

**[J-5-2013] [OAJC: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 26 EAP 2012

Appellant

v.

SHIEM GARY,

Appellee

:
: Appeal from the Judgment of Superior
: Court entered on September 27, 2011 at
: No. 3080 EDA 2010 reversing and
: remanding the Order entered on
: September 28, 2010 in the Court of
: Common Pleas of Philadelphia County,
: Criminal Division, at No. MC-51-CR-
: 0002245-2010
:
: ARGUED: March 5, 2013

DISSENTING OPINION

MADAME JUSTICE TODD

DECIDED: April 29, 2014

I respectfully dissent. Pennsylvania has long been at the constitutional forefront in recognizing the vital necessity of prior judicial approval of searches conducted by governmental officials, obtained through the warrant process, in order to maintain the fundamental right of the people to security from unreasonable searches and seizures. Consistent with that tradition, our Court has, heretofore, regarded warrantless searches of automobiles illegal under Article I, Section 8 of our Commonwealth's Constitution — except in those limited situations where both probable cause exists for such a search, and exigent circumstances, beyond the inherently mobile nature of the automobile itself, preclude obtaining a search warrant from a neutral magistrate. Pursuant to Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991), a case which emphasized the paramount importance of Article I, Section 8 in safeguarding the fundamental human

right to privacy enjoyed by the people of this Commonwealth, the plurality opinion in this matter incongruously now interprets that provision in a manner which severely diminishes its protections of the important personal privacy rights which owners and occupants of automobiles possess therein. The requirement that the ultimate decision-making authority for commencing an automobile search — a disruptive and invasive ordeal for those individuals whose vehicles are subjected to the search process — be vested in a neutral magistrate, and not the officer who will conduct the search, except in those instances where exigent circumstances make the obtaining of a warrant impracticable, is critical to ensure that the protections afforded by Article I, Section 8 to all owners and occupants of automobiles not be forsaken. However, our Court has now eliminated the time-honored and time-tested protection of our citizenry afforded by the interposition of the judgment of a neutral magistrate, through its wholesale adoption of the United States Supreme Court's "automobile exception" to the warrant requirement of the Fourth Amendment of the federal Constitution, which allows a search of an automobile based solely on the searching officer's determination that probable cause exists for such a search.

Moreover, our Court has chosen to eliminate this critical protection despite the undeniable fact that our society has undergone a sweeping technological revolution over the many years which have elapsed since the time of the federal decisions on which the plurality opinion relies, seriously undermining the viability of their use as governing constitutional norms for vehicle searches in our modern society. As I explain at greater length herein, the federal automobile exception was first created by the high Court in the 1920's, seemingly in response to the practical difficulties of federal

prohibition enforcement agents obtaining a search warrant for vehicles they suspected of transporting liquor, and then applied more recently by that Court in the mid-1980's because of a completely differing policy consideration — people's alleged diminished expectations of privacy in their vehicles. However, these rationales have been seriously eroded by both the advance of technology and the practical reality of how owners, operators, and passengers in automobiles utilize them in modern times. Today, the time it takes to obtain a search warrant for an automobile has been radically reduced, thanks in large measure to advances in communication technology which allow warrants to be obtained efficaciously by officers while they are still at the scene of an investigation. Other advances in technology have caused cars to become data repositories revealing the most discrete information about how and where individuals drive, whom they call from their car, and any number of other revealing insights into what they do in their daily lives. Likewise, for most people, the automobile, by consumer choice and by design, has become a rolling repository of their private possessions, which they keep shielded from public view during the significant amounts of time they spend therein. Some of these possessions, such as the laptop or smartphone, are digital treasure troves which contain significant amounts of highly sensitive personal and business information.

Most critically, as developed in greater detail infra, the federal approach discounts the vital individual privacy interests historically protected in this Commonwealth by Article I, Section 8. Indeed, it is seemingly contrary to the most recent public policy pronouncement of our legislature extending the "Castle Doctrine" of self-defense, heretofore reserved exclusively for the home, to automobiles. I, therefore,

deem the blanket espousal of such a relaxed standard as the controlling understanding of this integral provision of our own unique, organic charter of governance to be unjustified under the interpretational principles our Court articulated in Edmunds, and, thus, insufficient to safeguard the right of the people of Pennsylvania to be secure against unreasonable searches and seizures. Consequently, I must dissent from our Court's decision to impose such lockstep jurisprudential conformity with the high Court's interpretation of the federal Constitution.

I. Evolution of the automobile exception under Pennsylvania Law

As the plurality has acknowledged, in its able recitation of our Court's prior decisions in this area, we have heretofore refused to sanction the search of an automobile without a warrant unless two essential requirements are met: (1) probable cause exists that the automobile contains evidence of criminal activity, and (2) exigent circumstances, beyond the inherent mobility of the automobile itself, preclude the searching officers from obtaining a warrant from a neutral judicial officer authorizing the search, prior to its commencement. See Commonwealth v. Cockfield, 246 A.2d 381, 383-84 (Pa. 1968) (noting that "[w]henver practicable, the police must obtain advance judicial approval of searches and seizures through warrant procedure, and the failure to comply with the warrant procedure 'can only be excused by exigent circumstances'" and holding that, "[a]lthough it sometimes may be reasonable to search a movable vehicle without a warrant, the movability of the area to be searched is not alone a sufficiently 'exigent circumstance' to justify a warrantless search." (emphasis original)); Commonwealth v. Baker, 541 A.2d 1381, 1383 (Pa. 1988) ("[C]ertain exigencies may render the obtaining of a warrant not reasonably practicable under the circumstances of

a given case, and, when that occurs, vehicle searches conducted without warrants have been deemed proper where probable cause was present.”), *overruled on other grounds*, Commonwealth v. Rosario, 648 A.2d 1172 (Pa. 1994); Commonwealth v. White, 669 A.2d 896, 900 (Pa. 1995) (searches without a warrant may be conducted only, *inter alia*, when there exists probable cause to believe the car contains evidence of criminal activity and exigent circumstances preclude the police from obtaining a warrant to conduct the search);¹ Commonwealth v. Luv, 735 A.2d 87, 93 (Pa. 1999) (reading our Court’s prior caselaw as establishing probable cause and the presence of exigent circumstances as the two “determining factors” justifying a warrantless search of a vehicle); Commonwealth v. Hernandez, 935 A.2d 1275, 1280 (Pa. 2007) (“Warrantless vehicle searches in this Commonwealth must be accompanied not only by probable cause, but also by exigent circumstances beyond mere mobility; ‘one without the other is insufficient.’” (quoting Luv, 735 A.2d at 93)).

I agree with the plurality that, until our White decision in 1995, we viewed the twin requirements of probable cause and exigent circumstances as mandated by both the Fourth Amendment to the United States Constitution and Article I, Section 8 of our own Constitution. See Cockfield (finding warrantless search of trunk of Appellant’s car violated the Fourth Amendment and was not justified by exigent circumstances); Baker, (viewing warrant requirements of both the Fourth Amendment and Article I, Section 8 as

¹ I am in accord with the view expressed by Chief Justice Castille in his concurring opinion in Commonwealth v. Perry, 798 A.2d 697, 717-18 (Pa. 2007) (Castille, J., concurring), that the third requirement articulated in White to dispense with a warrant for an automobile search — the occupants are likely to drive the vehicle away, resulting in the contents never again being located by the police, unless the car is immediately searched or impounded — was not required by our Court prior to that decision, nor have we required it in our subsequent jurisprudence.

