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THE SATIVAS AND INDICAS OF PROOF: WHY THE SMELL OF MARIJUANA SHOULD NOT ESTABLISH PROBABLE CAUSE FOR A WARRANTLESS VEHICLE SEARCH IN ILLINOIS

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Abstract

Marijuana has a complex legal history in the United States, and as it becomes more popular with Americans, State legislators and courts are faced with new questions about the substance's legality and regulation. While possession of marijuana in any amount is federally illegal, the substance is treated quite differently by the states, with some jurisdictions allowing marijuana possession for medical treatment and others decriminalizing possession of small amounts. Some states, like Illinois, have fully legalized possession of marijuana and created a regulated, taxable market for its sale. However, a part of marijuana's legal history is its use as the justification for a warrantless search. Under the Fourth Amendment, a search is only reasonable if it is supported by probable cause. While a warrant is required for most searches, the Supreme Court adopted an Automobile Exception, allowing police officers to search a vehicle without a warrant if they have probable cause to believe they will discover evidence. One common justification for a vehicle search is the officer's claim that he smelled marijuana. Some courts have termed this the "Plain Smell Doctrine" and have upheld warrantless searches based on the smell of marijuana. However, if marijuana is legal in a specific jurisdiction, should its smell still justify an officer's warrantless search? This Comment explores that question, how courts across the country, and in Illinois, are treating the smell of marijuana after legalization, and how these decisions are inconsistent with the social and economic goals behind legalizing marijuana in the state of Illinois.

I. INTRODUCTION

A. Marijuana: A "Legal" Substance Unlike Any Other

Marijuana's legal status is a hotly debated political topic in every jurisdiction of the United States.[1] Each state's law varies on

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how possession of marijuana is treated, but many states now penalize people carrying small amounts of marijuana similarly to how they penalize traffic violations – by writing a ticket.[2] Other states, including Illinois, have legalized possession of certain amounts of marijuana.[3] Regardless, police officers conducting traffic stops still treat suspected possession of marijuana as if it is a crime by conducting vehicle searches.[4] It is easier to understand this difference in treatment by picturing a routine traffic stop that involves another legal, but highly regulated, substance – alcohol.[5]

Imagine you have just been pulled over for rolling through a stop sign. You are over 21 years of age and sober, but you have an unopened bottle of wine in a clear bag in the front seat. The officer who pulled you over speaks to you for a moment and then asks you to step out of the car. You are a bit confused. You only failed to come to a complete stop, a minor traffic violation.[6] But now the officer performs a full search of your car. He goes through your glove box, your trunk, your front center console, under and around the front and back seats – all without explanation and certainly without a warrant.[7] Eventually, finding nothing suspicious, he sends you on

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1. *See generally* Keith Speights, *Timeline for Marijuana Legalization in the United States: How the Dominoes are Falling*, MOTLEY FOOL (Sep. 23, 2018), www.fool.com/investing/2018/09/23/timeline-for-marijuana-legalization-in-the-united.aspx (framing the debate surrounding marijuana legalization through political and legal shifts concerning marijuana possession within each state over time).

2. Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 326 (2014). *See generally Marijuana: A Deep Dive*, NAT'L CONF. ST. LEGISLATURES, www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx (last visited Mar. 29, 2020) (compiling the laws of each state) [hereinafter *Marijuana: A Deep Dive*].

3. 410 ILL. COMP. STAT. 705/10-10 (2020).

4. The majority of United States Appellate Circuits and state courts currently uphold warrantless vehicle searches justified by a police officer's assertion that he detected the smell of marijuana despite changing its legal status. *See, e.g.,* People v. Zuniga, 372 P.3d 1052 (Colo. 2016) (concluding that "the odor of marijuana remains relevant to probable cause determinations" because "a substantial number of other marijuana-related activities remain unlawful."). For a full discussion, *see infra* Section III.B.

5. *Alcohol Policy Information System*, NAT'L INST. HEALTH, www.alcoholpolicy.niaaa.nih.gov (last visited Apr. 22, 2020) (providing a detailed list of alcohol-related policies in the United States at the federal and state levels, including laws on underage drinking, transportation of alcohol, and driving while intoxicated as well as regulations on pricing, taxes, retails sales, and alcohol control systems).

6. 625 ILL. COMP. STAT. 5/11-904 (2020).

7. "A writing issued by the sovereign, an officer of state, or an administrative

your way with a ticket for the incomplete stop.

A month later in court, you see a copy of his report. It explains that he searched your car because you did not stop at a stop sign and he had seen a bottle of alcohol in your car. This seems odd. It is illegal to have an open container of alcohol in a vehicle, but you were carrying alcohol in a legal way – the officer saw an unopened bottle.[8] That cannot possibly give the police justification to search your entire car - or can it?

The answer is no – A police officer does not have the right to search your car unless he has a reason to suspect *criminal* conduct.[9] Here, the officer saw you roll through a stop sign but that is a civil violation penalized by writing a ticket.[10] A civil violation, on its own, usually cannot justify the police conducting a full search.[11] The alcohol carried in a legal way does not justify the search either.[12] However, when the substance being carried is marijuana, recent changes to its legal status make it more difficult for courts across the United States to determine whether the officer was justified in searching the car.[13]

The majority of states now treat the act of carrying marijuana, conduct known as "unlawful possession," [14] as a civil violation.[15] Just like failing to stop at a stop sign, the civil violation of

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body, authorizing those to whom it is addressed to perform some act." *Warrant*, OXFORD ENGLISH DICTIONARY (online ed. 2020), www.oed.com/view/Entry/225837.

8. 625 ILL. COMP. STAT. 5/11-502(a) (2020) (explaining that "no driver may transport, carry, possess, or have any alcoholic liquor within the passenger area of any motor vehicle upon a highway in [Illinois] except in the original container and with the seal unbroken.").

9. People v. Ricketson, 264 N.E.2d 220, 224 (Ill. App. Ct. 1970) (stating "an arrest for a traffic violation does not, itself, warrant nor justify a search of the driver, and portions of his vehicle, unless surrounding circumstances reasonably indicate that the police may be dealing with more than an ordinary traffic violation.").

10. *Summary of State Laws*, U.S. DEP'T TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., (11th ed. 2011), www.nhtsa.gov/staticfiles/nti/pdf/811457.pdf.

11. Police may only search a vehicle if it is reasonable to believe evidence relevant to a crime of arrest will be discovered. Arizona v. Gant, 556 U.S. 332, 343 (2009) (citing Thornton v. United States, 541 U.S. 615, 632 (2004)). In the case of a traffic violation, there will often be no reasonable basis for a search, even if the traffic violation results in an arrest, because there is no additional evidence of the traffic violation within the vehicle. *Id.* at 343-44 (citing Atwater v. Lago Vista, 532 U.S. 318, 324 (2001); Knowles v. Iowa, 525 U.S. 113, 118 (1998)).

12. 625 ILL. COMP. STAT. 5/11-502 (describing the offense of possession of an open container of alcohol in a vehicle without including any provisions against possession of a sealed container of alcohol).

13. *See infra* Section III.

14. Unlawful possession is the crime of possession of a prohibited substance or item by a person not lawfully allowed to possess it by a license or justification. *Unlawful Possession*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed., 2012).

15. *Marijuana: A Deep Dive*, *supra* note 2.

marijuana possession is penalized by writing a ticket.[16] It is reasonable to assume that a police officer would respond to one civil violation in the same manner that they would respond to another. That would mean that if an officer has reason to believe someone has marijuana in their car, perhaps because he can smell it, he would write a ticket but not conduct a search.[17] Yet, in most states, an officer's claim that he detected a faint odor of marijuana coming from a vehicle still justifies a warrantless search.[18] This is true even in states where possession of marijuana in certain amounts is not a violation of civil or criminal law.[19]

This difference in treatment may be due, in part, to how the legal status of marijuana has changed significantly throughout the history of the United States.[20] Marijuana has shifted from unregulated, to criminalized, to decriminalized, to today's more complex situation where it is legal in one jurisdiction and illegal in another.[21] While the substance is still federally illegal,[22] there is some indication that this could change,[23] meaning another major shift may be coming soon for marijuana in the United States.[24] In Illinois, a major shift already occurred: as of January 1, 2020, residents age 21 and over may purchase and possess up to one ounce

16. *See* Lauren Krisai, *Reforming Illinois' Nonviolent Class 4 Felony Statutes*, ILL. POL'Y 12 (Spring 2016), www.illinoispolicy.org/reports/reforming-illinois-nonviolent-class-4-felony-statutes/ (stating that "[d]ecriminalization would allow law enforcement to issue infractions, similar to how traffic laws are enforced.").

17. *Id.*

18. *See* discussion *infra* Section III.B.

19. For example, the Michigan Appellate Court recently upheld a warrantless vehicle search where probable cause was based on the smell of marijuana. People v. Anthony, 932 N.W.2d 202, 215 (Mich. Ct. App. 2019). The Court explained that the passage of the Michigan Medical Marihuana Act (MMMA) provided "a limited license for qualifying patients to use marijuana," but that marijuana use cannot occur in "any public place." *Id.* (citing MICH. COMP. LAWS § 333.26427(b)(3)(B)(2020)). Thus, when the officer smelled marijuana coming from the defendant's vehicle on a public street, "the protections of the MMMA did not apply to defendant" and the officers had probable cause for the search. *Id.* In so holding, the Court established that the change to marijuana's legal status in the state of Michigan did not undermine precedent establishing that the smell of marijuana provides sufficient probable cause for a warrantless vehicle search. *Id.* (citing People v. Kazmierczak, 605 N.E.2d 667 (Mich. 2000)).

20. *See generally* Logan, *supra* note 2, at 319 (discussing the history of marijuana legality and arguing in favor of decriminalization with a focus on police authority).

21. *Id.*

22. 21 U.S.C. §§ 812, 841, 844 (2018).

23. *Several Marijuana-related Bills Pending in Congress*, MARIJUANA POL'Y PROJECT (Jan. 13, 2020), www.mpp.org/policy/federal/.

24. Ian Stewart & Dean Rocco, *Federal Cannabis Legalization May be Closer Than You Think*, LAW360 (July 16, 2018), www.law360.com /articles/1063280/federal-cannabis-legalization-may-be-closer-than-you-think.

of marijuana.[25]

Returning to the alcohol analogy, "Prohibition"[26] provides a clear example of how laws and attitudes towards intoxicating substances shift overtime. Until 1933, alcohol was federally banned just like marijuana.[27] Today, less than 100 years later, 67 percent of Americans drink alcohol at least occasionally.[28] Culturally, alcohol is a part of holiday celebrations and mainstream events like the Superbowl.[29] An adult can possess alcohol, even in a car, as long as they comply with the law.[30] Yet, marijuana, another substance that can be legally possessed in many jurisdictions, is singled out for special treatment.[31] Shifting attitudes throughout the country and in Illinois thus pose an interesting query: Should that special treatment extend to the context of vehicle searches? Should the mere smell of marijuana still establish probable cause[32] when a police officer wants to search a car?

B. Comment Overview

This Comment explores the history of vehicle searches based on the smell of marijuana and proposes how Illinois courts should treat searches given marijuana's current legal status. Part II will discuss the Fourth Amendment's general requirement that a search or seizure must be executed pursuant to a valid warrant or based on probable cause. It will explain the exception to that rule in a vehicle and show how the plain view doctrine led courts to adopt a plain smell doctrine. It will further detail the changing legal status of marijuana in the United States and more specifically, in Illinois.

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25. 410 ILL. COMP. STAT. 705/10-10 (2020).

26. The period between 1920 and 1933 when restrictions forbidding the law of the manufacture, sale, or transport of alcohol were in force. *Prohibition*, OXFORD ENGLISH DICTIONARY (online ed. 2020), www.oed.com/view/Entry/152258.

27. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

28. *The Buzz About Alcohol: America's Views on Booze*, BARNA GROUP (Oct. 17, 2017), www.barna.com/research/buzz-alcohol-americas-views-booze/.

29. Phillip Bump, *The Days of the Year When Americans are Most Drunk, Visualized*, WASH. POST (Dec. 20, 2014), www.washingtonpost.com /news/wonk/wp/2014/12/20/the-days-of-the-year-when-americans-are-most-drunk-visualized/.

30. 625 ILL. COMP. STAT. 5/11-502 (describing the offense of possession of an open container of alcohol in a vehicle without including any provisions against possession of a sealed container of alcohol).

31. For example, Illinois' medical marijuana laws forbid a medical cannabis cardholder from possessing marijuana in a vehicle "except in a sealed, tamper-evident medical cannabis container" whereas Illinois' open container alcohol statute required only that alcohol be "in the original container and with the seal unbroken." *Compare* 625 ILL. COMP. STAT. 5/11-502.1(b), (c) (2020), *with* 625 ILL. COMP. STAT. 5/11-502(a).

32. Probable cause is a practical, non-technical showing of a likelihood that incriminating evidence is involved. Maryland v. Pringle, 540 U.S. 366 (2003). For a discussion on probable cause see discussion *infra* Section II.C.

Part III will compare the rationale for and against holding that the smell of marijuana establishes probable cause for a search. It will address Illinois precedent establishing that an officer can search a vehicle pursuant to the smell of marijuana, and it will analyze the post-legalization holding of the Illinois Supreme Court in *People v. Hill*.[33] Finally, this Comment will propose that Illinois should change its position to better reflect the current legal status of marijuana, the state's legislative and economic goals, and the future towards which the United States appears to be heading.

II. BACKGROUND

Prior to analyzing the current treatment of marijuana possession in the context of vehicle searches, one must understand the history that led courts to find that some warrantless searches were permissible. Accordingly, this Comment first explains shifting interpretations of the Fourth Amendment and the resulting warrant exceptions for vehicle searches and items in plain view. Next, it discusses how plain view doctrine has been extended by some courts to cover other senses, specifically smell. Finally, this section addresses the history and latest changes to the legal status of marijuana in the United States and in Illinois.

A. The Fourth Amendment & Expectations of Privacy

The Fourth Amendment protects a citizen's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[34] The guarantee of these words today often functions as a limit on the power of the police,[35] but there were no organized police forces at the time of the Amendment's drafting.[36]

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33. People v. Hill, 2020 IL 124595.

34. U.S. CONST. amend. IV.

> 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.

35. This limit on the power of the police is accomplished through the exclusionary rule. The exclusionary rule functions to suppress evidence that was obtained in violation of the Fourth Amendment. While the rule itself is not in the text of the amendment, cases have suggested that without exclusion, the Fourth Amendment is an empty promise. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (explaining that the guarantees of the Fourth Amendment are secured through an exclusionary rule).

36. Barry Friedman & Orin Kerr, *The Fourth Amendment*, NAT'L CONST. CTR., www.constitutioncenter.org/interactive-constitution/interpretation/amendment-iv/interps/121(last accessed Apr. 24, 2020).

