PROBABLE CAUSE: IS THE "PLAIN-SMELL" DOCTRINE STILL VALID IN ARIZONA AFTER THE AMMA?

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In State v. Sisco *and* State v. Cheatham*, the two divisions of the Arizona Court of Appeals considered whether, in light of the Arizona Medical Marijuana Act, the smell of marijuana, standing alone, was sufficient to establish probable cause. The two divisions promulgated contradicting policies, which should be addressed to help clarify the law. This Note will provide a synopsis of the two cases as well as an overview of the approaches taken by comparable jurisdictions. This Note advocates for the adoption of an "odor-plus" standard, one that requires the finding of some fact(s), in addition to the smell of marijuana, before probable cause is met. This standard better balances the competing interests of law enforcement and the privacy rights of individuals. This Note will propose that the "plus" may be satisfied by focusing on the general probability of illegal use. Using statistics, this Note will suggest the probability that in specific instances, when the smell of marijuana is present, the smell is coming from an illegal source not exempt under the Arizona Medical Marijuana Act. However, if statistics shift or the law changes, the odor-plus standard would present a fluid doctrine, where probable cause can be met by other facts that establish the probability of finding the illegal use or possession of marijuana.*

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INTRODUCTION

In Arizona, marijuana has been an illegal substance for over three decades.[1] In fact, until the passage of the Arizona Medical Marijuana Act (the "AMMA"), anyone who cultivated, possessed, used, transported, or sold marijuana was guilty of a felony.[2] In 2010, however, Arizona voters passed the AMMA,[3] which allows qualifying patients[4] to legally use marijuana for medicinal purposes.[5] As a result, cultivation, possession, and use of marijuana are lawful in the state of Arizona under certain circumstances.[6]

Arizona courts have long found that the scent of marijuana was sufficient to establish probable cause for a search under the "plain-smell" doctrine.[7] Specifically, courts reasoned that because marijuana had a distinctive odor and was

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1. *See* 1981 Ariz. Sess. Laws, ch. 264, § 8.

2. ARIZ. REV. STAT. ANN. § 13-3405(B)(1)–(3) (2010 & Supp. 2015). There is proposed legislation in Arizona to decriminalize small amounts of marijuana. H.B. 2006, 52nd Leg., 1st Sess. (Ariz. 2015) (proposing amendments to ARIZ. REV. STAT. § 13-3405).

3. ARIZ. REV. STAT. ANN. §§ 36-2801–2819 (2010 & Supp. 2015); *see generally* Daniel G. Orenstein, *Voter Madness? Voter Intent and the Arizona Medical Marijuana Act*, 47 ARIZ. ST. L.J. 391 (2015).

4. ARIZ. REV. STAT. ANN. § 36-2801(13) (2010). The AMMA defines a "qualifying patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition." *Id.* Under the AMMA, debilitating medical conditions include: cancer, glaucoma, HIV, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, or the treatment of these conditions. *Id.* § 36-2801(3)(a). In addition, any chronic or debilitating disease or medical condition or its treatment that produces cachexia or wasting syndrome, severe and chronic pain, severe nausea, seizures, or severe and persistent muscle spasms is classified as a debilitating medical condition under the AMMA. *Id.* § 36-2801(3)(b).

5. *Id.* § 36-2801(9). Under the AMMA, "medical use" means "the acquisition, possession, cultivation, manufacture, use, administration, delivery, transfer or transportation of marijuana or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the patient's debilitating medical condition." *Id.*

6. State v. Sisco, No. 2 CA-CR 2014-0181, 2015 WL 4429575 (Ariz. Ct. App. July 20, 2015).

7. State v. Baggett, 306 P.3d 81, 85 (Ariz. Ct. App. 2013) ("When the officers smelled marijuana, they possessed probable cause to believe the backpack contained marijuana."); State v. Raymond, 516 P.2d 58, 61 (Ariz. Ct. App. 1973) ("The distinctive odor of marijuana emanating from appellant's car furnished sufficient probable cause to effect an arrest"); State v. McGuire, 479 P.2d 187, 189 (Ariz. Ct. App. 1971) (finding the odor of burning marijuana "amply demonstrates probable cause").

inherently criminal, the odor of marijuana, standing alone, was enough to conclude that a fair probability of criminal activity exists.[8]

After Arizona enacted the AMMA, each division of the Arizona Court of Appeals decided whether the plain smell of marijuana was still sufficient to establish probable cause.[9] In *State v. Sisco*, Division II held that the scent of marijuana, standing alone, was no longer sufficient to establish probable cause, thereby eliminating Arizona's plain-smell doctrine.[10] Three days later, however, Division I, in *State v. Cheatham*, came to the opposite conclusion, upholding Arizona's plain-smell doctrine.[11]

Probable cause is a totality-of-the-circumstances decision,[12] and exists when a reasonably prudent person is justified in finding a fair probability that evidence of criminal conduct will be found.[13] Though the probable cause standard might occasionally disturb the innocent, it should not do so as a matter of course.[14] Because the AMMA allows qualifying patients to lawfully use marijuana in Arizona, the odor of marijuana is not necessarily indicative of a crime. Thus, if officers are able to establish probable cause based on scent alone, they will disturb the privacy of innocent individuals, especially as the number of lawful marijuana users in the state grows.[15] Therefore, the Arizona Supreme Court should consider adopting the "odor-plus" standard set forth in *Sisco*, which would require officers to obtain circumstantial evidence beyond the mere scent of marijuana in order to establish probable cause for a search. Adopting the odor-plus standard would protect the privacy rights of individuals who are lawfully permitted to use medical

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8. *See, e.g.*, *Baggett*, 306 P.3d at 85 ("To invoke the plain view/smell [standard] . . . a police officer must lawfully be in a position to view/smell the object, its incriminating character must be immediately apparent, and the officer must have a lawful right of access to the object."); Michael A. Sprow, *Wake Up and Smell the Contraband: Why Courts that Do Not Find Probable Cause Based on Odor Alone Are Wrong*, 42 WM. & MARY L. REV. 289, 311–12 (2000). *But see* Richard L. Doty et al., *Marijuana Odor Perception: Studies Modeled from Probable Cause Cases*, 28 LAW & HUM. BEHAV. 223, 223 (2004) ("Our findings suggest that the odor of marijuana was not reliably discernable by persons with an excellent sense of smell [in either empirical study conducted].").

9. State v. Cheatham, 353 P.3d 382, 384 (Ariz. Ct. App. 2015); *Sisco*, 2015 WL 4429575, at *4.

10. *Sisco*, 2015 WL 4429575, at *6.

11. 353 P.3d at 384.

12. Illinois v. Gates, 462 U.S. 213, 238 (1983) (reaffirming the "totality-of-the-circumstances analysis that traditionally has informed probable cause determinations").

13. *Sisco*, 2015 WL 4429575, at *2–3; *see also* State v. Will, 672 P.2d 1316, 1319 (Ariz. 1983); State v. Million, 583 P.2d 897, 902 (Ariz. 1978).

14. *Sisco*, 2015 WL 4429575, at *4 (citing *Gates*, 462 U.S. at 243 n.13).

15. *Compare* ARIZ. DEP'T OF HEALTH SERVS., APPLICATION MONTHLY REPORT - ARIZONA MEDICAL MARIJUANA PROGRAM 1 (2011), http://azdhs.gov/documents/licensing/medical-marijuana/reports/2011/111125_Patient-Application-Report.pdf (showing 16,313 qualifying patients through November 2011), *with* ARIZ. DEP'T OF HEALTH SERVS., ARIZONA MEDICAL MARIJUANA PROGRAM SEPTEMBER 2015 MONTHLY REPORT 1 (2015), http://azdhs.gov/documents/licensing/medical-marijuana/reports/2015/2015-september-monthly-report.pdf [hereinafter ARIZ. SEPT. 2015 REPORT] (showing 82,644 qualifying patients through September 2015).

marijuana in Arizona, while also balancing the needs of officers in pursuit of legitimate law enforcement goals.

If the Arizona Supreme Court adopts the odor-plus standard, courts should allow officers to use statistical probabilities to satisfy the odor-plus standard. As this Note will show, the current statistical probability that a particular marijuana user or grower in Arizona *is not* a registered cardholder is greater than the statistical probability that an individual *is* a registered cardholder. Until that probability changes, courts should find that probable cause exists when officers encounter the smell of marijuana. Should the probability change, the "plus" may be satisfied by the inclusion of other evidence that tends to support an inference of illegal use.

