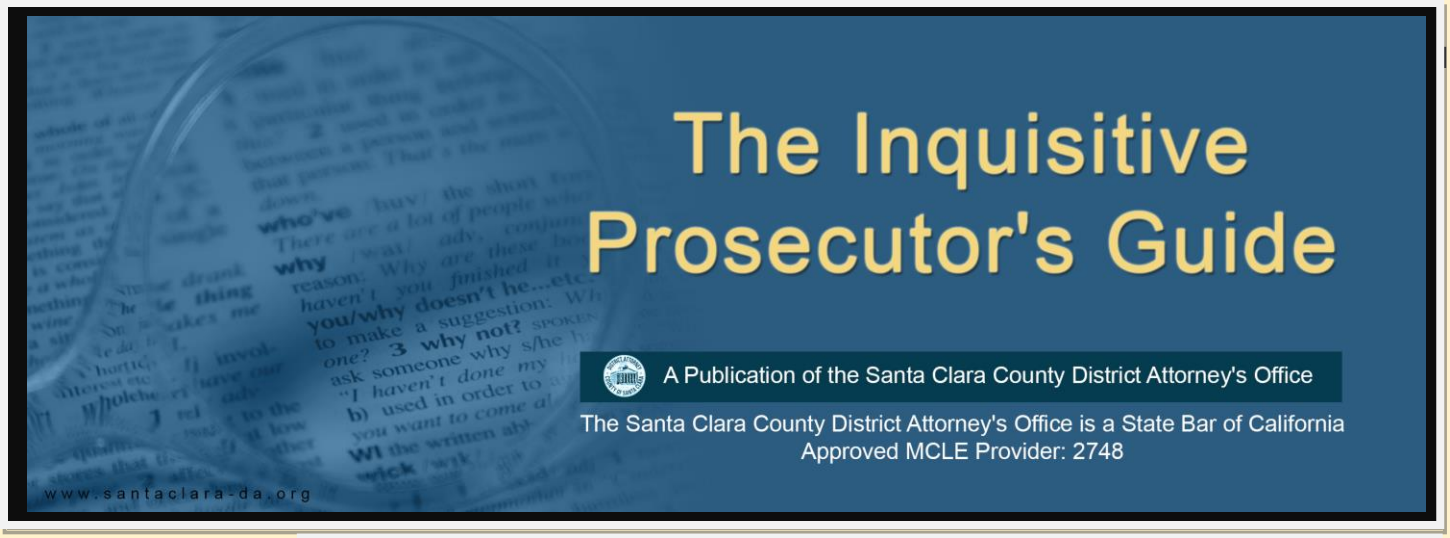

September 30 2021

2021-IPG-51 (MJ CAR SEARCHES & *NON*CUSTODIAL SEARCHES OF PERSONS CITED FOR H&S 11550 VIOLATIONS)

This edition of the Inquisitive Prosecutors Guide discusses:

(i) when officers have probable cause to search vehicles based on the odor or presence of marijuana in light of the all the most recent published and unpublished case law and Proposition 64 (which legalized possession and use of marijuana under certain circumstances) and

(ii) when (or if) officers can search a person for evidence of drug use based on probable cause to believe the person is under the influence of unlawful drugs even when the officer is not going to make a custodial arrest

We begin on pp. 2-8 providing the *basic principles* derived from the *post*-Prop 64 case law, followed by: (i) a discussion of the general law governing the vehicle search exception (at pp. 8-9); (ii) case law pre-dating the passage of Prop 64 bearing on the question of when the automobile exception permits searches of vehicles based on evidence of marijuana possession (at pp.9-12); (iii) relevant Prop 64 statutes (at pp. 13-15); (iv) a broader review of all the new cases (discussed in chronological order) bearing on the question of when the automobile exception permits searches of vehicles based on evidence of marijuana possession(at pp. 15-33); and (iv) a checklist of questions to ask the officer(s) conducting the search of the vehicle (at pp. 34).

We then discuss the issue of whether an officer *only* intending to *cite* (not make a custodial arrest of) a suspect for being under the influence of an illegal drug may conduct a warrantless search of the suspect for evidence of that offense, e.g., the unlawfully possessed drug (at pp. 35-42).

The podcast accompanying this IPG* features Santa Clara County DDA Melissa Castillo and will provide **45 minutes of (self-study) MCLE general credit.** It may be accessed at: **http://sccdaipg.podbean.com/**

I. Top 16 Things to Know (In Light of the Most Recent Cases) When Reviewing a Case Where an Officer Conducted a Vehicle Search Based on Direct or Circumstantial Evidence that the Vehicle Contained Unlawfully Possessed Marijuana or Evidence of Unlawful Possession or Use of Marijuana

1. In the absence of *additional reasons* to believe marijuana has been unlawfully used or possessed, most cases have held that the mere odor of marijuana and/or presence of a lawful amount of marijuana does **not** provide probable cause to search a vehicle. This is a change from pre-Prop 64 law. (**See *People* v. *Moore*** (2021) 64 Cal.App.5th 291 [278 Cal.Rptr.3d 776, 783] [discussed in this IPG at pp. 30-32]; ***People* v. *Hall*** (2020) 57 Cal.App.5th 946, 948-949, 952-954 [discussed in this IPG at pp. 28-30]; ***People* v. *McGee*** (2020) 53 Cal.App.5th 796, 801-803 [discussed in this IPG at pp. 25-28]; ***People* v. *Johnson*** (2020) 50 Cal.App.5th 620, 628-629 [discussed in this IPG at pp. 24-25]; ***People* v. *Lee*** (2019) 40 Cal.App.5th 853, 862, 865 [discussed in this IPG at pp. 18-20]; ***People* v. *Shumake*** (2019) 45 Cal.App.5th Supp. 1, 5-6 [discussed in this IPG at pp. 21-22]; ***United States* v. *Stokes*** (N.D. Cal. 2021) 2021 WL 388837, *2 [discussed in this IPG at p. 22]; ***United States* v. *Talley*** (N.D. Cal. 2020) 467 F.Supp.3d 832, 835-836 [discussed in this IPG at p. 23]; ***United States* v. *Maffei*** (N.D. Cal. 2019) 417 F.Supp.3d 1212, 1225, 1227 [discussed in this IPG at pp. 20-21]; ***People* v. *Sarente*** (unreported) 2021 WL 3240283, *4 [discussed in this IPG at pp. 32-33]; ***People* v. *Trone*** (unreported) 2021 WL 1205194, at *9; **but see *People* v. *Fews*** (2018) 27 Cal.App.5th 553, 563 [and unreported cases following ***Fews*** at pp. 15-18 of this IPG].)

2. However, if officers see a lawful amount of marijuana or smell the odor of marijuana, the officers may "investigate[] further by, for example, asking the defendant about how much marijuana he possessed, whether it was in a container, where it was located, and when he last smoked." (***People* v. *Hall*** (2020) 57 Cal.App.5th 946, 953-954 [discussed in this IPG at pp. 28-30]; **see also *People* v. *Shumake*** (2019) 45 Cal.App.5th Supp. 1, 8 [discussed in this IPG at pp. 21-22].)

3. If there is probable cause to believe that marijuana was used or possessed in an *unlawful* manner, there will usually be probable cause to search a vehicle for evidence of that unlawful use or possession, or for more unlawfully possessed marijuana. For example, if more than an ounce of marijuana is possessed, if it is possessed in manner violating the "open container"

laws, if the defendant smoked or was under the influence of marijuana while driving, if the possessor was under 21, if the defendant gave an implausible explanation for the odor of marijuana, if the defendant acted in a manner indicative of consciousness of guilty (i.e., furtive movements, nervousness, etc.,), then 11362.1(c) (**see** this IPG at p. 13) *does not apply* and the pre-Prop 64 analysis (**see** this IPG at pp. 9-11) allowing for a search of the vehicle may be used. (**See e.g.**, ***People* v. *Moore*** (2021) 64 Cal.App.5th 291 [278 Cal.Rptr.3d 776, 783] [discussed in this IPG at pp. 30-32]; ***People* v. *McGee*** (2020) 53 Cal.App.5th 796, 803 [discussed in this IPG at pp. 25-28]; ***People* v. *Johnson*** (2020) 50 Cal.App.5th 620, 626 [discussed in this IPG at pp. 24-25]; ***People* v. *Fews*** (2018) 27 Cal.App.5th 553, 563 [discussed in this IPG at pp. 15-18]; ***United States* v. *Martinez*** (unpublished 9th Cir. 2020) 811 Fed.Appx. 396, 397–398, cert. denied (U.S., Apr. 19, 2021, No. 20-7038); ***United States* v. *Maffei*** (N.D. Cal. 2019) 417 F.Supp.3d 1212, 1227 [discussed in this IPG at pp. 20-21, and finding search of vehicle unlawful, notwithstanding evidence of marijuana possession, because, inter alia, the officer did *not* observe any significant indications that the driver was under the influence of marijuana]; ***People* v. *Sarente*** (unreported) 2021 WL 3240283, *2-*5 [discussed in this IPG at pp. 32-33; ***People* v. *McKinney*** (unreported) 2021 WL 4145187, *5 [discussed in this IPG at p. 33]; **cf.**, ***People* v. *Lee*** (2019) 40 Cal.App.5th 853, 862, 866 fn. 8 [discussed in this IPG at pp. 18-20, and seeming to accept that a search could be justified if there was "additional evidence beyond the mere possession of a legal amount – that would cause a reasonable person to believe the defendant has more marijuana" or had engaged in unlawful activity but declining to decide whether evidence of illegal activity *necessarily* equates to probable cause to search for additional contraband].)

4. Many marijuana-related crimes are infractions. But the automobile exception permitting the search of the entire vehicle for evidence of a "crime" applies even when the crime being investigated is an infraction. (**See *People* v. *McGee*** (2020) 53 Cal.App.5th 796, 805; ***People* v. *Fews*** (2018) 27 Cal.App.5th 553, 564; this IPG at p. 8.)

5. The strong smell of fresh marijuana can potentially provide probable cause to search a vehicle but only if an officer can adequately explain why the strength of the smell is inconsistent with possession of a lawful amount of marijuana or indicates that it is possessed in an open container. (**See *People* v. *Johnson*** (2020) 50 Cal.App.5th 620, 634 [discussed in this IPG at pp. 24-25, and finding no probable cause to search car based on odor of marijuana where, inter alia, "there was no evidence or testimony presented about the connection between the smell of marijuana and the likelihood of finding an open container"]; ***People* v. *Cooke***

[unreported] 2021 WL 164332, at *5 [finding insufficient probable cause to believe vehicle trunk contained unlawful amount of marijuana based on "strong odor" of marijuana where officer "didn't testify about any specialized training or expertise he has in being able to ascertain the amount of marijuana a person possesses based on the odor of the drug"]; ***People* v. *Paul*** (unreported) 2020 WL 2570174, *1-*3 [discussed in this IPG at p. 17].)

6. Probable cause to search a vehicle can be based in part on a trained and experienced officer's ability to *broadly* assess how much marijuana is present based on the strength of the odor, i.e., that more than a lawful amount is present. (**See *People* v. *Moore*** (2021) 64 Cal.App.5th 291 [278 Cal.Rptr.3d 776, 783] [discussed in this IPG at pp. 30-32, and noting that the officer properly could consider defendant's implausible claim that a "strong" odor of fresh marijuana came from an empty mason jar or from the residual traces of recently burnt marijuana in developing probable cause to search vehicle "where officer specifically testified to his ability to distinguish between the smell of burnt and raw marijuana"]; ***People* v. *Lopez*** (unreported) 2020 WL 5033644, at *6 ["while the mere visual or olfactory estimation of an amount of marijuana may not be enough to establish the truth of its weight beyond a reasonable doubt, it is one of many valid considerations when assessing the probable cause to search"].)

7. Assuming sufficient expertise of an officer regarding the odor of marijuana, the smell of burnt marijuana and a partially smoked marijuana cigarette can be evidence of unlawfully smoking marijuana while driving and/or driving under the influence of marijuana (and thus provide probable cause to search a vehicle). (**See *People* v. *Fews*** (2018) 27 Cal.App.5th 553, 563 [discussed in this IPG at pp. 15-18]; ***People* v. *Shumake*** (2019) 45 Cal.App.5th Supp. 1, *8 [discussed in this IPG at pp. 21-22, and stating "the half-burnt cigar, combined with the smell of burnt marijuana, leads to the inference that the occupants very recently smoked marijuana. This would increase the likelihood that the occupants were illegally smoking while driving, or that the driver was under the influence."]; ***United States* v. *Vasquez*** (unpublished 9th Cir. 2021) 2021 WL 3011997, at *2 ["the smell of burnt — rather than fresh — marijuana supports an inference that Vasquez may have been driving under the influence of marijuana"]; **cf., *People* v. *Hall*** (2020) 57 Cal.App.5th 946, 953-954 [discussed in this IPG at pp. 28-30, and finding no probable cause to search vehicle based on seeing a clear plastic baggie with a lawful amount of marijuana, "an ashtray filled with ashes," "burnt cigar wrappers, commonly used to wrap marijuana," and "a green leafy substance, that appeared to be broken up marijuana" because, inter alia, there was "no odor of recently burnt marijuana (or of any marijuana at all)"]; ***United States* v. *Maffei*** (N.D. Cal. 2019) 417 F.Supp.3d 1212, 1226-1227 [discussed in

this IPG at pp. 20-21, and finding search of vehicle unlawful, notwithstanding evidence of marijuana possession, because, inter alia, the officer did not state the scent of marijuana he observed was burnt]; ***People* v. *Cooke*** [unreported] 2021 WL 164332, at *5 [finding insufficient basis to search trunk as part of an investigation into whether the defendant was driving under the influence of marijuana where, inter alia, officer did *not* observe any burnt or lit marijuana and "never testified that the odor of marijuana coming from the car smelled like it had recently been burned"].) But there will likely need to be additional circumstantial evidence establishing an inference that defendant *actually* drove while smoking and/or recently used marijuana. (**See *People* v. *Shumake*** (2019) 45 Cal.App.5th Supp. 1, *8 [discussed in this IPG at pp. 21-22 and finding a lack of probable cause to search a vehicle despite officer's smelling both fresh and burnt marijuana because, inter alia, the officer also testified that the smell of marijuana can linger for a week or more].)

