No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAEJERRON VALENTINE, Petitioner,

vs.

STATE OF NEBRASKA, Respondent.

On Petition for Writ of Certiorari to

The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

Thomas C. Riley
Counsel of Record
Public Defender for Douglas County, Nebraska

Jessica C. West
Counsel of Record
Assistant Public Defender for Douglas County, Nebraska

1819 Farnam Street
H05 Civic Center
Omaha, Nebraska 68183
(402) 444-7175

QUESTIONS PRESENTED

1) Did the warrantless search of an automobile pursuant to the automobile exception become unreasonable when police officers expanded the search beyond the time and intensity required to locate the object of the search?

2) Does the removal of the disjunctive "or" from a statutory list give rise to ambiguity such that legislative history can be considered when interpreting such statute?

3) Is a defendant entitled to jury instructions which consistently instruct the jury on the term "possession?"

LIST OF PARTIES

Clerk of the Nebraska Supreme Court and Nebraska Court of Appeals
2413 State Capitol, P.O. Box 98910,
Lincoln, NE 68509
(402) 471-3731

Douglas County District Court
1701 Farnam Street,
Omaha, NE 68183
(402) 471-2683

Nebraska Attorney General
2115 State Capitol P.O. Box 98920,
Lincoln, NE 68509
(402) 471-2683

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PETITION FOR A WRIT OF CERTIORARI

Daejerron Valentine respectfully petitions for a writ of certiorari to the Nebraska Supreme Court.

OPINIONS BELOW

The opinion of the Nebraska Court of Appeals is reported at 27 Neb. App. 725, 936 N.W.2d 16 (2019). The Nebraska Supreme Court denied petition for further review.

STATEMENT OF JURISDICTION

The Nebraska Court of Appeals delivered its opinion on October 29, 2019. The Nebraska Supreme Court denied petition for further review on December 12, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Fourth Amendment to the United States Constitution, which secures "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. Amend. IV.

II. The Fifth Amendment to the United States Constitution, which guarantees all criminal defendant's "due process of law." U.S. Const. Amend. V.

III. The Sixth Amendment to the United States Constitution, which guarantees all citizens the right to "be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.

IV. Nebraska Revised Statute § 28-1206 (2017) defining possession of a firearm by a prohibited person, as that statute was in effect between May 10, 2017 and July 19, 2018.

STATEMENT OF THE CASE

On October 12, 2017, Daejerron Valentine (hereinafter "Valentine") was subjected to a traffic stop predicated on suspicion of a window tint violation. The stop was initiated by Officer

Ramsey and Officer Dempsey of the Omaha Police Department. In drafting the majority opinion of the Nebraska Court of Appeals on this matter, the court specifically noted that Officer Dempsey was "assigned to the 'gang suppression unit,'" although the relevance of that label was never addressed in the opinion. Officer Dempsey gave detailed testimony regarding the nature of the stop, and much of the stop was recorded on Officer Dempsey's body worn camera. The officers were on patrol in a marked police car in the northeast part of Omaha, Nebraska. Around 10:30 p.m., Officer Dempsey observed the passenger side of a vehicle despite the fact that the vehicle was also said to be driving in front of him. Nevertheless, Officer Dempsey believed, based on his training and experience, that the tint on the windows was too dark and thus constituted a traffic violation. Based on this observation, the officers conducted a traffic stop and made contact with the sole occupant and driver of the vehicle: Valentine.

Valentine asked the officers why he was stopped. Officer Dempsey responded by requesting Valentine's license and registration, which Valentine produced immediately. Officer Dempsey later testified that he observed the odor of burnt marijuana emanating from the vehicle. In response to that single observation, Officer Dempsey opened the driver's side door and commanded Valentine to exit the vehicle. Again, Valentine promptly complied. Officer Dempsey searched Valentine's person and asked if Valentine had been smoking marijuana. Valentine denied smoking himself, but he admitted that a recent passenger had smoked marijuana in the car. Nothing of evidentiary value was found on Valentine's person. Officer Dempsey promptly searched the center console of the vehicle and discovered two "baggies" of marijuana. One of the baggies contained 18.8 grams and the other contained 9.196 grams for a total of 27.996 grams of marijuana, or, as the Court of Appeals eloquently put it, "just under 1 ounce." *State v. Valentine*, 27 Neb. App.

