No. 15-22-10000-CR
No. 15-22-10001-CR

IN THE FIFTEENTH COURT OF APPEALS

OF THE STATE OF TEXAS

IVAN DRAGO**, Appellant**

v.

THE STATE OF TEXAS, Appellee

Appeal from Stallone County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE FIFTEENTH COURT OF APPEALS:

The two issues properly before this Court can be resolved in two sentences. First, the odor of something that smells just like an illegal narcotic is still probable cause to search for that illegal narcotic. Second, putting crack cocaine where it cannot be easily seen is "concealing" it as that term is ordinarily used.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. Whether a search for marijuana can be justified on smell alone after the regulation of hemp is unanswered by any Texas court of appeals. The issue of concealment is not new but the fact pattern distinguishes it from controlling authority. Conversation will benefit this Court.

SUMMARY OF THE ARGUMENT

Appellant's convictions for possession of a controlled substance and tampering with evidence and should be affirmed.

The crack cocaine in the vehicle he was driving was found as the result of a lawful search based on the odor of marijuana. That odor provided probable cause to search notwithstanding the fact that hemp, which smells the same as marijuana, is legal to possess in a vehicle under limited circumstances. Innocent explanations do not vitiate probable cause. If this search was unreasonable at inception, the taint of the illegal search was attenuated by the discovery of crack in appellant's possession after he was removed from his vehicle. That discovery provided probable cause to search the vehicle for more crack.

Appellant's complaint of illegal arrest was not preserved.

Appellant was convicted of tampering with evidence because he successfully if temporarily hid his crack from law enforcement's view with the intent to make it unavailable in their investigation. This interpretation comports with the common meaning of "conceal" and best serves the purpose of the statute.

ARGUMENT

I. The search of appellant's vehicle was either reasonable at inception because of the odor of marijuana or justified by the intervening discovery of crack cocaine in his possession.

Officers have probable cause to search a vehicle for marijuana when they detect the smell of marijuana coming from it. This has been and continues to be the law notwithstanding the limited ability to lawfully transport plant material—hemp—that smells identical to marijuana. If the regulated possession of hemp makes such a search unreasonable, the discovery of crack on appellant after his removal from the vehicle was an intervening circumstance that attenuated the taint of the illegal search.

A. The statutory scheme at issue.

Title 5, Subtitle F, of the Agriculture Code creates a scheme to create and regulate a hemp industry. A license is required to "cultivate or handle" hemp, as those terms are defined.[1] Relevant to this case, raw hemp can be possessed in a vehicle without a license but only during the transport between the premises of a license holder to 1) another license holder's premises or 2) someone licensed to

[1] TEX. AGRIC. CODE § 122.101(a). *See* TEX. AGRIC. CODE § 122.001(1) ("'Cultivate' means to plant, irrigate, cultivate, or harvest a hemp plant."), (3) ("'Handle' means to possess or store a hemp plant: (A) on premises owned, operated, or controlled by a license holder for any period of time; or (B) in a vehicle for any period of time other than during the actual transport of the plant from a premises owned, operated, or controlled by a license holder to: (i) a premises owned, operated, or controlled by another license holder; or (ii) a person licensed under Chapter 443, Health and Safety Code."). By implication, anyone can legally possess hemp without a license or paperwork so long as they do not possess it on the property of a license holder or in a vehicle.

manufacture consumable hemp products.[2] Transportation of "hemp plant material" is prohibited unless the material is produced according to this regulatory scheme and is accompanied by the requisite paperwork.[3] The person transporting it must not transport any other cargo with it, and must furnish the required documentation upon request.[4] Violation of these rules is subject to both civil penalty[5] and a misdemeanor conviction punishable by a fine of not more than $1,000.[6]

This regulatory scheme specifies the "powers and duties of peace officers":[7]

- A peace officer may detain any hemp transported in this state until the person transporting it provides the required documentation.[8]

- A peace officer "may inspect and collect" material found in a vehicle to determine if it is hemp or marijuana but cannot seize it or arrest without probable cause to believe it is marijuana.[9]

- A peace officer may seize and impound everything in the vehicle if the officer has probable cause to believe marijuana or some

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[2] TEX. AGRIC. CODE § 122.001(3)(B).

[3] TEX. AGRIC. CODE § 122.356(a)(1), (2).

[4] TEX. AGRIC. CODE § 122.356(b).

[5] TEX. AGRIC. CODE § 122.359.

[6] TEX. AGRIC. CODE § 122.360.

[7] TEX. AGRIC. CODE § 122.358.

[8] TEX. AGRIC. CODE § 122.358(b).

[9] TEX. AGRIC. CODE § 122.358(a).

other controlled substance is also being transported.[10]

- None of this "limit[s] or restrict[s] a peace officer from enforcing to the fullest extent the laws of this state regulating marihuana and controlled substances, as defined by Section 481.002, Health and Safety Code."[11]

Read together, these statutes provide for the lawful interference with property rights to ensure this regulatory scheme is not used to further the marijuana trade.

B. The findings of fact present either an interesting problem or a swift solution.

The trial court issued findings of fact at appellant's request. Although appellant did not object in the trial court, he now claims that two findings—3 and 4—"have no evidentiary support."[12] The underlying assumption is that trial courts have authority to issue findings of fact on a motion to suppress carried with a bench trial. That is not at all clear. If they can, the complained-of findings are supported by the record and render appellant's suppression claims moot.

1. There is no authority for findings of fact on a "carried" motion to suppress.

Findings of fact are largely a creature of pretrial practice. Trial court's have the statutory discretion to hold pretrial hearings on motions to suppress.[13] If the court chooses to hold a pretrial hearing, some unique rules come into play. First, the ruling

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[10] TEX. AGRIC. CODE § 122.358(c).

[11] TEX. AGRIC. CODE § 122.358(d).

[12] App. Br. at 26.

[13] TEX. CODE CRIM. PROC. art. 28.01 § 1(6).

is interlocutory; the State may appeal if it loses.[14] Second, the trial court is the finder of fact.[15] Third, the losing party is entitled to findings of fact so the appellate court can review the reasoning actually employed by the trial court.[16]

But none of these unique features change what a pretrial ruling is. "In essence, a pretrial motion to suppress evidence is nothing more than a specialized objection to the admissibility of that evidence."[17] In other words, it is a trial objection that takes place pretrial under the special rules outlined above. When a trial objection is raised pretrial but carried with trial, the ruling is a trial ruling. It should be treated like one. That should preclude findings of fact.

