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Warrantless Search of Packages Seized from an Automobile--Fourth Amendment: United States v. Johns, 105 S. Ct. 881 (1985)

Bernard J. Bobber

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FOURTH AMENDMENT—WARRANTLESS SEARCH OF PACKAGES SEIZED FROM AN AUTOMOBILE

United States v. Johns, 105 S. Ct. 881 (1985).

I. INTRODUCTION

In *United States v. Johns*,[1] the Supreme Court held that the warrantless search of packages which were lawfully seized in a valid automobile search and stored in a Drug Enforcement Administration warehouse for three days did not violate the warrant requirement of the fourth amendment.[2] The Court's holding broadens the exception to the fourth amendment warrant requirement for the search of packages that was set out in *United States v. Ross*.[3] In *Ross*, the Court held that the search of packages[4] found in the course of a valid automobile search would not require a warrant where the police had reason to believe that the packages concealed the object of the probable cause search.

The *Ross* decision was grounded in the practical considerations that justify the warrantless search of an automobile.[5] The Court reasoned that the exigent circumstances which have traditionally justified the warrantless search of an automobile also justify the warrantless search of the packages found within the automobile, since to hold otherwise would undermine the purpose of the automobile

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1 105 S. Ct. 881 (1985).

2 The fourth amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV.

3 456 U.S. 798 (1982). For a detailed review of the *Ross* decision, see *infra* notes 35-40 and accompanying text.

4 In *Ross*, the Court referred to the object that was searched as a "container." In *Johns*, the objects involved were described as "packages." Since no distinction between these has been made by the Supreme Court, this note will generally use the word "packages" to refer to all sealed or closed containers, bags, boxes, suitcases, etc.

5 Under the automobile exception, the police may search an automobile without a warrant if they have probable cause to believe that the automobile contains contraband. Carroll v. United States, 267 U.S. 132 (1925). *See infra* notes 25-31 and accompanying text.

exception.[6] By extending the *Ross* exception to the facts in *Johns*, the Court has indicated that the warrantless search of packages found in automobiles, like the warrantless search of automobiles themselves, will not be deemed unreasonable merely because of a delay between the seizure of the packages and their subsequent search.[7]

This Note argues that the majority's reasoning in *Johns* was misguided. The Court failed to adhere to a cardinal principle of fourth amendment jurisprudence, namely, that there is a strong presumption in favor of a warrant, and the few, well-delineated exceptions to that requirement cannot be broader than necessary to satisfy the reasons that gave rise to them.[8] Because the warrantless search of packages which were seized and secured three days previously was not necessary to satisfy the practical considerations which justified the *Ross* exception,[9] the search in *Johns* should have been declared unreasonable.

In addition, this casenote will argue that the *Johns* Court failed to recognize a basic distinction between the justifications for the automobile exception and those for the *Ross* exception for the warrantless search of packages. The automobile exception is based, in large part, on a lesser expectation of privacy evidenced by the traditional treatment of vehicles under the fourth amendment. Such an exception based on a lesser expectation of privacy is not determined by whether or not a warrant can practicably be obtained. The *Ross* exception, on the other hand, is largely based on exigent circumstances and practical considerations.[10] This type of exception is strictly limited by the practicability of getting a warrant. When obtaining a warrant becomes practicable, the type of exception recog-

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6 *Ross*, 456 U.S. at 820, 821 n.28.

7 105 S. Ct. at 885-86. *See infra* note 65 and accompanying text.

8 New York v. Belton, 453 U.S. 454, 457 (1981); Mincey v. Arizona, 437 U.S. 385, 393, 405 (1970).

9 The Court in *Ross* desired to draw a bright line by which to guide law enforcement officials and lower courts, 456 U.S. at 826 (Powell, J., concurring), and attempted to advance the practical considerations involved in an automobile search which would be defeated if packages found in the vehicle could not be searched without a warrant incident to the automobile search. *Id.* at 820, 821 n.28.

10 Another example of an exception to the warrant clause which is based on exigent circumstances and practical considerations is the "search incident to arrest" exception. This exception allows the police to search without a warrant the immediate area in control of the arrestee at the time of the arrest. This exception is justified by the necessity of allowing the police to search for and seize valuable evidence before the arrestee can destroy it, or to search for and seize any weapons which the arrestee might gain possession of and use against the arresting officers. For a general review of the several recognized exceptions to the fourth amendment warrant requirement, see 2 W. LAFAVE, SEARCH AND SEIZURE § 4.1(a) (1978).

nized in *Ross* is diffused, whereas the justification for the automobile exception remains intact.

This Note will argue that in the context of an immediate probable cause search upon seizure, the rule developed in *Ross* is justified. In the absence of the exigent circumstances created by the location of a package in an automobile, however, the *Ross* exception for the warrantless search of packages is unjustified. Therefore, *Johns* overextends the *Ross* exception by deviating from fundamental fourth amendment principles and relying on an unfounded analogy.

II. FOURTH AMENDMENT ANALYSIS

To broaden the scope of permissible police activities at the expense of constitutional protection requires substantial justification. Such a justification in the instant case could only be sustained by demonstrating that the theoretical underpinnings for the automobile exception can be logically fused with the rationale for a warrantless package search. Because of the historically different bases for the two exceptions, however, this link cannot be made. The Court in *Johns* improperly extended an exception to the warrant requirement and further eroded fourth amendment protections. To demonstrate that this is the case, consideration of the fourth amendment and its several exceptions is necessary.

A. FOURTH AMENDMENT BACKGROUND

The fourth amendment applies wherever a person has a reasonable expectation of privacy in the house, paper, or effect that has been seized or searched.[11] In *Katz v. United States*, Justice Harlan separated the expectation of privacy that is necessary to trigger fourth amendment protections into two parts: the person must have an actual subjective expectation of privacy, and the subjective expectation of privacy must be one that society is prepared to recognize as reasonable.[12]

Where this subjective expectation of privacy is recognized as reasonable, the fourth amendment creates a strong presumption in

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[11] Rakas v. Illinois, 439 U.S. 128, 129 (1978) (Petitioners failed to show that they had a legitimate expectation of privacy in the glove compartment or the area under the seat of the automobile in which they were riding as passengers.); Katz v. United States, 389 U.S. 347, 351-52 (1967) (The government's eavesdropping activities violated the privacy upon which the petitioner justifiably relied while using a telephone booth.).

