

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CASE NO. ST-17-CR-268
	)	
v.	)	
	)	
SHAWN FREEMAN,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION

Before the Court is the “Defendant’s Motion to Suppress” filed by Defendant Shawn Freeman (“Freeman” or “Defendant”) on March 12, 2018. In his motion, Freeman requests suppression of all evidence seized because of a seizure and search of his person that occurred on September 2, 2017. The People of the Virgin Islands (“The People”) filed an Opposition to the Motion to Suppress on March 16, 2018. A suppression hearing followed on April 17, 2018, and post-hearing briefs were subsequently submitted by The People and Freeman. The People based the stop and seizure of Freeman and a firearm and the magazine on reasonable suspicion obtained from the smell of marijuana inside the driver’s car and the consent of the driver. However, this Court finds that the initial seizure was unlawful. Even though the subsequent findings of the magazine and firearm were reasonable from the smell emanating from the driver’s car and the passenger admitting to smoking, that does not negate the fact that the police had no reasonable suspicion or probable cause to seize the defendant when they approached the black Nissan Pathfinder. Therefore, this Court will **grant** Freeman’s motion in its entirety.

I. FACTUAL BACKGROUND

This Court held an evidentiary hearing in this matter on April 17, 2018.¹ Testimony on behalf of the People was taken from Officer Nick Felicien (“Officer Felicien”) of the Virgin Islands Police Department of the Special Operations Bureau. Officer Felicien said that he was on duty with several St.

¹ At the evidentiary hearing the People of the Virgin Islands were represented by Assistant Attorney General Alexandra C. Bynum, and Defendant Shawn Freeman was represented by Assistant Territorial Public Defender Casey Payton.

People of the Virgin Islands v. Shawn Freeman
Case No. ST-17-CR-268
Memorandum Opinion

Croix Virgin Islands Police Officers for a saturated patrol operation in the St. Thomas/St. John District on September 2, 2017. This special operation, named Operation Urgency, consisted of additional St. Thomas police officers that required the officers to patrol different communities, talk to individuals, and execute warrants. Officer Felicien could not recall exactly how many police officers and police cruisers were involved with the operation that led to the arrest of Freeman; however, he recalled that there were at least four (4) marked police cruisers and at least eight (8) police officers. At approximately 11:50 pm, all officers were in full uniform, Virgin Islands Police Department (“VIPD”) shirts, bullet proof vests, tactical pants, boots, utility belts, guns, OC sprays, batons, and boots.

Officer Felicien testified that he was in a police cruiser when he spotted the black Nissan Pathfinder, with its license plate number TEX-468, parked in front of Building 16, Hidden Valley, St. Thomas, Virgin Islands. Inside Officer Felicien’s police cruiser was a female police officer assigned to the traffic division operating the vehicle. Nothing about the Nissan Pathfinder, the driver or the passenger inside, made Officer Felicien suspicious of any criminal activity. Nevertheless, Officer Felicien’s special operations team approached the Nissan Pathfinder because they wanted to see what was going on inside of the vehicle. During that time, the Nissan Pathfinder’s doors were closed, and windows were rolled up. At least two (2) armed police officers, Officer Felicien and Officer Ismael Navarro² (“Officer Navarro”), approached the vehicle that Freeman sat in while at least four (4) police cars and an additional, at minimum, six (6) police officers stood by. As both officers approached the Nissan Pathfinder, both Officer Navarro’s and Officer Felicien’s headlights were on. Officer Felicien said that he approached the driver’s side of the vehicle with his flashlight in hand and gun in his holster. Officer Felicien’s partner, Officer Navarro approached the passenger side of the car at the same time.

According to Officer Felicien’s testimony, he went to tap on the car to “see what was going on.” When he tapped on the window, he could not smell any marijuana. Neither did he testify to any illegal

² Officer Navarro did not testify at the suppression hearing.