At trial, the court's gate-keeping role does not involve credibility determinations. This is true generally with admissibility conditioned on fact[18] and specifically with, for example, the reliability of expert opinions,[19] authenticity,[20]

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[14] *Black v. State*, 362 S.W.3d 626, 633 (Tex. Crim. App. 2012); *see* TEX. CODE CRIM. PROC. art. 44.01.

[15] *State v. Ross*, 32 S.W.3d 853, 857 (Tex. Crim. App. 2000).

[16] *State v. Cullen*, 195 S.W.3d 696, 698-99 (Tex. Crim. App. 2006).

[17] *Black*, 362 S.W.3d at 633 (quotation omitted).

[18] *Harrell v. State*, 884 S.W.2d 154, 164-65 (Tex. Crim. App. 1994) ("[T]he trial court neither weighs credibility nor makes a finding that the proponent has proved the conditional fact; the court simply examines all of the evidence in the case and decides whether the jury could reasonably find the conditional fact by a preponderance of the evidence.") (quoting *Huddleston v. United States*, 485 U.S. 681, 690 (1988)) (cleaned up).

[19] *Vela v. State*, 209 S.W.3d 128, 135-36 (Tex. Crim. App. 2006). *See also E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 567 (Tex. 1995) ("Under Rule 104(a), the trial judge does (continued...)

outcry witnesses under Art. 38.072,[21] and extraneous offenses under Art. 38.37 § 2-a.[22] The only exception appears to be rulings on confessions pursuant to Art. 38.22; Section 6 explicitly requires a finding of admissibility "as a matter of law and fact" without apparent regard to whether the determination is made mid-trial.[23] Outside of that narrow context, a trial court cannot make credibility determinations and therefore cannot make findings of fact.

Notably, this is true regardless of whether trial is to the jury or the judge. Granted, the reasons for prohibiting findings in a jury trial are more clear. Article 38.04 says that once trial begins "[t]he jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony [subject to limited

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[19](...continued)
not weigh the credibility of the evidence in proving the fact issue in question. Rather, the judge weighs the credibility of the conflicting testimony as to the reasonableness of the expert's reliance on the given facts or data. This distinction is critical in maintaining the separate roles of the expert witness, the trial judge, and the jury.").

[20] *Butler v. State*, 459 S.W.3d 595, 605 (Tex. Crim. App. 2015) ("Rule 901 . . . requires merely 'sufficient' evidence 'to support' authentication. It does not ordinarily require the trial court to make a threshold determination of the credibility of the evidence proffered by the proponent to establish authenticity.").

[21] *Sanchez v. State*, 354 S.W.3d 476, 488-89 (Tex. Crim. App. 2011) (rulings are "based only on the time, content, and circumstances of the statement, leaving the determination of the outcry witness's credibility to the fact finder at trial."). References to an article are to the Code of Criminal Procedure unless otherwise stated.

[22] *Romano v. State*, 612 S.W.3d 151, 159 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd) ("adequate to support a finding by the jury" presents a question of admissibility, not weight).

[23] TEX. CODE CRIM. PROC. art. 38.22 § 6.

exceptions]."[24] This principle also undergirds Art. 38.23(a), which gives the jury the power to decide any admissibility issue premised on dispositive fact-finding.[25] But even in bench trials, the Court of Criminal Appeals recognizes that "the judge assumes dual roles: He acts as a judge in ruling on the admissibility of the evidence, and he acts as a juror in weighing the credibility of the evidence."[26] A trial court may have more flexibility on the timing of its admissibility rulings in a bench trial,[27] but it should not have more flexibility over the standard for admissibility itself.

Beyond these specific concerns, there is nothing about a bench trial that grants the trial court the authority to issue findings of fact on "carried" mid-trial evidentiary rulings. There is no statute or rule authorizing them,[28] and no analogous source of authority; bench trial findings are not authorized for sufficiency purposes,[29] and findings on motions for new trial are authorized by rule but not required.[30] Notwithstanding this lack of authority, trial courts issue them in both jury and bench

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[24] TEX. CODE CRIM. PROC. art. 38.04.

[25] *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012).

[26] *Garza v. State*, 126 S.W.3d 79, 83 (Tex. Crim. App. 2004).

[27] *Smith v. State*, 499 S.W.3d 1, 8 (Tex. Crim. App. 2016); *Garza*, 126 S.W.3d at 83.

[28] There is a chapter of the Code of Criminal Procedure devoted to jury trials, TEX. CODE CRIM. PROC. art. 36.01 *et seq*., but not one for bench trials.

[29] *Robinson v. State*, 466 S.W.3d 166, 173 (Tex. Crim. App. 2015).

[30] *Thomas v. State*, 445 S.W.3d 201, 214 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). *See* TEX. R. APP. P. 21.8(b) ("In ruling on a motion for new trial, the court may make oral or written findings of fact.").

trials, and courts of appeals consider them.[31] However, none of these opinions address the problems explained above. And the exception authorized by the Court of Criminal Appeals—mid-trial "reopening" of the pretrial motion to suppress and findings of fact thereon[32]—does not apply when there was no pretrial hearing to "reopen."

In short, trial courts have a choice. They can 1) consider motions to suppress in an interlocutory setting in which they are the finder of fact and a party can appeal the court's application of law to its findings, or 2) consider admissibility during a proceeding in which their gate-keeping role is more limited. They cannot have it both ways. This trial court chose the latter. Its findings should not be entertained.

2. The trial court was entitled to believe Officer Rocky's claim that he smelled raw marijuana.

If the trial court can make findings on a motion carried with a bench trial, they are entitled to the same deference as findings issued following a pretrial motion to suppress. "It is well-settled that the trial court is the sole judge of the credibility of witnesses at a hearing on a motion to suppress evidence obtained in a search/seizure,

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[31] *See*, *e.g.*, *Gonzalez v. State*, No. 04-14-00709-CR, 2016 WL 1689968, at *2-5 (Tex. App.—San Antonio Apr. 27, 2016, pet. ref'd) (not designated for publication) (jury trial); *Walker v. State*, No. 02-14-00493-CR, 2016 WL 551964, at *1-3 (Tex. App.—Fort Worth Feb. 11, 2016, no pet.) (jury trial); *Savedra v. State*, No. 13-15-00089-CR, 2015 WL 6375876, at *2-5 (Tex. App.—Corpus Christi–Edinburg Oct. 22, 2015, no pet.) (not designated for publication) (bench trial).

[32] *Black*, 362 S.W.3d at 629-35. The authority to reopen was explained, not the issuance of findings.

and that it may choose to believe or disbelieve any or all of witnesses' testimony."[33] This includes settling conflicts within a single witness's testimony.[34] Applying these established rules shows Findings 3 and 4 are supported by the record and entitled to deference.

