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IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

CASE NO: 5D23-0118
LT NO: 16-2021-MM-014027

JASON HASSAN BAXTER,
APPELLANT,

vs.

STATE OF FLORIDA,
APPELLEE.
_______________________________________/

ON APPEAL FROM THE COUNTY COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

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<u>SUMMARY OF ARGUMENT</u>

Inasmuch as this Court has sua sponte ordered en banc rehearing in this case, the undersigned respectfully requests this Court rehear Issue I as outlined in the Initial and Reply briefs herein. Specifically, as addressed in Issue III, <u>supra</u>, pp 38-43, Baxter asserts that he was seized at the time Accra illuminated his blue lights and parked catty-corner to Baxter's vehicle and such seizure occurred without reasonable suspicion. This seizure occurred before Baxter rolled down his passenger-side window and the officer detected an odor of fresh "marijuana."

The majority's reliance on <u>G.M. v. State</u>, 19 So. 3d 973 (Fla. 2009) to support a finding that the officer's illumination of emergency lights did not constitute a seizure misapprehends the holding of <u>G.M.</u> Indeed, <u>G.M</u>. holds that in most circumstances such illumination does constitute a seizure because "it strains the bounds of reason to conclude that under these circumstances, a reasonable person would believe that he or she was free to end the encounter with police and simply leave." <u>Id</u>. at 979. <u>See also</u> <u>California v. Hodari D.</u>, 499 U.S. 621, 626 (1991) (submission to the assertion of authority must be considered when determining if a

seizure took place for Fourth Amendment purposes), § 316.1935, Fla. Stat. Here, Baxter's submission to police authority, the location of Accra's vehicle, and the activation of his emergency lights show he was seized before Accra detected an odor of fresh "marijuana." Such seizure was not based on reasonable suspicion and any evidence obtained thereafter should have been suppressed.

Nevertheless, if this Court declines to rehear that issue, Baxter respectfully requests this Court find an investigatory detention cannot be based on the odor of cannabis alone.

The ever-changing landscape of federal and Florida cannabis law mandates consideration of how the smell of cannabis factors into Fourth Amendment analyses. Although innocent behavior can factor into a reasonable suspicion analysis, it cannot be the sole basis for the detention because of these legislative changes. The premise for plain smell doctrine is no longer valid and the smell of "marijuana" is no longer sufficient to establish reasonable suspicion.

Nevertheless, the ultimate standard for reasonable suspicion is not affected by this change. An officer's decision to temporarily detain a citizen may only be justified by some objective

manifestation that the person stopped is, or is about to be, engaged in criminal activity based on the totality of the circumstances. Because the Supreme Court has rejected most bright line rules with regard to the Fourth Amendment, each case must be individually assessed to determine whether all the facts provided the officer a whole picture meeting this standard. The potentially legal behavior may be considered in this analysis but it must not be given undue weight.

In this case, the totality of the circumstances do not add up to a reasonable suspicion of criminal activity and, therefore, the investigatory detention was improper. Therefore, the trial court should have suppressed all evidence obtained from the illegal search as "fruit of the poisonous tree."

ARGUMENT

I. AN OFFICER'S BELIEF THAT THE SMELL COMING FROM INSIDE A STOPPED VEHICLE IS MARIJUANA IS NOT, BY ITSELF, SUFFICIENT TO ESTABLISH REASONABLE SUSPICION OF CRIMINAL ACTIVITY FOR AN INVESTIGATORY DETENTION.

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Riley v. California, 573 U.S. 373, 381 (2014). The questions addressed herein then are whether, in light of the changing legal landscape of federal and Florida cannabis law, it is unreasonable for law enforcement to seize a citizen based solely on what he perceives to be the odor of cannabis. For the reasons addressed below, Appellant submits it is.

A. Fourth Amendment and Reasonable Suspicion background

"[T]the Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures." Caldwell v. State, 41 So. 3d 188 (Fla. 2010), citing U.S. Const. amend. IV; art. I, § 12, Fla. Const. The Florida Constitution's guarantees against unreasonable searches and seizures "must be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme

Court." See also art. I, § 12, Fla. Const. "Any evidence obtained in violation of this right may not be used against the defendant if such items would be excluded pursuant to the rulings of the United States Supreme Court." Id., citing Hilton v. State, 961 So. 2d 284, 293 (Fla. 2007).

The Florida Supreme Court outlined the three levels of police encounters (consensual encounter, investigatory stop, and arrest) in Popple v. State, 626 So. 2d 185 (Fla. 1993). Citing to § 901.151, Fla. Stat. and Terry v. Ohio, 392 U.S. 1 (1968), the Court noted "a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime." Id. at 186. "In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop." Id., citing Carter v. State, 454 So. 2d 739 (Fla. 2d DCA 1984). "Reasonable suspicion is something less than probable cause, but more than an 'inchoate and unparticularized suspicion or hunch.'" Cresswell v. State, 564 So. 2d 480 (Fla. 1990). The detaining officer "must have a particularized and objective basis for suspecting the

particular person stopped of criminal activity." Id., quoting United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L.Ed. 2d 621 (1981). "The particularity requirement means that the officer's suspicion must be grounded in specific, articulable facts, while the objectivity requirement means that courts must 'view the facts and circumstances through the lens of a reasonable police officer giving due consideration to his or her training and experience.'" State v. Champers, 125 So. 3d 337 (Fla. 5th DCA 2013), quoting Price v. State, 120 So. 3d 198, 200 (Fla. 5th DCA 2013). Police must take into account the "totality of the circumstances" to provide the basis for suspecting a person of criminal activity. Cortez, 449 U.S. at 694.

B. Origins of "Plain Smell" doctrine

Law enforcement's reliance on senses has been upheld by the U.S. Supreme Court as sufficient probable cause to search in certain circumstances without a warrant. Terry, 392 U.S. at 27 (1968). The "plain view" doctrine enunciated in Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) permits law enforcement to seize evidence discovered in plain view if the initial intrusion is justified, either by warrant or an exception to the warrant

requirement, if the incriminating nature of the object is immediately apparent, and if the discovery of the object is inadvertent. In other words, if officers "lack probable cause to believe that an object in plain view is contraband without conducting further search of the object – i.e. if its incriminating character [is not] immediately apparent" the plain view doctrine does not apply. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (citation omitted). Federal courts have extended the "plain view" exception to "plain hearing" investigations in situations where law enforcement officers overhear statements in certain situations. United States v. Fisch, 474 F. 2d 1071, 1078-79 (9th Cir. 1973).

