The Warrantless Search of Closed Containers Under the Automobile Exception: United States v. Ross

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The Warrantless Search Of Closed Containers Under The Automobile Exception: United States v. Ross—The decisions of the United States Supreme Court construing the fourth amendment to the United States Constitution delineate a general rule requiring government officials to obtain a valid warrant from a neutral and detached magistrate before conducting a search. This intermediate judicial approval is intended to lend objectivity to the search and seizure process, thus safeguarding against unreasonable intrusions. Nonetheless, there are some instances in which a valid search may be conducted without a warrant. Among these instances are those that fall within the so-called automobile exception.

Although labelled the automobile exception, this rule extends neither to all searches of automobiles, nor solely to situations where an automobile is involved. The Supreme Court, however, has seldom been consistent in deciding what exactly are the appropriate dimensions of the exception’s application. All formulations hold that any warrantless intrusion implicating the fourth amendment which is alleged to be reasonable under the automobile exception

1 102 S. Ct. 2157 (1982).
2 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 person or things to be seized.
U.S. CONST. amend. IV.
3 "[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). This passage has been quoted by the United States Supreme Court a multitude of times. See, e.g., United States v. Ross, 102 S. Ct. 2157, 2172 (1982); Mincey v. Arizona, 437 U.S. 385, 390 (1978).

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

Id. (footnote omitted).
7 C. WHITEBREAD, CRIMINAL PROCEDURE § 7.01, at 141 (1980). “The exception is neither limited to automobile searches, nor does it cover all searches of automobiles.” Id.
9 The United States Supreme Court uses a two part test formulated by Justice Harlan.
must nonetheless be based on probable cause. Along with this requirement of probable cause, the Supreme Court has recognized two factors which justify the use of the automobile exception. These factors have recently been identified by the Court as "inherent mobility" and a "diminished expectation of privacy." Disagreement among the Justices over the application of the automobile exception has focused mainly on the roles of these two justifying factors.

The mobility of automobiles has been an underlying justification for the exception from its beginning. The Court has recognized that when police are confronted with a vehicle which could drive away, it is impractical to require them to obtain a warrant before searching or seizing the car. The second justification, the idea of a reduced expectation of privacy, was not enunciated by the Court, however, until later in the history of the automobile exception. The Court has indicated that even when the mobility of an automobile is not imminent, a warrantless search or seizure may still be permissible because of the low level of privacy people usually associate with their cars. Based on these considerations of mobility and a reduced expectation of privacy, the Court has had little difficulty using the automobile exception to justify the warrantless search of a vehicle stopped by police on the public highway. The Court, however, has found the application of the automobile exception to be more difficult in other situations; for instance when police search or seize a parked vehicle without a warrant. In these more complex situations, neither the mobility of the car nor any reduced expectation of privacy lead to a clear result.

Difficulties are especially likely to occur where police make a warrantless search of a closed container found within a motor vehicle. Although the
motor vehicle may present conditions which can justify the invocation of the automobile exception, it is apparent that such conditions do not extend to the closed container. A majority of the Supreme Court has recognized that with closed containers, as opposed to motor vehicles, neither the possibility of mobility nor any reduced expectation of privacy exists to the requisite degree. In deciding this issue, the Court initially focused on the attributes of the container, and indicated that since "inherent mobility" and a "diminished expectation of privacy" were absent, a closed container, once seized by police, could not be searched without a warrant under the automobile exception. This was true regardless of whether or not the container was seized from an automobile.

In United States v. Ross, however, a majority of the Supreme Court rejected the notion that closed containers found within a motor vehicle could never be searched without a warrant under the automobile exception. The Ross Court held that once a motor vehicle is legitimately subject to a warrantless search under the automobile exception, the scope of that search is as broad as a magistrate could authorize through a warrant. The significance of this conclusion is that once there is both probable cause to search a motor vehicle, and some combination of the vehicle's "inherent mobility" and "diminished expectation of privacy" sufficient to allow the initiation of a warrantless search under the automobile exception, the extent of the warrantless search permissible is defined only by the searching official's determination of probable cause. The searching official may therefore make an immediate warrantless search not only of the motor vehicle and its integral parts, but also of any closed container within the vehicle which could possibly conceal the object of the search. The Ross Court expanded the scope of such warrantless searches in this manner despite the fact that the "inherent mobility" and the
"diminished expectation of privacy" of the motor vehicle and its integral parts do not extend to closed containers found within the vehicle, and therefore cannot justify allowing a warrantless search of such containers under the automobile exception.³⁰

This casenote will begin by examining the history and development of the automobile exception, including the Supreme Court’s previous treatment of closed containers under that exception. Next, the Ross Court’s reasoning will be discussed. The Ross decision will then be analyzed and criticized under a view of the fourth amendment which adopts a warrant standard of reasonableness. This analysis will show that by equating the scope of a warrantless search with a search authorized by a neutral and detached magistrate, the Ross decision undermines a cardinal principle of the currently accepted view of the fourth amendment; that a neutral and detached magistrate’s determination of probable cause is superior to that of the searching official in the protection of individual rights secured by the fourth amendment. Further, it will be shown that the Ross decision fails to appreciate that this superior protection provided by a warrant makes it imperative to limit the scope as well as the initiation of warrantless searches under the automobile exception to the circumstances which justify having such an exception. The Ross Court’s attempt to justify the failure to maintain such a dual limitation on warrantless searches under the automobile exception based on “practical considerations” will be criticized for failing to sufficiently account for the countervailing fourth amendment values which are sacrificed. A revision of the automobile exception will then be suggested. This revision would respect the benefits provided by pre-search judicial warrants by reflecting the idea that search warrants should be used whenever reasonably practicable. The revision would entail dropping the “expectation of privacy” factor from the automobile exception analysis, and allowing warrantless searches under the automobile exception only when, due to problems related to mobility, a warrant requirement would unreasonably burden law enforcement. In summary, this casenote submits that the scope of the warrantless search permissible under the automobile exception which is enunciated in Ross is overbroad in light of currently accepted fourth amendment principles which are reflected by a warrant standard of reasonableness.

I. THE EVOLUTION OF THE AUTOMOBILE EXCEPTION

A. The Justifications for the Exception

The doctrine known as the automobile exception was first enunciated by the Supreme Court in Carroll v. United States.³¹ In Carroll, federal prohibition agents had knowledge indicating that the defendants were bootleggers who

transported liquor to a particular town. On this occasion, the agents unexpectedly encountered the defendants driving to that town, and stopped the defendant's vehicle. This stop was followed by a search of the car, which uncovered the suspected contraband. No warrant was ever obtained.

The Supreme Court upheld the warrantless search in Carroll as valid under the fourth amendment. This validity hinged on two factors which the Court found to be presented by the circumstances of the case before it. First, the Court noted that the mobility of automobiles and other modes of transportation set them apart in fourth amendment terms. This mobility, in the Court's view, created an exigency because a vehicle could easily leave the area while a warrant was being obtained. The Court therefore determined the situation required an immediate warrantless search. Second, the Court held that such warrantless searches could be valid only when based on probable cause, which existed in Carroll.

