IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

JASON HASSAN BAXTER,

Appellant, CASE NO. 5D23-0118
LT CASE NO. 16-2021-MM014027-AXXX

v.

STATE OF FLORIDA,

Appellee.
_____/

BRIEF OF *AMICUS CURIAE* FLORIDA SHERIFFS ASSOCIATION IN SUPPORT OF THE STATE OF FLORIDA

ROBERT WAYNE EVANS, ESQ.
BENJAMIN M. LAGOS, ESQ.
ALLEN, NORTON & BLUE, P.A.
906 North Monroe Street, Suite 100
Tallahassee, Florida 32303
revans@anblaw.com
blagos@anblaw.com

Counsel for Florida Sheriffs Association

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Sheriffs Association ("FSA" or "Sheriffs") is a statewide organization comprised of the sheriffs of the state of Florida. Its mission as a self-sustaining charitable organization is to foster the effectiveness of the office of sheriff through leadership, education and training, innovative practices and legislative initiatives. On occasion, the FSA appears as *amicus curiae* in cases of interest to the sheriffs that may impact their operational duties and responsibilities.

Due to the frequency with which sheriffs' deputies have initiated vehicle stops and detected the odor of marijuana, the present case involves issues of great interest to the FSA. It has been well established that the smell of marijuana coming from inside a vehicle provides not only reasonable suspicion of criminal activity but also probable cause to search the vehicle for marijuana.

The legalization of hemp, even though the odor may be indistinguishable from marijuana, has not created such an ambiguity that would cause this Court to recede from precedent holding that the odor of marijuana provides probable cause to search the vehicle. Each case must be considered based on its facts. A per se rule that the apparent odor of marijuana should be discounted in determining reasonable suspicion to

detain or establish probable cause to search defies precedent. Practically, it would significantly impede drug and driving under the influence investigations and encourage this illegal conduct. Accordingly, the apparent smell of marijuana alone should continue to provide reasonable suspicion of criminal activity to support an investigatory detention under *Terry v. Ohio*, 392 U.S. 1 (1968).

SUMMARY OF ARGUMENT

The Florida Sheriffs Association supports a totality of circumstances test in determining if probable cause exists to search a vehicle for the presence of marijuana or whether the circumstances support a reasonable suspicion of criminal activity for an investigatory detention. An 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. Other factors may come into play that would bolster the apparent smell of cannabis, such as the facts relied upon by the majority in this case to find reasonable suspicion of criminal activity.

The legalization of hemp is insufficient to warrant a departure from long-established case precedent that the odor of marijuana provides probable cause to search. Illegal marijuana use is increasing, particularly

among young adults. There is no evidence, however, that hemp is now as prevalent as marijuana. In light of judicial precent and law enforcement's longstanding experience with cases arising from the odor of marijuana, an officer's detection of the apparent odor of cannabis emanating from inside a vehicle should continue to provide at the very least reasonable suspicion of criminal activity.

The opinions of this Court in *Burnett v. State*, 246 So. 3d 516 (Fla. 5th DCA 2018), and the First District Court of Appeal in *Kilburn v. State*, 297 So. 3d 671 (Fla. 1st DCA 2020), are inapposite to the issues before this court. In both cases, the courts recognized the legal or constitutional right to carry firearms such that the carrying of a concealed firearm in and of itself is lawful. In other words, unlike the apparent odor of marijuana, there is nothing unusual about the appearance of a concealed firearm alone that would provide a reasonable suspicion that criminal activity is afoot.

In applying the totality of circumstances test to the present case, the facts established reasonable suspicion of criminal activity. Aside from the plain smell of marijuana, the officer observed Baxter parking his vehicle at a closed business; the driver gave dubious and inconsistent answers about the reason he was parked at the location; and the officer observed him place his backpack into the back seat as the officer approached the vehicle.

Taken together, these facts provide a reasonable degree of suspicion that Baxter was in possession of marijuana. The court should affirm the denial of Baxter's motion to suppress.