The jurisprudence of a "plain smell" exception is less clear, however. Interestingly, the High Court first addressed law enforcement's reliance on "distinctive odor" during the Prohibition era and the odor was that of whiskey, not cannabis. In Taylor v. United States, 286 U.S. 1 (1932), the Supreme Court noted that, although Prohibition officers may have relied on the distinctive odor of whiskey emanating from a garage adjacent to the petitioner's residence as support for the seizure of 122 cases of liquor, the officers violated the Fourth Amendment when it seized the cases

without a warrant. The Court noted the presence of the distinctive odor alone "does not strip the owner of a building of constitutional guarantees against unreasonable search," and, therefore, the Court reversed the denial of the suppression of the evidence. Id. at 6. The Court also applied this reasoning – that the odor alone (in this case, burning opium) did not provide a sufficient basis for an exception to the warrant requirement – in Johnson v. United States, 333 U.S. 10, 13, 17 (1948). [1]

Since then, the Supreme Court has not addressed the odor of contraband alone in determining the constitutionality of warrantless searches, although the issue has arisen in totality of the circumstances analyses. See United States v. Johns, 469 U.S. 478 (1985); Navarette v. California, 572 U.S. 393 (2014).

C. The expansion and adoption of "plain smell" by Florida courts, including the Fifth District

Florida's district courts of appeal have long held that the plain smell of marijuana justified both investigatory detention and search

[1] The Court cited Gouled v. United States, 255 U.S. 303, 304 (1921) which noted that the Fourth Amendment "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

of a vehicle. Most have held that smell alone is enough to allow for the detention and search. See, e.g., State v. Hill, 54 So. 3d. 530 (Fla. 5th DCA 2011); State v. Reed, 712 So. 2d 458 (Fla. 5th DCA 1998); Harvey v. State, 653 So. 2d 1146 (Fla. 5th DCA 1995). Many of these cases, however, specifically refer to the odor of "burnt" marijuana, which is presumably easier to identify and also raises the likelihood (at least at the time of the cases) that a crime had occurred or was occurring than is the odor of "raw" cannabis. See, e.g., State v. Williams, 967 So. 2d 941 (Fla. 1st DCA 2007); State v. Wells, 516 So. 2d 74 (Fla. 5th DCA 1987); State v. Jarrett, 530 So. 2d 1089 (Fla. 5th DCA 1988). Further, courts have also cautioned that a detention cannot exceed its scope and that reasonable suspicion based on the smell of marijuana is only valid if it is particularized to an individual. See, e.g., D.H. v. State, 121 So. 3d 76 (Fla. 3d DCA 2013); A.T. v. State, 93 So. 3d 1159 (Fla. 4th DCA 2012). The courts have recognized that mere suspicion of criminal activity does not justify an investigatory detention or search.

D. Extensive changes to Federal and Florida cannabis law

The past decade has seen an entire overhaul of cannabis law, both on the federal and state level. This development must alter how law enforcement considers the smell of marijuana during citizen encounters.

1. **Medical marijuana in Florida**

Since 2014, sweeping changes in the legality of medical marijuana have occurred in Florida, both via legislative means and Florida constitutional amendment. In 2014, the Compassionate Use Act was enacted by the Florida legislature and became law as § 381.986, Fla. Stat. Essentially, the law allowed for physicians to prescribe low-THC cannabis to certain chronically ill patients. It also excluded low-THC cannabis from the definition of prohibited cannabis, authorized certain university research on low-THC cannabis, and granted authority to dispensaries and medical centers to manufacture, possess and distribute low-THC cannabis with restrictions under statute. See also § 893.02(3), § 381.986(14)(i), Fla. Stat. In 2015, the legislature expanded the

availability of low-THC cannabis to all terminally ill patients. § 499.0295(2)(a), Fla. Stat.

Florida citizens overwhelmingly passed a constitutional amendment entitled "Use of Marijuana for Debilitating Medical Conditions" in 2016, which became enshrined in Florida's Constitution as article X, section 29. The amendment further expanded the number of Florida citizens entitled to lawfully possess and use medical marijuana under a doctor's care.

To align the legislation with the Florida Constitution, the Florida legislature then amended § 381.986(1)(k), Fla. Stat. in 2017 to expand the medical conditions covered as enunciated in the constitutional amendment which included those suffering from "chronic nonmalignant pain." This opened up the availability of medical marijuana to thousands more Florida citizens who suffer from a multitude of conditions. Johnson v. State, 275 So. 3d 800 (Fla. 1st DCA 2109). The Florida Legislature changed the medical marijuana statute to legalize the practice of smoking medical marijuana and as of July 1, 2019, patients can smoke medicinal marijuana. See § 381.986(1)(j), Fla. Stat. (2019).

2. **Federal and Florida hemp legislation**

Congress's passage of the 2018 Farm Bill excluded hemp from the definition of marijuana, and allowed for the nationwide cultivation, distribution and consumption of hemp and hemp products. 7 U.S.C. § 1639 et seq; 21 U.S.C. § 802(16)(B) (2018). The Act defines "hemp" as cannabis with a THC concentration under 0.3 per cent and "marijuana" – a schedule I controlled substance – is cannabis with a THC concentration over 0.3 per cent. This allowed for hemp to be used in a variety of products, including cosmetics, food products, fabric and much more.

Pursuant to the provisions of the federal Farm Bill, the Florida legislature enacted the Florida hemp statute in 2019. § 581.217, Fla. Stat. (2019). The statute designates hemp as an agricultural commodity and removes it from its list of controlled substances under certain conditions. Hemp and medical marijuana were also excluded from the definition of cannabis in § 893.02(3), Fla. Stat. The Florida Administrative Code was also amended to provide for the Industrial Hemp Pilot Project through the University of Florida. Fla. Admin. Code § 1004.4473 (2019). These changes have opened

up pathways for an entirely new industry and resulted in exponential growth in Florida hemp production.[2]

E. The odor of marijuana and hemp cannot be distinguished

It is widely accepted throughout the scientific and legal literature that marijuana and hemp – both products of the cannabis plant --- emit the same odor and cannot be distinguished.[3] The fact that hemp and marijuana smell the same "is understandable since they are the same plant and differ only in their THC content."

