

FILED WITH PERMISSION

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**IN THE
SUPREME COURT OF CALIFORNIA**

DAVONYAE SELLERS,
Petitioner,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

**PETITION FOR REVIEW
AFTER SUMMARY DENIAL OF PETITION FOR
WRIT OF MANDATE AND/OR PROHIBITION
THIRD APPELLATE DISTRICT
(Case No. C100036)**

Superior Court of Sacramento County
Department 62
Case No. 21FE018661

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INTRODUCTION

In order to justify a warrantless search, the appellate court determined that an open container law could be violated without any container at all. And further, that even after Proposition 64, .36 grams of debris resembling marijuana, scattered across the floorboard of the rear passenger compartment amounts to probable cause.

ISSUES FOR REVIEW

- 1) Is .36 grams of marijuana debris scattered on the rear passenger floorboard unlawful after Proposition 64?
- 2) Does such debris establish probable cause to search the vehicle under the Fourth Amendment?

REASONS FOR GRANTING REVIEW

Here, the majority opinion concluded that less than .36 grams of stray marijuana debris scattered on the rear passenger floorboard violated California's open container law. Further, this small amount in addition to the stop itself amounted to probable cause under the vehicle search exception. Review is needed for three core reasons.

First, review is necessary because the appellate court impermissibly broadened a penal statute without a statutory basis. California law is clear and unequivocal: the only law regarding marijuana possession in a vehicle relates to possession in an open or unsealed container. There is no prohibition on marijuana debris

amounting to less than one-eightieth of the legal amount. In reaching its decision, the majority opinion undermined established law and misapplied well-settled principles of judicial construction.

Proposition 64 sought to decriminalize the possession and use of small amounts of marijuana by adults, and its protections are designed to prevent unjust searches based solely on legal possession. The appellate court's ruling undermines that legislative intent and threatens to create a patchwork of conflicting interpretations across the state regarding the limits of lawful possession in vehicles. Review by this Court is necessary to ensure that the voters' intent in passing Proposition 64 is upheld consistently.

The Court of Appeal's decision broadened the scope of Health & Safety Code section 11362.3 beyond its plain language, creating a new and unjustified basis for criminalizing lawful possession of marijuana. This conflicts with the established canons of statutory interpretation, as well as recent case law like *People v. Raybon* (2021) 11 Cal.5th 1056, which emphasizes the need for statutory clarity, particularly in the context of Proposition 64. Review is necessary to ensure consistency in the interpretation of Proposition 64 and to avoid inconsistent, conflicting precedent.

Secondly, review is necessary to clarify the limits of the automobile search exception after Proposition 64. Since Proposition 64, the courts have struggled with the range of lawful marijuana possession in California. (E.g., *People v. Raybon* (2021) 11 Cal.5th 1056; *Blakes v. Superior Court* (2021) 72 Cal.App.5th 904, 912.) The appellate court's decision expands the scope of probable cause by treating loose marijuana debris as tantamount to possession in an

open container. This broad reading effectively creates a new category of criminal conduct—marijuana possession outside a container in a vehicle—that Proposition 64 did not contemplate. This conflicts with established principles that criminal statutes must be strictly construed and not expanded by the courts, as emphasized in cases like *In re David* (2012) 202 Cal.App.4th 675.

This case raises an important issue of statewide concern: what constitutes probable cause for a vehicle search? Various appellate courts have ruled that mere possession of marijuana, absent other suspicious circumstances, cannot justify a warrantless search. The majority opinion in this case contradicts prior well-reasoned rulings, creating uncertainty in the law that demands clarification from this Court.

And third, review is necessary to prevent judicial overreach and ensure proper application of the judicial construction. Here, the Court of Appeal's decision improperly invoked the absurdity doctrine to justify its expansive reading of Health & Safety Code section 11362.3. However, as this Court has repeatedly held, judicial broadening of a statute is permissible only where the plain language is ambiguous or leads to truly absurd consequences. In this case, the appellate court's interpretation creates an unnecessary new crime that voters never intended, criminalizing harmless conduct such as having trace marijuana debris on a car floorboard.

This Court should grant review and reverse the appellate court's holding. The plain language of the statute controls and appellate courts must refrain from creating new crimes under the guise of statutory interpretation.

STATEMENT OF THE CASE

On November 9, 2021, Petitioner Davonyae Sellers was charged with felony violations of Penal Code sections 25400(a)(1) and 25850(a) for an incident that took place on November 5, 2021. (Exh. A, at p. 71.) On October 4, 2022, the court granted a demurrer as to those two counts and both were dismissed. (Exh. A, at p. 63.) As a result, the district attorney's office filed an amended complaint on that same date alleging a third count, a violation of Penal Code section 29820; the unlawful possession of a firearm by a person previously having been adjudged a ward of the juvenile court. (Exh. A at p. 63).

Petitioner pleaded not guilty on January 17, 2023 and set the matter for a preliminary hearing to be held on February 17, 2023. (Exh. A, at p. 60.) The hearing was continued twice. (Exh. A, at pp. 55-59.) On April 3, 2023, Petitioner filed a motion to suppress to be heard concurrently with the preliminary hearing. (Exh. A, at p. 57.) On May 19, 2023, the prosecution filed its opposition. (Exh. A, at p. 191.)

On May 23, 2023, in Department 20 of the Sacramento Superior Court, the Honorable Michael W. Sweet, presiding, the joint hearing was held. (Exh. A, at p. 56; Exh. B.) The lower court received the testimony from the three arresting officers. (Exh. B, at p. 264.) In ruling on the motion to suppress, the magistrate upheld the vehicle search because he believed the loose leaf marijuana one of the officers saw and another officer collected is considered contraband in violation of Vehicle Code Section 23222(b). (Exh. B, at

p. 356-357.) The court also upheld the initial vehicle stop which Petitioner did not specifically contest.

The court then held Petitioner to answer on the charges and continued arraignment on the information to June 6, 2023 in Department 61 of the Sacramento Superior Court at 8:30 a.m. (Exh. A, at p. 52; Exh. B, at p. 357.) Petitioner was arraigned on that date. (Exh. A, at p. 54.)

On August 4, 2023, Petitioner filed a motion pursuant to Penal Code section 995 to be heard on August 22, 2023. (Exh. A, at p. 52; Exh. D.) Petitioner sought review of the magistrate's order denying the motion to suppress. On August 15, 2023, the prosecution filed its opposition. (Exh. A, at p. 32.) After a few continuances, on November 28, 2023, the superior court denied the motion. (Exh. A, at p. 49; Exh. C.) The case was set for a further proceedings date on January 11, 2024 in Department 61. (Exh. A, at p. 49.)

