Cannabis Conundrum

Judge Mary Celeste (Ret.) (Lead Author)
&
Francesca Jenkins (Co-Author)

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Introduction

Marijuana and hemp are varieties of the cannabis plant. The marijuana plant appears in three types: sativa, indica, and a lesser-known non-psychoactive plant called ruderalis. The sativa and indica plants have hundreds of compounds including psychoactive and nonpsychoactive cannabinoids. The major psychoactive compound and cannabinoid within these two plants is called Delta-9-Tetrahydrocannabinol ("THC"). Hemp, which is sometimes confused with marijuana, is a botanical class of cannabis sativa but has only small amounts of THC relative to the amount grown to produce marijuana. "Both hemp and marijuana come from the same cannabis species but are genetically distinct and are further distinguished by use, chemical makeup, and cultivation methods." In 1970, with the passage of the Controlled Substances Act ("CSA"),

all cannabis varieties, *including hemp*, were designated Schedule I controlled substances (along with heroin, LSD, peyote, and ecstasy). While marijuana remains illegal under the CSA, hemp was subsequently removed from the CSA due to the passage of the Agriculture Improvement Act of 2018—more commonly known as the 2018 Farm Act. This has led to the propagation of hemp derivatives like cannabidiol ("CBD") and Delta-8 along with the proliferation of hemp products. To date and pursuant to the 2014 Farm Act and the 2018 Farm Act, forty-six states, two territories, and forty-five American Indian Tribes have enacted legislation to establish hemp production programs, allow for hemp cultivation research, or to approve hemp cultivation programs. Hemp is used to make a variety of commercial and industrial products, including rope, textiles, clothing, shoes, food, paper, bioplastics, insulation, and biofuel. The global industrial hemp market attained a value of USD 4.7 billion in 2020.

The cannabis hemp plant derivative, CBD, can be extracted from both the hemp and marijuana plants if its THC concentration does not exceed 0.3 percent THC weight. "Any plant containing less than a defined concentration of the psychoactive THC is classified as hemp." This concentration ranges from 0.2 percent of dry weight in most European countries, to 0.3 percent in Canada and the United States. CBD products are now widely available to consumers through a variety of channels such as convenience stores, tobacco stores, newsstands, pharmacies, and the internet. The CBD "global cannabidiol market size was valued at USD 2.8 billion in 2020 and is expected to expand at a compound annual growth rate (CAGR) of 21.2% from 2021 to 2028."

The proliferation of CBD and marijuana derivatives is impacting the courts, law enforcement, and workplace settings. It is creating a confusing testing environment for laboratories and potentially serious legal outcomes for citizens. CBD and Delta-8 users cannot rely on the fact that CBD is legal everywhere and Delta-8 is legal in some states because they may unknowingly be testing positive for illegal THC. A CBD Oracle Lab Study showed that some Delta-8 products contained 7,700 percent of the legal Delta-9-THC limit, which still remains federally illegal under the CSA. Lab tests done on CBD products by Ellipse Analytics found more than half of the two hundred products tested were inaccurately labeled and lab results showed that a quarter of them—more than fifty products—falsely claimed they were "THC-free." This is compounded by the fact that laboratories, when testing, cannot easily delineate between low levels of THC in hemp and higher THC amounts in marijuana. Formerly,

"laboratories had to identify hairs on marijuana flowers and test for the presence of cannabinoids, a process that required just a few minutes and a test strip that turned purple when it was positive." These lab tests are now more complex and consequently more expensive.

While on its face unwittingly and mistakenly using illegal THC in lieu of CBD may not seem troublesome, some users may suffer unfortunate personal and legal consequences. For example, a citizen who suffers from substance use disorders and practices a zero-tolerance alcohol and drug regime could lose their sobriety; a citizen who is mandated by a zero-tolerance drug policy through an employer may lose their job; a parolee or probationer who is mandated to practice a zero drug policy may have their parole or probation revoked; a driver may be charged and convicted with marijuana-impaired driving; a prospective employee may not be hired, or a defendant may be denied entry into a drug court program or be terminated from one. These consequences all materialize in the name of a positive THC test. People who have been injured by the mischaracterization of CBD as legal are bringing lawsuits against those companies who claim that their CBD products are legal concentrations, even though they ultimately tested positive for illegal THC.

Although there have been many past and present congressional attempts to declassify or reclassify marijuana under the CSA and there have been numerous legal challenges to the CSA classification, to date, we are at status quo with *legal* hemp and CBD and federally illegal marijuana. The hemp and CBD quagmire, piecemeal decriminalization by states, and differing state legalization of marijuana, all influence court decisions on the issue of cannabis search and seizure under the Fourth Amendment of the U.S. Constitution. The overall legalization of cannabis (including hemp) is impacting searches in homes, land, curtilage, vehicles, schools, workplaces, body specimens, and other scenarios, and is expanding and contracting exceptions to the search warrant requirement.

This Article will first briefly review the legal history of hemp and marijuana in the United States and examine the established legal constructs under the Fourth Amendment of the U.S. Constitution's search and seizure provision. Second, this Article will explore past and developing state and federal appellate and U.S. Supreme Court cases in a variety of cannabis search and seizure settings. Third, this exploration will be followed by a full discussion on the exceptions to the warrant requirement and other search contexts in relation to cannabis searches. Finally, the Article will conclude by identifying

trends related to the topic.

History of Marijuana & Hemp

The hemp plant and marijuana plants have a protracted legal history in the United States. In the early days of the colonial settlements and prior to 1937, the forebears owned hemp plantations, and hemp and marijuana were simultaneously legal. Indeed, "[i]t was a common crop in the colonies and fairly widespread. . . . at one point in the early 1600s, all settlers in the Jamestown colony were required to grow marijuana." At that time, hemp was primarily used for shipbuilding. Prior to the late 1950s, hemp in the United States was considered an agricultural commodity, and the U.S. Department of Agriculture ("USDA") supported its production.

While the hemp plant was supported historically, marijuana plants, those that have higher levels of THC, did not fare as well. This traditional lack of support is perhaps because the hemp plant is considered utilitarian, while the marijuana plant is associated with its psychoactive effects or "high." Irrespectively, in the past, marijuana (usually marketed as "cannabis") could be found openly on pharmacy shelves as a medicinal elixir for a variety of ailments. In 1916, however, individual states began to outlaw marijuana, and by 1931, a total of twenty-nine states had done so. During this period there were rising concerns about marijuana use being harmful, some of which appeared to be racially motivated. More saliently, the lumber, paper, and nylon industries saw industrial hemp as a competitive threat to their industries. Those industries began to assert their political influence to make hemp, and consequently marijuana, less accessible. Until today, marijuana and hemp were somewhat inextricable.

Some have argued that the lumber, paper, and nylon industries' economic interests served as the precipitating factor for the congressional support and passage of the Marijuana Tax Act, which simultaneously convoluted and taxed the use of marijuana *and*, inextricably, hemp. The Marijuana Tax Act of 1937 was the law of the land until the Act was challenged in 1969. It was challenged on Fifth Amendment privilege against selfincrimination grounds in the landmark U.S. Supreme Court case, *Leary v. United States*, which overturned the Act. Leary, who had been transporting marijuana in his vehicle, claimed that by filling out the necessary forms to comply with the Marijuana Tax Act, he would be legally incriminating himself. Leary argued that he would be admitting to transporting and possessing marijuana in violation of Texas law that had made it illegal to do so. Although Leary was convicted, his Fifth

Amendment challenge resulted in the nullification of the Marijuana Tax Act of 1937 as the federal government, on the heels of this decision, passed the CSA. In the interim between the Marijuana Tax Act of 1937 and the CSA, there were some intervening drug laws like the Boggs Act of 1951 and the Narcotics Control Act ("NCA") of 1956.

Hemp again took center stage with the passage of the Farm Act in 2018. According to the Center for Disease Control ("CDC"), in 2017, "[fourteen percent] of American adults smoked cigarettes," which [was] a sharp decrease from the 20.9 percent of American adults who smoked in 2005. In the past 20 years, tobacco production in the state has declined 54.0 percent, to 117.1 million pounds harvested in 2021. Providing that "Kentucky—the state with the secondlargest tobacco harvest in the United States (North Carolina comes in first)—is responsible for almost a quarter of that output." The reduction in the tobacco crop forced many farmers to look into other crops. Although one could say that economics motivated the passage of the Act, with tobacco farmers substituting for the lumber barons, it was also geopolitical.

After the 2014 Farm Bill passed, the United States government, under the United States Department of Agriculture ("USDA"), began to pilot and approve plans submitted by states and American Indian Tribes for the domestic production of industrial hemp. This ultimately led to the passage of the 2018 Farm Act, which U.S. Senator Mitch McConnell (R-KY) supported, because the people in his home state of Kentucky saw hemp as a lucrative replacement for tobacco. Speaking on the Senate floor prior to the 2018 Farm Act's passage, U.S. Senator McConnell stated, "[a]t a time when farm income is down and growers are struggling, industrial hemp is a bright spot of agriculture's future." This has been, to date, the only marijuana-related congressional bill supported by Senator McConnell.

