CASE NO. 5D23-118

IN THE
DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JASON HASSAN BAXTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

APPELLEE'S SUPPLEMENTAL BRIEF

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SUMMARY OF ARGUMENT

At the outset, though the issues presented in this case will eventually need to be addressed, this case is an exceedingly poor vehicle for resolving whether the smell of marijuana alone constitutes reasonable suspicion for a brief investigatory stop. Whether the odor of marijuana and hemp are distinguishable is a fact question that falls outside the ken of the average layperson, and thus is a proper subject of expert testimony. Yet Appellant did not present an expert below; indeed, he did not even raise this argument as a basis for suppression. The record is thus woefully underdeveloped for en banc resolution of the lead issue this Court has flagged for consideration. The Court may therefore wish to reconsider its decision to hear this case en banc, or at a minimum not decide the first question presented in its November 16 briefing order.

If it reaches the merits, the Court should affirm. At issue here is not the legality of Appellant's full-scale arrest by police, but of the less intrusive *Terry* stop that preceded that arrest, done for the purpose of dispelling the officer's suspicion that Appellant was committing a crime. The officer therefore did not need to possess probable cause—itself a low bar—but only reasonable suspicion that

crime was afoot. Although hemp has been legalized, the smell of marijuana continues to provide reasonable suspicion. An officer who smells marijuana has a particularized and objective basis for believing that contraband is present. Reasonable suspicion is frequently based on conduct that could be innocent.

At the very least, the smell of marijuana continues to be a part of the totality of the circumstances analysis. The test requires courts to consider all of the circumstances, including facts that only suggest the existence of illegal conduct. Excising potentially innocent conduct from the test is improper.

Under the totality of the circumstances in this case, Officer Accra had reasonable suspicion to stop Appellant. Here, the officer came upon Appellant in a car parked at a closed business late at night; Appellant placed a backpack in the back of the car after the officer pulled up; Appellant's story was suspicious; and the officer smelled marijuana. That more than justified a brief stop.

If this Court finds that there was no reasonable suspicion, it should still affirm because there was no basis to suppress the evidence. Officer Accra was relying on longstanding binding precedent.

ARGUMENT

ISSUE: WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS

Standard of Review

In reviewing a trial court's ruling on a motion to suppress, deference is given to the findings of facts supported by competent substantial evidence. *Channell v. State*, 257 So. 3d 1228, 1232 (Fla. 1st DCA 2018). The Court reviews de novo the application of law to those facts. *Id*. The trial court's ruling is presumed correct, and the Court interprets the evidence and reasonable inferences derived therefrom in a manner most favorable to sustaining the trial court's ruling. *Id*.

Law and Argument on the Merits

I. Whether an officer's belief that the smell coming from inside a stopped vehicle is marijuana is by itself enough to establish reasonable suspicion of criminal activity for an investigatory detention despite Florida laws allowing for the possession and use of hemp, the smell of which is indistinguishable from marijuana?

A. This Case is a Poor Vehicle for Determining the Continuing Validity of the "Plain Smell" Doctrine

The record in this case is insufficient for this Court to determine that the smell of marijuana alone can never be reasonable suspicion. The idea that the legalization of hemp would affect the "plain smell"

doctrine is premised on the idea that a person cannot distinguish between the two substances. However, there is no evidence in the record that they have the same smell.[1]

Appellant did not raise this issue in the lower court. (R. 17-19). Appellant's motion to suppress does not mention hemp. (R. 17-19). Appellant's motion only argued that the stop was illegal because he was seized when Officer Accra turned on his lights. (R. 17-19).

During the short[2] hearing on the motion to suppress, the State had Officer Accra testify about the stop. (R. 36-50). Officer Accra testified that he smelled marijuana but neither the State nor the Defense asked whether he could tell the difference between marijuana and hemp or elicited any testimony about any special training or experience that he possessed. (R. 36-50). This lack of testimony makes sense: because Appellant never raised any issue about the smell of marijuana, the State never had notice that it needed to provide any testimony about that issue.

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[1] Several amici make the claim that they have identical smells but none of them cite any scientific evidence for this proposition.

[2] The transcript of the entire suppression hearing only covers thirty-three pages of the record. (R. 36-69).

