

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

ANTHONY LEE,

*Plaintiff,*

v.

CITY OF CHARLOTTE, KENNETH KLUDY,  
*in his individual and official capacities, and*  
DEVAN WILSON, *in his individual and*  
*official capacities.*

*Defendants.*

**COMPLAINT**

(Jury Trial Demanded)

**NOW COMES** Plaintiff Anthony Lee, by and through undersigned counsel, complaining of the acts and omissions of Defendants, requesting a jury trial, and alleging the following:

**NATURE OF THE CASE**

1. On November 13, 2023, Defendants arrested Mr. Lee without probable cause.
2. Defendants knew or should have known that their sole justification for arresting Mr. Lee—their only stated basis for probable cause—was well-established “junk science,” something that their own department and legal counsel had previously advised was not a sufficient legal basis to arrest someone and deprive them of their liberty.
3. Mr. Lee and his companion Christina Pierre were waiting at a bus stop near South Tryon Street and Arrowood Road in Charlotte when officers of the Charlotte-Mecklenburg Police Department (CMPD) approached them. Mr. Lee and Ms. Pierre had just finished

working their respective shifts at a nearby Bojangles restaurant. At that moment, they were doing nothing more than smoking a legally purchased hemp cigarette. Both Mr. Lee and Ms. Pierre are Black.

4. Defendants alleged that they smelled unlawful marijuana while driving by the bus stop in their patrol vehicle, which led them to pull into a nearby parking lot and approach Mr. Lee and Ms. Pierre on foot.

5. Despite being told clearly and unequivocally that the material being smoked was lawfully purchased and not marijuana, Defendants immediately placed Mr. Lee under arrest for the possession of marijuana. Defendants did this despite not being able to tell with any degree of certainty that the cigarette in question was anything but legal.

6. Defendants had no legal basis to arrest Mr. Lee.

7. A government may not lawfully authorize the arrest and physical assault of its citizens for conduct that is lawful. Mr. Lee brings this action to vindicate that principle and to obtain redress for the injuries he suffered.

8. Mr. Lee's arrest is not an isolated incident. It reflects a well-established pattern whereby police target Black people based on their race rather than reasonable suspicion or probable cause. CMPD's data show that Black people are more likely to be stopped, detained, and arrested for marijuana possession than white people. Indeed, while people of all races consume hemp and marijuana, which are the same plant and cannot be told apart by sight or smell, CMPD's data show that over 81% of people arrested for misdemeanor marijuana possession alone in Charlotte between 2016 and 2023 are Black. This is one of the various ways in which discriminatory policing practices ensnare Black people in the criminal legal

system as a result of engaging in a lawful activity (here, smoking legal hemp) or a minor offense (e.g., simple possession of marijuana).

### **JURISDICTION**

9. This Court has original subject-matter jurisdiction over Mr. Lee's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343(a) because the claims arise under the laws of the United States and seek redress for rights guaranteed by the United States Constitution that were deprived under color of state law.

10. This Court has supplemental jurisdiction over Mr. Lee's state-law claims pursuant to 28 U.S.C. § 1367. These claims derive from the same nucleus of operative facts and are part of the same case or controversy that gives rise to the federal claims.

### **VENUE**

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because (i) a substantial part of the events and omissions giving rise to the claims occurred in this District, and (ii) Defendant City of Charlotte resides in this District and, upon information and belief, Defendants Wilson and Kludy are both North Carolina residents.

### **PARTIES**

12. Anthony Lee ("Mr. Lee" or "Plaintiff") is a previous resident of Mecklenburg County, North Carolina, currently residing in New Jersey.

13. Upon information and belief, Defendant Devan Wilson ("Officer Wilson") is a resident of Mecklenburg County, North Carolina.

14. At the time of the events alleged herein, Officer Wilson was a sworn police officer with the Charlotte-Mecklenburg Police Department (“CMPD”). Officer Wilson’s employment with CMPD began on June 22, 2020.

15. Officer Wilson is sued in his individual and official capacities as to the state law claims for conduct that was malicious and corrupt. He is therefore not entitled to any public official immunity or governmental immunity that might otherwise shield him from liability. As for Plaintiff’s claims under 42 U.S.C. § 1983, Officer Wilson is sued in his individual capacity for conduct taken under color of state law in violation of the United States Constitution, and he is not entitled to any qualified immunity or other immunity that might otherwise shield him from liability. At all times relevant herein, Officer Wilson acted under the color of state law.

16. Upon information and belief, Defendant Kenneth Kludy (“Officer Kludy”) is a resident of Mecklenburg County, North Carolina.

17. At the time of the events alleged herein, Officer Kludy was a sworn police officer with the Charlotte-Mecklenburg Police Department (“CMPD”). Officer Kludy’s employment with CMPD began on February 24, 2020.

18. Officer Kludy is sued in his individual and official capacities as to the state law claims for conduct that was malicious and corrupt. He is therefore not entitled to any public official immunity or governmental immunity that might otherwise shield him from liability. As for Plaintiff’s claims under 42 U.S.C. § 1983, Officer Kludy is sued in his individual capacity for conduct taken under color of state law in violation of the United States Constitution, and he is not entitled to any qualified immunity or other immunity that might otherwise shield him from liability. At all times relevant herein, Officer Kludy acted under the color of state law.

19. Defendant City of Charlotte (“Charlotte” or “City”) was, at all times relevant herein, a municipal corporation duly organized and existing under the laws of North Carolina that was acting under the laws of North Carolina. Defendant Charlotte hired, trained, and supervised Officer Wilson, Officer Kludy, Officer Pistone, and others to carry out their duties on behalf of the City as police officers with the Charlotte-Mecklenburg Police Department (“CMPD”). Charlotte is sued under state law claims for the conduct of its employees for which the City is liable under *respondeat superior*. Charlotte is also sued directly for its own conduct under 42 U.S.C. § 1983 pursuant to *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Charlotte has waived immunity for liability for the state law claims by the purchase of commercial liability insurance. Accordingly, Charlotte has waived any claim of governmental and sovereign immunity with respect to this action. Charlotte is not immune from the federal law claims.

## **FACTUAL BACKGROUND**

### **Hemp, Marijuana, and Policing**

20. Hemp and marijuana belong to the same species: *Cannabis sativa*.

21. The defining difference between hemp and marijuana is the concentration of delta-9 tetrahydrocannabinol (“delta-9 THC”), the psychoactive component of marijuana.

22. Under both federal and North Carolina law, hemp must contain no more than 0.3% concentration of delta-9 THC.

23. Tetrahydrocannabinol acid (“THCA”) is a non-intoxicating acid naturally produced in raw cannabis buds. It does not have psychoactive qualities when consumed in its unprocessed form.

24. In October 2015, North Carolina enacted the Industrial Hemp Act, N.C. Gen. Stat. §§ 106-568.50 to 106-568.57 (S.L. 2015-299, Section 1), which established a pilot program to regulate and study industrial hemp cultivation. The legislation also decriminalized industrial hemp production and use in North Carolina.

25. On December 20, 2018, U.S. President Donald J. Trump signed the Agriculture Improvement Act of 2018 (“2018 Farm Bill”), Pub. L. No. 115-334, §§ 10113-10114, 132 Stat. 4490, 4908-14 (codified at 7 U.S.C.S. §§ 1639o-1639s), which authorized the production of hemp and removed hemp and hemp seeds from the federal Drug Enforcement Agency’s (DEA) schedule of Controlled Substances. The bill took effect on January 1, 2019.

26. In 2019, the North Carolina State Bureau of Investigation (“NC SBI”) published a memorandum entitled “Industrial Hemp/CBD Issues” (hereinafter “NC SBI Memo”). Ex. 1, NC SBI Memo.

27. Established in 1937, the NC SBI conducts criminal investigations across the state of North Carolina. The NC SBI has original jurisdiction in drug investigations, among other areas.

28. NC SBI’s five-page memorandum assessed the impact that The Industrial Hemp Act was having on the regulation of hemp and considered the impact that hemp legalization would have on law enforcement activity. *Id.*

29. NC SBI wrote, “There is no easy way for law enforcement to distinguish between industrial hemp and marijuana. There is currently no field test which distinguishes the difference.” Further, NC SBI noted that “[h]emp and marijuana look the same and have the same odor, both unburned and burned.” *Id.* at 3.

30. NC SBI asserted that the legalization of hemp made it impossible for law enforcement to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant based on “the appearance of marijuana or the odor of marijuana:”

Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant. In order for a law enforcement officer to seize an item to have it analyzed, the officer must have probable cause that the item being seized is evidence of a crime. The proposed legislation makes possession of hemp in any form legal. Therefore, in the future when a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp. Police narcotics K9’s cannot tell the difference between hemp and marijuana because the K9’s are trained to detect THC which is present in both plants. Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons. The inability for law enforcement to distinguish the difference between hemp and marijuana is problematic in all marijuana prosecutions, from small amounts to trafficking amounts of plant material. There is at least one District Attorney’s Office in NC which is currently not prosecuting marijuana cases due to the inability of law enforcement to distinguish the difference between hemp and marijuana.

Ex. 1, NC SBI Memo, at 3.

31. On November 18, 2020, Mecklenburg County District Attorney Spencer Merriweather formally announced that his office would no longer prosecute simple drug possession cases, including the charge of simple possession of marijuana.

32. In the summer of 2021, the City of Charlotte, through CMPD’s Police Attorney’s Office, published its “CMPD POLICE LAW BULLETIN: A Police Legal Newsletter,” Volume 38, Issue 4 (hereinafter “CMPD Police Law Bulletin, Summer 2021”). Ex. 2, CMPD Law Bulletin, Summer 2021.

33. Upon information and belief, the Police Law Bulletins published by CMPD's Police Attorney's Office are distributed to all CMPD personnel, along with other City of Charlotte Policies.<sup>1</sup>

34. According to the City of Charlotte, "CMPD personnel are responsible for reading the directives and law bulletins" as they are issued.

35. Among other things, the CMPD Police Law Bulletin, Summer 2021, discussed *State v. Parker*, 860 S.E.2d 21, a 2021 decision from the North Carolina Court of Appeals. The discussion noted that the defendant in *Parker* challenged the denial of his motion to suppress on multiple grounds, "including the argument that the trial court erred by failing to address the issue of the indistinguishable odors of marijuana and legalized hemp." Ex. 2, CMPD Law Bulletin, Summer 2021, at 4.