People of the Virgin Islands v. Shawn Freeman
Case No. ST-17-CR-268
Memorandum Opinion

or criminal activity afoot. After Officer Felicien tapped on the window of the vehicle, the occupants, Shalyne Joseph ("Driver") and Freeman, rolled down the windows simultaneously. Although it was not mentioned in the probable cause fact sheet, Officer Felicien testified that he smelled marijuana as Freeman rolled down his window. Officer Felicien's foundation for detecting the odor of marijuana is his two years and four months as a police officer. Throughout those two years, Officer Felicien testified that he has had the opportunity to smell marijuana in its raw and cooked forms on over 100 occasions. Additionally, Officer Felicien has received specific training for identification of the odor of marijuana. Upon the officer's request, the driver turned over her license and registration, proving that she was the owner of the Nissan Pathfinder. Additionally, the officers alleged that Freeman stated, "goodnight officer we just here chilling, had smoke a little weed".

The Affidavit stated that Officer Navarro asked Freeman if he was willing to step out of the car. The Affidavit further stated that as Freeman stepped out of the car, Officer Navarro observed an extended gun magazine sticking out of the right side of Freeman's front pants pocket. Moreover, the Affidavit said that Officer Navarro told Freeman to turn around and asked him if he had a license to carry, sell, or possess a firearm or ammunition in the Territory of the U.S. Virgin Islands and Freeman replied, "no." The Affidavit further attested that Officer Navarro conducted a pat down of Freeman and removed the extended magazine out of his right, front pants pocket. Officer Felicien asked the driver if he could search the car, and she consented. Officer Felicien stated that he did not make any promises, use any force, nor threaten the driver to obtain consent. As the officers searched the car, they found a black handgun under the passenger seat. Both officers found live ammunition in the firearm and magazine. According to the Affidavit, Freeman stated that the firearm belonged to him.

Subsequently, Officer Felicien testified that he arrested Freeman for Possession of an Unlicensed Firearm, Possession of Ammunition, Unauthorized Possession of a Firearm with Altered

Identification Marks, and Unauthorized Possession of a Controlled Substance with Intent to Distribute.³

Officer Felicien testified that there was “no evidence that marijuana was found in the car or on its occupants. No marijuana cigarettes, papers, pipe, or paraphernalia was found; no scale or baggies were found. Nor did Officer Felicien see any marijuana smoke or flicker of a marijuana cigarette.

II. LEGAL DISCUSSION.

A. Standard for analyzing a motion to suppress.

“The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.”⁴ If the search or seizure is warrantless, the burden shifts to the People to demonstrate that the search or seizure was permissible under an exception to the Fourth Amendment’s warrant requirement.⁵ Under the Fourth Amendment, people have the right “to be secure in their persons, houses...against unreasonable searches and seizures.”⁶ In *Thomas v. The People of the Virgin Islands*, quoting the U.S. Supreme Court, the Virgin Islands Supreme Court noted that searches conducted without a warrant are “per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.”⁷

The Fourth Amendment analysis typically proceeds in three stages.⁸ First, the Court asks whether a Fourth Amendment event, such as a search or a seizure, has occurred.⁹ Next, the Court considers whether that search or seizure was reasonable.¹⁰ If the search or seizure was unreasonable, the

³ The Unauthorized Possession of a Controlled Substance with Intent to Distribute charge was dismissed on February 12, 2018, with prejudice upon the People’s motion after finding no evidence of marijuana in the automobile.

⁴ *United States v. Murray*, 53 V.I. 831, 842 (D.V.I. 2010) (quoting *Rakas v. Illinois*, 439 U.S. 128, 132 (1978)).

⁵ *People v. Schulerbrandt*, No. ST-16-CR-F34, 2016 WL44585708, at *3 (V.I. Super. Ct. Aug. 22, 2016).

⁶ U.S. CONST. amend. IV; *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (adding that this “right of personal security belongs as much to the citizen on the streets” as to a citizen in her home).

⁷ See *Thomas v. People of the Virgin Islands*, 63 V.I. 595, 605 (V.I. 2015) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Courts hold this protection in no higher regard, than when the search in question is executed at the home of the defendant, noting “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *United States v. Mallory*, 765 F.3d 373, 382 (3d Cir. 2014) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

⁸ *United States v. Dupree*, 617 F.3d 724, 730 (3d Cir. 2010).

⁹ *Id.*; *Schulerbrandt*, 2016 WL 44585708, at *3.