8. When an officer smells an odor of marijuana, a defendant's *implausible explanation* for the smell, or a denial of possessing or using *any* marijuana, provides additional evidence that the marijuana is possessed unlawfully, i.e., because it reflects a consciousness of guilt. (**See e.g., *People* v. *Moore*** (2021) 64 Cal.App.5th 291 [278 Cal.Rptr.3d 776, 781-782] [discussed in this IPG at pp. 30-32, and noting that driver's *unbelievable* claim that the strong smell of fresh marijuana was only the smell of recently burnt marijuana or was emanating from an empty mason jar with marijuana residue helped provide probable cause to search vehicle for unlawfully possessed marijuana]; ***People* v. *McKinney*** [unreported] 2021 WL 4145187, *5 [discussed in IPG at p. 33 and finding probable cause to search vehicle arose because, inter alia, there was a strong smell of unburnt marijuana coming from defendant's truck, but defendant denied he had any marijuana].)

9. Consciousness of guilt (i.e., conduct or behavior reflecting the person does not believe they are in *lawful* possession of marijuana) can be the additional evidence beyond mere odor or possession of a lawful amount of marijuana necessary to establish probable cause. (**See e.g**., ***People* v. *Lopez*** (unreported) 2020 WL 5033644, at *7 [fact defendant failed to immediately pull over and furtively moved duffel bag in the vehicle to where it could not be as easily seen, coupled with a strong smell of marijuana and baggie containing small amount of marijuana, provided probable cause to search vehicle]; ***People* v. *McKinney*** [unreported] 2021 WL 4145187, *5 [discussed in this IPG at pp. 32-33, and finding probable cause to search vehicle because, inter alia, defendant's tone was 'nervous' and 'aggravated' when he denied there was marijuana in the truck, and he started to shake when marijuana was mentioned].)

10. The presence of a medical marijuana card should be considered in deciding whether there is probable cause to search that is based on seeing or becoming aware of evidence of the presence of marijuana in, or the odor of marijuana emanating from, a vehicle - at least if the officer believes the possession is unlawful because the marijuana is not in closed container. This is because the prohibition on possessing marijuana in a container that has been opened, or has a seal broken, or has had some of contents of the container partially removed (Veh. Code, § 23222(b)) does *not* apply if the marijuana is in a sealed or resealed closed container *regardless* of whether the container was previously opened if the person has a medical-marijuana authorization card. (**See *United States* v. *Maffei*** (N.D. Cal. 2019) 417 F.Supp.3d 1212, 1227 [discussed in this IPG at pp. 20-21].)

11. Possession of an open container of marijuana remains unlawful *under certain circumstances* as described in Health and Safety Code section 11362.3(a)(4) and/or Vehicle Code section 23222(b). (**See *People* v. *McGee*** (2020) 53 Cal.App.5th 796, 804[discussed in this IPG at pp. 25-28]; ***People* v. *Fews*** (2018) 27 Cal.App.5th 553, 563 [discussed in this IPG at pp. 15-18; ***People* v. *Shumake*** (2019) 45 Cal.App.5th Supp. 1, *7-*8 [discussed in this IPG at pp. 21-22].) And if those circumstances are present, a search of the entire vehicle for more evidence of unlawful possession should be permissible. (**See *People* v. *McGee*** (2020) 53 Cal.App.5th 796, 804 [discussed in this IPG at pp. 25-28, and finding officer could search purse of passenger in vehicle because the presence of an open container of marijuana on passenger's person provided probable cause to believe the passenger possessed *other* open containers (by analogy to ***People* v. *Souza*** (1993) 15 Cal.App.4th 1646, 1653, a case holding "an open container within plain view provides probable cause to believe that other open containers may be found in the vehicle")].) However, there *may* not be probable cause to search the *trunk* if possession of the marijuana only violates Health and Safety section 11362.3(a)(4). (**See *People* v. *Cooke*** [unreported] 2021 WL 164332, at *5 [strong odor of marijuana emanating from car coupled with seeing passenger discard small loose nuggets of marijuana out of front window provided probable cause to believe driver or passenger were possession of an open container of marijuana and to search passenger compartment, but (dubiously finding) not the trunk "since it is lawful to transport loose leaf, or open or unsealed containers of, marijuana in the trunk of a car."].)

12. Marijuana carried in a sealed but *previously opened* container *will* violate the open container law of *Vehicle Code section 23222(b)* but <u>only</u> when there is evidence (direct or circumstantial) that the container of marijuana *was on the "person" of the suspect while driving*. (**See**

People* v. *Johnson (2020) 50 Cal.App.5th 620, 631, 633 [discussed in this IPG at pp. 24-25]; ***People* v. *Hall*** (2020) 57 Cal.App.5th 946, 958 [discussed in this IPG at pp. 28-30, and drawing analogy to open container law governing possession of alcohol].) Moreover, possession of "loose cannabis flower" is not unlawful if carried in the trunk or if carried in the passenger compartment while driving regardless of whether the container has been opened or resealed on the person. (**See *People* v. *Shumake*** (2019) 45 Cal.App.5th Supp. 1, 5-6 [discussed in this IPG at pp. 21-22, and rejecting the notion that unless cannabis is transported in a heat-sealed container, the open container laws are violated]; ***United States* v. *Talley*** (N.D. Cal. 2020) 467 F.Supp.3d 832, 835-836 [discussed in this IPG at p. 23, and agreeing heat-sealed container is not required].)

13. Marijuana carried in a closed but previously opened container will *not* violate the open container law of *Health and Safety Code section 11362.3(a)(4)*. "[A] container or package must be open when found in the car, and not merely have the potential to be opened or have previously been opened, to violate section 11362.3, subdivision (a)(4)." (***People* v. *Johnson*** (2020) 50 Cal.App.5th 620, 632 [discussed in this IPG at pp. 24-25, and *rejecting* argument that plastic baggie knotted at the top was an open container because it could have been untied at some point]; **see also *People* v. *Hall*** (2020) 57 Cal.App.5th 946, 957-958 [discussed in this IPG at p. 28-30, and finding that absent testimony from an officer about the condition of a plastic baggie containing marijuana, there was insufficient evidence it was an open container].)

14. The amount of uncontained marijuana possessed in a vehicle *might* need to be a usable amount for the possession to be considered in violation of the open container laws of Vehicle Code 23222(b)(1) or Health and Safety Code section 11362.3(a)(4). (**See *People* v. *Hall*** (2020) 57 Cal.App.5th 946, 958–959; **but see** editor's note at p. 30 of this IPG.)

15. The presence of a partially smoked marijuana cigarette in a vehicle is likely to be found to be possessed in violation of at least one of the two "open container" laws (Veh. Code, § 23222(b) or Health & Saf. Code, § 11362.3(a)(4)). (**See *People* v. *Fews*** (2018) 27 Cal.App.5th 553, 563 [discussed in this IPG at pp. 15-18, and finding that "possession of a half-burnt marijuana cigar supported the inference" the driver was "at the very least, driving while in possession of an open container of marijuana" and thus probable cause to search the vehicle existed]; ***People* v. *McGee*** (2020) 53 Cal.App.5th 796, 803 [discussed in this IPG at pp. 25-28, and appearing to accept premise of ***Fews***].) It is an open question, however, whether those laws apply to possession of a *wrapped unsmoked* marijuana cigarette.

16. The fact marijuana remains unlawful under federal law likely does not permit an officer to conduct a search of a vehicle based on possession of marijuana that is lawful under state law. (**See *United States* v. *Talley*** (N.D. Cal. 2020) 467 F.Supp.3d 832, 836–837 [discussed in this IPG at p. 23]; ***United States* v. *Jones*** (N.D. Cal. 2020) 438 F.Supp.3d 1039, 1053; ***United States* v. *Martinez*** (9th Cir. 2020) 811 Fed.Appx. 396, 397, cert. denied (U.S., Apr. 19, 2021, No. 20-7038); **see also *Commonwealth* v. *Craan*** (Mass. 2014) 13 N.E.3d 569, 578.)

II. The "Automobile" or "Vehicle" Exception to the Warrant Requirement

In general, warrantless searches of automobiles are permitted when an officer has probable cause to believe the vehicle contains ***contraband or evidence of a crime***. (***Carroll* v. *United States*** (1925) 267 U.S. 132, 155-156; **see also *People* v. *Evans*** (2011) 200 Cal.App.4th 735, 753.) Probable cause to search exists "where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that ***contraband or evidence of a crime will be found***." (***Ornelas* v. *United States*** (1996) 517 U.S. 690, 696, emphasis added.) An officer who has probable cause to search pursuant to the automobile exception may conduct a probing search of all "compartments and containers within the vehicle whose contents are not in plain view." (***United States* v. *Ross*** (1982) 456 U.S. 798, 800.)

The automobile exception allowing for a search of a vehicle upon probable cause to believe that contraband or evidence of a crime will be located applies "'***irrespective of whether [the offense] is an infraction and not an arrestable offense***." (***People* v. *McGee*** (2020) 53 Cal.App.5th 796, 805, emphasis added.) Therefore, the fact "the officers lacked probable cause to believe defendant was guilty of anything greater than an infraction" makes no difference "as the distinction between misdemeanors and infractions is irrelevant to the probable cause analysis under the automobile exception." (***Id***. at p. 805; **accord *People* v. *Fews*** (2018) 27 Cal.App.5th 553, 564 ["Where such probable cause exists, a law enforcement officer may search the vehicle 'irrespective of whether possession of up to an ounce of marijuana is an infraction and not an arrestable offense.'"]; ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712, 716 and fn. 1 [upholding search of vehicle under automobile exception for evidence of infraction since an infraction is defined as a "crime" under Penal Code section 16]; **see also *People* v. *Simpson*** (2014) 223 Cal.App.4th Supp. 6, 9 ["An infraction is a *criminal* matter subject generally to the provisions applicable to misdemeanors, except for the right to a

jury trial, the possibility of confinement as a punishment, and the right to court-appointed counsel if indigent."]; ***Heredia* v. *Sessions*** (9th Cir. 2017) 720 Fed. Appx. 376, 379 ["the California classification scheme explicitly delineates infractions as crimes"]; ***United States* v. *Robbins*** (S.D. Cal. 2016) 2016 WL 6565922, *5 [rejecting argument there was no probable cause to search the defendant's vehicle because possession of a small amount of marijuana was "merely an 'infraction' and not an arrestable offense" under California law]; Pen. Code, § 691(g) ["'Misdemeanor or infraction case' means a *criminal* action in which a misdemeanor or infraction is charged ..."), emphasis added]; Pen. Code, § 804(b) ["[P]rosecution for an offense is commenced" when a "complaint is filed charging a misdemeanor or infraction"].)

III. *Pre*-Proposition 64 Analysis of What Type of Circumstances Will Provide Probable Cause to Search a Vehicle Based on the Sight or Smell of Marijuana

Before the passage of Proposition 64, it was well-established in California that the *odor* of marijuana (burnt or fresh) emanating from a vehicle provided probable cause to conduct a search of the vehicle. (**See *People* v. *Cook*** (1975) 13 Cal.3d 663, 667–669; ***People* v. *Gale*** (1973) 9 Cal.3d 788, 794; ***Robey* v. *Superior Court*** (2013) 56 Cal.4th 1218, 1253 (conc. opn. of Liu, J.) [noting it is a "settled proposition that the smell of marijuana can establish probable cause to search and, in the context of an automobile search or exigent circumstances, can provide a sufficient basis to proceed without a warrant"]; ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712, 719 [discussed in this IPG at pp. 10-11]; ***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052, 1059 [discussed in this IPG at p. 12].) "[T]he search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest: 'The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.'" (***People* v. *Superior Court (Overland)*** (1988) 203 Cal.App.3d 1114, 1120 [citing to ***Chambers* v. *Maroney*** (1970) 399 U.S. 42, 49 and ***Carroll* v. *United States*** (1925) 267 U.S. 132, 158–159.)

Thus, it was no surprise that the general rule allowing for a search of vehicle based on the odor of marijuana was held to apply regardless of whether possession of less than an ounce of marijuana carried only a $100 fine and regardless of whether such possession was treated either as a misdemeanor (from 1975-2010) or an infraction (after 2011). (**See *People* v. *Steele*** (2016) 246 Cal.App.4th 1110, 1120; ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712,

720-721, 725; ***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052, 1059; ***People* v. *Leyva*** (unreported) 2017 WL 1505924, at *7.) Moreover, this remained true, notwithstanding the passage of the medical marijuana laws that rendered possession of limited amounts of marijuana lawful under certain circumstances as illustrated in the cases of ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712, 720-721, 725 and ***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052, 1059; **see also *People* v. *Leyva*** (unreported) 2017 WL 1505924, *7; ***People* v. *Ryan*** (unreported) 2016 WL 5928669, at pp. *2-*4.)

