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# Marijuana, Phones, and Videotape: The Unconstitutionality of Automobile Exception Searches Based on Infraction Violations

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# MARIJUANA, PHONES, AND VIDEOTAPE: THE UNCONSTITUTIONALITY OF AUTOMOBILE EXCEPTION SEARCHES BASED ON INFRACTION VIOLATIONS

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## INTRODUCTION

Consider the legal issues created by the following scenarios: *First*, a police officer stops a vehicle for a traffic violation. When speaking to the driver, the officer recognizes the odor of marijuana coming from within the vehicle. In a state where possession of marijuana is a mere infraction, as opposed to a felony or misdemeanor, may the officer search the vehicle for the marijuana?[1] *Second*, an officer sees a driver who appears to be sending a text message. In a state where texting and driving is an infraction offense, the officer stops the vehicle, but the phone is nowhere to be seen. May the officer search the car to find the phone?[2] *Third*, in a state where running a red light is an infraction, an officer stops a vehicle for running a red light. While speaking with the driver, the officer notices that the car has a dashboard camera. May the officer search the car for the recording unit, in order to seize the video?[3]

Though they involve different facts, these three scenarios all pose the same question of law; may an officer conduct a probable cause search of a vehicle for evidence of an infraction, an offense that the legislature has designated as less serious than even a misdemeanor? The answer to this question is currently unclear. Notwithstanding the wealth of case law regarding the automobile exception to the warrant requirement,[4] few courts have considered how this rule applies to infraction violations.[5]

As the hypotheticals discussed above establish, this gap in the case law will not last for long. Historically, infraction offenses have rarely involved tangible evidence.[6] Recent developments, however, have increased the likelihood that infractions will involve tangible proof. First, the proliferation of new, advanced technologies within vehicles, such as GPS devices, on-board computers, and dashboard cameras, provides tangible evidence for virtually any infraction.[7] Second, increased legislation that regulate activities that take place inside vehicles, such as prohibiting the use of cellular devices while driving, may implicate tangible evidence such as call logs, text-

1. *See infra* Part V.
2. *See infra* Part V.
3. *See infra* Part V.
4. *See infra* Part II.A–B
5. *See infra* Part III.A–B.
6. *See infra* Part I.
7. *See infra* Part I.

message histories, and the cell phone itself.[8] Third, some states have reduced the offense of possession of marijuana from a misdemeanor to an infraction.[9]

This Comment prescribes that in most cases; a search of a vehicle for evidence of a mere infraction is unreasonable and violates the Fourth Amendment.[10] It also proposes that there is one exception to this general rule. Specifically, the rule will not apply where both an infraction and a greater crime are implicated by a particular piece of evidence or contraband, such as how the simple possession of marijuana implicates that marijuana was either sold or cultivated.[11]

The conclusion that a search of a vehicle based on an infraction is unreasonable is supported by the history of the automobile exception and the inherent differences between infractions and more serious offenses. Section I will discuss the nature of infraction offenses and how they differ from misdemeanors and felonies.[12] This section will also address the recent changes in technology and the law that increase the likelihood that tangible evidence contained within the vehicle will provide proof of an infraction. Section II will discuss the automobile exception and its application by courts.[13] As detailed in this portion of the Comment, the United States Supreme Court has prescribed a balancing test for ascertaining the reasonableness, and thus the constitutionality of searches under the automobile exception.[14] The Court, however, has never addressed how this balancing test applies to the automobile exception when the offense being investigated is an infraction. Section III will discuss how courts have taken an offense's classification as an infraction into account when assessing the reasonableness of searches other than searches under the automobile exception.[15] Section IV briefly explains that an expectation of privacy exists in vehicles.[16] Section V sets the stage for the balancing inquiry by examining the analyses of the lower courts that have addressed the issue of searches under the automobile exception based on infraction violations. Section VI then conducts an independent analysis of automobile exception searches based on infraction violations. Section VI concludes that, with one exception, a search of a vehicle for

8. *See infra* Part I.
9. *See infra* Part I.
10. *See infra* Part VI.
11. *See infra* Part VI.A.
12. *See infra* Part I.
13. *See infra* Part II.
14. Wyoming v. Houghton, 526 U.S. 295, 299–300 (1999); *see also infra* Part II.B.
15. *See infra* Part III.
16. *See infra* Part IV.

evidence of a mere infraction cannot be justified under the automobile exception.[17] Furthermore, this section concludes that the lower courts that have considered this issue adopted flawed reasoning in reaching their results. Lastly this section will examine why some state courts will not have to engage in a balancing analysis to find an automobile exception search based on an infraction unreasonable and why a search based on an infraction possession of marijuana violation is never based solely on an infraction.

This Comment will conclude by proposing a modified rule to govern the automobile exception. Under the proposed rule, police may search a motor vehicle when there is probable cause to believe that the vehicle contains evidence or contraband related to a misdemeanor or felony.[18]

## I. THE EXISTENCE OF DISCOVERABLE EVIDENCE OF INFRACTION OFFENSES IS AN EMERGING ISSUE

Few courts have considered the danger posed by permitting searches under the automobile exception where the only offense being investigated is an infraction.[19] This is because changing circumstances have only recently caused the issue to emerge. The proliferation of technology and the increased regulation of activity inside of vehicles has created situations where the investigation of an infraction can yield collectable evidence. Similarly, as some legislatures have reclassified the offense of marijuana possession as an infraction, they have created an infraction offense which, by its nature, has collectable evidence.

The proliferation of technology has created collectable evidence for many infraction violations where previously no evidence existed. Many modern vehicles now carry event data recorders.[20] The type and format of data they are required to record is already regulated by statute[21] and a federal Senate bill proposed in 2012 would have required that all newly manufactured vehicles carry event data

17. *See infra* Part VI.

18. *See infra* Conclusion.

19. The issue has been addressed by the Oregon Court of Appeals, the Massachusetts Supreme Court and the California Court of Appeals. State v. Smalley, 225 P.3d 844, 845 (Or. Ct. App. 2010); Commonwealth v. Cruz, 945 N.E.2d 899, 911 (Mass. 2011); People v. Waxler, No. A137796, 2014 WL 935470 (Cal. Ct. App. Mar. 11, 2014). These cases are discussed in detail *infra* Part V.

20. Kashmir Hill, *Hate to Break it to You, but Your Car Likely has a Black Box 'Spying' on You Already*, FORBES (Apr. 14, 2012), http://www.forbes.com/sites/kashmirhill/2012/04/19/hate-to-break-it-to-you-but-your-car-likely-has-a-black-box-spying-on-you-already/.

