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Open Season Declared on Automobile Searches

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OPEN SEASON DECLARED ON AUTOMOBILE SEARCHES

INTRODUCTION

The purpose of the fourth amendment to the United States Constitution[1] is to protect individuals[2] from arbitrary and oppressive official conduct which invades their privacy.[3] It is well recognized that no right is more sacred than an individual's right to possess and control his own person, free from all interference except by unquestionable authority of law.[4] In order to protect an individual's expectation of privacy, the fourth amendment imposes a standard of reasonableness upon law enforcement officials in handling searches and seizures.[5] When there is an intrusion upon a person's privacy by a government official to which the individual objects, the court balances the public and private interests involved in order to determine what is reasonable under the circumstances.[6] Thus, the fourth amendment protects the individual's expectations of privacy by requiring searches and seizures to be reasonable.

Underlying the fourth amendment is the fundamental constitutional rule that warrantless searches are "*per se* unreasonable."[7] This

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

U.S. CONST. amend. IV.

2. The fourth amendment protects people and the places for which they harbor reasonable expectations of privacy. Katz v. United States, 389 U.S. 347, 351 (1967).

3. United States v. Chadwick, 433 U.S. 1, 7 (1977) (fourth amendment "protects people from unreasonable government intrusion into their legitimate expectations of privacy"); Schmerber v. California, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." The fourth amendment is to protect against arbitrary intrusions upon privacy.)

4. "No right is held more sacred, or is more carefully guarded, by common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 251 (1891).

5. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (A person in an automobile does not lose all reasonable expectations of privacy.); Terry v. Ohio, 392 U.S. 1 (1968) (warrant must be obtained whenever practical because fourth amendment protects privacy interests in street as well as home).

6. *See, e.g., Prouse*, 440 U.S. at 648; Camara v. Municipal Court, 387 U.S. 523 (1967) (unconsented warrantless search of private property unreasonable).

7. Katz v. United States, 389 U.S. 347, 357 (1967).

rule is "subject only to a few specifically established and well delineated exceptions."[8] These exceptions are to be carefully construed[9] through a liberal interpretation of the protection the fourth amendment provides against unreasonable searches and seizures.[10] In addition, in order to invoke an exception to the warrant requirement, the government must show that the exigencies[11] of the situation render a warrantless search imperative.[12] Only where the circumstances of a search and seizure are exigent is a warrantless search valid under the carefully construed exceptions to the fourth amendment.

Since the fourth amendment's ratification,[13] disagreement over its proper construction and application continues to result in a considerable amount of interpretative litigation.[14] However, the Supreme Court's interpretation of the amendment has led to "something less than a seamless web"[15] in which the Court itself has become

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8. *Id.* "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* The Court refers here to exceptions such as the automobile and search incident to arrest exceptions to the fourth amendment warrant requirement. There are additional exceptions to the fourth amendment. *Id. See generally*, W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT 214-473 (1978). This note is limited to an evaluation of the automobile exception to the fourth amendment. *See infra* note 30.

9. Jones v. United States, 357 U.S. 493, 502 (1958) (Abuses of these exceptions would lead to the type of warrantless searches the fourth amendment was written to prevent.).

10. *See, e.g.*, United States v. Lefkowitz, 285 U.S. 452 (1932) (warrantless search of office for illegal liquor held unreasonable); Taylor v. United States, 286 U.S. 1 (1932) (search held unreasonable when officers broke into garage and seized whiskey without a warrant); Gouled v. United States, 255 U.S. 298, 303-04 (1921) (search conducted under a valid search warrant not unreasonable in light of liberal construction of fourth amendment).

11. Under the automobile exception, the government must show that the circumstances require immediate action without the delay of obtaining a warrant. The purpose of allowing warrantless searches under exigent circumstances is to prevent the loss of evidence. Therefore, when there is a danger of losing evidence within an automobile because the vehicle may be moved before it is possible to obtain a warrant, a warrantless search is reasonable. *See*, Carroll v. United States, 267 U.S. 132 (1925).

12. McDonald v. United States, 335 U.S. 451, 456 (1948) (those who wish to be exempt from the constitutional requirement for a warrant must show that "the exigencies of the situation made that course imperative".)

13. The fourth amendment was ratified on December 15, 1791.

14. The Court recognized as Justice Powell observed in Robbins v. California, 101 S. Ct. 2841, 2848 (1981) (Powell, J., concurring), *rev'd*, 102 S. Ct. 2157 (1982), that there has been an overwhelming number of cases in the area of search and seizure law. In order to clarify the confusion surrounding the interpretation of the fourth amendment it granted certiorari in United States v. Ross, 102 S. Ct. 2157, 2162 (1982).

15. Cady v. Dombrowski, 413 U.S. 433, 440 (1973) (Rehnquist, J.).

entangled.[16] Diverse interpretations of the amendment are particularly apparent in the area of vehicle searches.[17] Since criminal trials frequently involve searches and seizures, it is imperative that the law in this area be clear.[18] Yet, because courts frequently view minor differences in factual circumstances as controlling when determining fourth amendment rights,[19] application of search and seizure law with respect to automobiles is intolerably confusing.[20] As a result, the Supreme Court seeks to clarify the standards and objectives it uses in determining what elements the fourth amendment requires in a valid automobile search.

In determining the requisite elements of a valid warrantless automobile search under the fourth amendment, the Court weighs many variables including exigency,[21] reasonable expectations of privacy,[22]

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16. Justice Powell has pointed out that "the Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided." *Robbins*, 101 S. Ct. at 2841.

17. *See supra* notes 15-16.

18. Justice Frankfurter discussed the need for clarity in the area of automobile search and seizure law in the following passage:

> Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits. The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth.

Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring). In addition, it is more probable that a search or seizure will be valid if the officials involved clearly understand the law of search and seizure. Convictions are more likely where all possible evidence is admissible at trial. Thus, clear rules governing the law on searches and seizures help to prevent the release of a criminal on technicalities alone. *See*, Arkansas v. Sanders, 442 U.S. 753 (1979).

19. *Sanders*, 442 U.S. at 757.

20. *See supra* note 14.

21. *See, e.g., Chadwick*, 433 U.S. 1 (warrantless search conducted after seizure of luggage invalid); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (warrantless search of automobile two weeks after probable cause to search became apparent unreasonable); Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of automobile impounded at stationhouse valid); *Carroll*, 267 U.S. 132 (warrantless search of automobile substantial distance from neutral magistrate valid).