Similarly, under pre-Proposition 64 law, if an officer saw even a *small amount of marijuana* in a vehicle, the officer had probable cause to search the entire car, including the trunk, for additional marijuana. (**See e.g.**, ***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052, 1059 [discussed in this IPG at pp. 10-11]; ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712, 720-721 [discussed in this IPG at p. 12]; **see also *People* v. *Dey*** (2001) 84 Cal.App.4th 1318, 1320 [holding presence of a single marijuana bud among defendant's effects in the passenger compartment of the vehicle provided probable cause for the search of the vehicle, including the trunk]; ***People* v. *Hunter*** (2005) 133 Cal.App.4th 371, 377 [citing to ***People* v. *Coleman*** (1991) 229 Cal.App.3d 321, 325–328 and ***People* v. *Brocks*** (1981) 124 Cal.App.3d 959, 964–965 as cases holding "that possessing less than an ounce of marijuana, while exempt from arrest or booking where one furnishes satisfactory identity and promises to appear, nevertheless may support a search for further contraband"].) Moreover, this remained true, despite the passage of medical marijuana laws that made possession of limited amounts of marijuana lawful under certain circumstances as explained in ***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052 and ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712.)

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

In ***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052, a deputy sheriff approached a defendant and another person sitting in a car in a parking lot. As the deputy approached, the defendant opened the driver's side door. The deputy immediately smelled the odor of marijuana. The defendant told the deputy he had been smoking marijuana shortly before the deputy arrived but claimed he had a "medical marijuana" card. The deputy did not ask to see the card. (***Id.*** at p. 1055.) The deputy asked the defendant if he had marijuana on his person or in the car. The defendant replied that he did and retrieved a bag which defendant claimed contained about three-quarters of an ounce of marijuana. The deputy then asked the defendant to get out of the car. At that point, the deputy saw another bag of marijuana inside the car. The defendant gave the deputy this bag, which contained about 2.2 grams of

marijuana. (***Id***. at p. 1055.) When the defendant got out of the car, he again told the deputy he had a medical marijuana card and asked the deputy to look at the card, but the deputy again refused. The deputy conducted a patsearch of the defendant and placed the defendant in the back of his patrol car. The deputy asked the defendant if there was more marijuana in his car. Defendant replied there was and that it was more than an ounce. The deputy then searched the defendant's car and found 23 ounces of marijuana and a scale able to weigh the entire amount. (***Id***. at p. 1056.)

In the appellate court, the defendant claimed that once he produced a doctor's "prescription" for marijuana, the deputy had no basis to detain or frisk him or search his car because Health and Safety Code section 11362.5 (enacted by the Compassionate Use Act of 1996) provided a defense to charges of possession marijuana when the marijuana is possessed for personal medical purposes pursuant to a written or oral recommendation or approval of a physician, and Health and Safety Code sections 11362.77 (enacted as part of the "Medical Marijuana Program") allowed such persons to possess up to 8 ounces of dried marijuana. (***Id***. at pp. 1057-1058.)

The ***Strasburg*** appellate court, however, believed that as soon as the deputy smelled the odor of marijuana in defendant's car, he had probable cause to search the defendant's car for marijuana. (***Id***. at p. 1059.) The court recognized that the defendant had a medical marijuana prescription and could lawfully possess an amount of marijuana greater than that initially found. Moreover, the court recognized that if defendant only possessed 8 ounces of marijuana, he presumably could have invoked the medical marijuana defense at trial. (***Id***. at p. 1060.) Nevertheless, the court held these facts did "not detract from the officer's probable cause." (***Id***. at pp. 1059-1060.) And also, that neither the Compassionate Use Act nor the Medical Marijuana Program prevented the deputy from conducting a search of the vehicle. (***Id***. at p. 1060.)

The appellate court reasoned the deputy could "entertain a strong suspicion that even if defendant makes only personal use of the marijuana found in [the passenger area], he might stash additional quantities for future use in other parts of the vehicle, including the trunk." (***Id***. at p. 1059.) The appellate court held that if the deputy were prevented from searching in these circumstances, "every qualified patient would be free to violate the intent of the medical marijuana program and deal marijuana from his car with complete freedom from any reasonable search." (***Id***. at p. 1060.)

People* v. *Waxler (2014) 224 Cal.App.4th 712

In ***Waxler***, a deputy sheriff drove into a parking lot in response to reports of illegal trash dumping. The deputy spotted the defendant sitting in a truck, approached the truck, and smelled the odor of burnt marijuana coming from the truck. He also saw a marijuana pipe with what appeared to be burnt marijuana in the bench seat next to the defendant. The deputy then searched the truck and found a methamphetamine pipe and about $50 worth of methamphetamine. During a conversation between the deputy and the defendant, the defendant showed the deputy a medical marijuana card although it was not entirely clear whether that information was disclosed before the search of the truck. (***Id***. at pp. 716-717.) On appeal, the defendant claimed the deputy had no right to search under the automobile exception because possession of less than an ounce of marijuana was just an infraction with no jail time and because possession of medical marijuana was lawful. (***Id***. at p. 717.)

However, like the ***Strasburg*** court, the ***Waxler*** court held the police were entitled to search the defendant's car under the automobile exception to the warrant requirement: "a law enforcement officer may search a vehicle pursuant to the automobile exception to the warrant requirement where the officer smells burnt marijuana and sees burnt marijuana in the defendant's car. The automobile exception is not limited to situations where the officer smells or sees more than 28.5 grams of marijuana in the vehicle (§ 11357, subd. (b)); the observation of any amount of marijuana—which is currently illegal to possess except as authorized by the CUA—establishes probable cause to search pursuant to the automobile exception." (***Id***. at p. 725.) Moreover, "the possession of a 215 card does not preclude a warrantless automobile search where there is probable cause to believe the vehicle contains contraband or evidence of a crime." (***Ibid***; **see also *People* v. *Guzman*** (unpublished) 2016 WL 3884925, at *8 [notwithstanding presentation of medical marijuana card which the court assumed would provide protection from arrest under the MMP, officer had probable cause to search vehicle based on strong odor of unburnt marijuana coming from within the vehicle to determine whether the defendant was in fact possessing the marijuana for personal medical needs, and was adhering to the eight-ounce limit on possession]; ***United States* v. *Liu*** (E.D. Cal. 2015) [unpublished] 2015 WL 163006, at *5 ["Even assuming [the officer] saw [the defendant's] medical marijuana card. . ., the strong odor of marijuana gave [the officer] probable cause to search the car's trunk to determine whether [the defendant] in fact possessed the marijuana for personal medical needs"].)

IV. Brief Overview of Proposition 64 (The "Control, Regulate and Tax Adult Use of Marijuana Act") and the Pertinent Statutes It Enacted

Proposition 64, which was enacted in November of 2016, did not legalize the possession of any amount of marijuana under *all* circumstances. However, it did make possession of marijuana completely lawful under state law for persons over 21 *under certain circumstances*.

Note: See 2017-IPG-33 (Q&A ON PROP 64 –THE ADULT USE OF MARIJUANA ACT & SB 94) for a wide-ranging discussion of Prop 64 and the issues it raised.

Health and Safety Code section 11357, which makes simple possession of marijuana unlawful and describes the punishment to be imposed for possession, remains on the books. ***But*** Prop 64 enacted Health and Safety Code section 11362.1, which takes precedence over section 11357 because it lays out the law governing possession of marijuana "[s]ubject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but ***notwithstanding any other provision of law*** [e.g., Section 11357]." (Health & Saf. Code, § 11362.1(a), emphasis added.)

Under Health and Safety Code section 11362.1, "it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to: (1) Possess . . . not more than 28.5 grams of cannabis not in the form of concentrated cannabis; (2) Possess . . . not more than eight grams of cannabis in the form of concentrated cannabis, including as contained in marijuana products; (3) Possess . . . not more than six living cannabis plants and possess the cannabis produced by the plants . . ."; (4) Smoke or ingest cannabis or cannabis products; and [¶] (5) Possess, ... use, ... or give away cannabis accessories to persons 21 years of age or older without any compensation whatsoever."

Health and Safety Code section 11362.1, subdivision (c) provides "[c]annabis 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***." (Emphasis added.)

Health and Safety Code section 11362.3, subdivision (a) "places limitations on the possession and use of cannabis" and provides that "[s]ection 11362.1 does not permit any person to" engage in certain conduct. (***People* v. *Raybon*** (2021) 11 Cal.5th 1056 [282 Cal.Rptr.3d 301, 307].) "The penalties for engaging in any of these prohibited activities are set forth in newly added section 11362.4. (See Voter Guide, supra, text of Prop. 64, § 4.7, pp. 181–182.)" (***People* v. *Raybon*** (2021) 11 Cal.5th 1056 [282 Cal.Rptr.3d 301, 307].) Specifically:

Health & Safety Code section 11362.3(a)(4) in conjunction with section 11362.4(b) makes it unlawful to "[p]ossess an open container or open package of cannabis or cannabis products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation."

Health & Safety Code section 11362.3(a)(7) in conjunction with section 11362.4(b) makes it unlawful to "[s]moke or ingest cannabis or cannabis products while driving, operating a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation."

Health & Safety Code section 11362.3(a)(8) in conjunction with section 11362.4(b) makes it unlawful to "[s]moke or ingest cannabis or cannabis products while riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation except as permitted on a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation that is operated in accordance with Section 26200 of the Business and Professions Code and while no persons under 21 years of age are present."

In addition, possession of marijuana as necessary to engage in "commercial cannabis activity" is lawful if the person is licensed by the state to engage in such activity. (**See** Bus. & Prof. Code, §§ 26001(k) [defining "commercial cannabis activity" as including the "possession . . . of cannabis and cannabis products as provided for in this division"]; 26037 [making it lawful to engage in actions, such as possession of marijuana, when "(1) permitted under a license issued under this division and any applicable local ordinances and (2) conducted in accordance with the requirements of this division and regulations adopted pursuant to this division"].)

***Editor's note:** Prop 64 made no significant changes impacting the *legality* of possession, cultivation, and transportation of *medical* marijuana other than requiring future compliance with the section of the Business and Professions Code governing the issuance of "physician recommendations" for medical marijuana. (**See** 2017-IPG-33 (Q&A ON PROP 64 –THE ADULT USE OF MARIJUANA ACT & SB 94) at pp. 64-67 for a more in-depth discussion of this issue.)

Amendments to Vehicle Code section 23222 by Legislature in Light of Proposition 64

After Proposition 64 was enacted, amendments to Vehicle Code section 23222 were made by the legislature. (**See** Stats.2017, c. 27 (S.B.94), § 174, eff. June 27, 2017; Stats.2019, c. 497 (A.B.991), § 274, eff. Jan. 1, 2020.)

Vehicle Code section 23222(b)(1) (as amended by SB 94 and AB 991) provides:

"Except as authorized by law, every person who has in his or her possession on his or her person, while driving a motor vehicle upon a highway or on lands, as described in subdivision (b) of Section 23220, any receptacle containing any cannabis or cannabis products, as defined by Section 11018.1 of the Health and Safety Code, which has been opened or has a seal broken, or loose cannabis flower not in a container, is guilty of an infraction punishable by a fine of not more than one hundred dollars ($100)." (Veh. Code, § 23222(b)(1).)

However, if the receptacle or loose cannabis flower is in the trunk of the vehicle, there is no violation: "Paragraph (1) [of section 23222(b)] does not apply to a person who has a receptacle containing cannabis or cannabis products that has been opened, has a seal broken, or the contents of which have been partially removed, or to a person who has a loose cannabis flower not in a container, if the receptacle or loose cannabis flower not in a container is in the trunk of the vehicle." (Veh. Code, § 23222(b)(2).)

Moreover, subdivision (b)(1) "does not apply to a qualified patient or person with an identification card, as defined in Section 11362.7 of the Health and Safety Code, if both of the following apply: (1) The person is carrying a current identification card or a physician's recommendation. (2) The cannabis or cannabis product is contained in a container or receptacle that is either sealed, resealed, or closed." (Veh. Code, § 23222(c).)

V. *Post*-Prop 64 Case Law Bearing on Whether Probable Cause Exists to Search a Vehicle for Evidence of Unlawful Use or Possession of Marijuana Under the Automobile Exception (in Chronological Order)

Probable Cause Existed for Vehicle Search Based on Odor of Marijuana Emanating from Vehicle and Driver Possessing Half-Burnt Marijuana Cigar Even Post-Prop 64.
People v. *Fews* (2018) 27 Cal.App.5th 553

In ***Fews***, the defendant was a passenger in a vehicle stopped for having expired registration tabs in an area known to the officers as one for narcotics sales and use. (***Id***. at 556-557.) The driver quickly got out of the vehicle. When an officer approached him, the officer "smelled the odor of recently burned marijuana emanating from [the driver] and the [vehicle]." (***Id***. at 557.)

An officer noticed the driver was holding a half-burnt blunt (i.e., a factory-rolled cigar that is flattened and split to remove tobacco and add marijuana, and then rerolled"). (***Ibid***.) An officer then asked the driver "if there was marijuana in the cigar, and [the driver] admitted there was" marijuana. (***Ibid***.) While this was occurring, the defendant was "fidgeting" in the passenger seat with "his body moving back and forth and from side to side." (***Id***. at p. 557.) The driver then reached back into the passenger compartment of the vehicle despite being told not to, while the defendant continued to make "furtive" movements within the passenger compartment. (***Ibid***.) One of the officers decided to conduct a search of the vehicle. This eventually led to the discovery of a firearm on the defendant (who was asked to step out of the vehicle and frisked before the vehicle search). (***Id***. at p. 558.)

After being charged as a felon in possession of a firearm, the defendant made a motion to suppress. The defendant claimed there was no probable cause to search the vehicle based merely on the odor of marijuana and the officers' knowledge of a small amount of marijuana in the driver's possession "because a small amount of marijuana is no longer illegally possessed nor considered 'contraband' after the passage of . . . Proposition 64." (***Id***. at p. 559.) Thus, according to the defendant, since the vehicle search was invalid, the frisk was likewise invalid. (***Ibid***.) The motion to suppress was denied.

