RECEDING FROM THE PLAIN SMELL DOCTRINE

Why the Odor of Marijuana Alone Is No Longer Sufficient to Establish Reasonable Suspicion of Criminal Activity to Justify An Investigatory Detention

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The past decade has seen extensive changes to Florida and federal laws that have greatly expanded the number of people who can lawfully possess hemp and marijuana. Starting in 2014 with changes to the Florida medical marijuana laws, to the nationwide federal declassification of hemp as a controlled substance and the legalization of hemp in Florida, to the Florida constitutional amendment guaranteeing the right to possess marijuana for enumerated medical conditions, Florida courts are now considering whether police officers can continue to rely on the smell of marijuana alone to conduct an investigatory stop. Because hemp and cannabis (what people commonly refer to as marijuana) come from the same plant, both substances look and feel the same, their smell is indistinguishable, and both contain Delta-9 THC, the primary psychoactive compound in cannabis. The only difference between hemp (which is legal) and what would be considered "illegal" marijuana in Florida is that hemp has no more than 0.3% of Delta-9 THC. If the substance has up to 0.3% of Delta-9 THC, the substance is considered hemp and legal under Florida law. But if the Delta-9 THC content exceeds 0.3 percent, the substance is considered cannabis and its possession is illegal under Florida law, except for certain medical uses. Currently, it appears that the only way to determine whether a substance is hemp (under 0.3% THC) or cannabis (over 0.3% THC) is by laboratory testing for THC content. Thus, a police officer who smells the distinctive odor of marijuana cannot immediately discern whether the odor is from legal hemp, legal medical marijuana, or illegal marijuana.

Since at least the 1960s, Florida courts have held that under the "plain smell" doctrine — an extension of the well-known plain view doctrine — the smell of marijuana alone was sufficient to establish reasonable suspicion of drug activity because cannabis in all its forms was illegal. And because the odor of marijuana is so distinctive, courts held that the incriminating nature of the smell was immediately apparent to a police

officer without the need to conduct any further examination or search of the substance — for example, without the need for laboratory testing.

But in *State v. Baxter*, 389 So. 3d 803 (Fla. 5th DCA 2024) the en banc Fifth District Court of Appeal held that the basic tenet behind the plain smell doctrine no longer applies to the smell of marijuana because the smell of legal hemp and illegal marijuana is indistinguishable and "[t]he incremental legalization of certain types of cannabis at both the federal and state level has reached the point that its plain smell does not immediately indicate the presence of an illegal substance. As a result, the smell of cannabis cannot, on its own, support a detention."[1] The Fifth District therefore receded from the plain smell doctrine in favor of the totality of the circumstances test, which for decades has controlled the Fourth Amendment analysis in determining whether reasonable, articulable suspicion of criminal activity exists.[2]

In reaching its conclusions, the *Baxter* en banc court certified conflict with *Owens v. State*, 317 So. 3d 1218 (Fla. 2d DCA 2021), a short opinion by a panel of the Second District Court of Appeal which held that "the recent legalization of hemp, and under certain circumstances marijuana, does not serve as a sea change undoing existing precedent, and we hold that regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell of marijuana emanating from a vehicle continues to provide probable cause for a warrantless search of the vehicle."[3] The Florida Supreme Court has yet to resolve the conflict, but for a number of reasons outlined below, there are persuasive arguments that *Owens* was wrongly decided, including the fact that *Owens* relied on *Johnson v. State,* 275 So. 3d 800 (Fla. 1st DCA 2019), but *Johnson* was abrogated by changes in Florida and federal law relating to hemp and marijuana.[4]

Additionally, recently in *Simmons v. State*, 2024 WL 4863019 (Fla. 2d DCA Nov. 22, 2024), another panel of the Second District Court of Appeal explained how *Owens* did not necessarily stand for the broad proposition that the smell of marijuana alone is sufficient to establish probable cause to justify the warrantless search of a car. Instead, *Owens* "involved the odor of burnt marijuana *combined with* erratic driving," and the additional discussion in *Owens* about various other scenarios "is dicta and should be treated as such."[5] Chief Judge Sleet wrote separately that "[t]he determination of probable cause remains one that is based *on the totality of the circumstances* of each case and the law in place at the time of the offense," and "based on the[] facts [of the case] and current Florida law, the odor of fresh marijuana alone was insufficient to provide law enforcement the necessary probable cause to justify the warrantless search of Simmons' vehicle and person...."[6]

Finally, as this article was going to print, the Fifth District Court of Appeal extended *Baxter* to hold in *Ford v. State*, 2025 WL 39829 (Fla. 5th DCA Jan. 7, 2025), that as a matter of first impression, a dog's alert to the presence of marijuana, alone, does not establish probable cause for the warrantless search of a car.

This article provides a chronology of important changes in Florida and federal laws relating to hemp and marijuana; analyzes *Baxter, Ford, Owens*, and other Florida cases addressing the plain smell or plain view doctrine; and concludes that the *Baxter* en banc court reached the correct result by receding from the plain smell doctrine in favor of the totality of the circumstance test. Until the Florida Supreme Court decides the issue definitively, zealous defense attorneys should continue to challenge detentions and searches conducted based on the smell or look of marijuana alone, and we hope that the information in this article is helpful in crafting those motions.

THE ODOR OF MARIJUANA AND THE PLAIN SMELL DOCTRINE

The plain smell doctrine can trace its roots to the plain view doctrine. "Just as evidence in the plain view of officers may be searched without a warrant, evidence in the plain smell may be detected without a warrant."[7] For an object in plain view or in plain smell to be subject to an exception to the warrant requirement, "its incriminating character must be 'immediately apparent,' meaning 'without conducting some further search of the object.'"[8] Therefore, "an inability to immediately identify an odor's plain smell as emanating from an illegal source means the exception cannot apply."[9]

In years past, "the smell of marijuana alone was all that was required" for an investigatory stop "because the mere possession of marijuana was illegal [and] its odor was very distinctive."[10] But due to changes in Florida and federal laws relating to hemp and marijuana, and the fact that hemp and marijuana smell the same, the foundational basis for the plain smell doctrine is no longer sound.

FLORIDA AND FEDERAL LEGISLATIVE CHANGES RELATING TO HEMP AND MARIJUANA

2014 – The Compassionate Use Act, §381.986, Florida Statute: Florida's first marijuana legalization measure took effect in 2014, with the Compassionate Medical Cannabis Act of 2014. The Act (Florida Senate Bill 1030 (2014)) authorized physicians to prescribe low-THC cannabis to patients suffering from "cancer or a physical medical condition that chronically produces seizures or severe and persistent muscle spasms, and have no acceptable alternative treatment options available to them."[11] To effectuate its purpose, the Act created Florida Statute §381.986, at the time titled "Compassionate Use of Low-THC Cannabis," which authorized physicians to prescribe low-THC cannabis to qualifying patients. The Act excluded low-THC cannabis from the definition of prohibited cannabis, authorized state universities with medical or agricultural research programs to conduct research on low-THC cannabis, and authorized dispensaries and recognized medical centers to manufacture and distribute low-THC cannabis, notwithstanding the criminal prohibitions relating to

cannabis in Chapter 893 of the Florida statutes. §893.02(3), Fla. Stat. (2014); §381.986(14)(i).

2015 – The Right to Try Act, §499.0295, Florida Statute: One year later, in 2015, Florida passed the Right to Try Act, which made marijuana available to all terminally ill patients, not only those suffering from cancer, epilepsy, and ALS.[12] The Act was codified as Florida Statute §499.0295 and authorized the use of experimental drugs not yet approved for general use by the FDA. §499.0295(2)(a), Fla. Stat. (2015).