22. *See, e.g., Prouse*, 440 U.S. 648 (individual associated with automobile does not lose all fourth amendment protection of reasonable expectations of privacy simply because automobile subject to government regulation); *Chadwick*, 433 U.S. 1 (legitimate privacy interests in luggage seized from automobile protected by fourth amendment); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."); *Cady*, 413 U.S. at 442 (because extensive police contact with automobiles there is lesser expectation of privacy associated with them).

preservation of evidence,[23] and an underlying goal of ease in applying the amendment at the time of the search.[24] In balancing these interests, courts have created a diverse body of case law which lacks clarity.[25] The inconsistency has led to increased litigation in an effort to remedy the situation.[26] As a result, the Court's most recent decision, *United States v. Ross*,[27] reflects an effort to create distinct rules that make conducting automobile searches less difficult.[28] But in achieving clear rules, the Court appears to ignore basic fourth amendment principles.[29]

This note explores the basic fourth amendment principles the Supreme Court ignores in regard to automobile searches under the automobile exception.[30] Evaluation of the Supreme Court's consideration of fourth amendment principles in the past reveals inconsistent and drastic applications in the area of automobile exception searches.[31] In an effort to achieve clear rules governing automobile exception searches, the Court allows a warrantless search even when conducted after the justifications for the search have dissipated.[32] In addition, the Court assumes that a lesser expectation of privacy is inherent in automobiles and in some containers within automobiles regardless of the circumstances surrounding a particular automobile search.[33] This conclusion ignores the fourth amendment protection afforded to privacy interests in personal effects. Therefore, in light of the confusion created by the Court's holdings in this area,[34] an alternative to the present system of automobile exception searches must be considered. The solution proposed here preserves the well established

23. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, *reh. denied*, 404 U.S. 874 (1971); Husty v. United States, 282 U.S. 694 (1931) (warrantless search of automobile reasonable because could have been moved before warrant obtained); *Carroll*, 267 U.S. 132 (warrantless search of automobile valid because not practical to obtain warrant before vehicle could be moved out of reach of officials).

24. *Ross*, 102 S. Ct. 2157; *Carroll*, 267 U.S. 132.

25. *See supra* notes 10-16 and accompanying text.

26. *Ross*, 102 S. Ct. 2157; *Carroll*, 267 U.S. 132.

27. 102 S. Ct. 2157.

28. *Id.*

29. In his dissent, Justice Marshall notes the Court's failure to address basic fourth amendment principles. *Id.*, at 2173-82.

30. The automobile exception to the fourth amendment renders valid a warrantless search of an automobile under special circumstances. First, there must be probable cause to search the automobile. Second, the circumstances must be exigent. If there two requirements are present, the warrantless search is valid. *Carroll*, 267 U.S. at 149.

31. *See infra* notes 66-173 and accompanying text.

32. *See infra* notes 55-95 and accompanying text.

33. *See infra* notes 96-173 and accompanying text.

34. *See infra* notes 10-16 and accompanying text.

fourth amendment principle protecting reasonable expectations of privacy.

In order to protect reasonable expectations of privacy, the solution this note proposes requires that a warrant be obtained prior to conducting an automobile search.[35] A warrantless search is acceptable only where the individual makes a voluntary and intelligent waiver of his fourth amendment rights or where exigent circumstances exist. Absent these circumstances, the police officer must obtain a warrant issued by a detached and neutral magistrate.

In support of this alternative to warrantless searches, the present system of automobile searches under the automobile exception to the fourth amendment is evaluated. Initially this note discusses why the Court requires detached and neutral magistrates to issue warrants.[36] Then, through an assessment of the Court's view of the exigency requirement, it is shown that the Court is willing to find automobile exception searches valid even though the actual circumstances of the search are not exigent.[37] Since the present system of automobile exception searches disregards well established fourth amendment principles, an easily applicable rule is offered to replace it. The solution proposed maintains the protection the fourth amendment gives to individuals, a reasonable expectation of privacy, by strictly construing the exigency requirement.

FOURTH AMENDMENT REQUIREMENT OF A NEUTRAL MAGISTRATE

The Supreme Court has determined that individual freedoms, such as those protected by the fourth amendment, are best served by the basic constitutional doctrine of separation of powers and a division of functions among the branches of government.[38] As a result, the fourth amendment requires that warrants[39] be issued by neutral

35. *See infra* notes 174-83 and accompanying text. Throughout this note it is assumed that probable cause has been established prior to discussing the requirements of exigent circumstances and protection given to reasonable expectations of privacy. For a discussion of probable cause, *see infra* notes 41-44 and accompanying text.

36. *See infra* notes 38-54 and accompanying text.

37. *See infra* notes 55-95 and accompanying text.

38. United States v. United States District Court, 407 U.S. 297, 317 (1972).

39. A warrant is an order by a neutral magistrate, directed to a peace officer commanding him to search and bring before the court specific property illegally held by someone. The warrant must describe the particular place to be searched and the specific property to be seized. A warrant may be issued only upon probable cause to believe evidence of illegal activity is present. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); Giordenello v. United States, 357 U.S. 480 (1958).

and detached magistrates.[40] The detached scrutiny of a neutral magistrate provides independent assurance that a search will not commence without the requisite probable cause.[41]

The requirement of probable cause to search an automobile is satisfied when the facts and circumstances prior to the search are sufficient to warrant a prudent man to believe the vehicle contains crime-connected materials.[42] If a reasonable man would believe that

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40. Johnson v. United States, 333 U.S. 10 (1948) (As a general rule, the reasonableness of a search or seizure must be decided by a neutral magistrate rather than an officer or government agent.); *McDonald*, 335 U.S. 451 (informed and deliberate determinations of magistrates issuing warrants preferred over hurried judgment of officers). This note uses the word "magistrate" to refer generally to those within the judicial system who are considered capable of determining probable cause. *See, e.g.*, Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) (court clerk); United States v. Haywood, 464 F.2d 756 (1972) (justice of the peace).

41. Warrantless searches must be reasonable under the fourth amendment. *See, e.g., Prouse*, 440 U.S. at 653-54; *Terry*, 392 U.S. at 2-3. Since the requirements of a valid warrantless search or seizure "surely cannot be less stringent," Wong Sun v. United States, 371 U.S. 471, 479 (1963), than the requirements when a warrant is procured, the fourth amendment requires probable cause to be established prior to a valid warrantless search or seizure. Draper v. United States, 358 U.S. 307 (1959). Thus, the government must establish that probable cause existed prior to a warrantless search.

When police conduct a warrantless search, the basis for probable cause is determined through the officer's testimony on the motion to suppress the evidence obtained in the search. J. ISRAEL AND W. LAFAVE, CRIMINAL PROCEDURE, CONSTITUTIONAL LIMITATIONS 112 (1980). There is a danger that the facts presented at the suppression hearing will not be limited to those known to the officer prior to the warrantless search or seizure. In contrast, when a warrant is obtained prior to a search or seizure, the facts constituting the basis for a determination that probable cause exists are recorded in a complaint or affidavit. This record is presented at the suppression hearing and the court determines if the facts within the record are sufficient to establish probable cause. Thus, when probable cause is established by a magistrate, there is a record of the facts on which it was based. *Id.*

Probable cause may be established based on facts that would not be admissible as evidence in a trial. *See*, Brinegar v. United States, 338 U.S. 160, 172-74 (1949). Thus, "[I]n dealing with probable cause . . . , as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* Thus, if the facts are such that a reasonable man would believe that a crime has occurred, there is a sufficient basis for determining that probable cause to search exists. For a more extensive discussion of probable cause, *see*, W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT 436-704 (1978).

