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## Suspects, Cars & Police Dogs: A Complicated Relationship

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# SUSPECTS, CARS & POLICE DOGS: A COMPLICATED RELATIONSHIP

Brian R. Gallini\*

*Abstract:* Officers are searching and arresting vehicle occupants without a warrant with increasing regularity. For justification, this Article demonstrates, lower courts across the country unconstitutionally expand the scope of the Fourth Amendment’s automobile exception—often in the context of a positive dog alert. But Supreme Court jurisprudence specifically limits the scope of the automobile exception to warrantless searches of cars and their containers. In other words, the probable cause underlying the automobile exception allows police to search a vehicle and its containers—nothing more.

Despite that clear guidance, this Article argues that a growing number of lower courts nationwide unconstitutionally rely on the probable cause associated with the automobile exception to warrantlessly search vehicle occupants or, alternatively, warrantlessly arrest vehicle occupants. Specifically, this Article identifies those courts that interpret the automobile exception to additionally authorize two overarching categories of warrantless investigative activity: (1) searching vehicle occupants, and (2) arresting vehicle occupants. Each category, in the order presented by this Article, progressively unmoors the automobile exception from its constitutional foundation by broadly expanding the probable cause standard necessary to search a vehicle to permit further warrantless investigation.

In response, this Article asserts that the probable cause associated with the automobile exception is limited to searching cars and does not justify searching people—much less seizing people. Those investigative actions, the Article concludes, each require an independent exception to the warrant requirement supported by separate probable cause.

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## INTRODUCTION

*The word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.*<sup>1</sup>

At 3 a.m. on July 9, 2000, Earmon Alvin Wallace, Sr., was a passenger in a four-door Buick sedan traveling at approximately ninety miles per hour on a forty mile per hour road.<sup>2</sup> Officer Jessica Hertik witnessed the vehicle speeding and, additionally, run a red light.<sup>3</sup> After stopping and approaching the vehicle, she saw a male driver, a male front-seat passenger, and three passengers in the back seat—two women and Wallace.<sup>4</sup> As Officer Hertik wrote two tickets and performed a license check, Officer Elizabeth Nelson walked Bosco, her drug detection dog, around the car.<sup>5</sup> Bosco alerted to the presence of drugs “at the front and rear seam of the driver’s side door.”<sup>6</sup> Officer Nelson construed Bosco’s alert as “a general alert” that applied “to the whole of the passenger compartment of the car itself.”<sup>7</sup>

Accordingly, and solely based on Bosco’s alert, officers searched all five people in the Buick one at a time—first, the driver; then the front seat passenger; followed by Wallace; and finally, the other two female passengers.<sup>8</sup> During the search of Wallace, Officer Supko discovered cocaine.<sup>9</sup> Officers found no additional contraband on the other occupants’ persons.<sup>10</sup> Nevertheless, officers decided to search the vehicle and “found \$1,555 in cash in someone’s shorts in the front passenger seat and a knife in a purse in the backseat.”<sup>11</sup> They discovered no drugs in the car itself.<sup>12</sup> Wallace was ultimately charged and convicted with possession with the

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1. *Coolidge v. New Hampshire*, 403 U.S. 443, 461–62 (1971).

2. *State v. Wallace*, 812 A.2d 291, 294 (Md. 2002).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 294–95.

9. *Id.* at 295.

10. *Id.*

11. *Id.*

12. *Id.*

intent to distribute cocaine.<sup>13</sup>

The officers' decision to search Wallace—a vehicle occupant—on solely the basis of a canine alert during a traffic stop is not atypical.<sup>14</sup> To the contrary, this Article argues, lower courts across the country have unconstitutionally expanded the scope of the Fourth Amendment's automobile exception—often in the context of a positive dog alert. That exception permits officers to warrantlessly search a vehicle anywhere they have probable cause to believe the vehicle could house the object of their search.<sup>15</sup>

But Supreme Court jurisprudence specifically limits officers' authority pursuant to the automobile exception to search the car or containers within it.<sup>16</sup> In other words, the probable cause underlying the automobile exception allows police to search a vehicle and its containers—nothing more.<sup>17</sup> Despite that clear guidance, this Article identifies the growing number of lower courts nationwide that have unconstitutionally relied on the probable cause associated with a warrantless search of a vehicle (pursuant to the automobile exception) to permit a warrantless search of the vehicle's occupants or, alternatively, the warrantless arrest of one or more of the vehicle's occupants.<sup>18</sup>

That constitutional problem appears especially acute when the facts include drugs—particularly the smell of marijuana—and drug detection dogs. The Supreme Court has made clear that a dog alert provides probable cause to search a vehicle,<sup>19</sup> just as it has made clear that the

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13. *Id.* at 293. As discussed in more detail later, Wallace's conviction was ultimately reversed on appeal. *Id.* at 302–03.

14. *See, e.g.,* *People v. Neuberger*, 2011 IL App (2d) 100379, ¶ 3, 959 N.E.2d 195, 197 (search of a vehicle passenger); *Morton v. Commonwealth*, 232 S.W.3d 566, 567–68 (Ky. Ct. App. 2007) (search of a vehicle driver); *State v. Harris*, 280 S.W.3d 832, 837–38 (Tenn. Crim. App. 2008) (search of a vehicle driver).

15. *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999); *California v. Acevedo*, 500 U.S. 565, 580 (1991).

16. *Houghton*, 526 U.S. at 307–08 (Breyer, J., concurring) (clarifying that the scope of the automobile exception is limited to a warrantless search of an automobile and its containers and that the exception “does not extend to the search of a person found in that automobile”).

17. *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (*per curiam*); *California v. Carney*, 471 U.S. 386, 392 (1985); *United States v. Ross*, 456 U.S. 798, 825 (1982).

18. **Warrantless Search of Vehicle Occupants.** *See* *People v. Strong*, 574 N.E.2d 1271, 1275 (Ill. App. Ct. 1991); *State v. Fewell*, 184 P.3d 903, 912 (Kan. 2008); *State v. Doren*, 654 N.W.2d 137, 142 (Minn. Ct. App. 2002); *People v. Sostre*, 100 N.Y.S.3d 768, 772 (App. Div. 2019). **Warrantless Arrest of Vehicle Occupants.** *Blake v. State*, 772 So. 2d 1200, 1205–06 (Ala. Crim. App. 2000); *Brunson v. State*, 940 S.W.2d 440, 442 (Ark. 1997); *Richard v. State*, 7 N.E.3d 347, 349 (Ind. Ct. App. 2014); *Partlow v. State*, 24 A.3d 122, 132 (Md. Ct. Spec. App. 2011).

19. *Florida v. Harris*, 568 U.S. 237, 246–47 (2013).

automobile exception only applies to vehicles and the containers within.<sup>20</sup> Yet when officers smell marijuana or a drug dog returns a positive alert during a routine traffic stop, lower courts problematically view either of those factual events as authorizing warrantless searches of the car's driver or its occupants—or both. That approach, however, conflates the probable cause standard by relying on the probable cause justifying a vehicle search pursuant to the automobile exception to *also* justify a search that would otherwise be governed by another exception to the warrant requirement.

In sum, although every police investigative action that implicates Fourth Amendment protections requires separate and individualized probable cause, a growing number of lower courts often hold that probable cause to search a car also provides probable cause to conduct other investigative activity. That approach both misapplies the probable cause standard and deviates from the automobile exception itself.

Part I explores two separate facets of Supreme Court doctrine: the automobile exception and dog alerts. Doing so illustrates an important disconnect. That is, despite officers' frequent reliance on K9 units during routine traffic stops, the Supreme Court has never clarified with precision what constitutionally permissible investigative activities police may undertake following a positive dog alert to a vehicle.<sup>21</sup> But in that disconnect exists an implicit consistency: The Court has never permitted the warrantless search of *a person* based on probable cause to search a vehicle.

To fully appreciate that disconnect, some calibration is necessary. Part II therefore offers a baseline discussion by exploring illustrative lower court cases that properly apply the Supreme Court's automobile exception jurisprudence—including when a dog is involved.<sup>22</sup>

Part III then identifies the extraordinary number of lower courts that

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20. See *Collins v. Virginia*, 584 U.S. \_\_\_, 138 S. Ct. 1663, 1671 (2018); *Houghton*, 526 U.S. at 300; *United States v. Di Re*, 332 U.S. 581, 587 (1948); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

21. Although a wide array of scholarly literature exists criticizing dog alerts and the automobile exception generally, no article has specifically considered the permissible investigative activities the police may undertake following a positive dog alert to a vehicle. **Critique of dog alerts.** See *infra* note 145 and accompanying citations. **Critique of the automobile exception.** See George M. Dery III, *Improbable Cause: The Court's Purposeful Evasion of a Traditional Fourth Amendment Protection in Wyoming v. Houghton*, 50 CASE W. RES. L. REV. 547 (2000); Robert Angell, Note, *California v. Acevedo and the Shrinking Fourth Amendment*, 21 CAP. U. L. REV. 707 (1992); Kendra Hillman Chilcoat, Note, *The Automobile Exception Swallows the Rule: Florida v. White*, 90 J. CRIM. L. & CRIMINOLOGY 917 (2000); Daniel J. Hewitt, *Don't Accept Rides from Strangers: The Supreme Court Hastens the Demise of Passenger Privacy in American Automobiles*, 90 J. CRIM. L. & CRIMINOLOGY 875 (2000); Joel S. Hjelmaas, Note, *The Need for a Higher Standard of Exigency as a Prerequisite for Warrantless Vehicle Searches*, 71 IOWA L. REV. 1161 (1986).

22. See *State v. Harris*, 280 S.W.3d 832, 843 (Tenn. Crim. App. 2008); *State v. Gibson*, 108 P.3d 424, 429 (Idaho Ct. App. 2005); *People v. Juan*, 221 Cal. Rptr. 338, 341 (Ct. App. 1985).

expansively (and incorrectly) interpret the automobile exception. In doing so, Part III argues that those courts interpret the automobile exception, including in the context of a dog alert, to additionally authorize two overarching categories of investigative activity: (1) the search of a vehicle's occupants,<sup>23</sup> and (2) the arrest of a vehicle's occupants.<sup>24</sup> Part III contends that each category, in the order presented in this Article, progressively unmoors the automobile exception from its constitutional foundation by permitting any warrantless investigative activity based only on probable cause to search a vehicle pursuant to the automobile exception.

Thus, Part III maintains, the probable cause associated with the automobile exception is limited to searching a *car* and does not justify searching a *person*—much less *seizing a person*. Both of those investigative actions would, as Part III concludes, require separate probable cause to justify officers' reliance on an entirely different exception to the Fourth Amendment's search warrant requirement. But more on that later.

## I. CARS, DOGS, AND THE FOURTH AMENDMENT

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>25</sup> The Supreme Court generally views searches conducted without a warrant as *per se* unreasonable.<sup>26</sup> Across several decades, however, the Supreme Court has recognized numerous “well-delineated” exceptions.<sup>27</sup> For instance, the Court has interpreted the Fourth Amendment to permit warrantless searches of automobiles (i.e.,

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23. See *State v. Chambliss*, 752 So. 2d 114, 115 (Fla. Dist. Ct. App. 2000); *Turner v. State*, 443 S.E.2d 703, 705 (Ga. Ct. App. 1994); *People v. Rice*, 2019 IL App (3d) 170134, ¶ 19, 125 N.E.3d 546, 549; *State v. Greever*, No. 95,303, 2008 WL 5401107, at \*3 (Kan. Ct. App. Dec. 19, 2008); *Borkowski v. State*, No. 0806, 2017 WL 1435976, at \*5 (Md. Ct. Spec. App. Apr. 24, 2017); *Small v. State*, 977 S.W.2d 771, 774 (Tex. Crim. App. 1998).

24. *Coley v. State*, No. 11,2005, 2005 WL 2679329, at \*2 (Del. Oct. 18, 2005) (unpublished table decision); *Sebastian v. State*, 726 N.E.2d 827, 831 (Ind. Ct. App. 2000); *State v. Baugh*, 2016-1201, p. 7–8 (La. App. 4 Cir. 1/18/17); 229 So. 3d 520, 525; *State v. Secrist*, 589 N.W.2d 387, 394–95 (Wis. 1999).

25. U.S. CONST. amend. IV; see also *Carpenter v. United States*, 585 U.S. \_\_\_, 138 S. Ct. 2206, 2213 (2018).

26. See *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Thompson v. Louisiana*, 469 U.S. 17, 19–20 (1984) (per curiam); *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

27. *Katz*, 389 U.S. at 357.

the automobile exception),<sup>28</sup> a person incident to arrest,<sup>29</sup> a person or property pursuant to consent,<sup>30</sup> a person during a stop and frisk supported by reasonable suspicion,<sup>31</sup> and a home in response to exigent circumstances,<sup>32</sup> among other exceptions.<sup>33</sup>

Within that list, the Supreme Court automobile exception jurisprudence has evolved considerably since its Prohibition-era inception. In short, the automobile exception permits a police officer to warrantlessly search a vehicle and the areas within where the officer has probable cause to believe contraband or evidence of a crime is located.<sup>34</sup> Today, officers rely on the automobile exception to access all types of vehicles, including ordinary cars,<sup>35</sup> mobile homes,<sup>36</sup> boats,<sup>37</sup> airplanes,<sup>38</sup> buses,<sup>39</sup> tractor-trailers,<sup>40</sup> and trains.<sup>41</sup> Moreover, police rely on the exception to justify searching various types of containers inside, including

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28. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

29. *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Chimel v. California*, 395 U.S. 752, 768 (1969).

30. *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

31. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

32. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

33. *See United States v. Flores-Montano*, 541 U.S. 149, 155–56 (2004) (border search exception); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665–66 (1995) (school searches); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (special needs).

34. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

35. *See State v. Storm*, 898 N.W.2d 140, 156 (Iowa 2017); *State v. Rocha*, 890 N.W.2d 178, 208 (Neb. 2017); *State v. Andersen*, 390 P.3d 992, 1000 (Or. 2017).

36. *See United States v. Ervin*, 907 F.2d 1534, 1538 (5th Cir. 1990); *State v. Otto*, 2013 ND 239, ¶ 16, 840 N.W.2d 589, 594; *Powell v. State*, 898 S.W.2d 821, 828 (Tex. Crim. App. 1994) (en banc).

37. *See United States v. Lingenfelter*, 997 F.2d 632, 640–41 (9th Cir. 1993); *United States v. Maybusher*, 735 F.2d 366, 372–73 (9th Cir. 1984); *Blair v. United States*, 665 F.2d 500, 506 (4th Cir. 1981); *United States v. Block*, 483 F. Supp. 1296, 1300–01 (D. Mass. 1980).

38. *See United States v. Nigro*, 727 F.2d 100, 106–07 (6th Cir. 1984); *United States v. Rollins*, 699 F.2d 530, 534 (11th Cir. 1983); *United States v. Broome*, No. 1:05-cr-135-WSD, 2006 U.S. Dist. LEXIS 10848, at \*26–28 (N.D. Ga. Feb. 28, 2006).

39. *See Green v. State*, 978 S.W.2d 300, 304 (Ark. 1998); *State v. Lovely*, 365 P.3d 431, 434 (Idaho Ct. App. 2016); *Alvarez v. Commonwealth*, 485 S.E.2d 646, 650 (Va. Ct. App. 1997).

40. *See United States v. Smith*, 456 F. App'x 200, 208–10 (4th Cir. 2011); *United States v. Navas*, 597 F.3d 492, 500 (2d Cir. 2010).

41. *Symes v. United States*, 633 A.2d 51, 55 (D.C. 1993).

computers,<sup>42</sup> cell phones,<sup>43</sup> and luggage.<sup>44</sup>

But the scope of the automobile exception is fundamentally limited to the search of a vehicle. That limitation correspondingly informs the quantum of suspicion necessary for officers to warrantlessly search a vehicle—namely, probable cause. Establishing probable cause to search, however, is a threshold matter that is independent of whether the automobile exception applies. Accordingly, section I.A considers the evolution of the automobile exception. Section I.B then considers how officers establish the probable cause necessary to support the warrantless search of an automobile. In particular, section I.B focuses on the role that drug detection dogs play in establishing probable cause.

### A. *Automobile Exception*

The so-called “car cases” raise the question of when law enforcement may warrantlessly search the passenger compartment of a vehicle, its trunk, and/or any containers inside. Commonly referred to as the “automobile exception,” the Supreme Court’s jurisprudence related to answering that question was, for some time, a genuine mess.<sup>45</sup> This section, however, does not purport to discuss the numerous Supreme Court cases comprising that mess. Rather, it simply provides the Supreme Court’s modern approach to the automobile exception.

The authority for officers to warrantlessly search a vehicle dates back to 1925 and the Supreme Court’s opinion in *Carroll v. United States*.<sup>46</sup> In *Carroll*, federal prohibition agents stopped an Oldsmobile Roadster driven by George Carroll and John Kiro.<sup>47</sup> Suspecting that the pair were bootleggers, one of the agents struck the “lazyback” of the vehicle with

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42. See *State v. Alberts*, No. M2015-00248-CCA-R3-CD, 2016 WL 349913, at \*7–8 (Tenn. Crim. App. Jan. 28, 2016).

43. Some courts exclude cell phones from the reach of the automobile exception. See *United States v. Camou*, 773 F.3d 932, 941–43 (9th Cir. 2014); *United States v. Mayo*, No. 2:13-CR-48, 2013 WL 5945802, at \*9–14 (D. Vt. Nov. 6, 2013); *Chung v. State*, 475 S.W.3d 378, 386–87 (Tex. Crim. App. 2014). By contrast, other courts interpret the exception expansively to permit officers to access a suspect’s cell phone. See *United States v. Zaavedra*, No. 12-CR-156-GFK, 2013 WL 6438981, at \*3 (N.D. Okla. Dec. 9, 2013); *United States v. Garcia-Aleman*, No. 1:10-CR-29, 2010 U.S. Dist. LEXIS 65333, at \*12 (E.D. Tex. June 9, 2010); *United States v. Fierros-Alvarez*, 547 F. Supp. 2d 1206, 1211–14 (D. Kan. 2008).

44. See *United States v. Rodriguez-Lara*, 678 F. App’x 232, 233 (5th Cir. 2017); *United States v. Barbee*, 968 F.2d 1026, 1030 (10th Cir. 1992); *People v. Bullock*, 485 N.W.2d 866, 869 (Mich. 1992).

45. See *California v. Acevedo*, 500 U.S. 565, 576 (1991) (explaining that the Supreme Court’s early automobile exception jurisprudence “confused courts and police officers and impeded effective law enforcement”).

46. 267 U.S. 132 (1925).

47. *Id.* at 172.

his fist.<sup>48</sup> Determining that it was “a great deal harder” than it should be, the agent searched the vehicle and discovered whiskey.<sup>49</sup> Approving of the agent’s warrantless search of the Oldsmobile, the Court held that officers may search a vehicle so long as probable cause exists to believe the automobile has contraband inside.<sup>50</sup> It reasoned that obtaining a warrant in the context of an automobile search would be “impossible.”<sup>51</sup>

After *Carroll*, the Supreme Court spent more than six decades wrestling with several doctrinal facets of the automobile exception, including whether the exception justifies the warrantless search of a container found within a vehicle.<sup>52</sup> But in 1991, the Court decided *California v. Acevedo*,<sup>53</sup> a case of tremendous importance to defining the scope of the automobile exception.<sup>54</sup> In *Acevedo*, Jamie Daza picked up a Federal Express package that law enforcement knew contained marijuana.<sup>55</sup> Daza took the package to his apartment, after which time Charles Acevedo arrived.<sup>56</sup> Acevedo entered Daza’s apartment, stayed for a few minutes, and emerged carrying a brown paper bag that appeared full to observing officers.<sup>57</sup> Acevedo placed the bag in his trunk and began to drive away.<sup>58</sup> Officers then stopped Acevedo, opened his car’s trunk, and found the bag inside, which contained marijuana.<sup>59</sup>

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48. *Id.* at 174.

49. *Id.*

50. *Id.* at 155–56.

