IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40187

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SANDRA PERRY,

Defendant-Appellant,

STATE OF NEW MEXICO'S ANSWER BRIEF

On Certification from the New Mexico Court of Appeals

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SUMMARY OF PROCEEDINGS

I. Introduction

Defendant and the Court of Appeals want this Court to determine whether the smell of marijuana, standing alone, gives rise to probable cause. Answering this question would constitute an advisory opinion because it would not help Defendant or resolve the dispute between the parties – there were other facts besides and in addition to the smell of marijuana that gave the arresting officer reason to search Defendant's truck. The Legislature has already enacted the rule that Defendant wants for cases arising after marijuana was legalized. Because resolving this issue would not help Defendant and the Legislature has already provided a prospective rule, answering the certified question would violate the principle of constitutional avoidance.

Defendant's claim fails on the merits. In 2020, marijuana was still contraband even if the Legislature chose to impose a penalty assessment for possessing small amounts. Possessing larger amounts of marijuana was still a criminal offense, so the highly-characteristic odor of marijuana would still give an officer articulable suspicion to believe that criminal activity was afoot. Contrary to Defendant's

characterization, there is no broad consensus among sister sisters that have encountered similar claims. Ultimately, Defendant failed to carry the heavy burden of proving that the Legislature's 2019 decriminalization so changed the law as to warrant overruling precedent.

II. Facts and Procedural Background

On November 18, 2020, Silver City Police Department Officer Mackenzie Greene was driving on 32nd Street. **[8-23-21 CD 2:58:31-59, 2:59:26-42]** As she approached Swan Street, she saw a truck roll through the stop sign at the intersection. **[*Id.* 2:59:42-3:00:06]** Greene kept her eye on the truck; she had "[d]one a lot of DWI cases" and was trained to observe how a motorist generally drove. **[*Id.* 3:00:06-27]** She followed the truck and saw it quickly commit two more traffic offenses – it crossed the center line into the opposite lane of traffic, then abruptly turned left without signaling beforehand. **[*Id.* 3:00:27-3:01:03]** This caused the both the vehicle behind the truck and Greene to "slow down immensely[.]" **[*Id.* 3:01:03-10]** At this point, she stopped the truck. **[*Id.* 3:01:10-29]**

When Greene approached the driver's side door, she "immediately . . . noticed that there was the strong odor of marijuana coming out of the vehicle." **[*Id.* 3:01:30-38]** Defendant was driving, and there were three small children in the back seat. **[*Id.* 3:02:13-24]** Greene asked for her license, registration, and proof of insurance. **[St. Ex. 1 Clip 1 00:05-35]**[1] Defendant had her driver's license and eventually produced an email reflecting payment to an insurance company, but her truck was not registered. **[*Id.* 00:35-52, 02:43-51, 03:38-51]** She acknowledged that there was a bench warrant for her arrest. **[*Id.* 01:01-23]**

Greene asked Defendant if she "smoke[d] any weed[.]" **[*Id.* 02:15-17]** She responded: "No, I smoke," paused very briefly, then said "cigarettes." **[*Id.* 02:17-19]** Greene observed that "it smells a lot like weed." **[*Id.* 02:19-21]** Defendant said that her husband smoked weed, but had not been in the truck "for a while." **[*Id.* 02:21-32]** Greene asked her if there was any marijuana in the truck. **[*Id.* 02:32-33]** Defendant responded: "No," then said: "I hope not, it's been over a month[.]" **[*Id.* 02:33-39]**

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[1] State's Exhibit 1 is a disc containing several files. "Clip 1" refers to the file "117 sandra perry (1).mp4."

Greene told Defendant that she was waiting for her corporal to arrive because "if I can smell weed, I have to act on it, okay . . . I'm gonna try to make it as easy and less invasive [sic] as possible." **[*Id.* 04:23-34]** She asked Defendant if "there [was] anything I need to worry about[.]" **[*Id.* 04:42-44]** Defendant replied that she "honestly d[id not] know." **[*Id.* 04:44-47]** Greene observed that Defendant was "a little excited about it" and then explained that she did not want "to be looking around and get stuck with something[.]" **[*Id.* 04:47-50]** When she asked if she had to worry about anything, Defendant said: "you might." **[*Id.* 04:50-57]** Greene then asked her: "[f]rom you or from someone else?" **[*Id.* 04:57-05:00]** She responded: "From someone else, but I don't know." **[*Id.* 05:00-02]**

Greene asked Defendant to step out of the truck. **[*Id.* 05:19-32]** By this time, the corporal had arrived. **[*Id.* 05:32-34]** They walked over to him, and Greene said: "it smells like weed, *she said there might be a needle* . . . there's three kids in there . . . try to make it as easy as possible on them; they're little." **[*Id.* 05:34-47]** (emphasis added).