ARGUMENT

I. An Officer's Belief that the Smell Emanating from Inside a Stopped Vehicle is Marijuana Establishes a Reasonable Suspicion of Criminal Activity for an Investigatory Detention.

Although the Florida Legislature legalized hemp in 2019[1], the apparent odor of marijuana that stems from inside a vehicle is sufficient to give an officer not only reasonable suspicion to detain but probable cause to search. Putting it differently, the mere possibility that hemp rather than marijuana produces the odor does not diminish its significance in a narcotics or driving under the influence investigation.

The significance of the odor of marijuana in a criminal investigation cannot be overstated. Pragmatically, and out of an abundance of caution, many sheriffs follow an "odor plus" test that encourages deputies to buttress their detection of the odor of cannabis with other incriminating evidence. They do not, and should not, discount the odor of marijuana because in light

[1] *See* § 581.217, Fla. Stat. (2019). In 2018, Congress enacted the Agriculture Improvement Act of 2018, Pub. L. No. 334, 132 Stat. 4490 (codified as amended in scattered sections of Pub. L. 334 (2018)), which legalized hemp on a federal level.

of their training and experience, deputies have a reasonable belief that they are detecting the smell of cannabis. Obviously, the smell of marijuana provides a basis for further investigation.

If this Court rules that the order of marijuana shall no longer be a factor to be considered by an officer, it is no exaggeration to suggest that criminal investigations would be crippled. Other facts may support an investigatory detention or a search of a vehicle, but the plain smell of marijuana is the trigger.

Certainly, a suspect's furtive gestures, inconsistent or incredible responses, or other factors such as odd or erratic behavior would further alert an officer to the possibility that the suspect is engaged in criminal activity. To an experienced officer, all these factors taken together provide at a minimum reasonable suspicion that the suspect is in possession of cannabis.

Discounting the plain smell of marijuana improperly foreclosures any evidence that based on the officer's training and experience, the officer detected the odor of cannabis. In essence, this Court would have established a per se rule, which as the majority in *Baxter* recognized, is inappropriate in the context of Fourth Amendment seizure analyses. *Baxter v. State*, 2023 Fla. App. LEXIS 7381, at *6 (Fla. 5th DCA 2023); *G.M. v. State*, 19 So. 3d 973, 979 (Fla. 2009).

Such a result would also conflict with a body of case law that highlights an officer's training and experience in determining whether the officer conducted a reasonable search or seizure. For example, in *State v. Reed*, this Court held that "to a trained and experienced police officer, the smell of cannabis emanating from a person or a vehicle, gives the police officer probable cause to search the person or the vehicle." 712 So. 2d 458, 460 (Fla. 5th DCA 1998).

Similarly, in *Hatcher v State*, the court, in upholding the warrantless search of the defendant's vehicle, commented "[b]ased on the sergeant's training and experience, he believed that [the defendant's] laid back and lethargic demeanor suggested that he was under the influence of marijuana." 342 So. 3d 807, 808 (Fla. 1st DCA 2022). The court later added that "[t]he officer who conducted the stop had eleven years of experience, including several prior traffic stops and arrests that involved the use of marijuana in a vehicle. He had been trained to identify marijuana by sight and smell." *Id.* at 811.

Notably, in *Terry v. Ohio,* the Supreme Court emphasized Officer McFadden's substantial experience with retail crimes in approving his investigatory detention of Terry and his companions who appeared to be "casing a job, a stick-up." 392 U.S. at 10. Speaking to the reasonableness of

McFadden's conduct, the Court stated, "It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." *Id*. at 23.

In short, sheriff's deputies have benefited from the collective experience of law enforcement officers throughout the years, as well as their own particularized experience in cases involving marijuana. History favors the Sheriffs' position on this issue. Looking back at legislative efforts to curb the use of cannabis and law enforcement's response over the decades, it may be fairly deduced that when an officer smells cannabis, more likely than not, it is cannabis.

