FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 5D2023-0118
LT Case No. 16-2021-MM-14027-AXXX

JASON HASSAN BAXTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the County Court for Duval County.
Julie K. Taylor, Judge.

Charlie Cofer, Public Defender, and Elizabeth Hogan Webb, Assistant Public Defender, Jacksonville, and Nancy Ryan, Special Assistant Public Defender, Daytona Beach, for Appellant.

Carlos J. Martinez, Public Defender, Miami, Megan Long and Justin F. Karpf, Special Assistant Public Defenders, Tallahassee, amicus curiae, for Florida Public Defender Association, Inc., in support of Appellant.

Daniel Tibbitt, Amicus Chair and Dianne Carames, President, Miami Chapter, North Miami, Benjamin Eisenberg, of Office of the Public Defender, West Palm Beach, Jackie Perczek, of Black Srebnick, Miami, and Catherine Arcabascio, of Nova Southeastern University, Shepard Broad College of Law, Fort Lauderdale, amicus curiae, for Florida Association of Criminal Defense Lawyers, in support of Appellant.

Krista A. Dolan, of Southern Poverty Law Center, Tallahassee, Julian Clark, of American Civil Liberties Union Foundation, pro hac vice, New York, and Daniel Tilley, American Civil Liberties Union of Florida, Miami, amicus curiae, in support of Appellant.

Ashley Moody, Attorney General, and Christina Piotrowski and Adam B. Wilson, Assistant Attorneys General, Tallahassee, for Appellee.

Arthur I. Jacobs, of Jacobs Scholz & Wyler, LLC, Fernandina Beach, for Florida Prosecuting Attorney's Association, amicus curiae, in support of Appellee.

Robert Wayne Evans and Benjamin M. Lagos, of Allen, Norton & Blue, P.A., Tallahassee, for Florida Sheriffs Association, amicus curiae, in support of Appellee.

August 2, 2024

ON REHEARING EN BANC

KILBANE, J.

Having been presented with an issue of exceptional importance, we determined to rehear this case en banc, withdraw this Court's previously issued opinion, and substitute this opinion in its place. *See* Fla. R. App. P. 9.331(a).

This case requires us to examine the "plain smell" doctrine as applied to the smell of cannabis[1] in light of changes to Florida and federal law regarding hemp. Because the "plain smell" of cannabis is no longer clearly indicative of criminal activity, it alone cannot provide reasonable suspicion to support an

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[1] Although the parties referred to the smell as "marijuana," we refer to it as "cannabis" because that is the controlled substance's defined term in the Florida Statutes. *See* § 893.02(3), Fla. Stat. (2021).

investigatory detention. However, because the officer reasonably relied on binding precedent, we affirm.

Facts

Jason Hassan Baxter was arrested and charged with possession of cannabis and drug paraphernalia. He filed a motion to suppress arguing that he was unlawfully detained without reasonable suspicion of criminal activity. The trial court held an evidentiary hearing on Baxter's motion.

Officer Accra of the Jacksonville Sheriff's Office testified he was on patrol in Duval County, Florida, on the night of August 16, 2021.[2] While on patrol, Accra observed a vehicle pull into the parking lot of a closed CVS. Accra drove by and made a U-turn to go back to the CVS parking lot and speak with the driver of that vehicle. Accra testified he initially approached the vehicle because he

> was concerned . . . from a well-being standpoint, also the fact that part of our mission statement on the midnight squad from our lieutenant and chief up is to ensure property crimes aren't being committed. As in this, [the vehicle] was outside of a closed business. Just to make sure a burglary wasn't progressing as well.

Accra explained it was "a common occurrence" for cars to be parked outside of closed businesses, and he regularly stops to check if those people are doing all right. Accra was not responding to a call for assistance. He did not pull Baxter over for a traffic infraction. He did not stop Baxter for any unlawful conduct. Accra further testified he observed Baxter make an

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[2] Accra was the only witness who testified at the suppression hearing, and he was wearing a body camera. The video was admitted into evidence and is provided in the record on appeal. *See O.W. v. State*, 357 So. 3d 283, 284 (Fla. 2d DCA 2023) ("The body cam footage is in our record. We are therefore 'in the same position to review it as the trial court.'" (quoting *State v. Monroe*, 280 So. 3d 499, 503 (Fla. 2d DCA 2019))).

"overt" movement to place something in the backseat of the vehicle but that this movement could not be seen on video. When he walked up to Baxter's vehicle, Accra smelled the odor or aroma of fresh marijuana and, by his own admission, began a criminal investigation.

As viewed on the bodycam video, Accra walked up to the open passenger window, and Baxter cordially greeted him. Accra told Baxter he was "making contact" because Baxter was parked outside a closed business. Baxter responded that he was about to leave and that he was waiting for a friend "to get from the gym." Accra continued his line of inquiry regarding Baxter's reason for waiting in the parking lot. Baxter explained that initially he pulled off to check his tire but was about to leave. Baxter then identified the name of the apartment complex where his friend lived. Accra asked why Baxter was in a hurry to leave if his friend had yet to arrive at the parking lot. Baxter clarified that he was not waiting for his friend to get to the parking lot. He reiterated that he pulled off to check his tire and was leaving to go to his friend's residence. Accra instructed Baxter to stand by so that he could check everything out. Baxter complied.

Several minutes later, another officer arrived on scene and without further conversation with Baxter the second officer directed him to step out of his vehicle. Once Baxter was out of the vehicle, officers asked him if he had a medical marijuana card, if he smoked marijuana, or if he smoked hemp products. Baxter was handcuffed and placed in the backseat of Accra's patrol car. Accra explained he was going to search the vehicle based on Baxter's statements in response to the questions regarding marijuana and hemp and because there was probable cause based on the smell of marijuana. The search of the vehicle revealed marijuana and drug paraphernalia.

At the hearing on Baxter's motion to suppress, the State argued that the encounter began as a consensual encounter, and Accra properly began a criminal investigation "upon making contact" because he smelled marijuana. Defense counsel responded that reasonable suspicion was not established because Accra did not ask questions at the outset regarding whether Baxter had a medical marijuana card or hemp. The trial court

asked defense counsel when the questions regarding hemp and medical marijuana were asked. After confirming that these questions were asked only after Baxter was removed from the vehicle, the court asked defense counsel for case law on when those questions must be asked. Because defense counsel did not have any authority at that time, the trial court permitted both sides additional time to present case law on the issue.

Baxter's supplemental memorandum cited *Kilburn v. State*, 297 So. 3d 671, 675 (Fla. 1st DCA 2020), for the proposition that Accra had not developed reasonable suspicion in addition to *State v. Nord*, 28 Fla. L. Weekly Supp. 511, 512–13 (Fla. 20th Cir. Ct. Aug. 8, 2020), where a trial court granted a motion to suppress under nearly identical factual circumstances. The State primarily relied on *Johnson v. State*, 275 So. 3d 800, 802 (Fla. 1st DCA 2019), and *Owens v. State*, 317 So. 3d 1218, 1220 (Fla. 2d DCA 2021), in support of its position that irrespective of whether there could have been a lawful explanation, smell alone was still sufficient to constitute probable cause.

The trial court reviewed the supplemental memorandums and case law provided from both sides and denied Baxter's motion to suppress. The court explained that 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." Subsequently, Baxter pled nolo contendere to possession of drug paraphernalia specifically reserving his right to appeal the denial of his dispositive motion to suppress.

Analysis

Baxter argues[3] that changes to Florida and federal law legalizing hemp require law enforcement officers to develop some

[3] On appeal, Baxter argues that the activation of emergency lights, the position of Accra's police vehicle, and the arrival of additional officers transformed the encounter into a detention. We need not consider this argument because Baxter was already detained when the other officers arrived. Instead, we must

indication that criminal activity is afoot in connection with the smell of cannabis before conducting an investigatory detention. He contends that the officer here failed to do so, which rendered his detention unconstitutional. Based on recent changes to the law, we agree.

