STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2021AP938-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

QUAHEEM O. MOORE,

Defendant-Respondent.

ON APPEAL FROM A DECISION AND ORDER OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN WOOD COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR., PRESIDING

BRIEF-IN-CHIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

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INTRODUCTION

In *State v. Secrist*, 224 Wis. 2d 201, 217–18, 589 N.W.2d 387 (1999), this Court held that "the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons . . . ." Such a link may be established by "the particular circumstances in which it is discovered or, [by] other evidence at the scene or elsewhere links the odor to the person or persons." *Id.* at 218. *Secrist* also held that "[t]he strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug." *Id.*

In the present case, the court of appeals upheld an order suppressing evidence of possession with intent to deliver cocaine and fentanyl found during a search based on the strong odor of raw marijuana detected in the vehicle that Quaheem Moore was driving and was its sole occupant. While the court cited *Secrist*, it misread its holdings and legal principles.

In a judge-authored opinion already cited in numerous circuit courts around the state, the court read *Secrist*'s requirement that the odor of marijuana be "unmistakable" to preclude any search and arrest based on the odor of marijuana when the facts support any possible innocent explanation for the odor—for example, if it could be hemp (or, the court said, "CBD"), now-legal substances in Wisconsin.

The court of appeals' reading of *Secrist* is unreasonable because, as the court of appeals itself acknowledged in its decision, it establishes a heightened standard of proof for search and arrest based on the odor of marijuana that is significantly more demanding than probable cause. This Court said nothing in *Secrist* about establishing a more demanding standard for arrest in this area. Moreover, the court of appeals' interpretation of the word "unmistakable" is

inconsistent with a commonly-accepted meaning of the term that is in full agreement with the *Secrist* decision.

The court of appeals' decision also treats the issue of whether the odor is "unmistakable" to the officer as a question of law when it is actually one of fact for the circuit court to determine. The court further overread a statement in *Secrist* about the importance of evidence of the officer's training and experience in detecting the odor of marijuana to hold that, without such testimony, the State cannot meet its evidentiary burden at the suppression hearing.

The State asks the Court to address and reject these errors of law and to reaffirm the legal principles relating to search and arrest based on the odor of marijuana established in *Secrist*.

Applying these principles to the facts of this case, this Court should reverse the court of appeals' decision and remand the case to the circuit court with instructions to vacate the suppression order and reinstate the criminal complaint.

ISSUES PRESENTED

Did the court of appeals correctly read *Secrist* to create a heightened evidentiary standard for search and arrest based on the detection of the odor of marijuana?

a. The circuit court did not address this question.

b. The court of appeals said yes.

c. This Court should answer no.

Did the court of appeals correctly construe the requirement that the odor of marijuana be "unmistakable" to the officer to be question of law rather than a question of fact?

a. The circuit court did not address this question.

b. The court of appeals said yes.

c. This Court should answer no.

Did officers have probable cause to arrest Moore under the totality of the circumstances, which included the officers' detection of the "strong smell" of raw marijuana coming from the vehicle Moore was driving and was its sole occupant?

a. The circuit court answered no.

b. The court of appeals answered no.

c. This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is set for April 19 at 9:45 a.m. This Court ordinarily publishes its opinions.

STATEMENT OF THE CASE

The charge and motion to suppress

In November 2019, Quaheem Moore was charged in Wood County Circuit Court with possession with intent to deliver narcotics (fentanyl) and possession with intent to deliver more than one but less than five grams of cocaine, both as second and subsequent offenses. (R. 5:1–2.) According to the complaint, police stopped Moore's truck for speeding. (R. 5:2.) Upon contacting Moore, officers detected the odor of raw marijuana coming from the truck's cabin. (R. 5:2.) Officers later searched Moore's person, finding 11 "baggies" of fentanyl and 5 baggies of cocaine packaged for individual sale. (R. 5:2–3.)

Moore filed a motion to suppress evidence. (R. 11:1.) Moore argued that, at the time, officers had already completed a protective search for weapons, and the body search was unlawful because officers lacked probable cause to conduct a search incident to arrest. (R. 11:3–4.) Acknowledging that the odor of marijuana may provide grounds for such a search, Moore argued that officers lacked

probable cause in this case under the totality of the circumstances. (R. 11:3–4.)

The suppression hearing

The circuit court, the Honorable Nicholas J. Brazeau, Jr., presiding, held an evidentiary hearing on the motion on September 15, 2020, at which the investigating officers testified and a video recording of the investigation taken from Officer Mark Sheppler's body camera was played and entered into evidence. (R. 23:1–2, A-App. 25–26.)

At the hearing, City of Marshfield Police Officer Libby Abel testified that she was on patrol on November 17, 2019, when she observed a vehicle that appeared to be speeding; her radar showed the vehicle was travelling 39 miles per hour in a 25 mile per hour zone. (R. 5:2; 23:18–19, A-App. 42–43.) The officer testified that, while attempting to make the traffic stop, she observed "some sort of liquid fly out of the driver's window." (R. 23:19, A-App. 43.) The vehicle then "hit a curb" while coming to a stop. (R. 23:19, A-App. 43.)

Officer Abel testified that she walked up to the vehicle and approached the driver, whom she recognized from prior contacts as Quaheem Moore. (R. 23:19–20, A-App. 43–44.) The officer told Moore that she was stopping him for speeding. (R. 23:19, A-App. 43.) She asked Moore about the liquid she saw coming out of the driver's window, and she noticed that the inside of the driver's window also appeared to be wet. (R. 23:19, A-App. 43.) The officer said that Moore had "no explanation really" for the liquid. (R. 23:19–20, A-App. 43–44.) But neither Moore nor the interior of the vehicle smelled of alcohol. (R. 23:25–26, A-App. 49–50.)

Rather, Officer Abel testified that she detected the odor of "raw marijuana" when she made contact with Moore. (R. 23:20, A-App. 44.) The officer went back to her squad car to contact the dispatcher, and a second City of Marshfield police

officer, Mack Scheppler, arrived to provide assistance. (R. 23:21–22, 27, A-App. 45–46, 51.) The video recording from Officer Scheppler's body camera showed Moore exiting the vehicle and Officer Abel conducting a pat-down search of Moore for weapons. (R. 23:21, A-App. 45; Ex. 1 at 2 min 15 sec.)[1]

During the pat-down search, Officer Abel found a vaping pen in one of Moore's pockets. The officer then asked Moore, "Is this a THC vape?" (R. 23:15, 21, A-App. 39, 45; Ex. 1 at 2:50.) When Moore did not respond, the officer repeated the question, and Moore said, "It's a CBD vape." (R. 23:15, 21, A-App. 39, 45; Ex. 1 at 3:05.)

Officer Abel told Moore that she detected an odor of marijuana in the vehicle. (R. 23:20–21, A-App. 44–45; Ex. 1 at 4:20.) When Moore expressed disbelief, Office Scheppler, who approached Moore from the passenger's side door shortly before Moore exited the vehicle, said that he also smelled marijuana. (R. 23:5, 13, A-App. 29, 37; Ex. 1 at 4:25.) Moore then pulled at the front of his own sweatshirt, stepped toward Officer Abel, and said, "You don't smell that shit on me!" (R. 23:11, 27–28, A-App. 35, 51–52; Ex. 1 at 4:30.) Declining Moore's invitation to smell his sweatshirt, the officer stuck her hand out and said, "I can't smell it right now." (R. 23:28, A-App. 52; Ex. 1 at 4:30.) Though the video evidence and testimony showed that both officers detected the odor of marijuana coming from the vehicle cabin, the State did not elicit testimony from the officers about their experience and training detecting the odor.