Instead, the Framers included the Fourth Amendment to limit their new government from adopting a system of unfettered power like that of England's use of general warrants and writs of assistance.[37] In England, warrants did not require a showing of a specific cause for a search or any proof of criminal wrongdoing.[38] Thus, their use provided those in power a mechanism to enter the homes of political enemies and citizens who failed to pay taxes.[39] With this abuse of power in mind, the Framers' purpose for the Fourth Amendment was "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[40]

There is a debate among scholars[41] and U.S. Supreme Court Justices as to whether a search or seizure under the Fourth Amendment must be pursuant to a warrant or whether it must simply be reasonable.[42] While this debate is far from settled, the Supreme Court majority has generally agreed with a warrant-preference interpretation.[43] This means that when time and circumstances allow, a warrant, supported by probable cause,[44] must be approved by a neutral magistrate before a search or seizure can be conducted.[45] While there are exceptions,[46] a search or seizure

37. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 561 (1999). *See also* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 77-80 (1996) (analyzing the differences between writs of assistance and general warrants).

38. *Id.* at 561 (citing Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937)).

39. Freidman & Kerr, *supra* note 36.

40. Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018) (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 528 (1967)).

41. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 928 (1997) (first quoting TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969) ("[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants."); then discussing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 410-15 (1974) (rejecting Telford Taylor's argument that the Fourth Amendment requires only that warrantless searches be judged under a general reasonableness standard)).

42. *Id.* (comparing California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (reading the text of the Fourth Amendment to limit, rather than to require, warrants) with Payton v. New York, 445 U.S. 573, 585 (1980) ("Unreasonable searches and seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment.")).

43. *See* Katz v. United States, 389 U.S. 351, 357 (1967) (citing Agnello v. United States, 269 U.S. 20, 33 (1925); Wong Sun v. United States, 371 U.S.471, 481-82 (1963); United States v. Jeffers, 342 U.S. 48, 51 (1951) (stating that the general rule, outside of "well-delineated exceptions" is that a warrant is required for a search)).

44. "Probable cause is a practical, non-technical" showing of a likelihood that incriminating evidence is involved. Brinegar v. United States, 338 U.S. 160, 176 (1949). For a discussion on probable cause, see discussion *infra* Section II.C.

45. *Katz*, 389 U.S. at 357.

46. One such exception is the automobile exception. *See* discussion *infra* Section II.B. Another exception is exigent circumstances. *See, e.g.*, Kentucky v.

conducted without a warrant is per se[47] unreasonable.[48]

This warrant preference rule, and the Fourth Amendment itself, is only implicated if there is conduct qualifying as a search or seizure.[49] As to searches,[50] the Supreme Court has defined what qualifies as a search differently throughout its history.[51] At first, the concept of a search was tied directly to the idea of property and trespass.[52] A search required some sort of physical entry onto an individual's property.[53] For example, in *Olmstead v. United States*, police in the 1920s tapped a phone line outside of a suspect's home to intercept his calls.[54] The Court in *Olmstead* held that the government did not trespass; rather, the act of placing the tap took place on public property.[55] Under the Court's precedent at that time, police activity on public property was not a search.[56] The Fourth Amendment was not implicated, let alone violated.[57]

This sole focus on property and trespass proved untenable in a 1967 case, *Katz v. United States*.[58] In *Katz*, the police installed a listening device on a public phone booth and recorded the suspect's conversations, eventually using that evidence to convict him.[59] Following the example of *Olmstead*, the Ninth Circuit Court of

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King, 563 U.S. 452 (2011) (holding no warrant is required to enter a home to stop destruction of evidence).

47. "Per se, Latin for in itself, depicts something generalized, something considered in its most essential and generic character, without considering irrelevant or idiosyncratic descriptions." *Per se*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed., 2012).

48. *Katz*, 389 U.S. at 357.

49. *See* Oliver v. United States, 466 U.S. 170, 176-79 (1984) (discussing whether a person has privacy expectations in the context of open fields with a focus on the historical underpinnings of when the Fourth Amendment is implicated).

50. The validity of a seizure in the context of automobile stops is a complex topic outside the scope of this comment, which will focus primarily on searches. For more information on seizures, see Soldal v. Cook County, 506 U.S. 56, 63 (1992) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)) (stating "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property"); Florida v. Bostick, 501 U.S. 429, 436 (1991) (explaining that an individual can also be seized, such as in an arrest or custodial interrogation, which is measured by "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter").

51. *Compare* Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that a trespass is required for conduct to qualify as a search), *with* Katz, 389 U.S. at 357 (shifting the analysis of whether conduct qualifies as a search to societal expectations of privacy).

52. *Olmstead*, 277 U.S. at 466.

53. *Id.*

54. *Id.* at 456-57.

55. *Id.* at 466.

56. *Id.*

57. *Id.*

58. *Katz*, 389 U.S. at 357.

59. *Id.* at 348.

Appeals held there was no search because the act of installing a listening device did not take place on the suspect's property but on a public sidewalk.[60]

The Supreme Court granted review on the issue of whether a trespass or "physical penetration of a constitutionally protected area is necessary" to trigger Fourth Amendment protections.[61] The Supreme Court declined to adopt that position and instead reversed, holding that "the Fourth Amendment protects people, not places."[62] In a major shift from its previous holdings, the Court stated that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[63] Instead of relying on trespass to property, the Court examined (1) whether the suspect had an expectation of privacy; and (2) whether that expectation was objectively reasonable.[64] The Court determined that one who enters the phone booth, "shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."[65] It is not unreasonable to expect privacy in a society where telephonic communication is prevalent.[66]

After *Katz*, the legality of a search typically revolves around this determination of whether a person had a reasonable expectation of privacy in the object of the police's search.[67] Expectations shift depending on the facts of a case with location being determinative in some instances.[68] A person inside of her own home has a high expectation of privacy that the Fourth Amendment will vehemently protect, but a person outside of her home, perhaps on a public sidewalk, has a much lower expectation of privacy.[69]

This shift not only expanded what qualifies as a search but also helped define the "reasonableness" of a search when it is not pursuant to a warrant.[70] The lower the expectation of privacy, the

60. *Id.* at 348-49.
61. *Id.*
62. *Id.* at 351.
63. *Id.*
64. *Id.* at 361 (Harlan, J., concurring).
65. *Id.*
66. *Id.*
67. *But see* United States v. Jones, 132 S. Ct. 945 (2012) (stating that while *Katz* expanded the definition of a search, the previous trespass model is still good law).
68. *See, e.g., Payton*, 445 U.S. at 590 (describing the "firm line" that cannot be crossed without a warrant at the entrance of the home for Fourth Amendment purposes); Kyllo v. United States, 533 U.S. 27 (2001) (holding that using technology to see inside of a house is the same as entering the house and the home is vehemently protected by the Fourth Amendment).
69. *Payton*, 445 U.S. at 590.
70. *See* Florida v. Jardines, 569 U.S. 1, 10 (2013) (describing that the scope of reasonableness is defined by expectations of privacy).

more reasonable the warrantless search becomes.[71] This reasoning led the Supreme Court to adopt exceptions to its warrant preference, two of which help explain why the odor of marijuana may justify a warrantless search: the automobile exception[72] and the plain view doctrine.[73]

B. The Automobile Exception to the Fourth Amendment's Warrant Preference

The automobile exception to the general warrant requirement reflects the Court's shift to analyzing expectations of privacy and the Fourth Amendment's most basic mandate of reasonableness.[74] This exception, first established in *Carroll v. United States*[75] is often referred to as the Carroll doctrine.[76] In *Carroll*, the Court held that a police officer was entitled to search a vehicle without a warrant where there was probable cause to believe the vehicle was being used to transport liquor during Prohibition.[77] The Court described that such an exception arose from the practical difference between searching a house and searching an automobile.[78] A vehicle can be readily and quickly moved outside of the jurisdiction before a police officer can practically apply for and obtain a warrant.[79]

This focus on mobility gave rise to the exception, but when the Court's Fourth Amendment interpretation shifted towards expectations of privacy, there was even stronger support for the automobile exception.[80] A vehicle is driven on public roads in plain view[81] and subject to extensive government regulation such as

71. *Id.*

72. Carroll v. United States, 267 U.S. 132 (1925).

73. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

74. *See Carroll*, 267 U.S. at 153 (stating, "the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.").

75. *Id.* at 132.

76. *See, e.g., Acevedo*, 500 U.S. at 570 (citing United States v. Ross, 456 U.S. 798 (1982) (explaining "we held that a warrantless search of an automobile under the Carroll doctrine could include a search of a container or package found inside the car when such a search was supported by probable cause.")).

77. *Carroll*, 267 U.S. at 162.

78. *Id.* at 153.

79. *Id.*

80. *See generally* Cady v. Dombrowski, 413 U.S. 433 (1973) (reexamining the automobile exception after the ruling in *Katz*).

81. *Id.* at 440.

license plating and periodic safety checks.[82] A person driving a vehicle cannot reasonably expect a high level of privacy while in public in an object that is already subject to government inspection.[83] Due to this lower expectation of privacy combined with the practical limits of obtaining a warrant described in *Carroll,* there is an accepted rule that a warrant is not required for a vehicle search.[84]

C. Probable Cause in the Context of an Automobile

It is important to note that while the automobile exception means that officers do not need a warrant to search a vehicle, an officer must still have probable cause.[85] Probable cause is a practical, non-technical showing of a likelihood that incriminating evidence is involved.[86] It is an officer's belief in guilt of a crime from facts and inferences that are particularly focused on the person or place to be searched.[87] An officer must always have probable cause to conduct a search, even if the officer is not required to have a warrant.[88]

The difference between warrantless searches and those conducted pursuant to a warrant is in when and by whom probable cause is determined.[89] In the warrant context, the officer must demonstrate probable cause to a judge prior to the search.[90] An officer provides the judge with an affidavit describing the facts in support of probable cause.[91] The judge reviews the warrant application and, if the judge agrees that there is probable cause, the warrant is signed, allowing the search.[92]

In the warrantless context, "the prior approval of the magistrate is waived; the search otherwise [must be such] as the

82. South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

83. The Court's decision in *Katz*, created the principle that expectations of privacy are based on societal standards and are determined by objective reasonableness of how private a location is or should remain. *Katz*, 389 U.S. 351 (1967) applied to motor vehicles because drivers are aware that they can be seen and are aware that their cars are subject to inspection. Thus, a driver believing they had a high expectation of privacy would be unreasonable.

84. *Carroll*, 267 U.S. at 153.

85. California v. Carney, 471 U.S. 386, 394 (1985) (quoting *Ross*, 456 U.S. at 823 (1982) ("Under the vehicle exception to the warrant requirement, only the prior approval of the magistrate is waived; the search otherwise [must be such] as the magistrate could authorize.")).

86. *Brinegar*, 338 U.S. at 176.

87. *Pringle*, 540 U.S. at 371.

88. *Ross*, U.S. at 823.

89. *Id.* at 825 ("[T]he scope of a warrantless search . . . is no broader and no narrower than a magistrate could legitimately authorize by warrant.").

90. *Katz*, 389 U.S. at 357.

91. FED. R. CRIM. PRO. 41(d)(2)(A).

92. *Id.* at 41(f).

magistrate could authorize."[93] In practice, the officer determines in the moment whether there is probable cause to search,[94] but the evidence he finds will be suppressed if a judge later determines that he did not have sufficient probable cause.[95] If this system works correctly, probable cause is still required for a warrantless search, it is simply "approved" by the court after the fact.[96]

Likewise, regardless of whether an officer has a warrant, the permissible scope of the search is limited by probable cause. The scope of the search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found."[97] For example, probable cause to believe that a stolen lawnmower may be found in a garage does not justify a search of the upstairs bedroom. This is just as true in the context of a vehicle.[98] Probable cause to believe that a suitcase in the trunk contains drugs does not justify a search of the entire car.[99] In short, an officer may not have to obtain a warrant prior to searching a vehicle, but he must still have particularized probable cause that justifies the search and he must be able to demonstrate that after the fact.[100]

D. Plain View Doctrine & its Extension into Plain Smell Doctrine

While the automobile exception begins to explain how courts came to see the odor of marijuana as probable cause to search a vehicle, plain view doctrine and its evolution into "plain smell" doctrine is essential to the analysis.[101] Under plain view doctrine, an officer, in a place where he is lawfully entitled to be,[102] may seize an object in sight if it is immediately apparent that the object is

93. *Carney*, 471 U.S. at 394 (quoting *Ross*, 456 U.S. at 823).

94. Ornelas v. United States, 517 U.S. 690, 700 (1996) (citing United States v. Ortiz, 422 U.S. 891, 897 (1975)).

95. *Coolidge*, 403 U.S. at 478.

96. *Carney*, 471 U.S. at 392.

97. *Ross*, 456 U.S. at 824.

98. The Supreme Court briefly found certain containers within a car more "worthy" of Fourth Amendment protection but later dropped that distinction. *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753 (1979) (holding that luggage is more worthy of Fourth Amendment protection than other containers in a vehicle context).

99. *Ross*, 456 U.S. at 824.

100. United States v. Chadwick, 433 U.S. 1, 9 (1977).

101. 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, 295 (2000) [hereinafter Sprow, Wake Up].

102. *Coolidge*, 403 U.S. at 465 (creating the rule that for the plain view doctrine to apply, the police must legally be entitled to be in the location, due to a warrant or warrant exception).

incriminating.[103] For example, an officer executing a search warrant for drugs can seize stolen televisions that he sees in the same location if he has probable cause to believe they had been stolen.[104] This doctrine is about seizure; the officer can take the specific item, not perform an additional search outside of his warrant because he has seen it in plain view.[105]

In contrast, plain view doctrine in the vehicle context does allow that additional search.[106] If an officer sees an item in an automobile that he knows is incriminating on sight, such as a bag containing white powder, he can seize it.[107] Based on what the officer saw, he also now has probable cause to believe the vehicle contains more contraband.[108] Probable cause is all he needs to justify a search under the automobile exception.[109] The incriminating item in plain view provided him probable cause.[110] Thus, he can conduct a search of the vehicle.[111]

The basic rationale behind plain view is that an officer can rely on his senses and training.[112] As the U.S. Supreme Court described, when "the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous -- to the evidence or to the police themselves -- to require them to ignore it until they have obtained a warrant particularly describing it."[113] This rationale can easily be applied to an officer's other senses,[114] which has led courts to expand plain view into "plain smell doctrine."[115] Following the model of plain view,[116] plain smell doctrine's basic rule is that an officer, in a place where he is lawfully entitled to be, may seize an object that he smells if it is immediately

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103. *Id.*

104. Horton v. California, 496 U.S. 128 (1990).

105. Reuben Goetzl, *Common Scents: The Intersection of the "Plain Smell" and "Common Enterprise" Doctrines*, 50 AM. CRIM. L. REV. 607, 611 (2013) (citing Coolidge, 403 U.S. at 443) [hereinafter Goetzl, Common Scents].

