

**FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
February 9, 2018**

**PROPOSITION 64:
FOURTH AMENDMENT CONSEQUENCES
IMPACT ON LAW ENFORCEMENT'S RIGHT TO
STOP, ARREST AND SEARCH**

**KATHRYN SELIGMAN
Staff Attorney
First District Appellate Project
February 2018**

Copyright © 2018 First District Appellate Project.
All rights reserved.



TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. WHAT IS LEGAL AND WHAT IS NOT	3
III. HOW DO THESE CHANGES IN THE MARIJUANA LAWS AFFECT POLICE OFFICERS' RIGHTS TO STOP, ARREST, AND SEARCH?	5
IV. FOUR SCENARIOS: POLICE OBSERVE EVIDENCE OF SMOKING OR POSSESSION, OR SMELL THE ODOR OF MARIJUANA.....	8
V. TWO SCENARIOS INVOLVING CONTAINERS OF MARIJUANA IN THE VEHICLE ..	20
VI. OTHER SCENARIOS TO CONSIDER	23

**PROPOSITION 64:
FOURTH AMENDMENT CONSEQUENCES
IMPACT ON LAW ENFORCEMENT’S RIGHT TO STOP, ARREST AND
SEARCH**

I. INTRODUCTION

ON NOVEMBER 8, 2016, THE VOTERS OF CALIFORNIA PASSED PROPOSITION 64

- Proposition 64, The California Legalization Initiative, is also known as the Adult Use of Marijuana Act.
- Proposition 64 passed by a margin of 57.13% to 42.87%.
- Provisions affecting individual possession and use went into effect in 2017. Provisions affecting retail sales into effect on January 1, 2018.
- Proposition 64 was passed 20 years after California voters passed Proposition 215, in 1996, and legalized the use of medical marijuana under certain circumstances.
- In 2010, the legislature amended Health & Safety Code sec. 11357 to state that possession of up to one ounce of marijuana was an infraction, rather than a misdemeanor.

PROPOSITION 64 DID NOT LEGALIZE ALL USE AND POSSESSION OF MARIJUANA IN CALIFORNIA: HERE’S WHAT IT ACTUALLY DID:

- Legalized recreational use of marijuana and possession of up to an ounce, under certain circumstances, for persons over 21.
- Reduced penalties for marijuana-related offenses.
- Permitted individuals who were serving sentences or who had completed sentences for marijuana crimes to apply for re-sentencing or re-designation. (H&S Code sec. 11361.8)
- Allowed business to acquire licenses to sell and deliver recreational marijuana under certain circumstances.
- Provided for licensing and regulation of marijuana cultivation and distribution.
- Enabled the state to raise revenue by taxing cultivation and retail sales. (15% tax on retail sales)

II. WHAT IS LEGAL AND WHAT IS NOT

WHAT IS LEGAL AFTER PROPOSITION 64? PERSONS OVER 21 CAN:

- Possess, process, transport, purchase, or give away to persons over 21:
 - 1) up to one ounce (28.5 grams) of marijuana;
 - 2) up to eight grams of concentrated cannabis, including as contained in marijuana products;
 - 3) marijuana accessories.
- Smoke or ingest marijuana or cannabis products.
- Possess, plant, harvest and cultivate up to six living cannabis plants and possess the cannabis produced by those plants. (H&S Code sec. 11362.1)

WHAT IS NOT LEGAL? RESTRICTIONS ON WHERE ONE CAN SMOKE OR INGEST MARIJUANA:

- Cannot smoke or ingest marijuana in a public place (any business or property open to the public) – *an infraction*
- Cannot smoke marijuana in a location where smoking tobacco is prohibited – *an infraction*
- Cannot smoke or ingest marijuana within 1,000 ft. or upon the grounds of a school, day care center or youth center while children present – *an infraction*
(Restrictions in H&S sec. 11362.3)

WHAT IS NOT LEGAL? THINGS YOU CANNOT DO IN CARS, BOATS AND PLANES:

- Cannot possess an open container or package of marijuana or cannabis products while driving or riding as a passenger in a motor vehicle, boat, aircraft or other vehicle used for transportation - *an infraction*
- Cannot smoke or ingest marijuana or cannabis products while driving or riding in passenger seat of a motor vehicle, boat, aircraft, or other vehicle used for transportation – *an infraction*
(See H&S Code secs. 11362.3 [restrictions], 11362.4 [punishment].)
- Cannot drive under the influence of marijuana – *misdemeanor or felony if three or more priors*
(See Veh. Code secs. 23152 (f),(g); 23536-23550)

WHEN IS AN INDIVIDUAL’S POSSESSION OF MARIJUANA NOT LEGAL?

