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Fourth Amendment--Overextending the Automobile Exception to Justify the Warrantless Search of Closed Containers in Cars

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FOURTH AMENDMENT— OVEREXTENDING THE AUTOMOBILE EXCEPTION TO JUSTIFY THE WARRANTLESS SEARCH OF CLOSED CONTAINERS IN CARS

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

In *United States v. Ross*,¹ the Supreme Court upheld the warrantless search of a paper bag and leather pouch located inside an automobile that police had probable cause to search. Thus, the Court overruled its 1981 plurality decision, *Robbins v. California*.² In *Robbins*, a badly fractured Supreme Court had held that the "automobile exception"³ to the warrant requirement of the fourth amendment⁴ did not allow the warrantless search of closed containers that are inside a car, even when the automobile itself is undergoing a valid warrantless search. Writing for the *Ross* majority, Justice Stevens expressly discarded the *Robbins* holding and instead held the automobile exception to support the warrantless search of a container found in a car as well as the car itself.

Unfortunately, the Court decided *Ross* improperly. The majority's decision was not supported by exigent circumstances nor by any diminished privacy expectations on the part of the driver. The Court's rationale for validating warrantless searches of containers in vehicles was to provide police with a "bright line" rule and to increase the efficiency of police investigations. *Ross* fails, however, to clarify the standards for police in conducting a warrantless search because it creates a distinction between cases where police have probable cause to search a car and those where they have probable cause to search a specific container in a

¹ 102 S. Ct. 2157 (1982).

² 453 U.S. 420 (1981) (plurality decision).

³ Under the automobile exception, police may search an automobile without a warrant if they have probable cause to believe that contraband is within. See *infra* notes 26-31 and accompanying text.

⁴ 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 Warrant shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the person or things to be seized.
U.S. CONST. amend. IV.

car. In addition, marginal gains in efficiency do not justify limiting fourth amendment protections. Hence, *Ross* distorts the original justification for the automobile exception and constricts the warrant clause of the fourth amendment.

I. *UNITED STATES V. ROSS*

A. THE FACTS IN *ROSS*

Having probable cause to believe that an automobile contained illegal drugs,⁵ officers of the Washington, D.C. Metropolitan Police stopped the car and asked its driver, Albert Ross, to step out. As one officer searched Ross's person, another noticed a bullet on the front seat of the car. They then searched the inside of the car and found a pistol in the glove compartment. At this point, Ross was arrested and handcuffed.⁶

One of the officers unlocked the car's trunk and discovered a zippered red leather pouch and a closed brown paper bag.⁷ The policeman opened the paper bag and found several smaller glassine bags holding a white powder. He returned the paper bag to the trunk and an officer drove Ross's car to police headquarters.

One of the same policemen then made a thorough search of the vehicle, including a search of the paper bag and the leather pouch.⁸ Neither this search nor the previous opening of the paper bag was conducted pursuant to a search warrant.

A federal grand jury in the District of Columbia indicted Ross for possession of heroin, possession of heroin with the intent to distribute, carrying a pistol without a license, and possessing a firearm after having been previously convicted of a felony.⁹ The trial court denied Ross's motion to suppress the evidence taken from the pouch and bag, and a jury found Ross guilty of possession of narcotics with intent to distribute.¹⁰

A three-judge panel of the United States Court of Appeals for the

⁵ The officers did not have a warrant to search the car or to arrest Ross. They were acting on a tip from a reliable narcotics informant that "Bandit" (a/k/a Albert Ross) was selling drugs from his car on a Washington, D.C., street. After locating a parked automobile that matched the informant's description, the officers continued to patrol the neighborhood, waiting for the owner of the car to return to the vehicle. Soon the officers saw the car being driven around a corner from where it had been parked and, after overtaking the vehicle, they found that the driver matched the description provided by the informant. 102 S. Ct. at 2160.

⁶ Ross did not have a license for the pistol. *United States v. Ross*, 650 F.2d 1159, 1162 (D.C. Cir. 1981) (en banc).

⁷ The bag was "about the size of a lunch bag," "closed but unsealed." *Id.*

⁸ The paper bag contained heroin and the pouch contained \$3,200 in currency. *Id.*

⁹ *Id.*

¹⁰ 21 U.S.C. § 841(a) (1970).

District of Columbia reversed Ross's conviction.¹¹ The court relied upon *Arkansas v. Sanders*¹² to distinguish between the two containers. The majority held that Ross had a reasonable expectation of privacy in the pouch, but not in the paper bag, so that on retrial only the contents of the bag could be admitted as evidence.¹³

The court of appeals, sitting en banc, reconsidered the decision.¹⁴ After rejecting the original panel's "unworthy container" distinction and observing that *Arkansas v. Sanders*¹⁵ merely restated *United States v. Chadwick*,¹⁶ the court analyzed the situation in terms of those two container cases.¹⁷ The court noted that the automobile exception was based on the "inherent mobility" of the automobile¹⁸ and the burden on the police in detaining a car while awaiting a warrant. Thus, it held that the exception, "invoked to justify stopping the car and placing the items found in it under police control cannot be stretched to encompass the warrantless openings."¹⁹ The court of appeals upheld the reversal of Ross's conviction and remanded the case.²⁰

¹¹ *United States v. Ross*, No. 79-1624, slip op. (D.C. Cir. Apr. 17, 1980).

¹² 442 U.S. 753 (1979).

¹³ The initial search of the car's passenger compartment and trunk was valid under *Carroll v. United States*, 267 U.S. 132 (1925), and *Chambers v. Maroney*, 399 U.S. 42 (1970). No. 79-1624, slip op. (D.C. Cir. Apr. 17, 1980).

¹⁴ *United States v. Ross*, 655 F.2d 1150 (D.C. Cir. 1981) (en banc).

¹⁵ 442 U.S. 753 (1979).

¹⁶ 433 U.S. 1 (1977). The Court also held that the rule in *Sanders* applied retroactively to the date of the *Chadwick* decision and that Ross had standing to challenge the evidence. 655 F.2d at 1164-66.

¹⁷ In *Chadwick*, police had probable cause to believe that a footlocker placed in respondent's car contained narcotics. After the footlocker was taken from a train and set in the trunk of the car, and before the vehicle had moved, the officers arrested three people and conducted a warrantless search of the footlocker. 433 U.S. at 3-4.

In *Sanders*, officers had probable cause to believe that a suitcase taken from a plane and placed into the trunk of a taxi contained illegal drugs. When the taxi drove away, police pursued and then stopped the taxi, told the driver to open the trunk, and conducted a warrantless search of the suitcase. 442 U.S. at 755. In both cases the Supreme Court held that the searches violated the fourth amendment and that the evidence discovered could not be admitted at trial. 433 U.S. at 15-16; 442 U.S. at 766.

¹⁸ 655 F.2d at 1169.

¹⁹ *Id.* (footnotes omitted).

²⁰ *Id.* at 1171. Four of the eleven judges dissented. Judge Tamm argued that the search of the paper bag was justified because Ross did not have a reasonable expectation of privacy in the bag, although he did concerning the pouch. *Id.* at 1171-72 (Tamm, J., dissenting). Judge Robb agreed that precedent allowed the search of the bag alone, but found the distinction "impractical" and "amorphous." *Id.* at 1180 (Robb, J., dissenting). Judge Wilkey argued that the *Sanders* decision should not have been applied retroactively to the time of Ross's arrest, and that the searches should have therefore been valid. *Id.* at 1181 (Wilkey, J., dissenting). Judge MacKinnon concurred with the points made by Judges Tamm and Wilkey. *Id.* at 1180 (MacKinnon, J., dissenting).

