

An Uncomfortable Truth: Arkansas's Approach to Warrantless Vehicle Searches is Unconstitutional

Alex C. Carroll*

*"A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile."*¹

January 1, 1976 was a historic day in Arkansas for two notable reasons. First, the tenth-ranked Arkansas Razorback football team rallied late in the fourth quarter of the Cotton Bowl to secure a comeback victory against the eleventh-ranked Georgia Bulldogs.² Second, Rule 14.1 ("Rule 14.1") of the Arkansas Rules of Criminal Procedure ("ARCP"), titled "Vehicular Searches," took effect statewide.³ In the forty-three years since, a variety of Arkansas mediums have told and retold

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The first Article of this three-piece series, published separately, began the untold story of Rule 14.1. Part I of the first Article provided the Fourth Amendment principles relevant to this series and the history of the federal automobile exception. Part II then provided the modern application of the automobile exception. In doing so, the first Article laid the critical groundwork for understanding with precision why Arkansas's expansive approach to the automobile exception is unequivocally unconstitutional.

The second Article of this three-piece series, published separately, presented the middle of Rule 14.1's untold story. Part I of the second Article offered the historical context for Section 260.3, including its historical backdrop, development and adoption. Part II then offered the same for Rule 14.1. In doing so, the second Article provided the historical context necessary to conclude that Arkansas's expansive approach to the automobile exception is unequivocally unconstitutional.

1. *New York v. Class*, 475 U.S. 106, 112 (1986).

2. *Arkansas Wins, 31-10, With Rally*, N.Y. TIMES (Jan. 2, 1976), [<https://perma.cc/3U9C-QTPS>].

3. See *In re Ark. Criminal Code Revision Comm'n*, 259 Ark. 863, 864, 530 S.W.2d 672, 673 (1975).

the story about the Razorbacks' historic victory that day.⁴ All the while, the story of Rule 14.1's adoption has remained untold. Consequently, the question about its constitutionality has remained unanswered. Until now.

The constitutionality of Rule 14.1 even at the time of adoption was, in a word, questionable.⁵ The story begins in the mid-1970s, when the American Law Institute ("ALI") adopted Section 260.3 ("Section 260.3") of the Model Code of Pre-Arrest Procedure ("MCPA").⁶ Despite its drafters doubting its constitutionality,⁷ the ALI proposed Section 260.3 as a model statute of criminal procedure in 1975.⁸ Arkansas adopted Rule 14.1 just a year later,⁹ modeling it entirely after Section 260.3.¹⁰ Like those of Section 260.3, the drafters of Rule 14.1 questioned its constitutionality at the time of its adoption in 1976.¹¹ In the forty-three years since, Arkansas courts,¹² commentators,¹³ and police officials¹⁴ have failed to

4. *E.g.*, NWARazor, *1976 Cotton Bowl - Hogs Stomp the Dawgs 31-10*, HOGVILLE.NET (Sept. 17, 2010, 4:47 PM), [<https://perma.cc/WSQ3-DMYR>]; *1976 Cotton Bowl Arkansas 31, Georgia 10*, KATV (Sept. 11, 2015), [<https://perma.cc/ZH84-MBN9>].

5. *See infra* pp. 7–8 and note 23. For purposes of this Article, "Rule 14.1" specifically refers to Rule 14.1(b). *See infra* note 17.

6. *See* Biography/History, in the Model Code of Pre-Arrest Procedure Records, American Law Institute Archives, ALI.04.009, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA. [hereinafter History of the Model Code of Pre-Arrest Procedure]. To be clear, any reference to "Section 260.3" throughout the balance of this Article specifically refers to Section 260.3(2). *See* MODEL CODE OF PRE-ARREST PROCEDURE § 260.3 (AM. LAW INST., Proposed Official Draft No. 1, 1972).

7. *See, e.g.*, MODEL CODE OF PRE-ARREST PROCEDURE § 260.3 note at 163 (AM. LAW INST., Proposed Official Draft No. 1, 1972) ("Case authority for [Section 260.3] is lacking and clouded by the apparently contrary determination in *United States v. Di Re*, 332 U.S. 581, 589 (1948)."); Herbert Wechsler, *47th Annual Meeting*, 47 A.L.I. PROC. 161 (1970) [hereinafter *47th Annual Meeting*] (statement of Assoc. Reporter Telford Taylor) ("The constitutional doubts of including [Section 260.3] are impressive.").

8. *See* History of the Model Code of Pre-Arrest Procedure, *supra* note 6.

9. *See In re* Ark. Criminal Code Revision Comm'n, 259 Ark. 863, 864, 530 S.W.2d 672, 673 (1975).

10. ARK. R. CRIM. P. 14.1 Derivation Tbl. at xvii (ARK. CRIM. CODE REVISION COMM'N, Proposed Official Draft 1974).

11. *See* ARK. R. OF CRIM. P. ART. IV, Refs & Annos at 30 (ARK. CRIM. CODE REVISION COMM'N, Proposed Official Draft 1974) ("Rule [14.1], which permits search of the persons in a vehicle when the officer does not find the things subject to seizure in his search of the vehicle, may raise constitutional questions.").

