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**THE IMPLICATIONS OF LEGALIZED MARIJUANA ON
ESTABLISHING PROBABLE CAUSE FOR A WARRANTLESS
SEARCH**

LAUREN WILLIAMS* AND SAMUEL D. HODGE, JR.**

“The amount of money and legal energy being given to prosecute hundreds of thousands of Americans who are caught with a few ounces of marijuana in their jeans simply makes no sense - the kindest way to put it. A sterner way to put it is that it is an outrage, an imposition on basic civil liberties and on the reasonable expenditure of social energy.”

— William F. Buckley

ABSTRACT

A police officer pulled over a speeding automobile. As the officer approached the vehicle, the driver lowered her window, causing the unique odor of marijuana to escape into the air.¹ This smell immediately alerted the officer to the existence of a controlled substance and established probable cause to search the operator and car.² Not so fast! Sniff and search is no longer an automatic justification for law enforcement to conduct a warrantless search in those jurisdictions that have legalized or decriminalized cannabis.³

The Supreme Court has long recognized the “automobile exception” to the Fourth Amendment’s prohibition against unlawful search and seizures.⁴ This precedent has provided the police with the power to perform a warrantless search if a reasonable suspicion exists that the vehicle is being employed to hide

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1. Paul Stein, Court Rules Marijuana Odor No Longer Probable Cause to Search, STEIN SPERLING (Jan. 22, 2019), <https://steinsperling.com/court-rules-marijuana-odor-no-longer-probable-cause-to-search/>.

2. *Id.*

3. Michael Rubinkam, *In Era of Legal Pot, Can Police Search Cars Based on Odor?*, AP NEWS (Sept. 13, 2019), <https://apnews.com/article/0ba2cf617a414174b566af68262ef937>.

4. *Id.*

contraband or evidence of a crime.⁵ The police have used this exception for many years to perform car searches premised upon the unique smell of marijuana.⁶ However, recent case law suggests that they may no longer solely rely upon the odor of marijuana to support a search in some jurisdictions.⁷ Medical marijuana and the approved recreational use of the drug, or decriminalization, which imposes civil but not criminal penalties for some levels of marijuana possession, are forcing law enforcement to reexamine their operating procedures involving the searching of a motor vehicle, or person, without a warrant.

Marijuana has a complicated legal narrative in the United States. While it gains increased acceptance in this country, state lawmakers and the judiciary are confronted with ongoing and novel issues about the drug's legality and control.⁸ This article will explore one of the current controversies involving marijuana: law enforcement's reliance on smelling or seeing cannabis as establishing probable cause for suspicion of criminal activity. This is known as the "Plain Smell" Doctrine.⁹ Many courts have allowed warrantless searches premised upon the smell of the drug. However, if the substance is legal or decriminalized in a specific jurisdiction, should its odor still permit a warrantless search by law enforcement?¹⁰ That question is the focus of this article.

5. *Id.*

6. *Id.*

7. Stein, *supra* note 1.

8. Cece White, *The Sativas and Indicas of Proof: Why the Smell of Marijuana Should Not Establish Probable Cause for a Warrantless Vehicle Search in Illinois*, 53 UIC J. MARSHALL L. REV. 187, 188 (2020).

9. *Id.* at 188.

10. *Id.*

INTRODUCTION

Marijuana is the most frequently used psychotropic drug in the United States, after alcohol.¹¹ No one knows how long humans have used cannabis, but archeologists have found instruments available to burn psychoactive marijuana dating back to China 2,500 years ago.¹² The plant has perhaps engendered more joy, relief, suffering, and controversy than any other vegetation in human history.

Cannabis evolved 28 million years ago on the eastern Tibetan plateau¹³ and was first used to make oil and fiber for rope, clothing, and paper.¹⁴ Archeologists believe that early marijuana users were limited to mourners who burned the plant's leaves and inhaled the fumes.¹⁵ At that time, only the elites were privy to marijuana's magical effects; historians say China's Silk Road provided the first route by which the plant eventually spread to the outside world.¹⁶

Fast-forwarding to the United States in 2018, more than 11.8 million young adults used marijuana during that year, and its consumption is more prevalent among men than women.¹⁷ Statistically, 22.2 million Americans twelve years and older reported having used cannabis during the prior month (8.3%), and most said they use the drug for recreational purposes (89.5%) as opposed to a medical reason (10.5%).¹⁸ Older Americans are partaking as well: a University of Massachusetts study found that about one in twenty older Americans reported using marijuana within the previous month, specifically with five percent of men and women aged fifty-five or older saying they have used the drug within the last month.¹⁹

11. NAT'L INST. ON DRUG ABUSE, MARIJUANA RESEARCH REPORT (2020), <https://www.drugabuse.gov/download/1380/marijuana-research-report.pdf?v=d9e67cbd412ae5f340206c1a0d9c2bfd>.

12. Andrew Lawlor, *Oldest Evidence Of Marijuana Use Discovered In 2500-Year-Old Cemetery In Peaks of Western China*, SCI. (June 12, 2019), <https://www.sciencemag.org/news/2019/06/oldest-evidence-marijuana-use-discovered-2500-year-old-cemetery-peaks-western-china>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. MARIJUANA RESEARCH REPORT, *supra* note 11.

18. NAT'L ACAD. OF SCI., ENGINEERING, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH (2017), <https://www.ncbi.nlm.nih.gov/books/NBK425763/#:~:text=A%20recent%20survey%20showed%20that,et%20al.%2C%202016>.

19. Dennis Thompson, *1 In 20 Older Americans Smoke Pot Regularly, Survey Finds*, UPI (Sept. 1, 2020), https://www.upi.com/Health_News/2020/09/01/1-in-20-older-Americans-smoke-pot-regularly-survey-finds/8551598984977/?utm_source=fark&utm_medium=website&utm_content=link&ICID=ref_fark.

Decriminalization is part of the modernization of marijuana laws, involving removing criminal penalties for actions such as production, distribution, possession, and consumption.²⁰ Under this process, criminal consequences have been replaced with civil penalties and rules on commercial cannabis distribution. This decriminalization is an ongoing debate and a continuing societal trend in the United States in the twenty-first century.²¹ Voters have been asked to decide many questions about legalization, and federal and state laws for cannabis are being reviewed or changing.²²

I. OVERVIEW OF FEDERAL & STATE LAW

A. Federal Level

Marijuana is illegal for any reason on the federal level. It was initially regulated under the Marijuana Act of 1937 for tax purposes.²³ It was banned on a national basis by the Controlled Substance Act of 1970, which classified the drug as a Schedule 1 controlled substance.²⁴ This means that it is considered as having a high risk for abuse with no approved medical purpose.²⁵ Other substances classified as Substance 1 drugs include heroin, LSD, and peyote.²⁶ Because of this classification, crimes involving marijuana and other Schedule 1 drugs can lead to penalties in the thousands to millions of dollars and substantial prison time.²⁷ Fines for possession of marijuana can be as much as \$5,000 per offense, and distribution fines can be in the millions.²⁸ The sale of the drug on a large scale can also carry a life sentence with possession leading to prison time of up to three years.²⁹

In 2020, Congress examined multiple bills to legalize cannabis.³⁰ The Marijuana Opportunity, Reinvestment, and Expungement (“MORE”) Act was

20. *Leafly's Guide to Marijuana Legalization*, <https://www.leafly.com/learn/legalization> (last visited Mar. 12, 2021).

21. *Id.*

22. *Id.*

23. U.S. CUSTOM & BORDER PROT., DID YOU KNOW... MARIJUANA WAS ONCE A LEGAL CROSS-BORDER IMPORT? (2019), <https://www.cbp.gov/about/history/did-you-know/marijuana#:~:text=His%20campaign%20against%20Cannabis%20led,an%20annual%20tax%20of%20%242>.

24. *Background on: Marijuana and impaired driving*, INS. INFO. INST. (Feb. 23, 2021), <https://www.iii.org/article/background-on-marijuana-and-impaired-driving>.

