpreted in lockstep with the Fourth Amendment.

The appellate majority's conclusion that "article I, section 6 [of the Illinois Constitution] provides greater protections than the fourth amendment" due to the language about warrants in Illinois's search and seizure clause, *Bass*, 2019 IL App (1st) 160640, ¶ 43, contravenes this Court's precedent. Despite the slight differences in terminology, Illinois law has long recognized that there is no basis to construe the state constitution's search and seizure clause differently from the federal constitution's. Indeed, contrary to the appellate majority's reasoning, this Court long ago determined, and has consistently reiterated, that the Illinois Constitution's "supported by affidavit" language and the Fourth Amendment's "Oath or affirmation" language are "virtually synonymous," and that the search and seizure provisions of the two constitutions "should be construed alike." *People v. Caballes*, 221 Ill. 2d 282, 291 (2006) ("The phrase 'supported by affidavit' in the state provision being

virtually synonymous with 'by Oath or affirmation' in the fourth amendment, this [C]ourt repeatedly held that the two constitutions should be construed alike."). Thus, the Court concluded that

> the search and seizure clause of article I, section 6, of the state constitution, as construed under our limited lockstep approach, strikes the proper balance between protecting the people from unreasonable intrusion by the state and providing the people with effective law enforcement. We will not depart from the intent of the framers of the Illinois Constitution of 1970 or the understanding of the voters who adopted it — to the extent we are able to discern it from the language used, the committee comments, and the debate — to tip the balance in favor of expanding the scope of the right to be free from unreasonable searches and seizures that is already guaranteed by the fourth amendment.

*Id.* at 316-17.

And *Caballes* was not this Court's first word on the subject. In *People v. Tisler*, 103 Ill. 2d 226 (1984), "the seminal case on the question of lockstep interpretation of the search and seizure provisions of the two constitutions," *Caballes*, 221 Ill. 2d at 295, the Court rejected the notion that "article I, section 6, of the 1970 Illinois Constitution guarantees more individual rights than either the former State Constitution or the fourth amendment to the Federal Constitution" and noted that "the warrant clause with its probable-cause requirement, and the guarantee against unreasonable search and seizure . . . remains nearly the same as that of the fourth amendment." *Tisler*, 103 Ill. 2d at 241. Thus, *Tisler* held that the difference between the language of the 1970 Illinois Constitution and the Fourth Amendment of the United States

Constitution "does no more than specifically provide for fourth amendment protection with regard to eavesdropping and invasion of privacy." *Id.* at 242.

More recently, in *People v. Holmes*, 2017 IL 120407, this Court again compared the text of article I, section 6 to the text of the Fourth Amendment and concluded that when construing the Illinois Constitution, Illinois courts "follow decisions of the United States Supreme Court regarding searches and seizures." *Id.* ¶ 25. *People v. Manzo*, 2018 IL 122761, reaffirmed that the search and seizure provision in article I, section 6, of the Illinois Constitution is to be interpreted in lockstep with the fourth amendment. 2018 IL 122761, ¶ 28 (citing *Tisler*, 103 Ill. 2d at 245); *see also People v. Fitzpatrick*, 2013 IL 113449, ¶ 15 (explaining that this Court has conducted the limited lockstep analysis for purposes of article I, section 6 of the Illinois Constitution and determined that "the framers intended for it to have the same scope as the fourth amendment").

In light of this long- and clearly established precedent, it is plain that the appellate majority resolved incorrectly the unbriefed question of whether arrests pursuant to investigative alerts violate the warrant clause of article I, section 6. Certainly, "the issue identified sua sponte by the appellate court did not amount to obvious error controlled by clear precedent," *Givens*, 247 Ill. 2d at 326; thus, the appellate majority should not have reached it.

### B. Even if this Court were deciding the lockstep issue in the first instance, no Illinois tradition requires that a warrant issue before an arrest may be made.

Even if the lockstep question were not so firmly settled, long-standing Illinois precedent permits public, warrantless arrests supported by probable

cause, contravening the appellate majority's conclusion that "the Illinois Constitution requires, in the ordinary case, a warrant to issue before an arrest can be made." *Bass*, 2019 IL App (1st) 160640, ¶ 71.

This Court's interpretation of the Illinois Constitution begins with the principle that the Court must "ascertain and give effect to the intent of the framers of [the constitution] and the citizens who have adopted it." *Caballes*, 221 Ill. 2d at 298 (internal quotations omitted). The "lockstep doctrine" was firmly in place before the adoption of the 1970 constitution and known to its drafters, to the constitutional delegates who voted to adopt the present language, and to the voters who approved the new constitution. *Id.* at 292. Therefore,

> Any variance between the Supreme Court's construction of the provisions of the fourth amendment in the Federal Constitution and similar provisions in the Illinois Constitution must be based on more substantial grounds. We must find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.

*Tisler*, 103 Ill. 2d at 245.

Defendant can point to no such basis for a departure here. Nothing in the language of article I, section 6, or in the history of the constitutional debates, suggests an intent that the search and seizure provision of the 1970 Illinois Constitution be interpreted differently from the Fourth Amendment. For starters, the language of the two provisions is effectively identical. To be

sure, unlike the Fourth Amendment, article I, section 6 provides citizens with express protection against eavesdropping devices and invasions of privacy, but proposals to change other aspects of article I, section 6, such as the language about warrants, were rejected in committee. 6 Record of Proceedings, Sixth Illinois Constitutional Convention 29, 33. Indeed, the explanation to the voters prior to the adoption of the 1970 Constitution states: "This is an amended version of Article II, Section 6 of the 1870 Constitution expanded to include guarantees of freedom from unreasonable eavesdropping and invasions of privacy. *The restriction on warrants is unchanged*." 7 Record of Proceedings, Sixth Illinois Constitutional Convention 2683.

And for more than a century, this Court has held that police officers may make warrantless arrests in public where there is probable cause to believe that a crime was committed and that the individual arrested committed that crime. *See Cahill v. People*, 106 Ill. 621, 626 (1883) (applying "well-known rule that an officer has the right to make an arrest without warrant . . . where a criminal offence has been committed and he has reasonable ground for believing that the person arrested has committed the offence"); *see also People v. Wright*, 56 Ill. 2d 523, 528 (1974) (same); *People v. Hightower*, 20 Ill. 2d 361, 366 (1960) (same); *Lynn v. People,* 170 Ill. 527, 535 (1897) (same). The relevant question is whether the police had probable cause to arrest; the "fact that the police may have had time to obtain an arrest warrant is immaterial." *People v. Denwiddie*, 50 Ill. App. 3d 184, 190 (3d Dist. 1977) (citing *United States v.*

*Watson*, 423 U.S. 411, 423-24 (1976)). These and numerous other cases, decided both before and after adoption of the 1970 Constitution, establish the falsity of the appellate majority's conclusion that some Illinois tradition as yet unidentified by this Court requires that a warrant issue before an arrest may be made. Because when they drafted the 1970 Constitution, the framers did not intend to change the warrant requirement of the 1870 Constitution, which allowed officers to make warrantless arrests in public when supported by probable cause, or depart from the search and seizure provision's lockstep with the Fourth Amendment, which similarly allows such warrantless arrests, defendant has no viable challenge to his arrest on the basis of the investigative alert.

Accordingly, if this Court does not vacate that portion of the appellate court's decision invalidating investigative alerts, it should overrule it. Both the Second and the Fourth Divisions of the First District have declined to follow *Bass*. *See People v. Braswell*, 2019 IL App (1st) 172810, ¶ 37 (*Bass* was "incorrectly decided"); *id.* ¶ 39 (dissent correctly identified flaw in majority opinion: "arrests must be based on probable cause, not warrants as the majority in *Bass* suggests"); *see also People v. Bahena*, 2020 IL App (1st) 180197, ¶¶ 61-64 (same). As the court observed in *Braswell*, 2019 IL App (1st) 172810, ¶ 39, the *Bass* majority never addressed the dissenting justice's point that there is "no principled basis on which to hold that police may arrest an individual without a warrant and without an investigative alert as long as they

have probable cause, but if they issue an investigative alert based on the same facts giving rise to probable cause, they have run afoul of the Illinois Constitution." *Bass*, 2019 IL App (1st) 160640, ¶ 120 (Mason, J., concurring in part and dissenting in part). The Second Division also rejected *Bass*'s holding for the reasons explained in *Braswell* and in Justice Mason's dissent, *Bass*, 2019 IL App (1st) 160640, ¶ 120 (Mason, J., concurring in part and dissenting in part) (noting that "there is no apparent reason why, when police have probable cause to arrest an individual (as they did here), the use of an investigative alert gives them any untoward advantage"). *See People v. Thornton*, 2020 IL App (1st) 170753, ¶ 49. The *Thornton* majority added that "barring investigative alerts seems contrary to the central requirement of the fourth amendment and Illinois's search and seizure provision, which is reasonableness." *Id.*[4] Because investigative alerts do not violate the state or federal constitution, if this Court does not vacate the relevant portion of the appellate court's judgment, it should reverse it outright.

### C. In any event, the absence of a warrant should be excused under the good-faith exception to the exclusionary rule.

Finally, even if the appellate majority were correct to conclude that warrantless arrests violate the Illinois Constitution "in the ordinary case" —

[4] *See also Taylor v. City of Chicago*, No. 13 CV 4597, 2020 WL 92003, at *4 (N.D. Ill. Jan. 8, 2020) (Chicago Police Department investigative alert policy comports with Fourth Amendment).

and the majority was not — the good-faith exception to the exclusionary rule should apply here.

"There is no constitutional right to have the evidence resulting from an illegal search or seizure suppressed at trial." *People v. LeFlore*, 2015 IL 116799, ¶ 22; *see Manzo*, 2018 IL 122761, ¶ 62. Rather, application of the exclusionary rule is limited to the "unusual" case where it can achieve its "sole objective" of deterring future Fourth Amendment violations. *LeFlore*, 2015 IL 116799, ¶ 22; *Manzo*, 2018 IL 122761, ¶ 62. To determine whether the good-faith exception applies, a court must ask "whether a reasonably well trained officer would have known that the search [or seizure] was illegal in light of all of the circumstances." *LeFlore*, 2015 IL 116799. ¶ 25 (internal quotations and citations omitted).

Application of these principles establishes that exclusion is unwarranted here, because where "the particular circumstances of a case show that police acted with an objectively reasonable good-faith belief that their conduct was lawful," "there is no illicit conduct to deter." *Id.* ¶ 24 (internal quotations and citation omitted). At the time of defendant's arrest, and for more than a century before that, binding appellate precedent held that warrantless arrests in a public place were lawful so long as they were supported by probable cause. *See id.* ¶ 31 (declining to apply exclusionary rule where (1) officer could rely on "binding appellate precedent" permitting his conduct; and (2) "police conduct in relying on the legal landscape that existed at the time was objectively

reasonable and a reasonable officer had no reason to suspect that his conduct was wrongful under the circumstances"). And defendant concedes that the facts articulated in the investigative alert established probable cause.

Nor is there any question that the officers could rely on the investigative alert, even though it was drafted by Detective Davis. *Tisler*, 103 Ill. 2d at 237 (officer need not have personally observed facts asserted as probable cause for arrest); *see also Whitely v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568 (1971) (police may act upon a communication through official channels directing that an arrest or search be made, though arrest or search may be invalidated if officer or agency making the request lacked probable cause); *People v. McGee*, 2015 IL App (1st) 130367, ¶ 49 (When an arrest is "predicated on information received in an official police communication by a commanding officer," "the State must demonstrate that the circumstances known to other, non-arresting officers, whose report or directions were relied upon by the officer in making the arrest, were sufficient to establish probable cause to arrest the defendant."); *People v. Lawson*, 298 Ill. App. 3d 997, 1002 (1st Dist. 1998) (same, collecting cases); 2 W. LaFave, Search & Seizure § 3.1(a) (5th ed.) (under the Fourth Amendment, it is "clearly established" that "the police are free to make an arrest without first obtaining an arrest warrant even when there was ample time to obtain one"); *id.* § 3.5(b) (discussing *Whitely*'s rule and its application). Because reasonable officers such as Carrero and Serrano would have had no reason to suspect that their conduct might later be ruled unlawful,

*see Bass*, 2019 IL App (1st) 160640, ¶ 71 (recognizing that "officers here undoubtedly acted consistently with the established policy at the time"), the good-faith exception applies and defendant's post-arrest statement should not be suppressed, *see LeFlore*, 2015 IL 11670, ¶ 22.

## III. The Appellate Court Wrongly Concluded that the Police Unreasonably Extended the Duration of the Lawful Traffic Stop by Requesting Passenger Identification and Running Name Checks.