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[1] The body cam video recording is contained on a CD labelled "Exhibit #1." It does not have a record number. The recording is stored as an MP4 file and should open with Windows Media Player, Apple QuickTime, and other popular media players.

Moore also said that the vehicle was not his, and that he was borrowing it from his brother. (R. 23:27, A-App. 51; Ex. 1 at 4:35.) When Officer Abel said that she ran the vehicle's plates and the owner came back as a business, Moore said that his brother was renting the vehicle and let him borrow it. (Ex. 1 at 5:00.)

Officer Abel then told Moore that Officer Scheppler was going to search him. (R. 23:22, A-App. 46; Ex. 1 at 5:25.) Officer Scheppler added that the search was because of the odor of marijuana, and he conducted the search while Officer Abel stood by. (R. 23:6–7, 22, A-App. 30–31, 46; Ex. 1 at 6:10.) The officer searched Moore's person and discovered that Moore had a substantial amount of cash on him, later determined to be about $400 in total. (R. 5:3; Ex. 1 at 6:15–9:00.) Officer Abel then went to search the vehicle. (R. 23:22–23, A-App. 46–47; Ex. 1 at 9:05.)

While Officer Abel was searching the vehicle, Officer Scheppler stayed with Moore making small talk. (Ex. 1 at 9:05–10:55.) Officer Scheppler testified at the hearing that, as they were talking, he noticed that Moore's "belt buckle was sitting a little higher on his pants" and that there was a "bulge" in the buckle area of his pants. (R. 23:7, A-App. 31.) The officer then said to Moore, "Hey, can I just have you put your hands on top of your head? I just want to search one more area." (Ex. 1 at 10:55–11:10.) Before the officer could finish this statement, Moore interjected, "Check me, check me, check me!" extending his arms out to his sides. (Ex. 1 at 11:05.) "I forgot to check the belt," the officer said as he began to search. (Ex. 1 at 11:10.)

Noticing something that felt like a plastic baggie, the officer asked Moore, "You got something behind your zipper?" (R. 23:7, A-App. 31; Ex. 1 at 11:20.) When Moore joked that it was his private parts, the officer said that it was something else and called out to Officer Abel to come over. (R. 23:7–8, A-

App. 31–32; Ex. 1 at 11:35.) Moore's demeanor changed and he became unresponsive to the officers' questions. (R. 23:23, A-App. 47; Ex. 1 at 11:45.) Officer Scheppler told Officer Abel that he found something that felt like a baggie in Moore's zipper area. (R. 23:7–8, A-App. 31–32; Ex. 1 at 11:40.) Officer Abel later testified that, because of the change in Moore's demeanor, she handcuffed him for Officer Scheppler to safely continue searching the zipper area. (R. 23:7–8, 23–24, A-App. 31–32, 47–48; Ex. 1 at 12:00.) Officer Scheppler eventually found two plastic baggies each containing several smaller "baggies" or "bindles" of substances that resembled contraband and were later confirmed to be cocaine and fentanyl. (R. 5:3; 23:7–8, 24–25, A-App. 31–32, 48–49.)

Following the hearing, the State filed a brief opposing the motion, Moore filed a response brief, and the State filed a reply brief. (R. 12; 13; 14.) In its opening brief, the State appeared to attempt to link Moore's vape pen to the odor of marijuana by asserting that "the odor of *smoked* or *burnt* CBD is indistinguishable from that of marijuana." (R. 12:4 (emphasis added).) Whether true or not, and whether relevant to a case involving the odor of *raw* marijuana and (potentially) *vaped, liquid* CBD, no evidence was presented to support this assertion. The State also argued that the search was a lawful consent search because Moore said, "Check me, check me, check me," when Officer Scheppler told Moore he was going to search his belt buckle area. (R. 12:4–5.)

The circuit court's decision

In an April 8, 2021 decision and order, the circuit court granted Moore's suppression motion. (R. 16:1–4, A-App. 21–24.) In framing the legal issue, the court noted that officers had already conducted a protective frisk of Moore under *Terry v. Ohio*, 392 U.S. 1 (1968), and thus concluded that, to be lawful, Officer Scheppler's search needed to be based on probable cause to arrest. (R. 16:2–3, A-App. 22–23.) The court

also treated Officer Scheppler's intrusions on Moore's person—the initial search of his full body and the targeted search of his belt buckle area two to three minutes later—as one continuous search incident to arrest. (R. 16:2–3, A-App. 22–23.)

The court made findings of fact based on the hearing testimony and video evidence. (R. 16:1, A-App. 21.) The court found as fact that officers detected the odor or "strong smell" of marijuana coming from the vehicle's cabin. (R. 16:1, A-App. 21.) Officer Abel, the court found, "noted a strong smell of marijuana emanating from" inside the vehicle. (R. 16:1, A-App. 21.) The court also noted that, when Officer Abel told Moore that she smelled marijuana coming from the truck, Officer Scheppler said, "I smell it too," based on his contact with Moore at the truck window. (R. 16:1, A-App. 21.)

Having found that one officer did, in fact, detect a "strong smell" of marijuana and another said that he also detected the odor, the court said that the vehicle search was plainly lawful: "[T]here is no doubt the officer had probable cause to search that vehicle based on the odor of marijuana emanating from it." (R. 16:3, A-App. 23.)[2] Further, the court acknowledged that the "strong odor" of marijuana detected during a traffic stop "will normally" give probable cause to arrest "the driver and sole occupant of the vehicle," and thus to conduct a search of the driver's person incident to arrest, citing *State v. Secrist*, 224 Wis. 2d 201, 589 N.W.2d 387 (1999). (R. 16:3–4, A-App. 23–24.)

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[2] At the preliminary hearing, Officer Abel testified that she found remnants of marijuana plant ("shake") in the vehicle. (R. 21:11.) Shake is "a poor-quality of marijuana, usually referring to the 'shaken-off' weed found at the bottom of the bag, the pot dust sold at lower prices because of the high content of seeds and stems." The Online Slang Dictionary, http://onlineslangdictionary.com/meaning-definition-of/shake (accessed Feb. 8, 2023).

But the court concluded that officers did not have probable cause to search and arrest Moore because the link between Moore and the odor of marijuana was diminished where Officer Abel said she didn't detect the smell of marijuana on Moore's person when he was outside the vehicle, and where the vehicle wasn't Moore's. (R. 16:3–4, A-App. 23–24.) The court also said that the State's unsupported assertion that "burnt CBD" is indistinguishable from marijuana "cuts both ways." (R. 16:2, A-App. 22.) "It is unfortunate for a defendant, as it gives an officer an initial reason to investigate further." (R. 16:2, A-App. 22.) But "[t]he officer must now note that a legal explanation has been given for the item in question." (R. 16:2, A-App. 22.)