- Possession of up to an ounce of marijuana by a person under 21 – *an infraction (under 18 – counseling & community service; 18-21 –fine)*
- Possession of over an ounce of marijuana by a person of any age – *an infraction if under 18; a misdemeanor if over 18 [6 month maximum]*
(H&S Code sec. 11357)

WHAT ELSE IS NOT LEGAL? SALES-RELATED ACTIVITIES:

- Possession of cannabis for sale
Under 18 – *an infraction*
Over 18 – *a misdemeanor [6 year maximum], but it can be a wobbler if the offender has priors (super strike or 2 or more prior convictions for possession for sale), is a registered sex offender, or if conduct involves sale or attempted sale to person under 18*
(H&S Code sec. 11359)
- Sale or transport of cannabis for sale
Under 18 – *an infraction*
Over 18 – *a misdemeanor [6 year maximum] but it can be a wobbler if the offender has priors (super strike or 2 or more prior convictions for possession for sale), is a registered sex offender, or if conduct involves sale to person under 18*
(H&S Code sec. 11360)

FOR MINORS UNDER 18:

- For minors, all marijuana-related crimes are infractions.
- This includes possession of any amount of marijuana or cannabis, possession for sale, transport for sale, or sales of marijuana.
- Under state law, law enforcement officers cannot make a custodial arrest for an infraction.

WHAT HAPPENS WHEN ONE GOES TO THE LICENSED RETAIL DISPENSARY AND PURCHASES A LAWFUL AMOUNT OF MARIJUANA?

- It will be lawful to purchase up to one ounce of marijuana or up to 8 grams of concentrated cannabis, including as contained in marijuana products.
- Presumably the marijuana will be packaged in a closed container.
- Purchaser cannot start smoking or ingesting marijuana until one is in a private place. No smoking on the street or on public transit.
- Local governments can permit consumption at licensed retailers and businesses in a designated area restricted to persons 21 and older and not observable by the public, so that no one can see persons consuming marijuana from outside. (Bus. & Prof. 26200(g))

III. HOW DO THESE CHANGES IN THE MARIJUANA LAWS AFFECT POLICE OFFICERS' RIGHTS TO STOP, ARREST, AND SEARCH?

MARIJUANA AS PRETEXT:

- Prior to Proposition 64, the police have been selective in their enforcement of laws prohibiting possession of small amounts of marijuana or prohibiting smoking marijuana in public.
- Often police officers will rely on the smell of marijuana as a pretext for further investigation and for a search of a person or his vehicle.
- The officers are really looking for evidence of other crimes: possession of marijuana for sale, or possession of firearms and other weapons.

A TYPICAL SCENARIO:

- The police officer makes a traffic stop for an observed Vehicle Code violation (e.g. expired registration, an inoperable brake light).
- As the officer arrives at the car to talk to the driver about the violation, she smells the odor of marijuana – either fresh or burnt marijuana.
- Maybe she even sees a small amount of marijuana in plain view.
- The officer orders the driver out of the car and frisks him.
- The officer searches the car, including the trunk, because she claims probable cause to believe there is marijuana (or more marijuana) somewhere in the vehicle.
- The officer finds a gun in the trunk of the vehicle .

WHAT HAS CHANGED AND WHAT DO WE ARGUE?

- Adult Possession of up to one ounce of marijuana, up to 8 grams of concentrated cannabis or marijuana accessories is now legal, as is adult possession and transport of a closed container of a permissible amount of marijuana in a moving vehicle.
- What do we argue when the police observe or suspect only lawful marijuana activity – adult possession or transport of less than an ounce? Can the police search for more?
- What do we argue when the police observe or suspect only infraction conduct - smoking in public or in a moving vehicle? Can the police search the person or the vehicle incident to arrest? Can they conduct a pat search or search for more marijuana?

IN ARGUING AGAINST SEARCHES AND SEIZURES BASED ON EVIDENCE OF LAWFUL CONDUCT, WE CAN RELY ON FOURTH AMENDMENT PROTECTIONS WRITTEN INTO THE LAW BY PROPOSITION 64:

Health and Safety Code section 11362.1, subd. (c) states:

“Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search or arrest.”

What does this mean – particularly the second clause?

There is no discussion of this language in the ballot materials or analyses. The meaning will need to be litigated in application to different factual scenarios. As of now, there are no published California cases on the meaning of this language.

PROPOSED MEANING OF SECTION 11362.1(C):

If the police officer finds an adult in possession of up to one ounce of marijuana or up to 8 grams of concentrated cannabis, or reasonably suspects that he possesses a lawful amount:

- 1) The police cannot seize the marijuana or cannabis because it is not contraband.
- 2) The police cannot assert probable cause to believe that the person possesses more than an ounce of marijuana based on his possession of a lawful amount.

PROSECUTORS ARE URGING AN ANALOGY TO MEDICAL MARIJUANA CASES

- Prosecutors are already urging that the courts treat police discovery of adult possession of an ounce or less of marijuana precisely as they treat possession of a permitted amount of marijuana by a qualified medical marijuana user.
- The odor of marijuana emanating from a vehicle or the discovery of a small amount provides probable cause to search the entire car *even if* the driver presents evidence that he is a medical marijuana user and possesses an amount authorized by law.

(See *People v. Strasburg* (2007) 148 Cal. App. 4th 1052.)

PEOPLE V. STRASBURG (2007) 148 CAL. APP. 4TH 1052 [1ST DIST., DIV 1.]:

The Facts:

The deputy approached defendant's parked car in a lot and immediately smelled the odor of marijuana.

The defendant admitted he had been smoking and had marijuana in car.

The defendant twice said he had a medical marijuana card, but the deputy refused to look at the proffered card.