725, 729 (2019). Inside the center console, Officer Dempsey also discovered a small digital scale and two empty plastic baggies.

At this point in the search, the only evidence available to Officer Dempsey was the odor of burnt marijuana, Valentine's frank explanation that a recent passenger had smoked marijuana in the vehicle, less than an ounce of unsmoked and unpackaged marijuana, a small digital scale, and two empty plastic baggies. Nevertheless, Officer Dempsey expanded his search of the vehicle by dismantling the passenger door and searching inside the trunk of the vehicle. As a result of the extenuated and intrusive search, Officer Dempsey discovered a firearm hidden inside the passenger door, underneath the passenger door locking mechanism and window control panel. Officer Dempsey later testified that he "commonly" searches this location for guns. Officer Dempsey also located a box of empty plastic baggies and $240 cash in the trunk.

At trial, Valentine moved to suppress all of the evidence seized during the search. At the suppression hearing, Valentine's counsel made the following arguments on his behalf:

(1) The police did not have probable cause to believe the window tint on Valentine's vehicle was too dark because the state failed to show Officer Dempsey's observation was made on an "objective basis." *See id.* at 732; Brief for Appellant at 16-18.

(2) The expansion of the search beyond the time and intensity required to locate the 'object of the search' (i.e. evidence consistent with the consumption of marijuana) was not justified by the observations articulated by the officers at that point in the stop (i.e. suspected window tint violation, the odor of burnt marijuana, less than an ounce of marijuana, a digital scale, and plastic baggies). *Valentine*, 27 Neb. App. at 732; Brief for Appellant at 18-21.

The trial court denied Valentine's motion summarily, finding that "all of the officers' actions [on the] evening [of the traffic stop] were appropriate and in accordance with Nebraska

law." *Valentine*, 27 Neb. App. at 732. At the ensuing trial, a dispute arose as to the proper interpretation of Nebraska Revised Statute § 28-1206. This statute, as it existed on October 12, 2017, read as follows:

> (1) A person commits the offense of possession of a deadly weapon by a prohibited person if he or she:
>
> (a) Possesses a firearm, a knife, or brass or iron knuckles and he or she:
>
> (i) Has previously been convicted of a felony;
>
> (ii) Is a fugitive from justice;
>
> (iii) Is the subject of a current and validly issued domestic violence protection order, or sexual assault protection order and is knowingly violation such order

This is precisely how the statute was written from April 2017 until April 2018. Prior to April 2017, the statute included the word "or" after subsection (1)(a)(ii) and was written in narrative as opposed to list form. Prior to the April 2017 amendments, the statute read as follows:

> (1)(a) Any person who possesses a firearm . . . and who has previously been convicted of a felony, who is a fugitive from justice, *or* who is the subject of a current and validly issued domestic violence protection order and is knowingly violating such order . . . commits the offense of possession of a deadly weapon by a prohibited person.

(emphasis added).

When the legislature revised the statute to the current list format, it apparently omitted the word "or," suggesting that subsections (1)(a)(i)-(iii) must all be met for the statute to apply. In April 2018, the legislature once again amended the statute to include the word "or" after subsection (1)(a)(ii), thereby reinstating the disjunctive language used in the previous form of the statute which requires only one of the three subsections be met for the statute to apply.

Valentine argued that the plain meaning of the statute in effect when the offense was committed required all three subsections to be met for the statute to apply. The district court was of the opinion that the omission of the word "or" made the statute ambiguous because it was equally likely that the legislature intended the word 'or' as it was that the legislature intended the word 'and.' Accordingly, the district court declared the statute ambiguous and examined the

legislative history to ultimately interpret the statute as if the word "or" was included in the version of the statute as it existed at the time of Valentine's offense.