[12] *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The second component is virtually always met if a person's subjective expectation is objectively justified under the circumstances.

favor of requiring a warrant for a search or seizure.[13] The Court, however, has created a few well-delineated exceptions to the warrant requirement.[14] In order to uphold the presumption in favor of warrants, these exceptions are no broader than necessary to satisfy the reasons that justify them.[15] This limit on the scope of exceptions is especially binding when the exception allows a search of a place or thing that is normally protected by the warrant requirement.[16] This point is illustrated by cases in which the Supreme Court rejected warrantless searches under an exception that would have made them initially permissible, because the searches were delayed for a sufficient time to make it practical to obtain a

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[13] Smith v. Maryland, 442 U.S. 735, 740 (1979). "[I]t is a cardinal principle that 'searches conducted outside the judicial process without prior approval by a judge or magistrate, are *per se* unreasonable under the fourth amendment — subject to only a few specifically established and well-delineated exceptions.' " Mincey v. Arizona, 437 U.S. 385, 390 (1978)(quoting *Katz*, 389 U.S. at 357).

The warrant requirement is deemed crucial to protecting fourth amendment rights because of the importance of having the probable cause determination made by a neutral and detached magistrate. The warrant requirement provides a number of protections that a *post hoc* judicial evaluation of a police officer's probable cause does not. *Ross*, 456 U.S. at 830 (1982)(Marshall, J., dissenting).

Prior review by a detached and neutral magistrate limits the concentration of power by executive officers, and prevents overbroad and unjustified searches from occurring. *See* United States v. United States District Court, 407 U.S. 297, 317 (1972); Abil v. United States, 362 U.S. 217, 252 (1960) (Brennan, J., dissenting).

Prior review may also "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976). *See also* Beck v. Ohio, 379 U.S. 89, 96 (1964). Furthermore, even if the police conduct a search that a magistrate would have authorized, the imposition of prior judicial review reassures the public that the process of law has been orderly. *Ross*, 456 U.S. at 830 (Marshall, J., dissenting).

See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 410-11 (1974).

[14] Amsterdam puts the exceptions into three categories: "consent searches, a very limited class of routine searches (for example, border searches or the (inventory) search of impounded vehicles), and certain searches conducted under circumstances of haste that render the obtaining of a search warrant impracticable." Amsterdam, *supra* note 13, at 358. *See also supra* notes 5, 10 and accompanying text and *infra* note 22 and accompanying text.

[15] *See, e.g.*, New York v. Belton, 453 U.S. 454, 457 (1981)(majority opinion)("[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible")(quoting Chimel v. California, 395 U.S. 752, 762 (1962)); Mincey v. Arizona, 437 U.S. 385, 393, 405 (1978)("warrantless searches must be 'strictly circumscribed by the exigencies which justify its initiation,' ")(quoting Terry v. Ohio, 392 U.S. 1 (1967)).

[16] Typically, these exceptions are allowed because the immediate objective requirements of the situation make it impracticable to get a warrant. *See* United States v. United States District Court, 407 U.S. at 318 (rejecting government's argument that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement).

warrant.[17]

For example, the Court has permitted an arresting officer to make a warrantless search of an item, including a package, that is within an arrestee's immediate control.[18] In *United States v. Chadwick*,[19] however, the Court held that the search incident to arrest exception did not apply to the search of a footlocker which had been taken out of the arrestee's immediate area and searched after it had been stored at a government warehouse for an hour. The Court, declining to extend the exception beyond the justifications that gave rise to it, noted that since the arrestee could not gain access to the secured footlocker to seize a weapon or destroy evidence, the police could practicably obtain a warrant and were thus required to do so.[20]

Similarly, in *Michigan v. Tyler*,[21] the Court permitted investigators to make an immediate warrantless entry into a building after a fire had been extinguished,[22] but held that the investigators needed a warrant to re-enter the building days later.[23] As Chief Justice Burger once explained, "An exigency which would have permitted an immediate warrantless search of a building [does] not support a warrantless search two days later when it would have been practicable to get a warrant."[24]

B. FOURTH AMENDMENT TREATMENT OF AUTOMOBILES AND PACKAGES

The fourth amendment warrant requirement does not apply to automobiles.[25] In *Carroll v. United States*,[26] the Court held that a war-

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17 *See, e.g.*, Michigan v. Tyler, 436 U.S. 499 (1978)(once fire investigators had determined the cause of the fire, an additional search of the home could have only been for the purpose of finding evidence of arson, and thus a criminal search warrant was required for re-entry); United States v. Chadwick, 433 U.S. 1 (1977)(warrantless search of luggage or other property seized at the time of the arrest cannot be justified as incident to that arrest if the search is remote in time or place from the arrest); GM Leasing Corp. v. United States, 429 U.S. 338 (1977) (IRS agents' delay in making a warrantless entry into petitioner's office to seize records evidenced no exigent circumstances, so a warrant was required). *Cf. Mincey*, 437 U.S. at 393-94; *Chimel*, 395 U.S. at 762-63.

18 *Chimel*, 395 U.8. at 763. An immediate warrantless search is permissible because there exists some danger that the arrestee may seize and destroy evidence in his immediate control or that he might gain possession of a weapon which could be used against the arresting officer.

19 433 U.S. 1 (1977).

20 *Id.* at 15; *see also* Preston v. United States, 376 U.S. 364, 368 (1964).

21 436 U.S. 499 (1978).

22 Warrantless entry is allowed in this circumstance to determine the cause of the fire and to ensure that it does not reignite. *Id.* at 511.

23 *Id.*

24 *GM Leasing Corp.*, 429 U.S. at 361 (Burger, C.J., concurring).

25 The Court has not extended the fourth amendment to automobiles because of a unique historical footnote associated with the passage of that amendment. The same

rantless search of an automobile by police officers who had probable cause to believe that the vehicle contained contraband was not unreasonable within the meaning of the fourth amendment.[27]

Generally, two justifications have been articulated for removing the automobile from the purview of the fourth amendment. First, the exigency created by the mobility of an automobile makes obtaining a warrant impracticable.[28] Second, an individual's diminished expectation of privacy in an automobile makes a warrantless search based on probable cause reasonable.[29] The Court in recent years has invoked this second justification even in cases where there was no possibility that the automobile would be moved.[30] For example, the Court found that this diminished expectation of privacy justified the search of an automobile which was in police control for hours, or even days, after the lawful warrantless seizure of the vehicle.[31] Since a warrant is virtually never required to search an auto-

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Congress that ratified the fourth amendment also enacted a statute that allowed the warrantless search of ships, but not of homes. *Carroll*, 267 U.S. at 150-51 (referring to Act of July 31, 1784, 1 Stat. 29, 43 *et seq.*). Since the same Congressmen who enacted the fourth amendment did not extend the warrant requirement to the search of ships, the functional predecessors of automobiles, the Court has reasoned that automobiles are not guaranteed the protections of a warrant requirement. *Id.*

26 267 U.S. 132 (1925).