applicable to automobiles). However, as the plurality recognizes, see Opinion Announcing the Judgment of the Court (“OAJC”) at 30, White marked a clear break with the United States Supreme Court’s caselaw in this area, which, by 1995, had abandoned the requirement that exigent circumstances must exist to excuse the failure to obtain a warrant prior to an automobile search. As a result, I consider our decision in White, that suppression of evidence obtained from the search of the arrested driver’s vehicle was compelled by Article I, Section 8, because the police had time and opportunity to obtain a search warrant prior to the search, to reflect a deliberate choice by our Court to chart an independent course in our jurisprudence under Article I, Section 8. From my perspective, it, thus, represented an intentional repudiation of the federal approach to such searches, an approach which, as I explain at greater length infra, gives what I deem to be insufficient consideration to, and protection of, the vital interest in individual privacy, secured by the warrant requirement of Article I, Section 8. I, therefore, regard White as constituting a watershed division between Pennsylvania jurisprudence and federal law on this subject, which preserved and continued our prior interpretation of Article I, Section 8 as requiring a warrant for automobile searches, unless exigent circumstances preclude procuring one. This clear separation between our jurisprudence under Article I, Section 8, and that of the United States Supreme Court under the Fourth Amendment, has been maintained by subsequent precedential decisions from our Court continuing to insist on both probable cause and exigent circumstances as justification for a warrantless search of an automobile. See Luv, 735 A.2d at 93 (both “the existence of probable cause and the presence of exigent circumstances” are required “to justify a warrantless search of a vehicle”); Hernandez,

935 A.2d at 1280 (the “dual requirement of probable cause plus exigency is an established part of our state constitutional jurisprudence”).

Although the plurality now faults our Court for not conducting a formal four-part Edmunds analysis² in White, or any subsequent case, in support of its decision to establish this demarcation, I do not find the absence of such an analysis to undercut the validity or precedential force of those decisions in their application of Article I, Section 8. Indeed, Edmunds does not mandate that a decision recognizing heightened protections of individual rights under the Pennsylvania Constitution utilize the four-part analytical framework of that case in order for it to be an authoritative interpretation of that charter; rather, its requirements are intended as a guide for litigants. See Edmunds, 586 A.2d at 895 (explicitly describing its four factors as ones “to be briefed and analyzed by **litigants** in each case hereafter implicating a provision of the Pennsylvania constitution.” (emphasis added)); Commonwealth v. Shaw, 770 A.2d 295, 298 n.2 (Pa. 2001) (“Edmunds imposes no requirement on **this Court**, but instead, sets forth the briefing requirements for **litigants** seeking this Court's review of claims based exclusively on the Pennsylvania Constitution.” (emphasis original)).

Nevertheless, as the plurality has aptly cataloged, it is undeniable that our decision to pursue such an independent path has, at times, generated divergent viewpoints among members of this Court regarding both the soundness of the jurisprudential rationale for this choice, as well as the scope of the exigency requirement

² These factors are: (1) the text of the Pennsylvania constitutional provision; (2) the history of the provision, including Pennsylvania interpretative case-law; (3) relevant case-law from other states; and (4) policy considerations, including unique issues of state and local concern. Edmunds, 586 A.2d at 895.

itself. See, e.g., Perry (plurality) (Cappy, C.J., Opinion Announcing the Judgment of the Court; Castille, J., concurring; Saylor, J., concurring; Nigro, J., dissenting)); Commonwealth v. McCree, 924 A.2d 621 (Pa. 2007) (plurality) (Eakin, J., Opinion Announcing the Judgment of the Court; Cappy, C.J., concurring; Castille, J., concurring). Rather than viewing this disagreement as the product of an allegedly fundamental defect in White being perpetrated by its juridical progeny, I, instead, regard the differing expressions by various members of our Court in those cases to be based on their principled views regarding the manner in which Article I, Section 8 should be construed in the context of police vehicle searches. See Perry, 798 A.2d at 708 (Castille J., concurring) (“That probable cause arose unexpectedly is all the exigency I would require under Article I, Section 8 — since that is all that is required by the actual holdings of this Court's cases explicating the automobile exception . . . and since any other rule is unjustifiably hostile to perfectly reasonable police conduct.”); Hernandez, 935 A.2d at 1290 (Saylor, J., concurring) (“I believe that . . . adoption of the federal automobile exception subject to a warrant-when-practicable requirement, represents an appropriate stance and an essential resolution of the longstanding disharmony regarding fundamental principles governing police conduct in this line of cases.”).³

Consequently, because the plurality, in light of the continuing tension existing among various members of our Court regarding this area of the law, has applied, in a scholarly and developed fashion, the Edmunds factors⁴ to re-examine whether the

³ Inasmuch as the extant competing views regarding the soundness of White's rationale have been comprehensively articulated and debated by our Court previously, see e.g. Perry, McCree, Hernandez, supra, I need not discuss them herein.

⁴ See supra note 2.

choice to depart from federal law was proper, I will also address each of them. Contrary to the plurality's conclusion, however, I regard these factors to convincingly compel the rejection of a coterminous approach.

II. Edmunds Analysis

A. Comparative text of federal and state constitutional provisions

The conduct of an Edmunds analysis first necessitates that we examine the text of the governing state and federal constitutional provisions. Article I, Section 8 of the Pennsylvania Constitution provides:

Security from searches and seizures

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. art. I, § 8.

In comparison, the Fourth Amendment to the United States Constitution states:

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

U.S. Const. amend. IV.

The plurality finds “nothing in the text of Article I, Section 8 to suggest that it confers greater protection than does the Fourth Amendment with regard to a warrantless search of a motor vehicle.” OAJC at 38. I respectfully disagree. Unlike the Fourth Amendment, Article I, Section 8 uses the term “possessions,” which our Court

has previously interpreted to mean “intimate things about one’s person,” Commonwealth v. Russo, 934 A.2d 1199, 1214-15 (Pa. 2007), and also specifies that no warrant to search “**any** place,” or to seize “**any** . . . things shall issue without . . . probable cause.” Pa. Const. art. I, § 8 (emphasis added). Inasmuch as these expansive terms are absent from the Fourth Amendment, this difference in language suggests that the warrant requirement of Article I, Section 8 was intended to protect an individual’s privacy interest in **all** of his or her possessions or things in **any** place they may be, which would include, by necessity, when they are located inside of an automobile. I would, therefore, conclude that these textual differences support an interpretation of Article I, Section 8 broader than its federal counterpart in regard to the expectation of privacy owners and occupants of automobiles enjoy with respect to their personal possessions transported therein.

B. History of Article I, Section 8 and interpretative caselaw

The second part of an Edmunds analysis involves an examination of the pertinent history of Article I, Section 8 and our Court’s relevant interpretative case law.

1. The warrant requirement

This provision of our Commonwealth’s Constitution has, from the time of its birth during our nation’s revolutionary summer of 1776, recognized and protected a natural and fundamental human right to privacy of our people. Commonwealth v. Sell, 470 A.2d 457, 467-68 (Pa. 1983); Edmunds 586 A.2d at 899 (“[O]ur Constitution has historically been interpreted to incorporate a strong right of privacy.”). The architects of our first Constitution who acknowledged this fundamental right had firsthand experience, as subjects of the British Crown, with how this right could be diminished

through the granting of exclusive decision-making authority to officials empowered to search an individual's person, or the places where the individual kept their most important possessions, as to whether a search would be conducted, and, if so, the time, place, and manner of the search. The people of colonial Pennsylvania suffered myriad invasions of privacy as the result of widespread, capricious general search and seizure practices, which did not require that the searching official obtain prior approval from a neutral judicial officer before conducting a particular search or seizure. The people's active resistance to these practices, and the concomitant attempts by our colonial judiciary to limit the powers of crown officials to carry out searches and seizures at their exclusive discretion, greatly influenced the framers of our original Constitution to provide security to the people of this Commonwealth against such unreasonable searches and seizures. They provided such security by including within that Constitution's Declaration of Rights a warrant requirement in order to specifically regulate the future conduct of searches and seizures by governmental officials. See generally J. Paul Selsam, The Pennsylvania Constitution of 1776 — A Study In Revolutionary Democracy 182-83 (1971 reprint) (hereinafter "Selsam") ("[T]he Declaration of Rights was the true expression of the ideals of the American Colonists, and the guarantees contained therein were the product of long and severe experience.").