25. *Leafly's Guide to Marijuana Legalization*, *supra* note 20.

26. *Background on: Marijuana and impaired driving*, *supra* note 24.

27. Rebecca Haffajee et al., *Behind Schedule — Reconciling Federal and State Marijuana Policy*, 379 NEW ENG. J. MED. 501–04 (2018).

28. *Federal Laws and Penalties*, NORML, <https://norml.org/laws/federal-penalties-2/> (last visited Apr. 22, 2021).

29. *Id.*

30. *Federal Policy*, MPP (updated July 21, 2021), <https://www.mpp.org/policy/federal/>.

passed in the House on December 4, 2020, but stalled in the Republican-controlled Senate.³¹ Besides decriminalizing marijuana on the federal level, the MORE Act included robust social equity considerations focusing on restorative justice for those most affected by cannabis prohibition.³² The bill required federal courts to: expunge prior cannabis-related convictions and arrange for resentencing; provide grants and money to groups most damaged by the war on the plant; bar federal agencies from refusing benefits or security clearances related to marijuana consumption; and safeguard immigrants from being denied citizenship.³³ In September 2021, the bill was approved by the House Judiciary Committee. The proposed legislation will legalize marijuana at the federal level.³⁴

Interestingly, Canada has made possession of the drug legal on a national level.³⁵ The government believes that legalization will tackle the unfairness in a criminal justice system where cannabis and hashish punishments and prosecutions have disproportionately affected marginalized communities, particularly Black Canadians and Indigenous people.³⁶

B. State Level

The past five decades have witnessed state experimentation with marijuana liberalization policies. Decriminalization initiatives were first introduced in the 1970s, and medical access laws started to be adopted in the 1990s.³⁷ More recently, jurisdictions have started exploring the legalization of recreational markets. This action has caused a wide array of new marijuana strategies around

31. Kyle Jaeger, *Key Congressional Chairman Plans to Refile Federal Marijuana Legalization Bill This Year*, MARIJUANA MOVEMENT (Mar. 11, 2021), <https://www.marijuanamoment.net/key-congressional-chairman-plans-to-refile-federal-marijuana-legalization-bill-this-year/>.

32. *Federal Policy*, *supra* note 30.

33. *Id.*

34. Kyle Jaeger, *Bill to Federally Legalize Marijuana Approved By Key House Committee*, MARIJUANA MOVEMENT (Mar. 11, 2021), <https://www.marijuanamoment.net/watch-live-key-house-committee-to-vote-on-federal-marijuana-legalization-bill/>. On February 2, 2022, a bipartisan group of House lawmakers forwarded a letter to Congressional leadership, requesting that a proposed law to legalize marijuana at the federal level be "expeditiously" considered by Congress. Kyle Jaeger, *Bipartisan Congressional Lawmakers Demand Marijuana Legalization Bill 'Expeditiously' Get House Vote*, MARIJUANA MOVEMENT (Feb. 2, 2022), <https://www.marijuanamoment.net/bipartisan-congressional-lawmakers-demand-marijuana-legalization-bill-expeditiously-get-house-vote/>.

35. *Leafly's Guide to Marijuana Legalization*, *supra* note 20.

36. Ian Austin, *2 Years After Legalizing Cannabis, Has Canada Kept Its Promises?*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/world/canada/marijuana-legalization-promises-made.html#:~:text=The%20recreational%20use%20of%20cannabis,mot%20resonated%20with%20many%20Canadians.>

37. Roslaie Liccardo Pacula & Rosanna Smart, *Medical Marijuana and Marijuana Legalization*, 13 ANN. REV. CLIN. PSYCH. 397, 397 (2017), <https://www.annualreviews.org/doi/10.1146/annurev-clinpsy-032816-045128>.

the United States.³⁸ A variety of factors have resulted in the liberalization of the laws, such as the increasing costs related to the arresting and jailing of nonviolent drug offenders, the mounting body of scientific evidence about the therapeutic benefits of cannabinoids, and stressed budgets that have forced legislatures to find new streams of revenue.³⁹

Currently, medical marijuana is legal in thirty-seven states and the District of Columbia, and marijuana is legal for recreational purposes in nineteen of those jurisdictions.⁴⁰ Colorado and Washington were the first states to approve recreational marijuana in 2012. Two years later, Alaska, Oregon, and the District of Columbia followed their lead.⁴¹ New York and New Jersey legalized plant use in 2021.⁴² Twenty-seven states have also decriminalized minor amounts of cannabis possession. This action permits small, personal consumption to be a civil penalty and not a state crime subject to imprisonment.⁴³

Recreational use laws generally prescribe a certain amount of marijuana whose possession is legal. For example, Oregon's law specifies no penalty for possession of one ounce or less of marijuana in public and eight ounces or less at home.⁴⁴ The law provides that up to four plants may be cultivated at home without penalty. Having more than four plants constitutes a misdemeanor punishable by up to one year in prison and a maximum fine of \$6,250.⁴⁵ Medical marijuana laws also specify what activities remain illegal. For example, in Maine, where marijuana is legal for adult recreational use, the statute provides that "[i]t is illegal to open and use marijuana in a vehicle, and this applies to both the passenger and the driver."⁴⁶

In states where medical marijuana is authorized, the laws vary considerably concerning the number and types of conditions covered. According to researchers, for example,

Illinois permits marijuana for about seven times the number of conditions (40) permitted by Washington, the most restrictive state (six). Investigators also found that while some state laws allow medical marijuana use for mental conditions such as posttraumatic stress disorder and anorexia, coverage for those ailments is relatively rare; many more states cover conditions such as terminal

38. *Id.*

39. *Id.*

40. Legal Medical Marijuana States and DC, PROCON.ORG (Feb. 3, 2022), <https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/>.

41. Michael Hartman, *Cannabis Overview*, NAT'L CONF. STATE LEGISLATURES (Apr. 8, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

42. *Id.*

43. *Id.*

44. *Oregon Laws and Penalties*, NORML, <https://norml.org/laws/oregon-penalties-2/> (last visited Apr. 16, 2021).

45. *Id.*

46. *Learn the Laws*, GOOD TO KNOW, <https://goodtoknowmaine.com/laws/> (last visited Oct. 30, 2021).

illnesses like Lou Gehrig's Disease (amyotrophic lateral sclerosis [ALS]), or chronic problems such as muscle spasms and migraines.⁴⁷

State laws also vary as to the amount of marijuana a person is permitted to possess and the number of plants that can be cultivated.⁴⁸ Researchers then looked at the extent to which a patient or caregiver is allowed to retain or grow the drug, finding that the more autonomy the law permits, the more flexibility there is in dosage administration.⁴⁹ Many medical marijuana statutes permit drug use for medicinal purposes only in certain forms, and smoking dope is often prohibited. For example, Louisiana's statute provides that a physician may prescribe marijuana for treatment of specific conditions "in any form as permitted by the rules and regulations of the Louisiana Board of Pharmacy except for inhalation."⁵⁰ Similarly, Pennsylvania permits medicinal marijuana only in pill, oil, topical gel, cream or ointment, vapor, tincture, or liquid forms.⁵¹

II. MARIJUANA & LAW ENFORCEMENT

A 2006 study published in the *Harm Reduction Journal* examined marijuana offenses between 1990–2002 and found that:

[S]ince 1990, the primary focus of the war on drugs has shifted to low-level marijuana offenses. During the study period, 82% of the increase in drug arrests nationally (450,000) was for marijuana offenses, and virtually all of that increase was in possession offenses. Of the nearly 700,000 arrests in 2002, 88% were for possession. Only 1 in 18 of these arrests results in a felony conviction, with the rest either being dismissed or adjudicated as a misdemeanor, meaning that a substantial amount of resources, roughly \$4 billion per year for marijuana alone, is being dedicated to minor offenses.⁵²

As with any illegal drug, there are active and substantial black market sales. Drug trafficking is an issue, making marijuana a target of law enforcement at federal, state, and local levels. Illicit drug trafficking provides Mexican smuggling organizations with about \$6 billion per year in revenue.⁵³ Further, illegal drug distribution on both sides of the border has traditionally played a

47. *Marijuana Cultivation Law: A state by State Guide to Growing*, GROWACE (Jan. 1, 2020), <https://growace.com/blogs/learning-center/marijuana-grow-laws-by-state>; Jessica Bestrashniy & Ken C. Winters, *Variability in Medical Marijuana Laws in the United States*, 29 PSYCH. ADDICTIVE BEHAV. 639, 641 (2015).