Greene asked Defendant for permission to search the truck due to "the smell of marijuana, *with your admission, everything like that*[.]"

[*Id.* 05:49-58] (emphasis added). Defendant did not respond, and Greene prompted her for a "yes or a no." **[*Id.* 05:58-06:03]** She said that she did not know and asked what would happen if she said no. **[*Id.* 06:03-08]** Greene said:

> I can tell you what the options are…because I can smell *and your admission*, I can get a search warrant and tow it. And that's the last thing I want to do, but that is up to you. So either you can now allow me consent now and deal with it or I can get a search warrant. That's the only two options I have. So it's up to you, but I have to have a yes or a no to search it now.

[*Id.* 06:08-31] (emphasis added). Defendant said something unintelligible (perhaps to herself), then responded: "Yes, I guess; I don't know what else to do." **[*Id.* 06:31-43]** Greene asked her to clarify if she was "consenting . . . to search the vehicle[.]" **[*Id.* 06:43-45]** She immediately stated: "Yeah, yeah I am." **[*Id.* 06:45-46]**

Greene searched the front seat of the truck (so as to not disturb the children, who were still in the back seat) and found a bag of marijuana, a bag of methamphetamine, and numerous glass pipes commonly used to smoke methamphetamine. **[8-23-21 CD 3:28:30-3:29:47, 3:17:40-3:18:05, 3:16:39-43]**; **[St. Ex. 1 Clip 1 06:46-07:08]**; **[St. Ex. 2]**. One of the pipes was broken and others had what appeared

to be methamphetamine residue on them. **[8-23-21 CD 3:28:30-53]** The State charged Defendant for possessing controlled substances (methamphetamine and less than a half-ounce of marijuana), possessing drug paraphernalia, and the three traffic offenses. **[RP 1-2]** It later filed a nolle prosequi on the possession of marijuana count. **[*Id.* 118]**

Before trial, Defendant filed a motion to suppress the fruits of the search. **[*Id.* 76-85]** She argued that Greene did not have reasonable suspicion to ask if there was "anything that she would get stuck with" in the truck. **[*Id.* 77-79]** She also claimed that Greene coerced her into consenting and did not have probable cause to obtain a search warrant because possessing less than a half-ounce of marijuana was a penalty assessment. **[*Id.* 80-83]** The State responded that Greene's question about sharp objects was appropriate to protect her while searching and that the smell of marijuana by itself was sufficient to give her probable cause. **[*Id.* 88-89]**

At the suppression hearing, Greene testified about the stop, her interactions with Defendant, and the search. **[8-23-21 CD 2:58:30-3:33:42]** She explained that she had asked about being stuck because

officers frequently find needles during searches. **[*Id.* 3:03:05-35]** She had seen other officers injured by needles, had almost been herself in the past, and had been cut by broken glass pipes. **[*Id.* 3:03:35-47, 3:33:30-42]** Defendant "started getting really nervous" when discussing whether there was marijuana in the truck. **[*Id.* 3:02:52-3:03:05]** Greene stated that she had probable cause because of the smell of marijuana "*as well as her admission* that there was probably something in the vehicle." **[*Id.* 3:32:05-38]** (emphasis added).

In its closing, the State argued that the smell of marijuana by itself gave Greene probable cause. **[*Id.* 3:40:20-44]** But when the court asked which facts the State was relying on to establish probable cause, the prosecutor responded that Greene had testified that she smelled the odor of marijuana, Defendant was nervous, that she "said there might be something" in the truck, as well as "everything else." **[*Id.* 3:44:02-47]**

The court denied the motion in a written order. **[RP 110-13]** It found that Greene lawfully stopped Defendant. **[*Id.* 112]** She then smelled the odor of marijuana, which gave her probable cause even though she did not know how much was in the truck. **[*Id.*]** The question about being stuck with anything was permissible because it was brief

and reasonably related to officer safety.[2] **[*Id.* 113]** Although Greene "could have been more thorough in her explanation of the processes of obtaining a warrant," it concluded that she had probable cause to search the truck and a judge likely would have issued a search warrant. **[*Id.* 112-13]**

At trial, a jury convicted Defendant on all counts. **[*Id.* 156-60]** The court entered a conditional discharge and placed her on probation. **[*Id.* 168-75]** The Court of Appeals certified the case to this Court to determine whether the portion of *State v. Capps*, 1982-NMSC-009, ¶ 12, 97 N.M. 453, in which this Court held that "[t]he smell of marijuana alone can satisfy the probable cause requirement for a warrantless search" is still good law.