All citizens have the right to be free from unreasonable seizure guaranteed in the Fourth Amendment to the United States Constitution and article 1, section 12 of the Florida Constitution. Furthermore, "[t]he protections against unreasonable searches and seizures afforded by the Florida Constitution must be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court." *Caldwell v. State*, 41 So. 3d 188, 195 (Fla. 2010) (citing Art. I, § 12, Fla. Const.).

Based on these constitutional principles, there are three levels of encounters that law enforcement may have with citizens:

> 1) consensual encounters, during which the citizen remains free to leave at will, where a citizen may either voluntarily comply with a police officer's request or simply choose to ignore it; 2) an investigatory stop based on reasonable suspicion; and 3) an arrest supported by probable cause that a crime has been or is being committed.

McMaster v. State, 780 So. 2d 1026, 1028 (Fla. 5th DCA 2001) (citing *State v. Roux*, 702 So. 2d 240 (Fla. 5th DCA 1997)). To justify an investigatory stop, a law enforcement officer must develop reasonable suspicion to believe that a person has committed, is committing, or is about to commit a crime. § 901.151(2), Fla. Stat. (2021); *State v. Allen*, 994 So. 2d 1192, 1193 (Fla. 5th DCA 2008). "Therefore, 'an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop.'" *McMaster*, 780 So. 2d at 1028 (quoting *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993)).

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decide if the detention, which occurred prior to the additional officers' arrival, was justified.

The threshold to establish reasonable suspicion is not absolute nor is it "readily, or even usefully, reduced to a neat set of legal rules." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). "[T]he totality of the circumstances—the whole picture—must be taken into account," *United States v. Cortez*, 449 U.S. 411, 417 (1981), and be "viewed from the standpoint of an objectively reasonable police officer," *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

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 attaches to particular types of noncriminal acts." *Sokolow*, 490 U.S. at 10 (quoting *Gates*, 462 U.S. at 243–44 n.13). 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.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). However, "[a] potentially lawful activity cannot be the *sole* basis for a detention. If this were allowed, the Fourth Amendment would be eviscerated." *Kilburn*, 297 So. 3d at 675 (emphasis added).

A. The "Plain Smell" Doctrine and Changes to Florida and Federal Law

Beginning in the late 1960s, Florida courts recognized that because cannabis was illegal, its smell alone was sufficient to establish probable cause. *See State v. Jones*, 222 So. 2d 216, 217 (Fla. 3d DCA 1969) (citing *Boim v. State*, 194 So. 2d 313 (Fla. 3d DCA 1967)); *see also, e.g.*, *State v. Wells*, 516 So. 2d 74, 75 (Fla. 5th DCA 1987); *State v. Jarrett*, 530 So. 2d 1089 (Fla. 5th DCA 1988); *State v. T.T.*, 594 So. 2d 839, 840 (Fla. 5th DCA 1992); *State v. Hill*, 54 So. 3d 530, 531 (Fla. 5th DCA 2011). This was appropriate because its odor was "very distinctive," *T.T.*, 594 So. 2d at 840, and "evidence in the plain smell may be detected without a warrant," *Nelson v. State*, 867 So. 2d 534, 537 (Fla. 5th DCA 2004). *See also Wells*, 516 So. 2d at 75 ("The mere possession of marijuana is illegal."); *Commonwealth v. Grooms*,

247 A.3d 31, 39 (Pa. Super. Ct. 2021) (recognizing that prior to changes in law "all forms and uses of marijuana were illegal").

Notably, the "plain smell" doctrine can trace its roots to the "plain view" doctrine. *See Friedson v. State*, 207 So. 3d 961, 964 (Fla. 5th DCA 2016) ("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." (quoting *Nelson*, 867 So. 2d at 537)); *see also United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006) (explaining that "plain smell" doctrine is a logical extension of "plain view" doctrine). For an object in plain view–and by extension 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." *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). Therefore, an inability to immediately identify an odor's plain smell as emanating from an illegal source means the exception cannot apply.

With this backdrop, we examine the changes to Florida and federal law regarding marijuana and hemp, also known as cannabis. Prior to the 2014 medical marijuana ballot initiative, "cannabis" was broadly defined as "all parts of *any plant of the genus Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." § 893.02(3), Fla. Stat. (2013) (emphasis added).

In 2017, the Legislature amended the definition of "cannabis" to exclude "marijuana" as defined in section 381.986, the statute regarding medical use of marijuana by a qualified patient. *See* § 893.02(3), Fla. Stat. (2017). "Marijuana" under the medical use statute is

> *all parts of any plant of the genus Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin, including low-THC cannabis, *which are dispensed from a medical*

> *marijuana treatment center for medical use by a qualified patient.*

§ 381.986(g), Fla. Stat. (2021) (emphasis added).

In December 2018, federal law changed to exclude hemp from the federal definition of marijuana. *See* 21 U.S.C. § 802(16)(B) (2018). This change also authorized the creation of a nationwide regulatory framework to regulate the production of hemp. *See* 7 U.S.C. § 1639r. (2018).

In July 2019, the Florida Legislature enacted the "State hemp program." § 581.217, Fla. Stat. (2019). Under section 581.217(2)(b), Florida Statutes (2021), "[h]emp-derived cannabinoids, including, but not limited to, cannabidiol, are not controlled substances or adulterants." Included in both the federal and Florida definition, "hemp" is the plant Cannabis sativa L. and any part of that plant, that has a total delta-9-tetrahydrocannabinol ("Detla-9 THC") concentration that does not exceed 0.3 percent on a dry-weight basis. *See id.* § 581.217(3)(e); 7 U.S.C. § 1639 (2021).

As it did with marijuana for medical use, the Legislature specifically amended the Florida Comprehensive Drug Abuse Prevention and Control Act ("FCDAPCA") to exclude hemp from the definition of "cannabis." *See* § 893.02(3), Fla. Stat.[4] Based on these statutory changes, cannabis is legal in Florida when either it is dispensed from a medical marijuana treatment center for

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[4] Smokable hemp was authorized in Florida beginning July 1, 2020. *See* § 581.217, Fla. Stat. (2020). Unlike medical marijuana, there are no restrictions placed on smoking hemp in vehicles. *See* § 581.217, Fla. Stat. (2021); *cf.* § 381.986(1)(k)5.f., Fla. Stat. (2021) (prohibiting medical marijuana use in "a school bus, a vehicle, an aircraft, or a motorboat, except for low-THC cannabis not in a form for smoking"). The only restriction on the retail sale of hemp products that otherwise meet the requirements of section 581.217 is to individuals under the age of twenty-one. *See* § 581.217(7)(d), Fla. Stat. (2024).

medical use, *see* § 381.986(g), Fla. Stat., or it is "hemp," which has a Delta-9 THC concentration not exceeding 0.3 percent on a dry-weight basis. *See* § 581.217(3)(e), Fla. Stat.; *see also Hatcher v. State*, 342 So. 3d 807, 811 n.3 (Fla. 1st DCA 2022) (explaining difference between hemp and illegal cannabis is the "psychoactive component"). Because the Legislature dissected the cannabis plant when it legalized medical marijuana and hemp, the term "cannabis" for purposes of the FCDAPCA no longer has the same meaning it has had for decades. In other words, according to the plain language of the statute, if the cannabis is properly dispensed from a medical treatment center, then it is not a controlled substance. If the cannabis has a Delta-9 THC concentration not exceeding 0.3 percent, it is likewise not a controlled substance. We are required to acknowledge and follow these explicitly defined terms. *See Deloatch v. State*, 360 So. 3d 1165, 1169 (Fla. 4th DCA 2023) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)).