A. Marijuana's History in the United States

Legislation prohibiting the use and possession of marijuana in the United States spans over a century. Although marijuana was initially legal and considered medicinal in the United States during the mid-1800's, concerns about abuse of the drug were raised in the latter half of the century, and by the 1890's, medical professionals endorsed its regulation.[2]

[2] National Institute on Alcohol Abuse and Alcoholism – Alcohol Policy Information System, *About Cannabis Policy*, https://alcoholpolicy.niaaa.nih.gov/about/about-cannabis-policy#jumpmenu-4 (last visited Dec. 13, 2023).

Throughout the early 1900's, drug use was criminalized through the Harrison Act[3], and by 1937, marijuana possession was prohibited in 23 states.[4] The 1956 Federal Narcotic Control Act[5] imposed harsh punishment for possession of illicit substances, including marijuana, and marijuana was finally considered a Schedule I substance in 1970 through the Controlled Substances Act.[6]

Prohibitive legislation regarding marijuana has been enforced since the 1900's and concerns about its potential for abuse extend even further back in history.[7] Political responses to open and ubiquitous marijuana use

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[3] Harrison Narcotics Tax Act, Pub. L. 63-223, 38 § 785 (1914).

[4] National Institute on Alcohol Abuse and Alcoholism – Alcohol Policy Information System, *About Cannabis Policy*, https://alcoholpolicy.niaaa.nih.gov/about/about-cannabis-policy#jumpmenu-4 (last visited Dec. 13, 2023); *See also* Public Acts of the Sixty-Third Congress, Pub. L. 223, ch. 1, §§ 1-12 (1914).

[5] Narcotic Control Act of 1956, Pub. L. No. 728, §§ 101-109, 70 Stat. 567 (1956).

[6] National Institute on Alcohol Abuse and Alcoholism – Alcohol Policy Information System, *About Cannabis Policy*, https://alcoholpolicy.niaaa.nih.gov/about/about-cannabis-policy#jumpmenu-4 (last visited Dec. 13, 2023); *See also* Narcotic Control Act of 1956, Pub. L. No. 728, §§ 101-109, 70 Stat. 567 (1956); Controlled Substances Act, 21 U.S.C. § 812 (1970).

[7] National Institute on Alcohol Abuse and Alcoholism – Alcohol Policy Information System, *About Cannabis Policy*, https://alcoholpolicy.niaaa.nih.gov/about/about-cannabis-policy#jumpmenu-4 (last visited Dec. 13, 2023).

included the Nixon administration's "War on Drugs," which began in 1971 and encouraged law enforcement officers to strictly enforce marijuana prohibition through the 1980's.[8] Furthermore, officers in the 1990's and early 2000's were encouraged to crack down on marijuana offenses, and zero-tolerance policies increased possession arrests.[9]

The United States is currently experiencing a resurgence in illegal marijuana use, especially among young adults. Although fentanyl may now be receiving the most attention due to its lethality, marijuana still continues to be the drug of choice. The 2019 National Survey on Drug Use and Health found that 11% of all Americans reported past-year marijuana use in 2002 compared to 17.5% in 2019, with the demographic of highest use being young adults aged 18-25 (35.4%).[10]

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[8] The Editors of Encyclopedia Britannica, *War on Drugs*, https://www.britannica.com/topic/war-on-drugs (last visited Dec. 13, 2023).

[9] Ryan S. King, *The war on marijuana: The transformation of the war on drugs in the 1990s*, https://harmreductionjournal.biomedcentral.com/articles/10.1186/1477-7517-3-6 (last visited Dec. 13, 2023).

[10] Substance Abuse and Mental Health Services Administration, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health*, https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf (last visited Dec. 13, 2023).

Not only is this resurgence prominent, but it has proven to be harmful. Recent data indicates that one in five injured or killed drivers presenting to trauma centers are under the influence of cannabis and arrive under the influence of cannabis more often than alcohol or other drugs.[11]

Historical precedents may be decades old, but they remain highly relevant under the context of increasing marijuana use among the public. Equally relevant is the body of jurisprudence concerning the reasonableness of searches and seizures in cases involving marijuana.