Finally, the appellate court's unanimous conclusion that the police "unreasonably extended" the stop when they requested identification and ran name checks, *Bass*, 2019 IL App (1st) 160640, ¶¶ 72-78, cannot be squared with *People v. Harris*, 228 Ill. 2d 222 (2008), and *Arizona v. Johnson*, 555 U.S. 323 (2009).

In *Harris*, as here, the defendant was the passenger in a vehicle stopped for a traffic violation. 228 Ill. 2d at 224. During the course of the traffic stop, the defendant complied with the officer's request for his identification, and the officer arrested the defendant after a computer search revealed an outstanding warrant for his arrest. *Id.* This Court held that "a warrant check on the occupants of a lawfully stopped vehicle does not violate fourth amendment rights, so long as the duration of the stop is not unnecessarily prolonged for the purpose of conducting the check and the stop is 'otherwise executed in a reasonable manner.'" *Id.* at 237 (quoting *Caballes*, 543 U.S. at 408).

In the appellate court below, defendant did not dispute that the initial stop was lawful or that police could lawfully direct him and the other occupants

to get out of the vehicle during the stop. But defendant did argue that the request for the passengers' identification and name checks unreasonably extended the duration of the stop, violating the Fourth Amendment. Defendant did not include this argument in his post-trial motion, and thus forfeited the argument. *See*, *e.g.*, *People v. McCarty*, 223 Ill. 2d 109, 122 (2006); C74. In any event, the argument is incorrect on the merits, because the officers' requests did not "measurably extend the duration of the stop." *Johnson*, 555 U.S. at 334.

As the Supreme Court explained in *Rodriguez v. United States*, 575 U.S. 348, 354 (2015), "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission," *i.e.*, to "address the traffic violation that warranted the stop" and "attend to related safety concerns." Beyond determining whether to issue a ticket for the traffic infraction, an officer's mission includes "ordinary inquiries incident to [the traffic] stop," including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at 355. Because traffic stops are "especially fraught with danger to police officers," *Johnson*, 555 U.S. at 330, the Supreme Court has also recognized that an officer "may need to take certain negligibly burdensome precautions in order to complete his mission safely," *Rodriguez*, 575 U.S. at 356. Accordingly, here, as part of the "mission" of the traffic stop, the police were permitted to request the driver's license and run a name check on the driver. *See People v. Cummings*, 2016 IL 115769, ¶ 8

(determining whether there are outstanding warrants against driver is ordinary inquiry incident to traffic stop).

And because the officers requested the identification of the vehicle's other occupants and ran the name checks simultaneously, these acts did not "measurably extend[ed] the duration of the stop." *Johnson*, 555 U.S. at 334. The appellate court concluded otherwise, deeming it dispositive that the record purportedly "does not reveal when Bass's name check was run in relation to the name checks of the other passengers, the LEADS check on the driver, and the completion of the TSS card." *Bass*, 2019 IL App (1st) 160640, ¶ 78. But, although the information was not elicited from the officers in strict chronological order, the record nonetheless establishes that Officers Carrero and Serrano simultaneously approached on either side of the stopped vehicle and requested identification from the driver and defendant. R J15; R J24. After they directed the driver and passengers to get out of the vehicle — which the officers were permitted to do as a matter of course, *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (driver); *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (passengers) — Carrero then conducted the "name checks" on the vehicle's occupants, including defendant, R J17-18. Carrero also completed a "TSS card," on which he documents driver information, vehicle information, the reason for the stop, and whether the vehicle was searched. R J9. Finally, he issued the driver a verbal warning. R J10 (Carrero: "The verbal warning would have come last[.]"). Thus, regardless of the exact sequence of events,

the appellate court erred in holding that the name check measurably extended the duration of the stop. Accordingly, this Court should reverse that portion of the appellate court's judgment.

## CONCLUSION

This Court should vacate or reverse that portion of the appellate court's judgment holding that defendant's arrest violated the Illinois Constitution and reverse the appellate court's judgment holding that the traffic stop did not comport with the Fourth Amendment.

July 8, 2020

Respectfully submitted,

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## 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 containing the Rule 341(d) cover, the Rule 341(h)(1) 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(a), is 30 pages.

/s/ Katherine M. Doersch
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## PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 8, 2020, the foregoing **Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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# APPENDIX

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2019 IL App (1st) 160640
Appellate Court of Illinois, First District, First Division.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Cordell BASS, Defendant-Appellant.

No. 1-16-0640
|
Opinion filed July 25, 2019
|
Modified on denial of rehearing September 30, 2019

**Synopsis**

**Background:** Following denial of his motion to suppress postarrest statements, defendant was convicted in the Circuit Court, Cook County, Neera Lall Walsh, J., of criminal sexual assault. Defendant appealed.

**Holdings:** Upon denial of rehearing, the Appellate Court, Hyman, J., held that:

an arrest is unconstitutional when based on an investigative alert issued by police department, rather than on presentation of sworn facts to a judge;

evidence was sufficient to show that defendant knew that the victim did not give knowing consent to being sexually touched;

running a name check on defendant exceeded the scope of traffic stop's mission, and thus his arrest was unconstitutional;

error in admitting defendant's postarrest statement was not harmless; and

evidence was sufficient to convict defendant of criminal sexual assault.

Reversed and remanded.

Mason, J., filed an opinion concurring in part and dissenting in part on denial of rehearing.

***547** Appeal from the Circuit Court of Cook County. No. 14 CR 15846, Honorable Neera Lall Walsh, Judge, presiding.

**Attorneys and Law Firms**

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## OPINION

JUSTICE HYMAN delivered the judgment of the court, with opinion and supplemental opinion upon denial of rehearing.

****435** ¶ 1 Cordell Bass was arrested solely on the authority of what the Chicago Police Department calls an "investigative alert." Department regulations allow officers to arrest people on the basis of an alert where there is probable cause to believe the suspect has

committed a crime. But, the regulations allow for police supervisors to internally make that probable cause determination. Officers are not required to take their case for probable cause to a judge, as they would for an arrest warrant. We are asked to determine whether this practice is constitutional. We hold that it is not.

¶ 2 Our conclusion is based on the Illinois Constitution. Often (too often for some), if a provision of our constitution dovetails with one in the United States Constitution, we look only to judicial interpretation of the United States Constitution to answer constitutional questions. Our supreme court calls this the "limited lockstep" approach to Illinois constitutional interpretation. We only can depart from "limited lockstep" if the text and history of our constitution differs from the federal constitution. We also can look to preexisting Illinois law or any traditions, values, or public attitudes that qualify as unique to our State. *People v. Caballes*, 221 Ill. 2d 282, 309-10, 303 Ill.Dec. 128, 851 N.E.2d 26 (2006).

¶ 3 A critical difference exists between the fourth amendment to the United States Constitution (U.S. Const., amend. IV) and Illinois's search and seizure clause. Ill. Const. 1970, art. I, § 6. In the portion of the text that pertains to issuing a warrant, the United States Constitution requires probable cause supported by "oath or affirmation" (U.S. Const., amend. IV) ***548 **436** the Illinois Constitution requires probable cause supported by "affidavit." Ill. Const. 1970, art. I, § 6. The Illinois Supreme Court, in cases decided close in time to the amendment of our constitution, explained that the requirement of an affidavit goes "a step beyond" the United States Constitution. Importantly, those cases do not limit their reasoning to just the requirement for a warrant but apply it to the requirement for probable cause more generally. A long legal tradition in this State requires more than just the word of an official accuser (usually a police officer) to support a finding of probable cause.

¶ 4 Against this rule, the Chicago Police Department has a system where an officer reports a suspected crime to his or her supervisor, not a judge. If the supervisor agrees that there is probable cause, an investigative alert goes out ordering the arrest of a suspect. In other words, police officers can obtain approval for arrests without the one thing the framers of the Illinois Constitution thought most essential —the presentation of sworn facts to a judge.

¶ 5 Notably, investigative alerts are not issued instantaneously; in many cases, investigative alerts take the same or more time to procure than a warrant. We understand that some may worry that finding investigative alerts unconstitutional will hamper legitimate law enforcement efforts to prevent crime. We take those concerns seriously, but in Illinois, only the Chicago Police Department appears to use investigative alerts. So our decision merely puts the Chicago police officers on equal footing with their colleagues in other departments throughout the State of Illinois.

¶ 6 Background

¶ 7 On July 27, 2014, Bass and his girlfriend spent the night at the house of the victim, T.P. In the morning, while T.P.'s boyfriend was in

  

the bathroom, Bass went into T.P.'s room and molested her as she slept. When T.P. turned around and saw Bass, she screamed causing Bass to flee. T.P. reported the incident to police, who issued an investigative alert for Bass's arrest. The investigative alert summarized the incident as reported by T.P. and stated that there was probable cause to arrest Bass. Significantly, the officers did not get a warrant for Bass's arrest.

¶ 8 Almost three weeks later, officers pulled over a red minivan for running a red light. Bass was a passenger. For safety reasons, the officers had all of the passengers get out of the van. The officers did not observe Bass violate any laws or act suspiciously. But, they ran a "name check" on him and discovered the investigative alert. On the basis of the investigative alert, the officers arrested Bass.

¶ 9 After his arrest, Bass gave a statement to investigators. He admitted that he went into T.P.'s bedroom because she "looked good." He lifted up the sheets and saw that her underwear was partially off. He said that he started to kiss "along the crease of her buttocks, but did not go inside it." Bass stated that T.P. woke up and started yelling before he touched her vagina.

¶ 10 Ahead of trial, Bass moved to quash his arrest and suppress his statement. Officers Jeffrey Carrero and Salvador Serrano testified that they were patrolling in the area of Marquette Road and Normal Boulevard in Chicago in a marked squad car at about 1:00 a.m. when they saw a red van fail to stop at a red light. Officer Carrero pulled over the van, told the driver the reason for the stop, and asked the driver for his license. The officer could not recall whether the driver produced his license, but he did ask the driver to get out of the car, which is his usual practice when a driver fails to provide a license. After running a Law Enforcement Agencies Data ***549 **437** System check on the driver (based on either a license, an Illinois identification card, or the driver's name), Officer Carrero gave the driver a verbal warning for running the red light but did not issue a ticket for failing to have a license. Officer Carrero also completed a "TSS card," which documents the driver's information, the vehicle's information, the reason for the stop, and whether the vehicle was searched.

¶ 11 As Officer Carrero approached the driver, Officer Serrano approached the front passenger side, where Bass was sitting. Officer Serrano asked Bass and the rear passengers to get out for safety reasons. Neither officer saw Bass make any furtive movements or violate any laws.

¶ 12 Bass gave Officer Serrano his driver's license. Officer Carrero performed a "name check" and discovered an active investigative alert on Bass that read:

> "The victim was asleep in her bed when she was awakened by someone licking her anus. The victim turned around and observed the offender who is her sister's boyfriend and who was spending the night at the victim's residence with her sister. The victim did not give the offender permission to lick her anus."

After a total of eight minutes, the officers arrested Bass.

  

¶ 13 Detective Dwayne Davis explained the circumstances under which he issued the investigative alert. Detective Davis testified that he interviewed T.P. and her boyfriend two days after the incident. T.P. told the detective that she awoke from sleep to discover Bass licking her buttocks and moving into her groin without her consent. T.P's boyfriend told Davis that he saw Bass leave T.P.'s bedroom. Both identified Bass from a photo array. Based on these interviews, Detective Davis put out an investigative alert for Bass but did not obtain an arrest warrant.

¶ 14 Following argument, the trial court denied the motion to suppress, finding that officer safety justified ordering the passengers out of the car and that the name check was likewise legitimate. Further, the court held that because the State presented the testimony of the detective who promulgated the investigative alert, probable cause supported Bass's arrest.

¶ 15 At trial, T.P. testified that she lives with her boyfriend, Dunkin, and her three children. In July 2014, her sister, Tina, and Tina's three children were staying with them. T.P. had known Bass, who was dating Tina, for a year and a half, and he occasionally stayed over as well.

¶ 16 Everyone—T.P., Dunkin, Tina, Bass, and the six children—were staying at the house on July 27, 2014. After a family gathering, Dunkin went to bed at 9 p.m. and Tina joined him at 10 p.m. T.P. went to bed in only a T-shirt and underwear. In the morning, as T.P. slept facedown she awoke to someone touching the lower part of her butt cheeks going into her vagina. T.P. felt a tongue on her anus, and thinking it was Dunkin, she lifted her body up to encourage him. After she lifted her body up, she felt a tongue in her vagina. At that point, T.P. turned over and saw that it was Bass, not Dunkin. T.P. yelled for her sister and jumped out of bed. Dunkin, who had been in the bathroom, came to the door to ask what was wrong. T.P. told him, "this [expletive] was licking my a* * *." Bass then ran out of the residence, and T.P. and Dunkin called the police. The next day, T.P. identified Bass as in a photo array.

