STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. CUM-24-381

STATE OF MAINE,
Plaintiff/Appellant

v.

KYLE FITZGERALD,
Defendant/Appellee

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF FOR APPELLANT STATE OF MAINE

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INTRODUCTION

This case raises a legal question not yet addressed in Maine: during a dog sniff around the outside of a car, if the occupants leave the doors open and the dog enters the car instinctively, with no direction or encouragement from the police, does that violate the Fourth Amendment? Seven federal appellate courts already have addressed that issue and unanimously hold that under those narrow circumstance there is no Fourth Amendment violation. However, the trial court wrongly reached the opposite legal conclusion. Also, it wrongly concluded the police did not have probable cause to search before the dog entered the car, even though it found the police had reasonable suspicion of unlawful drug activity, plus uncontroverted evidence showed the dog's behavior indicated an odor of drugs was coming from the car before it entered. Finally, the trial court erred in its legal conclusion that suppression of evidence was warranted because its decision marked a new departure from established federal precedent and there was no intentional police misconduct. Therefore, the Law Court should vacate and reverse the suppression order.

FACTS AND PROCEDURAL HISTORY

On November 15, 2021, around 11:40 AM, Maine State Police Trooper Nicholas Young (a police officer since 2016) was on patrol on I-295 in Freeport and came upon a Honda Civic in the travel lane. *Tr. (4/19/2024)* 10-13; *Video 1,* at 00:00-01:05.[1] He saw the driver was not wearing a seatbelt in violation of 29-A M.R.S. § 2081(3-A) (2021), items obstructed the rear window in violation of 29-A M.R.S. § 2082(2) (2021), and the car was tailgating a pickup truck in violation of 29-A M.R.S. § 2066(1) (2021). *Tr. (4/19/2024),* 10-13.[2] Also, the driver seemed nervous because she was travelling far below the posted speed limit, gripping the steering wheel with both arms completely extended and elbows locked, and fixedly

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[1] Designations to pages of the appendix, the transcripts, and the exhibits are in the forms "*App.*, __," "*Tr. ([date]),* __" and "*Ex. [#],* __." Designations to the first and second police cruiser videos (State's Ex. 3 & 4, respectively) are in the form "*Video [1 or 2],* [__:__]."

[2] Under 29-A M.R.S. § 2081(3-A) (2021) a motor vehicle operator or adult passenger commits a traffic infraction when that person fails to wear a seatbelt. Under 29-A M.R.S. § 2082(2) (2021) a person may not operate a motor vehicle with an object in the window that prevents the operator from having a full and clear view of the road and traffic conditions. Under 29-A M.R.S. § 2066(1) (2021) the operator of a motor vehicle may not follow another vehicle more closely than is reasonable and prudent.

staring straight ahead without even glancing over at the police cruiser traveling alongside her for more than a minute. *Id.* Tr. Young activated his emergency lights and pulled the car over at 11:41 AM. *Tr. (4/19/2024),* 13, 74; *Video 1,* 01:00.

Within the first few minutes, Tr. Young began to suspect other unlawful activity for several reasons. *Tr. (4/19/2024),* 14-27; *Video 1,* 01:00-04:55. As he approached the car, and before he even spoke to anyone, rear passenger Mariah Lancaster held out her identification for him. *Tr. (4/19/2024),* 19-21. Driver Kyle Fitzgerald failed to produce the registration certificate in violation of 29-A M.R.S. § 404 (2021), and the owner was not present. *Tr. (4/19/2024),* 21-23, 27.[3] Fitzgerald said she was bringing two men and two puppies to New Hampshire, but the puppies were only two weeks old - much too young to be lawfully transferred. *Tr. (4/19/2024),* 33, 93-94.[4] Front passenger Dennis Jones was

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[3] Under 29-A M.R.S. § 105(2) (2021) police may demand and inspect the registration certificate during a traffic stop, and under 29-A M.R.S. § 404 (2021) the certificate must be carried on the person of the operator or occupant or kept in an easily accessible place in the vehicle.

[4] Under Maine animal welfare regulations promulgated pursuant to 7 M.R.S. § 3906-B (2021), "[i]t is unlawful for any

remarkably nervous and impatient. *Tr. (4/19/2024),* 27, 60, 69, 72. A man in the back seat, eventually identified as Ja'Wayne Early, also unlawfully was not wearing a seatbelt, and pretended to be asleep. *Tr. (4/19/2024),* 23-24.

Tr. Young became more suspicious as he briefly spoke with Fitzgerald outside the car. *Tr. (4/19/2024),* 28-32; *Video 1*, 04:55-07:00. Although Fitzgerald said she had known the passengers forever and they all had been friends for 10 years, she incorrectly said the man in the rear seat was Jermaine (not Ja'Wayne) and admitted she didn't know his last name. *Tr. (4/19/2024)*, 31-32. She contradicted herself about where she picked up the men and where they were going, saying at different times she picked them up in Clinton and in Skowhegan, and saying at different times their destination was Haverhill and Salem, and that she didn't even know if they were going to Massachusetts or New Hampshire. *Tr. (4/19/2024),* 28-30.

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person to sell, adopt, or give away any dog (puppy) or cat (kitten) until eighth (8) week of life." 01-001 C.M.R. ch. 701, § 1(P) (2021). The same prohibition exists under the laws of Massachusetts and New Hampshire. Mass. Gen. Laws Ann. Ch. 129 § 39G (2021); N.H. Rev. Stat. Ann. § 437:8(III) (2021).

Tr. Young returned to the car to identify the man who was not wearing a seatbelt and pretended to be asleep. *Video 1,* 07:20-09:00. The man said he didn't have identification, he spoke extremely quietly when asked to say his name despite several requests to speak louder, and eventually he said he was Ja'Wayne Early, but when asked to spell his name aloud he omitted the apostrophe. *Tr. (4/19/2024),* 25-26, 34-35, 70-71. Tr. Young returned to his cruiser and tried to confirm the motorists' identities through interstate records, but was unable to confirm Early's identity because of the incorrect spelling. *Tr. (4/19/2024),* 36-39; *Video 1,* 09:20-10:40. Tr. Young suspected that Early gave him an incorrect name, a crime under 29-A M.R.S. § 105(4) (2021). *Tr. (4/19/2024),* 46-47.[5] Also, he determined that the car's registered owner was on bail and had an active arrest warrant. *Tr. (4/19/2024),* 38-39; *Video 1,* 38:00-38:10.

