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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 28 MAP 2021

COMMONWEALTH OF PENNSYLVANIA
Appellee

vs.

TIMOTHY OLIVER BARR II
Appellant

BRIEF OF APPELLANT

Timothy Oliver Barr II's Appeal From the September 25, 2020 Superior Court Order and Opinion of Bender, P.J.E., Lazarus and Strassburger, JJ. Entered at Docket Number 2347 EDA 2019 Vacating and Remanding for Reconsideration the Order Granting Suppression of all Evidence Entered by the Honorable Maria L. Dantos in the Court of Common Pleas of Lehigh County, Pennsylvania at Criminal Docket Number 0279-2019 dated 8-2-19

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I. STATEMENT OF JURISDICTION

Jurisdiction is reposed in this Honorable Court in accordance with *Pennsylvania Rule of Appellate Procedure* 1112(a) and pursuant to 42 Pa. C.S. § 724, permitting appeals by allowance from final Orders of the Superior Court, with said allowance being granted by this Honorable Court on April 28, 2021.

II. ORDER IN QUESTION

Order granting suppression and habeas relief vacated. Case remanded for reconsideration consistent with the analysis set forth in this opinion. Jurisdiction relinquished.

Judge Lazarus joins this opinion.

Judge Strassburger joins and files a concurring opinion in which President Judge Emeritus Bender and Judge Lazarus join.

Judgment Entered.

____________________________ /s/
Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/25/20

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

> [W]ell-settled principles . . . guide our review of suppression orders. When, as here, we consider the propriety of a trial court's order granting a motion to suppress, "we may consider only the evidence from the appellee's witnesses along with the Commonwealth's evidence which remains uncontroverted." *Commonwealth v. Brown*, 606 Pa. 198, 996 A.2d 473, 476 (2010). Our standard of review is restricted to establishing whether the suppression record supports the trial court's factual findings; "however, we maintain *de novo* review over the suppression court's legal conclusions." *Id.*

Commonwealth v. Mason, 247 A.3d, 1070, 1080 (Pa. 2021).

In the instant case in which the Commonwealth has appealed from the subject Order granting suppression, this Court considers only the evidence from Mr. Barr's two witnesses, together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. *Commonwealth v. Nestor*, 709 A.2d 879, 880-81 (Pa. 1998).

IV. STATEMENT OF THE QUESTIONS INVOLVED

By Order dated April 8, 2021, this Court granted Allocatur as to the following two (2) issues:

1. What weight, if any, should the odor of marijuana be given in determining whether probable cause exists for a warrantless vehicle search, in light of the enactment of the Medical Marijuana Act, 35 P.S. §10231.101 *et seq.*?

2. To what extent does this Court's decision in *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019), apply to probable cause determinations involving the possession of marijuana following the enactment of the Medical Marijuana Act, 35 P.S. §10231.101 *et seq.*?

V. STATEMENT OF THE CASE

A. Procedural History

This is an appeal by Timothy Oliver Barr II ("Barr") from the Order of the Superior Court, Bender, P.J.E., Lazarus and Strassburger, JJ. dated September 25, 2020, vacating the Order of the Lehigh County Court of Common Pleas dated August 2, 2019 (granting suppression of evidence and habeas relief) and remanding for reconsideration consistent with the analysis set forth by the Superior Court.

Following Barr's filing of a Petition For Allowance Of Appeal, this Court granted allocatur on April 8, 2021 as to the two specific issues identified and discussed in the within Brief, which was filed by Barr on July 16, 2021.

B. Statement Of The Record Facts

On November 7, 2018, at approximately 12:30 a.m., Trooper Edward Prentice and Trooper Danielle Heimbach of the Pennsylvania State Police were on routine patrol in full uniform and

in a marked police unit.[1] They were traveling on Emmaus Avenue in the area of the Liberty Village Apartments, in Allentown, Lehigh County, Pennsylvania (R. 263a). Trooper Heimbach had just graduated from the police academy a mere three (3) weeks prior to this patrol and was on her fifteenth (15th) day of service as a Trooper (R. 66a, 120a, 263a). The night of November 7th, Trooper Prentice was acting as Trooper Heimbach's field training officer, also known as her coach (R. 25a).

While patrolling on Emmaus Avenue, Trooper Prentice observed a silver Chrysler 300 sedan leave the Liberty Village apartment complex and proceed to Emmaus Avenue (R. 263a-264a). Despite neither Trooper observing any illegal activity regarding the operation of the vehicle or its occupants, Trooper Prentice decided to make a U-turn and follow the sedan because it was the only vehicle in the area (R. 60a). The vehicle then made a turn onto Devonshire Road/Mack Boulevard and proceeded to an overpass, which constrained vehicles to pass one at a time (R.

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[1] (Appendix "A", August 2, 2019 Order and Opinion of the Honorable Maria L. Dantos, Findings of Fact, hereinafter referred to as "R. 263a", *et seq.*).

264a). There was no speed timing conducted by the Troopers regarding the operation of the sedan, which was traveling at a reasonable speed when the Troopers got behind it (R. 63a-64a). Trooper Prentice and Trooper Heimbach observed that upon approaching the overpass, the vehicle failed to make a complete stop at the solid white line on the road which was located before the stop sign controlling traffic at the single lane overpass (R. 264a). Due to this alleged violation, a traffic stop was effectuated, and the vehicle immediately complied with the stop (*Id.*).

Trooper Heimbach approached the passenger side of the vehicle to speak with the occupants. As she approached, she detected the odor of burnt marijuana emanating from the vehicle (*Id.*). There were three (3) occupants within the vehicle. The Defendant's wife, Teri Barr, was the operator of the vehicle. The Defendant, Timothy Barr, was seated in the front passenger's seat (R. 264a-265a). Luiz Monteiro was seated in the rear passenger seat behind Mr. Barr and was asleep at the time of the traffic stop (R. 38a, 265a). Following Trooper Heimbach's initial interaction with the occupants, Trooper Prentice approached the driver's side

of the vehicle. While still at the rear of the vehicle, Trooper Prentice testified that he could detect the odor of both raw and burnt marijuana emanating from the vehicle as he approached (R. 36a, 265a). The trial court did not find Trooper Prentice's testimony in this regard credible, and in fact found it unfathomable that Trooper Prentice was able to detect the odor of the .79 grams of fresh marijuana found in a sealed Ziploc bag on the opposite side of the car, while simultaneously detecting the odor of burnt marijuana from the rear of the vehicle upon approach (R. 265a-266a). Of note, Trooper Heimbach detected no odor of fresh marijuana at any time (R. 136a).

After a brief interaction with the Barrs,[2] Trooper Prentice requested that Mrs. Barr exit the vehicle (R. 265a). Mr. Barr took issue with the Trooper's request, and he did not want his wife to exit the vehicle. An argument over the Trooper's right to have the occupants exit the vehicle ensued for about two (2) to three (3)

[2] Unfortunately, for unknown reasons, only the video portion of the MVR (i.e. "dash cam") from the Troopers' patrol vehicle was operational, and no audio of the interaction was recorded (R. 33a). Upon arrival of the Allentown Police Department, some audio is audible which was captured by the Allentown Police Department body cameras (R. 266a).

minutes (*Id.*). Allentown Police back-up then arrived at the traffic stop, and Mr. Barr became cooperative and the occupants exited the vehicle without incident (*Id.*).

Trooper Prentice expressly advised the occupants that due to the odor of marijuana emanating from the vehicle, the Troopers were going to conduct a probable cause search of the vehicle "pursuant to *Commonwealth v. Gary*," [91 A.3d 102 (Pa. 2014)] (R. 79a-80a, 82a, 265a-266a). When the Troopers advised the Barrs that they detected the odor of burnt marijuana emanating from the vehicle, Mr. and Mrs. Barr both produced medical marijuana cards, establishing that they were lawfully licensed to possess and ingest medical marijuana (R. 80a, 136a-137a, 266a). Mr. Monteiro was never questioned as to whether he possessed a medical marijuana card at any point during the police interaction, and to this day the police are unaware of whether he possessed a medical marijuana card at the time of the stop (R. 82a, 137a-138a).

Trooper Prentice admitted that while he knew that green leafy marijuana was legal for medical purposes, he was not familiar with

how a person ingested green leafy medical marijuana (R. 84a, 103a, 118a, 266a). Trooper Prentice was also under the misconception that medical marijuana, when ingested through a vaping pen, produced no odor (R. 266a). Trooper Heimbach was unaware at the time of the stop that green leafy medical marijuana was lawful to possess and that it was used for medical purposes[3] (R. 135a, 266a). Like Trooper Prentice, she also had no knowledge of how green leafy medical marijuana was ingested (R. 134a-135a, 266a).

Both Troopers testified that they found it irrelevant that the occupants of the vehicle produced medical marijuana cards, or that they provided a lawful basis for the odor that was detected emanating from the vehicle (R. 81a-82a, 136a-139a). Both Troopers also testified that the basis for the search was the odor of burnt marijuana (R. 80a, 135a, 139a, 266a).

A search ensued which uncovered a sealed Ziploc bag containing .79 grams of marijuana located between the front

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[3] Green leafy medical marijuana became legal on August 1, 2018, over three months prior to the stop. 35 P.S. §10231.101 *et. seq*.

passenger seat and the center console (R. 266a). At the time the small amount of marijuana was uncovered, Trooper Prentice can be heard on the Allentown Police body camera stating that, "if he's allowed to have it, I'm fine with that. I'm not going to fucking worry about it" (R. 89a-90a, 266a). The search of the vehicle continued, revealing a handgun that was located rolled in a sweatshirt underneath the back-driver's seat (R. 267a). All three (3) occupants were detained, and Mr. Barr was later charged with Person Not to Possess Firearm[4], Possession of a Firearm without a License[5], and a Possession of a Small Amount of Marijuana[6]. (*Suppression Court Opinion*, Appendix "A", p. 1, R. 262a).

Trooper Prentice and Trooper Heimbach testified that they were never trained regarding the smell produced from the burning of medical marijuana, versus the smell produced from the burning of unlawfully purchased marijuana, and they admitted to no ability to distinguish the difference between the odors (R. 58a-59a, 133a-134a). Likewise, they were admittedly unable to distinguish any

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[4] 18 Pa. C.S.A. § 6105(a)(1).
[5] 18 Pa. C.S.A. § 6106(a)(1).
[6] 35 Pa. C.S.A. § 780-113(a)(31)(i).

difference between the odor produced from fresh, lawful medical marijuana, versus the odor produced from fresh, unlawfully purchased marijuana (*Id.*).

At the suppression hearing, Mr. Barr produced the testimony of David Gordon, M.D. Dr. Gordon is a retired heart and lung surgeon in the Lehigh Valley who was accepted by the Court as an expert in the field of medical marijuana (R. 267a). Following his retirement after 17 years as a surgeon, Dr. Gordon became one of the pioneer physicians in Pennsylvania to assess patients and determine if they had a qualifying condition under the law so as to be lawfully prescribed medical marijuana[7] (*Id.*). Dr. Gordon was the physician who made the recommendation that Mr. Barr qualified for a medical marijuana card based upon an approved underlying medical condition/diagnosis (R. 267a-268a).

Dr. Gordon testified that there are no distinguishable differences between the green leafy medical marijuana and marijuana purchased on the streets (R. 154a, 268a). In fact, the

[7] Dr. Gordon was the second physician in Pennsylvania to have the privilege of identifying patients that had qualifying conditions for medical marijuana usage under the Medical Marijuana Act (R. 144a-45a).

chemical composition of both forms of marijuana are identical. They are not grown or treated any differently (R. 154a-155a, 164a). In other words, there is absolutely no difference in the appearance of the two forms of marijuana, nor the odor of either (R. 154a-156a, 268a).

Dr. Gordon further testified to the mechanism by which a person lawfully ingests green leafy medical marijuana. Dr. Gordon indicated that the green leafy medical marijuana is placed into a battery-operated vaping pen that heats up the marijuana without combustion, producing vapor, which is ingested through the vaping pen (*Id.*). While it remains illegal to place medical marijuana into a "joint," and roll the joint up, light it on fire, and smoke it, it is not illegal to place the medical marijuana into a vaping pen, and similarly heat the marijuana and inhale the vapor (R. 154a-56a). Of critical importance, Dr. Gordon testified that there is no difference in the odor from ingesting the medical marijuana when utilizing a vaping pen, and the odor of smoking regular marijuana from an unlawful source (R. 155a, 268a). Dr. Gordon also testified that Mr. Barr possessed recent receipts for the purchase of green

leafy medical marijuana in amounts that would reasonably explain the marijuana found in the vehicle (R. 159a-160a).

As of the date of Dr. Gordon's testimony, July 17, 2019, there were more than 143,000 patients in Pennsylvania legally licensed to obtain, possess, and ingest medical marijuana (R. 157a, 268a). Dr. Gordon testified that due to Pennsylvania's robust program, that number is rapidly increasing (R. 157a-158a, 166a).

Dr. Gordon further opined as to the important medical benefits from marijuana (R. 165a). Dr. Gordon testified that he does not view medical marijuana as some form of "alternative medicine." Rather, he views it as a tool every bit as efficacious as the scalpel he wielded as a surgeon (R. 165a-166a). According to Dr. Gordon, medical marijuana can treat more medical conditions suffered by Pennsylvanians than even surgery itself (*Id.*).

The Commonwealth presented only the testimony of the two Troopers involved with the initial stop and search. The Commonwealth presented no expert testimony. Thus, Dr. Gordon's testimony was uncontradicted.

VI. **SUMMARY OF ARGUMENT**

The suppression court correctly found that the Troopers who searched the Defendant's vehicle improperly relied upon the smell of marijuana to establish probable cause. The "plain smell" doctrine, which firmly rested for years upon the twin pillars of the *per se* illegality of marijuana possession and use, and the claimed ability of trained members of law enforcement to readily detect the substance's unique aroma, came crumbling down in 2016 with the passage of Pennsylvania's Medical Marijuana Act. Marijuana is no longer *per se* illegal, and there is no discernable difference between either the appearance or aroma of lawful medical marijuana and illegal marijuana (which in fact, are chemically identical). Accordingly, the presence of marijuana, detected by odor, or observed, cannot, in the post-MMA era, support an "individualized suspicion of criminal activity" and therefore, should be given no weight in determining whether probable cause exists to conduct a warrantless vehicle search.

Further, the Supreme Court's decision in *Hicks* holds that, under the circumstances, Mr. Barr is constitutionally protected

from a search and seizure which is based solely upon his lawful engagement in a "commonly licensed activity." The same should apply here rendering this Court's decision in *Hicks* dispositive. To arrive at a different conclusion, the Superior Court took the unorthodox and unauthorized approach of altering well-established probable cause jurisprudence to invent a "general probabilistic suspicion of criminal activity" precept and doctrine which it impermissibly substituted for the long-standing doctrine of "individualized suspicion of criminal activity." The Superior Court attempted to justify its decision by creating a new category and status of criminal conduct which it identified as "generally illegal," specially constructed for marijuana possession (or use).

Finally, this Court anticipated the precise issue raised here in its Opinion in *Hicks* and, the Superior Court ignored both what it had to say about the MMA as well as the eight (8) enumerated teachings addressed *ad seriatum* hereinafter.

VII. ARGUMENT FOR APPELLANT

1. The Presence Of Marijuana Detected By Odor, Or Observed, Cannot, In The Post-MMA Era, Support An "Individualized Suspicion Of Criminal Activity" And Therefore, Should Be Given No Weight In Determining Whether Probable Cause Exists To Conduct A Warrantless Vehicle Search.

In order to appreciate why, following the enactment of the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq.* (the "MMA"), the odor or possession of marijuana should no longer constitute a factor in determining probable cause, a brief review of the prior legal landscape is necessary.

A. The Law of Probable Cause.

The Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution protect citizens from unreasonable searches and seizures. *Commonwealth v. Young*, 162 A.3d 524, 527-28 (Pa. Super. 2017); *Byrd v. United States*, 138 S.Ct. 1518, 1526 (2018). As a general rule, for a search to be reasonable under the Fourth Amendment or Article 1, Section 8, of Pennsylvania's Constitution, police must obtain a warrant, supported by probable cause and issued by an independent judicial officer prior to conducting the search.

Commonwealth v. Gary, 91 A.3d 102, 107 (Pa. 2014) (plurality). In *Gary*,[8] our Supreme Court adopted "the federal automobile exception to the warrant requirement, which allows police officers to search a motor vehicle when there is probable cause to do so." *Id*., at 104.

This Court has chosen to interpret the Pennsylvania Constitution's search and seizure provision in an equivalent manner. *See Commonwealth v. Holzer*, 480 Pa. 93, 100-102 n.5 and n.6, 389 A.2d 101, 105-106 n.5 and n.6 (1978); *Commonwealth v. Timko*, 4491 Pa. 32, 37 n.3, 417 A.2d 620, 622 n.3 (1980). This Court has also historically accorded Article 1, Section 8 of our Commonwealth's Constitution greater protection

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[8] This Court's decision in *Commonwealth v. Alexander*, 243 A.3d 177 (2020) (holding that Article 1, Section 8 of the Pennsylvania Constitution requires warrantless vehicle searches, like the one conducted here, to be supported by both probable cause and exigent circumstances) overturned that aspect of *Gary*. Because *Alexander* announced a new rule, it can be applied retroactively where the issue in question was properly preserved at all stages of adjudication. *Commonwealth v. Newman*, 99 A.3d 86, 90 (Pa. Super. 2014) (en banc). *Alexander* was decided on December 22, 2020, after Barr's appeal to this Court (October 22, 2020). Because the matters raised here are limited by this Court's certification, and because they represent issues raised pre-trial and prior to any adjudication on the merits, Barr submits that he can properly raise *Alexander* in the trial court, should that need arise. See, e.g. *Commonwealth v. Griffin*, 2021 WL 171073 at fn. 7 (Pa. Super. Ct. April 30, 2021).

regarding such things than that provided by the Fourth Amendment:[9]

> This Court has not hesitated to interpret the Pennsylvania Constitution as affording greater protection to defendants than the federal Constitution.

Commonwealth v. Sell, 504 Pa. 46, 64, 470 A.2d 457 (1983). See, e.g. *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991); *Commonwealth v. Hicks*, 652 Pa. 353, 367, 208 A.3d 916, 925 (2019).

The level of probable cause necessary for warrantless searches of automobiles is the same as that required to obtain a search warrant. *Commonwealth v. Lechner*, 685 A.2d 1014, 1016 (Pa. Super. 1996). The determination of whether probable cause exists to support a warrantless search or seizure is based on an evaluation of the totality of the circumstances observed by the officer when making the arrest. *Commonwealth v. Banks*, 658 A.2d 752 (Pa. 1995). Specifically, under the totality of the

[9] To avoid the sort of waiver found by this Court in *Commonwealth v. Adams*, 651 Pa. 440, 205 A.3d 1195, fn. 5 (2019), the constitutional protections that Barr invokes here, and throughout his suppression prosecution, have always been those provided by both our federal and state constitutions, and despite other Fourth Amendment or general constitutional references made herein for reading convenience, this matter is intended to seek review under both the Fourth Amendment and Article 1, Section 8 of the Pennsylvania Constitution.

circumstances test, probable cause is present "where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed." *Illinois v. Gates*, 462 U.S. 213 (1983); See also, *Commonwealth v. Gibson*, 638 A.2d 203, 206 (Pa. 1994). "[T]he evidence required to establish probable cause for a warrantless search must be more than a mere suspicion or a good faith belief on the part of the police officer." *Commonwealth v. Copeland*, 955 A.2d 396, 400 (Pa. Super. 2008) (citations and internal quotation marks omitted). Importantly, "[t]he burden rests on the Commonwealth to supply the evidence justifying a warrantless search." *Commonwealth v. Cost*, 224 A.3d 641, 650 (2020); *accord* Pa. R. Crim. P. 581(H). Mere hunches on the part of the officer are insufficient to meet this burden. *Commonwealth v. Bennett*, 827 A.2d 469, 478 (Pa. Super. 2003).

B. "The Plain Smell" Doctrine and Probable Cause.

Commonwealth v. Stoner, 334 A.2d 633 (Pa. Super. 1975) is roundly credited with being ground zero for the "plain smell" doctrine in Pennsylvania. In *Stoner*, the court adopted the

rationale in *United States v. Ventresca*, 380 U.S. 102 (1965) and *Johnson v. United States*, 333 U.S. 10 (1948) that an odor may be sufficient to establish probable cause for the issuance of a search warrant, and applied it to the search of a moving automobile, analogizing a "plain smell" concept to that of "plain view." See generally, *Commonwealth v. Stainbrook*, 471 A.2d 1223, 1225 (Pa. Super. 1984). Although often credited with doing so, *Stoner* did not adopt the bright-line rule that the smell of marijuana in and of itself was enough to establish probable cause. Rather, it noted that:

> [I]t would be a dereliction of a duty for a police officer to ignore the obvious aroma of an illegal drug which he/she was trained to identify.

Stoner, 344 A.2d at 635 (emphasis supplied).

For years, Pennsylvania courts held thereafter that the "plain smell" of marijuana alone was sufficient to establish probable cause due to marijuana's distinctive odor and illegal status. *Stainbrook*, 471 A.2d at 1225. However, after numerous public initiatives reflecting that Pennsylvanians had joined the vast number of Americans who believe that marijuana should be treated as a

medicine, on April 17, 2016,[10] the Pennsylvania state legislature enacted Pennsylvania's Medical Marijuana Act,[11] rendering the possession and use of medical marijuana lawful, and thereby removing the primary predicate for the "plain smell" doctrine (i.e. its illegal status). *See*, 35 P.S. § 10231.303 ("Lawful Use of Medical Marijuana") of the Act.