27 *Id.* In *Carroll*, the police officers had probable cause to believe that an automobile contained contraband and was participating in a bootlegging scheme. The police stopped the car and searched its interior by tearing open the upholstery of the seat cushion. They discovered 68 bottles of gin and whiskey concealed inside the cushion and arrested the driver. The Court held that the warrantless search of an automobile is not unreasonable, but did not explicitly address the scope of the search that is permissible.

28 *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970); *Carroll*, 267 U.S. at 132. The automobile's mobility would enable it to be removed from the jurisdiction by the time a warrant could be procured. Or, if the police could warrantlessly seize the vehicle but could not conduct an immediate search of it, they would often be faced with the problem of detaining the unarrested occupants while a warrant is obtained.

29 The Supreme Court has determined that the intrusion of a warrantless search of an automobile is constitutionally less significant than a warrantless search of more private areas because an automobile presents much of its contents to plain view and is used for travel subject to significant government regulation. Arkansas v. Sanders, 442 U.S. 753 (1979).

30 *See, e.g.*, Michigan v. Thomas, 458 U.S. 259, 261-62 (1982)(Once the inventory search of the glove compartment of respondent's automobile at the police staion revealed contraband, the warrantless search was properly expanded to include the air vents without any showing of exigent circumstances.). This suggests that the Court perceives this second factor, and not the factor of the automobile's mobility as the principle justification for the automobile exception.

31 *Thomas*, 458 U.S. at 261-62 (warrantless inventory search of respondent's automobile at the scene of the arrest prior to towing the automobile upheld); Texas v. White, 423 U.S. 67, 68 (1975)(per curiam); *Chambers*, 399 U.S. at 44.

mobile, the practicability of obtaining a warrant in such cases is not a relevant consideration.

Packages, on the other hand, have historically been treated differently. Over one hundred years ago, the Supreme Court held that the warrant clause applied to packages.[32] The *Chadwick* decision reaffirmed the general principle that closed packages may not be searched without a warrant,[33] and the Court in *Ross* refused to draw a distinction between packages which are "worthy" or "unworthy" of this protection.[34] From this universal recognition of the legitimate expectaion of privacy in packages, it is clear that the practicability of obtaining a warrant must become a significant factor in determining the reasonableness of the search of packages.

C. *UNITED STATES V. ROSS*

In *United States v. Ross*,[35] the Court allowed the warrantless search of packages[36] as part of a valid warrantless automobile search since the police conducting the search could reasonably have believed that the packages contained the object of the search.[37] The Court advanced two reasons to justify this exception to the normal rule that packages cannot be searched without a warrant. First, the Court reasoned that the police and lower courts needed a bright line rule to know when a warrantless search is permissible and when

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[32] *Ex parte* Jackson, 96 U.S. 727 (1878)("[S]ealed packages . . . are . . . fully guarded from examination and inspection . . . . [T]hey can only be opened and examined under . . . warrant . . . ."). *Id.* at 733.

[33] *Chadwick*, 433 U.S. at 11 ("No less than one who locks the doors of his house against intruders, one who safeguards his personal possessions in this manner [placing personal effects inside a footlocker] is due the protection of the Fourth Amendment Warrant Clause.").

[34] *Ross*, 456 U.S. at 822.

[35] 456 U.S. 798 (1982).

[36] Again, "packages" is used here as a general term encompassing closed or sealed packages or containers. *See supra* note 4.

[37] 456 U.S. at 825-26. In *Ross*, the police acted on an informant's tip that a described individual was selling narcotics kept in the trunk of his car at a certain location. The police went to that location, found the car and arrested the driver. The officers opened the trunk and discovered a closed, brown paper bag. Without a warrant, the police searched the bag and found glasine bags containing white powder which later proved to be heroin. Another warrantless search of the trunk at the police station revealed a zippered pouch containing cash. The defendant challenged the constitutionality of these two warrantless package searches, but the Supreme Court held that the automobile exception to the warrant requirement permits the warrantless search of the contents of a container found in a vehicle search conducted upon probable cause, provided that the container is one that might reasonably contain the object of the search. 456 U.S. at 810-14. "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." *Id.* at 825.

it is not.[38] Second, the Court noted that the practical consideration justifying the automobile exception — namely, the exigency created by the mobility of the automobile — would be undermined if the packages found inside the automobile could not be searched as part of the automobile search.[39] In light of these practical considerations, the Court in *Ross* held that the scope of the warrantless search authorized by the automobile exception is no broader or narrower than that which a magistrate could authorize by a warrant.[40]

Although the *Ross* majority acknowledged that packages normally cannot be searched without a warrant, it created this exception in recognition of the exigency created by the circumstances of the automobile search. The Court in *Ross*, however, never intimated that it was extending the complete scope of the automobile exception to packages found in automobiles.

III. *UNITED STATES V. JOHNS*

A. FACTS

On August 4, 1981, while conducting an investigation of a suspected drug smuggling operation, a United States Customs officer saw two pickup trucks drive away from respondent Duarte's residence in Tucson, Arizona.[41] The Customs officer contacted other officers who subsequently conducted air and ground surveillance of

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[38] 456 U.S. at 825 (Blackmun, J., concurring). The Court referred to this area of the law encompassing exceptions to the warrant requirement as "this troubled area." *Id.* at 825.

[39] The Court suggested that if a package found in the course of an automobile search could not be opened without a warrant, then the warrantless search of the automobile would be delayed until a warrant for the search of the package was obtained. The police could never be certain, until the package was opened, that the object of their search was not concealed in a yet undiscovered portion of the vehicle. The ensuing vehicle search would inevitably become excessively intrusive since the police would search every inch of the vehicle before obtaining a warrant to search the package. The Court stated that this result would be directly inconsistent with the *Carroll* rationale. 456 U.S. at 820, 822 n.28. Furthermore, the practical problem of whether to detain or release a vehicle's unarrested occupants would be exacerbated if the police had to delay the completion of the vehicle search to obtain a warrant to search a package found within the vehicle.

[40] *Id.* at 822.

