IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. No. S-1-SC-40187

SANDRA PERRY,

Defendant-Appellant.

APPELLANT'S BRIEF-IN-CHIEF

On Certification from the New Mexico Court of Appeals
Case No. A-1-CA-40097

Appeal from the Sixth Judicial District Court
Case No. D-608-CR-2021-00022
The Honorable Tom Stewart, District Court Judge

Nicholas T. Hart
HARRISON & HART, LLC
924 Park Ave SW, Suite E
Albuquerque, NM 87102
(505) 295-3261

Counsel for Appellant

Oral Argument Requested

April 17, 2024

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE

I certify, according to Rule 12-318(F), NMRA, that this brief complies with the type-volume, size, and word limitation of the New Mexico Rules of Appellate Procedure because it contains no more than 11,000 words of substantive text, and was prepared in size 14 Garamond font, which is a proportionally spaced type face, using Microsoft Word as part of Microsoft Office 365.

/s/ Nicholas T. Hart
Nicholas T. Hart

TRANSCRIPT OF PROCEEDING

References to the Record Proper are denoted by R.P., followed by the page number. Citations to the audio transcript are noted by the word Audio, followed by the date and time of the recording. Where there are recordings from multiple courtrooms on the same day, the citation to audio transcript will include the courtroom number in the citation.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Introduction

In 2021, when the possession and use of marijuana was legalized in New Mexico, Governor Michelle Lujan Grisham, stated: "We're going to start righting past wrongs of this country's failed war on drugs." *See* Gov. Lujan Grisham legalizes adult-use cannabis (Apr. 12, 2021), available at https://www.governor.state.nm.us/2021/04/12/gov-lujan-grisham-legalizes-adult-use-cannabis/ (last accessed Apr. 17, 2024). Legalization, however, did not solve the legal limbo created by New Mexico's 2019 decriminalization of the possession of marijuana. This case seeks to solve that problem.

Here, Sandra Perry's vehicle and purse were searched, after the decriminalization of marijuana, merely because an officer smelled marijuana coming from inside of her vehicle. At the time of the search, possession of marijuana was not a crime. Yet this Court's jurisprudence, which continued to apply until legalization, found probable cause solely when the smell of marijuana was present.

This conflict is untenable. The Court must reconsider its prior holdings and conclude that the smell of marijuana alone was not sufficient to establish probable cause during the time when marijuana was decriminalized to the time that it was legalized.

Factual Background

On November 18, 2020, at approximately 10 a.m., Silver City Police Officer Mackenzie Greene-Spurgeon was on routine patrol when she observed the truck Ms.

Perry was driving commit multiple traffic infractions. *See* 09/08/2021 CD(1) 1:26:30-1:29:24. Officer Greene-Spurgeon then pulled over Ms. Perry. *Id.* at 1:29:24-1:29:26. Ms. Perry was not able to produce her driver's license, registration, or insurance, and she indicated that she had an outstanding bench warrant. *Id.* at 1:29:26 – 1:30:30; 1:36:30-1:36:50.

While talking with Ms. Perry, Officer Greene-Spurgeon smelled the odor of marijuana coming from the vehicle. *Id.* at 1:30:30-1:30:34; 1:31:25-1:31:35; 1:37:43-1:37:48. Ms. Perry stated that her husband had smoked marijuana in the vehicle, and that she "hoped" that there was not any still in the vehicle since it had been over a month. *Id.* at 1:31:35-1:31:47; 1:37:48-1:38:07. Officer Greene-Spurgeon then told Mr. Perry that "if I smell weed, I have to act on it" and asked, "is there anything I have to worry about then?" *Id.* at 1:39:50-1:40:11. Ms. Perry responded, "I honestly don't know" and Officer Greene-Spurgeon stated that she did not want to get "stuck with something." *Id.* at 1:40:11-1:40:19. Ms. Perry was then asked to exit the truck. *Id.* at 1:40:48.

