**NO. COA21-144** **FIFTH DISTRICT**

**NORTH CAROLINA COURT OF APPEALS**

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| **STATE OF NORTH CAROLINA** | **)** | |
| | **)** | |
| **v.** | **)** | **From New Hanover** |
| | **)** | |
| **JAQUALYN ROBINSON** | **)** | |

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# BRIEF FOR THE STATE

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# BRIEF FOR THE STATE

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## ISSUES PRESENTED

**I. WHETHER THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE WHERE PROBABLE CAUSE EXISTED TO SEARCH DEFENDANT'S VEHICLE.**

## STATEMENT OF THE CASE

On 28 May 2020, Jaqualyn Robinson ("Defendant") was indicted by a New Hanover County grand jury for possession with intent to manufacture, sell or deliver a Schedule II controlled substance, possession of a controlled substance within 1000 feet of a park, possession of a controlled substance within 1000 feet of a school, possession of a Schedule I controlled substance, possession of a Schedule II controlled substance, possession of marijuana (up to one-half ounce), carrying a concealed gun, driving while license revoked, and a window tint violation. (R pp. 11–13)

On 13 August 2020, Defendant filed a motion to suppress arguing that due to the "adoption of N.C.G.S. § 106-568.50 et seq. and the subsequent legalization of industrial hemp, an officer cannot rely on sight and smell of what he believes to be marijuana to form the basis of probable cause to search or seize." (R pp. 14–22) On 29 October 2020, the matter came on for hearing at the 26 October 2020 Criminal Session of Superior Court, New Hanover County, before the Honorable R. Kent Harrell, Judge Presiding. (T p. 1) The trial court denied the motion to suppress. (R pp. 43–44; T pp. 69–70)

Pursuant to a plea agreement, Defendant pleaded guilty to felony possession of cocaine and carrying a concealed gun. (R p. 47) In exchange, the State dismissed the remaining charges. (R p. 49) The trial court accepted

Defendant's plea and, in accordance with the plea agreement, sentenced Defendant to 4 to 14 months of imprisonment. The trial court suspended the sentence and placed Defendant on supervised probation for 12 months. (R pp. 48, 52–55)

Defendant filed a written notice of appeal. (R p. 61) Defendant filed a record on appeal on 2 March 2021, a petition for writ of certiorari on 24 March 2021, and an appellant brief on 1 April 2021. (See Docket Sheet in No. 21-144)

## STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

For the reasons discussed in the State's motion to dismiss the appeal, which is incorporated herein, Defendant lacks a right to appeal the denial of his motion to suppress, and his appeal should be dismissed. Furthermore, for the reasons discussed in the State's response to the petition for writ of certiorari, which is also incorporated herein, his petition seeking review of the trial court's order should be denied.

## STATEMENT OF THE FACTS

On 5 February 2020 at approximately 4:09 P.M., Officer Ben Galluppi of the Wilmington Police Department was on routine patrol. (T pp. 6–8) Officer Galluppi noticed a Chrysler 300 drive by with such a "dark window tint" that Officer Galluppi "couldn't see inside the vehicle." (T p. 8) After pulling behind the vehicle and confirming that it did not have an exemption sticker from the

DMV for the dark tint, Officer Galluppi effectuated a traffic stop. (T pp. 10–11)

Defendant was the driver of the vehicle, and Officer Galluppi asked him for his license and registration. (T p. 11) Defendant could not provide his license. (T p. 11) While talking with Defendant, Officer Galluppi, who had both training and experience in narcotics offenses, detected "a very faint odor of marijuana -- what [he] kn[e]w to be marijuana coming from inside the vehicle." (T p. 12) Because Defendant was speaking "very softly[,]" Officer Galluppi had to lean in to properly hear Defendant. (T p. 12) When he did so, he "verified that it was marijuana that [he] was smelling -- coming from inside the vehicle and not from the surrounding area." (T pp. 12–13) Not wanting any possible evidence "tampered with or destroyed[,]" Officer Galluppi had Defendant step out of the vehicle and sit in the passenger seat of the patrol vehicle while Officer Galluppi ran Defendant's license information, which was suspended. (T pp. 14–15) Officer Galluppi "could still smell the odor of marijuana coming from [Defendant's] person at that point." (T p. 15)