B. THE SUPREME COURT OPINIONS

The Supreme Court considered two questions in *Ross*: (1) Whether the automobile exception, which permits the warrantless search of any motor vehicle the police have probable cause to believe contains contraband, should apply to the search of any closed containers within an automobile; and (2) whether the Court should reconsider its decision in *Robbins v. California*.²¹ The majority, per Justice Stevens,²² held that the automobile exception applied to any containers found within an automobile that is undergoing a valid warrantless search.²³ The Court thus overruled *Robbins v. California*²⁴ and limited much of the language of *Arkansas v. Sanders*.²⁵

Justice Stevens found the facts in *Ross* comparable to those in the leading automobile exception cases, *Carroll v. United States*²⁶ and *Chambers v. Maroney*.²⁷ In *Carroll*, prohibition agents conducted a warrantless search of a car on a probable cause belief that it was transporting liquor. In validating the search, the *Carroll* Court created a limited exception to the fourth amendment warrant requirement, observing that in the time it would have taken the officers to obtain a warrant, the car would have been out of the jurisdiction.²⁸ In *Chambers*, the Court extended the ex-

²¹ 453 U.S. 420 (1981). The *Robbins* plurality stated that the automobile exception did *not* justify the warrantless search of containers in a car that is being searched. A closed opaque container "may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile." *Id.* at 428.

²² Justice Stevens was joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and O'Connor, with Justices Blackmun and Powell each filing short concurrences. Justices White and Marshall each wrote a dissent and Justice Brennan joined in Justice Marshall's opinion.

²³ If police have legitimately stopped an automobile and have probable cause to believe that contraband is hidden within it, they "may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.'" 102 S. Ct. at 2159 (footnote omitted).

²⁴ 453 U.S. 420 (1981).

²⁵ 442 U.S. 753 (1979). Some of the language in *Sanders* implied that police need a warrant in order to search any luggage found in an automobile. See *infra* notes 38-39 and 93 and accompanying text.

²⁶ 267 U.S. 132 (1925).

²⁷ 399 U.S. 42 (1970). The Court reaffirmed the automobile exception in *Texas v. White*, 423 U.S. 67 (1975) (probable cause search of an automobile once the car had been taken to the police station); *Brinegar v. United States*, 338 U.S. 160 (1949) (warrantless search of an automobile after suspect admitted to having illegal liquor in the vehicle); *Scher v. United States*, 305 U.S. 251 (1938) (search of an automobile on the probable cause belief that illegal liquor was contained therein); *Husty v. United States*, 282 U.S. 694 (1931) (warrantless search of an automobile upon probable cause that it was transporting illegal liquor).

²⁸ 267 U.S. at 153. Chief Justice Taft noted the:

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 locality or jurisdiction in which the warrant must be sought.

ception to automobiles that had been seized and taken to the police station, reasoning that if an immediate search of the car is justified, a later search at the station would be no greater infringement on the owner's fourth amendment rights.²⁹ As Justice Stevens interpreted these cases, so long as an officer has probable cause³⁰ to believe that a vehicle contains contraband, the vehicle may be searched immediately or back at the station without the officer ever having to obtain a warrant.³¹

Justice Stevens distinguished *United States v. Chadwick*³² and *Arkansas v. Sanders*³³ as being "container cases" while *Ross* was an "automobile case."³⁴ According to Justice Stevens, in both *Chadwick* and *Sanders*, the officers had probable cause to believe that the specific containers held the contraband and their subsequent connection with automobiles was "coincidental."³⁵ In neither case did an officer have probable cause to justify the warrantless search of the entire vehicle; the probable cause applied only to the luggage.³⁶

Justice Stevens also read *Sanders* as more than a mere reiteration of the *Chadwick* holding.³⁷ Some of the language in *Sanders* can be read to imply that *all* opaque closed containers in automobiles must be searched pursuant to a warrant.³⁸ Justice Stevens believed that *Sanders* exceeded *Chadwick* in "broadly suggest[ing] that a warrantless search of a container found in an automobile could never be sustained as a part of a warrantless search of the automobile itself."³⁹ While he had joined in the *Chadwick* majority, in *Sanders* Justice Stevens joined Chief Justice Burger's concurrence which complained that the majority "seems to treat this case as if it involved the 'automobile' exception to the warrant

Id.

²⁹ For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

339 U.S. at 527.

³⁰ "[T]he probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." 102 S. Ct. at 2164.

³¹ *Id.* The *Chambers* Court justified the later search of the car at the station on the basis of practicality and officer safety. Justice Stevens, in *Ross*, also claimed that "[t]hese decisions are based on the practicalities of the situations presented" 102 S. Ct. at 2163 n.9.

³² 433 U.S. 1 (1977).

³³ 442 U.S. 753 (1979).

³⁴ 102 S. Ct. at 2166-67.

³⁵ *Id.* (citing *Sanders*, 442 U.S. at 767 (Burger, J., concurring)).

³⁶ 102 S. Ct. at 2167.

³⁷ The circuit court for the District of Columbia had stated that *Sanders* was only a reiteration of *Chadwick*. 655 F.2d at 1162.

³⁸ See *infra* note 93 and accompanying text.

³⁹ 102 S. Ct. at 2167.

requirement. It is not such a case."⁴⁰ In Justice Stevens's *Ross* opinion, the reasoning in *Chadwick* and *Sanders* was not applicable to *Ross*'s situation, where police did have probable cause to search the entire automobile.

The Court in *Robbins v. California*,⁴¹ extending the language of *Sanders*,⁴² required a warrant for the search of any containers found during the probable cause search of a car, in the absence of exigent circumstances. In *Ross*, however, Justice Stevens pointed out that since the parties in *Robbins* did not address the issue of extending the automobile exception to containers in cars,⁴³ the *Robbins* case was decided—improperly—on the basis of *Chadwick* and *Sanders*.⁴⁴

In analyzing the precedents, Justice Stevens noted that prior to the *Chadwick* and *Sanders* decisions, searches of containers found during the course of a valid warrantless automobile search were permissible.⁴⁵ Justice Stevens reasoned that a contrary rule—requiring a warrant to search containers in automobiles that police have probable cause to believe contain contraband—would nullify the practical consequences of the prior decisions.⁴⁶

Justice Stevens then compared the search of an automobile to the

⁴⁰ 442 U.S. at 766 (Burger, J., concurring). As Justice Stevens wrote in *Ross*, "The [*Sanders*] Court did not suggest that it mattered whether probable cause existed to search the entire vehicle." 102 S. Ct. at 2167.

⁴¹ 453 U.S. 420 (1981). In *Robbins*, officers found bundles of marijuana inside of two green plastic bags during the search of an automobile upon probable cause. The plurality, Justices Stewart, Brennan, Marshall, and White, held that the police should have obtained a warrant before opening the bags. *Id.* at 428.

⁴² See *supra* note 24.

