No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN VAUGHN, Petitioner,

vs.

STATE OF NEBRASKA, Respondent.

On Petition for Writ of Certiorari from
the Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the automobile exception to the warrant requirement of the Fourth Amendment apply to commercial trains?
2) Is there a plain smell exception to the warrant requirement of the Fourth Amendment?
3) Does a defendant's right to confrontation under the Sixth Amendment extend to statements that are not hearsay or fall within a hearsay exception, no matter whether they are testimonial or nontestimonial?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

DIRECTLY RELATED PROCEEDINGS

Proceedings at issue in this matter began with the filing of the Information in the District Court of Douglas County Nebraska, State of Nebraska v. John Vaughn, CR21-1009. Judgment was rendered on April 13, 2022. An appeal was filed on April 26, 2022. The Nebraska Supreme Court filed the opinion on May 5, 2023, under the case number S-22-308. The opinion can be found at *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023) (No. S-22-308).

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The opinion of the Nebraska Supreme Court is reported at 214 Neb. 167, 989 N.W.2d 378 (2023) (No. S-22-308) and is attached at App. A, p. 1a-30a.

Statement of Jurisdiction

The Nebraska Supreme Court delivered its opinion on May 5, 2023. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Constitutional 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 Confrontation Clause of the Sixth Amendment which guarantees, "In all prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. Amend. VI.

Statement of the Case

On March 24, 2021, the State of Nebraska filed an information alleging that John Vaughn committed three felony charges. (T1). The State alleged that on February 4, 2021, in Douglas County, Nebraska, Vaughn did 1) deliver, distribute,

dispense, manufacture, or possess with the intent to distribute, deliver, dispense, or manufacture marijuana; 2) possess marijuana, more than one pound; and 3) fail to affix a tax stamp. (Pet. App. 210a-211a).

A motion to suppress hearing was held, challenging whether evidence had been obtained in violation of Vaughn's Fourth Amendment right against warrantless search and seizure. The government called Officer Brian Miller, a Pottawattamie County deputy who is assigned to the DEA Task Force Criminal Interdiction Unit. (Pet. App. 128a). Miller testified that he is trained to monitor inconsistencies on the train railways that travel through Omaha. (Pet. App. 134a). Miller testified that on February 4, 2021, at the Amtrak train station in Omaha, Nebraska, Miller boarded the train and proceeded to smell the seam or zipper portion of the duffle bag. (Pet. App. 136a). Miller testified that while smelling the seam of the bag located on a luggage rack, he detected the odor of marijuana coming from it. (Pet. App. 136a). Miller testified that he was a couple of inches away from the seam of the bag when he smelled marijuana. (Pet. App. 145a).

Miller proceeded to conduct a "probable cause" search of the duffle bag and located marijuana in vacuum sealed packages. (Pet. App. 137a). Miller testified that he asked an Amtrak employee who owned the duffle bag and the employee responded that the bag belonged to a male party in room 12. (Pet. App. 138a). Vaughn was ultimately arrested and removed from the train. (Pet. App. 138a). Miller testified that he then conducted a search of the cabin and found a suitcase, a search of which revealed additional raw leaf marijuana. (Pet. App. 141a).

After hearing the evidence and arguments from both parties, the district court overruled Vaughn's motion to suppress and stated, "an officer can smell any bag he wants to smell. If he smells the odor of marijuana coming from the zipper as he said, then I believe that there's – I'm finding that there's probable cause to search the bag." (Pet. App. 214a; 173a).

Before trial, defense counsel argued its motion in limine regarding the Amtrak employees out of court statements to law enforcement. (Pet. App. 175a). Vaughn argued that the evidence of the Amtrak employee's identification of Vaughn as the owner of the duffle bag should be inadmissible at trial because the statements were hearsay not within an enumerated exception and violated Vaughn's right to confrontation. (Pet. App. 175a-176a).

