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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001587 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ASHLEY RAE BAKER,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

In 2021, Ms. Baker was a 19-year old African American woman seated as a passenger in a vehicle subject to a pretextual traffic stop in Sheboygan County. Prior to the stop, an officer testified that he observed the vehicle park near two suspected drug houses. After the stop, the vehicle's driver admitted that *he* had a small amount of marijuana in *his* vehicle and turned over a marijuana blunt from *his* pocket. An officer later found marijuana shake in the vehicle, but not specifically in the passenger area where Ms. Baker had been seated. The officer also found the marijuana the driver said was in the vehicle and a marijuana grinder near the gear shifter. The driver was arrested.

All the while, Ms. Baker remained outside of the vehicle with her purse. In addition to a reference to the "totality of everything," the officer speculated that "there is a possibility at any time that someone gives us a breadcrumb to hide the loaf of bread...Give me a half gram of marijuana to deter me from searching your person." The circuit court later cited this "[g]reat line" as the answer to what it otherwise admitted was a "close case."

Since probable cause indisputably requires more than a "possibility or suspicion" that a particular defendant committed a crime, did the circuit court err in denying Ms. Baker's motion

to suppress the evidence obtained as a result of the search of her purse?

The circuit court denied Ms. Baker's motion to suppress and the court of appeals affirmed. *See State v. Ashley Rae Baker*, No. 2022AP1587-CR, unpublished slip op., (WI App June 14, 2023). (Pet. App. 3-10). This Court should accept review and reverse.

CRITERIA SUPPORTING REVIEW

Proper application of the Fourth Amendment of the United States Constitution and Article I, sec. 11 of the Wisconsin Constitution presents a special and important reason to grant review in Ms. Baker's case. *See Wis. Stat. § (Rule) 809.62(1r)(a)*. Moreover, the application of constitutional principles to the undisputed facts in Ms. Baker's case presents a purely legal question for this Court's independent review.

On the surface, the law related to probable arrests of passengers is clear: "One's companionship with an offender who is breaking the law does not provide a law enforcement officer with probable cause to arrest the companion." *State v. Riddle*, 192 Wis. 2d 470, 478, 531 N.W.2d 408 (Ct. App. 1995) (citing *United States v. Di Re*, 332 U.S. 581, 593 (1948)). Admittedly, the court of appeals recognized this applicable precedent. However, like the circuit court, the court of appeals nevertheless relied on incriminating facts linked solely to the driver to conclude that a totality of the circumstances

established probable cause to arrest and search Ms. Baker.

The driver, not Ms. Baker, admitted to possessing a small amount of marijuana in the vehicle. The driver, not Ms. Baker, possessed a small amount of marijuana on his person. Evidence linked to Ms. Baker was limited to (1) her prior presumed presence near two suspected drug houses; and (2) her position as a passenger in the driver's vehicle. While her arresting officer clearly suspected that she might also be in possession of marijuana, the officer's suspicion does not equate to probable cause.

Moreover, while the law is clear that law enforcement confronted with two reasonable inferences need not act on the innocent inference weighing against arrest, *see State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660, that rule does not transform an admission by one person into evidence against another. Here, the driver admitted to possessing marijuana on his person and in his vehicle. Both the circuit court and the court of appeals relied on the *Kutz* rule to reason that Ms. Baker's arresting officer need not accept the driver's confession. However, the fact that the officer need not accept the driver's confession as the truth does not mean that the driver's confession amounts to a reasonable inference that Ms. Baker possessed marijuana.

In other words, the driver's confession is not affirmative evidence against Ms. Baker and, without more, objectively cuts against probable cause to believe Ms. Baker separately possessed marijuana. The driver's confession, therefore is unlike the indeterminate source of marijuana smoke at issue in *State v. Mitchell*, 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992), and more like the accusation made by the confidential informant in *Di Re*, where the Court held that probable cause to arrest the driver did not transfer to the passenger, in part because the informer singled out the driver alone as the "guilty party." This is all to say that while a rule might be easy to put down on paper, application of a rule in practice and with live facts is apparently more challenging.