Mr. Sellers petitioned for relief through a writ of mandate or prohibition. After informal briefing, the court issued an order to show cause and stayed proceedings in the superior court. The People filed a written return, the defense replied, and an oral argument was had. In a published opinion, the court upheld the search, finding the marijuana debris itself was unlawful and that probable cause supported the search. (*Sellers v. Superior Court* (Aug. 22, 2024, No. C100036) __ Cal.App.5th __ [2024 Cal.App.LEXIS 522], Attachment 1.)

STATEMENT OF FACTS

On November 5, 2021 at about 4:33pm, Officers Mills, Goetting¹, and Thrall were on patrol near Fairfield Street and Calvados Avenue in a marked patrol car for the Sacramento Police Department. (Exh. B, at p. 269-270) Officer Mills was driving, Officer Goetting was in the front passenger seat, and Officer Thrall was in the rear back seat behind the passenger. Officer Mills was travelling southbound on Fairfield Street approaching Arden Way when he observed a blue Honda sedan fail to come to a complete stop in violation of Vehicle Code section 22450 (failing to stop behind limit line). After the sedan turned eastbound onto Arden Way and approached Royal Oaks Drive, Officer Mills activated overhead lights to conduct a traffic stop.

Before getting out of the patrol car to initiate a traffic stop, Officer Goetting conducted records check in the patrol car. That records check revealed the registration was clear and current. It also showed that the registration had a lease with the lessee information to Kayla Sepulveda. Before approaching the car, Officer Goetting knew the car was registered to Kayla Sepulveda.

All three officers got out of their patrol car to approach the sedan for this simple infraction traffic stop during daytime. Officer Mills approached the driver side, Officer Goetting approached the front passenger side, and Officer Thrall approached the rear passenger side. When Officer Mills approaches the driver side window, he contacts the driver, identified as Kayla Sepulveda. Ms. Sepulveda handed Officer Mills her driver's license. Officer Mills

¹ Officer Goetting is the subject of an excessive force claim arising out of 2021. (*Sharron Frye v. City of Sacramento, et al.* Case No. 2"22-CV-01936-DJC-KJN.)

then hands Officer Goetting the driver's license. Officer Mills asks Ms. Sepulveda if she is on probation or parole and answers no. He asks if there is anything illegal in the car and she states no. He asks if officers can search the car to make sure there's no guns in the car. Ms. Sepulveda asks if there is an issue and Officer Mills states he is just asking. She states no.

While Officer Mills and Thrall stay outside of the car with Ms. Sepulveda and Mr. Sellers seated inside, Officer Goetting returns to the patrol car. Officer Goetting confirms that Ms. Sepulveda's license was valid and that she was not on probation, parole, or had any outstanding warrants. Officer Goetting also ran Mr. Sellers's information and found that he also was not on probation, parole, or had any outstanding warrants. After completing a records check, Officer Goetting returned to the car and informed Officer Mills and Thrall of his findings.

At this point in the traffic stop, Officer Thrall advised Officer Goetting that he observed a usable quantity of marijuana located within the car on the rear passenger floorboard behind the front passenger seat. After observing the alleged marijuana, Officer Mills asked Ms. Sepulveda to turn off the car and step outside. He proceeds to pat her down. Officer Thrall proceeds to get Mr. Sellers out of the car. Officer Thrall asks Mr. Sellers if he has any weapons on him. Mr. Sellers responds that he has a registered firearm on the side of the seat. Officer Thrall places Mr. Sellers in handcuffs. Officer Goetting searched the car and found a black Taurus G3 .9-millimeter pistol as well as loose marijuana that was located on the rear passenger floorboard. (Exh. B, at p. 315-319). The loose marijuana

that Officer Goetting collected weighed a total of .36 grams. (Exh. B at p. 318).

LEGAL ARGUMENT

I. Review is Necessary Because the Appellate Court Improperly Broadened the Plain Language of the Statute Contrary to Established Law

Review is necessary because the appellate court impermissibly broadened a penal statute, frustrating the voter's intent and undermining established canons of statutory construction. Said another way, no law criminalizes a person's dirty floorboards. No statute makes it unlawful to have the scattered remains of dried marijuana leaves on the floor of the backseat of a car. And there is no reason to think voters wanted one.

Nevertheless, the appellate court construed § 11362.1 and § 11362.3 "to prohibit any person from possessing marijuana *that is not in a closed package or container* while driving, operating, or riding as a passenger in a vehicle." (p. 10.) The appellate court found this was so because (1) the apparent purpose of the statutes, (2) Prop. 64 did not decriminalize the transportation of loose marijuana in a vehicle, even if lawful in amount, and (3) Prop. 64 decriminalized only the possession of less than 28.5 grams of marijuana in a close container or package.

The appellate court's reasoning is flawed in two respects. First, the opinion rewrote a penal statute to expand criminal conduct. Second, in creating its new crime, it undermined established law and canons of statutory interpretation.

A. Statutory & Legal Background

Before Proposition 64, mere possession of marijuana without a prescription was illegal. (Health & Saf. Code, § 11357 [Deerings, 2015].) The old law had gradations of penalties based on factors such as amount, concentration, and the age of the defendant. With marijuana’s status as potential contraband firmly established by § 11357, possession of marijuana was routinely found to support probable cause. (See e.g., *People v. Johnson* (2020) 50 Cal.App.5th 620, 628-629, citing *People v. Strasberg* (2007) 148 Cal.App.4th 1052, 1059-1060, and *People v. Waxler* (2014) 224 Cal.App.4th 712, 721, 725.)

In 2016, the voters passed Proposition 64. Among the changes, the voters rewrote § 11357. Now, § 11357 no longer prohibits mere possession of less than 28.5 grams of cannabis by adults aged more than 21 years. It again provides for gradations of punishment based on amounts, location of possession, and the age of the defendant. (§ 11357.)

Proposition 64 then created Health and Safety Code section 11362.1, subdivision c, which provides in part that, “[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.” (§ 11362.1, subd. (c).) That lawful conduct included:

Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to:

- (1) Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of cannabis not in the form of concentrated cannabis;
- (2) Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than eight grams of cannabis in the form of concentrated cannabis, including as contained in cannabis products;
- (3) Possess, plant, cultivate, harvest, dry, or process not more than six living cannabis plants and possess the cannabis produced by the plants;
- (4) Smoke or ingest cannabis or cannabis products; and
- (5) Possess, transport, purchase, obtain, use, manufacture, or give away cannabis accessories to persons 21 years of age or older without any compensation whatsoever.

§ 11362.1(a).

And § 11362.3 provides that “Section 11362.1 does not permit any person to: ... (4) Possess an open container or open package of cannabis or cannabis products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.” No law prohibits marijuana debris on a floorboard.

B. The Appellate Court Impermissibly Broadened a Plain and Unambiguous Criminal Statute

Recognizing that the new statutory scheme did not make marijuana debris on the floorboards illegal, the appellate court construed § 11362.3 beyond its plain and unambiguous language. “When statutory language is unambiguous, [the Court] must follow its plain meaning ‘whatever may be thought of the wisdom,

expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature.” (*In re D.B.* (2014) 58 Cal.4th 941, 948 [cleaned up].) As this Court has said, “Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.’ [Citation.]” (*People v. Raybon* (2021) 11 Cal.5th 1056, 1065 citing *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.)