At trial, Miller testified that on February 4, 2021, he boarded the Amtrak train and, without touching the bag, Miller smelled the seam of the duffle bag and stated he smelled an odor of marijuana. (Pet. App. 187a). Vaughn renewed his motion to suppress, and asked for a continuing objection. (Pet. App. 187a). The court overruled counsel's objection but permitted the continuing objection. (Pet. App. 187a). Miller testified that after he smelled the odor of marijuana, he conducted a probable cause search of the bag. (Pet. App. 187a). During this search, Miller testified that he saw an opaque black vacuum-sealed bag and a clear vacuum-sealed bag of a green leafy substance he believed to be marijuana. (Pet. App. 187a). Miller testified that he then asked the Amtrak attendant if she knew who the bag belonged to. (Pet. App. 190a). Vaughn objected and renewed his hearsay and

confrontation objections. (Pet. App. 190a). The court overruled counsel's objection to the Amtrak employee's statement. (Pet. App. 190a). The court reasoned that it was allowing the testimony as to what the attendant said because it was not to prove the truth of the matter asserted, it was just to give information as to why Miller took his next step. (Pet. App. 191a). In allowing the testimony, the district court gave a limiting instruction to the jury. (Pet. App. 191a). Miller went on to testify that he was told by the employee that the duffle bag belonged to a male that was in room 12. (Pet. App. 190a). Based on what the Amtrak employee said, Miller had a conversation with Vaughn, and ultimately arrested Vaughn. (Pet. App. 200a). After Vaughn's arrest and removal from the train, Miller searched room 12 and located a hard-sided suitcase. (Pet. App. 209a).

The court declared that the statement to Miller by the Amtrak employee is not hearsay. (Pet. App. 207a).

The jury found Vaughn guilty of all three charges. The court accepted the guilty verdicts and sentenced Vaughn to a period of four to six years of incarceration on count I: delivery, distribution, dispensing, manufacturing, or possession with intent to distribute, deliver, dispense, or manufacture marijuana and a fine of $10,000 on count III: failure to affix a tax stamp. (Pet. App. 221a-222a).

Vaughn filed his notice of appeal on April 26, 2022. The Honorable Peter C. Bataillon signed an order allowing Vaughn to proceed *in forma pauperis* on April 14, 2022. After briefing and argument, the Nebraska Supreme Court delivered its

opinion on May 5, 2023, affirming Vaughn's convictions and sentence. *State v. Vaughn*, 314 Neb. 167 (2023). (Pet. App. 1a-30a).

INTRODUCTION

This case presents an opportunity for this Court to find that the automobile exception to the Fourth Amendment warrant requirement as it exists under *California v. Acevedo*, 500 U.S. 565 (1991), extends the search of closed containers found on commercial passenger trains. Instead, closed containers on passenger trains may be subject to the general exigent circumstances exception to the warrant requirement, which requires a case specific inquiry as required by *Missouri v. McNeely*, 569 U.S. 141 (2013). The general exigent circumstance exception to the warrant requirement does not permit the warrantless search of closed containers on passengers. This Court should find that current case law permits the least intrusive means and probable cause of criminal activity inside a closed container on a train can be seized, in order to prevent the destruction of evidence, while a warrant is requested.

This case also presents an opportunity to correct and clarify a misstatement of law by the Nebraska Supreme Court related to the Confrontation Clause of the Sixth Amendment, as to whether statements by nontestifying witnesses that are determined to be not hearsay or that fall within a hearsay exception, are exempt from an accused's confrontation right, even if the statements could be considered testimonial.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED ON WHETHER PERSONAL PROPERTY ON PASSENGER TRAINS IS PROTECTED BY THE FOURTH AMENDMENT.

This case presents an opportunity for the Court to clarify a fundamental inconsistency that has emerged in Fourth Amendment jurisprudence. Does the automobile exception to the Fourth Amendment warrant requirement applies to commercial trains?