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[2] See Joint Brief of FACDL and Professor Catherine Arcabascio for a full review of Federal and Florida cannabis law.

[3] See Cynthia A. Sherwood et al., Even Dogs Can't Smell the Difference: The Death of "Plain Smell," As Hemp is Legalized, 55 Tenn. B.J. 14, 15 (Dec. 2019); Meghan Matt et al., Cannabis Law & Policy: In the Age of Decriminalization, is the Odor of Marijuana Alone Enough to Justify a Warrantless Search?, 47 S.U.L. Rev. 459 (Spring, 2020); Hatcher v. State, 342 So. 3d 807, 811 n. 1, J. Bilbrey, specially concurring (Fla. 1st DCA 2022) ("People smoke hemp for its purported ability to relieve stress or anxiety, but the fact that hemp is indistinguishable from marijuana has caused concern by law enforcement. *See* Sophie Quinton, *Cannabis Confusion Pushes States to Ban Smokable Hemp,* The Pew Charitable Trusts (Jan. 6, 2020), https://www.pewtrusts.org/en/reseach and analysis / blogs / stateline / 2020/01/06/ cannabis confusion pushed states to ban smokable hemp (last visited 01/02/2024)." See also Diego Elias, *The Florida Book: Note and Comment: Solving the Blurred Lines of Warrantless Searches: Marijuana Odor Alone as Probable Cause,* 47 Nova L. Rev. 57 (Fall, 2022) ("Low-THC cannabis and medical cannabis have a smell tantamount to that of hemp, making each of these types indistinguishable to an officer without supplementary query regarding the composition of the substance.")

Hatcher at 812. Because a potentially lawful activity cannot be the sole basis for detention based on reasonable suspicion of criminal activity, the "plain smell" of marijuana doctrine is no longer valid in Florida.

F. Reasonable suspicion in light of statutory changes

1. **Recent Florida case law**

Recent cases have addressed the plain smell doctrine in light of changes in cannabis regulation and legislation. In Johnson v. State, 275 So. 3d 800 (Fla. 1st DCA 2019), the First District rejected the appellant's argument that the odor of **burnt** marijuana no longer provided the basis for probable cause to search since medical marijuana was legalized in Florida pursuant to § 381.986, Fla. Stat. The court reasoned that (at that time) Florida's medical marijuana laws did not authorize smokeable marijuana, did not allow use in a vehicle (other than for low-THC cannabis), and that possession of marijuana remained a crime under federal law, citing 21 U.S.C. § 812 (c). Id. at 801. The court also noted the "practical and common-sensical standard" that is probable cause, holding that the mere possibility that a driver might be a medical marijuana user did not override the officer's conclusions. Id. at 802.

In yet another case dealing with **burnt** marijuana, the Second District Court of Appeal held an officer who smelled the odor of marijuana during a traffic stop had probable cause for a warrantless search, "even though the odor of cannabis was found to be indistinguishable from the odor of now legal hemp." Owens v. State, 317 So. 3d 1218 (Fla. 2d DCA 2021). The court cited an inapposite Ninth Circuit Court of Florida case, State v. Ruise, 28 Fla. L. Weekly Supp. 122 (Fla. 9th Cir. Ct. Mar. 20, 2020), in which the Second District noted that other facts contributed to the probable cause analysis, including the fact the officer was responding to a complaint of erratic driving and the defendant's odd responses to the officer's questions. Id. The Owens court did opine, however, that an occupant may have legitimate explanations "for the presence of the smell of *fresh* (not burnt or burning) marijuana in a vehicle", i.e. that it is legally prescribed or that it is hemp but stated that such would only provide an affirmative defense to a charge but would not prevent a search. Id. at 1219.

The First District relied on a totality of the circumstances analysis to determine probable cause for a search in Hatcher v. State, 342 So. 3d 807, 810 (Fla. 1st DCA 2022) of which only one

factor was the smell of marijuana, and declined to resolve whether the "smell of marijuana alone remains sufficient to establish probable cause." Id. at 810 However, Judge Bilbrey, in a specially concurring opinion, argued that changes in federal and Florida law have abrogated the reasoning in Johnson and urged the court "to consider receding from Johnson and Collie due to the statutory changes." Id. at 812. Judge Bilbrey relied on the First District's holding in Kilburn v. State, 297 So. 3d 671 (Fla. 1st DCA), discussed further infra, which held a potentially lawful activity (in that case carrying a concealed firearm with a valid license) cannot be the sole basis for a detention. Id. at 812, citing Kilburn at 675.

2. "Potentially lawful activity" cannot be sole basis for detention

As Judge Bilbrey submitted in his special concurrence in Hatcher, an officer cannot rely solely on facts that constitute potentially lawful activity to justify a search and/or seizure. Florida appellate courts have analyzed how an officer's observance of a potentially lawful activity plays into a reasonable suspicion analysis when determining the propriety of an investigatory detention primarily in the context of firearms possession but also in the context of potentially legal pills. If the reliance on potentially legal

conduct as the sole factor in cases involving sight is unreasonable, then reliance solely on potentially legal conduct involving smell as the sole factor is even more unreasonable, primarily because it so difficult to distinguish from legal conduct and cannot be verified or reviewed after the detention.

a. Burnett v. State

In Burnett v. State, 246 So. 3d 516 (Fla. 5th DCA 2018), this Court reviewed the trial court's denial of a dispositive motion to suppress a firearm that was seized pursuant to a Terry stop. The arresting officer testified that a restaurant employee had called in a tip that a customer appeared to have a gun in his waistband, although the tipster could not be certain what the item was. Id. at 517. Upon arrival at the scene, the officer observed the defendant having a "bulge" in his clothing which he believed to be a firearm. Id. Upon conducting a pat-down, the officer knew the bulge was a firearm but only later determined the defendant was a felon after the stop and frisk was complete, nor did he know if the defendant had a concealed firearms permit at the time of the frisk. Id.