The trial court found that Officer Rocky searched appellant's van because he smelled raw marijuana, which he recognized from training and experience.[35] The record supports this. Officer Rocky distinguished marijuana from hemp.[36] He said he smelled raw marijuana.[37] He based his belief on training and experience.[38] It does not matter that he contradicted himself under cross-examination.[39] Reconciling a witness's contradictory responses is the fact-finder's job, not this Court's. Because Findings 3 and 4 have evidentiary support, they must be respected.

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[33] *Johnson v. State*, 871 S.W.2d 744, 748 (Tex. Crim. App. 1994).

[34] *Shah v. State*, 414 S.W.3d 808, 814 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

[35] 1 CR 9 (Findings 3 & 4).

[36] 1 RR 12 (distinguishing what he smelled from what appellant claimed it was, *i.e.*, hemp), 23 (summarizing the definition of marijuana based on THC percentage).

[37] 1 RR 12 (raw marijuana), 13 (marijuana).

[38] 1 RR 12 ("I've detected it dozens of times and then found it afterward[.]"), 22 ("I've smelled plenty of marijuana.")

[39] 1 RR 23.

3. These findings effectively render appellant's first two issues moot.

Appellant's first two issues are premised on the idea that probable cause cannot be based on an odor that might have been hemp. The findings, supported by the record, say it wasn't. He should lose on that basis.

C. The possibility of an innocent explanation is largely irrelevant to probable cause determinations.

If the trial court's findings of fact do not preclude relief, the application of established Fourth Amendment law should. No innocent explanation can erase the probable cause that arises when the odor of marijuana is detected in Texas.

1. Cause to search must be reasonably probable, not certain.

Over 70 years ago, the Supreme Court in *Brinegar v. U.S.* reaffirmed its definition of probable cause:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
> . . .
> Since [Chief Justice] Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.[40]

[40] 338 U.S. 160, 175-76 (1949) (citation and quotation omitted).

This standard has not changed. The two main components are still 1) a "fair probability" of crime or evidence thereof, 2) on which a reasonable, prudent person would act.[41] "This is a flexible, nondemanding standard."[42] And it makes sense. As the text of the Fourth Amendment suggests and the Supreme Court has "repeatedly affirmed, the ultimate touchstone of the Fourth Amendment is reasonableness."[43] Not beyond a reasonable doubt, or even more likely than not—reasonableness.[44]

2. This standard leaves room for reasonable mistakes.

One of the consequences of a reasonableness standard is that it permits mistakes. "To be reasonable is not to be perfect[.]"[45] "[A] mistake about the facts, *if* reasonable, will not vitiate an officer's actions in hindsight so long as his actions were lawful under the facts as he reasonably, albeit mistakenly, perceived them to

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[41] *See*, *e.g.*, *Florida v. Harris*, 568 U.S. 237, 244 (2013) ("All we have required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act.") (cleaned up); *Parker v. State*, 206 S.W.3d 593, 599 (Tex. Crim. App. 2006) ("[P]robable cause is the accumulation of facts which, when viewed in their totality, would lead a reasonable police officer to conclude, with a fair probability, that a crime has been committed or is being committed by someone.").

[42] *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012).

[43] *Heien v. North Carolina*, 574 U.S. 54, 60 (2014) (cleaned up).

[44] *Illinois v. Gates*, 462 U.S. 213, 235 (1983); *Hughes v. State*, 24 S.W.3d 833, 838 (Tex. Crim. App. 2000).

[45] *Heien*, 574 U.S. at 60-61.

be."[46] This allowance for reasonable mistakes can save an officer's determination of probable cause,[47] the search of the wrong place,[48] or even the arrest of the wrong person.[49]

A corollary to this is the rejection of the idea that probable cause (or reasonable suspicion) cannot survive an innocent explanation. "[I]nnocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands."[50] "In 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 non-criminal acts."[51] Countless reasonable suspicion cases hold the same.[52] Regarding probable cause,

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[46] *Robinson*, 377 S.W.3d at 720-21 (emphasis in original).

[47] *Id*. at 720.

[48] *Maryland v. Garrison*, 480 U.S. 79, 87-89 (1987).

[49] *Hill v. California*, 401 U.S. 797, 802-04 (1971).

[50] *Gates*, 462 U.S. at 243 n.13 (quoted in *United States v. Sokolow*, 490 U.S. 1, 10 (1989)).

[51] *Id*. (quoted in *Sokolow*, 490 U.S. at 10).

[52] *See*, *e.g.*, *United States v. Arvizu*, 534 U.S. 266, 277 (2002) ("A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct[,]" and upholding a stop based on suspicion of drug trafficking over the defendant's argument that "the facts suggested a family in a minivan on a holiday outing."); *Ramirez-Tamayo v. State*, 537 S.W.3d 29, 39 (Tex. Crim. App. 2017) ("A determination that reasonable suspicion exists does not require negating the possibility of innocent conduct."); *Jaganathan v. State*, 479 S.W.3d 244, 248 (Tex. Crim. App. (continued...)

both the Supreme Court and the Court of Criminal Appeals acknowledge the consensus that innocent explanations do not vitiate probable cause.[53]

The upshot is that a reasonable probability of criminal activity can exist despite 1) facts that are innocent in isolation, 2) a conceivable innocent explanation for their totality, and 3) a suspect who swears that is the case.

3. This is a feature, not a bug.

Requiring only a probability of criminal activity practically guarantees innocent people will be detained and even searched and/or arrested. That is undeniable. But this is not an oversight, nor something courts have dismissed out of hand. On the contrary, this reality was confronted in *Brinegar* itself:

> These long-prevailing [by 1949] standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on

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[52](...continued)
2015) ("An officer's suspicion is not unreasonable just because facts surrounding a suspected offense might ultimately show a defense to conduct.").

[53] *District of Columbia v. Wesby*, 138 S. Ct. 577, 592 (2018) (recognizing the precedent holding "that officers are free to disregard either all innocent explanations, or at least innocent explanations that are inherently or circumstantially implausible. These cases suggest that innocent explanations—even uncontradicted ones—do not have any automatic, probable-cause-vitiating effect."); *State v. Ford*, 537 S.W.3d 19, 26 (Tex. Crim. App. 2017) ("Although a suspect's innocent explanation is relevant information to be considered in a probable cause determination, numerous courts have held that a police officer is generally not required to credit an accused's innocent explanation when probable cause to arrest is otherwise apparent.").