Tr. Young had Early step out of the car to ask his name again,

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[5] Under 29-A M.R.S. § 105(4) (2021) "[a] person is guilty of a Class E crime if a law enforcement officer has probable cause to believe the person violated or is violating this Title [such as a seatbelt violation] and the person intentionally fails or refuses upon request to give the person's correct name."

but first asked if he had any weapons. *Tr. (4/19/2024)* 40-44; *Video 1,* at 20:40-34:10. Early responded by pulling from his pocket a big roll of cash and said it was $500, but when Tr. Young asked where it came from Early only said "I work," and refused to elaborate. *Id.* Early again spelled his name aloud, omitting the apostrophe, and said he was from Alabama, but still Tr. Young could find no record to confirm his identity. *Tr. (4/19/2024),* 43, 66-67. As they spoke, Tr. Young noticed Maria Lancaster seemed anxious and repeatedly turned around in her seat to stare at them. *Tr. (4/19/2024),* 60, 71-72.

At 12:07 PM a Freeport police officer who had arrived to assist told Tr. Young that passenger Dennis Jones said he didn't even know Early, further contradicting Fitzgerald's statement that they all had been friends for years, and at that point Tr. Young requested a drug dog to sniff around the outside of the car. *Tr. (4/19/2024),* 44; *State's Ex. 5*; *Video 1,* 27:10-27:34.

While waiting for a drug dog, Tr. Conor Willard had Early write his own name on a piece of paper, and this time Early spelled his first name correctly with an apostrophe: "Ja'Wayne." *Tr. (4/19/2024)* 64-65, 68; *Video 1,* at 31:40-47:45. With that

correction, Tr. Willard was able to confirm Early's identity, which he promptly reported to Tr. Young at 12:24 PM. *Id.; Video 1,* at 00:44:00. However, based on suspicion of unlawful drug activity, Tr. Young detained the motorists for 34 minutes more, until Tr. Zachary Fancy arrived with a drug dog at 12:58 PM. *Tr. (4/19/2024),* 65, 68-69, 76. *Video 2,* 07:30.[6]

Tr. Fancy has been a police officer since 2016. *Tr. (12/7/2023),* 7. He and his dog, Dutch, have been certified by the Maine State Police and the Maine Criminal Justice Academy since 2019 for detecting heroin, cocaine, crack cocaine, and methamphetamine. *Tr. (12/7/2023),* 10-13, 34-35; *Tr. (4/19/2024),* 110; *State's Ex. 1.*[7] Their training together included 12 weeks of school in 2019, followed by two days of training each month since then. *Id.* Tr. Fancy also assists in training other dogs

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[6] The dispatcher determined that no drug dog was available from nearby municipal police departments in Freeport, Yarmouth or Falmouth, so Tr. Fancy responded from Standish. *Tr. (4/19/2024),* 44, 47-49, 74-75; *State's Ex. 5*; *Video 1,* 27:25-34:10. While waiting, Tr. Young asked Fitzgerald for consent to search the car, which she refused. *Video 2,* 00:30-01:00.

[7] The State provided in discovery 495 pages of training records for Tr. Fancy and Dutch. *Tr. (12/7/2023),* 13-14.

and handlers for the Maine State Police and the Maine Criminal Justice Academy. *Tr. (4/19/2024),* 101, 110. He and Dutch have conducted about 100 drug sniffs in the field, and Tr. Fancy knows Dutch to be reliable at detecting drugs. Tr. *(12/7/2023),* 48.

Tr. Fancy testified based on his training that it is best practice to remove all occupants from a car before a dog sniff around the outside. *Tr. (12/7/2023),* 16. Tr. Young asked the four occupants if they would be willing to get out of the car while the dog walked around the outside to sniff for drugs. *Video 2,* 07:28. *Tr. (12/7/2023),* 16, 39; *Tr. (4/19/2024),* 50. As they got out, each one of the four occupants left the car doors wide open, without being told to do so by the police. *Video 2,* 07:50-08:40; *Tr. (12/7/2023),* 17; *Tr. (4/19/2024),* 50. Tr. Young also asked Fitzgerald to remove the puppies from the car, which she did from the passenger side door, and again she left the door open without the police asking her or telling her to do so. *Tr. (4/19/2024),* 50; *Video 2,* 09:45-10:15. The police did not touch or manipulate the open doors before the dog sniff. *Tr. (12/7/2023),* 17; *Tr. (4/19/2024)* 50; *Video 2,* 07:50-10:15. As Fitzgerald removed the two puppies and the laundry basket that they were in, Tr. Young noticed and commented that

there was also something else visible in the laundry basket. *Video 2,* 10:15-11:00.

The sniff, which lasted less than 30 seconds, began when Tr. Fancy brought the dog to the front of the car and gave the command "find dope," then the dog sniffed along the passenger side, reached the open door and crawled underneath, then pulled towards the open doorway until its upper body and front legs entered the car. *Tr. (12/7/2023),* 18-27; *Tr. (4/19/2024),* 107; *Video 2,* 11:00-11:30; *State's Ex. 2.* Tr. Fancy testified that when the dog approached the open door, *before* it entered the car, it immediately showed several "just noticeable differences" in behavior consistent with being in the odor of drugs, including the head snap, pulling hard on the leash, and intense nasal exchanges.

> Dutch starts walking around clockwise as he always does. He's sniffing the vehicle. As he's doing so, we break past the front passenger side door. And he starts to sniff around that open area where the door is left open. And then goes – starts working towards the back of the vehicle and then *head snaps towards that open door* and *immediately begins to pull me* inside the vehicle. […] Dutch is *showing… just noticeable differences*. […] And as a handler, we look for these things to tell us that… *the dog is in the area of an odor.* […] *I know how my dog acts and what he looks like when he's [in] an odor* due to how many training hours… we've done. So when Dutch begin to do this and break that plane [passing the open door],

he was showing *successive deep nasal exchanges*.

Tr. (12/7/2023), 18-19 (emphasis added). He also testified he observed two other "just noticeable differences": tail wagging and salivation.

> He was also *salivating* which, for Dutch, is a common occurrence when he is in odor. […] And I believe I noted that *his tail was wagging* which when Dutch is in odor, he does that.

Tr. (12/7/2023), 27-28 (emphasis added). He testified that in the past the dog showed these behaviors in response to the odor of drugs. *Tr. (12/7/2023),* 23, 32, 55. He testified that inside the car the dog continued salivating, tail-wagging, pulling hard, and exhibiting intense deep nasal exchanges as it focused on the back seat, and after a few seconds Tr. Fancy pulled it out of the car. *Tr. (12/7/2023),* 27-28. He testified the dog entered the car spontaneously on its own, with no direction or encouragement from the handler, nor was it trained to enter a car during a sniff. *Tr. (12/7/2023),* 24.

