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# You Can't Teach an Old Dog New Tricks: *State v. Wilson* in Light of Changing Marijuana Law

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# YOU CAN'T TEACH AN OLD DOG NEW TRICKS: *STATE V. WILSON* IN LIGHT OF CHANGING MARIJUANA LAW

**Peter Yould***

## I. INTRODUCTION

In Montana, while the Highway Patrol's stated mission is "safeguarding the lives, property, and constitutional rights of people traveling the ways of our State,"[1] every day, officers initiate traffic stops which place them in a position to infringe the very constitutional rights they purport to uphold. Granted, people put their health, safety, and welfare at risk by driving on our nation's highways, and highway patrol officers are charged with protecting those drivers by enforcing civil and criminal laws, providing emergency response, and educating the community.[2] However, both the United States and Montana Constitutions protect against unreasonable searches and seizures, and these protections impose limitations on the permissible scope of police conduct.[3]

*State v. Wilson*[4] illustrates a failed attempt to safeguard the constitutional rights of the people during the attempted enforcement of criminal law. There, a highway patrol officer pulled a vehicle over for expired registration before impermissibly expanding the traffic stop into a drug investigation involving the use of a drug-detection canine[5] that, according to the Montana Supreme Court, violated Johnathan Wilson's constitutional right to be free from unreasonable searches and seizures.

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* Student, Alexander Blewett III School of Law at the University of Montana, J.D. candidate 2021. Thank you to my wife Audrey for recognizing my strengths when I struggle to see them. Thank you to my parents and family for supporting me over the years, especially through the challenging times that have graced me with a unique perspective to comment on the matters discussed in this paper. Thank you to the Montana Law Review, specifically Co-Editor-in-Chief, Riley Wavra, for the informative feedback and Faculty Advisor, Professor Anthony Johnstone, for the guidance and insight during the writing process.

1. Montana Dep't of Justice, *About MHP- Mission and Values*, MONTANA HIGHWAY PATROL (last visited Jan. 11, 2020), https://perma.cc/9KX9-3XS5.

2. Montana Dep't of Justice, *Recruitment: Duties of a Patrol Trooper*, MONTANA HIGHWAY PATROL (last visited Jan. 11, 2020), https://perma.cc/Q2C4-YGGC.

3. U.S. CONST. amend. IV; MONT. CONST. art. II, § 11.

4. 430 P.3d 77 (Mont. 2018).

5. This comment uses the term "drug-detection canine" to refer to a canine trained to detect illicit drugs. Courts and commentators have used other terms interchangeably including drug sniffing dog, drug detection dog, canine unit, K-9, and canine. The term drug detection canine is defined such that it excludes canines trained for rescue purposes and canines trained to detect explosives.

This comment first discusses the current scope of the federal and state constitutional rights to be free from unreasonable searches and seizures before analyzing the Montana Supreme Court's holding in *Wilson*. This comment takes a prospective look at the use of drug-detection canines in a nation with ever evolving marijuana policies. Specifically, Section II discusses the constitutional protections against unreasonable searches and seizures as applied to use of drug-detection canines. Section III relays the facts and procedure of *Wilson*, followed by a summary of the holding and dissent.

The substantive analysis of *Wilson* rests in Section IV, where this comment agrees with the Montana Supreme Court's holding that the officer lacked the particularized suspicion necessary to deploy a drug-detection canine, but argues that in light of Montana's Medical Marijuana Act, the defense should have questioned the continued validity of the particularized suspicion standard as applied to the use of drug-detection canines. Ultimately, this comment suggests that the Montana Supreme Court should require an officer to show probable cause, prior to initiating the use of a drug-detection canine for the purposes of uncovering marijuana. In the alternative, this comment suggests that an officer be required to demonstrate factual support that the individual or place to be searched contains drugs in violation of state law. Finally, this comment suggests that the Montana Highway Patrol, instead of relying on judicial action, could refrain from using drug-detection canines trained to detect marijuana.

## II. Constitutional Protections from Unreasonable Searches and Seizures

The framers of the United States Constitution enumerated the people's right to be free from unreasonable searches and seizures. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[6]

The Montana Constitution's provision against unreasonable searches and seizures utilizes nearly identical language as the Fourth Amendment of the United States Constitution.[7] However, the Montana Supreme Court has

6. U.S. CONST. amend. IV.

7. MONT. CONST. art. II, § 11 ("The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing").

consistently held that certain searches which are reasonable under the United States Constitution may nevertheless be unreasonable under the Montana Constitution.[8] That is, the Montana Constitution provides greater protections against unreasonable searches than the United States Constitution.[9] The Montana Supreme Court relies on two distinct rationales for affording greater protections against government searches than the United States Constitution: (1) Montana's constitution, unlike the United States Constitution, enumerates an individual right of privacy;[10] and (2) Montana's constitution is a source of authority distinct from the United States Constitution.[11]

Specifically, the Montana Constitution provides: "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[12] While debating the adoption of this provision, Constitutional Convention Delegate Thomas Ask suggested that the right of privacy must yield to the state's compelling interest in conducting reasonable searches and seizures.[13] Yet, Delegate Bob Campbell indicated that the right of privacy strengthens the

8. *See e.g.* State v. Sawyer, 571 P.2d 1131, 1133 (Mont. 1977); s*ee also* State v. Bullock, 901 P.2d 61, 75 (Mont. 1995); State v. Tackitt, 67 P.3d 295, 300 (Mont. 2003). However, with regards to unreasonable seizures, the Montana Constitution generally provides the same amount of protection as the United States Constitution. *See e.g.* MONT. CODE ANN. § 46-5-403 (a traffic stop may last no longer than is necessary to effectuate the purpose of the stop); *c.f.* Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015) ("[b]ecause addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose") (internal punctuation omitted).

9. At one point the Montana Supreme Court went so far as to hold that the right of privacy and the search and seizure provisions extended to infringements by not only law enforcement officers, but private individuals as well. State v. Helfrich, 600 P.2d 816, 817–19 (Mont. 1979) (holding the defendant's neighbor's conduct of collecting a sample of marijuana while trespassing upon defendant's property violated the defendant's right of privacy and right to be free from unreasonable searches and seizures) (overruled by State v. Long, 700 P.2d 153, 157 (Mont. 1985) (holding privacy protection only extends to infringements by the State)).

10. MONT. CONST. art. II, § 10; *see also Bullock*, 901 P.2d at 75.

11. *Bullock*, 901 P.2d at 75 ("states are free to grant citizens greater protections based on state constitutional provisions than the United States Supreme Court divines from the United States Constitution").

12. MONT. CONST. art. II, § 10.

13. 6 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT 1852–53 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT] (because the people have a right to be free only those searches and seizures that are *unreasonable*, the state has a compelling interest to conduct *reasonable* searches and seizures).

protections against searches and seizures.[14] The Montana Supreme Court has had to balance these competing concerns.[15]

The Montana Supreme Court, relying on both the right of privacy and distinct authority of Montana's Constitution, has provided greater individual protections by limiting the state's power to electronically record individuals' conversations,[16] to intrude on an individual's property,[17] to search automobiles,[18] and to use drug-detection canines.[19] Below, this Comment discusses the use of drug-detection canines in both the state and federal context, before discussing the development of the particularized suspicion standard.

14. *Id.* at 1681 (at the time the Bill of Rights was amended to the United States Constitution "the search and seizure provisions were enough," but by the time Montana revised its constitution in 1972 the prevalence of "wiretaps, electronic and bugging devices, photo surveillance equipment and computerized data banks" placed Montanan's at greater risk of privacy invasion and justified strengthening protections against search and seizures by expressing the right of privacy).

15. State v. Wood, 666 P.2d 753, 754 (Mont. 1983) (internal citations and quotations omitted) ("the right of individual privacy must yield to a compelling state interest. Such compelling state interest exists where the state enforces its criminal laws for the benefit and protection of other fundamental rights of citizens"); *see also* State v. Nelson, 941 P.2d 441, 449 (Mont. 1997) (the right of individual privacy must yield to compelling state interest in conducting reasonable searches and seizures based on probable cause); *but see Bullock*, 901 P.2d at 75 (unlike under federal precedent, in Montana, officers may not search the open-fields of a person's property because Montana's expressed individual right of privacy "grants rights beyond that inferred from the United States Constitution").

16. State v. Solis, 693 P.2d 518, 523 (Mont. 1984) (the State's warrantless recording of defendant's conversations with an undercover agent violated the defendant's right to be free from unreasonable searches); *c.f.* United States v. Caceres, 440 U.S. 741, 750–52 (1979) (holding the government's recording of defendant's conversations without Justice Department approval did not violate any constitutional protections).

17. *Bullock*, 901 P.2d at 75–76 (interpreting Montana's right of privacy as granting greater protections than those afforded under the United States Constitution with respect to government intrusion upon the open fields surrounding private property); *c.f.* Oliver v. United States, 466 U.S. 170, 177 (1984) ("government intrusion upon open fields is not one of those 'unreasonable searches' proscribed by the text of the 4th amendment").

18. State v. Sawyer, 571 P.2d 1131, 1134 (Mont. 1977) ("non-investigative inventory searches of automobiles without warrants must be restricted to safeguarding those articles which are within plain view of the officers vision"); *c.f.* South Dakota v. Opperman, 428 U.S. 364, 375–76 (1976) (a non-investigative inventory search of automobile without a warrant which went beyond articles in plain view was reasonable under Fourth Amendment); *see also* State v. Elison, 14 P.3d 456, 468–71 (Mont. 2000) (holding no automobile-exception exists in Montana and requiring probable cause and presence of some other well-established exception, such as plain-view, search incident to arrest, or exigent circumstances); *c.f.* Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018) (under federal law the search of an automobile does not need a warrant if an officer: (1) has lawfully stopped a vehicle; and (2) has probable cause to believe the vehicle contains evidence of a crime); *see also* Carroll v. United States, 267 U.S. 132, 149 (1925).

