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United States v. Ross: The Supreme Court Redefines the Scope of Warrantless Searches Under the Automobile Exception

Mary C. Gilhooly

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INTRODUCTION

The fourth amendment to the Constitution prohibits unreasonable searches and seizures.[1] It is well established that under most circumstances a warrant is required to conduct a reasonable search.[2] The warrant is a procedural safeguard which is designed to protect individual liberty by insuring that probable cause[3] will be assessed by a neutral and detached magistrate.[4]

Despite the importance of the warrant requirement, the Supreme Court has determined that under some circumstances warrantless searches are constitutionally permissible.[5] A body of exceptions to the warrant requirement has evolved through judicial declara-

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1. The text of the fourth amendment provides:
> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

2. *See* Katz v. United States, 389 U.S. 347, 357 (1967). The preeminence of the warrant requirement is attributable to several factors, e.g., 1) a warrant limits the concentration of power held by law enforcement officials and thereby helps prevent unreasonable searches from occurring, United States v. United States Dist. Court, 407 U.S. 297, 317 (1972); 2) a warrant prevents ad hoc evaluation from coloring the estimation of probable cause, United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976).

3. What constitutes probable cause is difficult to discern. *See* Brinegar v. United States, 338 U.S. 160, 175 (1949) (probable cause means something more than mere suspicion). *See also* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 268 (5th ed. 1980) [hereinafter cited as KAMISAR] (defining probable cause to search as a "substantial probability that certain items are the fruits, instrumentalities, or evidence of crime and that these items are presently to be found at a certain place.").

4. *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948):
> The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

5. The Supreme Court, however, has exhibited a strong preference for search warrants. *See, e.g.*, United States v. Ventresca, 380 U.S. 102 (1965).

tion.[6] Generally, warrantless searches are per se unreasonable unless justified by one of the Court's established exceptions.[7]

Automobile searches constitute one such exception to the warrant requirement.[8] From its inception, this exception was applied by the courts with little difficulty until recent years. Recent Supreme Court decisions, however, have created uncertainty both as to the requisites necessary to invoke the exception,[9] as well as to the exception's permissible scope.[10] The Court's ambiguous and often inconsistent opinions have confused and frustrated law enforcement officers, courts, practitioners, and legal scholars.[11]

The Supreme Court's most recent decisions have focused on the issue of whether containers found during an automobile search can themselves be searched without a warrant.[12] While the Court has generally accepted that a search pursuant to the automobile exception encompasses all integral parts of the vehicle,[13] the issue of secondary container searches has proven to be problematic. This issue has generated a series of decisions as the Court has attempted to formulate a clear rule which may be applied consistently in varying circumstances. Unfortunately, the Court's past efforts seem to have exacerbated the already existing confusion.[14]

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6. *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory searches); Almeida Sanchez v. United States, 413 U.S. 266 (1973) (border and customs searches); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view exception); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Bumper v. North Carolina, 391 U.S. 543 (1968) (consent); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Carroll v. United States, 267 U.S. 132 (1925) (automobile searches); Weeks v. United States, 232 U.S. 383 (1914) (search incident to arrest). *But see* Mincey v. Arizona, 437 U.S. 385 (1978); Michigan v. Tyler, 436 U.S. 499 (1978); United States v. United States Dist. Court, 407 U.S. 297 (1972) (where the Court found insufficient justifications for warrantless searches).

7. *See* Mincey v. Arizona, 437 U.S. 385, 390 (1978); South Dakota v. Opperman, 428 U.S. 364, 381 (1976) (Powell, J., concurring); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971); Terry v. Ohio, 392 U.S. 1, 20 (1968); Katz v. United States, 389 U.S. 347, 357 (1967).

8. *See* Carroll v. United States, 267 U.S. 132 (1925).

9. *See infra* notes 25-41 and accompanying text.

10. *See infra* notes 42-100 and accompanying text.

11. The degree of confusion in this area is exemplified by the following comment: "I recognize . . . 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." Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring).

12. *See infra* notes 42-100.

13. *See* Chambers v. Maroney, 399 U.S. 42 (1970) (search of concealed compartment hidden under the dashboard); Scher v. United States, 305 U.S. 251 (1938) (search of car's trunk); Carroll v. United States, 267 U.S. 132 (1925) (search of interior of car's upholstery).

14. *See infra* text accompanying notes 75-78, 93-98.

In *United States v. Ross,*[15] the Supreme Court attempted to put an end to the uncertainty and confusion surrounding the container search issue. In that case, the Court announced a "bright line"[16] rule to govern the permissibility of container searches under the automobile exception.[17] The Court radically departed from its most recent precedent and extended the scope of the automobile exception to all secondary containers.[18]

This article will first discuss the background and development of the automobile exception. It will then examine the Supreme Court's difficulty in establishing guidelines for the exception's application. The three major "container cases" which preceded the Court's most recent decision will be considered. In light of this background, this article will analyze the decision in *United States v. Ross,* focusing on *Ross*'s impact on established precedent. Finally, the article will consider the Supreme Court's probable future course on unresolved issues.

BACKGROUND

The Automobile Exception

The automobile exception to the search warrant requirement originated in *Carroll v. United States.*[19] In *Carroll,* the Supreme Court upheld the constitutionality of a warrantless, probable cause search of an automobile and set out the primary justification for

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15. 102 S. Ct. 2157 (1982).

16. Generally, this term refers to rules which are clear and capable of easy application by police. The need for bright line rules in the area of the fourth amendment is summed up by the following comment:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hair-line distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'

LaFave, *Case-by-Case Adjudication Versus "Standardized Procedures:" The Robinson Dilemma,* 1974 SUP. CT. REV. 127, 141. For further discussion of the Supreme Court's quest for bright lines in the context of the fourth amendment, see LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT L. REV. 307 (1982).

17. *See infra* text accompanying note 113.

18. *See infra* text accompanying note 114.

19. 267 U.S. 132 (1925). Hence, the automobile exception is also referred to as the *Carroll* doctrine.

the automobile exception.[20] Essentially, the Court found a constitutionally significant difference between the search of fixed premises, for which a warrant can easily be obtained, and the search of a vehicle, which can easily be moved from the jurisdiction before a warrant can be secured.[21] *Carroll* established that the automobile's mobility created a practical exigency which supplied the primary justification for dispensing with the warrant requirement.[22]

The *Carroll* doctrine, however, was not without limits. The Court emphasized that the automobile exception only applied where securing a warrant would be impracticable.[23] The Court declared that when "the securing of a warrant is reasonably practicable, it must be used. . . ."[24]

The Supreme Court's next major decision in this area did not come until *Chambers v. Maroney*.[25] *Chambers* seemed to depart from the principles laid down in *Carroll* and to set the automobile exception on a new footing. In *Chambers*, the Supreme Court upheld a warrantless automobile search which had been conducted at the station house after the seizure of the vehicle and the arrest of its occupants.[26] With the automobile already in police custody, neither did a practical exigency exist due to the automo-

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20. *Id.* at 147. In *Carroll*, police had conducted the warrantless search pursuant to specific statutory authorization. *See* National Prohibition Act, ch. 85, tit. II, § 26, 41 Stat. 315, 316 (1919) (repealed 1935). The Supreme Court upheld the constitutionality of the statutory provision and thereby upheld the constitutionality of the warrantless search. 267 U.S. at 147.

21. *Id.* at 153. The Court supported this distinction with constitutional justification found in congressional legislation which was passed contemporaneously with the fourth amendment. Justice Taft wrote:

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

Id.

22. *Id.* at 156.

23. The Supreme Court has not indicated precisely what is meant by this term. In the context of *Carroll*, it seems to mean circumstances where the police risk the loss of opportunity to search if required to obtain a warrant.

24. 267 U.S. at 156.

25. 399 U.S. 42 (1970). In the interim between *Carroll* and *Chambers*, the automobile exception was applied primarily to cases involving the illegal transport of liquor. *See, e.g.*, Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931).

