

IN THE  
INDIANA SUPREME COURT

No. 22A-CR-2524

BRIONE JACKSON,  
*Appellant-Defendant,*

v.

STATE OF INDIANA,  
*Appellee-Plaintiff.*

Appeal from the Hamilton Superior  
Court,

No. 29D03-2203-F4-1271,

The Honorable William J. Hughes,  
Judge.

**BRIEF IN OPPOSITION TO TRANSFER**

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**BRIEF IN OPPOSITION TO TRANSFER**

This Court should deny Jackson’s petition to transfer because it merely requests simple error correction of an unpublished opinion issued on an interlocutory appeal. And simple error correction of a factual matter in a discretionary appeal is not a reason for this Court to review a case under Indiana Appellate Rule 57(H). This Court should deny transfer.

**BACKGROUND AND PRIOR TREATMENT OF ISSUE**

At approximately 2:40 a.m. on March 1, 2022, Officer Thomas Szybowski was patrolling the parking lot of the Extended State of America Hotel in Carmel (Tr. Vol. II 9-10). Szybowski had a “significant history” of investigating criminal and drug-related activity in that parking lot (Tr. Vol. II 9-10). As he drove, he saw Brione Jackson sitting in the driver’s seat of a silver Lexus (Tr. Vol. II 10-13). Szybowski observed that Jackson “looked like a deer in headlights” and knew from his experience at the hotel that it was “uncommon for people to be out and about in that parking lot unless they are up to criminal activity” at 2:40 a.m. (Tr. Vol. II 10). Szybowski circled the parking lot and when he returned to the Lexus, Jackson was still seated inside (Tr. Vol. II 10-13). Szybowski decided to approach Jackson (Tr. Vol. II 11-12).

When Szybowski reached Jackson’s door, Jackson opened the door and Szybowski “was immediately met with the odor of marijuana emanating from the interior of that vehicle” (Tr. Vol. II 12). Szybowski knew from his training and experience that the odor was burnt marijuana (Tr. Vol. II 6-8, 30). He also observed

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several loose pills in the driver's door armrest (Ex. 1 at 5:50, 6:45-7:15, 9:45-10:15). Szybowski told Jackson, "I smell weed" (Ex. 1 at 1:00-1:20). Jackson replied, "Ain't no smell of weed in here" (Ex. 1 at 1:20-1:30). Jackson later said that there was marijuana in his vehicle "probably like a week ago" (Ex. 1 at 3:20-3:50).

Szybowski then detained Jackson in a police vehicle while police searched Jackson's vehicle for contraband (Tr. Vol. II 13-14). Szybowski seized the loose pills he had observed and searched the remainder of the passenger compartment (Ex. 1 at 9:35-15:05). He then moved toward the trunk to search there and "[Jackson was banging on the window [and] was real nervous when [Szybowski] [was] going in the trunk" (Ex. 1 at 15:05-17:00, 17:40-17:45). Szybowski found a handgun in the trunk, learned that Jackson was a serious violent felon, and arrested Jackson (Tr. Vol. II 14-15).

The State charged Jackson and he filed a pretrial motion to suppress (App. Vol. II 32, 36-38). After a hearing, the trial court issued a written order finding that there was probable cause to search Jackson's entire vehicle for contraband and denied his motion (Tr. Vol. II 36-39; App. Vol. II 39-46). Jackson filed a motion to correct error that was also denied (App. Vol. II 39-46). He filed a motion for an interlocutory appeal that was granted (Docket).

On appeal Jackson argued that there was not probable cause to search his trunk (Appellant's Br. 6). The State argued that probable cause existed to search Jackson's entire vehicle (Appellee's Br. 8-9). The Court of Appeals issued an opinion on March 17, 2023, but did not reach the issue of probable cause because it held

that Jackson granted consent to search his vehicle. *Jackson v. State*, \_\_\_ N.E.3d \_\_\_, No. 22A-CR-2524, slip op. at 4-5 (Ind. Ct. App. Mar. 17, 2023).

Jackson filed a petition for rehearing and argued that he did not grant consent (Reh’g Pet. 3-4). The State responded that it did not believe that Jackson consented to a search of his vehicle and that probable cause supported the search (Response to Reh’g Pet. 4). The Court of Appeals denied Jackson’s petition for rehearing on May 19, 2023 (Docket).