⁴³ In his dissent to *Robbins*, Justice Stevens argued for the same position later adopted by the majority in *Ross*: "the 'automobile exception' to the warrant requirement therefore provided each officer with the authority to make a thorough search of the vehicle—including the glove compartment, the trunk, and any containers in the vehicle that might reasonably contain contraband." 452 U.S. at 444 (Stevens, J., dissenting).

⁴⁴ 102 S. Ct. at 2168.

⁴⁵ *Id.* at 2169-70 (footnote omitted). In *Carroll v. United States*, 267 U.S. 132 (1925), agents tore open the rear seat of an automobile to find contraband. In *Husty v. United States*, 282 U.S. 694 (1931), illegal whiskey was found in a search of burlap bags inside of a car. The officers in *Scher v. United States*, 305 U.S. 251 (1938), opened paper packages in a car trunk and found illegal liquor. In *Chambers*, weapons and stolen property were found in a secret compartment under the dashboard of a car. In all of these cases, the Court upheld the validity of the warrantless searches.

Justice Stevens emphasized that the Court in earlier cases had never considered any arguments calling for warrants in the searches of containers in legitimately stopped vehicles. 102 S. Ct. at 2169-70.

⁴⁶ "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." *Id.* at 2169.

search of a house.⁴⁷ A warrant to search a house is not limited by any separate acts of opening or entry that the searching officer must perform. Claiming that a search under the automobile exception has the same scope as one conducted pursuant to a warrant, Justice Stevens declared that separate acts of entry or opening (as in opening a glove compartment or suitcase) should not in either case be a bar to the efficient completion of the search.⁴⁸ The only difference between the two searches is that under the automobile exception, "[o]nly the prior approval of a magistrate is waived"⁴⁹

Thus, the *Ross* majority overruled *Robbins v. California* and the "broad" language of *Arkansas v. Sanders*.⁵⁰ "If probable cause justified the search of a lawfully stopped vehicle, it justified the search of every part of the vehicle and its contents that may conceal the object of the search."⁵¹

Justices Blackmun and Powell, although having some theoretical differences with the majority opinion, concurred.⁵² Both recognized the importance of establishing clear guidelines for the police and lower courts to follow, as well as the need to clear up the confusion in the area of warrantless searches.⁵³

⁴⁷ *Id.* at 2170.

⁴⁸ *Id.* at 2170-71.

⁴⁹ *Id.* at 2172. Since the officer conducting the warrantless search is not protected by a magistrate's approval, Justice Stevens suggested that the threat of a law suit should deter the police from abusing their power. *Id.* at 2172 n.32.

⁵⁰ *Ross* overrules "the portion of the opinion in *Arkansas v. Sanders* on which the plurality in *Robbins* relied." *Id.* at 2172. See *infra* note 93.

⁵¹ *Id.*

⁵² Justice Blackmun agreed that the automobile exception should apply to the search of containers within automobiles. As he declared in his *Sanders* dissent, "[I]t would be better to adopt a clear-cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll* and *Chambers*." *Arkansas v. Sanders*, 442 U.S. at 772 (Blackmun, J., dissenting). He departed from the *Ross* majority in his disagreement with the results in *Chadwick* and *Sanders*. While he believed that the *Chadwick* footlocker search should have been upheld as a search incident to arrest, 433 U.S. at 19 (Blackmun, J., dissenting), the *Sanders* search should have been allowed under the automobile exception, 442 U.S. at 796 (Blackmun, J., dissenting). According to Blackmun, the Court should clarify the confusing distinction between cases where police have probable cause to search a container that is placed into a car, and those where police have probable cause to search a car in general. 442 U.S. at 770-71 n.3. He concurred in *Ross* "[i]n order to have an authoritative ruling" that established a bright-line rule for police to follow. 102 S. Ct. at 2173 (Blackmun, J., concurring).

While Justice Powell prefers a case-by-case method of review for searches over Stevens's bright-line rule in *Ross*, he concurred, as did Justice Blackmun, because the *Ross* decision provides specific guidance for police in conducting automobile searches. 102 S. Ct. at 2173 (Powell, J., concurring). Powell tempered his concurrence by stating "that in many situations one's reasonable expectation of privacy may be a decisive factor in a search case." *Id.* He had emphasized this point in his majority opinion in *Sanders*. 442 U.S. at 764-65.

⁵³ 102 S. Ct. at 2173 (Blackmun, J., concurring); *id.* (Powell, J., concurring).

Justice Marshall, in a dissent joined by Justice Brennan,⁵⁴ pointed out four significant flaws in the majority opinion. According to Justice Marshall, the most egregious error in *Ross* was that "[t]he Court simply ignores the critical function that a magistrate serves."⁵⁵ A magistrate serves as a check on the power of individual police officers, prevents the evaluation of the reasonableness of a search from becoming biased through hindsight, and assures the public of the orderly process of the law.⁵⁶

Justice Marshall also contended that the majority decision was not based upon either of what he saw as the traditional justifications for the automobile exception: the exigency presented by the automobile's mobility⁵⁷ and the diminished expectation of privacy in a car.⁵⁸ The seizure of containers does not present police with the practical problems that are involved in the impounding of an automobile.⁵⁹ Moreover, a container does not suddenly shed its ability to keep one's possessions private once it is placed in a car.⁶⁰

According to Justice Marshall, the *Ross* majority also distorted "the letter and the spirit of [the] automobile search cases."⁶¹ For example, the basis of *Carroll* was the impracticability of obtaining a warrant in a specific situation. As Chief Justice Taft wrote for the *Carroll* Court, "[i]n cases where the securing of a warrant is reasonably practicable, it must be used"⁶² Justice Marshall took issue with the majority's suggestion that since no arguments for the need of a warrant in the search of containers in an automobile were made in 1925, such arguments would be ineffective now.⁶³ The dissent emphasized the difference in terms of mobility between a glove compartment or a trunk—which, as parts of

⁵⁴ Justice White agreed with much of this dissent and stated that he would not overrule *Robbins v. California*. 102 S. Ct. at 2173 (White, J., dissenting).

⁵⁵ *Id.* at 2174 (Marshall, J., dissenting). "This Court has long insisted that the inference of probable cause be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* (citing *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972)).

⁵⁶ *Id.* at 2174-75. See *infra* notes 146-47 and accompanying text.

⁵⁷ "[T]he inherent mobility of the vehicle often creates situations in which the police's only alternative to an immediate search may be to release the automobile from their possession." *Id.* at 2175 (footnote omitted).

⁵⁸ "By focusing on the defendant's reasonable expectation of privacy, the Court [until the present case] has refused to require a warrant in situations where the process of obtaining such a warrant would be more intrusive than the actual search itself." *Id.* at 2176.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2178.

⁶² *Carroll v. United States*, 267 U.S. at 156, cited at 102 S. Ct. at 2178.

