LET'S MAKE SOME "SCENTS" OF OUR FOURTH AMENDMENT RIGHTS: THE DISCRIMINATORY TRUTHS BEHIND USING THE MERE SMELL OF BURNT MARIJUANA AS PROBABLE CAUSE TO SEARCH A VEHICLE

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I. INTRODUCTION

On March 13, 2018, Jason Serrano, who was recovering from abdominal surgery at the time, was riding in the passenger seat of his friend's car when they were pulled over by New York Police Department Officer Kyle Erickson for a broken taillight.[1] Officer Erickson approached the car and claimed that he smelled marijuana emanating from the vehicle.[2] What began as a routine traffic stop turned to a pretext traffic stop during which Officer Erickson ordered

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[1] *See* Jose Martinez, *Footage Appears to Show NYPD Officer Planting Marijuana Inside Car for Allegedly the Second Time*, COMPLEX (Mar. 18, 2020), https://www.complex.com/life/2020/03/nypd-officer-caught-on-camera-planting-marijuana-inside-car-for-a-second-time (detailing the encounter that occurred between Officer Erickson and Serrano and the events that led to Serrano's arrest); *see also How a Routine Stop for a Bad Tail Light Can Land You in Jail!*, GAMBONE L., http://gambonelaw.com/how-a-routine-stop-for-a-bad-tail-light-can-land-you-in-jail (last visited Mar. 26, 2021) (explaining that a broken taillight is a type of traffic stop that a police officer can make and once a traffic stop has been made, the officer is allowed to approach the driver, speak to the driver, and explore other illegal suspicions not involved with the traffic violation).

[2] *See* United States v. Winters, 221 F.3d 1039, 1041–42 (8th Cir. 2000) (holding that the officer had probable cause to search the vehicle after he stopped the vehicle for a traffic violation and detected the odor of burnt marijuana); *see also* Martinez, *supra* note 1 (reporting that Officer Erickson had stated the broken taillight as the justification for the traffic stop, but Serrano argued that there was no way the officers could have noticed the taillight because their car was so far away).

Serrano and his friend to step out of the vehicle so that he may conduct a search.[3] In response to Officer Erickson's request, Serrano lifted up his shirt and showed Officer Erickson his surgical wound, advising him that he could "barely move."[4] Officer Erickson, showing complete indifference to Serrano's poor physical state, pushed Serrano to the ground and handcuffed him.[5] After placing Serrano under arrest, Officer Erickson conducted a search of Serrano and the entire vehicle, but did not find any drugs.[6] A video from Officer Erickson's body cam shows Officer Erickson's visible frustration from being unable to find anything, and audio captures Officer Erickson saying, "[w]e gotta find something."[7] Towards the end of the search Officer Erickson is shown planting a

[3] *See* Whren v. United States, 517 U.S. 806, 809–10 (1996) (holding that pretext traffic stops do not violate the Fourth Amendment and "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"); *see also* Martinez, *supra* note 1 (stating that Officer Erickson claims he smelled marijuana from the moment Serrano rolled down the side window of the vehicle).

[4] *See* Martinez, *supra* note 1 (claiming that Serrano was recovering from a stab wound that had required abdominal surgery); *see also* Ashleigh Atwell, *NYPD Officer Still Has a Job Even Though He Was Caught Planting Weed on Two Innocent Men in Separate Incidents*, ATLANTA BLACK STAR (Mar. 20, 2020), https://atlantablackstar.com/2020/03/20/nypd-officer-still-has-a-job-even-though-he-was-caught-planting-weed-on-two-innocent-men-in-separate-incidents (detailing Serrano's personal account of the incident and explaining that during his encounter with the police he was unable to stand upright because he had staples in his stab wound).

[5] *See* Atwell, *supra* note 4 (concluding that Serrano was charged with "obstruction of government administration, unlawful possession of marijuana, and criminal possession of a controlled substance"); *see also* Sydney Pereira, *Staten Island NYPD Officers Accused of Planting Marijuana on Suspect Also Seen With Weed in Patrol Car, Lawyers Say*, GOTHAMIST (June 25, 2020, 3:47 PM), https://gothamist.com/news/staten-island-nypd-officers-accused-planting-marijuana-suspect-also-seen-weed-patrol-car-lawyers-say (stating that lab results confirmed that the second controlled substance that Serrano had been arrested for was not found, and ultimately Serrano pleaded guilty to resisting arrest, but the other charges against him were dismissed).

[6] *See* Martinez, *supra* note 1 (noting that Officer Erickson can be heard saying, "[w]e gotta find something," as he searches Serrano's jacket for drugs); *see also* Samantha Melamed, *Philadelphia Police are Searching More Cars for Marijuana – but Finding Less of It, Critics Say*, PHILA. INQUIRER (Oct. 31, 2019, 5:00 AM), https://www.inquirer.com/news/philadelphia/philadelphia-police-racial-profiling-marijuana-vehicle-stops-20191031.html (emphasizing the contradiction between the fact that while the number of times police officers listed the odor of marijuana as a justification for traffic stops and searches increased, the number of "hit rates" at which drugs were found inside of the vehicles decreased).

[7] *See* Atwell, *supra* note 4 (stating that Officer Erickson went back to the car for a second time to conduct another search, since he had not found any contraband in his initial search); *see also* Royce Dunmore, *Video of Cop Violently Snatching Black Driver Out of Car Sparks Investigation*, NEWSONE (July 16, 2020), https://newsone.com/3977763/video-cop-snatching-black-driver-out-car-investigation (reporting the story of a traffic stop that turned violent after an officer claimed to smell marijuana emanating from the Black driver's vehicle and then proceeded to forcibly grab the driver out of his car, but marijuana was never found inside the vehicle).

marijuana bud in the vehicle.[8] Officer Erickson then ends the search by fist-bumping his partner in celebration.[9]

Sadly, this was not the first time Officer Erickson used the "smell of marijuana" as a justification for conducting a warrantless search of a vehicle, and this was not an isolated incident.[10] This type of police misconduct and justification for a warrantless search based on the "smell" of burnt marijuana has become a pattern in the United States.[11] Although the Fourth Amendment protects individuals from warrantless searches, the Supreme Court has held that a vehicle search is an exception.[12] If the police officer has probable cause to believe "the vehicle contains contraband or other evidence of a crime," the officer may conduct a vehicle search without a warrant.[13] Oftentimes police officers cite the

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[8] *See* Atwell, *supra* note 4 (emphasizing that Officer Erickson and his partner are heard asking each other if they are, "good," as though to confirm the fact that Officer Erickson had just planted the marijuana inside of the vehicle); *see also* Martinez, *supra* note 1 (confirming that Officer Erickson had also stated "find something" and "you good" during another arrest he had made where there were speculations that he had also planted marijuana in the car).

[9] *See* Martinez, *supra* note 1 (recounting the details in a traffic stop that resulted in Officer Erickson planting marijuana inside of the vehicle); *see also* Joseph Goldstein, *Officers Said They Smelled Pot. The Judge Called Them Liars*, N.Y. TIMES (Sept. 12, 2019), https://www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html (stating that New York City police officer Pedro Serrano, admitted that often times his colleagues conduct a vehicle stop and report the odor of marijuana, but once he arrives at the scene he does not smell any odor in the vehicle).

[10] *See* Atwell, *supra* note 4 (explaining that in February 2018, Officer Erickson pulled over a vehicle containing four Black men because the driver of the vehicle did not use his turn signal, and then Officer Erickson proceeded to conduct a search and plant marijuana in the vehicle); *see also* Goldstein, *supra* note 9 (revealing that an anonymous Manhattan detective stated he believes some officers lie about smelling marijuana and it is very difficult to prove whether or not someone actually smelled marijuana).

[11] *See* Shawn Stout & Andy Elders, "*I Smell Marijuana": How Virginia Gave Cops License to Harass*, JUST. FORWARD VA. (July 13, 2020), https://justiceforwardva.com/blog/2020/7/13/i-smell-marijuana-how-virginia-gave-cops-license-to-harass (explaining that the words "I smell marijuana" have become magic words and "police have learned that they don't need to actually find marijuana to make the search legal. They just have to say those three magic words, and the Fourth Amendment disappears"); *see also* Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 761 (2007) (discussing that the DEA has conducted racially profiled traffic stops in the past and officers are trained on "how to lengthen a routine traffic stop and leverage it into a search for drugs by extorting consent or manufacturing probable cause.").

[12] *See* Carroll v. United States, 267 U.S. 132, 154–56 (1925) (holding that a warrantless search of a vehicle is reasonable and does not violate the Fourth Amendment when the officer has probable cause to believe that the vehicle contains "contraband or illegal merchandise"); *see also* United States v. Ross, 456 U.S. 798, 825 (1982) (holding that a police officer who has probable cause may conduct a warrantless search of a vehicle and the scope of the search may be as thorough as a magistrate could lawfully authorize by a valid warrant).

[13] *See* Michael Rubinkam, *In Era of Legal Pot, Can Police Search Cars Based on Odor?*, AP NEWS (Sept. 23, 2019), https://apnews.com/article/0ba2cf617a414174b566af68262ef937 (concluding that states that have legalized marijuana will no longer accept smell alone as probable cause to believe the vehicle contains evidence of a crime thereby "provid[ing] a layer of protection that we lost sometime in the past."). *But see* Tom Abate, *Black Drivers Get Pulled Over by Police Less at Night When Their Race is Obscured by 'Veil of Darkness,' Stanford Study Finds*, STANFORD NEWS (May 5, 2020), https://news.stanford.edu/2020/05/05/veil-darkness-reduces-racial-bias-traffic-stops

smell of burnt marijuana as probable cause in order to justify a warrantless search of an entire vehicle.[14] The Supreme Court lacks a definitive statement regarding whether the smell of burnt marijuana emanating from a vehicle is sufficient probable cause to conduct a warrantless search of an entire vehicle.[15] As a result, federal circuit courts are split on the issue.[16]

This Comment addresses the negative effects that have resulted and will continue to result if police officers are encouraged by jurisprudence to conduct a warrantless search of an entire vehicle based on the smell of burnt marijuana.[17] Warrantless searches of an entire vehicle based merely on the smell of burnt marijuana grant officers unlimited power that will likely result in police misconduct, an increase in racially profiled traffic stops, and a distrust between police officers and the Black community amid the nationwide outrage over the death of George Floyd.[18] Part II of this Comment discusses the history of the

(stating that a Stanford-led study found that even in Colorado and Washington, states that have legalized marijuana, Black drivers were more likely than white drivers to have their cars searched after a traffic stop).