Unlike hemp, seeking to remove or reclassify marijuana out from under the CSA has met with a more tortured history and with little success. Today, the CSA still classifies marijuana as a most dangerous drug. Many bills to either reclassify or declassify marijuana under the CSA have failed or are pending without much movement. As of the end of 2021, there are many marijuana-related bills sitting in committees, some of which took whole-cloth approaches while others are piecemeal. This list does not include all of the marijuana bills that have languished or died prior to 2021.

Additionally, to date, despite the many legal challenges to the marijuana classification, not one legal case has successfully overturned the marijuana classification under the CSA.

This leaves the United States with a mishmash of marijuana laws, with some states and localities decriminalizing small amounts of marijuana possession. Some states have fullblown or limited medical marijuana laws. Other states are without any medical marijuana laws, and some have recreational marijuana laws. Without a uniform federal approach to marijuana legalization, the states will continue to differ in their approaches to the legalization of cannabis. These varied existing and developing cannabis laws are impacting the courts in a variety of ways, including in the context of the Fourth Amendment. The new legal stance on marijuana and hemp, along with the similarities between them, are creating novel search and seizure issues. It is no longer clear that marijuana possession or use constitutes illegal activity or that marijuana is illegal contraband. Various parties are now asking courts who have once held that the odor of marijuana alone may serve to establish probable cause to secure a warrant, or, who have in the past considered marijuana to be illegal contraband, to reconsider the matter.

By way of example, prior to Illinois passing medical and recreational marijuana laws, the Illinois Supreme Court held that the uncorroborated detection of the cannabis odor by a trained and experienced police officer provided probable cause for that officer to conduct a warrantless search. In contrast, after Illinois's medical and recreational marijuana legalization, in a recent lower court ruling from Whiteside County, Illinois, the court held that the smell of marijuana does *not* give probable cause for officers to do a warrantless search during traffic stops.

Short of a change to the marijuana classification under the CSA, or U.S. Supreme Court decisions addressing cannabis search and seizure issues in the face of these new cannabis laws, the courts will continue to vary on cannabis search and seizure issues. Prior to more fully discussing the varying state and federal cases on the issue of hemp and marijuana legalization and decriminalization and its relationship to cannabis searches and seizures, it is necessary to review the Fourth Amendment legal constructs.

Fourth Amendment Constructs for Search and Seizure

The Fourth Amendment of the U.S. Constitution's search and seizure provision states:

> 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.

The provisions of the Fourth Amendment are applicable to the states. A court will uphold a search if there is a warrant for the search that complies with the criteria as set forth in the Fourth Amendment. It includes a sworn detailed statement made by a law enforcement officer before a neutral judge that details the person or place to be searched with specificity and that law enforcement officers show that there is probable cause to justify the search. Because a definition of probable cause is not within the Fourth Amendment itself, it has become one of court constructs. The U.S. Supreme Court has "defined 'probable cause' as an officer's reasonable belief, based on circumstances known to that officer, that a crime has occurred or is about to occur."

A court will also uphold a search if the defendant has legal authority over the items or places to be searched and voluntarily consents to the search. However, a search made pursuant to a warrant "cannot later be justified on the basis of consent if it turns out that the warrant was invalid." Additionally, a court will uphold a search if the search falls within a legally recognized exception to the warrant requirement. A warrantless search under one of the sanctioned exceptions requires the same probable cause standard required to secure a valid search warrant. The probable cause requirement for a search may not be necessary or has a lower standard of reasonableness in some specialized arenas including school searches, government offices, prisons, probation and parole regulation, and drug testing for public employees.

Despite the high constitutional protective standards under the Fourth Amendment, the exceptions to the warrant requirement for a search are numerous. The exceptions include the search incident to arrest exception, the automobile exception, the exigent circumstance exception, the plain view exception, which sometimes includes "plain smell," limited "open fields" exceptions, the limited pat-down and stop and frisk exceptions, the crimes committed in the presence of an officer exception, the community caretaking limited exception, the DUI checkpoints and borders exception, the administrative authorities searches exception in public schools, government offices, and prisons; the drug testing of public and transportation employees

exceptions, and the good faith exception to the exclusionary rule. Over the decades, U.S. Supreme Court case law has developed these exceptions to the warrant requirement for a warrantless search. In the 1970s, the U.S. Supreme Court was "closely divided on which standard to apply." In fact, "the balance tipped in favor of the view that warrantless searches are *per se* unreasonable, with a few carefully prescribed exceptions." Over time and "guided by the variable expectation of privacy approach to coverage of the Fourth Amendment, the Court broadened its view of permissible exceptions and of the scope of those exceptions." While the paramount consideration for these exceptions was historically based on the "reasonableness" of the search, the focus of the warrantless search exceptions were broadened by the U.S. Supreme Court to include privacy considerations. A hierarchy of protected places has since developed. For example, the home has the highest expectation of privacy, whereas a vehicle has a lesser expectation of privacy. The hallmark of the Fourth Amendment analysis to establish probable cause for searches is whether a person has a "constitutionally protected reasonable expectation of privacy." The United States Supreme Court has affected searches in a myriad of places including, but not limited to, on persons, personal effects and furnishings, automobiles, houses, apartments, motel rooms, offices, schools, land and curtilage, the workplace, electronic devices, and body specimens. How privacy protection plays in the context of probable cause for a warrant or warrantless marijuana-based search is still evolving. While the level of expectations varies with the place searched, sometimes the method used for the search can also be at issue; for example, a search that uses an airplane is less intrusive than the use of infrared technology. It is also dependent on whether a state has decriminalized or legalized marijuana. If marijuana possession is permissible or decriminalized by state law, then the odor of marijuana may not mean that there is criminal activity. Moreover, whether a state offers greater protection than under the Fourth Amendment of the U.S. Constitution can also play a role in the extent of the search. Finally, "[s]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretations of federal law."

Exceptions to the Warrant Requirement

In 1985, one commentator cataloged twenty exceptions to the warrant requirement, including "automobile searches . . .

border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . and school searches[es]." There are additional exceptions that the commentator has not noted, which include mobile home searches, searches of offices of government employees, "stop and frisk," "open fields," "plain sight-view," (sometimes referred to as doctrine) "plain smell" (sometimes referred to as doctrine), and public and private employment searches that have search and testing mandates. For example, since public employees work for the government, the public employer's actions are by definition "state action" subject to the Bill of Rights. Therefore, employees of any level of government are protected by the Fourth Amendment's prohibition of unreasonable search and seizure. However, private employers are not engaging in state action and thus the constitutional protections do not apply, therefore, private sector employees have lesser protections against workplace searches than those of the public sector. Assuming that the circumstances and standards of those warrantless searches are upheld, the exceptions seem to consume the Fourth Amendment protection.

A. Stop & Frisk

The probable cause standard for searches is not to be confused with reasonable suspicion for a legal stop, which is not considered a search and most importantly, not considered a seizure. A "seizure" of a place or object is any action by the government that limits your ability to use your property. For example, if the police impound your car or prevent you from entering your house—a seizure has occurred, requiring a warrant. A seizure may also be applicable to the taking of body specimens. The Supreme Court has characterized reasonable suspicion as the sort of common sense conclusion about human behavior on which practical people are entitled to rely. It has also defined reasonable suspicion as requiring only something more than an "unarticulated hunch." Reasonable suspicion requires facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. Reasonable suspicion means that any reasonable person would suspect that a crime was in the process of being committed, had been committed, or was going to be committed very soon.

In *Baptiste* v. State, the court stated that reasonable suspicion is a

> less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."

Stated differently, reasonable suspicion can be based upon a lesser amount of information and less reliable information compared to the higher standard required for probable cause.

This distinction between probable cause for a search versus reasonable suspicion for a stop is oftentimes blurred. This is best illustrated in the context of stop and frisks, patdowns, and vehicle stops. The Supreme Court made an important ruling on the use of "stop-and-frisk" in the 1968 case, *Terry v. Ohio*, hence such stops are referred to as *Terry* stops. Prior to *Terry*, a police officer could not search arrested persons, unless the officer obtained a search warrant. A *Terry* stop permits a weapons pat-down if there is reasonable suspicion that a person is armed and dangerous. This type of pat-down may also extend to a pat-down of a vehicle's passenger compartment if there is reasonable suspicion that the person is armed and dangerous as the police may open any container that may contain a weapon. Police may also require a driver to exit a vehicle, order passengers out of a vehicle, and even require passengers to stay at a scene, all with the goal of maintaining officer safety. If officer safety is asserted as the basis for the search, "the officer . . . must articulate 'why' officer safety was an issue (exactly what risk/danger to the officer . . . existed). The officer must 'explain' why there was a risk to the officer. . . . If the explanation is found to be reasonable, the frisk is good."

