

STATE OF NEW JERSEY

Respondent/Plaintiff,

0+4

Vs.

CORNELIUS C. COHEN

Appellant/Defendant.

SUPREME COURT OF  
NEW JERSEY

DOCKET NO.: 084493

CRIMINAL ACTION

SUPERIOR COURT OF  
NEW JERSEY  
APPELLATE DIVISION

DOCKET NO.: A-2354-18T2

Sat Below:

Hon. Ellen Koblitz, J.A.D.  
Hon. Hon. Greta Gooden-  
Brown, J.A.D.

APPELLANT/DEFENDANT'S SUPPLEMENTAL BRIEF  
IMPACT OF THE ENACTMENT OF L.2021,c.16 and/or L.2021,c.19

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**PREMINARY STATEMENT**<sup>1</sup>

On February 25, 2022, this Court requested briefs from the parties as to "the impact, if any, of the enactment of L.2021, c. 16 and/or L.2021, c. 19, on this matter." Cornelius C. Cohen (Appellant/Defendant) contends the "New Jersey Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act" (CREAMMA) L. 2021, c. 16 and the "Marijuana Decriminalization Act" (Decriminalization Act) L. 2021, c. 19 (hereinafter "Acts") are applicable to his case.

As discussed in detail herein, provisions of these Acts were intended by the Legislature to apply retroactively and serve to provide relief to the defendant in two significant aspects. First, the defendant pled guilty reserving the right to challenge the denial of his suppression motion as the search of the automobile he was driving was based on alleged conduct that was decriminalized or degraded. As such, his plea involves marijuana possession offenses and should be able to seek relief pursuant to the Marijuana Decriminalization Act.

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<sup>1</sup> "1T" refers to the transcript for the hearing on December 20, 2017.  
"2T" refers to the transcript for the hearing of April 19, 2018  
"3T" refers to the transcript for the Oral Argument of June 15, 2018.  
Db refers to Defendant's Appellate Division brief.  
Da refers to Defendant's Appellate Division brief appendix.  
DPA refers to Defendant's Petition for Certification appendix.

Second, as there was an ongoing criminal investigation of the defendant prior to the traffic stop by a State Police Trooper, CREAMMA specifically prohibits the use of the smell of marijuana to serve as a reasonable articulable suspicion of a crime supporting a search unless there was additional evidence supporting an amount of marijuana that would make the possession unlawful.

As there was no evidence of illegal marijuana possession in the State Police's criminal investigation, the defendant is entitled to relief under the Acts.

**PROCEDURAL HISTORY/STATEMENT OF FACTS<sup>2</sup>**

The defendant relies upon his Procedural History and Statement of Facts as previously submitted which is incorporated herein by reference. Db2-14.

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<sup>2</sup>New Jersey Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act" (CREAMMA) removes marijuana as a Schedule I drug and legalizes personal use of less than one ounce of marijuana for adults over the age of 21 in New Jersey; regraded certain marijuana and hashish offenses; establishes a comprehensive regulatory and licensing framework for commercial recreational (adult use) cannabis operations, use and possession; and provides employee protections from an adverse job action solely due to marijuana use. N.J.S.A. 24:6I-31 to -56. L. 2021, c. 16 "The Marijuana Decriminalization Act (Decriminalization Act), L. 2021, c. 19 provides for the dismissal, vacating, and expungement of certain marijuana and hashish cases.

### LEGAL ARGUMENT

In determining the effect of a statute, "the law favors prospective, rather than retroactive, application of new legislation unless a recognized exception applies." Ardan v. Bd. of Review, 444 N.J. Super. 576, 587 (2016). "The preference for prospective application of new legislation 'is based on [the Court's] long-held notions of fairness and due process.'" James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014) (quoting Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 45 (2008)). "[T]he presumption against retroactive application" is no more than a rule of statutory interpretation," and can be overcome by an indication of contrary legislative intent, either expressed in the language of the statute itself, or implied in its purpose. State v. Bey, 112 N.J. 45, 103 (1988) (quoting Rothman v. Rothman, 65 N.J. 219, 224 (1974)).

Courts are to "apply a two-part test to determine whether a statute should be applied retroactively: (1) whether the Legislature intended to give the statute retroactive application; and [if so] (2) whether retroactive application 'will result in either an unconstitutional interference with vested rights or a manifest injustice.'" Ardan, supra, 444 N.J. Super. at 587 (quoting James, supra, 216 N.J. 552, 563 (2014)).