It is well established that the arbitrary search and seizure practices of the Crown's customs officers charged with the collection of various excise taxes, imposed without the consent of the American colonists, were an integral part of the "long Train of Abuses and Usurpations" suffered by them which ultimately culminated in their fateful decision to seek independence from England. See Declaration of Independence (listing as one

of the enumerated “repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States” the King of England’s sending “hither swarms of Officers to harass our People and Eat out their substance.”); Jacob W. Landynski, Search & Seizure and the Supreme Court 38 (1966); see also William Cuddihy, The Fourth Amendment, Origins and Original Meaning 779 (Oxford Press) (hereinafter “Cuddihy”) (noting that the conduct of warrantless searches by customs officials prompted the Continental Congress to condemn the practice on three separate occasions in 1774 and to specifically denounce the power of customs officials to do so in an address to King George III).

Originally, customs officers claimed the plenary power to forcibly enter homes, warehouses, and other places to search for smuggled goods, without any warrant or other judicial authorization. Tracey Maclin, The Central Meaning of The Fourth Amendment, 35 Wm. & Mary L.Rev. 197, 219 (1993) (hereinafter “Maclin”). The customs officers contended that they possessed the inherent authority to conduct such searches *ex officio*, i.e., as pursuant to the powers of their offices bestowed upon them by their commissions. Id. at 220; Nelson Lasson, The Fourth Amendment to the Constitution 55 (1957) (hereinafter “Lasson”). However, because the invasive nature of the searches engendered great public opposition, officials of colonial governments attempted to mollify the populace by granting customs officers “general writs of assistance” to authorize such searches. Lasson, at 55. Initially, such writs were granted by executive officials of the colonial governments, such as the governor, as was the case in Massachusetts; however, the questionable legality of such practices was

soon challenged, and the task of issuing such writs ultimately fell to colonial courts. Maclin, at 221.

Nonetheless, these court-issued writs fueled a gathering popular tempest, as the colonists came to view the manner of the customs officers' reliance on them to carry out sweeping searches as an even greater affront to their privacy, which sparked increasing popular resistance that ultimately became, in the view of historians, a principal cause for the Revolution. Maclin, The Complexity of The Fourth Amendment: A Historical Review, 77 B.U. L. Rev. 925, 945 (2014). The chief focus of the colonists' ire was the fact that the writ gave customs officers "blanket authority to search where they pleased for goods imported in violation of the British tax laws." Stanford v. Texas, 379 U.S. 476 (1965). As Professor Lasson elaborates, "[t]he discretion delegated to the official [with respect to his power to search] was . . . practically absolute and unlimited. The writ empowered the officer and his deputies and servants to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye." Lasson, at 54. It is, therefore, unsurprising that the writs were ultimately and famously denounced by lawyer James Otis in "Paxton's Case,"⁵ which challenged the legality of their issuance by the Massachusetts Supreme Court, as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.'" Stanford, 379 U.S. at 481 (quoting Boyd v. United States, 116 U.S. 616, 625 (1886)).

⁵ Quincy's Rep. 51 (Mass. 1761).

Although Otis was unsuccessful in Paxton's Case in convincing the Massachusetts Supreme Court to adopt, as a replacement for the writ, a judicially issued specific warrant — limited as to the place to be searched and the items sought in the search — this outcome only increased the revulsion of the colonial populace to judicially unconstrained search practices. Indeed, popular opposition became sufficiently strong that it impeded customs officials from carrying out their search and seizure duties, due to the fact that, once people in an area became aware of the presence of the officers, mobs of angry people would routinely appear and carry away the goods which the officers sought. Maclin, Framing the Fourth, 109 Mich. L. Rev. 1048, 1054 (2011). As this hostility spread throughout the colonies, the English Parliament responded by enacting the Townshend Revenue Act of 1767, which, to facilitate the obtaining of the writs by customs officers, empowered the highest court from each colony to issue them. Id. However, this engendered not only further opposition from the people, but also from the high courts themselves.

Nowhere was this opposition more acute than here in Pennsylvania, as reflected by the writings of the leading critic of the writ in the colonies, John Dickinson. Dickinson forcefully attacked the writ in his influential publication, “Letters of a Pennsylvania Farmer” which was widely read throughout the colonies and regarded as having “a pervasive, deep impact on colonial legal opinion.” Cuddihy, at 546. Dickinson argued that the power of general search conferred by the writs, which extended to all places of privacy, including the innermost confines of a colonist’s home, had been recognized even in England as “dangerous to freedom and expressly contrary to the common law,” and he argued that the writs were “utterly destructive to liberty” since, unlike in England,

the people here had no security “against the undue exercise of this power by the crown.” *Lasson*, at 70 n.67.

Although in the aftermath of the Townshend Revenue Act other colonial supreme courts declined to issue writs of assistance, our Court’s colonial predecessor, along with that of Connecticut, was unique in basing its refusal to issue such writs on the fact that they failed to restrict searches to only specific places and enumerated items and did not require an official to disclose to a judicial officer, prior to a search, his reasons for conducting it. In rejecting a 1771 application for a general writ from the Philadelphia customs collector, John Swift, Chief Justice Allen of our Court informed Swift: “[I]f you will make oath that you have had an information that . . . [smuggled goods] are in any particular place, I will grant you a writ to search that particular place but no general writ to search every house — I would not do that for any consideration.” *Cuddihy*, at 520. Three years later, in 1774, when customs officials applied again for blanket authorization to conduct searches at their discretion, our Court once more rejected the application on the basis of their view that “arming officers of the customs with so extreme a power to be exercised totally at their own discretion would be of dangerous consequences [and] was not warranted by Law.” *Id.* at 525. Thus, our colonial high Court, along with Connecticut’s, was in the vanguard of a gathering legal consensus in the colonies to reject general search and seizure practices in favor of ones authorized by a judicially issued specific warrant. *Cuddihy*, at 534-36.

This evolving preference towards taking the decisional authority for the conduct and scope of searches away from the officials who would perform them, and placing such authority in the hands of a neutral judicial officer who could narrowly tailor the

search to only certain areas and items, based on the particular information presented to him, was further reflected legislatively in Pennsylvania. We, along with Massachusetts, were the only colonies to supplant the authority of our own excise collectors to conduct warrantless excise searches with a requirement that the searches be conducted pursuant to supplementary search warrants, which authorized searches of places based on information provided by the official on where he thought goods on which duty had not been paid might be found. Cuddihy, at 780.

These historical developments in Pennsylvania, reflecting popular and legal abhorrence of the arbitrariness of the pervasive general search practices under the rule of the English crown, and recognition of the need to constrain them through the use of specific warrants issued by neutral magistrates, were evidently of vital importance to the drafters of our first Constitution. Even though the members of our inaugural constitutional convention, who began their labors in July 1776 under the shadow of the gathering storm clouds of war with England, were confronted with numerous weighty matters such as selecting a basic form of government, they, nevertheless, immediately formed a “Bill of Rights Committee,” and assigned as one of its primary tasks the drafting of protections for the “freedom from arbitrary search.” Burton A. Kunkle, George Bryan and the Constitution of Pennsylvania 1731-1791 119 (1980); Selsam, at 151; The product of their labors produced Article X of the Constitution of 1776, which provided:

That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person

or persons, his or their property, not particularly described are contrary to that right, and ought not to be granted.

Pa. Const. (1776) art. X.

