NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

 SUPERIOR COURT DIVISON

COUNTY OF XXXXX FILE NO: 19CRS XXXX

STATE OF NORTH CAROLINA )

 ) MOTION IN LIMINE TO EXCLUDE

 vs. ) STATE’S EXPERT TESTIMONY

 )

DEFENDANT, )

 DEFENDANT. )

 )

NOW COMES the Accused, through counsel, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 19, 23, and 24 of the Constitution of North Carolina, and N.C. Gen. Stat. §8C-1, Rules 403 and 702, and *State v. McGrady*, 368 N.C. 880 (2016), and moves this Honorable Court to exclude the opinion testimony of OFFICER regarding the nature of the substance taken from the Accused as this testimony is based upon a method of identification which no longer meets the requirements of expert testimony since the enactment of N.C. Gen. Stat. 106-568.50 *et seq*. In support of this Motion, the Accused shows unto this Honorable Court as follows:

FACTS

1. The Accused is charged possession of a controlled substance.
2. During the course of a routine traffic stop, Officer smelled/saw a substance that had the odor/appearance of marijuana.
3. On the basis of this discovery, Officer conducted a search of the vehicle. In the course of the search, Officer found what he believed to be controlled substance and other items.
4. The Accused was charged with possession of a controlled substance based upon evidence uncovered during the search.

BACKGROUND KNOWLEDGE OF HEMP LEGALIZATION

 N.C. Gen. Stat 106-568.50 *et seq*. legalized the production of industrial hemp. Under the direction of the North Carolina Industrial Hemp Commission, industrial hemp, a strain of the species Cannabis sativa defined by N.C. Gen Stat 106-568.51(7), can now be legally grown and sold by licensed parties. N.C.G.S § 90-87(16) excludes industrial hemp from the definition of marijuana, which remains a controlled substance.

 The species Cannabis sativa includes both hemp and marijuana. As such, both contain the chemicals THC (delta-9 tetrahydrocannabinol, the primary psychoactive compound in marijuana) and CBD (cannabidiol, a non-psychoactive substance which has been linked to health benefits. *See generally* State Bureau of Investigations, *Industrial Hemp/CBD Issues* at 2, <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf> (hereafter known as *Industrial Hemp/CBD Issues*). The difference between hemp, which can be legally possessed and purchased, and marijuana, which remains a controlled substance under North Carolina law, is the differing amounts of CBD and THC in the plant. *See* N.C.G.S § 106-568.51(7).While marijuana typically has typically lower amounts of CBD and higher amounts of the psychoactive THC, hemp has low amounts of THC and typically higher amounts of CBD. *See* Ernest Small et al., *Hemp: A New Crop with New Uses for North America*, *in* Trends in New Crops and New Uses 284, (J. Janick & A. Whipkey eds., 2002), <https://www.hort.purdue.edu/newcrop/ncnu02/v5-284.html> (noting the common inverse relationship between amounts of THC and CBD in Cannabis). The NC Department of Agriculture routinely inspects licensed industrial hemp growers to ensure that the THC amount is within acceptable limitations (less than 0.3% of the sample’s dry weight, compared to 3-15% for traditional marijuana). *See* North Carolina Department of Agricultural & Consumer Services, *Industrial Hemp Pilot Program in North Carolina: Frequently Asked Questions*, at <https://www.ncagr.gov/hemp/FAQs.htm> (hereafter known as *Industrial Hemp Pilot Program in North Carolina: Frequently Asked Questions*).

 The only way to determine if a substance is hemp or marijuana is by testing the chemical composition to measure the THC level. *See Industrial Hemp Pilot Program in North Carolina: Frequently Asked Questions* (noting that “short of chemical analysis of the THC content, there was no way to distinguish between marijuana and hemp varieties”). There is currently no field test in North Carolina which can differentiate between hemp and marijuana, and the State Crime Lab lacks the ability to conduct this type of analysis for quantified levels of THC. *See* *Industrial Hemp/CBD Issues* at 2. As acknowledged in *Industrial Hemp/CBD Issues*, this situation creates problems for law enforcement officials attempting to enforce current restrictions on the possession, sale, and distribution of marijuana.

ARGUMENT

 To be admissible as expert testimony, each prong of Rule 702(a) must be satisfied. In *State v. McGrady*, 368 N.C. 880, 889 (2016), North Carolina adopted the more stringent *Daubert* standard to evaluate the admission of expert testimony. Here, the opinion of the arresting officer fails all three prongs as well as the general requirements of Rule 702 established through case law. In *State v. Fletcher*, 92 N.C. App. 50, 57 (1988), the Court of Appeals held that police officers, “because of their study and experience, were better qualified than the jury to form an opinion as the contents of [a] clear plastic bag” which was found to contain marijuana. North Carolina’s adoption of the *Daubert* standard, the update of Rule 702(a) and the legalization of industrial hemp under N.C.G.S. 106-568.*50* *et seq*. make any testimony of a police officer identifying a substance as marijuana based upon sight or smell inadmissible as it fails to meet Rule 702(a) standards, as explained in further detail below.

 Rule 702(a) first requires that opinion testimony be relevant. In order to be admissible, there must be “scientific, technical, or other specialized knowledge” which can assist the trier of fact. N.C.G.S. § 8C-1, Rule 702(a). For the specific variety of hemp which grows leaves and buds that resemble marijuana, “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.” *Industrial Hemp/CBD Issues* at 1. There is currently no test which can be used by an officer in the field to determine if the substance she discovered was lawfully purchased industrial hemp, or a controlled substance. *See id*. Since there is no way to identify whether the substance is marijuana or legal hemp, the arresting officer cannot have knowledge which will assist the trier of fact in determining the substance in question.