C. The "Plain Smell" Doctrine Itself, Smells.

Finally, no brief seeking to abrogate the "plain smell" doctrine would be complete without mentioning the questionable science upon which it is based. It is strange enough that the olfactory sensory neurons in the epithelium lining of the nostrils of a police officer can historically take away a man's liberty by the officer's claiming to detect odor molecules from marijuana, dissolved in the nasal mucus, and transmitted to the brain. Especially so, because

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[10] Effective on May 17, 2016.

[11] The Act makes medical marijuana lawfully available to "patients" who have a serious medical condition, have met the requirements for certification under the Act, and are residents of the Commonwealth. 35 P.S. §10231.103. The Act identifies 17 "serious medical conditions" *Id.* It establishes several new crimes and prohibitions relating to the Act ("Chapter 13. Offenses Related to Medical Marijuana"). Its salutary public policy, social, medical, scientific and quality of life intentions are found in its "Declaration of Policy". 35 P.S. §10231.102.

there exists scientific doubt as to how accurate this transmission of information (i.e. sensory transduction) actually is – especially on a person-by-person basis. See, e.g. Rodriguez-Gil, Gloria (Spring 2004), *The Sense of Smell: A Powerful Sense* (https://www.tsbvi.edu/seehear/summer05/smell.htm), retrieved May 17, 2021; and Mori, Kensaku, ed. (2014), *The Olfactory System: From Odor Molecules to Motivational Behaviors*, "The Study of Humans Uncovers Novel Aspects in Brain Organization of Olfaction," (Chapter 9.2) Tokyo: Springer, p. 182 *et seq.* Stranger still is that, historically, the courts have not required scientific proof that an officer actually smelled any odor.

Moreover, studies show that police are, *per se*, bad at accurately detecting the odor of marijuana. See, e.g. *The Sense of Smell*, *supra.* and the *Brief of Amici Curaie* filed in this matter in the Superior Court. And, the uncontradicted suppression record testimony here of Dr. Gordon, as credited by the lower court and confirmed by the Superior Court, clearly establishes that no one can differentiate between the odors of legal marijuana and contraband marijuana, fresh or burnt, because their odors are as

identical as are their chemical compositions. Further still, the suppression court (Judge Dantos, a former First Assistant District Attorney for more than a decade) found incredulous the super human olfactory claims made by arresting Trooper Prentice:

> THE COURT: Come on. I'm sorry. I'm sorry. But, come on. That is less than a gram in a bag and you smell burnt marijuana from someone smoking it and you are going to tell me you also smelled less than a gram of raw weed in a plastic bag inside the vehicle. I cannot believe that. That is impossible. I don't know what to say when --

(R. 69-70a).

Yet, the Superior Court here reasoned that an officer could infer that the marijuana odor he believes he smells was actually criminally procured and possessed because a majority of Pennsylvanians aren't licensed to possess or use marijuana. Hopefully, this Court's decision will go a long way in reducing the number of pretextual searches and seizures this practice has allowed, by removing all vestiges of the oft abused "plain smell" doctrine.

D. <u>The Collapse of "Plain Smell"</u>.

The twin pillars upon which *Stoner's* "plain smell" doctrine firmly rested – i.e. the *per se* illegality of marijuana possession and use in Pennsylvania, and the claimed ability of trained members of law enforcement to readily detect the illegal substance's unique aroma, came crumbling down with the passage of the MMA in 2016. No longer is marijuana possession or use a *per se* crime in Pennsylvania; and, "the obvious aroma of [illegal marijuana]," as the record in this case aptly bears out, is no longer something that law enforcement officers can be "trained to identify," or even be capable of distinguishing from legal, medicinal marijuana. The record from the suppression hearing makes these facts utterly clear:.

i. Barr was licensed to possess and use medical marijuana at the time of his vehicle search and subsequent arrest (*Suppression Court Opinion*, Appendix "A", p. 5, R. 266a);
ii. he provided his MMA license to the Troopers prior to their search (*Id.*);

iii. Trooper Prentice was not familiar with how a person ingests green leafy medical marijuana, and was under the misconception that medical marijuana, when ingested through a vaping pen, has no odor (*Id.*);

iv. Trooper Heimbach did not know how medical marijuana was ingested. She also stated that at the time of the vehicle stop she was under the misimpression that green leafy marijuana was illegal and not used for medical purposes (*Id.*); and

v. the Troopers received no training regarding medical marijuana (R. 57a-59a, 133a-134a).

Significantly, the indistinguishable characteristics of medicinal marijuana, as compared to illegal marijuana, were supported by the unchallenged, sworn testimony of Barr's expert, Dr. David Gordon. Dr. Gordon's testimony was properly summarized by the suppression court and also appears in the Statement of the Case, *supra.*, and will not be fully reiterated here, except to point out:

i. Dr. Gordon testified that there is no distinguishing physical difference between green leafy medical marijuana and

regular marijuana purchased on the streets. In other words, both their appearance and their chemical compositions are the same (R. 268a); and

ii. Dr. Gordon testified that there is no difference in the odor produced by ingesting medical marijuana when utilizing a vaping pen and the odor of smoking non-medicinal (i.e. illegal) marijuana from an unlawful source (*Id.*).

E. The Issues Presented Here Are Purely Legal And The Proper Subject Of *De Novo* Review By This Court

Because Trooper Prentice stated expressly that his sole reason for conducting the warrantless search of Barr's vehicle[12] was the odor of marijuana emanating from it, and even stated prior to the search, the exact legal authority that he was relying upon to do so, this fact is binding upon this Court. *Nester*, *supra*.

Trooper Prentice

> Q. [Y]ou explained to him and to the female that "the odor of marijuana in conjunction with *Commonwealth v. Gary*, gives law enforcement probable cause to search a vehicle in which he related that they had medical marijuana cards," right?

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[12] The term "Barr's" vehicle, as referenced throughout, is made as a matter of convenience and ease of reading. The record shows that Barr was a front seat passenger and his wife was the operator of the vehicle in question.

A. That's correct.

(R. 79a-80a, quoting Prentice Investigative Report).

Q. Okay. Nonetheless, you had all of the occupants exit the car and told them that you were going to do a probable cause search on the car based upon *Commonwealth v. Gary*, correct?
A. Based off of the burnt marijuana smell coming out of the car, yes.
Q. Okay. Exactly. That's my point ... that's what I want to make sure is clear for the record. You were searching the car based upon the burnt smell of marijuana in that car ....
A. Yes.

(R. 81a-82a).

Trooper Heimbach

Q. And it was your consideration in your stop that it didn't matter that they had a medical marijuana card. You were searching it via *Commonwealth v. Gary*, a probable cause search on burnt marijuana, correct?
A. Yes. I detected the odor of burnt marijuana so I searched the vehicle.
Q. I understand. I understand what you were trained at the time. And it was your position that you were searching that car regardless of whether or not there was medical marijuana licenses from these people correct?
A. Due to the odor of burnt marijuana.

(R. 138a-139a).

This record clearly supported the resultant suppression court's finding of fact number 5:

> 5. Trooper Prentice advised the occupants of the vehicle that he could search the vehicle pursuant to *Commonwealth v. Gary*, 625 Pa. 183, 91 A.3d 102 (2014) as the odor of marijuana provided them with probable cause.

Suppression Court Opinion of August 2, 2019, Appendix "A", p. 5, R. 266a.

Importantly, the Superior Court, on appeal, did not take issue with this finding, nor could they, because they are bound by the suppression court's findings of fact when, as here, they are supported by the record. *Commonwealth v. Galvin*, 603 Pa. 625, 985 A.2d 783, 795 (2009); *Commonwealth v. Revere*, 585 Pa. 262, 273, 888 A.2d 694, 700 (2005). The issues on appeal therefore, are legal ones subject to this Court's *de novo* review of the suppression court's legal conclusions. *Mason*, *supra.*

F. Marijuana Use Or Possession Should No Longer Constitute A Contributing Factor In Determining Whether The "Individualized Suspicion Of Criminal Activity" Required To Establish Probable Cause Is Present.

In its opinion below, the Superior Court acknowledged that "individualized suspicion" demonstrating that an actor is engaging

in criminal activity, is what is required to satisfy the existence of probable cause; and, even further, it admitted that searches based upon a more "generalized suspicion" violated the Fourth Amendment.

> The odor of marijuana alone, absent any other circumstances, cannot provide individualized suspicion of criminal activity when hundreds of thousands of Pennsylvanians can lawfully produce that odor .... [And,] [a]t the same time, those who act in compliance with the MMA should not be subjected to searches based solely on a generalized suspicion that is provided by that odor when the 4th Amendment also requires particularized suspicion.

Barr, 240 A.3d at 1287 (emphasis supplied).

To solve the Superior Court's self-created dilemma, to wit, the absence of probable cause establishing individualized suspicion here, and conduct which the Superior Court also concluded (see, *infra.*) was nonetheless criminal (despite the enactment of the MMA), it invented something called "a general probabilistic suspicion" to serve as a newly minted factor contributing to a finding of probable cause ... precisely the same sort of "generalized suspicion" which it had just said in the quote above, that MMA

licensees "should not be subjected to." The Superior Court attempted to justify this clear contradiction by simply inventing a new doctrine and legal precept.

> What it [the odor of marijuana] does provide to police is a general, probabilistic suspicion of criminal activity based on the fact that most citizens cannot legally consume marijuana. Thus, it is a factor that can contribute to a finding of probable cause, consistent with prior precedent discussed above, assuming some other circumstances supply more individualized suspicion that the activity is criminal.

Id. (Emphasis supplied.)

Ironically, while the Superior Court acknowledged in its opinion that the *Hicks*[13] decision expressly did away with the *Robinson*[14] rule which permitted the "inchoate and unparticularized suspicion or hunch that the individual is unlicensed and therefore engaged in wrongdoing" (*Id.*, 240 A.3d at 1285), it nonetheless substituted its own version of the *Robinson* rule by creating something it called "general probabilistic suspicion," which

[13] The overlap between this issue and issue number 2 discussed hereinafter, is unfortunately unavoidable.

[14] *Commonwealth v. Robinson*, 600 A.2d 957 (Pa. Super. 1991).

effectively acts in the same prohibited fashion as the *Robinson* rule did. To downplay the sea change which the court had just created, it simply said:

> This does not imply a change in the probable cause test, because, previously, the possession of marijuana was universally illegal.

Id.

In other words, the court was rationalizing that, it was not the law of probable cause that it had just obviously and fundamentally changed, but it was rather the status of marijuana that had changed – from "universally illegal" to "generally illegal." The fact is, what this Court said in *Hicks* regarding the *Robinson* rule is also true of the Superior Court's new doctrine. Left unchecked, "general probabilistic suspicion" is prone to become.

> a wholly distinct species of police intrusion, untethered from the law upon which it ostensibly is premised, and ultimately lacking any justification in the basic principles of the Fourth Amendment.

Hicks, 652 Pa. at 403, 208 A.3d at 947.

Moreover, roughly translated, what the court was really saying is that, because most people aren't licensed to smoke

marijuana, the odor of marijuana is "probably" coming from someone who is not licensed, and that trumps the "individualized suspicion" requirement that has been the recognized probable cause standard for decades. See, e.g. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S.Ct. 447 (2000) (cited by *Commonwealth v. Mistler*, 590 Pa. 390, 912 A.2d 1265, 1271 (2006). In short, by pure fiat of the Superior Court, the odor of marijuana is now to be deemed a contributing factor to the finding of probable cause.

Notably, we only have to look four (4) sentences later in the opinion, to see how the Superior Court would attempt to justify this marked transformation of Fourth Amendment law.

> The general illegality of marijuana under the CSA cannot simply be ignored merely because it is lawfully used in limited circumstances under the MMA ....

Id. (emphasis supplied.)

Translated once more, a licensed activity, such as the possession and use of marijuana under the MMA, should be seen as criminal activity because it is "generally illegal."

It is apparent that the Superior Court's decision and accompanying rationale are at odds with well-established law, and fraught with logical missteps. But, an examination of these deficiencies also presents us with stark evidence of why the possession or use of marijuana should no longer be seen as playing any role in determining the existence of probable cause.

(1) The Superior Court Is Without Authority To Dictate, As It Did, New Legal Precepts Or Enlarge Existing Doctrines Such As Its So-Called "General, Probabilistic Suspicion Of Criminal Activity," Or Its New Category Of Criminal Culpability, "Generally Illegal" Conduct.

"As an intermediate appellate court, [the panel cannot] enunciate new precepts of law or expand existing legal doctrines, since that province is reserved to our Supreme Court." *Commonwealth v. Sachette*, 2015 WL 7571612 at *fn 5 (Pa. 2015) (non-prec) quoting *Mountain Properties, Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1110 (Pa. Super 2001) appeal denied, 782 A.2d 547 (Pa. 2001) (citations omitted).

"General probabilistic suspicion" is not defined by the Superior Court, is not self-defining, and, it is a phrase which does not generally appear in Pennsylvania jurisprudence. It should be

noted that this Court used the adjective "probabilistic" to describe only the "nature of the inquiry" into "particular individual conduct." And, indeed the inquiry itself can be fairly described as "probabilistic" (i.e. dealing with what is generally probable). However, this Court has made it abundantly clear that nothing in its use of that adjective is intended to obviate the need for "particularized" suspicion of criminal activity.

> The probabilistic nature of the inquiry, as discussed in *Cortez*, merely guides the totality of the circumstances test, which, as noted above, nonetheless requires some "particularized and objective basis for suspecting the particular person stopped of criminal activity."

Id., 652 Pa. 391, 208 A.3d at 937 (quoting *Cortez*, 449 U.S. at 417-18, 101 S.Ct. 690). (Emphasis added).

This cannot be confused with the Superior Court's creation of a new and unique legal theorem which it employed for the exact purpose of avoiding the long-standing "particularized suspicion," which this Court expressly said was required in favor of a "generalized suspicion" and which is destined to bring about *Robinson* type results. Therefore, as with

> [t]he Robinson rule [it] improperly dispenses with the requirement of individualized suspicion and, in so doing, misapplies the overarching totality of the circumstances test.

Hicks, 652 Pa. at 387, 208 A.3d at 937.

It should also be noted that while not a term used in Pennsylvania legal parlance, in other jurisdictions and contexts where the phrase, "probabilistic suspicion" has been used, it is synonymous with unconstitutional "profiling" – the idea that someone is statistically more likely to commit a crime because of the way the persons looks or, more particularly, the way the person is perceived by a police officer. In any event, the bottom line is that the Superior Court's Opinion in this regard constitutes an impermissible change in Fourth Amendment and Article 1, Section 8 doctrines which clearly require the presence of "individualized" or "particularized" suspicion to justify a search or seizure. As stated above, such a change is improper and it is reserved to the exclusive province of this Court. Moreover, such a change should otherwise be found objectionable because it historically encompasses implicit bias and generally unaccepted philosophies regarding predictive police forecasting. In light of the foregoing,

the exercise of this Court's supervisory authority is necessary to preserve its exclusive province to enunciate new precepts of law or to expand existing search and seizure doctrine in Pennsylvania.

(2) The Superior Court's Decision To Label Marijuana "Generally Illegal," Despite The Enactment Of The MMA Rendering Its Possession And Use Legal, Also Creates A Presumption Which Is Contrary To The Most Fundamental Tenants Of Pennsylvania Decisional And Constitutional Law.

It is axiomatic in the law that the presumption of innocence is fundamental to the principles of our criminal justice system. *Commonwealth v. Wortham*, 471 Pa. 243, 245 (1977).

> This presumption of innocence is but one of the many aspects of the fundamental law of our land. Like its counterparts, it emanates from the core concept which seeks to restrain government excess and prevents abuse by those exercising state power.

Commonwealth v. Raffensberger, 435 A.2d 864, 865 (Pa. Super. 1981).

The Superior Court's reliance upon the unconstitutional notion that the odor or possession of marijuana generally presumes (i.e. infers) the commission of a crime, is patently irreconcilable with the recognized ends and objectives of justice under our constitutional system.

(3) Marijuana's "General Illegality" Is A Novel Precept And A Unique Category Of Culpability, Without Support In Pennsylvania Jurisprudence.

The Superior Court held that "the lower court abused its discretion in concluding that the odor of marijuana cannot contribute to a finding of probable cause in the post MMA environment (*Id.* at 1283)" because "while the odor alone does not imply individualized suspicion of criminal activity," the "possession of marijuana remains illegal generally ..." *Id.*, 240 A.3d at 1288 (emphasis supplied). The Superior Court actually contradicted itself when it employed that reasoning because, earlier in its opinion, it found exactly the opposite to be true – that the possession of marijuana was generally legal because the MMA expressly provides that its possession under the MMA

> 'shall not be deemed a violation of the [CSA – i.e. criminal law]' and '[i]f a provision of the [CSA] relating to marijuana conflicts with a provision of [the MMA], [the MMA] shall take precedence.' 35 P.S. § 10231.2101. *Id.* at 1286 (emphasis supplied).

Id., 240 A.3d at 1278 (internal quotations omitted) (emphasis supplied).

In other words, it stated that compliance with the MMA will not constitute a crime.

Putting aside this significant and irreconcilable internal conflict which goes to the core of its holding, the Superior Court plows no new ground here in any event, because it states only that the possession of marijuana is illegal, but licensed possession of medical marijuana is not. It is the same as saying possession of a concealed firearm is illegal, but the licensed possession of a concealed firearm is not. Applying deductive reasoning, it is tantamount to recklessly declaring that conduct which requires a license is "generally illegal."

This is not only unjustifiable, but it is not helpful in any meaningful way, and identifying something as "generally illegal" finds no basis in law, in any event. Further still, and more importantly, labelling it as such cannot permit the court to abrogate well-settled law requiring individualized criminal suspicion by creating a lower threshold and calling it "probabilistic suspicion" –

which appears to be nothing more than another phrase for "suspicion" or "hunch" or "surmise."[15]

The law simply provides no such "generally illegal – generally legal" dichotomy, especially when it comes to determining something as critically developed as individualized suspicion of criminal activity. Moreover, there simply is no way for a court to determine what is "generally illegal" without knowing, for example, what number of people are legally possessed of marijuana as opposed to those who are illegally possessed of marijuana. Nor is there any suggestion in the Superior Court's rationale explaining why courts should attempt to perform these mental gymnastics. The bottom line is that, the Superior Court has effectively jettisoned *Hicks'* opposite holding that the possession of a firearm is presumptively lawful and does not give rise to a "reasonable

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[15] It should be noted parenthetically however, that the possession or use of marijuana may still, in fact, be distinguishable from lawful conduct, even after the MMA. For example, where it is plainly observed in the form of a burning blunt or, in kilogram bricks. These are not however to be confused with additional factors to be considered. They represent a "particularized and objective basis," to suspect that criminal activity is afoot. What may seem like mere semantics however, is of paramount importance when considering the significance of the violations to a person's constitutional rights which could potentially follow.

suspicion of criminal activity." It must be noted that the Superior Court did so solely based upon the contrarian novel notion that because marijuana is "generally illegal," its possession, *per force*, creates a particularized suspicion that criminal activity is afoot.

It should come as no surprise that nowhere in Pennsylvania jurisprudence exists an analytical framework which recognizes gradations of illegal conduct like the Superior Court's unconventional "general illegality." Conduct which is illegal, generally, either is, or isn't. Conduct may be illegal under some circumstances but not others. For example, driving while under suspension is illegal but justifiable under the doctrine of "necessity" or emergency. However, Pennsylvania jurisprudence has recognized such things as unique, rare and emergent events, and the law has evolved to identify and deal with them. After all, there is no denying that all conduct requiring a license is considered to be unlawful if committed without the issuance of one.

Perhaps, the most compelling reason to decry the Superior Court's establishment of a new category of criminal culpability called "generally illegal," is this Court's wholly contradictory

holding in *Hicks* wherein it declared that, not only was there to be no inference of criminality based upon the mere possession of a concealed firearm, but its possession was to be assumed legal due to the fact that the possessor may be licensed to carry it.

Simply put, in the law of this Commonwealth, there is no such status as being "generally illegal." This seems to be an attempt to create a new genre of criminal culpability to justify the Superior Court's holding here which, ironically, is simply not needed to explain the obvious proposition that conduct requiring a license is <u>legal</u> when you have one, and <u>illegal</u> when you don't.

(4) <u>The Superior Court's Newly Minted "General Probabilistic Suspicion" Has Additional Shortcomings</u>.

The Superior Court itself plainly acknowledges that a "generalized suspicion" does <u>not</u> meet the well-settled requirements of probable cause but rather, a "particularized suspicion" <u>is required</u>.

> [T]hose who act in compliance with the MMA should not be subjected to searches based solely on a <u>generalized suspicion</u> that is provided by that odor when the 4th Amendment also requires <u>particularized suspicion</u>.

Barr, 240 A.3d at 1287.

Nonetheless, its decision here was predicated upon its new legal precept of exactly what it stated would not suffice to determine probable cause – "a general [not "particularized"], probabilistic suspicion" of criminal activity, based upon something which it also newly created, called "general illegality."

The Superior Court held that in the case *sub judice*, the quantum of suspicion generated from the odor of marijuana was "probabilistic" and therefore the Trooper was permitted to draw the inference – not that "a crime was afoot" – but rather, as stated above, something called "general illegality" (i.e. "generally illegal" conduct) was present. The proposition of jettisoning the "individualized suspicion of criminal activity" requirement to replace it with something which the court calls "a general, probabilistic suspicion of criminal activity," should not be found acceptable by anyone who has a passing familiarity with the doctrine of "probable cause" or how its carefully drawn protective presence has dictated Pennsylvania jurisprudence from the beginning. While the Superior Court does not anywhere define the

phrase, one can discern from its context that it must rely upon a statistical inference or assumption of some sort because the court says that it is "based on the fact that most citizens cannot legally consume marijuana." *Id.* This, of course, implies that the foundational protection of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution afforded citizens through the long-standing probable cause requirement of "individualized suspicion of criminal activity" will be suspended for all legal consumers of marijuana until such time as they represent a majority of Pennsylvanians, by population.