⁶³ "I would hesitate to rely upon the 'professional understanding' of the Fourteenth Amendment, or of *Plessy v. Ferguson* . . . in the early part of this Century as justification for not granting Negroes constitutional protection." 102 S. Ct. at 2178 n.7 (Marshall, J., dissenting) (citations omitted).

the car, share the same exigency considerations as the car itself—and luggage or containers that may be readily removed from the car.⁶⁴

Finally, Justice Marshall found the majority opinion impossible to reconcile with the results of *Chadwick* and *Sanders*. Under *Chadwick* and *Sanders*, containers that police have probable cause to believe conceal contraband cannot be searched without a warrant, in the absence of consent, a custodial arrest, or exigent circumstances.⁶⁵ Under *Ross*, however, containers that are in automobiles subject to a warrantless search upon probable cause may be opened without a warrant.⁶⁶ Justice Marshall stated that such a distinction “hardly indicates that the majority’s approach has brought clarification to this area of the law.”⁶⁷

Justice Marshall posited that the majority’s true purpose was to advance efficiency in police work.⁶⁸ After *Ross*, police may follow through on their probable cause beliefs without being checked by a magistrate or hindered by a locked suitcase.⁶⁹ The dissent rejected efficiency as a base for constitutional law⁷⁰ and warned that the privacy rights of people traveling in cars would be severely limited by this decision.⁷¹

II. ANALYSIS

A diminution of constitutional protections in favor of broadening the scope of permissible police activities requires strong justification. The majority’s equation of containers with the vehicles in which they may lie misapplies the precedents and the traditional justifications behind the once narrow automobile exception to the fourth amendment warrant requirements.⁷² In addition, the new rule does not succeed in

⁶⁴ *Id.* at 2179.

⁶⁵ *See, e.g., Sanders*, 442 U.S. at 766 (“[I]nsofar as the police are entitled to search . . . luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway.”).

⁶⁶ “This rule plainly has peculiar and unworkable consequences: the Government ‘must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient to know exactly where the contraband was located.’” 102 S. Ct. at 2180 (Marshall, J., dissenting) (quoting *United States v. Ross*, 655 F.2d 1159, 121 (D.C. Cir. 1981) (Wilkey, J., dissenting)).

⁶⁷ *Id.* at 2181.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2181-82.

⁷⁰ “I had thought it well established that ‘the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.’” 102 S. Ct. at 2181 (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)) (footnote omitted).

⁷¹ *Id.*

⁷² The traditional interpretation of the fourth amendment is that searches and seizures are unconstitutional only if they are unreasonable. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN L. REV. 349, 358 (1974). In fourth amendment cases, “what the Court is doing, in large part, is making a judgment as to the scope of the word ‘unreasonable’ as it applied to searches and seizures in the Fourth Amendment.” E. GRISWOLD, *SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT* 39 (1975). In 1950, the Supreme Court

alleviating the confusion present in the area of warrantless container searches. In *Ross*, the Court has thus improperly relaxed the constitutional restrictions on warrantless searches.

A. THE TRADITIONAL REASONING

1. *Exigent Circumstances and the Mobility of the Vehicle*

The Supreme Court created the automobile exception in the 1925 landmark case, *Carroll v. United States*.⁷³ In *Carroll*, the Court held that it would not have been "reasonably practicable" for the police to have obtained a magistrate's evaluation of whether the officers had probable cause to believe that an automobile contained contraband.⁷⁴ The Court upheld their immediate search of the car as necessary since "the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."⁷⁵ Under *Carroll*, an officer must have probable cause to believe that a motor vehicle is carrying contraband and must also be presented with exigent circumstances before the exception to the warrant applies.⁷⁶

For many years, the *Carroll* doctrine remained a very narrow exception, not often used to justify searches.⁷⁷ In 1970, however, the Court

stated that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

The Court has retreated from its position in *Rabinowitz* in recent years. "This view, however, overlooks the second clause of the Amendment. The warrant Clause of the Fourth Amendment is not dead language." *United States v. United States District Court*, 407 U.S. 297, 315 (1972). The more recent interpretation is that the reasonableness clause is defined in terms of the warrant clause. "[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 exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted).

Amsterdam puts the exceptions into three categories: "consent searches, a very limited class of routine searches [for example, border searches or the search of impounded vehicles], and certain searches conducted under circumstances of haste that render the obtaining of a search warrant impracticable." Amsterdam, *supra* note 72, at 358. The *Ross* decision seems to add an exception based upon probable cause alone to this list, 102 S. Ct., at 2181-82 (Marshall, J., dissenting), thus downgrading the warrant clause of the fourth amendment to the "dead language" position it occupied after *Rabinowitz*.

⁷³ 267 U.S. 132 (1925).

⁷⁴ *Id.* at 156.

⁷⁵ *Id.* at 153.

⁷⁶ See J. HALL, JR., SEARCH AND SEIZURE 268 (1982); Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 563-64 (1982); Note, *Fourth Amendment—Of Cars, Containers, and Confusion*, 72 J. CRIM. L. & CRIMINOLOGY 1171, 1192 (1981); Note, *Robbins and Belton: Conflicting Signals from the Supreme Court on Search and Seizure of Containers in Automobiles*, 54 MISS L.J. 227, 233 (1982).

⁷⁷ LaFave asserts that the *Carroll* doctrine did not become important until the Court, in *Chimel v. California*, 395 U.S. 752 (1969), limited the scope of a search incident to arrest to the area within the immediate control of the arrestee. Thus restricted, the police reverted to

broadened the scope of the exception in *Chambers v. Maroney*.⁷⁸ The Court in *Chambers*, while seeming to adhere to the exigency requirement,⁷⁹ permitted a warrantless search in a situation where there was no threat that the car would be driven away or that the officers would be harmed. Under *Chambers*, if the police have the right to conduct an immediate search of a car—through the coexistence of probable cause and exigent circumstances—that right to search “vests” in the police⁸⁰ and validates a later search of the automobile at the station house.⁸¹ Thus, the validity of the search in *Chambers* did not rest upon the exigency justification. Furthermore, because the Court did not want to permit the warrantless seizure of a car while prohibiting a warrantless search, it held a search of the car to be constitutionally equivalent with the car’s seizure.⁸²

Justice Harlan, dissenting in *Chambers*, wrote “[w]here nothing in the situation makes impracticable the obtaining of a warrant, I cannot join the Court in shunting aside that vital Fourth Amendment safeguard.”⁸³ Commentators have agreed with Justice Harlan that the Supreme Court in *Chambers* incorrectly strayed from the exigency requirement for the automobile exception.⁸⁴

The Court’s later decisions in *Coolidge v. New Hampshire*⁸⁵ and *Cardwell v. Lewis*⁸⁶ reflect the confusion generated by the *Chambers* decision. In holding that the police had improperly searched an impounded car, the *Coolidge* plurality seemed to reaffirm the importance of exigency: “Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant.”⁸⁷ In *Cardwell v. Lewis*,

the automobile exception to justify the warrantless search of an entire car. 2 W. LAFAVE, SEARCH AND SEIZURE 511-12 (1978).

⁷⁸ 399 U.S. 42 (1970).

⁷⁹ “Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.” *Id.* at 51.

⁸⁰ C. MOYLAN, THE RIGHT OF THE PEOPLE TO BE SECURE 88 (1976).

⁸¹ 399 U.S. at 52.

⁸² *Id.*

⁸³ *Id.* at 64 n.9 (Harlan, J., dissenting).