12. *Compare* Brunson v. State, 327 Ark. 567, 573–74, 940 S.W.2d 440, 443 (1997) (declining to address the constitutionality of Rule 14.1's expansion of the automobile exception, but explaining that Rule 14.1 may be interpreted as "analogous" to a search incident to a lawful arrest), *with* Rowland v. State, 262 Ark. 783, 790, 561 S.W.2d 304, 309

answer whether Rule 14.1 is constitutional. And, along the way, it has remained unamended.¹⁵ As of 2019, Rule 14.1 is the only statute or rule of criminal procedure in the country that is modeled after Section 260.3.¹⁶

Titled “Vehicular Searches,” Rule 14.1 permits the warrantless search of an individual’s person when the following four conditions are satisfied: (1) a police officer “has reasonable cause to believe that a . . . vehicle . . . contains things subject to seizure”; (2) the officer searches the suspected vehicle, but “does not find the things subject to seizure by his search”; (3) the officer believes that “the things subject to seizure are of such a size and nature that they could be concealed on the person”; and (4) “the officer has reason to suspect that one [] or more of the occupants of the vehicle may have the things subject to seizure so concealed.”¹⁷

(1978) (“It is well established that vehicle searches are often justified when searches of the person are not, because of the difference in the right to expectation of privacy.”).

As of 2019, *Brunson* remains the only Arkansas Supreme Court opinion to analyze Rule 14.1(b), however, the court has analyzed Rule 14.1(a) in several opinions. *See, e.g.*, *Colbert v. State*, 340 Ark. 657, 660–61, 13 S.W.3d 162, 164 (2000); *Reyes v. State*, 329 Ark. 539, 547–48, 954 S.W.2d 199, 202–03 (1997); *Bohanan v. State*, 324 Ark. 158, 163–66, 919 S.W.2d 198, 201–03 (1996).

13. *See* ARK. R. CRIM. P. 14.1 1987 Unofficial Supplementary Cmt. at 129–30 (“Questions raised in the original commentary about the continuing validity of *United States v. Di Re* remain unanswered, though recent decisions of the circuit courts of appeal have reiterated the *Di Re* Court’s assumption that ‘a person, by mere presence in a suspected car, [does not] lose immunities of search of his person to which he would otherwise be entitled.’”) (citations omitted).

14. *See, e.g.*, LESLIE RUTLEDGE, OFFICE OF ARK. ATTORNEY GEN., LAW ENFORCEMENT POCKET MANUAL 31–32 (7th ed. 2015) (failing to include a vehicle occupant’s person within the scope of a lawful warrantless vehicle search); CHARLES N. WILLIAMS ET AL., CRIMINAL PROCEDURE INST., SCH. OF LAW, UNIV. OF ARK., LAW ENFORCEMENT OFFICERS CRIMINAL PROCEDURE MANUAL 86 n.13 (2d prt. 1977) (“The authority granted under this rule may be questionable as a result of the decision in *United States v. Di Re*”) (citations omitted).

15. *Compare* ARK. R. CRIM. P. 14.1 (ARK. CRIM. CODE REVISION COMM’N, Proposed Official Draft 1974), *with* ARK. R. CRIM. P. 14.1.

16. *See* Alex C. Carroll, *Unpacking the Convolved History of the Automobile Exception*, 2019 ARK. L. NOTES 32, 33 & app. (2019).

17. ARK. R. CRIM. P. 14.1. The full text of the rule provides:

(a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:

(i) on a public way or waters or other area open to the public;

(ii) in a private area unlawfully entered by the vehicle; or

This Article tells the third piece—the conclusion—of the untold story of Rule 14.1. In doing so, it answers the forty-three-year-old (and counting) question about Rule 14.1’s constitutionality. This final piece argues in Part I that Rule 14.1 is an unconstitutional expansion of the automobile exception and, in Part II, contends that Rule 14.1 permits the warrantless search of an individual’s person without a firm constitutional basis. Accordingly, it concludes that Rule 14.1—Arkansas’s expansive approach to warrantless vehicle searches—is unconstitutional and must be amended.

I. THE [AUTOMOBILE] EXCEPTION

First recognized by the United States Supreme Court in 1925,¹⁸ the automobile exception permits a police officer to

(iii) in a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.

(b) If the officer does not find the things subject to seizure by his search of the vehicle, and if:

(i) the things subject to seizure are of such a size and nature that they could be concealed on the person; and

(ii) the officer has reason to suspect that one (1) or more of the occupants of the vehicle may have the things subject to seizure so concealed;

the officer may search the suspected occupants; provided that this subsection shall not apply to individuals traveling as passengers in a vehicle operating as a common carrier.

(c) This rule shall not be construed to limit the authority of an officer under Rules 2 and 3 hereof.

ARK. R. CRIM. P. 14.1. For purposes of this article, “Rule 14.1” specifically refers to Rule 14.1(b).

18. *See* *Carroll v. United States*, 267 U.S. 132, 162 (1925). In 1962, the Arkansas Supreme Court adopted the federal automobile exception in Arkansas. *Burke v. State*, 235 Ark. 882, 885–86, 362 S.W.2d 695, 697 (1962).

From 1962 to 1975, the Arkansas Supreme Court’s interpretation of the automobile exception largely tracked that of the United States Supreme Court. *See, e.g., Wickliffe v. State*, 258 Ark. 544, 546, 527 S.W.2d 640, 641 (1975) (“In *Cox* and *Easley* we held that where the initial intrusion of a vehicle was justified a subsequent warrantless search of a vehicle, after being removed into town, comported with constitutional standards. In doing so, we reviewed pertinent federal decisions.”); *Jenkins v. State*, 253 Ark. 249, 252, 485 S.W.2d 541, 543 (1972) (“In the case at bar we cannot, consistently with our own recent decisions and those of the [United States] Supreme Court, sustain the third search of Jenkins’s truck, which was the only search that is said to have revealed incriminating evidence.”); *Tygart v. State*, 248 Ark. 125, 126, 451 S.W.2d 225, 226 (1970) (“The fundamental requirements of the [automobile exception] are (1) that the officers have reasonable cause to believe the vehicle contains that which by law is subject to seizure, and (2) that it is not reasonably practicable to obtain a search warrant.”); *Mann v. City of Heber*

warrantlessly search a vehicle and its contents where the officer has probable cause to believe contraband or other evidence of a crime is located.¹⁹ In 1948, however, the Supreme Court held in *United States v. Di Re* that the automobile exception does not justify the warrantless search of a vehicle occupant's person.²⁰

