IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KEWHAN ROBEY,

Petitioner,

v.

SUPERIOR COURT OF SANTA BARBARA COUNTY,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Case No. S197735

Second Appellate District, Division Six, No. B231019
Santa Barbara County Superior Court No. 1349412
The Honorable Edward Bullard, Judge

OPENING BRIEF ON THE MERITS

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OPENING BRIEF ON THE MERITS

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

ISSUES PRESENTED

1. Could police conduct a warrantless search of a package smelling of marijuana under a "plain smell" exception to the warrant requirement?

2. Could police conduct a warrantless search of the package because the mobility of the box created exigent circumstances even after an

officer seized the package from a common carrier and held it at the police station?

INTRODUCTION

It has been over 40 years since this Court decided *People v. Marshall* (1968) 69 Cal.2d 51. It has been almost as long since the concurring opinion of Justice Mosk in *Guidi v. Superior Court* (1973) 10 Cal. 3d 1, confirmed that the sense of smell should be given "equal weight" to plain view. Yet, today the People ask the Supreme Court of California to endorse the "plain smell" exception to the warrant requirement in California.

In this case, Petitioner filed a motion to suppress evidence, which was denied by the Santa Barbara Superior Court. Petitioner filed a writ of mandate which was granted by the Court of Appeal. The People filed the instant Petition for Review with the California Supreme Court.

There is no doubt that shipments of marijuana from California to other states are increasing with the advent of "medical marijuana".[1] This increase in marijuana trafficking through the mail requires law enforcement to fortify their interdiction efforts. Acknowledgement by this Court that the "plain smell" exception to the warrant requirement exists will bolster law

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[1] The U.S. Postal Inspection Service's seizures of marijuana parcels have increased by more than 400 percent since 2007. There was an 84 percent increase in the amount of marijuana seized from 2007 to 2008 and a 180 percent increase between years 2008 and 2009. Postal Inspectors uncovered 8,453 pounds of marijuana in 2007, 15,521 pounds in 2008, and 43,403 pounds in 2009. In that same period, the total number of inspectors has remained relatively constant. Of the 3,621 parcels of marijuana intercepted by inspectors nationwide in 2009, 75 percent were in the border towns of Texas, New Mexico, Arizona, and California. *Sandholm, Marijuana Shipments Skyrocket, ABC News (March 16, 2010)*

enforcement's ability to respond to the increase in illegal marijuana transportation.[2]

STATEMENT OF THE CASE

On November 17, 2010, following a preliminary hearing in the Santa Barbara County Superior Court, Petitioner was held to answer for charges of possession of marijuana for sale (Health and Saf. Code §11359) and sale or transportation of marijuana (Health and Saf. Code §11360, subd. (a)). On January 20, 2011, the Superior Court conducted a hearing on Petitioner's motion to suppress evidence and denied that motion. On February 18, 2011, Petitioner filed a petition for writ of mandate in the Court of Appeal. On March 3, 2011, the Court of Appeal sent a letter to the Santa Barbara County District Attorney's Office, requesting that the People submit an informal opposition to the petition for writ of mandate. On April 7, 2011, the Court of Appeal issued an order to show cause. The Office of the Attorney General submitted an amicus curiae brief and the matter was heard on August 18, 2011.

The Court of Appeal issued a published decision on October 24, 2011. The decision failed to properly follow prevailing state and federal case law; e.g., *United States v. Place* (1983) 462 U.S. 696; *People v. McKinnon* (1972) 7 Cal. 3d 899; *People v. Gale* (1973) 9 Cal. 3d 788; *Chambers v. Maroney* (1970) 399 U.S. 42; and *Carroll v. United States*, (1925) 267 U.S. 132. The published decision of the Court of Appeal contradicted treatises, and misconstrued other California case law.

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[2] In 2006, the California Department of Justice reported that the Campaign Against Marijuana Planting (CAMP) resulted in the seizure of 1,675,681 marijuana plants in California, worth an estimated $6.7 billion dollars. There has been a steady and rapid increase in seizures since 1996 (approximately 100,000 plants seized).