Valentine also proposed a number of jury instructions which the district court refused to submit to the jury. First, Valentine argued that Jury Instruction No. 3 failed to accurately reflect the law with regard to Nebraska Revised Statute § 28-1206. Instruction No. 3 delineated the charges brought against Valentine, and it inserted the word "or" after subsection (1)(a)(ii) contrary to the plain meaning of the statute as discussed above. Second, Valentine proposed an amendment to Jury Instruction No. 6 to include the words "knowingly or intentionally" such that the instruction would read, "the defendant did *knowingly or intentionally* possess a deadly weapon." Finally, Valentine proposed an amendment to Jury Instruction No. 9 which defined the term 'possession' as "either knowingly having it on one's person or knowing of the object's presence and having control over the object." Valentine's proposal would have tacked on the phrase, "proximity, standing alone, is insufficient to prove possession."

Valentine was subsequently found guilty by a jury and convicted of possession of marijuana less than one ounce, first offense, and possession of a firearm by a prohibited person. At sentencing, the state enhanced the gun charge to a second offense. The district court ordered Valentine to pay a $300 fine for the marijuana infraction and sentenced him to a term of twenty years to twenty years and one day of imprisonment for the firearm possession conviction.

On appeal, the Nebraska Court of Appeals affirmed, agreeing with the district court on all the issues Valentine argued at the suppression hearing and at trial. The appellate court dismissed any notion that the officers lacked the probable cause necessary to carry out the extenuated search of Valentine's vehicle. *Id.* at 735-737. Quite notably, the Court of Appeals devoted almost the entire discussion of probable cause to only one of Officer Dempsey's observations—that is, the

odor of "marijuana" emanating from Valentine's vehicle. The opinion referred broadly to marijuana without the qualifier despite the undisputed fact that Officer Dempsey articulated his observation as "the odor of burnt marijuana." *See id.* at 728; Brief for Appellant at 9.

The Nebraska Supreme Court denied Valentine's petition for further review and this Petition for Writ of Certiorari followed pursuant to 28 U.S.C. § 1254.

REASONS FOR GRANTING THE WRIT

I

This case presents an opportunity for The Court to clarify a fundamental inconsistency that has emerged in Fourth Amendment jurisprudence. The underlying question at the heart of this petition is the relevance and significance of the distinction between 'the odor of burnt marijuana' and 'the odor of raw marijuana' as it relates to a warrantless search of an automobile under the automobile exception to the Fourth Amendment warrant requirement. A number of jurisdictions, primarily citing to the United States Court of Appeals for the Tenth Circuit, have adopted a logical distinction between the two smells. *See State v. Wright*, 977 P.2d 505 (Utah Ct. App. 1999); *State v. Farris*, 849 N.E.2d 985 (Ohio 2006); *Commonwealth v. Scott*, 210 A.3d 359 (Pa. Super. Ct. 2019); *Commonwealth v. Cruz*, 945 N.E.2d 899 (Mass. 2011); *Commonwealth v. Daniel*, 985 N.E.2d 843 (Mass. 2013); *State v. Schmadeka*, 38 P.3d 633 (Idaho Ct. App. 2001). In these jurisdictions, the odor of burnt marijuana emanating from the passenger compartment of a vehicle, standing alone, does not furnish probable cause to expand the search beyond the passenger compartment. Whereas other jurisdictions—Nebraska for example—have adopted a categorical rule that the odor of marijuana, regardless of the form, furnishes sufficient probable to search the entire vehicle. *See State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018); *State v. Ruzicka*, 202 Neb. 257, 274 N.W.2d 873 (1979); *State v. Daly*, 202 Neb. 217, 274 N.W.2d 556 (1979); *State v.*

Benson, 198 Neb. 14, 251 N.W.2d 659 (1977). These two rules are in direct contradiction with one another creating confusion and inconsistency in Fourth Amendment jurisprudence and law enforcement procedures across the country.

