



2021 State Analysis Chart: Probable Cause to Stop and Search Based on the Smell of Cannabis Alone

This chart addresses the question, “Does the smell of cannabis alone supply probable cause for law enforcement to search vehicles without a warrant?” We surveyed 35 states and found that there was not one uniform approach that states took; however, in states where recreational use was legal, those states appeared less likely to find that the smell of cannabis alone justified warrantless searches of vehicles. Not surprisingly, states like Texas that have not legalized the use of cannabis for recreational or medicinal purposes were more likely to find that the smell of cannabis alone did supply probable cause so as to justify the warrantless search of a vehicle.

Each state featured in this chart contains check boxes that appear as follows:

Legalization Status	Recreational Use for 21+ <input type="checkbox"/>	Medicinal Use <input type="checkbox"/>	Decriminalization <input type="checkbox"/>
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When any of these boxes are checked, it represents the legalization status of cannabis at a state-wide level. When states have piece-meal legalization policies, such policies are summarized in the research sections. For example, Pennsylvania has not decriminalized the possession of cannabis state-wide, but has in many cities. In instances like this, the decriminalization box will remain blank because decriminalization is not the state-wide policy.

This chart, and the research contained within it, was gathered and assembled in the second half of 2021. Because this area of law is quickly evolving, this chart should be updated periodically to ensure that it contains the most up to date information.



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ALABAMA	
State Law	<p>Alabama enacted the Darren Wesley ‘Ato’ Hall Compassion Act, legalizing (for some purposes) the sale of medical marijuana, on May 17, 2021.¹ However, the law requires that regulations be established by a state cannabis commission, which has not yet been formed. (For instance, the to-be-formed commission has until September 2022 to create a system that allows people to apply for licenses to produce, transport, and sell medical cannabis.)</p> <p>While Birmingham’s mayor (Randall Woodfin) has introduced programs to “blanket” pardon certain misdemeanor possession convictions, such programs do not inure to the benefit of ordinary citizens who have not yet been convicted (<i>i.e.</i>, who are being searched by police as of late 2021).</p>
State Case Law	It is “well settled” that “the odor of burned marijuana emanating from an automobile is enough to provide probable cause to search” a vehicle. ²
Police Department Policy	Huntsville’s police department’s written directives are posted online but do not appear to include any related to searches based on the odor of marijuana.
Analysis	While Alabama has enacted a medical marijuana law, the act has not yet taken practical effect— <i>i.e.</i> , there is no way for a person to obtain a prescription for medical cannabis within the state right now. In addition, the State’s medical marijuana law does not allow for cannabis to be sold in its raw form (or to be vaped, smoked, or added as a food ingredient). As a result, possession of marijuana—or smoking marijuana—will still be illegal even after the State’s medical marijuana law takes full effect. It is therefore likely that an Alabama court would deem a police officer’s decision to search after smelling (either raw or burnt) marijuana to be constitutional.
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input type="checkbox"/>
ALASKA	
State Law	<p>Alaska legalized recreational marijuana in 2014 and medical marijuana in 1998.</p> <p>AS § 17.38 allows the use of marijuana for persons 21 years of age and older, including for possession, use, display, purchase, or transporting less than 1 ounce and for possession, growing, processing, or transporting less than 6 plants. Public consumption is banned and punishable by a fine of up to \$100.</p> <p>AS § 17.37 regulates the use of medical marijuana in Alaska.</p> <p>Neither AS § 17.37 nor AS § 17.38 explicitly addresses the odor of marijuana constituting probable cause to stop or search a vehicle.</p>
State Case Law	All of the case law predates passage of Alaska’s legalization law, making it outdated.

¹ Ala. Code §§ 20-2A-1 et seq.

² *Blake v. State*, 772 So. 2d 1200, 1202 (Ala. Crim. App. 2000); *see also Cunningham v. State*, No. CR-18-0551, 2019 WL 4564721, at *6–7 (Ala. Crim. App. Sept. 20, 2019), *rev’d sub nom. Ex parte Cunningham*, No. 1190187, 2020 WL 6535170 (Ala. Nov. 6, 2020).



	<p><i>Seay v. State</i> (pre-legalization):³ “In the context of a legal traffic stop, an odor of marijuana detected by an officer familiar with that smell provides more than enough suspicion that criminal activity is afoot for the officer to investigate the possibility that there are drugs in the car.”⁴</p> <p><i>Williams v. State</i> (pre-legalization):⁵ Police received a tip that car was transporting illegal drugs. “Once the police stopped the car, they smelled marijuana. This provided probable cause for the police to obtain a search warrant.”⁶ “When officers approached car, they smelled marijuana and ultimately established probable cause to search the car and arrest Williams.”⁷</p>
<p>Police Department Policy</p>	<p>The Alaska Department of Public Safety Operating Procedure Manual⁸ (for Alaska state troopers) does not explicitly address searches of vehicles based on the smell of marijuana. However, a Police Officer may search with or without a warrant persons, dwellings, and other forms of property for evidence of a crime; and take other action consistent with exercise of these enumerated powers when necessary to maintain the public peace.</p> <p>The city of Anchorage police manual does not explicitly address policies on search based on odor alone.⁹</p>
<p>Analysis</p>	<p>Case law in Alaska is very limited and predates legalization. Prior to legalization, the odor of marijuana detected by an officer appeared to support obtaining a search warrant in the context of a house or building, but it was unclear that the odor alone was enough in the context of a vehicle. Both <i>Williams v. State</i> and <i>Seay v. State</i> did not directly hold that the odor alone is sufficient for a search. Now that marijuana is legal for adults under state law, and thus not contraband or indicative of “criminal activity,” the analysis would surely change.</p>
<p>Legalization Status</p>	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input type="checkbox"/></p>
<p>ARIZONA</p>	
<p>State Law</p>	<p>Arizona’s Responsible Adult Use of Marijuana statute¹⁰ legalizes for adults, among other things, possession of certain amounts of marijuana for personal use.¹¹</p> <p>The statute explicitly provides that “the odor of marijuana or burnt marijuana does not by itself constitute reasonable articulable suspicion of a crime” unless law enforcement is investigating whether a person is driving or in actual physical control of a vehicle while under the influence.¹² (Although the act legalizes possession and use for adults, the provision</p>

³ *Seay v. State*, No. A-8975, 2006 WL 120172 (Alaska Ct. App. Jan. 18, 2006).

⁴ *Id.* at 4.

⁵ *Williams v. State*, 139 P.3d 1282 (Alaska Ct. App. 2006).

⁶ *Id.* at 1284.

⁷ *Id.* at 1285.

⁸ Alaska Department of Public Safety, *Operating Procedures Manual* (March 8, 2021) https://dps.alaska.gov/AST/PIO/CompleteOPM_Redacted.pdf.

⁹ City of Anchorage, *Policy, Regulations and Procedures Manual*, <https://public.powerdms.com/ANCHOR/tree/documents/406573>.

¹⁰ Ariz. Rev. Stat. §§ 36-2850 to 2865.

¹¹ *Id.* § 36-2852.

¹² *Id.* § 36-2852(C).



	<p>stating that the odor of marijuana does not constitute, by itself, reasonable articulable suspicion of a crime does not make any distinction between adults and minors.)</p> <p>Ariz. Rev. Stat. Ann. § 36-2801 to -2821 is Arizona’s medical marijuana statute. Section 36-2811 protects registered qualifying patients from arrest, prosecution, and penalty for their use of medical marijuana and registered qualifying caregivers from arrest, prosecution, or penalty for assisting a registered qualified patient with their use if the patient and caregiver do not possess more than the allowable amount of marijuana.¹³</p>
<p>State Case Law</p>	<p><i>State v. Sisco</i> (pre-legalization):¹⁴ The Court held that probable cause exists “based on the smell or sight of marijuana alone unless, under totality of the circumstances, other facts would suggest to a reasonable person that marijuana use or possession complies with” the Arizona Medical Marijuana Act (“AMMA”). This holding was expressly premised, however, on the fact that marijuana use and possession was still generally illegal under Arizona law, and the Court acknowledged that its “conclusion reflects that AMMA did not decriminalize the possession or use of marijuana generally. <i>If AMMA had done so, or if Arizona eventually decriminalizes marijuana, our analysis and conclusion in this context might well be different.</i>”¹⁵</p> <p>It is highly likely that the Court would rule differently on the issue now that Arizona has legalized and decriminalized (for minors) marijuana. The case is not directly on point—the court was discussing whether odor of marijuana emanating from an apartment alone gives rise to probable cause sufficient to issue a search warrant—but courts have relied on its holding in cases that are on point, indicating that those holdings should not be relied on now that Arizona has legalized and decriminalized cannabis.</p> <p><i>State v. Cheatham</i> (pre-legalization):¹⁶ Citing <i>Sisco</i>, the Court held that odor of marijuana emanating from a vehicle alone provides probable cause for a warrantless search of the vehicle. Had any facts suggested AMMA-compliant use, the officer would have had to consider whether those “facts—as part of the totality of the circumstances—might dispel probable cause that otherwise exists based on odor alone.”¹⁷</p>
<p>Police Department Policy</p>	<p>The Phoenix Police Department manual does not directly address warrantless stops and searches of vehicles based solely on the odor of marijuana when discussing warrantless stops and searches. It does discuss warrantless searches and seizures of vehicles generally. The manual notes that officers may stop a vehicle for investigation if the officer “has a reasonable suspicion to believe the driver or occupants are involved in criminal activity or committed a traffic offense.”¹⁸ It states that officers may search the contents of the vehicle if “there is probable cause to believe that the vehicle contains items that may be seized and the vehicle is mobile or readily capable of becoming mobile.”¹⁹ The manual</p>

¹³ Id. § 36-2811(B).

¹⁴ *State v. Sisco*, 239 Ariz. 532, 373 P.3d 549, 553–55 (2016).

¹⁵ Id. at 553.

¹⁶ *State v. Cheatham*, 240 Ariz. 1, 375 P.3d 66, 68 (2016).

¹⁷ See also *State v. Raffaele*, 249 Ariz. 474, 471 P.3d 685, 691 (Ct. App. 2020), review denied (Feb. 2, 2021) (holding smell of cannabis in vehicle alone sufficient to prolong traffic stop and search vehicle); *State v. Dotson*, No. 1 CA-CR 19-0376, 2020 WL 3583205, at *2 (Ariz. Ct. App. July 2, 2020) (same).

¹⁸ Phoenix Police Department, Operations Order Manual at 614, https://www.phoenix.gov/policesite/Documents/operations_orders.pdf.

¹⁹ Id.



	<p>discusses the plain view exception to the search warrant requirement but does not discuss whether that exception encompasses “plain smell.”²⁰</p> <p>In providing an example of how officers should fill out paperwork related to juvenile arrests, the manual gives an example about an officer stopping a vehicle for a traffic violation and conducting a search based on a “strong odor of marijuana emanat[ing] from the driver’s open window”²¹ This example implies that searches based on the odor of marijuana alone are permissible.</p> <p>The Maricopa County Sheriff’s Department’s policy on searches and seizures discusses exceptions to the warrant requirement, but it does not indicate whether the odor of marijuana alone can provide probable cause to search a vehicle.²²</p>
<p>Analysis</p>	<p>The Responsible Adult Use of Marijuana statute clearly abrogates <i>Sisco</i> by explicitly stating that the odor of marijuana by itself does not constitute reasonable articulable suspicion of a crime unless law enforcement is investigating someone for driving under the influence. To the extent <i>Sisco</i> survives, it would only be when officers are investigating someone for driving under the influence. In all other circumstances, law enforcement may not permissibly stop or search a vehicle without a warrant based solely on the odor of marijuana. That the initiative did not qualify the provision abrogating <i>Sisco</i> by age indicates that the odor of marijuana by itself does not constitute reasonable articulable suspicion of a crime even if the driver or passenger is a minor.</p>
<p>Legalization Status</p>	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
<p>CALIFORNIA</p>	
<p>State Law</p>	<p>In 2016, California’s Proposition 64, also known as the Adult Use of Marijuana Act (AUMA), legalized the possession of 28.5 grams or less of marijuana for persons 21 years and older.²³</p> <p>The AUMA broadly legalized specified personal use and cultivation of marijuana for adults 21 years of age or older; reduced criminal penalties for specified marijuana-related offenses for adults and juveniles; and authorized resentencing or dismissal and sealing of prior, eligible marijuana-related convictions.</p> <p>Low-level marijuana possession had previously been “decriminalized,” or subject to a fine instead of possible jail time. The penalty was reduced to a fine in 1976, and it was made non-criminal in 2010.</p> <p>The “Compassionate Use Act of 1996” (Proposition 215)²⁴ generally permits “seriously ill Californians” to obtain and use marijuana for medical purposes as statutorily defined.</p>

²⁰ See id. at 616.

²¹ Id. at 665.

²² Maricopa County Sheriff’s Office, Policy and Procedures: Search and Seizure 8-11 (June 4, 2021), <https://www.mcso.org/home/showpublisheddocument/526/637583999698170000>. See also Tucson Police Department, General Orders: 2200 Constitutional Issues 7-8 (May 2001), https://www.tucsonaz.gov/files/police/general-orders/2200CONSTITUTIONAL_ISSUES.pdf?uuid=06052020 (same); Scottsdale Police Department, Field Orders: Warrantless Searches/Seizures 1-3 (Nov. 2013), <https://public.powerdms.com/SCOTT/tree/documents/907074> (same).

²³ Cal. Health & Safety Code §§ 11362.1 et seq.

²⁴ Cal. Health & Safety Code § 11362.5.



<p>State Case Law</p>	<p>In California, the smell of cannabis alone may not be grounds for searching a vehicle.²⁵</p> <p>No. 19-50275, 2021 WL 3011997, at *2 (9th Cir. July 15, 2021) (“when combined with other factors, the smell of marijuana may still support probable cause that a vehicle contains evidence of marijuana activity that remains unlawful under California law,” such as driving under the influence²⁶ or possessing an open container of cannabis while driving²⁷).</p>
<p>Police Department Policy</p>	<p>The San Jose Police Department manual notes that “[t]he mere odor of marijuana or sight of smoke or vapor emitting from a structure is not reasonable cause. If the person in possession of, or using, the marijuana is a qualified medical patient or primary caregiver and within the possession limits and circumstances set forth in the Compassionate Use Act, or the person is age 21 or older and within the possession limits and circumstances set forth in the Adult Use of Marijuana Act (Proposition 64) and the Medicinal and Adult-Use of Cannabis Regulation and Safety Act, then reasonable cause to arrest has not been established.”²⁸</p> <p>The Los Angeles Police Department’s policy and procedures documents are publicly available. A search of the department’s policies regarding traffic law enforcement encounters and searches/arrests does not reveal any explicit mention of marijuana search policies based on marijuana odor.</p>
<p>Analysis</p>	<p>California case law is clear; officers may not stop and search vehicles based <i>solely</i> on the odor of marijuana.²⁹ However, the odor of cannabis may be a factor in the probable cause analysis.³⁰</p>
<p>Legalization Status</p>	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
<p>COLORADO</p>	
<p>State Law</p>	<p>Colo. Const. art. XVIII, § 16 legalized the use and possession of up to 1 ounce of marijuana and up to six plants for persons twenty-one years of age or older for recreational use (2012). The legislature passed implementing legislation, and in 2021 it increased the amount to two ounces.</p>

²⁵ See *In re D.W.*, 13 Cal. App. 5th 1249, 1253, 221 Cal. Rptr. 3d 332 (2017) (stating that at the time, possession of small amounts of marijuana was a minor, non-jailable infraction, so the smell could not support probable cause for a search); see also *People v. Johnson*, 50 Cal. App. 5th 620, 634, 264 Cal. Rptr. 3d 103, 115 (2020), review denied (Aug. 12, 2020) (“the odor of marijuana alone no longer provides an inference that a car contains contraband” because individuals over the age of 21 can now lawfully possess and transport up to 28.5 grams of marijuana); *United States v. Martinez*, 811 F. App’x 396 (9th Cir. 2020), cert. denied, No. 20-7038, 2021 WL 1520866 (U.S. Apr. 19, 2021) (odor of marijuana alone did not provide probable cause for warrantless search of defendant’s car, since possession of 28.5 grams or less of marijuana was legal in California, warranting remand in prosecution for being a domestic violence misdemeanor in possession of a firearm to determine whether defendant consented to search); *People v. McGee*, 53 Cal. App. 5th 796, 266 Cal. Rptr. 3d 650 (2020), review denied (Oct. 28, 2020) (officers did not have probable cause to search the vehicle based solely upon the scent of unburned marijuana and the observation of the small amount of marijuana in a baggie in the passenger’s cleavage).