While the statute prohibits the possession of “an open container or open package of cannabis or cannabis products” in a moving vehicle, the majority broadened the statute to prohibit all marijuana possession in a moving vehicle except for possession in a closed container. (maj. Opn. at p. 10.) As the majority opinion would have it, the Proposition 64 statutory scheme prohibits “any person from possessing marijuana *that is not in a closed package or container* while driving, operating, or riding as a passenger in a vehicle.” (p. 10.)

As the dissent explains, this interpretation contradicts the plain language of the statute. (dissenting opn., p. 2.) As the Attorney General conceded, § 11362.3 requires the presence of a contained. “[N]o authority, and the majority cites none, [exists] that upholds an open container violation in the *undisputed* absence of a container of any sort.” (*Ibid.*) And common-sense dictates that spilled beer is certainly not an “open container” of alcohol as defined by Vehicle Code section 23222. (*Ibid.*)

But on top of undermining the plain and unambiguous language of an *open container* law, the majority’s opinion errs because it impermissibly creates a new crime. “In California all crimes are statutory and there are no common law crimes. Only the Legislature and not the courts may make conduct criminal.” (*In re Brown* (1973) 9 Cal.3d 612, 624; see *People v. Gonzalez* (2014) 60 Cal.4th 533, 537 and *People v. Chun* (2009) 45 Cal.4th 1172, 1183.) Here, disguised as statutory interpretation to resolve what it dubs an “absurdity,” the majority wrote an opinion that created a new crime: all marijuana possession without a container. This is impermissible. “Appellate courts may not rewrite unambiguous statutes.” (*In re David* (2012) 202 Cal.app.4th 675, 682 citing 2A Singer & Singer, Sutherland Statutes and Statutory Construction (2007 new ed.) § 46:4, pp. 179–181; see *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [“It is a cardinal rule that where a statute is facially clear and unambiguous, no judicial interpretation is necessary.”].) The majority erred because it was not empowered to rewrite the clear language of § 11362.3 to prohibit all marijuana possession in vehicles.

C. The Majority Incorrectly Applied the Absurdity Doctrine and Canons of Statutory Interpretation

It may very well be that it would be wise to have additional laws prohibiting other forms of marijuana possession in vehicles. But they do not exist. Even though § 11362.3 is plain and unambiguous, the majority nevertheless chose to rewrite the statute. In doing so, the majority misapplied the absurdity doctrine and the rules of statutory interpretation. (maj. Opn. at p. 9.)

1. *There was no ambiguity*

First, in order to construe the statute beyond its plain language, there must be an ambiguity within it. (*In re D.B.*, *supra*, at 948; *Raybon*, *supra*, at 1065.) The majority opinion failed to identify *any* ambiguity in the statutory scheme. Consider this Court’s opinion in *People v. Raybon*. Similar to here, the Court dealt with the application of Proposition 64 in a specific setting: prisons. Both before and after Proposition 64, Penal Code section 4573.6 prohibited the possession of any controlled substance in a prison. After Proposition 64, marijuana was largely decriminalized except that the amendments would “not amend, repeal, affect, restrict, or preempt” any “[l]aws pertaining to smoking or ingesting cannabis or cannabis products” in prison. (§ 11362.45(d).)

The defendants in *Raybon* were all found in possession of less than 28.5 grams of cannabis and convicted under Penal Code section 4573.6. (*Raybon*, *supra*, at 1060.) They contested the validity of the conviction arguing that Prop. 64 decriminalized their activity. Further, the clause in § 11362.45(d) applied solely to “smoking and ingesting cannabis” and not the mere possession. (*Raybon*, at 1069-1083.)

Ultimately, this Court disagreed, holding that possession was a necessary part of “smoking or ingesting” cannabis. To get there, however, this Court had to rely on ambiguities in the statute. (*Raybon*, *supra*, at 1065-1066.) Specifically, “the phrase ‘laws pertaining to smoking or ingesting cannabis’ is broad enough to encompass statutes that prohibit the possession of cannabis.” (*Id.*, at 1066.) “Pertaining to” is a phrase that is not about “exact

correspondence” but about a relation. (*Id.*, at 1067.) And this ambiguity is what allowed this Court to “save” simple possession of marijuana in prison as a crime. So while, “there is no statute that specifically criminalizes the use of cannabis or any other type of drug in prison, nor did any such provision exist when Proposition 64 was adopted. Instead, through the adoption of Penal Code section 4573 et seq., the Legislature has aimed to eliminate drug use in prison by targeting the *possession* of those illicit substances. In that way, the Penal Code’s prohibitions on drug possession in prison directly *pertain* to drug use.” (*Id.*, at 1067.)

Here, there is no ambiguity.

2. *There are no absurd consequences*

It is true that on rare occasions a court may still construe an unambiguous statute. (*In re C.H.* (2011) 53 Cal.4th 94, 107.) However, “judicial construction of unambiguous statutes is appropriate only when literal interpretation would yield absurd results.” (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 583.) But an absurd result is different than an unwise or incomplete one. Indeed, this Court has often hesitated to deem a result “absurd.” For instance, in strictly construing mediation confidentiality statutes, this Court was forced to accept that some behavior during a mediation might go unpunished. (*Foxgate Homeowners’ Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 17.) And that it would lead to some evidence being inadmissible. (*Simmons v. Ghaderi*, *supra*, at 587-588.) Or merely treating two somewhat similar groups

differently based on nuanced policy decisions. (*In re C.H., supra*, at 107.)

Turning to the doctrine the majority opinion, there are no absurd consequences wrought from holding that marijuana debris on a floorboard is not prohibited under Proposition 64. The majority opinion explains that, “It would defy logic to conclude that an individual with an unsealed container or open package of marijuana is violating the law, while someone with usable amounts of marijuana scattered loosely on a seat or around the passenger compartment is not.” (maj. Opn. at p. 9.)

But as the dissent points out, if the legislative concern behind the statutory scheme is a worry that occupants of a vehicle might ingest marijuana while the vehicle is in operation, then it seems that marijuana at least be accessible for consumption by someone in the car. (dissn. Opn. at p. 2.) But even outside of the reality of what it would take to ingest the marijuana in question, the concerns expressed in the majority opinion is not an “absurd result.” It is merely a demonstration of a hole in the scheme. “Absurd results” are not merely the failure to fully develop a law to the full wisdom of an appellate court. Absurd results occur where something far more severe would not be punished, but something trivial is punished. Here, we are dealing with debris on a floorboard.