SUMMARY OF ARGUMENT

The Court of Appeal erred in finding that the "plain smell" doctrine does not exist. The Court of Appeal's interpretation of prior decisional authority in California was in error. The Court of Appeal's interpretation of *Guidi v. Superior Court* (1973) 10 Cal.3d 1 and *People v. Marshall* (1968) 69 Cal.2d 51, that the California Supreme Court has rejected the "plain smell" exception to the warrant requirement is incorrect. The *Marshall* Court held that a warrantless search on the basis of odor alone was unconstitutional, and that "plain smell" is not equivalent to "plain view." (*People v. Marshall, supra,* 69 Cal.2d at p. 59.) However, in *People v. Gale*, the California Supreme Court concluded when an officer smelled marijuana from a vehicle, that law enforcement officer has "probable cause to believe...that contraband may be present." (*People v. Gale*, (1973) 9 Cal. 3d 788, 794).

The Court held that when the marijuana was located "...in an automobile parked in a public lot - unlocked, accessible, and readily movable - the same probable cause would have justified the subsequent search of each vehicle under the rationale of *Carroll v. United States*, 267 U.S. 132 69 L.Ed. 543, 45 S.Ct. 280, 39 A.L.R. 790, and its progeny." *Ibid.* The *Gale* case is significant in that it provides a close analogy to the instant case as to a highly mobile object, in a public location, containing a narcotic that is readily sensed with smell. When the holding of *Gale* is combined with *Chambers v. Maroney* (1970) 399 U.S. 42, 52, it reveals that law enforcement may search the mobile object either at the scene or at the police station. Neither location matters for a Fourth Amendment analysis.

The Court of Appeal also misapplied the rationale of *People v. McKinnon* (1972) 7 Cal. 3d 899, which does not require a search warrant when a package is highly mobile. Prevailing case law holds that where law

enforcement detects narcotics by smell from a highly mobile object, law enforcement may seize and search the object. The key to this line of cases is the interaction of the detection of the narcotic via the senses combined with its placement in a highly mobile object. The Court of Appeal failed to apply the rationale of *People v. McKinnon* in this case. The Petitioner contends that *People v. McKinnon* does not require a search warrant, contrary to the decision issued by the Court of Appeal. The *McKinnon* Court expressly holds that a warrant is not required to search a package where probable cause exists. (*Ibid* at 916-917).

ARGUMENT

I. A WARRANTLESS SEARCH IS LEGAL UNDER THE PLAIN SMELL DOCTRINE.

A. Expectation of Privacy

A threshold issue to any search and search analysis is whether the defendant had a subjective expectation of privacy in the item and that there was an objective right to privacy that society is prepared to accept. "The legitimacy of the expectation of privacy is determined under the totality of the circumstances." (*People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1239.) A defendant bears the burden of proving a legitimate expectation of privacy. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 104; *People v. Roybal* (1988) 19 Cal.4th 481 at p. 507; *People v. Tolliver*, *supra*, at p. 1239.)

"Whether the defendant had a legitimate expectation of privacy is subject to a two-part test: (1) did the defendant manifest a subjective expectation of privacy in the object of the search? and (2) is society willing to recognize the expectation of privacy as legitimate? (*California v. Ciraolo* (1986) 476 U.S. 207, 211.)" (*People v. Tolliver*, *supra*, 160 Cal.App.4th at p. 1239.) In other words, the defendant's subjective

expectation of privacy must be objectively reasonable under the circumstances. (*Smith v. Maryland* (1979) 442 U.S. 735, 740.)

The courts have specifically rejected several theories advanced to broaden the legitimate expectation of privacy of defendants whose personal rights have not been violated by police conduct. For example, a defendant does not gain an expectation of privacy simply because he or she is charged with possession of the property sought to be suppressed. (*United States v. Salvucci* (1980) 448 U.S. 83, 85; see also, *People v. Ooley* (1985) 169 Cal.App.3d 197, 202; *People v. Root* (1985) 172 Cal.App.3d 774, 778-779.) Even the defendant's ownership of the property itself is insufficient to create a legitimate expectation of privacy. (*United States v. Salvucci, supra.*)

In this case, the Petitioner voluntarily decided to use Federal Express to ship marijuana. Petitioner knew or should have known that Federal Express has a policy against shipping marijuana. Petitioner also knew or should have known that Federal Express has a policy which allows the company to open any an all packages received. Petitioner also used a false name and address when he shipped the package. Lastly, the marijuana was so poorly packaged that anyone who came within several feet of the package could smell the contents of the package.

