STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

Versus [redacted]

[redacted]

MEMORANDUM OF LAW IN SUPPORT OF SUPPRESSION FOLLOWING *INGLE, MAPP,* AND *HUNTLEY* HEARING

Dated: [redacted] By: [redacted]
[redacted]

To: HON. [redacted]
Erie County Court, [redacted]
25 Delaware Avenue
Buffalo, New York 14202

HON. [redacted]
Erie County District Attorney
25 Delaware Avenue
Buffalo, New York 14202
Attn: [redacted]

PROCEDURAL POSTURE

Defendant has been indicted, along with co-defendants [redacted] and [redacted], upon a charge of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]). The charges arose from a traffic stop and the subsequent finding of a loaded firearm on October 20, 2020. All three defendants have moved for suppression of the physical evidence and statements.

On [redacted], a combined *Ingle/Huntley/Mapp* hearing was held as to all three defendants. The prosecution called two witnesses: Cheektowaga Police Officers Charles Szymborski and Scott Leising. The defense did not call any witnesses. For the reasons that follow, this Court must suppress the handgun that was recovered from the vehicle, along with any other evidence and/or statements that flowed from the unlawful traffic stop and search.

FACTS

On October 20, 2020, Officer Charles Szymborski was on routine patrol in the Town of [redacted] when he noticed a vehicle with one of its four taillights out (4, 23, 24, 26, 235; numbers in parentheses refer to pages in the transcript of the hearing held on March 11, 2022). Despite this not being an equipment violation—or any other violation for that matter—the officer initiated a traffic stop on the sole basis of the one taillight not functioning (24, 35).

As Officer Szymborski approached the vehicle, Officer Leising arrived at the scene as well. Both officers noted the odor of burnt marijuana (6, 50). Defendant [redacted], who was driving

the vehicle, asked to step out to see the taillight (5). The occupants were removed from the vehicle so that a search could be conducted. Officer Szymborski testified that the ensuing search was an inventory search, while Officer Leising, perhaps more candidly, testified that the basis of the search was the odor of marijuana. During the search, Officer Leising lifted a portion of the carpet from the floorboard of the vehicle and found a loaded firearm (50).

While the vehicle had improper "paper tags" on it, Officer Szymborski testified that he was unaware of that prior to the stop and that the **only basis** for the stop was the taillight issue (24, 35). The officer testified that he had made hundreds of stops on equipment issues during his career, and thus, was well-versed on the equipment requirements placed on motorists by the State Vehicle and Traffic Law.

ARGUMENT

POINT ONE

THE TRAFFIC STOP WAS UNLAWFUL, AS THE DEFENDANT'S TAILLIGHT ISSUE WAS NOT A VIOLATION OF ANY PROVISION OF THE VEHICLE AND TRAFFIC LAW. THUS, ALL EVIDENCE MUST BE SUPPRESSED AS VIOLATIVE OF THE PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES (US CONST, 4TH AND 14TH AMENDMENTS; NY CONST, ART I, § 12).

Any evidence recovered after an illegal traffic stop must be suppressed (*Wong Sun v United States*, 361 US 471 [1963]; *People v Ingle*, 36 NY2d 413 [1975]). Here, it is undisputed that the handgun was recovered after, and as a result of, the stop of the vehicle occupied by the defendants on October 20, 2020.

The sole basis for the traffic stop was Officer Szymborski's observation that one of the four rear taillights was not functioning (24, 35). It is undisputed that there was, however, at least one functioning taillight on each side of the vehicle (26, 35).

The relevant Vehicle and Traffic Law section is Section 375(2)(a)(3). That section states that every vehicle driven on a public highway at dusk, dawn, or dark must have:

> **"…at least two lighted lamps on the rear, one on each side, which lamps shall display a red light visible from the rear for a distance of at least one thousand feet"**

Here, the testimony is clear that there was at least one lighted lamp on each side (26, 35). There is no conceivable argument that the vehicle was in violation of the equipment provisions of the Vehicle and Traffic Law, and that the vehicle driven by the defendant was stopped as a result.

The prosecution will not argue that the vehicle was being operated in violation of the Vehicle and Traffic Law. Instead, they will likely argue that the mistake in law by the officer was a "reasonable" mistake, requiring denial of the suppression motion. It is ironic that ignorance of the law is not a defense for ordinary citizens charged with crimes, but it is a defense for trained police officers sworn to uphold the law.

The prosecution will likely rely upon *People v Pena* (36 NY3d 978 [2020]) to support their argument. In *Pena*, the Court of Appeals held that an officer's interpretation of a

different provision of the Vehicle and Traffic Law was "objectively reasonable" where he thought that a ***middle brake lamp*** being out was a violation of the Vehicle and Traffic Law under VTL 375[40]. First, this case does not involve a brake lamp, but rather, a tail light. It does not involve VTL 375[40], but rather VTL 375[2][a][3]. *Pena* is not controlling.

Moreover, here, Officer Szymborski testified that he had conducted "hundreds" of stops on equipment issues during his career as a police officer (23). This is not a rookie police officer who should not be expected to be well-versed in the Vehicle and Traffic Law, but rather a seasoned officer. The language of VTL 375[2][a][3] is clear and there is no mistaking it that can be deemed to be "objectively reasonable." It requires that at least two tail lights, one on each side, illuminate.