3. *The majority opinion would lead to absurd results*

As the dissent points out, “although the amount scraped from the floorboards may have been ‘useable,’ there was neither evidence that the marijuana was in any condition to actually *be* used nor

evidence that anyone was in the position to scrape it together and use it while driving, operating, or riding in the car. Beyond the tray, no drug paraphernalia was found. Further, the scattered amount was approximately *one-eightieth* of the amount that would be *legal* if it were in a sealed baggie on the front seat. To criminalize the tiny amount of scattered marijuana on the rear floorboards but legalize the closed baggie in the front seat containing 80 times that amount strikes me as far more absurd than my proposed plain language interpretation of the statute as requiring an open container to find a violation of an open container law.” (dissn. Opn. at p. 3.)

But even outside of this reality, marijuana plants themselves may be lawfully possessed. They almost always weigh more than 28.5 grams. How would one ever transport a marijuana plant without breaking the law as the majority interprets it?

II. The Totality of the Circumstances Do Not Support Probable Cause

Next, this Court should turn to the totality of the circumstances and whether they support probable cause under the vehicle search exception. Before this case, the case law was united that something more than the mere presence of marijuana was required to support a probable cause search of a vehicle. (Blakes v. Superior Court (2021) 72 Cal.App.5th 904, 912; People v. McGee (2020) 53 Cal.App.5th 796; People v. Johnson (2020) 50 Cal.App.5th 620; People v. Hall (2020) 57 Cal.App.5th 946; *In re Randy C.* (2024) 101 Cal.App.5th 933.)

As the dissent points out, this case presents no facts amounting to probable cause. Consider for instance published

authority finding probable cause lacking. In *Blakes v. Superior Court*, the court held that the mere smell of burnt marijuana emanating from the car was insufficient probable cause. (*Blakes, supra*, 72 Cal.App.5th 911-913.) In *Hall*, in addition to a clear plastic baggie that contained a green leafy substance, the officer also saw a green leafy substance that appeared to be broken up in the lap of the driver. (*Hall, supra*, 57 Cal.App.5th at 949.) The *Hall* court concluded that the totality of the circumstances known to the officers during the traffic stop did not amount to probable cause to justify the search of the car. (*Id.* at 959.)

In *People v. Johnson* (2020) 50 Cal.App.5th 620, the court held that the totality of the circumstances in that case did not support a search of the defendant's car. (*Id.* at 635.) The facts the court considered "comprised of a parked car missing a registration tag and having an expired registration, the odor of marijuana emanating from the car, the observation of a tied baggie containing 'a couple grams' of marijuana in the car's center console, and defendant's actions outside the car in resisting the officers." (*Id.*) The Court also went on to define an open container and concluded "a container or package must be open when found in the car, and not merely have the potential to be opened or have previously been opened, to violate section 11362.3, subdivision (a)(4)." (*Id.* at 632.)

Compare now those cases to ones finding probable cause established. In *McGee*, the court was dealing with an *unsealed* bag of marijuana plainly visible on the passenger's person. (*McGee, supra*, 53 Cal.App.5th at 804.) *In re Randy C.* involved an actual marijuana blunt on the passenger's lap. (*In re Randy C., supra*, 101 Cal.App.5th

at 938.) All clear violations of law. Here, there is no such violation. Rather, as the dissent points out, we are dealing with the scattered remains of marijuana. Debris amounting to one-eightieth (1/80) the legal amount. Given the complete absence of any other facts justifying criminal activity, the majority erred in concluding the circumstances satisfied probable cause. Simply put, the idea that loose remnants of marijuana scattered around floorboards amounts to an “open container” of marijuana is ridiculous. Does anyone truly believe that someone would get on their hands and knees, sift through the dirt on their vehicle’s floorboards, amass remnants together, and then smoke it? While driving? The marijuana here is akin to spilled beer in a car. The dissent summarizes the reality most accurately:

After what was clearly a targeted traffic stop of a car that appears to have contained African-American and Hispanic individuals (see *People v. Flores* (2024) 15 Cal.5th 1032, 1054 (conc. opn. of Evans, J.) [“Black individuals were stopped 131.5 percent more frequently relative to their proportion of the population and Hispanic individuals comprised the largest racial group of stopped individuals.” “Stopped Black and Hispanic individuals were more likely to be searched than stopped White individuals”]), a questionably invasive “plain view” observation of an unclear amount of discarded marijuana on the back floorboards of the car, and extensive questioning of the driver, who had a sweaty upper lip (see *id.*, at pp. 1052-1053 (conc. opn. of Evans, J.) [discussing “the danger in considering ‘nervous’ and ‘evasive’ behavior in the totality of the circumstances analysis when devoid of real world context”]), the police executed a warrantless search of

the car in which defendant was riding.

Dissenting opinion, at p. 1.

Assuming that the voters were concerned with potentially impaired driving when it crafted § 11362.3, the majority's interpretation fails to effectuate that intent. The majority opinion actually acts to expand the police's authority to search beyond the contours of established law.

Unlike *Raybon*, where public safety justified the broadening of the statute's scope, the majority opinion's expansion of § 11362.3 fails to advance any legislative purpose behind Proposition 64. The court is criminalizing conduct that the statute was never meant to address. The mere observation of loose marijuana, without evidence of consumption or improper storage, does not fit within the voter's intent.

[I]n this case, the officers ostensibly stopped the car for a limit line violation, and the record reveals no arguably suspicious circumstances related to the car or its occupants at the time of the stop. There was no suspected drug transaction. There was no smell of marijuana or any other suspicious smell. There was no container, open or closed. Although there was an empty rolling tray on the backseat, there was no evidence of current drug consumption and no evidence the car's occupants were under the influence. There were no evasive answers to questions or attempts to avoid contact with the officers. The "false" response of "no" to the officer's question as to whether there was any marijuana in the car was far from a major falsehood; there was no evidence that the car's occupants were aware of the small amount of marijuana scattered on the rear floorboards. The driver explained to the officer that her sweaty upper lip was a medical condition. The video evidence does

not reveal any nervous or uncooperative behavior by the car's occupants, particularly when considering the intimidating circumstances of the stop: Three uniformed officers approached the car together and used flashlights to look inside the windows (in broad daylight) from both sides. The driver obeyed all commands and respectfully refused the officers' requests to search the car for guns, made before they spotted the scattered marijuana.

Dissenting opinion, at p. 4.

While the Court of Appeal found it "absurd" to interpret the statute as not allowing searches based on loose marijuana, it is more logically consistent with the statute's purpose to limit its scope to clear violations, such as open containers or active consumption while driving.

CONCLUSION

This Court must reverse the appellate court's opinion. Specks of marijuana debris strewn across a floorboard is neither probable cause nor unlawful.

Dated:

Respectfully submitted,

/s/ John W. H. Stoller

John W. H. Stoller

CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, Rule 8.504(d), I hereby certify that the attached petition is written in 13-point, Georgia font and contains 5,097 words.

