IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

CASE NO: 1D22-1412
LT NO: 16-2021-MM-014027

JASON HASSAN BAXTER,
APPELLANT,

vs.

STATE OF FLORIDA,
APPELLEE.
_____/

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

INITIAL BRIEF OF APPELLANT

CHARLIE COFER
PUBLIC DEFENDER

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER
407 N. LAURA STREET
JACKSONVILLE, FL 32202
(904)255-4673
FLORIDA BAR NO. 0853089

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PRELIMINARY STATEMENT

This appeal arises from Appellant's conviction on a charge of use, or possess with intent to use, drug paraphernalia following a plea of guilty and sentencing on April 5, 2022. The record on appeal consists of one volume and one supplemental volume. Appellant will designate all references to the record on appeal by "R." followed by the correct page number(s), and references to the supplemental record on appeal by "Supp. R." followed by the correct page number(s). The supplemental volume contains a DVD and references to this DVD will be designated as State's Ex. 1 with the corresponding time stamp. Appellant, Jason Hassan Baxter, will be referred to as Appellant or Baxter. Appellee, the State of Florida, will be referred to as the State or Appellee.

STATEMENT OF THE CASE AND FACTS

Jason Hassan Baxter was arrested on August 16, 2021 at approximately 10:30 p.m. for the offense of armed possession of over 20 grams of marijuana, in violation of § 893.13(6)(a), Fla. Stat. (R. 1-4). The State filed a two-count Information on September 28, 2021 charging Baxter with one count of possession of less than 20 grams of Cannabis, in violation of § 893.13(6)(b), Fla. Stat. and one count of possession of drug paraphernalia, in violation of § 893.147(1), Fla. Stat. (R. 12-13).

Motion to Suppress

Appellant filed a Motion to Suppress on November 30, 2021 submitting that all evidence and statements should be suppressed following Appellant's illegal detention. (R. 17-20). A hearing on the motion to suppress was held on December 16, 2021. (R. 33-69). The State and defense stipulated to the introduction of the body worn camera footage. (R. 36, Supp. R, State's Ex. 1).

T.W. Accra

The State called Jacksonville Sheriff's Office (JSO) patrol officer T.W. Accra to testify. (R. 36-50). Accra stated that in the evening of August 26, 2021 he was on duty in Duval County,

Florida wearing his "Class C uniform" which "consists of tactical gear, tactical vest, black T-shirt and black BDU pants." (R. 37-38). He stated he wore his body worn camera that evening and the footage was admitted into evidence as State's Exhibit 1. (R. 38, Supp. R, State's Ex. 1). The footage was played for the court at this time. (R. 39-46, State's Ex. 1).

The video shows the officer approaching Baxter with emergency lights illuminated after pulling into the parking lot of a CVS. (State's Ex. 1, 00:30). Accra told Butler "the only reason I'm making contact with you is because you parked outside a closed business." (State's Ex. 1, 00:40). Accra asked Baxter for his identification, which he held onto for the duration of the detention. (State's Ex. 1, 00:48). The officer told Baxter to "just stand by" because he was going to "check everything out and get the tag on your car, make sure it is good." (State's Ex. 1, 01:51). After taking note of Baxter's license plate, Accra returned to his squad car with Baxter's license and vehicle registration. (State's Ex. 1, 02:40). While in the police vehicle, the officer said (to an unidentified person, presumably another officer) Baxter's "story is kind of doodoo" and that he smelled "fresh" marijuana. (State's Ex. 1,

05:35). At some point, the camera footage shows two additional police vehicles on scene, all surrounding Baxter's vehicle. (State's Ex. 1, 05:39). Another officer told Baxter to step out of his vehicle. At this time the video shows Baxter with his hands up, body against the vehicle being blocked by the officer. (State's Ex. 1, 05:55). He was then handcuffed and ordered to sit in the backseat of the police vehicle. (Supp. R. 05:55-06:00). None of the officers asked Baxter whether he had a medical marijuana card or any other related questions until after he was ordered out of the vehicle. (State's Ex. 1, 05:55 et. seq.).