²⁶ Cal. Veh. Code § 23536.

²⁷ Cal. Health and Safety Code § 11362.3.

²⁸ *San Jose Police Department Duty Manual*, www.sjpd.org/home/showdocument?id=314, at 295.

²⁹ See *United States v. Martinez*, 811 F. App’x 396 (9th Cir. 2020), cert. denied, No. 20-7038, 2021 WL 1520866 (U.S. Apr. 19, 2021) (odor of marijuana alone did not provide probable cause for warrantless search of defendant’s car).

³⁰ *United States v. Vasquez*, No. 19-50275, 2021 WL 3011997, at *2 (9th Cir. July 15, 2021); see also *People v. Fews*, 27 Cal. App. 5th 553, 238 Cal. Rptr. 3d 337 (2018) (probable cause existed given the odor of marijuana, presence of half-burnt cigar, the high crime location, the furtive movements of both driver and passenger, and the type of clothing driver was wearing).



	<p>Colorado Medical Marijuana Code – article 43.3 of title 12 – for medical patients (2000).</p> <p>In 1975, Colorado legislators “decriminalized” cannabis, reducing the penalty for possession of up to an ounce to a fine.</p>
State Case Law	<p><i>People v. McKnight</i>:³¹ The court held that “a sniff from a drug-detection dog that is trained to alert to marijuana constitutes a search under [the Colorado Constitution] because that sniff can detect lawful activity, namely the legal possession of up to one ounce of marijuana by adults at least twenty-one years old. The Court held that law enforcement officers must have probable cause to believe that an item or area contains a drug in violation of state law before deploying a drug-detection dog that alerts to marijuana for an exploratory sniff.”</p> <p><i>People v. Zuniga</i>:³² The court held that “the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination.” In this case, the court held that there was probable cause to search a vehicle for illegal drugs because a confluence of factors, including extreme nervousness of driver and passenger, the strong odor of raw marijuana, and a K-9 unit’s alert at the vehicle.</p> <p><i>People v. Cox</i>³³ and <i>Zuniga</i> (and supported by <i>People v. McKnight</i>,³⁴ where warrantless sniff of automobile by dog trained to detect marijuana was not justified) suggest that a positive alert from a dog trained to detect marijuana alone does not alone establish probable cause, which would presumably apply to a police officer detecting the odor of marijuana as well.</p>
Police Department Policy	<p>A search of the Denver City and County Police manual does not reveal any explicit mention of vehicle search policies based on marijuana odor.</p>
Analysis	<p>The odor of marijuana is one of several relevant factors in determining probable cause and should be considered with other factors in a vehicle search.</p>
Legalization Status	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
CONNECTICUT	
State Law	<p>As of July 1, 2021, possession and use of up to 1.5 oz of cannabis is fully legal in Connecticut under Senate Bill 1201, also known as Public Act 21-1. Connecticut’s Adult-Use Marijuana Act allows people age 21 or older to possess or use cannabis, up to a specified possession limit; establishes various penalties for possession by underage individuals or possession exceeding the bill’s limit; and contemplates issuing guidance on how police officers must determine whether someone’s cannabis possession exceeds the bill’s limit.</p> <p>The statute explicitly provides that the odor of cannabis or burnt cannabis “does not constitute (in whole or part) probable cause or reasonable suspicion, and must not be used as a basis to support any stop or search of a person or motor vehicle.”³⁵ The Act carves out an exception for officers to conduct a test for impairment based on the odor of cannabis or</p>

³¹ *People v. McKnight*, 2019 CO 36, 446 P.3d 397, reh’g denied (July 1, 2019).

³² *People v. Zuniga*, 2016 CO 52, 372 P.3d 1052.

³³ *People v. Cox*, 2017 CO 8, 401 P.3d 509.

³⁴ *McKnight*, 2019 CO 36.

³⁵ Conn. Pub. Act 21-1, § 18(a)(1) (Searches and Seizures).



	<p>burnt cannabis if such official reasonably suspects the operator or a passenger of a motor vehicle of driving under the influence.^{36 37}</p> <p>Senate Bill 1014 was passed in 2011 to decriminalize the possession of up to 0.5 ounce (14 grams) of cannabis. In 2012, the state enacted House Bill 5389, which legalized medical marijuana.</p>
State Case Law	<p><i>State v. Brito</i> (pre-legalization):³⁸ Based on the odor of marijuana emanating from the vehicle that was being occupied solely by the defendant, the defendant's admitted history of drug dealing and related arrests, the defendant's history of a weapons charge, and the \$1000 found on the defendant incident to the pat-down search, the court determined that the totality of the circumstances afforded the police "probable cause to search the entire vehicle, including any containers, for drugs or narcotics."</p>
Police Department Policy	<p>There is no written guidance by way of publicly available manuals or written policies regarding how to handle the smell of cannabis in the context of a traffic stop.</p>
Analysis	<p>Connecticut's new Adult-Use Marijuana Act explicitly settles the question that the odor of burnt or unburnt cannabis cannot serve as probable cause and cannot be used as a basis to support the search of a motor vehicle. The single case to the contrary—<i>State v. Brito</i>—was decided four years ago and has likely been rendered moot by passage of Public Act 21-1.</p>
Legalization Status	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
DELAWARE	
State Law	<p>Delaware has decriminalized possession of personal use amounts of marijuana (less than 1oz.) and decreased penalties for possession of larger amounts and for minors in possession of any amount of marijuana. This was done in 2015 through House Bill 39, which amended the following sections of Delaware Code Title 16: 4714, 4755, 4756, 4764, and 4751B-4753.</p> <p>Delaware also has a medical cannabis law, which was enacted in 2011.</p>
State Case Law	<p><i>Juliano v. State</i>:³⁹ The Delaware Supreme Court held that an arrest based <i>solely</i> on the odor of marijuana violated the Fourth Amendment.⁴⁰ However, the court did take pains to note that the smell of marijuana can be a factor in the probable cause analysis, simply not the <i>sole</i> factor.⁴¹</p> <p><i>Valentine v. State</i>:⁴² Holding that because use or consumption of marijuana in a moving vehicle is a misdemeanor, possession of marijuana renders marijuana odors, raw or burnt, relevant to determinations of probable cause.</p>

³⁶ *Id.* § 18(c).

³⁷ It is illegal to drive under the influence of any intoxicating drug, including marijuana, per CT Code Sec. 14-227a.

³⁸ *State v. Brito*, 170 Conn. App. 269, 154 A.3d 535 (2017), *cert. denied*, 324 Conn. 925, 2017 WL 1174397 (2017).

³⁹ *Juliano v. State*, No. 320, --- A.3d ---, 2021 WL 4127187 at *1 (Del. Sept. 10, 2021) (odor of marijuana at traffic stop is not sufficient probable cause for arrest).

⁴⁰ *Id.* at *8.

⁴¹ *Id.* (recognizing three post-decriminalization cases where smell of marijuana appropriately considered factor in probable cause analysis).

⁴² *Valentine v. State*, 207 A.3d 166, 2019 WL 1178765 at *2 (Del. March. 12, 2019).



Police Department Policy	Wilmington, Delaware’s police department’s policy and procedures documents are publicly available. A search of the department’s policies regarding traffic law enforcement encounters and searches/arrests does not reveal any explicit mention of marijuana search policies based on marijuana odor. ⁴³
Analysis	Delaware case law is clear; officers may not stop and search vehicles based <i>solely</i> on the odor of marijuana. ⁴⁴ However, the odor of cannabis may be a factor in the probable cause analysis. ⁴⁵
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
FLORIDA	
State Law	Florida’s medical marijuana act has been in effect since March 25, 2016. ⁴⁶ In its current form, it permits qualified physicians to prescribe smoking as an appropriate route of administration. ⁴⁷ However, it does not permit the use of marijuana in any vehicle, aircraft, or motorboat, “except for low-THC cannabis not in a form for smoking.” ⁴⁸
State Case Law	<p>The Florida Supreme Court has not opined on this issue since the passage of Florida’s medical marijuana law, but two District Courts of Appeal in the state have. (Map of Districts.)</p> <p><i>First District:</i> “[W]e cannot say that it would be unreasonable for an officer to conclude there is a fair probability that someone driving around at 2:00 a.m., smelling of marijuana, is acting unlawfully. And this is true whether or not Florida law allows the medical use of marijuana in some circumstances...[T]he possibility that a driver might be a medical-marijuana user would not automatically defeat probable cause.”⁴⁹</p> <p><i>Second District:</i> “[A]n officer smelling the odor of marijuana has probable cause to believe that the odor indicates the illegal use of marijuana.”⁵⁰ “[W]here the individual has a lawful prescription...,” such a circumstance “<u>might</u> provide an affirmative defense to a charge of a criminal offense” of possession of a controlled substance, “but it would not prevent the search.”⁵¹</p> <p>A court reviewing this issue as a matter of first impression could recognize a distinction between searches of vehicles based on the smell of raw versus burnt marijuana. After all, Florida “continues to prohibit the use of smoked marijuana in vehicles”⁵²—even by a passenger, but possession of raw marijuana can be legal under the State’s medical marijuana act.</p>

⁴³ See *WPD Policies and Procedures*, <https://www.wilmingtonde.gov/government/public-safety/wilmington-police-department/policies-and-procedures>.

⁴⁴ See *Juliano*, 2021 WL 4127187 at *1.

⁴⁵ See *id.* at *8; *Valentine*, 207 A.3d 166.

⁴⁶ Fla. Stat. §§ 381.986–988.

⁴⁷ See *id.* § 381.986(4)(c).

⁴⁸ *Id.* § 381.986(1)(j)(5)(f).

⁴⁹ *Johnson v. State*, 275 So. 3d 800, 802 (Fla. Dist. Ct. App. 2019).

⁵⁰ *Owens v. State*, 317 So. 3d 1218, 1219 (Fla. Dist. Ct. App. 2021), *reh’g denied* (June 2, 2021).

⁵¹ *Id.* at 1220 (emphasis in original).

⁵² *Owens*, 317 So. 3d at 1220 (citing Fla. Stat. § 381.986(1)(j)(5)).



Police Department Policy	None found that appear to contain guidelines related to searches based on odor of marijuana.
Analysis	<p>While a couple of Florida District Courts of Appeals have issued opinions on the question, the State’s separate districts treat one another much in the same way that judges of the various U.S. Circuit Courts of Appeals treat one another—that is, as persuasive authority <i>at most</i>. (In addition, cultural divides in the State affect the weight of a given District Court may give to another’s opinions.) In particular, the Third District Court of Appeal, which encompasses Miami and much of South Florida, has not yet issued an opinion on medical marijuana’s effect on an officer’s probable cause assessment.</p> <p>Regardless, the prevailing attitude appears to be that the smell of raw—and especially burnt—marijuana coming from a vehicle provides probable cause to search the vehicle even though many Florida citizens may legally possess raw marijuana.</p>
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input type="checkbox"/>
HAWAII	
State Law	<p>Haw. Rev. Stat. § 712-1249 provides that possession of any amount of marijuana constitutes promoting a detrimental drug in the third degree, which is a petty misdemeanor. If, however, the person possesses three grams or less of marijuana, they have committed a violation punishable by a fine of \$130, not a petty misdemeanor.⁵³</p> <p>Haw. Rev. Stat. §§ 329-121 to -131 authorizes the medical use of cannabis in the state. Section 329-122(e)(2)(A) states that “[t]he authorization for the medical use of cannabis in this section shall not apply to [t]he medical use of cannabis[] [i]n . . . any moving vehicle.”</p> <p>Section 329-125 provides that qualifying patients, primary caregivers, qualifying out-of-state patients, and caregivers to out-of-state patients “may assert the medical use of cannabis authorized under this part as an affirmative defense to any prosecution involving marijuana” under certain parts of Hawaii statutes.⁵⁴</p> <p>It also provides that qualifying patients, primary caregivers, qualifying out-of-state patients, or caregivers to qualifying out-of-state patients “not complying with the permitted scope of the medical use of cannabis shall not be afforded the protections against searches and seizures pertaining to the misapplication of the medical use of cannabis.”⁵⁵</p>
State Case Law	No case law was found to be directly on point. In a case predating both the decriminalization and medical cannabis laws, the Hawaii Supreme Court stated that the smell of marijuana alone “may establish probable cause” in evaluating whether exigent circumstances existed justifying law enforcement’s warrantless search of a residence, but that “[o]dors alone do not authorize a search or seizure in a home without a warrant.” ⁵⁶

⁵³ *Id.* § 712-1249(2).

⁵⁴ *Id.* § 329-125(a).

⁵⁵ *Id.* § 329-125(b).

⁵⁶ *State v. Dorson*, 62 Haw. 377, 615 P.2d 740, 746 (1980).



Police Department Policy	The Honolulu Police Department has a published policy statement on warrantless searches. ⁵⁷ The policy does not explicitly discuss searches based on odor alone. With respect to motor vehicles, the policy states that “[w]henver practicable, a warrant shall be obtained for the search of a motor vehicle.” ⁵⁸ Nevertheless, officers may search a vehicle without a warrant “if there is: [(1)] Probable cause to believe the vehicle contains contraband or evidence of a crime; and [(2)] A foreseeable risk that, because of the vehicle’s mobility or exposure, the vehicle might be moved or the evidence it contains removed or destroyed before a warrant could be obtained.” ⁵⁹ The policy also discusses the “plain view” exception to the warrant requirement but does not address whether the exception encompasses “plain smell.” ⁶⁰
Analysis	Hawaii’s case law and codified law does not provide much clarity on whether police officers may stop and search vehicles based solely on the odor of cannabis. <i>Dorson’s</i> dicta that “the smell of marijuana may establish probable cause” suggests that, if the foreseeable risk of moving, removal, or destruction prong is met, officers may permissibly search vehicles based solely on the odor of marijuana. It is unclear how Hawaii’s medical marijuana or decriminalization statute impact the probable cause determination, though if a vehicle was moving when officers stopped it and they then smell an odor of burning cannabis—suggesting that marijuana was smoked while the vehicle was moving—the medical marijuana law may not protect even qualified registered patients or caregivers. ⁶¹
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
IDAHO	
State Law	<p>Marijuana is a Schedule I controlled substance under Idaho Law.⁶² It is illegal for any person to manufacture, deliver, possess with intent to manufacture or deliver, or possess marijuana, which refers to all parts of the plants of the genus cannabis, including or any preparation of cannabis which contains tetrahydrocannabinol. It is illegal to publicly use or be under the influence of marijuana. Specific penalties for these acts can be found in Sections 37-2732 and 37-2732C of the Uniform Controlled Substances Act.</p> <p>See Idaho Office of Drug Policy Website: https://odp.idaho.gov/marijuana/.</p>
State Case Law	<p><i>State v. Gonzales</i>:⁶³ “The smell of marijuana alone can satisfy the probable cause requirement for a warrantless search. An officer may draw reasonable inferences to establish probable cause from related experience and law enforcement training.”</p> <p>A search warrant was not necessary because motor vehicles are subject to warrantless searches if probable cause exists, leading the officer to believe seizable evidence is</p>

⁵⁷ Honolulu Police Department, Warrantless Searches and Seizures (Oct. 30, 2019), <https://www.honolulupd.org/wp-content/uploads/2020/08/HPD-Policy-114-10-30-2019.pdf>.

⁵⁸ *Id.* at 5.

⁵⁹ *Id.*

⁶⁰ *See id.* at 6.

⁶¹ *See* Haw. Rev. Stat. § 29-122(e)(2)(A) (“The authorization for the medical use of cannabis in this section shall not apply to [t]he medical use of cannabis[] [i]n . . . any moving vehicle.”).

⁶² Idaho Code § 37-2705(d)(22).

⁶³ *State v. Gonzales*, 117 Idaho 518, 519, 789 P.2d 206 (Ct. App. 1990) (cleaned up).