The present case hinges on conflicting determinations of the limitations of the exceptions to the Fourth Amendment warrant requirement. The Nebraska Supreme Court would seek to expand and broaden the automobile exception to the warrant requirement allowing the most intrusive invasion into private citizens' property. The Nebraska Supreme Court failed to apply the existing general exigent circumstances exception to the warrant requirement and failed to insist on the least intrusive option for law enforcement to respect citizens' privacy while still being able to effectuate the important governmental interest of detection and seizure of contraband on interstate travel.

Other jurisdictions have addressed questions of searches and seizures on trains without applying the automobile exception to the warrant requirement at all. *United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988), *abrogated on other grounds by Gozlon-Peretz v. United States*, 498 U.S. 395 (1991); *U.S. v. Coyler*, 878 F.2d 469 (D.C. Cir. 1989); *United States v. Marrocco*, 578 F.3d 627 (7th Cir. 2009).

One case has expanded the automobile exception to trains. *Symes v. U.S.*, 633 A.2d 51 (D.C. 1993).

Although not directly on point, some jurisdictions have included commercial buses under the umbrella of the automobile exception to the warrant requirement. *See United States v. Pina*, 648 Fed. Appx. 899 (11th Cir. 2016); *Green v. State*, 978 S.W.2d 300 (1998); *State v. Lovely*, 365 P.3d 431 (Idaho App. 2016); *Alvarez v. Com.*, 485 S.E.2d 646 (1997).

A. The Automobile Exception to the Fourth Amendment Warrant Requirement Does Not Extend to Passenger Trains.

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); *see also Illinois v. Gates*, 462 U.S. 213, 238 (1983). The two main justifications for the automobile exception to the warrant requirement are exigency and a lessened expectation in privacy. *Riley v. California*, 573 U.S. 373, 398–400 (2014) (citing *Thornton v. U.S.*, 541 U.S. 615, 631 (2004)); *see also Wyoming v. Houghton*, 526 U.S. 295, 303–304 (1999). This Court has explained the necessity for the automobile exception, "because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.' '(T)he opportunity to search is fleeting . . .'" *Coolidge v. New Hampshire*, 403 U.S. 443, 460 (1971), *holding modified by Horton v. California*, 496 U.S. 128 (1990)

(quoting *Chambers v. Maroney*, 399 U.S. 42, 51 (1970)). 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).

However, the Court has never defined the limits of what is an "automobile" for purposes of this exception. The most common use of the automobile exception is after a traffic stop of an individual vehicle on a public roadway. *See California v. Acevedo*, 500 U.S. 565, 575 (1991). However, using the same justifications for vehicles, this Court has concluded that a motor home parked in a public place also fell within the automobile exception due to its mobility and that motor homes are subject to a range of governmental regulations inapplicable to fixed dwellings. *California v. Carney*, 471 U.S. 386 (1985).

Additionally, there is some case law to indicate commercial buses also fall within the automobile exception for similar reasons. Buses have been included in the automobile exception to the warrant requirement because they are "readily mobile" and people have a lessened expectation in privacy on a bus. *See United States v. Pina*, 648 Fed. Appx. 899 (11th Cir. 2016); *Green v. State*, 978 S.W.2d 300 (Ark. 1998); *State v. Lovely*, 365 P.3d 431 (Idaho App. 2016); *Alvarez v. Com.*, 485 S.E.2d 646 (1997).

Passenger trains present a unique circumstance to address both the exigency exception to the warrant requirement and reasonable expectations of privacy in trains. Trains both have aspects like cars and buses where closed containers are

transported on these transportation devices, and have aspects like dwellings or hotels where people rent private or semi-private rooms on the train car.

Although trains are "readily mobile" as the automobile exception is primarily concerned about, a trains mobility is much more limited than a car or bus. Trains operate on a fixed schedule, can only travel on train tracks, and passengers have no control over their transportation. Because trains travel on tracks, law enforcement can easily ascertain where a train is heading when it begins moving. The exigency in trains is less because of these limitations and because of this, trains should not be considered automobiles as it relates to the automobile exception to the warrant requirement.