42. Beck v. Ohio, 379 U.S. 89 (1964) (no factual basis upon which to base probable cause to arrest, therefore, the subsequent search unreasonable); Henry v. United States, 361 U.S. 98 (1959) (no factual basis to establish probable cause to arrest or search); *Brinegar*, 338 U.S. 160 (probable cause to search automobile for illegal liquor established prior to warrantless search).

the automobile contains "crime-connected materials,"[43] the magistrate will authorize a warrant to search the automobile.[44] The issuing magistrate must be neutral, detached, and capable of determining whether probable cause exists for issuing a warrant.[45] By requiring this independent evaluation of probable cause, the fourth amendment provides a reliable safeguard against improper searches conducted by "well intentioned but mistakenly overzealous"[46] agents of the law enforcement system engaged in the "often competitive enterprise of ferreting out crime."[47] To assume that a police officer's hurried judgment that probable cause exists at the scene,[48] is equal to that of a magistrate's disinterested determination is to reduce the fourth amendment to a nullity.[49] Thus, absent some "grave emergency,"[50] a warrant is constitutionally required.

The purpose of the warrant requirement is to protect an in-

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43. The phrase "crime connected materials" is a term of art in the area of criminal law. It is used to replace the reference to the word "contraband" because the term "contraband" does not encompass all evidence associated with a crime. Thus, the phrase "crime connected materials" more accurately describes the objects searched for in an automobile search.

44. *Beck*, 379 U.S. 89; *Henry*, 361 U.S. 98; *Brinegar*, 338 U.S. 160.

45. *Shadwick*, 407 U.S. at 350.

46. *Gouled*, 255 U.S. at 304.

47. *Johnson*, 333 U.S. at 13-14. In *Johnson*, the Court discussed the value of a neutral magistrate:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id.

48. The Court discussed the preference for a warrant in *Lefkowitz*, 285 U.S. at 464:

> Indeed, the informed and deliberate determinations of magistrates impowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

49. The Court was speaking of the search of a home here. But, it stated that this ruling applies to all searches except under exceptional circumstances. *Johnson*, 333 U.S. at 13-14.

50. *McDonald*, 335 U.S. at 455-56. *See also infra* notes 55-95 and accompanying text.

dividual's privacy against unreasonable intrusions.[51] Historically, searches are less likely to exceed proper bounds when conducted pursuant to a valid warrant.[52] Therefore, the right to privacy is best protected when an objective mind weighs the need to invade that privacy for law enforcement purposes.[53] To best achieve protection of an individual's privacy rights while maintaining law and order, police should be strongly encouraged to seek warrants from detached and neutral magistrates prior to conducting searches.[54]

AUTOMOBILE EXCEPTION SEARCHES

The Supreme Court has long recognized exceptions to the requirement of a neutral magistrate's issuance of a warrant in exceptional circumstances. Specifically, the Court recognized the automobile exception to the fourth amendment warrant requirement in *Carroll v. United States*.[55] Under this exception, automobiles may be searched without a warrant if two conditions are met.[56] First, there must be probable cause to believe evidence subject to search, seizure, and destruction is located in the car.[57] Second, there must be exigent circumstances rendering a warrant impractical.[58] The Court stated that if exigent circumstances render obtaining a warrant for an automobile

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51. It has been suggested that the warrant requirement makes it less difficult for criminals to conduct illegal activity. However, the Supreme Court has noted that it is not intended to protect criminals or make homes safe places for criminal activity. Instead, the purpose is to protect reasonable expectations of privacy. *McDonald*, 335 U.S. at 455-56.

52. *Chadwick*, 433 U.S. at 9. ("Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization . . .")

53. *Id.*

54. United States v. Ventresca, 380 U.S. 102, 111-12 (1965).

55. 267 U.S. 132 (1925). In this landmark case, the officers had probable cause to believe the defendants were transporting alcohol illegally. Officers stopped the defendants' automobile on a highway 16 miles from Detroit, Michigan. A warrantless search of the car, which included tearing open the upholstery of the seats, was conducted at the location. The search revealed 68 bottles of whiskey. Admission of this evidence at trial led to a conviction under the Prohibition Act. *Id.* at 134-36.

56. *Id.* at 149.

57. *Id.* The Court made it clear that it was not basing its decision on the validity of the arrest of the defendants. Thus, a clear distinction was made between this automobile exception case and cases involving searches incident to lawful arrest. *Id.*

58. *Carroll*, 267 U.S. 132. The *Carroll* case involved a statute permitting searches of automobiles for the purpose of enforcing the Prohibition Act. The important question as to whether a statute is required upon which to base a valid warrantless search remains unclear after the *Carroll* opinion.

search impractical, a warrantless search is reasonable,[59] and therefore valid.[60]

A warrant must be used where it is reasonably practical to obtain one.[61] Only where it is not practical to obtain a warrant because the goods can be put readily out of the reach of a search warrant (as in vehicles that can be quickly moved), are warrantless searches constitutional.[62] Thus, the *Carroll* rule preserves the fourth amendment requirement that a warrantless search be reasonable and based upon probable cause.

The Court felt that its conclusion was in keeping with fourth amendment principles and would be easily and uniformly applied.[63] However, from what the Court believed to be a clear rule came much litigation concerning the elements of exigent circumstances.[64] The decisions involving application of the automobile exception's exigency requirement are confusing, difficult to apply, and seemingly contradictory.[65]

THE EXIGENCY REQUIREMENT

The automobile exception is premised on the theory that the inherent mobility of an automobile creates exigent circumstances that make it impractical for officers to obtain a warrant prior to a search.[66] The exigency requirement must be based only on the strongest possible emergency.[67] In *Carroll*, the primary justification for the warrantless automobile search was the potential mobility of the

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59. *Id.* at 153, 156.

60. "The fourth amendment does not denounce all searches or seizures, but only such as are unreasonable." *Id.* at 147.

61. *Id.* at 156.

62. *Id.* at 151.

63. *Id.* at 159. Note, that the only fourth amendment principles discussed by the *Carroll* Court were the reasonableness of the search and the newly introduced idea of exigent circumstances surrounding the search.

64. Unfortunately, the *Carroll* decision left questions unanswered. Are permitting statutes necessary for a valid search? Must the automobile be in motion immediately prior to the search? Does the exception apply to moveable containers within the automobile? *See supra* notes 10-16.

65. *See supra* notes 10-16.

66. *Carroll*, 267 U.S. 132.

67. *See, e.g.*, Johnson v. United States, 333 U.S. 10 (1948) (smell of opium eminating from room did not create exigent circumstances for warrantless search); *McDonald*, 335 U.S. 451 (detecting sound of adding machine outside lottery room did not make a warrantless search imperative).

automobile.[68] It was possible for the car to be moved before the officers were able to secure a warrant.[69] Thus, the circumstances were exigent because the automobile could be placed beyond the reach of a search warrant.[70]

In a subsequent Supreme Court case,[71] the Court did not require a warrant to search an automobile that was parked and unattended prior to the search even though the officers had ample time to procure the warrant.[72] Since this search was valid, it appears that the Court's interpretation of *Carroll* does not require that the automobile be in motion immediately prior to the search.[73] Therefore, the *Carroll* doctrine applies to stationary vehicles.