	<p>contained therein. The mobile characteristic of a vehicle ... creates exigent circumstances under which a warrantless search is allowed.”</p> <p><i>State v. Schmadeka</i>:⁶⁴ The odor of burnt marijuana was insufficient to justify a warrantless search of the trunk of a vehicle.</p> <p><i>State v. Shepherd</i>:⁶⁵ The odor of “raw marijuana,” presence of marijuana pipe, and marijuana located in a backpack on the rear seat were sufficient for probable cause to search the trunk of automobile</p>
Police Department Policy	No written guidance by way of manuals or written policies found regarding how to handle the smell of cannabis in the context of traffic stops. ⁶⁶
Analysis	Idaho case law is quite clear that the smell of cannabis, without more, can provide probable cause to search the passenger compartment of a vehicle, although Idaho courts have drawn a distinction between the smell of burnt versus raw marijuana to justify the search of a trunk of a vehicle. Those cases hold that the smell of burnt marijuana, without more, is not sufficient to justify a search of the trunk of a vehicle (because people typically do not smoke marijuana in the trunks of their vehicles), but that the smell of raw marijuana does provide probable cause for a trunk search as it is suggestive of drug trafficking or sales.
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input type="checkbox"/> Decriminalization <input type="checkbox"/>
ILLINOIS	
State Law	<p>Recreational: The Cannabis Regulation and Tax Act⁶⁷ legalizes the use of cannabis for persons 21 years of age or older, effective Jan. 1, 2020. The Cannabis Act does not explicitly address the odor of marijuana constituting probable cause to stop or search a vehicle.</p> <p>Medical: The Compassionate Use of Medical Cannabis Program Act⁶⁸ legalizes the use of cannabis for medicinal use by a qualified patient.</p> <p>Decriminalization: In 2016, the legislature reduced penalties for possession of up to 10 grams to a fine of \$100-200. That penalty remains in place for those under 21.</p>
State Case Law	<p>Illinois’ case law involves stops that predate passage of Illinois’ legalization law.</p> <p><i>People v. Stout</i> (pre-legalization):⁶⁹ Reaffirmed the court’s prior holding that distinctive odors, including burnt cannabis alone, can be persuasive evidence of probable cause. A police officer’s detection of controlled substances by their smell has been held to be a permissible method of establishing probable cause, particularly when a trained and experienced police officer detects the odor of cannabis emanating from a vehicle. This method of detection does</p>

⁶⁴ *State v. Schmadeka*, 136 Idaho 595, 600, 38 P.3d 633 (Ct. App. 2001).

⁶⁵ *State v. Shepherd*, 118 Idaho 121, 124, 795 P.2d 15 (Ct. App. 1990).

⁶⁶ See, e.g., *Boise Police Department Policy & Procedures Manual* (Jan. 2019), <https://www.cityofboise.org/media/6875/bpd-policy-and-procedure-manual-jan-2019.pdf>.

⁶⁷ 410 ILL. COMP. STAT. 705/.

⁶⁸ 410 ILL. COMP. STAT. 130/.

⁶⁹ *People v. Stout*, 106 Ill. 2d 77, 477 N.E.2d 498 (1985).



	<p>not constitute an unconstitutional search. This case dealt with the odor of burnt cannabis, but a distinction with raw cannabis was not made by the court.</p> <p><i>People v. Hill</i> (pre-legalization):⁷⁰ While this case did not decide whether odor of burnt cannabis without other corroborating evidence presents an officer probable cause to search a vehicle in light of the passage of the medical cannabis act and decriminalization, it did determine that the smell of cannabis remained a factor in a probable cause determination at the time. Additional factors in this case include the officer seeing a loose “bud” in the backseat and smelling a strong odor of cannabis, and a delay in pulling over, which, together, indicate that cannabis was in the car and, likely, not properly contained. The court cited a case favorably that noted decriminalization is not legalization. Because marijuana was not yet legal in the state, the Illinois Supreme Court found cannabis remained contraband for most individuals (although not for medical patients) and that they could not have a privacy interest in contraband. In addition, the court observed that it remained a Class A misdemeanor for patients to possess cannabis in a motor vehicle, “except in a sealed, tamper-evident medical cannabis container.”</p>
Police Department Policy	The rules and regulations of the Chicago Police Department do not explicitly address a policy on search based on odor of cannabis. ⁷¹
Analysis	Although marijuana is now legal for adults in Illinois, the smell of burnt or raw cannabis could still support probable cause to search a vehicle. It is a Class A misdemeanor for a passenger or driver to “possess cannabis within any passenger area of any motor vehicle upon a highway” in Illinois “except in a secured, sealed or resealable, odor-proof, child-resistant cannabis container that is inaccessible.” ⁷²
Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
MAINE	
State Law	<p>In Maine, recreational marijuana is legal after voters approved Question 1 in 2016. Maine legalized possession of small amounts (2.5oz) of marijuana for those over 21 and describes penalties for possession of larger amounts, including fines up to \$100 and additional criminal or civil penalties.⁷³</p> <p>Voters approved a medical cannabis initiative in 1999, which was subsequently expanded by both the legislature and voters.</p> <p>The legislature “decriminalized” simple possession of cannabis, reducing the penalty to a fine, in 1976. The penalty for minors remains a civil violation.</p>
State Case Law	Maine courts have not expressly considered the issue of whether the smell of marijuana alone can constitute probable cause to stop a vehicle. The Maine Supreme Court most

⁷⁰ *People v. Hill*, 2020 IL 124595, 162 N.E.3d 260.

⁷¹ See *Chicago Police Department Rules and Regulations* (Apr. 16, 2015), <http://directives.chicagopolice.org/directives/data/a7a57bf0-12d7c186-a4912-d7c1-8b12822c2ca106c4.html>.

⁷² 625 ILL. COMP. STAT. 5/11-502.15.

⁷³ Maine Revised Statutes Title 28-B, Chapter 3, Section 1102.



	<p>recently explained the contours of Maine’s application of the Fourth Amendment in relation to probable cause for traffic stops in <i>State v. Blier</i>.⁷⁴</p> <p><i>State v. Dominique</i> (pre-legalization):⁷⁵ “The Fourth Amendment to the United States Constitution protects citizens from unreasonable intrusions of police officers and other government agents.”⁷⁶</p> <p><i>State v. Donatelli</i> (pre-legalization):⁷⁷ When a police officer makes an investigative stop, he or she “must have, at the time of the stop, an articulable suspicion that criminal conduct has taken place, is occurring, or imminently will occur, and the officer’s assessment of the existence of specific and articulable facts sufficient to warrant the stop must be objectively reasonable in the totality of the circumstances.”⁷⁸ When an investigating officer’s actions during the stop “exceed what is necessary to dispel the suspicion that justified the stop, the detention may amount to an arrest and is lawful only if it is supported by probable cause.”⁷⁹</p> <p><i>State v. Lagasse</i>:⁸⁰ “Probable cause exists where facts and circumstances within the knowledge of the officers and of which they have reasonably trustworthy information would warrant a prudent and cautious person to believe that the arrestee did commit or is committing the felonious offense.”⁸¹ The probable cause standard is an objective one and presents “a very low threshold.”⁸²</p>
<p>Police Department Policy</p>	<p>There is no written guidance in available police manuals regarding how to handle the smell of cannabis in the context of a traffic stop.</p>
<p>Analysis</p>	<p>Based on the legalization of recreational cannabis, coupled with a lack of clarity in case law, Maine presents a difficult case. On the one hand, Maine has legalized recreational use of marijuana. On the other, courts have not yet considered the question of where the smell of marijuana fits into the probable cause analysis during a traffic stop. There is, however, anecdotal evidence that police are not relying on the odor of marijuana alone for probable cause. An article in <i>News Center Maine</i> describes that David Boyer, former Maine political director of Marijuana Policy Project, was pulled over for speeding after legalization, and when the officer reported she smelled marijuana, Boyer reminded her it was legal and a search of his vehicle was avoided.⁸³</p>
<p>Legalization Status</p>	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>

⁷⁴ *State v. Blier*, 2017 ME 103, 162 A.3d 829.

⁷⁵ *State v. Dominique*, 2008 ME 180, 960 A.2d 1160.

⁷⁶ *Id.* (quotation marks omitted), including unlawful arrest, see *State v. Langlois*, 2005 ME 3, 863 A.2d 913.3.

⁷⁷ *State v. Donatelli*, 2010 ME 43, 995 A.2d 238.

⁷⁸ *Id.* (alterations omitted) (quotation marks omitted).

⁷⁹ *Id.* (quotation marks omitted).

⁸⁰ *State v. Lagasse*, 2016 ME 158, 149 A.3d 1153.

⁸¹ *Id.* (quotation marks omitted).

⁸² *Id.* (quotation marks omitted); see *State v. Flint*, 2011 ME 20, 12 A.3d 54 (“[I]t is the objective view of the circumstances that matters; the arresting officer’s subjective belief regarding whether probable cause exists is not determinative.”)

⁸³ See Michael Rubinkam, *In era of legal pot, can police search cars based on odor?*, NEWS CENTER MAINE (Sept. 13, 2019), <https://www.newscentermaine.com/article/money/business/medical-marijuana-sales/in-era-of-legal-pot-can-police-search-cars-based-on-odor/97-003436e3-3497-4fb8-b863-af55bee1ecf9>.



MARYLAND	
State Law	<p>Maryland decriminalized possession of less than 10 grams of marijuana, making it a civil offense.⁸⁴ Section 5-601.1(a) provides that “a police officer shall issue a citation to a person who the police officer has probable cause to believe has committed a violation of § 5-601 of this part involving the use or possession of less than 10 grams of marijuana.”</p> <p>Medical marijuana is legal for patients over 18 years old and regulated by the Maryland Medical Cannabis Commission.</p> <p>There is no statute that speaks specifically to whether police can search or stop a person based on odor alone.</p>
State Case Law	<p><i>Robinson v. State</i>:⁸⁵ “[A] law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle.”</p> <p><i>Norman v. State</i>:⁸⁶ “[W]here an odor of marijuana emanates from a vehicle with multiple occupants, a law enforcement officer may frisk an occupant of the vehicle if an additional circumstance or circumstances give rise to reasonable articulable suspicion that the occupant is armed and dangerous . . . An odor of marijuana alone emanating from a vehicle with multiple occupants does not give rise to reasonable articulable suspicion that the vehicle’s occupants are armed and dangerous and subject to frisk.”</p> <p><i>Pacheco v. State</i>:⁸⁷ Holding that “possession of a joint and the odor of burnt marijuana” does not give police “probable cause to believe that [a suspect] was in possession of a criminal amount of that substance.”</p> <p><i>Lewis v. State</i>:⁸⁸ “[T]he 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 arrest.”</p> <p><i>In re D.D.</i>:⁸⁹ “Based on the reasoning of <i>Lewis</i> and other cases, however, because an officer cannot tell by the smell of marijuana alone that a person is involved in criminal activity, we hold that the odor of marijuana, by itself, does not provide reasonable suspicion to conduct an investigatory stop.”</p>
Police Department Policy	<p>Baltimore Police Department⁹⁰: “Members are not permitted to arrest individuals for use or possession of less than 10 grams of marijuana. However, the odor of marijuana still may establish probable cause to investigate possible criminal activity, and may still support searches, consistent with existing policies.”</p>
Analysis	<p>Though possession of less than 10 grams of marijuana was decriminalized in Maryland in 2014, possession remains a civil offense for which a citation can be issued. The Maryland</p>

⁸⁴ Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol., 2016 Supp.) § 5-601(c).

⁸⁵ *Robinson v. State*, 451 Md. 94, 152 A.3d 661, 680 (2017).

⁸⁶ *Norman v. State*, 452 Md. 373, 156 A.3d 940, 962 (2017).

⁸⁷ *Pacheco v. State*, 465 Md. 311, 214 A.3d 505, 518 (2019).

⁸⁸ *Lewis v. State*, 470 Md. 1, 233 A.3d 86, 91 (2020).

⁸⁹ *In re D.D.*, 250 Md. App. 284, 250 A.3d 284 (2021), cert. granted, No. 136, SEPT. TERM, 2021, 2021 WL 4095260 (Md. Aug. 25, 2021).

⁹⁰ Baltimore Police Department, Policy 809 (Marijuana: Uniform Civil Citation) (July 1, 2016), <https://www.baltimorepolice.org/transparency/bpd-policies/809-marijuana-uniform-civil-citation>.



	<p>Court of Appeals has held that the “odor of marijuana emanating from the vehicle” does provide police probable cause to search the vehicle, pursuant to the automobile exception to the Fourth Amendment. It is worth noting that Maryland’s second highest court, the Court of Special Appeal, held back in April that the “odor of marijuana, by itself, does not provide reasonable suspicion to conduct an investigatory stop.” The Maryland Court of Appeal has not addressed that specific question.</p> <p>Otherwise, marijuana odor, alone, does not give rise to probable cause to: frisk vehicle occupants (<i>Norman</i>), search a suspect’s person (<i>Pacheco</i>), arrest and perform a warrantless search of the suspect’s person incident to arrest (<i>Lewis</i>).</p>
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
MASSACHUSETTS	
State Law	<p>The 2016 Massachusetts Marijuana Legalization Initiative, passed through referendum, legalized the recreational use of cannabis. It was codified in Massachusetts G. L. c. 94G, §§ 1 - 14, entitled “Regulation of the Use and Distribution of Marijuana not Medically Prescribed.”</p> <p>An Act for the humanitarian medical use of marijuana, approved by voters in 2012, authorized the medical use of Marijuana, codified in Massachusetts General Laws Chapter 94I (G. L. c. 94I, §§ 1 - 7).</p> <p>An Act establishing a sensible State marijuana policy, approved by ballot initiative in 2008, decriminalized possession of one ounce or less of marijuana, codified by Massachusetts G. L. c. 94C, §§ 32L - 32N.</p> <p>Massachusetts General Laws Chapter 94G (2017) is the primary marijuana possession law.</p>
State Case Law⁹¹	<p><i>Commonwealth v. Cruz</i> (after decriminalization, before legalization):⁹² The Supreme Judicial Court held that it was impermissible for police to execute a warrantless search based on the burnt odor of marijuana. “[T]o order a passenger in a stopped vehicle to exit based merely on suspicion of an offense, that offense must be criminal.” Thereafter, the odor of marijuana is no longer de facto evidence of criminal activity under Massachusetts law.⁹³</p> <p><i>Commonwealth v. Overmyer</i> (after decriminalization, before legalization):⁹⁴ “Although the odor of unburnt, rather than burnt, marijuana could be more consistent with the presence of larger quantities, . . . it does not follow that such an odor reliably predicts the presence of a criminal amount of the substance, that is, more than one ounce, as would be necessary to constitute probable cause.” This was reinforced by the fact that less than an ounce of marijuana was no longer criminal. The court also cited Doty, Wudarski, Marshall, & Hastings,</p>

⁹¹ See also *Commonwealth v. Ilya I.*, 470 Mass. 625, 633, 24 N.E.3d 1048 (2015), quoting *Commonwealth v. Fontaine*, 84 Mass. App. Ct. 699, 706, 3 N.E.3d 82 (2014) (“odor of unburnt marijuana . . . , standing alone, does not provide . . . probable cause to conduct a search”); *Commonwealth v. Locke*, 89 Mass. App. Ct. 497, 498, 500, 503-505, 51 N.E.3d 484 (2016), quoting *Rodriguez*, 472 Mass. at 774, 37 N.E.3d 611 (suppressing 159 pounds of marijuana found in back of minivan, where trooper approaching van’s window “immediately detected the odor of unburned marijuana” that was “so strong that three air fresheners and an aerosol spray did not cover [it],” because “we no longer consider the ‘strong’ or ‘very strong’ smell of unburnt marijuana to provide probable cause to believe that a criminal amount of the drug is present”).

⁹² *Commonwealth v. Cruz*, 459 Mass. 459, 470, 945 N.E.2d 899 (2011).

⁹³ *Id.* at 472.

⁹⁴ *Commonwealth v. Overmyer*, 469 Mass 16, 11 N.E.3d 1054 (2014).