This court reviewed the legality of the investigatory detention through the Florida courts' application of Terry v. Ohio, 392 U.S. 1

(1968) which held that in order to conduct an investigatory stop, law enforcement must have a reasonable suspicion that "criminal activity may be afoot." Id. at 517, quoting Terry at 30. The detention must be "temporary and reasonable under the circumstances," "based on 'specific and articulable facts'" and not on "'inchoate'" "'unparticularized' or "mere 'hunch.'" Id., quoting Terry at 21, 27, 30. Although viewing legal activity can be part of a reasonable suspicion analysis, it can only be part of the totality of the circumstances which give rise to reasonable suspicion of criminal activity. Id.

In reversing the lower court, this Court held "possession of a concealed firearm, without more, does not justify a *Terry* stop" relying on the reasoning of Regalado v. State, 25 So. 3d 600, 604 (Fla. 4th DCA 2009), Slydell v. State, 240 So. 3d 134 (Fla. 2d DCA 2018) and Mackey v. State, 124 So. 3d 176 (Fla. 2013).

In Regalado, the Fourth District held that concealed possession of a firearm – in that case the officers observed a bulge in the defendant's clothing which resembled a gun – without more, did not give rise to reasonable suspicion of criminal activity, thereby making an investigatory detention invalid. Regalado, 25 So 3d at

604, 606. Based on similar facts as Regalado, the Second District in Slydell, held that because the officers "did not observe any conduct that would constitute a crime or impending crime," nor did they know whether he was a felon or whether he had a concealed weapons permit just by observing him, the stop was unlawful. Slydell, 240 So. 3d at 136.

The Burnett court also found these cases consistent with Mackey and found the State's reliance on it misplaced because the reasonable suspicion in Mackey included other factors, including the fact the area the officer was patrolling was known for illegal firearms. Mackey, 124 So. 3d. at 179-184. The Burnett court found that "*Mackey* supports the proposition that, consistent with *Regalado* and *Slydell*, something more than suspicion of a concealed firearm is required to validate a *Terry* stop." Burnett, 246 So. 3d. at 518.

b. Kilburn v. State

Judge Bilbrey relied on Kilburn v. State, 297 So. 3d 671, 671 (Fla. 1st DCA 2020) in his specially concurring opinion. In Kilburn, after approaching the defendant to "give him a verbal warning about the [translucent] license plate cover the officer saw the "butt of a

handgun sticking out of the appellant's waistband." Id. The officer noted he had no reason to detain Kilburn other than his observance of what he believed to be a handgun. Id. at 672. At the suppression hearing, the officer:

> clearly stated that he had no other reason for seizing the appellant other than the fact that he was armed. The deputy did not articulate that any crime was afoot and stated he was not conducting an investigation. According to the deputy, his 'sole intent was . . . to have a little conversation about the translucent tag and just have a conversation about that."

Id. In reversing the denial of a motion to suppress, the court held "[a] potentially lawful activity cannot be the sole basis for a detention. If this were allowed, the Fourth Amendment would be eviscerated." Id. at 675. Notably, the court found significant in its analysis that

> [i]n Florida, 2,074,782 residents were licensed to carry concealed weapons as of January 31, 2020. This represents 13.11 per cent of Floridians over twenty-one years old. This number does not include those that do not need a license, such as law enforcement officers, and those who may carry under a different license, such as private investigators and security guards. Based on these numbers, approximately one out of every seven persons over the age of twenty-one may lawfully carry a concealed weapon in Florida. The thought that millions of people are subject to seizure by law enforcement until their licenses are verified is antithetical to our Fourth Amendment jurisprudence. . . . No court would allow law

> enforcement to stop any motorist in order to check for a valid driver's license.

Id.

c. Pill case trilogy

Three Florida district courts have declined to extend the plain view doctrine to the seizure of pills because the substance of the pills or whether the person had a valid prescription could not be immediately discerned. Gay v. State, 138 So. 3d 1106, 1109 (Fla. 2d DCA 2014); Smith v. State, 95 So. 3d 966, 969 (Fla. 1st DCA 2012); Sawyer v. State, 842 So. 2d 310, 312 (Fla. 5th DCA 2003). In Gay, not only was the seizure of the pills unlawful, but the investigatory detention was as well because the officer lacked reasonable suspicion of criminal activity since "the incriminating nature of the pills was not immediately apparent." Gay, 138 So. 3d at 1110.

As in the pill cases, reasonable suspicion of criminal activity would not exist based on plain smell alone, since the incriminating nature of the smell is not immediately apparent. Therefore, an investigatory detention based on smell alone would be improper.

It must also be noted that the Florida Prosecuting Attorneys Association's argument, as set forth in its amicus brief, that

medical marijuana continues to provide reasonable suspicion because it remains illegal under federal law is unpersuasive. (Amicus Curiae Brief of the Florida Prosecuting Attorneys Association in Support of the State of Florida, pp. 6-8). Generally, state law enforcement officials have no duty or authority to enforce federal criminal laws and to justify a detention on federal law would be improper. Under § 943.10, Fla. Stat., a Florida law enforcement officer's primary responsibility is "the enforcement of the penal, criminal, traffic, or highway laws of the state." In fact, state enforcement of federal law is not permitted unless specifically provided for by federal legislation. See Arizona v. United States, 567 U.S. 387 (2012). No such federal law exists permitting state law enforcement to do so here, and in light of the Presidential Proclamation, most recently updated on December 22, 2023, pardoning many federal and District of Columbia offenders for simple marijuana possession under federal law, it is unlikely the federal government will grant state law enforcement such authority[4]. As such, under Florida law, the potential presence of

[4] https://www.justice.gov/pardon/presidential-proclamation-marijuana-possession (last visited January 1, 2024).

medical marijuana does not provide reasonable suspicion for an investigatory detention for Florida law enforcement officers.