As shown in the screen shots below, the video confirmed that the head snap, hard pulling, and tail wagging were plainly visible *before* the dog entered the car (although the camera was too far

away to see the salivation and the intense nasal exchanges).

Video 2, 11:10-11:12 (note head snap, pulling & tail wagging *before* the dog entered the car).

Tr. Fancy testified the dog was trained to detect an odor of drugs and then locate the source and give final indication (or alert) by laying or sitting, but under the certification criteria of the Maine State Police and the Maine Criminal Justice Academy, the handler can determine that the dog indicated the presence of an odor of drugs based on observation of "just noticeable differences" in

behavior consistent with being in the odor of drugs, even if the dog does not sit or lay down to indicate that it located the source.[8] *Tr. (12/7/2023),* 18-19, 30-32, 45-49; *Tr. (4/19/2024),* 90, 101, 105-109. Thus, final indication by sitting or laying down is not required for a dog sniff to establish probable cause to search for drugs. *Id.*

Tr. Fancy testified that based on his years of experience and training with Dutch, he knows the dog to be reliable at detecting and indicating the presence of unlawful drugs through "just noticeable differences" in behavior, such as pulling, tail wagging, salivation and intense nasal exchanges. *Tr. (12/7/2023),* 18-19, 48-49, 55; *Tr. (4/19/2024),* 90-91, 106-107. He testified that in this case the "just noticeable differences" in behavior he observed were objectively visible, and that any handler familiar with Dutch would have called that indication. *Tr. (4/19/2024),* 101, 112-114. In his opinion, the dog indicated the presence of an odor of unlawful drugs coming from the car and there was probable cause to search. *Tr. (12/7/2023),* 25-26, 28, 33, 55; *Tr. (4/19/2024),* 50-

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[8] In this context, the terms "indicate" and "alert" are synonymous. *Tr. (12/7/2023),* 44-45, 48, 70.

51, 89; *Video 2,* 11:31-11:37.[9] Tr. Young concurred, based on the dog's indication and the occupants' suspicious behavior. *Tr. (4/19/2024),* 50-51.

At 1:06 PM the officers started searching the car and quickly found a substantial quantity of drugs, $1,220 cash, a loaded handgun, and drug paraphernalia. *Tr. (12/7/2023),* 34; *Tr. (4/19/2024),* 51-57, 62-63, 96-97; *Video 2,* 12:37-13:47, 19:11-19:50; *State's Ex. 6.*[10] The officers arrested the car occupants. *Tr. (4/19/2024),* 53; *Video 2,* 19:55-20:20. After *Miranda* warnings,

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[9] Tr. Fancy also testified that Dutch reliably detects and indicates the presence of drugs even when other dogs are present, and therefore Tr. Fancy believed it was responding to an odor of drugs, not puppies. *Tr. (12/7/2023),* 16; *Tr. (4/19/2024),* 92, 98-99, 102, 111.

[10] In about a minute Tr. Fancy found on the floor of the driver's seat a red backpack containing two grams of cocaine and 0.2 grams of methamphetamine. *Tr. (4/19/2024),* 51-52, 96-97; *Video 2,* 12:37-13:47; *State's Ex. 6,* 13-15. A few minutes later Tr. Fancy found in the trunk a blue backpack containing 67 grams of crack cocaine, 40 grams of fentanyl powder, 33 grams of powder cocaine, cutting agents, two digital scales, $1,220 cash, and a loaded 9 mm Ruger handgun, and next to the backpack he found a WalMart shopping bag containing over two pounds of dried marijuana, plus there was drug paraphernalia throughout the car, including hypodermic needles, butane torches, NarCan, and straws with powder residue. *Tr. (12/7/2023),* 34; *Tr. (4/19/2024),* 53-57, 62-63, 96-97; *Video 2,* 19:11-19:50; *State's Ex. 6.*

Fitzgerald claimed ownership of both backpacks and their contents, and she described in detail the drugs, the money and the firearm. *Tr. (4/19/2024),* 58.[11]

On September 9, 2022, a grand jury returned an indictment charging Fitzgerald with four counts of aggravated unlawful drug trafficking, two counts of unlawful drug possession, and two forfeiture counts for the cash and the firearm. *App.* 1, 34-36. On June 22, 2023, Fitzgerald filed a motion to suppress evidence, challenging the lawfulness of the roadside detention, the car search, and her arrest. *App.* 3, 37-39.[12]

The trial court *(McKeon, J.)* held a two-day suppression hearing on December 7, 2023, and April 19, 2024, and took the matter under advisement. *App.* 4-6. The parties filed legal memoranda. *App.* 40-83. On July 1, 2024, the trial court issued an order granting Fitzgerald's motion to suppress, concluding that

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[11] The State also brought drug trafficking charges against codefendant Dennis Jones, as the blue backpack contained his personal items, including extra-large men's clothing, men's toiletries, and his bank account statement. *Tr. (4/19/2024),* 59.

[12] Fitzgerald's motion also challenged the lawfulness of the initial traffic stop, but at the hearing he waived that challenge. *Tr. (12/7/2023),* 5; *Tr. (4/19/2024),* 7-8; *App.* 11.

the roadside detention for a dog sniff was lawful based on the existence of reasonable and articulable suspicion of unlawful drug activity, but that the police lacked probable cause before the dog entered the car and the dog's entry violated the Fourth Amendment. *App.* 6, 9-15.

On July 11, 2024, the State moved for reconsideration and further findings of fact pursuant to M.R.U. Crim. P. 41A(d). *App.* 84-86. On July 25, 2024, the trial court held a non-testimonial hearing on the State's motion (*App.* 7), and made some rulings orally on the record (*App.* 16-29), and on July 30, 2024, it issued a final written order (*App.* 30-33). The trial court made additional factual findings and reaffirmed its legal conclusions that the police lacked probable cause to search before the dog entered the car, that the dog's entry violated the Fourth Amendment, and that the suppression remedy was warranted. *Id.*[13]

On August 16, 2024, the Maine Attorney General authorized a

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[13] The trial court denied codefendant Dennis Jones's motion to suppress, citing *State v. Lovett,* 2015 ME 7, ¶ 8, 109 A.3d 1135 (holding that a passenger lacks standing to challenge the lawfulness of a car search). *App.* 15. The Law Court dismissed Jones's appeal as untimely. *Order (Oct. 4, 2024),* State v. Dennis L. Jones, Law Court Docket No. Cum-24-434.