The defendant gave the deputy two bags of marijuana totaling less than one ounce. (Medical marijuana users may possess up to eight ounces.)

The deputy ordered the defendant out of the car and asked him if there was more marijuana in the car. The defendant said yes.

The deputy searched the car and found 23 ounces of marijuana.

The Court held:

As soon as the deputy smelled marijuana, he had probable cause to search the car.

The deputy had the right to detain the defendant and search his car even after he produced a medical marijuana card indicating he was a qualified patient and the deputy found less than eight ounces in the defendant's possession.

Possession of any amount of marijuana is a crime.

The Medical Marijuana Act does not confer immunity from a reasonable search or arrest. It merely allows the qualified patient to raise an affirmative defense at trial. The deputy could believe that additional quantities were in car. He could search the entire car to determine if defendant, in fact, possessed marijuana for medical needs and adhered to the 8 ounce limit.

THE STRASBURG COURT APPLIED THE RULE OF PEOPLE V. ROSS (1982) 456 U.S. 798:

- Police officers can search every part of a lawfully stopped vehicle, without a warrant, if they have probable cause to believe it contains drugs or other contraband.
- Cases have found that the police officers' discovery of less than an ounce of marijuana in the passenger compartment of a vehicle provides probable cause to search the trunk.

People v. Dey (2000) 84 Cal. App. 1318 [discovery of bud of marijuana in the passenger compartment justifies search of trunk]

People v. Hunter (2005) 133 Cal. App. 4th 371 [observation of two bags holding less than one ounce in passenger compartment provides probable cause to search the trunk]

WE MUST ARGUE AGAINST THE PROSECUTION'S RELIANCE ON STRASBURG AND THE MEDICAL MARIJUANA CASES, WHEN POLICE FIND LESS THAN AN OUNCE OF MARIJUANA:

- Adult possession of up to an ounce of marijuana is no longer a crime.
- Remember: "No conduct deemed lawful by this section shall constitute the basis for detention, search or arrest." (H&S sec. 11362.1(c))
- Distinguish the medical marijuana cases: The legality of this conduct is not dependent on possession of a valid medical marijuana card or on verifying possession of eight ounces or less for medical purposes.

IV. FOUR SCENARIOS: POLICE OBSERVE EVIDENCE OF SMOKING OR SMELL THE ODOR OF MARIJUANA

SCENARIO #1: SMOKING IN A PUBLIC PLACE:

- The police officer sees a person of any age walking down the street smoking marijuana.
- Can she detain or arrest that person?
- Yes. It is illegal to smoke or ingest marijuana in a public place. *The offense is an infraction.*
(See H&S sec. 11362.3)
- The officer could make an arrest and cite the person for the infraction.
- But could she search him incident to arrest?

BECAUSE SMOKING IN A PUBLIC PLACE IS AN INFRACTION, THE OFFICER CANNOT CONDUCT A SEARCH INCIDENT TO ARREST:

- Officers cannot conduct a search incident to arrest if they do not actually make a custodial arrest. (*People v. Macebo* (2016) 1 Cal. 5th 1206.)
- Under state law, an officer cannot generally make a custodial arrest for an infraction. (See Pen. Code 853.5; *In re D.W.* (2017) 13 Cal. App. 5th 1249.)

PEOPLE V. MACEBO (2016) 1 CAL. 5TH 1206

The facts:

Officers saw Macebo ride his bike straight through a stop sign.
They never cited him or arrested him for this Vehicle Code infraction.
He consented to the police request to search his pockets.
An officer searched Macebo's cell phone, finding photos of underage girls.

The court held:

The examination of the cell phone was not a lawful search incident to arrest, because the officers did not make a custodial arrest for the Vehicle Code infraction. The justifications for a search incident to arrest do not arise if the officers do not make a custodial arrest, or if they merely issue a citation and send the person on his way. (See *Knowles v. Iowa* (1998) 525 U.S. 113 [no search incident to arrest for a citation –only offense].)

IN RE D.W. (2017) 13 Cal. App. 5TH 1249 :

The facts:

Officers approached a group that included DW, a minor.
An officer smelled the odor of marijuana on DW's clothes and breath.
DW admitted that he had just smoked marijuana.
An officer searched DW "for more marijuana" and found a gun.

The court held:

The search was unlawful.
Under pre-Proposition 64 law, the officer could have arrested D.W. for two infractions – smoking marijuana and possession of less than one ounce of marijuana.
The officer had no right to make a custodial arrest for these infractions, and thus, no right to search incident to arrest.
Even if the officer could conclude from the smell and the admission of smoking that D.W. might have more marijuana, there was no probable cause to search; it was "*mere conjecture to conclude that he possessed enough to constitute a jailable offense*" – i.e. more than 1 ounce.

AFTER PROPOSITION 64, CONSIDER HOW MANY MARIJUANA CRIMES ARE INFRACTIONS

- Infractions:
 - 1) Smoking or ingesting marijuana in public; near or on school grounds; or in a motor vehicle, boat or airplane.
 - 2) Possessing an open container of an ounce or less in a moving vehicle.
 - 3) For persons under 18 – possession of any amount of marijuana, possession for sale, transport for sale, sales.
- Police officers can cite for an infraction but they cannot make a custodial arrest under state law, so they would have no right to search incident to arrest.

