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SCHRÖDINGER'S POT AND THE ONGOING PUZZLE OF THE EXCEPTIONS TO THE WARRANT REQUIREMENT

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I. INTRODUCTION

Not long after the automobile exception was established in 1925,[1] Erwin Schrödinger created a thought experiment popularly known as Schrödinger's Cat.[2] This thought experiment, better known as the Copenhagen Interpretation, was intended to illustrate the absurdity of recent developments in quantum theory, as applied to real life objects.[3] Put simply, the Copenhagen Interpretation states "that a particle exists in all states at once until observed."[4] Under this popular theory, Schrödinger devised a scenario in which a cat could be considered both dead and alive at the same time.[5] Schrödinger explained that this result is absurd, counterintuitive, and hopefully "prevents us from so naively accepting as valid a 'blurred model' for representing reality."[6]

In 2014, the Maryland General Assembly decriminalized the possession of less than ten grams of marijuana.[7] Based on this statute, without observing the total amount of marijuana, the possession of marijuana exists in a superposition of two states: it is civil and criminal in nature.[8] It is only upon observation by an officer that the nature of the offense reduces to one state: criminal or civil, but not both.[9] As we will see in the 2019 case of *Pacheco v. State*, like Schrödinger's thought experiment, the dual state of marijuana possession resulting from Maryland's 2014 statute is also counterintuitive and produces absurd results.[10] In effect, this statute has further blurred the analysis of probable cause as it relates to exceptions to the warrant requirement in an age of decriminalization.[11]

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1. Carroll v. United States, 267 U.S. 132, 155–56 (1925) (establishing the automobile exception to the Fourth Amendment prohibition on warrantless search and seizure); *see* Theo Merz, *Schrödinger's Cat Explained*, TELEGRAPH (Aug. 11, 2013, 11:36 PM), https://www.telegraph.co.uk/technology/google/google-doodle/10237347/Schrodingers-Cat-explained.html?fb [https://perma.cc/7LTC-HCPP].
2. Merz, *supra* note 1.
3. *See id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. 214 A.3d 505, 510 (Md. 2019).
8. *See id.* at 514–15 (citing Robinson v. State, 152 A.3d 661, 683 (Md. 2017)).
9. *See id.* at 514–15, 517.
10. *See infra* Sections III.C, IV.B–.D.
11. *See infra* Sections IV.A–.B.

In this Comment, I will argue that the complex nature of the 2014 legislation and its interaction with the exceptions to the warrant requirement led the Court of Appeals of Maryland to decide *Pacheco v. State* in a manner inconsistent with Federal and State case law.[12] Furthermore, the counterintuitive nature of this statute, in which marijuana exists in a superposition of two states, does little to further its legislative goals, thus supporting the argument for complete decriminalization or legalization of marijuana.[13]

Part II of this Comment will discuss the development and current standard for (1) probable cause in general, (2) the automobile exception to the warrant requirement, and (3) the search incident to arrest exception to the warrant requirement.[14]

Part III will analyze Maryland's 2014 statute which decriminalized the possession of less than ten grams of marijuana, and recent case law from the Court of Appeals of Maryland, which describes the initial impact of this decriminalization statute on the former probable cause standards and exceptions set forth in Part II.[15]

Part IV will first analyze the historical impact of the increasingly complex doctrine of probable cause on Federal and State courts, individual rights, and law enforcement.[16] Part IV will then explain why the *Pacheco* decision was inconsistent with prior Federal and State case law regarding the probable cause framework and exceptions to the warrant requirement.[17] This has resulted from the absurd and counterintuitive dual nature of possession of marijuana under Maryland's 2014 statute.[18]

Lastly, Part V of this Comment will conclude with a suggestion to the Maryland General Assembly to completely decriminalize or legalize the possession of marijuana.[19] The 2014 statute has not furthered goals of addressing racial disparity in police arrests and citations, and has confused the courts enough to yield a decision inconsistent with fundamental concepts of probable cause.[20] Complete legalization or decriminalization of marijuana would help reduce the impact of racial bias in policing, prevent the waste of judicial resources, and ultimately provide clear guidance to law

12. *See infra* Sections IV.B–.C.
13. *See infra* Section IV.D.
14. *See infra* Part II.
15. *See infra* Part III.
16. *See infra* Section IV.A.
17. *See infra* Sections IV.B–.C.
18. *See infra* text accompanying notes 70–74.
19. *See infra* Part V.
20. *See infra* text accompanying notes 59–68, 106–07.

enforcement in an era of decriminalization and legalization of marijuana.[21]

II. BACKGROUND: THE PROBABLE CAUSE DOCTRINE AND THE EXCEPTIONS TO THE WARRANT REQUIREMENT

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures.[22] A search that is conducted without a warrant is considered "per se unreasonable under the Fourth Amendment."[23] As with many bright-line rules, the former presumption is "subject only to a few specifically established and well-delineated exceptions."[24] As of now, there are many exceptions to the warrant requirement,[25] however, two are of importance in *Pacheco*: (1) the automobile exception and (2) the search incident to arrest exception.[26] Before analyzing Maryland's 2014 marijuana legislation and the legal implications of *Pacheco*, the former exceptions will be reviewed in succession.[27]

A. The Birth of the Automobile Exception and the Current Standard

In 1925 the Supreme Court established the automobile exception to the warrant requirement in *Carroll v. United States*.[28] As the country transitioned into an era of prohibition, this exception made it possible for law enforcement to stop rum-running automobiles engaged in illegal transportation of alcohol.[29] As the doctrine evolved, "*Carroll* and its progeny authorize the warrantless search of a lawfully-stopped vehicle where there is probable cause to believe the vehicle contains contraband or evidence of a crime."[30] Consequently, the