[14] *See* Melamed, *supra* note 6 (highlighting that in the last five years, police officers claimed the smell of marijuana as the reason for more than 25,000 car stops and searches, and in just the first quarter of 2019, police officers claimed the smell of marijuana in 3,300 searches); *see also* Ned Oliver, *Virginia Lawmakers Move to Ban Police Searches Based on the Smell of Marijuana*, VA. MERCURY (Aug. 28, 2020), https://www.virginiamercury.com/2020/08/28/virginia-lawmakers-move-to-ban-police-searches-based-on-the-smell-of-marijuana (noting that police officers often claim the odor of marijuana to justify a warrantless search and it is difficult for the defendant to challenge those claims).

[15] *See* United States v. Johns, 469 U.S. 478, 489 (1985) (Brennan, J., dissenting) ("[T]he Court today opines that '[w]hether respondents ever had a privacy interest in the packages reeking of marihuana is debatable.' . . . This is an issue which is the subject of a significant divergence of opinion in the lower courts"); *see also* Michael A. Sprow, *Wake Up and Smell the Contraband: Why Courts That Do Not Find Probable Cause Based on Odor Alone Are Wrong*, 42 WM. & MARY L. REV. 289, 296–97 (2000) (noting that the Supreme Court has yet to decide whether or not to adopt the plain smell doctrine, and has avoided answering the question).

[16] *See* Robinson v. State, 152 A.3d 661, 687 (Md. 2017) (holding that the officer had probable cause to search the entire vehicle based on the mere smell of marijuana emanating from defendant's vehicle); *see also* Commonwealth v. Scott, 210 A.3d 359, 365 (Pa. Super. Ct. 2019) (holding that "[u]nder these circumstances, the odor of burnt marijuana and small amount of contraband recovered from the passenger compartment of the vehicle did not create a fair probability that the officer could recover additional contraband in the trunk.").

[17] *See* United States v. Prandy-Binett, 995 F.2d 1069, 1075 (D.C. Cir. 1993) (Edwards, J., dissenting) (stating that "[i]n endorsing this conduct by the police, the majority gives officers license to snare guilty and innocent persons, alike, with no regard for their rights to be left alone in the absence of articulable suspicion or probable cause"); *see also* Stout & Elders, *supra* note 11 (describing the humiliating and intrusive emotions felt when an armed police officer forces an individual out of his or her car to conduct a vehicle search based solely on the smell of marijuana).

[18] *See* Rick Jervis, *Who Are Police Protecting and Serving? Law Enforcement Has History of Violence Against Many Minority Groups*, USA TODAY (June 13, 2020, 7:55 AM), https://www.usatoday.com/story/news/nation/2020/06/13/mistrust-police-minority-communities-hesitant-call-police-george-floyd/5347878002 (explaining the history of the Black community's strained relationship with officers and the feeling of mistrust that has led many to demand that cities defund the police after George Floyd's death); *see also* Marsha Mercer, *Police 'Pretext' Traffic Stops Need to End, Some Lawmakers Say*, PEW (Sept. 3, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/03/police-pretext-traffic-stops-need-to-end-some-lawmakers-say

Fourth Amendment.[19] In particular, it will discuss the vehicle exception to the search warrant requirement.[20] Part II will also review the current circuit split among the federal courts regarding whether the smell of burnt marijuana constitutes probable cause to conduct a warrantless search of an entire vehicle.[21] Part III examines the prevalence of discriminatory traffic stops and the shortcomings of the plain smell doctrine.[22]

Finally, Part IV offers a judicial and legislative solution to the circuit split.[23] The Supreme Court should grant certiorari and hold that the smell of burnt marijuana, alone, emanating from a vehicle does not establish probable cause to conduct a warrantless search of an entire vehicle because it violates the Fourth Amendment and is the type of warrantless search that the Framers of the

(stating the need for change after the George Floyd killing and how states are exploring ways to end police brutality by implementing potential laws that would reduce pretext traffic stops).

[19] *See* U.S. CONST. amend. IV (granting people the right to be protected from unreasonable searches and seizures by the government); *see also* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining the two-prong test that determines whether a search has occurred under the Fourth Amendment, which includes whether the individual exhibits a subjective expectation of privacy and whether that expectation was an expectation of privacy that society recognizes as reasonable).

[20] *See* Sprow, *supra* note 15, at 314–15 (explaining that the analysis of the expectation of privacy is an essential part of any Fourth Amendment claim, and the Supreme Court of the United States has held that there is less expectation of privacy in a vehicle compared to a house because of the vehicle's mobility); *see also* Ronald Richards, *The Nose Knows the Legal Accuracy of the Nose: People v. Taylor*, 16 T.M. COOLEY L. REV. 323, 355 (1999) (stating that in order to satisfy the reasonableness standard of the Fourth Amendment, the officer must have probable cause to conduct a warrantless search of a vehicle).

[21] *See* Jeff Welty, *Searches of Vehicles and Occupants Based on the Odor of Marijuana*, N.C. CRIM. L. (Sept. 19, 2016, 9:10 AM), https://nccriminallaw.sog.unc.edu/searches-vehicles-occupants-based-odor-marijuana/ (noting that federal courts are split on the issue and using the Tenth Circuit as an example of a federal court that has held that the smell of burnt marijuana does not constitute probable cause to search the entire vehicle, while using the Seventh Circuit as an example of a federal court that has held that the smell of burnt marijuana does constitute probable cause); *see also* United States v. McSween, 53 F.3d 684, 686–87 (5th Cir. 1995) (holding that the smell of burnt marijuana emanating from a vehicle constitutes probable cause to search an entire vehicle without a warrant).

[22] *See* Abate, *supra* note 13 (describing a Stanford-led five-year study that analyzed traffic stops and found that police officers conducted traffic stops and subsequent searches more often on Black and Hispanic drivers than white drivers); *see also* Ned Oliver, *When Police Say They Smell Pot, They Can Search You. Lawmakers Worry Decriminalization Won't Change That.*, NBC 12, https://www.nbc12.com/2020/01/25/when-police-say-they-smell-pot-they-can-search-you-lawmakers-worry-decriminalization-wont-change-that/ (Jan. 24, 2020, 8:48 PM) (noting officers frequently claim the odor of burnt marijuana as a basis for probable cause to conduct a warrantless search of a vehicle and that a judge was cognizant of the fact that there is a high frequency in which officers falsely cite the odor of marijuana).

[23] *See infra* Part IV; *see also* Andrew Ringle, *Bill to End Police Stops for Marijuana Smell Passes Va. Senate*, NBC 12, https://www.nbc12.com/2020/08/28/bill-end-police-stops-marijuana-smell-passes-va-senate/ (Aug. 29, 2020, 12:01 PM) (reporting that the Virginia Senate approved Senate Bill 5029, which would change certain traffic offenses from primary to secondary offenses, as well as prohibit officers from searching or seizing any person, place, or thing based on the mere smell of marijuana).

Constitution intended to avoid.[24] The states can also address the issue by enacting laws that reduce traffic stops and limit the actions an officer can take during a traffic stop.[25] Under these judicial and legislative changes, police officers will be made aware that they may not use the smell of burnt marijuana as a justification for conducting warrantless searches.[26]

II. BACKGROUND

A. HISTORY OF THE FOURTH AMENDMENT

The Fourth Amendment guarantees people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[27] In order to comply with the requirements set forth by the Fourth Amendment, a police officer must have probable cause and a valid warrant to constitute a "reasonable" search and seizure of an individual or an individual's possessions.[28] The Supreme Court has defined probable cause as "knowledge"

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[24] *See* Riley v. California, 573 U.S. 373, 403 (2014) (stating that the Framers of the Constitution created the Fourth Amendment in response to the authority that British officers had during that time to barge into homes to conduct an "unrestrained search for evidence of criminal activity"); *see also* Steagald v. United States, 451 U.S. 204, 220 (1981) (explaining that, in part, the Framer's intention behind the Fourth Amendment was to "protect against the abuses of the general warrants that had occurred in England and of the writs of assistance used in the Colonies.").

[25] *See* Mercer, *supra* note 18 (noting how some cities and counties have begun taking action to reduce bias in policing by transferring over the control of traffic stops from police officers to the transportation department); *see also* Sarah Ruiz-Grossman, *Study Finds Racial Bias in Police Traffic Stops and Searches*, HUFFPOST (Mar. 19, 2019, 7:00 PM), https://www.huffpost.com/entry/white-black-drivers-police-stops-searches-racial-bias_n_5c916558e4b0f7ed945d4ba3 (referring to the Stanford study regarding police traffic stops and emphasizing that although police officers were more likely to find "drugs, guns, or other contraband" in a traffic stop involving white drivers, white drivers were stopped by police officers less often than Black drivers).

[26] *See* Mercer, *supra* note 18 (explaining how "states and localities can limit the infractions police can use to stop motorists and what they do during stops, and more are doing so, through the courts, by law and local ordinance"); *see also Prandy-Binett*, 995 F.2d at 1075 (Edwards, J., dissenting) (noting that the pressures that courts may face cannot drive their decision making in cases involving police officers responding to "the illegal drug trade" and that "[c]onstitutional caution must rise above fear and above even the legitimate desire to defend against societal dangers.").

