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CASE No. 5D23-0118

In the District Court of the State of Florida, Fifth District

JASON HASSAN BAXTER

v.

STATE OF FLORIDA

JOINT BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PROFESSOR CATHERINE ARCABASCIO AS AMICI CURIAE SUPPORTING APPELLANT JASON BAXTER

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STATEMENT OF IDENTITY AND INTEREST

FACDL is a statewide organization with twenty-nine chapters and over 1,300 members who are active criminal defense practitioners. FACDL is a nonprofit corporation with a purpose of assisting in the fair administration of the state's criminal justice system. FACDL's participation in this case serves the organization's purpose by assisting the courts in reaching just results in cases involving the constitutional rights of criminal defendants in Florida.

Professor Catherine Arcabascio has been a law professor at the Shepard Broad College of Law, Nova Southeastern University since 1993. She teaches criminal law, criminal procedure, advanced criminal procedure, and is Co-Director of the Criminal Justice Field Placement program. Professor Arcabascio also co-founded the Florida Innocence Project; the work of that organization and volunteer Shepard Broad College of Law students resulted in two exonerations in Florida. Professor Arcabascio's areas of scholarly interest include the best interpretation of the Fourth Amendment and a robust recognition of individual liberties.

Professor Arcabascio participates in this amicus brief in her personal capacity; the views expressed here do not necessarily represent those of the Shepard Broad College of Law, Nova Southeastern University.

SUMMARY OF THE ARGUMENT

The legalization of hemp and changes in the laws relating to hemp and medical marijuana call for this Court to recede from the plain-smell doctrine in favor of the totality of the circumstances test. As Judge Kilbane wrote in her dissenting opinion in this case, "[i]n years past, the smell of marijuana alone was all that was required [for an investigatory detention]…because the mere possession of marijuana was illegal [and] its odor was very distinctive…." *Baxter v. State*, 2023 WL 7096645 *8 (Fla. 5th DCA 10/27/23) (Kilbane, J., dissenting in part) (cleaned up). But in light of the changes in state and federal laws, and the fact that hemp and illegal cannabis smell the same, the foundational basis for the plain-smell doctrine is no longer sound. *Id.* at *6. The odor of cannabis alone no longer provides a reasonable and well-founded suspicion of criminal activity to authorize an investigatory detention. *Id.* at *9

This Court should hold, consistent with Judge Kilbane's well-reasoned dissent and Judge Bilbrey's concurrence in *Hatcher v. State*, 342 So. 3d 807 (Fla. 1st DCA 2022), that an officer's belief that the smell coming from inside a stopped vehicle is marijuana is no longer, by itself,

enough to establish reasonable suspicion of criminal activity for an investigatory detention. To the extent that *Owens v. State*, 317 So. 3d 1218 (Fla. 2nd DCA 2021), holds to the contrary, amici submit that *Owens* was wrongly decided.

ARGUMENT

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," providing guidance on "Law Enforcement Issues."[1]

The memorandum contains three critical directives to law enforcement officers, which provide a framework for this Court to decide the instant case:

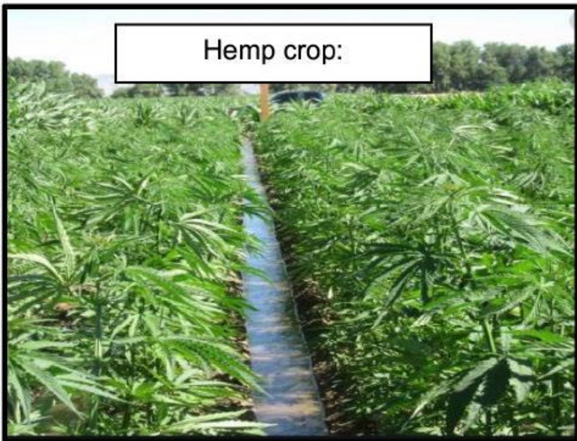
First, "it is not possible to determine if a crop is legal hemp or illegal marijuana by merely looking at the plants. The difference between the

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

two is in the THC level, which can only be determined by a laboratory test":

e. How to distinguish if a crop is legal hemp or illegal marijuana.

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. The below image, Left, depicts a marijuana crop and the image, Right, depicts a low THC hemp crop.