The automobile exception is a well-established doctrine allowing for the warrantless search of a lawfully stopped automobile when there is probable cause to believe the automobile contains evidence of a crime. *Carroll* v. *United States*, 267 U.S. 132 (1925). There is probable cause to search a vehicle if, under the totality of the circumstances, there is a "fair probability" that the vehicle contains contraband or evidence. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The scope of a warrantless search under the automobile exception "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v.* Ross, 456 U.S. 798, 824 (1982). In *California v. Acevedo*, the 'object of the search' was a paper bag of marijuana located in the trunk of the vehicle. There, the Court held that once police discovered the paper bag, there was no longer probable cause to believe the object of the search was hidden anywhere else in the vehicle. Under those circumstances, a continued or expanded search of the vehicle would have been without probable cause and therefore unreasonable under the Fourth Amendment. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

The present case hinges on conflicting determinations of the proper "object of the search." The Nebraska Supreme Court has adopted a categorical rule treating the odor of marijuana, regardless of form, as sufficient to justify any intrusion into a lawfully stopped vehicle. *See State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018); *State v. Ruzicka*, 202 Neb. 257, 274 N.W.2d 873 (1979); *State v. Daly*, 202 Neb. 217, 274 N.W.2d 556 (1979); *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977). Accordingly, the object of the search is broadly defined as "marijuana" writ large, thereby furnishing probable cause to search anywhere marijuana might be found.

Valentine, like the courts in various other jurisdictions, strongly believes that there is an immensely relevant distinction between the odor of burnt marijuana and the odor of raw marijuana. Specifically, the odor of burnt marijuana, without more, merely arouses suspicion of marijuana consumption and possession of a user amount of marijuana consistent with such consumption. Accordingly, the object of the search, upon detection of the odor of burnt marijuana, should be limited to evidence consistent with marijuana consumption.

In accordance with the argument below, Valentine urges the Court to adopt the logical distinction between an observation of the odor of burnt marijuana and an observation of the odor of raw marijuana insofar as it relates to the scope of reasonable search under the automobile exception. This distinction is consistent with longstanding Fourth Amendment principles and better comports with the rapidly changing legislative environment regarding the personal use and possession of small amounts of marijuana. Once this distinction is properly accounted for, Valentine contends that Officer Dempsey did not have probable cause sufficient to continue and expand the search of Valentine's vehicle after locating the object of the search (i.e. evidence consistent with consumption of marijuana) and prior to developing suspicion of additional criminality. In other words, the search of Valentine's vehicle went beyond the scope of reasonable search under the automobile exception to the warrant requirement of the Fourth Amendment.

A. The Nebraska Court of Appeals did not properly consider the totality of the circumstances when it failed to account for Officer Dempsey's articulated observation of the "odor of burnt marijuana."

In affirming the trial court's denial of Valentine's motion to suppress, the appellate court first looked to precedent and noted that the Nebraska Supreme Court has "consistently held that officers with sufficient training and experience who detect the odor of marijuana emanating from a vehicle have probable cause on that basis alone to search the vehicle under the automobile exception to the warrant requirement." *Valentine*, 27 Neb. App. at 736. The cases cited by the court

will be examined closely below; suffice it to say the appellate court was confident enough in Nebraska Supreme Court precedent to issue the narrow holding that Officer Dempsey's detection of the odor of burnt marijuana emanating from the vehicle, standing alone, furnished sufficient probable cause "to search the entire vehicle." *Id.* at 737. Then, somewhat confusingly, the court went on to issue the additional holding that Officer Dempsey's discovery of less than an ounce of marijuana "furnish[ed] additional probable cause to make a complete search of the automobile." *Id.* (internal quotations omitted).

In light of the prevailing rule in Nebraska regarding the automobile exception the warrant requirement of the Fourth Amendment, the appellate court explicitly neglected to account for the "commonsense distinction" between the odor of burnt marijuana and the odor of raw marijuana. *See United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir. 1998). Insofar as the "odor of burnt marijuana" was articulated by Officer Dempsey as a distinct observation to be considered in the probable cause analysis, the appellate court, and presumably the trial court, wholly failed to account for it as such. The Nebraska Supreme Court has adopted a categorical rule that the smell of marijuana—in any form, location, or intensity—standing alone, furnishes sufficient probable cause to justify even the most severe intrusions into a lawfully stopped automobile. *See State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018); *State v. Ruzicka*, 202 Neb. 257, 274 N.W.2d 873 (1979); *State v. Daly*, 202 Neb. 217, 274 N.W.2d 556 (1979); *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977). Two of these cases, *Seckinger* and *Ruzicka*, specifically addressed cases dealing with an officer's detection of the "odor of burnt marijuana." Both courts disregarded the observation articulated by the officer and referred broadly to the "odor of marijuana" so as to apply the categorical rule. In *Ruzicka*, the court declared "[w]e know of no reason why there should be a distinction between the odor of burned and unburned marijuana." *Ruzicka*, 202 Neb. at 257. In