⁸⁴ LaFave stated that “*Chambers* cannot be convincingly rationalized in terms of the oft-stated principle that a search warrant is required except in exigent circumstances . . .” 2 W. LAFAVE, SEARCH AND SEIZURE 514 (1978). Lewis Katz, agreeing with LaFave, complained: “The *Chambers* Court . . . extended the warrant requirement waiver to a situation where it was demonstrably unnecessary.” Katz, *supra* note 76, at 566. Joseph Grano also criticized the *Chambers* decision: “[U]nder a true exigent circumstances rationale, no persuasive argument can be made for the retention of *Chambers* . . . the Court in *Chambers* departed from the only rationale that gives appropriate respect to the fourth amendment warrant requirement.” Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 645-46 (1982) (footnotes omitted).

⁸⁵ 403 U.S. 443 (1971).

⁸⁶ 417 U.S. 583 (1974).

⁸⁷ 403 U.S. at 464.

however, the Court upheld the warrantless search of the exterior of a parked car that had been towed to police headquarters.⁸⁸ The basis of the *Cardwell* decision was that the car owner had a diminished privacy expectation in his car.⁸⁹

In *United States v. Chadwick*,⁹⁰ the Court applied the concept of exigency to the warrantless search of containers. In defining when containers could be searched without a warrant, Chief Justice Burger declared, "[W]hen no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority."⁹¹ Luggage in an automobile does not share the same degree of mobility as the car does because the police can always remove containers.⁹² Two years later in *Arkansas v. Sanders*, the Court reached a similar conclusion: "Once the police have seized a suitcase . . . the extent of its mobility is in no way affected by the place from which it was taken. Accordingly . . . there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places."⁹³

In 1981, the Court in *Robbins v. California*⁹⁴ relied upon the *Chadwick* and *Sanders* container cases to invalidate the warrantless search of containers in a car trunk.⁹⁵ As Justice Stewart wrote for the plurality: "Those cases made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else."⁹⁶ Following the *Robbins* decision, the en banc court of appeals in *Ross* invalidated the search of the paper bag and the leather pouch due to the

⁸⁸ 417 U.S. at 592.

⁸⁹ *Id.* at 591-92. "*Cardwell* makes no sense at all. It states things that were totally unnecessary to the decision, and it was seemingly decided contrary to *Coolidge* and *Carroll*. The slightest change in the facts (and, alas, even the Court) can alter the result and the course of the law." J. HALL, JR., SEARCH AND SEIZURE 265 (1982) (footnote omitted).

⁹⁰ 433 U.S. 1 (1977). See *supra* note 17.

⁹¹ *Id.* at 15.

⁹² *Id.* at 13.

⁹³ 442 U.S. at 763-64 (footnotes omitted). This is some of the "broad language" that the *Ross* decision overruled. *Ross* also overruled such phrases as: "[There is] no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police." *Id.* at 765 (footnote omitted). See *supra* notes 38-39 and accompanying text.

⁹⁴ 453 U.S. 420 (1981) (plurality decision).

⁹⁵ The police stopped *Robbins* for driving erratically. When officers approached the driver's window, they smelled marijuana smoke coming from the car. A subsequent search of the car revealed two large green plastic bags. After opening them without a warrant, the officers discovered that they contained large quantities of marijuana. *Id.* at 422.

⁹⁶ *Id.* at 425. Since California could not show how the facts fit into any of the exceptions to the warrant requirement, a search of the containers in the car's luggage compartment was illegal. *Id.* at 428-29.

lack of exigent circumstances.⁹⁷

The Supreme Court in *Ross* refused to follow the logic of *Chadwick* and *Sanders* and overruled *Robbins*. In *Ross*, Justice Stevens dealt with the exigency justification in terms of the *Chambers* decision. He reasoned that if the circumstances allowed a seizure of the containers, a search of them would also be permissible.⁹⁸ However, Justice Stevens failed to give weight to the difference between an automobile and a container. Even if one could accept the *Chambers* reasoning equating the search of a car with its seizure, such logic could not rationally apply to containers. The officers in *Ross* were never presented with exigent circumstances that could justify the search of the containers. Only a seizure of the containers was justified. The search of the car in *Chambers* was justified on the basis of convenience to both the police and the suspect.⁹⁹ In contrast, depriving a motorist of a paper bag or a suitcase for the time necessary for the police to obtain a warrant is not nearly as great an inconvenience for either party.

In effect, the *Ross* Court circumvented the exigency requirement and upheld the search simply because the practice of conducting searches without having to obtain warrants is more practical for the police.¹⁰⁰ Since exigent circumstances were not present, the officers in *Ross* should have only seized the containers that they had probable cause to believe held contraband. They then could have applied for a warrant, and a magistrate would have evaluated the grounds for their opinion.

2. *A Diminished Expectation of Privacy*

The diminished expectation of privacy claimed to be inherent in automobiles¹⁰¹ was not one of the original justifications for the automobile exception. The Court in *Carroll v. United States* did not mention such a privacy expectation as the basis for distinguishing automobiles from immobile objects. In fact, many critics believe that later Supreme Court decisions have misapplied this concept to circumvent the exigency

⁹⁷ 655 F.2d at 1168 (footnote omitted). "[B]oth containers were securely removed from Ross's reach at the time of the seizure; the police entertained no belief that the containers or their contents endangered their personal safety; with the pouch and bag in police possession there was no risk that the evidence would be lost or destroyed before a warrant could be obtained." *Id.* (citation omitted).

⁹⁸ 102 S. Ct. at 2163 n.9.

⁹⁹ 399 U.S. 42, 51-52 (1970).

¹⁰⁰ 102 S. Ct. at 2163 n.9. Some jurisdictions permit magistrates to authorize search warrants by telephone or radio. Justice Stevens's practicality argument for bypassing the warrant requirement is significantly weakened if a warrant can be obtained over the phone. *See infra* note 150.

¹⁰¹ *See infra* note 112 and accompanying text.

requirement.¹⁰²

Even if the concept properly validates warrantless searches of automobiles, there is, however, no logical rationale for allowing warrantless searches of containers in automobiles based on a diminished privacy expectation in such containers.

In *Katz v. United States*,¹⁰³ the Supreme Court for the first time recognized a protected "expectation of privacy" right under the fourth amendment. The Court held that the fourth amendment protects "what [one] seeks to preserve as private."¹⁰⁴ During the same term, in *Terry v. Ohio*,¹⁰⁵ the Court stated that "wherever an individual may harbor a reasonable 'expectation of privacy' . . . he is entitled to be free from unreasonable governmental intrusion."¹⁰⁶

The Court in *Chambers v. Maroney* equated the search of an automobile to its seizure in terms of intrusiveness.¹⁰⁷ It held that the search was no greater violation of the owner's privacy than was a seizure of the car.¹⁰⁸ Three years later, Justice Powell, in his concurrence to *Almeida-Sanchez v. United States*,¹⁰⁹ stated that "[t]he search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building."¹¹⁰ A plurality of the Court in *Cardwell v. Lewis*¹¹¹ applied the expectation of privacy concept to justify the warrantless search of a parked car that had been impounded. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects It travels public thoroughfares where both its occupants and its contents are in plain view."¹¹² In *Chambers* and *Cardwell*, the Court utilized the rationale that the search of an automobile violates no significant privacy expectation to validate searches in nonexigent circumstances.¹¹³

¹⁰² See Grano, *supra* note 84, at 638; Katz, *supra* note 76, at 570; Note, *Fourth Amendment—Of Cars, Containers, and Confusion*, 72 J. CRIM. L. & CRIMINOLOGY 1172, 1190 (1981).