The *Terry* stop is already playing out in marijuana cases with a New York court finding that the mere odor of marijuana emanating from a pedestrian may not be enough to stop, frisk, or search. The *Terry* Court's rationale was that reasonable suspicion requires more evidence of criminal conduct to justify a stop and detention. The New York Police Department (hereinafter "NYPD") has adopted this position with a new policy that was disseminated the day after the passage of the New York recreational marijuana law. How long a *Terry* detention may last varies with the circumstances.

The issue of the odor of marijuana as the basis for a *Terry* stop also arises with the use of sniff dogs. May an officer, informed by his

experience or the use of a sniff dog, conduct a stop and frisk based upon the odor of marijuana? That was precisely the issue in *In re D.D.* where a Maryland appellate court held that the odor of marijuana, by itself, does not provide reasonable suspicion of criminal activity, and therefore, a stop based on this circumstance alone is unreasonable under the Fourth Amendment. The arresting officer in that case testified that he could not differentiate the smell of marijuana, an illegal substance, from the smell of hemp, a legal substance. The court reasoned that "because an officer cannot tell by the smell of marijuana alone that a person is engaging in criminal activity, we hold that the odor of marijuana, by itself, does not provide reasonable suspicion to conduct an investigatory stop." Additionally, the Maryland General Assembly has decriminalized possession of fewer than ten grams of marijuana.

Other courts have reached this same conclusion. In *State v. Francisco Perez*, after the decriminalization of small amounts of marijuana, the odor of marijuana remained a relevant factor in assessing reasonable suspicion, but it did not alone provide reasonable suspicion of criminal activity. In *Commonwealth v. Cruz*, after the decriminalization of one ounce or less of marijuana, the odor of marijuana alone did not provide reasonable suspicion of criminal activity.

B. Homes & Curtilage

The expectation of privacy of the home has been found to be sacrosanct. Protection of property interests as the basis of the Fourth Amendment protection is rooted in early U.S. Supreme Court cases which found that a search or seizure within a home or its curtilage, without a warrant, was *per se* an unreasonable search. Whether an expectation is reasonable, depends upon: (1) whether the individual exhibited an actual, subjective expectation of privacy, and (2) whether the actual expectation was one that society recognizes as reasonable. The home privacy protection has ostensibly been extended in some instances to offices, apartments, motel rooms, rooms for rent, garages, dorm rooms, front porches, and even tents as a home. Essentially, anywhere that will be recognized as private by society, even vehicles parked within the curtilage, are protected and do not come within the automobile exception to a warrant requirement.

At common law, curtilage is the area to which extends "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" The U.S. Supreme Court in *Florida v. Jardines* stated, "[w]e therefore regard the area 'immediately surrounding and associated with the home'—what our cases call

the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" In *United States v. Dunn*, the Court stated that

> curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

The states differ on whether the search of a home or curtilage, based upon the odor of marijuana alone, and, by virtue of the experience of a law enforcement officer or a "sniff dog," is enough to establish probable cause to secure a warrant or to conduct a warrantless search. In *State v. Kazmierczak*, the Georgia Court of Appeals upheld a search warrant that was issued solely based upon the strong odor of marijuana that police detected when they visited the home after receiving a complaint that the residence was being used to manufacture marijuana. In *Johnson v. United States*, the U.S. Supreme Court found that while the presence of odors was *insufficient* to authorize a warrantless search, proper evidence of the presence of odors may be sufficient to justify the issuance of a search warrant. In *People v. Marshall*, the California Supreme Court ruled that the smell of marijuana created probable cause to obtain a search warrant for an apartment search but did not defend a warrantless search.

In *Florida v. Jardines*, the Supreme Court found that law enforcement officers' use of a drug-sniffing dog on the front porch of a home, to investigate an unverified tip that marijuana was being grown in the home without a warrant, was a trespassory invasion of the curtilage and constituted a search for Fourth Amendment purposes. The Court made its decision in spite of the fact that twenty-seven states and various departments of the federal government, among others, had supported Florida's argument that such use of a police dog was an acceptable form of minimally invasive warrantless search to the home's front porch. Whether this U.S. Supreme Court position will be bolstered by the fact that Florida, post-*Jardines*, passed a medical marijuana law in 2016, or if Florida does indeed pass recreational marijuana in 2022 as purported, remains to be seen.

Probable cause for a warrant to search a garage based upon an anonymous tip that it contained a marijuana grow-house and

substantiated by law enforcement when they smelled the marijuana emanating from the garage, was upheld by a Pennsylvania Superior Court in *Commonwealth v. Batista*. There, the defendant contended that "the smell of marijuana is not indicative of criminal activity. It is certainly not a circumstance that would prompt a person of reasonable caution to believe that a search of a private home should be conducted without more." The defendant's argument that marijuana was decriminalized in Pennsylvania and that the state had passed a medical marijuana law was not persuasive. It is interesting to speculate what the Pennsylvania Superior Court would have done had the defendant argued that the officer could not tell the difference between the odor of hemp and marijuana. Pennsylvania is now considering the passage of a recreational marijuana law making it legal for adults to possess small amounts of marijuana. Whether this potential change in Pennsylvania's marijuana law will be more persuasive in cases involving marijuana searches in a garage based upon odor also remains to be seen.

Many cases pre-date a state's decriminalization or legalization of marijuana and the federal legalization of hemp, which can be grown commercially and privately in some states. With these legal changes, the courts may overrule prior decisions. Changes in the laws or statutes may also impact case law.

In *United States v. Jones*, the Fourth Circuit Court of Appeals upheld a conviction for a variety of charges, including marijuana possession. The officers smelled the odor of marijuana at Jones' house and then observed a marijuana cigarette. The officers obtained a warrant to search the house for evidence of marijuana because simple possession of marijuana was a crime in Virginia. Jones was arrested and indicted for, among other charges, marijuana possession. Both the search itself and the scope of the search were issues in the case. Since that time, in July 2021, Virginia repealed the simple possession of marijuana statute that it used to convict Jones. Given the repeal of that statute, would probable cause based upon the odor of marijuana, which led to the observation of the marijuana cigarette, suffice to execute a warrant in this case? If so, would this same court uphold that warrant, or would the court believe that the odor would not be indicative of whether the marijuana possession was simple and therefore legal, or was it an illegal amount? What about the fact that now-legal hemp smells like marijuana? Could this fact also affect the execution of the warrant? These same types of issues are arising in the context of exceptions to the warrant requirement, as will be

discussed below.

Irrespective of whether a state has decriminalized or legalized marijuana, law enforcement may still not be able to conduct a warrantless search of a home or its curtilage because someone is in possession of marijuana. In *State v. Markus*, a police officer observed the defendant smoking a marijuana cigarette outside and, when the police approached him, the defendant threw it to the ground and backed into his open garage. This resulted in a warrantless search of the garage. The Florida Supreme Court stated that the underlying crime of marijuana possession was a nonviolent misdemeanor and unless the search rose to the level of an exigent circumstance, which it did not, the search should *not* be upheld. Interestingly, Florida had no decriminalization or legalization of marijuana at the time.

C. Land as Curtilage

In *Florida v. Jardines*, Justice Scalia cited a variety of pertinent U.S. Supreme Court cases and addressed the extent of curtilage as follows:

> We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law," so too is the identity of home and what Blackstone called the "curtilage or homestall," for the "house protects and privileges all its branches and appurtenants." This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened."

Despite this extensive interpretation of curtilage, ascertaining the boundaries of curtilage is not a simple concept and is mostly dependent on how and where the search is conducted. Courts seem willing to find areas to be outside of the curtilage if they are in any way separate from the home. For example, the land surrounding a home may be characterized as curtilage and therefore be subject to constitutional protection against warrantless searches. Whether a court wants to extend the protection on the issue of marijuana grows on land without a warrant varies from court to court.

Although backyards have been deemed curtilage, long before any marijuana laws were enacted and as far back as 1986 in *California v. Ciraolo*, the U.S. Supreme Court held that warrantless aerial observation of a fenced-in backyard within the curtilage of a home was *not* unreasonable under the Fourth Amendment. In *Ciraolo*, the police based their observation upon an anonymous tip that a person was growing marijuana on their land. The Court stated that Ciraolo's expectation of privacy "from all observations of his backyard" was unreasonable. The Court reasoned that the yard and its crop being within the "curtilage" of Ciraolo's home did not, itself, "bar all police observation." In fact, "[a]ny member of the public flying in this airspace who glanced down could have seen everything that [the] officers observed."

In *State v. Davis*, the state police "received several reports that residents were growing marijuana plants" and conducted aerial surveillance of the defendant's greenhouse with a low-flying helicopter. The New Mexico Supreme Court stated that the aerial surveillance was an unconstitutional search requiring a warrant. Although the U.S. Supreme Court found that an aerial observation of marijuana grow did *not* constitute a search in *Ciraolo*, fifteen years later, the U.S. Supreme Court deemed the use of infrared heat technology to detect marijuana grow in a home without a warrant was a search. In *Kyllo v. United States*, the Court stated, that "where . . . the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a [Fourth Amendment] 'search' and is presumptively unreasonable without a warrant."