Reference: https://minnlawyer.com/2016/06/09/national-firm-brings-cannabis-to-the-forefront/

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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":

h. Distinguishing between legal hemp flower or illegal marijuana

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. The below image, Left, depicts dried high-THC marijuana flower and the image, Right, depicts legal dried low-THC hemp flower.

Marijuana flower:

Reference: Oct. 19, 2009. (David McNew/Getty Images/JTA)

Hemp flower:

Reference:https://www.northcarolinahealthnews.org/2020/

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**
>
> 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.
>
> 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.

Consistent with these statement, Part I of this brief provides a chronology of important changes in the state and federal laws relating to marijuana and hemp. Part II argues that the smell of marijuana alone does not give rise to a well-founded suspicion of criminal activity to

authorize an investigatory detention. Part III endorses Judge Kilbane's analysis and urges this Court to recede from the plain-smell doctrine in favor of the totality of the circumstances test as set out by Judge Kilbane. Finally, Part IV argues that *Owens* was wrongly decided.

I. THE DEVELOPMENT OF LEGALIZED HEMP AND MARIJUANA WITHIN FLORIDA AND FEDERAL LAW

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 more recent nationwide federal declassification of hemp as a controlled substance, to the Florida constitutional amendment that guarantees the right to possess marijuana for enumerated medical conditions including PTSD and chronic pain, these changes establish that officers can no longer rely on the smell of marijuana alone to perform a *Terry* stop.

***A. 2014 – The Compassionate Use Act, § 381.986, Florida Statute**:* Florida's first marijuana legalization measure took effect in 2014, with the passage of 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."[2] To effectuate its purpose, the Act created Florida Statute § 381.986, at the time titled "Compassionate Use of Low-THC Cannabis" statute, 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 granted authority to 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).

***B. 2015 – The Right to Try Act, § 499.0295, Florida Statute**:* One year later, in 2015, Florida passed the Right to Try Act, which made

[2] www.flsenate.gov/Committees/BillSummaries/2014/html/819

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marijuana available to all terminally ill patients, not only those suffering from cancer, epilepsy, and ALS.[3] 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).

C. 2016 – Florida Constitutional Amendment, art. X, sec. 29: The following year, Florida voters overwhelmingly passed a constitutional amendment titled "Use of Marijuana for Debilitating Medical Conditions."[4] 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." *In re Advisory Op. to Att'y Gen. re Use of Medical Marijuana for Debilitating Medical Conditions*, 181 So. 3d 471, 476 (Fla. 2015).

Amendment 2 became effective as article X, section 29 of the Florida Constitution and guarantees the right to possess marijuana for multiple medical conditions. *Fla. Dep't of Health v. People United for Med.*

[3] www.flsenate.gov/Session/Bill/2015/1052

[4]https://ballotpedia.org/Florida_Medical_Marijuana_Legalization,_Amendment_2_(2016) (the Amendment passed with 71.3% support).

Marijuana, 250 So. 3d 825, 827 (Fla. 1st DCA 2018). 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." Art. X, § 29, FLA. CONST.

The amendment expanded the qualifying medical conditions for which marijuana was authorized under the Compassionate Use Act of 2014 to include not only cancer, epilepsy, and ALS, but also 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." Art. X, § 29(b)(1). This expansion significantly increased the number of people who may lawfully possess and use marijuana in Florida.

D. 2017 – Medical Marijuana, § 381.986, Florida Statute: In line with the constitutional amendment, the 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" to the list, Fla. Stat. § 381.986(2)(m), thereby exponentially increasing the number of people who can 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.[5]

E. 2018 – The 2018 Federal Farm Bill, Nationwide Legalization of Hemp*:* Although hemp was widely produced in the United States for hundreds of 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.[6]

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[5] www.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….").

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

In 2014, Congress passed the 2014 Farm Bill, which carved out hemp from the definition of illegal marijuana for purposes of a pilot program that allowed hemp cultivation for research purposes. 7 U.S.C. § 5940(a). Four years later, in 2018, Congress enacted the Agriculture Improvement Act, commonly known as the 2018 Farm Bill. *See* Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4908 (2018). The Bill expanded on the 2014 Farm Bill and authorized the nationwide commercial cultivation, distribution, and consumption of hemp and its derivatives, 7 U.S.C. § 1639o *et seq*. The Bill also directed the U.S. Department of Agriculture to establish a national regulatory framework for the production of hemp in the United States, 7 U.S.C. § 5940(b)(1)(B)(iii), which included a requirement that states submit their cultivation plans for USDA approval. The USDA approved Florida's plan in 2020.[7]

"Hemp" is the cannabis plant with a THC concentration under 0.3%. 7 U.S.C. § 1639o(1). 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, 21 U.S.C. §

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

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812, Schedule I(c)(10). *Id.* 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. *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).

