IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

CASE NO. 5D23-0118

JASON HASSAN BAXTER,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF CRIMNAL DEFENSE LAWYERS—MIAMI CHAPTER

APPEAL FROM THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY, FLORIDA

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

FACDL-Miami is a non-profit, non-partisan bar organization whose members are current or former criminal defense lawyers practicing in Miami-Dade County. We have nearly 1,000 members including judges, private attorneys, assistant public defenders, and assistant regional counsel. We seek to preserve and protect the

rights of those accused of crimes, as well as advocate for the interests of criminal defense lawyers. We practice in trial and appellate courts that follow and cite the Fifth District's current caselaw regarding searches and arrests based on the odor of marijuana.

SUMMARY OF ARGUMENT

A decade ago, Floridians were prohibited from using or possessing marijuana in any form. The Fourth Amendment rightly tracked that legal landscape and granted officers nearly unfettered discretion to arrest and search based on cannabis smell alone. Flash forward to today: Every adult in Florida enjoys a constitutional right to buy, store, and use marijuana for medicinal purposes, so long as they obtain a state-issued license. So, too, are Floridians allowed to use and smoke hemp, a strain of cannabis, without a license, even while operating their vehicles.

These rights enjoy a strong democratic pedigree, and the Fourth Amendment's reach must account for this. Search and seizure protections recently evolved in the firearm context to reflect new protections for concealed weapon carry. *Burnett v. State*, 246 So. 3d 516 (Fla. 5th DCA 2018); *Kilburn v. State*, 297 So. 3d 671 (Fla. 1st

DCA 2020). The logic of those decisions applies with equal force here. Accordingly, FACDL-Miami urges this Court to find that cannabis odor alone, without more, is a neutral fact that often indicates potentially lawful conduct, but still one officers may consider before detaining someone to investigate criminal activity. Applying that test here requires reversal.

ARGUMENT

I. Resolving Mr. Baxter's Case Requires Addressing Incongruities Between New Cannabis Protections and Fifth District Precedent.

This Court's call for supplemental briefing and *amici curiae* marks an important moment. Decades-old Fifth District precedent grants officers the power to arrest and search someone immediately after smelling fresh or burnt cannabis—even if no other facts suggest the individual is involved in criminal activity. *E.g.*, *State v. Chambliss*, 752 So. 2d 114 (Fla. 5th DCA 2000). That rule justifiably reflects the legal status and democratic consensus around cannabis from when those cases were decided. *See* Brief for Fla. Sheriffs Ass'n as *Amicus Curaie* Supporting Appellee, *Baxter v. State*, No. 5D23-118, 2023 WL 7096645 (Fla. 5th DCA Oct. 27, 2023), at 7–8 (hereinafter FSA Brief).

But, times have changed. Following a constitutional amendment passed by 71.3% of voters in 2016, nearly a million Floridians own state-issued licenses to buy, transport, possess, and use marijuana. *See infra* Section II. Florida's democratically-elected lawmakers went farther in 2019 by legalizing hemp. *See infra* Section II.

Against this backdrop, the Court's previously administrable rules cannot be squared with its broader search and seizure doctrine and basic Fourth Amendment principles. Continued reliance on these decisions risks greenlighting greater police surveillance over wholly legal—and, like here, constitutionally protected—conduct. In deciding Mr. Baxter's case, the Court should clarify one issue from its precedent that surfaces here: the relevant quantum of suspicion in Fourth Amendment cannabis cases—reasonable suspicion or probable cause.

Only reasonable suspicion is required to detain someone. *Popple v. State*, 626 So. 2d 185 (Fla. 1993). Though an officer's "suspicion" can develop from observing innocent conduct or circumstances, he must rely on articulable facts that suggest the person is, was, or will be involved in an actual crime. *Id.* One observable fact indicating only innocent conduct cannot justify a

detention. *Kilburn*, 297 So. 3d at 675. Meanwhile, to arrest someone or invade their privacy or property interests by conducting a "search," an officer needs a greater level of suspicion—probable cause—along with a warrant (or a warrant exception). *Katz v. United States*, 389 U.S. 347, 356–57 (1967).