Springs, 239 Ark. 969, 971–72, 395 S.W.2d 557, 559 (1965) (explaining that “an automobile may be searched without a warrant where there is reasonable or probable cause for the belief . . . that contents of the automobile offend against the law” but holding that a particular warrantless search of a vehicle lacked probable cause and was unconstitutional when police officers, prior to searching the vehicle, fruitlessly searched the owner’s apartment).

Likewise, during that time, Arkansas law enforcement officials interpreted the automobile exception in line with United States Supreme Court precedent. *See* JAMES W. GALLMAN ET AL., CRIMINAL PROCEDURE INST., UNIV. OF ARK. SCH. OF LAW, CRIMINAL PROCEDURE MANUAL 79 (1st prtng. 1970) (“An officer may stop and search an automobile without a warrant when he has reasonable cause to believe that the vehicle contains that which by law is subject to seizure and it is not reasonably practical to obtain a warrant.”). In its introduction to Chapter VIII, titled “Search of Vehicles,” the manual noted, “[a]n officer’s authority to search vehicles is broader than his authority to search persons and places.” *Id.* The manual explained:

The right to search a vehicle on reasonable grounds does not include the right to search a person inside the vehicle. If someone inside the vehicle is to be searched, he should be lawfully arrested before the search or be the subject of a search warrant, unless he voluntarily consents to the search.

Id. at 80.

19. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

20. *See* 332 U.S. 581, 587 (1948) (“We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.”). For context, the core rationale supporting the Supreme Court’s decision in *Di Re* is as follows:

Assuming, however, without deciding, that there was reasonable cause for searching the car, did it confer an incidental right to search *Di Re*? It is admitted by the Government that there is no authority to that effect, either in the statute or in precedent decision of this Court, but we are asked to extend the assumed right of car search to include the person of occupants because ‘common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person.’ . . .

The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a

In the years since, the Court has never retreated from the principle it established in *Di Re*—what this article calls the *Di Re* principle—that the automobile exception does *not* permit the warrantless search of a *person*.²¹

Rule 14.1 follows a different approach. At the time of its adoption in 1976, Rule 14.1’s drafters recognized, “Rule [14.1] . . . may raise constitutional questions” because “[t]he Supreme Court disapproved such searches in *United States v. Di Re*.”²² To support deviating from the *Di Re* principle, the drafters of Rule 14.1 cited only one authority: The drafters of Section 260.3.²³ To support their respective deviation from the *Di Re* principle, the drafters of Section 260.3 cited only

warrant confers greater latitude to search occupants than a search by warrant would permit?

We see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

Id. at 586–87.

21. *See* State v. Funkhouser, 782 A.2d 387, 397 (Md. Ct. Spec. App. 2001) (“There has never been a[n] [automobile exception] search of a person.”). In 2018, the Supreme Court reiterated, “the scope of the automobile exception extends no further than the automobile itself.” *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018).

22. *See* ARK. R. OF CRIM. P. ART. IV, Refs & Annos at 30 (ARK. CRIM. CODE REVISION COMM’N, Proposed Official Draft 1974). The full comments reads:

Rule [14.1], which permits search of the persons in a vehicle when the officer does not find the things subject to seizure in his search of the vehicle, may raise constitutional questions. The Supreme Court disapproved such searches in *United States v. Di Re*, 332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222 (1948), basing its holding on the analogous rule that a warrant to search premises does not justify a search of persons on such premises. However, this analogy may be inappropriate, and the continued validity of *Di Re* is questionable. Following *Chimel*, [] an officer must in most instances secure a warrant prior to a premises search. If the officer desires to search persons on the premises, he can always ensure that the warrant so states. On the other hand, a vehicular search under Rule 14.1 is, by definition, without a warrant. It would be unduly burdensome to require that the officer secure a warrant before he searches the occupants of the vehicle. Furthermore, as stated in the A.L.I. commentary, ‘it seems absurd to say that the occupants can take [seizable things] out of the glove compartment and stuff them in their pockets, and drive happily away after the vehicle has been fruitlessly searched.’

ARK. R. OF CRIM. P. ART. IV, Refs & Annos at 30 (ARK. CRIM. CODE REVISION COMM’N, Proposed Official Draft 1974) (citation to the ALI commentary omitted).

23. *See* ARK. R. OF CRIM. P. ART. IV, Refs & Annos at 30 (ARK. CRIM. CODE REVISION COMM’N, Proposed Official Draft 1974).

themselves.²⁴ Put simply, the drafters of Section 260.3 predicted that courts would stop enforcing the *Di Re* principle once the automobile exception became more widely recognized.²⁵

24. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 260.3 Note at 163–64 (AM. LAW INST., Proposed Official Draft No. 1, 1972) (“The considerations favoring the authority granted by this provision prevailed with the [ALI] at its 1970 and 1971 meetings.”); see also MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 260.3 cmt. at 208–09 (AM. LAW INST., Proposed Official Draft No. 1, 1972). The rationale supporting the drafters’ proposal of Section 260.3 is as follows:

A more difficult question is whether or not the right of vehicular search extends to the persons of individuals occupying the vehicle, as provided in Subsection (2). The Supreme Court has squarely held that officers may not enter premises without a warrant, even with probable cause to believe that seizable things are within, except to make an arrest based on probable cause with respect to a particular individual. The *Carroll* case lays down a different rule for vehicles. If the *Carroll* rule is to be accepted at all, it seems both illogical and impracticable to exempt from search the occupants themselves. If they were not in the vehicle, and there was probable cause to believe that they were in unlawful possession of things, they would be liable to arrest on probable cause. Why should there be a different result if they are in a vehicle, assuming probable cause to believe that *within* the vehicle—whether in the trunk or in their pockets—seizable things are to be found?”