[41] At approximately 1:30 a.m., a Customs officer received a report from an unidentified informant of suspicious activity at the Tucson Dragway. The informant stated that an airplane had landed at the dragway and had been met by a car. At the request of Customs officials, the county sheriff's department intercepted the car as it was leaving the scene. The police detected no criminal activity, so they allowed the driver and his passenger, later identified as respondents Johns and Hearron, to proceed on their way. Previously, Customs officers had information linking respondent Johns with respondent Duarte in an international drug smuggling operation. Based on this information, Customs officers initiated surveillance at Duarte's residence. United States v. Johns, No. CR 81-188 (D. Ariz. Jan. 8, 1982) (memorandum decision and order), *reprinted in* Petition for

the trucks.[42] The trucks traveled 100 miles to a remote private airstrip near Bowie, Arizona, approximately 50 miles from the Mexican border.[43] Soon after the trucks arrived at the airstrip, a small plane landed.[44] Customs officers in the air saw one of the trucks approach the plane and relayed this information to the officers on the ground who were unable to see what had transpired.[45] Shortly threreafter, the aircraft departed.[46] A second small aircraft then landed and departed in the same fashion.[47]

The two Customs officers on the ground approached to investigate, parking their vehicles about 30 yards from the trucks.[48] As the officers approached the trucks, one saw an individual covering the contents in the rear of the truck with a blanket.[49] Both officers smelled marijuana and ordered the respondents to come out from behind the trucks and to lie on the ground.[50]

In the backs of the trucks, the officers saw packages wrapped in dark green plastic and sealed with tape.[51] The officers arrested at the scene the respondent Duarte and the other four men involved in the transaction.[52] The other officers who were conducting the air surveillance followed the pilots of the planes, respondents Hearron and Johns, back to Tucson and arrested them upon landing.

The Customs officers did not search the pickup trucks or the packages at the airstrip but, rather, took the trucks back to the Drug Enforcement Administration (DEA) headquarters in Tucson. There the packages[53] were removed from the trucks and placed in the DEA

Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Appendix at 16, *Johns*, 105 S. Ct. 881 (1985).

42 *Id.* at 19.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at 20.

49 *Id.*

50 *Id.*

51 One of the officers testified, based on his experience, that smuggled marijuana is commonly packaged in this manner. 105 S. Ct. at 883.

52 Before leaving the scene, the officers noticed some loose vegetable matter on the ground that they believed to be marijuana. United States v. Johns, No. CR 81-188 (I. Ariz. Jan. 8, 1982)(memorandum decision and order), *reprinted in* Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Appendix at 22, *Johns*, 105 S. Ct. 881 (1985).

53 There were approximately 40 packages. The packages were of two types — some were cardboard boxes wrapped in heavy double-ply green garbage bags which were taped with heavy masking tape, and the others were in two thicknesses of heavy bags taped with masking tape. United States v. Johns, No. CR 81-188 (D. Ariz. Jan. 8, 1982)(memorandum decision and order), *reprinted in* Petition for Writ of Certiorari to

warehouse. Three days later,[54] DEA agents opened some of the packages without first obtaining a search warrant and took samples that later proved to be marijuana.

On September 1, 1981, a federal grand jury for the District of Arizona indicted the seven respondents for conspiracy to possess marijuana and possession of marijuana with intent to distribute.[55] Before trial, the motion to suppress the marijuana as evidence was granted.[56] The government appealed.[57]

A three-judge panel of the United States Court of Appeals for the Ninth Circuit affirmed and held that the officers were required to obtain a warrant to search the packages because there was a delay of three days between the seizure of the trucks and the subsequent search of the packages found within the trucks.[58] The court of ap-

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the United States Court of Appeals for the Ninth Circuit, Appendix at 2, 19-20, *Johns*, 105 S. Ct. 881 (1985).

54 Although the record leaves unclear precisely when the agents opened the packages, the parties did not dispute the conclusion of the court of appeals that the search occurred three days after the packages were seized. 105 S. Ct. at 882.

55 21 U.S.C. §§ 841(a)(1), 846 (1981)(making it illegal for any person to knowingly possess marijuana with intent to distribute it, and to conspire to possess marijuana with intent to distribute it).

56 The district court's memorandum of decision and order is unreported, but is reprinted in the appendix of the petition for certiorari. The district court relied on Robbins v. California, 453 U.S. 420 (1981) to hold that the insubstantial nature of the packages involved did not justify dispensing with a warrant. United States v. Johns, No. CR 81-188 (D. Ariz. Jan. 8, 1982)(memorandum decision and order), *reprinted in* Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Appendix at 23-27, *Johns*, 105 S. Ct. 881 (1985). The district court also refused to apply the automobile exception on the ground that "[t]he defendants were arrested and the contraband secured at the DEA warehouse" before the search of the packages was carried out. *Id.* at 24. The district court similarly declined to recognize a "plain odor" exception to the warrant requirement. *Id.* Finally, the court found the evidence insufficient to establish that the plastic wrapped packages "could have only contained marijuana." *Id.* at 27-28. This last finding refuted the government's argument that the warrantless search in this case was not unreasonable because the shape and characteristics of the packages disclosed their contents, thus eliminating respondents' reasonable expectation of privacy in them. The district court recognized this "plain view" exception as legitimate, *see Robbins*, 453 U.S. at 427-28, but refused to extend the exception to the facts before it.

57 While this case was pending on appeal, the United States Supreme Court decided United States v. Ross, 456 U.S. 798 (1982), which overruled *Robbins*. *See supra* notes 37 & 56.

58 United States v. Johns, 707 F.2d 1093 (9th Cir. 1983). In affirming the suppression order, the court of appeals concluded that *Ross* could be applied retroactively because *Ross* established a lawful search method, and thus, no legitimate reliance interest could be undercut by the *Ross* holding. 707 F.2d at 1096. The court also concluded that since the focus of the officer's suspicion was not exclusively on the packages but included the vehicles themselves, *Ross* was applicable. Thus, the court concluded that the packages could have been searched without a warrant as a part of the search of the trucks. *Id.* at 1098. However, the court held that because of the time lapse between the seizure of the packages and the subsequent search, taking samples from the packages

peals held that a warrant was necessary since the officers had held the packages long enough to obtain a warrant. The Court also rejected the government's contentions that the plain odor of the marijuana emanating from the packages made a warrant unnecessary[59] and that respondents Johns and Hearron lacked standing to challenge the search of the packages.[60] Most importantly, the court of appeals held that *Ross* did not authorize the warrantless search of the packages three days after they were removed from the pickup trucks and stored in the DEA warehouse.[61] Accordingly, the Ninth Circuit affirmed the suppression order.

B. SUPREME COURT OPINIONS

1. The Majority

The Supreme Court granted certiorari to consider whether *Ross* authorizes a warrantless search of packages several days after they are removed from vehicles that police officers had probable cause to believe contained contraband.[62] Justice O'Connor wrote for the seven-member majority.[63] Justice O'Connor wrote that inasmuch as

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without a warrant was unlawful. *Id.* at 1099. To reach that conclusion, the court relied on those cases holding that the search incident to arrest doctrine does not permit a warrantless search of property seized from an arrested subject if that search is conducted after the arrest is completed. *Id. See also* United States v. Burnette, 698 F.2d 1038 (9th Cir. 1983); United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981). The Court also relied on the fact that the Supreme Court in Chambers v. Maroney, 399 U.S. 42, 52 (1970), limited the automobile exception of searches upon seizure to those conducted "soon" after a seizure. *Johns*, 707 F.2d at 1099. Finally, the Court relied on the fact that the officers could have easily obtained a warrant at any time and that neither basis for the automobile exception—the impracticability of getting a warrant and the lesser expectation of privacy in automobiles—applied to packages secured for three days at a government warehouse. *Id.*

[59] *Id.* at 1095-96. Essentially, the court of appeals agreed with the disrict court's rejection of the "plain view" exception. *See supra* note 56.