Second, the privacy interests of individuals on trains exists on two levels. As it relates to this case, the privacy interests in closed containers on a train are subject to the same privacy interests as closed containers anywhere in public. Similar to passengers in an airport, *United States v. Place*, 462 U.S. 696 (1983), passengers on trains retain a reasonable expectation of privacy in their luggage. Traveling on a train is less intrusive than boarding an airplane at an airport. This privacy expectation means that law enforcement cannot search personal property without a warrant or exigent circumstances.

This is not to say that other exceptions to the warrant requirement do not apply to searches and seizures of closed containers on trains, but the expansion of the automobile exception to trains is inappropriate and contrary to justification used by this Court in creating the automobile exception to the warrant requirement.

B. The General Exigent Circumstances Exception to the Fourth Amendment Warrant Requirement Applies, but Permits the Seizure of the Container Pending Issuance of a Warrant.

This Court held in *Coolidge v. New Hampshire* that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." 403 U.S. 443, 468 (1971). In addition to the categorical exceptions to the warrant requirement,[1] this Court has recognized a general exigent circumstance exception as an exception to the Fourth Amendment warrant requirement. *Missouri v. McNeely*, 569 U.S. 141, 150 (2013). This exception is different than other warrant exceptions, as "the general exigency exception . . . asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry." *Id.* at fn 3. Such exigencies could include "the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury." *Riley v. California*, 573 U.S. 373, 402 (2014) (citing *Kentucky v. King*, 563 U.S., 452, 460, (2011)).[2]

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[1] See, e.g., *California v. Acevedo*, 500 U.S. 565, 569–570 (1991) (automobile exception); *United States v. Robinson*, 414 U.S. 218, 224–235 (1973) (searches of a person incident to a lawful arrest); *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) (plain view); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent).

[2] "In Chadwick, for example, the Court held that the exception for searches incident to arrest did not justify a search of the trunk at issue, but noted that 'if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977). "Consequently, rather than employing a *per se* rule of unreasonableness, the Court must balance the privacy-related and law enforcement-related concerns to determine if the intrusion here was reasonable." *Illinois v. McArthur*, 531 U.S. 326, 327 (2001).

As is relevant in the present case, this Court has held "that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." *Chadwick,* 433 U.S. at 13. As such, a "'canine sniff' by a well-trained narcotics detection dog . . . only [reveals] the presence or absence of narcotics, a contraband item. . ." and thus does not require probable cause. *United States v. Place*, 462 U.S. 696, 706-707 (1983).

In the present case, the trial court failed to conduct a balancing test to weigh the privacy interests against the law enforcement-related concerns to determine whether the search of the duffle bag was reasonable under the circumstances. Instead, the trial court found simply that the officer had probable cause and could search what he wanted. *See* Appendix G 214a, 217a-219a. The balancing test would require this Court to weigh Vaughn's privacy interest in closed personal property, a duffle bag on the train, with the governmental interest in finding and seizing contraband on the trains.

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transport it to the station house without opening the luggage.'" *Riley*, 572 U.S. at 401 (quoting *U.S. v. Chadwick*, 433 U.S., 1, 15, n. 9 (1977)).

Distinguishable from the present case is *United States v. Tartaglia*, where law enforcement searched a "roomette" on a train without first obtaining a warrant based on probable cause collected from police observations and a qualified narcotics detection dog. The trial court denied the motion to suppress. 864 F.2d 837, 838 (D.C. Cir. 1989). The lower court held that an extension of the "automobile exception" to the warrant requirement of the Fourth Amendment justified the warrantless search; and the imminent departure of the train pending issuance of a warrant and the difficulty of delaying the train were exigent circumstances which justified the warrantless search and seizure. The lower court not only found that there was probable cause to justify a search, but also specifically found that it was "practically impossible to get a warrant for a person on board a train which is only going to stop for 25 minutes." *Id.* at 838–39. The United States Court of Appeals for the District of Columbia Circuit rejected this logic. *Id.* Instead, it reasoned that because the police did not have sufficient time to procure a warrant before the train left Union Station and because there was more than a reasonable likelihood that the train—and therefore, the roomette and its contents—would be moved before a warrant could be obtained, the warrantless search of defendant's roomette was justified under the exigent circumstances exception to the warrant requirement of the Fourth Amendment. *Id.* at 841-42.