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 260.3 cmt. at 208–09 (AM. LAW INST., Proposed Official Draft No. 1, 1972). However, the Court has held pretty squarely to the contrary in *United States v. Di Re*, 332 U.S. 581 (1948), at 589:

‘The government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of a guest in a car for which none had been issued How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search warrant would permit By mere presence in a suspected automobile, a person does not lose immunities from search of his person to which he otherwise would be entitled.’

There is considerable basis for criticism of this reasoning, which takes analogy from a search of fixed premises under a search warrant to an emergency search without a warrant, justified as “reasonable” by the mobile character of the thing to be searched. Under the rejuvenescent *Trupiano* rule and the thrust of the *Chimel* case, one might reasonably say that if the officers want to search people as well as premises, they should get a warrant that says so. But this will not do for emergency searches of vehicles, and it seems absurd to say that the occupants can take the narcotics out of the glove compartment and stuff them in their pockets, and drive happily away after the vehicle has been fruitlessly searched.

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 260.3 cmt. at 209 (AM. LAW INST., Proposed Official Draft No. 1, 1972) (citations omitted).

25. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 260.3 cmt. at 209 (AM. LAW INST., Proposed Official Draft No. 1, 1972); see also *47th Annual Meeting, supra*

Contrary to those unsupported predications, Part I of this Article points to a representative sample of federal and state cases that have both recognized and enforced the *Di Re* principle since Rule 14.1's adoption in 1976. In doing so, Part I argues that Rule 14.1 is an unconstitutional expansion of the scope of the automobile exception because it deviates from the *Di Re* principle.

Beginning with the highest court in the land, the United States Supreme Court has continually reiterated that the Fourth Amendment provides heightened protection against warrantless searches of people than it does of vehicles or personal property.²⁶ By way of example, consider the Supreme Court's 1999 decision in *Wyoming v. Houghton*.²⁷ In *Houghton*, the Court's majority held that a police officer with probable cause to search a vehicle may warrantlessly search a passenger's belongings within the vehicle "capable of concealing the object of the search."²⁸ In expanding the scope of the automobile exception, the majority reasoned that an individual has a "considerably diminished" expectation of privacy in the contents of a vehicle, which is completely distinguishable from the "unique, significantly heightened" expectation of privacy the individual has in his or her person.²⁹

note 7, at 166 (statement of ALI member Kamisar) ("[I]t is a matter of common sense to be able to search all the people in the car. And so I do think that the *Di Re* case, as the Reporters candidly admit, is a problem, but it's an old case as this business goes. A lot has happened since 1948, and I think that [Justice] Jackson's arguments are just not persuasive."). For context, Justice Jackson was the Supreme Court justice who wrote the 1948 majority opinion in *United States v. Di Re*, 332 U.S. at 582.

26. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (explaining that the Fourth Amendment provides a "unique, significantly heightened protection" against warrantless "searches of one's person"); *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."); *Sibron v. New York*, 392 U.S. 40, 62 (1968) ("The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."); *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) ("[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.'").

27. 526 U.S. at 295.

28. *Id.* at 307.

29. *Id.* at 303–04.

Concurring with the *Houghton* majority, Justice Breyer wrote separately to clarify the Court's holding:

I would point out certain limitations upon the scope of the bright-line rule that the Court describes. Obviously, the rule applies only to *automobile* searches. Equally obviously, the rule applies only to containers found *within automobiles*. And it does *not* extend to the search of a *person* found in that automobile.³⁰

Thus, the *Houghton* Court's decision came "as a result of the Court's 'balancing of two relative interests'": The "reduced expectation of privacy" an individual has in the contents of a vehicle, distinguished from the "significantly heightened" expectation of privacy an individual has in his or her person as recognized in *Di Re*.³¹

More recently, in *Collins v. Virginia*, the Supreme Court re-emphasized another fundamental aspect of the *Di Re* principle.³² In 2018, the *Collins* Court held that the automobile exception does not justify the warrantless search of a home or its curtilage.³³ The Court reasoned that "the scope of the automobile exception extends no further than the automobile itself."³⁴ Expanding the scope of the automobile exception to justify the warrantless search of a constitutionally protected area outside of the automobile itself, the Court explained, would "untether" the automobile exception "from the justifications underlying" it.³⁵

Following the Supreme Court's guidance, federal circuits nationwide have recognized and enforced the *Di Re* principle

30. *Id.* at 307–08 (Breyer, J., concurring) (emphasis added).

31. See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.2(e) (5th ed. 2019) ("The *Houghton* holding came about as a result of the Court's 'balancing of the relative interests,' one of which was passengers' 'reduced expectation of privacy with regard to the property that they transport in cars,' as distinguished from the 'heightened protection' a passenger was recognized in *Di Re* as having regarding his person."). See also WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.7(C) (4th. Ed. 2018) ("*Di Re* was not overturned but only distinguished when the Court later confronted the related question of when a passenger's effects may be searched.").

