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Criminal Procedure - Fourth Amednment - Warrantless Search of Any Container Found in Automobile Held Permissible. (United States v. Ross)

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NOTES

CRIMINAL PROCEDURE — Fourth Amendment — Warrantless Search of Any Container Found in Automobile Held Permissible. *United States v. Ross*, 102 S. Ct. 2157 (1982).

On June 1, 1982, the United States Supreme Court rendered the most important search and seizure decision of the last Term in *United States v. Ross*.[1] In *Ross*, the Court held six to three[2] that warrantless searches of closed containers found within automobiles are not unreasonable within the meaning of the fourth amendment.[3] After considering the fourth amendment in its historical context,[4] the Court held that the only prerequisite to such a search was a determination of probable cause by the officer conducting the search.[5] Once probable cause is found to exist, such searches could be "as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.' "[6]

I. THE DECISION

In 1978 two District of Columbia police officers, acting pursuant to an informant's tip, stopped an automobile driven by Albert Ross.[7] The informant had previously indi-

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1. 102 S. Ct. 2157 (1982). *See* Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 557 (1982) (where it was stated that *Ross* was the most important fourth amendment case of the year).

2. Justice Stevens delivered the opinion of the Court in which Chief Justice Burger and Justices Blackmun, O'Connor, Powell and Rehnquist joined. Justices White, Marshall and Brennan dissented.

3. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. For a discussion of the fourth amendment as applied to various incidents of search and seizure, see generally W. LA FAVE, SEARCH AND SEIZURE (1978); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

4. 102 S. Ct. at 2162-64.

5. *Id.* at 2172.

6. *Id.* at 2154.

7. United States v. Ross, 102 S. Ct. 2157, 2160 (1982).

cated to the officers that a man known as "Bandit" was distributing narcotics from the trunk of his car.[8] Because Ross fit the informant's physical description of "Bandit" and a computer check indicated that Ross had used the alias "Bandit," the officers ordered Ross out of the vehicle.[9] While conducting a search of Ross' person, one of the officers discovered a bullet on the car's front seat. This officer then searched the interior of the car and found a pistol in the glove compartment.[10] After Ross' arrest for possession of that pistol, a search of the car's trunk was conducted at the Washington, D.C., Police Station. This search produced a closed "lunch-type" brown paper bag and a zippered red leather pouch.[11] When these containers were opened, the bag was found to contain narcotics and the leather pouch was found to contain $3,200 in cash. No search warrant was obtained prior to any of these searches.[12] Over Ross' objection, this evidence was admitted at his trial. He was subsequently convicted of possession of heroin with intent to distribute.[13] The conviction was reversed by the United States Court of Appeals for the District of Columbia on the grounds that the officers should not have opened and searched either the paper bag or the leather pouch absent an authorizing warrant.[14]

The United States Supreme Court granted the government's petition for certiorari to clarify the law involving warrantless searches of automobiles and to reconsider its

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id. See* 21 U.S.C. § 841 (1976).

14. United States v. Ross, 655 F.2d 1159, 1161 (D.C. Cir. 1981), *rev'd*, 102 S. Ct. 2157 (1982). Actually, there were two court of appeals cases. First, a three judge panel of the court of appeals reversed the conviction on the ground that the officers' warrantless search of the leather pouch violated Ross' fourth amendment right to privacy. United States v. Ross, No. 79-1624 (D.C. Cir. Apr. 17, 1980). However, the like search of the paper bag was found permissible because the nature of such a container could not reasonably support an expectation of privacy. *Ross*, No. 79-1624, slip op. at 14-15. The entire court of appeals voted to rehear the case en banc. The court then ruled that such a distinction between containers was without merit and thus, neither the bag nor the pouch could be properly searched without a warrant. 655 F.2d at 1161.

previous holding in *Robbins v. California*.[15] The *Robbins* holding was that while closed luggage found in automobiles could not be searched without a warrant, less substantial containers could be.[16] After noting that the fourth amendment, viewed in an historical perspective, has long been construed as differentiating between fixed dwellings and movable vehicles, the Court reaffirmed that warrantless searches of automobiles are permissible.[17]