Officer Greene-Spurgeon asked for permission to search Ms. Perry's truck. *Id.* at 1:41:18-1:41:26. Ms. Perry eventually consented to the search. *Id.* at 1:41:59-1:42:14. The search uncovered a baggie with a green substance, seven glass pipes used to smoke methamphetamine, and two baggies with white residue. *Id.* at 1:47:49-1:48:17, 1:50:50-1:51:00, 1:51:15-1:51:37. The officer later found, in Ms. Perry's purse, a clear

plastic baggy with a rock-like, crystal substance and another glass pipe. *Id.* at 1:58:15-1:58:55.

Procedural History

On November 19, 2020, Ms. Perry was charged by criminal complaint with one count each of possession of a controlled substance (methamphetamine), possession of a controlled substance (marijuana) (up to one-half ounce), possession of drug paraphernalia, failure to maintain traffic lane, failure to stop at stop sign, and failure to properly signal an intention to turn. R.P. 5-19. All counts were bound over for trial before the district court. R.P. 1-2, 34-35.

Motion to Suppress. On July 12, 2021, Ms. Perry filed a motion to suppress evidence based on suspicion-less questioning and coerced consent to search. R.P. 76-85. In that motion, Ms. Perry argued that the warrantless search of her vehicle violated the United States and New Mexico Constitutions. R.P. 76. Relevant to this brief, Ms. Perry contended that there was no probable cause to search the vehicle because possessing a small amount of marijuana was no longer a crime. R.P. 77-83.

In response, the State argued that the smell of marijuana is enough to justify an officer's request to search a vehicle. R.P. 88-89. The district court denied Ms. Perry's motion, concluding that the odor of marijuana coming from the truck was "actual probable cause" for the search and that it was "likely that a judge would have issued a search warrant[.]" R.P. 111, 113.

Trial. The State later dismissed the marijuana count. R.P. 118. But a one-day jury trial on the remaining counts took place on September 8, 2021. R.P. 124-134. Evidence from the search was admitted at trial, and the jury ultimately found Ms. Perry guilty of all counts. R.P. 156-160.

Order of Certification. Ms. Perry timely appealed on November 11, 2021. R.P. 176. On November 21, 2023, the Court of Appeals certified to this Court a single issue that is controlling in this appeal: "[W]hether, in light of New Mexico's progressive decriminalization of marijuana possession, the smell of marijuana alone can support a finding of probable cause for the search of a vehicle." Order of Certification, at 3. As part of this order, the Court of Appeals asked whether *State v. Capps*, which held that marijuana alone can be probable cause to search a vehicle, *see* 1982-NMSC-009, ¶ 12, 97 N.M. 453, 641 P.2d 484, is applicable during the two-year period when possession of marijuana was decriminalized but not yet legalized. Order of Certification, at 3. The certification was then accepted.

Argument

More than 40 years ago, this Court held that "[t]he smell of marijuana alone can satisfy the probable cause requirement for a warrantless search" of a vehicle. *Capps*, 1982-NMSC-009, ¶ 12. This categorical rule made sense when *Capps* was decided because it was a crime to possess even small amounts of marijuana. *See* NMSA 1978, § 30-31-23 (1972, effective until 2011). But at the time of Ms. Perry's arrest, the possession of small amounts of marijuana resulted only in a penalty assessment.

NMSA 1978, § 30-21-23(B)(1) (2011, as amended in 2019). And a penalty assessment is not a crime. NMSA 1978, § 31-19A-1(A). *See also* NMSA 1978, § 30-1-5 (classifying crimes as "felonies, misdemeanors, and petty misdemeanors").

This presents a legal conundrum: Should *Capps* apply to searches based solely on the smell of marijuana during the period when marijuana was decriminalized but not legalized? The only logical answer is no. The decision of the district court must be reversed.

I. Activity that can be equally criminal and non-criminal, like the possession of marijuana, does not give rise to probable cause.