Using a fake name and address when consigning a package, that reeks of marijuana, to Federal Express for shipment has a lower level of privacy protection than a dwelling, vehicle or even a piece of luggage. The United States Supreme Court in *United States v. Johns* (1985) 469 U.S. 478, held that, "[w]e have previously held that certain containers may not support a reasonable expectation of privacy because their contents can be inferred from their outward appearance [citations omitted], and based on this rationale the Fourth Circuit has held that 'plain odor' may justify a warrantless search of a container."

It has long been settled, that "a warrantless search and seizure involving abandoned property is not unlawful, because a person has no reasonable expectation of privacy in such property. [Citations.]" (*People v. Parson* (2009) 44 Cal.4th 332, 345 (*Parson*); see also, *People v. Pereira* (2007) 150 Cal.App.4th 1106, 1112; *People v. Daggs* (2005) 133 Cal.App.4th 361, 365 (*Daggs*). "Case law establishes that abandonment is primarily a question of the defendant's intent, as determined by objective factors such as the defendant's words and actions. (*Parson*, *supra*, 44 Cal.4th at p. 347. "The appropriate test is whether defendant's words or actions would cause a reasonable person in the searching officer's position to believe that the property was abandoned." (*People v. Pereira*, *supra*, 150 Cal.App.4th at p. 1113, citing *Daggs*, *supra*, 133 Cal.App.4th at pp. 365-366.) As discussed above, Petitioner's actions of using a false name and address indicate that he abandoned his interest in the property.

Therefore, Petitioner had no subject expectation of privacy which society should recognize as legitimate. In other words, shipping a pound of marijuana, in a package that reeks of marijuana, out of state, using a false name and address, is not a privacy interest society should conclude is legitimate.

B. Plain Smell Rationale

The Court of Appeal decision that "to smell it is not the same as to see it" (COA Decision p. 1), thereby negating the "plain smell" doctrine, is contrary to many treatises and other court rulings. In fact, there is no logical basis to conclude that an officer's sense of smell provides any less basis for probable cause than his or her sight. Logically, "plain smell" is an exception to the warrant requirement under the Fourth Amendment akin to plain view. Moreover, the United States Supreme Court has expanded

plain view to include "plain feel" in *Minnesota v. Dickerson* (1993) 508 U.S. 366 and "plain hearing" in *Hoffa v. United States* (1966) 385 U.S. 293.

In the California Judges Benchbook Search and Seizure, 2nd edition 2002 (CEB), Published by Judicial Counsel of California, "Plain Smell" is listed under the heading of plain view, Section 5.13. In the benchbook guide, it simply states, "plain view principles apply by analogy to other senses other, such as: Plain smell ..." The bench guide then goes on to list several of the authorities Petitioner has likewise submitted to the Court. Yet, the Second District Court of Appeal states their reluctance to find a "plain smell" in this case noting, "[w]e recognize that a number of exceptions exist, but we are wary of creating another one under the facts of this case." (COA Decision p. 7)

One issue is whether "plain smell" is as accurate as plain view. To that end, the ability of human beings to smell marijuana through plastic has been scientifically studied. A scientific study was conducted using the University of Pennsylvania Smell Identification Test (UPSIT). University researchers were able to demonstrate that the odor arising from 2.5 kg of processed marijuana was clearly discernable to the average human through a tightly sealed garbage bag sniffed at close range. [3] Thus, the question is confirmed that the officers involved in this case could detect and smell marijuana accurately under circumstances such as those presented here.

There is no reason to consider this detection of odor by law enforcement any less accurate than the observation of seeing a white powdery substance contained in plastic baggies which are in plain view. While an officer may make a mistake in identifying the odor of marijuana, he or she is also vulnerable to misidentifying baking soda as cocaine, for

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[3] *Doty, Marijuana Odor Perception: Studies Modeled From Probable Cause Cases, Law and Human Behavior, Vol. 28, No. 2 (April 2004)*

example. Yet, the possible of such a mistake does not render the plain view doctrine invalid. Thus, there is no logical reason to doubt an officer's testimony that he or she smelled something that smelled like marijuana, if the courts are willing to accept that officer can testify that he or she saw something that looked like cocaine.