The Court then turned to the central issue regarding the validity of warrantless searches of closed containers found within automobiles. The Court distinguished prior cases that held such searches constitutionally impermissible[18] and concluded that such searches are in fact proper.[19] In so deciding, the Court expressed concern that a "contrary rule could produce absurd results inconsistent with the rationale which permits warrantless searches of automobiles."[20] The Court also recognized that if closed containers were not searchable along with the automobiles in which they were carried, the practical law enforcement benefits derived from the ability to search an automobile without a warrant would be nullified.[21] The Court stated that "[c]ontraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container."[22] Thus, it was concluded, such a search could be as broad in scope as a like search conducted pursuant to a warrant.[23]

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15. 453 U.S. 420 (1981) (plurality opinion). *See infra* notes 61-68 and accompanying text for a discussion of *Robbins*.

16. 453 U.S. at 428-29.

17. 102 S. Ct. at 2163.

18. The Court indicated that:

> [u]nlike *Chadwick* and *Sanders*, in this case [*Ross*] police officers had probable cause to search respondent's entire vehicle. Unlike *Robbins*, in this case the parties have squarely addressed the question whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within the vehicle.

Id. at 2168.

19. *Id.* at 2172.

20. *Id.* at 2169.

21. *Id.* at 2170.

22. *Id.*

23. *See supra* note 6.

II. BACKGROUND

In *Ross* the Supreme Court was confronted with the issue of whether it was permissible to search closed containers found within automobiles during warrantless searches of those automobiles. In order to understand the analysis of the Court in *Ross*, it is necessary to understand the history of the automobile exception to the warrant requirement.

The fourth amendment of the United States Constitution[24] basically provides that searches of private property by government officials are improper unless conducted pursuant to a warrant issued by a magistrate based upon probable cause.[25] It is reasoned that the warrant requirement reflects the "basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government."[26]

There have been judicially created exceptions to this general requirement of a warrant. These exceptions are said to be necessary to "provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate."[27] Just such an exception was created for the automobile in *Carroll v. United States*.[28]

When the Court decided *Carroll*, it added another to what has become a growing list of exceptions to the warrant requirement.[29] In *Carroll* the Court was confronted with a

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24. *See supra* note 3.

25. Arkansas v. Sanders, 442 U.S. 753, 758 (1979). There the Court stated that it had "interpreted the Amendment to include the requirement that normally searches of private property be performed pursuant to a search warrant . . . ." *Id.* For a discussion of probable cause see *infra* note 35.

26. United States v. United States Dist. Court, 407 U.S. 297, 317 (1972). *See, e.g.*, Aguilar v. Texas, 378 U.S. 108 (1964).

27. Arkansas v. Sanders, 442 U.S. 753, 759 (1979).

28. 267 U.S. 132 (1925). *See* Moylan, *The Automobile Exception: What It Is and What It Is Not — A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987 (1976). Judge Moylan defines the automobile exception as the "legitimate search of a constitutionally protected area whenever (1) probable cause to believe that that area contains evidence of crime conjoins with (2) an exigency arising out of the mobility and imminent disappearance of that very constitutionally protected area itself." Moylan, *supra*, at 987.

29. When *Carroll* was decided in 1925, it became the second oldest of the warrant clause exceptions, the oldest exception being that of the warrantless search incident to

situation in which federal agents had stopped an automobile and, without a search warrant, torn open the rumble seat and discovered illicit whiskey.[30] The Court analyzed the fourth amendment in an historical context:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[31]

The Court indicated that such searches are only permissible when the searching officer has probable cause to believe the vehicle contains contraband.[32] Thus, if an officer had probable cause to believe an automobile carried contraband and if due to that automobile's mobility, the obtaining of a search warrant was not feasible, the automobile exception to the warrant requirement was said to exist and a search could be immediately conducted.[33]

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a lawful arrest. Weeks v. United States, 232 U.S. 383, 392 (1914). For subsequent exceptions see, e.g., Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent). *See also* Moylan, *supra* note 28, at 988.

30. Carroll v. United States, 267 U.S. 132, 134-35 (1925).

31. *Id.* at 153. *See also* Moylan, *supra* note 28.