On direct examination, during the hearing, Accra stated the reason he approached Baxter's vehicle "was from a well-being standpoint, also the fact that part of our mission statement on the midnight squad from our lieutenant and chief up is to ensure property crimes aren't being committed. As in this, he was outside of a closed business. Just to make sure a burglary wasn't progressing as well." (R. 46). Accra activated the patrol vehicle's lights because the area was not well-lit and he wanted to be seen by other officers in the event "things go wrong" and he also wanted to

alert Baxter that he was a law enforcement officer because it might not be readily apparent from his non-traditional uniform. (R. 46).

Although he said it was not in the body camera footage, Accra saw Baxter make an "overt to the back of the vehicle to place something there. Furthermore, he wound down his windows to speak with me, at which point the aroma or odor of marijuana immediately hit me." (R. 47). According to Accra, the encounter changed from checking on Baxter's well-being to a criminal investigation, "the minute that the fresh smell of marijuana hit my nose." (R. 47). However, Accra said that "[i]t is a common occurrence" to see cars parked outside closed businesses. (R. 47).

On cross examination, Accra stated that he saw a vehicle pull into the parking lot of a closed CVS and he thought it was suspicious because CVS was closed. (R. 48). He admitted CVS did not place a call for assistance but he drove by and decided to come back around to the parking lot. (R. 48). He also admitted that he did not receive any notice of a driver requesting assistance from the CVS parking lot. (R. 48). He decided to speak with the driver because he "thought something might have been going on." (R. 48). He pulled into the parking lot and turned on the JSO marked

vehicle's emergency lights. (R. 48-49). Baxter's vehicle was facing toward the JSO vehicle and no other cars were in the parking lot. (R. 49). Accra got out of the vehicle and approached Baxter and at that time he said he smelled the odor of marijuana. (R. 49).

On re-direct, Accra stated that Baxter's car was already parked when Accra approached the vehicle and he did not pull him over. (R. 50).

After hearing argument from both the State and the defense, and replaying the body-worn camera footage, the court requested case law and memoranda and took the motion under advisement, passing the case for ruling. (R. 50-69).

On January 3, 2022, the trial court denied the motion to suppress. (R. 70). On the record, the court based the ruling on the finding that Baxter was "free to leave" and that "the officer came into contact with Mr. Baxter in a caretaking type of posture that then developed into reasonable suspicion once he detected the odor of marijuana, which it appears he did as soon as the defendant rolled down his window and they came into contact with each other." (R. 70-71). No written order was entered.

On January 25, 2022, the trial court accepted Baxter's plea of guilty on Count 2 with a finding that the ruling on the motion to suppress was dispositive. (R. 72-75). The trial court adjudicated Baxter guilty on Count 2 and sentenced him to one day county jail with credit for one day and $303.00 in court costs. (R. 75-76). The State announced a nolle prosequi on Count 1. (R. 21-22, 76).

On February 15, 2022, defense counsel filed a Motion to Vacate Judgment and Sentence seeking to vacate the plea in order to re-enter the plea to specifically reserve Baxter's right to appeal the ruling on the dispositive motion. (R. 23-24). The trial court heard the motion on February 24, 2022 and requested additional case law and passed the case to March 16, 2022. (R. 77-84).

On March 16, 2022, defense counsel provided additional case law and on April 5, 2022 the trial court granted the motion, and allowed Baxter to re-enter his plea with the express reservation of his right to appeal the ruling on the dispositive motion. (R. 87-91). The trial court adjudicated Baxter guilty on one count of possession of drug paraphernalia and sentenced him to $303.00 in court costs. (R. 25-26, R. 90-91).

A timely notice of appeal was filed on May 5, 2022. (R. 28). Upon reviewing the record, the undersigned discovered that State's Exhibit 1 (the DVD of the body-worn camera footage), was not included in the record on appeal. A Motion to Supplement the Record was filed on August 3, 2022, which was granted. The Supplemental Record was filed on September 8, 2022 which included State's Ex. 1, the DVD of Accra's body-worn camera footage.