21. *See infra* Part V and Sections III.A–.B, IV.A–.C.
22. U.S. CONST. amend. IV.
23. Katz v. United States, 389 U.S. 347, 357 (1967).
24. *Id.*
25. California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring). In his concurring opinion, Justice Scalia noted that "[i]n 1985, one commentator cataloged nearly 20 such exceptions [to the warrant requirement]. . . . Since then, we have added at least two more." *Id.*
26. 214 A.3d 505, 510–12 (Md. 2019).
27. *See infra* Part II.
28. *See* 267 U.S. 132 (1925); *see also Pacheco*, 214 A.3d. at 510–11 (discussing origin of the automobile exception).
29. *See Carroll*, 267 U.S. at 146.
30. State v. Johnson, 183 A.3d 119, 128 (Md. 2018).

legality of a warrantless search of a vehicle is largely dependent on a probable cause analysis.[31]

While the Supreme Court has restated that probable cause "is incapable of precise definition or quantification,"[32] they have insisted that this standard be described as "practical" and "nontechnical."[33] In *Robinson v. State*, the Court of Appeals of Maryland restated several helpful observations relating to a probable cause analysis.[34] As early as the 1980s, critics feared the vast expansion of the automobile exception pushed "[w]arrants for searches of automobiles . . . on the verge of absolute extinction."[35] The Supreme Court seemed to justify this expansion, as the reasons in support of the automobile exception have also grown.[36] Even prior to the former criticism, the late Justice Burger stated, "[b]esides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[37] Additionally, "[b]ecause vehicles on the road are heavily regulated, individuals understand that the government has some interest in the vehicle, the condition of a vehicle's driver, and perhaps, the contents of the vehicle."[38] However, Courts have consistently held that the same logic that may support a warrantless search of one's automobile does not necessarily support a warrantless search of that person.[39]

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31. *See Pacheco*, 214 A.3d at 511.
32. Maryland v. Pringle, 540 U.S. 366, 371 (2003).
33. *Id.* at 370.
34. 152 A.3d 661, 671–72, 674–79 (Md. 2017) (discussing creation of the automobile exception and how the Maryland Court of Special Appeals and courts in other jurisdictions have applied it within the context of marijuana decriminalization).
35. Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RSRV. L. REV. 375, 376–77 (1986). "By applying diverse justifications for not obtaining a warrant and shifting justifications from case to case, the present Court exploits this 'labyrinth of uncertainty' to negate constitutional restraints on police behavior." *Id.* at 379 (footnotes omitted). Katz further argues that these additional justifications "are a total betrayal of the Court's traditional catechism that warrantless searches are per se unreasonable." *Id.* at 381.
36. *See* California v. Carney, 471 U.S. 386, 391–92 (1985).
37. South Dakota v. Opperman, 428 U.S. 364, 367 (1976).
38. Jackie L. Starbuck, Comment, *Redefining Searches Incident to Arrest:* Gant*'s Effect on* Chimel, 116 PENN ST. L. REV. 1253, 1272–73 (2012) ("The regulation of vehicles, the fact that vehicles and their contents are often in plain view, and the public nature of travel all contribute to the lesser sense of privacy that can be reasonably expected in vehicles.").
39. *E.g.*, Pacheco v. State, 214 A.3d 505, 518 (Md. 2019).

B. The Search Incident to Arrest Exception and the Heightened Protection Afforded to One's Person

Historically, the Supreme Court has provided "unique . . . [and] significantly heightened protection . . . against searches of one's person."[40] This principle was strongly manifested in the Supreme Court case *Terry v. Ohio*, as well *Pacheco*.[41] For example, the late Chief Justice Warren wrote the following: "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[42]

As the name of the exception suggests, "the condition precedent to a search incident to arrest is that police have made a lawful custodial arrest of the person, that is, an arrest supported by probable cause that the arrestee has committed or is committing a crime."[43] Courts must be careful to assess whether probable cause existed prior to the lawful arrest.[44] Any facts that may be uncovered by the search of one's person before a lawful arrest must not be used to "bootstrap the search itself into constitutional compliance."[45] It is important to note, however, that Courts have held "[f]or a search to be an incident of an arrest, it need not literally follow the arrest."[46] It is only "axiomatic that an incident search may not precede an arrest *and* serve as part of its justification."[47] In *United States v. Davis*, the District Court of New York expanded on this concept:

> A search incident to arrest need not necessarily occur after formal arrest to be valid, but the argument that the search was incident to arrest becomes more strained when the facts show that a defendant would not have been arrested but for the fact that the search produced evidence of a crime[.][48]

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40. Wyoming v. Houghton, 526 U.S. 295, 303 (1999).
41. *See* Terry v. Ohio, 392 U.S. 1, 24–25 (1968); *see Pacheco*, 214 A.3d at 518.
42. *Terry*, 392 U.S. at 24–25.
43. *Pacheco*, 214 A.3d at 512 (citing Maryland v. Pringle, 540 U.S. 366, 369–70 (2003)).
44. *Id.* ("[T]he first question to be considered whenever such a search has been conducted is whether the police had the requisite probable cause *before* conducting the search.").
45. *See* Joshua Deahl, *Debunking Pre-Arrest Incident Searches*, 106 CAL. L. REV. 1061, 1064 (2018).
46. State v. Funkhouser, 782 A.2d 387, 407 (Md. Ct. Spec. App. 2001).
47. *Id.* (emphasis added) (quoting Sibron v. New York, 392 U.S. 40, 63 (1968)).
48. 111 F. Supp. 3d 323, 334 (E.D.N.Y. 2015). Similarly, in *United States v. Wilson*, the United States Court of Appeals for the Second Circuit held, "[o]nce probable cause was established, it is irrelevant whether the officers' searches of [the defendant] occurred prior or subsequent to his arrest." 94 F. App'x 14, 17 (2d Cir. 2004).