TWO CAVEATS REGARDING ARRESTS FOR INFRACTIONS:

1) Under California law, an officer cannot make a custodial arrest for an infraction, but a custodial arrest for an infraction arguably does not violate the Fourth Amendment. (See *Atwater v. Lago Vista* (2001) 532 U.S. 318; *Virginia v. Moore* (2008) 553 U.S. 164; *People v. McKay* (2002) 27 Cal. 4th 601.)

But consider: *Atwater* did not overrule *Knowles v. Iowa* [a driver arrested for a citation-only offense cannot be taken into custody or searched incident to arrest].

The California Supreme Court's discussion of this point in *McKay* is arguably dicta.

2) Under California law, the officer has the discretion to make a custodial arrest for an infraction if the person: fails to present “his driver’s license or other satisfactory evidence of his identity for examination”, refuses to give written promise to appear, demands to be taken before a magistrate, or is arrested for DUI. (Veh. Code sec. 40302(a); *People v. McKay*.)

But the officer must actually exercise this discretion – if the officer does not make a custodial arrest, she cannot search the person incident to arrest.

IF A PERSON IS DETAINED FOR SMOKING IN PUBLIC, MAY THE OFFICER CONDUCT A PAT SEARCH FOR WEAPONS?

- A pat search for weapons is justified if the officer has a reasonable belief that the suspect is armed and presently dangerous. (*Terry v. Ohio* (1968) 392 U.S. 1.)
- If a person is detained or cited for smoking in public – or any other smoking or simple possession infraction or misdemeanor – the police may arguably conduct a pat search under the authority of *People v. Collier* (2008) 166 Cal. App. 4th 1374.

PEOPLE V. COLLIER (2008) 166 CAL. APP. 4TH 1374:

The facts:

Officers stopped a car for not having a front license plate.

The defendant was the front seat passenger.

As the officer spoke to the driver, he smelled a marijuana odor emanating from the vehicle. The odor was stronger on the passenger side.

Both occupants were ordered to exit so officers could search the car.

The defendant was pat-searched and a loaded gun was found in his pocket.

The court held:

A combination of three factors supported a reasonable belief that the defendant was armed:

- 1) The defendant was wearing baggy & concealing clothing.
- 2) The defendant was taller than the officer.
- 3) *The odor of marijuana indicated that the defendant may have been smoking marijuana, and guns often accompany drugs.*

HOW TO ARGUE AGAINST APPLICATION OF THE COLLIER RULE:

- *Collier* was wrongly decided and should not apply when officers reasonably suspect that the person is smoking marijuana or possesses an amount for personal use, even if the smoking or possession is illegal
- According to previous authorities, the presumption that guns often accompany drugs applies to drug sellers who are armed to protect themselves, their cash and their drugs. (*Ybarra v. Illinois* (1979) 444 U.S. 85, 106; *People v. Glaser* (1995) 11 Cal. 4th 354, 367-68.)

THE SWEET SMELL OF MARIJUANA:

- As noted, the police often rely on the odor of marijuana emanating from a vehicle as a reason to search the occupants and the vehicle.
- The courts routinely uphold probable cause searches of a vehicle based solely on the officer's claim that he "smelled marijuana".

THE OFFICER'S AMAZING SENSE OF SMELL:

- The typical police officer apparently has a great sense of smell.
- He can always detect the odor of marijuana, however faint.
- He can distinguish between the odor of burnt (smoked) marijuana and the odor of fresh marijuana.
- Often, he can detect the strength of the odor, although he can't always tell where in the vehicle it's coming from.

- The question of whether the officer smelled burnt or fresh marijuana may affect his right to search and arrest.
- Also, the strength and location of the odor might make a difference.

CHALLENGE THESE PLAIN SMELL CLAIMS AND BRING IN THE EXPERTS:

- In litigating these cases, trial attorneys may need to call experts to challenge an officer's claim as to precisely what he could detect with his nose.
- Could the officer really smell vacuum sealed baggies of fresh marijuana inside the trunk?
Could he tell whether the smell was burnt or fresh marijuana?
- Burnt marijuana has a distinct smell, but fresh marijuana has a different smell and it's not always detectable, based on various factors.
- According to one expert, used by the Alameda County Public Defender's office, one cannot determine the quantity of marijuana based solely on the strength of the odor. There are too many variables.
- Hopefully, we will see some of this expert testimony in the records that come up to us on appeal.
- Even if no experts were called in the trial court, appellant practitioners can rely on a discussion in *Commonwealth v. Overmyer* (2014) 11 N.E. 3d 1054, 1058-59.
The Massachusetts Supreme Court noted that police characterizations of the smell of unburnt marijuana as strong or weak are inherently subjective as the strength of the odor perceived depends on a wide variety of factors. Claims that a particular amount of marijuana is present, based on the strength of the odor is not a reliable means of detecting the presence of a criminal amount of marijuana.