21. 49 C.F.R. § 563.6 (West 2014).

recorders.[22] In a crash, these recorders register " 'a car's speed, how far the accelerator was pressed, the engine revolutions per minute, whether the driver hit the brakes, whether the driver was wearing a safety belt, and how long it took for the airbags to deploy.' "[23] While the owner or lessee of the vehicle owns the data on the recorder[24] a search of that data could still be justified under the automobile exception.[25]

Event data recorders are only one of many emerging technologies that have created discoverable digital evidence inside vehicles: some drivers install dashboard cameras in their cars,[26] smart phones can detect if a person is speeding,[27] and at least one insurance company will give a discount to drivers who install a GPS recorder in their car, which can measure speed.[28] The use of these and similar devices can be expected to increase as technology proliferates. Each of these devices has the ability to yield collectable evidence. An event data recorder can show how a vehicle was operated in the moments before a crash, to justify an at-fault determination in an accident;[29] a dashboard camera showing the condition of a traffic light before a vehicle entered an intersection could justify a red-light ticket; smart phone and GPS records could justify a speeding ticket.

At the same time that technology is creating collectable evidence for infractions, states are increasingly regulating the conduct of drivers inside their vehicles.[30] That regulation creates new infractions, which

22. S. 1813, 112th Cong. § 31406(a)(1) (2012). The provisions requiring event data recorders were not included in the bill that was ultimately passed. H.R. 4348, 112th Cong. (2012).

23. Hill, *supra* note 20 (quoting Willie D. Jones, *The Automotive Black Box*, IEEE SPECTRUM, (Apr. 4, 2012), http://spectrum.ieee.org/computing/embedded-systems/the-automotive-black-box-data-dilemma/0.

24. A provision of the proposed Senate bill would have expressly stated that the owner or lessee owned the data. S. 1813, 112th Cong. § 31406(b)(1) (2012).

25. A provision of the proposed Senate bill would have required a court order to retrieve the data without the owner's consent. S. 1813, 112th Cong. § 31406(b)(2)(A) (2012).

26. Andrew Moran, *Are Dash Cams Becoming a Necessity for Drivers to Avoid Fraud?*, DIGITAL JOURNAL (Sept. 7, 2012), http://digitaljournal.com/article/332333.

27. Somini Sengupta, *'Big Brother'? No, It's Parents*, N.Y. TIMES, (June 26, 2012), http://www.nytimes.com/2012/06/26/technology/software-helps-parents-monitor-their-children-online.html?_r=0.

28. Ian Bush, *Part 1: A Spy in Your Car*, PHILADELPHIA CBS, (Aug. 9, 2012), http://philadelphia.cbslocal.com/2012/08/09/part-1-a-monitoring-device-in-your-car/.

29. In California, an officer who has been trained as a traffic collision investigator may cite a person involved in the collision when the officer has reasonable cause to believe that the person violated a provision of the vehicle code. CAL. VEH. CODE § 40600(a) (West 2012).

30. *See, e.g.*, *Distracted Driving Laws*, GOVERNORS HIGHWAY SAFETY ASS'N, http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (last visited Mar. 22, 2014).

by their nature have collectable evidence. These laws include prohibitions against everything from smoking while children are present,[31] to limiting the maximum temple-width of the driver's glasses.[32] Laws requiring the use of hands-free devices for phones and prohibiting the use of text messaging functions while operating a vehicle represent another type of regulation that has been implemented in many states.[33] The regulation of the use of cellular phones has created a situation where a cellular phone could be an important piece of evidence in the investigation of an infraction. For example, in California, although hands free devices are required[34] and text messaging is prohibited,[35] drivers are expressly permitted to dial numbers on their phone.[36] In a dispute as to whether a driver was sending a text message or merely dialing a number, the phone itself would be an excellent piece of evidence, as it may prove that the driver violated the statute.[37]

Another type of regulation undertaken by several states has reclassified the possession of small amounts of marijuana from a misdemeanor to an infraction.[38] This has already caused some courts to question whether the same bright-line search and seizure rules that govern most automobile exception searches can be applied to an infraction possession of marijuana violation.[39]

The result of this emerging technology, increased regulation, and decriminalization of marijuana is that it has become unclear if searches under the automobile exception are reasonable when they are undertaken to find evidence of infraction violations. The question as to whether these searches are reasonable may seem trivial, given the petty nature of infractions. However this issue is important, because if searches based on infractions are permitted, the officers conducting those searches are likely to find evidence of other crimes. Small searches often lead to big discoveries such as weapons,[40] drugs,[41] and

31. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 118948 (West 2012).

32. *See, e.g.*, CAL. VEH. CODE § 23120 (West 2012).

33. *See* Shannon L. Noder, *Talking and Texting While Driving: A Look at Regulating Cell Phone Use Behind the Wheel*, 44 VAL. U. L. REV. 237 (2009).

34. CAL. VEH. CODE § 23123(a) (West 2012).

35. *Id.* § 23123.5(a).

36. *Id.* § 23123.5(c). Without this provision some drivers would be unable to initiate or receive calls, even while using a hands free device.

37. Although there are likely other ways to get this information, looking at the phone would be an easy method. *See* Eric Lichtblau, *More Demands on Cell Carriers in Surveillance*, N.Y. TIMES, July 9, 2012, at A1.

38. *See, e.g.*, S.B. 1449 (Cal. 2010), S.B. 1014 (Conn. 2011), S.B. 2253 (R.I. 2012).

39. *See infra* Part III.

40. *See, e.g.*, New York v. Class, 475 U.S. 106 (1985).

cell phone messages containing evidence of drug sales[42] or cell phones containing child pornography.[43] Defendants facing charges related to those discoveries will be eager to challenge the search of their vehicles. Vehicle stops are the most common type of detention conducted by police officers,[44] and about five percent of traffic stops lead to a search of the driver, vehicle, or both.[45] As such, even though infractions are not serious violations in themselves, courts will likely be forced to address the issue of whether or not an automobile exception search based on an infraction violation is reasonable.

## II. THE AUTOMOBILE EXCEPTION REQUIRES THE APPLICATION OF BALANCING

The Supreme Court has interpreted the Fourth Amendment[46] as creating a "warrant requirement."[47] Under the warrant requirement, searches of protected areas are "presumptively unreasonable in the absence of a search warrant."[48] One of the ways in which that presumption can be overcome is under the "automobile exception."[49]

### *A. The Origins of the Automobile Exception*

Many commonly refer to searches under the automobile exception as "*Ross*" searches,[50] after the Supreme Court's decision in *United States v. Ross*.[51] The holding in *Ross* frames reasonableness as a balancing of two competing interests: the public interest on one side and the individual's expectation of privacy on the other.[52] In *Ross*, officers obtained information from an informant that Albert Ross was

41. *See, e.g.*, State v. Smalley, 225 P.3d 844, 845 (Or. Ct. App. 2010).

42. *See, e.g.*, People v. Diaz, 244 P.3d 501, 502 (Cal. 2011).

43. Cell phones are capable of containing child pornography. Because these images can be sent via text message, an officer checking a phone for text messages may come across those images. *See*, Jan Hoffman, *A Girls Nude Photo, and Altered Lives*, N.Y. TIMES, Mar. 27, 2011, at A1.

44. *Traffic Stops*, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=702 (last visited Mar. 22, 2014).

45. *Id.*

46. U.S. CONST. amend. IV.

47. *See, e.g.*, Filarsky v. Delia, 132 S. Ct. 1657, 1669 (2012).

48. Katz v. U.S., 389 U.S. 347, 361 (1967).

49. *See* U.S. v. Ross, 456 U.S. 798, 808-09 (1982); California v. Acevedo, 500 U.S. 565, 566 (1991); Wyoming v. Houghton, 526 U.S. 295, 309 (1999).

50. *See* Steven D. Soden, *Expansion of the Automobile Exception to the Warrant Requirement: Police Discretion Replaces the Neutral and Detached Magistrate*, 57 MO. L. REV. 661, 671 (1992).

51. U.S. v. Ross, 456 U.S. 798 (1982).

52. *Id.* at 804.

selling drugs, and that Ross had drugs in his vehicle.[53] After corroborating some of the information, the officers stopped Ross's car and searched it, finding a gun, cash, and drugs.[54]

The Court's analysis began by observing that the case presented a conflict "between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement."[55] The court determined that waiting to obtain a warrant would have been impractical[56] and found that the search was valid, because it was supported by probable cause.[57] The Court stated that, "an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband."[58]

While the language in *Ross* limited the automobile exception to searches for contraband,[59] the exception was soon expanded to include searches for evidence of a crime. The Court in *California v. Acevedo*,[60] under facts similar to *Ross*,[61] where police officers had reason to believe that Charles Acevedo had drugs inside a bag in the trunk of his vehicle,[62] ruled that "The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."[63]

Together, *Ross* and *Acevedo* lay down a bright-line rule that police may search a vehicle[64] they have stopped when there is probable cause to believe the vehicle contains contraband or evidence.[65] The Court reached that rule by balancing the same interests the Court balances when analyzing other types of searches: an individual's privacy interest

53. *Id.* at 801.
54. *Id.* at 801–02.
55. *Id.* at 804.
56. *Id.* at 806–07.
57. *Id.* at 808–09.
58. *Id.* at 823.
59. *Id.*
60. California v. Acevedo, 500 U.S. 565 (1991).
61. Reading the cases reveals their similarity. The Court in *Acevedo* also noted the similarity in the facts. *Id.* at 572–73.
62. *See id.* at 566–67.
63. *Id.* at 580.
64. While each of the cases that created the rule for probable cause vehicle searches require that there be a possibility the vehicle could be moved before a warrant is obtained, the Supreme Court set that bar low in *Pennsylvania v. Labron*, so that "[i]f a car is readily mobile and probable cause exists . . . the Fourth Amendment [will] thus permit[] police to search the vehicle without more." Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).
65. *See* Daniel T. Gillespie, *Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 LOY. U. CHI. L.J. 1, 2 (1999).

against the government's interest.[66]

### *B. The Reasonableness of a Search Under the Automobile Exception is Measured by Weighing the Governmental Interest Against the Individual's Expectation of Privacy*

A search must be reasonable to survive Fourth Amendment scrutiny. That reasonableness requirement applies evenhandedly to all types of warrantless searches, including consent searches,[67] inventory searches,[68] searches incident to an arrest,[69] as well as parole,[70] and probation searches.[71] Vehicle searches under the "automobile exception" to the warrant requirement have long been considered to be reasonable.[72]

In a recent application of the automobile exception, *Wyoming v. Houghton*,[73] the Court explicitly adopted a balancing test to determine whether a search under the automobile exception was reasonable.[74] The Court balanced an individual's expectation of privacy on one side and the government's interest on the other, observing that:

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by

66. *See supra* Part II.

67. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Consent searches are discussed at length in Tracey Maclin, *The Good and Bad News About Consent Searches in The Supreme Court*, 39 MCGEORGE L. REV. 27 (2008).

68. *See* South Dakota v. Opperman, 428 U.S. 364 (1976).

69. *See* Arizona v. Gant, 556 U.S. 332 (2009). Searches incident to an arrest are discussed at length in George M. Dery III, *A Case of Doubtful Certainty: The Court Relapses into Search Incident to Arrest Confusion in* Arizona v. Gant, 44 IND. L. REV. 395 (2011).

70. *See* Samson v. California, 547 U.S. 843, 846-48 (2006) ("[R]easonableness is determined by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.").

71. *See* United States v. Knights, 534 U.S. 112 (2001) ("[T]he reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.").

72. California v. Acevedo, 500 U.S. 565, 566 (1991).

73. Wyoming v. Houghton, 526 U.S. 295 (1999).

74. The balancing test use in *Houghton* is the same test later used in *Knights* and *Samson*. *Supra* notes 70–71.

> assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.[75]

The Court then described that evaluating a search and seizure requires a "balancing of the relative interests."[76]

The *Houghton* Court recognized that the interests in this balancing equation vary, depending on the circumstances of the search. *Houghton* held that officers with probable cause to search a car may search a passenger's belongings, provided that they may contain the target of the search.[77] The Court distinguished the search of a vehicle from the search of a passenger in the vehicle, because one's person has a greater privacy interest than a vehicle, triggering " 'significantly heightened protection,' " so that a search of the passenger's person would not be reasonable.[78] The Court's use of that distinction, where the search of a vehicle would be reasonable but the search of the person of a passenger in that vehicle would not, demonstrates that whether a search is reasonable or unreasonable can differ between searches that are similar on their face, but implicate different interests. Similarly, automobile exception searches based on infraction violations do not implicate the same interests as searches based on more serious violations.

The Court has not yet considered the permissibility of a search under the automobile exception where probable cause exists only as to evidence of an infraction offense. As related below, however, the Court has held elsewhere that an offense's designation as a mere infraction limits the investigative steps that law enforcement officers may take.[79]

## III. THERE IS A DECREASED GOVERNMENTAL INTEREST IN INFRACTIONS

### *A. The Supreme Court and the New York Court of Appeals Have Recognized That There is a Decreased Governmental Interest in Infractions.*

In *Welsh v. Wisconsin*,[80] instead of a vehicle search based on an infraction, the United States Supreme Court examined the search of a

75. *Houghton*, 526 U.S. at 299–300 (quoting U.S. CONST. amend. IV).
76. *Id.* at 303.
77. *Id.* at 307.
78. *Id.* at 303.
79. Welsh v. Wisconsin, 466 U.S. 740 (1984); *infra* Part III.
80. 466 U.S. 740 (1984).

home, where officers were conducting a driving under the influence investigation.[81] At the time in question, Wisconsin classified a first-offense DUI as a civil infraction.[82] The Court found that the officers' entry into the defendant's home, while conducting their investigation, was an unreasonable search under the Fourth Amendment.[83] In reaching this conclusion, the court considered the governmental interest in an infraction violation stating:

> The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. Given this expression of the State's interest, a warrantless home arrest cannot be upheld . . . To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.[84]

The Court's focus on the difference between an infraction and a more serious offense demonstrates both that there is a decreased governmental interest in infractions and that the decreased interest is a factor in weighing reasonableness.[85]

While *Welsh* dealt with the search of a home for the violation of a mere infraction, the New York Court of appeals addressed the search of a vehicle following a detention for an infraction in *People v. Class*.[86] In *Class*, police officers stopped a vehicle driven by Benigno Class after they observed two infractions: speeding and a broken windshield.[87] After stopping, Class stepped out of his car and spoke with one of the officers. The second officer went to the vehicle and opened the door to check the door jam for the vehicle identification number ("VIN").[88] Finding no VIN on the door jam, the officer reached into the vehicle and moved some papers that were obscuring the area of the dashboard where the VIN is located in newer model vehicles.[89] While doing so, that officer saw the handle of a gun protruding from under the driver's seat of the vehicle, and then seized

81. *Id.* at 741–43.
82. *Id.* at 747 n.6.
83. *Id.* at 753.
84. *Id.* at 754.
85. *See supra* Part III.B.
86. People v. Class, 472 N.E.2d 1009 (N.Y. 1984), *rev'd*, 475 U.S. 106 (1985).
87. New York v. Class, 475 U.S. 106, 107–08 (1985).
88. *Id.*
89. *Id.*

the gun.[90] The opinion of the Court of Appeals focused on the reasonableness of a search when there was no suspicion of wrongdoing, other than the two infractions.[91] The court found that "[t]he facts reveal[ed] no reason for the officer to suspect other criminal activity or to act to protect his own safety. The sole predicate for the officer's action here was defendant's commission of an ordinary traffic infraction, an offense which, standing alone, did not justify the search."[92] While *Class* concerned a VIN,[93] rather than evidence of an infraction or contraband amounting to an infraction, the New York Court of Appeals was unwilling to permit a search for such a minor offense.[94]

Although *Class* was overturned by the Supreme Court in *New York v. Class*,[95] the Court overturned the Court of Appeals on the grounds that there was no expectation of privacy in a vehicle's VIN, rather than by weighing the state's interest in pursuing the infraction violations.[96] Since the New York Court of Appeals was applying the normal expectation of privacy in vehicles and not the lack of such an expectation in the VIN,[97] the reasoning of the Court of Appeals can still be applied to those portions of a vehicle where an expectation of privacy exists.

### *B. There is a Meaningful Difference Between Infractions and Misdemeanors*

Infractions and misdemeanors are both classifications of offenses. Infractions are distinguishable from misdemeanors by the government's interest in identifying and prosecuting offenders,[98] the available punishments,[99] and the societal consequences outside of the criminal justice system associated with a conviction.[100] These factors

90. *Id.*

91. *See* People v. Class, 472 N.E.2d 1009, 1012 (N.Y. 1984), *rev'd*, 475 U.S. 106 (1985). There was also a question as to whether the search had really been in order to uncover the VIN, as the officer conducting the search never radioed in or recorded the VIN number. People v. Class, 97 A.D.2d 741, 741–42 (N.Y. App. Div. 1983), *rev'd*, 472 N.E.2d 1009 (N.Y. 1984).

92. *Class*, 472 N.E.2d at 1012, *rev'd*, 475 U.S. 106 (1985).

93. *Id.* at 1010.

94. *Id.* at 1012.

95. 475 U.S. 106 (1985).

96. *See id.* at 114.

97. *See* People v. Class, 472 N.E.2d 1009, 1012–13 (N.Y. 1984), *rev'd*, 475 U.S. 106 (1985).

98. *See infra* Part III.B.

99. *See infra* Part III.B.

100. *See infra* Part III.B.

are interrelated, but it is in the government interest that a distinction with significance can be found.

The label of an offense as a felony, misdemeanor, or infraction signals the level of the government's interest in that offense. Labeling an offense as an infraction signals that the government has a reduced interest in prosecuting the offense, as well as the government's desire to expend fewer resources policing that type of offense.[101] For example, California demonstrated a diminished interest in unlawful possession of marijuana, when the Legislature enacted a bill that reduced possession of less than one ounce of marijuana from a misdemeanor to an infraction.[102] That bill expressed the desire to avoid jury trials and to "keep[] low-level offenders out of court."[103] The government's intention that offenders receive low-level treatment is evidence of the reduced governmental interest in those offences.

The California Legislature is not the only entity to acknowledge a decreased governmental interest in infractions. The Supreme Court, in *Welsh v. Wisconsin*,[104] reached the same conclusion, finding a decreased governmental interest in prosecuting civil infractions. While discussing the nature of an infraction, the Court explained that, the offense's label as an infraction "is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest."[105] The government does not have the same interest in identifying and convicting those that commit infractions, as it does in identifying and convicting those that commit misdemeanors and felonies.[106]

The decreased interest of both the government and society is also expressed by the authorized punishment for a particular offense classification. The maximum punishment for infractions is a fine[107] or

101. In his S.B. 1449 (Cal. 2010) signing statement, former California Governor Schwarzenegger wrote, "law enforcement, and the courts cannot afford to expend limited resources prosecuting a crime that carries the same punishment as a traffic ticket." Bonnie King, *Governor Schwarzenegger Signs Bill to Reduce Marijuana Penalties in California*, SALEM-NEWS.COM, (Oct. 1, 2010), http://www.salem-news.com/articles/october012010/schwarzenegger-marijuana.php.

102. S.B. 1449 (Cal. 2010).

103. S.B. 1449 (Cal. Assembly Floor Analysis, June 25, 2010), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1449_cfa_20100625_150316_asm_floor.html.

104. Welsh v. Wisconsin, 466 U.S. 740 (1984).

105. *Id.* at 754.

106. While the ultimate decision in *Welsh* is distinguishable, on its facts, from a vehicle search, the Court's rationale demonstrates that there is a decreased governmental interest in infractions.

107. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 3 (6th ed. 2012).

other punishment short of imprisonment, such as community service,[108] or a driver's license suspension.[109] The maximum punishment for misdemeanors varies, depending on the offense, from a monetary fine, to incarceration in a jail, or a combination of the two.[110] Misdemeanors may result in imprisonment,[111] while infractions may not.[112] That imprisonment is completely unavailable as a punishment for infraction violations signals that the government has a lower interest in punishing those offenders.

Punishments administered by the government, such as fines and imprisonment are not the only consequences of criminal convictions. Another, appreciable, difference between misdemeanors and infractions is the societal consequences associated with a conviction. The difference in the societal consequences between felonies and misdemeanors are sharply drawn. For example, felons cannot possess firearms[113] and the courts permit the use of a felony conviction for impeachment of testimony, regardless of the offense.[114] The distinction between misdemeanors and infractions is more subtle. For example, in California, infractions do not appear on a person's criminal record, while misdemeanors appear for a limited time.[115] That criminal record that follows misdemeanors can affect future events, such as employment or rental applications.[116] As such, misdemeanor convictions can affect entire areas of a person's life, while infractions affect only the pocket book.[117] There is a lower societal interest in

108. *See, e.g.*, CAL. PEN. CODE § 1209.5 (West 2014).

109. *See, e.g.*, CAL. VEH. CODE § 13202.5 (West 2014).

110. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.6(a), at 48 (2d ed. 2003).

111. The line blurs when comparing a misdemeanor punishable only by a fine, such as possession of less than one ounce of marijuana in California prior to 2011, (CAL. HEALTH & SAFETY § 11357(b) (West 2010)) with an infraction punishable only by a fine, such as possession of less one ounce of marijuana in California after 2011. CAL. HEALTH & SAFETY § 11357(b) (West 2014). There, the only true difference is the label. Both the low level misdemeanor and the infraction are punishable by a fine only. Therefore, the available punishment is not a trait that can be used to distinguish all misdemeanors from all infractions. This dilemma only arises when the available punishment for a misdemeanor is set as a fine by the legislature.

112. DRESSLER, *supra* note 107, at 3.

113. 18 U.S.C. § 922(g) (West 2012).

114. FED. R. EVID. 609(a) (2011).

115. Kathleen Pender, *When Marijuana Possession Becomes an Infraction*, S.F.GATE.COM (Nov. 7, 2010), http://www.sfgate.com/business/networth/article/When-marijuana-possession-becomes-an-infraction-3247238.php#page-1. Court records will still be locatable, if they are checked. *Id.*

116. *See* Paul Bergman, *Expunging or Sealing an Adult Criminal Record*, NOLO, http://www.nolo.com/legal-encyclopedia/expungement-of-criminal-records-basics-32641.html (last visited Mar. 22, 2014).

117. *See infra* Part I.

holding the offender accountable and accordingly, less interest in convicting the offender.

The decreased societal interest in infractions complements the decreased government interest. Both are evidence of the same conclusion. The people and their government care less about infractions, because infractions are minor violations.

## IV. THERE IS AN EXPECTATION OF PRIVACY IN VEHICLES

The existence of an expectation of privacy in a vehicle is a more settled point than the governmental interest in infractions. A person does not have the same expectation of privacy in a vehicle as they do their home.[118] The Supreme Court has explained that:

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels pubic thoroughfares where both its occupants and its contents are in plain view.[119]

The Court has further justified the diminished expectation of privacy in vehicles by explaining that "the ready mobility of the automobile justifies a lesser degree of protection of those interests,"[120] and that the "reduced expectations of privacy derives not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways."[121] While the expectation is not a defined numerical value, there is an expectation of privacy in vehicles.[122] It is sufficient, for the purposes of this Comment, to recognize that while the expectation of privacy in a vehicle is less than in a home, some expectation of privacy in vehicles exists.[123] That expectation remains constant in the analysis of searches under the automobile exception, whether the offense being investigated is an infraction, or a more serious offense such as a misdemeanor or felony.

118. *See* California v. Carney, 471 U.S. 386 (1985).

119. Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

120. *Carney*, 471 U.S. at 390.

121. *Id.* at 392.

122. Arizona v. Gant, 556 U.S. 332, 345 (2009).

123. *Gant*, 556 U.S. at 345 ("Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection . . . .") (citing New York v. Class, 475 U.S. 106, 112–13 (1986); Knowles v. Iowa, 525 U.S. 113, 117 (2000)). For an argument that cars have a greater expectation of privacy than currently recognized by the court, *see* Cecil J. Hunt, II, *Calling in the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy*, 56 CASE W. RES. L. REV. 285, 342–43 (2005).

## V. LOWER COURT'S HAVE COME TO CONFLICTING CONCLUSIONS WHEN ANALYZING AUTOMOBILE EXCEPTION SEARCHES BASED ON INFRACTION VIOLATIONS

While *Class*[124] and *Welsh*[125] both touch on the issue of searches based on infractions, neither reaches the discrete issue that is the focus of this Comment. The Oregon Court of Appeals, the Massachusetts Supreme Court, and the California Court of Appeals have addressed the issue, in the context of marijuana possession. Those courts each addressed the search of a vehicle for marijuana, where possession of less than one ounce of marijuana was an infraction.[126]

The Oregon Court of Appeals addressed a search of a vehicle for evidence of marijuana possession, which was an infraction in Oregon, in the case of *State v. Smalley*.[127] In *Smalley*, an officer conducted a traffic stop and observed an odor of marijuana coming from the vehicle.[128] At that time, possession of less than one ounce of marijuana was an infraction in Oregon[129] and the officer had no reason to suspect that there was more than an ounce of marijuana in the vehicle.[130] The officer conducted a search of the vehicle and found marijuana in a backpack placed behind a seat in the vehicle.[131] The appellate court relied on a state supreme court decision similar to *Ross*, which allowed for searches of vehicles when an officer had "probable cause to believe . . . a[n] automobile, which was mobile at the time of the stop contains contraband or crime evidence. . . ."[132] The court found that the language "contraband or crime evidence" was significant, because if the automobile exception was limited to cases where possession of the contraband was a crime, the words "crime evidence" would have been sufficient to define the limits of the exception.[133] The court then applied the automobile exception to the infraction violation at issue, holding that because any amount of marijuana is contraband,[134] the search was reasonable under the automobile exception. The court did not consider any type of balancing.[135]

124. People v. Class, 472 N.E.2d 1009, 1012 (N.Y. 1984), *rev'd*, 475 U.S. 106 (1985).
125. Welsh v. Wisconsin, 466 U.S. 740 (1984).
126. *See infra* Part III.B.
127. State v. Smalley, 225 P.3d 844 (Or. Ct. App. 2010).
128. *Id.* at 845.
129. OR. REV. STAT. § 475.864(3) (2009).
130. State v. Smalley, 225 P.3d 844, 845 (Or. Ct. App. 2010).
131. *Id.*
132. *Id.* at 846 (quoting State v. Brown, 721 P.2d 1357, 1362 (Or. 1986)).
133. *Id.* at 848.
134. *Id.* (citing BLACK'S LAW DICTIONARY 365 (9th ed. 2009)).
135. *See* State v. Smalley, 225 P.3d 844, 848 (Or. Ct. App. 2010). The court's analysis of the entire case was limited to four pages and the court indicated that it felt bound by

In a case decided after *Smalley*, the Massachusetts Supreme Court reached the opposite conclusion. In *Commonwealth v. Cruz*,[136] the Supreme Court of Massachusetts suppressed crack cocaine found during a search.[137] The court found that an officer's investigation of possession of less than one ounce of marijuana did not justify a vehicle search under the "automobile exception."[138] In *Cruz*, two officers contacted the defendant after they observed his car parked next to a fire hydrant.[139] The officers smelled an odor of marijuana coming from the vehicle.[140] There was nothing to indicate that the quantity of marijuana was greater than one ounce and in Massachusetts, possession of less than once ounce of marijuana[141] and stopping next to a fire hydrant[142] were infractions, distinct from criminal violations.[143] The officers waited for the arrival of four additional officers and then instructed the defendant, a passenger in the vehicle, to step out of the vehicle.[144] Once out of the vehicle, the defendant admitted that he had crack cocaine in his pocket, which one of the officers recovered.[145] In Massachusetts, under most circumstances, officers could not order a passenger out of a vehicle unless the officers had "reasonable suspicion (based on articulable facts) that the defendant was engaged in criminal activity separate from any offense of the driver," or "to facilitate a search of the vehicle."[146] As such, the court considered whether the officers had sufficient grounds to search the vehicle under the automobile exception. The court considered *Smalley*, but was not persuaded by the reasoning of the *Smalley* court.[147] The *Cruz* court ruled that Massachusetts law required a different outcome than *Smalley* because under Massachusetts state law, warrants could not be issued to locate evidence of non-criminal violations[148] and that there could be no

precedent. *See id.* at 845 n.1. In *State v. Kurokawa-Lasciak*, the Oregon Court of Appeals reached the same conclusion, using the same type of analysis, on similar facts. *See* State v. Kurokawa-Lasciak, 239 P.3d 1046 (Or. Ct. App. 2010), *rev'd on other grounds*, 263 P.3d 336 (2011).

136. Commonwealth v. Cruz, 945 N.E.2d 899 (Mass. 2011).

137. *Id.* at 914.

138. *Id.* at 913.

139. *Id.* at 902.

140. *Id.* at 903.

141. MASS. GEN. LAWS ch. 94C, § 32L (West 2010).

142. Commonwealth v. Cruz, 945 N.E.2d 899, 903 (Mass. 2011) (citing BOSTON, MASS., TRAFFIC R. & REGS. art. 4, § 1(6) (2003)).

143. *Id.* at 903, 905 n.9.

144. *Id.* at 903.

145. *Id.* at 904.

146. *Id.* at 906 (citing Commonwealth v. Bostock, 880 N.E.2d 759, 765 (Mass. 2008)).

147. *Cruz*, 945 N.E.2d at 912.

148. *Id.* at 913.

exception to the warrant requirement where no warrant could have been obtained.[149] The court's decision was thus based only on Massachusetts law and the court recognized that by noting that the outcome might be different in other jurisdictions.[150]

In *People v. Waxler*,[151] the California First Appellate District similarly addressed the search of a vehicle under the automobile exception, where possession of a small amount of marijuana was classified as an infraction.[152] In *Waxler*, a deputy searched a vehicle after smelling an odor of marijuana coming from the vehicle and seeing a marijuana pipe, with burnt marijuana in the bowl, in plain view. The deputy then searched the vehicle and found methamphetamine.[153] The court applied the automobile exception rule and found that a search was justified, as a search for contraband.[154] The *Waxler* court recognized that its conclusion, that any amount of marijuana was contraband and justified a search under the automobile exception, was similar to the conclusion reached by the *Smalley* court.[155] *Waxler* then distinguished *Cruz*, because unlike in Massachusetts, in California, committing an infraction is a "crime" and because California law permitted automobile exception searches for any type of contraband.[156] Like the *Smalley* and *Cruz* courts, the *Waxler* court did not undertake a balancing analysis.[157]

## VI. THE AUTOMOBILE EXCEPTION CANNOT JUSTIFY THE SEARCH OF A VEHICLE FOR EVIDENCE OF A MERE INFRACTION

Searches based on infraction violations should be found unreasonable when the expectation of privacy in a vehicle is weighed against the state interest in infraction violations. The automobile exception should not be applied as a blanket rule and courts should be examined as a weighing of those two interests.[158] The Supreme Court has stated that, "[i]n determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts and

149. *Id.*

150. *Id.* at 913 n.31 (quoting United States v. Pugh, 223 F. Supp. 2d 325, 330 (D. Me. 2002)).

151. People v. Waxler, No. A137796, 2014 WL 935470 (Cal. Ct. App. Mar. 11, 2014).

152. *Id.* at *1.

153. *Id.* at *2.

154. *Id.* at *4 (discussing that marijuana is "contraband," and may provide probable cause to search a vehicle under the automobile exception).

155. *Id.* at *5.

156. *Id.* at *6.

157. *See* State v. Smalley, 225 P.3d 844, 846 (Or. Ct. App. 2010); Commonwealth v. Cruz, 945 N.E.2d 899, 906 (Mass. 2011); *Waxler*, 2014 WL 935470, at *7.

158. *See, e.g.*, *Smalley*, 225 P.3d at 846.

circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright-line rule of general application,"[159] and that, "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."[160]

An examination of the circumstances that led to the creation of the automobile exception reveals that in *Ross*, *Acevedo*, and *Houghton*, the police officers were investigating serious drug offenses.[161] In the case relied on by the Oregon appellate court in *Smalley*, police officers were investigation the unlawful carrying of a concealed handgun.[162] Comparing the seriousness of those offenses to the pettiness of an infraction violation reveals that the governmental interest in infractions is substantially lower than the governmental interest that existed in the cases that gave rise to the automobile exception.

A court determining the reasonableness of an automobile exception search based on an infraction should adopt the rule that such searches are unreasonable and should be prohibited. A court could adopt that rule without disturbing the automobile exception, which was created for misdemeanor and felony offenses.[163] Infractions are different from more serious violations. As a result, when the expectation of privacy is weighed on one side,[164] and the governmental interest in an infraction is weighed on the other[165] the scale tips towards privacy.

This Comment does not suggest the abolition of the bright-line rules of *Ross* and *Acevedo*.[166] It recommends a delineation of the grounds to which the rule applies, with infractions on one side and more serious offenses on the other. The Supreme Court has recognized that "[t]he Fourth Amendment does not insist upon bright-line rules. Rather it recognizes that no single set of legal rules can capture the

159. New York v. Belton, 453 U.S. 454, 464 (1981), *overturned by*, 556 U.S. 332 (2009) (Brennan J., dissenting) (citing Sibron v. New York, 392 U.S. 40, 59 (1968); Preston v. United States, 376 U.S. 364, 367 (1964)).

160. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

161. United States v. Ross, 456 U.S. 798, 801 (1982) (officers found a bag containing heroin); California v. Acevedo, 500 U.S. 565, 566–67 (1991) (a large quantity of marijuana had been shipped from Hawaii); Wyoming v. Houghton, 526 U.S. 295 (1999) (officers searched a vehicle for contraband after noticing a hypodermic needle in the driver's shirt pocket).

162. State v. Brown, 721 P.2d 1357, 1358 (Or. 1986).

163. *See supra* Part II.

164. *See supra* Part IV.

165. *See supra* Part II.B.

166. *See supra* Part II.

ever-changing complexity of human life."[167] However, bright-light rules are not without their benefits.[168] The Court has also recognized that bright-line rules can provide "a single, familiar standard. . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[169] Prohibiting automobile exceptions searches based on infraction violations, but allowing those searches during the investigation of misdemeanors and felonies embraces both these principles. It recognizes the changing complexities of human life that have led to the existence of discoverable evidence for a number of petty offenses, while still providing police officers with guidance on when an automobile exception search is permitted.

A consideration of the potential consequences of a ruling allowing automobile exception searches based on infractions shows that public policy cannot allow such searches. The continued introduction of new technology creates collectable digital evidence as well as new distractions for drivers that may result in new prohibitions of in-car conduct.[170] People have a real expectation of privacy in their vehicles.[171] That expectation would become illusory if a vehicle search were permitted for almost every possible violation; police would be justified in searching a vehicle during almost every traffic stop. The expectation of privacy in a vehicle would lose its meaning and the right to privacy in a vehicle would erode at the same rate that technology expands.

As with any rule that inhibits the ability of police to detect violations and enforce laws, there would be a societal cost of "letting guilty and possibly dangerous [people] go free. . . ."[172] Here, when the cost of letting infraction violators go free is weighed against the liberty interest of the people, the scales tip in the favor of liberty. "Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety."[173]

167. Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer, J., concurring).

168. Gillespie, *supra* note 65, at 3.

169. New York v. Belton 453 U.S. 454, 458 (1981), *overturned by* 556 U.S. 332 (2009) (quoting Dunaway v. New York, 443 U.S. 200, 213-14 (1979)).

170. *See supra* Part I.

171. *See* James A. Adams, *The Supreme Court's Improbable Justifications for Restriction of Citizens' Fourth Amendment Privacy Expectations in Automobiles*, 47 DRAKE L. REV. 833, 835 (1999).

172. Herring v. U.S., 555 U.S. 135, 141 (2009).

173. Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor, November 11, 1755, *in* 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963).

Adopting a rule that prohibited searches based on infraction violations would not allow red light runners and speeders to commit violations without fear of prosecution. Police still have other options available for enforcement,[174] which don't require searches in response to minor offenses.

### *A. Infraction Possession of Marijuana Violations Will Not Be Balanced at the Same Level As Other Infractions, Because Marijuana Possession Implicates More Serious Crimes*

While the application of balancing will lead to the conclusion that a search under the automobile exception is unreasonable in cases such as texting while driving or speeding,[175] cases involving infraction possession of marijuana will receive different treatment. That different treatment is because before infraction possession of marijuana can occur, either the possessor or another party must have committed a felony. The marijuana in question came from somewhere and as such, the marijuana was either illegally cultivated or illegally sold to the unlawful possessor.[176] In the cases of *Cruz* and *Smalley*, the courts reasoned that there was nothing that could lead officers to believe that there was more than one ounce of marijuana in the vehicle and that as such, the most serious offense being investigated was the infraction possession of marijuana.[177] However, that infraction possession of marijuana was not the only offense implicated. The possession of marijuana requires a source of marijuana, meaning that the marijuana was either sold to, or cultivated by, the person possessing it. As such, the marijuana is evidence of a felony. Specifically, either the unlawful sale of,[178] or unlawful cultivation of, marijuana.[179]

Furthermore, possession of marijuana remains a felony under federal law[180] and state officers are permitted to investigate and make

174. Traditional methods include hiding in bushes and behind billboards. In an interesting example, an officer in Florida dressed in a giant bunny costume to find seatbelt violators. Cythia Roldan, *West Palm Beach police use bunny costume to enforce seat-belt law*, PALM BEACH POST (Mar. 28, 2012), http://www.palmbeachpost.com/news/news/traffic/west-palm-beach-police-use-bunny-costume-to-enfo-1/nLh3B/.

175. *See supra* Part III.

176. It is conceivable that a person unlawfully possession marijuana may obtain it in some other way such as finding it. However that does not change the analysis here, as officers would still have probable cause that either unlawful cultivation or unlawful distribution occurred.

177. *See supra* Part V.

178. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11359 (West 2012).

179. *See, e.g.*, *id.* § 11358.

180. 21 U.S.C. § 811 (2012); *See also*, Gonzales v. Raich, 545 U.S. 1 (2005) (finding

arrests for federal offenses.[181] As such, the governmental interest is not at the level of an infraction. Instead, the governmental interest it is at the level of a felony because in every case, a felony must have been committed by someone in order for the current possessor to acquire the marijuana and because in every case, the possessor is committing a felony. Once felony crimes are implicated, *Houghton* can be applied without considering the decreased level of governmental interest in infractions and a search will be reasonable if the officer has probable cause to believe that the vehicle contains contraband or evidence.[182] While the law varies from state to state as to what constitutes probable cause that a vehicle contains marijuana,[183] any marijuana would be evidence. Black's Law Dictionary,[184] defines evidence as "[s]omething . . . that tends to prove or disprove the existence of an alleged fact . . . ."[185] Since marijuana in a vehicle tends to prove that someone is in possession of marijuana and that the possessor cultivated the marijuana or purchased the marijuana from a third party, it is evidence of those crimes. So long as the particular states probable cause threshold is met, the search will be valid.[186]

### *B. States That Do Not Authorize Search Warrants for Infraction Violations May Not Reach Balancing*

Although the application of balancing should lead to the conclusion that a probable cause search based on an infraction violation is unreasonable, some states will find the search unreasonable on other grounds before reaching the balancing test. They may conclude that there cannot be an exception to the warrant requirement where no warrant could possibly be obtained to search for the evidence. As such, they would not even begin the balancing analysis.

In the Massachusetts Supreme Court Case *Commonwealth v.*

that federal marijuana law is a valid exercise of the Commerce Clause, even if marijuana use is legal under state law)).

181. People v. Barajas, 147 Cal. Rptr. 195 (Cal. Ct. App. 1978); Marsh v. United States, 29 F.2d 172, 173–74 (2d Cir. 1928).

182. *See supra* Part V.

183. *See* 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 (2000).

184. Black's Law Dictionary was chosen because that was the choice of the courts in *Cruz* and *Smalley*, when they sought to define "contraband." Commonwealth v. Cruz, 945 N.E.2d 899, 911 (Mass. 2011); State v. Smalley, 225 P.3d 844, 848 (Or. Ct. App. 2010).

185. BLACK'S LAW DICTIONARY 635 (9th ed. 2009).

186. For an article otherwise critical of the Commonwealth v. Cruz decision, *see* John Sullivan, *Reasonable Suspicion of an Unjust Conclusion: How* Commonwealth v. Cruz *Cripples Enforcement of Mass. Gen. Laws Ch. 94c,* § *32l*, 46 NEW ENG. L. REV. 877 (2012).

*Cruz*,[187] the court found that because no warrant could have obtained under the state's search warrant statute,[188] there could be no exception to the warrant requirement.[189] A potential flaw in that reasoning is that there are already several exceptions to the warrant requirement in situations where no warrant can be obtained. Those situations include searches incident to an arrest,[190] inventory searches,[191] stop and frisk searches,[192] consent searches[193] and the emergency aid exception.[194] The existence of those other exceptions does not mean that the reasoning in *Cruz* is invalid, as state courts may apply more restrictive search and seizure requirements than those required by the Fourth Amendment.[195] The existence of those exceptions means only that the unavailability of a search warrant may not be of constitutional significance.

States that authorize the issuance of search warrants for infraction violations will not be able to follow the reasoning of *Cruz.* The *Cruz* court identified Maine as such a state.[196] Similarly, the California Penal Code allows for a search warrant to be obtained "[w]hen the property or things are in the possession of any person with the intent to use them as a means of committing a public offense. . . ."[197] The California Penal Code defines "public offenses" as including infractions,[198] so it follows that in California a warrant could be issued to search for items of evidence in infraction cases, so long as they were used as "means" of committing the offense. As such, courts in states such as Maine and California could still reach balancing, even if they followed the reasoning of the *Cruz* court.

### *C. States that Do Not Classify Infractions as Crimes May Not Reach Balancing*

There is another way in which some courts may disallow a search under the automobile exception based on an infraction violation, before reaching balancing. A search under the automobile exception requires

187. Commonwealth v. Cruz, 945 N.E.2d 899, 903 (Mass. 2011); *see* discussion *supra* Part V.

188. *Id.* at 912 (citing MASS. GEN. LAWS ch. 276 § 2B (2010)).

189. Commonwealth v. Cruz, 945 N.E.2d 899, 913 (Mass. 2011).

190. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969).

191. *See* South Dakota v. Opperman, 428 U.S. 364, 380 (1976).

192. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

193. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973).

194. *See* Brigham City v. Stuart, 547 U.S. 398 (2006).

195. *See* People v. Scott, N.E.2d 1328, 1335–39 (N.Y. 1992).

196. Commonwealth v. Cruz, 945 N.E.2d 899, 913 n.31 (Mass. 2011).

197. CAL. PEN. CODE § 1524(a)(3) (West 2012).

198. *Id.* § 16.

that the search be for crime evidence or contraband.[199] In a state where infractions are not considered to be "crimes" and the target of the search is not contraband, a search based on an infraction violation could not possibly locate crime evidence or contraband, related to that infraction. As such, a court could disallow a search before even beginning the balancing analysis.

The court in *Cruz* reasoned that if an offense is not classified as a crime, a search based on that offense is unreasonable,[200] and disallowed the search because infractions were not classified as criminal offenses in Massachusetts.[201] In *Smalley*, the court was able to skirt the issue of the non-criminal offense classification. The court validated the search, reasoning that the evidence in question was marijuana, which was contraband. As such, the search was valid because the Oregon automobile exception[202] allowed probable cause searches to find either crime evidence *or* contraband.[203]

However, in a future case where the target of a search is neither crime evidence nor contraband, even the Oregon court may be forced to disallow a search. For example, if the search in question was for a cellular phone used to text while driving,[204] or a dash camera video of a red light violation,[205] that evidence would be neither crime evidence nor contraband. As such, even the reasoning of the *Smalley* court would require the conclusion that the search did not fall within the automobile exception.[206]

## CONCLUSION

The question as to whether a search based on an infraction violation can be justified under the automobile exception has not been

199. *Supra* Part II.A.

200. *Cruz*, 945 N.E.2d at 910 ("Ferreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is n[ot] desired by the public . . . .").

201. *Id.* ("Given our conclusion that G.L. c. 94C, §§ 32L-32N, has changed the status of possession one ounce or less of marijuana from a crime to a civil violation, without at least some other additional fact to bolster a reasonable suspicion of *criminal* activity, the odor of burnt marijuana alone cannot reasonably provide suspicion of criminal activity to justify an exit order."); *but see* People v. Waxler, No. A137796, 2014 WL 935470, at *10 (Cal. Ct. App. Mar. 11, 2014) (" [P]ossession of up to an ounce of nonmedical marijuana in California is a 'crime.' ").

202. The history of the Oregon "automobile exception" varies from the Supreme Court case history, but the rule is ultimately the same. State v. Smalley, 225 P.3d 844, 848 (Or. Ct. App. 2010).

203. *Id.*

204. OR. VEH. CODE. § 811.507 (2).

205. *Id.* § 811.260 (7).

206. *See supra* Part V.

fully addressed by the courts. It is now emerging as an issue, as technology becomes more pervasive, regulation becomes more targeted, and marijuana possession is decriminalized. As these trends continue, there will continue be an increase in the number of vehicle stops where evidence or contraband is recoverable.

The Supreme Court decisions setting the bright-line rule currently used to evaluate probable cause vehicle searches all involved crimes classified as either felonies or misdemeanors. However, where an offense is classified as an infraction, there is a meaningful difference between that offense and more serious offenses such as misdemeanors and felonies. That difference changes the result when weighing reasonableness. The decreased weight of an infraction tips the scales so that the government's interest no longer outweighs the individual's expectation of privacy and any search based on an infraction violation becomes unreasonable. Both the application of the Court's balancing test and public policy require an adjustment to the bright-line rule so that police may only conduct a search of a motor vehicle when there is probable cause to believe that the vehicle contains evidence or contraband related to a misdemeanor or felony.