Another officer arrived to provide backup and stayed with Defendant while Officer Galluppi began to search Defendant's vehicle. (T pp. 15–16) Officer Galluppi asked Defendant whether he had any weapons in the vehicle, and Defendant "crossed his arms and shook his head 'no'[.]" (T p. 16) Officer

Galluppi, however, discovered a firearm, a .44 Charter Arms revolver, in the center armrest of the vehicle. (T p. 16) Defendant was handcuffed, and the other officer found a pill on Defendant's person while searching Defendant prior to placing him in the patrol vehicle. (T p. 17) A similar pill was found on the side of Defendant's vehicle. (T p. 17) Officer Galluppi believed the pills looked like MDMA, and a field test returned a positive result for MDMA. (T p. 17)

Defendant was transported to the Wilmington Police Department for processing. (T p. 18) A search was performed on Defendant's person, and, as he was removing his pants, a clear plastic baggie fell from the area between the pants and the black shorts Defendant had on underneath. (T p. 19) Inside the baggie was "a rock-like substance in addition to like a green leafy substance inside packaged separately." (T p. 19)

## STANDARD OF REVIEW

Our Supreme Court has explained the standard of review for a trial court's ruling on a motion to suppress as follows:

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo

> and are subject to full review. Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167–78, 712 S.E.2d 874, 878 (2011).

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO DISMISS.

Defendant contends that because legal hemp "cannot be distinguished from marijuana" based on smell and "without chemical analysis," the odor of marijuana "alone does not provide the probable cause necessary for a warrantless search under the Fourth Amendment." (Def's Br p. 12) He therefore argues that Officer Galluppi's detection of the odor of marijuana emanating from Defendant's vehicle was insufficient to establish probable cause and that the trial court erred by denying the motion to suppress. Defendant's argument is meritless.

#### A. Fourth Amendment principles.

The Fourth Amendment provides:

> 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.

U.S. Const. amend. IV; see Mapp v. Ohio, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961) (incorporating the Fourth Amendment's protection against unreasonable searches and seizures against the States). The Fourth Amendment's protection "extends to occupants of automobiles." State v. Corpening, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894 (1993).

While the Fourth Amendment generally requires that a warrant be secured to effectuate a search, "the warrant requirement is subject to certain reasonable exceptions." Kentucky v. King, 563 U.S. 452, 459, 179 L. Ed. 2d 865, 874 (2011). One such exception is the "automobile exception," which "is founded upon two separate but related reasons: the inherent mobility of motor vehicles which makes it impracticable, if not impossible, for a law enforcement officer to obtain a warrant for the search of an automobile while the automobile remains within the officer's jurisdiction and the decreased expectation of privacy which citizens have in motor vehicles, which results from the physical characteristics of automobiles and their use." State v. Isleib, 319 N.C. 634, 637, 356 S.E.2d 573, 575–76 (1987) (internal citations omitted). Under this exception, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." Pennsylvania v. Labron, 518 U.S. 938, 940, 135 L. Ed. 2d 1031, 1036 (1996) (per curiam).

Probable cause exists "where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found." Ornelas v. United States, 517 U.S. 690, 696, 134 L. Ed. 2d 911, 918 (1996). A law enforcement officer "may draw inferences based on his own experience in deciding whether probable cause exists." Id. at 700, 134 L. Ed. 2d at 921. Determining whether an officer has probable cause looks to the totality of the circumstances. Maryland v. Pringle, 540 U.S. 366, 371, 157 L. Ed. 2d 769, 775 (2003). The United States Supreme Court has emphasized "that the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id. at 370, 157 L. Ed. 2d at 775 (internal citations and quotation marks omitted).