State's appeal. *App.* 43. On August 20, 2024, the State filed timely notice of appeal. *App.* 7.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in its legal conclusion that probable cause did not exist before the dog entered the car?

2. Whether the trial court erred in its legal conclusion that the dog's entry into the car violated the Fourth Amendment?

3. Whether the trial court erred in its legal conclusion that suppression of evidence was warranted because its decision marked a new departure from federal precedent and there was no intentional police misconduct?

ARGUMENT

The suppression order rests on three erroneous legal conclusions: (1) that the police did not have probable cause before the dog entered the car, (2) that the dog's entry into the car violated the Fourth Amendment, and (3) that suppression of the evidence was warranted. To the contrary, probable cause did exist before the dog entered the car, based on information already known to the police and changes in the dog's behavior indicating it already had detected an odor of drugs coming from the car. Additionally, there

was no Fourth Amendment violation when the dog entered the car instinctively and without the police directing or encouraging it to do so, according to all seven federal courts of appeals that have decided that issue. Finally, suppression of evidence was not warranted because the trial court's decision marked a new departure from established federal precedent and there was no intentional police misconduct. Therefore, the Law Court should vacate and reverse the suppression order.

1) The trial court erred in its legal conclusion that probable cause did not exist before the dog entered the car.

On a State's appeal from an order granting a motion to suppress evidence based on violation of the Fourth Amendment, the State bears the burden of demonstrating that the search was lawful. *State v. LaForge,* 2012 ME 65, ¶ 9, 43 A.3d 961. The Law Court reviews the trial court's factual findings for clear error and it reviews the legal conclusions and ultimate decision de novo. *State v. Croteau,* 2022 ME 22, ¶ 19, 272 A.3d 286.[14] In this case de novo

[14] A factual finding is clearly erroneous if there is no competent evidence in the record to support it, or if the trial court clearly misapprehended the meaning of the evidence, or if the evidence taken as a whole persuades to a certainty that the finding was wrong. *Remick v. Martin,* 2014 ME 120, ¶ 7, 103 A.3d 552.

review applies because the State challenges only the trial court's legal conclusions and its ultimate decision, not its findings of fact. Under de novo review, the Law Court may draw its own legal conclusions based on the trial court's factual findings.[15] Because the State moved for further findings of fact, the Law Court should not assume the trial court found all facts necessary to support its ultimate decision. *State v. Sasso,* 2016 ME 95, ¶ 19, 143 A.3d 124.

Although the Fourth Amendment generally requires a search warrant to search private property, under the automobile exception the police may search a car if probable cause exists to believe it contains evidence of a crime. *Arizona v. Gant,* 556 U.S. 332, 347 (2009), citing *United States v. Ross,* 456 U.S. 798, 820-21 (1982), and *California v. Acevedo,* 500 U.S. 565, 579-580 (1991); *State v. Melvin,* 2008 ME 118, ¶ 15, 955 A.2d 245. In this case the trial

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[15] *See e.g., State v. Blier,* 2017 ME 103, 162 A.3d 829 (vacating suppression order based on Law Court's de novo legal conclusion that the trial court's factual findings were sufficient to establish probable cause to arrest, regardless of trial court's contrary legal conclusion); *State v. Croteau,* 2022 ME 22, 272 A.3d 286 (vacating suppression order based on Law Court's de novo legal conclusion that the trial court's factual findings supported the legal conclusion that an OUI defendant consented to blood draw voluntarily, regardless of trial court's contrary legal conclusion.)

court erred in its legal conclusion that probable cause did not exist before the dog entered the car, in light of information already known to the police and the dog's immediate behavioral changes as it approached the car's doorway.

The trial court found that before the dog arrived the police knew the following information establishing a basis for suspicion:

- Fitzgerald was not wearing a seatbelt and seemed nervous because she was driving substantially slower than the speed limit, tailgating a pickup truck in front of her, and staring straight ahead with her arms fully extended and elbows locked as a police car drove beside her (*App.* 9);[16]

- passenger Lancaster seemed nervous, because she immediately held out her identification card as Tr. Young first approached, before he even asked anyone for identification, and she kept turning around in her seat and staring at the back of the car as he spoke with the others (*App.* 17-18, 84);

- the registered owner of the vehicle was not present, was on bail for criminal charges, and had an outstanding arrest warrant (*App.* 17-18, 84);

- the occupants said they were delivering two puppies, but the puppies were only two weeks old, and it is unlawful to transfer puppies before they are eight weeks old (*App.* 17-18, 84);

- Fitzgerald contradicted herself about where she had picked up the men, saying it was in Clinton and then saying it was in

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[16] Nervousness and furtive behavior may contribute to the existence of probable cause to search a car. *United States v. Reed,* 882 F.2d 147, 149 (5th Cir. 1989) (nervousness); *State v. Ireland,* 1998 ME 35, ¶ 12, 706 A.2d 597 (furtive behavior).

Skowhegan, and she also gave contradictory answers about their destination (*App.* 10, 12, 17-18, 84);

- Fitzgerald and the other occupants gave contradictory information about how long they had known each other, as Fitzgerald initially stated they had all been friends for years, but then she did not know Early's first or last name, and Jones denied he even knew Early (*App.* 10, 12, 17-18, 84);

- Early, who also was not wearing a seatbelt, seemed to be concealing his identity because he pretended to be asleep, he did not produce identification upon request, when asked his name he spoke so quietly that Tr. Young couldn't hear him, even after asking him repeatedly to speak louder, when asked to spell his name he repeatedly omitted the apostrophe in his first name, and he refused to explain what kind of "work" he did to earn the $500 roll of cash in his pocket (*App.* 9-10, 12, 17-19, 84).[17]

Additionally, Tr. Fancy's uncontroverted testimony established that before the dog entered the car it showed "just noticeable differences" in behavior consistent with being in the odor of drugs, including the head snap towards the open doorway, pulling hard and crawling towards it, tail wagging, intense nasal exchanges and salivating. The head snap, pulling, and tail wagging were plainly visible in the video (see screen shots above).

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[17] Based on that information, the trial court found the police had reasonable suspicion of unlawful drug activity and therefore the prolonged detention for a dog sniff was lawful, citing *Rodriguez v. United States,* 575 U.S. 348, 357-358 (2015). *App.* 11-12.