G. Stare Decisis and Chesterton's Fence

In the majority opinion in the instant case, Judge MacIver, although not deciding the issue directly, stated that Owens v. State, 317 So. 3d 1218 (Fla. 2d DCA 2021) "is the binding law for all circuit courts in Florida" citing Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992). However, this Fifth District has not directly decided the issue of whether the smell of marijuana (or more accurately cannabis) alone – the "plain smell" doctrine -- is all that is required after the sweeping changes in federal and state law. Because the basis of the earlier Fifth District cases adopting the "plain smell" doctrine is no longer valid, these earlier cases should no longer control. State v. Hill, 54 So. 3d 530, 531 (Fla. 5th DCA 2011); State v. Reed, 712 So. 2d 458 (Fla. 5th DCA 1998); Harvey v. State, 653 So. 2d 1146 (Fla. 5th DCA 1995); State v. T.T. , 594 So. 2d 839 (Fla. 5th DCA 1992); State v. Jarrett, 530 So. 2d 1089 (Fla. 5th DCA 1988); State v. Wells, 516 So. 2d 74 (Fla. 5th DCA 1987). At the time these cases were decided, "[t]he mere possession of marijuana [was] illegal." Wells, 516 So. 2d at 75. Such is no longer true.

As the Florida Supreme Court noted in State v. Sturdivant, 94 So. 3d 434 (Fla. 2012)

> When considering whether to recede from precedent, this Court has explained "The doctrine of stare decisis counsels us to follow our precedents unless there has been a significant change in circumstances after the adoption of the legal rule, or . . . an error in legal analysis." "Fidelity to precedent provides stability to the law and to the society governed by that law. However, the doctrine does not command blind allegiance to precedent. Stare decisis yields when an established rule of law has proven unacceptable or unworkable in practice."

Sturdivant, 94 So. 3d. at 440, internal citations omitted.

Later, in State v. Poole, 292 So. 3d 694 (Fla. 2020), the Supreme Court reasoned,

> In a case where we are bound by a higher legal authority – whether it be a constitutional provision, a statute, or a decision of the Supreme Court – our job is to apply that law correctly to the case before us. When we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield. . . But once we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason *why not* to recede from that precedent.

Poole, 292 So. 3d. at 712. In the instant case, the compelling Fourth Amendment implications weigh in favor of receding from previous Fifth District cases.

Indeed, although receding from precedent is a matter not to be taken lightly, the "Chesterton's fence" metaphor directs the Court to reconsider its prior rulings on this issue. As Justice Gorsuch waxed in his dissenting opinion in Artis v. District of Columbia, 138 S. Ct. 594 (2018):

> Chesterton[5] reminds us not to clear away a fence just because we cannot see its point. Even if a fence doesn't seem to have a reason, sometimes all that means is we need to look more carefully for the reason it was built in the first place. The same might be said about the law before us.

Artis, 138 S. Ct. at 608 (Gorsuch, J., dissenting). The principle Gorsuch referred to was propounded by G.K. Chesterton, an early 20th century English essayist and is thus:

> There exists . . . a certain institution or law, let us say, for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, "I don't see the use of this; let us clear it away." To which the more intelligent type of reformer will do well to answer: "If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you *do* see the use of it, I may allow you to destroy it."

Chesterton, The Thing 35 (1929).

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[5] Gilbert Keith Chesterton, The Thing 35 (1929).

Applying this "second-ordered thinking" to the matter before us, it is clear that the prior decisions holding that smell of "marijuana" alone justifies an investigatory detention and even search are no longer valid because the premise is no longer true. At the time of these decisions, "[t]he mere possession of marijuana [was] illegal." Wells, 516 So. 2d. at 75. Recent changes to federal and state cannabis law negate this reasoning.

The Florida Sheriffs Association's rationale for maintaining the status quo that, "[i]t is no exaggeration to suggest that criminal investigations would be crippled" (Brief of Amicus Curiae Florida Sheriffs Association In Support of the State of Florida, p. 5) suggests the ends (apprehending lawbreakers) justifies the means (violating their Fourth Amendment rights) and is unconvincing. As such, Chesterton's metaphorical fence should be cleared away in consideration of Fourth Amendment protections against unreasonable searches and seizures.

Furthermore, any reliance on the inter-district case, Owens, supra, is misguided as its reasoning was flawed.[6] As Judge Bilbrey

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[6] See Joint Brief of the Florida Association of Criminal Defense Lawyers and Professor Catherine Arcabascio As Amici Curiae

noted in his special concurrence in Hatcher, the Owens court followed Johnson, supra, which based its reasoning on a version of Florida and federal cannabis law that has since been abrogated. Hatcher, 342 So. 3d at 813-14. At the time of the Johnson decision, smokable medical marijuana was not legal (it is now), and medical marijuana could not be used in a motor vehicle (it can now). Moreover, the Owens court proposed that the legality of the substance "may provide an affirmative defense to a charge of a criminal offense, but it would not prevent the search." Owens, 317 So. 3d at 1220. As Judge Bilbrey noted, this reasoning is entirely false as it would require a defendant to prove that the substance is legal instead of requiring the state to prove all of the elements of the offense beyond a reasonable doubt. Hatcher, 342 So. 3d at 813. Such improper burden shifting cannot be the basis for an investigatory detention and search. Rather, an investigatory detention must always be based on "a well-founded, articulable suspicion of criminal activity." Terry, 392 U.S. at 186.

Supporting Appellant Jason Baxter pp. 25-27 for further discussion.

II. REASONABLE SUSPICION CAN BE ESTABLISHED UNDER A TRUE TOTALITY OF THE CIRCUMSTANCES TEST, WHICH INCLUDES THE SMELL OF CANNABIS, BUT WHICH IS MORE THAN JUST AN "ODOR PLUS" STANDARD.

A. U.S. Supreme Court

The Supreme Court discussed reasonable suspicion as being based on the totality of the circumstances in United States v. Cortez, 449 U.S. 411 (1981). Because "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity," police must take into account "the totality of the circumstances – the whole picture -- . . ." Id. at 694. The whole picture, then, must provide the officers with "a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. The Court said that this whole-picture analysis contains two elements:

> First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person.

Id. The Court noted that "[t]he process does not deal with hard certainties but with probabilities" and allows officers to formulate "commonsense conclusions about human behavior." Id.

The second part of the "whole picture" reasonable suspicion analysis is that the above data and inferences and deductions drawn from them "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." Id. Quoting Chief Justice Warren in Terry v. Ohio, the Court noted, "[this] demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence."* Id., citing Terry at 21, n. 18 (emphasis added in Cortez).