106. *Id.*

107. *Id.*

108. *Id.* at 613.

109. *Carroll*, 267 U.S. at 149.

110. *Coolidge*, 403 U.S. at 455.

111. Goetzl, *Common Scents*, *supra* note 105, at 612 (stating "The Supreme Court of Ohio explained that since 'courts already acknowledge the use of a person's senses - sight, touch, hearing - to identify contraband . . . [there] is no reason to afford less weight to one's use of the sense of smell . . . when looking to probabilities.'").

112. *See* Arizona v. Hicks, 480 U.S. 321, 327 (1987) (explaining that under plain view doctrine, the officer need not rely on any "special operational necessities" such as a trained drug-sniffing dog, but rather "the mere fact that the items in question came lawfully within the officer's pain view").

113. *Coolidge*, 403 U.S. at 467-68.

114. Sprow, *Wake Up, supra* note 101, at 295.

115. *See* United States v. Sifuentes, 504 F.2d 845 (4th Cir. 1974) (holding "[t]he odor of marijuana places it in plain view").

116. *Coolidge*, 403 U.S. at 467-68.

apparent from the scent that the object is incriminating.[117] The difference is that in order to seize the object, he must find it first so he can search for the object that he smells.[118]

In an automobile context, an officer smells contraband coming from the car. Pursuant to plain smell doctrine, he now has probable cause to believe there is contraband in the vehicle.[119] Probable cause gives grounds for a warrantless search of the vehicle.[120] Just as an officer who *sees* what he knows to be contraband can search for more, an officer who *smells* what he knows to be contraband can do the same.[121]

The U.S. Supreme Court has not formally adopted plain smell doctrine.[122] Despite its reluctance, many lower federal courts and state courts have explicitly adopted it.[123] While these courts have applied plain smell in cases involving other substances, like burning opium,[124] the smell of marijuana is its most common application.[125] These courts rely on the combined reasoning of a lower expectation of privacy, leading to the automobile exception, and plain view doctrine, leading to plain smell doctrine, to find the odor of marijuana provides sufficient probable cause to support a vehicle

117. Goetzl, *Common Scents, supra* note 105, at 611 (stating "an officer can seize evidence if he lawfully smells contraband, he immediately recognizes the smell's source as an illegal object, and he has a lawful right to access the object. The 'plain smell' doctrine is as expansive as the 'plain view' doctrine and can create probable cause to search people and places and arrest suspects.").

118. *Id.*

119. *Id.*

120. *Carroll*, 267 U.S. at 149.

121. Mayfield v. Commonwealth, 590 S.W. 3d 300, 303 (Ky. Ct. App. 2019) (quoting Sprow, *Wake Up, supra* note 101, at 308-309) ("This court recognizes the constitutional analogue between the 'plain small' 'plain feel' and 'plain view' doctrines . . . because 'any attempt to create a hierarchy of senses under the Fourth Amendment probable cause standard defies common sense and unjustifiably hinders effective law enforcement.'").

122. *See* Taylor v. United States, 286 U.S. 1 (1932) (holding that the smell of whiskey is not enough for probable cause in prohibition era, but other scents may be); *and* United States v. Johns, 469 U.S. 478 (1985) (implying that scent of marijuana may be enough for probable cause but having other facts to rely on to decide the present case).

123. *See, e.g.,* United States v. Banks, 684 F. App'x 531, 535-36 (6th Cir. 2017) (holding an officer's detection of the smell of marijuana in the vehicle context establishes probable cause for a search, even without other facts in support); *and* United States v. Winters, 221 F.3d 1039, 1041 (8th Cir. 2000) (holding the odor of burnt marijuana is sufficient probable cause to search an entire vehicle).

124. Johnson v. United States, 333 U.S. 10, 15 (1948).

125. Andrea L. Ben–Yosef, Annotation, *Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana–State Cases*, 114 A.L.R.5th 173, 189 (2003) ("The majority of [state] courts have found that the odor of marijuana alone supplies the probable cause for a warrantless search."). *See also* Andrea L. Ben–Yosef, Annotation, *Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana–Federal Cases*, 188 A.L.R. Fed. 487, 497 (2003) (collecting federal cases on the same issue).

search.[126]

E. The Changing Legal Status of Marijuana

Considering one necessary inference to the rationale behind plain smell doctrine is that the odor of marijuana is indicative of criminal activity, the current legal status of marijuana is important to consider.[127] The laws regulating marijuana in the United States have shifted throughout its history.[128] Marijuana was unregulated in the states until 1915 when possession was first criminalized in Utah.[129] By 1931, 22 states had statutes criminalizing possession.[130] By 1950, all 50 states had made possession of marijuana a crime.[131] In 1970, the federal government criminalized possession at the national level when it passed the Controlled Substances Act.[132] As the war on drugs continued in the 1970s and 1980s, arrests and incarcerations as a result of marijuana possession rose exponentially, despite the drug's recreational popularity.[133]

The first state to decriminalize marijuana possession was Oregon in 1973,[134] but a major shift among the states towards decriminalizing did not occur until the early 2000s.[135] Motivated by shifts in popular opinion, as well as economic and political pressures, states slowly began to relax the penalties associated with possession of marijuana over the last two decades.[136] Today, the laws regulating marijuana in the United States can be grouped into four categories: (1) prohibition; (2) decriminalization; (3) medical;

126. *See e.g.,* People v. Stout, 477 N.E.2d 498, 502 (Ill. 1985) (holding marijuana odor is indicative of criminal activity and due to the lowered expectation of privacy in a vehicle and the impracticality of obtaining a warrant before the vehicle could be moved, is enough to establish sufficient probable cause for a warrantless search of the vehicle).

127. Commonwealth v. Cruz, 945 N.E.2d 899, 908 (Mass. 2011) (concluding "suspicion of an offense" in the probable cause or reasonable articulable suspicion analysis means an offense that is criminal).

128. Logan, *supra* note 2, at 323-27.

129. *Id.* at 323 (citing Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970).

130. *Id.* (citing MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA - MEDICAL, RECREATIONAL AND SCIENTIFIC 24-26 (2012)).

131. *Id.* (citing Bonnie & Whitebread, *supra* note 129, at 1034).

132. *See generally* Comprehensive Drug Abuse and Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236-1285 (codified as amended at 21 U.S.C.§§ 812-844 (2018)).

133. Logan, *supra* note 2, at 323-34 (citing James A. Inciardi, *Marijuana Decriminalization Research*, 19 CRIMINOLOGY 145, 151 (1981)).

134. *Id.* at 324-25 (citing James B. Slaughter, *Marijuana Prohibition in the United States: History and Analysis of a Failed Policy*, 21 COLUM. J.L. & SOC. PROBS. 417, 425 (1988)).

135. *Id.* at 325-26.

136. *Id.*

and (4) legalization.[137]

Prohibition laws define any conduct related to marijuana as a criminal offense, including possession in any amount, cultivation, or sale.[138] These state laws may penalize possession of marijuana differently depending on the amount that a person possesses, but whether a misdemeanor or felony, possession in prohibition jurisdictions is always a criminal offense.[139] For example, United States Federal Law is a prohibition law.[140] Marijuana is a Schedule I drug under the Controlled Substances Act.[141] Schedule I is the most tightly restricted category in the Act and is defined as a drug or substance with "a high potential for abuse" that "has no currently accepted medical use in treatment in the United States" and for which "there is a lack of accepted safety for use . . . under medical supervision."[142] At the federal level, possession of marijuana in any amount is a criminal offense.[143]

Decriminalization refers to those laws that have eliminated the criminal status associated with marijuana possession to some degree.[144] The term is typically used to describe two different categories of state law.[145] First, some state laws that have "decriminalized" marijuana have more accurately "de-penalized" in that possession of a small amount of marijuana is punishable by a fine, but the statute still defines it as a criminal offense.[146] For example, Missouri law defines first offense possession of up to 10 grams of marijuana as a misdemeanor, subject to a maximum fine of 500 dollars with no possibility of incarceration.[147] The second category is state laws that have entirely removed criminal penalties associated with marijuana possession, opting instead to define it as a civil offense.[148] For example, Maryland law defines possession of 10 grams or less of marijuana as a civil offense subject to a fine of up to 100 dollars.[149] Even those states that would more accurately be described as "de-penalized," treat possession of marijuana more

137. Rosalie Liccardo Pacula & Rosanna Smart, *Medical Marijuana and Marijuana Legalization*, 13 ANN. REV. CLINICAL PSYCHOL. 397-419, 400 (2017), www.annualreviews.org/doi/10.1146/annurev-clinpsy-032816-045128.

138. *Id.*

139. For example, Wisconsin is a state with prohibition laws in which possession of any amount is a misdemeanor subject to 6 months' incarceration and a fine of 1,000 dollars and in which there is law allowing medical use of marijuana. WIS. STAT. §§ 961.14, 961.41(3g) (2019).

140. 21 U.S.C. §§ 812, 841, 844 (2020).

141. 21 U.S.C. § 812(c)(I)(c)(10) (2020).

142. *Id.* § 812(b)(1)(A)-(C) (2020).

143. 21 U.S.C. § 844 (2020).

144. Pacula & Smart, *supra* note 137, at 400.

145. *Id.*

146. *Id.*

147. MO. REV. STAT. § 579.015 (2020).

148. Pacula & Smart, *supra* note 137, at 400.

149. MD. CODE ANN., CRIM. LAW §5-601(a), (c)(2)(ii) (2020).

like a minor traffic violation for a first time offender in that the police officer typically issues a citation.[150] While state laws that define marijuana possession as a criminal offense carry personal consequences for those convicted,[151] it is useful for the limited purpose of this comment to group both types of state law under the category "decriminalization."

Medical marijuana laws remove any penalty, civil or criminal, for possession of marijuana for state-approved medicinal purposes.[152] States that have laws allowing medical marijuana typically require a doctor to certify that a person has one of the qualifying conditions listed in the statute and typically define where a person may obtain marijuana and in what quantity.[153] For example, in the state of Arizona, a person whose doctor has diagnosed a serious medical condition, such as Alzheimer's Disease, Cancer, or Glaucoma, may possess 2.5 ounces of marijuana and may purchase it at a state-licensed dispensary or may cultivate it themselves at home.[154]

Finally, legalization refers to those laws that have removed any penalty, civil or criminal, for possession of certain amounts of marijuana for adult recreational use, regardless of medical need.[155] Colorado and Washington led the charge on legalization when they both passed ballot initiatives in 2012 removing penalties for marijuana possession and creating a taxed retail market for the sale of marijuana in each state.[156] For example, the state of Washington has legalized possession of certain amounts of marijuana entirely.[157] An adult over the age of 21 can purchase up to one ounce of marijuana, a little more than 28 grams.[158] Therefore, a police officer who searched a vehicle in Washington and found 28 grams of marijuana would likely allow the driver to leave without any sort of penalty.[159]

Today, there are 13 states that have prohibition laws making

150. *Missouri: Sentencing Reform Measure Reduces Marijuana Possession Penalties*, NORML (May 8, 2014), www.norml.org/news/2014/05/08/missouri-sentencing-reform-measure-reduces-marijuana-possession-penalties.

151. Pacula & Smart, *supra* note 137, at 400.

152. *Id.*

153. *Id.* at 400-01.

154. ARIZ. REV. STAT. §§ 36-2801(1)(a)(i), (3)(a) (2020).

155. Pacula & Smart, *supra* note 137, at 401.

156. *Id.*

157. WASH. REV. CODE § 69.50.360 (2020) (removing all criminal penalties for possession of less than one ounce of marijuana).

158. *Id.* § (3)(a) (2020).

159. This statement assumes that the vehicle's occupant is over the age of 21 and has purchased the marijuana for personal consumption. It is still a felony within the state to distribute marijuana and a misdemeanor to possess marijuana if under the age of 21. WASH. REV. CODE § 9A.20.021 (2015); WASH. REV. CODE ANN. § 69.50.401 (2019); WASH. REV. CODE § 69.50.430 (2015); WASH, REV. CODE § 9A.20.021 (2015).

possession of marijuana in any amount a criminal offense.[160] The other categories of law typically overlap, with many states adopting laws for both medical marijuana and decriminalization.[161] In total, 27 states and the District of Columbia have decriminalized, 33 states and the District of Columbia have medical marijuana laws, and 11 states and the District of Columbia have legalized.[162] However, these numbers are expected to shift over the next year as there are currently 22 states considering bills for legalization, 13 states considering bills for decriminalization, and 12 states considering bills for medical marijuana.[163]

While legalization is taking place at the state level, there are indications that the Federal Government no longer prioritizes marijuana as it once did. In response to legalization in Colorado and Washington, the Department of Justice announced in 2013 that it would not expend resources on prosecution or challenge the passage of legalization laws at the state level.[164] However, that position was officially rescinded in 2018 by Attorney General Jeff Sessions, but he did not call for federal prosecutors to take any specific action.[165] When Attorney General William Barr was confirmed as Sessions' replacement, he pledged to the Senate that he would not "go after" marijuana businesses acting in compliance with state law.[166]

Marijuana remains classified as a Schedule I drug under the Controlled Substances Act, but the Federal Government has created an exemption for "certain cannabis plant material,"[167] in

160. *Map of Marijuana Legality by State*, DISA (last updated Apr. 2020), www.disa.com/map-of-marijuana-legality-by-state. Some of these states do allow other cannabinoids, such as CBD oil. *Id.*

161. *Id.*

162. *Id.*

163. *2020 Marijuana Policy Reform Legislation*, MARIJUANA POL'Y PROJECT (March 19, 2020), www.mpp.org/issues/legislation/key-marijuana-policy-reform/.

164 Memorandum from James M. Cole, Deputy Att'y Gen., to All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

165. Memorandum from Jeffrey Sessions, Att'y Gen., to All United States Attorneys Regarding Marijuana Enforcement (Jan. 4, 2018).

166. Tom Angell, *Trump Attorney General Pick Puts Marijuana Enforcement Pledge in Writing*, FORBES (Jan. 28, 2019), www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#753593e65435.