Dated:

Respectfully submitted,

/s/ John W. H. Stoller

John W. H. Stoller

ATTACHMENT 1

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

DAVONYAE SELLERS,

Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

C100036

(Super. Ct. No. 21FE018661)

ORIGINAL PROCEEDING in mandate and/or prohibition. The stay order issued by this court on February 2, 2024, will terminate upon finality of this opinion. Petition denied. Deborah D. Lobre, Judge.

Amanda M. Benson, Public Defender, Cecilia C. Herrera, Assistant Public Defender, for Petitioner.

No appearance for Respondent.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Edrina M. Anderson and Clara M. Levers Deputy Attorneys General, for Real Party in Interest.

In this mandamus action, petitioner Davonyae Sellers challenges the trial court's denial of his motion to suppress the fruits of a warrantless search of a vehicle. The question presented is whether the plain-view observation of a marijuana rolling tray and approximately 0.36 grams of loose marijuana on the rear floorboard, coupled with other factors, provided probable cause for police officers to conduct a warrantless search of a vehicle. Because we conclude that the search was supported by probable cause, we deny the petition.

BACKGROUND FACTS AND PROCEDURE

On November 5, 2021, around 4:30 p.m., defendant was riding in the front passenger seat of a vehicle that was stopped by police for a minor traffic infraction (Veh. Code § 22450 [limit line violation]). Aside from the traffic violation, there was nothing suspicious about the vehicle.

During the traffic stop, three police officers emerged from the patrol car and approached the vehicle. Officer Conner Mills approached the driver's side of the vehicle, while Officers Derek Goetting and Mark Thrall approached the passenger side.

Officer Mills contacted the female driver and explained the reason for the traffic stop. The driver was sweating and both defendant and the driver appeared slightly nervous. Officer Mills requested a driver's license and asked if there was any marijuana or anything illegal in the vehicle. The driver said no. However, Officer Mills could see in the back of the vehicle a tray commonly used for rolling marijuana cigarettes or blunts.¹ The tray was covered in a sticky residue consistent with marijuana. Officer Mills found the presence of the tray suspicious given the driver's statement that there was no marijuana in the vehicle.

¹ A cigar that has been hollowed out and filled with marijuana. (Merriam-Webster Unabridged Dict. Online (2024) <https://unabridged.merriam-webster.com/unabridged/blunt>, par. 3> [as of Aug. 19, 2024], archived at <https://perma.cc/K9YP-X3YP>.)

While Officer Mills was speaking with the driver, Officer Thrall conducted a plain view search of the vehicle by peering through the rear passenger's side window.² Using his flashlight, Officer Thrall saw "crumbs" of green, loose-leaf marijuana scattered throughout the rear floorboard, as well as "somewhat larger" "round circular nuggets" of marijuana under the front passenger seat.

The marijuana observed by the police officers was "loose" in the vehicle. According to Officer Thrall, it appeared as if the marijuana had been "crumbled" throughout the rear of the vehicle. The marijuana was not in a container and the officers did not observe any containers nearby. The officers did not recall smelling any marijuana odor and they found no rolling papers, joints, blunt wrappers or blunts, pipes, vapes, or other smoking devices in the vehicle. The driver obeyed all commands and there was nothing to suggest she was driving under the influence.

Based on the loose marijuana observed on the floorboard, together with the marijuana rolling tray and other factors, the police officers concluded there was probable cause to search the vehicle. Thus, officers asked defendant and the driver to exit the vehicle so officers could perform the probable cause search. As defendant was preparing to exit the vehicle, Officer Thrall asked if he had any weapons on him. Defendant responded that he had a firearm, which was located on the side of the passenger seat. Officer Goetting then searched and found a black nine-millimeter handgun underneath the front passenger seat.

² The "plain view" exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize incriminating evidence or contraband when it is discovered in a place where the officer has a right to be. (*People v. Breault* (1990) 223 Cal.App.3d 125, 131-132; *People v. Sandoval* (1985) 164 Cal.App.3d 958, 963 [illumination provided by officer's flashlight is of no significance].)

Officer Goetting also collected the loose marijuana from the rear passenger floorboard. In total, the marijuana collected from the vehicle weighed 0.36 grams, which the officers testified was a “usable” amount.

Defendant was charged with unlawful possession of a firearm by a person previously having been adjudged a ward of the court (Pen. Code, § 29820). On April 3, 2023, defendant filed a motion to suppress the evidence obtained by the warrantless search of the vehicle, including the firearm. Defendant argued that there was no probable cause to justify the search. The People opposed the motion.

After a joint preliminary hearing and suppression motion hearing, the magistrate denied the motion. The magistrate reasoned that the police officers had probable cause to search the vehicle because the loose marijuana observed by the officers was “contraband” under Vehicle Code section 23222, subdivision (b).

After defendant was arraigned on the information, defendant renewed the suppression issue in a motion to dismiss under Penal Code section 995. The People filed an opposition, and the trial court denied the motion.

Defendant filed a petition for a writ of mandate and/or prohibition directing that his motion to suppress be granted and that the charges arising from the illegally-obtained evidence be dismissed. After the People filed an informal response, we issued an order to show cause and stayed proceedings in the trial court pending further order of this court. The People filed a written return to the order to show cause, to which defendant replied. We now address the merits.

DISCUSSION

Defendant contends that the trial court erred in denying his motion to suppress the evidence seized during the search of the vehicle. We conclude that the search was supported by probable cause, albeit for reasons different from those given by the trial court.

A. *Legal Background*

The Fourth Amendment protects the right to be free from unreasonable searches and seizures. (U.S. Const., 4th Amend.) Reasonableness under the Fourth Amendment generally requires obtaining a judicial warrant. (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1213.) Warrantless searches are presumed to be unreasonable, and therefore illegal, subject only to a few carefully delineated exceptions. (*People v. Vasquez* (1983) 138 Cal.App.3d 995, 1000; *People v. Johnson* (2020) 50 Cal.App.5th 620, 625 (*Johnson*)). The burden is on the People to show that a warrantless search falls within one of those exceptions. (*People v. Vasquez, supra*, 138 Cal.App.3d at p. 1000.)

“One such exception . . . is the automobile exception, under which an officer may search a vehicle without a warrant so long as the officer has probable cause to believe the vehicle contains contraband or evidence of a crime. [Citation.]” (*People v. Hall* (2020) 57 Cal.App.5th 946, 951 (*Hall*)). When police officers have probable cause to believe a vehicle contains contraband or evidence of criminal activity, even for a minor infraction, they may conduct a warrantless search of any area of the vehicle in which there is probable cause to believe it may be found. (*People v. Evans* (2011) 200 Cal.App.4th 735, 753; *People v. McGee* (2020) 53 Cal.App.5th 796, 805 (*McGee*)).