Regarding the dog sniff, the trial court found the following facts:

- Tr. Fancy and Dutch were certified and had appropriate and sufficient training and experience for the handler to recognize "just noticeable differences" in behavior indicating the presence of an odor of illegal drugs (*App.* 10, 18, 23, 30-32);

- the dog crawled under the passenger-side door, then suddenly snapped its head and lunged towards the open doorway, pulling hard until it climbed into the car, exhibiting deep nasal exchanges and salivating (*App.* 10, 15);

- based on the dog's behavior "there is no question… that his conduct likely indicated he smelled the odor of drugs," even though the dog did not give final indication that it located the source of the odor by sitting or laying down. *App.* 10, 15, 32.

Based on those facts, the trial court made the legal conclusion that probable cause existed only *after* the dog entered the car, not *before* the dog entered the car. *App.* 14-15, 19-20, 23, 30-31.

> The court cannot conclude that there was enough time for the officer to conclude that the dog's behaviors indicated that it had detected drugs before the dog entered the car.

App. 31. However, the distinction doesn't make sense, because the dog demonstrated "just noticeable differences" in behavior consistent with detecting the odor of drugs *before* it entered the car. Ironically, the trial court stated "there's no probable cause until the dog… got all excited" (*App.* 23), but Tr. Fancy's testimony and the

video both showed unmistakably that the dog got very excited *before* it entered the car. Based on the totality of the information already known to the police, and the uncontroverted evidence of "just noticeable differences" in the dog's behavior, the trial court erred in its legal conclusion that probable cause did not exist *before* the dog entered the car.

Probable cause exists where facts and circumstances would warrant a prudent and cautious person to believe the place to be searched contains evidence of a crime, based on the totality of the circumstances. *Ohio v. Robinette,* 519 U.S. 33, 39 (1996).[18] It is "a very low threshold," merely requiring "a fair probability." *State v. Blier,* 2017 ME 103, ¶ 9, 162 A.3d 829; *State v. Michael M.,* 2001 ME 92, ¶ 6, 772 A.2d 1179.[19] If a dog has either successfully completed a drug detection certification program or demonstrated

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[18] Probable cause is an objective standard, such that the investigating officer's subjective belief regarding its existence is irrelevant. *State v. Lepenn,* 2023 ME 22, ¶ 17, 295 A.3d 139.

[19] Probable cause requires more than mere suspicion but less than a preponderance of the evidence (the 'more likely than not' standard). *State v. Martin,* 2015 ME 91, ¶ 10, 120 A.3d 113.

proficiency in a drug detection training program, then its indication establishes probable cause to search.

> [A] well-trained dog's alert establishes a fair probability – all that is required for probable cause – that either drugs or evidence of a drug crime… will be found.

Florida v. Harris, 568 U.S. 237, 246-247, n.2 (2013); see also *State v. Ntim,* 2013 ME 80, ¶ 20, 76 A.3d 370.[20]

Analysis of a dog's indication of an odor of drugs is governed by common sense rather than inflexible rules.

> [T]he court should not prescribe an inflexible set of evidentiary requirements. The question – similar to every inquiry into probable cause – is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal evidence of a crime. A sniff is up to snuff when it meets that test.

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[20] As the United States Supreme Court held in *Florida v. Harris,* 568 U.S. 237, 246-247 (2013):

> [E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs.

Harris, 568 U.S. at 248. Thus, it has long been established that probable cause does not require that a drug dog locate the source of a drug odor and give final indication by sitting or laying down, and instead, even without final indication, probable cause exists if the dog handler can give a specific and objectively reasonable description of "just noticeable differences" in behavior signaling the dog detects an odor of drugs.[21]

Accordingly, in this case the trial court properly found that the dog reliably indicated the presence of an odor of drugs through "just noticeable differences" in its behavior, even though it did not give

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[21] *United States v. Parada,* 577 F.3d 1275, 1282-1283 (10th Cir. 2009) ("We decline to adopt the stricter rule… which would require the dog to give a final indication before probable cause is established."); *United States v. Clayton,* 374 Fed.Appx. 497, 502 (5th Cir. 2010) ("our Fourth Amendment jurisprudence does not require drug dogs to abide by a specific and consistent code in signaling their sniffing of drugs to their handlers"); *United States v. Curry,* 478 Fed.Appx. 42, 44 (4th Cir. 2012) (per curiam); *United States Thomas,* 726 F.3d 1086, 1098 (9th Cir. 2013) (finding the 10th Circuit's rejection of a final indication requirement to be "on the mark," because "probable cause is measured in reasonable expectations, not certainties"); *United States v. Holleman,* 743 F.3d 1152, 1156-1157 (8th Cir. 2014); *United States v. Braddy,* 11 F.4th 1298, 1314-1315 (11th Cir. 2021) ("We decline to adopt this rigid standard, as [under *Harris*] there is no 'strict evidentiary checklist' for assessing whether a drug detection dog is sufficiently reliable.")

final indication that it had located the source of the odor by sitting or laying down.

> Even though Dutch… didn't sit down and indicate that way… I don't think that necessarily excludes probable cause. I think that the dog's behavior was enough…, combined with the other issues that provided the reasonable articulable suspicion, to [establish] probable cause[.]

App. 23. However, the trial court erred in finding that probable cause did not exist before the dog entered the car, ignoring the uncontroverted evidence that the dog immediately demonstrated "just noticeable differences" in behavior as it approached the car doorway.[22]

In a case strikingly similar to the case at bar, the 8th Circuit Court of Appeals held that in the brief "moment" after a dog handler gave the command to find drugs and before the trained drug dog jumped into an open car door, the fact that the dog immediately pulled the handler towards the open door was sufficient to establish

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[22] The trial court's opportunity to observe changes in the dog's behavior during 2 seconds of recorded video was by far inferior to Tr. Fancy's perspective as he stood beside the dog and held it by a leash during the entire sniff (including during the first ten seconds of the sniff when the dog was not even visible on the video), and could see, hear and feel the changes in the dog's behavior.

probable cause to search the car. *United States v. Pulido-Ayala,* 892 F.3d 315, 319 (8th Cir. 2018). In this case, as in *Pulido-Ayala,* the dog's immediate behavioral changes established probable cause to search the car for drugs before the dog entered the car, particularly considered in combination with the other information already known to the police about the occupants' suspicious behavior.[23]

Given the trial court's factual findings endorsing Tr. Fancy's qualifications and his credibility, and the uncontroverted testimony and video evidence showing there were "just noticeable differences" in the dog's behavior as it approached the car doorway and before it entered the car, plus the totality of the information already known

[23] If the trial court's conclusion that the dog's behavior did not establish probable cause before it entered the car was a mixed question of fact and law, then its factual finding was clearly erroneous, because (1) it was not supported by competent evidence, as it was squarely contradicted by Tr. Fancy's uncontroverted testimony and it was refuted by the video, (2) the trial court clearly misapprehended the meaning of the evidence by misinterpreting the dog's behavior, and (3) taken as a whole, the evidence persuades to a certainty that the finding was wrong. *Remick v. Martin,* 2014 ME 120, ¶ 7, 103 A.3d 552.

to the police, the trial court erred in its legal conclusion that probable cause did not exist before the dog entered the car.[24]

2) The trial court erred in its legal conclusion that the dog's entry into the car violated the Fourth Amendment.

