

CASENOTES

The Warrantless Search Of Closed Containers Under The Automobile Exception: *United States v. Ross*¹—The decisions of the United States Supreme Court construing the fourth amendment to the United States Constitution² delineate a general rule requiring government officials to obtain a valid warrant from a neutral and detached magistrate before conducting a search.³ This intermediate judicial approval is intended to lend objectivity to the search and seizure process, thus safeguarding against unreasonable intrusions.⁴ Nonetheless, there are some instances in which a valid search may be conducted without a warrant.⁵ Among these instances are those that fall within the so-called automobile exception.⁶

Although labelled the automobile exception, this rule extends neither to all searches of automobiles, nor solely to situations where an automobile is involved.⁷ The Supreme Court, however, has seldom been consistent in deciding what exactly are the appropriate dimensions of the exception's application.⁸ All formulations hold that any warrantless intrusion implicating the fourth amendment⁹ 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).

⁴ See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

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).

⁵ See, e.g., *Chimel v. California*, 395 U.S. 752, 755, 762-63 (1969) (search incident to arrest exception); *Warden v. Hayden*, 387 U.S. 294, 297-99 (1967) (hot pursuit exception). The exceptions to the general rule requiring a warrant have been "jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958); see also *Katz v. United States*, 389 U.S. 347, 357 (1967) (exceptions are "specifically established and well-delineated").

⁶ See *Carroll v. United States*, 267 U.S. 132, 153 (1925); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 462 (1971) (plurality).

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.*

⁸ See, e.g., *Robbins v. California*, 453 U.S. 420 (1981) (plurality); *Cardwell v. Lewis*, 417 U.S. 583 (1974) (plurality); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality). See *infra* note 12 and accompanying text.

⁹ The United States Supreme Court uses a two part test formulated by Justice Harlan

must nonetheless be based on probable cause.¹⁰ 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."¹¹ Disagreement among the Justices over the application of the automobile exception has focused mainly on the roles of these two justifying factors.¹²

The mobility of automobiles has been an underlying justification for the exception from its beginning.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ Although the

in his concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967), to determine whether the fourth amendment is implicated. See *Rakas v. Illinois*, 439 U.S. 128, 143 & n.12 (1978). An intrusion by a government official is a "search" or a "seizure" governed by the fourth amendment if the individual intruded upon had a subjective expectation of privacy from such an intrusion, and that expectation was reasonable judged by societal standards. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹⁰ See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Carroll v. United States*, 267 U.S. 132, 153-54, 161-62 (1925).

¹¹ *United States v. Chadwick*, 433 U.S. 1, 12 (1977).

¹² See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974) (plurality) (compare opinion of Blackmun, J., at 585-96, with opinion of Stewart, J., dissenting, at 596-99); *Coolidge v. New Hampshire*, 403 U.S. 403 (1971) (plurality) (compare opinion of Stewart, J., at 447, 458-64, with opinions of Blackmun, J., concurring and dissenting, at 504-05, and White, J., concurring and dissenting, at 523-27).

¹³ See *Carroll v. United States*, 267 U.S. 132, 153 (1925).

¹⁴ *Id.*; see *Arkansas v. Sanders*, 442 U.S. 753, 765 n.14 (1979).

¹⁵ See *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality).

¹⁶ See *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality); *Cady v. Dombrowski*, 413 U.S. 433, 441-43 (1973).

¹⁷ See *Arkansas v. Sanders*, 442 U.S. 753, 760-61 (1979).

¹⁸ See cases cited *supra* note 12.

¹⁹ This difficulty is demonstrated by the fact that the Supreme Court itself has ad-

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.²⁰ 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.²¹ 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.²² This was true regardless of whether or not the container was seized from an automobile.²³

In *United States v. Ross*,²⁴ 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.²⁵ 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.²⁶ 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.²⁷ The searching official may therefore make an immediate warrantless search not only of the motor vehicle and its integral parts,²⁸ but also of any closed container within the vehicle which could possibly conceal the object of the search.²⁹ The *Ross* Court expanded the scope of such warrantless searches in this manner despite the fact that the "inherent mobility" and the

dressed issues concerning the automobile exception which are presented by that particular fact situation on four occasions in the space of five years. See *United States v. Ross*, 102 S. Ct. 2157, 2159, 2161-72 (1982); *Robbins v. California*, 453 U.S. 420, 424-29 (1981) (plurality); *Arkansas v. Sanders*, 442 U.S. 753, 762-65 (1979); *United States v. Chadwick*, 433 U.S. 1, 11-13 (1977). This fact situation has also recently been before the Court in the context of the search incident to arrest exception. See *New York v. Belton*, 453 U.S. 454, 460-63 (1981).

