STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

KEVIN KAVANAUGH,

Defendant-Appellee.
_____/

Supreme Court No. 156408

Court of Appeals No. 330359

Lower Court No. 2014004247 FH

AARON J. MEAD (P49413)
Assistant Prosecuting Attorney

DANIEL W. GROW (P48628)
Attorney for Defendant
_____/

**PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF ON APPLICATION FOR LEAVE TO APPEAL**

MICHAEL J. SEPIC (P29932)
Berrien County Prosecuting Attorney

By Aaron J. Mead (P49413)
Assistant Prosecuting Attorney
Berrien County Courthouse
St. Joseph, MI 49085
(269) 983-7111 Ext. 8311

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## JUDGMENT APPEALED FROM, STATEMENT OF JURISDICTION, AND RELIEF SOUGHT

The People seek leave to appeal from the Court of Appeals' published July 6, 2017 opinion reversing the trial court's denial of defendant's motions to suppress evidence found after his car was stopped. *People v Kavanaugh*, 320 Mich App 293; ___ NW2d ___ (2017) (Docket No. 330359) (307a-315a). This Court has jurisdiction over this application for leave to appeal under MCR 7.303(B)(1). This Court has directed the Clerk to schedule oral argument on whether to grant the People's application for leave to appeal, and has ordered the parties to file supplemental briefs and appendices (316a).

The People ask this Court to hold that the clear error standard of review applies to factual findings based on video evidence, and that parties are no more obliged to provide video evidence than any other kind of evidence. The People further ask the Court to peremptorily reverse the Court of Appeals majority opinion and reinstate defendant's conviction. In the alternative, the People request that this Court grant leave to appeal.

## STATEMENT OF QUESTION PRESENTED

Should an appellate court review a trial court's factual findings for clear error based on the entire factual record presented to the trial court, whether or not a recording of events under consideration is available to the appellate court?

Plaintiff-Appellant answers: "YES"
The trial court was not presented with this question.

## STATEMENT OF FACTS

In a bench trial, The Honorable Charles T. LaSata found defendant guilty of possession with intent to deliver 5 kilograms or more but less than 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii) (296a). Judge LaSata sentenced defendant to 90 days in jail and 18 months' probation (303a).

This appeal concerns the trial court's denial of defendant's second motion to suppress the evidence found in his car, made at the close of the proofs at his bench trial. Defendant first moved to suppress this evidence before trial, and an evidentiary hearing was held on that motion. Since the trial court had the benefit of facts from both that hearing and the bench trial when it ruled on the second motion to suppress, this statement of facts draws from both proceedings. The People also refer to a squad car video from the traffic stop, which the trial court viewed. The People provided copies of this video to this Court when they filed their application for leave to appeal.

Grand Rapids Police Officer Jose Gamez was assigned to the Metropolitan Enforcement Team (MET), a narcotics squad (152a). One morning, Gamez observed defendant engaging in suspicious behavior[1] in the parking lot of the Grand Village Inn, a hotel known for narcotics trafficking and other criminal activity (152a-154a, 166a). When defendant later got into the car and drove away, along with a female friend later identified as Billie Sue Brown, Gamez followed them along Highway I-196 to Berrien County (89a, 157a, 160a-161a). Along the way, Gamez contacted other MET members, alerting them to be on the lookout for a silver Honda Accord with

[1] Defendant came out of the hotel carrying two duffel bags. He went to a car with a temporary Florida license plate, looked around furtively, put the bags down, opened the trunk, and put the bags in. Defendant closed the trunk, continuing to look around, before going back into the hotel (153a-154a)).

a paper Florida plate (162a, 165a, 170a-171a. The MET relayed the alert, but not Gamez' observations, to the Michigan State Police (35a, 122a, 162a).

Trooper Michael Daniels, having received this information, sat in his squad car in the median of I-196 in Berrien County, watching the southbound traffic (22a, 35a, 83a, 122a). A silver Honda Accord passed him, and defendant (the driver) looked at Daniels, which was unusual (22a, 84a-85a, 89a). In one of his car mirrors, Daniels saw that the Accord had a paper license plate, which was flapping (22a-23a, 84a-85a, 89a). Daniels began following the Accord to get a better look at the plate (23a, 89a). When he caught up to the Accord, it started to slow down and made a quick lane change to an exit ramp without signaling (24a, 89a).