In Chambers v. Maroney the Court invoked the automobile exception to uphold a warrantless search of a vehicle made after the car had been taken from the scene of an arrest to the police station, thereby expanding the boundaries of the Carroll exception. Faced with the apparent lack of mobility of the vehicle at the time and place of the search, the Court nevertheless restated Carroll's dual requirement of probable cause plus exigent circumstances arising from the car's mobility. The Chambers Court noted that the Carroll justifications clearly

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32 Id. at 160.
33 Id. at 136.
34 Id. One federal agent raised the rumble seat, looked under the seat cushion, and "struck" at the lazyback of the seat. Id. at 174. The officer found the lazyback to be "a great deal harder" than is usual. Id.
35 Id. at 136. Sixty-eight bottles of whiskey and gin were confiscated from behind the upholstery of the defendant's vehicle. Id.
36 Id. at 174.
37 Id. at 149, 155-56, 160-62.
38 Id. at 153. The Court discussed several statutes in conjunction with the fourth amendment which supported the idea of the necessity of a warrantless search due to the mobility of the place to be searched. Id. at 143-53.
39 Id. at 153.
40 Id. at 153, 160-62.
41 Id. at 155-56, 160-62. The Court stated that to allow the search of vehicles for contraband based on less than probable cause would be "untolerable and unreasonable." Id. at 153-54.
43 399 U.S. at 43-44, 48-52. Defendants, suspected of armed robbery, were stopped and arrested by police based on a description of the robbers and their vehicle given by the victim and witnesses who observed the car drive away from the location of the robbery. Id. at 44. After the arrest, police drove the car to the police station, and during a thorough search there found two revolvers, ammunition, and other evidence associated with this and a separate robbery. Id.
44 See id. at 44; see also id. at 65 (Harlan, J., concurring in part and dissenting in part).
45 Id. at 44; see id. at 65 (Harlan, J., concurring in part and dissenting in part).
would have authorized a warrantless search at the place where the vehicle was stopped by the police, and held that bringing the car back to the police station did not abridge the applicability of the automobile exception.

One year after Chambers was decided, the Court determined in the plurality decision of Coolidge v. New Hampshire that a search made of a vehicle which was seized while parked at its owner's residence by police at the police station without a valid warrant could not be justified under the automobile exception. The plurality explained that unlike the vehicle in Chambers, the automobile in Coolidge had not presented any threat of mobility to the police, either at the time the car was first seized, or at the time of any of the searches of the car. The Coolidge plurality stated that an imminent threat of mobility must exist at some time prior to the warrantless search for the doctrine of Carroll and Chambers to apply. The plurality noted that the mere fact that an automobile was involved was not enough to invoke the automobile exception. The Court indicated that where the accepted justifying circumstances were absent, a warrantless search could not be upheld under the automobile exception.

Several years after Coolidge, the Court produced another plurality decision on the automobile exception, Cardwell v. Lewis. In Cardwell the warrantless

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46 Id. at 52.
47 Id. In Chambers the Court stated specific reasons why it would have been impractical for the police to perform the search of the car at the spot where they stopped it. Id. at 52 n.10. Subsequent cases make clear, however, that the validity of a vehicle search at the police station is not contingent upon circumstances which make an on the scene search impractical. See, e.g., Texas v. White, 423 U.S. 67, 67-69 (1975) (per curiam) (warrantless search of a car at the station upheld even though police easily could have conducted the search when the car was first stopped); Colorado v. Bannister, 449 U.S. 1, 3 (1980) (Court reaffirmed the holding of White). The current position of the Court is that if a warrantless search was permissible at the scene of the stop, it is always practical to allow such a search a short time later at the station. White, 423 U.S. at 68; Bannister, 449 U.S. at 3.
48 403 U.S. 443 (1971) (plurality).
49 A warrant was obtained before the car was seized; however, this warrant was determined to be invalid. Id. at 447, 449. Thus, it was necessary to justify the search on other grounds. Id. at 453.
50 Id. at 447, 462. The defendant was arrested at his house for allegedly murdering a 14-year-old girl. Id. at 447. His car was parked at his residence at the time of the arrest and remained there until it was towed to the police station two hours later to be searched for "certain objects and things used in the commission of said offense, now kept, and concealed in or upon" the vehicle. Id. at 447-48 (quoting from the invalid search warrant).
51 Id. at 463 n.20.
52 Id. at 448, 463-64. The car was searched by the police two days after it was towed to the police station, and on two other occasions eleven and fourteen months later. Id. The car remained under police control at all times, thus in a non-mobile state. Id. at 463-64.
53 Unlike Chambers, the threat of mobility was never present in Coolidge. Id. at 462, 463 n.20.
54 Id. at 461-62. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Id.
55 Id. at 462.
search by police, at the police station, of a vehicle which had been seized while parked in a public parking lot was upheld under the automobile exception. The vehicle was unoccupied, but in the plurality's view it could have been driven away if it were not seized by the police. Consequently, the plurality found an exigent circumstance and held that under Chambers a warrant was not required to seize and search the car. In addition, the plurality sought to justify the use of the automobile exception by reference to the lesser expectation of privacy associated with cars. This lesser expectation of privacy was derived by the plurality both from the fact that the contents of an automobile are often in "plain view," and because the intrusion itself in Cardwell was seen as minimal by the Court. A majority of the Supreme Court subsequently has accepted the reduced expectation of privacy justification as a legitimate component of the automobile exception analysis. The automobile exception, therefore, will allow the warrantless search of a motor vehicle when the government official has probable cause to make the search, and the circumstances of mobility and a reduced expectation of privacy justify dispensing with the generally required search warrant from a neutral magistrate.

B. The Exception and Closed Containers

Many of the recent cases involving the application of the automobile exception have involved the propriety of the warrantless search of closed containers found within motor vehicles. The Supreme Court has addressed this question on several different occasions in the space of only a few years. To answer this question the Court has had to consider when, if ever, the rationale behind the automobile exception, used to justify the warrantless search of a

57 See id. at 587-88, 592-93.
58 See id. at 592-96.
59 Id. at 587-88.
60 See id. at 594-95.
61 Id. at 593-96.
62 Id. at 590-91.
63 Id. at 590; Cady v. Dombrowski, 413 U.S. 433, 442 (1972). The Court has also offered the fact that motor vehicles are extensively regulated by state and local authorities to support the idea that there is a reduced expectation of privacy associated with automobiles. United States v. Chadwick, 433 U.S. 1, 12-13 (1977); see Cady, 413 U.S. at 441.
64 See 417 U.S. at 588-89, 593 n.9. The Cardwell plurality distinguished Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality) on this point. 417 U.S. at 593 n.9. The Cardwell plurality stressed the fact that the police only examined the exterior of a car which had been seized, as opposed to the thorough search of an entire car which had been seized in Coolidge. See id. at 588 & n.4, 589, 592 n.8, 593 & n.9 (emphasis added).
66 See supra notes 9-12 and accompanying text.
motor vehicle, can also justify the warrantless search of a closed container found within a motor vehicle.

In United States v. Chadwick a majority of the Court explicitly recognized basic differences between closed containers and motor vehicles which were relevant to the respective applicability of the rationale behind the automobile exception. In Chadwick, government agents seized a footlocker which they believed contained contraband from the trunk of an automobile and searched the closed container without a warrant. The automobile, however, was parked and the footlocker had only just been placed in its open trunk at the time of the seizure. The warrantless search itself took place an hour and a half later in a government building.

The government argued that regardless of the coincidental involvement of the automobile in the seizure and search of the footlocker, the same considerations which have justified warrantless vehicle searches in the past should also justify the warrantless search of the movable closed container in Chadwick. The Chadwick Court rejected this contention, finding that the container involved, while movable, was not mobile in the same sense as an automobile because the container was easily seized and secured by the police. The Chadwick Court also found that the container, unlike an automobile, displayed a high expectation of privacy. The circumstances of mobility and a reduced expectation of privacy both being absent, the Court determined that a warrantless search of the footlocker could not be justified under the automobile exception.