The Court in *Chambers v. Maroney*[74] contributed greatly to the confusion surrounding the exigency requirement by applying the *Carroll* doctrine to a stationary vehicle which was in police custody at the time of the search.[75] A search conducted after the automobile was seized on the street and subsequently impounded at police headquarters was held constitutional under the *Carroll* rationale.[76] The Court concluded that if probable cause to search exists at the time an automobile is stopped, it continues to exist and justifies a later search upon the automobile reaching the police station.[77] The defen-

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68. Immediately prior to the search the car was moving. *Carroll*, 267 U.S. at 135-36.

69. *Id.* at 153.

70. *Id.*

71. *Husty*, 282 U.S. 694.

72. In *Husty*, the automobile was unattended when located by police. The officers waited for Husty to return to the car and at that time conducted the search. *Id.* at 700-01.

73. Although the occupants of the car attempted escape, the Supreme Court did not apply these facts to its determination that exigent circumstances existed. Rather, the Court applied these facts to establish probable cause. Therefore, the exigency requirement appears to have been based solely on the fact that the search was of an automobile, which is inherently mobile. *Id.* at 701.

74. 399 U.S. 42 (1970).

75. The Court stated:

> [O]n the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured.

Id. at 52; *See also infra* note 178.

76. *Chambers*, 399 U.S. at 48-51.

77. *Id.* at 52.

dant in *Chambers* was in police custody and had no access to the automobile.[78] There was no danger that the vehicle would be moved[79] as there was in *Carroll* where the defendants had access to the automobile.[80] Therefore, the *Chambers* Court relied on the inherent mobility of the automobile rather than the actual circumstances immediately prior to the search[81] in order to satisfy the exigency requirement.

In contrast, one year after the *Chambers* decision, the Court held that a warrantless search of an automobile conducted at police headquarters was not valid because the circumstances were not exigent.[82] The defendant had ample time to destroy the evidence and had no access to the automobile at the time of the search.[83] A possible distinguishing factor between this case and the *Chambers* case was the time at which the probable cause developed.[84] In *Chambers*, probable cause became apparent just prior to the vehicle being stopped.[85] In contrast, probable cause came two weeks prior to the search in

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78. *Id.* at 44-45.

79. *Id.*

80. *Carroll*, 267 U.S. at 135-36.

81. In particular, compare the *Chambers* decision with the *Sanders* holding that the circumstances must be exigent immediately prior to a search in order to fall within the automobile exception:

> We conclude that the state has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles. A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in *Chadwick*, the exigency of the mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control.

Arkansas v. Sanders, 442 U.S. 753, 763 (1979). Therefore, the exigency standard is not met unless the circumstances immediately prior to the search are exigent. In the *Chambers* case, the actual circumstances were not exigent just prior to the search. *See supra* note 75.

82. *Coolidge*, 403 U.S. 443.

83. In *Coolidge*, the defendant had been questioned about a murder several times during a three week period prior to the warrantless search of his automobile. Both he and his wife were aware that he was a suspect in the crime. Therefore, the three week period provided ample time for the defendant or his wife to destroy the evidence in the automobile before the vehicle was impounded. At the time of the impoundment and during the subsequent searches, the defendant was in police custody and had no access to the automobile. As a result, the Court found that there were no exigent circumstances justifying a warrantless search. *Id.*

84. For a complete discussion and supporting authority for this conclusion, *see* W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS 11-4 — 11-5 (1979). *See also* J. HALL, JR., SEARCHES AND SEIZURES 270-71 (1982).

85. *Chambers*, 399 U.S. at 51.

this case.[86] Here the Court minimized the distinction by concluding, in adherence to *Carroll*, that a warrant must be procured in advance of a search if there is sufficient time to obtain one.[87] However, the Court has held warrantless searches to be valid where the probable cause developed sufficiently prior to the search to obtain a warrant.[88] Consequently, it is difficult to determine the maximum length of time which must lapse before a warrant is required.

Reconciling these cases has been difficult for the courts. As a result, the courts do not agree whether the inherent mobility of an automobile satisfies the exigency requirement[89] or if each case requires an individual analysis to determine whether the specific circumstances result in exigency.[90] The Supreme Court has held that the reasonableness of a search depends upon the specific facts and circumstances of each case.[91] Yet, this statement has been confused by subsequent inconsistent statements concluding that cars are inherently mobile; therefore, warrantless searches are reasonable.[92] It is not sur-

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86. The *Chambers* and *Coolidge* cases are distinguished on the basis of the time lapse between each search and the point in time where probable cause became apparent:

> The *Coolidge* plurality intimated that the *Chambers* decision was limited to situations in which the probable cause to search the vehicle arises immediately before or soon after the stopping of a vehicle, thereby making it impossible to obtain a warrant prior to the stop. However, the plurality concluded, when probable causes arises sufficiently in advance of the search to permit a warrant to be obtained, failure to do so will not be excused under *Carroll*.

W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS 11-5 —11-6 (1979).

87. *Coolidge*, 403 U.S. at 458-64. *See also supra* note 86.

88. *See supra* notes 71-73 and accompanying text.

89. Many courts have determined that the automobile's inherent mobility satisfies the exigency requirement. *See, e.g.*, United States v. Finnegan, 568 F.2d 637 (9th Cir. 1978); United States v. Walton, 538 F.2d 1348 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976); United States v. Bertucci, 532 F.2d 1144 (7th Cir. 1976); United States v. McClain, 531 F.2d 431 (9th Cir. 1976).

90. Other courts have required a specific showing of exigent circumstances. *See, e.g.*, United States v. Jamerson, 549 F.2d 1263 (9th Cir. 1977); United States v. Robinson, 533 F.2d 578 (D.C. Cir. 1976); United States v. Farnkoff, 535 F.2d 655 (1st Cir. 1976); United States v. Bradshaw, 490 F.2d 1097 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974).

91. *See, e.g.*, Cooper v. California, 386 U.S. 58 (1967); Beck v. Ohio, 379 U.S. 89 (1964); Preston v. United States, 376 U.S. 364 (1964); Brinegar v. United States, 338 U.S. 160 (1949); Johnson v. United States, 333 U.S. 10 (1948).

92. It is difficult for the courts to determine whether it is the particular circumstances surrounding the search or the inherent mobility of an automobile that satisfies the exigency requirement as a result of statements made by the Supreme Court such as the following:

> [W]hether a search and seizure is unreasonable within the meaning of

prising that the lower courts are unable to determine whether it is the inherent mobility or specific circumstances that satisfy the exigency requirement.[93] If exigency is based solely on the inherent mobility of automobiles, then warrantless searches of automobiles may be conducted at any time there is probable cause to search.[94] This result is clearly contrary to the *Carroll* ruling and fourth amendment principles protecting reasonable expectations of privacy.[95]

REASONABLE EXPECTATIONS OF PRIVACY

In addition to the theory that automobiles are inherently mobile, the automobile exception is based upon the assumption that individuals have a diminished expectation of privacy with regard to automobiles.[96] Two elements must be present to justify any legitimate expectation of privacy.[97] First, there must be a subjective expectation of privacy.[98] Second, the expectation of privacy must be one that society is willing to recognize as reasonable.[99] The fourth amendment may protect what a person "seeks to preserve as private, even in an area accessible to the public."[100] Therefore, in each warrantless search, it should be shown that there was no reasonable expectation of privacy.