Daniels activated his overhead lights (24a, 89a). The Accord continued up the exit ramp for about 20 seconds, during which time Daniels saw defendant appear to make furtive movements as though trying to hide something (25a-26a, 43a, 89a-90a).

When the Accord stopped, Daniels got out of his patrol car and approached it (26a, 88a). Brown was in the front passenger seat, and a small dog was in the back seat. In response to Daniels' request, defendant handed over a Florida driver's license, and Daniels noticed that defendant's hand was shaking (26a, 88a). Daniels asked for paperwork on the Accord, but defendant said he did not have it because he had just purchased the car. Daniels asked for a purchase agreement, but defendant did not have that either (26a-27a, 88a).

Daniels had defendant come with him to the patrol car and asked him to sit in the front seat (27a-28a, 89a-90a). Defendant sat in the front passenger seat, but did not close the door, which was unusual (28a, 90a). Daniels sat in the driver's seat of the patrol car and conversed with defendant while checking defendant's driver's license against computer records. Defendant told Daniels he had been in Grand Rapids for three days visiting friends (28a, 90a). He said he had

stayed at the Travel Lodge Hotel (30a, 90a). Brown, he said, was just a coworker, not his girlfriend (29a, 94a). Defendant became increasingly nervous during the conversation, scratching his leg and head, not making eye contact, and repeatedly looking out the passenger-side door, where his body was pointed (28a, 90a). His nervousness was greater than what Daniels usually observed (44a).

Daniels returned to the Accord to check the vehicle identification number against the one that had appeared on his computer screen (29a, 91a, 94a). He spoke with Brown, who told him that she and defendant had stayed at the Grand Village Inn[2] in Grand Rapids, and that defendant was her boyfriend (29a, 94a, 142a).

Back at his patrol car, Daniels told defendant he would give him a warning for failing to signal (30a, 95a). Daniels asked if there was anything illegal in the car, such as marijuana, cocaine, heroin, or other drugs. Defendant said no to all of these and stated that he did not do drugs. Daniels asked for consent to search the car, and defendant refused (30a, 95a). Daniels then advised defendant that he was going to have a canine unit come to the scene and sniff around the car to make sure it did not contain narcotics (30a, 96a).

Deputy Jason Haskins arrived with a drug-sniffing dog about 10 minutes later – about 22 minutes after Daniels had stopped the Accord (16a, 48a, 51a, 144a, 205a). The dog circled the car twice and alerted to the trunk (31a, 207a-208a). Troopers John Moore and Russell Bawks[3] arrived and helped Daniels search defendant's car (32a, 96a, 177a). Opening the trunk, the troopers found about 15 pounds of marijuana in 15 heat-sealed bags inside a duffel bag (32a, 194a-195a, 237a-

[2] At the motion hearing, Daniels said that Brown named the "Grand Travel Lodge." But on the squad car video, Brown clearly says, "Grand Village." Daniels asks, "Grand Village Inn?" and Brown answers, "Yes" (Video, 13:54 – 13:57).
[3] Trooper Bawks' name is incorrectly transcribed as "Baluks."

238a, 241a). Under the driver's seat were some marijuana cigarettes and a container of marijuana butter or wax (43a, 195a-197a). In between the car seats was a ledger that appeared to be related to drug proceeds (178a). Lieutenant Jamie Zehm, an expert in the sale and distribution of controlled substances, testified that the amount and packaging of the marijuana indicated the intent to deliver it (245a. 247a-248a). Defendant admitted the drugs were his and that he intended to sell them (33a, 100a-101a, 159a-160a).

Several months before trial, defendant moved to suppress the evidence obtained as a result of the dog sniff. The trial court ruled that the traffic stop was proper because Trooper Daniels had observed defendant change lanes improperly (58a). Defendant had also engaged in furtive actions as if he were trying to hide something (58a-59a). Defendant had exhibited extreme nervousness and had not shut the patrol car door, which, in Daniels' experience, was unusual. Defendant's and Brown's accounts were somewhat inconsistent (58a-59a). Finally, the ten-minute detention while awaiting the drug dog was not excessive[4] (60a). The trial court denied the motion to suppress (60a).