¶ 17 Dunkin explained that when he came back from the bathroom he asked Bass what was wrong with T.P. Bass said, "I made a mistake. I walked in the room. She had no clothes." Dunkin went into the bedroom, and T.P. explained that Bass had ***550 **438** licked her. Dunkin also identified Bass in a photo array the next day.

¶ 18 Detective Davis testified that Bass gave a statement after being arrested during the traffic stop. Bass said that he had come back into the house after walking with Tina and saw T.P. lying in her bed covered by a sheet. Bass lifted up the sheet, saw T.P.'s underwear was in the middle of her buttocks. He admitted to kissing the crease of her buttocks but denied "going inside." Bass explained that he kissed T.P. because she "looked good" and also because he wanted to "get back" at Tina, who had been talking to other men. Bass said that he ran when T.P. started yelling.

¶ 19 After trial, the court found Bass guilty on a single count of criminal sexual assault. The court found T.P., her boyfriend, and Detective Davis credible and also referenced Bass's

  

statement to the detective that T.P. "looked good" as evidence that he took advantage of the situation despite knowing he did not have T.P.'s consent. Following the denial of his posttrial motion, the trial court sentenced Bass to eight years in prison.

¶ 20 Analysis

¶ 21 Bass raises three arguments: (i) the evidence is insufficient to prove that he knew T.P. was unable to give knowing consent, (ii) the trial court erred in denying his motion to suppress statements, and (iii) various monetary assessments should be vacated. We agree that the trial court erroneously denied Bass's motion to suppress, and we reverse his conviction and remand for a new trial. We begin our analysis, however, with Bass's claim as to the sufficiency of the evidence as it will be relevant to our discussion of the remedy.

¶ 22 A. Sufficiency of the Evidence

¶ 23 Bass argues that the State failed to prove that he did not know of T.P.'s incapability of giving knowing consent. When we review a challenge to the sufficiency of the evidence, we determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements beyond a reasonable doubt. *People v. Newton*, 2018 IL 122958, ¶ 24, 427 Ill.Dec. 881, 120 N.E.3d 948. We draw all reasonable inferences in favor of the prosecution, and we will not reverse the trial court's judgment unless the evidence is so "unreasonable, improbable, or unsatisfactory" as to raise a reasonable doubt of Bass's guilt. *Id.*

¶ 24 Bass was charged with criminal sexual assault under section 11-1.20(a)(2) of the Criminal Code of 2012, which provides that a person commits criminal sexual assault by committing "an act of sexual penetration" and "knows that the victim is unable to understand the nature of the act or is unable to give knowing consent." 720 ILCS 5/11-1.20(a)(2) (West 2014). On appeal, Bass challenges the State's evidence on the element of knowledge. By statute, Bass acted with knowledge that T.P. was unable to give knowing consent if he was "consciously aware * * * that those circumstances exist." 720 ILCS 5/4-5(a) (West 2014). Ordinarily, circumstantial evidence proves knowledge, and it can be inferred from a defendant's acts, statements, or conduct, as well as surrounding circumstances. *People v. Fleming*, 2013 IL App (1st) 120386, ¶ 74, 370 Ill.Dec. 408, 988 N.E.2d 184. In cases arising under section 11-1.20(a)(2), our supreme court has emphasized a case by case approach to determine the defendant's "particular knowledge" of a victim's ability to give knowing consent. *People v. Lloyd*, 2013 IL 113510, ¶ 33, 369 Ill.Dec. 759, 987 N.E.2d 386.

¶ 25 The State presented more than sufficient evidence to prove Bass ***551 **439** knew T.P. unable to give *knowing* consent. When Bass entered and began licking her, T.P. was asleep on her stomach in the bedroom she shared with her boyfriend. This cuts against Bass's argument on appeal that he made no attempt to conceal his identity or trick T.P.—she could not see him, and he knew she could not see him. While T.P. may have awoken before

Bass committed any act of penetration, the fact remains that T.P. had no reason to suspect that anyone other than Dunkin, her boyfriend, was performing these acts.

¶ 26 The rest of State's evidence also supports the conclusion that Bass knew T.P. had not given knowing consent. The fact that Bass was T.P.'s sister's boyfriend alone gives rise to an inference that Bass knew T.P. would not welcome his advances. Further, his explanation to Detective Davis that he committed these acts because he thought T.P. "looked good" reveals much. He did not attempt to justify his behavior by claiming that he believed T.P. had given him permission to enter her bedroom and engage in sex acts. T.P.'s maneuvering of her body to give Bass easier access to her private areas proves only that T.P. consented to an act. But this was not *knowing* consent within the meaning of the statute, as there was no reason for T.P. to believe that Bass was performing these acts or for Bass to believe that T.P. knew it was Bass. For these reasons, we believe the evidence was sufficient to sustain Bass's conviction.

¶ 27 B. Motion to Suppress

¶ 28 Bass argues that the trial court erred when it denied his motion to suppress on two grounds. He primarily argues that the traffic stop was unlawfully extended under *Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609, 191 L.Ed.2d 492 (2015), because asking him, as a passenger, for his identification and running a name check unreasonably prolonged the stop for reasons unrelated to its initial purpose. Alternatively, Bass argues that even if the stop was conducted in a constitutionally permissible manner, the information that the officers learned after running the name check —in the form of an investigative alert— constitutes an unconstitutional basis on which to arrest him. We agree with both of Bass's arguments.

¶ 29 We review a motion to suppress with a two-part standard of review, accepting the facts as found by the trial court unless those findings are manifestly erroneous. *People v. Harris*, 228 Ill. 2d 222, 230, 319 Ill.Dec. 823, 886 N.E.2d 947 (2008). Applying *de novo* review, we may make our own determinations as to whether the facts justify the challenged police action as a matter of law. *Harris*, 228 Ill. 2d at 230, 319 Ill.Dec. 823, 886 N.E.2d 947.

¶ 30 *Investigative Alerts in Illinois Cases*

¶ 31 The Chicago Police Department employs two types of investigative alerts. The first is called "Investigative Alert/Probable Cause to Arrest," and it "identifies an individual that is wanted by Bureau of Detective[s] [ (BOD) ] or Bureau of Organized Crime [ (BOC) ] investigative personnel concerning a specific crime, and while an arrest warrant *has not been issued*, there is probable cause for an arrest." (Emphasis added.) Chicago Police Department Special Order No. S04-16, § II.A.1 (eff. Dec. 18, 2018), http://directives.chicagopolice.org/directives/data/a7a57be2-12b780f4-30412-b787-088f791c8131bbf7.html (last visited July 22, 2019) [https://perma.cc/BGH5-E44M]. The second type is called, "Investigative Alert/No Probable Cause to Arrest," and it "identifies an individual that [BOD] or [BOC] investigative

personnel seek to interview concerning a specific police matter. However, an arrest warrant for that individual has not been issued, and there is no probable ***552 **440** cause to arrest that person on the strength of the investigative alert alone." *Id.* § II.A.2.

¶ 32 The special order also directly instructs police officers confronting a person subject to the "No Probable Cause" alert that they not make an arrest unless the person committed another crime. See *id.* § V.A.2.a. By contrast, if a "Probable Cause" alert has been issued, the special order instructs the officers to immediately "place the subject into custody if not already in custody." *Id.* § V.A.1.b. The City of Chicago has affirmatively represented in federal litigation that these are the two types of investigative alert orders. *E.g.*, *Sanders v. Cruz*, No. 08 C 3318, 2010 WL 3004636, at *3 (N.D. Ill. July 29, 2010).

¶ 33 This court has described either the issuance of investigative alerts or officers' knowledge that an alert had or had not been issued in the factual summaries of a heap of cases (see appendix, *infra* ¶ 114). This court has also mentioned investigative alerts as non-dispositive components of other legal arguments in a variety of contexts (see *infra* ¶ 114). And these references represent only published decisions. Many more cases discuss investigative alerts under their former name, "stop orders." *E.g.*, *People v. Cokley*, 347 Ill. App. 3d 292, 298-300, 282 Ill.Dec. 944, 807 N.E.2d 568 (2004), *vacated*, 211 Ill. 2d 589, 288 Ill.Dec. 176, 817 N.E.2d 534 (2004) (supervisory order directing appellate court to retain jurisdiction in event that outcome of suppression hearing on remand did not result in new trial). Thus, while our research has uncovered no other jurisdiction in Illinois that uses a system like investigative alerts, the practice of issuing investigative alerts and acting on them has had a recurring appearance in this Appellate District.

¶ 34 Prolific though it may be, the practice of arrests based on investigative alerts has been strongly condemned in this court. *E.g.*, *People v. Hyland*, 2012 IL App (1st) 110966, ¶¶ 39-52, 367 Ill.Dec. 89, 981 N.E.2d 414 (Salone, J., specially concurring, joined by Neville, J.). Justice Salone's concurrence in *Hyland* focused heavily on the lack of judicial review, which allows police "unbridled power to take into custody persons without the benefit of an arrest warrant." *Id.* ¶ 46. While Justice Salone opined on the propriety of investigative alerts, critical to the decision in *Hyland* was the court's conclusion that the officers did *not* have probable cause to arrest the defendant. *Id.* ¶ 39. So, while Justice Salone raised many important prudential concerns, *Hyland* itself did not pose the constitutional question we confront here.

### ¶ 35 *Investigative Alerts and the United States Constitution*

¶ 36 Unlike *Hyland*, we are confronted with the only circumstance in which the constitutional question appears at all, which is where an officer had become aware of facts amounting to probable cause. If we were convinced that at the time of Bass's arrest no probable cause existed in the first place, then we could so hold and go no further because our conclusion would be the same regardless of whether the police issued an investigative alert or a neutral magistrate issued

a warrant. See, *e.g.*, *People v. Manzo*, 2018 IL 122761, ¶ 61, 432 Ill.Dec. 598, 129 N.E.3d 1141 (reversing trial court's determination that probable cause existed to issue warrant). But, we are not asked to decide whether there was probable cause for Bass's arrest; we are asked to decide *who* has the constitutional authority to make that determination. That question only arises when there is probable cause to arrest either way.

¶ 37 Under the United States Constitution, the existence of probable cause also answers the question. It is well-settled ***553 **441** that the fourth amendment allows for warrantless arrests outside the home as long as the police have probable cause to arrest the suspect. See *United States v. Watson*, 423 U.S. 411, 417, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *People v. Tisler*, 103 Ill. 2d 226, 237, 82 Ill.Dec. 613, 469 N.E.2d 147 (1984). Because Bass has conceded that the facts in the investigative alert amounted to probable cause, his warrantless arrest did not violate the fourth amendment to the United States Constitution.

¶ 38 *Investigative Alerts and the Illinois Constitution*

¶ 39 Our agreement that the existence of probable cause satisfies the United States Constitution does not end the inquiry as to the Illinois Constitution. Bass's original brief cited the Illinois Constitution, but did so without exposition on why the result might differ by applying its unique language and the precedent interpreting it. We requested supplemental briefs from the parties on the Illinois constitutional question and, after reviewing them, agree that the language of the Illinois Constitution and precedent interpreting it supports Bass's argument.

¶ 40 There are several approaches to state constitutional interpretation ranging from true "lockstep," viewing interpretations of the federal constitution as binding, to "primacy" approaches, viewing interpretations of the federal constitution as mere guidance. See *Caballes*, 221 Ill. 2d at 307-09, 303 Ill.Dec. 128, 851 N.E.2d 26. Our supreme court has called it an "overstatement" to say that Illinois employs a true "lockstep" approach to interpretation of provisions of our constitution that have federal constitutional analogs. *Id.* at 309, 303 Ill.Dec. 128, 851 N.E.2d 26. Instead, as both parties acknowledge in their supplemental briefs, Illinois follows a "limited lockstep" approach, which assumes the primacy of federal constitutional interpretation but looks to the Illinois Constitution for any gap-filling potential it may have. *Id.*

¶ 41 The State argues that the limited lockstep approach "demands * * * strict conformance to the United States Supreme Court and Constitution." Our supreme court has not taken an all-or-nothing view. Instead, when determining whether to depart from limited lockstep, Illinois courts look to the language of our constitution or the debates and committee reports from the constitutional convention. *Id.* at 310, 303 Ill.Dec. 128, 851 N.E.2d 26 (citing *Tisler*, 103 Ill. 2d at 245, 82 Ill.Dec. 613, 469 N.E.2d 147). For further guidance, we can look to our own state traditions and preexisting law. *Id.* at 310-11, 303 Ill.Dec. 128, 851 N.E.2d 26 (discussing *People v. Washington*, 171 Ill. 2d 475, 216 Ill.Dec. 773, 665 N.E.2d 1330 (1996),

and *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923)).