B. Marijuana and the Fourth Amendment

Turning to the courts, Florida's appellate courts began seeing marijuana cases on a more frequent basis in the 1960's, coinciding with a surge in marijuana during that time period. Even then, the courts emphasized the odor of marijuana in upholding an officer's search of a motor vehicle.

For example, in *State v. Jones,* 222 So. 2d 216 (Fla. 3d DCA 1969), the court reversed a trial court's order holding that no probable cause existed to search the defendant's vehicle. The Third District Court of Appeal held that evidence was lawfully seized under the plain view doctrine because even

[11] F.D. Thomas, et al., *Alcohol and Drug Prevalence Among Seriously or Fatally Injured Road Users*, https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-12/Alcohol-Drug-Prevalence-Among-Road-Users-Report_112922-tag.pdf (last visited Dec. 13, 2023).

though he did not see the marijuana, he "plainly smelled it and definitely knew the odor to be the odor of marijuana." *Id*. at 217.

Since that time, Florida's courts have continually upheld searches of vehicles based in whole or in part upon the smell of marijuana. The Florida Supreme Court's opinion in *State v. Betz*, 815 So. 2d 627 (Fla. 2002), is a case on point. In *Betz,* the Florida Supreme Court, consistent with other jurisdictions, concluded that "the smell of burnt marijuana, in combination with other circumstances, leads to law enforcement officers' possession of probable cause to search the entirety of a motor vehicle." 815 So. 2d at 633.

There is a wealth of decisions by the district courts of appeal, including cases decided by this Court, that follow suit. *See e.g. State v. Hill*, 54 So. 3d 530 (Fla. 5th DCA 2011) ("When [the officer] smelled the strong odor of marijuana wafting from [the defendant] the officer had probable cause and sufficient grounds for search"); *State v. Williams*, 967 So. 2d 941, 943 (Fla. 1st DCA 2007) ("'[T]o a trained and experienced police officer, the smell of cannabis emanating from a person gives the police officer probable cause to search the person or the vehicle.'") (quoting *Betz,* 815 So. 2d at 633); *State v. Brookins*, 290 So. 3d 1100 (Fla. 2d DCA 2020) ("[I]t is undisputed that the officers detected the smell of burnt marijuana emanating from the truck's interior... It is also undisputed that the officers each had experience and

training in recognizing the odor of burnt marijuana. Those factors provided the officers with probable cause to believe that Brookins, as an occupant of the vehicle, had 'violat[ed] the provisions of [chapter 893] relating to possession of cannabis.'") (quoting Fla Stat. § 893.13(6)(e)); *See also G.M. v. State*, 981 So. 2d 529 (Fla. 3d DCA 2008) ("It is equally clear that when the officers smelled marijuana coming from the black Lexus, the officers had reasonable suspicion to investigate"); *State v. Sarria*, 97 So. 3d 282 (Fla. 4th DCA 2012) ("Once the officers smelled the raw marijuana, the traffic stop evolved into something more. The odor of burnt cannabis generates probable cause to both search a vehicle and arrest the occupants.")

The legalization of hemp has not deterred the district courts of appeal from continuing to find probable cause based upon the odor of marijuana. In *Owens v. State,* 317 So. 3d 1218 (Fla. 2d DCA 2021), the Second District Court of Appeal rejected defendant's argument that the odor of marijuana could no longer serve as the basis for probable cause to search a vehicle because the odor of marijuana cannot be distinguished from that of hemp. The probable cause standard, observed the court, is a "practical and common sensical standard." *Id*. at 1219. It is enough, reasoned the court, if there is "'the kind of fair probability on which reasonable and prudent people,

not legal technicians act.'" *Id*. (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013)).

More importantly, the court spoke specifically to the advent of legalized hemp as well as medical marijuana. The court concluded that these legislative changes "[do] not serve as a sea change undoing existing precedent…" *Id.* at 1220. Regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell of marijuana emanating from a vehicle, according to the Second District Court of Appeal, continues to provide probable cause for a warrantless search of the vehicle. *Id*.