19. State v. Tackitt, 67 P.3d 295, 300–01 (Mont. 2003).

### A. Use of Drug-detection Canines: Federal Case Law

The Fourth Amendment only applies when the government conducts searches or seizures.[20] Therefore, much police work falls outside the reach of this constitutional protection. The initial question of constitutional analysis is whether the right to be free from unreasonable searches and seizures extends to the circumstances at issue. Specifically, did the police conduct a "search?" Did the police conduct a "seizure?" If the answers to both these questions are no, then Fourth Amendment protections are not implicated. If the answer to either of these questions is yes, then a court must determine, based on the facts and circumstances, whether the search or seizure at issue was unreasonable.

#### 1. Seizures in Order to Allow a Drug-Detection Canine to Sniff

Government conduct constitutes a seizure if it either interferes with a person's possessory interest in property,[21] or restricts a person's freedom of motion such that a reasonable person would not feel free to leave.[22]

For example, if an officer, in order to allow a drug-detection canine to sniff the exterior of an individual's luggage, takes control of the luggage, such that the individual does not retain possession of the luggage, the officer has effectuated a seizure within the meaning of the Fourth Amendment.[23] Alternatively, when an officer stops an individual driving a vehicle, even for a simple traffic violation, such that a reasonable person in that situation would not feel free to leave, the officer has seized that individual.[24] Once a court determines a seizure occurred, the next analytic step is determining whether that seizure was reasonable.

Regardless of whether the officer seized the individual person or the individual's property, a critical limitation on seizures remains—duration.[25] In *United States v. Place*, the United States Supreme Court held as unreasonable a seizure in which the officers detained the individual's luggage for ninety minutes and transported it to another airport in order to allow a drug-detection canine to sniff the exterior of the luggage.[26] Similarly, in *Rodriguez v. United States*, an officer stopped a vehicle for a traffic violation,

20. Tracy Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 131 (2001).

21. Soldal v. Cook Cty, 506 U.S. 56, 63 (1992) (seizure of property occurs "where there is some meaningful interference with an individual's possessory interests in that property").

22. Terry v. Ohio, 392 U.S. 1, 19, n.16 (1968).

23. United States v. Place, 462 U.S. 696, 708 (1983).

24. Maclin, *supra* note 20, at 144–45; s*ee e.g.* Rodriguez v. United States, 135 S. Ct. 1609, 1613 (2015) (finding Rodriguez was not "free to leave").

25. *Place*, 462 U.S. at 709.

26. *Id.* at 699, 709–10.

issued a traffic citation, then, without first identifying any objective indications of criminal activity, prolonged the stop to allow a drug-detection canine to sniff the exterior of the vehicle.[27] Because the officer's use of the drug-detection canine prolonged the traffic stop beyond the time reasonably required to complete the stop's purpose, the United States Supreme Court held the seizure to be unreasonable.[28] While other factors, such as an officer's failure to inform the individual of how long the property will be seized and where it will be taken, make it more likely that the seizure is unreasonable, a lengthy duration of a seizure is sufficient for a court to hold a seizure to be unreasonable.[29]

### *2. When Does the Government's Use of Drug-Detection Canines Constitute a Search?*

Government conduct constitutes a search if the government either: (1) physically trespasses on an individual's person, papers, or effects;[30] or (2) intrudes on an individual's reasonable expectation of privacy.[31] The first category will be referred to as physical searches while the latter will be referred to as informational searches. Physical searches, historically, were the only searches the Fourth Amendment protected against,[32] while informational searches later gained constitutional protections in response to public concern[33] of the government's increased use of wiretaps and other non-physically intrusive investigation techniques.[34] While the United States Supreme Court has expanded Fourth Amendment protections beyond physical searches to include informational searches such as wire taps and thermal imaging, it has yet to extend those protections to non-physically invasive use of drug-detection canines.

Under the United States Constitution, government use of drug-detection canines only constitutes a search if the officer or drug-detection canine

27. *Rodriguez,* 135 S. Ct. at 1612–13.

28. *Id.* at 1616—17; *see also* United States v. Rodriguez, 799 F.3d 1222 (8th Cir. 2015) (on remand the 8th Circuit held that, under precedent at the time of the stop, the officer's seizure was reasonable).

29. *Place*, 462 U.S. at 710.

30. *See e.g.*, Florida v. Jardines, 569 U.S. 1, 5 (2013).

31. *See e.g.*, Kyllo v. United States, 533 U.S. 27, 33–35 (2001).

32. Olmstead v. United States, 277 U.S. 438, 464 (1928) (holding that wiretaps did not violate the Fourth Amendment because, "[t]here was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants"); *see also* Richard C. Tallman & Tania M. Culbertson, *2019 James R. Browning Distinguished Lecture in Law, "Holding the Delicate Balance Steady and True": The History of FISA's Grand Bargain*, 80 MONT. L. REV. 137, 140 (2019) (an informational search such as "wiretapping simply was not the kind of search against which the Fourth Amendment protect[ed]").

33. Or perhaps the concern of nine unelected Justices. *See supra* Tallman note 32, at 141 ("it is the responsibility of the legislative branch to adjust the balance when it comes to privacy issues").

34. Katz v. United States, 389 U.S. 347, 353 (1967); *Kyllo*, 533 U.S. at 33—35.

physically intrudes on a person's property.[35] If the officer or drug-detection canine does not physically intrude on a person's property, and the officer has not unreasonably seized the individual or the individual's property,[36] then the officer's use of a drug-detection canine does not violate the Fourth Amendment.[37]

Comparing the physical search present in *Florida v. Jardines* with the informational search present in *United States v. Place* illuminates the difference between government use of drug-detection canines which physically intrudes upon a person's property and the less invasive use of drug-detection canines to sniff the exterior of a person's property. In *Jardines*, the United States Supreme Court determined the officers' use of a drug-detection canine constituted a search because the officers, along with their drug-detection canine, physically trespassed on Jardines' porch to detect odors. Justice Scalia, writing for the majority, stated that, "[o]ne virtue of the Fourth Amendment property-rights base-line is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."[38]

Whereas in *United States v. Place*, the drug-detection canine did not physically trespass into the traveler's luggage. There, because the drug-detection canine merely sniffed the exterior of the traveler's luggage and because the drug-detection canine was able to distinguish the scent of narcotics from the scent of clothing and other non-contraband items, the Court concluded the use of the drug-detection canine did not constitute a search within the meaning of the Fourth Amendment.[39] The United States Supreme Court, in *Place*, reasoned that since the drug-detection canine which sniffed the exterior of luggage, "disclose[d] only the presence or absence of narcotics, a contraband item," it did not intrude the traveler's reasonable expectation of privacy[40] and, therefore, did not constitute a search.[41]

35. *Jardines*, 569 U.S. at 11–12.

36. Rodriguez v. United States, 135 S. Ct. 1609, 1616–17 (2015).

37. United States v. Place, 462 U.S. 696, 706–07 (1983) (under the expectation of privacy analysis of informational searches, government use of a drug-detection canine does not constitute a "search").

38. *Jardines*, 569 U.S. at 11–12.

39. *Place*, 462 U.S. at 707.

40. A search occurs if an officer infringes on a person's reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (because Katz had an "actual, subjective expectation of privacy" in the conversation, and "society [was] prepared to recognize [that expectation of privacy] as reasonable," the Fourth Amendment protected Katz from government intrusion of his private conversation).

41. *Place*, 462 U.S. at 707.

While the accuracy of drug-detection canines in detecting contraband has been challenged,[42] the United States Supreme Court has yet to abrogate *Place*'s rule that the government's non-physically intrusive use of a drug-detection canine does not implicate the Fourth Amendment.[43] The following section analyzes the different approach to drug-detection canines adopted by the Montana Supreme Court.

### *B. Use of Drug-detection Canines: Montana Case Law*

Regarding unreasonable *seizures*, Montana's Constitution generally affords the same amount of protection as the United States Constitution.[44] However, regarding unreasonable *searches*, the Montana Supreme Court, relying on both the express right of individual privacy and the distinct authority of the Montana Constitution, affords greater protections than the United States Constitution—at least with respect to government use of drug-detection canines.[45]

Unlike at the federal level, under Montana law, government use of a drug-detection canine constitutes a search whether or not there is a physical intrusion upon a person's property,[46] including when a drug-detection canine sniffs the exterior of container in which an individual has a reasonable expectation of privacy.[47] Under the Montana Constitution, when an officer

42. *See* Illinois v. Caballes, 543 U.S. 405, 411–12 (2005) (Souter, J., dissenting); *see also* Katz & Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 755–57 (2007).

43. *Caballes*, 543 U.S. at 409–10; *but see* Florida v. Jardines, 569 U.S. 1, 11–12 (2013) (holding officers physically intruding on porch with drug-detection canines constitutes a search); *see also* State v. Tackitt, 69 P.3d 295, 300–01 (Mont. 2003) (use of a drug-detection canine constitutes a search); People v. McKnight, 446 P.3d 397, 400 (Colo. 2019) (use of a drug-detection canine constitutes a search).

44. MONT. CODE ANN. § 46-5-403 (a traffic stop may last no longer than is necessary to effectuate the purpose of the stop); *c.f.* Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015) ("[b]ecause addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose") (internal punctuation omitted); *but see* Terry v. Ohio, 392 U.S. 1, 30 (1968); Hulse v. Department of Justice, 961 P.2d 75, 86–87 (Mont. 1997) (once stopped, if the officer's initial suspicion of wrongdoing has not been dispelled and the officer fears for his or her safety, or the safety of others, the officer may conduct a limited search).

45. *Tackitt*, 67 P.3d at 300–01 ("the use of the canine sniff of Tackitt's vehicle was a search under Article II, Sections 10 and 11"); *see e.g.* Scott v. Billings Police Dep't., 2018 U.S. Dist. LEXIS 218805 (D. Mont. 2018) (under Montana law the use of a drug-detection canine was unreasonable, but under the Fourth Amendment of the United States Constitution the use of the drug-detection canine was reasonable).

46. *See Tackitt*, 67 P.3d at 301 (use of a drug-detection canine on a residence generally requires probable cause and a warrant because it is a search).

