The Effect of Cannabis Law Reforms on Probable Cause to Search

White Paper prepared for the Attorney General Alliance (AGA)

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Final Draft - June 12, 2020

Suggested citation format:

Robert A. Mikos et al., The Effect of Cannabis Law Reforms on Probable Cause to Search (AGA, June 12, 2020)

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FOREWORD

For nearly a decade, I have taught a course on Marijuana Law & Policy at Vanderbilt. The course introduces students to a broad range of fascinating and complicated legal issues raised by recent cannabis law reforms.

In late 2019, the Attorney General Alliance (AGA) approached me with a potential project for my class. The AGA fosters bipartisan cooperation among state Attorneys General on issues of common concern, including cannabis regulation. The AGA sought answers to a set of legal questions state officials were confronting as a result of cannabis law reforms.

The 30 students in my spring 2020 class were up for the challenge. In addition to completing the demanding work normally required in my course – including readings on a broad range of substantive topics – the students completed a series of legal research memos designed to help answer three questions posed by the AGA:

(1) What are the effects of cannabis law reforms on probable cause to search?

(2) Do social equity provisions in cannabis licensing programs violate the Equal Protection Clause of the Fourteenth Amendment?

(3) Do restrictions on commercial cannabis advertising violate the First Amendment?

The students did a superb job completing several research memos related to each of these questions, in a very short period of time (less than 3 months), and, perhaps most notably, all while working under the strains of the growing COVID 19 pandemic. I am proud of the students and their contributions. I learned a great deal from their individual efforts and from our group discussions.

Guided by the students' individual research memos and our group discussions, I wrote three White Papers for the AGA. The White Papers provide the necessary background on each of the questions posed above, analyze dozens of cases, summarize our research findings, and provide guidance for state officials now confronting these issues in practice and anyone else interested in the questions posed.

In addition to the students in the class, I want to thank Austin Bernstein and Karen White of the AGA for honing the questions posed by the organization and for providing comments on drafts of the White Papers.

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June 2020

EXECUTIVE SUMMARY

Cannabis commonly plays a role in police searches. When possession of cannabis was always illegal, the odor (sight, etc.) of cannabis by itself established probable cause to conduct a search. However, recent cannabis reforms have upended that long-settled rule.

Utilizing extensive caselaw research, this White Paper discusses the impact of three different types of cannabis reform on probable cause: (1) medical legalization; (2) adult use legalization; and (3) hemp legalization.

Medical cannabis reforms

No court has yet overturned a precedent holding that the odor of cannabis by itself *can* establish probable cause to conduct a search. In affirming that cannabis continues to have strong probative value in probable cause inquiries, courts emphasize that medical cannabis reforms are limited in scope, and thus, possession of cannabis remains unlawful in most circumstances.

However, some courts have added a proviso, indicating that "Odor Alone" continues to establish probable cause, *unless the police have information at the time of the search suggesting that possession is authorized by the state's medical cannabis law.* Given the limited scope of medical cannabis reforms, however, the duty to consider exculpatory evidence imposed by this "Odor Unless" standard has rarely deprived police of probable cause in litigated cases. In fact, our search of caselaw from thirty-four jurisdictions uncovered only one reported decision that invalidated a search because of that state's medical cannabis law.

Other courts have absolved the police of any duty to consider medical cannabis reforms at the time of search. These courts have held that their medical cannabis reforms merely create an affirmative defense to criminal charges, and thus, technically, do not *legalize* cannabis activities, even by Qualifying Patients. For this reason, indications that a suspect has complied with the state's medical cannabis reforms cannot affect probable cause at the time of search. We call this the "Affirmative Defense" exception because it departs from the notion that police normally must consider exculpatory facts in probable cause determinations.

Adult use cannabis reforms

Several courts have already held or strongly suggested that the Odor Alone standard no longer applies once a state has legalized adult use cannabis. These courts instead now use the Odor Plus standard, under which police need additional facts – besides the likely presence of cannabis – to establish probable cause to search.

In shifting to this more demanding standard, courts note that adult use laws are broader than medical cannabis reforms, and thus, diminish the likelihood that cannabis is connected to unlawful behavior. Courts reason that the Odor Plus standard is also more consistent with the language and purposes of adult use reforms than is the Odor Alone standard.

Even if it no longer suffices to establish probable cause, however, cannabis remains relevant in probable cause inquiries. The presence of the drug, in conjunction with other facts or

circumstances, might suggest a violation of one of the limits adult use states have imposed on cannabis-related activities, such as driving under the influence of the drug.

Hemp legalization

A handful of courts have considered – and rejected – the claim that hemp legalization undermines probable cause to search based on the odor or sight of cannabis.

However, these decisions are not reliable indicators of the impact of hemp reforms on probable cause. All cases decided thus far have considered state hemp reforms that were narrower than the reforms adopted in the 2018 Farm Bill. Courts have also attached too much weight to bald declarations from police that they saw or smelled "marijuana", without considering whether officers had the ability to distinguish "marijuana" from "hemp" by sight or smell alone.

Given the proliferation of hemp reforms and booming market for hemp, courts may need to reconsider the weight they now give to the sight or odor of cannabis in probable cause inquiries.

BACKGROUND

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> U.S. Const. Amend IV[1]

Under the Fourth Amendment to the United States Constitution, the police need probable cause to conduct a lawful search. In a nutshell, probable cause exists when, "given all the circumstances" known to the police or a magistrate, "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[2]

The adequacy of cause has important ramifications for the use of evidence discovered in the course of a search. If the police had probable cause at the time of the search, they may use the evidence in a subsequent prosecution against the suspect. But if the police lacked probable cause, any evidence they discovered will normally be considered tainted and thus inadmissible in a criminal prosecution—a doctrine known as the exclusionary rule.[3]

When states banned all activities involving cannabis, facts suggesting the presence of cannabis – such as the smell or sight of the drug -- normally sufficed to establish probable cause to search the area. For example, the smell of cannabis emanating from a car window – by itself – would normally give police probable cause to search of the vehicle.[4] In other words, regardless of other circumstances, the likely presence of cannabis raised a "fair probability" that evidence of unlawful possession (and possibly other crimes) would be found. We call this the "Odor Alone" standard.

But recent reforms to cannabis law – at both the state and federal level – complicate the probable cause inquiry. After all, in most states – and even in the eyes of the federal government – the possession of cannabis is no longer *always* illegal. More than 30 states now allow qualifying patients to possess cannabis for medical purposes, at least 10 of those states also allow adults to possess the drug for any purpose, and even the federal government (along with many states) has

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[1] Although we generally focus on the federal constitution, our analysis generally applies to comparable search and seizure provisions in state constitutions as well. Because state constitutions sometimes provide greater protections against search than does the Fourth Amendment, we highlight a few instances in which state constitutions would suppress cannabis searches the federal constitution would allow.

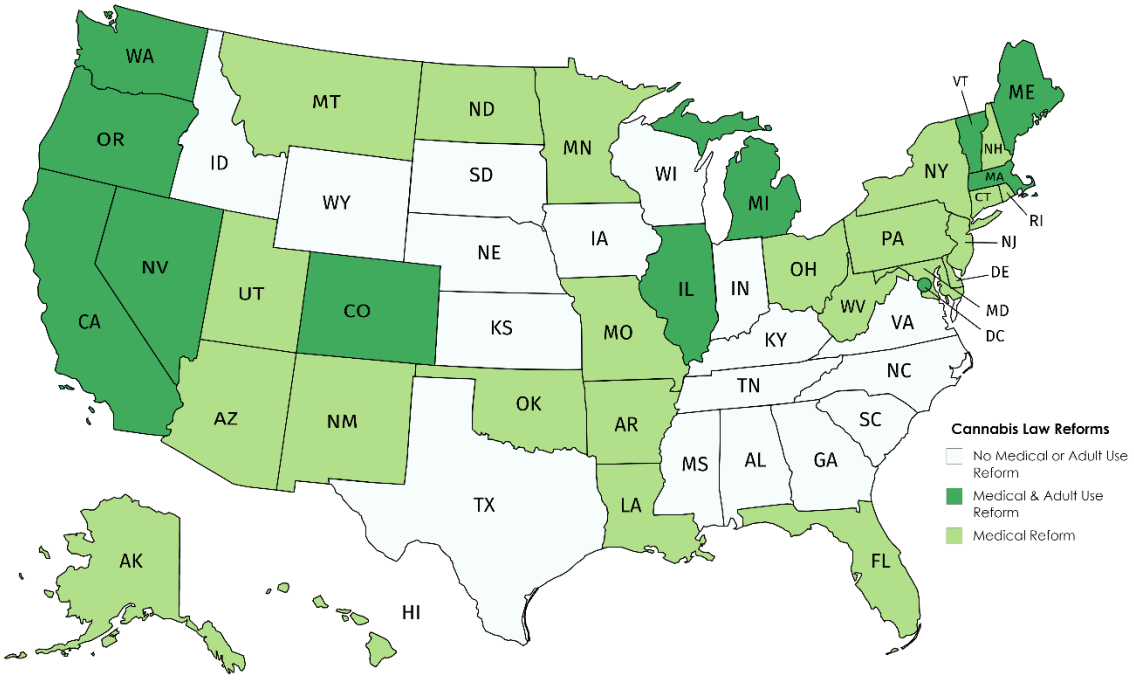
[2] Illinois v. Gates, 462 U.S. 213, 238 (1983). Normally, the police must demonstrate probable cause to a judge before conducting the search—this is known as the warrant requirement. However, the same probable cause standard applies regardless of whether a warrant is required, so we do not distinguish between warrant searches and warrantless searches.