In fact, the Superior Court's novel analysis flies in the face of its own oft-quoted axiom that, "it is well settled that mere assumption is not synonymous with reasonable suspicion." *Commonwealth v. Bailey*, 2008 Pa. Super. 81, 947 A.2d 808 (2008) (the mere assumption that the vehicle owner is the driver cannot support probable cause). Accord, *Commonwealth v. Anderson*, 753 A.2d 1289, 1294 (Pa. Super. 2000).

Moreover, even if changing the decisional law in Pennsylvania in such a fundamental way wasn't solely reposed in this Court, the Superior Court's venture into probability and statistical inference constitutes further evidence of its overreach. One cannot, under the laws of probability, determine the likelihood (i.e. probability) which the Superior Court seeks to invoke by comparing (at least as it inferentially did) the number of people licensed to use marijuana, to those who aren't. In any event, when seeking to determine the "general" likelihood that marijuana odor would be produced by an unlicensed person, the proper methodology would be to fractionally place the number of licensed marijuana users in Pennsylvania as the numerator and the number of unlicensed marijuana users as the denominator. Although that study has not been done (to the best of the author's knowledge), it is highly likely that in such a study, a "generally" high percentage of those who wish to use marijuana have secured a license to do so. Moreover, it will likely continue to increase exponentially as Barr's Expert testified to on this record.

Stated another way, the Superior Court, it appears, is trying to create a sort of statistical[16] approach declaring, in this instance, that if a minority of Pennsylvanians are licensed to possess and use medical marijuana, chances are (i.e. the "probability" is) that a stopped driver is not so licensed, thereby raising a statistical probability of illegality (i.e. a probability that "crime is afoot").

This of course, would lead to the unconstitutional rule that any officer could stop any motor vehicle on the sheer basis of "probabilistic suspicion" because, the operator may not, in fact, be licensed, and there are no statistics to prove otherwise. The outrageous nature of such a statement masquerading as Pennsylvania law needs no further discussion.

(5) The Superior Court's Reliance On The Presumption That The Number Of MMA Licensees Are Inconsequential In Order To Justify Neoteric Doctrines Of "General Probabilistic Suspicion" And "Generally Illegal" Conduct Are Not Factually Supportable.

[16] We remember, of course, Winston Churchill once reportedly said that "the only statistics you can trust are the ones you have falsified yourself". His predecessor as British prime minister in the 19th century, Benjamin Disraeli, allegedly said that there were "three kinds of lies: lies, damn lies and statistics."

Despite its other legal shortcomings, the Superior Court's justification for unloosing its new and unique probable cause doctrines upon us also appears to be based upon unsupported factual assumptions concerning the breadth of MMA licensures. Approximately a year ago, on August 14, 2020, *The Philadelphia Enquirer* headline read: "Medical marijuana sales soar amid COVID-19, making Pa. one of the nation's fastest growing cannabis markets." The actual article reported that, based upon the state's Department of Health:

> The number of patient visits at cannabis dispensaries has risen by more than 70 percent – rising from 70,000 a week in February to 120,000 each week in August [2020].

Id. by Sam Wood.

More recently:

> Harrisburg, PA – Governor Tom Wolf over the weekend commemorated the five-year anniversary of Act 16 of 2016, better known as the Pennsylvania Medical Marijuana Act, which establishes the medical marijuana program in the commonwealth.
>
> Close to 553,000 patients and caregivers are registered for the program in order to obtain medical marijuana for one of 23 serious

> medical conditions. There are more than 327,400 active certifications as part of the program.
>
> Active cardholders are continuing to visit dispensaries more than once a month to get treatment for a serious medical condition. More than 31.2 million products have been sold since the start of the program, and total sales within the program are close to $2.6 billion, which includes sales by the grower/processors to the dispensaries, and sales by the dispensaries to patients and caregivers. More than $1.5 billion in sales has been from the dispensaries to patients.
> More than 2,100 physicians have registered for the program, more than 1,530 of whom have been approved as practitioners.

WCED News, Posted April 19, 2021.

The most recent information regarding the total number of licensed medical marijuana users in Pennsylvania puts the current number at:

343,634

Project, Marijuana Policy "Medical Marijuana Patient Numbers" (May 27, 2021) MPP, www.mpp.org/issues/medicalmarijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers.

By comparison, the *Pennsylvania State Police Firearms Annual Report 2020* (prepared as part of legislation requiring PSP to issue an annual "Pennsylvania Uniform Crime Report") reported that:

> In 2020, there were a total of 311,224 licenses to carry firearms issued as reported by the County Sheriff's Offices and the City of Philadelphia, equating to a 25.3 percent increase from 2019.
>
> * * *
>
> Sportsman's Firearms Permits are issued by the County Treasurer's Office and do not require a background check. In 2020, there were a total of 1,312 permits issued.

Pennsylvania State Police Firearms Annual Report 2020, p.6.

This 312,536 total of concealed carry permits is, of course, subject to daily license revocations occurring as a result of PFA Orders, criminal convictions, and the like. The PSP's Firearm Division PICS (Pennsylvania Instant Check System) Operation Center does not maintain an accurate count on current active license holders (N.B. All licenses expire after five years) but there is likely a significant reduction to the above-referenced reported total due to such daily revocations.

It therefore appears by the standards referred to above, that currently registered medical marijuana users (343,634) actually

outnumber persons currently registered to carry concealed firearms (312,536). It is even more likely that with dispensary trips exceeding 6,240,000 annually (not to mention transporting medical marijuana by vehicle on other than dispensing trips), vehicular possession of legal (medical) marijuana is likely far more common than vehicular possession of concealed firearms ... rendering possession of marijuana not "generally illegal" or at least, as "generally legal" as the possession of concealed firearms.

2. Given The Enactment Of The MMA, The Possession And Use Of Marijuana Is A Common, Lawfully Licensed Activity, It Warrants The Same Fourth Amendment And Article 1, Section 8 Protections That This Court Afforded Potential Firearm Licensees In *Hicks*, Which Decision Is Both Controlling And Dispositive Of The Issues Raised Here.

The suppression court found that the reasoning in *Hicks* was dispositive of the probable cause issue here. It concluded, most directly, that, with the passage of the MMA, the odor of marijuana is no longer a factor which will support probable cause for a search.

> The Court finds that *Commonwealth v. Hicks, supra.*, applies to the within matter, and that the "plain smell" of marijuana alone no longer provides authorities with probable cause to conduct a search of a subject vehicle. As marijuana has been legalized in Pennsylvania

> for medical purposes, the plain smell of burnt or raw marijuana is no longer indicative of an illegal or criminal act.

Suppression Hearing Opinion of August 2, 2019, Appendix "A", p. 14-15, R. 275a-276a.

The Superior Court, on the other hand, stated:

> We agree with the Commonwealth that the trial court's direct application of *Hicks* to the circumstances of this case constituted an abuse of discretion. First, as is obvious, the holding in *Hicks* could not directly apply because it concerned what constitutes reasonable suspicion of criminality justifying a *Terry* stop when possession of a concealed firearm is observed, not whether probable cause to search a vehicle exists based on the odor of marijuana alone. Moreover, even assuming the trial court merely adopted the reasoning of *Hicks*, the respective conduct is not sufficiently analogous to compel an identical result. The possession of a firearm is generally legal, with limited exceptions. The possession of marijuana, by contrast, remains generally illegal, but for the limited exception of lawful possession of medical marijuana pursuant to the MMA.

Barr, 240 A.3d at 1285.

Barr agrees with the lower court's decision and asserts that the Superior Court improperly marginalized *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019) by an overly restrictive reading of

it, by its otherwise skewed interpretation of applicable precedent which is not faithful to well-established principles of probable cause, and through the application of the Superior Court's own improvident invention of new legal precepts and doctrines that are irreconcilable with long-standing jurisprudence. Barr further contends, that as applied here, *Hicks* teaches that, in instances where the possession of an item (e.g. marijuana) may be lawful, based upon a license to do so, that possession is not suggestive of criminal activity, and therefore cannot contribute to a finding of probable cause, which depends upon particularized suspicion of criminal activity.

There is little doubt that an entire law school semester could be (well) spent analyzing the legal contours of this Court's well-reasoned decision in *Hicks*. However, it is *Barr's* position that, *Hicks* is particularly persuasive, if not wholly dispositive, when it comes to post-MMA probable cause determinations involving the possession or use of marijuana.

The Superior Court has had time to digest and apply *Hicks* to a number of cases that have come before it in the past two years.

It is therefore hard to improve upon some of the intermediate courts' concise statements of the underlying facts, or their summaries of the decision, which is clearly honeycombed with a scholastic cache of consequential legal precepts to be mined.

In one instance, the Superior Court concisely summarized the facts in *Hicks* as follows:

> In *Hicks*, officers responded to a camera operator of a gas station reporting a man with a gun. The camera operator saw the defendant, via live surveillance, with a weapon, in a high-crime area, at 3:00 a.m. when the officers arrived, they saw the defendant driving his vehicle to exit the parking lot. After they saw Hicks move his hands in the vehicle, they ordered Hicks to keep his hands up. Then, they performed an investigative stop and took defendant's gun from the holster of his waistband. The officers restrained Hicks and removed him from the vehicle. The officers smelled alcohol on Hicks and discovered marijuana during a search of his pockets. Upon further investigation, the officers discovered that Hicks had a license to carry a concealed weapon. Hicks was charged with driving under the influence and possession of marijuana.

Commonwealth v. Mike, 2019 WL 3290945, at *3 (Pa. Super. Ct. July 22, 2019).

In *Commonwealth v. Batty*, 2020 WL 488512 (Pa. Super. January 29, 2020) (non-prec.) the Superior Court succinctly summarized the holding of this Court in *Hicks* as follows:

> In *Hicks*, our Supreme Court recently held that allowing an officer to approach an individual and briefly detain him or her, in order to investigate whether he or she was properly licensed to possess a concealed firearm in public, contravened the requirements of *Terry v. Ohio*, 392 U.S. 1 (1968), and subverted the fundamental protections of the Fourth Amendment. The *Hicks* Court further held that the trial court erred by denying the defendant's motion to suppress because, in consideration of the totality of the circumstances, the facts did not support a finding of reasonable, articulable suspicion that defendant was engaged in any manner of criminal activity prior to his seizure and was seized solely due to the observation of a firearm, concealed on his person.

Id., at fn. 8.

To fully appreciate the application of *Hicks* to the case *sub judice*, one need only substitute the words "medicinal marijuana" for *Hicks'* reference to "concealed weapon" or "handgun" in the *Hicks* Opinion; or, in other instances, simply leave the words unchanged, to speak for themselves. It quickly becomes pellucid

that our Supreme Court could easily have been referencing the instant case. For example:

i. "An individual licensed to carry [medical marijuana] is permitted to do so every bit as much as a holder of a driver's license is permitted to operate a motor vehicle." *Id.*, 208 A.3d at 943.

ii. "[I]t remains a violation of the Fourth Amendment to detain a motorist solely to ascertain the motorist's [MMA] licensing status." *Id.*

iii. "[D]etaining motorists to check their [MMA] licenses is undesirable – indeed unconstitutional." *Id.*

iv. "There has been no suggestion that the investigation of individuals carrying [medical marijuana cards] constitutes a special need beyond the 'general interest in crime control.'" *Id.*, 208 A.3d at 938.

v. "Our analysis of the question at bar is guided by fundamental Fourth Amendment principles. We find no justification for the notion that a police officer may infer

criminal activity merely from an individual's possession of [medical marijuana] in public." *Id.*, 208 A.3d at 936.

A. The MMA In This Court's Sights.

This Court's decision in *Hicks* followed the recognized juridical protocol of 'deciding only the case before it.' Nonetheless, in responding to the Concurrence, Justice Wecht, writing for the Court, clearly foreshadowed the decision's potential application to the MMA, and hence the case at bar.

> The Concurrence also raises the specter of future difficulties with the enforcement of criminal laws, such as the prohibition upon the possession of marijuana in light of the recent passage of the Medical Marijuana Act, 35 P.S. §§ 10231.101-10231.2110. *See* Concurring Opinion (Dougherty, J.) at 958 n.4. However, even if our reasoning herein may reach to such a distinct matter—which we do not today decide—this is not a compelling reason to dilute the protections of the Fourth Amendment. Indeed, the element-or-defense test also has consequences beyond the case at bar, and these entail unacceptable limitations of Fourth Amendment rights.

Hicks, 652 Pa. at 944, 208 A.3d at 398-99.

This Court in *Hicks* also made it clear that it was rendering its decision, at least in part, upon public policy considerations which

would obviously apply equally to the common activities of an MMA licensee.

> If the consequence of our decision is that future courts afford meaningful Fourth Amendment protection to individuals engaged in other commonly licensed activities, that result is preferable to our allowance of governmental overreach that undermines the individual freedom that is essential to our way of life in this constitutional republic.

Id., 652 Pa at 400, 280 A.3d at 944-45 (emphasis supplied).

Therefore, it does appear, that this Court was clearly anticipating the application of *Hicks* to other licensed activities, including specifically, the licensed possession and use of marijuana. If Barr were called upon to choose two sentences in this Court's *Hicks* opinion, among all the excellent, comprehensive legal exegesis presented, which he could describe as the "beating heart" of the decision, it would be the following:

> When many people are licensed to do something, and violate no law by doing that thing, common sense dictates that the police officer cannot assume that any given person doing it is breaking the law. Absent some other circumstances giving rise to a suspicion of criminality, a [search or] seizure upon that basis alone is unreasonable.

Hicks, 652 Pa. at 401, 208 A.3d at 945.

Ironically, the Superior Court saw fit to focus upon the same two sentences in its decision below. *Barr*, 240 A.3d at 1287. And, even more significantly, it adopted the core of Barr's argument made to it on appeal.

> Here, 'many people' are licensed to consume marijuana under the MMA, and violate no law by doing so. The odor of marijuana alone, absent any other circumstances, cannot provide individualized suspicion of criminal activity when hundreds of thousands of Pennsylvanians can lawfully produce that odor.

Id.

Because the record is clear, as stated *supra*, that the Troopers who conducted the instant search of Barr's vehicle, did so expressly on the basis of the odor of marijuana alone, it is clear that the instant search lacked the very same required "individualized suspicion of criminal activity" reaffirmed in *Hicks*, and was therefore equally unconstitutional. However, that is where the Superior Court seriously departed from the well-established jurisprudence regarding the analysis of probable cause, as well as the holding in *Hicks*, by declaring a new legal standard, one that is

at variance with anything resembling past probable cause jurisprudence. It also jettisoned the same in favor of totally new and unique standards and doctrines of its own making, which are at variance with anything resembling the teachings of this Court.

At several points in the Section 1, *supra*, Barr argued not only that the Superior Court's rationale deviated from long-standing precedent, but that it was also in direct conflict with this Court's holding in *Hicks*, and those arguments are incorporated here. There are, of course, other deficiencies not mentioned in supra which are appropriate to the instant discussion, not only because they controvert the Superior Court's holding, but because they also support the dispositive effect which should be accorded *Hicks* in the instant case.

B. The Inference Of Illegality, Which Is Integral To The Superior Court's Decision, Is Directly Contrary To This Court's Holding In *Hicks*.

The Superior Court itself acknowledged that:

> the *Hicks* Court found "no justification for the notion that a police officer may infer criminal activity merely from an individual's possession of a concealed firearm in public."

Barr, 240 A.3d at 1285 (quoting *Hicks* at 936) (emphasis supplied).

Notwithstanding this acknowledgement, the Superior Court made the mainstay of its decision the allowance of just the opposite inference, to wit, that a police officer may infer criminal activity from the odor of marijuana.

> [Even though], the strength of the inference of illegality stemming from the odor of marijuana has necessarily been diminished by the MMA in Pennsylvania (*Id.* at 1278) ... the inference of criminality [is] implied by the odor of marijuana (*Id.* at 1276) (emphasis supplied) [and,] [t]he odor of marijuana may still be indicative of an illegal or criminal act, because the possession of marijuana remains generally illegal (*Id.* at 1286).

Barr, 240 A.3d at 1276, 1278 and 1286.

C. The Superior Court Wrongfully Stated That *Hicks* Is Inapplicable To The Instant Matter Because *Hicks* Dealt With A Terry[17] Stop And The Instant Case Deals With Probable Cause To Search A Vehicle.

The Superior Court's attempt to differentiate the subject case from *Hicks*, because *Hicks* involved a *Terry* stop and here we are dealing with a vehicle search, is clearly unavailing. The Superior Court stated:

> First, as is obvious, the holding in *Hicks* could not directly apply because it concerned what

[17] *Terry v. Ohio*, 392 U.S. 1 (1968).

> constitutes reasonable suspicion of criminality justifying a Terry stop when possession of a concealed firearm is observed, not whether probable cause to search a vehicle exists based on the odor of marijuana alone.

Id., 240 A.3d at 1285.

The obvious response to this attempted differentiation is that it is nothing more than a distinction without a difference. Because *Hicks* holds that a police officer may not infer criminal activity of a kind supporting a *Terry* stop merely from an individual's possession of a concealed firearm in public, it clearly follows that a search required to meet the even higher standard of probable cause to conduct a warrantless search of a vehicle, based upon another licensed activity, to wit, possession of marijuana, cannot survive suppression. See, *Commonwealth v. Cook*, 558 Pa. 50, 57, 735 A.2d 673, 676 (1999) (Probable cause is a more stringent standard than reasonable suspicion.).

In *Commonwealth v. Malloy*, 2021 Pa. Super. 90, 2021 WL 1826984 (2021) the Superior Court rejected a similar argument that *Hicks* was not applicable because the officer had already commenced a lawful stop. The Court held that the post-stop

detention and investigation was commenced when the officer's focus went from the probable cause for the traffic stop to the detention and investigation prompted by the appellant's carrying of a firearm, which required separate probable cause.

The Court concluded:

> Were we to adopt the trial court's view and permit a lawful traffic stop to serve as the relevant antecedent investigative detention, we would essentially resurrect the *Robinson* rule within the context of constitutionally justified traffic stops. We do not read *Hicks* as allowing courts to treat the justification for a traffic stop as grounds for permitting licensure checks for motorists and passengers who merely possess a concealed firearm.

Id., at fn. 9.

It can only be repeated that in the instant case we are dealing with an actual warrantless search, which requires a more stringent standard than reasonable suspicion for an investigative detention. *Cook*, *supra.* As the suppression court here reminds us, this Court found in *Hicks* "that reasonable suspicion, a lesser standard than probable cause, of criminal activity did not exist in that case to support a warrantless seizure of a person." *Suppression Opinion*, Appendix "A", pg. 9, R. 270a. It is, of course, axiomatic that

probable cause to effect a traffic stop based upon a mere motor vehicle violation will not support a subsequent search of the vehicle nor a seizure of its occupant.

D. The Superior Court's Finding That *Hicks* Is Inapplicable To The Case At Bar Because *Hicks* Involved A Concealed Firearm While The Instant Case Involves Marijuana, Does Not Legally Nor Logically Stand.

The Superior Court stated here that:

> [E]ven assuming the trial court merely adopted the reasoning of *Hicks*, the respective conduct is not sufficiently analogous to compel an identical result. The possession of a firearm is generally legal, with limited exceptions. The possession of marijuana, by contrast remains generally illegal, but for the limited exception of lawful possession of medical marijuana pursuant to the MMA.

Barr, 240 A.3d at 1285.

Again, it must be noted, that the Superior Court is again operating within its alternative "generally illegal" paradigm, which has been debunked, *supra*. Next, fundamental fairness requires the Superior Court to admit that under its reasoning, both the possession of a concealed weapon (what we were actually dealing with in *Hicks*) and the possession of marijuana, would be "generally illegal" except for the "limited exception" of possessing a license

for each. That alone renders the Superior Court's rationale in this case unavailing.

Finally, there is simply no denying that the instant case, and the case in *Hicks* are mirror-images of each other. In *Hicks*, the officer observed a concealed firearm and used it as a basis to conduct a search, uncovering a bag of marijuana in the defendant's possession. Here, the officer allegedly smelled the odor of marijuana and used it as a basis to conduct a search, uncovering a concealed firearm. Moreover, the Court in *Hicks*, broadly speaking, concluded that conduct which can be lawfully licensed (like marijuana possession/use) cannot be said to give rise to reasonable suspicion of criminal activity, so as to authorize a warrantless search. The factual distinctions made by the Superior Court between a gun as contraband and marijuana as contraband simply ignores that holding. The Superior Court's decision also ignores the critically relevant legal point that, despite the difference in the inanimate items which triggered the respective searches, the searches in both cases are governed by the same constitutional provisions, the Fourth Amendment and Pa. Art. 1,

Sec. 8; and, that the examined conduct in both instances are each commonly licensed, legal activities – a matter of fundamental importance in *Hicks*, and to the outcome here.

E. No Fair Reading Of *Hicks* Would Countenance The Abrogation Of The Critical Fourth Amendment Requirement Of "Individualized Suspicion" In Favor Of A "General Probabilistic Suspicion Of Criminal Activity."

In *Hicks*, this Court reaffirmed, on multiple occasions, the Constitutional imperative that "individualized suspicion of wrongdoing remains essential under the Fourth Amendment." See, e.g. *Hicks*, 208 A.3d at 938, 652 Pa. at 389. The Superior Court's "general probabilistic suspicion" precept is clearly irreconcilable with that holding … full stop.