2016 – Florida Constitutional Amendment, Art. X, Sec 29: The following year, Florida voters passed a constitutional amendment titled "Use of Marijuana for Debilitating Medical Conditions."[13] Known as Amendment 2, its chief purpose was to allow for "medical use of marijuana for individuals with debilitating medical conditions as determined by a licensed Florida physician."[14]

Amendment 2 became effective as article X, section 29 of the Florida Constitution and guarantees the right to possess marijuana for multiple medical conditions.[15] The amendment specifically states that "[t]he medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law."[16]

The amendment expanded the qualifying medical conditions for which marijuana was authorized under the Compassionate Use Act of 2014 to include glaucoma, HIV, AIDS, PTSD, Crohn's disease, Parkinson's disease, multiple sclerosis, and "other debilitating medical conditions of the same kind or class as or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient."[17] This expansion significantly increased the number of people who may lawfully possess marijuana in Florida.

2017 – Medical Marijuana, §381.986, Florida Statute: In line with the Florida constitutional amendment, the Florida Legislature revised Florida Statute §381.986 to authorize the medical use of marijuana, which the statute defined as "the acquisition, possession, use, delivery, transfer, or administration of marijuana authorized by a physician certification." § 381.986(1)(k), Fla. Stat. The statute lists the same qualifying medical conditions as those listed in the Florida Constitution, and added "chronic nonmalignant pain," Fla. Stat. §381.986(2)(m), thereby exponentially increasing the number of people who could lawfully possess marijuana in Florida. According to the Centers for Disease Control, 50 million adults suffered from chronic pain in the United States in 2016.[18]

2018 – The 2018 Federal Farm Bill and the Nationwide Legalization of Hemp: Although hemp was widely produced in the United States for many years, the Marijuana Tax Act of 1938 ended the legal production of hemp by declaring hemp a Schedule I controlled substance under the Controlled Substances Act, 21 U.S.C. §801.[19]

But in 2014, Congress passed the 2014 Farm Bill, which carved out hemp from the definition of illegal marijuana for purposes of a research pilot program. 7 U.S.C. §5940(a). Four years later, in 2018, Congress enacted the Agriculture Improvement Act, commonly known as the 2018 Farm Bill.[20] That Bill expanded on the 2014 Farm Bill and authorized the nationwide commercial cultivation, distribution, and consumption of hemp and its derivatives.[21] The Bill also directed the U.S. Department of Agriculture to establish a national regulatory framework for hemp production in the United States, which included a requirement that states submit their cultivation plans for USDA approval.[22] The USDA approved Florida's plan in 2020.[23]

As described earlier, "hemp" is the cannabis plant with a Delta-9 THC concentration under 0.3%.[24] Cannabis with a THC concentration exceeding 0.3% is considered marijuana, which continues to be a Schedule I controlled substance under the Controlled Substances Act.[25] Pursuant to 21 U.S.C. §802(16)(B)(i), hemp was excluded from the definition of marijuana and thereby excluded as a controlled substance under the Controlled Substances Act.[26]

2019 – The Florida State Hemp Program, §581.217, Florida Statute: The Farm Bill of 2018 paved the way for the Florida Legislature to adopt Senate Bill 1020, which established the Florida State Hemp Program within the Department of Agriculture and enacted the Florida hemp statute.[27] The statute designated hemp as an agricultural commodity and provided that neither hemp nor hemp-derived cannabinoids are considered controlled substances if compliant with the other statutory requirements.[28] As with its federal counterpart, Florida Statute §893.02 (the Florida Drug Abuse Prevention and Control Act) was amended to exclude hemp from the definition of cannabis.[29]

2019 – The Commerciality of Hemp, Florida Administrative Code §1004.4473 (2019): Following the legalization of hemp in Florida, the legislature introduced the Industrial Hemp Pilot Project at the Institute of Food and Agricultural Sciences at the University of Florida, with an end goal to streamline the cultivation, processing, and marketing of industrial hemp.[30] Under the Pilot Project, the University of Florida, the Florida Agricultural and Mechanical University, and any Florida College System institution or state university that has an established agriculture, engineering, or pharmacy program became authorized to engage in hemp cultivation, processing, and research.[31]

As expected, the last several years have seen a surge in hemp production, and the Florida hemp market is expected to continue to grow.

HEMP AND MARIJUANA LOOK THE SAME, FEEL THE SAME, AND THEIR ODOR IS INDISTINGUISHABLE

Following the nationwide legalization of hemp and amendments to the Florida and federal statutes re-designating hemp as an agricultural commodity rather than a controlled

substance, the Office of Agricultural Law Enforcement of the Florida Department of Agriculture issued a memorandum titled "Hemp and CBD Information For Law Enforcement" to provide guidance on "Law Enforcement Issues."[32] The memorandum contains three critical directives to law enforcement officers:

First, "it is not possible to determine if a crop is legal hemp or illegal marijuana by merely looking at the plants. The difference between the two is in the THC level, which can only be determined by a laboratory test":


MARIJUANA CROP


HEMP CROP

Second, "it is not possible to determine if dried plant product is legal hemp or illegal marijuana by merely looking at the material. The difference between the two is in the THC level, which can only be determined by a laboratory test":


MARIJUANA FLOWER


HEMP FLOWER

Third, because "hemp and illegal cannabis can look, feel, **and smell the same**," there is "**no way** to distinguish hemp and illegal cannabis based on plain view **or plain odor alone**." Therefore, "the Office of Agricultural Law Enforcement, as well as the Florida Highway Patrol and many other Agencies in the State of Florida now have adopted what is called the 'odor plus standard' to determine probable cause to conduct a search of a vehicle upon the smell of cannabis." The memorandum concludes that "[d]ue to the legalization of hemp[,]…officers conducting cannabis investigations **should not rely solely on the smell of cannabis** for conducting a search" and should obtain evidence "beyond the mere scent of cannabis":

> **SECTION IV: LAW ENFORCEMENT ISSUES**
> **11. ODOR PLUS STANDARD APPLIED TO INVESTIGATIONS**
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> Hemp and illegal cannabis can look, feel, and smell the same, and both substances can be smoked. Currently, there is no known way to distinguish Hemp and illegal cannabis based on plain view or plain odor alone. There is no definitive universal probable cause search standard. Subsequently, the Office of Agricultural Law Enforcement (OALE), as well as the Florida Highway Patrol, and many other Agencies in the State of Florida now have adopted what is called the "odor plus standard" to determine probable cause to conduct a search of a vehicle upon the smell of cannabis. See ss. 581.217, 893.02, and 1004.4473, F.S.
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> Due to the legalization of hemp products and smokable medical marijuana law enforcement officers conducting cannabis investigations should not rely solely on the smell of cannabis for conducting a search. The "odor plus standard" requires officers to obtain circumstantial evidence beyond the mere scent of cannabis (burnt or fresh) in order to establish probable cause for a search of a vehicle.