[3] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[4] *See, e.g.*, *State v. Moore*, 734 N.E.2d 804, 807 (Ohio 2000) ("Many state and federal courts have . . . concluded that the detection of the odor of marijuana, alone, by an experienced law enforcement officer is sufficient to establish probable cause to conduct a reasonable search.") (citing cases).

legalized the possession of cannabis containing less than .3% THC (such cannabis is now considered "hemp", rather than marijuana). The map below indicates the passage of medical and adult-use reforms by state, as of spring 2020.

Figure 1: The Adoption of State Medical and Adult Use Cannabis Reforms (June 2020)



Because of these reforms, even certain knowledge that cannabis is present no longer *necessarily* suggests that evidence of a *crime* (or even a civil offense) would be discovered in a search of the area.

So how have these reforms affected probable cause determinations? In recent years, many defendants have cited cannabis law reforms to challenge the lawfulness of police searches that were based, in whole or in part, on the presence of cannabis. To prepare this White Paper, we exhaustively researched and analyzed cases addressing such challenges. To help assess the impact of cannabis reforms, we also occasionally drew upon search cases involving similar products, possession of which is sometimes legal and sometimes not, like alcohol and prescription drugs. Based on this research, we discuss whether police need more than knowledge that cannabis is present to establish probable cause following adoption of each of three major types of reform: (1) medical legalization, (2) adult use legalization, and (3) hemp legalization.

DISCUSSION

Medical Cannabis Laws

To date, thirty-three (33) states and the District of Columbia (D.C.) have legalized cannabis for medical purposes.

In several pertinent respects, these medical cannabis reforms are the narrowest of the three types of reform considered in this White Paper.[5] For one thing, even under the most permissive of these laws, only a small subset of the population is even eligible to possess cannabis. To become a Qualifying Patient, an individual must first obtain a diagnosis with a Qualifying Condition, as well as a physician's recommendation to use cannabis to treat the condition. Most states also require Qualifying Patients and their caregivers to register with the state in order to avail themselves of the protections afforded by their laws.

While these Qualifying Patients and their caregivers are now allowed to possess and use – and in roughly one-half of the states, cultivate[6] -- cannabis for their own medical purposes, they remain subject to several discrete limits on their cannabis-related activities. All medical cannabis states cap the total quantity of the drug that Qualifying Patients may possess (or cultivate) at one time, though the limits vary from state to state. A few states also limit the forms of cannabis that Qualifying Patients may lawfully possess, barring, e.g., smokable or edible cannabis products. States also commonly bar Qualifying Patients from using cannabis in public places, and all states bar Driving Under the Influence (DUI) of cannabis, though again, they differ somewhat in how they define the DUI offense.

We researched caselaw from state courts in all thirty-four medical cannabis jurisdictions for decisions explicitly addressing the impact of their medical cannabis reforms on probable cause determinations. In the Sections below, we first briefly summarize our findings. We then discuss in more depth the decisions and the patterns that emerge therefrom.

Summary of Key Findings

No court has yet overturned a precedent holding that the odor of cannabis by itself *can* establish probable cause to conduct a search. In affirming that cannabis continues to have strong probative value in probable cause inquiries, courts emphasize that medical cannabis reforms are limited in scope, and thus, possession of cannabis remains unlawful in most circumstances.

However, some courts have added a proviso, indicating that "Odor Alone" continues to establish probable cause, *unless the police have information at the time of the search suggesting that possession is authorized by the state's medical cannabis law*. Given the limited scope of medical cannabis reforms, however, the duty to consider exculpatory evidence imposed by this "Odor

[5] For a more in-depth discussion and review of state medical cannabis reforms relating to Qualifying Patients, see ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY CH. 4 (2017).

[6] *Id.* at 414 Fig. 8.1.

Unless" standard has rarely deprived police of probable cause in litigated cases. In fact, our search of caselaw from thirty-four jurisdictions uncovered only one reported decision that invalidated a search because of that state's medical cannabis law.

Other courts have absolved the police of any duty to consider medical cannabis reforms at the time of search. These courts have held that their medical cannabis reforms merely create an affirmative defense to criminal charges, and thus, technically, do not *legalize* cannabis activities, even by Qualifying Patients. For this reason, indications that a suspect has complied with the state's medical cannabis reforms cannot affect probable cause at the time of search. We call this the "Affirmative Defense" exception because it departs from the notion that police normally must consider exculpatory facts in probable cause determinations.

"Odor Alone" remains good law following passage of medical cannabis reforms

Every court to have addressed the issue has declined to overrule precedents holding that the smell (sight, etc.) of cannabis alone generally establishes probable cause to conduct a lawful search (the Odor Alone standard). In affirming these precedents, courts commonly emphasize the fact that medical cannabis reforms are limited in scope, and thus, that state law continues to ban the possession of cannabis in most instances.[7]

The 2016 Arizona Supreme Court decision in *State v. Sisco*[8] is illustrative. In *Sisco*, the police searched a storage warehouse based solely on the odor of marijuana emanating from one of the units. The police discovered hundreds of cannabis plants in the unit, and its owner was charged with manufacturing marijuana and other offenses based on the plants and other evidence found in the search. The owner subsequently challenged the search, claiming that after passage of the Arizona Medical Marijuana Act (AMMA), the smell of cannabis by itself no longer necessarily suggests that evidence of a crime will be found, and thus, police need additional facts suggesting the cannabis was not possessed pursuant to the AMMA.

The court, however, rejected this "Odor Plus" standard and affirmed that the odor of cannabis, by itself, *could* establish probable cause to search. In reaching this conclusion, the court repeatedly noted that the AMMA made only modest changes to the state's cannabis laws:

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[7] *E.g.*, *State v. Sisco* 373 P.3d 549, 554 (Ariz. 2016)("[The Arizona Medical Marijuana Act] does not broadly alter the legal status of marijuana in Arizona but instead specifies particular rights, immunities, and obligations for qualifying patients and others, such as designated caregivers."); *Commonwealth v. Batista*, 219 A.3d 1199, 1201 (Pa. Sup. Ct. 2019) ("[T]he smell of marijuana may still indicate that a crime is afoot, because the growth, distribution, possession, and use of marijuana without a state-issued permit remains illegal."); *State v. Myers*, 122 A.3d 994, 1000 (N.J. Sup. Ct. App. Div. 2015) (noting that possession of marijuana remains an offense under New Jersey law, and that the state's medical cannabis law "creates a limited exception allowing possession of marijuana for medical use by qualifying patients who obtain the appropriate registry identification card"); *People v. Brown*, 670 N.W.2d 91, 95 (2012) (noting that the Michigan Medical Marihuana Act (MMMA) "constitutes a 'very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan,' and thus, to establish probable cause, "a search-warrant affidavit need not provide facts from which a magistrate could conclude that a suspect's marijuana-related activities are specifically not legal under the MMMA").

[8] 373 P.3d 549 (Ariz. 2016).

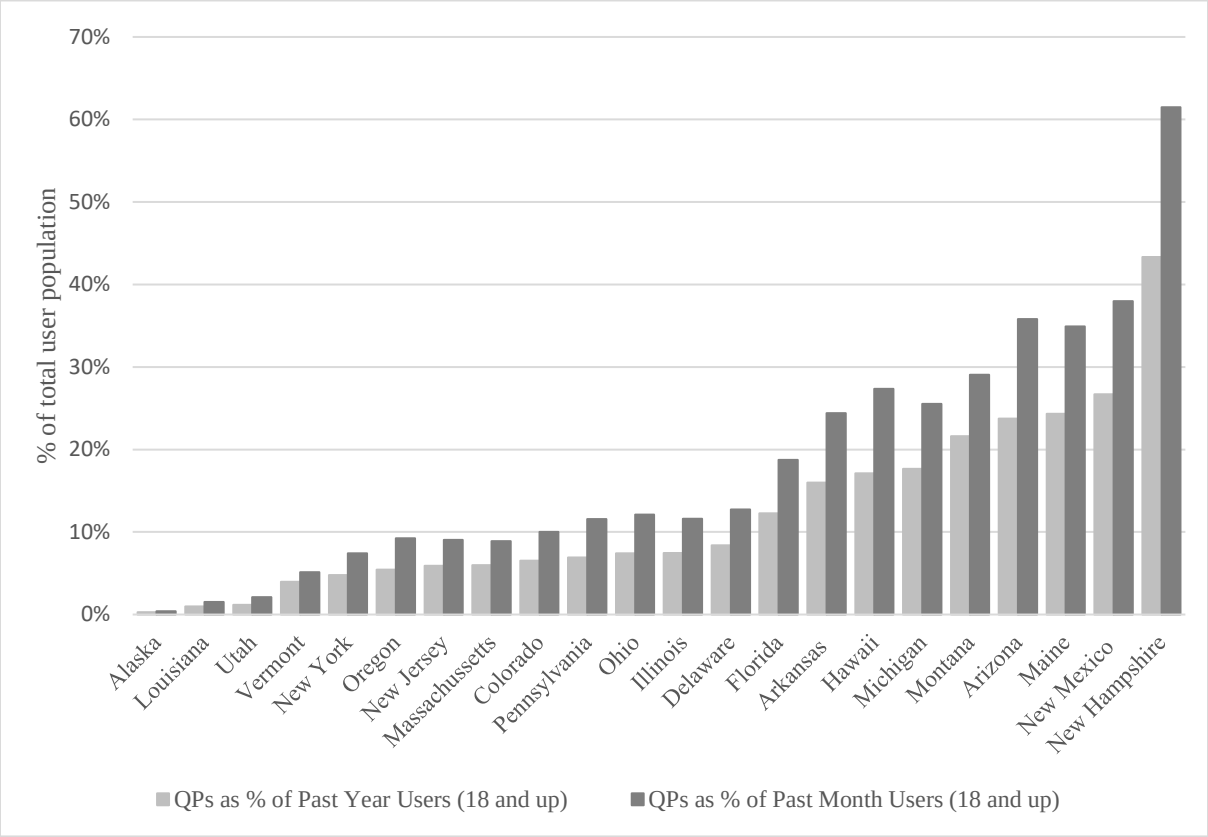
> "[The] AMMA makes marijuana legal in only limited circumstances. Possession of any amount of marijuana by persons other than a registered qualifying patient, designated caregiver, or medical marijuana dispensary agent is still unlawful, and even those subject to AMMA must strictly comply with its provisions to trigger its protections and immunities. . . . Thus, when an officer detects marijuana by sight or smell, the 'degree of suspicion that attaches' remains high, ... [and] probable cause exists."[9]

A comparison of the number of registered Qualifying Patients to the number of total cannabis users in medical cannabis states helps illustrate the limited scope of state medical cannabis reforms. The chart below shows the number of registered qualifying patients as a percentage of total past year and past month cannabis users (age 18 and older) in twenty-two medical cannabis states with mandatory registries.[10]

[9] *Id.* at 553.