¹⁰ *Id.*

Court must then determine whether the circumstances warrant suppression of the evidence.¹¹ Here, the defendant did not have a reasonable expectation of privacy nor a possessory interest in the car.¹² As elucidated in *Rakas v. Illinois*, passengers in an automobile have no reasonable expectation of privacy nor possessory interest.¹³ Because the defendant neither owned nor drove the car on the night in question, he cannot contest the reasonableness of the search in the car. The remaining issue is whether a seizure took place. Therefore, the court will focus on this analysis of this third stage.

B. Decriminalization of Marijuana Does Not Affect Analysis on the Reasonableness of the Seizure.

The pivotal question in every case is whether, based on the police's experience, observation, and information derived from others which contain specific and articulable facts, a search or seizure can be justified.¹⁴ The search or seizure of an automobile can be reasonable even when the civil infraction or traffic violation does not grant the police the power to arrest.¹⁵

Decriminalization of marijuana has no bearing on whether probable cause existed at the time of the search or seizure of the automobile.¹⁶ Earlier this year, in *People v. Looby*¹⁷, the Virgin Islands Supreme Court addressed this exact question when they searched through the legislative history and text of Act No. 7700, which is codified as Possession of Marijuana at Title 19 §607a. Section 607a (b) provides:

§607a. Possession of marijuana

(b) Simple possession of marijuana

(1) Any person who possesses one ounce or less of marijuana commits a civil infraction

¹¹ *Dupree*, 617 F.3d, at 730.

¹² *Rakas*, 439 U.S. at 148.

¹³ *Id.*

¹⁴ *United States v. Cortez*, 449 U.S. 411, 417 (1981); *United States v. Williams*, 413 F.3d 347, 352 (3rd Cir. 2005) (holding that the officers had probable cause to search the van because they saw in plain sight the defendant with zip lock bags of contraband); *Government v. Rijos*, 6 V.I. 475, 487 (D.V.I. 1968) (holding that an officer may rely upon information received through an informant rather than upon his observations so long as informant's statement is reasonably corroborated by other matters within the officer's knowledge); *People v. Ambrose*, No. SX-09-CR-418, 2013 V.I. LEXIS 60, at *8 (V.I. Super. Ct. Sept. 20, 2013).

¹⁵ See *People v. Looby*, 68 V.I. 683, 699 (2018).

¹⁶ *Id.*

¹⁷ *Id.*

People of the Virgin Islands v. Shawn Freeman
Case No. ST-17-CR-268
Memorandum Opinion

that is a civil offense punishable by a fine of \$100, payable no later than 90 days after assessment, and may be subject to forfeiture of the contraband.

- (2) Any person who openly and publicly displays, consumes, or uses one ounce or less of marijuana commits a civil offense punishable by a fine of not more than \$200, payable no later than 90 days after assessment, and is subject to forfeiture of the contraband...
- (4) Any person assessed a civil fine under this subsection who fails to pay the fine within 90 days after its assessment shall pay double the amount assessed...
- (h) Any person who fails to pay the fines imposed for a civil infraction by 180th day after the civil infraction pursuant to this section commits a misdemeanor and is subject to the imposition of additional fines not to exceed \$500, imprisonment not to exceed 3 months, or both fine and imprisonment.¹⁸

The legislature concluded that while the possession of marijuana of one ounce or less no longer gives the officers the power to arrest, it is still unlawful as it remains a Schedule I controlled substance under Title 19 §595 of the Virgin Islands Code. Additionally, §607a(b)(2) allows for the police to confiscate the marijuana.¹⁹ To hold otherwise would undermine the intent of the legislators in providing a mechanism for the officers to ticket offenders and seize contraband as evidence they suspect of violating Title 19 V.I.C. §607(a) or Title 20 V.I.C. §493.²⁰

The odor of marijuana may provide probable cause for the police to seize the automobile.²¹ In the case *sub judice*, Freeman rolled down the window when Officer Navarro approached him. According to the Affidavit, Officer Navarro immediately smelled the marijuana as soon as the window rolled down. Unlike the officers in *People v. Cannergeiter*, who provided no testimony about their distance from the car, Officer Felicien testified that they were right next to the car.²² Also, Officer Felicien further testified, unlike the officers in *Cannergeiter*, that he could smell marijuana emanating

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *People v. Cannergeiter*, 65 V.I. 114, 134 (V.I. Super. Ct. 2016).