Part I of this Note will analyze both of the Arizona Court of Appeals cases that have addressed the plain-smell doctrine since the enactment of the AMMA. Part II will compare the effect that medical marijuana statutes in other states have had on the plain-smell doctrine. Part III will propose that the Arizona Supreme Court adopt the odor-plus standard set forth in *Sisco*. Lastly, Part IV will break down the statistical probability that the smell of marijuana, in any given instance, indicates the presence of criminal activity under Arizona law, ultimately arguing that courts should allow officers to use statistics to satisfy the "plus" requirement of the odor-plus standard. In Arizona, the effect of the AMMA on the plain-smell doctrine is an issue of first impression. An odor plus standard would balance the privacy interests of lawful marijuana users with the legitimate needs of law enforcement to enforce Arizona's criminal laws.

I. THE "PLAIN-SMELL" DOCTRINE AFTER THE AMMA

A. State v. Sisco

In *State v. Sisco*, officers sought a search warrant for one particular warehouse in a four-unit complex after they smelled the "strong odor of fresh marijuana" from a street and sidewalk near the complex.[16] After a magistrate granted the warrant, officers searched the unit but found no evidence of marijuana.[17] Subsequently, the officers were granted a search warrant for a second unit in the complex—again based on nothing more than the scent of marijuana.[18] There, officers found growing equipment and dozens of marijuana plants.[19] On appeal from conviction, the Arizona Court of Appeals, Division II addressed "whether the AMMA had altered the 'plain smell standard.'"[20]

With the passage of the AMMA, the rationale underlying the plain-smell doctrine no longer applies. the possession of marijuana was no longer illegal per se.[21] Because certain individuals could lawfully cultivate, possess, and use

16. *Sisco*, 2015 WL 4429575, at *1.
17. *Id.*
18. *Id.*("[The same police officer who applied for the first search warrant] avowed that after he and other officers had entered the property of Unit 18 they had been able to 'narrow . . . down' the source of the odor and exclude other potential sources.").
19. *Id.*
20. *Id.* at *4.
21. *Id.* at *5.

marijuana under the AMMA, police officers would need additional facts in order to determine whether the use or possession was illegal.[22]

The court found that the degree of suspicion that was now attached to the potentially legal possession of marijuana was comparatively modest in the absence of any information about the status of the person or entity possessing it.[23] "Unless the items are 'inherently criminal,' 'the absence of any additional facts suggesting a criminal connection renders the discovery of those items insufficient to support a finding of probable cause.'"[24] The court analogized the permitted use of medical marijuana by registered cardholders to the possession of prescription drugs: "Just as the possession of a prescription drug does not provide probable cause to suspect a drug offense under A.R.S. § 13-3406(A)(1), the mere scent of marijuana does not provide probable cause to suspect a crime under § 13-3405."[25]

The privacy rights of individuals outweighed the degree of suspicion provided by the smell of marijuana.[26] If the smell of marijuana, standing alone, were sufficient to establish probable cause, it would serve the purpose of treating all marijuana users alike, and would result in police practices that would infringe on the rights of any number of innocent individuals.[27] The court held that the likelihood that a person is not guilty of an offense is necessarily part of the probable cause determination, and that law enforcement officers were required to make some particularized showing that there was a "fair probability" that the person or place to be searched would provide evidence of criminal activity.[28] When marijuana was legalized for some citizens, officers could not distinguish unlawful use through smell alone.[29]

The *Sisco* court held that "demanding some circumstantial evidence of criminal activity, beyond the mere scent of marijuana, struck a reasonable balance," which is the touchstone of the Fourth Amendment.[30] This additional evidence of criminal activity would preserve the privacy rights of a significant number of individuals who were permitted to use medical marijuana in accordance with the AMMA.[31] The majority promoted what it coined an "odor-plus" standard.[32] An odor-plus standard would not only protect registered cardholders, but would also

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22. *Id.*. The court found that this decision was in accord with *Illinois v. Gates*. Because there were some individuals who could lawfully possess and use marijuana, the court needed to determine if there was a "fair probability" that evidence of criminal activity, i.e., the illegal use of marijuana, would be found. *Id.* at *6.

23. *Id.* at *6.

24. *Id.* at *5.

25. *Id.* The court found that Arizona voters had intended the law in Arizona to preserve the privacy rights of "those authorized to use medical marijuana, much like patients using any other therapeutic drug . . . ." *Id.* at *12.

26. *Id.* at *3.

27. *Id.* at *5.

28. *Id.* at *13.

29. *Id.* at *3; *see also* Illinois v. Gates, 462 U.S. 213, 238 (1983).

30. *Sisco*, 2015 WL 4429575, at *7.

31. *Id.*

32. *Id.*

protect the privacy rights of those whose property might be located nearby or those who occasionally host registered cardholders.[33]

The court held that the requirement of additional evidence was strengthened by their interpretation of the AMMA statute. "A registered qualifying patient . . . or caregiver is *not subject to* arrest, prosecution or penalty in any manner, or *denial of any right or privilege*," such as the right to be free from unreasonable searches and seizures.[34] This right, protected by the requirement for a search warrant, exists to protect an individual's privacy interests.[35] The court stated that a subsequent legal defense provides no relief from an invasion of privacy, because in these instances the search warrant hearing offers no opportunity for the suspected individual to assert a defense.[36]

In line with the reasonableness balancing test of the Fourth Amendment, the *Sisco* court considered the public interest, or the legitimate needs of law enforcement.[37] The court held that requiring such additional evidence of criminality did not unreasonably burden law enforcement, as officers were trained to "identify and skillfully investigate circumstances that would readily support a reasonable belief that marijuana is not likely to be lawfully possessed."[38] In many situations, officers could easily develop facts that tend to support a belief that the use, possession, or cultivation of marijuana is illegal, rather than legal.[39]

The *Sisco* decision was not unanimous, however, with one judge dissenting. The dissent argued that the odor-plus standard would essentially force officers to prove a negative—that the suspected use of marijuana was not legal—before probable cause could be met.[40] The dissent argued that this contradicted prior case law, which had established that "proof of such a negative [was] not a requirement [of] probable cause."[41] Further, the dissent took issue with the majority for finding that probable cause was not met in the particular case, even under an odor-plus standard. The dissent noted that when the officers discovered an

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33. *Id.* The fact that officers first searched a nearby unit in this case exemplifies a situation where the privacy rights of neighboring individuals were infringed.

34. *Id.* at *11 (emphasis added). The court also makes mention that the privacy rights of the registered qualifying patients are respected by keeping that information in a confidential database, against which police can only verify a registration card for validity. *See id.* at *12.

35. *Id.* at *8 ("When a magistrate makes no effort to discriminate between lawful and unlawful marijuana possession . . . an individual's constitutional rights to privacy are not adequately safeguarded.").

36. *Id.* at *13 ("[A]n ex parte warrant hearing affords no opportunity to assert a defense, prevent a search, and preserve one's constitutional right to privacy.").

37. *Id.* at *7. *See also* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) ("The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

38. *Sisco*, 2015 WL 4429575, at *7.

39. *Id.*

40. *Id.* at *17 (Espinosa, J., dissenting).

41. *Id. See also*, State v. Evans, 349 P.3d 205, 209 (Ariz. 2015) (recognizing a reasonableness standard does not demand that officers rule out possible alternative, innocent explanations for actions observed before effecting investigative stop).

overpowering odor of fresh marijuana; the smell was coming from a warehouse close to homes; there were no external signs indicating the presence of a dispensary or cultivation site; and the warehouse was located in a "high crime area."[42] These factors, the dissent argued, should have sufficiently provided the officers with reason to believe that the warehouse was not a legal cultivation site.

B. State v. Cheatham

Three days after the court decided *Sisco*, the Arizona Court of Appeals, Division I held that the AMMA has not eliminated the plain-smell doctrine in Arizona because the possession of marijuana remains a crime under Arizona law.[43] In *Cheatham*, an officer found probable cause to search the defendant's vehicle after the officer noticed a "strong odor of burnt marijuana" emanating from inside the vehicle during a routine traffic stop.[44] Eventually, the officer's search yielded a small amount of unburnt marijuana and the defendant was arrested and charged for illegal possession.[45] Although the defendant argued to suppress the evidence of his possession on the basis that "the odor of marijuana no longer has an incriminating character sufficient to establish probable cause of a crime" since the enactment of the AMMA, he was unsuccessful.[46] The court reasoned that the AMMA does not decriminalize marijuana possession, but simply allows registered qualifying patients to claim immunity from arrest, prosecution, or penalty for the use of marijuana pursuant to the AMMA.[47] As a result, "the AMMA does not eliminate the significance of the smell of marijuana as an indicator of criminal activity."[48]

The two court of appeals decisions espouse fundamentally different views of the effect the AMMA has had on the plain-smell doctrine in Arizona. The court in *Sisco* found that the purpose of the AMMA was to make a distinction between

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42. *Sisco*, 2015 WL 4429575, at *18 (Espinosa, J., dissenting).