SUMMARY OF ARGUMENT

The search in this case was unlawful because the encounter was not initiated by community caretaking concerns but rather was based on unfounded suspicion of criminal activity. Baxter was initially approached by the first officer on scene solely because he was sitting in his vehicle in a CVS parking lot shortly after it closed for the night. The officer activated his emergency lights and this police conduct indicated to Baxter that he was not free to leave, elevating the encounter to an investigatory detention. Because this detention was not based on a well-founded suspicion of criminal activity, all subsequent evidence obtained in the search should have been suppressed.

Moreover, the continued investigation and detention was also illegal. Officer Accra testified that the continued investigation was supported by his detection of the smell of "fresh marijuana." Recent changes to State and federal law that legalize the smoking of hemp – a substance indistinguishable by smell from marijuana – invalidate this as a basis for probable cause to arrest. Such potentially lawful activity alone cannot meet this standard for probable cause.

For these reasons, the law enforcement officers obtained the evidence from the subsequent search in violation of the Fourth Amendment. Because Baxter's motion to suppress was dispositive, this Court should reverse the Judgment and Sentence.

ARGUMENT

ISSUE: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE THE SEARCH WAS UNREASONABLE UNDER THE U.S. AND FLORIDA CONSTITUTIONS AND ALL EVIDENCE OBTAINED THEREAFTER WAS "FRUIT OF THE POISONOUS TREE"

A. Standard of Review

A denial of a motion to suppress is reviewed on a *de novo* basis, with the trial court's factual findings being sustained if supported by competent, substantial evidence. State v. Glatzmayer, 789 So. 2d 297 (Fla. 2001). This court is bound by the Florida Constitution to make this determination in conformity with the Fourth Amendment as interpreted by the U.S. Supreme Court. Holland v. State, 696 So. 2d 757, 759 (Fla. 1997).

B. The Merits

1. Legal Background

This appeal arises out of the trial court's denial of a motion to suppress evidence that was discovered during Appellant's illegal detention pursuant to the Fourth Amendment to the United States Constitution and Article I, section 12 of the Florida Constitution,

which guarantee citizens the right to be free from unreasonable searches and seizures. Golphin v. State, 945 So. 2d 1174, 1179 (Fla. 2006). "The protections against unreasonable searches and seizures afforded by the Florida Constitution must be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court." Caldwell v. State, 41 So. 3d 188 (Fla. 2010). Warrentless searches, such as is the issue in the instant case, are per se unreasonable "[s]ubject only to a few specifically established and well-delineated exceptions." Katz v. v. United States, 389 U.S. 347, 357 (1967). The State bears the burden of proving an exception to the warrant requirement. Lewis v. State, 979 So 2d 1197, 1200 (Fla. 4th DCA 2008).

The protection against unreasonable searches and seizures applies "whenever a police officer accosts an individual and restrains his freedom." Terry v. Ohio, 392 U.S. 1, 16 (1968). Florida courts have held that an individual's freedom is so restrained if, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Baptiste v. State, 995 So. 2d 285, 295 (Fla. 2008)

(quoting United States v. Mendenhall, 446 U.S. 554 (1980). An officer must have reasonable suspicion that criminal activity has occurred to detain a person. Terry, supra at 31. This reasonable suspicion must be present at the time of the seizure, and events that transpire after the seizure may not be utilized in determining reasonable suspicion. Baptiste, supra at 295. A person "may not be detained, even momentarily, without reasonable objective grounds for doing so." Florida v. Royer, 460 U.S. 491, 498 (1983).

Therefore, all evidence obtained after this illegal detention is fruit of the poisonous tree and should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). A "seizure" under the Fourth Amendment will only occur "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Terry, supra. Because not all personal interaction between law enforcement and citizens rise to the level of "seizures" under the Fourth Amendment, the Florida Supreme Court has identified three levels of police-citizen encounters. Popple v. State, 626 So. 2d 185 (Fla. 1993).