51. *Id.* at 156. Professor Robert C. Post, in his extensive discussion of the Taft Court, notes that the Court’s holding in *Carroll* was chiefly motivated by the absence of then-existing constitutional doctrine addressing the automobile. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 125 (2006).

52. See *California v. Carney*, 471 U.S. 386, 392–93 (1985); *United States v. Johns*, 469 U.S. 478, 487–88 (1985); *United States v. Ross*, 456 U.S. 798, 825 (1982); *Michigan v. Thomas*, 458 U.S. 259, 261 (1982); *Robbins v. California*, 453 U.S. 420, 428 (1981); *Colorado v. Bannister*, 449 U.S. 1, 4 (1980); *Arkansas v. Sanders*, 442 U.S. 753, 763–64 (1979); *United States v. Chadwick*, 433 U.S. 1, 13–15 (1977); *Texas v. White*, 423 U.S. 67, 67–69 (1975); *Cardwell v. Lewis*, 417 U.S. 583, 587–88 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 463 (1971); *Chambers v. Maroney*, 399 U.S. 42, 44 (1970); *Brinegar v. United States*, 338 U.S. 160, 161–62 (1949); *Husty v. United States*, 282 U.S. 694, 700 (1931).

53. 500 U.S. 565 (1991).

54. See Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1438–41 (2010); Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment’s Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 615 (2008); Angell, *supra* note 21, at 721.

55. *Acevedo*, 500 U.S. at 567.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

The Supreme Court upheld law enforcement's warrantless search of Acevedo's car and the container within. Justice Blackmun, for the majority, wrote: "[W]e now hold that the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle."<sup>60</sup> Accordingly, he concluded, "the police may search without a warrant if their search is supported by probable cause."<sup>61</sup> In doing so, the Court admitted that "it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers" established under the Court's prior automobile exception precedent.<sup>62</sup>

The Court's effort to further clarify the automobile exception continued in 1995 when it decided *Wyoming v. Houghton*.<sup>63</sup> In *Houghton*, during a routine traffic stop, a highway patrol officer noted a hypodermic syringe in the driver's shirt pocket.<sup>64</sup> After the driver admitted using the syringe to take drugs, the officer engaged in a full search of the automobile's passenger compartment—including a purse containing drug paraphernalia that belonged to a passenger.<sup>65</sup> Although the Wyoming Supreme Court declared the search of a passenger's bag unconstitutional,<sup>66</sup> the *Houghton* majority disagreed. The Court held that when probable cause exists to search a vehicle for contraband, officers may warrantlessly search even a passenger's belongings.<sup>67</sup> Writing for the majority, Justice Scalia reasoned that, compared to a full search of a passenger, "the degree of intrusiveness upon personal privacy and indeed even personal dignity" is lower "when the police examine an item of personal property found in a car."<sup>68</sup>

Finally, and most recently,<sup>69</sup> the Supreme Court in 2018 evaluated the

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60. *Id.* at 576.

61. *Id.* at 579.

62. *Id.*; see also *id.* at 576 ("The *Chadwick-Sanders* rule not only has failed to protect privacy but also has confused courts and police officers and impeded effective law enforcement.").

63. 526 U.S. 295 (1999).

64. *Id.* at 297–98.

65. *Id.* at 298.

66. *Id.* at 299. The Wyoming Supreme Court held, in part, that:

[I]f the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection.

*Id.* (quoting *Houghton v. State*, 956 P.2d 363, 372 (Wyo. 1998)).

67. *Id.* at 302.

68. *Id.* at 303.

69. After *Houghton*, but before *Collins v. Virginia*, 584 U.S. \_\_\_, 138 S. Ct. 1663 (2018), the Court decided *Maryland v. Dyson*, 527 U.S. 465 (1999). In a per curiam opinion, the *Dyson* Court clarified

question of whether the automobile exception permits an officer to warrantlessly enter a home's curtilage in order to search a vehicle.<sup>70</sup> In *Collins v. Virginia*,<sup>71</sup> an officer located a possibly stolen motorcycle parked on the driveway of a house.<sup>72</sup> He walked up the driveway and pulled off a tarp covering the motorcycle, at which time he confirmed the motorcycle was indeed stolen.<sup>73</sup> The Court held that the automobile exception did not justify the officer's warrantless search.<sup>74</sup> Specifically, Justice Sotomayor wrote for a majority of the Court that "the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein."<sup>75</sup> She reasoned quite simply that "the scope of the automobile exception extends no further than the automobile itself."<sup>76</sup>

The Court's modern approach makes clear that police may warrantlessly search a car and its contents so long as officers have probable cause to do so. But nothing more is permitted.

## B. *Dogs and Probable Cause*

The Supreme Court's Fourth Amendment treatment of drug dogs is, in a word, limited. In the Fourth Amendment context, the Court's discussion of dogs focuses on either the impact a dog sniff has on a citizen's Fourth Amendment rights or the role of a dog sniff in establishing probable cause. This section follows that organizational framework.

### 1. *The Fourth Amendment Implications of a Dog Sniff*

Police use of dogs in domestic law enforcement dates back to the early 1900s, when the Philadelphia Police Department began patrolling with the aid of St. Bernard dogs in 1904.<sup>77</sup> Then, in 1907, the South Orange, New Jersey, police began a patrol dog program.<sup>78</sup> From the inception of those

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that the automobile exception contains no separate exigency requirement. *Dyson*, 527 U.S. at 466–67.

70. *Collins*, 138 S. Ct. at 1668.

71. 584 U.S. \_\_\_, 138 S. Ct. 1663 (2018).

72. *Id.* at 1668.

73. *Id.*

74. *Id.* at 1671.

75. *Id.* at 1675.

76. *Id.* at 1671.

77. SAMUEL G. CHAPMAN, *POLICE DOGS IN NORTH AMERICA* 25 (1990).

78. *Id.* at 15. This limited discussion focuses solely on domestic use of police detection dogs, although dogs began patrolling for police in other countries as early as 1895. Charles F. Sloane, *Dogs in War, Police Work and on Patrol*, 46 J. CRIM. L. & CRIMINOLOGY 385, 391 (1955).

programs through 1952, just fourteen dog-handler programs existed in domestic law enforcement.<sup>79</sup> But dogs as a law enforcement investigative tool grew in popularity and took a genuine foothold in the 1960s.<sup>80</sup> By 1989, more than 2,000 programs existed across America, with more than 7,000 police handler dog teams.<sup>81</sup> Amidst those programs existed considerable diversity in the breed of dog used,<sup>82</sup> the law enforcement purpose,<sup>83</sup> and the type of training the dog received.<sup>84</sup> But a preference emerged: Law enforcement most commonly came to rely on dogs as a tool for drug detection.<sup>85</sup>

Despite law enforcement's increased reliance on dogs as an investigative tool across more than seven decades, the Supreme Court did not consider the relationship between dogs and the Fourth Amendment until 1983. And, once it did, the Supreme Court preliminarily considered only whether a dog alert implicated Fourth Amendment protections, specifically, whether a dog sniff constitutes a "search."<sup>86</sup> By that time, the Court had considered whether a variety of other law enforcement actions constituted a search for Fourth Amendment purposes, including: (1) the attachment of a listening and recording device to the outside of a public

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79. CHAPMAN, *supra* note 77, at 15.

80. *Id.* at 40 ("The 1960s brought a sharp upsurge in the number of canine units implemented by American forces. It was almost as if it were a fad to have one . . .").

81. *Id.* at 27.

82. Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 BUFF. L. REV. 81, 141 (2013).

83. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 751 n.54 (2007); *War Dog Roles*, OLIVE-DRAB, [http://olive-drab.com/od\\_wardogs\\_roles.php](http://olive-drab.com/od_wardogs_roles.php) [<https://perma.cc/8VV3-7F28>]; Alexandra Horowitz, *The Limits of Detection*, NEW YORKER (Apr. 24, 2013), <https://www.newyorker.com/news/news-desk/the-limits-of-detection> [<https://perma.cc/C9V4-XXNV?type=image>].

84. See Jane J. Lee, *Detection Dogs: Learning to Pass the Sniff Test*, NAT'L GEOGRAPHIC (Apr. 8, 2013), <http://news.nationalgeographic.com/news/2013/04/130407/detection-dogs-learning-to-pass-the-sniff-test/> [<https://perma.cc/Y83G-CQGR>].

85. See *United States v. Place*, 462 U.S. 696, 707 (1983); see also Kenneth R. Wallentine, *Dogs Are a Prosecutor's Best Friend: Canine Search and Seizure Law*, PROSECUTOR, Sept.–Oct. 1997, at 31.

86. To be clear, the Fourth Amendment only protects against government action, and only government action can constitute a "search" or "seizure" within the meaning of the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). For Fourth Amendment purposes, a search occurs when a government action: (1) infringes on "an expectation of privacy that society is prepared to consider reasonable"; or (2) intrudes onto a constitutionally protected area—i.e., persons, houses, papers and effects. *Id.* (expectation of privacy); *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (constitutionally protected area). By contrast, a person is seized within the meaning of the Fourth Amendment when a reasonable person would not "feel free to terminate the encounter" with law enforcement. *United States v. Drayton*, 536 U.S. 194, 201 (2002). Property is seized for Fourth Amendment purposes "when there is some meaningful interference with an individual's possessory interests in that property." *Jacobsen*, 466 U.S. at 113.

telephone booth;<sup>87</sup> (2) the installation and use of a pen register at a phone company's central office;<sup>88</sup> and (3) police reliance on a wired informant to listen to a suspect's conversations.<sup>89</sup>

But the role of dogs in the search calculus presented a new challenge for the Supreme Court. In *United States v. Place*,<sup>90</sup> Raymond Place caught the eyes of law enforcement while waiting in line at Miami International Airport to buy a plane ticket to New York's La Guardia airport.<sup>91</sup> Federal agents then met Place at La Guardia and detained his luggage in order to subject the bags to a "sniff test" by a trained drug detection dog.<sup>92</sup> The dog alerted to Place's luggage, and the agents, after opening the luggage, discovered more than 1,000 grams of cocaine.<sup>93</sup>

After pleading guilty in federal court for possession of cocaine with the intent to distribute, Place appealed to the Supreme Court and argued, in part, that the warrantless seizure of his luggage violated his Fourth Amendment rights.<sup>94</sup> Although the Supreme Court sided with Place, it separately held along the way that the dog sniff of Place's luggage "did not constitute a 'search' within the meaning of the Fourth Amendment."<sup>95</sup> A majority of the Court reasoned that a dog sniff involves only a "limited disclosure" that does not subject the property owner "to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."<sup>96</sup> Accordingly, said the Court, a dog sniff is "sui generis"<sup>97</sup>—i.e., unique.<sup>98</sup>

The Court did little to clarify the implications of *Place* for roughly two

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87. *Katz v. United States*, 389 U.S. 347, 353 (1967).

88. *Smith v. Maryland*, 442 U.S. 735, 741 (1979).

89. *United States v. White*, 401 U.S. 745, 746–47 (1971).

90. 462 U.S. 696 (1983).

91. *Id.* at 698.

92. *Id.* at 699.

93. *Id.*

94. *Id.* at 700.

95. *Id.* at 707.

96. *Id.*

97. *Id.* Interestingly, some commentators view the *Place* Court's discussion of the search issue as merely dictum. See Hope Walker Hall, Comment, *Sniffing Out the Fourth Amendment: United States v. Place—Dog Sniffs—Ten Years Later*, 46 ME. L. REV. 151, 152 (1994) (noting that *Place* "announced in dictum that a canine sniff of luggage in an airport was not a 'search'" though acknowledging that its doing so "has not prevented subsequent courts from expanding and further delineating the rather terse assertion by the Court that sniffs are not searches").

98. *Sui generis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

decades.<sup>99</sup> Lacking clear guidance from the Supreme Court,<sup>100</sup> lower courts at the federal and state levels struggled with the question of whether a dog sniff could *ever* constitute a Fourth Amendment search.<sup>101</sup> Just a few months after *Place*, for example, the Ninth Circuit (briefly) added a suspicion requirement to dog sniffs of airport luggage.<sup>102</sup> Then, in 1985, the Second Circuit held that a dog alert used to generate probable cause to enter a home constituted a “search.”<sup>103</sup>

As lower courts continued to offer differing approaches to the Fourth Amendment implications of dog sniffs,<sup>104</sup> the Supreme Court in 2005 directly considered whether law enforcement’s use of a narcotics-detection dog at a traffic stop constituted a “search.”<sup>105</sup> Relying

99. Questions about the core premise of *Place* persisted on the Supreme Court. In 1984, for example, the Court decided *United States v. Jacobsen*, 466 U.S. 109 (1984). Admittedly, *Jacobsen* did not involve a dog sniff; rather, it considered whether use of a chemical field test to detect cocaine constituted a search. *Id.* at 121–23. In holding that no search occurred, the Court relied on *Place* and reasoned that the field test, like a dog sniff, could reveal only the presence or absence of contraband. *Id.* at 123. But Justices Brennan and Marshall in dissent called *Place* “dangerously incorrect.” *Id.* at 136 (Brennan, J., dissenting). To their minds, “the use of techniques like the dog sniff at issue in *Place* constitutes a search whenever the police employ such techniques to secure any information about an item that is concealed in a container that we are prepared to view as supporting a reasonable expectation of privacy.” *Id.* at 142.

100. Dog sniffs seemingly remained outside Fourth Amendment protections in *Indianapolis v. Edmond*, 531 U.S. 32 (2000). In *Edmond*, approximately thirty officers staffed a checkpoint where police stopped a predetermined number of vehicles. *Id.* at 35. Following the stop, an officer would approach the vehicle, inform the driver about the purpose for the stop, request the driver’s license and registration, and look for signs of impairment. *Id.* As one officer interacted with the driver, another officer walked a narcotics-detection dog around the stopped vehicle. *Id.* Although the Court’s opinion focused largely on explaining why the vehicle checkpoint violated the Fourth Amendment, it did comment that officers’ use of a dog at the checkpoint did not constitute a search. *See id.* at 40–41. Citing *Place*, the Court indicated that “[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search.” *Id.* at 40.

101. **Federal decisions.** *See* *United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998); *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir. 1993); *United States v. Watson*, 783 F. Supp. 258, 264–65 (E.D. Va. 1992); *United States v. Stone*, 866 F.2d 359, 363 (10th Cir. 1989); *United States v. Quinn*, 815 F.2d 153, 159 (1st Cir. 1987); *United States v. DiCesare*, 765 F.2d 890, 897 (9th Cir. 1985). **State decisions.** *See* *State v. Ortiz*, 600 N.W.2d 805, 807 (Neb. 1999); *People v. May*, 886 P.2d 280, 283 (Colo. 1994), *abrogated by* *People v. Esparza*, 2012 CO 22, 272 P.3d 367, *abrogated by* *People v. McKnight*, 2019 CO 36, 446 P.3d 397; *Illinois v. Cruz*, 643 N.E.2d 636, 662 (Ill. 1994); *State v. Pellicci*, 580 A.2d 710, 717 (N.H. 1990); *Commonwealth v. Johnston*, 530 A.2d 74, 78 (Pa. 1987).

102. *United States v. Beale*, 731 F.2d 590, 596 (9th Cir. 1983). The Ninth Circuit issued a revised opinion en banc one year later vacating its suspicion requirement. *United States v. Beale*, 736 F.2d 1289, 1290 (9th Cir. 1984) (en banc).

103. *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985).

104. *Compare* *Fitzgerald v. Maryland*, 864 A.2d 1006, 1015 (Md. 2004), *and* *State v. Wiegand*, 645 N.W.2d 125, 132 (Minn. 2002), *with* *United States v. Jackson*, No. IP 03-79-CR-1H/F, 2004 WL 1784756, at \*2 (S.D. Ind. Feb. 2, 2004), *and* *People v. Haley*, 41 P.3d 666, 673 (Colo. 2001), *abrogated by* *Esparza*, 272 P.3d 367.

105. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

in part on *Place*, the Court in *Illinois v. Caballes*<sup>106</sup> held that “the use of a well-trained narcotics-detection dog—one that ‘does not expose noncontraband items that otherwise would remain hidden from public view,’—during a lawful traffic stop generally does not implicate legitimate privacy interests.”<sup>107</sup> A majority of the Court reasoned that a dog sniff does not meaningfully intrude on privacy interests because it reveals only the presence or absence of contraband.<sup>108</sup>

The cumulative impact of *Place* and *Caballes* was significant. In the immediate wake of *Place* and *Caballes*, lower courts generally assumed that dog sniffs were per se non-searches.<sup>109</sup> As a result, law enforcement extended the use of dog sniffs beyond airport luggage and traffic stops, and into homes.<sup>110</sup> But as police reliance on dog sniffs expanded into the home, some lower courts pushed back; indeed, several state courts held that such sniffs constituted a “search” under their respective state constitutions,<sup>111</sup> or otherwise required individualized suspicion to conduct.<sup>112</sup>

Debate persisted among lower courts about whether Fourth Amendment protections changed depending on the location of a dog sniff—until 2013.<sup>113</sup> In *Florida v. Jardines*,<sup>114</sup> the Court for the first time clarified that some dog sniffs do, in fact, implicate Fourth Amendment protections.<sup>115</sup> In *Jardines*, police approached Joelis Jardines’s home with

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106. 543 U.S. 405 (2005).

107. *Id.* at 409 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

108. *Id.* at 410. Justice Souter dissented, famously commenting that “[t]he infallible dog . . . is a creature of legal fiction.” *Id.* at 411 (Souter, J., dissenting).

109. *E.g.*, *People v. Jones*, 755 N.W.2d 224, 228 (Mich. Ct. App. 2008) (explaining that “[t]he majority of the federal circuit courts have viewed the *Place* Court’s holding as a general categorization of canine sniffs as nonsearches” and likewise holding that a canine sniff is not a Fourth Amendment “search”).

110. *See* *United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998); *United States v. Sklar*, 721 F. Supp. 7, 14 (D. Mass. 1989); *Rodriguez v. State*, 106 S.W.3d 224, 230 (Tex. Crim. App. 2003); *Fitzgerald v. State*, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003).

111. *See* *State v. Guillen*, 213 P.3d 230, 239 (Ariz. Ct. App. 2009); *Hoop v. State*, 909 N.E.2d 463, 470 (Ind. Ct. App. 2009); *People v. Dunn*, 564 N.E.2d 1054, 1058 (N.Y. 1990); *State v. Woljevach*, 160 Ohio App.3d 757, 2005-Ohio-2085, 828 N.E.2d 1015, at ¶ 19; *State v. Dearman*, 92 Wash. App. 630, 637, 962 P.2d 850, 854 (1998).

112. *See* *State v. Baumann*, 759 N.W.2d 237, 239 (Minn. Ct. App. 2009); *State v. Tackitt*, 2003 MT 81, ¶ 31, 315 Mont. 59, 67 P.3d 295; *People v. Haley*, 41 P.3d 666, 672 (Colo. 2001); *State v. Ortiz*, 600 N.W.2d 805, 811 (Neb. 1999); *Commonwealth v. Martin*, 626 A.2d 556, 560 (Pa. 1993); *State v. Pellicci*, 580 A.2d 710, 716–17 (N.H. 1990).

113. *See* *United States v. Hayes*, 551 F.3d 138, 145 (2d Cir. 2008); *State v. Rabb*, 920 So. 2d 1175, 1184 (Fla. Dist. Ct. App. 2006); *People v. Driggers*, 853 N.E.2d 414, 419 (Ill. 2006). *See generally* *State v. Guillen*, 223 P.3d 658, 663 (Ariz. 2010).

114. 569 U.S. 1 (2013).