ARGUMENT

I. This Court Should Not Reach the Merits of Defendant's Argument.

Defendant asks this Court to rule that the smell of marijuana, standing alone, is insufficient to constitute probable cause. But a favorable ruling from this Court would not help her; below, the arresting officer and the prosecutor relied on other facts in addition to

[2] Defendant did not challenge this finding on appeal.

the smell of marijuana to establish probable cause to search Defendant's vehicle. The district court based its order on the smell of marijuana alone, but it is well-established that appellate courts may affirm a lower court's ruling—even one based on a legal error—if it was right for any reason. Here, the district court's ruling should be affirmed even if this Court accepts Defendant's interpretation of the state constitution because there was ample evidence to establish probable cause.

Defendant's request therefore asks this Court to issue an advisory opinion about a hypothetical set of facts, which is something this Court has repeatedly stated that it will not do. Reaching the merits of Defendant's claim would also violate the principle of constitutional avoidance. Because the Court of Appeals can decide this case without reaching Defendant's constitutional issue, it should do that. And there is no need to lay down a rule for future cases because the Legislature has already provided a standard for how the smell of marijuana may inform future probable cause determinations.

A. Answering the certified question would not resolve the legal dispute between the parties and would instead constitute an advisory opinion.

Precedent is clear: "[t]his [C]ourt does not give advisory opinions." *Bell Tel. Lab'ys, Inc. v. Bureau of Revenue*, 1966-NMSC-253, ¶ 39, 78 N.M. 78. *See also City of Las Cruces v. El. Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640 ("We avoid rendering advisory opinions."); *State v. Wyrostek*, 1994-NMSC-042, ¶ 1 n.1, 117 N.M. 514 ("Because we do not give advisory opinions . . ."); *Application of Timberon Water Co., Inc.*, 1992-NMSC-047, ¶ 33, 114 N.M. 154 ("We do not give advisory opinions.").

Here, opining about whether the smell of marijuana alone constitutes probable cause would be an advisory opinion because it would deal with a hypothetical situation not before this Court or the Court of Appeals below. *See Bell Tel.*, 1966-NMSC-253, ¶ 39 (stating that a question "being interjected as a hypothetical situation . . . would be an advisory opinion"). In this case, there was evidence in addition to and besides the smell of marijuana to support probable cause to search Defendant's vehicle.

Probable cause exists "when there are reasonable grounds to believe an offense has been or is being committed in the place to be searched." *State v. Haidle*, 2012-NMSC-033, ¶ 11 (quoting *State v. Nyce*, 2006-NMSC-026, ¶ 10, 139 N.M. 647, *overruled on other grounds by State v. Williamson*, 2009-NMSC-039, ¶ 29 & n.1, 146 N.M. 488). The quantum of proof required is "more than a suspicion or possibility but less than a certainty of proof." *Nyce*, 2006-NMSC-026, ¶ 10 (quoting *State v. Gonzales*, 2003-NMCA-008, ¶ 12, 133 N.M. 158). The test is objective; courts determine whether there was probable cause "in relation to the circumstances as they would have appeared to a prudent, cautious[,] and trained police officer." *State v. Ochoa*, 2004-NMSC-023, ¶ 9, 135 N.M. 781 (quoting *State v. Pena*, 1989-NMSC-035, ¶ 7, 108 N.M. 760).

Greene had witnessed Defendant drive poorly and break several traffic laws in a short period of time. When she approached the driver's side door, she smelled the strong odor of marijuana. Although Defendant replied "No" when Greene asked her if there was marijuana in the truck, she then paused and said "I hope not" and suggested that her husband might have left drugs in the truck. **[St. Ex. 1 Clip 1 2:32-**

39] Defendant was also nervous. When Greene asked her if she had to worry about being "stuck by anything," Defendant said "you might[,]" even though the hypothetical object might have come from "someone else." **[*Id.* 04:42-05:02]** Because marijuana is not consumed with a needle or sharp object, this gave Greene reason to suspect that there was paraphernalia and other controlled substances in the truck.

