IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KEWHAN ROBEY,

Petitioner,

v.

SUPERIOR COURT OF SANTA BARBARA COUNTY,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Case No. S197735

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

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON MERITS

The People restate and affirm the arguments previously made in the Opening Brief on Merits. In this Reply Brief, the People only address those points needing reply, explanation or amplification in light of the Answer Brief.

Any failure to reply to a specific point is not intended as a concession; rather, the point was sufficiently addressed in the Opening Brief and no additional argument is believed to be necessary.

The Fourth Amendment to the United States Constitution permits police to rely upon all of their senses, including the sense of smell, when making probable cause determinations. Probable cause is based upon the totality of the circumstances and can be supported by one or more of a police officer's senses. To require police to ignore contraband discovered during the course of a legitimate investigation solely because the probable cause is based, in part, upon the officer's sense of smell defies common sense and unnecessarily hampers effective law enforcement.

ARGUMENT

I. ONCE THE PACKAGE WAS LAWFULLY SEIZED THERE WAS NO REQUIREMENT FOR A WARRANT TO OPEN THE PACKAGE

The issue presented in *People v. Marshall* (1968) 69 Cal.2d 51, which the Court of Appeal relied upon, is not here presented. In *People v. Marshall, supra,* the majority held that because a home cannot be searched on probable cause alone, a warrantless search of a package in the home cannot be justified under the "plain view" exception unless the officer can actually see the contents of the package. (*Id.* at p. 59.) In the case at bar, by contrast, the package was consigned to a common carrier for shipment, it was not inside the home.

This Court in *People v. McKinnon* (1972) 7 Cal.3d 899, made it clear that once a box is lawfully seized from a common carrier, there is no need to get a warrant. In *California v. Acevedo* (1991) 500 U.S. 565, the Supreme Court concluded that if a package was lawfully seized, officers did not need to wait for a search warrant to open the package as follows:

> We now must decide the question deferred in *Ross:* whether the Fourth Amendment requires the police to obtain a warrant to open the sack in a movable vehicle simply because they lack probable cause to search the entire car. We conclude that it does not. (*California v. Acevedo* (1991) 500 U.S. 565, 573.)

As pointed out previously, the People contend that the rationale in *McKinnon* is still applicable and should be applied to the present case because *United States v. Chadwick* (1977) 433 U.S. 1, was abrogated by *California v. Acevedo*. Moreover, in a subsequent case *United States v. Jacobsen* (1984) 466 U.S. 109, the Supreme Court acknowledged a warrantless search of a package as follows:

> While the agents' assertion of dominion and control over the package and its contents did constitute a "seizure," that seizure was not unreasonable. The fact that, prior to the field test, respondents' privacy interest in the contents of the package had been largely compromised, is highly relevant to the reasonableness of the agents' conduct in this respect. The agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to

> examine its contents. Under these circumstances, the package could no longer support any expectation of privacy... (*U.S. v. Jacobsen* (1984) 466 U.S. 109, 120-2.)

In *Chambers v. Maroney* (1925) 267 U.S. 132, a defendants' automobile was seized by police officers and impounded at the police station; the court ruled that under those circumstances the mobility of the car still obtained at the station house, "a fortiori a chattel" remains "mobile" in the constitutional sense despite its limited and voluntary bailment to a common carrier. (*Chambers v. Maroney* 399 U.S. at p. 52.)

In the present case, the FedEx employees smelled the marijuana and were so convinced of the package's illegal contents that they took the package out of the shipping line and called the police. While the FedEx employee did not open the package in this case, the rationale of *Jacobson* supports the People's contention that a warrant was not required under the totality of circumstances in this case. Just as in *Jacobson,* the police officer's conduct was reasonable and suppression of the evidence is not warranted.

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II. NO FOURTH AMENDMENT VIOLATION OCCURRED WHEN THE PACKAGE WAS SEIZED AND LATER OPENED

The People are not asking this court to create a new doctrine, but rather seek a ruling that the conduct in this case fits within the already existing "plain smell" corollary to the plain view doctrine.[1] The doctrine of "plain view" has already been extended to "touch", "feel", "hearing" and "smell".

In *Minnesota v. Dickerson* (1993) 508 U.S. 366, the United States Supreme recognized the analogy of the plain view doctrine to other senses:

> We think that this doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment... (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375.)