Defendant moved for suppression again after the proofs were closed at trial (258a-262a). By this time, the trial court had viewed the relevant portions of Daniels' squad car video, which was admitted into evidence (118a-119a, 254a-258a). This motion focused mainly on the validity of the traffic stop itself (258a-262a). But defendant did note the United States Supreme Court's then-recent holding in *Rodriguez v United States*, ___ US ___; 135 S Ct 1609, 1616; 191 L Ed 2d 492 (2015), in which the Court held that absent reasonable suspicion of criminal activity,

[4] At the time the trial court ruled on defendant's first motion to suppress, the United States Supreme Court had not yet issued its opinion in *Rodriguez v United States*, ___ US ___; 135 S Ct 1609; 191 L Ed 2d 492 (2015). So it was arguable that a brief additional detention was permissible to allow a drug dog sniff after a traffic stop was concluded (310a).

prolonging a traffic stop for even a brief time in order to conduct a drug dog sniff violates the Fourth Amendment. The trial court denied the motion to suppress on essentially the same grounds as before (272a-273a).

The Court of Appeals reversed. *People v Kavanaugh*, 320 Mich App 293; ___ NW2d ___ (2016) (Docket No. 330359); slip op at 1 (307a). The Court watched a copy of Daniels' squad car video and relied on its own factual conclusions from it (308a). The Court did not agree that defendant showed "unusual or increasing levels of nervousness" when talking with Daniels (311a). But the Court conceded that the video did not show defendant handing his license to Daniels (and therefore could not verify or contradict Daniels' testimony that defendant's hands shook when he handed over his license) (311a). The Court also said that defendant's opportunity for eye contact with Daniels was "greatly limited" or even "not available" because Daniels was often looking at his computer screen (312a). Defendant's failure to shut the patrol car door, the Court said, was not suspicious, and the inconsistencies between defendant's and Brown's statements were not significant and did not point to criminal activity (312a-313a). The Court of Appeals concluded that Daniels lacked lawful grounds to detain defendant after the traffic stop was over (308a).

The People applied for leave to appeal to this Court, which directed the Clerk to schedule oral argument on whether to grant the application or take other action (316a). This Court ordered supplemental briefs on the following questions:

(1) What deference should be accorded to the trial court's factual findings where a recording of events under consideration is available to an appellate court?

(2) What evidence may be considered in determining whether there was clear error in the trial court's factual findings?

(3) What standard of review is to be applied under such circumstances?

Additional facts will be set forth as needed in the argument.

## ARGUMENT

**An appellate court should review a trial court's factual findings for clear error based on the entire factual record presented to the trial court, whether or not a recording of events under consideration is available to the appellate court.**

**Standard of Review.** Determining the proper standard of review for a particular type of trial court decision is a question of law. Questions of law are reviewed de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

The standard of review for a trial court's factual findings is clear error. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). It is embodied in our court rules:

> Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. [MCR 2.613(C).]

The previous provision in the 1963 court rules, GCR 517.1, set forth the same standard.

In particular, the clear error standard applies to factual findings made in a suppression hearing. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005).

This is a very deferential standard. "Clear error is present when the reviewing court is left with a 'definite and firm conviction' that an error occurred." *Buie*, 491 Mich at 315-316, quoting *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). "That standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v Bessemer City*, 470 US 564, 573; 105 S Ct 1504; 84 L Ed 2d 518 (1985). Instead, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between

them cannot be clearly erroneous." *Id*. at 573-574. This Court has adopted the same description of the clear error standard. *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990).

Put another way, to be clearly erroneous, a factual finding must strike the reviewing court "as more than just maybe or probably wrong; it must strike [the court] as wrong with the force of a five-week old, unrefrigerated dead fish." *People v Cheatham*, 453 Mich 1, 30 n 23; 551 NW2d 355 (1996) (Boyle, J.), quoting *Parts & Electric Motors, Inc v Sterling Electric, Inc*, 866 F2d 228, 233 (CA 7, 1988).

But the Court of Appeals has gradually weakened the clear error standard of review with respect to video evidence until it is now, in effect, tantamount to de novo review. This erosion of the standard of review for video evidence is unwarranted.

### A. Video and other recordings of events are not a separate class of evidence that changes the standard of review.

First, as discussed in the forthcoming amicus brief from the Prosecuting Attorneys Association of Michigan, the language and history of MCR 2.613(C) show that the clear error standard of review applies to factual findings whether they involve evaluation of testimony or of physical evidence. The amicus brief covers this point thoroughly, so the People will not repeat that argument here.