On appeal, the reviewing court disagreed with the premise that the validity of the frisk was tied to whether probable cause existed for the search of the vehicle. The court held that, "[t]aken together, [the driver's] evasive and uncooperative conduct, combined with the high-crime area in which the traffic stop took place, the odor and presence of marijuana, and [the defendant's] continuous and furtive movements inside the [vehicle], were sufficiently unusual to raise the officers' suspicions that [the driver and the defendant] were involved in criminal activity related to drugs and could be armed." (***Id***. at p. 561 [and noting, at p. 560, that "[d]rug crimes have been recognized as offenses in which the perpetrators are likely to be armed with guns."].)

The ***Fews*** court ***rejected*** the defendant's argument "that after the passage of Proposition 64, law enforcement officers can no longer assume that a person possessing a small amount of marijuana is armed and engaged in criminal activity." (***Id***. at p. 561.) The court observed that "because marijuana possession and use is still highly circumscribed by law even after the passage of Proposition 64, the odor and presence of marijuana in a vehicle being driven in a high-crime area, combined with the evasive and unusual conduct displayed by [the defendant and the driver] were still reasonably suggestive of unlawful drug possession and transport to support the *Terry* frisk." (***Ibid***.)

The ***Fews*** court then went to discuss whether probable cause existed to search the vehicle – even assuming the frisk would only be valid if the search of the vehicle were deemed valid. (***Id***. at p. 561.) The ***Fews*** court held that, notwithstanding the passage of Proposition 64 and "particularly in light of the facts of the instant case," [t]he continuing regulation of marijuana leads us to believe that [***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052 and ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712 – **see** this IPG at pp. 10-12] still permit law enforcement officers to conduct a reasonable search to determine whether the subject of the investigation is adhering to the various statutory limitations on possession and use, and whether the vehicle contains contraband or evidence of a crime." (***Fews*** at p. 562.) And thus, "[d]ue to the odor of marijuana emanating from the [vehicle] and [the driver], as well as [the driver's] admission that there was marijuana in his half-burnt cigar, there was a fair probability that a search of the [vehicle] might yield additional contraband or evidence." (***Id***. at p. 563.)

The ***Fews*** court *rejected* the argument that section 11362.1(c) [**see** this IPG, at p. 13] rendered the search invalid since that section only prohibits law enforcement relying on conduct deemed *lawful* under section 11362.1 from being used as the basis for a search. And "[d]riving a motor vehicle on public highways under the influence of any drug (see Veh. Code, § 23152, subd. (f)) or while in possession of an open container of marijuana (Veh. Code, § 23222, subd. (b)(1)) [citation omitted]) are not acts 'deemed lawful' by section 11362.1." (***Id***. at p. 563.)

The ***Fews*** court stated: "Here, the evidence of the smell of 'recently burned' marijuana and the half-burnt cigar containing marijuana supported a reasonable inference that [the driver] was illegally driving under the influence of marijuana, or, at the very least, driving while in possession of an open container of marijuana. Because this was not conduct 'deemed lawful' by section 11362.1, [the defendant] cannot validly rely upon the 'not contraband' designation of section 11362.1, subdivision (c), in order to avoid the holding in ***Waxler***." (***Id***. at p. 563; **see also *People* v. *Paul*** (unreported) 2020 WL 2570174, *1-*3 [probable cause existed to search vehicle for evidence of the driver of the car being under the influence of marijuana or that the car contained an open container of marijuana where officer smelled a strong odor of fresh cannabis emitting from inside the vehicle, the driver had bloodshot eyes and a marijuana cigarette behind his ear, and all three occupants of the car had been smoking marijuana earlier that day (albeit not in the car)]; ***People* v. *Hitchcock*** (unreported) 2019 WL 2317305, at *5 [noting holding in ***Fews*** that odor of marijuana emanating from a vehicle remains suggestive of criminal activity and can provide probable cause for a search, even after the passage of Proposition 64]; ***People* v. *Vaughn*** (unreported) 2019 WL 1613569, *3 [relying on ***Fews*** to

uphold a post-Proposition 64 search of a vehicle under the automobile exception where a deputy observed furtive movements by the defendant, smelled the scent of burnt marijuana, and the defendant told the deputy he had a medical marijuana card and handed him a small amount of fresh marijuana.]; ***People* v. *Fuggins*** (unreported) 2019 WL 1512645, *1-*2 [relying on ***Fews*** to uphold a post-Proposition 64 search of a vehicle under the vehicle exception where a deputy making a traffic stop smelled marijuana coming from inside the vehicle and, when the deputy asked the defendant "if there was anything illegal in the vehicle," the defendant replied, "Just a little bit of marijuana."]; **cf**., ***People* v. *Trone*** (unreported) 2021 WL 1205194, at *9 [holding Proposition 64 changed the calculus for determining probable cause in the context of a vehicle search and thus, "the mere odor of marijuana, without more, is insufficient to establish probable cause" but also noting "non-smell related indicia of criminality may buttress the "odor' evidence to establish probable cause"].)

Probable Cause Did *Not* Exist for Vehicle Search Based on Finding Small Bag of Marijuana and Wadded Up Cash on Driver Who Told Officer He Delivered Medical Marijuana.
People v. *Lee* (2019) 40 Cal.App.5th 853

In ***Lee***, police stopped a Cadillac with no front license plate and illegally tinted windows. (***Id***. at p. 857.) When the defendant said he did not have his driver's license with him, the officers instructed him to step out of the vehicle and conducted a pat down search of his person. The defendant tensed up as he was handcuffed. (***Ibid***.) The police found a small bag of marijuana on the defendant and "wadded-up" $100 to $200 cash in his pocket. (***Ibid***.) The defendant told the officers that he delivered medical marijuana. (***Ibid***.) After determining that the defendant had a suspended license, the officers searched the vehicle. (***Id***. at p. 858.) During the search, the officers recovered cocaine, a firearm, and other items associated with selling narcotics in the vehicle. (***Id***. at p. 856.)

The defendant moved to suppress the evidence obtained during the search, arguing that the small amount of marijuana on his person did not give rise to probable cause to search his car. The trial court granted the motion and the People appealed. (***Id***. at p. 859.)

The appellate court agreed with the trial court, concluding that "[t]he recent legalization of marijuana in California means we can now attach fairly minimal significance to the presence of a legal amount of the drug on [defendant's] person, and the remaining facts cited by the People do not provide any reasonable basis to believe contraband would be found in the car." (***Id***. at

p. 861.) The ***Lee*** court held there must be "additional evidence beyond the mere possession of a legal amount—that would cause a reasonable person to believe the defendant has more marijuana" before a vehicle may be searched. (***Id***. at p. 862.) And the additional evidence relied upon by the People (i.e., defendant's statement he delivered medical marijuana, "wadded-up" $100 to $200 cash in his pocket, an additional $10 in cash in the center console; and the manner in which defendant "tensed" as Robles handcuffed him and led him to the patrol car) was insufficient to create the inference more unlawfully possessed marijuana would be located in the vehicle. (***Ibid***.) The court stated the fact the defendant 'tensed up' as he was handcuffed hardly seems an unusual reaction for someone being detained and escorted to the back of a police car" and "[l]ike his possession of a legal amount of marijuana, [the defendant's] admission that he delivers medical marijuana is not particularly significant in the absence of evidence that his delivery business was illegal. The cash found in [the defendant's] pocket and in the center console of the car might be of significance if it suggested illegal drug sales" but not in the absence of knowing the exact amount and denominations of the bills. (***Id***. at p. 866.)

The ***Lee*** court concluded that with the legalization of marijuana in California and the enactment of the language in Health and Safety Code section 11362.1(c) ["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"] *undercut* the continuing validity of ***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052 [**see** this IPG at pp. 10-11 and ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712 [**see** this IPG at p. 12] – case which had held that probable cause to search a vehicle for additional evidence of marijuana exists whenever marijuana is found in a vehicle. (***Lee*** at p. 865.)

The ***Lee*** court distinguished the holding in ***People* v. *Fews*** (2018) 27 Cal.App.5th 553 (**see** this IPG at pp. 15-18), on the ground that *unlike* in the case before it, in ***Fews***, there was an odor of recently burned marijuana and uncontained marijuana (i.e., the half-burnt cigar) supporting "a reasonable inference that the driver was illegally operating a vehicle under the influence of marijuana or, at the very least, driving while in possession of an open container of marijuana." (***Lee*** at p. 865.) The ***Lee*** court also stated that "the other factors surrounding the ***Fews*** search, such as the locale, odd behavior of the driver, and 'furtive movements' of the defendant provided a much stronger basis for probable cause than the facts surrounding [the officer's] search of the Cadillac" in the case before it. (***Lee*** at p. 866.)

Editor's note:** The ***Lee court (2019) 40 Cal.App.5th 853 recognized that, under the ***Fews*** analysis, if there is evidence the defendant was using the marijuana (or possessing it in an open container) while driving, a defendant cannot "rely on the 'not contraband' designation of section 11362.2, subdivision (c) to avoid the holding in ***Waxler***. (***Lee*** at pp. 865-866.) But declined to decide whether that would be the decisive consideration in whether a vehicle search would be justified, noting "[t]here may be an analytic difference between evidence of illegal activity—impaired driving or violation of the open container law—and whether that evidence suggests that contraband will be found in the vehicle, which is the critical issue in establishing probable cause to conduct a search." (***Id***. at p. 866, fn. 8.)

Post-Prop 64, Probable Cause Did *Not* Exist for Vehicle Search Based on the Strong Odor of Marijuana and Driver's Admission there Was Marijuana in the Car and that He Had a Marijuana Card

United States v. *Maffei* (N.D. Cal. 2019) 417 F.Supp.3d 1212

In the case of ***Maffei***, an officer pulled over the defendant and her spouse for traffic violations. While speaking with them, the officer smelled a strong odor of marijuana "emanating from the open car window." (***Id***. at p. 1218.) When the officer asked the defendant and her husband for consent to search, both declined. But the defendant's spouse stated there was marijuana in the car and that he had a cannabis card. The police then searched the car and located oxycodone and 4.3 grams of marijuana as well as other indicia of narcotic sales. (***Id***. at p. 1219.)

The district court *rejected* the argument that the officer had probable cause to believe the car contained contraband or evidence of the following crimes: (i) driving under the influence of marijuana, (ii) possession of more than 28.5 grams of marijuana, and (iii) possession of open containers of marijuana in a vehicle. The district court stated that the decision in ***Fews*** did not provide a basis for the overarching proposition that officers may still search vehicles to determine if the occupants' possession of marijuana conforms to the law based on *odor alone*." (***Id***. at p. 1225, emphasis in the original.)

The district court distinguished ***Fews*** on the ground that in ***Fews*** "the evidence of the smell of 'recently burned' marijuana and the half-burnt cigar containing marijuana supported a reasonable inference that [the driver] was illegally driving under the influence of marijuana, or, at the very least, driving while possession of an open container of marijuana." (***Id***. at p. 1226.) In contrast, in the case before it, the officer did not see any marijuana at all, he did not observe any significant indications that defendant's spouse was under the influence of marijuana; there was no indication the scent of marijuana was of burnt marijuana; no field sobriety test was

performed; no smell emanated from the trunk, a car carrier, or other known trafficking storage locations; and neither the defendant nor her husband attempted to flee. (***Id***. at p. 1227.)

Moreover, the district court found that since defendant's husband indicated "that there was marijuana inside the vehicle, and that he had a cannabis card, "the officer should have considered the same under California Vehicle Code Section 23222(b) (the only marijuana-related offense to which [the officer] cites in his report) which does not apply if the marijuana is in the trunk or a closed container and the person has a medical-marijuana authorization card." (***Id***. at pp. 1227-1228.) The district court observed that the defendant's husband only told the officer of the presence of marijuana after the officer indicated his intent to search the vehicle. Thus, the statement itself could not have contributed to the officer's initial decision to search the vehicle. (***Id***. at p. 1228.)

Probable Cause Did *Not* Exist for Vehicle Search Based on the Fresh and Burnt Odor of Marijuana (Which Could, Per the Officer, Linger for More than a Week) and a Legal Amount of "Cannabis Flower" Contained in a Tube that Could Be Opened by Squeezing Its Sides. *People* v. *Shumake* (2019) 45 Cal.App.5th Supp. 1

In ***Shumake***, an officer stopped a car driven by the defendant for a missing front license plate. The officer noticed a strong smell of marijuana, both fresh and "freshly burnt." The officer asked the defendant if he had any marijuana. He answered that he had "some bud" in the center console. The officer was under the impression that any marijuana transported within a car must be in a closed, heat-sealed package. The officer believed that if marijuana was contained in that manner, she should not be able to smell it - although the officer also stated that the smell of marijuana may linger on clothes or car upholstery for a week or more after it is smoked. (***Id***. at p. *4.) The officer thus decided to search the car. When she looked in the center console, there was a "plastic tube containing 1.14 grams of marijuana bud, later described as 'dried flower.' The tube was closed. It could be opened by squeezing the sides of the tube, which flexed the top open." (***Ibid***.) The officer believed the discovery of the tube provided additional probable cause to search and the officer subsequently found a loaded pistol under the driver's seat. The trial court denied defendant's motion to suppress. (***Ibid***.)

The ***Shumake*** appellate court believed there was insufficient probable cause to search the vehicle based on the smell of fresh and unburnt marijuana and the 1.14 grams of marijuana in the tube. The court first observed that while Vehicle Code section 23222(b)(1) makes it an

infraction to possess "any receptacle containing any cannabis … which has been opened or has a seal broken" while driving, possessing "loose cannabis flower" simply must be carried in a container. Since the "bud" in the tube was described as "dried flower," it was *not unlawful* to possess. And, thus, under section 11362.1(c), it could not be used as the basis for the search. (***Id***. at pp. 5-6.)*

Editor's note:** The ***Shumake court did express some confusion as to the rationale for differentiating between "cannabis, which must be in an unopened, sealed, container" and "loose cannabis flower," which only needs to be in a closed container. (***Id***. at p. *6, fn. 2.)