47. *Id.* at 300–01 ("the use of the canine sniff of Tackitt's vehicle was a search under Article II, Sections 10 and 11"); *see also Id.* at 302–03 ("when a person maintains control of a container in which he has a reasonable expectation of privacy, but where the odors from that container are freely exposed to the public, particularized suspicion is required for the use of a canine to detect those odors"); *c.f.* State v. Scheetz, 950 P.2d 722, 727 (Mont. 1997) ("a person lacks a reasonable expectation of privacy in the smell of luggage that he or she brings to an airport").

or drug-detection canine physically intrudes upon a person's property, the officer generally needs probable cause and a warrant before allowing the drug-detection canine to sniff within the person's property.[48] However, when a drug-detection canine sniffs the exterior of a vehicle, luggage, or other container, the officer needs only particularized suspicion of criminal activity.[49]

The Montana Supreme Court, by recognizing that government use of a drug-detection canine constitutes a search, affords greater protections against government use of drug-detection canines than the United States Supreme Court. However, it reduces the necessary factual support from probable cause to particularized suspicion based upon the same rationale the United States Supreme Court utilized to exclude drug-detecting canines from the scope of the Fourth Amendment.[50] In short, the Montana Supreme Court, by applying the particularized suspicion standard to the use of drug-detection canines has concluded that such police conduct should be subject to less constitutional scrutiny because it is less intrusive than other types of investigative techniques and is "uniquely selective," disclosing only the presence or absence of contraband.[51] The origins and contemporary form of the particularized suspicion concept are discussed below.

### *C. Particularized Suspicion — Origins of the Standard*

Warrantless searches and seizures are presumptively unreasonable, save for a few well-defined exceptions.[52] By requiring a warrant, courts reduce error in law enforcement's application of constitutional principles because a neutral third party determines if the officer has sufficient factual evidence of criminal activity to conduct the search or seizure.[53] Conversely, obtaining a warrant for all searches and seizures inhibits government's ability to aptly uncover criminal wrongdoing. However, certain exceptions to the warrant requirement[54] expand law enforcement's scope of permissible

48. *Tackitt*, 67 P.3d at 301 (unless an exception to the warrant requirement applies); *c.f.* Florida v. Jardines, 569 U.S. 1, 12 (2013) ("probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make prior to conducting a dog 'sniff test' at a private residence").

49. *Tackitt*, 67 P.3d at 302–03.

50. *Tackitt*, 67 P.3d at 302; *c.f.* United States v. Place, 462 U.S. 696, 707 (1983).

51. *Tackitt*, 67 P.3d at 302; *Place*, 462 U.S. at 707.

52. United States v. Karo, 468 U.S. 705, 717 (1984); Katz v. United States, 389 U.S. 347, 361 (1967); *see also* State v. Elison, 14 P.3d 456, 467 (Mont. 2000).

53. Oren Bar-Gill and Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U. L. Rev. 1609, 1614 (2010). *See also* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. Rev. 1, 10–12 (1992).

54. Texas v. Brown, 460 U.S. 730, 736 (1983) (plain view exception for seizures); *c.f.* State v. Loh, 914 P.2d 592, 597–600 (1996) (plain view exception for seizures); United States v. Robinson, 414 U.S. 218, 235 (1973) (search incident to arrest); State v. Cooney, 149 P.3d 554, 556 (Mont. 2006) (applying

conduct by reducing constitutional scrutiny of police conduct. Generally, these exceptions permit an officer to search or seize individuals or their property, without a warrant, based merely upon particularized suspicion of criminal activity.

The particularized suspicion standard originates from *Terry v. Ohio*, the seminal case establishing the investigatory stop and frisk. *Terry* holds "in justifying the particular [physical] intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that [physical] intrusion."[55]

*Terry* reasoned that the government's interest in officer safety outweighed constitutional protections when holding that officers may conduct investigative stop and frisks based upon mere particularized suspicion.

Over a decade later, *United States v. Cortez*[56] refined the particularized suspicion standard and applied it to investigative stops of automobiles. Aligning with *Terry*'s balancing test to determine reasonableness, *Cortez* reasoned that the government's interest in "halting illegal entry into this country" outweighed the individual's constitutional right to be free from unreasonable searches.[57] The balancing of government interests against the constitutional right to be free from unreasonable searches and seizures was similarly used by the Montana Supreme Court when it adopted and later expanded the particularized suspicion standard.

### *1. The Particularized Suspicion Standard Enters Montana Law*

Shortly after the United States Supreme Court decided *Cortez*, Montana adopted the particularized suspicion standard for vehicular stops. In *State v. Gopher*,[58] the Montana Supreme Court held that "when a trained police officer has particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity, or witness thereto, a limited and reasonable investigatory stop and search is justified."[59] In *Gopher*, the police officer, while responding to a call that somebody broke a rifle store window, noticed a singular vehicle drive very slowly past the crime scene

MONT. CODE ANN. § 46–5–102, the codified search-incident-to-arrest exception); Kentucky v. King, 563 U.S. 452, 462 (2011) (exigent circumstances exception); *c.f.* State v. Wakeford, 953 P.2d 1065, 1068 (Mont. 1998) (exigent circumstances exception); Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018) (automobile exception); *c.f. Elison*, 14 P.3d at 468–71 (automobile exception does not apply in Montana, instead an officer must have probable cause and another exception to the warrant requirement such as plain view, search incident to arrest, or exigent circumstances).

55. Terry v. Ohio, 392 U.S. 1, 21 (1968).

56. 449 U.S. 411 (1981).

57. 449 U.S. at 418–19.

58. 631 P.2d 293 (Mont. 1981).

59. *Id.* at 296.

and express an inordinate amount of interest in the scene. The officer, based on his experience, deduced from these facts that the occupants of the vehicle were either involved with or witnessed the crime.[60] The Court held that the "objective data" from which the "experienced officer" made "certain inferences," coupled with the "resulting suspicion that the occupant of [the] certain vehicle [was] engaged in wrongdoing or was witness to criminal activity" justified the officer in pulling the vehicle over.[61] The Montana Legislature codified this standard in Montana Code Annotated § 46–5–401, which states an "officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense."[62]

*Terry*, *Cortez*, and *Gopher* all reduce constitutional scrutiny of law enforcement conduct with respect to physical seizures of individuals, and in each, the courts held that the officers had sufficient particularized suspicion of criminal activity to justify the stops. The Montana Supreme Court has continued this reduction of constitutional scrutiny of law enforcement conduct, by applying the particularized suspicion standard to the more ephemeral "searches" including field sobriety tests[63] and the use of drug-detection canines.[64]

### *2. Montana Expands the Particularized Suspicion Standard to Non-physical, Informational Intrusions of Privacy*

As discussed above, every time an officer pulls a vehicle over, the officer has physically seized the individual occupants of the vehicle. In order to prevent a violation of the individuals' constitutional rights, the officer must have particularized suspicion that at least one of the occupants is engaged in, was engaged in, or witness to wrongdoing.[65] Once stopped, however, if the officer's initial suspicion of wrongdoing has not been dispelled and the officer fears for his or her safety, or the safety of others, the officer may conduct a limited search.[66] The Montana Supreme Court, following the rationale of *Terry*, later expanded the scope of permissible conduct during an investigative traffic stop to include administration of field sobriety tests. In *Hulse v. Department of Justice*,[67] the Montana Supreme Court first cate-

60. *Id.*
61. *Id.*
62. MONT. CODE ANN. § 46–5–401.
63. Hulse v. Department of Justice, 961 P.2d 75, 86–87 (Mont. 1997).
64. State v. Tackitt, 67 P.3d 295, 301–02 (Mont. 2003).
65. United States v. Cortez, 449 U.S. 411, 417–18 (1981); State v. Gopher, 631 P.2d 293, 296 (Mont. 1981).
66. Terry v. Ohio, 392 U.S. 1, 30 (1968).
67. 961 P.2d 75 (Mont. 1997).

gorized the field sobriety test as a search, then it established the evidentiary standard an officer must satisfy prior to conducting a field sobriety test.[68]

The Court in *Hulse* held that an officer must have particularized suspicion of a driver's intoxication in order to reasonably conduct a field sobriety test.[69] Applying the same balancing approach as *Terry*, where the United States Supreme Court reasoned that officer safety outweighed the constitutional protections against unreasonable searches and seizures, the Montana Supreme Court reasoned that the governmental interest in protecting the public from the dangers of drunk drivers outweighed the limited intrusion of an individual's privacy stemming from a field sobriety test.[70]

Similarly, in *State v. Tackitt*, the Montana Supreme Court expanded the application of the particularized suspicion standard to another non-physically intrusive search—government use of drug-detection canines to sniff the exterior of a closed container. *Tackitt* recognizes the government's use of a drug-detection canines as a search[71] and holds that an officer must have particularized suspicion of criminal activity prior to using a drug-detection canine to sniff the exterior of a vehicle.[72]

In *Tackitt*, the Montana Supreme Court took pains to establish that an officer only needs particularized suspicion of an individual's criminal drug activity prior to commencing use of a drug-detection canine. Following the approach of *Terry* and *Hulse*, where the particularized suspicion standard properly determined that the respective government interests of officer and public highway safety outweighed the minimal intrusion of privacy during stop and frisk investigations and sobriety tests, in *Tackitt*, the Montana Supreme Court reasoned that the particularized suspicion standard best balanced the government interest in "discouraging illegal drug trafficking" against the minimal intrusion of privacy from the exploratory sniff of a drug-detection canine.[73] *Tackitt* stands for the proposition that "when a person maintains control of a container in which he has a reasonable expectation of privacy, but where the odors from that container are freely exposed to the public, particularized suspicion is required for the use of a canine to detect those odors."[74] *Tackitt's* holding, therefore, permits an officer, supported by particularized suspicion, to use a drug-detection canine not only

68. *Id.* at 84–85 (because of the reasonable expectation of privacy in the information disclosed such as literacy of the individual, and whether the individual suffers from diseases that affect memory or physical capabilities).