[10] The chart includes all states for which registration data are available. The registration data were taken from Marijuana Policy Project, Medical Marijuana Patient Numbers (2020), https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/ (last visited June 5, 2020). The total past month and past year usage statistics were calculated using survey data from Subst. Ab. & Ment. Hlth. Svcs. Admin, National Survey on Drug Use and Health - State Estimates (2017-18), https://pdas.samhsa.gov/saes/state (last visited June 5, 2020) and population statistics from United States Census Bur., Estimates of the Total Resident Population and Resident Population Age 18 Years and Older for the United States, States, and Puerto Rico: July 1, 2019, https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-detail.html (last visited June 5, 2020).

Figure 2: Qualifying Patients as Percentage of Total Cannabis Users, by State (2019)



Although there is some variation across the twenty-two states, the data show that qualifying patients nearly always represent a minority of total cannabis users in medical cannabis states. New Hampshire is the only state in which Qualifying Patients represented a majority of total users (61.5% of past month users). The median for all states is 7.5% of past year and 11.9% of past month users; the mean for all states is 12.2% of past year and 18.1% of past month users.[11]

Although probable cause is "incapable of precise definition or quantification into percentages,"[12] these percentages help explain why courts have downplayed the impact of medical cannabis reforms on probable cause inquiries. The court in *Commonwealth v. Batista*[13] engaged in such numerical reasoning. Notwithstanding Pennsylvania's medical cannabis law, the court upheld the search of a garage based on the odor of fresh cannabis and a tip that the garage was being used as

[11] We note that these figures do not necessarily capture the probability that any given police search will involve a registered qualifying patient. For example, qualifying patients may be less likely to conceal cannabis in their cars given that they are breaking no law, suggesting that police will be more likely to detect cannabis possessed by qualifying patients as opposed to other users. In that case, the figures in the chart may underestimate the impact of medical cannabis reforms on the probability of discovering evidence of *unlawful* possession during any given search.

[12] *Maryland v. Pringle*, 540 U.S. 366, 370 (2003).

[13] 219 A.3d 1199 (Pa. Sup. 2019).

a grow house. In so doing, the court noted that Pennsylvania's medical cannabis law required a permit to cultivate cannabis, and that only 25 such commercial permits had been issued statewide. "Given the extremely limited number of [cultivation] permits that the Department has issued, . . . when an officer smells fresh marijuana emanating from a building that is a reported grow-house there still exists a fair probability that the marijuana inside is *illegal*."[14]

The "Odor Unless" standard

Even though medical cannabis reforms might not apply in most cases, some courts have held that the police may not ignore the reforms when there are indications that possession is authorized by law.[15] The duty to consider both inculpatory and exculpatory facts stems from the general principle that probable cause is a function of a "totality of the circumstances." For that reason, this duty is not unique to medical cannabis. In cases involving analogous items that are sometimes criminal to possess – like syringes, firearms, or prescription drugs – courts have likewise held that police must consider any facts suggesting lawful possession before executing a search.[16]

In the context of medical cannabis, indications of lawfulness might arise if, for example, a suspect presents his or her registration card to the police. The *Sisco* Court explains the card's relevance to the probable cause inquiry:

> "Presentation of a valid AMMA registry identification card . . . could indicate that marijuana is being lawfully possessed or used. Such information could effectively dispel the probable cause resulting from the officer's detection of marijuana by sight or smell, unless of course other facts suggest the use or possession is not pursuant to AMMA."[17]

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[14] *Id.* at 1205. *See also State v. Senna*, 79 A.3d 45, 50 (Vt. 2013) ("The small possibility that someone in the residence might have been immune from prosecution, in the absence of any evidence that anyone was, does not negate the State's probable cause to search based in part on the odor of fresh marijuana.").

[15] *E.g.*, *Sisco*, 373 P.3d at 554 ("Because probable cause is determined by the totality of the circumstances, . . . and marijuana possession or use is lawful when pursuant to AMMA, . . . a reasonable officer cannot ignore indicia of AMMA-compliant marijuana possession or use that could dispel probable cause."); *State v. Jernigan*, -- A3d --, -- (Del. Sup. 2019) ("When weighing the facts, a court must consider circumstances that both enhance and detract from a probable cause determination. [Delaware's Medical Marijuana Act] provisions providing that possessing less than six ounces of marijuana is no longer criminal, no longer contraband, and no longer generates civil liability, must be considered if the officer is aware of the defendant's status [as a medical marijuana patient].").

[16] *E.g.*, *Burdeshaw v. Snell* 350 F. Supp. 2d 944, 950 (M.D. Ala. 2004) (in Section 1983 action, holding that "officer did not act reasonably when he refused to investigate [suspect's] offer to prove that his possession of the [prescription] drugs was lawful," and consequently, "he did not have probable cause to arrest the plaintiff for unlawful possession of a controlled substance."); *id.* ("An officer may not ground even arguable probable cause upon mere speculation and ignore the impact of objective exculpatory evidence that is present at the scene of the arrest."); *Commonwealth v. Landry*, 779 N.E.2d 638, 642 (Mass. 2002) ("[W]hen a person presents a facially valid [syringe] exchange program membership card, a police officer may not lawfully arrest that person for violating [the law prohibiting possession of hypodermic needles] absent evidence that the card is invalid or the bearer is not entitled to possess it.").

[17] 373 P.3d at 554.

While not abandoning the notion that odor alone *could* supply probable cause in a given case, these courts have added a proviso to the Odor Alone standard. The *Sisco* Court provides an apt statement of the resulting "*Odor Unless*" standard that is now employed in several medical cannabis jurisdictions:

> "[T]he odor of marijuana suffices to establish probable cause for issuance of a search warrant, . . . *unless other facts would cause a reasonable person to believe the marijuana use or possession is authorized* [by the state's medical cannabis law]."[18]

It is important to recognize that, notwithstanding this duty to consider, we found only one published decision that has actually invalidated a search based on a state medical cannabis law: *State v. Jernigan*.[19] The case began when the Delaware police noticed the odor of cannabis as they approached defendant's vehicle. Based solely on that odor – and nothing else – the police searched the car. The Delaware appeals court subsequently invalidated the search, finding there was not enough probable cause in light of the defendant's status as a registered medical cannabis patient. Interestingly, the police did not actually *know* that defendant was registered – defendant had not volunteered that information to them before the search. However, the *Jernigan* court held that the police *should have known*. The defendant's status was readily available in the Delaware Criminal Justice System (DELJIS) database, which the police had already accessed to verify defendant's license information. According to the court, "the officer need only have checked an additional screen" on the terminal in his patrol car to discover that defendant "likely did not violate Delaware marijuana laws."[20]

We highlight three possible explanations for the dearth of successful challenges to searches in these Odor Unless states. One is that the police may be foregoing searches when they have indicia that the state's medical cannabis law authorizes possession.[21] This explanation suggests

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[18] *Id.* at 534 (emphasis added). *See also Myers*, 122 A.3d at 1003 ("[W]e hold that absent evidence the person suspected of possessing or using marijuana has a registry identification card, detection of marijuana by the sense of smell, or by the other senses, provides probable cause to believe that the crime of unlawful possession of marijuana has been committed."); *Brown*, 670 N.W.2d at 677 n. 5 ("[I]f the police do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant"); *Jernigan*, -- A3d at -- (holding that police lacked probable cause to search registered medical cannabis patient's car, absent facts that would suggest the patient had exceeded the quantity limits imposed by state law). *Cf. Senna*, 79 A.3d at 50 (mentioning but not necessarily adopting the Odor Unless standard) ("At least in the absence of any indication that a resident of a home is a registered patient, the fact that Vermont has a registry of patients who are exempt from prosecution for possession or cultivation of marijuana does not undermine the significance of the smell of marijuana as an indicator of criminal activity.").

[19] -- A.3d – (Del. Sup. Ct. 2019).

[20] *Id.* at --.

[21] For example, after adoption of the state's medical cannabis law, the New Jersey Attorney General issued guidance to state law enforcement, implying that officers should forego a search if "reasonably satisfied from [an] on-scene investigation" that the medical cannabis law applies. Attorney General Medical Marijuana Enforcement Guidelines for Police, Dec. 6, 2012, https://www.nj.gov/health/medicalmarijuana/documents/attorney_general_guideline.pdf.

that medical cannabis reforms could have an effect on police search practices, even if very few court decisions have had to suppress searches.