Second, the foundation for the Court of Appeals' different treatment[5] of video evidence is unsound. For its notion that a reviewing court need not defer to a trial court's findings about what a video recording contains, the Court relied on either *People v Zahn*, 234 Mich App. 438, 445–

[5] As the People noted in their application for leave to appeal to this Court (pp 18-19), the Court of Appeals not only relaxed the standard of review for video evidence; it also directed parties and courts across the state to use this particular kind of evidence whenever practicable (311a n 9).

446; 594 NW2d 120 (1999), or *City of East Grand Rapids v Vanderhart*, unpublished opinion per curiam of the Court of Appeals (Docket No. 329259, issued July 6, 2017), slip op at 4 (Opinion by Swartzle, J.), depending on which version of the Court of Appeals' opinion in this case one consults.[6] The Court's analysis is essentially the same in either event, since *Vanderhart* itself can be traced back to *Zahn*.

In *Vanderhart*, Judge Swartzle relied on *People v White*, 294 Mich App 622, 633; 823 NW2d 118 (2011), in which the Court said that because it could review an "audio/video disk" as easily as the trial court, the clearly erroneous standard "may not even apply." This was dictum, since the Court went on to affirm the lower court's conclusion from the audio/video disk even under a de novo standard of review. *White*, 294 Mich App at 633. To support that dictum, *White* cited *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130 n 1; 743 NW2d 585 (2007), and *Zahn*, 234 Mich App. At 445–446. *Harbor Park Market*, in which the trial exhibits appear to have been only documents, said that there was "some authority for the proposition that little or no deference is due a trial court's findings of fact when they are based solely on transcripts and exhibits." *Harbor Park Market*, 277 Mich App at 130 n 1, citing *Zahn*, 234 Mich App at 445-446. This was also dictum: "[B]ecause our decision is based solely on the contract language, we need not decide what deference is due the factual findings made in this case." *Harbor Park Market*, 277 Mich App at 130 n 1.

In *Zahn*, the Court observed that "the trial court made its decision solely on the basis of the preliminary examination transcript. Therefore, the trial court was in no better position than this Court to assess the evidence, and there is no reason to give special deference to the trial court's

[6] In the original advance sheet and the Westlaw version of the opinion (2017 WL 2882721, slip op at 2), the citation is to *Vanderhart*, which the Court of Appeals cited as though it were a published opinion. In the version now on the Court of Appeals' website, the citation is to *Zahn* (308a).

'findings.'" *Zahn*, 234 Mich App at 445-446. *Zahn* cited to no authority for this proposition. And *Vanderhart*, *White*, and *Zahn* never even mentioned MCR 2.613(C).

In short, the Court of Appeals' statements (often dicta) that the clear error standard might not apply to factual findings based on specific kinds of evidence sprang from nowhere in *Zahn*. This Court's pronunciation in MCR 2.613(C) that "[f]indings of fact by the trial court may not be set aside unless clearly erroneous," which admits no such exceptions, was all but ignored. Also, the Court of Appeals has given little or no consideration to how interpreting video evidence might differ from interpreting a document (as in *Zahn*).

And the clear error standard itself is quite capable of addressing video evidence. A reviewing court can determine, in an appropriate case, that a trial court's factual finding based in whole or in part on video evidence leaves the reviewing court with a definite and firm conviction that an error occurred. *Buie*, 491 Mich at 315-316.

The Supreme Court faced such a case in *Scott v Harris*, 550 US 372; 127 S Ct 1769; 167 L Ed 2d 686 (2007). In *Scott*, a motorist sued a police officer after the officer ended a high-speed chase of the motorist by pushing the motorist's car off the road, severely injuring him. *Id*., 550 US at 375. The officer moved for summary judgment based on qualified immunity, but the federal district court denied the motion, finding that material issues of fact existed. *Id*. at 376. The Eleventh Circuit affirmed. *Id*. at 376-377.

The Supreme Court reversed. *Scott*, 550 US at 386. The Court viewed a videotape of the chase and concluded that it "quite clearly contradicts the version of the story told by respondent [the motorist] and adopted by the Court of Appeals." *Id*. at 378. "Far from being the cautious and controlled driver the lower court depicts," the Court said, "what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and

innocent bystanders alike at great risk of serious injury." *Id*. at 380. The Supreme Court declared, "When opposing parties tell two different stories, one of which is *blatantly contradicted* by the record, so that *no reasonable jury could believe it*, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*. (emphasis added). The motorist's "version of events is *so utterly discredited* by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id*. at 380-381 (emphasis added). The Supreme Court's standard in *Scott* "is a demanding one: a court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account." *Darden v City of Fort Worth, Texas*, 880 F3d 722, 730 (CA 5, 2018) (citation omitted).