This Court also pointed out in *Hicks* that whatever the "quantum of individualized suspicion" that is "prerequisite to a constitutional search and seizure," it is a person's "particularized" and objectively suspicious criminal conduct which is required by the Fourth Amendment's central teachings (i.e. not some "general" or "probabilistic" suspicion). *Id.* Thus, it cited *U.S. v. Cortez*, 499 U.S. 411, 417-418, 101 S.Ct. 690 (1981) which criticized the use of any other terms that failed to require "particularized" suspicion:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad of factual situations that arise. But the essence of all that has been written is that the totality of the circumstances – the whole picture – must be taken into account. Based upon the whole picture the detaining officers must have a *particularized and objective basis for suspecting that particular person stopped of criminal activity*.

Hicks, 208 A.3d at 389-390 (emphasis by this Court).

F. As This Court Provided In *Hicks*, A Holding Like The Superior Court's Here, Which Would Employ A "General Probabilistic Suspicion" Standard, Especially To Licensed Activities, Would Be Untenable And Unreasonable Under The Fourth Amendment.

Even if "general illegality" could find its way into some acceptable protocol, the Superior Court still advances no criteria to establish its "sometimes it is ... and sometimes it isn't" legal calculus. Moreover, the Superior Court doesn't explain how it could confine such an approach to a single licensed activity, or how it would handle the unavoidable chaos that would occur when it couldn't legally impose such a stricture.

Using an example from this Court in *Hicks*, without "particularized suspicion" that a crime is or has been committed, every motorist could be subject to the "general" suspicion that they are unlicensed. This Court stated:

> In this regard, we find significant relevance in the United States Supreme Court's decision in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Like the carrying of a firearm without a license, it also is unlawful to drive an automobile without a license. In *Prouse*, the Supreme Court of the United States held that, absent reasonable, articulable suspicion that a particular motorist is unlicensed or that a particular vehicle is unregistered, and without any other independent basis to seize a vehicle or its occupants, stopping an automobile and detaining the driver in order to check his driver's license and registration of the automobile are unreasonable under the Fourth Amendment. *Id.* at 663, 99 S.Ct. 1391.

Id., 208 A.3d at 941, 652 Pa. at 393-94.

G. The 'Licensing Trap' Exposed in *Hicks* Would Produce The Same Injustice Here.

The Superior Court's decision here allows law abiding persons who made every effort and suffered significant expense and inconvenience in order to comply with licensing requirements to be

treated as criminal targets. *Hicks'* rejection of such a trap would apply to MMA licensees as well as firearm carry licensees.

> Although wholly lawful conduct certainly may give rise to reasonable suspicion of criminal conduct under some circumstances, and although reasonable suspicion "need not rule out the possibility of innocent conduct," the *Terry* doctrine unequivocally requires *something* suggestive of criminal activity before an investigative detention may occur. The Commonwealth cannot simply point to conduct in which hundreds of thousands of citizens lawfully may engage, then deem that conduct to be presumptively criminal. This would, as *Reid* stated, "describe a very large category of presumably innocent travelers," many of whom surely would be surprised to learn that the very conduct for which they have obtained a license nonetheless served as the sole predicate for the deprivation of their liberty. The instant case demonstrates precisely the dangers inherent in such an approach: Hicks was, like many other Pennsylvania citizens, licensed to engage in the activity for which he was seized. We must reject the Commonwealth's assertion that a police officer is authorized, let alone "duty bound," to seize and question any and every one of those people.

Id., 652 Pa. at 392-393, 208 A.3d at 940 (internal citations omitted).

Here, of course, Barr was "licensed to engage in the activity for which he" suffered both a search and seizure.

H. The Constitutional Infirmities Of The Element-Or-Defense Test Are Equally To Be Avoided With Marijuana.

Hicks pointed out the "seize now and sort out later approach" (*Id.*, 208 A.3d at 944) dangers inherent in the alternative "element-or-defense" approach to the licensure issue. For example, the risk that such an approach would

> transfer . . . to the legislature the power to erase the protections of the Fourth Amendment for any individual who seeks to comply with the legislatures' own licensing requirements.

Hicks, 208 A.3d at 942.

Moreover, because the application of the "same statutory formulation" would apply to the possession of prescription medication,

> an individual with a medical condition requiring prescription medication is subject to unlimited seizures by law enforcement agents upon the mere observation of that person's medication, or her orange pill prescription pill bottle.

Id., 208 A.3d at 944.

I. With No Other Criterion Beyond Mere Possession To Justify A Search Or Seizure, The Superior Court's Decision Would Subject Individuals Like Barr To The Very Arbitrary Invasions Of Their Privacy Which *Hicks* Intended To Avoid.

This Court cautioned vigilance against "the diminution of the core liberties that define our republic," the "desperate enforcement" of the law, and the overreaches and abuses of governmental authority, which would occur if licensed conduct were permitted to constitute reasonable suspicion of criminal activity. *Id.*, 652 Pa. at 402-403, 208 A.2d at 946. The last thing that we need is other untried, subjective, and undefined theorems, like those proposed by the Superior Court here, which would allow

> a police officer to base the decision to detain a particular individual upon an "inchoate and unparticularized suspicion or 'hunch' " that the individual is unlicensed and therefore engaged in wrongdoing. This reflects precisely the "kind of standardless and unconstrained discretion," that lends itself to "arbitrary invasions solely at the unfettered discretion of officers in the field." The result is an unjustifiable risk of disparate enforcement on the basis of an individual's appearance alone, while the rights of others go unquestioned.

Hicks, 652 Pa. at 946, 208 A.3d at 402 (internal citations omitted).

J. The "Lifeblood" Of *Hicks* Is Effectively Drained By The Superior Court's Decision.

If the 'common licensing – common sense' quote which Barr identified *supra,* is the "beating heart" of this Court's decision in *Hicks*, the decision's "lifeblood" must surely be this paragraph:

> [T]here is no way to ascertain an individual's licensing status, or status as a prohibited person, merely by his outward appearance. As a matter of law and common sense, a police officer observing an unknown individual can no more identify whether that individual has a license in his wallet than discern whether he is a criminal. Unless a police officer has prior knowledge that a specific individual is not permitted to carry a concealed firearm, and absent articulable facts supporting reasonable suspicion that a firearm is being used or intended to be used in a criminal manner, there simply is no justification for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity.

Id., 652 Pa. at 387, 208 A.3d at 937.

Once again, the Superior Court was forced to agree with the logic of this proposition, and make Barr's point:

> It remains a fact that police cannot distinguish between contraband marijuana and medical marijuana legally consumed by a substantial number of Pennsylvanians based on odor alone, just as police cannot determine from a

> person's possession of a concealed firearm that he or she is unlicensed to carry it concealed.

Barr, 240 A.3d at 1286.

Nonetheless, the Superior Court went on to state that it was "precisely because police cannot discern lawful from unlawful conduct by the odor of marijuana alone" that the police would have to employ the Court's new presumption of illegality and doctrine of "general probabilistic suspicion" in an effort to distill probable cause from "other circumstances." *Id.*

In short, the Superior Court's decision doubles down on the same unorthodox inventions discussed and criticized above. It remains the simple fact that when fully distilled, the Superior Court's newly issued tools for ferreting out probable cause are nothing more than a pass given to law enforcement to allow them to search and seize when they believe that an individual, for whatever reason, is likely to be unlicensed and can therefore be found to have engaged in criminal wrongdoing.

VIII. CONCLUSION

The MMA has signaled the death of the "Plain Smell" doctrine in Pennsylvania, an apothegm which is probably responsible for more pretextual, unconstitutional searches or seizures than any other legal doctrine regularly invoked by law enforcement. The Superior Court here refused to acknowledge that death knell and attempted instead to preserve the harmful vestiges of "plain smell" by improvidently and impermissibly inventing new legal precepts and doctrines which, in and of themselves, could actually do more lasting damage to Fourth Amendment protections than "plain smell" ever did.

Exactly how this Honorable Court decides to disassemble "'plain smell" is critical not only to Barr but, to the millions of Pennsylvanians who, knowingly or not, regularly depend upon the protections which the Fourth Amendment and Article 1, Section 8 of our Constitution provide them, each and every day – whether they are engaging in lawfully licensed activities under the MMA, or any other statute. In fact, restoring constitutional privacy protections clearly jeopardized by the Superior Court below will

impact not only lawful licensees engaged in state approved activities, but will also protect those who are doing little more than sleeping in their own beds at night.

Our own William Penn wrote this observation in *Some Fruits of Solitude*:

> People are more afraid of the laws of Man than God, because their punishment seems to be nearest.

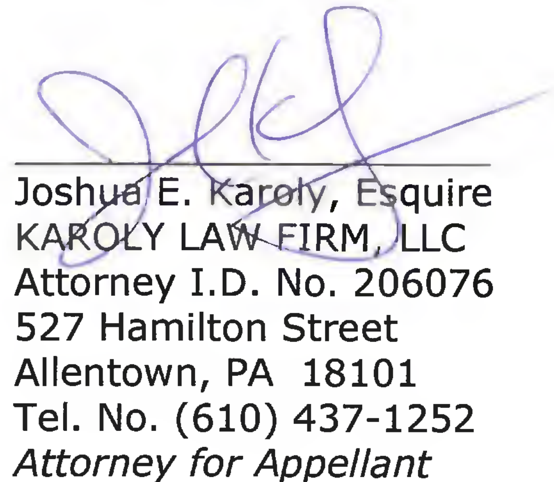
Pennsylvanians should rest assured that this same Court which gave us *Hicks*, will not hesitate to continue to provide us with the same constitutional safeguards here.

Such expectations are both reasonable and precedently well-founded. In this case of "first impression," there is an enduring belief that, especially this Honorable Court, will leave us with a "lasting impression" that it will continue, unabated, to serve as a guardian of the peoples' rights, with an eye towards preserving and enlarging freedom, as John Locke said, not abolishing or restraining it.

In the final analysis, Barr asserts that a reasonable reading of the suppression record, and careful consideration of the applicable

law which has been outlined above, require that the ruling of the Superior Court be reversed and vacated, that the suppression court's determination be reinstated, that his habeas be granted and that the charges against him be dismissed.

Submitted By:



Dated: July 16, 2021

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CERTIFICATE OF WORD COUNT COMPLIANCE Pursuant to 210 Pa. Code Rule 2135(d) and 2013 Amendments

I, Joshua E. Karoly, Esquire, Attorney for Appellant, hereby certify that the attached *Brief for Appellant* contains 13,519 words, based on word count from Microsoft Office 365, which complies with the word count limit pursuant to 210 Pa. Code Rule 2135(d) and 2013 Amendments.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted By:

Dated: July 16, 2021

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CERTIFICATE OF SERVICE

I, Joshua E. Karoly, Esquire, hereby certify that I am this 16th day of July, 2021, serving true and correct copies of the attached *Brief of Appellant* upon the person in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by Electronic Mail through AOPC/PACFile procedures addressed to:

Heather F. Gallagher, Esquire
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Via Hand Delivery
The Honorable Maria L. Dantos
c/o The Honorable J. Brian Johnson
President Judge
Court of Common Pleas of Lehigh County
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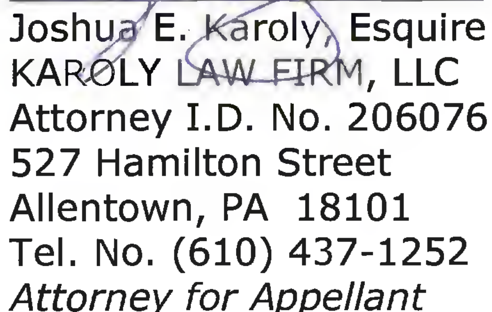

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	No. 0279/2019
	)	
TIMOTHY OLIVER BARR, II,	)	
Defendant	)	

ORDER

NOW, this 2nd day of August, 2019, upon consideration of Defendant's Omnibus Pretrial Motion, and for the reasons stated in the accompanying Opinion,

IT IS HEREBY ORDERED that the Defendant's Omnibus Pretrial Motion is granted, and all evidence seized from the vehicle, specifically the small amount of marijuana and the firearm, are suppressed.

IT IS FURTHER ORDERED that the Defendant's Petition for Writ of Habeas Corpus is granted, and Count 3 (Possession of a Small Amount of Marijuana) is dismissed.

BY THE COURT:

Maria L. Dantos, J.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	No. 0279/2019
	)	
TIMOTHY OLIVER BARR, II,	)	
Defendant	)	

* * * * * * * *

APPEARANCES:

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SENIOR DEPUTY DISTRICT ATTORNEY,
On behalf of the Commonwealth

JOSHUA KAROLY, ESQUIRE,
On behalf of Defendant

* * * * * * * *

OPINION

MARIA L. DANTOS, J.

Defendant, Timothy Barr, has been charged in the above-captioned matter with Person Not to Possess Firearm,[1] Possession of a Firearm without a License,[2] and a Possession of a Small Amount of Marijuana.[3] Presently before this Court is Defendant's Omnibus Pretrial Motion in the nature of a Motion to Suppress the evidence seized as a result of the subject vehicle search, as well as a Petition for Writ of Habeas Corpus with regard to the charge of Possession of a Small Amount of Marijuana. An evidentiary

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1 18 Pa. C.S.A. § 6105(a)(1).
2 18 Pa. C.S.A. § 6106(a)(1).
3 35 Pa. C.S.A. § 780-113(a)(31)(i).

hearing relative to Defendant's motion was conducted before this Court on July 17, 2019. At the evidentiary hearing, the Commonwealth presented the testimony of Trooper Edward Prentice and Trooper Danielle Heimbach. The Defendant presented the testimony of Dr. David Gordon, M.D., an expert in the field of medical marijuana, as well as the testimony of Patricia Gregory, the Records Custodian for Keystone Canna Remedies. In addition, the dash cam video from the Pennsylvania State Police vehicle[4] and the body camera from a member of the Allentown Police Department were introduced into evidence and reviewed by this Court. (C. Ex. 1); (C. Ex. 3). Based on the testimony of the aforementioned witnesses and a review of the evidence, we make the following findings of fact.

FINDINGS OF FACT

1. On November 7, 2018, at approximately 12:30 A.M., Trooper Edward Prentice and Trooper Danielle Heimbach of the Pennsylvania State Police, Fogelsville Barracks, Troop M, were on routine patrol in full uniform and in a marked police unit on Emaus Avenue in the area of the Liberty Park at Allentown apartment complex, Allentown, Lehigh County, Pennsylvania.[5] At that time, Trooper Prentice observed a silver Chrysler 300 sedan making a U-turn in the Liberty Park at Allentown apartment complex on Allenbrook Drive, and then proceeding east on Emaus Avenue. Trooper Prentice turned his cruiser around and decided

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[4] The dash cam video from the Pennsylvania State Police cruiser only recorded the video of the incident. (C. Ex. 1). The dash camera malfunctioned, despite being checked by Trooper Prentice at the beginning of his shift, and there is not audio recording associated with the dash cam video. (C. Ex. 1).

[5] Trooper Prentice was Trooper Heimbach's mentor, as Trooper Heimbach graduated from the police academy on October 12, 2018. On that night, Trooper Prentice was operating the

to follow the vehicle.[6]

2. The subject vehicle drove eastbound on Emaus Avenue and made a left onto Devonshire Road/Mack Boulevard, Allentown, Lehigh County. Trooper Prentice noted that the vehicle was traveling at a fast rate of speed. However, the vehicle slowed down prior to approaching an overpass on which the vehicles are constrained to pass one at a time. (C. Ex. 1). Trooper Prentice and Trooper Heimbach observed that the subject vehicle failed to stop at the solid white stop line on the road at the stop sign controlling the single lane railroad overpass at Mack Boulevard and South 8th Street, Allentown, Lehigh County, Pennsylvania.[7] (C. Ex. 1). Consequently, observing this motor vehicle violation, a traffic stop was effectuated. (C. Ex. 1). The subject vehicle pulled over immediately. (C. Ex. 1).

3. As Trooper Prentice was "coaching" or training Trooper Heimbach, Trooper Heimbach took the lead and exited the police cruiser to investigate.[8] (C. Ex. 1). Trooper Heimbach approached the passenger side of the vehicle to speak with the occupants. (C. Ex. 1). As she approached, she smelled the odor of burnt marijuana. The driver of the vehicle was a white female, later identified as Teri Barr, the Defendant's wife. The Defendant, Timothy Barr, was seated in the front

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police cruiser and was Trooper Heimbach's training officer.

[6] No criminal activity was observed at this time. Trooper Prentice based his decision to follow the vehicle on the fact that no other cars were around, the car appeared to be traveling at a fast rate of speed, and the early hour of the night.

[7] Both the front and rear tires passed over the solid white stop lines prior to slowly rolling through the single lane railroad overpass. (C. Ex. 1). At that time, another vehicle was approaching the railroad pass from a distance from the opposite lane of travel. As this vehicle was far away, no danger or safety risk was present. (C. Ex. 1).

[8] Trooper Prentice briefly remained in the police cruiser to perform a records check of the vehicle, as well as to notify dispatch of the traffic stop. (C. Ex. 1). The subject vehicle was owned by the Defendant's mother.

passenger seat and was speaking with Trooper Heimbach.[9]

4. After Trooper Prentice completed his tasks in the police cruiser, he approached the vehicle on the driver's side. (C. Ex. 1). Upon approach, Trooper Prentice could smell the odor of both burnt and raw marijuana through the open window of the vehicle.[10] At that time, Trooper Prentice asked the driver to exit the vehicle so that he could interview her and confirm that she was not under the influence and incapable of safe driving. He stepped back to make room for her egress from the vehicle. (C. Ex. 1). When Trooper Prentice overheard the passenger arguing with Trooper Heimbach and stating that "no one is getting out of this fucking car," Trooper Prentice walked back to the driver's side door. (C. Ex. 1). The argument ensued for approximately two (2) to three (3) minutes, until members of the Allentown Police Department arrived as back up.[11] (C. Ex. 3). When members of the Allentown Police Department arrived, the Defendant's attitude changed and he became more cooperative. He exited the vehicle, along with the other occupants. (C. Ex. 1). They were patted down for officer safety. (C. Ex. 1).

5. Trooper Prentice advised the occupants of the vehicle that he could search the

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[9] Co-Defendant Luiz Monteiro was seated in the rear passenger seat behind the Defendant. He appeared to be either passed out or in and out of sleep. There was limited interaction with Mr. Monteiro. Co-Defendant Monteiro did not present a medical marijuana card at the time of the traffic stop.

[10] Trooper Prentice testified that he could smell the odor of raw and burnt marijuana through the open window when he was at the rear of the vehicle. This Court takes issue with this testimony of Trooper Prentice and finds it not to be credible. Indeed, it is only reasonable to conclude that one (1) odor would trump the other odor, and that Trooper Prentice was not able to detect both raw and burnt marijuana. Also, this Court notes that the amount of raw marijuana located in the vehicle in a sealed Ziploc bag was only .79 grams. (C. Ex. 2). It is unfathomable to this Court that Trooper Prentice was able to detect the odor of both raw and burnt marijuana.

[11] Trooper Prentice had called for assistance when he realized that the Defendant was not being cooperative and was preventing his wife from complying with his commands and exiting the vehicle.

vehicle pursuant to Commonwealth v. Gary, 625 Pa. 183, 91 A.3d 102 (2014), as the odor of marijuana provided them with probable cause. At that time, the Defendant presented Trooper Prentice with a medical marijuana identification card that allows him to possess and ingest medical marijuana pursuant to this license.[12] (D. Ex. 1). Trooper Prentice admitted that while he knew that green leafy marijuana was legal for medical purposes, he was not familiar with how a person ingests green leafy medical marijuana.[13] Also, Trooper Prentice was under the misconception that medical marijuana, when ingested through a vaping pen, has no odor.[14]

6. Trooper Heimbach and Trooper Prentice then conducted a probable cause search of the vehicle based on the odor of marijuana that they detected therein. (C. Ex. 1). The search of the vehicle yielded marijuana "shake"[15] throughout the cabin area, as well as a sealed Ziploc plastic bag containing marijuana[16] between the front passenger seat and the center console. (C. Ex. 4). The marijuana weighed .79 grams. (C. Ex. 2). The Ziploc plastic bag did not have any markings or barcodes on it that would be indicative of coming from a medical marijuana

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12 At the time of the hearing, the Defendant presented a receipt for medical flower marijuana purchased from a dispensary on November 2, 2018, totaling $85.00. (D. Ex. 2); (D. Ex. 3). Neither Trooper Prentice nor Trooper Heimbach recalled that the Defendant presented this receipt to them at the time of the traffic stop.

13 While in the presence of the Allentown Police Department and captured on the body cam of a member of the Allentown Police Department, Trooper Prentice indicated that "if he's allowed to have it, I'm fine with that. I'm not going to fucking worry about it." (C. Ex. 3).

14 Trooper Heimbach was frank with this Court and stated that she did not know how medical marijuana was ingested. She also indicated that at the time of the preliminary hearing in this matter (and consequently, at the time of the vehicle stop) she was under the misimpression that green leafy marijuana was illegal and not used for medical purposes.

15 Trooper Prentice explained that marijuana "shake" served as evidence that marijuana was being smoked in the vehicle, but did not amount to a prosecutorial amount. Indeed, generally "shake" is a residual amount of marijuana. No photos of the "shake" were taken at the time of the traffic stop.

dispensary.[17] Trooper Prentice indicated that the odor of burnt marijuana got stronger in the area of the center console of the vehicle.