This provision has been described by one scholar as “memorable because it [unlike earlier colonial constitutions] recognizes a right of the people in affirmative terms rather than merely declaring against general warrants or grievous searches.” Leonard W. Levy, Origins of the Bill of Rights 169 (1999). Also remarkable was the fact that Article X secured the right of the people to be free from arbitrary search and seizure of their papers and possessions by requiring the use of specific warrants “to search suspected places” in which such papers and possessions might be found. I find it particularly noteworthy that Article X was the first post-colonial constitutional provision to contain a requirement that an officer, who wished to obtain such a specific warrant to search a particular place, or to seize particular items, swear or affirm to a neutral third party empowered to issue the warrant — most often a judge — that “[a] sufficient foundation” existed, factually, for the officer to conduct such a search or make such a seizure. Id. at 170. By inclusion of this requirement that a governmental official obtain authorization **prior** to conducting a particular search or seizure, Article X represents a deliberate and affirmative repudiation of the previously discussed judicially unsupervised search practices which the framers found so repugnant.

Especially relevant for purposes of this appeal, I agree with Professor Levy’s observation that, while there exists no evidence to show the warrant requirement of Article X was intended to alter the long-standing common law rule that warrantless searches and seizures are permissible when required by exigent circumstances, Article X clearly required specificity as to places to be searched and items to be seized

“when a warrant was attainable.” Id. I, thus, consider Article X to reflect a strong “warrant preference” philosophy which regards specific warrants issued by a detached and neutral magistrate as the constitutionally required default search methodology, and which, correspondingly, views warrantless searches as authorized only in exceptional circumstances.

Consequently, the enactment of Article X — a full 15 years ahead of the adoption of the Fourth Amendment to the United States Constitution — enshrined the requirement of specific warrants issued by a neutral judge as an integral part of our state constitutional framework and, correspondingly, established such warrants as the main protection of the substantial privacy interests of our citizenry in every place where they choose to keep their most private papers and possessions. That our Commonwealth was the first to express a clear constitutional preference for the independent judgment of the judiciary regarding prior approval for, and conduct of, searches and seizures is significant, as it was a logical and natural outgrowth of the unique historical experiences of the people of Pennsylvania, who had long embraced specific warrants, issued after judicial review of specific justifying facts, but prior to any search or seizure taking place, as an effective legal means to ameliorate the harmful consequences of the deleterious warrantless search and seizure practices to which they were subjected. Based on this rich history, I regard our Constitution’s warrant requirement to be one of singular and distinctive importance to Pennsylvania, in contrast to the later warrant requirement of the Fourth Amendment to the United States Constitution, which was based, in part, on this provision. Edmunds, 586 A.2d at 896.

Although the language of Article X was reworked in 1790, when it was transformed into Article I, Section 8, and an additional requirement that all warrants be “subscribed to by the affiant,” was added in 1873, the basic values embodied in Article X are still reflected in the current version of Article I, Section 8. Article I, Section 8 continues to recognize a robust individual right of privacy in one’s papers and possessions, and protects that privacy right through its warrant requirements for searches of “any place” such items may be found. See Sell, 470 A.2d at 467 (“[T]he survival of the language now employed in Article I, [S]ection 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.”); Edmunds, 586 A.2d at 897 (“Article I, Section 8 . . . is meant to embody a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries.”); Commonwealth v. Glass, 754 A.2d 655, 665 (Pa. 2000) (recognizing warrant requirement of Article I, Section 8 “furthers the concern for privacy”); Bruce A. Antkowiak, Pennsylvania Criminal Procedure, Elements Analysis, and Application, 168 (3d. ed.) (“Privacy is so valued a commodity in the Commonwealth that searches for evidence of crimes must, presumptively, be supported by a warrant.”). Thus, in accordance with this strong historical tradition, the warrant requirement of Article I, Section 8 should be given the broadest reasonable application to searches conducted by governmental officials in this Commonwealth.

I note that, for nearly five decades from the mid 1920’s until the 1970’s, the United States Supreme Court construed the Fourth Amendment as requiring that a search of a vehicle for suspected contraband be conducted pursuant to a warrant,

unless obtaining a warrant was not reasonably practicable; thus reflecting the same warrant preference philosophy as embodied in Article I, Section 8. As discussed by the plurality, this exception was first articulated in Carroll v. United States, 267 U.S. 132 (1925), a case in which the high Court found the warrantless search of a suspected bootlegger's vehicle by revenue agents, who were empowered by the National Prohibition Act of 1919 to immediately seize any liquor they discovered while it was in the act of being transported in an automobile, did not violate the Fourth Amendment since the search was supported by probable cause, and, also, because it was "not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Carroll, 267 U.S. at 153. However, the Court also emphasized that, "where the securing of a warrant is reasonably practicable, it **must** be used." Id. at 156 (emphasis added).

Gradually, however, in the 1970's, the high Court began to excuse the requirement of a warrant for searches of vehicles when such searches were conducted in circumstances other than as the result of stopping a vehicle while it was in transit on a public roadway. The Court, in justifying these searches, began to treat the entirety of an automobile as an area in which its owner or occupant possesses a diminished expectation of privacy — citing certain factors such as automobiles being exposed to public view and interaction with police officers during their operation, as well as being subjected to official regulation and inspection by governmental authorities. See, e.g., Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973) (approving of the warrantless search of a towed vehicle pursuant to police "community caretaking functions," noting that "extensive, and often noncriminal contact with automobiles will bring local officials in

'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband”); South Dakota v. Opperman, 428 U.S. 364, 367-69 (1976) (approving of an inventory search of a vehicle impounded for violations of parking ordinances when such search was conducted pursuant to standard police procedures, and generally justifying “less rigorous warrant requirements” for the searches of automobiles on the basis of its determination that the expectation of privacy people possess in their automobiles is “significantly less” because of frequent contact by police with automobiles, governmental regulation and controls on automobiles, and the fact that automobiles will frequently be taken into custody by police as a result of “caretaking and traffic-control activities”).

This transformation of the high Court’s caselaw culminated in the case of California v. Carney, 471 U.S. 386 (1985), where the court approved of the warrantless search of a mobile home parked in a public lot for suspected contraband, even though the mobile home sat for hours a mere two blocks from the courthouse, and, as noted by Justice John Paul Stevens in his dissent, a warrant could have been readily obtained from “dozens of magistrates” who worked there prior to the search. Id. at 404. As discussed infra, the high Court primarily relied on the lesser expectation of privacy rationale to completely abandon Carroll’s “warrant when reasonably practicable” requirement, and, instead, granted police a blanket search authority which allows an officer to search for contraband, simply on the basis of his or her on the scene assessment of the existence of probable cause. Under Carney, a police officer now need not seek any authorization for a search of a vehicle from a neutral magistrate prior to commencing the search, and the officer possesses exclusive discretion to decide

whether he or she has probable cause to undertake the search, as well as the scope thereof. A warrantless search is therefore the default search methodology under the Fourth Amendment after Carney.

The reasons for such a paradigm shift by the high Court are unclear, given that it has never fully explained its rationale in electing to place primary emphasis on the factors it cited in Carney — which it imported from Opperman — in order to justify its complete dispensation with the warrant requirement. These factors were extant at the time of the Carroll decision as well, but apparently not regarded as sufficiently compelling for the Court to eliminate the warrant requirement in that case. Whatever the reason for this shift, however, the Carney standard — which eliminates, in all circumstances, the need for an officer to obtain a warrant from a neutral magistrate to search an automobile — is wholly inconsistent with Pennsylvania’s strong warrant preference philosophy of Article I, Section 8.