43. 353 P.3d 382 (Ariz. Ct. App. 2015).

44. *Id.* at 383.

45. *Id.* at 383–84. The officer also found an empty cigar package. Based on the officer's experience and knowledge, he stated that individuals would empty the tobacco out of the cigar, insert the marijuana into the cigar, and then smoke it as a "blunt," or marijuana cigarette.

46. *Id.* at 384.

47. *Id.* (citing Reed-Kaliher v. Hoggatt, 347 P.3d 136, 139 (Ariz. 2015)); ARIZ. REV. STAT. ANN. § 36-2611(B) (2010). *But see Hoggatt*, 347 P.3d at 139 ("AMMA broadly immunizes qualified patients against 'penalty in *any* manner, or denial of *any* right or privilege.'"). In order to exercise the immunity under the AMMA, the defendant must "'please and prove,' by a preponderance of the evidence, that his or her actions fall within the range of immune action." *Cheatham*, 353 P.3d at 385. Because the defendant in *Cheatham* did not demonstrate that the AMMA immunity should apply, the court felt it was to determine the "impact on the plain smell doctrine by the AMMA if [the defendant] had presented an AMMA registry identification card issued in his name to the officers when he was stopped." *Id.*

48. *Cheatham*, 353 P.3d at 386. The court found support for its reasoning in non-Arizona cases deciding a similar issue. *Id.* at 385 (distinguishing Arizona from Massachusetts, Alaska, and Oregon, but drawing similarities between Arizona and Vermont).

the medical, lawful use of marijuana, and the nonmedical, unlawful use.[49] Because the smell of marijuana, standing alone, no longer provided officers with probable cause to believe a crime had been committed, the *Sisco* court held that the AMMA altered the plain smell doctrine under Arizona law.[50] *Cheatham* held the AMMA did not.[51]

It is worth noting that the *Cheatham* court suggested that its holding could be reconciled with *Sisco* because probable cause would still be met if officers detected the smell of marijuana in a defendant's automobile, as the smell of marijuana in the automobile suggests that a crime had occurred. However, unless *Cheatham* is narrowly understood to mean that the smell of marijuana establishes probable cause only when it is discovered in public or an automobile, or in violation of any of the listed prohibitions of the AMMA, then it is in conflict with the *Sisco* decision.[52] Additionally, the two decisions cannot be reconciled because the court in *Cheatham* held that the AMMA merely provided immunity from prosecution, but the *Sisco* court held that the AMMA protects registered qualified users from the denial of any right or privilege. It is unclear to what extent the plain smell of marijuana is sufficient for probable cause for situations outside the prohibitions of A.R.S. § 36-2802,[53] and the Arizona Supreme Court should address the issue to provide clarification.

II. COMPARABLE JURISDICTIONS

The courts in both *Sisco* and *Cheatham* looked to the approaches taken by other jurisdictions regarding the plain smell of marijuana in establishing probable cause. The majority of states that have enacted medical marijuana statutes have found that the smell of marijuana, standing alone, remains sufficient to establish probable cause.[54] This majority includes Michigan, Vermont, New Jersey, Washington,[55] and California. The courts in these states have held that the smell of

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49. State v. Sisco, No. 2 CA-CR 2014-0181, 2015 WL 4429575, at *5 (Ariz. Ct. App. July 20, 2015).

50. "A contrary decision would erase the distinction between the lawful and unlawful marijuana at the heart of the AMMA." *Id.*

51. *Cheatham*, 353 P.3d at 386.

52. *Id.* at 386 n.5.

53. *Id.*; ARIZ. REV. STAT. ANN. § 36-2802 (2010).

54. *See* People v. Strasburg, 56 Cal. Rptr. 3d 306, 311 (Ct. App. 2007) (finding "[p]robable cause was created by the odor and presence of marijuana in a parked car occupied by the two persons"); State v. Fry, 228 P.3d 1, 3–4, 7 (Wash. 2010) (finding probable cause where officers were informed that marijuana was being grown at a certain residence and subsequently smelled marijuana upon arriving at that residence); *cf.* People v. Brown, 825 N.W.2d 91, 92, 95 (Mich. Ct. App. 2012) (finding probable cause to search defendant's home where defendant's former roommate told police that defendant was growing marijuana, even though the Michigan Medical Marijuana Act made it legal to grow certain amounts of marijuana).

55. As in Oregon, Washington has legalized small amounts of marijuana since the cases cited by the *Sisco* and *Cheatham* courts. Jonathan Martin, *Voters Agree to Legalize Pot*, POLITICS NW. (Nov. 6, 2012, 10:15 PM), http://blogs.seattletimes.com/politicsnorthwest/2012/11/06/marijuana-legalizition-takes-

marijuana still reveals evidence of criminal activity, as the smell reveals marijuana, the possession and use of which is criminal.[56] The states that have held that the smell of marijuana no longer provides probable cause, at least in limited circumstances, are Alaska, Oregon, and Massachusetts.

A. The Majority Position

The majority of jurisdictions have treated the legalization of medical marijuana as an affirmative defense, providing immunity from prosecution.[57] An affirmative defense does not per se legalize an activity, nor does it negate probable cause to believe that a crime has been committed for the purpose of executing a search warrant.[58] Medical marijuana statutes merely exempt from prosecution a small number of individuals who comply with the requirements of their medical marijuana acts.[59] This immunity is from prosecution and arrest,[60] not a shield from reasonable investigation,[61] and, therefore, the scent of marijuana is still sufficient for probable cause.

The Vermont Supreme Court, in particular, seemed to base its decision on the fact that the medical marijuana exemption was from arrest and prosecution,[62] and the proportion of registered users who would be immune from prosecution was small compared to the population of the state as a whole.[63] The court held that, in the absence of any evidence that someone in the house was a registered cardholder, probable cause was not negated just because there was a "small possibility" that someone in the residence could have been a registered user.[64]

The majority of state courts hold that while officers should take into account an individual's status as a registered medical marijuana cardholder when

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commanding-lead/. It is unlikely that the smell of marijuana, standing alone, would then still be sufficient to establish probable cause.

56. *Brown*, 825 N.W.2d at 91; *Strasburg*, 56 Cal. Rptr. 3d at 311.

57. *Cheatham*, 353 P.3d at 384; *see also Fry*, 228 P.3d 1; Chianelli v. Commonwealth, 770 S.E.2d 778 (Va. Ct. App. 2015) (interpreting VA. CODE ANN. § 18.2-251.1); State v. Christen, 976 A.2d 980, 984 (Maine 2009).

58. *Fry*, 228 P.3d at 7.

59. *See* State v. Senna, 79 A.3d 45 (Vt. 2013).

60. *See* People v. Clark, 178 Cal. Rptr. 3d 649 (Cal. Ct. App. 2014) (interpreting California's medical marijuana act).

61. *Strasburg*, 56 Cal. Rptr. 3d at 314 (Cal. Ct. App. 2007).

62. VT. STAT. ANN. tit. 18 § 4474(b)(a) (West 2003) ("A person who has in his or her possession a valid registration card . . . and who is in compliance with the requirements of this subchapter . . . shall be exempt from arrest or prosecution."). *See also* CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996). Unlike statutes that exempt from arrest and prosecution registered medical marijuana cardholders, Arizona's guarantees registered medical marijuana cardholders freedom from the denial of any right or privilege. *Compare* ARIZ. REV. STAT. ANN. § 36-2811(B) (2010), *with* MICH. COMP. LAWS ANN. § 333.26424 (West 2013) (stating an exemption from arrest, prosecution, or penalty in any manner, and registered cardholders are not subject to the denial of any right or privilege).

63. *See Senna*, 79 A.3d at 51 (Vt. 2013). The *Sisco* court found this was not a relevant comparison. State v. Sisco, No.2 CA-CR 2014-0181, 2015 WL 4429575, at *6 (Ariz. Ct. App. July 20, 2015).