¶ 42 A substantial body of criticism has been leveled against Illinois's use of the "limited lockstep" approach to interpreting our constitution. *E.g.*, *Caballes*, 221 Ill. 2d at 307, 303 Ill.Dec. 128, 851 N.E.2d 26 (citing Thomas B. McAffee, *The Illinois Bill of Rights and Our Independent Legal Tradition*, 12 S. Ill. U. L.J. 1, 87 (1987)); see also *e.g.*, Hon. John Christopher Anderson, *Can State Constitutional Development Make a Difference in Illinois?*, 39 N. Ill. L. Rev. 48, 59-60 (2018) (noting that *Caballes* left open possibility that Illinois courts could depart from lockstep with the federal constitution if they find the federal interpretation badly reasoned); Timothy P. O'Neill, *Escape From Freedom: Why "Limited Lockstep" Betrays Our System of Federalism*, 48 J. Marshall L. Rev. 325 (2014)). Much of Bass's argument focuses on these kinds of policy judgments about ***554 **442** the value of limited lockstep. For example, he argues that Illinois "does not blindly follow federal courts when the legitimate interests of our citizens are at risk" and our courts have shown "willing[ness] to exercise judicial independence in interpreting the Illinois Constitution when the rights of Illinois's citizens are infringed."

¶ 43 While calls to reconsider an approach to Illinois constitutional interpretation that tracks so closely with the federal constitution have much to recommend them, we need not (and do not) take a side in those debates. For the purposes of Bass's case, we find, with regard to the necessity of a warrant issued by a neutral magistrate, historical precedent concludes that article I, section 6 provides greater protections than the fourth amendment. Indeed, arrests based solely on investigative alerts, even those supported by probable cause, are unconstitutional under the Illinois Constitution.

¶ 44 *Constitutional Text*

¶ 45 Following the analytical framework in *Caballes*, the text of the Illinois Constitution sets the beginning of the inquiry. Bass argues that the language in the 1970 constitution indicates the General Assembly's and (by extension) the people's intent to depart from the limited lockstep approach to interpreting our search and seizure clause. He's right, but he focuses on the wrong text. But, we have the obligation to properly apply the law even where the parties have not. See *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.*, 783 F.3d 976, 980 (4th Cir. 2015) ("A party's failure to identify the applicable legal rule certainly does not diminish a court's responsibility to apply that rule. The judiciary would struggle to maintain the rule of law were it limited to the parties' competing assertions about what the law requires. For this reason, it is well established that '[w]hen 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' " (quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991))); see also *People v. Knapp*, 2019 IL App (2d) 160162, ¶¶ 45, 57, —— Ill.Dec. ——, —— N.E.3d ——.

¶ 46 We do not rely on these cases, as the partial dissent suggests, to justify our review of the purportedly "unargued and unbriefed issues." As we have said, Bass raised the constitutionality of investigative alerts in his original briefs. We point to these cases only as examples of situations where courts of review do not rely on a party's precise legal theory to address the question presented where the party's analysis goes astray. Ultimately, Bass points us in the right direction and arrives at the right destination.

¶ 47 Bass emphasizes the language in our constitution that protects our citizens from "invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. 1970, art. I, § 6. Bass takes this language to mean the General Assembly that proposed this amendment must have thought the Illinois Constitution went beyond the federal constitution because this language does not appear in the fourth amendment at all. Compare U.S. Const., amend. IV.

¶ 48 In a literal sense, this is right, because we afford (and have always afforded) independent meaning to portions of our constitution that have no federal analog. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 42, 372 Ill.Dec. 255, 991 N.E.2d 745 ("The privacy clause is unique to the Illinois Constitution, there being no cognate provision in the federal constitution. Accordingly, we interpret the ***555 **443** provision without reference to the federal counterpart."). Even though the federal constitution has no provision expressly protecting privacy or protecting against the interception of communications by eavesdropping (see *id.*), it does have a provision protecting against unreasonable searches and seizures and requiring a warrant. It is the analogous text in our constitution related to those provisions that we must analyze to determine if a basis exists for a different interpretation under our law.

¶ 49 In its first form, our constitution's search and seizure clause read:

> "That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and that general warrants whereby an officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted." Ill. Const. 1818, art. VIII, § 7.

That same language persisted in the next ratified constitution. Ill. Const. 1848, art. XIII, § 7. Under these versions, the only mention of warrants involved a condemnation of the issuance of a general warrant. Not until 1870 did the language in the search and seizure clause of our constitution appear substantially similar to its current counterpart. Compare Ill. Const. 1870, art. II, § 6, and Ill. Const. 1970, art. I, § 6. That language differs from the fourth amendment in one critical respect relevant here:

> "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 [w]arrants shall issue, but

> upon probable cause, supported by *[o]ath or affirmation*, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added.) U.S. Const., amend. IV.

Compare with:

> "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 warrant shall issue without probable cause, supported by *affidavit*, particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added.) Ill. Const. 1870, art. II, § 6.

¶ 50 We can tell from the debates during the 1870 Constitutional Convention that the delegates intentionally included the word "affidavit." The first proposed version of the search and seizure clause at the 1870 convention included the words "oath or affirmation" instead of "affidavit," tracking the text of the fourth amendment almost verbatim. Journal of the Constitutional Convention of the State of Illinois 664-65 (Apr. 23, 1870), https://babel.hathitrust.org/cgi/pt?id=hvd.li2qkb;view=1up;seq=678 (last visited July 22, 2019) [https://perma.cc/9US2-BBZP]. During debate, one of the delegates proposed striking the phrase "oath or affirmation" and replacing it with the word "affidavit." *Id.* at 772. The convention adopted that amendment (*id.* at 773), and included it in the language of the ratified constitution. Ill. Const. 1870, art. II, § 6.

¶ 51 *Early Interpretations of the 1870 Constitution*

¶ 52 Close in time to the addition of this language, our supreme court held that requiring an "affidavit" as opposed to mere "oath or affirmation" was "a step beyond the constitution of the United States." *Lippman v. People*, 175 Ill. 101, 112, 51 N.E. 872 (1898). The court found that

> ***556 **444** "[w]herever a statute requires probable cause, supported by oath or affirmation, the complaint must set up facts and cannot rest on mere belief * * *. * * * [T]he law, in requiring a showing of probable cause, supported by affidavit, intends that the facts shall be stated which shall satisfy the *magistrate* that suspicion is well founded. The mere expression of opinion, under oath, is no ground for the warrant, except as the facts justify it." (Emphasis added.) *Id.* at 113, 51 N.E. 872.

The purposes of going "a step beyond" the federal constitution involves limits on "the abuse of executive authority" 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." *Id.* at 112, 51 N.E. 872.

¶ 53 While *Lippman* dealt with a search warrant (*id.* at 104, 51 N.E. 872), our supreme court later found that "[t]he language of section 6 of article 2 of our constitution provides exactly the same protection whether the warrant be for the search of a house and the seizure of property or for the search or seizure of a

person." *People v. Elias*, 316 Ill. 376, 382, 147 N.E. 472 (1925), *overruled on other grounds by People v. Williams*, 27 Ill. 2d 542, 544, 190 N.E.2d 303 (1963) (allowing warrant affidavits based on credible hearsay). The court in *Elias* reaffirmed our supreme court's commitment to vesting the probable cause determination in a neutral magistrate, not an executive branch officer:

> "The magistrate must exercise his [or her] own judgment and not act on the judgment of the official accuser. A warrant issued upon a conclusion of the accuser, without any facts stated in the application upon which a judicial officer to whom it is addressed may form his [or her] own conclusion, does not show 'probable cause supported by affidavit,' within the meaning of the [constitutional] guaranty." *Elias*, 316 Ill. at 381, 147 N.E. 472 (quoting *State ex rel. Samlin v. District Court of Sixteenth Judicial District*, 59 Mont. 600, 198 P. 362, 365 (1922)).

¶ 54 Our supreme court has similarly 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." *People v. Clark*, 280 Ill. 160, 167, 117 N.E. 432 (1917). Even though a state's attorney, like the police officer in Bass's case, is sworn to uphold the laws and constitution of the United States and Illinois, this oath cannot substitute for a sworn affidavit presented to a neutral magistrate. *Id.*

¶ 55 Other decisions in the decades following the ratification of the 1870 constitution confirm the primacy of the role of the neutral magistrate in the probable cause determination. In *People v. McGurn*, the defendant rode in a taxi that was stopped on a Chicago street. 341 Ill. 632, 634, 173 N.E. 754 (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, 173 N.E. 754. The officers got into the taxi, found a gun on the defendant, and arrested him. *Id.*

¶ 56 The court, again reaffirming the necessity of a determination of probable cause by a neutral magistrate, found that "under 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 ***557 **445** whim of such officer." (Emphasis added.) *Id.* at 638, 173 N.E. 754. 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, 173 N.E. 754.

¶ 57 The common thread through all of these amendment-era cases is that the mere word of an executive branch official fails, on its own, as a substantiate for a finding of probable cause. The interposition of a neutral magistrate became the paradigm of investigative propriety. Notably, had Illinois borrowed the language of the fourth amendment verbatim, the

  

foundations of these cases would be severely eroded. The fourth amendment allows a finding of probable cause on "oath *or* affirmation." So while the "judgment of the official accuser" would not be enough under the Illinois Constitution (*Elias*, 316 Ill. at 381, 147 N.E. 472), mere affirmation by an executive branch official would be enough under the fourth amendment. This is yet further evidence that the drafters of our constitution made a deliberate choice to use the word "affidavit" in order to provide greater protections in Illinois than the protections enjoyed under the fourth amendment.

¶ 58 We acknowledge the long-standing common-law tradition allowing warrantless arrests for felonies where a citizen was "reasonably suspected of being [a] felon[ ]." *McGurn*, 341 Ill. at 636, 173 N.E. 754. That common-law rule has been part of the law in Illinois for many decades. *Id.* (citing Illinois statute allowing for warrantless arrest where "a criminal offense has, in fact, been committed and [the officer] has reasonable ground for believing that the person to be arrested has committed it" (citing Ill. Rev. Stat. 1929, ch. 38, ¶ 657)). A similar statutory provision exists today. 725 ILCS 5/107-2(1)(c) (West 2016) (allowing for warrantless arrest where officer "has reasonable grounds to believe that the person is committing or has committed an offense").

¶ 59 But, as we have described, *McGurn* itself placed limits on this common-law rule that are relevant to the constitutionality of investigative alerts. The constitution of this state does not "clothe any officer with the autocratic power to order the summary arrest and incarceration of any citizen without warrant or process of law." *McGurn*, 341 Ill. at 638, 173 N.E. 754. To hold otherwise 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.* (quoting *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860, 863 (1920)). The 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.

¶ 60 We pause to emphasize that applying the limitation set out in *McGurn* does not impede officers from relying on the collective knowledge of their fellows. The State argues that arresting officers can rely on information provided by nonarresting officers as long as the facts known to the nonarresting officers suffice to establish probable cause. See *People v. McGee*, 2015 IL App (1st) 130367, ¶ 49, 398 Ill.Dec. 481, 44 N.E.3d 510. That is the rule and has been at least since the United States Supreme Court's decision in *Whiteley v. Warden*, 401 U.S. 560, 568, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) ("Certainly ***558 **446** police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting the aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause."). See also *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) ("[I]f a flyer or bulletin has been issued on the basis of articulable

  

facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification [citation], to pose questions to the person, or to detain the person briefly while attempting to obtain further information.").

¶ 61 Significantly, the principles in *Whiteley* and *Hensley* apply in a world without investigative alerts. In *Whiteley*, officers relied on information from their colleagues that an *arrest warrant* had been issued after assessment of the facts by a neutral magistrate. There, probable cause had been asserted and properly tested before a judge, so unless the nonarresting officers turned out to be lying, the arrest would still be valid. See *Whiteley*, 401 U.S. at 568, 91 S.Ct. 1031. *Hensley* did not involve arrests and permitted *Terry* stops (*Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) to be made based on the issuance of a bulletin by another police department. *Hensley*, 469 U.S. at 233, 105 S.Ct. 675. Even without an investigative alert, an officer may still conduct *Terry* stops when he or she has information from another officer that a reasonable suspicion exists that a crime has been committed. In sum, our conclusion that investigative alerts are unconstitutional does not deprive police of their ability to rely on the collective knowledge of their colleagues.