48. *Id.*

49. Bestrashniy & Winters, *supra* note 47, at 642.

50. LA. STAT. ANN. § 40:1046 (2021).

51. 35 PA. CONS. STAT. § 10231.303 (2021).

52. Ryan S. King & Marc Mauer, *The War On Marijuana: The Transformation Of The War On Drugs In The 1990s*, 3 HARM REDUCT. J. 1, 1 (2006). <https://doi-org.libproxxy.temple.edu/10.1186/1477-7517-3-6>.

53. Evelina Gavrilona et al., *Is Legal Pot Crippling Mexican Drug Trafficking Organisations? The Effect of Medical Marijuana Laws On Us Crime*, 129 ECON. J. 375, 375 (2017).

significant role in crime, especially in U.S. border states.⁵⁴ The smuggling of illicit drugs typically goes hand in hand with violence, gang activity, and law enforcement attention.⁵⁵

There have been several studies suggesting that legalization can have a positive effect on crime, including one showing that crime in U.S. border states has gone down since marijuana has been legalized for medical use.⁵⁶ Other research demonstrates that a dispensary in a neighborhood positively affects non-violent crimes in that community.⁵⁷ Nevertheless, there are still many law enforcement concerns related to the legalization of the plant.⁵⁸ Since it is not legal in all states or at the federal level, there is still a significant black market and interstate transit activity.⁵⁹

The legalization of the drug presents new challenges. A 2018 study examined the effects of marijuana legalization in Colorado on law enforcement in neighboring states.⁶⁰ It found that police officers “expressed concern with an increase in marijuana coming from Colorado, both in plant and edible form.”⁶¹ They were concerned about an increase in potency.⁶² They noted a strain on resources due to time spent on marijuana law enforcement and also found a rise in trafficking across state lines and among use by juveniles.⁶³

Marijuana continues to present issues for law enforcement even when its use is legal, such as trafficking, juvenile consumption, DUI, and ongoing illegality in other places.⁶⁴ How then does legalization affect the traditional enforcement efforts by the police, especially with search and seizure laws based upon suspicion of criminal activity?

54. *Id.*

55. *Id.*

56. *Id.*

57. Jeffrey Brinkman & David Mok-Lamme, *Not In My Backyard? Not So Fast. The Effect of Marijuana Legalization On Neighborhood Crime* 4–5 (Fed. Rsrv. Bank of Philadelphia, Working Paper No. 17-19, 2019) (finding that “receiving a dispensary in a neighborhood causes a reduction in crime; specifically, an additional dispensary per 10,000 residents is associated with a reduction of 17 crimes per 10,000 residents per month.”).

58. Sara Zaske, *Washington State Law Enforcement Officers Cite Concerns With Marijuana Legalization*, WSU INSIDER (May 7, 2020), <https://news.wsu.edu/press-release/2020/05/07/washington-state-law-enforcement-officers-cite-concerns-marijuana-legalization/>.

59. Austin Jenkins, *Will Marijuana Legalization End The Black Market?*, HERE & NOW (June 5, 2014), <https://www.wbur.org/hereandnow/2014/06/05/marijuana-black-market>.

60. Kyle C. Ward et al., *The Impact of Marijuana Legalization on Law Enforcement in States Surrounding Colorado*, 22 POLICE Q. 217, 220 (2019).

61. *Id.* at 232.

62. *Id.*

63. *Id.*

64. *Id.*

III. SEARCH & SEIZURE INVOLVING MARIJUANA

The laws of each state vary on how possession of cannabis is handled, but several jurisdictions now treat violations of marijuana laws similarly to traffic violations.⁶⁵ A growing number of jurisdictions have even legalized possession of small amounts of the plant.⁶⁶ Nevertheless, law enforcement personnel performing vehicle stops continue to handle possession of the drug as a crime by performing warrantless car searches.⁶⁷ Logic suggests that the police would handle one civil violation the same way they handle another.⁶⁸ Therefore, if an officer believes a person has pot in their vehicle, perhaps because she can smell it or see it on the seat, the proper course would be to write a ticket but not search.⁶⁹

A. *The Smell of Marijuana*

Burnt marijuana has a distinctly skunky smell that users describe as earthy, herbal, and woody.⁷⁰ Occasionally, the plant emits a lemon, apple, diesel, or plum odor.⁷¹ This fragrance is formed by aromatic terpenes, and the crucial factor affecting the smell is the age when the marijuana is harvested.⁷² Regardless of its odor, an officer's assertion that she smelled marijuana emanating from a car is still used to rationalize a warrantless search.⁷³ This position exists even in jurisdictions where possession of small amounts of the plant is not considered illegal or improper.⁷⁴

B. *The Motor Vehicle Exception*

The Fourth Amendment protects individuals from unreasonable search and seizure and has allowed the suppression of evidence if investigatory detention can be proven counter to a person's constitutional rights.⁷⁵ A determination of whether a police search is valid hinges on reasonableness.⁷⁶ The Fourth Amendment is based upon the foundation that an unbiased judge is more suitable to ascertain probable cause than an officer or prosecutor interested in the

65. White, *supra* note 8, at 188–89.

66. *Id.* at 189.

67. *Id.*

68. *Id.* at 191.

69. *Id.*

70. Kathryn Watson, *The Fragrance of Marijuana Before and After Consumption*, HEALTHLINE (Aug. 6, 2019), <https://www.healthline.com/health/what-does-weed-smell-like>.

71. *Id.*

72. *Id.*

73. White, *supra* note 8, at 191.

74. *Id.*

75. U.S. CONST. amend. IV.

76. Meghan Matt, *In the Age of Decriminalization, Is the Odor Of Marijuana Alone Enough to Justify a Warrantless Search?*, 47 S.U.L. REV. 459, 462 (2020).

matter.⁷⁷ While warrantless searches are presumed unreasonable, they may be found proper if they come within the ambit of a “few specifically established and well-delineated exceptions.”⁷⁸ These include searches incident to arrest, consensual searches, and plain view searches.⁷⁹

Almost 100 years ago, the Supreme Court created an automobile exception to the Fourth Amendment requirement of a warrant.⁸⁰ The Court held that a vehicle may be stopped and searched without a warrant, as long as the police officer has probable cause to believe that the car contains contraband.⁸¹ This exception allows vehicles to be searched without a warrant due to their “inherent mobility,” as long as probable cause or another reason such as an “inventory search” exists.⁸² This exception is premised upon the inherent mobility of motor vehicles and the fact that requiring a warrant before the car departs the location is usually unrealistic.⁸³ The emergency requirement has also never been applied to cars as rigorously as it has been to houses.⁸⁴ Therefore, special circumstances may be found even when the automobile is parked in a public location or if the police could position another officer next to the vehicle while obtaining a search warrant.⁸⁵

In 1996, this country’s highest court abolished the exigency mandate for warrantless searches of motor vehicles.⁸⁶ The Supreme Court opined that exigent circumstances were no longer needed; “[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.”⁸⁷

C. *The Legislative Approach*

Some states have had the foresight to address plain smell searches by legislative enactment or police regulation.⁸⁸ For instance, Virginia’s law provides that “no law-enforcement officer may lawfully stop, search, or seize any person, place, or thing solely on the basis of the odor of marijuana. Also, no

77. *Id.*

78. *Id.*

79. *Id.*

80. *Carroll v. United States*, 267 U.S. 132, 149 (1925).