> the fourth amendment depends upon the facts and circumstances of each case . . . in particular, that searches of cars that are constantly moveable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece(s) of property.

Cooper, 386 U.S. at 61.

93. *See supra* notes 89-90.

94. The Supreme Court in *United States v. Ross* concluded that a warrantless search of an automobile, assuming probable cause, can be as extensive as a neutral magistrate could authorize. United States v. Ross, 102 S. Ct. 2157, 2159 (1982).

95. "The word 'automobile' is not a talisman in whose presence the [f]ourth [a]mendment fades away and disappears." *Coolidge*, 403 U.S. at 461-462. *See also* Terry v. Ohio, 392 U.S. 1 (1968); *Carroll*, 267 U.S. 132.

96. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976) (expectations of privacy in automobile significantly less than in home or office); Cardwell v. Lewis, 417 U.S. 583 (1974) (lesser expectation of privacy in automobiles because serve function of transportation not residence); Cady v. Dombrowski, 413 U.S. 433 (1973) (lesser expectation of privacy in automobiles because extensive police contact with vehicles).

97. Justice Harlan's observations of the necessary elements in a reasonable expectation of privacy, noted in his concurring opinion in *Katz*, is often relied upon by many other courts. *Katz*, 389 U.S. at 361. (Harlan, J., concurring).

98. The person must have exhibited an actual expectation of privacy in order to meet the first requirement. *Id.*

99. *Id.*

100. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of [f]ourth [a]mendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52.

Expectations of privacy in automobiles

Many courts have assumed there is a lesser expectation of privacy in automobiles (as compared to the expectations of privacy associated with homes) without independently evaluating the specific circumstances or assumptions upon which such a conclusion is based.[101] It is true that individuals may have a lesser expectation of privacy in automobiles because they seldom serve as a residence or repository for personal effects.[102] Furthermore, while serving the function of transportation, automobiles travel public roads where both the automobile and occupants are in the public's view.[103] But, the Court extends the lesser expectation of privacy rationale to the glove compartment and trunk of an automobile.[104] This extension is made despite the fact that neither location is within the view of the public.

Although an occupant may be in the view of the public while riding in an automobile, the function of transportation does not extend only to the occupant. In reality, one who is traveling or using his car for daily business often takes along personal effects that are not within the view of others. In addition, he may have the same expectation of privacy for them as he did prior to putting the items in the automobile.[105] Therefore, the fact that these items are located in an automobile does not necessarily lead to the conclusion there is a lesser expectation of privacy with respect to them.

To accept that a lesser expectation of privacy exists in automobiles simply because they are a form of transportation parallels

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101. *See, e.g., Ross*, 102 S. Ct. 2157 (automobile exception search may be extensive as magistrate can authorize); *Sanders* 442 U.S. 753 (expectations of privacy in luggage greater than in automobile); *Chambers*, 399 U.S. 42 (lesser expectation of privacy in automobile searched after impoundment at police headquarters); United States v. Miller, 460 F.2d 552 (10th Cir. 1972) (allowed search of mobile home with no mention of reasonable expectations of privacy).

102. In *Cardwell v. Lewis*, the Supreme Court found there is a lesser expectation of privacy in an automobile because it functions as transportation rather than as a residence. In addition, automobiles travel public roads where both the automobile and the occupants are in the public's view. *Cardwell*, 417 U.S. at 590.

103. The Supreme Court has also used the justification that the police have extensive non-criminal contact with cars to support the lesser expectation of privacy view. However, this view also rests on the fact that the contact is only to the extent of what is in the public's view. *See, Cady*, 413 U.S. at 441-42. *See also, Cardwell*, 417 U.S. at 590.

104. *Opperman*, 428 U.S. at 366 (glove compartment); *Cady*, 413 U.S. at 437 (trunk).

105. *See, e.g., Sanders*, 442 U.S. at 764-65; United States v. Chadwick, 433 U.S. 1 (1977).

the problem discussed above concerning the view that cars are inherently mobile and therefore warrantless searches are valid without a showing of exigent circumstances immediately prior to the search. Application of the lesser expectation of privacy doctrine in conjunction with the inherent mobility theory without full consideration of the circumstances results in an automobile exception based solely on probable cause.[106] In addition, application of the lesser expectation of privacy theory violates the well established principle that privacy interests in automobiles are protected by the fourth amendment.[107]

Expectations of privacy in containers

The fourth amendment's protection of privacy interests in automobiles extends beyond the automobile to containers within the vehicle. The fourth amendment protects against intrusions into legitimate privacy interests both inside and outside the home.[108] In the past, the Supreme Court has protected privacy interests held with respect to moveable opaque containers even when the containers were located in an automobile prior to a search.[109] However, a recent Court decision has changed this area of the law.[110]

The Court in *United States v. Ross*,[111] held that an automobile exception search can be as "thorough as a magistrate could authorize in a warrant."[112] Since a magistrate could authorize the search of an entire automobile and its contents, the decision extends the automobile exception to any moveable container within the automobile at the time of the search that might conceal the object of the search.[113] The scope

106. *See supra* notes 66-95 and accompanying text. If we assume there is a lesser expectation of privacy in automobiles without looking to the specific circumstances, only the remaining requirements of probable cause and exigent circumstances must be satisfied for a valid warrantless search. Further, if we then assume that inherent mobility satisfies the exigency requirement, the only remaining requirement for a valid warrantless search is probable cause.

107. *See, e.g., Sanders*, 442 U.S. 753; *Prouse*, 440 U.S. 648; *Coolidge*, 403 U.S. 443.

108. In *Chadwick*, the Court held that respondents manifested an expectation of privacy in a foot locker that was double locked in the same manner as the locking of the doors of a home to prevent intrusions manifests an expectation of privacy. *Chadwick*, 433 U.S. at 13. *See also Terry*, 392 U.S. at 8-9.

109. Robbins v. California, 101 S. Ct. 2841 (1981), *rev'd.*, 102 S. Ct. 2157 (1982) (opaque container); *Sanders*, 442 U.S. 753 (suitcase); *Chadwick*, 433 U.S. 1 (footlocker).

110. United States v. Ross, 102 S. Ct. 2157 (1982).

111. 102 S. Ct. 2157.

112. "We hold that they may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant 'particularly describing the places to be searched'." *Id.* at 2159.

113. *Id.*

of the search is not governed by the nature of the container that might conceal the crime-connected materials.[114] Instead, the scope of the search is governed by the locations where there is probable cause to believe crime-connected materials are hidden.[115]

In *Ross*, officers conducted an on the street search of the defendant's car. In the trunk they found a closed brown bag containing heroine.[116] During a later search of the car at police headquarters, officers found a zippered leather pouch containing $3,200 in cash.[117] The defendant was charged and convicted of possession of heroine with an intent to distribute.[118] On appeal, the Supreme Court found both searches valid under the automobile exception.[119] Thus, *Ross* extends the automobile exception, when an automobile is the subject of a search, to all containers in the automobile that might contain the object of the search.[120] The *Ross* Court distinguished the facts of the case from the facts in *United States v. Chadwick*[121] and *Arkansas v. Sanders*[122] where specific containers were the subject of the searches rather than the automobiles from which the containers were removed.[123]

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114. The Court explained the scope of the *Ross* ruling:

> The scope of a warrantless search of an automobile thus 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. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id. at 2172.