After decriminalization, *Capps* created a conflict between its categorical rule and the principle that "mere suspicion about ordinary, non-criminal activities, regardless of an officer's qualification and experience, does not satisfy probable cause." *State v. Nyce*, 2006-NMSC-026, ¶ 14, 139 N.M. 647, 137 P.3d 587. This rule requires that "ordinary, innocent facts," such as the possession of small amounts of marijuana, can establish probable cause only where other facts and circumstances "make it reasonably probable that a crime is occurring in the place to be searched." *Id.* This determination is made through a "particularly exacting" review of the facts. *Id.*

For example, the New Mexico Court of Appeals has held, consistent with other states, that the possession, and even concealing, of something that may or may not have been lawfully possessed does not create probable cause. *State v. Sanchez*, 2015-NMCA-084, ¶ 22, 355 P.3d 795. In *Sanchez*, an officer saw a clear, plastic bag with a

capsule or pill in it on the floorboard of a vehicle during a traffic stop. *Id.*, ¶ 2. The officer asked what pills were inside the bag. *Id.*, ¶ 3. The defendant then tried to push the bag under his seat with his feet while denying that there was a bag on the floor. *Id.* The officer reached into the vehicle and removed the bag. *Id.* The officer later testified that while he recognized the pills as prescription medicine, he could not identify what prescription medicine the pills were, and he did not ask whether the defendant lawfully possessed the medication. *Id.*, ¶ 4. The defendant filed a motion to suppress, which was denied by the district court.

The Court of Appeals reversed for two reasons. First, the court noted that "the existence of two pills contained within a small bag on the floorboard of [a] car" is "insufficient to convey evidence of criminality," because "the possession of prescription pills is commonly lawful, and our laws do not prohibit the possession of prescription pills in an aftermarket container." *Id.*, ¶ 15. And second, the court concluded that "Defendant's attempt to conceal the bag on the floorboard containing pills that may or may not have been lawfully possessed, without any testimony from the officer indicating suspicious circumstances or specific knowledge about Defendant or the item seized, is not an act that supplied . . . suspicion that rose to the level of probable cause." *Id.*, ¶ 22. *See also United States v. Richardson,* 2017 WL 1416816, at *6 (M.D. La. Apr. 19, 2017) (holding that an officer did not have probable cause for an arrest for possession of a controlled substance because the officer could not

identify the pills the defendant possessed even though the defendant threw the pills on to the floor of a vehicle).

Similarly, in *State v. Haidle*, this Court was tasked with determining whether there was probable cause to search a home for evidence of a homicide because of the "Defendant's admission that Victim's blood may have been in his bathroom." 2012-NMSC-033, ¶ 31, 285 P.3d 668. There, this Court found that such a statement, lacking any context, was not sufficient to establish probable cause because the alleged victim, who was in a relationship with the defendant, could have left blood at "any home that Victim ever visited where she used heroin or even a shaving razor." *Id.* This Court also found there was no probable cause merely because the defendant paid the alleged victim for sex or because the alleged victim possessed a baseball bat. *Id.*, ¶¶ 33-34 ("There is nothing unusual about having an ordinary baseball bat in one's home and nothing unlawful about having it available for personal protection.").

In *State v. Anderson,* a defendant was stopped for driving 67 miles per hour in a 65 mile per hour zone. 1988-NMCA-033, ¶ 2, 107 N.M. 165, 754 P.2d 542. The officer then searched the vehicle's trunk believing the defendant to be a drug courier because the defendant was driving from Phoenix to Oklahoma City, the car he was driving was registered in Iowa, he was dressed in clothes with Harley-Davidson motorcycle logos, he was alone in the car, there was no luggage visible in the car, there was a box of Kentucky Fried Chicken in the back seat, he told the officer he had slept at a rest area, and he appeared nervous while looking for his license and registration.

Id., ¶¶ 2-3. The search uncovered methamphetamine. *Id.*, ¶ 6. The Court of Appeals, however, suppressed the methamphetamine, concluding that the facts used to establish probable cause did not establish probable cause of drug smuggling because they were "generally descriptive of hundreds of innocent persons traveling through New Mexico on the interstate every day." *Id.*, ¶ 16. *See also State v. Flores*, 1996-NMCA-059, ¶ 14, 122 N.M. 84, 920 P.2d 1038. (concluding that "neutral, non-incriminating details," can be reasonable suspicion for a *Terry* stop of a vehicle but could not, by itself, be probable cause to continue detention or search the vehicle).