¹⁰³ 389 U.S. 347 (1967).

¹⁰⁴ *Id.* at 351.

¹⁰⁵ 392 U.S. 1 (1967).

¹⁰⁶ *Id.* at 9.

¹⁰⁷ 399 U.S. 42, 51-52 (1970). See *supra* note 82 and accompanying text.

¹⁰⁸ But see *United States v. Van Leeuwen*, 397 U.S. 249 (1970). In *Van Leeuwen*, decided the same year as *Chambers*, the Court held that a temporary detention (*seizure*) of mail without a warrant is less an intrusion than the warrantless *search* of it would have been. The latter would have been unconstitutional. *Id.* at 252.

¹⁰⁹ *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring).

¹¹⁰ *Id.*

¹¹¹ 417 U.S. 583 (1974) (plurality decision).

¹¹² *Id.* at 590. The plurality went so far as to state that "insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry." *Id.* at 591.

¹¹³ See *supra* notes 79-89 and accompanying text.

The majority in *United States v. Chadwick*¹¹⁴ noted the difference between the expectations of privacy in automobiles and privacy expectations in containers, and invalidated the warrantless search of a footlocker: "Luggage contents are not open to public view . . . 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."¹¹⁵

In *Arkansas v. Sanders*,¹¹⁶ the Court applied *Chadwick*'s expectation of privacy distinction between cars and containers to invalidate the warrantless search of a suitcase. According to Justice Powell, writing for the majority, "[A] suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations."¹¹⁷ In a footnote, however, Justice Powell commented that not *all* containers found in a car during the course of a search are fully protected by the fourth amendment. Justice Powell noted that some containers, as a result of their shape or the material of which they are made, "cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance."¹¹⁸ This ambiguous dicta resulted in many conflicting lower court opinions as to what containers could be searched without a warrant in any given situation.¹¹⁹

The Court, in *Robbins v. California*,¹²⁰ tried to eliminate the chaos resulting from Powell's comment. The *Robbins* plurality interpreted his

¹¹⁴ 433 U.S. 1 (1977).

¹¹⁵ *Id.* at 13.

¹¹⁶ 442 U.S. 753 (1979).

¹¹⁷ *Id.* at 764.

¹¹⁸ *Id.* at 764 n.13. As examples of such containers, Powell mentioned a kit of burglar tools and a gun case. *Id.*

¹¹⁹ Many courts interpreted Powell's footnote 13 as recognizing an expectation of privacy for all containers whose contents could not readily be determined from the outside. *See, e.g.*, *United States v. Montano*, 613 F.2d 147 (6th Cir. 1980) (per curiam) (invalidating the warrantless search of a suitcase in an automobile); *United States v. Dien*, 609 F.2d 1038 (2d Cir. 1979), *aff'd*, 615 F.2d 10 (2d Cir. 1980) (invalidating the warrantless search of sealed cardboard boxes in a vehicle); *United States v. Bella*, 605 F.2d 160 (5th Cir. 1979) (per curiam) (warrantless search of guitar case invalidated); *People v. Minjares*, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, *cert. denied*, 444 U.S. 887 (1979) (invalidating warrantless search of tote bag).

Other courts interpreted footnote 13 as making a "worthy container" distinction, allowing a paper bag to be searched without a warrant while a briefcase would be protected. *See, e.g.*, *United States v. Sutton*, 636 F.2d 96 (5th Cir. 1981) (upheld warrantless search of paper bag in car); *United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980) (validated warrantless search of plastic bags); *United States v. Sanders*, 631 F.2d 1309 (8th Cir.), *cert. denied*, 449 U.S. 1127 (1980) (upheld warrantless search of envelope); *United States v. Milhollan*, 599 F.2d 518 (3d Cir.), *cert. denied*, 444 U.S. 909 (1979) (validated warrantless search of a closed satchel in automobile).

¹²⁰ 453 U.S. 420 (1981).

footnote to mean: "[U]nless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment."¹²¹ The plurality required a warrant for the search of *all* closed opaque containers.¹²² Yet Justice Powell did not join the *Robbins* plurality because he believed that the requirement for a warrant for the search of all closed containers in automobiles was mechanical and ignored the differing privacy interests emphasized in his *Sanders* footnote.¹²³

The *Ross* Court concluded that the privacy expectation that an automobile occupant has toward containers found within his or her car is outweighed by the police's interest in conducting investigations efficiently, without having to deal with the "impracticality" of obtaining search warrants.¹²⁴ Justice Stevens, for the majority, relied upon *Chambers*¹²⁵ for his practicality argument: an immediate search is more efficient than the impounding or securing of an item until a warrant can be obtained, and such a search is no more intrusive on private rights.¹²⁶ All that is needed is probable cause, which is no longer evaluated before the

¹²¹ *Id.* at 427.

¹²² *Id.* at 428.

¹²³ *Id.* at 433 (Powell, J., concurring).

In *New York v. Belton*, 453 U.S. 454 (1981), decided the same day as *Robbins*, and with facts strikingly similar to those in *Robbins*, the Court permitted a warrantless search of an automobile's passenger compartment and any containers therein when that search is incident to a custodial arrest. *Id.* at 460. The Court's rationale was that the arrest preempts any privacy expectation that the arrestee may have in his car or the containers within the passenger compartment. *Id.* at 461. The *Belton* decision established a bright-line rule for police to follow in searches incident to arrest. Similarly, Justice Stevens set out a bright-line test in *Ross* for probable cause searches. Although Stevens never mentioned *Belton*, his opinion in *Ross* appears to reflect that decision. Justice Powell recognized that the *Ross* decision "is consistent with the similar step taken last Term in *Belton v. New York* . . ." 102 S. Ct. at 2173. (Powell, J., concurring).

The Court's decisions distinguish between the two types of searches represented in *Ross* and *Belton*. In a search upon probable cause under the automobile exception, officers may open containers found anywhere within the automobile. In a search incident to a legal arrest, police may search without a warrant only those containers found within the passenger compartment of a car. Logic does not support this distinction between the scope of a search incident to arrest and the scope of a probable cause search. If this trend toward bright-line rules continues, it is likely that the Court will amend the *Belton* rule to conform with the rule in *Ross*.

¹²⁴ 102 S. Ct. at 2163 n.9.

¹²⁵ 399 S. Ct. at 42.

[W]hich is the 'greater' and which is the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.

Id. at 51-52.

¹²⁶ 102 S. Ct. at 2163 n.9.

search but in hindsight.¹²⁷

Justice Stevens ignored the factual differences between *Ross* and *Chambers*. *Chambers* concerned the search of an automobile and the impracticalities resulting from seizing a car while obtaining a search warrant.¹²⁸ The *Chambers* decision rested upon the suspect's diminished privacy expectations in his or her car and the transportation function of the automobile.¹²⁹ Containers are different from automobiles in terms of both mobility and the amount of privacy expected.¹³⁰ Even if a warrantless automobile search can be based upon the owner's imputedly diminished privacy expectation in the car, such a diminished expectation cannot rationally extend to containers that happen to be inside the car at the time it is searched. A search of the containers is a greater intrusion than their seizure.¹³¹ The *Chambers* logic, then, is not applicable to this situation. Hence, the *Ross* majority failed to honor the privacy expectation that the Court itself had read into the fourth amendment in *Katz* and *Chadwick*.