The Supreme Court was very careful in considering the counter arguments against "plain touch" such as reliability and intrusion. The Supreme Court concluded that a suspects privacy rights are not advanced

[1] A WestlawNext search of "plain smell" results in a list of 57 cases and 193 secondary sources.

by a categorical rule barring seizure of contraband through the sense of touch. Using the Supreme Court's logic there would also be no benefit to a categorical ban to the use of smell.

> Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 376.)

The Supreme Court rationale makes it clear that the focus is not on the means, but rather on the whether there is probable cause based on the officer's sense. The California courts have acknowledged the "plain touch" doctrine in *People v. Dibb* (1995) 37 Cal.App.4th 832 as follows, "[t]he rationale expressed in *Dickerson* follows analogy to the plain-view doctrine: contraband left open to the view or touch of an officer from a lawful vantage point involves no invasion of the possessor's legitimate expectation of privacy, and thus no search independent of any initial intrusion occurs." (*People v. Dibb* (1995) 37 Cal.App.4th 832, 836.)

Therefore, under the Supreme Court's and California Court of Appeal's rationale, it would not matter if the officer used his sense of vision, touch, taste, hearing or smell if the officer was able to articulate probable cause based on this "observation." Clearly, a probable cause seizure based upon the sense of smell is no more intrusive than probable cause seizures

based upon the sense of sight. In fact, "plain smell" is less expansive, less intrusive and more easily and readily recognized than a pat down search that involves plain touch. The extension of the warrant exception to "plain smell" is not as expansive as plain touch, and it is more akin to plain view.

Moreover, with the plain smell exception, there is no incentive for police to engage in improper stops and searches since, if the underlying stop and search is improper, any resulting evidence will not be admissible at trial. When probable cause is established in a situation such as the one presented in this case, the additional step of obtaining a warrant does nothing to further the Fourth Amendment's central purpose of ensuring that searches and seizures are reasonable.

III. THE PLAIN SMELL EXCEPTION

The United States Supreme Court has repeatedly indicated that probable cause can be determined through senses other than sight. In *Johnson v. United States*, (1948) 333 U.S. 10, the Supreme Court effectively recognized a "plain smell" corollary to the "plain view" exception. The defendant in *Johnson* argued that a narcotics officer's detection of the odor of burning opium from an adjacent room was an insufficient basis to justify the issuance of a search warrant. In rejecting this argument, the Supreme Court stated that detection of the presence of

distinctive odors by one "qualified to know the odor" established probable cause for the search.

In *United States v. Johns*, (1985) 469 U.S. 478, the Supreme Court held that the scent of marijuana from trucks established probable cause to believe the trucks contained contraband. Essentially the same reasoning supports the argument that there is no "reasonable expectation of privacy" from lawfully positioned agents "with inquisitive nostrils." (*United States v. Johnston* (9th Cir. 1974) 497 F.2d 397). This means, for example, that no search in a Fourth Amendment sense has occurred when a law enforcement officer, lawfully present at a certain place, detects odors emanating from private premises, from a vehicle, or from some personal effects nearby.

The Supreme Court, contrary to Respondent's position notes, "the mere fact that the police may be less than 100% certain of the contents of the container is insufficient to create a protected interest in the privacy of the container." (*Illinois v. Andreas* (1983) 463 U.S. 765, 772.) Once a container has been found to a certainty to contain illicit drugs. the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost. And in losing an expectation of privacy the search and seizure of the object is lawful. (*Ibid).*

The Ninth Circuit Court of Appeal decision in *United States v. Johnston* (9th Cir. 1974) 497 F.2d 397, is very similar to the case at bar. In *Johnson*, the agent bent down a sniff the suspect luggage. When he smelled a controlled substance, he forced the luggage open, finding several kilos of marijuana. The Ninth Circuit stated:

> We reject Johnston's argument that he had a reasonable expectation of privacy from drug agents with inquisitive nostrils. He admits he should have reasonably expected fellow passengers or railway employees to handle his luggage. While we have held that squeezing a suitcase is a search under some circumstances, *Hernandez v. United States*, 353 F.2d 624, 626 (9th Cir. 1965), we are not prepared to hold that, under the circumstances here, suitcase sniffing (whether the sniffer is erect or bending over) is a search within the meaning of the Fourth Amendment. *United States v. Martinez-Miramontes,* 494 F.2d 808 (9th Cir. 1974). (*United States v. Johnston* (9th Cir. 1974) 497 F.2d 397, 398.)

