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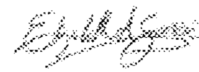

IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. No. S-1-SC-40187

SANDRA PERRY,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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

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Oral Argument Requested

June 4, 2024

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Introduction

In 1982, this Court held that the smell of marijuana alone is always probable cause to extend a traffic stop and to search a vehicle without a warrant. *See State v. Capps*, 1982-NMSC-009, 97 N.M. 453, 641 P.2d 484. Yet in 2019, New Mexico's Legislature decriminalized the possession of use amounts of marijuana. And the Legislature legalized marijuana in 2021. This case presents the narrow question of whether *Capps* controls for that period between decriminalization and legalization.

The State asks that the Court refuse to review *Capps* for three reasons. First, the State contends that revisiting addressing the issues here would be an advisory opinion addressing a hypothetical question unconnected to the facts. Second, the State argues that *Capps* should not be reviewed under the principle of constitutional avoidance. And third, the State argues that the smell of marijuana alone can still be probable cause to extend a traffic stop and conduct a wireless search for the time between when marijuana was decriminalized and when it was fully legalized.

Neither argument has merit. The Court should therefore hold that *Capps* is no longer controlling and return the case to the Court of Appeals for a merits review.

Argument

I. The Court Should Determine Whether *State v. Capps* Applies to the Time Between Decriminalization and Legalization.

A. Reviewing *State v. Capps* would not result in an advisory opinion.

The State first asks this Court to quash the certification because answering whether the smell of marijuana alone is probable cause to extend a traffic stop and conduct a warrantless search of a vehicle because doing so would be an advisory opinion. *See* Answer Br. at 10. But the cases cited by the State show otherwise.

The State first cites Bell *Telephone Laboratories, Inc. v. Bureau of Revenue*, 1966-NMSC-253, ¶ 39, 78 N.M. 78, 428 P.2d 617. But this case is not like *Bell Telepone.* In *Bell Telephone*, the plaintiffs sought a ruling even though the Bureau of Revenue took no action against it because the state "might" have sought to enjoin it and that theoretical case "could" have affected Bell Telephone's interstate operations. *Id.* But this Court recognized that this request was made even though no legal dispute existed. *Id.* (holding that "[n]o injunction is involved in this case," and that the "propriety of injunction proceedings being interjected as a hypothetical situation"). But no such circumstance is present here. Ms. Perry was stopped by local police for an alleged traffic violation. That traffic stop was extended because the officer smelled marijuana. And the officer searched Ms. Perry's vehicle without a warrant. Whether doing so was constitutional is not hypothetical; it is squarely before the Court.

The same is true for the State's reliance on *City of Las Cruces v. El Paso Electric Co.*, 1998-NMSC-006, 124 N.M. 640, 954 P.2d 72. In *El Paso Electric*, the federal court certified a question to this Court that was by legislative action taken after certification but before this Court decided the case. *Id.*, ¶ 24. The Court then held that certification was no longer appropriate because the unsettled question of New Mexico law was answered by the Legislature. ¶ 24. But the parties still asked this Court to determine the constitutionality of the enacted statute. *Id.* This Court then refused, concluding that "because the parties have not challenged the constitutionality of [the statute] in the certifying court, any decision of this issue would be advisory." *Id.* But the same is not true here as Ms. Perry raised this issue before the trial court and in her briefing to the Court of Appeals.

Despite this, the State argues that deciding this question would still be an advisory opinion because the officer that stopped Ms. Perry could have done so because she committed a traffic violation, acted nervous, and gave odd answers to questions about whether she had marijuana or anything sharp in the vehicle. *See* Answer Brief at 11-12. But a driver being nervous when interacting with police during a traffic stop is just as likely to be the reaction of an innocent person as the reaction of someone committing a crime. Such reactions are not probable cause. *State v. Nyce*, 2006-NMSC-026, ¶ 14, 139 N.M. 647, 137 P.3d 587. The traffic stop was

therefore extended *only* because the officer smelled marijuana coming from the vehicle.[1]

And the State asserts that a traffic violation plus the smell of marijuana, the statement that marijuana may be in the vehicle, and the presence of children in the vehicle gave the officer probable cause that Ms. Perry was impaired while driving. *See* Answer Brief at 13. But there is no evidence that Ms. Perry was driving while impaired. For example, while the officer testified that she smelled marijuana coming from the vehicle, the officer did not testify that the smell of marijuana was coming from Ms. Perry. The officer did not give Ms. Perry any field sobriety tests. And there is no testimony that Ms. Perry was impaired. Any argument that Ms. Perry was driving while impaired is a red herring unsupported by the facts.

Here, the smell of marijuana was the only reason that the officer extended the traffic stop and searched the vehicle. Whether *State v. Capps* is controlling during the time between decriminalization and legalization is thus before the Court. Deciding that issue would not be an advisory opinion.[2]

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[1] The State includes in its arguments Ms. Perry's answer that there may sharp objects in the vehicle. That statement, however, was made in response to the officer's question whether she would come across anything sharp while searching the vehicle. Any answer to that question, which was made after the search commenced, should not be considered here.