115. *Id.* at 11–12.

a drug-detection dog on a six-foot leash.<sup>116</sup> The dog, trained to detect the scent of several drugs, alerted once on the presence of Jardines’s front porch.<sup>117</sup> On the basis of the dog’s alert, police obtained a warrant to search Jardines’s home and discovered marijuana plants upon executing the warrant.<sup>118</sup>

Jardines appealed his subsequent conviction for trafficking in cannabis, arguing that the use of a dog to investigate his home constituted a warrantless and unsupported Fourth Amendment search.<sup>119</sup> The Supreme Court agreed, holding that law enforcement’s “use of trained police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”<sup>120</sup> It reasoned that the dog sniff constituted an “unlicensed physical intrusion” into, in this case, the home’s curtilage, which the Court regarded as “the classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’”<sup>121</sup>

In the aftermath of *Jardines*, then, officers may—without a warrant or probable cause—conduct a dog sniff anywhere outside a “constitutionally protected area.”<sup>122</sup> Or, in summary, dog sniffs of any person or property outside of the home or its curtilage remain governed by *Place/Caballes* and are not considered searches within the meaning of the Fourth Amendment.<sup>123</sup>

## 2. Dog Alerts and Probable Cause

Separate from the question of whether a dog sniff implicates the Fourth Amendment is the associated question of whether a positive dog alert amounts to probable cause or some lesser quantum of individualized suspicion. Assuming that a positive dog alert constitutes some amount of individualized suspicion, a related question exists about whether that suspicion entitles an officer to search or seize—or both.

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116. *Id.* at 4.

117. *Id.*

118. *Id.*

119. *Id.* at 5.

120. *Id.* at 11–12.

121. *Id.* at 7.

122. *Id.* at 11; *see also* United States v. Parrilla, No. 13 Cr. 360(AJN), 2014 WL 2111680, at \*4 (S.D.N.Y. May 13, 2014), *aff’d sub nom.* United States v. Kirk Tang Yuk, 885 F.3d 57 (2d Cir. 2018); State v. Foncette, 356 P.3d 328, 331 (Ariz. Ct. App. 2015); State v. Edstrom, 916 N.W.2d 512, 521 (Minn. 2018).

123. *See* United States v. Beene, 818 F.3d 157, 162 (5th Cir. 2016); United States v. Winters, 782 F.3d 289, 297 (6th Cir. 2015); State v. Williams, 2015 ND 103, ¶ 26, 862 N.W.2d 831, 838. To be clear, then, an investigative dog sniff outside of the home or its curtilage is a nonsearch pursuant to both the *Katz* “expectation-of-privacy” test and the *Jardines* “constitutional-trespass” test.

Let's begin with a brief overview of probable cause. Probable cause is the justification or quantum of suspicion generally necessary to support law enforcement acquiring a warrant, executing an arrest, or searching/seizing property. According to the Supreme Court's well-known decision in *Illinois v. Gates*<sup>124</sup>:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.<sup>125</sup>

Interestingly, the Court has never quantified probable cause. Instead, it has called probable cause a "fluid concept"<sup>126</sup> that is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."<sup>127</sup> The Court, however, has noted that probable cause is a standard more demanding than reasonable suspicion, but less demanding than proof beyond a reasonable doubt.<sup>128</sup>

Moreover, the Court has made clear that the definition of probable cause varies depending on the type of Fourth Amendment intrusion at issue. Probable cause to seize a person (i.e., make an arrest) roughly translates to the "evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed."<sup>129</sup> Probable cause to seize property, by contrast, exists when a reasonable person would "associate the property with criminal activity."<sup>130</sup> Finally, probable cause to search is defined as "a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>131</sup>

The Court has also emphasized that the probable cause standard is an objective concept where the subjective motivations of an officer are irrelevant. Thus, an officer's underlying motivations do not play a role when determining the existence of probable cause to search or seize. That said, courts generally do consider an officer's subjective attributes when determining the existence of probable cause. For example, courts often

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124. 462 U.S. 213 (1983).

125. *Id.* at 238.

126. *Id.* at 232.

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

128. *See Rudolph v. Commonwealth*, 722 S.E.2d 527, 530 (Va. 2009).

129. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

130. *Payton v. New York*, 455 U.S. 573, 587 (1980).

131. *Gates*, 462 U.S. at 238.

consider an officer's knowledge or expertise,<sup>132</sup> personal experience patrolling a particular area,<sup>133</sup> and/or the number of years the officer has served.<sup>134</sup>

With that background in mind, let's turn to the first question presented at the outset of section I.B.2: Whether a positive dog alert provides a sufficient amount of quantifiable suspicion to establish probable cause. In 1983, the Supreme Court peripherally addressed that very question in *Florida v. Royer*.<sup>135</sup> In *Royer*, two detectives approached Mark Royer at Miami International Airport because Royer fit a "drug courier profile."<sup>136</sup> After obtaining Royer's airline ticket and driver's license, the detectives asked him to accompany them to a separate private room adjacent to the concourse.<sup>137</sup> Inside the room, described as a "large storage closet,"<sup>138</sup> detectives obtained Royer's consent to search his luggage and discovered marijuana.<sup>139</sup> The Court reversed his conviction for felony possession of marijuana, holding that Royer was detained unlawfully.<sup>140</sup> But in passing, and most relevant here, the Court criticized the state for failing to investigate Royer's bags using "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."<sup>141</sup> In dicta, the Court offered as an example "the use of trained dogs to detect the presence of controlled substances in luggage."<sup>142</sup> Had a dog been used, the Court commented, "[a] negative result would have freed Royer in short order; a positive result *would have resulted in his justifiable arrest on probable cause*."<sup>143</sup>

But to be clear, *Royer* did not hold that a dog alert provides probable cause to arrest—indeed, the facts of *Royer* did not even include a dog alert—and no Supreme Court case ever has. Misunderstanding of *Royer*'s reach has created consistent confusion in the lower courts since its issuance in 1983. Despite *Royer*'s increasingly diminished impact,<sup>144</sup>

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132. See *State v. Ellison*, 455 So. 2d 424, 431 (Fla. Dist. Ct. App. 1984).

133. See *People v. Hanes*, 72 Cal. Rptr. 2d 212, 214 (App. Dep't Super. Ct. 1997).

134. See *State v. Litke*, No. 2013AP1606-CR, 2014 Wisc. App. LEXIS 196, at \*12 (Mar. 11, 2014).

135. 460 U.S. 491, 505–07, 505 n.10 (1983).

136. *Id.* at 493.

137. *Id.* at 494.

138. *Id.*

139. *Id.* at 494–95.

140. *Id.* at 502.

141. *Id.* at 500.

142. *Id.* at 505.

143. *Id.* at 506 (emphasis added).

144. The *Royer* Court's "less intrusive means" analysis to investigatory stops was indeed short-lived. See *United States v. Sokolow*, 490 U.S. 1, 11 (1989) ("The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.").

lower courts have nonetheless relied on its dicta to justify a number of police investigative activities based solely on a positive dog alert. For example, depending on the court and circumstances,<sup>145</sup> a dog alert provides either probable cause or reasonable suspicion to search property,<sup>146</sup> extend the length of an investigatory stop,<sup>147</sup> or arrest a suspect.<sup>148</sup> Relatedly, courts struggled during that period with the quality and quantity of evidence necessary to prove a dog's reliability.<sup>149</sup>

In 2013, the Court in *Florida v. Harris*<sup>150</sup> clarified that a dog alert provides probable cause to warrantlessly search a vehicle pursuant to the automobile exception.<sup>151</sup> In *Harris*, an automobile exception case, K-9 Officer William Wheatley pulled over Clayton Harris for driving with an

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145. See Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 9–12 (2006); Matthew Slaughter, *Supreme Court's Treatment of Drug Detection Dogs Doesn't Pass the Sniff Test*, 19 NEW CRIM. L. REV. 279, 287–88 (2016); Monica Fazekas, Comment, *Pawing Their Way to the Supreme Court: The Evidence Required to Prove a Narcotic Detection Dog's Reliability*, 32 N. ILL. U. L. REV. 473, 474 (2012); Hall, *supra* note 97, at 153; Taylor Phipps, *Probable Cause on a Leash*, 23 B.U. PUB. INT. L.J. 57, 59–61 (2014). In the context of traffic stops, consider that courts in Arkansas have held that the smell of contraband provides a police officer with “reasonable suspicion to detain the occupants to determine the lawfulness of their conduct, to search the vehicle, and to arrest some or all of its occupants, depending upon the particular circumstances.” *Brunson v. State*, 940 S.W.2d 440, 442 (Ark. 1997) (citations omitted).

146. See, e.g., *United States v. Pierce*, 622 F.3d 209, 213 (3d Cir. 2010) (probable cause to search a vehicle); *United States v. Tamari*, 454 F.3d 1259, 1264–65 (11th Cir. 2006) (probable cause); *United States v. Sundby*, 186 F.3d 873, 876 (8th Cir. 1999) (reasonable suspicion); *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993) (probable cause); *State v. Foster*, 252 P.3d 292, 297–98 (Or. 2011) (probable cause).

147. E.g., *United States v. Garcia-Garcia*, 319 F.3d 726, 730 (5th Cir. 2003). The *Garcia-Garcia* court was careful to note that, although a positive dog alert permitted the extension of an investigatory immigration stop, it did not provide the authority for officers to warrantlessly search those who are detained. *Id.*; see also *United States v. Garvey*, 956 F.2d 270 (6th Cir. 1992) (unpublished table decision). Consider also that the Sixth Circuit has held that a dog's failure to alert to a vehicle provides police officers with reasonable suspicion to extend an investigatory detention so that another dog can investigate the vehicle further. *United States v. Perez*, 440 F.3d 363, 373 (6th Cir. 2006).

148. See *Kerr v. Morrison*, 664 F. App'x 48, 52 (2d Cir. 2016); *United States v. Brown*, 500 F.3d 48, 57 (1st Cir. 2007); *United States v. Simeon*, 115 F. Supp. 3d 981, 999 (N.D. Iowa 2015); *United States v. Claude*, No. 08–03109–01–CR–S–ODS, 2010 WL 2010764, at \*7 (W.D. Mo. Apr. 16, 2010), *report and recommendation adopted*, No. 08–03109–01–CR–S–ODS, 2010 WL 2010779 (W.D. Mo. May 18, 2010), *aff'd sub nom.* *United States v. Claude X*, 648 F.3d 599, 604 (8th Cir. 2011); *Chase v. State*, 121 A.3d 257, 273 (Md. Ct. Spec. App. 2015), *aff'd*, 144 A.3d 630, 647 (Md. 2016); *State v. Young*, No. CA2011–06–066, 2012 WL 2700451, at \*5 (Ohio Ct. App. Jul. 9, 2012).

149. See *United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010); *United States v. Owens*, 167 F.3d 739, 749 (1st Cir. 1999); *United States v. Kennedy*, 131 F.3d 1371, 1376–77 (10th Cir. 1997); *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980); *State v. Nguyen*, 2007 SD 4, ¶ 16, 726 N.W.2d 871, 876; *State v. England*, 19 S.W.3d 762, 768–69 (Tenn. 2000); *United States v. Delaney*, 52 F.3d 182, 188 (8th Cir. 1995).

150. 568 U.S. 237 (2013).

151. *Id.* at 247–48.

expired license plate.<sup>152</sup> During the ensuing traffic stop, Officer Wheatley walked his dog, Aldo, around Harris's vehicle.<sup>153</sup> After Aldo gave a positive alert, Wheatley searched Harris's vehicle and discovered several ingredients for making methamphetamine—none of which Aldo was trained to detect.<sup>154</sup> Harris was charged with possessing pseudoephedrine for use in manufacturing methamphetamine. Remarkably, while Harris was out on bail, Wheatley again pulled Harris over.<sup>155</sup> Aldo again alerted during the ensuing traffic stop, although this time Wheatley's search of Harris's vehicle produced nothing incriminating.<sup>156</sup>

Following the denial of Harris's motion to suppress the evidence found in his truck during the first traffic stop, Harris argued on appeal that Aldo's alert did not establish probable cause to support the resulting search.<sup>157</sup> Although the intermediate state court affirmed his conviction, the Florida Supreme Court reversed and held that Aldo's alert did not produce probable cause to search Harris's vehicle because, in short, Aldo was unreliable.<sup>158</sup>

The Supreme Court, however, reversed.<sup>159</sup> The *Harris* Court confirmed that an alert by a "reliable" dog provides the probable cause necessary to conduct the warrantless search of a vehicle.<sup>160</sup> A dog is generally "reliable,"<sup>161</sup> said the Court, when "a bona fide organization has certified

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152. *Id.* at 240.

153. *Id.*

154. *Id.* at 240–41.

155. *Id.* at 241.

156. *Id.*

157. *Id.* at 242.

158. *Id.* at 242–43.

159. *Id.* at 237.

160. *See id.* at 248 ("The record in this case amply supported the trial court's determination that Aldo's alert gave Wheatley probable cause to search Harris's truck.")

161. The *Harris* Court's presumption that a dog alert is "reliable" originates from Justice O'Connor's majority opinion in *Place*, wherein she concluded that "no other investigative procedure [other than a dog sniff] is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *United States v. Place*, 462 U.S. 696, 698 (1983). Both Justice O'Connor's conclusion in *Place* and the *Harris* Court's presumption that a dog alert is reliable have drawn considerable scholarly ire. *See, e.g., Myers, supra* note 145, at 15–18 (calculating that a dog alert alone is accurate only sixteen percent of the time); Slaughter, *supra* note 145, at 308–09 (concluding that "[t]he current Supreme Court approach to . . . drug detection dogs is fundamentally flawed" because it "introduc[es] . . . unscientific evidence into law enforcement practices, which allows officers to disregard traditional Fourth Amendment protections"); Fazekas, *supra* note 145, at 504 ("Although the Supreme Court and most lower courts have granted particular deference to the olfactory abilities of police drug detection dogs, the evidence is clear that the canine is anything but infallible . . ."); Hall, *supra* note 97, at 152 (arguing that Justice O'Connor's "discussion of canine sniffs [in *Place*] was strictly dictum" that allowed lower courts to expand "the

a dog after testing his reliability in a controlled setting.”<sup>162</sup> Even absent evidence that a dog completed a formal certification program, the Court reasoned, a dog is reliable if it “recently and successfully completed a training program that evaluated his proficiency in locating drugs.”<sup>163</sup>

Since *Harris*, the Court has decided little if anything of note about the role of dogs and probable cause.<sup>164</sup> But perhaps one other decision bears brief mention. In 2015, the Court decided *Rodriguez v. United States*,<sup>165</sup> wherein it held that a dog sniff conducted after completion of a traffic stop constituted an unreasonable seizure.<sup>166</sup> The holding aside, Justice Alito’s dissent summarized his understanding that a positive dog alert during a routine traffic stop provides law enforcement with probable cause to *search a vehicle*.<sup>167</sup> Illustrating how the principles established in *Harris* and *Acevedo* interrelate, he wrote:

When occupants of a vehicle who know that their vehicle contains a large amount of illegal drugs see that a drug-sniffing dog has alerted for the presence of drugs, they will almost certainly realize that the *police will then proceed to search the vehicle*, discover the drugs, and make arrests.<sup>168</sup>

Simply put, Justice Alito’s dissent nicely demonstrates that probable cause to search or arrest must exist before police can constitutionally search a vehicle or arrest a vehicle occupant.<sup>169</sup>

Before moving on, we can draw a handful of conclusions about the state of the Supreme Court’s automobile exception jurisprudence and the impact of a dog alert on it. First, in order to warrantlessly search a vehicle, *Acevedo* makes clear that officers need probable cause to search the car and/or containers within it.<sup>170</sup> Second, using a dog to sniff the exterior of a vehicle during a routine traffic stop does not constitute a Fourth

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rather terse assertion . . . that sniffs are not searches”); Phipps, *supra* note 145, at 68 (“If random dog sniffs occur on 100,000 vehicles, the probability that substances the dog is trained to detect are discovered upon an alert is 24 percent.”).

162. *Harris*, 568 U.S. at 246–47.

163. *Id.* at 247.

164. Most recently, the Court declined to hear a petition raising the question of whether police use of a drug-sniffing dog outside of an apartment (i.e., in an apartment hallway) constitutes a “search.” See *Edstrom v. Minnesota*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1262 (2019), *denying cert. to* 916 N.W.2d 512 (2018).

165. 575 U.S. 348 (2015).

166. *Id.* at 350–51.

167. *Id.* at 371 (Alito, J., dissenting).

168. *Id.* (emphasis added).

169. *Id.*

170. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

Amendment search.<sup>171</sup> Third, a positive dog alert to a vehicle during a routine traffic stop provides officers with the requisite probable cause contemplated by *Acevedo* to search the vehicle—and nothing more.<sup>172</sup> That is, although a positive dog alert constitutes probable cause to search a vehicle, it does *not* provide probable cause to do anything more—like search the people inside the vehicle or arrest the vehicle’s occupants.<sup>173</sup>

## II. LOWER COURTS AND THE AUTOMOBILE EXCEPTION: A CONFUSING APPROACH

In an effort to calibrate the disconnect between Supreme Court automobile exception jurisprudence and lower court application of that jurisprudence, this Part explores a representative collection of lower court cases that faithfully apply the automobile exception. These courts unanimously agree that the scope of the automobile exception is limited to the warrantless search of a vehicle and its contents. Accordingly, these courts hold that if there is probable cause to believe the vehicle contains evidence of a crime, regardless of the presence or absence of a dog alert, then an officer may lawfully conduct a warrantless search of a vehicle and its contents—nothing more. These are what Part II calls “the core cases.”

At the federal level, circuit and district courts across the country have regularly—and unsurprisingly—applied the automobile exception to the warrantless searches of vehicles.<sup>174</sup> Consider a routine example provided by *United States v. Tamari*,<sup>175</sup> a commonly cited opinion from the Eleventh Circuit.<sup>176</sup> In *Tamari*, federal and state law enforcement agents

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171. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

172. *Florida v. Harris*, 568 U.S. 237, 248 (2013).

173. *E.g.*, JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 3:33 (3d ed. 2019); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.2(e) (6th ed. 2020).

174. **Circuit Courts.** See *United States v. Hernandez-Mieses*, 931 F.3d 134, 145 (1st Cir. 2019); *United States v. Gaskin*, 364 F.3d 438, 456 (2d Cir. 2004); *United States v. Harwood*, 998 F.2d 91, 96 (2d Cir. 1993); *United States v. Donahue*, 764 F.3d 293, 302–03 (3d Cir. 2014); *United States v. Salmon*, 944 F.2d 1106, 1123 (3d Cir. 1991), *abrogated on other grounds* by *United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013) (en banc); *United States v. Schecter*, 717 F.2d 864, 870–71 (3d Cir. 1983); *United States v. Brookins*, 345 F.3d 231, 238 (4th Cir. 2003); *United States v. Ervin*, 907 F.2d 1534, 1538 (5th Cir. 1990); *United States v. Markham*, 844 F.2d 366, 369 (6th Cir. 1988); *United States v. Zahursky*, 580 F.3d 515, 523 (7th Cir. 2009); *United States v. Walker*, 900 F.2d 1201, 1203 (8th Cir. 1990); *United States v. Scott*, 705 F.3d 410, 417 (9th Cir. 2012); *United States v. Mercado*, 307 F.3d 1226, 1230 (10th Cir. 2002); *United States v. Watts*, 329 F.3d 1282, 1286 (11th Cir. 2003); *United States v. Caroline*, 791 F.2d 197, 198 (D.C. Cir. 1986). **District Courts.** See *United States v. Perry*, 79 F. Supp. 3d 524, 535 (D.N.J. 2015); *United States v. Phillips*, 9 F. Supp. 3d 1130, 1137–38 (E.D. Cal. 2014); *United States v. Uter*, 746 F. Supp. 298, 300–01 (S.D.N.Y. 1990).

175. 454 F.3d 1259 (11th Cir. 2006).

