STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

Supreme Court No. 165233

Court of Appeals No. 360693
Circuit No. 21-003294-01-FH

-vs-

JEFFERY SCOTT ARMSTRONG

Defendant-Appellee

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

NEIGHBORHOOD DEFENDER SERVICE
Attorney for Jeffery Armstrong

AMICUS BRIEF OF THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML)

Oral Argument Requested

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INTEREST OF AMICUS CURIAE[1]

NORML's mission is to advocate for public policy changes so responsible possession and use of marijuana by adults is no longer subject to criminal penalties. NORML also advocates for a regulated commercial cannabis[2] market so that activities involving the for-profit production and retail sale of cannabis products are safe, transparent, consumer-friendly, and subject to state and/or local licensure. NORML further advocates for additional legal and regulatory policy changes so those who consume marijuana responsibly no longer face social stigma or workplace discrimination, and so those with past criminal records for marijuana-related violations can have their records automatically expunged.

[1] Pursuant to MCL 7.212(H)(3), Amicus states that no counsel for a party authored the brief in whole or in part and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

[2] "cannabis" and "marijuana" are used interchangeably throughout, and have the same meaning.

SUMMARY OF ARGUMENT

With passage of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), the odor of marijuana alone—whether "burnt" or "raw"—no longer provides either probable cause to conduct a warrantless search under the automobile exception to the Fourth Amendment[3], or an inference creating reasonable suspicion to justify a limited inquiry under *Terry v. Ohio*, 392 U.S. 1 (1968).

Michigan's MRTMA affords all citizens over the age of twenty-one the right to possess, transport, and home-grow cannabis, as well as to consume it privately. Given its legalization, the mere scent of cannabis alone is no longer a valid gauge of probable cause to justify a warrantless search of an automobile, nor does it create reasonable suspicion triggering an inquiry of the occupants. Notably, cannabis has an often strong and distinctive odor—much as do summer straw, honeysuckle and roses, baked bread, barbecue ribs, fried chicken, and gasoline—that is capable of being wafted on the wind, filling the air, and leaving streets, parks, buses, trains, taxis, and cars redolent with its scent.

Furthermore, as experience informs us all, our sense of scent is far less reliable than our sense of sight. Absent seeking smoke, plain-view evidence of public use,

[3] The Fourth Amendment to the U.S. Constitution provides that "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."

or an admission by the subject, the mere smell of cannabis alone in any form in Michigan is far more likely to derive from lawful cannabis use or possession rather than illegal public consumption.

Multiple states' courts of appeal addressing the enactment of state-legal cannabis laws have held that the mere scent of cannabis, without more, does *not* constitute probable cause to conduct a warrantless search of an automobile. Amicus NORML further asserts that the subjective smelling of cannabis alone, without any other evidence, is no longer a valid basis for reasonable suspicion. To hold otherwise would undermine the state policy objectives of legalizing cannabis, and expose countless citizens to unfounded searches by law enforcement officers operating nearly unfettered by the Fourth Amendment and State Constitution, based upon nothing more than their purported and often unreliable olfactory impressions of what is today almost-always lawful conduct.

ARGUMENT

MERE SCENT OF CANNABIS IS NOT A VALID BASIS FOR PROBABLE CAUSE TO SEARCH OR REASONABLE SUSPICION TO INQUIRE

A. Relevant Facts

Familiarity with the facts is presumed, and only restated as necessary. Appellee Jeffrey Scott Armstrong's parked vehicle was surrounded by police officers, rendering him unable to leave. He was, at this juncture, legally detained. Armstrong and his passenger were then confronted by law enforcement officers because one officer had purportedly smelled "burning" cannabis in the air as she drove down the public street, near the public parking area in which Armstrong's car was parked. While boxed in and not free to leave, the officers asked whether he possessed cannabis, was smoking it, or had been previously. Armstrong replied in the negative, and yet, absent any other indicia of criminal activity to support even the lower-level inquiry upon reasonable suspicion that is attendant to a *Terry* stop, he and the passenger were removed from the vehicle and a weapon recovered from under his passenger's seat.

Both the trial and intermediate appellate courts correctly held that, in light of the MRTMA, this Court's earlier decision in *People v. Kazmierczak*, 461 Mich 411 (2000) that the "very strong smell of marijuana emanating from [a] vehicle"

established probable cause to search was no longer valid, and there was no constitutionally permissible basis to stop and search Armstrong or his vehicle.

B. Recreational Cannabis Legalization Vitiated the Probity of Scent

On November 6, 2018, Michigan residents voted to pass the Michigan Regulation and Taxation of Marihuana Act (MRTMA), thereby legalizing cannabis for recreational consumption. Adults over twenty-one (21) years of age may possess or transport up to 2.5 (2.5) ounces of marijuana at any time, possess up to ten (10) ounces in their homes, and grow up to twelve (12) plants at home. There are an infinite number of ways in which the scent of cannabis can lawfully enter the domain of our olfactory perceptions.