### ARGUMENT

**Transfer is not required because Jackson merely requests this Court to conduct simple error correction in a discretionary appeal and no new or interesting legal questions are raised.**

This Court should deny transfer of this discretionary interlocutory appeal because there was probable cause to search Jackson’s vehicle as determined by the trial court. And the unpublished Court of Appeals opinion never reached the question of whether probable cause existed, so the trial court’s determination remains undisturbed and still provides the parties with a framework for the issue going forward at trial. *See Jackson*, slip op. at 4-5. Indeed, to preserve his suppression issue at trial, Jackson must still object and state the appropriate grounds for his objection.

“Probable cause exists ‘when the totality of the circumstances establishes ‘a fair probability’ ... of criminal activity, contraband, or evidence of a crime.’” *Combs v. State*, 168 N.E.3d 985, 993 (Ind. 2021). Police may conduct a “warrantless search of an automobile where the searching officers have probable cause to believe the

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automobile contains the fruits or instrumentalities of a crime.” *Moody v. State*, 448 N.E.2d 660, 663 (Ind. 1983); *see Carroll v. United States*, 267 U.S. 132 (1925). “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *United States v. Ross*, 456 U.S. 798, 825 (1982); *see also Krise v. State*, 746 N.E.2d 957, 964 (Ind. 2001) (applying “every part of the vehicle” standard in addressing scope of vehicle search). And “[t]he scope of a warrantless search of an automobile ... is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” *Id.* at 824. The scope of this search includes closed containers found inside the automobile. *California v. Acevedo*, 500 U.S. 565, 580-81 (1991); *Ross*, 456 U.S. at 824. “The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.” *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (citations omitted). And “[w]hen there is probable cause to search for contraband in a car, it is reasonable for police officers ... to examine packages and containers without a showing of individualized probable cause for each one.” *Id.*

The totality of the circumstances established a fair probability that Jackson’s vehicle contained contraband. Jackson “looked like a deer in headlights” when Szybowski passed Jackson’s car at 2:40 a.m. in a parking lot that routinely features

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drug-related criminal activity. Szybowski then circled around the hotel, which could provide Jackson time to hide contraband in his trunk while Szybowski was out of sight.<sup>1</sup> When Jackson opened his door, Szybowski smelled marijuana and saw loose pills. Jackson then provided conflicting statements about the odor, first claiming there was no odor at all, then claiming that there might have been marijuana in the car a week prior. The totality of the circumstances was sufficient to establish probable cause to search Jackson's entire vehicle for contraband.

Jackson merely requests a third bite at the probable cause apple, and he asks this Court to interpret the automobile exception to the warrant requirement in a manner contrary to the United States Supreme Court and this Court. *See Ross*, 456 U.S. at 825; *State v. Hobbs*, 933 N.E.2d 1281, 1287 (Ind. 2010) (“the same considerations underlying the federal automobile exception support permitting the officers to secure the evidence without delay”). Indeed, Jackson's argument that extra probable cause is required to search his trunk is based on an anomalous 30-year-old opinion from the Tenth Circuit that has not been adopted elsewhere. *See United States v. Kiszart*, 967 F.3d 693, 698-99 (7th Cir. 2020) (collecting cases that disagree with *Nielson*); *United States v. Nielson*, 9 F.3d 1487 (10th Cir. 1993). But Jackson is unable to explain how his interpretation fits within the greater framework of the automobile exception. And even if we assume Jackson's incorrect argument that extra probable cause is required to search the trunk is accurate,

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<sup>1</sup> There is approximately 48 seconds between the start of Szybowski's body cam video and the time Szybowski parks and exits his police vehicle that shows Szybowski driving.



extra probable cause existed in his case. When Szybowski moved toward the trunk, Jackson “was banging on the window [and] was real nervous,” which is precisely the extra probable cause that he argues is required. The trial court correctly determined within the framework of the automobile exception that there was probable cause to search Jackson’s entire vehicle.

There is no reason to disturb the trial court’s finding that probable cause existed. To do so would require this Court to adopt Jackson’s extreme-minority interpretation of the automobile exception based on an incomplete record and one anomalous case from the Tenth Circuit decided in 1993. This Court should deny transfer.

### CONCLUSION

This Court should deny transfer.

Respectfully submitted,

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**WORD COUNT CERTIFICATE**

I verify that this Brief in Opposition to Transfer contains no more than 4,200 words.

/s/ Robert M. Yoke  
Robert M. Yoke

**CERTIFICATE OF SERVICE**

I certify that on July 12, 2023, the foregoing document was electronically filed and served on the appellant at the address below using the Indiana E-filing System (“IEFS”).

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