32. Carroll v. United States, 267 U.S. 132, 154 (1925). For a definition of probable cause see *infra* note 35 and accompanying text.

33. See Moylan, *supra* note 28, at 992-93, for a discussion of these two requirements. *See also* Robb, *The* Carroll *Case: The Expansion of the Automobile Exception in Warrantless Search and Seizure Cases*, 15 WILLAMETTE L.J. 39 (1978). Robb offers a slightly different theory for the *Carroll* decision:

> The holding was based on two propositions: (1) the inherent mobility of the automobile rendered the acquisition of a search warrant impracticable; and (2) it would have circumvented the intent of the National Prohibition Act to reach and destroy forbidden liquor in transport, to require a search warrant under the circumstances there presented.

Id. at 41.

Robb further indicates that "[b]y accenting the need to enforce Prohibition, the *Carroll* majority had, in effect, claimed that the greater harm to the nation would

During the period immediately following the *Carroll* decision, other warrantless searches of motorized vehicles were held constitutional. The most significant of these decisions was *Brinegar v. United States*.[34] *Brinegar* is important for the insight it provides regarding the standard by which probable cause is to be judged. The *Brinegar* Court set forth criteria against which a given factual situation was to be measured in order to determine probable cause:

> Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[35]

Thus, with the *Carroll* and *Brinegar* decisions the Court had firmly established the automobile exception to the general warrant requirement.

As the automobile exception was applied to a greater number of warrantless searches, the scope of the exception began to expand. The most significant case contributing to this expansion was *Chambers v. Maroney*.[36] In *Chambers* the Court modified the need for "mobility" or "exigency" previously required by *Carroll*.[37] In *Chambers* a warrantless search of an automobile was conducted at a police station when there was no possibility of the disappearance or de-

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result from circumventing the eighteenth amendment than by allowing governmental violation of the warrant requirement." *Id.* at 41 n.17.

34. 338 U.S. 160 (1949). *See also* Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931); United States v. Lee, 274 U.S. 559 (1927).

35. *Id.* at 175-76 (quoting Carroll v. United States, 267 U.S. 132, 167 (1925)). See Robb, *supra* note 33, at 50-53, in which he postulated that the Court has never specifically addressed the quantum and quality of factual circumstances necessary to support probable cause in warrantless automobile searches. He further stated that:

> The Court's inattention to the definition of a clearer standard of probable cause is perhaps consistent with its policy of giving officers the widest possible latitude in conducting automobile searches. When it operates in conjunction with the expanded "mobility" doctrine, however, a vague definition of probable cause comes dangerously close, in many instances, to undermining the basic fourth amendment policy of protecting citizens against unreasonable searches and seizures.

Id. at 53.

36. 399 U.S. 42 (1970).

37. *See supra* note 28 and accompanying text.

struction of the seized contraband.[38] The Court sanctioned this search and indicated that depriving the occupants of the use of the car until a warrant could be obtained may prove to be a greater intrusion upon their constitutional rights than an immediate warrantless search.[39] If probable cause to search is established, the Court decided that a warrant need not be obtained prior to the search even though the automobile itself is no longer mobile.[40]

Perhaps the situation in which the Court has encountered the most difficulty is that involving the warrantless search of closed containers found within automobiles. The first case to squarely confront this issue was *United States v. Chadwick*.[41] In that case, federal narcotic agents seized a footlocker resting in the open trunk of an automobile. The footlocker was taken to the Federal Building in Boston where it was stored so as to create "no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates."[42] One hour and a half later, the agents opened the locker without a warrant and discovered marihuana.[43]

The government sought to justify this search under *Chambers*.[44] The government did not, however, attempt to argue that the footlocker's brief contact with the automobile's trunk created the automobile exception, but urged that the "mobility" of a footlocker makes it analogous to motor

38. 399 U.S. at 44.

39. *Id.* at 51-52. *Contra id.* at 63-64 (Harlan, J., concurring and dissenting), where Justice Harlan stated:

> [I]n the circumstances in which this problem is likely to occur, the lesser intrusion will almost always be the simple seizure of the car for the period — perhaps a day — necessary to enable the officers to obtain a search warrant. In the first place, as this case shows, the very facts establishing probable cause to search will often justify arrest of the occupants of the vehicle. Since the occupants themselves are to be taken into custody, they will suffer minimal further inconvenience from the temporary immobilization of their vehicle. Even where no arrests are made, persons who wish to avoid a search — either to protect their privacy or to conceal incriminating evidence — will almost certainly prefer a brief loss of the use of the vehicle in exchange for the opportunity to have a magistrate pass upon the justification for the search.