Rule 702(a)(1) stipulates that “[t]estimony must be based on facts or data.” Once again, the issue becomes clear when examining the SBI’s warning to law enforcement officials that “[n]ot being able to distinguish between hemp and marijuana defeats the previous basis for probable cause to seize items believed to be marijuana.” *Id*. at 2. There is no set of facts or data currently available to law enforcement in the field which will allow the positive identification of marijuana as opposed to legal hemp. *See Id*.; *see Industrial Hemp Pilot Program in North Carolina: Frequently Asked Questions*. Police K9’s cannot distinguish between hemp and marijuana as both contain THC, the compound K9’s are trained to detect. *See Industrial Hemp/CBD Issues* at 2. Without facts or data to differentiate between hemp and marijuana, no amount of experience or expertise can satisfy the requirement of Rule 702(a)(1).

Rule 702(a)(2) requires that “[t]he testimony is the product of reliable principles and methods.” While it has long been established that police officers in North Carolina can visually identify marijuana under *State v. Fletcher*, 368 N.C. App. at 57, this precedent can no longer be logically applied due to the legalization of hemp. As noted above and in the SBI memo, there is no way to distinguish marijuana from hemp without a chemical analysis, no matter the amount of experience or knowledge of the officer. *See Industrial Hemp/CBD Issues*. Since the adoption of N.C.G.S. 106-568.50 *et seq*., there are no longer any “reliable principles and methods” which the testimony of an officer identifying marijuana by odor or appearance can be based upon. There are no sensory methods which distinguish hemp and marijuana. *See Id*. This eliminates the notion that experience as a police officer is sufficient “skill, experience, training, or education” upon which an expert opinion can be based. As noted above, K9 units, previously able to differentiate legal substances from controlled substances, have no ability to detect the amount of THC in the plant and therefore cannot distinguish between legal hemp and marijuana. *See Id*. at 2. Even the NC State Crime Laboratory is unable to distinguish industrial hemp from marijuana at this time. *See Id*.

Finally, Rule 702(a)(3) demands “[t]he witness has applied the principles and methods reliably to the facts of the case.” Because there are no reliable principles and methods for an officer to apply, it is not possible for the officer to apply the methods reliably in the instant case. The mere odor or appearance of a substance resembling marijuana is not enough to demonstrate any illegal conduct. *See Industrial Hemp/CBD Issues*. Similar methods of ingestion, such as use of rolling papers and pipes, are used to ingest both substances, so presence of these paraphernalia items are similarly not indicative that the substance is a controlled substance. *See Id*. at 1.

Rule 401 and Rule 402 require evidence to be relevant, meaning it “[has] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Here, testimony from the arresting officer indicating that a substance is marijuana does not pass this standard. Because it is impossible for an officer in the field to factually identify that a substance is marijuana as opposed to legal hemp, *see Industrial Hemp/CBD Issues* at 1, the inclusion of the testimony cannot make “the determination of the action more or less probable.” Without a way to determine the actual nature of the substance, *see Id.*, the testimony of the officer identifying the sight/odor of marijuana is purely speculative and does not provide information which will add any useful information for the fact-finder.

Furthermore, allowing expert testimony identifying the substance also runs afoul of Rule 403, as the testimony of the arresting officer will have “probative value [that] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” The arresting officer cannot, as discussed above, factually say whether the substance in question is a controlled substance or the identical, but legal hemp. *See Industrial Hemp/CBD Issues*. An officer who testifies that a stop was made because of the odor or appearance of marijuana is making a statement without factual basis which has a high probability of confusing jurors. Many jurors may remain unaware that hemp and marijuana are indistinguishable, trusting that a trained officer would be able to tell the difference. Furthermore, as this testimony cannot be based on facts, data or reliable methodology, the probative value it adds will be substantially outweighed by the danger of confusion.

CONCLUSION

1. Rule 702 states that expert testimony can only be admitted if: “(1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; (3) The witness has applied the principles and methods reliably to the facts of the case.” In this case, the State fails on all three prongs for the reasons described above.
2. Here, the officer…
3. Rules 401 and 402 require evidence to be relevant and probative. Rule 403 allows evidence to be excluded if it is prejudicial, will likely confuse or mislead a jury or wastes time. Here, the opinion of the officer based on visual or olfactory identification is not relevant because legal hemp and marijuana cannot be distinguished by visual or olfactory identification. Therefore, the admission of this testimony into evidence will be prejudicial and likely to confuse the jury.
4. It is the command of both the State and Federal constitution that the accused receive a fair trial and the due process of law. To allow the officer’s testimony about marijuana identification in this case would unduly prejudice the Accused and would violate his rights under the5th, 6th, and 14th Amendments of the United States Constitution and Section I, Articles 19, 23, and 24 of the North Carolina Constitution.

RELIEF SOUGHT

WHEREFORE, the Accused moves this Honorable Court to summarily grant this Motion and to enter an Order excluding the Officer’s marijuana identification testimony from the evidence at trial in this case. In the alternative, the Accused requests a pre-trial evidentiary hearing on the admissibility of this evidence.

Respectfully submitted this the \_\_\_\_\_ day of May, 2019.

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Attorney

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that the undersigned attorney served a copy of the foregoing Motion In Limine To Exclude State’s Expert Testimony on the State of North Carolina by hand delivery to the District Attorney’s Office:

Assistant District Attorney XXX

Address

This the \_\_\_\_\_\_ day of May, 2019.

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Attorney