SCENARIO #2: THE ODOR OF BURNT MARIJUANA EMANATING FROM A VEHICLE WITH NO EVIDENCE OF SMOKING OR POSSESSION:

- The police conduct a lawful traffic stop of a car, based on a Vehicle Code equipment violation.
- They have not seen any signs of erratic driving.
- As two officers approach the car, they see the driver and a passenger, who are both over 21.
- The officers smell an odor of burnt marijuana coming from the vehicle, particularly the passenger side, but see no evidence of recent smoking or possession: no smoke, no ingestible marijuana or open containers in plain view, no marijuana cigarettes, no pipe.

BURNT MARIJUANA ODOR, BUT NO EVIDENCE OF SMOKING, POSSESSION OR DUI: DO THE POLICE HAVE PROBABLE CAUSE TO ARREST?

- Can the officers assume that the occupants of the car have been smoking marijuana in the moving vehicle and arrest the passenger for an infraction (smoking in a vehicle) or the driver for driving under the influence of marijuana (DUI)?
- We should argue no: The officers cannot arrest any vehicle occupant without observing evidence of current or very recent smoking in the vehicle or evidence of DUI.
- The officers must have probable cause to believe that an occupant was smoking while the vehicle was moving.
- The occupants could have smoked before they got into car or started driving. It may take quite a while for the marijuana odor to dissipate.

REMEMBER THE INFRACTION/MISDEMEANOR PRESENCE RULE:

- Pen. Code sec. 836 (a): Police may arrest without warrant *only if they have probable cause to believe person committed a misdemeanor or infraction in the officer's presence.* (*People v. Welsch* (1984) 151 Cal. App. 3d 1038.) [rule re-enacted by a 2/3 majority in 1994]
- But this is a state rule, not federally compelled. Post-Proposition 8, the arrest may be illegal but evidence discovered as a result of the arrest need not be suppressed. (*People v. Trepane* (1991) 1 Cal. App. 4th Supp 10; *People v. Donaldson* (1995) 36 Cal. App. 4th 532.)
- Remember: Officers cannot search incident to non-custodial arrest for infraction, so the court could only admit evidence discovered by other means (e.g. a consent search)
- W&I sec. 625: the “non-felony presence” rule does not apply to minors.

PEOPLE V. TEMPLE (1995) 36 CAL. APP. 4TH 1219: MARIJUANA ODOR DOES NOT JUSTIFY AN ARREST OF AN OCCUPANT OR A PERSONAL SEARCH :

The facts:

The officer stopped a van for a broken taillight and weaving.

The officer saw the driver and four passengers inside.

He smelled the odor of burnt marijuana on the driver and decided to search all of the occupants and the van for marijuana.

He also detected the odor of unburnt marijuana from inside the van.

Before searching the van, the officer searched the defendant, a passenger, and found marijuana and methamphetamine.

The court held:

The defendant-passenger's mere presence in a van that smelled like unburnt and burnt marijuana did not provide probable cause for his arrest or for a search of his person.

(However, the combination of odors provided probable cause to search the van.)

BURNT MARIJUANA ODOR, BUT NO IMMEDIATE EVIDENCE OF SMOKING, POSSESSION OR DUI: WHAT CAN THE OFFICERS DO?

- They can order the occupants out of car during the traffic stop, but we should argue against the officers' right to pat search when the officers had an inference of only personal use, especially if they observed no clear evidence of smoking or possession. (*Collier* wrongly decided)
- They can ask questions of the driver and passengers about recent smoking, how long they have been in car, and whether they have any marijuana in the car.
- They can observe the occupants' demeanor, speech and eyes while they do this, looking for signs of being under the influence.
- They can observe the car interior for evidence of smoking or possession.
- If they then detect evidence of smoking in the vehicle, they can cite for an infraction but not search incident to arrest.

BASED MERELY ON THE ODOR OF BURNT MARIJUANA ODOR: DO THE POLICE HAVE PROBABLE CAUSE TO SEARCH THE VEHICLE FOR MARIJUANA:

If the police merely detect the odor of burnt marijuana, but discover no other evidence of smoking or possession, would they have probable cause to search the entire vehicle for marijuana?

- We should argue no: At most, the odor gives rise to an inference of personal use and possession of an ounce or less – a lawful amount. (Remember the car occupants are over 21.)
- It is mere conjecture to assume that there is an illegal amount of marijuana (more than an ounce) in the vehicle.

If the officers smell burnt marijuana, would they have probable cause to search the car for evidence of smoking in a moving car (e.g. a pipe with residue, an open container with a small amount of marijuana)?

- Possibly. But we should argue that they can only search the passenger compartment and not the trunk.
- It's unlikely that a pipe or roaches would be in the trunk if the occupants had been smoking while the car was moving.

SCENARIO #3: THE ODOR OF BURNT MARIJUANA EMANATING FROM A VEHICLE WITH EVIDENCE OF SMOKING OR POSSESSION, BUT NO EVIDENCE OF DUI:

- The police conduct a lawful traffic stop of a car, based on a Vehicle Code equipment violation.
- As two officers approach the car, they see the driver and one passenger.
- The officers smell an odor of burnt marijuana coming from the vehicle, particularly the passenger side. They also see a pipe with marijuana residue in the center console.
- Upon observation, the driver does not appear to be under the influence of marijuana.

BURNT MARIJUANA ODOR, EVIDENCE OF SMOKING OR POSSESSION BUT NO DUI: WHAT CAN THE OFFICERS DO?