The ***Shumake*** court then analyzed whether, excluding that evidence, the firearm would still have been inevitably discovered because the smell of marijuana coupled with the defendant's admission of possession of the "bud" (which turned out to be within the legal limit) nevertheless provided sufficient probable cause to search the entire car (and such a search would still have been done regardless of the discovery of the tube). The ***Shumake*** court held it would not – "given the legality of personal use of marijuana in the State of California." (***Id***. at p. *8.)

The ***Shumake*** court distinguished the case of ***Fews*** [**see** this IPG at pp. 15-18]. The court noted in the case before it, there was no violation of the open container law or partially smoked cannabis in plain view and the officer testified that the smell of marijuana could linger for a week or more. (***Id***. at p. *8.) In contrast, the officers in ***Fews*** observed a violation of the cannabis open container law (i.e., the half-burnt cigar) which, "combined with the smell of burnt marijuana, leads to the inference that the occupants very recently smoked marijuana." (***Ibid***.) According to the ***Shumake*** court, "[t]his would increase the likelihood that the occupants were illegally smoking while driving, or that the driver was under the influence. Further, the driver of the SUV in ***Fews*** drove erratically, and both the driver and passenger acted strangely during the stop." (***Ibid***.)

Editor's note:** This aspect of the ***Shumake decision strongly implies that where officer smells burnt marijuana and sees evidence of recent smoking or driving under influence, the pre-Proposition 64 rule allowing a search of the entire vehicle prevails. (**See also *United States* v. *Stokes*** (N.D. Cal. 2021) 2021 WL 388837, at *1 [stating that the smell of "freshly burnt marijuana" emanating from a car coupled with the remnants of consumed marijuana" in a car's ashtray "will support a reasonable inference that the occupants of the vehicle were smoking marijuana while the car was moving" in many circumstances but not when, based on other evidence, the only reasonable conclusion is that somebody smoked and extinguished a joint in the car *before* it started moving].) An officer may, however, need to explain how the officer can distinguish between the smell of marijuana that is "freshly burnt" from that burnt many minutes or even hours before. (**See *United States* v. *Stokes*** (N.D. Cal. 2021) 2021 WL 388837, at *1, fn. 1.)

Probable Cause Did *Not* Exist for Vehicle Search Based on Possessing a Legal Amount of Marijuana Contained in a Tube that Could Be Opened by Squeezing Its Sides. And Federal Marijuana Laws Do Not Permit Vehicle Searches Based on the Possession of Marijuana Lawful Under State Law.
***United States* v. *Talley* (N.D. Cal. 2020) 467 F.Supp.3d 832**

In ***Talley***, officers made a traffic stop on the defendant and saw a closed, clear plastic tube, about the size of a prescription pill bottle, containing what appeared to be marijuana in the vehicle's center console. Based on this observation, the officers conducted a search of the vehicle. The search uncovered a firearm. The defendant was indicted for being a felon in possession of a firearm and made a motion to suppress. (***Id***. at pp 833-834.)

The district court granted the motion to suppress, finding that since defendant's possession of less than an ounce of marijuana was lawful, it could not provide probable cause to search the vehicle. In concluding that possession of the marijuana was lawful, the ***Tally*** court rejected the argument the marijuana was possessed in violation of section 23222(b)(1). The ***Tally*** court claimed that its decision was consistent with the holding in ***People* v. *Shumake*** (2019) 45 Cal.App.5th Supp. 1 [discussed in this IPG at pp. 21-22] which, according to the ***Talley*** court, involved the same "exact type of container—that is, a plastic 'tube' which 'could be opened by squeezing the sides of the tube, which flexed the top open." (***Id***. at p. 835.)

Editor's note:** The ***Talley court seems to have overlooked the actual rationale behind the decision in ***Shumake***. In ***Tally***, it does not appear the marijuana seen by the officer was "loose cannabis flower." ***Shumake*** stands for the proposition that "*loose cannabis flower*" is lawfully possessed while defendant is driving so long as it is in a container – even if the container is unsealed or has previously been open. But that all other forms of marijuana (i.e., cannabis and cannabis products) are only lawfully possessed when contained in a receptacle that has *not* been opened and has *not* had its seal broken. (***Id***. at p. 6, fn. 2 [albeit confessing confusion at the reason for the differential treatment].)

The ***Talley*** court ***rejected*** the argument that even if the defendant's "transport of marijuana was not illegal under state law, possession of marijuana is still illegal under federal law, and thus the officers could rely on [defendant's] container of marijuana to believe that the vehicle contained contraband." (***Id***. at p. 836; **see also *United States* v. *Jones*** (N.D. Cal. 2020) 438 F.Supp.3d 1039, 1053 [rejecting similar argument]; **cf.**, ***United States* v. *Whitlock*** (D. Vt., Apr. 16, 2021, No. 2:20-CR-00017) 2021 WL 1439846, at *7 [*federal* agents may still do a vehicle search based on the smell of marijuana regardless of the state laws].)

Probable Cause Did Not Exist to Search a Vehicle Based Solely on the Smell of Marijuana and the Presence of Under an Ounce of Marijuana in a Knotted Plastic Bag of Marijuana. And to be in Violation of H&S Code Section 11362.3(a)(4), the Container Must be Open When Found in the Car and Not Merely Have the Potential to be Opened or Have Been Previously Opened
***People* v. *Johnson* (2020) 50 Cal.App.5th 620**

In ***Johnson***, the defendant "was parked on the side of a road when two police officers approached to investigate his car's missing registration tag. Defendant ended up handcuffed in the patrol car for resisting an officer. After defendant was detained, one of the officers approached defendant's car to perform what the officer described as a tow inventory search." (***Id***. at p. 623.) The officer smelled marijuana emanating from the car and found two grams of marijuana in a knotted plastic bag in the center console. The officer then conducted a search of the rest of the car, including the rear cargo area where he located a firearm. (***Id***. at pp. 622-623.) After being charged with unlawful possession of the firearm (the defendant was a felon), he made a motion to suppress. The trial court held the search could not be justified as an inventory search but was upheld based on the ground there was probable cause to search the vehicle based on the smell of the marijuana and the baggie. (***Id***. at p. 623.)

The ***Johnson*** court agreed with the decision in ***People* v. *Lee*** (2019) 40 Cal.App.5th 853 [**see** this IPG at pp. 18-20] that the *pre*-Proposition 64 decisions in ***People* v. *Strasburg*** (2007) 148 Cal.App.4th 1052 [**see** this IPG at pp. 10-11] and ***People* v. *Waxler*** (2014) 224 Cal.App.4th 712 [**see** this IPG at p. 12], were no longer valid insofar as they would permit a search a vehicle for additional evidence of marijuana exists *whenever* marijuana was found in a vehicle. (***Johnson*** at pp. 628-629 citing to ***Lee*** at p. 865.)

The ***Johnson*** court did, however, adopt the principle expressed in ***People* v. *Fews*** (2018) 27 Cal.App.5th 553 (**see** this IPG at pp. 15-18) that "section 11362.1, subdivision (c) ***does not apply*** when the totality of the circumstances gives rise to a fair probability that an existing marijuana regulation was violated when the search occurred." (***Johnson*** at p. 626, citing to ***Fews*** at p. 563, emphasis added by IPG.) Nevertheless, the ***Johnson*** court concluded the officer did *not* have probable cause to search the defendant's car because (i) there was no evidence the smell of marijuana suggested more than a lawful amount of marijuana was possessed; and (ii) the amount of marijuana seen in the plastic bag was an amount that could

be legally possessed. (***Id***. at pp. 626-635.) Moreover, the remaining facts (i.e., a missing registration tag, having an expired registration, and defendant's resisting arrest) did not add up to probable cause. (***Id***. at p. 635.)

The ***Johnson*** court rejected the People's argument that since the marijuana was possessed in violation of Vehicle Code section 23222(b) or Health and Safety Code section 11362.3(a)(4), the marijuana in the plastic bag was possessed unlawfully. (***Id***. at pp. 630-634.) The ***Johnson*** court did not dispute that in ***People* v. *Souza*** (1993) 15 Cal.App.4th 1646, the court held that an officer's observation of an open bottle of tequila in violation of Vehicle Code section 23222 provided the officer probable cause to search for additional open bottles. (***Johnson*** at pp. 629-630 [citing to ***Souza*** at p. 1649.) However, the ***Johnson*** court held the principle involved in the ***Souza*** case was inapplicable because defendant did not possess an "open container" of marijuana in an unlawful manner, i.e., in violation of Vehicle Code section 23222(b)(1) or Health and Safety Code section 11362.3(a)(4). (***Johnson*** at pp. 630-632.)*

> ***Editor's note:** **See** the editor's note in this IPG at p. 27 for further discussion on the propriety of analogizing open containers of marijuana to open containers of alcohol.

The ***Johnson*** court held there was no violation of Vehicle Code section 23222(b)(1) because that statute only applies when the individual possesses on the person an opened or seal-broken container while *driving* and there was no evidence defendant drove. The car was parked when approached by the officer and there "was no evidence presented to indicate defendant had driven the car with the marijuana baggie inside when the search began." (***Id***. at p. 631.) The ***Johnson*** court held there was no violation of Health and Safety Code section 11362.3(a)(4) because the plastic bag was knotted and "a container or package must be open when found in the car, and not merely have the potential to be opened or have previously been opened, to violate section *11362.3, subdivision (a)(4)*. (***Id***. at p. 632.)

Seeing Marijuana Contained in an Unsealed Container on a Passenger in a Vehicle Permits a Search of the Vehicle for More Marijuana *People* v. *McGee* (2020) 53 Cal.App.5th 796

In ***McGee***, officers made a traffic stop of the defendant for an expired registration. One of the officers approached the driver's side to contact the defendant. The other officer approached on the passenger side. As the officers approached the car, they both noted the scent of unburned marijuana. When asked about the scent, the defendant denied having any marijuana in the car. However, one of the officers saw an unsealed bag of marijuana in the *passenger*'s

cleavage. The officers then conducted a search of the car. During the search, officers noticed a purse on the passenger floorboard. A search of the purse revealed a loaded handgun. The defendant admitted he placed the firearm in the purse. (***Id***. at p. 799.)

After being charged with unlawful possession of the firearm (the defendant was a felon), he made a motion to suppress in the trial court. The motion was denied. On appeal, the defendant challenged the denial on the ground there was insufficient probable cause to search the vehicle, including the purse. (***Ibid***.)

The ***McGee*** court held that, in light of the enactment of Health and Safety Code section 11362.1(c) [**see** this IPG at p. 13], pre-Proposition 64 authority holding officers have probable cause to search a vehicle under the automobile exception based *solely* on their observation of a lawful amount of marijuana on the passenger's person is no longer valid. (***Id.*** at pp. 801-802.) Thus, in order to search a vehicle under the automobile exception based on the presence of marijuana, "there must be additional evidence, beyond mere possession of a legal amount of marijuana, to support a reasonable belief the defendant has an illegal amount or is violating some other statutory provision." (***Id***. at p. 803.)

Editor's note:** **T**he ***McGee court endorsed the decision in ***People* v. *Fews*** (2018) 27 Cal.App.5th 553, 562 (**see** this IPG, at pp. 15-18) finding that officers had probable cause to search a vehicle can arise where "a driver's possession of a half-burnt marijuana cigar supported the inference he was "illegally driving while under the influence of marijuana, or, at the very least, driving while in possession of an open container of marijuana[.]" (***McGee*** at p. 803 citing to ***Fews*** at p. 563.)

The ***McGee*** court stated that while *Vehicle Code section 23222(b*) does not render a passenger's possession of an open container of marijuana while a car is being driven a violation of the law, Health and Safety Code section *11362.3(a)(4) does*. That section renders it unlawful to "[p]ossess an open container or open package of cannabis or cannabis products while driving, operating, or *riding in the passenger seat or compartment* of a motor vehicle." (***Id***. at p. 84, italics in opinion.)

Relying on the reasoning of ***People* v. *Souza*** (1993) 15 Cal.App.4th 1646, a case holding "an open container [of alcohol] within plain view provides probable cause to believe that other open containers may be found in the vehicle" (***id***. at p. 1653 [bracketed information added by IPG], the ***McGee*** court held the officer's observation of the passenger in possession of an unsealed container of marijuana in violation of section 11362.3(a)(4) provided "probable cause to search the passenger and her purse for further evidence of contraband" (***id***. at p. 804.)

Editor's note: Compare *People* v. *Cooke (unreported) 2021 WL 164332, at p. *5 [probable cause existed to search *passenger compartment* of vehicle based on strong odor of marijuana and seeing passenger discard several little nuggets of marijuana *but not to search the trunk* since it is lawful to transport unsealed containers of marijuana in the trunk and there was no testimony showing officer could tell the amount of marijuana possessed from the smell].)