	<p>Marijuana Odor Perception: Studies Modeled from Probable Cause Cases, 28 Law & Hum. Behav. 223, 232 (2004).</p> <p><i>Commonwealth v. Craan</i> (after decriminalization, before legalization):⁹⁵ The odor of (unburnt) marijuana emanating from a vehicle does not provide probable cause to search for an illegal quality of marijuana.</p> <p><i>Commonwealth v. Rodriguez</i> (after decriminalization, before legalization):⁹⁶ Ruled that police were not entitled to stop a vehicle based on detecting the odor of burnt marijuana.</p> <p><i>Commonwealth v. Gerhardt</i> (the traffic stop occurred after decriminalization, before legalization):⁹⁷ Ruled that "while using marijuana is no longer a crime in Massachusetts," operating a motor vehicle while under the influence of marijuana remains a criminal offense, and certain indicia of marijuana impairment may be relevant in detecting such impairment due to marijuana. The Court held that a "police officer makes numerous relevant observations in the course of an encounter with a possibly impaired driver. There is no doubt that an officer may testify to his or her observations of, for example, any erratic driving or moving violations that led to the initial stop; the driver's appearance and demeanor; the odor of fresh or burnt marijuana; and the driver's behavior on getting out of the vehicle."</p> <p><i>Commonwealth v. Long</i> (after legalization):⁹⁸ The Supreme Judicial Court reaffirmed that a police officer's sense of smell is an unreliable means to distinguish between a legal and an illegal amount of marijuana stashed in an automobile, but also specified that the Court previously did not "articulate a bright-line rule excluding the odor of unburnt marijuana as one factor in the probable cause calculus in all circumstances." The Court elaborated that "the circumstances underlying a determination of probable cause are fact- and situation-specific" and held that "in all of the circumstances set forth in the search warrant affidavit, there was probable cause that illegal cultivation of marijuana was taking place within the warehouse."</p>
Police Department Policy	<p>The Massachusetts police department policy and procedure manual does not explicitly address search based on odor alone.</p> <p>The 2019-2020 Legal Issues Student Guide cites the smell of cannabis in justifying warrantless searches, but it specifies that "police can rely on other indicia" and acknowledges that the Supreme Judicial Court has acknowledged the challenges in detecting impairment caused by marijuana. It states that "any erratic driving or moving violations that led to the initial stop; the driver's appearance and demeanor, the odor of fresh or burnt marijuana; and the driver's behavior on getting out of the vehicle," as all relevant.</p> <p>The Memo entitled "Disciplining Police Officers Re: Medical Marijuana" by Atty. John M. (Jack) Collins, General Counsel of the Massachusetts Chiefs of Police Association, Inc., mentions the odor of marijuana when investigating drug use, but does not specify whether or not a police officer may rely on smell to justify a warrantless search.</p>

⁹⁵ *Commonwealth v. Craan*, 569 Mass. 24, 13 N.E.3d 569 (2014).

⁹⁶ *Commonwealth v. Rodriguez*, 472 Mass. 767, 778, 37 N.E.3d 611 (2015).

⁹⁷ *Commonwealth v. Gerhardt*, 477 Mass. 775, 780, 81 N.E.3d 751 (2017)

⁹⁸ *Commonwealth v. Long*, 482 Mass. 804, 128 N.E.3d 593 (2019).



Analysis	<p>The Supreme Judicial Court has said repeatedly ruled that the smell of marijuana alone cannot justify a warrantless vehicle search, and the appellate courts have consistently held that the odor of marijuana, burnt or unburnt, without more, is insufficient to establish probable cause that a crime is being committed.</p> <p>Because of the Commonwealth’s marijuana laws and court rulings, to obtain a search warrant for an offense involving marijuana, the police are required to establish that they are investigating illegal marijuana possession, not merely the possession or consumption of marijuana.</p>
Legalization Status	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
MICHIGAN	
State Law	<p>Michigan voters legalized the recreational use of cannabis for adults 21 and older and decriminalized use and possession of cannabis for minors when they approved the 2018 Michigan Regulation and Taxation of Marihuana Act (“the Act”). The Act does not directly address whether the smell of cannabis establishes probable cause to execute warrantless searches.</p> <p>In 2008, Michigan voters approved a medical cannabis initiative.</p>
State Case Law	<p><i>People v. Moorman</i> (pre-legalization).⁹⁹ The Defendant was stopped for speeding.¹⁰⁰ The officer claimed to have smelled raw cannabis as he approached Defendant’s vehicle.¹⁰¹ Defendant initially denied having any cannabis in the car; however, upon further questioning, Defendant stated that he had harvested cannabis earlier that day pursuant to Michigan’s Medical Marijuana Act (“MMMA”).¹⁰² The officer then conducted a search of defendant’s vehicle, finding that defendant was in possession of cannabis within legal limits provided for in the MMMA.¹⁰³ Following the search, Defendant was arrested for possession of other controlled substances but did not face any charges related to cannabis.¹⁰⁴ The Court held that because Defendant lied about being in possession of cannabis, the officer had probable cause to search the vehicle because “if a person, even with a registry card, misrepresents that he has no marijuana in his possession, then it is reasonable to believe that he is doing so because the amount he possesses is in excess of that permitted by the MMMA.”¹⁰⁵</p> <p>Prior to legalization of cannabis for medical and later, recreational use in Michigan, the Michigan Supreme Court held that the “smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement.”¹⁰⁶ However, this question does not appear to have been revisited by the courts post-legalization.</p>

⁹⁹ *People v. Moorman*, 331 Mich. App. 481, 952 N.W.2d 597 (2020) (Warrantless search of Defendant’s vehicle during traffic stop was supported by probable cause).

¹⁰⁰ *Id.* at 598.

¹⁰¹ *Id.*

¹⁰² *Id.* at 599.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 601 (emphasis added).

¹⁰⁶ *People v. Kazmierczak*, 461 Mich. 411, 605 N.W.2d 667 (2000).



Police Department Policy	Police Manuals for Detroit and Ann Arbor do not address whether the smell of cannabis alone justifies warrantless searches.
Analysis	The <i>Moorman</i> case was decided prior to the legalization of the recreational use of cannabis in Michigan; however, it appears to remain good law. The <i>Moorman</i> Court’s rationale that lying about the possession of cannabis establishes probable cause to execute a warrantless search may extend to recreational use as well.
Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
MINNESOTA	
State Law	Minnesota legalized cannabis for medical purposes. Until 2021, it only allowed non-combustible forms (no burning of plant). ¹⁰⁶ Recreational marijuana remains illegal, but possession is decriminalized and considered a petty misdemeanor for up to 1.5 ounces.
State Case Law	<i>State v. Pierce</i> : ¹⁰⁷ “[T]he detection of odors alone, which trained police officers can identify as being illicit, constitutes probable cause to search automobiles for further evidence of a crime.” <i>State v. Ortega</i> : ¹⁰⁸ Trooper had probable cause to extend traffic stop and request consent to search vehicle when he smelled odor of burnt marijuana emanating from vehicle.
Police Department Policy	The Minneapolis police department policy and procedure manual does not explicitly address search based on odor alone.
Analysis	It is fairly well established in Minnesota that odors alone (including marijuana), detected by a trained police officer, are sufficient to constitute probable cause to search a vehicle. However, it should be noted that these cases pre-dated the legalization of combustible medical cannabis.
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
MISSISSIPPI	
State Law	Mississippi has decriminalized marijuana to some degree, although cannabis is still illegal for recreational use. Under the Mississippi Code of 1979, the possession of less than 1.1 oz of marijuana is a misdemeanor, but probation is always given in lieu of a jail sentence following decriminalization in 1978. Harper Grace’s Act (HB 1231), passed in 2014, legalized the use of low-THC/high CBD products for severe seizure disorders.

¹⁰⁷ State v. Pierce, 347 N.W.2d 829, 833 (Minn. Ct. App. 1984); Reaffirmed by State v. Hunter, No. A19-1429, 2020 WL 1983310 (Minn. Ct. App. Apr. 27, 2020) after the passage of the medical marijuana act. See also State v. Browder, No. A19-1908, 2020 WL 3172848 (Minn. Ct. App. June 15, 2020).

¹⁰⁸ State v. Ortega, 749 N.W.2d 851 (Minn. Ct. App. 2008), aff’d but criticized, 770 N.W.2d 145 (Minn. 2009).



	In May 2021, the Supreme Court of Mississippi struck down the voter approved Initiative 65, which legalized medical marijuana in 2020.
State Case Law	<p><i>Miller v. State</i>:¹⁰⁹ The court held that probable cause may come from an officer’s five senses.</p> <p><i>Boches v. State</i>:¹¹⁰ The court held that “If an officer clearly smells contraband, such as marijuana, that smell can give rise to the probable cause necessary to search a vehicle and its passengers.”</p> <p><i>Townsend v. State</i>:¹¹¹ The court held that the smell of marijuana discovered during a search incident to arrest gave the officer and officers who arrived on the scene six or seven minutes later probable cause to search the vehicle and bags therein.</p> <p><i>Martin v. State</i>:¹¹² The court ruled that probable cause was provided “as soon as the officer smelled the odor of marijuana.”¹¹³</p>
Police Department Policy	Unable to locate relevant police manuals.
Analysis	Mississippi case law is clear that police will have probable cause to search a vehicle based on the odor of marijuana alone.
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
MISSOURI	
State Law	<p>Passed in 2014, Senate Bill 491 made the possession of 10 grams or less of marijuana a misdemeanor punishable by a fine for first-time offenders. Possession of greater quantities of marijuana remains a felony.</p> <p>On Nov. 6, 2018, Missouri voters approved Amendment 2, a ballot initiative to legalize medical marijuana use as recommended by state-licensed physicians and create regulations for licensing and certification.</p>
State Case Law	<p>These court cases all predate Missouri’s “decriminalization” and medical cannabis laws.</p> <p>In <i>State v. Villa-Perez</i>,¹¹⁴ a police officer stopped a truck to ensure it complied with state weight limits, sniffed the back of truck and smelled marijuana, then broke the lock on the truck and searched the interior, finding 284 pounds of marijuana. The court held that if a police officer legitimately stops a vehicle, smells marijuana, and has the experience to recognize the smell, there is probable cause to search the vehicle.</p> <p>In <i>State v. Cook</i>,¹¹⁵ a police officer stopped a van for speeding then, because of the driver’s suspicious behavior, asked the driver if he could take a look in the back of the van, to which the driver consented, then moved boxes under a bed in the van and smelled raw marijuana.</p>

¹⁰⁹ *Miller v. State*, 373 So. 2d 1004, 1007 (Miss. 1979).

¹¹⁰ *State v. Browder*, No. A19-1908, 2020 WL 3172848 (Minn. Ct. App. June 15, 2020).

¹¹¹ *Townsend v. State*, 681 So. 2d 497 (Miss. 1996).

¹¹² *Martin v. State*, 240 So. 3d 1047, 1054 (¶25) (Miss. 2017).

¹¹³ *Id.* at 1055 (¶32).

¹¹⁴ *State v. Villa-Perez*, 835 S.W.2d 897 (Mo. 1992) (abrogation on other grounds recognized by *State v. Bigsby*, 891 S.W.2d 160 (Mo. Ct. App. S.D. 1995)).

¹¹⁵ *State v. Cook*, 854 S.W.2d 579 (Mo. Ct. App. 1993).



	<p>At this point, the driver withdrew his consent. Another officer then continued to search the van and found marijuana in a suitcase. The court held that the odor of marijuana gave police probable cause to search the van. The police did not need consent after they smelled marijuana because at that point they had probable cause to search the vehicle.</p> <p>In <i>State v. Fuente</i>,¹¹⁶ a police officer stopped a car for speeding and smelled the faint odor of marijuana coming from the car. The officer then got consent from the passenger to search his suitcase and smelled the strong odor of fresh marijuana when the officer opened the car door to get the suitcase. The officer searched the passenger's and the driver's bags and found 45 pounds of marijuana in the driver's bag. Finding that the trial court correctly denied the driver's motion to suppress, the court said, "At the moment the trooper smelled marijuana she had probable cause to search the vehicle."</p>
Police Department Policy	The Kansas City Police Department policy and procedure manual does not explicitly address search based on marijuana odor, but does state that reasonable suspicion can be based on the officer's experience and "odors," especially when combined with other facts. ¹¹⁷
Analysis	Missouri case law, which predates the decriminalization and medical cannabis laws, is clear that police will have probable cause to search a vehicle based on the odor of marijuana alone. The Missouri Supreme Court has ruled: "[w]here there is a legitimate reason for stopping a vehicle, and the officer thereafter detects the odor of marihuana emanating from the stopped vehicle, and is by virtue of training or experience able to identify it as marihuana, an ensuing search is based on probable cause." ¹¹⁸ Neither Senate Bill 491 (the decriminalization law) or Amendment 2 (the medical marijuana law) mention searches.
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
MONTANA	
State Law	<p>Montana has codified the law governing stops of vehicles and persons.¹¹⁸ "A peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense."¹¹⁹ The statute does not authorize searches beyond asking for basic information (including to see a driver's license, vehicle registration, and proof of insurance) and "frisk[ing] the person and tak[ing] other reasonably necessary steps for protection if the officer has reasonable cause to suspect that the person is armed and presently dangerous to the officer or another person present."¹²⁰</p> <p>Montana also has a statute providing that searches and seizures may be made with a warrant or pursuant to common law exceptions to the warrant requirement (but does not codify specific exceptions in the statute). Mont. Code Ann. § 46-5-101 provides that searches and seizures are authorized when a search is made "by the authority of a search warrant; or in accordance with judicially recognized exceptions to the warrant requirement."</p>

¹¹⁶ *State v. Fuente*, 871 S.W.2d 438 (Mo. 1994), as modified (Mar. 22, 1994).

¹¹⁷ Policy & Procedure Manual, Section 17-6 Detaining & Questioning and Search & Seizure Procedures, p. A-1.

¹¹⁸ Mont. Code Ann. § 46-5-401.

¹¹⁹ *Id.* § 46-5-401(1).

¹²⁰ *Id.* § 46-5-401(2).



Mont. Code Ann. § 16-12-106 to -113 legalizes personal use and cultivation of marijuana for persons 21 years of age or older. Section 16-12-106 legalizes, among other things, possession, use, and transportation by adults of 21 years of age or older of 1 ounce or less of usable marijuana, except only 8 grams or less may be in a concentrated form and only 800 milligrams or less THC may be in edible products.¹²¹ The statute explicitly states that the legalized activities “may not be an offense under state law . . . [or] a basis to detain, search, or arrest . . . under state law or the laws of any local government for a person who is 21 years of age or older.”¹²²

Section 16-12-108, however, provides that the legalization statute does not permit, among other things, “any individual to operate, navigate, or be in actual physical control of a motor vehicle . . . while under the influence of marijuana; consumption of marijuana while operating or being in physical control of a motor vehicle . . . while it is being operated; [or] smoking marijuana while riding in the passenger seat within an enclosed compartment of a motor vehicle . . . while it is being operated”¹²³ Section 16-12-106(1) provides that the bar on basing a search on the legalized activities is “[s]ubject to the limitations in 16-12-108,” so law enforcement may still search a vehicle if law enforcement has probable cause to believe that a driver is operating a vehicle under the influence of marijuana or a driver or passenger consumed marijuana while the vehicle was being operated.

Mont. Code Ann. § 16-12-106 also decriminalizes, among other things, possession and use of marijuana for persons under 21 years of age and for minors under certain circumstances. Under the law, persons under 21 years of age who do not have a medical marijuana card and who use or possess marijuana may be punished under the criminal code’s section dealing with possession or unlawful attempt to purchase an intoxicating substance.¹²⁴ Under that statute, individuals who are over the age of 18 but under the age of 21 who use or possess marijuana should face fines, community service, and drug and alcohol information courses and may only face potential prison time after a third or subsequent offense.¹²⁵ Minors face fines, community service, substance abuse information courses, and confiscation or suspension of driver’s licenses, but do not face potential prison time for use or possession of marijuana.¹²⁶

Mont. Code Ann. §§ 50-46-310 to -347 is Montana’s medical marijuana statute. Section 50-46-319 legalizes possession of up to one ounce of usable marijuana for registered cardholders.¹²⁷

State Case Law

Montana does not recognize an “‘automobile exception’ to the search warrant requirement under the Montana Constitution” (though it may recognize such an exception justifying a warrantless seizure of a vehicle).¹²⁸ “Rather . . . a warrantless search of an automobile requires the existence of probable cause as well as a generally applicable exception to the

¹²¹ *Id.* § 16-12-106(1)(a).

¹²² *Id.* § 16-12-106(1).

¹²³ *Id.* § 16-12-108(1)(a)-(c).

¹²⁴ *Id.* § 16-12-106(5).

¹²⁵ *Id.* § 45-5-624(3).

¹²⁶ *Id.* § 45-5-624(2).

¹²⁷ *Id.* § 50-46-319(1)(a)(i).

¹²⁸ *State v. Elison*, 2000 MT 288, 302 Mont. 228, 14 P.3d 456, 471 & n.3.



