

**ARIZONA SUPREME COURT**

STATE OF ARIZONA, ) No. CR-20-0265-PR  
)  
Appellee, ) Court of Appeals No.  
) 1 CA-CR 19-0226  
v. )  
) Maricopa County Superior  
SHANE ALAN RAFFAELE, ) Court No.  
) CR2013-437445-001  
Appellant. )  
\_\_\_\_\_ )

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR  
CRIMINAL JUSTICE IN SUPPORT OF APPELLANT**

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## INTRODUCTION

In *State v. Sisco*, 239 Ariz. 532, 538 ¶¶ 25-26 (2016), and *State v. Cheatham*, 240 Ariz. 1, 3 ¶ 11 (2016), this Court created a “odor unless” standard by which the plain smell of marijuana still provides an officer with probable cause to believe an offense is being committed, unless the officer has reason to believe that the use or possession of marijuana is compliant with the Arizona Medical Marijuana Act (AMMA). See A.R.S. §§ 36-2801 et seq. *Cheatham* involved a vehicle emanating the smell of burnt marijuana, and because no occupant produced an AMMA card, this Court did not address whether “such facts—as part of the totality of the circumstances—might dispel probable cause that otherwise exists based on odor alone.” 240 Ariz. at 3 ¶ 12. The question left unanswered in *Cheatham* is squarely presented in *State v. Raffaele*, 249 Ariz. 474, 479-81 ¶¶ 16-21 (App. 2020).

The officer in this case had no reasonable suspicion to search Raffaele’s rental car, and the detention and search was prohibited by AMMA and by *Rodriguez v. United States*, 575 U.S. 348 (2015). The issue in this case is of great statewide importance based on the number of AMMA cardholders who drive. See *Dobson v. McClennen*, 238 Ariz. 389, 391 ¶ 6 (2015) (“whether the AMMA immunizes a medical marijuana cardholder from DUI prosecution...presents a recurring issue of statewide importance”). In light of Arizona’s voters recently enacting Proposition

207 in this month's election,<sup>1</sup> all persons will be legally permitted to travel with up to one ounce of marijuana. Thus, this Court should accept its own invitation to revisit its precedent. *See Sisco*, 239 Ariz. at 536 ¶ 16 (“if Arizona eventually decriminalizes marijuana, our analysis and conclusion in this context might well be different.”).

### **INTEREST OF *AMICUS CURIAE***

Arizona Attorneys for Criminal Justice, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

*Amicus* offers this brief because ensuring the liberty to travel unmolested by illegal searches is squarely within AACJ's core mission. This case involves a

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<sup>1</sup> Proposition 207, “Smart and Safe Arizona,” passed with 60% of the vote. <https://results.arizona.vote/#/ballotmeasure/18/0> (last visited November 13, 2020); Ryan Randazzo, “Arizona voters approve Proposition 207, making recreational marijuana legal in state,” *Arizona Republic*, Nov. 4, 2020, <https://www.azcentral.com/story/news/politics/elections/2020/11/03/arizona-marijuana-proposition-207-election-results/5997553002/>.

continued detention and search based on no further evidence but for the officer's smell of marijuana in the vehicle of an AMMA cardholder. The court of appeals' opinion in this case does nothing to protect Arizonans who comply with AMMA and other laws from police harassment on the roads. Without this Court's review, the Fourth Amendment right to be free from unreasonable searches and seizures will be toothless.