> their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.[54]

The Court of Criminal Appeals adopted similar language regarding reasonable suspicion when it abandoned the "as consistent with innocent activity as with criminal activity" construct:

> The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal to "enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges." The citizen's undoubted interest in freedom from abuse of this procedure is protected so far as it is within the law's power to do so by the correlative rule that no stop or detention is permissible when the circumstances are not reasonably "consistent with criminal activity" and the investigation is therefore based on mere curiosity, rumor, or hunch.[55]

This precedent is well-established and consistent. Even the truth of an obviously plausible innocent explanation cannot defeat probable cause. It is simply not enough to say the officer might be or even likely is wrong.

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[54] *Brinegar*, 338 U.S. at 176.

[55] *Woods v. State*, 956 S.W.2d 33, 37 (Tex. Crim. App. 1997) (block quoting *In re Tony C.*, 582 P.2d 957, 960 (1978), corrected, 697 P.2d 311 (Cal. 1985)) (citations omitted). That court recently quoted the first two sentences again in *Leming v. State*, 493 S.W.3d 552, 565 (Tex. Crim. App. 2016).

D. A distinctive smell identical to that of contraband constitutes probable cause.

1. "Legal" hemp smells just like illegal marijuana.

Appellee's primary argument is that "legal" hemp smells the same as illegal marijuana. He's right. The odor given off by the thing he claims Officer Rocky detected is indistinguishable from the odor of something that is a crime to possess in any quantity in Texas.[56] Marijuana is contraband. Any reasonable, prudent person would think an odor indistinguishable from that of contraband raises a fair probability that the contraband is present. The possibility of mistake is irrelevant if that mistake is reasonable. Nothing could be more reasonable than mistaking the distinct smell of one thing for the smell of something that smells the same.

2. "Legalizing" hemp did not change the Fourth Amendment or reality.

The reasonableness of mistaking raw hemp for raw marijuana persists regardless of whether the Legislature made hemp "legal." First, as explained above, it is not legal *per se*. At best, possession of raw hemp is 1) legal outside the commercial context, 2) decriminalized but heavily regulated for a small class of licensed commercial actors, 3) potentially criminal for commercial transporters, and 4) always criminal for anyone else transporting it.

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[56] *See* TEX. HEALTH & SAFETY CODE § 481.121(b)(1) (making possession of two ounces or less a Class B misdemeanor).

Second, the "as consistent with innocent activity as with criminal activity" construct does not gain new life because the Legislature makes something "legal" in some circumstances. That would elevate statutorily innocent activity over inherently innocent activity. Although a legislature could raise artificial barriers to the enforcement of marijuana laws, ours made it clear that officers should continue to pursue marijuana to the fullest extent possible. This includes inspection of anything that *might* be marijuana. In Texas, probable cause is still probable cause.

Third, the chance that someone whose vehicle smells like marijuana is or recently has been transporting legal hemp between licensed entities is remote. Currently, the Texas Department of Agriculture lists only 91 licensed handlers and 80 licensed processors across the state.[57] The probabilities favor criminal activity.

3. The "marijuana is different" argument warps or ignores the Fourth Amendment (and sometimes reality).

As appellant ably sets out, there are few courts that have squarely addressed why odor alone is not enough for probable cause, reasonable suspicion, or both. Notably, none of them are "hemp" states.[58] Instead, they are states that have medical

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[57] https://texasagriculture.gov/RegulatoryPrograms/Hemp.aspx.

[58] One Florida court of appeals intimated in *dicta* in a "burnt" marijuana case 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 v. State*, 317 So. 3d 1218, (continued...)

marijuana acts (MMAs), decriminalization of marijuana under a certain "user" amount, or both. In theory, it should be easy to hold that an odor that is associated only with something that is still criminal to possess under many if not most circumstances would present a "fair probability" of criminal activity to a reasonable person. Instead, most of these courts either disregard this standard or manipulate it because "marijuana is different."

a. "Medical marijuana" cases have spawned two distinct schools of thought.

The Supreme Court of Pennsylvania joined the "odor plus" camp in a "burnt" case.[59] Although it held that "the smell of marijuana indisputably can still signal the possibility of criminal activity," it concluded that smell alone cannot support probable cause.[60] It based this on its recent holding that mere possession of a handgun cannot support reasonable suspicion in light of state carry laws.[61] That is, possessing something that can be legally possessed under some circumstances is not suspicious on its own *at all*.

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[58](...continued)
1220 (Fla. Dist. Ct. App. 2021, rev. denied).

[59] *Commonwealth v. Barr*, 266 A.3d 25 (Pa. 2021).

[60] *Id*. at 41.

[61] *Id*. at 41-43.

The Arizona Supreme Court went the other way in a thorough analysis of the smell of raw marijuana coming from a storage warehouse. Beginning with reliance on *Illinois v. Gates*'s discussion of probable cause and innocent activity, it held that, "Notwithstanding AMMA, the odor of marijuana in most circumstances will warrant a reasonable person believing there is a fair probability that contraband or evidence of a crime is present."[62] Simply put, "AMMA did not decriminalize the possession or use of marijuana generally. . . . Instead, AMMA makes marijuana legal in only limited circumstances."[63] "Given Arizona's general prohibition against marijuana possession and use, it is reasonable for officers to conclude that criminal activity is occurring when they see or smell marijuana, thereby satisfying probable cause."[64]

That court explicitly rejected an "odor (or sight) plus" standard because "[the] AMMA does not broadly alter the legal status of marijuana in Arizona but instead specifies particular rights, immunities, and obligations for qualifying patients and others, such as designated caregivers."[65] "Nor does AMMA's broad immunity provision . . . or its subsection relating to probable cause . . . suggest that AMMA patients have greater protections from searches or increased expectations of privacy

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[62] *State v. Sisco*, 373 P.3d 549, 553 (2016).

[63] *Id*. at 553.

[64] *Id*. at 555.

[65] *Id*. at 554.

than those enjoyed by the general public."[66] Instead, "they are simply treated like the broader public."[67]

One Florida court of appeals agreed generally with Arizona's approach in a "burnt" case and held, "the possibility that a driver might be a medical-marijuana user would not automatically defeat probable cause. The probable cause standard, after all, is a 'practical and common-sensical standard.'"[68]

b. "Amount" states ignore or misconstrue the Fourth Amendment because "marijuana is different."

Opinions from states that have decriminalized marijuana below certain thresholds show how far those courts have strayed from the Fourth Amendment.

i. Massachusetts ignores the Fourth Amendment as a matter of policy.