176. *Id.* at 1260.

collaboratively investigated a large drug conspiracy run by Humberto Febles, who owned a yellow Hummer.<sup>177</sup> During the course of the investigation, officers obtained a warrant to search a rural property and any vehicle registered to or owned by the occupants of that property.<sup>178</sup> While executing the search warrant, agents observed a yellow Hummer drive onto the property.<sup>179</sup> One agent preliminarily searched the vehicle, but found nothing.<sup>180</sup> A drug dog named Ho Jo subsequently walked around the vehicle and alerted. Agents then found \$45,000 in cash alongside contraband implicating the Hummer's driver—Jesus Tamari—in the conspiracy.<sup>181</sup> Following his conspiracy conviction, Tamari argued on appeal that the Hummer searches were improper.<sup>182</sup>

A panel of the Eleventh Circuit affirmed. The court held as a preliminary matter that the warrant justified both Hummer searches.<sup>183</sup> Even had it not, the court further held, the automobile exception justified both searches.<sup>184</sup> With respect to the first search, the court reasoned that agents had probable cause to believe the Hummer contained evidence of the suspected drug conspiracy.<sup>185</sup> As to the second search, the court reasoned that Ho Jo's "positive alert was itself sufficient to give agents probable cause to search the Hummer a second time."<sup>186</sup> *Tamari*, then, offers a solid baseline illustration for how the automobile exception operates—alongside its limitations. That is, it illustrates how the automobile exception works to justify the search of a traditional vehicle both with and without a dog alert. But *Tamari* makes clear that each Fourth Amendment intrusion must be supported by independent probable cause.<sup>187</sup>

But the automobile exception has also been applied to support the warrantless search of a more broadly defined "vehicle."<sup>188</sup> Consider the

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177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1261.

182. *Id.*

183. *Id.* at 1264.

184. *Id.* at 1263.

185. *Id.* at 1264.

186. *Id.* at 1265.

187. *Id.*

188. For example, although undecided by the Supreme Court, a number of federal circuits have concluded the automobile exception applies to aircraft. *See* *United States v. Nigro*, 727 F.2d 100, 107 (6th Cir. 1984); *United States v. Rollins*, 699 F.2d 530, 534 (11th Cir. 1983); *United States v. Gooch*, 603 F.2d 122, 124–25 (10th Cir. 1979). The Tenth Circuit has also applied the automobile exception

oft-cited opinion in *United States v. Navas*,<sup>189</sup> wherein a panel of the Second Circuit considered whether the automobile exception supported the warrantless search of “a trailer, unhitched from its cab and parked in a warehouse.”<sup>190</sup> In holding that the exception applies, the *Navas* court first highlighted the rationales supporting the exception: A vehicle is both inherently mobile and subject to a reduced expectation of privacy.<sup>191</sup> Drawing from those twin rationales, the court first reasoned that the trailer was inherently mobile because it was: “(1) affixed with at least one axle and a set of wheels; and (2) capable of being attached to a cab and driven away.”<sup>192</sup> The court further reasoned that the reduced-privacy rationale “applies forcefully” because of “the nature and scope of the regulations relating to the commercial trucking industry.”<sup>193</sup>

Other federal precedent has applied the automobile exception to fact patterns unaddressed by Supreme Court jurisprudence. For instance, the court in *United States v. Howard*,<sup>194</sup> another Second Circuit opinion, applied the automobile exception to a search of a suspect’s empty vehicle—empty because troopers had lured the suspect away from the car so that other officers could search it undisturbed.<sup>195</sup> The court reasoned in part that “[e]ven where there is little practical likelihood that the vehicle will be driven away, the exception applies at least when that possibility exists.”<sup>196</sup>

Consider also *United States v. Holleman*,<sup>197</sup> wherein the Eighth Circuit affirmed David Holleman’s conviction for possession of marijuana with the intent to distribute, in part, by interpreting the automobile exception to validate two separate dog sniffs—one on the roadside during a traffic stop and another in a hotel parking lot following the traffic stop.<sup>198</sup>

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to the search of a houseboat. *See* *United States v. Hill*, 855 F.2d 664, 668 (10th Cir. 1988); *see also* *United States v. Weinrich*, 586 F.2d 481, 492–93 (5th Cir. 1978).

189. 597 F.3d 492 (2d Cir. 2010).

190. *Id.* at 493.

191. *Id.* at 498.

192. *Id.* at 500.

193. *Id.* at 500–01. Even if the trailer was not truly mobile, the court recognized that the reduced privacy rationale could support application of the automobile exception by itself. *Id.* at 499–500. Other circuits have reasoned similarly. *See* *United States v. Fields*, 456 F.3d 519, 524 (5th Cir. 2006); *United States v. Mercado*, 307 F.3d 1226, 1230 (10th Cir. 2002); *United States v. Matthews*, 32 F.3d 294, 299 (7th Cir. 1994). *But see* *United States v. O’Connell*, 408 F. Supp. 2d 712, 723 (N.D. Iowa 2005) (“Because the van’s immobility was readily apparent, the court concludes it was not reasonable for the officers in this case to assume the vehicle was readily mobile.”).

194. 489 F.3d 484 (2d Cir. 2007).

195. *Id.* at 489.

196. *Id.* at 493.

197. 743 F.3d 1152 (8th Cir. 2014).

198. *Id.* at 1155–59.

Regardless of a dog's involvement, a common thread runs through the oft-cited core federal automobile exception cases: They authorize only a vehicle search. Or, stated differently, the probable cause in support of the vehicle search does not extend to either arresting or searching vehicle occupants.

The automobile exception also remains popular among state courts. Indeed, an overwhelming number of state courts have adopted some version of the automobile exception.<sup>199</sup> Like their federal counterparts, state courts generally apply the automobile exception to traditional vehicles,<sup>200</sup> as well as non-traditional "vehicles" like aircraft,<sup>201</sup> buses,<sup>202</sup>

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199. See, e.g., *State v. Reyna*, 71 P.3d 366, 369 n.5 (Ariz. Ct. App. 2003) (Arizona); *Jackson v. State*, 2013 Ark. 201, at 8, 427 S.W.3d 607, 613 (Arkansas); *People v. Super. Ct.*, 59 Cal. Rptr. 3d 633, 645 (Ct. App. 2007) (California); *People v. Zuniga*, 2016 CO 52, ¶¶ 9–14, 372 P.3d 1052, 1056 (Colorado); *People v. Edwards*, 836 P.2d 468, 471 (Colo. 1992) (Colorado); *State v. Williams*, 88 A.3d 534, 547 (Conn. 2014) (Connecticut); *Reeder v. State*, No. 552,1999, 583,1999, 2001 WL 355732, at \*2 (Del. Mar. 26, 2001) (Delaware); *State v. Betz*, 815 So. 2d 627, 631 (Fla. 2002) (Florida); *State v. Wallace*, 910 P.2d 695, 714 n.16 (Haw. 1996) (Hawaii); *State v. Anderson*, 302 P.3d 328, 331 (Idaho 2012) (Idaho); *People v. Smith*, 447 N.E.2d 809, 813 (Ill. 1983) (Illinois); *State v. Storm*, 898 N.W.2d 140, 156 (Iowa 2017) (Iowa); *State v. Conn*, 99 P.3d 1108, 1111–12 (Kan. 2004) (Kansas); *Chavies v. Commonwealth*, 354 S.W.3d 103, 107 (Ky. 2011) (Kentucky); *State v. Crawford*, 2017-0025, p. 2 (La. 2/24/17); 210 So. 3d 268, 269 (Louisiana); *State v. Melvin*, 2008 ME 118, ¶¶ 14–16, 955 A.2d 245, 250 (Maine); *Berry v. State*, 843 A.2d 93, 113 (Md. Ct. Spec. App. 2004) (Maryland); *Commonwealth v. Dame*, 45 N.E.3d 69, 81 (Mass. 2016) (Massachusetts); *People v. Kazmierczak*, 605 N.W.2d 667, 674 (Mich. 2000) (Michigan); *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (Minnesota); *Moore v. State*, No. 1999-KA-00703-SCT (¶¶ 19–24), 787 So. 2d 1282, 1288 (Miss. 2001) (Mississippi); *State v. Lloyd*, 312 P.3d 467, 474 (Nev. 2013) (Nevada); *State v. Witt*, 126 A.3d 850, 853 (N.J. 2015) (New Jersey); *People v. Galak*, 616 N.E.2d 842, 843–44 (N.Y. 1993) (New York); *State v. Isleib*, 356 S.E.2d 573, 577 (N.C. 1987) (North Carolina); *State v. Zwicke*, 2009 ND 129, ¶¶ 9–12, 767 N.W.2d 869, 872–73 (North Dakota); *Gomez v. State*, 2007 OK CR 33, ¶¶ 14–17, 168 P.3d 1139, 1145 (Oklahoma); *State v. Werner*, 615 A.2d 1010, 1014 (R.I. 1992) (Rhode Island); *State v. Fischer*, 2016 SD 1, ¶¶ 18–20, 873 N.W.2d 681, 689 (South Dakota); *State v. Saine*, 297 S.W.3d 199, 207 (Tenn. 2009) (Tennessee); *State v. Rigby*, 2016 UT App 42, ¶¶ 25–29, 369 P.3d 127, 137–38 (Utah); *State v. Tompkins*, 423 N.W.2d 823, 829 (Wis. 1988) (Wisconsin); *McKenney v. State*, 2007 WY 129, ¶¶ 11–13, 165 P.3d 96, 99 (Wyoming).

Five of those states initially abandoned the automobile exception, only to subsequently restore it. See, e.g., *State v. Lloyd*, 312 P.3d 467, 474 (Nev. 2013) (Nevada); *State v. Witt*, 126 A.3d 850, 853 (N.J. 2015) (New Jersey); *State v. Zwicke*, 2009 ND 129, ¶¶ 9–12, 767 N.W.2d 869, 873 (North Dakota); *Gomez v. State*, 2007 OK CR 33, ¶¶ 14–17, 168 P.3d 1139, 1145 (Oklahoma); *State v. Werner*, 615 A.2d 1010, 1014 (R.I. 1992) (Rhode Island).

200. See generally Andra Levinson Ben-Yosef, Annotation, *Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana—State Cases*, 114 A.L.R.5TH 173 (2003) (collecting and analyzing all state cases discussing whether an odor detected by law enforcement officers thought to be contraband provides probable cause to warrantlessly search a vehicle).

201. See *Cooper v. State*, 480 So. 2d 8, 11 (Ala. Crim. App. 1985); *State v. Merchant*, 490 So. 2d 336, 341 (La. Ct. App. 1986); *State v. Russell*, 352 S.E.2d 922, 925 (N.C. Ct. App. 1987).

202. See *Green v. State*, 978 S.W.2d 300, 303 (Ark. 1998); *State v. Lovely*, 365 P.3d 431, 434 (Idaho Ct. App. 2016); *Alvarez v. Commonwealth*, 485 S.E.2d 646, 650 (Va. Ct. App. 1997).

and boats.<sup>203</sup> In the recent representative case of *State v. Storm*,<sup>204</sup> for example, the Supreme Court of Iowa in 2017 declined to abandon the federal automobile exception despite technological advancements that permit officers to obtain a search warrant while conducting a traffic stop.<sup>205</sup> In *Storm*, Deputy Clay Leonard stopped Christopher Storm for failing to wear a seatbelt.<sup>206</sup> During the ensuing stop, Deputy Leonard smelled marijuana coming from Storm's Chevrolet pickup truck and observed Storm acting nervous.<sup>207</sup> Deputy Leonard elected to search the vehicle and found forty-seven grams of marijuana and several pills.<sup>208</sup> Storm was charged with, among other crimes, possession with the intent to deliver marijuana.<sup>209</sup>

Following the denial of Storm's motion to suppress, the Iowa Supreme Court affirmed his conviction and upheld the search.<sup>210</sup> Storm argued on appeal that the automobile exception should be abandoned because new technology allowed officers to obtain search warrants during a traffic stop.<sup>211</sup> The court disagreed and elected to preserve the automobile exception—as measured by the federal standard.<sup>212</sup> It reasoned in part that the automobile exception is “easy to apply” and therefore offers “the clarity of bright-line rules in time-sensitive interactions between citizens and law enforcement.”<sup>213</sup> Although the court acknowledged that technological advancements may at some point require a change to its automobile exception jurisprudence, it did not view the ability of officers to electronically draft roadside warrants as a justification to abandon the exception altogether.<sup>214</sup> To the contrary, the court commented, “forcing an officer to draft a search warrant application while multitasking on the side of the road may jeopardize the accuracy of the warrant application and would require motorists to be detained for much longer periods.”<sup>215</sup>

But some state courts do maintain limits on the automobile exception

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203. See *Mewbourn v. State*, 570 So. 2d 805, 806 n.1 (Ala. Crim. App. 1990); *State v. Sullivan*, 935 S.W.2d 747, 755 (Mo. Ct. App. 1996); *Dahlem v. State*, 322 S.W.3d 685, 689 n.4 (Tex. Ct. App. 2010).

204. 898 N.W.2d 140 (Iowa 2017).

205. *Id.* at 141–42.

206. *Id.* at 142.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 144–45.

211. *Id.*

212. *Id.* at 148.

213. *Id.* at 156 (quoting *State v. Hellstern*, 856 N.W.2d 355, 364 (Iowa 2014)).

214. *Id.* at 155–56.

215. *Id.* at 155.

pursuant to their own state constitutions or rules of criminal procedure.<sup>216</sup> In Oregon, for instance, application of the automobile exception is limited to vehicles that are mobile and occupied at the time police first encounter the car in connection with investigating criminal activity.<sup>217</sup> Some states, like Indiana,<sup>218</sup> Pennsylvania,<sup>219</sup> Georgia,<sup>220</sup> Louisiana,<sup>221</sup> New York,<sup>222</sup> and Nebraska,<sup>223</sup> decline to apply the automobile exception to the search of a vehicle parked on private residential property. New Jersey, by contrast, permits the warrantless search of an automobile “only when the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous.”<sup>224</sup> By way of final illustrative example, the automobile exception in Connecticut does not apply to a vehicle that has been impounded or parked.<sup>225</sup>

In terms of core state doctrine, nothing changes when a dog is involved. Like their federal counterparts,<sup>226</sup> state courts agree that a positive dog alert provides probable cause for a warrantless vehicle search.<sup>227</sup> In the

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216. *E.g.*, CONN. GEN. STAT. ANN. § 54-33m (West 2019). Consider also Colorado, wherein the sniff from a drug detection dog constitutes a “search” within the meaning of the Colorado Constitution “because that sniff can detect lawful activity, namely the legal possession of up to one ounce of marijuana by adults at least twenty-one years old.” *People v. McKnight*, 2019 CO 36, ¶¶ 62–64, 446 P.3d 397, 414 (Colo. 2019). Thus, in Colorado, “law enforcement officers must have probable cause to believe that an item or area contains a drug in violation of state law before deploying a drug-detection dog that alerts to marijuana for an exploratory sniff.” *Id.*

217. *State v. Kock*, 725 P.2d 1285, 1287 (Or. 1986); *accord State v. Andersen*, 390 P.3d 992, 998 (Or. 2017).

218. *State v. Hobbs*, 933 N.E.2d 1281, 1286 (Ind. 2010).

219. *Commonwealth v. Loughnane*, 173 A.3d 733, 745 (Pa. 2017).

220. *State v. LeJeune*, 576 S.E.2d 888, 892–93 (Ga. 2003).

221. *State v. Hernandez*, 410 So. 2d 1381, 1384 n.1 (La. 1982).

222. *People v. Kreichman*, 339 N.E.2d 182, 186–87 (N.Y. 1975).

223. *State v. Rocha*, 890 N.W.2d 178, 207 (Neb. 2017).

224. *State v. Witt*, 126 A.3d 850, 872 (N.J. 2015).

225. *State v. Miller*, 630 A.2d 1315, 1325–26 (Conn. 1993); *see State v. Winfrey*, 24 A.3d 1218, 1224–25 (Conn. 2011).

226. *See United States v. Rodriguez-Morales*, 929 F.2d 780, 789 (1st Cir. 1991); *United States v. Foreste*, 780 F.3d 518, 528 (2d Cir. 2015); *United States v. Johnson*, 742 F. App’x 616, 623 (3d Cir. 2018); *United States v. Jeffus*, 22 F.3d 554, 557 (4th Cir. 1994); *United States v. Clayton*, 374 F. App’x 497, 501 (5th Cir. 2010); *United States v. McAllister*, 31 F. App’x 859, 866 (6th Cir. 2002); *United States v. Simon*, 937 F.3d 820, 833–35 (7th Cir. 2019); *United States v. Gunnell*, 775 F.3d 1079, 1085 (8th Cir. 2015); *United States v. Perez-Almonte*, 487 F. App’x 328, 329–30 (9th Cir. 2012); *United States v. Brown*, 24 F.3d 1223, 1226 (10th Cir. 1994); *United States v. Parada*, 577 F.3d 1275, 1282 (10th Cir. 2009); *United States v. Glington*, 154 F.3d 1245, 1257 (11th Cir. 1998); *United States v. Maddox*, 398 F. App’x 613, 613 (D.C. Cir. 2010).

227. *See State v. Blessie*, No. 2 CA–CR 2008–0321, 2010 WL 1111555, at \*3 (Ariz. Ct. App. Mar. 24, 2010); *Hunter v. State*, No. CACR 01–541, 2002 WL 242504, at \*1 (Ark. Ct. App. Feb. 20, 2002);

straightforward case of *State v. Tucker*,<sup>228</sup> for example, the Idaho Supreme Court upheld the warrantless search of Boone Tucker’s vehicle following a positive dog alert.<sup>229</sup> In doing so, it reasoned that “an officer’s investigation at the scene of a stopped automobile can ripen into probable cause as soon as a drug detection dog alerts on the exterior of the vehicle, justifying a *search of the vehicle* without the necessity of obtaining a warrant.”<sup>230</sup> *Tucker* is hardly anomalous; state courts agree that the automobile exception justifies a warrantless search of a vehicle and its contents—nothing more.<sup>231</sup> But there are outliers. And their numbers are growing.

### III. THE AUTOMOBILE EXCEPTION’S UNFORESEEN EXPANSION

Despite clear Supreme Court guidance to the contrary, Part III contends that lower courts have gradually expanded the scope of the automobile exception—and particularly so when a dog alert is involved—to include the warrantless search or arrest of a vehicle’s occupants. That is, unlike the core automobile exception cases discussed in Part II, a growing number of jurisdictions, including Illinois,<sup>232</sup> Kansas,<sup>233</sup> New York,<sup>234</sup>

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People v. Stillwell, 129 Cal. Rptr. 3d 233, 240 (Ct. App. 2011); *St. Fleur v. State*, 676 S.E.2d 243, 246 (Ga. Ct. App. 2009); *State v. Buck*, 317 P.3d 725, 727 (Idaho Ct. App. 2014); *State v. Smoke*, No. 39064, 2012 WL 9495963, at \*2 (Idaho Ct. App. Oct. 18, 2012); *People v. Reedy*, 2015 IL App (3d) 130955, ¶¶ 45–49, 39 N.E.3d 318, 327–28; *State v. Bergmann*, 633 N.W.2d 328, 338 (Iowa 2001); *Grimm v. State*, 183 A.3d 167, 206 (Md. 2018); *State v. Cabral*, 859 A.2d 285, 296 (Md. Ct. Spec. App. 2004); *People v. Clark*, 559 N.W.2d 78, 80 (Mich. Ct. App. 1996); *State v. Thompson*, No. A13–1991, 2014 WL 4798896, at \*6 (Minn. Ct. App. Sept. 29, 2014); *State v. Kazazi*, No. WD-03-035, 2004 WL 1765404, at \*3 (Ohio Ct. App. Aug. 6, 2004); *State v. Foster*, 252 P.3d 292, 297 (Or. 2011); *Commonwealth v. Brown*, No. 1676 MDA 2017, 2019 WL 409647, at \*9 (Pa. Super. Ct. Feb. 1, 2019); *State v. Chavez*, 2003 SD 93, ¶¶ 29–33, 668 N.W.2d 89, 99; *Harrison v. State*, 7 S.W.3d 309, 311 (Tex. Crim. App. 1999); *Josey v. State*, 981 S.W.2d 831, 846 (Tex. Crim. App. 1998); *Jones v. Commonwealth*, 670 S.E.2d 727, 733 (Va. 2009); *State v. Miller*, 2002 WI App 150, ¶¶ 13–15, 647 N.W.2d 348, 353.

228. 979 P.2d 1199 (Idaho 1999).

229. *Id.* at 1201.