26. 399 U.S. at 52. In *Chambers*, the vehicle had been stopped on the roadway as had the vehicle in *Carroll*. Instead of conducting an immediate search, however, the police officers brought the vehicle back to the station house and then conducted the search. *Id.* at 44.

bile's mobility, nor would the procurement of a warrant be impracticable. Nonetheless, the Supreme Court upheld the search on the basis of the *Carroll* doctrine. The Court concluded that the probable cause and mobility which would have justified an on-the-scene search still obtained at the station house.[27] Thus, the Court did not find it significant that the police had had ample opportunity to obtain a warrant after the vehicle's seizure without risk of losing the opportunity to search. This holding was in obvious disregard of *Carroll*'s directive that, whenever reasonably practicable, a warrant must be obtained.[28] As a result, *Chambers* represents an extension of the applicability of the automobile exception beyond the boundaries set in *Carroll.*[29]

The Supreme Court's next decision concerning the application of the automobile exception generated confusion regarding the status of *Carroll*'s impracticability requirement. In *Coolidge v. New Hampshire,*[30] the Court invalidated a warrantless automobile search that was conducted at the station house after seizure of the vehicle.[31] The Court held that the automobile exception was inapplicable because it would have been reasonably practicable for the police to secure a warrant before searching the vehicle.[32] Thus, the *Coolidge* decision was premised on the precise consideration which *the Chambers* Court appeared to have ignored. Consequently, the rationales of *Chambers* and *Coolidge* were irreconcilable,[33] and

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27. *Id.* at 52. The Court never adequately explained why mobility was still present after the seizure.

28. *See supra* text accompanying note 24.

29. *See* W. LAFAVE, 2 SEARCH AND SEIZURE. A TREATISE ON THE FOURTH AMENDMENT § 7.2, at 514 (1978).

30. 403 U.S. 443 (1971).

31. *Id.* at 462. In *Coolidge,* the defendant was arrested for murder. Police had probable cause to search his automobile and obtained a search warrant which was later invalidated. The automobile was seized from the defendant's residence and brought to the police station where a search was conducted two days later.

32. *Id.* The Court stated:

> The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in the meaning of this case to invoke the meaning and purpose of Carroll v. United States - no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant,' and the 'automobile exception,' despite its label, is simply irrelevant.

Id. at 461-62. This issue was decided by a plurality of the Court: Stevens, J., joined by Douglas, Brennan and Marshall, J.J.

33. *See* KAMISAR, *supra* note 3, at 339 n. 1.

left courts with little guidance as to the proper application of the automobile exception.[34]

In *Cardwell v. Lewis,* the Supreme Court subsequently exacerbated the already existing confusion over the proper criteria for determining the applicability of the automobile exception.[35] In *Cardwell* the Court upheld the warrantless search of the exterior of an automobile that had been seized from a public parking lot.[36] The Court declared that the nature of an automobile imparts a lesser expectation of privacy[37] to its owner, than do other constitutionally protected areas.[38] Automobiles, therefore, are entitled to a lesser degree of constitutional protection. The Court explained that, because an automobile's primary function is transportation, it rarely serves as a repository for personal effects.[39] In addition, an automobile is inherently less private because it travels on public thoroughfares where both its occupants and contents are in plain view.[40] Thus, *Cardwell* added a new consideration to the analysis but did not clarify the ambiguity generated by *Chambers* and *Coolidge.*[41]

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34. *See, e.g.,* United States v. Clark, 559 F.2d 420 (5th Cir. 1977); United States v. Colclough, 549 F.2d 937 (4th Cir. 1977); Haefeli v. Chernoff, 526 F.2d 1314 (lst Cir. 1975); United States v. Patterson, 495 F.2d 107 (D.C. Cir. 1974); United States v. Young, 489 F.2d 914 (6th Cir. 1974); United States v. Evans, 481 F.2d 990 (9th Cir. 1973); Carlton v. Estelle, 480 F.2d 759 (5th Cir. 1973).

35. 417 U.S. 583 (1974).

36. *Id.* at 590.

37. The concept of an expectation of privacy as a basis for determining fourth amendment protection came into existence in Katz v. United States, 389 U.S. 347 (1967). *Katz* held that a phone booth was a constitutionally protected area because the fourth amendment "protects people, not places." *Id.* at 351. Since the individual had exhibited an expectation that his conversations would remain private, he was entitled to fourth amendment protection. *Id.* at 351-52. For further consideration of this standard for determining fourth amendment protection, see Kitch, *Katz v. United States: The Limits of the Fourth Amendment,* 1968 SUP. CT. REV. 133; Note, *A Reconsideration of the Katz Expectation of Privacy Test,* 76 MICH. L. REV. 154 (1977).

38. 417 U.S. at 590.

39. *Id.*

40. *Id. Cf.* Katz v. United States, 389 U.S. 347, 351-52 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection (citation omitted).").

41. *See supra* text accompanying notes 33-34. For critical analyses of these decisions, see generally Wilson, *The Warrantless Automobile Search: Exception Without Justification,* 32 HASTINGS L.J. 127 (1980); Comment, *The Automobile Exception: A Contradiction in Fourth Amendment Principles,* 17 SAN DIEGO L. REV. 933 (1980). The Court did decide one case subsequent to these decisions concerning this issue. In Texas v. White, 423 U.S. 67 (1975), a case factually similar to *Chambers,* the Court reaffirmed the *Chambers* holding with little

It was with this background that the Supreme Court first encountered a unique issue related to the automobile exception. This issue involved the permissible scope of a warrantless search conducted pursuant to the automobile exception. Without resolving the seemingly inconsistent rationales of *Chambers* and *Coolidge* or clearly defining the implications of the lesser expectation of privacy recognized in *Cardwell*, the Court embarked on a series of decisions in an effort to determine whether secondary containers found in an automobile during a warrantless search, could be searched pursuant to the automobile exception. This issue proved to be even more troublesome than had the application of the automobile exception itself.

THE CONTAINER CASES

United States v. Chadwick

The Supreme Court first considered the issue of warrantless container searches in *United States v. Chadwick*.[42] The search in *Chadwick* was not performed pursuant to the automobile exception, but was merely a warrantless search of a container.[43] Nevertheless, the decision is significant because the rationale used by the Court could apply equally to containers searched under the automobile exception.[44]

Chadwick involved the warrantless probable cause search of a double-locked footlocker.[45] The Court invalidated the search and held that it was unreasonable because it was conducted without a warrant.[46] According to the Court, the individuals, having chosen to place the contents of the footlocker in such a container,[47] had

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discussion. There, as in *Chambers*, the search occurred at the station house after the vehicle's seizure where no practical exigency was present.

42. 433 U.S. 1 (1977).

43. While the government had argued the applicability of the automobile exception at the district court and court of appeals levels, this argument, twice rejected, was not pursued at the Supreme Court level. *See* United States v. Chadwick, 532 F.2d 773, 782 (1st Cir. 1976); United States v. Chadwick, 393 F. Supp. 763, 771 (D. Mass. 1975). *See also infra* note 45.

44. This was the precise nature of the uncertainty created by *Chadwick*. *See infra* notes 58-59 and accompanying text.

45. 433 U.S. at 4. At the time the footlocker was seized it was being placed in the trunk of an automobile. The Court pointed out that it was not being argued that the footlocker's brief contact with the car made it an automobile search. *Id.* at 11.

46. *Id.* The Court determined that there was no exigency because, at the time the search took place, all suspects were under arrest and the footlocker had been transported to the Boston Federal Building under the exclusive control of federal agents. *Id.* at 4.

47. The Court emphasized that this container was a 200 pound double-locked footlocker

manifested an expectation of privacy in those items.[48] The Court concluded, therefore, that the police could not intrude into this constitutionally protected area without first obtaining a warrant.[49]

In so holding, the Supreme Court rejected the two major arguments advanced by the government in an attempt to justify the search. The first argument, that the fourth amendment only protects interests traditionally identified with the home, was found untenable.[50] The Court reemphasized that fourth amendment protection is not determined by the place searched, but rather by the nature of the individual's privacy interest.[51] Second, the Court rejected the argument that the rationale of the automobile exception should be extended to permit the search of all movable personalty.[52] Such an extension was unwarranted because the justifications which support the automobile exception do not support a similar exception for all movables;[53] that is, the diminished expectation of privacy which attaches to automobiles is not characteristic of secondary containers.[54] In addition, because movable items can easily be seized and immobilized until a warrant is secured,[55] the practical mobility problem which is present in the case of an

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but gave no clear indication what role the durability of the container played in its decision. *Id.* at 11.