Clarification of the scope and proper application of this important area of Constitutional law by this Court is appropriate. The rules against transferring probable cause from one person to another protects us all from guilt by association. Especially within the context of permissible pretextual traffic stops, this Court must hold the line and reassert the long-standing rule that passengers are not guilty by mere association with a "guilty party." *See U.S. v. Di Re*, 332 U.S. at 594.

STATEMENT OF THE CASE AND FACTS

The charge

On February 12, 2021, the state charged Ashley Rae Baker with carrying a concealed firearm. (2). Ms. Baker filed a motion to suppress, which challenged the constitutionality of the search of her purse, which had resulted in the discovery of a firearm. (16). The court held an evidentiary hearing on Ms. Baker's suppression motion on July 30, 2021. (26; Pet. App. 11-47).

The suppression hearing

At the suppression hearing, the state called one witness: City of Sheboygan Police Officer, Michael Moore, who testified as follows. Officer Moore had less than three years of experience as a police officer, and on December 31, 2020, he was on duty when he observed a vehicle on the "1200 Block of Huron Avenue" "after the hours of dark." (26:8-9; Pet. App. 12-13).

Officer Moore "often" watched this area because "[i]t's known to officers through information obtained by other officers as well as contacts that there is active drug dealing going on in that area." (26:10; Pet. App. 14). Two homes in particular were suspected to be involved in "drug activity." (26:10; Pet. App. 14). At one of the homes, there was "dealing of potential methamphetamine, heroin" and the individual who stays there "would make individual[s] stay for up to 15 minutes so that there was no short

term traffic.” (26:11-12; Pet. App. 15-16). With regard to the other home, Officer Moore stated that he “knew one of the individuals from previous contacts with drug arrests, and I knew him to partake in drug trafficking.” (26:12; Pet. App. 16).

Officer Moore observed a vehicle “arrive” on the block and depart roughly 10 minutes later. (26:14; Pet. App. 18). Officer Moore did not witness any individual exit the vehicle after it arrived, but he saw “people” return to the vehicle before it departed. (26:14-15; Pet. App. 18-19). Officer Moore didn’t see how many people got into the vehicle, but said “he knew” they had come from “one of those two houses,” just not “exactly which one.” (26:10-11; Pet. App. 14-15).

Asked to clarify *how* he knew that an unidentified number of people came from one of these two houses suspected to be involved in drug activity, Officer Moore attempted to explain:

So, midblock -- I guess the way to describe is, is gauging off of my passing through the area, knowing where vehicles are parked along the street, and seeing where that person walks in relation to those vehicles to enter the vehicle is how I made my judgement on where in the block they came out.

(26:11; Pet. App. 15). Officer Moore had no knowledge of, or association with, Ms. Baker or the driver prior to stopping the vehicle. (26:14; Pet. App. 18).

With regard to the traffic stop, Officer Moore explained that he noticed the vehicle had no front license plate before the vehicle departed the 1200 block of Huron Avenue and he initiated a traffic stop on that basis on Erie Avenue. (26:15; Pet. App. 19). Prior to making contact with the driver, however, Officer Moore requested “one additional unit as well as a K9 unit to the scene.” (26:15; Pet. App. 19). Officer Moore then made contact with the vehicle and identified the driver as “Javon” and the passenger as Ms. Baker and relocated the traffic stop to a CVS parking lot for officer safety. (26:15-16; Pet. App. 19-20).

Officer Moore admitted that when he approached the vehicle “nothing did stand out,” in terms of “odor, or plain view.” (26:16; Pet. App. 20). Officer Moore returned to his vehicle and “conducted normal paperwork,” including a warning for a “registration lamp” and a citation for the “no front plate.” (26:16; Pet. App. 20). While completing paperwork, Officer Moore was advised that the K9 unit alerted on the vehicle. (26:16-17; Pet. App. 20-21). Officer Moore then exited his vehicle and made contact with the driver, Mr. Porter. (26:17; Pet. App. 21). Asked “if there was any reason that there would be an indication” on the vehicle he was driving, Mr. Porter stated that “there was about a half gram of marijuana inside the vehicle.” (26:17; Pet. App. 21). Officer Moore did not question Ms. Baker.