Massachusetts changed the basic rules for reasonable suspicion and probable cause related to marijuana based on its perception of the intent behind decriminalization of possession of one ounce or less.[69] In 2011, the Massachusetts

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[66] *Id*. at 554. *See* ARIZ. REV. STAT. § 36-2811 (providing protections for and even presumptions in favor of people lawfully using the AMMA but clarifying in subsection H that possession of a registry identification card neither constitutes probable cause nor "preclude[s] the existence of probable cause if probable cause exists on other grounds").

[67] *Sisco*, 373 P.3d at 555.

[68] *Johnson v. State*, 275 So. 3d 800, 802 (Fla. Dist. Ct. App. 2019) (quoting *Florida v. Harris*, 568 U.S. at 244).

[69] It is now two ounces or less. MASS. GEN. LAWS Ann. ch. 94C, § 32L (West).

Supreme Judicial Court concluded that the smell of burnt marijuana is not even reasonable suspicion of crime because "[f]erreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statute."[70] Notably, the court refused to apply the rationale used by Pennsylvania, *i.e.*, possession of items that can be lawfully possessed in some circumstances is no indication of crime.[71] Instead, it said, "decriminalization is not synonymous with legalization[; b]ecause marijuana remains unlawful to possess, any amount of marijuana is considered contraband."[72] This should have helped the State. Instead, that court viewed the decriminalization statute as a statement of legislative will. "By mandating that possession of such a small quantity of marijuana become a civil violation, not a crime, the voters intended to treat offenders who possess one ounce or less of marijuana differently from perpetrators of drug crimes."[73] In other words, marijuana is different.

Three years later, it extended this rationale to the smell of raw marijuana *even when some marijuana had already been found*. In that case, officers said they smelled raw marijuana, the driver acknowledged he had some, and he consented to

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[70] *Com. v. Cruz*, 945 N.E.2d 899, 910 (2011).

[71] *Id*. at 911.

[72] *Id*. at 911.

[73] *Id*. at 909-10.

opening the glove box to reveal a "fat bag" of it.[74] The record does not say whether it reasonably appeared to contain more than an ounce of marijuana.[75] At some point, a backpack containing two large freezer bags of marijuana was found in the back seat.[76] The Supreme Judicial Court held the continued investigation could not be justified. Despite acknowledging decades old law that "the discovery of some controlled substances gives probable cause to search for additional controlled substances," the court said "[its] decisions since 2008 have rejected that proposition as to marijuana."[77] Turning to the odor, it conceded that the odor of unburnt marijuana "could be more consistent with the presence of larger quantities" but concluded odor cannot "reliably predict[] the presence of a criminal amount of the substance . . . as would be necessary to constitute probable cause."[78]

Neither opinion from that court addressed the low quantum of evidence required by reasonable suspicion and probable cause, the fact that they are based in

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[74] *Com. v. Overmyer*, 11 N.E.3d 1054, 1056 (2014).

[75] *Id*. at 1060.

[76] *Id*. at 1056.

[77] *Id*. at 1058 (citation and quotation omitted).

[78] *Id*. (citation omitted). *See id*. at 1059 ("Although it is possible that training may overcome the deficiencies inherent in smell as a gauge of the weight of marijuana present, there is no evidence that the officers here had undergone specialized training that, if effective, would allow them reliably to discern, by odor, not only the presence and identity of a controlled substance, but also its weight.") (citation omitted).

probability, or the tolerance for reasonable mistakes about innocent conduct. Instead, they are based on an officer's inability to smell weight. This is policy a determination regarding enforcement, not Fourth Amendment analysis.

ii. Vermont ignores common sense.

Vermont also modifies its search and seizure law for marijuana. After eliminating the other circumstances justifying the search incident to a traffic stop using the divide-and-conquer and "as consistent with innocent activity" constructs, the Vermont Supreme Court addressed the odor of raw marijuana.[79] The analysis of this factor started out well. "Simply because possession of small amounts of marijuana is not a crime does not require law enforcement to disregard the odor of marijuana in establishing probable cause that a crime has been committed."[80] It held this even though Vermont, like Pennsylvania, also has a medical marijuana law.[81] However, the suspect handed over a small bag of marijuana—less than one ounce—

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[79] *State v. Clinton-Aimable*, 232 A.3d 1092, 1098-1101 (2020).

[80] *Id*. at 1101.

[81] *Id*. Participation in Vermont's medical program is a defense to prosecution that need not be disproved before an officer has probable cause. *State v. Senna*, 79 A.3d 45, 50 (2013) ("The small possibility that someone in the residence might have been immune from prosecution, in the absence of any evidence that anyone was, does not negate the State's probable cause to search based in part on the odor of fresh marijuana.").

before the search.[82] The court held that, because there was no evidence the officers smelled marijuana *after* the suspect handed them a civil amount of marijuana, there was no more probable cause:

> We are left with the proposition that the presence of an amount of marijuana that is not a crime to possess is sufficient to establish probable cause that defendant possessed additional marijuana in criminal amounts or drugs other than marijuana. We cannot accept the logic of this proposition.[83]

The court rejected the argument—supported by officer testimony—that dealers often carry a user amount of marijuana they can surrender in hopes of ending the investigation.[84] "Again," that court held, "the logic of this proposition is suspect. [A d]efendant would be in a better position to avoid a search of his vehicle if he had no drugs on his person than if he had a small amount of a drug he was willing to acknowledge he possessed." This defies common sense.

As with Massachusetts's analysis, there was no discussion of probabilities or innocent mistake.

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[82] *Clinton-Aimable*, 232 A.3d at 1096.

[83] *Id*. at 1102.

[84] *Id*.

iii. Maryland acknowledges the law but applies it differently to marijuana anyway.

In 2020, the Maryland Court of Appeals held that "police officers must have probable cause to believe a person possesses a criminal amount of marijuana," ten grams or more, "in order to arrest that person and conduct a search incident thereto."[85] "The odor of marijuana alone is not indicative of the quantity (if any) of marijuana in someone's possession[.]"[86] The court was concerned about government intrusions based on a smell that results from second-hand smoke or use in a nearby jurisdiction where marijuana is legal.[87]

Last year, in a case cited by appellant, the Court of Special Appeals applied this rationale to reasonable suspicion and held that police must reasonably suspect possession of more than 10 grams of marijuana to lawfully detain someone.[88] "And because the odor of marijuana alone does not indicate the quantity, if any, of marijuana in someone's possession, it cannot, by itself, provide reasonable suspicion

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[85] *Lewis v. State*, 233 A.3d 86, 99, 101 (2020).

[86] *Id*. at 99.