²¹ *United States v. White*, 593 F.3d 1193, 1203 (11th Cir. 2010); *United States v. Ramos*, 443 F.3d 304, 308 (3d Cir. 2006); *United States v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004).

²² *Cannergeiter*, 65 V.I. at 135.

directly from the car.²³ Moreover, based on Officer Felicien's testimony, he has had two years and four months of experience with over 100 occasions to detect the odor of marijuana. Thus, if Freeman admitted to having smoked marijuana that night, the police may have had probable cause to search the car under other circumstances. However, the facts before this Court leading up to the officers tapping on the windows do not rise to the level of reasonable suspicion or probable cause, therefore, this was an unlawful seizure.

C. Officers clearly seized Freeman when they approached the car.

The People contend that there was no seizure on the night in question because the officers merely approached the Nissan Pathfinder and tapped on the windows. Moreover, the People contend that Officer Felicien was not investigating a crime at the time he spotted the Nissan Pathfinder. Courts determine whether a seizure took place based on the police's use of physical force or submission to a show of authority.²⁴ The question in every case is based from the defendant's perspective whether a reasonable person would feel free to leave or decline the officers' request or otherwise terminate the encounter given the circumstances.²⁵ When an automobile is seized, all occupants, including the passengers are seized.²⁶ If the passenger does not feel free to leave or terminate the encounter, a seizure has occurred.²⁷ Under *United States v. Mendenhall*,²⁸ courts have considered a comprehensive, but not exhaustive, list of factors to determine whether a seizure took place such as: 1) threatening presence of several officers; 2) display of a weapon by an officer; 3) some physical touching of person or; 4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled.²⁹

²³ *Id.*

²⁴ *Brendlin v. Cal.*, 551 U.S. 249, 250 (2007).

²⁵ *United States v. Drayton*, 536 U.S. 194, 202 (2002); *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (holding that the police's conduct controls whether a reasonable person on a bus would feel free to leave); *People v. Prentice*, 64 V.I. 79, 88 (V.I. Super. Ct. 2016).

²⁶ *United States v. Mosley*, 454 F.3d 249, 253 (3d Cir. 2006).

²⁷ *Drayton*, 536 U.S. at 202.

²⁸ 446 U.S. 544, 552 (1980).

²⁹ *Id.*

People of the Virgin Islands v. Shawn Freeman
Case No. ST-17-CR-268
Memorandum Opinion

A seizure does not occur merely because an officer approaches an individual and asks a few questions.³⁰ Nor is it dispositive if the officers are wearing uniforms or possess guns at the time of the encounter.³¹ In fact, it is expected that the officers will be armed.³²

The threatening presence of several officers can illustrate a show of authority.³³ Here, the officers clearly seized Freeman. Although Officer Felicien testified that the defendant was free to leave, that is irrelevant. There is no question that given the circumstances, no reasonable person would have felt free to leave. This is distinguished from *United States v. Drayton* where the officer left a lane open for the defendant to leave and the officers were far apart from each other.³⁴ Freeman and the driver were both sitting in the privacy of the car at 11:50 pm with the windows rolled up. By the officer's own testimony, Officer Felicien and Officer Navarro approached the driver's and passenger's side of the vehicle, respectively. Similar to the officers in *United States v. Crandell*, who circled around Crandell two feet apart from him,³⁵ the officers in this case surrounded both occupants in the car. Additionally, approximately six other officers stood close by with four marked cars as each of them wore their police uniforms, including bulletproof vests and badges. Finally, each officer was armed with guns, batons, OC spray and utility belts.

The display of the weapon and physical touching of a person also illustrate a show of authority.³⁶ As Officer Felicien tapped on the driver's side of the vehicle, Officer Navarro approached Freeman's side of the vehicle, and tapped on his window. While not necessarily a physical touching of the person, the touching of the car constituted an unexpected intrusion of both occupants of the car.