These statutory changes are significant and warrant both recognition and proper application by the courts. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (explaining where legislative enactment does not violate constitutional provision, "[c]ourts have then no power to set it aside or evade its operation by forced and unreasonable construction," and "[i]f it has been passed improvidently the responsibility is with the Legislature and not the courts" (quoting *Van Pelt v. Hilliard*, 78 So. 693, 693–95 (Fla. 1918))). 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.[5] As a result, the smell of cannabis cannot on its own

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[5] For the first time on rehearing, and without citation to authority, the State argues that marijuana and hemp may smell different. First, we observe that this is of little significance in this case because our analysis depends entirely on the statute and its definitions of "cannabis," "marijuana," and "hemp." As we have explained, "marijuana" and "hemp" are both simply cannabis, and cannabis can be either legal or illegal based on its origin or THC pursuant to Florida statute.

Second, below and on appeal, the State relied on caselaw stating that changes to the law were irrelevant and during oral argument the State conceded that it proceeded below as if hemp and marijuana smell the same. Thus, the State cannot avoid the effect of its concession. *See Maldonado v. State*, 992 So. 2d 839, 843 (Fla. 2d DCA 2008); *see also Dicus v. Dist. Bd. of Trs. for Valencia*, 734 So. 2d 563, 564 (Fla. 5th DCA 1999) ("A party is also bound by factual concessions made by that party's attorney before a judge in a legal proceeding."). While testimony that the smell of hemp and marijuana is indistinguishable has been presented in various Florida and federal courts without contradiction, *see United States v. Angrand*, No. 1:22-cr-20558-KMM, 2023 WL 6554293, at *6 (S.D. Fla. Aug. 29, 2023) ("Lt. Carvajal additionally testified that she was trained that there is no distinction between the smell of hemp and marijuana."); *Hatcher*, 342 So. 3d at 811 n.3 ("There was undisputed testimony at the suppression hearing that hemp and marijuana are indistinguishable by sight or smell."); *Nord*, 28 Fla. L. Weekly Supp. at 512 (explaining that the State "did not dispute the assertion that the odor and appearance of hemp is indistinguishable from marijuana"), we need not and do not take judicial notice of any facts to reach our decision here.

Instead, 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. *See generally Hilton v. State*, 961 So. 2d 284, 296 (Fla. 2007) ("When a search or seizure is conducted without a warrant, the government bears the burden of demonstrating that the search or seizure was reasonable." (citing *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995))); *Dusan v. State*, 323 So. 3d 239, 241 (Fla. 5th DCA 2021) (explaining that State has burden to prove exception to warrant requirement). Unless and until the State demonstrates that illegal cannabis has an odor that is distinct from legal cannabis, the justification for the exception, *see T.T.*, 594 So. 2d at 840 (explaining that cannabis odor is "very distinctive"), no longer exists. As the Supreme Court has explained, an odor may be an adequate indication of

support a detention. *See Kilburn*, 297 So. 3d at 675; *see also Sawyer v. State*, 842 So. 2d 310, 311 (Fla. 5th DCA 2003) (requiring officers to have reasonable belief that item is contraband prior to its seizure under "plain view" doctrine); *Smith v. State*, 95 So. 3d 966, 969 (Fla. 1st DCA 2012) (finding investigatory detention invalid and stating "the incriminating nature of the pills was not immediately apparent to the deputy such that he had probable cause to seize the bag under the plain-view doctrine" (citing *Rimmer v. State*, 825 So. 2d 304, 313 (Fla. 2002))); *Burnett v. State*, 246 So. 3d 516, 520 (Fla. 5th DCA 2018) (explaining that "there must be something about the circumstances, when considered in total, that reasonably raises a suspicion that a crime has been or is being committed"); *Commonwealth v. Barr*, 266 A.3d 25, 41 (Pa. 2021) (concluding "smell of marijuana alone cannot create probable cause to justify a search under the state and federal constitutions" where changes to law eliminated main pillar supporting "plain smell" doctrine as applied to possession or use of marijuana).

B. Totality of the Circumstances

Nevertheless, 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. *See State v. Francisco Perez*, 239 A.3d 975, 985 (N.H. 2020) (holding that the odor of marijuana remains a relevant factor that can be considered among the totality of the circumstances "in determining whether reasonable, articulable suspicion of criminal activity exists" in light of changes to state law); *see also 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))).

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criminal activity where it is demonstrated that such odor is "one sufficiently distinctive to identify *a forbidden substance*." *Johnson v. United States*, 333 U.S. 10, 13 (1948) (emphasis added).

Here, under the totality of the circumstances, Accra did not develop reasonable suspicion of criminal activity because the degree of suspicion that attached to the observed conduct is too insignificant. *See Sokolow*, 490 U.S. at 10; *see also, e.g., Popple*, 626 So. 2d at 186 (determining officers lacked reasonable suspicion where they observed defendant 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 a *Terry* [*v. Ohio*, 392 U.S. 1 (1968)] 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 context courts "have required more than the odor of alcohol to establish reasonable suspicion for an investigatory stop"). 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*.[6] To justify a detention, there must be some context or

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[6] Judge MacIver contends that regardless of the applicability of the "plain smell" doctrine, *Kansas v. Glover*, 589 U.S. 376 (2020), stands for the proposition that an investigatory stop may be initiated based on a single noncriminal factor. However, the stop in *Glover* was not based on a single factor. The *Glover* Court explained that the officer drew a reasonable inference based on "the totality of the circumstances of th[e] case." 589 U.S. at 386. The Court further explained, "[l]ike all seizures, '[t]he officer's action must be justified at [the stop's] inception.'" *Id.* (second alteration in original) (quoting *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 185 (2004)). Importantly, *before initiating the stop*, the deputy had several pieces of information, including that the owner of the vehicle had a suspended license, which led him to reasonably conclude the defendant was committing a crime by driving his own vehicle. *Id.* at 381.

other factors that, in combination with the potentially lawful activity, creates reasonable suspicion. *See Allen*, 994 So. 2d at 1193 (explaining that reasonable suspicion "requires a factual foundation based on the observations of and information in the possession of the law enforcement officer").

C. Objectively Reasonable Reliance on Binding Precedent

Finally, the State urges us to affirm under *Davis v. United States*, 564 U.S. 229 (2011), because Accra relied on binding precedent. As the *Davis* Court explained, objectively reasonable reliance on binding precedent is "blameless police conduct" that "comes within the good-faith exception and is not properly subject to the exclusionary rule." *Id.* at 249.

In the months preceding Baxter's arrest, the Second District Court held:

> [W]e conclude 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.

Owens, 317 So. 3d at 1220 (emphasis added). We disagree with this holding and the court's conclusion that substantive changes to the law regarding cannabis have no impact on the analysis for a warrantless search of a vehicle.[7]

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[7] We also doubt the court's suggestion that the substance being hemp or the person having a valid medical marijuana card "<u>might</u> provide an affirmative defense to a charge of a criminal offense, but it would not prevent the search," *see id.*, when the search itself is not otherwise constitutional.

Nevertheless, we recognize that *Owens* was the only case from a district court of appeal addressing the effect of changes to the law at the time of the arrest.[8] As such, it was binding, *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts." (citing *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985))), and Accra's continued reliance on longstanding precedent was therefore objectively reasonable.[9]

Conclusion

Because it is no longer "immediately apparent" that the smell of cannabis is synonymous with criminal activity, it cannot be the sole basis supporting reasonable suspicion for an investigatory detention. Instead, the smell of cannabis is a factor that may be considered under the totality of the circumstances. However, because Accra reasonably relied on binding precedent at the time of the arrest, we affirm. We further certify conflict with the stated holding in *Owens*.

REHEARING GRANTED; CONFLICT CERTIFIED; AFFIRMED.

EDWARDS, C.J., and LAMBERT, JAY, EISNAUGLE, and BOATWRIGHT, JJ., concur.

EISNAUGLE, J., concurs specially, with opinion, in which LAMBERT, JAY, and KILBANE, JJ., concur.

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[8] *Johnson* addressed a prior version of the medical marijuana statute and did not discuss hemp. *See* 275 So. 3d at 801. *Kilburn*, although persuasive, is not a marijuana case. *See* 297 So. 3d at 675.