The courts have long held that a canine sniff of a package is not a violation of the Fourth Amendment and provides probable cause. (*United States v. Place* (1983) 462 U.S. 696; *Illinois v. Caballes* (2005) 543 U.S. 405.) There is also no reason for distinguishing between the reliability of a dog and the ability of a trained police officer. While the dog has more advanced ability to detect remote or subtle smells such as those arising from something hidden in automobile trunks, in some cases, such as the case at bar, the human nose can be just as accurate when a large amount of the pungent narcotic is placed right under the human nose.

The "plain smell" doctrine has been upheld in many courts throughout the United States. In 2008, the Virginia's Court of Appeals permitted a search based on the smell of raw marijuana, saying: "As many courts have held, if an officer smells the odor of marijuana in circumstances where the officer can localize its source to a person, the officer has probable cause to believe that the person has committed or is committing the crime of possession of marijuana." *Bunch v. Virginia* (2008) 51 Va. App. 491, 496, 658 S.E.2d 724 (approvingly quoting *United States. v. Humphries* (4th Cir. 2004) 372 F.3d 653, 660, *Humphries* substantially relies on *United States v. Scheetz* (4th Cir. 2002) 293 F.3d 175. In turn, *Scheetz* relies heavily on the Tenth Circuit decision in *United States v. Morin* (10th Cir. 1991) 949 F.2d 297.

The court in *Morin* held that, "[t]his court has long recognized that marijuana has a distinct smell and that the odor of marijuana alone can satisfy the probable cause requirement to search a vehicle or baggage.

United States v. Merryman (10th Cir. 1980) 630 F.2d 780, 785; *United States v. Sperow* (10th Cir. 1977) 551 F.2d 808, 811 *cert. de*nied, 431 U.S. 930, 53 L. Ed. 2d 245 , 97 S. Ct. 2634 (1977); *United States v. Bowman* (10th Cir. 1973) 487 F.2d 1229, 1231" (*Morin*, 949 F.2d at 300).

In *Bowman*, the court held, "[i]n our disposition of this issue, we do not write on a clean judicial slate. It is well settled within the Ninth Circuit that smell alone is sufficient to constitute probable cause for a subsequent search for marijuana. *United States v. Barron* (9th Cir. 1973) 472 F.2d 1215, *cert. den.*, 413 U.S. 920, 93 S. Ct. 3063, 37 L. Ed. 2d 1041 (1973); *United States v. Campos* (9th Cir. 1972) 471 F.2d 296; *Fernandez v. United States* (9th Cir. 1963), 321 F.2d 283." *Bowman*, 487 F.2d at 1230.

In other words, in some cases the odor is so obvious that it does not take a trained dog to identify the smell. Whether contraband is in "plain view", "plain feel," or "plain smell," the rationale is the same. If an officer is in a place where he or she is lawfully entitled to be and immediately recognizes contraband through one of his or her senses and seizes it there is no violation of the Fourth Amendment.

While the Court of Appeal relied heavily on the *Marshall* case, it does not have much application to the present case. The *Marshall* case dealt with a residential entry and search, not the seizure of a package consigned to a third party business for shipment. Also, as *Witkin* points out, the applicable portion of *Marshall* has been overruled by *People v. Cook* (1975) 13 Cal.3d 663 at p. 668, fn. 4. (4 Witkin & Epstein, Cal. Criminal Law (3d Ed. 2000) Illegally Obtained Evidence § 286, pp. 947-950 & *id.* (2010 supp.) p. 308 [noting *Marshall* has been repudiated and citing several treatises providing that warrantless search based on odor of narcotics is constitutional].)

Further, *Guidi* is not precedent rejecting the "plain smell" doctrine. Rather, *Guidi* constitutes precedent which effectively overrules *Marshall*,

since a majority of the Court (three Justices plus Justice Mosk) agreed with that part of Justice Mosk's concurring opinion stating that smell has "equal weight" as sight in determining probable cause to search and seize. (*Guidi v. Superior Court, supra,* 10 Cal.3d at p. 20)

> All the majority of the sharply divided court permitted in *Marshall* was that 'officers may rely on their sense of smell to confirm their observation of already visible contraband... It was that unreasonable restriction which I decried in my dissent... I insisted then, and continue to believe, that the sense of smell, and indeed all the senses, may be employed, not merely in confirmation of what is already visible, but in equal weight with the sense of sight in the determination of probable cause to search and seize. For illustrations that demonstrate the impracticality of limiting valid discovery of evidence to that which is seen, or to the use of other senses merely in corroboration of what is already known or visible... (*Guidi v. Superior Court* (1973) 10 Cal.3d 1, 20).