Thus, the home and curtilage constitutional protections have two nuances: like some other constitutional protections, a state may grant more protections than what is granted under the federal Constitution, and while a warrantless search of a home and curtilage is presumed unreasonable, there are a few exceptions.

D. Exigent Circumstances Exception

The exigent circumstances exception applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." The burden is on the state to demonstrate that an exigent circumstance existed to justify the warrantless search. Exigent circumstances require that there be a "'grave emergency' that 'makes a warrantless search imperative to the safety of the

police and of the community.'" The U.S. Supreme Court has consistently recognized three major categories of exigent circumstances: (1) the emergency aid exception, whereby an officer enters a home to render emergency assistance to an occupant who is seriously injured or to whom serious injury is imminent; (2) "to prevent the imminent destruction of evidence;" and (3) the hot pursuit exception, which allows officers to proceed into a residence without a warrant if they are in the process of the continuous hot pursuit of a fleeing suspect. As is true for any protected right against a warrantless search, if there is an exigent circumstance, the revered home and its curtilage protection could be lost.

E. "Open Fields"

The "open fields" doctrine was first recognized in 1924 in *Hester v. United States*, where the Supreme Court held that the Fourth Amendment "did not protect 'open fields' and that, therefore, police searches in such areas as pastures, wooded areas, open water, and vacant lots need not comply with the requirements of warrants and probable cause." In *Oliver v. United States*, the Supreme Court held that a search of open fields is *not* considered a Fourth Amendment search, and thus, it is not governed by the Fourth Amendment. There, narcotics agents investigated Oliver's farm based on reports that marijuana was being grown on Oliver's farm. Upon arrival at the farm, the agents drove past Oliver's house to a locked gate with a "No Trespassing" sign, but with a footpath around one side. The agents then "walked around the gate and along the road" and found a marijuana field over a mile from Oliver's house. Oliver was arrested and indicted for manufacturing a "controlled substance" in violation of a federal statute, 21 U.S.C. 841(a)(1). The Oliver majority held that, even for secluded lands and notwithstanding efforts of the owner to exclude the public by erecting fences or posting "No Trespassing" signs, a warrantless search was not constitutionally protected. The Court reasoned that society does not recognize a reasonable expectation of privacy in open fields because they "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."

Since *Oliver*, the highest courts of Montana, New York, Oregon, and Vermont, as well as a Washington state appeals court, have rejected the open fields doctrine and protected the privacy rights of their citizens based upon their state constitutions, and in some instances, the steps taken by the defendant to protect their privacy

interest.

In *State v. Dixson,* after flying over the property in question and observing groves of the plant, based upon a tip, the police were able to see cannabis planted outside the curtilage of the house. The defendant's conviction of manufacturing and possessing a controlled substance was upheld. The Supreme Court of Oregon held that: (1) there is no open field exception to the search and seizure provision of the Oregon Constitution; *but* (2) an individual's privacy interest in land which she or he has left unimproved and unbounded is not sufficient to trigger the protections of the constitutional provisions,: and (3) officers could make a warrantless entry into an open field which was only posted with a "No Hunting" sign.

In *People v. Scott*, law enforcement officers executed a search warrant on property based on the use of "in-camera" testimony of a private citizen who observed what appeared to be the remnants of a marijuana growing operation. The defendant appealed his conviction for firstdegree possession of marijuana. The question presented on the appeal was whether defendant's act of posting "No Trespassing" signs about every twenty to thirty feet around the perimeter of his property where he was growing marijuana, established an expectation of privacy cognizable under the right to privacy protection of the Fourth Amendment of the U.S. Constitution and Article 1, section 12 of the New York Constitution. The court ruled that the warrantless entries of the police and the trespasser were illegal under the N.Y. Constitution. The court reasoned that because Scott's property was posted with "No Trespassing" signs, Scott manifested a subjective expectation of privacy.

The Vermont Supreme Court, after an extensive discussion of the open field doctrine, took a similar posture to New York. The court provided the only issue on appeal of a conviction for cultivating marijuana was the legality under the Vermont Constitution of a warrantless search of defendant's property. The court held that this search violated Chapter I, Article 11, of the Vermont Constitution, and reversed. Based on a tip, officers flew over a property and took photographs.

The Vermont Supreme Court stated "[b]y no stretch of the imagination could the officers reasonably conclude . . . that their 'walk-on' search was permissible." Indeed, "[g]iven the extensive posting of the land, defendant's intent to exclude the public was unequivocal." As such, the court found that the "officers' walk over defendant's logging roads and through his woods violated his right to privacy under Article 11 [of the Vermont Constitution], and the evidence obtained thereby may not be used against him."

It is interesting to note that these series of cases were decided well before the passage of any marijuana laws. Each court will continue to determine whether they will follow the U.S. Supreme Court "open field" doctrine as decided in *Oliver* or look to their own state Fourth Amendment constitutional protection. Those states that do not follow the *Oliver* doctrine will look to whether the facts of the case establish an expectation of privacy consistent with the analysis set forth in *Katz*, where the U.S. Supreme Court has held that the Fourth Amendment permits the police to conduct a warrantless search of an area in which a person does not have a "reasonable expectation of privacy." In the meantime, the presence of illegal commercial hemp grows: growers without state permission under a hemp program, along with the perceived odor of marijuana, may play a role in conducting warrantless searches in "open fields." The 2018 Farm Bill permits the USDA to approve plans submitted by states and native American tribes for the domestic production of hemp. It further establishes a federal plan that the USDA directly manages for producers in states or territories of native American tribes that do not have a USDA-approved plan but the production of hemp is legal. In fact, searches in open fields for hemp may even increase. Despite the fact that recreational marijuana is legal in sixteen states and more accessible now than ever before, illegal grows continue. In California for example, "as more licenses to grow marijuana are added, illegal growing has also risen" with more than 1.11 million illegal plants seized in 2020.

F. Plain Sight/View & Plain Smell Doctrines

Unlike the **"**open fields doctrine,**"** the plain sight/view and plain smell doctrines are very much impacted by the decriminalization and legalization of marijuana and hemp. The smell and look of illegal marijuana and legal hemp are almost indistinguishable, which is making identification for law enforcement and their **"**sniff dogs**"** difficult. While hemp remained illegal under the CSA, law enforcement officers and their **"**sniff dogs**"** did not have to distinguish between hemp and marijuana visually or olfactorily, as they are now being called upon to do. These similarities are compounded by the fact that many locales and states have either decriminalized marijuana or outright made it available statewide through the passage of medical and recreational marijuana laws. The "plain sight" or "plain view" doctrine was first recognized in 1971 in the U.S. Supreme Court case *Coolidge v. New Hampshire*. Although a car was seized in *Coolidge* instead of marijuana plants, and, the officers intended to seize the car when they entered on petitioner's property, the Court found that the "plain view" doctrine

was inapplicable. The Court stated that "where the police had ample opportunity to obtain a valid warrant, knew in advance the car's description and location . . . and no contraband or dangerous objects were involved, the exception was inapplicable."
The Court characterized "plain view" as an exception to a warrant requirement. The *Coolidge* plurality set forth three requirements necessary to uphold the warrantless seizure by police of private possessions based on "plain view."

> First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. While the lower courts generally have applied the *Coolidge* plurality's discussion of "plain view," it has never been expressly adopted by a majority of [the U.S. Supreme Court].

In *Texas v. Brown*, the U.S. Supreme Court further stated that "'plain view' is perhaps better understood . . . not as an independent 'exception' to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." In *Brown*, the Court distinguished "plain view" from "plain sight." The Court noted that the term "plain view" as used to justify seizure of an object must be distinguished "from an officer's mere observation of an item left in plain view." The latter "generally involves no Fourth Amendment search . . . [but] the former generally does implicate the [Fourth] Amendment's limitations upon seizures of personal property." The Court further noted that "information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity," and "these levels of suspicion may, in some cases . . . justify police conduct affording them access to a particular item." Stated another way, the seizure of property in plain view is permissible without a warrant if there is probable cause to believe that the property observed is somehow involved in criminal activity or is illegal contraband.