Other law enforcement agencies have also acknowledged that the smell of marijuana alone no longer establishes reasonable suspicion of illegal activity. For example, the Jacksonville Sheriff's Office issued Legal Bulletin No. 2019-16, stating that "[t]his Legal Bulletin is prepared to assist officers with regard to addressing hemp that is a legal substance and illegal cannabis, when the officer smells, based on his experience, what is believed to be illegal cannabis."[33] The Bulletin states that "hemp and cannabis look, feel, and smell the same." Thus, "probable cause *may not be developed solely on the smell.* Additionally, the Jacksonville Sheriff's Office does not currently have a field test that can determine the percentage of THC. Thus, an officer will be required to base probable cause on the 'totality of the circumstances' with regard to the possession of the illegal substance. An officer will be required to rely on his observations and facts, *in addition to the smell*, to support the search, seizure, and arrest of an individual. *The scent alone is insufficient because hemp and cannabis smell alike.*"

Similarly, the Office of the State Attorney for Indian River, Martin, Okeechobee, and St. Lucie Counties issued a memorandum in July 2019 addressed to the "Law Enforcement Agencies of the 19th Judicial Circuit"

regarding marijuana prosecutions. The memorandum states: "Since there is *no way* to visually distinguish hemp from cannabis, *the mere presence of suspected cannabis or its odor will no longer suffice* to establish probable cause to believe that the substance is cannabis. Law enforcement officers should therefore look for other evidence of illegality before taking any action that requires probable cause …The use of a field test kit that can differentiate between cannabis and hemp may also provide additional evidence of probable cause. Agencies should carefully consider, however, whether such field test kits have been scientifically validated as accurate, have a sufficient shelf life, and are economically feasible to use." [34]

And Kathy Fernandez Rundle, the State Attorney for Miami-Dade County, issued a memorandum to all law enforcement agencies in her judicial circuit, announcing that changes in Florida law legalizing hemp will have a significant impact on police and marijuana prosecutions. The memorandum states: "The greatest impact will be upon probable cause determinations by police and sheriff's offices, and upon State Attorney's Offices' ability to prove beyond a reasonable doubt that a substance is cannabis, an illegal controlled substance under Florida Statute 893.02, and not hemp. *Because hemp and cannabis both come from the same plant, they look, smell, and feel the same.* There is no way to visually or microscopically distinguish one from the other. Similarly, since hemp can be — and is — also smoked, *there is no olfactory way to distinguish hemp from marijuana.* In either their raw vegetative state, or while burning*, both hemp and cannabis smell the same.* Accordingly, *the only way* to distinguish legal hemp from illegal cannabis is through quantitative testing." For officers conducting an investigatory stop or a search, the memo states that "[s]ince there is no visual or olfactory way to distinguish hemp from cannabis, the mere visual observation of suspected cannabis — *or its odor alone — will no longer be sufficient* to establish probable cause to believe that the substance is cannabis." [35]

THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN *OWENS V. STATE*, 317 SO. 3D 1218 (FLA. 2D DCA 2021)

The Defendant in *Owens* entered a guilty plea to possession of methamphetamine, reserving the right to appeal a dispositive motion to suppress. He argued that the warrantless search of his car was based solely on the odor of marijuana and that, due to changes in the laws relating to marijuana and hemp, the smell of marijuana alone "can no longer serve as a basis for probable cause to search a vehicle because the odor of marijuana cannot be distinguished from that of hemp."[36]

Without a substantive analysis of Fourth Amendment law or the legislative changes regarding hemp, the court held that "an officer smelling the odor of marijuana has probable cause to believe that the odor indicates the illegal use of marijuana." [37] The court added that in any event, in that case, "the officer was responding to a complaint of reckless and erratic driving; and Owens' odd and erratic responses to the officer's attempts to communicate with him, coupled with the smell, caused the officer to reasonably conclude that Owens should not be behind the wheel of a vehicle."[38] The court concluded that even if there was a lawful explanation for the smell of marijuana — for example "where the individual has a lawful prescription or that the substance is hemp" — this only provides "an affirmative defense to a charge of a criminal offense but would not prevent the search."[39]

The State in *Baxter* would later ask the Fifth District Court of Appeal to follow *Owens* and similarly hold that the smell of marijuana alone provides probable cause to search a car, but the *Baxter* court declined to do so, ultimately certifying conflict with *Owens*.

THE FIFTH DISTRICT COURT OF APPEAL RECEDES FROM THE PLAIN SMELL DOCTRINE IN *BAXTER*

Jason Baxter was charged with possession of cannabis and drug paraphernalia following his detention and a warrantless search of his car. In the lower court, Baxter argued that he was unlawfully detained (and his car unlawfully searched) because officers lacked reasonable suspicion of criminal activity. Baxter moved to suppress marijuana and paraphernalia seized during the search of his car.

At an evidentiary hearing, Officer Accra testified that while on overnight patrol, he drove by a CVS that was already closed for the night and saw a car pull into the parking lot and back-in to a parking spot.[40] Officer Accra turned around, entered the CVS lot, and activated his car's red and blue emergency lights. Accra drove directly toward Baxter's car, stopping just a few feet away; positioned the patrol car catty-corner, partially impeding Baxter's direct exit; got out of the patrol car and approached Baxter in black tactical gear to question him.

Officer Accra testified that he approached the car to make sure the driver and any occupants were alright, and because the mission statement of the police night squad was to protect local businesses against property crimes. Officer Accra testified that because the car had parked outside a business that was closed, Accra wanted to make sure a burglary was not in progress. Officer Accra acknowledged that it was "a common occurrence" for cars to be parked outside of closed business, but testified that he regularly checks to ensure the occupants are alright. With respect to Mr. Baxter, Officer Accra testified that Accra was not responding to a call for assistance, did not pull Baxter over for a traffic infraction, and did not stop Baxter for any unlawful conduct.

Bodycam video showed that Officer Accra walked up to the open car window and Baxter greeted him cordially. Although Accra testified that he saw Baxter make "an overt" movement to place something in the back seat of the car, this movement could not be seen on the video. Officer Accra testified that he could smell fresh marijuana from the open window, and it was at this

point that the officer began a criminal investigation.

Officer Accra testified that he told Baxter that Accra was "making contact" because Baxter had parked outside a closed business. Baxter responded that he was about to leave and was waiting for a friend "to get from the gym." On further questioning by Officer Accra, Baxter explained that Baxter had parked there to check his tire and repeated that he was about to leave, identifying for the officer the apartment complex where the friend lived. Officer Accra asked why Baxter would leave without his friend. Baxter repeated that he had pulled into the lot to check his tire and was not waiting for his friend to arrive at the parking lot but rather was leaving to go to his friend's apartment. Officer Accra ordered Baxter to stand by so that the officer could check things out, and Baxter complied.

A second officer arrived and, without any conversation with Baxter, ordered Baxter out of his car. Baxter complied. Once outside, officers asked Baxter if he had a medical marijuana card or if he smoked marijuana. Baxter said no. Baxter was asked if he smoked hemp, but his answer could not be heard due to crosstalk.[41] Baxter was handcuffed, placed in the back seat of a patrol car, and declined consent to search his car. Officer Accra told Baxter that Baxter's car would be searched anyway based on Baxter's statements and because in Accra's view, there was probable cause for a search based on the smell of marijuana. Officers found marijuana and drug paraphernalia during the search.

To support Baxter's detention and the warrantless search of his car, the State argued in the trial court that the encounter started as a consensual encounter, and Officer Accra properly began a criminal investigation "upon making contact" with Baxter because Officer Accra smelled marijuana. Baxter argued that reasonable suspicion was not established because Officer Accra did not ask Baxter whether he had hemp or a medical marijuana card until after Baxter was removed from the vehicle, and the smell of marijuana alone was insufficient to establish reasonable suspicion to allow Baxter's detention.

