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28 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 28 MAP 2021

COMMONWEALTH OF PENNSYLVANIA
Appellee

vs.

TIMOTHY OLIVER BARR II
Appellant

REPLY BRIEF OF APPELLANT

Appeal from the Pennsylvania Superior Court's Order at 2357 EDA 2019 dated September 25, 2020, Vacating and Remanding for Reconsideration the August 2, 2019 Order Granting the Motion to Suppress entered in the Lehigh County Court of Common Pleas in Case No. CP-39-CR-0279-2019

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I. INTRODUCTION

The Commonwealth's argument appears to go like this: marijuana is "presumptively illegal" in Pennsylvania and therefore, the odor of marijuana, as the product of presumptively illegal activity constitutes "individual suspicion" sufficient to warrant a person of reasonable caution in the belief that a crime has been or is being committed.

Barr, on the other hand, asserts that after the passage of Pennsylvania's Medical Marijuana Act, 35 P.S. §§ 10231.101-10231.2110 (hereinafter "MMA"), marijuana is not presumptively illegal in Pennsylvania, and its odor should not be treated as evidence of illegal activity, but instead, should be afforded the same Fourth Amendment and Article 1, Section 8 Constitutional protections which this Court afforded potential firearm licensees in *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019).[1] And, although marijuana provides no indicia of criminal activity, that legal fact

[1] There "is no justification for a conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity." *Id.* At 937. Logic would dictate that, under *Hicks*, the odor of gun smoke allegedly detected by a police officer would be even less suggestive of criminal activity than firearm possession. In the case sub judice, the non-criminal nature of the odor of marijuana allegedly detected in the air, is a fair analogy.

does no violence to applying "totality of the circumstances" analytics (as contrarily argued by the Commonwealth and found by the Superior Court), because marijuana's non-criminal status does not preclude a finding of probable cause based upon other legitimate evidence of a crime, to wit, evidence that marijuana was unlawfully possessed or ingested.

These competing contentions are generally already fully joined in Barr's principal Brief in which he argues, on several levels, that the Commonwealth and 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 Pennsylvania jurisprudence and the recognized ends and objectives of justice under our constitutional system. But, the Commonwealth and its Amici have staked out two [2] rather casuistic positions in support of their argument which require brief refutation here.

[2] While there are numerous legal interpretations posited throughout the Commonwealth's Brief which Barr naturally does not agree and hence, has argued to the contrary in his principal Brief, there is one rather important factual correction to be made in the Commonwealth's Brief. On page 2 of its Brief the Commonwealth states as part of its "Counter-Statement of the Case" that: "Defendant subsequently filed a Motion to Suppress and Petition of Writ of

First, although it is undisputed that as of this moment the MMA makes the possession of marijuana legal for approximately one half million Pennsylvanians, the Commonwealth and its *Amici* ask this court to ignore that reality and continue to treat all dry leaf marijuana as presumptively illegal, subject only to a "limited exception" for licensed patients. The Commonwealth argues that this "limited exception" does nothing more than to allow a person arrested consequent to "plain smell" probable cause, to raise their MMA licensure and lawful possession as an affirmative defense. This framework is contrary to both the MMA's expressed immunity provision and to this Court's pronouncements about the legality of marijuana under the MMA and the impact (or, more correctly, the lack thereof) of federal prohibition. The Commonwealth's argument that the possession of marijuana should, ab initio, be treated the same as any other indicia of criminal activity, unless or until a citizen proves otherwise, is irreconcilable with the well-established law of this Commonwealth and its, and the U.S., Constitutions.

Habeas Corpus with regard to Count 3 – Possession of a Small Amount of Marijuana for Defendants (sic)." The subject motion, of course, sought, and the suppression court granted, relief as to all Counts of the Criminal Complaint.

And, under any reasonable approach to probable cause, more facts are required to demonstrate that police possess reasonable suspicion that the odor or physical presence of the substance is either illegal in itself or, evidences other criminal conduct. Otherwise, this Court would be lending its imprimatur to the immediate denial of the privileges protected by the 4th Amendment and Article 1, Section 8, to hundreds of thousands of Pennsylvanians and the countless more who will undoubtedly be granted licenses under the MMA in the future.