Collectively, these facts would have given a prudent, cautious, and trained officer reason to believe that Defendant possessed some amount of marijuana as well as another controlled substance. At the time – November 2020—the possession of marijuana was illegal under NMSA 1978, Section 30-31-23(B) (2019). *See State v. Lucero*, 2007-NMSC-041, ¶ 14, 142 N.M. 102 (stating that the law in effect at the time of the commission of the offense is controlling). The associated penalty depended upon the weight: up to one-half ounce was a penalty assessment, between half of an ounce and a full ounce was a petty misdemeanor (except for a second offense, which would be a full misdemeanor), more than one ounce but less than eight was a misdemeanor, and eight ounces or more was a fourth-degree felony. § 30-31-23(B)(1) to (4). Greene could not tell how much marijuana was in

the truck by smell alone. Accordingly, she could not know before conducting the search whether Defendant had committed a penalty assessment or a felony. Possessing any amount of heroin or methamphetamine—Greene was worried about needles, and both are commonly injected—was a felony. § 30-31-23(F).

Moreover, driving while "under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle" was punishable by 90 days of imprisonment. NMSA 1978, §§ 66-8-102(B) and (E) (2006). Greene had seen Defendant drive poorly and smelled marijuana. While simple possession of a small amount of marijuana might have been a penalty assessment, impaired driving was not.

The district court based its order on the smell of marijuana alone. But it is well-established that "[a]n appellate court may affirm a district court's decision if it is right for any reason." *State v. Marquez*, 2023-NMSC-029, ¶ 32. Courts will not apply the right for any reason doctrine when doing so would be unfair under the circumstances to the appellant. *Id.* The doctrine is generally used to affirm on "strictly legal

questions" that do not depend upon a "fact-dependent ground not raised below." *Id.* (quotation marks omitted).

Here, the district court's decision to deny Defendant's motion to suppress would be right even if the smell of marijuana by itself was insufficient to give rise to probable cause. As discussed above, there was ample evidence besides and in addition to the smell of marijuana from which prudent, cautious, and trained officer could infer that Defendant committed at least one criminal offence.

It would not be unfair to rely on these grounds to affirm because the State expressly pointed to this evidence below and Defendant had a full opportunity to respond. At the suppression hearing, Greene told defense counsel that she based her probable cause determination both on the odor of marijuana *and* Defendant's statement that there was probably something in the vehicle. Although the prosecutor initially pointed only to the smell of marijuana to establish probable cause, he later clarified when asked by the district court that the State was "relying on" the odor of marijuana, Defendant's nervousness, and her statement that there might be another substance in the vehicle. **[8-23-21 CD 3:44:02-47]** Defendant had actual notice that the State was

relying on evidence besides the smell of marijuana and had a full opportunity to develop facts and argue the issue.

Moreover, the ultimate question of whether there was probable cause under particular circumstances is a legal question that appellate courts review de novo. *See State v. Neal*, 2007-NMSC-043, ¶ 15, 142 N.M. 176 ("The legality of a search questioned in a suppression hearing is generally tested as a mixed question of law and fact wherein we review any factual questions under a substantial evidence standard and we review the application of law to the facts de novo.") (quoting *State v. Baca*, 2004-NMCA-049, ¶ 11, 135 N.M. 490). Although appellate courts defer to the factual findings of the court below, the "application of law to the facts" is a legal question. *Id.* Here, the facts were largely undisputed. The only question was whether they constituted probable cause. Because this is a legal determination, it would be appropriate to apply the right for any reason doctrine. The district court's decision was correct regardless of whether or not the smell of marijuana standing alone could constitute probable cause.

That Defendant's argument calls for an advisory opinion can be seen by applying her proposed rule to the facts of her case. Doing so

shows either that (1) the rule would create enormous risks on public streets, or (2) she truly asks for an advisory opinion that has no bearing on how this case will turn out.

If Defendant takes the position that, under her rule, there was not probable cause to search her vehicle, then Greene would have been required to let her continue on her way after investigating the traffic violations. This would be so even though Greene had seen Defendant driving poorly with children in the vehicle, smelled the strong odor of marijuana, and Defendant had admitted that there was likely marijuana as well as another substance in the car. Such an outcome would unduly restrict the ability of police officers to get dangerous drivers off the streets. Even after the Legislature legalized the possession of marijuana, it still recognized that officers may rely on its smell when investigating suspected impaired drivers. *See* § 26-2C-25(C)(1) and (D) (permitting officers to consider "the odor of cannabis" when investigating suspected DWIs). So, if Defendant's proposed rule would help her, it would pose a grave danger to public safety.