Equally important in determining whether probable cause exists is what is *not* required. This Court has explained that "[t]he determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent[.]" State v. Eutsler, 41 N.C. App. 182, 183, 254 S.E.2d 250, 250, disc. review denied, 297 N.C. 614, 257 S.E.2d 438 (1979). Indeed, the evidence need not even amount to a prima facie showing of criminal activity. Illinois v. Gates,

462 U.S. 213, 235, 76 L. Ed. 2d 527, 546 (1983); State v. Phillips, 300 N.C. 678, 684, 268 S.E.2d 452, 456 (1980). Rather, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Gates, 462 U.S. at 243, n.13, 76 L. Ed. 2d at 551–52.

It is well settled that "[w]hen an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana." State v. Smith, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (2008), disc. review denied, 363 N.C. 380, 680 S.E.2d 206 (2009), cert. denied, 560 U.S. 925, 176 L. Ed. 2d 1221 (2010) (citing State v. Greenwood, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981)); see also United States v. Humphries, 372 F.3d 653, 658 (4th Cir. 2004) ("We have repeatedly held that the odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place. In United States v. Scheetz, 293 F.3d 175, 184 (4th Cir. 2002), for example, we held that the smell of marijuana emanating from a properly stopped automobile constituted probable cause to believe that marijuana was in the vehicle, justifying its search.").

**B. The legalization of industrial hemp in North Carolina.**

In 2015, the General Assembly passed Session Law 2015-299 (S.B. 313). S.L. 2015-299 created the North Carolina Industrial Hemp Commission and tasked the Commission with, among other things, "establish[ing] an

agricultural program to grow or cultivate industrial hemp in the State" and issuing licenses for such cultivation. Industrial hemp was defined as

> All parts and varieties of the plant Cannabis sativa (L.), cultivated or possessed by a grower licensed by the Commission, whether growing or not, that contain a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis.

S.L. 2015-299, sec. 1; N.C.G.S. §106-568.51 (2019).

S.L. 2015-299 amended N.C.G.S. § 90-87(16), which defined "marijuana" in the North Carolina Controlled Substances Act, to read as follows:

> "Marijuana" means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. <u>The term does not include industrial hemp as defined in G.S. 106-568.51, when the industrial hemp is produced and used in compliance with rules issued by the Board of Agriculture upon the recommendation of the North Carolina Industrial Hemp Commission.</u>

S.L. 2015-299, sec. 2.

In 2016, the General Assembly then passed Session Law 2016-93 (H.B. 992). The bill, among other things[1], created civil and criminal penalties for individuals who violated industrial hemp regulations. Id.

### C. The trial court's findings of fact were supported by competent evidence.

The trial court made the following findings of fact relevant to the existence of probable cause to search Defendant's vehicle:

> 4. Upon approaching the vehicle, Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle.
>
> 5. The defendant was the driver of the vehicle. He had no license but provided his vehicle registration.
>
> . . .
>
> 9. Officer Galluppi then conducted a search of the vehicle with the assistance of another officer. The search revealed a handgun in the console and a non-descript pill under the back seat.
>
> 10. The defendant was then placed under arrest and transported to the Wilmington Police Department for processing. While at the police department, the defendant was strip searched. While removing his clothing, a plastic pouch fell from the defendant's pants which contained two separate baggies; one containing a green leafy substance and the other containing a white rock like substance.

[1] One such change is that the term "the Board of Agriculture upon the recommendation of" was deleted in the definition of marijuana in the Controlled Substances Act cited above.

> 11. The Court took judicial notice of a State Bureau of Investigations bulletin regarding the similarities of marijuana and hemp. The court took judicial notice of the bulletin only to the extent that physical properties and characteristics of the two plants were discussed. Legal conclusions and opinions contained in that bulletin were disregarded as the State Bureau of Investigation does not have legal authority to issue binding opinions on the sufficiency of evidence to establish probable cause. Marijuana and hemp share very similar physical characteristics and it is difficult to tell one from the other either by appearance or smell.