F. 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, § 581.217, Florida Statute (2019). The statute designates hemp as an agricultural commodity (§ 581.217(2)(a)) and provides that neither hemp nor hemp-derived cannabinoids are considered controlled substances or adulterants if compliant with the other statutory requirements (§ 581.217(2)(b)). 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. Fla. Stat. §

893.02(3) ("'cannabis'. . . does not include hemp as defined in s. 581.217 or industrial hemp as defined in s. 1004.4473").

G. 2019 – The Commerciality of Hemp in Florida, 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, testing, research, development, and marketing of safe and effective commercial applications for industrial hemp in our state's agricultural sector. Fla. Admin. Code § 1004.4473(2)(a) (2019). Under the Pilot Project, the University of Florida, 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. Fla. Admin. Code § 1004.4473(2)(a).

As expected, the last several years have seen a surge in hemp production, and the Florida hemp market is expected to continue to grow. When the hemp program started, then-Florida Agriculture Commissioner

Nikki Fried said that "[b]y working closely with our farmers, processors, retailers, and consumers, Florida's state hemp program will become a model for the nation, will set a gold standard for this emerging industry, and will create billions in economic opportunity for Florida."[8] Seven months later, Commissioner Fried stated that Florida had licensed as many acres for hemp cultivation as acres used to grow other key Florida crops: "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."[9]

A study published by the University of Florida found that with increasing market competition and disease, "many Florida growers question the viability of traditional commodity crops such as tomatoes, citrus, and avocados. Industrial hemp might be an attractive alternative

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[8] www.cbsnews.com/miami/news/florida-hemp-program-accepting-applications/

[9] https://news.wfsu.org/state-news/2021-01-08/florida-hemp-farming-grows-as-cbd-demand-rises

for these growers, given that the . . . 2018 Farm Bill permitted its production."[10] By December 2021, there were 736 hemp growers with "the top counties in terms of licensed acreage" being "Hendry (7,740 acres), Osceola (1,670 acres) and Palm Beach (950 acres)." *Id.*

In addition to Florida, other states have also 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. *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).

II. THE SMELL OF MARIJUANA ALONE DOES NOT GIVE RISE TO A REASONABLE AND WELL-FOUNDED SUSPICION OF CRIMINAL ACTIVITY TO AUTHORIZE AN INVESTIGATORY DETENTION

As the above chronology illustrates, Judge Kilbane correctly concludes that the changes to the hemp and marijuana laws have been sweeping. *Baxter,* 2023 WL 7096645 at *8 (Kilbane, J., dissenting). This is not an exaggeration. The changes include a nationwide declassification

[10] https://edis.ifas.ufl.edu/publication/FE1116

of hemp as a controlled substance, the implementation of a commercial hemp program in Florida, licensing thousands of acres of land for the cultivation and widespread distribution of hemp, and a Florida constitutional amendment guaranteeing the right to possess marijuana for a host of medical conditions, including conditions that afflict large portions of the population such as chronic pain.

Question I of the Court's November 16 Order effectively asks whether the plain-smell doctrine (i.e., odor alone) continues to be a valid basis for an investigatory detention. The answer is No. Possession of a substance that smells like marijuana is potentially lawful activity under Florida and federal law because the smell of illegal marijuana is indistinguishable from the smell of legal hemp, and the illegal nature of the substance cannot be determined without scientific testing. Therefore, smell alone does not give rise to a reasonable and well-founded suspicion of criminal activity to authorize an investigatory detention. That Mr. Baxter was in a car does not change the analysis: "It is also worth noting that even though Baxter was in a parked vehicle, the smell of marijuana alone would not be sufficient to begin a DUI investigation." *Id.* at *9 n.6,

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citing *Santiago v. State*, 133 So. 3d 1159, 1166 (Fla. 4th DCA 2014) ("This court and others have required more than the odor of alcohol to establish reasonable suspicion for an investigatory stop"). "Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed." *Id.*, quoting *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979).