Given that any adult in the State of Michigan can legally smoke cannabis at home or privately, travel with cannabis, store even larger quantities in their clothes closets, and grow multiple flowering marijuana plants at home, there is no longer a valid basis from which to conclude that the scent of marijuana itself is evidence of anything illegal.

C. Other States' Courts of Appeal Reject Scent Alone as a Basis to Search

As more and more states legalize recreational cannabis, courts throughout the country have been tasked with redeciding the question of whether mere odor of cannabis alone constitutes a legal basis for an automobile search. Thus far, they have

uniformly decided that it does not. *See, e.g.*, *Commonwealth v Cruz*, 459 Mass. 459, 464 (MA 2011); *State v Torgerson*, 995 NW2d 164, 174 (MN 2023); *State v Schoendaller*, 176 Mont. 376 (MT 1978); *Pennsylvania v Barr*, 240 A3d 1263 (PA 2020); *Zullo v Vermont*, 209 Vt. 298 (VT 2019).

In *Commonwealth v Cruz*, 459 Mass. 459 (MA 2011), the defendant was parked at a hydrant, smoking a small cigar of the type commonly used to roll a "blunt." He acted nervously when approached by police officers, who purportedly smelled the faint aroma of burnt marijuana. They ordered him out of the car, ultimately recovering crack cocaine. Massachusetts' Supreme Judicial Court, affirming the lower court, held that, since state law had changed the status of possessing one ounce or less of marijuana from a crime to a civil violation, "without at least some other additional fact to bolster a reasonable suspicion of actual criminal activity, the odor of burnt marijuana alone cannot reasonably provide suspicion of criminal activity to justify an exit order." *Id.* at 464.

The court also held that since there was no probable cause to believe that a criminal amount of cannabis was present in the car and thus no basis to issue a search warrant, it was unreasonable for the police to order the defendant out of the car in order to facilitate a warrantless search for criminal contraband under the automobile exception to the Fourth Amendment warrant clause. *Cruz* at 476.

In *State v. Torgerson*, 995 NW2d 164 (MN 2023), the Minnesota Supreme Court held that the odor of marijuana emanating from a stopped vehicle, by itself, was insufficient to create the requisite probable cause to search a vehicle under the automobile exception to the warrant requirement. Notably, in *Torgerson*, the smell of cannabis was detected by two law enforcement officers during a traffic stop as *emanating from the vehicle*, whereas in the present case, a single law enforcement officer alleged that she smelled the odor of burning marijuana in the open air of a public street as she was driving by Anderson's parked car. The evidentiary basis to stop, let alone search Anderson's car, was more tenuous than that rejected by the court in *Torgerson*.

Long ago, in *State v. Schoendaller*, 176 Mont. 376 (MT 1978), the Montana Supreme Court recognized that since "the mere odor of marijuana might linger in an automobile for more than a day," basing a warrantless automobile search on "a strong odor of marijuana in the car," without any exigent circumstances, fell "closer to the realm of bare suspicion than probable cause." *Id.* at 382.

In *Pennsylvania v Barr*, 240 A3d 1263 (PA 2020), the Pennsylvania Supreme Court held that, given the passage of the state's Medical Marijuana Act, ("MMA"), which had legalized the possession and use of marijuana in limited circumstances, the smell of marijuana could be a factor, but not a stand-alone one,

in determining whether the totality of the circumstances established probable cause to permit a police officer to conduct a warrantless search of a vehicle.

In *Zullo v Vermont*, 209 Vt. 298 (VT 2019), a civil rights action, the Vermont Supreme Court found an exit order for a driver that had been pulled over to be proper only because there existed an "articulable and reasonable basis to order plaintiff to exit his vehicle to determine whether plaintiff was driving impaired" *id.* at ¶ 75, including "the faint smell of burnt marijuana, in conjunction with the trooper's observations of items that may be used to mask the effects of smoking marijuana." *Id.* Acknowledging that probable cause may exist based upon the nature and strength of those odors, along with the presence of other factors, the court noted particularly that, "the faint smell of burnt marijuana is far less probative as to whether a car contains marijuana than, say, an overpowering odor of fresh marijuana emanating from the trunk of a car." *Id.* at ¶ 81.

Here, by legalizing the possession of cultivation, transport, and private consumption of cannabis, Michigan has changed the rubric for evaluating probable cause based upon odor alone. No longer is cannabis illegal for anyone to possess. Nor is it any longer limited to legal possession by only a small population of medical patients. To the contrary, any adult can possess and transport up to 2.5 ounces of cannabis, store up to ten (10) ounces, and home-grow up to twelve (12) fragrant and flowering cannabis plants. Any adult can privately consume cannabis at home, even

though its scent may emanate out into the community, just as when they are making coffee or baking bread. Given this dramatic change in its legal status, the scent of marijuana cannot be the sole basis for either a reasonable suspicion or probable cause finding.