With respect to the "plain view" doctrine, the decriminalization and legalization of recreational and medical marijuana and hemp calls into question whether an officer who is lawfully present at a location and views what is believed to be illegal marijuana is *in fact* viewing illegal marijuana. If marijuana has been legalized, is what is being *viewed* incriminating evidence of a marijuana crime or illegal contraband? Many marijuana laws permit adults to grow a certain amount of marijuana plants in their abode and outdoors in a secure manner. Prior to marijuana legalization in any form, it was clear that an officer did not have to face the issue of the legality of marijuana. After Pennsylvania passed a medical marijuana law in 2016 and decriminalized small amounts of marijuana possession in several counties, a Pennsylvania court, in *Commonwealth v. Rial*, upheld a trooper's warrantless intrusion into the defendant's yard and subsequent seizure of marijuana plants based on the trooper's plain view of the defendant's marijuana plants. The plain view was based upon the trooper's training and experience as immediately identifying the plants as marijuana. Rhetorically speaking, could the defendant have inquired at trial if the trooper could accurately distinguish between the look and smell of marijuana and hemp? If the plants were in a *secure* location in the defendant's yard, would it be reasonable for the trooper to conclude that the plants were being illegally grown? If there was any question about whether the marijuana grown was more than the permissible amount under a state recreational or medical marijuana law, should the trooper have secured a warrant?

While the "plain view" and "open fields" doctrine have enjoyed a long-standing exception to the warrant requirement, the "plain smell" doctrine has a more limited status, as some states uphold it as the basis for probable cause, while others do not. In *Johnson v. United States*, the United States Supreme Court did address the "smell" of opium along with other factors that resulted in entry into a house and ultimately a room therein. The search and subsequent arrest were *not* upheld for a variety of reasons, none of which were related to the "smell" of opium. There is still no final word on this doctrine from the U.S. Supreme Court, but without acknowledging its validity, the Court did briefly discuss the "smell" of marijuana as it related to the case in the *Florida v. Jardines* concurring opinion. Despite the Supreme Court's failure to adopt "plain smell," the lower federal courts embrace it overwhelmingly and the states have also addressed the doctrine with varying outcomes.

Sometimes these doctrines overlap with the exigent circumstance's exception. For example, law enforcement may identify marijuana through "plain sight" and "plain smell" in a home where a child resides and is exposed to the marijuana. Does that scenario establish an exigent circumstance that would obviate the need to secure a warrant? After a state decriminalizes and legalizes marijuana, it may not be enough to conduct an emergency search of the home without a warrant for several reasons. In *Holder v. State*, the Indiana Supreme Court held that police officers' detection of a "very strong odor of ether" near a residence provided sufficient exigent circumstances for them to enter the apparent curtilage of the dwelling without a warrant to confirm that the smell was, in fact, emanating from it and then, upon learning that a young child was inside the house, entering to bring her outside. Nevertheless, with respect to potential child endangerment, where marijuana is legally used or grown in a home in front of a child, the trend seems to be that there needs to be evidence that the use or grow is detrimental to the child in some regard. Further, growing and using marijuana in one's home may be legal in those states that have passed medical and recreational marijuana laws that permit adult-use and grow of marijuana plants within the confines of a home.

These "plain smell" and "plain view" doctrines have also been examined in conjunction with the "automobile exception" and the "search incident to arrest" exception to the warrant requirement. In the cases preceding the decriminalization and legalization of marijuana and hemp, the odor of marijuana as illegal contraband mostly gave rise to probable cause to conduct a search under the automobile exception to the warrant requirement. Additionally, several appellate courts had expanded the search to the trunk and other areas of the vehicle based on the odor of marijuana. Post-state decriminalization and legalization of recreational or medical marijuana, appellate cases are addressing whether the odor of marijuana may form the basis of a warrantless search of a vehicle, including its occupants. The developing appellate case law in this area is meeting with mixed outcomes.

G. Automobile Exception

The automobile exception to the warrant requirement was first enunciated by the Supreme Court in *Carroll v. United States*. Chief Justice Taft stated that there was a lower standard of reasonableness for searching an automobile than for other places since, due to its

mobility, the automobile might be gone by the time a search warrant could be obtained. Since that decision, the reasons for the vehicle exception have become two-fold. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." Since mobile homes are a hybrid of automobiles and more traditional homes or offices, their Fourth Amendment protection is circumstancedriven. In this totality of the facts analysis, courts have considered whether the motor home is on wheels and traveling, or whether the mobile home is stationary or on stilts. "If the motor home were parked in the exact middle of the intersection between the general rule and the exception for automobiles, priority should be given to the rule rather than [to] the exception."

The *Carroll* Court further stated that the search must be based upon probable cause, reasonably arising out of circumstances known to the officer, that the vehicle contains such contraband. The search, however, "extends no further than the automobile itself." *Carroll* was decided in 1925 during alcohol prohibition, thus the contraband addressed in that case was alcohol. Marijuana has been considered and treated as illegal contraband at least since the Marijuana Tax Act, during the 1930s when several states started to make possession of marijuana illegal, and with the passage of the Controlled Substance Act ("CSA"). Whether it still maintains that characterization is one of the preeminent questions arising in the courts, that is, whether marijuana after decriminalization or the passage of recreational or medical marijuana laws, is still illegal contraband. The courts have also addressed whether, if marijuana is not considered illegal contraband, may the odor alone permit a warrantless search of a vehicle or person therein.

Courts weigh the "plain smell" doctrine heavily when discussing the automobile exception as it relates to marijuana odor. As early as 1948, the Supreme Court acknowledged that the odor of an illegal drug can be probative in establishing probable cause for a search without a warrant. In *Johnson v. United States*, the Supreme Court explained:

> [i]f the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed, it *might very well be found* to

be evidence of most persuasive character.

A Pennsylvania Superior Court further wrestled with these issues in *Commonwealth v. Barr,* where the court found that the odor of marijuana does not per se establish probable cause to conduct a warrantless search of a vehicle "because a substantial number of Pennsylvania citizens can now consume marijuana legally, calling into question the so-called plain smell doctrine." The defendant in *Barr* argued that the U.S. Supreme Court in *Johnson* did not articulate a *per se* rule regarding the odor of obvious contraband. Instead, Justice Jackson clearly expressed that the odor of a "forbidden" substance is a factor that "might" constitute evidence of the "most persuasive character" when considered in the totality-of-the-circumstances test for probable cause.

The Pennsylvania Superior Court agreed that there is no preexisting per se rule that the odor of marijuana is always sufficient to establish probable cause to believe a crime is being committed. The court referred to language in the Pennsylvania Medical Marijuana Act to show that compliance with the Act will not constitute a crime under the CSA. It is important to note that the defendant in *Barr* presented the officers with his medical marijuana card prior to the search at issue. The Pennsylvania Supreme Court has further taken these matters up on review and phrased the issues as: (1) what weight, if any, should the odor of marijuana be given in determining whether probable cause exists for a warrantless vehicle search, in light of the enactment of the Medical Marijuana Act, and (2) to what extent does this court's decision in *Commonwealth v. Hicks* apply to probable cause determinations involving the possession of marijuana following the enactment of the Medical Marijuana Act.

In 2014, Maryland passed a medical marijuana law and decriminalized possession of fewer than ten grams of marijuana. In *Pacheco v. State*, the Maryland Court of Appeals held that law enforcement, who detected marijuana odor emanating from a vehicle and observed a marijuana "joint" in the vehicle console, had probable cause to search that vehicle under the automobile exception to warrant requirement. The search of the defendant was unreasonable because the possession of a "joint" and the odor of marijuana did not give the officers probable cause to believe the defendant was in possession of a criminal *amount* of marijuana. The court stated that "the facts presented by the State and credited by the hearing judge were sufficient to establish probable cause to search the vehicle based on the presence of contraband." The court went on to reason that "little else was presented that addressed why this

minimal amount of marijuana, which is not a misdemeanor, but rather a civil offense, gave rise to a fair probability that [defendant] possessed a criminal amount of marijuana on his person."
The following year, in *Lewis v. State*, an officer approached a defendant and smelled an odor of marijuana emitting from him, stopped the defendant based on the odor of marijuana and the information that he received, and searched him. The court held "that the odor of marijuana, if localized to a particular person, provides probable cause to arrest that person for the crime of possession of marijuana." The court found when the officer smelled the odor of marijuana from appellant's person and localized to appellant, the officer had probable cause to arrest appellant and search him incident to that arrest. The Court of Special Appeals of Maryland reversed and remanded the case and held that the odor of marijuana, without more, does not provide law enforcement officers with the requisite probable cause to arrest and perform a warrantless search of that person incident to the arrest. The court went on to hold that the odor of marijuana

> is not indicative of the quantity, if any, of marijuana in someone's possession for purposes of search incident to arrest exception to warrant requirement . . . arresting and searching a person, without a warrant and based exclusively on the odor of marijuana on that person's body or breath, is unreasonable; and odor of marijuana emanating from defendant's person fell short of supplying the requisite probable cause to conduct search incident to arrest.

In *Butler v. United States*, the court noted that prior to the legalization of marijuana in Washington D.C., "the smell of marijuana generally emanating from appellant's vehicle . . . indisputably would allow the police to search the vehicle," but the court had "reservations" about whether the driver's arrest could have been upheld without the additional facts that the defendant was engaged in criminal activity. After the decriminalization of marijuana in New Hampshire and Massachusetts, the odor of marijuana remains a relevant factor in assessing reasonable suspicion, but it does not alone provide reasonable suspicion of criminal activity.