The trial court agreed with the State and denied Baxter's motion to suppress. Based on the plain smell doctrine, the court held that Officer Accra developed 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."[42] Baxter pled no contest to possession of drug paraphernalia, reserving the right to appeal the denial of the dispositive motion to suppress.

a. The Initial Panel Decision

On appeal, Baxter argued in part that pursuant to federal and state laws legalizing hemp, and because the odor of hemp is indistinguishable from the odor of marijuana, the court should recede from the plain smell doctrine and hold that the smell of marijuana alone is no longer sufficient to establish reasonable suspicion of criminal activity for an investigatory detention (or probable cause to search a car). The State argued that even if hemp and marijuana smell the same, innocent conduct can provide probable cause to search a car, and urged the court to hold that "once Baxter voluntarily rolled down his window, and Officer Accra smelled the scent of marijuana coming from the vehicle, Officer Accra had probable cause to detain Baxter and search the vehicle."[43]

The Fifth District Court of Appeal ruled in the State's favor and affirmed 2-1. Judges MacIver and Wallis affirmed the denial of Baxter's motion to suppress, but Judge Wallis wrote separately to address whether the plain smell doctrine continued to be viable in marijuana odor cases. The majority declined to reach the question of whether the smell of marijuana alone was sufficient to establish reasonable suspicion for an investigatory detention or, in this case, probable cause to search Baxter's car. Instead, the court found that Office Accra relied on more than just the smell of marijuana, including what the court viewed as Baxter's inconsistent responses to Officer Accra, which the court considered "provided the officers with the probable cause to search Baxter's vehicle."

Judge Wallis expressed "concern" with the "confusion" created by changes in marijuana and hemp laws, as well as developments in the case law to include *Owens*, Judge Kilbane's dissent in this case (addressed below), and Judge Bilbrey's concurring opinion in *Hatcher v. State*, 342 So. 3d 807 (Fla. 1st DCA 2022). In *Hatcher*, Judge Bilbrey wrote that "in the appropriate case I would urge this court to reconsider" the plain smell doctrine in marijuana cases due to "changes in Florida and federal law" because "an officer's perception of a potentially lawful substance cannot be the sole basis for a search."[44] In light of these developments, Judge Wallis considered that the continued viability of the plain smell doctrine in marijuana odor cases was a question of great public importance.

Judge Kilbane wrote a thorough and well-reasoned dissent, and she would later write the majority opinion of the court en banc, receding from the plain smell doctrine in favor of a totality of the circumstances analysis. In her dissent in the panel opinion, Judge Kilbane described the historical application of the plain smell doctrine to marijuana cases, the changes in Florida and federal laws relating to hemp and marijuana, the indistinguishable nature of the odor of hemp vs. the odor of marijuana, all leading to the inescapable conclusion that the smell of marijuana alone no longer "immediately indicates the presence of contraband," thus "call[ing] into question the continued viability of the 'plain smell' doctrine." Judge Kilbane wrote that "at most," the smell of marijuana alone "presents an ambiguity" that "can authorize further investigation," but "suspicion from that ambiguity must still be reasonable and cannot in and of itself constitute reasonable suspicion" to justify an investigatory detention. Judge Kilbane wrote that the smell of marijuana remains "a relevant factor to consider under the totality of

the circumstances," but that in Baxter's case, it was "difficult to reach the conclusion that Officer Accra's suspicions and Baxter's detention were reasonable. In fact, other than the potential crime of unlawful possession of marijuana, Accra had no suspicion that Baxter was engaged in any other criminal activity." Judge Kilbane concluded that "[b]ecause the smell of marijuana alone cannot immediately be known to be contraband thereby constituting reasonable suspicion, and the totality of the circumstances here do not otherwise give rise to reasonable suspicion, I would reverse the judgment and sentence and certify conflict with the stated holding in *Owens*."

b. The en banc court vacates the panel's decision and recedes from the plain smell doctrine

Shortly after the *Baxter* panel opinion was released, the court sua sponte issued an order determining to rehear the case en banc. The court invited supplemental briefing from the parties addressing three issues, including "[w]hether an officer's belief that the smell coming from inside a stopped vehicle is marijuana is by itself enough to establish reasonable suspicion of criminal activity for an investigatory detention despite Florida laws allowing for the possession and use of hemp, the smell of which is indistinguishable from marijuana?"

The Court also solicited the view of amici curiae, and ultimately amicus briefs were filed by FACDL, FACDL-Miami Chapter, the Florida Public Defender Association, the Southern Poverty Law Center, the ACLU, the ACLU of Florida, the Florida Sheriff's Association, and the Florida Prosecuting Attorneys Association.[45]

The en banc decision, written by Judge Kilbane, tracks her dissent from the panel opinion and provides a thorough analysis of the facts and the law to reach the correct result. The decision first outlines the three levels of encounters that law enforcement may have with citizens: consensual, investigatory stop based on reasonable suspicion, and arrest based on probable cause that a crime was or is being committed. The decision explains that an investigatory stop must be based on "a well-founded articulable suspicion of criminal activity" and "mere suspicion is not enough."[46] Because the threshold to establish reasonable suspicion is not easily "reduced to a neat set of legal rules," the court looks to "the totality of the circumstances" such that "the whole picture must be taken into account" and viewed "from the standpoint of an objectively reasonable officer."[47] The court reiterated the longstanding rule that "because noncriminal conduct will frequently provide the basis for reasonable suspicion, the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attached to particular types of noncriminal acts.'"[48] Yet the court warned that "a potentially lawful activity cannot be the *sole* basis for a detention. If this were allowed, the Fourth Amendment would be eviscerated." [49]

Turning to the plain smell doctrine, the en banc decision traced its roots to the plain view doctrine, and its application in marijuana cases to the 1960s when "Florida courts recognized that because cannabis was illegal, its smell alone was sufficient to establish probable cause. This was appropriate because its odor was 'very distinctive… and evidence in the plain smell may be detected without a warrant.'"[50] Thus, for an object "in plain smell" to be "subject to an exception to the warrant requirement, its incriminating character must be 'immediately apparent,' meaning without conducting some further search of the object. *Therefore, an inability to immediately identify an odor's plain smell as emanating from an illegal source means the exception cannot apply.*"[51]

The court then outlined the statutory changes to Florida and federal laws as described earlier in this article, starting with the 2017 amendment to the definition of "cannabis" under Florida law to exclude medical marijuana.[52] One year later, in 2018, federal law was amended to exclude hemp from the definition of marijuana, thus making hemp legal nationwide.[53] And Florida followed with enactment of the "State Hemp Program," providing that "hemp-derived cannabinoids, including but not including to, cannabidiol, are not controlled substances," nor are substances with less than 0.3% of Delta-9 THC.[54] Florida also amended the Florida Comprehensive Drug Abuse Prevention and Control Act to exclude hemp from the definition of the controlled substance cannabis.[55] The court explained that in combination, these amendments established that hemp, cannabis properly dispensed by a medical treatment center, and cannabis with a Delta-9 THC concentration under 0.3 percent, are no longer controlled substances and therefore not illegal.

