NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

 SUPERIOR COURT DIVISON

COUNTY OF DURHAM FILE NO: 19CRS XXXX

STATE OF NORTH CAROLINA )

 ) MOTION TO SUPPRESS

 vs. ) EVIDENCE

 )

DEFENDANT, )

 DEFENDANT. )

 )

NOW COMES the Defendant, by and through the undersigned counsel, pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 19, 23, and 24 of the Constitution of North Carolina, and *Mapp v. Ohio*, 367 U.S. 643, (1961), and moves this Honorable Court to exclude evidence found by OFFICER during the initial stop as unlawfully collected. Since the enactment of N.C. Gen. Stat. § 106-568.50 *et seq*., the sight or odor of Cannabis sativa does not indicate with any certainty that the defendant was engaged in, or about to engage in any illegal activity, removing any justification of probable cause for the stop, search or seizure of evidence. In support of this Motion, the Defendant respectfully shows as follows:

FACTS

1. The Defendant is charged with criminal activities discovered due to the search and seizure conducted by the arresting officer.
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 collected additional items of evidence.

BACKGROUND KNOWLEDGE OF HEMP LEGALIZATION

 N.C.G.S. 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.G.S. § 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. Hemp, as defined in Chapter 106 of the General Statutes, is not a controlled substance and may be lawfully possessed by any citizen of the state.

 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> (hereinafter 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 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> (hereinafter 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. *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

 The Fourth Amendment to the United States Constitution protects American citizens from unlawful and arbitrary seizure of property by the state. Improperly seized evidence, even if indicative of criminal activity, is inadmissible in court as a violation of this Constitutional protection of our rights. *See* *Mapp* 367 U.S. at 659 (“The criminal goes free, if he must but it is the law that sets him free.”). While a lawful search generally requires a warrant, there are exceptions recognized by North Carolina case law. *See State v. Greenwood*, 301 N.C.705, 708 (1981) (“…the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug”). Since the adoption of N.C.G.S. § 106-568.50 *et seq*. and the subsequent legalization of industrial hemp, an officer cannot rely on sight and smell of what he believes to be marijuana to form the basis of probable cause to search or seize.

 In order to be admissible, evidence must be lawfully obtained by the police. *See* *Mapp* 367 U.S. at 655 (“…all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court”). Because marijuana and legal hemp are indistinguishable by sight or smell, *See* *generally Industrial Hemp/CBD Issues*, there is no way for an officer to establish probable cause for a search based on sight or smell alone. To establish probable cause, the officer must show “at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.” *See Beck v. Ohio*, 379 U.S. 89, 91 (1964). While *State v. Fletcher*, 92 N.C. App. 50, 57 (1988), held that police officers could identify marijuana without a chemical analysis, the legalization of industrial hemp means that previously accepted means of identification are no longer useful. *See Industrial Hemp/CBD Issues* at 2 (*“*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”). As noted by Peg Dorer, director of the North Carolina Conference of District Attorneys in her testimony before the Senate Agriculture, Environment, and Natural Resources committee on May 30, 2019, “Law enforcement cannot discern the difference between smokable hemp and marijuana, and our State Crime Lab cannot discern the difference because they can’t discern the level of the THC that it contains.” *See* Laurie Leslie, *Law enforcement fears NC’s effort to boost hemp industry could essentially legalize marijuana*, WRAL, May 31, 2019, <https://www.wral.com/law-enforcement-fears-nc-s-effort-to-boost-hemp-industry-could-essentially-legalize-marijuana/18421082/>.

Because an officer cannot determine if a suspect possesses marijuana or hemp, there is no way that an officer can prudently “believ[e] that the [defendant] had committed or was committing an offense” based on sight and smell alone. Lacking probable cause to begin a search, all evidence collected based upon the odor/sight of a substance indistinguishable from legally purchased hemp is inadmissible under the Fourth Amendment and comparable provisions of the State constitution.