The case at bar provides this Court with the opportunity to establish a clear standard for the "plain smell" exception to the warrant requirement. First, the officer must be lawfully in the position to smell the item. Second, the officer must have the proper training and/or experience to identify the smell of the item in question. Third, the officer's sense of smell, within the totality of circumstances, must provide the officer with probable cause to believe that the smell is contraband or other evidence of a crime.

In the present case, all three elements were satisfied. The officers were called to the location by store employees. The officer had training and experience in the odor and appearance of marijuana. Finally, the package was highly mobile, FedEx employees could smell marijuana emanating from the package, and the information on the packing slip contained incorrect information.

IV. A HIGHLY MOBILE PACKAGE CREATES EXIGENT CIRCUMSTANCES

The seizure in this case occurred when the officer took possession of the package at the FedEx store. While FedEx had taken the package out of the shipping line, if law enforcement had not seized it at that time, over a pound of marijuana would have been unsecured and accessible to the suspect, other criminals and the general public. Therefore, law enforcement had no alternative other than to seize the package. In *People v Hampton* (1981) 115 Cal.App.3d 515, the court noted that shipment of package before a defendant had been arrested demanded immediate action.

The present case involved a highly mobile object consigned into the stream of commerce that had evidence of a felony being committed by the sender. It is important to note, that Health and Safety Code § 11360, makes it a felony punishable up to four years in prison to "transports ... furnishes,

administers, or gives away, or offers to transport ... sell, furnish, administer, or give away, or attempts to ... transport any marijuana."

The marijuana smell emanating from the package was not merely evidence, but proof positive there was an on-going felony being committed by the sender of the package, and the sender of the package had not yet been arrested. Respondent could have returned at any time to FedEx and request the package back or have it removed from the stream of commerce and returned to him. In fact, as noted, Respondent eventually did return and make an inquiry as to the package with his shipping slip.

Once the package was seized, law enforcement had the right to open the package based on the exigent circumstances that existed at the time of the seizure. "Narcotics agent who detected presence of marijuana in defendant's suitcases on train was not required to secure a warrant, and agent's forcing of locks and opening of the luggage was justified by exigent circumstances." (*U.S. v. Johnston* (9th Cir. 1974) 497 F.2d 397.)

The fact that the officers waited to open the package under the controlled environment at the police station as a precautionary measure does not obviate the exigent circumstances that led to the seizure of the package. If a police officer is in a place where he has a right to be, seizure of evidence reasonably believed to be evidence of a crime is proper. (*People v. Hampton* (1981) 115 Cal. App. 3d 515, 520.)

Therefore, the highly mobile nature of the package combined with the plain smell of marijuana created exigent circumstances which authorized the warrantless seizure and search of the package.

Respondent argues in his brief that this case "is a container search." (Respondent Brief - page 11). Respondent follows up the point that "the fact that this container was originally consigned to 'Fed Ex' [sic] a common carrier changes nothing." (Respondent Brief - page 12). Respondent, however, does not provide compelling authority to support his proposition.

Instead, Respondent distinguishes *People v. Mckinnon* (1972) 7 Cal.3d 899, as a luggage consigned to an airplane and search involving a plane flight leaving which necessitated quick action. (Respondent Brief - page 13). Along these lines, Respondent then quotes the "opportunity to search ... was much more 'fleeting' and prompt action was far more imperative..." (Respondent Brief - page 14). Likewise as the Respondent quotes to the court, the fact that the cartons were being "used for an illegal" purpose in that they contained not 'mere evidence' but contraband was critical to the *McKinnon's* analysis. (Respondent Brief - page 14). This analysis, however, only reinforces that the very nature of the package being shipped is a critical fact for a Fourth Amendment determination. The very nature of the package, it is intended to be mobile and the storage of certain pungent items within may inherently reveal themselves to even the ordinary nose.

Respondent also never distinguishes or disagrees the binding language of *United States v. Johns* (1985) 469 U.S. 478, 487-488. Respondent only asserts the case is "completely inapplicable to the search of this container." (Respondent Brief - page 19). No further analysis was provided by Respondent.

In *Johns*, the government seized packages containing marijuana that were being transported from airplane to a truck in commerce by customs agents. The packages smelling of marijuana, the government seized the packages and moved them to a DEA warehouse. Three days, later the government then opened the packages to confirm that they were marijuana. The United States Supreme Court stated in language quite appropriate to this case:

> Inasmuch as the Government was entitled to seize the packages and could have searched them immediately without warrant, we conclude the warrantless search three days after the packages were placed in the DEA warehouse was reasonable and consistent with our precedent involving searches of impounded vehicles. (*U.S. v. Johns* (1985) 469 U.S. 478, 487-488.)