64. *Id.* at 289-290.

making a probable-cause determination,[65] they are not required to affirmatively prove that the specific use or possession of marijuana is illegal before probable cause can be established.[66] Probable cause is met as long as there is a substantial basis, i.e., a "fair probability," in support of the inference that contraband will be found; probable cause does not require finding a defense does not apply.[67] An affidavit that provides evidence that a grow operation is merely "potentially" illegal "[does] not undermine the finding of probable cause."[68] So long as the circumstances support a reasonable belief that evidence of criminal activity will be found, officers need not refrain from searching a person or place that could potentially be legal.[69]

Courts in the majority have placed the burden of establishing lawful use on the defendant or registered user.[70] This is because the existence of facts that would prove the legality of the use or possession of marijuana tends to be within the defendant's knowledge.[71] Proof of permission to use marijuana—the possession of a valid medical marijuana card—can be difficult for the prosecution to disprove,[72] and in some courts does not negate a probable cause determination.[73] Arizona's statute reflects this view because the AMMA prescribes that a presumption of lawful, medicinal use of marijuana exists if the qualifying patient is in possession of a registry identification card, and is in possession of an amount of marijuana that does not exceed the allowable amount.[74] Despite a similar presumption, California

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65. People v. Mower, 49 P.3d 1067, 1079 (Cal. 2002).

66. *See, e.g.*, People v. Brown, 825 N.W.2d 91, 93–95 ("[A] search-warrant affidavit concerning marijuana need not provide specific facts pertaining to the MMMA, i.e., facts from which a magistrate could conclude that the possession, manufacture, use, creation, or delivery is specifically not legal under the MMMA."); State v. Ellis, 327 P.3d 1247, 1250 (Wash. Ct. App. 2014); State v. Myers, 122 A.3d 994 (N.J. Super. Ct. App. Div. 2015) (holding that the smell of marijuana gave the officer probable cause to arrest the defendant, in the absence of any indication that the defendant or anyone in his car was a registered qualifying patient).

67. *Id.*

68. People v. Sexton, 296 P.3d 157, 162 (Colo. App. 2012).

69. *Id.*

70. *See Mower*, 49 P.3d 1067 (holding that while CAL. HEALTH & SAFETY CODE §11362.5(d) did not explicitly do so, the court decided to allocate the burden of proof to the defendant based on the rule of convenience and necessity); *see also* State v. Myers, 122 A.3d 994 (N.J. Super. Ct. App. Div. 2015) (interpreting N.J. STAT. ANN. § 2C:35-18(a) (West 2010).

71. *Id.* at 477. While this case involved the defense issue during trial, the thought is the same during an investigatory stop by a police officer.

72. *Id.*

73. State v. Reis, 322 P.3d 1238, 1245 (Wash. Ct. App. 2014) (citing State v. Fry, 228 P.3d 1, 7–10 (Wash. 2010)) ("As an affirmative defense, the [medical marijuana] defense does not eliminate probable cause where a trained officer detects the odor of marijuana. A doctor's authorization does not indicate that the presenter is totally complying with the Act: e.g., the amounts may be excessive. An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed."). This case involved the manufacturing of marijuana, which is still criminalized in Washington.

74. ARIZ. REV. STAT. ANN. § 36-2811(A)(1)(a)–(b) (2010); *see also* MICH. COMP. LAWS ANN. § 333.26424 (2013); VT. STAT. ANN. tit. 18, § 4474 (West 2015); N.J. STAT. ANN. 24:6I-6 (West 2010).

allows its officers to continue to search and investigate in an attempt to determine whether the individual possesses the marijuana for medicinal needs, and adheres to the limits prescribed.[75]

B. The Minority Position

Courts do not look solely at medical marijuana statutes when deciding whether the plain smell of marijuana is no longer sufficient to establish probable cause. In *State v. Crocker*, the Alaska Court of Appeals found that knowledge of marijuana possession alone was insufficient to establish probable cause.[76] However, their finding was not based upon the enactment of a medical marijuana statute, but rather the constitutional right of Alaskans to possess a limited amount of marijuana for personal use in their homes.[77] Because of this right, officers needed more than just the knowledge of marijuana possession to establish probable cause that conduct of a criminal nature would be found.[78] Since *Crocker*, Alaskan courts have weighed the applicability of statistics to the plain-smell doctrine.[79] In *State v. Smith*, the Alaskan Court of Appeals found that the addition of the officer's experience, plus the statistical analysis of previous cases within his unit, remedied the deficiency found in *Crocker*.[80]

In Massachusetts, where the possession of small amounts of marijuana was decriminalized in 2008,[81] courts have found that probable cause can be met only when evidence provides reason to believe that a criminal amount of marijuana was

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75. People v. Strasburg, 56 Cal. Rptr. 3d 306, 314 (Ct. App. 2007).

76. 97 P.3d 93, 96 (Alaska Ct. App. 2004).

77. *Id.* at 94. The holding that Alaskans have a constitutional right to possess marijuana in the privacy of their own homes was stated in *Ravin v. State*. 537 P.2d 494 (Alaska 1975). The *Ravin* court reasoned that the state's interests in promoting the safety and welfare of its citizens did not outweigh the privacy rights of individuals when there was little to no harm caused by the private, noncommercial use of marijuana in an individual's home. *Id.* at 511. It is also worth noting that a Hawaiian court recognized a higher state constitutional protection in the home, as the plain smell of marijuana was sufficient for probable cause, but would not justify an exigent circumstance to enter the home. State v. Dorson, 615 P.2d 740 (Haw. 1980). *But see* Mendez v. People, 986 P.2d 275 (Colo. 1999) (finding that the smell of burning marijuana did justify an exigency and the officer was allowed to enter the suspect's motel room to search for marijuana).

78. *Id.* at 96.

79. Jason Brandeis, *The Continuing Vitality of* Ravin v. State*: Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes*, 29 ALASKA L. REV. 175, 227–29 (2012).

80. State v. Smith, 182 P.3d 651, 654 (Alaska Ct. App. 2008). "[The officer's] affidavit stated that: eighty-one of the marijuana grows seized by [the officer's] unit from 2000 to 2004 were discovered by officers smelling growing marijuana, and in ninety-six percent of those seizures, a felony level grow operation was discovered." *Id.*

81. David Abel, Vote*rs Approve Marijuana Law Change*, BOSTON GLOBE (Nov. 5, 2008), http://www.boston.com/news/local/articles/2008/11/05/voters_approve_marijuana_law_change/ (discussing Massachusetts's decriminalization of possession of one ounce of marijuana).

possessed.[82] After enacting a medical marijuana statute in 2012,[83] courts in Massachusetts have found that the plain smell of marijuana was no longer sufficient to establish probable cause.[84] In contrast to the majority of states, Massachusetts requires police to affirmatively produce evidence suggesting that the cultivation of marijuana is not legal before probable cause is met.[85]

In Oregon, small amounts of recreational marijuana, as well as medical marijuana, are permitted.[86] While no Oregon court has explicitly overruled the plain-smell doctrine,[87] it is unlikely that the smell of marijuana, standing alone, would be sufficient for probable cause.[88] For probable-cause determinations, officers need to produce sufficient evidence to believe that contraband will probably be found in the defendant's home.[89] In Oregon, the question for police officers is not whether *any* marijuana will be found, but whether *an unlawful* amount of marijuana, and therefore evidence of criminal activity, will be found.[90] In *Castilleja,* the amount of

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82. Commonwealth v. Cruz, 945 N.E.2d 899, 915–16 (Mass. 2011) (holding that the statute decriminalizing the possession of a small amount of marijuana did not decriminalize the cultivation of marijuana).

83. Ryan Jaslow, *Medical Marijuana Law Passes in Massachusetts*, CBS NEWS (Nov. 7, 2012, 2:01 PM), http://www.cbsnews.com/news/medical-marijuana-law-passes-in-massachusetts/.

84. Commonwealth v. Canning, 28 N.E.3d 1156 (2015) (holding that because the cultivation of marijuana was still criminalized, the source of the smell of marijuana was either illegal, or the legal cultivation by a registered medical marijuana user).

85. *Id.* at 342.

86. Press Release, Or. Liquor Control Comm'n, Oregon's Recreational Marijuana Laws Go into Effect (June 30, 2105), http://www.oregon.gov/olcc/docs/news/news_releases/2015/nr_06_30_15_Effective_date_media_release6-30.pdf.

87. Since marijuana was legalized for recreational use, courts have not decided whether the plain smell doctrine is still valid.

88. *See* State v. Derrah, 84 P.3d 1084, 1091–92 (Or. Ct. App. 2004). The plain smell doctrine may still be applicable for "reasonable suspicion." *See* State v. Acuna, 331 P.3d 1040, 1050 (Or. Ct. App. 2014).