¶ 62 As we have set out, the text of the Illinois Constitution leaves beyond dispute that a finding of probable cause must be based, not only on a minimum threshold of sufficient facts, but sufficient facts presented in proper form (a sworn affidavit) to the appropriate person (a neutral magistrate). The Illinois Supreme Court's early interpretations of our warrant clause shows a strong presumption against executive branch officers making their own probable cause determinations without swearing to facts before a magistrate. Taking together the text of our constitution and its historical interpretation by our supreme court, we conclude that the Illinois Constitution requires, in the ordinary case, a warrant to issue before an arrest can be made. Arrests based on investigative alerts violate that rule.

¶ 63 *The 1970 Constitution*

¶ 64 The 1970 Constitution bolsters our conclusion. *Caballes* found it appropriate to continue following the United States Constitution in limited lockstep, in part, because the drafters of the 1970 Constitution were aware of that interpretive framework at the time of the ratification debates and took no affirmative steps to amend the constitution to get around it. *Caballes*, 221 Ill. 2d at 292-94, 303 Ill.Dec. 128, 851 N.E.2d 26 (discussing *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 142, 77 Ill.Dec. 787, 461 N.E.2d 410 (1984)). A no less powerful consequence of that logic means that we must presume those same drafters knew of historical instances in which the Illinois Supreme Court *departed* from the limited lockstep approach. By not altering the language, we must presume they accepted those interpretations of the constitution as well.

¶ 65 This canon of construction examines the ratification debates surrounding article I, section 6, revealing little attention having been paid to its pre-existing language. Indeed, the highlight of the 1970 Constitutional

***559 **447** Convention, at least as far as section 6, was the new language expanding protections for privacy and against the unreasonable interception of communications. From the historical record, the drafters meant to leave substantial portions of section 6, and by extension any previous interpretations of its language, unchanged: "There is nothing new or no new concepts that the Bill of Rights Committee intended to provide insofar only as the search and seizure section—or the search and seizure concept—is concerned * * *." 3 Record of Proceedings, Sixth Illinois Constitution Convention 1524 (statements of Delegate Dvorak), http://www.idaillinois.org/cdm/ref/collection/isl2/id/3982 (last visited July 22, 2019) [https://perma.cc/5PNE-ERAD]. Most of the discussion, and debate, focused on two new concepts introduced into section 6 in the 1970 constitution—protections against eavesdropping and the privacy clause. See generally *id.* at 1524-45. We must presume, based on the drafters' relative silence, that they acquiesced in the historical application of the limited lockstep doctrine, both where our supreme court has adhered to it *and* departed from it.

¶ 66 *Traditional Law Enforcement Tools*

¶ 67 Our conclusion about investigative alerts under the Illinois Constitution does not take away any of the traditional tools available to law enforcement. Invalidating the investigative alert procedure does not alter any of the already-existing constitutional doctrines allowing them to work around the warrant requirement. For example, officers can already act without a warrant when they are confronted with "the need to render emergency assistance, the 'hot pursuit of a fleeing suspect,' and the need to prevent the imminent destruction of evidence." *People v. Harrison*, 2016 IL App (5th) 150048, ¶ 17, 405 Ill.Dec. 362, 58 N.E.3d 623 (quoting *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011)). These exceptions already apply to situations that require a warrant.

¶ 68 We cannot stress enough that our holding rests on the structure of the investigative alert system. An investigative alert is not a fast-acting response to an evolving scenario in the field. The system parallels the warrant system, in both the time it takes and the deliberation required, and in that way the procedure allows police to obtain warrant-like documents without the one safeguard that the framers of the Illinois Constitution found most important—an affidavit presented to a neutral magistrate. The oddity of the investigative alert system is that it appears to be no less burdensome for police than the procedure for actually obtaining a warrant. To get an investigative alert issued, an officer "must submit to a supervisor a report explaining what investigative steps have been taken in the case and the basis of the officer's belief that probable cause exists." *Craig v. City of Chicago*, No. 08 C 2275, 2011 WL 1196803, at *3 (N.D. Ill. Mar. 25, 2011). It can take up to a full day for a supervisor to approve the request for an investigative alert. *Hale v. City of Chicago*, No. 10 C 0547, 2013 WL 2338125, at *4 (N.D. Ill. May 22, 2013). As Justice Salone noted in *Hyland*, "[i]f there is time to get a supervisor's approval for the investigative alert, as the special order requires, there is time to seek an arrest warrant from a member of the

  

judiciary." *Hyland*, 2012 IL App (1st) 110966, ¶ 51, 367 Ill.Dec. 89, 981 N.E.2d 414 (Salone, J. specially concurring, joined by Neville, J.).

¶ 69 Another oddity of the investigative alert system related to the suppression remedy is that, compared to the warrant system, the costs are much higher in terms of suppression of evidence that is discovered as a result of an arrest later ***560 **448** determined to be lacking probable cause. Traditionally, where an officer does not have probable cause to arrest, the evidence the officer discovers as a result of that arrest must be suppressed absent a warrant or exigent circumstance. See *In re D.W.*, 341 Ill. App. 3d 517, 529-30, 275 Ill.Dec. 566, 793 N.E.2d 46 (2003). But, when the officer acts under the cover of a warrant, the evidence the officer discovers may still be admitted even if a court eventually invalidates the warrant for lack of probable cause. *People v. Manzo*, 2018 IL 122761, ¶ 63, 432 Ill.Dec. 598, 129 N.E.3d 1141 ("exclusion of evidence was not required where a police officer acted in objectively reasonable reliance on a facially valid warrant * * * later found invalid based upon a lack of probable cause" (citing *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984))).

¶ 70 So when an officer acts on the department's own determination that probable cause exists, he or she risks suppression of the evidence uncovered, but when an officer acts with the imprimatur of a neutral magistrate, the evidence the officer uncovers will still be admitted even if the magistrate turns out to have been wrong. Indeed, in this additional way, investigative alerts fail to improve the administration of criminal justice. They increase the risk of the " 'substantial social cost' " incurred by suppression of competent evidence. *Id.* ¶ 64 (quoting *People v. LeFlore*, 2015 IL 116799, ¶ 23, 392 Ill.Dec. 467, 32 N.E.3d 1043).

¶ 71 These policy considerations augment our conclusion that the Illinois Constitution's search and seizure provision pointedly prevents overreaching by officers of the executive branch. See *Caballes*, 221 Ill. 2d at 310-11, 303 Ill.Dec. 128, 851 N.E.2d 26 (noting that we look to our State's "traditions and values" in determining whether to depart from lockstep interpretation of federal constitution). The officers here undoubtedly acted consistently with the established policy at the time, but that policy allowed them to subjectively determine the sufficiency of their own probable cause without the protection of neutral magistrate. We find that our constitution goes "a step beyond" the United States Constitution and requires, in ordinary cases like Bass's, that a warrant issue before a valid arrest can be made. We hold an arrest unconstitutional when effectuated on the basis of an investigative alert issued by the Chicago Police Department.

¶ 72 *Unlawful Extension of the Traffic Stop*

¶ 73 For the sake of completeness, we also address the legality of the traffic stop, which we find to have been unconstitutionally extended. A traffic stop, like an arrest, is a seizure that implicates the fourth amendment's prohibition against unreasonable searches and seizures. U.S. Const., amend. IV; see also *People v. Jones*, 215 Ill. 2d 261, 268, 294 Ill.Dec. 129, 830 N.E.2d 541 (2005). As we

have discussed, the default requirement for effectuating a reasonable seizure is a warrant supported by probable cause. *Jones*, 215 Ill. 2d at 269, 294 Ill.Dec. 129, 830 N.E.2d 541 (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). But a lesser standard applies to brief investigatory detentions—colloquially know as *Terry* stops—where a police officer need only have reasonable suspicion that person has committed, or is about to commit, a crime. *People v. Duran*, 2016 IL App (1st) 152678, ¶ 13, 408 Ill.Dec. 83, 64 N.E.3d 1168 (citing *Terry*, 392 U.S. at 21-22, 88 S.Ct. 1868). We analyze a traffic stop applying the same standards we would to a *Terry* stop. *Jones*, 215 Ill. 2d at 270, 294 Ill.Dec. 129, 830 N.E.2d 541.

¶ 74 A seizure, lawful at its inception, may nevertheless violate the ***561 **449** fourth amendment if it is "prolonged beyond the time reasonably required to complete [its] mission." *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). The United States Supreme Court has recently applied this principle in *Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609, 191 L.Ed.2d 492 (2015). There, the court held that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop." *Id.* at 353-54, 135 S. Ct. at 1614. Ordinary inquires related to traffic stops include checking the driver's license, doing a warrant check on the driver, or asking for registration and proof of insurance. *Id.* at 355-56, 135 S. Ct. at 1615. Officers also may attend to safety concerns as part of the stop's "mission." *Id.* at 357-58, 135 S. Ct. at 1616. Authority for the stop ends when tasks related to the stop's purpose are, or reasonably should have been, completed. *Id.* at 353-54, 135 S. Ct. at 1614.

¶ 75 We are not concerned solely with the duration of the stop or the order of events. The Court in *Rodriguez* explained that officers cannot act outside the scope of the stop's mission just because they act quickly. *Id.* at 357-58, 135 S. Ct. at 1616 (rejecting argument that officers can get "bonus time" by "completing all traffic-related tasks expeditiously"). The Court also explained that the question is not "whether the [unrelated act] occurs before or after the officer issues a ticket." *Id.* at 357, 135 S. Ct. at 1616. Put in terms of Bass's case, the officers could not buy time to run a name check on Bass just because they finished with the driver more quickly. They also could not run a name check on Bass just because they had not yet finished with the driver. Bass's name check, whenever it occurred, added time to the stop, so we must answer one question: Did the name check on Bass exceed the scope of the traffic stop's mission?

¶ 76 The State's brief makes only one argument, namely, that the running Bass's name check was related to the mission of the stop due to officer safety. Yet, at the same time, the State points out the officers had already ordered all of the passengers out of the car, including Bass. Officers are allowed to do this for safety reasons. See *Maryland v. Wilson*, 519 U.S. 408, 414, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). But, we see no safety justification, and the State has offered none, for running name checks on the passengers when they are already in the control of the officers.

  

¶ 77 The State's primary argument asserts that the officers did not extend the stop because "the name checks were all done at the same time, prior to the officer issuing the driver his verbal warning." As we have said, the question is not whether the officers did things in the proper order; the question is whether the challenged action was outside the scope of the stop's mission. Were it otherwise, officers could conduct tasks unrelated to the mission of the traffic stop as long as they do so before they issue a ticket. *Rodriguez* does not allow that.

¶ 78 Even if we were concerned with the temporal order of the officer's actions, we would reject the State's argument. At oral argument, the State conceded that it had the burden to show that the officers' conduct was lawful because Bass made a *prima facie* case that the officers' check of the passengers' identifications was unrelated to the mission of the stop. The record does not reveal when Bass's name check was run in relation to the name checks of the other passengers, the LEADS check on the driver, and the completion of the TSS card. The State's failure to clarify the timeline of the stop and thereby meet its ***562 **450** burden leads us to conclude that the motion to suppress should have been granted.

¶ 79 C. Remedy

¶ 80 The traditional remedy for an unconstitutional arrest is to suppress the fruit of that arrest, including postarrest statements. *People v. Jennings*, 296 Ill. App. 3d 761, 763, 231 Ill.Dec. 184, 695 N.E.2d 1303 (1998). The only exception is where a statement is " 'sufficiently an act of free will' " such that " 'the primary taint of the unlawful invasion' " is purged. *Id.* at 763-64, 231 Ill.Dec. 184, 695 N.E.2d 1303 (quoting *People v. White*, 117 Ill. 2d 194, 222, 111 Ill.Dec. 288, 512 N.E.2d 677 (1987)). Here, the State has not argued that Bass's postarrest statements should not be suppressed. The State only argues that failure to suppress the statement at Bass's first trial was harmless. See *Arizona v. Fulminante*, 499 U.S. 279, 307, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (admission of evidence obtained in violation of fourth amendment subject to harmless error analysis); see also *People v. Mitchell*, 152 Ill. 2d 274, 328, 178 Ill.Dec. 354, 604 N.E.2d 877 (1992).

¶ 81 For a constitutional error to prove harmless, it must appear beyond a reasonable doubt that the verdict would have been the same absent the error. *People v. Patterson*, 217 Ill. 2d 407, 428, 299 Ill.Dec. 157, 841 N.E.2d 889 (2005). On this issue, the State has the burden of proof. *Id.* Three approaches have been used for determining whether an error is harmless beyond a reasonable doubt: (1) focusing on the error to determine whether it may have contributed to the conviction; (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction; and (3) considering whether the evidence is cumulative or duplicates properly admitted evidence. *People v. Wilkerson*, 87 Ill. 2d 151, 157, 57 Ill.Dec. 628, 429 N.E.2d 526 (1981).