In *State v. Seckinger*, the Nebraska Supreme Court also addressed the

issue of whether the odor of marijuana, standing alone, furnished probable cause to support the warrantless search of defendant's vehicle. There, the defendant argued that Nebraska had decriminalized possession of small amounts of marijuana and that the neighboring state of Colorado had legalized recreational marijuana. The defendant's primary contention was that the legalization of marijuana in Colorado eroded the legal premise of the court's precedent because the odor of marijuana standing alone no longer suggests criminal activity. The court upheld that the odor of marijuana coming from a vehicle, standing alone, still provided probable cause to search the vehicle.

In 2019, in *People v. Shumake*, after California legalized recreational marijuana, an officer lawfully stopped a vehicle, and based upon the odor of marijuana and the defendant admitting to possessing marijuana, which he handed to the officer from the console, he established "more probable cause to believe there was more marijuana in the vehicle" and thus, the officer conducted a full search of the vehicle. The court concluded that, given the legality of the personal use of marijuana in the State of California, there was not a fair probability that the officer would find evidence of a crime in the vehicle. The court went on to state that "anyone 21 years and older can now lawfully smoke marijuana in California, and as [the officer] testified, the smell can linger for more than a week." Further, the law "permits possession and transportation of up to 28.5 grams of cannabis in a car." Accordingly, the search of the vehicle was not upheld.

The following year in *United States v. Martinez*, another California case, the U.S. Court of Appeals for the Ninth Circuit, found that the lower court erred by relying on pre-Proposition 64 (statewide recreational marijuana law) California cases held that the odor of marijuana alone provides probable cause to search for violations of state marijuana laws. The court stated that those cases were decided when possession of any quantity of marijuana was unlawful under state law, which is no longer true in California after recreational marijuana was passed. The court remanded the case and directed the trial court to determine whether the facts known to the law enforcement officer supported probable cause to believe that Martinez's car had evidence of a crime. They went on to say that it was conceivable that there was a violation of the California Health and Safety Code, which prohibits an open container of marijuana while operating a vehicle. In sidestepping the issue of whether there was probable cause to believe that there was a violation of *federal*

laws, the court stated "[w]e are a court of review, not first view." In *People v. Hill*, the Illinois Supreme Court *upheld* a vehicle search based upon the odor of marijuana. There, after a lawful stop, the officer told the occupants that he smelled raw cannabis in the car, and defendant was asked to exit the vehicle. Defendant was then patted down and asked to sit on the curb next to the car. A search of the vehicle produced an unspecified amount of cannabis. Defendant argued that smelling cannabis cannot create probable cause because Illinois decriminalized marijuana possession in amounts under ten grams. The Illinois Supreme Court cited *In re O.S.*, which states that "decriminalization is not synonymous with legalization" and that under Illinois law, the knowing possession of cannabis is still a criminal offense under the CSA because the possession of more than ten grams remains a crime subject to criminal penalties. The court pointed out that the defendant failed to explain how a police officer "confronted with the obvious odor of cannabis when he first approaches a vehicle, is left to discern how much cannabis may be present by its smell alone." The Illinois Supreme Court still considers the odor of marijuana relevant to a probable cause determination and "support[s] an inference that a crime is ongoing, even though possession of one ounce or less" was legal.

The Illinois Supreme Court found the reasoning in *Zuniga* applicable to *Hill* because a "substantial number of other marijuana-related activities remain unlawful." However, the Colorado Supreme Court has since decided the *McKnight* case, discussed below, on the issue of the use of sniff dogs to detect marijuana that may affect the *Zuniga* rationale and may ultimately take the Illinois Supreme Court down a different path. Now that Illinois has legalized recreational marijuana, the question is whether the Illinois Supreme Court change the rationale that it adopted from the *Zuniga* case in *People v. Hill*. The day after former New York Governor Andrew M. Cuomo signed New York's recreational marijuana law, the New York Police Department ("NYPD") issued a Memorandum to all police officers addressing the search of vehicles on the basis of the odor of marijuana that stated in part:

> *Effective immediately, the smell of marihuana alone no longer establishes probable cause of a crime to search a vehicle. This change applies to both burnt and unburnt marihuana. Searches of vehicles related to marihuana enforcement may only be conducted in accordance with the following: driving while impaired*

> *by drugs: if the driver appears to be under the influence of marihuana and there is probable cause to believe that the vehicle contains evidence of the impairing marihuana (e.g. smell of burnt marihuana or admission of having smoked recently), a search of the passenger compartment of the vehicle is permissible. However, the trunk may not be searched unless the officer develops separate probable cause to believe the trunk contains evidence of a crime.*

This position is consistent with a recent New York appellate case in which police officers smelled the odor of marijuana emanating from a car, searched the console where they found a small amount of marijuana, and then proceeded to search the trunk. The court held that "the odor of marijuana, together with a de minimis amount of marijuana found in the center console of the vehicle, did not furnish the requisite probable cause to search the trunk of defendant's vehicle and that there was no factual nexus between the possession of an amount of marijuana consistent with personal consumption and a search for contraband in the trunk of the vehicle."

On the heels of this decision, in another New York appellate case, officers smelled the odor of marijuana emanating from a car and searched the console, where the officers found marijuana and a bottle, which contained a significant amount of Oxycodone. There, the court held that there was probable cause to believe that additional drugs were being stored in the car, including the trunk. Neither of these two cases post-date the newly enacted New York recreational marijuana law nor the new NYPD police policy as stated above. It is interesting to keep in mind that irrespective of the new NYPD policy, New York courts are still free to make decisions on these issues should cases, based upon the odor emanating from a car that results in a search, come before them.

States have approached the use of "sniff dogs" or drug-detection dogs to detect drugs from the exterior of a vehicle without a warrant with mixed results. Some states hold that the use of a sniff dog to detect marijuana is a *search*, and some do not. Some states find that the sniff dog's alert establishes probable cause to search the vehicle, and some do not. Still, other states extend further Fourth Amendment protections than others. The U.S. Supreme Court in

Illinois v. Caballes held that a sniff of a vehicle's exterior by a trained narcotics dog is permissible under the Fourth Amendment if conducted without extending a traffic stop. In *Caballes*, an officer led a drugdetection dog around a vehicle that was lawfully stopped

for speeding. The dog alerted at the trunk, leading to a search that revealed marijuana.

A series of cases have developed since *Caballes*. In *Varner v. Roane*, the court held police can have a drug-sniffing dog circle a motor vehicle without individualized suspicion or a search warrant. In *United States v. Jones*, a drugdetection dog's positive alert on a vehicle provided probable cause to search that vehicle. In *Flora v. Southwest Iowa Narcotics Enforcement Task Force*, "a drug dog sniff itself did not constitute a search under the Fourth Amendment, because the sniff discloses only the presence or absence of narcotics, a contraband item in which a person maintains no inherent privacy interest." These three cases pre-date the legalization of hemp and the added issue of how the smell of hemp and marijuana cannot be distinguished by a sniff dog.

In some states, sniff dogs are now becoming obsolete. Sniff dogs have been retired or repurposed in some states, such as Virginia, Colorado, California, Michigan, and Massachusetts, based on the legalization of marijuana in those states. Based upon the adoption of a new marijuana possession law, Virginia is set to retire fifteen drug-sniffing dogs "because these dogs are trained to alert to the scent of cannabis" and "any alert is interpreted by police . . . as probable cause to effect a search under the Fourth Amendment." Further, the sniff dog cannot discern "between a large amount of cannabis and a single joint, and because a dog trained to detect both cocaine and marijuana [cannot] inform its handler what was detected, the only path forward for police narcotics units is to retire their drug-sniffing dogs." When recreational marijuana was passed in New Mexico in 2021, law enforcement also reconsidered using sniff dogs to detect marijuana.

A sniff dog that alerts to marijuana in a state that has legalized marijuana raises privacy issues and could lead to an "unnecessary" search. Hemp and marijuana "look and smell alike" and police officers might not be able to determine whether a search has unveiled hemp or marijuana without testing the THC levels. A sniff dog does not know the difference between what is legal and what is not legal. As determined in *People v. McKnight*, a sniff dog cannot specifically distinguish between marijuana and methamphetamine and the presence of both drugs would "trigger the same response" from the sniff dog. Properly distinguishing hemp versus marijuana could mean the difference between a conviction or not, depending on the state and whether it has decriminalized or legalized marijuana. Legalization in Colorado has already impacted court decisions

involving marijuana and sniff dogs. In *People v. McKnight*, the Colorado Supreme Court, after Colorado passed a recreational marijuana law where possession of an ounce or less of marijuana by someone twentyone or older is legal, found that marijuana was no longer always "contraband" under state law. There, police observed a parked pickup truck facing the wrong way in a one-way alley and followed the truck as it traveled a few blocks. The truck then parked in front of a residence where police had found drugs two months earlier, and it remained parked there for fifteen minutes. During that time, no one exited the truck or the residence. When the truck started moving again, the officer followed it and observed a traffic infraction. The officer recognized the passenger as someone who had previously used methamphetamine. A sniff dog was called to the scene and alerted the officers as to potential drug contraband, including marijuana. The officers next ordered McKnight and the passenger to exit the truck, patted them down, and found nothing on them; the officers then searched the truck by hand.