81. 14A MASS. PRAC. *Summary of Basic Law* § 7:68 (5th ed.), Westlaw.

82. *United States v. Coseres*, 533 F.3d 1064, 1070 (9th Cir. 2008) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

83. Andrea Levinson Ben-Yosef, Annotation, *Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana—State Cases*, 114 A.L.R.5th 173 (2003).

84. *Summary of Basic Law* § 7:68, *supra* note 81.

85. *Id.*

86. *Pennsylvania v. Labron*, 518 U.S. 938, 938–39 (1996).

87. *Id.* at 940.

88. Kyle Jaeger, *Police Can’t Search You for Smelling Like Marijuana Under New Virginia Law*, MARIJUANA MOMENT (Nov. 10, 2020), <https://www.marijuanamoment.net/police-cant-search-you-for-smelling-like-marijuana-under-new-virginia-law/>.

evidence discovered or obtained as a result of such unlawful search or seizure shall be admissible in any trial, hearing, or other proceeding.”⁸⁹ New York has solved the problem through police guidelines.⁹⁰ This 2021 policy provides that an officer can only search a vehicle if the operator looks to be under the influence of marijuana and there is probable cause to suspect that the motorist has been smoking the drug, or if the person is observed smoking or vaping marijuana while driving or inside a vehicle.⁹¹ In the absence of these type of rules, there is a diverse assortment of court decisions to resolve the issue.

D. *The Changing Landscape*

A brief history detailing some of the important court cases dealing with warrantless searches based on the smell of marijuana is instructive. Three distinct approaches have been identified. They include (1) the ability to conduct a warrantless search based upon the mere smell of marijuana; (2) the role of an officer’s training in detecting the distinct smell of the burnt plant; and (3) the growing use of a totality of the circumstances approach.⁹²

The automobile search exception has been frequently used by the courts to permit vehicle searches due to the detection of the smell of marijuana. This approach notes that odor by itself can establish probable cause for searches of vehicles following stops by immigration officers, police for traffic offenses and law enforcement’s investigations of cars on suspicion they were engaged in criminal activity.⁹³ After all, an individual has no reasonable expectation of privacy in odors unhesitatingly evident by the human nose.⁹⁴ As noted in *State v. Moore*:

The use of one’s sense of smell is no less reliable than other senses upon which we rely. A familiar or distinctive odor, such as freshly cut grass, a bouquet of flowers, a hot apple pie, or the scent of perfume, evokes a vivid and accurate image in our minds. We draw factual conclusions about our surroundings from the use of our sense of smell. Consequently, we agree with the appellate court that a law enforcement officer, who is trained and experienced in the detection of marijuana, should not be prohibited from relying on his or her sense of smell to justify probable cause to conduct a search for marijuana.⁹⁵

89. *Id.*

90. Mirna Alsharif, *NYPD Officers Can No Longer Search a Vehicle Due to the Smell of Marijuana Alone, New Memo Says*, CNN (Apr. 1, 2020), <https://www.cnn.com/2021/04/01/us/nypd-marijuana-smell-car-search/index.html>.

91. *Id.*

92. William Garriott, *Change Is in the Air: The Smell of Marijuana, After Legalization*, 45 L. & SOC’Y INQUIRY 995, 997 (2020).

93. Levinson Ben-Yosef, *supra* note 83.

94. Francis C. Amendola et al., 79 C.J.S. *Searches* § 91 (2021).

95. *State v. Moore*, 734 N.E.2d 804, 808 (Ohio 2000). Further, as noted in *State v. Seckinger*, 920 N.W.2d 842 (Neb. 2018), “officers with sufficient training and experience who detect the odor

As explained later in this article, marijuana odors that formerly generated criminal suspicion are now the subject of a different set of rules in some jurisdictions.⁹⁶ This change has occurred because of the legalization or decriminalization of the plant.⁹⁷ In a small but growing number of jurisdictions, the odor of marijuana does not automatically create probable cause to search a vehicle.⁹⁸ Instead, more recent court decisions apply a totality of the circumstances approach.⁹⁹ They will look at the smell of drugs mixed with suspicious conduct by a car's occupant or other indications of carrying narcotics.¹⁰⁰ The courts will even look at the training or expertise of the officer who detected the smell of marijuana as justification for the car search.¹⁰¹ However, some jurisdictions have failed to state a well-defined view on the issue of plain smell.¹⁰² One state seems so uncertain about plain smell that its appellate courts have wavered on the question annually.¹⁰³ The intermediate appellate courts in these states have provided inconsistent rulings on the smell of marijuana, and there has been some failure of the highest courts in these jurisdictions to settle the question conclusively.¹⁰⁴ This uncertainty leaves the trial courts free to accept or reject marijuana odor searches on a case-by-case basis.¹⁰⁵

E. *The History of Car Searches*

The development of the law in this area shows that in the 1973 case of *Cady v. Dombrowski*, the U.S. Supreme Court essentially coined the term “community caretaking,” which describes police functions in society, such as attending to vehicle accidents where there is no initial suspicion of criminal activity.¹⁰⁶ However, suspicion then arises during that police interaction with a vehicle. As the court explained, “often noncriminal contact with automobiles will bring local officials in ‘plain view’ of evidence, fruits, or instrumentalities of a crime, or contraband.”¹⁰⁷ This has included the sight and smell of marijuana.¹⁰⁸

of marijuana emanating from a vehicle have probable cause on that basis alone to search the vehicle under the automobile exception to the warrant requirement.”

96. Garriott, *supra* note 92, at 997.

97. *Id.* at 1007.

98. F. Lee Bailey & Kenneth J. Fishman, *Handling Narcotic and Drug Cases* § 112.8 (2021).

99. Levinson Ben-Yosef, *supra* note 83.

100. *Id.*

101. *Id.*

102. Michael A. Sprow, *Wake Up and Smell the Contraband: Why Courts that do not Find Probable Cause Based on Odor Alone Are Wrong*, 42 WM. & MARY L. REV. 289, 291 (2000).

103. *Id.* at 298–99.

104. *Id.* at 299.

105. *Id.*

106. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

107. *Id.* at 442.

108. Amendola et al., *supra* note 94.

In 1982, the Supreme Court in *United States v. Ross* continued to refine the law and determined that a warrantless search, when justified by probable cause, extends to the entirety of the vehicle:

[T]he scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause permits the search of a lawfully stopped vehicle, it justifies the search of every part of the car and its contents that may conceal the object of the search.¹⁰⁹

In this matter, the defendant asserted that police officers' search of a paper bag containing heroin found inside a vehicle and a pouch with \$3,200 in cash was unlawful without a warrant specific to those items.¹¹⁰ The Supreme Court disagreed and opined that police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within the car—may conduct a warrantless search, including compartments and containers within the vehicle whose contents are not in plain view.¹¹¹

As previously noted, marijuana presents unique issues for the police when stopping a vehicle. The sight and smell of the drug emanating from a vehicle is a common source of probable cause for suspicion of criminal activity and often leads police officers to uncover other illegal activities such as intent to sell drugs and unlawful possession of firearms.¹¹² With the decriminalization or legalization of marijuana, its presence in a vehicle may no longer automatically establish probable cause and reasonable suspicion of criminal activity. Attempts by law enforcement to use the mere scent of cannabis in a vehicle will be met with legal challenges.¹¹³

There are many cases in which the mere odor of marijuana, assessed as a primary cause for investigatory detention, detected during a traffic stop or other lawful seizure performed by a police officer, has provided reasonable suspicion for a warrantless search. However, a more nuanced approach has developed which requires more than detection of the smell of marijuana. As early as 1975, the Court of Appeals in New Mexico articulated the requirement that a warrantless search based upon the scent of marijuana is only permitted when the officer can also demonstrate expertise in detecting the plant's odor.¹¹⁴ As the court noted, the "plain smell of marijuana emanating from a vehicle is

109. *United States v. Ross*, 456 U.S. 798, 825 (1982).