Tartaglia is distinguishable because the balancing test the court weighed the privacy interest in the roomette with the exigent circumstances that are the possibility of evidence being destroyed while the train was in route to its next stop.

It was not possible to seize and remove the roomette from the train in order to seek a search warrant. The present case concerns a duffle bag on a commercial train. The exigency in a moveable closed container is lessened when the property may be easily removed from the train and seized while a warrant is obtained.

This Court has previously established that law enforcement can, without a warrant, temporarily seize personal property in public if there is probable cause of criminal behavior. In *U.S. v. Place,* this Court held that law enforcement did not have probable cause, but this Court opined that even with probable cause, seizure and seeking a warrant was the appropriate method for a closed container in public place that is not an automobile, stating:

> [W]here law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit the seizure of property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present."

U.S. v. Place, 462 U.S. 696, 701 (1983). *See also Chadwick,* 433 U.S. at 13; *Arkansas v. Sanders,* 442 U.S. 753, 770 (1979) (dissenting opinion). And the police often will be able to search containers without a warrant, despite the *Chadwick-Sanders* rule, as a search incident to a lawful arrest. *California v. Acevedo*, 500 U.S. 565, 575 (1991).

Place clearly applies the exigent circumstances balancing test but the Court went farther to ensure the least intrusive invasion into privacy rights by insisting on a procedure where law enforcement seizes the closed container temporarily,

while requesting a warrant. This Court has taken the time concerns about the depth of the intrusion into a person's privacy interests in other cases as well.

For example, in *California v. Acevedo*, this Court has opined, "We cannot see the benefit of a rule that requires law enforcement officers to conduct a more intrusive search in order to justify a less intrusive one." *California v. Acevedo*, 500 U.S. 565, 575 (1991). Where police can seize from a public place and not violate privacy interests that is preferred as opposed to entering and/or searching private property and invading the privacy of the individuals. This logic was adopted by this Court years ago with the adoption of the plain view exception to the warrant requirement. *Payton v. New York*, 445 U.S. 573, 586–87 (1980) ("The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."); *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977) ("It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer."). The same least intrusive means logic is relevant in any circumstance upon which any of the recognized exceptions to the warrant requirement are relied.

In *Ex Parte Jackson*, this Court held that the FBI was lawfully in possession of boxes of film that they had probable cause contained illicit materials, based on information from another individual, but the FBI's possession did not give them

authority to search their contents without a warrant. 96 U.S. 727 (1877). In *Walter v. United States*, this Court held that there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties. 447 U.S. 649, 656 (1980). However, the argument that probable cause to believe the contents contained obscene materials justified to an unlimited search of the contents of the containers must fail, "whether we view the official search as an expansion of the private search or as an independent search supported by its own probable cause." *Id.* at 656. *See also United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable."). Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984). *See also United States v. Ross*, 456 U.S. 798, 809-812 (1982); *Robbins v. California*, 453 U.S. 420, 426 (1981) (plurality opinion); *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979); *United States v. Chadwick*, 433 U.S. 1, 13 and n. 8 (1977); *United States v. Van Leeuwen*, 397 U.S. 249 (1970).