If instead the rule would not help her—because there was sufficient evidence besides or in addition to the smell of marijuana to

justify the search—then Defendant is asking this Court to weigh in on an abstract legal issue that has no bearing on her case.

This Court should not answer the hypothetical question of whether the smell of marijuana alone constitutes probable cause. The real question before the Court of Appeals is whether there was probable cause to search Defendant's vehicle in this case. Even if this Court sides with Defendant on the certified question, Greene still had probable cause to search Defendant's vehicle. Answering the certified question would constitute a purely advisory opinion in this case because, instead of resolving the actual legal dispute between the parties, it would only govern a hypothetical future case. This Court should follow its firm policy against doing exactly that.

B. Answering the certified question would violate the principle of constitutional avoidance.

Defendant asks this Court to rule that "the smell of marijuana alone is not probable cause to search a vehicle under Article II, Section 10 of the New Mexico Constitution." **[BIC 13]** "It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so. We have repeatedly declined to decide constitutional questions unless necessary to the

disposition of the case." *Allen v. LeMaster*, 2012-NMSC-001, ¶ 28. This rule makes sense. When this Court announces a new interpretation of the common law or a statute, the people are free to overrule that decision by changing the law. But when this Court interprets the state constitution, the people cannot alter that result short of convincing this Court to overrule itself or going through the laborious process of amending the fundamental law.

Answering the certified question would violate the principle of constitutional avoidance in two ways. First, as discussed above, answering the question is not "necessary to the disposition of the case." *Id.* So Defendant's request to interpret the state constitution more broadly asks this Court to gratuitously change the meaning of the state constitution.

Second, the Legislature has already codified Defendant's requested rule in a statute for future cases. The Legislature enacted the Cannabis Regulation Act, NMSA 1978, §§ 26-2C-1 to -42 (2021), to legalize the possession of certain quantities of marijuana and provide for commercial sales. Under Section 26-2C-25(C)(1), the "odor of cannabis" cannot, either by itself or in combination with other facts,

"constitute reasonable articulable suspicion of a crime[.]" An officer may continue to rely on the smell of marijuana, however, when "investigating whether a person is operating a vehicle . . . while intoxicated or under the influence of or impaired by alcohol or a drug[.]" § 26-2C-1(D).

Section 26-2C-25 does not apply to Defendant's case because the law in effect "at the time of the commission of the offense[] is controlling." *Lucero*, 2007-NMSC-041, ¶ 14 (quoting *Allen*, 1971-NMSC-026, ¶ 6). But it will apply in future cases when police smell marijuana. There is no need for this Court to craft a constitutional rule to govern cases going forward because the Legislature has already spoken. So, changing the meaning of the constitution to provide a prospective rule would be unnecessary and gratuitous.

Defendant may argue that this Court could avoid the latter problem by confining its holding to only apply to cases arising after the Legislature turned simple possession into a penalty assessment but before it generally legalized possession. But this would introduce more difficulties. This Court would have to say that Article II, Section 10 meant something different between 2019 and 2021 than it meant either

before or after that period. It is very difficult to see a principled reason for that result. And such a rule would only apply to a very small universe of cases—Defendant has not identified any other criminal cases from this time period that would be affected—and would not, as discussed above, even control the outcome in this case.

This Court should quash certification because this case is not the proper vehicle to answer the question that the Court of Appeals posed.

II. Defendant's Claim Fails on the Merits.

Defendant's arguments all rest on an overly simplistic characterization of the 2019 amendment to Section 30-31-23. Although she broadly claims that "marijuana was decriminalized," **[BIC 1]**, when Greene pulled her over, this is not accurate.

In 2019, possessing any amount of marijuana was still against the law; the Legislature provided for calibrated penalties depending upon the amount involved and whether the offender had possessed marijuana before. As discussed above, possessing marijuana could be punished by a penalty assessment, a petty misdemeanor, a full misdemeanor, or a felony. Petty misdemeanors, full misdemeanors, and felonies are all

crimes, so Defendant's argument could only pertain to the penalty assessment for possessing a small amount of marijuana.