As discussed above, the Law Court reviews de novo the trial court's legal conclusions. *Croteau,* 2022 ME 22, ¶ 19, 272 A.3d 286. The trial court erred in its legal conclusion that the dog's entry into the car without direction or encouragement from the police violated the Fourth Amendment.

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[24] The trial court also erred when it made the legal conclusion that Tr. Young did not have probable cause to arrest Early for failure to give his correct name. *App.* 19. Although the trial court made the legal conclusion "I don't think that I can find probable cause just because he left the apostrophe out" (*App.* 19), that legal conclusion contradicted its factual findings that Tr. Young saw Early commit a seatbelt violation and that "[i]t appeared [Early] pretended to be asleep, [and] *was providing false identification."* (*App.* 12, emphasis added). Under 29-A M.R.S. § 105(4) (2021) it is a crime to fail to give your correct name to a police officer who has probable cause to believe you committed a motor vehicle violation, including a seatbelt violation. Under 17-A M.R.S. § 15(1)(B) (2021) police may arrest a person who commits a crime in their presence. Since probable cause is a low standard requiring only "fair probability," clearly Tr. Young had probable cause to arrest Early for failure to give correct name, and incident to that arrest the police would have had lawful authority to search the area of the car within Early's reach. *Arizona v. Gant,* 556 U.S. 332 (2009); *New York v. Belton,* 453 U.S. 454 (1981).

Regarding the conduct of the police during the car search, the trial court found that the car's occupants left the doors open, and the police neither told them to do so nor prevented them from closing the doors. *App.* 10, 18, 30-31.[25] The trial court also found that Tr. Fancy did not intend for the dog to enter the car and did not direct or encourage it to do so, and that the dog was not trained to enter a car during a drug sniff. *App.* 10, 14. Based on those factual findings, it was error for the trial court to make the legal

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[25] Although the trial court found that the officers were in control of the situation and could have asked the occupants to close the doors (*App.* 14), the officers were under no legal duty to do so, nor were the police required to close the doors themselves before the dog sniff. *United States v. Johnson,* 2024 WL 1956209, at *3 (6th Cir., May 3, 2024) ("[Defendant] points to no legal authority, and we know of none, that requires police officers to close car doors before performing a drug sniff"); *United States v. Guidry,* 817 F.3d 997, 1006 (7th Cir. 2016), *cert. denied,* 580 U.S. 865 (2016) (police had no duty to close car door left open by suspect before dog sniff); *United States v. Miles,* No. 3:17-CR-100-CRS, 2018 WL 1903608, at *6 (W.D. Kentucky, Mar. 19, 2018) (police had no duty to close car door before dog sniff); *United States v. Irvin,* No. 07-20557, 2012 WL 5817903, at *6 (E.D. Michigan, Sep. 20, 2012) (police had no duty to close car door before dog sniff); *United States v. Sharp,* 689 F.3d 616, 620 (6th Cir. 2012), *cert. denied,* 568 U.S. 1056 (2012) (police had no duty to close car window before dog sniff); *United States v. Lyons,* 486 U.S 367, 373. (8th Cir. 2007) (police had no duty to close car window before dog sniff); *United States v. Pulido-Ayala*, 892 F.3d 315, 319-320 (8th Cir. 2018) (police had no duty to close car door left open by passenger before dog sniff).

conclusion that the dog's entry into the car violated the Fourth Amendment.

Seven federal courts of appeals have addressed this issue (the 3rd, 5th, 6th, 7th, 8th, 10th and 11th Circuits), and they unanimously hold that it does not violate the Fourth Amendment when, during a drug sniff around the outside of a car, the dog instinctively enters into the car of its own volition and without the dog handler's instruction or encouragement.[26] On the other hand, it *does* violate

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[26] *United States v. Pierce,* 622 F.3d 209 (3d Cir. 2010) (no Fourth Amendment violation when dog jumped through open car door, instinctively and without facilitation by its handler, then alerted on glove box); *United States v. Wilson,* 2024 WL 3634199, at *2, n.1 (5th Cir., Aug. 2, 2024) (no Fourth Amendment violation when dog jumped into car through open passenger window, where officers did not direct it to do so); *United States v. Sharp,* 689 F.3d 616, 620 (6th Cir. 2012), *cert. denied,* 568 U.S. 1056 (2012) (no Fourth Amendment violation when dog jumped through open car window, instinctively and with no encouragement from its handler, and alerted on the front passenger seat); *United States v. Johnson,* 2024 WL 1956209, at *3 (6th Cir., May 3, 2024) (no Fourth Amendment violation where dog, of its own volition, partially entered truck cab through open driver's door); *United States v. Guidry,* 817 F.3d 997, 1006 (7th Cir. 2016), *cert. denied,* 580 U.S. 865 (2016) (no Fourth Amendment violation when dog stuck its head through open car door, with no encouragement or facilitation from handler); *United States v. Lyons,* 486 F.3d 367 (8th Cir. 2007); *United States v. Stone,* 866 F.2d 359, 364 (10th Cir. 1989) (no Fourth Amendment violation when police dog instinctively jumped into car's hatchback, which suspect had left open, with no encouragement from the dog handler); *United States v. Vazquez,* 555 F.3d 923 (10th Cir., 2009);

the Fourth Amendment if the police facilitate or encourage a dog's entry into a car, such as by opening a closed door, lifting the dog, or removing impediments to its entry.[27] Although the First Circuit Court of Appeals has not yet addressed this issue, the federal District Court for the District of Maine has noted the unanimity of the holdings of other federal appellate courts. *United States v. Artis,* No. 2:17-cr-102-DBH, 2018 WL 3037420, at *3 (D. Me., Jun. 19, 2018) (noting the unanimous circuit court cases allowing the permissible scope of a dog sniff "to expand to the car's interior…

United States v. Moore, 795 F.3d 1224 (10th Cir. 2015); *United States v. Mostowicz,* 471 Fed. Appx. 887, 891 (11th Cir. 2012) (unpublished) (no Fourth Amendment violation when dog instinctively jumped through open car door, without encouragement or facilitation from police officers, and alerted on the center console). See also, *United States v. Zabokrtsky,* No. 5:19-cr-40089-HLT-I, 2020 WL 1082583 (D. Kan., Mar. 6, 2020), *State v. Beames,* 511 P.3d 1226, 1233 (Utah Ct. App., May 12, 2022), and *United States v. Iverson,* 897 F.3d 450, 461 (2nd Cir. 2018), noting unanimity of federal appellate court opinions on this issue.

