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Regarding Industrial Hemp¹

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Changes to laws regarding industrial hemp have raised questions about the effect that those laws have on cases involving suspected marijuana.

As explained further below, law enforcement should determine probable cause looking at the totality of the circumstances. Currently, absent some evidence that a substance is legal industrial hemp, a court would likely find that the odor or sight of a substance suspected to be marijuana based on an officer's training and experience provides probable cause to believe that the substance is in fact marijuana.

When determining whether probable cause exists, law enforcement should document any additional evidence that supports an inference of criminality. When law enforcement is less confident that the substance is marijuana, law enforcement should exercise sound judgment in deciding whether to arrest a subject, seize evidence, or file criminal charges.

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Although delta-9-tetrahydro-cannabinol (commonly known as "THC") is a Schedule I controlled substance in Wisconsin, substances regarded as industrial hemp are specifically excluded from the definition of illegal THC. Wis. Stat. § 961.14(4)(t).² In addition, under Wisconsin law, a person may "plant, grow,

¹ The advice provided herein should not be construed in any way to confer any rights, privileges, or immunities, or applied to invalidate an investigative detention, arrest, search, seizure, or charge made in accordance with applicable law.

² The statute excludes THC "contained in fiber produced from the stalks, oil or cake made from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil

cultivate, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export industrial hemp in this state to the greatest extent allowed under federal law.” Wis. Stat. § 94.55(2)(a).

On December 20, 2018, the President signed into law the Agricultural Improvement Act of 2018, Pub. L. No. 115-334, commonly known as the 2018 Farm Bill. That statute removed industrial hemp from Schedule I of the federal Controlled Substances Act.

Industrial hemp and marijuana derive from different portions of the same plant, *Cannabis sativa*. Marijuana and industrial hemp both contain THC, although marijuana contains higher levels of it. Because they are from the same plant genus, industrial hemp and marijuana generally look and smell the same. Given that, when does law enforcement have probable cause to believe that a substance is illegal marijuana?

Probable cause is a “practical and common-sensical standard” that depends on the totality of the circumstances. *Florida v. Harris*, 568 U.S. 237, 244 (2013). In general, rigid rules and bright-line tests are inappropriate. *Id.* As the U.S. Supreme Court has explained:

In dealing with probable cause, . . . 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 [law enforcement officers], not legal technicians, act. . . .

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior [T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.

Illinois v. Gates, 462 U.S. 213, 231-32 (1983) (citations omitted); *see also State v. Kiper*, 193 Wis.2d 69, 83, 532 N.W.2d 698 (1995) (“probable cause eschews

or cake or the sterilized seed of a Cannabis plant which is incapable of germination.” Wis. Stat. § 961.14(4)(t)2. This does not mirror the definition of “industrial hemp” under Wis. Stat. § 94.55(1), which includes a limitation on THC concentration of “no more than 0.3 percent on a dry weight basis or the maximum concentration allowed under federal law up to 1 percent, whichever is greater.” Wis. Stat. § 94.55(1).

technicality and legalisms in favor of a ‘flexible, common-sense measure of the plausibility of particular conclusions about human behavior’ (citations omitted); *State v. Wisumierski*, 106 Wis. 2d 722, 739, 317 N.W.2d 484 (1982) (probable cause “deal[s] with probabilities” that are “not technical” (citation omitted)).

Under well-established Wisconsin law, the odor of marijuana coming from a vehicle provides probable cause to believe that the vehicle contains evidence of a crime. *State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999). And, absent evidence that the substance causing the odor is in fact legal industrial hemp, a court would likely reach the same conclusion now. Although there is a chance that the substance causing the odor is legal industrial hemp, the fact remains that there is a “fair probability” that it is illegal marijuana. *State v. Hughes*, 2000 WI 24, ¶ 21, 233 Wis. 2d 280, 607 N.W.2d 621 (probable cause requires only a “fair probability” that evidence of a crime will be found); *see also State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125 (“[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.”).³

The same is true if a canine trained to detect marijuana alerts on a vehicle: Provided that law enforcement can establish that the canine has been appropriately trained and has demonstrated a sufficient level of reliability detecting drugs in the past, a court would likely find that the canine alert provides probable cause to search the vehicle. *Harris*, 568 U.S. at 248; *State v. Miller*, 2002 WI App 150, ¶ 14, 256 Wis. 2d 80, 647 N.W.2d 348. Indeed, the probable cause is higher than when a trained officer smells the odor of marijuana, because although there is an equal chance that the canine and the officer have both detected legal industrial hemp, the canine alert includes the additional probability of locating illegal drugs besides marijuana that the canine has been trained to detect.