40. *Id.* at 51-52.

41. 433 U.S. 1 (1977).

42. *Id.* at 4.

43. *Id.* at 5.

44. 399 U.S. 42 (1970).

vehicles for fourth amendment purposes.[45] The Court rejected this argument indicating that the rationale permitting warrantless searches of automobiles was inapplicable to like searches of containers.[46] Automobiles are subject to a warrantless search, according to the Court, because there exists a diminished expectation of privacy in the automobile.[47] The Court concluded that this diminished expectation of privacy does not apply to footlockers, stating that "[i]n sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile."[48] The *Chadwick* Court further reasoned that because the footlocker was safely placed in the Federal Building, any claim that its inherent mobility required an immediate warrantless search was without merit.[49] Finding no justification for the warrantless search, the Court held that the search violated the fourth amendment.[50]

The next case decided by the Court involving a warrantless search of a container was *Arkansas v. Sanders*.[51] *Sanders* presented a somewhat different factual situation from *Chadwick*. In *Sanders* authorities stopped a taxi cab as it drove away from an airport.[52] They seized a suitcase from the trunk and immediately searched it, finding over nine pounds of marihuana.[53] The Court stated that because *Sanders* presented a somewhat different situation from *Chadwick*,[54] it would have to determine whether the warrantless search of the suitcase fell on the *Chadwick* or the *Chambers/Carroll* side of the fourth amendment.[55]

Unlike *Chadwick*, the government in *Sanders* attempted to justify the search by bringing it directly within the scope

45. 433 U.S. at 12.

46. *Id.* at 13.

47. The Court stated that because the automobile travels public throughfares and is subject to registration, licensing and safety inspections, its occupants necessarily entertain a diminished expectation of privacy. *Id.* at 12-13.

48. *Id.* at 13.

49. *Id.*

50. *Id.* at 15.

51. 442 U.S. 753 (1979).

52. *Id.* at 755.

53. *Id.*

54. *Id.* at 762-63.

55. *Id.* at 757.

of the automobile exception.[56] The Court rejected this attempt to distinguish *Chadwick* and decided that:

> A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in *Chadwick*, the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control.[57]

The Court indicated that 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."[58] As to the question of expectation of privacy, the *Sanders* Court stated that "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."[59] The Court concluded that the warrantless search was not justified, finding "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."[60]

In 1981 the Supreme Court, in *Robbins v. California*, rendered an opinion regarding warrantless container searches.[61] The *Robbins* Court addressed the situation in which the container searched was not personal luggage, but green opaque plastic packages, each found to contain fifteen pounds of marihuana.[62] The Court looked to both *Chadwick* and *Sanders* and ruled that "[t]hose cases made it 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."[63] The government attempted to distinguish those decisions by arguing that the nature of the container, in this case, green opaque plastic, diminished the constitu-

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56. *Id.* at 762.
57. *Id.* at 763.
58. *Id.*
59. *Id.* at 764.
60. *Id.* at 765.
61. 453 U.S. 420 (1981).
62. *Id.* at 422.
63. *Id.* at 425.

tional protection to which it would otherwise be entitled.[64] The Court rejected this argument by ruling, first, that it had no constitutional basis and, second, that such a distinction would be impossible to administer in an objective manner.[65] Following *Chadwick* and *Sanders*, the *Robbins* Court decided that containers found within automobiles are not subject to warrantless searches as readily as the automobile itself.[66]

One year later, the Court in *Ross* expressed dissatisfaction with the holdings in *Chadwick*, *Sanders* and *Robbins*. The Court indicated that neither *Chadwick* nor *Sanders* was truly a case construing the automobile exception.[67] Moreover, the parties in *Robbins* had not squarely raised the question of "whether in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within the vehicle."[68] The *Ross* decision was necessary to definitively set forth guidelines pertaining to this issue.