“Probable cause is a more demanding standard than mere reasonable suspicion. [Citation.] It exists ‘where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found’ [Citation.]” (*Johnson, supra*, 50 Cal.App.5th at p. 625.) As the United States Supreme Court has noted, “probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” (*Illinois v. Gates* (1983) 462 U.S. 213, 232 [76 L.Ed.2d 527, 544].) Further, “[a]n officer is entitled to rely on his [or her] training and experience in drawing inferences from the facts he [or she] observes, but those inferences must also ‘be grounded in objective facts and be capable of rational

explanation.’ ” (*United States v. Lopez-Soto* (9th Cir. 2000) 205 F.3d 1101, 1105, quoting *United States v. Garcia-Camacho* (9th Cir. 1995) 53 F.3d 244, 246; accord *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1667.) When considering the validity of the evidence, it is to be analyzed “ ‘as understood by those versed in the field of law enforcement.’ ” (*Illinois, supra*, 462 U.S. at p. 232 [76 L.Ed.2d at p. 544], quoting *United States v. Cortez* (1981) 449 U.S. 411, 418 [66 L.Ed.2d 621, 629].) “The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount . . . to probable cause.” (*Ornelas v. United States* (1996) 517 U.S. 690, 696 [134 L.Ed.2d 911, 919].) As such, we consider the totality of the circumstances, and analyze these facts as would a reasonable police officer, in assessing the officer’s probable cause, rather than looking to singular facts in a vacuum. (See *Illinois*, at pp. 230-231, 238 [76 L.Ed.2d at pp. 543-544, 548].)

Before California decriminalized marijuana possession, case authority established that a police officer’s observation of *any* amount of marijuana in a vehicle established probable cause to search under the automobile exception. (See *Johnson, supra*, 50 Cal.App.5th at pp. 628-629, citing *People v. Strasberg* (2007) 148 Cal.App.4th 1052, 1059-1060, and *People v. Waxler* (2014) 224 Cal.App.4th 712, 721, 725.) However, in 2016, the voters passed Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act, as approved by the voters, General Election, November 8, 2016, which decriminalized the possession of small amounts of marijuana for personal use. (*Johnson, supra*, at p. 625.) Under Health and Safety Code section 11362.1, subdivision (a)(1),³ it is lawful for persons 21 years or older, under defined circumstances, to possess and transport up to 28.5 grams of cannabis. (§§ 11362.1, subd. (a)(1); 11362.3, subd. (a).)

³ Undesignated section references are to the Health and Safety Code.

Subdivision (c) of section 11362.1 further provides that “[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.” (§ 11362.1, subd. (c).)

Since the passage of Proposition 64, courts have held that *lawful* possession of marijuana in a vehicle, by itself, does not provide probable cause for a warrantless search on the theory that there may be a greater, unlawful amount of marijuana in the vehicle. (*Hall, supra*, 57 Cal.App.5th at pp. 952-953; accord, *Johnson, supra*, 50 Cal.App.5th at p. 629; *People v. Lee* (2019) 40 Cal.App.5th 853, 861-862, 866 (*Lee*).) As the appellate court explained in *Hall*, “Proposition 64 and, in particular, section 11362.1[, subdivision] (c) . . . fundamentally changed the probable cause determination by specifying lawfully possessed cannabis is ‘not contraband’ and [that] lawful conduct under the statute may not ‘constitute the basis for detention, search, or arrest.’ [Citations.]” (*Hall, supra*, at pp. 954-955.) As a result, we now attach “fairly minimal significance” to a defendant’s possession of a legal amount of marijuana. (*Lee, supra*, at p. 861.)

However, section 11362.1, subdivision (c) applies only to conduct “deemed lawful” under that section. (*People v. Moore* (2021) 64 Cal.App.5th 291, 300 (*Moore*).) Thus, while possession of a lawful amount of marijuana alone is insufficient to establish probable cause, it may support a finding of probable cause if it is coupled with other factors contributing to a reasonable belief that the vehicle contains contraband or evidence of criminal activity. (*Ibid.*; *Blakes v. Superior Court of Sacramento County* (2021) 72 Cal.App.5th 904, 911-912 (*Blakes*).) For example, even after the passage of Proposition 64, it is unlawful to possess or transport more than 28.5 grams of cannabis (§ 11362.1, subd. (a)(1)); to smoke or ingest cannabis while driving or riding in the passenger seat of a vehicle (§ 11362.3, subds. (a)(7) & (a)(8)); to possess an open container or package of cannabis while driving or riding in the passenger seat of a vehicle (§ 11362.3, subd. (a)(4)); or to drive a vehicle while under the influence of any drug

(Veh. Code, § 23152, subd. (f).) It follows that a warrantless vehicle search will be justified where the presence of a lawful amount of marijuana, combined with other suspicious facts or circumstances, gives officers reasonable grounds to believe the suspect has an illegal amount of marijuana or is otherwise violating marijuana regulations. (*Moore, supra*, 64 Cal.App.5th at pp. 298, 300.)

B. *Standard of Review*

Because the motion to suppress was made during the preliminary hearing, and the renewed motion was submitted on the transcript of that hearing, we disregard the findings of the trial court and review the determination of the magistrate who ruled on the motion to suppress. (*Blakes, supra*, 72 Cal.App.5th at p. 910.) We review the evidence in the light most favorable to the magistrate’s ruling and defer to the trial court’s factual findings, express or implied, if they are supported by substantial evidence. (*Johnson, supra*, 50 Cal.App.5th 620, 626.) We exercise our independent judgment in determining, on the facts found, whether the search was constitutionally reasonable. (*Id.* at pp. 626-627.)

C. *Analysis*

Defendant does not contest the legality of the initial traffic stop but argues the ensuing search of the vehicle was unlawful because it was without probable cause. Defendant’s principal argument is that small amounts of “stray marijuana” scattered around the floorboards of a vehicle does not provide probable cause for a search.

The People initially argued that the loose marijuana, although lawful in amount, was contraband because the manner in which it was being transported violated statutory prohibitions against driving with an open container or package of marijuana (§ 11362.3, subd. (a)(4)) or loose cannabis flower (Veh. Code, § 23222, subd. (b)). The People later abandoned these arguments, however, and at oral argument relied solely upon the totality of circumstances to support a finding a probable cause. The People argued that, based on the totality of the circumstances, the police had probable cause to conduct the search

based on the evidence that (1) the suspects seemed nervous, (2) the suspects falsely stated there was no marijuana in the vehicle, (3) officers saw a marijuana rolling tray in the back of the vehicle, and (4) officers observed a “usable” amount of loose marijuana scattered on the floorboard.

We conclude that the loose marijuana was contraband, and illegally transported, and thus find the search was proper. As noted above, while Proposition 64 decriminalized the use and possession of marijuana in limited circumstances, it did not decriminalize marijuana use and possession in all circumstances. Thus, “even after the enactment of Proposition 64, there is probable cause to search a vehicle if a law enforcement official sees a legal amount of cannabis in an illegal setting” (*Blakes, supra*, 72 Cal.App.5th at p. 912.) Relevant here, section 11362.3, subdivision (a)(4), states that it is unlawful to “[p]ossess an open container or open package of cannabis . . . while driving, operating, or riding in the passenger seat or compartment of a motor vehicle” (§ 11362.3, subd. (a)(4).)