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.; *see* Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528, 534, 540 (1967) (holding that appellant had a constitutional right under the Fourth Amendment to refuse to allow housing inspectors to inspect his private property without a valid warrant because "[t]he basic purpose of the [Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

[28] *See* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 938 (1997) (stating that there is a warrant requirement because it "promotes the norm that the police should not decide for themselves when to search or seize."). *But see* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 55 (1996) (recognizing that the Fourth Amendment only requires all searches and seizures be

that is "sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime."[29]

To obtain a valid warrant, a police officer must provide a magistrate with an affidavit that details sufficient information and probable cause.[30] If the magistrate believes the affidavit establishes probable cause to conduct a search, then the warrant will be issued.[31] Once a valid warrant is issued, police officers may lawfully execute the warrant.[32] If a valid warrant is not issued, then officers cannot conduct a search because warrantless searches and seizures are deemed to be "per se unreasonable" and a violation of an individual's Fourth Amendment rights.[33] However, not every search must be made pursuant to a valid warrant.[34]

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reasonable, not that every search and seizure require a warrant).

[29] *See* Devenpeck v. Alford, 543 U.S. 146, 151–52 (2004) (stating that the district court instructed the jury that in order for the defendant to prevail, the defendant must demonstrate that the officers did not have probable cause, and "that probable cause exists 'if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime'"); *see also* Beck v. Ohio, 379 U.S. 89, 91, 96–97 (1964) (holding that "when the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed.").

[30] *See* Illinois v. Gates, 462 U.S. 213, 239 (1983) ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others"); *see also* Johnson v. United States, 333 U.S. 10, 13–14 (1948) (explaining that the Fourth Amendment requires that a "neutral and detached magistrate," be the one to determine whether sufficient probable cause exists to issue a warrant, because an officer is typically "engaged in the often competitive enterprise of ferreting out crime.").

[31] *See Gates*, 462 U.S. at 238 (finding that in determining whether the affidavit provided by the officer supports a finding of probable cause, the magistrate is tasked with making a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place"); *see also* Spinelli v. United States, 393 U.S. 410, 416, 418–19 (1969) (holding that the informant's tip was insufficient to provide a finding of probable cause because when analyzing an affidavit, the magistrate must rely on a tip that is more substantial than just a "casual rumor" or an "individual's general reputation" and that "a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause").

[32] *See* State v. Chen, 1 So. 3d 1257, 1260 (Fla. Dist. Ct. App. 2009) (stating that the police officer obtained a warrant issued by the judge who had concluded that the facts contained in the affidavit established probable cause, and the next day the police officer executed the warrant when he searched defendant's apartment); *see also* M. Jackson Jones, *The Fourth Amendment and Search Warrant Presentment: Is a Man's House Always His Castle?*, 35 AM. J. TRIAL ADVOC. 525, 561–62 (2012) (highlighting the protections of the Fourth Amendment and its assurances that the warrant used to conduct searches and seizures is valid, and moreover, that the warrant be properly executed).

[33] *See Katz*, 389 U.S. at 357 (stating that a warrantless search conducted without the approval of a magistrate or a judge is considered "per se unreasonable" under the Fourth Amendment); *see also* Melinda Roberts, *The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment*, 43 FORDHAM L. REV. 571, 571 (1975) (discussing that warrantless searches are "per se unreasonable under the Fourth Amendment—subject only to a few exceptions" such as "those situations in which the exigencies make it imperative to proceed without a warrant").

[34] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (holding that the warrantless search and seizure of Mr. Terry was reasonable under the Fourth Amendment because there exists an exception in situations where an officer has reason to believe that a person is armed and dangerous and for their own

B. THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT

The Supreme Court has held that there are certain exceptions to the warrant requirement, and a vehicle is one such exception.[35] As recognized in *Carroll v. United States*, and consistently throughout other cases, the Court has maintained that vehicles are different from homes and other stationary structures because vehicles can be quickly moved, which may make it impracticable to require a warrant.[36] Accordingly, a vehicle search conducted by a police officer without a warrant may be deemed reasonable if the police officer has probable cause to believe "the vehicle contains contraband or other evidence of a crime."[37]

C. THE PLAIN SMELL DOCTRINE

Under the plain smell doctrine, the odor of contraband can provide probable cause to justify a warrantless search.[38] Consequently, an officer who smells illegal drugs inside of a vehicle may conduct a warrantless vehicle search because the odor provides the officer with probable cause to reasonably believe that the individual inside of the vehicle is committing or has committed a

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protection may conduct a carefully limited search of the individuals outer clothing for weapons that may be used to harm them); *see also* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298–99 (1967) (holding that a 'hot pursuit' search and seizure is an exception and does not require a valid warrant because "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

[35] *See* California v. Carney, 471 U.S. 386, 390 (1985) ("There are, of course, exceptions to the general rule that a warrant must be secured before a search is undertaken; one is the so-called 'automobile exception' at issue in this case"); *see also Ross*, 456 U.S. at 806–07, 809 (stating that an exception to the Fourth Amendment warrant requirement is the automobile exception, whereby the Supreme Court has found it to not be unreasonable in "searches of vehicles that are supported by probable cause").

[36] *See Carroll*, 267 U.S. at 153 (explaining that a vehicle is an exception to the Fourth Amendment warrant requirement since "it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought"); *see also* Chambers v. Maroney, 399 U.S. 42, 50–51 (1970) (recognizing that because a vehicle is readily movable, the opportunity to conduct a vehicle search is "fleeting," therefore, the search must either be conducted immediately without a warrant to avoid having the vehicle escape, or the vehicle must be seized and held without a warrant in order to allow the police an opportunity to obtain a warrant for the search).

[37] *See* United States v. Pulido-Ayala, 892 F.3d 315, 318–20 (8th Cir. 2018) (holding that a warrant was not required to search the vehicle because the officer had probable cause to believe that there were drugs inside of the vehicle due to the defendant's suspicious reaction and the trained drug dog's reaction to sniffing the exterior of the defendant's vehicle); *see also* Ornelas v. United States, 517 U.S. 690, 696, 700 (1996) (holding that the search conducted inside of the panel of the vehicle that resulted in the discovery of cocaine was not a violation of the defendant's Fourth Amendment right because the officer had probable cause to believe that "contraband or evidence of a crime [would] be found" inside of the vehicle, therefore, a warrant was not required for the search).

[38] *See* Matthew P. Hoxsie, *Probable Cause: Is the "Plain-Smell" Doctrine Still Valid in Arizona After the AMMA?*, 57 ARIZ. L. REV. 1139, 1140–41 (2015) (stating that in Arizona, before the AMMA was passed, courts had adopted the plain smell doctrine and determined that the plain smell of marijuana was sufficient probable cause to believe that a crime existed); *see also* Andrew D. Selbst, *Contextual Expectations of Privacy*, 35 CARDOZO L. REV. 643, 683–84 (2013) (stating that under the plain smell doctrine, police officers are not required to ignore their senses if they smell marijuana).

crime.[39] Many courts have adopted the plain smell doctrine and view it as "a logical extension of, and analogous to, the plain view doctrine."[40] Although the Supreme Court has recognized the plain view doctrine in *Coolidge v. New Hampshire*, and has extended it to the plain feel doctrine, the Court has yet to decide on the extension of it to the plain smell doctrine.[41]

D. FEDERAL COURT CASES INVOLVING THE SMELL OF MARIJUANA EMANATING FROM A VEHICLE

Because the Supreme Court lacks a definitive statement regarding the plain smell doctrine, federal circuits are split on the following issue: whether the smell of burnt marijuana emanating from a vehicle establishes sufficient probable cause to search an entire vehicle without a warrant.[42]

i. Smell of burnt marijuana alone is probable cause

The Fifth and Eighth Circuits have held that the mere smell of burnt marijuana emanating from a vehicle establishes probable cause to search an entire vehicle without a warrant.[43] In *United States v. McSween*, the defendant

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[39] *See* Caffee v. State, 814 S.E.2d 386, 392–93 (Ga. 2018) (holding that based on the smell of marijuana, the officer had probable cause to believe that the driver of the vehicle was committing a crime and, therefore, the search of the vehicle and driver's person, along with the arrest, did not violate the driver's Fourth Amendment rights); *see also* Evan M. Levow, *The "Plain Smell Doctrine" in New Jersey DWI Cases*, N.J. DWI ATT'Y BLOG (Nov. 19, 2019), https://www.newjerseydwiattorneyblog.com/the-plain-smell-doctrine-in-new-jersey-dwi-cases/ ("The 'plain smell doctrine' gives police a limited right to conduct a warrantless search based on odors that suggest illegal conduct.").

[40] *See* United States v. Hutchinson, 471 F. Supp. 2d 497, 509–11 (M.D. Pa. 2007) (holding that the officer lawfully stopped the defendant's vehicle for a traffic violation, that the external sniff of the vehicle by the drug-detecting dog did not constitute a search for purposes of the Fourth Amendment, and that the drug-detecting dog's positive alert to the duffle bag gave the officer probable cause to conduct a search of the vehicle); *see also* Reuben Goetzl, *Common Scents: The Intersection of the "Plain Smell" and "Common Enterprise" Doctrines*, 50 AM. CRIM. L. REV. 607, 607–08 (2013) (stating that many jurisdictions have adopted the plain smell doctrine, but noting that a problem may exist when a search does not uncover contraband).

[41] *See* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (acknowledging that "under certain circumstances the police may seize evidence in plain view without a warrant"); *see also* Goetzl, *supra* note 40, at 614 ("While the Supreme Court has yet to explicitly acknowledge the 'plain smell' doctrine, lower courts have determined that the police may rely on their noses as well as their eyes.").

[42] *See Scott*, 210 A.3d at 364–65 (holding that the mere smell of burnt marijuana emanating from a vehicle did not provide probable cause to search an entire vehicle because "[u]nder these circumstances, the odor of burnt marijuana and small amount of contraband recovered from the passenger compartment of the vehicle did not create a fair probability that the officer could recover additional contraband in the trunk"); *see also Winters*, 221 F.3d at 1041 (holding that the mere smell of burnt marijuana emanating from a vehicle constitutes probable cause to search an entire vehicle without a warrant).