Seckinger, the court relied heavily on *Ruzicka*, *Daly*, and *Benson* and ultimately reiterated "the general rule" as follows:

> "[W]hen an officer with sufficient training and experience detects the odor of marijuana emanating from a vehicle that is readily mobile, the odor alone furnishes probable cause to suspect contraband will be found in the vehicle and the vehicle may be lawfully searched under the automobile exception to the warrant requirement."

Seckinger, 301 Neb. at 975.

The categorical rule adopted in Nebraska is in direct conflict with another rule emerging primarily out of the United States Court of Appeals for the Tenth Circuit. Specifically, "the odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause to search the trunk of the vehicle." *United States v. Bradford*, 423 F.3d 1149, 1160 (10th Cir. 2005) (citing *United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir. 1993)). The Tenth Circuit relied on this rule in at least four cases prior to *Bradford*. *See United States v. Wald*, 216 F.3d 1222 (10th Cir. 2000); *United States v. Downs*, 151 F.3d 1301 (10th Cir. 1998); *United States v. Parker*, 72 F.3d 1444 (10th Cir. 1995); *United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir. 1993). In *Downs*, the court explained the distinction between burnt and raw marijuana as follows:

> "[T]his court has established a commonsense distinction between the smells of burnt and raw marijuana based on the imperative that the scope of a warrantless search 'is defined by the object of the search and the places in which there is probable cause to believe that it may be found.' As to the smell of burnt marijuana, *Nielsen* and *Parker* recognize that the smell of burnt marijuana is generally consistent with personal use of marijuana in the passenger compartment of an automobile. In such a case, therefore, there is no fair probability that the trunk of the car contains marijuana and an officer must limit the search

to the passenger compartment absent corroborating evidence of contraband. When, on the other hand, an officer encounters, as was the case here, the overpowering smell of raw marijuana, there is a fair probability that the car is being used to transport large quantities of marijuana and that the marijuana has been secreted in places other than the passenger compartment."

Downs, 151 F.3d at 1303.

Valentine requests this Court to adopt the "commonsense distinction" outlined by the Tenth Circuit above and clarify that a proper totality of the circumstances analysis of probable cause under the automobile exception to the Fourth Amendment warrant requirement should account for the "odor of burnt marijuana" as such rather than conflating the observation to accommodate an apparent preference for a categorical rule.

B. Officer Dempsey conducted an unreasonable search of Valentine's vehicle because he expanded the search beyond the time and intensity required to locate the object of the search in violation of the Court's opinion in *United States v. Ross*.

Once the distinction between the odor of burnt marijuana and the odor of raw marijuana is accounted for, it is clear that Officer Dempsey did not have probable cause to continue and expand the search after discovering less than an ounce of marijuana in the center console. At this point in the search, the evidence available to Officer Dempsey was limited to the odor of burnt marijuana, less than an ounce of unsmoked and unpackaged marijuana in plastic baggies, a small digital scale, and two empty plastic baggies. All of this evidence is entirely consistent with the information provided by Valentine that a recent passenger had smoked marijuana in the vehicle. Indeed, Officer Dempsey later testified that he did not discover any evidence to suggest that Valentine himself had consumed marijuana.