The court also rejected the State's argument that the search was a lawful consent search. The court noted that the search "was already being conducted" when Moore said to the officer, "check me." (R. 16:2, A-App. 22.) The officer had already directed Moore to put his hands on his head and did not request permission to search the belt buckle area. (R. 16:2, A-App. 22.) Moreover, the search "was already being conducted" because, as the circuit court had (properly) determined, the initial search and the search of the belt buckle area was one, continuous search incident to arrest. (R. 16:2–3, A-App. 22–23.) The State did not argue consent in the court of appeals and does not argue it here.

The parties' arguments in the court of appeals

The State appealed the suppression order. The State argued that the search was lawful because two officers had detected the odor of raw marijuana coming from the truck cabin, relying on *Secrist*, 224 Wis. 2d at 218. (State's Op. Br. 14.) The fact that Officer Abel may not have detected the odor on Moore's person when he was outside of the vehicle did not significantly diminish the odor's linkage to Moore. He was the driver and sole occupant of the vehicle, so the odor could not

be attributed to another person. (State's Op. Br. 14.) And, unlike in *Secrist*, the odor detected was of raw, not burnt, marijuana. Therefore, it was unsurprising that Moore did not smell of the plant outside the vehicle because there was no smoke or particulate matter to permeate Moore's clothing. (State's Reply Br. 4.)

The State further argued that, while the "strong odor" of marijuana already provided officers with probable cause to arrest, two additional facts—the vape pen Moore used to consume liquid cannabinoids and the observation of a non-alcoholic liquid being tossed from the driver's side window as the truck was pulling to a stop—bolstered probable cause to arrest based on the totality of the circumstances. (State's Op. Br. 14–17.) Where officers detected no alcohol in the cabin, the State argued that an officer could reasonably infer that Moore was seeking to dispose of some other prohibited liquid before the stop, like vaping liquid containing THC or another illegal substance Moore used with his vaping pen. (State's Op. Br. 16.)

Moore argued that the court reached the correct conclusion for largely the same reasons stated in its decision. Moore argued that officers lacked probable cause to arrest him because (1) Officer Abel indicated that she did not smell marijuana on Moore when he was outside of the vehicle; and (2) the vehicle was not Moore's, it was his brother's. (Moore's Br. 5, 17–19.)

The court of appeals' decision

The court of appeals, District IV, affirmed the suppression order, albeit on different grounds. *State v. Quaheem O. Moore*, No. 2021AP938-CR, 2022 WL 2978311 (Wis. Ct. App. July 28, 2022) (unpublished). (A-App. 3–20.) In a decision authored by Judge Rachel A. Graham, the court began its analysis with a discussion of *Secrist*. *Id.* ¶¶ 19–23. (A-App. 10–12.) The court said that "*Secrist* stands for the

proposition that the odor of marijuana, alone, may provide probable cause to arrest when the odor is 'unmistakable' to a person with relevant training or experience, and the odor is linked to a specific person." *Id.* ¶ 23 (citing *Secrist*, 224 Wis. 2d at 217–18). (A-App. 12.) The court then affirmed the circuit court's decision for three primary reasons.

First, the court concluded that the State did not show at the suppression hearing that the odor was "unmistakably that of marijuana" because it did not elicit testimony from the officers about their training and experience in identifying the odor of marijuana. *Id.* ¶ 28. (A-App. 14.) "[N]either officer was asked about their training or experience in identifying the odor of marijuana, whether raw, burnt, or in liquid form; in identifying the strength, recency, or source of marijuana; or in distinguishing the odor of marijuana from other odors, including CBD," the court said. *Id.* ¶ 29. (A-App. 14.) The court added that no testimony established "that either officer had even smelled the odor of marijuana" ever before. *Id.* (A-App. 14.) The court read *Secrist* to "direct[ ] that such testimony is required when determining whether the unmistakable odor of marijuana alone provides probable cause to arrest." *Id.* (A-App. 14.) The court did not address the circuit court's findings of fact that the officers detected the odor and "strong smell" of marijuana, respectively. (R. 16:1, A-App. 21.)

Second, the court concluded that the State did not show that the odor of marijuana was "unmistakable" because "the facts suggested a potential innocent explanation for the odor in the vehicle—that Moore vaped CBD." *Moore,* 2022 WL 2978311, ¶ 30. (A-App. 15.)

"[T]he facts" supporting this innocent explanation were the State's assertion in the circuit court that "the odor of *smoked* or *burnt* CBD is indistinguishable from that of

marijuana." [3] (R. 12:4 (emphasis added).) *Moore,* 2022 WL 2978311, ¶ 30. (A-App. 15.) The court read this assertion to include *all* CBD, however, including *vaped*, liquid CBD: "[T]he State asserted that the odor of CBD is indistinguishable from that of marijuana." *Id.* (A-App. 15.) The court then treated its expansive reading of the State's assertion "as a concession of fact for the purposes of this case," while acknowledging no evidence in the record supported or refuted the assertion. *Id.* (A-App. 15.)

Applying the purported concession, the court concluded that the odor of marijuana that the officers detected could not have been "unmistakable" because it could have been due to vaped CBD from Moore's vape pen: "If CBD, which is legal, produces an odor that is indistinguishable from THC, which is illegal, then the odor of CBD may be 'mistaken' for the odor of marijuana." *Id.* ¶ 30. (A-App. 15.)

The court then held that the well-established rule that officers are not bound to accept a suspect's "innocent explanation"[4] does not apply to a *Secrist* determination of probable cause to arrest based on the odor of marijuana: "Although officers typically are not required to definitively rule out a suspect's innocent explanation, *Secrist* requires

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[3] The State on appeal did not repeat this assertion—or any similar assertion more relevant to this case comparing *raw* marijuana and the odor of *vaped* liquid CBD or THC. Rather, the State asserted it "is not arguing that the theory that the discarded liquid was a prohibited substance used for vaping necessarily connects that liquid to the odor of raw marijuana detected in the vehicle." (State's Op. Br. 16.) "No evidence was presented at the hearing about the odor, if any, of vaped THC or CBD, or the odor, if any, of the unvaped liquid." (State's Op. Br. 16.)

[4] *See, e.g., State v. Conway,* 2010 WI App 7, ¶ 5, 323 Wis. 2d 250, 779 N.W.2d 182; *State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125; *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985).

that the odor of marijuana be 'unmistakable' for the *odor alone* to supply officers with probable cause to believe a crime was committed." *Id.* ¶ 31. (A-App. 15.) "The odor cannot be unmistakably that of marijuana if officers are unable to rule out an innocent explanation for the odor." *Id.* (A-App. 15–16.)

In a footnote at the end of its analysis, the court appeared to acknowledge that it had read *Secrist* to establish a more demanding standard for arrest based on the odor of marijuana than probable cause: "[T]here may be tension between *Secrist*'s requirement that the odor of marijuana be 'unmistakable' and the quantum of evidence normally required to establish probable cause," the court observed. *Id.* ¶ 31 n.11. (A-App. 15–16.) But, treating its interpretation of *Secrist* as binding authority, the court explained it was not at liberty to disregard that holding. *Id.* (A-App. 16.)