32. 138 S. Ct. 1663 (2018).

33. *Id.* at 1673.

34. *Id.* at 1671.

35. *Id.* (quoting *Riley v. California*, 134 S. Ct. 2473, 2485 (2014)).

throughout the decades following Rule 14.1's adoption.³⁶ Consider first the Fifth Circuit's 1993 decision in *United States v. Davis*.³⁷ In *Davis*, the court considered whether the automobile exception justifies the warrantless search of a vehicle passenger following the arrest of the vehicle's driver.³⁸ Citing the Supreme Court's decision in *Di Re*, the court reiterated that a person's "mere presence in a vehicle where [an] illegal transaction occurred, without more, [is] not enough to establish probable cause" to warrantlessly search or arrest that person."³⁹

Additionally, in 2001 the Tenth Circuit recognized the *Di Re* principle in *United States v. Vogl*.⁴⁰ Seventeen years before the Supreme Court definitively answered the question in *Collins*, the Tenth Circuit considered whether the automobile exception justifies the warrantless search of a person or property within a home.⁴¹ The court held that it does not.⁴² In doing so, it reasoned that the automobile exception is "uniquely 'grounded on'" the principle that an individual has a lesser expectation of privacy in the contents of a vehicle, which is distinguishable from the greater expectation of privacy the individual has in his or her person.⁴³

Finally, consider the Sixth Circuit's 2010 decision in *United States v. Moore*, in which it likewise followed the *Di Re* principle.⁴⁴ In *Moore*, the Sixth Circuit considered whether the automobile exception justifies the warrantless search of a

36. See ARK. R. CRIM. P. 14.1 1987 Unofficial Supplementary Cmt. at 130 ("[R]ecent decisions of the circuit courts of appeal have reiterated the *Di Re* Court's assumption that 'a person, by mere presence in a suspected car, [does not] lose immunities of search of his person to which he would otherwise be entitled.'").

37. No. 92-1672, 1993 U.S. App. WL 360747 (5th Cir. Aug. 25, 1993).

38. *Id.* at *4.

39. *Id.* The court in *Davis* upheld the warrantless search of a vehicle occupant's person based on additional factors supporting the individual's arrest. *Id.*

40. See 7 Fed. Appx. 810, 810-11 (10th Cir. 2001). Three years prior, in *United States v. Anchondo*, the Tenth Circuit held that a canine alert to a vehicle, followed by an unsuccessful search of that vehicle, justified a warrantless search or arrest of the vehicle's occupants. 156 F.3d 1043, 1045 (10th Cir. 1998). Only the Supreme Court of Nebraska, however, has followed the *Anchondo* court's approach. See generally *State v. Anderson*, 136 P.3d 406, 415 (Kan. 2006) (explaining that only one court has endorsed the approach taken by the Tenth Circuit and citing a number of courts who have implicitly and/or explicitly rejected the *Anchondo* court's approach).

41. *Vogl*, 7 Fed. Appx. at 810.

42. *Id.* at 818.

43. *Id.* at 814.

44. 390 Fed. Appx. 503 (6th Cir. 2010).

vehicle's driver.⁴⁵ Adhering to the *Di Re* principle, the court wrote:

Supreme Court case law is clear that the standard for searching a car is very different than that of searching a passenger of a car. In allowing police officers to search a passenger's belongings, the Court distinguished between the search of a vehicle and a personal search because of "the unique, significantly heightened protection afforded against searches of one's person." This holding is based on a longstanding rule that probable cause to search a car does not mean that "a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."⁴⁶

Accordingly, the Sixth Circuit held that the automobile exception does not justify the warrantless search of a vehicle occupant's person.⁴⁷ In sum, federal circuits have recognized and adhered to the *Di Re* principle since Rule 14.1's adoption in 1976.

Like their federal counterparts, an overwhelming majority of state courts nationwide have recognized and enforced the *Di Re* principle throughout the decades following Rule 14.1's adoption.⁴⁸ To begin, consider the Arkansas Supreme Court's 1978 decision in *Rowland v. State*.⁴⁹ In *Rowland*, the court held that the automobile exception does not justify the warrantless search of a vehicle's driver.⁵⁰ In doing so, the court wrote:

It should be noted that all the incriminating evidence was discovered in a search of [Rowland's] person and none, in a search of the vehicle itself. The searching officers testified that two bags of pills and one bag of marijuana were found in [Rowland's] left boot and that nothing else was found in the vehicle.⁵¹

The Arkansas Supreme Court concluded, "It is well established that vehicle searches are often justified when

45. *Id.* at 503–04.

46. *Id.* at 507 (citations omitted).

47. *Id.* at 510–11.

48. See cases cited *infra* note 64.

49. See *Rowland v. State*, 262 Ark. 783, 561 S.W.2d 304 (1978).

50. *Id.* at 790, 561 S.W.2d at 308–09.