[9] Because *Owens* merely reaffirmed longstanding precedent, *see, e.g.*, *Jones*, 222 So. 2d at 217 (citing *Boim*, 194 So. 2d 313), such reliance did not fall within the exception to *Davis* recognized in *Carpenter v. State*, 228 So. 3d 535, 539 (Fla. 2017) (declining to extend *Davis* to highly uncertain area of law where reliance was not based on longstanding precedent).

MACIVER, J., concurs in result only, with opinion, in which WALLIS, J., concurs.

PRATT, J., concurs in result only, with opinion, in which HARRIS, J., concurs.

WALLIS, HARRIS, and SOUD, JJ., concur in result only.

MAKAR, J., concurs in part; dissents in part, with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

EISNAUGLE, J., concurring specially.

I agree with the entirety of the majority's opinion but write to explain why Baxter's argument is preserved for our review.

As Judge Pratt correctly observes, there are three elements of a properly preserved argument. *See* § 924.051(3), Fla. Stat. (2023). "First, the party must make a timely, contemporaneous objection at the time of the alleged error." *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010). "Second, the party must state a legal ground for that objection." *Id.* (citation omitted). "Third, '[i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.'" *Id.* (citation omitted).

In his concurring in result only opinion, Judge Pratt appears to concede that the second and third elements are present here, but argues that the first element is not because Baxter did not timely raise the argument. Specifically, Judge Pratt reasons:

> Baxter did not raise his "smell alone" argument in his motion to suppress or during the hearing on his motion. Instead, he hatched his newfound argument in a supplemental memorandum that did not directly answer the question on which the court had sought supplemental briefing. That's hardly a model of preservation.

I agree with Judge Pratt that our record does not present a "model of preservation," but of course that is not the standard. It is well-established in Florida that no "magic words" are necessary. *Williams v. State*, 414 So. 2d 509, 511–12 (Fla. 1982). Instead, counsel need only raise an argument "sufficiently specific to inform the trial judge of the alleged error." *Id.* at 512.

In this case, it is true that Baxter's counsel did not raise the "smell alone" argument in his motion, but he made the argument

at the hearing and then again in the supplemental memorandum.[1] While I agree with Judge Pratt that counsel did not do so artfully, at least not at the hearing, our record makes clear beyond all doubt that the trial judge fully understood the argument and eventually ruled on the issue. The rule on preservation does not require an eloquent presentation. *Id.* at 511–12.

Moreover, it matters not if the State or trial judge was the first to raise the issue. To my knowledge, the rule on preservation, as it appears in the statute and as explained in Florida's court decisions, contains no requirement that counsel win the race to the courthouse. If it did, a trial judge or opposing party could close the door on an otherwise meritorious argument simply by beating counsel to the punch. The rule is not so technical, nor does it countenance the potential for gamesmanship.[2]

That leaves us purely with counsel's imperfect timing. Again, counsel could have raised this argument in the motion but did not. Instead, counsel waited until the trial judge asked[3] about "plain smell" at the hearing. At that point, counsel made a sufficient (but inartful) argument, and then made the argument again (this time quite a bit more clearly) in a supplemental memorandum.

On this record, I have no difficulty concluding that the argument was timely. The purpose of a timely objection or argument is to "place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that

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[1] Neither party objected to the trial court ordering supplemental memoranda, and neither party argues that it was error on appeal.

[2] There is no evidence of gamesmanship in this case.

[3] The hearing transcript suggests that the trial judge likely asked about "plain smell" because the State first argued that Baxter was not seized until the officer obtained probable cause because he "smelled marijuana."

which must be cured eventually." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978); *see also Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005).

Given the purpose of the rule's timeliness requirement, the context matters. In this case, the argument on appeal was raised timely because, although it *could* have been raised earlier in the proceedings, it did not need to be. When counsel made the argument for the first time at the hearing and then in a supplemental memorandum as permitted by the trial judge, the court was in no worse of a position to consider and rule on the issue than if the argument had been raised initially in the motion to suppress.[4]

This is not a case where a party delayed an objection to evidence at a jury trial, or waited to raise a legal argument in a motion for rehearing after judgment was already rendered. In short, the minimal delay in this case had no impact on the trial judge's analysis or ability to consider the issue fully and efficiently. Although the argument was not raised at the *earliest* stage of the proceedings, it was raised early enough.

LAMBERT, JAY, and KILBANE, JJ., concur.

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[4] Indeed, I can identify nothing in our record that would have precluded Baxter from raising the "plain smell" argument even after the trial court denied his initial motion.

MACIVER, J., concurring in result only.

While I concur with the affirmance of the trial court's decision below, I cannot join the majority's reasoning for two distinct reasons that would be dispositive in this case. I also write separately to express my view on the question that the en banc majority has certified. First, notwithstanding the perceived exceptional importance of the issue, the question of whether plain smell alone is sufficient for reasonable suspicion was not properly before this court. Second, erroneously determining a need to reach the question, the majority then reaches a conclusion adverse to precedents that constitutionally bind Florida's judiciary. Following those precedents, plain smell alone is sufficient to establish reasonable suspicion for a brief investigatory detention.

Question Not Properly Before This Court

To reach the question of whether plain smell alone is sufficient to justify an investigative detention, the majority must either disregard that there were other suspicious factors present or dismiss those factors as irrelevant and parse them out of the totality of the circumstances analysis. Neither is permitted under existing United States Supreme Court precedent addressing reasonable suspicion.

As an initial matter, "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" is protected by article I, section 12, of the Florida Constitution. The constitutional provision further provides that "[t]his right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. This latter provision is commonly referred to as the "Conformity

Clause."[1] With the adoption of the Conformity Clause in 1982, all Florida courts became bound to follow the Fourth Amendment interpretations of the United States Supreme Court and to provide no greater protections than those afforded by the Supreme Court's interpretation. *Soca v. State*, 673 So. 2d 24, 27 (Fla. 1996). Primarily, the amendment made clear that the protections of article I, section 12, did not provide greater protection than the Fourth Amendment to the United States Constitution. Additionally, though, the amendment provided a textual basis for the binding authority of the Supreme Court opinions that interpret the Fourth Amendment. To be sure, Supreme Court opinions were already considered controlling under the Supremacy Clause[2] and the judicial policy of stare decisis. However, with the addition of the Conformity Clause, the controlling authority of those interpretations is not just a matter of judicial policy, it is found in the clear mandate of the constitutional text.

Turning to the case before us, when determining whether the facts available to a detaining officer constituted reasonable suspicion to conduct an investigatory detention, we consider that question de novo. *Baxter v. State*, 48 Fla. L. Weekly D2084, D2085 (Fla. 5th DCA Oct. 27, 2023). "In determining whether an officer had a reasonable suspicion of criminal activity, courts consider the totality of the circumstances." *United States v. Sokolow*, 490 U.S. 1, 8 (1989) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). While both the detaining officer and the court below asserted the justification for the detention as the smell of marijuana, we have both testimonial and video evidence in the record of the additional facts that were known by officers when Baxter was initially detained.

First, Baxter was observed pulling into and parking in the lot of a closed business. Baxter later explained that he had pulled into the parking lot to check his tire, but when the officer initially told

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[1] Not to be confused with the Conformity Clause of article I, section 17, of the Florida Constitution dealing with excessive punishments under the Eighth Amendment.

[2] Art. VI, Para. 2, U.S. Const.

him that his reason for checking on him was that he was parked at a closed business, Baxter responded that he was on his way to meet a friend and was getting ready to leave. The officer then pushed back on the answer, asking why he was leaving if he was supposed to meet a friend. Baxter explained that he was meeting his friend somewhere else and only then offered the explanation about his tire. "Reasonable suspicion depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Navarette v. California*, 572 U.S. 393, 402 (2014) (quoting *Ornelas v. United States,* 517 U.S. 690, 695 (1996)) (internal quotation marks omitted). Taking this common sense approach, a reasonably prudent officer could infer that failing to mention the tire when he was first alerted to the officer's reason for stopping was a sign of Baxter's evasiveness. Additionally, a reasonably prudent officer might find it odd that a person who just stopped to check their tire would take the time to back into a parking spot to do so.