That alone renders this case an inappropriate vehicle for deciding the continued relevance of the smell of marijuana to the reasonable-suspicion analysis, let alone for resolution of that question by the en banc Court. In its November 16 en banc briefing order, the Court suggested that "the smell [of hemp] is indistinguishable from marijuana." But whether hemp's odor is indistinguishable from marijuana is a matter of "scientific, technical, or other specialized knowledge," and the question therefore requires opinion testimony. § 90.702, Fla. Stat. A fact question calls for an expert opinion where it is "beyond the common understanding of the average layman." *Buchman v. Seaboard Coast Line R. Co.*, 381 So. 2d 229, 230 (Fla. 1980). Here, the average layperson is highly unlikely to know whether hemp and marijuana smell the same. Both substances had long been banned in Florida and elsewhere, and thus most people—even those who are familiar with one or another of the substances—would not be qualified to discuss their comparative smells. Yet this record contains no expert testimony concerning that fact.

Had Appellant wished to offer the opinion of an expert tending to show that the smells were indistinguishable, he could have done

so at the suppression hearing. The parties might also have offered testimony concerning other facts pertinent to the inquiry, like how often an officer believes that a substance is marijuana based on its smell but is later proven incorrect by laboratory or other testing; or how common it is for people to transport hemp by car in the manner done here; or how often hemp is lawfully possessed by members of the community. *See, e.g.*, FPAA Br. 14 (explaining that it is unlikely hemp would be transported in a backpack in a car). Any of those facts could bear on the likelihood that what the officer smelled was illegal marijuana or legal hemp. After a hearing, the trial court then could have issued findings of fact to aid this Court in resolving the legal questions here. But Appellant opted not to do any of that. As a result, the factual premise of the Court's en banc briefing order has not been subjected to the ordinary adversarial testing that lends itself to sound decision-making, and other potentially significant facts are missing from this record. The panel majority was thus quite right not to attempt to resolve the question on this record. (Op. at 7-8.)

Further, the State is not aware of any scientific evidence demonstrating that hemp and marijuana have indistinguishable smells. Admittedly some courts have proceeded under the

assumption that these two substances smell the same. *See e.g., Hatcher v. State*, 342 So. 3d 807, 811 (Fla. 1st DCA 2022) (Bilbrey, J. concurring). However, none of these courts rely on scientific evidence. The dissent points to testimony from a police officer in a different case; a Department of Agriculture PowerPoint for law enforcement; and Tennessee Bar Journal article written by three attorneys who appear to have no significant background in science. (Op. at 18).

The only source that even attempts to explain the underlying basis for its conclusion that these two substances smell the same is the article in the Tennessee Bar Journal. However, it provides no citations to scientific sources[3] in the section dealing with the odor of cannabis. Worse, there are absolutely no citations for its ultimate conclusions that the odors are indistinguishable. None of these sources provides a compelling scientific basis for concluding that these two substances smell the same.

[3] The article relies on posts from the following websites: terpenesandtesting.com; bluebirdbotanicals.com; cannibigold.pl; and analyticalcannibis.com. The State does not consider these to be reliable and unbiased sources for scientific information.

This Court should not make a sweeping change to the law based on this limited and unreliable evidence. It is entirely within the realm of possibility that, while a rookie patrol officer may not be able to discern a difference, an experienced narcotics officer may be able to. Sommeliers are often capable of discerning flavors and aromas from wines that novice wine drinkers cannot.

Moreover, the question of whether the smell of marijuana alone continues to provide reasonable suspicion is not before this court. The question before this court is whether the totality of the circumstances warranted reasonable suspicion. This court does not need to decide whether the smell of marijuana alone continues to provide probable cause or reasonable suspicion because there was reasonable suspicion based on the totality of the circumstances. (Op. at 8). Because an opinion on whether the odor alone is enough is not necessary in this case, any such opinion would be dicta.

The Florida Supreme Court's decision in *Mackey v. State*, is instructive. 124 So. 3d 176, 185 (Fla. 2013). In *Mackey*, an officer searched a defendant based on three factors: (1) the apparent presence of a concealed firearm; (2) the defendant's lie about the presence of the firearm; and (3) the defendant's presence in a high

crime area. *Id*. at 179. The Third District Court of Appeal found that the officer had reasonable suspicion based solely on the fact that he believed the defendant was concealing a firearm. *Id*. at 181. On review, the Florida Supreme Court declined to decide whether that alone was sufficient for reasonable suspicion. *Id*. at 185. Instead, the Court analyzed the totality of the circumstances and found that the officer had reasonable suspicion without opining on whether a single factor could have provided enough suspicion. *Id*. As in *Mackey*, because the instant case involves multiple circumstances, there is no reason to opine on the weight that should be afforded to a single factor in isolation.

In short, the en banc Court should decline to resolve this issue on an undeveloped record in a case where it is not dispositive to the outcome.