A second explanation is that the police often do not have indicia of compliance before they conduct searches. Even though many defendants challenged searches on the basis of medical cannabis laws, several courts (including *Sisco*) noted that at the time of the search the police had no reason to believe that the medical cannabis law applied, and thus, had no obligation to consider it.[22]

Importantly, courts have refused to impose "an affirmative duty" on police to seek out indicia of compliance before conducting searches.[23] Instead, courts merely require police to consider evidence that is already on hand (or readily available).[24] Even *Jernigan*, the lone successful challenge to a search, arguably does not require police to gather information they do not already have on hand or can easily access. As explained above, the *Jernigan* Court suggested that police could have easily checked the defendant's medical cannabis status through the state's criminal justice database – thus, in a sense, the police *already did have the patient's registration status on hand*, they just did not look at it.[25] Delaware is unusual in this regard, because most states do not allow the police to search their medical cannabis registries by name; instead, they may verify a person's registration status only by using his or her registration card number – a number they will not have unless the patient has given it to them. One court has suggested that the police may be forgiven for failing to check whether a suspect in an investigation was a registered patient because confidentiality rules likely would have foiled such an inquiry.[26]

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[22] *Sisco*, 373 P.3d at 555 (emphasizing that "[n]othing in the record suggests that the police, in seeking a warrant, disregarded any indicia that marijuana was being used or possessed in compliance with AMMA"); *Senna*, 79 A.3d at 50 ("There is no evidence that either defendant or his partner was, in fact, a registered patient."); *Johnson v. State*, 275 So. 3d 800, at 802 (Fla. Dist. Ct. App. 2019) (noting that defendant "does not argue that he is a medical-marijuana user" and rejecting his claim that as a general matter, police no longer have probable cause based on the smell of marijuana alone following passage of Florida's medical cannabis law); *Myers* 122 A.3d at 1003 ("Here, no claim was or is made that defendant or anyone in his car was a registered qualifying patient or otherwise authorized to possess marijuana under the [Compassionate Use and Medical Marijuana Act]" and thus, "the odor of marijuana emanating from defendant's car gave [the officer] probable cause, which justified his arrest of defendant.");

[23] *Brown*, 825 N.W.2d at 677 n.5 ("[W]e decline, in light of the pertinent case law, to impose an affirmative duty on the police to obtain information pertaining to a person's noncompliance with the MMMA before seeking a search warrant for marijuana.").

[24] As the *Brown* Court explained, "if the police do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant." *Id.*

[25] *Jernigan*, -- A.3d at -- ("[T]he searching officer did not know Mr. Jernigan had a registry identification card. Mr. Jernigan's status, however, was readily available in the Delaware Criminal Justice System ("DELJIS"). The officers on scene did not view the screen in DELJIS containing this status, but under the circumstances of this case, they should have.").

[26] *Brown*, 670 N.W.2d at 672 (noting officer's statement that he did not check the state registry before executing a search of a suspected cannabis grow house because the registry's confidentiality rules did not permit officers to search the database by the suspect's name).

A third reason for the limited number of successful search challenges is that police often have additional facts – besides the presence of cannabis – that suggest the cannabis was *not* in compliance with the state's medical cannabis reforms. For example, facts or circumstances might suggest that a suspect possess more than the quantity of cannabis permitted by the state's medical cannabis law. In light of such facts or circumstances, the fact that a suspect is a medical cannabis patient does not necessarily deprive the police of probable cause to believe that evidence of some crime would be found, even if that crime is no longer simple possession.

Johnson v. State[27] illustrates just how little additional proof might be needed to (re)establish probable cause. On the basis of the smell of burnt marijuana coming from the vehicle, the *Johnson* Court upheld the search of defendant's car, notwithstanding Florida's medical cannabis law.[28] The court suggested the fact the odor was of burnt (rather than raw) marijuana helped establish probable cause to believe no less than three violations of the state's medical cannabis law had occurred. For one thing, "at the time of the stop, Florida's medical-marijuana laws did not authorize *smokable* marijuana."[29] In addition, "Florida law did not allow use [of medical cannabis] in 'a vehicle' other than 'for low-THC cannabis.'"[30] Lastly, the court suggested that "even if smoking marijuana were legal altogether, the officers would have had probable cause based on the fact that [defendant] was operating a car" under the influence of cannabis, in violation of the state's DUI law.[31] Courts have upheld searches based on similarly thin additional facts suggesting possible violations of other limits imposed by medical cannabis laws, including bans on open containers of cannabis[32] and public use of the drug.[33] Indeed, *Jernigan* appears to be the rare case where the police knew (or should have known) that the defendant was a registered medical cannabis patient but also offered no reason to think that the defendant had violated one of the limits of the state's medical cannabis law.[34]

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[27] 275 So. 3d 800 (Fla. Dist. Ct. App. 2019).

[28] The court noted that the defendant was not a medical cannabis patient, *id.* at 801, so the police may not have even needed to compile additional incriminating facts to sustain the search.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 802.

[32] *People v. Hill*, -- N.E. 3d --, -- (Ill. 2020) (finding that because officer "saw a loose 'bud' in the backseat [of the car] and smelled a strong odor of cannabis", the officer had sufficient evidence to believe he would find evidence of a crime – namely, possession of cannabis that was not properly contained in a search of the vehicle).

[33] *People v. Anthony*, 932 N.W.2d 202, 215 (Mich. App. 2019) (citing MMMA ban on public use of medical cannabis, and concluding that "because defendant used marijuana in his truck on a public street, the protections of the MMMA did not apply").

[34] Jernigan, -- A.3d at -- (noting that police had no indications that registered medical cannabis patient possessed more than the quantity of cannabis permitted by state law).

The Affirmative Defense exception

Although several courts require police to consider medical cannabis reforms at time of search, some do not. Some courts have concluded that their medical reforms are irrelevant for probable cause because they do not actually *legalize* possession. Rather, those reforms merely create an affirmative defense to criminal charges. These courts have held that, like other affirmative defenses,[35] the medical cannabis affirmative defense may be raised by a defendant at trial, but not before. It thus follows that police are free to ignore even credible claims that a suspect has complied with the state's medical cannabis laws when conducting a search.[36]

The leading case on point is *State v. Fry*.[37] In *Fry*, police received a tip that there was a cannabis growing operation at defendant's house. When officers visited the house to investigate, they smelled burning cannabis. Although the defendant presented the officers with a medical cannabis authorization form from his doctor, the officers applied for a telephonic warrant and searched the home anyway. The defendant then challenged the search under Washington's medical cannabis law, arguing that probable cause to conduct the search was negated as soon as he presented his medical cannabis authorization to the police. The Washington Supreme Court, however, disagreed. It found that the "authorization form does not negate probable cause."[38] The court based this holding on its conclusion that the Washington medical cannabis law merely created an affirmative defense to criminal marijuana charges. It further reasoned that because an affirmative defense "does not negate any elements of the charged crime", it remains a crime for anyone, including Qualifying Patients, to possess or grow cannabis.[39] Thus, the court held that the defendant's presentation of his medical cannabis authorization form did not "result in making the

[35] *See, e.g., McBride v. Walla Walla Cty.*, 975 P.2d 1029, 1033 (Wash. App. 1999) ("Self-defense is an affirmative defense which can be asserted to render an otherwise unlawful act lawful. But the arresting officer does not make this determination. . . . The self-defense claim did not vitiate probable cause [to make an arrest]."); *Weible v. City of Akron*, No. 14878, 1991 WL 77187, at 3, 7 (Ohio Ct. App. May 8, 1991) ("[A] police officer is not required to weigh and evaluate the truth of alleged affirmative defenses [like self-defense] to a crime before he may act upon probable cause to arrest and charge a defendant.").

[36] *State v. Fry*, 228 P.3d 1 (Wash. 2010). See also *People v. Strasburg*, 56 Cal. Rptr. 3d 306, 311 (2007), as modified (Apr. 3, 2007)("[The Compassionate Use Act] provides a limited immunity—not a shield from reasonable investigation. An officer with probable cause to search is not prevented from doing so by someone presenting a medical marijuana card or a marijuana prescription."). For other decisions mentioning but not necessarily relying on the Affirmative Defense exception to uphold searches under state medical cannabis laws, see *Myers*, 122 A.3d at 302 ("The CUMMA provides that possession of a registry identification card is an affirmative defense, not an element of the offense."); *Brown*, 825 N.W.2d at 674 ("We find that because the possession, manufacture, use, creation, and delivery of marijuana remain illegal in Michigan even after the enactment of the MMMA, a search-warrant affidavit concerning marijuana need not provide specific facts pertaining to the MMMA, i.e., facts from which a magistrate could conclude that the possession, manufacture, use, creation, or delivery is specifically not legal under the MMMA.").

[37] 228 P.3d 1 (2010).

[38] *Id.* at 7.

[39] *Id.* at 8.

act of possessing and using marijuana noncriminal" and "does not eliminate probable cause" established by the odor of cannabis.[40]

However, it should be noted that not all courts and commentators agree that affirmative defenses are irrelevant for probable cause inquiries.[41] Furthermore, this exception to the general rule that police must consider all exculpatory evidence does not apply in states that have created more robust legal protections for medical cannabis patients.[42] In *Jernigan*, for example, the court rejected the government's claim that the Delaware Medical Marijuana Act (DMMA) "merely provides an affirmative defense to criminal and civil liability" and thus, that the "relevant circumstances [for probable cause] *do not* include [the defendant's] DMMA status."[43] It found that "a registered qualifying patient who possesses marijuana and otherwise complies with Delaware's Medical Marijuana Act [DMMA] *is not engaged in illegal activity*."[44]

[40] *Id*. at 10.