Capps' categorical rule that the smell of marijuana alone is always probable cause irreconcilably conflicts with this line of cases. Here, Ms. Perry was stopped for a traffic violation. The sole probable cause for searching Ms. Perry's vehicle, as stated by the officer, and as found by the district court, was the smell of marijuana coming from Ms. Perry's truck. But just like in *Sanchez*, *Haidle*, *Anderson*, and *Flores*, the possession of marijuana could have equally been non-criminal or criminal. *Capps* must therefore yield to the well-settled rule that innocent or non-criminal conduct cannot, by itself, be probable cause to arrest or search absent additional facts raising suspicion of criminal conduct.

II. *Capps* should be overruled because its legal underpinnings were later rejected by this Court under the New Mexico Constitution.

In *Capps*, the question before this Court was whether there was probable cause under the automobile exception to the warrant requirement under the United States

constitution. 1982-NMSC-009 at ¶¶ 9-23. This Court, however, later rejected the federal automobile exception[1] as repugnant to the New Mexico Constitution's warrant requirement. *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15, 130 N.M. 386, 25 P.3d 225. The question for this Court is whether New Mexico should diverge from federal precedent regarding the sufficiency of the odor of marijuana alone to provide probable cause to search a vehicle, given that the federal analysis relied on in *Capps* is flawed—evidence from the fact that our Supreme Court has abandoned the federal automobile exception to the warrant requirement under the New Mexico Constitution—and in light of the distinct state characteristic of a "strong preference for warrants" under Article II, Section 10. *State v. Crane*, 2014-NMSC-026, ¶ 16, 329 P.3d 689. *See also State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (explaining that the New Mexico Constitution provides broader protection that the United States Constitution when there is "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics"). It should.

The legal underpinnings that applied in *Capps* fulfill all three criteria for deviating from the federal constitution. First, the analysis that was the basis for

---

[1] *Capps* was also supported by other federal cases related to exceptions to the United States Constitution's warrant requirement, such as an automobile search at a border checkpoint, *see United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973), and exigent circumstances, *see United States v. Rumpf*, 576 F.2d 818 (10th Cir. 1978). *Capps*, 1982-NMSC-009, ¶ 12. Because *Capps* never considered whether the search was permissible under the New Mexico Constitution.

Capps—the federal automobile exception to the warrant requirement—has been rejected by the New Mexico courts. Second, the rejection of the automobile exception created structural differences between federal and state law; federal law concludes that a person has a lesser expectation of privacy in a vehicle while New Mexico law does not. And third, the decriminalization of marijuana is a distinctive state characteristic because the possession of marijuana is still unlawful under federal law. Thus, even if the Court believes that *Capps* does not hopelessly conflict with other constitutional principles since decriminalization, then the Court should conclude that it must be overruled because of its reliance on federal principles that this Court later rejected.

III. The legislature has recognized that the smell of marijuana should no longer create probable cause for a search.

During the legalization of marijuana in 2021, the New Mexico Legislature passed a legislative fix to the problem with *Capps*' categorical rule related to probable cause because of the odor of marijuana. That fix, states:

> C. None of the following shall, individually or in combination with each other, constitute reasonable articulable suspicion of a crime and is not a basis to stop, detain or search a person:
>
> (1) the odor of cannabis or cannabis extract or burnt cannabis or cannabis extract;
>
> (2) the possession of or the suspicion of possession of cannabis without evidence of quantity in excess of two ounces of cannabis, sixteen grants of cannabis extract or eight hundred milligrams of edible cannabis; or
>
> (3) the possession of multiple containers of cannabis without evidence of quantity in excess of two ounces of cannabis,

> sixteen grams of cannabis extract or eight hundred milligrams of edible cannabis.

NMSA 1978, § 26-2C-25(C)(1)-(3). And this fix makes sense, and was necessary, given *Capps*' categorical rule related to probable cause when the odor of marijuana is present.

The same is true for the decriminalization of cannabis. It would make no sense to apply *Capps*' categorical rule when the possession of marijuana was no longer a crime. And while the 2021 legislative fix is not binding on this Court's determination of whether *Capps* applies to decriminalization rather than legalization, its approach is persuasive and logical. The Court should thus follow the legislature and conclude that *Capps*' categorical rule does not apply during the 2019 through 2021 period where the possession of marijuana was decriminalized.