Likewise, if an officer discovers a substance that, based on that officer’s training and experience, appears to be marijuana, a court would likely find that the officer has probable cause to seize the substance as evidence of a crime—even though industrial hemp and marijuana can look alike. “[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); *accord Gates*, 462 U.S. at 243 n.13 (“[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”).

³ There is scant authority regarding the impact that the legalization of industrial hemp has on probable cause determinations involving a substance that appears to be or has the odor of marijuana. *Cf. People v. Cox*, 429 P.3d 75, 81-82 (Colo. 2018) (Gabriel, J., concurring) (officer does not need to conduct chemical testing before submitting probable cause affidavit stating that officer believes that substance is illegal marijuana as opposed to legal industrial hemp).

Furthermore, a law enforcement officer may have probable cause to arrest a person for drugged driving upon smelling the odor of marijuana. In Wisconsin, it is illegal to drive a vehicle on a public highway with a “detectable amount of a restricted controlled substance” in the blood, even if the driver is not impaired. *State v. Smet*, 2005 WI App 263, ¶¶ 4, 23, 288 Wis. 2d 525, 709 N.W.2d 474. THC is a restricted controlled substance for the purposes of the motor vehicle code. *Id.* ¶¶ 2, 4; Wis. Stat. § 340.01(50m)(e).⁴ “[A]n odor of burnt marijuana creates an inference that marijuana is not only physically present in the vehicle, but that some of it has been smoked recently.” *Secrist*, 224 Wis. 2d at 211 (citation omitted). Accordingly, the smell of burnt marijuana, especially when combined with other suspicious factors, can create probable cause of drugged driving. At a minimum, the odor of burnt marijuana in a vehicle can provide police with reasonable suspicion to further investigate a drugged driving offense.

To be clear, law enforcement must not ignore facts suggesting that a substance is in fact legal industrial hemp and not illegal marijuana. In all situations, the probable cause determination hinges on the totality of the circumstances. If there are facts suggesting that a substance may be industrial hemp, law enforcement should conduct further investigation before deciding that there is probable cause to believe that the substance is marijuana. Relevant considerations could include, but are not limited to:

- How is the substance being grown?
- How is the substance stored?
- How is the substance packaged?
- How has the substance been referred to in communications?
- How does location affect the probability of criminality? For example, has the person in possession of the substance been stopped outside a store that sells legal industrial hemp? Is the location known for drug dealing, or does law enforcement have information about suspicious activity at the location that may be consistent with illegal activity?
- Does the subject claim that the substance is hemp? If so, where does the subject claim to have obtained the hemp?
- If the subject is growing or processing hemp, is the subject licensed and registered to do so? Does the location of the growing or processing operation match the registered location?
- If the subject is processing hemp, or transporting hemp for a grower or processor, does the subject have a “fit for commerce” certificate attesting that the hemp has been tested for THC concentration?
- Are there other indicia of criminality such as drug paraphernalia?

⁴ Unlike Wis. Stat. § 961.14(4)(t)2, Wis. Stat. § 340.01(50m)(e) does not contain an exclusion for THC contained in fiber produced from certain parts of the plant.

- If the officer sees or smells a substance that looks or smells like marijuana, is the subject impaired? (The level of THC in industrial hemp should not cause impairment.)
- Has the subject demonstrated consciousness of guilt through furtive gestures, nervousness, or inconsistent statements?

When considering the totality of the circumstances, an officer may still have probable cause to believe that a substance is marijuana even when a subject asserts that the substance is industrial hemp. Officers should be careful to document in their reports all the factors that support probable cause.

In those circumstances when law enforcement is less confident that the substance is marijuana, law enforcement must exercise judgment to determine whether the intrusion on a subject's liberty and property interests, and the expenditure of police, prosecution, and judicial resources, justifies an arrest, seizure of evidence, or the filing of criminal charges. These are the types of judgment calls that law enforcement has made for years in Wisconsin.

If law enforcement decides that THC charges are warranted, the State of course must prove beyond a reasonable doubt at trial that the substance is marijuana and not industrial hemp. Prior to trial, the prosecutor should contact the Wisconsin State Crime Labs (WSCL) to determine whether the results of testing are consistent with illegal marijuana or industrial hemp. In most cases, with existing resources, the WSCL can distinguish between industrial hemp (fiber type) and illegal marijuana. If WSCL can opine that the substance is not consistent with legal industrial hemp, the prosecutor can take steps to admit this evidence at trial.

If you have any questions, please contact Assistant Attorney General Randall Schneider in the Criminal Litigation Unit at the Wisconsin Department of Justice at (608) 267-1339.