This Court's supplemental questions accurately frame the issue around reasonable suspicion, not probable cause. In earlier decisions, decided when possession of any marijuana would be unequivocally criminal conduct, the "odor of burning marijuana alone provided probable cause" that a person was involved in criminal activity. *Chambliss*, 752 So. at 114; *Harvey v. State*, 653 So. 2d 1146 (Fla. 5th DCA 1995) (per curiam); *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). These cases grant officers power to arrest and search a car's occupants and then comb through the vehicle and any containers. *E.g.*, *Jarrett*, 530 So. 2d at 1090.[1]

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[1] *State v. Reed*, 712 So. 2d 458 (Fla. 5th DCA 1998), provides one exception. There, this Court held that "the smell of cannabis alone can provide probable cause to *search*, . . . [but not] probable cause to *arrest*." *Id.* at 460.

The sole rationale for these cases no longer stands and thus they no longer are good law. To avoid confusion, this Court should say that. As recounted in *Wells*, 516 So. 2d at 75, and quoted in *T.T.*, 594 So. 2d at 840, the "smell alone" rule for probable cause was justified because "mere possession of marijuana [was] illegal." Today, possession and use of some forms of marijuana are not just legal, but constitutionally protected conduct as declared by an overwhelming majority of Florida voters. Fla. Const. art. X, § 29. So too can Floridians legally possess other forms of cannabis that smell the same as criminalized marijuana. *See infra* Section II. The relatively new landscape legalizing hemp and marijuana justifies a clear ruling that marijuana odor (in a totality of circumstances test or alone) is not probable cause to search or arrest.

Florida's Sheriffs Association argues otherwise. It insists that "[a]n officer's belief that the smell emitted from inside a stopped vehicle is marijuana is by itself enough to establish not only reasonable suspicion of criminal activity for an investigatory detention but also probable cause to search." FSA Brief at 2. The argument follows like this: (1) laws criminalizing marijuana have existed for more than a century, *see id.* at 7–9; (2) against that

backdrop, precedent held that officers had probable cause immediately after smelling cannabis, *see id.* at 10–12; (3) police developed training and experience in reliance on those cases, leading to a strong correlation between cannabis odor and criminal investigations for marijuana, *see id.* at 5–7; (4) officers previously smelled marijuana and found illegal marijuana, so they can distinguish between illegal marijuana and legal hemp today, *see id.* at 7, 15; accordingly, (5) nothing about hemp legalization warrants disrupting the status quo—lest this Court "cripple[]" law enforcement's ability to conduct "criminal investigations" generally. *Id.* at 5.

The Association's position is a policy argument that is unsupported by law or logic. *See infra* Sections II, III. In their view, insufficient "ambiguity" exists to "recede from precedent." FSA Brief at 1. But the Sheriffs' favored policy outcome—that police get maximal power to search vehicles and persons—conflicts with the Fourth Amendment given the new legal landscape around cannabis. The problem with the current law in this area is not ambiguity. Facing new legal changes and democratic consensus, the Association asks the Court to ignore all of that. The organization's brief does not

even try to resolve the problem resulting from their position: What Fourth Amendment protections are safe if officers have probable cause to arrest and search after potentially smelling a constitutionally protected product. This Court should give law enforcement leeway to do their job—but only up to, not over, the clear line the Fourth Amendment draws barring detaining citizens absent reasonable suspicion of criminal activity.

Notwithstanding recent changes to cannabis law, FACDL-Miami attorneys litigate cases in which judges still rely on *Chambliss*, *T.T.*, and *Reed* to find full probable cause to search a vehicle and its occupants where there is any cannabis odor, fresh or burnt. Mr. Baxter's case raises important questions of first impression in this a new legal landscape. The Court should clearly hold that cannabis odor, standing alone, does not give probable cause to detain, search, or arrest.

II. Legal Protections for Cannabis Products Mean That an Officer Who Smells Marijuana from Inside a Stopped Vehicle Does Not Have Reasonable Suspicion to Detain Someone.

A. New Constitutional and Statutory Rights to Use and Possess Cannabis Make Mr. Baxter's Case Categorically Different From Fifth District Precedent.

Due regard for Florida's new legal landscape requires courts to consider the list of statutory and constitutional protections for different strains of cannabis. Today, Florida law recognizes three types: (1) hemp, defined as cannabis with 0.3% delta-9-tetrahydrocannabinol (hereinafter D9-THC) or less, Fla. Stat. § 581.217(2)(e); (2) low-THC cannabis, defined as cannabis plants which contain less than 0.8% of D9-THC but more than 10% cannabidiol, Fla. Stat. § 381.986(1)(f); and (3) cannabis containing more than 0.8% D9-THC, Fla. Stat. § 381.986(1)(g). Cannabis with over 0.8% D9-THC and low-THC cannabis are both considered "marijuana" and require a license to possess or consume them. Fla. Stat. § 381.986.