Indeed, law enforcement is aware of and able to acknowledge the additional step of seizing property and requesting a warrant without minimizing the important governmental function they seek to execute. Although presented with a

different issue, the D.C. Circuit court acknowledged circumstances where a drug dog on an Amtrak train conducted a "sweep" and alerted to two bags. When the owner refused to consent to a search of the bags, law enforcement said he would have to take the bags' owner off the train and apply for a search warrant. *United States v. Six Hundred Thirty-Nine Thousand Five Hundred & Fifty-Eight Dollars ($639,558) In U.S. Currency*, 955 F.2d 712 (D.C. Cir. 1992).

An increasingly persuasive justification for emphasizing the least intrusive means is the development of technological advancements that permit law enforcement to seek and receive a warrant electronically, and quickly. The logic used in *Tartaglia* that a warrant could not be obtained in the 25 minutes that the train was stopped no longer applies is outdated. *Tartaglia*, 864 F.2d at 842. *See Riley v. California*, 573 U.S. 373, 401 (2014); ("Recent technological advances . . . have . . . made the process of obtaining a warrant itself more efficient"); *U.S. v. McNeely*, 569 U.S. 141, 172 (ROBERTS, C.J., concurring in part and dissenting in part) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes"); *State v. McCarthy*, 501 P.3d 478 (2021) (overruling the "Oregon automobile exception" as it was "not well founded or clearly reasoned; it was not intended to be permanent; it has not provided stability or clarity; it is inconsistent with other, more recent cases; given technological changes, it is no longer justified; and maintaining it might well diminish the incentives for

jurisdictions to improve warrant processes and for officers to seek warrants when practicable").

Individuals have a privacy interest in personal property on passenger trains, such that, absent exigent circumstances, a warrant is required to search that property. When exigent circumstances establish that potential contraband could be lost or destroyed if not immediately seized, probable cause permits law enforcement to seize the property in order to prevent its destruction, while seeking a warrant to search the contents of the property.

II. "PLAIN SMELL" IS NOT A RECOGNIZED EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT

A well-established exception to the warrant requirement of the Fourth Amendment is the plain view exception. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). This case presents this Court with an opportunity to determine whether the plain view doctrine extends to "plain smells."

Some courts in other jurisdictions have determined an odor of marijuana detected by law enforcement was sufficient probable cause to permit the warrantless detention of individuals and search of closed containers. *See United States v. Ramos*, 443 F.3d 304 (3d Cir. 2006); *United States v. Cartwright*, 183 F. Supp. 3d 1348, 1355-57 (M.D. Ga. 2016) (officers' testimony of smelling the "pungent" odor of marijuana on a person established an objective, reasonable

suspicion to justify a *Terry* stop); *United States v. Johnson*, 497 F.2d 397 (9th Cir. 1974); *State v. Jackson*, 831 N.W.2d 103 (Wis. App. 2013).

This Court has not established a "plain smell" exception to the warrant requirement. *See Robey v. Superior Ct.*, 302 P.3d 574, 590 (2013) (The United States Supreme Court has never "upheld a warrantless search of a closed container solely on the ground that its smell, appearance, or other outward characteristic clearly announced its contents."). In *Caffee v. State*, the Georgia Supreme Court held that although a police officer has probable cause to search when that officer, through training or experience, detects the smell of marijuana, in order to have probable cause to arrest, additional factors must be present to show that a particular person is the source of the odor; that is, the arresting officer have probable cause to believe a particular person smells of marijuana because he is in possession of it. *Caffee v. State*, 814 S.E.2d 386 (2018).

The analysis in *Caffee* is particularly applicable in the present case, where the officer testified to the odor of marijuana coming from a luggage rack where multiple suitcases and duffle bags were being stored. The officer's basis for probable cause was based entirely on his own sniff and the lack of a visible luggage tag. No additional factors were present tending to show that this duffle bag was the source of the odor. Officer Miller did not testify that he attempted to smell other bags on the luggage rack or conducted any additional investigation to verify that the odor was marijuana and was more likely than not coming from this duffle bag.