[43] *See* United States v. Pankey, 710 F. App'x 615, 617 n.1 (4th Cir. 2018) ("The Fifth and Eighth Circuits have held that the mere odor of burnt marijuana may give rise to probable cause to search an entire vehicle, including its trunk"); *see also McSween*, 53 F.3d at 686 (finding that the officer's detection of the odor of burnt marijuana—based on his experience and special training in the

appealed to the Fifth Circuit and argued that the district court erred in denying his motion to suppress drugs that had been seized from his vehicle's hatchback because the officer did not have probable cause to search the entire vehicle.[44] The vehicle search initially began as a routine traffic stop after McSween was pulled over for speeding.[45] The officer was made aware through a computer search that McSween had previously been arrested on narcotic charges, and after gathering this information, the officer asked McSween if he could conduct a search of the vehicle.[46] While searching the passenger area of the vehicle, one of the officers noticed the smell of burnt marijuana emanating from the ashtray.[47] Yet, the officer never discovered any marijuana in the ashtray or anywhere else inside of the vehicle.[48] Next, the officer opened the hood of the vehicle where he discovered a brown plastic bag that contained marijuana.[49]

McSween argued that "even if the odor of marihuana gave [the officer] probable cause to search, the search should have been limited to the passenger

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detection of marijuana odor—gave the officer probable cause to continue searching the entire vehicle).

[44] *See McSween*, 53 F.3d at 685–87 (examining McSween's argument that the officers lacked probable cause and that they had exceeded the scope of his consent in searching his vehicle because the officers went so far as to remove, with screwdrivers, the hatchback's interior panels); *see also* United States v. Mayfield, 678 F. App'x 437, 438 (8th Cir. 2017) (reviewing the defendant's appeal and argument that the district court erred in denying his motion to suppress evidence that had been seized during the course of a vehicle search).

[45] *See McSween*, 53 F.3d at 685 (explaining that the officers stopped McSween while he was driving 87 mph on a 65-mph zone); *see also* United States v. McCoy, 200 F.3d 582, 583 (8th Cir. 2000) (describing the vehicle search conducted by a police officer after the officer stopped the vehicle for having a burned-out headlight).

[46] *See McSween*, 53 F.3d at 685–86 (stating that the fact that the officer had received McSween's consent to search the vehicle's passenger compartment is undisputed); *see also Winters*, 221 F.3d at 1040–41 (noting that after smelling "raw marijuana" in the defendant's vehicle, the officer on scene checked the defendant's criminal history and discovered that the defendant had "a prior drug record." Once the defendant was placed under arrest for unrelated charges, the officer conducted a search of the vehicle that produced "marijuana residue in the defendant's attaché case.").

[47] *See McSween*, 53 F.3d at 686 (detailing the officer's testimony where he claimed that he was certain the odor was that of burnt marijuana based on his twenty-two years of experience and training in the detection of the odor of marijuana); *see also Winters*, 221 F.3d at 1040 (stating that after the officer had pulled over the defendant for speeding, the officer stuck his head inside the vehicle to observe the defendant's movements and he smelled raw marijuana).

[48] *See McSween*, 53 F.3d at 686–87, 689 (rejecting McSween's argument that although he gave the officer consent to search inside the passenger compartment of the vehicle, the search should have been limited to just the search of the passenger area and should have ended after the officer did not discover any drugs or contraband in the area where the officer had first detected the odor); *see also Winters*, 221 F.3d at 1041 (indicating that the remainder of the vehicle search was completed at a service station with the aid of a police dog, and that the dog detected "a large quantity of amphetamine, an unknown white powdery substance, [and] marijuana").

[49] *See McSween*, 53 F.3d at 686 (stating that a second search of the car conducted at the sheriff's office revealed cocaine, and that a grand jury indicted McSween "with possession with intent to distribute [fifty] or more grams of crack cocaine"); *see also Winters*, 221 F.3d at 1041 (claiming that not only did the officers search the left rear quarter panel of the vehicle, but that they also searched the locked trunk, which produced two loaded hand-guns, whereby the defendant was ultimately charged with "four drug-related counts and one count of carrying a firearm in connection with a drug-trafficking crime").

area, where [the officer] detected the smell."[50] However, the court disagreed with McSween and concluded that "the smell of marihuana alone may be ground enough for a finding of probable cause, as [the] Court has held many times."[51] In reaching its decision, the Court acknowledged the automobile exception to the warrant requirement and held that the officer's detection of the odor of burnt marijuana provided probable cause to believe that marijuana could be concealed under the hood of the vehicle.[52]

ii. Smell of burnt marijuana alone is not probable cause

In contrast to the Fifth and Eighth Circuits, the Tenth Circuit has held that the mere smell of burnt marijuana emanating from a vehicle alone does not establish probable cause to conduct a warrantless search of an entire vehicle.[53] In *United States v. Nielsen*, the district court denied Nielsen's motion to suppress cocaine that had been obtained from the trunk of his vehicle during a warrantless search.[54] On appeal, Nielsen argued that the district court erred in denying his motion because the officer's assertion that he smelled burnt marijuana did not constitute probable cause to search the entire vehicle, which included the

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[50] *See McSween*, 53 F.3d at 687 ("We disagree. It is well settled that, in a case such as this, the detection of the odor of marihuana justifies 'a search of the entire vehicle'"); *see also Winters*, 221 F.3d at 1041–42 (holding that the officer's detection of the odor of raw marijuana gave him probable cause to search for concealed drugs in the passenger compartment and the entire vehicle including any containers).

[51] *See McSween*, 53 F.3d at 686–87 (comparing the current case to *United States v. Ross*, where the Supreme Court stated that "if there is probable cause to suspect that the vehicle contains contraband, then the search may be extended not only to closed containers, but also a 'car's trunk or glove compartment,'" and applying the reasoning in *Ross* to the officer's conduct of searching under the hood of McSween's vehicle after suspecting the vehicle contained marijuana); *see also* United States v. Henke, 775 F.2d 641, 645 (5th Cir. 1985) (holding that "[o]nce the officer smelled the marijuana, he had probable cause to search the vehicle"); *see also* United States v. Reed, 882 F.2d 147, 149 (5th Cir. 1989) (stating that the officer "detected the distinct odor of burnt marihuana, and this in itself would have justified the subsequent search of [the defendant's] vehicle.").

[52] *See McSween*, 53 F.3d at 686–87 ("Together these facts, viewed in light of Price's experience, justify a finding of probable cause to search the entire vehicle"); *see also* United States v. Kizart, 967 F.3d 693, 695–96, 699 (7th Cir. 2020) (affirming the district court's ruling in denying the defendant's motion to suppress because the court found that the officer was justified in searching the trunk since he had probable cause to believe that the trunk contained drugs).

[53] *See Pankey*, 710 F. App'x at 617, n.1 (describing the Tenth Circuit's view on the issue as a "more defendant-friendly approach" and stating that "[t]he Tenth Circuit has held that the mere odor of marijuana is insufficient grounds to search a vehicle's trunk, and that 'corroborating (Continued) evidence of contraband' is necessary"); *see also* United States v. Loucks, 806 F.2d 208, 209–11 (10th Cir. 1986) (holding that mere smell of burnt marijuana was insufficient to amount to probable cause to search the entire vehicle, but the smell on the defendant's person coupled with the discovery of marijuana in the passenger compartment gave the officer sufficient probable cause to search the trunk).

[54] *See* United States v. Nielsen, 9 F.3d 1487, 1488 (10th Cir. 1993) (pointing out that after Nielsen's motion to suppress was denied, the district court charged Nielsen with possession of cocaine); *see also Loucks*, 806 F.2d at 209 (stating that the district court denied defendant's motion to suppress marijuana that had been found inside of the trunk of defendant's vehicle).

trunk.[55] The vehicle search was conducted after the officer had stopped Nielsen for a speeding violation.[56] The officer approached the vehicle to speak to Nielson and claimed that he had immediately smelled burnt marijuana emanating from the open window.[57] Then, the officer asked Nielsen about the marijuana but Nielsen denied possessing any.[58] After receiving consent from Nielsen, the officer proceeded to search the interior of the vehicle but did not find any drugs.[59] Next, the officer told Nielsen that he believed there was marijuana in the vehicle and that he was going to search the trunk because a radio check on Nielsen revealed that he had previously been arrested for a misdemeanor marijuana offense.[60] Nielsen did not consent to the search of the trunk, but the officer continued the search anyway, opened the trunk, and discovered cocaine.[61] In reaching its decision that the district court erred in denying Nielsen's motion to suppress the evidence, the Court applied the totality of the circumstances

[55] *See Nielsen*, 9 F.3d at 1488–89 (stating that the district court had found the officer's testimony credible, although the Court of Appeals would not have made the same determination because Nielsen's urine test came back negative, thereby indicating that Nielsen had not been smoking marijuana at the time of the traffic stop); *see also Loucks*, 806 F.2d at 209 (analyzing defendant's argument that the district court erred in denying his motion to suppress because the officer did not have probable cause to search the trunk of his vehicle).

[56] *See Nielsen*, 9 F.3d at 1488 (providing details of the traffic stop which occurred on April 22, 1992, at 4:30 p.m. on I-35 near Nephi, Utah); *see also Loucks*, 806 F.2d at 209 (describing that the defendant was driving at a speed of seventy-three miles per hour when a police officer pulled him over for speeding).

[57] *See Nielsen*, 9 F.3d at 1488 (claiming that at the time of the traffic stop, the officer could not identify whether the smell of burnt marijuana came from Nielsen's person or the vehicle); *see also Loucks*, 806 F.2d at 209 (describing the officer's first detection of the odor of burnt marijuana occurring when the defendant was seated in the patrol car while the officer was in the process of writing a traffic ticket, and that the officer also smelled burnt marijuana when he opened the driver's side door of the vehicle).