[41] *See* Kevin Cole, *Probable Cause to Believe What? Partial Marijuana Legalization and the Role of State Law in Federal Constitutional Doctrine*, 54 CRIM. L. BULL. 4 (Spring 2018) (discussing cases and criticizing notion that medical cannabis affirmative defenses are irrelevant to the probable cause calculus).

[42] Because of unclear legislative drafting, in some states it may prove difficult to determine whether a medical cannabis law legalizes some cannabis activities or rather creates an affirmative defense to criminal charges based on those activities. *See Brown*, 825 N.W.2d at 677 n.4 ("Even if the protection scheme set forth in [the MMMA] is not technically viewed as an 'affirmative defense,' it nonetheless constitutes a "narrowly tailored protection[ ]" against punishment for a violation of the Public Health Code," hence, "[t]he violation itself still exists," and thus, "we disagree that search-warrant affidavits must set forth information indicating that a suspect's marijuana-related activities are specifically not legal under the MMMA."). This difficulty adds to the confusion over probable cause.

[43] *Jernigan*, -- A.3d at --. *See also State v. Senna*, 79 A.3d 45, 50 (Vt. 2013) (distinguishing *Fry* because it rested on Washington's medical cannabis law, which "expressly created an affirmative defense to conviction in certain circumstances rather than an exemption to prosecution for registered individuals").

[44] *Jernigan*, -- A.3d. at -- (emphasis added).

Adult Use Cannabis Laws

Eleven medical cannabis states and the District of Columbia have gone a step further and legalized adult use cannabis.

Adult use laws are much broader than medical cannabis reforms. They allow all adults (not just Qualifying Patients) to possess cannabis, regardless of the purpose for use. However, adult use laws are similar to medical cannabis reforms because they continue to impose many (though not necessarily all) of the same limits on possession and use of cannabis. For example, all adult use states limit the quantity of cannabis that adults may possess; most ban public use of the drug; and all ban driving under the influence of cannabis.[45]

The students researched caselaw from all twelve adult use jurisdictions. Once again, they focused on state cases addressing whether adult use laws effect probable cause to conduct a search. On occasion, however, we also draw upon cases addressing the impact of state laws decriminalizing simple possession.

Summary of Key Findings

Several courts have already held or strongly suggested that the Odor Alone standard no longer applies once a state has legalized adult use cannabis. These courts instead now use the Odor Plus standard, under which police need additional facts – besides the likely presence of cannabis – to establish probable cause to search.

In shifting to this more demanding standard, courts note that adult use laws are broader than medical cannabis reforms, and thus, diminish the likelihood that cannabis is connected to unlawful behavior. Courts reason that the Odor Plus standard is also more consistent with the language and purposes of adult use reforms than is the Odor Alone standard.

Even if it no longer suffices to establish probable cause, however, cannabis remains relevant in probable cause inquiries. The presence of the drug, in conjunction with other facts or circumstances, might suggest a violation of one of the limits adult use states have imposed on cannabis-related activities, such as driving under the influence of the drug.

Courts are shifting toward the "Odor Plus" standard

Adult use reforms are of relatively recent vintage, but several courts have already held or strongly suggested that the odor of cannabis by itself no longer establishes probable cause to search once a state has legalized adult use cannabis.[46] These courts have replaced the Odor

[45] For a more in-depth discussion and review of state adult use cannabis reforms, see MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY, *supra* note 5, at Ch. 4.

[46] *See People v. Lee*, 253 Cal. Rptr. 3d 512 (Cal. App. 2019); *State v. Crocker*, 97 P.3d 93 (Alaska App. 2004). *Cf. People v. McKnight*, 446 P.3d 397 (Colo. 2019); *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016); *State v. Sisco*, 373 P.3d 549 (Ariz. 2016) (upholding search under AMMA on grounds that "that AMMA did not decriminalize the possession or use of marijuana generally, but noting that "[i]f AMMA had done so, or if Arizona eventually

Alone standard that applied under prohibition with the Odor Plus standard. Under this Odor Plus standard, police need additional facts – besides the likely presence of cannabis – to establish probable cause to search.[47]

The California appeals court decision in *People v. Lee*[48] discusses the new Odor Plus standard. Following passage of California's Adult Use law (Proposition 64), the *Lee* Court suppressed the search of a car that was based on the presence of a small bag of cannabis and some cash that was found in the driver's pocket during a patdown. The court found that adult use legalization required it to adopt the more defendant friendly Odor Plus standard for searches involving cannabis, in lieu of the Odor Alone standard that had previously been the governing law:

> "The recent legalization of marijuana in California means we can now attach fairly minimal significance to the presence of a legal amount of the drug on [defendant's] person. . . . [T]here must be evidence—that is, *additional* evidence beyond the mere possession of a legal amount—that would cause a reasonable person to believe the defendant has more marijuana."[49]

Decisions like *Lee* emphasize that adult use reforms make simple possession legal in most circumstances, which, in turn, substantially diminishes the inference of criminality that once followed from the presence of cannabis when all possession was unlawful. The relatively broad scope of adult use reforms also distinguishes them from medical cannabis laws, which, as just discussed, permit only a limited population of qualifying patients to possess the drug. In addition, unlike some of those medical cannabis reforms, all adult use reforms make possession of the drug *lawful* for adults (as matter of state law anyway[50]) – i.e.,they do not just create an affirmative defense to criminal charges.[51]

Courts have also reasoned that the adoption of a more privacy friendly Odor Plus standard better comports with the language and purposes of adult use legalization measures. For example, the *Lee* Court noted that California's adult use measure expressly stated that "no conduct deemed

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decriminalizes marijuana, our analysis and conclusion in this context might well be different"); *State v. Rondeau*, 436 P.3d 49 (Or. App. 2019).

[47] *Lee*, 253 Cal. Rptr. 3d at 520; *Crocker*, 97 P.3d at 96 ("Evidence that a person possesses an unspecified quantity of marijuana in their home does not, standing alone, establish probable cause to believe that the person is breaking the law. Thus, without some additional indication of illegality (for instance, evidence suggesting that the marijuana is being sold, or that the amount of marijuana equals or exceeds the statutory ceiling of four ounces), the search and seizure provision of our state constitution . . . prohibits the issuance of a search warrant.").

[48] 253 Cal. Rptr. 3d 512 (Cal. App. 2019)

[49] *Id.* at 519.

[50] We briefly consider the relevance of the *federal* ban for probable cause determinations below.

[51] *State v. Crocker*, 97 P.3d 93, 95 (Alaska App. 2004) (noting that state decisions recognizing a privacy right to use cannabis in the home "did not create an affirmative defense that defendants might raise, on a case-by-case basis")(citation omitted).

lawful by [the measure] shall constitute the basis for detention, search, or arrest."[52] And the Alaska appeals court in *State v. Crocker*,[53] which adopted the Odor Plus standard before Alaska passed its adult use law but after Alaska courts had recognized a comparable right of privacy to possess and use the drug in the home, suggested that standard was more consistent with the purposes of legalization. It reasoned that if the police could search homes based on any indication that marijuana was present,

> "Alaska citizens would have the constitutional right to possess marijuana for personal use in their homes, but they would exercise this right at their peril—because their possession of marijuana would subject them to thorough-going police searches of their homes. If this were the law, the Alaska Constitution's protection of the right of privacy in one's home—the cornerstone of the Ravin decision—would be eviscerated."[54]

The *Crocker* court drove home its point by analogizing to searches involving possession of other items that are sometimes (but not always) lawful to possess:

> "Every day, people obtain controlled substances legally through a doctor's prescription. For instance, several prescription painkillers contain codeine, which is a Schedule IA controlled substance. Our state constitution protects people from government intrusion into their homes unless the government affirmatively establishes a valid reason for the intrusion. Thus, even though the police may have firm information that a person currently possesses codeine in their home, a judicial officer should not issue a warrant that authorizes the police to enter the person's home and search the person's cupboards and drawers for evidence of this codeine possession unless the police also present the magistrate with some affirmative reason to believe that the codeine was obtained illegally or that (having been obtained lawfully) it is being distributed illegally."[55]

The Massachusetts Supreme Judicial Court has used similar purposivist reasoning to explain why it shifted from the Odor Alone to the Odor Plus standard following the adoption of a 2008 state measure decriminalizing simple possession of 1 ounce or less of cannabis.[56] Although

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[52] *Lee*, 253 Cal. Rptr. 3d at 522 (quoting Cal. Health & Safety Code § 11362.1).

[53] 97 P.3d 93 (Alaska Ct. App. 2004).

[54] *Id.* at 97.

[55] *Id.* at 96. *See also McKnight*, 446 P.3d at 408 (using similar reasoning to conclude that a sniff from a dog trained to detect cannabis (and other drugs) implicated the expectation of privacy protected by the Fourth Amendment and the Colorado Constitution and thus required probable cause) ("Although possession of guns, alcohol, and tobacco can be unlawful, persons still maintain an expectation of privacy in lawfully using or consuming those items. The same now goes for marijuana: In legalizing marijuana for adults twenty-one and older, Amendment 64 . . . [created] a reasonable expectation of privacy to engage in the lawful activity of possessing marijuana in Colorado. . . . We see no reason to treat a search that could reveal legal marijuana any differently from a search that could reveal other lawful activity.").

