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The Automobile Exception Swallows the Rule: Florida v. White

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THE AUTOMOBILE EXCEPTION SWALLOWS THE RULE: *FLORIDA V. WHITE*

Florida v. White, 119 S. Ct. 1555 (1999)

I. INTRODUCTION

In *Florida v. White*, the United States Supreme Court held that the warrantless seizure of an automobile did not violate the Fourth Amendment where that automobile, which had been used in the commission of a drug offense two months before the seizure, was defined as seizable contraband under Florida state law.[1]

White continues the Supreme Court's long-term expansion of the so-called "automobile exception," a category of searches and seizures that involves cars and other vehicles in increasingly tangential ways.[2] This exception originally was grounded in the notion that evidence in a stopped vehicle created an exigency that made the warrant process infeasible.[3] The Court has since expanded the exception to cases involving mobile homes[4] and now in circumstances where probable cause developed months before seizure.[5]

This Note illustrates that the automobile exception has increasingly diverged from Fourth Amendment precedent. It also demonstrates that cases relying upon the automobile exception have become divorced from the Fourth Amendment's purpose: protecting individuals from abusive governmental intrusions.[6] When compared to recent cases, *White* is an apparently small and innocuous step in increasing police power. This Note, however, argues that *White* and its progeny are part of a disturb-

[1] Florida v. White, 119 S. Ct. 1555 (1999).

[2] Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375, 376 (1986).

[3] *See* Carroll v. United States, 267 U.S. 132 (1925).

[4] California v. Carney, 471 U.S. 386, 393 (1985).

[5] *White*, 119 S. Ct. at 1557-58.

[6] James A. Adams, *The Supreme Court's Improbable Justifications for Restriction of Citizens' Fourth Amendment Privacy Expectations in Automobiles*, 47 DRAKE L. REV. 833, 833-34 (1999).

ing long-term trend of eliminating the Fourth Amendment's warrant requirement.[7] Finally, this Note contends that it would behoove the Court to recall that the automobile exception is an exception to the warrant requirement and not the rule itself.

II. BACKGROUND

A. THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution provides that:

> 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.[8]

It was added to the Constitution as a means to protect individual liberties from governmental abuses.[9] The Framers of the Constitution were extremely concerned about the general warrants and warrantless searches that were part of the colonial regime.[10] By drafting a requirement for individualized warrants, the Framers hoped to prevent the privacy invasions inherent in general warrants and warrantless searches. It is generally accepted that the Fourth Amendment's "reasonableness" clause condones certain warrantless searches and seizures.[11] The Court has held, however, that warrantless searches and seizures are *per se* unreasonable.[12]

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[7] *See* Katz, *supra* note 2.

[8] U.S. CONST. amend. IV.

[9] Adams, *supra* note 6. *See also* Chimel v. California, 395 U.S. 752, 761 (1969) (noting that the Fourth Amendment's warrant requirement was part of a reaction to warrantless searches and general warrants).

[10] *Chimel*, 395 U.S. at 761.

[11] Adams, *supra* note 6, at 836. *See also* Florida v. White, 119 S. Ct. 1555, 1561 n.2 (1999) (Stevens, J., dissenting) (citing United States v. United States Dist. Court for Eastern Dist. of Mich., 407 U.S. 297, 315-18 (1972) (noting that warrantless seizures and searches may be reasonable); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967); Johnson v. United States, 333 U.S. 10, 13-14 (1948); Harris v. United States, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting), *overruled in part by Chimel*, 395 U.S. 752; Shadwick v. Tampa, 407 U.S. 345, 348 (1972); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963)).

[12] *Katz*, 389 U.S. at 357 (citations omitted).

B. THE AUTOMOBILE EXCEPTION

1. The Exception is Born: Carroll

The "automobile exception" originated in 1925 with *Carroll v. United States.*[13] The exception affords decreased Fourth Amendment protections for searches and seizures connected to cars. In *Carroll,* the police had reason to believe that a car fleeing pursuit contained contraband alcohol.[14] The officers pulled over the car, searched it without a warrant, and found sixty-eight bottles of illegal alcohol.[15] The Court held that the officers did not need a warrant, so long as they had probable cause to suspect that the car contained contraband.[16] The Court rationalized its decision through two closely linked analyses.

First, the Court explored the nature of search and seizure law at the time of the Fourth Amendment's ratification.[17] The Court concluded that:

> [C]ontemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.[18]

Thus, the Court used the Framers' intent to create an exception to the warrant requirement in cases where the item searched was highly mobile.

Second, the Court found the distinction between mobile and stationary contraband containers to be pragmatic.[19] The historical record supported the idea that courts' and legisla-

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[13] Carroll v. United States, 267 U.S. 132 (1925). Some types of automobile exception cases pertain to situations not relevant to *White.* This Note does not discuss those situations or cases, including searches incident to traffic stops, *see, e.g.,* Knowles v. Iowa, 119 S. Ct. 484 (1998); Whren v. United States, 517 U.S. 806 (1996), and the rights of a passenger involved in the warrantless search of a car, *see, e.g.,* Maryland v. Wilson, 519 U.S. 408 (1997).

[14] *Carroll,* 267 U.S. at 132.

[15] *Id.* at 135-36.

[16] *Id.* at 153-54.

[17] *Id.* at 149-53.

[18] *Id.* at 151.

[19] *Id.* at 153-54.

tures' construction of the Fourth Amendment had always distinguished between mobile and immobile items.[20] For example, the Court noted that courts and legislatures have distinguished between searches of stores or houses and searches of boats, wagons, or cars.[21] Vehicles may create a situation "where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[22] In *Carroll,* the defendants were fleeing pursuit. That pursuit, and the concomitant possibility of destroyed evidence, created an exigency which made a warrantless search necessary.[23] The Court therefore held that a warrantless search or seizure might be necessary where contraband would otherwise be moved beyond the reach of the law.[24]

The progeny of *Carroll* primarily relied on one or both of two automobile characteristics to justify warrantless searches and seizures: mobility and publicness.[25] Courts initially approached the automobile exception with the presumption that warrantless searches and seizures were "*per se* unreasonable."[26] Subsequently, the requirements have become increasingly lenient.[27]

2. *Mobility as a Rationale for the Automobile Exception*

The first important expansion on the *Carroll* doctrine of mobility occurred in *Chambers v. Maroney,*[28] which held that automobiles are inherently mobile.[29] In that case, two armed

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[20] *Id.* at 154-56.

[21] *Id.* at 153.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 153.

[25] *See* Florida v. White, 119 S. Ct. 1555, 1559-60 (1999) (upholding warrantless seizure because car was mobile and public); Adams, *supra* note 6, at 839 (describing rationalizations under the automobile exception as addressing either mobility or a diminished expectation of privacy); Katz, *supra* note 2, at 379 n.13 (categorizing automobile exception rationalizations as addressing mobility, diminished expectation of privacy, and impracticability of obtaining a warrant due to mobility).

[26] Katz v. United States, 389 U.S. 347, 357 (1967) ("[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.").

[27] Adams, *supra* note 6, at 834.

[28] 399 U.S. 42 (1970).

[29] *Id.* at 51-52.

individuals robbed a service station and fled in their car.[30] Police stopped a car matching the description given by service station attendants and arrested the defendants.[31] The officers seized the car without a warrant.[32] After bringing the vehicle to the police station, the officers conducted a warrantless search of the car and found two guns, which they later used as evidence.[33]

Although the car was no longer mobile, the Court used the car's potential mobility as a rationale to uphold the warrantless search.[34] The court first noted that under *Carroll*'s probable cause requirement, a warrantless search would have been constitutional at the time the car was stopped.[35] The search would have been justified because the defendants were fleeing pursuit and because evidence would have disappeared without an immediate search.[36] The potential loss of evidence created an exigency justifying a warrantless search.[37] Essentially without explanation, the Court contended that the later search at the police station was also justifiable because of a potential loss of evidence.[38] The Court noted that the mobility of the car "still obtained at the station house," as did probable cause.[39] The Court upheld the search, finding a warrantless search more practical and desirable than detainment of the car while officers sought a warrant.[40] Thus, the car itself somehow remained "mobile" for constitutional purposes in spite of the fact that it was in police custody.[41] This reasoning contrasts with *Carroll*,[42] in

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[30] *Id.* at 44.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 51-52.

[35] *Id.* at 51.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 51-52.

[39] *Id.* at 52.