[58] *See Nielsen*, 9 F.3d at 1488–89 (noting the inconsistencies between the officer's assertion that he had detected the odor of marijuana and Nielsen's denial of smoking marijuana); *see also Loucks*, 806 F.2d at 209 (stating that after the officer detected the odor of burnt marijuana, he asked the defendant if he had been smoking marijuana, and the defendant denied it).

[59] *See Nielsen*, 9 F.3d at 1488, 1490 (distinguishing the instant case from *Loucks* and *Ashby* because in those cases, there was probable cause to search the trunk due to the fact that the officers had smelled burnt marijuana emanating from the vehicle and additionally found marijuana in the passenger compartment before searching the trunk). *But see Loucks*, 806 F.2d at 209 (detailing the officer's findings during the search of the interior of the vehicle which included a small wooden box that contained marijuana, some marijuana cigarette butts from the car's ashtray, and a brown paper bag that contained marijuana).

[60] *See Nielsen*, 9 F.3d at 1488, 1491 (recognizing that there was no corroboration of the smell because the officer did not find any evidence of marijuana when he searched the interior of the vehicle and, thus, there was nothing to support the officer's suspicions that marijuana would be found inside of the trunk); *see also Loucks*, 806 F.2d at 209 (stating that after the officer discovered the marijuana inside of the vehicle, the officer then opened the trunk to conduct a warrantless search).

[61] *See Nielsen*, 9 F.3d at 1488, 1491 (acknowledging that if the court does not place limitations on warrantless searches, constitutional rights will be endangered because an officer with "an incentive to find evidence of illegal activities and [a need] to justify his actions when he had searched without consent," has a reason to make a false detection of the smell of burnt marijuana); *see also Loucks*, 806 F.2d at 209 (recounting the fact that the officer discovered a nylon utility bag which contained twenty-five pounds of marijuana inside of the defendant's trunk).

approach and held that there was no probable cause to search the trunk because nothing could have led the officer to believe that there was a fair probability that the trunk contained marijuana.[62] Unlike the Fifth and Eighth Circuits, the Tenth Circuit did not adopt the plain smell doctrine and instead decided to protect a defendant's right to privacy under the Fourth Amendment.[63]

III. DISCUSSION

A. THE SUPREME COURT HAS YET TO ADOPT THE PLAIN SMELL DOCTRINE

The cases from the Fifth, Eighth, and Tenth Circuits show that defendants are being treated differently because of lack of guidance from the Supreme Court, which has never addressed the issue of whether an officer's detection of the smell of marijuana provides probable cause to search an entire vehicle, but instead has only addressed that a narcotic dog's sniff of a vehicle is not a violation of the Fourth Amendment.[64] A dog sniff and an officer's sense of smell are different and should be treated as such when analyzing the issue.[65] A dog trained to alert to the smell of drugs only discloses information about the contraband and does not reveal other innocent smells.[66] A police officer's training

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[62] *See Nielsen*, 9 F.3d at 1491 ("We do not believe under the circumstances that there was a fair probability that the *trunk* contained marijuana, or that a disinterested magistrate would so hold if asked to issue a search warrant."); *see also Loucks*, 806 F.2d at 210–11 (agreeing with the government's position that in applying the totality of the circumstances approach, "the officer had probable cause to search the entire vehicle for marijuana, and the fact that in the interior of the automobile he found marijuana, or evidences thereof, did not require him to call off the search." As such, the court held that the district court did not err in denying defendant's motion to suppress).

[63] *See supra* Sections II(D)(i), II(D)(ii).

[64] *See* Illinois v. Caballes, 543 U.S. 405, 410 (2005) (holding that a dog sniff that alerted the officers of contraband inside of the vehicle's trunk did not violate the defendant's Fourth Amendment rights); *see also* Meghan Matt, *In the Age of Decriminalization, Is the Odor of Marijuana Alone Enough to Justify A Warrantless Search?*, 47 S.U. L. REV. 459, 467–471, 493, 495 (2020) (concluding that due to the circuit split regarding whether the mere smell of marijuana provides probable cause to justify a warrantless vehicle search, there is a lack of uniformity among the states).

[65] *See* United States v. Place, 462 U.S. 696, 707 (1983) (holding that the "canine sniff" by a narcotics detection dog did not constitute a search of the defendant's luggage because it did not "expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage"); *see also* Peter Tyson, *Dogs' Dazzling Sense of Smell*, PBS (Oct. 4, 2012), https://www.pbs.org/wgbh/nova/article/dogs-sense-of-smell/ (reporting that a dog's sense of smell is 10,000 to 100,000 times more acute than a human's sense of smell because dogs possess 300 million olfactory receptors compared to a human's six million, and the part of the dog's brain that analyzes smell is forty times greater than a human's).

[66] *See Caballes*, 543 U.S. at 409 (concluding that a police dog is well-trained at detecting narcotics and the dog sniff does not violate an individual's privacy interests because it "does not expose noncontraband items that otherwise would remain hidden from public view"); *see also Place*, 462 U.S. at 707 (distinguishing a dog sniff from a typical search and pointing out that a dog sniff is less intrusive because the information obtained by this type of search is limited to disclosing only the presence or absence of drugs).

and life experience is different than a dog's, so an officer's smell may reveal additional information about an individual's private life.[67]

B. ISSUES WITH THE PLAIN SMELL DOCTRINE

Aside from the clear distinction between a police officer's sense of smell and the Supreme Court's Fourth Amendment interpretation of a dog sniff, there are other issues associated with the plain smell doctrine, which is why the mere smell of burnt marijuana should not be relied upon for probable cause.[68] Courts have compared the plain smell doctrine to the plain view doctrine and they have defined it as the doctrine of "public smell" in which "a person does not have a reasonable expectation of privacy in any odors that can be detected by law enforcement agents (or their trained canines) while they are in a position they have a right to be in."[69] First off, the doctrine of "public smell" is troublesome because some police officers lack the proper training and experience with marijuana-related investigations.[70] Additionally, it is difficult for officers to be able to properly distinguish the smell of marijuana and legal hemp.[71] Therefore,

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[67] *See* United States v. Montes-Ramos, 347 F. App'x 383, 389–90 (10th Cir. 2009) (determining that the officer's act of leaning and sniffing into defendant's vehicle constituted a search because the sniff could have revealed certain "private, lawful activities [such as] the perfume of a recently departed passenger, a recently consumed lunch, [or] a wet dog"); *see also Place*, 462 U.S. at 707 (acknowledging that "the canine sniff is sui generis[]" and that the Court is not "aware of [any] other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.").

[68] *See* Sprow, *supra* note 15, at 301–02 (noting that critics of the plain smell doctrine believe that the doctrine is less reliable than the plain view doctrine and should not be relied on to establish probable cause); *see also* Cece White, *The Sativas and Indicas of Proof: Why the Smell of Marijuana Should Not Establish Probable Cause for A Warrantless Vehicle Search in Illinois*, 53 UIC J. MARSHALL L. REV. 187, 222–23 (2020) (highlighting that an issue related with the plain smell doctrine is that police officers cannot accurately detect the odor of marijuana and smell is usually less reliable than sight).

[69] *See* United States v. Kelly, 128 F. Supp. 2d 1021, 1023, 1026 (S.D. Tex. 2001), *aff'd*, 302 F.3d 291 (5th Cir. 2002) (holding that the sniffing by a trained dog of the defendant's body constituted a search within the meaning of the Fourth Amendment, but the search was reasonable because the sniff was part of a routine border search); *see also Montes-Ramos*, 347 F. App'x at 390 ("The plain view doctrine is equally applicable to plain smells, such that no search occurs if a police officer detects an odor of illegal drugs, alcohol, chemicals or the like from a location in which he is entitled to be.").

[70] *See* Matt, *supra* note 64, at 481 (analyzing a case decided by the Supreme Court of Michigan where the court took into consideration the officer's lack of training in marijuana odors and held that the search based merely on the smell of marijuana was unreasonable); *see also* Kathleen Gray & Christina Hall, *Law Enforcement Facing the Challenges of New Legal Marijuana Laws*, DET. FREE PRESS (Nov. 1, 2019, 9:59 AM), https://www.freep.com/story/news/marijuana/2019/11/01/new-legal-weed-law-police-sorting-out/4112094002/ (emphasizing that some police departments are waiting to get more guidance from Legislature and will take on a hands-off approach to training their officers about the changes in enforcement due to the newly enacted recreational marijuana laws).

[71] *See* Cynthia A. Sherwood et al., *Even Dogs Can't Smell the Difference: The Death of 'Plain Smell,' As Hemp Is Legalized*, 55 TENN. B.J. 14, 15, 18, 19 (2019) (indicating that now that some states have legalized hemp, many citizens are in possession of hemp, which has a similar smell to marijuana); *see also Hemp vs. Marijuana: Why Can't Cops Tell Them Apart?*, CANNABIS L. REP.,

inadequate police training may lead to many investigative nightmares and unreasonable searches because an officer may believe he has probable cause to conduct a vehicle search based on the smell of a distinct odor that he assumes is illegal marijuana, yet in reality is actually legal hemp.[72]

Second, the plain smell doctrine is insufficient to create probable cause because of the mobility of odors.[73] Just like the odor of a neighbor's barbeque travels to the next door property that is not presently grilling outside, the odor of marijuana similarly can travel into the car of an individual who has not smoked marijuana.[74] One court rejected the plain smell doctrine and acknowledged the mobility of odors stating that odors can "be carried by the movement of air to locations where the object which originally created the odor was never present."[75]

Third, the plain smell doctrine should not be adopted because of the difficulty associated with being able to quickly determine the source of the smell and the length of time the odor has actually been present.[76] An officer may detect the odor of marijuana, but the odor has "no actual connection, past or present, to the place or party being searched."[77] With the plain feel and plain

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https://cannabislaw.report/hemp-vs-marijuana-why-cant-cops-tell-them-apart/ (last visited Mar. 26, 2021) (explaining that legal hemp contains a combination of CBD and about one percent THC, wherein legal hemp should contain no more than 0.3 percent THC, while marijuana contains illegal amounts of THC varying from five percent THC or more).