230. *Id.* (emphasis added).

231. *See State v. Hobbs*, 933 N.E.2d 1281, 1286 (Ind. 2010); *State v. Williams*, 2004 WY 53, ¶¶ 17–21, 90 P.3d 85, 90–91 (Wyo. 2004); *Bergmann*, 633 N.W.2d at 334.

232. *See People v. Stout*, 477 N.E.2d 498, 503 (Ill. 1985); *People v. Strong*, 574 N.E.2d 1271, 1275 (Ill. App. Ct. 1991).

233. *See State v. Fewell*, 184 P.3d 903, 912 (Kan. 2008); *State v. Greever*, No. 95,303, 2008 WL 5401107, at \*3 (Kan. Ct. App. Dec. 19, 2008) (unpublished table decision).

234. *See People v. Dolan*, 86 N.Y.S.3d 306, 307–08 (App. Div. 2018); *People v. Rasul*, 995 N.Y.S.2d 380, 382–83 (App. Div. 2014).

Florida,<sup>235</sup> Minnesota,<sup>236</sup> Ohio,<sup>237</sup> Kentucky,<sup>238</sup> Oregon,<sup>239</sup> Maine,<sup>240</sup> Wisconsin,<sup>241</sup> and Texas,<sup>242</sup> have at varying times misconstrued the automobile exception to additionally permit the warrantless search and/or arrest of a vehicle's occupants.

In doing so, those lower courts generally rely on one of two core rationales: First, as discussed in section III.A, many lower courts expand the scope of the automobile exception to include a vehicle's occupants by misinterpreting the Fourth Amendment's probable cause requirement. Second, which section III.B addresses, numerous lower courts extend the boundaries of the automobile exception to permit the arrest of a vehicle's occupants when only probable cause to search the vehicle exists. Across each category of lower courts, Part III argues, is a progressive misunderstanding and misapplication of the Fourth Amendment's probable cause requirement and the limitation that requirement places on the scope of the automobile exception.

#### A. *Searching Vehicle Occupants*

Against overwhelming jurisprudence to the contrary, a number of jurisdictions have interpreted the automobile exception expansively to permit the warrantless search of a vehicle's occupants. Speaking very generally, that search is typically preceded by either an officer smelling a controlled substance or a dog alerting to the same. Those cases involving a dog alert seemingly exacerbate the judiciary's interpretive difficulty.

The reasoning that supports opinions from those courts, as you will read, generally falls into one of three categories. First, many courts reason that the odor of a controlled substance creates an "exigency" that merits the warrantless search of a vehicle's occupants.<sup>243</sup> Second, other courts

235. *See* State v. Reed, 712 So. 2d 458, 460 (Fla. Dist. Ct. App. 1998); *see also* State v. K.V., 821 So. 2d 1127, 1128 (Fla. Dist. Ct. App. 2002); State v. T.T., 594 So. 2d 839, 840 (Fla. Dist. Ct. App. 1992). *See generally* State v. Betz, 815 So. 2d 627, 634 (Fla. 2002).

236. *See* State v. Wicklund, 205 N.W.2d 509, 511 (Minn. 1973).

237. *See* State v. Urdiales, 2015-Ohio-3632, 38 N.E.3d 907, at ¶¶ 38–39.

238. *See* Lewis v. Commonwealth, No. 2017-CA-001598-MR, 2019 WL 413610, at \*2–3 (Ky. Ct. App. Feb. 1, 2019); Bailey v. Commonwealth, No. 2007-CA-001963-MR, 2009 WL 276715, at \*4 (Ky. Ct. App. Feb. 6, 2009); Dunn v. Commonwealth, 199 S.W.3d 775, 777 (Ky. Ct. App. 2006).

239. State v. Devine, 496 P.2d 51, 52 (Or. Ct. App. 1972).

240. State v. Smith, 593 A.2d 210, 212–13 (Me. 1991).

241. State v. Mata, 602 N.W.2d 158, 161–62 (Wis. Ct. App. 1999).

242. Saenz v. State, 632 S.W.2d 793, 797 (Tex. Ct. App. 1982).

243. **Dog Sniff.** *See* State v. Becker, No. 15-1840, 2016 WL 6902330, at \*3 (Iowa Ct. App. Nov. 23, 2016) (unpublished table decision); State v. Johnson, 737 S.E.2d 442, 447 (N.C. Ct. App. 2013); State v. Urdiales, 2015-Ohio-3632, 38 N.E.3d 907, at ¶¶ 38–39. **Officer Smell.** *See* State v. Moriarty,

rely on the search incident to arrest exception to justify warrantlessly searching vehicle occupants. Third, and of greatest concern, are lower courts that permit the warrantless search of a vehicle's occupants based solely on the generic existence of probable cause. Each of those sub-categories, section III.A argues, progressively expands the scope of the automobile exception by ignoring the constitutional difference between probable cause to search *property* and probable cause to search *people*.

### 1. *The Exigency Cases*

The “Exigent Circumstances” doctrine is admittedly one of the most pervasive exceptions to the warrant requirement.<sup>244</sup> Broadly construed, the term “exigent circumstance” conveys an emergency situation that permits an officer to conduct a warrantless search because the situation’s urgency makes obtaining a warrant nearly impossible.<sup>245</sup>

Relying on that doctrine, a category of lower courts expand the automobile exception to justify the warrantless search of a vehicle’s occupants. Consider first a 1985 decision from the Supreme Court of Illinois.<sup>246</sup> In *People v. Stout*,<sup>247</sup> Stephen Eakle, a patrol officer, saw Robert Stout make an illegal turn and conducted a traffic stop of Stout’s vehicle.<sup>248</sup> Stout then exited his car and met Officer Eakle halfway

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566 N.W.2d 866, 869 (Iowa 1997); *State v. Greever*, No. 95,303, 2008 WL 5401107, at \*3 (Kan. Ct. App. Dec. 19, 2008) (unpublished table decision); *State v. Farrow*, No. 18CA011327, 2019 WL 3891154, at \*6 (Ohio Ct. App. Aug. 19, 2019); *State v. Yates*, 589 S.E.2d 902, 905 (N.C. Ct. App. 2004); *cf.* *Commonwealth v. Washington*, 869 N.E.2d 605, 615 (Mass. 2007) (holding that a police officer is permitted in searching an individual’s person when the officer has probable cause to believe that the individual is concealing evidence of a drug transaction and exigent circumstances justify the search).

244. *See Kentucky v. King*, 563 U.S. 452, 455 (2011) (“It is well established that exigent circumstances, including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant.” (internal quotation marks omitted)); *United States v. King*, 604 F.3d 125, 147 (3d Cir. 2010) (“The exigent circumstances exception to the warrant requirement is well-established.”); *United States v. Martin*, 613 F.3d 1295, 1299 (10th Cir. 2010) (“[O]ne well established exception, justifying warrantless entry into the home, exists when the officers have probable cause to effect an arrest and face exigent circumstances.” (internal quotations omitted)); *Wallace v. Lathrope*, 60 F.3d 836 (9th Cir. 1995) (unpublished table decision) (“The law regarding the exigent circumstances exception to the search warrant requirement is well established.”).

245. *See Missouri v. McNeely*, 569 U.S. 141, 149 (2013); *see also Mitchell v. Wisconsin*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2525, 2543 (2019); *Illinois v. McArthur*, 531 U.S. 326, 331 (2001); *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978).

246. *People v. Stout*, 477 N.E.2d 498, 502–03 (Ill. 1985).

247. 477 N.E.2d 498 (Ill. 1985).

248. *Id.* at 499.

between the two vehicles.<sup>249</sup> During their interaction, Officer Eakle saw two other passengers in the vehicle and smelled marijuana.<sup>250</sup> He then elected to warrantlessly search Stout, which produced a vial of cocaine and cocaine capsules.<sup>251</sup>

Although the trial court suppressed the evidence and the intermediate appellate court affirmed, the Illinois Supreme Court reversed.<sup>252</sup> In applying its interpretation of the automobile exception, the court held that Officer Eakle's detection of a controlled substance indicated "that probable cause existed to justify the warrantless search."<sup>253</sup> It reasoned, in part, that Officer Eakle's search was justified because "[p]olice officers often must act upon a quick appraisal of the data before them, and the reasonableness of their conduct must be judged on the basis of their responsibility to prevent crime and to catch criminals."<sup>254</sup>

In another representative case, the Ohio Supreme Court extended the automobile exception to permit the warrantless search of a vehicle driver.<sup>255</sup> In *State v. Moore*,<sup>256</sup> Sergeant Jeffrey Greene stopped Christopher Moore for running a red light.<sup>257</sup> During the ensuing traffic stop, Sergeant Greene smelled marijuana and asked Moore to exit the vehicle, at which time he searched Moore's pockets and found drug paraphernalia.<sup>258</sup> In upholding the warrantless search of Moore's person, the Ohio Supreme Court reasoned that Sergeant Green's actions were appropriate considering the "compelling" circumstances—namely, "[h]aving to permit [Moore] to leave the scene alone, unaccompanied by any law enforcement officer, the dissipation of the marijuana odor, and the possible loss or destruction of evidence."<sup>259</sup>

The idea that an exigent circumstance supports the warrantless search of a vehicle occupant was likewise persuasive to the Supreme Court of

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249. *Id.*

250. *Id.* at 500.

251. *Id.*

252. *Id.* at 500, 503.

253. *Id.* at 503.

254. *Id.* Illinois has not backed away from *Stout*. To the contrary, the Illinois Appellate Court relied expressly on *Stout* in 1991 to uphold the warrantless search of a vehicle occupant. *People v. Strong*, 574 N.E.2d 1271, 1275 (Ill. App. Ct. 1991). More recently, though more generally, the Illinois Supreme Court cited with approval the *Stout* court's approach to probable cause. *See People v. Gocmen*, 2018 IL 122388, ¶¶ 30–34, 115 N.E.3d 153, 159–60.

255. *State v. Moore*, 734 N.E.2d 804, 808–09 (Ohio 2000).

256. 734 N.E.2d 804 (Ohio 2000).

257. *Id.* at 805.

258. *Id.*

259. *Id.* at 809.

Kansas in 2008.<sup>260</sup> In *State v. Fewell*,<sup>261</sup> Trooper Mark Engholm stopped Ramon Fewell for speeding.<sup>262</sup> Engholm approached the passenger side of the vehicle and informed Fewell's passenger, Charles Brown, of the reason for the stop.<sup>263</sup> After Engholm detected the smell of burnt marijuana, Brown admitted to smoking marijuana earlier that day.<sup>264</sup> Engholm searched Brown, found three bags of marijuana and \$1,000 in cash, and placed Brown under arrest.<sup>265</sup> Engholm then conducted a "pat-down search" of Fewell and found a switchblade knife, bent spoon, and glass pipe in Fewell's pants.<sup>266</sup> Once backup arrived, Engholm searched Fewell a second time and found a small bag of crack cocaine.<sup>267</sup> Following the denial of his motion to suppress, Fewell was convicted of possession of cocaine, criminal use of a weapon, possession of drug paraphernalia, and speeding.<sup>268</sup>

The Kansas Court of Appeals affirmed—as did the Kansas Supreme Court.<sup>269</sup> For its part, the Kansas Supreme Court first held that Engholm had probable cause to believe that "Fewell had engaged in or was engaging in criminal activity based on the odor of burnt marijuana and the responses of Fewell and Brown during the traffic stop."<sup>270</sup> Relying in part on a predecessor case, *State v. MacDonald*,<sup>271</sup> which upheld the warrantless search of a car,<sup>272</sup> the court further held that "exigent circumstances existed in this case that justified the warrantless search of Fewell's person in order to prevent the imminent destruction or concealment of evidence."<sup>273</sup>

Like an officer's plain smell, various courts consider a positive dog alert to contraband an exigent circumstance that permits the warrantless

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260. *State v. Fewell*, 184 P.3d 903, 912 (Kan. 2008).

261. 184 P.3d 903 (Kan. 2008).

262. *Id.* at 907.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* The suppression court concluded, in part, that "'it would be ludicrous to think that you could search the car and not the people' if an officer smelled a strong odor of marijuana emanating from the passenger compartment of the vehicle." *Id.*

269. *Id.* at 908.

270. *Id.* at 913.

271. 856 P.2d 116 (Kan. 1993) (construing an officer's smell of marijuana as providing probable cause to conduct a vehicle search).

272. *Fewell*, 184 P.3d at 910–12 (citing *MacDonald* multiple times).

273. *Id.* at 914.

search of a vehicle occupant.<sup>274</sup> Consider, for example, the Court of Special Appeals of Maryland’s 2017 decision in *Borkowski v. State*.<sup>275</sup> In *Borkowski*, Trooper Derrick Huffman and Sergeant Robert Stryjewski pulled over the driver of a silver Lexus, Elijah Borkowski.<sup>276</sup> Roughly twenty-seven minutes into the stop, Deputy Kathleen Yox arrived with her dog, Gero.<sup>277</sup> Gero then alerted—although not captured by the officers’ dashboard video—to the presence of narcotics near the front of the Lexus roughly four minutes later.<sup>278</sup> The officers elected to search Borkowski, in addition to the Lexus, and found “a clear plastic baggie containing small pills” inside Borkowski’s pocket.<sup>279</sup>

The circuit court ultimately denied Borkowski’s suppression motion, and the Maryland Court of Special Appeals affirmed.<sup>280</sup> Without drawing a distinction between searching the Lexus and Borkowski’s person, the court simply concluded that probable cause existed because the circuit

274. See *State v. Jones*, No. 03CA61, 2004 WL 3090198, at \*9 (Ohio Ct. App. Dec. 16, 2004).

275. No. 08068, 2017 WL 1435976, at \*1 (Md. Ct. Spec. App. Apr. 24, 2017).

276. *Id.* at \*2.

277. *Id.* at \*3.

278. *Id.* The circumstances of Gero’s alert were particularly odd. Apart from his alert not being captured on video, Deputy Yox would testify later at Borkowski’s suppression hearing that Gero’s alert typically consisted of him sitting, although she was “unable to remember” if Gero sat in this instance. *Id.* Rather, she said, “there was a change in [Gero’s] behavior” and that signaled the presence of drugs in the vehicle. *Id.* There’s more. At the suppression hearing, Deputy Yox

explained that Gero sometimes alerts by breathing deeply, and, when she was presented with Trooper Huffman patrol vehicle’s video recording of Borkowski’s stop, was able to identify when, based on Gero’s movement in the video, she recalled the K-9 alerting, even though Gero, in the video, was obscured by Borkowski’s car when he did so.

*Id.* at \*5. Despite the overwhelmingly concerning circumstances surrounding Gero’s alert, the suppression court found Deputy Yox’s testimony credible and concluded that an alert had, in fact, occurred. *Id.*

Upholding Gero’s alert under these circumstances seemingly affirms the basis for the scholarly concern about Justice O’Connor’s belief in a dog’s reliability. See *supra* note 161 and accompanying citations. Other examples similar to Gero’s questionable alert exist. See, e.g., *Jackson v. State*, 2013 Ark. 201, at 12–13, 427 S.W.3d 607, 615 (finding that a drug dog alert occurred when the dog “exhibited excessive tail wagging and deep, labored breathing,” attempted to enter the driver’s side window, and “stood and stared at the door [of the vehicle]”); *State v. Cabral*, 859 A.2d 285, 290, 300 (Md. Ct. Spec. App. 2004) (concluding a dog alerted although the prosecution was “unable to produce” video footage of the alert due to technical difficulties); *State v. Chavez*, 2003 SD 93, ¶¶ 22–29, 668 N.W.2d 89, 96–98 (holding despite the absence of corroborating evidence that a dog alerted when the dog “started inhaling, sucking in, and being a Hoover vacuum,” at which point it “sniffed a little bit more, stiffened up, and then [received] . . . a toy”).

279. *Borkowski*, 2017 WL 1435976, at \*3. The opinion makes reference to this being the second time officers searched Borkowski but no description or reference to the first search exists elsewhere.

280. *Id.* at \*1, \*5. The nuances of the procedural history surrounding Borkowski’s suppression motions are largely unimportant. By way of brief summary, the circuit court initially granted his motion to suppress and the state filed an interlocutory appeal. *Id.* at \*3. The Maryland Court of Special Appeals reversed and this time the circuit court denied Borkowski’s supplemental motion to suppress. *Id.* at \*4.

court found “Deputy Yox and her testimony credible.”<sup>281</sup> Despite the absence of video evidence to confirm Gero’s alert, the court concluded that probable cause existed to search Borkowski and his vehicle.<sup>282</sup> It relied on Gero’s unseen alert alongside “the information provided by the caller, and by Borkowski’s appearance and behavior after the stop.”<sup>283</sup>

Other examples abound, but the point is this: Officers frequently rely on the generic existence of exigent circumstances developed during a traffic stop—either by an officer or a positive dog alert—to justify searching an occupant of a vehicle without a warrant.<sup>284</sup> Even a casual reading of those cases illustrates that lower courts rely on the concept of an “exigency” or “exigent circumstances” as a catch-all that, if present, provides a boundaryless opportunity to search people without a warrant.

Although the concept of exigent circumstances is admittedly broad, the Supreme Court has offered guidance on what factual circumstances qualify as accepted exigencies. Among other cases,<sup>285</sup> for example, the Supreme Court’s decision in *Minnesota v. Olson*<sup>286</sup> is instructive on that question.<sup>287</sup> In *Olson*, police suspected that Joseph Ecker had just robbed a gas station and fatally shot the station’s manager in the process.<sup>288</sup> Further suspecting that he had a partner, the police drove to Ecker’s home and, upon arrival, simultaneously met an Oldsmobile vehicle.<sup>289</sup> After seeing the police, the occupants of the Oldsmobile took “evasive action,” but lost control of the vehicle and fled on foot.<sup>290</sup> Police pursued and captured the driver, Ecker, but the passenger escaped.<sup>291</sup>

The next morning, police received information that the passenger,

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281. *Id.* at \*5.

282. *Id.*

283. *Id.*

284. *See* *State v. Martin*, No. 115,753, 2017 WL 4848583, at \*4 (Kan. Ct. App. Oct. 27, 2017); *Commonwealth v. Valentine*, 470 N.E.2d 384, 385 (Mass. App. Ct. 1984); *State v. Smith*, 593 A.2d 210, 212–13 (Me. 1991); *State v. Young*, No. COA18-1232, 2019 WL 4453894, at \*7 (N.C. Ct. App. Sept. 17, 2019); *State v. Flowers*, No. 2009-L-103, 2010 WL 2560078, at \*6 (Ohio Ct. App. June 25, 2010); *cf.* *State v. Currier*, 521 A.2d 295, 298 (Me. 1987) (holding that probable cause arising from an informant’s tip and exigent circumstances permitted a police officer to search a vehicle occupant without a warrant during the course of a traffic stop); *State v. Vanderveer*, 667 A.2d 382, 385 (N.J. Super. Ct. App. Div. 1995) (holding that probable cause and exigent circumstances permit a police officer to warrantlessly search an individual located in a confined area that smells of marijuana).

285. *See* *Missouri v. McNeely*, 569 U.S. 141 (2013); *Kentucky v. King*, 563 U.S. 452 (2011).

286. 495 U.S. 91 (1990).

287. *See id.* at 100.

288. *Id.* at 93.

289. *Id.*

290. *Id.*

291. *Id.*

Robert Olson, was hiding at a particular residence with two women.<sup>292</sup> Police dispatched several officers who surrounded the home.<sup>293</sup> Then, “[w]ithout seeking permission and with weapons drawn, the police entered the upper unit and found respondent hiding in a closet.”<sup>294</sup> Olson shortly thereafter made an inculpatory statement.<sup>295</sup>

Olson filed a motion to suppress his statement, which the trial court denied.<sup>296</sup> The Supreme Court of Minnesota reversed on appeal, holding that no exigent circumstances existed to justify the officers’ entry.<sup>297</sup> The suspect was, after all, surrounded and would have been apprehended had he attempted to flee.<sup>298</sup> The Supreme Court affirmed, noting that it was “not inclined to disagree with [the Minnesota Supreme Court’s] fact-specific application of the proper legal standard.”<sup>299</sup> More importantly for purposes of this Article, the Court approved of the Minnesota Supreme Court’s definition of exigent circumstances:

The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. *The court observed that “a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect’s escape, or the risk of danger to the police or to other persons inside or outside the dwelling.”* The court also apparently thought that in the absence of hot pursuit there must be at least probable cause to believe that one or more of the other factors justifying the entry were present and that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered.<sup>300</sup>

In sum, for exigent circumstances to apply, police must generally believe that probable cause supports a *particular* and *specific* category of exigency.<sup>301</sup>

Unsurprisingly, the four categories listed in *Olson* are widely accepted

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292. *Id.* at 93–94.