The detaining officer also noted that Baxter had moved to place a blue bag into the rear seat as the officer was pulling into the lot. Taken alone this might not be suspicious at all, but when combined with the smell of marijuana, moving the bag might be viewed as an attempt to place contraband out of view of the approaching officer.

Given the facts above, this simply is not a case where plain smell alone was the justification for the detention. To arrive at the question of plain smell alone this court would have to treat the above facts in isolation and disregard them. That "divide and conquer" approach is specifically prohibited by Supreme Court precedent. *United States v. Arvizu*, 534 U.S. 266, 274 (2002) ("The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase. The court appeared to believe that each observation by [the detaining officer] that was by itself readily susceptible to an innocent explanation was entitled to 'no weight.' *Terry,* however, precludes this sort of divide-and-conquer analysis." (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968))).

Here, Baxter's inconsistent answers alone might not be sufficient to establish the reasonable suspicion necessary to conduct a detention. But the inconsistency was combined with the smell of marijuana. Moving a bag from the front seat to the back seat is certainly an innocuous activity, but when combined with the smell of marijuana and the inconsistent, possibly evasive answers it could also lead to the inference that Baxter was trying to hide contraband. For the purpose of a brief investigative detention, the detaining officer was not required to reject such inferences in favor of a possible innocent explanation. *Arvizu*, 534 U.S. at 277.

The majority asserts that "under the totality of the circumstances, [the detaining officer] did not develop reasonable suspicion of criminal activity because the degree of suspicion that attached to the observed conduct is too insignificant."[3] For that assertion, the majority cites to *Sokolow*, which held that a collection of behaviors that were otherwise "consistent with innocent travel," when taken together amounted to reasonable suspicion for an investigative detention. 490 U.S. at 9. Specifically, the court found that paying for an airline ticket in cash (from a roll of twenty-dollar bills), traveling under an alias (at the time this was not prohibited), and the short duration of a stay in Miami (48 hours) after a twenty-hour flight from Honolulu, were factors sufficient to establish reasonable suspicion. *Id.* In doing so, the Court pointed out that "'[i]n making a determination of probable cause 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.' That principle applies equally well to the reasonable suspicion inquiry." *Id.* (alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983)).

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[3] The majority also cites to *Popple v. State*, which held that an order to exit a vehicle pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), was only lawful if it was contingent upon the occupant already being detained. 626 So. 2d 185, 187 (Fla. 1993). The issue of whether law enforcement had reasonable suspicion was not actually addressed by the court because the state (erroneously in my opinion) conceded that law enforcement did not have a basis for the stop. *Id.*

While this quote tells us that the totality of the circumstances test considers the degree of suspicion that attaches to a set of facts, it tells us nothing about the threshold of suspicion that is necessary.

As to threshold, *Sokolow* tells us "[t]he Fourth Amendment requires 'some *minimal* level of objective justification' for making the stop." *Sokolow,* 490 U.S. at 7 (emphasis added) (quoting *Immigr. & Naturalization Serv. v. Delgado,* 466 U.S. 210, 217 (1984)). Reasonable suspicion thus requires "something more than an 'inchoate and unparticularized suspicion or "hunch."'" *Sokolow,* 490 U.S. at 7 (quoting *Terry,* 392 U.S. at 27). "A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *Arvizu,* 534 U.S. at 277.

"It is not uncommon for members of the same court to disagree as to whether the proper threshold for reasonable suspicion has been reached." *State v. Teamer*, 151 So. 3d 421, 433 (Fla. 2014) (Canady, J., dissenting) (quoting William E. Ringel, *Searches & Seizures Arrests & Confessions* § 11:12 (1972)). When that happens, it is also not uncommon for those members who find the threshold has not been reached to invoke the above quote from *Sokolow* and describe a law enforcement officer's inference as a "mere hunch." "The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules . . . .'" *Sokolow*, 490 U.S. at 7 (quoting *Gates*, 462 U.S. at 232). Still, the dichotomy between a mere hunch and a particularized suspicion must be discernable with more than the circular reasoning of whether the respective judges find that the totality meets their perceived threshold. Indeed, the Supreme Court has instructed so. As noted above, the justification required is *minimal*,[4] but must also be objective, because when a stop lacks an

[4] In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of

objective basis, "the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas,* 443 U.S. 47, 52 (1979). Thus, when determining whether there is reasonable suspicion for an investigatory stop, the court should ask itself whether the justification is so devoid of an objective basis, that law enforcement would be permitted to conduct "arbitrary invasions solely at the unfettered discretion of officers in the field." *Id.* at 51; *see also, Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (no reasonable suspicion where officers were conducting random stops to check driving licenses and car registrations); *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (facts relied on by DEA agents provided no distinction between the suspects and a very large category of presumably innocent travelers).

Here, the detaining officer prompted Baxter to address his presence at the closed business; he then drew reasonable inferences from both Baxter's answers, his behavior, and the correlation of both with the smell of marijuana. The initial detention phase of the encounter was entirely prompted by circumstances—it was not arbitrary, nor was it so devoid of the minimal justification necessary so as to allow unfettered discretion by law enforcement. In short, the detaining officer had reasonable suspicion, based upon a totality of circumstances that included more than the plain smell of marijuana. Therefore, the question certified by the majority was not properly before this court for consideration.

Plain Smell Alone

Baxter argues, and the majority agrees, that because of changes to federal and state law that have legalized hemp, the smell of marijuana can no longer be the sole basis for an investigatory detention. I disagree for two reasons. First, the conclusion is contrary to the United States Supreme Court's long held and often repeated rule that "[a] determination that

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> probable cause, the individual must be allowed to go on his way.

Illinois v. Wardlow, 528 U.S. 119, 126 (2000).

reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *Arvizu,* 534 U.S. at 277; *Sokolow*, 490 U.S. at 9–10; *Navarette*, 572 U.S. at 403; *Cortez*, 449 U.S. at 694; *Wardlow*, 528 U.S. at 125; *Kansas v. Glover*, 589 U.S. 376, 381 (2020). Second, the majority's reliance on the premise from *Kilburn*—that a potentially lawful activity cannot be the sole basis for a detention as that would eviscerate the Fourth Amendment[5]—continues a line of reasoning that (if even correct to begin with) has been thoroughly refuted by the United States Supreme Court's decision in *Kansas v. Glover*, 589 U.S. 376 (2020).

As a preliminary matter, we must note that possession of marijuana, except in very limited circumstances, is still a crime pursuant to Florida statutes. § 893.13, Fla. Stat. (2023). We do still charge our law enforcement officers and agencies with the enforcement of those statues, by investigating and interdicting the commission of prohibited criminal acts. The changes to federal and state law that Baxter suggests should eliminate the "plain smell" doctrine have not eliminated either the criminal prohibition of marijuana possession or the expectation that law enforcement will indeed investigate and enforce the law. When someone uses or possesses marijuana it does produce a discernable odor. That fact has not changed with the evolution of the laws regarding hemp. Marijuana does, as an undisputable fact still smell like marijuana. The only thing that changed with the legalization of hemp and medical marijuana was that the smell could now both indicate illegal activity and also be subject to an innocent explanation. The specific reason for an officer to detain an individual under *Terry* is to resolve the ambiguity between suspicious behavior and otherwise lawful activity. *Wardlow*, 528 U.S. at 125. Further, as noted above, a finding that reasonable suspicion exists need not rule out the possibility of innocent conduct. Thus, to suggest that because the smell of marijuana might be indicative of lawful use it is therefore insufficient to justify a brief detention to inquire about the ambiguity is in direct conflict with the reasoning of the United States Supreme Court on the subject of reasonable suspicion for a *Terry* stop.

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[5] *Kilburn v. State*, 297 So. 3d 671, 675 (Fla. 1st DCA 2020).