48. *Id.* at 7. *See supra* note 37.

49. 433 U.S. at 11. *See* cases cited *supra* note 7 and accompanying text.

50. 433 U.S. at 7. After a detailed historical analysis the Court determined that there was no basis for such a distinction. *Id.* at 11. In light of established precedent it seems surprising that the government would even make such an argument. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (upholding warrant requirement for a search of a parked automobile); United States v. Van Leeuwen, 397 U.S. 249 (1970) (upholding warrant requirement to open packages sent through the mails); Katz v. United States, 389 U.S. 347 (1967) (upholding warrant requirement for electronic interception of a conversation in a public phone booth).

51. 433 U.S. at 7. *See* Katz v. United States, 389 U.S. 347 (1967).

52. 433 U.S. at 13.

53. *Id.* at 12.

54. *Id.* at 13. The Court stated:

> The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects.

Id.

55. *Id.* In this case seizure and detention were sufficient measures to safeguard the contents of the footlocker until a warrant could be obtained and therefore, "it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." *Id.*

automobile search does not obtain.[56]

Prior to the Supreme Court's decision in *Chadwick*, lower courts had almost universally upheld searches of containers under the automobile exception.[57] *Chadwick*, however, cast doubt on the correctness of these decisions. Arguably, the *Chadwick* rationale could apply to containers found within an automobile as well as to containers found elsewhere. *Chadwick* left unclear whether such containers were subject to searches under the automobile exception.[58] Lower courts thus reached opposing results in *Chadwick*'s application.[59]

Arkansas v. Sanders

Aware of the uncertainty caused by *Chadwick*, the Supreme Court granted certiorari in *Arkansas v. Sanders*[60] to delineate the proper scope of the *Chadwick* holding.[61] In *Sanders*, the issue before the Court was whether police could conduct a warrantless search of a container under the automobile exception.[62]

Sanders involved the warrantless probable cause search of an unlocked suitcase found in an automobile.[63] The purported justifi-

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56. *Id.* The Court noted that secure storage facilities may not be available and the size and inherent mobility of an automobile make it susceptible to theft or intrusion by vandals. *Id.* at 13 n.7.

57. The leading case in this area was United States v. Soriano, 497 F.2d 147 (5th Cir. 1974), where the court held that probable cause which justified the initial intrusion into the automobile also supported the intrusion into any container located therein. *Accord* United States v. Vento, 533 F.2d 838 (3d Cir. 1976); United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975); United States v. Halliday, 487 F.2d 1215 (5th Cir. 1973); United States v. Kulp, 365 F. Supp. 747 (E.D. Pa. 1973). *See also* W. LAFAVE, *supra* note 29, § 7.2, at 535.

58. For commentary on the implications of *Chadwick*, see W. LAFAVE, *supra* note 29, § 7.2, at 538-43; Note, *Criminal Procedure-Search and Seizure-Persons Lawfully Arrested for Alleged Possession of Narcotics Have a Privacy Interest in a Footlocker in Their Possession at the Time of Their Arrest Which Is Protected by the Warrant Clause of the Fourth Amendment: United Staes v. Chadwick, 97 S. Ct. 2476 (1977)*, 6 AM. J. CRIM. L. 81 (1978); Note, *United States v. Chadwick and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable*, 58 B.U.L. REV. 436 (1978).

59. This conflict is exemplified by United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) and United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977). The two circuits applied *Chadwick* to similar facts and reached contrary conclusions. The Ninth Circuit held that *Chadwick* did not preclude a search of a suitcase under the automobile exception, while the Eighth Circuit explicitly rejected this result and held that such a search was impermissible under *Chadwick*.

60. 442 U.S. 753 (1979).

61. *Id.* at 754. ("We took this case by writ of certiorari . . . to resolve some apparent misunderstanding as to the application of our decision in United States v. Chadwick. . . .").

62. *Id.*

63. *Id.* In *Sanders*, the police received a tip that the defendant would be arriving at the

cation for the search was the automobile exception.[64] The Supreme Court held that the search of the suitcase without a warrant was invalid.[65] Essentially, the Court determined that the fourth amendment warrant requirement applies equally to personal luggage taken from an automobile and that found in other locations.[66] Thus, the Court extended the *Chadwick* holding to encompass luggage found within an automobile during a search pursuant to the automobile exception.[67]

In reaching this result, the Court relied on a rationale similar to that used in *Chadwick*. The Court determined that the justifications for the automobile exception simply did not support its extension to secondary containers.[68] Containers possess neither the inherent mobility[69] nor the diminished privacy interest that are characteristic of automobiles.[70] Therefore, there was no basis upon which to uphold the warrantless search.[71]

The *Sanders* decision clearly established that the warrantless search of an unlocked suitcase cannot be justified by the automobile exception.[72] The Court's holding was carefully limited to per-

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local airport at a specified gate and time, and that he would be carrying a green suitcase which contained marijuana. With the area under surveillance, the police observed the defendant arrive carrying the suitcase. They watched as the suspect's companion placed the suitcase in the trunk of a taxi. They stopped the taxi several blocks from the airport, searched the unlocked suitcase, and found marijuana. *Id.* at 755.

64. *Id.* at 757.

65. *Id.* at 763-64.

66. *Id.* at 764.

67. The Court invalidated the approach taken by most courts prior to *Chadwick*. See *supra* note 57, and the approach taken by the Ninth Circuit after *Chadwick*. *See supra* note 59.

68. 442 U.S. at 763-65.

69. *Id.* at 763. The point at which mobility is to be assessed is the point in time immediately before the search. Thus, once police have seized the suitcase, "the extent of its mobility is in no way affected by the place from which it was taken." *Id.*

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

71. *Id.* at 765. The two concurring Justices believed that the majority was wrong in treating this as an automobile exception case. They asserted that *Sanders* was indistinguishable from *Chadwick* in that the relationship between the container and the automobile was merely coincidental. They concurred in the invalidation of this search. They would have permitted, however, a warrantless search when police have probable cause to search the entire automobile rather than any particular container. *Id.* at 767 (Burger, C.J., concurring).

72. This holding does not mean, however, that suitcases in automobiles may never be the subject of warrantless searches, e.g., the preclusion of warrantless border searches of luggage, which are based on a different exception to the warrant requirement. *Id.* at 764 n.12.

sonal luggage.[73] The Court expressly stated in a footnote that the holding may not be applicable to some containers.[74] It gave no indication, however, what standards were to be used in determining whether a particular container was encompassed by the *Sanders* rule.[75] Due to this ambiguity, *Sanders,* rather than clear up *Chadwick* residue, generated new confusion.[76]

After *Sanders*, the courts faced the difficult task of determining whether a container was encompassed by the *Sanders* "luggage rule" or fell instead within the undefined class of containers for which a warrant was not required.[77] Not surprisingly, courts varied in their interpretation and application of *Sanders*,[78] rendering the law of warrantless container searches a case-by-case, container-by-container, process of adjudication.

Robbins v. California

Once again the Supreme Court was aware of the confusion created by its most recent decision, and again it granted certiorari to resolve the continuing uncertainty surrounding the scope of

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73. *Id.* at 764-65. ("[T]he very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them.").

74. *Id.* at 764-65 n.13. The language of footnote 13 provided:

> Not all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.

Id.

75. *Sanders'* infamous footnote 13 was to be a consistent source of confusion for lower courts. *See* cases cited *infra* note 78.

76. *See generally* W. LAFAVE, *supra* note 29, § 7.2, at 149 (Supp. 1982); Note, *Warrantless Container Searches Under the Automobile and Search Incident Exceptions,* 9 FORDHAM URB. L.J. 185 (1980).