69. *Id.* at 87.

70. *Id.* 86–87.

71. State v. Tackitt, 67 P.3d 295, 300–01 (Mont. 2003).

72. *Id.* at 304.

73. *Id.* at 302.

74. *Id.* at 302–03.

on a parked, unattended vehicle, but also when using a drug-detection canine during a routine traffic stop.[75]

While *Tackitt* posits a broad rule allowing the Montana government to use drug-detection canines if an officer has mere particularized suspicion of criminal activity, it does so based on the presumption that use of drug-detection canines is less intrusive than other investigative techniques and is uniquely selective in detecting contraband.[76] However, as discussed further in Section V, after the passage of Montana's Medical Marijuana Act, possession of marijuana by registered medical marijuana cardholders does not violate state law. Consequently, the use of drug-detection canines trained to detect marijuana is no longer uniquely selective because it now discloses the presence of property possessed in compliance with the law in which the individual has a reasonable expectation of privacy. Moreover, in light of Montana's changes in marijuana law, the use of drug-detection canines trained to detect marijuana is now an investigative technique as intrusive as other investigative techniques, such as thermal imaging and wiretaps, which generally require probable cause and a warrant.[77]

Before this comment moves into the facts of the case at hand, take note of what has been covered so far. An officer seizes an individual every time the officer initiates a traffic stop. That seizure triggers constitutional scrutiny, and to pass muster, the officer must have had particularized suspicion of a traffic violation or criminal activity prior to pulling the vehicle over. Once this bar is met, under Montana law, the officer must have particularized suspicion of criminal drug activity prior to expanding the traffic stop into a drug-investigation. Additionally, under Montana law, the officer must have particularized suspicion of criminal drug activity prior to initiating use of a drug-detection canine. Moreover, under both the Montana Constitution and the United States Constitution, if the officer, in order to allow a drug-detection canine to sniff the exterior of the vehicle, extends the stop beyond a reasonable time needed to effectuate the purpose of the stop, the officer has unreasonably seized the individual, and any evidence obtained thereafter must be excluded.

75. *See e.g.*, State v. Estes, 403 P.3d 1249 (Mont. 2017); State v. Wilson, 430 P.3d 77 (Mont. 2018).

76. *Tackitt*, 67 P.3d at 302.

77. *See e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) (thermal imaging "is a 'search' and is presumptively unreasonable without a warrant").

## III. *STATE v. WILSON*

### *A. Facts and Procedure*

Montana Highway Patrolman Cody Smith, while parked on the side of U.S. Highway 2 near Chinook, Montana, observed a vehicle with a North Dakota license plate approaching from the rear.[78] The occupants of the vehicle passing Smith's patrol car looked over at the patrol car and quickly looked away.[79] After Officer Smith ran the vehicle's plates and discovered expired registration, he initiated a traffic stop.[80]

Officer Smith informed the driver, Scott Paramore, that expired registration was the reason for the stop.[81] In Officer Smith's opinion, Paramore and passenger Johnathan Wilson, appeared visibly nervous and avoided eye contact.[82] Officer Smith noted old food items on the floor and "a lived-in appearance" of the vehicle.[83] After Officer Smith unsuccessfully requested identification from Paramore, he asked Paramore to walk to the patrol car.[84] Paramore kept an unlit cigarette in his mouth when they walked back to the patrol car, which Officer Smith found unusual.[85]

Once in the patrol car, Paramore informed Officer Smith that they were returning from his wedding in Idaho.[86] Despite Paramore explaining that his wife was travelling in a separate vehicle because: (1) she arrived in Idaho before he did to set up the wedding; (2) was transporting their three children; and (3) did not need to return to work in North Dakota as soon as Paramore did, Officer Smith thought it was strange that Paramore was not driving with his wife.[87]

Paramore explained to Officer Smith that the vehicle they were driving was registered to his co-worker, who let them borrow it for the trip.[88] After Officer Smith questioned how long Paramore had known the owner, Paramore responded "four or five months."[89] Officer Smith felt it was unusual that a co-worker who only knew Paramore for a few months would have loaned him a vehicle.[90] Officer Smith, doubting the validity of Paramore's account, continued to question Paramore about the reasons for

78. *Wilson*, 430 P.3d at 79.
79. *Id.*
80. *Id.*
81. Brief of Appellee at 3, *State v. Wilson* (Mont. May 23, 2018) (No. DA 17-0550).
82. *Id.*
83. *Id.*
84. *Id.*
85. Appellant's Opening Brief at 4, *State v. Wilson* (Mont. Jan. 30, 2018) (No. DA 17-0550).
86. *Wilson*, 430 P.3d at 80.
87. *Id.*
88. Brief of Appellee, *supra* note 81, at 4.
89. *Wilson*, 430 P.3d at 80.
90. Brief of Appellee, *supra* note 81, at 4.

driving separately from his wife.[91] Then, Officer Smith returned to the passenger side of the vehicle to see if Wilson could find a valid insurance card.[92]

Wilson, despite failing to provide valid insurance, independently corroborated that they were indeed returning from Paramore's wedding in Idaho, along with the reasons Paramore drove separately from his wife, and the fact that the vehicle belonged to Paramore's co-worker. Officer Smith, after returning to his patrol car, checked Paramore and Wilson's criminal history and discovered that Paramore had a history of drug charges.[93] Paramore confirmed this finding and admitted that he had been on probation two years ago for a marijuana related charge.[94]

At this point, Officer Smith left the patrol car to make a call to Agent Ost, a border patrol agent with a drug-detection canine.[95] Officer Smith requested that Agent Ost bring the drug-detection canine to assist with the investigation.[96] While Officer Smith was on the radio requesting the drug-detection canine, Paramore opened the patrol car door, which Smith believed indicated Paramore's attempt to listen in on the conversation.[97] This "continued to make [Officer Smith] suspect that Paramore was extremely nervous."[98]

Three minutes after the radio request for the drug-detection canine, Officer Smith issued Paramore citations for failure to provide proof of insurance and for operating a vehicle with expired registration.[99] However, before Paramore could leave the patrol car, Officer Smith requested that he stay for further questioning.[100]

Officer Smith informed Paramore that U.S. Highway 2 was a known drug trafficking corridor and asked whether there were any drugs in the vehicle.[101] Paramore denied that any drugs were in the vehicle, to which Officer Smith returned a request to search the vehicle.[102] Paramore did not consent to the search.[103] Officer Smith asked if he would be willing to wait for a drug-detection canine to arrive.[104] Paramore stated he would "prefer

91. *Wilson*, 430 P.3d at 80.
92. Brief of Appellee, *supra* note 81, at 4.
93. *Id.* at 5.
94. *Wilson*, 430 P.3d at 80.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. Brief of Appellee, *supra* note 81, at 5.
101. *Id.*
102. *Id.*
103. *Id.* at 5–6.
104. *Id.* at 6.

not to wait."[105] Officer Smith, then informed Paramore that a drug-detection canine would search the vehicle and that he needed to wait for this to occur.[106]

After the drug-detection canine inspected the vehicle, Agent Ost informed Officer Smith that the canine had indicated drugs were in the vehicle.[107] Officer Smith notified Wilson and Paramore that, due to the canine's alert, he would be applying for a warrant to search the vehicle.[108] While Officer Smith awaited the warrant, he permitted Paramore and Wilson to leave the scene on foot.[109]

The officers, after obtaining a search warrant, conducted a thorough search of the vehicle.[110] The search revealed a small bag of marijuana and a pipe in the vehicle's center console, and a large bag of marijuana in the trunk, totaling over a half-pound of marijuana.[111] Law enforcement arrested Paramore and Wilson soon thereafter in Havre, Montana.[112]

The State charged Wilson with multiple drug charges.[113] Wilson filed a motion to suppress the evidence gathered from the vehicle.[114] The district court of the 17th Judicial District denied the motion, reasoning that Officer Smith had sufficient factual support to expand the traffic stop into a drug investigation and particularized suspicion of drug activity which justified the use of a drug-detection canine on the vehicle's exterior.[115] Wilson plead no contest to Criminal Possession of Dangerous Drugs, a felony, reserving his right to appeal. The Montana Supreme Court decided the appeal as follows.

### *B. Holding*

Chief Justice Mike McGrath, joined by five other Justices of the Montana Supreme Court, delivered the opinion, holding that Officer Smith lacked the particularized suspicion required to extend the traffic stop and that Officer Smith's use of a drug-detection canine violated Montana's con-

105. *Id.*
106. *Id.*
107. Appellant's Opening Brief, *supra* note 85, at 8.
108. *Id.*
109. Brief of Appellee, *supra* note 81, at 6.
110. State v. Wilson, 430 P.3d 77, 81 (Mont. 2018).
111. *Id.*
112. *Id.*
113. *Id.* (charging Wilson with Criminal Possession of Dangerous Drugs with Intent to Distribute, a felony, in violation of MONT. CODE ANN. § 45–9–103; Criminal Possession of Dangerous Drugs, a felony in violation of MONT. CODE ANN. § 45–9–102(1); and Criminal Possession of Drug Paraphernalia, a felony, in violation of MONT. CODE ANN. § 45–10–103).
114. *Id.*
115. *Id.*

stitutional shield against unreasonable searches.[116] Consequently, after finding the district court erroneously denied Wilson's motion to suppress evidence, the Montana Supreme Court reversed Wilson's conviction.[117] The majority reasoned, "a messy vehicle, a nervous driver with an unlit cigarette, daylight use of a Montana highway, using a borrowed vehicle, and the fact that newlyweds aren't traveling together following their wedding does not amount to particularized suspicion."[118]