The first level of police-citizen encounter is "consensual encounter," which involves minimal police contact and does not

trigger constitutional safeguards. During a consensual encounter, a citizen may either voluntarily comply with a police officer's requests or choose to disregard them and go about his business. Id. at 186. The second level is an "investigatory stop," which allows an offer to "reasonably detain a citizen temporarily if the officer has reasonable suspicion that a person has committed, is committing, or is about to commit a crime." Id. An investigatory stop must be based on a "well-founded, articulable suspicion of criminal activity" and cannot be based on "mere suspicion." Id., citing Carter v. State, 454 So. 2d 739 (Fla. 2d DCA 1984). The third and final level of police-citizen encounter is an arrest, which requires probable cause that a crime has been, is being, or is about to be committed. Id.

When determining whether a particular encounter is consensual, courts must look to the "totality of the circumstances" to decide if the police conduct would have communicated to a reasonable person that the person was free to leave or to terminate the encounter. Hayward v. State, 24 So. 3d 17, 34-35 (Fla. 2009). "Examples of circumstances that might indicate a seizure, even where a person did not attempt to leave, would be the threatening

presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Golphin, supra at 1182 (quoting United States v. Mendenhall, 446 U.S. 544, 554-55 (1980)).

2. The Initial Encounter

In this case, the trial court found that "the officer came into contact with Mr. Baxter in a caretaking typo of posture that then developed into reasonable suspicion . . ." However, the facts in this case did not support the necessity of such encounter, thereby negating the subsequent exchange.

It is well settled that "[e]ven a stop pursuant to an officer's community caretaking responsibilities . . . must be based on specific articulable facts showing that the stop was necessary for the protection of the public." Majors v. State, 70 So. 3d 655 (Fla. 1st DCA 2011). Such stops cannot be based on "sheer speculation." Id. In Majors, a bank customer was "acting weird" and trying to withdraw $17,500.00 and was entering and exiting the bank to have discussions with people inside a vehicle waiting outside the bank. Id. After receiving a call from a bank employee, the officers

blocked the vehicle and approached the vehicle, ultimately resulting in an arrest. Id. The defendant filed a motion to suppress all the evidence seized as the result of the stop of the vehicle, which was denied. On appeal, the First District Court of Appeal reversed, holding that the officers did not have reasonable suspicion for the stop because they could not articulate a basis for suspecting criminal activity. Id. at 661. Additionally, the court found the stop did not fall under the community caretaking exception because the officers were not able to articulate specific facts showing that the stop was necessary for the protection of the public. Id.

Here, the officer's basis for the encounter with Baxter was the fact he was parked in a CVS parking lot a little after 10 p.m. when the store was closed. The officer also noted that his supervisors stressed the "mission statement on the midnight squad" is to ensure property crimes are not being committed. Although the officer said he approached Baxter's vehicle from a "well-being standpoint," he admitted that he wanted to "make sure a burglary wasn't progressing as well." He admitted that he approached Baxter because he thought something "might be going on." The officer, therefore, came to the situation with the preconceived notion that a

car parked outside a store slightly after closing is suspicious even though he admitted that this is a common occurrence. With that mindset, the officer then activated his lights on his JSO-marked car because he wanted to be seen by other officers in the event "things go wrong." A second and third officer arrived on scene and then three police vehicles surrounded Baxter's vehicle with their lights activated.

It is evident, therefore, that Accra's actions were precipitated by a suspicion of criminal activity rather than from community caretaking. The objective of deterring property crimes and his suspicion of Baxter for being parked outside a closed business signaled Accra's reasons for pulling his vehicle in front of Baxter's and activating his emergency lights and for the arrival of the second and third officers. These are not actions of a peace officer concerned for the well-being of a non-threatening citizen. Rather, Accra approached the encounter from an investigatory viewpoint right from its initiation. This was improper because it was not based on a "well-founded, articulable suspicion of criminal activity" but was based on "mere suspicion."

The Fourth District Court of Appeal has held that reasonable suspicion is not established to support an investigatory stop simply from a car being parked outside of a closed business. Jordan v. State, 707 So. 2d 338, 339 (Fla. 2d DCA 1998). In Jordan, a deputy drove by a "pickup truck parked in a dark area next to a closed business" which had been burglarized in the past. Id. at 338. When the officer turned around to go back to the truck, the driver of the pickup pulled away. Id. While the deputy followed the truck, he noticed items in the back and "decided to stop Jordan to investigate if any of the items were stolen." Id. The deputy activated his emergency lights and approached Jordan's truck and saw him place something under his seat. Id. Upon the encounter, the deputy questioned Jordan as to what he placed underneath the seat and Jordan admitted to having "a little bit of 'dope'" and he consented to a search which resulted in the discovery of a small amount of methamphetamine and paraphernalia. Id.