89. State v. Castilleja, 192 P.3d 1283, 1299 (Or. 2008); *See also id.* at 1298–99 ("To uphold a warrant, the reviewing court need only conclude that the issuing magistrate reasonably could conclude that the facts alleged, together with the reasonable inferences that fairly may be drawn from those facts, establish that seizable things *probably* will be found at the location to be searched.").

90. *Id.* at 1298; State v. King, 312 P.3d 595, 605 (Or. Ct. App. 2013). These cases were decided before Oregon legalized recreational marijuana for individuals 21 and older. Both cases involved defendants who were registered medical marijuana cardholders, so probable cause required showing possession of more than the permitted amount for those users. If the individuals were not registered cardholders and the officers smelled marijuana, officers would presumably have to produce evidence to believe that the individuals were not registered cardholders and therefore *any* amount of marijuana possession would be unlawful. Further, in Oregon, police officers are able to verify an individual's classification before applying for a search warrant, in contrast to Arizona and Michigan. *See* State v. Sisco, No.2 CA-CR 2014-0181, 2015 WL 4429575, at *12 (Ariz. Ct. App. July 20, 2015); ARIZ. REV. STAT. ANN § 36-2807(B) (2010); People v. Brown, 825 N.W.2d 91, 93 (Mich. Ct. App. 2012) (holding that the police officer could not check the defendant's status under the state's medical marijuana act because the Department of Community Health would not provide

marijuana lawfully possessed was six ounces, so the question was whether probable cause existed to believe that more than six ounces of marijuana would be found.[91] In *King*, the court found the issue to be whether there was probable cause to believe that *unlawful* activity related to marijuana cultivation was occurring.[92] Probable cause can be met by showing a non-registered cardholder was in possession of some marijuana, as even small amounts of marijuana were criminalized,[93] or showing that a registered cardholder possesses more than what is lawfully permitted.

In all search and seizure determinations, courts must balance the privacy interests of individuals against the right of the police to investigate criminal activity.[94] Where marijuana possession and use is legal for all citizens, courts have found that the smell of marijuana is not sufficient to establish probable cause. Under these circumstances, constitutional concerns over privacy rights necessitate a finding of additional factors before probable cause can be met.[95] However, where only medical marijuana is permitted, the majority of courts find that the smell of marijuana, standing alone, is still sufficient for probable cause.

III. AN ODOR-PLUS STANDARD

In Arizona, where marijuana is still an illegal substance, the court could adopt a decision in support of the continuance of the plain-smell doctrine. When doing so, the court should consider the needs of police enforcement when officers cannot obtain knowledge of a suspected individual's registration status before a search may be conducted.[96] However, the court must additionally consider the privacy rights of individuals when making probable cause determinations. This requires balancing the legitimate needs of law enforcement to enforce society's prohibition on marijuana against the individual's right to privacy and freedom from official interference.[97]

The standard that best balances these interests is the *Sisco* court's odor-plus standard.[98] Detecting the odor of marijuana ("plain smell") should remain a factor as it helps effectuate Arizona's criminal prohibition against marijuana possession. But something more should be required to meet probable cause. The demand that

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information about an individual based solely on the individual's name; an identification number was required).

91. State v. Castilleja, 192 P.3d 1283, 1291–92 (Or. 2008). The Oregon Medical Marijuana Act (OMMA) in force at the time of defendants' alleged crimes, a person who possessed a "registry identification card"—the document more commonly referred to as a "medical marijuana card"—could lawfully possess up to three mature plants, four immature plants, and one ounce of "usable marijuana" per each mature marijuana plant. Officers knew the defendants had six plants, and so could lawfully possess up to six ounces of marijuana.

92. *King*, 312 P.3d at 602, 605.

93. *Id.*; *Castilleja*, 192 P.3d at 1291–92 (reasoning of the court was given before recreational marijuana was legalized for all citizens 21 and older).

94. *Sisco*, 2015 WL 4429575, at *7.

95. State v. Crocker, 97 P.3d 93, 95 (Alaska Ct. App. 2004).

96. *See supra* discussion in note 90.

97. *Sisco*, 2015 WL 4429575, at *7. The odor-plus standard better protects individuals in their home, particularly if the Arizona Supreme Court finds that the Arizona Constitution provides higher privacy protections on the home than the Fourth Amendment.

98. *Id.*

police produce additional evidence may be burdensome,[99] but this may be the price Arizona citizens anticipated and were willing to pay to ensure the freedom of medical marijuana users.[100] At this time, statistics could provide the "plus" in an odor-plus standard,[101] effectively allowing officers to continue to meet probable cause based on the discovery of the smell of marijuana. As such, a magistrate reviewing the application for a search warrant could determine that probable cause is met when an officer smells marijuana and pairs the smell of marijuana with the probability that in the given area at the given time the smell is coming from the illegal use or production of marijuana.[102] The officer would not need to produce additional facts tending to show a particular user is not registered because the odds are in favor of illegal use. While an odor-plus standard supported by statistics may not be perfect, and would still result in some false positives, statistics provide a more reliable framework than other factors.[103]

The odor-plus standard would be adaptable to changes in statistics over time. At the end of 2014, there were 63,417 active AMMA cardholders,[104] but several months later the number of active cardholders had increased to 82,644.[105]

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99. *Id*. at *16 (Espinosa, J., dissenting).

100. *Id.* at *7; *cf.* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983) ("The inevitable result of the Constitution's prohibition against unreasonable searches and seizures . . . is that police officers who obey its strictures will catch fewer criminals. . . . It is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.").

101. The statistics and probabilities discussed in Part IV are based on the most currently available data. For more accurate and reliable statistics the Arizona government should compile more in-depth statistics to better estimate the number of illegal users of marijuana. This is particularly true in locations where there may be more illegal users on average than in other areas. The State or officers should bring forth evidence showing that one inference, the illegal use of marijuana, is more likely than the other, legal use of marijuana.

102. An individual officer could presumably produce statistics about, or attest to, the number of marijuana arrests he has made in a particular area, as well as the number of instances he has arrested individuals for marijuana possession of more than a permitted amount. An officer's affidavit could also put forth that in a certain town or location there are only a select number of dispensaries, the location to be searched is within the 25-mile limit, and evidence tends to show it is more probable that the location to be searched is not a lawful cultivation site. *Sisco*, 2015 WL 4429575, at *18 (Espinosa, J., dissenting); *infra* Section IV.B.

103. *See* Jane Bambauer, *Hassle*, 113 MICH. L. REV 461, 509 (2015) (discussing the faults with more intuitive tools, i.e., eyewitness accounts, confidential informants, the "hunches" of police officers); *see also* Illinois v. Rodriguez, 497 U.S. 177, 185 (1990) ("What is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.").

104. ARIZ. DEP'T OF HEALTH SERVS., ARIZONA MEDICAL MARIJUANA ACT (AMMA) END OF YEAR REPORT 4 (2014), http://azdhs.gov/documents/licensing/medical-marijuana/reports/2014/arizona-medical-marijuana-end-of-year-report-2014.pdf [hereinafter ARIZ. 2014 END OF YEAR REPORT].

105. *See* ARIZ. SEPT. 2015 REPORT, *supra* note 15.

This trend suggests a growing likelihood of detecting legal marijuana use more often than illegal use.[106] At some point, the legitimate needs of law enforcement to enforce society's prohibition on marijuana would no longer outweigh the privacy rights of individuals. If the likelihood of illegal marijuana use decreases, plain smell alone may result in a greater inaccuracy than we are prepared to accept. If the statistics change over time, an odor-plus standard would better protect the privacy interests of individuals: statistics would no longer serve as the "plus," but instead additional facts would be required to show illegal use.[107]

One fear of the majority in *Sisco* is that, if probable cause is established by the odor of marijuana alone, then law enforcement officers could invade an individual's privacy with the goal of finding marijuana even if the individual is a registered cardholder in compliance with the AMMA.[108] An odor-plus standard would protect an individual's privacy rights by requiring multiple factors, while also enabling law enforcement to ensure that even registered users comply with the AMMA.[109] Under this standard, officers would simply need to provide evidence that supports the belief of an illegal amount of marijuana being possessed, which is the standard Oregon has adopted.[110]

Even where statistics do not support the belief that in a certain situation there is a likelihood of finding criminal activity, police are not overburdened by an odor-plus standard because the plus may be met through other factors.[111] The plus may be met by showing that the smell of marijuana was coming from the use of marijuana in a public place, or in a car.[112] If police are concerned with the illegal cultivation of marijuana, the odor-plus standard may be met by the smell of marijuana as well as information from a confidential informant, or evidence showing higher utility bills relative to a suspect's neighbors.[113]

The odor-plus standard would not require that police prove the use of marijuana is illegal to establish probable cause, as courts in Massachusetts do.[114] The odor-plus standard would simply require finding additional facts which tend to support a probable cause determination that it is likely that evidence of a criminal

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106. Certainly some medical marijuana users only began using marijuana or considered it for medical treatment, in lieu of traditional medicines, once medical marijuana was permitted. These users would therefore increase both the number of registered users, and the total number of marijuana users in Arizona (the 699,000 estimate).