[56] *E.g.*, *Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1055 (Mass. 2014) ("Because the 2008 initiative reclassified possession of one ounce or less of marijuana as a civil violation, . . . the odor of burnt marijuana alone no longer constitutes a specific fact suggesting criminality. Accordingly, such an odor alone does not constitute probable cause to believe that a vehicle contains a criminal amount of contraband or specific evidence of a crime."); *Commonwealth*

Massachusetts at the time had only decriminalized possession (i.e., possession remained unlawful), the court concluded that allowing the police to search anytime cannabis is present in an area would undermine the purposes of the decriminalization ballot measure:

> "By mandating that possession of such a small quantity of marijuana become a civil violation, not a crime, the voters intended to treat offenders who possess one ounce or less of marijuana differently from perpetrators of drug crimes. . . . The statute does away with traditional criminal consequences [for marijuana possession], including the long-term and embarrassing effect that a criminal record has on employment or applying for school loans, demonstrating the intent of the voters to change the societal impact of possessing one ounce or less of marijuana. . . . Ferreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statute."[57]

Cannabis is still relevant for probable cause

Importantly, although it may no longer establish probable cause by itself, the odor of cannabis remains relevant under the *Odor* Plus standard. Even though states allow all adults to possess, use, and cultivate cannabis, they continue ban certain cannabis related activities, even by adults – e.g., driving under the influence of cannabis or using the drug in a public place. The odor (sight, etc.) of cannabis can thus contribute to showing that one of these bans has been breached and that evidence of such a breach would be found during a search. As the Colorado Supreme Court aptly explained, "while Amendment 64 allows possession of one ounce or less of marijuana, a substantial number of other marijuana-related activities remain unlawful under Colorado law" and hence, "the odor of marijuana . . . can *contribute* to a probable cause determination."[58]

The California appellate court decision in *People v. Fews*[59] helps illustrate how police can build the case for probable cause based on the odor of cannabis. The *Fews* Court held that police had established probable cause to search a car based in part – but not entirely – on the presence of

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v. Cruz, 945 N.E.2d 899, 913 (Mass. 2011) (suppressing search triggered by the odor of cannabis because "no facts were articulated to support probable cause to believe that a criminal amount of contraband was present in the car"). *See also State v. Clinton-Aimable*, -- A.3d --, -- (Vt. 2020) (applying state decriminalization measure and rejecting the state's argument that "the presence of an amount of marijuana that is not a crime to possess is sufficient to establish probable cause that defendant possessed additional marijuana in criminal amounts").

[57] *Cruz*, 945 N.E.2d at 910. Although several state courts have upheld the Odor Alone standard following decriminalization, their reason for doing so – that possession remains unlawful, and probable cause may be based on civil infractions – would not support retaining the Odor Alone standard if the state were to *legalize* cannabis. *See, e.g.*, *State v. Smalley*, 225 P.3d 844 (Or. App. 2010).

[58] *People v. Zuniga*, 372 P.3d 1052, 1064 (Colo. 2016) (emphasis added) (holding that the "heavy odor" of raw cannabis, the extremely nervous demeanor of driver and passenger, and conflicting accounts of their activities, all combined to establish probable cause to believe that search of car might turn up evidence of possession in excess of amounts permitted by Amendment 64). *See also Clinton-Amiable*, -- A.3d --, -- ("Simply because possession of small amounts of marijuana is not a crime does not require law enforcement to disregard the odor of marijuana in establishing probable cause that a crime has been committed.").

[59] 238 Cal.Rptr.5th 553 (Cal. App. 2018).

cannabis. The police had detected the odor of "recently burned" marijuana coming from the car and its driver, and the driver had admitted that a half-burnt cigar on his person contained the drug. The court explained that although "conduct deemed lawful" by Proposition could not constitute the basis for a search,

> "[d]riving a motor vehicle on public highways under the influence of any drug . . . or while in possession of an open container of marijuana . . . are not acts "deemed lawful" by [Proposition 64]. . . . Here, the evidence of the smell of 'recently burned' marijuana and the half-burnt cigar containing marijuana supported a reasonable inference that [defendant] was illegally driving under the influence of marijuana, or, at the very least, driving while in possession of an open container of marijuana."[60]

We note that the police do not always have additional facts which, in conjunction with the odor (sight, etc.) of cannabis, suffice to establish probable cause following adult use legalization. In other words, the Odor Plus standard has some teeth, especially as compared to Odor Alone standard used by some medical cannabis jurisdictions. For example, in *Commonwealth v. Overmyer*,[61] the Massachusetts Supreme Judicial Court rebuffed police claims that the "strong odor" of marijuana gave them probable cause to believe that a car contained a criminal amount of cannabis (more than one ounce). The court expressed serious doubts about the ability of government agents to discern quantity based on subjective assessments of the strength of an odor:

> "The officers in this case detected what they described as a "strong" or "very strong" smell of unburnt marijuana. However, such characterizations of odors as strong or weak are inherently subjective. . . . . [T]he strength of a smell is thus at best a dubious means for reliably detecting the presence of a criminal amount of marijuana. . . .[T]here is no evidence that the officers here had undergone specialized training that, if effective, would allow them reliably to discern, by odor, not only the presence and identity of a controlled substance, but also its weight. . . . In the absence of reliability, . . . [a] search is not justified based solely on the smell of marijuana'."[62]

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[60] *Id.* at 563.

[61] 11 N.E.3d 1054 (Mass. 2014).

[62] *Id.* at 1059 (citations omitted). For other cases finding that police lacked probable cause under the Odor Plus standard, see *Commonwealth v. Craan*, 13 N.E.3d 569, 576 (Mass. 2014) ("The trooper was adamant that it was unburnt, rather than burnt, marijuana that he smelled, suggesting that, prior to the stop, the defendant had not been smoking while driving."); *Cruz*, 945 N.E.2d at 908 n.17 (noting there were no indications suggesting that defendant had committed a DUI cannabis offense, since officers "could not recall whether the engine was running" when they stopped the car and the record did not reveal "how long the vehicle had been parked"); *id.* at 908, n17 ("There are no facts in the record to support a reasonable suspicion that the defendant possessed more than one ounce of marijuana."); *People v. Shumake*, 259 Cal.Rptr.3d 405, 410 (Cal. App. 2019) (rejecting claim that tube containing 1 gram of cannabis in car may have violated state's open container law and thus supplied probable cause to believe that a violation of Proposition 64 had occurred); *Lee*, 253 Cal.Rptr.3d at 523 ("Officer . . . did not smell the odor of burnt marijuana—suggesting the possibility of driving under the influence—and there was no evidence of marijuana in an open container in [Defendant's] car. Indeed, [the officer] conceded there was nothing illegal about the small amount of marijuana in [Defendant's] pocket."); *Crocker*, 97 P.3d at 97 (rejecting state's assertion that "the strength of the smell" of cannabis emanating from a house adequately demonstrated that the amount inside the home exceeded limits imposed under Alaska precedent: "we can not simply assume that there is a direct proportionality

Could the federal ban support the "Odor Alone" standard for searches by state *police?*

Given that the federal government continues to ban marijuana outright, the presence of the drug alone presumably continues to supply probable cause for searches by federal agents enforcing federal law in federal court. But could the federal ban help salvage searches by *state* police as well?

While detailed examination of this complicated question is beyond the scope of this White Paper,[63] we note that two state court decisions mentioned above specifically considered – and rejected – the invitation to use the federal marijuana ban to uphold state search practices.[64] These decisions suggest that state courts are unlikely to uphold searches that would lack for probable cause but for the federal marijuana ban.

In *Commonwealth v. Craan*,[65] the Massachusetts Supreme Judicial Court expressly rejected the claim that the odor of cannabis gave state police probable cause to search because the odor suggested they would find evidence of a *federal* crime – possession of marijuana. To begin, the *Craan* court acknowledge that federal law could be relevant to state police searches, but only if state police are authorized to enforce it. In other words, if they had no business enforcing the federal marijuana ban, the state police could not properly consider it when making their probable cause determination. The *Craan* court then noted that such authorization must come from the state government, which was not obliged to provide it.[66] Because state police searches would undermine the purposes of the state's 2018 decriminalization measure, the *Craan* Court concluded that the state had not, in fact, authorized state police to enforce the federal marijuana ban. Thus, the federal marijuana ban could not justify a state police search based on smell of cannabis. A passage from the court's opinion nicely encapsulates the court's reasoning:

> "[The state's argument that the] trooper had probable cause to believe that evidence of a Federal crime, namely, possession of marijuana, would be found inside the defendant's

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between the strength of the odor and the amount of marijuana giving rise to that odor"). *Cf. State v. Rondeau*, 769 P.3d 49, 56 (Or. App. 2019) (holding that police had unlawfully extended stop based on odor of burnt cannabis) ("We are skeptical that the existing record could establish that Stevens had reasonable suspicion that defendant possessed a criminal amount of marijuana, especially because the trial court implicitly found that Stevens smelled smoked marijuana, not unburned marijuana, on defendant's person.").

[63] For detailed analyses of the Fourth Amendment issues raised by state enforcement of federal law, see Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471 (2018).

[64] *People v. McKnight*, 446 P.3d 397 (Colo. 2019); *Commonwealth v. Craan*, 13 N.E.3d 569 (Mass. 2014). A third decision briefly noted the argument, but appeared not to have relied on it. *Brown*, 825 N.W.2d at 677. A fourth decision mentioned the argument but did not address it because it had been dropped by the parties. *See Jernigan*, -- A.3d at --.

[65] 13 N.E.3d 569 (Mass. 2014).