Therefore, the result in *Guidi* was a *pro tanto* overruling of *Marshall* as to the particular issue. In fact, Westlaw Next indicates in its heading summary that *Marshall* was overruled by *Guidi.* [4]

The Court of Appeal decision invited this Court to rule on the issue of "plain smell" by stating "Does the passage of 43 years since Marshall was decided warrant (pardon the expression) reconsideration of Mosk's view?" (COA Decision p. 6) The decision went even further by suggesting that the logic of the People's argument was sound, but the Court of Appeal was restrained by precedent:

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[4] "Seizure of bag containing hashish as evidence of the offense of offering hashish for sale was constitutionally reasonable where the bag had been described by informer in advance to the arresting officers, where the bag, when seen in plain view in kitchen, considering the way it was neatly folded, discounted its use as a trash bag, and where officer also detected an odor of hashish which was strongest near the bag; overruling *People v. Marshall*, 69 Cal.2d 51, 69 Cal.Rptr. 585, 442 P.2d 665."

> The People argue that no distinction exists between something that is apparent to the sense of smell and something that is apparent to the sense of sight. We comprehend the logic of the argument. But we cannot hold the seizure proper. Our Supreme Court has not endorsed this view when probable cause is based on odor alone. (COA Decision p. 5)

As another Court of Appeal succinctly noted, "*Marshall* does not state a rule applicable to the use of smell in determining probable cause to believe a crime has been committed or contraband is present. (*People v. Christensen* (1969) 2 Cal. App. 3d 546, 548-49)." The Court of Appeal's reliance on *Marshall* and its holding is misplaced in denying that odor could be a basis for probable cause and a search of the package.

The Court of Appeal also relied upon dicta from *People v. Pereira* (2007) 150 Cal. App. 4th 1106. *Pereira* involved the abandonment of property and standing to claim it in a motion to suppress. The Court necessarily relied on dicta because the only question presented in *Pereira* was whether the package, containing a false name and address, was abandoned. There was no discussion of probable cause in the Court's analysis in *Pereira* because that was not the issue in that case. There is nothing in *Pereira* that stands for the proposition that probable cause is no longer a valid exception to a warrantless search. The circumstances known to the officer when the search was conducted would certainly include the suspicious nature of the transaction as well as the undeniable odor of marijuana emanating from the package.

The People contend that the Court of Appeal failed to account for critical facts of this case: the smell of marijuana emanating from a mobile object, i.e. a package. The "plain view" doctrine, as applied **to containers**, has been held applicable to "plain smell" situations, justifying a warrantless search where the incriminating odor is attributed to a container. (3 *LaFave*,

Search & Seizure, § 5.5(f), (4th ed.) p. 253.). The United States Supreme Court has recognized the "plain smell" doctrine in *United States v. Place* (1983) 462 U.S. 696. Numerous courts have held that the strong odor of marijuana is sufficient to establish probable cause to search. (*United States v. Johns* (1985) 469 U.S. 478, 482; *People v. Gale* (1973) 9 Cal.3d 788.) This is true whether the odor is of fresh marijuana or burnt marijuana. (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 273-274.)

Therefore, based upon odor alone, an officer may conduct an immediate search of an automobile from which the odor is emitting or conduct a search incident to an arrest of persons associated with the odor. Several federal courts have held that a warrantless search of a container is lawful based solely on the fact the container has a strong smell of marijuana. *United States v. Angelos* (10th Cir. 2006) 433 F.3d 738, 747, held that plain smell doctrine is "simply a logical extension" of the plain view doctrine. The Court of Appeal failed to follow a long line of federal case law as to the "plain smell" rule under federal law as required by Proposition 8.

Since adoption of Proposition 8, defendant's right to object to seized evidence is controlled by federal law. (*In re Rudy F.* (2004) 117 Cal.App.4th 1124.) There are a number of federal cases holding that probable cause to conduct a warrantless search can be based on the officers' observations of smell. (E.g., *United States v. Angelos* (10th Cir. 2006) 433 F.3d 738, 747 [upholding search and seizure based on smell of marijuana and evident residue on duffle bags]; *United States v. Clayton* (8th Cir. 2000) 210 F.3d 841, 845 [noting that officer executing arrest warrant "quickly developed probable cause for a search based on his immediate perception of an odor associated with methamphetamine production"]; *United States v. Haley* (4th Cir. 1982) 669 F.2d 201, 203 [holding that the odor emanating from a

container in an automobile may justify invocation of the "plain view" doctrine] as cited in the Court of Appeal decision.)