In Arkansas v. Sanders the Court faced a situation somewhat similar to Chadwick. Government officials observed a suitcase which they had probable cause to believe contained contraband being placed in the trunk of a taxi cab. Unlike Chadwick, however, the vehicle in Sanders drove away with the container still in its trunk. The officials followed the taxi, stopped it, seized the suitcase and searched it on the spot without a warrant. The government argued that because there was probable cause to search the suitcase, and because the suitcase was seized from a motor vehicle which had been stopped on the public

70 Id. at 13.
71 The Court noted that the First Circuit had held that the agents had probable cause to believe that the footlocker contained contraband. Id. at 5.
72 Id. at 3-4.
73 Id. at 4.
74 Id.
75 Id. at 11-12.
76 Id. at 13.
77 Id.
78 See id.
80 Id. at 762 n.9.
81 Id. at 755, 761.
82 Id. at 755, 762-63.
83 Id. at 755-56.
highway, the warrantless search of the suitcase was valid under the automobile exception. The Court rejected the government's contention, concluding that despite the factual variation, the reasoning of Chadwick controlled. The Sanders Court recognized that although the suitcase was seized from an automobile stopped on the public highway, it was the same as the closed container searched in Chadwick in that it was still easily seized and secured and it still displayed a high expectation of privacy. The Court saw no reason why the characteristics of a closed container seized from a car would be any different from a closed container seized from any other place. Consequently, the Court stated that the fact that a container was seized from an automobile in no way controlled the degree of fourth amendment protection accorded that container. Because the justifying circumstances of mobility and a reduced expectation of privacy were not presented by the suitcase itself, the Court determined that the automobile exception could not excuse the failure of the searching official to obtain a warrant from a neutral magistrate before opening that closed container.

The inquiry into the propriety of the warrantless search of closed containers found within automobiles, however, did not end with the Sanders decision. Robbins v. California involved a situation where a police officer had stopped a car on the public highway because of the operator’s erratic driving. At the scene of the stop, the officer discovered evidence indicating that the vehicle contained marijuana. The officer conducted a search of the car and discovered two bundles wrapped in green, opaque plastic. The officer opened the packages without first obtaining a search warrant. The government asserted that the warrantless search of the opaque packages undertaken by the officer in Robbins was justified under the fourth amendment. The government relied on language from the Sanders decision which indicated that not all containers discovered by police would be protected under the fourth amendment.

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84 Id. at 761-62.
85 Id. at 763-65.
86 See id. at 763.
87 Id. at 764.
88 Id. at 763-64. In general a warrant is required to search a closed container, even when it is lawfully seized by a government official without a warrant. See, e.g., United States v. Chadwick, 433 U.S. 1, 13 (1977); Ex parte Jackson, 96 U.S. 727, 733 (1878); see also United States v. Van Leeuwen, 397 U.S. 249, 253 (1970). But cf. United States v. Robinson, 414 U.S. 218, 223, 236 (1973).
89 442 U.S. at 765 n.13. "[T]he extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." Id.
90 Id. at 763-65.
92 Id. at 422.
93 Id.
94 Id.
95 See id. at 422-23.
96 See id. at 425.
through the requirement of a search warrant. The government argued that the containers in Robbins, unlike the luggage type containers in Sanders and Chadwick, displayed a reduced expectation of privacy and thus were properly subject to a warrantless search.

In a plurality opinion, the Court stated that a warrantless search of the vehicle itself was justified under the automobile exception. The Robbins Court nonetheless rejected the idea that the warrantless search of the green plastic bundles was within the proper scope of a warrantless search permissible under the automobile exception. A majority of the Justices concluded that it was improper to open the bundles before a search warrant was obtained from a neutral and detached magistrate.

The plurality opinion based its conclusion on the reasoning expressed in Chadwick and Sanders. The plurality refused to distinguish the containers searched in Robbins from "luggage type" containers holding that all closed, opaque containers exhibited a sufficiently high expectation of privacy so that they were outside the purview of a warrantless search under the automobile exception. The plurality repeated the conclusion of Sanders that a closed container in an automobile is no different from a closed container in any other place. After reviewing the circumstances which can justify allowing a warrantless search under the automobile exception, the Court held that a closed, opaque container could not be searched without a warrant, even when found during the course of a lawful warrantless search of an automobile.

Only four members of the Robbins Court, however, expressly subscribed to the above reasoning. Justice Stevens, in dissent, found Robbins to turn on an issue entirely different from that presented to the Court in Chadwick and Sanders. The Justice noted that in Robbins the entire car, including the packages found within it, was the focus of the search, while in Chadwick and Sanders the searching officials were concerned solely with the individual closed

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97 Id. at 427.
98 See id. at 424-26.
99 See id. at 428.
100 See id.
101 Id. at 428-29. Justice Powell concurred with the judgment but not the reasoning of the plurality. Id. at 429. The alternative to an immediate search is to hold the closed container until a warrant can be obtained. See Arkansas v. Sanders, 442 U.S. 753, 762 (1979).
102 453 U.S. at 425.
103 Id. at 426-28.
104 Id. at 425.
106 453 U.S. at 428-29.
107 Id. at 422.
108 Id. at 444.
109 Id. at 444-47, 445 n.3.
110 See id. at 444.
container involved. Using Justice Stevens's distinction as a springboard, a majority of the Court overruled the Robbins decision in United States v. Ross, only one year after Robbins had been decided.

C. The Ross Decision

In late November, 1978 a car owned and operated by Albert Ross was stopped by District of Columbia police on the suspicion that he was selling narcotics which were stored in the trunk of the vehicle. The police searched the car and discovered a closed paper bag in the trunk. They opened the bag and found glassine bags of white powder, later identified as heroin. The vehicle was then brought to the police station where, after a more thorough examination of the car, a zippered leather pouch, also in the trunk, was discovered. The police opened the pouch and found $3,200 in cash. No warrant was ever obtained.

Prior to trial, defendant Ross moved to suppress the heroin found in the paper bag and the money found in the leather pouch. The Federal District Court for the District of Columbia denied this motion. The contested evidence was admitted at trial, and Ross was subsequently convicted.

A three-judge panel of the Circuit Court of Appeals for the District of Columbia reversed the conviction. The court of appeals said that the warrantless search of the vehicle itself was valid under the automobile exception. The court also upheld the warrantless search of the paper bag. The court based its reversal on the failure of the police to obtain a warrant prior to opening the zippered leather pouch.