Editor's note:** The language of section 23222(b) enacted by SB 94 tracks the language of section 23222(a) dealing with containers of alcohol. The latter section assumes that the alcohol was originally purchased in a closed container. The same assumption is likely to apply with less frequency when it comes to marijuana. People may keep their marijuana in a closed container which they have opened and closed before placing it in their vehicle. However, since subdivision (c) of section 23222 exempts the carrying of containers that are sealed or resealed or closed if a person has a current identification or physician's recommendation, this suggests that subdivision ***(b), which prohibits driving around with cannabis in "any receptacle . . . which has been opened or has a seal broken," would penalize persons for having cannabis in a container that is closed at the time of the driver is pulled over but has been opened or unsealed *at any time*. If the intent was to *precisely* track how open containers of alcohol are treated, the drafters would have added provisions governing possession of open receptacles of marijuana that were comparable to Vehicle Code sections 23225(a)(1) [prohibiting registered owners of vehicles to keep a . . . receptacle containing any alcoholic beverage that has been opened, or a seal broken, or the contents of which have been partially removed ***in any portion*** of the vehicle other than the trunk] and 23226 [prohibiting a driver or passenger from keeping "in the ***passenger compartment*** of a motor vehicle, when the vehicle is upon any highway or on lands, as described in subdivision (b) of Section 23220, any . . . receptacle containing any alcoholic beverage that has been opened, or a seal broken, or the contents of which have been partially removed"]. However, the legislature did not amend these statutes to include cannabis.

The ***McGee*** court held the fact "the officers lacked probable cause to believe defendant was guilty of anything greater than an infraction" makes no difference "as the distinction between misdemeanors and infractions is irrelevant to the probable cause analysis under the automobile exception." (***Id***. at p. 805.)

The ***McGee*** court distinguished the case before it from the case of ***In re D.W.*** (2017) 13 Cal.App.5th 1249, which held that "the smell of marijuana, even when coupled with a defendant's admission to having just smoked some, was not sufficient to justify probable cause to search because it was 'mere conjecture' for the officers to conclude they would find more marijuana amounting to a jailable offense." (***McGee*** at p. 804.) The ***McGee*** court found ***In re D.W.*** distinguishable because ***In re D.W.*** "concerned a search incident to arrest, which requires independent probable cause to [make a custodial] arrest, and here we are concerned with the automobile exception." (***Id***. at pp. 804-805 [bracketed information added by IPG].)

The ***McGee*** court also distinguished the case before it from the case of ***People* v. *Torres*** (2012) 205 Cal.App.4th 989, a case holding a warrantless search of a defendant's hotel room, based solely on suspicion of simple possession of marijuana, at the time a misdemeanor, was unjustified." (***McGee*** at p. 805.) The ***McGee*** court found ***Torres*** distinguishable because it involved entry into a residence, which requires a showing of more than probable cause to search, i.e., it requires "probable cause to believe that the entry [based on exigent circumstances] is justified by ... factors such as the imminent destruction of evidence or the need to prevent a suspect's escape." (***McGee*** at p. 805.)

There was Insufficient Probable Cause to Search a Vehicle Based on Seeing a Lawful Amount of Marijuana in a Presumedly Closed Plastic Bag that Was Not on the Driver's Person. And the Search Could Not be Upheld Based on the Presence of a Miniscule and Unusable Amount of Marijuana (Especially Given the Absence of Any Odor Marijuana) that Apparently Was Not Considered as Constituting Marijuana in an Open Container.
***People* v. *Hall* (2020) 57 Cal.App.5th 946**

In ***Hall***, officers pulled over the defendant for a vehicle equipment violation. During the traffic stop, an officer saw "a clear plastic baggie, inside of which was a green leafy substance," which he believed was marijuana. The officer did not state how much marijuana was present in the baggie. The officer also saw in the cup holders "an ashtray filled with ashes," "burnt cigar wrappers, commonly used to wrap marijuana," and "a green leafy substance, that appeared to be broken up" "in the lap of the driver." (***Id***. at p. 948.) Although the officer did not see any smoke in defendant's car, smell the odor of marijuana emanating from the car or the defendant, or observe any signs indicating defendant was under the influence, two officers searched the defendant's car and found a gun in a closed backpack. This resulted in criminal charges being filed against the defendant. (***Id***. at pp. 948-949.) The defendant filed a motion to suppress, which was denied. The defendant appealed. (***Id***. at p. 948.)

The ***Hall*** court held that lawful possession of marijuana in a vehicle does not provide probable cause to search the vehicle, a conclusion stemming from the plain language of Health and Safety Code section 11362.1(c) [**see** this IPG, at p. 13]. (***Id***. at pp. 948-949, 952.) The court found that there was insufficient probable cause in the instant case to believe that the marijuana in the baggie was unlawfully possessed. (***Id***. at p. 954.)

The ***Hall*** court initially observed that "[t]here was no testimony about the weight of the baggie and no description of the baggie from which one could reasonably infer that it contained over 28.5 grams of marijuana. Thus, there was no evidence to support a belief that [the defendant] had an unlawful amount of marijuana in his car." (***Id***. at p. 954.)

Moreover, the court held there was insufficient evidence that the marijuana was unlawfully possessed in violation of Vehicle Code section 23222. The ***Hall*** court said that even assuming this argument was properly argued in the appellate court (it was not raised or relied upon by the prosecution), "there simply was no evidence about the condition of the plastic baggie." (***Id***. at p. 957.) Moreover, there was no evidence presented that the baggie of marijuana was in the defendant's "possession on [his] person" as required for a violation of Vehicle Code section 23222, subdivision (b)(1), and, in fact, the evidence was to the contrary." (***Id***. at p. 958.)*

Editor's note:** For the proposition that the marijuana needed to be on the "person," the ***Hall court cited to ***People* v. *Squadere*** (1978) 88 Cal.App.3d Supp. 1. In ***Squadere***, the court held there was insufficient direct or circumstantial evidence to support ***a conviction*** of violating section 23222 for possessing an open bottle of beer "on his person" *while driving* based solely on the fact that there were five occupants and five cold and partially empty cans in the car, three underneath the driver's seat and two underneath the passenger seat. The ***Squadere*** court noted the officer did not see any "furtive movements or any other movement by [the defendant] to indicate that he had placed beer bottles under either seat" and that the defendant "testified that he had not been drinking in the car and did not know of the presence of the bottles." (***Id***. at pp. *3-*5.) But ***Squadere*** does **not** stand for the proposition that the evidence was insufficient in the case before it to establish ***probable cause to search*** nor that there must be direct visual evidence of the item being possessed on the driver's person. (**See *Squadere*** at p. 4, fn. 2; ***People* v. *Monroe*** (1993) 12 Cal.App.4th 1174, 1182, fn. 4; **see also *People* v. *McCloskey*** (1990) 226 Cal.App.3d Supp. 5, 10 [section 23222 "is not violated unless the evidence establishes that the open container of alcoholic beverage was literally connected to the person of the defendant" albeit also recognizing that a "trier of fact could find by *circumstantial evidence* that the defendant, while driving, had the open container of beer *on his person* in his hand and had set it down on the console" based on the presence of a half-filled can of beer with condensation on it seen resting on the truck console], emphasis added by IPG.)

The ***Hall*** court also *rejected* the argument that since there was "ash in the cupholders" in the center console and loose marijuana in the lap of the defendant, *this* marijuana was unlawfully possessed in violation of section 23122 - establishing probable cause to search. The ***Hall*** court rejected the argument because "[n]othing in the record indicates the magistrate considered the ash, 'remnants,' and/or the substance on [the defendant's] lap to constitute either an 'open container or open package of cannabis or cannabis products' under section 11362.3, subdivision (a)(4) or 'loose cannabis flower not in a container' under Vehicle Code section 23222, subdivision (b)(1)." (***Id***. at pp. 958-959.) And that circumstance coupled with the fact

the officer did not smell the odor of marijuana, the fact the defendant obeyed the officer's commands, and the fact the defendant was not suspected of driving under the influence undermined the idea that there was probable cause to search the car. (***Ibid***.)

Editor's note:** In ***Hall, the court *recounted but did not necessarily adopt* the defense argument that since there must be evidence the marijuana in the vehicle was of a "usable quantity" for a violation of section 23222 to occur and there was none presented at the motion to suppress, there was not probable cause to believe the defendant unlawfully possessed the small unpackaged amount of marijuana in the console and on his lap. (***Id***. at p. 958; **see also *United States* v. *Stokes*** (N.D. Cal. 2021) 2021 WL 388837, at *2 [ashtray containing remnants of consumed marijuana (i.e., ash and bits of paper) that could not be smoked was not a violation of the open container law of Health & Safety Code § 11362.3(a)(4)].) Significantly, however, both cases relied upon by the defense in ***Hall*** for this principle (***People* v. *Leal*** (1966) 64 Cal.2d 504 and ***People* v. *Thomas*** (1966) 246 Cal.App.2d 104) only involved the sufficiency of the evidence to support *a conviction* for possession of narcotics – not whether an officer had probable cause to believe marijuana was unlawfully possessed or whether remnants could circumstantially indicate recent use of marijuana while driving. And the California Supreme Court has specifically rejected the argument that in order for find *probable cause* to search a vehicle based on seeing marijuana in a vehicle, the amount of marijuana seen must be in a usable amount. (**See *Wimberly* v. *Superior Court*** (1976) 16 Cal.3d 557, 564; ***People* v. *Schultz*** (1968) 263 Cal.App.2d 110, 114; ***People* v. *Fein*** (1971) 4 Cal.3d 747, 755 [approving ***Schultz*** but only insofar as it held marijuana seeds provided probable cause to search a vehicle, *not* a home]; **see also *People* v. *Palaschak*** (1995) 9 Cal.4th 1236, 1241 [discussing ***Fein*** and noting that the principle that "evidence of past possession is inadequate to sustain a conviction for present possession, makes little sense when applied to a case, such as the present one, in which there exists sufficient direct or circumstantial evidence of past possession, over and above evidence of mere use or ingestion"]; ***People* v. *Monroe*** (1993) 12 Cal.App.4th 1174, 1183 ["the inquiry whether probable cause exists is not the same as that undertaken by an appellate court reviewing a judgment for support by substantial evidence"].)

There Was Probable Cause to Search a Vehicle Based on an Officer Seeing a Defendant Leaning into Vehicle in a High Crime Area and Walking Away Upon the Officer's Approach, the Odor of Marijuana in a Strength Inconsistent with the Driver's Claim that the Odor Came from a Jar with Marijuana Residue and that He Had Recently Smoked Marijuana, and the Driver's Ambiguous Response When Asked if There Was Anything Illegal in the Car

People v. *Moore* (2021) 64 Cal.App.5th 291 [278 Cal.Rptr.3d 776]

In ***People* v. *Moore***, a police sergeant with extensive training and experience investigating marijuana offenses observed the defendant leaning into the open front passenger door of a Jeep near a park in a high crime area, suggesting to the officer that there was a potential drug transaction occurring. (***Id***. at pp. 779, 781.) When the officer "parked his patrol unit behind the Jeep, defendant walked away to the middle of the park." (***Id***. at p. 779.) The sergeant then

approached an individual sitting in the driver's seat [hereafter, "the driver"] and engaged him in conversation. When the sergeant reached the Jeep, the driver opened the driver's side door and a "strong" smell of "fresh marijuana" escaped from the vehicle. (***Ibid***.) The driver appeared nervous. When the sergeant asked the driver if there was any marijuana in the car, the driver said there was not. The driver then showed the sergeant an "empty glass mason jar that looked like it had marijuana residue in it" and claimed there had been marijuana in the car, which he had recently smoked. (***Ibid***.) When the sergeant asked if there was anything illegal in the Jeep, the driver said, "[n]ot that I know of." (***Ibid***.) The sergeant also asked about a backpack that was on the front passenger floorboard. The driver stated it was left by a friend. (***Ibid***.) Based on his observations and the odor of fresh marijuana, the sergeant decided to search the Jeep, including the backpack, for an unlawful amount of marijuana. (***Ibid***.)

During the sergeant's interaction with the driver, the sergeant noticed the defendant watching him. When the sergeant picked up the backpack from the floorboard, defendant approached and claimed the backpack as his property. After telling the sergeant he did not want the backpack searched, the defendant walked away and then drove away. When the sergeant opened the backpack, he found a jar containing approximately one-quarter pound of marijuana, along with a firearm and other indicia of sales. (***Ibid***.)

The trial court denied a subsequent motion to suppress filed by the defendant. On appeal, the defendant argued that since Proposition 64 made it legal to possess up to 28.5 grams of marijuana and subdivision (c) of section 11362.1 states no conduct deemed lawful under section shall constitute the basis for a search, the sergeant lacked probable cause to search the Jeep based on the driver's admission of having recently smoked, and the driver's presentation of the empty mason jar that appeared to contain marijuana residue. (***Id***. at p. 782.) Relying on ***People* v. *Lee*** (2019) 40 Cal.App.5th 853 [discussed in greater depth in this IPG at pp. 18-20 and finding a small legal amount of marijuana had little significance in providing a basis for believing evidence of illegal activity would be found in a vehicle], the defendant essentially argued the fresh smell of marijuana was of similar little to no value in providing probable cause to search the vehicle. (***Moore*** at p. 782.)

The ***Moore*** appellate court *rejected* defendant's argument because it ignored the fact that subdivision (c) only applies when possession of marijuana is deemed lawful and not all possession of marijuana is lawful. "Existing marijuana regulations include limits on the amount an individual may lawfully possess," and given other statutory restrictions on

marijuana possession, "section 11362.1, subdivision (c) does not apply when the totality of the circumstances gives rise to a fair probability that an existing marijuana regulation was violated when the search occurred." (***Moore*** at p. 782 citing to ***People* v. *Johnson*** (2020) 50 Cal.App.5th 620, 626 [discussed in this IPG at p. 24-25] and ***People* v. *Fews*** (2018) 27 Cal.App.5th 553, 563 [discussed in this IPG at pp. 15-18].) The ***Moore*** court stated that while a lawful amount of marijuana (and thus, presumably, the mere odor of marijuana that does not indicate possession of more than a lawful amount of marijuana) "is not, on its own, enough to establish probable cause, such a lawful amount may establish probable cause where coupled with other factors contributing to an officer's reasonable belief the defendant may be in violation of other statutory regulations of marijuana possession." (***Id***. at p. 783.)