167. For example, the FDA has approved Epidolex, a drug with an active ingredient that is derived from the same family of plants as marijuana. *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FDA, www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd (last updated Mar. 11, 2020). Marijuana is derived from cannabis, a plant that "contains more than eighty biologically active chemical compounds." *Id.* The most common chemical compounds are delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD). *Id.* THC has psychoactive effects and remains a prohibited substance, but "a purified form" of CBD is the active ingredient in Epidolex, which is FDA- approved for the treatment of seizures. *Id.*

recognition of the plant's overall potential for medical treatment.[168] Further, there are several marijuana reform bills currently pending in Congress,[169] including an Act that would federally decriminalize marijuana and remove it from the Controlled Substances Act.[170]

1. Marijuana Legalization in Illinois

Illinois legislators passed medical marijuana laws in 2013 allowing those with certain qualifying illnesses[171] to purchase and possess[172] marijuana. In 2017, Illinois law decriminalized marijuana making possession of 10 grams or less a civil violation akin to a traffic ticket.[173] Under decriminalization, only those possessing quantities of marijuana that implicated distribution were subject to the harsh penalties that were once the norm.[174] As of January 1, 2020, Illinois became the eleventh state to legalize marijuana for recreational adult use.[175] Today, an adult can purchase and possess up to 30 grams of marijuana without facing any penalty.[176]

Whatever the outcome of upcoming legislation at the state and federal levels, it is undeniable that marijuana possession is not policed with the veracity it once was. As states decriminalize or legalize, their courts are grappling with new challenges to the automobile exception, plain view doctrine, and plain smell doctrine. As the next section will further detail, one major question facing courts today is how this change in law affects the validity of an officer's warrantless vehicle search based on probable cause justified by the smell of marijuana.

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168. 21 C.F.R. § 1308.35 (2020).

169. *Several Marijuana-related Bills Pending in Congress*, MARIJUANA POL'Y PROJECT (Jan. 13, 2020), www.mpp.org/policy/federal/.

170. Marijuana Opportunity Reinvestment and Expungement Act of 2019, 116 H.R. 3884, 116 S. 2227 (2019) (as reported to H.R. Comm. on the Judiciary), and Marijuana Opportunity Reinvestment and Expungement Act of 2019, 116 S. 2227 (2019) (as reported to S. Comm. on Fin.).

171. *See* 410 ILL. COMP. STAT. 130/5 (a) (2018) (stating "[m]odern medical research has confirmed the beneficial uses of cannabis in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions, including cancer, multiple sclerosis, and HIV/AIDS, as found by the National Academy of Sciences' Institute of Medicine in March 1999").

172. 410 ILL. COMP. STAT. 130/25 (2020).

173. *Id.*

174. *Id.*

175. German Lopez, *Illinois Just Legalized Marijuana*, VOX (Jun. 25, 2019), www.vox.com/2019/6/25/18650478/illinois-marijuana-legalization-governor-jb-pritzker.

176. 410 ILL. COMP. STAT. 705/10-10.

III. ANALYSIS

This section will analyze two opposing rationales employed by courts in decriminalized and legalized jurisdictions cases where the smell of marijuana was the justification for a warrantless vehicle search. Some courts elect to follow pre-decriminalization precedent by holding that the smell of marijuana provides sufficient grounds to establish probable cause, despite its change in legal status.[177] On the other hand, some courts are overturning such precedent by finding that changing the legal status of marijuana necessarily changes the probable cause analysis.[178]

This section will next analyze Illinois' pre-legalization treatment of the odor of marijuana and how the state's highest court changed its position throughout the 1980s. Next, this section will discuss the Illinois Supreme Court's holding in *People v. Hill*,[179] a case ruled on after Illinois legalized possession of marijuana. While the Illinois Supreme Court failed to definitively provide an answer on the issue of marijuana odor and probable cause, *Hill* suggests that in at least the vehicle context, the odor of marijuana shall remain sufficient to establish probable cause in the state of Illinois.[180]

Finally, this section will argue that it is a mistake for courts in Illinois to continue to find that the smell of marijuana, on its own, provides an officer probable cause for a warrantless vehicle search. Such a policy depends on an unfounded belief that a police officer can reliably detect the odor of marijuana and contradicts the goals behind legalization. This section argues that by refusing to reject such a policy, the state court system is frustrating the legislation's social and economic goals – the key reasons why legalization passed in Illinois.

A. Courts Split into Two Debating Groups After Decriminalization

As more states alter marijuana's legal status, their criminal courts must determine how to analyze warrantless searches later

177. This is the majority position. *See e.g.*, Robinson v. State, 152 A.3d 661, 681 (Md. 2017) (stating that because a recent amendment decriminalized, but did not legalize marijuana possession in small amounts, the smell of marijuana still constitutes sufficient probable cause).

178. *See Cruz,* 945 N.E.2d at 910 (explaining that that when possession is a civil violation, the odor of burnt marijuana alone cannot provide suspicion of criminal activity); *Id*. at 913 (stating that "no facts were articulated to support probable cause to believe that a criminal amount of contraband was present in the car.").

179. *Hill*, 2020 IL 124595.

180. *Id.* ¶ 18 n.2.

justified by an officer's claim of smelling marijuana. Prior to relaxed marijuana regulation, the automobile exception,[181] plain view doctrine, and its extension into plain smell doctrine[182] worked together to justify warrantless vehicle searches. However, it is harder to rationalize that same position when the odor of marijuana could exist for completely legal reasons.[183] Out of this tension, state courts and federal jurisdictions applying state law have split into two groups employing different rationales to solve this legal problem.[184] Many courts in states that have decriminalized or legalized marijuana still maintain that the smell of marijuana is sufficient to establish probable cause justifying warrantless searches in the vehicle context.[185] Others take the position that the smell of marijuana cannot alone justify such searches where possession of marijuana has been decriminalized or legalized.[186]

1. *Courts in Favor of the Smell of Marijuana Establishing Probable Cause Despite its Change in Legal Status*

There are courts that continue to uphold warrantless searches based on the smell of marijuana in jurisdictions that have

181. *See* discussion *supra* Section II.B.

182. *See* discussion *supra* Section II.D.

183. For example, it is legal to possess a sealed bag of marijuana in a vehicle in Illinois and thus, the smell could emanate from a car during a traffic stop despite the driver complying with law. *See* 410 ILL. COMP. STAT. 130/30(2)(E) (2019) (stating a person cannot possess cannabis in a vehicle unless "in a reasonably secured, sealed container and reasonably inaccessible while the vehicle is moving").

184. There is a circuit split on the issue of marijuana odor and probable cause. *See generally* Bernie Pazanowski, *Marijuana-Based Car Search Still Up in the Air in Fourth Circuit*, BLOOMBERG LAW (Feb. 12, 2018), www.biglawbusiness.com/marijuana-based-car-search-still-up-in-the-air-in-fourth-circuit (discussing how circuits have ruled on the issue compared to the Fourth Circuit). The Fifth and Eighth Circuits have held that the odor of marijuana does constitute probable cause for a warrantless vehicle search, even if it is the only fact in support of probable cause. *See, e.g.*, *Winters*, 221 F.3d at 1041 (holding that the odor of burnt marijuana constitutes sufficient probable cause for the whole vehicle, including the trunk); United States v. McSween, 53 F.3d 684, 686-87 (5th Cir. 1995) (holding that the smell of marijuana provides probable cause to search any part of the car, refusing to adopt a bright line rule). The Tenth Circuit has distinguished between the type of marijuana odor – raw or burnt – to determine whether an officer has probable cause to search a vehicle's main cabin, where marijuana could be burning, or search a vehicle's trunk, where it would presumably be raw. United States v. Parker, 72 F.3d 1444, 1450 (10th Cir. 1995). The Fourth Circuit has not expressly ruled on the issue finding in a recent case that the smell of marijuana was only one factor and, because it was supported by other indications of suspicion, the court did not need to determine if it would have been enough on its own. United States v. Pankey, 710 F. App'x 615, 616-17 (4th Cir. 2018).

185. *See infra* Section III.B.1.

186. *See infra* Section III.B.2.

decriminalized and legalized.[187] Courts in decriminalized jurisdictions that continue to find the smell of marijuana sufficient to establish probable cause, despite decriminalization, have focused on the exact meaning of "decriminalizing," instead of "legalizing."[188] As explained in Part II, decriminalizing involves modifying the penalty for possession of marijuana, either by changing possession from a criminal violation to a civil violation or by opting to penalize possession with a fine instead of incarceration.[189]As such, decriminalizing does not "legalize" possession of marijuana; it merely removes the severe penalties associated with criminal conduct.[190] For example, in the state of Maryland, possession of less than 10 grams of marijuana is defined as a civil offense, but possession is nonetheless still technically illegal.[191]

This difference is easiest to understand by returning to the comparison to traffic violations. Just as it is still illegal to possess any amount of marijuana in Maryland, it is illegal to drive at any speed over the posted speed limit.[192] Despite this, driving 10 miles over the posted speed limit is a civil violation, while driving 30 miles over the posted speed limit is a criminal violation.[193] In Maryland, a police officer who has observed someone speeding 10 miles per hour over the limit is likely to give them a ticket and send them on their way.[194] A police officer who has searched a vehicle and found no more than 10 grams of marijuana is similarly likely to give them

187. People v. Zuniga, 372 P.3d 1052 (Colo. 2016).

188. *See, e.g., Robinson*, 152 A.3d at 681 (stating that a recent amendment decriminalized but did not legalize marijuana possession in small amounts); *Zuniga*, 372 P.3d at 1060 (concluding that "the odor of marijuana remains relevant to probable cause determinations" because "a substantial number of other marijuana-related activities remain unlawful.").

189. *See* Jordan B. Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 677 (2015) (quoting DAVID E. AARONSON, C. THOMAS DIENES & MICHAEL C. MUSHENO, PUBLIC POLICY AND POLICE DISCRETION: PROCESSES OF DECRIMINALIZATION 153, 153 (1984) (defining decriminalization as "removing criminal sanctions attached to particular behavior" and providing a nuanced discussion on the differences between decriminalized conduct and legalized conduct)).

190. Woods, *supra* note 189, at 693.

191. MD. CODE ANN., CRIM. LAW §§ 5-601(a), (c)(2)(ii) (2020).

192. MD. CODE ANN., TRANSP. §§ 21-801, 801.1 (2020).

193. Maryland has a point system that assigns value based on the seriousness of the offense. Hon. John P. Morrissey, Schedule of Preset Motor Vehicle Files and/or Penalty Deposits, Dist. Ct. of Maryland, (Rev. Oct. 2019), *available at* www.courts.state.md.us/sites/default/files/court-forms/dccr090public.pdf. Driving between one to nine miles per hour over the speed limit results in only one point and requires no in-court appearance while driving 30 miles over the speed limit results in five points and is a misdemeanor criminal offense. *Id.* at 48. *See also* MD. CODE ANN., TRANSP. §§ 21-801.1 (2020) (stating maximum speed limits) *and* 26-204 (describing compliance with traffic citations as either an in-person hearing or the payment of fine, depending on severity).

194. *Id.*

a ticket and send them on their way.[195] In contrast, a police officer observing someone driving 30 miles per hour over the posted speed limit,[196] or searching and finding over 30 grams of marijuana, may instead make an arrest.[197] This is essentially what it means for certain conduct to be "decriminalized" but still illegal.[198]

This difference between "decriminalized" and "legalized" leads courts in decriminalized jurisdictions to find that the analysis of whether the smell of marijuana establishes probable cause remains the same after decriminalization.[199] The question in the probable cause analysis is whether the smell indicates to the officer a greater likelihood that a search will reveal evidence of wrongdoing.[200] Prior to decriminalization, the answer to this question was *always* in the affirmative because possessing *any* amount of marijuana was a crime.[201] The jurisdictions on this side of the debate argue that this analysis is no different today.[202] Possession of 10 grams of marijuana may only be a civil offense, but it is still an offense.[203] While a police officer may not choose to arrest someone for driving 10 miles over the speed limit, the officer does have the option to do

195. *Robinson*, 152 A.3d at 674 (quoting MD. CODE ANN., CRIM. LAW § 5-601.1 (2020)).

196. MD. CODE ANN., TRANSP. §§ 21-801.1, 26-202 (2020).

197. *Compare* MD. CODE ANN., CRIM. LAW § 5-601(a), (c) (2020) (describing terms of imprisonment as the penalty for possession of controlled substances, including more than 10 grams of marijuana) *with* § 5-601.1 (describing the issuance of a citation as the penalty for possession of less than 10 grams of marijuana).

198. *But see* Woods, *supra* note 189, at 696-700 (explaining that "decriminalized" conduct is defined and policed differently depending on jurisdiction and race).

199. *See e.g.,* State v. Senna, 79 A.3d 45, 50-51 (Vt. 2013) (holding legalizing medical marijuana "does not undermine the significance of the smell of marijuana as an indicator of criminal activity").

200. *Carroll*, 267 U.S. at 162 (stating "probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution' in the belief that certain items may be contraband or stolen property or useful as evidence of a crime it does not demand any showing that such belief be correct or more likely true than false.").

201. *See* Monique Garcia, *Rauner Reduces Punishment for Minor Pot Possession from Jail to Citation*, CHICAGO TRIBUNE. (July 29, 2016), www.chicagotribune.com/news/local/breaking/ct-illinois-marijuana-decriminalzation-0730-20160729-story.html (stating that prior to the amendment that decriminalized marijuana in the state of Illinois, possession of even a small amount of marijuana was a class B misdemeanor that could result in up to six months in jail and fines of up to $1,500).

202. *See, e.g.,* United States v. Harrison, No. 17-59-GMS-1, 2018 WL 1325777, at *3 (Del. Mar. 15, 2018) (quoting DEL. CODE ANN. tit. 16, § 4764(d) (2019)) (stating that marijuana has been decriminalized in some instances in Delaware, but "every possession and usage of marijuana was not made legal" and thus, the smell is still indicative of criminal activity).

203. *E.g.,* In re O.S., 112 N.E.3d 621, 634, *reh'g denied* (July 27, 2018), *appeal denied*, 110 N.E.3d 189 (Ill. 2018) ("Because decriminalization is not synonymous with legalization, even though possession of less than 10 grams of cannabis is no longer a crime in Illinois, it remains illegal.").

so because speeding, like possession, is always illegal.[204] As such, an indication of possession, like an odor of marijuana, still makes it more likely that a search will reveal something illegal.[205] Therefore, the smell of marijuana can provide an officer with probable cause to conduct a search despite how the state law defines the offense.[206]

This rationale applies in even those states that have legalized possession of marijuana, but the focus in these jurisdictions is the fact that only certain amounts of marijuana are legal to possess.[207] The smell indicates that marijuana is present in *some* amount.[208] That mere presence of marijuana warrants further investigation by the police to determine *exactly what amount* of marijuana is present.[209] Even though the driver may not possess the criminal amount of marijuana, the smell still makes it *more likely* that he or she did possess the criminal amount of marijuana.[210] Therefore, courts in legalized and decriminalized jurisdictions nonetheless hold that the smell does establish sufficient probable cause in support of a vehicle search.[211] This is the group that most state courts are currently siding with, including Washington,[212] Maryland,[213] Colorado,[214] and Arizona.[215]

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204. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001) (holding "[t]he Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine").

205. *In re O.S.*, 112 N.E.3d at 634.

206. *See e.g.*, State v. Smalley, 225 P.3d 844, 848 (Orr. Ct. App. 2010) (explaining that despite decriminalization of marijuana possession in small amounts, when an officer smells marijuana he has probable cause to believe some possession of contraband has occurred and the quantity is irrelevant).