[40] *Id.*

[41] The Court also based its reasoning on the idea that searches and seizures are approximately equal in terms of their invasiveness. *Id.* However, the Court has held that searches (which invade a privacy interest) are actually more intrusive than seizures (which invade a property interest). *See* Katz, *supra* note 2, at 391 (citing Segura v. United States, 468 U.S. 796, 806 (1984)); United States v. Place, 462 U.S. 696, 707 (1983); United States v. Chadwick, 433 U.S. 1, 14 n.8 (1977); United States v. Van Leeuwen, 397 U.S. 249, 252 (1970)).

[42] Carroll v. United States, 267 U.S. 132 (1925).

which it was clear that a car (and therefore evidence) would have disappeared if officers had not conducted an immediate search.

The Court declined to expand the mobility rationale for warrantless searches and seizures in *United States v. Chadwick*.[43] In *Chadwick*, the Court refused to extend the automobile exception to the warrantless search of a footlocker in the locked trunk of a car.[44] In stark contrast to later cases, the Court noted that:

> [n]o less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.[45]

Only a few years later, the Court overruled *Chadwick* in *United States v. Ross*, in which the majority held that a car's mobility could sustain the warrantless search of a closed container within the locked trunk of a car.[46] In support of the mobility rationale, the Court relied heavily on *Carroll*'s historical exploration of the mobility issue.[47] The *Ross* Court said that "since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods."[48] The Court's interpretation of *Carroll* was that "the nature of an automobile in transit" justified a warrantless search.[49] Since both the trunk in *Ross* and the alcohol in *Carroll* were in transit, the Court found them equally searchable.[50] The Court concluded that disallowing container searches would defeat the purpose of *Carroll*, saying, "the practical consequences of the *Carroll* decision would be largely nullified if the permissible scope of a warrantless search of an automobile did not in-

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[43] 433 U.S. 1, 12-13 (1977).

[44] *Id.* *See also* Robbins v. California, 453 U.S. 420 (1981) (holding that party's Fourth Amendment rights were violated when, in the context of a traffic stop, police searched without a warrant opaque plastic containers sitting in the locked trunk of a car).

[45] *Chadwick*, 433 U.S. at 11.

[46] United States v. Ross, 456 U.S. 798, 825 (1982).

[47] *Id.* at 804-09 (citing *Carroll*, 267 U.S. at 132).

[48] *Id.* at 806.

[49] *Id.* at 806-07.

[50] *Id.* at 820.

clude the containers and packages found inside the vehicle."[51] *Ross*, then, reinvoked *Carroll* and expanded the automobile exception to closed containers within vehicles.

In *California v. Carney*, the Court expanded the mobility rationale to include the warrantless search of mobile homes.[52] In justification, the Court relied both on mobility and on a privacy rationale.[53] Citing earlier cases that used the mobility rationale, the Court stated that "the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. . . . [T]he overriding social interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable."[54] *Carney*, then, expanded the automobile exception in a manner that began to threaten the home, a location formerly afforded a very high level of Fourth Amendment protection.[55] In the end, *Carney* further removed the automobile exception from situations in which a car's mobility created a genuine possibility of lost evidence.

In addition to *Carney*, the Court decided two other automobile cases during the 1985 term. One case, *Oklahoma v. Castleberry*, affirmed a lower court's decision without opinion.[56] The lower court determined that officers needed a warrant to search containers that they had probable cause to believe contained contraband before being placed in a car.[57] The most similar case, *Ross*, was distinguishable because in *Ross* probable cause focused on the car itself, rather than on an item inside the car.[58]

During the 1985 term, the Court also decided *United States v. Johns*.[59] In *Johns*, Customs officers observed suspicious behavior by individuals driving pickup trucks.[60] The officials approached the trucks and noticed bales that smelled of marijuana.[61] They then arrested the drivers and seized the

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[51] *Id.*

[52] California v. Carney, 471 U.S. 386 (1985).

[53] *Id.* at 390-94.

[54] *Id.* at 393.

[55] *See* Katz, *supra* note 2, at 380.

[56] Oklahoma v. Castleberry, 471 U.S. 146 (1985).

[57] Castleberry v. State, 678 P.2d 720 (Okla. Crim. App. 1984).

[58] United States v. Ross, 456 U.S. 798, 806 (1982).

[59] 469 U.S. 478 (1985).

[60] *Id.* at 480-81.

[61] *Id.*

trucks, which they took to DEA headquarters.[62] Three days later, officials searched the truck without a warrant and found marijuana.[63] The Supreme Court held that the delay between the development of probable cause and a warrantless search was not necessarily unreasonable under the Fourth Amendment.[64]

Most recently, the Court in *Pennsylvania v. Labron* held that a car's mobility is by itself a sufficient exigency to permit a warrantless search or seizure.[65] *Labron* is quite similar to earlier cases relying on inherent mobility to rationalize warrantless searches and seizures. The case is noteworthy, however, as it is the first case to hold explicitly that inherent mobility is by itself a sufficient exigency for a warrantless search or seizure.[66] While *Chambers* discussed inherent mobility, it retained the fiction that a car in custody could theoretically disappear with evidence.[67] *Labron*, in contrast, is entirely divorced from any practical considerations.[68] The Court made a car's potential mobility the lynchpin of its argument while leaving behind pragmatic arguments that caused earlier Courts to discuss that nature.

Thus, from its limited beginnings in *Carroll*[69] in the 1970s, the mobility rationale for the automobile exception has expanded dramatically.

3. Diminished Privacy Expectations as a Rationale for the Automobile Exception

In recent years, the Supreme Court has also upheld warrantless automobile searches and seizures by explaining that automobiles involve a diminished expectation of privacy. The Court has used either or both of two explanations to support this idea: that cars are public, and their contents are therefore in public view; or that cars are heavily regulated, leading owners to expect greater government intrusion.[70]

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[62] *Id.* at 481.

[63] *Id.*

[64] *Id.* at 484.

[65] Pennsylvania v. Labron, 518 U.S. 938 (1996).

[66] *Id.*

[67] Chambers v. Maroney, 399 U.S. 42, 51 (1970).

[68] *Labron*, 518 U.S. at 939-41.

[69] Carroll v. United States, 267 U.S. 132 (1925).

[70] United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (citing Cardwell v. Lewis, 417 U.S. 583, 590 (1974); Cady v. Dombrowski, 413 U.S. 433, 441 (1973); South Dakota v. Opperman, 428 U.S. 364, 368 (1976)).

A series of cases in the mid-1970s used the privacy rationale to uphold warrantless searches and seizures. In *Cady v. Dombrowski*,[71] the Court addressed a case in which officers looked for a gun in a truck being removing from an accident scene and discovered other incriminating evidence.[72] The truck in question was wrecked and thus clearly immobile.[73] The Court therefore could not argue that the truck was mobile, so it instead used a different explanation: the diminished privacy created through ubiquitous regulation of vehicles.[74] In support, the majority stated that "[a]ll States require vehicles to be registered and operators to be licensed."[75] The extensive vehicle regulations passed by most states and localities thus reduced owners' privacy expectations regarding their vehicles.[76] The Court contrasted the high level of regulation on automobiles with what it perceived as lesser regulation on areas such as homes or businesses.[77] Cars' frequent location in public view also could diminish privacy expectations, according to the Court.[78]

United States v. Chadwick lent additional weight to the diminished expectations rationale.[79] The Court endorsed the plurality in a 1974 case, which said, "[o]ne 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 . . . it travels public thoroughfares where both its occupants and its contents are in plain view."[80] The Court also looked to the frequency of government intervention as a source of lessened privacy expectations.[81] While cases cited in *Chadwick* had mentioned diminished privacy expectations in

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[71] 413 U.S. 433 (1973).

[72] *Id.* at 435-38.

[73] *Id.* at 443.

[74] *Id.* at 441-42.

[75] *Id.* at 441.

[76] *Id.*

[77] *Id.* at 441-42.

[78] *Id.*

[79] 433 U.S. 1, 12 (1977).

[80] *Id.* (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)). Because it was a plurality opinion, this case had little impact on Fourth Amendment jurisprudence until it was endorsed in *Chadwick*.