Overall, compared to the automobile exception, the probable cause standard remains the same, however, the standard is applied to "somewhat different facts and circumstances[.]"[49] Generally, in context of a search incident to arrest, the focus should be on the "likelihood of the 'guilt of the arrestee,'"[50] while considering the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[51]

III. PRINCIPLE CASES: MARYLAND LEGISLATION AND CASE LAW

A. The History, Goals, and Effect of Maryland's 2014 Decriminalization Statute

In 2010, "Maryland [had] one of the highest arrest rates for marijuana possession in the country - it [was] fourth in the nation."[52] Arrests for drug possession offenses totaled 38,179.[53] Arrests for possession of marijuana, in any amount, constituted about sixty-one percent of all drug possession arrests, or a total of 23,552 in 2010.[54] Of these arrests, "whites were arrested at a rate of less than three per 1,000, while blacks were arrested at a rate of roughly eight per

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49. *Pacheco*, 214 A.3d at 513. In *United States v. Humphries*, the Fourth Circuit stated that in the context of arrest, "the question is whether the totality of the circumstances indicate to a reasonable person that a 'suspect has committed, is committing, or is about to commit' a crime[,]" and not just whether "contraband or evidence of a crime will be found in a particular place." 372 F.3d 653, 659 (4th Cir. 2004). Furthermore, *Pacheco* quotes language from *Humphries* which elaborates on this distinction:

> In the search context, the question is whether the totality of circumstances is sufficient to warrant a reasonable person to believe that contraband or evidence of a crime will be found in a particular place. Whereas in the arrest context, the question is whether the totality of the circumstances indicate to a reasonable person that a "suspect has committed, is committing, or is about to commit" a crime.

Pacheco, 214 A.3d at 513.

50. *Pacheco*, 214 A.3d at 513 (citation omitted).
51. *Id.* at 512 (quoting Maryland v. Pringle, 540 U.S. 366, 370 (2003)).
52. *ACLU Report on Racial Disparities in Marijuana Arrests*, ACLU MARYLAND (June 4, 2013), https://www.aclu-md.org/en/press-releases/aclu-report-racial-disparities-marijuana-arrests [https://perma.cc/K5ZS-VH2K].
53. *Crime Data Explorer: Maryland*, FBI, https://crime-data-explorer.fr.cloud.gov/explorer/state/maryland/arrest [https://perma.cc/5JCD-SEUH] (last visited Mar. 30, 2021).
54. *See id.*

1,000[,]"[55] despite comparable usage rates between whites and blacks.[56] State and local governments' aggressive enforcement of laws criminalizing marijuana disproportionately impacted Black people and their communities.[57] For example, in 2010, Maryland had the ninth highest rate of spending on such enforcement in the U.S., totaling $106 million.[58]

In 2014, the Maryland General Assembly decriminalized the possession of fewer than ten grams of marijuana.[59] Drafters of this legislation intended to address "concerns over the disproportionate number of African-Americans arrested for marijuana,"[60] noting that the disproportionate arrest rate raised serious concerns of civil rights violations.[61]

The 2014 statute is a step in the right direction toward these goals. However, it does not do enough to achieve them.[62]

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55. *ACLU Report on Racial Disparities in Marijuana Arrests*, *supra* note 52.
56. *Id.*
57. EZEKIEL EDWARDS ET AL., THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 9 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [https://perma.cc/PE6M-HMN9].
58. *In Maryland, Black People Found to Be 3 Times More Likely to Be Arrested for Marijuana Possession than White People, Despite Equal Usage Rates*, ACLU (June 4, 2013), https://www.aclu.org/press-releases/maryland-black-people-found-be-3-times-more-likely-be-arrested-marijuana-possession?quicktabs_content_video_podcasts=1&redirect=criminal-law-reform/maryland-black-people-found-be-3-times-more-likely-be-arrested-marijuana [https://perma.cc/8NEP-3AH5].
59. S.B. 364, 434th Gen. Assemb., Reg. Sess. (Md. 2014).
60. Pacheco v. State, 214 A.3d 505, 514 (Md. 2019). Furthermore, "[t]he decriminalization was an effort to reduce the considerable time and resources spent on arresting, prosecuting, and adjudicating marijuana cases." *Id.*
61. Fredrick Kunkle & John Wagner, *Maryland Gov. O'Malley Will Sign Marijuana Decriminalization Bill, He Says*, WASH. POST (Apr. 7, 2014), https://www.washingtonpost.com/local/md-politics/maryland-gov-omalley-will-sign-marijuana-decriminalization-bill-senior-aide-says/2014/04/07/d50ec44c-be8f-11e3-bcec-b71ee10e9bc3_story.html [https://perma.cc/R24C-XPFC].
62. *See generally, e.g.*, Balt. Sun Editorial Board, *More Blacks Still Arrested for Marijuana Charges*, BALT. SUN (Jan. 3, 2019, 1:15 PM), https://www.baltimoresun.com/opinion/editorial/bs-ed-0103-african-americans-marijuana-arrests-20190102-story.html [https://perma.cc/95VS-HA39].

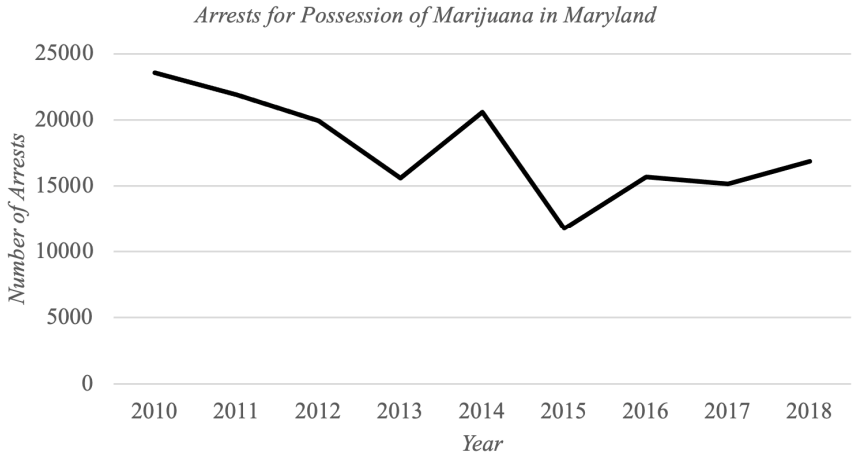

Figure 1

Figure 1[63] shows a decrease in total arrests for possession of marijuana following passage of the 2014 legislation.[64] However, racial disparities in arrests for marijuana possession did not change, and arrests overall ultimately increased before leveling out. For example, "[i]n the first three years after the law was instituted, Baltimore police arrested 1,448 adults and 66 juveniles for possession . . . . Of those, 1,450 – 96 percent – were black."[65] Overall, the arrest rates for marijuana possession in Maryland remained below their pre-2014 levels.[66] However, a racially disproportionate rate of citations for cannabis possession took the place of such arrests.[67] One news website noted that, since 2014, Baltimore Police have issued an increasing number of cannabis citations each year, "from 44 in 2015 to 200 in 2016 to 429 in 2017."[68]