207. *See e.g.,* People v. Fews, 238 Cal. Rptr. 3d 337, 344-45 (2018) (stating "the continuing regulation of marijuana" allows a police officer to search to "determine whether the subject of the investigation is adhering to the various statutory limitations on possession and use, and whether the vehicle contains contraband or evidence of a crime.").

208. *Id.*

209. *See, e.g.*, *Smalley*, 225 P.3d at 847-48 (quoting *State v. Bingman*, 986 P.2d 676, 679 (Or. Ct. App. 1999)) (explaining that there was probable cause for a search because the officer smelled "the odor of marijuana" emanating from the car and "testified that, in his experience, the strength of the odor led him to believe a larger amount of marijuana remained in the car.").

210. *Fews*, 238 Cal. Rptr. 3d at 345 (holding the odor of marijuana indicated "there was a fair probability that a search of the SUV might yield additional contraband or evidence.").

211. *Id.* at 562 (quoting People v. Waxler, 224 Cal. App. 4th 712, 723-24 (2014) "It is well settled that even if a defendant makes only personal use of marijuana found in the passenger compartment of a car, a police officer may reasonably suspect additional quantities of marijuana might be found in the car.").

212. State v. Tibbles, 236 P.3d 885, 888 (Wash. 2010) (citing State v. Grande, 187 P.3d 248, 253 (Wash. 2008))

213. *Robinson*, 152 A.3d at 681.

214. *Zuniga*, 372 P.3d at 1060.

215. State v. Sisco, 373 P.3d 549, 553 (Ariz. 2016).

2. *Courts Against the Smell of Marijuana Establishing Probable Cause After its Change in Legal Status*

In contrast, other courts have found that changing the legal status of marijuana also necessarily changes the probable cause analysis.[216] These courts hold that the smell of marijuana, after decriminalization or legalization, is no longer enough on its own to justify a warrantless search.[217] These courts focus not on the definition of decriminalizing, but instead on the *reasons* for decriminalizing.[218]

The Massachusetts Supreme Court explained this rationale in *Commonwealth v. Cruz*, holding that after decriminalizing possession, the smell of marijuana on its own is not justification for a warrantless search.[219] In its analysis, the Massachusetts Supreme Court examined the ballot initiative that decriminalized marijuana[220] and the intention of the voters.[221] When voters were asked whether to decriminalize in 2008,[222] the ballot explained that this would change the possession of less than one ounce of marijuana from a crime to a new system of civil penalties.[223]

The ballot included arguments in favor and against the law to inform the voters. In favor, it stated that police would be "freed up" to focus on serious crimes, saving taxpayers an estimated 30 million dollars a year in arrest costs.[224] Arguments against the law described decriminalizing as an "endorsement of substance abuse and dangerous criminal activity."[225] The ballot was passed and possession of marijuana was decriminalized in the state when the law went into effect in January of 2009.[226] Today, Massachusetts is one of 12 jurisdictions that have legalized marijuana, but when the Massachusetts Supreme Court reached its holding in *Cruz*, the

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216. *See* Commonwealth v. Locke, 51 N.E.3d 484, 504-05 (Mass. App. Ct. 2016) (holding that because possession is a civil infraction, the smell of marijuana, even coupled with nervous behavior, is not enough for probable cause).

217. *Id.*

218. *See Cruz*, 945 N.E.2d at 908-09 (holding that it was the intention of the voters in passing decriminalization legislation to no longer treat possession of marijuana at the same level as other criminal conduct).

219. *Id.* at 910.

220. MASS. ANN. LAWS ch. 94C, § 32L (2020).

221. *Cruz,* 945 N.E.2d at 909 (quoting MASS. ANN. LAWS ch. 94C, § 32L (2017)) (stating "Notwithstanding any general or special law to the contrary, possession of one ounce or less of marijuana shall *only* be a civil offense . . . .")).

222. *See id.* at n.19 (describing the process of ballot questions within the state of Massachusetts).

223. *Id.* at 909 (citing Information for Voters: 2008 Ballot Questions, Question 2: Law Proposed by Initiative Petition, Possession of Marijuana).

224. *Id.*

225. *Id.*

226. MASS. ANN. LAWS ch. 94C, § 32L (2020).

state had only decriminalized.

In *Cruz*, the Massachusetts Supreme Court determined that with the benefit of this written explanation in the ballot, the intent behind passing the law is clear: possession of marijuana should no longer be treated as worthy of criminal sanctions.[227] By considering voter intent, the court found that police officers should not put the same amount of effort into searching for marijuana as they should put into searching for presently criminalized contraband.[228] The court reasoned that decriminalization means that possession of marijuana is not a "crime" nor a priority.[229] As such, the smell of marijuana does not indicate to an officer that evidence of a crime will be found; it merely indicates that someone may be committing a civil violation.[230]

Courts on this side of the debate have found evidence that someone may be committing a civil violation or may be carrying a legal amount of marijuana is not sufficient to establish probable cause to justify a warrantless search.[231] As of today, New York is the only state to definitively follow Massachusetts' example.[232] However, both Vermont and Colorado's Supreme Courts have signaled they may adopt similar logic.[233] The Supreme Court of Colorado recently held that because a drug-sniffing dog's alert may signal only lawful activity, "namely the legal possession of up to one ounce of marijuana," officers must have probable cause based on more than smell to believe the vehicle "contains drugs in violation of state law" before deploying the dog.[234] The Supreme Court of Vermont recently held that the smell of marijuana and the defendant's voluntary surrender of a recreational amount of marijuana were insufficient to establish probable cause for a search of his vehicle.[235] The court rejected the proposition that "the presence of an amount of marijuana that is not a crime to possess is sufficient to establish probable cause that defendant possessed

227. *Cruz*, 945 N.E.2d at 910 (stating the passing of the law "provides a clear directive to police departments handling violators to treat commission of this offense as noncriminal. We conclude that the entire statutory scheme also implicates police conduct in the field.").

228. *Id.* ("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").

229. *Id.*

230. *Id.*

231. *Id. See also* People v. Brukner, 25 N.Y.S.3d 559, 572 (2015) (concluding that after decriminalization "the mere odor of marijuana emanating from a pedestrian, without more, does not create reasonable suspicion that a crime has occurred").

232. *Brukner*, 25 N.Y.S. 3d at 570-71.

233. People v. McKnight, 446 P.3d 397 (Colo. 2019); State v. Clinton-Aimable, 2020 VT 30.

234. *McKnight*, 446 P.3d at 414.

235. *Clinton-Aimable*, 2020 VT 30, ¶33.

additional marijuana in criminal amounts or drugs other than marijuana."[236] While this rationale is currently the minority position, it appears to be gaining popularity and because the appellate process is lengthy,[237] some state supreme courts have not had the opportunity to rule on the issue since their state passed legalization.[238]

B. Illinois Supreme Court Precedent and its Recent Ruling in People v. Hill Signal that Illinois will Uphold Warrantless Vehicle Searches Based on the Smell of Marijuana, Regardless of its Legality in the State

Illinois Supreme Court precedent concerning the smell of marijuana must be reviewed in that it informs the court's current position and provides an indication of how it may rule on future cases. Additionally, this precedent informed the court's March 19, 2020 opinion on the topic in *People v. Hill*.[239] In *Hill*, the Illinois Supreme Court signaled the state's position in the marijuana smell debate by adopting a policy that the smell of marijuana is still indicative of a crime and sufficient to establish probable cause for a warrantless search under the automobile exception.[240] While the court ruled on *Hill* after legalization, the events that led to the defendant's conviction took place in 2017,[241] when Illinois law allowed for only medical marijuana[242] and had decriminalized possession of marijuana in small amounts. [243] As such, the court's

236. *Id.*

237. Based on the Bureau of Justice Statistics' Survey of State Court Criminal Appeals, 75 percent of felony state appeals are resolved in about 1.5 years and 75 percent of all misdemeanor state appeals are resolved in 1.4 years. Nicole Waters, Anne Gallegos, James Green & Martha Rozsi, *Criminal Appeals in State Courts*, U.S. DEP'T JUST. 7 (Sept. 2015), www.bjs.gov/content/pub/pdf/casc.pdf. However, in a state like Illinois, with both an intermediary appellate court and a state supreme court, cases take much longer to resolve with many never reaching the state's supreme court. *Id.* For example, in Illinois, the Supreme Court accepts only about two to four percent of appeals. ADMIN. OFF. ILLINOIS CTS., ANNUAL REPORT (2018), *available at* www.illinoiscourts.gov/SupremeCourt/AnnualReport/2019/2018_Annual_Report.pdf.

238. *People v. Hill* ruled on in March 2020, was based on events taking place in May 2017, prior to legalization in the state of Illinois. *Hill*, 2020 IL 124595, ¶ 5. *State v. Clinton-Aimable* ruled on in March 2020, was based on events taking place in July 2016, prior to legalization in the state of Vermont. *Clinton-Aimable*, 2020 CT 30, ¶ 3.

239. *Hill*, 2020 IL 124595.

240. *Id.* ¶¶ 31-35.

241. *Id.* ¶ 5.

242. 410 ILL. COMP. STAT. 130/25.

243. 720 ILL. COMP. STAT. 550/4 (2016).

holding dealt with how to analyze probable cause based on the smell of marijuana after decriminalization, not after legalization.[244] However, it signals the court's position and indicates that similar logic will be applied in cases brought to the Illinois courts today.[245]

1. *Illinois' Treatment of Probable Cause Determinations based on Marijuana Odor Prior to Decriminalization*

Prior to the state relaxing its laws regulating marijuana, the Illinois Supreme Court had held that the smell of marijuana was sufficient to establish probable cause for a vehicle search.[246] The court had so ruled based on the recognized diminished expectation of privacy under the automobile exception.[247] The court has nonetheless recognized that even vehicle searches could be unreasonable and must be justified by a showing of possible criminal activity.[248] There was a brief moment in Illinois' history where it appeared that the court was moving towards refusing to accept the mere scent of marijuana as a justification for a warrantless vehicle search. While this is not the court's current position, two cases in the early 1980s present an alternative analysis to the more modern analysis where the smell of marijuana establishes probable cause.

Prior to being overruled, two cases seemed to indicate the state of Illinois would hold officers to a higher standard when establishing probable cause on the basis of odor, even in the context of automobile searches.[249] The first of the two cases is *People v. Argenian*.[250] In this case, the officer was investigating a traffic accident when the officer smelled the odor of marijuana coming from an unoccupied vehicle.[251] The officer searched the car and discovered a firearm, but not any marijuana.[252] There was a pipe in the vehicle, but it only contained tobacco.[253] The vehicle's owner was charged with unlawful possession of a firearm and moved to suppress the evidence arguing the officer's search was not

244. *Hill*, 2020 IL 124595 ¶ 27.

245. *See id.* at n.2 (citing District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018)) ("Although we do not reach whether the odor of cannabis, alone, is sufficient to establish probable cause, the smell and presence of cannabis undoubtedly remains a factor in a probable cause determination.").

246. *Stout*, 477 N.E.2d at 498.

247. *Id. See also Carroll*, 267 U.S. at 153 (creating the automobile exception upon which Illinois based its decision in *Stout*).

248. *Stout,* 477 N.E.2d at 502.

249. *Argenian,* 423 N.E.2d 289; People v. Wombacher, 433 N.E.2d 374 (Ill. App. Ct. 1982).

250. *Argenian*, 423 N.E.2d 289.

251. *Id.* at 289-90.

252. *Id.*

253. *Id.*

supported by probable cause.[254] The officer asserted he had extensive training in detecting the odor of marijuana despite having not found the drug in his search.[255]

Since the officer was undeniably wrong in this instance, the court reasoned there were only so many explanations as to why the officer claimed to smell marijuana: (1) there is no discernable difference between the smell of tobacco and marijuana and thus, any search on the basis of marijuana odor would be unreasonable; (2) this particular officer never smelled marijuana at all and simply asserted that he did smell it to legalize his search; or (3) there is a discernable difference between the smell of tobacco and the smell of marijuana, but this particular officer was not trained to detect it despite his assertions to the contrary.[256] The court found that regardless of which explanation was the truth, the evidence must be suppressed.[257] Importantly, the court stated,

> To hold otherwise would be to give an unlimited license to any police officer to search any and all vehicles merely on his uncorroborated testimony that he was an expert marijuana sniffer and that he smelled marijuana in the car. That testimony could conveniently be used to justify any search at any time whether or not there was marijuana on the premises and whether or not the officer was a qualified expert or was honestly mistaken or actually lying. More is required.[258]

The second case is *People v. Wombacher*.[259] There, an officer approached a parked motor vehicle with occupants inside on suspicion of involvement in a theft.[260] The officer claimed he also saw smoke, and upon nearing the vehicle, he could tell from his training in detecting the odor, that the smoke was created by burning marijuana.[261] In his search of the vehicle, the officer found nothing, but the men were arrested regardless.[262] In a search incident to arrest, the officer discovered the men were carrying small amounts of unburnt marijuana.[263] The Illinois Supreme Court found again that the evidence must be suppressed.[264] The court reasoned that since there was no burning marijuana in the car, the alleged odor that the officer claimed to detect was not enough to establish probable cause without additional evidence to corroborate the presence of marijuana.[265]

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254. *Id.*
255. *Id.*
256. *Id.* at 290.
257. *Id.*
258. *Id.*
259. *Wombacher*, 433 N.E.2d at 374.
260. *Id.*
261. *Id.* at 374-75.
262. *Id.* at 375.
263. *Id.*
264. *Id.* at 377.
265. *Id.*

While this was not the case in *Wombacher*, the court stated that sufficient probable cause could be established through a trained officer smelling marijuana if that claim was combined with other factors.[266] For those factors, the court provided examples such as seeing a marijuana pipe in the vehicle or seeing a burnt marijuana cigarette in the car's ashtray.[267] Without such a corroborating factor, the court repeated its concern that allowing the smell of marijuana, on its own, to constitute sufficient probable cause for a search would provide police officers with "an unlimited license to conduct searches."[268]

These two cases were overruled[269] by the Illinois Supreme Court in *People v. Stout*.[270] In *Stout*, the officer searched a vehicle after pulling the driver over for a minor traffic stop.[271] Just as in both *Argenian*[272] and *Wombacher*,[273] the officer's contention that he smelled marijuana was uncorroborated in that no marijuana was found in the vehicle.[274] Instead, the officer found cocaine, which had not been burned and could not have produced the smell.[275] In explicitly overturning *Argenian* and *Wombacher*, the court found that the diminished expectation of privacy under the automobile exception did not require the officer to claim additional corroborating evidence if he smelled marijuana.[276] The court in *Stout* stated, "what constitutes probable cause for searches and seizures must be determined from the standpoint of the arresting officer, with his skill and knowledge, rather than from the standpoint of the average citizen under similar circumstances."[277] After this case, the rule in Illinois has been clear: "additional corroboration is not required where a trained and experienced police officer detects the odor of cannabis emanating from a

266. *Id.* at 376-77.