Finally, the court of appeals concluded that the officers' detection of "the not 'unmistakable' odor" of marijuana, combined with Moore's possession of the vape pen, Moore's statement that he uses the pen to vape CBD, and the officer's observation that Moore's vehicle hit the curb did not provide probable cause to arrest under the totality of the circumstances. *Id.* ¶¶ 33–38. (A-App. 16–18.) The court rejected as "objectively unreasonable" the State's argument on appeal that Moore's possession of the vape pen further added to the probable cause determination because officers did not have to accept that the pen was used to vape CBD, not THC—particularly where they had already detected the odor of raw marijuana in the vehicle, and where Moore did not immediately respond when asked if he used the pen to vape THC. *Id.* ¶ 35. (A-App. 17.)

The court declined to address Officer Abel's observation of Moore disposing of a non-alcoholic liquid out of the driver's side window in determining whether officers had probable cause to arrest under the totality of the circumstances. *Id.*

¶¶ 39–42. (A-App. 18–19.) Noting that the State had not relied on Officer Abel's observation when arguing probable cause in the circuit court, the court of appeals treated this fact and the inferences the State highlighted from it as an unpreserved argument, deeming it forfeited. *Id.* ¶¶ 40–41. (A-App. 18–19.)

The State petitioned for review. The State argued that the court of appeals misread *Secrist* to establish a unique evidentiary standard for arrest based on the odor of marijuana that is far more demanding than the constitutional standard of probable cause. The State also argued that the court of appeals misread *Secrist* to carve out an odor-of-marijuana exception to the general rule that officers need not rule out innocent explanations in determining whether probable cause exists to arrest. Finally, the State argued that, had the court properly read and applied *Secrist*, the court would have reversed the suppression order.

This Court granted review.

STANDARD OF REVIEW

"In reviewing an order granting or denying a motion to suppress evidence, this court will uphold a circuit court's findings of fact unless they are clearly erroneous." *Secrist*, 224 Wis. 2d at 207. Whether the historical facts satisfy the constitutional standard of probable cause to arrest is a question of law this Court reviews *de novo*. *See id.* at 208. "[W]hether the odor of marijuana constitutes probable cause to arrest 'is a question of constitutional fact involving the application of federal constitutional principles which this court reviews independently of the conclusions of the circuit court.'" *Id.* (quoting *State v. Mitchell*, 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992)).

ARGUMENT

I. This Court should reaffirm *Secrist*'s holding that the odor of marijuana alone may provide probable cause to arrest when the odor is unmistakable and is linked to the person or persons.

A. Probable cause is the essential requirement of a lawful arrest.

Under the Fourth Amendment and Article I, section 11 of the Wisconsin Constitution, persons have the right to be secure from unreasonable searches and seizures. This Court has traditionally interpreted these provisions of the federal and state constitutions in concert, and both require probable cause to believe that the person has committed a crime to justify an arrest. *Secrist*, 224 Wis. 2d at 208–09.

The officers' search of the vehicle in this case was not contested. The issue instead is whether officers had probable cause to arrest Moore, authorizing a search of his person incident to the arrest. The State briefly addresses the standard for a vehicle search because the court of appeals' decision has implications for vehicle searches based on the odor of marijuana, as well.

Police may conduct a warrantless search of an automobile based on probable cause under the automobile exception. *See State v. Tompkins*, 144 Wis. 2d 116, 126–28, 423 N.W.2d 823 (1988) (discussing *Carroll v. United States*, 267 U.S. 132 (1925)). "Probable cause to search a vehicle exists when, based on the totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Kizart*, 967 F.3d 693, 695 (7th Cir. 2020) (citation omitted). "The unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the

automobile contains evidence of a crime." *Secrist*, 224 Wis. 2d at 210.

While a search of a vehicle is based on the likelihood a search would yield evidence of a crime, the standard for arrest is based on the probability that the person committed a crime. *See State v. Hughes*, 2000 WI 24, ¶ 20, 233 Wis. 2d 280, 607 N.W.2d 621. "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *Secrist*, 224 Wis. 2d at 212; *see* Wis. Stat. § 968.07(1)(d). "There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *Id.*

"Probable cause is the *sine qua non* of a lawful arrest." *Secrist*, 224 Wis. 2d at 212 (quoting *Mitchell*, 167 Wis. 2d at 681). Probable cause may exist notwithstanding a possible innocent explanation for the circumstances justifying an arrest. *See State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985). "[A]n officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause." *State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125 (citing *McCaffrey*, 124 Wis. 2d at 236).

"Probable cause is a flexible, commonsense standard" that "deals with probabilities, not hard certainties." *Nieves*, 304 Wis. 2d 182, ¶ 14. "[P]robable cause eschews technicality and legalisms in favor of a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" *Secrist*, 224 Wis. 2d at 215 (citations omitted). "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . ." *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (citation omitted).

If officers had probable cause to arrest Moore, the search was authorized as incident to the arrest. When the arrest is lawful, "a search incident to the arrest requires no additional justification." *State v. Fry*, 131 Wis. 2d 153, 169, 388 N.W.2d 565 (1986) (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)). The search may precede the arrest so long as the arrest is supported by probable cause, and the fruits of the search are not necessary to support the arrest. *State v. Sykes*, 2005 WI 48, ¶ 16, 279 Wis. 2d 742, 695 N.W.2d 277; *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980).

B. Under *Secrist*, probable cause exists for an arrest when an officer detects the odor of marijuana, and it is unmistakable and linked to the person.

To understand the principles of *Secrist*, it is helpful to start with its facts. On the afternoon of the Fourth of July 1996, an officer was standing at an intersection directing traffic when a motorist pulled up to his car to ask for directions. *Secrist*, 224 Wis. 2d at 204. The driver's windows were down, and he was alone in the car. *Id.* When the driver was just two to three feet away and began to speak, the officer immediately smelled "a strong odor of marijuana coming from the automobile." *Id.* The officer directed the driver to pull his car over to the side of the road. *Id.* at 205. The driver complied, and when the officer returned to the car he arrested the driver, Timothy Secrist, for possession of marijuana. *Id.* Officers later found a marijuana cigarette with an attached "roach clip" in the ashtray next to the driver's seat. *Id.*

Secrist moved to suppress the evidence, arguing that his arrest was illegal. *Secrist*, 224 Wis. 2d at 205. At the suppression hearing, the arresting officer testified that he "detected a strong odor of marijuana" when Secrist

approached him.[5] *Secrist*, 224 Wis. 2d at 206. The circuit court denied the motion to suppress, concluding that probable cause existed to arrest Secrist where the officer smelled the "strong odor of marijuana," the odor was coming directly from the area where Secrist was sitting in the car, and Secrist was the only occupant of the vehicle. *Id.* at 206–07.

The court of appeals reversed upon determining that the evidence was not sufficient to establish that Secrist was the person who had smoked the marijuana. *Id.* at 207.