As to the first part of the test, there are three exceptions to the general rule of prospective application of statutes:" (1) when the Legislature intended retroactive application of the statute either expressly, as "stated in the language of the statute or in the pertinent legislative history," or implicitly, requiring retroactive application to "make the statute workable or to give it the most sensible interpretation"; (2) when the statute is "ameliorative or curative"; or (3) when the "expectations of the parties may warrant retroactive application." Gibbons v. Gibbons, 86 N.J. 515, 522-23 (1981).

I. **THE INTENT OF THE LEGISLATURE SUPPORTS  
RETROACTIVE APPLICATION OF THE ACTS**

As to the first element of the two-part test of "James v. N.J. Mfrs. Ins. Co.", the defendant contends that the Legislature intended for the Acts to have retroactive application. *Id.*, supra, 216 N.J. at 563. The language of the Acts extended beyond decriminalizing conduct and regrading offenses involving the use of marijuana (cannabis) and hashish for prospective application as it also provided relief to individuals as to conduct that occurred prior to the effective date of the Acts including the dismissal of



pending charges, post-conviction relief (PCR) and expungements L. 2021 c, 16, § 4, para. a-b; § 5.<sup>3</sup>

Similarly, the Acts also address the smell of marijuana and hashish and individual rights with prospective and retroactive applications. Certain provisions of CREAMMA bars the smell of marijuana or hashish prospectively as to its use in support of a reasonable articulable suspicion to search and this prohibition begins after the effective date of the statute. See, e.g., L. 2021 c.16, § 56 para b(i) (amending N.J.S.A 2C:35-10).

In contrast, as to criminal investigations, the Legislators did not include prospective wording in this CREAMMA provision.

1[53.]2[54.1] 61.2 (New section) Criminal Investigation.

None of the following shall, individually or collectively, constitute reasonable articulable suspicion of a crime, unless on property used for school purposes which is owned by a school or school board, or at any detention facility, adult

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<sup>3</sup>For crimes and offenses pending that involved acts occurring prior to the effective date of the legislation that involved possession with the intent to manufacture or distribute under N.J.S.A. 2C:35-5; possession pursuant to N.J.S.A. 2C: 35-10; possession with the intent to use marijuana or hashish with drug paraphernalia in violation of N.J.S.A. 2C:36-2; possession or use of a controlled dangerous substance (CDS) while operating an automobile N.J.S.A. 2C:39-4-49.1 or a disorderly person or petty disorderly person charge subject to a conditional discharge pursuant to N.J.S.A. 2C:36:A-1; such pending charges would be dismissed, guilty pleas vacated or and served sentences subject to expungement. L. 2021 c, 16, § 4, para a-b; § 5. Further relief would be available for guilty pleas for these offenses (and 2C:35-7) if a final judgment had not been entered prior to the effective date. *Id.* § 4 para c (1). Post-conviction relief (PCR) is also available, *Id.* § 4 para C (2), as well as expungements.

correctional facility, or youth correction facility:

- a. The odor of cannabis or burnt cannabis;
- b. The possession of or the suspicion of possession of marijuana or hashish without evidence of quantity in excess of any amount that would exceed the amount of cannabis 1[or cannabis resin] items1 which may be lawfully possessed pursuant to section. 1[44] 2[451] 462 of P.L. ,c. (C. ) (pending before the Legislature as this bill); or
- c. The possession of marijuana or hashish without evidence of quantity in excess of any amount that would exceed the amount of cannabis 1[or cannabis resin] 2[ititems] items2 may be lawfully possessed pursuant to section 1[44] 2[451] 46.2 of P.L. , c. (C. ) (pending before the Legislature as this bill), in proximity to any amount of cash or currency.

L. 2021, c. 16, § 61.

Furthermore, CREAMMA and the Decriminalization Act should apply retroactively as these Acts are ameliorative as these laws legalize conduct and mitigate penalties for offenses. Perry v. N.J. State Parole Bd., 459 N.J. Super. 186, 196 (App. Div. 2019). These Acts seek to "address the legal consequences" of New Jersey's drug policies and are "aimed at mitigating a legislatively perceived undue severity in the existing criminal law." Kendall v. Snedeker, 219 N.J. Super 283, 286 n1 (App. Div. 1987). CREAMMA identified the Legislatures' view of the severity of the prior marijuana laws. L. 2021 c.16, §. 2 para e, n, and o.