To conduct a valid investigatory stop, a police officer must have a reasonable and well-founded suspicion that the person detained has committed, is committing, or is about to commit a crime. *State v. Allen*, 994 So. 2d 1192, 1193 (Fla. 5th DCA 2008); Fla. Stat. § 901.151(2). Thus, "an investigatory stop requires a well-founded, articulable suspicion *of criminal activity*." *Allen*, 994 So. 2d at 1193 (emphasis added).

The smell of marijuana is no longer plainly indicative of the presence of contraband nor plainly incriminating, as it was when hemp and marijuana were illegal and the distinctive smell of marijuana was sufficient to suspect unlawful possession. As Judge Kilbane wrote, a law enforcement officer who smells marijuana today cannot immediately

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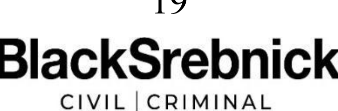
know whether the smell is emanating from legal hemp, legal medical marijuana, or illegal marijuana. *Baxter,* 2023 WL 7096645 at *9. The smell can be consistent with innocent and lawful conduct and therefore, when considered alone, is insufficient for an investigatory detention. *See Kilburn v. State*, 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 v. State*, 342 So. 3d 807, 813 (Fla. 1st DCA 2022) (Bilbrey, J., special concurrence) ("potentially lawful activity cannot be the sole basis for detention premised on a reasonable suspicion of criminal activity"). "The law allows officers to draw rational inferences, but to find reasonable suspicion based on this single noncriminal factor would be to license investigatory stops on nothing more than an officer's hunch." *Baxter*, 2023 WL 7096645 at *9 n.5, quoting *State v. Teamer,* 151 So. 3d 421, 428 (Fla. 2014).

This Court is correct to look to *Kilburn* and *Burnett* for guidance; in both cases, the sole basis for the defendant's improper detention was an officer's observation of a concealed firearm, a potentially lawful activity



under Florida law. *See Kilburn*, 297 So. 3d at 673 ("[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, 519-20 (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").

The courts in *Kilburn* and *Burnett* held that because carrying a concealed firearm is not illegal unless the person does not have a license (a fact that an officer cannot determine simply by observation), observing 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. *Burnett*, 246 So. 3d at 519; *Kilburn*, 297 So. 3d at 674. 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," *Kilburn*, 297 So. 3d at 674, just as possession

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of medical marijuana is now a specifically enumerated right in the Florida Constitution. FLA. CONST. art. X, § 29.[11]

Similar reasoning was applied in three cases involving the plain-view seizure of pills that turned out to be controlled substances. *Gay v. State*, 138 So. 3d 1106, 1109 (Fla. 2d DCA 2014); *Smith v. State*, 95 So. 3d 966, 969 (Fla. 1st DCA 2012); *Sawyer v. State*, 842 So. 2d 310, 312 (Fla. 5th DCA 2003). In all three cases, the courts held the seizure was unlawful because the incriminating character of the pills was not immediately apparent—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

[11] *See also Mackey v. State*, 124 So. 3d 176, 184-85 (Fla. 2013) (applying totality of circumstances test to officer who observed a bulge and the butt of a gun on defendant's waistband; indicating that *Regalado* was correctly decided); *Regalado v. State*, 25 So. 3d 600, 604 (Fla. 4th DCA 2009) (holding that possession of a gun is not illegal if the carrier has a permit and officer did not offer any facts or circumstances beyond possession of the gun to detain defendant).

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> 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.

Gay, 138 So. 3d at 1110; *see Smith*, 95 So. 3d at 969-70 ("we find the circumstances insufficient to create a reasonable suspicion that Appellant was in *unlawful* possession of a controlled substance"); *Sawyer,* 842 So. 2d at 312 ("the incriminating character of the evidence [must be] immediately apparent…In this case, the incriminating character of the pill was not 'immediately apparent'").

III. THIS COURT SHOULD RECEDE FROM THE PLAIN-SMELL DOCTRINE AND ADOPT THE TOTALITY OF THE CIRCUMSTANCES TEST.

Consistent with the reasoning in *Kilburn*, *Burnett*, and the pill cases, an officer who smells cannabis cannot discern that the smell is emanating from illegal marijuana and therefore lacks a "well-founded, articulable suspicion *of criminal activity*" to perform a constitutionally valid investigatory detention. As the law enforcement memorandum cited at the Introduction of this brief shows, there is "**no way** to distinguish hemp and illegal cannabis based on plain-view or plain odor alone."