The court concluded that, under the totality of the circumstances, there was no probable cause justifying the use of the dog to sniff McKnight's truck or the subsequent hand search of the truck. The court reasoned that in legalizing marijuana for adults twenty-one and older, Amendment 64 expanded the protections of Article II, section 7 of the Colorado Constitution and provided a reasonable expectation of privacy to engage in the lawful activity of possessing marijuana in Colorado. Because there was no way to know whether the dog was alerting to lawful marijuana or unlawful contraband, the sniff violated McKnight's reasonable expectation of privacy. Thus, McKnight's conviction was overturned because the dog had alerted to drugs in the car but may have just alerted to the "legal amount of marijuana" in the vehicle.

The Colorado Supreme Court further stated that "[m]arijuana is now treated like guns, alcohol, and tobacco—while possession of these items is lawful under some circumstances, it remains unlawful under others." The court went on to state that, "[a]lthough possession of guns, alcohol, and tobacco can be unlawful, persons still maintain an expectation of privacy in lawfully using or consuming those items.

The same now goes for marijuana." In diverting from the U.S. Supreme Court ruling in *Caballes*, the Colorado Supreme Court cited its previous holding in *Sporleder*, stating, "we are not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections."

H. Search Incident to Arrest

The exception that authorizes a search incident to the lawful arrest of a person was recognized long before it was iterated in *Birchfield v. North Dakota*. The search incident to arrest exception was first announced in *Chimel v. California*. For the search to be reasonable under the Fourth Amendment, the police must be armed with probable cause to believe that the person subject to arrest has committed a felony or is committing a felony or misdemeanor in the presence of the police. The justification of officer safety for this exception is long rooted in U.S. Supreme Court cases. The U.S. Supreme Court has also held that it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person to prevent the concealment of weapons or destruction of evidence. Essentially, there are two types of warrantless searches that may be made incident to a lawful arrest: a search of the arrestee's person and a search of the area within the arrestee's immediate control. *Arizona v. Gant*, partially overruling *Chimel*, limited searches justified by concerns of officer safety or the preservation of evidence, to those areas within reaching distance at the time of the search.

As discussed above, the *Lewis* case in Maryland is on appeal and one of its questions for review is whether probable cause existed to allow a *search incident to arrest* based solely on the odor of marijuana. The underlying Maryland Court of Special Appeals agreed with the Maryland circuit court that the odor of marijuana emanating from a person, like the odor coming from a vehicle, was *sufficient* to establish probable cause to perform a search incident to arrest. However, the dissent in the lower court decision drew a distinction between the types of searches and noted that there are several benign reasons one might smell like marijuana without having the contraband on their person. Some identified issues related to the "plain smell" doctrine and marijuana include: the odor may not be current, odors are mobile, the source of the odor may not be identifiable, the confusion with the hemp odor for both law enforcement and sniff dogs, the lack of quick testing methods, and the potential for discriminatory stops.

Exclusionary Rule & Good Faith Exception

All these exceptions to a warrant requirement do not amount to much if they do not have an impact in a criminal case. If a search is found to be unconstitutional by a court of law, the court will typically

exclude or suppress seized evidence against the defendant from admissibility against them at trial. That is, if a warrant is found to be invalid, or reasonable suspicion for a stop or probable cause for a search did not meet legal requirements, it will be deemed a Fourth Amendment violation. This suppression of evidence is legally known as the exclusionary rule as set forth in 1961 in *Mapp v. Ohio*, which has its roots in the long-standing doctrine known as "fruits of the poisonous tree."

There are a couple of exceptions to the good faith exception. First, for a search conducted *with* a warrant, the search may be upheld if the warrant has some flaws unbeknownst to the officer when executing it and the officer in good faith. The U.S. Supreme Court has ruled that a court can consider evidence obtained from a search that appeared to have a lawful basis, such as a search supported by a warrant. If the warrant later turns out to have been invalid, the police may not be held accountable for conducting a search while relying on it. Another exception is when an officer takes steps based on the existing interpretation of the law, but a court later rules that the law should be interpreted differently; there the police may be found to have acted in good faith. Some states do not apply this good faith exception in their courts, while other states apply a limited version of the exception. This is because states have a right to provide greater liberties to their citizens under their own state constitutions than those contained in the U.S. Constitution.

Other Search Settings

A. Body Specimens

Searches related to automobiles arise in yet another context, that is, the taking and testing of body specimens from drivers without a warrant. A cadre of U.S. Supreme Court cases came forward from 2012–2019 addressing this issue. In *Missouri v. McNeely*, the driver was stopped by a highway patrolman for speeding, failed several field sobriety tests, and was asked to submit to an alcohol breath test, which he refused. The driver was then transported to a medical clinic where the clinic staff administered a blood test without the suspect's consent and without a warrant. The issue in the case was whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream. The U.S. Supreme Court, in affirming the Missouri Supreme Court, held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does *not* constitute

an exigency in every case sufficient to justify conducting a blood test without a warrant."

A few years later in *Birchfield v. North Dakota*, along with invaliding an implied consent statute that imposed criminal penalties for refusing to submit to a blood test, the U.S. Supreme Court held that a breath test, but *not* a blood test, may be administered as a *search incident to a lawful arrest* for drunk driving. The Court reasoned that a blood test is not only more invasive than a breath test, but also more intrusive because it reveals too much information about the defendant. The U.S. Supreme Court revisited body specimen searches once again in *Mitchell v. Wisconsin*. There, the Court held that the exigent circumstances exception to the Fourth Amendment's warrant requirement *almost always* permits a blood test without a warrant where the driver suspected of drunk driving is *unconscious*, and therefore cannot be given a breath test.

It is also noteworthy to briefly address the "plain view" doctrine in the context of warrantless searches of automobiles. Before any state decriminalized or legalized medical and recreational marijuana, in *Illinois v. Andreas*, a large, locked metal container, shipped by air from Calcutta to respondent in Chicago, was opened by a customs officer at the airport, who found marijuana concealed in a compartment. A Drug Enforcement Administration (DEA) agent confirmed that it was marijuana. "The next day, the DEA agent and a Chicago police officer posed as delivery men and delivered the container to respondent, leaving it in the hallway outside his apartment. . . . the container was reopened and the marihuana found inside the table was seized" The warrantless reopening of the container following its reseizure did not violate respondent's rights under the Fourth Amendment. The U.S. Supreme Court held that an officer may search an individual's vehicle when the officer can see incriminatory evidence in the car from outside of the car.

B. Schools

School policies are amid change with respect to medical marijuana use and possession on school grounds. Under certain conditions, some schools now permit medical marijuana to be administered, used, and stored in schools. While there is a rise in marijuana use among college students, according to several sources, however, marijuana use by youth has not increased with the legalization of marijuana. Nonetheless, without a school sanction for medical marijuana use and possession on school grounds, illegal marijuana possession continues to be an issue in schools, prompting Fourth Amendment search and seizure issues both pre- and post-marijuana

decriminalization and legalization. The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by school officials.

In *New Jersey v. T.L.O.*, the U.S. Supreme Court addressed the standard for warrantless school searches in holding that "[n]either the warrant requirement nor the probable cause standard is appropriate." Instead, "a simple reasonableness standard governs all searches of students' persons and effects by school authorities." The Court further explained that school authorities are permitted "to regulate their conduct according to the dictates of reason and common sense."

The U.S. Supreme Court addressed the parameters of a warrantless search of a school student in *New Jersey v. T.L.O.* There, an assistant vice principal conducted a search of a student's purse for the cigarettes based upon a report that the student was smoking in the school lavatory in violation of school policy. In the purse, the assistant vice principal found marijuana, drug paraphernalia, and other evidence of marijuana dealing activities. The U.S. Supreme Court iterated that public school teachers function as agents of the state, and not merely agents of the students' parents. Thus, the Fourth Amendment applies to their actions. The Court also established the following test to determine the reasonableness of a search: whether the search was (1) "justified at its inception," and (2) as the search was conducted, whether it was related in scope to the circumstances that justified the interference in the first place. A search will be "permissible in its scope" when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

The Court in *T.L.O.* found that the report provided to the assistant vice principal accusing the student of smoking warranted a reasonable suspicion that she had cigarettes in her purse, and thus the search was justified at its inception. Further, the discovery of drug paraphernalia in the student's purse gave rise to a reasonable suspicion that she was carrying marijuana in her purse. This justified a further exploration of the purse that turned up more evidence of marijuana-related activities. In this case, both prongs of the *T.L.O.* test were met, and the search was upheld.