[27] See e.g., *United States v. Winningham*, 140 F.3d 1328, 1329-1330 (10th Cir. 1998) (Fourth Amendment violated when police officer opened van door and actively encouraged dog to enter by removing its leash); *State v. Freel,* 32 P.3d 1219, 1225 (Kansas 2001) (Fourth Amendment violated when police encouraged dog to enter into car); *State v. Warsaw,* 956 P.2d 139, 143 (N.M. 1997) (Fourth Amendment violated when handler, expecting dog would jump into open car trunk, reached in to remove broken glass).

when the dog instinctively jumps in without the handler's facilitation.")

In rejecting that solid federal precedent, the trial court relied on an opinion from a decision of the United States District Court for the Northern District of Iowa in *United States v. Buescher,* and a decision from the Supreme Court of Idaho in *State v. Randall*. However, the trial court's reliance on those two decisions was misplaced because both decisions resulted from facts that were critically different from this case.

In *Buescher*, a federal district court in Iowa held that a drug dog's entry into an automobile (by putting his nose in an open window and then putting his head inside as he tried to jump in) violated the Fourth Amendment because the dog handler testified the dog actually was *trained* to do just that. *United States v. Buescher,* __ F. Supp. 3d __, No. CR23-4014-LTS, 2023 WL 5950124, at *8-*10 (D. Iowa, Sep. 12, 2023).[28] Thus, the *Beuscher*

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[28] The *Buescher* opinion focused on and quoted the dog handler's testimony that the drug dog was *trained* to enter the suspect's vehicle:

> Q: […] what did he do… on the third pass?
> A: He put his nose in the vehicle and then tried to jump in the vehicle.

opinion rests on the fact that the police encouraged or facilitated the dog's entry into the car by training it to do so. In contrast, compare *United States v. Sharp,* in which the Sixth Circuit Court of appeals held there was no Fourth Amendment violation where "[t]he drug dog jumped into Defendant's car because the dog smelled drugs in the car, *not because he was trained to jump into the car.*" 689 F.3d 616, 620 (6th Cir. 2012), *cert. denied,* 568 U.S. 1056 (2012) (emphasis added). In this case, like *Sharp* and unlike *Beuscher,* there was no evidence to suggest the dog was trained to enter the car, and in fact the trial court expressly found that the police did not encourage or train it to do so. Therefore, the *Beuscher* opinion does not support the trial court's legal conclusion.

In *Randall,* the Idaho Supreme Court held that absent probable cause to search, *any* physical entry into a car by a drug

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Q: Is that what he's trained to do?
A: Yes.

United States v. Buescher, __ F. Supp. 3d __, No. CR23-4014-LTS, 2023 WL 5950124, at *1, *3, *8 (D. Iowa, Sep. 12, 2023). The opinion noted "Not only had [the dog] done this previously, but Officer Kerr suggested [the dog] is actually trained to do so." *Id.,* at *10. Thus, the federal judge found the entry violated the Fourth Amendment in large part because the police had trained the drug dog to enter the suspect's vehicle. *Id.,* at *9-*10.

dog violates the Fourth Amendment. *State v. Randall,* 496 P.3d 844, 854 (Idaho 2021). However, *Randall* was critically different from this case because in *Randall* there was no evidence that the dog had detected an odor of drugs *before* it entered the car. Indeed, the Idaho Supreme Court conceded, "where competent evidence exists to explain why a drug dog has entered a car, the instinctive entry rule could be applied consistently with the Fourth Amendment." *Randall,* 496 P.3d at 854. Thus, even the Idaho Supreme Court would find lawful a drug dog's entry into a suspect's car if, as here, the dog demonstrated it detected an odor of drugs coming from the car before it entered. Additionally, *Randall* differs from this case because Tr. Fancy did not encourage or assist the drug dog to enter the vehicle, while the dog handler in *Randall* helped the dog when he "gave Bingo a boost, pushing him fully into the car." *Randall,* 496 P.3d at 847. Because of those important factual differences, and the contrary federal appellate court precedent, the trial court's reliance on *Randall* was misplaced.[29]

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[29] Even within Idaho, the federal district court has rejected *Randall's* legal conclusion. *United States v. Mahan,* 2021 WL 1341038, at *6 (D. Idaho, Apr. 9, 2021) (noting unanimous federal appellate court opinions on this issue, and holding there was no

The trial court also relied on two United States Supreme Court cases, *Florida v. Jardines* and *United States v. Jones,* to support its view that *any* physical trespass involving the police violates of the Fourth Amendment, but those cases are inapposite because they involved actual police officers intruding into protected spaces, not a drug dog entering a suspect's car of its own volition and without direction or encouragement from the police. *Jardines* involved unlawful physical intrusion into the curtilage of a home by a police officer and his dog. *Florida v. Jardines,* 569 U.S. 1, 6-7 (2013). *Jones* involved unlawful physical intrusion into an automobile by a police officer to install a GPS tracking device, which then was used to monitor the vehicle's location. *United States v. Jones,* 565 U.S. 400, 404 (2012). Thus, *Jardines* and *Jones* are factually different from this case and the unanimous line of federal appellate court cases holding that a drug dog's instinctive entry into a suspect's car does not violate the Fourth Amendment.

Furthermore, some of those federal appellate court opinions were decided years after *Jardines* and *Jones*, disproving the trial

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Fourth Amendment violation when a drug dog instinctively jumped through an open car window and alerted on a bag inside the car).

court's theory that those Supreme Court cases invalidated that holding, nor has any federal appellate court backed away from that holding in the wake of *Jardines* and *Jones*. See e.g., *United States v. Guidry*, 817 F.3d 997 (7th Cir. 2016), *cert. denied,* 580 U.S. 865 (2016); *United States v. Moore,* 795 F.3d 1224 (10th Cir. 2015).

Given the great weight of the opinions of the seven federal courts of appeals that have decided this issue, unanimously holding that it does not violate the Fourth Amendment when a drug dog instinctively enters a suspect's car without direction or encouragement from the police, the trial court's contrary legal conclusion was error.