110. *Id.* at 801.

111. *Id.* at 800.

112. *United States v. Williams*, No. 16-20611-CR-LENARD/GOODMAN, 2016 WL 10891527 (S.D. Fla. Dec. 15, 2016) (in which a defendant moved to suppress evidence collected by police after a traffic stop during which the officers smelled marijuana, which gave them probable cause to search the vehicle, in which they found two stolen firearms and a baggie of marijuana).

113. *Garriott*, *supra* note 92, at 1007.

114. *State v. Bidegain*, 540 P.2d 864, 867–68 (N.M. Ct. App. 1975).

insufficient probable cause for a search of that vehicle absent a foundation as to the officers' expertise."¹¹⁵

Likewise, in 1999, the Court of Appeals for the Eighth Circuit ruled that a South Dakota highway patrol officer, Mike Kayras, who smelled burning marijuana in a car he had pulled over for speeding, had probable cause to search the vehicle for drugs.¹¹⁶ The court pointed to the officer's experience and training: "Kayras had had seventeen years' experience with the highway patrol and significant training in the area of alcohol and drug detection."¹¹⁷ In this case, the officer first smelled alcohol on the driver's breath, which gave him probable cause to search for an open container.¹¹⁸ During that search, he smelled burnt marijuana.¹¹⁹ In turn, that odor gave him probable cause to search the vehicle for drugs.¹²⁰ The defendant's motion to suppress the evidence collected in the ensuing warrantless search, more than ninety-four pounds of marijuana, was denied.¹²¹ A federal grand jury then indicted the driver for possession with the intent to distribute marijuana.¹²²

An officer's experience with marijuana and drug activity was also considered a decade later in *United States v. McCaster*.¹²³ The issue before the court was whether the evidence collected in a vehicle search based on officers smelling marijuana should be suppressed "because the government presented no evidence that the officers were trained to detect the odor of marijuana."¹²⁴ The court opined that "this circuit has never required an officer claiming to have smelled burnt marijuana—a common and distinctive odor—to show he had particular training and experience in detecting marijuana."¹²⁵ However, the officer had ten years of experience being exposed to "[q]uite a bit of drug activity."¹²⁶

The third and most current approach to a warrantless search following the smell of marijuana involves examining the totality of the circumstances. The Sixth Circuit Court of Appeals considered a defendant's motion to suppress evidence collected via a warrantless search that occurred pursuant to a Terry stop.¹²⁷ In *United States v. Garza*, the court noted that a Terry stop provides law

115. *Id.* at 870.

116. *United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999).

122. *Id.* at 755.

123. *United States v. McCaster*, 466 Fed. App'x 443, 444 (6th Cir. 2011).

124. *Id.*

125. *Id.* at 446.

126. *Id.*

127. *United States v. Garza*, 10 F.3d 124, 124 (6th Cir. 1993). A Terry Stop is just another name for a stop and frisk. *Terry Stop / Stop and Frisk*, LEGAL INFO. INST., <https://www.law.cornell.edu/>

enforcement officers with probable cause to stop a vehicle if the official believes the occupants are about to be involved in criminal activity.¹²⁸ In *Garza*, the officer's smelling of marijuana was considered to be among the totality of the circumstances authorizing the probable cause to search the vehicle.¹²⁹ That search yielded a seizure of approximately 150 pounds of marijuana.¹³⁰

F. Decriminalization & Probable Cause

Decriminalization of marijuana moves “possession of small amounts for personal consumption from a criminal offense to a civil offense punishable by fine.”¹³¹ This change in penalty affects the ability of the police officer to search a person because it eliminates reasonable suspicion of a felony or misdemeanor, a pre-requisite to that kind of search.¹³² When marijuana possession under a certain amount is a civil offense, “possession of a small quantity of marijuana (one ounce or less), standing alone, will not support the search of a person, a backpack, or a vehicle for an additional quantity of marijuana or other evidence of criminal activity.”¹³³

In *Pacheco v. State*, the Maryland Court of Appeals was one of the first to address what the court referred to as “probable cause in the post-decriminalization era.”¹³⁴ This matter was decided after the passage of the 2014 Maryland statute that made possession of less than ten grams of marijuana a civil, rather than a criminal, offense.¹³⁵ In *Pacheco*, the defendant was approached by police officers while sitting in his car near a laundromat.¹³⁶ One of the officers testified that he smelled burnt marijuana and saw a joint on the center console of the defendant's car, which he knew to be less than ten grams of marijuana.¹³⁷ The officers then ordered Mr. Pacheco to exit the vehicle, searched him, recovered cocaine from one of the suspect's jacket pockets, and

wex/terry_stop/stop_and_frisk (last visited Oct. 12, 2021). This doctrine came about in the Supreme Court case *Terry v. Ohio*, 392 U.S. 1 (1968). Basically, when a law enforcement official has a reasonable suspicion that a person is armed, engaged, or about to participate in criminal activity, the officer may briefly stop and detain the person for a pat-down search of outer clothing.

128. *Garza*, 10 F.3d at 1245.

129. *Id.*

130. *Id.* at 1243.

131. Robin A. Pollini et al., *The Impact of Marijuana Decriminalization on California Drivers*, 150 DRUG & ALCOHOL DEPENDENCE 135, 135–40 (2015).

132. *Commonwealth v. Fontaine*, 3 N.E.3d 82, 88–89 (Mass. App. Ct. 2014) (describing the effects of marijuana decriminalization in Massachusetts on reasonable suspicion of criminal activity and lawful searches).

133. *Id.* at 88.

134. *Pacheco v. State*, 214 A.3d 505, 514 (Md. 2019).

135. *Id.*

136. *Id.* at 508.

137. *Id.* at 508–09.

arrested him.¹³⁸ The defendant moved to have the drug evidence suppressed.¹³⁹ He argued that the search of his person was illegal because the officers had no probable cause to believe that he had more than ten grams of marijuana.¹⁴⁰ Mr. Pacheco asserted that the officers would have had probable cause to search the vehicle but not his person.¹⁴¹ To search him, they would need probable cause that he was committing a felony or misdemeanor.¹⁴² The circuit court and the court of special appeals found for the State, relying on pre-decriminalization precedent.¹⁴³ The Court of Appeals of Maryland, however, reversed part of this ruling.¹⁴⁴ The court cited *Robinson v. State*, which addressed law enforcement's right to search a vehicle based upon the smell of marijuana:

[A] law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle, as marijuana in any amount remains contraband, notwithstanding the decriminalization of possession of less than ten grams of marijuana; and the odor of marijuana gives rise to probable cause to believe that the vehicle contains contraband or evidence of a crime.¹⁴⁵

Thus, the court found the search of the vehicle was warranted, but the search of Mr. Pacheco's person was a different story, "little else was presented that addressed why this minimal amount of marijuana, which is not a misdemeanor, but rather a civil offense, gave rise to a fair probability that Mr. Pacheco possessed a criminal amount of marijuana on his person."¹⁴⁶ The court determined that the "arrest and search of Mr. Pacheco was unreasonable because nothing in the record suggests that possession of a joint and the odor of burnt marijuana gave the police probable cause to believe he was in possession of a criminal amount of that substance."¹⁴⁷ The case was remanded to the lower court with instructions to grant the motion to suppress the evidence collected from the search of Mr. Pacheco's person.¹⁴⁸ As small amounts of marijuana become legal for possession and use in many states, the totality of circumstances standard for probable cause has become more prominent. In *Lewis v. State*, the Maryland Court of Appeals found that "more than the odor of marijuana is required for

138. *Id.*

139. *Id.* at 509.

140. Pacheco v. State, 214 A.3d 505, 509 (Md. 2019).

141. *Id.*

142. *Id.* at 511, 516.

143. *Id.* at 509.

144. *Id.* at 516, 518.

145. Pacheco v. State, 214 A.3d 505, 514–15 (Md. 2019) (citing *Robinson v. State*, 451 Md. 94, 99 (2017)).

146. *Id.* at 518.