III. THE *ROSS* ANALYSIS

Justice Stevens, speaking for the majority in *Ross*, explained that an analysis of the law regarding warrantless searches of containers found within automobiles must be designed to resolve a fundamental conflict in society. This conflict is that which arises "between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement."[69] When the Court set out in *Ross* to resolve this conflict through its analysis of the law regarding the automobile exception, rather than looking to

64. *Id.*

65. *Id.* at 426-27.

66. *Id.* at 428.

67. The Court explained that neither *Chadwick* nor *Sanders* was an automobile case "because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile." United States v. Ross, 102 S. Ct. 2157, 2168 (1982) (quoting Robbins v. California, 453 U.S. 420, 429 (1981) (Powell, J., concurring)).

68. 102 S. Ct. at 2168. The Court concluded that "institutional constraints made it inappropriate to re-examine basic doctrine without full adversary presentation." *Id.*

69. *Id.* at 2161-62.

the more contemporary decisions on the subject, it focused instead on the fifty-seven year old *Carroll* decision.

The Court explained that *Carroll* indicated that an analysis of the law regarding the automobile exception must begin with the history of the fourth amendment. The Court felt that *Carroll* required "[t]he Fourth Amendment . . . to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . . ."[70] The Court then reaffirmed the *Carroll* Court's interpretation of the warrant requirement. This interpretation construed the requirement to apply differently to searches of fixed dwellings than to searches of movable objects.[71] This construction was largely the result of looking solely to the interpretation given the fourth amendment at the time of its ratification.[72] The Court explained that it was the "mobility" of these certain objects which made the securing of a warrant prior to their search impracticable. The Court concluded that "[i]t is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision."[73]

The Court in *Ross* noted that "impracticability" alone is not sufficient to permit the warrantless search of an automobile.[74] In addition, it stated that "the Court in *Carroll* emphasized the importance of the requirement that officers have probable cause to believe that the vehicle contains con-

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70. *Id.* at 2162 (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)). But see the majority opinion in *Chadwick* where Chief Justice Burger explained that looking to the intent of the framers of the Constitution at the time of its ratification may prove misleading. He indicated that although "the Framers were men who focused on the wrongs of that day [they also] intended the Fourth Amendment to safeguard fundamental values which would outlast the specific abuses which gave it birth." United States v. Chadwick, 433 U.S. 1, 9 (1977).

71. 102 S. Ct. at 2162.

72. *See supra* note 31 and accompanying text. But see Chief Justice Burger's majority opinion in *Chadwick* where he states:

> [I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America.

433 U.S. at 8.

73. 102 S. Ct. at 2163.

74. *Id.* at 2163-64.

traband."[75] The impracticability of securing a warrant prior to the search of an automobile allows a search of that automobile to be deemed reasonable "if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."[76] Thus, the Court reaffirmed *Carroll* and the *Carroll* criteria which made impracticability and probable cause necessary to invoke the automobile exception.

The *Ross* Court then turned its attention to the issue involving warrantless searches of containers found within automobiles during a *Carroll* search. The Court's analysis of the law in this area was highlighted by its attempt to distinguish *Chadwick*, *Sanders* and *Robbins*.[77] The Court began its analysis of these three cases by indicating in advance the conclusion such an analysis would reach. The Court said that "[t]he rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance."[78]

The *Ross* Court summarily stated the facts and holdings of both *Chadwick* and *Sanders*.[79] It then offered Chief Justice Burger's concurring opinion in *Sanders* as the correct interpretation of these decisions. In that opinion, the Chief Justice stated:

> Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick*. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an "automobile" exception case.[80]

Justice Powell, in a concurring opinion, offered further support for the majority's view that neither *Chadwick* nor

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75. *Id.*

76. *Id.* at 2164.

77. *See supra* notes 67 & 68.

78. 102 S. Ct. at 2165.

79. *Id.* at 2165-66.

80. Arkansas v. Sanders, 442 U.S. 753, 767 (1979) (Burger, C.J., concurring) (emphasis in original).

Sanders involved application of the automobile exception rule. Justice Powell opined in *Robbins* that *Chadwick* and *Sanders* were not automobile cases "because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile."[81] Justice Powell concluded that neither *Chadwick* nor *Sanders* offered assistance to the resolution of the issue addressed in *Ross*.