Accordingly, in response to Question II in the Court's November 16 Order, amici submit that this Court should recede from the plain-smell doctrine and adopt the totality of the circumstances test as laid out by Judge Kilbane:

> [A]n investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop. The threshold to establish reasonable suspicion is not absolute nor is it readily, or even usefully, reduced to a neat set of legal rules. It must be assessed based on the totality of the circumstances—the whole picture, and from the standpoint of an objectively reasonable police officer. Moreover, it has been recognized that innocent behavior will frequently provide the basis for reasonable suspicion. Thus, 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. The reasonableness of an officer's suspicion also depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.

Baxter, 2023 WL 7096645 at *6 (cleaned up).

In proposing that the Court recede from plain smell, amici acknowledge that adherence to precedent "provides stability to the law and to the society governed by that law." *State v. Sturdivant*, 94 So. 3d 434, 440 (Fla. 2012). But "fidelity to precedent" does not mean "blind allegiance to precedent." *Id.* 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." *Valdes v. State*, 3 So. 3d 1067, 1076 (Fla. 2009); *see also* Diego Elias, *Solving the Blurred Lines of Warrantless Searches: Marijuana Odor Alone as Probable Cause*, 47 Nova. L. Rev. 57, 69 (2022) (arguing that courts should depart from precedent when a change in the law makes application of precedent unfair or unjustified).

The presumption in favor of stare decisis may be overcome upon consideration of three factors:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"?
>
> (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law?
>
> (3) Have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

Id. at 1077. These factors weigh in favor of receding from plain-smell precedent.

First, for the reasons stated by Judge Kilbane and Judge Bilbrey, the plain-smell doctrine is now an impracticable legal fiction; the smell of

marijuana alone no longer establishes unlawful possession of a controlled substance.

Second, no injustice will come about by receding from the plain-smell doctrine, nor will a new rule bring instability to the law, or to law enforcement. An officer may still consider the totality of the circumstances, a standard that has been in effect for decades and is applied even to potentially dangerous situations (for example involving guns, as was required in *Kilburn* and *Burnett*).

Third, the factual premise for the plain smell doctrine (i.e., that marijuana and hemp are illegal and cannot be lawfully possessed) has drastically changed as to marijuana and eliminated altogether as to hemp, such that there is no longer legal justification for the proposition that the smell of cannabis gives rise to a well-founded suspicion of criminal activity.

IV. *OWENS* WAS WRONGLY DECIDED

In the panel opinion, this Court stated: "*Owens* [*v. State*, 317 So. 3d 1218 (Fla. 2d DCA 2021)] holds that plain smell is still probable cause, notwithstanding the legalization of hemp, which, absent an interdistrict

conflict, is the binding law for all circuit courts in Florida. *Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992)." *Baxter*, 2023 WL 7096645 at *4. Amici submit that *Owens* was wrongly decided for at least two reasons.

First, *Owens* followed this Court's holding in *Johnson*, 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" may "provide an affirmative defense to a charge of a criminal offense, but it would not prevent the search." *Owens*, 317 So. 3d at 1220. As Judge

Bilbrey explained, this is error. A defendant bears no burden to prove that the substance with which the defendant is charged is hemp. The burden is on *the State* to prove all the elements of the crime beyond a reasonable doubt. *Hatcher,* 342 So. 3d at 813; *Cardona v. State*, 185 So. 3d 514, 519-20 (Fla. 2016).

In a drug case, the State must prove the illegal nature of the substance because this is an element of the offense. *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). Thus, contrary to *Owens*, a defendant does not have to prove that the substance was hemp. *Hatcher,* 342 So. 3d at 813; Fla. Std. Jury Instr. (Crim.) 3.7 ("The defendant is not required to present evidence or prove anything").

In contrast to the brief *Owens* opinion, Judge Kilbane reaches the correct conclusion after a thoughtful and careful consideration of all the facts and the law presented.

CONCLUSION

For the foregoing reasons and for the reasons explained in Appellant's Initial Brief, this Court should recede from the plain-smell doctrine and adopt the totality of the circumstances test.

Respectfully Submitted,

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