[81] *Id.* at 13 (citing Cady v. Dembrowsky, 413 U.S. 433, 441 (1973) (holding that government regulation of vehicles creates lessened expectation of privacy); South Dakota v. Opperman, 428 U.S. 364, 368 (1976) (holding that government inspections of vehicles may create lessened expectation of privacy)).

passing, *Chadwick* made it an important component of the automobile exception.[82]

For a time after *Chadwick*, diminished privacy expectations were abandoned as an explanation for the automobile exception.[83] In 1985, however, *United States v. Carney* reinvoked diminished privacy expectations as part of its rationale for warrantless searches.[84] *Carney* involved the warrantless search of a mobile home, which the court ruled was, in fact, mobile enough to invoke the automobile exception.[85] *Carney* united for the first time the mobility and diminished privacy expectation rationales for the automobile exception, stating that "the lesser expectation of privacy resulting from its use as a mobile vehicle justified application of the vehicular exception."[86] Oddly, the Court cited *Ross* for the reduced privacy rationale, although *Ross* relied only on mobility to uphold a warrantless search. *Carney* heralded a shift in the law that combined the diminished privacy rationale and the mobility rationale into a single "exigency."[87] Since that "exigency" relied solely on the nature of cars, it potentially eliminated the need for warrants in any circumstance involving anything that could be considered a vehicle.

4. The Circuit Split: Cars as Seizable Contraband

Before *White*, federal circuits split on the handling of warrantless vehicle seizures under civil forfeiture statutes. The cases each addressed one of two federal forfeiture acts.[88]

The majority of circuits addressing the issue have upheld as constitutional warrantless seizures of cars where civil forfeiture

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[82] *Chadwick*'s discussion of car owners' diminished privacy expectations was dictum. It has, however, been widely cited and is an important foundation for subsequent cases.

[83] *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982).

[84] California v. Carney, 471 U.S. 386, 391 (1985).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *See* 21 U.S.C. § 881 (1993); Uniform Controlled Substances Act, 9 U.L.A. § 505 (1993). A majority of state courts that have addressed similar state forfeiture laws have upheld them. *See, e.g.*, State v. White, 680 So. 2d 550, 554 (Fla. Dist. App. Ct. 1996) (citing State v. Brickhouse, 20 Kan. App. 2d 495 (Kan. 1995); State v. McFadden, 63 Wash. App. 441 (Wash. Ct. App. 1991), *rev. denied* 119 Wash. 2d 1002 (Wash. 1992); Lowery v. Nelson, 43 Wash. App. 747 (Wash. Ct. App. 1986), *rev. denied*, 106 Wash. 2d 1013 (Wash. 1986); *cf.*, Davis v. State, 813 P.2d 1178 (Utah 1991)).

laws defined the seized cars as contraband.[89] The Eleventh Circuit, part of the majority, addressed warrantless car seizures under civil forfeiture statutes in *United States v. Valdes*.[90] Interestingly, the Eleventh Circuit made no reference to the automobile exception.[91] Instead, the court justified the warrantless seizure of an automobile used in drug trafficking as analogous to a warrantless arrest.[92] The court justified this analogy by noting that a person's liberty interest against arrest is greater than her property interest against seizure.[93] If an officer can arrest a drug dealer without a warrant, the Eleventh Circuit concluded, it should be even easier for that officer to seize the drug dealer's car without a warrant.[94]

The Seventh Circuit upheld the warrantless seizure of vehicles used for criminal purposes in *United States v. Pace*.[95] In *Pace*, officers seized without a warrant the car of suspected assassins.[96] The court cited several grounds for upholding the officers' warrantless seizure, including the fact that several other circuits had upheld such seizures.[97] The court also cited such seizures' historical acceptability[98] and noted that "under a civil forfeiture statute, 'the vehicle . . . is treated as being itself guilty of wrongdoing.'"[99] The court then echoed *Valdes*, stating that the warrantless seizure of a forfeitable automobile is analogous to an

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[89] State v. White, 680 So. 2d at 553 (citing United States v. Decker, 19 F.3d 287 (6th Cir. 1994); United States v. Pace, 898 F.2d 1218 (7th Cir. 1990); United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989); United States v. One 1978 Mercedes Benz, Four-Door Sedan, 711 F.2d 1297 (5th Cir. 1983); United States v. Kemp, 690 F.2d 397 (4th Cir. 1982); United States v. Bush, 647 F.2d 357 (3d Cir. 1981)). *White* further notes that three circuits have overturned warrantless seizures of automobiles as contraband under civil forfeiture acts. *Id.* (citing United States v. Dixon, 1 F.3d 1080 (10th Cir. 1993); United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992); United States v. $149,442.43 in United States Currency, 965 F.2d 868 (9th Cir. 1989); United States v. Linn, 880 F.2d 209 (9th Cir. 1989)).

[90] *Valdes*, 876 F.2d at 1559-60.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1560.

[94] *Id.*

[95] *Pace*, 898 F.2d at 1218.

[96] *Id.*

[97] *Id.* at 1241 (citing cases).

[98] *Id.*

[99] *Id.* at 1242 (quoting United States v. One Mercedez Benz 280S, 618 F.2d 453, 454 (7th Cir. 1980)).

arrest.[100] Since an arrest under probable cause required no warrant, the court reasoned that none was necessary to seize a forfeitable automobile.[101]

The Sixth Circuit indirectly addressed the issue of warrantless seizures under civil forfeiture acts in *United States v. Decker*.[102] In *Decker*, the defendant protested the use of material gained in an inventory search by the FBI.[103] The federal officers responded that the search was valid because the vehicle was forfeitable as contraband.[104] The Sixth Circuit upheld the inventory search because the officers had probable cause to believe the car's contents were forfeitable.[105] Since the case did not directly address forfeiture statutes, it is not directly on point.[106] *Decker* is relevant, however, because it was cited in *White*.

In *United States v. One 1977 Lincoln V Coupe*, a case remarkably similar to *White*, the Third Circuit held that probable cause to seize a vehicle under a forfeiture statute did not grow stale after two months.[107] The Third Circuit noted that two months "does not present a very long or completely unexplained delay between the occurrence of events giving rise to probable cause and the seizure."[108] The court declined to decide whether probable cause could ever become stale.[109]

Similarly, in *United States v. Kemp*, the Fourth Circuit upheld a warrantless seizure that occurred months after police had probable cause to search a car.[110] After probable cause developed, officers did not search for the car for two months.[111] Upon finding the car, officers promptly seized it without a warrant.[112] *Kemp* distinguished between searches and seizures, not-

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[100] *Id.*

[101] *Id.*

[102] 19 F.3d 287 (1994).

[103] *Id.* at 289.

[104] *Id.* at 290.

[105] *Id.*

[106] *Id.*

[107] United States v. One 1977 Lincoln V Coupe, 643 F.2d 154 (3rd Cir. 1981), *cert. denied* 454 U.S. 818 (1981).

[108] *Id.*

[109] *Id.*

[110] United States v. Kemp, 690 F.2d 397 (4th Cir. 1982).

[111] *Id.* at 399.

[112] *Id.*

ing that seizures have a lower threshold of reasonableness than searches.[113] The court used the lower standard because warrantless seizures do not violate an individual's privacy interest, but only her property interest.[114]

In *United States v. One 1978 Mercedez Benz*,[115] the Fifth Circuit adopted *Kemp*'s holding that warrantless seizures are more likely to be reasonable than warrantless searches. This case, too, upheld the warrantless seizure of a car under a civil forfeiture statute.[116] The Fifth Circuit added that the owner automatically forfeited the car to the government when he or she used the car illegally.[117] Thus, by seizing the car, government agents were merely taking property that already belonged to the government.[118] Government agents did not, therefore, need a warrant for such a seizure.[119] The court also found that "the statute did not place any exigent circumstances requirement on the warrantless seizure."[120] Finally, the court held that the civil forfeiture statute stipulated no time constraints for seizures of forfeitable vehicles.[121]

In *United States v. Bush*, the Third Circuit also upheld the warrantless seizure of a car under a civil forfeiture act.[122] The Third Circuit justified its opinion through a literalist reading of a civil forfeiture statute.[123] The court stated that "[o]n its face . . . [the statute] would appear to have authorized the warrantless seizure of the automobile, notwithstanding the absence of any exigency."[124] The court therefore upheld the seizure and chose to disregard any other circumstances in the case.[125]

In contrast, three circuits have overturned warrantless seizures of cars that were forfeitable as contraband under civil statutes. In *United States v. Spetz*, the Ninth Circuit held that