In 2018, Congress excluded hemp from the federal controlled substance schedule. 21 U.S.C. § 802(16). Florida followed suit in 2019. Fla. Stat. § 581.217(2)(b). Every adult in Floridia enjoys a statutory right to purchase and consume hemp, Fla. Stat. § 581.217(2)(b), which can be ingested or inhaled by adults without restriction. *See generally* Fla. Stat. § 581.217(2)(f). And, Florida

lawmakers have not passed a single restriction on smoking hemp in public or inside a vehicle. *Id.*

The questions here turns on what conclusions officers can reach once they smell cannabis. But when smelling burnt cannabis, officers cannot determine whether that smell comes from illegally smoked marijuana or legally smoked hemp. *See Baxter*, 2023 WL 7096645, at *9 (hereinafter *Panel Op.*) (Kilbane, J., dissenting in relevant part) (citing case law, executive agency guidance, and academic literature about the inability to distinguish between hemp and illegal marijuana); *see also* FSA Brief at 1 ("[T]he odor [of hemp] may be indistinguishable from marijuana[.]").

And when officers instead use fresh cannabis odor as the sole basis for investigatory detentions, they create more constitutional problems. While the Court's call for *amici curiae* references hemp legalization, *Kilburn* and *Burnett* implicate medical marijuana, which Floridians now have a constitutional right to use and possess. Fla. Const. art. X, § 29. As explained above, there is no restriction on possessing raw hemp. Fla. Stat. § 581.217(2)(b). For medical marijuana, the only restriction on how, whether, and when permit-

holders can carry or transport the substance is a packaging requirement. Fla. Stat. § 381.986(8)(e)(11).

Confronted with fresh cannabis odor, police must respect that Florida's medical marijuana statute does not require permit-holders to conceal the odor in public. In fact, low-THC cannabis may be consumed, including by vaping,[2] in public and in cars. Fla. Stat. § 381.986(1)(k)(5). And, permit-holders may possess and transport 70 days' worth of non-smokable marijuana or four ounces of marijuana for smoking. Fla. Stat. Fla. Stat. § 381.986(14); *see also* Dosing and Supply Limits for Medical Marijuana, 48 Fla. Admin. Reg. 168 (Aug. 29, 2022). For many Floridians, possessing marijuana inside a vehicle is a valid exercise of a constitutional right.

Beyond enjoying constitutional and statutory protections, cannabis is widely popular. More than seventy-one percent of voters supported codifying an expanded right to medical marijuana in Florida's constitution. Fla. Dep't of State, November 8, 2016 General Election Official Results,

[2] The statute only prohibits low-THC cannabis use by smoking, defined as: "burning or igniting a substance and inhaling the smoke." Fla. Stat. § 381.986(1)(o).

https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/2016&DATAMODE= (last visited Dec. 18, 2023). Although hemp statistics are not widely available, official data from Florida's Department of Health Office of Medical Marijuana Use (OMMU) show that medical marijuana licensure is on track to reach the same permitting threshold that concealed carry did when *Kilburn* was decided. 297 So. at 676 (noting just over two million valid concealed carry permits). As of December 15, 2023, 863,373 patients carry active medical marijuana cards for prescribed marijuana. Fla. Dep't Health OMMU, *Weekly Update, Dec. 15, 2023*, https://knowthefactsmmj.com/wp-content/uploads/ommu_updates/2023/121523-OMMU-Update.pdf (hereinafter OMMU Update Dec. 15, 2023). That represents a 1,491% increase from November 2017. Fla. Dep't Health OMMU, *Weekly Update, Nov. 21, 2017*, https://knowthefactsmmj.com/wp-content/uploads/ommu_updates/2017/171121-ommu-update.pdf

B. The Fourth Amendment Requires Deference to the New Legal Landscape for Cannabis Products.

The smell of cannabis alone—whether burnt or fresh—cannot give officers reasonable suspicion. Investigatory detentions only

survive constitutional muster if officers have reasonable suspicion "that a person has committed, is committing, or is about to commit a crime." *Popple,* 626 So. 2d at 186 (citations omitted). Because "potentially lawful activity cannot be the sole basis for a detention[,]" *Kilburn*, 297 So. 3d at 675, any other result violates the Fourth Amendment.