[60] *Id.* at 1099-1100. The government claimed that Johns and Hearron lacked standing to question the validity of the search since they had departed a few minutes before the seizures of the packages at the airstrip. The court of appeals found that the pilots' interests in the packages were indistinguishable from those of the other defendants and that the pilots therefore had standing. The court found that Johns and Hearron met their burden of showing a reasonable expectation of privacy based on their formalized bailor/bailee relationship to the other five defendants. *Id.*

[61] *Id.* at 1097-99. The court emphasized that *Ross* did not overrule United States v. Chadwick, 433 U.S. 1 (1977) (holding that placing a package in an automobile does not destroy the expectation of privacy in the package). The court stated, "[W]hile *Ross* holds that the officers could have searched the packages, either on the spot or shortly thereafter, the automobile exception does not allow the warrantless search of containers seized and secured by the police for three days before the search. The rationale for the automobile exception no longer applies." *Id.* at 1100.

[62] United States v. Johns, 104 S. Ct. 3532 (1984) (granting petition for certiorari).

[63] Justice O'Connor was joined by Chief Justice Burger and Justices Blackmun, Pow-

the *Ross* exception entitled the government to seize the packages and search them immediately without a warrant, the warrantless search three days after the packages were stored in the DEA warehouse was reasonable and consistent with precedent involving delayed searches of impounded automobiles.[64] In reversing the decision of the court of appeals, the Court relied on *United States v. Ross*,[65] and other cases extending the automobile exception, and distinguished *United States v. Chadwick*,[66] one of the cases suggesting that a warrant is required for the search of packages.

Before Justice O'Connor addressed the issue of the delay, she disposed of two of the respondents' arguments. First, Justice O'Connor acknowledged the respondents' claim that the suppression of the marijuana should be affirmed because the Customs officers never had probable cause to conduct a vehicle search, and therefore, *Chadwick*, and not *Ross*, was applicable. The Court rejected this argument, concluding that the officers had probable cause to believe that not only the packages, but the vehicles themselves contained contraband.[67] It was this probable cause, according to the Court, that distinguished *Chadwick* and made *Ross* applicable.[68]

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ell, Stevens, Rehnquist and White. Justice Brennan wrote a dissenting opinion in which Justice Marshall joined.

64 *See* Florida v. Meyers, 104 S. Ct. 1852, (1984)(per curiam); Michigan v. Thomas, 458 U.S. 259 (1982)(per curiam); Cooper v. California, 386 U.S. 58 (1967)(upholding a warrantless search of an automobile that took place seven days after the seizure of the automobile).

65 456 U.S. 798 (1982).

66 433 U.S. 1 (1977). In *Chadwick*, police officers had probable cause to believe that a footlocker contained contraband. The officers seized the footlocker as soon as it was placed in the trunk of an automobile and then searched its contents without a warrant. The Court refused to hold that probable cause generally supports the warrantless search of luggage, and did not extend the automobile exception to the search of the footlocker simply because the footlocker was located in an automobile when it was seized. The Court deemed the search unreasonable. *Id.* at 11.

67 105 S. Ct. at 884. The Court cited various factors which supported the officers' probable cause belief that the vehicles themselves contained contraband, namely: 1) the events involved indicated that these trucks were being used in smuggling activity; 2) the officers on the ground were unable to see what transpired between the aircraft and the trucks; and 3) the smell of marijuana emanated from the area around the trucks.

68 The Court pointed out that *Ross* did not overrrule *Chadwick*. 105 S. Ct. at 885. The distinction lies in the basis of the probable cause. The *Chadwick* Court recognized that where the police have probable cause to believe a container contains contraband and that container's contact with an automobile is merely incidental, the automobile exception does not extend to allow the warrantless search of the container. *Chadwick*, 433 U.S. at 15. *See also* Arkansas v. Sanders, 442 U.S. 753 (1979)(holding that warrantless search of luggage was unreasonable where police waited for the luggage to be placed in automobile's trunk before they seized it). However, where the police have probable cause to believe a vehicle contains contraband, *Ross* allows the warrantless

Justice O'Connor next addressed the respondents' claim that no vehicle search had occurred. The Court disposed of this argument as "meritless," concluding that the Customs officers had conducted a vehicle search at least to the extent of removing the packages from the trucks.[69]

Justice O'Connor then analyzed the central issue of the case. The Justice began by explaining the rationale and significance of *Ross*.[70] In *Ross*, the Court drew on the original description set out in *Carroll v. United States*[71] of the scope of warrantless searches pursuant to the automobile exception to the warrant requirement.[72] From the Court's conclusion in *Ross* that "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,"[73] Justice O'Connor reasoned that the Customs officers could have lawfully searched the packages when they were first discovered at the airstrip.[74]

The Court then compared the delay between the seizure of the packages and their subsequent warrantless search in *Johns* to cases in which the Court allowed the warrantless searches of automobiles a significant time after police lawfully seized them.[75] Justice O'Connor noted that there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure because "the justification to conduct such a warrantless search does not vanish once the car has been immobilized."[76]

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search of all containers within the vehicle which could reasonably conceal the object of the search. *Ross*, 456 U.S. at 826.

69 105 S. Ct. at 885.

70 *Id.* at 885-87.

71 267 U.S. 132 (1925). "[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.* at 153-54. "[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the (officer), which in the judgment of the court would make his faith reasonable." *Id.* at 161-62 (quoting Director General of Railroads v. Kastenbaum, 263 U.S. 25 (1923)).

72 The Court in *Ross* held that the scope of the warrantless search authorized by the exception recognized in *Carroll* is no broader and no narrower than a magistrate could legitimately authorize by warrant. *Ross*, 456 U.S. at 825.

73 *Id.*

74 105 S. Ct. at 885.

75 *See* Texas v. White, 423 U.S. 67 (1975)(per curiam); *Chambers*, 399 U.S. at 42 (upholding a warrantless search at the police station of a seized automobile).