In the statute, the meaning of "decriminalization" is ambiguous.[69] Under the statute, the possession of marijuana—in any

63. *Crime Data Explorer: Maryland*, *supra* note 53.
64. Balt. Sun Editorial Board, *supra* note 62.
65. *Id.*
66. *Crime Data Explorer: Maryland*, *supra* note 53.
67. *See* Monique Judge, *Marijuana Decriminalization in Maryland Has Not Stopped Implicit Bias nor Institutional Racism Against Black People*, THE ROOT (Jan. 2, 2019, 2:57 PM), https://www.theroot.com/marijuana-decriminalization-in-maryland-has-not-stopped-1831437660 [https://perma.cc/9L3S-ALEQ].
68. *Id.*
69. *See* Robinson v. State, 152 A.3d 661, 680 (Md. 2017) (discussing the impact of the decriminalization statute on the legality of marijuana possession).

amount—remains illegal.[70] However, the possession of less than ten grams of marijuana no longer constitutes a criminal offense.[71] Instead, individuals possessing this amount will receive a civil citation.[72] As discussed in Part IV of this Comment, the interaction between the probable cause doctrine, the exceptions to the warrant requirement, and the 2014 criminal versus civil distinction is another challenge courts must consider,[73] and one that is relevant in *Pacheco*.[74]

B. Deeper Dive into the Civil or Criminal Nature of Marijuana in Robinson v. State

Prior to *Robinson v. State*, the Court of Appeals of Maryland had "not yet addressed the impact of the decriminalization of possession of less than ten grams of marijuana on an analysis of probable cause."[75] However, the *Robinson* Court was guided by the legislative intent behind the statute.[76] For example, they noted the following:

> In short, the statute's plain language and legislative history demonstrate that the General Assembly, in decriminalizing the possession of small amounts of marijuana, did not intend to otherwise alter existing case law concerning the search, seizure, and forfeiture of marijuana, which remains illegal.[77]

Therefore, the probable cause standard was unaffected; however, it remained unclear how the underlying circumstances, more specifically the civil versus criminal nature of marijuana, would impact the former analysis.[78]

The facts presented in *Robinson* are straightforward: while driving, Officer Steven Vinias detected a strong odor of marijuana coming from Jermaul Robinson's vehicle.[79] Robinson was leaning against

70. *Id.* at 680.
71. *Id.*; *see also* Jenna Johnson, *Having a Small Amount of Pot in Md. Is No Longer a Criminal Case*, WASH. POST (Oct. 1, 2014), https://www.washingtonpost.com/local/md-politics/pot-decriminalization--for-small-amounts--takes-effect-in-maryland-on-wednesday/2014/09/30/bc379534-48a5-11e4-891d-713f052086a0_story.html [https://perma.cc/8DBL-85BM].
72. *Robinson*, 152 A.3d at 680.
73. *See infra* Sections IV.A, .D.
74. *See infra* Section III.C.
75. 152 A.3d at 674.
76. *See id.* at 681.
77. *Id.*
78. *See id.* at 663.
79. *Id.* at 665.

his vehicle and it was the only vehicle on that side of the street.[80] Officer Vinias testified that the smell of marijuana was clearly coming from the vehicle.[81] A subsequent search of Robinson's vehicle uncovered more than ten grams of marijuana.[82] Robinson argued, in part, that because the 2014 legislation considered less than ten grams of marijuana a civil offense, the mere odor of marijuana does not give rise to probable cause that Robinson was in possession of a criminal amount.[83]

As previously stated, the Court of Appeals of Maryland began their analysis by reviewing the legislative intent and history of the decriminalization statute.[84] Although the 2014 legislation decriminalized the possession of the lesser amount of marijuana, any amount of marijuana remained contraband and illegal to possess.[85] While refusing to accept Robinson's argument, the Court repeatedly stated, "[d]ecriminalization is not the same as legalization."[86] The *Robinson* Court did not solely rely on the legislative intent in making its decision.[87] Instead, the Court discussed basic Fourth Amendment case law[88]—i.e., where an officer has probable cause to believe that a lawfully stopped vehicle contains contraband or evidence of a crime, they may conduct a warrantless search of that vehicle.[89] It follows that "a warrantless search of a vehicle is permissible upon detection of the odor of marijuana emanating from the vehicle."[90] Essentially, *Robinson* concludes that the odor of marijuana coming from a vehicle means there is a fair probability that the defendant has marijuana in the vehicle, regardless of whether the officer believed the amount only constituted a civil violation.[91]

Furthermore, *Robinson* also states that "[t]he [mere] odor of marijuana emanating from a vehicle may be just as indicative of crimes [that involve an amount greater than ten grams.]"[92] The Court lists three crimes as an example: "possession of ten grams or more of

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 669.
84. *See id.* at 672–73.
85. *Id.* at 680.
86. *Id.*
87. *See generally id.* at 670–72 (discussing the basic concepts of probable cause and the exceptions to the warrant requirement).
88. *See id.*
89. *Id.* at 687.
90. *Id.* at 681.
91. *See id.*
92. *Id.* at 685.

marijuana, crimes involving the distribution of marijuana, and driving under the influence of a controlled and dangerous substance."[93]

C. Pacheco v. State

In *Pacheco*, the Court of Appeals of Maryland took *Robinson* a step further by determining the impact of this legislation on the search incident to arrest exception.[94] The facts presented in *Pacheco* are again quite simple[95]: two officers were conducting a routine foot patrol late at night in Wheaton, Maryland.[96] The officers spotted a "suspicious vehicle" parked behind a business with the windows down.[97] As they both approached the vehicle, the officers could see that Mr. Pacheco was alone in the driver's seat.[98] One officer testified "that he was 'within a foot' of the vehicle when he smelled the odor of 'fresh burnt' marijuana."[99] Furthermore, that same officer observed a marijuana cigarette in the center console, "which he testified he knew immediately was less than ten grams."[100] Mr. Pacheco exited the vehicle, and a search of his person uncovered cocaine in his pocket.[101]