2. Privacy protections for automobiles

I agree with the plurality that we have regarded the enhanced privacy protections afforded by Article I, Section 8, as applicable only to “areas where an individual has a reasonable expectation of privacy,” Commonwealth v. Shaw, 770 A.2d 295, 299 (Pa. 2001), and that this expectation must be both subjectively held and objectively reasonable. Russo, 934 A.2d at 1211. I further acknowledge that our Court has previously stated that the expectation of privacy people possess in an automobile is not identical to that which they possess with respect to the interior of their home, or in the sanctity of their bodies. OAJC at 42 (quoting Commonwealth v. Rogers, 849 A.2d 1185 (Pa. 2004) and Commonwealth v. Holzer, 389 A.2d 101, 106 (Pa. 1978)). However,

unlike the plurality, I do not view the expectation of privacy possessed by owners and occupants of automobiles to be so diminished as to be undeserving of the protections of Article I, Section 8. Indeed, our Court has recognized in the past that automobiles **do** fall under the protection of Article I, Section 8. See Holzer, 389 A.2d at 106 (Pa. 1978) (“[T]here is no ‘automobile exception’ as such and . . . constitutional protections are applicable to searches and seizures of a person's car.”); Baker, 541 A.2d at 1383 (“It is well established that automobiles are not *per se* unprotected by the warrant requirements of . . . Art. I, § 8 of the Pennsylvania Constitution.”). I consider these suggestions to be eminently sound.

Recognition of an objectively reasonable expectation of privacy worthy of constitutional protection in an automobile is, of course, inconsistent with the now nearly 30-year-old pronouncement of the United States Supreme Court in Carney, which the plurality accepts, that “there is a reduced expectation of privacy stemming from [a vehicle’s] use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling.” Carney, 471 U.S. at 393. As indicated, above, the high Court cited, as examples of such regulation, the inspection and licensing requirements of cars, and other motor vehicle code requirements governing the operation of cars on the public highways. Id. at 392 (quoting Opperman, supra). In addition to the mobile nature of the automobile, a factor on which it had relied exclusively in Carroll to justify a more limited exception to the warrant requirement of the Fourth Amendment, the Carney Court relied heavily on these additional factors to completely dispense with the warrant requirement under the Fourth Amendment for automobile searches, reasoning that “[t]he public is fully aware that it is accorded less

privacy in its automobiles because of this compelling governmental need for regulation,”⁶ and, thus, “the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.” Carney at 392-93.

Carney’s lesser expectation of privacy rationale has been roundly criticized as lacking a sound, logical foundation, as summed up cogently by Professor LaFave:

When one rides in an automobile, he accepts that he himself and those items left uncovered on the dashboard or seat are no longer “private.” In contrast, the driver or occupant of a vehicle who places objects under the seat, in a locked or unlocked glove compartment, or in a trunk does not surrender his expectation of privacy in those items.

* * *

There are probably few Americans who have not at one time or another used their cars for storage, albeit unwisely. All personal effects so stored are entitled to fourth amendment protection; constitutional guarantees are not reserved only for valuable possessions carefully protected by their owners. Most Americans view the automobile as more than merely a means of transportation.

Finally, the high degree of government regulation does not support the excessive diminution of fourth amendment protection of the automobile which accompanies application of the automobile exception. A legitimate interest in securing compliance with safety and traffic regulations should not be

⁶ Interestingly, it would appear that our country’s populace as a whole may possess a greater expectation of privacy in their automobiles than the high Court has traditionally recognized. See Henry F. Fradella, Quantifying Katz: Empirically Measuring ‘Reasonable Expectations of Privacy’ in the Fourth Amendment Context, 38 American Journal of Criminal Law 289, 364 (2011) (noting that, respondents to a nationwide survey, “[b]y a 52.3% to 35.8% margin, rejected the so-called ‘automobile exception’ to the Fourth Amendment warrant requirement as set forth in Carroll.”).

used to justify a reduced expectation of privacy in the entire vehicle.

Wayne R. LaFave, Search and Seizure: A Treatise on The Fourth Amendment 734-35 (5th Ed. 2012); see also Carol A. Chase, Privacy Takes a Back Seat: Putting the Automobile Exception Back on Track After Several Wrong Turns, 41 B.C.L.Rev. 71, 91 (1999) (observing that most jurisdictions in America have significant legal regulations governing residential property, yet that does not justify finding a reduced expectation of privacy therein which would excuse the requirement of police obtaining a warrant to search home); Joseph D. Grano, Rethinking the Warrant Requirement, 19 Am. Crim. L. Rev. 605, 638 (1982) (hereinafter “Grano”) (“The fact that police may examine license plates, inspection stickers, headlights, exhaust systems, and other such things hardly proves that one has a reduced expectation of privacy in items held in the glove compartment, under the seat, or in the trunk.”).

I find these criticisms to have substantial merit as, in my view, the mere operation of a vehicle on a public highway does not *ipso facto* eliminate the operator’s or owner’s expectation of privacy in areas of the vehicle secured against public view, such as the trunk or the glovebox, any more than a pedestrian’s act of walking on the public streets eliminates his or her expectation of privacy for the areas underneath his or her clothing, or in his or her wallet or purse. Neither the fact that a motor vehicle is registered with the Commonwealth⁷ — a brief process in which the owner submits a registration form and fee to the state, and does not involve any governmental official searching the vehicle or its contents — or the requirement of the Motor Vehicle Code that a registered

⁷ 75 Pa.C.S.A. § 1301.

vehicle undergo a once yearly inspection⁸ — which is not done by a state enforcement official, but rather by a private individual selected by the vehicle owner, and limited in scope and purpose to ensuring that the mechanical components of the vehicle can safely operate — justify compelling all owners or operators of motor vehicles to surrender their reasonable expectation of privacy in the areas of their vehicles secured against public view. Likewise, the average Pennsylvania motorist does not reasonably expect that if he or she is stopped for an alleged violation of the laws regulating travel on our Commonwealth's roadways that this will automatically result in the police officer conducting a complete search of the entire vehicle. Cf. Knowles v. Iowa, 525 U.S. 113 (1998) (Fourth Amendment does not permit full search of vehicle simply because of the issuance of a speeding citation).

Perhaps more importantly, to find that present-day owners or occupants of automobiles do not have an objectively reasonable expectation of privacy therein ignores the practical realities of the manner in which these conveyances are used in modern society, and, also, how they are viewed by their owners and occupants. While some state courts have accepted, without serious scrutiny, Carney's mantra that an individual has such a lessened expectation of privacy in his or her automobile that it is unworthy of the protection of the warrant requirement of their own constitutions⁹, this disregards the plain fact that today's automobile is not just used to transport persons, but, also, to store and transport a myriad of their most private belongings. For most individuals who own or ride frequently in cars, the automobile functions as a veritable

⁸ 75 Pa.C.S.A. § 4702(a).

⁹ See infra notes 12-13 and accompanying text.

storehouse of their intimate personal possessions, i.e., their “home away from home.”

As aptly noted by one commentator in this regard:

[Automobiles] store the suit or dress that one keeps forgetting to leave at the cleaners, the bank statement that should be brought inside the house, the library book that should be returned, the briefcase that will be needed at a subsequent meeting, the work one had planned to do overnight, and sundry items permitted, deliberately or from laziness, to remain in the car until some other day.

Grano, at 637.

Further, as part of the routine ritual of modern life, people transport in their automobiles, and often store for periods of time in them, their laptops, smartphones and other digital devices, which contain a plethora of intimate and elaborate details about their daily lives, their personal financial records, their interactions with family and friends, and their innermost thoughts. Indeed, one jurist has memorably illustrated the highly sensitive and private nature of the type of materials which are regularly carried and stored in an automobile by observing: “[T]he workload of this court often requires judges to take their work home. The automobile provides the usual mode of transporting drafts of opinions, notations indicating the probable outcome of submitted cases, and confidential messages from other judges.” U.S. v. Edwards, 554 F.2d 1331, 1338 (5th Cir. 1977), *vacated* U.S. v. Edwards, 577 F.2d 883 (5th Cir. 1978). Consequently, the personal items stored or transported in an automobile constitute the very type of private “papers and possessions” which are secured against unlawful search and seizure by Article I, Section 8.