It is far from clear that a penalty assessment is categorically not a crime. To be sure, some law supports the conclusion that a penalty assessment is not a crime for certain purposes. Under NMSA 1978, § 31-19A-1(A) (2019), the "[*p*]*ayment of a fine* pursuant to a penalty assessment citation shall not be considered a criminal *conviction*." (emphasis added). And a statute written 56 years before the Legislature created marijuana penalty assessments defines crimes to be "classified as felonies, misdemeanors and petty misdemeanors." NMSA 1978, § 30-1-5 (1963).

But penalty assessments do count as crimes for some legal purposes. For example, a person issued a penalty assessment may refuse to pay the assessment and demand a trial. *See* § 31-19A-1(B) and (I) (describing the process by which an offender could proceed to court). Confusingly, Section 31-19A-1(I) refers to an adjudication of a penalty assessment as a "conviction[.]" To bring such an offender to trial, the State would have to follow the ordinary rules of criminal procedure. The State did so here when it charged Defendant with possessing

marijuana. **[*See, e.g.*, RP 1, 61, 118 (charging Defendant with simple possession by information, reflecting her not guilty plea to the offense, and dismissing the count)]**

If the State had not dismissed that charge, Defendant would have been entitled to the substantive and procedural protections which a criminal defendant is due: she would have had the right to remain silent, confront and cross-examine the witnesses against her, hold the State to the burden of proof beyond a reasonable doubt, receive jury instructions on defenses, and so on. Because other portions of the criminal law would unquestionably apply to a penalty assessment, it stands to reason that the portions of the law dealing with search and seizure would apply as well, especially when the smell of marijuana was equally consistent with a felony or misdemeanor offense.

Even assuming for the purposes of argument that a penalty assessment is not itself a crime, possessing marijuana could still have been a misdemeanors or felony. An officer who, like Greene, smelled the plain odor of marijuana from a suspect would have good cause to believe that the suspect had violated the law, but would not immediately know

whether that individual had committed a penalty assessment, a misdemeanor, or a felony.

Holding that an officer could not pursue a possible misdemeanor or felony offense simply because it was also possible that the suspect had committed only a penalty assessment offense would violate the logic underlying the probable cause standard. For probable cause to exist, it is not necessary to prove that a suspect in fact committed an offense; it is "more than a suspicion or possibility but less than a certainty of proof." *Nyce*, 2006-NMSC-026, ¶ 10 (quoting *Gonzales*, 2003-NMCA-008, ¶ 12). There may be probable cause to perform a search when in fact the suspect did not commit any crime at all. But when an officer detects an odor that is highly characteristic of a felony or misdemeanor offense, it is not unreasonable for that officer to investigate even if she later discovers that the total amount of marijuana possessed warrants a fine instead of imprisonment.

A. The arguments that Defendant offers to support her position fail.

Defendant relies on cases that are meaningfully distinguishable. Even in her characterization, those cases stand at most for the proposition that "possession . . . of something that may or may not have

been *lawfully* possessed does not create probable cause." **[BIC 5]** But in 2019, it *was not* lawful for Defendant to possess marijuana, even if possessing a small amount was punishable as a penalty assessment.

This distinguishes the holding in *State v. Sanchez*, where an officer saw pills that he believed were available by prescription only but did not know if the defendant had a prescription. 2015-NMCA-084, ¶ 15. If the defendant there had a valid prescription, it would have been lawful to possess the pills. *Id.* In *State v. Haidle*, this Court suggested that the presence of blood in a bathroom, standing alone, did not establish that the defendant killed the victim; the victim could have, for example, bled after injecting herself or cut herself with "a shaving razor." 2012-NMSC-033, ¶ 31. *State v. Anderson* established only that the fact that "defendant was traveling east; he had slept at a rest stop; he had no luggage visible in the car except a carry-on bag; he had a box of Kentucky Fried Chicken in the car with him; and he was nervous" did not give officers probable cause to believe that the defendant was smuggling drugs. 1988-NMCA-033, ¶¶ 15-16. Again, traveling in a certain direction while in possession of fried chicken is not illegal. But because it was not legal for Defendant to possess any amount of

marijuana, the smell of marijuana was not consistent with lawful activity. Accordingly, none of these cases apply here.

Defendant argues that *Capps* must be overruled because it relied in part on the blanket automobile exception that this Court rejected in *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777. **[BIC 8-10]** This argument misreads *Capps*.