Secondly, a response is also required to the Commonwealth and its *Amicis'* painting of a very misleading picture regarding the state of the law nationally. Not only is this Court obviously not bound by decisions from other states but, other jurisdictions are, at best, split on the collateral legal effects of their state's medical marijuana programs. And, those states which actually prescribe to a view consistent with the Commonwealth's, justify that result by relying on the federal prohibition of marijuana, the fact that the possession of a medical marijuana license in that state permits only

an affirmative defense to criminal sanction, or more simply, other states completely fail to consider or address the scope of their marijuana programs or the number of people possessing or using marijuana legally in their state.

Barr's brief response to these contentions, follows.

II. ARGUMENT

A. The MMA Does Not Carve Out Just A Limited Legal Exception For Marijuana, It Clearly Legalizes Marijuana Possession And Use For All Compliant MMA Patients.

The MMA does not carve out a "limited exception" to the "presumptively *ILLEGAL*" quality of marijuana in Pennsylvania. Brief for Appellee at 23. Rather, this Court has recently held that the "[U]se or possession of medical marijuana as set forth in [the] act is lawful within this Commonwealth." *Gass v. 52nd Judicial District, Lebanon County*, 232 A.3d 706 (Pa. 2020) (quoting 35 P.S. § 10231.303(a)) (Emphasis added). The MMA's immunity provision clearly declares as much. No patient under the Act "shall be subject to arrest, prosecution or penalty in any manner, or

denied any right or privilege, ... solely for lawful use of medical marijuana." 35 P.S. § 10231.2103(a).

This provision makes it incumbent on state officials to demonstrate why they believe the use of marijuana which they observe is unlawful. *Gass,* 232 A.3d at 715 ("judges and/or probation officers should have some substantial reason to believe that a particular use is unlawful under the Act before hauling a probationer into court."). In *Gass,* this Court held that even for probationers and parolees, whose rights have otherwise been circumscribed by their criminal convictions, evidence of possession or use alone will not justify further restraint on their liberty. *Id.* This conclusion is based, in pertinent part, upon the express breadth of the MMA as found by this Court.

In *Gass*, the Lebanon County Probation Department had issued a policy that prohibited MMA patients from using marijuana while on probation. In response to a legal challenge, the Department amended its policy to permit use "after a hearing" where the probationer could show a medical necessity. *Id.* at 708-

10. This Court held that the Amendment's effect created "a presumption that any and all use is impermissible" and placed an impermissible burden on patients to demonstrate the lawfulness of their conduct. *Id.* at 715. And, this Court further stated that such a "presumption" of illegality was "foundationally inappropriate" because the MMA not only makes use and possession of marijuana lawful, but it also immunizes those lawful acts from governmental restraints. *Id.*

That very same "foundationally inappropriate" presumption, which this Court expressly rejected in *Gass*, is precisely what the Commonwealth wants this Court to apply to Pennsylvania's search and seizure law – arguing that marijuana is presumptively illegal, so that legal restraints on liberty may be imposed to ensure that a patient is complying with the law. As *Gass has* already held, the liberal use policy enshrined within the MMA prevents that reading.

Moreover, the extraordinary number of patients approved to possess and use marijuana under the MMA (now, approximately 500,000) and, the hundreds of thousands more waiting for

approval, demonstrate that the MMA's exception is anything but "limited," as the Commonwealth contends. As it currently stands, the Commonwealth's proposed "exception" may soon swallow the rule, if it has not already. [3] And with each passing month, this is only more likely to be true. For example, in just the three months between May 18, of 2021 and August 17, 2021, more than 24,000 additional Pennsylvanians became active MMA patients.[4]

Although marijuana remains illegal to non-patients, we are reminded that probability is the touchstone of probable cause. The United States Supreme Court describes a "fair probability" as a "substantial chance." *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 371 (2009) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 (1983)). Taken alone, it is no longer reasonable to presume

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[3] *See* John Finnerty, Medical marijuana sought by more than 50,000 people living in counties with no dispensaries, CHNI News, Aug 23, 2021; https://www.cnhinews.com/pennsylvania/article_263065d8-01ef-11ec-9651-1387e67557cc.html. (367,925 active patients on August 17th).