B. Florida Supreme Court

The Florida Supreme Court followed this reasoning and analysis in State v. Teamer, 151 So 3d 421 (Fla. 2014). In Teamer, an officer "ran" the license plate number of a *green* Chevrolet and discovered that number was actually assigned to a *blue* Chevrolet. Id. at 424. Based on this discrepancy (and nothing more), the officer stopped the vehicle. Id. During the stop, the officer "noticed a strong odor of marijuana emanating from the car" and then

proceeded to conduct a search of the vehicle, the driver and the passenger. Id.

In reversing the lower court's denial of a motion to suppress, the First District acknowledged that the discrepancy between a vehicle's plates and registration may legitimately raise a concern of criminal activity, but that concern must be weighed against Fourth Amendment protections. Id. As such, and citing cases in which the color discrepancy was one of *several* factors constituting reasonable suspicion, the First District held an investigatory detention could not be based on color discrepancy alone. Id. Although the Supreme Court has held that police can detain a person for investigative purposes "if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,'" an "'inchoate and unparticularized suspicion or hunch'" does not suffice. Id., quoting United States v. Sokolow, 490 U.S. 1, 7 (1989).

The Florida Supreme Court agreed with the First District, resolving inter-district conflict, and held the investigatory detention violated the Fourth Amendment. Id. at 430. In conducting its analysis, the Court said it "must balance the nature and quality of the intrusion required to stop an individual and investigate a color

discrepancy against the government's interest in finding stolen vehicles or enforcing vehicle registration laws." Id. at 428. The Teamer court found that no factors existed that would elevate the "mere hunch" to a "reasonable and articulable suspicion." Id. Although the color discrepancy "may" be a relevant factor, "standing alone, it does not justify" the investigatory detention. Id. at 429. The Court, thus, reversed the judgment and sentence and ordered Teamer to be discharged. Id. at 430.

Indeed, as in Teamer, basing a detention on the odor of cannabis alone would be nothing more than a "mere hunch" of illegal activity. The odor of cannabis can have entirely innocent causes, based on the legality of hemp and medical marijuana. Moreover, the officer cannot know the person directly related to the odor (was it from a previous passenger or driver?), the exact location of the odor (where exactly in the vehicle is the odor emitting?), the freshness of the odor (the odor can linger for days and only points to past use). In other words, the who, what, when, where, why and how questions of the odor cannot be definitively answered based on an officer's approach to a vehicle.

C. Florida District Court Application

This "whole picture" or totality of the circumstances analysis has also been applied in various other contexts, and the courts have cautioned against the reliance on a single, potentially innocuous factor in determining reasonable suspicion to allow for an investigatory detention. The Florida courts have held the smell of an alcoholic beverage emitting from the breath of a driver does not meet this standard. Santiago v. State, 133 So. 3d 1159 (Fla. 4th DCA 2014) ("This court and others have required more than the odor of alcohol to establish reasonable suspicion for an investigatory stop."). "Mere nervousness" does not constitute reasonable suspicion. Cowart-Darling v. State, 256 So. 3d 250, 252 (Fla. 1st DCA 2018); State v. Barnes, 979 So. 2d 991, 993 (Fla. 4th DCA 2008); Ray v. State, 849 So. 2d 1222 (Fla. 4th DCA 2003); Musallam v. State, 133 So, 3d 568 (Fla. 2d DCA 2014).

Courts in other jurisdictions have also applied the totality of the circumstances standard in light of recent cannabis legislation. State v. Li, 297 A. 3d 908 (R.I. 2023); State v. O'Brien, (N.H. 2023); State v. Burke, 2022-Ohio-2166 (Ohio 2d Court of Appeals 2022).

D. "Odor Plus"

Nevertheless, some Florida law enforcement agencies are employing an "odor plus" standard. In other words, if the officer smells cannabis, this standard allows for an investigatory detention, and potentially for a search, if the officer has detected one other factor beyond the smell of cannabis. This oversimplification does not comport with Fourth Amendment jurisprudence. Certainly, it does not consider the entire "whole picture" or totality of the circumstances. Based on this policy, an officer could stop a person based on the odor plus nervousness, odor plus bloodshot eyes, odor plus perception of lying. Although the officers need guidance, this "odor plus" policy is an overly simplistic approach to law enforcement procedure and does not meet constitutional standards. Instead, a true totality of the circumstances analysis is required. To hold otherwise and to guide law enforcement to merely find "something else" would be contrary to the Supreme Court's rejection of per se rules in Fourth Amendment seizure analyses. See G.M. v. State, 19 So. 3d 973, 979 (Fla. 2009).

Moreover, it is important to note that if a detention is for some legitimate reason, the detention may only continue just long enough to address that reason, unless reasonable suspicion based on additional articulable facts develops. Rodriguez v. United States, 135 S.Ct. 1609 (2015); State v. Diaz, 850 So. 2d 435 (Fla. 2003); Whitfield v. State, 33 So. 3d 787 (Fla. 5th DCA 2010). This begs the question, then, as to whether law enforcement may continue to detain and question a citizen on whether he or she has hemp or a medical marijuana card if reasonable suspicion of criminal activity has not developed from more than just the odor alone. Based on Rodriguez and Florida case law, the answer is no and this continued detention and questioning exceeds the original mission thereby making this additional information suppressible.

III. THE TOTALITY OF CIRCUMSTANCES DID NOT GIVE RISE TO REASONABLE SUSPICION THEREBY MAKING BAXTER'S INVESTIGATORY DETENTION UNLAWFUL.

A. Relevant Facts

At the motion to suppress hearing, Officer Accra's testimony and his body worn camera footage (BWC) established the relevant facts that led up to the investigatory detention.