The Montana Supreme Court thoughtfully distinguished the facts of *Wilson* from those of *State v. Estes*. In *Estes*, the officer pulled over a vehicle for a routine traffic stop, and upon noticing numerous air fresheners, two cell phones, and a stack of cash in the center console, the officer allowed his drug-detection canine to sniff the exterior of the vehicle.[119] Unlike *Estes*, where the presence of numerous air fresheners, the plain view observation of two cell phones, and a stack of cash was sufficient factual support giving rise to particularized suspicion,[120] here Officer Smith did not articulate any specific facts demonstrating criminal behavior. Therefore, the Montana Supreme Court held that Officer Smith did not have the requisite particularized suspicion of criminal activity needed to initiate use of a drug-detection canine.[121] Additionally, the Montana Supreme Court emphasized that the purpose of the stop was to ticket Paramore for expired registration, and after Officer Smith issued the citations he should have concluded the stop.[122]

### *C. Dissent*

Justice Jim Rice, the only Justice to dissent, agreed with the district court's denial of Wilson's motion to suppress evidence.[123] Justice Rice pointed to the "lived-in" appearance of the vehicle, lack of eye contact with Officer Smith, use of a known drug trafficking corridor, use of a borrowed car, the exceptional nervousness of Wilson and Paramore, along with Paramore's prior drug charges as indicators that gave rise to particularized suspicion of drug activity.[124] Although Justice Rice stated that past drug charges alone would not constitute particularized suspicion, he emphasized prior drug charges should not be considered an "innocent indicator."[125]

116. *Id.* at 83.
117. *Id.* at 79.
118. *Id.* at 83.
119. State v. Estes, 403 P.3d 1249, 1251 (Mont. 2017).
120. *Id.* at 1254.
121. *Wilson*, 430 P.3d at 83.
122. *Id.*
123. *Id.*
124. *Id.* at 84–85.
125. *Id.*

## IV. ANALYSIS OF *STATE V. WILSON*

The Montana Supreme Court correctly held that Officer Smith lacked the particularized suspicion of criminal drug activity required to initiate use of the drug-detection canine. Moreover, the dissent's reliance on Paramore's prior conviction for marijuana possession as indication that he currently possessed marijuana was misplaced. While the Montana Supreme Court correctly held that Officer Smith lacked particularized suspicion of criminal drug activity, it did not expressly address that the nervousness of Wilson and Paramore, relied on by Officer Smith to justify his use of the drug-detection canine, was based in-part on nervousness arising after Officer Smith had requested the canine unit.

### *A. Intimidation Resulting in Nervousness*

While the Montana Supreme Court correctly analyzed the facts of *Wilson* when holding that Officer Smith lacked particularized suspicion of criminal activity, it did not directly address Officer Smith's radio request for the drug-detection canine as a means to intimidate Wilson and Paramore into a state of nervousness, nor his later reliance on such nervousness as justification for the use of the drug-detection canine. Permitting an officer to develop particularized suspicion based on an individual's nerves which result from the officer's show of authority endangers our fundamental rights of security and privacy, while impinging on individual liberty.

An officer cannot rely on information collected during a search to provide reason for initiating the search in the first place. This is exactly why warrants are required *before* a search commences.[126] By the same logic, an officer must notice objective indications of criminal activity before commencing a search under an exception to the warrant requirement. Constitutional rights of security and privacy would be futile if officers were able to, without particularized suspicion of criminal activity, snoop through private matters simply to use what they have found as justification of the intrusive search they already conducted. As Justice Jackson once stated, "uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[127] Permitting investigative searches to be justified by evidence uncovered during the search, would

126. Katz v. United States, 389 U.S. 347, 358 (1967) (quoting Beck v. Ohio, 379 U.S. 89, 96 (1964)) (a search without a warrant "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment").

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

subject many innocent people to extended inquiry, undue delay, and needless frustration.

Here, the Montana Supreme Court, when holding that Officer Smith lacked particularized suspicion, should have expressly acknowledged that Officer Smith incorrectly relied on Paramore's nerves as post-hoc rationalization for the search.[128] Paramore, as most people would, became nervous when the officer called a drug-detection canine to the routine traffic stop.[129] Permitting an officer to intimidate an individual as a way to drum up nervousness, and then allowing the officer to use that nervousness as factual support of particularized suspicion, places an unsettling amount of power in law enforcement officers.[130] The Montana Supreme Court in *Wilson* correctly held that Officer Smith lacked the particularized suspicion required to initiate use of a drug-detection canine, however, it should have expressly addressed that Officer Smith's use of intimidation, and his reliance on the resulting nervousness to support particularized suspicion, was unreasonable.

### *B. Paramore's Past Conviction*

Justice Rice's reliance on Paramore's previous drug history as a key indicator of illegal drug activity runs counter to the rehabilitative purposes of probation and incarceration. While, based on a probationer's diminished expectation of privacy, a person's rights during probation may be limited,[131] upon successful completion of probation, the expectation of privacy returns. If fulfilling sentencing requirements for prior criminal acts, instead of restoring an individual's rights, permanently affords that individual fewer constitutional protections, such individuals have no incentive to avoid criminal activity in the future. The dissent's theory that Paramore's completion of probation was not an innocent indicator, therefore, perpetuates the stereotype that once a drug-user, always a drug-user.

Moreover, Wilson was not the one with a history of drug charges. That was Paramore. As the United States Supreme Court has noted, "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic of narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."[132] Stripping away a citizen's rights just because he or she is traveling

128. *Wilson*, 430 P.3d at 80.

129. *See* Maclin, *supra* note 20, at 144 ("a traffic stop interrupts a motorist's 'freedom of movement, is annoying and time consuming, and often generates 'substantial anxiety,' even for the law-abiding motorist who has not committed a crime").

130. *Id.* at 189 (the bulk of police officers' abuse of power is "shouldered by innocent motorists").

131. State v. Charlie, 239 P.3d 934, 941 (Mont. 2010) (requiring merely reasonable cause for warrantless search of the person, vehicle, or residence of somebody on probation or parole).

132. Sibron v. New York, 392 U.S. 40, 62–63 (1968).

with somebody that successfully completed probation a number of years ago[133] not only contravenes the fundamental nature of those rights, but also further isolates and ostracizes those with prior drug charges. Those without prior drug charges will be less likely to travel or associate with people with such charges if, by riding in a vehicle with somebody who at one point was arrested for marijuana possession, they lose their fundamental rights. This paradox only perpetuates recidivism by relegating those with misdemeanor marijuana convictions to associate only with people who have criminal records—likely including felons and violent offenders. Instead of promoting those individuals struggling with substance abuse problems to become thriving members of society, the dissent seeks to inhibit those who have completed their sentences from integrating back into society.

The following section discusses the critical flaws in the rationale supporting reduced constitutional scrutiny of government use of drug-detection canines. Specifically, it suggests that the defense should have raised the argument that, in light of Montana's Medical Marijuana Act, the particularized suspicion standard should no longer apply to government use of drug-detection canines trained to detect marijuana.

## V. Nosing Forward: The Future of Drug-Detection Canines

Criminalized marijuana possession is quickly becoming an outdated doctrine. Despite the Federal Controlled Substances Act classifying marijuana as a Schedule I drug due to its alleged lack of known medical benefits,[134] at the time of this publication, 37 states permit medical use of marijuana,[135] and each have established regulatory systems for the cultivation,

133. *See e.g. Wilson*, 430 P.3d at 80.

134. 21 U.S.C. § 812 (2018). *See also* Gonzales v. Raich, 545 U.S. 1, 32–33 (2005) (holding, despite state laws permitting medical use of marijuana, the Controlled Substance Act is valid exertion of Congress' power to regulate commerce among the several states).

135. ALASKA STAT. § 17.37.030 (2019); ARIZ. REV. STAT. ANN. § 36–2801; ARK. CONST. Amend. 98, § 1; CAL. HEALTH & SAFETY CODE § 11362.1 (LexisNexis 2020); COLO. CONST. Art. XVIII, § 14; CONN. GEN. STAT. § 21a-408 (2019); DEL. CODE ANN. 16, § 4901A; D.C. CODE § 7–1671.01 (2020); FLA. CONST. Art. X, § 29; GA. CODE ANN. § 43–34–120 (2019); HAW. REV. STAT. § 329–121; 410 ILL. COMP. STAT. ANN. 130/1 (2020); IND. CODE ANN. § 24–4–21-1 (LexisNexis 2020); IOWA CODE § 124E.1; LA. STAT. ANN. § 1168.1 (2019); ME. REV. STAT. ANN. 22 § 2421 (2019); MD. CODE ANN., HEALTH-GEN. § 13-3301.1 (LexisNexis 2019); MASS. ANN. LAWS ch. 94I, § 1; MICH COMP LAWS SERV. § 333.26421 (LexisNexis 2019); MINN. STAT. § 152.21; MO. CONST. Art. XIV, § 1; MONT. CODE ANN. § 50–46–301 (2019); NEV. REV. STAT. ANN. § 453A.010 - 453A.810 (LexisNexis 2019); N.H. REV. STAT. ANN. 126–X:1; N.J. STAT. ANN. § 24:6I–1; N.M. STAT. ANN. § 26-2B-1 (2019); N.Y. PUB. HEALTH LAW § 3360 (McKinney 2019); N.D. CENT. CODE § 19-24.1-01 (2019); OHIO REV. CODE ANN. § 3796.01 (LexisNexis 2020); OKLA. STAT. TIT. 63 § 15–420 (2019); OR. REV. STAT. § 475B.010 (2019); 35 PA. CONS. STAT. § 10231.303 (2019); R.I. GEN. LAWS § 21–28.6–1 (2019); UTAH CODE ANN. § 26–61a–101 (LexisNexis 2019); VT. STAT. ANN. TIT. 18 § 4474b (2020); WASH. REV. CODE § 69.515A.005. (2019); W. VA. CODE § 16A–1–1 (2019).

distribution, and use of marijuana for medical use. Of those 37 states, 11 states also permit recreational marijuana[136] more recently referred to as "adult-use cannabis."[137] The states allowing adult-use cannabis express numerous legislative purposes including shifting law enforcement focus to violent and property crimes,[138] regulating and taxing the marijuana industry,[139] disbanding the unregulated marijuana markets,[140] restricting use by minors[141] and enhancing revenue for public purposes.[142] While, under federal law, marijuana remains illegal to possess for either medical or recreational purposes, since 2014, the Consolidated Appropriations Act has prohibited the United States Department of Justice from spending funds to federally prosecute individuals who engage in conduct permissible under state medical marijuana laws.[143]

Relevant here, in 2004 the Montana legislature enacted the Montana Medical Marijuana Act (MMA).[144] The MMA provides legal protections against not only arrest and prosecution for marijuana offenses, but also ex-

136. ALASKA STAT. § 17.38.010 (2019); CAL. HEALTH & SAFETY CODE § 11362.1 (LexisNexis 2020); COLO. CONST. Art. XVIII, § 16; D.C. CODE § 48–904.01 (2020); 410 ILL. COMP. STAT. ANN. 130/1 (2020) 2019 ILL. LAWS 27; ME. REV. STAT. ANN. 28-B § 1501 (2019); MASS. ANN. LAWS Ch. 94G, § 7; MICH COMP LAWS SERV. § 333.27951 (LexisNexis 2019).; NEV. REV. STAT. ANN. § 453D.020 (LexisNexis 2019); OR. REV. STAT. § 475B.010 (2019); VT. STAT. ANN. TIT. 18 § 4230a (2020); WASH. REV. CODE § 69.50.4013 (2019).