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111 See id. at 445 & n.3.
112 102 S. Ct. 2157 (1982).
113 Id. at 2160. The suspicion of Ross was based on a tip from an informant with a reputation for reliability who told District of Columbia police that someone named "Bandit" was dispensing narcotics from the trunk of a "purplish-maroon" vehicle at a specified location, and that additional narcotics were in the trunk. Upon arrival at that location police spotted a maroon Chevrolet, registered to Albert Ross. A check on Ross revealed that he matched the description of "Bandit" as given by the informant, and was known to use the alias "Bandit." After a period of observation the police stopped the vehicle, which was operated by a person matching Ross' ("Bandit's") description.
114 Id. Police first searched the interior of the car, finding a bullet on the front seat and a pistol in the glove compartment.
115 Id.
116 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Id. at 2160.
123 Id.
124 Id.
125 Id. at 2160-61.
two warrantless searches was based upon what the court of appeals perceived as a reasonable expectation of privacy in the leather pouch as opposed to no reasonable privacy expectation associated with a rolled up paper bag.\textsuperscript{126}

The Circuit Court of Appeals for the District of Columbia then decided to rehear the case en banc.\textsuperscript{127} A majority of the court found the warrantless search of both containers to be unlawful,\textsuperscript{128} expressing dissatisfaction with any distinction based on varied expectations of privacy between the two closed containers.\textsuperscript{129} The court stated that both the closed paper bag and the leather pouch displayed a sufficient intent on the part of the defendant Ross to keep their contents private.\textsuperscript{130} The court therefore concluded that absent some exigency presented by the containers seized from the automobile, the police could not search them without first obtaining a warrant from a neutral and detached magistrate.\textsuperscript{131}

The Supreme Court reversed, holding that both closed containers could properly be searched under the fourth amendment without a warrant.\textsuperscript{132} The Court stated that the determinative issue was whether the scope of a lawful warrantless vehicle search included the right to search closed containers found within that vehicle.\textsuperscript{133} The Ross majority noted that a recent pronouncement of the Court, Robbins v. California,\textsuperscript{134} had been unable to provide an answer to this question supported by a majority opinion.\textsuperscript{135} The Ross Court held that the scope of a warrantless vehicle search permissible under the automobile exception is as broad as a magistrate could authorize through a warrant.\textsuperscript{136} The Court therefore concluded that warrantless search could extend to anywhere inside the vehicle where the searching official determines there is probable cause to search, including within closed containers.\textsuperscript{137}

In so holding, the Ross majority distinguished two earlier pronouncements of the Court where the opening of a closed container seized from a car without a search warrant was held to violate the fourth amendment; United States v.

\textsuperscript{126} \textit{Id.} at 2160. The three judge panel of the court of appeals apparently read Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979), to indicate that certain "less worthy" containers could be searched without a warrant when legitimately seized by the police. United States v. Ross, 655 F.2d 1159, 1161 & n.3 (D.C. Cir. 1981) (en banc). Subsequent decisions of the Supreme Court reject any distinction between "worthy" and "unworthy" containers. United States v. Ross, 102 S. Ct. at 2171; see California v. Robbins, 453 U.S. at 425-27.

\textsuperscript{127} 102 S. Ct. at 2161.

\textsuperscript{128} United States v. Ross, 655 F.2d 1159, 1171 (D.C. Cir. 1981) (en banc).

\textsuperscript{129} \textit{Id.} at 1161, 1170-71.

\textsuperscript{130} \textit{Id.} at 1171.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} 102 S. Ct. at 2159, 2170-73.

\textsuperscript{133} \textit{Id.} at 2168.

\textsuperscript{134} 453 U.S 420 (1981) (plurality).

\textsuperscript{135} See 102 S. Ct. at 2167-68, 2172. The Ross Court noted, however, that the parties in Robbins did not squarely address the issue, even though it was presented by the facts of that case. \textit{Id.} at 2168; see Robbins v. California, 453 U.S. at 435 (1981) (Powell, J., concurring).

\textsuperscript{136} 102 S. Ct. at 2159.

\textsuperscript{137} \textit{Id.} at 2172.
Chadwick and Arkansas v. Sanders. The Court noted that in both Chadwick and Sanders probable cause to search had been directed solely at the closed container involved and not at the automobile from which the container had been taken. A key element of the automobile exception, probable cause to search a motor vehicle, was therefore missing in those cases. The Ross Court stated that it is only in cases like Ross and Robbins, where there is probable cause to search a motor vehicle and the vehicle's "inherent mobility" and "diminished expectation of privacy" justify the initiation of a warrantless search, that the proper scope of such a warrantless search can be determined.

The Court then turned to the justifications for its holding that the proper scope of a warrantless search initiated under the automobile exception included the opening of closed containers found during that search. The Court began by referring to some past warrantless vehicle searches upheld by the Court under the automobile exception. The Court noted the thorough nature of those past lawful warrantless searches, and stated that the scope of a search which had been held to include the right to rip open the upholstery in a car would logically also include the right to open a closed container found underneath that upholstery. The Court also indicated that some of the past warrantless vehicle searches it had upheld under the automobile exception had actually included the opening of closed containers found within the vehicle. The Ross majority qualified this latter point by noting that the validity of those container searches had not been contested by the parties in those cases. The Court stated, however, that the fact that those container searches were not even contested demonstrated the legal profession's clear understanding that the automobile exception included the right to search closed containers during the course of a lawful warrantless vehicle search.

The Ross Court next discussed an argument premised upon what it termed "practical considerations." The Court noted that illicit materials carried within motor vehicles will almost always be concealed, usually within closed containers. Consequently, the Court stated, unless the permissible scope of the automobile exception included the right to search such closed containers,
the "practical consequences" of the automobile exception would be largely "nullified."\textsuperscript{151}

In support of its decision the \textit{Ross} Court also drew an analogy to situations where searches were conducted under the authorization of a valid warrant.\textsuperscript{152} The Court noted that a search of a vehicle made with a judicial warrant would include the opening of any compartments or containers where there was probable cause to believe the object of the search might be located.\textsuperscript{153} The Court stated that when any lawful search, with its purpose and limits exactly defined, is under way, "nice distinctions" such as that between a vehicle and closed containers within that vehicle must yield to the "prompt and efficient" completion of the search.\textsuperscript{154} The Court held that the scope of a warrantless search initiated under the automobile exception is the same as could be approved by a magistrate through a warrant, and thus includes the opening of closed containers.\textsuperscript{155} The Court noted that its reasoning applied equally to all closed containers.\textsuperscript{156}

Finally, the \textit{Ross} Court asserted that "[o]f greatest importance" their decision was consistent with the Court's past decisions interpreting the fourth amendment.\textsuperscript{157} The Court recited an often quoted passage from its decision in \textit{Katz v. United States}\textsuperscript{158} strongly declaring the requirement of a warrant before a search may be conducted, subject only to a few narrow exceptions.\textsuperscript{159} The \textit{Ross} Court stated that the rule which it pronounced was consistent with a "well-delineated" automobile exception.\textsuperscript{160}

Justice Marshall, in dissent,\textsuperscript{161} expressed concern that the \textit{Ross} majority was moving towards establishing a "probable cause" exception to the warrant clause of the fourth amendment.\textsuperscript{162} Justice Marshall noted that such a position was foreclosed by the Court's own prior decisions.\textsuperscript{163} He observed that the result of defining the scope of a warrantless search by the extent of probable

\textsuperscript{151} \textit{Id.} The Court indicated that these "practical considerations" were an important factor to be considered in defining the scope of the automobile exception. \textit{See id.} at 2163 n.9, 2171 n.28.

\textsuperscript{152} \textit{Id.} at 2170-71.

\textsuperscript{153} \textit{Id.} at 2170.

\textsuperscript{154} \textit{Id.} at 2170-71.

\textsuperscript{155} \textit{Id.} at 2170-72.

\textsuperscript{156} \textit{Id.} at 2171.

\textsuperscript{157} \textit{Id.} at 2172.

\textsuperscript{158} \textit{389} U.S. 347 (1967).

\textsuperscript{159} \textit{102} S. Ct. at 2172.