"Plain smell" is analogous to when officers see pills in "plain view." In *Smith v. State*, 95 So. 3d 966 (Fla. 1st DCA 2012), and *Gay v. State*, 138 So. 3d 1106 (Fla. 2d DCA 2014), the First and Second District Courts considered whether police had reasonable suspicion after seeing a person possessing pills. In both cases, the Courts held that police lacked reasonable suspicion to detain because officers could not tell from sight alone whether the pills were controlled substances. The same issue occurs when an officer employs smell as opposed to sight. Because an officer cannot tell by plain smell that cannabis is illegal (just as he could not by plain sight in *Smith* and *Gay*), odor alone cannot justify detention.

Outside the controlled substance context, the Court should draw on recent Fourth Amendment firearms cases. Both the popularity of and the legal protections for cannabis make *Kilburn* and

Burnett on-point Fourth Amendment precedent here. There, this Court, 297 So. 3d at 675, and the First District, 246 So. 3d at 520, recognized that statutory protections for firearms meant prior Fourth Amendment precedent no longer applied—and held that mere sight of a concealed firearm is not reasonable suspicion of a crime. Lawful possession of medical marijuana is no less constitutionally protected than lawful possession of a firearm. Fla. Const. art. I, § 8; art. X, § 29. Statutory protections for hemp possession are no less valid than statutory protections for concealed carry. *See supra*; Fla. Stat. § 790.01. Just as there is no Fourth Amendment "firearms exception," *J.L. v. State*, 727 So. 2d 204, 208–09 (Fla. 1998), there is none for marijuana either.

Like with pills, an equally forceful parallel between cannabis and firearms surrounds the inability for law enforcement to immediately discern between protected and illicit conduct. An officer cannot look at a bulge in a waistband or a firearm in a holster and know that a person is committing a crime, nor can she distinguish between types of cannabis by smell. Hemp, low-THC cannabis, and higher-THC cannabis are impossible to differentiate by smell alone. *See Panel Op.*, at *9 (Kilbane, J., dissenting in relevant part); FSA

Brief at 1 (acknowledging that hemp odor "may be indistinguishable from marijuana").

Cannabis thus enjoys the same defining features as firearms that made *Kilburn* and *Burnett* administrable rules capable of hewing to Fourth Amendment precedent while respecting evolving legal protections and democratic consensus. Not only do *Kilburn* and *Burnett*'s rationales therefore favor finding that cannabis odor alone is insufficient for reasonable suspicion, that rule is consistent with how courts resolve *Terry* stop questions. Our Supreme Court has recognized that "the totality of the circumstances controls" in Fourth Amendment cases. *State v. Baez*, 894 So. 2d 115 (Fla. 2004); *see also Burnett*, 246 So. 3d at 518 (quoting *Regalado v. State*, 25 So.3d 600, 604 (Fla. 4th DCA 2009)). A bright line "smell alone" rule runs afoul of this principle because "smell alone" no longer indicates criminal conduct. Stated otherwise, the government's position cannot be squared with the new regulatory landscape. This Court should hold that the smell of cannabis alone—whether coming from inside a car or on a public street—is not reasonable suspicion to conduct a *Terry* stop.

As a policy matter, this provides a workable rule for law enforcement. *Kilburn* instructs, as our Supreme Court did in *Mackey v. State*, 124 So. 3d 176 (Fla. 2013) (*Mackey II*) and the Fourth District did in *Regalado*, 25 So. 3d 600, that officers cannot detain someone based solely on suspicion of concealed firearm possession. In the fifteen years since *Regalado*, police have continued investigating gun crimes. Even when *Kilburn* and *Burnett* prevent officers from detaining someone, they still can (and do) cultivate consensual encounters with any civilian they choose. *See e.g.*, *J.L. v. State*, 727 So. 2d 204, 208 (Fla. 1998). Police may ask whether the person has the firearm legally or whether they are a convicted felon.[3] Because consensual encounters allow someone to leave or "voluntarily comply with a police officer's requests[,]" "constitutional safeguards are not invoked." *Popple,* 626 So. 2d at 186 (citation omitted).