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[113] *Id.* at 401.
[114] *Id.*
[115] 711 F.2d 1297 (5th Cir. 1983).
[116] *Id.*
[117] *Id.* at 1302.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* at 1302.
[122] 647 F.2d 357 (3d Cir. 1981).
[123] *Id.* at 367.
[124] *Id.*
[125] *Id.*

such warrantless seizures are unconstitutional.[126] The court noted that "a forfeiture seizure must nevertheless comport with the requirements of the Fourth Amendment, because 'no Act of Congress can authorize a violation of the Constitution.'"[127] The court noted that past courts have ruled that warrantless searches and seizures are *per se* unreasonable.[128] Assuming the *per se* unreasonableness of the seizure, the court concluded that the government had acted unconstitutionally.[129] Thus, a civil forfeiture act upheld in other circuits was imbued with a warrant requirement (absent exigent circumstances) in the Ninth Circuit.[130]

The Second Circuit in *United States v. Lasanta* also held that federal forfeiture statutes do not negate the warrant requirement for searches and seizures.[131] In *Lasanta*, the government attempted to justify its seizure by referring to the forfeiture statute's plain language, which did not mandate a warrant.[132] In response, the court asserted that the government's suggested reading of the statute was unacceptable because it would write the warrant requirement out of the Constitution.[133] The Third Circuit also worried that a literal reading of the statute would remove judges from the search and seizure process.[134] In overturning the seizure, the court commented that "it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the constitution itself a casualty."[135]

Finally, in *United States v. Dixon*, the Tenth Circuit overturned the warrantless seizure of a car under a federal civil forfeiture statute.[136] The Court noted that it aligned itself with courts that found warrantless seizures of cars under civil forfeiture laws unconstitutional.[137]

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[126] United States v. Spetz, 721 F.2d 1457, 1470 (9th Cir. 1983).

[127] *Id.* at 1470 (quoting United States v. McCormick, 502 F.2d 281, 286 (9th Cir. 1974)).

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] United States v. Lasanta, 978 F.2d 1300, 1305 (2d Cir. 1992).

[132] *Id.* at 1304

[133] *Id.* at 1305.

[134] *Id.*

[135] *Id.*

[136] United States v. Dixon, 1 F.3d 1080 (10th Cir. 1993).

[137] *Id.* at 1083.

In sum, the majority of courts had upheld warrantless seizures under civil forfeiture statutes, while the minority read a warrant requirement into such statutes.

5. The Florida Contraband Forfeiture Act

The Florida Contraband Forfeiture Act,[138] the statute relevant in *White*, was enacted in 1974. The state legislature has since amended the statute several times.[139] The statute's structure is extremely similar to the structure of federal civil forfeiture statutes.[140] In relevant part, the Florida statute states that, "[a]ny contraband article used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which any violation of the Florida Contraband Forfeiture Act has taken or is taking place, may be seized and shall be forfeited."[141] The statute also "authorizes law enforcement agencies to seize vehicles 'of any kind' used 'to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.'"[142] Courts have interpreted this section of the Act to mean that law enforcement may seize vehicles used in cocaine sales.[143] The Act does not require a warrant for seizures of vehicles that qualify as contraband.[144]

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

In June and July of 1993, Florida police observed and videotaped Respondent Tyvessel Tyvorus White delivering and selling

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[138] Florida Contraband Forfeiture Act, FLA. STAT. ANN. §§ 932.701-932.707 (West 1993).

[139] White v. State, 710 So. 2d 950, 955 (Fla. 1998).

[140] 21 U.S.C. § 881 (1993); Uniform Controlled Substances Act, 9 U.L.A. § 505 (1993).

[141] FLA. STAT. ANN. § 932.703(1)(a).

[142] *Id.* § 932.703(1)(b).

[143] State v. White, 680 So. 2d 550, 552 (Fla. Dist. Ct. App. 1996) (quoting FLA. STAT. ANN. §§ 932.701(2)(a)5, 032.702(3) (West 1993); *id.* § 932.701(2)(a)1; FLA. STAT. ANN. § 893.03(2)(a)4 (West 1993)).

[144] FLA. STAT. ANN. § 932.703(2)(a) ("Personal property may be seized at the time of the violation or subsequent to the violation, provided that the person entitled to notice is notified . . . that there is a right to a [sic] adversarial preliminary hearing.").

cocaine.[145] White used his car to make his deliveries, but the police did not arrest or detain him at that time.[146] Months later, on October 14, 1993, White was arrested at work on unrelated charges.[147] While he was in custody, officers seized White's car as contraband under the Florida Contraband Forfeiture Act.[148] The police did not obtain a warrant for the seizure, because they believed the car to be contraband under the Act due to its prior involvement in drug-related activity.[149]

After the seizure, police searched the vehicle and discovered two pieces of crack cocaine in a paper bag in the car's ashtray.[150] As a result, police charged White with possession of a controlled substance under the Florida Contraband Forfeiture Act.[151]

B. PROCEDURAL HISTORY

At trial, White moved to suppress as evidence the crack found in his car, stating that the officers found the cocaine after they unconstitutionally seized the car without a warrant.[152] The court still permitted that evidence to go to the jury.[153] After the jury found White guilty, White moved again to suppress the inclusion of the crack cocaine as evidence.[154] The court denied the motion to suppress, and White appealed the court's denial.[155]

On appeal, the First District of Florida affirmed the lower court's opinion.[156] The court held that under the Forfeiture Act, "the seizing agency is required only to have probable cause to believe that the property sought to be seized [was used] in

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[145] *White*, 680 So. 2d at 551.

[146] *Id.*

[147] Brief for Petitioner at 4, Florida v. White, 119 S. Ct. 1555 (1999) (No. 98-223).

[148] *Id.*

[149] *Id.* at 5.

[150] *Id.* at 2.

[151] *Id.* at 4.

[152] State v. White, 680 So. 2d 550, 552 (Fla. Dist. Ct. App. 1996).

[153] *Id.*

[154] *Id.*

[155] *Id.* White also appealed the admission of certain statements he made before receiving a Miranda warning, *id.* at 555, but that issue is was not argued before the Supreme Court.

[156] *Id.* at 551.

violation of the Forfeiture Act (citations omitted)."[157] The court did not find it relevant that police lacked probable cause to believe that the car contained contraband or was being used in violation of the Act at the time of seizure.[158]

The court then asked whether the Act itself was unconstitutional because it allowed warrantless seizures.[159] In deciding that the Act was constitutional, the court referred to the Act's strong similarities to a federal forfeiture statute and the Uniform Controlled Substances Act.[160] In support, the court noted that a plurality of federal courts have found that federal civil forfeiture statutes do not violate the Fourth Amendment and "that evidence obtained in a subsequent inventory search is admissible in a criminal prosecution."[161] The court also cited state courts that upheld warrantless searches or seizures under state civil forfeiture laws.[162] In explanation, the Florida court quoted the Eleventh Circuit, which said "[i]f federal law enforcement agents armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs."[163] The Florida court also noted that automobiles traditionally receive fewer Fourth Amendment protections than most property, and a warrant was therefore less necessary.[164] One member of the three-judge panel dissented, siding with the minority of courts that have found warrantless seizures, absent exigent circum-

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[157] *Id.*

[158] *Id.*

[159] *Id.* at 553.

[160] *Id.*

[161] *Id.* (citing United States v. Decker, 19 F.3d 287 (6th Cir. 1994); United States v. Pace, 898 F.2d 1218 (7th Cir. 1990); United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989); United States v. One 1978 Mercedes Benz, Four-Door Sedan, 711 F.2d 1297 (5th Cir. 1989); United States v. Kemp, 690 F.2d 397 (4th Cir. 1982); United States v. Bush, 647 F.2d 357 (3d Cir. 1981)); *but see* United States v. Dixon, 1 F.3d 1080 (10th Cir. 1993); United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992); United States v. $148,442.43 in United States Currency, 965 F.2d 868 (10th Cir. 1992); United States v. Linn, 880 F.2d 209 (9th Cir. 1989)).

[162] *Id.* at 554 (quoting State v. McFadden, 820 P.2d 53, 57 (Wash. App. 1992) (citing Lowery v. Nelson, 719 P.2d 594 (Wash. App. 1986), *rev. denied*, 106 Wash. 2d 1013 (1986); State v. Brickhouse, 890 P.2d 353 (1995); *cf.* Davis v. State, 813 P.2d 1178 (Utah 1991))).

[163] *Id.* (quoting *Valdes*, 876 F.2d at 1559-60).