[72] *See* Sherwood et al., *supra* note 71, at 17 (highlighting that illegal marijuana and hemp have very similar smells, tastes, and appearances because they both come from the same plant genus *Cannabis*); *see also Hemp vs. Marijuana: Why Can't Cops Tell Them Apart?*, *supra* note 71 (highlighting that the reason many officers confuse illegal marijuana and hemp is because of the lack of education, training, and antiquated equipment used).

[73] *See* Sprow, *supra* note 15, at 302 (emphasizing that the courts that oppose the plain smell doctrine are concerned with the fact that after the original source of the odor is no longer present, the odor can still "linger" for some time which "makes it uncertain whether the odor that the officer has detected can be attributed to an object that is physically present"); *see also* State v. Jones, No. 97-COA-01240, 1998 WL 515939, at *7 (Ohio Ct. App. 1998) (describing claims of suspicious odors as "ephemeral" and stating that because of this characteristic, it is easier to lie about odors than it is to lie about visual evidence).

[74] *See* Matt, *supra* note 64, at 482 ("Because odors are ambulatory, in most circumstances, they cannot provide an officer with more than a mere suspicion of criminal activity"); *see also* Sprow, *supra* note 15, at 302–03 (concluding that those who oppose adopting the plain smell doctrine argue that the doctrine should be rejected because of the mobility of odors).

[75] *See Jones*, 1998 WL 515939 at *3 ("[T]he location and/or nature of an object generating a particular odor is often uncertain"); *see also* Sprow, *supra* note 15, at 302–03 (analyzing the mobility of odors and stating that this feature can easily mislead officers into "fruitless invasions" of an individual's privacy because the source of the odor was never actually present in the vehicle, but instead was carried by the wind).

[76] *See* Matt, *supra* note 64, at 481 (concluding that the plain smell doctrine is unreliable because it is difficult to determine exactly how long the odor of marijuana has been present in the vehicle); *see also* Sprow, *supra* note 15, at 303 (contrasting the plain smell doctrine to the plain view or plain feel doctrine and stating that the sense of smell is distinct from the others because it is impossible to attribute the source of an odor without more information).

[77] *See* Sprow, *supra* note 15, at 303 (stating that one of the concerns with the plain smell doctrine is that it may mislead an officer into conducting an unconstitutional search that results in no findings of illegal activity); *see also* Matt, *supra* note 64, at 482–83 (concluding that the plain smell doctrine

view doctrines, the officer is able to quickly detect an item by touch or sight, but the plain smell doctrine differs because it requires a more intrusive search since the officer cannot know the person directly connected to the odor or the exact location of the contraband without having to conduct a more in depth investigation.[78] Since the officer is not able to immediately identify the source of the odor, a constitutional issue arises because the officer fails to "particularly describ[e] the place to be searched and the persons or things to be seized."[79] Moreover, the odor inside of a vehicle may be strong, linger for a considerably long time, and falsely appear to be recent.[80] For example, according to the advocates of the plain smell doctrine, an individual who smoked marijuana days earlier and consequently left behind a strong odor in the vehicle would create a scenario where, if stopped by an officer, sufficient probable cause exists for a search.[81] In order to avoid fruitless invasions of privacy, evidence of the individual's past use of marijuana, with nothing more, should not establish probable cause for an officer to conduct a warrantless vehicle search.[82] Thus, it is not reasonable to assume present use of marijuana or believe that the vehicle contains contraband when the suspicion is based solely on the odor.[83]

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is unreliable because a search supported by probable cause must be "particularized as to the person or place to be searched," and it is difficult to identify the source of an odor).

[78] *See* Matt, *supra* note 64, at 465, 480 (stating that the plain view doctrine is less of an intrusion of privacy to the individual because one of the requirements in order for the seizure to be valid is that the illegal object be immediately apparent). *But see* Sprow, *supra* note 15, at 304–05 (concluding that arguments against the plain smell doctrine are weak because sense of smell is just as reliable as sense of touch and sight).

[79] *See* Maryland v. Garrison, 480 U.S. 79, 84 (1987) (stating that particularity is required in order to avoid general searches that the Framers intended to protect the people from); *see also Ross*, 456 U.S. at 824 ("Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.").

[80] *See* Sprow, *supra* note 15, at 302 (describing the lingering characteristic of odors and stating that this feature may mislead an officer into thinking that the odor is related to contraband that is physically present in the defendant's current location); *see also* State v. Schoendaller, 578 P.2d 730, 734 (Mont. 1978) (stating that the officer testified at trial and he admitted that the odor of marijuana can linger for more than a day).

[81] *See* Sprow, *supra* note 15, at 305–06, 315 (arguing that those who reject the plain smell doctrine because of the difficulty in determining the length of time the odor lingered fail to realize that the standard for probable cause is "a fair probability that contraband or evidence of a crime will be found in a particular place," and not that the police officer be one hundred percent certain that contraband is present in the vehicle). *But see* Matt, *supra* note 64, at 481 (rejecting the plain smell doctrine and concluding that "smell alone does not even reach the lower standard of reasonable suspicion because it offers no more than an unparticularized hunch.").

[82] *See Schoendaller*, 578 P.2d at 734 (holding that the officers did not have probable cause to search the entire vehicle based merely on the odor of marijuana because the officer's testimony revealed that he could not determine whether the defendants had presently been smoking marijuana). *But see* Sprow, *supra* note 15, at 306 ("Thus, rejecting plain smell based on the fear that it will produce occasional fruitless searches is inconsistent with both the Supreme Court's acceptance of plain touch and the standard of probable cause dictated by the Fourth Amendment.").

[83] *See* People v. Hilber, 269 N.W.2d 159, 164 (1978), *abrogated by* People v. Kazmierczak, 605 N.W.2d 667 (2000) ("[I]t is not reasonable to infer present use of marijuana, or to conduct a search for it, on the basis of past use of marijuana evidenced solely by a residual odor of marijuana in an

C. FALSELY STATING THE SMELL OF MARIJUANA

What is even more concerning about the plain smell doctrine is that there have been instances where police officers falsely state they smell burnt marijuana in order to establish probable cause for a warrantless vehicle search.[84] Recently, a judge accused an officer of lying about smelling marijuana in order to justify a warrantless vehicle search, however, not all judges are willing to dispel an officer's testimony.[85] Senators and defense attorneys have also become skeptical of police officers' sense of smell because they have noticed the increase in searches that have been justified by simply stating, "I smell marijuana."[86] To wit, in the first quarter of 2019, smell-of-marijuana searches reached their highest level since 2014.[87] In the last five years, police have stated marijuana odor as their basis for more than 25,000 vehicle searches.[88] Yet, nine times out of ten, police end up finding nothing after conducting a vehicle search.[89] In 2014, the "hit rate" of police finding contraband decreased from

automobile occupied by the defendant, absent determination with reasonable accuracy of the time frame of use in relation to defendant's occupancy"); *see also Schoendaller*, 578 P.2d at 734 (stating that the officer admitted that although he recognized the smell of marijuana, it was unclear as to whether the defendants had smoked inside of the vehicle "within the previous hour or more," or if the defendants were smoking marijuana when he approached the vehicle).

[84] *See* Goldstein, *supra* note 9 (referring to a decision written by Judge April Newbauer wherein she stated "[t]he time has come to reject the canard of marijuana emanating from nearly every vehicle subject to a traffic stop"); *see also* Oliver, *supra* note 22 (explaining that senators have become skeptical about police officers' sense of smell).

[85] *See* Goldstein, *supra* note 9 (stating that it is very rare for a New York City judge to accuse a police officer of lying); *see also* Oliver, *supra* note 22 (claiming that many defense attorneys around the country have complained about police officers lying about smelling marijuana in order to establish probable cause to search an individual's vehicle).

[86] *See* Oliver, *supra* note 22 (noting that senators have become skeptical because data shows an "improbably high number" of vehicle searches over the last few years and they want to put an end to this with decriminalization); *see also* Melamed, *supra* note 6 (stating that Michael Mellon, an assistant [public] defender, argued that it is very difficult to prove that an officer lied about smelling marijuana and, therefore, stating odor as a reason to search seems like an easy way to get access to a vehicle).

[87] *See* Melamed, *supra* note 6 (reporting that in the first quarter of 2019, police officers conducted 3,300 vehicle searches where they stated the odor of marijuana as the reason for the search); *see also* Oliver, *supra* note 22 (emphasizing that over the last ten years there has been a sudden surge in police officers saying they smell marijuana).

[88] *See* Melamed, *supra* note 6 (analyzing that the increase in traffic stops and searches that yield no findings of contraband is evidence that police officers' olfactory senses are not reliable); *see also* Goldstein, *supra* note 9 (addressing the issue of the increase in vehicle searches and stating that it is difficult to prove what an officer did or did not smell).

[89] *See* Oliver, *supra* note 22 (reporting that Senator Joe Morrissey stated that nine times out of ten, officers are not discovering any contraband inside of the vehicle, but no one is aware because only searches that end up with findings are brought to court); *see also* Melamed, *supra* note 6 (stating that although the odor of marijuana has become one of the most common reasons stated by officers to justify a search, Philadelphia officers are not discovering marijuana).

40% to 9.7%.[90] In light of this low hit rate, courts should put an end to condoning the practice of falsifying the smell of marijuana.[91]

D. RACIAL DISCRIMINATION IN TRAFFIC STOPS AND SEARCHES

The racial group that is most disproportionately affected by the increase in smell-of-marijuana searches are Black people.[92] Police officers are more likely to pull over Black drivers than white drivers for a traffic violation.[93] Traffic stops lead to more searches, and one particular study showed that Black people made up 84% of the drivers who were searched by a police officer after the officer claimed to have smelled marijuana.[94] Notwithstanding the foregoing, police discovered marijuana only 12.6% of the time when searching a Black driver compared with 20.3% of the time when searching a white driver.[95] Adopting the plain smell doctrine would continue to reinforce racism, illegal searches, and police encounters with Black people.[96]

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[90] *See* Melamed, *supra* note 6 (defining "hit-rate" as the rate at which police officers find contraband and recounting a story about two police officers whose hit rates declined to about 5% although the number of vehicle searches they had conducted increased); *see also* Matt, *supra* note 64, at 490 (concluding that it has become common for officers to claim that they smelled marijuana, but that their findings usually include a weapon or other type of drug that is not marijuana).