Based on the odor of burnt marijuana alone, Officer Dempsey had probable cause to believe that someone had recently consumed marijuana in the vehicle. Accordingly, the object of the

search was evidence consistent with the consumption of marijuana. The subsequent discovery of less than an ounce of unsmoked and unpackaged marijuana bolstered that suspicion and merely justified the conclusion that Valentine was in possession of less than an ounce of marijuana which is an infraction punishable by a fine under Nebraska law. At that point in the stop, Officer Dempsey had located the object of the search (i.e. evidence of marijuana consumption) and failed to articulate evidence in support of additional probable cause that evidence of marijuana consumption would be located anywhere else in the vehicle. Therefore, Officer Dempsey should have simply issued citations for the marijuana infraction and the window tint violation and let Valentine on his way. Nevertheless, Officer Dempsey continued and expanded his search to look for evidence of additional criminality. At best, this expansion of the search was based on mere unsubstantiated and unarticulated suspicions. At worst, as suggested by his testimony, Officer Dempsey has simply developed a habit of indiscriminately dismantling car doors during traffic stops. Regardless, the continued and expanded search of Valentine's vehicle went beyond the scope of a reasonable search because it went beyond the time and intensity required to locate the object of the search in violation of the Court's opinion in *Ross*.

C. Officer Dempsey's invasive search of the passenger door was without probable cause and therefore unreasonable under the Fourth Amendment.

Officer Dempsey's invasive search of the passenger door was apparently based, not on any observations or articulable suspicion of criminal activity, but rather on Officer Dempsey's habitual and indiscriminate practice of searching inside passenger door panels for guns. While it is true that dismantling a portion of a vehicle in search of contraband is not per se unreasonable, such a search still requires probable cause directed to that portion of the vehicle. *See United States v. Guerrero-Sanchez*, 412 F. App'x. 133 (10th Cir. 2011) (holding that a positive indication by a drug dog furnished probable cause to dismantle that portion of the vehicle in search of contraband). In

Guerrero-Sanchez, the Tenth Circuit explained that dismantling a portion of the vehicle was justified "because evidence of a hidden compartment not only contributes to probable cause to search a vehicle but supports an officer's dismantling of a vehicle to find it." *Id.* at 141; *see also United States v. Bernal*, 2017 U.S. Dist. LEXIS 193809 (finding that disassembling the interior of a vehicle was justified by a drug dog alert and subsequent observations of obvious after-market alterations to the interior of a vehicle).

These cases can be distinguished from the present case insofar as Officer Dempsey failed to articulate any evidence of a hidden compartment or secreted contraband inside the passenger door. Rather, he simply stated he regularly dismantles passenger doors in search of guns even where, as here, there was no evidence to suggest the existence of a gun. The only arguable justification for dismantling the passenger door is that there was probable cause to believe the object of the ongoing search could be hidden therein. However, the object of the search in the present case was evidence consistent with the consumption of marijuana. Officer Dempsey failed to articulate even the slightest suspicion, let alone probable cause, that evidence consistent with the consumption of marijuana was secreted in a hidden compartment inside the passenger door. Indeed, after searching, there was not any evidence consistent with the consumption of marijuana secreted therein.

Unlike in *Guerrero-Sanchez* and *Bernal*, there was no alert by a drug dog in this case. Nothing found inside the center console indicated that contraband could be secreted in the interior of the passenger door. Rather, Officer Dempsey simply searched a location where he commonly searches without regard for the circumstances of the present case. Accordingly, Officer Dempsey's invasive search of the passenger door was without probable cause and was therefore unreasonable under the Fourth Amendment.

D. Officer Dempsey's search of the trunk was without probable cause and therefore unreasonable under the Fourth Amendment.

Officer Dempsey's expansion of the search to the trunk of Valentine's vehicle was without probable cause to believe the object of the search could be secreted therein. Once again, there was no alert to the trunk by a drug dog. There was no odor emanating from the trunk. There was nothing to suggest that evidence consistent with marijuana consumption would be found inside the trunk. Indeed, the Tenth Circuit as consistently pointed out that it is unreasonable to think that someone had been consuming marijuana in the trunk of a car. *See United States v. Wald*, 216 F.3d 1222, 1226 (10th Cir. 2000).