The Fourth District Court of Appeal reversed the trial court's denial of a motion to suppress, which had found reasonable suspicion supported the stop based on the fact the defendant was parked outside a closed business establishment late at night, he

was parked away from a pay phone and lighting, the business had recently been burglarized, and the defendant immediately pulled away from the parking lot when he saw the deputy. Id. The appellate court found these facts did not provide a founded suspicion of criminal activity to justify the stop and investigation. Id. See also McCloud v. State, 491 So. 2d 1164 (Fla. 2d DCA 1986) (reversing the denial of a motion to suppress, holding the officers did not have reasonable suspicion to detain a driver parked next to a boarded-up building under a "no trespassing" sign late at night in a "high-crime area.").

As in Jordan, the encounter should never have occurred here because it did not meet the standard for an investigatory stop. Other than the fact Baxter was parked outside of a closed store, Officer Accra could not point to any suspicious activity to justify the detention. As such, any and all evidence obtained during this encounter should have been suppressed.

Nevertheless, even if Officer Accra's concern for Baxter's well-being is accepted, the community caretaker encounter must still be supported by "specific articulable facts showing that the stop was necessary for the protection of the public." Majors, supra. The

simple act of being parked outside a CVS a little after 10 p.m. without anything else does not provide a basis for the police encounter. As in Majors, the encounter was based on "mere speculation," and was improper.

Furthermore, if this Court accepts the trial court's finding that the initial encounter fell within the community caretaking doctrine, the encounter, nevertheless became an investigatory stop when Accra put Baxter in a position where he did not feel he was free to leave. The position of the police vehicle, the activation of the emergency lights, the arrival of two other police vehicles and the totality of the circumstances would lead a reasonable person to believe that he was not free to leave. Even if Officer Accra's initial thoughts included concern for Baxter's safety, his actions elevated the encounter to an investigatory stop which was improper because the facts do not support a finding of reasonable suspicion. See Jordan, supra.

In G.M. v. State, 19 So. 3d 973, 979 (Fla. 2009), the Florida Supreme Court, applying United States v. Mendenhall, 446 U.S. 544 (1980), determined activities of the police vehicle's emergency lights, combined with the vehicle's rapid approach, the positioning

of the police vehicle behind the parked car where the defendant was standing, and the fact there was no indication the defendant asked for assistance or that the officers believed the defendant was in need of aid would lead a reasonable person to conclude he was free to leave. The Court noted that:

> it would be both dangerous and irresponsible for this Court to advise Florida citizens that they should feel free to simply ignore officers under such circumstances. Instead, as a matter of safety to both the public *and law enforcement officers*, we conclude that a citizen who is aware of the police presence under the specific facts presented by this case is seized for Fourth Amendment purposes and should *not* attempt to walk away from the police or refuse to comply with lawful instructions.

The similar facts in the instant case would have reasonably led Baxter to believe he was not free to leave and was, therefore, seized. Because the investigatory detention and seizure was not based on reasonable suspicion, the subsequent search was unlawful.

3. The continuing investigation and arrest

Furthermore, Accra's continued detention and seizure of Baxter and the subsequent search were unlawful because the search was based solely on the odor of what he believed to be marijuana. Because of recent changes to Florida and federal law,

the sight or smell of a substance presumed to be marijuana is no longer sufficient to establish probable cause to search.

Accra stated that the encounter became an investigation, "the minute that the fresh smell of marijuana hit my nose." The officer then told Baxter to "just stand by" because he was going to "check everything out" and "get the tag on your car, make sure it is good." Baxter was then told to exit the vehicle and he was taken into custody. Only then did the officers ask Baxter if he had a marijuana card or used hemp products.