Reversing the court of appeals, this Court concluded that the officer had probable cause to arrest Secrist under the totality of the circumstances, which included detecting "a strong, unmistakable odor of marijuana" coming from inside a vehicle solely occupied by the defendant. *Secrist*, 224 Wis. 2d at 218–19. The Court held that "the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons . . . ." *Id.* at 217–18. The Court also held that "[t]he strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug." *Id.* at 218. The Court added that the probability that a crime has been committed "diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are

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[5] The "facts" section of the opinion states that the officer "recognized the odor [of marijuana] from his police training and his frequent contact with marijuana over 23 years of experience as a police officer." *State v. Secrist*, 224 Wis. 2d 201, 204, 589 N.W.2d 387 (1999). It is unclear whether these facts were taken from the complaint or the suppression hearing. Though the opinion notes the importance of testimony about the officer's training and experience detecting the odor of marijuana, neither the account of the suppression hearing nor the analysis itself describes the officer's testimony about his training and experience in Secrist's case. *See Secrist*, 224 Wis. 2d at 204–19.

several people in the vehicle, or if a person offers a reasonable explanation for the odor." *Id.* at 218.

The Court also advised that "[i]t is important in these cases to determine the extent of the officer's training and experience in dealing with the odor of marijuana or some other controlled substance." *Secrist*, 224 Wis. 2d at 216. "The extent of the officer's training and experience bears on the officer's credibility in identifying the odor as well as its strength, its recency, and its source." *Id.* The Court specifically noted that "corroboration by another officer" who also detected the odor "can be helpful in firming up the reasonableness of the officer's judgments." *Id.*

C. Background: Marijuana, hemp, THC, and CBD

The court of appeals' decision addressed Moore's potential use of a legal substance, CBD, in affirming the suppression order. Some background about CBD, as well as THC, hemp, and marijuana is in order.

Marijuana and its close, legal relative hemp, derive from the same plant, *cannabis sativa*. *Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 955 (8th Cir. 2009). "All cannabis plants contain tetrahydrocannabinol (THC), the substance that gives marijuana its psychoactive properties." *Monson*, 589 F.3d at 955. But hemp has a much lower THC concentration than marijuana, typically less than 1 percent.[6] Ryan LeCloux, *Regulating Wisconsin's Hemp Industry*, Wisconsin Legislative Reference Bureau, Wisconsin Policy

[6] One percent THC concentration is the generally accepted threshold for the plant to have psychoactive effects. Ryan LeCloux, *Regulating Wisconsin's Hemp Industry*, Wisconsin Legislative Reference Bureau, Wisconsin Policy Project, Vol. 2 No. 9 at 1 (Aug. 2019), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_policy_project/wisconsin_policy_project_2_9.pdf (accessed Feb. 10, 2023).

Project, Vol. 2 No. 9 at 1 (Aug. 2019), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_policy_project/wisconsin_policy_project_2_9.pdf (accessed Feb. 10, 2023). Wisconsin law defines "industrial hemp" as "the plant Cannibis sativa L. and any part of [it] . . . with a delta-9-[THC] concentration of not more than 0.3 percent on a dry weight basis." Wis. Stat. § 94.55(1). Marijuana has much higher THC levels than hemp, an average of about 10 percent THC concentration. LeCloux, *Regulating Wisconsin's Hemp Industry* at 1.

Hemp has been cultivated for centuries, and different parts of the plant are used for various industrial and agricultural purposes. LeCloux, *Regulating Wisconsin's Hemp Industry* at 1–2. The 2014 U.S. Farm Bill authorized states to create pilot programs for domestic hemp production, and Wisconsin established its hemp pilot in November 2017. Agricultural Act of 2014, Pub. L. No. 113–79; LeCloux, *Regulating Wisconsin's Hemp Industry* at 6–7. Some hemp growers harvest the plant's flower to extract cannabidiol (CBD), "a non-psychoactive chemical compound that has garnered consumer interest for its purported medicinal and therapeutic benefits." *Id.* at 2. CBD is sold as an oil, dietary supplement, in food, and as a liquid for use in vaping devices, among other things. *Id.* at 9; Centers for Disease Control (CDC), *E-Cigarette, or Vaping, Products Visual Dictionary* at 15–20, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/pdfs/ecigarette-or-vaping-products-visual-dictionary-508.pdf (accessed Feb 9, 2023).

Users of vaping devices like Moore's vape pen typically consume an "e-liquid" from a prefilled or refillable cartridge, which may contain nicotine, flavorings, THC, CBD, or other substances. CDC, *E-Cigarette, or Vaping, Products Visual Dictionary* at 15–20.

D. The odor of marijuana is "unmistakable" when it is marked by marijuana's very distinctive and recognizable smell; the court of appeals' reading of *Secrist* is unreasonable and should be rejected.

For over two decades, the bench, bar, and law enforcement have relied on *Secrist* in determining whether officers have probable cause to arrest based on the odor of marijuana. The court of appeals had applied *Secrist* without difficulty in published[7] and many more unpublished[8] opinions involving probable cause determinations based in whole or in part on the odor of marijuana.

But in this case, the court of appeals read *Secrist* to establish a significantly higher standard for arrest based on the odor of marijuana—a standard more akin to beyond a reasonable doubt than probable cause. *Moore,* 2022 WL 2978311, ¶ 31. (A-App. 15–16 & n.11.) It indicated that the mere possibility that the odor detected might be legal CBD renders invalid any arrest based on the odor of marijuana alone. *Id.* ¶¶ 30, 31. (A-App. 15–16 & n.11.) It treated the question of whether the odor was "unmistakable" as a legal standard—again, one far more demanding than probable cause—subject to *de novo* review. Id. ¶¶ 29–31. (A-App. 14–15.) And it did so without addressing the circuit court's finding that an officer did, in fact, detect the "strong smell" of

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[7] *State v. Miller*, 2002 WI App 150, ¶ 12, 256 Wis. 2d 80, 647 N.W.2d 348; *State v. Mata*, 230 Wis. 2d 567, 570–73, 602 N.W.2d 158 (Ct. App. 1999); *State v. Wilson*, 229 Wis. 2d 256, 268, 600 NW.2d 14 (Ct. App. 1999).

[8] Westlaw shows that, as of this writing, *Secrist* has been cited in 125 unpublished Wisconsin Court of Appeals cases. More than 30 of these cases appear to reference *Secrist*'s discussion of the odor of marijuana as grounds for arrest, based on the particular headnotes from *Secrist* associated with each case. *See* Thomas Reuters WestLaw, *Secrist*, 224 Wis. 2d 201, Citing References.

raw marijuana coming from the truck's cabin, and a second officer confirmed that he, too, detected the odor. (R. 16:1, A-App. 21.)

This Court should reaffirm the legal principles adopted in *Secrist* and reject the court of appeals' unreasonable reading of well-established precedent.

1. As an initial matter, the prosecutor did not make the concession on which the court based its discussion about the odor potentially being that of vaped CBD.

The court of appeals upheld the suppression order upon concluding that the State had not shown that the odor of marijuana was "unmistakable" based, in part, on the potential that it could have been the odor of vaped CBD from Moore's vape pen. *Moore,* 2022 WL 2978311, ¶¶ 30–31. (A-App. 16–17.) Where no evidence was presented at the hearing regarding the odor, if any, of vaped CBD, the court of appeals said, "[T]he State asserted [in the circuit court] that the odor of CBD is indistinguishable from that of marijuana," and treated this assertion as a concession. *Id.* ¶ 30. (A-App. 15.)