	<p>warrant requirement, such as a plain view search, a search incident to arrest, or exigent circumstances.”¹²⁹</p> <p>Montana courts have long held that the smell of marijuana alone does not provide probable cause for a warrantless search of a vehicle. In <i>State v. Schoendaller</i>, the Montana Supreme Court found that “[t]he police conducted their warrantless search on the basis of ‘a strong odor of marijuana in the car along with that of some incense or something’ and lacking any exigent circumstances, such perception falls closer to the realm of bare suspicion than probable cause...[T]o hold that odor alone, absent evidence of visible contents, is deemed equivalent to plain view might very easily mislead officers into fruitless invasions of privacy where there is no contraband.”¹³⁰</p> <p>In a case prior to legalization, however, where additional facts suggested that a vehicle contained an illegal substance, the odor of marijuana and these additional facts created probable cause for a warrantless search of a vehicle.¹³¹</p>
<p>Police Department Policy</p>	<p>The Missoula Police Department Policy Manual does not specifically discuss searches based solely on the odor of marijuana. It does note that searches with warrants are “always preferable” and briefly defines the eight exceptions to the warrant requirement.¹³² The manual discusses the plain view exception but does not address whether “plain smell” is encompassed by the doctrine.¹³³</p> <p>The Helena Police Department’s General Order on Legal Guidelines for Search and Seizure does not specifically discuss searches based solely on the odor of marijuana. It does provide an overview of exceptions to the warrant requirement, including the plain view doctrine.¹³⁴ It does not address whether the doctrine encompasses “plain smell.”¹³⁵</p>
<p>Analysis</p>	<p>Montana case law clearly establishes that law enforcement cannot search vehicles based solely on the odor of marijuana. However, the statutory analysis is more complicated if officers are investigating a “driving under the influence” offense.</p>
<p>Legalization Status</p>	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
<p>NEBRASKA</p>	
<p>State Law</p>	<p>Nebraska law lists Marijuana as a Schedule I controlled substance.¹³⁶ However, the state “decriminalized” possession of an ounce or less in 1978. A first offense is an infraction,</p>

¹²⁹ *Id.* at 471.

¹³⁰ *State v. Schoendaller*, 176 Mont. 376, 578 P.2d 730, 734 (1978).

¹³¹ *See Elison*, 14 P.3d at 466, 471 (suggesting approval of district court’s conclusion that officer had probable cause for warrantless search of vehicle based on smell of burnt marijuana, defendant’s indication that there was marijuana in the vehicle, and a drug dog indicating the presence of drugs in the vehicle by examining only whether warrantless search was justified by an exception to the warrant requirement in adjudicating the issue of whether the search “was justified by both probable cause and an exception to the warrant requirement”); *see also State v. Pierce*, 2005 MT 182, 328 Mont. 33, 116 P.3d 817, 821 (holding officer had probable cause for warrantless seizure of vehicle based on the odor of marijuana and the defendant’s admission that he had smoked marijuana in the vehicle).

¹³² Missoula Police Department, *6.10 Search and Seizure 2* (Sept. 1, 2007), <https://www.ci.missoula.mt.us/DocumentCenter/View/25062/610-Search-and-Seizure?bidId=>.

¹³³ *See id.*

¹³⁴ Helena Police Department, *General Order: Legal Guidelines for Search & Seizure* 1-3 (Feb. 23, 2006), https://www.helenamt.gov/fileadmin/user_upload/Police/Documents/Chapter_6_-_Legal_Guidelines_for_Search___Seizure.doc.

¹³⁵ *See id.* at 2.

¹³⁶ Uniform Controlled Substances Act, Neb. Rev. Stat. §§ 28-405(c)(7) and 28-416(11)–(13) (Supp. 2017).



	carrying a fine only. Subsequent offenses are criminal misdemeanors and can include short jail sentences.
State Case Law	<p>In <i>State v. Seckinger</i>, the Nebraska State Supreme Court held that the odor of marijuana emanating from a vehicle furnished probable cause to search the vehicle, despite the fact that marijuana had been legalized in other states. The Court began its analysis by stating that “[f]or decades, [it had] consistently held that officers with sufficient training and experience who detect the odor of marijuana emanating from a vehicle have probable cause on that basis alone to search [a] vehicle.”¹³⁷ The court first articulated that rule in the 1977 case <i>State v. Benson</i>.¹³⁸</p> <p>In <i>Seckinger</i>, the defendant asked the court to revisit the line of cases holding that the smell of marijuana provides probable cause for a search, given that “the legalization of marijuana in Colorado has eroded the legal premise of [Nebraska’s] precedent because [] the odor of marijuana standing alone no longer suggests criminal activity.”¹³⁹ The court thus interpreted the question presented as follows: “[d]oes the odor of marijuana coming from a vehicle, standing alone, still provide probable cause to search the vehicle?” and concluded that “it does.”¹⁴⁰</p> <p>The court reiterated that “[m]arijuana remains a controlled substance under both federal law and Nebraska law, [and] [b]ecause of marijuana’s legal status as contraband, a trained officer who detects the odor of marijuana emanating from a vehicle in Nebraska has firsthand information that provides an objectively reasonable basis to suspect contraband will be found in the vehicle.”¹⁴¹ “Assuming the vehicle is readily mobile, the odor of marijuana alone provides probable cause to search the vehicle under the automobile exception to the warrant requirement.”¹⁴² “And while there may be innocent explanations for the odor of marijuana inside a vehicle, the concept of probable cause is based on probabilities and does not require officers to rule out all innocent explanations for suspicious facts.”¹⁴³</p> <p>It concluded “[e]ven among states that have passed laws allowing medical or recreational marijuana use, many courts continue to recognize that marijuana is contraband and that the odor of marijuana can provide probable cause to search a vehicle.”¹⁴⁴</p>

¹³⁷ *State v. Seckinger*, 301 Neb. 963, 969–70, 920 N.W.2d 842 (2018).

¹³⁸ *State v. Benson*, 198 Neb. 14, 18–19, 251 N.W.2d 659 (1977) (“Officer Lundy was an investigator with the drug division of the state patrol with ample expertise in the field and the ability to identify marijuana by smell. The great majority of courts which have currently passed upon the issue have held that the smell of marijuana was alone sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to expertise. Under current Nebraska law the detention stop here was valid, the officers had a right to be where they were, and when Officer Lundy smelled marijuana there was probable cause for the arrest and search.”) (citations omitted); see also *State v. Daly*, 202 Neb. 217, 220, 274 N.W.2d 557 (1979) (reiterating the rule that the odor of marijuana coming from a vehicle is sufficient standing alone to furnish probable cause to search the vehicle); *State v. Ruzicka*, 202 Neb. 257, 259, 274 N.W.2d 873 (1979) (same); *State v. Watts*, 209 Neb. 371, 375, 307 N.W.2d 816 (1981) (same).

¹³⁹ *Seckinger*, 301 Neb. at 973.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 973–74.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (collecting cases).



	In an even more recent 2021 ruling, District Court Judge Julie Smith confirmed that any odor of marijuana, “even innocent odor,” provides probable cause for police to search a vehicle: “Nebraska law is clear that the odor of marijuana alone is sufficient probable cause.” ¹⁴⁵
Police Department Policy	The Omaha Police Department’s Policies and Procedures Manual does not provide any guidance on how officers are to factor in the smell of marijuana during a traffic stop, other than stating simply that “[i]t is the policy of the Omaha Police Department (OPD) to conduct lawful and thorough searches of motor vehicles,” and “[o]fficers may search a vehicle without a warrant if there is articulable Probable Cause to believe that the vehicle contains fruits, or evidence of a crime or contraband [and] Probable Cause searches may extend to all areas of the motor vehicle, unless the Probable Cause is limited to a specific area of the vehicle.” ¹⁴⁶
Analysis	The Nebraska State Supreme Court confirmed in <i>State v. Seckinger</i> that the odor of marijuana emanating from a vehicle furnished probable cause to search the vehicle despite legalization of marijuana in other states. ¹⁴⁷
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
NEVADA	
State Law	Marijuana is recreationally legal up to one ounce and medicinally up to two and a half ounces. ¹⁴⁸ Nevada also had a weak “decriminalization” law on the books since 2001 — whereby first-offense possession of up to an ounce was a fine-only criminal misdemeanor. Those penalties still apply to individuals under 21 who are not registered patients.
State Case Law	Some pre-legalization cases found the smell of marijuana can establish probable cause, because — at the time — “nonmedical marijuana remain[ed] contraband.” ¹⁴⁹
Police Department Policy	Nevada Highway Patrol confirmed over the phone that it does not have any written guidance by way of manuals or written policies regarding how to handle the smell of cannabis in the context of traffic stops. If an individual is underage, then state police take the position that they are justified to conduct a warrantless search without more. If the individual is not a minor, then the police will try to develop other indicators. The Las Vegas Metropolitan Police Department’s manual likewise contains no guidance regarding how to address the smell of cannabis during a traffic stop. But it does provide that “[n]arcotics detection dogs can be useful in locating hidden compartments inside vehicles

¹⁴⁵ See Dan Swanson, *Judge says ‘innocent’ odor of marijuana allows police search*, NEWS CHANNEL NEBRASKA (Jul. 27, 2021), <https://rivercountry.newschannelnebraska.com/story/44389992/judge-says-innocent-odor-of-marijuana-allows-police-search>.

¹⁴⁶ *Omaha Police Department Policies and Procedures Manual – Searches – Vehicles* (<https://public.powerdms.com/OPDEP1/documents/858083>).

¹⁴⁷ *State v. Seckinger*, 301 Neb. 963, 969–70, 920 N.W.2d 842 (2018) (collecting cases and detailing that “[f]or decades, this court has consistently held that officers with sufficient training and experience who detect the odor of marijuana emanating from a vehicle have probable cause on that basis alone to search the vehicle under the automobile exception to the warrant requirement.”).

¹⁴⁸ See *United States v. Harris*, No. 216CR00014GMNCWH, 2016 WL 11449028, at *2 (D. Nev. June 30, 2016), *report and recommendation adopted*, No. 216CR00014GMNCWH1, 2016 WL 6683540 (D. Nev. Nov. 14, 2016).

¹⁴⁹ *United States v. White*, 732 F. App’x 597 (9th Cir. 2018) (smell of marijuana emanating from vehicle provided probable cause for warrantless search because nonmedical marijuana remained contraband and driver did not inform officers of his medical marijuana card); see also *Harris*, 2016 WL 11449028, at *2 (“One indicator of probable cause is the odor of marijuana emanating from a vehicle.”).



	[and] a dog can be used to help solidify the obtaining probable cause for a vehicle, if need be.” ¹⁵⁰
Analysis	Nevada case law provides that the smell of cannabis, alone, can provide an officer trained to detect the odor of marijuana emanating from a vehicle with probable cause to search that vehicle. However, this case was decided before cannabis became recreationally legal within the state and relied on the fact that marijuana was contraband at the time.
Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
NEW HAMPSHIRE	
State Law	<p>N.H. Rev. Stat. § 318-B:2-c decriminalizes personal possession of marijuana but still imposes penalties on any person in possession of personal amounts of marijuana (3/4 of an ounce or less) or hashish (5 grams or less) and on any person over the age of 21 in possession of personal amounts of a regulated marijuana-infused product unless the possession is permissible under New Hampshire’s medical marijuana law.¹⁵¹</p> <p>It does not decriminalize knowing possession of marijuana infused products for persons between 18 years old and 21 years old; instead possession of such products for this group of individuals constitutes a misdemeanor unless the possession is authorized under New Hampshire’s medical marijuana law.¹⁵²</p> <p>The statute provides that individuals with 3 convictions for violations of the personal possession law (or of reasonably equivalent offenses in other jurisdictions) within a 3-year period prior to a 4th offense are guilty of a class B misdemeanor.¹⁵³ The police may not arrest adults solely for violations of the statute, but may take minors who violate the statute into custody.¹⁵⁴</p> <p>N.H. Rev. Stat. § 126-X is New Hampshire’s medical marijuana law. Section 126-X:2 legalizes possession of 2 ounces of usable cannabis and any amount of unusable cannabis for qualifying patients.¹⁵⁵ It also legalizes possession by designated caretakers of 2 ounces of usable cannabis, “or the total amount allowable for the number of qualifying patients for which he or she is a designated caregiver;” and any amount of unusable cannabis.¹⁵⁶</p>
State Case Law	<p>Under New Hampshire law, a <i>Terry</i> stop—a temporary detention, including the expansion of the scope of a traffic stop—“is lawful if the police have a reasonable, articulable suspicion that the person detained has committed or is about to commit a crime.”¹⁵⁷</p> <p>After decriminalization of small amounts of marijuana in the state, while the odor of marijuana can be a factor in forming a reasonable, articulable suspicion, the odor of</p>

¹⁵⁰ See *Las Vegas Metropolitan Police Department Manual* (June 29, 2007), <http://www.lvpmso.org/Forms/Dept.%20Man%207-14-07.pdf>, at 538.

¹⁵¹ N.H. Rev. Stat. § 318-B:2-c(II)-(IV).

¹⁵² *Id.* § 318-B:2-c(IV).

¹⁵³ *Id.* § 318-B:2-c(V).

¹⁵⁴ *Id.* § 318-B:2-c(VI)(a), (c).

¹⁵⁵ *Id.* § 126-X:2(I).

¹⁵⁶ *Id.* § 126-X:2(II).

¹⁵⁷ *State v. Francisco Perez*, 173 N.H. 251, 239 A.3d 975, 984 (2020).



	<p>marijuana alone is likely not sufficient to form a reasonable, articulable suspicion.¹⁵⁸ The New Hampshire Supreme Court was faced with this issue in <i>Francisco Perez</i>. The Court disagreed with the state’s argument “that the detected odor of marijuana alone supports, <u>per se</u>, a reasonable, articulable suspicion ‘that a person possesses an illegal quantity of marijuana’” but declined to apply a bright line rule that a reasonable, articulable suspicion does not exist when none of the detainee’s observed behaviors are by themselves illegal.¹⁵⁹ Instead, the court applied a totality of the circumstances test and approved of the trial court’s finding that multiple facts, including the odor of marijuana, combined to form a reasonable, articulable suspicion.¹⁶⁰ Given the application of a totality of the circumstances test and the court’s statement that the trial court would have erred if it “had applied a <u>per se</u> rule to the detected odor of marijuana,”¹⁶¹ it is likely that the odor of marijuana alone cannot form the basis of a reasonable articulable suspicion for a <i>Terry</i> stop, including of a vehicle.</p> <p>Notably, this reasonable, articulable suspicion standard “is a less demanding standard than probable cause, not only in the sense that it 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.”¹⁶² Because it is likely that the odor of marijuana alone is not enough to form a reasonable, articulable suspicion for a <i>Terry</i> stop of a vehicle, it is also likely that the odor of marijuana alone is insufficient to form probable cause for a warrantless search of a vehicle under New Hampshire law.</p>
<p>Police Department Policy</p>	<p>The New Hampshire Department of Justice’s 2020 Law Enforcement Manual states that, though the New Hampshire Supreme Court has not ruled on whether the plain view exception to the warrant requirement applies to objects law enforcement has found via “plain feel” or “plain smell[,]” other courts have recognized the same analysis applies in those circumstances.¹⁶³ This could give law enforcement officers the impression that they may be able to conduct a warrantless search based on the smell of marijuana alone (even though the discussion regards seizure of evidence, it is in the section of the manual discussing search warrants and the manual appears to conflate the seizure of evidence without a warrant with a warrantless search); however, the manual also notes that for the plain view doctrine to apply, “it must be immediately apparent that the item is contraband or incriminating evidence.”¹⁶⁴</p> <p>The manual also discusses New Hampshire’s limited motor vehicle exception to the search warrant requirement, which permits officers to enter a car to seize evidence if: (1) “[t]he officers stop the motor vehicle in transit pursuant to a lawful stop; and” (2) “[t]he officers have probable cause to believe that a plainly visible item in the vehicle is contraband.”¹⁶⁵ It notes that an officer who stops a vehicle for a traffic violation and sees drugs in the vehicle may seize those drugs.¹⁶⁶ Given the manual’s earlier discussion regarding “plain smell” as part of</p>

¹⁵⁸ *Id.* at 986.

¹⁵⁹ *Id.* (emphasis in the original).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 987 (emphasis in original).

¹⁶² *Id.* at 985 (quoting *State v. Melanson*, 140 N.H. 199, 665 A.2d 338, 339 (1995)).

¹⁶³ N.H. Dep’t of Justice, *Law Enforcement Manual* at 93 (2020), <https://www.doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>.

¹⁶⁴ *Id.* at 95.

¹⁶⁵ *Id.* at 101.