107. A change in statistics is relevant, as it would change the probability that one could infer illegal use of marijuana. *See Sisco*, 2015 WL 4429575, at *3 ("[W]here there is more than one inference equally reasonable, then probable cause does not exist.").

108. *Id.* at *7.

109. The requirement of the "plus" better protects those individuals who may be lawfully using or possessing small amounts of medical marijuana in the privacy of their own homes. *See id*.

110. State v. Castilleja, 192 P.3d 1283 (Or. 2008); State v. King, 312 P.3d 595 (Or. Ct. App. 2013).

111. *See Sisco*, 2015 WL 4429575, at *9.

112. State v. Cheatham, 353 P.3d 382, 386 n.5 (Ariz. Ct. App. 2015); ARIZ. REV. STAT. ANN. § 36-2802 (2010).

113. *See* State v. Cole, 906 P.2d 925 (Wash. 1995).

114. Commonwealth v. Canning, 28 N.E.3d 1156 (Mass. 2015).

nature would be found,[115] i.e., a showing of *probable* illegal use. This requirement would be a compromise between police not having to provide any evidence tending to show illegal use at one end of the spectrum, and police having to affirmatively prove that an individual is *definitively not* a registered user at the other end.[116]

The adoption of an odor-plus standard would be in line with the Supreme Court's interpretation of probable cause as a fluid concept.[117] Odor-plus would not only be fluid with respect to evolving statistics, but also to evolving legislation. The odor-plus standard, if marijuana is legalized, could be satisfied by the production of other applicable statistics, or the production of other evidence that tends to show it is probable that *illegal* use is occurring, i.e., that an illegal amount is being possessed.[118] The odor-plus standard, unlike the plain-smell doctrine, would minimize the need for revision of the law in light of changes in marijuana law and policy. Because the standard would already require a finding of additional facts, judges could simply change their consideration of what additional facts qualify as the "plus." Even if statistics may no longer support an inference of illegal use, other facts could.

IV. THE PROBABILITY THAT THE SMELL OF MARIJUANA IS COMING FROM AN ILLEGAL SOURCE NOT EXEMPTED UNDER THE AMMA

In medical-marijuana states, there is a binary distinction among incidents of marijuana use: either lawful or unlawful. But, this is not a coin flip, as the odds are weighted in favor of illegal use.[119] The statistics of use are relevant in a court's analysis because "[w]hen assessing whether probable cause exists, '[courts] deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[120] The odor of marijuana does not create a 50-50 scenario regarding whether the use is legal or illegal. It is more like a lottery ticket where one particular outcome is much more likely than the other.

The probable cause standard "represents a necessary accommodation between the individual's right to liberty and the States duty to control crime," and

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115. *Sisco*, 2015 WL 4429575, at *18, *21 (Espinosa, J., dissenting).

116. *See* State v. Evans, 349 P.3d 205, 208 (Ariz. 2015).

117. Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause 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.").

118. State v. Smith, 182 P.3d 651, 654 (Alaska Ct. App. 2008)..

119. *See Sisco*, 2015 WL 4429575, at *4 (quoting Drury v. Burr, 483 P.2d 539, 540 (Ariz. 1971) ("Where there is more than one inference equally reasonable, then probable cause does not exist, but where one inference is more reasonable than another and is on the side of guilt, then probable cause may be said to exist.").

120. *Id.* at *17 (Espinosa, J., dissenting) (quoting State v. Dixon, 735 P.2d 761, 763 (Ariz. 1987)); *see also* State v. Myers, 122 A.3d 994, 1002 (N.J. Super. Ct. App. Div. 2015) ("Under search and seizure law, probable cause can arise about objects that are not 'per se contraband.' Probable cause merely requires a practical, common sense determination whether, given all the circumstances, there is a fair probability that contraband or evidence of a crime will be found.").

while the United States Supreme Court has declined to provide a precise quantification of the probable cause standard, the Court has stated that it is lower than the preponderance standard.[121] Because of this, it is unlikely that probable cause requires a "more probable than not" standard of more than 50%.[122] In fact, the average figure for judges polled on this question was 45%.[123]

Courts require that the belief of guilt be *particularized* to the person to be searched or seized.[124] This is also known as *individualized* suspicion, and it is, in most instances, a prerequisite to conducting a search or seizure.[125] However, case-by-case reasoning cannot, and does not, eliminate generalizations.[126] Courts routinely rely on generalizations and probabilities.[127] In the context of the odor-plus standard, courts should find that the general probability that marijuana use is illegal, together with the detection of marijuana odor from a particular individual or place is sufficient to justify probable cause.[128]

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121. *See* Bambauer, *supra* note 103, at 468 (citing Illinois v. Gates, 462 U.S. 213, 238 (1983); Gerstein v. Pugh, 420 U.S. 103, 121 (1975)).

122. Texas v. Brown, 460 U.S. 730, 742 (1983); *see also* Christopher Slobogin, *The World without a Fourth Amendment*, 39 UCLA L. REV. 1, 40 n.130 (1991) (citing McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1325 (1982)) ("[W]hen asked to quantify the degree of certainty represented by the phrase 'probable cause,' 166 federal judges gave an average response of 45.78%.").

123. *See* Slobogin, *supra* note 122.

124. Maryland v. Pringle, 540 U.S. 366, 371 (2003).

125. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2007) ("A search and seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."); *see also* Bambauer, *supra* note 103, at 469; *see generally* Andrew E. Taslitz, *What Is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 LAW & CONTEMP. PROBS., 145, 146 (2010) ("Roughly defined, individualized suspicion is the idea that the state should judge each citizen based upon his own unique actions, character, thoughts, and situation.").

126. *See* Bambauer, *supra* note 103, at 471 (citing Justice Stevens's opinion in *Richards*, 520 U.S. at 394, as an example but finding that the "plus" of the exigency created by the worry of the individual to destroy the drugs really advances the suspicion prong of individualized suspicion (the probability that a particular defendant will destroy drugs), not the individualization prong)). Bambauer ultimately concludes that Justice Stevens' rule relies just as heavily on generalizations as the rule it replaces. Adding additional facts does nothing more than add another layer of generalizations. *Id.*

127. For a discussion on courts' reliance on drug-sniffing dogs, even when they are shown to be imperfect, because the majority of the time they may be accurate, see Jane Bambauer, *Defending the Dog*, 91 OR. L. REV. 1203 (2013); Bambauer, *supra* note 103, at 472 ("Whatever is truly unique about a case cannot support an educated guess about its outcome unless it is analogized to some other generalization. The generalizations can be more finely grained by adding variables, but the nature of the prediction does not change.");

128. Taslitz, *supra* note 125, at 148–49 (mentioning that, in the context of searching a student for paraphernalia, probable cause requires that something be linked to the student being searched). In the present context, because marijuana is still an illegal substance, particularized suspicion should be achieved where the police can point to a specific person or place as the source of the smell. General probability will provide the belief that the particular source of the smell is illegal. *See* United States v. Ramos, 443 F.3d 304, 308–09 (3rd Cir. 2006) (evaluating particularization of smell in a reasonable suspicion context).

A statistical analysis is useful.[129] In *Sisco*, the state argued, without providing the statistics, that the odds remain "overwhelming[ly]" in favor of the marijuana being possessed illegally, even in light of the hundreds of Arizonans who can now lawfully possess or use marijuana.[130] The court found that, in the absence of such statistics, the "magistrate had no basis to assume that most warehouses currently containing marijuana in Arizona do so illegally."[131] The below statistics reflect the best information currently available during the process of writing this Note. It would not be improper, but rather commendable, for a prosecutor or court relying upon a statistical analysis to compile more recent and narrow data.