D. The Unreliability of Smell

Finally, the time has come to end the practice of granting law enforcement officers authority to search based solely upon their unproven assertion of the ability to detect the scent of cannabis.[4] This is particularly so in jurisdictions where it has become a legal consumer product like lettuce or lavender. Cannabis, admittedly, can have a strong and distinctive odor. However, just like infinite other scents, from blossoming wildflowers and mown grass to pig manure and ammonia, it is capable of travelling sightlessly on the wind over long distances, filling the air, and lingering in public streets and parks, buses, trains, taxis, and cars. It impregnates itself into clothing and private spaces. One might smell cannabis, but without more, cannot with any degree of accuracy know when it was used or from where it came.

All of the various forms of marihuana produce exceedingly different odors.[5] Accordingly, there is no predictive value whatsoever in a police officer's contention

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

[5] For example, MCL 333.27953(3)(a) provides that to "cultivate" marihuana:

means to propagate, breed, grow, harvest, dry, cure, or separate parts of the marihuana plant by manual or mechanical means. Id.

Marihuana in any of these stages will offer different odors. Pursuant to MCL 333.27953(3)(e), "marihuana" means:

> (e) "Marihuana" means all parts of the plant of the genus cannabis, growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin, ***including marihuana concentrate and marihuana-infused products.*** For purposes of this act, marihuana does not include: (1) the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from those stalks, fiber, oil, or cake, or any sterilized seed of the plant that is incapable of germination; ***(2) industrial hemp; or (3) any other ingredient combined with marihuana to prepare topical or oral administrations, food, drink, or other products.*** Id. (emphasis added).

MCL 333.7106(4) provides similarly. The boldfaced / italicized language in (e) immediately hereinabove however, is not included:

> "Marihuana" means all parts of the plant Cannabis sativa L., growing or not; the seeds of that plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. Marihuana does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from those stalks, fiber, oil, or cake, or any sterilized seed of the plant that is incapable of germination. ***Marihuana does not include industrial hemp.*** Id. (emphasis added).

MCL 333.27953(3)(c) defines "Industrial Hemp" as:

> a plant of the genus cannabis and any part of that plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration that does not exceed 0.3% on a dry-weight basis, or per volume or weight of marihuana-infused product, or the

of the presence of the "odor of marihuana" such as to justify an OUID investigation, absent some other indicia of impairment. No such other indicia are present in the case at bar.

Here, there was also not a scintilla of evidence that the officer who allegedly smelled "burnt" versus "raw" cannabis—or, for that matter, any cannabis at all—had received any training sufficient to render this opinion with any degree of accuracy. In point of fact, despite a generally accepted belief that police officers can accurately detect the scent of marijuana, "the empirical basis for such claims is remarkably thin."[6]

> combined percent of delta-9-tetrahydrocannabinol and tetrahydrocannabinolic acid in any part of the plant of the genus cannabis regardless of moisture content. Id.

Meanwhile, the federal definition of "marihuana" is similar. Title 21, Chapter 13, Section 802 of the U.S. Code provides:

> (A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
> (B) The term "marihuana" does not include—
> (i) hemp, as defined in section 1639o of title 7; or
> (ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. Id., 21 U.S.C. 802(16).

[6] *See* Cece White, The Sativas and Indicas of Proof: Why the Smell of Marijuana Should Not Establish Probable Cause for a Warrantless Vehicle Search in Illinois,

In a study 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 in which they showed that although the smell of marijuana was detectable through a garbage bag immediately in front of a participant, it was not detectable when the bag was placed in the trunk of a vehicle.[7] The study showed that participants were unable to detect the smell of cannabis when diesel exhaust fumes were nearby[8], that participants who believed they were capable of detecting cannabis were more likely to believe they had smelled it when there was none present[9], and that "claims made by police officers were implausible when tested experimentally."[10]

The limited research data currently available suggests that, given our human olfactory limitations, any presumption that a police officer can reliably detect the

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53 UIC J. Marshall L. Rev. 187, 222-225 (2020) (collecting studies), at fn. 333, citing Avery N. Gilbert & Joseph A. DiVerdi, *Human Olfactory Detection of Packaged Cannabis*, 60 SCI. & JUST. 169, 169 (2020).

[7] Doty et al., *supra* note 3, at 231.

[8] *Id.*

[9] *Id.* at 231-32.

[10] Avery N. Gilbert & Joseph A. DiVerdi, *Human Olfactory Detection of Packaged Cannabis*, 60 SCI. & JUST. 169, 169 (2020) (citing Doty et al., *supra* note 3, at 223-233).

presence of cannabis with only their sense of smell is not supported by the facts.[11] The purported scent of cannabis alone is therefore even less probative of its presence or recent use than many courts have presumed—yet another reason to reject it as a singular basis either to stop and inquire under *Terry v. Ohio*, 392 U.S. 1 (1968), or as probable cause for a warrantless automobile search.

CONCLUSION

For the reasons set forth herein, Amicus NORML respectfully submits that the mere scent of marijuana alone does not constitute probable cause to conduct the warrantless search of an automobile, nor reasonable suspicion justifying further inquiry of its occupants.

Dated: May 10, 2024
Michigan

[11] Doty et al., *supra* note 4, at 231.

Respectfully submitted,

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(Admitted in NYS; On the Brief)

Pursuant to MCR 7.312(A) and 7.212(B)(3), the countable number of words in this document is 2,421.