36. The CMPD Police Law Bulletin, Summer 2021, noted that the appellate court affirmed the trial court's finding of probable cause in *Parker* "because the Officer had more than just the odor of marijuana. [The Court of Appeals] concluded that here there were three pieces of evidence which supported probable cause to search the defendant's vehicle: (1) the odor of what the Officer believed to be burnt marijuana coming from the vehicle; (2) the passenger's admission he had recently smoked marijuana; and, (3) the partially smoked marijuana cigarette the passenger pulled from his sock. This combination of factors was sufficient to establish probable cause to justify the warrantless search of the defendant's vehicle." *Id.* at 5.

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<sup>1</sup> See *CMPD Directives*, CITY OF CHARLOTTE, at 1, [www.charlottenc.gov/files/assets/police/v/67/documents/directives/cmpddirectives.pdf](http://www.charlottenc.gov/files/assets/police/v/67/documents/directives/cmpddirectives.pdf) [<https://perma.cc/CZ4B-D2NQ>] (last visited July 13, 2026).



37. The CMPD Police Law Bulletin, Summer 2021, further advised that “[a]dditional information concerning odor/sight of marijuana and the ‘plus’ factors to establish probable cause is discussed further in the Reminders section which follows.” *Id.*

38. On page six of the CMPD Police Law Bulletin, Summer 2021, the Police Attorney’s Office advised CMPD officers as follows:

Due to the legalization of hemp and hemp extract (cannabidiol (CBD)) products in North Carolina and the fact that hemp, CBD and marijuana cannot be distinguished from one another without chemical analysis, Officers will need additional evidence beyond the sight or smell of marijuana to establish probable cause (PC). Hemp and hemp extract can contain up to 0.3% THC and 0.9% THC respectively, and our currently available testing only detects the presence of THC, not the amount.

*Id.* at 6.

39. In its legal bulletin, the Police Attorney’s Office reiterated “PC for Marijuana = Odor/Sight ‘Plus’” before listing several examples of what the necessary “plus” factor might include (e.g., suspect admissions, suspect’s behavior, etc.). *Id.*

40. As noted in the CMPD Police Law Bulletin, Summer 2021, at that time, CMPD’s available testing only detected the presence of THC, not the amount. *Id.*

41. On June 30, 2022, North Carolina Session Law 2022-32 went into effect. The law was entitled, “AN ACT TO CONFORM THE HEMP LAWS WITH FEDERAL LAW BY PERMANENTLY EXCLUDING HEMP FROM THE STATE CONTROLLED SUBSTANCES ACT.” Among other things, it amended N.C. Gen. Stat. § 90-87 to permanently exclude hemp and hemp products from the North Carolina Controlled Substances Act, bringing state law in line with the 2018 Farm Bill.

42. The 2022 law also amended the definition of “Marijuana” in the North Carolina Controlled Substances Act to “not include Hemp or Hemp Products.” N.C. Gen. Stat. § 90-87(16).

43. On November 13, 2023, under the laws of North Carolina, an individual was permitted to openly possess and smoke hemp.

**The City of Charlotte’s Response to Hemp Legalization**

44. As of December 20, 2018, hemp was no longer a controlled substance under federal law.

45. As of 2019, law enforcement agencies across North Carolina, including CMPD, were alerted to the fact that it was “impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant.” Ex. 1, NC SBI Memo, at 3.

46. By the summer of 2021, CMPD had been advised by its legal counsel that “[o]fficers will need additional evidence beyond the sight or smell of marijuana to establish probable cause.” Ex. 2, CMPD Law Bulletin, Summer 2021, at 6.

47. As of June 30, 2022, hemp was no longer a controlled substance under North Carolina state law.

48. Despite the aforementioned legislative changes, guidance from NC SBI, and guidance from their own legal counsel, CMPD continued to use the *mere odor* of something that may have smelled like marijuana as the only justification to stop, seize, search, and/or arrest people in Charlotte, North Carolina, up to and including on November 13, 2023.

49. Despite the aforementioned legislative changes, guidance from NC SBI, and guidance from their own legal counsel, CMPD continued to use the *mere sight* of something

that may have looked like marijuana as the only justification to stop, seize, search, and/or arrest people in Charlotte, North Carolina, up to and including on November 13, 2023.

50. Prior to November 13, 2023, as a result of the aforementioned legislative changes, guidance from NC SBI, and guidance from their own legal counsel, CMPD officers, including Officer Wilson and Officer Kludy, knew or should have known that they could not distinguish if someone is smoking marijuana or hemp based on mere odor or sight alone.

51. Prior to November 13, 2023, as a result of the aforementioned legislative changes, guidance from NC SBI, and guidance from their own legal counsel, CMPD officers, including Officer Wilson and Officer Kludy, knew or should have known that CMPD did not have a field test that could distinguish if a substance was marijuana or hemp.

52. Prior to November 13, 2023, as a result of the aforementioned legislative changes, guidance from NC SBI, and guidance from their own legal counsel, CMPD officers, including Officer Wilson and Officer Kludy, knew or should have known that CMPD did not have any testing instruments available that could distinguish if a substance was marijuana or hemp.

53. Based on the aforementioned legislative changes, guidance from NC SBI, and/or guidance from their own legal counsel, the City of Charlotte was aware that the actions of its CMPD officers were being challenged in Mecklenburg County District and Superior Courts with respect to officers' assertions that the mere odor or sight of supposed marijuana, without additional factors or indicia, constituted probable cause, prior to the November 13, 2023 arrests of Plaintiff Lee and Plaintiff Pierre, described herein.

54. Between approximately 2019 until at least November 13, 2023, in Mecklenburg County District and Superior Courts, legal challenges (*e.g.*, motions to suppress) were litigated in cases wherein CMPD officers claimed that their reasonable suspicion and/or probable cause

justifications relied on only the odor or sight of marijuana, without any other indicia of criminality or criminal activity.

55. Between approximately 2019 until at least November 13, 2023, in Mecklenburg County District and Superior Courts, legal challenges (*e.g.*, motions to suppress) were litigated in cases wherein CMPD officers would acknowledge that they could not distinguish the difference between legal hemp and illegal marijuana based on odor alone.

56. Between approximately 2019 until at least November 13, 2023, in Mecklenburg County District and Superior Courts, legal challenges (*e.g.*, motions to suppress) were litigated in cases wherein CMPD officers would acknowledge that they were aware of, among other things, the guidance and direction from the NC SBI's 2019 memo and CMPD's Police Attorney's Office's 2021 legal guidance bulletin.

57. Although the City of Charlotte knew or reasonably should have known that in the wake of legislative changes, guidance from NC SBI, and/or guidance from CMPD's Police Attorney's Office in 2021, "odor only" was insufficient to constitute probable cause in cases involving suspected marijuana, its officers were nonetheless using that sole justification to support stopping, seizing, searching, and/or arresting individuals in Charlotte between approximately 2019 until at least November 13, 2023.

### **Policing, Race, and Marijuana Arrests in Charlotte**

58. In 2021, the City of Charlotte contracted with the RAND Corporation to evaluate its policing. The City of Charlotte undertook this effort "[a]s part of ongoing efforts to improve policing standards and procedures."<sup>2</sup>

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<sup>2</sup> Molly S. Simmons et al., *SAFE Charlotte*, RAND CORP., at iii (2021), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1300/RR1355-1/RAND\\_RRA1355-1.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1300/RR1355-1/RAND_RRA1355-1.pdf) [<https://perma.cc/4PQ4-YVJB>].

59. On September 28, 2021, the RAND Corporation produced a report, “SAFE Charlotte: Alternative Response Models and Disparities in Policing,” for the City of Charlotte. The RAND report analyzed data from CMPD about traffic stops, arrests, uses of force, and the result of searches for contraband, from 2015 through 2020.<sup>3</sup>

60. Among the findings by the RAND Corporation were that Black residents in Charlotte were more likely to be stopped both as a pedestrian and a driver and, when stopped, were more likely to experience “use of force” as well as more likely to be arrested by CMPD. For example, the report’s Black drivers were nearly two times as likely to be arrested during a stop as whites, and nearly two times as likely to experience a use of force by CMPD.<sup>4</sup>

61. The report found that, among other things:

- a. The rate at which Black motorists were stopped was two to three times higher than the rate at which white motorists were stopped. This finding was not explained by the characteristics of the neighborhood, like crime rates, where the stop took place.<sup>5</sup>
- b. Black pedestrians were stopped at much higher rates than white, Asian, and Hispanic pedestrians by CMPD. This finding was not explained by the characteristics of the neighborhood, like crime rates, where the stop took place.<sup>6</sup>
- c. Black motorists were asked to consent to a CMPD search at much higher rates than white motorists were.<sup>7</sup>

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<sup>3</sup> *Id.* at 40-86.

<sup>4</sup> *Id.* at 50.

<sup>5</sup> *Id.* at 52-53.

<sup>6</sup> *Id.* at 53-54.

<sup>7</sup> *Id.* at 60.

62. The findings contained in the 2021 RAND report were not materially different from previous studies that found statistically significant racial disparities in various aspects of CMPD's policing practices. For example:

- a. A 2015 study that examined 1.3 million stops made over 12 years by CMPD determined, among other things, that Black drivers in Charlotte are searched at twice the rate of white drivers.<sup>8</sup>
- b. A 2019 analysis by WCNC Charlotte found that from 2019 through May 2020, Black men accounted for approximately 33% of all traffic stops by CMPD, compared with white men constituting 22% of traffic stops. Of the Black men stopped by CMPD during this period, CMPD searched 10% of them compared to 3% of the white men they pulled over. The analysis further showed that Black men made up 62% of all people arrested during traffic stops, while white men constituted 18% of those arrested.<sup>9</sup>
- c. According to data provided by CMPD, between January 1, 2016, and December 31, 2023, CMPD arrested approximately 332 people where misdemeanor marijuana possession was the only charge. Over 81% of those people were identified as Black.<sup>10</sup>

63. Upon information and belief, between 2019 and at least November 13, 2023, CMPD officers used “odor only” as justification to stop, seize, search, and/or arrest numerous individuals, and that police practice was marked by statistically significant racial disparities.