IV. Other states that have decriminalized marijuana have also found that the odor of marijuana alone is not probable cause.

Most of the states[2] that have grappled with this issue have held that the smell of marijuana itself is no longer probable cause of criminal activity. For example, in *Commonwealth v. Barr*, the Supreme Court of Pennsylvania concluded, after the enactment of a state law permitting the possession and use of medical marijuana, that

[2] A small minority of states, such as California, have concluded that the smell of marijuana can never be probable cause because it is not probative of marijuana being present in a vehicle. *See People v. Johnson*, 50 Cal. App. 5th 620, 634-35 (Cal. Ct. App. 3d Dist. 2020). But Ms. Perry does not request that this Court create a categorical rule that is the opposite of *Capps*. Ms. Perry instead seeks a ruling that the smell of marijuana *alone* is not sufficient to establish probable cause of criminal activity.

"the odor of marijuana may be a factor, but not a stand-alone one," when determining probable cause because marijuana was no longer "per se illegal" in Pennsylvania. 266 A.3d 25, 41 (Pa. 2021). Similarly, the Supreme Judicial Court of Massachusetts concluded, after enactment of a law nearly identical to New Mexico's decriminalization law, "that the odor [of marijuana] alone does not constitute probable cause to believe that a vehicle contains a criminal amount of contraband or specific evidence of a crime." *Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1058 (Mass. 2014). There, the Supreme Judicial Court recognized, as the Court should do here, that the smell of marijuana "points only to the presence of *some* marijuana, not necessarily a criminal amount." *Id.* (emphasis in original). And the Court of Appeals of Michigan has also concluded that the smell of marijuana alone does not give probable cause to search a vehicle. *People v. Armstrong*, 1 N.W.3d 299, 300 (Mich. Ct. App. 2022).

A minority of states, however, have still held that the smell of marijuana coming from a vehicle is probable cause to search the vehicle as long as any amount of marijuana remains contraband. *See, e.g., State v. Winthrow*, 194 N.E.3d 804 (Ohio Ct. App. 2022); *Robinson v. State*, 152 A.3d 661, 665 (Md. 2017); *State v. Perry*, 874 N.W. 2d 36, 46 (Neb. 2016). But, as discussed *supra*, such a rule conflicts with the New Mexico Constitution's principle that activity that is both criminal and non-criminal is not enough to establish probable cause. The Court should therefore follow the majority approach and conclude that the smell of marijuana alone, without other facts

establishing suspicion of criminality, does not establish probable cause to search a person or a vehicle.

Conclusion

The New Mexico Constitution requires the conclusion that the smell of marijuana alone is not probable cause to search a vehicle under Article II, Section 10 of the New Mexico Constitution. Finding otherwise would subject defendants, like Ms. Perry, to warrantless searches of their entire vehicles (including the containers therein) based on the smell of a decriminalized substance, which was legalized completely less than two years later. This Court must therefore overrule *Capps* and hold that the smell of marijuana alone is no longer sufficient probable cause for the warrantless search of an automobile.

Respectfully submitted,

/s/ Nicholas T. Hart

Nicholas T. Hart
HARRISON & HART, LLC
924 Park Ave SW, Suite E
Albuquerque, NM 87102
(505) 295-3261
nick@harrisonhartlaw.com

Counsel for Appellant

Dated: April 17, 2024

STATEMENT ABOUT ORAL ARGUMENT

Ms. Perry requests oral argument because this case asks the Court to overrule a decision that has governed law enforcement officers' interactions with citizens for over 40 years. Doing so necessarily requires careful examination of the facts of this case, the statutes relevant to this case, competing constitutional principles, and the decisions of other states facing a similar dilemma. Ms. Perry therefore believes that oral argument would be helpful to the Court.

CERTIFICATE OF SERVICE

I certify that, on April 17, 2024, I electronically filed Appellant Sandra Perry's Brief-in-Chief with the State of New Mexico's Tyler/Odyssey E-File & Serve system. All parties are registered as service contacts and were electronically served by that system.

/s/ Nicholas T. Hart
Nicholas T. Hart