B. *The Smell of Marijuana Continues to Provide Reasonable Suspicion*

The smell of marijuana has historically been sufficient not only for reasonable suspicion but also for probable cause. The changing landscape surrounding the legal status of marijuana and hemp does not mean that the smell of marijuana can no longer provide

reasonable suspicion. At best, these developments mean that the smell of marijuana no longer provides an officer with near certainty that criminal activity occurred or is occurring. But the smell continues to provide more than "a mere hunch" that criminal activity is occurring. *See United States v. Arvizu*, 534 U.S. 266, 274 (Fla. 2002) (explaining that reasonable suspicion requires something more than a mere hunch). Accordingly, in most cases[4] the smell of marijuana alone will continue to provide reasonable suspicion and will warrant a brief investigatory detention of a person to dispel that suspicion.

Before 1982, Florida courts were free to impose greater restrictions on searches and seizures than the United States Supreme Court. *Bernie v. State*, 524 So. 2d 988, 990 (Fla. 1988). However, in 1982 Florida's citizens amended the Florida Constitution to add a conformity clause to Article I, section 12. *Id.* Now Florida

[4] The State would concede that it is possible that other factors present at the time of the smell could quickly dispel the reasonable suspicion from the odor. *See, e.g., Kansas v. Glover*, 140 S.Ct. 1183, 1191 (2020) (noting that in some cases the addition of certain facts could dispel reasonable suspicion). For example, if an officer smelled marijuana on a person who was leaving a medical marijuana dispensary and who displayed a valid medical marijuana card, suspicion from the smell alone would quickly be dispelled.

courts must decide search and seizure issues in conformity with decisions of the United States Supreme Court. Fla. Const. Art. I, sec. 12. Thus, the Supreme Court's interpretation of the Fourth Amendment is both "the floor and the ceiling" for protection from unreasonable searches and seizures in Florida. *See Zack v. State*, 371 So. 3d 335, 348 (Fla. 2023).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, and effects, against *unreasonable* searches and seizures." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (emphasis added). "[T]he underlying command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). An investigatory detention requires reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993).

Reasonable suspicion is not a high bar. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989). It is "considerably less than proof of wrongdoing by a preponderance of the evidence." *Id.* The Fourth Amendment only requires "'some minimal level of objective justification' for making the stop." *Id.* (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984)). Reasonable suspicion exists if there is "some

objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981). Put differently, "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 417-18.

To determine whether reasonable suspicion existed, a reviewing court must consider "the totality of the circumstances—the whole picture." *Id.* This analysis should involve "consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Id.* at 418. Law enforcement officers are permitted to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002). The Supreme Court has explained that:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Cortez, 449 U.S. 411, 418 (1981); *see also Texas v. Brown*, 460 U.S. 730, 746 (1983) (Powell J., concurring in the judgment) ("[W]e have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person.").

Historically, under the "plain smell" doctrine, the smell of marijuana has provided not just reasonable suspicion but probable cause. *See, e.g., State v. Burnett*, 481 So. 2d. 971, 972 (Fla. 5th DCA 1986). The plain smell doctrine is sometimes called a logical extension of the plain view doctrine. *See United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006). The plain smell doctrine allows law enforcement to use their sense of smell to gather information that can be used to justify a search. *Burnett*, 481 So. 2d at 972.

Despite the legalization of hemp, the smell of marijuana continues to provide some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *See United States v. Cortez*, 449 U.S. 411, 417 (1981) (defining "reasonable suspicion"). Assuming, arguendo[5], that marijuana and hemp smell

[5] *See* discussion of the record in this case, *supra* pp 4-6.

the same, when an officer smells that odor he is smelling a substance that could be contraband or could not be contraband. The fact that it could be contraband is a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417-18 (providing another definition of reasonable suspicion).

Appellant argued that this Court should recede from the "plain smell" doctrine because the smell of marijuana is no longer conclusive evidence of criminal activity. Even if there is a 50-50 chance that when an officer smells marijuana, he is actually smelling hemp, the fifty percent likelihood that its marijuana is more than sufficient to establish reasonable suspicion. Reasonable suspicion is "*considerably less* than proof of wrongdoing by a preponderance of the evidence." *Sokolow*, 490 U.S. at 7 (emphasis added). Simply because there is chance that the officer is incorrect about the presence of contraband does not mean that his suspicion is not reasonable. *See Kansas v. Glover*, 140 S.Ct 1183, 1188 (2020) ("[t]o be reasonable is not to be perfect,") (quoting *Heien v. North Carolina*, 574 U.S. 54, 60 (2014)). That follows from the nature of an investigatory stop, which is less intrusive than a full-scale arrest and

involves "only a brief detention," *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), designed to "confirm or dispel [the officer's] suspicions quickly." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Because the intrusion on a person's liberty is less severe, the degree of individualized suspicion necessary to justify an investigatory stop is correspondingly lesser as well. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 707-10 (1983).