3) The trial court erred in its legal conclusion that suppression of evidence was warranted because its decision marked a new departure from established federal precedent and there was no intentional police misconduct.

As discussed above, the Law Court reviews de novo the trial court's legal conclusions and its ultimate decision to suppress evidence. *Croteau,* 2022 ME 22, ¶ 19, 272 A.3d 286. Even if the dog's entry into the car violated the Fourth Amendment, it was legal error for the trial court to conclude that the suppression remedy was warranted because its decision marked a new departure from

established federal precedent and there was no intentional police misconduct.

The United States Supreme Court has long held that the exclusionary rule does not apply automatically for every violation of the Fourth Amendment.

> The fact that a Fourth Amendment violation occurred – *i.e.* that a search or arrest was unreasonable – does not necessarily mean that the exclusionary rule applies. *Illinois v. Gates,* 462 U.S. 213 (1983). Indeed, exclusion "has always been our last resort, not our first impulse." *Hudson v. Michigan,* 547 U.S. 586 (2006), and our precedents establish important principles that constrain application of the exclusionary rule.

Herring v. United States, 555 U.S. 135, 141 (2009). Thus, the exclusionary rule does not apply when the police act in good faith reliance on the validity of a search warrant, a statute, or case law that later is determined to be invalid. *United States v. Leon,* 468 U.S. 897, 906 (1984) (search warrant); *Illinois v. Krull,* 480 U.S. 340, 349 (1987) (statute); *Davis v. United States,* 564 U.S. 229, 241 (2011) (case law).

In *Davis v. United States,* the Supreme Court held that the good faith exception to the exclusionary rule applies when police search a car in reliance on case law that later is overruled. 564

U.S. 229, 241 (2011). The Maine Law Court, citing *Davis,* has recognized and adopted the good faith exception.

> Accordingly, the good faith exception has been applied when a law enforcement officer reasonably relies, in good faith, on a statute or common law rule that the officer has no reason to believe was unconstitutional and which has previously been declared constitutional by an appellate court with binding authority. *See Davis v. United States*, 564 U.S. 229, 241, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.")

State v. Weddle, 2020 ME 12, ¶ 35, 224 A.3d 1035.

In deciding whether the good faith exception applies, the courts must consider the exclusionary rule's limited purpose.

> The purpose of the exclusionary rule is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. The rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered. Instead, the rule acts as a remedial device that safeguards Fourth Amendment rights generally through its deterrent effect, rather than as a personal constitutional right of the party aggrieved.

Weddle, 2020 ME 12, ¶ 32, 224 A.3d 1035, citing *United States v. Calandra,* 414 U.S. 338, 347 (1974), *Leon,* 468 U.S. at 906, and *Krull,* 480 U.S. at 347 (internal quotations omitted). The exclusionary rule is grounded in the need to deter only

extraordinary police misconduct involving "flagrant or deliberate violation of rights," or "abuses that… featured intentional conduct that was patently unconstitutional." *Herring,* 555 U.S. at 143. By contrast, "[a]n error that arises from nonrecurring and attenuated negligence… is far removed from the core concerns that led us to adopt the rule in the first place," and therefore does not trigger the exclusionary rule. *Id.,* at 144-145.

Furthermore, application of the exclusionary rule is not an individual right; it applies only if it will have a significant deterrent effect on future violations by the police. *Id.* The benefit of deterrence must outweigh the substantial social costs of letting guilty defendants go free, which presents a high obstacle for those urging its application. *Id.* at 141-142, citing *Leon,* 468 U.S. at 910, *Krull,* 480 U.S. at 349, and *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357, 364-365 (1998). Thus, the focus of the analysis is on the gravity of the police misconduct, and "evidence should be suppressed only if… the law enforcement officer… may properly be charged with knowledge… that the search was unconstitutional." *Herring,* 555 U.S. at 142, quoting *Krull,* 480 U.S. at 348-349, and *United States v. Peltier,* 422 U.S. 531, 542 (1975).

In this case, the trial court found that the troopers were "professional" and "courteous," that "there certainly wasn't any malicious conduct," that "I don't take any issue with their general conduct toward these particular defendants during… the stop," and that "their testimony was credible." *App.* 21, 31. It also found that "Tr. Fancy did not intend for the dog to enter the car, and he did not encourage or train it to do so." *App.* 10, 14. However, the trial court made a legal conclusion that merely because the police "were in control of the situation" (*App.* 21, 31), and because Tr. Fancy "fail[ed] to restrain the dog from entering the car" (*App.* 13-14), that failure was police misconduct warranting suppression of evidence.

> [M]aybe that means you handle the dog differently so the dog doesn't go in the car… So to the extent there's wrongdoing, it was that [-] whether it's in the training of the dog or in – that the police should have been able to avoid that happening. […] So I am going to deny… the State's motion for reconsideration.

App. 21.

Again, the trial court's legal conclusion contradicts the unanimous holdings of all seven federal courts of appeals that have addressed this issue (cited above), because in each one of those cases the police were in control of the situation during

the dog sniff and they failed to prevent the dog from entering a vehicle, just as in this case, yet none of the federal courts of appeals concluded that constituted police misconduct warranting suppression of evidence. Based on that precedent, the trial court's legal conclusion was wrong. Furthermore, the trial court's specific finding that the dog's entry into the car resulted from negligence, not deliberate violation of rights or intentional police misconduct, precludes the suppression remedy. *Herring,* 555 U.S. at 143-145.

Additionally, the trial court's conclusion marks a radical new departure from federal case law, such that the good faith exception based on police reliance on existing precedent should apply, as posited in *Davis* and in *Weddle.* The police officers did not engage in any misconduct, much less any extraordinary and flagrant misconduct or "abuses that featured intentional conduct that was patently unconstitutional," such that the need for deterrence outweighs the substantial social costs of letting guilty defendants go free. *Leon,* 468 U.S. at 910; *Herring,* 555 U.S. at 143. Therefore, the trial court erred in its legal conclusion that suppression of evidence was warranted.

CONCLUSION

For all of the foregoing reasons, the Law Court should vacate and reverse the trial court's decision and deny Fitzgerald's motion to suppress evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused two true copies of the foregoing brief to be served upon counsel for Appellee Kyle Fitzgerald by first class United States mail, postage pre-paid, addressed to: Daniel Wentworth, Esq., Law Offices of Dylan Boyd, 6 City Center, Suite 301, Portland, Maine 04101.

Dated: December 16, 2024

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