(R pp. 43–44)

Defendant admits that Finding of Fact #4 is "accurate" but contends that it is "incomplete" because "Officer Galluppi detected the 'very faint odor' of what he believed to be marijuana." (Def's Br p. 13) At the outset, Defendant's acknowledgement that this finding of fact is "accurate" demonstrates that he is not arguing that the finding is not supported by competent evidence. Nevertheless, the finding of fact is not incomplete when Officer Galluppi's testimony is viewed in full. Officer Galluppi testified that as he was speaking with Defendant at Defendant's vehicle, Officer Galluppi smelled a "very faint odor of marijuana . . . coming from inside the vehicle." (T p. 12) Once Officer Galluppi "leaned in closer" to hear Defendant, however, he "verified that it was marijuana that [he] was smelling -- coming from inside the vehicle and not

from the surrounding area." (T pp. 12–13) Therefore, the trial court's finding of fact is not incomplete, and it is binding on appeal.

Furthermore, whether the odor of marijuana was faint or stronger would not impact the probable cause analysis in the way that Defendant argues it does. To be sure, this Court has used the term "strong" in reference to odors of substances while discussing evidence that gives rise to reasonable suspicion or probable cause. See State v. Yates, 162 N.C. App. 118, 123, 589 S.E.2d 902, 905 (2004) ("In this case, Deputy Aleem testified defendant walked by him twice, once going in, the other time out of the Waffle House, emanating a strong odor of marijuana, and each time defendant was alone."); State v. Williams, 225 N.C. App. 636, 640, 738 S.E.2d 211, 214 (2013) ("The findings of fact support the trial court's conclusion of law that '[b]ased on the Defendant's proximity to the car involved in an accident, no one else was in the area, strong odor of alcohol, slurred speech, bloodshot eyes, and extremely unsteady [sic] on his feet. Officer Miller had probable cause to arrest the Defendant for Driving While Impaired[.]" (brackets in original)). However, neither this Court nor our Supreme Court has qualified the rule that "[w]hen an officer detects the odor of marijuana from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana" based on the strength of the odor. See Smith, 192 N.C. App. at 694, 666 S.E.2d at 194.

Defendant next argues that Finding of Fact 11 is "not fully supported by competent evidence" because the trial court stated that marijuana and hemp have "very similar physical characteristics" and that it is "difficult to tell one from the other either by appearance or smell" rather than using the terms in the SBI memo that the two are "the same species" and "look the same and have the same odor." (Def's Br pp. 13–14; R pp. 28–29, 44) While the trial court did not use the exact terms of the SBI memo or provide direct quotations, the trial court's finding of fact accurately summarizes the proposition of the SBI memo about the similarities of industrial hemp and marijuana. Defendant fails to show that the trial court's use of other words which functionally have the same meaning renders the finding of fact unsupported by competent evidence.

Defendant also argues that it was "unreasonable for the trial court to ignore the memo's discussion of probable cause in its entirety." (Def's Br p. 14) As will be discussed below, the trial court did not err by not giving weight to the SBI memo's legal opinion regarding what evidence establishes probable cause because an agency memo lacks legal authority over a judicial determination of probable cause. Defendant cites no authority for his proposition that it was "unreasonable" for the trial court to not consider the SBI's "legal conclusions and opinions." (R p. 44)

Lastly, Defendant contends "the trial court did not make any findings of fact indicating that Officer Galluppi had the training and experience necessary to distinguish between hemp and marijuana – or even that he had the training and experience to support his belief that what he smelled might be marijuana at all." (Def's Br p. 15) Implicit in the trial court's finding that "Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle" is a finding that Officer Galluppi knew, by virtue of training and experience, what marijuana smelled like in the first instance. And the evidence presented at the suppression hearing supports this implicit finding. Officer Galluppi testified that he has attended multiple narcotics classes administered by the North Carolina State Crime Lab which included in the curriculum the smell of marijuana. (T p. 13) This included the differences between burned and unburned marijuana. (T p. 13) Officer Galluppi also testified that, in his experience as an officer, he has encountered burned and unburned marijuana approximately 400 times. (T p. 14) Therefore, the trial court's finding that Officer Galluppi smelled what he detected as marijuana was complete and supported by competent evidence.