76 105 S. Ct. at 885 (quoting Michigan v. Thomas, 458 U.S. 259 (1982)). Essentially, these delayed car search cases hold that a vehicle lawfully in police custody may be searched without a warrant on the basis of probable cause to believe that the vehicle contains contraband, even when exigent circumstances otherwise justifying the war-

Although the court of appeals read *Ross* only to allow warrantless searches of packages if the search occurs "immediately" as a part of the vehicle inspection or "soon thereafer",[77] Justice O'Connor emphasized that neither *Ross* nor the delayed car search cases[78] suggest any such limitation.[79] Justice O'Connor wrote that *Ross* indicated that the test for the legality of the package search was whether the exception to the warrant requirement recognized by *Carroll* was applicable, and not whether exigent circumstances existed.[80] Summarily, the Court held that "the fact that a [package] is involved does not in itself either expand or contract the well-established exception to the warrant requirement recognized by *Carroll*."[81]

Justice O'Connor also pointed out that the practical effect of the lower court's decisions would only be to direct police to search all containers and packages that they discover in the course of a vehicle search immediately upon discovery. Since this result would be of little benefit to the person whose property is being searched, Justice O'Connor reasoned, then the delay in the execution of the war-

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rantless search are absent. *See also* Florida v. Meyers, 104 S. Ct. 1852 (1984) (per curiam)(warrantless search of an automobile eight hours after its seizure upheld as reasonable).

77 707 F.2d at 1099.

78 *See supra* notes 75 & 76. In *Ross*, the Court characterized *Chambers* as holding that if an immediate search on the street is permissible without a warrant, then "a search *soon* thereafter at the police station is permitted if the vehicle is impounded." *Ross*, 456 U.S. at 807 n.9 (emphasis added). In *Johns*, the Court chose to interpret this possible time limit on the *Ross* exception as not subjecting the packages found in the course of a vehicle search to restrictions not applicable to the vehicle search itself. 105 S. Ct. at 886.

79 In fact, *Ross* involved the search of two containers. The Court there did not distinguish between the search of the paper bag that occurred at the scene of the arrest and the search of the leather pouch later conducted at the police station.

80 105 S. Ct. at 886. The Court showed a bias toward the "lesser expectation of privacy" justification for the automobile exception and practically ignored the "exigency" justification. The *Ross* decision extended the automobile exception to packages found in the automobile because they presented the same exigency when being transported in the vehicle as the automobile itself presented. The Court in *Johns* apparently extended the exception to packages seized and secured by the police by extending the "lesser expectation of privacy" rationale. Yet, because *Ross* stated that it did not overrule *Chadwick*, which held that a person's privacy expectation in a package was not diminished by placing it in a vehicle, the exigent circumstances justification must be the only rationale for extending the automobile exception to packages. Because no exigency existed in *Johns*, the Court's extension of *Ross* has no doctrinal support. *See infra* note 83.

81 The majority then criticized the approach of the court of appeals for failing to further any fourth amendment privacy interests. Citing United States v. Haley, 669 F.2d 201 (4th Cir. 1979)("plain odor" may justify a warrantless search), the Court suggested that the respondents may not have possessed any privacy interest in the packages. The Court concluded that any expectation of privacy in the vehicles or their contents was subject to the authority of the officers to conduct a warrantless search based on probable cause. 105 S. Ct. at 886-87.

rantless search is not unreasonable.[82]

Thus, the majority in *Johns* expanded the scope of *Ross* by reasoning that because a delay between the lawful warrantless search of an automobile and the subsequent warrantless search of that automobile does not take that search out of the scope of the automobile exception, and because *Ross* applied the automobile exception to permit the warrantless search of packages found in a vehicle in the course of a valid search, then the warrantless search after the delay between the seizure of those packages and their subsequent search is not unreasonable.[83]

2. *The Dissent*

Justice Brennan, in a dissent joined by Justice Marshall, took a broader view of the issue presented by *Johns*.[84] Generally, Justice Brennan emphasized that exceptions to the fourth amendment warrant requirement can only extend to cases where their justifications mandate the exception. Brennan concluded that no justification mandated extending the exception to the facts in *Johns*.

Specifically, the dissent noted that the fourth amendment proscribes the warrantless search of closed packages,[85] and that the fourth amendment permits no more than "seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the situation demand it . . . ."[86] Justice Brennan went on to assert that the location of a package in a vehicle does not provide a reason to depart from this general rule.[87] In effect, Justice Brennan simply reiterated in *Johns* the reasoning of the dissent in Ross, and concluded that *a fortiori*, a warrantless search of a package three days

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[82] *Id.* at 887. The Court warned, however, that the police may not indefinitely retain possession of a vehicle and its contents before they complete a vehicle search and cautioned that the owner might attempt to prove that the delay was unreasonable as adversely affecting a privacy or possessory interest.

[83] *Id.* The Court did not recognize that each of its premises had different justifications, none of which is applicable to the search in *Johns*. First, the station house vehicle searches are justified by the lesser expectaion of privacy in automobiles. *Chadwick*, however, stated that this lesser expectation does not extend to packages. Second, the *Ross* exception is justified by exigent circumstances and practical considerations. However, with the packages seized and secured in the DEA warehouse in *Johns*, no such exigencies were present.

[84] Justice Marshall, joined by Justice Brennan, dissented in United States v. Ross, 456 U.S. 798 (1982).

[85] *Chadwick*, 433 U.S. at 10-11.

[86] 105 S. Ct. at 888 (Brennan, J., dissenting)(quoting United States v. Place, 462 U.S. 696, 701 (1983)).

[87] 105 S. Ct. at 888 (Brennan, J., dissenting)(citing *Ross*, 456 U.S. at 830 (Marshall J., dissenting))("The traditional reasoning for the automobile exception plainly does not support extending it to the search of a container found inside a vehicle.").

after its seizure violates the fourth amendment.[88]

The dissent addressed the central issue presented, the delay before the warrantless search. The dissent rejected the majority's "extension of the temporal scope of a permissible search" by an analogy to the delayed car search cases.[89] Without delineating his reasoning, Justice Brennan flatly stated that "there is simply no justification for departing from the fourth amendment warrant requirement under the circumstances of this case; no exigency precluded reasonable efforts to obtain a warrant prior to the search of the packages in the warehouse."[90] Justices Brennan and Marshall therefore urged affirmance of the Ninth Circuit's decision.

IV. Analysis

In *Johns*, the majority failed to adhere to the principle that the *Ross* exception to the warrant clause, like other exceptions thereto, should be "strictly limited by the exigencies which justify its initiation."[91] A review of the justifications for the *Ross* exception indicates that the Court exceeded the boundaries of these justifications in *Johns*.

First, the *Ross* Court claimed its exception was necessary to prevent the automobile exception from being undermined.[92] However, the purpose behind the automobile exception would not have been undercut by requiring the Customs officers in *Johns* to obtain a warrant in the three-day interim between the seizure and the search of the packages. The search of the pickup trucks, and the investigation as a whole, would have been neither impeded nor delayed by requiring a warrant for the search of the packages once they were secured

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88 105 S. Ct. at 888 (Brennan, J., dissenting).