Similarly in *Hatcher*, the defendant argued that case precedent holding that odor alone was enough to establish probable cause no longer applied because it is impossible to distinguish between hemp and marijuana by sight or smell. 342 So. 3d at 810. The majority disagreed.

Applying a totality of circumstances test, the court found that the officer reasonably believed that the defendant was under the influence of marijuana while driving his vehicle. *Id*. The court noted that the officer had been trained to identify marijuana by sight and smell, the vehicle was stopped for erratic driving, the defendant admitted that he had just smoked a marijuana "blunt"[12]

[12] A blunt is made by removing the tobacco from a cigar and replacing it with marijuana. *Hatcher,* 342 So. 3d at 809.

and discarded it before the traffic stopped, and the driver's demeanor resembled someone who was under the influence. *Id*. at 811.

As an aside, reminiscent of the Supreme Court's observation about Officer McFadden in *Terry*, the court agreed with the trial court that the officer "would have been derelict had he not stopped the vehicle, had he not initiated the investigation, and had had he not performed in the manner he described." *Id*. at 811. In essence, the court has signaled to law enforcement that it may continue its longstanding practice of relying upon the odor of marijuana as a basis for further investigation.

In sum, with rare exception,[13] Florida's courts have adhered to case precedent holding that the smell of marijuana may be sufficient, with or without other evidence, to establish probable cause to search a vehicle for marijuana. Arguably, this precedent compels the conclusion that it provides at minimum a reasonable suspicion of criminal activity.

C. The Smell of Marijuana Provides Reasonable Suspicion to Detain for Further Investigation

There is little doubt that reasonable suspicion is a less demanding standard than probable cause. *See Illinois v. Wardlow,* 528 U.S. 119, 123 (2000); *see also Baptiste v. State*, 995 So. 2d 285, 291 (Fla. 2008). Upon

[13] *See e.g*., *State v. Nord*, 2020 Fla. Cir. LEXIS 14313 (Fla. 20th JC, Collier Cty., Aug. 6, 2020).

examining the test for reasonable suspicion, it is readily apparent that the odor of marijuana would support an investigatory detention.

In order to conduct an investigatory stop consistent with the Fourth Amendment, an officer must have a reasonable suspicion that "criminal activity may be afoot." *Terry,* 392 U. S. at 30. To be constitutionally permissible, a Terry stop must be temporary and reasonable under the circumstances and only if the officer has a well-founded suspicion that the individual detained has committed, is committing, or is about to commit a crime. *Reynolds v. State,* 592 So. 2d 1082 (Fla. 1992).

Reasonable suspicion must be based on specific and articulable facts. *Terry*, 392 U. S. at 21, 27. It may result from viewing exclusively legal activity, but it depends upon the totality of the circumstances. *Regalado v. State*, 25 So. 3d 600, 604 (Fla. 4th DCA 2009).

The common experience of officers for decades has been that the apparent odor of marijuana reveals marijuana. In other words, it is fair to say that as 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.

The dissent in the case at bar concludes that the plain smell of marijuana presents an ambiguity. *Baxter*, 2023 Fla. App. LEXIS 7381, at *19.

The Sheriffs respectfully disagree. The mere fact that an officer may not be able to distinguish hemp and marijuana by smell or sight does not diminish the likelihood that in a traffic stop an apparent odor of marijuana emanates from marijuana, rather than hemp.

The *Owens* court correctly deduced that the recent legalization of hemp did not serve as a sea change undoing existing precedent. 317 So. 3d at 1220. Although legislation may change the law so that prior judicial decisions are no longer controlling,[14] the Florida Legislature legalized hemp, not recreational marijuana.

Simply put, *Owens* and *Hatcher* correctly state the law. An odor of marijuana, particularly in combination with other circumstances, establishes probable cause to search for marijuana. It stands to reason, then, that the same odor would initially provide reasonable suspicion of criminal activity sufficient to support an investigatory detention.