7. In addition, Trooper Prentice searched the rear of the vehicle. (C. Ex. 1). On the floor of the rear passenger compartment, tucked halfway under the front driver's seat, Trooper Prentice located a jacket with "OBH" markings on it rolled up in a ball. Therein, Trooper Prentice found a loaded black handgun, with one (1) bullet in the chamber and four (4) rounds in the magazine. Trooper Prentice believed the jacket to belong to the Defendant. Consequently, Trooper Prentice advised the members of the Allentown Police Department to detain the three (3) occupants of the vehicle. Further search of the vehicle yielded an Apple logo baggie with new clear plastic baggies therein. These small baggies were located in the trunk of the vehicle. Trooper Prentice testified that they were consistent with the packaging of drugs for distribution, as well as the baggie of marijuana found between the front passenger seat and the center console.

8. David Gordon, M.D., a retired heart and lung surgeon in the Lehigh Valley and an expert in the field of medical marijuana, is one of the pioneer physicians in Pennsylvania to assess patients and determine if they have a qualifying condition under the law to be prescribed medical marijuana. Dr. Gordon was the physician who made the recommendation that the Defendant qualified for a

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[16] The suspected marijuana field-tested positive for marijuana.

[17] Trooper Prentice testified that he was trained that medical marijuana has to remain in the original packaging that it is received in from the dispensary, from the time that it is opened until the time that the contents are totally consumed. As the baggie located in the vehicle had no markings on it that were indicative of being medical marijuana, Trooper Prentice grew concerned and skeptical that the contents were medical marijuana. However, Trooper Prentice did acknowledge that he did not know if the packaging of medical marijuana included an inner baggie like the one located in the center console of the vehicle. Similarly, Trooper Heimbach indicated that she did not know how medical marijuana was packaged.

medical marijuana card based on his underlying medical condition/diagnosis.

9. Dr. Gordon explained that there is no distinguishable physical difference between the green leafy medical marijuana and regular marijuana purchased on the streets. Indeed, the chemical compositions are the same. Dr. Gordon further explained how a person lawfully ingests green leafy medical marijuana. He indicated that the green leafy marijuana is placed in a battery-operated vaping pen that heats up the marijuana without combustion, producing a vapor. A person then breathes in the vapors through the vaping pen. Dr. Gordon indicated it is a violation of regulations to smoke medical marijuana without a vaping pen, such as placing it into cigarettes or pipes.

10. Dr. Gordon stated that there is no difference in odor of ingesting the medical marijuana when utilizing a vaping pen and the odor of smoking regular marijuana from an unlawful source.

11. Dr. Gordon is familiar with the packaging of medical marijuana and explained that it can be dispensed in a plastic container similar to a pill bottle, which then has a plastic bag in it containing the medical marijuana. Dr. Gordon believed that the inner plastic bag does contain some marking on it to reflect that it was purchased at a medical marijuana dispensary, but he was not certain. Dr. Gordon advises all of his patients to maintain their receipts to evidence what was purchased.

12. As of now, there are more than 143,000 patients in Pennsylvania legalized to obtain, possess, and ingest medical marijuana.

13. Dr. Gordon opined that there is a clear disconnect between the medical community and the law enforcement community with respect to the legalization

of marijuana.

CONCLUSIONS OF LAW

1. Trooper Prentice and Trooper Heimbach did not possess probable cause to conduct a search of the subject vehicle.
2. The search of the subject vehicle was unlawful.
3. The evidence seized as a result of the search of the Defendant's mother's vehicle was unlawfully obtained and must be suppressed.
4. The Commonwealth failed to establish a *prima facie* case of Possession of a Small Amount of Marijuana under 35 Pa. C.S.A. § 780-113(a)(31)(i).

DISCUSSION

The Defendant contends in his Omnibus Pre-Trial Motion that the search of the Defendant's mother's vehicle was unconstitutional because the authorities did not have probable cause to search same. Consequently, the Defendant argues that any alleged evidence seized as a result of the unlawful vehicle search must be suppressed. We agree with the Defendant's position that the search of the Defendant's vehicle was unlawful and that the evidence located therein must be suppressed.

Initially we note that the Fourth Amendment of the United States Constitution provides for "[t]he right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures." See Fourth Amendment of the U.S. Constitution. The goal of the Fourth Amendment is to protect a person's right to privacy and freedom from unreasonable intrusions by the government. Therefore, "the prerequisite for a warrantless search of a motor vehicle is

probable cause to search." Commonwealth v. Gary, 625 Pa. 183, 242, 91 A.3d 102, 138 (2014). Probable cause is a more stringent standard than reasonable suspicion. Commonwealth v. Cook, 558 Pa. 50, 57, 735 A.2d 673, 676 (1999). For probable cause to exist, a police officer must articulate a particularized justification based on the totality of the circumstances, which includes all of the facts, circumstances, and inferences arising therefrom, for believing that the individual is engaged in criminal conduct. United States v. Arvizu, 534 U.S. 266, 273-274, 122 S. Ct. 744, 151 L.Ed.2d 740 (2002).

As further guidance, this Court notes that the Supreme Court of Pennsylvania recently has articulated in Commonwealth v. Hicks, 208 A.3d 916 (2019) that police officers may not infer criminal activity merely from an individual's possession of a concealed firearm in public, as a firearm may lawfully be carried and, alone, is not suggestive of criminal activity. Hicks, 2019 WL 2305953, 208 A.3d at 939-940. Indeed, it is not a criminal offense for a license holder to carry a concealed weapon in public. Id. Therefore, the Supreme Court of Pennsylvania in Hicks found that reasonable suspicion, a lesser standard than probable cause, of criminal activity did not exist in that case to support a warrantless seizure of a person. The Supreme Court noted that the very conduct for which a person has obtained a license cannot serve "as the sole predicate for the deprivation of [a person's] liberty." Hicks, 208 A.3d at 940. When people "are licensed to do something, and violate no law by doing that thing, common sense dictates that the police officer cannot assume that any given person doing it is breaking the law. Absent some other circumstances giving rise to a suspicion of criminality, a seizure upon that basis alone is unreasonable." Hicks 208

A.3d at 945. Fundamentally, the whole picture must establish probable cause that the individual is engaged in wrongdoing prior to being able to legally perform a search of a vehicle. Unfortunately, that was not the case in the within matter.

In the instant case, on November 7, 2018, at approximately 12:30 A.M., Trooper Edward Prentice and Trooper Danielle Heimbach of the Pennsylvania State Police, Fogelsville Barracks, Troop M, were on routine patrol in full uniform and in a marked police unit on Emaus Avenue in the area of the Liberty Park at Allentown apartment complex. Trooper Prentice observed a silver Chrysler 300 sedan making a U-turn in the Liberty Park at Allentown apartment complex on Allenbrook Drive, and then proceed east on Emaus Avenue. Trooper Prentice turned his cruiser around and decided to follow the vehicle, despite having observed no illegal activity. Trooper Prentice noted that the vehicle was traveling at a fast rate of speed. However, the vehicle slowed down prior to approaching an overpass on which vehicles are constrained to pass one at a time. Trooper Prentice and Trooper Heimbach observed that the subject vehicle failed to stop at the solid white stop line on the road at the stop sign controlling the single lane railroad overpass at Mack Boulevard and South 8th Street, Allentown, Lehigh County, Pennsylvania. Consequently, observing this motor vehicle violation, a traffic stop was effectuated. The subject vehicle pulled over immediately.

Trooper Prentice was the field training officer assigned to Trooper Heimbach, who had less than thirty (30) days on the job. This Court finds that Trooper Prentice, as Trooper Heimbach's "coach," was using this relatively minor infraction as a teaching moment. The vehicle, when first observed by the troopers, was not involved in

any motor vehicle infractions which would cause them to pursue the vehicle. Nevertheless, this Court finds that Trooper Prentice was well-intentioned in the performance of his duties.

As Trooper Prentice was "coaching" Trooper Heimbach who was new to the Pennsylvania State Police, Trooper Heimbach took the lead and exited the police cruiser to investigate. Trooper Heimbach approached the passenger side of the vehicle to speak with the occupants. As she approached, she smelled the odor of burnt marijuana. The driver of the vehicle was a white female, later identified as Teri Barr, the Defendant's wife. The Defendant, Timothy Barr, was seated in the front passenger seat and was speaking with Trooper Heimbach. Co-Defendant Luiz Monteiro was seated in the rear passenger seat behind the Defendant. He appeared to be either passed out or in and out of sleep, and had no involvement with police contact.

After Trooper Prentice completed his tasks in the police cruiser, he approached the vehicle on the driver's side. Upon approach, Trooper Prentice could smell the odor of both burnt and raw marijuana through the open window of the vehicle. At that time, Trooper Prentice asked the driver to exit the vehicle to interview her and to confirm that she was not under the influence and incapable of safe driving. He stepped back to make room for her egress from the vehicle. When Trooper Prentice overheard the passenger arguing with Trooper Heimbach and stating that "no one is getting out of this fucking car," Trooper Prentice walked back to the driver's side door. The argument ensued for approximately two (2) to three (3) minutes, until members of the Allentown Police Department arrived as back up. When members of the Allentown Police Department arrived, the Defendant's attitude changed and he became more cooperative. He exited the vehicle, along with the other occupants. They were patted

down for officer safety.

Trooper Prentice advised the occupants of the vehicle that he could lawfully search the vehicle, because the odor of burnt marijuana provided them with probable cause. At that time, the Defendant presented Trooper Prentice with a medical marijuana identification card that allows him to possess and ingest medical marijuana pursuant to this license. Trooper Prentice admitted that while he knew that green leafy marijuana was legal for medical purposes, he was not familiar with how a person ingests green leafy medical marijuana. Indeed, Trooper Prentice was under the misconception that medical marijuana, when ingested through a vaping pen, has no odor. Similarly, Trooper Heimbach was frank with this Court and stated that she did not know how medical marijuana was ingested. She also indicated that at the time of preliminary hearing in this matter, and consequently, at the time of the vehicle stop, she was under the misimpression that green leafy marijuana was illegal and not used for medical purposes. Once Trooper Prentice was presented with the medical marijuana card, he indicated that "if he's allowed to have it, I'm fine with that. I'm not going to fucking worry about it."[18]

Nevertheless, Trooper Heimbach and Trooper Prentice then conducted a probable cause search of the vehicle based on the odor of marijuana that they detected therein. The search of the vehicle yielded marijuana "shake" throughout the cabin area, as well as a sealed Ziploc bag containing marijuana between the front passenger seat and the center console. The marijuana weighed .79 grams. The Ziploc plastic bag did not have any markings or barcodes on it indicative of coming from a medical marijuana

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[18] It is unclear to this Court why Trooper Prentice changed his position and conducted the search of the vehicle.

dispensary. Trooper Prentice testified that he was trained that medical marijuana has to remain in the original packaging that it is received in from the dispensary, from the time that it is opened until the time that the contents are totally consumed. As the baggie located in the vehicle had no markings on it that were indicative of being medical marijuana, Trooper Prentice grew concerned and skeptical that the contents were medical marijuana. However, Trooper Prentice did acknowledge that he did not know if the packaging of medical marijuana included an inner baggie like the one located in the center console of the vehicle. Similarly, Trooper Heimbach indicated that she did not know how medical marijuana was packaged.

In addition, Trooper Prentice searched the rear of the vehicle. On the floor of the rear passenger compartment, tucked halfway under the front driver's seat, Trooper Prentice located a jacket with "OBH" markings on it rolled up in a ball. Therein, Trooper Prentice found a loaded black handgun, with one (1) bullet in the chamber and four (4) rounds in the magazine. Trooper Prentice believed the jacket to belong to the Defendant. Consequently, Trooper Prentice advised the members of the Allentown Police Department to detain the three (3) occupants of the vehicle. Further search of the vehicle yielded an Apple logo baggie with unused, clear plastic baggies therein. These small baggies were located in the trunk of the vehicle. Trooper Prentice testified that they were consistent with the packaging of drugs for distribution, as well as the baggie of marijuana found between the front passenger seat and the center console.

David Gordon, M.D., a retired heart and lung surgeon in the Lehigh Valley and an expert in the field of medical marijuana, is one of the pioneer physicians in Pennsylvania to assess patients and determine if they have a qualifying condition under

the law to bc prescribed medical marijuana. Dr. Gordon was the physician who made the recommendation that the Defendant qualified for a medical marijuana card based on his underlying medical condition/diagnosis. Dr. Gordon explained that there is no distinguishable physical difference between thc green leafy medical marijuana and regular marijuana purchased on the streets. Indeed, the chemical compositions are the same. Dr. Gordon further explained how a person lawfully ingests green leafy medical marijuana. He indicated that the green leafy marijuana is placed in a battery-operated vaping pen that heats up the marijuana, producing a vapor. A person then breathes in the vapors through the vaping pen. This manner of ingestion is preferable for its pulmonary benefits. Dr. Gordon indicated it is a violation of regulations to smoke medical marijuana without a vaping pen, such as placing it into cigarettes, rolling papers, or pipes. In addition, Dr. Gordon stated that there is no difference in odor of ingesting the medical marijuana when utilizing a vaping pen and the odor of smoking regular marijuana from an unlawful source. Furthermore, Dr. Gordon is familiar with the packaging of medical marijuana and explained that it can be dispensed in a plastic container similar to a pill bottle, which then has a plastic bag in it containing the medical marijuana. Dr. Gordon believed that the inner plastic bag does contain some marking on it to reflect that it was purchased at a medical marijuana dispensary, but he was not certain. Dr. Gordon advises all of his patients to maintain their receipts to evidence what was purchased. As of now, there are more than 143,000 patients in Pennsylvania legalized to obtain, possess, and ingest medical marijuana. This necessarily means that patients are permitted lawfully to smell like marijuana.

This Court finds that Commonwealth v. Hicks, *supra*, applies to the within matter, and that the "plain smell" of marijuana alone no longer provides

authorities with probable cause to conduct a search of a subject vehicle. As marijuana has been legalized in Pennsylvania for medical purposes, the plain smell of burnt or raw marijuana is no longer indicative of an illegal or criminal act. In this situation, Trooper Prentice and Trooper Heimbach conducted a search of the vehicle based solely on the odor of marijuana that they both detected emanating from the vehicle.[19] However, as in Hicks where the defendant possessed a valid license to carry a concealed firearm, Defendant Timothy Barr has a valid license to possess and ingest medical marijuana. Additionally, as Dr. Gordon opined, there is no distinguishable physical difference between the green leafy medical marijuana and regular marijuana purchased on the streets, and there is no difference in odor of ingesting the medical marijuana when utilizing a vaping pen and the odor of smoking regular marijuana from an unlawful source. It is illogical, impractical, and unreasonable for Trooper Prentice and Trooper Heimbach to have concluded that there was criminal activity afoot when the Defendant was able to present them with a valid medical marijuana card which permitted him to possess and ingest marijuana. This Court is not willing to make such an irrational leap based on the within facts and circumstances and utilizing its common sense.

This is not a simple issue of "plain smell" since the legalization of medical marijuana. The smell of marijuana is no longer per se indicative of a crime. With a valid license an individual is permitted, and expected, to leave an odor of marijuana emanating from his or her person, clothes, hair, breath, and therefore, his or her vehicle.

As exemplified by the within case, there is a clear disconnect between the

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[19] It also bears noting that the education of these troopers appears to have been limited to walking past a controlled marijuana burn for a few seconds. Although good-intentioned, both

medical community and the law enforcement community. Pennsylvania legislators did not contemplate that people with legal medical marijuana cards would be arrested and prosecuted for possession of marijuana in a package that is not clearly marked with a dispensary name on it. Such actions are merely means of hampering the legalization of marijuana for medical purposes.

Based on the foregoing, this Court concludes that the search of the subject vehicle was unlawful. Consequently, all evidence seized from the vehicle, specifically the small amount of marijuana and the firearm, were unlawfully obtained. Accordingly, the Defendant's Motion to Suppress is granted, and the small amount of marijuana and the firearm are hereby suppressed.[20]

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troopers lacked knowledge about the specifics of legal/medical marijuana and its usage.

[20] As a result of this Court's determination and suppression of the evidence seized from the subject vehicle, this Court finds that the Commonwealth failed to establish a *prima facie* case of Possession of a Small Amount of Marijuana under 35 Pa. C.S.A. § 780-113(a)(31)(i). The Defendant's Petition for Writ of Habeas Corpus is granted.

APPENDIX B

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	No. 0279/2019
	)	2347 EDA 2019
TIMOTHY OLIVER BARR, II,	)	
Defendant	)	

ORDER

NOW, this 14th day of August, 2019, it appearing that the Commonwealth filed a Notice of Appeal of this Court's Order of August 2, 2019 which granted the Defendant's Omnibus Pretrial Motion to Suppress and Motion to Dismiss, and it further appearing that an immediate appeal would facilitate resolution of the entire case,

IT IS HEREBY ORDERED that this Court's Order of August 2, 2019, is expressly entered a final order pursuant to Pa. R.A.P. 341(c).

I, Andrea E. Naugle, Clerk of Judicial Records of the Court of Common Pleas of Lehigh County, Allentown, PA do certify that this is a true and correct copy of the original record filed in said Court.
Andrea E. Naugle, Clerk of Judicial Records

8/16/19 Date
Deputy

BY THE COURT:

Maria L. Dantos, J.

FILED
2019 AUG 15 AM 9:58
CLERK OF COURTS
LEHIGH COUNTY, PA

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)
)
vs.) No. 0279/2019
)
TIMOTHY OLIVER BARR, II,)
Defendant)

* * * * * * * * *

APPEARANCES:

HEATHER GALLAGHER, ESQUIRE,
CHIEF OF APPEAL,
On behalf of the Commonwealth

JOSHUA KAROLY, ESQUIRE,
On behalf of Defendant

FILED
2019 AUG 15 AM 9:58
CLERK OF COURTS
LEHIGH COUNTY, PA

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MEMORANDUM OPINION

MARIA L. DANTOS, J.

The Commonwealth has filed a notice of appeal from the Order of this Court dated August 2, 2019, which granted the Defendant's Motion to Suppress and Motion to Dismiss. Accordingly, we are issuing this Opinion pursuant to the provisions of Pennsylvania Rule of Appellate Procedure 1925(a).

The relevant facts are as follows: The Defendant has been charged in the above-captioned matter with Person Not to Possess Firearm,[1] Possession of a Firearm without a License,[2] and a Possession of a Small Amount of Marijuana.[3] On or about

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1 18 Pa. C.S.A. § 6105(a)(1).
2 18 Pa. C.S.A. § 6106(a)(1).
3 35 Pa. C.S.A. § 780-113(a)(31)(i).

April 3, 2019, the Defendant filed Omnibus Pretrial Motions. Argument on said motions was conducted on July 17, 2019. Thereafter, on August 2, 2019, this Court granted the Defendant's Motion to Suppress and Motion to Dismiss. The Commonwealth's appeal to the Superior Court followed on or about August 8, 2019.

Initially we note that an appeal may be taken as a matter of right from any *final order* of a lower court. Pa. R.A.P 341(a). The Pennsylvania Rules of Appellate Procedure define "final order" as follows:

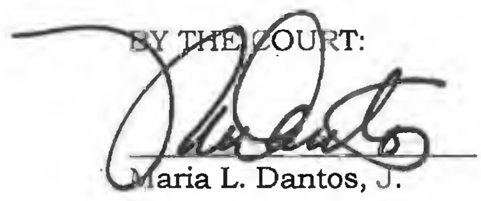
> (b) **Definition of final Order**. A final order is any order that:
> (1) disposes of all claims and of all parties; or
> (2) RESCINDED
> (3) is entered as a final order pursuant to paragraph (c) of this rule.

Pa. R.A.P. 341(b). Consequently, on August 16, 2019, this Court made a determination that an immediate appeal would facilitate resolution of the entire case and expressly entered a final order pursuant to Pa. R.A.P. 341(c).

The Commonwealth's sole contention in this matter is that this Court erred in granting the Defendant's Omnibus Pre-Trial Motion on August 2, 2019. Consequently, this Court relies on its comprehensive Opinion of August 2, 2019 which granted the Defendant's Motion to Suppress and Motion to Dismiss, and incorporates it herein.

DATED: 8/14/19

BY THE COURT:



Maria L. Dantos, J.

APPENDIX C

2020 PA Super 236

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
TIMOTHY OLIVER BARR II	:	No. 2347 EDA 2019

Appeal from the Order Entered August 2, 2019
In the Court of Common Pleas of Lehigh County Criminal Division at No(s): CP-39-CR-0000279-2019

BEFORE: BENDER, P.J.E., LAZARUS, J., and STRASSBURGER, J.*

OPINION BY BENDER, P.J.E.: **FILED SEPTEMBER 25, 2020**

This is a Commonwealth appeal from the trial court's order granting Appellee's, Timothy Oliver Barr II, motion to suppress and *habeas corpus* petition ("*habeas* petition"). In granting Appellee's suppression motion, the trial court held that the odor of marijuana no longer provides police with probable cause to search a motor vehicle from which the odor emanates because a substantial number of Pennsylvania citizens can now consume marijuana legally, calling into question the so-called plain smell doctrine. After careful review, we agree with the trial court that the odor of marijuana does not *per se* establish probable cause to conduct a warrantless search of a vehicle. However, because the trial court failed to afford that factor any weight, and did not appear to evaluate any other factors in conjunction with the odor of marijuana in its probable cause analysis, we vacate the portion of

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* Retired Senior Judge assigned to the Superior Court.

the order granting suppression and remand for reconsideration by the trial court. We also vacate the portion of the order granting Appellee's *habeas* petition, and remand for reconsideration by the trial court following resolution of the suppression issue.