51. *Id.* at 790, 561 S.W.2d at 308–09.

searches of the person are not, because of the difference in the right to expectation of privacy.”⁵²

Additionally, in 1993 the Court of Appeals of Ohio likewise followed the *Di Re* principle in *State v. Mitchell*.⁵³ In *Mitchell*, the court held that the automobile exception does not justify the warrantless search of a vehicle occupant’s person simply because the driver of the vehicle is arrested for possessing narcotics.⁵⁴ The court explained, “[T]he fact that officers have a valid constitutional basis to search one person does not, standing alone, justify the search of others in the area.”⁵⁵

Next, consider the Court of Appeals of Idaho’s 2005 decision in *State v. Gibson*, in which it also enforced the *Di Re* principle.⁵⁶ In *Gibson*, the court held that the automobile exception does not justify the warrantless search of a vehicle occupant’s person merely because the vehicle is fruitlessly searched for contraband.⁵⁷ Citing the Supreme Court’s decisions in *Di Re* and *Houghton*, the court reiterated that there is “a unique, significantly heightened protection afforded against searches of one’s person.”⁵⁸ Thus, the court concluded, “[P]ersonal searches of vehicle occupants are not authorized under the automobile exception as a result of the occupant’s mere presence within a vehicle, which there is probable cause to search.”⁵⁹

Finally, in 2012 the Court of Appeals of Oregon likewise adhered to the *Di Re* principle in *State v. Freeman*.⁶⁰ In *Freeman*, the State not only failed to assert any basis for expanding the scope of the automobile exception to warrantless searches of people, it admitted that such an expansion would be unconstitutional.⁶¹ Acting with a refreshing sense of candor, the State conceded that “the automobile exception authorizes a warrantless search of a vehicle but not body searches of the

52. *Id.* at 790, 561 S.W.2d at 309.

53. 622 N.E.2d 680, 685 (Ohio Ct. App. 1993).

54. *Id.*

55. *Id.*

56. 108 P.3d 424 (Idaho Ct. App. 2005).

57. *Id.* at 429.

58. *Id.*

59. *Id.*

60. 290 P.3d 908, 909 (Or. Ct. App. 2012).

61. *Id.*

vehicle's occupants."⁶² The Court of Appeals of Oregon agreed.⁶³

Although more examples exist,⁶⁴ the point is clear: Contrary to the unsupported predictions made by the drafters of Section 260.3 and Rule 14.1, the *Di Re* principle remains a fundamental limitation on the scope of the automobile exception. Indeed, the Supreme Court has never retreated from its holding in *Di Re* that the automobile exception does not justify the warrantless search of a vehicle occupant's person. Following that precedent, both federal and state courts nationwide have consistently recognized and enforced the *Di Re* principle throughout the last four decades. Rule 14.1 plainly deviates from the *Di Re* principle by permitting the warrantless search of a vehicle occupant's person—in addition to the vehicle itself.⁶⁵ Rule 14.1, therefore, unconstitutionally expands the scope of the automobile exception.

62. *Id.*

63. *Id.*

64. *See, e.g.,* *People v. Temple*, 42 Cal. Rptr. 2d 888, 892 (Cal. Ct. App. 1995) (“[W]e reject the contention, if it is indeed one the People mean to assert, that all passengers in a vehicle are automatically subject to a lawful search simply by virtue of their presence in a vehicle believed to be involved in criminal activity.”); *People v. Fondia*, 740 N.E.2d 839, 842 (Ill. App. Ct. 2000) (holding that probable cause to search a vehicle, alone, does not justify a warrantless search of a vehicle occupant's person); *State v. Anderson*, 136 P.3d 406, 415 (Kan. 2006) (holding that probable cause to warrantlessly search a vehicle does not permit a warrantless search of an occupant of that vehicle); *State v. Wallace*, 812 A.2d 291, 302 (Md. 2002) (holding that although a positive dog alert to narcotics in a vehicle provides a police officer probable cause to search a vehicle, it does not justify a warrantless search of an occupant of that vehicle); *State v. Funkhouser*, 782 A.2d 387, 397 (Md. Ct. Spec. App. 2001) (“There has never been a[n automobile exception] search of a person.”); *State v. Gambow*, 306 S.W.3d 163, 164 (Mo. Ct. App. 2010) (holding that the automobile exception justifies a warrantless search of a vehicle and its contents, but does not justify a warrantless search of a vehicle's occupants); *State v. Smith*, 729 S.E.2d 120, 126 (N.C. Ct. App. 2012) (“The fact that defendant was formerly a passenger in a motor vehicle as to which a drug dog alerted, and a subsequent search of the vehicle found no contraband, is not sufficient, without probable cause more particularized to defendant, to conduct a warrantless search of defendant's person.”); *State v. Harris*, 280 S.W.3d 832, 843 (Tenn. Crim. App. 2008) (“We know of no broad application of the vehicle search exception to the warrant requirement . . . that underwrites the search of a person.”); *Whitehead v. Commonwealth*, 683 S.E.2d 299, 306 (Va. 2009) (holding that a positive dog alert to narcotics inside a vehicle and a fruitless search of the vehicle, did not justify a warrantless search of a person occupying the vehicle).

65. Ark. R. Crim. P. 14.1.

II. [PROBABLE CAUSE] [TO ARREST]

Recall that Rule 14.1 permits a police officer to *warrantlessly* search an individual's *person* when the "officer has *reason to suspect*" that the individual is concealing *contraband*.⁶⁶ This Part argues that no exception to the Fourth Amendment's warrant requirement authorizes such a search. Accordingly, it concludes that Rule 14.1 permits the warrantless search of an individual's person without a firm constitutional basis—in addition to unconstitutionally expanding the scope of the automobile exception.

Under both the United States Constitution⁶⁷ and the Arkansas Constitution,⁶⁸ the warrant requirement is simple: All searches conducted without a warrant are unreasonable—i.e., unconstitutional—"subject only to a few specifically established and well-delineated exceptions."⁶⁹ Although reasonable minds can differ, there are roughly twenty-one exceptions to the warrant requirement.⁷⁰ Of those twenty-one exceptions, only a search incident to a lawful arrest justifies the warrantless search of an individual's person for contraband.⁷¹ Pursuant to that

66. ARK. R. CRIM. P. 14.1.

67. U.S. CONST. amend. IV. The full text of the Fourth Amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV.

68. ARK. CONST. art. 2, § 15. The full text of Article Two, Section 15 provides:

The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

ARK. CONST. art. 2, § 15.