Mr. Pacheco concedes that the warrantless search of his vehicle was constitutional.[102] The search of Mr. Pacheco's vehicle is a straightforward application of the rule established in *Robinson*[103]: the mere odor of marijuana coming from a vehicle authorizes a warrantless search thereof.[104] However, Mr. Pacheco successfully argued that the "officers' warrantless search of his person was illegal because, at the time of the search, the officers lacked probable cause to believe that he possessed ten grams or more of marijuana."[105]

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93. *Id.*
94. *See* 214 A.3d 505, 513 (Md. 2019) ("An arrest is a wholly different kind of intrusion upon individual freedom . . . and the interests [it] is designed to serve are likewise quite different." (quoting Terry v. Ohio, 392 U.S. 1, 25 (1968))).
95. *See id.* at 508–09.
96. *Id.* at 508.
97. *Id.*
98. *Id.* at 508–09.
99. *Id.* at 508.
100. *Id.* at 509.
101. *Id.*
102. *Id.* at 516.
103. *See id.*
104. *Id.* ("[T]he eventual search of Mr. Pacheco's vehicle was permissible by application of the automobile doctrine.").
105. *Id.* at 509, 517–18.

In other words, the Court of Appeals of Maryland held that the odor of fresh burnt marijuana and the presence of a marijuana cigarette, the amount of which constituted a civil violation, does not give rise to a "fair probability" that Mr. Pacheco possessed marijuana that would amount to a criminal violation.[106] As discussed in a later part of this Comment, this decision is inconsistent with Federal and State probable cause case law, and if left unaddressed, will continue to frustrate lower courts and law enforcement with a greater degree of uncertainty.[107]

IV. ANALYSIS

A. Historical and Current Impact of the Probable Cause Doctrine on Federal and State Courts, Law Enforcement, and Individual Rights

The never-ending puzzle of exceptions to the warrant requirement is one that has been passed down for generations in the courts.[108] In *California v. Acevedo*, the late Justice Scalia stated:

> The victory was illusory. Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions . . . . [T]herefore, I do not regard today's holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years.[109]

Justice Scalia is one of many Supreme Court Justices to voice their opinion on this subject.[110] Some have argued that this area of

106. *Id.* at 518.

107. *See infra* Section IV.D.

108. *See* California v. Acevedo, 500 U.S. 565, 568–69 (1991) ("[T]he law applicable to a closed container in an automobile . . . has troubled courts and law enforcement officers since it was first considered in [*United States v.] Chadwick*[, 433 U.S. 1 (1977)].").

109. *Id.* at 582–83 (Scalia, J., concurring).

110. *See infra* notes 111–19 and accompanying text. Justice Rehnquist also stated, "While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web." Cady v. Dombrowski, 413 U.S. 433, 440 (1973).

inconsistent jurisprudence has exhausted judicial resources.[111] "Although litigation is important in creating case law, repeated litigation with inconsistent results throws our system into confusion."[112] In *United States v. Robinson*, Justice Rehnquist seemed to express frustration about the constant litigation and "case-by-case adjudication" of these issues.[113] However, standing as a guard against all things that could resemble a bright-line rule, the dissenting opinion characterized Justice Rehnquist's belief as a selfish one.[114] For example, Justice Marshall stated:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." . . . And the intensive, at times painstaking, case-by-case analysis characteristic of our Fourth Amendment decisions bespeaks our "jealous regard for maintaining the integrity of individual rights."[115]

If we are to accept that such bright-line rules have no place within the doctrine of probable cause and the exceptions to the warrant requirement,[116] then courts must do their best to simplify this seemingly complex area of law.

The confusing and dense nature of probable cause has not only troubled courts for decades, but it has also impacted law enforcement.[117] This impact can be simply stated as follows: "Uncertainty about the constitutionality of a warrantless search may lead police either to forego a legitimate search or to violate an

111. *See* Starbuck, *supra* note 38, at 1255 ("When lower courts split on how to properly apply precedent, it is the Supreme Court that must step in to settle the dispute. The Supreme Court has failed to mend the split of authority over the applicability of the vehicle cases to other searches incident to arrest. This failure has caused the protections of the Fourth Amendment to vary by jurisdiction and has wasted judicial resources.") (footnotes omitted).

112. *Id.* at 1266.

113. *See* 414 U.S. 218, 235 (1973).

114. *See id.* at 238 (Marshall, J., dissenting).

115. *Id.*

116. The dissent goes on to state, "The majority's attempt to avoid case-by-case adjudication of Fourth Amendment issues is not only misguided as a matter of principle, but is also doomed to fail as a matter of practical application." *Id.* at 248. Additionally, "bright-line" rules have been characterized as "unnecessary, unsuccessful, and an infringement on privacy interests." Steven D. Clymer, Note, *Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule*, 68 CORNELL L. REV. 105, 138 (1982).