The mistake doctrine provides further support for the argument that the smell of marijuana continues to provide reasonable suspicion. "[T]he Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Heien v. North Carolina*, 574 U.S. 54, 61 (2014) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). A search based on a reasonable mistake of fact does not offend the Fourth Amendment. *Id.* If an officer obtains consent to search from a person he reasonably believes has authority to give consent, the search does not become illegal simply because he was wrong. *See Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990). The same logic applies here. When an officer smells the odor of cannabis, he could reasonably believe that he is smelling illegal marijuana. The

fact that he may be factually incorrect does not offend the Fourth Amendment. *Heien*, 574 U.S. at 61; *see also Gowen v. State*, 860 S.E.2d 828, 832-33 (Ga. Ct. App. 2021) (McFadden, C.J., concurring) ("At most, [defendant's] assertion about the similarity of the smells of hemp and marijuana calls into question the reasonableness of the officer's belief that he smelled burnt marijuana. Assuming for purposes of this appeal that [defendant's] assertion is correct … the officer could have reasonably, but mistakenly, believed that he smelled burnt marijuana; the smell could have been hemp but it also could have been marijuana since, according to [defendant], they smell the same.").

C. *Potentially lawful conduct can provide reasonable suspicion*

Some Florida courts have claimed that "[a] potentially lawful activity cannot be the sole basis for a detention." *See Kilburn v. State*, 297 So. 3d 671, 675 (Fla. 1st DCA 2020). The "potentially lawful activity" doctrine not only lacks any basis in Supreme Court precedent but actively contradicts it. In the original reasonable suspicion case, *Terry v. Ohio*, a law enforcement officer observed two men repeatedly walk past a storefront and peer inside at two o'clock

on a Thursday afternoon. 392 U.S. 1, 6 (1968). These two men eventually met up with a third man. *Id.* The Supreme Court determined that the officer had reasonable suspicion to stop the three men.

Clearly, then, lawful conduct can provide reasonable suspicion.[6] Window shopping is not illegal. It is conduct engaged in by millions of Americans every year. In fact, the justification for large window displays is to encourage window shopping.

In the years since *Terry*, the Supreme Court has continued to explain that innocent conduct can be the basis for reasonable suspicion and probable cause. In *United States v. Sokolow*, the Supreme Court found reasonable suspicion to stop an airline passenger. 490 U.S. 1, 3-4 (1989). At the time of the stop, the officers knew that:

> (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed;

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[6] *Kilburn* suggests that basing reasonable suspicion on potentially lawful activity would "eviscerate" the Fourth Amendment. If so, then the Supreme Court eviscerated the Fourth Amendment nearly sixty years ago when they decided *Terry v. Ohio*. Florida's citizens then decided to adopt this "eviscerated" right when they adopted the conformity clause.

> (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.

Id. While suspicious, none of these factors involves unlawful conduct. In fact, they are "quite consistent with innocent travel." *Id.* at 9.

In *Illinois v. Wardlow*, the Supreme Court reversed the Illinois Supreme Court's ruling that there was no reasonable suspicion. 528 U.S. 119, 123 (2000). Law enforcement officers were in a high crime area and noticed an individual fleeing the area. *Id.* at 122. At the time of the stop officers only knew two facts: (1) the individual was present in a high crime area and (2) that he fled when police showed up. *Id.* at 124. Neither being present in a high crime area nor leaving an area when police show up is unlawful. *Id.* at 124-25. The Supreme Court explicitly rejected the argument that there can be no reasonable suspicion because there are potentially innocent justifications for leaving the area when police arrive. *Id.* at 125.

Two years later, in a unanimous opinion, the Supreme Court was again forced to reverse a lower court's incorrect reasonable suspicion analysis. *United States v. Arvizu*, 534 U.S. 266, 268 (2002).