[91] *See* Rubinkam, *supra* note 13 (stating that Heather Gallagher, a Chief of Appeals in the District Attorney's office, recognizes the ongoing issue with marijuana odor and acknowledges the need for the courts to offer guidance on this issue); *see also* Matt, *supra* note 64, at 491 (discovering that within the last few years, police officers have lied under oath about detecting the odor of marijuana as a justification to conduct a warrantless vehicle search).

[92] *See* Sam Levin, *LA Police Search Black Drivers Most – Even Though White People Have More Drugs, Report Finds*, THE GUARDIAN (Oct. 8, 2019, 6:06 PM), https://www.theguardian.com/us-news/2019/oct/08/los-angeles-police-stop-search-black-latino (reporting that in Los Angeles, police officers are more likely to pull over Black drivers than white drivers even though white drivers have been found to carry more drugs); *see also* Melamed, *supra* note 6 (stating that the Defender Association of Philadelphia observed the racial disparity in traffic stops and searches and cited this issue as one of the reasons why police should not be trusted when listing the odor of marijuana).

[93] *See Whren*, 517 U.S. at 813–15 (rejecting the defendant's argument that discrimination was the reason for the traffic stop and stating that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). *But see* Matt, *supra* note 64, at 487–88 (concluding that traffic stops lead to searches and even arrests, which is why over the last ten years, the Black marijuana arrest rate has risen and the white marijuana arrest rate has remained the same).

[94] *See* Melamed, *supra* note 6 (discussing the data results of the study conducted by the Defender Association of Philadelphia where they analyzed thousands of police stops); *see also* Levin, *supra* note 92 (reporting that traffic stop data across Los Angeles revealed that even though the population is only "9% [B]lack, roughly 27% of people pulled over were [B]lack[,]" while "[w]hite people make up 28% of the city, but roughly 18% of stops.").

[95] *See* Melamed, *supra* note 6 (claiming that police and the Philadelphia Law Department are evaluating the accuracy of the statistics that showed that Black drivers were more likely to be searched than white drivers, but less likely to be found with marijuana); *see also* Levin, *supra* note 92 (stating that 20% of the time that a white driver was searched drugs or other contraband were found, in comparison to the 17% rate for Black people).

[96] *See* Matt, *supra* note 64, at 487–88 (concluding that the plain smell doctrine is problematic because it elicits racist encounters with police); *see also* Levin, *supra* note 92 (informing that the co-founder of Black Lives Matter LA, stated that the disproportionate traffic stops ultimately led to the death of several Black people).

IV. SOLUTION

A. RACIAL DISCRIMINATION IN TRAFFIC STOPS AND SEARCHES SUPREME COURT SOLUTION TO CREATE UNIFORMITY

As it stands, Black people and defendants are subject to illegal searches because of the lack of uniformity among the states on how to apply the plain smell doctrine.[97] If the Supreme Court decides to grant certiorari to address this issue and help guide the lower courts, it should hold that the mere smell of burnt marijuana does not provide probable cause to search an entire vehicle.[98]

i. Scope of a warrantless search

At the very least, the Court should hold that the mere smell of burnt marijuana emanating from the passenger compartment of the vehicle does not establish sufficient probable cause to allow an officer to extend the scope of the search to the entire vehicle, because the Court should defer to precedent by upholding its prior decisions regarding the scope of a warrantless search.[99] In *United States v. Ross*, the appropriate scope of a warrantless vehicle search was "defined by the object of the search and the places in which there is probable cause to believe it may be found."[100] Reaffirming the *Ross* holding, the Supreme Court in *California v. Acevedo* stated that if an officer does not have probable cause to believe that "the object of the search" is being concealed somewhere else, then a warrantless search of the entire vehicle would be considered unreasonable.[101]

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[97] *See supra* Sections II(D)(i), II(D)(ii).

[98] *See infra* Section IV(A).

[99] *See Ross*, 456 U.S. at 823 ("The scope of a warrantless search based on probable cause is no narrower-and no broader-than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize"); *see also* Arizona v. Gant, 556 U.S. 332, 335 (2009) (holding that "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle[,]" and that "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.").

[100] *See Ross*, 456 U.S. at 824 (emphasizing that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab"); *see also Nielsen*, 9 F.3d at 1491 (referencing *United States v. Ross* and applying its holding to the current case in order to "decide whether [the mere smell of burnt marijuana] provide[d] probable cause to search a trunk, after a consented-to search of the passenger compartment produced no evidence to support the officer's suspicions.").

[101] *See* California v. Acevedo, 500 U.S. 565, 570 (1991) ("In *Ross,* therefore, we clarified the scope of the *Carroll* doctrine as properly including a 'probing search' of compartments and containers within the automobile so long as the search is supported by probable cause"); *see also Gant*, 556 U.S. at 351 (concluding that a police officer may search a vehicle incident to an arrest only if "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest," but if these justifications do not exist, then the search is considered to be unreasonable unless the officers obtain a warrant or there is another applicable exception to the warrant requirement).

It is common knowledge that the smell of burnt marijuana alone indicates personal use, not drug trafficking.[102] Therefore, by applying the definition set forth by *Ross* and its application in *Acevedo*, the mere smell of burnt marijuana does not create probable cause to believe that a probability exists that marijuana could be found in the trunk of the vehicle because it is unreasonable to think that individuals recreationally smoke marijuana inside of the trunk.[103]

ii. The intent of the framers of the Constitution

The Court can go beyond the existing precedent of the scope of a warrantless search, which would only prohibit an officer from searching a trunk but not from searching a passenger compartment, and truly consider the Framer's intent in creating the Fourth Amendment.[104] The Fourth Amendment was established by the Framers of the Constitution as a way to prohibit government intrusion and unreasonable searches and seizures.[105] Accordingly, the Framers would have wanted to protect the people by placing restrictions on certain police conduct.[106] However, recent decisions by the Court shed light on a perspective that

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[102] *See* Lisa N. Sacco et al., *The Marijuana Policy Gap and The Path Forward*, CONG. RSCH. SERV. (Mar. 10, 2017), https://fas.org/sgp/crs/misc/R44782.pdf (distinguishing the difference between drug users and drug traffickers and stating that federal marijuana enforcement tends to be heavily focused on traffickers not on "low-level users"); *see also* David Ingram, *U.S. Allows States to Legalize Recreational Marijuana Within Limits*, REUTERS (Aug. 29, 2013, 1:35 PM), https://www.reuters.com/article/us-usa-crime-marijuana/u-s-allows-states-to-legalize-recreational-marijuana-within-limits-idUSBRE97S0YW20130829 (highlighting the statement of President Barack Obama, "It does not make sense, from a prioritization point of view, for us to focus on recreational drug users in a state that has already said that's legal.").

[103] *See Acevedo*, 500 U.S. at 580 ("The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment"); *see also* Christopher Ingraham, *11 Charts That Show Marijuana Has Truly Gone Mainstream*, WASH. POST (Apr. 19, 2017, 5:00 AM), https://www.washingtonpost.com/news/wonk/wp/2017/04/19/11-charts-that-show-marijuana-has-truly-gone-mainstream/ (claiming that about 35 million American adults use marijuana regularly for recreational use).

[104] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 287 (1990) (Brennan, J., dissenting) ("[T]he Framers intended to create a Government of limited powers"); *see also* Matt, *supra* note 64, at 462, 493 (explaining the reason behind the creation of the Fourth Amendment and stating that the Framers wrote it in response to the British government and their desire "to live as free men, away from the kingdom from which they fled, in a way that allowed them the autonomy to live and work apart from governmental intrusion.").

[105] *See Acevedo*, 500 U.S. at 586 (Stevens, J., dissenting) ("The Amendment constitutes the Framers' direct constitutional response to the unreasonable law enforcement practices employed by agents of the British Crown"); *see also* Matt, *supra* note 64, at 493 (elaborating the details of how the British government invaded the privacy of its people and stating that at that time there were no limits on what items could be searched or seized).

[106] *See* United States v. Leon, 468 U.S. 897, 929–30 (1984) (Brennan, J., dissenting) ("[W]hat the Framers understood then remains true today—that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy"); *see also* Rand Paul & Chris Coons, *The Founding Fathers Would Have Protected Your Smartphone*, POLITICO (May 27, 2014), https://www.politico.com/magazine/story/2014/05/a-tech-

is different from the Framers' intent of designing safeguards for the people.[107] Rather than uphold the Framers' intent, the Court has interpreted the Fourth Amendment in a way that has placed an emphasis on granting police officers more powers, which in turn takes away some of the protections the Framers would have wanted individuals to have today.[108] In doing so, the Court also seems to ignore the connection between policing practices and race.[109]

Consequently, the Court's decisions throughout the last few years have granted police officers the continued power to acquire "free-floating" reasons to frequently interact with and specifically target young, Black men.[110] As a result, police officers are aware of the many ways in which they can engage with Black men, solely based on their race without necessarily having evidence of criminal activity, while simultaneously not implicating the Fourth Amendment.[111] Condoning this sort of police conduct facilitates and increases police interactions with Black people which often times leads to violence and even death.[112] The Black community has been left with less protections and a higher

challenge-for-fourth-amendment-application-107129 (stating that technology has evolved, but the Constitution's Fourth Amendment text remains the same and people should continue to have the right against unreasonable searches).

[107] *See* Hudson v. Michigan, 547 U.S. 586, 605 (2006) (Breyer, J., dissenting) ("At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks v. United States*"); *see also* Matt, *supra* note 64, at 493–94 (emphasizing that the Supreme Court should restore the Fourth Amendment rights because these are the rights that the Framers felt were essential to all Americans).