69. *United States v. Ross*, 456 U.S. 798, 825 (1982); *see also Evans v. State*, 65 Ark. App. 232, 235, 987 S.W.2d 741, 743 (1999).

70. *See generally* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1473–74 (1985) (providing a list of the exceptions to the warrant and/or probable cause requirement of the Fourth Amendment).

71. Of the twenty-one exceptions to the Fourth Amendment's warrant requirement, the following eighteen are outside the scope of a Rule 14.1 search. *See Horton v. California*, 496 U.S. 128, 133–34 (1990) (plain view exception); *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (exigent circumstances, including hot pursuit of a fleeing felon, *imminent* destruction of evidence to which there is *probable cause* to believe exists,

exception, a police officer may warrantlessly search an individual whom the officer has probable cause to arrest.⁷² An incident search may occur either before or after the individual's formal arrest—if probable cause to arrest exists at the time of search.⁷³ With regard to those incident searches preceding arrest, the United States Supreme Court has made clear, “It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.”⁷⁴ It has never wavered from that fundamental principle.⁷⁵

Consistent with United States Supreme Court precedent, the Arkansas Supreme Court has also recognized that a search incident to a lawful arrest is a “well settled” exception to the

preventing a suspect's escape, or danger to the police or to other persons inside or outside of a dwelling); *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (custodial inventory searches of property at a police station); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (schoolhouse searches); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (prison cell searches); *Oliver v. United States*, 466 U.S. 170, 181 (1984) (open fields); *United States v. Villamonte-Marquez*, 462 U.S. 579, 592 (1983) (warrantless boat boarding to check documentation); *Washington v. Chrisman*, 455 U.S. 1, 7 (1982) (searches of an area in which an arrestee has moved into); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (license and registration checks following a valid traffic stop); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (searches of premises to put out fires or investigate the cause of fires); *United States v. Ortiz*, 422 U.S. 891, 896–97 (1975) (traffic check points removed from an international border); *United States v. Edwards*, 415 U.S. 800, 807 (1974) (post-arrest administrative searches); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272–73 (1973) (searches at or near an international border or an equivalent); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (consent); *United States v. Biswell*, 406 U.S. 311, 316–17 (1972) (searches of a federally regulated business); *Wyman v. James*, 400 U.S. 309, 318 (1971) (welfare searches); *United States v. Moreno*, 475 F.2d 44, 51 (5th Cir. 1973) (airport searches); *Downing v. Kunzig*, 454 F.2d 1230, 1233 (6th Cir. 1972) (court house searches). Of the remaining three exceptions, only a search incident to a lawful arrest justifies the warrantless search of an individual's person for contraband. *See United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that a police officer may warrantlessly search the person of an arrestee for contraband as incident to a lawful arrest); *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (holding that a police officer with reasonable suspicion to believe that a person is involved in criminal activity may stop the person to investigate; and the officer may pat down the person's outer clothing for firearms *if* the officer has additional reasonable suspicion to believe that the person is armed and dangerous); *United States v. Di Re*, 332 U.S. 581, 587 (1948) (holding that the automobile exception does not justify a warrantless search of a vehicle occupant).

72. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980).

73. *Id.*

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

75. *See, e.g., Smith v. Ohio*, 494 U.S. 541, 543 (1990); *Rawlings*, 448 U.S. at 111; *Sibron*, 392 U.S. at 63; *Johnson v. United States*, 333 U.S. 10, 16–17 (1948).

warrant requirement.⁷⁶ The Arkansas Supreme Court has held that a police officer “may validly conduct a search incident to arrest of either person or the area within his immediate control” if the “officer has probable cause to arrest” the person to be searched.⁷⁷ Like the Supreme Court, Arkansas’s highest court has made clear that an incident search may only precede formal arrest when “there [is] probable cause to arrest prior to the search.”⁷⁸ In sum, the most basic principle in this area of Fourth Amendment jurisprudence is that “[t]he authority to search incident to an arrest depends wholly upon the lawfulness of the arrest . . . i.e., based upon probable cause.”⁷⁹

Accordingly, the critical question becomes whether probable cause to arrest exists prior to the relevant incident search. The question of probable cause “is a pragmatic one to be decided in light of a particular case.”⁸⁰ The Arkansas Supreme Court has held that probable cause to make a warrantless arrest exists “when the facts and circumstances within the officers’ collective knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed by the person to be arrested.”⁸¹ Although probable cause to arrest does not require the proof necessary to sustain a conviction, both the United States and Arkansas Supreme Courts have recognized that “a mere suspicion is not enough” to

76. *Holmes v. State*, 262 Ark. 683, 688, 561 S.W.2d 56, 58 (1978). Additionally, Rule 12.2 of the ARCP codifies the search incident to a lawful arrest exception to the warrant requirement. ARK. R. CRIM. P. 12.2. The full text of the rule provides:

An officer making an arrest and the authorized officials at the police station or other place of detention to which the accused is brought may conduct a search of the accused’s garments and personal effects ready to hand, the surface of his body, and the area within his immediate control.

Ark. R. Crim. P. 12.2.

77. *State v. Earl*, 333 Ark. 489, 494, 970 S.W.2d 789, 792 (1998).