This was a notable choice by the court in multiple respects. First, when confronted about the odor, Moore never claimed to the officers that the odor came from him vaping CBD in the truck. No reasonable officer would credit an innocent explanation not asserted by the suspect when confronted with evidence of guilt. But even a hypothetical theory of innocence not asserted by the suspect is sufficient under the court of appeals' decision to preclude an arrest based on the odor of marijuana. Second, the State on appeal explicitly made no representations about the odor of the vape pen or vaped, liquid CBD (or THC) because there was nothing in the record about these matters. (State's Op. Br. 16.) Third, and most importantly, the State in the circuit court did not

make the assertion that the court of appeals said it made and took to be a concession.

Rather, the State made a statement about *smoked or burnt* CBD in a brief opposing the suppression motion: "[T]he odor of *smoked* or *burnt* CBD is indistinguishable from that of marijuana." (R. 12:4 (emphasis added).) The worst that could be said about this assertion is that it is confusing and not applicable to the present case. It's possible that a smoked or burnt hemp cigarette—which might *contain* CBD, like marijuana contains high levels of THC—smells like a smoked or burnt marijuana cigarette. But this case concerns the odor of *raw* marijuana, and perhaps the odor, if any, of *a vaporized liquid* containing CBD (or THC) that Moore might have vaped in the truck.

Perhaps the court of appeals inferred that the State meant to assert that vaped CBD smells like raw marijuana. But the State did not say that, and nor did it make the more general statement the court of appeals said it made that CBD (in what form?) smells like marijuana (raw or burnt?). Accordingly, the court of appeals' determination that the State conceded this issue of fact in the circuit court is unsupported by the record.

2. Under *Secrist*, the odor of marijuana is "unmistakable" if it has marijuana's very distinctive and recognizable smell such that it is unlikely to be mistaken for something else, and the court of appeals' reading of "unmistakable" to establish a "probable cause plus" standard for arrest is unreasonable.

Without its determination that the State conceded in the circuit court that "CBD smells like marijuana," the court of appeals would not have gone on to conclude that the odor of

marijuana was not unmistakable because it could have been CBD from Moore's vape pen. But even if this Court agrees that the court of appeals' concession determination was unreasonable, the State requests that it address the court of appeals' conclusions on the merits. The court of appeals' reading of *Secrist* warrants this Court's attention in light of its position that the odor of marijuana cannot be "unmistakable" and thereby justify an arrest if there is any chance that it might be a legal substance.

As argued below, this Court should take this opportunity to reaffirm its holding in *Secrist* that the odor of marijuana may provide probable cause to arrest if it is unmistakable—that is, if it has marijuana's very distinctive and recognizable smell such that it is unlikely to be something else—and is linked to the person or persons. *Secrist*, 224 Wis. 2d at 217–18. It should reject the court of appeals' conclusion that, by requiring that the odor be "unmistakable," this Court adopted a significantly more demanding evidentiary standard than probable cause for arrest based on the odor of marijuana—without so much as saying so. *Moore,* 2022 WL 2978311, ¶¶ 30–31. (A-App. 15–16 & n.11.)

* * * *

This Court in *Secrist* did not define the term "unmistakable." The court of appeals did not consult a dictionary either in interpreting "unmistakable" as used in *Secrist*. But it read the word to mean, in effect, incapable of being mistaken for something else: "If CBD, which is legal, produces an odor that is indistinguishable from THC, which is illegal, then the odor of CBD may be 'mistaken' for the odor of marijuana." *Id.* ¶ 30. (A-App. 15.)

Granted, the court of appeals' interpretation of the word is consistent with some dictionary definitions. For example, one defines "unmistakable" as "that cannot be mistaken for somebody/something else." *Unmistakable*, Oxford Advanced

Learner's Dictionary (10th Ed. 2023), https://www.oxfordlearnersdictionaries.com/us/definition/english/unmistakable (accessed Feb. 10, 2023). Another: "If you describe something as unmistakable, you mean that it is so obvious that it cannot be mistaken for anything else." *Unmistakable*, Collins Online Dictionary (2023), collinsdictionary.com/us/dictionary/english/unmistakable (accessed Feb. 10, 2023).

But other dictionaries favor a definition of the term that is not nearly so literal or rigid and is arguably more consistent with common usage.[9] For example, one definition restates the above definition but adds a second, somewhat more flexible meaning: "not to be mistaken for anything else; *very distinctive*." *Unmistakable*, New Oxford American Dictionary 1894 (3rd Ed. 2010) (emphasis added). Another defines the term as: "very easy to recognize." *Unmistakable*, Macmillan Dictionary (2023), https://www.macmillandictionary.com/us/dictionary/american/unmistakable (accessed Feb. 10, 2023). Another references probabilities: "*not likely* to be confused with something else." *Unmistakable*, Cambridge Online Dictionary (2023), https://dictionary.cambridge.org/us/dictionary/english/unmistakable (accessed Feb. 10, 2023) (emphasis added).

The latter group of definitions—very distinctive, very easy to recognize, and not likely to be confused with something else—are more consistent with "unmistakable" as it is used in *Secrist*. *Secrist* grounded the requirement that the odor of marijuana be "unmistakable" within the context of established search and seizure law. Referencing the standard

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[9] To illustrate, if one refers to the "unmistakable vocal stylings of Bob Dylan," she does not mean that it would be literally impossible to mistake Dylan's singing for that of another performer. The point is that Dylan's vocal style is very distinctive and easily recognizable, making it difficult, though not impossible, to confuse Bob Dylan with another singer.

for probable cause, the Court stated: "We believe a common sense conclusion when an officer smells the odor of a controlled substance is that a crime has probably been committed." *Secrist*, 224 Wis. 2d at 218. *Secrist's* holding equates the odor of marijuana as being "unmistakable" and linked to the person or persons with probable cause to arrest, a standard that, by definition, "deals with probabilities, not certainties." *See State v. Gant*, 2015 WI App 83, ¶ 12, 365 Wis. 2d 510, 872 N.W.2d 137. A reading of "unmistakable" to mean incapable of being mistaken for anything else would be inconsistent with the probabilistic calculation officers make in deciding whether to make an arrest.

In contrast, the more rigid interpretation of "unmistakable" would preclude an arrest upon detection of the odor of marijuana based on the mere possibility that the odor detected is hemp, not marijuana. The court of appeals concluded: "The odor cannot be unmistakably that of marijuana if officers are unable to rule out an innocent explanation for the odor." *Moore,* 2022 WL 2978311, ¶ 31. (A-App. 15–16.) But it is black-letter law that officers are not required to rule out innocent explanations when making an arrest: "[A]n officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause." *Nieves*, 304 Wis. 2d 182, ¶ 14 (citing *McCaffrey*, 124 Wis. 2d at 236).

Under the court of appeals' test, any assertion that the odor detected is hemp, not marijuana, would preclude an arrest—as would explanations not even asserted by the suspect but arguably supported by the circumstances, such as the odor could have been from the pen with which Moore said he vaped CBD. But this level of certainty is closer to beyond a reasonable doubt than probable cause. *Secrist* itself stated that "the evidence need not reach the level of proof beyond a reasonable doubt" for officers to have grounds to arrest. 224

Wis. 2d at 212. Had this Court intended to create a heightened standard for arrest based on the odor of marijuana that is significantly more demanding than probable cause—"probable cause plus" or even beyond a reasonable doubt—it would have said so. But it did not, and there is no justification for imposing such a demanding standard for arrest in this one type of fact pattern.