In the face of this widespread authority, the Court of Appeal noted that these cases were "distinguishable" and therefore not authoritative. The Court of Appeal, though, declined to state with any detail in what meaningful manner any of these cases were distinguishable from the instant case, or the case of *People v. Christensen* (1969) 2 Cal.App.3d 546, 548-549, which is still good law. The People disagree that these federal cases were in direct opposition to California law as the Court of Appeal's decision suggests. However, if they were in opposition, the court would have been obligated to follow the federal standard: "Federal constitutional standards govern review of issues related to the suppression of evidence seized by the police. (*People v. Racklin* (2011) 195 Cal.App.4th 872.)

In rejecting the Petitioner's position, the Court of Appeal misapplied the holding in *Guidi v. Superior Court* (1973) 10 Cal.3d 1. Chief Justice Wright wrote the main opinion which was joined by two other justices, holding that under the "particular circumstances" of that case, an officer's seizure of a bag was reasonable. In a footnote, Chief Justice Wright "emphasized" that the odor of contraband corroborated prior information, and stated that:

> We do not here hold that only the smell of contraband and nothing more would justify seizing a supposed container of the contraband, nor do we mean to accord "plain smell" a place in Fourth Amendment doctrine equivalent to that occupied by "plain sight." We recognize that the scent of contraband within a residence may well provide, of itself, probable cause to search, and when conjoined with exigent circumstances may justify a warrantless search for and seizure of that

> contraband. *Guidi v. Superior Court* (1973) 10 Cal.3d 1, p. 17, fn. 18.)

Footnote 18 of Chief Justice Wright's opinion is not binding precedent. Only a total of three Justices, including the Chief Justice, concurred in Chief Justice Wright's Opinion. Indeed, a majority of the Justices specifically disagreed with footnote 18's language that the smell of contraband alone could not justify a warrantless search of a container. Justice Mosk wrote a separate concurring opinion, joined by three other Justices, criticizing footnote 18 (*Id.* at pp. 19-20 [conc. opn. of Mosk, J.]) and stating, in relevant part:

> I insisted then, and continue to believe, that the sense of smell, and indeed all the senses, may be employed, not merely in confirmation of what is already visible, but in equal weight with the sense of sight in the determination of probable cause to search and seize. (*Ibid.* at p. 20.)

Accordingly, under the authorities set forth above, law enforcement may conduct a warrantless search based solely on the plain smell, in the absence of any exigent circumstances. In this case, the officers were dispatched to the location based on a citizen complaint and had a lawful right to be at the location when the "plain view" observation was made by law enforcement. It is clear that a citizen (a Federal Express employee) conducted the initial seizure and removed the package from the "shipping line." Once the police arrive, the long standing doctrine that an observation of contraband in plain view provides probable cause to arrest applies.

There is no logical distinction between something being apparent to the sense of smell and something apparent to the sense of sight or the sense of hearing. (*People v. Mayberry* (1982) 31 Cal.3d 335; *People v. Bock Leung Chew* (1956) 142 Cal.App.2d 400.) The plain smell of contraband

by an experienced officer supplies at least reasonable cause to suspect a crime, if not probable cause to arrest or search. (*People v. Duncan* (1986) 42 Cal.3d 91, 101-104; *People v. Shandloff* (1985) 170 Cal.App.3d 372, 381; *People v. Divito* (1984) 152 Cal.App.3d 11, 14.) "If the presence of odors is testified to before [the court and it] finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character." (*Johnson v. United States* (1948) 333 U.S. 10; *People v. Benjamin* (1999) 77 Cal.App.4th 264, 273.)

In this case, there is no doubt that every one who came into contact with the package could smell the marijuana inside. Federal Express employee Her and Officer Totorica both noticed the smell of marijuana from the package when it was at the Federal Express office. Lieutenant Haley also noticed the smell of marijuana coming from the package when it was taken to the police station. Officer Totorica and Lieutenant Haley both had training and experience in identifying marijuana and were familiar with its odor. Thus, the warrantless search in this case was constitutional under the "plain smell" doctrine. Officer Totorica's warrantless search of Petitioner's package that was left for shipment with Federal Express was based upon the fact that that package had a strong odor of marijuana, and other investigative techniques such as the invalid name, address and telephone number listed on the Federal Express receipt.