The Commonwealth charged Appellee with person not to possess a firearm, 18 Pa.C.S. § 6105, possession of a firearm without a license, 18 Pa.C.S. § 6106, and possession of a small amount of marijuana ("PSAM"), 35 Pa.C.S. § 780-113(a)(31)(i), following a warrantless search of his vehicle conducted on November 7, 2018. Appellee filed a motion to suppress the seized firearm and marijuana, and a *habeas corpus* petition seeking dismissal of all charges.[1] The trial court conducted a suppression hearing on July 17, 2019. The court summarized its factual findings from that hearing as follows:

> FINDINGS OF FACT
>
> 1. On November 7, 2018, at approximately 12:30 A.M., Trooper Edward Prentice and Trooper Danielle Heimbach of the Pennsylvania State Police, Fogelsville Barracks, Troop M, were on routine patrol in full uniform and in a marked police unit on Emaus Avenue in the area of the Liberty Park at Allentown apartment complex, Allentown, Lehigh County, Pennsylvania.[5] At that time, Trooper Prentice observed a silver Chrysler 300 sedan making a U-turn in the Liberty Park at Allentown apartment complex on Allenbrook Drive, and then proceeding east on Emaus Avenue. Trooper Prentice turned his cruiser around and decided to follow the vehicle.[6]
>
> [5] Trooper Prentice was Trooper Heimbach's mentor, as Trooper Heimbach graduated from the police academy on

[1] Both the suppression motion and *habeas corpus* petition were incorporated in an omnibus pre-trial motion filed on April 3, 2019.

October 12, 2018. On that night, Trooper Prentice was operating the police cruiser and was Trooper Heimbach's training officer.

[6] No criminal activity was observed at this time. Trooper Prentice based his decision to follow the vehicle on the fact that no other cars were around, the car appeared to be traveling at a fast rate of speed, and the early hour of the night.

2. The subject vehicle drove eastbound on Emaus Avenue and made a left onto Devonshire Road/Mack Boulevard, Allentown, Lehigh County. Trooper Prentice noted that the vehicle was traveling at a fast rate of speed. However, the vehicle slowed down prior to approaching an overpass on which the vehicles are constrained to pass one at a time. Trooper Prentice and Trooper Heimbach observed that the subject vehicle failed to stop at the solid white stop line on the road at the stop sign controlling the single lane railroad overpass at Mack Boulevard and South 8th Street, Allentown, Lehigh County, Pennsylvania.[7] Consequently, observing this motor vehicle violation, a traffic stop was effectuated. The subject vehicle pulled over immediately.

[7] Both the front and rear tires passed over the solid white stop lines prior to slowly rolling through the single lane railroad overpass. At that time, another vehicle was approaching the railroad pass from a distance from the opposite lane of travel. As this vehicle was far away, no danger or safety risk was present.

3. As Trooper Prentice was "coaching" or training Trooper Heimbach, Trooper Heimbach took the lead and exited the police cruiser to investigate.[8] Trooper Heimbach approached the passenger side of the vehicle to speak with the occupants. As she approached, she smelled the odor of burnt marijuana. The driver of the vehicle was a white female, later identified as Teri Barr, [Appellee]'s wife. [Appellee] was seated in the front passenger seat and was speaking with Trooper Heimbach.[9]

[8] Trooper Prentice briefly remained in the police cruiser to perform a records check of the vehicle, as well as to notify dispatch of the traffic stop. The subject vehicle was owned by [Appellee]'s mother.

[9] Co-Defendant Luiz Monteiro was seated in the rear passenger seat behind [Appellee]. He appeared to be either

> passed out or in and out of sleep. There was limited interaction with Mr. Monteiro. Co-Defendant Monteiro did not present a medical marijuana card at the time of the traffic stop.

4. After Trooper Prentice completed his tasks in the police cruiser, he approached the vehicle on the driver's side. Upon approach, Trooper Prentice could smell the odor of both burnt and raw marijuana through the open window of the vehicle.[10] At that time, Trooper Prentice asked the driver to exit the vehicle so that he could interview her and confirm that she was not under the influence and incapable of safe driving. He stepped back to make room for her egress from the vehicle. When Trooper Prentice overheard the passenger arguing with Trooper Heimbach and stating[,] "no one is getting out of this fucking car," Trooper Prentice walked back to the driver's side door. The argument ensued for approximately two (2) to three (3) minutes, until members of the Allentown Police Department arrived as backup.[11] When members of the Allentown Police Department arrived, [Appellee]'s attitude changed and he became more cooperative. He exited the vehicle, along with the other occupants. They were patted down for officer safety.

> [10] Trooper Prentice testified that he could smell the odor of raw and burnt marijuana through the open window when he was at the rear of the vehicle. This [c]ourt takes issue with this testimony of Trooper Prentice and finds it not to be credible. Indeed, it is only reasonable to conclude that one (1) odor would trump the other odor, and that Trooper Prentice was not able to detect both raw and burnt marijuana. Also, this [c]ourt notes that the amount of raw marijuana located in the vehicle in a sealed Ziploc bag was only .79 grams. It is unfathomable to this [c]ourt that Trooper Prentice was able to detect the odor of both raw and burnt marijuana.

> [11] Trooper Prentice had called for assistance when he realized that [Appellee] was not being cooperative and was preventing his wife from complying with [the trooper's] commands and exiting the vehicle.

5. Trooper Prentice advised the occupants of the vehicle that he could search the vehicle pursuant to ***Commonwealth v. Gary***, ... 91 A.3d 102 ([Pa.] 2014), as the odor of marijuana provided them with probable cause. At that time, [Appellee] presented Trooper

Prentice with a medical marijuana identification card that allows him to possess and ingest medical marijuana pursuant to this license.[12] Trooper Prentice admitted that while he knew that green leafy marijuana was legal for medical purposes, he was not familiar with how a person ingests green leafy medical marijuana.[13] Also, Trooper Prentice was under the misconception that medical marijuana, when ingested through a vaping pen, has no odor.[14]

> [12] At the time of the hearing, [Appellee] presented a receipt for medical flower marijuana purchased from a dispensary on November 2, 2018, totaling $85.00. Neither Trooper Prentice nor Trooper Heimbach recalled that [Appellee] presented this receipt to them at the time of the traffic stop.
>
> [13] While in the presence of the Allentown Police Department and captured on the body cam of a member of the Allentown Police Department, Trooper Prentice indicated that "if he's allowed to have it, I'm fine with that. I'm not going to fucking worry about it."
>
> [14] Trooper Heimbach was frank with this [c]ourt and stated that she did not know how medical marijuana was ingested. She also indicated that at the time of the preliminary hearing in this matter (and consequently, at the time of the vehicle stop) she was under the misimpression that green leafy marijuana was illegal and not used for medical purposes.

6. Trooper Heimbach and Trooper Prentice then conducted a probable cause search of the vehicle based on the odor of marijuana that they detected therein. The search of the vehicle yielded marijuana "shake"[15] throughout the cabin area, as well as a sealed Ziploc plastic bag containing marijuana[16] between the front passenger seat and the center console. The marijuana weighed .79 grams. The Ziploc plastic bag did not have any markings or barcodes on it that would be indicative of coming from a medical marijuana dispensary.[17] Trooper Prentice indicated that the odor of burnt marijuana got stronger in the area of the center console of the vehicle.

> [15] Trooper Prentice explained that marijuana "shake" served as evidence that marijuana was being smoked in the vehicle, but did not amount to a prosecutorial amount. Indeed, generally "shake" is a residual amount of

> marijuana. No photos of the "shake" were taken at the time of the traffic stop.
>
> [16] The suspected marijuana field-tested positive for marijuana.
>
> [17] Trooper Prentice testified that he was trained that medical marijuana has to remain in the original packaging that it is received in from the dispensary, from the time that it is opened until the time that the contents are totally consumed. As the baggie located in the vehicle had no markings on it that were indicative of being medical marijuana, Trooper Prentice grew concerned and skeptical that the contents were medical marijuana. However, Trooper Prentice did acknowledge that he did not know if the packaging of medical marijuana included an inner baggie like the one located in the center console of the vehicle. Similarly, Trooper Heimbach indicated that she did not know how medical marijuana was packaged.

7. In addition, Trooper Prentice searched the rear of the vehicle. On the floor of the rear passenger compartment, tucked halfway under the front driver's seat, Trooper Prentice located a jacket with "OBH" markings on it rolled up in a ball. Therein, Trooper Prentice found a loaded black handgun, with one (1) bullet in the chamber and four (4) rounds in the magazine. Trooper Prentice believed the jacket to belong to [Appellee]. Consequently, Trooper Prentice advised the members of the Allentown Police Department to detain the three (3) occupants of the vehicle. Further search of the vehicle yielded an Apple logo baggie with new clear plastic baggies therein. These small baggies were located in the trunk of the vehicle. Trooper Prentice testified that they were consistent with the packaging of drugs for distribution, as well as the baggie of marijuana found between the front passenger seat and the center console.

8. David Gordon, M.D., a retired heart and lung surgeon in the Lehigh Valley and an expert in the field of medical marijuana, is one of the pioneer physicians in Pennsylvania to assess patients and determine if they have a qualifying condition under the law to be prescribed medical marijuana. Dr. Gordon was the physician who made the recommendation that [Appellee] qualified for a medical marijuana card based on his underlying medical condition/diagnosis.

> 9. Dr. Gordon explained that there is no distinguishable physical difference between the green leafy medical marijuana and regular marijuana purchased on the streets. Indeed, the chemical compositions are the same. Dr. Gordon further explained how a person lawfully ingests green leafy medical marijuana. He indicated that the green leafy marijuana is placed in a battery-operated vaping pen that heats up the marijuana without combustion, producing a vapor. A person then breathes in the vapors through the vaping pen. Dr. Gordon indicated it is a violation of regulations to smoke medical marijuana without a vaping pen, such as placing it into cigarettes or pipes.
>
> 10. Dr. Gordon stated that there is no difference in odor of ingesting the medical marijuana when utilizing a vaping pen and the odor of smoking regular marijuana from an unlawful source.
>
> 11. Dr. Gordon is familiar with the packaging of medical marijuana and explained that it can be dispensed in a plastic container similar to a pill bottle, which then has a plastic bag in it containing the medical marijuana. Dr. Gordon believed that the inner plastic bag does contain some marking on it to reflect that it was purchased at a medical marijuana dispensary, but he was not certain. Dr. Gordon advises all of his patients to maintain their receipts to evidence what was purchased.
>
> 12. As of now, there are more than 143,000 patients in Pennsylvania legalized to obtain, possess, and ingest medical marijuana.
>
> 13. Dr. Gordon opined that there is a clear disconnect between the medical community and the law enforcement community with respect to the legalization of marijuana.

Trial Court Opinion (TCO), 8/2/19, at 2-8 (citations to hearing exhibits omitted).

On August 2, 2019, the trial court issued an opinion and order granting both Appellee's suppression motion and his *habeas* petition.[2] The

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[2] The order granted suppression of all evidence obtained during the search of Appellee's vehicle. Order, 8/2/19, at 1 (single page). The order is somewhat

Commonwealth filed a timely notice of appeal on August 8, 2019. On August 15, 2019, the trial court ruled that its August 2, 2019 order granting Appellee's suppression motion and *habeas* petition was a final order. ***See*** Order, 8/15/19, at 1 (single page) (citing Pa.R.A.P. 341(c) (permitting "the trial court" to "enter a final order as to one or more but fewer than all of the claims and parties only upon an express determination that an immediate appeal would facilitate resolution of the entire case" which then "becomes appealable when entered")). The court did not order the Commonwealth to file a Pa.R.A.P. 1925(b) statement. The trial court filed a Rule 1925(a) opinion, which fully adopted its August 2, 2019 opinion, to address the Commonwealth's claims. ***See*** Rule 1925(a) Opinion, 8/14/19, at 2. In addition to the briefs filed by the Commonwealth and Appellee, the Defender Association of Philadelphia and the American Civil Liberties Union of Pennsylvania filed an *Amici Curiae* brief ("*Amici* Brief") in support of the order granting suppression.

The Commonwealth now presents the following questions for our review:

> I. Did the trial court err in granting [Appellee]'s motion to suppress the drugs and firearm seized by Pennsylvania State

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inconsistent with regard to the *habeas* petition. Appellee sought dismissal of all charges in his *habeas* petition, and the order initially indicated that the *habeas* petition was granted. ***Id.*** However, the order then stated that only the PSAM charge was dismissed. ***Id.*** The lower court docket also reflects that only the PSAM charge was dismissed by the trial court.

> Police where the search of the vehicle in which [he] was a passenger was supported by probable cause?
>
> II. Did the trial court err in granting [Appellee]'s [*habeas* petition] with regard to Count 3, [PSAM,] at the same time it granted [his] [m]otion to [s]uppress and where the Commonwealth established that it was more probable than not that [he] possessed the marijuana in violation of the Controlled Substances Act, 35 P.S. § 780-113(a)(31)(i)?

Commonwealth's Brief at 4.

I

The Commonwealth's first claim presents a multipart argument that the trial court erred in determining that the police lacked probable cause to conduct a warrantless search of Appellee's vehicle.[3]

> We begin by noting that where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible. In reviewing the ruling of a suppression court, our task is to determine whether the factual findings are supported by the record. If so, we are bound by those findings. Where, as here, it is the Commonwealth who is appealing the decision of the suppression court, we must consider only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole remains uncontradicted.

Commonwealth v. DeWitt, 608 A.2d 1030, 1031 (Pa. 1992) (citations omitted).

> Both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect

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[3] We refer to "Appellee's vehicle" for convenience, while we recognize that Appellee was a passenger in the vehicle that his wife was driving. In any event, the Commonwealth makes no claims that Appellee lacked standing to challenge the search of the vehicle, nor does it claim that he lacked a reasonable expectation of privacy therein.

> individuals from unreasonable searches and seizures by police in areas where individuals have a reasonable expectation of privacy. An expectation of privacy exists if a person has a subjective expectation of privacy that society is willing to recognize as legitimate and reasonable. Where there exists a reasonable expectation of privacy, Article I, Section 8 and the Fourth Amendment generally require police to obtain a warrant, issued by a neutral and detached magistrate and founded upon probable cause, prior to conducting a search or seizure of a person and/or a person's property, unless one of the few well delineated exceptions apply. One such exception is the automobile exception, adopted by this Court in ***Gary***, which permits the search and/or seizure of a motor vehicle if supported by probable cause—no separate finding of exigent circumstances is required.

Commonwealth v. Loughnane, 173 A.3d 733, 741 (Pa. 2017) (some citations omitted).

In the case *sub judice*, it is undisputed that the automobile exception applies if the police possessed probable cause to believe that a search of the vehicle would uncover evidence of a crime. "In determining whether probable cause exists, we apply a totality of the circumstances test." ***Commonwealth v. Thompson***, 985 A.2d 928, 931 (Pa. 2009). "Probable cause is a practical, nontechnical conception: it is a fluid concept-turning on the assessment of probabilities in particular factual contexts not readily, or even usefully, reduced to a neat set of legal rules." ***Commonwealth v. Glass***, 754 A.2d 655, 663 (Pa. 2000) (cleaned up).

The Commonwealth first asserts that it has long been the case that the odor of marijuana is alone sufficient to demonstrate probable cause to conduct a search. Commonwealth's Brief at 14-15. Second, the Commonwealth argues that, contrary to the trial court's analysis, this long-held rule has

neither been altered by intervening legislation, namely, the Medical Marijuana Act ("MMA"), 35 P.S. § 10231.101 *et seq.*, nor by our Supreme Court's recent decision in ***Commonwealth v. Hicks***, 208 A.3d 916 (Pa. 2019) (holding that the presence of a concealed firearm, alone, does not provide police with reasonable suspicion that criminal activity is afoot). Commonwealth's Brief at 16-32. Third, the Commonwealth contends that even if the odor of marijuana does not itself establish probable cause, it is nonetheless a relevant fact that, in conjunction with other factors, may contribute to a finding of probable cause. ***Id.*** at 32-36. Under that view, the Commonwealth argues that the trial court erred by affording the odor of marijuana no weight in assessing the at-issue search under the totality of the circumstances test for probable cause, and by failing to consider other relevant factors.

Prior Precedent

The Commonwealth first argues that prior precedent firmly establishes that the odor of marijuana, alone, provides probable cause to search a vehicle. Appellee partially concedes this point. ***See*** Appellee's Brief at 12-13 (stating that in ***Commonwealth v. Stoner***, 334 A.2d 633 (Pa. Super. 1975), "the [C]ourt adopted the rationale in ***United States v. Ventresca***, 380 U.S. 102 (1965)[,] and ***Johnson v. United States***, 333 U.S. 10 (1948)[,] that an odor may be sufficient to establish probable cause for the issuance of a search warrant[,]" and that ... "Pennsylvania courts held thereafter that the plain smell of marijuana alone was sufficient to establish probable cause due to marijuana's distinctive odor and illegal status"). Appellee rejects the notion

that the ***Stoner*** Court adopted a *per se* legal rule. However conceived, Appellee maintains, and the trial court agreed, that the plain smell doctrine was contingent upon the previously universal factual premise that the possession of marijuana was always and necessarily illegal; *i.e.*, the detection of marijuana by smell was previously *always* evidence of criminal activity. They argue that the MMA changed that universal factual assumption in Pennsylvania and, applying the reasoning of ***Hicks***, the odor of marijuana is no longer alone sufficient to establish probable cause to believe criminal activity is afoot.

Initially, we agree with the Commonwealth that prior cases in this Commonwealth established that the odor of marijuana ***may*** be alone sufficient to establish probable cause for a search, as conceded by Appellee. We need not belabor that point; however, clarification of the nature of that rule is warranted. The Commonwealth seems to further argue that the odor of marijuana is ***always*** sufficient to establish probable cause under the prior precedent, suggesting the existence of a *per se* rule of law that applies regardless of any other circumstances known to an officer prior to his conducting a search. We disagree with this conception of the plain smell doctrine as a *per se* legal rule.

To the contrary, courts have routinely held that the odor of marijuana is ***a factor*** for consideration in a determination of the existence of probable cause, a factor that was dispositive, or almost always controlling, in the prior factual context of the substance's universal illegality. As this Court stated in

Commonwealth v. Trenge, 451 A.2d 701 (Pa. Super. 1982), "[a]t least since the Supreme Court of the United States decided ***Johnson v. United States***, 333 U.S. 10 ... (1948), it has been clear that probable cause ***may*** be established" by the odor of marijuana alone. ***Trenge***, 451 A.2d at 706 (emphasis added). In ***Johnson***, the Supreme Court explained:

> If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one ***sufficiently distinctive to identify a forbidden substance***, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it ***might very well be*** found to be ***evidence of most persuasive character***.

Johnson, 333 U.S. at 13 (emphasis added). Justice Jackson did not articulate a *per se* rule regarding the odor of obvious contraband in ***Johnson***. Instead, he clearly expressed that the odor of a "forbidden" substance is a factor that "might" constitute evidence of the "most persuasive character" when considered in the totality-of-the-circumstances test for probable cause. ***Id.***

In ***Stoner***, this Court explicitly adopted the reasoning of ***Johnson***, stating that the "Supreme Court of the United States has held that an odor ***may*** be sufficient to establish probable cause for the issuance of a search warrant." ***Stoner***, 344 A.2d at 635 (citing ***Johnson***) (emphasis added). The ***Stoner*** Court further opined that it "would have been a dereliction of duty for [an officer] to ignore the obvious aroma of an illegal drug which he was trained to identify." ***Id. Stoner*** neither departed from nor exceeded the rationale of ***Johnson***, that the detection of an odor of a ***prohibited*** substance ***may*** be sufficient by itself to establish probable cause. Applying that rule in the

context of a legal environment where virtually every instance of possession of marijuana is illegal, the odor of marijuana becomes dispositive in establishing probable cause to conduct a search for that substance.

This is assuming, of course, yet another factual premise upon which all plain smell cases are contingent—that the odor in question is emanating from the location sought to be searched. ***See, e.g.***, ***Commonwealth v. Scott***, 210 A.3d 359, 365 (Pa. Super. 2019) (holding "the odor of burnt marijuana and small amount of contraband recovered from the passenger compartment of the vehicle did not create a fair probability that the officer could recover additional contraband in the trunk" because, citing the suppression court in that case, the "officers could only smell burnt marijuana as a result of [the defendant's] having just smoked a blunt in the car and therefore they could not discern the odor of fresh marijuana that would lead them to reasonably believe additional narcotics had been concealed within the vehicle"). While that factor is not at issue in this case, it further serves to demonstrate the absence of a *per se* rule giving police *carte blanche* authority to search based on the odor of marijuana despite any circumstances that might serve to undermine the otherwise strong inference of criminal activity that the odor typically implied. A *per se* rule undermines the very nature of the totality-of-the-circumstances test for probable cause, which is "a fluid concept-turning on the assessment of probabilities ***in particular factual contexts*** not readily, or even usefully, reduced to a neat set of legal rules." ***Glass***, 754 A.2d at 663 (emphasis added).

Thus, contrary to the Commonwealth's claim, there is no preexisting, *per se* rule that the odor of marijuana is ***always*** sufficient to establish probable cause to believe a crime is being committed. Rather, the existing rule, properly stated, is that the odor of marijuana ***may*** alone be sufficient to establish probable cause to search in particular factual contexts. In practical terms, historically, the circumstances wherein the odor of marijuana would not alone be sufficient to establish probable cause were necessarily rare or even nonexistent when marijuana was, in all or virtually all circumstances, illegal to possess. To the extent that the Commonwealth suggests a *per se* rule existed prior to, much less survived the MMA, and that the trial court erred by failing to mechanically follow that rule once it deemed credible that the odor had been detected by the police, we deem that aspect of its claim to be meritless. The trial court was free to weigh the inference of criminality implied by the odor of marijuana against other relevant facts known to the officers in determining whether they possessed probable cause to conduct the search.