147. *Id.*

148. *Id.*

probable cause to arrest a person and conduct a search incident thereto.”¹⁴⁹ In this matter, the defendant was personally searched in a convenience store after the officers smelled marijuana.¹⁵⁰ They seized a handgun in the ensuing search.¹⁵¹ Although decriminalization in Maryland did not erase marijuana’s status as contraband, possession was no longer a crime for which suspicion could justify a warrantless search of a person.¹⁵² Therefore, the defendant was entitled to have the handgun and the other evidence collected during the search suppressed.¹⁵³ The court pointed out that “the prerequisite to a lawful search of a person incident to arrest is that the police have probable cause to believe the person subject to arrest has committed a felony or is committing a felony or misdemeanor in the presence of the police.”¹⁵⁴ The officer must have a reasonable suspicion that a person possessed a criminal amount of marijuana to search the person, “and the odor of marijuana alone is not indicative of the quantity (if any) of marijuana in someone’s possession.”¹⁵⁵ This is a fact to which the arresting officer admitted.¹⁵⁶ The court further distinguished between the search of an automobile and a search of one’s person, “[t]he same facts and circumstances that justify a search of an automobile do not necessarily justify an arrest and search incident thereto.”¹⁵⁷ This is based on the heightened expectation of privacy one enjoys in his person compared to the diminished expectation of privacy one has in an automobile.¹⁵⁸

In *People v. Hall*, the California Court of Appeal also applied a totality of the circumstances approach.¹⁵⁹ This matter involved an officer’s sighting a baggie containing a green leafy substance in the center console of a car, which allegedly justified a search of the vehicle that yielded a pistol.¹⁶⁰ This search led to two felony weapons counts.¹⁶¹ The trial court denied the defendant’s motion to suppress.¹⁶² The appellate court reversed, holding that an officer’s observation of a not-unlawful amount of marijuana (marijuana possession is legal under 28.5 grams) in the car did not establish probable cause to believe contraband or evidence of a crime would be found in the car.¹⁶³ The officer did not suspect that

149. *Lewis v. State*, 233 A.3d 86, 95 (Md. 2020).

150. *Id.* at 91–92.

151. *Id.* at 92.

152. *Id.* at 95.

153. *Id.*

154. *Lewis v. State*, 233 A.3d 86, 97 (Md. 2020).

155. *Id.* at 99.

156. *Id.*

157. *Id.* at 101.

158. *Id.* at 98.

159. *People v. Hall*, 271 Cal. Rptr. 3d 793, 798 (Cal. Ct. App. 2020).

160. *Id.* at 795.

161. *Id.* at 796.

162. *Id.*

163. *Id.* at 799.

the defendant was driving under the influence of marijuana.¹⁶⁴ There was no evidence that the baggie was an “open container.”¹⁶⁵ The court referenced the passage of Proposition 64 in California, which legalized marijuana for recreational use in specific quantities.¹⁶⁶ It noted that it “join[ed] those courts that have held the lawful possession of marijuana in a vehicle does not provide probable cause to search the vehicle.”¹⁶⁷ The court began its analysis by stating, “[w]e determine probable cause considering the totality of the circumstances.”¹⁶⁸ The first factor to consider is whether marijuana was in the vehicle.¹⁶⁹ The court found that the officer:

[T]estified he saw a clear plastic baggie containing a green leafy substance in the center console of [the defendants'] car. There was no testimony about the weight of the baggie and no description of the baggie from which one could reasonably infer that it contained over 28.5 grams of marijuana. Thus, there was no evidence to support a belief that Hall had an unlawful amount of marijuana in his car.¹⁷⁰

Further, the officer did not suspect the defendant was driving under the influence of cannabis, another essential factor to consider in a totality of the circumstances approach.¹⁷¹

The next question considered by the court was possession of an open container of marijuana.¹⁷² This activity remains prohibited under Proposition 64 while “driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.”¹⁷³ Because no evidence was presented as to the condition of the plastic baggie, which held the marijuana—whether it was opened, unopened, or had a seal that had been breached—the court found that the prosecution failed to meet its burden of establishing a violation.¹⁷⁴ There was also no testimony related to the officers smelling burnt or unburnt marijuana, which may have played a role in establishing drugged driving might be afoot.¹⁷⁵ After completing its analysis, the court granted the defendant’s motion to suppress: “Considering the totality of

164. *People v. Hall*, 271 Cal. Rptr. 3d 793, 799 (Cal. Ct. App. 2020).

165. *Id.* at 801–02.

166. *Id.* at 795.

167. *Id.* at 795.

168. *Id.* at 797.

169. *People v. Hall*, 271 Cal. Rptr. 3d 793, 797 (Cal. Ct. App. 2020).

170. *Id.* at 799.

171. *Id.*

172. *Id.* at 801.

173. *Id.*

174. *People v. Hall*, 271 Cal. Rptr. 3d 793, 802 (Cal. Ct. App. 2020).

175. *Id.* at 803.

the circumstances known to the officers during the traffic stop, we conclude there was no probable cause to justify the search of Hall's car."¹⁷⁶

The possession of a card or identification proving that a defendant is lawfully authorized to use marijuana for medical purposes can be considered as part of the totality of the circumstances analysis; however, it is not dispositive.¹⁷⁷ In the 2018 California case of *United States v. Collins*, a defendant's motion to suppress evidence was denied after officers searched his vehicle after seeing and smelling marijuana.¹⁷⁸ The police seized several other illegal items, but the driver repeatedly stated that he had a cannabis card for medicinal use.¹⁷⁹ The court pointed out that being a valid medical marijuana user provides an affirmative defense under California's medical marijuana law.¹⁸⁰ However, it does not provide immunity from arrest for marijuana crimes of cultivation and possession.¹⁸¹ The court used language from an earlier decision to explain:

Given the probable cause here, the officer is entitled to continue to search and investigate, and determine whether the subject of the investigation is in fact possessing the marijuana for personal medical needs, and is adhering to the eight-ounce limit on possession. Unlawful possession of marijuana remains a criminal offense under [California law] subject to seriously ill persons using marijuana for medical purposes recommended by a physician . . . not being subject to criminal liability . . .¹⁸²

G. Statutes Can Provide Guidance

Statutory language can clarify what is and is not legal when marijuana has been decriminalized or legalized for recreational or medicinal use. This type of analysis can offer guidance in cases where probable cause is being challenged due to decriminalization or legalization. For example, in the *Hall* case noted above, the language of California's Proposition 64 explained that driving with an open container of marijuana remains illegal in the state.¹⁸³ Similarly, California's Compassionate Use Act, passed in 1996 to legalize medical marijuana, provides an affirmative defense to prosecution for crimes of

176. *Id.*

177. *United States v. Collins*, No. 16-cr-00244-SI-1, 2018 WL 306696, at *4 (N.D. Cal. Jan. 5, 2018) (citing *People v. Strasburg*, 148 Cal. App. 4th 1052, 1055 (2007)).

178. *Id.* at *1, *7.

179. *Id.* at *2.

180. *Id.* at *6.

181. *Id.* at *4.

182. *United States v. Collins*, No. 16-cr-00244-SI-1, 2018 WL 306696, at *4 (N.D. Cal. Jan. 5, 2018).