**D. The trial court's findings of fact, in turn, supported its conclusions of law.**

Based upon its findings of fact, the trial court concluded:

> 2. That the odor of marijuana emanating from the vehicle provided sufficient probable cause for a warrantless search of the vehicle under the automobile exception to the Fourth Amendment warrant requirement.
>
> 3. The fact that marijuana and hemp share similar characteristics and have a similar odor does not negate the ability of law enforcement to use the odor of a potentially controlled substance as a sufficient basis to establish probable cause for the warrantless search of a vehicle. Marijuana is still an illegal substance in this state.

(R p. 44) It therefore denied the motion to suppress.

The trial court did not err in so concluding. The evidence, as described in the trial court's findings of fact, establish that when Officer Galluppi began to speak with Defendant at Defendant's vehicle, he detected an odor of marijuana coming from the vehicle. (R p. 43) It is well established that the odor of marijuana, an illegal substance in this State, gives an officer probable cause to believe that the vehicle contains the contraband. Smith, 192 N.C. App. at 694, 666 S.E.2d at 194; Corpening, 200 N.C. App. at 315, 683 S.E.2d at 460; Greenwood, 301 N.C. at 708, 273 S.E.2d at 441. Applying this well-settled case law, the trial court did not err in concluding that Officer Galluppi had probable cause to believe that, based on the odor of marijuana coming from Defendant's vehicle, the vehicle contained marijuana.

The trial court also did not err by concluding that the legalization of industrial hemp does not negate this well-settled precedent. The legalization

of hemp containing less than 0.3 THC does not change the illegal status of marijuana. The fact that hemp, a legal substance, and marijuana, an illegal substance, share a similar smell does not prevent a law enforcement officer from gaining probable cause to believe that a vehicle contains marijuana when he or she detects the odor of marijuana. This is because probable cause is only "a *fair probability* that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238, 76 L. Ed. 2d at 548 (emphasis added). Probable cause does not require a prima facie showing of criminal activity, much less an actual showing that the substance emanating the odor is definitively marijuana. See Eutsler, 41 N.C. App. at 183, 254 S.E.2d at 250. When an officer detects an odor of marijuana coming from a vehicle, there is still a "fair probability" that there is marijuana in the vehicle, despite the fact that it could be legal industrial hemp.

Furthermore, the Fourth Amendment did not require Officer Galluppi to definitively determine whether the odor was from marijuana or legal industrial hemp. There are numerous scenarios where facts and circumstances form probable cause to believe that contraband is present but turn out to be a factual mistake. As the United States Supreme Court has explained:

> The Fourth Amendment prohibits "unreasonable searches and seizures." Under this standard, a search or seizure may be permissible even though the justification for the action

> includes a reasonable factual mistake. An officer might, for example, stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat. The driver has not violated the law, but neither has the officer violated the Fourth Amendment.

Heien v. North Carolina, 574 U.S. 54, 57, 190 L. Ed. 2d 475, 480 (2014); see also State v. Parker, 2021-NCCOA-217, ¶ 33 (officer's "own subjective belief that the substance he smelled was marijuana was additional evidence supporting probable cause—even if his belief might ultimately have been mistaken"). Thus, the fact that the substance that Officer Galluppi smelled *could have* been industrial hemp does not make the search here unreasonable.