In *Capps*, a police officer stopped a car and smelled both marijuana and talcum powder. 1982-NMSC-009, ¶ 3. When the officer asked for permission to search the car's trunk, the driver tried to bribe the officer, then admitted that there was marijuana in the trunk when the officer rejected the offer. *Id.* When the officer opened the trunk, he discovered nine trash bags. *Id.* He tore a hole in one of the bags and verified that there was marijuana inside. *Id.* In ruling on the legality of the search, this Court discussed the two elements of the automobile exception: "1) There must be probable cause that the automobile contains evidence of a crime, and 2) there must be an exigency to search the automobile at that moment, because of the automobile's mobility and fear that evidence could be destroyed." *Id.* ¶ 9 (footnote omitted). So, to determine whether the automobile exception allowed the officer to

search the entire car, this Court had to first determine whether there was probable cause to believe that it contained evidence of a crime.

It was only in this context that the Court cited *United States v. Rumpf*, 576 F.2d 818 (10th Cir. 1978) for the proposition that "[t]he smell of marijuana alone can satisfy the probable cause requirement for a warrantless search." 1982-NMSC-009, ¶ 12. This is the holding that Defendant wants overturned, not the Court's later conclusion that the search of garbage bags in the trunk was appropriate under the automobile exception. Neither that exception nor its reasoning played a role in this Court's conclusion that the smell of marijuana alone "could" give rise to probable cause. So, this Court's later rejection of a per se automobile exception does not undermine the precedential value of the part of *Capps* that Defendant wants overturned.

Next, Defendant notes that the Legislature enacted Section 26-2C-25 after it generally legalized the possession of marijuana. But this cuts against her argument. New Mexico appellate courts "presume that the [L]egislature is well informed as to existing statutory and common law and does not intend to enact a nullity, and . . . also presume that the [L]egislature intends to change existing law when it enacts a new

statute." *Inc. Cnty. of Los Alamos v. Johnson*, 1989-NMSC-045, ¶ 4, 108 N.M. 633. Applying this presumption, Section 26-2C-25(C)(1) changed the law when the Legislature enacted it. Accordingly, the Legislature recognized that the smell of marijuana could constitute reasonable articulable suspicion of a crime before it fully legalized the possession of marijuana in 2021. Because Defendant's case arose before full legalization, the rule in place before the Legislature changed the law applies.

Defendant points to some cases from other jurisdictions that have adopted similar rules to the one she now proposes. **[BIC 11-12]** But she acknowledges that other states have rejected such a rule. **[*Id.* 12]** Although she characterizes her position as the "majority," the split in authority is very close indeed—even by Defendant's reckoning, four states agree with her and three disagree. **[*See id.* 11-12]**

And even this slim majority buckles on closer inspection. In *Commonwealth v. Barr*, the Pennsylvania Supreme Court based its conclusion on the passage of a medical marijuana program, not the decriminalization of possessing small amounts of marijuana at issue here. 266 A.3d 25, 28 (Pa. 2021) Although Defendant claims that

Massachusetts' law decriminalizing some marijuana possession was "nearly identical" to New Mexico's, this is not accurate. **[BIC 12]** Mass. Gen. Laws ch. 94C § 32L (2008) was very clear: possession of a less than an ounce of marijuana was "only a civil offense" that did not carry "any other form of criminal or civil punishment or disqualification." In contrast, Section 31-19A-1, as discussed above, is far more ambiguous.

Similarly, the court in *People v. Armstrong* based its conclusion on the Michigan Regulation and Taxation of Marihuana Act (MRTMA). 1 N.W.3d 299, 304-06 (Mich. Ct. App. 2022). The MRTMA was a sweeping legalization, not mere decriminalization: under it, various acts, including possessing up to 2.5 ounces of marijuana "are not unlawful, are not an offense, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search or inspection, and are not grounds to deny any other right or privilege[.]" Mich. Comp. Laws. § 333.27955 (2018). This was very different from the New Mexico Legislature's limited action in 2019.

Defendant, citing *People v. Johnson*, 50 Ca.App.5th 620 (2020), states that, in California, "the smell of marijuana can never be probable cause[.]" **[BIC 11 n.2]** It is unclear if this is accurate. *See People v.*

Fews, 27 Cal.App.5th 553, 560-61 (2018) (considering the odor of marijuana together with other facts to find that officers had reasonable suspicion). It is unnecessary for this Court to fully plumb the depths of California law, however, because *Johnson* based its conclusion entirely upon a legislative enactment that fully legalized the possession of up to 28.5 grams of marijuana. *See* 50 Ca.App.5th at 634 ("[T]he 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."). The State agrees that the smell of marijuana alone does not constitute probable cause in New Mexico after the Legislature legalized the possession of marijuana. Again, however, Defendant possessed marijuana before that date.