267. *Id.*

268. *Id.* at 377 (quoting *Argenian*, 423 N.E.2d at 290).

269. Despite their subsequent overruling, a federal Illinois district court recently applied the logic of *Argenian* and *Wombacher*. *See* United States v. Plummer, No. 16-CR-30037-NJR, 2018 U.S. Dist. LEXIS 92863, ¶¶ 16-17 (S.D. Ill. June 1, 2018) (stating that an officer's alleged detection of the smell of marijuana was unreliable because "[t]he fact of the weather conditions that day, the way [the officer] acted following the alleged smelling of raw cannabis, the way [the officer] went about his search, and the (less than) .1 gram of cannabis 'shake' or 'crumbs' that ultimately turned up leads the Court to believe that [the officer] did not actually smell a 'strong odor of raw cannabis emitting from within the interior of the vehicle'").

270. *Stout*, 477 N.E.2d at 502.

271. *Id.* at 499.

272. *Argenian*, 423 N.E.2d at 289.

273. *Wombacher*, 433 N.E.2d at 374.

274. *Stout*, 477 N.E.2d at 499-500.

275. *Id.* at 500.

276. *Id.* at 503.

277. *Id.* at 502 (quoting People v. Smith, 95 Ill. 2d 412, 419-20 (1983)).

defendant's vehicle."[278]

The court's decision in *Stout* is demonstrative of how Illinois courts have since analyzed probable cause justified by an officer's assertion that he smelled marijuana.[279] Illinois courts require the officer to state the training, skill, or knowledge upon which his detection of the odor is based.[280] This is not a difficult requirement to meet.[281] In practice, an officer must simply state in his affidavit why he is capable of detecting that specific odor, which usually takes the form of "I have smelled it in my years as a detective."[282] Neither the courts nor Illinois Police Departments require an officer to have specific training or testing to assure an accurate sense of smell – the officer's sworn oath that he has smelled marijuana before is enough.[283]

Stout and the cases that followed were ruled on when possession of marijuana in any quantity was a crime.[284] As such, when these cases were decided, it was true that the smell of marijuana would always be indicative of a crime.[285] Therefore, the question is raised – is the smell of marijuana still indicative of *criminal activity* or is the smell simply indicative of a possible *civil violation*? If the latter is true, is an indication of a civil violation enough to establish probable cause for a warrantless vehicle search?

2. *People v. Hill: Illinois Revisits the Probable Cause Analysis After Decriminalization*

In *People v. Hill*, the Illinois Supreme Court considered whether the smell of marijuana establishes probable cause for a vehicle search, after decriminalization and legal medical marijuana

278. *Stout*, 477 N.E.2d at 503.

279. *See e.g.,* People v. Zayed, 49 N.E.3d 966, 971 (Ill. App. Ct. 2016) (citing *Stout*, 477 N.E.2d at 498) (stating "[p]ursuant to *Stout* and its progeny, the officer had probable cause because of his training in detecting the smell of marijuana").

280. *See Zayed*, 49 N.E.3d at 971 (stating "the officer has probable cause to conduct a search of a vehicle if testimony has been elicited that the officer has training and experience in the detection of controlled substances.").

281. *Id.* (finding probable cause because the officer testified under oath that he was trained in recognizing the smell of cannabis and had smelled the odor of burnt cannabis hundreds of times).

282. *Zayed*, 49 N.E. 3d at 971. *See also Stout,* 477 N.E.2d at 499 (holding the officer was qualified because he "testified that he had smelled the odor of burning cannabis on 'numerous other occasions' during his seven-year employment as a patrol officer.").

283. *See supra* notes 279-282 and accompanying text.

284. Decriminalization in the state of Illinois was not until 2016. 720 ILL. COMP. STAT. 550/4 (d).

285. *See e.g.*, *Stout*, 477 N.E.2d at 502 (explaining that the reasonableness of police officer conduct is weighed against their responsibility to prevent crime and to catch criminals and thus smelling marijuana, a crime to possess, is reasonable justification for a search).

were in effect.[286] While the stop that gave rise to the case took place prior to legalization, the appeal nonetheless provided the Illinois Supreme Court an opportunity to guide how police officers in the state should be investigating and policing marijuana today.[287] Unfortunately, the Illinois Supreme Court failed to answer that question definitively, instead, finding that the officer relied on more than the mere smell of marijuana in his probable cause analysis.[288] While the case did not foreclose a future ruling to the contrary, *People v. Hill* indicates that the Illinois court system will continue to accept an officer's uncorroborated assertion that he smelled marijuana as probable cause for a warrantless vehicle search.[289]

Defendant Charles Hill was charged with unlawful possession of cocaine after his vehicle was searched in a traffic stop by Officer Baker of the Decatur Police Department.[290] At a Motion to Suppress hearing, the officer testified that he initiated his traffic stop because he believed that the passenger in Mr. Hill's car was a known fugitive.[291] When the officer activated his lights, Mr. Hill failed to immediately pull his vehicle over.[292] The officer testified that, in his experience, this indicates that the occupants are attempting to conceal or destroy contraband or retrieve a weapon.[293] After he approached, the officer quickly realized that the passenger was not who he thought he was, but he smelled "the strong odor of raw cannabis," and asked if there was marijuana in the vehicle.[294] Mr. Hill denied possessing or recently smoking marijuana, but his passenger informed the officer that the smell may be coming from him as he had smoked earlier that day.[295] The officer stated that he saw "a bud in the backseat" and he searched the vehicle.[296] The

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286. The exact question before the court was:

> Whether police may still search a vehicle without a warrant following a traffic stop based solely on a perceived odor of cannabis, or whether the State legislature's decision to decriminalize possession of less than 10 grams of cannabis requires officers to justify their search based on specific evidence that the occupant possesses more than 10 grams.

Kerry Bryson & Shawn O'Toole, *Summary of Significant Criminal Issues Pending in the Illinois Supreme Court*, ST. APP. DEFENDER 9 (Jan. 31, 2020), www2.illinois.gov/osad/Publications/Documents/pend.pdf.

287. John Seasly, Illinois Supreme Court to decide whether smell of pot is grounds to search a car, INJUSTICE WATCH (Jan. 14, 2020), www.injusticewatch.org/news/2020/illinois-supreme-court-to-decide-whether-smell-of-pot-is-grounds-to-search-a-car/.

288. *Hill*, 2020 IL 124595, ¶ 35.

289. *Id.*

290. *Id.* ¶ 1.

291. *Id.* ¶ 5.

292. *Id.*

293. *Id.*

294. *Id.* ¶ 5-6.

295. *Id.* ¶ 9-10.

296. *Id.* ¶ 10.

officer found a small rock of crack-based cocaine and "a small amount of cannabis residue."[297]

Mr. Hill moved to suppress the evidence found in the search of his vehicle, claiming that the officer did not have probable cause in support of the search.[298] Mr. Hill won his motion to suppress, but the Illinois Appellate Court reversed, stating that the officer did have probable cause because he smelled marijuana.[299] In his petition for leave to appeal to the Illinois Supreme Court, Mr. Hill argued that the legalization of medical cannabis and the decriminalization of small amounts of cannabis altered the police's power to conduct a warrantless search of a vehicle based solely on the odor of marijuana.[300]

Despite granting the appeal on this narrow issue, the Illinois Supreme Court failed to definitively answer whether the smell of marijuana on its own justifies a warrantless search, instead, finding that the officer, under these specific facts, had probable cause based on more than smell.[301] Mr. Hill argued that medical legalization and decriminalization meant that possession is no longer a criminal activity, nor is marijuana contraband, and therefore, the odor of marijuana is insufficient to establish probable cause. [302] The court analyzed the effect of medical marijuana and decriminalization separately.[303] As to decriminalization, the court agreed with other jurisdictions[304] that "decriminalization is not synonymous with legalization." [305] "Because cannabis remains unlawful to possess, any amount of marijuana is considered contraband."[306]

The court did agree with the defendant that the Compassionate Use of Medical Cannabis Pilot Program Act[307] permits possession of cannabis, and thus, when possessed by a medical user, marijuana is not contraband.[308] However, the court rejected the idea that because it may be legally possessed in some circumstances, officers need more facts to suggest it is illegally possessed or connected to criminal activity.[309] The court stated that

297. *Id.* ¶ 7 n.1.
298. *Id.* ¶ 4.
299. *Id.* ¶ 12.
300. *Id.* ¶ 15.
301. *Id.* ¶ 15-16.
302. *Id.* ¶ 25.
303. *Id.* ¶ 26.
304. *Compare id.* ¶ 31 (stating, "While the decriminalization of cannabis diminished the penalty for possession of no more than 10 grams of cannabis to a civil law violation punishable by a fine, possession of cannabis remained illegal"), *with Robinson*, 152 A.3d 661 at 680 (stating, "Despite the decriminalization of possession of less than ten grams of marijuana, possession of marijuana in any amount remains illegal in Maryland.").
305. *In re O.S.*, 112 N.E.3d at 634.
306. *Hill*, 2020 IL 124595, ¶ 29 (quoting *Cruz*, 945 N.E.2d at 911).
307. 410 ILL. COMP. STAT. 130/1 *et. seq.* (2020).
308. *Hill*, 2020 IL 124595, ¶ 32.
309. *Id.* ¶ 33-34.

medical "users must possess and use cannabis in accordance with the act" and pointed to the portion of the statute stating that a driver or passenger is prohibited from possessing cannabis within an area of the motor vehicle "except in a sealed, tamper-evident medical cannabis container."[310]

The court ruled that there was probable cause based on the following facts: (1) Mr. Hill's delay in pulling over after the officer initiated his traffic stop; (2) the officer's testimony that based on his experience, vehicles delaying in pulling over are hiding contraband or retrieving a weapon; (3) the passenger revealed he had smoked marijuana that day; and (4) the officer "saw a loose 'bud' in the backseat and smelled the strong odor of marijuana which, together, indicate that cannabis was in the car, and likely, not properly contained."[311]

This holding did not foreclose future defendants from making similar arguments when an officer bases probable cause on the smell of marijuana alone,[312] but it raised more questions than it answered. First, is the court suggesting that the smell of marijuana in a traffic stop is *per se* probable cause to suspect a person is improperly storing their legally possessed marijuana?[313] The court seemed to suggest that it may when it compared Mr. Hill's case to cases in which an officer smelled alcohol and performed a search based on a suspected violation of open container laws.[314] Notably, the court cited only cases in which there was an additional corroborating factor suggesting the driver had an open container of alcohol,[315] such as "seeing two open beer cans."[316] Additionally, in the court's ruling in *Hill,* it made clear that it was the loose "bud" together with the smell of marijuana that indicated marijuana may be improperly stored in the vehicle,[317] suggesting smell alone may not have been sufficient.

Secondly, will the court be able to apply the same logic when it rules on a case arising from a stop that took place after legalization? The court admitted that legalizing possession means marijuana is not "contraband," for those complying with the Act that legalized medical marijuana.[318] With legalization in Illinois, will the Illinois

310. *Id.* ¶ 34 (quoting 625 ILL. COMP. STAT. 5/11-502(1(b), (c) (2016)).

311. *Id.* ¶ 35.

312. *See id.* ¶ 18 n.2 (citing *Wesby*, 138 S. Ct. at 588) ("Although we do not reach whether the odor of cannabis, alone, is sufficient to establish probable cause, the smell and presence of cannabis undoubtedly remains a factor in a probable cause determination.").

313. *Id.* ¶ 34.

314. *Id.* ¶ 34-36.

315. *Id.* ¶ 36 (citing People v. Smith, 447 N.E. 2d 809 (Ill. 1983); People v. Gray, 420 N.E. 2d 856 (Ill. 1981); People v. Zeller, 367 N.E.2d 488 (1977)).

316. *Id.* (citing *Gray,* 420 N.E. 2d at 856).

317. *Id.* ¶ 35.

318. *Id.* ¶ 32, 34.

Supreme Court's holding in *Hill*[319] apply only to those searches conducted before January 1, 2020? Does this holding give police officers license to search any vehicle if they assert that their warrantless search was based on the smell of marijuana, which in their experience, indicates improper storage of a legal substance?[320]

While there are future arguments to be made, *People v. Hill* nonetheless signals the Illinois Supreme Court's reluctance to explicitly hold that the smell of marijuana cannot alone justify a warrantless vehicle search.[321] Although the court did not reach whether the odor alone is sufficient to establish probable cause, the court's position is that the smell of marijuana "undoubtedly remains a factor in a probable cause determination."[322] As such, all lower courts in Illinois remain unlikely to suppress evidence based on these warrantless searches, and Illinois' policy of accepting an officer's assertion that he smelled marijuana remains intact.

C. The Illinois Supreme Court's Interpretation of Probable Cause Relies on Flawed Misconceptions about Marijuana Smell Accuracy, Contradicts the Legislature's Intent, and Frustrates Economic Goals

The Illinois Supreme Court's decision in *People v. Hill* signals that Illinois courts will continue to uphold warrantless vehicle searches based on an officer's assertion that he smelled marijuana.[323] This position is flawed in 2 important ways: (1) it relies on a misconception that police officers can accurately detect marijuana, and (2) it frustrates the State's economic and social goals, contradicting the very reasons the state chose to first decriminalize, and then legalize.

1. *Illinois' Holding Relies on a Misconception that Police Officers can Accurately Detect Marijuana*

Allowing officers to justify warrantless searches of motor vehicles relies on a misconception that the officers can accurately detect the scent of marijuana.[324] This underlying assumption that

319. *Id.* ¶ 37.

320. *Id.* ¶ 34-36.

321. *See id.* ¶ 29 (explaining that marijuana remains "contraband" regardless of decriminalization because, "to hold otherwise leads to the absurd conclusion that persons could have a legitimate privacy interest in an item that remains illegal to possess").

322. *See id.* ¶ 18 n.2 (citing *Wesby*, 138 S. Ct. at 588) ("Although we do not reach whether the odor of cannabis, alone, is sufficient to establish probable cause, the smell and presence of cannabis undoubtedly remains a factor in a probable cause determination.").

323. *Id.*

324. *See supra* notes 279-282 and accompanying text.

police officers are capable of smelling marijuana is simply unproven.[325] The sense of smell is generally less reliable and consistent than other senses, such as sight.[326] Courts have addressed the limitations of relying on smell alone pointing out the ability of smell to linger[327] or travel.[328] Further, while sight is quantifiable on a widespread scale because of the prevalence of testing,[329] the reliability of an individual's sense of smell is not commonly tested.[330] The reliability of smell can also be affected by multiple factors both environmental and genetic.[331] There is a widely accepted belief that people, and more specifically police officers, can detect the scent of marijuana,[332] but "the empirical basis for such claims is remarkably thin."[333]

Recognizing the gap in quantifiable data and the wide acceptance of probable cause on the basis of smell, scientists at the Smell and Taste Center of the University of Pennsylvania's Medical School conducted an experiment.[334] The study showed that while the smell of marijuana was discernable through a garbage bag immediately in front of a participant, it was not discernable once that bag was placed in the trunk of a vehicle.[335] The study showed

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325. *See generally* Richard L. Doty et al., *Marijuana Odor Perception: Studies Modeled from Probable Cause Cases*, 28 LAW & HUM. BEHAV. 223 (Apr. 2004).