Prior to the recent amendments in federal and state law this court held in State v. Williams, 967 So. 2d 941, 941 (Fla. 1st DCA 2007) that "the odor of burnt cannabis emanating from a vehicle constitutes probable cause to search all occupants of that vehicle." Although Williams was reaffirmed in Johnson v. State, 275 So. 3d 800, 801 (Fla. 1st DCA 2019), this holding was based in large part on other factors, including the fact that smokable medical marijuana was not legal at the time of the search, medical marijuana could not be legally used in a vehicle at the time, and that federal law continued to prohibit the use of marijuana. Id. Additionally, the court in Johnson also found that the defendant

was potentially driving under the influence. Id. See also Collie v. State, 331 So. 3d 1240 (Fla. 1st DCA 2022) (relying on Johnson supra, and Owens v. State, 317 So. 3d 1218 (Fla. 2d DCA 2021) to find probable cause for a warrantless search of a vehicle based on the smell of marijuana alone).

However, as Judge Bilbrey advocates in his specially concurring opinion in Hatcher v. State, 342 So. 3d 807 (Fla. 1st DCA 2022), recent changes in Florida and federal law require a reexamination of whether the odor of marijuana is sufficient to establish probable cause. In 2020, the Florida legislature enacted the "State hemp program" codified in Ch. 2019-132 sec. 1, Laws of Florida. This program excluded "hemp-derived cannabinoids" from the list of controlled substances or adulterants. Sec. 581.217(2)(a)-(b), Fla. Stat. The new law also changes the definition of cannabis to exclude medical marijuana and hemp. Sec. 893.02(3), Fla. Stat. And federal law also now excludes hemp from the definition of marijuana. See 21 U.S.C. sec. 802(16)(B)(i) (2020).

As Judge Bilbrey noted, this Court's recent decision in Kilburn v. State, 297 So. 3d 671 (Fla. 1st DCA 2020) supports a departure from Johnson. In Kilburn, this Court held that reasonable

suspicion to justify a Terry[1] detention could not be based on the officer's view of the butt of a handgun protruding out of the waistband on a defendant's body because "[a] potentially lawful activity [having a license to carry a concealed firearm] cannot be the sole basis for a detention." Id. at 675. This Court urged that if a potentially lawful activity formed the sole basis for a detention "the Fourth Amendment would be eviscerated." See also State v. Nord, 28 Fla. L. Weekly Supp. 511a (Fla. 20th Jud. Cir. August 8, 2020) (trial court granted motion to suppress when the only basis for the arrest was that defendant's vehicle was parked outside closed business and when the officer approached he smelled fresh marijuana from the driver side door).

Here, the officers did not question Baxter about medical marijuana or hemp until after he was already in custody. The officers detained Baxter on the basis of the odor of "fresh" marijuana alone. As Judge Bilbrey stated in Hatcher, "If a potentially lawful activity cannot be the sole basis for detention premised on a reasonable suspicion of criminal activity, then potentially lawful activity alone (such as possessing a substance

[1] Terry, supra, 392 U.S. 1 (1968).

which could be hemp) cannot meet the higher standard of probable cause. Hatcher's possession of a substance that smelled like marijuana was potentially lawful since the substance was indistinguishable from hemp without scientific testing." Hatcher at 813, J. Bilbrey, specially concurring. Because there may have been a potentially lawful explanation for the officers' observations in this case, the detention could not meet the higher standard of probable cause and his arrest and the subsequent search were unlawful.

Therefore, the trial court erred in denying the motion to suppress in this case, and because the motion was dispositive, the Judgment and Sentence should be reversed.

CONCLUSION

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

Respectfully submitted,

CHARLIE COFER
PUBLIC DEFENDER

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER
407 N. Laura Street
Jacksonville, FL 32202
(904)255-4727
FLORIDA BAR NO. 0853089
Email: ehw@pd4.coj.net

CERTIFICATE OF SERVICE

I certify that a copy of this brief was served, via the Florida Courts E-Filing Portal, on the Office of the Attorney General, at crimapptlh@myfloridalegal.com, this 7 day October, 2022.

ELIZABETH HOGAN WEBB

CERTIFICATE OF COMPLIANCE

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

ELIZABETH HOGAN WEBB