- They can order the occupants out of the car, but we should argue against a pat search based on evidence of smoking or possession of an amount for personal use. (*Collier* wrongly decided)
- The officers have probable cause to arrest for smoking in a vehicle and possibly possession of an open container in vehicle - infractions committed in the officers' presence.
- The officers cannot search the person or the car incident to an arrest for an infraction.

BURNT MARIJUANA ODOR, EVIDENCE OF SMOKING OR POSSESSION OF LESS THAN ONE OUNCE: DO THE POLICE HAVE PROBABLE CAUSE TO SEARCH THE VEHICLE?

Prior cases have held that the odor of burnt marijuana, often with other factors indicating use or possession, may provide probable cause to search the entire vehicle for additional marijuana.

(See, e.g. *People v. Strasburg* (2007) 148 Cal. App. 4th 1052 [odor of marijuana provides probable cause for a vehicle search because possession of any amount of marijuana is a crime]; *People v. Waxler* (2014) 224 Cal. App. 4th 712 [odor of burnt marijuana emanating from parked truck and marijuana pipe with residue in plain view provided probable cause to search the car].)

PEOPLE V. WAXLER (2014) 224 CAL. APP. 4TH 712 [1ST DIST., Div. 5] :

The facts:

The deputy responded to a report that a person was illegally dumping trash in a parking lot.

He parked next to the defendant's truck.

The defendant was sitting in the driver's seat.

As the deputy approached, he smelled the odor of burnt marijuana and saw a marijuana pipe with 0.3 grams of burnt residue in its bowl on the bench seat next to the defendant.

The deputy searched the trunk and found methamphetamine.

The court held:

The burnt marijuana odor plus the observation of a pipe with residue in plain view provided probable cause to search the truck for marijuana.

It did not matter that possession of up to an ounce had been reduced to a non-jailable infraction. Possession of any amount was still illegal in California, and the marijuana was contraband.

HOW TO DISTINGUISH WAXLER AND ARGUE THAT BURNT MARIJUANA ODOR AND EVIDENCE OF SMOKING IN THE VEHICLE DOES NOT PROVIDE PROBABLE CAUSE TO SEARCH THE WHOLE VEHICLE:

Remember *In re D.W.* (2017) 13 Cal. App. 5th 1249:

An officer approached the minor, DW, on the street & smelled marijuana on his clothes & breath. DW admitted smoking marijuana.

Possession of less than one ounce by the minor and smoking were infractions.

The court held the officers did not have probable cause to search D.W., as it was "mere conjecture to conclude that he possessed enough to constitute a jailable offense"

PROPOSED ARGUMENT BASED ON *IN RE D.W.*:

- We could use this reasoning to oppose full vehicle searches upon discovery of infraction-level conduct (e.g. smoking in the vehicle) and the consequent inference of possession of up to an ounce of marijuana (legal if over 21).
- The smell of burnt marijuana and evidence that the occupant is smoking in the vehicle or possesses up to one ounce does not provide probable cause to believe that more than an ounce will be found in the trunk. This is mere conjecture.

MASSACHUSETTES CASE: COMMONWEALTH V. CRUZ (2011) 945 N.E. 2d 899: AFTER DECRIMINALIZATION OF POSSESSION OF LESS THAN ONE OUNCE OF MARIJUANA, BURNT MARIJUANA ODOR DID NOT PROVIDE PROBABLE CAUSE TO SEARCH A VEHICLE:

The facts:

Patrol officers saw a vehicle parked in front of a fire hydrant. They approached the car because this is a Vehicle Code violation.

The driver and the passenger, the defendant, were smoking cigars commonly known to mask the odor of marijuana.

One officer had seen the defendant smoking a marijuana blunt on a previous occasion.

From the driver's side, an officer smelled a faint burnt marijuana odor.

Both occupants were ordered out of the car so officers could search.

The defendant then admitted that he possessed a rock of cocaine.

The court held:

In 2008, Massachusetts voters changed possession of one ounce or less of marijuana from a criminal to a civil offense.

The Mass. Supreme Court held that in light of this change, the odor of burnt marijuana did not provide probable cause to believe that a "criminal amount" of marijuana – more than an ounce – would be found in the vehicle.

Warning with out-of-state cases:

- 1) Different decriminalization laws;
- 2) The court may have relied on independent state search and seizure doctrine.

**CALIFORNIA COURT OF APPEAL CASES INVALIDATING WARRANTLESS HOME SEARCHES
BASED ON THE ODOR OF BURNT MARIJUANA AND EVIDENCE OF SMOKING**

**PEOPLE V. HUA (2008) 158 CAL. APP. 4TH 1027: NO RIGHT TO ENTER A HOME WITHOUT
WARRANT :**

As they approached an apartment to investigate a noise complaint, officers smelled the odor of burnt marijuana and saw a person smoking marijuana inside the home.

Their warrantless entry into the home was supported by probable cause to believe the occupants possessed less than an ounce of marijuana.

Since this was a minor, non-jailable offense, it did not support a warrantless entry based on exigent circumstances.

Although there was a reasonable possibility that there was more marijuana in the apartment, it was “mere conjecture” to conclude there was enough to constitute a jailable offense.