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<sup>8</sup> Frank R. Baumgartner, Derek Epp & Kelsey Shoub, *Analysis of Black-White Differences in Traffic Stops and Searches in Charlotte, NC, 2002-2013*, UNIV. OF N.C. AT CHAPEL HILL, at 4 tbl. 3 (2015), <https://fbaum.unc.edu/TrafficStops/Reports2014/Charlotte-Report.pdf> [<https://perma.cc/BYU8-JXBD>].

<sup>9</sup> See Nate Morabito, *CMPD continues to stop, search and arrest black men disproportionately*, WCNC CHARLOTTE: INVESTIGATIONS (June 8, 2020 at 6:35pm ET), <https://www.wcnc.com/article/news/investigations/cmpd-continues-to-stop-search-and-arrest-black-men-disproportionately/275-80ca07f1-f00a-480b-8de1-e017f256d358> [<https://perma.cc/9XRU-UFY3>].

<sup>10</sup> Public Records Request Number PRR-1093-2024 from City of Charlotte, fulfilled on Oct. 27, 2025 (on file with undersigned counsel).

### **Events of November 13, 2023**

#### ***The Unlawful Arrests of Anthony Lee and Christina Pierre***

64. Around 2:00 p.m. on November 13, 2023, Mr. Lee and Ms. Pierre were sitting on a bench at a bus stop in front of a Bojangles near South Tryon Street and Arrowood Road in Charlotte, Mecklenburg County, North Carolina.

65. Mr. Lee and Ms. Pierre had just finished working their respective shifts at Bojangles and were waiting for the bus.

66. As Mr. Lee and Ms. Pierre sat on a bench, they shared a hemp cigarette that they had previously purchased at a store in Charlotte that sold legal hemp products.

67. At the same time, Officers Wilson and Kludy were driving in a marked CMPD patrol vehicle at the intersection of South Tryon Street and Arrowood Road.

68. According to CMPD's own internal investigation, Officers Wilson and Kludy, while driving their patrol car inbound on South Tryon Street, claimed to smell what they believed to be the odor of marijuana in the area of the bus stop where Plaintiff Lee and Pierre were seated.

69. Traffic camera footage made publicly available by CMPD shows the distance between the patrol car and the bench where Mr. Lee sat, as Officers Wilson and Kludy drove down South Tryon Street:<sup>11</sup>

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<sup>11</sup> Charlotte-Mecklenburg Police, *Steele Creek Arrest- Lee/Pierre- November 13, 2023- 12*, at 5:35 (YouTube, Dec. 8, 2023), <https://www.youtube.com/watch?v=m6WogrM0Joc>.



[Figure 1: Screenshot from traffic camera footage, superimposed arrow indicating CMPD patrol car.]

70. Officer Wilson and Officer Kludy turned off of South Tryon Street and parked their patrol car.

71. Officers Wilson and Kludy approached Plaintiff Lee and Pierre, who were both sitting at the bus stop, on foot.

72. A significant portion of the subsequent interactions between Officers Wilson and Kludy and Plaintiff Lee and Pierre was captured on bodyworn camera (“BWC”) footage produced by the City of Charlotte, which is publicly available on YouTube and incorporated by reference here. *See* Charlotte-Mecklenburg Police, *Steele Creek Arrest- Lee/Pierre- November 13, 2023- 16* (YouTube, Dec. 8, 2023), <https://www.youtube.com/watch?v=g1L8wDmask8>.

73. According to that BWC footage produced by the City of Charlotte, Officer Kludy initiated contact with Lee and Pierre by asking, “What’s up guys? Y’all just hanging out?” *Id.* at 0:33-0:36.



74. According to that BWC footage produced by the City of Charlotte, Mr. Lee answered, “We just got off of work.” *Id.* at 0:37.

75. According to that BWC footage produced by the City of Charlotte, Ms. Pierre then asked the officers, “What did we do wrong?” *Id.* at 0:40.

76. According to that BWC footage produced by the City of Charlotte, Officer Wilson stated, “It smelled like you’re smoking weed.” *Id.* at 0:42.

77. According to that BWC footage produced by the City of Charlotte, Mr. Lee and Ms. Pierre attempted to explain to the officers that they were smoking lawfully purchased and possessed hemp. “This is stuff from the store. It’s sold in the store. It’s THCA,” Mr. Lee said. *Id.* at 0:43-0:48.

78. According to that BWC footage produced by the City of Charlotte, without acknowledging Mr. Lee’s explanation, Officer Wilson stated: “You’re smoking weed? You guys smoking weed?” *Id.* at 0:48.

79. According to that BWC footage produced by the City of Charlotte, Mr. Lee responded, “It comes from the store.” *Id.* at 0:50.

80. According to that BWC footage produced by the City of Charlotte, Officer Wilson said, “Well, I can smell it coming from that,” gesturing towards the hemp cigarette in Pierre’s hand. *Id.* at 0:52.

81. According to that BWC footage produced by the City of Charlotte, Ms. Pierre tried to explain further: “We got it from the smoke shop.” *Id.* at 0:54.

82. According to that BWC footage produced by the City of Charlotte, in response to hearing, again, that the substance being smoked had been purchased from a smoke shop, Officer Wilson grabbed Mr. Lee’s arm. *Id.* at 0:57.

83. According to that BWC footage produced by the City of Charlotte, while grabbing Mr. Lee's arm, Officer Wilson said, "Okay, well, alright, do me a favor and put your hand behind your back," and placed Mr. Lee under arrest. *Id.* at 0:57.

84. According to that BWC footage produced by the City of Charlotte, within 25 seconds of initiating contact, Officer Wilson had grabbed Mr. Lee's arm to place handcuffs on him. *Id.* at 0:33-0:58.

85. Prior to grabbing Mr. Lee's arm, neither Officer Kludy nor Officer Wilson asked a single follow-up question in response to the information they had learned: that according to Mr. Lee and Ms. Pierre, the substance in question was hemp and had been purchased at a "smoke shop."

86. Officer Kludy then grabbed Ms. Pierre's arm and pulled her off the bench. According to the BWC footage produced by the City of Charlotte, Ms. Pierre is heard repeatedly asking, "Whoa, whoa, whoa, what are you doing? What are you doing?" *Id.* at 0:59-1:03.

87. According to the BWC footage produced by the City of Charlotte, as Officer Kludy continued to forcibly grab Ms. Pierre, Mr. Lee, who was seated on the bench, asked Officer Wilson, "Will you stop? We just got off of work. Why am I being detained?" *Id.* at 1:03-1:08.

88. According to the BWC footage produced by the City of Charlotte, Mr. Lee then stated, "I just told you that they sell it in the store; why am I being detained?" *Id.* at 1:09-1:13.

89. According to the BWC footage produced by the City of Charlotte, Officer Wilson responded to Mr. Lee by commanding, "Turn around now or you're going to get tased, do you hear me?" *Id.* at 1:13-1:16.

90. According to the BWC footage produced by the City of Charlotte, Officer Wilson then pulled Mr. Lee from the bench to the ground.

91. According to the BWC footage produced by the City of Charlotte, Officer Kludy proceeded to aggressively pull and yank on Ms. Pierre, ultimately slamming her to the ground.

92. Within minutes, additional CMPD officers arrived at the scene.

93. One of the officers to arrive at the scene was Officer Vincent Pistone.

94. According to CMPD's own investigation, Officer Pistone then delivered seven (7) knee strikes and ten (10) hammer fists against Ms. Pierre.

95. While being aggressively restrained by Officer Wilson, Officer Konnor Lott, and, for a period of time, Officer Pistone, Mr. Lee watched helplessly as CMPD officers violently assaulted and restrained Ms. Pierre.

96. Mr. Lee also watched helplessly as Officer Pistone kned and punched Ms. Pierre.

97. Mr. Lee repeatedly asked the CMPD officers why this was happening to them.

98. Ms. Pierre repeatedly screamed for help.

### ***Booking and Processing***

99. Officer Wilson and Officer Kludy initially transported Mr. Lee and Ms. Pierre to holding rooms at the CMPD Steele Creek Division precinct.

100. While in a CMPD holding room, Mr. Lee told a CMPD Sergeant that he did not understand why he was arrested for possessing a substance he purchased from a store.

According to BWC footage produced by the City of Charlotte, Mr. Lee said: "I'm just saying that there, it's called human rights. There's the constitution ... I don't understand how you have a city that sells cannabis-like products that smell like it, so that means that you're stopping everybody that smells like weed." Charlotte-Mecklenburg Police, *Steele Creek Arrest-*

*Lee/Pierre- November 13, 2023- 13*, at 44:52-45:11 (YouTube, Dec. 12, 2023),  
[https://www.youtube.com/watch?v=IC\\_GeGsgDT4&t=734s](https://www.youtube.com/watch?v=IC_GeGsgDT4&t=734s).

101. After processing at the Steele Creek precinct was completed, CMPD officers eventually transported Mr. Lee and Ms. Pierre to the Mecklenburg County Detention Center.

102. According to BWC footage produced by the City of Charlotte, during the processing at the Mecklenburg County Detention Center, Defendants conceded that “CBD’s legal down here.” *Charlotte-Mecklenburg Police, Steele Creek Arrest- Lee/Pierre- November 13, 2023- 6*, at 50:29 (YouTube, Dec. 12, 2023),  
<https://www.youtube.com/watch?v=qZeCspZVBCU>.

103. According to BWC footage produced by the City of Charlotte, Mr. Lee noted, “It all smells the same,” to which Defendants’ responded: “Correct. So as law enforcement, it is not our burden to figure out if it’s CBD, it’s yours in court.” *Id.* at 50:48-50:56.

104. Mr. Lee was subsequently charged with three misdemeanors: Possession of Marijuana (<½ oz.), Resisting Public Officer, and Carrying a Concealed Gun.

105. Ms. Pierre was subsequently charged with three misdemeanors: Possession of Marijuana (<½ oz.), Resisting Public Officer, and Assault on a Government Official.

106. On November 27, 2023, the Mecklenburg District Attorney’s Office voluntarily dismissed all criminal charges against Mr. Lee and Ms. Pierre. The prosecution’s stated reasons were as follows: “After consideration of the body-worn camera evidence and the various recorded accounts of police and civilian witnesses present, based on the totality of the circumstances, the State does not have a reasonable likelihood of success at any potential trial on this matter.”

107. Several bystanders, including Mr. Lee and Ms. Pierre’s Bojangles coworkers, witnessed the altercation. Some recorded it with their cellphones and uploaded videos to various social media platforms.