137. Certain state legislatures have substituted the term "adult-use cannabis" for what was more commonly referred to as "recreational" marijuana, presumably to acknowledge that adults may choose to use marijuana for myriad reasons, only one of which might be recreation. *See, e.g.* Adult and Medical Use of Cannabis Act, OR. REV. STAT. § 475B.010 (2019); *see* People v. McKnight, 446 P.3d 397, 409 (Colo. 2019) (discussing multiple uses of marijuana).

138. ALASKA STAT. § 17.38.010 (2019); *see also* NEVADA REV. STAT. ANN. § 453D.020 (2019).

139. 2016 Prop. 64 note following CAL. HEALTH & SAFETY CODE § 11018; *see* COLO CONST. art. XVIII, § 16(a).

140. Note following WASH. REV. CODE § 69.50.334 (2019).

141. 2016 Prop. 64 note following CAL. HEALTH & SAFETY CODE § 11018 (2020).

142. NEVADA REV. STAT. ANN. § 453D.020(2) (2019) (revenue dedicated to public education); COLO CONST. art. XVIII, § 16(a). Colorado has obtained over $1 billion in State revenue since it legalized adult-use cannabis in 2014, netting $500 million of that in the last two years, https://perma.cc/3BXB-9GAM.

143. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 538, 132 Stat. 348 (2017); United States v. McIntosh, 833 F.3d 1163, 1176-77 (9th Cir. 2016). *But see* Montana Caregivers Assoc., LLC v. United States, 841 F.Supp.2d 1147, 1149-50 (D. Mont. 2012) (prior to the Consolidated Appropriations Act limiting DOJ funding for medical marijuana prosecution, the Commerce Clause provided the DOJ with power to enforce medical marijuana possession and distribution under the Controlled Substances Act). *See also* Kyle Jaeger, *House-Passed Marijuana Amendments Stripped From Congressional Spending Bills*, Marijuana Moment (Dec. 16, 2019), https://perma.cc/LW7A-DMDS (a similar appropriations rider prohibiting federal spending on prosecution of persons in compliance with state recreational and adult-use marijuana laws did not obtain senate consent).

144. MONT. CODE ANN. § 50-46-101 (repealed in 2011); MONT. CODE ANN. § 50-46-301 (2019).

plicitly protects against the denial of constitutional rights.[145] The MMA provides, subject to certain location limitations,[146] that

> an individual who possesses a registry identification card or license issued pursuant to this part may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege . . . solely because the person cultivates, manufactures, possesses, or transports marijuana in the amounts allowed under this section; or the registered cardholder acquires or uses marijuana.[147]

The regular enactment of appropriations riders, beginning in 2014, protecting those in the medical marijuana industry from federal prosecution, followed by the 2016 amendments to the MMA which enabled licensed providers to serve more than three patients[148] heralded a new era of marijuana law in Montana. From 2016 to 2019, the number of medical marijuana patients obtaining effective care increased by 342%, now totaling 34,413 patients.[149] The substantial increase in prevalence of Montanans lawfully using, cultivating, and possessing marijuana has significantly increased the likelihood that drug-detection canines will give false positive alerts.

Before the MMA permitted medical marijuana possession, drug-detection canines trained to detect marijuana and other drugs were uniquely selective in disclosing only the presence of contraband. However, this no longer holds true. While a positive alert from a drug-detection canine trained to detect marijuana is reliable indication that a person possesses marijuana, a positive alert no longer reliably indicates that a person possesses marijuana illegally. A positive alert could very well be indicating that a person possesses marijuana in compliance with the MMA. Moreover, those permitted to possess marijuana have a reasonable expectation of privacy in the medicine they use.

With this supporting rationale of unique selectivity crumbling under the weight of the MMA, Montana courts should re-evaluate the use of drug-detection canines trained to detect marijuana based upon mere particularized suspicion. While a case where a drug-detection canine discovers a person's lawfully possessed medical marijuana would be the ideal case for the Montana Supreme Court to reconsider this area of its search and seizure doctrine, any case in which an officer uses a drug-detection canine trained to detect marijuana based upon mere particularized suspicion will suf-

145. Id. § 50–46–319(2).

146. *Id.* § 50–46–320.

147. *Id.* § 50–46–319(2).

148. *Montana's medical marijuana laws and history*, Marijuana Policy Project (2020), https://perma.cc/D3G8-K38X.

149. Seaborn Larson, *Number of Montana medical marijuana card holders surges 342% in three years*, Missoulian (Jun 27, 2019), https://perma.cc/67KR-F7D4.

fice.[150] If the defense in *Wilson* had challenged the validity of the particularized suspicion standard with respect to drug-detection canines trained to detect marijuana, the Montana Supreme Court would have had the opportunity to correct the current flaws in its drug-detection canine jurisprudence.

### *A. Re-evaluating Tackitt's Reasoning*

Tackitt's reasoning, which allows an officer to use a drug-detection canine trained to detect marijuana based upon mere particularized suspicion, is flawed in two ways. First, the rationale that use of a drug-detection canine reveals only the presence or absence of contraband is no longer valid because canines trained to detect marijuana cannot distinguish between lawfully possessed marijuana and illegally possessed marijuana. Second, *Tackitt* improperly balances government law enforcement interests against individual privacy interests.

#### *1. Indistinguishable Scents and Reasonable Expectations of Privacy*

As discussed above, in Montana, an officer may initiate use of a drug-detection canine based upon mere particularized suspicion of criminal activity.[151] The Montana Supreme Court, in *Tackitt*, held that use of a drug-detection canine to sniff the trunk of a parked vehicle did, in fact, constitute a search.[152] However, the Montana Supreme Court, instead of requiring the same level of factual support it requires for any other warrantless search of an automobile— "the existence of probable cause as well as a generally applicable exception to the warrant requirement such as a plain view search, a search incident to arrest, or exigent circumstances,"[153] the Montana Supreme Court allowed the use of a drug-detection canine based upon much less factual indicia of criminal activity. The Montana Supreme Court justified this reduced standard because the use of the drug-detection canine was minimally intrusive and revealed only the presence or absence of illegal substances.[154] Importantly, at the time the Montana Supreme Court decided *Tackitt*, the Montana legislature had not passed the MMA and possession of marijuana was illegal for all people in the state. However, under the MMA, certain amounts of marijuana may now be lawfully possessed by registered cardholders. Consequently, the drug-detection canines trained to detect ma-

150. *See e.g.* People v. McKnight, 446 P.3d 397, 399 (Colo. 2019) (a methamphetamine case that re-evaluated the search and seizure doctrine surrounding drug-detection canines trained to detect marijuana).

151. State v. Tackitt, 67 P.3d 295, 303 (Mont. 2003).

152. *Id.* at 300–01.

153. State v. Elison, 14 P.3d 456, 471 (Mont. 2000) (discussing the requirements of a warrantless search of an automobile).

154. *Tackitt*, 67 P.3d at 302–303.

rijuana indiscriminately disclose the presence of both lawfully possessed marijuana and illegally possessed marijuana.

The Supreme Court of Colorado, in *People v. McKnight*, recently addressed a similar issue — a drug-detection canine's inability to distinguish between lawful possession of marijuana and illegal possession of methamphetamine. In *McKnight*, the officer, based upon particularized suspicion of methamphetamine possession,[155] requested back-up bring a drug-detection canine that had been trained to detect odors of methamphetamine, cocaine, heroin, ecstasy, and marijuana.[156] The drug-detection canine was trained to give the same alert upon detection of any of those five drugs.[157] The Colorado Supreme Court held that, due to the canine's inability to distinguish between lawful possession of marijuana[158] and illegal possession of methamphetamine, an officer may not initiate use of a drug-detection canine trained to detect marijuana, unless the officer has "probable cause to believe that an item or area contains drugs in violation of state law."[159]

The same logic applied in *McKnight* holds true in states such as Montana where, despite recreational marijuana being illegal, medical marijuana is legal. Just as the drug-detection canine in *McKnight* could not distinguish between legal marijuana and illegal methamphetamine, a drug-detection canine trained to detect marijuana cannot distinguish between legally possessed medical marijuana and illegally possessed marijuana. Drug-detection canines trained to detect marijuana no longer provide a yes-or-no answer to the question of whether illegal narcotics are present in a vehicle.[160]

Now, the canine may alert to lawfully possessed marijuana, violating the individual's reasonable expectation in his or her lawful possession.[161] What a person uses marijuana for, whether to "treat symptoms of a chronic illness, mitigate mental health conditions, or [currently in 11 states] engage in recreational activities" is reasonably expected to remain private.[162] Use of a drug-detection canine trained to alert to the presence of marijuana invades that expectation of privacy. And, unless an officer has "probable cause as well as a generally applicable exception to the warrant require-

155. *See McKnight*, 446 P.3d at 400—401 (the trial court "conclude[d] that there was reasonable suspicion of criminal activity supporting the search).