The ***Moore*** court held the sergeant articulated a reasonable basis for his belief the defendant possessed an unlawful amount of marijuana based not merely on the mere odor of fresh marijuana but on the following *additional* circumstances, coupled with the sergeant's training and experience: (i) the driver was parked in a high-crime area with defendant leaning into the passenger side of the Jeep, suggesting a potential drug transaction was occurring; (ii) the defendant left the Jeep when the officer approached; (iii) the "strong" odor of fresh marijuana (i.e., an odor that was inconsistent with the driver's implausible explanation for the odor arising from burnt marijuana or marijuana residue in a mason jar)*; (iv) the fact the driver provided an deceptive explanation; (v) the driver's nervousness; and (vii) the equivocal answer provided by the driver when asked if there was anything illegal in the Jeep (i.e., "[n]ot that I know of"). (***Id***. at pp. 781-782.) These circumstances permitted a search of the defendant's vehicle and the backpack contained within it. (***Id***. at p. 784.)

Editor's note:** The notion that a "strong odor" of marijuana can sometimes be evidence of unlawfully possessed marijuana is supported by the holding in the unreported case of ***People* v. *Nevins (unreported) 2020 WL 7331954, at *2, *6 [*rejecting* argument that since cultivation of six plants of marijuana was now legal, "strong" odor of marijuana in driveway and across the street coming from a residence, coupled with the abnormal electricity usage, could not be considered in establishing probable cause].)

Seeing Suspect Under 21 Rolling Joint of Marijuana in Parked Vehicle Provided Probable Cause to Search of the Vehicle for More Marijuana *People* v. *Sarente* (unreported) 2021 WL 3240283

In the *unreported* case of ***Sarente***, the court held that even after the enactment of Proposition 64, there was probable cause to search a vehicle where the officer sees a "legal amount of cannabis in an illegal setting." (***Id***. at p. *4.) Thus, the fact the defendant was seen rolling a

joint of marijuana and additional cannabis in the console of a parked vehicle belonging to a defendant *under 21* provided a basis to search the vehicle notwithstanding the passage of Proposition 64 or the possibility the defendant was medically authorized to possess the marijuana under Proposition 215. (***Id***. at pp. *2-*5.)

Officer's Observations of Persons Crowded Together Near Defendant's Truck in the Parking Lot of a Closed Business (an Area of High Crime and Drugs Sales) in a Manner Consistent with Drug Sales, Coupled with a Strong Smell of Unburnt Marijuana and Defendant's Nervous Denial He Possessed Marijuana, Provided Probable Cause to Search the Truck *People* v. *McKinney* (unreported) 2021 WL 4145187

In the unreported case of ***McKinney***, a deputy spotted a group of people in a parking lot of a closed business. The area was one of high crime and drug sales and was poorly lit, consistent with hand-to-hand drug transactions and a desire to avoid detection. The individuals were crowded together near defendant's truck. (***Id***. at p. *3, *5.) When the deputy contacted the defendant, he noticed "a strong smell of unburnt marijuana coming from inside defendant's truck, but defendant denied he had any marijuana, which [the deputy] found suspicious and indicative of attempting to hide unlawful conduct. Further, defendant's tone was 'nervous' and 'aggravated' when he denied there was marijuana in the truck; he also started to shake when marijuana was mentioned. (***Id***. at p. *5.)

The ***McKinney*** court agreed with ***People* v. *Johnson*** (2020) 50 Cal.App.5th 620 [discussed in this IPG at pp. 24-25], that section 11362.1(c) "does not apply when the totality of the circumstances gives rise to a fair probability that an existing marijuana regulation was violated when the search occurred." (***Id***. at p. *5.) And found the circumstances constituted probable cause supporting the deputy's "decision to detain defendant for the purpose of searching his truck to determine whether he was in compliance with marijuana laws." (***Id***. at p. *6 [citing to ***People* v. *Moore*** (2021) 64 Cal.App.5th 291, 300-301 [discussed in this IPG at pp. 30-32]; ***People* v. *Fews*** (2018) 27 Cal.App.5th 553, 561[discussed in this IPG at pp. 15-18; and ***People* v. *Lee*** (2019) 40 Cal.App.5th 853, 862 [discussed in this IPG at pp. 18-20]].)

VI. Prosecutor's Checklist of Relevant Information to Elicit When Officers Have Searched a Vehicle Based on the Odor of Marijuana or Presence of a Small Amount of Marijuana

1. Is there direct or circumstantial evidence that the marijuana is possessed unlawfully?

2. Is the suspect under 21?

3. Is the marijuana in an amount over the legal limit (28.5 grams)?

4. Is the marijuana in an open container?

    a. Is the open container in the passenger compartment?

    b. Did the officer see marijuana on the driver's person and/or is there circumstantial evidence that the suspect was driving with the container *on his person*?

    c. How is the container sealed?

    d. Is the marijuana in a container that has been opened or has a seal broken?

    e. Is the marijuana a usable amount?

5. If the marijuana is kept in an unsealed or open container, is the marijuana "loose cannabis flower" and does the officer know the difference between "loose cannabis flower" and "cannabis?"

6. Is there evidence aside from the marijuana or odor of marijuana that defendant is engaged in selling marijuana, i.e., hand to hand observations, indicia of sales, etc.?

7. Is the odor of fresh marijuana strong enough to suggest the odor is emanating from an amount of marijuana over the legal limit? And does the officer have sufficient training and knowledge to come to this conclusion?

8. Is the odor of burnt marijuana sufficiently strong to suggest the driver or passenger was recently smoking marijuana while driving? And does the officer have sufficient training and knowledge to come to this conclusion?

9. Is there other evidence aside from the odor of burnt marijuana suggesting the defendant was smoking marijuana while driving (direct or circumstantial)?

10. Is there any evidence suggesting the defendant was under the influence of marijuana while driving?

VII. When, If at All, Can an Officer with Probable Cause to Believe a Defendant is Under the Influence of Drugs Conduct a Warrantless Search of the Person Without Intending to Make a Custodial Arrest?

Given the logistics and time involved in making a custodial arrest (not to mention the outcome) of taking a person into custody for being under the influence of, or in possession of a controlled substance, a common question arises when citing a person for such an offense: If there is probable cause to believe a suspect has on their person additional drugs or evidence of the crime, does an officer have to intend to, and make, a custodial arrest in order to search for such evidence? This portion of the IPG attempts to answer that question.

An Officer May Search Incident to Custodial Arrest for Crime, But Not When the Officer is Just Planning to Cite Out the Suspect at the Time of the Search

If an officer has probable cause to arrest a person and intends to make a ***custodial*** arrest, the officer may search the person contemporaneously (shortly before or after the arrest) incident to that arrest. (***United States* v. *Robinson*** (1973) 414 U.S. 218; ***People* v. *McKay*** (2002) 27 Cal.4th 601, 607.) It does not make a difference that the defendant is not formally arrested until after the search, so long as the search is substantially contemporaneous with the arrest. (***People* v. *Adams*** (1985) 175 Cal.App.3d 855, 860-861.)

"The interests justifying search [incident to arrest] are present whenever an officer makes an arrest. A search enables officers to safeguard evidence, and, most critically, to ensure their safety during 'the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.'" (***Virginia* v. *Moore*** (2008) 553 U.S. 164, 177.) But "[o]fficers issuing citations do not face the same danger, and . . . therefore . . . they do not have the same authority to search." (***Ibid***.) Accordingly, "[o]nce it [is] clear that an arrest [is] not going to take place, the justification for a search incident to arrest [is] no longer operative." (***People* v. *Macabeo*** (2016) 1 Cal.5th 1206, 1219; **accord *In re D.W.*** (2017) 13 Cal.App.5th 1249, 1252-1253.)*

Editor's note regarding "citations" versus "arrests":** Section 834 provides, "An arrest is taking a person into custody, in a case and in the manner authorized by law...." The essential elements of an arrest are: "(1) taking a person into custody; (2) actual restraint of the person or his submission to custody. [Citations.]" (People* v. *Boren*** (1987) 188 Cal.App.3d 1171, 1177 citing to ***People* v. *Hatcher*** (1969) 2 Cal.App.3d 71, 75.) "Also, section 836 provides in part, "A peace officer may ... without a warrant, arrest a person: 1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence." (***People* v. *Boren*** (1987) 188 Cal.App.3d 1171, 1177.) However, there is such a thing as a noncustodial arrest. Although courts often draw a distinction between "citations" and "arrests" when talking about whether a search may be conducted incident to an arrest, "when the officer determines there is probable cause to believe that an offense has been committed and begins the process of citing the violator to appear in court (Veh. Code, ss 40500—40504), an 'arrest' takes place at least in the technical sense: 'The detention which results (during the citation process) is ordinarily brief, and the conditions of restraint are minimal. Nevertheless, the violator is, during the period immediately preceding his execution of the promise to appear, under arrest. (Citations.) Some courts have been reluctant to use the term 'arrest' to describe the status of the traffic violator on the public street waiting for the officer to write out the citation (citations). The Vehicle Code, however, refers to the person awaiting citation as 'the arrested person.'" (***People* v. *Superior Court*** (1972) 7 Cal.3d 186, 200.) This type of "arrest" for a minor Vehicle Code violation is considered a "noncustodial" arrest and must "be distinguished in some respects from arrest under other circumstances. Ordinarily, the word 'arrest' implies a sequence of events that begins with physical custody and at least a minimal body search, and concludes with booking and incarceration or release on bail. However, where a minor Vehicle Code violation is involved, the arrest is complete when, after an investigatory stop, 'the officer determines there is probable cause to believe that an offense has been committed and begins the process of citing the violator to appear in court.' (Citation omitted.) This species of arrest does not inevitably result in physical custody and its concomitant, a search." (***People* v. *Monroe*** (1993) 12 Cal.App.4th 1174, 1183, fn.5; **accord *Henry* v. *County of Shasta*** (9th Cir. 1997) 132 F.3d 512, 522.)

An arrest is "custodial" if the officer will be transporting the person to jail, a police station or other place of confinement or treatment. An arrest is not custodial if the person is going to be cited and released. (**See** Hutchins, California Criminal Investigation (2021 Edition) at p. 142 [An arrest is also custodial if the law gave officers *the option* of taking the arrestee into custody and *they had elected to do so*.], emphasis added.) Hence, if an officer cannot lawfully take a suspect into custody, or is not intending to make a custodial arrest, the officer cannot search the person of the suspect under the search incident to arrest exception. (**See *Knowles* v. *Iowa*** (1998) 525 U.S. 113, 115; ***People* v. *Macabeo*** (2016) 1 Cal.5th 1206, 1217-1219.) This is what the courts are referring to when they say there is no such thing as a search "incident to citation." (***People* v. *Macabeo*** (2016) 1 Cal.5th 1206, 1218; ***In re D.W.*** (2017) 13 Cal.App.5th 1249, 1252.)

Editor's note:** Interestingly, on the (hopefully) rare occasion when an officer decides to disregard a lack of state statutory authority to make a custodial arrest and makes (or intends to make) a custodial arrest for an offense that, under state law, is strictly a nonjailable offense, any evidence found may not be excluded. (**See *Virginia* v. *Moore (2008) 553 U.S. 164, 178 [even if officer violated state rules forbidding a custodial arrest, those rules "were those of state law alone, and as we have just concluded, it is not the province of the Fourth Amendment to enforce state law. That Amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest."]; ***People* v. *Macabeo*** (2016) 1 Cal.5th 1206, 1219 [no right to search incident to citation where it did not "appear that there are objective indicia to suggest. . . that the officers would have arrested defendant in violation of state law"]; ***People* v. *McKay*** (2002) 27 Cal.4th 601, 605 [Proposition 8 "eliminate[d] a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled."].)

Being Under the Influence of a Controlled Substance is a Misdemeanor for Which a Person Would Ordinarily Be Cited Out

The offense of being under the influence of a controlled substance is a misdemeanor. (**See** Health & Saf. Code, § 11550(a)/11055(d)(2).)

Penal Code section 853.6(a)(1), in pertinent part, provides: "In any case in which a person is arrested for an offense declared to be a misdemeanor . . . and does not demand to be taken before a magistrate, that person shall, instead of being taken before a magistrate, be released according to the procedures set forth by this chapter, although nothing prevents an officer from first booking an arrestee pursuant to subdivision (g)."

A misdemeanor arrest for being under the influence of a controlled substance is not an offense expressly listed as exempt from the mandate of section 853.6(a)(1).

However, an Arrest for a Misdemeanor Can Sometimes be a *Custodial* Arrest

However, subdivision (g) gives an officer the option of booking "the arrested person at the scene *or at the arresting agency prior to release . . .*" (Pen. Code, § 853.6(a).) Subdivision (g) may permit a search of a person if the person is going to be transported under this subdivision under the same rationale for permitting the search of person arrested for an infraction or misdemeanor who is going to be transported to appear before a magistrate pursuant to Vehicle Code section 40302 for lack of satisfactory identification may be searched incident to being taken before a magistrate. (**See *People* v. *Monroe*** (1993) 12 Cal.App.4th 1174, 1195.)

Moreover, a person arrested for being under the influence of a controlled substance is likely to fall under one or more of the categories listed in subdivision (i) of section 853.6, which, in pertinent part, provides: "Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the procedures set forth by this chapter unless one of the following is a reason for nonrelease . . .

(1) The person arrested was so intoxicated that they could have been a danger to themselves or to others.
(2) The person arrested required medical examination or medical care or was otherwise unable to care for their own safety.
(3) The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.
(4) There were one or more outstanding arrest warrants for the person.
(5) The person could not provide satisfactory evidence of personal identification.
(6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.
(7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.*
(8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.
(9) There is reason to believe that the person would not appear at the time and place specified in the notice."