[4] *See* PA Medical Marijuana Advisory Board, Presentation, May 18, 2021, (slide 4) https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/PA%20DOH%20MMAB%20Presentation%20-%20May%2018%202021.pdf (343,634 active patients on May 18th); John Finnerty, Medical marijuana sought by more than 50,000 people living in counties with no dispensaries, CHNI News, Aug 23, 2021; https://www.cnhinews.com/pennsylvania/article_263065d8-01ef-11ec-9651-1387e67557cc.html. (367,925 active patients on August 17th).

that the mere presence of marijuana odor, without more, has a substantial chance of leading to marijuana being illegally possessed. The ubiquity of the substance legally carried and used in this state, at this point in time, requires pure guesswork to determine whether on its face, the particular possession or use of marijuana is legal or not. While other actual evidence may certainly lead a reasonable person to conclude that marijuana is being possessed or used illegally (such as the presence of a burning blunt), the odor of marijuana's presence alone cannot be considered evidence of illegality in a post MMA world.

Further, it should be noted that both the Commonwealth and the Superior Court seemingly seek to lower the probable cause bar by referring to the odor of marijuana as an appropriate "factor" to be considered in the totality of the circumstances which an officer encounters. This designation is, admittedly, part of the common probable cause parlance. But, employed as the Commonwealth and Superior Court have done here, is at best misleading because it improperly suggests, or at least allows the inference that, the odor

of marijuana denominated as a "factor" need not reach any evidentiary threshold beyond a mere hunch, or simple surmise.

Marginalizing the need for actual evidence of criminality by disguising it as a "factor" to be considered under the "totality of the circumstances," cannot lawfully obtain. "Individualized suspicion of criminal activity", as Barr has argued, is still dependent upon evidence, not a "hunch" (variously referred to by the Commonwealth as "a factor"). "[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 quotations marks omitted) (emphasis supplied).

Even *Commonwealth v. Gary's* [125 Pa. 183, 91 A.3d 102 (2014)] now overruled federal automobile exception, operated under the principle that police were permitted to conduct a warrantless search of a vehicle only "if police have probable cause to believe the vehicle contains evidence of criminal activity."

Commonwealth v. Valdivia, 649 Pa. 186, 195 A.3d 855 (2018) (fn. 11) (emphasis supplied). To allow the Commonwealth to infer that marijuana odor need only be a "factor", and therefore something less than the specifically articulatable "evidence" historically required, represents an impermissible debasement of the objective evidentiary standard required by the law and smacks of the very same "hunch" or "mere surmise" proscribed by extensive Pennsylvania jurisprudence.

B. Courts In Other Jurisdictions Are Split Regarding The Legal Consequences Of Newly Enacted Laws Legalizing Marijuana, And The Non-Precedential Cases Cited By The Commonwealth Are Either Inapposite, Poorly Reasoned, Or Contrary To Previous Holdings By This Court.

The Commonwealth and Its *Amici* assert that other states are largely uniform in rejecting the Superior Court's conclusion that the odor of marijuana, standing alone, cannot support a warrantless search, and that this Court should follow suit. This conclusion is misplaced. The state of the law nationally regarding the effect of a jurisdiction's change in marijuana laws on determinations of probable cause is far from uniform. See, e.g., *State Courts Coping*

With Medical Marijuana Legislation-Discerning Strife or Harmony, Judge Stephanie Domitrovich, 60 No. 1 Judges' J. 30, Winter, 2021.

Three states, Massachusetts, New Hampshire and New York, have found that where "statutory changes" which make possession and use of certain categories of marijuana non-criminal, "a bright-line [*per se* odor is sufficient] rule, does not adequately safeguard the privacy and security of individuals against arbitrary invasions." *State v. Francisco Perez*, 239 A.3d 975, 986 (N.H, 2020) (internal quotations omitted) (finding that "that the decriminalization of small quantities of marijuana in 2017 . . . as well as the legalization of medical marijuana . . . change the definition of behavior that constitutes criminal activity" relevant to a reasonable suspicion analysis).[5]

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5. *See also Commonwealth v. Sheridan*, 25 N.E.3d 875, 879 (Mass. 2015); *Commonwealth v. Cruz*, 945 N.E.2d 899 (Mass 2011); *Commonwealth v. Rodriguez*, 37 N.E.3d 611, 614 (Mass. 2015) (odor of burnt marijuana alone did not create probable cause to justify search); *People v. Brukner*, 51 Misc.3d 354, 25 N.Y.S.3d 559, 572 (City Ct. 2015) (concluding that "the mere odor of mari[j]uana emanating from a pedestrian, without more, does not create reasonable suspicion that a crime has occurred" following state legislature's decriminalization of possession of less than 25 grams of marijuana).