Moreover, one of the cases that Defendant cites, *Robinson v. State*, 152 A.3d 661, 676 (Ct. App. Md. 2017), surveyed the law from several states to determine "whether decriminalization—or, in one instance, legalization—of possession of a small amount of marijuana negates probable cause to search a vehicle based on an odor of marijuana" and reached a different conclusion than Defendant. According to the

Robinson court, "[t]he view of the majority of other jurisdictions that have addressed the issue—four out of five jurisdictions, to be exact—is that decriminalization has no such effect." *Id.*

Robinson joined this majority based on "straightforward" reasoning: "[d]ecriminalization is not the same as legalization. Despite the decriminalization of possession of less than ten grams of marijuana, possession of marijuana in **any** amount remains illegal in Maryland." *Id.* at 680 (emphasis in original). Beyond the plain language of the statute and its legislative history, the *Robinson* court based its reasoning on the purpose of the probable cause standard itself—"probable cause to search exists where a person of reasonable caution would believe that contraband or evidence of a crime is present." *Id.* at 681 (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013)).

The *Robinson* court reasoned that "the terms 'contraband' and 'evidence of a crime' have different meanings" and that "marijuana remains contraband, despite the decriminalization of possession of small amounts of marijuana." *Id.* at 682-83. Accordingly "the odor of marijuana constitutes probable cause for the search of a vehicle." *Id.* at 683. The same was true in New Mexico when Greene searched

Defendant's vehicle: it was still against the law for Defendant to possess the marijuana that she had.

The Supreme Court of Nebraska reached a similar result for different reasons in *State v. Perry*, 874 N.W.2d 36 (Neb. 2016). It is unclear whether the *Perry* Court held that the odor of marijuana standing alone would always give rise to probable cause—in holding that there was probable cause in the case before it, the Court noted the existence of other suspicious factors besides the smell, and it stated that "the odor of marijuana in an area will not inevitably provide probable cause to arrest all those in proximity to the odor." *Id.* at 46-47.

But the *Perry* Court rejected the defendant's argument that the "mere smell of marijuana is not sufficient probable cause that a crime is being or has been committed and does not justify an arrest" based on Nebraska's recent decriminalization of a less than an ounce of marijuana. *Id.* at 46. It based this conclusion on the fact that possessing larger amounts of marijuana remained criminal offenses: "[o]bjectively, the smell of burnt marijuana tells a reasonable officer that one or more persons in the vehicle recently possessed and used the drug. The officer need not know whether the amount possessed is more than 1 ounce in

order to have probable cause to suspect criminal activity in the vehicle." *Id.* at 46. The same was true of New Mexico law when Greene pulled Defendant over.

Taken collectively, Defendant failed meet the standard required to overrule *Capps*. "When deciding whether to overrule [its] own precedents, this Court considers such common-sense factors as whether the precedent is a remnant of abandoned doctrine, whether the precedent has proved to be unworkable, whether changing circumstances have deprived the precedent of its original justification, and the extent to which parties relying on the precedent would suffer hardship from its overruling." *State v. Montoya*, 2013-NMSC-020, ¶ 40 (quotation marks omitted).

As discussed above, *Capps* is not the remnant of an abandoned doctrine or unworkable—the challenged holding is the natural result of applying the probable cause standard to a smell that is highly characteristic of contraband. Defendant argues that the 2019 de-criminalization of small amounts of marijuana deprived *Capps* of its original justification. But this claim falls apart on closer inspection: marijuana was still contraband until 2021, and the smell of marijuana

could have indicated the presence of a misdemeanor or felony amount of marijuana. There is no broad consensus among sister states, and Defendant ignores the reasoning of the contrary cases. Defendant failed to "convincingly" demonstrate that *Capps* was wrong. *Id.* ¶ 42 (quotations omitted)

CONCLUSION

This Court should quash this certified question so that the Court of Appeals can follow the ordinary process of appellate decision making. Neither this Court nor the Court of Appeals should consider whether *Capps* is good law because doing so is not necessary to decide this case and would constitute an advisory opinion. Doing so would also gratuitously decide a constitutional question when the Legislature has already provided a rule to govern future cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 16, 2024, I filed a true and correct copy of the foregoing Answer Brief electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/ Van Snow
Deputy Solicitor General