¹⁶⁶ *Id.*



	the plain view doctrine, it is possible that officers may believe that the second prong of the motor vehicle exception allows for searches based on the odor of drugs alone.
Analysis	The 2020 police manual could give officers the impression that they are permitted to search vehicles based solely on the odor of marijuana. It is unclear whether marijuana would constitute “contraband” under these doctrines, because New Hampshire has decriminalized but not legalized marijuana for the general public. That said, the New Hampshire Supreme Court’s opinion in <i>Francisco Perez</i> suggests that the odor of marijuana alone would not be deemed sufficient to form probable cause to stop or search a vehicle. The New Hampshire Department of Justice has not published a 2021 law enforcement manual on its website, and it is possible that future guidance to law enforcement may take into account the <i>Francisco Perez</i> opinion. However, the 2020 manual is dated November 2020, and <i>Francisco Perez</i> was issued in May 2020, so the Department of Justice had the opportunity to incorporate the opinion into the 2020 manual but did not do so.
Legalization Status	Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
NEW JERSEY	
State Law	<p>On January 1, 2021, the Constitution of the State of New Jersey was amended to allow for the sale, possession, and production of recreational cannabis through the addition of Paragraph 13 of the Constitution’s Article IV Section VII. Specifically, Article IV Section VII provides: “The growth, cultivation, processing, manufacturing, preparing, packaging, transferring, and retail purchasing and consumption of cannabis, or products created from or which include cannabis, by persons 21 years of age or older, and not by persons under 21 years of age, shall be lawful and subject to regulation by the Cannabis Regulatory Commission created by P.L.2019, c.153 (C.24:6I-5.1 et al.), or any successor to that commission.” This provision went into effect on February 22, 2021.</p> <p>On February 22, 2021, Gov. Phil Murphy signed three bills to implement cannabis legalization for adults 21 and older and to decriminalize cannabis for minors. The bills included a provision noting, “[t]he odor of marijuana or hashish, or burnt marijuana or hashish, shall not constitute reasonable articulable suspicion to initiate a search of a person” for certain violations.</p> <p>The medicinal use of cannabis was legalized in New Jersey in 2010.</p>
State Case Law	<p>Before the implementing legislation for legalization was enacted, New Jersey courts found that the odor of marijuana is sufficient to constitute probable cause. In <i>State v. Robinson</i>,¹⁶⁷ the court ruled that there was probable cause to search the defendant’s vehicle where officers smelled a strong odor of marijuana.</p> <p><i>State v. Myers</i>¹⁶⁸: Prior to legalization, New Jersey courts had long recognized that the smell of marijuana itself constitutes probable cause “that a criminal offense ha[s] been committed and that additional contraband might be present.”¹⁶⁹ It has been “repeatedly recognized that ... the smell of burning marijuana establishes probable cause that there is contraband in the</p>

¹⁶⁷ *State v. Robinson*, No. A-0201-18T2, 2021 WL 233367, at *3 (N.J. Super. Ct. App. Div. Jan. 25, 2021), *cert. denied*, 246 N.J. 144, 249 A.3d 186 (2021).

¹⁶⁸ *State v. Myers*, 442 N.J. Super. 287, 295–96, 122 A.3d 994 (App. Div. 2015).

¹⁶⁹ *Id.* (alterations in original) (internal quotation marks omitted) (quoting *State v. Walker*, 213 N.J. 281, 290, 62 A.3d 897 (2013)).

	<p>immediate vicinity and that a criminal offense is being committed, and that the detection of that smell satisfies the probable-cause requirement.”¹⁷⁰ “[A] strong odor is [not] required”; detection of the ‘characteristic’ ‘smell of burnt marijuana, by a trained and experienced [police officer], emanating from the passenger compartment of a legally stopped motor vehicle, created probable cause to believe that a violation of law had been or was being committed.”¹⁷¹</p> <p><i>State v. Vanderveer</i> (pre-legalization)¹⁷²: The smell of burnt marijuana gives “probable cause to conduct a warrantless search of the persons in the immediate area from where the smell has emanated.”</p> <p>There may be nuance, however, as in <i>State v. Poole</i>, a New Jersey appeals court explained that the odor of marijuana alone is best conceived as a factor supporting probable cause, and did not find that the detection of odor alone in that circumstance permitted a pat-down frisk.¹⁷³</p>
<p>Police Department Policy</p>	<p>Newark, New Jersey’s police rules and regulations are publicly available (version most current is their 2010 manual). A review of the document’s contents does not appear to reveal any explicit mention of search policies based on marijuana odor.¹⁷⁴</p> <p>However, an FAQ memo updated on March 8, 2021 from New Jersey Attorney General Gurbir Grewal includes:</p> <p>1. What should an officer do if they smell marijuana coming from a vehicle during a motor vehicle stop?</p> <p><i>First, the officer should take the traditional investigative steps to determine if there is probable cause to believe that the driver is operating the vehicle while under the influence, in violation of N.J.S.A. 39:4-50. If so, the driver may be arrested and the vehicle may be searched. If the driver is not found to be under the influence, the new laws are clear that the odor of marijuana, either burned or raw, by itself does not establish reasonable suspicion to justify a continued stop, nor probable cause to conduct a search of the vehicle or the person, in a marijuana possession case or even in a low-level (fourth-degree) possession with intent to distribute marijuana case. As a result, the vehicle and occupants must be released once the initial reason for the stop has been addressed.</i></p> <p>2. May an officer initiate or continue a pedestrian stop of an individual based on the officer detecting the odor of marijuana?</p> <p><i>No, the new laws are clear that the odor of marijuana, either burned or raw, by itself does not establish reasonable suspicion to justify or continue a pedestrian stop. In addition, the odor of marijuana by itself does not</i></p>

¹⁷⁰ *Id.* at 296 (alterations in original) (internal quotation marks omitted) (quoting *Walker*, 213 N.J. at 287–88).

¹⁷¹ *Id.* at 297 (second alteration in original) (internal quotation marks omitted) (quoting *State v. Judge*, 275 N.J. Super. 194, 197, 645 A.2d 1224 (App. Div. 1994)).

¹⁷² *State v. Vanderveer*, 285 N.J. Super. 475, 481, 667 A.2d 382 (App. Div. 1995).

¹⁷³ See *State v. Poole*, 2021 WL 2624123 at *4 n. 5 (N.J. Super. App. Div. June 25, 2021).

¹⁷⁴ See *Newark Police Department Rules & Regulations* (June 1, 2010), https://npd.newarkpublicsafety.org/assets/docs/rules/npd_rules_regulations_2010.pdf.



	<i>establish probable cause to conduct a search in a marijuana possession case or even a low-level (fourth-degree) possession with intent to distribute marijuana case. The age of the person being stopped is irrelevant in these situations.</i>
Analysis	No New Jersey case law has involved a post-legalization search based on the smell of cannabis. The New Jersey Attorney General has advised that searches and stops based on the smell of cannabis are not permissible under current law.
Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
NEW YORK	
State Law	<p>The New York State Marijuana Regulation and Taxation Act (the “Act”), signed on March 31, 2021, legalized the recreational use of marijuana for adults over the age of 21. After this act was legalized, the NYPD released a memorandum with new policies and procedures wherein the smell of unburnt and burnt marijuana alone is no longer cause for NYPD officers to search vehicles.¹⁷⁵ Driving under the influence of cannabis and smoking while driving are still unlawful under the new regulations, however.</p> <p>New York Penal Law § 222.05(4) states that during an investigation into whether an operator of a vehicle is impaired by drugs, "the odor of burnt cannabis shall not provide probable cause to search any area of a vehicle that is not readily accessible to the driver and reasonably likely to contain evidence relevant to the driver's condition."</p>
State Case Law	<p><i>Police Dep’t v. Williams</i>:¹⁷⁶ A New York administrative court held that the Act applies to suppression motions in pending criminal proceedings and in prospective and even completed criminal actions (through sentencing). The Court found the Act’s particularized remedial treatment, including reconsideration of pending criminal proceedings of marijuana searches based solely upon the odor of marijuana, and the legislative intent of the Act especially persuasive in ruling that the Act should be applied retroactively in a Fourth Amendment situation, and that under the Act and new laws,¹⁷⁷ the smell of cannabis does not provide probable cause.</p> <p><i>People v. Ponder</i>:¹⁷⁸ The New York appellate court declined to follow the <i>per se</i> rule previously established in New York case law¹⁷⁹ that the smell of marijuana alone provides probable cause to search the trunk of the vehicle, reversed the charges, specifically dismissing the unlawful possession charge in the interest of justice.¹⁸⁰</p>

¹⁷⁵ Tina Moore, Larry Celona & Bruce Golding, *NYPD gives cops new orders to let people smoke weed in public*, NEW YORK POST (Apr. 1, 2021), <https://nypost.com/2021/04/01/nypd-gives-cops-new-orders-to-let-people-smoke-weed-in-public/>.

¹⁷⁶ Mem. & Decision, *Police Dep’t v. Williams*, OATH Index No. 1623/21 (Apr. 30, 2021).

¹⁷⁷ New York Penal Law § 222.05(3); Crim. Proc. Law §§ 1.20(18), (16).

¹⁷⁸ *People v. Ponder*, 195 A.D.3d 123, 146 N.Y.S.3d 628, 2021 NY Slip Op 02880 (2021).

¹⁷⁹ See *People v. Valette*, 88 A.D.3d 461, 931 N.Y.S.2d 6 (2011); *People v. Mena*, 87 A.D.3d 946, 930 N.Y.S.2d 7 (2011).

¹⁸⁰ *Id.*



	District Attorneys in New York have begun to dismiss possession cases en masse, and the Manhattan District Attorney’s Office has implemented a new “Decline-to-Prosecute” policy, effective as of August 1, 2021. ¹⁸¹
Police Department Policy	NYPD Memorandum (2021): “Effective immediately, the smell of marijuana alone no longer establishes probable cause of a crime to search a vehicle.” Police officers can only search vehicles if the driver appears to be under the influence of marijuana and there is probable cause to believe that they have been smoking it, or if the driver is seen smoking or vaping marijuana while operating or inside a vehicle.
Analysis	Marijuana odor alone is not considered probable cause anymore; however, the motorist’s condition, appearance, balance, coordination, and manner of speech can still give a police officer probable cause to search a vehicle.
Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
NORTH CAROLINA	
State Law	Marijuana is illegal in North Carolina but is partially decriminalized. The state’s General Statute 90-95(a)(3)(4) describes penalties for possession of marijuana or hashish of varying degrees based on the amount of marijuana/hashish found in a person’s possession. If found in possession of a 1/2oz of marijuana or less, a person will be guilty of a misdemeanor with no jail time and a maximum fine of \$200. Still, there is hope that medical marijuana will be legalized soon in North Carolina. ¹⁸²
State Case Law	The North Carolina Court of Appeals recently reinforced that North Carolina officers may rely on the odor of marijuana alone to constitute probable cause in <i>State v. Parker</i> . ¹⁸³ In <i>Parker</i> , the North Carolina Court of Appeals rejected an invitation to re-examine the rule that the odor of marijuana alone is sufficient to constitute probable cause because it did not need to. This was because the court determined that probable cause existed based on the totality of circumstances, which included the scent of burnt marijuana, the defendant’s admission that he had smoked marijuana (which is not legal in North Carolina) and the partially smoked marijuana cigarette the defendant produced from his sock. ¹⁸⁴ Accordingly, the court left in place the North Carolina rule that “the odor of marijuana alone is sufficient to constitute probable cause.” ¹⁸⁵

¹⁸¹ See Press Release, Manhattan District Attorney’s Office, D.A. Vance Ends Prosecution of Marijuana Possession and Smoking Cases (Jul. 31, 2018), <https://www.manhattanda.org/tomorrow-d-a-vance-ends-prosecution-of-marijuana-possession-and-smoking-cases/>; Brendan Pierson, *Manhattan DA’s office drops more than 3,000 open marijuana cases*, REUTERS (Sept. 12, 2018), <https://www.reuters.com/article/us-new-york-marijuana/manhattan-das-office-drops-more-than-3000-open-marijuana-cases-idUSKCN1LS2ID>.

¹⁸² See Charles Duncan, *Could North Carolina get a medical marijuana law? Bill passes another committee vote*, SPECTRUM NEWS 1 (Aug. 24, 2021), <https://spectrumlocalnews.com/nc/charlotte/politics/2021/08/24/could-north-carolina-get-a-medical-marijuana-law-bill-passes-another-committee-vote>.

¹⁸³ *State v. Parker*, 2021-NCCOA-217, 860 S.E.2d 21, 29–30, *appeal dismissed, review denied*, 860 S.E.2d 917 (N.C. 2021) (not addressing whether scent or visual identification of marijuana alone remains sufficient to yield probable cause to search vehicle because admission of a crime to law enforcement sufficient to support finding of probable cause).

¹⁸⁴ *Id.* at 29.

¹⁸⁵ *State v. Mitchell*, 224 N.C. App. 171, 175, 735 S.E.2d 438 (2012).



Police Department Policy	<p>The police department directives of Charlotte, North Carolina are publicly available.¹⁸⁶</p> <p>A search of the directives did not reveal any language that describes marijuana search policies for traffic stops. However, in the department’s policies regarding the search of structures, the directives state that “the smell of marijuana alone is NOT sufficient to justify an exigent entry”.¹⁸⁷</p>
Analysis	<p>Generally, and given that recreational marijuana use is not legal in North Carolina, officers in the state are permitted under applicable case law to rely exclusively on the odor of marijuana in a traffic stop.</p>
Legalization Status	<p>Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
NORTH DAKOTA	
State Law	<p>The state has decriminalized cannabis to some degree, and medical marijuana laws have been enacted. North Dakota House Bill 1050 was passed through legislation in 2019, which reduced marijuana possession penalties.</p> <p>Under N.D.C.C. § 29-06-15(1)(a), warrantless arrest is authorized “for a public offense, committed or attempted in the officer’s presence and for the purpose of this subdivision, a crime must be deemed committed or attempted in the officer’s presence when what the officer observes through the officer’s senses reasonably indicates to the officer that a crime was in fact committed or attempted in the officer’s presence by the person arrested.”</p>
State Case Law	<p>All of the below reported cases involve searches that occurred prior to limited decriminalization, which was signed into law in May 2019.</p> <p><i>State v. Binns</i>:¹⁸⁸ The court held that the circumstances justified a warrantless search of the vehicle based on the odor of burning marijuana, and that “the officer, through his sense of smell, had reasonable cause to believe the person arrested had committed a public offense under N.D.C.C. § 29-06-15(1).”</p> <p><i>State v. Overby</i>:¹⁸⁹ The court held that an “officer, through his sense of smell, had reasonable cause to believe that the person arrested had committed a public offense . . . under [N.D.C.C.] § 29-06-15(1)(a).”</p> <p><i>State v. Schmalz</i>:¹⁹⁰ The court held that the smell of marijuana may establish probable cause.</p> <p><i>State v. Ballard</i>:¹⁹¹ North Dakota courts examine the totality of the circumstances to determine whether a search was reasonable under the Fourth Amendment.</p>

¹⁸⁶ *Charlotte-Mecklenberg Police Department Interactive Directives Guide*, <https://charlottenc.gov/CMPD/Documents/Resources/CMPDDirectives.pdf>.

¹⁸⁷ *Id.* at 352.

¹⁸⁸ *State v. Binns*, 194 N.W.2d 756, 759 (N.D. 1972).

¹⁸⁹ *State v. Overby*, 1999 ND 47 at ¶ 5, 590 N.W.2d 703.

¹⁹⁰ *State v. Schmalz*, 2008 ND 27 at ¶ 20, 744 N.W.2d 734.

¹⁹¹ *State v. Ballard*, 2016 ND 8 at ¶ 8, 874 N.W.2d 61.