These states instead require police to articulate other evidence which suggests that the odor detected in a given situation is possessed criminally. *Id.* For example, Massachusetts enacted a decriminalization law. While marijuana remained illegal to possess, the law made possession of less than one ounce of marijuana a civil infraction only. *See* Mass. General Laws C. 94C, § 32L. Applying a straightforward rationale, Massachusetts courts "have 'reconsider[ed] our jurisprudence in light of the change to our laws.'" *Rodriguez*, 37 N.E.3d at 617 (quoting *Cruz*, 945 N.E.2d at 904-05)). "The meaning that can be derived from the odor of marijuana alone has evolved, such that, as indicated previously, we no longer consider the 'strong' or 'very strong' smell of unburnt marijuana to provide probable cause to believe that a criminal amount of the drug is present." *Id.*

Significantly, this logic does not exclude the odor of marijuana as part of a Fourth Amendment analysis where appropriate (such as driving under the influence), it merely "keep[s] in mind that probable cause determinations turn on probabilities, including

factual and practical considerations of everyday life . . . " and the "the varied and occasionally complex contexts in which such evidence presents itself." *Id.* at 618. These practical considerations include understanding that an odor of burnt marijuana for example, may be present on a person's breath, hair, clothes, or in a vehicle, but the substance may not. Or, that a passenger may have used marijuana legally, giving rise to the odor, but the driver may not have imbibed.

This recognition comports with the constitutional requirement that police may look at the totality of the circumstances and make honestly reasoned judgment calls, supported by particularized evidence, about what conduct may be criminal, eschewing the courts green-lighting of marijuana odor as pretext. In some settings, police may observe multiple signs of intoxicated driving, such that the addition of a strong odor of burnt marijuana which may give rise to probable cause of a DUI, irrespective of (or, indeed consisted with) the MMA. Where the indicia of intoxication is not apparent, however, little legitimate suspicion of criminality, if any,

may result. These states rightly recognize that the proper balance is fact-bound and that on the change in the law naturally changes the probability of what facts actually give rise to an indicia of criminality.

Most other states, however, reject the notion that the state's medical marijuana or decriminalization law can change the inquiry. They do so however, not because they reject an evidence-based, balanced approach, or because the change in law had no effect on what a reasonable person presumes about the legal or illegal nature of the odor's origin. They reject the argument for reasons specific to that state's statutory scheme. These reasons simply do not apply to Pennsylvania or this case.

At least five state courts have found that their state's medical marijuana laws create only an affirmative defense from prosecution.[6] In these states' view, an affirmative defense law

[6] *See, e.g., People v. Clark,* 78 Cal. Rptr. 3d 649, 657 (Cal App. Ct. 2d. 2014) ("The [medical marijuana act's] exception constitutes an affirmative defense to be proven by the defendant at trial.") (quotations omitted); *People v. Brown,* 825 N.W.2d 91, 95 (Mich. 2012) (holding that Michigan's medical marijuana law only entitles a "patient and a patient's primary caregiver to assert the medical purpose for using marijuana as an affirmative defense") (internal quotations omitted); *State v. Roberson,* 492 P.3d

means that the law does not alter the relationship between the investigating officer and the amount of information necessary for probable cause. For example, in *People v. Brown*, the Michigan Supreme Court concluded "where the relevant medical-marijuana law provides an affirmative defense to a crime, the fact that a suspect may have a medical authorization to use and possess marijuana does not negate probable cause. . . ." *Brown*, 825 N.W.2d at 94 (quotations omitted). It reasoned that because "[t]he possession, manufacture, use, creation, and delivery of marijuana remain illegal in this state . . . . [t]he affirmative defense merely excuses or justifies the defendant's criminal act, it does not negate any elements of the crime." *Id.* at 94-95. The Court continued, "[N]o authority indicat[es] that for probable cause to exist, there

620, 624 (Ok. 2020) ("While the production of a medical marijuana license may constitute an affirmative defense to the crime, in this case the officer's determination of probable cause was not affected given the totality of all the circumstance."); *State v. Fry*, 228 P.3d 1, 5 (Wash. 2010) (" the authorization only created a potential affirmative defense that would excuse the criminal act"); *State v. Senna*, 79 A.3d 45, 49 (Vt. 2013) ("Vermont's 'medical marijuana' law does not purport to decriminalize the possession of marijuana; it merely exempts from prosecution a small number of individuals who comply with rigid requirements for possession or cultivation. 18 V.S.A. § 4474b. In that sense, the law creates a defense to prosecution.").

must be a substantial basis for inferring that defenses do not apply." *Id.*[7]

According to these courts, unlike in Pennsylvania, their Legislature designed their law to maintain the drug's presumption of illegality. Their state laws, whether predicated upon a medicinal or decriminalization scheme, only entitle qualified individuals to assert immunity to prosecution or sanction. It does not alter the primary relationship between the substance and those enforcing state law.