It is the defendant's contention that the Legislature clearly evidenced their intent for provisions of the Acts to apply to retroactively in the wording of the laws and in its intended application. The Decriminalization Act impacts pending cases (dismissals) but also provides relief for currently incarcerated offenders (PCR's) and others who served their sentences (expungements). In addition, as to criminal investigations, CREAMMA prohibited the smell of marijuana or hashish from serving as a reasonable articulable basis unless the police possessed information that the amount in possession would be otherwise be unlawful. See, Bey, supra, 112 N.J. at 102. (1988) ("That the Legislature possesses the power to prescribe the retroactive application of ameliorative laws cannot be doubted.. [and] does not impose a new criminal liability or a punishment of increased severity. Thus, retroactive application will not run afoul of federal and state constitutional guarantees prohibiting "ex post facto laws."")

**II. RETROACTIVITY WILL NOT UNCONSTITUTIONALLY INTERFERE WITH VESTED RIGHTS OR RESULT IN MANIFEST INJUSTICE**

Concerning the second part of the James test, a court is to assess whether "retroactive application will result in either an

unconstitutional interference with vested rights or a manifest injustice." Ardan, supra, 444 N.J. Super. 576 (2016).

As to Mr. Cohen's case, the defendant pled guilty to Unlawful Possession of a Weapon, in violation of N.J.S.A. 2C:39-5(b), retaining his right to appeal the alleged unlawful search of his automobile which was based on the purported smell of marijuana from the vehicle. Therefore, he would be entitled to relief under the Decriminalization Act as his conditional guilty plea was entered into on July 6, 2018, prior to the effective date of the act (February 22, 2021), and "involves" such offenses as N.J.S.A. 2C:35:10 (possession) or "one or more crimes or offenses or delinquent acts which if committed by an adult would constitute one or more crimes or offenses enumerated in subsection a of this section" such as 2C:39:4-49.1 (Possession by Motor Vehicle Operator), offenses that served as the basis for the trooper's reasonable articulable suspicion of criminal conduct as to the alleged unlawful search. L. 2019, c.19, S. 4, para (c) (1); Da58.

The retroactive application of CREAMMA is consistent with the current state of the law in that a traffic stop must not be preplanned or based upon fake exigencies. State v. Alston, 88 N.J. 211, 233 (1981). In State v. Witt, 223 N.J. 409 (2015), this Court returned to the exigent-circumstances standard articulated in Alston where "a warrantless search of an automobile was constitutionally permissible, provided that the police had

probable cause to search the vehicle and that the police action was prompted by the 'unforeseeability and spontaneity of the circumstances giving rise to probable cause.'" Alston, supra, 88 N.J. at 233(emphasis added).

As there was an ongoing criminal investigation of the defendant, the retroactive application of CREAMMA would bar the smell of marijuana alone as a reasonable articulable suspicion in support the trooper's search of the automobile as the State Police did not have any information that would support the possession of an illegal amount of marijuana.

Defendant contends that the State will not be able to successfully argue that the retroactive application of the Acts would result in manifest injustice. Ardan, supra, 444 N.J. Super. 576 (2016). Here, the State Police failed to obtain a warrant when there was a reasonable period of time to do so. Their investigation commenced on or about December 15, 2015 and the search of the automobile occurred on January 17, 2016. The defendant contends that this search was otherwise unreasonable and therefore unconstitutional as the State Police has sufficient time to obtain a warrant. *Def. Cert. Brief 8-9*.

Accordingly, the State cannot show that the retroactive application of the Acts would be unfair or unjust as the requirement of a warrant remains the law in New Jersey. State v

Gonzales, 227 N.J. 77, 104-105 (2016) ("In short, when the police have sufficient time to secure a warrant, they must do so.")

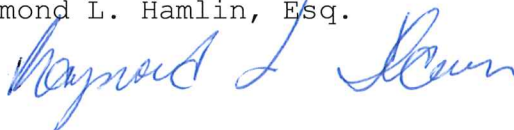
CREAMMA and the Decriminalization Acts should apply to defendant's appeal of his guilty plea as a court should "apply the statute in effect at the time of [its] decision" in accordance with the "current policy declared by the legislative body." Bey, supra, 112 N.J. at 103 (quoting Kruvant v. Mayor of Cedar Grove, 82 N.J. 435, 440 (1980)).

**CONCLUSION**

For all of the above stated reasons and previous submissions, Defendant respectfully requests that this Court grant his Petition for Certification and reverse the Appellate Division's decision.

Respectfully Submitted,

/s/ Raymond L. Hamlin  
Raymond L. Hamlin, Esq.



Dated: March 18, 2022

cc.

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