A Border Patrol agent stopped a vehicle he believed was engaged in smuggling or drug trafficking. At the time of the stop the officer knew the following facts:

> (1) A minivan was traveling on a rarely used unpaved road during a border patrol shift change; (2) the road was used by smugglers; (3) minivans were used by smugglers; (4) when the minivan passed by the agent's car, the driver did not look at the agent and seemed to be "trying to pretend that [the agent] was not there;" (5) the knees of two children sitting in the backseat were unsually high; (6) the children began waving in an unusual manner; (7) the driver turned on a turn signal; turned it off; and then turned it back on again; and (8) the minivan was registered to an address in a location "notorious for smuggling."

Id. at 269-70. None of these facts involves unlawful activity. *Id*. at 277 ("Undoubtedly, each of these factors alone is susceptible of innocent explanation"). In fact, the defendant argued that these facts are consistent with a family picnic. The Supreme Court rejected this argument noting that "[a] determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct."

The Supreme Court recently reiterated this concept in *Kansas v. Glover*, 140 S.Ct 1183 (2020). In *Glover*, a law enforcement officer ran the plates of a car driving by and saw that the owner's license had been revoked. *Id*. at 1187. The officer assumed that the owner

was driving and pulled the car over. *Id.* At the time of the stop, the officer did not know who was driving. The officer only knew that the owner's license had been suspended. There is no law against driving a car that is owned by a person with a suspended license. Yet this was sufficient for reasonable suspicion. *Id.* at 1188.

The fact that reasonable suspicion is often based on legal conduct makes intuitive sense. If officers were required to witness illegal conduct before detaining an individual, reasonable suspicion would cease to be any different than probable cause. Once an officer witnessed illegal conduct, he would have both reasonable suspicion and probable cause that a crime was occurring or had occurred. Probabilities would never come into play. Law enforcement would only be able to act when they definitely knew that criminal activity was occurring.

D. ***Handguns are not contraband. Thus, the body of caselaw finding that a concealed handgun alone does not provide reasonable suspicion is not applicable to marijuana.***

Florida courts have found that merely seeing a concealed handgun does not rise to the level of reasonable suspicion. *See Burnett v. State*, 246 So. 3d 516, 518 (Fla. 5th DCA 2018); *Kilburn v.*

State, 297 So. 3d 671, (Fla. 1st DCA 2020); *Regalado v. State*, 25 So. 3d 600, 607 (Fla. 4th DCA 2009); *Slydell v. State*, 240 So. 3d 134, 136 (Fla. 2d DCA 2018). These cases do not mandate a reassessment of the plain smell doctrine as they are distinguishable.

Possession of a handgun by itself in no way suggests that a person is committing a crime. Handguns are not contraband. They may be lawfully possessed. Merely seeing a concealed firearm does not provide any basis to assume that a person is committing an offense. This analysis would be different, however, if a handgun could be reasonably confused with something that was contraband.

In contrast, marijuana is contraband. When an officer smells the odor of cannabis, he may be smelling contraband. He is thus justified in believing that contraband may be present. This belief—even though it may end up incorrect—provides an officer with a reasonable basis for believing that criminal activity is occurring.

At least one amicus brief suggests that handguns are comparable to medical marijuana. FACDL Brief at 10 and 13. This comparison fails to account for the fact that marijuana remains illegal in all forms under federal law. As one court put it, "[i]t is indisputable that state medical-marijuana laws do not, and cannot,

supersede federal laws that criminalize the possession of marijuana." *United States v. Hicks*, 722 F.Supp.2d 829, 833 (E.D. Mich. 2010). "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 454 U.S. 1, 29 (2005). Regardless of how the Florida Legislature has treated medical marijuana, it continues to remain illegal under federal law. *Id.* at 27 ("The CSA designates marijuana as contraband for any purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.") (emphasis in original).

Thus, the comparison between a firearm and medical marijuana misses the mark. Marijuana is always contraband regardless of whether someone possesses a license. *See United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 945 (9th Cir. 2010) ("The federal government has not recognized a legitimate use for marijuana, however, and there is no exception for medical marijuana distribution or possession under the federal Controlled Substances Act[.]") (alteration in original).

E. *Plain view cases provide even more support for the continued reliance on plain smell doctrine*

The panel dissent suggests that the odor of marijuana can no longer be reasonable suspicion because the incriminating nature of the odor is not immediately apparent. (Op. at 18). The dissent's argument is as follows: Plain smell was warranted because the odor of marijuana was almost definitive proof that contraband was present. The odor of marijuana is no longer almost definitive. Thus, plain smell can no longer be justified. The State respectfully disagrees with this analysis.