In the cannabis context, an officer can initiate an encounter and follow up on a hunch about illegal marijuana possession. She can

[3] Before recent statutory changes to Section 790.01, officers could also inquire whether a person possessed a valid concealed firearm license.

ask about the source of the odor or about medical marijuana licenses. She can look for packaging, paraphernalia, indicia of trafficking, or any non-odor-related clues that furnish reasonable suspicion. And just like in the firearm context, she can run records checks of the medical marijuana registry. *See* Fla. Dep't Health OMMU, *Understanding the Registry: How to Search for a Person*, https://knowthefactsmmj.com/wp-content/uploads/_documents/Instructional_Guides/LE/Patient-Search.pdf (last visited Dec. 17, 2023); *see also infra* Section III.

The Fourth Amendment encourages such police work. But to permit police to continue to detain (much less arrest and search) a person based solely on the smell of cannabis undermines both the democratic consensus that constitutionalized medical marijuana protections and the legislative process that legalized hemp. Law enforcement adapt to legal change all the time. This Court should recognize as much rather than create an elephant-size law-enforcement exception to the protections enshrined by legislators and voters.

III. Marijuana Odor Can Factor into a Reasonable Suspicion Inquiry, But Odor Itself is Typically a Neutral Factor, Rather than one that Elevates an Officer's Suspicion.

Like any observation, the smell of cannabis factors into the totality of the circumstances test. *District of Columbia v. Wesby*, 583 U.S. 48 (2018) ("The totality of the circumstances requires courts to consider the whole picture." (quotation omitted)). Which way the odor cuts under that analysis—either in favor or against finding reasonable suspicion—depends on additional information officers might gather before detaining someone. Many of those factors cannot be reduced to ex-ante rules. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996).

The totality of the circumstances test must recognize important limitations that marijuana odor presents in every case. Absent any articulable fact suggesting the cannabis smell is connected to a crime—something that indicates, for example, impaired driving, public intoxication, disorderly conduct, illegal sale or possession, or narcotics trafficking—the odor itself is, at worst, a neutral factor in the reasonable suspicion calculus. The Court should say as much

here. Doing so would greatly benefit trial courts in the proper application of its rule.

Recall that raw hemp, marijuana, and low-grade THC are different strains of cannabis that smell identical to a trained police officer. *See supra* Section II. Given the legal protections for various forms of cannabis and the human nose's inability to distinguish between legal and illicit possession, there are countless reasons why an officer smelling fresh cannabis on the street or inside a car should *not* believe that smell adds to the reasonable suspicion calculus. Without any other indicia of illegality, a person shrouded in the smell of fresh cannabis might lawfully be carrying a legal product from one of Florida's 610 state-approved dispensaries. OMMU Update Dec. 15, 2023, *supra*. Or the individual might possess hemp.

The same absence of criminality must be credited when officers smell burnt cannabis. Even in traffic stops, police must faithfully enforce all of Florida's laws, including those that allow people to smoke hemp inside a moving vehicle. *See supra* Section II. Of course, once any articulable fact suggests the burnt cannabis is connected to criminal activity, the calculus changes. For example, police have reasonable suspicion to detain if a person lies about their marijuana

registry status. *Cf. Mackey II*, 124 So. 3d at 184. Likewise, signs of driving under the influence—moving traffic violations, bloodshot or watery eyes, impaired speech—could amount to reasonable suspicion under the totality test. The First District's decision in *Hatcher v. State* and the Second District's decision in *Owens v. State* ultimately make that point, even though both used "smell alone" language. In *Hatcher*, officers saw a car "veer completely out of its lane for no apparent reason and travel[] through marked parallel parking spaces for about half a block"; the driver appeared "lethargic" and said he was just "'getting over' to make a turn." 342 So. 3d 807, 809 (Fla. 1st DCA 2022). And in *Owens*, police were "responding to a complaint of reckless and erratic driving" and then found the suspect behaving erratically. 317 So. 3d 1218, 1219 (Fla. 2d DCA 2021).