None of this suggests that officers should ignore signs that the odor detected is, in fact, hemp. Hemp and CBD are legal substances, and, to the extent that raw hemp and raw marijuana and burnt hemp and burnt marijuana may smell alike, officers should be alert for evidence that confirms an individual's assertion that the odor detected is that of legal hemp. A sampling of the considerations relevant to whether the officer has encountered a legal substance would include: how the substance is stored; how it is packaged; how location—for example, outside a store that sells hemp—affects the probability of criminality; and whether the individual appears to be impaired.

But while the existence of legal hemp and CBD require officers to be alert to a potential legal explanation for suspected marijuana based on odor and appearance, it should not prevent them from making reasoned determinations based on the totality of the circumstances when assessing whether probable cause exists to arrest. THC remains a Schedule 1 controlled substance in Wisconsin. Wis. Stat. § 961.14(4)(t). And, as to the odor of marijuana within the context of traffic stops, "drugged driving" will almost certainly continue to be illegal even if THC's legal status changes. *See* Wis. Stat. § 346.63(1)(am) (prohibiting operation of a motor vehicle while "[t]he person has a detectable amount of a restricted controlled substance in his or her blood"). Wis. Stat. § 340.01(50m)(e) (defining "[r]estricted controlled substance"

to include "Delta-9 [THC] . . . at a concentration of one or more nanograms per milliliter of a person's blood.").

In sum, this Court should affirm its holding in *Secrist* that odor of marijuana may provide probable cause to arrest if it is unmistakable—i.e., if it has marijuana's very distinctive, easily recognizable smell, such that it is not likely to be mistaken for something else—and is linked to the person or persons. *Secrist*, 224 Wis. 2d at 218. The court of appeals' contrary and unreasonable reading of *Secrist* should be rejected.

3. Whether the odor is "unmistakable" to the officer is a question of fact for the circuit court to determine at the suppression hearing; the court of appeals erred in treating the issue as one of law, and in misreading *Secrist* to mandate evidence of the officer's training and experience in all cases to show that the odor was unmistakable.

The court of appeals also concluded that the State did not show that the odor was "unmistakable" because it did not present evidence at the hearing about the training and experience of the officers in detecting the odor of marijuana. *Moore*, 2022 WL 2978311, ¶ 28. (A-App. 14.) The court of appeals erred in reaching this conclusion, too. *Secrist* does not mandate a showing of the officer's training and experience for the State to meet its burden. Further, the question of whether the odor was "unmistakable" is an issue of fact subject to deferential review, and the court erred by ignoring the circuit court's relevant findings and credibility determinations and treating the issue as a question of law for the appellate court to decide on its own.

As noted, the question of whether a search or seizure was unreasonable is an issue of constitutional fact requiring

application of a two-part standard of review. *See Secrist*, 224 Wis. 2d at 207–08; *State v. Griffith*, 2000 WI 72, ¶ 23, 236 Wis. 2d 48, 613 N.W.2d 72. Questions of historical fact are reviewed under the clearly erroneous standard of review, while the appellate court determines independently the application of constitutional principles to those facts. *See Griffith*, 236 Wis. 2d 48, ¶ 23.

"[W]hether an issue presents a question of fact or a question of law is in itself of a question of law." *State v. Byrge*, 2000 WI 101, ¶ 32, 237 Wis. 2d 197, 614 N.W.2d 477. An appellate court separates determinations of fact from conclusions of law and applies the appropriate standard of review to each part. *See Peplinski v. Fobe's Roofing, Inc.*, 193 Wis. 2d 6, 19, 531 N.W.2d 597 (1995). "Whether to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact'" can often be "more a matter of allocation than analysis, an allocation in which the Court recognizes that one judicial actor is better positioned than another to decide a matter." *Byrge*, 237 Wis. 2d 197, ¶ 39 (citing *Miller v. Fenton*, 474 U.S. 104, 113–14 (1985)).

Secrist itself indicates that the question of whether the odor of marijuana was unmistakable to the investigating officer is a question of fact that turns on an assessment of the officer's credibility, a core circuit court function. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). *Secrist* explains that the circuit court determines the officer's credibility "*in identifying the odor* as well as its strength, its recency, and its source," and that "the extent of the officer's training and experience in dealing with the odor of marijuana" is important to the circuit court's credibility assessments:

> It is important in these cases to determine the extent of the officer's training and experience in dealing with the odor of marijuana or some other controlled substance. The extent of the officer's

> training and experience bears on the officer's credibility *in identifying the odor* as well as its strength, its recency, and its source. While corroboration by another officer is not required, corroboration can be helpful in firming up the reasonableness of the officer's judgments.

Secrist, 224 Wis. 2d at 216 (emphasis added). *Secrist* thus indicates that whether the odor of marijuana was unmistakable is ultimately a question of fact that largely turns on the court's assessment of the officer's credibility at the suppression hearing.

At the hearing, the State presented evidence that both officers detected the odor of raw marijuana coming from inside the truck. (R. 23:5, 13, A-App. 29, 37; Ex. 1 at 4:25.) While the court ultimately granted the motion to suppress on other grounds, the circuit court found in its decision that Officer Abel detected the "strong scent" of marijuana and noted that "the strong odor of marijuana emanating from a vehicle being driving by the defendant forms the basis for probable cause" to conduct a search incident to arrest. (R. 16:1–2, A-App. 21–22.) The court also found that Officer Scheppler told Moore that he also detected the odor of marijuana coming from the truck. (R. 16:1, A-App. 21.) Though the circuit court did not explicitly find that the odor was "unmistakable" to the officers, the circuit court's explicit findings are consistent with such a determination; the court believed Officer Abel's statement that she detected the "strong smell" of marijuana, and that Officer Scheppler confirmed her detection of the odor in a statement to Moore. (R. 16:1, A-App. 21.)

Secrist states that evidence about the officer's training and experience detecting the odor of marijuana is "important in these cases" to allow the circuit court to assess the officer's credibility. 224 Wis. 2d at 216. But the court of appeals overread this section to require, in all cases, evidence of the

officer's training and experience for the circuit court to accept the officer's testimony that he or she detected the odor of marijuana. *Moore*, 2022 WL 2978311, ¶¶ 28–29. (A-App. 14.) *Secrist* contains no such requirement.

Granted, the State ideally should have elicited testimony from the officers about their training and experience because such information would have been highly relevant to an assessment of their credibility. Nonetheless, the court could (and did) believe Officer Abel's testimony that she detected the "strong smell" of marijuana, which was confirmed by Officer Scheppler's assertion on the video that he, too, detected the odor. Again, while the circuit court made no explicit finding that the odor was "unmistakable," the circuit court's acceptance of both officers' statements presented at the hearing that they detected the odor is consistent with such a finding.