MMA

Next, the Commonwealth contends that the MMA "did not legalize nor did it render possession or use of marijuana presumptively legal." Commonwealth's Brief at 18. Thus, the Commonwealth argues that the "MMA merely constitutes one limited exception" to the Controlled Substance, Drug, Device, and Cosmetic Act ("CSA") and that "Pennsylvania's long[-]standing

precedent that the smell of marijuana establishes probable cause ... control[s]." ***Id.***

In ***Commonwealth v. Jezzi***, 208 A.3d 1105 (Pa. Super. 2019), this Court described the interplay between the MMA and the CSA as follows:

> This appeal involves the interplay of two public safety statutes; the first statute is the CSA, which describes five schedules of controlled substances. 35 P.S. § 780-104. In outlining the Schedule I substances, the Act states:
>
> > **§ 780-104. Schedules of controlled substances**
> >
> > **(1) Schedule I**—In determining that a substance comes within this schedule, the secretary shall find: a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. The following controlled substances are included in this schedule:
> >
> > ***
> >
> > (iv) Marihuana.
>
> 35 P.S. § 780-104(1)(iv) (effective June 14, 1972).
>
> The second statute is the MMA, which states in its declaration of policy:
>
> > **§ 10231.102. Declaration of policy**
> >
> > The General Assembly finds and declares as follows:
> >
> > (1) Scientific evidence suggests that medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life.
> >
> > (2) The Commonwealth is committed to patient safety. Carefully regulating the program which allows access to medical marijuana will enhance patient safety while research into its effectiveness continues.
> >
> > (3) It is the intent of the General Assembly to:

(i) Provide a program of access to medical marijuana which balances the need of patients to have access to the latest treatments with the need to promote patient safety.

(ii) Provide a safe and effective method of delivery of medical marijuana to patients.

(iii) Promote high quality research into the effectiveness and utility of medical marijuana.

(4) It is the further intention of the General Assembly that any Commonwealth-based program to provide access to medical marijuana serve as a temporary measure, pending Federal approval of and access to medical marijuana through traditional medical and pharmaceutical avenues.

35 P.S. § 10231.102(1)-(4) (emphasis added). In essence, the MMA creates a temporary program for qualified persons to access medical marijuana, for the safe and effective delivery of medical marijuana, and for research into the effectiveness and utility of medical marijuana. ***Id.***; 35 P.S. § 10231.301. Significantly, the MMA does not declare that marijuana is safe and effective for medical use; instead, the MMA is a temporary vehicle to access the substance pending research into its medical efficacy and utility. 35 P.S. § 10231.102(1)-(4).

Section 10231.303 of the MMA allows for the limited lawful use of medical marijuana, and pertinent to this case, Section 10231.304 emphasizes the unlawful use of medical marijuana:

§ 10231.304. Unlawful use of medical marijuana

(a) General rule.—Except as provided in section 303, section 704, Chapter 19 or Chapter 20, the use of medical marijuana is unlawful and shall, in addition to any other penalty provided by law, be deemed a violation of the [CSA].

(b) Unlawful use described.—It is unlawful to:

(1) Smoke medical marijuana.

(2) Except as provided under subsection (c), incorporate medical marijuana into edible form.

> (3) Grow medical marijuana unless the grower/processor has received a permit from the department under this act.
>
> (4) Grow or dispense medical marijuana unless authorized as a healthy medical marijuana organization under Chapter 19.
>
> (5) Dispense medical marijuana unless the dispensary has received a permit from the department under this act.
>
> **(c) Edible medical marijuana.**—Nothing in this act shall be construed to preclude the incorporation of medical marijuana into edible form by a patient or a caregiver in order to aid ingestion of the medical marijuana by the patient.

> 35 P.S. § 10231.304. Further, the MMA states: "The growth, processing, distribution, possession and consumption of medical marijuana permitted under [the MMA] shall not be deemed a violation of the [CSA]" and "[i]f a provision of the [CSA] relating to marijuana conflicts with a provision of [the MMA], [the MMA] shall take precedence." 35 P.S. § 10231.2101. In other words, compliance with the MMA will not constitute a crime under the CSA. ***Id.***

Jezzi, 208 A.3d at 1111–12 (footnotes omitted).

As established above, the plain smell doctrine is a specific application of the totality-of-the-circumstances test for probable cause, crafted in light of the previously universal fact of marijuana's illegality and its distinctive odor. The MMA has clearly altered the underlying factual context in which that probable cause test applies. ***See*** *Amici* Brief at 5 ("The logical nexus between smelling marijuana in a car and the likelihood of finding unlawfully possessed narcotics is not immune to the effects of time and changes in law; it is affected and altered by both."). This much is true: marijuana is a prohibited substance

under the CSA, despite the passage of the MMA.[4] However, it is undisputed that a substantial number of Pennsylvania citizens may now possess and consume marijuana legally pursuant to the MMA.[5] Previously, every instance in which marijuana was detected by smell indicated the commission of a crime. Soon, hundreds of thousands of Pennsylvanians will become potential lawful sources of that same odor. Thus, the strength of the inference of illegality stemming from the odor of marijuana has necessarily been diminished by the MMA in Pennsylvania.

The Commonwealth cites several post-MMA cases by this Court, implying that the MMA has not affected the plain smell doctrine. However, the cited decisions do not preclude a finding by a suppression court that probable cause is lacking, despite a credible finding that police smelled marijuana coming from the location to be searched, nor do they provide analogous facts to the instant case that are controlling here.

First, in ***Commonwealth v. Handley***, 213 A.3d 1030 (Pa. Super. 2019), the police responded to a report that Handley had an argument with a utility worker outside of his home, and that he had threatened to get a gun from inside the house. ***Id.*** at 1033. The worker also reported that he heard

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[4] As the ***Jezzi*** Court held, "the CSA and the MMA can be read in harmony and given full effect...." ***Jezzi***, 208 A.3d at 1115.

[5] As noted by *Amici Curiae*, nearly 163,000 Pennsylvania have active medical marijuana cards in Pennsylvania, and some 70,000 more are pending approval. ***See*** *Amici* Brief at 4. The Commonwealth does not dispute these statistics.

"four or five gunshots" after Handley returned to his residence. ***Id.*** When police arrived, they detected "a strong odor of marijuana" coming from the house. ***Id.*** Handley did not respond when the officers knocked on his door. ***Id.*** Additionally, the police observed a firearm inside the house from their vantage point on the front porch, and they further discovered marijuana leaves and stems protruding from garbage bags that were outside the home. ***Id.*** at 1033-34. Based on this information, the police obtained a warrant to search the home. ***Id.*** at 1034. A subsequent search yielded "33 marijuana plants and numerous jars containing marijuana." ***Id.*** Handley filed a suppression motion, which was denied.

On appeal, Handley argued that the police lacked probable cause to secure the search warrant. The ***Handley*** Court disagreed, stating, *inter alia*, that a "strong smell of marijuana emanating from a residence creates probable cause to procure a search warrant" and that "the odor of marijuana, in and of itself, was sufficient to support issuance of a warrant." ***Id.*** at 1035 (citing ***Commonwealth v. Johnson***, 68 A.3d 930 (Pa. Super. 2013) (hereinafter, "***PA Johnson***," and ***Commonwealth v. Waddell***, 61 A.3d 198 (Pa. Super. 2012)).

On first glance, ***Handley*** may appear to support the Commonwealth's position. However, under further scrutiny, it is easily distinguishable from the case *sub judice*. Although ***Handley*** was decided after passage of the MMA,

the search at issue in that case occurred several years prior.[6] Thus, at the time the warrant in ***Handley*** was secured, there was no possibility that Handley lawfully possessed the marijuana detected by the investigating officers pursuant to the MMA, and Handley presented no such claim on appeal. The ***Handley*** Court relied on prior expressions of the plain smell doctrine in ***PA Johnson*** and ***Waddell***, both cases that were issued several years before the MMA could have contributed to the factual context in which a probable cause determination is made, and both of which involved facts that far exceeded the mere smell of marijuana as the justification for a search.[7]

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[6] As noted by the ***Handley*** Court, the MMA "took effect on May 17, 2016." ***Id.*** at 1036. Handley's home was searched nearly a year before on August 27, 2015. ***Id.*** at 1033.

[7] In ***Waddell***, this Court did not 'hold' that the odor of marijuana was in-and-of-itself sufficient to establish probable cause. Indeed, ***Waddell*** was not even a probable cause case. The issue in ***Waddell*** was whether exigent circumstances existed to search a home without a warrant, not whether police possessed probable cause for the search. ***Waddell***, 61 A.3d at 207. In any event, numerous facts supported a determination of probable cause in that case, including: a tip from an informant that the home was used for distributing marijuana; observations of suspicious persons going to and from the residence with backpacks purportedly containing marijuana; and a person stopped after leaving Waddell's residence, who was in possession of a large quantity of marijuana, told the police that he had obtained the marijuana from Waddell's home. ***Id.*** at 208-29. Only after recounting all those contributing facts did the ***Waddell*** Court state that "the evidence certainly surpassed the threshold necessary to establish probable cause after [police] detected the smell of marijuana emanating" from Waddell's home. On appeal, Waddell even *conceded* that probable cause existed. ***Id.*** at 212. Needless to say, there were ample facts supporting a finding of probable cause to conduct the search at issue in ***Waddell*** independent of the odor detected, and the

Additionally, there were more circumstances known to the officer in ***Handley*** when he obtained the warrant beyond the mere odor of marijuana. The officer responded to a reported threat and a report of shots fired, observed a firearm inside the residence, and discovered marijuana leaves and stems in the garbage outside the residence. The Commonwealth's extraction of a single sentence from the ***Handley*** opinion, outside that greater factual context in which the probable cause determination was made, does not convince us that the rule derived from ***Stoner*** and ***Johnson*** evolved into a *per se* test.

The Commonwealth also cites ***Scott***, where police were patrolling in a high crime area when they stopped Scott's vehicle due to a malfunctioning brake light. ***Scott***, 210 A.3d at 360-61. When the officer approached the vehicle, he ***smelled*** burnt marijuana, ***saw*** "smoke was still emanating from the vehicle," and then further ***observed*** Scott "attempt to place a [marijuana]

Waddell Court had simply opined in *dicta* that the odor of marijuana was the proverbial icing on the cake.

Similarly, in ***PA Johnson***, which itself relied on ***Waddell***, police received tips from two anonymous sources that the ultimately-searched trailer park home was being used for the sale of marijuana and prescription pills, and the sources gave a specific description of one of the female suspects. ***See PA Johnson***, 68 A.3d at 931. When they arrived at the scene, police observed a woman who fit the provided description near the identified home. ***Id.*** at 932. When they approached the home, they detected the smell of burnt marijuana. ***Id.*** Based on those facts, the ***PA Johnson*** Court concluded that probable cause existed once the police detected the smell of marijuana. The ***PA Johnson*** Court did not state nor suggest that the smell of marijuana was alone sufficient to establish probable cause independent of the preceding tips and partial corroboration of those tips.

blunt" in the center console. ***Id.*** at 361 (emphasis added). The officer conducted a search of the passenger compartment and recovered the blunt and a small jar of marijuana. The officer then searched the trunk of Scott's vehicle, where he discovered an illegal firearm.

On appeal, Scott challenged only the search of his trunk, essentially conceding probable cause existed to search the passenger compartment. While presenting boilerplate law on the plain smell doctrine, the ***Scott*** Court correctly stated the standard that "an odor may be sufficient to establish probable cause[.]" ***Id.*** at 363 (quoting ***Stoner***). It then cited the application of that rule in another case, which was just another rephrasing of the rule in ***Stoner***, but from which the Commonwealth again attempts to construe a statement of a *per se* rule from a poorly-crafted recitation of boilerplate law that was not critical to the issue of probable cause in that case.[8] Indeed, the ***Scott*** Court held that, despite the odor of marijuana emanating from the vehicle, police did not possess probable cause to further search the trunk after having already discovered the likely source of the odor. ***Id.*** at 365 ("Under these circumstances, the odor of burnt marijuana and small amount of

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[8] The ***Scott*** Court quoted ***Commonwealth v. Stainbrook***, 471 A.2d 1223, 1225 (Pa. Super. 1984), wherein this Court stated: "In ***Stoner***, we analogized a plain smell concept with that of plain view and held that where an officer is justified in being where he is, his detection of the odor of marijuana is sufficient to establish probable cause." As discussed at length above, the applicable rule from ***Stoner*** is not a *per se* test. There is no suggestion in ***Stainbrook*** that the Court's omission of the word 'may' in its recitation of the standard was intentional, much less relevant to the holding in that case.

contraband recovered from the passenger compartment of the vehicle did not create a fair probability that the officer could recover additional contraband in the trunk.").

Moreover, although Scott was stopped a few months after the passage of the MMA, he did not present officers with a medical marijuana card, nor did he present an argument on appeal that the MMA altered the factual context in which probable cause is assessed based on the odor of marijuana. Indeed, the ***Scott*** Court did not address any issue related to the passage of the MMA. Accordingly, ***Scott*** also does not support the Commonwealth's arguments.

Next, in ***Commonwealth v. Batista***, 219 A.3d 1199 (Pa. Super. 2019), this Court addressed the odor of marijuana's effect on probable cause determinations in light of the MMA, and that decision does provide some guidance in the instant matter. However, it does not decide the question before us, because it is distinguishable in several respects. In that case, the police received a tip from an unidentified source that Batista's home was being used to grow large quantities of marijuana, and that the odor of fresh marijuana was emanating from an exhaust vent on the first floor. ***Id.*** at 1201. When the police went to the house to investigate, they detected a strong smell of fresh marijuana coming out of a first-floor exhaust vent. ***Id.*** The police further testified that the exhaust vent and smell were consistent with all other grow houses they had previously investigated. ***Id.*** Based on those facts, they secured a warrant to search the premises, and upon execution of the warrant, they discovered 91 marijuana plants growing in Batista's home, and charged

him with possession with intent to deliver marijuana. Batista challenged the warrant for lack of probable cause, but the suppression court denied the suppression motion, and Batista was ultimately convicted. ***Id.*** at 1201-02.

On appeal, Batista claimed, *inter alia*, that "the smell of fresh marijuana can no longer serve as an element of probable cause in Pennsylvania" after passage of the MMA. ***Id.*** at 1204–05. The ***Batista*** Court disagreed, reasoning:

> The [MMA] is a limited exception to [the CSA]. Only a "grower/processor" or "dispensary", as defined under the MMA, may "receive a permit to operate as a medical marijuana organization to grow, process, or dispense medical marijuana." 35 P.S. § 10231.601. A grower is a "natural person, corporation, partnership, association, trust or other entity, or any combination thereof, which holds a permit from the Department [of Health] under this act to grow and process medical marijuana." 35 P.S. § 10231.103.
>
> To receive a grower permit under the MMA, a person must undergo an extensive application and permitting process through the Department. ***See*** 35 P.S. § 10231.602 (requiring, among other things, full, financial disclosure of all backers; descriptions of responsibilities within the partnership or corporation; criminal background checks; statements of "good moral character[";] title searches for the land use; and personal information for all investors).
>
> The number of authorized growers and processors who have completed that administrative process is currently very small. The General Assembly has capped the number of permits for growers. "The department may not initially issue permits to more than 25 growers/processors." 35 P.S. § 10231.616.
>
> Given the extremely limited number of permits that the Department has issued, we hold that, when an officer smells fresh marijuana emanating from a building that is a reported grow-house there still exists a fair probability that the marijuana inside is illegal. Law enforcement still holds the power and the duty to investigate that probability.

> Thus, Batista has failed to persuade us that enactment of the MMA abrogates our precedents holding that the aroma of marijuana contributes to the finding of probable cause.

Batista, 219 A.3d at 1205 (footnote omitted).

Contrary to the Commonwealth's claim that a *per se*, plain-smell rule exists, the ***Batista*** Court did not apply such a rule, instead characterizing the prior precedents as establishing the rule that the odor of marijuana ***may contribute*** to a finding of probable cause. ***Id.*** The Court considered whether the odor of marijuana, in conjunction with other circumstances, contributed to a finding of probable cause, and concluded that it did—a wholly unnecessary task if the odor of marijuana was alone sufficient to establish probable cause to search Batista's home.

The additional circumstances considered were both specific to the case and universal; specific in that the odor of marijuana, and its location, had directly corroborated a tip that marijuana was being illegally grown there, and universal in the sense that the Court deliberated on the likelihood that the detected marijuana might have complied in some sense with the MMA. Because the odor corroborated the tip, in addition to the fact that it was extremely unlikely that Batista had been granted one of a handful of licenses to grow marijuana under the MMA, the ***Batista*** Court concluded that the search warrant was supported by probable cause to believe that the marijuana detected was illegal.

Here, there was no tip suggesting that Appellee or the other passengers in the vehicle were illegally using marijuana, and Appellee presented the

officers with his MMA card prior to the search at issue. Moreover, while licenses to grow marijuana under the MMA are extremely limited—on the order a few dozen statewide—hundreds of thousands of Pennsylvania citizens will soon legally possess and consume marijuana pursuant to the MMA. Thus, the likelihood that police will encounter the lawful possession and use of marijuana through its odor pursuant to the MMA is exponentially greater than the likelihood that they will discover a lawful grow house, and no facts known to police before the search was conducted supported the belief that marijuana was being manufactured or sold in or from Appellee's vehicle. Thus, ***Batista*** does not control here.

We conclude, therefore, that the post-MMA cases cited by the Commonwealth do not control our decision and, consequently, we consider the question before us in the first instance. The Commonwealth contends that the MMA did not make marijuana presumptively legal, and that it remains presumptively illegal, despite the MMA. As a factual matter, the trial court credited expert testimony that there is no distinction between legal medical marijuana and contraband marijuana that can be detected through odor alone. ***See*** TCO at 7. Nevertheless, the Commonwealth maintains that all marijuana remains presumptively illegal, and that medical marijuana exists only as a limited exception to the CSA. As far as the Commonwealth asserts that the MMA is a limited exception to the CSA, we agree. ***See Batista***, 219 A.3d at 1205. It does not follow that the odor of marijuana is always sufficient to establish probable cause, or, relatedly, that the MMA is irrelevant to the test

for probable cause. It would strain credulity to think the legislature intended that all medical marijuana users under the MMA—hundreds of thousands of Pennsylvanians already—may be presumptively subjected to searches by law enforcement due to the odor of marijuana alone. However, we need not read into the intent of the legislature here, because there is no statutory question before us. Lawful users of medical marijuana do not surrender their 4th Amendment rights merely because other citizens will continue to possess contraband marijuana in contravention of the CSA. The MMA has altered the fact of marijuana's previously universal illegality, and probable cause is a fact-driven standard "not readily, or even usefully, reduced to a neat set of legal rules." ***Glass***, 754 A.2d at 663. Thus, we conclude that the trial court did not err in merely considering the passage of the MMA as a relevant fact in its probable cause analysis. The question remains, however, whether the lower court abused its discretion in concluding that the odor of marijuana cannot contribute to a finding of probable cause in the post-MMA environment.

Hicks

Next, the Commonwealth argues that the trial court erroneously applied the reasoning of ***Hicks*** in granting Appellee's suppression motion. In ***Hicks***, our Supreme Court held that possession of a concealed firearm by an individual in public is not sufficient to create a reasonable suspicion that the individual may be dangerous or committing a criminal offense, explicitly overruling this Court's longstanding decision in ***Commonwealth v. Robinson***, 600 A.2d 957 (Pa. Super. 1991). ***Hicks***, 208 A.3d at 947. Here,

the trial court "applied" ***Hicks*** in determining "that the plain smell of marijuana alone no longer provides authorities with probable cause to conduct a search of a subject vehicle. As marijuana has been legalized in Pennsylvania for medical purposes, the plain smell of burnt or raw ***marijuana is no longer indicative of an illegal or criminal act***." TCO at 14-15 (emphasis added). The Commonwealth contends that ***Hicks*** is distinguishable because it was expressly limited to the possession of firearms, and that the rationale of ***Hicks*** cannot apply here because the possession of a concealed firearm is ostensibly not analogous to the possession of medical marijuana. Essentially, the Commonwealth maintains that possession of marijuana under the MMA is in a distinct legal category that makes it presumptively illegal in a manner that does not apply to the possession of a concealed firearm.

In ***Hicks***,

> at approximately 2:30 a.m., a remote camera operator conducting live surveillance of a gas station and convenience store ... notified police officers that a patron of the establishment was in possession of a firearm. According to the suppression court's factual recitation, the camera operator advised officers that the observed individual showed the firearm to another patron, put the firearm in his waistband, covered it with his shirt, and walked inside the convenience store.
>
> The observed individual was Michael Hicks. It later emerged that Hicks possessed a valid license to carry a concealed firearm. ***See*** 18 Pa.C.S. § 6109(a) ("A license to carry a firearm shall be for the purpose of carrying a firearm concealed on or about one's person or in a vehicle throughout this Commonwealth."). Hicks was not statutorily prohibited from possessing a firearm. Accordingly, on the morning in question, and at the observed location, there was nothing unlawful about Hicks' possession of his handgun, nor the manner in which he carried it.

> While responding police officers were en route, Hicks entered and exited the convenience store, then reentered his vehicle. Before Hicks could exit the parking lot, numerous police officers in marked vehicles intercepted and stopped Hicks' vehicle. Believing that Hicks had moved his hands around inside the vehicle, Officer Ryan Alles drew his service weapon as he approached Hicks' vehicle and ordered Hicks to keep his hands up.

Hicks, 208 A.3d at 922 (cleaned up).