	<p><i>State v. K.V. (In re K.V.)</i>:¹⁹² The court ruled that “these facts do not support a conclusion of law, based on the totality of the circumstances, that probable cause, based on individualized suspicion, existed that would justify an arrest of K.V. (a passenger in a vehicle where there was an odor of marijuana), therefore, the search of his person was unlawful.”</p>
Police Department Policy	<p>The Fargo North Dakota Police Department Policy is vague about their stop and search policy and lists some examples of exceptions to the rule that permit a warrantless search including “incident to lawful arrest, vehicle searches under certain circumstances, and exigent circumstances” and officers should act according to current training and clearly established rights as determined by case law.</p>
Analysis	<p>The Supreme Court of North Dakota recently ruled that the warrantless search of a passenger in a car due to the odor of cannabis was unlawful under the totality of the circumstances standard for reasonable search. Case law history of the state before <i>State v. K.V.</i> had established that the smell of marijuana may establish probable cause, but it all predates the limited decriminalization of cannabis. The analysis could change now that cannabis possession is a mere infraction.</p>
Legalization Status	<p>Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
OHIO	
State Law	<p>There is no statute that governs whether marijuana odor provides reasonable suspicion or probable cause for a stop, seizure, or search of a vehicle or person. The governing rule instead comes from case law, described below.</p> <p>Possession of less than 100 grams or the transfer of less than 20 grams of marijuana are considered “minor misdemeanors,” meaning they are not jailable offenses, but are punishable by up to \$150 in fines and possible driver’s license suspension.</p> <p>Ohio also has a medical cannabis law, which was enacted in 2016.</p>
State Case Law	<p><i>State v. Moore</i> (pre-medical cannabis law):¹⁹³ “[T]he smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement. There need be no other tangible evidence to justify a warrantless search of a vehicle.” The Court observed, however, police must independently justify a search of the vehicle’s occupants beyond marijuana odor.</p> <p><i>See also State v. Maddox</i>:¹⁹⁴ “<i>Moore</i> stands for the proposition that law enforcement need not observe tangible evidence of drug use during a lawful traffic stop in order for law enforcement to form a reasonable belief that the vehicle operator is guilty of a drug-related offense.” While <i>Maddox</i>’s arrest occurred after the enactment of medical cannabis laws, the stop occurred well before patient ID cards were available allowing patients to possess cannabis. The decision did not mention the medical cannabis law.</p>

¹⁹² *State v. K.V. (In re K.V.)*, 2021 N.D. 79, 959 N.W.2d 577 (N.D. 2021).

¹⁹³ *State v. Moore*, 734 N.E. 804 (Ohio 2000).

¹⁹⁴ *State v. Maddox*, 2021-Ohio-586, 168 N.E.3d 613, 621.



<p>Police Department Policy</p>	<p>In October 2013, the Ohio Attorney General provided guidance through a “Law Enforcement Bulletin” that indicated that smelling marijuana at a suspect’s home or vehicle provides probable cause for a search, citing two state appellate decisions.¹⁹⁵ It provided guidance to officers that they must “outline your qualifications in the search warrant affidavit or in your police report. In addition, you should be prepared to defend your qualifications to a defense attorney, judge, or jury. This could mean discussing any training, classes, or field experience that gives you the skill to identify the scent of marijuana.”¹⁹⁶</p> <p>Ohio Highway Patrol & Columbus:¹⁹⁷ In August 2019, both the Ohio Highway Patrol and Columbus Division of Police suspended marijuana-detection training for new police dogs because they cannot distinguish between marijuana and hemp odors. The City Attorney issued a memo stating that “a vehicle may not be searched solely because a K-9 trained to alert to marijuana, alerted to the vehicle.” It noted that if an officer “suspected burning marijuana,” that would likely supply probable cause.</p> <p>Cincinnati:¹⁹⁸ On September 5, 2019, the Cincinnati Police Department issued a staff memo stating that “[t]he odor of raw or burnt marijuana ALONE will <u>not</u>” be used to justify a stop of a person or a stop/search of a vehicle.¹⁹⁹ Instead, officers “will use the ‘odor plus standard’ when developing probable cause to conduct a search or seize a recovered substance believed to be illegal marijuana.”²⁰⁰</p>
<p>Analysis</p>	<p>Ohio case law is clear that police will have probable cause to search a vehicle based on the odor of marijuana alone. However, the reported cases predate cannabis being legal for medical purposes to more than 185,000 individuals. In addition, in practice, the police departments of major cities such as Columbus and Cincinnati will require more than odor alone before concluding that probable cause exists to search a person or vehicle.</p>
<p>Legalization Status</p>	<p>Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
<p>OREGON</p>	
<p>State Law</p>	<p>Oregon has an adult-use legalization law that was enacted by voters in 2014. It also has a decriminalization law dating back to 1973, with fines that still apply to those under 21. In addition, it has a medical cannabis law that was first enacted in 1998.</p> <p>There is no statute in Oregon that explicitly states whether the smell of cannabis alone establishes probable cause to justify a warrantless search.</p>

¹⁹⁵ Ohio Attorney General, *Law Enforcement Bulletin: Search and Seizure (Scent of Marijuana is Reasonable Suspicion): State of Ohio v. Harris and State of Ohio v. Green* (Oct. 2013), [https://www.ohioattorneygeneral.gov/Media/Newsletters/Law-Enforcement-Bulletin/October-2013/Search-and-Seizure-\(Scent-of-Marijuana-is-Reasonab](https://www.ohioattorneygeneral.gov/Media/Newsletters/Law-Enforcement-Bulletin/October-2013/Search-and-Seizure-(Scent-of-Marijuana-is-Reasonab).

¹⁹⁶ *Id.*

¹⁹⁷ Bill Bush, *Police dogs can’t tell the difference between hemp and marijuana*, The Columbus Dispatch (Aug. 12, 2019), <https://www.dispatch.com/news/20190812/police-dogs-cant-tell-difference-between-hemp-and-marijuana>.

¹⁹⁸ *Cincinnati Police Department Staff Notes* (Sept. 5, 2019), <https://www.cincinnati-oh.gov/police/department-references/2019-weekly-staff-notes/september-05-2019-weekly-staff-notes/>.

¹⁹⁹ *Id.* at 2.

²⁰⁰ *Id.*



State Case Law	<p>When an adult over the age of 21 is present, the smell of cannabis alone does not establish probable cause to justify the warrantless search of a vehicle.²⁰¹</p> <p>In <i>State v. Robinson</i>, the Oregon Court of Appeals considered whether the smell of cannabis was enough to establish probable cause to justify the warrantless search of a vehicle and ultimately determined that on its own, the smell of cannabis did not support the warrantless search of a vehicle.²⁰² In <i>Robinson</i>, the Defendant was stopped for speeding and when the officer approached Defendant’s vehicle, he smelled cannabis emanating from the windows.²⁰³ Throughout the course of the stop, Defendant made a number of inconsistent statements that the officer deemed to be suspicious and the officer ultimately made the decision to search the vehicle without a warrant.²⁰⁴ The Defendant was subsequently arrested for being in possession of other controlled substances but did not face any charges related to cannabis.²⁰⁵ On appeal, Defendant moved to suppress the evidence found during the traffic stop, arguing that the search was unconstitutional.²⁰⁶ The <i>Robinson</i> Court determined that on its own, the smell of cannabis would not provide an officer with probable cause to search a vehicle without a warrant, but that the smell of cannabis could be considered as part of the “totality of the circumstances” when an officer is determining whether there is probable cause to execute a warrantless search of a vehicle.²⁰⁷ The <i>Robinson</i> Court went as far as to say that even cannabis in plain view may not be enough to justify the warrantless search of a vehicle on its own.²⁰⁸</p>
Police Department Policy	<p>The City of Portland Police Directives Manual does not address whether the smell of cannabis alone establishes probable cause to justify a warrantless search.</p>
Analysis	<p>Case law suggests that in Oregon, the smell of cannabis alone does not establish probable cause to justify a warrantless search for those over the age of 21.</p>
Legalization Status	<p>Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
PENNSYLVANIA	
State Law	<p>Medical marijuana has been legal in Pennsylvania since May 17, 2016.²⁰⁹ In its current form, patients with qualifying conditions can obtain 90-day supplies of cannabis-infused pills, oils, topical ointments, tinctures, liquids, or herbal cannabis. However, patients are only permitted to vaporize—and not to smoke—medical cannabis. (An expert in <i>Commonwealth v. Barr</i>, discussed below, testified that there is no discernable difference between the smell of</p>

²⁰¹ See *State v. Robinson*, 310 Or. App. 644, 656, 486 P.3d 28, 35–36 (2021) (“[T]he smell of marijuana...generally no longer has the significance it once had as a basis for reasonable suspicion, in light of decriminalization. [A] strong odor can signal the presence of marijuana, but not necessarily the presence in a quantity that is illegal for persons 21 and older to lawfully possess”).

²⁰² *Robinson*, 310 Or. App. at 656.

²⁰³ *Id.* at 647.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 656.

²⁰⁸ *Id.* at 656 (“...even the fact that [the officer] observed two separate bags of marijuana in plain view in defendant’s car may not, by itself, support reasonable suspicion of the crime of marijuana import/export. And finally...the smell of some marijuana alone is not enough to support a finding of reasonable suspicion...a strong odor can signal the presence of marijuana, but not necessarily the presence in a quantity that is illegal for persons 21 and older to lawfully possess.”) (internal citations omitted).

²⁰⁹ Penn. Stat. §§ 10231.101 *et seq.*



	<p>vaporized herbal cannabis versus smoked herbal cannabis. So, this distinction in the law should not affect the outcome of a suppression motion where the same expert testimony is admitted.)</p> <p>Marijuana has been decriminalized in both Pittsburgh (eff. 12/22/2015) and Philadelphia (eff. 10/20/2014)—the states’ two largest cities. Both cities’ decriminalization ordinances affirm “that police officers may undertake custodial arrests where there is probable cause that a criminal offense <i>other than simple possession of a small amount of marijuana</i> has been or is being committed.”²¹⁰ Similar decriminalization ordinances have been passed in several other Pennsylvania cities (including Erie, Harrisburg, and State College). Scranton is effectively the only city in Pennsylvania where possession of small amounts of marijuana have <i>not</i> been decriminalized.</p>
<p>State Case Law</p>	<p><i>Commonwealth v. Barr</i>:²¹¹ “The odor of marijuana alone, absent any other circumstances, cannot provide individualized suspicion of criminal activity...What it does provide to police is a general, probabilistic suspicion of criminal activity based on the fact that most citizens cannot legally consume marijuana...[:] it is a factor that can contribute to a finding of probable cause,...assuming some other circumstances supply more individualized suspicion that the activity is criminal...we must reject the [rule] that the odor of marijuana provides no indication of criminal activity. At the same time, those who act in compliance with the MMA should not be subjected to searches based solely on a generalized suspicion that is provided by that odor when the 4th Amendment [of the U.S. Constitution] also requires particularized suspicion.” The Pennsylvania Supreme Court is hearing oral argument on the appeal on this case on October 27, 2021 in the Supreme Court Courtroom in Pittsburgh. Both the ACLU and Pennsylvania District Attorneys’ Association filed amicus briefs.</p> <p>In the interim, however, other Pennsylvania courts have applied <i>Barr</i> to mean what it says: where the only articulable fact supporting probable cause for a search was the odor of marijuana, a search would be unconstitutional;²¹² where at least some other fact was articulated, the search would be constitutional notwithstanding marijuana’s sometimes-legal status in the state.²¹³</p>
<p>Police Department Policy</p>	<p>None relating to searches based on odor of marijuana are available for public view. Some City of Philadelphia directives are purportedly accessible through the city’s website, but none are accessible without additional credentials.</p>
<p>Analysis</p>	<p><i>Barr</i> has no real-world effect on the way police officers will conduct searches after detecting the odor of marijuana: as intermittent decisions like <i>Shaw</i> and <i>Grooms</i> highlight, courts will deem searches constitutional where the record simply reflects that the arresting officer had more than the scent of marijuana <i>alone</i> supporting his reasonable suspicion to conduct the search. What is more, the decision is currently before the Pennsylvania Supreme Court, which could easily reverse and remand to adopt the State’s position that even smell alone is</p>

²¹⁰ Pittsburgh Ordinance 2015-2245 § 627.02(f) (emphasis added); Philadelphia Ordinance 140377-A § 10-2102(7) (same).

²¹¹ *Commonwealth v. Barr*, 2020 PA Super 236, 240 A.3d 1263, 1287 (2020), *appeal granted*, 252 A.3d 1086 (Pa. 2021).

²¹² See, e.g., *Commonwealth v. Shaw*, 2021 PA Super 19, 246 A.3d 879, 886–87 (2021) (agreeing that suppression court erred in finding that an officer “had probable cause to search Appellant’s vehicle, without his consent, upon detecting an odor of marijuana.”).

²¹³ See, e.g., *Commonwealth v. Grooms*, 2021 PA Super 26, 247 A.3d 31, 41–42 (2021) (“On remand, the trial court shall determine on the existing record . . . whether the police officers relied on, or were influenced by, any additional factors beyond the smell of marijuana, to establish probable cause . . .”).



	<p>sufficient. The <i>Barr</i> rule assures no security for persons in Pennsylvania who possess medical marijuana consistent with the Medical Marijuana Act.</p> <p>The effect of decriminalization ordinances in so many of the State’s cities (including its two most populous) is unclear. Per the language in these ordinances, a police officer’s authority to conduct a search <i>should</i> be limited. But that limitation does not appear to have been litigated. It is unclear if a defendant could prevail by arguing that a search was unreasonable because there was no probable cause that he had committed a violation <i>other</i> than a simple possession of a small amount of marijuana (which, per the ordinances, would not support a search). The lack of clarity about the scope of a police officer’s authority to search in the context of decriminalization ordinances at the city level is exacerbated by the fact that officers in some of these cities openly claim authority to continue to charge folks possessing small amounts of marijuana with misdemeanors under state law.²¹⁴ This confusion, coupled with the equivocating <i>Barr</i> rule, contributes to an environment where the rights of law-abiding citizens are unclear, and where the scope of police authority to infringe upon those rights avoids any real definition.</p>
Legalization Status	<p>Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input type="checkbox"/></p>
RHODE ISLAND	
State Law	<p>Rhode Island has a medical cannabis law dating to 2006. It also has a 2012 decriminalization law that reduced the penalty for possession of up to an ounce of cannabis to a civil fine for those over 18, with other civil sanctions for minors.</p> <p>Research did not reveal any statute advising on whether the smell of cannabis alone justifies the warrantless search of a vehicle.</p>
State Case Law	<p>Rhode Island appellate courts have not yet weighed in on whether the smell of cannabis alone is enough to justify the warrantless search of a vehicle; however, at the trial court level, judges have weighed in and concluded that while the smell of cannabis alone does not justify the warrantless search of a vehicle, the smell of cannabis can be “a factor in the totality of the circumstances test for probable cause to search a vehicle.”²¹⁵</p>
Police Department Policy	<p>The Providence Police Department Policies and Procedures Manual does not specifically address whether the smell of cannabis alone justifies the warrantless search of a vehicle.</p>
Analysis	<p>Rhode Island offers limited guidance on whether the smell of cannabis alone justifies the warrantless search of a vehicle, but the trial courts suggest that the smell of cannabis alone is not enough to justify the warrantless search of a vehicle.</p>
Legalization Status	<p>Recreational Use for 21+ <input type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/></p>
TEXAS	
State Law	<p>Adult-use cannabis is currently illegal in Texas. There is a limited medical marijuana scheme under the Texas Compassionate Use Act, or SB 339, authorizing organizations to cultivate,</p>

²¹⁴ See, e.g., Bresswein, *Busted for weed in Bethlehem? Charge will depend on where*, LehighValleyLive.com (Jan 2, 2019); Opilo, Q&A: *Why Allentown’s marijuana decriminalization law isn’t being enforced*, MCall.com (May 30, 2018).

²¹⁵ *State v. Li*, No. K2-2019-0513A, 2021 WL 1970577, at *9 (R.I.Super. May 10, 2021) (internal citations omitted).



	<p>process, and dispense low-THC cannabis (0.5% by weight of THC) to qualifying patients. It also legalized the use of low-THC, high-CBD cannabis for sale and patient use to treat intractable epilepsy. On June 14, 2019, Texas passed HB 3703, which expanded the qualifying conditions for medical marijuana use and eliminated the need for a second physician's opinion, though still requiring a "prescription" for medical use.</p> <p>Consumption of flower cannabis products via smoking remains prohibited, even for medical use.²¹⁶</p>
<p>State Case Law</p>	<p>The court in <i>Herrera v. State</i>²¹⁷ held that police officer's reasonable suspicion to detain the defendant for a traffic violation became probable cause when the officers detected the odor of marijuana emanating from the vehicle, and the officers thus had probable cause to conduct a search without a warrant.</p> <p>The court in <i>Ford v. State</i>²¹⁸ held that following a traffic stop and issuance of a warning for a traffic violation, the officer's continued detention of the defendant was supported by reasonable suspicion that another offense had been or was being committed, where the officer smelled a strong odor of marijuana when the defendant rolled down the vehicle's window.</p> <p>In <i>Moulden v. State</i>,²¹⁹ police stopped a car for speeding and smelled burnt marijuana emanating from the car. The police then searched the car and an overnight bag in front of the defendant/passenger. The court held that under the automobile exception of the warrant requirement, the smell of burnt marijuana, by two policemen who could identify the odor, gave the police probable cause to search the vehicle and the defendant's bag.</p> <p>In <i>Sloboda v. State</i>,²²⁰ police saw car occupants throwing a beer can on the ground in a public high school stadium's parking lot, saw beer in the car, opened the car to seize the beer, then smelled marijuana and searched the entire car. Affirming a lower court's denial of a motion to suppress the evidence, the court held that the smell of marijuana gave police probable cause to search entire car, including any containers that may contain the object of the search, such as, in this case, a paper bag in the spare tire compartment.</p>
<p>Police Department Policy</p>	<p>The San Antonio Police Department Policies and Procedures Manual does not specifically address whether the smell of cannabis alone justifies the warrantless search of a vehicle.</p> <p>The Dallas Police Department Policies and Procedures Manual does not specifically address whether the smell of cannabis alone justifies the warrantless search of a vehicle.</p> <p>The Austin Police Department Policies and Procedures Manual does not specifically address whether the smell of cannabis alone justifies the warrantless search of a vehicle.</p>
<p>Analysis</p>	<p>Texas case law is clear that police will have probable cause to search a vehicle based on the odor of marijuana alone.</p>

²¹⁶ Texas S.B. No. 339, <https://capitol.texas.gov/tlodocs/84R/billtext/pdf/SB00339F.pdf>.