[164] *Id.* at 554 (citing California v. Carney, 471 U.S. 386, 390 (1985)).

stances, to be an unacceptable intrusion on Fourth Amendment Rights.[165]

The Florida appellate court, however, did note that neither the Florida Supreme Court nor the United States Supreme Court had addressed the constitutionality of warrantless searches or seizures under civil forfeiture statutes.[166] They therefore certified to the Florida Supreme Court the question of "whether the warrantless seizure of a motor vehicle under the Florida Forfeiture Act (absent other exigent circumstances) violates the Fourth Amendment of the United States Constitution so as to render evidence seized in a subsequent inventory search of the vehicle inadmissible in a criminal prosecution."[167]

On February 26, 1998, a four-judge majority of the Florida Supreme Court answered the appellate court's question affirmatively, holding that the warrantless seizure of White's car was unconstitutional.[168] The court first focused on the First District's application of the automobile exception to the case, acknowledging that the mobility and (sometimes) publicness of cars lessen concerns about warrantless searches and seizures.[169] Still, the court believed that the existence of exigent circumstances were an important component of constitutional warrantless searches.[170] The majority agreed with the minority of federal circuits that "no language in the fourth amendment suggest[s] that the right of the people to be secure in their 'persons, houses, papers, and effects' applies to all searches and seizures except civil-forfeiture seizures in drug cases."[171] The Florida court stated that upholding the constitutionality of this warrantless seizure would amount to allowing the legislature to rewrite the Fourth Amendment and thus usurp the judiciary's role in constitutional construction.[172]

The court found *United States v. Lasanta*[173] to be a powerful analogy.[174] In that case, the Second Circuit found unconstitu-

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[165] *Id.* at 557.

[166] *Id.* at 555.

[167] *Id.*

[168] White v. State, 710 So. 2d 949, 950 (Fla. 1998).

[169] *Id.* at 952.

[170] *Id.*

[171] *Id.* at 951 n.4 (quoting United States v. Lasanta, 978 F.2d 1300, 1305 (1992)).

[172] *Id.*

[173] 978 F.2d 1300 (1992).

[174] *White*, 710 So. 2d at 953.

tional the seizure of a car parked in appellant's driveway, where agents had surveilled the vehicle for months, and where seizure occurred while the appellant slept.[175] The Second Circuit refused to uphold the *Lasanta* seizure, and the Florida court found the seizure of White's car to be equally unacceptable.[176]

The Florida court next noted that it had upheld the Contraband Act's constitutionality in *Department of Law Enforcement v. Real Property.*[177] In *Law Enforcement,* however, the court predicated its decision on the imposition of "numerous restrictions and safeguards on the use of the act in order to protect a citizen's property from arbitrary action by the government."[178] The government's actions in *White* were "the very antithesis of the cautious procedure we mandated" in *Law Enforcement.*[179] The court rejected the idea that the government could use the Contraband Act to seize property without a warrant under any circumstances, so long as the government believed that property had once been involved in a crime.[180]

The majority also declined to follow the lower court's analogy to the warrantless seizure of a person (i.e., arrest), noting that an extension of this analogy to seizures of property would make any property seizable without a warrant.[181] The majority quashed the lower court opinion and remanded for further proceedings.[182]

Disagreeing with the majority, two dissenting justices commented on the majority's failure to recognize holdings of the majority of circuits and several state courts cited by the appellate court.[183] Further, they argued that the Forfeiture Act had been upheld for twenty-three years and that some of the searches and seizures upheld under the Act were similar to *White.*[184]

The Supreme Court of the United States granted certiorari on the question of "whether the Fourth Amendment requires

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[175] *Id.* at 952 (citing *Lasanta,* 978 F.2d at 1305).

[176] *Id.* at 954.

[177] *Id.* at 952 (citing Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991) (upholding constitutionality of Florida Contraband Forfeiture Act)).

[178] *Id.* (citing *Law Enforcement,* 588 So. 2d at 961).

[179] *Id.*

[180] *Id.*

[181] *Id.* at 954.

[182] *Id.* at 955.

[183] *Id.* (Wells, J., dissenting).

[184] *Id.*

the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband."[185]

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

The United States Supreme Court reversed the finding of the Florida Supreme Court, holding that the Fourth Amendment does not require "the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband."[186] In its decision, the Court relied largely on evidence of the Founders' intent in writing the Fourth Amendment.[187]

Justice Thomas first expressed the need "to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed."[188] Citing *Carroll*, the Court noted that early Congresses passed laws authorizing the seizure of goods found on ships after warrantless searches.[189] The majority also cited *Carroll* for the proposition that the Court and Congresses "have always recognized a greater need for warrants for searches of homes or businesses than for searches or seizures of mobile goods or vehicles."[190] The Court criticized the Florida Court's distinction between a search based on belief that it contained contraband and a seizure based on a belief that the item was once used in an illegal activity.[191] The seizure of White's car, the majority asserted, was based on the fact that the car itself was contraband under the Forfeiture Act rather than any belief about its contents.[192] Further, the court noted, early statutes allowed the warrantless seizures of both goods and the vehicles concealing those goods.[193]

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[185] Florida v. White, 119 S. Ct. 1555, 1557 (1999) (Thomas, J.).

[186] *Id.* Justices O'Connor, Scalia, Kennedy, Souter, Breyer, and Chief Justice Rehnquist joined in the opinion.

[187] *Id.* at 1558-59.

[188] *Id.* at 1558.

[189] *Id.*

[190] *Id.* at 1559 (quoting Carroll v. United States, 267 U.S. 132, 151 (1925)).

[191] *Id.*

[192] *Id.*

[193] *Id.* (citing, *e.g.*, 1 Stat. 43, 46; 1 Stat. 170, 174; 1 Stat. 677, 678, 692).

The opinion also emphasized the fact that the car sat in a semi-public space, noting that "[o]ur Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places."[194] The Court drew an analogy to their decision in *G.M. Leasing Corp. v. United States*, in which federal agents seized automobiles without a warrant but were found not to have violated the Fourth Amendment, in part because the cars were seized from a public space.[195] Since White's car was also in a public space, the court determined that no invasion of respondent's privacy occurred and therefore no warrant was necessary.[196]

Notably, the majority explicitly declined to decide whether probable cause could grow stale during the two months between police observation of White and the seizure of his car.[197]

B. JUSTICE SOUTER'S CONCURRENCE

Justice Souter authored a very brief concurrence, joined by Justice Breyer, expressing concern about the floodgate effect that *White* could spur.[198] They joined the majority "subject to a qualification against reading our holding as a general endorsement of warrantless seizures of anything a State chooses to call 'contraband.'"[199] Justice Souter expressed concerned that legislatures appeared to be using the word contraband as a means to avoid the warrant requirement.[200] Under *White*, a legislature might use an expansive statutory definition of seizable contraband to make the Fourth Amendment warrant requirement the exception, rather than the rule. The Justices therefore conditioned their concurrence on the reservation that state legisla-

[194] *Id.* (citing Payton v. New York, 445 U.S. 573, 587 (1980); United States v. Watson, 423 U.S. 411, 416-24 (1976)).

[195] *Id.* (citing G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977)). The Background section does not address this case because the case does not rely upon the automobile exception. Instead, it relies upon prior tax cases in which federal agents were able to seize property located in public.

[196] *Id.* The dissent took issue with this analogy, noting that a previous tax assessment on the vehicles in question caused the petitioners to have lost possessory interest, as well as privacy interest in the vehicles. *Id.* at 1562 n.6 (Stevens, J., dissenting). In contrast, no one contended that White lacked a property interest in his car until the seizure occurred.

[197] *Id.* at 1559 n.4.

[198] *Id.* at 1562 (Souter, J., concurring).

[199] *Id.* (Souter, J., concurring).

[200] *Id.* (Souter, J., concurring).

tures were not to interpret the decision in *White* to mean that anything deemed contraband could be seized without a warrant.[201] Thus, Justices Souter and Breyer were comfortable with the basic holding of *White* but were concerned that it would open floodgates that could make warrantless seizures the norm.