183. *People v. Hall*, 271 Cal. Rptr. 3d 793, 795 (Cal. Ct. App. 2020).

possession and cultivation but “does not grant immunity from arrest for those crimes.”¹⁸⁴

Several medical marijuana statutes prohibit smoking the drug.¹⁸⁵ This language has the effect of eliminating confusion when the odor of burnt marijuana is detected during a traffic stop. For instance, Pennsylvania’s medical marijuana statute permits the use of marijuana for medicinal purposes only in pill, oil, topical gel, cream or ointment, vapor, tincture, or liquid forms.¹⁸⁶ When a defendant argued that the smell of marijuana should not provide the police with probable cause to search his vehicle following a traffic stop—because the legalization of marijuana for medical use provided a legal reason why the odor of burnt marijuana could be in the air—the court quickly dismissed this argument.¹⁸⁷ Smoking marijuana was not permitted under the law, so the smell of burnt marijuana could still give rise to reasonable suspicion that criminal activity was afoot, since the defendant “could not have produced the odor of burnt marijuana through a use permitted under the [statute].”¹⁸⁸

Regardless of the legalization of marijuana and the totality of the circumstances approach, some jurisdictions still adhere to the plain smell rule in establishing probable cause to conduct a warrantless search. These include Arizona,¹⁸⁹ Florida,¹⁹⁰ Iowa,¹⁹¹ Louisiana,¹⁹² New Jersey,¹⁹³ Nebraska,¹⁹⁴

184. *United States v. Collins*, No. 16-cr-00244-SI-1, 2018 WL 306696, at *4 (N.D. Cal. Jan. 5, 2018).

185. Sabby Jane, *Is it Legal to Smoke Weed in PA?*, CURE (Mar. 4, 2019), <https://curepenn.com/is-it-legal-to-smoke-weed-in-pa/>.

186. 35 PA. CONS. STAT. § 10231.303 (2021).

187. *Commonwealth v. Yeager*, 242 A.3d 435, 2020 WL 6799113, at *2, *6 (Pa. Super. Ct. Nov. 19, 2020).

188. *Id.* at *5.

189. *State v. Cheatham*, 237 Ariz. 502, 353 P.3d 382 (Ariz. Ct. App. 2015).

190. *Owens v. State*, 317 So.3d 1218, 1219 (Fla. Dist. Ct. App. 2021). The court noted that it was aware of the opinion of the Twentieth Judicial Circuit Court of Florida that held that the smell of marijuana related to a traffic stop cannot form the sole basis for a search. *Id.*; see *State v. Nord*, 28 Fla. L. Weekly Supp. 511 (Fla. Cir. Ct. Aug. 8, 2020). However, the court refused to follow that decision. *Owens*, 317 So.3d at 1219. Instead, it found that an officer smelling the odor of marijuana has probable cause to believe that the smell indicates the illegal use of marijuana. *Id.* at 1220. The court decided instead to “adopt the opinion of the Ninth Judicial Circuit of Florida in *State v. Ruise*, 28 Fla. L. Weekly Supp. 122 (Fla. Cir. Ct. Mar. 20, 2020) (holding that an officer who smelled the odor of marijuana during a traffic stop had probable cause for a warrantless search of the vehicle, even though the odor of cannabis was found to be indistinguishable from the odor of now legal hemp).” *Id.* at 1219.

191. *State v. Warren*, 955 N.W.2d 848, 866–67 (Iowa 2021).

192. *State v. Landor*, 318 So.3d 225, 230 (La. App. 1 Cir. 2/19/2021).

193. *State v. Williams*, No. A-3746-18, 2021 WL 560758, at *3 (N.J. Super. Ct. Feb. 16, 2021).

194. *State v. Seckinger*, 920 N.W.2d 842, 857 (Neb. 2018).

Kentucky,¹⁹⁵ Wyoming,¹⁹⁶ Fourth Circuit Court of Appeals,¹⁹⁷ Sixth Circuit Court of Appeals,¹⁹⁸ Eighth Circuit Court of Appeals,¹⁹⁹ Ninth Circuit Court of Appeals,²⁰⁰ and Tenth Circuit Court of Appeals.²⁰¹ At the other end of the spectrum are the states that have found that the odor of marijuana by itself fails to establish probable cause for a warrantless search of a motor vehicle. These states include Pennsylvania,²⁰² Ohio,²⁰³ Massachusetts,²⁰⁴ California,²⁰⁵ Oregon,²⁰⁶ Maryland,²⁰⁷ and Vermont.²⁰⁸

H. *The Current Role of Federal Law*

Marijuana use, possession, and transport continue to be illegal under federal law.²⁰⁹ However, with the legalization of recreational and medical marijuana in many states, the federal government has initiated a ceasefire on pursuing marijuana possession arrests and prosecutions as long as individuals adhere to their state laws.²¹⁰ The Rohrabacher-Cohen-Farr Amendment, passed in 2014 and reauthorized in 2015, prohibits the Justice Department from spending money to prevent states from implementing their laws regarding the legalization

195. *Mayfield v. Commonwealth Ct.*, 590 S.W.3d 300, 305 (Ky. Ct. App. 2019).

196. *Dixon v. State*, 438 P.3d 216, 226–28 (Wyo. 2019).

197. *United States v. Scheetz*, 293 F.3d 175, 184 (4th Cir. 2002).

198. *United States v. Bailey*, No. 08-2577, 407 F. App'x 27, 29 (6th Cir. 2011).

199. *United States v. Smith*, 990 F.3d 607, 612 (8th Cir. 2021).

200. *United States v. Jennings*, No. 19-156-BLG-SPW, 2020 WL 4192272, at *2 (D. Mont. July 21, 2020).

201. *United States v. Morin*, 949 F.2d 297, 300 (10th Cir. 1991).

202. *Commonwealth Ct. v. Barr*, 240 A.3d 1263, 1276 (Pa. Super. Ct. 2020).

203. *State v. Prince*, 986 N.E.2d 553, 564 (Ohio Ct. App. Dist. 2013).

204. *Commonwealth Ct. v. Locke*, 51 N.E.3d 484, 489 (Mass. App. Ct. 2016).

205. *People v. Trone*, No. B294933, 2021 WL 1205194, at *7 (Cal. Ct. App. 2 Dist. 2021).

206. *Matter of T.T.*, 479 P.3d 598, 610 (Or. Ct. App. 2021). The court noted that: “[G]iven the legality of an adult possessing some amount of marijuana in Oregon, the smell of marijuana in a car in which an adult is present is no longer remarkable, and, by itself, does not give rise to reasonable suspicion that it is being *unlawfully* possessed by or delivered to an underage passenger. An officer could not reasonably conclude from the smell of fresh tobacco in a car—or even a pack of cigarettes resting on the center console—that the adult driver was unlawfully distributing cigarettes to a minor passenger under ORS 323.482; nor, for that matter, would an unopened six-pack of beer visible in the car, by itself, provide reasonable suspicion that minor children near the beer were in possession of that alcohol. This circumstance is not materially different.” *Id.* at 611.

207. *Lewis v. State*, 233 A.3d 86, 95 (Md. 2020). As the court noted, “more than the odor of marijuana is required for probable cause to arrest a person and conduct a search incident thereto.” *Id.*

208. *State v. Clinton-Aimable*, 232 A.3d 1092, 1101 (Vt. 2020). The court noted, “the smell of marijuana alone will not always be enough to establish probable cause of criminal activity and is just one factor to be considered.” *Id.*

209. *Federal Marijuana Laws*, FINDLAW (updated Nov. 29, 2021), <https://www.findlaw.com/criminal/criminal-charges/federal-marijuana-laws.html>.