108. BWC footage depicts some of the crowd of bystanders:<sup>12</sup>



[Figure 2: Screenshot from BWC footage.]

109. In the aftermath of the November 13, 2023, events, Mr. Lee’s name, image, and his harrowing, upsetting, and humiliating experience were covered on a regular basis by local news, as well as on national media platforms (e.g., CNN, Fox News).

### ***The City of Charlotte’s Response to Events of November 13, 2023***

110. In the aftermath of the November 13, 2023, events, CMPD continued to make false and misleading claims about Mr. Lee and Ms. Pierre.

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<sup>12</sup> Charlotte-Mecklenburg Police, *Steele Creek Arrest- Lee/Pierre- November 13, 2023- 26*, at 7:50 (YouTube, Dec. 12, 2023), <https://www.youtube.com/watch?v=UfZcbjrh6cU>.

111. For example, on December 12, 2023, CMPD posted a video on its YouTube channel that it created concerning the incident. *See* Charlotte-Mecklenburg Police, *Critical Incident Briefing- Steele Creek Arrest- Lee/Pierre- November 13, 2023* (YouTube, Dec. 12, 2023), <https://www.youtube.com/watch?v=TNy1XUYkLk8>. The video, titled “CMPD Critical Incident Briefing,” was also widely shared with media outlets. The video is nine (9) minutes and eight (8) seconds long, and narrated by Lieutenant Kevin Pietrus from CMPD Public Affairs. During the video, multiple false and misleading claims were made by Pietrus on behalf of CMPD. These false and misleading statements included, but were not limited to, the following:

- a. That Officer Kludy’s grabbing of Ms. Pierre was intended to “deescalate her interference,” when the evidence makes clear that Officer Kludy escalated the situation. *Id.* at 2:16.
- b. That Mr. Lee “remained uncooperative with one officer,” when the evidence makes clear that Plaintiff Lee was entirely cooperative. *Id.* at 2:35.
- c. That Officer Kludy “struck Ms. Pierre in the face in response to Ms. Pierre’s repeated assaults on the officer,” when the evidence makes clear that Ms. Pierre did not repeatedly assault Officer Kludy. *Id.* at 3:22.
- d. That “[t]he substances that were recovered from Mr. Lee and Ms. Pierre were tested by the CMPD Crime Lab. Analysis showed that the substances were marijuana,” when the analysis done by CMPD merely showed the presence of THC and did not establish that there was at least 0.3% concentration of delta-9 THC. *Id.* at 8:02.

112. CMPD coordinated the release of its misleading video with an op-ed by then-CMPD Chief Johnny Jennings in the *Charlotte Observer*.<sup>13</sup> In his op-ed, Chief Jennings asserted several falsehoods, including the following:

- a. “[T]he officers had probable cause to make the arrest,” when, in fact, the officers did not have probable cause to arrest Plaintiff for possessing marijuana.<sup>14</sup>
- b. “The substances located on the male subject tested positive for marijuana,” when, in fact, the analysis done by CMPD merely showed the presence of THC and did not establish that there was at least 0.3% concentration of delta-9 THC.<sup>15</sup>

113. Chief Jennings also voiced his displeasure and disagreement with the decision by the Mecklenburg County District Attorney’s Office to voluntarily dismiss all pending charges against Mr. Lee and Ms. Pierre.

114. As noted above, prior to November 13, 2023, CMPD did not have testing instruments available that could distinguish if a substance was marijuana or hemp. The testing procedures used by CMPD on the substances seized from Mr. Lee involved gas chromatography-mass spectrometry (GC-MS), which did not distinguish the concentration of delta-9 THC.

115. Because the legal difference between marijuana and hemp in North Carolina in November 2023 was determined by the concentration of delta-9 THC, not simply the presence of THC, Defendants knew, or should have known, that Chief Jennings’ claim was false.

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<sup>13</sup> Johnny Jennings, *CMPD chief: ‘Context is crucial’ before you judge Steele Creek incident*, CHARLOTTE OBSERVER (Dec. 12, 2023 at 4:35pm ET), <https://www.charlotteobserver.com/opinion/article282967353.html> [<https://perma.cc/5TFZ-SV3X>].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*



116. After the Mecklenburg County District Attorney's Office voluntarily dismissed the pending charges against Mr. Lee and Ms. Pierre, and while CMPD's internal affairs investigation was ongoing, the Charlotte City Council convened a closed session on December 11, 2023, to review all available BWC footage related to the arrests of Mr. Lee and Ms. Pierre, pursuant to a judicial order authorizing disclosure.<sup>16</sup>

117. During that session, Councilmember Renée Johnson provided visual demonstrations to educate her colleagues about hemp products, passing around a legal THCA pre-rolled cigarette and a bag of hemp flower that she lawfully purchased from a local retailer. Councilmember Johnson explained that the demonstration illustrated the indistinguishability of legal hemp and illegal marijuana and the urgent need for policy guidance.<sup>17</sup> As WFAE News reported, "'There's no way to tell,' Johnson said. 'The CBD flower looks exactly like marijuana or so I've heard. I don't think there is any way to tell because of the smell.'"<sup>18</sup> Johnson emphasized that the Council "need[s] to have that discussion because it helps our officers as well."<sup>19</sup>

118. Then-Mayor Pro Tem Braxton Winston agreed, remarking that it is "practically impossible for officers to discern the molecular structures of what someone is smoking" and

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<sup>16</sup> See Mary Calkins, *City Council to view body cam footage from controversial CMPD arrest*, WBTV NEWS (Dec. 11, 2023 at 5:53am ET), <https://www.wbtv.com/2023/12/11/city-council-view-body-cam-footage-controversial-cmpd-arrest/> [<https://perma.cc/RM72-FAVF>].

<sup>17</sup> See Steve Harrison, *Charlotte City Council member passes around a 'legal joint' in closed session*, WFAE NEWS (Dec. 18, 2023 at 3:24pm ET), <https://www.wfae.org/politics/2023-12-18/charlotte-city-council-member-passes-around-a-legal-joint-in-closed-session> [<https://perma.cc/NQL7-92B7>].

<sup>18</sup> Steve Harrison, *Violent arrests show Charlotte's struggles to adapt as legal, intoxicating cannabis flourishes*, WFAE NEWS (Nov. 21, 2023 at 4:12pm ET), <https://www.wfae.org/crime-justice/2023-11-21/violent-arrests-show-charlottes-struggles-to-adapt-as-legal-intoxicating-cannabis-flourishes> [<https://perma.cc/QN5G-MAW6>].

<sup>19</sup> *Id.*



that the City of Charlotte “needs to go a different way” in responding to the challenges created by hemp legalization.<sup>20</sup>

119. Councilmember Ed Driggs similarly observed that the incident revealed “a real problem in a sense of a disconnect between the letter of the law and the practical reality,” noting that “[police officers] can’t attack every instance of this. It’s arguably legal....So I think that’s a fair question.”<sup>21</sup>

120. At the conclusion of its session, the City Council did not adopt any formal resolution, directive, or ordinance addressing CMPD’s continued reliance on the supposed odor or appearance of marijuana as the sole basis to stop, search, seize, and/or arrest someone.

121. Despite the City Council’s inaction on that day, Defendants had previously acknowledged, and advised CMPD staff, that “[d]ue to the legalization of hemp and hemp extract (cannabidiol (CBD)) products in North Carolina and the fact that hemp, CBD and marijuana cannot be distinguished from one another without chemical analysis, [CMPD] Officers will need additional evidence beyond the sight or smell of marijuana to establish probable cause (PC).” Ex. 2, CMPD Law Bulletin, Summer 2021, at 6.

***Mr. Lee Suffers a Second Arrest***

122. In April 2024, nearly five months after the Mecklenburg County District Attorney's Office voluntarily dismissed all pending charges from the November 13, 2023 incident, CMPD issued a Warrant for Arrest for Possession of a Stolen Firearm against Mr. Lee.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

123. Mr. Lee first learned of the warrant for his arrest in July 2024, a full eight months after the November 13, 2023, incident, during a background check with a potential employer.

124. On July 29, 2024, Mr. Lee turned himself in to the Mecklenburg County Jail with Ms. Pierre present.

125. Mr. Lee was officially rearrested and charged with two counts of Possession of a Stolen Firearm, criminal case numbers 24CR246863 and 24CR292732.

126. Defendants only recovered one gun during Mr. Lee's unlawful arrest and subsequent unlawful search on November 13, 2023.

127. Mr. Lee spent the night in jail after the magistrate refused to set a bond on the untrue grounds that Mr. Lee was rearrested "while on pretrial release for other charges," pursuant to G.S. 15A-533(h).

128. Mr. Lee had no pending charges in July 2024.

129. The following morning, July 30, 2024, a Mecklenburg County District Court Judge modified Mr. Lee's bond to an unsecured \$2,500 bond.

130. Lee was released later that day after being unlawfully incarcerated for 30 hours.

131. On August 13, 2024, the Mecklenburg County District Attorney's Office voluntarily dismissed Mr. Lee's two charges of Possession of a Stolen Firearm that had been initiated by Defendants.

132. Upon voluntarily dismissing the charges on August 13, 2024, the Mecklenburg County District Attorney's Office wrote as follows: "There is insufficient evidence to prove that the defendant knew or had reasonable grounds to believe the firearm was stolen. The defendant made no admissions concerning the firearm. The doctrine of recent possession also does not apply due to the firearm being reported stolen in November 2022, found on the

defendant's person in November 2023 and not discovered stolen by CMPD until February 2024.”

***Mr. Lee Has Suffered Significantly Due to the Events Described Herein***

133. Defendants’ acts and omissions described herein caused months of severe mental, emotional, and financial hardship for Mr. Lee, the grandson of a 30+ year NYPD police officer, a former TSA employee, and someone with no criminal record.

134. In the aftermath of his unlawful arrest, Mr. Lee’s employment was interrupted multiple times. His professional and personal reputation suffered. His relationship with Ms. Pierre was significantly strained.

135. To this day, Mr. Lee continues to experience intense emotional and mental harm stemming from the traumatic events of his arrest.

**CLAIMS FOR RELIEF**

**FIRST CLAIM**

**Violation of 42 U.S.C. § 1983 for False Arrest Under the Fourth Amendment  
(Against Officer Wilson and Officer Kludy)**

136. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

137. Officer Wilson and Officer Kludy are “persons,” as that term is used in the text of 42 U.S.C. § 1983.

138. Plaintiff brings this claim against Officer Wilson and Officer Kludy in their individual capacities as police officers with CMPD.