III. THE CONFRONTATION CLAUSE REQUIRES THAT AN ACCUSED HAVE THE OPPORTUNITY TO CROSS-EXAMINE A WITNESS AGAINST THEM, EVEN IF THE STATEMENTS ARE NOT HEARSAY.

The State of Nebraska violated Vaughn's rights under the Confrontation Clause when an officer presented a fact essential to the prosecution by recounting out of court statements elicited by police of an Amtrak employee, who was not called to testify or identified by law enforcement, and the defendant had no opportunity to cross-examine the employee who made the statement. The Confrontation Clause provides, "In all prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. Amend. VI.

The Confrontation Clause cannot be bypassed simply by a finding that the statements are not hearsay. The Nebraska Supreme Court relied on bad law to violate Vaughn's rights in holding that statements by an Amtrak employee accusing him of being the owner of a duffle bag of contraband was not hearsay so was not subject to Confrontation concerns.

A. NON-TESTIFYING WITNESS STATEMENTS TO LAW ENFORCEMENT AS PART OF AN INVESTIGATION ARE TESTIMONIAL AND SUBJECT TO THE CONFRONTATION CLAUSE.

The Confrontation Clause provides, "In all prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. Amend. VI. "The right to confront one's accusers is a concept that dates back to

Roman times." *Crawford*, 541 U.S. at 43. And from its earliest days, the right to confrontation has been understood (as that passage from *Crawford* suggests) to apply with special solicitude to out-of-court statements that are accusatory in nature. The right, at its core, prohibits criminal prosecutions based on out-of-court accusations. This Court reaffirmed that the Confrontation Clause was meant to ensure that "the accused and the accuser engage in an open and even contest in a public trial." *Lee v. Illinois*, 476 U.S. 530, 540 (1986); see also *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"); *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.").

Crawford established a test to determine whether an accused is entitled to an opportunity to cross-examine a witness against them by creating the "testimonial" requirement. 541 U.S. 36 (2004). As is applicable in the present case, this Court held that "testimonial" statements may not be introduced at trial against criminal defendants unless the declarants are unavailable and the defendants had an opportunity to cross-examine them. A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Crawford v. Washington*, 541 U.S. at 51. It is the testimonial character of the statement that separates it

from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 821 (2006). The opinion in Crawford set for "[v]arious formulations" of the core class of "testimonial" statements, including "[s]tatements taken by police officers in the course of interrogations." *Crawford*, at 53. This Court in *Davis* clarified the holding *Crawford*, stating:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. The Court clarified that this holding refers to interrogations because the statements in the case before the Court at that time involved interrogations. Statements made in the absence of any interrogation can still be testimonial. *Id.* at fn 1.

In *Bullcoming v. New Mexico*, this Court was asked to address whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the

certification or perform or observe the test reported in the certification. 564 U.S. 647, 652 (2011). In reaching its decision, the Court noted that, "Most witnesses, after all, testify to their observations of factual conditions or events, e.g., 'the light was green,' 'the hour was noon.' Such witnesses may record, on the spot, what they observed." *Id.* at 660. The Court asked, "Could an officer other than the one who say the number on the house or gun present the information in court—so long as the officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures?" *Id.* (citing, *Davis v. Washington*, this Court answered its question, "[e]mphatically 'No.'" *Id.* See *Davis v. Washington*, 547 U.S. at 826 (the Confrontation Clause may not be "evaded by having a note-taking police [officer] recite the ... testimony of the declarant.").

In the present case, the statements made to Officer Miller by the Amtrak employee were clearly testimonial. The prosecution was permitted to bring evidence from an unnamed and unidentifiable Amtrak employee, whose statements formed a direct accusation as to who owned the duffle bag full of contraband. The Amtrak employee did not testify at trial and Vaughn had no opportunity to cross-examine this witness prior to trial because the employee was not identified in the reports. There was no emergency—no reports of injury, weapons, or drug use— Officer Miller was conducting an investigation into this duffle bag. Additionally, evidence presented at trial indicated that Amtrak had an agreement with the DEA to permit DEA agents to enter and conduct investigations on their trains. (188:20-22; 224:2-7; 350:18-25; 351:1-3). An Amtrak employee would be aware of this arrangement and

know what the purpose of Officer Miller's questions were. Consequently, the statements made by the Amtrak employee were testimonial in nature.