Finally, *Pena* was decided as a matter of New York State Constitutional Law. However, the Western District of New York has ruled on this same issue as a matter of Federal Constitutional Law. In fact, the Western District of New York has held that was not objectively reasonable. In *United States v Mota* (155 FSupp3d 461 [WDNY 2016]), a Westchester County Police Officer pulled the defendant over for a non-functioning brake light, likely the same light as in *Pena*. The Western District held the stop to be invalid as a matter of Federal Constitutional Law, holding that the officer's mistake of New York Vehicle and Traffic Law was not "objectively reasonable" and that the stop was in violation of the United States Constitution.

Defendant [redacted] specifically argues that the stop was unlawful based upon both the New York State Constitution and the United States Constitution. Thus, even

if the Court finds *Pena* to be analogous in its interpretation of the *State* Constitution, *Mota* found the same mistake to be violative of the *United States* Constitution.

It makes little to no sense to forgive this mistake in law by the officer and deny suppression. This is an officer with years upon years of experience who had made "hundreds" of stops based upon equipment violations. He should be expected to know easily-interpretable sections of the law like this one. Perhaps even more importantly, when the officer was shown this provision of the law during cross-examination, he was able to determine after a quick reading that the vehicle was not in violation of the law. This is not a provision that is particularly hard to understand, and clearly this officer understood it once he read it. Thus, this mistake on the officer's part would fall under the category of "ignorance of the law" rather than an "objectively reasonable mistake in law."

For all of these reasons, the traffic stop must be deemed unconstitutional and the evidence suppressed.

POINT TWO

THE SEARCH OF THE VEHICLE WAS UNLAWFUL, AND ALL EVIDENCE OBTAINED THEREFROM MUST BE SUPPRESSED.

Even if, despite the plain language of VTL 375(2)(a)(3), this Court finds the stop to be constitutional, the ensuing search was improper and requires that the evidence be suppressed under the federal and state constitutional bars against unreasonable searches and seizures.

The prosecution first argues that the search was an inventory search, ie a search conducted after an impound of the vehicle, not to uncover evidence of criminal wrongdoing. This argument fails for a number of reasons.

First, while Officer Szymborski testified that the search was an inventory search, Officer Leising candidly admitted that the basis of the search was the odor of marijuana rather than to inventory the vehicle (38). Officer Leising was the one who searched the passenger side and found the gun, so his impression is what controls. To now call the search an inventory search is an attempt to validate an otherwise improper search.

Moreover, an inventory search is a search of the contents of the vehicle in order to document same. This involves a visual inspection of the vehicle. In order to find the gun, Officer Leising had to pull up the carpet on the floorboard. This is not within the scope of a normal inventory search, but rather is indicative of a search for contraband. The policy, entered into evidence, does not permit the pulling up of carpets and search of the inner cavity and frame of the mechanisms of the vehicle.

If this was an actual inventory search, an inventory would have been taken contemporaneous with the search. The prosecution offered no testimony to that effect. Moreover, it appears that Officer Leising, who found the gun, did not even think he was doing an inventory search, but rather a search for contraband (38).

Furthermore, for an inventory search to be valid, an actual meaningful inventory must be taken. Here, on the inventory sheet, no actual items were listed; rather, certain boxes were checked. The only boxes were "keys," "cell phone," and "personal papers." There were three adults and a baby in the vehicle, and it defies logic and common sense that these were the only items within the vehicle. In *People v Johnson* (1 NY3d 252 [2003]), the Court of Appeals held that an inventory search is not valid unless a meaningful inventory of the vehicle's contents is actually taken. Here, inasmuch as the inventory taken was not "meaningful," the search must be held improper.

Nor does the odor of marijuana permit the search under these circumstances. First, an officer may search a vehicle after detecting the odor of marijuana, but only when his training and experience in detecting same is established at the hearing by the prosecution (*People v Boswell*, 197 AD3d 950 [4th Dept 2021]; *see also People v Mack*, 114 AD3d 1282 [4th Dept 2014] […"the odor of marijuana emanating from a vehicle ***when detected by an officer qualified by training and experience to recognize it,*** is sufficient to constitute probable cause"]). Here, inasmuch as the prosecution inexplicably failed to elicit the officer's training and experience, the odor does not constitute probable cause to search.

Even if the prosecution would have established the officer's training and experience, new Penal Law § 222.05 states that no finding of reasonable suspicion or probable cause may be based upon the odor of marijuana alone. The prosecution will argue that, at the time of the stop, searches based upon this odor were lawful. However, it is the law at the time of the ***hearing*** that controls.

Generally, statutes implicating criminal procedure apply to all cases still pending at the trial court or on direct appeal (*People v Smith*, 28 NY3d 191; see also, *People v Favor*, 82 NY2d 254, 260 [1993] ["Traditional common-law methodology contemplates that cases on direct appeal will generally be decided in accordance with the law as it exists at the time the appellate decision is made"]; *People v Oliver*, 1 NY2d 152, 163 [1956] ["Whenever the Legislature alters existing law, a certain measure of inequality is bound to ensue. Where the change is ameliorative and reflects a judgment that the earlier law was unduly harsh or unjust, a court should not withhold the benefits of the new statute to one tried after its passage"]).

In *People v McFadden*, 189 AD3d 2086 [4th Dept 2020], the Fourth Department acknowledged that any changes in law would apply to any proceedings not yet held at the time the law is changed, like this hearing: "[W]hile procedural changes are, in the absence of words of exclusion, deemed applicable to 'subsequent proceedings in pending actions' . . . , it takes 'a clear expression of the legislative purpose to justify' a retrospective application of even a procedural statute so as to affect proceedings previously taken in such actions"

For those reasons, it is the law at the time of the ***hearing*** that controls. The search may not be justified based upon the odor of marijuana.

CONCLUSION

All of the evidence must be suppressed as a result of an unconstitutional traffic stop and an unconstitutional search.