77. The *Sanders* dissenters foresaw such a problem with the majority's holding. 442 U.S. at 768 (Blackmun, J., dissenting). Blackmun felt that the majority opinion had not cleared up the confusion created by *Chadwick*, but rather, had created greater difficulties for police, prosecutors, and the courts. He pointed out that "Still hanging in limbo, and probably soon to be litigated, are the briefcase, the wallet, the package, the paper bag, and every other kind of container." *Id.*

78. *See, e.g.,* United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980) (*Sanders* permits search of two plastic bags, within three brown paper bags, within two more plastic bags). Daigger v. State, 595 S.W.2d 653 (Ark. 1980) (*Sanders* does permit the warrantless search of a purse); Liichow v. State, 228 Md. 502, 419 A.2d 1041 (1980) (*Sanders* does not permit the warrantless search of a plastic bag); State v. Duers, 49 N.C. App. 282, 271 S.E.2d 81 (1980) (*Sanders* permits the warrantless search of a white plastic bag); State v. Prober, 98 Wis. 2d 345, 297 N.W.2d 1 (1980) (*Sanders* does not permit the warrantless search of a purse). *See also* W. LAFAVE, *supra* note 29, § 7.2, at 149-50 (Supp. 1982). LaFave concludes that most of

warrantless searches under the automobile exception.[79] In *Robbins v. California*,[80] the Court attempted to establish how the *Sanders* holding applies to containers other than personal luggage.[81]

Robbins involved warrantless search of two green opaque plastic bags which were found during a lawful, probable cause search of an automobile.[82] In a plurality opinion,[83] the Supreme Court invalidated the warrantless search.[84] The plurality took the position that *all* closed containers are equally protected by the warrant requirement and, therefore, could not be the subject of a warrantless search under the automobile exception.[85] The only limitation on the plurality's "bright line" rule[86] was that the war-

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these cases can be squared with the following proposition: "[A] warrant is needed to search a container . . . only when the container is one that generally serves as a repository for personal effects or that has been sealed in a manner manifesting a reasonable expectation that the contents will not be open to public scrutiny." *Id.*

79. Robbins v. California, 453 U.S. 420, 423 (1981).

80. 453 U.S. 420 (1981).

81. *Robbins*, however, was distinguishable from *Chadwick* and *Sanders* because probable cause focused on the entire automobile rather than a particular container. This distinction was ignored by Justice Stewart writing for the plurality but was viewed by one dissenter as justifying a contrary result. 453 U.S. at 445 (Stevens, J., dissenting).

82. *Id.* at 422. In *Robbins*, the petitioner was stopped while driving erratically. When he opened the car door, police officers smelled marijuana and, therefore, had probable cause to search the automobile. During the search, the officers found two green, plastic-wrapped packages in a recessed luggage compartment located in the rear of the vehicle. *Id.* The court of appeals had upheld the search under *Sanders*, finding that the contents of the packages could be inferred from their outward appearance. Thus, the defendant could not have had a reasonable expectation of privacy in the packages. 103 Cal. App. 3d 34, 40, 162 Cal. Rptr. 780, 783 (1980).

83. Stewart, J., joined by Brennan, White and Marshall, J.J., wrote the plurality opinion; Burger, C.J., concurred without opinion; Powell, J., filed a concurring opinion; Blackmun, J., Rehnquist, J., and Stevens, J., filed dissents.

84. 453 U.S. at 425.

85. *Id.* The Court relied on the holdings of *Chadwick* and *Sanders* and rejected the contention that the nature of a container may diminish its constitutional protection. *Id.* The Court determined that placing an item in any closed container manifests the necessary expectation of privacy under *Sanders*. Therefore, "once placed within such a container, a diary and a dishpan are equally protected by the Fourth Amendment." *Id.* at 426.

86. The "bright line" approach was obviously aimed at resolving the difficulties created by *Chadwick* and *Sanders* and obviating the need for case-by-case, container-by-container adjudication of privacy interests. This approach is consistent with the approach taken by the Court on the same day with respect to the search incident to arrest exception as it applies to automobiles. *See* New York v. Belton, 453 U.S. 454 (1981) (establishing the rule that all areas of the car's interior, including secondary containers, may be searched without a warrant pursuant to the arrest of the car's occupants). For a discussion of the combined effects of *Robbins* and *Belton*, see Comment, *Robbins v. California and New York v. Belton: The Supreme Court Opens Car Doors to Container Searches*, 31 AM. U.L. REV. 291 (1982); Note, *Drawing Lines Around the Fourth Amendment: Robbins v. California and New York v. Belton*, 10 HOFSTRA L. REV. 483 (1982) [hereinafter cited as Note, *Drawing Lines*].

rant requirement does not apply to containers with such a distinctive configuration that their contents can be discerned from their outward appearance.[87]

Justice Powell concurred in the result reached by the plurality, but refused to adopt the "bright line" approach.[88] According to Powell, the proper inquiry under *Sanders* was whether the nature of the container indicated that the owner had a privacy interest in its contents.[89] Thus, Powell's position entailed a case-by-case adjudication of the expectation of privacy which attaches to various containers.[90] In contrast, the three dissenters[91] in *Robbins* contended that the automobile exception should encompass all containers found in an automobile without regard to privacy interests.[92]

The extent of the confusion in the area of container searches under the automobile exception is evidenced by the failure of any opinion in *Robbins* to attract a majority of the Court. Four members were of the opinion that a warrant is required to search any container, while three members would have adopted a contrary rule.[93] Justice Powell alone advocated that the "bright line" rule was improper and that case-by-case adjudication was required instead.[94]

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87. 453 U.S. at 427. This was the construction which the plurality placed on the problematic footnote in *Sanders*. *See supra* note 74. The plurality viewed the specific exceptions listed in the footnote, i.e., a kit of burglar tools and a gun case, as "the very model of exceptions which prove the rule. . . ." *Id.* Thus, only when a container's contents are in "plain view" can a warrantless search be conducted. *Id.*

88. *Id.* at 429 (Powell, J., concurring). Justice Powell felt that the plurality's approach was undesirable because it placed a substantial burden on law enforcement without furthering any privacy interests. He stated: "The plurality's 'bright line' rule would extend the Warrant Clause of the Fourth Amendment to every 'closed, opaque container' without regard to size, shape, or whether common experience would suggest that the owner was asserting a privacy interst in the contents." *Id.* at 429 n.1.

89. *Id.* at 432. Under Powell's analysis the existence of a privacy interest is determined by whether the container is typically a repository for personal effects or whether it is sealed in a manner which evidences a privacy interest. Under the facts in *Robbins*, he therefore concurred in the result because the package had been carefully wrapped and sealed.

90. Powell's approach was essentially the same as that employed by lower courts after *Sanders*. *See supra* note 78 and accompanying text. *See generally* Note, *Drawing Lines*, *supra* note 86 (where the author advocates a case-by-case, factually sensitive analysis for container cases under the automobile exception).

91. Justices Blackmun, Rehnquist and Stevens all wrote separate dissents.

92. In the dissenters' view, when the police have probable cause to search an entire automobile, the exigencies which justify the initial intrusion also justify intrusion into any containers. 453 U.S. at 436 (Blackmun, J., dissenting); *id.* at 443 (Rehnquist, J., dissenting); *id.* at 447 (Stevens, J., dissenting).

93. *See supra* notes 83, 92 and accompanying text.

94. *See supra* notes 88-90 and accompanying text.

In light of the internal dissension among the members of the Court, it is not surprising that *Robbins* did little to achieve the Court's goal of clarity. After *Robbins*, courts still varied in their treatment of warrantless container searches. Some courts strictly adhered to the "bright line" rule,[95] while others openly doubted the precedential value of a plurality opinion.[96] These latter courts focused instead on the reasonable expectation of privacy analysis in Justice Powell's concurring opinion.[97] In addition, a number of courts were still uncertain when a container's configuration clearly announces its contents.[98]

The precedential value of *Robbins* was further drawn into question when shortly after the decision was announced the Supreme Court granted certiorari in *United States v. Ross*.[99] *Ross* was factually similar to *Robbins* and would seem to be controlled by that case's holding. In granting certiorari, however, the Court expressly requested that the parties address the question of whether the deci-

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95. *See, e.g.*, United States v. Weber, 668 F.2d 552 (1st Cir. 1981) (adopted a broad definition of container and invalidated a warrantless search of a rolled up rain slicker under *Robbins*); Sharpe v. United States, 660 F.2d 967 (4th Cir. 1981) (warrantless search of well-packaged bales of marijuana located in the equivalent of a luggage compartment held invalid under *Robbins*); United States v. Musick, 534 F. Supp. 954 (N.D. Cal. 1982) (warrantless search of an unlocked briefcase found in passenger compartment and a locked attache case found in the truck invalidated under *Robbins*).