The fact that an officer who smells the odor of cannabis cannot be one hundred percent sure that he is smelling contraband does not mean he cannot have reasonable suspicion. The dissent is relying on caselaw from a related doctrine—the plain view doctrine. However, courts have routinely upheld searches and seizures of substances in plain view even when officers were not entirely sure that the substance they saw was contraband. *See, e.g., State v. Hafer*, 773 So. 2d 1223, 1225 (Fla. 4th DCA 2000) (finding reasonable suspicion for an open container violation when an officer saw an amber-colored

liquid in a plastic cup). Under the plain view doctrine, an item can be seized if:

1) law enforcement is in a place they have a right to be;

2) there is probable cause[7] to believe the item is evidence or contraband; and

3) the officer has a lawful right of access to the item

Horton v. California, 496 U.S. 128, 136-37 (1990); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983). In addition to amber-colored liquid, the plain view doctrine has often been applied to white powders. *See Sanchez v. State*, 712 So. 2d 1152, 1154 (Fla. 5th DCA 1998) (finding that there was probable cause to seize "a clear plastic bag containing what appeared to be smaller packets of a white powdery substance.");

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[7] The Supreme Court has sometimes described the second element of the doctrine as requiring that "the incriminating nature of the item be immediately apparent." *See Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plurality opinion). Following *Coolidge*, some courts began requiring near certainty as to the incriminating nature of an item before the plain view doctrine could be applied. *Texas v. Brown*, 460 U.S. 730, 741 (1983) (plurality opinion). In reversing a lower court decision that applied this heightened standard, a plurality of the Supreme Court explained that the phrase "immediately apparent" was "very likely an unhappy choice of words." *Id.* The Supreme Court confirmed in *Illinois v. Andreas*, that this element requires only probable cause and not certainty. 463 U.S. 765, 771 (1983). Thus, the question is only whether there is probable cause to believe that an item is incriminating.

State v. Walker, 729 So. 2d 463, 464 (Fla. 2d DCA 1999) (finding probable cause to seize "plastic bags containing small amounts of a white crystalline powder."); *State v. Futch*, 715 So. 2d 992, 993 (Fla. 2d DCA 1998) (finding probable cause to seize a white powder found on a mirror). An amber liquid could be apple juice and a white powder could be baby formula, yet Florida courts have consistently found probable cause to seize these substances when they are in plain view. That is because neither reasonable suspicion nor probable cause requires anything near certainty that a substance is contraband.

As explained above, however, the panel majority was correct that the Court need not decide in this case whether the smell of marijuana is alone enough for reasonable suspicion; the officer here relied on more than just plain smell, and the totality of the circumstances more than justified a brief investigatory stop. *See infra* 26-35

II. Whether reasonable suspicion can be established under the totality of the circumstances test, which includes the smell of marijuana?

Florida courts must continue to determine whether reasonable suspicion exists using the totality of the circumstances test.[8] *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Bernie v. State*, 524 So. 2d 988, 990 (Fla. 1988). The totality of the circumstances involves a consideration of the "whole picture." *United States v. Cortez*, 449 U.S. 411, 417 (1981). Courts must consider "all the circumstances." *Id.* Although it may be caused by a legal substance, the odor of marijuana continues to be an important part of the picture.

Deeming certain factors innocent or neutral and discarding them from the analysis is an incorrect application of the totality of the circumstances test. *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002). In *Arvizu*, the Supreme Court explicitly rejected such a procedure. *Id.* In its opinion, the Court of Appeals for the Ninth

[8] Application of the plain smell doctrine is not inconsistent with the totality of the circumstances test. The plain smell doctrine simply means that in the absence of circumstances that weaken the likelihood of criminal activity, the smell of marijuana alone will be sufficient to find probable cause or reasonable suspicion. Thus, even if this Court continues to recognize the plain smell doctrine, Florida courts should continue to consider the totality of the circumstances.

Circuit determined that there were ten factors or circumstances to be considered. *Id.* at 273. The Court of Appeals discarded all factors that were "readily susceptible to an innocent explanation". *Id.* at 274. The Supreme Court characterized this type of "divide-and-conquer analysis" as a sharp departure from the proper analysis and reiterated that courts need to consider all the circumstances. *Id.* at 274-75.

Moreover, the State is aware of no authority suggesting that certain circumstances, if deemed innocent, can be removed from the totality of the circumstances analysis. Any such authority would seem to be clearly in conflict with Supreme Court caselaw describing the totality of the circumstances test. *See, e.g., id.*; *see also Mackey v. State*, 124 So. 3d 176, 185 (Fla. 2013) (considering a potentially lawful activity—possession of a firearm—in the totality of the circumstances). It would also appear to conflict with Supreme Court's application of the test. *See*, *supra*, pp 16-20 (demonstrating that the Supreme Court has considered innocent conduct in the totality of the circumstances analysis). Accordingly, the smell of marijuana continues to be a factor in the totality of the circumstances analysis.