C. JUSTICE STEVENS' DISSENT

In dissent, Justice Stevens, joined by Justice Ginsburg, expanded upon Justices Souter and Breyer's concerns.[202] While the majority declined to discuss the delay between the development of probable cause and the car's seizure, Justice Stevens expressed grave concern about the two month delay.[203] The dissent noted that it was once "settled law" that warrantless searches and seizures were *per se* unreasonable under the Fourth Amendment.[204] According to the dissent, the Fourth Amendment required those defending a warrantless search or seizure to demonstrate that the exigencies of the situation made a warrant infeasible.[205] They expressed concern that the Court did not apply the presumption of *per se* unreasonableness in White's case.[206]

Justice Stevens argued that *White* indicated that "the exceptions have all but swallowed the general rule" that warrantless searches and seizures are *per se* unreasonable.[207] He found little comfort in the majority's supporting cases, noting that:

> searches of automobiles for contraband or temporary seizures of automobiles to effect such searches . . . are weak support for a warrantless seizure of the vehicle itself, months after the property was proverbially tainted by its physical proximity to the drug trade, and while the owner is safely in police custody.[208]

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[201] *Id.* (Souter, J., concurring).

[202] *Id.* (Stevens, J., dissenting).

[203] *Id.* at 1562 (Stevens, J., dissenting). The dissenters also noted that if a warrant had been obtained at the time officers saw the vehicle being used for illegal acts, the two month delay still may have posed Constitutional problems. *Id.* at 1563 (Stevens, J., dissenting).

[204] *Id.* at 1561 (Stevens, J., dissenting) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 453-55 (1992)).

[205] *Id.* (Stevens, J., dissenting) (quoting *Coolidge*, 403 U.S. at 453).

[206] *Id.* (Stevens, J., dissenting).

[207] *Id.* (Stevens, J., dissenting).

[208] *Id.* (Stevens, J., dissenting).

As the majority expressed, the importance of the automobile exception has always hinged on the danger implicit in the vehicle's mobility. The dissenters, however, argued that this exigency was nonexistent in *White*.[209] Given the absence of any exigency, they believed that the warrant process' protections from governmental abuse outweighed any inconvenience to law enforcement.[210] They noted that "no serious fear for officer safety or loss of evidence can be asserted in this case."[211]

Lastly, the dissenters focused on the importance of inserting a neutral adjudicatory power into the process of governmental seizure.[212] They commented that "the State's treatment of certain vehicles as 'contraband' based on past use provides an added reason for insisting on an appraisal of the evidence by a neutral magistrate, rather than a justification for expanding the discretionary authority of the police."[213] The dissenters believed that upholding a warrantless seizure and subsequent search where police only had reason to believe that the vehicle had been used illegally in the past would expand police power too broadly.[214] Since police often sell seized property, the dissenters argued that police had a "pecuniary interest" to expand their powers as much as possible.[215] That pecuniary interest made the interjection of a neutral magistrate all the more important in a case such as White's.[216]

In sum, the dissenters "would not permit bare convenience to overcome our established preference for the warrant process as a check against arbitrary intrusions by law enforcement agencies 'engaged in the often competitive'—and, here, potentially lucrative—'enterprise of ferreting out crime.'"[217] Concerned about the erosion of individuals' right to a warrant, the dissent reasoned that the police in *White* had sacrificed individual liberties for the sake of convenience.

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[209] *Id.* at 1561 (Stevens, J., dissenting).
[210] *Id.* at 1562 (Stevens, J., dissenting).
[211] *Id.* (Stevens, J., dissenting).
[212] *Id.* (Stevens, J., dissenting).
[213] *Id.* (Stevens, J., dissenting).
[214] *Id.* (Stevens, J., dissenting).
[215] *Id.* at 1562 (Stevens, J., dissenting).
[216] *Id.* at 1563 (Stevens, J., dissenting).
[217] *Id.* (quoting Johnson v. United States, 333 U.S. 10, 14-15 (1948)).

V. ANALYSIS

This Note argues that, although the Court decided *White* consistently with current Fourth Amendment jurisprudence, it is not faithful to the sources of the automobile exception.[218] A return to the sources of the automobile exception would restore clarity to the law and help to prevent governmental abuses invited by Fourth Amendment exceptions.

A. *WHITE* FOLLOWS THE CURRENT TREND IN FOURTH AMENDMENT JURISPRUDENCE

This Note argues that the Supreme Court came to an incorrect and unsound conclusion in *White*. *White* is, however, a logical extension of other recent Fourth Amendment cases.

Courts seldom place limits any longer on searches and seizures under the automobile exception.[219] Instead, judges use judicial deference to police officials as justification to permit greater latitude by the police.[220] The new latitude granted to police in *White*, therefore, is unsurprising, as it closely followed recent precedent.[221]

First, *White* followed the two most common rationales used in automobile exception cases in the last twenty years: that vehicles create diminished privacy expectations and that cars are "inherently mobile."[222] Although the inherent mobility rationale was muted in *White* (unlike previous cases, *White* never used the words "inherently mobile"), the Court clearly cites cases that address the issue explicitly, such as *Carney*[223] and *Opperman*.[224] Instead of addressing inherent mobility, the Court asserted that "[r]ecognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll*."[225] White's car, however, was not po-

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[218] *See* Katz v. United States, 389 U.S. 347 (1967); Carroll v. United States, 267 U.S. 132 (1925).

[219] *See, e.g.*, California v. Carney, 471 U.S. 386 (1985).

[220] *See, e.g.*, Baldwin v. Reagan, 715 N.E.2d 332, 338 n.6 (Ind. 1999) (explaining the Court's trend towards expansion of the automobile exception since *Whren v. United States*, 517 U.S. 806 (1996)).

[221] *See, e.g., Carney*, 471 U.S. at 386.

[222] Florida v. White, 119 S. Ct. 1555, 1558 (1999).

[223] *Carney*, 471 U.S. at 390-94.

[224] South Dakota v. Opperman, 428 U.S. 364 (1976).

[225] *White*, 119 S. Ct. at 1559 (citing Carroll v. United States, 267 U.S. 122, 150-52 (1925)); *see also* Wyoming v. Houghton, 119 S. Ct. 1297, 1303 (1999) (the Court's

tentially or actually mobile, since police had both White and his car keys in custody.[226] "Ready mobility," then, appears to be a proxy term for "inherent mobility." In cases addressing inherent mobility, as in *White*, the likelihood that the car actually will move is irrelevant.[227] The Court grounded its ready mobility argument in the inherent mobility arguments of the past.[228]

The second traditional rationale for permitting the warrantless search or seizure of automobiles is their publicness.[229] The Court also invoked this explanation in *White*.[230] In lieu of describing automobile exception cases, the Court primarily cited cases addressing other types of seizures in public places.[231] For example, the Court cited the permissibility of public warrantless arrests.[232] The Court also noted that "[i]t is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant."[233] The Court, therefore, took a logical step by making publicly visible vehicles seizable by defining them as contraband.[234] While the concurrence and dissent made strong arguments explaining why the decision was ill-advised, the seizure of public contraband without a warrant was well-established.[235] From the perspective of recent precedent, therefore, the Court made a logical decision.[236]

Interestingly, the Court chose to "express no opinion about whether excessive delay prior to a seizure could render probable cause stale, and the seizure therefore unreasonable under the Fourth Amendment."[237] The majority decided to ignore the

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other 1999 automobile exception case that also uses the phrase "ready mobility" in lieu of "inherent mobility").

[226] *White*, 119 S. Ct. at 1557.

[227] *See, e.g., Carney*, 471 U.S. at 391.

[228] *White*, 119 S. Ct. at 1559.

[229] *See, e.g., Carney*, 471 U.S. at 390-94; United States v. Chadwick, 433 U.S. 1, 12 (1977); Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973).

[230] 119 S. Ct. at 1559.

[231] *Id.*

[232] United States v. Watson, 423 U.S. 411, 416-24 (1976).

[233] *White*, 119 S. Ct. at 1659 (quoting Payton v. New York, 445 U.S. 573, 586-87 (1980)). The dissent, however, distinguished the sole automobile-related case used by the majority in their publicness argument. *Id.* at 1562 n.5 (Stevens, J., dissenting).

[234] *Id.*

[235] *See, e.g.*, California v. Carney, 471 U.S. 386, 395 (1985).

[236] *White*, 119 S. Ct. at 1558.

[237] *Id.* at 1559 n.4.

issue in spite of the fact that the respondent relied on staleness at oral argument.[238] The respondent argued that if police were truly concerned about losing evidence, they would not have waited two months to seize the car.[239] Even a conservative reading of the automobile exception would have allowed a warrantless seizure of White's car immediately after officers observed its use in drug deals.