139. This claim is brought pursuant to 42 U.S.C. § 1983 for violation of rights protected by the Fourth Amendment. A false arrest claim under the Fourth Amendment

requires evaluating whether the officer had objective probable cause for the arrest based on “the totality of the circumstances known to the officer at the time of the arrest.” *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995).

140. At the time he arrested Plaintiff Lee, Officer Wilson did not have objective probable cause to justify the arrest.

141. Officer Wilson did not have a warrant for the arrest.

142. Plaintiff did not resist, delay, or obstruct Officer Wilson under N.C.G.S. § 14-223.

143. Officer Wilson nevertheless arrested Plaintiff despite the lack of objective probable cause and without any legal justification, constituting an unreasonable seizure and false arrest under the Fourth Amendment.

144. At the time he arrested Plaintiff Lee, Officer Kludy did not have objective probable cause to justify the arrest.

145. Officer Kludy did not have a warrant for the arrest.

146. Plaintiff did not resist, delay, or obstruct Officer Kludy under N.C.G.S. § 14-223.

147. Officer Kludy nevertheless arrested Plaintiff despite the lack of objective probable cause and without any legal justification, constituting an unreasonable seizure and false arrest under the Fourth Amendment.

148. Plaintiff did not possess marijuana in violation of N.C.G.S. § 90-95.

149. The subsequent search of Plaintiff and his possessions was conducted incident to the unlawful arrest, and was thus unreasonable and unlawful.

150. As a direct and proximate result of this conduct, Plaintiff suffered an unlawful arrest, search, detention, loss of wages, emotional pain, psychological suffering, and

humiliation. He seeks compensatory damages and all other damages permitted by law for the injuries he suffered.

151. Plaintiff also seeks costs and attorneys' fees to the extent allowed by law, including pursuant to 42 U.S.C. § 1988.

## **SECOND CLAIM**

### **False Arrest**

#### **(Against Officer Wilson, Officer Kludy, and the City of Charlotte)**

152. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

153. Plaintiff brings this claim against Officer Wilson and Officer Kludy in their individual capacities and in their official capacities as police officers with CMPD.

154. At the time of his actions as alleged herein, Officer Wilson was acting as an employee and agent of CMPD and the City of Charlotte, and within the course and scope of his official employment with those entities. Officer Wilson was on duty and was assigned to carry out his lawful duties, which he failed to do.

155. At the time of his actions as alleged herein, Officer Kludy was acting as an employee and agent of CMPD and the City of Charlotte, and within the course and scope of his official employment with those entities. Officer Kludy was on duty and was assigned to carry out his lawful duties, which he failed to do.

156. At the time he arrested Plaintiff, Officer Wilson did not have objective probable cause to justify the arrest.

157. Officer Wilson did not have a warrant for the arrest.

158. Plaintiff did not possess marijuana in violation of N.C.G.S. § 90-95.

159. Plaintiff did not resist, delay, or obstruct Officer Wilson under N.C.G.S. § 14-223.

160. Officer Wilson nevertheless arrested Plaintiff despite the lack of objective probable cause and without any legal justification, constituting a false arrest under state law.

161. The subsequent search of Plaintiff and his possessions was conducted incident to the unlawful arrest, and was thus unreasonable and unlawful.

162. The conduct of Officer Wilson and Officer Kludy was unreasonable, deliberate, grossly negligent, wanton, willful, done with conscious or reckless disregard for the rights and safety of others, and exceeded the scope of their lawful authority.

163. The conduct of Officer Wilson and Officer Kludy proximately and directly caused the foreseeable physical and emotional harms suffered by Plaintiff.

164. Plaintiff also brings this claim against the City of Charlotte as the principal of its agents, Officer Wilson and Officer Kludy, under *respondeat superior*. The City has waived immunity for this claim and for claims brought against it that arise from the conduct of its agents who, like Officer Wilson and Officer Kludy here, act within the scope of their employment.

165. Plaintiff seeks and is entitled to recover compensatory damages in excess of twenty-five thousand dollars (\$25,000) for the above-described conduct, and all other damages permitted by law from Officer Wilson, Officer Kludy, and the City of Charlotte.

### **THIRD CLAIM**

#### **Violation of 42 U.S.C. § 1983 for Use of Excessive Force Under the Fourth and Fourteenth Amendment (Against Officer Wilson and Officer Kludy)**

166. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

167. Officer Wilson and Officer Kludy are “persons,” as that term is used in the text of 42 U.S.C. § 1983.

168. Plaintiff brings this claim against Officer Wilson and Officer Kludy in their individual capacities as police officers with CMPD.

169. This claim is brought pursuant to 42 U.S.C. § 1983 for violation of rights protected by the Fourth Amendment and the Fourteenth Amendment to the United States Constitution. Specifically, this claim is brought under the Fourth Amendment, which applies to the actions of Officer Wilson and Officer Kludy under the Fourteenth Amendment.

170. The actions of Officer Wilson described herein constituted the unlawful use of excessive force under color of law. The force used against Plaintiff by Officer Wilson was also objectively unreasonable.

171. The actions of Officer Wilson described herein were taken under color of state law and are thus actionable pursuant to 42 U.S.C. § 1983.

172. As a direct and proximate result of Officer Wilson’s conduct, Plaintiff suffered physical pain and humiliation. Accordingly, Plaintiff seeks and is entitled to recover compensatory damages.

173. The actions of Officer Kludy described herein constituted the unlawful use of excessive force under color of law. The force used against Plaintiff by Officer Wilson was also objectively unreasonable.

174. The actions of Officer Kludy described herein were taken under color of state law and are thus actionable pursuant to 42 U.S.C. § 1983.

175. As a direct and proximate result of Officer Kludy's conduct, Plaintiff suffered physical pain and humiliation. Accordingly, Plaintiff seeks and is entitled to recover compensatory damages.

176. As a direct and proximate result of this conduct, Plaintiff suffered emotional pain, psychological suffering, and humiliation. He seeks compensatory damages and all other damages permitted by law for the injuries he suffered.

177. Plaintiff also seeks costs and attorneys' fees to the extent allowed by law, including pursuant to 42 U.S.C. § 1988.

**FOURTH CLAIM**  
**Assault and Battery**  
**(Against Officer Wilson, Officer Kludy, and the City of Charlotte)**

178. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

179. Plaintiff brings this claim against Officer Wilson and Officer Kludy in their individual capacities and in their official capacities as police officers with CMPD.

180. At the time of his actions as alleged herein, Officer Wilson was acting as an employee and agent of CMPD and the City of Charlotte, and within the course and scope of his official employment with those entities. Officer Wilson was on duty and was assigned to carry out his lawful duties, which he failed to do.

181. At the time of his actions as alleged herein, Officer Kludy was acting as an employee and agent of CMPD and the City of Charlotte, and within the course and scope of his official employment with those entities. Officer Kludy was on duty and was assigned to carry out his lawful duties, which he failed to do.



182. The conduct of Officer Wilson and Officer Kludy was unreasonable, deliberate, grossly negligent, wanton, willful, done with conscious or reckless disregard for the rights and safety of others, and exceeded the scope of their lawful authority.

183. The conduct of Officer Wilson and Officer Kludy proximately and directly caused the foreseeable physical and emotional harms suffered by Plaintiff.

184. Plaintiff also brings this claim against the City of Charlotte as the principal of its agents, Officer Wilson and Officer Kludy, under *respondeat superior*. The City has waived immunity for this claim and for claims brought against it that arise from the conduct of its agents who, like Officer Wilson and Officer Kludy here, act within the scope of their employment.

185. Plaintiff seeks and is entitled to recover compensatory damages in excess of twenty-five thousand dollars (\$25,000) for the above-described conduct, and all other damages permitted by law from Officer Wilson, Officer Kludy, and the City of Charlotte.

## **FIFTH CLAIM**

### **Violation of 42 U.S.C. § 1983 for Malicious Prosecution Under the Fourth Amendment (Against Officer Wilson and Officer Kludy)**

186. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

187. Officer Wilson and Officer Kludy are “persons,” as that term is used in the text of 42 U.S.C. § 1983.

188. Plaintiff brings this claim against Officer Wilson and Officer Kludy in their individual capacities as police officers with CMPD.

189. This claim is brought pursuant to 42 U.S.C. § 1983 for violation of rights protected by the Fourth Amendment.

190. The actions of Officer Wilson and Officer Kludy described herein were taken under color of state law and are thus actionable pursuant to 42 U.S.C. § 1983.

191. Officer Wilson and Officer Kludy initiated charges against Plaintiff for possession of marijuana up to ½ ounce, in violation of N.C.G.S. § 90-95, as well as resisting public officer, in violation of N.C.G.S. § 14-223.

192. But as described above, these charges were not supported by probable cause.

193. Officer Wilson and Officer Kludy knew this fact but nevertheless initiated, instituted, and participated in pursuing these charges; and in doing so, their actions were malicious and evidenced a reckless and callous disregard for, and deliberate indifference to, Plaintiff's constitutional rights.

194. The criminal proceedings terminated in favor of Plaintiff when these charges stemming from his encounter with Officer Wilson and Officer Kludy on November 13, 2023 were dismissed on November 27, 2023.

195. This malicious prosecution caused serious injuries to Plaintiff.

196. Plaintiff seeks compensatory damages and all other damages permitted by law for the injuries he suffered.

197. Plaintiff also seeks costs and attorneys' fees to the extent allowed by law, including pursuant to 42 U.S.C. § 1988.

**SIXTH CLAIM**  
**Malicious Prosecution**  
**(Against Officer Wilson, Officer Kludy, and the City of Charlotte)**

198. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

199. Plaintiff brings this claim against Officer Wilson and Officer Kludy in their individual capacities and in their official capacities as police officers with CMPD.

200. At the time of his actions as alleged herein, Officer Wilson was acting as an employee and agent of CMPD and the City of Charlotte, and within the course and scope of his official employment with those entities. Officer Wilson was on duty and was assigned to carry out his lawful duties, which he failed to do.

201. At the time of his actions as alleged herein, Officer Kludy was acting as an employee and agent of CMPD and the City of Charlotte, and within the course and scope of his official employment with those entities. Officer Kludy was on duty and was assigned to carry out his lawful duties, which he failed to do.