The court concluded that these legislative changes "are significant" and must be recognized and incorporated by the courts in the Fourth Amendment analysis: "The incremental legalization of certain types of cannabis at both the federal and state level has reached the point that its plain smell does not immediately indicate the presence of an illegal substance. As a result, the smell of cannabis cannot on its own support a detention."[56] For the same reasons, the court concluded that the smell of cannabis alone would not establish probable cause to search a car, and the burden remains on the state to establish that an exception to the warrant requirement applies. Thus, "because the 'plain smell' doctrine operates as an exception to the warrant requirement, it is incumbent on the State to prove that the exception still applies given the statutory changes…. [U]ntil the State demonstrates that illegal cannabis has an odor that is distinct from legal cannabis, the justification for the exception no longer exists."[57]

c. The en banc court looks to the totality of the circumstances test

Having receded from the plain smell doctrine in marijuana odor cases, the court then addressed the totality of the circumstances test. Under this test, a

police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. But the "officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an investigatory stop."[58] Reasonable suspicion is assessed based on "the totality of the circumstances — the whole picture," and "from the standpoint of an objectively reasonable police officer."[59] A police officer may draw inferences based on his own experience, and "innocent behavior" may provide the basis for reasonable suspicion.[60] "[B]ut to find reasonable suspicion based on [a] single noncriminal factor would be to license investigatory stops on nothing more than an officer's hunch."[61] Therefore, "the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts."[62]

Since the smell of marijuana no longer indicates a per se violation of Florida law, the question becomes what degree of suspicion attaches to the odor of marijuana under the totality of the circumstances of each case. The court held that "not all cannabis is legal, and that fact must be reflected in a Fourth Amendment analysis. Therefore, notwithstanding the statutory changes, the smell of cannabis may be a relevant, but not dispositive, factor to consider under the totality of the circumstances."[63] In Mr. Baxter's case, the court concluded that "under the totality of the circumstances, [Officer] Accra did not develop reasonable suspicion of criminal activity because the degree of suspicion that attached to the observed conduct is too insignificant…. The record is devoid, in testimony or otherwise, of any circumstances that would have led a reasonable officer to believe that Baxter was unlawfully possessing cannabis at the inception of the investigatory detention."[64]

Ultimately the court affirmed the lower court's denial of Baxter's motion to suppress, finding that Officer Accra's reliance on the odor of marijuana alone was objectively reasonable under *Davis v. United States,* 564 U.S. 229 (2011), because the Second District Court of Appeal's decision in *Owens* was the only case from a district court of appeal addressing the effect of changes to the law at the time of Baxter's arrest, and *Owens* held that "regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell of marijuana emanating from a vehicle continues to provide probable cause for a warrantless search of the vehicle."[65]

Although the court in *Baxter* certified conflict with *Owens*, the State did not seek review in the Florida Supreme Court and as of this filing, the authors are not aware of any case pending in the Florida Supreme Court addressing these issues.[66]

"IS THAT SNIFF UP TO SNUFF? GOING FORWARD, THAT DOG WON'T HUNT."

As a matter of first impression, the Fifth District Court of Appeal started the new year by extending *Baxter* to hold in *Ford v. State*, 2025 WL 39829 (Fla. 5th DCA Jan. 7, 2025), that the plain view doctrine no longer supports the warrantless search of a car based solely on the alert of a dog where the K-9 officer cannot tell whether the dog is alerting to "illegal pot" or "legal medical marijuana or hemp." In the words of Chief Judge Edwards writing for the majority, "is that sniff up to snuff? Going forward, that dog won't hunt."[67]

Officers in *Ford* stopped a Lyft car for speeding.[68] There was no suspicion that the driver was impaired, and no smell of marijuana emanated from the car. The defendant was the only passenger and the officer viewed him as nervous and agitated. The officer requested consent to search the car but consent was declined, so the officer radioed for a K-9 unit. Upon arrival, the K-9 officer did not ask anyone whether they had a medical marijuana card. After the dog alerted, officers searched the car and found marijuana, crack cocaine, ecstasy, and methamphetamine. The defendant moved to suppress the narcotics, arguing that the search of the car was unlawful because the sole basis for probable cause was the dog's alert and the dog "cannot differentiate between illegal marijuana and legal medical marijuana or hemp."[69]

At the suppression hearing, the K-9 officer testified that the dog was properly trained to alert to the presence of THC in marijuana, and the State relied in part on *Owens* to argue that this was sufficient to establish probable cause to search the car *even if the dog alerted to a possibly legal substance*.[70] The trial court agreed, and denied the motion to suppress.

On appeal, the Fifth District Court of Appeal recognized that "[i]n the past, an alert by a properly trained police dog was usually accepted as providing probable cause for a search."[71] But the court found that the reasoning in *Baxter* applied equally to the dog and the K-9 officer in this case because "the sole basis offered to justify the search of the vehicle" was the dog's alert, but the dog was trained to alert to the presence of THC and "THC is present in different concentrations in various forms of cannabis, including illegal street marijuana, medical marijuana, and hemp."[72]

Additionally, this dog was not trained to differentiate between legal vs. illegal forms of cannabis, nor was he trained to alert in a different manner depending on the substance detected.[73] Thus, when the dog alerted, the K-9 officer could not tell whether the dog was alerting to THC in legal hemp, THC in legal medical marijuana, THC in illegal marijuana, or cocaine, heroin, or methamphetamine.[74] The court therefore concluded that "the dog's alert did not tell [officers] which target substance(s) had been detected. *Whether the substance [the dog] smelled was legal or illegal was not readily apparent*, and thus his alert, alone, could not provide the probable cause needed to justify a warrantless search. Under the facts of this case, we conclude that the police could not rely solely upon [the dog's] alert to provide probable cause to

justify the warrantless search of the Lyft vehicle and its contents."[75] As the court did in *Baxter*, it affirmed the denial of the motion to suppress, finding that the officer reasonably relied on existing law at the time of the search.[76]

Judge Pratt concurred but wrote separately to add that a dog could be trained to alert in a way that supports a finding of probable cause: "There is nothing incompatible between today's decision and the proposition that '[a] n alert by *a properly trained* police [drug-sniffing] dog provides probable cause for a search.' An alert by a dog trained not to alert to cannabis — or to alert to cannabis differently than it alerts to other drugs — can still on its own supply probable cause. And for another thing, even without such canine training, an undifferentiated alert can supply probable cause when combined with an officer's questions ruling out the presence of lawful cannabis. Officers easily can be trained to ask such questions in conjunction with a dog's undifferentiated alert."[77] Judge Pratt added that nothing in the court's opinion was intended to "erase a valuable law-enforcement investigatory tool. Whether through an update to human officer training or an update to canine officer training, I expect that law enforcement can continue to rely on dog sniffs to support its critical drug-interdiction efforts within our district."[78]

THE ROAD AHEAD IN MARIJUANA ODOR CASES – *BAXTER* REACHED THE CORRECT RESULT

The changes to the hemp and marijuana laws have been sweeping. As Judge Makar correctly stated in Baxter, "judicial reevaluation of legal doctrines due to significant legislative changes is just as necessary as when significant changes in judicial precedent occur, such as newly issued opinions of the United States Supreme Court and the Florida Supreme Court."[79] This principle recognizes that while adherence to precedent generally provides stability to the law, blind allegiance to precedent does not: "Fidelity to precedent provides stability to the law and to the society governed by that law. However, the doctrine does not command blind allegiance to precedent. Stare decisis yields when an established rule of law has proven unacceptable or unworkable in practice."[80] Thus, the Florida Supreme Court has held that "stare decisis counsels us to follow our precedents unless there has been a significant change in circumstances after the adoption of the legal rule, or…an error in legal analysis."[81] The significant changes in hemp and marijuana laws make the continued adherence to the plain smell doctrine unworkable due to what is now a legal fiction — that is, that the plain smell of marijuana alone establishes unlawful possession of a controlled substance.