115. *Id.*

116. The officers opened the bag during the search on the street. *Id.* at 2160.

117. *Id.*

118. *Id.*

119. *Id.* at 2159.

120. *See supra* note 114.

121. 433 U.S. 1.

122. 442 U.S. 753.

123. In *Chadwick* and *Sanders*, the probable cause to search was directed at only the specific containers. But, in *Ross*, the vehicle itself was the subject of the search because the officers did not know where the crime connected materials would be located in the car. The *Ross* Court directly rejected the *Sanders* Court's reasoning requiring a warrant to search the luggage even in cases where there is probable cause to search the entire automobile. *Ross*, 102 S. Ct. at 2167, 2172 (overrules *Robbins*, 101 S. Ct. 2841); *Sanders*, 442 U.S. 753; *Chadwick*, 433 U.S. 1.

Prior to *Chadwick*, most courts held that the search of moveable opaque containers during an automobile exception search was valid. The courts justified this because the moveable nature of the personal effects provided sufficient exigencies to permit a warrantless search.[124] However, in *Chadwick* the Court required a warrant prior to the search of a double locked footlocker that had been taken from the trunk of a car.[125]

The *Chadwick* Court established that when luggage, such as the double locked footlocker, has been seized and is in the exclusive control of the police there is no longer any exigency based on the mobility of the luggage.[126] Therefore, a warrantless search was not justified under the automobile exception.[127] This decision was based on a distinction between the expectations of privacy in luggage and automobiles.[128] Because luggage is a container typically used to store personal effects and the contents of luggage are "not open to public view,"[129] absent exigent circumstances,[130] a valid search may be conducted only pursuant to a valid search warrant.[131] Seizure of the luggage eliminated

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124. *See, e.g.*, United States v. Hand, 497 F.2d 929 (5th Cir. 1974) *aff'd*, 516 F.2d 472 (5th Cir. 1975) (en banc), *cert. denied*, 424 U.S. 953 (1976) (purses); United States v. Johnson, 467 F.2d 630 (2nd Cir. 1972), *cert. denied*, 413 U.S. 920 (1973) (suitcases); United States v. Menhciz, 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971) (suitcases).

125. *Chadwick*, 433 U.S. 1.

126. *Id.* at 13.

127. The Court rejected the government's argument that exigent circumstances that existed on the scene continued to justify a search at a later time, as in automobile searches that are conducted at the station house under the *Chambers* rule. *Id.*

128. The Court compared the expectations of privacy held with respect to luggage to the expectations of privacy in an automobile. After accepting the view of the *Cardwell v. Lewis* Court, *supra* notes 102-105 and accompanying text, the *Chadwick* Court concluded that luggage has a greater expectation of privacy associated with it. *Chadwick*, 433 U.S. at 12-13.

129. The Court compared the expectations of privacy in luggage with those in an automobile:

> Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a respository of personal effects. In sum, a persons' expectations of privacy in personal luggage are substantially greater than in an automobile.

Chadwick, 433 U.S. at 13.

130. The Court considered the immediate search of a container carrying an explosive device to be exigent circumstances. *Id.*

131. *Id.*

any exigent circumstances.[132] Therefore, the Court protected the expectations of privacy with respect to luggage by requiring a valid search warrant.[133]

Although it was clear that the Supreme Court was protecting expectations of privacy in luggage in accordance with the fourth amendment, the *Chadwick* decision left ambiguities that required clarification.[134] In *Arkansas v. Sanders*,[135] the Court took the opportunity to clarify the *Chadwick* decision. Under the *Sanders* rationale, even if a piece of luggage is located in a moving vehicle prior to seizure, absent exigent circumstances,[136] a warrant must be obtained prior to a valid search.[137] Neither the fourth amendment nor the automobile exception created in *Carroll* supports a warrantless search of luggage merely because it is located in an automobile.[138] For instance, the fourth amendment protects reasonable expectations of privacy with respect to luggage located in the home.[139] It is reasonable that a piece of luggage would be moved from the home into an automobile for the purpose of transportation. But, it is not clear that an individual's state of mind with respect to his expectations of privacy in the luggage changes simply by virtue of its location.[140] Specifically, one purpose of a suitcase is to prevent the public from viewing personal items while they are transported.[141] One would not transport

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132. *Id.*

133. *Id.*

134. In *Chadwick*, the Court did not clarify when a piece of luggage in an automobile may be searched without a warrant. Therefore, it was unclear whether it made a difference if the automobile or the container was the subject of the search. In addition, it was not clear whether a warrant was required to search luggage if the automobile was in motion prior to the search. *See Sanders*, 442 U.S. 753; *Chadwick*, 433 U.S. 1.

135. 442 U.S. 753.

136. The *Sanders* Court said that the size of the luggage has no effect on the exigency attached to it and therefore cannot be used to distinguish between the exigencies involved with different pieces of luggage. *Sanders*, 442 U.S. at 765. *See also* note 130.

137. The *Ross* Court rejected this conclusion made by the *Sanders* Court. *Ross*, 102 S. Ct. at 2167, 2172.

138. In *Sanders*, there was probable cause to search the luggage prior to its placement in the vehicle. The Court stated that "as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." *Sanders*, 442 U.S. at 764. The Court then concluded that there is "no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by police." *Id.*

139. *Katz*, 389 U.S. 347.

140. *See supra* note 138.

141. *Sanders*, 442 U.S. at 762.

in open view what he would put in luggage if the transportation were in something other than an automobile.[142]

In addition to analyzing expectations of privacy with regard to luggage seized from automobiles, the *Sanders* Court evaluated the element of exigent circumstances required by the automobile exception. The Court concluded that once the luggage has been seized during an automobile search and is under the exclusive control of the police, "its mobility is in no way affected by the place from which it was taken."[143] Therefore, the *Sanders* Court recognized that the need to conduct a warrantless search is no greater when luggage is taken from an automobile than from any other place.[144]

The *Chadwick* and *Sanders* rulings seem clear; however application of the rule to searches of containers within automobiles is difficult.[145] The difficult aspect of applying the rule is determining what containers are considered repositories of personal effects that command a reasonable expectation of privacy.[146] Courts have required warrants to search briefcases,[147] backpacks,[148] some paper bags,[149] a purse,[150] and a shaving kit.[151] In contrast, warrantless searches of plastic and

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142. "One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored." *Id.* at 764.

143. *Id.* at 763. *See also supra* note 138.

144. *See supra* note 138.

145. The difficulty arises from the following passage:

> Not all containers and packages found by police during the course of a search will deserve full protection of the [f]ourth [a]mendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant. *See* Harris v. United States, 390 U.S. 234, 236 (per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the [f]ourth [a]mendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

Sanders, 442 U.S. at 764-65.