Neither *Kilburn* nor *Burnett* dictate a different result. In each case, the courts relied heavily upon a citizen's right to carry a firearm in holding that the mere possession of a firearm without additional facts does not justify a Terry stop. *Kilburn,* 297 So. 3d at 674; *Burnett*, 246 So. 3d at 520. Moreover,

[14] *See Heath v. State,* 1988 Fla. App. LEXIS 5170, at *1 (Fla. 1st DCA 1988) ("[I]t is a function of the judiciary to declare what the law is.").

as the First District Court of Appeal observed in *Kilburn,* "[b]earing arms is not only legal; it also is a specifically enumerated right in both the federal and Florida constitutions." 297 So. 3d at 674.

In other words, when the officers in each case observed what appeared to be a concealed firearm, there was nothing unusual about the conduct to indicate that a crime was being committed. They could not articulate any facts that would lead them to believe that the suspects were unlawfully carrying a firearm without a concealed license. *See Kilburn*, 297 So. 3d at 673-74; *Burnett*, 246 So. 3d at 520.

Certainly, there was no historical precedent that compelled a different result. Importantly, speaking to a 2015 statutory change to Section 790.01, Florida Statutes, apparently clarifying that an officer may not use the presence of a concealed weapon as the sole basis to detain an individual, the court added in *Kilburn,* "**that has always been true based on a complete reading of section 790.01.**" 297 So. 3d at 675 (emphasis added).

In contrast, for more than 50 years the smell of marijuana has provided probable cause to search a vehicle for cannabis. Due to their training and experience, law enforcement officers who detect what appears to be the odor marijuana emanating from a vehicle reasonably believe that marijuana, rather than hemp, is to be found within the vehicle.

Therefore, *Kilburn* and *Burnett* should be read in light of their factual context – that is, specific to a case involving a concealed firearm. They do not compel a conclusion in this case that an officer's belief that the apparent smell of marijuana coming from inside of a stopped vehicle is insufficient to establish reasonable suspicion of criminal activity for an investigatory detention.

II. The Facts in this Case Support a Finding of Reasonable Suspicion Under a Totality of the Circumstances.

The totality of the circumstances test was clearly articulated by the First District Court of Appeal in *Hatcher*. The court explained that two basic principles apply: first, the court must consider the whole picture rather than review each fact in isolation. Second, the court must not dismiss outright any circumstances that were susceptible of innocent explanation. *Hatcher*, 342 So. 3d at 810. Although the court was applying the totality of circumstances analysis to the issue of whether probable cause existed to search a vehicle, the same principles equally apply in determining whether reasonable suspicion exists to support an investigatory detention.

In *Baxter*, the Court echoed these principles by taking into consideration the entirety of the conduct rather than parsing the facts separately. The Court also noted that innocent behavior frequently provided the basis for a showing of probable cause and that the relevant inquiry is not

whether the particular conduct is innocent or guilty but the degree of suspicion that attaches to particular types of non-criminal acts. *Baxter*, 2023 Fla. App. LEXIS 7381, at *8-9.

In the case at hand, the majority correctly determined that the facts apparent to the investigating officer provided the necessary degree of suspicion to justify further investigation. As in the case of the arresting officer in *Hatcher*, Officer Accra would have been derelict in his duty had he not investigated the defendant's conduct. *See Hatcher*, 342 So. 3d at 811.

Initially, Officer Accra observed Baxter at approximately 10:30 p.m. driving his vehicle into the parking lot of a closed CVS drug store. As he walked over to Baxter's car, he saw Baxter place something in the back seat of the vehicle. Upon approaching the passenger's side, Accra immediately smelled what appeared to be fresh marijuana through the open window of the car. *Baxter*, 2023 Fla. App. LEXIS 7381, at *2.