In arguing that the opposite conclusion should be reached in this case, Defendant points to the SBI memo, which contains a legal opinion that the shared appearance and odor of marijuana and hemp "makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant." (R p. 30) Defendant also relies on a blog post from the North Carolina School of Government which, citing the SBI memo, asserts that "without a field test or some other way to verify whether something is hemp or marijuana, officers do not have probable cause to seize it or to arrest someone in possession of it without some other reason to believe the substance is

contraband." (Def's Br p. 19) However, the legal opinions of outside organizations on whether evidence is sufficient to establish probable cause is not binding on this Court or other courts making similar determinations—probable cause is a judicial determination. Indeed, even the blog post that Defendant cites to recognizes that this issue of probable cause after the legalization of hemp remains "unsettled" in our appellate courts. (Def's Br p. 19)

Although this Court has not directly addressed this issue[2], the federal district courts of North Carolina have concluded that probable cause exists when an officer smells marijuana despite the legalization of industrial hemp in this State.[3] In United States v. Brooks, No. 3:19-cr-00211-FDW-DCK, 2021 WL 1668048 (W.D.N.C. Apr. 28, 2021), the defendant was charged with multiple narcotics offenses and filed a motion to suppress, arguing "that the smell [the law enforcement officer] detected could have been from a legal source" and cited the "North Carolina State Bureau of Investigation report that

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[2] See Parker, 2021-NCCOA-217 at ¶ 29 ("The legal issues raised by the recent legalization of hemp have yet to be analyzed by the appellate courts of this state.").

[3] While decisions by federal districts courts are, of course, not binding on this Court, they are persuasive. See State v. Mangum, 250 N.C. App. 714, 719, 795 S.E.2d 106, 112–13 (2016), disc. review denied, 369 N.C. 536, 797 S.E.2d 8 (2017); State v. McDowell, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), cert. denied, 476 U.S. 1164, 90 L.Ed.2d 732 (1986).

seems to suggest that marijuana and hemp look and smell almost identical." Id. at *4. He therefore contended that "since none of the materials found in the vehicle were tested [the district court] should reject the Magistrate's conclusion [below] and find that there was no smell of marijuana." Id. The district court rejected the defendant's argument:

> Assuming, *arguendo*, hemp and marijuana smell "identical," then the presence of hemp does not make all police probable cause searches based on the odor unreasonable. The law, and the legal landscape on marijuana as a whole, is ever changing but one thing is still true: marijuana is illegal. To date, even with the social acceptance of marijuana seeming to grow daily, precedent on the plain odor of marijuana giving law enforcement probable cause to search has not been overturned. Therefore, if hemp does have a nearly identical smell to marijuana — and hemp was present — it would suggest to this court that [the officer] was even more reasonable to believe evidence of marijuana was present.

Id. (emphases omitted). The United States District Courts for the Eastern and Middle Districts of North Carolina have reached similar conclusions. See United States v. Harris, No. 4:18-CR-57-FL-1, 2019 WL 6704996 (E.D.N.C. Dec. 9, 2019) ("[T]he smell of marijuana alone, particularly where corroborated here by two officers at separate times, supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because "[o]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." (quoting Gates,

462 U.S. at 235, 76 L. Ed. 2d at 546)); United States v. Holloman, 1:15CR246–1, 2015 WL 5824031, *4, n. 2 (M.D.N.C. Oct. 6, 2015) (despite legalization of hemp extract at the time for limited medical treatment, possession of marijuana remained illegal, and "[i]t is the fact that possessing marijuana is a crime that gives rise to probable cause.").

Courts in other jurisdictions where hemp has been legalized have similarly concluded that an officer has probable cause to believe that marijuana is present in a place where he or she detects an odor of marijuana. In United States v. Clark, 3:19-CR-64-PLR-HBG, 2019 WL 8016712 (E. D. Tenn. Oct. 23, 2019)[4], the United States District Court for the Eastern District of Tennessee held:

> The possession and use of marijuana is illegal in Tennessee and under Federal law. 21 U.S.C. § 812(c). The active odor of marijuana gave [the officer] probable cause to search the vehicle. Defendant's argument that hemp and marijuana are "the same plant," and that hemp is legal in Tennessee, does not change the fact that Officer Bailey testified that he smelled marijuana.