Defendant argues there was no “open container” violation because the marijuana observed by the police officers was not in a container. Defendant’s argument does not hold up under scrutiny. Although the words used in a statute are the most useful guide to its intent, the language of a statute should not be given a literal meaning if doing so would frustrate the purposes of the legislation or lead to absurd results. (*People v. Johnson* (2022) 83 Cal.App.5th 1074, 1083; *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1844.) To construe the statute as defendant urges would lead to an absurd result and undermine the purpose of the open container law, which is to ensure that marijuana is transported only in sealed containers such that it is inaccessible while driving or riding as a passenger in a vehicle. (See *People v. Souza* (1993) 15 Cal.App.4th 1646, 1652.) It would defy logic to conclude that an individual with an unsealed container or open package of marijuana is violating the law, while someone with usable amounts of marijuana scattered loosely on a seat or around the passenger compartment is not.

Thus, in spite of the People's belated concession,⁴ we construe the statute, consistent with its apparent purpose, to prohibit any person from possessing marijuana *that is not in a closed package or container* while driving, operating, or riding as a passenger in a vehicle. In other words, when read together, the most logical interpretation of sections 11362.1 and 11362.3 is that these statutes decriminalized only the possession of less than 28.5 grams of marijuana in a *closed* container or package in a motor vehicle and that the law continues to prohibit the possession of open containers of marijuana *or* loose marijuana not in a container, just as before Proposition 64's enactment. In short, these statutes did not decriminalize the transportation of loose marijuana in a vehicle, even if lawful in amount. Consequently, we conclude that the marijuana at issue in this case was contraband because it was being transported illegally under section 11362.3, subdivision (a)(4).⁵

Further, even if we were to conclude the loose marijuana was not contraband, we are persuaded that the totality of the circumstances observed by the police officers gave probable cause to search the vehicle. Given the evidence that (1) the driver and defendant seemed nervous, (2) the officers were falsely told that there was no marijuana in the vehicle, (3) officers saw a marijuana rolling tray in the back of the vehicle, and (4) officers observed a "usable" amount of loose marijuana scattered on the floorboard, the officers reasonably believed that they would find contraband or evidence of unlawful marijuana possession in the vehicle. (*Moore, supra*, 64 Cal.App.5th at pp. 299, 302 [odor

⁴ We are not bound to accept a party's concession on a question of law. (*Desny v. Wilder* (1956) 46 Cal.2d 715, 729; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1021 [although the Attorney General's concession entitled to "appropriate deference," the appellate court is not bound by it].)

⁵ This renders it unnecessary for us to decide whether the loose marijuana was contraband under Vehicle Code section 23222, subdivision (b)(1).

of marijuana plus nervous, evasive behavior reasonably caused an officer to believe a vehicle contained more marijuana than the law allows].)

We reject defendant’s argument that the amount of marijuana observed was too small to justify the search. Defendant’s argument relies on *Hall, supra*, 57 Cal.App.5th at page 946, in which police officers observed “ ‘a green leafy substance, that appeared to be broken up’ ” in the driver’s lap. (*Hall, supra*, at p. 949.) *Hall* is distinguishable because, in that case, there was no evidence that the fragments of loose marijuana observed in the driver’s lap constituted a usable quantity, as opposed to useless trace amounts. (*Id.* at p. 958; see *People v. Rubacalba* (1993) 6 Cal.4th 62, 65-66.) Here, in contrast, the testimony was undisputed that the officers observed a “usable” amount of loose marijuana.

In sum, we conclude the presence of a “usable” amount of unlawfully possessed marijuana, together with the other facts observed or known to the police officers, provided probable cause to search the vehicle. (*McGee, supra*, 53 Cal.App.5th at pp. 803-805; *People v. Fews* (2018) 27 Cal.App.5th 553, 562-564; *People v. Souza, supra*, 15 Cal.App.4th at p. 1653.)

DISPOSITION

The petition for writ of mandate is denied. The stay order issued by this court on February 2, 2024, will terminate upon finality of this opinion.

_____\s_____,
Krause, J.

I concur:

_____\s_____,
Earl, P. J.

Duarte, J., Dissenting.

The majority rejects a concession by the Attorney General to hold that an open container violation does not require the existence of a container, whether open or closed. It then alternatively and cursorily concludes that the sum of three legal and innocuous events constitutes a “totality of the circumstances” justification for a warrantless vehicle search. I cannot agree with the majority on either of these points. Accordingly, I dissent.

After what was clearly a targeted traffic stop of a car that appears to have contained African-American and Hispanic individuals (see *People v. Flores* (2024) 15 Cal.5th 1032, 1054 (conc. opn. of Evans, J.) [“Black individuals were stopped 131.5 percent more frequently relative to their proportion of the population and Hispanic individuals comprised the largest racial group of stopped individuals.” “Stopped Black and Hispanic individuals were more likely to be searched than stopped White individuals”]), a questionably invasive “plain view” observation of an unclear amount of discarded marijuana on the back floorboards of the car, and extensive questioning of the driver, who had a sweaty upper lip (see *id.*, at pp. 1052-1053 (conc. opn. of Evans, J.) [discussing “the danger in considering ‘nervous’ and ‘evasive’ behavior in the totality of the circumstances analysis when devoid of real world context”]), the police executed a warrantless search of the car in which defendant was riding. The search was performed after the driver politely declined an officer’s request for consent to search. A postsearch total of 0.36 grams of marijuana was represented as the amount scraped off the car’s rear floorboards and found under the passenger seat, although the scrapings were never analyzed and, in my view, could easily have contained other materials from the floor of the car.

First, the majority concludes that the officers witnessed a violation of Health and Safety code section 11362.3, subdivision (a)(4)¹--which criminalizes “an open container or open package” of marijuana in a vehicle--when they observed the scattered marijuana on the floorboards of the car. (Maj. opn., *ante*, at pp. 9-10.) However, I agree with the Attorney General’s concession at oral argument that scattered marijuana on a car’s floorboards does *not* constitute an open container of marijuana. I know of no authority, and the majority cites none, that upholds an open container violation in the *undisputed* absence of a container of any sort. There was not even wrapping paper involved, were I inclined to stretch the definition of “container.” (See *In re Randy C.* (2024) 101 Cal.App.5th 933, 940-941 [holding that “a marijuana blunt, wrapped in paper but for a ‘speck of marijuana’ on the flattened end,” was “an ‘open container’ of marijuana within the meaning of section 11362.3”].) The reason for this dearth of authority is clear: Without *any* evidence of a container or package, there can be no *open* container or package. The presence of an empty rolling tray elsewhere in the car is irrelevant, as is the testimony (questionable in my view, but unchallenged on appeal) that a useable amount of marijuana is any amount that “could be ingested by a human.” As but one example, a tablespoon of beer “could be ingested by a human,” but common sense dictates that a small amount of beer spilled on the rear floorboards of a car would not constitute an open container of alcohol as defined by Vehicle Code section 23222, subdivision (a).