**PEOPLE V. TORRES (2012) 205 CAL. APP. 4TH 989: NO RIGHT TO ENTER A HOTEL ROOM
WITHOUT A WARRANT :**

A strong odor of burning marijuana emanating from a hotel room (equivalent to a home) provided probable cause to believe a crime was being committed inside – possession of marijuana, a non-jailable offense.

Relying on *Hua*, the court found that this offense was too minor to support exigent circumstances for a warrantless entry. The officers’ belief that the occupants possessed more than an ounce of marijuana was pure speculation.

IF HUA AND TORRES WERE DECIDED POST-PROPOSITION 64:

The conduct observed in *Hua* and suspected in *Torres* – smoking in a private place and possession of less than one ounce of marijuana – is now legal conduct. Thus, the officers would not have had probable cause to believe that crimes were being committed.

**SCENARIO #4: THE ODOR OF UNBURNT, FRESH MARIJUANA EMANATING FROM THE
VEHICLE:**

- The police conduct a traffic stop for an equipment violation.
- There is a driver and one passenger in the vehicle.
- When the officers approach the car and contact the driver, they smell the distinct odor of fresh marijuana emanating from the vehicle.
- They see no marijuana inside the vehicle and there is no other evidence of possession.

THE ODOR OF UNBURNT MARIJUANA: WHAT CAN THE OFFICERS DO?

- The odor of unburnt, fresh marijuana arguably provides probable cause to believe that the driver or car occupants have some marijuana in the vehicle.
- But can the police assume there is more than one ounce – i.e. an illegal amount? We should argue against this inference
- Can the officers conduct a pat search?
 - We should argue that the officers have no reason to believe that any occupant possesses an amount for sale, so there is no basis to reasonably believe any occupant is armed (Distinguish *Collier*)
- Can the officers arrest the car occupants?
 - We should argue that based merely on the odor, the officers would not have probable cause to believe that the driver or passenger was possessing or transporting an illegal amount – more than one ounce. Thus, they would have no basis for an arrest or a search incident to arrest.

THE ODOR OF FRESH, UNBURNT MARIJUANA: DO THE POLICE HAVE PROBABLE CAUSE TO SEARCH THE ENTIRE VEHICLE?

- We should argue that based solely on the odor, the officers would not have probable cause to believe that there is more than an ounce of marijuana (a lawful amount) in the car. It would be mere conjecture to assume there was a greater amount.
- One needs to distinguish cases like *People v. Temple* (1995) 36 Cal. App. 4th 1219, which held the combined odor of burnt and fresh marijuana provided probable cause to search the entire vehicle. (*Temple* was decided when possession of any amount of marijuana was illegal.)

HELPFUL CASES FROM THE MASSACHUSETTS SUPREME COURT:

After Massachusetts decriminalized possession of one ounce or less of marijuana in 2008 (changing possession to a civil rather than a criminal offense), the Massachusetts Supreme Court held that the odor of unburnt marijuana emanating from a vehicle did not provide probable cause to search the entire vehicle.

(See *Commonwealth v. Overmyer* (2014) 11 N.E. 3d 1054 [the very strong odor of unburnt marijuana emanating from the car did not reliably predict the presence of a criminal amount of marijuana, more than once ounce, as necessary to constitute probable cause to search the car]; see also *Commonwealth v. Craan* (2014) 13 N.E. 569.)

WHAT IF THE UNBURNT MARIJUANA ODOR IS VERY STRONG OR EMANATING FROM THE TRUNK OR A CONCEALED COMPARTMENT?

- Under these facts, the argument challenging probable cause to search the entire vehicle would be harder, although there are studies and expert testimony challenging any alleged correlation between the subjectively perceived strength of the marijuana odor and the amount of the substance. (See also *Commonwealth v. Overmyer, supra*, 11 N.E. 3d at 1059.)
- Consider also that it is not illegal to carry an open container of marijuana in the trunk. (Veh. Code sec. 23222(b))

V. TWO SCENARIOS INVOLVING CONTAINERS OF MARIJUANA IN THE VEHICLE

SCENARIO #5: DURING A TRAFFIC STOP, THE POLICE DISCOVER A CLOSED CONTAINER WITH LESS THAN ONE OUNCE IN THE CAR:

- The police conduct a traffic stop and smell the odor of fresh marijuana emanating from the vehicle.
- When asked if they have any marijuana in the car, the driver, who is over 21, produces a sealed ziplock bag containing less than an ounce of fresh marijuana.
- Alternatively, there is no odor, but the officer sees this sealed ziplock baggie of fresh marijuana in a cup holder in the passenger compartment.

CLOSED CONTAINER WITH LESS THAN AN OUNCE: WHAT CAN THE POLICE DO?

- The police have discovered only lawful conduct -- adult possession of less than an ounce in a closed container. They have not discovered any evidence of smoking.
- We should argue that there is no probable cause for an arrest.

PRIOR CALIFORNIA CASES HAVE FOUND PROBABLE CAUSE TO SEARCH THE ENTIRE VEHICLE BASED ON POLICE DISCOVERY OF LESS THAN AN OUNCE:

People v. Dey (2000) 84 Cal. App. 1318:

Police searched the passenger compartment of a stopped car incident to the lawful arrest of a passenger. They found a marijuana bud in the driver's day planner.