156. *Id.*

157. *Id.*

158. COLO. CONST. art. XVIII, §16(a)(3) (The Colorado Constitution permits adults 21 years of age or older to lawfully possess up to an ounce of marijuana).

159. *McKnight*, 446 P.3d at 400.

160. *Id.* at 406.

161. *Id.* at 408.

162. *Id.* at 409; s*ee also* State v. Nelson, 941 P.2d 441, 449 (Mont. 1997) (recognizing a reasonable expectation of privacy in an individual's medical records).

ment,"[163] the officer should not be allowed, without a warrant, to use a drug-detection canine that alerts to marijuana. Consequently, in states permitting either medical or adult-use marijuana, use of drug-detection canines trained to detect marijuana based on mere particularized suspicion is no longer justified.

### *2. Governmental Interests in Enforcing Drug Prohibitions*

The Court in *Tackitt*, when holding that officers may use drug-detection canines based on mere particularized suspicion relied on *Hulse* which closely follows the rationale of *Terry.*[164] Terry and *Hulse*, which weighed the dangers of armed suspects and drunk drivers against constitutional protections of privacy, ultimately decided the interests of officer and highway safety justified "carefully limited search[es],"[165] including weapons frisks and field sobriety tests, based upon mere particularized suspicion. The Court in *Tackitt*, followed this balancing approach, but instead of balancing the government's *safety* interests against the individual privacy interests, it balanced the government's "*law enforcement* interests" against the individual privacy interests.[166]

Presumably, the *Tackitt* Court avoided balancing the safety interests against privacy interests because the direct safety concerns arising from the suspected drug-trafficking were already addressed by *Terry* and *Hulse*. Under *Terry* and *Hulse*, an officer would be able to conduct a weapons frisk to protect themselves from weapons used by illegal drug-traffickers or a field sobriety test to protect people on roadways from an individual who is driving under the influence of the drugs they are suspected to be trafficking. But, does drug-trafficking have other indirect safety concerns? Could *Tackitt* be justified by the safety concerns that possession or trafficking of illegal drugs will lead to overdose by those who ultimately consume the drugs?

Granted, consumption of certain drugs, opiates for example, are dangerous to the individuals consuming them, however, marijuana consumption, whether legally or illegally consumed, is demonstrably safer than other illicit substances.[167] The Montana Legislature recognizes this by making possession of marijuana a misdemeanor, while making possession of other

163. State v. Elison, 14 P.3d 456, 471 (Mont. 2000) (discussing the requirements of a warrantless search of an automobile).

164. State v. Tackitt, 67 P.3d 295, 302 (Mont. 2003); s*ee also* Hulse v. Department of Justice, 961 P.2d 75, 86–87 (Mont. 1997).

165. *Hulse*, 961 P.2d at 86–87.

166. *Tackitt*, 67 P.3d at 302 (emphasis added).

167. The CDC reported 63,600 drug overdoses in 2016. National Center for Health Statistics, *Drug Overdose Deaths in the United States, 1999-2016*, Centers for Disease Control and Prevention (Dec. 2017), https://perma.cc/LD3E-KNBS. *C.f.* CDC report that marijuana overdoes is "unlikely." National Center for Chronic Disease Prevention and Health Promotion, *Is it possible to "overdose" or have*

drugs a felony.[168] Thus, allowing drug-detection canines trained to detect marijuana the same reduced constitutional scrutiny as those trained to detect more dangerous drugs like heroin, is not justified.

Moreover, a person like Tackitt or Wilson, who illegally possesses marijuana and refrains from consuming it before driving, poses much less danger to society than somebody who ingests a lawful intoxicant, like alcohol, and gets behind the wheel of an automobile.[169] An individual possessing marijuana cannot injure the investigating officer with the drugs, nor can the individual endanger highway safety by merely possessing the drugs. The safety concerns which justified the reduction in constitutional scrutiny for weapons frisks and field sobriety tests, are not present to justify reducing the constitutional scrutiny of drug-detection canines trained to detect marijuana.

Further, while the *Tackitt* Court recognized Montana's "interest in discouraging illegal drug trafficking is substantial,"[170] that interest is not compelling and does not justify infringing the individual right of privacy. Despite delegates at Montana's Constitutional Convention suggesting that the right of privacy must yield to the compelling interest of conducting reasonable searches,[171] the delegates also discussed the weaknesses of traditional property-based search and seizure law.[172] Delegate Bob Campbell acknowledged that "the government must come into our lives at some point," however, he qualified that statement by requiring that the government must have a good—i.e. compelling— reason for doing so.[173]

While the Montana Supreme Court has held that the government interest in conducting reasonable searches and seizures based on "probable cause" is compelling justification to infringe the individual right of privacy,[174] it has not recognized searches and seizures based on "particularized suspicion" as similarly compelling interests.

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*a "bad reaction" to marijuana?*, CENTERS FOR DISEASE CONTROL AND PREVENTION (March 7, 2018), https://perma.cc/C4NU-T9AN.

168. MONT. CODE ANN. § 45-9-102(1)—(3).

169. National Center for Injury Prevention and Control, *Impaired Driving: Get the Facts*, Centers for Disease Control and Prevention (March 22, 2019), https://perma.cc/AQY3-KZ8E (in 2016, 10,497 people died in alcohol-impaired driving crashes, accounting for 28% of all traffic-related deaths in the United States).

170. *Tackitt*, 67 P.3d at 302.

171. 6 CONSTITUTIONAL CONVENTION TRANSCRIPT 1852–53 (because the people have a right to be free only from *unreasonable* searches and seizures, the state has a compelling interest to conduct *reasonable* searches and seizures).

172. *Id.* at 1681.

173. *Id.*

174. State v. Nelson, 941 P.2d 441, 449 (Mont. 1997).

*Tackitt* itself concedes that the government's interest in discouraging illegal drug trafficking is merely substantial, but not compelling.[175] Absent the compelling safety interests present in *Hulse* and *Terry*, the holding in *Tackitt* violates the individual right of privacy. Furthermore, any argument that suggests the individual right of privacy must yield to the government's interest in enforcing laws through reasonable search and seizures is misplaced, unless such searches and seizures are based on probable cause. Therefore, the Montana Supreme Court should require, prior to an officer's warrantless use of a drug-detection canine trained to detect marijuana, "the existence of probable cause as well as a generally applicable exception to the warrant requirement such as a plain view search, a search incident to arrest, or exigent circumstances."[176]

### *3. Alternate Judicial Options*

Alternatively, the Montana Supreme Court could maintain *Tackitt*, and simply require that prior to using drug-detection canines, officers have particularized suspicion of drug activity that violates state law. This would require officers to provide specific, articulable facts that the item or area to be searched contains drugs other than marijuana,[177] or if the officer suspects the item or area to be searched contains marijuana, that the individual fails to comply with the MMA, e.g. does not display a registry identification card upon demand.[178]

One way for officers to clearly identify which drug other than marijuana they suspect the individual to possess is to refer to a list of illegal drugs and notice any objective indications of piqued interest when inquiring whether the individual possesses any of the specific drugs.[179]

As for establishing that an individual suspected of marijuana possession is suspected of violating state law, the officer must provide specific articulable facts that such an individual is not in compliance with the MMA. To do so, the officer merely needs to request that such an individual display a valid registry identification card. The MMA requires a registered card-

175. State v. Tackitt, 67 P.3d 295, 302 (Mont. 2003). The interest in discouraging illegal drug trafficking may be better served by legalizing adult-use marijuana. *See* note following WASH. REV. CODE § 69.50.334 (2019) (discussing express legislative purposes of legalizing adult-use marijuana including disbanding the unregulated marijuana markets).

176. State v. Elison, 14 P.3d 456, 471 (Mont. 2000) (discussing the requirements of a warrantless search of an automobile).

177. *See e.g.* State v. Espinoza, 2019 WL 5382516 at *3 (Mont. 2019) (officer observed defendant exhibit unique physical movements when asked about the presence of methamphetamine in her vehicle).

178. MONT. CODE. ANN. § 50–46–319(8) (possession of registration identification card presumes compliance with MMA)

179. *See e.g. Espinoza*, 2019 WL 5382516 at * 2 (officer noted objective indications of heightened nervousness when asking individual if methamphetamine was present in the vehicle).

holder to display his or her identification card upon demand,[180] and it presumes those individuals in possession of a registry identification card to be in compliance.[181] If the individual suspected of possessing marijuana fails to display a registry identification card when an officer demands, the officer continues to have particularized suspicion of criminal activity because the individual would not be in compliance the MMA. However, if the individual does display his or her registry identification card, the officer must presume that the individual is in compliance with applicable law, and any particularized suspicion of unlawful possession of marijuana would, therefore, be dispelled.

Moreover, in Montana, the MMA provides not only a defense to be raised at trial but also maintains the cardholder's right to be free from unreasonable searches and seizures.[182] Any argument stating that a registered card-holder can fight the seizure of lawfully possessed marijuana in court, while a truthful statement, does not encompass the entire truth. It disregards both the card-holder's presumption of compliance with the MMA and the card-holder's right to be free from unreasonable searches and seizures. The officer, without objective data from which he or she can infer that an individual possesses drugs *illegally*, the officer should not initiate use of a drug-detection canine.

Requiring officers to ask individuals if they are registered card-holders before initiating use of a drug-detection canine trained to detect marijuana may seem unduly burdensome on the officers, given that there are only 34,413 registered card-holders in Montana,[183] a state with over 1 million residents.[184] However, this is the best way to prevent denial of Montana's registered card holders' rights to privacy and freedom from unreasonable searches and seizures.[185] The Massachusetts Supreme Court adopted such a position in *Commonwealth v. Canning*.[186]

In Massachusetts, prior to a search, an officer must provide factual support that the individual or property in question "is not or probably not

180. City of Missoula v. Shumway, 434 P.3d 918, 921 (Mont. 2019) (citing MONT. CODE. ANN. § 50–46–317 (2017)).

181. *Id.* (citing MONT. CODE. ANN. § 50–46–319(8) (2017)).