## ARGUMENTS

### **I. Plain smell of marijuana alone provides no basis for a continued detention or search when in the possession of an AMMA cardholder.**

#### A. Arizona's law of plain smell.

Arizona's "plain smell" doctrine for probable cause was created in *State v. McGuire*, 13 Ariz. App. 539, 541 (1971): "The weight of authority, and we believe the better rule, holds that the offense is committed in the presence of an officer when the officer receives knowledge of the commission of an offense in his presence through any of his senses." This Court adopted the rule in *State v. Harrison*, 111 Ariz. 508, 509 (1975), and *State v. Morrow*, 128 Ariz. 309 (1981). Though it has not been adopted by the Supreme Court, "plain smell" is modeled on the "plain feel" and "plain view" doctrines. "To invoke the plain view/smell exception to the warrant requirement for a search, a police officer must lawfully be in a position to view/smell the object, its incriminating character must be immediately apparent, and the officer must have a lawful right of access to the object." *State v. Baggett*, 232 Ariz. 424,

428 ¶ 16 (App. 2013) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 373-77 (1993), and *State v. Millan*, 185 Ariz. 398, 402 n.4 (App. 1995)). Because marijuana has a distinctive scent, the reasoning goes, police officers who smell it need obtain no further information to claim probable cause that a crime has been committed.

Prior to AMMA's passage in 2010, the smell of marijuana was sufficient to establish probable cause that evidence of a crime was present, for the sole reason that it was always unlawful for any Arizonan to possess or use marijuana under any circumstance. Now, however, nearly 300,000 Arizonans are AMMA cardholders.<sup>2</sup>

In establishing the plain feel doctrine as a corollary of plain view, the Supreme Court also required that "the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures." *Dickerson*, 508 U.S. at 376. The Court reasoned:

Once again, the analogy to the plain-view doctrine is apt. In *Arizona v. Hicks*, 480 U.S. 321 (1987), this Court held invalid the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. Although the police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers. The subsequent seizure of the equipment could not be justified by the plain-view doctrine, this Court explained, because

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<sup>2</sup> Arizona Department of Health Services, Arizona Medical Marijuana Program: September 2020 Monthly Report, <https://azdhs.gov/documents/licensing/medical-marijuana/reports/2020/mm-sept20.pdf> (last visited November 13, 2020). By contrast, on the offense date in *Sisco*, there were only 37,614 cardholders. *See id.*, March 2013 Monthly Report, <https://azdhs.gov/documents/licensing/medical-marijuana/reports/2013/130312-patient-application-report.pdf> (last visited November 13, 2020).

the incriminating character of the stereo equipment was not immediately apparent; rather, probable cause to believe that the equipment was stolen arose only as a result of a further search—the moving of the equipment—that was not authorized by a search warrant or by any exception to the warrant requirement. The facts of this case are very similar. Although the officer was lawfully in a position to feel the lump in respondent’s pocket, because *Terry* entitled him to place his hands upon respondent’s jacket, ***the court below determined that the incriminating character of the object was not immediately apparent to him.***

*Id.* at 378-79 (emphasis added). At the doctrine’s core is the requirement that the object being seen or felt (or smelled) must have an incriminating character that is immediately apparent. The stereo equipment described in *Hicks* turned out to be evidence incriminating the defendant in a robbery, but police could only detect its incriminating nature after moving it, thus it was not “immediately apparent.” *Hicks*, 480 U.S. at 323-24.

AMMA specifically sought to protect cardholders from police harassment by including A.R.S. § 36-2811(H), which states that one’s cardholder status “may not constitute probable cause or reasonable suspicion, nor may it be used to support the search of the person or property of the person possessing or applying for the registry identification card.” It recognizes that other facts may provide probable cause, *id.*, and thus it is not a “Get Out Of Jail Free” card.

In *Sisco*, this Court held that AMMA makes marijuana legal in only limited circumstances and cardholders “must strictly comply with its provisions to trigger its protections and immunities.” 239 Ariz. at 536 ¶ 17. Because AMMA did not

decriminalize possession of marijuana generally, “the odor of marijuana in most circumstances will warrant a reasonable person believing there is a fair probability that contraband or evidence of a crime is present.” *Id.* ¶ 16. This Court continued:

This does not mean, however, that AMMA has no effect on an officer’s probable cause determination. Because probable cause is determined by the totality of the circumstances, *Gates*, 462 U.S. at 238, 103 S.Ct. 2317, and marijuana possession or use is lawful when pursuant to AMMA, a reasonable officer cannot ignore indicia of AMMA-compliant marijuana possession or use that could dispel probable cause. *See, e.g., State v. Buccini*, 167 Ariz. 550, 556-58, 810 P.2d 178, 184-86 (1991) (holding probable cause absent when officer ignores information material to distinction between criminal and non-criminal activity).