It may be argued that the discovery of a small amount of marijuana inside the center console simply furnished additional probable cause to expand the search to the trunk of the vehicle. *See United States v. Bradford*, 423 F.3d 1149, (10th Cir. 2005) (affirming the rule that the odor of burnt marijuana alone does not establish probable cause to search the trunk, and adding, "[r]ather, an officer obtains probable cause to search the trunk of the vehicle if he smells marijuana in the passenger compartment and finds corroborating evidence of contraband"). It may very well be true that, generally speaking, the odor of burnt marijuana and the subsequent discovery of "contraband" often furnishes probable cause to search the trunk. However, application of this rule to the present case would lead to an illogical result. The very reason that the Tenth Circuit adopted the commonsense distinction between burnt marijuana and raw marijuana was to acknowledge the commonsense distinction between suspicion of personal marijuana consumption and large-scale drug trafficking. *See United States v. Wald*, 216 F.3d 1222 (10th Cir. 2000) ("This rule is premised on the common-sense proposition that the smell of burnt marijuana is indicative of drug usage, rather than drug trafficking").

The underlying distinction being made by the Tenth Circuit is between evidence consistent with marijuana consumption and evidence consistent with large-scale drug trafficking. It is precisely because officers only have probable cause of personal consumption that a reasonable search is confined to the passenger compartment when the odor of burnt marijuana is detected. If additional evidence consistent with personal marijuana consumption is all the officers discovered (e.g., less than an ounce of marijuana), then officers still only have probable cause of personal consumption. Allowing officers to expand their search based on such observations would be to adopt and obliterate the commonsense distinction in one fell swoop.

Without additional observations sufficient to furnish probable cause to believe the object of the search could be secreted in the trunk, Officer Dempsey's expansion of the search to the trunk of Valentine's vehicle was without probable cause and therefore unreasonable under the Fourth Amendment.

II

The Nebraska Court of Appeals also erred when it affirmed the district court's interpretation of Nebraska Revised Statute § 28-1206. Specifically, the Court of Appeals, like the district court before it, erroneously read ambiguity into the statute despite the fact that the plain meaning of the statute was apparent. In so doing, both courts denied Valentine his Fifth Amendment right to due process of law and his Sixth Amendment right to be informed of the nature and cause of the accusation.

The Fifth Amendment to the U.S. Constitution guarantees a criminal defendant's right to due process of law. U.S. Const. Amend. V. The Sixth Amendment to the U.S. constitution guarantees the right to be "informed of the nature and cause of the accusation." U.S. Const. Amend. VI. Courts must interpret what a legislature has expressed in the plain meaning of a statute.

Callahan v. United States, 364 U.S. 587 (1961). As a result of the April 2017 revision, the Nebraska Legislature omitted the word "or" from the statute, effectively creating a list of three necessary elements which must be met for the statute to apply. *See State v. O'Laughlin*, 372 P.3d 342 (2016); *see also Encyclopedia of Rhetoric and Composition*, 41, Ed. Theresa Enos, 1996; and Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16, 3, 51 n.179 (2010) (discussing that the omission or absence of a conjunction between parts of a sentence, or asyndenton, suggest unity of the listed items); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, 119 (2012) (asserting "the general rule interpreting asyndetic sentences is to imply 'and' as the final coordinating conjunction"). Moreover, it is presumed that legislatures know the language used in a statute and, if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended. *In re Estate of Psota*, 297 Neb. 570, 900 N.W.2d 790 (2017).

The Nebraska Legislature is presumed to know the language used in § 28-1206 at all times and throughout revisions thereof. By specifically omitting the word "or," the legislature is presumed to have intended a change in the law which required all three subsections to be met before the statute applies. However, at trial, the prosecution wholly failed to present any evidence with regard to subsections (1)(a)(ii) and (1)(a)(iii), and Valentine was entitled to a directed verdict on that account. Nevertheless, both the district court and the appellate court avoided this result by reading ambiguity into the statute. Both courts suggested there was ambiguity because it was equally as likely that the legislature had intended to include the word "or" as it is that the legislature had intended to include the word "and." Importantly, however, neither court addressed the also likely scenario that the legislature did not intend to include either word. Valentine argues that the statute, as it was written at the time of his offense, was not ambiguous at all. Rather, according to

the well-known principles of construction discussed above, the plain meaning of the statute clearly indicates a list of essential elements to be met before application of the statute. Without ambiguity, it was error for the lower courts to resort to legislative history to imply the legislature's intent to include the word "or." This error deprived Valentine of due process of law and the right to be accurately informed of the nature and cause of the accusation. Valentine requests this court to reverse the erroneous determination that the statute was ambiguous as written and vacate Valentine's wrongful conviction for possession of a deadly weapon by a prohibited person.