Receding from the plain smell doctrine in favor of the totality of the circumstances test in marijuana odor cases aligns with current Fourth Amendment jurisprudence. The test places a minimal added burden on law enforcement officers who already must meet the totality of the circumstances test in multiple other investigative scenarios. Receding from the plain smell doctrine also aligns with Florida decisions addressing the possession of narcotic medications or firearms where officers cannot immediately determine whether the possession is lawful and further investigation is required. For example, in *Smith v. State*, 95 So. 3d 966 (Fla. 1st DCA 2012), the First District Court of Appeal held that where the defendant appeared intoxicated, had slurred speech, and attempted to hide some pills, the officer still did not have probable cause to seize the pills under the plain view doctrine because the officer could not immediately determine that the pills were narcotics or otherwise unlawfully possessed them, meaning that the incriminating nature of the pills was not immediately apparent to the officer.[82]

Subsequently in *Gay v. State*, 138 So. 3d 1106 (Fla. 2d DCA 2014), the Second District Court of Appeal held that observing unlabeled pills in the defendant's possession did not provide reasonable suspicion to detain the defendant or probable cause to seize the pills because the presence of the pills was "equally consistent with noncriminal activity as with criminal activity." The court emphasized that the officers could not tell, by observation alone, that the pills were of an illicit nature or that the defendant lacked a prescription:

> [N]either the illegal nature of the possession of the pills nor the type of pills was known to the officer at the time he removed them from the vehicle. Nothing about the pills or pill box gave him a reasonable suspicion that Gay had committed, was committing, or was about to commit a crime. Nor did he know that any of the pills were controlled substances at the time he seized them…the officer lacked reasonable suspicion of criminal activity and probable cause to seize the evidence. Gay's motion to suppress should have been granted.[83]

And in *Sawyer v. State*, 842 So. 2d 310 (Fla. 5th DCA 2003), the Fifth District Court of Appeal held that even when an officer testified that he could visually identify a pill by its appearance, the officer lacked reasonable suspicion because the officer "could not tell what kind of pill it was until he seized it, and it was only after he seized the pill that he saw a design on the pill which made him believe it was Ecstasy."[84]

Drawing parallels to firearms cases, the First and Fifth District Courts of Appeal held in *Kilburn v. State*, 297 So. 3d 671 (Fla. 1st DCA 2020), and *Burnett v. State*, 246 So. 3d 516 (Fla. 5th DCA 2018), that observing a concealed weapon, alone, does not establish reasonable suspicion to justify detention because carrying a concealed firearm is not illegal unless the person lacks a license — a fact that an officer cannot determine simply by observation.[85] Thus, seeing a firearm on the defendant's waistband or a bulge that looks like a firearm does not by itself give rise to reasonable

suspicion of criminal activity to justify an investigatory detention.[86] The *Kilburn* court emphasized that "[b]earing arms is not only legal; it is also a specifically enumerated right in both the federal and Florida constitutions," just as possession of medical marijuana is now a specifically enumerated right in the Florida Constitution.[87]

Finally, by receding from the plain smell doctrine in favor of the totality of the circumstances test, courts can also consider that people may smell like marijuana for entirely lawful reasons—for example, those who grow, transport, sell, consume, smoke, burn, or otherwise come in contact with hemp may smell like marijuana. As well, as of January 3, 2025, there were 895,469 people in Florida with an active medical marijuana license.[88] This represents about 5% of the almost 18 million people aged 18 or older in Florida.[89] This means that about 1 in every 20 adults in Florida may lawfully possess and use medical marijuana, and the entirety of the adult population may lawfully possess and smoke hemp. In 2021, then-Florida Agriculture Commissioner Nikki Fried stated that Florida had licensed as many acres for hemp cultivation as acres used to grow other key Florida crops. She stated: "Florida has 22,078 licensed acres of hemp cultivation after just seven months. This acreage is nearly identical to three of our key crops—tomatoes, watermelon and snap peas and is double that of what we have in production of strawberries here in the state of Florida."[90] And in addition to Florida, other states have embraced the commercial cultivation and distribution of hemp, making hemp widely available to Florida residents not only from local vendors but also across state lines and via online sales.[91] "The thought that [all] these…people are subject to seizure by law enforcement…is antithetical to our Fourth Amendment jurisprudence."[92]

RESPONDING TO *OWENS*

If you file a motion to suppress and have to respond to a State argument that *Owens* should control, there are a number of reasons why *Owens* was wrongly decided and should carry little or no weight in cases involving the plain smell doctrine.

First, as noted earlier in this article, *Owens* relied on *Johnson v. State*, 257 So. 3d 800 (Fla. 1st DCA 2019), but *Johnson* was abrogated by the changes in Florida and federal law relating to hemp and marijuana, as Judge Bilbrey stated in his special concurrence in *Hatcher*:

> We have previously held that "the odor of burnt cannabis emanating from a vehicle constitutes probable cause to search all occupants of that vehicle." *State v. Williams*, 967 So. 2d 941, 941 (Fla. 1st DCA 2007). Following the legalization of medical marijuana under Florida law, we reaffirmed *Williams*. *Johnson v. State*, 275 So. 3d 800, 801 (Fla. 1st DCA 2019). Our holding in *Johnson* was based in part on smokable medical marijuana not being legal at the time of the search at issue, that medical marijuana could not be legally used in a vehicle at the time, and that federal law continued to prohibit the use of any marijuana. *Id.* at 801-02. Changes in Florida and federal law have abrogated the basis for our reasoning in *Johnson*. As a result, I respectfully submit that we should no longer rely on *Johnson*….

Hatcher, 342 So. 3d 813-14.

Second, *Owens* held that whether the substance is hemp or legal medical marijuana may "provide an affirmative defense to a charge of a criminal offense, but it would not prevent the search." This is error. A defendant bears no burden to prove that the substance with which the defendant is charged is hemp or otherwise legal. The burden is on *the State* to prove all the elements of the crime beyond a reasonable doubt.[93] In a drug case, the State must prove the illegal nature of the substance because this is an element of the offense.[94] Thus, contrary to *Owens*, a defendant does not have to prove that the substance was hemp.[95]

Third, in rejecting Owens's argument that developments in the law relating to hemp and marijuana call for the courts to recede from the plain smell doctrine, the *Owens* panel engaged in no meaningful analysis and provided no reasoned basis for broadly concluding that "an officer smelling the odor of marijuana has probable cause to believe that the odor indicates the illegal use of marijuana." Especially when considered in light of the thorough and well-reasoned opinions by Judge Kilbane in *Baxter*, *Owens* appears to carry little weight in cases involving the plain smell doctrine.

Fourth, as stated earlier, in *Simmons*, another panel of the Second District Court of Appeal explained that *Owens* "involved the odor of burnt marijuana *combined with* erratic driving," which obviously means *Owens* did not involve the smell of marijuana alone. Indeed, the *Owens* opinion described the events leading up to the search of Owens's car as an "officer…responding to a complaint of reckless and erratic driving; and Owens' odd and erratic responses to the officer's attempts to communicate with him, coupled with the smell, caused the officer to reasonably conclude that Owens should not be behind the wheel of a vehicle." This is a totality-of-the- circumstances analysis and not a case where the plain smell doctrine was at play.