1. **Officer Accra**

Accra testified that on August 26, 2021 he was on duty in Duval County, Florida wearing his "Class C" uniform, which "consists of tactical gear, tactical vest, black T-shirt and black BDU pants." (R. 37-38). At approximately 10:30 p.m., Accra saw a vehicle pull into the parking lot of a closed CVS which he thought was suspicious. (R. 48). Because Accra "thought something might be going on," he pulled into the parking lot and illuminated his blue lights on the police car. (R. 48-49). Neither the business nor a driver had called for assistance and there is no indication this was a high crime area. (R. 48). Accra said the reason he approached Baxter's vehicle "was from a well-being standpoint" and "to ensure property crimes" weren't being committed and that a burglary was not progressing. (R. 46). Accra said it is a common occurrence for cars to be parked outside a closed business. (R. 47). He parked catty-corner to Baxter's vehicle and illuminated his lights because the parking lot was not well lit and he wanted to be seen by other officers in the event "things go wrong" and so that Baxter would identify him as a law enforcement officer. (R. 49).

Although he said it was not in the body camera footage, Accra said he saw Baxter make an "overt to the back of the vehicle to place something there." (R. 47).[7] As Accra approached Baxter's vehicle, Baxter wound down the passenger side window to speak with Accra "at which point the aroma or odor of marijuana immediately hit [him]." (R. 47). According to Accra, the encounter changed from checking on Baxter's well-being to a criminal investigation, "the minute that the fresh smell of marijuana hit [his] nose." (R. 47).

2. **The body camera footage**

The BWC shows Accra approaching Baxter with emergency lights activated. While approaching, Baxter is alert, polite, cooperative. Accra said to Baxter, "What's up, my man?" after Baxter rolled down the passenger-side window. This was the point where Accra said the encounter turned into an investigatory

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[7] However, the record contains no evidence that Baxter's movements were in response to the police encounter. Accra had not announced his presence and Accra did not testify that Baxter was trying to conceal the item. In fact, the item was not concealed. Judge Kilbane cited to Hunter v. State, 32 So. 3d 170, 174-175 (Fla. 4th DCA 2010) which notes that the act of rummaging in one's pockets is not an act of concealment when it occurred prior to the officers' announcing their presence.

detention. Baxter responded that he was waiting for his friend to get off work and Accra asked Baxter for his driver's license/ID and Baxter complied without hesitation or incident. Some dialogue ensued about Baxter checking on his tires and the location of his friend and his plans. Baxter answered all of Accra's questions, complied with his directives, was polite, not hostile or aggressive. Accra told Baxter to "just stand by" because he was going to "check everything out and get the tag on your car, make sure it is good."

Accra took Baxter's ID and went to his police vehicle. He was speaking on his radio to (presumably) another officer, who (it appears) was on scene and behind Accra's vehicle. He told the other officer Baxter's "story is kind of doodoo" and that he smelled fresh marijuana. Another police vehicle is also shown on the BWC in front of Accra's vehicle. As Accra returned to Baxter's car, the BWC shows Baxter being handcuffed, hands up, body against the vehicle, questioned, and patted down. He was ordered to sit in the backseat of the police vehicle. At no point on the BWC does it show Baxter being given Miranda warnings. Only at this point was Baxter asked if he had a marijuana card or hemp.

B. Initial Detention

At the outset, Appellant reiterates his original argument that he was seized at the time Accra illuminated his blue lights and parked catty-corner to Baxter's vehicle. Here, the majority concedes that the activation of police lights is one important factor, citing, G.M. v. State, supra at 979, but that "there is nothing in the record indicating any heightened show of force or authority on the part of Accra that would have made a reasonable person feel that they could not terminate the encounter." Appellant submits this is a misreading of G.M.

In fact, G.M., supports a finding that Baxter was seized when Accra activated his lights, got out of his vehicle, and approached Baxter but before Baxter rolled down his passenger-side window. In G.M., two officers had been watching individuals at a public park known for narcotics activity. Id. at 974. The individuals were not observed in any criminal behavior but the officers said the individuals were not engaged in "traditional" park activities, and had been going in and out of two parked cars. Id. The officers activated the police vehicle's emergency lights and drove across the street to approach the group. Id. The officers parked about three

feet behind the parked cars and exited the vehicle. Id. As one of the officers approached, he smelled an odor of marijuana emanating from the car and then he looked in the window and saw a substance that appeared to be marijuana. Id. After the officer identified himself as such, the individual placed the marijuana in his mouth but was ordered to surrender the substance and he complied. Id.

In denying a motion to suppress, the trial court ruled that the interaction between the officers and the individuals was a consensual encounter and that reasonable suspicion was not required. Id. at 975. The Third District affirmed, finding no seizure occurred until after the officers smelled marijuana emanating from the vehicle in which the defendant was seated. Id. The Third District found the defendant "did not see the emergency lights and was not aware of the presence of the officers until Officer Smith was at the window directly outside" the vehicle where he was seated. Id. As such, the Third District found the activation of the police lights was not a factor to be considered in the Fourth Amendment analysis. Id.

The Florida Supreme Court, however, approved "the result, but not the reasoning, of the Third District Court of Appeal that the seizure of G.M. under the circumstances here did not violate the Fourth Amendment to the United States Constitution." Id. at 982. The Court said

> Despite our approval of the Third District's conclusion with regard to the general inappropriateness of per se rules in the Fourth Amendment analysis context, we cannot agree with its further conclusion that, even if G.M. had been aware of the emergency lights, a seizure would not have occurred under the totality of the circumstances here. The record reflects that the officers rapidly crossed the public street in their vehicle with emergency lights activated, entered the park, and positioned the police vehicle behind the two parked cars around which the individuals were congregating. There is absolutely no indication that the officers believed the individuals to be in need of aid, and the individuals certainly did not exhibit conduct to indicate that they sought police assistance. . .
>
> It strains the bounds of reason to conclude that under these circumstances, a reasonable person would believe that he or she was free to end the encounter with police and simply leave. Moreover, it would be both dangerous and irresponsible for this Court to advise Florida citizens that they should feel free to simply ignore the officers, walk away, and refuse to interact with these officers under such circumstances. Instead, as a matter of safety to both the public *and* law enforcement officers, we conclude that a citizen who is aware of the police presence under the specific facts presented by this case is seized for Fourth Amendment purposes and should *not*

> attempt to walk away from the police or refuse to comply with lawful instructions.