\textsuperscript{160} \textit{See id.}

\textsuperscript{161} \textit{Id.} at 2173. Several other Justices also filed opinions. \textit{Id.} In brief concurrences, Justices Blackmun and Powell emphasized the need for clarification in this confused area of the law. \textit{Id.} Both joined the opinion of the Court written by Justice Stevens which they felt expressed a much-needed clear rule of law concerning the automobile exception. \textit{Id.} Justice White, in dissent, merely noted that he would have maintained the reasoning of \textit{Robbins v. California}, 453 U.S. 420 (1981) (plurality), and that he agreed substantially with Justice Marshall's dissent. \textit{Id.}

\textsuperscript{162} \textit{Id.} at 2174 (Marshall, J., dissenting).

\textsuperscript{163} \textit{Id.} at 2176.
cause alone is to equate the searching official with the normally required neutral and detached magistrate. Justice Marshall noted that the two are not normally considered equals for purposes of the fourth amendment.

Justice Marshall indicated that historically the automobile exception has been limited by the factors of mobility and a reduced expectation of privacy. He noted that the majority failed to base its decision on these justifications. He added that this failure was not surprising since those justifications did not support extending the automobile exception to include the warrantless search of closed containers found within an automobile.

Justice Marshall rejected the majority's interpretations of past Court decisions concerning the automobile exception. He stated that the thorough searches upheld by the Court in the past which were cited by the majority all involved integral and inseparable parts of the vehicle, and thus were subject to the same mobility problems as the vehicle itself. As for decisions not even addressing the issue explicitly, he found them to be questionable authority upon which to base the warrantless search of a closed container. Justice Marshall also found the "practical considerations" voiced by the majority to be unpersuasive and thus rejected the idea of basing such an extension of the automobile exception on such considerations.

Finally, the Justice indicated that the majority's rule would create anomalous results. He questioned the majority's distinction between containers found during a probable cause search of an entire car and containers found in other contexts. Justice Marshall concluded by stating that the only plausible explanation for the majority's rule was expediency, which he deemed to be an illegitimate basis for altering fourth amendment doctrine.

II. Ross and the Warrant Standard of Reasonableness

The declaration of the Court in United States v. Ross, that the scope of a warrantless search validly initiated under the automobile exception is the same as that which a neutral and detached magistrate could authorize through a warrant, effectively means that the boundaries of such a warrantless search will

164 Id. at 2177.
165 Id. at 2174-75. Justice Marshall expressed concern over the potential for overbroad searches justified by hindsight reasoning and a general disrespect for orderly law enforcement which would be created by the majority's new rule. See id.
166 Id. at 2175-76.
167 Id. at 2176.
168 Id.
169 Id. at 2178.
170 Id. at 2179.
171 See id. at 2178 n.7.
172 See id. at 2179-80.
173 Id. at 2180.
174 Id.
175 Id. at 2181.
176 Id. at 2159, 2172.
be established by the searching official's determination of probable cause.\textsuperscript{177} This determination will not be limited by the circumstances which are necessary to justify the initiation of that warrantless search.\textsuperscript{178} By equating the scope of a warrantless search under the automobile exception with a search authorized by a neutral and detached magistrate, the \textit{Ross} decision undermines a cardinal principle of the currently accepted view of the fourth amendment that a neutral and detached magistrate's determination of probable cause is superior to that of the searching official in the protection of individual rights secured by the fourth amendment.\textsuperscript{179} The \textit{Ross} decision fails to appreciate that this superior fourth amendment protection provided by a warrant makes it imperative to limit the scope as well as the initiation of warrantless searches to circumstances which can justify relying on the searching official's determination of probable cause rather than that of the neutral magistrate.\textsuperscript{180} Finally, the \textit{Ross} Court's attempt to justify the failure to maintain such a dual limitation on warrantless searches under the automobile exception based on "practical considerations" does not sufficiently account for the countervailing fourth amendment values which will be sacrificed through the implementation of the \textit{Ross} Court's reasoning in the future.\textsuperscript{181}

A. The "Superiority" of the Neutral and Detached Magistrate

In \textit{Ross} the Court concluded that the scope of the valid warrantless vehicle search under the automobile exception included the opening of two closed containers.\textsuperscript{182} The Court reached this conclusion despite its own previous acknowledgment that a closed container does not present either "inherent mobility" or a "diminished expectation of privacy;"\textsuperscript{183} the two factors necessary to justify the initiation of a warrantless search under the automobile exception.\textsuperscript{184} Rather than limiting the extent of the warrantless search permissible under the automobile exception with those justifying factors, the \textit{Ross} Court indicated that the scope of the warrantless search would be the same as a magistrate could authorize through a warrant.\textsuperscript{185} The \textit{Ross} Court thereby contradicted the fourth amendment principle that a neutral magistrate's determination of probable cause is superior to that of the searching official.\textsuperscript{186}

In carrying out his law enforcement function, a government official who is considering whether or not it is reasonable to undertake a search\textsuperscript{187} necessarily

\begin{footnotes}
\item[177] \textit{Id.} at 2172.
\item[178] \textit{See id.} at 2170-72.
\item[179] \textit{See infra} notes 182-204 and accompanying text.
\item[180] \textit{See infra} notes 203-21 and accompanying text.
\item[181] \textit{See infra} notes 227-48 and accompanying text.
\item[182] \textit{See 102 S. Ct.} 2160, 2172-73.
\item[184] \textit{See supra} notes 9-11 and accompanying text.
\item[185] \textit{See 102 S. Ct.} at 2159, 2172.
\item[186] \textit{See supra} notes 2-4 and accompanying text.
\item[187] Generally, before a search can be "reasonable" as required by the fourth amend-
occupies a biased position. Because that official is involved so closely in the difficult task of criminal investigation, he is less likely to make an accurate assessment of whether there is probable cause to conduct the search. In contrast, a neutral and detached magistrate's determination of whether probable cause to conduct a search exists is more likely to be reliable since he is removed from the pressures of police work and is capable of making an objective judgment.

Judicial weighing of the probable cause factor alternatively could be required after, instead of before, the search, but then it is too late to prevent an unreasonable intrusion. Also, post hoc rationalization would make it more likely that a search would later be found to have been reasonable if evidence or contraband was in fact discovered, since that discovery would color what may have been an unrevealing set of facts prior to the search. These principles thus support the idea of obtaining prior judicial determination of probable cause.

The superiority of the neutral magistrate's determination of probable cause is recognized in fourth amendment doctrine through the warrant standard of reasonableness. This standard, as is implied by its name, requires that a warrant must be obtained from a neutral magistrate before a search may be "reasonable" as required by the fourth amendment.

In the area of criminal investigation, probable cause to search exists where "the facts and circumstances within [the] knowledge [of the officials who want to make the search] and of which they had reasonably trustworthy information [are] sufficient . . . to warrant a man of reasonable caution in the belief that . . . certain items related to criminal activity will be found in a particular location. Carroll v. United States, 267 U.S. 132, 162 (1925); see also United States v. Harris, 403 U.S. 573, 574-85 (1971) (plurality); Spinelli v. United States, 393 U.S. 410, 411-420 (1969); Aguilar v. Texas, 378 U.S. 108, 109-16 (1964). While this form of probable cause is not constitutionally required in support of all searches, see, e.g., Terry v. Ohio, 392 U.S. 1, 24, 30 (1968) ("stop and frisk" allowed based on reasonable suspicion that criminal activity is afoot); Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967) (administrative, as opposed to criminal, probable cause); Chimel v. California, 395 U.S. 752, 767 (1969) (no probable cause needed for search made incident to a valid arrest), this casenote is directed at an area of the fourth amendment where probable cause in the criminal context, as described above, is required. See United States v. Ross, 102 S. Ct. at 2164 n.11.