A. The Odor of "Burnt"[132] Marijuana

Where the police encounter the smell of marijuana, it is more probable that they are encountering the illegal use or possession of marijuana than the lawful use or possession. In 2013, an estimated 24.6 million Americans aged 12 or older used illicit drugs regularly, including marijuana, cocaine, heroin, and prescription pain relievers.[133] The 2012–2013 Substance Abuse and Mental Health Services studies (the most recent with estimates of marijuana smokers in Arizona) estimate that roughly 699,000 Arizona residents, ages 12 and older, used marijuana during the year.[134] In September 2015, there were 82,644 qualifying patients—licensed users—

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129. *See* Bambauer, *supra* note 103, at 476 (providing examples); State v. Sisco, No. 2 CA-CR 2014-0181, 2015 WL 4429575, at *6 (Ariz. Ct. App. July 20, 2015). This is necessary where the "touchstone of the Fourth Amendment is reasonableness . . . [which] depends on balancing the public interest, or the legitimate needs of law enforcement, and the individual's right to privacy and freedom from official interference." *Id.* at *7 (citing Kentucky v. King, 131 S. Ct. 1849 (2011); United States v. Knights, 534 U.S. 112 (2001)).

130. *Sisco*, 2015 WL 4429575, at *6 (Ariz. Ct. App. July 20, 2015).

131. *Id.* The court felt it was not representative to support the State's intuition by taking the number of medical marijuana smokers out of the entire population; the more accurate representation would be achieved by taking the number of medical marijuana smokers out of the marijuana smoking population.

132. I use "burnt" to represent the use of marijuana, which must be done by an individual, and therefore would not represent what is thought to be marijuana plants or the cultivation of marijuana.

133. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (2014), http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf. The most recent year in which data is provided is 2013 that compares medical marijuana users out of the population of marijuana users. Because the possession and use of marijuana is still criminalized on a federal level, these estimates include medical marijuana users in addition to nonregistered users.

134. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., 2012–2013 NATIONAL SURVEYS ON DRUG USE AND HEALTH: MODEL-BASED ESTIMATED TOTALS (IN THOUSANDS) (50 STATES AND THE DISTRICT OF COLUMBIA) 4–5 (2013), http://www.samhsa.gov/data/sites/default/files/NSDUHsaeTotals2013/NSDUHsaeTotals2013.pdf [hereinafter 2012–2013 SAMHSA SURVEY]. (representing 2013 data). There is a 95% confidence interval between 599,000 and 813,000 for these estimates.

that could lawfully use marijuana in Arizona.[135] If the estimate of marijuana smokers remains constant, the percentage of marijuana smokers who are lawfully allowed to smoke would be 11.82%.[136] Standing alone, the odor of marijuana should be sufficient for probable cause because the remaining 88.18% of individuals who use marijuana are doing so illegally.[137]

The number of users is only half of the analysis; the frequency at which individuals use marijuana is the other. It is understandable that marijuana users who are permitted to use marijuana because of its medical benefits would use the drug often, likely daily, just as they would other prescriptions and medications, in order to alleviate chronic pain or other symptoms.[138] Such daily use would result in more instances where police might smell the odor of marijuana. While there are no specific facts available on the rate of use in Arizona, national studies report 17.4% of those who used marijuana over the past year did so on a daily or near-daily basis.[139] If all medical marijuana smokers do so daily (and therefore are captured by the 17.4% of total daily smokers),[140] about 67.95% of daily or near-daily users in Arizona have a medical marijuana card, and thus may use marijuana legally.[141]

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135. *See* ARIZ. SEPT. 2015 REPORT, *supra* note 15.

136. 82,644 ÷ 699,000 = .11823, or roughly 11.82%. In general, these numbers are similar to those from other states that have legalized the use and possession of medical marijuana but have not decriminalized marijuana for all citizens.

137. This does not take into account the number of registered users who may nonetheless be using or possessing marijuana illegally if they possess more than the allowable amount.

138. Mark A. Ware et al., *Cannabis for the Management of Pain: Assessment of Safety Study (COMPASS)*, J. OF PAIN (2015), http://www.jpain.org/article/S1526-5900(15)00837-8/fulltext#sec2 (discussing medical marijuana users who used for chronic non-cancer pain who did so daily). For the probability of illegal and legal uses of marijuana, I use the figure of one use of marijuana per day for all users. Without further data I believe this is a fair representation, where both medicinal and illegal daily users of marijuana may actually use more than once per day, seeing as both could develop tolerances or simply choose to use more than once per day, as well as those users who do not use every day but could use more than once in the given day they reported using.

139. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS, RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES 1440 (2015), http://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs2014/NSDUH-DetTabs2014.pdf [hereinafter, SAMHSA]. Considering the number of states where marijuana is legal, medical marijuana is legal, or marijuana is not legal but individuals choose to use marijuana at a significant level anyway, I have no reason to doubt that those percentages are not fairly representative of Arizona as a state.

140. For these estimates, individuals can only answer within one range of uses. Other ranges of uses do not represent medical marijuana users, those who are assumed to use marijuana on a daily or near daily basis. 17.4% of the past year users of marijuana represents 121,626 Arizonans. 82,644 of those are registered cardholders, or the 11.8% out of all respondents, leaving 38,982 daily users of marijuana doing so illegally, or 5.6% of Arizonan marijuana users.

141. 17.4% x 699,000 equals 121,626 daily or near daily marijuana users in Arizona. Because 82,644 of those daily users are registered cardholders, they account for 67.95% of the daily or near daily users. (82,644 ÷ 121626 = .67949).

Of those who reported using marijuana in the past month—426,000 in Arizona[142]—41.1% were reported as daily or near daily users.[143] Assuming medical marijuana smokers use marijuana daily (and so are captured by the 41.1%[144]) as a prescription medicine, roughly 47.21% of daily or near daily users in the past month were registered cardholders who could legally possess and use marijuana.[145] The remaining 52.79% of daily users smoke marijuana illegally, in addition to the number of illegal smokers who do not use daily but still reported using the drug during the past month.

If we continue to assume that all medical marijuana users use daily, and we use the median figure in each range, we can additionally estimate the number of legal uses of marijuana in the past month, as well as the past year, against the number of illegal uses. Over the past month, roughly 426,000 Arizonans smoked marijuana: 41.1% did so between 20–30 days over the past month; 19.1% did so between 6–19 days; 16.4% did so between 3–5 days; and 23.3% did so only on 1–2 days over the past month.[146] Where 82,644 medical marijuana smokers did so daily, this accounts for roughly 19.4% of the total month users, leaving the remaining users doing so illegally. If there are 30 days in a given month, the number of instances of legal marijuana use is 2,479,320.[147] The number of illegal instances is 3,756,468.[148] The total number of marijuana uses in the past month is 6,235,788. The illegal uses represent roughly 60% of all uses of marijuana in the past month.

Over the past year, roughly 699,000 Arizonans smoked marijuana, and only 82,644 users did so legally. 17.4% did so on a total of 300–365 days; 24% did so between 100–299 days; 9.8% did so between 50–99 days; 18.6% did so between 12–49 days; and 30.2% did so between 1–11 days over the past year.[149] The annual total of illegal uses of marijuana is 56,659,500,[150] against 30,165,060 legal uses.[151]

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142. *See* 2012–2013 SAMHSA SURVEY, *supra* note 134, at 6–7.

143. SAMHSA, *supra* note 139.

144. If medical marijuana smokers use daily, they would represent a portion of the 41.1% of individuals who reported using daily; they would not be part of the remaining ranges of number of uses over a given month.

145. 41.1% of 426,000 equals 175,086; the number of daily or near daily users of marijuana. Roughly 47.21% of those daily or near daily users were registered users. (82,644 (legal daily users) ÷ 175, 086 (daily users) = .472019).

146. SAMHSA, *supra* note 139.

147. (82,644 x 30).

148. (92,442 x 25 =2,311,050) + (81,366 x 12.5 = 1,017,075) + (69,864 x 4 = 279,456) + (99,258 x 1.5 = 148,887). As the numbers of uses are given in a range, such as between one and two times a month, I use the average, so 1.5, for the calculation. The use of the average accounts for both those who use at the top and bottom of each range.

149. SAMHSA, *supra* note 139.

150. (38,982 x 332.5 = 12,961,515) + (167,760 x 199.5 = 33,468,120) + (68,502 x 74.5 = 5,103,399) + (130,014 x 30.5 = 3,965,427) + (211,098 x 5.5 = 1,161,039). Because marijuana is still federally criminalized the estimates for Arizona include medical marijuana smokers who are allowed to smoke in accordance with state law. Because I am assuming that medical marijuana cardholders use marijuana daily, they are represented in the 17.4% who use daily or near daily. Because they can legally use according to state law, the number of illegal daily smokers is ((17.4% of 699,000, or 121,626) – 82,644 =) 38,982.

151. (82644 x 365).

This indicates that roughly 65% of instances of marijuana use within a given year are illegal.