Based on the K9 unit's "positive indication" and Mr. Porter's admission that "a half gram of marijuana" was in the vehicle, Officer Moore searched the vehicle. (26:17-18; Pet. App. 21-22). Officer Moore's search resulted in his discovery of ".6 grams of marijuana," "marijuana shake," and a "grinder" that had the "odor of marijuana coming from it." (26:18; Pet. App. 22). Officer Moore admitted that he located the marijuana in the center console, where Mr. Porter "indicated it would be." (26:18; Pet. App. 22). Officer Moore further explained that he found the grinder near the gear shifter and the marijuana shake "spread throughout the vehicle," but that he could not say whether any "shake" was identified in the passenger area where Ms. Baker had been seated. (26:18; Pet. App. 22).

Officer Moore then spoke with Mr. Porter about what he located in the vehicle and told him that he "would be searching him based off of my locating narcotics inside the vehicle." (26:20; Pet. App. 24). Officer Moore searched Mr. Porter and located a "marijuana blunt" in one of his front pockets. (26:20; Pet. App. 24).

During this time, Ms. Baker "would have been standing outside of the vehicle with another officer." (26:21; Pet. App. 25). After searching Mr. Porter, Officer Moore asked Ms. Baker to "step toward the rear of the vehicle due to her holding her purse" and asked her to "place the purse on the rear of the vehicle." (26:21-22; Pet. App. 25-26).

Asked to explain, Officer Moore stated that he asked Ms. Baker to place her purse on the vehicle “for officer safety.” (26:22; Pet. App. 26). Officer Moore explained that “due to what I found inside the vehicle, it was believed that there could potentially be something concealed inside of the purse or on her person as well.” (26:22; Pet. App. 26). Officer Moore then opened Ms. Baker’s purse and discovered the firearm that led to Ms. Baker’s sole misdemeanor charge in this case. (26:23; Pet. App. 27).

Asked to clarify whether there was anything that suggested there was something “potentially illegal or concerning for officer safety” inside Ms. Baker’s purse before he opened it, Officer Moore said no. (26:24; Pet. App. 28). He stated that typically “we do ask that they leave any belongings inside based off of officer safety,” but he didn’t notice that Ms. Baker was holding her purse until after he searched the vehicle. (26:24; Pet. App. 28).

On cross-examination, Officer Moore clarified that neither Ms. Baker nor her purse were in the vehicle when the K9 alerted and that Ms. Baker was “maybe like 20-30 feet away from the vehicle” during the K9 search. (26:27, 34; Pet. App. 31, 38). Further, Officer Moore admitted that none of the information about the two alleged drug houses was included in the report he prepared and presented to the prosecutor in this case. (26:29-30; Pet. App. 33-34). Officer Moore further admitted that his report contained no information about Ms. Baker allegedly entering or leaving an alleged drug house. (26:30; Pet. App. 34).

Officer Moore admitted that prior to his search of the vehicle, Mr. Porter took responsibility for the marijuana found in the vehicle. (26:35; Pet. App. 39).

On re-direct, Officer Moore was asked again why he searched Ms. Baker's purse. (26:39; Pet. App. 43). Officer Moore responded by saying "[i]t would have been a totality of everything." (26:39; Pet. App. 43). Officer Moore recounted observing "her coming from that house," "what we found inside the vehicle and the potential for any concealment of other items." (26:39-40; Pet. App. 43-44). Officer Moore then speculated that "there is a possibility at any time that someone gives us a breadcrumb to hide the loaf of bread...Give me a half gram of marijuana to deter me from searching your person." (26:40; Pet. App. 44).

Following the motion hearing, the parties filed briefs and the state provided the court with a copy of the Officer Moore's squad car video related to the search of Ms. Baker's purse. (27; 29; 30; 42; 83). Ms. Baker argued that argued that Officer Moore's testimony failed to provide a legal basis to justify the warrantless search of her purse. (27:1; 30). The state responded by arguing that the search of Ms. Baker's purse was probable cause because the totality of the circumstances established "that [Ms. Baker] had committed a crime." (29:1).

The circuit court's decision

The court issued its oral decision denying Ms. Baker's motion to suppress on February 24, 2022. (77:7-21; Pet. App. 54-68). In doing so, the court noted

that it took the court longer than expected to decide the motion, which had been pending for nine months. (77:3-4; Pet. App. 50-51). The court stated that it had read the evidentiary hearing transcript twice, that “it’s a close case,” and that the court thought it arrived at an “appropriate decision.” (77:3-4, 7, 20; Pet. App. 50-51, 54, 67).