***Editor's note:** Paragraph (7) should almost always be available if an officer wishes to make a custodial arrest when a defendant is under the influence of a controlled substance since a persuasive argument can be made that if an officer has probable cause to believe the person is under the influence then there is probable cause to believe the person possesses the substance or paraphernalia associated with consumption of the substance. (**See** this IPG, at pp. 5-7.) Hence, the immediate release of the person would jeopardize the prosecution of the person because the person will likely get rid of evidence that would be used in the prosecution.

A Search Incident to a Custodial Arrest May Precede the Formal Arrest So Long as the Search is Done Contemporaneously with the Formal Arrest

Finally, if there is lawful authority to make a custodial arrest and the officer honestly intends to make a custodial arrest, the officer can conduct a search of the person incident to arrest before making a formal custodial arrest. However, it is likely that a custodial arrest must occur contemporaneously with the search. (**See *Rawlings* v. *Kentucky*** (1980) 448 U.S. 98, 111 [*Where the formal arrest followed quickly on the heels* of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa", emphasis added]; ***People* v. *Macabeo*** (2016) 1 Cal.5th 1206, 1218 [When a custodial arrest *is made*, and that arrest is supported by independent probable cause, a search incident to that custodial arrest may be permitted, even though the formalities of the arrest follow the search", emphasis added]; ***State* v. *Richards*** (Tenn. 2009) 286 S.W.3d 873, 878 [for search incident to arrest exception to apply, "the arrest must be *consummated* either prior to or contemporaneously with the search", emphasis added]; ***State* v. *Lee*** (Idaho 2017) 402 P.3d 1095, 1099, 1103 [where an officer "could have" arrested the defendant but only intended to issue a citation, officer was not entitled to conduct search incident to arrest]; **but see *People* v. *Corsini*** (1984) 161 Cal.App.3d 514, 517 ["an arrest valid when made is not converted to a sham simply because an officer later elects to release the arrestee, properly or not"].)

If a Person to be Cited is Under the Influence of, or in Possession of, an Unlawful Drug, A Search of the Person *Should be* Justifiable Based on the Existence of Probable Cause to Believe the Person Possesses Evidence of the Offense and the Exigent Circumstance that Such Evidence Will be Lost Unless an Immediate Warrantless Search Takes Place.

Officers may search a suspect absent a warrant if exigent circumstances exist to justify the search and there is insufficient time to obtain a warrant before addressing the exigency. (***Lange* v. *California*** (2021) 141 S.Ct. 2011, 2017 ["The exigent circumstances exception applies when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable."].) One type of exigent circumstance is the need to prevent the loss or destruction of evidence. (***Lange* v. *California*** (2021) 141 S.Ct. 2011, 2017; ***Missouri* v. *McNeely*** (2013) 569 U.S. 141, 169.) "When the police possess probable cause to conduct a search, but because of exigent circumstances, do not have time to

obtain a warrant, they may search without a warrant. [Citations omitted]. The rule applies equally to searches of person and property." (***United States* v. *Banshee*** (11th Cir. 1996) 91 F.3d 99, 102; **see also** 3 W.R. LaFave, Search & Seizure § 5.4(b) (6th ed. September 2020 Update), fn. 34 [collecting cases]; ***Cupp* v. *Murphy*** (1973) 412 U.S. 291, 296 [evanescent nature of evidence permitted warrantless scraping of defendant's fingernails even though defendant was not going to be arrested].)

If an officer has probable cause to believe a suspect is under the influence of a controlled substance, there is likely probable cause to believe that evidence relating to that offense (i.e., the substance itself or items used to ingest the substance) will be found on the suspect's person. (**See *People* v. *Wade*** (1989) 208 Cal.App.3d 304, 307.)

This conclusion is based on the same general rationale that if there is probable cause to believe a person is driving under the influence of a drug or alcohol, evidence relevant to that offense might be found in a person's vehicle. (**See *People* v. *Sims*** (2021) 59 Cal.App.5th 943, 955 [where defendant found intoxicated in parked vehicle, there was "probable cause to search the defendant's vehicle because it was reasonable to believe the search would produce evidence the defendant was publicly intoxicated in violation of San Diego Municipal Code section 85.10"]; ***People* v. *Quick*** (2016) 5 Cal.App.5th 1006, 1012–1013 ["when a driver is arrested for driving under the influence, or being under the influence, it will generally be reasonable for an officer to believe evidence related to that crime might be found in the vehicle. [Citations.] It is certainly logical and reasonable to expect that items related to alcohol or drug consumption, such as alcoholic beverage bottles or drug paraphernalia, might readily be contained in the intoxicated driver's car."]; ***People* v. *Evans*** (2011) 200 Cal.App.4th 735, 750 [same]; ***People* v. *Nottoli*** (2011) 199 Cal.App.4th 531, 554 ["When a driver is arrested for being under the influence of a controlled substance, the officers could reasonably believe that evidence relevant to that offense might be found in the vehicle. The presence of some amount of the controlled substance or drug paraphernalia in the interior of the vehicle would be circumstantial evidence tending to corroborate that a driver was in fact under the influence of the controlled substance."].)* The converse of that inference is also true: evidence that a person is under the influence of a drug is circumstantial evidence of past possession of that drug. (***People* v. *Morales*** (2001) 25 Cal.4th 34, 49; ***People* v. *Palaschak*** (1995) 9 Cal.4th 1236, 1241-1243.)

Editor's note:** The cases of ***Quick, ***Evans***, and ***Nottoli*** are all cases involving whether a search of the vehicle for evidence "relevant to the crime of arrest" would be permitted under the rule laid out ***Arizona* v. *Gant*** (2009) 556 U.S. 332 when an occupant of a vehicle is arrested. The ***Gant*** court stated it would be permissible to search the car if it was "reasonable to believe" evidence relevant to the crime of arrest would be present. (***Id***. at p. 351.) Whether "reasonable to believe" is the equivalent of "probable cause" is an open question though it is probably some lesser standard. (**See *United States* v. *Edwards*** (7th Cir. 2014) 769 F.3d 509, 514 ["The Court in ***Gant*** did not elaborate on the precise relationship between the 'reasonable to believe' standard and probable cause, but the Court's choice of phrasing suggests that the former may be a less demanding standard."]; ***People* v. *Evans*** (2011) 200 Cal.App.4th 735, 749, 751 [considering that the automobile exception requires probable cause, "a requirement of probable cause in this context would render the entire second prong of the ***Gant*** search-incident-to-arrest exception superfluous. . . . Reasonable suspicion, not probable cause, is required."].) Regardless, all these cases establish it is at least a reasonable inference that a person who is under the influence of a drug will be in possession of evidence of that offense.

If an officer lacks the authority to place such a defendant under custodial arrest (and thus lacks the authority to conduct a search incident to that custodial arrest), the paraphernalia associated with that use or whatever unused amount of the drug is still in possession of the user is going to be lost or destroyed unless the officer searches the person. (**See *Com.* v. *Skea*** (Mass. App. Ct. 1984) 18 Mass.App.Ct. 685, 700 [470 N.E.2d 385, 397 [finding search of defendant "was constitutionally justified by probable cause to believe he carried marihuana or other controlled substances, coupled with exigent circumstances, inherent in the fact that any contraband he carried would be unavailable to the police unless it were then taken into their control."].) This provides the exigent circumstance to search a person who is going to be cited out for being under the influence. Although this just makes sense, the defense may argue that there is no California case directly on point (true) and the exigent circumstances exception does not apply because an officer could technically obtain a search warrant before searching the suspect's person.

However, there is a ton of out-of-state authority that would support a warrantless search of a person when probable cause exists to believe the person is in possession of contraband or evidence of a crime that will be lost or destroyed if the officer sought a warrant. (***Guzman* v. *Estelle*** (5th Cir. 1974) 493 F.2d 532, 538; ***United States* v. *Dicks*** (D.D.C. 1992) 791 F.Supp. 306, 308; ***State* v. *Fewell*** (Kan. 2008) 184 P.3d 903, 914; ***Com.* v. *Washington*** (Mass. 2007) 869 N.E.2d 605, 615; ***Com.* v. *Skea*** (Mass. App. Ct. 1984) 470 N.E.2d 385, 395; ***State* v. *Michael M.*** (Me. 2001) 772 A.2d 1179, 1183; ***State* v. *Martin*** (Me. 2015) 120 A.3d 113, 118; ***State* v. *Moore*** (Ohio 2000) 734 N.E.2d 804, 808; ***State* v. *Vanderveer*** (N.J. Super. 1995) 667 A.2d 382, 384-385; ***State* v. *Smith*** (Me. 1991) 593 A.2d 210, 212–213; ***People* v.**

Houser (Mich. Ct. App. 1986) 390 N.W.2d 674, 676; ***State* v. *Yates*** (N.C. Ct. App. 2004) 589 S.E.2d 902, 904–905; ***United States* v. *Carr*** (11th Cir. 2008) 296 Fed.Appx. 912, 916; ***State* v. *Campbell*** (Iowa Ct. App. 2006) 728 N.W.2d 225 [table case]; **see also *United States* v. *Pope*** (9th Cir. 2012) 686 F.3d 1078, 1083-1084.)

Moreover, the idea that it would be feasible to obtain a search warrant in that circumstances is implausible. After all, if an officer had to obtain a search warrant, it would require the person being cuffed or otherwise incapacitated (so they could not destroy the evidence) and kept detained for a lengthy period of time while the search warrant was obtained. This would be a greater intrusion than the search itself. (**See *United States* v. *Banshee*** (11th Cir. 1996) 91 F.3d 99, 102 [where choice was letting person go or detaining her for a prolonged period of time while he secured a warrant, a frisk and search was much less an intrusion than a prolonged detention]; ***Com.* v. *Washington*** (Mass. 2007) 869 N.E.2d 605, 614–615 ["Where the police have legitimate reason not to arrest an individual, it is illogical to require them to inflict this greater deprivation of liberty 'to justify the lesser intrusion of a search.' . . . Requiring police to arrest a suspect to justify a search would paradoxically 'turn an arrest into a constitutional safeguard' against warrantless searches."].)

Bottom line: If an officer has probable cause to believe a suspect is in possession of an unlawful drug (i.e., because the person is under the influence of drugs, because the suspect says he has drugs on him, or because other facts suggest the suspect was in possession of drugs) the officer *should* be able to conduct a search of the person under the exigent circumstances exception – even though the officer is not intending to make a custodial arrest.

Searches of Persons Suspected of Being Under the Influence of Marijuana

For a couple of reasons, the rules regarding searches of persons who are suspected of being in possession of marijuana because they are under the influence of marijuana under an exigent circumstances theory are different than the rules regarding searches of persons who are suspected of being in possession of other unlawful drugs. First, unless the person is under the influence of marijuana *while driving* (Veh. Code, § 23152(f)) or is in a public place and is unable to exercise care for their own safety or the safety of others due to being under the influence (Pen. Code, § 647), it is not unlawful to be under the influence of marijuana. Second, unless the officer believes that the marijuana potentially found on the person would be evidence of the one of those offenses or the officer has probable cause to believe that the person is *unlawfully* in possession of the marijuana (e.g., the person is a minor), a search of the

person cannot be justified under either the search incident to arrest (**see *In re D.W.*** (2017) 13 Cal.App.5th 1249)* *or* the exigent circumstances exception. On the other hand, *if* there is reason to believe the odor reflects *unlawful* possession of marijuana, a search based on the exigent circumstances exception should apply. (**See *Robey* v. *Superior Court*** (2013) 56 Cal.4th 1218, 1253 (conc. opn. of Liu, J.) [noting it is a "settled proposition that the smell of marijuana can establish probable cause to search and, in the context of . . . exigent circumstances, can provide a sufficient basis to proceed without a warrant"].)

Editor's note:** ***In re D.W. (2017) 13 Cal.App.5th 1249 invalidated a search "incident to citation" of a minor for possession of marijuana even though possession of marijuana by someone under 21 remains unlawful because it was a nonjailable offense and even if more marijuana could be found, "it would have been mere conjecture to conclude that [the minor] possessed enough to constitute a jailable offense." (***Id***. at p. 1253.) However, the case did *not discuss* whether the search could be justified under the exigent circumstances in order to preserve evidence of the offense. How serious the offense being investigated is a factor in deciding whether exigent circumstances justify entry into a home. (**See *Lange* v. *California*** (2021) 141 S.Ct. 2011, 2020 ["application of the exigent-circumstances exception in the context of a *home entry* should rarely be sanctioned when there is probable cause to believe that only a minor offense" is involved], emphasis added.) However, the search of a person's clothing is much less intrusive than the search of a home and the nature of the intrusion is a factor in assessing the reasonableness of a search. (Compare ***In re Calvin S.*** (Md. Ct. Spec. App. 2007) 175 Md.App. 516, 535-536 [considering the gravity of an offense in declining to uphold a search of a juvenile for evidence of a "relatively minor *civil* infraction" under the exigent circumstances exception and stating it "would be perverse to permit officers to perform a warrantless search of an individual, on grounds of exigency, to investigate an offense for which the officers could not obtain a search warrant in any event"] *with* ***State* v. *Michael M.*** (Me. 2001) 772 A.2d 1179, 1183 [holding exigent circumstances relieved an officer from complying with the requirement to obtain a warrant to search a smoking minor for cigarettes even though it is a civil violation, not a crime, for a minor to possess cigarettes].) In California, of course, infractions are considered "crimes." (**See** this IPG, at pp. 8-9.)

NEXT EDITION: THE NEW RULES ON SELECTING JURORS IN LIGHT OF CODE OF CIVIL PROCEDURE SECTION 231.7 (ENACTED BY AB 3070 LAST YEAR BUT GOING INTO EFFECT THIS YEAR) AND AN UPDATED *BATSON-WHEELER* OUTLINE.

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.