[87] *Id*. at 99-100. It distinguished, and left undisturbed, its prior holding that the odor of marijuana grants probable cause to search a vehicle pursuant to the automobile exception despite acknowledging that all exceptions to the warrant requirement "requires the same quantum of evidence" "in terms of degree of their probability." *Id*. at 98-99, 101 (citations omitted). The court drew this distinction based on the differing expectations of privacy in vehicles and persons.

[88] *In re D.D.*, 250 A.3d 284, 294 (2021), *rev'd and remanded*, 2022 WL 2207895 (Md. June 21, 2022).

that the person is in possession of a criminal amount of marijuana or otherwise involved in criminal activity."[89]

The Maryland Court of Appeals reversed that decision in June of this year.[90] This time, that court recognized that neither the probable cause nor reasonable suspicion standard requires an officer to rule out a suspect's innocent explanation for suspicious facts.[91] It discounted D.D.'s "correct[] observ[ations] that there are many wholly innocent reasons why someone might smell of marijuana."[92] It called odor of marijuana "a 'concrete observation' that supports further investigation."[93] "When a police officer smells marijuana on someone, it is certainly the case that the person may possess less than 10 grams of marijuana or they may possess no marijuana at all. But it also is possible that the person is presently in possession of 10 or more grams of marijuana."[94]

Unfortunately, instead of applying this recognition and the body of "innocent explanation" law it cited earlier, that court split the baby by concluding,

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[89] *Id*.

[90] *In re D.D.*, __ A.3d __, 2022 WL 2207895, at *1 (Md. June 21, 2022).

[91] *Id*. at *9 (citing *District of Columbia v. Wesby*, 138 S. Ct. at 588).

[92] *Id*. at *11.

[93] *Id*. at *12.

[94] *Id*.

> partial decriminalization has reduced the level of certainty associated with the odor of marijuana on a person from probable cause that the person has committed a crime to reasonable suspicion that the person has committed a crime or is in the process of committing a crime.
>
> It follows that a brief investigatory detention based solely on the odor of marijuana is reasonable, whereas an arrest (and a search incident to such arrest) is unreasonable if based solely on the odor of marijuana. The different outcomes make sense, given the differing levels of intrusiveness of the two Fourth Amendment events.[95]

In Maryland, then, the smell of marijuana gives reasonable suspicion to detain and investigate, probable cause to search a vehicle, but not probable cause to search a person. The last holding is based in part on a misunderstanding of the role expectation of privacy plays in the analysis but, relevant here, also on a "marijuana is different" mentality. If, as that court says, "[t]he partial decriminalization of marijuana changed the legal landscape significantly,"[96] it is because that court wanted it to—not because the Fourth Amendment required it.

4. Officer Rocky had probable cause to search appellant's van.

Depending on how this Court views the record, Officer Rocky smelled either marijuana—a substance that is illegal to possess—or a substance that smells just like it. On that basis alone, a reasonably prudent person would have found a fair probability that appellant was committing a crime. Officer Rocky was not required

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[95] *Id*. at *9-10.

[96] *Id*. at *6.

to accept appellant's innocent explanation; criminals lie to hide their crimes. That the explanation involved a legislatively authorized scheme for handling something that smells like marijuana may make the explanation more facially plausible but it does not change the fact that appellant's vehicle smelled of contraband. Even Maryland, with its arbitrary limitations on searches based on the odor of marijuana, still holds that odor alone can justify the warrantless search of a vehicle.

Nor does the scheme include or suggest a statement of legislative policy that could change the outcome. Unlike the statute considered by the Massachusetts high court, Texas's hemp scheme explicitly reaffirms the ability of law enforcement to go after marijuana "to the fullest extent."[97] It allows them to take samples of alleged hemp to make sure the scheme is not being abused, and conspicuously limits the seizure of plant material and arrest of a transporter but not searches of the vehicle. It also perhaps recognized the possibility that persons who transport "legal" hemp might use it to transport marijuana or other contraband when it prohibited transporters from carrying anything that is not hemp plant material. Texas wants potential criminal activity investigated.

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[97] Even if it did not, the existence of any regulatory scheme diminishes legitimate expectations of privacy, especially within vehicles. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989) (generally); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976) (vehicles).

E. The discovery that appellant possessed crack cocaine on his person attenuated any taint of illegality.

Assuming Officer Rocky illegally commenced his search, the taint of that illegality was attenuated by the intervening discovery that appellant had crack on him.

The exclusionary rule was created to deter police misconduct.[98] Because society pays a substantial cost for exclusion, this remedy of "last resort" should be reserved for cases in which the evidence was obtained by exploitation of that misconduct.[99] This is not a "but for" analysis.[100] Even given a direct causal connection, the taint of that misconduct can be attenuated such that the purpose of exclusion would not be served by suppression.[101] The factors to be considered are the temporal proximity of the misconduct and discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the misconduct.[102] The latter factor is most important when there is an intervening circumstance (other than time) because it goes to the heart of the purpose of the exclusionary rule.[103]

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[98] *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

[99] *Hudson v. Michigan*, 547 U.S. 586, 591-92 (2006). "Obtained" means the same here as in TEX. CODE CRIM. PROC. art. 38.23(a). *State v. Jackson*, 464 S.W.3d 724, 731 (Tex. Crim. App. 2015).

[100] *Hudson*, 547 U.S. at 592.

[101] *Id*. at 593.

[102] *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

[103] *State v. Mazuca*, 375 S.W.3d 294, 306 (Tex. Crim. App. 2012). *See Utah v. Strieff*, 579 U.S. (continued...)

Appellant cites *Massey v. State*, from the Second Court, for the proposition that "petty and relatively predictable" crimes committed cannot be intervening circumstances.[104] That court relies primarily Professor LaFave's view that admitting evidence derived from "'common and predictable'" acts like "'attempts to dispose of incriminating evidence'" "'would encourage such Fourth Amendment violations in future cases.'"[105] But this assumes the very exploitation a *Brown* analysis is supposed to verify. That is backwards. And both the Supreme Court and the Court of Criminal Appeals have rejected it.[106] In short, nothing in *Massey* explains why a suspect's decision to shed contraband "is better viewed as an extended derivation of the illegal police action" than an intervening circumstance.[107]

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[103](...continued)
232, 241 (2016) (the third factor "reflects th[e the exclusionary rule's] rationale").

[104] No. 02-20-00140-CR, __ S.W.3d __, 2022 WL 623491 at *9-10 (Tex. App.—Fort Worth Mar. 3, 2022, pet. granted).

[105] *Id*. at *9 (quoting LaFave, Crime committed in response to illegal arrest or search as a fruit, 6 Search & Seizure § 11.4(j) (6th ed.))