*Id.* at 537 ¶ 18. This Court recognized, however, that AMMA compliance cannot be ignored:

Moreover, as we have explained, probable cause can be dispelled by indicia of AMMA-compliant marijuana possession and use. Under the standard we adopt, registered qualifying patients are not denied Fourth Amendment rights or privileges, nor are they “subject to arrest, prosecution or penalty in any manner,” for their medical use of marijuana. § 36-2811(B)(1).

*Id.* at 538 ¶ 25. Once an officer is informed that a cardholder’s marijuana is lawful, the smell of marijuana no longer has an “incriminating character” that defines the plain smell doctrine.

Raffaele, unlike the defendants in *Sisco* and *Cheatham*, was a cardholder. *See Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 123 ¶ 17 (2015) (“Medical marijuana use pursuant to AMMA is lawful under Arizona law.”). This status did not shield him

from possibility of being searched altogether, but it did shield him from being searched based “solely” on presence of marijuana in the car (whether now or in the past). For the officer’s search to be lawful, there must be additional information supporting probable cause that a crime was being committed, i.e., that Raffaele possessed a criminal amount of marijuana.

B. Extra-jurisdictional authority supports rejection of the plain smell rule

Several state courts have had occasion to address this question, and they generally support the thesis that cardholder status defeats probable cause based solely on smell of marijuana.

In *Commonwealth v. Cruz*, 945 N.E.2d 899 (Mass. 2008), the court held that new legislation that decriminalized possession of small amounts of marijuana served to invalidate vehicle searches for which probable cause was based solely on the smell of marijuana. That court upheld this ruling in *Commonwealth v. Craan*, 13 N.E.3d 569 (Mass. 2014), and *Commonwealth v. Overmyer*, 11 N.E.3d 1054 (Mass. 2014). In *Overmyer*, the odor of unburnt marijuana was characterized as “strong or very strong,” but the court found such claims unconvincing based on research showing that traits such as age and gender affect the sense of smell. *Id.* at 1059. The court concluded that “we are not confident, at least on this record, that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine.” *Id.*

Since decriminalizing marijuana, Alaska also requires police to provide reliable information that the amount of marijuana believed to be present exceeds the amount allowed by law. In *State v. Crocker*, 97 P.3d 93, 96-97 (Alaska App. 2004), the court held that “[e]vidence that a person possesses an unspecified quantity of marijuana in their home does not, standing alone, establish probable cause to believe that the person is breaking the law.” Yet, in *State v. Smith*, 182 P.3d 651, 652 (Alaska App. 2008), the court found that the warrant affidavit, in addition to describing “moderate odor” of growing marijuana, included information from a neighbor and that Smith had no medical marijuana certificate. Based on substantially more information, the court determined there was sufficient to establish probable cause of commercial marijuana cultivation (although it remanded for substantiation of the officer’s “success rate”). *Id.* at 654-55. *See also People v. Zuniga*, 372 P.3d 1052, 1059 (Colo. 2016) (while smell alone is not sufficient for probable cause, it should not be entirely disregarded and it can be considered in the totality of the circumstances).