This structural barrier does not exist in Pennsylvania. *See Gass*, 232 A.3d at 714-715 (establishing an entitlement and accepting the view that a qualifying patient who uses medical marijuana in accordance with the MMA is receiving lawful medical treatment with the equivalent of a prescription drug). Additionally, even if the MMA did create an affirmative defense, this Court has

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[7] *See also, e.g.*, *Roberson*, 492 P.3d at 623-24 ("While the production of a medical marijuana license may constitute an affirmative defense to the crime" "[t]he decriminalization of marijuana possession for those holding medical marijuana licenses in no way affects a police officer's formation of probable cause based upon the presence or odor of marijuana.").

studiously and comprehensively addressed and rejected the relevance of that distinction in *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019). In *Hicks*, the Commonwealth argued that because the Pennsylvania Uniform Firearms Act of 1995, 18 Pa.C.S. §§ 6101-27 creates an affirmative defense to possession of a concealed weapon, it does not alter the fact that possession of a concealed weapon remains illegal.

This Court rejected that argument reasoning that "[t]o characterize an investigative detention as lawful solely because licensure is an affirmative defense under the applicable statute, rather than non-licensure serving as an element of the crime, is to obscure the fact that licensed individuals who engage in the conduct for which they have obtained licenses are, at bottom, in compliance with the requirements of the law." *Id.* at 936. The "element-or-defense approach is ultimately untenable, because it would allow a manifestly unacceptable range of ordinary activity to, by itself, justify" a physical intrusion. *Id*. (internal quotations

omitted). This Court should continue to follow this same reasoning here.

Two other states, Arizona and Florida, have rejected claims that their medical marijuana programs alter an officer's probable cause determinations, but again, neither rationale applies here. First, in *State v. Sisco*, 373 P.3d 549 (Ariz. 2016), which the District Attorney's Association relies on heavily, the Arizona Supreme Court concluded that despite the states' medicinal marijuana program, "'when an officer detects marijuana by sight or smell, the degree of suspicion that attaches remains high . . . .'" Brief for Amicus Curiae District Attorney Association of Pennsylvania at 12 (quoting *Sisco*, 373 A.3d at 553). The Arizona court's conclusion, however, relied in large part upon the specific language of Arizona's Medical Marijuana Act (AMMA), and what should admittedly be seen as an inadequate assessment of the practical scope of the law.

Unlike Pennsylvania's MMA, AMMA's language does not include a broad immunity provision. Rather, the immunity provision is not only extremely limited, but arguably does not

actually grant immunity. It expressly "reiterate[s] that marijuana possession and use remains unlawful in Arizona except as authorized under the [AMMA].'" *Sisco*, 373 at 554 (quoting A.R.S. §§ 36–2802(E). Thus, the Arizona Supreme Court was merely attempting to comply with the Legislature's specific directive that the program was not meant to grant legal status to patients.

Secondly, although *Sisco* correctly understood that AMMA compliance must be considered under the totality of the circumstances, it did not require police to consider the change in law. *Id.* at 555. Rather, it held that putting the onus on AMMA patients to demonstrate their compliance, did not deny 4th amendment privileges, but simply treated them consistent with the "broader public." *Id*.

This logic not only conflicts with how this Court has interpreted the MMA, *see Gass*, at 715, it **assumes** that the population comprising the "broader public" is how most marijuana in Arizona is used and possessed, rendering compliant lawful users invisible and insignificant. The *Sisco* Court simply was never asked

by the parties, nor found it necessary to address on its own, what effect the AMMA had on the prevalence and use of marijuana in the state. Basically, it did not address the practical realities of how marijuana might appear in any given setting. And, maybe, because of the AMMA's anemic immunity provision, the *Sisco* Court found no need to explore this dynamic.

Regardless of the reason those facts were not addressed, Pennsylvania's law obviously grants greater protections to MMA patients, as well as to the practical realities of how much legal medical marijuana possession or usage police may encounter, which logically, must be included in any reasonable probable cause calculus going forward.