In conclusion, the People contend that in 2012, the odor of marijuana is so distinct and common that the plain smell of marijuana is as reliable as the plain view of marijuana. The ongoing battle against criminals that grow marijuana in California and ship it out of state through common carriers warrants that the California Supreme Court clarify whether law

enforcement may seize and search a package turned over to a common carrier which plainly smells of a specific controlled substance.

II. THE MOBILE NATURE OF A PACKAGE JUSTIFIES THE SEIZURE AND SEARCH OF A PACKAGE THAT PROBABLE CAUSE SHOWS MAY CONTAIN A CONROLLED SUBSTANCE.

Law enforcement acted appropriately under the law, in seizing a package with the smell of marijuana emanating from a common carrier. *McKinnon* states that "when the police have probable cause to believe a chattel consigned to a common carrier contains contraband, they must be entitled either (1) to search it without a warrant or (2) to 'seize' and hold it until they can obtain a warrant; absent these remedies, the chattel will be shipped out of the jurisdiction or claimed by its owner or by the consignee."

People v. McKinnon (1972) 7 Cal. 3d 899 is stood good law when read in conjunction with other preceding authority. It has not been overruled by *People v. Yackee* (1984) 161 Cal. App.3d 843 or *United States v. Jacobson* (1984) 466 U.S. 109. In fact, those decisions support the People's position in this case. In *People v. Yackee,* the court held that an airline employee's search of a suitcase and uncovering of a suspicious baggie, which lead to a police seizure, was legal.

A box consigned to a common carrier for shipment to another destination is a "thing readily moved" and not a "fixed piece of property." To be sure, such a box has neither wheels nor motive power, but these features of an automobile are legally relevant only insofar as they make it movable despite its dimensions. A box, which is a fraction of the size and weight of an automobile, is movable without such appurtenances. It is also true that a box or trunk, as distinguished from an automobile, may serve the double purpose of both storing goods and packaging them for shipment.

But whenever such a box is consigned to a common carrier, there can be no doubt that it is intended, in fact, to be moved

Law enforcement relied on *McKinnon* and complied with its mandates by searching the item once they had probable cause to believe marijuana was located inside the package. The search was even less intrusive than the extensive manipulation of the package permitted by *Jacobsen.* The court in *Yackee and Jacobsen* both concluded that the trial court did not abuse its discretion in denying defendant's motion to suppress. Therefore, *People v. McKinnon, supra,* is still good law and has been followed by numerous courts.

In its decision, the Court of Appeal cited *McKinnon* to hold that a search warrant was required. Ironically, this portion of the *People v. McKinnon, supra*, holds the exact opposite, that packages may be search where probable cause exists. In this case, the probable cause that existed was the plain and obvious smell of marijuana emanating from the box that was about to be shipped by common carrier.

After the Federal Express employee advised the seizing officer that Federal Express could not deliver the package, exigent circumstances required the seizure of the package without a warrant due to the inherent dangerousness and mobility of the controlled substance. The existence of an emergency requiring quick action by police excuses the Fourth Amendment warrant requirement. (*Brigham City v. Stuart* (2006) 547 U.S. 398; *People v. Rogers* (2009) 46 Cal.4th 1136; and *People v. Panah* (2005) 35 Cal. 4th 395.) "Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose." (*People v. Roberts* (1956) 47 Cal.2d 374, 377.)

Of course, officers may also seize any evidence seen in plain view during the course of their legitimate emergency activities. (*Mincey v. Arizona* (1978) 437 U.S. 385, 393; *People v. Rogers*, *supra*, 46 Cal.4th at p. 1157.) "Generally, a court will find a warrantless entry justified if the facts available to the officer at the moment of entry would cause a person of reasonable caution to believe that the action taken was appropriate." (*People v. Rogers*, *supra*, 46 Cal.4th at p. 1157.)

The exigent circumstances exception has been applied to justify many warrantless searches under a variety of fact patterns; for example, to retrieve a handgun lying unattended in a side yard (*People v. Chavez* (2008) 161 Cal. App. 4th 1493, 1503), or protect individuals from a suspected PCP lab. (*People v. Patterson* (1979) 94 Cal.App.3d 456, 463-466.)