326. United States v. Pace, 709 F. Supp. 948, 956 (C.D. Cal. 1989) (stating sense of smell is less reliable than the senses of sight and touch).

327. *See* Sprow, *Wake Up, supra* note 101, at 302 *(*citing Brewer v. State, 199 S.E.2d 109, 112 (Ga. Ct. App. 1973) (discussing potential for smell to linger in a location for an undetermined amount of time)).

328. *See* Sprow, *Wake Up, supra* note 101, at 302 (citing People v. Taylor, 564 N.W.2d 24, 30 (Mich. 1997) (suggesting that the odor of marijuana could travel in a car that has never contained marijuana)).

329. For more information, see Celia Vimont, *What Does 20/20 Vision Mean?*, AM. ACAD. OPHTHALMOLOGY (Nov. 30, 2016), www.aao.org/eye-health/tips-prevention/what-does-20-20-vision-mean.

> A person with 20/20 vision can see what an average individual can see on an eye chart when they are standing 20 feet away . . . .
>
> An eye chart measures visual acuity, which is the clarity or sharpness of vision. The top number refers to your distance in feet from the chart. The bottom number indicates the distance at which a person with normal eyesight can read the same line.

Id.

330. Doty et al., *supra* note 325, at 223 (explaining that although scientists are able to test a person's ability to smell, it is not a common procedure).

331. *Id.*

332. *See, e.g.,* Goetzl, *Common Scents, supra* note 105, at 611 (stating "there is no reason to afford less weight to one's use of the sense of smell . . . when looking to probabilities.").

333. Avery N. Gilbert & Joseph A. DiVerdi, *Human Olfactory Detection of Packaged Cannabis*, 60 SCI. & JUST. 169, 169 (2020).

334. Doty et al., *supra* note 325, at 223.

335. *Id.* at 231.

that participants were unable to discern the smell of marijuana when diesel exhaust fumes were nearby.[336] The study further found that participants who believed themselves capable of detecting marijuana were more likely to believe they had smelled it when there was no marijuana present.[337] In short, this study found that "claims made by police officers were implausible when tested experimentally."[338]

While this is the only published study to focus on the smell of marijuana in typical search and seizure encounters, its findings suggest at least that courts, like those in Illinois, should not accept an officer's mere claim that he smelled marijuana. It may be possible to enhance a person's ability to detect a certain smell through training,[339] but there is nothing to suggest that law enforcement officers have been trained in such a way.[340] Further, a more recent study that tested the ability of individuals to detect the smell of marijuana in different types of containers discovered that, in the right conditions, a person can smell marijuana in both a sealed Ziploc bag and a sealed pop-cap container. [341] The study's authors provided multiple reasons for why their results are not applicable to police officers conducting traffic stops, such as their use of strains known for their "distinct aroma profiles,"[342] the dilution to the smell caused by the larger air volume of a vehicle, the potential use of "physically partitioned storage spaces" like glove compartments, and the presence of "competing ambient odors" in a real-world situation.[343]

However, this study used five grams of marijuana,[344] a legal possession amount in Illinois,[345] and found that the smell of marijuana was detected, even when placed inside a sealed container[346] like that required in Illinois for motor vehicle transport.[347] Thus, the results refute one important point suggested by the Illinois Supreme Court in *People v. Hill*: the smell of marijuana cannot reliably indicate to a police officer that marijuana within the vehicle is improperly contained.[348]

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336. *Id.*

337. *Id.* at 231-32.

338. Gilbert & DiVerdi, *supra* note 333, at 169 (citing Doty et al., *supra* note 325, at 223-233).

339. *See, e.g.,* Richard S. Smith et al., *Smell And Taste Function In The Visually Impaired*, 53 PERCEPTION & PSYCHOPHYSICS 649, 655 (1993) (testing the change in smelling ability in the visually impaired before and after training exercises meant to improve smell detecting ability).

340. Doty et al., *supra* note 325, at 231.

341. Gilbert & DiVerdi, *supra* note 333, at 170.

342. *Id.*

343. *Id.* at 171.

344. *Id.* at 170.

345. 410 ILL. COMP. STAT. 705/10-10.

346. Gilbert & DiVerdi, *supra* note 333, at 170.

347. 410 ILL. COMP. STAT. 130/30(2)(E).

348. *Hill*, 2020 IL 124595, ¶ 35.

The results of this recent container study and the University of Pennsylvania study suggest that the underlying presumption that officers are able to detect marijuana in a traffic stop with their sense of smell is not based in fact.[349] The authors of the study suggest that just as with drug-sniffing dogs, "standardized procedures are needed to establish the smell ability of law enforcement officers who are called on to testify about odors of illicit drugs."[350] Until such a standardized system exists, the underlying assumption that an officer can actually detect marijuana using his sense of smell during a traffic stop is not supported by evidence.[351] Considering the lack of scientific data and police training on marijuana smells, Illinois should not base its rulings affecting privacy rights on unsubstantiated claims.

2. *Frustrates the Social and Economic Goals behind Decriminalization and Legalization*

Illinois' policy that the smell of marijuana provides sufficient probable cause to justify a warrantless search of a vehicle contradicts the intention behind decriminalization and legalization, frustrating the state's goals.[352]

a. Social Goals

The legislative intent behind amending Illinois statutes to decriminalize possession of small amounts of marijuana was to lessen the prison population and refocus police resources towards more serious criminal offenders.[353] Further, Bruce Rauner, the Republican governor in office when the amendment passed, cited the difficulty incarceration imposes on a family, both emotionally and financially, especially as released offenders struggle to obtain employment.[354] Illinois passed decriminalization with the goal of treating possession of small amounts of marijuana in the same manner as traffic offenses.[355] Public ballots reflected that Illinois citizens agreed with these positions and preferred that police energy and resources be focused more towards serious criminal

349. Doty et al., *supra* note 325, at 231.

350. *Id.* at 232.

351. *Id.*

352. For a discussion on the goals of decriminalization on the national scale, see Woods, *supra* note 189.

353. Krisai, *supra* note 16.

354. Bryant Jackson-Green, *Illinois Gov. Bruce Rauner Signs Marijuana Decriminalization Bill*, ILL. POL'Y (July 29, 2016), www.illinoispolicy.org/rauner-signs-marijuana-decriminalization-bill/.

355. Krisai, *supra* note 16 (stating that decriminalization would allow law enforcement to issue infractions, similar to how traffic laws are enforced).

conduct.[356]

While the goals behind decriminalizing were certainly admirable, Illinois' legalization legislation earned the state widespread respect and positive press.[357] When Governor Pritzker signed The Cannabis Regulation and Tax Act,[358] Illinois became the first state whose legislation both legalized sale and possession of marijuana and sought to reduce the harm to communities most affected by the war on drugs.[359] While white people and black people use marijuana at similar rates, a black person in America is 3.64 times more likely to be arrested for marijuana possession than a white person.[360] This rate of racial disparity was much worse in Illinois, however, where a black person in 2018 was 7.51 times more likely to be arrested for marijuana possession than a white person.[361]

The Cannabis Regulation and Tax Act attempts to reduce this impact on black communities by undoing the past and creating opportunities for the future.[362] The Act automatically expunges past convictions for possession of up to 30 grams of marijuana and creates a more streamlined process for expunging convictions for possession of between 30 and 500 grams of marijuana.[363] In total, 770,000 marijuana-related records became eligible for expungement under the Act.[364] As for future growth, the Act established a 20 million dollar low-interest loan program for qualified "social equity applicants," to "defray the start-up costs associated with entering the licensed cannabis industry."[365] A social

356. Tom Angell, *Voters in Illinois' Cook County Approve Marijuana Legalization Ballot Measure*, FORBES (Mar. 20, 2018), www.forbes.com/sites/tomangell/2018/03/20/illinois-voters-approve-marijuana-legalization-ballot-measure/#3512f4a87951.

357. *E.g.,* Candice Norwood, *Why Illinois' Marijuana Legalization Law Is Different From All Others*, GOVERNING (June 11, 2019), www.governing.com/topics/public-justice-safety/gov-illinois-marijuana-legalization-legislature.html; Ben Curren, *"The Gold Standard": Lessons From Illinois On Cannabis Legalization*, FORBES (July 1, 2019), www.forbes.com/sites/bencurren/2019/07/01/the-gold-standard-lessons-from-illinois-on-cannabis-legalization/#394a7b583ec1.

358. 410 ILL. COMP. STAT. 705/1 *et seq.*

359. Curren, *supra* note 357.

360. *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU 5 (Apr. 2020), www.aclu.org/sites/default/files/field_document/042020-marijuanareport.pdf.

361. *Id.* at 32.

362. *New Illinois Legalization Bill Means Unprecedented Social and Criminal Justice Reform*, MARIJUANA POL'Y PROJECT (Dec. 2019), www.mpp.org/states/illinois/new-illinois-legalization-bill-means-unprecedented-social-and-criminal-justice-reform/.

363. *Id.*

364. Curren, *supra* note 357.

365. *Adult Use Cannabis Summary*, ILLINOIS.GOV, www2.illinois.gov/IISNews/20242-Summary_of_HB_1438__The_Cannabis_Regulation_and_Tax_Act.pdf (last visited May 7, 2020).

equity applicant is an Illinois resident with at least 51 percent ownership in the business who has resided in a disproportionately impacted area[366] or who has been arrested or convicted of a marijuana-related crime, now subject to expungement.[367]

These social goals were a primary driving force towards legalization in the state of Illinois. As Governor Pritzker described the law's provisions in a press conference, he made that intent clear, stating, "For the many individuals and families whose lives have been changed – indeed hurt – because the nation's war on drugs discriminated against people of color, this day belongs to you."[368]

b. Economic Goals

In addition to the social policies above, a primary goal behind Illinois' decision to decriminalize marijuana was economic, as was its later decision to legalize.[369] As to decriminalization, the Illinois Sentencing Policy Advisory Council analyzed the benefits and estimated a net profit in the three years following decriminalization to land between 19.3 million dollars and 23.9 million dollars.[370] Specifically, the costs associated with arrest, processing, and incarcerations of those possessing less than 10 grams of marijuana between 2012 and 2015 was 13.1 million dollars, a cost that would drop to 0 dollars after decriminalization.[371] If possession of marijuana was a civil infraction over the same period of time, it would have not only saved the state millions of dollars, but also generated over 9 million dollars in revenue.[372]

This study also examined the impact decriminalization would have on law enforcement in Illinois by examining the time saved by processing a civil violation instead of a criminal violation.[373] Between 2012 and 2014, Illinois law enforcement arrested 90,783 people for possession of less than 10 grams of marijuana.[374] As civil violations do not require transporting the offender to a station,

366. *See* 410 ILL. COMP. STAT. 705/1-10 (defining "Disproportionately Impacted Area" based on the area's rates of poverty, unemployment, and arrests, convictions, and incarcerations related to cannabis).

367. *Id.*

368. Jessica Corbett, *Equity-Centric Bill to Legalize Recreational Marijuana Introduced by Illinois Dems*, COMMON DREAMS (May 6, 2019), www.commondreams.org/news/2019/05/06/equity-centric-bill-legalize-recreational-marijuana-introduced-illinois-dems.

369. Krisai, *supra* note 16.

370. ILL. SENTENCING POLICY ADVISORY COUNCIL, *H.R.B. 4257 & S.B. 2228 Reductions for Possession of Cannabis Under 500 Grams* 1 (Mar. 8, 2016), *available at* www.spac.icjia-api.cloud/uploads/HB4357_SB2228_Cannabis_Analysis_030816_UPDATED-20200106T18340271.pdf.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

fingerprinting, booking, or arrest paperwork, an officer has more time to focus on more serious offenses after decriminalization.[375] Assuming the process of writing a ticket would take about 15 minutes, officers would have an additional 26,696 hours over the span of three years to devote to other police work.[376] This benefit of decriminalization was demonstrated in Chicago, a city that decriminalized possession in 2012.[377] In 2011, Chicago police reported 21,000 arrests for marijuana possession, but after the city passed its decriminalization ordinance in 2012, that figure steadily dropped resulting in only 94 arrests in 2017.[378] Hoping for similar economic savings, and in part due to the findings of the Illinois Sentencing Policy Advisory Council, Illinois decriminalized possession of small amounts of marijuana in 2017.[379]

Legalization was similarly motivated by an economic need in the state of Illinois. Illinois has struggled with financial crises for over a decade, receiving the lowest credit score among all states in the nation.[380] When he took office, Governor J.B. Pritzker inherited a 2.8 billion dollar budget deficit.[381] Recognizing the need to generate revenue and boost the state's economy, the Illinois Economic Policy Institute and the Project for Middle Class Renewal studied the financial impact of legalizing marijuana in Illinois.[382] The resulting report estimated that if marijuana were legalized and taxed, an estimated 1.6 billion dollars would be sold in the state, generating 525 million dollars in new tax revenue.[383] Further, the report concluded that Illinois taxpayers would save "18.4 million annually in reduced incarceration costs, law enforcement spending, and legal fees."[384] The governor's budget estimated that the state would collect 28 million dollars in cannabis tax revenue before June 30, 2020, but the state is on track to surpass that estimate.[385] In the

375. *Id.*

376. ILL. SENTENCING POLICY ADVISORY COUNCIL, *supra* note 369, at 7.

377. Frank Main, *Marijuana Arrests in Chicago Plummet, but Blacks are 'Vast Majority' of Cases*, CHI. SUN TIMES (July 13, 2018), www.chicago.suntimes.com/cannabis/marijuana-arrests-enforcement-chicago-police-declines-possession-blacks-african-americans-most-often-charged-ticketed-cannabis-weed-watchdogs/.

378. *Id.*

379. Garcia, *supra* note 195.

380. Ted Dabrowski & John Klingner, *The History of Illinois' Fiscal Crisis, Illinois Policy,* ILLINOIS POL'Y INST., www.illinoispolicy.org/reports/the-history-of-illinois-fiscal-crisis/ (last visited Apr. 25, 2020).

381. Adam Schuster, *A 5-Year Plan to Balance Illinois' Budget, Pay off Debt, & Cut Taxes*, ILLINOIS POL'Y INST., www.illinoispolicy.org/reports/the-history-of-illinois-fiscal-crisis/ (last visited Apr. 25, 2020).

382. Frank Mazo IV et al., *The Financial Impact of Legalizing Marijuana in Illinois*, ILL. UPDATE (Nov. 9, 2018), illinoisepi.files.wordpress.com/2018/11/ilepi-pmcr-financial-impact-of-legalizing-marijuana-in-illinois-final.pdf.