Florida, uniquely, has rejected altering its probable cause calculous, in part, because marijuana remains criminal under federal law. *See*, *e.g.*, *Johnson v. State*, 275 So. 3d 800, 801 (Fla. Dist. Ct. App. 2019) ("[T]hough Florida law does not criminalize all use of medical marijuana, possession of marijuana remains a crime under federal law."). This Court has taken a different view, and

justifiably so. While marijuana does remain illegal under federal law, "the federal Controlled Substances Act does not (and could not) require states to enforce it." *Gass*, 232 A.3d at 713 (quoting *Printz v. U.S.*, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program.")).

This Court recognized that both the necessary deference to federalism and the express tenets of the MMA prohibit local officers or municipalities from requiring "state-level adherence to the federal prohibition, where the General Assembly has specifically undertaken to legalize the use of medical marijuana for enumerated therapeutic purposes." *Id.*

Finally, there are some states that have addressed legalization schemes for certain amounts, but as discussed by Appellant's *Amici Curiae,* these states merely recognize the obvious – that because marijuana may still be used or possessed in some criminal ways, its odor may still be considered in a totality of the circumstances analysis in appropriate cases. Brief for *Amici Curiae* Defender Association of Philadelphia and The American Civil

Liberties Union of Pennsylvania, p. 8 (quoting, e.g., *People v. Zuniga*, 372 P.3d 1052. 1059 (Col. 2016) and discussing some of these cases). This approach is consistent with the Fourth Amendment, *Hicks*, and logic and, does not improperly permit the odor of marijuana, standing alone, to constitute evidence of criminality.

In sum, the Commonwealth and its *Amici* attempt to frame the MMA in a way that ignores the words and intent of the legislation, and the practical effects of the law. They rely, time and again, on legislation and decisions which interpret and apply different laws, and then ignore those laws' practical effects, as well as the precedent previously established by this Court. This Court has already interpreted the MMA to offer protected status to patients who are doing nothing more than legally going about their day. And, it has already concluded in *Hicks* that where the practical realities of possession of an item that may sometimes be lawful, and sometimes not, making it nearly impossible to discern the difference based upon the mere fact of possession (or smell), the

law has to require more before Fourth Amendment and Article 1 Section 8 Constitutional rights are invaded.

Fair probabilities are at the core of any probable cause analysis. It is therefore ironic that in such a context the Commonwealth is more than willing to ignore the very real probability that, faced with the same sturdy state Constitution as in Pennsylvania, the same well-established jurisprudence robustly interpreting the protections afforded the state's citizens thereunder, the same medical marijuana law (program) and, the same growing number of persons possessing or using marijuana legally, the courts it cites would, in fact, reach the same conclusions as Barr has here.

II. CONCLUSION

For the forgoing reasons, this Court should find that the odor of marijuana, either burnt or fresh, or its possession, alone, does not constitute criminal activity and cannot contribute to a finding of probable cause justifying a search or seizure.

While it is certainly possible that in the context of a case where individualized suspicion of criminal activity is established by other independent and objective evidence justifying a search, the presence of the odor of marijuana may be determined to be consistent with the reasonable belief that a crime has been or is being committed. But, it is abundantly clear that the odor of marijuana itself cannot be seen as evidence of that criminality, even when dressed up as "a factor" in "totality of the circumstances" clothes. To conclude otherwise would not only be to ignore this Court's predominant probable cause pronouncements over the last many years, but would potentially inundate our already over-burdened criminal justice system with hundreds of

thousands of people who are doing exactly what they are supposed to be doing – following the law.

Submitted By:

Dated: October 6, 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 4599 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.

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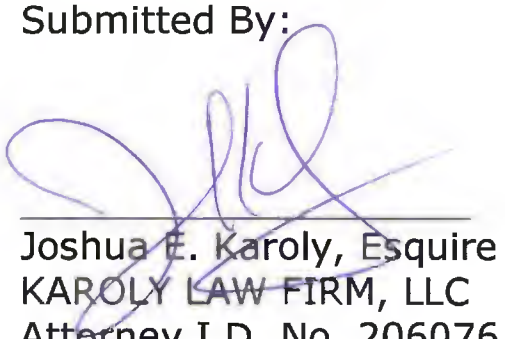

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CERTIFICATE OF SERVICE

I, Joshua E. Karoly, Esquire, hereby certify that I am this 6th day of October, 2021, serving true and correct copies of the attached *Reply Brief of Appellant* upon the persons 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:

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