III

Finally, the Nebraska Court of Appeals erred when it affirmed the district court's refusal of Valentine's proposed jury instructions. Under Nebraska law, to establish reversible error from the district court's failure to five a requested jury instruction, Valentine bore the burden to show (1) the tendered instruction was a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) Valentine was prejudiced by the court's refusal. *State v. Castellanos*, 26 Neb. App. 310, 918 N.W.2d 345 (2018).

First, the district court refused Valentine's proposed Jury Instruction No. 3 which reflected the plain meaning of the statute discussed above. In this instance, not only did Valentine's proposal correctly state the law, the final Jury Instruction No. 3 misstated the law. Because of the erroneous interpretation of § 28-1206, the final Jury Instruction No. 3 impermissibly included the word "or" after subsection (1)(a)(ii). Valentine's proposed instruction would have required the jury to find all three subsections had been met to find Valentine guilty of violating § 28-1206. This is the correct statement of law based on the plain meaning of § 28-1206. By refusing Valentine's proposed instruction, the district court irreversibly prejudiced Valentine and therefore constitutes reversible error.

Second, the district court refused Valentine's proposed amendments to Jury Instruction No. 6 to include the words "knowingly or intentionally." If accepted, Jury Instruction No. 6 would have read, "the defendant did *knowingly or intentionally* possess a deadly weapon." However, the district court refused Valentine's proposal and excluding any reference to the element of intent. Valentine's proposed changes were an accurate statement of law, were warranted by the evidence. Indeed, the inclusion of "knowingly or intentionally" would have brought Jury Instruction No. 6 in line with the language of Jury Instruction No. 5. Instruction No. 5 referred to the possession of marijuana and included the words "knowingly or intentionally" with regard to possession. Valentine was merely requesting that the district court also include that language with regard to possession of a firearm in Instruction No. 6. The exclusion of the proposed language prejudiced Valentine insofar as it was misleading on the issue of the criminal intent element. The jury was asked to carefully consider the instructions. A careful consideration of Instructions No. 5 and No. 6 would reveal the apparent inconsistencies and thereby influence jury deliberations resulting in reversible error.

Third, the district court refused Valentine's proposed instruction which would have included the clarifying phrase "proximity, standing alone, is insufficient to prove possession." This is a correct statement of law and has been integrated into the pattern jury instructions in Nebraska. *See* NJI2d Crim. 4.2. This is precisely the type of case in which such a clarifying statement would be warranted by the evidence. Valentine was found inside a vehicle with a handgun secreted inside the passenger door. It is clear that Valentine was in close proximity to the handgun, however, as is pointed out by the proposed instruction, proximity alone is not enough. Valentine, having proposed a valid and relevant instruction was entitled to its inclusion. The refusal of such failed to instruct the jury on all relevant components of the law and prejudiced Valentine accordingly

resulting in reversible error. Valentine urges the Court to reverse the Nebraska Court of Appeals' erroneous refusals of Valentine's proposed jury instructions and remand this case for a new trial.

CONCLUSION

This case presented an opportunity for The Court to clarify a fundamental inconsistency in Fourth Amendment jurisprudence regarding the smell of burnt marijuana verse raw marijuana, enforce the limiting power of the Fourth Amendment against unlawful and excessive government intrusion, properly interpret plain statutory language, and instruct on correct and consistent statements of law.

The lower courts erred in these respects and Valentine urges a reversal of the lower courts' holdings with instruction on further proceedings.

RESPECTFULLY SUBMITTED:

Thomas C. Riley, #13523
Douglas County Public Defender
Attorney for Petitioner

Jessica C. West, #24664
Assistant Public Defender
Attorney for Petitioner