In attempting to distinguish *Robbins* from the situation in *Ross*, the Court encountered greater difficulty. The Court in *Robbins* clearly indicated 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.[82] The Court explained that the holding in *Robbins* may have been different had the parties therein squarely addressed the question of whether closed containers found during a *Carroll* search could be opened and searched pursuant to the automobile exception.[83] This was the extent of the Court's explanation as to why *Robbins* was not controlling in *Ross*.

The Court, satisfied that it had adequately distinguished *Chadwick*, *Sanders* and *Robbins*,[84] turned to the issue presented in *Ross*. Restating its prior assessment of the basis of the automobile exception as set forth in *Carroll*, the *Ross* Court explained that *Carroll* was "based on the Court's appraisal of practical consideration viewed in the perspective of history."[85] This basis, according to the Court, would be nullified if the warrantless search of an automobile could not encompass containers found within.[86] The Court reasoned that *Carroll* merely relaxed the requirement of a warrant on the ground of impracticability and found that *Carroll* "neither broadened nor limited the scope of a lawful search based on probable cause."[87] The Court then held that "[t]he scope of a warrantless search based on probable cause is no

81. *See supra* note 67.
82. *See supra* note 63.
83. *See supra* note 68.
84. 102 S. Ct. at 2168.
85. *Id.* at 2170.
86. *See supra* note 19.
87. 102 S. Ct. at 2170.

narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize."[88] The Court concluded that a search properly conducted pursuant to the automobile exception was, for all practical purposes, tantamount to one conducted pursuant to a warrant. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[89]

The Court in *Ross* clearly resolved the conflict between the individual's constitutional interest in privacy and the societal interest in effective law enforcement in favor of effective law enforcement. Consequently, as a result of *Ross*, an individual's privacy interest in containers placed within his automobile is deemed outweighed by the societal interest in effectively seizing contraband being transported along public roadways.[90] The Court clearly ruled that containers found within an automobile during a lawful warrantless search are also subject to a like search if there is probable cause to believe they contain contraband.[91]

Justice Marshall vehemently took issue with the majority's holding.[92] He protested that the majority's newly created "probable cause" exception to the warrant requirement, aside from being unprecedented, totally ignores the function that a magistrate plays in the warrant issuing process.[93] The dissent insisted that had this function been considered, the

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88. *Id.* at 2172.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2173-82 (Marshall, J., dissenting). Marshall was joined by Justice Brennan. Justice White wrote a brief separate dissent. *Id.* at 2173 (White, J., dissenting). However, Justice White agreed with the Marshall dissent. *Id.* at 2173.

93. *Id.* at 2173-74. See also Johnson v. United States, 333 U.S. 10 (1948), in which the Court held:

> 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.

333 U.S. at 13-14.

majority could not have reasonably concluded that a search of an automobile conducted without a magistrate's approval could be as broad in scope as a search conducted with such approval.[94]

Justice Marshall further challenged the majority to justify a container search pursuant to the automobile exception, noting that containers, by their very nature, fail to meet the exception's "mobility" requirement.[95] Moreover, the dissent pointed out, containers are attended by a greater expectation of privacy than the automobile in which they are found.[96] Thus, the dissent argued, extending the automobile exception to cover closed containers found within vehicles defies precedent.[97]

IV. THE IMPACT OF *ROSS*

The *Ross* decision will serve to clarify the present Supreme Court's position on the permissible scope of a warrantless automobile search. The Court clearly indicated that the warrantless search of an automobile may be as broad in scope as a like search conducted pursuant to a warrant. A warrantless search of an automobile may properly include a search of all containers found therein. The Court further provided that the only prerequisite to such a search is that the officer conducting the search have probable cause to believe he will uncover contraband.[98] Courts in the future will be able to confine their inquiry into the constitutionality of a warrantless automobile search to a determination of the requisite probable cause.

Aside from this clarification of the law regarding warrantless automobile searches, the decision may offer some indication as to how the Court will rule on future occasions. With the addition of Justice Sandra Day O'Connor, the Court now seems to possess a solid pro-law-enforcement

94. 102 S. Ct. at 2174-75, 2176-77 (Marshall, J., dissenting).