293. *Id.* at 94.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 94–95.

298. *Id.*

299. *Id.* at 100.

300. *Id.* (emphasis added) (citations omitted); *accord* United States v. Struckman, 603 F.3d 731, 743 (9th Cir. 2010) (listing the *Olson* categories as accepted exigencies); State v. Dugan, 276 P.3d 819, 828 (Kan. Ct. App. 2012) (“The courts have generally recognized four types of exigent circumstances that may obviate the warrant requirement . . .”).

301. See United States v. Eberle, 993 F. Supp. 794, 799 (D. Mont. 1998); People v. Celis, 93 P.3d 1027, 1036 (Cal. 2004); State v. DeCoteau, 1999 ND 77, ¶¶ 7–8, 592 N.W.2d 579, 582.

by lower courts.<sup>302</sup> And although lower courts generally agree that the *Olson* categories are not exhaustive,<sup>303</sup> overwhelming Supreme Court authority counsels against expansion.<sup>304</sup> To the extent that the Supreme Court has expanded the categories of qualifying exigent circumstances, it has done so in the limited context of “emergency aid.”<sup>305</sup>

By contrast, an officer or dog smelling contraband during a vehicle stop does not fall within an *Olson*—or related—exigency. In the examples provided by *Stout*, *Moore*, *Fewell*, and *Borkowski*, unlike the factual categories contemplated by *Olson*, officers have seized the suspect and the suspect’s vehicle via traffic stop.<sup>306</sup> They are accordingly not chasing the suspect or concerned about preventing the suspect’s escape. Any concerns about destruction of evidence are likewise mitigated by the suspect’s seizure, not to mention the fact that the officer’s observations and/or smells themselves separately constitute admissible evidence. Finally, and perhaps most importantly, the overwhelming majority of exigent circumstances cases contemplate the legality of police warrantlessly entering a home—not searching a person.<sup>307</sup>

Apart from well-accepted factual categories or circumstances that qualify as exigencies, the Supreme Court has likewise concluded that the exigent circumstances doctrine does not apply to minor offenses. In *Welsh v. Wisconsin*,<sup>308</sup> for instance, the Court declined to apply the exigent circumstances exception when police entered a suspect’s home to arrest

302. See *State v. Weber*, 2016 WI 96, 887 N.W.2d 554, 560 (referring to the categories listed in *Olson* as the “well-recognized categories of exigent circumstances”).

303. See *Struckman*, 603 F.3d at 743 (observing “there is no immutable list of exigent circumstances”); *United States v. Rohrig*, 98 F.3d 1506, 1519 (6th Cir. 1996) (noting the “existing categories do not occupy the entire field of situations in which a warrantless entry may be justified”); *State v. Telshaw*, 195 Ohio App. 3d 596, 2011-Ohio-3373, 961 N.E.2d 223, at ¶ 25 (noting the categories listed by *Olson* are “not the only recognized types of exigent circumstances”).

304. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” (quoting *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978))); *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 318 (1972) (noting the exigent circumstances exception is premised on a “few in number and carefully delineated” circumstances).

305. *Brigham City*, 547 U.S. at 403 (“One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury.”).

306. *Berkemer v. McCarty*, 468 U.S. 420, 436–37 (1984) (“[W]e have long acknowledged that ‘stopping an automobile and detaining its occupants constitute a “seizure” within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief.’” (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979))).

307. See, e.g., *State v. Thomas*, No. 14AP–185, 2015 WL 2191107, at \*6 (Ohio Ct. App. May 12, 2015) (warrantless entry into suspect’s hotel room); *State v. Lala*, 2008-0484, at \*4 (La. App. 4 Cir. 12/3/08); 1 So. 3d 606, 609 (warrantless entry into home); *State v. Dahl*, 915 P.2d 979, 985–86 (Or. 1996) (same).

308. 466 U.S. 740 (1984).

him for “a nonjailable traffic offense.”<sup>309</sup> Lower courts have generally interpreted *Welsh* to limit exigent circumstances to serious crimes—i.e., not misdemeanors.<sup>310</sup> As states and localities increasingly decriminalize marijuana,<sup>311</sup> the idea that an officer smelling marijuana constitutes a “serious offense” for exigency purposes appears dubious.

Finally, it is worth remembering that “exigency” as a concept is already included in the automobile exception’s framework.<sup>312</sup> As the Court most recently recognized in *Collins*, “[t]he ‘ready mobility’ of vehicles served as the core justification for the automobile exception for many years.”<sup>313</sup> That mobility, the Court has likewise recognized (since 1925),<sup>314</sup> is itself an exigency.<sup>315</sup> But lower courts’ reliance on the generic existence of exigent circumstances ignores that core rationale. Taken to its logical extreme, it moreover suggests that the presence of any contraband creates a generic exigent circumstance. If correct, that interpretation would render the automobile exception superfluous at best and wholly unnecessary at worst.

## 2. *The Search Incident to Arrest Cases*

A second category of lower courts rely on the search incident to arrest exception to justify the warrantless search of vehicle occupants. Stated simplistically, the doctrine enables the police—at the moment of arrest—to conduct an unqualified warrantless search of the arrestee’s person.<sup>316</sup>

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309. *Id.* at 742.

310. See *United States v. Johnson*, 256 F.3d 895, 908 n.6 (9th Cir. 2001); *M.J.R. v. State*, 715 So. 2d 1103, 1104 (Fla. Dist. Ct. App. 1998); *State v. Ramirez*, 49 Wash. App. 814, 820, 746 P.2d 344, 346–47 (1987).

311. At present, fifteen states have decriminalized possession (not distribution) of marijuana. German Lopez, *15 States Have Decriminalized—But Not Legalized—Marijuana*, VOX (July 10, 2019), <https://www.vox.com/identities/2018/8/20/17938358/marijuana-legalization-decriminalization-states-map> [https://perma.cc/L3P2-PERM]; see Sarah Friedmann, *What States Decriminalized Weed? Cannabis Laws Are Changing Across the US*, BUSTLE (July 11, 2019), <https://www.bustle.com/p/what-states-decriminalized-weed-cannabis-laws-are-changing-across-the-us-17043680> [https://perma.cc/L3P2-PERM].

312. See *Maryland v. Dyson*, 527 U.S. 465, 466–67 (1999); *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

313. *Collins v. Virginia*, 584 U.S. \_\_\_, 138 S. Ct. 1663, 1669 (2018).

314. See *Carroll v. United States*, 267 U.S. 132, 153–54 (1925).

315. *E.g.*, *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) (“[T]he inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.”).

316. *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”).

The search incident to arrest doctrine involves two separate and distinct Fourth Amendment intrusions: first is the arrest—a seizure of the person—and second is the search of the arrestee.<sup>317</sup> Note also that officers may not search the arrestee without the presence of a lawful arrest supported by probable cause.<sup>318</sup> In other words, the probable cause must go to the arrest (the seizure). That’s important because, absent probable cause to make an arrest, officers may not search individuals’ persons for contraband without a warrant.<sup>319</sup>

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317. *See* *United States v. Currence*, 446 F.3d 554, 556 (4th Cir. 2006) (“[The search incident to arrest] exception provides that when law enforcement officers have probable cause to make a lawful custodial arrest, they may—incident to that arrest and without a warrant—search ‘the arrestee’s person . . . .’” (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969))).

318. *See* *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (explaining that the constitutional validity of a search incident to an arrest is dependent on the constitutional validity of the underlying arrest—i.e., supported by probable cause); *see also Currence*, 446 F.3d at 557 (“[A]lthough a search can occur before an arrest is actually made, a search may not precede an arrest and serve as part of its justification.” (internal quotation marks and citations omitted)); *United States v. Han*, 74 F.3d 537, 541 (4th Cir. 1996) (“Because a search incident to arrest is permitted only when there is a valid arrest, the validity of the arrest cannot depend on evidence found during the search.”).

319. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (“The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’” (quoting *Katz v. United States*, 389 U.S. 347 (1967))).

Of the roughly twenty exceptions to the Fourth Amendment’s warrant requirement, sixteen justify warrantless searches and/or seizures that are outside the scope of this Article. *See* *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (international border exception); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (federally regulated business exception); *United States v. Edwards*, 415 U.S. 800, 807 (1974) (post-arrest administrative exception); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (fire response exception); *United States v. Villamonte-Marquez*, 462 U.S. 579, 592 (1983) (boat boarding exception); *United States v. Ortiz*, 422 U.S. 891, 896–97 (1975) (traffic check point exception); *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) (license and registration check exception); *United States v. Moreno*, 475 F.2d 44, 51 (5th Cir. 1973) (airport exception); *Downing v. Kunzig*, 454 F.2d 1230, 1233 (6th Cir. 1972) (court house exception); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (schoolhouse searches); *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (custodial inventory searches of property at a police station); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (consent); *Horton v. California*, 496 U.S. 128, 134 (1990) (plain view exception); *Oliver v. United States*, 466 U.S. 170, 181 (1984) (open fields); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (prison cell exception); *Wyman v. James*, 400 U.S. 309, 318 (1971) (welfare exception).

Of the remaining four exceptions, a search incident to a valid arrest is the only one that justifies a warrantless search of a citizen’s person for contraband in the context of a routine traffic stop. *Cf.* *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that a police officer may stop a person who the officer suspects is involved in criminal activity and may pat down the person’s outer clothing for firearms if the officer has separate reasonable suspicion to believe that the person is armed and dangerous); *United States v. Di Re*, 332 U.S. 581, 584 (1948) (holding that the automobile exception does not justify searching a vehicle occupant’s person without a warrant); *Missouri v. McNeely*, 569 U.S. 141, 148–49 (2013) (explaining that the exigent circumstance exception justifies a warrantless search of a person when “the needs of law enforcement [are] *compelling*” (emphasis added) (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011))); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding

But the reverse is also true. That is, so long as probable cause exists to arrest, no separate probable cause is necessary to support the accompanying search.<sup>320</sup> In Fourth Amendment terms, then, the search following an arrest is “suspicionless” in the sense that it does not require a justification separate from the arrest.<sup>321</sup> Finally, in *Rawlings v. Kentucky*,<sup>322</sup> the Supreme Court recognized that a warrantless search may precede the arrest, so long as the probable cause to arrest existed at the time of the search.<sup>323</sup> The Court has separately cautioned that “an arrest is not justified by what the subsequent search discloses.”<sup>324</sup>

But lower courts have broadly interpreted the search incident to arrest exception to permit even searches of vehicle occupants who are not under arrest. In 1977, for example, the Florida District Court of Appeal applied the search incident to arrest exception to uphold the warrantless search of all three vehicle occupants in *Dixon v. State*.<sup>325</sup> In *Dixon*, at roughly 12:45 a.m., a motorist advised Officer John Henderson that a black Buick with a particular tag number nearly ran her off the road.<sup>326</sup> Officer Henderson identified the vehicle and, without engaging his cruiser’s lights, followed it to a parking lot.<sup>327</sup> He then approached the Buick and, as he did, detected marijuana.<sup>328</sup> Officer Henderson then called for backup and told the three occupants to exit the vehicle.<sup>329</sup> When backup arrived, no arrest occurred and, instead, “Officer Henderson asked Officer Frank Owens to search the suspects while he searched the automobile.”<sup>330</sup> During the ensuing

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that a police officer may search a citizen’s person following a lawful arrest based upon probable cause).

320. *See Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979) (“The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.”).

321. *See, e.g., Robinson*, 414 U.S. at 235 (“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.”); *United States v. Abdul-Saboor*, 85 F.3d 664, 667 (D.C. Cir. 1996) (“[E]ven though the reasons for conducting a search incident to arrest . . . may be stronger in some situations than in others, the Government is not obliged to justify each such search in the particular context in which it occurs.”).

322. 448 U.S. 98 (1980).

323. *See id.* at 111 (upholding warrantless search of individual before an arrest where “petitioner [already] admitted ownership of the sizable quantity of drugs”).

324. *Henry v. United States*, 361 U.S. 98, 104 (1959); *see Smith v. Ohio*, 494 U.S. 541, 543 (1990) (explaining that the fruits of a search incident to an arrest cannot be used to justify the arrest).

325. 343 So. 2d 1345, 1348–49 (Fla. Dist. Ct. App. 1977).

326. *Id.* at 1346.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

searches, Officer Owens found PCP hanging from the belt of James Dixon, the driver.<sup>331</sup>

The Florida District Court of Appeal upheld the warrantless search.<sup>332</sup> Relying on the search incident to arrest exception, the court preliminarily observed that “if a warrantless search is otherwise valid the fact that the accused was not arrested does not render the evidence found inadmissible where probable cause to arrest existed prior to the search.”<sup>333</sup> Applying that general rule, the court went on to hold that the “smell of marijuana and sight of smoke emanating from an automobile constitute probable cause to believe that both elements [of criminal possession of marijuana] are satisfied as to all of the occupants of the vehicle and that each occupant had actual or constructive possession of marijuana.”<sup>334</sup> It accordingly affirmed Dixon’s conviction.<sup>335</sup> The result in *Dixon* has since motivated a number of Florida appellate courts to authorize the warrantless search of a vehicle’s occupants based on the search incident to arrest exception.<sup>336</sup>

For a more recent post-*Rawlings* example, the Wisconsin Court of Appeals upheld the warrantless search of a vehicle passenger in its 1999 decision, *State v. Mata*.<sup>337</sup> In *Mata*, Juan Mata was a passenger in a vehicle stopped for missing a front license plate.<sup>338</sup> During the stop, Deputy Sheriff Daniel Klatt approached the driver’s side of the vehicle and smelled marijuana.<sup>339</sup> When the driver could not produce his license, Deputy Sheriff Klatt ordered him out of the vehicle and searched his person but found nothing incriminating.<sup>340</sup> Officers then checked the records of the vehicle’s second passenger, which revealed an outstanding warrant.<sup>341</sup> Accordingly, officers searched the second passenger, but again

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331. *Id.*

332. *Id.* at 1349.

333. *Id.* at 1347.

334. *Id.* at 1348.

335. *Id.* at 1349. Although the court’s analysis focused primarily on the search incident to arrest doctrine, it separately commented on the applicability of the automobile exception: “Other jurisdictions have affirmatively ruled that the odor of burning marijuana emanating from an automobile provides sufficient probable cause to arrest and/or to search the occupants as evidence of a crime . . . or as reasonable grounds to believe that the occupants had recently committed a felony.” *Id.* at 1348 n.5. The court endorsed that approach, emphasizing that “an automobile is not accorded the status of a dwelling.” *Id.*

336. See *State v. Chambliss*, 752 So. 2d 114, 115 (Fla. Dist. Ct. App. 2000); *Harvey v. State*, 653 So. 2d 1146, 1146 (Fla. Dist. Ct. App. 1995); *Rogers v. State*, 586 So. 2d 1148, 1153 (Fla. Dist. Ct. App. 1991) (Danahy, J., concurring in part and dissenting in part).

337. 602 N.W.2d 158 (Wis. Ct. App. 1999).

338. *Id.* at 159.

339. *Id.*

340. *Id.*

341. *Id.*

found nothing incriminating.<sup>342</sup> Finally, Deputy Sheriff Klatt ordered Mata out of the vehicle, searched his person, and found “a clear plastic baggie that contained two similar baggies with green leafy material that Klatt believed to be unsmoked marijuana.”<sup>343</sup>

The trial court denied Mata’s motion to suppress the evidence found on his person, and the Court of Appeals of Wisconsin affirmed.<sup>344</sup> In concluding that Deputy Sheriff Klatt had probable cause to search Mata, the court reasoned, “it is significant that by the time the police searched Mata, the other two occupants of the vehicle had already been searched and no evidence of marijuana or other contraband had been discovered.”<sup>345</sup> That mattered, according to the court, because “the odds of Mata possessing the suspected marijuana had increased—not diminished.”<sup>346</sup> Accordingly, the court concluded, the search was reasonable because Klatt had “probable cause to believe that marijuana was in the vehicle or on the persons of the occupants.”<sup>347</sup>

These illustrative cases, of which there are many,<sup>348</sup> present a clear constitutional problem. By interpreting the search incident to arrest exception to justify the warrantless search of multiple vehicle occupants, lower courts ignore the constitutional mandate that probable cause be individualized to each suspect. The Supreme Court held as much in *Ybarra v. Illinois*,<sup>349</sup> wherein it considered whether a search warrant for a public premises permitted the warrantless search of *all* persons present.<sup>350</sup> In *Ybarra*, police obtained a warrant to search a tavern and the tavern owner for evidence of heroin possession.<sup>351</sup> During the execution of the warrant, officers conducted a “cursory search for weapons” of all of the tavern’s patrons.<sup>352</sup> While patting down Ventura Ybarra, an officer felt “a cigarette pack with objects in it.”<sup>353</sup> After completing the pat-down of the other twelve patrons, the officer returned to Ybarra, retrieved the pack,

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342. *Id.*

343. *Id.* (noting that officers also searched the vehicle but found nothing incriminating).

344. *Id.* at 159, 162.

345. *Id.* at 160.

346. *Id.*

347. *Id.* at 161.

348. *See* *Carter v. State*, 182 A.3d 236, 246 (Md. Ct. Spec. App. 2018); *State v. Fuller*, 809 S.E.2d 157, 163 (N.C. Ct. App. 2017); *Commonwealth v. Rogers*, 849 A.2d 1185, 1192 (Pa. 2004).

349. 444 U.S. 85 (1979).

350. *Id.* at 87.

351. *Id.* at 87–88.

352. *Id.* at 88.

353. *Id.*

and found heroin inside.<sup>354</sup>

The Supreme Court suppressed the heroin by holding that officer's warrantless search of Ybarra violated the Fourth Amendment.<sup>355</sup> The Court held that the existence of probable cause to search a constitutionally protected area (the premises), does not automatically mean that probable cause exists to search each person within or near that same area. It reasoned that "[a]lthough the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search [the tavern's owner], it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers."<sup>356</sup> Each patron on the premises, the Court further reasoned, was entitled to individualized Fourth Amendment protection.<sup>357</sup>

The implications of *Ybarra* in the automobile context are clear. The smell of contraband emanating from a car, whether smelled by an officer or a drug-detection dog, does not provide police officers with probable cause to search (or arrest) any occupant of the car. Rather, as the automobile exception makes clear, an officer smelling contraband or a dog's positive alert provides only probable cause to search *the car*.<sup>358</sup> To be sure, the smell of contraband alone establishes probable cause to believe that contraband is in the car, but it does not provide the kind of *individualized* probable cause required by the Fourth Amendment to search any particular occupant. The fact that officers might discover contraband on a vehicle occupant's person does not cure the problem; rather, as the Supreme Court in *Sibron v. New York*<sup>359</sup> observed, "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification."<sup>360</sup>

### 3. *The Probable Cause Cases*

A third category of lower courts—what this Article calls “the probable cause cases”—permits the search of vehicle occupants based on the generic presence of probable cause. Regardless of whether an officer or drug-detection dog generates that probable cause, these courts reason that the odor of marijuana coming from a vehicle, for instance, permits searching all of the vehicle's driver and its occupants. Let's look at some

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354. *Id.* at 88–89.

355. *Id.* at 95.

356. *Id.* at 92 (internal quotation marks omitted).

357. *Id.* at 91–92.

358. *Florida v. Harris*, 568 U.S. 237, 246–47 (2013).

359. 392 U.S. 40 (1968).

360. *Id.* at 63.

illustrative examples.