383. *Id.* at 4-5.

384. *Id.* at 3.

385. Ally Marotti, *Recreational Marijuana Sales in Illinois Generated More*

state's first month of legalization alone, Illinois generated over 10 million dollars in tax revenue.[386]

The allocation of tax revenue reflects again the state's priority on both social and economic goals. For example, while 35 percent of the revenue goes to the state's general fund, 10 percent is dedicated to Illinois' backlog of unpaid bills, and 25 percent of the revenue is dedicated to community development projects in areas with high arrest and poverty rates that were disproportionately affected by the war on drugs.[387] The Cannabis Regulation and Tax Act is explicit in the legislature's intention of achieving both social and economic goals.[388] It states,

> In the interest of allowing law enforcement to focus on violent and property crimes, generating revenue for education, substance abuse prevention, and treatment, freeing public resources to invest in communities and other public purposes, and individual freedom, the General Assembly finds and declares that the use of cannabis should be legal . . . .[389]

c. The Social and Economic Goals are Frustrated by the Illinois Supreme Court formally adopting a policy that the smell of marijuana justifies a warrantless search

Illinois courts continuing to hold that the smell of marijuana is indicative of criminal activity directly contradicts the social and economic goals behind decriminalizing, and legalizing marijuana possession. Such a policy undermines the legislative intent to redirect police efforts and restructure the state's criminal justice system towards more serious criminal offenders.[390] It lowers the economic and social benefits of legalizing, by reinforcing the very police practices that the state sought to address.[391] When the court allows police officers to search based on the smell of marijuana, it indicates that searching for marijuana is a worthwhile use of police time.[392] It indicates that police officers are still justified in expending resources in the search for a substance that is legal to

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than $10 Million in Tax Revenue in January, CHI. TRIBUNE (Feb. 25, 2020), www.chicagotribune.com/marijuana/illinois/ct-biz-illinois-legal-weed-tax-evenue-20200224-iorl7m53qfburbrh7lv7gzszhm-story.html.

386. *Id.*

387. *Adult Use Cannabis Summary*, *supra* note 365, at 7.

388. 410 ILL. COMP. STAT. 705/1-10 (2020).

389. *Id.* § 1-10(a) (2020).

390. *See* Krisai, *supra* note 16; Jackson-Green, *supra* note 354.

391. *See* ACLU, *supra* note 360, at 5 (discussing Illinois's racial disparities as the third worst in the United States); *Adult Use Cannabis Summary*, *supra* note 365 (stating that the goal is investing in communities that have suffered through the war on drugs).

392. Woods, *supra* note 189, at 736.

possess.[393] It lowers the economic savings and undermines the legislative intent to end the racial disparities of marijuana policing.[394] This expenditure of resources is contradictory to the goal of deprioritizing marijuana possession and refocusing police power towards violent crimes.[395] The smell of marijuana only indicates that marijuana *may* be present.[396] It does not indicate that a criminal amount is present or that marijuana is improperly contained.[397] The mere smell of marijuana does not tell an officer anything about a potential suspect's propensity for violence[398] or drug use.[399] Therefore, continuing to allow police officers to search on these grounds frustrates the state's goals.

IV. PROPOSAL

When the Illinois Supreme Court reached its decision in *People v. Hill* it signaled that the smell of marijuana will remain sufficient justification for warrantless searches.[400] This policy fails to recognize the purposes of decriminalization and legalization and

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393. *Id.*

394. *See* Mazo et al., *supra* note 382, at 3 (concluding that reduced law enforcement spending associated with the policing of marijuana possession would save the taxpayers 5.21 million dollars).

395. *See* Woods, *supra* note 189, at 740 (citing Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2268 (2002); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (arguing there is harm to communities and affected motorists when police aggressively target "suspicions of wholly noncriminal conduct that voters and legislatures determined does not carry the type of moral culpability as crimes do, and that might be afforded weaker substantive and procedural protections as a result of being adjudicated in the administrative realm")).

396. *See generally* Doty et al., *supra* note 325 (testing the ability of individuals to detect the smell of marijuana in circumstances similar to a traffic stop).

397. *See generally* Gilbert & DiVerdi, *supra* note 333 (testing the ability of individuals to detect the smell of marijuana in containers with varying degrees of sealing).

398 *See* Mazo et al., *supra* note 382, at 9 (citing Erin Brodwin, *We Took a Scientific Look at Whether Weed or Alcohol is Worse for You and There Appears to be a Winner*, BUS. INSIDER (Aug. 28, 2018), www.businessinsider.com/alcohol-marijuana-which-worse-health-2017-11) (stating "[t]here is some evidence that marijuana users may actually be less likely to commit violence against a partner.").

399 *Id.* (citing Hefei Wen & Jason Hockenberry, *Association of Medical and Adult-Use Marijuana Laws with Opioid Prescribing for Medicaid Enrollees,* 178 HEALTH CARE POL'Y & L. 673, 673-679 (2018) (discussing study that found that opiate-related deaths decreased by about 33 percent in 13 states in the six years after medical marijuana was legalized).

400. *Hill*, 2020 IL 124595, ¶ 18 n.2 (citing *Wesby*, 138 S. Ct. at 588) ("Although we do not reach whether the odor of cannabis, alone, is sufficient to establish probable cause, the smell and presence of cannabis undoubtedly remains a factor in a probable cause determination.").

frustrates the state's economic and social goals. Decriminalization was an effort by Illinois lawmakers to stop prioritizing the policing and prosecution of citizens possessing small amounts of marijuana.[401] Legalization was even more explicit in its economic and social purposes, making Illinois the first state to pass legislation that not only legalizes possession, but also attempts to undo years of discriminatory policing.[402] By adopting a policy that the odor of marijuana is still indicative of criminal activity after decriminalizing possession of marijuana, Illinois courts have directly contradicted that effort.

This proposal asserts that the Illinois Supreme Court should accept review of a case involving a warrantless vehicle search that took place after legalization passed and was based on an officer's assertion that he smelled marijuana. The court should definitively hold that, after legalization, the smell of marijuana does not establish probable cause to more accurately reflect the legislative intent behind legalization.[403] This section proposes that Illinois should follow the example set by Massachusetts in *Commonwealth v. Cruz* and require an additional fact in support of probable cause that shows suspicion of criminal activity, not simply suspicion of marijuana possession.[404] Illinois could rely on its own pre-decriminalization precedent in *Argenian*[405] and *Wombacher*[406] as the groundwork for adopting such a policy. This section will highlight the benefits of refusing to accept the smell of marijuana as sufficient to establish probable cause and suggest that doing so would better serve Illinois' budgetary and social goals.

The Illinois Supreme Court should accept certiorari of a case that would definitively answer the questions left open by *People v. Hill*. Illinois should follow the example of Massachusetts and adopt a policy that the odor of marijuana, on its own, cannot establish probable cause for a warrantless search, even in the vehicle context.[407] As discussed in more detail above, the Massachusetts Supreme Court in *Commonwealth v. Cruz* held that the odor of marijuana emanating from a driver's car, detected by a trained

401. *See* Savannah Eadens, *Decriminalization May be Road to Legalization in Illinois*, CHRON. (Feb. 19, 2018), www.columbiachronicle.com/metro/article_b7f32c32-12c2-11e8-a282-bb65f098d764.html (stating that lawmakers in Illinois pushed for decriminalization due to concerns regarding public safety, the state's budget crisis, and incarceration rates amongst non-violent offenders); Jackson-Green, *supra* note 354 (describing rationale behind decriminalizing in Illinois as "not only does this reform stop wasting police resources that can be better focused on more serious crimes, it'll save the state millions in enforcement and incarceration costs.").

402. Curren, *supra* note 357.

403. Corbett, *supra* note 368.

404. *Cruz*, 945 N.E.2d at 910.

405. *Argenian*, 423 N.E.2d at 290.

406. *Wombacher*, 433 N.E.2d at 374.

407. *Cruz*, 945 N.E.2d at 910.

police officer, did not provide that officer with sufficient probable cause to conduct a warrantless search because "no facts were articulated to support probable cause to believe that a *criminal* amount of contraband was present in the car."[408] Therefore, Massachusetts adopted a policy that the officer cannot rely on the smell of marijuana alone to establish probable cause, but must present an additional fact to support a suspicion that the driver possesses more than one ounce, the criminalized amount in the state.[409]

Illinois' legal system should adopt a policy mirroring that of the Massachusetts court. In practice, this would mean that an officer basing his probable cause assessment on his detection of the smell of marijuana would also be required to state a corroborating fact that indicates the smell is tied to criminal activity.[410] For example, the officer must have reason to believe that the person is transporting a criminal amount of marijuana or is currently intoxicated while driving.[411] The corroboration could include, as suggested in *People v. Hill*, marijuana improperly stored in plain view. However, the court must recognize that smell is not the same as sight and reject *Hill*'s suggestion that the smell may indicate improper containment. If the only conclusion that can be drawn from the officer's facts in support of his probable cause determination is that the driver may possess marijuana in some amount, there is no justification for a search because possession of marijuana is legal in the state of Illinois. Therefore, an officer suspecting possession of marijuana does not have probable cause to justify a warrantless vehicle search, and Illinois courts should suppress any evidence discovered.[412]

Illinois has already laid the groundwork for adopting such a policy in its previously overturned cases of *Argenian*[413] and *Wombacher*.[414] Had these cases not been overturned, the policy in Illinois would already be very similar to this proposal. The holdings required that an officer who asserts that his probable cause analysis was based on the smell of marijuana must also provide an

408. *Cruz*, 945 N.E.2d at 913.

409. Massachusetts has continued to apply its holding in *Cruz* to cases involving probable cause determinations based on the scent of marijuana. *See, e.g.*, Commonwealth v. Lobo, 978 N.E.2d 807 (Mass. App. Ct. 2012) (holding that a police officer's detection of odor of "freshly burnt marijuana" following vehicle stop did not justify exit order in absence of other evidence of criminal activity); Commonwealth v. Daniel, 985 N.E.2d 843 (Mass. 2013) (holding 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).

410. *Cruz*, 945 N.E.2d at 910.

411. 625 ILL. COMP. STAT. 5/11-501 (2020).

412. Suppression is the remedy for evidence seized in an illegal search or seizure. *See* discussion *supra* note 35.

413. *Argenian*, 423 N.E.2d at 290.

414. *Wombacher*, 433 N.E.2d at 374.

additional corroborating fact.[415] As the court provided in *Wombacher*, this additional corroborating fact could be that the officer saw a partially burnt marijuana cigarette in the vehicle's ashtray.[416] However, if the only factual support for the officer's probable cause determination was the odor of marijuana, the court found probable cause lacking and the evidence was suppressed.[417]

These cases were ruled on 30 years prior to decriminalization, when possession of marijuana in any amount was a felony.[418] Yet, they were more progressive and protected the privacy of Illinois citizens more than the post-legalization holding of *People v. Hill*. The current policy is especially troubling as the only limit on whether the smell of marijuana provides sufficient probable cause is an officer's mere assertion that his training helped him detect the smell.[419] Not only does evidence suggest that these officers are incapable of detecting the smell in a traffic stop context,[420] but the required training is undefined, unregulated, and would potentially be ineffective regardless.[421] Clearly, Illinois courts should revisit this issue now that the state has redefined the legal status of marijuana. As the Illinois Supreme Court stated in *Argenian*, allowing an officer's mere assertion that he smelled marijuana to establish probable cause "could conveniently be used to justify any search at any time."[422]

Adopting the policy proposed here would better accomplish the state of Illinois' social and economic goals. Legalization was intended to shift the incarceration population towards violent offenders and save Illinois taxpayers and police officers time and money by refocusing their efforts towards those offenders.[423] The legislation intended to save money ordinarily spent on arresting, prosecuting, and jailing citizens possessing small amounts of marijuana while also generating revenue through taxable sales.[424] Adopting a policy that the odor of marijuana does not provide sufficient probable cause, unless corroborated by a fact indicating *criminal* conduct, is required to accomplish these goals. Otherwise, the police, the courts, and the state itself will continue to expend resources on searches resulting from the smell of marijuana.

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415. *Argenian*, 423 N.E.2d at 290; *Wombacher*, 433 N.E.2d at 377.

416. *Wombacher*, 433 N.E.2d at 376 (citing People v. Loe, 306 N.E.2d 368, 369 (Ill. App. Ct. 1973)).

417. *Id.*

418. *Wombacher,* 433 N.E.2d at 374-75 (stating defendant was charged with unlawful possession of cannabis after officers discovered a small amount of marijuana).

419. *See supra* notes 279-282 and accompanying text.

420. Doty et al., *supra* note 325, at 231.

421. Smith et al., *supra* note 339, at 655.

422. *Argenian*, 423 N.E.2d at 290.

423. *See* discussion *supra* Section III.D.

424. *See* discussion *supra* Section III.D.

However, if Illinois were to adopt such a policy, police officers relying on the smell of marijuana in probable cause determinations would quickly be deterred from that behavior as the evidence obtained in their searches would become inadmissible.[425] Thus, requiring corroborating evidence of criminal behavior would refocus the police force's time and money towards violent offenders, just as the state of Illinois intended.

V. CONCLUSION

Illinois' current policy arises out of the history of Fourth Amendment jurisprudence surrounding expectations of privacy in the vehicle context. It reflects an extension of the plain view doctrine to find that the odor of marijuana places the illegal contraband in front of the officer, just as seeing a bag of marijuana would. This reasoning no longer applies after legalization. Further, Illinois' policy is based on an underlying assumption that officers are capable of detecting the smell of marijuana as easily as an officer can identify it by sight. While courts throughout the United States are holding that the smell of marijuana can still establish probable cause for a vehicle search even after decriminalization or legalization, their justification fails to reflect the intent and goals of deprioritizing marijuana. As Massachusetts correctly reasoned, decriminalization and legalization reflect legislative intent and voter desire that police officers spend their resources searching for evidence of violent offenses.

When Illinois decriminalized marijuana, the intent was similarly aimed to refocus resources away from adults possessing small amounts of marijuana intended for personal use. Legalization went even further, with the State of Illinois setting a bold example for how a state can draft legislation to both increase tax revenue and decrease racial disparity associated with marijuana prohibition. Unfortunately, the admirable goals of the state's legislators have been frustrated by Illinois courts adopting a policy that the smell of marijuana is still indicative of a crime and still sufficient to establish probable cause. It is time for the Illinois Supreme Court to definitively answer the question it left open in *People v. Hill* and hold that the smell of marijuana can no longer establish probable cause without additional facts suggesting *criminal* behavior. Illinois' people and legislature have spoken, but their economic and social goals are out of reach until Illinois courts change their position and deprioritize policing of marijuana possession as legalization intended.

425. *See* discussion *supra* note 35.