 Here, the arresting officer used a K9 unit to substantiate his suspicion the defendant possessed a controlled substance. With the legalization of industrial hemp this method of identifying a controlled substance cannot be enough to form the basis of probable cause to continue a search. K9’s are trained to detect the presence of marijuana by identifying THC in the substance, but both hemp and marijuana contain the compound THC and a drug detection K9 unit will alert to either substance. *See Industrial Hemp/CBD Issues* at 2 (“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”). After identifying the sight/smell of Cannabis sativa, the arresting officer sought verification of his suspicion through the use of the K9. The positive response of the K9 unit was to THC, the presence of which does not distinguish legally purchased hemp from marijuana. *See id.* Since the adoption of N.C. Gen. Stat. § 106-568.50 *et seq*. there are lawful products which can be legally possessed that contain less than 0.3% THC. Because the K9 could only distinguish the presence of THC, *see Industrial Hemp/CBD Issues* at 2, there is no reason to suspect “that the petitioner had committed or was committing an offense.” There was therefore no probable cause to justify the search.

 Even if the defendant possesses marijuana, an unlawful seizure would be needed to make that factual determination. Other than unscientific guesses about the nature of the substance, an officer in the field cannot say with certainty if a substance is hemp or marijuana. *See Industrial Hemp/CBD Issues* at 1 (“…one would need a chemical analysis to tell the difference”). Because the 4th Amendment also protects against seizure of property absent a warrant or probable cause, there is no effective way for the State to identify if the substance is legal or not. For the specific variety of hemp which grows leaves and buds that resemble marijuana, “…one would need a chemical analysis to tell the difference.” *See* *Industrial Hemp/CBD Issues* at 1. There are currently no tests which can be used by an officer in the field that differentiate hemp and marijuana. *See id*. Even the NC State Crime Lab lacks the capability to do more than identify the presence of THC which is found in both hemp and marijuana. *See id.* Without a way to distinguish between the two strains of Cannabis sativa, there can be no probable cause for the seizure required to test the illegality of the substance. The State cannot seize property absent probable cause, *see* *Mapp v. Ohio*, 367 U.S. at 655-56, and the seizure of Cannabis sativa to test for illegality is a violation of the right to avoid arbitrary state intrusion. Without additional indicia of a crime, based on something more than sight or smell of cannabis, the lack of probable cause makes the seizure unconstitutional and without the seizure there can be no factual determination the substance is not legally owned industrial hemp.

 Because there is no way for an officer to determine if the substance is hemp or marijuana, and because the 4th Amendment protects against arbitrary search and seizure of goods by the police, any evidence collected on the basis of the sight/smell of a substance that resembles marijuana lacks probable cause, and is inadmissible in court.

CONCLUSION

1. The Fourth Amendment to the Constitution and comparable state constitutional provisions demand that probable cause exist for a search or seizure to be deemed lawful. As there is no factual way for the state to differentiate between legal hemp and marijuana, an officer cannot have information “sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense…,” *see* *Beck v. Ohio*, 379 U.S. at 91, based on sight or smell of the plant Cannabis sativa alone.
2. Here, the officer…
3. The officer had no probable cause to conduct a search of the defendant’s person, vehicle, or home based solely on sight/smell of what he believed to be Cannabis sativa as the purchase of legal hemp products (identical in odor and appearance to marijuana)is allowed by N.C.G.S. § 106-568.50 *et seq*.
4. The seizure of the substance was similarly without probable cause, as the officer had no way to determine the legality of the substance without arbitrarily seizing it on the presumption that it was a controlled substance.

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 admittance of evidence collected through a search conducted without probable cause would unduly prejudice the Defendant and would violate his rights under the 4th, 5th, 6th and 14th Amendments of the United States Constitution and Articles 19, 23, and 24 of the North Carolina Constitution.

RELIEF SOUGHT

WHEREFORE, the Defendant moves this Honorable Court to:

1. Summarily grant this Motion and enter an Order suppressing any and all evidence obtained as a result of the illegal search, seizure, and detention of the Defendant, including any evidence subsequently obtained as a result of the unconstitutional actions of the Officer;
2. Alternatively, that this Honorable Court conduct a pretrial evidentiary hearing in order to receive evidence and make findings as to the legality of the Officer’s action.

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 to Suppress Evidence 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