Other state courts, like Arizona, have determined that the odor of marijuana may establish probable cause that a crime is being committed, in the absence of any information that the person is a qualifying medical marijuana patient. *See People v. Brown*, 825 N.W.2d 91, 93 (Mich. App. 2012) (a search-warrant affidavit concerned marijuana need not provide specific facts pertaining to the MMMA, i.e., facts from

which a magistrate could conclude that the possession, manufacture, use, creation, or delivery is specifically not legal under the MMMA.”); *State v. Senna*, 79 A.3d 45, 49 (Vt. 2013) (“Vermont’s ‘medical marijuana’ law does not purport to decriminalize the possession of marijuana; it merely exempts from prosecution a small number of individuals who comply with rigid requirements for possession or cultivation. In that sense, the law creates a defense to prosecution.”); *State v. Myers*, 122 A.3d 994, 1001-02 (N.J. Super 2015) (smell of burning marijuana provides probable cause to search vehicle; only authorized patients may assert the defenses in state medical marijuana act).

In *State v. Fry*, 228 P.3d 1, 5 (Wash. 2010), the Washington Supreme Court adopted a strange rule permitting searches solely on the smell of marijuana, even when the person produces a medical marijuana card, because the medical marijuana act merely created an affirmative defense to prosecution. One Washington judge called this rule “un-American.” *State v. Ellis*, 327 P.3d 1247, 1251 (Wash. App. 2014) (Fearing, J., concurring). In the context of gun possession, the Supreme Court of Pennsylvania similarly rejected this “element-or-defense test”:

The legislature is further entitled to prescribe the requirements and procedures necessary to obtain a license for otherwise-prohibited conduct. However, the issuance of a license cannot entail the deprivation of constitutional rights. Under the element-or-defense test, the legislature is imbued with the power to limit the scope of Fourth Amendment protection. The legislature cannot lay such a trap for the unwitting licensee, who obtains a license precisely for the purpose of achieving good-faith compliance with the law, yet who may be subject

to unlimited seizures by law enforcement agents for the very conduct that the license permits. This is not a matter of deference to the legislature; this is a matter of freedom from unreasonable seizure under the Fourth Amendment.

*Commonwealth v. Hicks*, 208 A.3d 916, 943-44 (Pa. 2019).

Oregon requires that officers obtain more information than mere presence of marijuana before sustaining a determination of probable cause. In *State v. Castilleja*, 192 P.3d 1283, 1291-92 (Or. 2008), the court found probable cause in a warrant affidavit not from the presence of marijuana alone but from reliable evidence that two pounds of marijuana (well above the six ounces permitted for two patients) was present. *See also Crocker*, 97 P.3d at 96 (“our holding rests on the constitutional principle that no search warrant can issue until the police present a magistrate with good reason to believe that the law has been broken (and that evidence of that illegality can be found on the premises to be searched).”).

It is hardly a revolutionary concept to require police to have probable cause that the law has been broken before searching a car. Particularly now that Arizona has legalized recreational marijuana, Arizona search-and-seizure law should account for that change.

## **II. Extended detention and compliance searches based solely on legal conduct violates the Fourth Amendment.**

When assessing probable cause, comparison to the reasonable-suspicion standard is instructive. Probable cause to search exists where the known facts and

circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Reasonable suspicion for traffic stops cannot rest solely on “circumstances or factors that do not reliably distinguish between suspect and innocent behaviors...because they may cast too wide a net and subject all travelers to ‘virtually random seizures.’” *State v. Sweeney*, 224 Ariz. 107, 113 ¶ 22 (App. 2010) (quoting *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam)). The facts must be “specific, distinct, or ‘particular’ to the suspect” so as to “reduce the risk of sweeping in a substantial number of innocent travelers.” *State v. Evans*, 237 Ariz. 231, 234 ¶ 10, 235 ¶ 17 (2015). An officer who has witnessed a traffic violation may stop the driver. *Whren v. United States*, 517 U.S. 806, 810 (1996). The stop, a seizure for Fourth Amendment purposes, *State v. Richcreek*, 187 Ariz. 501, 505 (1997), communicates that the driver is not free to terminate the encounter and may not leave until the officer says so. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009).