At the outset, the court noted that the state had “abandoned” the “theory that the officer searched the purse for purposes of officer safety.” (77:7; Pet. App. 54). The court explained that while the officer testified along those lines, the state was “not suggesting that after the initial traffic stop, 25 minutes, not patting her down, not doing anything, that he suddenly went into search her purse to protect himself.” (77:7; Pet. App. 54). Thus, the court explained that the validity of the search came down to whether the officer had probable cause to arrest Ms. Baker. (77:7, 13-14; Pet. App. 54, 60-61).

After considering the evidence in the record, the court concluded that Officer Moore had probable cause to arrest Ms. Baker for possession of marijuana and search her purse incident to arrest. (77:13-16; Pet. App. 60-63). In reaching its decision, the court relied on the following facts:

- “She’s one of two people who goes into an area known for drugs, it’s a short term visit, and this is a short-term visit drug area.”
- “The officer sees [the driver] get in the car; he pulls the car over.”

- Ms. Baker is the passenger.
- There is a “K9 indication” on the vehicle when Ms. Baker and her purse are outside of the vehicle.
- A search of the vehicle reveals “marijuana in the console, a marijuana grinder, baggies, and shake all through the vehicle,” but not the passenger area.
- “The driver takes the fall and says it’s all mine.”
- Ms. Baker was “in the vehicle with her purse when...there’s marijuana in the vehicle...the drugs are to her left, the driver’s right.”

(77:16-19; Pet. App. 63-66).

The court notably flagged what it thought to be a “very interesting line” from Officer Moore’s testimony: “There’s a possibility at any time that someone gives us a bread crumb...to hide the loaf of bread. Great line. Because I believe this officer has probable cause to believe that Ms. Baker may have had a loaf of bread, and the loaf of bread was in her purse. I think that’s the answer to this case.” (77:16-17; Pet. App. 63-64) (internal quotations omitted).

At the same time, the court noted concerns regarding Officer Moore’s testimony:

Well, wait a minute. He was talking about safety; he was talking about all sorts of stuff. His reports don’t reflect that but, I think in total -- in totality

of the circumstances it's not like any of this didn't happen.

...

Was this done perfectly in the sense that, I mean, timing and all that and the -- did the officer perhaps in his reports fill out enough? I mean, he didn't even -- I don't think they charged her with possession, but I think they have probable cause to search based on the belief that there would be - - that fruits of the search would be drugs, and there was probable cause to believe that she was in possession of drugs and one of the places she could possess it.

(77:18-19; Pet. App. 65-66).

The court subsequently signed a written order denying Ms. Baker's motion and Ms. Baker, soon thereafter, pled no contest to the misdemeanor charge of carrying a concealed firearm. (53; 60; Pet. App. 69-71). At sentencing, the court placed Ms. Baker on probation for one year and ordered her to serve 60 days in jail as a condition of probation. (60; Pet. App. 70-71).

The court of appeals affirmed. As noted above, the court of appeals cited and relied upon applicable precedent, but extended the *Kutz* rule too far in using the driver's admission as evidence against Ms. Baker. (*See* Pet. App. 8-9).

ARGUMENT

A. Introduction and governing law.

The Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution guarantee the right to be free from unreasonable searches. These provisions “safeguard individuals’ privacy and security against arbitrary governmental invasions, which requires striking a balance between the intrusion on an individual’s privacy and the government’s promotion of its legitimate interests.” *State v. Sykes*, 2005 WI 48, ¶13, 279 Wis. 2d 742, 695 N.W.2d 277. Searches “conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967); *see also State v. Sanders*, 2008 WI 85, ¶27, 311 Wis. 2d 257, 752 N.W.2d 713.