In other words, the Supreme Court in *Scott* was left with a definite and firm conviction that an error had occurred. See *Buie*, 491 Mich at 315-316. One might even say that the lower courts' factual findings struck the Supreme Court as wrong "with the force of a five-week old, unrefrigerated dead fish." See *Cheatham*, 453 Mich at 30 n 23.

But the Supreme Court's ruling was not based on some special quality of video evidence. "*Scott* does not treat video footage as a distinct type of evidence…. *Scott* did not create a *per se* rule that video evidence is always subject to an appellate court's independent assessment." *Hurt v Wise*, 880 F3d 831, 840 (CA 7, 2018). "Indeed, nothing about video evidence justifies placing it in such a privileged position." *Id*.

Video evidence, like other evidence, can be weak for various reasons that have caused courts to distinguish *Scott* or its reasoning. It may not include all the relevant events. See, e.g., *Witt v West Virginia State Police, Troop 2*, 633 F3d 272, 277 (CA 4, 2011) ("[T]he video fails to

capture seven important seconds of the incident, about which the parties' accounts decidedly differ"); *Perez v City of Albuquerque*, 276 P3d 973, 975-976 (NM App, 2012) ("[O]nly the latter part of the struggle was captured on videotape. As a result, the videotape itself cannot be considered determinative or a definitive account of the full circumstances of the events…"). The camera's view may be much more limited than that of police officers or other eyewitnesses who were present. *Watkins v State*, 85 NE3d 597, 602 n 2 (Ind, 2017) (video did not indisputably contradict officer's testimony where officer testified that "his view was much wider than what the camera captured because the camera was mounted directly on top of his head"). Video recordings may be poorly lit, see *Love v State*, 73 NE3d 693, 700 (Ind, 2017), or have poor picture quality, *Witt*, 633 F3d at 277. They may contain unclear audio, see *State v Gobert*, 275 SW3d 888, 891-892 n 13 (Tex Crim App, 2009), or no audio at all, *Witt*, 633 F3d at 277. And of course, some aspects of events cannot be captured on video. See, e.g., *Campbell v Goode*, 304 Ga App 47, 50; 695 SE2d 44 (2010) ("[T]he recordings do not conclusively establish such matters as the tightness of Campbell's grip on Goode's arm or the amount of force he exerted on it").

Even events shown on a video recording are still subject to interpretation. See *Perez*, 276 P3d at 976 (distinguishing *Scott* where various witnesses had "differing interpretations of the events depicted" in a videotape shown at trial); *Davis v Pickell*, 939 F Supp 2d 771, 779 (ED Mich, 2013) (remarking that a video of a jail cell could reasonably interpreted either to show that an inmate had deliberately thrown or kicked a shoe, or that he had accidentally flipped or dropped it). Addressing a question of qualified immunity, the Seventh Circuit observed that "not all disputes are about what transpired. Sometimes the availability of qualified immunity turns on the inferences that are permissible in light of the historical facts." *Hurt*, 880 F3d at 840. And "[w]here

the parties disagree about inferences, the fact that evidence is found in a video is not important – the purpose of the evidence is what matters." *Id*.

Video evidence alone, moreover, seldom constitutes the entire factual record. As in this case, factual findings are often based partly on video evidence and partly on other evidence. The Tenth Circuit relied on this point when it declined to disturb a lower court's finding that a detained motorist was unusually nervous. The motorist argued that a patrol car videotape contradicted this finding. *United States v Santos*, 403 F3d 1120, 1127 (CA 10, 2005). But as the Tenth Circuit observed,

> our assessment of the tape is not the issue. The district court made a factual finding that Mr. Santos appeared unusually nervous, and we cannot say that finding was clearly erroneous. Those moments when the district court found Mr. Santos to be most nervous—during the initial stop and when in Trooper Peech's car—were not recorded by the video camera…. In addition to viewing the video tape, the district court heard the testimony of Trooper Peech and Mr. Santos, and it is in the best position to assess the credibility of that testimony.
>
> Mr. Santos's suggestion that this Court make its own analysis of the degree of nervousness displayed on the tape asks us in effect to usurp the district court's position as finder of fact. We must reject this invitation, since the availability of some of the same evidence that was before the district court does not transform this Court into the factfinder. [*Id*. at 1128 (citation omitted).]