The majority reaches the opposite conclusion because "[a] potentially lawful activity cannot be the sole basis for a detention." *Kilburn*, 297 So. 3d at 675. While not cited by *Kilburn*, this concept seems to find its foundation in *State v. Teamer*, 151 So. 3d 421 (Fla. 2014). In *Teamer*, an officer conducted a traffic stop[6] when a license plate check indicated that the bright green truck the officer observed was supposed to be a blue truck. *Id.* at 424. The stop was conducted based solely on the color discrepancy. *Id.* During the stop the officer smelled marijuana and Teamer was ultimately arrested. *Id.* The court held that the officer did not have reasonable suspicion for the stop. *Id.* at 430. The court recognized that the officer might make a reasonable inference that the color discrepancy could indicate a stolen vehicle, but also found that painting one's vehicle was a lawful activity. *Id.* at 429–30. The court held "[t]he 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." *Id.* at 428. The dissenting opinion by Justice Canady lays out a strong argument for why the court's reasoning was flawed. As a matter of Florida precedent, though, *Teamer* does stand for the premise that a single, possibly noncriminal factor cannot be the sole basis for a *Terry* stop. That premise, however, appears to be in direct conflict with *Glover*, which is constitutionally binding on Florida courts under the Conformity Clause of article I, section 12, Florida Constitution.

In *Glover*, an officer ran a license plate check of a vehicle which indicated that the owner of the vehicle had a revoked license. 589 U.S. at 379. The officer conducted a stop and ultimately an arrest, and the trial court granted Glover's motion to suppress. *Id.* The appellate court reversed, holding that it was reasonable for the officer to infer the driver was the owner of the vehicle and the officer's common sense inference gave rise to a reasonable suspicion. *Id.* The Kansas Supreme Court reversed, finding that the officer's inference that it was the owner driving

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[6] Traffic stops and *Terry* stops are analogous for the purpose of a reasonable suspicion analysis. § 901.151, Fla. Stat. (2023); *Peterson v. State*, 264 So. 3d 1183 (Fla. 2d DCA 2019); *State v. Outler*, 20 So. 3d 421 (Fla. 3d DCA 2009).

evinced a mere hunch; family members or even friends may often drive another's vehicle, and operating a vehicle that is owned by a person with a revoked license is not illegal. *Id*. at 379–80. The United States Supreme Court reversed the Kansas Supreme Court, finding that the officer's common sense inference was reasonable. *Id*. at 385. In *Glover*, the sole basis for the stop was the fact that a person was operating a vehicle that was owned by a person with a revoked license. If we were to apply the reasoning of *Teamer* to *Glover,* the stop wouldn't be justified, because the sole basis for the stop would be the possible legal activity of driving a vehicle owned by a person with a revoked license. The Court in *Glover* held the opposite.

Florida's Conformity Clause dictates that the answer to the plain smell alone question must be based on a sound application of the Fourth Amendment jurisprudence of the United States Supreme Court. The majority's assertion that plain smell alone cannot provide the justification for a brief investigative detention because it is susceptible to both criminal and innocent explanations is not such an application.

WALLIS, J., concurs.

PRATT, J., concurring in result only.

The question that the en banc majority opinion decides today is important. But it's not the question that Baxter initially put to the trial court. Because Baxter belatedly raised the "smell alone" argument that he now advances—and because he at no time introduced testimony or evidence supporting the factual predicate on which his argument turns, *i.e.*, that marijuana and hemp smell the same—I would discharge our en banc review and reinstate the panel opinion.

I.

In his motion to suppress, Baxter argued only that the stop was illegal because Officer Accra quickly seized him when he activated his patrol car lights. The motion assumed that the seizure took place at the outset of the encounter; it did not argue that Officer Accra lacked reasonable suspicion when he later detected the apparent smell of marijuana. During the hearing on Baxter's motion, neither side raised any argument over whether the apparent smell of marijuana alone can generate reasonable suspicion. Neither side pointed to changes in federal and state regulation of hemp. Neither side asked Officer Accra whether he can distinguish between the smell of marijuana and the smell of hemp. Neither side introduced *any* testimony or evidence comparing the smells of both substances. Indeed, neither side even mentioned hemp at all.

Instead, it was the *trial court*, and not the parties, that opened the door to the issue. At the hearing, after Baxter and the State concluded their arguments over whether a seizure occurred when Officer Accra activated his lights, the trial court asked Baxter's counsel, "[i]f I did find that it did begin as a welfare check, would you agree that the odor of marijuana was sufficient to provide reasonable suspicion?" Baxter's counsel seemed to agree, with one caveat. He responded, "we would say that at that point Officer [Accra] would be required to ask from the outset whether he had a medical marijuana card, CBD, anything for that, and . . . if Mr.

Baxter had said no to that question, then that would be reasonable suspicion, Your Honor." The court replied, "I think it's clear from his testimony that he smelled the odor at the time he approached." It then asked: "So, again, my question is if I do find that it's a welfare check do you agree that smelling the odor of marijuana is sufficient to provide reasonable suspicion or is it your position that there is not sufficient evidence to provide that?" Baxter's counsel again conditionally conceded the point, answering: "The smell of marijuana, if asked in connection with the question do you have a CBD card, do you have a reason to have medical marijuana, if Mr. Baxter at that time had said no, then Officer [Accra] would be within his rights to have a Fourth Amendment seizure, ask for his identification and hold him for further investigation."

Based on Baxter's counsel's responses, the court turned its attention to the issues of when law enforcement asked Baxter about a medical marijuana card, and whether it had to do so. It replayed the recording of the encounter. Noting that "it appears [Baxter is] being taken into custody" when asked about having a card, the court asked Baxter's counsel, "do you have any case law . . . in regard to whether those questions have to be asked[?]" Counsel responded that he did not, but he offered, "I'm sure I can find some this afternoon." The court then asked both sides to "provide any follow-up case law" on whether "those questions"—*i.e.*, questions concerning possession of a medical marijuana card—"need to be asked before [Baxter is] taken into custody."

Five days later, the parties submitted their supplemental memoranda. Baxter's counsel's transmittal e-mail acknowledged that his memorandum answered a question different from the one on which the court had sought supplemental briefing. It stated, "I could not find any cases directly addressing the issue of whether an officer, upon smelling what he believes to be marijuana, must ask the suspect if he has a medical license or legal hemp before detaining him." It continued: "However, I did find several cases focusing more generally upon the issue of whether the smell of marijuana still provides a probability of criminal activity in light of the legalization of hemp and medical marijuana, and that is what I wrote my memorandum on." The memorandum cited a circuit court order that asserted marijuana and hemp smell the same, but it provided no evidence to support the assertion.

During a brief follow-up hearing, the trial court stated that it had reviewed the supplemental memoranda. Calling Baxter's argument "a good one," the court nonetheless denied his motion to suppress. It reasoned that it was bound by First District case law, and it concluded: "initially the officer came into contact with Mr. Baxter in a caretaking type of posture that then developed into reasonable suspicion once he detected the odor of marijuana, which it appears he did as soon as the defendant rolled down his window and they came into contact with each other."

II.

"A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error." § 924.051(3), Fla. Stat. (2023). "'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." § 924.051(1)(b); *see Aills v. Boemi*, 29 So. 3d 1105, 1008 (Fla. 2010) (listing the three elements of preservation); *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Because Baxter does not argue fundamental error, we should reach his argument only if it was preserved. *See Wheeler v. State*, 87 So. 3d 5, 6 (Fla. 5th DCA 2012) (defendant has the burden to demonstrate fundamental error, and he fails to preserve a claim of fundamental error by failing to argue fundamental error in his initial brief).