96. *See infra* note 97. For a consideration of the weight accorded plurality decisions, see generally Comment, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV 756 (1980); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981).

97. *E.g.*, United States v. Martino, 664 F.2d 860 (2d Cir. 1981) (decided under Powell's reasonable expectation of privacy test that no warrant was required to search an unsealed paper bag); Government of Virgin Islands v. Rasool, 657 F.2d 582 (3d Cir. 1981) (holding that a grocery bag can be searched under the automobile exception because it does not carry an expectation of privacy); United States v. Rivera, 654 F.2d 1048 (5th Cir. 1981) (justifying its result under Powell's reasonable expectation of privacy test as well as the "bright line" rule).

98. *See, e.g.*, United States v. Haley, 669 F.2d 201 (4th Cir. 1982). On facts remarkably similar to *Robbins*, the court upheld the search of numerous opaque, sealed garbage bags on the grounds that they were packed with a course substance which was "obviously marijuana." In addition to this "distinctive configuration," the intense odor of marijuana brought the contraband into plain view. *Id.* at 204. *See also* Blair v. United States, 665 F.2d 500 (4th Cir. 1981) (upholding a warrantless search of burlap-covered bales on the grounds that some were split open, thereby bringing the contents of all the bales into plain view); United States v. Cobler, 533 F. Supp. 407 (W.D. Va. 1982) (upholding the warrantless search of one gallon plastic jugs filled with a clear substance on the ground that their contents were in plain view because of the distinctive odor of whiskey emanating from them).

99. 454 U.S. 891 (1981). Certiorari was granted on October 13, 1981, a little over three months after *Robbins* had been decided. Since then, Justice Stewart retired and was replaced by Justice Sandra Day O'Connor.

sion in *Robbins* should be reconsidered.[100] Consequently, the continuing validity of the *Robbins* holding was in a state of uncertainty.

UNITED STATES v. ROSS: THE SUPREME COURT'S BRIGHT LINE ANSWER TO THE PROBLEM OF WARRANTLESS CONTAINER SEARCHES

Factual Background

In *Ross,* the police received a tip from a reliable informant that the defendant, Albert Ross, was carrying narcotics in the trunk of his automobile.[101] The police located the defendant's car, parked and unoccupied, and placed it under surveillance. After leaving the scene momentarily, the officers returned to find the car proceeding a short distance from where it had been parked. The police officers matched the driver's description with that of the suspect and stopped the automobile.[102]

After searching both the defendant and the car's interior,[103] the officers placed the defendant under arrest.[104] One officer then opened the trunk of the car and found a closed brown paper bag. He opened the bag, and discovered a number of glassine bags containing white powder which later proved to be heroin.[105] No search warrant was ever obtained.[106]

The district court upheld the warrantless search of the paper bag.[107] The court of appeals, however, reversed and held that the search violated the fourth amendment warrant requirement.[108] A

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100. *Id.*

101. United States v. Ross, 102 S. Ct. 2157, 2160 (1982). The informant stated that he had just observed Ross complete a sale and that Ross had told him that there were additional narcotics in the trunk of Ross's car. *Id.*

102. *Id.* The police had received a description of Ross from the informant which matched that given by police computers.

103. During the search of the car's interior, police discovered a bullet on the front seat and a pistol in the glove compartment.

104. 102 S. Ct. at 2160.

105. *Id.* At a later station house search, police also discovered a red leather pouch in the vehicle's trunk. The government conceded to the court of appeals that the pouch was covered by the *Sanders* luggage rule. United States v. Ross, 655 F.2d 1159, 1161 (D.C. Cir. 1981) (en banc).

106. 102. S. Ct. at 2160.

107. *Id.* Ross was indicted by a federal grand jury in the District of Columbia for, among other things, possession of heroin. Ross moved to suppress the evidence taken from the paper bag and, after a hearing, the district judge denied the motion. Ross was convicted in a jury trial. *Id.*

108. 655 F.2d at 1161. It should be noted that the court of appeals decided *Ross* before the

majority[109] of that court rejected the idea that there was any constitutionally significant difference between various types of containers.[110] Therefore, it held that the warrant requirement protects paper bags in the same way that it protects personal luggage.[111]

The United States Supreme Court reversed the court of appeals and upheld the constitutionality of the warrantless search.[112] In a majority opinion, it broadly declared that when the police have stopped an automobile, having probable cause to believe that contraband is located somewhere therein, they may conduct a search "as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.'"[113] Consequently, the rule established by the Court in *Ross* permitted the warrantless search of *all* closed containers pursuant to the automobile exception.[114]

The Opinion

The majority in *Ross* offered several lines of reasoning to justify its "bright line" holding. Initially, the Court determined that the search of secondary containers under the automobile exception satisfies the reasonableness requirement of the fourth amendment.[115] This premise was based on the assumption that a search of a secondary container is no greater an intrusion into fourth amendment interests than is the search of other areas which constitute

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Robbins decision was announced. In fact, the court of appeals decision in *Ross* was cited by the plurality in *Robbins*. *See* 453 U.S. at 426-27.

109. Seven justices joined in the appellate court opinion while four justices filed separate dissents. 655 F.2d at 1160.

110. *Id.* at 1170. The court foresaw extensive problems for both the police and courts if an "unworthy container" rule were adopted. The court asked:

> Are police to distinguish cotton purse from silk; felt, vinyl, canvas, tinfoil, cardboard, or paper containers from leather; sacks closed by folding a flap from those closed with zippers, drawstrings, buttons, snaps, velcro fastenings, or strips of adhesive tape? Would a Tiffany shopping bag rank with one from the local supermarket?

Id.

111. *Id.* at 1161. The court emphasized that the fourth amendment is designed to protect all persons, "not just those with the resources or fastidiousness to place their effects in containers that decisionmakers would rank in the luggage line. . . ." *Id.*

112. 102 S. Ct. at 2157.

113. *Id.* at 2159.

114. *Id.* at 2171. According to the *Ross* Court, this holding overrules the "disposition" of *Robbins*, and some of the "reasoning" in *Sanders* which was relied on by the *Robbins* plurality. *Id.* at 2172.

115. *Id.* at 2169.

the integral parts of a vehicle.[116] Therefore, since these highly intrusive automobile searches comport with the fourth amendment, searches of secondary containers should also be permissible.[117]

The majority next proposed that if the automobile exception is to have any practical effect, it must encompass closed containers.[118] The Court explained that contraband, by its very nature, must be concealed from public view.[119] Objects typically sought in an automobile search are rarely left in open view.[120] To be of any practical assistance to the police, the Court concluded that the automobile exception must encompass secondary containers.[121]

Finally, the *Ross* Court found support for the constitutionality of warrantless container searches by reference to the scope of searches conducted pursuant to a warrant. The Court pointed out that once a warrant has been issued, police are entitled to search any area where the object of the warrant might be concealed.[122] In the case of an automobile, police are not restricted to searching the integral parts of the vehicle but may also open any secondary containers. The Court concluded that once a legitimate search is under way,[123] distinctions between various containers must give way "to the interest in the prompt and efficient completion of the task at hand."[124]

In establishing its new rule, the majority in *Ross* engaged in a

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116. *Id.* The Court referred to several cases where highly intrusive searches of automobiles were upheld as reasonable. *E.g.*, Chambers v. Maroney, 399 U.S. 42 (1970) (search of a concealed compartment under the dashboard of a car); Carroll v. United States, 267 U.S. 132 (1925) (search of the interior of a car's upholstery).

117. The Court reasoned:

> It would be illogical to assume that the outcome of *Chambers* - or the outcome of *Carroll* itself - would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. If it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it.

102 S. Ct. at 2169.

118. *Id.* at 2170.

119. *Id.*

120. *Id.* The Court pointed out that contraband goods are rarely placed in a car unless they are in some sort of container.

121. *Id.*

122. *Id.*

123. Presumably, the Court is referring to both searches conducted pursuant to a warrant, and warrantless searches based upon probable cause as "legitimate" searches.