When Accra questioned Baxter about why he was parked outside the business, Baxter gave a questionable response that he was waiting for a friend to get from the gym, but he was about to leave. Upon further questioning, Baxter changed his story and advised the officer that he pulled over to check a tire and he was about to go to his friend's house. *Id.*

These facts, together with the odor of marijuana, would lead any experienced officer to reasonably suspect criminal activity. The possibility that Baxter was in possession of hemp rather than marijuana does not require this court to ignore all the facts under the totality of the circumstances.

In many respects, this case favorably compares to *Johnson v. State*, 275 So. 3d 800 (Fla. 1st DCA 2019). In *Johnson*, the defendant challenged the search of his vehicle based upon the burnt smell of marijuana, arguing that because medical marijuana was legal it was not a sufficient basis for probable cause. *Id*. at 801. Affirming the trial court's denial of the motion to suppress, the court held: “Here, we cannot say that it would be unreasonable for an officer to conclude there is a fair probability that someone driving around at 2:00 a.m., smelling of marijuana, is acting unlawfully. And this is true whether or not Florida allows the medical use of marijuana in some circumstances.” *Id*. at 802.

While Baxter may not have been driving at 2:00 a.m., he pulled into the parking lot of a closed CVS store at 10:30 in the evening, which initially was enough to attract Officer Accra’s attention. Aside from the odor of fresh marijuana, Baxter’s actions, including placing his backpack in back seat of his vehicle and giving dubious and inconsistent explanations as to why he

was in the parking lot, generate a higher level of suspicion than the facts upon which the First District Court of Appeal relied to find probable cause to search in *Johnson*.

Finally, in resolving this issue, it is helpful to return to the bedrock case of *Terry v. Ohio.* All that is required, held the Supreme Court, is a well-founded suspicion that the individual detained has committed, is committing, or is about to commit a crime. *Terry*, 392 U. S. at 30; *See also Reynolds*, 592 So. 2d at 1084. Given the particular circumstances of this case, including the apparent odor of fresh marijuana, Officer Accra held a well-founded suspicion that Baxter was in possession of marijuana. The denial of the motion to suppress should be affirmed.

CONCLUSION

In cases involving the apparent odor of marijuana, this Court should apply a totality of circumstances test that affirms the smell of marijuana as a basis for determining not only reasonable suspicion for an investigatory detention but also probable cause to search a vehicle for marijuana. The legalization of hemp does not create an ambiguity sufficient to depart from precedent. The mere possibility that an officer may be detecting the odor of hemp does not eviscerate an officer's reasonable belief, based on his training and experience, that he is smelling the odor of cannabis.

In the present case, the totality of facts, including the apparent odor of fresh marijuana, provided reasonable suspicion of criminal activity sufficient to support Baxter's investigatory detention. The denial of the motion to suppress should be affirmed.

Respectfully submitted this 15th day of December 2023.

By: */s/ R. W. Evans*
ROBERT WAYNE EVANS, ESQ.
Florida Bar No. 198862
revans@anblaw.com
BENJAMIN M. LAGOS, ESQ.
Florida Bar No. 1025146
blagos@anblaw.com
ALLEN, NORTON & BLUE, P.A.
906 North Monroe Street, Suite 100
Tallahassee, Florida 32303
(850) 561-3503
(850) 561-0332 (Facsimile)

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 4,685 words, excluding the sections listed in Florida Rule of Appellate Procedure 9.045(e), in compliance with Florida Rule of Appellate Procedure 9.370(b).

By: */s/ R. W. Evans*
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of December 2023, I filed a copy of the foregoing through the Florida E-Filing Portal, which causes electronic service to all counsel of record, including:

Adam B. Wilson
Florida Bar No. 124560
Adam.wilson@myfloridalegal.com
Christina Piotrowski
Florida Bar No. 1032312
Christina.piotrowski@myfloridalegal.com
Office of the Attorney General
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399

Elizabeth Hogan Webb
Florida Bar No. 853089
ehw@pd4.coj.net
Office of the Public Defender
Florida's 4th Judicial Circuit
407 N. Laura Street
Jacksonville, FL 32202

By: */s/ R. W. Evans*
Attorney