²¹⁷ *Herrera v. State*, No. 14-02-00620-CR, 2003 WL 21710357 (Tex. App. July 24, 2003).

²¹⁸ *Ford v. State*, No. 01-02-00643-CR, 2003 WL 22310499 (Tex. App. Oct. 9, 2003), rev'd, 158 S.W.3d 488 (Tex. Crim. App. 2005).

²¹⁹ *Moulden v. State*, 576 S.W.2d 817 (Tex. Crim. App. 1978).

²²⁰ *Sloboda v. State*, 747 S.W.2d 20 (Tex. App. 1988).



Legalization Status	Recreational Use for 21+ <input type="checkbox"/>	Medicinal Use <input type="checkbox"/>	Decriminalization <input type="checkbox"/>
VERMONT			
State Law	<p>Marijuana is legal for adult-use and medicinal purposes in Vermont.</p> <p>In 2020, the State passed S.54 (An act relating to the regulation of cannabis), which legalized recreational sales of cannabis. Possession was legalized in 2018 for adults 21 and older. However, it remains illegal to have an open container in cars. Recreational cannabis retail outlets are expected to open in 2022.</p> <p>Cannabis was “decriminalized” in 2013. Individuals under 21 are generally referred to diversion.</p>		
State Case Law	<p>All of the case law pre-dates legalization and most pre-date decriminalization. The odor of marijuana is a factor, but not necessarily a determinative factor, as to whether probable cause exists.</p> <p>In <i>Zullo v. State</i>, the only case involving a search after decriminalization,²²¹ the Supreme Court of Vermont analyzed whether probable cause existed to seize, tow, and search an individual’s vehicle when that individual was stopped by police and the officer stated that he smelled a faint odor of burnt marijuana. The court concluded that the smell of marijuana, alone, did not provide probable cause.</p> <p>Under Vermont law, “[t]he finding of probable cause is a decidedly fact-specific determination, turning on whether the particular circumstances establish a nexus between the crime, the suspect, and the place to be searched.”²²² “The concept of probable cause is a practical, nontechnical one [applied] in a commonsense manner” based on “the totality of the circumstances.”²²³</p> <p>Citing prior cases, the Vermont Supreme Court in <i>Zullo</i> explained that it had previously concluded “that the odor of marijuana, detected by a trained and experienced police officer, can provide a reasonable basis to believe that marijuana is present,” but also “that the odor alone may not always be sufficient [to provide probable cause] to arrest an individual.”²²⁴</p> <p>In <i>State v. Guzman</i>, a police officer stopped the defendant for speeding and, following the stop, “detected the distinct odor of marijuana coming from defendant’s vehicle.”²²⁵ The defendant acted nervously “and was sweating, fidgeting, and moving his hands around the vehicle,” which caused the officer to be concerned that the defendant had a weapon.²²⁶ Following an exit order, the officer smelled the odor of marijuana on the defendant’s person and, after patting him down, found, among other things, a packet of fresh marijuana and</p>		

²²¹ *Zullo v. State*, 2019 VT 1, 209 Vt. 298, 205 A.3d 466 (2019).

²²² *State v. Bauder*, 2007 VT 16, 181 Vt. 392, 924 A.2d 38 (2007).

²²³ *State v. Guzman*, 2008 VT 116, 184 Vt. 518, 965 A.2d 544 (2008); see *People v. Zuniga*, 2016 CO 52, 372 P.3d 1052 (“[T]he totality of the circumstances test for probable cause is an all-things-considered approach that calls for consideration of any and all facts that a reasonable person would consider relevant to a police officer’s belief that contraband or evidence of a crime is present.”)

²²⁴ *Zullo*, 2019 Vt. 298 at ¶¶ 79-84 (citing *Guzman*, 184 Vt. 518 at ¶ 14 (noting caution by other courts that “the odor of marijuana will not always produce probable cause to search or to arrest,” but rather is one factor “within the context of the entire factual situation” under which “the grounds for probable cause must be examined”) and *Zuniga*, 372 P.3d 1052 at ¶23 (“[T]he odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination.”)).

²²⁵ *Guzman*, 184 Vt. 518 at ¶ 2.

²²⁶ *Id.*



	<p>cocaine. The Vermont Supreme Court concluded that the search was permissible incident to an arrest supported by probable cause “given the odor of marijuana from the car, followed by the stronger odor of marijuana that [the officer] detected coming from defendant’s person—the only individual present, combined with the officer’s other observations of defendant’s suspicious conduct.”²²⁷</p> <p>In <i>State v. Senna</i>,²²⁸ another case in which the Vermont Supreme Court considered the odor of marijuana as a factor in determining whether probable cause existed, police officers investigating a complaint about a screaming child arrived at the house where the child was located and noted the odor of fresh marijuana, which got stronger as the officers approached the door. Upon learning from the defendant’s neighbors that the defendant and his partner were using heroin and selling marijuana out of their residence, the officers obtained a warrant to search the residence. The court considered “whether, in light of Vermont’s ‘medical marijuana’ law, the smell of fresh marijuana outside the entry to a home can be a factor supporting a finding of probable cause to search the house.”²²⁹ It concluded that, notwithstanding the possibility that someone in the residence was a registered medical patient immune from prosecution, “the trial court properly considered the odor of fresh marijuana emanating from defendant’s home in assessing probable cause to search his residence.”²³⁰</p> <p>Analyzing those cases, the <i>Zullo</i> court concluded that “[Vermont’s] caselaw has made it clear that an odor of marijuana is a factor, but not necessarily a determinative factor, as to whether probable cause exists.” It elaborated that “[t]he weight of that factor in determining whether probable cause exists generally depends not only upon the nature and strength of the odor and other factors accompanying the odor, but also how those factors relate to the offense being investigated. While adjectives assessing the strength of an odor may be subjective and unhelpful at times in assessing whether probable cause exists, [] the faint smell of burnt marijuana is far less probative as to whether a car contains marijuana than, say, an overpowering odor of fresh marijuana emanating from the trunk of a car.”</p>
<p>Police Department Policy</p>	<p>The City of Burlington Vermont Police Department Traffic Enforcement Report provides that “[t]he legalization of marijuana significantly changed how traffic stop searches are conducted in Burlington. The past laws that provided probable cause for a search no longer apply, and as a result, investigative patterns of officers in the post-legalization era will be most relevant to traffic enforcement going forward. While searches in past years still provide historical context, the legal landscape for roadside searches has changed dramatically [] and the number of BPD traffic searches [] reflect that. In the 12 months since July 1st, 2018, Burlington police officers have searched 19 vehicles at the roadside based on suspicions of unlawful activity. This is less than a third of the searches performed in the 12 months prior to legalization. All races have experienced this sharp decline in roadside searches as a result. In the 12 months before legalization, 23 black drivers were searched during car stops. In the 12 months since legalization, three black drivers have been searched. There have been no</p>

²²⁷ *Id.* ¶ 15.

²²⁸ *State v. Senna*, 2013 VT 67, 194 Vt. 283, 79 A.3d 45 (2013).

²²⁹ *Id.* ¶ 9.

²³⁰ *Id.* ¶ 16.



	searches of black drivers in 2019, although the data is preliminary and subject to change. Post-legalization, very few cars are searched by the BPD.” ²³¹
Analysis	<p>In Vermont, there is no case law since legalization. This may be due to police and prosecutors increasingly recognizing the new policy. As the Burlington Police Department recognized, “The past laws that provided probable cause for a search no longer apply.”</p> <p>The smell of cannabis emanating from a vehicle is a factor—although not necessarily a determinative one—as to whether probable cause exists to search a vehicle. Under Vermont law, the finding of probable cause is a fact-specific exercise that is to be undertaken based on “the totality of the circumstances.” In practice, courts within the state have found under different factual circumstances that the smell of cannabis may (or may not) provide a reasonable basis to believe that marijuana is present, but also have held “that the odor alone may not always be sufficient [to provide probable cause].”</p> <p>In trying to focus this subjective analysis, the Supreme Court of Vermont has elaborated that the weight of this one factor in determining whether probable cause exists typically depends not only upon the nature and strength of the odor, but also on “other factors accompanying the odor,” and acknowledged that “adjectives assessing the strength of an odor may be subjective and unhelpful at times in assessing whether probable cause exists,” but that “the faint smell of burnt marijuana is far less probative as to whether a car contains marijuana than, say, an overpowering odor of fresh marijuana emanating from the trunk of a car.”</p>
Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
VIRGINIA	
State Law	<p>Va. Code Ann. § 4.1-1302(A) (West 2021): “No law-enforcement officer, as defined in § 9.1-101, may lawfully stop, search, or seize any person, place, or thing and no search warrant may be issued solely on the basis of the odor of marijuana and no evidence discovered or obtained pursuant to a violation of this subsection, including evidence discovered or obtained with the person’s consent, shall be admissible in any trial, hearing, or other proceeding.”</p> <p>Starting July 1, 2021, limited amounts of cannabis are legal for adults 21 years of age and older in Virginia. The state had previously reduced penalties to a \$25 fine, and the civil penalties continue to apply to minors. Virginia also has a medical cannabis law.</p> <p>Under the legalization law, beginning January 1, 2024, consuming cannabis in a moving motor vehicle would be a fine-only misdemeanor and bringing any cannabis into Virginia would be punishable by up to a year in jail. However, both provisions require re-enactment to become law.</p>
State Case Law	<p>There is currently no case law interpreting Virginia’s statute prohibiting the stop, search, or seizure of a person, place, or thing based solely on the odor of marijuana. The statute went into effect on July 1, 2021.</p>

²³¹ City of Burlington Police Department, *Traffic Enforcement Report*, <https://www.burlingtonvt.gov/sites/default/files/u585/Reports/BPDTrafficReport.pdf>.



	Prior to the law’s enactment, Virginia courts allowed marijuana odor to supply probable cause for a vehicle search. ²³²
Police Department Policy	Police department policy providing guidance on the new legislation could not be located.
Analysis	Virginia law now unequivocally prohibits police for stopping, searching, or seizing a “person, place, or thing” solely based marijuana odor. However, given the newness of the law, it is unclear how broadly or narrowly courts will interpret and apply the law.
Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/> Medicinal Use <input checked="" type="checkbox"/> Decriminalization <input checked="" type="checkbox"/>
WASHINGTON	
State Law	<p>Wash. Rev. Code § 10.31.100 provides, in relevant part, that “(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor...involving the use or possession of cannabis...shall have the authority to arrest the person.” It should be noted that this statute does not outright say that the smell of cannabis alone establishes probable cause to search or arrest an individual. Similarly, this law is a relic of pre-legalization. The Washington Legislature is revisiting this statute, which is currently set to expire in 2022.</p> <p>Washington also has a medical cannabis law. It was expanded from an affirmative defense, which dated back to 1998. Washington did not decriminalize prior to legalization, and possession remains a criminal offense for individuals under the age of 21.</p>
State Case Law	The court in <i>State v. Grande</i> ²³³ held that officers have probable cause to search vehicles based on smell of cannabis alone. <i>Grande</i> was decided prior to the legalization of cannabis for recreational use in Washington. Research has not revealed a case contemplating this question post-legalization.
Police Department Policy	Seattle and Spokane police department manuals do not address whether the smell of cannabis alone rises to probable cause so as to justify a warrantless search of a vehicle. However, following the legalization of cannabis in Washington, the Seattle Police Department published a blog post with frequently asked questions concerning the legalization of cannabis and stated that “the smell of pot alone will not be reason to search a vehicle.” ²³⁴
Analysis	Case law pre-legalization allows for officers to search vehicles based on the smell of cannabis alone, and research did not reveal case law addressing this question since the legalization of cannabis in Washington. However, the Washington Legislature may be considering this issue as prior statutes (e.g. Wash. Rev. Code § 10.31.100) will become invalid in 2022. It does not appear that cannabis-related searches or arrests are a high priority for law enforcement in Washington.

²³² See *Bunch v. Commonwealth*, 51 Va. App. 491, 658 S.E.2d 724 (2008) (observing that “if an officer smells the odor of marijuana in circumstances where the officer can localize its source to a person, the officer has probable cause to believe that the person has committed or is committing the crime of possession of marijuana”); *Gillard v. Commonwealth*, No. 0037-02-2, 2003 WL 21962513, at *4 (Va. Ct. App. Aug. 19, 2003) (“Officer Crimonese possessed probable cause to search Gillard’s vehicle based on the odor of marijuana he smelled.”).

²³³ *State v. Grande*, 164 Wash. 2d 135, 146, 187 P.3d 248, 253 (2008).

²³⁴ Seattle Police Department, SPD Blotter, “Marijwhatnow? A Guide to Legal Marijuana Use In Seattle” (2012) <https://spdblotter.seattle.gov/2012/11/09/marijwhatnow-a-guide-to-legal-marijuana-use-in-seattle/>.



Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/>	Medicinal Use <input checked="" type="checkbox"/>	Decriminalization <input type="checkbox"/>
WASHINGTON D.C.			
State Law	<p>D.C. voters legalized simple possession and cultivation of marijuana in 2014, but Congress has prevented the District from legalizing adult-use sales. Medical cannabis is also allowed. The District had also previously decriminalized possession, and a civil penalty continues to apply to individuals under the age of 21.</p> <p>D.C. Law § 48-921.02a: "[N]one of the following shall, individually or in combination with each other, constitute reasonable articulable suspicion of a crime: (1) The odor of marijuana or of burnt marijuana; (2) The possession of or the suspicion of possession of marijuana without evidence of quantity in excess of 1 ounce; (3) The possession of multiple containers of marijuana without evidence of quantity in excess of 1 ounce; or (4) The possession of marijuana in proximity to any amount of cash or currency without evidence of marijuana quantity in excess of one ounce."</p>		
State Case Law	<p>There are few cases applying the law.</p> <p>A D.C. Superior Court example of a successful motion to suppress based on statutory law is found in <i>United States v. Hardy</i>.²³⁵ The <i>Hardy</i> court granted a motion to suppress where police saw a car in a parking lot and as they approached, "smelled the odor of burnt marijuana emanating from the open windows of the car" and "observed the driver of the car, who was not Defendant, holding a lit hand-rolled cigarette, which was emitting the smell of marijuana."²³⁶</p>		
Police Department Policy	<p>The Metropolitan Police Department's policy manual is silent on whether marijuana odor alone supplies probable cause; however, its website states that "[s]imply smelling the odor of marijuana does not present a reasonable articulable suspicion."²³⁷ Metropolitan Police Department, <i>Marijuana Enforcement</i></p> <p>Additionally, Part III.D.1 of Special Order 15, issued by the MPD on February 26, 2015, states that marijuana odor does not provide reasonable articulable suspicion of a crime; however, it "shall not apply when a member is investigating whether a person is operating or in physical control of a vehicle or watercraft while intoxicated, under the influence of, or impaired by alcohol or a drug."</p>		
Analysis	<p>D.C. law explicitly forbids using marijuana odor as the basis for reasonable articulable suspicion of a crime, and Metropolitan Police policy codifies that as well. (However, it can be used to justify an investigation of driving under the influence).</p>		
Legalization Status	Recreational Use for 21+ <input checked="" type="checkbox"/>	Medicinal Use <input checked="" type="checkbox"/>	Decriminalization <input checked="" type="checkbox"/>

²³⁵ *United States v. Hardy*, No. 2018 CF2 018779, 2019 WL 3948394 (D.C.Super. May 29, 2019).

²³⁶ *Id.* at *1.

²³⁷ Metropolitan Police Department, *Marijuana Enforcement*, <https://mpdc.dc.gov/page/marijuana-enforcement>.



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