A search may be reasonable at its inception, but not reasonable in scope. It would stand to reason then that if the search is *unreasonable* at its inception, the court need not consider the second prong of the test related to the scope of the search, and, that if the search is reasonable at its inception, but the scope of the search is unreasonable, the search will *not* be upheld. These propositions are

best demonstrated in the following two cases.

In *Phaneuf v. Fraikin*, school officials performed a "pre-announced search of all students' bags for security purposes." This search "revealed a package of cigarettes in Phaneuf's purse," which was prohibited by school policy. A student reported to a teacher that Phaneuf told her and other students that she possessed marijuana. Phaneuf told the other student that she planned to hide the marijuana "down her pants" during the mandatory bag check. After receiving this information from the student, the teacher reported the statement to the principal. The principal subjected Phaneuf to a strip search. The issue was "whether the school officials had a reasonably high level of suspicion that Phaneuf had marijuana on her person to justify an intrusive, potentially degrading strip search."

Unlike in *T.L.O.*, where marijuana and drug paraphernalia were found as contents of the student's purse, the search of Phaneuf's purse only discovered cigarettes and a lighter. The Court "believe[d] that the discovery of this particular contraband ha[d] such a tenuous connection to the alleged marijuana on her person to be of relatively little consequence in deciding whether the strip search for drugs was reasonable." Consequently, the Court concluded that the search was not justified at its inception, and therefore, the scope of the strip search did not need to be addressed.

In contrast, in *D.H. v. Clayton County Sch. Dist.*, a warrantless strip search of a student for marijuana was justified at its inception while forcing the student to strip fully naked in front of his peers was unconstitutionally excessive in scope. Even where a student strip search is justified at its inception, the Fourth Amendment still requires the execution of the search to be reasonable in scope. While some of these cases involved searching purses, the same approach would apply to backpacks, lockers, or any other possessions owned by a student, and thus would all be subjected to the *T.L.O.* analysis.

Public schools and colleges also face marijuana search issues in the context of mandatory drug testing. The U.S. Supreme Court has held that a school district's student-athlete drug policy, which authorized random urinalysis drug testing of students who participated in its athletic programs, did not violate students' federal or state constitutional right to be free from unreasonable searches. In *Vernonia School Dist. 47J v. Acton*, the Court reasoned that the school district had an immediate, legitimate concern in preventing student-athletes from using drugs, invasion of student privacy interest was negligible, and the district was not required to come up with a less intrusive search. Likewise, students who are studying health and other medical professions, like nursing, are subject to

mandatory drug testing but not without growing legal challenges. Some colleges, due to the passage of medical marijuana laws, have permitted the possession of medical marijuana on campus. An Arizona State University police officer arrested student Juwaun Maestas after the officer observed Maestas sitting on a road near his oncampus dormitory. The officer found a valid Arizona Medical Marijuana Act (hereinafter "AMMA") registry identification card in Maestas's wallet. "After Maestas admitted that he had marijuana in his dorm room, the officer obtained a search warrant, searched Maestas's dorm room, and found . . . 0.4 grams of marijuana." The Arizona Supreme Court ruled that the state cannot criminally charge public college students for having and using marijuana on campus if they have a medical marijuana card. The court reasoned that banning medical marijuana on college campuses violated the Arizona Constitution's protections for voterapproved laws referring to the AMMA.

C. Workplaces

In workplaces, cannabis search and seizure issues arise in the context of searches of people, places, things, and the taking and testing of body specimens like blood, urine, and oral fluids. The constitutionality of those searches is dependent upon whether the search is related to a public (governmental) or private employer, with searches by public employers treated differently than searches conducted by law enforcement. The Fourth Amendment search and seizure protections and standards for *public* employees are the same as protections afforded to students in *public* schools, which is consistent with the school search standards set out in the two-pronged test from *T.L.O*. In *O'Connor v. Ortega*, the U.S. Supreme Court held that: (1) "public employer intrusions on constitutionally protected privacy interests of government employees for noninvestigatory, workrelated purposes, as well as for investigations of work-related misconduct, should be judged by a standard of reasonableness under all the circumstances," and (2) should be reasonable *both in its inception and in its scope*.

This protection to public employees has extended to a search of employees' persons, desks, and other effects including the taking and testing of body specimens. The U.S. Supreme Court held that "the collection and subsequent analysis of . . . biological samples must be deemed Fourth Amendment searches." There are some categories of constitutionally permissible "suspicionless" searches that will automatically be upheld for the taking of body specimens to test for drugs (including marijuana) in the workplace. For example, in

National Treasury Employees Union v. Von Raab, the U.S. Customs Service mandatory drug screening requiring urinalysis tests of U.S. Customs Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction was permissible. The "Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders . . . outweigh the privacy interests of those who seek promotion to these positions." Additionally, there are mandatory drug testing requirements, which include testing for marijuana, in federal safety-sensitive employment positions such as truckers with the Department of Transportation. Under the Federal Drug-Free Workplace Act, federal employers are bound by the fact that marijuana is still considered illegal federally, and therefore federal employers implement zero-tolerance policies for all drugs including marijuana. Thus far, and even in the face of state medical marijuana laws, employees bringing actions under the Americans with Disabilities Act, which is an employee protection law, have lost their civil actions due to the federal illegality of marijuana.

On the other hand, private employers, as non-governmental entities, are left to establish their own drug testing policies, including but not limited to, zero-tolerance, random and suspicionbased testing. Some private employers will deny potential employee hires or fire an employee based on positive marijuana test results, while others will not test for it at all. As more state medical marijuana laws carve out protections for employees who legally use medical marijuana, more employment cases are developing. Employees are bringing actions against employers for the use of medical marijuana by utilizing state discrimination statutes, disability statutes, off-duty conduct statutes, and even housing statutes, with mixed results. Some courts point to the federal illegality of marijuana and rule against the employee, some point to medical marijuana statutes that either protect the employer or employee, while some look to disability, discrimination, and off-duty conduct statutes for guidance.

Conclusion

We are at an impasse with *legal* hemp and CBD, state decriminalization and legalizations of marijuana, and federally *illegal* marijuana. Oddly, *legal* CBD can be extracted from the *illegal* marijuana plant in addition to the *legal* hemp plant. This is further compounded by the removal of hemp from the CSA and the resulting propagation of CBD products. These products are not always accurate in representing THC concentrations which

sometimes results in a positive test for THC. Consequently, this causes unintended negative legal outcomes in the workplace, in the criminal justice system, and at a personal level.

The decriminalization and legalization of marijuana and hemp is also testing the boundaries of established principles of warrants and warrantless searches. Due to the similarities of the sight and smell of hemp and marijuana, hemp legalization is causing confusion in a variety of settings, particularly on the roadways where the "plain view" and "plain smell" doctrines, as exceptions to the warrant requirement, are prevalent. A law enforcement's or sniff dog's identification of hemp versus marijuana by sight or smell is now more complex.

Additionally, with this decriminalization and legalization, law enforcement can no longer assume that the odor of marijuana is due to something nefarious that involves illegal activity or illegal contraband. Some courts espouse that even if possession of marijuana is legal, there is no way to know if the amount possessed exceeds the permissible legal amount. Some courts mandate something more than odor alone to form the basis for probable cause for a search. A court's stance toward this issue may either validate or invalidate a search. The courts often discuss the status of marijuana state decriminalization and legalization laws in their marijuana search decisions. The scope of a search in the context of marijuana is also being addressed in the courts. The legal standards for the scope of a marijuana search vary and may be dependent upon where the search occurs, with some cases being more stringent in scope and others more liberal in scope.

The state legalization of cannabis and federal legalization of hemp is impacting how searches are conducted in stop and frisks, homes, land, curtilage, vehicles, schools, workplaces, body specimens, and other scenarios, and is fluctuating exceptions to the search warrant requirement. Legalization is also impacting exceptions to the warrant requirement including the "automobile exception," the "open fields" doctrine exception, the "exigent circumstances" exception, and the search incident to arrest exception, with varying outcomes.

While states continue to move to decriminalize, legalize, or regulate recreational and medical marijuana, the schism between the states and the federal government continues. As a result, issues related to marijuana in all regards, and pinpointedly on the topic of search and seizure, remain in flux. Even if the U.S. Supreme Court renders opinions on developing search and seizure issues, states may still rule under their own constitutions and grant their citizens more expansive Fourth Amendment rights than the federal Constitution.

While the courts, including the U.S. Supreme Court, grapple with marijuana search and seizure issues, until and unless marijuana is declassified or reclassified and hemp is placed back into the CSA, which is unlikely on both accounts, this confusing and ever-changing landscape will persist.
In the words of conservative Supreme Court Justice Clarence Thomas,

> If the Government is now content to allow States to act "as laboratories" and try novel social and economic experiments then it might no longer have authority to intrude on [t]he States' core police powers . . . to define criminal law and to protect the health, safety, and welfare of their citizens. A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach.