

CONFUSION AND INCONSISTENCIES SURROUNDING THE EXIGENCY
COMPONENT FOR WARRANTLESS VEHICLE SEARCHES UNDER
ARTICLE I, SECTION 8

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I. INTRODUCTION

Both the United States Supreme Court and the Pennsylvania Supreme Court acknowledge that individuals have a reduced expectation of privacy inside their vehicles.¹ The Pennsylvania Supreme Court stated: “it is too great a leap of logic to conclude that the automobile is entitled to the same sanctity as a person’s body.”² This reduced expectation of privacy, along with a vehicle’s inherent mobility, makes a warrantless vehicle search reasonable under certain circumstances.³ Fourth Amendment jurisprudence clearly recognizes an automobile exception to the warrant requirement.⁴ Under this exception, police can search a vehicle without a warrant

1. *Commonwealth v. McCree*, 924 A.2d 621, 629 (Pa. 2007) (plurality) (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). *See New York v. Class*, 475 U.S. 106, 112-13 (1986) (recognizing a lesser expectation of privacy in a vehicle because its function is transportation and rarely a “repository of personal effects”) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)).

2. *McCree*, 924 A.2d at 630 (quoting *Commonwealth v. Rogers*, 849 A.2d 1185, 1191 (Pa. 2004)); *see also Commonwealth v. Rubis*, 978 A.2d 391, 394 (Pa. Super. 2009) (recognizing a citizen has a lesser expectation of privacy with respect to his vehicle); *In Re O.J.*, 958 A.2d 561, 565 (Pa. Super. 2008) (same); *Commonwealth v. Holzer*, 389 A.2d 101, 106 (Pa. 1978) (recognizing a lesser expectation of privacy in vehicle than in home or office)).

3. *Holzer*, 389 A.2d at 103.

4. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Carroll v. United States*, 267 U.S. 132, 147-56 (1925).

when probable cause exists.⁵ The Pennsylvania Supreme Court has not adopted this full federal automobile exception, which it recently reaffirmed in both *Commonwealth v. McCree* and *Commonwealth v. Hernandez*.⁶ Instead, the Pennsylvania Supreme Court holds that under Article I, Section 8 of the Pennsylvania Constitution, police can search an automobile without a warrant only when both probable cause and exigent circumstances exist.⁷

The problem surrounding this limited exception within the Pennsylvania Supreme Court's jurisprudence is in consistently articulating what is enough of an exigency to justify a warrantless vehicle search. In *McCree*, a three justice majority opinion stated that when police do not have advance knowledge that a particular vehicle carrying criminal evidence will be parked in a particular place, the exigencies of the mobility of the vehicle and of there having been inadequate time to obtain a warrant justify a warrantless search.⁸ The Court held that this "limited automobile exception" could provide police with the lawful right to access incriminating evidence in plain view in a vehicle.⁹ A few months later in *Hernandez*, the Court stated that the exigency requirement for a warrantless search is fulfilled when there is potential danger to police or others in the context of a vehicle stop.¹⁰ Although in *Hernandez* the Court did not reaffirm the "no advance knowledge" exigency it previously advanced in *McCree*, it did cite to its previous decision, *Commonwealth v. Luv*, where it held that when police do not have advance knowledge a vehicle will be carrying evidence, the circumstances present enough of an exigency.¹¹ The *Luv* decision cited and discussed a line of cases which all focused on the "no advance knowledge"

5. *Chambers*, 399 U.S. at 51.

6. *Commonwealth v. Hernandez*, 935 A.2d 1275, 1280 (Pa. 2007) (citing *McCree*, 924 A.2d at 629-30 ("We have not adopted the full federal automobile exception under Article I, Section 8.")).

7. *Hernandez*, 935 A.2d at 1280; *McCree*, 924 A.2d at 630.

8. *Id.* at 630.

9. *Id.* at 631.

10. *Hernandez*, 935 A.2d at 1282.

11. *Id.* at 1280 (citing *Commonwealth v. Luv*, 735 A.2d 87 (Pa. 1999)).

exigency.¹² Despite this citation in *Hernandez*, it still remains unclear where the Pennsylvania Supreme Court stands on the exigency requirement, because the Court has not consistently stated a bright line rule delineating what is or is not an exigent circumstance to justify a warrantless search.

This article will first discuss the history of uncertainty surrounding the exigency requirement in our Commonwealth. Section II will analyze the two latest Pennsylvania Supreme Court decisions, *McCree* and *Hernandez*, and look backwards at where the confusion began in prior Pennsylvania case law. In most of those earlier cases, the Pennsylvania Supreme Court wove federal case law into its discussion of the exigency requirement without clearly distinguishing the Pennsylvania standard from the federal standard.¹³ This shows the Court's ongoing struggle with where Pennsylvania stands on the exigency requirement, as the federal exception does not have an exigency component. Next, section II will examine the two latest Pennsylvania Superior Court decisions to see how the intermediate court interpreted the *McCree* and *Hernandez* holdings.¹⁴ Finally, section II will examine a lesser form of the warrantless vehicle search—the protective sweep of a limited area in a vehicle when a police officer reasonably believes that the defendant has a weapon concealed in that limited area and could gain control of it.¹⁵ This standard requires police officers to have only reasonable suspicion.¹⁶

12. *Luy*, 735 A.2d at 91-93 (citing *Commonwealth v. White*, 669 A.2d 896 (Pa. 1995)), *Commonwealth v. Rodriguez*, 585 A.2d 988 (Pa. 1991), *Commonwealth v. Baker*, 541 A.2d 1381 (Pa. 1988), *Commonwealth v. Milyak*, 493 A.2d 1346 (Pa. 1985)).

13. *See White*, 669 A.2d at 899-900; *Commonwealth v. Labron*, 669 A.2d 917, 924 (Pa. 1995) (*Labron I*), *rev'd*, *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996); *Baker*, 541 A.2d at 1383; *Commonwealth v. Ionata*, 544 A.2d 917, 919 (Pa. 1988); *Holzer*, 389 A.2d at 106. *See also Commonwealth v. Kilgore*, 677 A.2d 311, 312-13 (Pa. 1995) (*Kilgore I*), *rev'd*, *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996); *Milyak*, 493 A.2d at 1348, n. 3.

14. *See Commonwealth v. Turner*, 982 A.2d 90 (Pa. Super. 2009); *Commonwealth v. Copeland*, 955 A.2d 396 (Pa. Super. 2008).

15. *See Commonwealth v. Morris*, 644 A.2d 721 (Pa. 1994) (citing *Michigan v. Long*, 463 U.S. 1032 (1983); *In Re O.J.*, 958 A.2d 561 (Pa. Super. 2008); *Commonwealth v. Murray*, 936 A.2d 76 (Pa. Super. 2007); *Commonwealth v. Rosa*, 734 A.2d 412 (Pa. Super. 1999)).

16. *Morris*, 644 A.2d at 723, n. 2.

Section III will analyze how because of the years of indecision surrounding the exigency component, the Pennsylvania Supreme Court needs to lay down an explicit standard for warrantless vehicle searches. First, section III will discuss the negative effects of the current exigency requirement on our Commonwealth's criminal justice system, not only in how police know when conducting a warrantless vehicle search is reasonable, but also in how judges know when the facts of a case give rise to enough of an exigency to deem a warrantless vehicle search reasonable, in order to render fair and consistent rulings and preserve the integrity of our courts. Next, section III will argue that the Pennsylvania Supreme Court should abandon the exigency component and adopt the federal automobile exception, based on the established principle that one has a reduced expectation of privacy in his vehicle.¹⁷ This is a direction that many other states have taken.¹⁸ Furthermore, the federal automobile exception should be adopted because the ultimate purpose of the exclusionary rule is to deter police misconduct, which is not at issue when the police have a justification, like probable cause, supplied to them from a reliable informant or from personal observations.¹⁹

II. A HISTORY OF WARRANTLESS VEHICLE SEARCHES IN PENNSYLVANIA

A. *COMMONWEALTH V. MCCREE*

In *Commonwealth v. McCree*, the Pennsylvania Supreme Court, in a three-justice majority opinion, held that a "limited automobile exception" under Article I, Section 8 of the Pennsylvania Constitution provided police with the lawful right to access and seize incriminating

17. *See supra* n. 1-2.

18. *See infra* n. 107.

19. *See, e.g., White*, 699 A.2d at 898; *Ionata*, 544 A.2d at 920.

evidence in plain view in an automobile without a search warrant.²⁰ *McCree* involved a police investigation of illegal prescription drug sales in Philadelphia.²¹ An undercover Philadelphia Police Officer entered into a controlled buy of Xanax with a seller.²² The officer watched that seller enter the passenger side of a blue Pontiac and speak to the defendant who was sitting in the driver's seat.²³ Acting on information received from this officer of a possible narcotics sale in progress, responding Philadelphia Police Officer Cujdik approached the driver's side of the blue Pontiac and observed the defendant shove a pill bottle under the driver's seat cushion.²⁴ After asking the defendant to step out of the vehicle, Officer Cujdik recovered the pill bottle containing 52 Xanax pills from under the driver's seat cushion.²⁵ The defendant was taken to the back of the Pontiac.²⁶ When Officer Cujdik went back to the open driver's side door, he observed two more pill bottles on the door pocket and seized them, one containing 12 Oxycontin pills and the other containing 25 Percocet pills.²⁷ The trial court denied the defendant's motion to suppress the drugs, which the Pennsylvania Superior Court later affirmed.²⁸

On review, the Pennsylvania Supreme Court emerged with a fractured view concerning when the automobile exception to the warrant requirement could provide police with a lawful right to access evidence in plain view in a vehicle.²⁹ The Court acknowledged the federal automobile exception under the Fourth Amendment, where police can conduct a warrantless

20. 924 A.2d at 631.

21. *Id.* at 623.

22. *Id.*

23. *Id.* at 624.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 631. A majority of the Court reaffirmed Pennsylvania's plain view standard from *Horton v. California*, requiring (1) that police be at a lawful vantage point, (2) that the object be immediately apparent to be incriminating in nature, and (3) that police have a lawful right of access to the object. *Id.* at 625 (quoting *Horton v. California*, 496 U.S. 128, 136-37 (1990)).

vehicle search if probable cause exists.³⁰ The Court explained that under the federal automobile exception, the mobility of the vehicle and the reduced expectation of privacy an individual has in its contents make such a warrantless search reasonable.³¹ While acknowledging that an individual's right to privacy is greater under Article I, Section 8 than under the Fourth Amendment,³² the Court's reasoning as to why exigent circumstances justify a warrantless search in Pennsylvania mirrored the federal rationale.³³ The Court specifically stated that the increased privacy concerns with respect to the seizure of one's person are not present when an object is seized from one's vehicle.³⁴

Although the Court declined to adopt the "full federal automobile exception" it phrased the probable cause and exigency requirement as a "limited automobile exception" under Article I, Section 8.³⁵ To illustrate the exigent circumstance component of this exception, the Court said warrantless seizures are justified "[w]here police do not have advance knowledge that a *particular* vehicle carrying evidence of crime [will] be parked in a *particular* locale."³⁶ In these situations, "the exigencies of the mobility of the vehicle" and having "inadequate time and opportunity to obtain a warrant" render such warrantless searches proper.³⁷ Conversely, when the police have ample advance knowledge that a search of a vehicle is likely to occur with the apprehension of a suspect, a warrant is required before the vehicle can be searched.³⁸ Because *McCree* was a plurality opinion with four justices concurring on the contours and limitations of

30. *Id.* at 629 (citing *Carroll*, 267 U.S. at 147-56).

31. *Id.* (citing *Chadwick*, 433 U.S. at 12).

32. *Id.* at 626 (citing *Commonwealth v. Waltson*, 724 A.2d 289, 292 (Pa. 1998)).

33. *Id.* at 630 (the mobility of the vehicle, the reduced expectation of privacy one has inside his vehicle, and the risk that evidence might not be found if police could not immobilize a vehicle until a warrant was secured) (citing *Holzer*, 389 A.2d at 106).

34. *Id.*

35. *Id.*

36. *McCree*, 924 A.2d at 621 (quoting *Rodriguez*, 585 A.2d at 991 (citing *Baker*, 541 A.2d at 1383)).

37. *Id.* at 630.

38. *Id.* (citing *Ionata*, 544 A.2d at 920-21).

the exigency requirement, this “limited automobile exception” is not a clearly established standard.³⁹

After applying its “limited automobile exception,” the Court found that Officer Cudjik’s observation of the pill bottle in plain view, and the information from his fellow officer regarding the narcotics transaction, provided probable cause to search the interior of the defendant’s vehicle for evidence of drugs.⁴⁰ Because there was no advance knowledge that the defendant or his vehicle would be the target of a police investigation, exigent circumstances were present, providing Officer Cudjik with the lawful right to access the pill bottle in plain view in the vehicle without a warrant.⁴¹

B. *COMMONWEALTH V. HERNANDEZ*

Sixth months after deciding *McCree*, the Pennsylvania Supreme Court, in *Commonwealth v. Hernandez*, held that a police officer’s warrantless entry into the rear of the defendant’s U-Haul truck, where the officer observed illegal narcotics, was not justified based on an exigency of police danger.⁴² In *Hernandez*, the police responded to a shipping company after the manager notified them of a shipment of 20 boxes, in one of which he observed marijuana wrapped in plastic.⁴³ The manager told police that the defendant appeared nervous upon initially coming to pick up the shipment, and would be returning to pay for and load the boxes onto his U-haul truck.⁴⁴ After the defendant returned and was leaving the shipping terminal, the police stopped

39. See *Hernandez*, 935 A.2d at 1286, n. 1 (Castille, J., concurring) (“The *McCree* OAJC was a majority opinion in some respects, but a plurality with respect to the automobile search issue.”).

40. *Id.* at 631.

41. *Id.*

42. *Hernandez*, 935 A.2d at 1281.

43. *Id.* at 1277.

44. *Id.*

him and asked him to exit the truck.⁴⁵ While other officers were questioning the defendant, Officer Palmer approached the rear of the U-haul and entered, where he observed marijuana in plain view inside one of the open boxes.⁴⁶ Officer Palmer claimed he entered the rear of the truck for officer safety reasons in case someone else was inside.⁴⁷ The trial court denied the motion to suppress the drugs, but on appeal the Superior Court found the warrantless search improper and vacated the sentence.⁴⁸

Just as in *McCree*, the Court acknowledged but declined to adopt the “full federal automobile exception” under Article I, Section 8.⁴⁹ While reaffirming the requirement of both probable cause and an exigent circumstance in Pennsylvania, the Court noted how the exigency component has been the subject of many of the Court’s opinions, causing “multiple, varying expressions with no clear majority.”⁵⁰ The Court stated that when there is potential danger to police or others in the context of a vehicle stop, exigent circumstances have been established for purposes of a warrantless search on the condition that the police can fully articulate that danger under the specific circumstances of the case.⁵¹

The Court juxtaposed the facts of *Hernandez* to those in *Commonwealth v. Perry*, a case that also relied on the police danger exigency.⁵² But unlike in *Perry*, here the Commonwealth failed to offer evidence that Officer Palmer reasonably believed someone else was in the rear of the U-haul to justify the warrantless search.⁵³ The Court infers that if the Commonwealth had had Officer Palmer articulate more of a police danger on direct examination, the exigency may

45. *Id.*

46. *Id.*

47. *Id.* at 1278.

48. *Id.* at 1280.

49. *Id.* (citing *McCree*, 924 A.2d at 629).

50. *Id.* at 1280, n. 1 (“The various expressions in that case [*McCree*] illustrate the differing, current viewpoints held by members of this Court.”).

51. *Id.* at 1282.

52. *Id.* at 1281 (citing *Commonwealth v. Perry*, 798 A.2d 697 (Pa. 2002)).

53. *Id.* at 1282.

have been fulfilled.⁵⁴ Instead, the Commonwealth did not offer any evidence from Officer Palmer why he suspected someone else was in the U-Haul or whether someone else could have joined the defendant inside the truck while it was outside police surveillance.⁵⁵ In short, the Commonwealth did not meet its burden to show the police danger exigency existed.⁵⁶

Although the *Hernandez* court solely focused on the police danger exigency, and did not discuss an alternate fulfillment of the exigency requirement, like the “no advance knowledge” requirement discussed in *McCree*, it did directly cite to *Commonwealth v. Luv*, a case that relied on the “no advance knowledge” requirement.⁵⁷ In *Luv*, the police obtained a warrant to search the defendant’s house for illegal narcotics.⁵⁸ The police had information that the defendant was carrying a supply of drugs with him, and while waiting for the defendant to arrive back at his house to execute that search warrant, they quickly learned from an informant that the defendant was at his girlfriend’s house and was going to a nightclub to distribute his supply of narcotics.⁵⁹ Knowing it would take an hour or longer to get a warrant for the defendant’s vehicle, and that the defendant was going to the nightclub to sell the drugs, the police stopped the defendant and immediately conducted a warrantless search of his vehicle, finding a large quantity of cocaine under the driver’s seat.⁶⁰ The Pennsylvania Supreme Court held that exigent circumstances existed to justify the warrantless search.⁶¹ The *Luv* opinion cited and discussed an entire line of

54. *Id.* at 1283 (“Indeed, Officer Palmer was not asked and did not offer the basis for his beliefs.”).

55. *Id.* “The fatal flaw in this case is not that the Commonwealth failed to establish with certainty that someone else might have been hiding in the truck. Instead, it is that the Commonwealth did not offer *any* support for such a claim, and the evidence it did offer belies it.” *Id.*

56. *Id.* “The Commonwealth has the burden of affirmatively establishing exigent circumstances; it is not enough that the possibility of exigent circumstances was not disproved.” *Id.* at n. 3.

57. *Id.* at 1280 (citing *Luv*, 735 A.2d at 93). The *Hernandez* Court cited *Luv* for the principle that probable cause without an exigency is not enough to justify a warrantless search in Pennsylvania. *Id.*

58. *Luv*, 735 A.2d at 89.

59. *Id.*

60. *Id.*

61. *Id.* at 94. “The police had two choices: either stop the vehicle and search it without a warrant, or allow *Luv* to continue on his way, possibly resulting in the disappearance of the evidence, and in the introduction of a substantial amount of drugs to their community. There was no time to secure a new warrant.” *Id.*

cases which all held that when police do not have advance knowledge a vehicle will be carrying evidence, the circumstances present enough of an exigency to justify a warrantless search.⁶²

Despite the citation in *Hernandez* to *Luv*, it remains unclear where the boundaries of the exigency requirement exist in Pennsylvania. Because *McCree* was a plurality in its discussion of the scope and extent of the “limited automobile exception,” it is uncertain just how accepted that standard is. The latest case, *Hernandez*, focused solely on the police safety exigency and did not come forward supporting the idea of a “limited automobile exception” under Article I, Section 8. There is yet to be a case with a bright line rule discussing all possible types of exigencies and their limitations, to justify a warrantless vehicle search in Pennsylvania.

C. WARRANTLESS VEHICLE SEARCHES BEFORE *MCCREE* AND *HERNANDEZ*

The uncertainty surrounding the exigency requirement in Pennsylvania may be rooted in how the Pennsylvania Supreme Court utilized and relied upon federal case law in its opinions before *McCree* and *Hernandez*. In *Commonwealth v. Ionata*, the Pennsylvania Supreme Court said:

“[u]nder the Fourth Amendment to the United States Constitution, and under Article I, Section 8 of the Pennsylvania Constitution, ‘[i]t is clear that there is no “automobile exception” as such and that constitutional protections are applicable to searches and seizures of a person’s car.... Yet, in considering the reasonableness of a given search or seizure of an automobile, the need for a warrant is often excused by exigent circumstances.’”⁶³

Likewise, there is a clearly established automobile exception under the Fourth Amendment,⁶⁴ where exigent circumstances are not needed, just probable cause.⁶⁵ The United States Supreme

62. *Id.* at 91 (citing *White*, 669 A.2d at 902 (no unforeseen circumstances which would justify a warrantless search existed); *Rodriguez*, 585 A.2d at 991 (unforeseen circumstances existed giving police insufficient opportunity to secure a warrant and justifying the warrantless search); *Baker*, 541 A.2d at 1383 (police did not know in advance where the evidence would be located and could not reasonably have gotten a search warrant)).

63. *Ionata*, 544 A.2d at 920 (quoting *Holzer*, 389 A.2d at 106).

64. *See Carroll*, 267 U.S. at 147-56.

Court noticed the Pennsylvania Supreme Court's incorrect reading of the federal automobile exception in *Pennsylvania v. Labron*,⁶⁶ where it reversed the Pennsylvania Supreme Court's decisions in *Commonwealth v. Labron* and *Commonwealth v. Kilgore*.

Several of the Pennsylvania Supreme Court's earlier opinions, cited to federal case law without clearly distinguishing the Pennsylvania standard requiring an exigency, from the federal standard not requiring an exigency.⁶⁷ In *Pennsylvania v. Labron*, the United States Supreme Court commented on this problem when it stated that "[t]he law of the Commonwealth thus appears to us 'interwoven with the federal law, and . . . the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'"⁶⁸ The United States Supreme Court stated that although the Pennsylvania Supreme Court discussed Commonwealth cases in its *Labron* and *Kilgore* opinions, those Commonwealth cases it cited relied on analyses of the federal automobile exception.⁶⁹

Many Pennsylvania Supreme Court cases grounded in Article I, Section 8 repeatedly cited to *Commonwealth v. Milyak*, a case that was decided on Fourth Amendment grounds only.⁷⁰ In *Milyak*, the defendant specifically based his claim on the Fourth Amendment, and not under Article I, Section 8 in his petition for allowance of appeal.⁷¹ Therefore, the Court could only consider whether probable cause existed.⁷² Yet, the Pennsylvania Supreme Court

65. See *California v. Carney*, 471 U.S. 386 (1985) (tracing the history of the federal automobile exception).

66. *Pennsylvania v. Labron*, 518 U.S. at 939.

67. See *White*, 699 A.2d at 899-900; *Commonwealth v. Kilgore*, 677 A.2d at 312-13 (*Kilgore I*), *rev'd*, *Pennsylvania v. Labron*, 518 U.S. at 940; *Commonwealth v. Labron*, 669 A.2d at 924 (*Labron I*), *rev'd*, *Pennsylvania v. Labron*, 518 U.S. at 941.

68. *Labron*, 518 U.S. at 941 (quoting *Michigan v. Long*, 463 U.S. at 1040-41).

69. *Id.* at 941 (citing *Labron*, 669 A.2d at 921 (citing *Holzer*, 389 A.2d at 106 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 (1971))); (citing *Labron*, 669 A.2d at 924 (citing *White*, 669 A.2d 896 (resting on Pennsylvania Supreme Court's analysis of *Chambers*, 399 U.S. 42))).

70. *Milyak*, 493 A.2d at 1348 at n. 3; *see infra* n. 73.

71. *Id.*

72. *Id.* at 1351 (upholding the search because probable cause existed for Fourth Amendment purposes).

continually cited *Milyak* for support in cases where claims were raised under Article I, Section 8, without pointing out how *Milyak* was distinguishable.⁷³ For example, in the *Luv* opinion, the Court cited and discussed *Milyak*, along with *Rodriguez*, *Baker*, and *White*, stating: “[t]he determining factors in all of these cases are the existence of probable cause and the presence of exigent circumstances.”⁷⁴ However, *Milyak* was not dependent on the exigent circumstance component at all. The complications in the Pennsylvania Supreme Court’s earlier opinions in articulating the federal standard, and citing it for support even for claims grounded in Article I, Section 8, suggests the Court’s own ongoing struggle on the existence and boundaries of the exigent circumstance requirement in Pennsylvania.

D. WARRANTLESS VEHICLE SEARCHES SINCE *MCCREE* AND *HERNANDEZ*

The two latest cases since *McCree* and *Hernandez* dealing with warrantless vehicle searches come from the Pennsylvania Superior Court. In both cases, the Superior Court upheld the respective searches. Neither of the majority opinions cited *Hernandez*, yet both cited *McCree*, even though that opinion did not emerge with a clear majority on the existence of the “limited automobile exception.”⁷⁵

The first of these cases, *Commonwealth v. Copeland*, involved a warrantless search during a vehicle stop after the police observed furtive movements, reasonably believing that the defendant was armed and dangerous.⁷⁶ Yet, the Pennsylvania Superior Court did not cite *Hernandez* for support in the context of a police danger exigency.⁷⁷ Instead, the Superior Court cited *McCree* for its creation of the “limited automobile exception” under Article I, Section 8,

73. See *Luv*, 735 A.2d at 93; *White*, 669 A.2d at 900; *Rodriguez*, 585 A.2d at 989; *Ionata*, 544 A.2d at 919; *Baker*, 541 A.2d at 1383.

74. *Luv*, 735 A.2d at 93.

75. See *supra* n. 20.

76. 955 A.2d at 403.

77. See *supra* n. 51.

without acknowledging that *McCree* was a plurality opinion with respect to this exception.⁷⁸ The Superior Court held that because probable cause arose quickly with inadequate time for the police officer to secure a search warrant, the subsequent search of the defendant's vehicle was reasonable.⁷⁹ Although the Superior Court did not cite *Hernandez*, that case would have been relevant because the defendant was described as an "armed and dangerous" fugitive, therefore the police danger exigency arguably existed.⁸⁰ Further, the defendant's furtive movements towards the rear passenger seat as the officer initially approached the vehicle would implicate *Hernandez* as the police officer had a reasonable belief that the defendant was reaching for a weapon.⁸¹ The Commonwealth arguably had the "specific" and "articulate" facts on the record that the Pennsylvania Supreme Court said were missing in *Hernandez*.⁸²

In *Commonwealth v. Turner*, the Superior Court again did not cite *Hernandez*, but cited *McCree* to hold that the "limited automobile exception" gave the officer a lawful right to access a spent shotgun shell in plain view in the defendant's car.⁸³ *Turner* involved similar facts as *McCree*, where the police observed incriminating evidence in plain view inside the vehicle, after acting on flash information of shots fired in the area and a specific description of the perpetrator's vehicle. The Superior Court relied on the *McCree* court's discussion of the third prong of the plain view standard, as to whether the police have a lawful right to access evidence in plain view without a search warrant.⁸⁴ The Superior Court said that because the police officer had no advance knowledge that the defendant or his vehicle would be investigated, the "limited

78. *Copeland*, 955 A.2d at 400 (citing *McCree*, 924 A.2d at 631).

79. *Id.* at 400.

80. *Id.* at 403. *See supra* n. 52-55.

81. *Id.* at 398.

82. *See supra* n. 52-55.

83. 982 A.2d at 93-94.

84. *Turner*, 982 A.2d at 92 n. 1.

automobile exception” applied, allowing the officer to search the vehicle.⁸⁵ Unlike in *Copeland*, the *Turner* court acknowledged that *McCree* split on the issue of whether and to what extent the automobile exception applies in Pennsylvania, yet said a majority of the court *would* recognize a “limited automobile exception” under Article I, Section 8, because of the reduced expectation of privacy one has in his vehicle.⁸⁶

Copeland and *Turner* illustrate the Pennsylvania Superior Court’s reliance on the “no advance knowledge” exigency and disregard of the *Hernandez* decision. Yet it is uncertain why *Copeland* did not cite to *Hernandez*, as the facts of *Copeland* involved a police safety situation, which would implicate the police safety exigency. Similarly, although it is understandable why *Turner* relied upon *McCree* because of the similar facts involving plain view, that reliance is troubling because *McCree* was a plurality opinion.

E. THE LIMITED PROTECTIVE SWEEP FOR WEAPONS

In what may be viewed as an off-shoot of the warrantless automobile search, Pennsylvania recognizes that a police officer can conduct a warrantless, protective sweep of a limited area of a suspect’s vehicle when he reasonably believes the suspect is concealing a weapon in that limited area that he could gain control of.⁸⁷ The latest case dealing with this limited search is *In Re O.J.*, where the Pennsylvania Superior Court held that the police officer’s warrantless protective search of the defendant’s center console for weapons was justified, because the officer reasonably believed, based on specific and articulate facts, that the defendant

85. *Id.* at 94 (citing *McCree*).

86. *Id.* at 94 n. 5.

87. *See Morris*, 644 A.2d 721 (adopting *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983) (holding that under *Terry v. Ohio*, an officer can conduct a warrantless search of areas in a vehicle in which a weapon could be hidden when the officer has specific, articulable facts that criminal activity is afoot); *Murray*, 936 A.2d 76; *Rosa*, 734 A.2d 412.

had immediate access to a weapon.⁸⁸ In *O.J.*, the Pennsylvania Superior Court did not cite either *Hernandez* or *McCree*, nor any of the earlier warrantless automobile search case law. Instead, the majority relied on a line of cases dealing exclusively with a limited sweep for weapons, requiring only reasonable suspicion, versus an entire search of a vehicle, requiring probable cause and exigent circumstances.⁸⁹ These cases emphasize that the conduct involved is not a warrantless search of the entire interior compartment, but rather a limited protective sweep for officer safety reasons.⁹⁰ In justifying such a protective sweep, the *O.J.* majority explained: “[t]he heightened risk of danger to police officers during roadside encounters should be contrasted with the lessened expectation of privacy that a citizen possesses with respect to his vehicle.”⁹¹ The majority further reasoned that because the defendant was pulled over for a motor vehicle violation, the officer was not going to put the defendant under arrest.⁹² Therefore, if the officer had allowed the defendant to return to his vehicle without conducting this minimal search of the center console for weapons, he would have put his safety at risk.⁹³

The dissenting opinion in *O.J.* viewed the police action as a warrantless search in citing *Hernandez*, and found that the evidence of the officer’s belief of danger was not compelling enough to fulfill the police danger exigency.⁹⁴ The dissent restated the *Hernandez* rule that although police danger is enough of an exigency, the Commonwealth must show specific facts of

88. 958 A.2d 561, 566.

89. *O.J.*, 958 A.2d at 565-66.

90. *See Morris*, 644 A.2d at 723 n. 2.

91. *O.J.*, 958 A.2d at 565.

92. *Id.* at 566.

93. *Id.* *See also* *Commonwealth v. Van Winkle*, 880 A.2d 1280, 1285 (Pa. Super. 2005) (finding exigent circumstances where police officer observed passenger concealing suspected contraband and following issuance of the traffic citation, the driver would have been free to leave the scene and destroy evidence).

94. *Id.* at 568 (Musmanno, J., dissenting) (citing *Hernandez*, 935 A.2d at 1282).

the officer's reasonable belief that the defendant was armed and dangerous, to justify a warrantless search.⁹⁵

The *O.J.* opinion shows a divergence in categorizing police officer actions. The majority viewed the actions as a protective sweep for weapons, while the dissent viewed the actions as a search. These two views involve different levels of officer justification and different lines of cases. It leaves open the question of at what point a "sweep" becomes a "search."

III. ANALYSIS

A. HOW THE EXIGENCY COMPONENT NEGATIVELY AFFECTS OUR CRIMINAL JUSTICE SYSTEM

The exigency requirement for a warrantless vehicle search under Article I, Section 8 negatively affects Pennsylvania's criminal justice system in its application both on the streets and in the courtroom. First and foremost, it is difficult to discern what is a sufficient exigency under current Pennsylvania jurisprudence. This confusion leaves police officers with an unclear standard to follow, to know whether conducting a warrantless vehicle search is reasonable.⁹⁶ When an officer encounters a suspect and his vehicle, and has probable cause that evidence is inside the vehicle, under Article I, Section 8, he must further decide whether a sufficient exigency exists. In a decision that is often instantaneous, the officer must choose either to conduct the search and risk having the evidence suppressed at trial, immobilize the vehicle until a search warrant can be obtained,⁹⁷ or let the suspect leave without searching the vehicle and risk the evidence being released into the community. The later choice can be a critical one if that evidence involves a large quantity of illegal narcotics or a firearm. The United States Supreme

95. *Id.*

96. *See White*, 669 A.2d at 909 (Castille, J., dissenting).

97. *See Holzer*, 389 A.2d at 106; *see also Milyak*, 493 A.2d at 1350 (citing *Chambers*, 399 U.S. at 51-52 (noting how the Supreme Court could not decide whether impounding a vehicle while waiting for a search warrant is the "lesser" privacy invasion than searching without a warrant)).

Court picked up on these quick judgment calls a police officer makes when it adopted a bright line rule for searches incident to arrest under the Fourth Amendment.⁹⁸ The Court said that a “police officer’s determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment,” which does not require a broken down analysis of each step of the search.⁹⁹

The confusion of the exigency requirement not only concerns police officers, but judges, and how they know when the facts of a case give rise to enough of an exigency to deem a warrantless vehicle search reasonable, so that rulings can be fair and consistent. The problem with consistent rulings is evident in *Commonwealth v. White* and *Commonwealth v. Rodriguez*, two cases with very similar facts. Both cases involved informants supplying police with information that the defendants were in possession of illegal narcotics and would be using vehicles to transport those narcotics.¹⁰⁰ In both cases, it was uncertain what vehicle the defendant would be using, so in both subsequent warrantless searches of the vehicles, police justified not getting search warrants on unforeseen circumstances. Yet, both cases rendered entirely opposite rulings by the Pennsylvania Supreme Court.

In *Rodriguez*, the Pennsylvania Supreme Court upheld the search because the police did not know until they saw the defendant that she would be driving that particular vehicle in the county, and therefore a search warrant could not have been obtained.¹⁰¹ Justice Flaherty dissented in *Rodriguez*, stating that police should have gotten a warrant to permit the search of “whatever vehicle appellant might be driving” on the day in question, adding that the

98. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

99. *Robinson*, 414 U.S. at 235.

100. *White*, 669 A.2d at 898; *Rodriguez*, 585 A.2d at 990.

101. *Rodriguez*, 585 A.2d at 990-91 (noting how the informant told police that defendant had used different vehicles and motorcycles when transporting drugs before). The Court also upheld the search as valid because the police did not know exactly where in the county defendant would be traveling on the date in question, therefore did not know which magistrate would have proper jurisdiction to issue a search warrant. *Id.* at 991. Police also learned from the informant that the defendant distributed cocaine “as rapidly as possible.” *Id.*

requirement that search warrants be particular in description of where to search would not have been violated due to the circumstances.¹⁰² A few years later in *White*, the Pennsylvania Supreme Court held the search was improper because the police not knowing what vehicle would be driven was not an unforeseen circumstance.¹⁰³ Justice Flaherty wrote for the *White* majority, and just as in his *Rodriguez* dissent, he stated that police could have requested a search warrant “as particular as reasonably possible.”¹⁰⁴ The inconsistent holdings in *Rodriguez* and *White*, which are two cases based on nearly identical facts, undermines the integrity of our criminal justice system because it shows the inability of the Court to announce a consistent standard for law enforcement to follow.

B. PENNSYLVANIA SHOULD ADOPT THE FEDERAL STANDARD

The confusion and inconsistencies of the exigency requirement show the need for a bright line rule on warrantless vehicle searches under Article I, Section 8. Our Commonwealth adopted bright line rules when more flexible rules proved difficult for law enforcement to administer, based on the totality of the circumstances.¹⁰⁵ Some states, like Pennsylvania, still require some sort of exigent circumstance along with probable cause for a warrantless vehicle search under their respective state constitutions.¹⁰⁶ Yet, many more follow the federal automobile exception,

102. *Id.* at 994 (Flaherty, J., dissenting).

103. *White*, 669 A.2d at 901.

104. *Id.* at 901, n. 3.

105. *See id.* at 909 (Castille, J., dissenting) (quoting *Commonwealth v. Johnson*, 532 A.2d 796, 800 (Pa. 1987)); *see also* *Commonwealth v. Jenkins*, 454 A.2d 1004, 1006-7 (Pa. 1982) (adopting bright line rule for station house confessions). The United States Supreme Court also adopted a bright line rule allowing searches incident to arrest. *Robinson*, 414 U.S. 218.

106. *See* Wayne LaFare, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.2, n. 79 (4th ed., West 2010) (citing *People v. Edwards*, 836 P.2d 468 (Colo. 1992); *State v. Miller*, 630 A.2d 1315 (Conn. 1993); *State v. Ritte*, 710 P.2d 1197 (Haw. 1985); *State v. Elison*, 14 P.3d 456 (Mont. 2000); *State v. Harnisch*, 954 P.2d 1180 (Nev. 1998); *State v. Sterndale*, 656 A.2d 409 (N.H. 1995); *State v. Cooke*, 751 A.2d 92 (N.J. 2000); *State v. Gomez*, 932 P.2d 1 (N.M. 1997); *State v. Kock*, 725 P.2d 1285 (Or. 1986); *State v. Larocco*, 794 P.2d 460 (Utah 1990); *State v. Patterson*, 774 P.2d 10 (Wash. 1989)).

requiring only probable cause.¹⁰⁷ The negative repercussions of interpreting and applying the exigency component within our criminal justice system, mean that Pennsylvania should abandon it and adopt the federal standard. There are two main reasons why this adoption is called for.

First, the exigency requirement is illogical because it creates a tougher standard for a type of search that is recognized as a lesser invasion of privacy. Our Commonwealth recognizes that the seizure of one's vehicle is not afforded the same privacy protections as to a seizure of one's person due to the lower expectation of privacy in one's vehicle.¹⁰⁸ If a police officer has probable cause to believe a suspect has committed a crime, he can arrest that person without a warrant and search them.¹⁰⁹ Further, if a police officer has reasonable suspicion, a lesser demanding standard than probable cause,¹¹⁰ that a suspect is armed and dangerous, he can conduct a pat-down of the suspect as part of an investigatory detention.¹¹¹ Yet, our Commonwealth requires greater justification for a warrantless vehicle search—probable cause *and* exigent circumstances—than for a search of one's person incident to a warrantless arrest. This tougher standard for a lesser invasion of privacy does not make sense.

107. See LaFave, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 7.2 at n. 79 (citing *State v. Prasertphong*, 75 P.3d 675 (Ariz. 2003) (“If the automobile exception applies, there is no requirement of a separate exigency.”); *People v. Ruggles*, 702 P.2d 170 (Cal. 1985); *People v. Romero*, 767 P.2d 1225 (Colo. 1989) (defendant's claim no exigent circumstances irrelevant); *State v. Smith*, 777 A.2d 182 (Conn. 2001) (“warrantless vehicle search does not require a showing of exigent circumstances”); *State v. Williams*, 816 P.2d 342 (Idaho 1991) (whether “it was possible” for police to get a search warrant for the car irrelevant); *State v. Lopez*, 772 So.2d 90 (La. 2000) (same); *State v. Tarantino*, 587 A.2d 1095 (Me. 1991) (same); *Moore v. State*, 787 So.2d 1282 (Miss. 2001) (applied “automobile exception” even where the vehicle was unmovable); *State v. Isleib*, 356 S.E.2d 573 (N.C. 1987) (no need for exigent circumstances); *State v. Garrett*, 584 N.W.2d 502 (N.D. 1998) (same); *State v. Werner*, 615 A.2d 1010 (R.I. 1992) (same); *State v. Leveye*, 796 S.W.2d 948 (Tenn. 1990); *Neal v. State*, 256 S.W.3d 264 (Tex. Crim. App. 2008); *State v. Tompkins*, 423 N.W.2d 823 (Wis. 1988); *McKenney v. State*, 165 P.3d 96 (Wyo. 2007)).

108. See *Rubis*, 978 A.2d at 394; *O.J.*, 958 A.2d at 565; *McCree*, 924 A.2d at 629; *Rogers*, 849 A.2d at 1191; *Holzer*, 389 A.2d at 106.

109. See *Commonwealth v. Trengue*, 451 A.2d 702 (Pa. Super. 1982).

110. See *Alabama v. White*, 496 U.S. 325 (1990); *Commonwealth v. Ogborne*, 599 A.2d 656 (Pa. Super. 2001), *appeal denied*, 606 A.2d 901 (Pa. 1992).

111. See *Commonwealth v. Zhahir*, 751 A.2d 1153, 1157 (Pa. 2000).

Secondly, the United States Supreme Court and the Pennsylvania Supreme Court acknowledge that because the purpose of the exclusionary rule is to deter police misconduct, it will not be applied when doing so will not achieve that purpose.¹¹² The Pennsylvania Supreme Court stated:

A rule of exclusion is properly employed where the objection goes to the reliability of the challenged evidence . . . or reflects intolerable government conduct which is wide-spread and cannot otherwise be controlled.¹¹³

When a police officer has probable cause justifying his search of a vehicle, there is no misconduct. Therefore suppression is improper.

A case where this is most evident is *Commonwealth v. Ionata*.¹¹⁴ In *Ionata*, the police, acting on the defendant's girlfriend's tip of the defendant's year-long drug transactions at their apartment, obtained a search warrant for the defendant and the apartment.¹¹⁵ They did not know the defendant kept his stash of drugs under his car hood until the girlfriend told them this information, twenty minutes before the defendant's return to the apartment.¹¹⁶ Therefore, they did not have time to secure a search warrant for the vehicle.¹¹⁷ After the defendant arrived and before searching his vehicle, the detective looked through the open driver's side door, where he saw a brown box with glassine bags protruding from the lid, on the front passenger seat.¹¹⁸ Although the majority opinion stated that the case did not involve plain view observations by

112. See *United States v. Leon*, 468 A.2d 897 (1984) (holding that the exclusionary rule is not a constitutional requirement); *Commonwealth v. Corley*, 491 A.2d 829, 835 (Pa. 1985) (Larsen, J., concurring) (citing *Leon*, 468 U.S. 897; *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *Commonwealth v. Mason*, 490 A.2d 421 (Pa. 1985); *Commonwealth v. Musi*, 404 A.2d 378 (Pa. 1979)).

113. *Musi*, 404 A.2d at 384.

114. *Ionata*, 544 A.2d 917.

115. *Id.* at 918.

116. *Id.*

117. *Id.*

118. *Id.* at 919.

police,¹¹⁹ the majority is wrong. The moment that the detective looked in and saw the glassine bags, he had probable cause to believe under the totality of the circumstances that contraband was inside the vehicle, because glassine bags are commonly used for packaging illegal narcotics.¹²⁰ The subsequent search was supported by probable cause, if not from the specific information supplied from the defendant's girlfriend of the defendant's year-long drug transactions, then from the drug paraphernalia seen in plain view on the front seat.

Probable cause also existed before the warrantless vehicle search in *White*. When the police had the defendant exit the vehicle, one officer partially entered the car, and saw a marijuana cigarette on the center console in plain view.¹²¹ Just like in *Ionata*, not only did police have reliable, specific information from an informant before the apprehension of the defendant which supplied probable cause, but here the officer personally observed marijuana in plain view in the vehicle before he conducted the full warrantless vehicle search. Because the officers had probable cause supplied to them from reliable informants¹²² and from personal observations, both of the searches in *Ionata* and *White* were not products of intolerable police misconduct, therefore application of the exclusionary rule is improper.

IV. CONCLUSION

Although in *Commonwealth v. Hernandez* the Pennsylvania Supreme Court left us with a clear rule confirming that police officer safety can fulfill the exigency component for a warrantless vehicle search,¹²³ many questions were left unanswered as to what other circumstances might fulfill the exigency. *Commonwealth v. McCree* announced a "limited

119. *Id.* (citing *Milyak*, 493 A.2d 1346).

120. *Id.* at 922 (Papadakos, J., dissenting).

121. *White*, 669 A.2d 896; *see supra* n. 100, 103-104.

122. *See In Re O.A.*, 717 A.2d 490, 495 (Pa. 1998).

123. *See supra* n. 51.

automobile exception” where when police lack advance knowledge that a vehicle will be involved with the apprehension of a suspect, the exigency is fulfilled.¹²⁴ Yet because *McCree* was a plurality opinion, it lacks precedential value.¹²⁵ The confusion in earlier case law before *McCree* and *Hernandez* shows how the Pennsylvania Supreme Court has historically struggled in interpreting and distinguishing claims under Article I, Section 8 from those under the Fourth Amendment. Since *McCree* and *Hernandez*, the Pennsylvania Superior Court has only cited to *McCree* for support in its two opinions dealing with warrantless vehicle searches despite the fact that it was a plurality opinion.¹²⁶

This uncertainty leaves Pennsylvania’s criminal justice system in a weak spot in a situation which arises repeatedly on a daily basis all over cities in our Commonwealth. Officers have to second guess whether to conduct a warrantless search under a requirement that is uncertain to begin with. Judges have to decide whether a warrantless search was supported by an exigency even though that standard is not entirely clear. History has shown us that bright line rules have proven beneficial in situations as this where other rules prove unworkable.¹²⁷ Many states across our country adopted the federal standard under their respective state constitutions.¹²⁸ Additionally, the Pennsylvania Supreme Court stated that the exclusionary rule should only be applied to deter police misconduct,¹²⁹ which is not at issue when police have probable cause that evidence is in a vehicle, either from a reliable informant or from personal observations. Due to the recognized lower expectation of privacy in one’s vehicle,¹³⁰ the exigency requirement should be eliminated, and Pennsylvania, like many other states have

124. *See supra* n. 20.

125. *See supra* n. 39.

126. *See supra* n. 75.

127. *See supra* n. 105.

128. *See supra* n. 107.

129. *See supra* n. 113.

130. *See supra* n. 1-2.

already done, should adopt the federal standard requiring only probable cause for a warrantless vehicle search.

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