Id. at *4–*5. The United States District Court for the Southern District of West Virginia reached the same conclusion in United States v. Boggess, 444 F.

[4] The District Court adopted in whole the Magistrate's Report and Recommendation. United States v. Clark, 2020 WL 869969 (E. D. Tenn. Feb. 21, 2020).

Supp. 3d 730 (S.D. W. Va. 2020), after the defendant argued "the rationale" of cases holding that the odor of marijuana can provide probable cause for a search "no longer exists as it is lawful to grow, cultivate, possess and sell hemp products" in West Virginia. Id. at 736. The court explained, "possession of marijuana is still a criminal offense under West Virginia state law and federal law" and therefore the officer's "belief that there was likely illegal contraband present in [the d]efendant's jeep was reasonable based on the odor of marijuana emanating from the vehicle." Id.

Relatedly, courts in jurisdictions where marijuana has been decriminalized or legalized in small possessory amounts or in the medical context continue to hold that the odor of marijuana is sufficient to establish probable cause. For example, the Fourth Circuit has explained:

> The odor of marijuana alone provides probable cause to believe that evidence of marijuana possession would be found in [the defendant's] residence. [The defendant] argues, however, that the Commonwealth's limited exception allowing citizens to possess marijuana for medical reasons undermined the magistrate's probable cause finding. We reject this contention. Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. This is especially the case so long as marijuana possession is prohibited by federal law, without exception.

United States v. Mitchell, 720 F. App'x 146, 152 n. 4 (4th Cir. Mar. 28, 2018) (internal citations, quotation marks, and brackets omitted); see also United

States v. Harrison, No. 17-59-GMS-1, 2018 WL 1325777, *3 (D. Del. Mar. 15, 2018) ("The decriminalization of marijuana does not affect the court's reliance on well-established precedent that the smell of marijuana establishes probable cause. Even if marijuana has been decriminalized in some instances in Delaware, every possession and usage of marijuana was not made legal.").

Lastly, Defendant erroneously likens this case to State v. Benters, 367 N.C. 660, 766 S.E.2d 593 (2014). In Benters, officers received an anonymous tip that the defendant was growing marijuana, and "the corroborating evidence proffered by the police consisted of: (1) utility records of power consumption for the target residence; (2) gardening equipment observed at the target residence (coupled with the apparent absence of significant gardening activity); and (3) the investigating officer's expertise and knowledge of the defendant." State v. Lowe, 369 N.C. 360, 365, 794 S.E.2d 282, 286 (2016) (citing Benters, 367 N.C. at 661–62, 669, 766 S.E.2d at 596, 600–01). Our Supreme Court held that this was insufficient to establish probable cause. Benters, 367 N.C. at 673, 766 S.E.2d at 603. Benters, however, was not a case where an officer detected an odor of marijuana, which our appellate courts have repeatedly held gives rise to probable cause to believe that marijuana is present in that particular place. See Smith, 192 N.C. App. at 694, 666 S.E.2d at 194. It is therefore inapposite here.

## CONCLUSION

For the reasons stated in the State's motion to dismiss the appeal and response to the petition for writ of certiorari, this Court should dismiss Defendant's appeal and deny his petition for writ of certiorari seeking review of the trial court's order denying the motion to suppress. In the event this Court reaches the merits of Defendant's argument, the State respectfully requests that this Court affirm the trial court's order.

Electronically submitted this the 6th day of July, 2021.

JOSHUA H. STEIN
ATTORNEY GENERAL

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**CERTIFICATE OF COMPLIANCE WITH RULE 28 (j)(2)**

Undersigned counsel certifies that the State's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Word, the program used to prepare the brief.

Electronically submitted this the 6th day of July, 2021.

Electronically Submitted
Nicholas R. Sanders
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows

Sarah Holladay
Email: sarah@holladaylawoffice.com

Electronically submitted this the 6th day of July, 2021.

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