The police conducted a ***Terry***[9] search and discovered a bag of marijuana in Hicks' possession. Hicks sought to suppress the evidence based on the theory that the police lacked reasonable suspicion to conduct the ***Terry*** search merely because he was observed with a concealed firearm. The suppression court denied his motion, relying on ***Robinson***, where the Superior Court held that possession of a concealed weapon in public creates a reasonable suspicion justifying an investigatory stop in order to investigate whether the person is

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[9] ***See Terry v. Ohio***, 392 U.S. 1 (1968). Importantly,

> [o]ur Supreme Court has defined three forms of police-citizen interaction: a mere encounter, an investigative detention, and a custodial detention. ***Commonwealth v. Boswell***, ... 721 A.2d 336, 340 (Pa. 1998). A mere encounter between police and a citizen "need not be supported by any level of suspicion, and carr[ies] no official compulsion on the part of the citizen to stop or to respond." ***Commonwealth v. Riley***, 715 A.2d 1131, 1134 (Pa. Super. 1998).
>
> An investigatory stop, which subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute an arrest, requires a reasonable suspicion that criminal activity is afoot. ***See Terry***..., 392 U.S. [at] 21.... A custodial detention is an arrest and must be supported by probable cause. ***Id.***

Commonwealth v. Fuller, 940 A.2d 476, 478–79 (Pa. Super. 2007).

properly licensed (the "***Robinson*** rule"). ***See Robinson***, 600 A.2d at 960-61. After this Court affirmed the order denying suppression, our Supreme Court reversed, thereby overturning ***Robinson***.

The ***Hicks*** Court began with an examination of the laws regulating the possession of firearms. The Court concluded that carrying a firearm in Pennsylvania is generally legal but subject to a few exceptions, one of which being a prohibition on carrying a concealed firearm without a license. ***Hicks***, 208 A.3d at 926. Nevertheless, the court recognized that "there can be no doubt that a properly licensed individual who carries a concealed firearm in public engages in lawful conduct. Indeed, millions of people lawfully engage in this conduct on a daily basis." ***Id.*** The ***Robinson*** rule, the ***Hicks*** Court reasoned, "characterizes the carrying of a concealed firearm as *per se* reasonable suspicion authorizing" a ***Terry*** stop "in order to investigate whether the person is properly licensed." ***Id.*** at 928. Hicks argued that nothing about his conduct gave rise to reasonable suspicion of criminal activity, including his carrying of a concealed weapon, which is lawful in Pennsylvania when licensed, and that ***Robinson*** was, *inter alia*, a misapplication of ***Terry***. ***Id.*** The Commonwealth maintained "that the *per se* approach of ***Robinson*** is a justifiable application of the ***Terry*** doctrine," and it emphasized that, "under the totality of the circumstances, 'wholly lawful conduct might justify the suspicion that criminal activity [is] afoot.'" ***Id.*** at 928–29 (quoting ***Reid v. Georgia***, 448 U.S. 438, 441 (1980)).

After a thorough review of 4th Amendment case law from this and other jurisdictions, the ***Hicks*** Court found "no justification for the notion that a police officer may infer criminal activity merely from an individual's possession of a concealed firearm in public." ***Id.*** at 936. Thus, the "***Robinson*** rule improperly dispenses with the requirement of individualized suspicion and, in so doing, misapplies the overarching totality of the circumstances test." ***Id.*** at 937. The Court explained:

> Although the carrying of a concealed firearm is unlawful for a person statutorily prohibited from firearm ownership or for a person not licensed to do so, ***see*** 18 Pa.C.S. §§ 6105-06, there is no way to ascertain an individual's licensing status, or status as a prohibited person, merely by his outward appearance. As a matter of law and common sense, a police officer observing an unknown individual can no more identify whether that individual has a license in his wallet than discern whether he is a criminal. Unless a police officer has prior knowledge that a specific individual is not permitted to carry a concealed firearm, and absent articulable facts supporting reasonable suspicion that a firearm is being used or intended to be used in a criminal manner, there simply is no justification for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity.

Id. at 936–37. Thus, the ***Hicks*** Court held that the ***Robinson*** rule violated the principles of the 4th Amendment because, "with no other criterion beyond the fact of an individual's possession of a concealed firearm necessary to justify a seizure, the ***Robinson*** rule allows a police officer to base the decision to detain a particular individual upon an 'inchoate and unparticularized suspicion' or 'hunch' that the individual is unlicensed and therefore engaged in wrongdoing." ***Id.*** at 946 (quoting ***Terry***, 392 U.S. at 27).

We agree with the Commonwealth that the trial court's direct application of ***Hicks*** to the circumstances of this case constituted an abuse of discretion. First, as is obvious, the holding in ***Hicks*** could not directly apply because it concerned what constitutes reasonable suspicion of criminality justifying a ***Terry*** stop when possession of a concealed firearm is observed, not whether probable cause to search a vehicle exists based on the odor of marijuana alone. Moreover, even assuming the trial court merely adopted the reasoning of ***Hicks***, the respective conduct is not sufficiently analogous to compel an identical result. The possession of a firearm is generally legal, with limited exceptions. The possession of marijuana, by contrast, remains generally illegal, but for the limited exception of lawful possession of medical marijuana pursuant to the MMA.

Thus, we simply cannot sustain the trial court's conclusion, based on ***Hicks***, that because "marijuana has been legalized in Pennsylvania for medical purposes, the plain smell of burnt or raw marijuana is no longer indicative of an illegal or criminal act." TCO at 15. The odor of marijuana may still be indicative of an illegal or criminal act, because the possession of marijuana remains generally illegal. This is especially true when other circumstances suggest that the detected marijuana cannot be in compliance with the MMA, such as was the case in ***Batista***.

However, the reasoning in ***Hicks*** is not completely irrelevant here. While there is a legal distinction to be made between possession of marijuana and possession of a concealed firearm, the ***Hicks*** decision was not premised solely

on the general legality of firearms. ***See Hicks***, 208 A.3d at 945 ("The seizure at issue was not unconstitutional due to the statutory classification of Hicks' license; it was unconstitutional because the police officers had no way of determining from Hicks' conduct or appearance that he was likely to be unlicensed and therefore engaged in criminal wrongdoing."). It remains a fact that police cannot distinguish between contraband marijuana and medical marijuana legally consumed by a substantial number of Pennsylvanians based on odor alone,[10] just as police cannot determine from a person's possession of a concealed firearm that he or she is unlicensed to carry it concealed.

The Commonwealth argues that there is no way for law enforcement to determine whether someone is complying with the MMA "absent investigation," and therefore the MMA "cannot have a negative impact on an officer's assessment of probable cause." Commonwealth's Brief at 27. The second proposition does not flow from the first. It is precisely because the police cannot discern lawful from unlawful conduct by the odor of marijuana alone that the police may need to rely on other circumstances to establish probable cause to believe that the possession of marijuana detected by that odor is criminal.

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[10] The Commonwealth contests this point, arguing that the smell of burnt marijuana indicates that the substance had been smoked, which is illegal under the MMA. Commonwealth's Brief at 31. However, the trial court credited the expert witness's testimony that vaporizing medical marijuana, which is a legal method of consumption under the MMA, produces an identical odor to burning marijuana. ***See*** TCO at 14.

To the extent that the Commonwealth implies that the MMA exists only as an affirmative defense to the CSA, and that compliance with the MMA is a matter irrelevant to the probable cause test, there is no statutory support for such a claim. Although marijuana is generally illegal under the CSA, nowhere in the MMA does the legislature purport to create an affirmative defense to CSA crimes. Rather, the MMA declares that medical marijuana is legal, and that it takes precedence over conflicting provisions in the CSA. ***See*** 35 Pa.C.S. § 10231.2101.

In any event, even if the MMA provides an affirmative defense to the CSA, the ***Hicks*** Court rejected the so-called "element-or-defense" test for 4th Amendment questions:

> The element-or-defense test amounts to a "seize now and sort it out later" approach. This is antithetical to the foundational protections of the Fourth Amendment. It casts too wide a net, with no regard for the number of law-abiding citizens ensnared within.

Hicks, 208 A.3d at 944. The Court further elaborated that "it is certainly the legislature's prerogative to define the elements of crimes and to set forth affirmative defenses. However, the constitutionality of enforcement tactics is a matter of judicial concern." ***Id.*** at 943.

One of the primary concerns when courts consider the constitutionality of a search or seizure is whether individualized suspicion is present.

> In addition to the reasonableness of the search and seizure, the Fourth Amendment generally requires the presence of individualized suspicion to justify a seizure. ***City of Indianapolis v. Edmond***, 531 U.S. 32, 37 (2000); .... The courts of this

> Commonwealth and federal courts have recognized limited circumstances where the general rule does not apply.

Commonwealth v. Mistler, 912 A.2d 1265, 1271 (Pa. 2006). No recognized exceptions apply in this case, and the Commonwealth presents no argument to that effect. As such, particularized suspicion was required to justify the search. In this regard, the ***Hicks*** Court instructs:

> When many people are licensed to do something, and violate no law by doing that thing, common sense dictates that the police officer cannot assume that any given person doing it is breaking the law. Absent some other circumstances giving rise to a suspicion of criminality, a [search or] seizure upon that basis alone is unreasonable.

Hicks, 208 A.3d at 945.

Here, 'many people' are licensed to consume marijuana under the MMA, and 'violate no law' by doing so. The odor of marijuana alone, absent any other circumstances, cannot provide individualized suspicion of criminal activity when hundreds of thousands of Pennsylvanians can lawfully produce that odor. What it does provide to police is a general, probabilistic suspicion of criminal activity based on the fact that most citizens cannot legally consume marijuana. Thus, it is a factor that can contribute to a finding of probable cause, consistent with prior precedent discussed above, assuming some other circumstances supply more individualized suspicion that the activity is criminal. This does not imply a change in the probable cause test, because, previously, the possession of marijuana was universally illegal. That universal factual circumstance established particularized suspicion of criminal activity, because ***every*** instance of possession of marijuana was previously a crime.

However, here, the trial court afforded the odor of marijuana no weight in its determination that police lacked probable cause to search Appellee's vehicle. That extreme view is not justified by the ***Hicks*** decision. The general illegality of marijuana under the CSA cannot simply be ignored merely because it is lawfully used in limited circumstances under the MMA and, thus, we must reject the trial court's conclusion that the odor of marijuana provides no indication of criminal activity. At the same time, those who act in compliance with the MMA should not be subjected to searches based solely on a generalized suspicion that is provided by that odor when the 4th Amendment also requires particularized suspicion.

Other Factors Supporting a Finding of Probable Cause

In the Commonwealth's final suppression argument, it contends that, even assuming the odor of marijuana does not alone establish probable cause, it can still be a contributing factor to a finding of probable cause. As discussed above, we agree with this general statement of the state of the plain smell doctrine. The Commonwealth further argues that "there were ample other uncontradicted factors in addition to the smell of burnt marijuana that when considered in their totality and objectively, provided police with ... probable cause to support the search of the vehicle." Commonwealth's Brief at 32. Specifically, the Commonwealth contends that the following factors were not adequately considered by the trial court: 1) Trooper Prentice's training and experience with regard to narcotics investigations; 2) Trooper Prentice's identification of the area where Appellee's vehicle was stopped as a high crime

area; 3) Appellee's numerous statements prior to the search; and 4) Appellee's change in demeanor upon the arrival of more police officers. ***Id.*** at 33-34. The Commonwealth asserts that a "common sense and objective view of these facts" adds up to probable cause to believe that criminal activity was afoot. ***Id.*** at 34.

Assuming the trial court found the officers' testimony entirely credible, it should have considered those factors, in addition to the odor of marijuana, in determining whether police possessed probable cause to search Appellee's vehicle. Unfortunately, and perhaps because the trial court afforded no weight to the odor of marijuana as a contributing factor to a finding of probable cause based on its misapplication or overstatement of ***Hicks***'s applicability here, the court failed to provide us with discrete credibility assessments relevant to the other potential factors affecting probable cause in its opinion.

For instance, the Commonwealth contends that Trooper Prentice essentially testified that Appellee's vehicle was stopped in a 'high crime area.' However, while we acknowledge the trooper testified that he had made many drug and gun arrests in the area of the stop, ***see*** N.T., 7/17/19, at 14, he did not offer an opinion as to whether that area was any more likely to produce gun and/or drug arrests than any other area. Thus, we cannot state that it is clear and uncontradicted from the record that the stop occurred in a high crime area, or simply in an area where Trooper Prentice has conducted arrests for common crimes. The trial court did not include this aspect of Trooper Prentice's testimony in the summary of its findings of fact, nor include it in its

legal analysis. If this was because the court determined that Trooper Prentice's testimony did not establish that the stop occurred in a high crime area, it did not say so.

Similarly, the Commonwealth contends that Appellee's statements and related behavior preceding the search, in conjunction with the odor of marijuana, should have also been considered in the trial court's probable cause analysis. Although the trial court recounted those statements in its findings of fact, the court did not appear to consider them at all. If the court believed those statements did not contribute in any way to a potential finding of probable cause to suspect criminal activity, it failed to explain how it reached that conclusion. Nor did the trial court address the trooper's observation that Appellee's demeanor changed when backup arrived.

In sum, the factual record before us is inadequate to conclude whether police possessed probable cause to search Appellee's vehicle. While the odor of marijuana may contribute to a finding of probable cause, as possession of marijuana remains illegal generally, the odor alone does not imply individualized suspicion of criminal activity, and Appellee's presentation of an MMA card was at least one factor that tends to undermine the inference of criminality. However, other potentially relevant factors were not considered by the trial court, and the court's credibility assessments of the testimony ostensibly establishing those factors are not in the record. Thus, the most prudent course of action is to remand for reconsideration by the trial court under the appropriate standard.

Accordingly, we conclude that we must vacate the order granting suppression and remand for reconsideration of that motion by the trial court given the deficiencies in the court's opinion identified herein. We instruct the court that while it is not compelled by case law to find that probable cause exists solely on the basis of the odor of marijuana, that fact may, in the totality of the circumstances, still contribute to a finding of probable cause to believe the marijuana detected by the odor was possessed illegally. The court may consider Appellee's presentation of an MMA card as a factor that weighs against a finding of probable cause, as it provides at least some evidence tending to suggest the marijuana in question was possessed legally.[11] However, the court must also consider (or explain why it need not consider) the other factors suggested by the Commonwealth as contributing to a finding of probable cause, such as Appellee's statements and demeanor during the stop, as well as the nature of the location of the stop.

II

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[11] The Commonwealth complains that police cannot immediately ascertain whether a MMA card is valid at this time. However, even if true, that fact does not render presentation of an MMA card irrelevant to the court's probable cause analysis. Nevertheless, the presentation of an MMA card does not automatically defeat a finding of probable cause, either. It is plausible that circumstances in a particular case might demonstrate that an officer has a reasonable belief that a card is invalid, or that the manner of possession of medical marijuana is not compliant with the MMA. It is also possible that a person possessing a valid MMA card may also possess contraband marijuana. Whether any such circumstances exist in this case is for the trial court to decide in the first instance.

The Commonwealth also contends that the trial court erred when it granted Appellee's *habeas* motion to dismiss the PSAM charge.[12] The court determined that the Commonwealth failed to establish a *prima facie* case for that offense due to the suppression of the seized marijuana. ***See*** TCO at 16 n.20. The Commonwealth argues that the court "cannot enter an order dismissing the charges unless the Commonwealth consents or the time for filing a notice of appeal [from the order granting suppression] has elapsed." Commonwealth's Brief at 37 (citing ***Commonwealth v. Micklos***, 672 A.2d 796, 801 (Pa. Super. 1996) (*en banc*)). This is a pure question of law and, therefore, our standard of review is plenary. ***Commonwealth v. Karetny***, 880 A.2d 505, 513 (Pa. 2005) (stating "it is settled that the evidentiary sufficiency, or lack thereof, of the Commonwealth's *prima facie* case for a charged crime is a question of law as to which an appellate court's review is plenary").

In ***Micklos***, an *en banc* panel of this Court considered "whether the Commonwealth may appeal from an order of court which granted a criminal defendant's suppression motion and concurrently dismissed all charges filed against that defendant, thereby preventing the Commonwealth from pursuing its right to appeal the adverse rulings of a suppression court." ***Micklos***, 672 A.2d at 798. The Court proceeded "under the assumption that defense counsel first presented the motion to suppress at the close of testimony"

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[12] The offense of PSAM is defined as "the possession of a small amount of mari[j]uana only for personal use[.]" 35 P.S. § 780-113(a)(31)(i).

during a non-jury trial. ***Id.*** at 799. The trial court granted the suppression motion, and on that basis, dismissed the charges that were contingent upon the suppressed evidence.

The ***Micklos*** Court first determined that jeopardy had attached when the defendant filed his suppression motion, as the evidentiary portion of the trial had already concluded. ***Id.*** at 800. In typical circumstances, when a suppression motion is timely filed in a pre-trial setting, the Commonwealth has, pursuant to Pa.R.A.P. 311(d), the right to appeal from an adverse suppression ruling upon certification that the prosecution is substantially handicapped. ***See*** Pa.R.A.P. 311(d) ("In a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution."). Because jeopardy had already attached, the ***Micklos*** Court observed that "the trial court lacked power to dismiss before allowing the Commonwealth an opportunity to appeal the adverse suppression ruling." ***Id.*** at 801.

Appellee distinguishes this matter from ***Micklos***, arguing that the procedural posture of this case, where both the suppression motion and *habeas* petition were filed and decided before trial, is critically different from ***Miklos***, where the trial had already begun, and jeopardy had attached. ***See*** Appellee's Brief at 35-36. We agree. Here, the Commonwealth was not deprived of the opportunity to appeal from the adverse suppression ruling, as

jeopardy has not yet attached to this case. Furthermore, Appellee was required to file both motions pursuant to Pa.R.Crim.P. 578. ***See*** Pa.R.Crim.P. 578 ("Unless otherwise required in the interests of justice, all pretrial requests for relief shall be included in one omnibus motion.").[13] The trial court certified the order denying both motions for immediate appellate review pursuant to Pa.R.A.P. 341(c). Additionally, it is well-established that "[w]hen a charge is dismissed on a pre-trial writ of *habeas corpus*, the Commonwealth may appeal." ***Commonwealth v. Huggins***, 836 A.2d 862, 865 n.2 (Pa. 2003). Presently, both the suppression and *habeas* issues are properly before this Court. Accordingly, we conclude that ***Micklos*** is inapplicable here, and that the Commonwealth's claim lacks merit on that basis.[14]

Nevertheless, the order granting Appellee's *habeas* motion cannot stand, given our disposition with regard to the Commonwealth's first claim. The trial court explicitly conditioned its dismissal of the PSAM charge on its granting of suppression. ***See*** TCO at 16 ("***As a result*** of this [c]ourt's ... suppression of the evidence seized from the subject vehicle, this [c]ourt finds that the Commonwealth failed to establish a *prima facie* case of [PSAM].") (emphasis added). Accordingly, we vacate the order granting Appellee's

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[13] The official comment to Rule 578 notes that such relief includes requests "(3) for suppression of evidence[, and] ... (5) to quash or dismiss an information[.]" Pa.R.Crim.P. 578 (comment).

[14] We note that the Commonwealth provides little more than a citation to ***Micklos***, and no analysis of the facts of that case, in its single-page argument in support of this claim. ***See*** Commonwealth's Brief at 37.

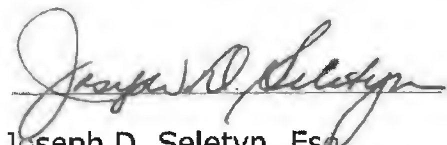
habeas petition, and remand for reconsideration of that petition following the trial court's reevaluation of the suppression issue.

Order granting suppression and *habeas* relief ***vacated***. Case ***remanded*** for reconsideration consistent with the analysis set forth in this opinion. Jurisdiction ***relinquished***.

Judge Lazarus joins this opinion.

Judge Strassburger joins and files a concurring opinion in which President Judge Emeritus Bender and Judge Lazarus join.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/25/20

2020 PA Super 236

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
TIMOTHY OLIVER BARR II,	:	
Appellant	:	No. 2347 EDA 2019

Appeal from the Order Entered August 2, 2019
in the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0000279-2019

BEFORE: BENDER P.J.E., LAZARUS, J. and STRASSBURGER, J.*

CONCURRING OPINION BY STRASSBURGER, J.: **FILED SEPTEMBER 25, 2020**

I join the Majority in its entirety, and agree "the odor of marijuana does not *per se* establish probable cause to conduct a warrantless search of a vehicle[,]" thus requiring remand of this matter for the trial court to consider that factor, along with any other factors, in its probable cause analysis.

I write separately to note my discontent with the Commonwealth's reliance on the "high-crime area" factor in support of a finding of probable cause. I believe that the status of the neighborhood at issue as a "high-crime area" should not be relevant to the probable cause determination. People who live in poor areas that are riddled with crime do not have fewer constitutional rights than people who have the means to live in "nice" neighborhoods.

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* Retired Senior Judge assigned to the Superior Court.

President Judge Emeritus Bender and Judge Lazarus join in this concurring opinion.

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 583 MAL 2020
Respondent	:	
	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
TIMOTHY OLIVER BARR II,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 28th day of April, 2021, the Petition for Allowance of Appeal is **GRANTED**, **LIMITED TO** the issues set forth below. Allocatur is **DENIED** as to all remaining issues. The issues, rephrased for clarity, are:

(1) What weight, if any, should the odor of marijuana be given in determining whether probable cause exists for a warrantless vehicle search, in light of the enactment of the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq.*?

(2) To what extent does this Court's decision in *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019), apply to probable cause determinations involving the possession of marijuana following the enactment of the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq.*?

A True Copy Amy Dreibelbis, Esquire
As Of 04/28/2021

Attest: Amy J. Dreibelbis
Deputy Prothonotary
Supreme Court of Pennsylvania