[2] The State contends that the Court can affirm by finding separate probable cause under the right for any reason doctrine. *See* Answer Br. at 13-16. But this argument relies exclusively on an incorrect characterization of the facts as described above. The Court therefore does not have to address the State's right for any reason arguments.

B. The constitutional avoidance doctrine does not apply.

Second, the State argues that this Court should not decide whether *State v. Capps* applies between decriminalization and legalization because of the constitutional avoidance doctrine. *See* Answer Brief at 16-20. But the constitutional avoidance doctrine applies only when the question before the Court can be decided by reliance on a statute, ordinance, or non-constitutional principle. *See State v. Radosevich*, 2018-NMSC-028, ¶ 8, 419 P.3d 176; *City of Albuquerque v. Pangaea Cinema LLC*, 2013-NMSC-044, ¶ 23, 310 P.3d 604 (quotations and citation omitted); NMSA 1978, § 12-2A-18(A)(3). But no statute, ordinance, rule, or other legal authority can be applied to decide the issues here.

Even so, the State cites Allen *v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806, to argue that this Court should not decide the constitutional question. But *LeMaster* was a case where the constitutional question could be avoided because the case was dispositively decided by the Rules of Criminal Procedure. *Id.*

The State's constitutional avoidance argument instead appears to be an extension of its advisory opinion argument. As discussed above, the argument is equally without merit. The Court should determine, on the merits, whether *State v. Capps* applies to the time between decriminalization and legalization.[3]

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[3] The State also contends that deciding whether *State v. Capps* applies to the two years of decriminalization would be "gratuitous" because the Legislature already provided, in 2021, that the smell of marijuana alone is not probable cause. *See* Answer Brief at 19. But that statute only says that, because marijuana was legalized, the smell

II. *State v. Capps* Should be Overruled as Applied to the Period Between Decriminalization and Legalization.

The State's initial merits argument is simple: while there is "some law [that] supports the conclusion that a penalty assessment is not a crime for certain purposes," "[i]t is far from clear that a penalty assessment is categorically not a crime." Answer Brief at 21. This is incorrect for two reasons. First, a penalty assessment is not a crime because New Mexico limits crimes to felonies, misdemeanors, and petty misdemeanors. NMSA 1978, § 31-10A-1(A). And second, because a penalty assessment is not a crime, the answer is not whether a suspicious behavior is categorically not a crime; the question is whether the suspicious behavior can equally convey criminal conduct as innocent conduct. Because when, as here, suspicious behavior can be criminal or innocent, then it cannot be probable cause of criminal activity. *See Nyce*, 2006-NMSC-026, at ¶ 14. Thus, the State's concession that a penalty assessment is not categorically a crime or not a crime is dispositive of the issue before the Court because such circumstances are never probable cause. *Id.*

Despite this, the State asks this Court to accept the minority approach the smell of marijuana in states that have decriminalized marijuana because possession of certain amounts could, during those 2 years, still be a misdemeanor or a felony. *See*

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of marijuana cannot by itself be probable cause. NMSA 1978, § 26-2C-1(D). It does not address decriminalization. And Ms. Perry should not be deprived of her ability to challenge an allegedly unconstitutional search because a different law would have applied if she was arrested in 2021 rather than 2019.

generally Answer Brief at 23-33. But the cases from those minority approach states do not tackle the bedrock principle of the New Mexico constitution that behavior that can be equally innocent and criminal is probative of nothing, and therefore cannot be probable cause for a warrantless search.

The failure to meaningfully grapple with this principle means that the Court should reject the minority approach to the smell of marijuana as probable cause after decriminalization. The Court should instead apply the majority approach applied to states where the possession of marijuana is not categorically a crime. That approach requires that this Court decide that the smell of marijuana alone is not probable cause to extend a traffic stop or search a vehicle without a warrant between the decriminalization and legalization of marijuana.

Conclusion

State v. Capps must be overruled, and this Court must hold that the smell of marijuana alone was not probable cause for the warrantless search of Ms. Perry's vehicle.

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Respectfully submitted,

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Dated: June 4, 2024

<u>CERTIFICATE OF COMPLIANCE</u>

I certify, according to Rule 12-318(F), NMRA, that this brief complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains no more than 4,400 words, excluding all text excluded by that rule, and was prepared in size 14 Garamond font, a proportionally spaced type face, using Microsoft Word as part of Microsoft Office 365.

/s/ Nicholas T. Hart
Nicholas T. Hart

CERTIFICATE OF SERVICE

I certify that, on June 4, 2024, I electronically filed this brief with the State of New Mexico's Tyler/Odyssey E-File & Serve system. All parties are registered as service contacts and were therefore electronically served by that system.

/s/ Nicholas T. Hart
Nicholas T. Hart