Upon stopping the driver, the police are required to diligently and expeditiously complete the tasks tied to the traffic violation. *Rodriguez v. United States*, 575 U.S. 348, 357 (2015). A traffic stop becomes unreasonable under the Fourth Amendment when it is prolonged beyond the time reasonably required to issue a ticket. *Id.* (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). During the stop, police may conduct “ordinary inquiries incident to the stop.” *Id.* at 355

(quoting *Caballes*, 543 U.S. at 408). Such inquiries may include, “checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.” *Id.* A detour from the diligent and expeditious issuance of a ticket can only arise when, during the course of this diligent and expeditious pursuit, police acquire reasonable suspicion of an additional offense. *Id.* at 358; *State v. Kjolsrud*, 239 Ariz. 319, 322 ¶ 10 (App. 2016).

In this case, the court of appeals cited *Sisco* for the proposition that the smell of marijuana may factor into a totality-of-the-circumstances consideration. *Raffaele*, 249 Ariz. at 480 ¶ 20 (citing *Sisco*, 239 Ariz. at 537 ¶ 20). The court misconstrued its prior holding in *State v. Tagge*, 246 Ariz. 486, 489 ¶¶ 9–10 (App. 2019), as stating that smoking marijuana in a car is prohibited, when that case involved only the criminality of smoking in a “public place.” *Raffaele*, 249 Ariz. at 480 ¶ 21. The officer in this case had no information concerning where the car was located at the time Raffaele smoked marijuana, nor did he rely on such information. Instead, the officer claimed the power to enforce AMMA by ensuring Raffaele possessed an allowable amount. *Id.* at 478 ¶ 5.

In fact, the officer violated the plain terms of A.R.S. § 36-2811(H) by conducting a search of a cardholder with no additional information supporting probable cause. A police officer has no legal authorization to act as an administrative

“AMMA compliance officer,” any more than he does to ensure that a driver is in compliance with a rental car agreement. *See Byrd v. United States*, 138 S. Ct. 1518, 1529 (2018) (officer not vested with authority to detain or search a driver based on violation of rental agreement).

But for Raffaele’s approved use and possession of marijuana, *Sweeney* is dispositive of this case. Although he did commit a moving violation, the officer’s interest in following Raffaele was based only on “a rental car with California plates” and “the driver’s posture appeared to be rigid and he did not acknowledge the officer’s presence.” *Raffaele* 249 Ariz. at 477 ¶ 2; *see also State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118 (1996) (not looking at officer does not support reasonable suspicion); *Sweeney*, 224 Ariz. at 113-14 ¶¶ 25-28 (describing the “plasticity” of drug-courier profile factors). The fishing continued when the officer asked Raffaele to exit the car before he could retrieve documents from the center console—a premeditated tactic designed to position the officer to “ask” permission to enter the car to get the registration.<sup>3</sup> And, of course, once inside the car, any observation made would meet constitutional requirements. This is part of an overall

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<sup>3</sup> The State cites *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), as permitting the officer to require Raffaele to exit the car for officer safety purposes. Response at 3 n.1. This Court has rejected the State’s expansive view of *Mimms*. *See State v. Serna*, 235 Ariz. 270, 276 ¶¶ 25-26 (2014) (holding that *Mimms* does not permit frisks unless there is reasonable suspicion that the person is both armed and presently dangerous).

scheme to overcome obstacles to winning the “competitive enterprise of ferreting out crime.” *Illinois v. Gates*, 462 U.S. 213, 240 (1983).

In this case, there was no reason to believe contraband or evidence of a crime would be found. At the time of the stop, the officer had no reason to believe the weight was beyond AMMA limits and, consequently, the officer had no reason to believe evidence of a crime would be found. Therefore, the detention to conduct a search was unreasonably prolonged pursuant to constitutional protections expressed in *Rodriguez*, and the search was unsupported by probable cause.

### CONCLUSION

For these reasons, *amicus curiae* AACJ requests that this Court grant review and hold that AMMA cardholders may not be subjected to a vehicle (or other) search based solely on the cardholder’s use of marijuana at some point in the past.

RESPECTFULLY SUBMITTED this 17th day of November, 2020.

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