Finally, the defendant in *Simmons* argued on appeal "that the search of his car was unlawful" because "the odor of fresh marijuana alone does not give officers probable cause to search an automobile given the fact that hemp, which he argues smells like fresh marijuana, is legal, as is medical marijuana." For procedural reasons, the panel considered the issue not properly before the court and declined to consider it. However, Chief Judge Sleet, who had concurred in *Owens*, dissented in *Simmons*, stating his view that the issue was properly before the court and he would have ruled that due to changes in hemp and marijuana laws, the smell of fresh marijuana alone was insufficient to detain Simmons or search his car.[96]

REGARDING "SHAKE" OR THE INFAMOUS "GREEN LEAFY SUBSTANCE"

In a recent case, the Fourth District Court of Appeal credited an officer's testimony that the officer "immediately observed, on the center console [of a car], a clear plastic bag containing a green leafy substance, which — based upon his knowledge and experience — was marijuana. Looking at the back passenger floorboard, he observed what his training and experience led him to believe was marijuana residue, referred to as 'shake.'" [97] The court concluded that "we do not need to decide whether the smell of fresh marijuana alone gives an officer probable cause to search a vehicle, because in addition to the plain smell of fresh marijuana, the officer saw in plain view a clear bag containing what appeared to be fresh marijuana and uncontained flakes of marijuana."[98] The court upheld the search based on the officer's "knowledge, training, and sensory perceptions."[99]

This type of reasoning for upholding a search is no longer valid. The law enforcement arm of the Florida Department of Agriculture, as well as the various law enforcement agencies mentioned earlier, all admit that hemp and marijuana not only smell the same, but they also look the same. The Department of Agriculture's guidance to law enforcement states that hemp and marijuana are visually indistinguishable and there is "*no way* to distinguish hemp and illegal cannabis based on plain view."[100] Therefore, regardless of "knowledge, training, and sensory perceptions," no police officer can visually determine whether "a green leafy substance" is legal hemp or illegal marijuana, and a detention or search based solely on this observation or "sensory perception" should be challenged. Indeed, short of smoking it or ingesting it, no human sensory perception currently can distinguish legal hemp from illegal marijuana; only a lab test can.

[1] *State v. Baxter*, 389 So. 3d 803, 810-11 (Fla. 5th DCA 2024) (en banc).

[2] *See State v. Baez*, 894 So. 2d 115, 117 (Fla. 2004) ("[T]he totality of the circumstances controls in cases involving the Fourth Amendment"), citing *State v. Butler*, 655 So. 2d 1123, 1125 (Fla. 1995).

[3] *Id.* at 1220.

[4] *See Hatcher v. State*, 342 So. 3d 807, 812 (Fla. 1st DCA 2022) (Bilbrey, J. concurring) ("Our holding in *Johnson* was based in part on smokable medical marijuana not being legal at the time of the search at issue, that medical marijuana could not be legally used in a vehicle at the time, and that federal law continued to prohibit the use of any marijuana. Changes in Florida and federal law have abrogated the basis for our reasoning in *Johnson*").

[5] *Simmons v. State,* 2024 WL 4863019 at *2 (Fla. 2d DCA Nov. 22, 2024). At the time this article was submitted for publication, *Simmons* had not been released for publication in the permanent law reports and until released, it is subject to revision or withdrawal.

[6] *Simmons*, 2024 WL 4863019 at *4 (Sleet, C.J., dissenting) (emphasis added).

[7] *Baxter*, 389 So. 3d at 809, quoting *Friedson v. State*, 207 So. 3d 961, 964 (Fla. 5th DCA 2016).

[8] *Baxter*, 389 So. 3d at 809, citing *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

[9] *Baxter*, 389 So. 3d at 809.

[10] *Baxter v. State*, 2023 WL 7096645 *8 (Fla. 5th DCA 10/27/23) (Kilbane, J., dissenting in part).

[11] Compassionate Medical Cannabis Act, S. 1030 Leg. (Fla. 2014), https://www.flsenate.gov/Committees/BillSummaries/2014/html/819.

[12] Experimental Treatment for Terminal Conditions, S. 1052 Leg. (Fla. 2015) https://www.flsenate.gov/Session/Bill/2015/1052/ByVersion.

[13] ballotpedia.org/Florida_Medical_Marijuana_Legalization,_Amendment_2_(2016).

[14] *In re Advisory Op. to Att'y Gen. re Use of Medical Marijuana for Debilitating Medical Conditions*, 181 So. 3d 471, 476 (Fla. 2015).

[15] *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 827 (Fla. 1st DCA 2018).

[16] Art. X, §29, Fla. Const.

[17] Art. X, §29(b)(1), Fla. Const.

[18] cdc.gov/mmwr/volumes/67/wr/mm6736a2.htm ("In 2016, an estimated 20.4% (50.0 million) of U.S. adults had chronic pain and 8.0% of U.S. adults (19.6 million) had high-impact chronic pain….").

[19] federalregister.gov/documents/2021/01/19/2021-00967/establishment-of-a-domestic-hemp-production-program.

[20] *See* Pub. L. No. 115-334, §10113, 132 Stat. 4490, 4908 (2018).

[21] 7 U.S.C. §1639o *et seq*.

[22] 7 U.S.C. §5940(b)(1)(B)(iii).

[23] http://programs.ifas.ufl.edu/hemp/faq

[24] 7 U.S.C. §1639o(1).

[25] 21 U.S.C. §812, Schedule I(c)(10).

[26] See 21 U.S.C. §802(16)(B)(i) ("The terms 'marihuana' and 'marijuana' do not include — (i) hemp, as defined in section 1639o of title 7"); 21 U.S.C. §812, Schedule I(c)(17) (providing an exception for hemp to the prohibition against possessing a substance containing tetrahydrocannabinols).

[27] §581.217, Fla. Stat. (2019).

[28] §581.217(2)(a), Fla. Stat.; §581.217(2)(b), Fla. Stat.

[29] §893.02(3), Fla. Stat. ("'cannabis'…does not include hemp as defined in s. 581.217 or industrial hemp as defined in s. 1004.4473").

[30] Fla. Admin. Code § 1004.4473(2)(a) (2019).

[31] Fla. Admin. Code § 1004.4473(2)(a).

[32] https://ccmedia.fdacs.gov/content/download/94417/file/hemp-and-cbd-information-for-law-enforcement.pdf.

[33] A copy of the Legal Bulletin can be found at www.royblack.com/attorneys/jackie-perczek in the publications tab.

[34] A copy of the memorandum can be found at www.royblack.com/attorneys/jackie-perczek in the publications tab.

[35] A copy of the memorandum can be found at www.royblack.com/attorneys/jackie-perczek in the publications tab.

[36] *Owens v. State*, 317 So. 3d 1218, 1219 (Fla. 2d DCA 2021).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 1220.

[40] These facts are taken from the court's en banc decision, 389 So. 3d at 806-08, and from Judge Makar's concurrence, 389 So. 3d at 824.

[41] *Baxter v. State*, No. 5D23-118, 2023 WL 7096645, at *2 (Fla. 5th DCA Oct. 27, 2023), *opinion withdrawn and superseded on reh'g en banc*, 389 So. 3d 803 (Fla. 5th DCA 2024).

[42] *Baxter*, 389 So. 3d at 807.

[43] State's brief at page 11 (the brief can be found at www.royblack.com/attorneys/jackie-perczek in the publications tab).

[44] *Baxter*, 389 So. 3d at 814.

[45] The briefs are collected at www.royblack.com/attorneys/jackie-perczek in the publications tab.

[46] *Baxter v. State*, 389 So. 3d 803, 808 (Fla. 5th DCA 2024).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 809.

[50] *Baxter v. State*, 389 So. 3d 803, 809 (Fla. 5th DCA 2024).

[51] *Id.*

[52] §893.02(3), Fla. Stat. (2017); §381.986(g), Fla. Stat. (2021).

[53] 21 U.S.C. §802(16)(B) (2018).

[54] §581.217(2)(b), Fla. Stat.; 581.217(3)(e), Fla. Stat.; 7 U.S.C. §1639 (2021).

[55] §893.01(3), Fla. Stat.

[56] *Baxter v. State*, 389 So. 3d 803, 810 (Fla. 5th DCA 2024).

[57] *Id.* at 811 n.5.

[58] *State v. Teamer*, 151 So. 3d 421, 425 (Fla. 2014), quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

[59] *Teamer*, 151 So. 3d at 426.