202. Officer Wilson and Officer Kludy initiated charges against Plaintiff for possession of marijuana up to ½ ounce, in violation of N.C.G.S. § 90-95, as well as resisting public officer, in violation of N.C.G.S. § 14-223.

203. But as described above, these charges were not supported by probable cause.

204. Officer Wilson and Officer Kludy knew this fact but nevertheless initiated, instituted, and participated in pursuing these charges; and in doing so, they acted with malice.

205. The criminal proceedings terminated in favor of Plaintiff when these charges stemming from his encounter with Officer Wilson and Officer Kludy on November 13, 2023 were dismissed on November 27, 2023.

206. The conduct of Defendants was unreasonable, deliberate, grossly negligent, wanton, willful, done with conscious or reckless disregard for the rights and safety of others, and exceeded the scope of their lawful authority.

207. The conduct of Defendants proximately and directly caused the foreseeable harms suffered by Plaintiff.

208. Plaintiff also brings this claim against the City of Charlotte as the principal of its agents, Officer Wilson and Officer Kludy, under *respondeat superior*. The City has waived immunity for this claim and for claims brought against it that arise from the conduct of its agents who, like Officer Wilson and Officer Kludy here, act within the scope of their employment.

209. Plaintiff seeks and is entitled to recover compensatory damages in excess of twenty-five thousand dollars (\$25,000) for the above-described conduct, and all other damages permitted by law from Officer Wilson, Officer Kludy, and the City of Charlotte.

#### **SEVENTH CLAIM**

##### **Violation of 42 U.S.C. § 1983 Against the City of Charlotte for Failure to Train (Against the City of Charlotte)**

210. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

211. Plaintiff brings this claim against the City of Charlotte under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

212. The conduct of Officer Wilson and Officer Kludy, described above, resulted in the deprivation of Plaintiff's federal constitutional rights.

213. The City of Charlotte had a duty to adequately and effectively train Officer Wilson and Officer Kludy.

214. The City of Charlotte breached these duties, and its failure to train its officers constituted deliberate indifference to Plaintiff's constitutional rights.

215. Upon information and belief, well before the November 13, 2023 incident described above, the City of Charlotte knew or should have known that, in light of the legalization of hemp, CMPD needed to train its officers accordingly, to wit: because hemp and marijuana cannot be distinguished from one another without chemical analysis, CMPD officers need additional evidence beyond the mere sight or smell of marijuana to establish probable cause.

216. In light of the change in the law and directives provided by the North Carolina State Bureau of Investigation and legal counsel for CMPD, as well as the duties and responsibilities assigned to Officer Wilson and Officer Kludy, the need for more or different training was obvious. The inadequacies of the training were so obvious and likely to result in the violation of constitutional rights described above that the City of Charlotte's actions and omissions constituted deliberate indifference to the need and/or a conscious choice on the part of policymaking officials to disregard constitutional rights.

217. In addition and/or in the alternative, the City of Charlotte failed to correct a pattern of unconstitutional conduct occurring before November 13, 2023, relating to CMPD officers' use of the supposed odor or sight of marijuana as sole justification to stop, seize, search, and/or arrest people. The City of Charlotte had actual or constructive knowledge that the unconstitutional conduct was occurring and violating the rights of others, but was deliberately indifferent to the need to train.

218. The City of Charlotte's failure to adequately train CMPD officers was a proximate cause and the moving force behind the violations of Plaintiff's rights as set forth herein.

219. The actions complained of were taken under color of state law and are thus actionable pursuant to 42 U.S.C. § 1983.

220. As a direct and proximate result of this conduct, Plaintiff suffered an unlawful arrest, search, detention, prosecution, loss of wages, emotional pain, psychological suffering, and humiliation.

221. Plaintiff seeks compensatory damages and all other damages permitted by law for the injuries he suffered.

222. Plaintiff also seeks costs and attorneys' fees to the extent allowed by law, including pursuant to 42 U.S.C. § 1988.

#### **EIGHTH CLAIM**

##### **Violation of 42 U.S.C. § 1983 Against the City of Charlotte for Ratification (Against the City of Charlotte)**

223. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

224. Plaintiff brings this claim against the City of Charlotte under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

225. The conduct of Officer Wilson and Officer Kludy, described above, resulted in the deprivation of Plaintiff's federal constitutional rights.

226. The City of Charlotte knew, or had constructive knowledge, that its officers were continuing to violate the constitutional rights of people who were innocently possessing and/or consuming lawful hemp, and sanctioned that behavior.

227. The City of Charlotte further ratified the actions taken by Officer Wilson and Officer Kludy, acting at the direction of CMPD, to violate the rights of Plaintiff.

228. The actions complained of were taken under color of state law and are thus actionable pursuant to 42 U.S.C. § 1983.

229. As a direct and proximate result of this conduct, Plaintiff suffered an unlawful arrest, search, detention, prosecution, loss of wages, emotional pain, psychological suffering, and humiliation.

230. Plaintiff seeks compensatory damages and all other damages permitted by law for the injuries he suffered.

231. Plaintiff also seeks costs and attorneys' fees to the extent allowed by law, including pursuant to 42 U.S.C. § 1988.

#### **NINTH CLAIM**

##### **Violation of 42 U.S.C. § 1983 Against the City of Charlotte for Unofficial Custom, Policy, or Practice (Against the City of Charlotte)**

232. Plaintiff realleges and incorporates by reference all preceding paragraphs as if set forth herein.

233. Plaintiff brings this claim against the City of Charlotte under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

234. The conduct of Officer Wilson and Officer Kludy, described above, resulted in the deprivation of Plaintiff's federal constitutional rights.

235. The City of Charlotte adhered to an unofficial custom, policy, or practice to show deliberate indifference towards the rights of people who were innocently possessing and/or consuming lawful hemp.

236. Despite knowing that innocent people were being unlawfully stopped, detained, and arrested based on the possession and/or consumption of lawful hemp, the City of Charlotte, by and through CMPD, permitted this unofficial custom, policy, or practice to persist.

237. The actions complained of were taken under color of state law and are thus actionable pursuant to 42 U.S.C. § 1983.

238. As a direct and proximate result of this conduct, Plaintiff suffered an unlawful arrest, search, detention, prosecution, loss of wages, emotional pain, psychological suffering, and humiliation.

239. Plaintiff seeks compensatory damages and all other damages permitted by law for the injuries he suffered.

240. Plaintiff also seeks costs and attorneys' fees to the extent allowed by law, including pursuant to 42 U.S.C. § 1988.

#### **JURY DEMAND**

241. Plaintiff requests that all issues be tried before a jury of his peers.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for the following judgment:

- A. An Order finding in favor of Plaintiff on all causes of action alleged herein;
- B. The grant of any reasonable request to amend Plaintiff's Complaint to conform to the discovery and evidence obtained in this lawsuit;



- C. Compensatory damages;
- D. An award of attorneys' fees and costs and expenses;
- E. Any other appropriate relief available in law or equity; and
- F. Such other and further relief as this Court may deem just, equitable, or proper.

Dated: July 27, 2026

Respectfully submitted,

/s/ Jacob H. Sussman

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*Counsel for Plaintiff Anthony Lee*

# Exhibit 1



**ROY COOPER**  
**GOVERNOR**

**NORTH CAROLINA**  
**STATE BUREAU OF INVESTIGATION**

3320 Garner Road  
P.O. BOX 29500  
Raleigh, NC 27626-0500  
(919) 662-4500  
FAX: (919) 662-4523



**ROBERT SCHURMEIER**  
**DIRECTOR**

## **Industrial Hemp/CBD Issues**

### **Background**

Session Law 2015-299 established the North Carolina Industrial Hemp Commission and initiated a pilot program to study the feasibility of industrial hemp as a crop in NC. Industrial hemp is the plant species *Cannabis Sativa*, which is the same species as marijuana. Industrial hemp contains low levels of tetrahydrocannabinol (THC), which is the psychoactive ingredient in marijuana, a Schedule VI controlled substance in NC. Industrial hemp is engineered to contain high levels of cannabidiol (CBD), which is not psychoactive and has many alleged health benefits including treatment for some forms of epilepsy. It should be noted that the FDA recently approved a pharmaceutical CBD drug called Epidiolex, which can be prescribed by a physician for epilepsy. This is the only FDA approved use of CBD for a medical condition.

There are several types of industrial hemp:

1. One variety is grown for seed oils. Oil is extracted from the seeds and used in various food products such as bread, shampoos, and granola products;
2. One variety looks like long stalks of bamboo and is grown for fiber for textiles and rope; and
3. One variety looks like marijuana and grows "buds" just like marijuana. CBD is extracted from the buds. This type looks just like marijuana, including the leaves and buds, and it smells the same as marijuana. In fact, there is no way for an individual to tell the difference by looking at the plant; one would need a chemical analysis to tell the difference.

The NC Department of Agriculture (NC DAG) oversees the growers of industrial hemp in NC by providing licenses to growers who qualify. NC DAG performs inspections of fields and indoor grown space and takes plant samples which are tested to determine the percentage of THC. If the percentage of THC is determined to be greater than 0.3%, NC DAG burns the plants. NC DAG's lab has the capability to determine the percentage of THC; however, they outsource the testing to a private lab in Durham due to the high number of samples that are submitted.

*Due to the popularity of CBD, the overwhelming majority of NC licensees are growing the CBD producing variety of hemp, rather than the variety for clothing and rope.* As of July 2018, there were 348 licensed growers on 4548 licensed acres and in 1,630,485 square feet of indoor greenhouse space. As of January 2019, there were well over 500 licensed growers in NC. There are a number of large processing facilities that have recently opened in NC. Hemp grown in NC, as well as many other states, are processed into various CBD containing products in these facilities. These products include balms, lotions, salve, oils, capsules, cigarettes, cigars, and "buds." There are CBD dispensaries that have opened in NC in order to sell these products; in addition, the products are sold in hundreds of tobacco shops, convenience stores, and pharmacies. CBD liquids are sold for vaping. Food products labeled to contain CBD are sold in stores across NC in the form of gummies, trail mix, lollipops, and many other food products. These products are expensive; with a small 4-ounce bottle of CBD oil sold for \$80.00 or a small bag of CBD trail mix for \$40.00. These products are being sold in large quantities, with little oversight by a regulatory body. Recently the FDA banned CBD from food products, dietary supplements, and products claiming medicinal benefits. Currently, the NC DAG is sending letters to notify store owners that they cannot sell food products containing CBD.