*Accord*, *Perez*, 276 P3d at 976 ("Reasonable jurors watching the videotape and hearing the testimony of all five witnesses could disagree over the constitutionality of the Officers' actions").

Many jurisdictions, including those just discussed, review factual findings based on video evidence just as they would any other factual findings in light of the above considerations. In *Love*, for example, the Indiana Supreme Court recently examined the standard of review to be applied to video evidence on appeal. Defendant Royce Love was convicted of resisting law enforcement and battery to a law enforcement animal. *Love* 73 NE3d at 695-696. Love failed to pull over when the police initiated a traffic stop because Love had disregarded a stop sign. *Id*. at

695. When Love was eventually stopped and exited his vehicle, he was apprehended through the use of a taser and a police dog. *Id*. The dispute was whether Love had cooperated with the police initially upon getting out of his car. *Id*. at 685-696. The Indiana Court of Appeals reversed Love's convictions, finding that a video recording from one of the police officer's cars unambiguously showed that Love cooperated with the police almost immediately. *Id*. at 696. The Indiana Supreme Court granted a petition to transfer from the Court of Appeals, which, under Indiana appellate rules, automatically vacated the Court of Appeals decision. *Id*. at 695, 696.

The Indiana Supreme Court noted that video evidence admitted in a trial court was subject to review "just like any other evidence." *Love*, 73 NE3d at 698, citing *Robinson v State*, 5 NE3d 362, 366 (Ind, 2014). But, "just like any other type of evidence, video is subject to conflicting interpretations." *Love*, 73 NE3d at 698, quoting *Robinson*, 5 NE3d at 366. There might be "times when reasonable minds could disagree about interpretation of the video evidence or times when the video is unclear or does not capture the entire event." *Id*. Yet at other times, objective video evidence might be complete and might indisputably contradict other evidence. For example, where the issue is whether a defendant consented to a search, video might show that the defendant indisputably said "no" when the police asked to search, despite police testimony that the defendant consented. *Id*.

The Court held that "for video evidence, the same deference is given to the trial court as with other evidence, unless the video evidence at issue indisputably contradicts the trial court's findings." *Love*, 73 NE3d at 700. "A video indisputably contradicts the trial court's findings when no reasonable person can view the video and come to a different conclusion." *Id*. Because the video in *Love* was dark and difficult to make out, and because it did not show critical events like the use of the tasers and the police dog, the video did not indisputably contradict the police officers'

testimony. *Id*. So the Court deferred to the trial court's factual determinations and affirmed Love's convictions. *Id*.

The *Love* Court found guidance in *State v Carmouche*, 10 SW3d 323, 332 (Tex Crim App, 2000). *Love*, 73 NE3d at 699. *Carmouche* involved an indisputable contradiction between video evidence and witness testimony. The issue was whether the defendant had consented to a search of his person. Videotape from a patrol car's camera showed a different sequence of events from what the police officer described. *Carmouche*, 10 SW3d at 331. The officer testified that he asked the defendant, "Do you mind if I search you again?" whereupon the defendant threw his hands up, said, "All right," turned around, and put his hands on his car. *Id*. But the videotape showed that the police ordered the defendant to turn around and put his hands on the car, that the defendant complied, and that only then did the officer ask, "Mind if I pat you down again?" as he was already reaching for the defendant's crotch area. *Id*. at 332.

"In the unique circumstances of this case," the Court "decline[d] to give 'almost total deference' to the trial court's implicit findings:"

> [T]he nature of the evidence presented in the videotape does not pivot on an evaluation of credibility and demeanor. Rather, the videotape presents indisputable visual evidence contradicting essential portions of [the police officer's] testimony. In these narrow circumstances, we cannot blind ourselves to the videotape evidence simply because [the officer's] testimony may, by itself, be read to support the Court of Appeals' holding. [*Carmouche*, 10 SW3d at 332.]