146. *Id.*

147. State v. Groda, 591 P.2d 1354 (Ore. 1979).

148. United States v. Bloomfield, 594 F.2d 1200 (8th Cir. 1979); People v. Minjares, 591 P.2d 514 (Cal. 1979).

149. *Robbins*, 101 S. Ct. 2841 (1981), *rev'd*, 102 S. Ct. 2157 (1982).

150. People v. Redmond, 73 Ill. App. 3d 160, 390 N.E.2d 1364 (1979).

151. Moore v. State, 594 S.W.2d 245 (Ark. 1980).

burlap bags,[152] paper bags,[153] and a cardboard box[154] have been held valid.

The Supreme Court finally clarified the question of which containers have fourth amendment protection by recognizing that there should be no distinction between different types of opaque containers that might carry personal effects.[155] Because there is no objective criteria by which to distinguish between containers, all opaque containers are given the same amount of fourth amendment protection.[156] Therefore, the fourth amendment principles concerning reasonable expectations of privacy must be applied to all opaque containers in determining whether a warrantless search is valid.[157]

The *Ross* Court accepted the view that all opaque containers should be treated alike under the fourth amendment.[158] However, the Court gave minimal consideration to the expectations of privacy attached to the paper bag and zippered pouch in determining that a warrant was unnecessary to search them.[159] It merely concluded that the expectations of privacy in a trunk or glove compartment may be no less than those in moveable container.[160] But, this conclusion is premised upon the assumption that a person actually has a diminished expectation of privacy with regard to containers in an automobile.[161]

The *Ross* Court supported its holding by suggesting that the search in *Carroll*, which included tearing open the seat cushions to find the contraband within, was the search that a magistrate could

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152. United States v. Firclin, 570 F.2d 352 (9th Cir. 1978).

153. United States v. Jimenez, 626 F.2d 39 (7th Cir. 1980); Clark v. State, 574 P.2d 1261 (Alaska 1978).

154. United States v. Newmann, 585 F.2d 255 (8th Cir. 1978).

155. However, the Court made it clear that if the outward appearance of the container makes the contents obvious, (such as clear plastic bag or a kit of burglar tools) no warrant is necessary for a valid search. A container that leaves its contents in open view or easily inferrable from the outward appearance has no reasonable expectation or privacy associated with it. No fourth amendment protection is given to an item unless there is a reasonable expectation of privacy associated with the item. *Robbins*, 101 S. Ct. 2841 (supported by *Ross*, 102 S. Ct. 2157).

156. *Id.* Thus, there is no distinction for fourth amendment purposes between suitcases and paper bags on the basis of the container's worthiness.

157. *See supra* notes 97-100 and accompanying text.

158. *Ross*, 102 S. Ct. 2157.

159. *Id.*

160. The *Ross* dissent recognized the expectations of privacy aspect of the fourth amendment protection given to personal effects. *Id.* at 2173-82.

161. *See supra* notes 101-73 and accompanying text.

authorize.[162] Therefore, the scope of an automobile search should be limited only to what a magistrate could authorize.[163] The *Ross* Court pointed out that rarely would contraband be strewn throughout an automobile because the nature of the goods would dictate they be withheld from public view.[164] As a result, the Court concludes that to hold that containers cannot be searched under the automobile exception would nullify the *Carroll* holding.[165]

However, it is not clear from *Carroll* that the Court would not, as in *Chadwick* and *Sanders*, have protected containers that command a reasonable expectation of privacy. The *Carroll* Court was not confronted with the search of a moveable container, but was confronted instead with a search of the vehicle itself.[166] Since the Court did not even discuss reasonable expectations of privacy with respect to automobiles, but instead based its decision on the exigency standard, it is not clear that the *Carroll* Court even contemplated the *Ross* result.[167] The *Ross* Court essentially based its conclusion on a standard never previously stated by the Court. Thus, the exigency rationale extends to items that in any location other than a vehicle would have full fourth amendment protection.[168]

In order to arrive at this conclusion, the *Ross* Court ignores

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162. The Court supported the *Ross* decision by analogizing the holding to the *Carroll* holding:

> Having stopped Carroll and Kiro on a public road and subjected them to the indignity of a vehicle search—which the Court found to be a reasonable intrusion on their privacy because it was based on probable cause that their vehicle was transporting contraband—prohibition agents were entitled to tear open a portion of the roadster itself. The scope of the search was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search. Since such a warrant could have authorized the agents to open the rear portion of the roadster and to rip the upholstery in their search for concealed whiskey, the search was constitutionally permissible.

Ross, 102 S. Ct. at 2169.

163. *Id.*

164. "Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container." *Id.* at 2170.

165. *Id.*

166. *See Carroll*, 267 U.S. 132.

167. *See supra* note 63.

168. The Court held in *Terry v. Ohio* that personal effects have fourth amendment protection both inside and outside the home. *Terry*, 392 U.S. at 8-9.

reasonable expectations of privacy associated with opaque containers.[169] Because the argument suggesting warrantless opaque container searches are invalid was never raised until *Chadwick*, the *Ross* Court reasoned that it was understood that such containers could be searched under *Carroll*.[170] One possible reason for the absence of this argument is that most container searches prior to *Chadwick*, that came before the Supreme Court, involved containers that made their contents obvious, such as the whiskey bags in *Carroll*.[171] These packages are not typically used to store personal items. In contrast, the question was raised in *Chadwick* where the container searched was a piece of luggage; a typical repository for personal effects.[172] The fact that the argument was not raised until *Chadwick* is no justification for ignoring reasonable expectations of privacy associated with opaque containers.

Prior to the *Ross* decision, each case discussed in this note has given to the law enforcement officers conducting valid warrantless automobile searches the duty of judging probable cause, which is ordinarily that of a neutral magistrate. But no court has gone as far as the *Ross* Court in ruling that an automobile search, assuming probable cause, can be as broad as a magistrate can authorize. The Supreme Court ignores fourth amendment principles requiring the judgment of a neutral magistrate and protecting reasonable expectations of privacy in order to achieve the *Ross* result.[173] When balancing the actual exigencies involved with respect to the expectations of privacy and the general requirement for a warrant, it is clear that the warrant requirement has taken a back seat as a result of the *Ross* decision.

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169. *See Ross*, 102 S. Ct. at 2173-82. (Marshall, J., dissenting).

170. *Id.* at 2169.

171. Scher v. United States, 305 U.S. 251 (1938) (liquor containers, unstamped); Husty v. United States, 282 U.S. 694 (1931) (liquor of particular description given by an informant); *Carroll*, 267 U.S. 132 (whiskey bags).

172. *See Chadwick*, 433 U.S. 1.

173. The dissent in *Ross* noted that the Court ignored the fourth amendment requirement of a neutral magistrate:

> The majority today not only repeals all realistic limits on warrantless automobiles searches, it repeals the [f]ourth [a]mendment warrant requirement itself. By equating a police officer's estimation of probable cause with a magistrate's, the Court utterly disregards the value of neutral and detached magistrate . . . The new rule adopted by the Court today is completely incompatible with established [f]ourth [a]mendment principles, and takes a first step toward an unprecedented "probable cause" exception to the warrant requirement. In my view under accepted standards, the warrantless search of the container in this case clearly violates the [f]ourth [a]mendment.