Id. The Court's rationale for affirming, however, was based solely on the fact G.M. "was not aware of the emergency lights or the police presence until the officer was at the window" because his head was down rolling a "blunt" and he was not positioned to see the officer. Id. Indeed, the Court was clear that had G.M. seen the activated lights on the police car he would have been seized for Fourth Amendment purposes. Id.

The Court cited to cases which held that "the display of police authority be the cause of or produce the submission before it can be said that a seizure has occurred." California v. Hodari D., 499 U.S. 621, 626 (1991) ("[a]n arrest requires *either* physical force . . . *or*, where that is absent, submission to the assertion of authority." (emphasis in original); Yam Sang Kwai v. INS, 411 F. 2d 683, 684 (D.C. Cir. 1969). In the instant case, there is no question that the display of police authority (by the activated lights and the position of the vehicle) is what caused Baxter to roll down his window and respond to Accra's greeting of "What's up, my man?" with "How ya

doing?" The position of the police vehicle here (catty corner, in front) exhibited even more authority than in G.M. (behind).

As in G.M., it would strain the "bounds of reason" to expect that Baxter felt he was free to leave, but doing so would have been both "dangerous and irresponsible." As the G.M. Court said, leaving could pose a danger to both the public and law enforcement officers. A citizen who is aware of police presence in such circumstances "is seized for Fourth Amendment purposes and should *not* attempt to walk away from the police or refuse to comply with lawful instructions." Id. at 982. See § 316.072, Fla. Stat., § 316.126, Fla. Stat., and § 316.1935, Fla. Stat. which mandate submission to police authority in certain instances. In fact, § 316.1935(1), Fla. Stat. provides that had Baxter attempted to leave, he could have been charged with a felony. See also Torres v. Madrid, 141 S. Ct. 989 (2021) (Roberts, J. in majority opinion discusses English common law as recognizing "arrest without touching through a submission to a show of authority" citing Horner v. Battyn, Bull. N. P. 62 (K. B. 1738), reprinted in W. Loyd, Cases on Civil Procedure 798 (1916).

Therefore, at the time Baxter was seized, the officers lacked reasonable suspicion of criminal activity. Other than the fact that Baxter was parked outside a closed store, Accra could not point to any suspicious activity to justify the detention. See Jordan v. State, 707 So. 2d 338, 339 (Fla. 2d DCA 1998); Bowen v. State, 685 So. 2d 942 (Fla. 5th DCA 1996). Accra admitted he was patrolling for "suspicious" behavior and was not concerned about Baxter's well-being, and no call for assistance had been made. Because the investigatory detention and seizure from the time the police lights were activated was not based on reasonable suspicion, the subsequent search was unlawful and the trial court erred in denying the motion to suppress.

C. The Continuing Detention

If this Court declines to find Baxter was seized at the time Accra activated his police lights and set out to approach Baxter, but before Baxter rolled down the passenger-side window, the subsequent detention was, nevertheless, unlawful because it was not based on reasonable suspicion.

As Judge Kilbane notes, "the majority finds that Accra developed reasonable suspicion based on a totality of the

circumstances that could have only included: Baxter being parked in front of a closed business, placing a backpack in the backseat, giving 'inconsistent' answers, and the smell of fresh marijuana." Judge Kilbane noted "[w]ithout the smell of fresh marijuana, there is little doubt that the remaining circumstances would be insufficient to provide a basis for reasonable suspicion. The degree of suspicion that attaches to these behaviors is just too insignificant."

As Accra stated, it is not unusual for people to be parked outside a closed business and such is not enough to detain. Jordan, Bowen supra. See also Baker v. State, 754 So. 2d 154 (Fla. 5th DCA 2000); Jauden v. State, 749 So. 2d 548, 549-50 (Fla. 2d DCA 2000). Nothing in the record would support a finding that the placing of the backpack in the backseat was to conceal the article. See Smith v. State, 592 So. 2d 1206, 1207-08 (Fla. 2d DCA 1992). The alleged "inconsistent" answers were not truly inconsistent and Accra's conclusions were presumptuous. See Perkins, 348 F. 3d 965, 968, 971.

The totality of these circumstances, therefore, do not show a "particularized and objective basis for reasonable suspicion that a

crime was being committed." Price v. State, 120 So. 3d 198 (Fla. 5th DCA 2013). These circumstances amount to nothing more than a "mere hunch." Id. at 199, quoting United States v. Arizona, 534 U.S. 266, 273 (2002). The innocuous behavior plus the alleged odor of "marijuana" here do not add up to reasonable, articulable suspicion but are based on bare intuition."

The mere hunch about a property crime was not confirmed by Accra's encounter with Baxter, Baxter did not appear impaired in any way, and Accra did not suspect Baxter of selling narcotics. It is clear that Accra's only suspicion related to the possession of "marijuana" and this potentially lawful activity does not amount to reasonable suspicion.

As such, even with the alleged odor of cannabis, the detention and subsequent search in this case were based on nothing more than a 'mere hunch' and did not meet constitutional standards.

Therefore, the Judgment and Sentence should be reversed.

CONCLUSION

For the reasons outlined above, this Court should hold that the recent changes to federal and Florida law require it to recede from earlier decisions that held the "plain smell" of "marijuana" was sufficient to establish reasonable suspicion for an investigatory detention. Applying the "totality of the circumstances" standard, the officer in this case did not have reasonable suspicion to initiate an investigatory detention.

Therefore, the trial court should have suppressed all evidence obtained from the unlawful search and seizure as fruit of the poisonous tree. Because the Motion to Suppress was dispositive, Appellant respectfully requests this Honorable Court reverse the Judgment and Sentence.

Respectfully submitted,

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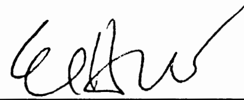
CERTIFICATE OF SERVICE

I certify that a copy of this brief was served, via the Florida Courts E-Filing Portal, on the Office of the Attorney General, at crimapptlh@myfloridalegal.com, this 2 day January, 2024.



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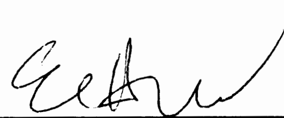
CERTIFICATE OF COMPLIANCE

I certify that this brief is in conformity with all font and word count provisions pursuant to Rule 9.045, Fla. R. App. P. and complies with Rule 9.100, Fla. R. App. P.



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