The state bears the burden to prove that an exception to the warrant requirement applies. *Id.* Where an unlawful search occurs, the remedy is to suppress the evidence produced. *State v. Carroll*, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

One recognized exception to the warrant requirement is a search incident to a lawful arrest. The search-incident-to-arrest exception to the warrant requirement allows police to conduct a search after

there has been a lawful arrest based on probable cause. *State v. Sykes*, 279 Wis. 2d 742, ¶14 (citing *Chimel v. California*, 395 U.S. 752, 762–63 (1969)); *see also United States v. Robinson*, 414 U.S. 218 (1973) (“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification”). Where a search precedes an arrest, “the legality of the search is established by the officer’s possession, *before the search*, of facts sufficient to establish probable cause to arrest followed by a contemporaneous arrest.” *State v. Sykes*, 279 Wis. 2d 742, ¶16 (emphasis added).

B. The standard of review.

Generally speaking, appellate review of a circuit court’s order on a motion to suppress evidence presents a question of constitutional fact necessitating a two-step review process. *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. First, this Court upholds the circuit court’s factual findings unless clearly erroneous. *Id.* Second, this Court independently applies constitutional principles to the facts. *Id.*

- C. This Court should accept review and hold that no probable cause existed to arrest and search Ms. Baker for marijuana.

Probable cause to arrest exists “when the totality of the circumstances within [an] officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that *the defendant* probably committed a crime.” *Sykes*, 279 Wis. 2d 742, ¶18 (emphasis added). While it can be difficult to “articulate the precise quantum of evidence needed for probable cause,” it “requires that guilt be more than a possibility.” *See State v. Young*, 2006 WI 98, ¶22, n.8, 294 Wis. 2d 1, 717 N.W.2d 729 (stating that probable cause is a “commonsense, nontechnical conception[] that deals with the factual and practical considerations of everyday life on which reasonable and prudent [people] not legal technicians, act” (citing *Ornelas v. United States*, 517 U.S.690, 695 (1996); *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985)). Whether probable cause exists is determined by applying an objective standard. *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551.

In this case, there is no dispute about the evidence and testimony put before the circuit court by the state to establish the lawfulness of the search of Ms. Baker’s purse. The dispute concerns the weight to be given to the evidence and whether the evidence establishes probable cause to believe Ms. Baker probably possessed marijuana. A reasonable and objective review of the totality of the circumstances

reveals that the state failed to establish probable cause to arrest Ms. Baker.

First, Officer Moore's testimony regarding the alleged "short term visit" on the 1200 block of Huron Avenue, is more notable for what it lacked than what it established. Officer Moore admitted that he included none of the alleged information about drug houses in his report related to this incident. (26:29-30; Pet. App. 33-34). More importantly, Officer Moore's testimony was essentially limited to observing a vehicle arrive and then depart 10 minutes later. (26:9-15; Pet. App. 13-19). Officer Moore did not witness anyone exit the vehicle. (26:14-15; Pet. App. 18-19). Officer Moore did not see how many people got in the vehicle. (26:10; Pet. App. 14). Further, Officer Moore did not see anyone go into or come from either alleged drug house. (26:9-15; Pet. App. 13-19).

Instead, Officer Moore explained that "he knew" "people" came from one of the two houses because "gauging off of my passing through the area, knowing where vehicles are parked along the street, and seeing where that person walks in relation to those vehicles to enter the vehicle is how I made my judgement on where in the block they came out." (26:11; Pet. App. 15). In other words, Officer Moore did not see Mr. Porter or Ms. Baker exit or enter the vehicle or a drug house but made a "judgment" that they did based on where the vehicle was parked. A shorter and clearer way to describe this "judgment" is a hunch.

Moreover, Officer Moore specifically testified that his knowledge of one of the alleged drug houses included the fact that the “individual who stays there would make individual stay for up to 15 minutes so that there was no short term traffic.” (26:12; Pet. App. 16). Hence, Officer Moore’s hunch about the vehicle’s less than 10 minute stop on Huron Avenue cuts against his own testimony.

In any case, an individual’s presence in a “high-crime” area or an “area known for drug trafficking” can be a factor in determining whether a subsequent search or arrest was justified. *See State v. Morgan*, 197 Wis. 2d 200, 211-212, 539 N.W.2d 887 (1995); *State v. Young*, 212 Wis. 2d 417, 427, 569 N.W.2d 84 (Ct. App. 1997). However, standing alone, such presence fails to establish even “reasonable suspicion” necessary to support an investigatory stop, much less probable cause to arrest. *State v. Young*, 212 Wis. 2d at 427 (citing *Brown v. Texas*, 443 U.S. 47 (1979)).