[66] *Id.* at 578. For a detailed explanation of why states may refuse to enforce the federal marijuana ban, see generally Robert A. Mikos, *On the Limits of Supremacy: State Medical Marijuana Laws and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

> vehicle, ... effectively asks us to circumvent the "clear intent" of the voters who enacted the 2008 [decriminalization] initiative. . . . We decline to do so. We observe at the outset that State and local law enforcement authorities are the creatures of statute, which may be modified by the Legislature. . . . Their authority to enforce federal law derives from state law. Where the 2008 initiative decriminalized possession of one ounce or less of marijuana under State law, and accordingly removed police authority to arrest individuals for civil violations, . . . it also must be read as curtailing police authority to enforce the Federal prohibition of possession of small amounts of marijuana. Any contrary interpretation would clearly contravene the people's intent, to which we must give effect. . . . Construing the statutory scheme to continue to permit State and local police to enforce the Federal prohibition would be entirely inconsistent with the objective that we discerned in *Commonwealth v. Cruz* . . . to 'free up the police for more serious criminal pursuits.' We will not adopt an interpretation that is so plainly at odds with the purpose of the initiative."[67]

In *People v. McKnight*,[68] the Colorado Supreme Court held that a drug dog sniff constitutes a search requiring probable cause if the dog might alert to the presence of marijuana. The court reasoned that because the state had legalized possession of the drug, individuals now have a "reasonable expectation of privacy in possessing" it.[69] The court acknowledged that the sniff "was not a search under the U.S. Supreme Court's interpretation of the Fourth Amendment", because federal law continued to ban the drug outright. But the *McKnight* Court based its decision on the Colorado Constitution, and it was not bound to follow federal precedent when interpreting state law.[70] Indeed, the court reasoned that when there are "state constitutional provisions that provide rights not guaranteed by the federal constitution, interpreting the state constitution in a manner that departs from federal courts' interpretations of similar federal provisions not only makes sense, it may be the most logical option."[71]

The next Section suggests a second reason why the federal ban may no longer support probable cause in state *or federal* cases: the federal government has legalized "hemp", which means that cannabis is no longer necessarily illegal under *federal* law.

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[67] *Crann*, 13 N.E.3d at 578.

[68] 446 P.3d 397 (Colo. 2019).

[69] *Id.* at 408.

[70] *Id.* at 406.

[71] *Id.* at 407.

Hemp Legalization

When Congress passed the Controlled Substances Act (CSA) in 1970, it defined "marijuana" to include all cannabis plants, *regardless of THC content*.[72] Under this expansive definition, the possession, cultivation, and distribution of *any* cannabis plant was illegal under federal law.

In 2018, however, Congress passed legislation that narrowed the definition of "marijuana." In particular, the Agriculture Improvement Act of 2018 – more commonly known as the 2018 Farm Bill -- removed from the definition of "marijuana" cannabis plants that contain .3% or less delta-9 tetrahydrocannabinol (THC).[73] The Act rechristened such plants "hemp." Thus, although federal law continues to ban the possession, cultivation, and distribution of "marijuana" outright, that ban now only applies to a subset of cannabis plants (and products made therefrom) – namely, those that contain more than a minimal amount of THC.

Many states have adopted their own hemp reforms as well. Although the White Paper focuses on federal hemp reforms, we discuss some of the differences between federal and state reforms in the Sections below.[74]

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[72] 21 U.S.C. §802(16) (2017) ("The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination."). *See New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 1999) (holding that the CSA makes no distinction between hemp and "marijuana" and defines "marijuana" to include all cannabis plants, regardless of THC content).

[73] Pub. L. No: 115-334 (Dec. 20, 2018). As a result of the 2018 Farm Bill, the CSA now defines "marihuana" as follows:

> (16)(A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
>
> (B) The term "marihuana" does not include—
>
> > (i) hemp, as defined in section 1639 of title 7 [(the 2018 Farm Bill)]; or
> >
> > (ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Congress had passed a much more limited hemp reform in 2014. The 2014 Farm Bill also defined hemp by reference to THC content, but it legalized hemp only for research purposes.

[74] For more information on state hemp laws, see Nat'l Conf. St. Legis., State Industrial Hemp Statutes, at https://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx (last visited June 5, 2020).

The changes wrought by these hemp reforms could be dramatic. For example, the United States Department of Agriculture (USDA) reports that farmers had already planted at least 146,780 acres of hemp across the country in 2019.[75] To put that number in perspective, researchers at the RAND Corporation have estimated that all of the THC-rich marijuana now consumed in the United States could be grown on "a dozen or so modest farms of 1,000 acres."[76]

So how has the legalization of hemp affected probable cause to conduct searches? In particular, after the 2018 Farm Bill, does the presence of *cannabis* alone still generate probable cause to believe that evidence of a federal crime will be discovered during a search?

Because the prior two Sections relied primarily on state caselaw, in this Section, we focus instead on *federal* cases that address the impact of hemp reforms on probable cause inquiries.

Summary of Key Findings

A handful of courts have considered – and rejected – the claim that hemp legalization undermines probable cause to search based on the odor or sight of cannabis.

However, these decisions are not reliable indicators of the impact of hemp reforms on probable cause. All cases decided thus far have considered state hemp reforms that were narrower than the reforms adopted in the 2018 Farm Bill. Courts have also attached too much weight to bald declarations from police that they saw or smelled "marijuana", without considering whether officers had the ability to distinguish "marijuana" from "hemp" by sight or smell alone.

Given the proliferation of hemp reforms and booming market for hemp, courts may need to reconsider the weight they give to the sight or odor of cannabis in probable cause inquiries.

"Odor Alone" remains good law (for now) . . .

A handful of courts have addressed challenges to probable cause based on hemp reforms. These courts have uniformly rejected the claim that police need additional facts – besides those suggesting the presence of cannabis – to conduct a lawful search following the passage of such reforms.[77] In other words, courts continue to hold that the odor of cannabis by itself gives police

[75] United States Dep't Ag., Farm Svc. Ag., FSA Crop Acreage Reported to FSA, 2019 acreage data as of Jan. 1, 2020, https://www.fsa.usda.gov/news-room/efoia/electronic-reading-room/frequently-requested-information/crop-acreage-data/index (last visited June 5, 2020). *See also* Farm Bur., USDA Releases Long-Awaited Hemp Regulations, Oct. 31, 2019 (noting that hemp acreage could be underreported because it was not mandatory for farmers to provide that information to the USDA), at https://www.fb.org/market-intel/usda-releases-long-awaited-industrial-hemp-regulations (last visited June 5, 2020).

[76] Jonathan P. Caulkins, et al., Considering Marijuana Legalization: Insights for Vermont and Other Jurisdictions 55 (RAND 2015), at file:///C:/Users/mikosra/Downloads/RAND_RR864%20(4).pdf (last visited June 5, 2020).

[77] *United States v. Atkins*, No. 1:19CR455-1, 2020 WL 1274136, at *1 (M.D.N.C. Mar. 17, 2020); *United States v. Boggess*, No. 2:19-CR-00296, 2020 WL 1243607, at *1 (S.D.W. Va. Mar. 13, 2020); *United States v. Clark*, No. 3:19-CR-64-PLR-HBG, 2019 WL 8016712, at *1 (E.D. Tenn. Oct. 23, 2019), report and recommendation adopted, No. 3:19-CR-64-2, 2020 WL 869969 (E.D. Tenn. Feb. 21, 2020); *United States v. Harris*, No. 4:18-CR-57-FL-1,

probable cause to conduct a search (the Odor Alone standard), notwithstanding the legalization of hemp.

United States v. Boggess,[78] a 2020 decision from the Southern District of West Virginia, is illustrative. Although *Boggess* is a federal case, it concerns a search that was conducted by state police—a recurring fact pattern in the federal cases we found. Following a traffic stop, the police searched defendant's car and found 2 grams of cannabis, firearms, and a pipe bomb. After federal authorities took over the case, the defendant challenged the adequacy of the cause to search his car. The government based probable cause on a statement by an officer that he had detected "the odor of raw marijuana" as he approached defendant's vehicle.[79] For the *Boggess* court, this statement was enough to sustain the search. It noted Fourth Circuit precedent predating the 2018 Farm bill holding that "the odor of marijuana can provide probable cause to believe marijuana is present in a particular place, thereby providing probable cause for a search."[80] It then acknowledged but quickly dismissed the defendant's claim that the Odor Alone standard no longer applied following hemp legalization:

> "Defendant argues that this precedent should be revisited because the 'rationale of this line of cases no longer exists as it is lawful to grow, cultivate, possess and sell hemp products'. . . . In support of this proposition, Defendant points to recent federal and West Virginia state laws that legalized hemp. . . . Defendant avers that because marijuana and hemp come from the same plant the difference between the two are impossible to discern with the naked eye or distinguished by smell. Thus, marijuana no longer has a 'distinct smell' that indicates a crime is being committed. . . .
>
> There is certainly a nationwide movement to legalize or decriminalize marijuana. Perhaps in the future, revisiting this precedent will be warranted. But possession of marijuana is still a criminal offense under West Virginia state law and federal law. . . . Therefore, Corporal Lowe's belief that there was likely illegal contraband present in Defendant's jeep was reasonable based on the odor of marijuana emanating from the vehicle. I find that law enforcement had probable cause to search Defendant's car . . ."[81]

The other decisions we found all reached similar conclusions that downplay the implications of hemp reforms for probable cause inquiries.

2019 WL 6704996, at *1 (E.D.N.C. Dec. 9, 2019); *People v. Cox*, 429 P.3d 75 (Colo. 2018). *See also United States v. Bignon*, No. 19-2050, 2020 WL 2530178, at *1 (2d Cir. May 19, 2020) (unpublished).

[78] *United States v. Boggess*, No. 2:19-CR-00296, 2020 WL 1243607, at *1 (S.D.W. Va. Mar. 13, 2020).

[79] *Id.* at *4

[80] *Id.*

[81] *Id*.

. . . but could (and perhaps should) be replaced by "Odor Plus"

Although the results in these cases have been uniform, no decision has yet satisfactorily addressed the implications of hemp reforms, especially broad reforms like those contained in the 2018 Farm Bill. Thus, extant caselaw does not necessarily serve as a reliable indicator of the future impact of hemp legalization on probable cause inquiries, for two main reasons.