¶ 82 One cannot seriously dispute that the error contributed to Bass's conviction and that the unlawfully admitted evidence was not cumulative to the properly admitted evidence.

  

The trial court explicitly referenced Bass's statement during its ruling, describing the statement as "telling" and noting that Bass "took advantage of the situation" in a way that was "devious" and "manipulative" to "get back at [his] own girlfriend." Under these circumstances, we conclude that the error in admitting Bass's statements may well have contributed to his conviction. And because the error may have contributed to the conviction and Bass's statement to the police was not merely cumulative to the testimony of T.P. and Dunkin, the error in admitting Bass's statement was not harmless.

¶ 83 The remedy for reversible error is a new trial, but because Bass alleges that the evidence was insufficient to sustain his conviction, we must first consider whether a new trial poses double jeopardy concerns. See *People v. Hernandez*, 2017 IL App (1st) 150575, ¶¶ 134-36, 414 Ill.Dec. 275, 80 N.E.3d 8.

¶ 84 The double jeopardy clause, found in both the United States Constitution as well as the Illinois Constitution (U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10), prohibits retrial "for the purpose of affording the prosecution another opportunity to supply evidence which it failed to present in the first proceeding" but does not "preclude retrial where a conviction has been set aside because of an error in the proceedings leading to the conviction" (*People v. Lopez*, 229 Ill. 2d 322, 367, 323 Ill.Dec. 55, 892 N.E.2d 1047 (2008)). Therefore, to determine whether a new trial poses double jeopardy concerns, we must examine the sufficiency of the evidence at the initial trial —including that ***563 **451** which was improperly admitted. *Id.*; see also *Hernandez*, 2017 IL App (1st) 150575, ¶ 136, 414 Ill.Dec. 275, 80 N.E.3d 8. As we have set out (*supra* ¶¶ 19-22), the evidence was sufficient to convict Bass and so there is no double jeopardy bar to retrying him.

¶ 85 As we alluded to before, suppression of evidence exacts a "substantial social cost[ ]." (Internal quotation marks omitted.) *Manzo*, 2018 IL 122761, ¶ 64, 432 Ill.Dec. 598, 129 N.E.3d 1141. In no way should our conclusion about the unlawfulness of Bass's arrest diminish the seriousness of Bass's offense or the harm done to the victim. But the Illinois Constitution, like the fourth amendment, must protect the guilty and innocent just the same. See *Mapp v. Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) ("The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."). It is with this understanding that we remand for a new trial.

¶ 86 D. Responses to Partial Dissent

¶ 87 We reject the assertion that we "decide[d] this case based on a constitutional issue of first impression [we] *sua sponte* raised postargument." *Infra* ¶ 99. Bass's original briefing raised the question of the constitutionality of investigative alerts. Bass framed the issue this way: "Whether the trial court erred in denying Bass's motion to quash arrest and suppress evidence where the police * * * used an investigative alert as an end-run around obtaining an arrest

  

warrant in violation of the fourth amendment's prohibitions on unreasonable searches and seizures." In the body of his argument he highlighted that "[b]oth the United States and Illinois Constitutions provide for the use of warrants, issued on probable cause and supported by affidavit." He cited both constitutions in support of that proposition.

¶ 88 We have not " 'sall[ied] forth * * * looking for wrongs to right.' " *Greenlaw v. United States*, 554 U.S. 237, 244, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of rehearing *en banc*). Placed in its proper context, this quotation does not support the partial dissent's point. Judge Arnold, the author of the sentiment, was concurring in the denial of the Eighth Circuit's decision to hear a case *en banc* (as a full court). The United States Government, through the Solicitor General's office, had declined to seek rehearing, to the ire of the dissenters. *Samuels*, 808 F.2d at 1302 (Fagg, J., dissenting from denial of rehearing *en banc*, joined by Ross, Gibson, and Bowman, JJ.) ("The Justice Department's failure to act should never paralyze this court."). In other words, when Judge Arnold spoke of "sally[ing] forth," he meant courts should refrain from making what amount to litigation decisions on behalf of parties; he did not suggest that appellate courts should refrain from requesting more fully developed argument on an issue that is already presented.

¶ 89 And we have not made any of those litigation decisions. Bass *did* elect to advance the argument that investigative alerts are unconstitutional. He also addressed the Illinois constitutional question in supplemental briefing. In two rounds of briefing the State had an opportunity to respond to Bass's arguments. Depriving parties of any opportunity to raise an argument (which we have not done) differs entirely from disagreeing with the parties' analysis of an issue that is presented. In any event, a petition for rehearing provides the losing party with an opportunity to raise misstatements of facts and mistakes ***564 **452** of law. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060, 327 Ill.Dec. 403, 902 N.E.2d 158 (2009) ("[t]he purpose of a petition for rehearing is to provide litigants with the opportunity to direct the court's attention to errors in the court's previous application of existing law").

¶ 90 Properly understood, our reliance on an analysis that departs from the precise argument that Bass made in his supplemental brief is not unusual. Appellate courts regularly and must do so. See *Miller v. Civil Constructors, Inc.*, 272 Ill. App. 3d 263, 265, 209 Ill.Dec. 311, 651 N.E.2d 239 (1995) (addressing issue raised in plaintiff's brief even though "plaintiff's counsel has failed to provide much in the way of legal authority or even persuasive legal analysis"). If we had to follow parties' arguments to the letter, we would be constrained to issue decisions that got the law wrong because the only analysis presented by the parties was wrong. See *Dan Ryan Builders*, 783 F.3d 976 at 980. This would be an abdication, not vindication, of our judicial duties.

¶ 91 Two further examples provide guidance. We have the authority to reject concessions when we believe a party has gotten the law wrong. See *People v. Sykes*, 2012 IL App (4th)

100769, ¶¶ 21-22, 360 Ill.Dec. 95, 968 N.E.2d 174 (rejecting State's concession of error where court believed trial court to be incorrect); *In re T.A.*, 359 Ill. App. 3d 953, 957, 296 Ill.Dec. 555, 835 N.E.2d 908 (2005) (rejecting parties' concession that case from another district controlled where court disagreed with outcome of other case); see also *People v. Hollins*, 2012 IL 112754, ¶ 70, 361 Ill.Dec. 402, 971 N.E.2d 504 (Burke J., dissenting, joined by Freeman, J.) (similar). We also see courts address the merits even where the parties have not complied with Illinois Supreme Court Rule 341 (eff. May 25, 2018). See *People v. Grenko*, 356 Ill. App. 3d 532, 534-35, 292 Ill.Dec. 211, 825 N.E.2d 1222 (2005) (addressing merits on appeal even though the defendant's brief failed "to address the merits of the [trial court's] decision"); *People v. Patrick*, 298 Ill. App. 3d 16, 31, 232 Ill.Dec. 237, 697 N.E.2d 1167 (1998) (addressing defendant's argument about sufficiency of the evidence even though the point was "raised but not argued" in violation of Rule 341).

¶ 92 The partial dissent suggests that a factual reason bars our taking up the issue of investigative alerts: "Had the issue been raised at the trial level, a factual record necessary to address these issues could have been developed." But, the partial dissent does not indicate what additional facts we would need. The record shows that the police issued an investigative alert after talking to the victim. The record shows that the investigative alert was the *sole* basis for Bass's arrest. And critically, the record shows that the police did not arrest Bass until weeks after the investigative alert issued, an ample amount of time within which officers could have gotten a warrant. We are at a loss to understand what other facts would aid our consideration of the propriety of investigative alerts as a constitutional matter, especially given that our ultimate determination as to whether suppression of evidence is warranted mandates *de novo* review. *Harris*, 228 Ill. 2d at 230, 319 Ill.Dec. 823, 886 N.E.2d 947.

¶ 93 We have also not engaged in any of our own "factfinding" (*infra* ¶ 109) to reach our decision. The information that investigative alerts are not issued instantaneously is apparent from judicial decisions. *E.g.*, *Hale*, 2013 WL 2338125, at *4 (investigative alert approved one day after submitting to supervisor). We also did not make a finding of fact to determine that investigative alerts are unique to Cook County; every single Illinois decision referencing ***565 **453** investigative alerts comes from the First District, which only covers Cook County. What the partial dissent describes as "factfinding" is no more than legal research.

¶ 94 As part of that research, we have cited 22 cases mentioning or discussing investigative alerts. But, in addition to the 22 cases mentioned in the appendix, a Westlaw search shows that investigative alerts have been mentioned or discussed in 97 Rule 23 orders, 81 of those after the partial dissent's cutoff date of December 20, 2012. And that's to say nothing of the additional 36 federal cases in the Seventh Circuit and Illinois District Courts (27 after December 20, 2012). And, as we set out, investigative alerts were formerly known as "stop orders." At least a dozen cases in Illinois mention or discuss investigative alerts under their former name (and that is only on the

  

first page of Westlaw results). *E.g.*, *People v. Lewis*, 92 Ill. App. 2d 463, 467, 236 N.E.2d 417 (1968). We are comfortable describing the over 155 mentions of investigative alerts in court decisions as a "heap."

¶ 95 Despite their frequent mention, investigative alerts have not been addressed often. We do so now because, as we have underscored throughout this opinion, Bass raised the constitutionality of investigative alerts, pointing to *both* the United States and Illinois Constitutions in his original briefing. We see no impropriety in attempting to correctly answer a question that was presented to us.

¶ 96 Because we remand for a new trial, we need not address Bass's challenge to the fines and fees the trial court imposed.

¶ 97 Reversed and remanded.

## ¶ 98 SUPPLEMENTAL OPINION UPON DENIAL OF REHEARING

¶ 99 The State has filed a timely petition for rehearing raising three primary arguments: (i) we misapplied Illinois's limited lockstep doctrine, (ii) we misread historical case law about the primacy of the magistrate in determining probable cause, and (iii) even if our analysis is correct, the good faith exception to the exclusionary rule should apply. We have not requested a response from Bass because only minor clarifications of our original opinion address the State's arguments.

¶ 100 The State argues that we should reconsider our decision because it conflicts with Illinois Supreme Court precedent saying that our constitution "must be read in lockstep" with the federal constitution. The State cites *People v. Holmes*, 2017 IL 120407, ¶ 25, 418 Ill.Dec. 254, 90 N.E.3d 412, where our supreme court said, "we follow decisions of the United States Supreme Court regarding searches and seizures." The State omits the quotation from the immediately preceding paragraph where the court clarifies that Illinois only follows the United States Supreme Court's guidance "unless any of the narrow exceptions to lockstep interpretation apply." *Id.* ¶ 24 (citing *People v. Fitzpatrick*, 2013 IL 113449, ¶ 28, 369 Ill.Dec. 527, 986 N.E.2d 1163). As we noted in our original opinion, our supreme court has expressly said "it is clear that it is an overstatement to describe our approach as being in strict lockstep with the Supreme Court." *Caballes*, 221 Ill. 2d at 309, 303 Ill.Dec. 128, 851 N.E.2d 26. The State attempts this same overstatement in its petition for rehearing. The language from *Caballes* that the State quotes in its brief comes from our supreme court's *application* of the limited lockstep approach to the circumstances before it, not its explanation of the doctrine. *Id.* at 316-17, 303 Ill.Dec. 128, 851 N.E.2d 26. Our original opinion follows the analytical pattern set out in *Caballes* to determine whether to depart from lockstep: text, constitutional ***566 **454** debates, historical precedent, state traditions, and values. *Supra* ¶ 41.

¶ 101 The State next argues that we have misread the historical precedent that guided us to our conclusion. In particular, the State disagrees with our citation to *McGurn*, 341

Ill. 632, 173 N.E. 754. The State argues that the officers in *McGurn* admitted they did not have probable cause and that limits the decision's persuasive value. On closer examination, we agree in part with the State, which has accurately described the facts of *McGurn*. *Id.* at 634, 173 N.E. 754 (describing officer's testimony that he had no reasonable grounds to believe defendant had committed either misdemeanor or felony). We conclude that *McGurn*'s facts make it a poor vehicle for a literal comparison with Bass's case. But, that is where our agreement ends. *McGurn*, as just one example, gives voice to the attitudes and values that existed nearer the time of the ratification of the 1870 Constitution—an attitude of skepticism toward executive branch officials making their own determinations about the sufficiency of their cause to arrest someone. *Supra* ¶¶ 52-60.