124. 102 S. Ct. at 2170-71.

lengthy analysis of fourth amendment precedent in the area of automobile searches. In the Court's view, *Carroll v. United States*[125] had held simply that a warrantless search of an automobile, supported by probable cause, is not unreasonable under the fourth amendment.[126] The Court emphasized that *Carroll* had not addressed the question of the permissible scope of a search pursuant to the automobile exception.[127]

The Court noted that its holding was reconcilable with the holdings of *United States v. Chadwick*[128] and *Arkansas v. Sanders.*[129] It pointed out that in both of these cases the probable cause which supported the search had focused on the particular container to be searched, rather than the automobile as a whole.[130] In contrast, *Ross* presented the situation where police had probable cause to search the *entire* automobile. The Court viewed this distinction as constitutionally significant, and hence determined that *Chadwick* and *Sanders* were not controlling.[131]

Finally, the Court briefly discussed the plurality opinion in *Robbins v. California,*[132] but did not attempt to reconcile it with the current holding.[133] Rather, the Court focused on the fact that *Robbins* was decided without a majority opinion, and the parties in *Robbins* had not addressed the issue argued by the parties in *Ross.*[134]

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125. 267 U.S. 132 (1925).

126. 102. S. Ct. at 2159.

127. *Id.* The majority pointed to authority subsequent to *Carroll* in support of its proposition that the *Carroll* holding could be read to encompass containers. The Court cited Scher v. United States, 305 U.S. 251 (1938), and Husty v. United States, 282 U.S. 694 (1931), cases decided under *Carroll,* where searches of secondary containers were upheld. Although the Court acknowledged that no argument was raised regarding the secondary intrusion into the containers, it nevertheless concluded that these cases "have much weight" because the "fact that no such argument was even made illuminates the profession's understanding of the scope of the search permitted under *Carroll.*" 102 S. Ct. at 2169.

128. 433 U.S. 1 (1977).

129. 442 U.S. 753 (1979).

130. 102 S. Ct. at 2167.

131. *Id.* at 2168. The Court did acknowledge that *Sanders* had broadly suggested that the automobile exception could never be used to justify the warrantless search of a container. *Id.* at 2167. Apparently, this is the "reasoning" in *Sanders* which the *Ross* Court overruled.

132. 453 U.S. 420 (1981).

133. 102 S. Ct. at 2168. In *Robbins*, as in *Ross*, probable cause to search focused on the entire automobile. *See supra* note 81. Thus, it is not surprising that the Court did not attempt to reconcile its holding with the contrary holding in *Robbins.*

134. 102 S. Ct. at 2168. In support of this reasoning, the Court pointed to Powell's concurrence in *Robbins.* Powell had suggested the proper rule should be that when the police have

The Dissent

The dissent, written by Justice Marshall and joined in by Justice Brennan,[135] leveled harsh criticism at both the rationale and the holding of the majority.[136] Initially, Marshall attacked the majority's total disregard for the important function which the warrant requirement serves.[137] In Marshall's view, the warrant requirement is critical because it insures that probable cause will be assessed by a neutral and detached magistrate and thereby provides significant protections that post-hoc judicial evaluation of probable cause would not.[138] He pointed out that these protections are important in the context of the automobile searches, despite the existence of the automobile exception.[139] Marshall wrote that the automobile exception is narrow, and should be applicable only when either mobility[140] or diminished privacy interests are present.[141]

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probable cause to search an entire automobile, the automobile exception justifies intrusions into secondary containers. Powell determined, however, that it was inappropriate to examine this distinction in *Robbins*, because the parties had not addressed it and administrative constraints made it inappropriate to examine such an issue without full adversarial presentation. *Id.* In contrast, the parties in *Ross* had litigated this distinction and so the Court addressed its merits.

135. Justice White dissented separately, reaffirming the plurality opinion in *Robbins* and stating that he agreed with much of Marshall's dissent. 102 S. Ct. at 2173 (White, J., dissenting).

136. *Id.* at 2174 (Marshall, J., dissenting). Justice Marshall stated:

> The new rule adopted by the Court today is completely incompatible with established Fourth Amendment principles, and takes a first step toward an unprecedented 'probable cause' exception to the warrant requirement. In my view, under accepted standards, the warrantless search of the container in this case clearly violates the Fourth Amendment.

Id.

137. *Id.* at 2173-74.

138. *Id.* at 2174-75. Specifically, Marshall noted that the warrant requirement (1) limits the concentration of power held by executive officers over the individual and thereby prevents some unjustified searches from occurring at all; (2) prevents hindsight from coloring the evaluation of the reasonableness of a search; (3) reassures the public that an orderly process of law has been respected. *Id.*

139. *Id.* at 2175.

140. *Id.* Justice Marshall explained that mobility justifies a warrantless search because it puts police in a situation where they must risk losing the car and its contents if they cannot conduct an immediate search. He suggested that mobility is perhaps a misnomer, because police can always seize the vehicle and immobilize it. This alternative, however, is impractical because police will then have to determine what to do with the vehicle and its occupants while a warrant is being sought. *Id.* n. 2.

141. Justice Marshall explained that because an individual is deemed to have a lesser privacy interest in an automobile than in other constitutionally protected areas, application of the warrant requirement is unnecessary because no significant fourth amendment inter-

After applying these principles to the search of secondary containers, Marshall found that neither of the justifications for the automobile exception justifies the search of secondary containers.[142] Because containers can easily be seized, there is no practical exigency present which obviates procurement of a warrant. In addition, secondary containers do not give rise to diminished privacy interests.[143] Thus, Marshall concluded that a movable container found in an automobile is entitled to the same amount of fourth amendment protection as a container found elsewhere.[144]

Marshall sharply criticized the several justifications proferred by the majority in support of its holding. He attacked the majority's assumption that the scope of a search pursuant to the automobile exception is as broad as the scope of a search authorized by a magistrate.[145] He pointed out that although the issuance of a warrant need only be supported by probable cause, a warrantless search requires probable cause plus the existence of a practical exigency.[146] Consequently, the scope of a warrantless search should only be as broad as the exigency justifies. Marshall argued that the majority's premise was unsound because it ignored this critical distinction.[147]

Marshall also attacked the majority's purported reliance on an established precedent. He argued that the majority's conclusion

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est is being protected. In addition, where privacy interests are minimal an immediate search is considered a lesser intrusion than the seizure of the automobile *Id.* at 2175-76.

142. *Id.* at 2176.

143. *Id.* Marshall pointed out that the premise that a seizure may be a greater intrusion than a search was inapplicable to containers, because an owner of a container will rarely suffer significant inconvenience as a result of the deprivation of the use of a container. *Id.*

144. *Id.* at 2177. Marshall argued that because Ross had placed the evidence at issue in an opaque, closed bag, the bag could be seized but not searched without a warrant. In addition, since Ross was arrested and in custody when the search occurred, there was no practical exigency to justify the warrantless search. *Id.*

145. *Id.* at 2176-77. According to Marshall, this assumption arises out of the majority's characterization of the scope of a permissible search under *Carroll*, that is, since *Carroll* "neither broadened nor limited the scope of a lawful search based on probable cause," the scope of a search under *Carroll* is "as broad" as a probable cause search pursuant to a warrant. *Id.*

146. *Id.* at 2177. Justice Marshall states: "It is irrelevant to a magistrate's function whether the items subject to search are mobile, may be in danger of destruction, or are impractical to store, or whether an immediate search would be less intrusive than a seizure without a warrant." *Id.*

147. *Id.* Marshall emphasized the majority's disregard for the function of the warrant requirement. Underlying the majority's reasoning is the assumption that a police officer's evaluation of probable cause is the equivalent of a magistrate's. Marshall noted that precedent clearly establishes that an "on-the-spot determination of probable cause is *never* the same as a decision by a neutral and detached magistrate (emphasis provided)." *Id.*

that it would be "illogical" and "absurd" to allow searches of integral parts of an automobile while prohibiting searches of secondary containers ignores the reasons for including integral parts of the automobile within the exception.[148] Compartments are included because they present the same practical problems with mobility and safekeeping as the automobile itself. Therefore, the privacy interests focused on by the majority are irrelevant because exigency, not privacy, is the basis for including all of the automobile's integral parts within the scope of the exception.[149]

Similarly, Marshall discerned as improper the majority's rationale premised on the practical advantages to police.[150] He pointed out that the automobile exception was not established to provide the police with an easy means to obtain evidence.[151] Therefore, the majority's concern over maximization of police efficiency was improper.