Although the majority refers to this conclusion as an “absurd result” and points out that the purpose of the open container law is to ensure that marijuana is inaccessible to persons while they are driving, operating, or riding as passengers in a vehicle (maj. opn, *ante*, at p. 9), here there is no evidence that the marijuana scattered on the rear floorboards was accessible for consumption by anyone in the car; indeed, the back seat of

¹ Further undesignated statutory references are to the Health and Safety Code.

the car was unoccupied. Tellingly, although the amount scraped from the floorboards may have been “useable,” there was neither evidence that the marijuana was in any condition to actually *be* used nor evidence that anyone was in the position to scrape it together and use it while driving, operating, or riding in the car. Beyond the tray, no drug paraphernalia was found. Further, the scattered amount was approximately *one-eightieth* of the amount that would be *legal* if it were in a sealed baggie on the front seat. To criminalize the tiny amount of scattered marijuana on the rear floorboards but legalize the closed baggie in the front seat containing 80 times that amount strikes me as far more absurd than my proposed plain language interpretation of the statute as requiring an open container to find a violation of an open container law.²

Second, the majority concludes in the alternative, with minimal analysis, that the “totality of the circumstances” provided probable cause for the search even assuming there was no open container violation. In addition to the scattered marijuana on the floorboards, the majority points to the evidence that the driver and defendant “seemed nervous,” that the officers were “falsely told that there was no marijuana in the vehicle,” and that there was a rolling tray in the back of the car. (Maj. opn., *ante*, at p. 10.)

The one case cited by the majority is eminently distinguishable, containing far more to provide reasonable grounds for belief of guilt than the instant case. (See, e.g., *People v. Celis* (2004) 33 Cal.4th 667, 673 [“ ‘ ‘The substance of all the definitions of

² The magistrate understandably rejected the argument that there could be an open container violation where there was no container but reasoned that the officers had probable cause to search the vehicle because the loose marijuana they observed was “contraband” under Vehicle Code section 23222, subdivision (b). The Attorney General wisely abandoned his defense of this reasoning after we requested supplemental briefing on the language in subdivision (b)(1) of that statute specifically requiring the driver to be in “possession *on their person*” while driving in order for “loose cannabis flower not in a container” to be an infraction. The majority does not address this argument, and instead rejects the Attorney General’s concession that the trial judge correctly found there was no violation of Health and Safety Code section 11362.3, subdivision (a)(4), in this case.

probable cause is a reasonable ground for belief of guilt” ’ ”]; see *People v. Moore* (2021) 64 Cal.App.5th 291, 299 [cited by the majority, where a panel of this court found probable cause for searching a Jeep existed when the officer interrupted a suspected drug transaction in a high-crime area, the defendant (who had been leaning into the passenger side of the Jeep) left the scene when the officer approached, the officer smelled “the strong odor of fresh marijuana emanating from the Jeep,” and the driver had an “implausible explanation” for the smell, was nervous, and gave an ambiguous answer when asked if anything illegal was in the Jeep].) In contrast, in this case, the officers ostensibly stopped the car for a limit line violation, and the record reveals no arguably suspicious circumstances related to the car or its occupants at the time of the stop. There was no suspected drug transaction. There was no smell of marijuana or any other suspicious smell. There was no container, open or closed. Although there was an empty rolling tray on the backseat, there was no evidence of current drug consumption and no evidence the car’s occupants were under the influence. There were no evasive answers to questions or attempts to avoid contact with the officers. The “false” response of “no” to the officer’s question as to whether there was any marijuana in the car was far from a major falsehood; there was no evidence that the car’s occupants were *aware* of the small amount of marijuana scattered on the rear floorboards. The driver explained to the officer that her sweaty upper lip was a medical condition. The video evidence does not reveal any nervous or uncooperative behavior by the car’s occupants, particularly when considering the intimidating circumstances of the stop: Three uniformed officers approached the car together and used flashlights to look inside the windows (in broad daylight) from both sides. The driver obeyed all commands and respectfully refused the officers’ requests to search the car for guns, made before they spotted the scattered marijuana.

Section 11362.1, subdivision (c) precludes the consideration of the legal possession of the 0.36 grams of marijuana found on the floorboards; its presence in the car cannot properly support the probable cause determination absent other factors properly considered, and here there were none. The empty rolling tray was neither illegal nor proof of any illegality, and the majority does not explain its relevance to this analysis. Likewise, the fact that the car's occupants "seemed" nervous and that the driver disclaimed knowledge of one third of a gram of marijuana scattered on the floorboards behind her passenger did not supply probable cause for this warrantless search. Simply put, there was no evidence of any ongoing illegal activity whatsoever. I would grant the petition and issue the writ.

\s\

Duarte, J.

S287164

Declaration of Service

I, **Kyle Hofmeister**, being duly sworn, deposes and says:

I am and was on the dates herein mentioned over the age of 18 years and not a party to this action; my business address is 700 H Street, Suite 0270, Sacramento, California 95814.

I served the PETITION FOR REVIEW in this action by delivering via electronic mail to the designated e-mail addresses for the entities below. I have also served them via TrueFiling where indicated.

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| Superior Court of the State of California, County Of Sacramento, Department 61 720 9th Street Sacramento, California 95814 Dept61@saccourt.ca.gov; [Personal Service] | DDA Miranda Drolet Sacramento District Attorney's Office 901 G St. Sacramento, CA 95814 [Via TrueFiling] |
| Davonyae Sellers 734 Rio Terra Ave Sacramento, CA 95833 [USPS] | Attorney General's Office P.O. Box 944255 1300 I St. Sacramento, CA 95814 (916) 445-9555 [Via TrueFiling] |

I declare under penalty of perjury that the foregoing is true and correct.

Executed October 2, 2024, at Sacramento, California.

/s/ Kyle Hofmeister _____

Kyle Hofmeister

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Sellers v. Superior Court**
Case Number: **TEMP-S5S2GWCX**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **hofmeisterk@saccounty.gov**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

| Filing Type | Document Title |
|-----------------------|--------------------------------|
| ISI_CASE_INIT_FORM_DT | Case Initiation Form |
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| PROOF OF SERVICE | Declaration of Service for PFR |

Service Recipients:

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| Kyle Hofmeister Sacramento County Public Defender 323186 | hofmeisterk@saccounty.gov | e-Serve | 10/2/2024 2:56:32 PM |
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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/2/2024

Date

/s/Kyle Hofmeister

Signature

Hofmeister, Kyle (323186)

Last Name, First Name (PNum)

Sacramento County Public Defender

Law Firm