Moreover, and importantly, I note that automobiles are specifically designed and built with features such as trunks, glove boxes, and internal storage compartments,

some of which may only open with a special key, in order to allow personal items to be deliberately secreted from public view during transport. Hence, the deliberate provision by automakers of these private places as standard features of every car, and their frequent utilization by the owners and occupants of cars to store items out of public sight, evidences a societally reasonable expectation that the privacy of all such areas in an automobile shielded from public view will be afforded the maximum degree of protection from unlawful and unjustified intrusion.

Additionally, the modern automobile itself is outfitted with a multiplicity of electronic devices, not in existence at the time of the Carney decision, which catalog, in minute detail, the personal information and life activities of the automobile's user. "Black boxes" also known as "event data recorders," which currently are standard equipment for 96 percent of all new vehicles sold annually in the United States, and which will eventually be a part of every new car sold, record at all times while a vehicle is being driven and, thus, capture a multitude of facts regarding the vehicle's operation.¹⁰ Such facts include the speed of the vehicle, its direction of travel, turn signal activation, seat belt usage by all occupants, and the Global Positioning System ("GPS") coordinates of the vehicle at every point in its movements. Bozeman, Automobile "Black Boxes": Is the Fourth Amendment a Crash Test Dummy? 44 (No.2) Crim. Law Bull. 2 (2008). Further, today's vehicles, using extant "Bluetooth" computer technology, can interface with an occupant's electronic data storage device such as a mobile phone or laptop so that the car collects and stores therein the user's telephone

¹⁰ See generally Jaclyn Tropa, A Black Box for Car Crashes, N.Y. Times, July 21, 2013, at B1.

contact lists, song collections, video and audio recordings and a growing number of other personal electronic files. Indeed, as a stark illustration of the seemingly limitless type of sensitive personal information which a car can now acquire and retain, current Bluetooth technology permits a user to share his or her “real time” blood glucose levels from a personal blood sugar monitoring device with the car so that these levels are continually displayed on a dashboard view screen. See <http://www.bluetooth.com/Pages/cars.aspx> (last visited 3/22/14). This capacity for a car to function as an electronic warehouse for its owner’s or occupants’ personal data will only grow in the future as engineers develop new ways for vehicle users to share personal data with their cars, such as allowing the driver and passengers to surf the Internet while in transit from a tablet computer that pops out of the dashboard. Cecilia Kang, As Automakers Tap Smartphone Technology, Concerns Grow About Use of Drivers’ Data, Wash. Post, January 9, 2014, available at http://www.washingtonpost.com/business/economy/as-automakers-tap-smartphone-technology-concerns-grow-about-use-of-drivers-data/2014/01/09/91a505f2-78a0-11e3-b1c5-739e63e9c9a7_story.html (article available only on the Internet). Concomitantly, the need for legal protection for the privacy of the growing volumes of personal data collected by automobiles will only become greater with the passage of time.

Another significant factor weighing heavily in favor of recognizing a reasonable expectation of privacy in an automobile is the fact that it has come to be regarded by most Americans as something more than just a means of transportation. It is viewed, for those who routinely travel in it, as a place of refuge and protection from the external world and the stresses of modern life. Today’s vehicles are deliberately engineered to

insulate the drivers and passengers from as many extraneous disturbances as possible, and people frequently take maximum advantage of this insularity to “get away from it all” by taking long evening, weekend, or vacation drives. Even in their daily lives, more people still opt for driving than taking public transportation, in large measure because of the privacy the vehicle affords them while in transit. As William Safire has cogently observed in this regard: “[M]ost people . . . prefer vehicles of their own. Certainly a strong reason must exist for commuters to go into hock to buy a car, to sweat out traffic jams, to groan over repair bills. That reason is, simply: the blessed orneriness called privacy.” Katz, Automobile Searches and Diminished Expectations in the Warrant Clause, 19 Am.Crim.L.Rev. 557, 571-72 n.79 (1982) (quoting William Safire, The Great American Love Affair, Readers Digest, May 1976, at 179)).

I also find compelling support for the notion that the inside of an automobile should be treated in this Commonwealth as an area akin to the inside of a home, with respect to the legal protections afforded to persons and property therein, from our legislature’s recent decision to extend the “Castle Doctrine” — “a common law doctrine of ancient origins which declares that a home is a person’s castle” — to vehicles.¹¹ See 2011 Pa. Legis. Serv. Act 2011-10, finding 2. Notably, in so doing, the General Assembly found that “[p]ersons residing in or visiting this Commonwealth have a right to expect to remain unmolested within their **homes or vehicles**.” Id. at finding 4 (emphasis added). This legislatively recognized equivalence is, for me, a clear indication that the public policy of this Commonwealth supports the modern societal

¹¹ See 18 Pa.C.S.A. § 501 (defining vehicles as “[a] conveyance of any kind, whether or not motorized, that is designed to transport people or property.”).

perspective that individuals are entitled to similar broad protections of the law in the use and enjoyment of their automobiles as those which they enjoy with respect to their home. In sum, I deem owners and occupants of automobiles to have a societally recognized, objectively reasonable expectation of privacy therein which is worthy of the protections of the warrant requirement of Article I, Section 8.

For all of these reasons, I view the adoption of the Carney standard as anathema to the unique history and interpretation by our Court of Article I, Section 8 discussed above, as it removes the interposition of the judgment of a neutral magistrate in the automobile search process by eliminating the warrant requirement of Article I, Section 8 for all searches of vehicles, and thereby eviscerates its critical role in protecting the important right to privacy of all motorists of this Commonwealth against unreasonable searches and seizures of their cars. Therefore, I find this Edmunds factor strongly counsels against the wholesale utilization of the Carney standard as the governing legal standard for automobile searches in this Commonwealth.

C. Caselaw from other jurisdictions

The third factor of an Edmunds analysis involves an assessment of the decisions of our sister states. Initially, I note that some states which do not generally recognize a strong right to individual privacy protected by their own constitutions have elected to conform their state constitutional jurisprudence in this area to Carney, by wholly adopting the federal automobile exception in applying the search and seizure provisions of their own constitutions to automobile searches, and they allow warrantless searches of automobiles based exclusively on an officer's determination that probable cause

exists to do so.¹² Because these jurisdictions do not share our Commonwealth's robust historical commitment to the protection of the right of privacy, I find their decisions, several of which were relied on by the plurality, to be of little guidance for the purposes of Edmunds.

Instead, I find persuasive the weight of authority from other jurisdictions, which have traditionally shared Pennsylvania's view that the individual privacy rights of their populace are entitled to greater protections under various provisions of their state constitutions, and have, with some exceptions noted below, in accordance with that recognition, explicitly refused to follow Carney.¹³ These states' high courts flatly reject Carney's "lesser expectation of privacy" rationale as insufficiently compelling to cause them to abandon the greater protections against warrantless searches of automobiles which they previously recognized under their own state constitutions, and they continue to require a warrant for automobile searches, unless there exists both probable cause and exigent circumstances which prevent the searching officer from obtaining one. See, e.g., State v. Sterndale, 656 A.2d 409, 411 (N.H. 1995) (holding that, because New Hampshire Constitution provides "significantly greater protection than the fourth amendment against intrusion by the State," the reduced expectation of privacy rationale

¹² See State v. Lloyd, 312 P.3d 467 (Nev. 2013); State v. Zwicke, 767 N.W.2d 869 (N.D. 2009); McKenney v. State, 165 P.3d 96 (Wyo. 2007); State v. Werner, 615 A.2d 1010 (R.I. 1992); State v. Conn, 99 P.3d 1108 (Kan. 2004); State v. Tompkins, 423 N.W.2d 823 (Wisc. 1988).