The issue of staleness, however, posed no threat to a warrantless search under current jurisprudence.[240] The respondent's argument that no exigency justified a warrantless seizure was irrelevant, since no exigency need exist under the doctrine of ready or inherent mobility.[241] The car by its nature is mobile, and that is enough to allow a warrantless search or seizure under the automobile exception.[242] The argument begs the question: what circumstances under *White* would officers need to seek a warrant? The answer is that reasons are no longer necessary for warrantless searches or seizures of automobiles to be linked to crime, because the automobile exception to the warrant requirement arises from the automobile's inherent qualities. Hence, it does not appear that any reason can restore the requirement for a warrant.

Further, federal circuit courts indicate that under current caselaw, there appears to be little problem with holding that a two-month delay between probable cause and seizure is constitutional.[243] While declining to address delays longer than two months, the Third Circuit has held that a two-month delay between probable cause and seizure is neither "a very long or completely unexplained delay between the occurrence of events giving rise to probable cause and the seizure."[244] The Fourth Circuit has explained that contraband under civil forfeiture acts belongs to the government from the moment of its illegal use. Any delay between probable cause and seizure is therefore merely a delay in the government asserting an existing property

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[238] *Id.*

[239] *Id.*

[240] *Id.* at 1559.

[241] California v. Carney, 471 U.S. 386, 393 (1985).

[242] *Id.*

[243] *See, e.g.*, United States v. Kemp, 690 F.2d 397, 401 (4th Cir. 1982); United States v. One 1977 Lincoln V. Coupe, 643 F.2d 154, 158 (3d Cir. 1981), *cert. denied* 454 U.S. 818 (1981).

[244] *Lincoln v. Coupe*, 643 F.2d at 158.

right.[245] The same could be said of *White*, where the car ostensibly became contraband several months before officers seized it.[246] Thus, there is little reason to believe that, under current Fourth Amendment jurisprudence, probable cause could become stale. The circuit courts have held that staleness is a non-issue, and the Supreme Court declined to consider it as part of the petitioner's argument in *White*. It seems, then, that the Supreme Court is unlikely to rule against officers who have waited to search or seize a vehicle even long after probable cause has developed.

The Supreme Court therefore was well within the constraints of current law in *White*. This does not, however, mean that the decision was correct.

B. COURTS' USE OF *WHITE*

Trial courts have already used *White* to continue expanding the automobile exception.[247] Commentators have expressed concern over this additional diminution of the rights of property owners.[248] The "Pyrrhic victory" foreseen by the Second Circuit[249]—that the automobile exception will swallow the rule that warrantless seizures and searches are *per se* unreasonable—is approaching fruition.

A Texas Court of Appeals used *White* as ammunition to legitimate the seizure and inventory search of a vehicle where the vehicle was not contraband and where officers had no probable cause to believe that the car contained any evidence.[250] In *Lagaite v. Texas*, police knew that the defendant, a murder suspect, had driven a particular car to the scene of a murder.[251] Based on that knowledge, the police seized the defendant's car without a warrant and searched it at the police station, revealing

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[245] *Kemp*, 690 F.2d at 401.

[246] *White*, 119 S. Ct. at 1555.

[247] *See* United States v. Zabala, 52 F. Supp. 2d 377, 384 (S.D.N.Y. 1999); Baldwin v. Reagan, 715 N.E.2d 332, 338 n.6 (Ind. 1999); Lagaite v. Texas, 995 S.W.2d 860, 866-67 (Tex. Ct. App. 1999).

[248] *See, e.g.*, Craig M. Bradley, *Warrant Requirement Takes Another Blow*, TRIAL, July 1999, at 101 ("On May 17, the Supreme Court committed itself further to the proposition that the warrant requirement is dead for outdoor searches and seizures.").

[249] United States v. Lasanta, 978 F.2d 1300, 1305 (2d Cir. 1992).

[250] *Lagaite*, 995 S.W.2d at 866-67.

[251] *Id.* at 866.

evidence vital to the defendant's conviction.[252] In upholding Lagaite's conviction, the appellate court held that since police had probable cause to believe the car had been involved in a crime, they had probable cause to seize the vehicle.[253] The Texas court found the seizure lawful, concluding "that the police officers had probable cause to believe that appellant's white Mustang, regardless of its contents, was used, albeit indirectly, in the commission of the offense."[254] Since the defendant used the vehicle in conjunction with the crime, "the need to seize and preserve the vehicle is equally as important as the need to seize contraband articulated in *White*."[255] Again citing *White*, the court held that Lagaite's car's public location also mitigated the need for a warrant.[256]

Remarkably, *Lagaite* contained no discussion of the car owner's rights. Instead, the court addressed only the need of law enforcement.[257] *Lagaite* made even more tenuous the connection to the exigencies that originally justified the automobile exception.[258] Following *White*, the Texas court saw no need for exigent circumstances to legitimate the warrantless seizure. It was enough that the vehicle was in public and possibly linked to a crime.[259] Taking the next step, the Texas court has for the first time authorized seizure where there was no contraband, only a vehicle's "indirect" involvement in a crime.[260] The exigent circumstances that were so crucial to early automobile exception cases have become irrelevant, leaving a rule that cars may be seized based solely on the fact that they are connected to a crime.

In *United States v. Zabala*, the Southern District of New York used *White* to diminish the need for warrants no matter how tangentially an automobile is involved.[261] Invoking both *White*

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[252] *Id.*

[253] *Id.*

[254] *Id.* at 866-67 (citing Florida v. White, 119 S. Ct. 1555 (1999)).

[255] *Id.* at 867.

[256] *Id.* at 866-67 (citing *White*, 119 S. Ct. at 1555).

[257] *Id.*

[258] *See* Carroll v. United States, 267 U.S. 132 (1925).

[259] *Lagaite*, 995 S.W.2d at 866-67.

[260] *Id.*

[261] United States v. Zabala, 52 F. Supp. 2d 377, 384 (S.D.N.Y. 1999).

and *Wyoming v. Houghton*,[262] the court refused to suppress evidence gained upon the arrest of two individuals where they were transporting duffel bags from an apartment to a car.[263] The automobile exception was not dispositive of that case, since the parties had given the officers permission to search the trunk.[264] The case is noteworthy, however, because it continued the trend of recent Fourth Amendment jurisprudence by stating that "the automobile exception has been applied flexibly."[265] Indeed, the exception's flexibility, in this case, only continued to increase.

In *Baldwin v. Reagan*, the Indiana Supreme Court upheld the constitutionality of a law permitting traffic stops to check for compliance with a seat belt law.[266] The Indiana court cited *White* as evidence that the Supreme Court is unwilling to constrain the automobile exception.[267] The court stated in a footnote that "[i]n nearly every case (one exception), the high court found the police search at issue to be constitutional."[268] Thus, it appears that courts are interpreting *White* as carte blanche to approve the inclusion of evidence found without a warrant, so long as an automobile was somehow involved in the crime or violation in question.

Lastly, in *Grinberg v. Safir*, the Supreme Court of New York County, N.Y. used *White* to justify the seizure of a car used by a man arrested for driving while intoxicated.[269] Drawing an analogy to *White*'s statutory construction, the trial court concluded that a New York City Property Clerk Forfeiture Law[270] did not make a facial case for a warrant requirement.[271] Citing *White*, the court noted that "[n]o warrant was required to arrest petitioner or to seize his car; no warrant was needed to validate his

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[262] Wyoming v. Houghton, 119 S. Ct. 1297 (1999) (extending police powers to search car passengers' belongings without a warrant in the context of a traffic stop).

[263] *Zabala*, 52 F. Supp. 2d at 384.

[264] *Id.*

[265] *Id.*

[266] Baldwin v. Reagan, 715 N.E.2d 332, 341 (Ind. 1999).

[267] *Id.* at 338 n.6.

[268] *Id.*

[269] Grinberg v. Safir, 694 N.Y.S.2d 316, 323 (N.Y. Sup. Ct. 1999).

[270] NEW YORK, N.Y., ADMINISTRATIVE CODE § 14-140 (1995). It is worth mentioning that this law, unlike Florida's Forfeiture Act or the federal civil forfeiture acts, does not involve drugs.