## Issues for Law Enforcement

There is no easy way for law enforcement to distinguish between industrial hemp and marijuana. There is currently no field test which distinguishes the difference.

Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant. In order for a law enforcement officer to seize an item to have it analyzed, the officer must have probable cause that the item being seized is evidence of a crime. The proposed legislation makes possession of hemp in any form legal. Therefore, in the future when a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp. Police narcotics K9's cannot tell the difference between hemp and marijuana because the K9's are trained to detect THC which is present in both plants. Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons. The inability for law enforcement to distinguish the difference between hemp and marijuana is problematic in all marijuana prosecutions, from small amounts to trafficking amounts of plant material. There is at least one District Attorney's Office in NC which is currently not prosecuting marijuana cases due to the inability of law enforcement to distinguish the difference between hemp and marijuana.

While NC DAG oversees the hemp growers in NC to ensure that the THC levels are within legal limits, there is currently no regulation of hemp and CBD products. This is particularly concerning because processors in NC are making hemp and CBD products using hemp grown all over the US. We do not verify that hemp grown in another state contains less than the percentage THC required by law, which means that products made in NC may contain a higher percentage of THC than what is allowed by law. Retail products currently sold in NC include hemp "buds" or plant material, hand rolled hemp cigarettes and hemp cigars, CBD/Hemp oils, and edible candies, gummies, and food products. Law enforcement has encountered employees in some businesses who encourage the purchase of hemp products as a legal marijuana alternative. Consumers can currently purchase hemp buds and rolling papers in the same store and then roll a hemp "joint" and smoke it. (Note: On the last page of this document is a series of photographs of "hemp" products sold in stores in NC).

The North Carolina State Crime Laboratory does not conduct testing to differentiate between hemp and marijuana. The State Crime Lab, as well as most municipal crime labs in NC, perform a qualitative analysis on plant material to determine whether THC is present. All hemp and CBD products contain some level of THC; therefore, the crime labs will report these products as containing marijuana or THC, which are both Schedule VI controlled substances. While it has been suggested that additional funds be allocated to the Crime Lab in order to add additional chemists and equipment to conduct the quantitative analysis described above, this will not resolve the issue. As previously mentioned, law enforcement cannot seize an item without probable cause that the item is evidence of a crime. Not being able to distinguish between hemp and marijuana defeats the previous basis for probable cause to seize items believed to be marijuana.

Many products for sale in commercial businesses are intentionally mislabeled to contain CBD, but they contain harmful Schedule I controlled substances, synthetic cannabinoids, "bath salts," and other adulterants such as rat poison. Law enforcement cannot rely on the product labels to accurately identify the ingredients or percentages. For example, if a package of hemp "buds" has a label that states it contains less than 0.3% THC, law enforcement cannot rely on the label to be accurate. The product could contain marijuana or another controlled substance. But law enforcement does not currently have the legal right to seize the product and the crime labs do not have the ability to confirm the percentages. The crime labs can only identify THC or other controlled substances.

According to the FDA, CBD cannot be contained in food products such as gummies, lollipops, etc. This is particularly concerning for several reasons: first, children could purchase these products as there is no purchasing age limit;

secondly, these products may be mislabeled and contain other psychoactive substances such as THC or Schedule I synthetic cannabinoids.

The FDA approved a product called Epidiolex, which contains CBD, for use in cases of epilepsy and this product can be prescribed by a physician. There are many hemp and CBD products on the market, and individuals are self-prescribing these products for things such as pain management, anxiety, sleep disorders, and autism, even though CBD has not been scientifically proven or approved for use with these conditions. Users of these products will test positive for THC during employer random narcotics screening and their employment may be terminated for unlawful drug use. A narcotics screening only tests for the presence of THC, not the percentage of THC.

### **Possible Solutions**

The North Carolina Farm Act of 2019 (Senate Bill 315), which was filed on March 20, 2019, formalizes NC's Industrial Hemp program and the Industrial Hemp Commission moving forward. This bill adds Chapter 106-568.67, which requires no license to possess, handle, transport, or sell hemp products or extracts. This bill modifies the definition of marijuana in Chapter 90-87 to exclude hemp, hemp products, or hemp extracts.

***The unintended consequence upon passage of this bill is that marijuana will be legalized in NC because law enforcement cannot distinguish between hemp and marijuana and prosecutors could not prove the difference in court.*** Every quantity of hemp and/or marijuana is important for police investigations, from the cigarette to the "dime" bag to a bale.

There are several possible solutions which allow farmers in NC to grow industrial hemp, but also allow the criminal justice system to continue to seize marijuana, and charge and prosecute marijuana offenses. Below is a listing of possible solutions:

**1) Limit the varieties of hemp that can be grown in NC to those which are used in rope, clothing, and paper. Do not allow the variety of hemp that produces "buds" similar to marijuana.**

**2) Modify the definition of marijuana in 90-87(16) as follows:**

(16) "Marijuana" means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. The term does not include industrial hemp as defined in G.S. 106-568.51, when the industrial hemp is produced in compliance with rules issued by the North Carolina Industrial Hemp Commission and provided to a processor. The possession or sale of hemp in any other circumstance, unless in lawful possession pursuant to the North Carolina Epilepsy Act, is unlawful.

In addition to 1) and 2), the following conditions are warranted:

- **An individual must be 18 or older to purchase or possess hemp, hemp extract, and CBD products.**
- **Provide immunity for law enforcement officers who seize hemp and hemp products during the course of an investigation, even if the products fall within the legal limits of THC and CBD.**
- **Clarify that all paraphernalia used to smoke plant-based materials (whether hemp or marijuana) is illegal.**

Alternative solutions may include:

- **Plant based materials and plant based commercial products cannot be made in hemp processing facilities in NC. Only oils, balms, lotions, salves, etc. can be made in these facilities.**
- **Hemp in plant form cannot leave processing facilities.**

- Hemp in plant form cannot be sold by processors or commercial businesses. It can only be sold by NC farmers with a license from the NC Department of Agriculture.
- Mandate that only growers and processors with a license from the NC Industrial Hemp Commission can possess hemp or hemp plants. Any other person who possesses hemp or hemp plants will be charged with possession of a Schedule VI controlled substance.
- Hemp and CBD containing edibles such as candies, gummies, lollipops, brownies, etc. cannot be sold or possessed in NC. No edible hemp and CBD food products. (this follows FDA regulations)
- Place a ban on smoking hemp, hemp products, hemp extracts, and CBD products.
- Regulate CBD oils to ensure they oils sold in NC are produced by NC farmers, tested by the Department of Ag to fall within legal limits of THC and CBD. The oil products could have a label and tax stamp. Any CBD products without this tax stamp would be illegal to manufacture, sell, or possess.
- Place a tax stamp on all hemp grown in NC and CBD products manufactured in NC. This stamp could go on all products by NC licensed growers and processors. This tax stamp would allow for the product to be followed from the field to the processor to the store. It would ensure that hemp grown by NC farmers is being sold to NC processors, and then sold in NC retail stores. It also ensures that the products fall within the legal THC limits. Any hemp and CBD products without the tax stamp would be illegal to manufacture, sell, or possess.
- License hemp/CBD retail stores in NC. A store must be on the approved list to sell hemp and CBD products.
- Add Epidiolex to Schedule V so it can be prescribed by physicians in NC. This is an FDA approved pharmaceutical form of CBD which is already a Federal Schedule V controlled substance.

### Photos of Commercially Sold Products



**CBD gummies**



**CBD cookies**



**CBD lollipop**



**Hemp cigarette**



**Hemp cigar**



**Hemp "buds"**





**Hemp "buds"**



**Hemp "buds"**

# Exhibit 2



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#### Reminders



**Forward:** This issue will review three relevant cases which were decided in May from the Supreme Court of the United States, the United States Court of Appeals for the Fourth Circuit and the North Carolina Court of Appeals. This issue also includes reminders about the process for obtaining a search warrant or court order from Superior Court Judges, as well as probable cause and the odor and/or sight of marijuana.

### CASE BRIEFS:

#### UNITED STATES SUPREME COURT

**Fourth Amendment/Community Caretaking Exception:** Caniglia v. Strom, 141 S. Ct. 1596 (2021).

**Issue:** Did the community caretaking exception justify the officers' warrantless entry into a home to seize the firearms of an individual who was taken to the hospital for a mental health evaluation?

**Holding:** No, the community caretaking exception did not justify the officers' warrantless entry into the home.

**Facts:** Mr. Caniglia had an argument with his wife in their home in Rhode Island. At some point during the argument he took a handgun from their bedroom, placed it on the dining room table and instructed his wife to "shoot me now and get it over with." His wife refused his request, left the house and spent the night at a hotel. The next morning after she was unable to reach her husband by phone, she called the police and requested a welfare check. Officers along with his wife went to the home where they found Mr. Caniglia on the front porch. Mr. Caniglia confirmed what had happened the prior evening, but denied that he was feeling suicidal. The officers believing him to be a danger to himself or others called for an ambulance, and Mr. Caniglia agreed to go to the hospital for an evaluation on the condition that the officers promised not to confiscate his firearms. However, after the ambulance left the officers entered the home with his wife and seized two of his handguns.

Mr. Caniglia subsequently sued the officers alleging they violated his 4th Amendment rights. The trial court granted summary judgment for the

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officers and on appeal the United States Court of Appeals for the First Circuit affirmed the decision finding that the seizure of his firearms fell within the community caretaking exception to the 4th Amendment's search warrant requirement.

**Discussion:** A unanimous Supreme Court rejected the First Circuit Court's extension of the community caretaking exception to the home. When officers have an objectively reasonable basis to believe a weapon is located in an impounded vehicle, the community caretaking doctrine justifies a warrantless search of the vehicle to prevent the possibility of an intruder obtaining the weapon and endangering the public. In analyzing this case the Court reviewed Cady v. Dombrowski, 413 U. S. 433 (1973). In Cady, the Supreme Court held that a warrantless search of a vehicle's interior and trunk while the defendant was in the hospital and under arrest for driving while impaired, was reasonable under the 4th Amendment to protect public safety. The officer had a reasonable belief that a weapon was inside the vehicle and the search was justified as a proper community caretaking function to protect the public from the possibility that an unauthorized person might retrieve the weapon. The vehicle had been towed and was being stored at a private lot.