³⁰ See *Drayton*, 536 U.S. at 202; *United States v. Crandell*, 554 F.3d 79, 82 (3d Cir. 2009) (holding that the officers seized the defendant because they surrounded him when they circled around him two feet apart and told the defendant that they were checking to see if he had a weapon).

³¹ *Drayton*, 536 U.S. at 202.

³² *Id.*

³³ *Mendenhall*, 446 U.S. at 552.

³⁴ *Drayton*, 536 U.S. at 204.

³⁵ *Crandell*, 554 F.3d at 82.

³⁶ *Mendenhall*, 446 U.S. at 552.

Some courts recognize flashing lights where the defendant is located can be a seizure when coupled with other actions.³⁷ Here, Officer Felicien shined his flashlight on the driver. Moreover, as Officer Felicien and Officer Navarro approached the Nissan Pathfinder, both officers' vehicles had their headlights on. While the presence of officers with the gun holsters are expected because that is normally seen in public, it is not expected to see four marked cars and eight officers in the same area immediately upon the space of a person. Nor is it reasonably anticipated to have both officers surround the vehicle and tap on the window of one's car with flashing lights shining at them at 11:50 pm.

With the show of authority, both Freeman and the driver submitted to the officers and rolled down their windows. Unlike the occupant in *United States v. Williams* where the rear doors were open and he was holding a zip lock bag containing marijuana in plain-view,³⁸ the opposite was true in this case.

D. The Police had neither Probable Cause nor Reasonable Suspicion to Seize the Defendant.

Unreasonable seizures occur when there is a stop without reasonable suspicion or probable cause, which is based on the circumstances within the officer's knowledge at the time of the investigative stop or arrest.³⁹ When a seizure transpires in the automobile, everyone is stopped.⁴⁰ Thus

³⁷ See *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (holding that pursuing police car and flashing lights can represent a seizure; however, he did not stop at that moment, therefore was not seized for Fourth Amendment purposes). *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (holding that a checkpoint that has flashing lights which says STOP HERE U.S. Officers count as a seizure); *United States v. Matthews*, 417 F. Supp. 813, 817 (E.D. Pa. 1976) (holding that red flashing lights while tapping his horn is not a seizure if the suspect does not stop in submission to police); *Leroy v. State*, 982 So. 2d 1250, 1252 (Fla. Dist. Ct. App. 2008) (holding that the shining of the flashlight was a seizure because he showed it to the defendant's vehicle while approaching the defendant in a confined space with two other officers joining the officer shortly); *Blake v. State*, 939 So. 2d 192, 197 (Fla. Dist. Ct. App. 2006) (holding that the officer's shining of the flashlight on the defendant was not a seizure because the officer did not give any order to the defendant to get out nor did the officers touch the defendants).

³⁸ *United States v. Williams*, 413 F.3d 347, 353 (3d Cir. 2005).

³⁹ *Arizona v. Johnson*, 555 U.S. 323, 331-32 (2009); *People v. Ambrose*, No. SX-09-CR-418, 2013 WL 5461150, at *3 (V.I. Super. Ct. Sept. 20, 2013) (holding that the police had reasonable suspicion to stop the defendant based on the commission of two traffic violations and to frisk the defendant based on their claim that they had to use the bathroom); *People v. Archibald*, 50 V.I. 74, 94-95 (V.I. Super. Ct. 2008) (concluding that the police officers had no reasonable suspicion to stop and frisk the defendants because the defendants were just walking away from the police in a high crime area. The officers had no suggestion the alleged persons were previously arrested or that the night the officers discovered the weapon that the defendants were there the previous night).

⁴⁰ See *United States v. Mosley*, 454 F.3d 249, 253 (3d Cir. 2006); *Ambrose*, 2013 WL 54611503 at *3.