Indeed, the smell of marijuana—without anything indicating illegal sale, purchase, possession, use, or trafficking—is neutral and may instead suggest a person is intentionally complying with the legislature's demands. Without additional facts, officers cannot pick between their hunch and presuming a person is acting lawfully. Nothing about any "training and experience" from an earlier era, when the same conduct at issue here was always criminal and never

legal, could suggest otherwise. The Sheriffs Association insists that can't be right. They argue that "[d]iscounting the plain smell of marijuana improperly foreclosures [sic] any evidence that based on the officer's training and experience, the officer detected the odor of cannabis." FSA Brief at 5. No one doubts the officer's conclusion. Certainly, an officer's training and experience permit her to think she smells cannabis. The relevant question is what conclusion the officer is permitted to reach about a person's criminality based on the smell. When perfectly legal (or here, constitutionally protected) conduct is indistinguishable from potentially illicit activity, the Fourth Amendment requires police to wait until their hunches ripen into reasonable suspicion of an actual crime. *Cf. Gay*, 138 So. 3d 1106 (applying to pill bottles); *Smith*, 95 So. 3d 966 (same).

The same is true in the firearm context. When an officer sees a weapon securely encased in a holster or watches countless Floridians drive to and from secure indoor ranges, she has no reason to suspect its owner is not complying with Section 790.25. *Kilburn* and *Burnett* forbid that same officer, upon seeing bulge in someone's waistband, from concluding the person is violating Section 790.01. For the officer with potential suspicion about weapons, an investigatory detention

would only be lawful if she observed some additional fact that—taken together with the holster, lockbox, or bulge—suggested the person was committing a firearms offense or some other crime. *Cf. State v. Maxwell*, 245 So. 3d 994 (Fla. 3d DCA 2018) (upholding *Terry* frisk because officer received report of violent crime and observed suspect make repeated movements with both hands toward the same pocket). The Sheriffs Association agrees: "there is nothing unusual about the appearance of a concealed firearm alone that would provide a reasonable suspicion that criminal activity is afoot." FSA Brief at 3.

The Association argues that *Kilburn* and *Burnett* are rightly decided but "inapposite." *Id.* To create that distinction, the Association suggests that the same officer who cannot differentiate between lawful and unlawful gun possession based on appearance alone somehow can distinguish between legal marijuana and illegal marijuana based only on smell. *Compare id.* at 3 (arguing firearm appearance is "unlike the apparent odor of marijuana"), *and id.* at 15 ("[A]s a result of their training and experience, an officer would reasonably believe that when the odor of marijuana is detected, the substance in the vehicle is marijuana rather than hemp.").

Those conclusions are unsupported by citations or common science. *See, e.g.*, *Panel Op.*, at *9 (Kilbane, J., dissenting in relevant part). Accounting for fresh marijuana odor in any other way would denigrate the statutory and constitutional protections for cannabis, disparage the democratic processes that produced them, and imperil the civil liberties of law-abiding citizens statewide. Of course, when the Court instructs that suspicion about possession of raw cannabis is not itself suspicion of criminal activity, lower courts may still consider that innocent conduct in the totality of circumstances. *See United States v. Sokolow*, 490 U.S. 1, 9 (1989). No judge can "dismiss outright" facts that are "susceptible of innocent explanation." *Wesby*, 583 U.S. at 61.

But where the panel opinion goes awry is how the innocent conduct of legally (and in some cases constitutionally) protected cannabis possession factors into the reasonable suspicion calculus. Due respect for cannabis' legal status requires police to smell fresh marijuana and not automatically associate it with criminal wrongdoing. Still, officers confronted with the odor of fresh cannabis are not forced to fold up their ticket books and walk away. Rather, police retain unfettered authority to do their jobs—observe their

surroundings, speak with people, follow up on leads—by engaging in consensual encounters with anyone who piques their interest. *United States v. Mendenhall*, 446 U.S. 544 (1993).

IV. Officer Accra Lacked Reasonable Suspicion to Detain Mr. Baxter.

Under the totality of circumstances test, Officer Accra lacked reasonable suspicion to detain Mr. Baxter. Accra approached Mr. Baxter's vehicle to check on the driver's well-being and confirm no burglary was in progress. When asked questions, Mr. Baxter's responses about his presence in the parking lot were confusing, although not unreasonable, verifiably false, or criminal. Mr. Baxter's nervous behavior and answers to questions may have given Accra a hunch about a potential burglary.