The Court stated that while the search in Cady and this case both involved a search for firearms, there was a constitutional difference in the locations of the two searches. While the exception applies in the motor vehicle context, it does not apply to searches of homes. The Court concluded that "[w]hat is reasonable for vehicles is different from what is reasonable for homes" and that it has repeatedly refused to extend the scope of exceptions to the 4th Amendment's search warrant requirement to allow warrantless entry into the home (internal citation omitted). It is important to note that the Supreme Court did not consider whether another justification, such as exigent circumstances or consent, would have justified the officers' actions since the Circuit Court based its decision solely on the community caretaking exception.

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### FOURTH CIRCUIT

**Fourth Amendment/Search Incident to Arrest:** U.S. v. Davis, 997 F.3d 191 (4th Cir. 2021).

**Issue:** Was the warrantless search of the defendant's backpack reasonable under the 4th Amendment when the defendant was handcuffed and lying face down on the ground?

**Holding:** No, the warrantless search was unreasonable since the defendant was secure and not within reach of the backpack at the time of the search.

**Facts:** On March 1, 2017, a Holly Springs Police Department Officer stopped the defendant's vehicle for a window tint violation. After speaking with the defendant and getting his driver's license and insurance card, he discovered that the defendant had a history of felony drug charges and convictions. Two additional officers arrived and within a few minutes the defendant made a motion with his hand to indicate he was leaving and sped off without his license and insurance card. Officers initiated a vehicle

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pursuit which ended when the defendant drove down a dead-end street, went between two houses and into a backyard. The defendant jumped out of the vehicle with a backpack and ran into a swamp where he got stuck. The Officer pursued the defendant on foot and ordered him out of the water. The defendant came out, dropped the backpack next to himself and lied down on his stomach. The Officer patted the defendant down and discovered a large amount of cash. The defendant was arrested and handcuffed with his hands behind his back. The Officer then opened the backpack and located more cash and two plastic bags containing cocaine. The defendant's vehicle was searched and a digital scale and bag with more cash were found. Officers also located a firearm the defendant had thrown out of his vehicle during the pursuit. The defendant was indicted in federal court and made a pretrial motion to suppress the evidence on the basis that the warrantless search of his backpack and vehicle were in violation of his 4th Amendment rights. The trial court denied the motion and the defendant was convicted at trial and sentenced to 420 months.

**Discussion:** Warrantless searches are generally invalid unless they fall within one of the exceptions to the 4th Amendment's search warrant requirement. One recognized exception is the search incident to arrest which allows officers to search the arrestee's person and the area within his or her immediate control (lunge area). This type of warrantless search is reasonable under the 4th Amendment because of concerns for officer safety and the preservation of evidence. A search incident to arrest prevents an arrestee from using a weapon to harm officers and from hiding or destroying evidence. In Arizona v. Gant, 556 U.S. 332 (2009), the Supreme Court held that in the motor vehicle context a search incident to arrest is reasonable only when (1) the arrestee is unsecured and within reaching distance of the vehicle's compartment at the time of the search, or (2) when it is reasonable to believe the vehicle contains evidence related to the crime of arrest (internal citations omitted).

In this case, the Fourth Circuit extended the rationale underlying the first holding in Gant to containers and concluded that that "police officers can conduct warrantless searches of non-vehicular containers incident to a lawful arrest 'only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search'" (internal citation omitted)(emphasis added). In applying this rule to the case, the Court concluded that the warrantless search of the defendant's backpack was unreasonable because the defendant was lying face down on the ground with his hands cuffed behind his back at the time the backpack was searched. The defendant was secured and not within reaching distance of the backpack.

The Court similarly concluded that the warrantless search of the vehicle was unreasonable because the defendant was secured and not within reaching distance of the vehicle at the time it was searched. The Court further stated that it was unreasonable to believe the vehicle contained evidence related to the crimes of arrest (traffic violations, felony flee to elude and RDO). Additionally, the Court concluded that the motor vehicle exception did not justify the warrantless search of the vehicle because without the evidence obtained from the backpack (cash and two bags of cocaine), the remaining evidence officers had at the time (flight, arrest and the cash located on the defendant) was insufficient to support probable cause.

This case does not impact the ability of officers to search a person incident to arrest. While officers can still search the lunge area incident to arrest and seize items of evidence within it, they can no longer

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search any containers found within it based on the search incident to arrest rationale unless the suspect is unsecured and could reasonably access the container at the time of the search. As this is unlikely to occur when an arrestee is in handcuffs, in order to search containers officers are advised to obtain consent, a search warrant, or to perform an inventory search pursuant to policy when the arrestee is processed. Additionally, officers may search such containers when an arrestee denies ownership of the container and has abandoned the property.

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### NORTH CAROLINA COURT OF APPEALS

**Fourth Amendment/Motor Vehicle Exception/Odor of Marijuana:** [State v. Parker](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2021).

**Issue:** Was there probable cause to conduct a warrantless search of the defendant's vehicle?

**Holding:** Yes, probable cause existed to justify the warrantless search of the defendant's vehicle based on the odor of marijuana coming from the vehicle, the passenger's admission to having recently smoked marijuana and the partially smoked marijuana cigarette produced by the passenger.

**Facts:** In January 2018, a Kannapolis Police Department Officer stopped the defendant's vehicle after noticing the defendant was not wearing a seatbelt while operating it. In addition to the defendant, there was a front seat passenger in the vehicle. After approaching and requesting the defendant's license and registration, the Officer detected an odor of burnt marijuana coming from the vehicle. After additional officers arrived to assist with a search of the vehicle, the defendant was informed by the Officer that he could smell marijuana and that if the defendant turned over the contraband, he would be issued a citation for misdemeanor possession and the passenger would be released. The passenger then replied that he had recently smoked a marijuana cigarette and pulled a partially smoked joint from his sock. During the search of the vehicle two digital scales and a pill in a plastic bag were located in the center console. An "open pack of cigarillos containing a plastic bag with a green leafy substance" that the Officer believed was marijuana was located in the driver's side door compartment, along with two rock-like substances suspected to be narcotics that were found inside a cloth in the cup holder. The defendant was arrested and denied knowledge of the substances.

At trial the defendant moved to suppress the evidence arguing that the Officer lacked probable cause to search the vehicle based solely on the odor of burnt marijuana in light of North Carolina's legalization of hemp and the fact that the burnt odors of the two substances were indistinguishable. The trial court denied the motion to suppress finding that the odor of burnt marijuana plus the passenger's admission to having recently smoked marijuana justified the search. The defendant was ultimately convicted on the felony possession of controlled substances charges and admitted to his habitual felon status, receiving an active sentence of 43-64 months.

**Discussion:** On appeal the defendant challenged the denial of his motion to suppress on several grounds, including the argument that the trial court erred by failing to address the issue of the indistinguishable odors of marijuana and legalized hemp. In analyzing this challenge, the Court of

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Appeals first noted that the motor vehicle exception to the search warrant requirement allows for a search of a vehicle on a public street or public vehicular area when probable cause exists for the search (internal citation omitted). With probable cause officers are authorized to search every part of the vehicle where the object of the search could be located including the trunk. To support his argument in this case the defendant relied on a North Carolina State Bureau of Investigation (SBI) memo which discussed some of the legal issues that arose after the State legalized hemp in 2015. The SBI memo states in relevant part that:

Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant.

...

[W]hen a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp. Police narcotics K9's cannot tell the difference between hemp and marijuana because the K9's are trained to detect THC which is present in both plants. Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons. The inability for law enforcement to distinguish the difference between hemp and marijuana is problematic in all marijuana prosecutions[.]

The Court of Appeals acknowledged that the issues raised by the legalization of hemp have not yet been addressed by the appellate courts, but that prior to its legalization the courts had held that the odor of marijuana alone was sufficient to establish probable cause. The Court further stated that while the "[d]efendant's appeal raises the possibility that these holdings may need to be re-examined", it declined to answer the question of "whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle." The Court declined to do so in this case because the Officer had more than just the odor of marijuana. It concluded that here there were three pieces of evidence which supported probable cause to search the defendant's vehicle: (1) the odor of what the Officer believed to be burnt marijuana coming from the vehicle; (2) the passenger's admission he had recently smoked marijuana; and, (3) the partially smoked marijuana cigarette the passenger pulled from his sock. This combination of factors was sufficient to establish probable cause to justify the warrantless search of the defendant's vehicle.

\*Please Note: Additional information concerning odor/sight of marijuana and the "plus" factors to establish probable cause is discussed further in the Reminders section which follows.

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### REMINDERS

#### Superior Court Judge Search Warrant/Court Order Process

Officers and detectives seeking to approach, contact, or set up an appointment with a Superior Court Judge to have a search warrant or court order reviewed and signed in their presence **must** seek the approval of the Police Attorney's Office prior to contacting a Superior Court Judge or one of the Judges' assistants. This process was established by Senior Resident Superior Court Judge W. Robert Bell and it is required that all officers and detectives proceed accordingly. Please be sure to contact one of the Police Attorneys for review of your search warrant or court order.

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#### Odor/Sight of Marijuana "Plus"

Due to the legalization of hemp and hemp extract (cannabidiol (CBD)) products in North Carolina and the fact that hemp, CBD and marijuana cannot be distinguished from one another without chemical analysis, Officers will need additional evidence beyond the sight or smell of marijuana to establish probable cause (PC). Hemp and hemp extract can contain up to 0.3 % THC and 0.9% THC respectively, and our currently available testing only detects the presence of THC, not the amount. Below are some examples of additional evidence that can be used to establish PC that the substance is marijuana.

#### PC for Marijuana = Odor/Sight "Plus"

##### Examples of the "Plus" include:

- suspect statements/admissions (implied admission by lack of response to officer's statement "I smell MJ")
- suspect's behavior (evasive, nervous)
- evidence of impairment
- evidence of PWISD (packaged in corner bags)
- sprays/scents used to mask the odor of marijuana
- drug paraphernalia (but NOT CBD/hemp paraphernalia)
- suspect's prior history (arrests/convictions)
- shipments/packages – evidence of illegality of substance inside (no return address; listed recipient denies knowledge of package; knowledge that legal CBD/hemp package lacks these indicia)

Please note that additional evidence will be required for K9 hits as our dogs are also unable to distinguish between hemp, CBD and marijuana.

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