89 *Id. See* Texas v. White, 423 U.S. 67 (1975)(per curiam)(holding that where police officers had probable cause to search respondent's car at the scene immediately after arresting him, such probable cause still obtained shortly thereafter so that the officers could constitutionally search the automobile at the station house without a warrant); Chambers v. Maroney, 399 U.S. 42 (1970). Justices Marshall and Brennan dissented in *White* and questioned the reasoning of these decisions in South Dakota v. Opperman, 428 U.S. 364 (1976). In *Opperman*, the Court held that the routine inventory search of the defendant's locked automobile, which had been lawfully impounded for multiple parking violations, was not unreasonable. *Id.*

90 105 S. Ct. at 888 (Brennan, J., dissenting). The dissent also chided the majority for introducing the "plain odor" issue in *Johns*, *see supra* note 81, because that issue had not been presented to the Court.

91 Mincey v. Arizona, 437 U.S. 385, 393 (1978)(quoting Terry v. Ohio, 392 U.S. 1, 25-26 (1967)). *See also* Chimel v. California, 395 U.S. 752, 762-63 (1962); United States v. Chadwick, 433 U.S. 1, 15 (1977); GM Leasing Corp. v. United States, 429 U.S. 338, 361 (1977)(Burger, C.J., concurring).

92 *Ross*, 456 U.S. at 820, 821 n.28. *See supra* note 9.

by the officials.[93] Also, the practical considerations supporting the automobile exception do not support an exception for packages which are completely within the police's control.[94] In short, once the officials seized the packages and safely stored them in the DEA warehouse, the practical considerations which justified the warrantless search in *Ross* no longer applied, and the authorities faced no problems of impracticability in obtaining a warrant.

Second, the *Ross* exception was further justified because it created a bright line to guide law enforcement officials and lower courts.[95] Any bright line, however, should not stray far from the cardinal principle of fourth amendment jurisprudence — that there is a strong presumption in favor of warrants.[96] The *Johns* majority not only side-stepped this cardinal principle, but it also diminished the brightness of *Ross*' bright line. Although the Court did write that officials may not indefinitely retain possession of a vehicle and its contents before they complete the vehicle search,[97] it gave no further direction. In *Johns*, the Court allowed a three-day delay

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93 This is so because the focus of the Custom officer's investigation from the start was more on the packages than on the trucks, despite the Court's assertion that the officers could have reasonably believed that the trucks themselves contained contraband.

In *Chadwick*, the Court held that since the focus of the officer's investigation was on the footlocker, the footlocker's location in the automobile was merely incidental, and thus a search of the footlocker could only be conducted upon issuance of a warrant. *Chadwick*, 433 U.S. 1 at 15-16. In *Ross*, the Court held that the police officers could search a package found during a valid automobile search without a warrant if the packages could conceal the object of the search. *Ross*, 456 U.S. at 825. In this instance, the focus of the investigation was on the automobile. The warrantless search of the packages was allowed merely to avoid undermining the practical considerations behind the automobile exception.

In *Johns*, the Customs officers' investigation seemed to be focused on the packages. The trucks were not searched at the airstrip and were only searched at the warehouse "to the extent of entering the trucks and removing the *packages*." 105 S. Ct. at 885 (emphasis supplied). However, the Court characterized the respondents' contention that the record failed to show that any vehicle search ever in fact occurred as "meritless." *Id.* Furthermore, the Court held that *Ross*, and not *Chadwick*, applied here because the "officers had probable cause to believe that not only the packages, but the vehicles themselves conained contraband." *Id.* In essence, the Court applied *Ross* and distinguished *Chadwick* based on what the officers could have believed, not on what they actually believed as objectively evidenced by their actions.

94 *See supra* notes 56-87 and accompanying text. Once the seized packages are in the police's control, they cannot be removed from the jursidiction before a warrant is obtained.

95 *See supra* note 38 and accompanying text.

96 "It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." New York v. Belton, 453 U.S. 454, 457 (1981). See also Mincey, 437 U.S. at 393.

97 105 S. Ct. at 887.

before the warrantless search of a package after authorities seized it during a valid automobile search. The question remains whether this search would still be reasonable after a thirty-day delay — or a 300-day delay. The Court seemed to leave itself, and obviously the lower courts, no option but to plod through each fact situation, case by case, to determine the reasonableness of the delayed search.

The brightest line at which to require a warrant in a delayed search of a package seized in the course of a valid automobile search is at the point where obtaining a warrant becomes practicable. The justifications in *Ross* allow the warrantless search of packages found in the course of a valid automobile search if the police officer could have reasonably believed that the package contained the object of the search.[98] However, if the police officer's intention is to seize the packages, but the officer does not search them incident to the initial search of the automobile, the *Ross* decision's practical concerns[99] are no longer valid; the search of the automobile will not be delayed and the reasons for the automobile exception will not be undermined. From that point on, the reasonableness of the search should depend on the practicability of obtaining a warrant.[100]

Since the reasons that underlie the exception to the warrant requirement for the search of packages in *Ross* do not apply to packages held by officials after the automobile search has been completed, the Court's decision to extend the *Ross* exception to the facts in this case violates its historic refusal to extend exceptions to the warrant clause beyond the reasons giving rise to them.[101] *Ross* did not purport to treat packages in automobiles according to the lesser expectation of privacy afforded to automobiles, but the Court's application of *Ross* to the facts of *Johns* makes the historically protected expectation of privacy in packages no greater than that of the automobile itself. This step was unprecendented and unsupported.

Notwithstanding the above reasoning, the *Johns* Court justified

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98 *Ross*, 456 U.S. 798 (1982).

99 *See supra* note 39 and accompanying text. In *Johns*, once the packages were secured, any search of the trucks was over and could not have been impeded by requiring a warrant for the search of the packages.

100 One complaint against this suggestion is that a standard which closely adheres to the fourth amendment presumption in favor of warrants would unduly burden police officers in the completion of their duties. However, it is well established that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey*, 437 U.S. at 393. Justice Marshall noted, "Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?" *Ross*, 456 U.S. at 842 (Marshall, J., dissenting).

101 *See, e.g.*, Michigan v. Clifford, 104 S. Ct. 641 (1984). *See also supra* note 5.

its extension of the *Ross* exception by comparing the three-day delay in *Johns* to cases which permit a delayed warrantless search of an automobile.[102] This analogy cannot justify the delayed package search in *Johns*, however, because of the historically different expectations of privacy surrounding automobiles and packages.