78. *E.g., id.* at 494, 970 S.W.2d at 792 (“This court, as well as the Supreme Court, has held that a search is valid as incident to a lawful arrest even if it is conducted *before* the arrest, provided that the arrest and search are substantially contemporaneous and that there was a probable cause to arrest prior to the search.”); *Brunson v. State*, 327 Ark. 567, 572, 940 S.W.2d 440, 442 (1997) (“A search is valid as incident to a lawful arrest even if it is conducted before the arrest, provided that the arrest and search are substantially contemporaneous and that there was probable cause to arrest prior to the search.”).

79. *Richardson v. State*, 288 Ark. 407, 413, 706 S.W.2d 363, 367 (1986); *see, e.g., Sibron*, 392 U.S. at 63.

80. *Perez v. State*, 260 Ark. 438, 445, 541 S.W.2d 915, 920 (1976).

81. *Roderick v. State*, 288 Ark. 360, 363, 705 S.W.2d 433, 435 (1986).

establish probable cause to arrest—not even a “strong reason to suspect” will suffice.⁸²

Against that backdrop, neither the search incident to arrest exception nor any other well-recognized exception to the Fourth Amendment’s warrant requirement authorizes the expansive approach taken by Rule 14.1. First, consider that Rule 14.1 permits a police officer to warrantlessly search an individual’s person for contraband based upon a “reason to suspect”⁸³—a standard less than probable cause.⁸⁴ As both the United States and Arkansas Supreme Courts have explained, “Arrest on mere suspicion collides violently with the basic human right of liberty.”⁸⁵ Second, consider the consequences of Rule 14.1’s unfounded approach. Because Rule 14.1 permits a police officer to warrantlessly search an individual whom the officer lacks probable cause to arrest, it allows the officer to use the fruits of that warrantless search to establish the necessary probable cause to arrest the individual.⁸⁶ Such police practice strikes directly against both United States and Arkansas Supreme Court precedent.⁸⁷

In sum, Rule 14.1 permits the warrantless search of an individual’s person without a firm constitutional basis. It first

82. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (“It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict.”) (citations omitted); *Henry v. United States*, 361 U.S. 98, 101 (1959) (“[A]s the early American decisions both before and immediately after [the Fourth Amendment’s] adoption show, common rumor or report, suspicion, or even ‘strong reason to suspect’ was not adequate to support a warrant for arrest. And that principle has survived to this day.”) (citations and quotations omitted); *Howell v. State*, 350 Ark. 552, 561, 89 S.W.3d 343, 348 (2002) (“[A] mere suspicion is not enough to support a finding of probable cause to arrest.”), *overruled on other grounds by* *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003); *Friend v. State*, 315 Ark. 143, 147, 865 S.W.2d 275, 277 (1993) (“[P]robable cause [to arrest] does not require that degree of proof sufficient to sustain a conviction; however, a mere suspicion or even a strong reason to suspect will not suffice.”) (citations and quotations omitted); *Roderick*, 288 Ark. at 363, 705 S.W.2d at 435 (“[A probable cause] determination is based on factual and practical considerations of prudent men rather than of legal technicians. However, a mere suspicion is not enough. Even a ‘strong reason to suspect,’ will not suffice.”) (citations omitted).

83. ARK. R. CRIM. P. 14.1.

84. *See* cases cited *supra* note 82.

85. *Henry*, 361 U.S. at 101; *Roderick*, 288 Ark. at 363, 705 S.W.2d at 436.

86. ARK. R. CRIM. P. 14.1.

87. *See, e.g.*, *Smith v. Ohio*, 494 U.S. 541, 543 (1990); *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980); *Sibron v. New York*, 392 U.S. 40, 63 (1968); *Johnson v. United States*, 333 U.S. 10, 16–17 (1948); *State v. Earl*, 333 Ark. 489, 494, 970 S.W.2d 789, 792 (1998); *Brunson v. State*, 327 Ark. 567, 572, 940 S.W.2d 440, 442 (1997).

permits a police officer to warrantlessly search an individual for contraband whom the officer lacks probable cause to arrest and second allows the officer to use the fruits of that search to serve as hindsight justification for the individual's arrest.⁸⁸ Accordingly, Rule 14.1 permits a warrantless search that is neither justified as one incident to a lawful arrest nor any other well-recognized exception to the warrant requirement.⁸⁹ Thus, Rule 14.1 permits the warrantless search of an individual's person without a firm constitutional basis—in addition to unconstitutionally expanding the scope of the automobile exception.

III. CONCLUSION

Rule 14.1 is unconstitutional and must be amended.⁹⁰ The Supreme Court has held and never retreated from the *Di Re* principle that the automobile exception does not justify the warrantless search of a vehicle occupant's person.⁹¹ Further, no well-recognized exception to the Fourth Amendment's warrant requirement justifies the warrantless search of an individual's person for contraband based upon a standard less than probable cause to arrest.⁹² In sum, then, Rule 14.1 not only unconstitutionally expands the scope of the automobile exception, but also permits a warrantless search without a firm constitutional basis.

88. ARK. R. CRIM. P. 14.1.

89. *See supra* note 71 and accompanying text.

90. Rule 14.1 needs less amending than it does editing. Consider that only section (b) of Rule 14.1 must be stricken in order for the rule to comply with Supreme Court precedent. *See* ARK. R. CRIM. P. 14.1. Accordingly, a constitutional version of Rule 14.1 would provide:

An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:

- (i) on a public way or waters or other area open to the public;
- (ii) in a private area unlawfully entered by the vehicle; or
- (iii) in a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.

ARK. R. CRIM. P. 14.1(a).

91. *See* discussion *supra* Part I.

92. *See* discussion *supra* Part II; *see also* cases cited *supra* note 71.