People of the Virgin Islands v. Shawn Freeman
Case No. ST-17-CR-268
Memorandum Opinion

passengers in an illegally stopped vehicle have “standing” to object to the stop and may seek to suppress the evidentiary fruits of that illegal seizure under the fruit of the poisonous tree doctrine.⁴¹

The People have not provided any reason for the police officers approaching Freeman or the driver other than, as Officer Felicien stated, “to see what was going on.” Unlike the officers in *People v. Ambrose*, who saw the defendants commit two traffic violations,⁴² the officers saw nothing that remotely resembled a crime being committed or a crime about to be committed. There was no tip, anonymous or not, given to the officers that suggested Freeman or the driver were involved in any criminal activity. In fact, it was not until both officers accosted the driver’s and Freeman’s window, which prompted them to open their window, that suggested Freeman may have engaged in or about to engage in an illegal activity. The prosecution has relied on the *Williams* case in their opposition of the motion to suppress.⁴³ However, that case is not apt to the present one. The officers in *Williams* already saw the defendant in plain sight holding a large ziplock bag in his lap with the rear doors open.⁴⁴ Furthermore, the officers saw the defendant discard all the bags in his lap and hands.⁴⁵ In this case, none of the aforementioned events transpired or anything that remotely represents similar events.

Although Freeman has no standing to contest the search of the car because he was not the driver, nor did he own the car, he does have standing to contest the seizure of the car. Once an illegal seizure takes place, all occupants of the vehicle have standing.⁴⁶ Because the initial seizure was illegal, the subsequent seizure of the magazine and firearm was also illegal. If it was not for the initial seizure, the officer would not have asked the defendant to step out of the car, which he was obligated to under a

⁴¹ *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

⁴² *Ambrose*, 2013 WL 5461150, at *3.

⁴³ *Williams*, 413 F.3d at 352 (holding that the Fourth Amendment is simply not implicated by the police approaching the parked van).

⁴⁴ *Id.* at 353.

⁴⁵ *Id.*

⁴⁶ *Mosley*, 454 F.3d at 253.

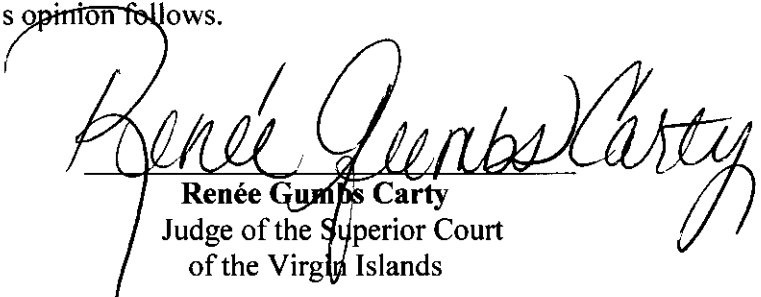
People of the Virgin Islands v. Shawn Freeman
Case No. ST-17-CR-268
Memorandum Opinion

lawful seizure, and would not have found the magazine in his pocket.⁴⁷ Moreover, the officers would not have had the need to ask the driver to search the car and find the firearm underneath the passenger's seat. Therefore, the firearm, magazine, and ammunition should be suppressed.

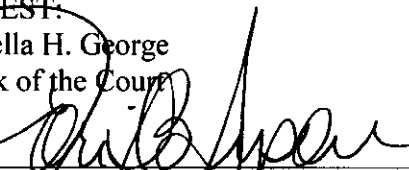
III. CONCLUSION

Based on the foregoing reasons, this Court is satisfied that Freeman has met his burden in suppressing the firearm, ammunition, and magazine that were seized from him. While the smell of marijuana may have provided the police probable cause to search the car and seize the defendant, regardless of it being decriminalized, the initial seizure of the defendant was illegal. Had it not been for the illegal seizure, the officers would not have discovered the magazine nor the firearm underneath the car seat. For the foregoing reasons, the Court will **grant** the defendant's motion to suppress the evidence in this case. An order consistent with this opinion follows.

Dated: August 24, 2018


Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella H. George
Clerk of the Court

By: 
Lori Boynes-Tyson
Chief Deputy Clerk 8/24/18

⁴⁷ See *Maryland v. Wilson*, 519 U.S. 408, 412 (1997) (holding that the officer may order the passenger to step out of the car after a lawful traffic stop as a precautionary measure for the officer's safety); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (concluding that a face-to-face confrontation diminishes the possibility that the driver can make unobserved movements reduces the likelihood that the officer will be a victim of an assault).