ANALYSIS

In *Ross*, the Supreme Court established that, when police have stopped an automobile on the roadway and have probable cause to search it for contraband or evidence of a crime, they may conduct a warrantless search which encompasses closed containers as well as the integral parts of the vehicle itself. Such a warrantless search is justified under the automobile exception to the fourth amendment warrant requirement. Under *Ross*, once the automobile exception has been properly invoked,[152] its scope is limited only by the restrictions which limit the scope of searches authorized by a warrant: the areas searched must be places where the object of the search could realistically be secreted.[153] The *Ross* holding indicates that the Supreme Court has determined that the protections afforded by the warrant requirement are of little or no significance in the context of automobile searches. The Court has decided that

148. *Id.* at 2179.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Ross* clearly involved a *Carroll*-type search since the vehicle was stopped in transit and the search was conducted immediately. The defendant did not assert that the exception was inapplicable.
153. The Court explained:

> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to

the inquiry should focus on the existence of probable cause and has equated a police officer's assessment of probable cause with that of a neutral and detached magistrate.[154]

Although the justifications supporting the automobile exception had been critical in the Court's previous decisions, in *Ross,* the Court paid little attention to the applicability of these justifications to secondary containers. It required no showing of the impracticability of securing a warrant.[155] Additionally, the Court did not deem it significant that secondary containers typically manifest a greater privacy interest than do automobiles themselves.[156] Instead, the Court determined that once the exception has been properly invoked, privacy interests must give way so that the search may be conducted promptly and efficiently.

The Supreme Court made one careful distinction in *Ross* which limits the application of its holding. The Court determined that the automobile exception can properly be invoked to justify a container search only when probable cause to conduct the search focuses on the *entire* automobile.[157] The Court differentiated "automobile searches" from "container searches." Under *Ross*, a "container search" occurs when probable cause focuses on a par-

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> believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

102 S. Ct. at 2172.

154. *See supra* notes 122-24 and accompanying text.

155. The Court did not deem it significant that police have an alternative of seizing a container and bringing it to a magistrate to obtain a warrant. The only reference the Court made to the impracticability of this alternative is contained in a footnote where the Court stated:

> Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests.

102 S. Ct. at 2171 n.28.

156. Here, the Court's analysis turns on the fact that permissible intrusion into the vehicle's compartments and other of its integral parts is equivalent to intrusions into secondary containers. Hence, container searches can be justified in the same manner as searches of the vehicle's integral parts because the fact that containers can be seized has already been dismissed by the Court as a significant consideration.

157. 102 S. Ct. at 2172. The Court stated that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *Id.* This characterization is implicit in the Court's reconciliation of this decision with *Chadwick* and *Sanders.*

ticular container, and where that container's relationship with the vehicle is only incidental. "Container searches" are clearly not emcompassed by the *Ross* holding.[158] This distinction enabled the Court to reconcile its holding with both *United States v. Chadwick*[159] *and Arkansas v. Sanders.*[160] According to *Ross* these cases were both "container search" cases, and the warrantless searches were properly invalidated.[161]

Ross's automobile-container search distinction has several practical implications. This distinction requires that analysis center on the nature of the facts giving rise to probable cause to determine whether a search is an "automobile search," or a "container search."[162] In some cases, this determination may be difficult. As pointed out by the dissent, the courts will have to determine that police had knowledge sufficient to formulate probable cause, yet insufficient knowledge regarding the contraband's precise location.[163] As a result, the Court's "bright line" may create difficulties in application.[164]

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158. *See supra* notes 125-28 and accompanying text. The court of appeals had considered the approach adopted by the Supreme Court in *Ross* and had rejected it. The lower court saw significance in the fact that the *Sanders* Court had cited United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978), and United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977), as illustrative of the post-*Chadwick* misunderstanding among lower courts. The court noted that in *Stevie*, probable cause focused on the container placed in the vehicle; however, in *Finnegan*, probable cause focused on the automobile itself. Thus, the court concluded that since the Supreme Court viewed these decisions as inconsistent, "the *Sanders* majority did not believe the compatibility of the search with the Fourth Amendment should turn on whether police suspicion related to the car (as in *Finnegan)* or to the container (as in *Stevie).*" 655 F.2d at 1167. The Supreme Court did not respond to this reasoning in *Ross.*

159. 433 U.S. 1 (1977).

160. 442 U.S. 753 (1979).

161. The extent to which *Sanders* has been reconciled is questionable. The reasoning in *Sanders* was premised on the automobile exception. In reaching its conclusion that the search of the suitcase was impermissible, the Court was construing the scope of the automobile exception. There are no indications that the Court deemed it significant that probable cause focused on the suitcase rather than the automobile as a whole. Thus, while the result in *Sanders* would be the same under *Ross,* the rationale of the *Sanders* Court has been effectively overruled by the *Ross* holding.

162. The facts of many cases will lend themselves to straightforward determination under this distinction. Cases such as *Chadwick* and *Sanders,* for example, where probable cause focused on the container long before it was placed inside the automobile, are clearly "container searches" under *Ross.*

163. 102 S. Ct. at 2180 (Marshall, J., dissenting).

164. It is curious to note that in *Sanders* the dissenters rejected the validity of this car search-container search distinction precisely because they felt it might create problems in application. They stated:

After *Ross,* the only container case remaining intact is *Chadwick.* This case escaped modification because it was not decided under the automobile exception. The *Ross* Court clearly limited its holding and discussion to the automobile exception. Thus, *Chadwick*'s holding, that all movable containers cannot be subjected to warrantless searches by way of analogy to automobiles, remains valid.[165] *Robbins v. California,*[166] however, is clearly inconsistent with *Ross* and is impliedly overruled.[167] Since *Sanders* was based on a rationale inconsistent with the one adopted in *Ross,* it too has been effectively overruled.[168]

Essentially, *Ross* has reinstated the pre-*Chadwick* status of the automobile exception. Prior to *Chadwick,* courts routinely upheld

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> Surely . . . the intrusion on privacy, and consequently the need for the protection of the Warrant Clause, is, if anything, greater when police search the entire interior area of the car, including possibly several suitcases, than when they confine their search to a single suitcase. Moreover, given the easy transferability of articles to and from luggage once it is placed in a vehicle, the police would be entitled to assume that if contraband was not found in the suspect suitcase, it would likely be secreted somewhere else in the car. The possibility the opinion concurring in the judgment would preserve for future decision thus contemplates the following two-step ritual: first, the police would take the targeted suitcase to the station for a search pursuant to a warrant; then, if the contraband was not discovered in the suitcase, they would return for a *warrantless* search of other luggage and compartments of the car. It does not require the adjudication of a future controversy to reject that result.

442 U.S. at 770-71 n.3 (Blackmun, J., dissenting). Blackmun was joined by Justice Rehnquist in this dissent. Both Justices joined the majority opinion in *Ross.* Justice Powell foresaw similar difficulties in his concurring opinion in *Robbins:*

> Resolving this case by expanding the scope of the automobile exception is attractive not so much for its logical virtue, but because it may provide ground for agreement by a majority of the presently fractured Court on an approach that would give more specified guidance to police and courts in this recurring situation—one that has led to incessant litigation. I note, however, that this benefit would not be realized fully, as courts may find themselves deciding when probable cause ripened, or whether suspicion focused on the container or on the car in which it traveled.

453 U.S. at 435 (Powell, J., concurring).

165. The automobile search-container search distinction seems to preclude recognition of an exception to the warrant requirement for all movable containers analogous to the automobile exception. A "movable container" exception would require the establishment of probable cause to search the container. *Ross* dictates that once probable cause has focused on a container, it cannot be searched without a warrant.

166. 453 U.S. 420 (1981).

167. The *Ross* Court acknowledged that the "disposition" of *Robbins* is inconsistent with its decision in *Ross.* 102 S. Ct. at 2172. Marshall pointed out in his dissent that the Court "gingerly avoids stating that it is overruling the case itself" by choice of terms. *Id.* at 2181.