¶ 102 The State's arguments bring to the fore a comparison we made in our original opinion between investigative alerts and warrants. *Supra* ¶ 68. We made that comparison in practical terms, noting that investigative alerts appear to offer no investigative benefits to officers in terms of efficiency; all they do is allow officers to sidestep a judge. The State's arguments on rehearing show that we should place that comparison in more concrete doctrinal terms.

¶ 103 As our original opinion sets out, our decision rests on the warrant clause of the Illinois Constitution. The State does not dispute, and early postratification precedent confirms, that the framers of our constitution believed the presentation of sworn affidavits to a neutral magistrate to be the constitutional baseline for probable cause to issue a warrant. *Supra* ¶ 53 (citing *Elias*, 316 Ill. at 381, 147 N.E. 472). We fail to see how our constitution would zealously protect against the issuance of a warrant without probable cause proven to a neutral magistrate, but would allow the issuance of an alert that has every feature of a warrant *except* the presentation of sworn facts to a neutral magistrate.

¶ 104 We adhere to our discussion of all of the law enforcement tools available to officers even without investigative alerts. *Supra* ¶¶ 60-61, 67. To that discussion we add that our decision that the issuance of an investigative alert is a deliberative process, not a response to actions unfolding in real time or in an emergency. Why would an officer prefer an investigative alert to a warrant? The most likely answer is that the officer worries he or she possesses insufficient facts to persuade a judge to issue a warrant. Investigative alerts are a deliberate end-run around the principles imbued in our constitution; it is that error we correct and our opinion passes no judgment on other police practices not at issue.

¶ 105 This brings us to the question of remedy. The State urges us to apply the good faith exception to the warrant requirement should we adhere, as we have, to our original opinion. In short, the good faith exception allows the State to introduce evidence obtained in violation of the constitution as long as officers acted with a reasonable belief that their actions comported with settled precedent. See *LeFlore*, 2015 IL 116799, ¶ 27, 392 Ill.Dec. 467, 32 N.E.3d 1043. This argument is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued are forfeited and shall not be raised

  

* * * on petition for rehearing."). In both its original brief and supplemental brief, the State addressed Bass's arguments on the merits. ***567** ****455** The only mention of a remedial argument was that any error in denying the motion to suppress would have been harmless, an argument addressed in our original opinion. *Supra* ¶¶ 80-82. Indeed, the argument may be affirmatively waived; in footnote 3 in its original brief, the State contested Bass's assertion that the remedy was outright reversal but appeared to agree that the proper remedy would be a new trial if we agreed with Bass on the merits. We decline to apply the good faith exception.

¶ 106 Our colleague would find that the State's good faith argument is not forfeited because "there was no basis for the State to have raised application of the good faith exception in its original briefs." As we wrote in response to the original dissent, Bass raised the constitutionality of investigative alerts in his original opening brief. The State has been on notice since the filing of that brief that there was a possibility that we would invalidate Bass's arrest on that basis. Because this would have been (and is) the first case to so hold, the State was similarly on notice that the good faith exception was an available argument. See *LeFlore*, 2015 IL 116799, ¶ 27, 392 Ill.Dec. 467, 32 N.E.3d 1043 (good faith exception available where officers were relying on settled precedent). The applicability of the good faith exception to Bass's argument did not depend on whether our holding was grounded in the United States or Illinois Constitution and so there is no basis to excuse that forfeiture now.

¶ 107 In all other respects, we adhere to our original opinion.

Justice Pucinski concurred in the judgment, opinion, and opinion upon denial of rehearing.

Justice Mason * concurred in part and dissented in part, with opinion.

Justice Coghlan dissented upon denial of rehearing, with opinion.

¶ 108 JUSTICE MASON, concurring in part and dissenting in part:

¶ 109 I agree that Bass's conviction must be reversed and so concur in the ultimate result. I further concur in the conclusion that, even without Bass's incriminating statements, the evidence was sufficient to sustain his conviction. I write specially because I do not agree with the majority's analysis on the issue of whether the traffic stop was unnecessarily prolonged. I respectfully dissent, in part, because the majority decides this case based on a constitutional issue of first impression it raised *sua sponte* postargument. The majority's decision to *reverse* Bass's conviction on this self-styled constitutional issue is neither necessary nor appropriate.

¶ 110 I first address the majority's decision to raise and resolve the broad constitutional issue under the Illinois constitution that is the centerpiece of its analysis. The majority's conduct in raising a constitutional issue *sua sponte* is improper. In *People v. Givens*, 237 Ill. 2d 311, 343 Ill.Dec. 146, 934 N.E.2d 470 (2010), the appellate court reversed a

  

defendant's conviction based not on any of the issues raised by defendant on appeal but on a different issue the court raised *sua sponte*. In plain language, our supreme court criticized this practice: "Illinois law is well settled that other than for assessing subject matter jurisdiction, 'a reviewing court should not normally search the record for unargued and unbriefed reasons to *reverse* a trial court judgment.' " (Emphasis in original.) *Id.* at 323, 343 Ill.Dec. 146, 934 N.E.2d 470 ***568 **456** (quoting *Saldana v. Wirtz Cartage Co.*, 74 Ill. 2d 379, 386, 24 Ill.Dec. 523, 385 N.E.2d 664 (1978)). The court quoted with approval the following passage from the United States Supreme Court decision in *Greenlaw v. United States*, 554 U.S. 237, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008):

> " 'In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. [Citation.] But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them and are responsible for advancing the facts and arguments entitling them to relief." [Citation.] As cogently explained:
>
> > "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do * * *." [Citation.]' " *Givens*, 237 Ill. 2d at 323-24, 343 Ill.Dec. 146, 934 N.E.2d 470 (quoting *Greenlaw*, 554 U.S. at 243-44, 128 S.Ct. 2559).

The majority's analysis of investigative alerts under the Illinois constitution makes litigation decisions on behalf of the parties. Specifically, despite its extended disclaimer (*supra* ¶¶ 86-95), the majority has decided that the argument Bass should have made, and which warrants reversal, is one his counsel never elected to advance and one that the State has never had an opportunity to address. See also *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

¶ 111 The fact that the majority solicited postargument briefs on the issue it determined to raise does not change the impropriety of its decision to act *sua sponte*. Bass, represented by counsel, did not elect to argue the issue of the constitutionality of investigative alerts under the Illinois Constitution and even when invited to, did not advance the rationale the majority now adopts. The majority's analysis —emanating solely from the majority and not from the advocates—remains "unargued and unbriefed."

¶ 112 The majority cites *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.*, 783 F.3d 976, 980 (4th Cir. 2015), nonbinding authority from another federal circuit, and

*People v. Knapp*, 2019 IL App (2d) 160162, —— Ill.Dec. ——, —— N.E.3d ——, for the proposition that "we have the obligation to properly apply the law even where the parties have not" (*supra* ¶ 45). Yet both cases *affirmed* the trial court's decision, an important distinction the majority fails to mention. No case—and certainly no binding decision from our supreme court—approves of a court of review reversing a trial court's decision on unargued and unbriefed issues. Indeed, binding authority dictates otherwise. *Givens*, 237 Ill. 2d at 323, 343 Ill.Dec. 146, 934 N.E.2d 470. Further, because the majority is admittedly addressing a constitutional issue of first impression raised *sua sponte* upon which there is no law, the source of its purported obligation "to properly apply the law" remains unclear.

¶ 113 Apart from its decision to act *sua sponte*, the majority is unnecessarily addressing ***569 **457** a constitutional issue, a practice repeatedly criticized by our supreme court. As the court stated recently in *The Carle Foundation v. Cunningham Township*, 2017 IL 120427, ¶ 34, 417 Ill.Dec. 693, 89 N.E.3d 341:

> "[T]his court's longstanding rule is that 'cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort.' *In re E.H.*, 224 Ill. 2d 172, 178 [309 Ill.Dec. 1, 863 N.E.2d 231] (2006). Consequently, 'courts * * * must avoid reaching constitutional issues when a case can be decided on other, nonconstitutional grounds,' and such issues 'should be addressed only if necessary to decide a case.' *People v. Hampton*, 225 Ill. 2d 238, 244 [310 Ill.Dec. 906, 867 N.E.2d 957] (2007)."

In frustration, the court has noted that its admonishments "seem to fall not infrequently on deaf ears." *In re E.H.*, 224 Ill. 2d at 172, 309 Ill.Dec. 1, 863 N.E.2d 231; see also *In re Alfred H.H.*, 233 Ill. 2d 345, 351, 331 Ill.Dec. 1, 910 N.E.2d 74 (2009) ("As a general rule, courts in Illinois do not * * * render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided."); *People v. Lee*, 214 Ill. 2d 476, 482, 293 Ill.Dec. 267, 828 N.E.2d 237 (2005) (declining to address alleged facial unconstitutionality of loitering statute because case could be resolved on more limited ground that police lacked probable cause to arrest defendant); Ill. S. Ct. R. 18(c)(4) (eff. Sept. 1, 2006) (requiring any opinion declaring unconstitutional a "statute, ordinance, regulation or other law" to articulate specific grounds for the determination "that the finding of unconstitutionality is necessary to the decision or judgment rendered, and that such decision or judgment cannot rest upon an alternative ground").

¶ 114 Indeed, the majority specifically discusses the much narrower issue that is case-specific: whether the traffic stop was unnecessarily prolonged by investigation into matters unrelated to its mission (*supra* ¶¶ 72-78). Because (i) Bass's conviction should be reversed this narrower ground, *i.e.*, that *this* traffic stop was unduly prolonged (see *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) (police seizure that is lawful at its inception may nevertheless violate the fourth amendment if it is "prolonged beyond the time reasonably

  

required to complete [its] mission")),[1] and (ii) the majority does not even attempt to articulate why resolution of the broader constitutional issue is necessary or why resolution of this appeal cannot rest on narrower grounds, this decision contravenes our supreme court's directives.

¶ 115 A recap of the procedural history of this appeal illustrates the impropriety of the majority's course of conduct. In his first round of briefs, Bass argued that investigative alerts were unconstitutional under the fourth amendment, an argument the majority recognizes is a nonstarter. *Supra* ¶ 37 ("It is well-settled that the fourth amendment allows for warrantless ***570 **458** arrests outside the home as long as the police have probable cause * * *."). Under the fourth amendment, if police have probable cause to arrest a defendant, the lack of a warrant is of no moment. *United States v. Watson*, 423 U.S. 411, 417, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (postal inspector's failure to secure warrant for defendant's arrest even though he concededly had time to do so did not invalidate warrantless arrest). And under the fourth amendment, it does not matter how or when the police acquired the information giving rise to probable cause, as long as they possess it prior to the defendant's arrest. *Id.* at 423, 96 S.Ct. 820 ("Congress has plainly decided against conditioning warrantless arrest power on proof of exigent circumstances."). A finding that probable cause existed for defendant's arrest precludes invalidation of that arrest on fourth amendment grounds. Illinois cases have long reached the same result. See *People v. Jones*, 16 Ill. 2d 569, 572-73, 158 N.E.2d 773 (1959) (police had information that defendant had previously supplied informant drugs; informant arranged for defendant to bring drugs to his home; instead, police met defendant and arrested him, finding drugs on his person; denial of defendant's motion to suppress drugs affirmed: an "arrest without a warrant is lawful if a criminal offense has in fact been committed and the arresting officer has reasonable grounds for believing that the person arrested committed it").

¶ 116 Here, because Bass concedes and it is readily apparent that the police did have probable cause to arrest him based on the contents of the investigative alert, which provided the details of his sexual assault of the victim, the only constitutional argument he elected to advance under the fourth amendment fails. Bass advanced no separate or independent argument under the Illinois Constitution, and even if he did, I have no reason to believe that this case would present one of those narrow exceptions to the "limited lockstep" doctrine under which our supreme court has consistently interpreted the Illinois Constitution's search and seizure clause in conformity with the United States Supreme Court's interpretation of the fourth amendment. See *People v. Burns*, 2016 IL 118973, ¶ 19, 401 Ill.Dec. 468, 50 N.E.3d 610; *People v. Fitzpatrick*, 2013 IL 113449, ¶ 15, 369 Ill.Dec. 527, 986 N.E.2d 1163; *People v. Caballes*, 221 Ill. 2d 282, 316, 303 Ill.Dec. 128, 851 N.E.2d 26 (2006); *People v. Lampitok*, 207 Ill. 2d 231, 240-41, 278 Ill.Dec. 244, 798 N.E.2d 91 (2003).