[108] *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L. J. 1479, 1505, 1508 (2016) ("[T]he Supreme Court's interpretation of the Fourth Amendment has rendered Fourth Amendment law an open border across which a range of law enforcement officials can travel to intrude on black bodies and spaces"); *see also* Matt, *supra* note 64, at 494 ("The similarities between the police powers against which the framers fought and those facing Americans today cannot, and should not, be ignored.").

[109] *See* Matt, *supra* note 64, at 487–88 (concluding that there is a racial bias in the criminal legal system and Black people are more likely to be arrested for drugs than white people); *see also* Levin, *supra* note 92 (stating that the policy currently in place encourages the targeting, searching, and harassing of Black people without any justification).

[110] *See* Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1543 (2019) ("Tragically, current Fourth Amendment law insulates the very police practices that allow a different policing regime for communities of color and ensures that the rising death toll of unjustly killed Black and brown men will continue"); *see also* Carbado, *supra* note 108, at 1490 (highlighting that police officers can come up with just about any excuse or justification to investigate a Black person for criminal activity).

[111] *See* Navarette v. California, 572 U.S. 393, 405 (2014) (Scalia, J., dissenting) (recognizing the impact a Supreme Court decision has on law enforcement agencies because they closely follow the Court's judgments in order to be aware of certain actions officers can take without violating Fourth Amendment requirements); *see also* Carbado, *supra* note 108, at 1506 (recognizing that there is a very high bar for police conduct to qualify as a search or seizure and a violation of the Fourth Amendment).

[112] *See* Radley Balko, *Opinion: The No-Knock Warrant for Breonna Taylor was Illegal*, WASH. POST (June 3, 2020, 4:35 PM), https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal/ (describing the killing of Breonna Taylor by Louisville police officers and stating that "[h]er death was the entirely foreseeable consequence of a police department feeling free to callously and carelessly ignore the Fourth Amendment and the Supreme Court's

chance of being searched or seized by the police.[113] The Court should revert to its Fourth Amendment jurisprudence from some of its older cases when it valued, protected, and respected human dignity, and an individual's right to privacy.[114]

Police departments learn from the Court's various decisions regarding what type of conduct is considered to be reasonable or not under the Fourth Amendment.[115] Then, they train their officers on how to engage in policing practices and protocols without "crossing the line."[116] The Court would have an opportunity to change the type of police behavior that has recently elicited important conversations about a need for reform and advocacy for defunding the police.[117]

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decision to prioritize the integrity of drug prosecutions over the Fourth Amendment right of Americans to feel safe and secure in their homes"); *see also* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 129 (2017) (stating that the Supreme Court's interpretation of the Fourth Amendment permits racial profiling and has resulted in police officers targeting Black people which exposes them to frequent police encounters).

[113] *See* Carbado, *supra* note 112, at 130 ("African Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures"); *see also* White, *supra* note 68, at 226 (comparing the similar rates in use of marijuana among white people and Black people, but noting that Black people are 3.64 times more likely to be arrested).

[114] *See* Mapp v. Ohio, 367 U.S. 643, 655, 659 (1961) (acknowledging that "[n]othing can destroy a government more quickly than its failure to observe its own laws," and holding that "all evidence obtained by searches and seizures in violation of the Constitution" is inadmissible in state court); *see also* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (disagreeing with the majority's holding that the officer did not use excessive force in violation of the Fourth Amendment because their decision "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.").

[115] *See* Dianne Molvig, *Cops & Lawyers: Combining the Careers of Law Enforcement and the Practice of Law*, 72 WIS. L. 10, 13 (1999) (describing how a police officer would track state court appeals and Supreme Court decisions in order to be aware of how those outcomes affect the department's policing and procedures); *see also* Nick Sibilla, *Supreme Court Could Create New Fourth Amendment Loophole For Police Shootings*, FORBES (Oct. 12, 2020, 7:00 PM), https://www.forbes.com/sites/nicksibilla/2020/10/12/supreme-court-could-create-new-fourth-amendment-loophole-for-police-shootings/ (informing that the Supreme Court will hold oral arguments in *Torres v. Madrid*, and the NAACP Legal Defense and Educational Fund filed an amicus brief stating that if the Court rules in favor of the officers it could create a Fourth Amendment loophole that would give officers immunity in specific excessive force cases and would "open the door to countless more unjustified shootings against innocent people, a burden that will disproportionately affect African-American communities.").

[116] *See* Charles Lane, *Opinion: A 1989 Supreme Court Ruling is Unintentionally Providing Cover for Police Brutality*, WASH. POST (June 8, 2020, 6:57 PM), https://www.washingtonpost.com/opinions/a-1989-supreme-court-ruling-is-unintentionally-providing-cover-for-police-brutality/2020/06/08/91cc7b0c-a9a7-11ea-94d2-d7bc43b26bf9_story.html (stating that ever since the Supreme Court's *Graham v. Connor* decision, police officers have been trained to use force because according to the Court's holding officers cannot be sued for such conduct); *see also* Doug Wyllie, *5 Supreme Court Cases the Police and the Public Should Know*, POLICE 1 (Feb. 20, 2020), https://www.police1.com/law-enforcement-policies/articles/5-supreme-court-cases-the-police-and-the-public-should-know-CZ0QsFxmsG66A4rX/ (highlighting that Supreme Court decisions govern police conduct and officers apply the law out on the street).

[117] *See* Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 441–

Moreover, the Court would "meaningfully impact lives," and "change how federal courts think about Fourth Amendment values."[118]

B. STATE COURT SOLUTION

Until the Supreme Court decides to grant certiorari, the states can still address the issue by implementing law and local ordinances that limit the infractions that police officers use to make traffic stops, along with also limiting what police officers can do during traffics stops.[119] Additionally, states can reallocate funds from the police department to social services by replacing an in-person traffic stop with automated traffic cameras.[120] As a way to deter police officers from engaging in misconduct, states should implement more stringent decertification regimes.[121] Moreover, states should require more specific training in the police academy curriculum to educate officers on discrimination, racial profiling, proper documentation, and accountability.[122] All of these state actions would reduce the number of traffic stops, warrantless vehicle searches, and

42 (2019) (concluding that advocates believe policing procedures and practices can change through transparency and accountability); *see also* Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020, 10:32 AM), https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html (reporting that the supporters of the defund the police movement want to redirect funding away from police departments to social services).

[118] *See* Obasogie & Newman, *supra* note 117, at 443 (discussing the need to change the way in which courts interpret the Fourth Amendment in terms of excessive force used by police officers); *see also* Ilya Shapiro, *To Apply the Fourth Amendment in the Digital Age, Go Back to Its Text*, CATO (Aug. 13, 2017, 7:03 PM), https://www.cato.org/blog/apply-fourth-amendment-digital-age-go-back-its-text ("Courts have also used the 'reasonable expectation of privacy' test to undermine the very things the Fourth Amendment was designed to protect.").

[119] *See* Mercer, *supra* note 18 (informing that Virginia legislature has started to consider limiting traffic stop violations); *see also* Seth W. Stoughton et al., *How to Actually Fix America's Police*, THE ATL. (June 3, 2020), https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/ (reporting that some agencies have adopted policies that provide guidance for officers to use in the field).

[120] *See* Mercer, *supra* note 18 (acknowledging that if traffic cameras are going to replace in-person stops, then an effort should be made not to install the cameras disproportionately throughout Black communities); *see also* Stoughton et al., *supra* note 119 (stating that overcriminalization has become a problem in most states which results in "police over-involvement in matters that would be far better left to other government institutions and social-service provider.").

[121] *See* Stoughton et al., *supra* note 119 (defining the word decertification as the state's power to prevent an officer who has engaged in misconduct from working as a police officer in that state); *see also* Candice Norwood, *Can States Tackle Police Misconduct With Certification Systems?*, THE ATL. (Apr. 9, 2017), https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246/ (stating that Florida has done about 7,000 decertifications while other states have only done ten).

[122] *See* Stoughton et al., *supra* note 119 (informing that most officers are required to be certified by a standards-and-training commission but the commission sets a minimum training requirement); *see also* Mercer, *supra* note 18 (claiming that the federal government usually trains its officers to use pretext stops in high-crime areas).

seizures.[123] Also, it would reduce police misconduct and the interaction between police officers and the Black community.[124]

V. CONCLUSION

Currently, there is a circuit split that has resulted in defendants being treated differently in terms of their Fourth Amendment rights to be "secure" against unreasonable searches and seizures.[125] To maintain uniformity among the states, and to address the issue of whether the mere smell of marijuana constitutes probable cause to search an entire vehicle, the Supreme Court should grant certiorari and it should hold that the mere smell of marijuana emanating from a vehicle does not constitute probable cause.[126] If the Court and the states do not address this issue, the people will lose a part of their Fourth Amendment rights that the Founders intended for them to have.[127] Furthermore, because Black people are more likely than white people to be pulled over for a traffic violation and subjected to a search, Black people will continue to experience injustices.[128] With the Black Lives Matter movement in full force, it is time the Supreme Court brings back the value of protecting privacy rights and respecting human dignity to its Fourth Amendment jurisprudence.[129]

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[123] *See* Mercer, *supra* note 18 (summarizing some of the different states' legislative intent on reducing pretext stops by placing an end to certain traffic citations); *see also* Stoughton et al., *supra* note 119 (emphasizing that young Black men are most at risk for police abuse).

[124] *See* Mercer, *supra* note 18 (recognizing that pretext stops can lead to the death of an innocent person); *see also* Stoughton et al., *supra* note 119 (concluding that in most states a police officer is decertified only if the officer is convicted for a felony or a serious misdemeanor).

[125] *See supra* Sections II(D)(i), II(D)(ii).

[126] *See supra* Sections IV(A)(i), IV(A)(ii).

[127] *See supra* Section IV(A)(ii).

[128] *See supra* Section III(D).

[129] *See supra* Section IV(A)(ii).