¹³ Although Colorado, Tennessee, Kentucky and Massachusetts recognize a greater right of privacy under their own constitutions, in some circumstances, these states have chosen to follow the federal automobile exception in applying the search and seizure provisions of their constitutions to automobile searches. See People v. Hill, 929 P.2d 735 (Colo. 1996); State v. Saine, 297 S.W.3d 199 (Tenn. 2009); Chavies v. Commonwealth, 354 S.W.2d 103 (Ky. 2011); Commonwealth v. Cast, 556 N.E.2d. 69 (Mass. 1990).

was “not persuasive” as an interpretation of that provision); State v. Gomez, 932 P.2d 1, 12 (N.M. 1997) (refusing, following Carney, to relax search and seizure provisions of the New Mexico Constitution which reflect a strong preference for warrants and, also, imposing the additional requirement of a particularized showing of exigent circumstances to justify excusing the warrant requirement).

The Montana Supreme Court’s decision in State v. Elison, 14 P.3d 456 (Mont. 2000), is particularly instructive. Therein, the court expressly refused the state’s invitation to follow Carney and abandon the twin requirements of probable cause and exigent circumstances for a warrantless search of an automobile, which it previously interpreted the Montana Constitution¹⁴ to require. Echoing the criticisms of Carney, recounted above, the Court reasoned:

[W]hen a person takes precautions to place items behind or underneath seats, in trunks or glove boxes, or uses other methods of ensuring that those items may not be accessed and viewed without permission, there is no obvious reason to believe that any privacy interest with regard to those items has been surrendered simply because those items happen to be in an automobile. Furthermore, there is no reason to believe that the ‘pervasive and continuing governmental controls and regulations’ of automobiles could serve to reduce someone’s expectation of privacy in items so stowed. Although the State may have a legitimate interest in securing compliance with safety and traffic regulations, there is absolutely no logical connection between prohibitions such as driving with expired registration stickers or a noisy muffler, and the State’s need to conduct a warrantless

¹⁴ Although, in addition to its reliance on the provision of the Montana Constitution governing searches and seizures, the Montana Supreme Court also founded its decision, in part, on Article II, Section 11 of its charter, which explicitly guarantees a right to privacy; however, as developed above, we have consistently interpreted Article I, Section 8 of our Constitution as incorporating the same “strong right of privacy,” Edmunds 586 A.2d at 899; thus, its rationale is fully applicable.

search behind the seat of an automobile. Visual inspections of license plates for expired tags do not entail searches of glove boxes, trunks, and underneath seats.

Id. at 470. Significantly, the Montana Supreme Court also reminded that, because a search of a car is an invasion of the owner's or operator's constitutionally protected privacy interests in the items stored therein, the state is required to provide procedural safeguards when it invades those interests. The court noted it is, therefore, the type of search which "typically requires a warrant or other special circumstances," and it refused to allow a search solely on the basis of the existence of probable cause. Id.

Similarly, the highest court of our sister state of New Jersey in State v. Cooke, 751 A.2d 92 (N.J. 2000), recognized, as our Court has done previously, that, though there may be a lesser expectation of privacy in one's automobile, that expectation is not so attenuated that, standing alone, it constitutes sufficient justification to conduct a warrantless search thereof — absent exigent circumstances making it impracticable for police to obtain a warrant. That court also rejected Carney as the standard under its state's constitution, based on its reaffirmation that its state constitutional protection against unreasonable searches and seizures, like ours, embodies "a constitutional preference for a warrant, issued by a neutral judicial officer, supported by probable cause." Cooke, 751 A.2d at 99. The court reminded that "[t]he cautionary procedure of procuring a warrant ensures that there is a reasonable basis for the search and that the police intrusion will be reasonably confined in scope." Id.

As noted by the plurality, the high courts of Washington and Vermont, which also recognize a strong individual right to privacy under provisions of their state constitutions — either explicitly via a separate amendment (Washington) or through interpretation of

the provision generally regulating searches and seizures (Vermont) — have also refused to allow warrantless searches of motor vehicles solely on the basis of a police officer's determination of probable cause. Although these decisions did not directly address the applicability of Carney under their state constitutions, they, nevertheless, are in accord with the fundamental principles of the decisions discussed above in that they continue to view a warrant as the bedrock means of protecting the privacy interest an owner or occupant of a vehicle has in areas of automobiles outside of public view, and, thus, mandate that those areas may not be searched without a warrant, unless exigent circumstances exist that make the obtaining of a warrant impracticable. See State v. Tibbles, 236 P.3d 885, 890 (Wash. 2010) (ruling that suppression of contraband found under front passenger seat was properly suppressed under Washington constitution due to officer's failure to obtain a warrant, even though he possessed probable cause to suspect marijuana was in the vehicle, due to the lack of any exigent circumstances which prevented him from obtaining a warrant such as "delay inherent in securing a warrant [which] would compromise officer safety, facilitate escape, or permit the destruction of evidence."); State v. Bauder, 924 A.2d 38, 43 (Vt. 2007) (upholding suppression of contraband found under and behind the driver's seat, and in a compartment in the driver's side door, during warrantless search of the vehicle after driver was arrested for DUI, noting lack of exigent circumstances to excuse obtaining a warrant and emphasizing that "[t]he warrant requirement serves as a check on the executive power by guaranteeing review by a neutral and detached magistrate *before* a search is carried out, thereby deterring 'searches on doubtful grounds' and assuring the people of 'an impartial objective assessment' prior to a governmental invasion."). I note

also that the high Court of Hawaii continues to maintain, under its own constitution, dual requirements for a warrantless search of a vehicle: probable cause that contraband is located within the vehicle and “reason to believe that because of the car’s mobility or exposure, there is a foreseeable risk that it may be moved or that the evidence which it contains may be removed or destroyed before a warrant can be obtained.” State v. Phillips 696 P.2d 346, 350 (Haw. 1985); State v. Wallace, 910 P.2d 695, 713 n.16 (Haw. 1996).¹⁵

In sum, I find these decisions from courts of our sister states which have not accepted the Carney standard as the controlling interpretation for their own constitutions to be more persuasive, as they are wholly consonant with our Court’s long-standing interpretation of Article I, Section 8 as embodying both a strong individual right to privacy of individuals, and a strong preference for the utilization of the warrant procedure in recognition of the vital role it plays in protecting that right.

¹⁵ A plurality of the Utah Supreme Court, which has interpreted the search and seizure provision of the Utah Constitution to provide a greater expectation of privacy than the Fourth Amendment, has endorsed the dual requirements of probable cause and exigent circumstances for a warrantless search of an automobile. State v. Anderson, 910 P.2d 1229 (Utah 1996) (plurality); State v. Larocco, 910 P.2d 1229 (Utah 1990) (plurality). The Oregon Supreme Court has drawn a distinction in its application of the federal automobile exception under the search and seizure provision of its constitution which allows a warrantless search of a vehicle on probable cause when the vehicle has “just been lawfully stopped by police;” however, it requires a warrant issued by a neutral magistrate when the vehicle is “parked, immobile and unoccupied at the time the police first encountered it in connection with the investigation of a crime,” unless exigent circumstances other than the mobile nature of the automobile itself are present. State v. Kock, 725 P.2d 1285, 1287 (Or. 1986). Connecticut, in interpreting its own constitution, has adopted only a limited version of the federal automobile exception which allows a warrantless search on probable cause when the automobile remains in a public place after the arrest of the driver; however, if the vehicle is impounded and towed to the police station, then a warrant is required to search it. State v. Winfrey, 24 A.3d 1218 (Conn. 2011).

D. Policy considerations

The final prong of the Edmunds analysis is an examination of relevant policy considerations at stake, particularly those of state and local concern in our Commonwealth. In this regard, I observe that, not only has our Court steadfastly protected the important right of personal privacy by insisting, through our decisions, on the use of a warrant for searches of all areas in which our citizenry has a reasonable privacy interest, unless not reasonably practicable, we have also purposefully sought to encourage the use of warrants to conduct searches by making them far easier for police officers to obtain in conducting field investigations. Over a decade ago, in 2002, our Court amended our Rules of Criminal Procedure to allow the use of advanced communications technology to enable an officer to obtain a search warrant from a magistrate without having to physically depart from the scene and personally appear before the magistrate. Pa.R.Crim.P. 203, setting forth the requirements for issuance of search warrants, now provides, in relevant part:

Rule 203. Requirements for Issuance

(A) In the discretion of the issuing authority, advanced communication technology may be used to submit a search warrant application and affidavit(s) and to issue a search warrant.