The Court of Appeal decision all but concedes that law enforcement had probable cause to search the package at the Federal Express location. (COA Decision p. 4) However, the Court of Appeal's logic is that by moving the package to a police station, the officers somehow lost probable cause to search the package. The ruling of Court of Appeal allows for two options in this case: (1) immediately open the package containing narcotics in the field; or (2) seize the package, obtain a warrant (to confirm what they know by smell is marijuana) and then open it at a secure location. This rule creates an illogical incentive to open the package containing controlled substances in public rather than within the controlled confines of a police station. The Court of Appeal's holding is contrary to binding United States Supreme Court authority under *United States. v. Johns* (1985) 469 U.S. 478.

The United States Supreme Court held in *U.S. v. Johns, supra,* that a warrantless search of a package three days after seizure did not constitute an unreasonable search and seizure. In *Johns*, United States Customs Agents stopped trucks loaded with packages that smelled of marijuana.

The packages inside the trucks were packaged in green plastic and sealed with tape. The federal government seized the packages and the trucks and transported them to DEA holding facility. Three days later, without a warrant, DEA agents opened the packages and took samples of the marijuana. (*U.S. v. Johns* 469 U.S. 478, 480-481.) On these facts the United States Supreme Court stated, "Inasmuch as the Government was entitled to seize the packages and could have searched them immediately without a warrant, we conclude that the warrantless search three days after the packages were placed in the DEA warehouse was reasonable and consistent with our precedent involving searches of impounded vehicles. (*United States v. Johns*, 469 U.S. 478, 487-88).

Here, the fact Petitioner's package was very mobile and potentially valuable (as it contained a controlled substance) created exigent circumstances for the officers to remove the package from the Federal Express office. Therefore, law enforcement was allowed to seize and search the package based on the probable cause acquired by law enforcement. The probable cause consisted of the statement of witnesses that marijuana was believed to be inside the package, the odor observed by multiple officers and the inaccurate information contained on the Federal Express shipping label.

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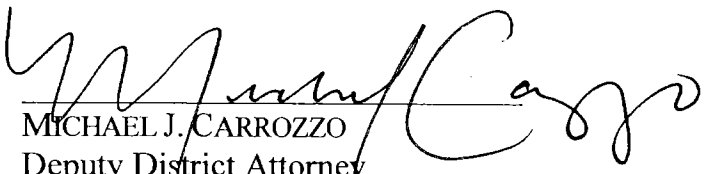
CONCLUSION

For the foregoing reasons, the People respectfully request that the decision of the Court of Appeal be reversed.

Dated: February 12, 2012

Respectfully submitted,

JOYCE E. DUDLEY
District Attorney of Santa Barbara



MICHAEL J. CARROZZO
Deputy District Attorney
Attorneys for Real Party in Interest

CERTIFICATE OF COMPLIANCE

I certify that the attached the OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 6,428 words.

Dated: February 12, 2012

Respectfully submitted,

JOYCE E. DUDLEY
District Attorney of Santa Barbara

MICHAEL J. CARROZZO
Deputy District Attorney
Attorneys for Real Party in Interest

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA BARBARA)

PEOPLE v. KEWHAN ROBEY

Case No. S197735

I am a citizen of the United States and a resident of Santa Barbara County, California. I am over the age of eighteen years, and not a party to the above-entitled action. My business address is the Office of the District Attorney, 1112 Santa Barbara Street, Santa Barbara, CA 93101, telephone: (805) 568-2399.

On FEBRUARY 13, 2012, I served a true copy of the attached OPENING BRIEF ON THE MERITS on the following, by method(s) indicated below:

☐ **BY PERSONAL SERVICE:** By hand delivering a true copy thereof, at his office with his clerk therein or the person having charge thereof, at the address indicated below:

☒ **BY FIRST CLASS MAIL:** By placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the U.S. Post Office Box addressed as indicated below:

Patty Dark
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Santa Maria, CA 93454

Superior Court
Honorable Edward Bullard
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Santa Maria, CA 93454

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Los Angeles, CA 90012

Court of Appeals
Second District
200 East Santa Clara
Ventura, CA 93001

☐ **BY FACSIMILE TRANSMISSION:** By faxing a true copy thereof to the recipient at the facsimile number indicated below:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Santa Barbara, California.

FEBRUARY 13, 2012

Donna Crawford