The statistics suggesting that roughly 60% over a given month and 65% of the annual uses of marijuana are illegal should be enough to satisfy an odor-plus standard for probable cause because judges have described probable cause as a 45% likelihood of illegal activity. Using these current statistics, along with the actual detection of the odor of marijuana, satisfies two needs. It reflects the police's legitimate law enforcement duty to investigate further for the illegal use of marijuana, while also providing protection for individuals privacy interests.[152]

B. The Odor of "Unburnt" Marijuana[153]

Officers do not solely pursue the use and possession of small amounts of marijuana. Officers similarly pursue enforcement of the cultivation and distribution of marijuana. The smell of burnt marijuana refers to the possession and use of small amounts of marijuana. The smell of "un-burnt" marijuana refers to the smell of marijuana plants, that is, marijuana being cultivated for distribution. Particularly where some Arizona citizens may legally cultivate medical marijuana, the scent of growing marijuana plants may no longer indicate criminal conduct.[154] However, as this section will show, the presumed majority of marijuana distribution and cultivation is illegal, and officers, when they smell the scent of (growing) marijuana plants, should have probable cause to investigate the source of marijuana cultivation.

Arizona citizens are allowed to grow their own marijuana upon meeting certain requirements.[155] However, there has recently been a decline in the cultivation of marijuana among cardholders for personal use, primarily attributable to a growth in the number of dispensaries, and the twenty-five mile regulatory restriction for cultivation.[156] Arizona does not allow registered medical marijuana patients living within 25 miles of a dispensary to grow their own cannabis.[157] Approximately 97.2% of Arizonans, or 6,211,787 individuals, currently live within twenty-five miles of an operating medical marijuana dispensary and therefore are not legally allowed to grow their own marijuana.[158] Only 1,445, or 1.75%, of qualifying patients are authorized to cultivate marijuana, and only 442 caregivers are allowed to cultivate in the state of Arizona.[159]

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152. *See* State v. Gunter, 414 P.2d 734, 739 (Ariz. 1966) (recognizing the standard's role in balancing the community's interest in law enforcement against the individual interest in immunity).

153. "Unburnt" marijuana represents marijuana that is being cultivated, as it has not been smoked yet.

154. ARIZ. REV. STAT. ANN. § 36-2801(1)(a)(ii) (2010).

155. *Id.* § 36-2811.

156. *See* ARIZ. 2014 END OF YEAR REPORT, *supra* note 104, at 4.

157. ARIZ. REV. STAT. ANN. § 36-2804.02(A)(3)(f) (2010); State v. Sisco, No. 2 CA-CR 2014-0181, 2015 WL 4429575, at *16 n.14 (Ariz. Ct. App. July 20, 2015).

158. ARIZ. 2014 END OF YEAR REPORT, *supra* note 104, at 11.

159. *See* ARIZ. SEPT. 2015 REPORT, *supra* note 15, at 4.

In Arizona there is an allowance for up to 126 dispensaries.[160] In certain locations, only a few dispensaries are permitted, and each dispensary is only allowed one cultivation site.[161] Therefore, there will also be a limited number of cultivation sites where marijuana can be grown legally.[162] Marijuana is not just obtained from dispensaries, however. In addition to purchasing from a medical marijuana dispensary, individuals procure marijuana from a number of other locations, such as other public buildings, public areas, school buildings or outside school property, and from inside a home, apartment, or dorm.[163]

In 2013 there were 30,962 arrests in Arizona for drug abuse violations, of which approximately 1,455 were for the sale or manufacture of marijuana.[164] In Tucson, there are ten listed medical marijuana dispensaries; in Phoenix there are thirteen.[165] These are the two largest cities in Arizona; smaller cities have far fewer dispensaries, if any. The majority of individuals live within 25 miles of an authorized dispensary, and are not lawfully allowed to cultivate their own marijuana. In Tucson, for the most part, there will only be 20 locations where marijuana may be lawfully cultivated: 10 by the known dispensaries, and 10 by the legally allowable number of cultivation sites (1 per dispensary). In Phoenix, there can at most be 26 locations where marijuana may be lawfully grown. Dispensaries are likely to be clearly marked, and in fact officers could simply conduct an Internet search in order to discover the location of a known dispensary. Cultivation sites will be harder to locate.

In towns with one or two dispensaries, there may only be one or two auxiliary cultivation sites, or locations other than a dispensary that could lawfully grow marijuana. In those locations where fewer dispensaries are lawfully permitted,

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160. *See Compassionate Care Dispensary, Inc. v. Ariz. Dep't of Health Servs.*, No. 1 CA-CV 13-0133, 2015 WL 1395271, at *1 (Ariz. Ct. App. Mar. 24, 2014) ("Pursuant to regulations promulgated by the Department, only one dispensary registration certificate was to be awarded for each Arizona Community Healthcare Analysis Area, or "CHAA," of which there are 126.").

161. ARIZ. REV. STAT. ANN. § 36-2804(B)(1)(b)(ii) (2010); ARIZ. ADMIN. CODE R9-17-101 (defining "cultivation site" as the one additional location where marijuana may be cultivated, infused, or prepared for sale by and for a dispensary.").

162. A dispensary may only have one cultivation site in addition to its dispensary location. Not all dispensaries have an additional cultivation site. As of March 2015, only 58 dispensaries had obtained permits to grow marijuana. *See* Ken Alltucker, *Could Arizona See a Glut of Medical Marijuana?*, AZCENTRAL (Mar. 24, 2015, 10:38 AM), http://www.azcentral.com/story/news/arizona/politics/2015/03/21/arizona-moving-toward-toward-medical-pot-glut/25170547/.

163. SAMHSA, *supra* note 139, at tbl.6.45A. It is also worth mentioning that a large portion of marijuana users obtained their marijuana for free from someone else or shared it. *Id.* at tbl.6.44B.

164. FED. BUREAU OF INVESTIGATION, Arrests by State, 2013 (2014), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-69/table_69_arrest_by_state_2013.xls. Approximately 4.7% of which were for sale or manufacture of marijuana. FED. BUREAU OF INVESTIGATION, Persons Arrested, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested (last visited Nov. 20, 2015).

165. *Arizona Dispensaries by City*, AZMARIJUANA.COM, http://azmarijuana.com/dispensaries/ (last visited Nov. 20, 2015).

and therefore fewer cultivation sites are lawfully permitted, the number of instances of the police possibly encountering a location that is cultivating marijuana legally are fewer and fewer. The police, upon encountering the odor of marijuana cultivation not in the vicinity of a known dispensary, are more likely encountering an illegal grow operation. Allowing police to investigate effectuates police enforcement of the illegal manufacture and cultivation of marijuana.[166]

CONCLUSION

While marijuana remains a prohibited substance in Arizona, with a limited lawful use by those registered in accordance with the AMMA, the creation of an odor-plus standard is a reasonable one. An odor-plus standard balances the competing interests of law enforcement against the privacy rights of individuals by requiring additional facts that tend to support the belief that the use or possession of marijuana is unlawful. Statistics could provide the "plus" at this time; even after the passing of the AMMA, there is a high likelihood that marijuana use is illegal. But, the odor-plus standard is fluid and can easily adapt if the statistics change over time, or if there is a change in legislation with regard to the legality of marijuana. Courts would not have to reassess the validity of the odor-plus standard, but would simply have to review a request for a search warrant to determine if there is enough statistical evidence to satisfy the odor-plus standard. Overall, the odor-plus standard best promotes the interests of law enforcement while respecting the privacy rights of individuals.

166. *See, e.g.*, *MCSO Busts Largest Pot Operation in Phoenix History, 9 Arrested*, ABC15 (May 20, 2015, 8:25 AM), http://www.abc15.com/news/region-phoenix-metro/south-phoenix/mcso-on-scene-of-one-of-the-largest-narcotic-manufacturing-operations-in-phoenix (discussing over 1,400 plants seized from eight different locations in Phoenix area); *Six Men Arrested in Marijuana-Growing Operation*, VERDE INDEP. (Aug. 1, 2015, 12:21 PM), http://verdenews.com/main.asp?SectionID=1&SubSectionID=1&ArticleID=66705 (where six individuals attempted to defraud the DHS by listing their addresses at a home outside of the 25 mile prohibited area, even though none lived actually lived at that location); Scott Oathout, *Man Arrested After Marijuana Grow Operation Discovered in Oracle*, NEWS 4 TUCSON (Apr. 23, 2015, 11:49 AM), http://www.kvoa.com/story/28882847/man-arrested-after-marijuana-grow-operation-discovered-in-oracle.