Had the court of appeals applied the correct, more deferential standard of review to whether the odor of marijuana was unmistakable to the officers, it would have reached a different result. It would have concluded that, by plainly believing Officer Abel's testimony finding that she detected the "strong smell' of marijuana coming from the truck, the circuit court effectively found that the odor of the drug was "unmistakable" to her. Applying the correct standard of review, it would have upheld the court's implicit finding that the odor was "unmistakable" as not clearly erroneous.

Finally, though the State perhaps should have asked the officers about their training and experience, *Secrist* does not mandate such testimony for the State to meet its burden at the suppression hearing, and the court of appeals overread *Secrist* to contain such a requirement.

Based on these errors, the court of appeals' conclusion that the State did not show that the odor of marijuana was unmistakable should be rejected.

II. Applying the correct legal standards to the facts, officers had probable cause to arrest Moore under the totality of the circumstances.

Applying a proper reading of *Secrist* and established search and seizure principles, this Court should conclude the officers' search of Moore was lawful because the totality of the circumstances known to officers at the time would have supported probable cause to believe that Moore probably committed a crime.

To repeat, *Secrist* holds that "the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances in which it is discovered . . . ." 224 Wis. 2d at 217–18. And most relevant here: "The strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug." *Id.* at 218.

Here, two officers detected the odor of raw marijuana coming from the truck cabin of which Moore was the driver and sole occupant. Following the suppression hearing, the circuit court found that Officer Abel detected the "strong smell" of raw marijuana on approaching the truck, and that Officer Scheppler said on the scene that he also detected the odor of marijuana. (R. 16:1–2, A-App. 21–22.) While the circuit court ultimately granted the motion to suppress, its findings as to Officer Abel's detection of the "strong smell" of marijuana coming from a vehicle of which Moore was the driver and sole occupant provided officers probable cause to arrest. The circuit court acknowledged this conclusion upon finding that Officer Abel detected the "strong smell" of raw marijuana coming from the vehicle: "the strong odor of

marijuana emanating from a vehicle being driv[en] by the defendant forms the basis for probable cause" to conduct a search incident to arrest. (R. 16:1–2, A-App. 21–22.)

Two other facts arguably diminished somewhat the basis for an arrest at the time: (1) the truck wasn't Moore's, he was borrowing it from his brother, as Moore told police and they confirmed at the time; and (2) officers did not detect the odor of marijuana on Moore's person once he was outside of the vehicle. The circuit court relied on these facts in concluding that the officers no longer had probable cause by the time of the search incident to arrest. (R. 16: 3–4, A-App. 23–24.) But these facts did not substantially diminish the evidence giving probable cause to arrest.

First, while the fact that the vehicle wasn't Moore's suggests that his brother could have been responsible for the odor, Moore was the driver and sole occupant of the vehicle when officers detected the odor coming from the truck cabin. Officers could (and did) reasonably conclude that it is much more likely that the person operating the vehicle at the time the odor is detected is the person responsible for that odor.

Second, the fact that the odor was not detected on Moore's person when he was outside of the vehicle likewise does not significantly diminish Moore's ties to the odor in this case. That Moore did not smell of marijuana outside the vehicle was not surprising given that the odor detected was raw, not burnt marijuana, and thus there was no smoke to permeate Moore's clothing. Further, language in *Secrist* about "the source of the odor is not [being] near the person" "diminish[ing]" the justification for an arrest has less application here than in a case with multiple persons in the car. The only reasonable "sources" for the odor in this case were Moore's person and the vehicle that he was operating and was the sole occupant. In either instance, the odor was sufficiently linked to Moore himself, and thus the fact that the

odor was not detected on him does little to "diminish" the reasons for the search.

Based on the foregoing, the officers had probable cause to arrest Moore under *Secrist* based on Officer Abel's detection of the "strong smell" of raw marijuana alone, confirmed by Officer Schlepper on the scene. 224 Wis. 2d at 218.

But even if the officer's detection of the strong odor of marijuana from a vehicle where Moore was the driver and sole occupant were somehow not enough, two additional facts provided further justification for an arrest under the totality of the circumstances.

First, officers discovered a vape pen on Moore's person during the protective search. (R. 23:15, 21, A-App. 39, 45; Ex. 1 at 2:50.) Having just detected the strong odor of raw marijuana coming from the truck Moore was driving, the officer reasonably asked Moore whether he used the pen to vape THC. This question was reasonable not necessarily because an officer would have believed that the pen was the odor's source. It was reasonable because the officer already had substantial reason (and likely probable cause) to believe that Moore was linked to marijuana use or possession. When Moore did not initially respond, and only responded that it was "a CBD vape," the officer had another reason in addition to the strong odor of raw marijuana[10] to doubt Moore's answer. *See Nieves*, 304 Wis. 2d 182, ¶ 14. Again, while the vape is not evidence as to the source of the odor—no evidence was presented about the odor, if any, of the vape pen or of

[10] To the extent it may be argued that the odor the officers detected was of raw legal hemp, Moore never told officers that the odor detected in the vehicle was hemp or CBD. A reasonable officer would not credit a potential explanation of innocence that is not even asserted by the suspect.

vaped CBD and THC—it is additional evidence associating Moore with marijuana use or possession.

Second, Officer Abel observed a liquid being tossed out of the driver's side window as Moore was pulling the truck over to comply with the stop. (R. 23:19, A-App. 43.) To the officer, Moore appeared to be disposing of incriminating evidence, so she asked him about what she saw when was attempting to dispose of incriminating evidence before the stop. (R. 23:19, A-App. 43.) But the officers did not detect the odor of alcohol. Moore told the officers that he had gotten the truck washed, a potential explanation. (R. 23:20, A-App. 44.) But Officer Abel also detected liquid on the *inside* of the driver's side window. (R. 23:20, A-App. 44.)

These facts and observations support a reasonable, if not compelling, inference that Moore disposed of a non-alcoholic, incriminating liquid immediately before the stop. From this strong inference and other facts known to the officers, a reasonable officer could draw a less strong but still reasonable inference that the liquid observed was vaping liquid containing a prohibited substance like THC. Because the State did not explore this inference with Officer Abel at the suppression hearing, there is nothing in the record about the officer's knowledge about vaping and liquid for vaping. But despite this gap, the known facts support an objective, reasonable inference about a potential THC use that Moore was seeking to hide, further associating Moore with marijuana use or possession. *See State v. Kutz*, 2003 WI App 205, ¶ 12, 267 Wis. 2d 531, 671 N.W.2d 660 (reviewing court applies an objective standard in determining whether probable cause to search exists).

For these reasons–the strong odor of raw marijuana coming from the vehicle of which Moore was the driver and sole occupant, the discovery of a vape pen Moore said he used for CBD, the observation of Moore's disposing of a non-

alcoholic liquid before the traffic stop, and all reasonable inferences drawn from these facts–probable cause existed to arrest Moore for marijuana possession. Because the search was a search incident to a lawful arrest, this Court should reverse the court of appeals' decision affirming the circuit court's order suppressing evidence of Moore's possession with intent to deliver cocaine and fentanyl.

CONCLUSION

The court of appeals' decision upholding the circuit court's order suppressing evidence should be reversed. The case should be remanded with instructions to vacate the order suppressing evidence and reinstate the criminal complaint.

Dated this 17th day of February 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,791 words.

Dated this 17th day of February 2023.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 17th day of February 2023.

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