¶ 117 Not content with that result and unwilling to decide the case based on the arguments raised by the parties, the majority, two months after oral argument, entered an

order directing the parties to address the constitutionality of investigative alerts under the *Illinois* constitution, thus signaling that the fourth amendment argument of the Office of the State Appellate Defender decided to raise would not carry the day. (I did not sign that order.) Bass nevertheless did not advance the rationale the majority utilizes to reverse his conviction. Instead, Bass argued that the Illinois constitution's language prohibiting "invasions of privacy or interceptions of communications by eavesdropping devices or other means" could be interpreted to prevent the police from maintaining a "database of potentially arrest-worthy individuals" since such conduct "plainly implicates the privacy rights of the citizens of Chicago." Rejecting this argument, the majority comes up with its own analysis. See *supra* ¶ 45 ("[Bass is] right, but he focuses on the wrong text."). We will not find in the parties' supplemental briefs (or in any reported decision for that matter) a discussion of the difference between the fourth amendment's requirement that warrants be issued based on "oath or affirmation" versus ***571 **459** the Illinois constitution's inclusion of the word "affidavit." Nor will we find any discussion of cases dating back to 1898 as the source for the conclusion that the difference in wording was intended to be meaningful and to broaden the protection Illinois citizens enjoy from unlawful searches and seizures. But this is the basis on which the majority resolves this appeal. This is not a proper basis upon which to *reverse* a circuit court's ruling.

¶ 118 The majority rationalizes its decision to raise and resolve its own constitutional issue on the ground that the use of investigative alerts is "prolific" (*supra* ¶ 34) and attaches an appendix citing 22 reported decisions (labeled "a heap" (*supra* ¶ 33)) in which investigative alerts are mentioned but not discussed in any detail. Of those 22 cases, 7 were decided well before any member of this court raised a concern about the use of investigative alerts, leaving 15 cases decided since December 20, 2012 (the date *Hyland* was filed) that refer to investigative alerts in the facts. Add to those the reported decisions actually discussing investigative alerts (*Hyland*, *Starks*, and *Jones*) and the grand total rises to 18. Since December 20, 2012, and through June 30, 2019, this court has decided by published opinion 877 criminal appeals. Accordingly, the 18 cases, including *Hyland*, in which investigative alerts are mentioned comprise slightly over 2% of the criminal appeals decided in the last 6½ years, providing no support for the majority's characterization of the use of investigative alerts as "prolific."

¶ 119 The majority also engages in fact-finding and then declares those "facts" "notabl[e]" (see *supra* ¶ 5). Specifically, the majority finds that "investigative alerts are not issued instantaneously; in many cases, investigative alerts take the same or more time to procure than a warrant" (*supra* ¶ 5). The majority also observes that it "appears," based on its own research (into facts, not law), that Cook County is the only jurisdiction in Illinois in which investigative alerts are used. The source of these "facts" is undisclosed, and the majority's reliance on them is improper. See *People v. Hughes*, 2015 IL 117242, ¶ 46, 410 Ill.Dec. 246, 69 N.E.3d 791 ("The dissenting justice below quite aptly pointed out the difficulty of discerning the appellate majority's standard of

  

review; this was because the appellate majority was deciding new issues of fact for the first time on appeal.").

¶ 120 For this additional reason, this case is an inappropriate vehicle to serve as the means to resolve the majority's constitutional issue. Facts regarding the police department's use of investigative alerts have never been developed. *Hyland* recognized as much. 2012 IL App (1st) 110966, ¶ 39, 367 Ill.Dec. 89, 981 N.E.2d 414 (Salone, J., specially concurring, joined by Neville, J.) ("I * * * question the legality of the Chicago police department's * * * policy of issuing investigative alerts under any circumstances. In doing so, *I acknowledge this issue has yet to be addressed in any detail*." (Emphasis added.)). No case since *Hyland*, including this one, has developed any facts regarding how often investigative alerts are used and why. Although the majority is willing to assume that investigative alerts are routinely used by police to circumvent the process of obtaining a warrant, there is no apparent reason why, when police have probable cause to arrest an individual (as they did here), the use of an investigative alert gives them any untoward advantage. See 725 ILCS 5/107-2(1)(c) (West 2014) (permitting warrantless arrest when police officer "has reasonable grounds to believe the person * * * has committed an offense"); *People v. Buss*, 187 Ill. 2d 144, 204, 240 Ill.Dec. 520, 718 N.E.2d 1 (1999) (permitting officers to rely on the collective ***572 **460** knowledge of other officers for purposes of establishing probable cause). The majority certainly does not articulate any. And I can perceive no principled basis on which to hold that police may arrest an individual without a warrant and without an investigative alert as long as they have probable cause, but if they issue an investigative alert based on the same facts giving rise to probable cause, they have run afoul of the Illinois Constitution.

¶ 121 Despite the fact that *Hyland* was decided over six years ago, no defendant in any reported case has raised the constitutionality of investigative alerts at the trial level as a basis to quash his arrest and suppress evidence obtained as a result. Had this issue been raised at the trial level, a factual record necessary to address these issues could have been developed. In the absence of any factual record, it is apparent that not only is the majority's decision to address a constitutional issue not raised by Bass prudentially unsound, but its conclusion that this practice is widespread has no factual underpinnings.

¶ 122 Under identical circumstances, courts in this district have refrained from addressing the constitutionality of investigative alerts. See *People v. Brookins*, 2018 IL App (1st) 151431-U, ¶ 62, 2018 WL 1613625 (finding police had probable cause to arrest defendant; fact that arrest was accomplished after investigative alert issued not discussed); *People v. Starks*, 2014 IL App (1st) 121169, ¶ 77, 382 Ill.Dec. 588, 13 N.E.3d 1 ("whether the failure of the police to obtain an arrest warrant and instead pursue an individual via an investigative alert poses issues of constitutional dimension must await another case"). We should do the same here.

¶ 123 In sum, I can discern no apparent explanation for the conclusion that *this* case at *this* time presents the ideal opportunity to

  

resolve a constitutional issue of first impression raised *sua sponte* by the majority. For all of the foregoing reasons, I respectfully dissent.

¶ 124 JUSTICE COGHLAN, dissenting upon denial of rehearing:

¶ 125 I must respectfully dissent from the majority's supplemental opinion upon denial of rehearing.

¶ 126 To begin with, I concur in Justice Mason's well-reasoned dissent and adopt it in its entirety, in *haec verba*. Because the dissent recognizes both that historical case law validates arrests based on probable cause under the fourth amendment (*supra* ¶ 115) and rejects application of the narrow exceptions to the limited lockstep doctrine to the facts of this case (*supra* ¶ 116), I embrace those findings with respect to the majority's supplemental opinion (*supra* ¶¶ 98-107).

¶ 127 I choose to separately address the majority's finding that the State forfeited its claim advocating for the application of the good faith exception. The majority invoked forfeiture, arguing that the State raised the good faith exception for the first time in its petition for rehearing (*supra* ¶ 105). But because the majority has now declared that "arrests based solely on investigative alerts, even those supported by probable cause, are unconstitutional under the Illinois Constitution" (*supra* ¶ 43), there was no basis for the State to have raised application of the good faith exception in its original briefs. For that reason, I find that the State's good faith exception argument was not forfeited. Although I find that this argument was not forfeited, I agree with the majority that sufficient grounds existed to grant Bass's motion to suppress based on the unlawful extension of the traffic stop (*supra* ¶ 73).

¶ 128 I believe the State should be afforded an opportunity to argue the valid ***573 **461** points it raised in its petition for rehearing relating to the majority's declaration of the unconstitutionality of investigative alerts under the Illinois Constitution. Consequently, I must respectfully dissent from the supplemental opinion, and I would allow the State's petition for rehearing.

¶ 129 Appendix

Illinois cases mentioning investigative alerts in facts:

*People v. Davison*, 2019 IL App (1st) 161094, ¶ 21, 432 Ill.Dec. 340, 129 N.E.3d 558

*People v. Middleton*, 2018 IL App (1st) 152040, ¶ 11, 424 Ill.Dec. 97, 107 N.E.3d 410

*People v. Evans*, 2017 IL App (1st) 150091, ¶¶ 5-6, 414 Ill.Dec. 593, 80 N.E.3d 736

*People v. Thomas*, 2016 IL App (1st) 141040, ¶ 13, 409 Ill.Dec. 920, 68 N.E.3d 1028, *vacated*, No. 121947, 89 N.E.3d 762 (Ill. Sep. 27, 2017)

*People v. Randall*, 2016 IL App (1st) 143371, ¶ 15, 408 Ill.Dec. 64, 64 N.E.3d 1149

*People v. Robinson*, 2016 IL App (1st) 130484, ¶ 18, 404 Ill.Dec. 324, 55 N.E.3d 798

*People v. Abram*, 2016 IL App (1st) 132785, ¶ 19, 401 Ill.Dec. 715, 50 N.E.3d 1197

*People v. Brock*, 2015 IL App (1st) 133404, ¶ 7, 398 Ill.Dec. 864, 45 N.E.3d 295

*People v. Thompson*, 2015 IL App (1st) 122265, ¶ 7, 395 Ill.Dec. 95, 37 N.E.3d 931

*People v. Rankin*, 2015 IL App (1st) 133409, ¶ 8, 394 Ill.Dec. 853, 37 N.E.3d 332

*People v. Lewis*, 2015 IL App (1st) 130171, ¶ 6, 392 Ill.Dec. 663, 33 N.E.3d 212

*People v. Lewis*, 2015 IL App (1st) 122411, ¶ 22, 390 Ill.Dec. 270, 28 N.E.3d 923

*People v. Wilson*, 2014 IL App (1st) 113570, ¶ 11, 385 Ill.Dec. 584, 19 N.E.3d 142

*People v. Alicea*, 2013 IL App (1st) 112602, ¶ 9, 376 Ill.Dec. 509, 999 N.E.2d 392

*People v. Flynn*, 2012 IL App (1st) 103687, ¶ 10, 367 Ill.Dec. 854, 983 N.E.2d 8

*People v. Walker*, 2012 IL App (1st) 083655, ¶¶ 5, 16-17, 362 Ill.Dec. 543, 973 N.E.2d 939

*People v. Wilborn*, 2011 IL App (1st) 092802, ¶¶ 19, 25, 356 Ill.Dec. 843, 962 N.E.2d 528

*People v. Peters*, 2011 IL App (1st) 092839, ¶ 16, 353 Ill.Dec. 173, 955 N.E.2d 640

*People v. Nugen*, 399 Ill. App. 3d 575, 583, 339 Ill.Dec. 285, 926 N.E.2d 760 (2010)

*People v. Aguilar*, 396 Ill. App. 3d 43, 48, 335 Ill.Dec. 311, 918 N.E.2d 1124 (2009)

*People v. Cotton*, 393 Ill. App. 3d 237, 246, 332 Ill.Dec. 646, 913 N.E.2d 578 (2009)

*In re Dante W.*, 383 Ill. App. 3d 401, 408, 322 Ill.Dec. 111, 890 N.E.2d 1030 (2008).

Illinois cases mentioning investigative alerts in analysis of other issues:

*People v. Velez*, 388 Ill. App. 3d 493, 504 n.3, 327 Ill.Dec. 946, 903 N.E.2d 43 (2009) (Defendant argued that counsel was ineffective for failing to move to suppress based on lack of probable cause; in support defendant attached investigative alert to appendix, which court declined to consider because it was not part of the record)

***574 **462** *People v. Echols*, 382 Ill. App. 3d 309, 320-21, 320 Ill.Dec. 649, 887 N.E.2d 793 (2008) (testimony about investigative

alert does not support defendant's argument that State improperly elicited evidence from which jury could infer that he was in a gang)

*People v. Cox*, 377 Ill. App. 3d 690, 701, 316 Ill.Dec. 392, 879 N.E.2d 459 (2007) (investigative alert mentioned, but not analyzed, as part of defendant's argument that State elicited improper hearsay about a phone call that led to a photo array being generated).

## All Citations

2019 IL App (1st) 160640, 144 N.E.3d 542, 437 Ill.Dec. 430

## Footnotes

* On Justice Mason's retirement, Justice Coghlan was substituted on the panel. Justice Coghlan has listened to the recording of oral argument and has reviewed the briefs and the State's petition for rehearing.

1 My rationale for reversing on this narrow ground is as follows: The State concedes it had the burden to prove that the traffic stop was not unduly prolonged by virtue of the officers' decision to run “name checks” on the passengers. The record is unclear in what order the name checks were completed and whether they were completed simultaneously with the check of the driver's license. Accordingly, the State did not sustain its burden to show that the seizure extraneous to the purpose of the traffic stop did not impermissibly extend its duration, and therefore, the motion to suppress should have been granted. Both this and the majority's analysis of whether running name checks was “unrelated to the mission” of the traffic stop constitute narrow, independent, and legally sufficient bases upon which to reverse. The analysis should, therefore, stop there.

## INDEX TO RECORD ON APPEAL

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