One of the earlier cases to authorize the search of a vehicle passenger in a vehicle based on generic probable cause arose from the Minnesota Supreme Court's 1973 case in *State v. Wicklund*.<sup>361</sup> In *Wicklund*, two officers observed a slowly moving automobile pass carrying three "young people" in the front and one in the back.<sup>362</sup> The officers followed the vehicle, observed it driving erratically, and thought they saw the driver hiding something.<sup>363</sup>

During the ensuing traffic stop, one approached the driver and smelled marijuana.<sup>364</sup> Another officer proceeded to the passenger side, observed beer in the back seat, and elected to open the vehicle's back passenger door.<sup>365</sup> After also smelling marijuana, the second officer "ordered [the backseat passenger] to keep his hands raised and then proceeded to search him, finding first a small plastic bag containing marijuana and later other evidence including cigarette papers and a homemade pipe which smelled of burned marijuana."<sup>366</sup>

Although the trial court suppressed the marijuana, the Minnesota Supreme Court—quite remarkably—had "*no difficulty* in concluding that the officers did not violate defendant's Fourth Amendment rights."<sup>367</sup> It reasoned that the smell of marijuana gave the officers "probable cause to believe that one or more of the occupants of the automobile had smoked marijuana in violation of the law."<sup>368</sup>

Other states have accepted *Wicklund*'s holding that the odor of a controlled substance—particularly marijuana—provides probable cause to warrantlessly search a vehicle passenger.<sup>369</sup> In 1998, for example, the

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361. 205 N.W.2d 509 (Minn. 1973). *Wicklund* remains persuasive in Minnesota. See *State v. Bartlette*, No. C7-02-1669, 2003 WL 21743483, at \*5 (Minn. Ct. App. July 29, 2003) ("We have held that the odor of marijuana in a vehicle provides probable cause to search the vehicle's occupants."); *State v. Doren*, 654 N.W.2d 137, 142 (Minn. Ct. App. 2002) ("The odor of burned marijuana inside a stopped motor vehicle provides probable cause for the search of the vehicle's occupants."); see also *State v. Ortega*, 770 N.W.2d 145, 149 n.2 (Minn. 2009) ("We take this opportunity to clarify that the odor of burnt marijuana justified the warrantless search in *Wicklund* because it provided the officer probable cause to believe Wicklund possessed a *criminal* amount of marijuana as possession of any amount of marijuana was a crime under then-existing law." (emphasis in original)).

362. *Wicklund*, 205 N.W.2d at 510.

363. *Id.*

364. *Id.* at 510–11.

365. *Id.* at 511.

366. *Id.*

367. *Id.* (emphasis added).

368. *Id.*

369. *E.g.*, *People v. Boyd*, 700 N.E.2d 444 (Ill. App. Ct. 1998). In *Boyd*, the Appellate Court of Illinois in 1998 evaluated the constitutionality of an officer's warrantless search of an automobile

facts presented to the Court of Appeals of Texas in *Small v. State*<sup>370</sup> included that a police officer, Benjamin Risner, stopped Jimmy Small's vehicle for a traffic violation.<sup>371</sup> Then, during the stop, Risner smelled "a strong odor of burnt marihuana coming from the car."<sup>372</sup> Officer Risner had Small exit the vehicle, after which he frisked Small for weapons.<sup>373</sup> Although Risner found no weapons, he elected to search Small a second time for marijuana—remarkably by having Small "lower his outer pants to his knees."<sup>374</sup> Risner then searched Small's "crotch area" and discovered cocaine.<sup>375</sup>

The trial court denied Small's motion to suppress, and the Court of Appeals of Texas affirmed.<sup>376</sup> Citing a variety of Texas cases, the court of appeals held that "[t]he odor of marihuana alone is sufficient to constitute probable cause to search a defendant's person, vehicle, or objects within the vehicle."<sup>377</sup> It reasoned in part that Small made a "furtive [hand]

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passenger during a routine traffic stop for failure to completely stop at a stop sign. *Id.* at 446. During that stop, two officers "smelled a stronger odor of cannabis from within the vehicle" as they approached the car where Gregory Boyd was traveling as a passenger. *Id.* One of the officers ordered Boyd out of the car and "began attempting to search him 'for any controlled substances.'" *Id.* When Boyd refused to cooperate, the officer handcuffed Boyd and performed a warrantless search, which uncovered marijuana and cocaine. *Id.*

Although the trial court granted Boyd's motion to suppress, the Appellate Court of Illinois reversed. *Id.* at 447, 451. The appellate court held (quite directly) that "officers' detection of the odor of burning cannabis emanating from the lawfully stopped maroon car provided the officers with probable cause to search defendant, who was a passenger in the car." *Id.* at 450. It reasoned that

[t]o hold otherwise would lead to the illogical conclusion that when a trained police officer detects the odor of a burning controlled substance emanating from a lawfully stopped vehicle he can search only the driver and not the other occupants of the car even though the smell was emanating from the enclosed space of the vehicle in which *all* occupants were present.

*Id.* (emphasis in original).

The Appellate Court of Illinois more recently reaffirmed the core principle of *Boyd* in *People v. Rice*—a 2019 decision. 2019 IL App (3d) 170134, 125 N.E.3d 546. In *Rice*, an officer stopped Jeremiah Rice for speeding and, during the traffic stop, smelled "a strong odor of burnt cannabis." *Id.* ¶ 3. The officer asked Rice to step out of the car, whereupon the officer searched Rice and discovered cannabis. *Id.* ¶ 4. A subsequent search of Rice's car uncovered 1,300 pills containing methamphetamine. *Id.* The court upheld the warrantless search of Rice's person and reasoned, "Illinois courts have repeatedly recognized that the smell of burnt cannabis emanating from a vehicle will provide officers familiar with and trained in the detection of controlled substances with probable cause to search a vehicle." *Id.* ¶ 19. It added, "[t]his principle has been extended to include searches of the driver and any passengers." *Id.*

370. 977 S.W.2d 771 (Tex. Ct. App. 1998).

371. *Id.* at 773.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 775.

377. *Id.* at 774.

movement' toward the front of his trousers," which entitled Riser to conclude that Small "had concealed marihuana in his outer trousers."<sup>378</sup>

Consider also *People v. Neuberger*,<sup>379</sup> a 2011 case from the Appellate Court of Illinois, wherein Officer Dennis Asay responded to a report that "someone was hiding in the bushes on the north side of the post office."<sup>380</sup> As he approached the geographic area, Officer Asay watched a person, later determined to be Karl Beyer, run through some bushes and get into the backseat of an automobile.<sup>381</sup> Officer Asay pulled the vehicle over and saw three people in the car, including Jacob Neuberger who was sitting in the front seat.<sup>382</sup> As the stop proceeded, Deputy Michael Holland arrived on the scene with Illo, his drug-detection dog.<sup>383</sup> During a walk around the vehicle, Illo alerted, and Deputy Holland specifically ordered Neuberger out of the car.<sup>384</sup> Officer Asay then "frisked" Neuberger and subsequently had him remove his shoes.<sup>385</sup> Officer Asay found a "baggie" containing contraband in one of Neuberger's shoes.<sup>386</sup>

The trial court denied Neuberger's motion to suppress, and the Appellate Court of Illinois affirmed.<sup>387</sup> In doing so, the court recognized a line of precedent that permitted the warrantless search of a vehicle driver based on an officer smelling burning cannabis.<sup>388</sup> Applying that precedent, the court saw "no reason to reach a different result . . . because the presence of drugs was detected via canine."<sup>389</sup> Although it recognized contrary Supreme Court precedent,<sup>390</sup> the court nonetheless reasoned that "a dog's alert to the vehicle, standing alone, will justify searching the occupants if there is evidence that having the dog sniff the occupants

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378. *Id.* at 775.

379. 2011 IL App (2d) 100379, 959 N.E.2d 195.

380. *Id.* ¶ 2.

381. *Id.*

382. *Id.*

383. *Id.* ¶ 3.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* ¶¶ 5, 14.

388. *Id.* ¶ 9.

389. *Id.* ¶ 10.

390. *Id.* ¶ 9. Specifically, the *Neuberger* court recognized the Supreme Court's decision in *United States v. Di Re*, 332 U.S. 581 (1948). *Id.* (citing *Di Re* for the proposition that "[p]robable cause to search a vehicle for contraband does not automatically confer authority to conduct an incidental search of the occupants of the vehicle, even if the contraband in question is the sort that could easily be concealed on one's person"). The *Neuberger* court, sitting in the Second District, also recognized contrary precedent from the Appellate Court of Illinois, Fourth District. *Id.* ¶ 10. (first citing *People v. Staley*, 778 N.E.2d 362 (Ill. App. Ct. 2002); and then citing *People v. Fondia*, 740 N.E.2d 839 (Ill. App. Ct. 2000)).

individually would raise valid safety concerns.”<sup>391</sup>

One other example involving a dog alert should suffice to make the point. In 2014, an Appellate Division from the Supreme Court of New York noted that “it is well established that [t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle *and its occupants*.”<sup>392</sup> In *People v. Rasul*,<sup>393</sup> police were on the lookout for a particular vehicle suspected of transporting cocaine.<sup>394</sup> While on patrol, State Trooper Gary Denise observed a matching vehicle change lanes without signaling and initiated a traffic stop.<sup>395</sup> During the stop, Denise and backup State Trooper John Knoetgen smelled marijuana and, according to the court, conducted a “pat down and/or search” of the driver—Faqr Rasul.<sup>396</sup> Because “the circumstances presented and the observations made by the troopers provided probable cause for Knoetgen’s pat down/search of defendant,” the court reasoned that “no basis” existed to suppress the drugs ultimately found in Rasul’s pants.<sup>397</sup>

By raising two distinct constitutional problems, the probable cause cases comprise the most problematic category in this section. First, there is simply no exception to the search warrant requirement that permits officers to warrantlessly search a person for contraband based on a standard less than probable cause to arrest. As discussed in section III.A.2, there exists a search incident to arrest exception, but it requires probable cause to *arrest*—not search. Accordingly, the probable cause cases neither rely on the search incident to arrest exception nor any other exception to the search warrant requirement. Instead, those courts rely on the generic existence of probable cause to justify searching people without a warrant, which contradicts well-established Supreme Court precedent: Probable cause arising during a traffic stop from an officer’s smell or a drug-detection dog alert permits only the search of a vehicle and its containers—nothing more.<sup>398</sup>

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391. *Neuberger*, 2011 IL App (2d) 100379, ¶ 10, 959 N.E.2d at 199–200.

392. *People v. Rasul*, 995 N.Y.S.2d 380, 383 (App. Div. 2014) (emphasis added) (quoting *People v. Cuffie*, 972 N.Y.S.2d 383, 384 (App. Div. 2013)). This language has taken on a bit of a life of its own in New York. See *People v. Sostre*, 100 N.Y.S.3d 768, 772 (App. Div. 2019); *People v. Dolan*, 86 N.Y.S.3d 306, 308 (2018); *People v. Williams*, 43 N.Y.S.3d 190, 193 (App. Div. 2016).

393. 995 N.Y.S.2d 380 (App. Div. 2014).

394. *Id.* at 381.

395. *Id.*

396. *Id.* at 381–82, 383.

397. *Id.* at 383.

398. See *United States v. Di Re*, 332 U.S. 581, 587 (1948) (“We are not convinced that a person,

Contrary to that precedent, the probable cause cases illustrate lower courts relying on probable cause to search a vehicle, pursuant to the automobile exception, to instead search a person. Although the Supreme Court has made it clear that every Fourth Amendment action—be it a “search” or a “seizure”—requires separate and individualized probable cause, those cases above hold that probable cause to search a car simultaneously justifies several other Fourth Amendment actions, including the search of a vehicle’s driver. Such an approach both misapplies the probable cause standard and deviates from the automobile exception itself. As the Supreme Court has recognized, “its name alone should make all this clear enough: It is, after all, an exception for automobiles.”<sup>399</sup>

Additionally, in 1947, the Supreme Court recognized that probable cause to search a vehicle does not extend to the vehicle’s occupants in *United States v. Di Re*.<sup>400</sup> In *Di Re*, officers stopped a vehicle in which Michael Di Re was riding based on their suspicions that the driver was in possession of counterfeit gasoline ration coupons.<sup>401</sup> During the stop, Di Re was “frisked” and then taken into custody.<sup>402</sup> At the police station, officers ordered Di Re to empty his pockets and discovered “[t]wo gasoline and several fuel oil ration coupons.”<sup>403</sup> Declining to interpret the automobile exception to permit searching a vehicle’s passengers, the Court held that the warrantless search of Di Re violated the Fourth Amendment.<sup>404</sup> Justice Robert Jackson reasoned for the majority: “We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.”<sup>405</sup>

More recently, *Di Re* weighed heavily in the *Houghton* majority’s

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by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.”); *see also* *Collins v. Virginia*, 584 U.S. \_\_\_, 138 S. Ct. 1663, 1671 (2018) (“[T]he scope of the automobile exception extends no further than the automobile itself.”); *United States v. Ross*, 456 U.S. 798, 809 (1982) (“In short, the [automobile] exception to the warrant requirement . . . applies only to searches of vehicles that are supported by probable cause.”); *cf.* *Henry v. United States*, 361 U.S. 98, 104 (1959) (“The fact that the suspects were in an automobile is not enough [to justify the seizure of their persons and property. The automobile exception] liberalized the rule governing searches when a moving vehicle is involved. But that [exception] merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause.”).

399. *Collins*, 138 S. Ct. at 1673.

400. 332 U.S. 581, 587 (1948).

401. *Id.* at 583.

402. *Id.*

403. *Id.*

404. *Id.* at 587.

405. *Id.*

reasoning that the search of a person and the search of property are two distinguishable Fourth Amendment intrusions.<sup>406</sup> Turning to Justice Jackson’s majority opinion for support, Justice Scalia wrote that *Di Re* made “very clear” the “distinction between search of the person and search of property.”<sup>407</sup> Even the *Houghton* dissent viewed *Di Re* as directly on point, calling it “the only automobile case confronting the search of a passenger defendant.”<sup>408</sup> The dissent commented that *Di Re* established a “settled distinction between drivers and passengers” that made it “quite plain” that the search of a passenger’s belongings involves a serious intrusion.<sup>409</sup> Despite being divided over whether the automobile exception permitted the search of a passenger’s *belongings*, the *Houghton* Court was uniformly aligned in at least one proposition: The automobile exception does not support the warrantless search of passengers’ *persons*.<sup>410</sup>

The import of *Di Re* and *Houghton* is clear;<sup>411</sup> *Di Re* does not permit the warrantless search of vehicle occupants.<sup>412</sup> Rather, as *Houghton* clarified, the automobile exception allows only for the warrantless search

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406. *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999).

407. *Id.* at 304 n.1.

408. *Id.* at 309 (Stevens, J., dissenting).

409. *Id.* at 309–10.

410. Compare *id.* at 303 (majority opinion) (discussing *Di Re* and noting that the search of a passenger involves “traumatic consequences” that are “not to be expected when the police examine an item of personal property found in a car”), with *id.* at 313 (Stevens, J., dissenting) (noting that “the Court’s automobile-centered analysis limits the scope of its holding”).

One year after *Houghton*, the Court applied the automobile exception to justify a pair of warrantless vehicle searches that took place following arrests. *Pennsylvania v. Labron*, 518 U.S. 938, 939–40 (1996). The *Pennsylvania v. Labron* opinion was inconsequential but for perhaps the Court’s clarification that the automobile exception does not require the presence of exigent circumstances. *Id.* at 940 (“If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.”).

411. *E.g.*, *United States v. Moore*, 390 F. App’x 503, 507 (6th Cir. 2010) (“Supreme Court case law is clear that the standard for searching a car is very different than that of searching a passenger of a car.”).

412. *United States v. Di Re*, 332 U.S. 581, 587 (1948); accord *United States v. Williams*, 650 F. Supp. 2d 633, 673 (W.D. Ky. 2009) (“[T]he automobile exception, while it may justify a search of the car’s interior and the personal possessions of its occupants found therein, it will not alone justify the warrantless search of the vehicle’s occupants themselves.”); *Lessley v. City of Madison*, 654 F. Supp. 2d 877, 901 (S.D. Ind. 2009) (applying *Di Re* to conclude that “[t]he smell of marijuana emanating from a car combined with the presence of rolling papers on a floorboard does not give officers probable cause to believe that a search of each of the occupants . . . was clearly established”); *State v. Freeman*, 290 P.3d 908, 909 (Or. Ct. App. 2012) (“The state now concedes that the search of defendant was unlawful under the Fourth Amendment to the United States Constitution, because the automobile exception authorizes a warrantless search of a vehicle but not body searches of the vehicle’s occupants.”); *State v. Mitchell*, 622 N.E.2d 680, 686 (Ohio Ct. App. 1993) (“After a review of the record and the authorities cited, we find that appellant’s mere presence in the vehicle did not justify the warrantless search of his shoes.”).

of a vehicle and its containers “capable of concealing the object of the search.”<sup>413</sup>

### B. Arresting Vehicle Occupants

As if the appellate courts discussed in the previous section were not concerning enough, there exists an entirely separate group of courts that permit the *arrest* of a vehicle’s occupants based solely on probable cause to *search* the vehicle.<sup>414</sup> This section offers a representative sample of those courts, which generally fall into two categories. First, those that misconstrue probable cause to search a car as probable cause to arrest the car’s occupants. Second, those holding that a positive dog alert alone provides probable cause to arrest one or all of a vehicle’s occupants—in addition to searching the vehicle itself. Section III.B concludes by arguing that both categories of cases abandon the probable cause standard guaranteed by the text of the Fourth Amendment.

To begin, some courts construe probable cause to search a vehicle as sufficient probable cause to also arrest the vehicle’s occupants.<sup>415</sup> Consider, *State v. Wells*,<sup>416</sup> where an officer smelled marijuana emanating from a van, searched the van, found five bags of marijuana, and arrested the van’s driver.<sup>417</sup> Those facts, by themselves, are hardly noteworthy, but the Court of Appeal of Florida included some surprising comments in its brief opinion.<sup>418</sup> Citing the automobile exception, the appellate court commented that an officer smelling marijuana from a vehicle “authorizes *the arrest of such person* and a warrantless search, either before or after the arrest, of the passenger compartment of the vehicle, and closed containers therein, for evidence of the crime.”<sup>419</sup>

A more direct problematic example of a lower court relying on the probable cause to search a vehicle to justify the arrest of vehicle occupants

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413. *Houghton*, 526 U.S. at 307 (Breyer, J., concurring).

414. *See, e.g.*, *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998) (multiple occupants); *Chambers v. State*, No. CACR 01-921, 2002 WL 343398, at \*2 (Ark. Ct. App. 2002) (multiple occupants); *State v. Arrington*, 556 So. 2d 263, 265–66 (La. Ct. App. 1990) (single occupant—driver); *State v. Funkhouser*, 782 A.2d 387, 402 (Md. Ct. Spec. App. 2001) (single occupant—driver); *State v. Voichahoske*, 709 N.W.2d 659, 671 (Neb. 2006) (multiple occupants).

415. *See* *Partlow v. State*, 24 A.3d 122, 132 (Md. Ct. Spec. App. 2011); *State v. Overby*, 1999 ND 47, ¶ 13, 590 N.W.2d 703, 707; *Branch v. State*, 335 S.W.3d 893, 901 (Tex. Crim. App. 2011).

416. 516 So. 2d 74 (Fla. Dist. Ct. App. 1987).

417. *Id.* at 74–75.

418. *See id.* at 75.