But absent such an indisputable contradiction, the *Love* Court observed, Texas courts "'give almost total deference to the trial court's factual determinations'" based on video evidence. *Love*, 73 NE3d at 699, quoting *State v Houghton*, 384 SW3d 441, 446 (Tex App, 2012). The Indiana Supreme Court found this to be "a workable approach that allows for appropriate deference to the trial court unless and until there is a reason such deference is not appropriate." *Love*, 73 NE3d at 699. But the Court cautioned:

> To be clear, in order that the video evidence indisputably contradict the trial court's findings, it must be such that no reasonable person could view the video and conclude otherwise. When determining whether the video evidence is undisputable, a court should assess the video quality including whether the video is grainy or otherwise obscured, the lighting, the angle, the audio and whether the video is a complete depiction of the events at issue, among other things. In cases where the video evidence is somehow not clear or complete or is subject to different interpretations, we defer to the trial court's interpretation. [*Id*. at 699-700.]

What the Court said in *Love* about video evidence applies equally to evidence of any kind: If the evidence is such that any reasonable person considering it could arrive at only one conclusion, then – and only then – does a contrary finding amount to clear error that merits disturbing that finding. This Court should check the erosion of the standard of review for findings of fact based on video evidence in the Court of Appeals and clarify that the clear error standard applies.

### B. An appellate court should consider the entire factual record presented to a trial court in reviewing the trial court's factual findings, whether or not that record includes a recording of events.

Review of a lower court's finding is based on the entire factual record presented to the lower court. "If the district court's account of the evidence is plausible *in light of the record viewed in its entirety*, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Beason*, 435 Mich at 803, quoting *Anderson*, 470 US at 573-574 (emphasis added). As discussed above, other jurisdictions apply this principle to findings based partly on video evidence. *Santos*, 403 F3d at 1127-1128; *Perez*, 276 P3d at 976. And again, no reason exists to treat video evidence differently in this regard.

**C. Because the Court of Appeals did not follow these principles, this Court should reverse.**

The Court of Appeals engaged in improper review in this case. First, the Court of Appeals expressly declined to defer to the trial court in its findings based on the video evidence (308a). Instead, the Court substituted its own interpretation of the video evidence, finding no evidence of unusual nervousness or avoidance of eye contact with Trooper Daniels (311a). But as the People argued in their application for leave to appeal to this Court (p 14), the video can reasonably be interpreted to show the avoidance of eye contact and other signs of nervousness to which Trooper Daniels testified. That is, the video does not indisputably contradict Daniels' testimony. But instead of allowing for this alternative interpretation of the video – thereby considering the video evidence and the testimony together – the Court relied on its own interpretation of the video to discredit Daniels as a witness generally, even on matters not addressed by the video (312a n 6). This stands the correct standard of review on its head.

The Court of Appeals also discounted evidence that it admitted was not captured on video: Trooper Daniels' testimony that defendant's hands were shaking as he passed his driver's license to Daniels (311a). In effect, the Court again failed to consider the video evidence as only one part of the record, instead elevating it above the testimony. Compare *Santos*, 403 F3d at 1128 (declining to find clear error in a lower court's finding of nervousness where the moments when the district court found the defendant to be most nervous were not recorded by the video camera).

The Court of Appeals made the same error with respect to Trooper Daniels' testimony that as defendant was pulling over, Daniels saw him making furtive movements as if reaching to hide something (25a-26a, 85a-86a). The Court agreed that Daniels could have seen such movements even if the video did not capture them (311a n 11). And in fact, drugs were found under defendant's seat (43a, 195a-197a), strengthening the conclusion that Trooper Daniels saw what he

said he saw. But the Court never mentioned this fact again, even though it should have contributed to the Court's review of Trooper Daniels' credibility and of whether he had reasonable suspicion to extend the traffic stop.

Finally, the People have also argued in their application for leave (pp 18-19) that the Court of Appeals appears to have inappropriately directed parties and trial courts to favor video evidence as well.

Because of these errors in its published opinion, this Court should reverse.

## REQUEST FOR RELIEF

The People ask this Court to hold that the clear error standard of review applies to factual findings based on video evidence, and to clarify that trial courts and parties have no greater obligation to use video evidence than to use any other evidence. The People further ask the Court to peremptorily reverse the Court of Appeals majority opinion and reinstate defendant's conviction. In the alternative, the People request that this Court grant leave to appeal.

DATED: March 7, 2018

Respectfully submitted,

/s/ Aaron J. Mead

AARON J. MEAD (P49413)
Assistant Prosecuting Attorney