95. *Id.* at 2175.

96. *Id.* at 2176.

97. *Id.* at 2181. Justice Marshall pointed out that "[t]he Court today ignores the clear distinction that *Chadwick* established between movable containers and automobiles. It also rejects all of the relevant reasoning of *Sanders* and offers a substitute rationale that appears inconsistent with the result." *Id.* (footnote omitted).

98. *Id.* at 2172.

majority. Moreover, this majority seems unconcerned with adhering to recent precedent. This is evidenced by the fact that *Ross* rejects "the precise holding in *Robbins*,"[99] a decision rendered less than one year ago.

The *Ross* opinion is also demonstrative of a method of legal analysis somewhat peculiar to the Burger Court. This methodology involves a somewhat convoluted use of precedent. Rather than looking to recent precedent for guidance when addressing an issue, the Burger Court has exhibited a propensity to base its opinions on cases decided many years earlier.[100] The *Ross* Court bypassed recent automobile exception cases and based its decision on the fifty-seven year old *Carroll* case.[101] The use of this methodology is indicative of a decision which is result oriented. The ignoring or distinguishing of recent precedent in order to reach a desired result can best be described as "outcome-determinative."

The use of this methodology also introduces an element of confusion into the law by creating a real question as to the precedential value of the cases bypassed by the Supreme Court. This confusion may now have been introduced into the area of law regarding warrantless automobile searches. Consequently, a serious question as to the precedential value of *Chadwick*, *Sanders* and *Robbins* is created by the *Ross* Court's reliance on *Carroll*. Although the precise holding in *Ross* seems relatively uncomplicated, courts in the future will have to wrestle with this question when applying *Ross* to specific situations.

This confusion may be aggravated by the manner in which the Court used *Carroll* as precedent. While claiming to base its decision directly on *Carroll*,[102] the Court, in reality, reached a conclusion in *Ross* inconsistent with the rule set forth in *Carroll*. After the *Ross* Court specifically reaf-

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99. *Id.*

100. *See, e.g.*, United States v. Harris, 403 U.S. 573 (1971). In the *Harris* case, the Court was confronted with the challenge of defining precisely the nature and quantum of factual support needed for the proper issuance of a warrant by a magistrate. *Id.* at 576-77. In reaching its decision, the Court overlooked the more recently decided cases on this issue, Spinelli v. United States, 393 U.S. 410 (1969) and Aguilar v. Texas, 378 U.S. 108 (1964), and based its holding on Jones v. United States, 362 U.S. 257 (1960). *Harris*, 403 U.S. at 576-83.

101. 102 S. Ct. at 2162-64, 2169-72.

102. *See supra* notes 28-33 and accompanying text.

firmed the rule of *Carroll*,[103] the majority determined that a closed container found in an automobile could be subject to a warrantless search pursuant to this rule.[104] The inconsistency of this holding is that a closed container, by its very nature, fails to satisfy the "mobility" rationale supporting the rule of *Carroll*. Thus, while claiming to specifically rely on *Carroll* as a basis for its decision in *Ross*, the Court formulated a rule which is inconsistent with the rationale used by the *Carroll* Court to justify the warrantless search.

This apparent elimination of the "mobility" requirement as a justification for the warrantless search is essentially what was criticized by the dissent in *Ross*.[105] Once "mobility" is eliminated as an exigent circumstance justifying the warrantless search, the only criterion remaining for conducting such a search is probable cause. As asserted by Justice Marshall in his dissent, the true import of the *Ross* decision may be that it authorizes a warrantless search merely upon a showing of probable cause.[106] This decision may, therefore, be the first of many cases in which the exigency element, previously needed to justify a warrantless search, is eliminated. The dissent's contention that a "probable cause" exception to the warrant requirement was created in *Ross* may prove to be a correct assessment of this decision's effect.[107]

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103. 102 S. Ct. at 2164.
104. *Id.* at 2169-72.
105. *Id.* at 2173-82 (Marshall, J., dissenting).
106. *Id.* at 2174.
107. *Id.*