Accordingly, the fact that Ms. Baker was a passenger in a car that had previously parked for roughly 10 minutes in an area Officer Moore alleged to be known for drug trafficking is an extremely weak factor to be weighed in the totality of the circumstances when analyzing whether probable cause existed to arrest Ms. Baker for possession of marijuana.

Next, Officer Moore initiated a pretextual traffic stop of the vehicle because he noticed it did not have a front license plate. Officer Moore testified that, at no point did he observe “any furtive movements or any behavior by either driver or the passenger of the vehicle to suggest something amiss was going on in the vehicle.” (26:32; Pet. App. 36). Prior to the K9 alert, Mr. Porter and Ms. Baker were removed from the vehicle. (26:27, 32-34; 77:11; Pet. App. 31, 36-38, 58). Ms. Baker exited the vehicle with her purse and was never asked or directed to leave the purse inside the vehicle. (26:24; Pet. App. 28).

After being informed that the K9 unit had made a “positive indication” on the vehicle, Officer Moore immediately made contact with Mr. Porter, who admitted there was about half a gram of marijuana in the vehicle. Officer Moore located the marijuana where Mr. Porter told him it would be. (26:18; Pet. App. 22). Officer Moore also located a marijuana grinder, baggies, and “shake” in the vehicle. Asked directly whether “there was marijuana shake” in the “front passenger compartment [where] Ms. Baker was seated,” Officer Moore stated that he could not say “yes.” All Officer Moore was able to testify to is that “it was throughout the vehicle, it wasn’t confined to one space.” (26:19; Pet. App. 23). Further, the state offered no evidence of Ms. Baker’s connection to this vehicle aside from her position in the passenger seat at the time of Officer Moore’s traffic stop. (*See e.g.* 26:20; Pet. App. 24).

After Officer Moore's search of the vehicle, he again confronted only Mr. Porter, searched him, and located a "blunt," which Mr. Porter confirmed contained marijuana. (26:20; Pet. App. 24). Mr. Porter took responsibility for the illegal items, including marijuana, inside the vehicle and on his person. (26:21,35; Pet. App. 25, 39).

During this time, Ms. Baker remained outside the vehicle with her purse for roughly 25 minutes. (77:7; Pet. App. 54). While Officer Moore testified that law enforcement "typically" asks individuals to leave any personal belongings inside the vehicle, the state offered no evidence that Ms. Baker was asked to do so. (26:24; Pet. App. 28). Further, Officer Moore admitted that Ms. Baker engaged in no "distinct actions" "that suggested there was something illegal[] or concerning for officer safety inside of [her purse] before [he] actually opened it and looked inside." (26:24; Pet. App. 28).

Nevertheless, immediately after Officer Moore finished questioning and searching Mr. Porter, he asked Ms. Baker to place her purse on the trunk of the vehicle and searched it. (26:22; Pet. App. 26).

Prior to Officer Moore's search of Ms. Baker's purse, it is undisputed that probable cause existed to arrest *Mr. Porter* for possession of marijuana. Mr. Porter was the driver, who presumably had control over the vehicle and its contents. Mr. Porter was the occupant questioned about the K9 alert. Mr. Porter admitted to possessing a small amount of

marijuana was in the vehicle. Mr. Porter took responsibility for the illegal items in the vehicle. Mr. Porter was searched and possessed a marijuana blunt on his person. At no point did law enforcement seek or receive any evidence from Mr. Porter that incriminated Ms. Baker. At no point did Officer Moore question Ms. Baker or otherwise obtain any reasonable suspicion or incriminating evidence related to her.

Other than Ms. Baker's limited association with Mr. Porter as the passenger in a vehicle he drove, the state offered absolutely no evidence linking Ms. Baker to any illegal activity. "Presumptions of guilt are not lightly to be indulged from mere meetings." *United States v. Di Re*, 332 U.S. 581 (1948).