A warrant, to be valid under the fourth amendment, must be based on the magistrate's belief that the search to be undertaken is supported by probable cause and it must specifically describe the location to be searched and the items to be seized. See United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting). See supra notes 2 and 187.

proclaims to adhere to the warrant standard of reasonableness, having stated on numerous occasions that warrantless searches "are per se unreasonable under the Fourth Amendment." While this "per se" rule is subject to exceptions, the Court has emphasized that they must be "specifically established and well-delineated." Although exceptions may be necessary to deal with certain difficult situations, the condition that they be "specifically established and well-delineated" is designed to minimize any departure from the requirement of prior judicial approval of searches under the warrant standard of reasonableness. In this way the benefits of requiring a judicial warrant may be maintained except in particular situations where the need for a warrant would place an unreasonable burden upon law enforcement.

By equating the scope of the warrantless search under the automobile exception with the scope of a search approved by a neutral and detached magistrate, the Court has contradicted the rationale behind a warrant standard of reasonableness. In essence, the Court decision states that a search under the automobile exception based on the searching official's inherently suspect determination of probable cause may without qualification proceed just as far as a search based on the neutral magistrate's superior determination of probable cause. The Court failed to recognize that the scope of a warrantless search under a "specifically established and well-delineated" automobile exception should instead be limited to circumstances which can


See supra notes 187-92 and accompanying text.


See id. at 2170-72. The Court stated that since a search of a vehicle made pursuant to a valid judicial warrant would include the right to search closed containers found within the vehicle, a warrantless search of a vehicle should include the same right. Id. at 2170-71. The Court asserted that the scope of the vehicle searches in both cases should be the same because it: the warrantless situation "[o]nly the prior approval of the magistrate is waived." Id. at 2172 (emphasis added). Past decisions of the Court, however, underscore what a significant waiver this is, one that should not be made absent ample justification. See, e.g., Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).
justify the departure from the superior fourth amendment protection provided by a warrant from a neutral and detached magistrate. 202

B. Limiting the Scope As Well As the Initiation of a Search

It is apparent that a warrantless search of some dimension was permissible in Ross. The police had probable cause to search a vehicle stopped on the public highway; 203 that is, the automobile exception was applicable. 204 Instead of imposing precise limits on the scope of the warrantless search which was permissible, however, the Ross Court instead made that scope as broad as a magistrate could authorize through a warrant. 205 The Ross decision thus fails to appreciate that under a warrant standard of reasonableness the scope, as well as the initiation of warrantless searches, must be limited to those narrowly defined circumstances which justify dispensing with the neutral magistrate's determination of probable cause.

The exceptions to the warrant standard of reasonableness's general requirement of search warrants provide for particular situations where it would unreasonably hinder effective law enforcement if a searching official was required to obtain prior judicial approval. 206 Consistent with the requirement that these exceptions be "specifically established and well-delineated," 207 warrantless searches are limited to the particular circumstances which justify dispensing with the warrant requirement. 208 Under the automobile exception, therefore, a warrantless search may be initiated only where the situation presents the requisite justifying circumstances of "inherent mobility" and a "diminished expectation of privacy." 209

It is imperative that this limitation be applied to the scope as well as the initiation of a warrantless search under the automobile exception. 210 An overbroad scope can be just as detrimental to the rationale behind a warrant standard of reasonableness as the unrestrained allowance of a warrantless intrusion in the first place. 211 Both would mean the allowance of searches based only on the searching official's determination of probable cause 212 in the absence of

202 See infra notes 203-21 and accompanying text.
203 See 102 S. Ct. at 2160, 2168 & n.22.
204 Id. at 2159, 2164, 2169.
205 See id. at 2172.
209 See supra notes 31-66 and accompanying text.
211 See Terry v. Ohio, 392 U.S. 1, 17-18 (1968). "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." Id.
212 See supra notes 187-92 and accompanying text.
particular circumstances justifying a departure from the general rule requiring the prior approval of a neutral magistrate.\textsuperscript{213} To preserve the heightened fourth amendment protection offered by a neutral magistrate’s determination of probable cause, an exception to the warrant requirement must operate within logical and carefully defined boundaries, both as to the initiation and the scope of warrantless searches.\textsuperscript{214} A warrantless search should be allowed only when circumstances which justify the operation of a recognized exception to the warrant requirement exist, and should proceed only as far as those circumstances justify.\textsuperscript{215} This is not necessarily to the full extent which the searching government official deems to be proper.\textsuperscript{216}

The \textit{Ross} decision ignores the fact that consistent application of a warrant standard of reasonableness can only be achieved through a dual limitation of warrantless searches.\textsuperscript{217} Although the circumstances which can justify the initiation of a warrantless search under the automobile exception have been specifically defined by the Court in prior decisions,\textsuperscript{218} the Court nonetheless allowed the scope of the warrantless search in \textit{Ross} to proceed further than those circumstances could justify.\textsuperscript{219} In \textit{Ross}, the warrantless searches of two closed containers were upheld under the automobile exception, despite the fact that neither “inherent mobility” nor any “diminished expectation of privacy” justified allowing the police to open either container without first providing the owner of those containers with the additional fourth amendment protection secured by a search warrant from a neutral and detached magistrate.\textsuperscript{220} Such an expansion of the scope of the warrantless search permissible under the automobile exception is inconsistent with a general requirement for search warrants subject only to “specifically established and well-delineated” exceptions.\textsuperscript{221}


\textsuperscript{214} See Arkansas v. Sanders, 442 U.S. 753, 759-60 (1979); United States v. Rabinowitz, 339 U.S. 56, 80 (1950) (Frankfurter, J., dissenting). Thus, the Court has repeatedly asserted that any exception to the warrant requirement must be "specifically established and well-delineated." E.g., United States v. Ross, 102 U.S. at 2172; Katz v. United States, 389 U.S. 347, 357 (1967).


\textsuperscript{216} See Coolidge v. New Hampshire, 403 U.S. 443, 450-51 (1971) (plurality). “[U]njustified warrantless] searches are held unlawful notwithstanding facts unquestionably showing probable cause.” Id. (quoting Agnello v. United States, 269 U.S. 20, 33 (1925)). In light of this proposition, the searching government official’s determination of probable cause, however accurate it may be in any particular instance, will be insufficient to make a search reasonable, absent justifying circumstances.

\textsuperscript{217} See supra notes 210-16 and accompanying text.

\textsuperscript{218} See supra notes 31-66 and accompanying text.

\textsuperscript{219} See 102 S. Ct. at 2172.

\textsuperscript{220} See supra notes 187-92 and accompanying text.

\textsuperscript{221} 102 S. Ct. at 2172 (quoting Katz v. United States, 389 U.S. 347, 357 (1967) (foot-
C. "Practical Considerations" Versus the Consistent Protection of Fourth Amendment Rights

The Ross Court attempted to support its expanded definition of the scope of a warrantless search under the automobile exception by referring to so-called "practical considerations." In essence, the Court asserted that "practical considerations," other than the justifying factors heretofore associated with the automobile exception, made it necessary for a searching official to be able, without the prior approval of a neutral magistrate, to open closed containers found during the course of a valid warrantless search of a motor vehicle. Despite the Ross Court's contentions, it seems clear that it would not seriously impede effective law enforcement to require the searching official to obtain a warrant before opening any closed containers found within a motor vehicle. Even assuming some hindrance to law enforcement due to such a requirement, however, the Ross decision fails to accurately balance it against the impairment of fourth amendment rights which is caused by warrantless searches exceeding the "specifically established and well-delineated" circumstances which justify the automobile exception.