[271] *Grinberg*, 694 N.Y.S.2d at 323.

arrest and the car's retention."[272] This case, like other post-*White* vehicle seizure cases, is notable for the complete absence of any discussion of the party's rights.[273] The same is true for the traditional Fourth Amendment concerns of property, privacy, and exigency. In *Grinberg*, a court has extended the automobile exception to allow seizure for a new offense—driving while intoxicated.[274]

Grinberg, like the other post-*White* automobile exception cases, lends credence to Justice Souter's argument that the States would read *White* as "a general endorsement of warrantless seizures of anything a State chooses to call 'contraband.'"[275] It is significant that the New York City police commissioner chose to enforce a civil forfeiture act on drunk drivers only a month before the Supreme Court heard arguments on *White*.[276] State administrators and legislators will tailor policies geared to *White*, thereby turning an exception to the warrant requirement into the rule. The above cases make it clear that such strategies succeed under *White*. Justice Souter's concern about strategic legislative use of the word "contraband" to avoid the warrant requirement has proved well-founded.[277]

C. THE SOLUTION: A RETURN TO *CARROLL* AND *KATZ*

The weaknesses inherent in *White* are illustrated by the fact that stale probable cause poses very little threat to warrantless searches and seizures.[278] These flaws indicate that the decision is fundamentally unsound and dangerous. A true return to *Carroll*'s[279] requirement of exigent circumstances and *Katz*'s[280] assumption that warrantless searches and seizures are *per se* unreasonable would better protect the requirements of the Fourth Amendment and individuals' rights to property and privacy.

White appears to address original intent, yet ignores the fundamental purpose behind the Fourth Amendment. *White*

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[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *White*, 119 S. Ct. at 1560.
[276] *See Grinberg*, 694 N.Y.S.2d at 319.
[277] *White*, 119 S. Ct. at 1560.
[278] 119 S. Ct. 1555 (1999).
[279] 267 U.S. 132 (1925).
[280] 389 U.S. 347 (1967).

discusses at some length early laws that allowed warrantless searches of ships and seizures of contraband,[281] yet it ignores entirely the Fourth Amendment's *raison d'etre.* While "[t]he focus of the Fourth Amendment [was] to provide the people with protection against government activity unsupported by judicial involvement in the search process,"[282] the Fourth Amendment's warrant requirement has become an inconvenience that officers are allowed to avoid under a wide variety of circumstances.

It is remarkable that *White* and its progeny, in dealing with an amendment that speaks so strongly to the importance of privacy and property, made no reference to these rights. The cases are essentially silent about these individual liberties. Instead, *White* examined the details of early laws that allowed searches and seizures without warrants under specialized circumstances.[283] Unfortunately, *White*'s progeny have followed this lead by ignoring individual liberties and rights.[284] Instead, they discuss the needs of law enforcement.[285] Such unbalanced discussions contrast sharply with the protective scope of the Fourth Amendment.

Additionally, *White* was inconsistent in its holding. It did not overrule *Carroll,*[286] and even cites that case approvingly as the source of the automobile exception.[287] Yet the Court agreed with more modern cases that ignored *Carroll*'s exigent circumstances requirement for warrantless searches and seizures.[288] In *Carroll,* a vehicle was readily mobile because it was fleeing police pursuit.[289] *White,* however, made the circular argument that a vehicle was readily mobile because it was a vehicle.[290] Even though the Court cited *Carroll* as controlling precedent, the majority ignored the older case's spirit and context.

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[281] *White,* 119 S. Ct. at 1558.

[282] Adams, *supra* note 6, at 833-34.

[283] *White,* 119 S. Ct. 1555.

[284] *See, e.g.,* United States v. Zabala, 52 F. Supp. 2d 377, 384 (S.D.N.Y. 1999); Baldwin v. Reagan, 715 N.E.2d 332, 338 n.6 (Ind. 1999); Lagaite v. Texas, 995 S.W.2d 860, 866-67 (Tex. Ct. App. 1999).

[285] *See, e.g., Lagaite,* 995 S.W.2d at 866-67.

[286] Carroll, 267 U.S. 132 (1925).

[287] *White,* 119 S. Ct. at 1559.

[288] *Carroll,* 267 U.S. at 144.

[289] *Id.*

[290] *White,* 119 S. Ct. at 1159.

It may be that such internal contradictions are simply a part of "automobile exception" jurisprudence. In an earlier automobile exception case, Justice Powell noted that "the law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided."[291] Justice Brennan, in another case, excoriated the Court for "adopt[ing] a fiction."[292] Chief Justice Rehnquist himself once wryly noted that "the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web."[293] In order to untangle the web of automobile exception jurisprudence and to remain true to Supreme Court precedent, the Court must ignore recent cases such as *White* and return to *Katz* and *Carroll*.

In a true acknowledgment of *Carroll*, the Court would use an accurate notion of ready mobility.[294] A return to *Carroll* still would allow the Court to acknowledge that exigent circumstances may require officers to forego a warrant in order to prevent evidence from disappearing from the scene.[295] Following earlier precedent would not, however, create a blanket exemption from the warrant requirement where automobiles were involved. Instead, the Court would examine the presence of exigent circumstances and ask whether the officers had reason to believe that the evidence would soon disappear. In *White*, the answer would have been no, because White was in custody and his car keys were in the hands of police.[296]

Further, a return to the "exigent circumstances" requirement would give the Court incentive to address the staleness issue ignored in *White*.[297] From the *Carroll* perspective, it is clear that staleness would weigh against any argument that exigent circumstances existed. In *Carroll*, the fact that the defendants were fleeing a search justified an invasion of their Fourth

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[291] Robbins v. California, 453 U.S. 420, 430 (1981).

[292] New York v. Belton, 453 U.S. 454, 466 (1981).

[293] Cady v. Dembrowsky, 413 U.S. 433, 440 (1973).

[294] *White*, 119 S. Ct. at 1559.

[295] *Carroll*, 267 U.S. at 153-55.

[296] *White*, 119 S. Ct. at 1559.

[297] *Id.* at 1559 n.4.

Amendment rights.[298] In *White*, police officers were aware of the location of the vehicle at varying points in a two-month period. The officers' awareness would be convincing evidence that the danger of the car's disappearance was not so great as to allow foregoing a warrant.[299] The case would be true to the Founders' intent of allowing warrantless searches and seizures under restricted circumstances,[300] but would avoid a meaningless blanket exception.

Through a return to *Katz*,[301] another case the Court has not yet disavowed, the Court would be forced to recall that warrantless searches are "*per se* unreasonable."[302] Though exigent circumstances could create a situation allowing a warrantless search or seizure, primary consideration would be given to the rights of the individual.[303] The *Katz* majority noted that "this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end."[304] In *White*, such an approach would have the effect of heeding the dissenters' worries, while (as the majority apparently wished) still considering the fact that the Founders' wanted warrantless searches and seizures to be possible.[305]

A return to *Katz* would also address the *White* dissenters' concerns. Using statutory definitions of contraband to avoid the warrant requirement would no longer be effective. A presumption of *per se* unreasonableness would ameliorate Justices Souter, Breyer, and Ginsburg's concerns about laws defining contraband broadly.[306] Further, Justices Stevens and Ginsburg would have no cause for concern about the police's pecuniary interest in potentially seizable property.[307] The *per se* unreasonableness of warrantless seizures would mean that neutral magistrates would be much more likely to intervene between the

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[298] *Carroll*, 267 U.S. at 144.

[299] *White*, 119 S. Ct. at 1559.

[300] *See Carroll*, 267 U.S. at 151.

[301] 389 U.S. 347 (1967).

[302] *Id.* at 357.

[303] *See id.*

[304] *Id.* at 356-57.

[305] *White*, 119 S. Ct. at 1559.

[306] *See id.* at 1560 (Souter, J., concurring); *id.* at 1562 (Stevens, J., dissenting).

[307] *Id.* at 1562-63 (Stevens, J., dissenting).

individual and the State and to protect the property rights of individuals.

Thus, a return to the law of *Katz* and *Carroll* would end the trend of making the automobile exception the rule and return it to a more reasonable status as an occasional exception. Without foregoing precedent entirely, the Court could restore meaning to the Fourth Amendment in cases involving automobiles.

VI. CONCLUSION

The automobile exception, as it relies more on the character of automobiles and less on the rights of individuals, is coming close to swallowing the rule of the warrant requirement. The Court has steadily expanded the exception, and it has become more unwieldy over time. *White* is no exception to this trend. The Court must treat the Fourth Amendment as a guarantee of individual liberties, not an inconvenience to law enforcement. By returning to the roots of the automobile exception, the Court could both honor original intent and protect the rights of individuals.

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