Ross, 102 S. Ct. at 2173-74 (1982) (Marshall, J., dissenting).

PROPOSED SOLUTION

It is possible to provide fourth amendment protection for automobile searches without incurring the risk of losing evidence that the automobile exception was intended to eliminate. Instead of applying the automobile exception to vehicle searches, a warrant should be required to search all automobiles except where the individuals involved intelligently and voluntarily choose to allow a warrantless search,[174] or where circumstances are actually exigent. Where an individual does not voluntarily allow a search, seizure of the automobile is necessary while a warrant is being secured. If it is determined that probable cause did not exist in a case where an individual chose to allow an immediate search, the search is invalid. Any evidence obtained during the illegal search is not admissible at trial. This alternative would allow those involved the opportunity to choose which intrusion is least offensive to them[175] with reassurance that voluntarily allowing a search will not cause them to forfeit their fourth amendment rights.

In an effort to determine which is the greater intrusion, an immediate search or a seizure of a vehicle, the majority of the Court in *Chambers v. Maroney*[176] balanced the invasions of each alternative against the invasion upon an individual's reasonable expectation of privacy.[177] The Court concluded that the invasions were constitutionally equal.[178] Therefore either course is reasonable under the fourth amendment.[179] Thus, it is not unreasonable to require seizure of an automobile until a warrant can be obtained as an alternative to an immediate search of the automobile. This alternative provides full fourth amendment protection to privacy interests. One who prefers

174. As Justice Harlan noted, there are circumstances where seizure of an automobile may be more offensive to an occupant than an immediate search. *Chambers*, 399 U.S. at 64. However, an occupant has the option of allowing an immediate search thereby avoiding any delay. *Id.*

175. *Ross*, 102 S. Ct. at 2173-82 (Marshall, J., dissenting).

176. 399 U.S. 42 (1970).

177. *Id.* at 52.

178. In determining that the intrusions were equal, the Court ignored the particular facts of each case. In *Chambers*, the car was seized and brought to the station. This is fairly standard practice when a person is arrested near his vehicle. As a result, even if the car had been searched at the scene or if there was no interest in searching the car, such a seizure could be expected. Here, the owner of the automobile was arrested and in no position to reclaim the car during the necessary time required to obtain a warrant. In addition, there was no evidence that any third party wanted to reclaim the car. Therefore, there would have been no greater intrusion here had the car been held while a warrant was obtained. *Id.* at 51-52.

179. *Id.*

to protect his expectations of privacy may choose that the automobile be seized until a warrant is obtained.

For the purpose of protecting expectations of privacy, at least one court has required that an automobile be guarded while a warrant is being obtained to search it.[180] Although the inconvenience of guarding an automobile would be present in most cases, it has no constitutional significance.[181] Therefore, it is not unreasonable to require officers to guard an automobile during the time necessary to obtain a warrant.

Only in extreme cases where circumstances are actually exigent will warrantless searches of automobiles be valid without those involved voluntarily choosing an immediate search. An example of this type of case would be where one officer stops an automobile carrying several people and he is unable to receive additional help in order to obtain a warrant, detain the individuals, and guard the automobile. Mere inconvenience to the officer will not be sufficient to make the circumstances exigent. The officer must not be able to obtain a warrant without an actual threat of losing the evidence.

The threat of losing the evidence is not present with regard to opaque containers within the vehicle. Therefore, during an automobile search based on exigent circumstances, the officer must seize the container and obtain a warrant prior to a valid search. Only where there is probable cause to believe the contents of the containers create exigent circumstances, such as the danger posed by explosives, will a warrantless search of an opaque container be valid. This requirement is consistent with the Supreme Court's finding that the intrusion of an immediate warrentless search of luggage is greater than the intrusion of detaining luggage while obtaining a warrant.[182] The Court held in *Sanders* and *Chadwick* that an immediate search of luggage, as the greater intrusion upon privacy compared to seizure of the luggage, is inherently unreasonable.[183] Thus, the lesser intrusion of seizing opaque containers until a warrant is obtained to search them is required, absent actual exigent circumstances.

The solution proposed here not only protects reasonable expectations of privacy associated with containers within automobiles but

180. United States v. Bradshaw, 490 F.2d 1097 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974).

181. Mincey v. Arizona, 437 U.S. 385, 393 (1978).

182. *Sanders*, 442 U.S. 753; *Chadwick*, 433 U.S. 1.

183. *Sanders*, 442 U.S. at 762-66; *Chadwick*, 433 U.S. at 13.

also protects reasonable expectations of privacy held with respect to the automobiles themselves. Because the intrusion involved in seizing an automobile is constitutionally equal to the intrusion of searching the automobile without a warrant, fourth amendment protection is best served by allowing the individuals to choose which intrusion is least offensive to them. Only where circumstances are actually exigent should the fourth amendment warrant requirement yield to the need for law enforcement.

CONCLUSION

The results in many warrantless automobile cases indicate a concern of the Court that the job of law enforcement be made less difficult.[184] When the automobile exception was created in the *Carroll* case, the Court noted that the decision was "a wise one because it leaves the rule one which is easily applied and understood and is uniform."[185] However, the fourth amendment protects against unreasonable searches and seizures.[186] It does not purport to make this an easy task.[187] In addition, it does not suggest that a clear interpretation of the fourth amendment has more value than fourth amendment interests protecting reasonable expectations of privacy.[188]

Chief Justice Burger noted in his concurrence to *Sanders* that "we are construing the constitution, not writing a statute or a manual for law enforcement officers."[189] As discussed earlier, mere inconvenience to law enforcement agents does not make circumstances exigent.[190] In fact, *Carroll* specifically stated that a warrant must be obtained when practical.[191] But the courts that have allowed searches of automobiles after seizure and impoundment at police headquarters have ignored this holding in *Carroll*.[192]

The *Ross* Court made an extensive effort to achieve a clear standard in spite of fourth amendment principles protecting expectations of privacy[193] and requiring neutral magistrates to issue warrants.[194]

184. *Ross*, 102 S. Ct. at 2161-62.
185. *Carroll*, 267 U.S. at 159.
186. *See supra* notes 2-3 and accompanying text.
187. Mincey v. Arizona, 437 U.S. 385, 393 (1978).
188. *See supra* note 1.
189. *Sanders*, 442 U.S. at 768.
190. *See, e.g.*, Mincey, 437 U.S. at 393; *Bradshaw*, 490 F.2d 1097.
191. *Carroll*, 267 U.S. at 156.
192. *Chambers*, 399 U.S. 42.
193. *Ross*, 102 S. Ct. 2157; *See also supra* notes 96-173 and accompanying text.
194. *Ross*, 102 S. Ct. 2157; *See also supra* note 38-54.

In fact, the Court granted certiorari for the purpose of clarifying the law on automobile exception searches.[195] Unfortunately this goal resulted in the Supreme Court ignoring highly valued fourth amendment principles.

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195. *Ross*, 102 S. Ct. at 2161-62.