B. POST *CRAWFORD V. WASHINGTON*, OUT-OF-COURT STATEMENTS BY A NON-TESTIFYING WITNESS THAT ARE NOT HEARSAY ARE SUBJECT THE RIGORS OF THE CONFRONTATION CLAUSE IF THE STATEMENTS ARE TESTIMONIAL.

The question of who owned and was in possession of the marijuana was directly in dispute at trial but the Nebraska Supreme Court held that the statements were not offered for the truth and therefore not hearsay-and exempt from the rigors of the Confrontation Clause. 314 Neb. 167, 188 & 190. Nebraska Supreme Court relied on *Barrett v. Acevedo*, 169 F.3d 1155 (8th Cir. 1999), and *United States v. Inadi*, 475 U.S. 387 (1986), to hold that statements that are not hearsay raise no Confrontation Clause concerns. 314 Neb. 167, 190. However, both of these cases were decided before *Crawford v. Washington*. 541 U.S. 36 (2004). Since *Crawford*, the analysis revolves around whether the statements were testimonial or not. *See Davis v. Washington,* 547 U.S. 813, 821 (2006); *Williams v. Illinois*, 567 U.S. 50, 64-65 (2012).

This Court has specifically rejected the Nebraska Supreme Court's logic and reliance on *Barrett v. Acevedo* and *Inadi*. *See Williams v. Illinois*, 567 U.S. 50, 64-65 (2012) ("Before *Crawford*, this Court took the view that the Confrontation Clause did not bar the admission of an out-of-court statement that fell within a firmly

rooted exception to the hearsay rule, but in *Crawford*, the Court adopted a fundamentally new interpretation of the confrontation right, holding that '[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" *Id.* (internal citations omitted)).

In *Melendez-Diaz v. Massachusetts*, this Court rejected the argument that a DNA analyst's certified report was exempt from the Confrontation Clause requirements it was akin to a business record and "even if [it were a business record], their authors would be subject to confrontation nonetheless." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009). *See also United States v. Maher*, 454 F.3d 13 (1st Cir. 2006) (nontestifying declarant-informant's statement to drug task force officer that defendant was involved in illegal drug dealing activity was testimonial under *Crawford* rule); *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011) (testimony by task force member that targets the investigation changed after he spoke with co-conspirator violated the defendants' rights under the Confrontation Clause); *United States v. Kizzee*, 877 F.3d 650 (5th Cir. 2017) (Detective's testimony conveyed nontestifying lay witness's statements that the defendant was his drug dealer. The Court held that the lay witness's statements were offered for their truth, the detective's testimony contained a lay witness's out-of-court testimonial statements, and that the defendant did not have the opportunity to cross-examine the witness, thus admission of the witness's statements violated the Confrontation Clause.). *Cf. Williams v. Illinois*, 567 U.S. 50, 66-67 (2012) (Confrontation Clause

not violated when an expert testifies discussing others' testimonial statements if those statements are not themselves admitted as evidence).

Even before *Crawford*, this Court has long recognized a distinction between the right protected by the Confrontation Clause and the rules that generally govern the admissibility of hearsay evidence:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. ... The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

California v. Green, 399 U.S.at 155-56 (citations omitted).

In the present case, the Nebraska Supreme Court expressly ignored *Crawford* and its lineage, and has sanctioned the violation of Vaughn's right to Confrontation. The Nebraska Supreme Court's opinion as to the Confrontation Clause needs to be corrected.

CONCLUSION

The Petition for Writ of Certiorari should be granted. 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 Vaughn urges a reversal of the lower courts' holdings with instruction on further proceedings.

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