The court found that discovery of this small amount, suggesting personal use, provided probable cause to search the trunk for more drugs, where additional marijuana was found.

People v. Hunter (2005) 133 Cal. App. 4th 371:

During a traffic stop, officers ordered the driver and two passengers out of the car. They recognized one passenger as a “street drug dealer”.

The officers observed and seized two baggies containing much less than one ounce of marijuana from the passenger compartment.

Based on the officers’ finding this small amount for personal use, the court found that they had probable cause to search the trunk where 14 additional baggies were found.

HOW TO DISTINGUISH DEY AND HUNTER:

- Adult possession of up to one ounce of marijuana is now lawful and that amount is not contraband. Thus, the officers would have no right to seize that marijuana or search the vehicle based on possession of that lawful amount.

“Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search or arrest.”
(H & S Code, sec. 11362.1(c).)
- It is mere conjecture to believe that an amount in excess of one ounce of marijuana will be found elsewhere in the car. Probable cause cannot be based on such speculation.
- Here are some helpful cases on this point:

In re D.W. (2017) 13 Cal. App. 5th 1249.
People v. Torres (2012) 205 Cal. App. 4th 989.
People v. Hua (2008) 158 Cal. App. 4th 1027.
Commonwealth v. Overmyer (2014) 11 N.E. 3d 1054.
Commonwealth v. Cruz (2011) 945 N.E. 2d 899.

UNBURNT MARIJUANA ODOR PLUS DISCOVERY OF CLOSED CONTAINER OF MARIJUANA IN THE VEHICLE:

If the officers claim to smell the odor of unburnt marijuana emanating from the car and then find a closed container of fresh marijuana in the vehicle which may account for the smell, one may have a stronger argument that there is no probable cause to search the car for more.

The source of the odor has been located. (See *Commonwealth v. Overmeyer, supra*, 11 N.E. 3d at 1054 [once the officer discovered a bag of fresh marijuana in the glove compartment, his belief that more might be found during a further search of the car was a mere hunch. Nothing suggested that the marijuana in the bag did not account for the perceived smell].)

SCENARIO #6: THE POLICE DISCOVER AN OPEN CONTAINER OF FRESH MARIJUANA IN THE VEHICLE:

- The police conduct a traffic stop.
- There are three occupants of the car, a driver and two passengers.
- While talking to the driver, the officer observes an open container of unburnt marijuana in the center console between the two front seats – not in any occupant’s actual possession.
- There is no evidence that anyone has been smoking marijuana in the vehicle.

OPEN CONTAINER IN THE VEHICLE WITH LESS THAN AN OUNCE: CAN THE POLICE MAKE AN ARREST?

- Possibly, the police can arrest the driver for violating Health and Safety Code sec. 11362.3(a)(4): A person cannot possess an open container or package of cannabis or cannabis products while drive, operating or riding in the passenger seat of a vehicle.
- This is an infraction, punishable by a \$250 fine if over 18.
- The police might also arrest the passengers.
- If the police arrest the driver or passengers for an infraction, they cannot conduct a search of the person or the vehicle incident to arrest.

BUT THERE IS A VEHICLE CODE SECTION THAT MAY CONTROL THIS SCENARIO:

- Vehicle Code section 23222 (b) was amended in 2017, after passage of Proposition 64, so it arguably controls.
- This section prohibits a vehicle driver from having on his person, while driving, any receptacle containing any cannabis or cannabis products which has been opened or has a broken seal.
- This is an infraction, punishable by a \$100 fine.
- The prohibition does not apply if the container that is open or has a broken seal is in the trunk of the vehicle.
- There are three ways in which the Vehicle Code section 23222(b) provision is narrower than the Health & Saf. Code section 11362.3 provision:
 - 1) The prohibition apply only to possession by the driver.
 - 2) The container that is open or has its seal broken must be on the driver's person (not somewhere else in the passenger compartment).
 - 3) It permits storage of the open container in the trunk.

- Applying Vehicle Code section 23222(b) to Scenario #6, we should argue that neither the driver nor the passengers could be arrested, because the open container was in the car's center console and not on the driver's person.

OPEN CONTAINER IN THE PASSENGER COMARTMENT: IS THERE PROBABLE CAUSE TO SEARCH THE ENTIRE CAR FOR MORE MARIJUANA?

- Even if this is infraction level conduct, we should argue that any belief that there is additional marijuana in the car – i.e. more than an ounce – is mere conjecture.
- If the police claim to detect the odor of fresh marijuana, we should argue that the source of that odor has been located. It comes from the open container. The police do not have probable cause to search for more.

VI. OTHER SCENARIOS TO CONSIDER

- 1) Based on observations made prior to and during the traffic stop, the officers have probable cause to believe that the driver is under the influence of marijuana.
- 2) Some or all occupants of the car are under 21, so possession of less than one ounce is not legal. However, for persons under 18, all marijuana crimes are infractions.
- 3) The police bring out the drug-sniffing dog who walks around the exterior of the vehicle and alerts, indicating the presence of marijuana or concentrated cannabis in the vehicle, but the dog does not indicate the amount detected?