The Ross Court asserted that the search of a closed container is a logical extension from the search of the vehicle in which the closed container is found, especially since it is likely that the object of a vehicle search will be concealed, often in a closed container. The Court concluded that because of this logical relationship between a container and the vehicle in which it is located, it would be impractical to allow one search without a warrant, yet require a warrant for the other. The Court also asserted that to avoid unreasonable results it is necessary for the searching official to be able to open closed containers during a warrantless search under the automobile exception. The Court stated that if the object of the search was in a closed container, the police should be allowed to find it on the spot and avoid having to tear the automobile apart in further search, a course which would be necessary if police were required to set containers aside until a warrant was obtained to search them. Also, the Court continued, if the containers did not hold any illicit material it is important that the police discover that fact while the car is being searched since that fact would indicate that the object of the search could be in some "yet undiscovered portion of the vehicle." The Court argued in effect that a warrantless search

notes omitted}).

222 See id. at 2171 n.28.
223 See supra notes 31-66 and accompanying text.
224 See 102 S. Ct. at 2171 n.28.
225 See infra notes 233-44 and accompanying text.
226 See infra notes 245-48 and accompanying text.
227 See 102 S. Ct. at 2170.
228 See id. at 2170, 2171 n.28.
229 See id. at 2171 n.28.
230 See id.
231 See id.
without the right to open closed containers could result in greater than necessary intrusions on privacy interests, and force police who came up empty handed to detain the vehicle until any containers could be opened.232

These arguments fall short of establishing that the exclusion of closed containers from the scope of the warrantless search permissible under the automobile exception would work any unreasonable hardship upon law enforcement officials. Whether or not one sees the search of a container as a logical extension of the search of a car within which that container was located, the fact remains that the opening of a closed container is a separate additional search which may be delayed until a warrant is obtained.233 The broad generalization that contraband is likely to be concealed within a closed container is pure speculation as applied to each individual search, especially in cases where the searching official's determination of probable cause may in fact be erroneous due to his lack of objectivity.234 As to the argument that an on the spot warrantless opening of closed containers could prevent further unnecessary intrusions if fruitful, it seems far more likely that a searching official, upon opening a closed container and discovering contraband, will be even further encouraged to perform a top to bottom search of the vehicle in the hope of finding more evidence of illegality.235 Finally, it is unclear why the Ross Court indicated that since closed containers may contain no evidence of any illegality, police would have to detain a vehicle until every closed container could be opened.236 It is difficult to see how the immediate opening of closed containers holding no contraband will aid police in finding illicit materials located in some "yet undiscovered portion of the vehicle," or otherwise necessarily alter the immediate search of the vehicle itself.237 Contrary to the Ross Court's assertions, it seems that a search of the vehicle itself could have been carried out just as effectively if closed containers were seized and held until a warrant to search them could be obtained,238 rather than included in the scope of the warrantless search allowed under the automobile exception.239

These "practical considerations" are insignificant when weighed against the fourth amendment protection which is sacrificed by the expansion of the

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232 See id.
234 See supra notes 187-92 and accompanying text.
235 See 102 S. Ct. at 2179 (Marshall, J., dissenting).
236 See id. at 2171 n.28.
237 See id.
238 Such a warrantless detention based on the searching official's determination of probable cause would be reasonable since the alternative to holding the container is to lose whatever illicit contents it might have, a severe burden on law enforcement. See United States v. Van Leeuwen, 397 U.S. 249, 252-53 (1970). While exigency justifies the detention of such a container, the same cannot be said for its warrantless search. See Arkansas v. Sanders, 442 U.S. 753, 765 n.14 (1979).
scope of the warrantless search permissible under the automobile exception. 240
No circumstance associated with closed containers makes it unreasonable to re-
quire police to obtain a warrant before searching them. 241 This is evidenced by
the fact that a warrant is required to search closed containers found in contexts
other than the one faced by the Ross Court. 242 If a warrant will be required
when a closed container is seized from the trunk of a parked car, 243 then there is
no reason one could not be reasonably required when a closed container is
taken from a vehicle stopped on the highway. 244 The fact that the police in Ross
had probable cause to search the car as well as the containers found within the
car does not change the fact that the police could have seized the closed con-
tainers and set them aside until a warrant was obtained with little or no difficul-
ty or risk.

The fourth amendment rights sacrificed, however, by not following such a
course in Ross are significant. At stake is the superior fourth amendment
protection provided by the neutral magistrate’s determination of probable
cause. 245 The magistrate’s prior approval cannot be waived every time it sim-
ply removes a burden for law enforcement officials. 246 Furthermore, if the
general rule requiring judicial warrants is to be preserved, along with the
added protection it provides, then exceptions to it must truly be “specifically
established and well-delineated.” 247 By turning to newly discovered “practical
considerations” when the recognized justifications 248 could not produce the
desired result, the Ross Court has failed to sufficiently account for the fourth
amendment values sacrificed by including closed containers in the scope of the
warrantless search permissible under the automobile exception.

Consequently, although the Ross majority proclaimed its adherence to a
view of the fourth amendment which is based on a warrant standard of
reasonableness, 249 it is apparent that the Court has taken a step away from the
rationale which underlies that standard. By equating the searching official with
the neutral magistrate, 250 and by refusing to tie the scope of the warrantless
search permissible under the automobile exception to the delineated justifica-
tions for that exception, 251 the Court has departed from the supposed superiori-

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240 See infra notes 245-48 and accompanying text.
243 See id.
244 See Robbins v. California, 453 U.S. 420 (1981) (plurality) (effectively overruled by
245 See supra notes 187-92 and accompanying text.
247 See Katz v. United States, 389 U.S. 347, 357 (1967); see also Arkansas v. Sanders, 442
248 See supra notes 9-11 and accompanying text.
249 See supra notes 182-202 and accompanying text.
250 See supra notes 203-21 and accompanying text.
ty of the neutral and detached magistrate in determining probable cause to search.\textsuperscript{252} The "practical considerations" cited by the Court are insufficient to justify this departure.\textsuperscript{253} Such a departure, however, could be avoided by a revision of the automobile exception which reflected the idea that search warrants should be used whenever reasonably practicable.

III. REVISING THE AUTOMOBILE EXCEPTION

In \textit{United States v. Ross} the Supreme Court used the automobile exception to expand the acceptable scope of warrantless searches under the fourth amendment with the necessary result of reducing the use of the pre-search approval of the neutral magistrate. A serious revision of the automobile exception is required to achieve a result which is harmonious with a warrant standard of reasonableness.\textsuperscript{254} This revised automobile exception would more consistently offer heightened fourth amendment protection\textsuperscript{255} by reflecting the concept that warrants should be used whenever it is reasonably practicable to do so. This would entail dropping the notion of the reduced expectation of privacy from the automobile exception analysis,\textsuperscript{256} and allowing warrantless searches under the automobile exception only when problems related to mobility would unreasonably impair law enforcement.\textsuperscript{257}

Because of the advantages of having a neutral magistrate determine whether there is probable cause to conduct a search,\textsuperscript{258} the current view of the fourth amendment asserts a requirement that warrants be used as a general rule.\textsuperscript{259} Exceptions to this general rule are created, however, to deal with situations where it would unreasonably burden law enforcement to require a search warrant.\textsuperscript{260} But because each exception to the warrant requirement necessarily suspends the added protection provided by the neutral magistrate, the operation of these exceptions is required to be of a limited nature.\textsuperscript{261} It follows that in order to consistently provide the significant constitutional safeguard of placing the neutral magistrate between the individual and the searching official,\textsuperscript{262} a warrant should be used whenever it is reasonably practicable to do so.\textsuperscript{263}

\textsuperscript{252} See supra notes 187-92 and accompanying text.