182. *See* MONT. CODE. ANN. § 50-46-319 (registered cardholders may not be denied any right); *see also Shumway*, 434 P.3d at 921, n.1 (noting the MMA affords a defense, not an affirmative defense, because affirmative defenses only apply when the conduct being defended is actually unlawful).

183. Larson, *supra* note 149.

184. United States Census Bureau, *QuickFacts Montana* (last visited Jan. 14, 2020), https://perma.cc/YMY3-PZS9.

185. MONT. CODE. ANN. § 50–46–319(2) (2019).

186. 28 N.E.3d 1156 (Mass. 2015) (superseded by statute); *see* MASS. GEN. LAWS CH. 94G, §7 (legalizing recreational use of marijuana and cultivation of no more than 6 marijuana plants); *see also* Commonwealth v. Richardson, 94 N.E.3d 819, 827 n.9 (Mass. 2018).

registered to cultivate [or possess] the marijuana at issue."[187] The Massachusetts Supreme Court analogized the medical marijuana registry card to that of a license to possess certain firearms, where the possession of those firearms are illegal without a license, but with a license possession is legal. *Canning* notes that, "although firearms cannot legally be carried without a license to carry, in the absence of any evidence beyond the 'unadorned fact' that the defendant was carrying a gun, there [is] no probable cause to suspect a crime was being committed."[188] Similarly, the unadorned suspicion that a person possesses marijuana does not provide probable cause or even particularized suspicion that the individual has committed a crime. *Canning* holds that an officer seeking to search for evidence of illegal marijuana possession or cultivation "must offer information sufficient to provide probable cause to believe the individual is not properly registered under the act to possess or cultivate the suspected substance."[189] *Canning*, therefore, places on the investigating officer the burden to confirm or dispel whether an individual suspected of marijuana possession has a valid registry identification card before searching that individual.[190]

Montana should adopt the *Canning* approach because it aligns with the current construction of Montana's MMA, which places the burden on investigating officers to confirm whether an individual possess a registry identification card. In Montana, a registered cardholder need not "display" the registry identification card to be presumed in compliance, he or she merely needs to "possess" the card.[191] Unless an officer demands to see an individual's registry identification card, the registered cardholder is not bound to disclose his or her private medical information. In order for an officer, investigating an individual suspected of marijuana possession, to have particularized suspicion of criminal activity, the investigating officer must determine whether such an individual is or is not a registered cardholder.[192]

Must a registered cardholder stopped for a minor traffic infraction assume that he or she is also under investigation for the possession of illegal drugs and disclose that he or she suffers from a debilitating medical condition just to suggest compliance with a law he or she is statutorily presumed to be in compliance with? Or consider an officer, suspecting a registered cardholder of cultivating marijuana, who plans on searching the cardholder's property when the cardholder is not present. Must all medical marijuana patients post a sign on their front door stating they suffer from a

187. *Canning*, 28 N.E.3d at 1165.

188. *Id.* at 1164.

189. *Id.* at 1158.

190. *But see* State v. Sisco, 373 P.3d 549, 554—555 (Ariz. 2016) (rejecting the "odor or sight plus" standard which roughly equates to the standard suggested here).

191. MONT. CODE. ANN. § 50–46–319.

192. *Id*. (requiring display of a valid registry identification card only upon demand).

debilitating medical condition for which they are prescribed medical marijuana in order to suggest compliance with medical marijuana laws? Montana's MMA suggests not. Possession of a valid registry identification is enough.

But what about people like Wilson and Paramore, who were not registered cardholders. Must an officer inquire whether they possess a registry identification card before initiating use of a drug-detection canine trained to detect marijuana? The short answer is yes. Otherwise, how can an officer have particularized suspicion of *criminal activity*? An officer that doesn't request to see an individual's registry identification card before initiating use of a drug-detection canine trained to detect marijuana is unable to determine whether the marijuana suspected to be possessed by the individual is possessed lawfully or unlawfully.

By failing to ask Wilson and Paramore if either of them possessed valid registry identification cards, Officer Smith lacked particularized suspicion of *criminal activity*. Officer Smith suspected Wilson and Paramore were trafficking drugs, but never dispelled the likelihood that the drugs he suspected Wilson and Paramore to be trafficking were lawfully possessed under the MMA. Even if Officer Smith had particularized suspicion that Wilson and Paramore were in possession of marijuana, without asking them whether they were registered cardholders, he lacked the particularized suspicion of *criminal activity* necessary to support the use of the drug-detection canine trained to detect marijuana.

If the Montana Supreme Court re-enforces the particularized suspicion standard to emphasize that the standard requires particularized suspicion of *criminal activity*, it must consider whether a positive alert from a drug-detection canine trained to detect marijuana gives rise to the probable cause needed to obtain a warrant.

### *4. A Positive Alert is Not Probable Cause*

Under Montana law, the particularized suspicion needed to use a drug-detection canine, coupled with a subsequent positive alert from that drug-detection canine, amounts to probable cause sufficient to issue a search warrant.[193] In *State v. Mercer*,[194] the officer had particularized suspicion of criminal activity such that the canine search was lawful,[195] and the positive alert from the drug-detection canine established probable cause to issue a

193. *See* State v. Stoumbaugh, 157 P.3d 1137, 1143 (Mont. 2007) (positive alert from drug-detection canine was one of many factors in determining probable cause); *see e.g.* State v. Mercer, 2015 WL 575994 at *4 (Mont. 2015); *see also* Florida v. Harris, 568 U.S. 237, 247–48 (2013) (drug-detection canine alert provides probable cause).

194. *Mercer*, 2015 WL 575994 at *1–4.

195. *Id.* at *3.

warrant.[196] There, a confidential informant indicated that Mercer used hidden compartments in his Lexus to transport drugs from California to Montana.[197] The officer noticed modifications in Mercer's Lexus that were consistent with hidden compartments.[198] Thus, the use of the drug-detection canine was adequately supported by particularized suspicion.[199] While the facts in *Mercer* clearly gave rise to particularized suspicion of criminal activity, it was the positive alert from the drug-detection canine that established probable cause to obtain a search warrant.[200]

However, this presumes that the positive alert indicates presence of illegal drugs. As discussed above, a drug-detection canine trained to alert to the presence of marijuana is unable to distinguish between marijuana possessed in compliance with the MMA and marijuana possessed illegally. While, in many cases, a positive alert from a drug-detection canine is just one of many factors supporting probable cause,[201] in cases like *Mercer* and *Wilson*, which rely solely on a positive alert from a drug-detection canine to move from particularized suspicion to probable cause, a positive alert from a canine trained to detect marijuana is no longer a reliable indicator that the person or place to be searched contains drugs in violation of state law.[202] In cases where the positive alert is the only factor distinguishing particularized suspicion from probable cause, the positive alert does not give rise to probable cause, and the judge should not issue a warrant.

### *B. Non-judicial Alternative—the Next Generation of Drug-detection Canines*

As the old adage goes, "you can't teach an old dog new tricks." Due to the difficulties in retraining drug-detection canines, law enforcement should begin training the next generation of drug-detection canines to alert only drugs that violate state law. In fact, some canines are trained to do just that.[203] However, most drug-detection canines currently used by state police are trained to detect numerous drugs *including* marijuana.

The canine's inability to distinguish between legally possessed marijuana and illegally possessed marijuana, or legally possessed marijuana and

196. *Id.* at *4.
197. *Id.* at *1.
198. *Id.*
199. *Id.* at *3.
200. *Id.* at *4.
201. *Stoumbaugh*, 157 P.3d at 1143; State v. Hart, 85 P.3d 1275, 1278 (Mont. 2004).
202. *See e.g.* People v. McKnight, 446 P.3d 397, 405–06 (Colo. 2019) (a positive alert from a canine trained to detect marijuana alone will not likely establish probable cause).
203. *See, e.g.* People v. Bailey, 427 P.3d 821, 824 (Colo. 2018) (using a drug-detection canine trained to detect a list of narcotics excluding marijuana was sufficient to give rise to probable cause needed to search the vehicle).

other illicit substances, prevents police from utilizing the canine's ability to detect illegal drugs.[204] In a state in which possession of marijuana for medical purposes is lawful, a positive alert from a drug-detection canine trained to detect marijuana no longer provides probable cause to justify a search, and even if the marijuana seized is possessed unlawfully, as was the case in *Wilson*, the conviction must be reversed to uphold the individual's constitutional rights. Therefore, the use of drug-detection canines trained to detect marijuana will result in less effective enforcement of the laws that prohibit non-cardholders from possessing marijuana. By relying on drug-detection canines that are no longer reliable investigative tools, law enforcement may ultimately have more convictions reversed. This applies not only to convictions for marijuana possession but also for possession of methamphetamine, cocaine, heroin, and other illegal drugs.

By refraining from using drug-detection canines trained to detect marijuana, it may be argued that law enforcement would not be able to enforce laws prohibiting marijuana. However, an officer may still, without the use of a drug-detection canine, conduct reasonable searches. An officer suspecting an individual of possessing marijuana could, with probable cause and a warrant or warrant-exception, search the individual by hand. The use of drug-detection canines is an investigative technique which courts have allowed based upon less than probable cause only because the canines historically disclosed nothing but the presence or absence of contraband. However, in states that permit medical or adult-use marijuana, the validity of this rationale only holds true if law enforcement uses drug-detection canines *not* trained to detect marijuana.

## VI. Conclusion

The right to be free from unreasonable searches and seizures is a firmly protected right, yet judicial interpretations of reasonableness reflect changes in current legislation and more broadly society's expectations. While the government's interest in promoting the health and welfare of its citizens is best served by reasonable searches and seizures, the courts must continue to adjust what constitutes a reasonable search in order to allow the people to remain free from unconstitutional intrusions. This especially holds true, as states continually relax marijuana prohibitions. If law enforcement does not catch up with changing ideals, it will continue to find its attempts at drug interdiction rejected by the courts.

204. *See* Katz & Golembiewski, *supra* note 42, at 755–57.