III. Given the totality of the circumstances in this case, was there reasonable suspicion?

Yes. The totality of the circumstances in this case demonstrate that Officer Accra had at least reasonable suspicion to temporarily detain Appellant. At the time Appellant was detained, the following circumstances were present:

> (1) Appellant pulled into the parking lot of a closed business at night; (2) Appellant then backed into a spot; (3) after Officer Accra pulled up in a marked police car Appellant placed a large backpack in the rear of his car; (4) when Appellant rolled down his window, Officer Accra could smell marijuana; (5) Appellant's story was inconsistent[9]; (6) Appellant also struggled to fill in the gaps in his story; and (7) Appellant himself admitted—without any prompting—that the story was suspicious.

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[9] Although Appellant may not have actively contradicted himself, his story was inconsistent. He began by saying he was at the CVS to wait for a friend. He later supplemented this story by stating that he was only at CVS to check a tire. Moreover, even if this Court determines that the story is not in fact inconsistent, Officer Accra clearly believed that it was. This was a reasonable mistake of fact. Officer Accra was trying to determine what was occurring in real time. He did not have the benefit of being able to repeatedly view a video before determining whether the story was inconsistent. In fact, even with the ability to go back a review, the judges on the panel could not agree on whether the story was consistent. *Compare* Op. at 10 (Wallis J. concurring) *with* Op. at 20 (Kilbane J., concurring in part and dissenting in part). If two learned judges can disagree about this fact, any mistake by an officer in real time must be reasonable. Because any mistake was reasonable, it does not violate the Fourth Amendment to include this factor in the totality analysis. *See Heien v. North Carolina*, 574 U.S. 54, 61 (2014).

(R. 36-50; BC 0:00-2:45). These factors are consistent with a person engaged in some sort of criminal activity. A criminal might choose to park by a closed business to case it for a robbery or because they are able to engage in criminal activity without running into potential customers. A criminal could also decide to spend extra time backing into a parking spot so that they can make a hasty exit. Placing an item in the backseat at the moment a police officer arrives is clearly suspicious, as it indicates an attempt to hide contraband.[10][11]

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[10] The panel dissent argues that there is no evidence that Appellant was aware of Officer Accra at the time he put the bag in the backseat. The State respectfully disagrees. Officer Accra arrived on scene in a marked police vehicle and parked next to Appellant. The lights on his vehicle were illuminated before he left the vehicle. Then as Officer Accra approached the vehicle, Appellant placed something in the backseat of his vehicle. Appellant then rolls down the window to speak with Officer Accra. A law enforcement officer can reasonably draw the inference that a person is aware of a vehicle that parks next to them with bright flashing lights.

[11] The dissent relies on the Fourth District's decision in *Hunter v. State*, 32 So. 3d 170, 174-75 (Fla. 4th DCA 2010). *Hunter* is factually distinguishable because the defendant in that case merely "rummaged in his pockets" and the evidence established that the defendant was not aware of the police at the time he did so. In *Hunter*, officers were responding to a "suspicious incident" and came upon two men. The officers noticed that these men were "rummaging" in their pockets. The officers then announced themselves and the men took off towards a residence. The fact that these two men fled as soon as police announced themselves strongly suggests that they were not aware of the officers at an earlier point.

Although potentially a legal substance, the odor of marijuana remains suspicious.

Appellant's discussion with Officer Accra was also consistent with a person discovered doing something illicit. Appellant gave an inconsistent story and struggled to fill in details. Common sense tells you that this is consistent with someone making up a story as they go.[12] Appellant also spontaneously admitted that his story was suspicious. Spontaneously admitting that a story is suspicious is itself suspicious.

Florida courts are required to consider all of the circumstances and the reasonable inferences that a trained officer could reasonably draw from those circumstances. *See Arvizu*, 534 U.S. at 277. Taken together, the totality of these circumstances provides, at minimum "a particularized and objective basis for suspecting the particular person stopped of criminal activity." The quantum of suspicion present in this case is significantly more than is present in some cases where the Supreme Court has found reasonable suspicion. *See*

[12] Common-sense conclusions about human behavior are part of the totality of the circumstances analysis. *District of Columbia v. Wesby*, 583 U.S. 48, 58 (2018).

e.g., *Terry v. Ohio*, 392 U.S. 1, 6 (1968) (window-shopping) and *Kansas v. Glover*, 140 S.Ct 1183 (2020) (driving a vehicle owned by a person with a revoked license). Thus, the panel majority correctly affirmed the denial of Appellant's motion to suppress.