[60] *Id.*

[61] *Baxter*, No. 5D23-118, 2023 WL 7096645, at *9, n.5, quoting *Teamer*, 151 So. 3d at 428; *see Kilburn v. State*, 297 So. 3d 671, 675 (Fla. 1st DCA 2020) ("A potentially lawful activity cannot be the sole basis for a detention. If this were allowed, the Fourth Amendment would be eviscerated"); *Hatcher*, 342 So. 3d at 813 (Bilbrey, J., special concurrence) ("potentially lawful activity cannot be the sole basis for detention premised on a reasonable suspicion of criminal activity").

[62] *Id.*

[63] *Baxter*, 389 So. 3d at 811.

[64] *Baxter*, 389 So. 3d at 812, citing *Popple v. State*, 626 So. 2d 185, 186 (Fla, 1993) (holding that officers lacked reasonable suspicion where defendant was parked in desolate area and "acting in a nervous manner, reaching under the seat and 'flipping' about in the car"); *Baker v. State*, 754 So. 2d 154, 154 (Fla. 5th DCA 2000) ("The fact that [defendant] was parked late at night near a closed business does not establish grounds for an [investigatory] stop"); *United States v. Perkins*, 348 F.3d 965, 968, 971 (11th Cir. 2003) (concluding officer lacked reasonable suspicion based on "his hunch that [defendant] was being untruthful about his destination" where answers did not contradict in any way*); cf. Santiago v. State*, 133 So. 3d 1159, 1166 (Fla. 4th DCA 2014) (explaining in DUI case that courts "have required more than the odor of alcohol to establish reasonable suspicion for an investigatory stop").

[65] *Owens,* 317 So. 3d at 1220.

[66] Some judges in *Baxter* wrote separately to address other aspects of the case (*i.e.*, whether certain issues were preserved for appeal, whether en banc review was improvidently granted, etc.). For purposes of this article, it is important to address only that Judges MacIver and Wallis wrote separately, consistent with their original panel opinion, that they would have found that Office Accra did not rely solely on the smell of marijuana, that other factors in addition to smell supported the detention of Baxter and the search of his car, and in any event, that changes in Florida and federal law would not support receding from the plain smell doctrine because "reasonable suspicion…need not rule out the possibility of innocent conduct" and "possession of marijuana, except in very limited circumstances, is still a crime in Florida"; and Judge Makar, who wrote separately to express his opinion that Baxter was seized by Officer Accra "without reasonable suspicion that criminal conduct was afoot even before the officer smelled what could have been either fresh-cut marijuana or hemp…." *Baxter*, 389 So. 3d at 827. Importantly, Judge Makar would have found that a seizure of Baxter occurred when "the officer: turned on his marked patrol car's red and blue emergency lights; drove directly at Baxter's car, stopping just a few feet away; positioned the patrol car catty-corner-like, partially impeding Baxter's direct exit; got out of the patrol car; and approached Baxter in black tactical gear to immediately start questioning." *Id.*

[67] *Ford v. State*, 2025 WL 39829 at *1-2 (Fla. 5th DCA Jan. 7, 2025).

[68] *Ford v. State*, 2025 WL 39829 at *1-2 (Fla. 5th DCA Jan. 7, 2025). The *Ford* opinion has not been released for publication in the permanent law reports, so it is subject to revision or withdrawal.

[69] *Id.* at *1.

[70] *Id.* at *2.

[71] *Id.* at *3, citing *State v. Robinson*, 756 So. 2d 249, 250-51 (Fla. 5th DCA 2000).

[72] 2025 WL 39829 at *2 (Fla. 5th DCA Jan.. 7, 2025).

[73] *Id.*

[74] *Id.*

[75] *Id.* at *4 (emphasis added).

[76] *Id.* at *4-5.

[77] 2025 WL 39829 at *5 (Fla. 5th DCA Jan. 7, 2025) (Pratt, J., concurring) (cleaned up) (emphasis in original).

[78] *Id.* at *6. Judge MacIver concurred in the result only (that is, affirming the denial of the motion to suppress), as he likely was of the opinion that the dog's alert was sufficient, consistent with his dissent in *Baxter*.

[79] *Baxter*, 389 So. 3d at 827.

[80] *State v. Sturdivant*, 94 So. 3d 434, 440 (Fla. 2012).

[81] *Valdes v. State*, 3 So. 3d 1067, 1076 (Fla. 2009).

[82] *Smith v. State*, 95 So. 3d 966, 969 (Fla. 1st DCA 2012).

[83] *Gay v. State*, 138 So. 3d 1106, 1110 (Fla. 2d DCA 2014) ("The investigatory detention and seizure of the pills and pill box was unauthorized; the officer lacked reasonable suspicion of criminal activity and probable cause to seize the evidence").

[84] *Sawyer v. State*, 842 So. 2d 310, 311 (Fla. 5th DCA 2003) ("the incriminating character of the evidence [must be] immediately apparent… In this case, the incriminating character of the pill was not 'immediately apparent'").

[85] *Kilburn v. State*, 297 So. 3d 671, 675 (Fla. 1st DCA 2020) ("[a]t the suppression hearing, the trial court recognized that the sole basis for detention in this case was the presence of the handgun"); *Burnett v. State*, 246 So. 3d 516, 518 (Fla. 5th DCA 2018) ("Appellant was on his phone…the officer…observed a 'bulge'… [b]elieving the bulge to be a concealed firearm, the officer began to pat [Appellant] down…the officer conceded that he did not see any illegal or threatening activity").

[86] *Burnett*, 246 So. 3d at 519; *Kilburn*, 297 So. 3d at 674.

[87] *Kilburn*, 297 So. 3d at 674; Fla. Const. Art. X, §29.

[88] December 8, 2023 OMMU Update, *Office of Medical Marijuana Use,* Dep't of Health, https://knowthefactsmmj.com/wp-content/uploads/ommu_updates/2025/010325-OMMU-Update.pdf (last visited 1-6-25).

[89] Quick Facts: Florida, U.S. Census Bureau (July. 1, 2022), https://www.census.gov/quickfacts/fact/table/FL/PST045222 (last visited 1-6-25).

[90] Regan McCarty, *Florida Hemp Farming Grows as CBD Demand Rises*, WFSU (Jan. 8, 2021), https://news.wfsu.org/state-news/2021-01-08/florida-hemp-farming-grows-as-cbd-demand-rises.

[91] *E.g.*, Ga. Code Ann. §2-23-2(3); Colo. Rev. Stat. §35-61-108(3) (2022); Assemb. B. 45, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

[92] *Kilburn v. State*, 297 So. 3d 671, 676 (Fla. 1st DCA 2020).

[93] *Hatcher,* 342 So. 3d at 813; *Cardona v. State*, 185 So. 3d 514, 519-20 (Fla. 2016).

[94] *Hatcher,* 342 So. 3d at 813; Fla. Std. Jury Instr. (Crim.) 25.7 (stating that to prove possession of a controlled substance, State must prove beyond a reasonable doubt the illegal nature of the substance).

[95] *Hatcher,* 342 So. 3d at 813; Fla. Std. Jury Instr. (Crim.) 3.7 ("The defendant is not required to present evidence or prove anything").

[96] *Simmons,* 2024 WL 4863019 *5-6 (Fla. 2d DCA Nov. 22, 2024).

[97] *State v. Fortin*, 383 So. 3d 820, 822 (Fla. 4th DCA 2024).

[98] *Id.* at 823-24.

[99] *Id.* at 824.

[100] https://ccmedia.fdacs.gov/content/download/94417/file/hemp-and-cbd-information-for-law-enforcement.pdf.

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