While it's fair to say that Baxter eventually raised, and the trial court eventually ruled on, the issue whether the smell of marijuana alone suffices for reasonable suspicion, it's less clear that Baxter *timely raised* the issue. Defendants generally are expected to raise, in their motion to suppress and the hearing on their motion, the search-and-seizure arguments that they intend to press on appeal. *See Reyes v. State*, 952 So. 2d 1262, 1265 (Fla. 2d DCA 2007). That's not what happened here. Baxter did not raise his "smell alone" argument in his motion to suppress or during the

hearing on his motion. Instead, he hatched his newfound argument in a supplemental memorandum that did not directly answer the question on which the court had sought supplemental briefing. That's hardly a model of preservation. I take Judge Eisnaugle's points that preservation doesn't require an eloquent presentation, the trial court requested supplemental briefing, and the parties obliged. Even assuming that Baxter's supplemental memorandum meets the minimum bar for preservation, however, the convolution and tardiness in his presentation of the issue both weigh against enbancworthiness. *See* Fla. R. App. P. 9.331(d)(2) ("A rehearing en banc is an extraordinary proceeding."). The best vehicles for determining issues "of exceptional importance," Fla. R. App. P. 9.331(a), typically are those in which counsel has recognized their importance by diligently and thoroughly presenting them below.

Putting aside the winding and bumpy road that Baxter's argument traveled, Baxter introduced no testimony or evidence to support its fundamental factual predicate: that Officer Accra cannot distinguish between the smell of marijuana and the smell of hemp. That defect alone makes this case a poor vehicle to decide the question that he belatedly raised. *Hatcher v. State*, 342 So. 3d 807 (Fla. 1st DCA 2022), provides a useful comparator. There, the defendant "argue[d] on appeal, as he did below, that the officer lacked probable cause to search the vehicle based solely on the odor of marijuana." *Id.* at 808. He "acknowledge[d] [First District] precedent holding that 'odor alone' is enough but contend[ed] that it no longer applies because hemp is now legal in Florida and it is impossible to distinguish between hemp and marijuana by sight or smell." *Id.* at 810. Critically, the defendant backed up his argument with *evidence*: "There was undisputed testimony at the suppression hearing that hemp and marijuana are indistinguishable by sight or smell." *Id.* at 810 n.3.

The First District ultimately concluded that it did not need to resolve the issue. *Id.* at 811. But there was no question that the defendant had introduced the testimony necessary to support the argument that he had raised and preserved. Here, by contrast, Baxter introduced no evidence or testimony to substantiate his

factual claim that marijuana and hemp have indistinguishable odors. For that reason alone, we should not consider it.*

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* Given the belatedness of—and lack of evidentiary support for—Baxter's factual claim, the State had little reason to argue below that law enforcement can distinguish between the two odors. Thus, I do not think the State made any substantial concession at oral argument when it acknowledged that it proceeded below as if hemp and marijuana smell the same. We shouldn't expect the State to contest a case that the defendant hadn't yet brought.

By observing that "testimony that the smell of hemp and marijuana is indistinguishable has been presented in various Florida and federal courts without contradiction," the en banc majority opinion highlights the evidentiary deficiency. Defendants in other cases have backed their claims with evidence; we should expect Baxter to do the same. To be sure, we should revisit our plain-smell doctrine if there has been "a significant change in circumstances," *State v. Michel*, 257 So. 3d 3, 6 (Fla. 2018) (plurality opinion) (quotation marks omitted), since we adopted that legal rule. But whether regulatory developments constitute a "significant" changed circumstance hinges here on a factual question: whether law enforcement can distinguish between the odors of hemp and marijuana. Baxter, as the party urging us to depart from our precedent, bears the burden on that issue.

The en banc majority opinion rightly declines to fill Baxter's evidentiary void with judicial notice. "[C]ourts should exercise great caution when using judicial notice" and should employ this mechanism of convenience only to establish "facts [that] need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it." *Huff v. State*, 495 So. 2d 145, 151 (Fla. 1986). "[J]udicial notice is not intended to fill the vacuum created by the failure of a party to prove an essential fact." *Id.* (internal quotation marks omitted). Unless and until the smell of hemp and its comparison to the smell of marijuana become "'common knowledge which [courts] are presumed to share with the public generally,'" *id.* (quoting *Amos v. Mosley*, 77 So. 619, 623 (Fla. 1917)), those factual questions should be left to the normal adversarial process—a process that was followed in other state and federal cases that the en banc majority opinion cites, but that wasn't followed here.

En banc review of this appeal is all the more improvident because it revisits our court's precedent. In *State v. Bennett*, we held that "the odor of marijuana emanating from a car or a driver who recently exited his car, is sufficient probable cause to justify a search of the car." 481 So. 2d 971, 972 (Fla. 5th DCA 1986). In so holding, we rejected the trial court's conclusion that the officer could not rely on the odor "without something more than just plain smell." *Id.* We have reaffirmed *Bennett*'s plain-smell holding at least a half-dozen times. *See State v. Hill*, 54 So. 3d 530, 531 (Fla. 5th DCA 2011); *Blake v. State*, 939 So. 2d 192, 197 (Fla. 5th DCA 2006); *Harvey v. State*, 653 So. 2d 1146, 1146 (Fla. 5th DCA 1995); *State v. T.T.*, 594 So. 2d 839, 840 (Fla. 5th DCA 1992); *State v. Jarrett*, 530 So. 2d 1089, 1091 (Fla. 5th DCA 1988); *State v. Wells*, 516 So. 2d 74, 75 (Fla. 5th DCA 1987); *see also State v. Reed*, 712 So. 2d 458, 460 (Fla. 5th DCA 1998) (noting that "[i]n a number of cases, this court has held that to a trained and experienced police officer, the smell of cannabis emanating from a person or a vehicle, gives the police officer probable cause to search the person or the vehicle"). Although *Bennett* and its progeny often dealt with the odor of burnt (or burning) marijuana, nothing in those cases suggests that their dispositions turn on the burn. Thus, the en banc majority opinion marks a departure from those decisions.

Perhaps changes in the state and federal regulatory schemes for hemp justify a break from *Bennett*; perhaps not. *Compare Owens v. State*, 317 So. 3d 1218, 1220 (Fla. 2d DCA 2021) (concluding that "the recent legalization of hemp, and under certain circumstances marijuana, does not serve as a sea change undoing existing precedent"), *with Hatcher*, 342 So. 3d at 812 (Bilbrey, J., concurring) (urging the First District to recede from its plain-smell precedent "in an appropriate case" due to "the statutory changes" in Florida's treatment of hemp); *see also Michel*, 257 So. 3d at 3 (plurality opinion) ("[S]tare 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." (quotation marks omitted)); *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012) ("The doctrine of stare decisis bends where there has been a significant change in circumstances since the adoption of the legal rule or where there has been an error in legal analysis." (quotation marks omitted)).

At a minimum, we should insist that any reevaluation of our "plain smell" precedent await a case where the defendant fully presented the issue below, with both the evidence and the argument needed to properly inform a decision. Because that case is not the one Baxter brought to us, we should have let the panel opinion stand.

III.

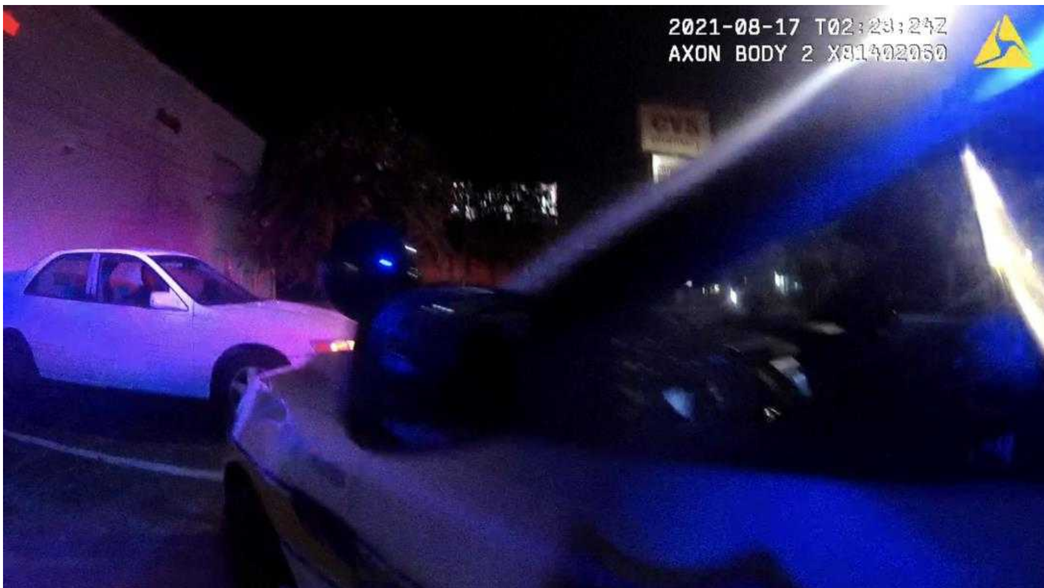
In sum, this case is a poor vehicle to address the question that the en banc majority opinion decides today, much less to revisit our court's precedent. I would discharge our grant of en banc rehearing and reinstate the panel opinion affirming Baxter's judgment and sentence.