First, none of the cases we found addressed the *2018 Farm Bill* and probable cause. Each of the federal court cases stemmed from searches conducted by state police officers enforcing state laws.[82] This significantly limits the relevance of these decisions because state hemp reforms in effect at the time of these searches were narrower – perhaps *much* narrower – than the reforms found in the 2018 Farm Bill.

Consider, for example, *United States v. Harris*,[83] which involved a rather limited North Carolina hemp reform. In the case, the court upheld the search of a residence by North Carolina police, based in part on an officer's testimony that he smelled "burned marijuana" outside the home. The defendant argued that police could no longer rely on the odor of cannabis to establish probable cause because North Carolina had legalized hemp, and, as a result, the same odor could "signify legal industrial hemp as opposed to illegal marijuana."[84] The court, however, rejected the challenge, concluding that "the smell of marijuana alone . . . supports a determination of probable cause, even if *some* use of industrial hemp products is legal under North Carolina law."[85]

Although the *Harris* Court does not describe North Carolina's hemp law in effect at the time of the search (February 2018),[86] that law was rather limited in scope, especially in comparison to the 2018 Farm Bill. For one thing, the state law only legalized possession of cannabis (qua hemp) if it contained less than .3% THC and *was grown by a licensed hemp producer*.[87] The

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[82] It appears that evidence discovered by the state police during their searches was turned over to federal authorities, who used it to pursue charges (mostly non-cannabis charges) against defendants.

[83] No. 4:18-CR-57-FL-1, 2019 WL 6704996 (E.D.N.C. Dec. 9, 2019).

[84] *Id.*

[85] *Id*. at *3 (emphasis added).

[86] *United States v. Harris*, No. 4:18-CR-57-FL-1, 2019 WL 8012237, at *1 (E.D.N.C. Aug. 30, 2019) (memorandum and recommendation) (noting date of search).

[87] This limitation is apparent from North Carolina's definition of "marijuana":

> (16) "Marijuana" means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. The term does not include industrial hemp . . . , *when the industrial hemp is produced and used in compliance with rules issued by the North Carolina Industrial Hemp Commission*.

former requirement is found in the 2018 Farm Bill, but the latter requirement is not. As explained above, the 2018 Farm Bill legalizes possession of all cannabis containing less than .3% THC, *regardless of its source*. Furthermore, North Carolina only allowed hemp to be produced for research purposes. This limitation stemmed directly from Congress's *2014* Farm Bill, which authorized limited production of "hemp" for research; the 2018 Farm Bill is much broader in scope and removed that limitation.

In short, courts have only addressed the implications of relatively narrow and possibly outdated state hemp reforms. This means that no court has yet decided whether Odor Alone remains good law once a jurisdiction passes broader hemp legalization, like that found in the 2018 Farm Bill.

Second, the decisions employ conclusory reasoning and gloss over the core challenge posed by hemp reforms: the difficulty of distinguishing "hemp" from "marijuana." The decisions commonly indicate that it was enough, to the court, that the police *said* they smelled or saw "marijuana" rather than "hemp." In other words, they simply credit these statements without demanding that officers establish their qualifications to make that critical distinction.

The opinion in *United States v. Clark*[88] illustrates the high degree of reliance courts have placed on bald assertions by police. In the case, the defendant claimed that a state police officer's statement that he "smelled an 'active odor of marijuana'" coming from defendant's car failed to supply probable cause to search the vehicle.[89] The court briefly described the rationale behind the defendant's challenge, then just as quickly rejected it:

> "The possession and use of marijuana is illegal in Tennessee and under Federal law. . . . The active odor of marijuana gave officer Bailey probable cause to search the vehicle. Defendant's argument that hemp and marijuana are 'the same plant,' and that hemp is legal in Tennessee, does not change the fact that Officer Bailey testified that he smelled marijuana."[90]

N.C. Gen. Stat. Ann. § 90-87 (emphasis added). Another section of North Carolina law defines "industrial hemp" by reference to THC content: "(7) Industrial hemp.--All parts and varieties of the plant Cannabis sativa (L.), cultivated or possessed by a grower licensed by the Commission, whether growing or not, that contain a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis." N.C. Gen. Stat. Ann. § 106-568.51

For more details on North Carolina's hemp program, see North Carolina Dep't of Ag. & Con. Svcs., Industrial Hemp Pilot Program in North Carolina, at https://www.ncagr.gov/hemp/#:~:text=Hemp%20production%20has%20been%20legalized,to%20stay%20within%20federal%20laws (last visited June 5, 2020).

[88] *United States v. Clark*, No. 3:19-CR-64-PLR-HBG, 2019 WL 8016712, at *1 (E.D. Tenn. Oct. 23, 2019), report and recommendation adopted, No. 3:19-CR-64-2, 2020 WL 869969 (E.D. Tenn. Feb. 21, 2020)

[89] *Id.* at *5.

[90] *Id.*

Reliance on such bald statements from police is deeply problematic because hemp and marijuana are indistinguishable through sight or smell. As the United States Department of Agriculture has recognized, "Marijuana and industrial hemp are different varieties of the same plant species, Cannabis sativa L.' that are indistinguishable by appearance"; thus, "short of chemical analysis of the THC content," there is "no way to distinguish between marijuana and hemp varieties."[91]

Given the impossibility of distinguishing hemp from marijuana based on odor or sight, statements from a police officer or tipster claiming that they smelled or saw "marijuana" lack the proper foundation.[92] Training and long experience might equip police officers to reliably distinguish raw or burning cannabis from, say, cassava or burning tobacco by sight or smell alone. But past training and experience never prepared them to distinguish one form of cannabis from another. Indeed, until recently, they never needed to make that distinction because *all* cannabis was considered marijuana.[93] In his concurring opinion in *People v. Cox*,[94] Justice Richard Gabriel of the Colorado Supreme Court suggested that probable cause now requires more than merely reciting the "M" word in an affidavit:

> Contrary to [defendant's] suggestion, I do not believe that, in a case like this, an officer must conduct chemical testing before submitting a probable cause affidavit averring the officer's belief that an illegal marijuana grow, as opposed to a legal industrial hemp operation, was being conducted on property to be searched. Because it is lawful to possess and process industrial hemp and because the record in this case indicates that marijuana and hemp appear and smell identical, however, I believe that an officer must aver more than just a belief that 'marijuana' is present on site. Absent such factual assertions, an officer could obtain a search warrant for any legal industrial hemp operation merely by asserting the word 'marijuana' in a probable cause affidavit. In my view, such an affidavit would amount to a 'bare bones' affidavit that would be insufficient to establish probable cause. . . .[95]

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[91] U.S. Dep't Agr., Industrial Hemp in the United States: Status and Market Potential (Jan. 2000), https://www.ers.usda.gov/webdocs/publications/41740/15867_ages001e_1_.pdf?v=4834.6 (last visited June 5, 2020) (citing DeMeijer, E.P.M., H.J. van der Kamp, and F.A. van Eeuwijk, "Characterization of Cannabis Accessions with Regard to Cannabinoid Content and Relation to Other Plant Characters," Euphytica, Vol. 62, No. 3, 1992, pp. 187-200). *See also Boggess*, 2020 WL 1243607, at *4 n.1 ("[I]t is fair to infer that the odor of hemp could be reasonably mistaken for the odor of marijuana.").

[92] In a similar context, the Massachusetts Supreme Judicial Court has invalidated a search based on the claim that officer's smelled a "strong odor" of cannabis that indicated criminal amounts of the drug were present. The court remarked that "there is no evidence that the officers here had undergone specialized training that, if effective, would allow them reliably to discern, by odor, not only the presence and identity of a controlled substance, but also its weight." *Overmyer*, 11 N.E.3d at 1059.

[93] *See supra* note 72 and accompanying text.

[94] 429 P.3d 75 (Colo. 2018).

[95] *Id.* at 81-82 (Gabriel, J., concurring). Notwithstanding Justice Gabriel's concerns, the *Cox* Court upheld the search of a residence against a challenge based on Colorado's hemp law. A magistrate had issued a search warrant in the case based on the affidavit of a police officer, who stated that he had seen large quantities of "marijuana" being grown on the site. The trial court later suppressed evidence from the search on grounds that it lacked probable cause. Among the reasons the trial court gave for suppression was the fact that the defendant showed officers his license to

For both of these reasons, the caselaw decided thus far likely does not accurately gauge the impact of hemp legalization on probable cause. Going forward, courts may need to consider a more demanding standard like Odor Plus that takes account of the diminishing probative value of the presence of cannabis.

CONCLUSION

Cannabis law reforms are changing the role that cannabis plays in probable cause determinations. In the wake of reforms, the odor of cannabis no longer always establishes probable cause to search. To varying degrees, reforms require law enforcement officials to consider other facts – both inculpatory and exculpatory -- before conducting searches. This White Paper provides a roadmap to help guide lawmakers, law enforcement officials, and courts through this transition in search practices as their jurisdictions adopt reforms.

grow hemp when they came to execute the search warrant. Although the Supreme Court reversed the trial court, its decision might simply reflect the very deferential standard of review it applied to the magistrate's decision, rather than its support of the merits of that decision. 429 P.3d at 77 ("We now reverse the suppression order because we conclude that the trial court erred in three ways. First, the trial court reviewed the magistrate's probable cause determination de novo instead of according it great deference. Second, the trial court failed to limit its review to the information contained within the four corners of the search warrant's accompanying affidavit. And third, the trial court did not afford the affidavit the presumption of validity to which it was entitled.").