210. *Id.*

of cannabis, removing funding for federal medical cannabis raids, arrests, and prosecutions in states where medical cannabis is legal.²¹¹

Nevertheless, case law demonstrates that the illegality of marijuana on the federal level can still justify probable cause for suspicion of criminal activity. In *United States v. Mitchell*, the Fourth Circuit Court of Appeals rejected the defendant's argument that because Virginia provided a limited exception to possession of marijuana for medical purposes, the odor of marijuana coming from a home should not provide probable cause to search the premises based on suspicion of criminal activity.²¹² The court found that the police are not required to investigate the existence of affirmative defenses provided by a medical marijuana act once probable cause has been established.²¹³ It was pointed out that "this is especially the case so long as marijuana possession is prohibited by federal law, without exception."²¹⁴

Mitchell was cited in the 2020 case of *Garcia v. Brown* from South Carolina.²¹⁵ This matter involved police officers who searched a vehicle after smelling marijuana despite the driver's protests that he had a valid medical marijuana user card from California.²¹⁶ The search yielded 2.617 grams of marijuana; the drug's possession in South Carolina is illegal in any amount.²¹⁷ In the footnotes to the case, the court pointed out that

[T]he Fourth Circuit has rejected the argument that a probable cause analysis is altered by some states legalizing the use of marijuana in some instances, holding that "[t]he odor of marijuana alone provides probable cause. . . . This is especially the case so long as marijuana possession is prohibited by federal law, without exception."²¹⁸

I. Social Justice

There are important social justice considerations inherent in any discussion about the smell or sight of marijuana as probable cause for a search and seizure and reasonable suspicion of criminal activity.²¹⁹ New Jersey's legislature tried and failed several times to create a statute legalizing marijuana for recreational

211. Press Release, Americans for Safe Access, Medical Marijuana Patients Applaud House Reauthorization of Rohrabacher-Farr CJS Amendment (June 3, 2015) (available at <https://www.commondreams.org/newswire/2015/06/03/medical-marijuana-patients-applaud-house-reauthorization-rohrabacher-farr-cjs>).

212. *United States v. Mitchell*, 720 Fed. App'x 146, 152 (4th Cir. 2018).

213. *Id.*

214. *Id.*

215. *Garcia v. Brown*, No. 3:19-1934-JMC-SVH, 2020 WL 8454921, at *6 (D.S.C. June 24, 2020).

216. *Id.* at *2.

217. *Id.* at *2-3.

218. *Id.* at *6 n.11 (citing *United States v. Mitchell*, 720 Fed. App'x 146, 152 (4th Cir. 2018)).

219. Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591 (2010).

use before voters finally approved the initiative by ballot.²²⁰ In their efforts to draft legislation, New Jersey lawmakers indicated social justice as one reason for legalization, including the language: “Black New Jerseyans are nearly three times more likely to be arrested for marijuana possession than white New Jerseyans, despite similar usage rates.”²²¹ News coverage of the laws generated by the ballot initiative, legalizing recreational marijuana in New Jersey, addressed the same topic: “[Governor Phil] Murphy and many lawmakers have said their main motivation for supporting legalized recreational marijuana was social justice.”²²² A report by the American Civil Liberties Union, published in 2020, documented that in New Jersey, “Black people were arrested for marijuana at a rate 3.45 times higher than white New Jerseyans, despite similar usage—a marked increase since the last major examination of racial disparities in marijuana arrests issued in 2017.”²²³

A 2017 Partnership for the Public Good report examined arrest demographics for low-level marijuana possession crimes in western New York, where marijuana is illegal for recreational use.²²⁴ It found that marijuana prohibition in Buffalo has been largely enforced in communities of color, and that the harm of prohibition, including increased barriers to higher education, housing, and employment opportunities, has been born almost entirely by Buffalo’s Black and Latino residents.²²⁵

However, some studies suggest that legalization alone is not enough to confront this problem effectively.²²⁶ An analysis of the effect of marijuana legalization on racial disparities in marijuana arrests in Washington State found that marijuana legalization “is not a sufficient public policy action to accomplish the elimination of racial inequities in arrests. [There is] evidence of persistent

220. Sam Sutton, *New Jersey Legalizes Cannabis After Years of Failed Efforts and Toxic Negotiations*, POLITICO (Feb. 22, 2021), <https://www.politico.com/states/new-jersey/story/2021/02/22/new-jersey-legalizes-cannabis-after-years-of-failed-efforts-and-toxic-negotiations-1364873>.

221. S.B. 2702, 2018 Leg., 218th Sess. (N.J. 2018).

222. Joe Hernandez, *Recreational Marijuana Is Legal In N.J. What Happens Now?*, WHY?PBS (updated Mar. 25, 2021), <https://why.org/articles/recreational-marijuana-is-legal-in-n-j-what-happens-now/#:~:text=The%20new%20legal%20industry,be%20criminally%20charged%20for%20it>.

223. ACLU, *A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARREST IN THE ERA OF MARIJUANA REFORM* (2020), <https://www.aclu-nj.org/news/2020/04/20/racial-disparities-marijuana-arrests-across-new-jersey-worse>.

224. Phil Fairbanks, *Racial disparity found in local marijuana arrests, study says*, PPG (Nov. 14, 2017), <https://ppgbuffalo.org/news-and-events/news/article:11-14-2017-12-00am-racial-disparity-found-in-local-marijuana-arrests-study-says-published-by-the-buffalo-news/>.

225. *Id.*

226. Caislin L. Firth et al., *Did Marijuana Legalization In Washington State Reduce Racial Disparities In Adult Marijuana Arrests?*, 54 *SUBSTANCE USE & MISUSE* 1582, 1582–87 (2019).

disparities in marijuana arrests for African Americans after legalization.”²²⁷ The data revealed that,

Marijuana arrest rates among both African American and White adults decreased significantly with the legalization of possession and stayed at a dramatically lower rate after the marijuana retail market opened. However, relative disparities in marijuana arrest rates for African Americans increased for those of legal age and remained unchanged for younger adults.²²⁸

The researchers recommend further study of “[t]he underlying cause of the disparities in marijuana-related arrests – even after marijuana legalization”²²⁹

A study of decriminalization on arrest rates in Philadelphia between 2009 and 2018 found similar trends. Researchers concluded that “[f]indings suggest an absolute/relative reduction for possession-based arrests post-decriminalization; however, relative disparities in sales/manufacturing-based arrests, specifically for African Americans, increased.”²³⁰

Additional research is needed to determine what other factors contribute to racial disparities in the arrest and prosecution of marijuana-related crimes. Though legalization and decriminalization may play a role in the overall reduction in possession-based arrests, there are other factors at play causing the perpetuation and even the exacerbation of social justice concerns.

Researcher Mike Males from the Center on Juvenile and Criminal Justice compared marijuana arrest data before and after the 2012 legalization of recreational marijuana in Colorado and Washington.²³¹ He found no difference in the racial disparities though the overall number of marijuana-related arrests dropped.²³² In an interview with the Washington Post, he expressed disappointment but also acknowledged a bright side: “I wish the disparity were gone,” he said, “but having such a huge drop in the number of African Americans being arrested is still a good thing.”²³³

CONCLUSION

Marijuana is the most widely used psychotropic drug in the United States, and its effects on all aspects of society are pervasive. Efforts to decriminalize

227. *Id.*

228. *Id.*

229. *Id.*

230. Nguyen K. Tran et al., *The Heterogeneous Effect of Marijuana Decriminalization Policy on Arrest Rates in Philadelphia, Pennsylvania, 2009–2018*, 212 *DRUG & ALCOHOL DEPENDENCE* 1, 1 (2020), <https://doi.org/10.1016/j.drugalcdep.2020.108058>.

231. Keith Humphreys, *Pot legalization hasn't done anything to shrink the racial gap in drug arrests*, *WASH. POST* (Mar. 21, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/21/pot-legalization-hasnt-done-anything-to-shrink-the-racial-gap-in-drug-arrests/>.

232. *Id.*

233. *Id.*

marijuana possession and legalize it for recreational and medical use have led to new challenges for law enforcement. This fact is particularly true concerning the role that the sight and smell of marijuana plays in establishing probable cause to search a vehicle or person. Savvy defendants have argued that evidence seized due to an officer's sighting or smelling of marijuana should be suppressed because of the legalization or decriminalization of the drug. Their arguments are sometimes successful.

Marijuana legalization is an evolving societal trend. Many states have already legalized its use for medical or recreational purposes. Several jurisdictions have decriminalized possession of marijuana, making it a civil penalty rather than a felony or misdemeanor, which affects reasonable suspicion and the right to search. This metamorphosis is altering the law of search and seizure and resulting in much litigation over the legality of searching a vehicle merely because the officer sees or smells marijuana. As the law continues to develop, it is anticipated that more and more jurisdictions will adopt a totality of the circumstances approach to establishing reasonable suspicion of a crime for purposes of a warrantless search.