168. *See supra* note 161. *See also* 102 S. Ct. at 2181 (Marshall, J., dissenting), "[The Court] rejects all of the relevant reasoning of *Sanders* and offers a substitute rationale that

searches of secondary containers under the automobile exception.[169] *Ross* sanctioned the constitutionality of such searches.[170] Ironically, the Supreme Court has come full circle in its determination of the permissibility of warrantless container searches under the automobile exception.

OTHER IMPLICATIONS OF *ROSS*

Although *Ross* only involved the container search issue, the Court's reasoning may be indicative of its future direction with respect to the automobile exception in general. The resolution of the container search issue and clear delineation of the scope of the automobile exception will probably renew concern over the requisites necessary to invoke the exception in the first instance. None of the cases wherein the Supreme Court construed the scope of the automobile exception raised this issue because all clearly involved searches falling within the scope of *Carroll v. United States*.[171] As a result, *Ross* did not directly resolve the pre-*Chadwick* confusion over the permissibility of warrantless automobile searches in the absence of a practical exigency. The Court's present treatment of secondary containers, however, is no doubt indicative of the Court's position on this issue.

Confusion had arisen because *Chambers v. Maroney*[172] and *Cardwell v. Lewis*[173] departed from the principles laid down in *Carroll*. Neither case involved a practical exigency which militated against the police's ability to obtain a warrant.[174] Nonetheless, the searches were upheld on the basis of the automobile exception. In contrast, the search in *Coolidge v. New Hampshire*[175] had been invalidated precisely because the Court found that it was reasonably practicable to obtain a warrant.[176] As a result, it remained uncertain whether police must demonstrate the infeasibility of obtaining a warrant before the automobile exception may be

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appears inconsistent with the result."

169. *See supra* note 57 and accompanying text.

170. The only factor added by *Ross* is its distinction between car searches and container searches.

171. 267 U.S. 132 (1925). These cases include *Sanders*, *Robbins*, and *Ross*. All involved vehicles stopped on the roadway where immediate searches were conducted. Thus, they did not involve the issues raised in *Chambers*, *Coolidge* and *Cardwell*.

172. 399 U.S. 42 (1970).

173. 417 U.S. 583 (1974).

174. *See supra* text accompanying notes 26-27, 36.

175. 403 U.S. 443 (1971).

176. *See supra* note 32 and accompanying text.

invoked. Prior to the *Chadwick-Sanders-Robbins* line of decisions, the Supreme Court seemed to be heading towards the elimination of this consideration.[177] *Chadwick, Sanders* and *Robbins,* however, indicated that this factor was still significant. Those cases rejected container searches under the automobile exception in part because the Court determined that the practical problems which exist in obtaining a warrant to search automobiles do not obtain in container search situations.[178]

Ross represents yet another shift, returning to the position of *Chambers* and *Cardwell.*[179] In upholding the permissibility of warrantless container searches in spite of the fact that containers can easily be seized until a warrant is obtained, the Court virtually abandoned consideration of practical exigencies in determining the scope of the automobile exception. Thus, it is not surprising that the Court reaffirmed the *Chambers* holding in the same term that it decided *Ross.* In *Michigan v. Thomas,*[180] the Court reaffirmed per curiam the *Chambers* holding that when police have probable cause to believe that a vehicle stopped on the roadway contains contraband, the police may conduct a warrantless search of the vehicle even after it has been impounded and is in police custody.[181] With little discussion and no mention of *Coolidge,* the Court declared that the justification to search does not vanish once the car has been immobilized, nor does it depend on the presence of a likelihood that the car will be driven away or that its contents will be tampered with during the time when police

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177. *Chambers, Cardwell,* and *White* indicated that exigency was no longer required. *Coolidge,* decided by just a plurality of the Court on this issue, was the only indication of this requirement's continuing validity.

178. *See supra* text accompanying notes 56, 69, 85. In these cases, the Court determined that practical exigencies were non-existent because containers could easily be seized and brought to a magistrate for issuance of a search warrant.

179. The precise issue in these two cases was the validity of a delayed warrantless search conducted when the practical exigency no longer existed, which would clearly have been permissible if conducted immediately.

180. 102 S. Ct. 3079 (1982) (per curiam). In *Thomas,* police had conducted a warrantless search of an automobile after its owner was arrested for possession of open intoxicants in a motor vehicle. A truck was called to tow the automobile and pursuant to a departmental policy, an officer searched the vehicle prior to its impoundment. The search uncovered two bags of marijuana in the unlocked glove compartment, and a loaded .38 caliber revolver in the air vents under the dashboard. The defendant was convicted for possession of a concealed weapon but the Michigan Court of Appeals reversed. Although generally upholding inventory searches of impounded vehicles, the court invalidated this search because by extending to the air vents, it was unreasonable in scope. *Id.* at 3080.

181. In addition to citing *Chambers* as supporting this holding, the Court cited Texas v. White, 423 U.S. 67 (1975) and *United States v. Ross,* 102 S. Ct. at 2163 n.9.

seek a warrant.[182] Thus, any doubt about the continuing existence of the practical exigency requirement appears to have been laid to rest by this decision.[183]

At this point, however, it is unclear what the status of *Coolidge* is and whether the Supreme Court will extend the automobile exception to encompass the search of parked vehicles such as those involved in *Coolidge* and *Cardwell*. While the *Ross* majority never explicitly discussed parked vehicles,[184] the dissenters viewed the majority's holding as restricted to cars stopped in transit.[185] The majority's rationale, on the other hand, would appear to permit recognition of such an extension in a future case. If practical exigencies are no longer required, it is difficult to see how a parked vehicle differs from one stopped on a highway, as long as there is probable cause to justify the search.

In addition, *Ross* gives a broad reading to the diminished expectation of privacy which attaches to automobiles. Its holding implies that the diminished privacy interest encompasses the entire vehicle, as well as anything located within the vehicle.[186] Thus, if diminished privacy interests alone are sufficient to justify a warrantless probable cause search, parked vehicles would also fall within the automobile exception.[187]

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182. 102 S. Ct. at 3081.

183. It is interesting to note that the Court need not have reaffirmed the *Chambers* principle in order to uphold the search in this case. Here, the search was conducted on-the-scene rather than at the station house. Thus, the search could probably have been sustained on the authority of *Carroll* alone. In addition, the Court identified that there were exigencies present because the occupants of the vehicle could have had unknown confederates who might have returned to remove the secreted contraband. Nonetheless, the Court pointedly held that the existence of such exigencies was not required to invoke the automobile exception. *Id.*

184. The majority opinion contained references only to cars stopped by police such as the car involved in *Carroll*.

185. *See* Marshall, J., dissenting: "The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars. Cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971)." 102 S. Ct. at 2174 n.1.

186. *See supra* text accompanying notes 38-39.

187. It is interesting to note that the vehicle in *Ross* was parked just moments before the police conducted the search. *See supra* text accompanying notes 101-02. The question which remains open is whether police could have conducted the warrantless search while the vehicle was still parked and unoccupied. Technically, *Carroll, Chambers, Ross,* and *Thomas* do not authorize such a search. However, if such is the rule, once police have probable cause to search a vehicle, they could place it under surveillance until it was moved and then conduct a warrantless search. The Court has clearly indicated its disapproval for a

CONCLUSION

Regardless of the way in which the Supreme Court resolves the unanswered issue of parked vehicles, it is evident that further clarification in this area is necessary if the Court truly wishes to achieve clarity and consistency in the law of automobile search. The Court has evidenced a desire to establish guidelines which can easily be applied by both law enforcement officials and courts. *Ross* accomplishes much of this objective with respect to the scope of the search conducted under the automobile exception. The Court's goal of clarity, however, will not fully be realized until the Court clearly delineates the requisites necessary to invoke the exception. If *Ross* is any indication of the direction that the Court is taking in this area, the automobile is well on its way to becoming a "talisman in whose presence the fourth amendment fades away and disappears."[188]

MARY C. GILHOOLY

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rule that enables police to avoid the warrant requirement in this manner. In *Coolidge*, the Court indicated that when police have preexisting probable cause to seize and search containers, they are not entitled to wait until they are placed in a vehicle to take advantage of the automobile exception. To avoid an analogous result with respect to parked vehicles, some further clarification of *Ross* is required.

188. *Coolidge v. New Hampshire*, 403 U.S. at 461.