Nervousness and confusing answers, however, do not produce reasonable suspicion of a crime. *See, e.g.*, *Eldridge v. State*, 817 So. 2d 884 (Fla. 5th DCA 2002) (finding nervousness coupled with failure to answer questions and possession of large roll of $100 bills did not establish reasonable suspicion); *Hoover v. Bullock*, 880 So.2d 710 (Fla 5th DCA 2004) (finding no reasonable suspicion when nervous

suspect with stumbling speech was fidgeting and sweating). The facts here are less suspicious than cases where this Court has found officers lacked reasonable suspicion.

Lacking reasonable suspicion based on Mr. Baxter's behavior, Accra needed to decide whether the fresh cannabis smell—viewed together with any nervousness and confusing responses—elevated his hunch about criminal activity into reasonable articulable suspicion. On the facts here, the answer is no. Accra did not know if Mr. Baxter was lawfully carrying hemp or medical marijuana. Just like the pill context, where "neither the illegal nature of the possession of the pills nor the type of pills was known to the officer[,]" there was nothing for Accra to believe the odor came from *illegal* marijuana. *Gay*, 138 So. 3d at 1109.

Of course, "wholly lawful conduct" can help create reasonable suspicion. *Sokolow*, 490 U.S. at 9. But officers must have more than a generalized or "mere" suspicion. *McMaster v. State*, 780 So. 2d 1026, 1028 (Fla. 5th DCA 2001). Even with innocent conduct, the Fourth Amendment requires "well-founded, articulable suspicion of criminal activity." *Id.* To Accra, cannabis was unrelated to his hunch that Mr. Baxter was in the parking lot to commit a burglary. And

nervousness in police presence does not make otherwise innocent conduct criminally suspect. *See Eldridge*, 817 So. 2d 884; *Hoover*, 880 So. 2d 710. Accra did not suspect Mr. Baxter of impaired driving or selling narcotics. And there was no testimony that the encounter occurred in an area known for narcotics sales.

Had Accra's hunch about illicit marijuana correlated to other observable facts associated *with a marijuana offense*—impaired driving, bloodshot eyes or dilated pupils, behavior consistent with trafficking—the added odor might have produced reasonable suspicion.[4] But Accra lacked any indicia of criminality related to narcotics and never developed his hunch about a property crime. This case illustrates how cannabis odor alone is a neutral factor that officers encounter.

Importantly, Accra had other options. Officers may start with a hunch about property crime and subsequently develop reasonable suspicion of another offense. Had Accra asked first about a medical marijuana license or hemp products *before* detaining Mr. Baxter, the odor of marijuana plus Mr. Baxter's answers may have justified

[4] This would be particularly true if Accra smelled burnt marijuana.

detention. *Cf. Mackey II*, 124 So. 3d at 184 (finding reasonable suspicion of firearm offense when suspect was seen carrying a firearm and lied about the gun during consensual questioning). Or, further investigation—by peering into the car with a flashlight, continuing consensual conversation, asking about marijuana licensure, running Mr. Baxter against the registry—could have been fruitful.

In other words, an officer need not abandon his hunches that criminality is afoot; he simply may not encroach on civilians' Fourth Amendment protections while investigating them. Even with the smell of marijuana, Accra lacked reasonable suspicion that Mr. Baxter had committed or was about to commit any property, narcotics, or other crime. The trial court thus erred in denying Mr. Baxter's motion to suppress.

CONCLUSION

Confronted with new statutory and constitutional protections for cannabis use and possession, the Court's Fourth Amendment jurisprudence must keep pace. No longer can law enforcement rely on what past training and experience tell them the odor of cannabis

says about criminality. The proper Fourth Amendment framework for resolving these questions is a totality of the circumstances test. Under that analysis—with full understanding of the new legal landscape and proper deference to the democratic and political process— cannabis odor often presents a truly neutral factor unless other information suggests the marijuana itself is connected to criminal activity. In Mr. Baxter's case, officers lacked that suspicion. Reversal is required.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that this brief is typed in 14-point Bookman Old Style font, is 4,983 words, and that a true and correct copy of the foregoing was efiled with the Fifth District Court of Appeals, and a copy served via email on Christina Piotrowski, Esq., counsel for Appellee at christina.piotrowski@myfloridalegal.com, on counsel for Appellant Elizabeth Hogan Webb, Esq. at ehw@pd4.coj.net, and on all other persons registered for e-service, this 18th day of December, 2023.

/s/ Daniel Tibbitt
Daniel Tibbitt