Since the passage of the fourth amendment, automobiles (or their functional predecessors) have not been protected by the warrant clause.[103] In addition, since *Carroll* in 1925, the law has been clear that one has little expectation of privacy in an automobile.[104] This reasoning has allowed the Court to uphold the search of an automobile hours (or even days) after its seizure even in the absence of exigent circumstances.[105]

The same is not true of packages.[106] The Court has attributed a greater expectation of privacy to the individual in cases involving packages.[107] Thus, like any other areas or things protected by the warrant clause, and unlike automobiles, the scope of any exception that allows for a warrantless search of packages should be delineated by the practicability of getting a warrant.[108] The analogy of the delay in *Johns* to the permissible delay in warrantless automobile search cases is thus not a justification for the warrantless search of packages.

The better analogies are to the search incident to arrest[109] and post-fire[110] exceptions. These exceptions are based exclusively on exigent circumstances and practical considerations, whereas the automobile exception is largely based on a lesser expectation of pri-

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102 *See supra* note 64 and accompanying text.

103 *Ross*, 456 U.S. at 807.

104 *Carroll*, 267 U.S. at 153. "[T]he guarantee of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically from the beginning of the Government, as recognizing a necessary difference between the search of a store, dwelling, house or other structure in respect of which a proper official warrant readily may be obtained, and the search of a ship, boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because a vehicle can be quickly moved from the locality or jurisdiction in which the warrant must be sought."

105 *See supra* note 64 and accompanying text.

106 *Ross*, 456 U.S. at 811-12; *Chadwick*, 433 U.S. at 11.

107 *Ex parte Jackson*, 96 U.S. at 733.

108 In the *Ross* scenario where a package is found in the course of a valid, warrantless automobile search and could reasonably contain the object of the search, obtaining a warrant for the search of the package is impracticable. The warrantless search of the package facilitates the automobile search and advances the practical considerations behind the automobile exception. However, when the package is removed from the vehicle and is secured by the police for three days, obtaining a warrant is clearly practicable.

109 Chimel v. California, 395 U.S. 752 (1969). *See supra* note 18 and accompanying text.

110 Michigan v. Tyler, 436 U.S. 499 (1978). *See supra* note 17 and accompanying text.

vacy.[111] These exceptions are strictly limited by the courts to circumstances where it is impractical for officials to obtain a warrant. However, the Court in *Johns* failed to limit the *Ross* exception similarly.

Furthermore, the practical consequences of not allowing the delayed automobile search that the Court concerned itself with in *Chambers v. Maroney*[112] are not relevant with respect to packages. In *Chambers*, the Court reasoned that to limit the warrantless search of an automobile to the time contemporaneous with its seizure would simply be impractical.[113] Also, the Court rationalized that given the initial intrusion caused by the seizure of the automobile, a contrary rule would provide relatively minor additional protection for privacy interests.[114] With packages, however, the Court has repeatedly stated that there is an important distinction between impounding a package in anticipation of obtaining a warrant and the warrantless search of the package.[115] The warrant clause permits the former, but prohibits the latter.[116]

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111 Michigan v. Thomas, 458 U.S. at 261-62 (holding that a vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, even when there are no exigent circumstances to justify a warrantless search). *See also* Florida v. Meyers, 104 S. Ct. 1852 (1984)(per curiam).

112 399 U.S. 42 (1970).

113 In *Chambers*, the Court stated:

> It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.

Chambers, 399 U.S. at 52 n.10.

114 "[T]here is little to choose from in terms of practical consequences between an immediate search without a warrant and the car's impoundment until a warrant is obtained." *Chambers*, 399 U.S. at 52. The Court asserted that the intrusion of seizing the vehicle in expectation of obtaining a warrant is equal to the intrusion of a warrantless search of the automobile on the spot since the vehicle's occupants are stranded. *Id.*

115 United States v. Place 462 U.S. 696 (1983). *See infra* note 116. *See also* Texas v. Brown, 460 U.S. 730 (1983) (Stevens, J., concurring)(officer properly seized the balloon the driver attempted to hide when officer validly stopped automobile and saw loose white powder and open bag of balloons); Walter v. United States, 447 U.S. 649, 654 (1980).

116 *See* Segura v. United States, 104 S. Ct. 3380 (1984). In *Segura*, the Court recognized that the police may, under certain circumstances, seize an item for the time necessary in which to obtain a search warrant. *Id.* at 3387. The purpose of this seizure is to give the police the opportunity to obtain a warrant. *Id.* Any seizure that is longer than what is reasonably necessary to obtain a warrant, however, would be unreasonable. *Id.* at 3391 (Stevens, J., dissenting).

In United States v. Place, 462 U.S. 696 (1983), the police seized a suitcase on reasonable suspicion in order to have a trained dog sniff the luggage for contraband. The Court held that the 90-minute detention of the suitcase was unreasonable because it was longer than necessary to have a dog smell the suitcase. *Id.* at 710.

Finally, the Court's argument that Johns had no legitimate expectation of privacy because the packages were subject to a lawful warrantless search at the airstrip again ignores the distinction between packages and automobiles, i.e., that packages are normally protected by the warrant clause, and automobiles are not. Once it became practicable to get a warrant, Johns regained a recognized expectation of privacy. Certainly by the third day, Johns could legitimately expect that the packages would only be searched after review by a magistrate since no exigent circumstances surrounded them.

V. CONCLUSION

In *United States v. Johns*, the Supreme Court expanded the scope of the *Ross* exception by holding that authorities could search packages without obtaining a warrant after holding the packages for three days.[117] The Court's extension of the *Ross* exception to the delayed search of packages in *Johns* cannot be supported by either of the Court's premises. First, the *Ross* exception should not apply because the practical considerations which justify the *Ross* exception are not valid when the seized packages are the object of the search and are secured by the police before the search is conducted. Second, the Court incorrectly analogized the delay in this case to the permissible delay between the warrantless seizure of an automobile and its subsequent warrantless search. This analogy is inappropriate because the Court has historically extended very different fourth amendment protections to packages and automobiles.

The Court should have adhered to established fourth amendment principles and recognized that exigent circumstances are the sole justification for the warrantless search of a package.[118] This exigency is present in the *Ross* scenario, where packages need to be searched incident to the search of the automobile; it is absent when packages have been secured by officials in a law enforcement warehouse for three days. In this case, no impracticabilities precluded police from obtaining a warrant to conduct the search, and the advantages of prior review by a neutral and detached magistrate far outweigh the importance of the marginal inconvenience imposed on the police.[119]

In *Johns*, the Court had the opportunity to draw a bright line at

117 105 S. Ct. at 887.

118 Professor LaFave suggests that the Court consider the question of what constitutes "truly exigent circumstances" for the purpose of avoiding the warrant requirement. 2 W. LAFAVE, SEARCH AND SEIZURE 543 (1978).

119 *See supra* note 13.

the point where obtaining a warrant becomes practicable. Instead of seizing this opportunity, the Court further eroded fourth amendment protections and showed little restraint in extending exceptions to the strongly presumed warrant requirement.

BERNARD J. BOBBER