[106] *Strieff*, 579 U.S. at 243 (rejecting presumptive exclusion because "the *Brown* factors take account of the purpose and flagrancy of police misconduct"); *Mazuca*, 375 S.W.3d at 310 (rejecting "an approach that would effectively *presume* purposeful and/or flagrant police misconduct from the fact of the primary illegality alone rather than assessing the character of that illegality, and of any subsequent police conduct, to determine whether it indicates that they *actually* behaved purposefully or flagrantly in the particular case.") (emphasis in original).

[107] *Massey*, 2022 WL 623491, at *9. This fundamental flaw in Professor LaFave's reasoning was the basis for two of the eight cases cited in *Massey*, neither of which acknowledged this body of law. *Jones v. State*, 745 A.2d 856, 873 (Del. 1999) ("We must look beyond the facts of this individual case and weigh the potential for abuse if we were to establish a precedent that would allow the (continued...)

Even if this approach to some intervening offenses made sense in the abstract, it leads to disparate and therefore absurd results. Attenuation does not have to be based on a new offense; probable cause is probable cause. Relevant here, a search of a vehicle is justified by the discovery of narcotics on the driver following his removal.[108] That discovery could result from a lawful *Terry* frisk or search incident to arrest on an unrelated charge. The result should not change when the discovery results instead from additional criminal conduct designed to hide evidence. Even authorities cited by *Massey* generally discourage "self-help."[109] Yet this approach tells criminals in clear terms that committing new crimes might be a good option. That is bad policy.

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[107](...continued)
admission of evidence seized as a result of a defendant's resisting an illegal arrest."); *State v. Beauchesne*, 868 A.2d 972, 982, 984 (N.H. 2005) (citing *Jones*). Of the five cited cases that do acknowledge and purport to apply *Brown* and progeny, three of them misapply the framework beyond requiring the intervening offense to be unexpected or dangerous. *Johnson v. United States*, 253 A.3d 1050, 1057-61 (D.C. Cir. 2021) (conflating temporal proximity with intervening circumstance, and deciding the case on flagrancy primarily because pat-downs are intended to reveal things); *Thornton v. State*, 214 A.3d 34, 57 (Md. 2019) (conflating the "exploitation" rationale for the exclusionary rule with the intervening circumstance factor, creating a *de facto* "but for" test); *State v. Owens*, 992 N.E.2d 939, 943 (Ind. Ct. App. 2013) (reducing the analysis to a "but for" test and ignoring purpose/flagrancy).

[108] *See*, *e.g.*, *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (reaffirming the practice as a valid search incident to arrest).

[109] *Johnson*, 253 A.3d at 1059 (reiterating its advice to test the legality of officer conduct in court, "rather than engage in self-help"); *Thornton*, 214 A.3d at 56 ("Defendants facing these circumstances should resort to the courts, and not the streets, to resolve the constitutionality of searches and seizures."); *Beauchesne*, 868 A.2d at 983 (recognizing the wisdom of not permitting resistance to unlawful arrests). *See also Strieff*, 579 U.S. at 237 (noting that the historic remedies for police intrusion—tort suits or self-help—have largely been replaced by the exclusionary remedy).

In this case, the taint of any misconduct was attenuated by the discovery that appellant possessed crack. Once that happened, Officer Rocky had probable cause to search his vehicle for more crack. It does not matter that the crack was discovered during the commission (or attempt) of a new offense.[110] Importantly, Officer Rocky did not commence the search that uncovered crack in appellant's vehicle until after Officer Apollo found crack "on" appellant.[111] More importantly, this intervening circumstance was not invalidated by any ill purpose or flagrancy at inception. There is no evidence Officer Rocky pursued his initial investigation based on anything other than the belief he had probable cause to search for the marijuana he believed he smelled. Therefore, no interest protected by the exclusionary rule would be served by exclusion.

II. Appellant's claim of unlawful arrest was not preserved.

In his second issue, appellant extends his "probable cause" argument to claim he was unlawfully arrested when he was handcuffed and placed in Officer Rocky's vehicle. This complaint was not preserved at trial.

The standards for preservation of a complaint for review are not onerous. All a party has to do is to let the trial judge know what he wants and why he thinks

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[110] Appellant does not challenge the element of intent; as discussed *infra*, he is at least guilty of attempted tampering with evidence.

[111] 1 RR 18; 1 CR 10 (Finding 14).

himself entitled to it at a time when the trial court can do something about it.[112] The Court of Criminal Appeals has "extended this concept even so far as to hold that a party need not state his objection with specificity in order to preserve error so long as the record otherwise makes it clear that both the trial court and the opposing party understood the legal basis."[113] Nothing like that happened in this case.

Appellant filed a boilerplate motion to suppress that covered every abstract claim that could be raised.[114] Much of it was inapplicable to his case. Arguments in motions to suppress that are "global in nature and contain[] little more than citations to constitutional and statutory provisions" are "not sufficiently specific to preserve" substantive arguments for review.[115] Appellant also made a generic "fruit of the poisonous tree" objection at the outset of the bench trial.[116] The State made it clear that it did not understand appellant's complaint(s) when it asked that the basis for the motion be specified.[117] That clarification took place off the record and outside the

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[112] *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992).

[113] *Thomas v. State*, 408 S.W.3d 877, 884 (Tex. Crim. App. 2013).

[114] 1 CR 5.

[115] *Swain v. State*, 181 S.W.3d 359, 365 (Tex. Crim. App. 2005).

[116] 1 RR 6.

[117] 1 RR 6.

presence (or at least hearing) of the trial court.[118] The trial court specifically told both parties to make their arguments to it after the close of evidence.[119] At that time, appellant attacked the search but not his seizure.[120] The State's arguments did not address it. And neither the trial court's unadorned denial of the motion[121] nor its findings show consideration of the issue.

There is no evidence this claim was presented to the trial court or ruled upon. It is not properly presented on appeal.

III. Appellant is guilty of tampering with evidence because he put it where it could not be readily found by investigating officers.

In his third issue, appellant argues his conviction for tampering with physical evidence by concealment should result in acquittal because his actions exposed rather than concealed the crack. A plain understanding of the term "conceal" includes hiding it from an officer's view. That is what happened in this case. Alternatively, appellant is at least guilty of attempted tampering.

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[118] 1 RR 6 ("Well, while I hear this quick civil matter, [defense counsel], share your complaint with the prosecutor.").

[119] 1 RR 8.

[120] 1 RR 35, 37.

[121] 1 RR 39.