The dissent—and some amici—errs by trying to address each of these circumstances individually and suggesting some innocent explanations for them. (Op. 14-15). This type of divide-and-conquer analysis is not appropriate in this context. *Arvizu*, 534 U.S. at 274-75. In *Arvizu*, the lower court determined that certain factors that were capable of an innocent explanation were entitled to no weight. *Id.* at 274. This approach "depart[ed] sharply the teachings of [Supreme Court precedent]." *Id.*

After excising the smell of marijuana from the analysis, the dissent then cites several cases that demonstrate that each of these factors, standing alone, is insufficient to establish probable cause. (OP. at 15). Besides the odor of marijuana, each of the other factors present in this case, standing alone, may not be sufficient to provide reasonable suspicion. But that does not matter. "[T]he whole is often greater than the sum of its parts—especially when the parts are viewed in isolation." *District of Columbia v. Wesby*, 538 U.S. 48, 62

(2018) "A factor viewed in isolation is often more 'readily susceptible to an innocent explanation' than one viewed as part of a totality." *Id.* (quoting *Arvizu*, 534 U.S. at 274). Considered together, the circumstances provide more than a mere hunch, they provide a particularized and objective basis for suspecting Appellant of criminal activity.

IV. Even if this Court determines that the totality of the circumstances did not provide reasonable suspicion, suppression is not warranted in this case

Even if this Court decides that Officer Accra did not have reasonable suspicion, the evidence in this case should not be suppressed. The exclusionary rule does not require suppression of the evidence in this case because the deterrence benefits of excluding the evidence do not outweigh the substantial social costs it would impose.

In 1914, the United States Supreme Court created the exclusionary rule, which excludes evidence obtained in violation of a person's constitutional rights. *Weeks v. United States*, 232 U.S. 383, 398 (1914). The Supreme Court incorporated this rule against the States in *Mapp v. Ohio*, 367 U.S. 643 (1961). "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights

generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). It does not, however, "proscribe the use of illegally seized evidence in all proceedings or against all persons." *Id.*

The Supreme Court has rejected approaches that call for per se application of the exclusionary rule in favor of an approach that involves weighing the costs of exclusion against deterrence benefits. *Davis v. United States*, 564 U.S. 229, 238 (2011). Because the exclusionary rule is designed to deter police misconduct, it does not make much sense to apply it in situations where the deterrence benefits are slight. *United States v. Leon*, 468 U.S. 897, 922 (1984) ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."). The Supreme Court has recognized that:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

> . . .
> [W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." In such a case, the criminal should not "go free because the constable has blundered."

Herring, 555 U.S. at 145-7 (internal citations omitted).

There is no real deterrent value in suppressing evidence in this case. Officer Accra relied on binding appellate precedent that has existed for over thirty years. *See e.g., Berry v. State*, 316 So. 2d 72, 73 (Fla. 1st DCA 1975). A search in accordance with binding appellate precedent generally[13] does not involve police misconduct. *Davis*, 564 U.S. at 239-40. The absence of misconduct means that suppression is not warranted. *Id.* at 240 ("Police practices trigger the harsh sanction of exclusion **only** when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'") (quoting *Herring*, 555 U.S. at 144)

[13] The Florida Supreme Court appears to have determined that reliance on binding appellate precedent can be culpable conduct when that opinion is based on a principle that is not well-established, the authors of the opinion certified a question to the Florida Supreme Court, and the case is pending in the Supreme Court. *Carpenter v. State*, 228 So. 3d 535, 539 (Fla. 2017). None of those factors are present in the instant case.

(emphasis added). "[T]he harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Id.* at 241 (quoting *Leon*, 468 U.S. at 919). Officer Accra acted in reasonable reliance on longstanding, binding case law from both the First District and the Florida Supreme Court. This was not improper. Therefore, the evidence obtained should not be suppressed. *Id.* at 242 ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.").

CONCLUSION

Based on the foregoing, the State asks that this Court affirm.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by e-mail to Elizabeth Hogan Webb at ehw@pd4.coj.net on January 2, 2024.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing contains 7,372 words, per the "word count" feature in Microsoft Word and was printed in 14-point Bookman Oldstyle and thereby satisfies the requirements of Florida Rule of Appellate Procedure 9.045.

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