B. SIGNIFICATIONS

1. Continuing Confusion

Justice Stevens, as well as the other members of the *Ross* Court, recognized the importance of clarifying the scope of warrantless searches.¹³² Yet the result of this bright-line ruling is not the clarification that is so badly needed, but a shift of the confusion into the realm of probable cause.

The Court in *Ross* eliminated a major ambiguity that was left over from the *Robbins* decision. Now there are no longer any distinctions based upon the expectation of privacy in different types of containers. The *Ross* decision provided the police with some guidelines as to what behavior is permissible in a car search so that officers no longer have to make metaphysical distinctions as to the nature of different containers in a car. In both probable cause searches of automobiles¹³³ and searches

¹²⁷ See *id.* at 2176-77 (Marshall, J., dissenting).

¹²⁸ Seizing an automobile involves towing it or posting guard at the car. Seizing a paper bag or a footlocker merely requires taking the container to the station in a police car.

¹²⁹ *Chadwick*, 433 U.S. at 14 n.8 (It was the "greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle" that made the *Chambers* Court reluctant to decide whether the immediate search or the immobilization of an automobile is the more serious of the two infringements. "This is clearly not the case with locked luggage.").

¹³⁰ *Id.*

¹³¹ See *supra* note 108.

¹³² 102 S. Ct. at 2161. See also *supra* note 52.

¹³³ *United States v. Ross*, 102 S. Ct. 2157 (1982).

incident to the arrest of the driver or of a passenger,¹³⁴ an officer may open any container found within the car that could possibly hold the object of the search.¹³⁵

A new ambiguity, however, has replaced the one that has been clarified. The validity of a warrantless search of a container in a car now turns on whether an officer's probable cause first concerns the container¹³⁶ or the car.¹³⁷ Since the *Ross* Court did not overrule *Chadwick* or the ruling of *Sanders*, an officer is still required to obtain a warrant if he or she has probable cause to search a container placed in an automobile *after* probable cause has attached to the container. Under *Ross*, though, the officer need not obtain a search warrant if he or she has probable cause to believe that contraband is hidden inside a car, which happens to harbor a container. Thus, one whose container is not in a car when probable cause to search that container arises has more constitutional protection than one whose identical container is inside an automobile for which there is probable cause to search.

Ross will give courts as many interpretational problems as did Justice Powell's footnote in *Sanders*.¹³⁸ Already, a lower court interpreting *Ross*¹³⁹ has observed:

It is obvious from the Court's discussion and treatment of the issues that some container locations are less equal than others, for better or worse and however illogical some of the distinctions in the application may appear. Rules that apply to containers in automobiles do not necessarily apply

¹³⁴ *New York v. Belton*, 453 U.S. 454 (1981). See *supra* note 123.

¹³⁵ The scope of a search incident to arrest is limited to the passenger compartment of the car. *Id.* at 460. See *supra* note 123.

¹³⁶ *United States v. Chadwick*, 433 U.S. 1 (1977). See *supra* note 17 and accompanying text.

¹³⁷ *United States v. Ross*, 102 S. Ct. at 2157 (1982). See *supra* note 51 and accompanying text.

¹³⁸ 442 U.S. at 764-65 n.13. See *supra* notes 118-19 and accompanying text.

¹³⁹ *United States v. White*, No. 80-CR-159, slip op. (N.D. Ill. June 9, 1982). The opinion was written by District Judge Shadur. *Ross* has affected the results of other recent search and seizure cases: *United States v. Riviera*, 684 F.2d 308 (5th Cir. 1982) (warrantless search of vehicles and black polyethylene garbage bags found therein was valid under *Ross*); *United States v. Kelly*, 683 F.2d 871 (5th Cir. 1982) (warrantless search of Winnebago and green plastic bags therein upheld); *United States v. Floyd*, 681 F.2d 265 (5th Cir. 1982) (*Ross* used to uphold warrantless search of containers in car trunk because police had probable cause to believe that the car was transporting illegal drugs); *United States v. Sanchez*, No. 81-1444, slip op. (5th Cir. Sept. 16, 1982) (*Ross* used to validate the warrantless search of a vehicle's false auxiliary gas tank); *State v. Jaso*, — Kan. —, 648 P.2d 1 (Kan. 1982) (*Ross* used to validate the warrantless search of a suitcase in a car that police had probable cause to believe harbored illegal drugs. "[T]he prohibition against a warrantless search of a specific container thought to contain the sought after contraband is still to be distinguished from the authorized search of a vehicle and its contents when the officers only have probable cause to believe that contraband is somewhere in the vehicle." *Id.* at 6.); *Kansas v. Potter*, — Kan. App. 2d. —, 648 P.2d 1162 (1982) (search of luggage in wrecked car invalidated due to lack of probable cause).

with full vigor to containers found elsewhere.¹⁴⁰

Distinguishing between containers on the basis of whether they are in a car at the moment probable cause to search arises destroys the efficacy of Justice Stevens's bright-line rule. It is now necessary to "show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located."¹⁴¹ The police must now determine where the container rule¹⁴² ends and the automobile exception¹⁴³ begins.¹⁴⁴ It is likely that the Court will face this issue again in the future.¹⁴⁵

2. *Efficiency Now a Justification*

The *Ross* majority's efficiency justification is insufficient to support the diminution of constitutional checks upon police power. As Justice Marshall noted in his dissent, the Court has long stressed that the inference of probable cause be approved by a "neutral and detached" magis-

¹⁴⁰ *United States v. White*, No. 80-CR-159, slip op. (N.D. Ill. June 9, 1982). The court held that the evidence obtained during the search of a travel bag could not be admitted because White had consented to let officers search his bag for money and jewels and the officers found money and drugs. This may be an important decision in defining the scope of probable cause in warrantless searches.

¹⁴¹ *Ross*, 655 F.2d at 1201 (Wilkey, J., dissenting).

¹⁴² Under *Chadwick* and *Sanders*, the rule requires a warrant for the search of containers.

¹⁴³ Under *Ross*, no warrant is required for a probable cause search of a car and the containers therein.

¹⁴⁴ In *Robbins v. California*, the container rule and fourth amendment protections were favored over the automobile exception when containers were found during the warrantless search of a car. In *New York v. Belton*, the custodial arrest and the search incident exceptions overrode the container rule and the Court upheld the warrantless search. Now, after the Court readjusted its priorities in *Ross*, the automobile exception overrides the rule from the container cases as long as the containers are in an automobile which police have probable cause to search. Otherwise, the container rule still prevails.