A. "Conceal" includes placement outside another's point of view.

In cases like this, "legal sufficiency turns upon the meaning of the statute under which the defendant is being prosecuted."[122] Statutory interpretation is a question of law that reviewed *de novo*.[123] When the term, as in this case, is undefined, juries (and trial courts) are permitted to define them according to common usage.[124]

Common usage allows for an object to be concealed without being enclosed or covered but simply removed from a person's line of sight. As Presiding Judge Keller said in her concurrence to *Thornton v. State*, "Whatever else 'conceal' might mean in the context of the tampering with evidence statute, it at least means to remove from sight. And removal from a person's sight occurs, at least, when a person's line of sight to the object in question is blocked."[125] For example, ordinary people would—or at least could—agree that cookies can be hidden on top of a refrigerator, a refrigerator can be hidden behind a van, and a van can be hidden behind a barn. These items aren't any less concealed because they can be seen once you place yourself in a better position to find them. And if the items were placed there to make them unavailable as evidence in an investigation, that should be a crime.

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[122] *Day v. State*, 614 S.W.3d 121, 127 (Tex. Crim. App. 2020).

[123] *Id*.

[124] *Kirsch v. State*, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012).

[125] *Thornton v. State*, 425 S.W.3d 289, 307 (Tex. Crim. App. 2014) (Keller, P.J., concurring).

B. The Court of Criminal Appeals has not held differently.

In fairness, there are cases supporting appellant's view of "conceal." In *Thornton v. State*, the Seventh Court held a crack pipe was not concealed in part because it never left the sight of the officer who watched the suspect discard it.[126] More on point, that court held in *Meals v. State* that a suspect detained in the backseat of a police vehicle who removed crack from his sock to hide it under the front seat was not guilty of concealing.[127] It held, as appellant argues, that Meals "actually exposed it to the view of the deputies[; b]oth deputies testified that some of the cocaine was readily visible and all of the cocaine was visible—if they just looked."[128]

But the Court of Criminal Appeals has not gone that far. In *Stahmann v. State*, that court was confronted with what the State argues in this case.[129] It neither accepted nor rejected it because of the unique facts of that case. Upon arrival at the scene of a car accident, bystanders immediately directed officers to a pill bottle they watched Stahmann throw over the a nearby fence where it landed "plain as day."[130]

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[126] 377 S.W.3d 814, 818 (Tex. App.—Amarillo 2012), reformed to attempted tampering, 425 S.W.3d 289 (Tex. Crim. App. 2014).

[127] 601 S.W.3d 390 (Tex. App.—Amarillo 2020, pet. ref'd).

[128] *Id.* at 397.

[129] 602 S.W.3d 573, 580 (Tex. Crim. App. 2020) ("The State argues that 'conceal' means to remove from sight or notice, even if only temporarily[.]")

[130] *Id*. at 575-76.

Like the officer in *Thornton*, the bystanders never lost sight of it.[131] As a result, law enforcement was never not aware of it. These circumstances were important to the holding:

> The outcome of this case might be different had [the bystanders] not been there, had they lost sight of what Stahmann threw or where it landed, had they not spoken to [the officer] and directed him to the pill bottle when he arrived, or had [the officer] had a difficult time locating it. But those are not the facts of this case.[132]

In context, that court's agreement with the court of appeals "that actual concealment requires a showing that the allegedly concealed item was hidden, removed from sight or notice, or kept from discovery or observation" lacks the weight appellant says it does.[133]

C. Appellant placed his crack where it could not easily be seen.

Applying this common understanding of the term "conceal" shows appellant concealed his crack from both officers.

When Officer Rocky ceased his initial search to see what appellant was doing, he was able to see that appellant's right shoe and sock were off but could not see any

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[131] *Id*. at 576.

[132] *Id*. at 580.

[133] App. Br. at 47.

crack.[134] Had Officer Apollo not pointed it out, it is unclear when he might have seen it. It was, in acceptable common use, concealed from him.

A better example is Officer Apollo. Although he discovered the crack, it was only after he "kept kind of looking around to figure out what [appellant] might have been doing."[135] Officer Apollo's inability to see it immediately was not because appellant was covering it with his foot or shoe.[136] It was because appellant had placed it under the front seat where Officer Apollo could not be seen without changing his vantage point.[137]

Vantage point is everything. As State's Exhibit 4 shows, it is easy to say the crack was plainly exposed if one gets down low enough and close enough to where it can be seen under the front seat. The crack can also be readily seen in State's Exhibit 3 (if one is looking for it) because the photo was taken so that it could be seen. But holding that anything that is visible from *some* vantage point cannot be concealed for the purposes of the tampering statute would ignore that word's common meaning.

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[134] 1 RR 15, 17-18.

[135] 1 RR 29.

[136] 1 RR 30.

[137] 1 RR 30, 33.

It would also result in absurdity. If concealment regardless of viewpoint is the standard, that would mean that parking a stolen bus in front of your house with a tarp over it would be a crime but parking it uncovered in the middle of your 100-acre field would not be. The tampering statute cannot be that easily defeated by a theoretical-visibility rule.

If invisibility from any angle is not required, this Court has two choices. It can create an amorphous test based perhaps on how much time and/or effort was expended finding the item. Or it can accept that hiding something from anyone's view for some amount of time is concealment. The latter option best serves the ordinary meaning of the term and the purpose of the statute.

D. Reformation to attempt is the proper alternative to affirmation.

Finally, if this Court finds the evidence of concealment insufficient, it should reform the conviction to one of attempted tampering. Reformation to a lesser-included offense is appropriate when the fact-finder necessarily found the elements of that lesser and there is sufficient evidence to support it.[138] That was the outcome in *Thornton* and *Meals*, and it applies here.

A person is guilty of attempt "if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the

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[138] *Thornton*, 425 S.W.3d at 300.

commission of the offense intended."[139] Attempt is always a lesser-included offense of the offense of conviction.[140] Tampering, as charged, required proof appellant knew an investigation was in progress and concealed a thing with intent to impair its availability as evidence in the investigation.[141] A rational fact-finder could conclude that appellant knew there was an investigation and dispossessed himself of his crack with the specific intent to hide it under the front seat. Reformation is warranted.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that this Court affirm appellant's convictions for tampering with evidence and possession of a controlled substance.

Respectfully submitted,

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[139] TEX. PENAL CODE § 15.01(a).

[140] *Thornton*, 425 S.W.3d at 302.

[141] TEX. PENAL CODE § 37.09(a)(1).

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 9,877 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of July, 2022, the State's Brief on the Merits has been eFiled and electronically served on the following:

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