\textsuperscript{253} See supra notes 222-48 and accompanying text.

\textsuperscript{254} See supra notes 193-99 and accompanying text.

\textsuperscript{255} See supra notes 187-92 and accompanying text.

\textsuperscript{256} See infra notes 267-72 and accompanying text.

\textsuperscript{257} See infra notes 273-80 and accompanying text.

\textsuperscript{258} See supra notes 187-92 and accompanying text.

\textsuperscript{259} See 102 S. Ct. at 2172. Warrantless searches "are per se unreasonable under the Fourth Amendment...." \textit{Id.} (quoting \textit{Katz v. United States}, 389 U.S. 347, 357 (1967)).


\textsuperscript{261} See \textit{Arkansas v. Sanders}, 442 U.S. 753, 759-60 (1979); \textit{Katz v. United States}, 389 U.S. 347, 357 (1967) (exceptions must be "specifically established and well-delineated").

\textsuperscript{262} See supra notes 187-92 and accompanying text.

\textsuperscript{263} This proposition has been expressed by the Court as whenever it is "reasonably practicable" for police to secure a judicial warrant prior to making a search, they "must" do so.
The automobile exception, like any other exception which allows for warrantless searches, is based on factors which purport to justify departing from the general rule requiring a judicial warrant before a search can be reasonable. Currently, however, the justifying factors associated with the automobile exception are not effectively used to limit the exception's operation to only those situations where it would not be reasonably practicable to obtain a warrant. The result is that some individuals lose the fourth amendment benefits provided by a judicial warrant, even though it was reasonably practicable for the searching official to secure one prior to the search.

To change this situation, the Supreme Court's current approach to justifying warrantless searches under the automobile exception should be revised. The factor of a "diminished expectation of privacy" should be dropped as a circumstance which can justify warrantless searches under the automobile exception. Even assuming its general applicability to motor vehicles, this factor has nothing to do with whether it is reasonably practicable to obtain a warrant. The idea of one's expectation of privacy does fit into fourth amendment doctrine. Its proper function, however, is to determine whether police conduct amounts to a search or a seizure in the first place; in essence, whether or not the fourth amendment is implicated at all. It is anomalous to say that a motor vehicle displays a great enough expectation of privacy to deserve fourth amendment protection, but at the same time, displays a sufficiently reduced expectation of privacy to justify withholding one of the main protections of the fourth amendment; the requirement of a judicial warrant before a search may be conducted. All privacy interests which come within the ambit of the fourth


These factors are currently phrased by the Court as "inherent mobility" and a "diminished expectation of privacy." United States v. Chadwick, 433 U.S. 1, 12 (1977). See supra notes 9-11 and accompanying text.


See supra notes 188-94 and accompanying text.


Despite the Court's reasoning, it seems fairly clear that an individual might justifiably have a high expectation of privacy in association with his car. An intrusion by police into someone's car can certainly breach sufficient privacy expectations so as to implicate the fourth amendment. See Preston v. United States, 376 U.S. 364, 368 (1964).

The level of privacy displayed in no way affects the inquiry of whether it is "reasonably practicable" to obtain a warrant. See Carroll v. United States, 267 U.S. 132, 156 (1925).


amendment deserve the protection of the judicial warrant whenever it is reasonably practicable to provide it.272

The Court should therefore return to a more narrowly applied automobile exception based solely on the idea of the mobility of motor vehicles articulated in Carroll v. United States.273 The difficulties involved with seizing and securing a motor vehicle are such that it would often not be reasonably practicable to require a government official to obtain a warrant before searching such a vehicle.274 The revised automobile exception would require, however, that regardless of distinctions between the initiation and the scope of warrantless searches,275 no warrantless intrusion should take place unless the mobility factor made it not reasonably practicable for police to obtain a warrant.276

Clearly, closed containers could not be searched without a warrant under such a revised definition of the automobile exception. As a general rule, closed containers are easily seized and secured, regardless of where they are found.277 In other words, it is reasonably practicable to obtain a warrant before searching a closed container.278 The fact that the container might be found during the course of a lawful vehicle search does not change the searching official's ability to secure the container until a warrant is obtained, and should have no bearing on the question of whether a warrant should be required.279 The protection of the fourth amendment should not evaporate merely because a "smaller" search is made during the course of a "larger" search.280

CONCLUSION

The Supreme Court in United States v. Ross, although asserting that the fourth amendment is governed by a warrant standard of reasonableness,281 takes a noticeable step away from that standard. The Ross Court equated the role of the searching official with that of the superior neutral magistrate in

272 The warrant standard of reasonableness applies to searches in general and not merely to sub-categories within the ambit of the fourth amendment. See Katz v. United States, 389 U.S. 347, 357 (1967).
275 It is necessary that warrantless searches in both these contexts be limited. See supra notes 203-21 and accompanying text.
278 This proposition assumes the nonapplicability of any other recognized exception to the warrant requirement. See Arkansas v. Sanders, 442 U.S. 753, 763 n.11 (1979).
279 See supra note 269.
281 See 102 S. Ct. at 2172.
determining the proper scope of a warrantless search under the automobile exception.\textsuperscript{282} By doing so, the \textit{Ross} Court failed to realize the necessity, under a warrant standard of reasonableness, of limiting the scope as well as the initiation of warrantless searches under the automobile exception to those circumstances which justify having such an exception.\textsuperscript{283} Finally, the \textit{Ross} Court's attempt to justify this expansion of the automobile exception based on "practical considerations" failed to sufficiently account for the fourth amendment values sacrificed, and violates the concept of "specifically established and well-delineated" exceptions to the warrant requirement.\textsuperscript{284}

To remedy this inconsistency with the warrant standard of reasonableness, the Court should revise the automobile exception to reflect the idea that a judicial warrant should be used by searching government officials whenever reasonably practicable.\textsuperscript{285} This would entail dropping the expectation of privacy factor from the automobile exception analysis.\textsuperscript{286} It would also mean allowing warrantless searches under this exception only when, because of problems related to mobility, it would not be reasonably practicable to require police to obtain a warrant prior to making a search.\textsuperscript{287}

The result of the \textit{Ross} decision was to allow the warrantless search of closed containers during the scope of a warrantless search under the automobile exception.\textsuperscript{288} It is hard, however, to discern any special circumstance in that general situation which would justify allowing such an immediate warrantless search of a closed container. Given the supposed preference for search warrants, it would seem reasonable to require that closed containers be seized and secured until a warrant can be obtained. The Court, however, reaches the opposite result, even as it ardently professes that "warrantless searches are \textit{per se} unreasonable — subject only to a few specifically established and well-delineated exceptions."\textsuperscript{289} While it is clear that the definitions of "specific" and "well-delineated" are changing, it is unclear to what extent the exceptions will become the rule.

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\textsuperscript{282} See supra notes 188-202 and accompanying text.
\textsuperscript{283} See supra notes 203-21 and accompanying text.
\textsuperscript{284} See supra notes 222-48 and accompanying text.
\textsuperscript{285} See supra notes 254-80 and accompanying text.
\textsuperscript{286} See supra notes 267-72 and accompanying text.
\textsuperscript{287} See supra notes 273-80 and accompanying text.
\textsuperscript{288} See 102 S. Ct. at 2172 (1982).
\textsuperscript{289} Id.