The facts of *United States v. Di Re* are analogous to Ms. Baker's case. Michael Di Re was prosecuted under the Second War Powers Act of 1942 for knowingly possessing counterfeit gasoline ration coupons. *Id.* at 582. An individual, Reed, informed an investigator of the "Office of Price Administration" that he was going to buy counterfeit gasoline ration coupons from an individual named Buttitta in Buffalo, New York. *Id.* at 583. Investigators trailed Buttitta's car to "the appointed place," and, upon approaching the car, they found Reed in the back seat holding "two gasoline ration coupons, which later proved to be counterfeit." *Id.* Reed stated that he obtained them from Buttitta, "who was sitting in the driver's seat. Beside Buttitta sat Di Re," in the passenger seat. *Id.* All three men were arrested,

interrogated, and searched. *Id.* Di Re was eventually found to have “[o]ne hundred inventory gasoline ration coupons in an envelope concealed between his shirt and underwear.” *Id.*

The Court affirmed the Second Circuit Court of Appeals’ decision overturning Di Re’s conviction on the grounds that the evidence obtained from the search of Di Re was “the fruit of an illegal arrest and search.” *Id.* at 582-83, 595. While rejecting the contention that Di Re’s position in the passenger seat was sufficient to arrest him either for a direct or indirect role in a criminal conspiracy, the Court explained that even “[i]f Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he knew them to be counterfeit....Presumptions of guilt are not lightly to be indulged from mere meetings.” *Id.* at 593.

Moreover, the Court reasoned that “whatever suspicion might result from Di Re’s presence seems diminished, if not destroyed, when Reed, present as the informer, pointed out Buttitta, and Buttitta only, as a guilty party...Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person.” *Id.* at 594.

In closing, the Court addressed the “appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting

the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals for punishment.” *Id.* at 595.

In Ms. Baker’s case, Officer Moore, the state, and the circuit court all seemed to think that Mr. Porter’s incriminating statements accepting sole responsibility for his crime had no import on whether probable cause existed to also arrest Ms. Baker for possession of marijuana. Aside from Ms. Baker’s presumptively innocent association with Mr. Porter, however, no evidence established probable cause that she knowingly possessed marijuana. The law is clear that it is the state’s burden to establish probable cause that “*the defendant probably committed a crime.*” *Sykes*, 279 Wis. 2d 742, ¶18 (emphasis added). It is simply insufficient to rely on evidence linked only to Mr. Porter, the driver, to establish probable cause that Ms. Baker, the passenger, knowingly possessed marijuana.

In reality, Officer Moore’s “great line,” which the court believed was “the answer to this case,” is nothing more than a tell that all Officer Moore had related to Ms. Baker was a flawed hunch. (77:16-17; Pet. App. 63-64). Officer Moore opined that there “is a *possibility at any time that* someone gives us a breadcrumb to hide the loaf of bread.” (26:40; Pet. App. 44). A “possibility” that any time a suspect admits to one crime, they are hiding evidence of another crime may

be a reasonable hunch, but it's a hunch nonetheless, and it is not "the answer" to this case.

Had the state presented *any* evidence specifically related to Ms. Baker this would be a different case. The state presented absolutely no evidence of an odor of marijuana linked to Ms. Baker. The state presented absolutely no evidence of any suspicious movements or activity engaged in by Ms. Baker that would have led to a reasonable officer to believe she possessed marijuana. The state presented absolutely no evidence that Mr. Porter made statements incriminating anyone other than himself. The state presented absolutely no evidence that Ms. Baker said or did anything suspicious that would lead a reasonable officer to believe she probably possessed marijuana. The evidence directly connected to Mr. Porter cannot be transferred to Ms. Baker simply by association. Furthermore, Ms. Baker's inferred presence in a vehicle that spent 10 minutes near two homes believed to be involved in drug trafficking does not make up for the dearth of evidence in this case.

CONCLUSION

For the foregoing reasons, Ashley Rae Baker respectfully requests that this Court accept review and thereafter reverse the court of appeals decision and remand this case to the circuit court with instructions to grant her motion to suppress and vacate her judgment of conviction.

Dated this 13th day of July, 2023.

Respectfully submitted,

Electronically signed by

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this petition is 5,588 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of July, 2023.

Signed:

Electronically signed by

Jeremy A. Newman

JEREMY A. NEWMAN

Assistant State Public Defender