²⁰ *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977); see *Coolidge v. New Hampshire*, 403 U.S. 443, 461 n.18 (1971) (plurality).

²¹ *Arkansas v. Sanders*, 442 U.S. 753, 763-65 (1979); *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977).

²² *United States v. Chadwick*, 433 U.S. 1, 13 (1977).

²³ See *Robbins v. California*, 453 U.S. 420, 428 (1981) (plurality); *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979).

²⁴ 102 S. Ct. 2157 (1982).

²⁵ See *id.* at 2167, 2172.

²⁶ *Id.* at 2159.

²⁷ See *id.* at 2170-72; see also *Arkansas v. Sanders*, 442 U.S. 753, 763-65 (1979); *United States v. Chadwick*, 433 U.S. 1, 13 (1977).

²⁸ See *Arkansas v. Sanders*, 442 U.S. 753, 763 (1979).

²⁹ See 102 S. Ct. at 2172.

"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

³⁰ See *id.*; *Arkansas v. Sanders*, 442 U.S. 753, 763-65 (1979); *United States v. Chadwick*, 433 U.S. 1, 13 (1977).

³¹ 267 U.S. 132 (1925).

transported liquor to a particular town.³² On this occasion, the agents unexpectedly encountered the defendants driving to that town, and stopped the defendant's vehicle.³³ This stop was followed by a search of the car,³⁴ which uncovered the suspected contraband.³⁵ No warrant was ever obtained.³⁶

The Supreme Court upheld the warrantless search in *Carroll* as valid under the fourth amendment.³⁷ 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.³⁸ This mobility, in the Court's view, created an exigency because a vehicle could easily leave the area while a warrant was being obtained.³⁹ The Court therefore determined the situation required an immediate warrantless search.⁴⁰ Second, the Court held that such warrantless searches could be valid only when based on probable cause, which existed in *Carroll*.⁴¹

In *Chambers v. Maroney*⁴² 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.⁴³ Faced with the apparent lack of mobility of the vehicle at the time and place of the search,⁴⁴ the Court nevertheless restated *Carroll*'s dual requirement of probable cause plus exigent circumstances arising from the car's mobility.⁴⁵ The *Chambers* Court noted that the *Carroll* justifications clearly

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 "intolerable and unreasonable." *Id.* at 153-54.

⁴² 399 U.S. 42 (1970). Between *Carroll* and *Chambers* the Court applied the automobile exception several times without any major modification of the reasoning set forth in *Carroll*. See, e.g., *Brinegar v. United States*, 338 U.S. 160, 165-71 (1949); *Scher v. United States*, 305 U.S. 253, 254-55 (1938); *Husty v. United States*, 282 U.S. 694, 701 (1931).

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). The car's occupants were under arrest and the vehicle was under police control at the station house. *Id.* at 44; see *id.* at 65 (Harlan, J., concurring in part and dissenting in part).

⁴⁵ *Id.* at 51.

would have authorized a warrantless search at the place where the vehicle was stopped by the police,⁴⁶ and held that bringing the car back to the police station did not abridge the applicability of the automobile exception.⁴⁷

One year after *Chambers* was decided, the Court determined in the plurality decision of *Coolidge v. New Hampshire*⁴⁸ 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 warrant⁴⁹ could not be justified under the automobile exception.⁵⁰ 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,⁵¹ or at the time of any of the searches of the car.⁵² 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.⁵³ The plurality noted that the mere fact that an automobile was involved was not enough to invoke the automobile exception.⁵⁴ The Court indicated that where the accepted justifying circumstances were absent, a warrantless search could not be upheld under the automobile exception.⁵⁵

Several years after *Coolidge*, the Court produced another plurality decision on the automobile exception, *Cardwell v. Lewis*.⁵⁶ In *Cardwell* the warrantless

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.

⁵⁶ 417 U.S. 583 (1974) (plurality).

search by police, at the police station, of a vehicle which had been seized while parked in a public parking lot⁵⁷ was upheld under the automobile exception.⁵⁸ The vehicle was unoccupied,⁵⁹ but in the plurality's view it could have been driven away if it were not seized by the police.⁶⁰ Consequently, the plurality found an exigent circumstance and held that under *Chambers* a warrant was not required to seize and search the car.⁶¹ In addition, the plurality sought to justify the use of the automobile exception by reference to the lesser expectation of privacy associated with cars.⁶² 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,"⁶³ and because the intrusion itself in *Cardwell* was seen as minimal by the Court.⁶⁴ A majority of the Supreme Court subsequently has accepted the reduced expectation of privacy justification as a legitimate component of the automobile exception analysis.⁶⁵ 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.⁶⁶

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.⁶⁷ The Supreme Court has addressed this question on several different occasions in the space of only a few years.⁶⁸ 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).