419. *Id.* (emphasis added) (citing *United States v. Ross*, 456 U.S. 798 (1982)).

arose in *Brunson v. State*.<sup>420</sup> In *Brunson*, Alton Brunson was as a passenger in a vehicle stopped for violating a noise ordinance at roughly 1:30 a.m.<sup>421</sup> Detective John Breckon, who stopped the car, smelled marijuana as he approached.<sup>422</sup> He therefore ordered all four occupants out of the car and searched each of them.<sup>423</sup> Following “a pat-down search” of Brunson, Detective Breckon discovered “a small quantity of marijuana and a package of cigarette rolling papers in his left front pants pocket.”<sup>424</sup> He then arrested Brunson, searched Brunson’s person again, and found “two rocks of cocaine.”<sup>425</sup>

The state charged Brunson with one count of felony possession of cocaine and one count of misdemeanor possession of marijuana.<sup>426</sup> Following the denial of Brunson’s motion to suppress, the Arkansas Appeals Court reversed his conviction, noting in part that “[n]othing resembling probable cause existed until the officer searched appellant’s pocket and found the marijuana.”<sup>427</sup> But the Arkansas Supreme Court reversed and affirmed Brunson’s conviction.<sup>428</sup> In doing so, it found Brunson’s contention that the odor of marijuana did not justify the warrantless search of a vehicle passenger “without merit.”<sup>429</sup> To the contrary, it upheld the search by reasoning that “the smell of the marijuana or its smoke emanating from the vehicle” gave Detective Breckon “probable cause to *arrest the occupants of the vehicle*.”<sup>430</sup> According to the court, the warrantless search of Brunson was valid as incident to a lawful arrest.<sup>431</sup>

In addition to the above examples, some courts rely on a positive dog alert to simultaneously provide probable cause to search a vehicle and

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420. 940 S.W.2d 440, 441 (Ark. 1997). The *Brunson* example is merely illustrative. See *United States v. Beltran-Palafox*, 731 F. Supp. 2d 1126, 1166 (D. Kan. 2010); *Harvey v. State*, 653 So. 2d 1146, 1146 (Fla. Dist. Ct. App. 1995) (per curiam); *Richard v. State*, 7 N.E.3d 347, 350 (Ind. Ct. App. 2014); *State v. Reha*, 686 N.W.2d 80, 84 (Neb. Ct. App. 2004).

421. *Brunson*, 940 S.W.2d at 441.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Brunson v. State*, 925 S.W.2d 434, 437 (Ark. Ct. App. 1996), *rev’d*, 940 S.W.2d 440 (Ark. 1997).

428. *Id.* at 443.

429. *Id.* at 441.

430. *Id.* at 442 (emphasis added).

431. *Id.*; see also *id.* at 444 (Newbern, J., dissenting) (referring to the majority opinion as reaching a “remarkable conclusion” because “the search commenced prior to any arrest, and the arrest was the result of the search”).

arrest its occupants.<sup>432</sup> In *State v. Arrington*,<sup>433</sup> for instance, two deputies stopped William Arrington for speeding.<sup>434</sup> During the stop, Arrington could not produce proof of registration or insurance and exhibited “nervous” behavior, prompting Crum to walk his drug-detection dog around the car.<sup>435</sup> The dog alerted, and Detective Crum asked Arrington for consent to search the vehicle, which Arrington declined to provide.<sup>436</sup> In response, Detective Crum arrested and detained Arrington.<sup>437</sup> A subsequent search of Arrington’s vehicle, pursuant to a search warrant, revealed thirteen pounds of marijuana in the trunk, cash under the carpet, and a vial of cocaine.<sup>438</sup>

Arrington was charged with a variety of possession offenses and moved to suppress.<sup>439</sup> The Court of Appeal of Louisiana affirmed the denial of his suppression motion.<sup>440</sup> Without a supporting citation, it pointedly held that “[t]he dog’s alert, coupled with Crum’s observations and his ten years of experience, eight or nine of which were involved in working narcotics cases as time permitted, gave Crum *probable cause to arrest* [Arrington] at the scene of the traffic stop.”<sup>441</sup>

At the federal level, *United States v. Anchondo*<sup>442</sup> presents a concerning illustration of a circuit court interpreting probable cause generated by a dog alert to justify arresting a vehicle’s occupants.<sup>443</sup> In *Anchondo*, Erik Anchondo was driving with his passenger, Felipe Garcia, when the pair

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432. *E.g.*, *State v. Harding*, 9 A.3d 547, 577 (Md. Ct. Spec. App. 2010).

433. 556 So. 2d 263 (La. Ct. App. 1990).

434. *Id.* at 264.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* at 265.

439. *Id.* at 264–65.

440. *Id.* at 266.

441. *Id.* at 265 (emphasis added).

442. 156 F.3d 1043 (10th Cir. 1998).

443. *Id.* at 1045. Again, the *Anchondo* discussion is merely illustrative. *See, e.g.*, *United States v. Chartier*, 772 F.3d 539, 545 (8th Cir. 2014) (“[T]he fact that Reso alerted to the vehicle, coupled with the fact that a thorough search of the vehicle revealed no obvious source of the scent to which he alerted, made it more likely that the scent had come from one of the vehicle’s occupants.”); *United States v. Romero*, 156 F.3d 1245, 1245 (10th Cir. 1998) (unpublished table decision) (noting in vehicle checkpoint context that “[a] dog alert alone establishes probable cause to arrest”); *United States v. Klinginsmith*, 25 F.3d 1507, 1510 (10th Cir. 1994) (holding that dog alert to vehicle provided probable cause to arrest occupants); *United State v. Garcia*, 52 F. Supp. 2d 1239, 1253 (D. Kan. 1999) (“Even in the absence of the other information known by the troopers, once the drug dog alerted on the two vehicles, the troopers had probable cause to arrest Garcia and the other occupants of the two vehicles.”).

was stopped at a routine vehicle checkpoint.<sup>444</sup> During the stop, one officer walked his drug-detection dog around the vehicle.<sup>445</sup> After the dog alerted, Anchondo exited the vehicle, and the dog alerted again to the inside of the car.<sup>446</sup> Although agents found nothing in the vehicle, they elected to search Anchondo's person and found a package of cocaine strapped to his stomach.<sup>447</sup>

Anchondo was charged with one count of possession with intent to distribute more than 500 grams of cocaine.<sup>448</sup> He entered a conditional plea of guilt and appealed the district court's denial of his motion to suppress.<sup>449</sup> Before the Tenth Circuit, Anchondo conceded that the dog alert provided officers probable cause to search his vehicle, but argued that it did not permit searching his person without a warrant.<sup>450</sup> The court disagreed. It first properly recognized that the search incident to arrest doctrine can apply even when the search precedes the arrest where: "(1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed shortly after the search."<sup>451</sup>

Applying that doctrine, the question shifted to whether the officer had probable cause to arrest Anchondo at the time officers searched his person.<sup>452</sup> In concluding that they did, the court wrote in a direct and controversial fashion that "[a] canine alert provides the probable cause necessary for searches *and* seizures."<sup>453</sup> Because the dog alerted to Anchondo's car, the court reasoned, probable cause existed to arrest Anchondo.<sup>454</sup> The court further reasoned that the "fruitless search" of Anchondo's car "increased the chances that whatever the dog had alerted to was on" Anchondo's or Garcia's person.<sup>455</sup>

The Tenth Circuit's *Anchondo* conclusion has influenced a number of

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444. *Anchondo*, 156 F.3d at 1044.

445. *Id.*

446. *Id.*

447. *Id.* at 1044–45.

448. *Id.* at 1044.

449. *Id.*

450. *Id.* at 1045.

451. *Id.*

452. *Id.*

453. *Id.* (emphasis added) (citing *United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1991)). The court's reliance on *United States v. Ludwig* is quizzical given that *Ludwig* involved a dog alert during a traffic stop that caused officers only to warrantlessly search the trunk of defendant's car. *Ludwig*, 10 F.3d at 1525–27. Nowhere in the page cited by the *Anchondo* court does the *Ludwig* opinion suggest that a positive dog alert during a vehicle stop provides probable cause to *arrest*. See *id.* at 1527.

454. *Anchondo*, 156 F.3d at 1045.

455. *Id.*

other lower federal courts to hold similarly.<sup>456</sup> Although state courts have not uniformly followed *Anchondo*,<sup>457</sup> at least one has adopted its conclusion that a dog alert permits the warrantless arrest of vehicle passengers. For example, in *Richard v. State*,<sup>458</sup> Officer John Weir stopped the car in which Charla Richard was riding because the vehicle's driver, Christopher Fields, repeatedly crossed the center line.<sup>459</sup> During the traffic stop, Officer Weir arrested Fields pursuant to an outstanding warrant.<sup>460</sup> After placing Fields in his squad car, Officer Weir walked his drug detection dog, Rex, around the vehicle.<sup>461</sup> After Rex alerted to the driver's door, Officer Weir ordered Richard out of the car, noticed she was favoring one side of her body, and "asked her to raise her arm."<sup>462</sup> A small tin containing meth fell from Richard's shirt, and Officer Weir placed her under arrest.<sup>463</sup>

The state charged Richard with possession of methamphetamine.<sup>464</sup> Following the denial of her motion to suppress, Richard was found guilty and appealed her conviction.<sup>465</sup> The appellate court affirmed Richard's conviction, holding that she was lawfully searched incident to her arrest.<sup>466</sup> The court reasoned that the dog's alert provided probable cause to warrantlessly search the vehicle.<sup>467</sup> Without a supporting citation, the court then concluded that "because there was probable cause to believe the vehicle contained drugs, there was probable cause to believe any of its passengers had at least constructive possession of the drugs."<sup>468</sup>

Collectively, the foregoing cases provide an illustrative example of lower courts abandoning the probable cause standard all together. Although each case is constitutionally problematic, *Richard* is perhaps the most concerning moving forward because the *Richard* Court reached its erroneous conclusion based on a fundamental misunderstanding of the

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456. See *United States v. Ojeda-Ramos*, 455 F.3d 1178, 1183 n.9 (10th Cir. 2006); *United States v. Chartier*, No. CR13-0018, 2013 U.S. Dist. LEXIS 154443, at \*9–12 (N.D. Iowa Aug. 16, 2013); *United States v. Beltran-Palafox*, 731 F. Supp. 2d 1126, 1166 (D. Kan. 2010).

457. Cf. *State v. Anderson*, 136 P.3d 406, 415 (Kan. 2006) (providing an overview of the state courts that have declined to follow *Anchondo*'s approach).

458. 7 N.E.3d 347 (Ind. Ct. App. 2014).

459. *Id.* at 348.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.* at 348–49.

466. *Id.* at 350.

467. *Id.* at 349–50.

468. *Id.* at 349.

Supreme Court's 2003 decision in *Maryland v. Pringle*.<sup>469</sup> In *Pringle*, an officer stopped a vehicle carrying three men for speeding in the early hours of the morning.<sup>470</sup> The officer searched the car and found “\$763 of rolled-up cash from the glove compartment and five glassine baggies of cocaine from between the back-seat armrest and the back seat.”<sup>471</sup>

After each passenger denied ownership of the cocaine, the officer arrested all three men, one of whom was Pringle.<sup>472</sup> Pringle challenged his arrest, contending that the officer lacked probable cause to believe that the contraband belonged specifically to him.<sup>473</sup> The Supreme Court disagreed, observing that “[t]he probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.”<sup>474</sup> Viewed in that context, the Court held that it was an “entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.”<sup>475</sup> Accordingly, the Court reasoned that “a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.”<sup>476</sup>

Lower court reliance on *Pringle* to justify the arrest of vehicle occupants is misplaced for at least four reasons. First, and as a basic premise, *Pringle* is not an automobile exception case. Rather, it establishes the outermost limits of the probable cause standard *to arrest*.<sup>477</sup> Recall that the officer in *Pringle* found contraband during the search of a vehicle authorized by the automobile exception. Then, after discovering tangible evidence of a crime—rolled-up cash and five baggies of cocaine—the officer arrested the vehicle's three passengers, each of whom denied owning the contraband. On those facts, the *Pringle* Court

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469. 540 U.S. 366 (2003).

470. *Id.* at 366.

471. *Id.* at 367–68.

472. *Id.* at 369.

473. *Id.*

474. *Id.* at 371.

475. *Id.* at 372.

476. *Id.*

477. See Tracey Maclin, *The Pringle Case's New Notion of Probable Cause: An Assault on Di Re and the Fourth Amendment*, 2003–2004 CATO SUP. CT. REV. 395, 432 (arguing that the Court's holding in *Pringle* was an overbroad expansion of the probable cause to arrest standard); Amanda Peters, *Mass Arrests & the Particularized Probable Cause Requirement*, 60 B.C. L. REV. 217, 238 (2019) (describing *Pringle* as a probable cause to arrest case); accord *Thomas v. State*, 81 N.E.3d 621, 626 (Ind. 2017) (explaining that the Court's holding in *Pringle* guides probable cause to arrest determinations); *State v. Suddith*, 842 A.2d 716, 726 (Md. 2004) (“[T]he *Pringle* case dealt with the lower threshold standard of probable cause [to arrest] . . .”).

held that tangible and already-discovered evidence could justify the warrantless *arrest* of a vehicle's occupants if no one admitted ownership.

By contrast, investigating officers in *Arrington*, *Brunson*, *Anchondo*, and *Richard* first warrantlessly searched people—not the vehicle—by relying on a dog alert (*Arrington*, *Anchondo*, *Richard*) or their plain smell (*Brunson*). Only after this warrantless search were the suspects arrested. But no exception to the warrant requirement justifies the warrantless search of a person.<sup>478</sup> Accordingly, lower courts' reliance on *Pringle* to uphold the arrest of vehicle occupants dramatically misconstrues longstanding Supreme Court precedent.

Second, as a general public policy concern, the absence of clarity in the law makes it nearly impossible to expect officers to properly enforce it while also eliminating the incentive to develop more thorough investigative techniques. The probable cause standard is already challenging for officers to articulate,<sup>479</sup> but the judiciary has exacerbated the problem further by failing to clarify with precision how the probable cause standard applies *separately* to each individualized Fourth Amendment action (i.e., “search” or “seizure”). Consequently, the judiciary has deprived law enforcement of the benefit it receives from clarity in the law—a benefit the Supreme Court has long-recognized.<sup>480</sup> From a broader perspective, the unchecked expansion of warrantless searches undermines the historical purpose of the Fourth Amendment to serve as a restriction on government action. Indeed, “[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.”<sup>481</sup>

A third more nuanced problem exists in the dog alert setting. Assume, as was the case in *Richard*, that a dog alert precedes the arrest of multiple vehicle occupants. Now consider the judicial force of misapplying the union of *Pringle* and *Rawlings* to the context of the automobile exception. Recall that *Rawlings* permits an officer to lawfully search a person incident to arrest before formally arresting the person—so long as the probable cause to arrest exists when the search occurs. If *Richard* is correct that a dog alert, post-*Pringle*, establishes probable cause to arrest all occupants of a vehicle, suddenly *Rawlings* justifies all the otherwise

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478. *See supra* note 319.

479. *See State v. Greene*, 591 P.2d 1362, 1369 (Or. 1987) (“People subjected to illegal searches that turn up nothing incriminating do not appear in the criminal process. Illegal searches rarely surface in a civil proceeding because legislatures and courts have not created effective civil remedies.”).

480. *E.g.*, *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979) (“A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”).

481. *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

problematic warrantless *searches* discussed earlier in this Article.<sup>482</sup> But in that scenario, no contraband yet exists.<sup>483</sup> Such an expansive approach wholly disregards the requirement of probable cause—one that “has roots . . . deep in our history.”<sup>484</sup>

Most troubling is the fourth and final problem, which is one that will never make it into the pages of a reported judicial opinion. Consider a scenario where a dog alerts to a vehicle and all of its occupants are arrested and searched incident to their arrests, yet no contraband is found. What happens at that point? Perhaps nothing because there is no constitutional harm for the Fourth Amendment to remedy.<sup>485</sup> Justice Jackson, the Chief Prosecutor in the Nuremberg trials and the author of the majority’s decision in *Di Re*, was deeply concerned about that very scenario fifty years ago:

[A]n illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court’s supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention.<sup>486</sup>

Justice Jackson’s concerns remain prevalent today.<sup>487</sup> Sure, the occupants could bring a civil claim, but that has little likelihood of success.<sup>488</sup> That practical scenario emphasizes the importance of the probable cause requirement, the critical differences between probable cause to search versus arrest, and the basic limitation of the automobile exception. Collectively, probable cause to search a vehicle pursuant to the automobile exception justifies searching the vehicle—and nothing more.

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482. See *supra* section I.A.

483. See *Brunson v. State*, 925 S.W.2d 434, 444 (Ark. Ct. App. 1996) (Newbern, J., dissenting).

484. *Henry v. United States*, 361 U.S. 98, 100 (1959).

485. As Judge Sneed once wrote:

The Fourth Amendment protects the guilty because only by doing so can the innocent be protected. The innocent are not mere incidental beneficiaries of an amendment designed to protect the guilty. The innocent are its primary beneficiaries; the reasonableness of any expectation of privacy should be ascertained from their standpoint.

*United States v. Quinn*, 751 F.2d 980, 981 (9th Cir. 1984) (Sneed, J., dissenting).

486. *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting).

487. *Id.* at 181 (“There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.”).

488. Larry Glasser, *The American Exclusionary Rule Debate: Looking to England and Canada for Guidance*, 35 GEO. WASH. INT’L L. REV. 159, 191 (2003) (explaining that citizens only have a “minimal” chance to recover civilly for violations of their Fourth Amendment rights because juries are overwhelmingly biased and unsympathetic towards those involved in criminal conduct).

## CONCLUSION

Every police investigative action that implicates Fourth Amendment protections requires separate and individualized probable cause. The presence of probable cause in the context of the automobile exception, whether generated by an officer or a drug-detection dog, authorizes just one thing: a vehicle search.<sup>489</sup> Justice Sotomayor best summarized the constitutional scope of the automobile exception in her *Collins* majority opinion, writing, “its name alone should make all this clear enough: It is, after all, an exception for automobiles.”<sup>490</sup>

But lower courts are expanding the probable cause associated with the automobile exception to justify the search or arrest of vehicle occupants. These courts authorize almost any warrantless investigative technique during a traffic stop so long as officers have “probable cause.” In doing so, they fail to distinguish whether that probable cause supports a search or seizure, leading to reliance on inapplicable search warrant exceptions like exigent circumstances or search incident to arrest. Those approaches create an unconstitutional collage of warrantless investigative techniques by deviating from the automobile exception and misapplying the probable cause standard.

Relatedly, as the application of the automobile exception expands, so too does the application of probable cause more generally. Viewed in that context, then, the automobile exception is merely one symptom of a much larger constitutional issue—the expansion of probable cause—that permits the careless expansion of other exceptions to the warrant requirement. But as the Nebraska Supreme Court has aptly recognized, “[p]robable cause to arrest is not some vapor permeating a place, engulfing anyone who happens to be at a site where unlawful conduct may be occurring or may have occurred.”<sup>491</sup>

In Ernest Hemingway’s 1926 novel, *The Sun Also Rises*, one man asks another, “how did you go bankrupt?”<sup>492</sup> The other man replied, “Two

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489. The Georgia Supreme Court has also succinctly summarized the scope of the automobile exception:

[T]he automobile exception cases do not hold that a search warrant is never needed to search a car. There is an automobile exception to the search warrant requirement, not an exemption. Otherwise, the Supreme Court of the United States would have held that the police would not, under any circumstances, need to obtain a search warrant for an automobile, provided they have probable cause for the search.

State v. LeJeune, 576 S.E.2d 888, 892 (Ga. 2003) (internal quotation marks omitted).

490. *Collins v. Virginia*, 584 U.S. \_\_\_, 138 S. Ct. 1663, 1673 (2018).

491. *State v. Evans*, 389 N.W.2d 777, 781 (Neb. 1986) (“[P]robable cause to arrest is particularized and exists in reference to a specific individual.”).

492. ERNEST HEMINGWAY, *THE SUN ALSO RISES* 141 (1926).

ways: gradually and then suddenly.”<sup>493</sup> The idea is that the world is full of thresholds; those that are often approached without warning and have dire consequences once reached. Applied to this Article, every small deviation from constitutional standards does not seem like a cause for alarm on its own. But somewhere there exists a threshold. Wherever it is, we have passed it—as demonstrated by the countless illustrations of lower court cases misapplying the automobile exception and its related probable cause standard.

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493. *Id.*