(B) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.

(C) Immediately prior to submitting a search warrant application and affidavit to an issuing authority using advanced communication technology, the affiant must

personally communicate with the issuing authority by any device which, at a minimum, allows for simultaneous audio-visual communication. During the communication, the issuing authority shall verify the identity of the affiant, and orally administer an oath to the affiant.

Pa.R.Crim.P. Rule 203. Advanced communication technology (“ACT”) is further defined by the Rules of Criminal Procedure as “any communication equipment that is used as a link between parties in physically separate locations, and includes, but is not limited to: systems providing for two-way simultaneous communication of image and sound; closed-circuit television; telephone and facsimile equipment; and electronic mail.” Pa.R.Crim.P. Rule 103.

As noted by our Criminal Procedural Rules Committee, in its explanatory report prepared pursuant to adoption of these rules, these revisions were made with the purposeful goal of reducing the number of warrantless searches, because searches with a warrant are so strongly favored in this Commonwealth. The Committee explained its reasoning as follows:

[T]here are a sufficient number of ‘warrant’ situations in which time and convenience are important, and [the Committee] expects that the new ACT provisions will (1) reduce the amount of time it takes to obtain a warrant, and (2) increase the convenience to both affiant and issuing authority. **In addition, the Committee agreed with the concept that proceeding with a warrant is favored over proceeding without a warrant, and using ACT will reduce the number of warrantless arrests and seizures.**

Pa. Bull. vol. 32, no. 21 at 2595 (5/25/02) (emphasis added). Consequently, the adoption of these rules reflects a strong policy choice by our Court to maximize the use of judicially issued warrants by police in the field who wish to conduct searches, by providing a modern update to the warrant application process which facilitates rapid

communication between them and the issuing magistrates. Although the rules do not require magistrates to use this process, as a rule of statewide applicability, it nevertheless permits the utilization of these procedures in every county of this Commonwealth, and, thus, insures and strengthens compliance with the warrant requirement of Article I, Section 8.

Adoption of this rule was a clear recognition by our Court that search warrant application procedures have advanced dramatically from the “Model T and vacuum tube radio” technology extant at the time of the Carroll decision, and now permits an officer to do in minutes what would have taken many hours, or perhaps even days, in 1925. As discussed supra, the length of time required to obtain a search warrant was a factor of considerable importance to the Carroll Court in finding that an immediate warrantless search on probable cause was justified, given the possibility the vehicle could be driven away before a magistrate could be found to consider a warrant application. However, this concern has been significantly lessened by the advent of the above enumerated modern technological means to enhance communication between officers in remote locations and magistrates, which technology has only improved in both quality and availability since the original promulgation of Pa.R.Crim.P. 203.¹⁶ The Carney Court, in fashioning its broad warrantless search rule, did not consider, at all, the impact such rapid communications technologies — in development at the time that case was heard — would have on the speed and ease of obtaining a warrant for the search of an automobile, and, thus its persuasiveness as a basis to

¹⁶ For example, computer programs such as “Skype” or “FaceTime,” which permit instant two way audio and video communication over computers and smartphones, are now widely available, easy to use, and relatively inexpensive.

impede the operation of this state rule, and thereby impact the administration of justice in this Commonwealth is severely undermined.

Nevertheless, I find it significant that, even though the time required to obtain a warrant was considerably longer in the 1920's, the Carroll Court, as related above, expressed a warrant preference which was in alignment with our current state constitutional standard, i.e., "where the securing of a warrant is reasonably practicable, it must be used." Carroll, 267 U.S. at 156. Today, in this Commonwealth, as the result of Rule 203, which seeks to maximize the use of advanced communication technology, obtaining a search warrant is **quite** reasonably practicable; accordingly, as is constitutionally required, it should remain the first choice, unless exigent circumstances foreclose an investigating officer from obtaining it. I deem adherence to these requirements as affording our police officers a clear and understandable standard to guide them, as sought by the plurality, and I consider police officers eminently capable as trained professionals of making the basic assessment of whether it is reasonably practicable for them to seek a warrant, under all of the circumstances existing at the time they wish to search an automobile.

Moreover, in my view, the immobilization of a vehicle, pending a magistrate's determination, better effectuates Article I, Section 8's strong safeguards for individual privacy.¹⁷ The impact on individual privacy occasioned by the immobilization of a

¹⁷ The United States Supreme Court held in Chambers v. Maroney, 399 U.S. 42, 52 (1970), that there is no difference, for "constitutional purposes," between an immediate full search of a vehicle and impoundment of that vehicle while application to a magistrate for a warrant is made. In Commonwealth v. Milyak, 493 A.2d 1346 (1985), we commented on the holding of Chambers, but we did not endorse or adopt it as a matter of our state constitutional jurisprudence.

vehicle while an officer seeks a search warrant from a magistrate is, from my perspective, far less than that which results from a full search of a vehicle. The disruption of individual privacy while a magistrate considers a search warrant application is limited to the temporary loss of the vehicle's use, which, especially if the procedures set forth in Pa.R.Crim.P. 203 are utilized, will usually be brief, and, most significantly, avoids any invasion of the vehicle's interior and disturbing of its contents prior to a judicial determination of whether the search is lawful under our Constitution. Further, it bears emphasis that the process of judicial consideration of a warrant application, guaranteed by Article I, Section 8, is a citizen's sole means by which he or she may attain judicial review of the legality of a search **prior** to it occurring. See Brinegar v. U.S., 338 U.S. 160, 182 (1949) (Jackson, J. dissenting) ("We must remember . . . that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way the innocent citizen can invoke advance protection.").

In summary, I determine that these policy interests strongly weigh in favor of not utilizing the Carney standard to assess whether searches of automobiles comport with the requirements of Article I, Section 8.

E. Summary of Edmunds factors

Based upon the foregoing examination of the Edmunds factors, I conclude that the text of Article I, Section 8, the unique and rich history surrounding its origins, its subsequent interpretation by our Court, relevant case law of other states, but especially those which share both our Commonwealth's commitment to protecting the right of privacy and our regard for the warrant process as a vital procedural safeguard for that

right, as well as important policy considerations, all support interpreting Article I, Section 8 as offering heightened protections of the right of individual privacy a person possesses in his or her automobile as a driver or occupant. Consequently, in my view, the present safeguard for this privacy right provided by the warrant process of Article I, Section 8 — requiring the authorization of any search of an automobile to be made by a neutral magistrate, except in those limited exigent circumstances where obtaining such a warrant is impracticable — should be maintained.

V. Conclusion

Because the search of Appellee's vehicle in this case occurred while he was in custody, and, therefore, ample opportunity existed for the police to obtain a search warrant from a neutral magistrate prior to searching it, I would affirm the Superior Court's decision in this matter suppressing the evidence recovered during the warrantless search of its engine compartment. Our Court, by adopting the diluted federal automobile exception and sanctioning the search of Appellee's vehicle under Article I, Section 8, based solely on the officer's determination of probable cause, has eviscerated the strong privacy protections that amendment affords the people of Pennsylvania in their automobiles. By so doing, our Court heedlessly contravenes over 225 years of unyielding protection against unreasonable search and seizure which our people have enjoyed as their birthright. I cannot join our Court in this endeavor, as it is so diametrically contrary to the deep historical and legal traditions of our Commonwealth. As Mr. Justice Jackson observed so persuasively over a half century ago, and which principle remains just as viable today: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer,

not by a policeman or Government enforcement agent.” Johnson v. U.S., 333 U.S. 10, 14 (1948). I therefore respectfully dissent.

Mr. Justice Baer joins this dissenting opinion.