117. *See* Clymer, *supra* note 116, at 106.

individual's privacy rights."[118] As previously mentioned, the degree of uncertainty has been tremendous in Fourth Amendment jurisprudence, which will continue to impact law enforcement and decisions made by lower courts.[119]

In *Acevedo*, Justice Stevens recognized the importance of providing "clear and unequivocal" guidelines to law enforcement, however, he argued "that the decisions of this Court evince a lack of confusion about the automobile exception."[120] Furthermore, Justice Stevens reasoned "that law enforcement has not been impeded because the Court has decided 29 Fourth Amendment cases since [1982] in favor of the government."[121] Justice Blackmun quickly disputed Justice Stevens' argument by noting the following:

> The dissent fails to explain how the loss of 29 cases below, not to mention the many others which this Court did not hear, did not interfere with law enforcement. The fact that the state courts and the Federal Courts of Appeals have been reversed in their Fourth Amendment holdings 29 times since 1982 further demonstrates the extent to which our Fourth Amendment jurisprudence has confused the courts.[122]

The statistics presented by Justice Blackmun not only show the impact of this issue on law enforcement, but also how it has affected Federal and State courts.[123] "[C]onfusion of the law breeds litigation, and the constant re-litigation of the same issues wastes judicial resources."[124]

As legislation surrounding marijuana becomes more detailed and complex, disagreements about the law of probable cause and the application of exceptions to the warrant requirement are inevitable.[125]

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118. *Id.* In *Acevedo*, the Court states that another exception to the warrant requirement, referred to as the *Chadwick-Sanders* rule, "is the antithesis of a clear and unequivocal guideline and, thus, has confused courts and police officers and impeded effective law enforcement." 500 U.S. 565, 566 (1991) (citing United States v. Place, 462 U.S. 696 (1983) (citations omitted)). The *Chadwick-Sanders* rule provides that law enforcement may search a bag within a vehicle when there is probable cause to search the entire vehicle. *Id.* at 565–66.
119. *See Acevedo*, 500 U.S. at 576–77.
120. *Id.* at 577.
121. *Id.* at 578.
122. *Id.* (illustrating the Court's continuous struggle with how to apply the automobile exception and its impact on lower courts and law enforcement).
123. *See id.*
124. Starbuck, *supra* note 38, at 1267.
125. *See id.* at 1270–71.

B. The Court of Appeals of Maryland Did Not Adequately Distinguish Pacheco *from* Robinson

Following the *Robinson v. State* decision, *Pacheco* affirmed the holding that the mere odor of marijuana coming from a vehicle gives rise to a fair probability that the vehicle contains a civil or criminal amount of marijuana.[126] However, *Pacheco* went on to hold that the odor plus the actual presence of less than ten grams of marijuana, does not give rise to a fair probability that the defendant is in possession of a criminal amount.[127]

First, the Court in *Pacheco* made it clear that it gave little weight to the actual discovery of marijuana, rather than the mere odor, in determining whether officers had probable cause for a warrantless arrest and search incident thereof.[128] For example, the Court repeatedly stated: "little else was presented that addressed why this minimal amount of marijuana, which is not a misdemeanor, . . . gave rise to a fair probability that Mr. Pacheco possessed a criminal amount . . . ."[129] By failing to give weight to the additional evidence, the Court's decision yields a result inconsistent with the probable cause standard only requiring a fair probability of criminal activity to support a lawful warrantless arrest and search incident to that arrest.[130]

As previously mentioned, the Court in *Pacheco* heavily relied on the following premise in support of their holding: "The same facts and circumstances that justify a search of an automobile do not necessarily justify an arrest and search incident thereto."[131] The former premise can be restated with the facts in *Pacheco*: the mere odor of marijuana that would justify a search of an automobile does not necessarily justify a lawful warrantless arrest and search incident to that arrest.[132]

However, in *Pacheco*, the State was not attempting to justify a search incident to arrest solely on the facts used in support of the automobile exception.[133] In addition to the mere odor of marijuana, the officers discovered a freshly burnt marijuana joint in the center

126. *See* Pacheco v. State, 214 A.3d 505, 516 (Md. 2019).
127. *See id.* at 518.
128. *See id.* at 517–18 ("In a different case, additional facts or testimony beyond what we have here may well have compelled a different result.").
129. *Id.* at 518.
130. *See infra* notes 131–53 and accompanying text.
131. 214 A.3d at 518.
132. *See id.* at 515–18.
133. *See id.*

console of Pacheco's car.[134] Strangely, the Court seems to give no weight to the additional circumstances that should arguably support a warrantless search incident to Mr. Pacheco's arrest.[135] Furthermore, these additional circumstances overcome the legal barrier of the defendant's "significantly heightened" expectation of privacy to be secure in their body and distinguish *Pacheco* from *Robinson*.[136]

Although the Court of Appeals is not bound by a lower court's decision and analysis, in *Barrett v. State*, the Court of Special Appeals of Maryland correctly answered the question presented in *Pacheco* while remaining consistent with Federal and State probable cause case law.[137]

Barrett took place post-2014 legislation and pre-*Pacheco*.[138] Additionally, the facts in *Barrett* are very similar to those in *Pacheco*.[139] In November 2014, Detective Brian Salmon (Salmon) saw a vehicle with a large crack along the front windshield.[140] This prompted Salmon to approach the defendant's vehicle.[141] When Salmon and another officer passed the vehicle, "they 'immediately smelled the strong odor of marijuana.'"[142] Following a lawful stop of the vehicle, the other officer "approached the passenger side of the vehicle and asked [Barrett] . . . if there was any marijuana in the car."[143] The passenger "'freely stated that they were smoking marijuana' . . . and he handed [the officer] 'a brown hand-rolled cigar containing green plant material.'"[144] After asking the passenger to exit the vehicle, Salmon searched the passenger's person and recovered a "9–millimeter handgun from [his] pants."[145]

Not only are the facts in *Barrett* strikingly similar to those in *Pacheco*, the overall issues and arguments raised by the defendants

134. *Id.* at 517.
135. *Id.* at 517–18.
136. *See id.* at 513 (discussing the additional circumstances required to support a warrantless search incident to arrest).
137. *See generally* 174 A.3d 441, 449–51 (Md. Ct. Spec. App. 2017).
138. *See id.* at 444.
139. *Compare Barrett*, 174 A.3d at 444–45 (involving warrantless search of the front seat passenger in vehicle, based on the odor of marijuana, revealing a handgun), *with Pacheco*, 214 A.3d at 508–09 (involving warrantless search of the front seat passenger in vehicle, based on the odor of marijuana, revealing cocaine).
140. *Barrett*, 174 A.3d at 444.
141. *See id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 445

are identical.[146] For example, the Court in *Barrett* states following: "Defense counsel argued that appellant's 'admittance of [a] civil offense' of possession of less than ten grams of marijuana 'does not give rise to [] probable cause of criminal activity.'"[147] However, the Court of Special Appeals of Maryland disagreed with the defense.[148] Persuaded by the additional circumstances with the odor of marijuana, the *Barrett* court stated:

> This case, however, does not involve the mere odor of marijuana. Here, not only did the officers smell marijuana in a vehicle[,] . . . when [the passenger] was asked if there was marijuana in the car, he "freely admitted" that "they" had been smoking marijuana, and he handed [the officers] a cigar.[149]

Therefore, the *Barrett* court concluded that "[i]n situations where the police have more information connecting an occupant of a vehicle to the marijuana, and there is more than merely the odor of marijuana, courts have found probable cause to arrest."[150] "The Court of Appeals noted that other jurisdictions that had addressed the issue had determined that, even though possession of a small amount of marijuana had been decriminalized, it still suggested criminal activity."[151]

The court's decision in *Barrett* is consistent with the Supreme Court's framework in *Maryland v. Pringle*, and Maryland's new framework established in *Robinson v. State.*[152] Based on *Pringle*, "[w]e note that probable cause does not require evidence sufficient to

146. *Compare Barrett*, 174 A.3d at 450 ("[Defendant] argues that, because the police could not tell the quantity of the marijuana involved, the police did not have probable cause to believe that he was committing a crime."), *with* Pacheco v. State, 214 A.3d 505, 509 (Md. 2019) (arguing that the minimal amount of marijuana discovered in Mr. Pacheco's vehicle did not give police probable cause to believe he was committing a crime). Although the search incident to arrest determination was not decided by the circuit court, "'an appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court,' and 'if legally correct, the trial court's decision will be affirmed on such alternative ground.'" *Barrett*, 174 A.3d at 448 (quoting Unger v. State, 48 A.3d 242, 245 (Md. 2012)).

147. *Barrett*, 174 A.3d at 445 (alterations in original).

148. *See id.* at 452.

149. *Id.* at 449.

150. *Id.* at 449–50 (citing United States v. Humphries, 372 F.3d 653, 659 (4th Cir. 2004)).

151. *Id.* at 450 (citing Robinson v. State, 152 A.3d 661, 678–79 (Md. 2017) (citation omitted)).

152. *See infra* notes 153–54 and accompanying text.

convict—only that which would lead a reasonable inference of guilt."[153] Therefore, "[a] requirement that the police need to be absolutely sure that the amount of marijuana involved is more than 9.99 grams before they have probable cause to arrest is inconsistent with the concept of probable cause."[154]

C. *By Failing to View the Facts from the Officers' Perspective, the Result in* Pacheco *Is Inconsistent with the Framework Set Forth in* Pringle

The *Pacheco* Court failed to analyze and review the facts leading up to the arrest from the perspective of an objectively reasonable police officer, as required by key precedent.[155] This has resulted in a conclusion that is inconsistent with the standards set forth in *Pringle* and *Brinegar v. United States*.[156]

Pringle restates the well-known standard that when a court analyzes an issue of probable cause, they must only look to the facts known to the officer leading up to the arrest.[157] Additionally, these facts will be "viewed from the standpoint of an objectively reasonable police officer."[158] "These long-prevailing standards seek to safeguard citizens from rash and unreasonable inferences . . . ."[159] "They also seek to give fair leeway for enforcing the law in the community's protection."[160] Because probable cause deals with probabilities, "'the *quanta* . . . of proof' appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant."[161]

In *Pacheco*, the facts only indicate that the officers immediately knew the marijuana joint "was less than ten grams."[162] They had no knowledge of the exact amount leading up to the arrest.[163] However, in support of their analysis, the *Pacheco* Court assumes the officers had precise knowledge of the amount of marijuana as they conducted

153. Nebraska v. Perry, 874 N.W.2d 36, 47 (Neb. 2016).
154. *Barrett*, 174 A.3d at 452 (quoting Moulden v. State, 69 A.3d 36, 44 (Md. Ct. Spec. App. 2013)).
155. Maryland v. Pringle, 540 U.S. 366, 371 (2003) (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)).
156. *See infra* notes 157–80 and accompanying text.
157. *See Pringle*, 540 U.S. at 371.
158. *Id.* (quoting *Ornelas*, 517 U.S. at 696).
159. Brinegar v. United States, 338 U.S. 160, 176 (1949).
160. *Id.*
161. *See Pringle*, 540 U.S. at 371 (quoting *Brinegar*, 338 U.S. at 173).
162. *See* Pacheco v. State, 214 A.3d 505, 509 (Md. 2019).
163. *See id.* at 517.

a search for more on Mr. Pacheo's person.[164] For example, after the fact, the Court had the privilege to reference *How Much Weed is in a Joint? Pot Experts Have a New Estimate*.[165] Thereafter, the Court used this lower extreme value to hold that the officers could not reasonably infer that Mr. Pacheco had the additional nine and a half grams to constitute a criminal offense.[166]

Using this data ex post facto, the Court asserts a degree of certainty into the probable cause analysis, which the officers did not have leading up to the arrest of Mr. Pacheco.[167] This leads to a result inconsistent with that of a reasonable police officer standard.[168] On its face this may seem insignificant, however, it is important to understand the change in circumstances, point-of-view, and practical differences between judges and law enforcement[169]:

> A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges easily feed, but they may be "literally impossible of application by the officer in the field."[170]

Although not discussed in *Pacheco*, it is important to address the effect of mistake of fact by an officer on the validity of an arrest.[171] In other words, does a mistake of fact, which was assumed by the

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164. *See id.*

165. *Id.* at 517 n.8 (citing Niraj Chikshi, *How Much Weed Is in a Joint? Pot Experts Have a New Estimate*, N.Y. TIMES (July 14, 2016), https://www.nytimes.com/2016/07/15/science/how-much-weed-is-in-a-joint-pot-experts-have-a-new-estimate.html [https://perma.cc/MLH2-M9JX]).

166. *See id.* at 517. The Court reasoned the officers did not testify that the circumstances "supported an inference that Mr. Pacheco also possessed roughly nine and a half more grams of that substance on his person." *Id.*

167. *See id.* (stating that the officers only knew the marijuana joint "clearly contained less than ten grams of marijuana").