¹⁴⁵ Since *Ross* was decided, the Court has handed down five per curiam judgments concerning the search of items within automobiles. Four of these decisions vacate judgments of lower courts that had invalidated searches on the basis of *Robbins v. California*: *United States v. Sharpe*, 606 F.2d 967 (4th Cir. 1981), *vacated*, 102 S. Ct. 2951 (1982) (marijuana found in shell camper of truck after a 30 to 40 minute warrantless search); *United States v. Cleary*, 656 F.2d 1302 (9th Cir. 1981), *vacated*, 102 S. Ct. 2919 (1982) (warrantless search of unzipped canvas bag in rear of van); *United States v. Spieler*, 646 F.2d 955 (5th Cir. 1981), *vacated*, 102 S. Ct. 2919 (1982) (warrantless search of briefcase and paper bag in car trunk); *Maine v. Patton*, 436 A.2d 387 (Me. 1981), *vacated*, 102 S. Ct. 2919 (1982) (search of a brown paper bag seized from back seat of automobile). The Court remanded all four cases for reconsideration in light of *Ross*. The fifth case, *Michigan v. Thomas*, 106 Mich. App. 601, 308 N.W.2d 170 (1981), *rev'd per curiam*, 102 S. Ct. 3079 (1982), concerned the inventory search of a car that was to be impounded. The Court in *Thomas* merely reiterated the *Chambers* rule that "the justification to conduct . . . a warrantless search does not vanish once the car has been immobilized." *Id.* at 3081.

trate,¹⁴⁶ instead of leaving the ultimate decision of whether probable cause exists with "the officer engaged in the often competitive enterprise of ferreting out crime."¹⁴⁷ Indeed, "the warrant requirement has been a valued part of our constitutional law for decades It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency."¹⁴⁸ This, though, is exactly what the majority in *Ross* did; it weighed fourth amendment protections against the prospect of more efficient law enforcement and found for the latter. The Court's own precedents do not support such a finding.¹⁴⁹

The Court should have held that the automobile exception does not justify the warrantless search of closed opaque containers found in cars. Whatever impracticalities may have resulted would not be severe enough to justify the actual *Ross* holding.¹⁵⁰ While the standard set in

¹⁴⁶ *Shadwick v. Tampa*, 407 U.S. 345, 350 (1972) (citing *Johnson v. United States*, 333 U.S. 10, 14 (1948)). See 102 S. Ct. 2174 (Marshall, J., dissenting).

¹⁴⁷ In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the Court stated:

The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.

Id. at 323 (footnote omitted). See also *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976); *United States v. United States District Court*, 407 U.S. 297, 317 (1972); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Abel v. United States*, 362 U.S. 217, 252 (1960).

¹⁴⁸ *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

¹⁴⁹ The Court recently stated:

the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view . . . that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey v. Arizona, 437 U.S. 385, 393 (1978) (citations omitted). See *supra* note 148 and accompanying text.

¹⁵⁰ Some jurisdictions now authorize magistrates to issue search warrants over the telephone to requesting officers. Federal Rule of Criminal Procedure 41(c)(2)(A), added in 1977, states, "If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means." FED. R. CRIM. P. 41 (C)(2)(A). *United States v. McEachin*, 670 F.2d 1139 (D.C. Cir. 1981), applied the rule to the warrantless search of a house. "[W]e believe that the courts must consider the availability of a telephonic warrant in determining whether exigent circumstances existed, unless it is clear that exigency in a particular case was so great that it precluded recourse to any warrant procedure, however brief." *Id.* at 1147 (footnote omitted). In *United States v. Baker*, 520 F. Supp. 1080 (S.D. Iowa 1981), Rule 41(c)(2) was used to invalidate the warrantless search of a house, since there was sufficient time for the officers to have telephoned for a warrant. In addition, the Supreme Court recently stated in dicta that, "if a magistrate is not nearby, a telephonic search warrant can usually be obtained." *Steagald v. United States*, 451 U.S. 204, 22 (1981).

Some states have procedures for the issuance of telephonic search warrants. Both California, CAL. PENAL CODE §§ 1526(b), 1528(b) (West, 1982) and Arizona, ARIZ. REV. STAT. ANN. §§ 13-3914(c), 13-3915(c) (1978 & Supp. 1981-82), have passed statutes authorizing tel-

Ross saves the police both time and money, and is likely to result in more arrests, these efficiency gains come at the expense of constitutional rights. "This case will have profound implications for the privacy of citizens traveling in automobiles, as the Court well understands."¹⁵¹

In utilizing the automobile exception to justify the *Ross* search, the Court applied an old rule to a novel situation to which the original justifications for the fourth amendment exception cannot be applied. The holding in *Ross*, particularly when combined with the search incident to arrest doctrine,¹⁵² significantly increases the power of officers to conduct warrantless searches of automobiles and containers found therein. Marginal gains in efficiency or clarity cannot justify such an infringement upon constitutional rights.¹⁵³

III. CONCLUSION

In *United States v. Ross*, the Supreme Court expanded the scope of the automobile exception by holding that it justifies certain warrantless searches of closed containers in automobiles.¹⁵⁴ The extension of the doctrine to the search of containers cannot be supported by either of the traditional justifications for the fourth amendment exception: the Court did not find that *Ross* has a diminished privacy expectation in the containers, nor did it find any exigent circumstances. Justice Stevens based his decision upon a doctrine which, at its birth in *Carroll*, would have invalidated the search in *Ross* due to the absence of exigency.

What is needed in this area is a return to the concept of exigent circumstances as the sole justification for the automobile exception.¹⁵⁵ Thus, a warrant would be required for the search of all containers,

ephonetic warrants. In New Jersey, the procedure was validated by the courts in the absence of a statute. See generally J. HALL, JR., SEARCH AND SEIZURE 192-94 (1982).

The widespread adoption of the telephonic warrant procedure would weaken the rationale for the *Ross* decision. If officers are able to radio in to a magistrate for a warrant to conduct a car or container search, it will no longer be impractical for them to obtain warrants prior to the search. In addition, the number of circumstances that can legitimately be labeled as exigent would be significantly reduced.

¹⁵¹ *Ross*, 102 S. Ct. at 2181 (Marshall, J., dissenting).

¹⁵² See *supra* note 123.

¹⁵³ *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

¹⁵⁴ 102 S. Ct. at 2172.

¹⁵⁵ Katz believes that "[t]he Court must reconsider *Chambers* and succeeding automobile exception cases It should reintroduce traditional fourth amendment principles so that the automobile exception is compatible with established search and seizure rules, permitting waiver of the warrant requirement *only* when exigent circumstances or a genuine claim of impracticality exists." Katz, *supra* note 76, at 572. LaFave suggests that the Court consider the question of what constitutes "truly exigent circumstances" for purposes of avoiding the warrant requirement. W. LAFAVE, *supra* note 77, at 543. He cites *Chadwick* as giving examples of what should be considered truly exigent circumstances: when an officer has probable cause to believe that a container houses inherently dangerous items, or evidence which, in

whether located inside or outside of cars, unless the combination of probable cause and exigent circumstances permits otherwise. For example, police should be able to conduct a warrantless search if they have probable cause to believe that a package in an automobile contains a bomb.

A police officer's probable cause belief alone, without a magistrate's impartial review, does not justify the search of closed or locked containers in automobiles. If the Court had remained true to the traditional justifications for the automobile exception, there would be a clear standard for the police to follow: absent exigent circumstances, a warrant would be required to search containers found during an automobile search. The Court's overextension of the automobile exception in *Ross* gives little credence to the fact that there are, after all, *two* clauses in the fourth amendment.¹⁵⁶

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order to be helpful, must be taken at once, or, when the search would terminate ongoing criminal activity. *Id.*

Grano defines truly exigent circumstances as "present only when the police could not have preserved the evidence by making a seizure." Under this definition of exigency, even the search in *Carroll* exceeded constitutional limitations. Grano, *supra* note 84, at 642.

¹⁵⁶ See *supra* note 72.