⁶⁵ *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977).

⁶⁶ See *supra* notes 9-12 and accompanying text.

⁶⁷ See *Robbins v. California*, 453 U.S. 420, 426 (1981) (plurality) (listing of cases).

⁶⁸ See *United States v. Ross*, 102 S. Ct. 2157, 2168-72 (1982); *Robbins v. California*, 453 U.S. 420, 422-23, 425-29 (1981) (plurality); *Arkansas v. Sanders*, 442 U.S. 753, 762-65 (1979); *United States v. Chadwick*, 433 U.S. 1, 4, 11-12 (1977).

motor vehicle, can also justify the warrantless search of a closed container found within a motor vehicle.

In *United States v. Chadwick*⁶⁹ 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.⁷⁰ In *Chadwick*, government agents seized a footlocker which they believed contained contraband⁷¹ from the trunk of an automobile and searched the closed container without a warrant.⁷² The automobile, however, was parked and the footlocker had only just been placed in its open trunk at the time of the seizure.⁷³ The warrantless search itself took place an hour and a half later in a government building.⁷⁴

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*.⁷⁵ 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.⁷⁶ The *Chadwick* Court also found that the container, unlike an automobile, displayed a high expectation of privacy.⁷⁷ 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.⁷⁸

In *Arkansas v. Sanders*⁷⁹ the Court faced a situation somewhat similar to *Chadwick*.⁸⁰ Government officials observed a suitcase which they had probable cause to believe contained contraband being placed in the trunk of a taxi cab.⁸¹ Unlike *Chadwick*, however, the vehicle in *Sanders* drove away with the container still in its trunk.⁸² The officials followed the taxi, stopped it, seized the suitcase and searched it on the spot without a warrant.⁸³ 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

⁶⁹ 433 U.S. 1 (1977).

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.*

⁷⁹ 442 U.S. 753 (1979).

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.⁸⁴ The Court rejected the government's contention, concluding that despite the factual variation, the reasoning of *Chadwick* controlled.⁸⁵ 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 secured⁸⁶ and it still displayed a high expectation of privacy.⁸⁷ 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.⁸⁸ 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.⁸⁹ 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.⁹⁰

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*⁹¹ involved a situation where a police officer had stopped a car on the public highway because of the operator's erratic driving.⁹² At the scene of the stop, the officer discovered evidence indicating that the vehicle contained marijuana.⁹³ The officer conducted a search of the car and discovered two bundles wrapped in green, opaque plastic.⁹⁴ The officer opened the packages without first obtaining a search warrant.⁹⁵ The government asserted that the warrantless search of the opaque packages undertaken by the officer in *Robbins* was justified under the fourth amendment.⁹⁶ 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

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.

⁹¹ 453 U.S. 420 (1981) (plurality).

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.⁹⁷ 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.⁹⁸

In a plurality opinion, the Court stated that a warrantless search of the vehicle itself was justified under the automobile exception.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

The plurality opinion based its conclusion on the reasoning expressed in *Chadwick* and *Sanders*.¹⁰² 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.¹⁰³ 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.¹⁰⁴ After reviewing the circumstances which can justify allowing a warrantless search under the automobile exception,¹⁰⁵ 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.¹⁰⁶

Only four members of the *Robbins* Court, however, expressly subscribed to the above reasoning.¹⁰⁷ Justice Stevens, in dissent,¹⁰⁸ found *Robbins* to turn on an issue entirely different from that presented to the Court in *Chadwick* and *Sanders*.¹⁰⁹ The Justice noted that in *Robbins* the entire car, including the packages found within it, was the focus of the search,¹¹⁰ while in *Chadwick* and *Sanders* the searching officials were concerned solely with the individual closed

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.

¹⁰⁵ *Id.* at 424-27. The Court specifically referred to its past discussions of "inherent mobility" and "a diminished expectation of privacy" from *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977), and *Arkansas v. Sanders*, 442 U.S. 753, 763-65 (1979). 453 U.S. at 424-27.