168. *See* Brinegar v. United States, 338 U.S. 160, 172–73 ("Apart from its failure to take account of the facts disclosed by [the officer's] direct and personal observation, . . . the so-called distinction places a wholly unwarranted emphasis upon the criterion of admissibility in evidence.").

169. *See id.* at 173.

170. Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974) (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting), *rev'd*, 414 U.S. 218 (1973)).

171. *See Brinegar*, 338 U.S. at 176 ("Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part.").

officer in support of their arrest, automatically make that warrantless arrest invalid or unlawful?[172] The short answer is no.[173] From an officer's perspective, "room must be allowed for some mistakes on their part[,] [b]ut the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."[174] As Justice Rutledge explained the concept in *Brinegar*:

> The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.[175]

The officers in *Pacheco* "were quite wrong as it turned out, . . . [b]ut sufficient probability, not certainty, is the touchstone of reasonableness," as stated in *Hill v. California*.[176] Therefore, a reasonable mistake of fact which armed the officer with probable cause that Mr. Pacheco was committing a crime means the arrest is considered unlawful.[177] To hold otherwise would significantly "hamper law enforcement"[178] and would further disregard "the difference between [what] is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search."[179] "There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them."[180]

D. Pacheco *Inconsistent with the Legislative Intent of 2014 Marijuana Statute*

The decision in *Pacheco* is inconsistent with the legislative intent of the 2014 decriminalization statute.[181] In *Robinson v. State*, the

172. *See id.* (describing the impact of mistake of fact on a probable cause analysis).
173. *See id.*
174. *Id.*
175. *Id.*
176. 401 U.S. 797, 804 (1971); *see also* Pacheco v. State, 214 A.3d 505, 508–09 (Md. 2019).
177. *See Brinegar*, 338 U.S. at 176.
178. *Id.*
179. *Id.* at 172–73.
180. *Id.*
181. *See infra* notes 184–88 and accompanying text.

Court notes the following: "[T]he statute's plain language and legislative history demonstrate that the General Assembly, in decriminalizing possession of small amounts of marijuana, did not intend to otherwise alter existing case law concerning the search, seizure, and forfeiture of marijuana, which remains illegal."[182]

The Court's decision in *Robinson v. State* is consistent with the legislative intent.[183] However, the Court in *Pacheco* seems encouraged to treat the civil nature of less than ten grams of marijuana differently in their probable cause analysis.[184] "On April 5, 2014, the House Judiciary Committee adopted an amendment to address this issue."[185] "This amendment added the [] language regarding seizure and forfeiture . . . ."[186] Furthermore, Senator Robert Zirkin (D-Md.), a supporter of the bill, "testified that '[t]he intention of this bill is not to stop what would be right now a lawful search incident to arrest.'"[187] This legislative history stands in contrast with the holding in *Pacheco*.[188]

V. CONCLUSION

In 2014, Maryland decriminalized the possession of less than ten grams of marijuana.[189] The possession of less than ten grams became a civil offense; however, the possession of ten grams or more remained a criminal offense.[190] The statute had many goals[191]: (1) to prevent police and prosecutors from wasting their "attention on what is increasingly viewed by the public as a relatively harmless vice"; (2) reduce the use of judicial resources on these matters; and more importantly (3) address concerns of "racial disparities in marijuana possession arrests between blacks and whites despite equivalent rates of use."[192]

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182. Robinson v. State, 152 A.3d 661, 681 (Md. 2017).
183. *See id.* at 680–81.
184. *See generally* Pacheco v. State, 214 A.3d 505, 517–18 (Md. 2019).
185. *Robinson*, 152 A.3d at 681.
186. *Id.*
187. *Id.*
188. *Compare Robinson*, 152 A.3d at 681 (stating that the 2014 legislation was not meant to alter a search incident to arrest analysis), *with Pacheco*, 214 A.3d at 517–18 (holding that a civil amount of marijuana does not necessarily give rise to probable cause in support of a warrantless search of that person).
189. *See supra* note 59 and accompanying text.
190. *See supra* notes 70–72 and accompanying text.
191. *Fixing Md.'s Marijuana Law [Editorial]*, BALT. SUN (Oct. 3, 2014, 12:40 PM), https://www.baltimoresun.com/opinion/editorial/bs-ed-marijuana-decriminalization-20141005-story.html [https://perma.cc/L25V-H3W9].
192. *Id.*

The Court of Appeals of Maryland was quickly presented with two cases that would determine the impact of this 2014 legislation on a probable cause analysis: *Robinson v. State* and *Pacheco v. State*.[193] *Pacheco* ultimately held that the odor of marijuana gives rise to probable cause for a warrantless search of a vehicle; however, the odor plus the actual discovery of less than ten grams of marijuana in a vehicle does not give rise to probable cause or support a reasonable probability that the defendant is in possession of ten grams or more.[194]

Even before the era of legalization and decriminalization of marijuana, "the Fourth Amendment has always been a deadly serious gamble"[195] generated by decades of uncertainty and confusion surrounding the exceptions to the warrant requirement.[196] The Court of Appeals of Maryland's decision in *Pacheco v. State* shows us how the counterintuitive nature of a partial-decriminalization statute causes absurd results in courts and further complicates the ongoing puzzle of probable cause.[197]

The Supreme Court "has overruled . . . prior case[s] [regarding the scope of the probable cause doctrine] on the comparatively rare occasion when it has bred confusion or been a derelict or led to anomalous results."[198] By legalizing or completely decriminalizing the possession of marijuana, Maryland courts would be able to avoid the future struggle and confusion of how Maryland's 2014 statute would impact a probable cause analysis.[199] More importantly, this would further the goals set out by the 2014 legislation.[200]

193. *See supra* Sections III.B–.C.
194. 214 A.3d 505, 518 (Md. 2019).
195. Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 279 (2004).
196. *See supra* Section IV.A.
197. *See supra* Section IV.D.
198. California v. Acevedo, 500 U.S. 565, 579 (1991).
199. *See supra* Part IV.
200. *See supra* notes 189–92 and accompanying text.