HARRIS, J., concurs.

MAKAR, J., concurring in part, dissenting in part.

In this county court misdemeanor case, Jason Hassan Baxter pled to and was adjudicated guilty of one count of possession of drug paraphernalia (a scale), serving one day in jail and paying $303 of court costs; one count of possessing less than 20 grams of fresh cut cannabis was dropped. His plea reserved the right to appeal the denial of his motion to suppress, which—had it been granted—would have been dispositive, resulting in dismissal of the paraphernalia charge.

It all started when a police officer followed Baxter into the parking lot of a CVS Pharmacy in Jacksonville, Florida, shortly after it had closed at 10:00 pm. Baxter had backed into a parking space, after which 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.



The totality of these circumstances establishes an investigative seizure, which is a limited exception to the Fourth Amendment's prohibition of unreasonable searches and seizures, a fundamental protection of personal liberty in our country. An investigative seizure is an exception because ordinarily a warrant supported by probable cause is required absent an exigency or other judicially recognized doctrine. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). To establish a valid investigative seizure, it must be shown that the officer had a "reasonable" and "well-founded, articulable suspicion" that "a person has committed, is committing, or is about to commit a crime." *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993). "Mere suspicion is not enough to support a stop." *Id.*

What occurred in this case was a show of authority from which no reasonable person would believe they were free to go, i.e., a seizure. *See id.* at 188 ("This Court has consistently held that a person is seized if, under the circumstances, a reasonable person would conclude that he or she is not free to end the encounter and depart."). Baxter would have likely faced criminal charges if he ignored the officer and attempted to drive away, creating a potentially dangerous situation. *See G.M. v. State*, 19 So. 3d 973, 980 (Fla. 2009) ("[I]t would be both dangerous and irresponsible for this Court to advise Florida citizens that they should feel free to simply ignore the officers, walk away, and refuse to interact with these officers under such circumstances.").

The use of emergency lights is not per se a seizure, but such use generally evinces an investigative stop and is a critical factor in evaluating whether a seizure took place. *See id.* at 983. Notably, this court in *Young v. State*—a case involving emergency lights—reversed a drug conviction where the "only basis for the [investigative] stop was the fact that Young entered the unfinished apartment complex and parked his vehicle. Such activity does not establish the requisite reasonable suspicion for an investigatory

stop." 803 So. 2d 880, 883–84 (Fla. 5th DCA 2002). This Court agreed that the "officer's use of his patrol car in a blocking manner and subsequent activation of the patrol car's emergency lights resulted in a show of authority that would cause any reasonable person to believe he or she was not free to leave." *Id*. at 882.

The core holding of *Young* is that the *confluence* of emergency lights and the use of a police vehicle in a blocking manner can constitute an investigative stop under a totality of the circumstances approach. The holding is not in conflict with *G.M.*, which merely held that the use of emergency lights alone does not constitute a per se investigative stop. As the concurrence in *G.M.* summarized, "an officer's use of his or her emergency lights *generally* evidences an investigatory stop rather than a consensual encounter and is an important factor in evaluating the totality of the circumstances. This is of course the general holding of the conflict cases, such as *Young*." *G.M.*, 19 So. 3d at 983 (Pariente, J., concurring, joined by Quince, J.). *Young* controls because it involved "emergency lights" *plus* other factors; *G.M.* abrogated only those decisions that said emergency lights *alone* are sufficient to establish a detention.

Courts don't consider what a detaining officer sees or smells *after* a seizure has occurred. The determination of whether a traffic stop or detention is reasonable, instead, is based on what an officer knew *before* the stop or detention occurred. *Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); *Brevick v. State*, 965 So. 2d 1246, 1249 (Fla. 5th DCA 2007) (quoting another source) ("Whether an officer's suspicion is reasonable is determined by the totality of the circumstances which existed at the time of the stop and is based solely on facts known to the officer before the stop."); *see generally* Wayne A. Logan, *Florida Search & Seizure* § 9.60 (2022 ed.) (discussing the legality of *Terry* stops and what is required for reasonable suspicion).

Here, at the point of seizure, the officer hadn't smelled or seen anything unusual and had only the barest of hunches that something might be afoot: he clearly had no reasonable suspicion of *criminal* activity to conduct an investigative detention at that

point. Indeed, the officer said upon first confronting Baxter that the "only reason I'm making contact with you is because you're parked outside a closed business," which falls far short of what's legally required to summarily seize an individual and initiate investigative questioning. Each day innumerable vehicles park briefly outside closed-for-the-evening businesses like Baxter did, providing no reasonable basis for a well-founded and articulable suspicion that a crime had occurred or was about to occur.

That Baxter had backed into the parking space is a non-starter. With the advent of mandatory backup cameras and assisted parking technology, someone backing into a parking space turns no heads today (people don't like waiting for the backers-in, however). Indeed, studies show it is much safer to back-in park. Granted, in some circumstances, backing a vehicle into a suspicious position, such as a loading dock of a closed business at 3:00 am, could be a factor in the totality of the circumstances analysis. But nothing along those lines occurred here; Baxter merely backed into a designated space near a windowless brick wall in a highly visible parking lot on a major thoroughfare.

This was not a consensual citizen's encounter. In fact, Baxter immediately expressed an intent to be let go ("I'm actually about to leave"), but the officer persisted in detaining and questioning him despite having no lawful reason for initially doing so. Moreover, it was not a welfare check; nothing suggested Baxter was in distress or in need of assistance. *See generally* Logan, *supra* § 9.180 (discussing seizures justified by the community caretaking doctrine). Neither was it an issue of officer safety; Baxter was polite and respectful from the outset, even while being subject to intense questioning thereafter without *Miranda* warnings (which were first given over ten minutes after he was handcuffed, interrogated, and asked to "come clean"). Nor was preserving evidence from destruction in play, as Baxter was handcuffed quickly and placed in a police vehicle. Simply put, it was an investigative detention without a legally adequate basis (i.e., no reasonable basis under the totality of the circumstances to conclude that a crime had been committed, was occurring, or was about to occur).

In conclusion, I concur in that part of Judge Kilbane's opinion and decision as it relates to the plain smell doctrine and to certification of conflict. I concur in Judge Eisnaugle's opinion as to preservation only; 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. My disagreement is that the seizure of Baxter by the initial officer—as the public defender's initial and supplemental briefs argue—occurred without reasonable suspicion that criminal conduct was afoot even before the officer smelled what could have been either fresh-cut marijuana or hemp, making consideration of *Davis v. United States*, 564 U.S. 229, 232 (2011), unnecessary. All this said, it is commendable that police officers vigilantly patrol neighborhoods and commercial corridors to actively root out and prevent criminal activity; their jobs are challenging enough and even more so when changes in the law make enforcement decisions more complex. Under court precedent, however, the circumstances of this case demonstrate an unlawful seizure; because Baxter and the State agree that Baxter's motion to suppress was dispositive, the conviction on misdemeanor possession of drug paraphernalia should be dismissed.