This language of "reasonable and consistent" is telling, in that it directly applies to the word "packages" seized as part of the Court's holding. The Supreme Court in no uncertain terms instructs that the removal of a package smelling of marijuana from the point of seizure and transport to a government facility for search, even a search three days later, is reasonable

under the Fourth Amendment. What's also critical to the analysis is the United States Supreme Court makes of a point of stating that this search of the packages is consistent with our precedent of searches of impounded vehicles. For this reason, not only is *Johns* applicable, it is highly probative and on point as to the facts before this court.

The United States Supreme Court goes even further in analyzing the issue from a public policy point of view in upholding the warrantless search of the marijuana package three days later as follows:

> The warrantless search of the packages was not unreasonable merely because the Customs officers returned to Tucson and placed the packages in a DEA warehouse rather than immediately opening them. Cf. *United States v. Jacobsen,* 466 U.S. 109, 119-120, 104 S.Ct. 1652, 1659-1660, 80 L.Ed.2d 85 (1984) (no privacy interest in package that was in possession of and had been examined by private party); *Michigan v. Thomas, supra,* 458 U.S., at 261, 102 S.Ct., at 3081. The practical effect of the opposite conclusion would only be to direct police officers to search immediately all containers that they discover in the course of a vehicle search. Cf. *Ross, supra,* 456 U.S., at 807, n. 9, 102 S.Ct., at 2163, n. 9 (noting similar consequence if police could not conduct warrantless search after vehicle is impounded). This result would be of little benefit to the person whose property is searched, and where police officers are entitled to seize the container and continue to have probable cause to believe that it contains contraband, we do not think that delay in the execution of the warrantless search is necessarily unreasonable. Cf. *Cardwell v. Lewis,* 417 U.S., at 592-593, 94 S.Ct., at 2470 (impoundment and 1-day delay did not make examination of exterior of vehicle unreasonable

> where it could have been done on the spot) (*United States v. Johns*, (1985) 469 U.S. 478, 486-87.)

Therefore, applying this language from *Johns*, a police officer is entitled to make a warrantless seizure of an object when, during a lawful encounter with the package, the officer develops probable cause to believe that an object is contraband or other evidence of a crime. (*Payton v. New York* (1980) 445 U.S. 573, 587.) At that point, since the object is intended to be transitory and has already a reduced expectation of privacy by the very emanating smell, law enforcement may consider its content in plain view and seize it for their criminal investigation. The location of the search at a government facility does not remove the reasonableness of the search in any matter whatsoever.

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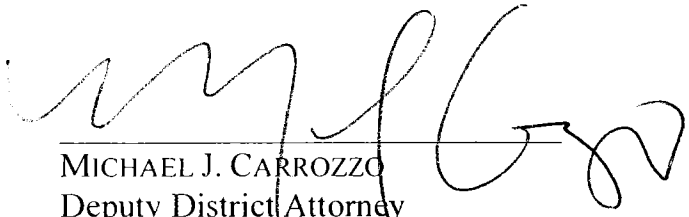
CONCLUSION

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

Dated: May 11, 2012

Respectfully submitted,

JOYCE E. DUDLEY
District Attorney of Santa Barbara



MICHAEL J. CARROZZO
Deputy District Attorney
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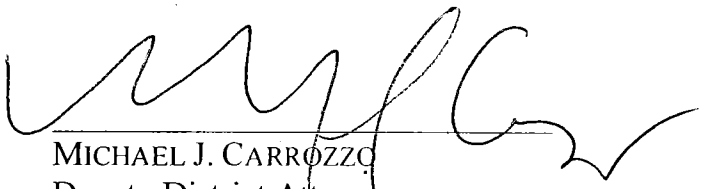
CERTIFICATE OF COMPLIANCE

I certify that the attached the REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,691 words.

Dated: May 11, 2012

Respectfully submitted,

JOYCE E. DUDLEY
District Attorney of Santa Barbara



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PROOF OF SERVICE

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

PEOPLE v. KEWHAN ROBEY

Case No. S197735

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

On May 11, 2012, I served a true copy of the attached REPLY BRIEF ON THE MERITS on the following, by method(s) indicated below:

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

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

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

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

MAY 11, 2012

Donna Crawford