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.¹¹¹ Using Justice Stevens's distinction as a springboard, a majority of the Court overruled the *Robbins* decision in *United States v. Ross*,¹¹² 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.¹¹³ The police searched the car and discovered a closed paper bag in the trunk.¹¹⁴ They opened the bag and found glassine bags of white powder, later identified as heroin.¹¹⁵ 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.¹¹⁶ The police opened the pouch and found \$3,200 in cash.¹¹⁷ No warrant was ever obtained.¹¹⁸

Prior to trial, defendant Ross moved to suppress the heroin found in the paper bag and the money found in the leather pouch.¹¹⁹ The Federal District Court for the District of Columbia denied this motion.¹²⁰ The contested evidence was admitted at trial, and Ross was subsequently convicted.¹²¹

A three-judge panel of the Circuit Court of Appeals for the District of Columbia reversed the conviction.¹²² The court of appeals said that the warrantless search of the vehicle itself was valid under the automobile exception.¹²³ The court also upheld the warrantless search of the paper bag.¹²⁴ The court based its reversal on the failure of the police to obtain a warrant prior to opening the zippered leather pouch.¹²⁵ The distinction between the validity of the

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. *Id.* Upon arrival at that location police spotted a maroon Chevrolet, registered to Albert Ross. *Id.* 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." *Id.* After a period of observation the police stopped the vehicle, which was operated by a person matching Ross' ("Bandit's") description. *Id.*

¹¹⁴ *Id.* Police first searched the interior of the car, finding a bullet on the front seat and a pistol in the glove compartment. *Id.*

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.¹²⁶

The Circuit Court of Appeals for the District of Columbia then decided to rehear the case en banc.¹²⁷ A majority of the court found the warrantless search of both containers to be unlawful,¹²⁸ expressing dissatisfaction with any distinction based on varied expectations of privacy between the two closed containers.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.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.¹³¹

The Supreme Court reversed, holding that both closed containers could properly be searched under the fourth amendment without a warrant.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.¹³³ The *Ross* majority noted that a recent pronouncement of the Court, *Robbins v. California*,¹³⁴ had been unable to provide an answer to this question supported by a majority opinion.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.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.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.*

¹²⁶ *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.

¹²⁷ 102 S. Ct. at 2161.

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

¹²⁹ *Id.* at 1161, 1170-71.

¹³⁰ *Id.* at 1171.

¹³¹ *Id.*

¹³² 102 S. Ct. at 2159, 2170-73.

¹³³ *Id.* at 2168.

¹³⁴ 453 U.S. 420 (1981) (plurality).

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. *Id.* at 2168; see *Robbins v. California*, 453 U.S. at 435 (1981) (Powell, J., concurring).

¹³⁶ 102 S. Ct. at 2159.

¹³⁷ *Id.* at 2172.

*Chadwick*¹³⁸ and *Arkansas v. Sanders*.¹³⁹ 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.¹⁴⁰ A key element of the automobile exception, probable cause to search a motor vehicle,¹⁴¹ 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.¹⁴²

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.¹⁴³ The Court began by referring to some past warrantless vehicle searches upheld by the Court under the automobile exception.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

The *Ross* Court next discussed an argument premised upon what it termed "practical considerations."¹⁴⁹ The Court noted that illicit materials carried within motor vehicles will almost always be concealed, usually within closed containers.¹⁵⁰ Consequently, the Court stated, unless the permissible scope of the automobile exception included the right to search such closed containers,

¹³⁸ 433 U.S. 1 (1977).

¹³⁹ 442 U.S. 753 (1979).

¹⁴⁰ 102 S. Ct. at 2165-67.

¹⁴¹ See *supra* notes 10 and 41 and accompanying text.

¹⁴² 102 S. Ct. at 2167-68.

¹⁴³ *Id.* at 2168-69.

¹⁴⁴ *Id.* at 2169 (citing *Chambers v. Maroney*, 399 U.S. 42 (1970) and *Carroll v. United States*, 267 U.S. 132 (1925)).

¹⁴⁵ 102 S. Ct. at 2169.

¹⁴⁶ *Id.* (citing *Scher v. United States*, 305 U.S. 251 (1938) and *Husty v. United States*, 282 U.S. 694 (1931)).

¹⁴⁷ 102 S. Ct. at 2169.

¹⁴⁸ *Id.* at 2169-70.

¹⁴⁹ *Id.* at 2170-71 & n.28.

¹⁵⁰ *Id.* at 2170.

the "practical consequences" of the automobile exception would be largely "nullified."¹⁵¹

In support of its decision the *Ross* Court also drew an analogy to situations where searches were conducted under the authorization of a valid warrant.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.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.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.¹⁵⁵ The Court noted that its reasoning applied equally to all closed containers.¹⁵⁶

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

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

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

¹⁵² *Id.* at 2170-71.

¹⁵³ *Id.* at 2170.

¹⁵⁴ *Id.* at 2170-71.

¹⁵⁵ *Id.* at 2170-72.

¹⁵⁶ *Id.* at 2171.

¹⁵⁷ *Id.* at 2172.

¹⁵⁸ 389 U.S. 347 (1967).

¹⁵⁹ 102 S. Ct. at 2172.

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 2173. Several other Justices also filed opinions. *Id.* In brief concurrences, Justices Blackmun and Powell emphasized the need for clarification in this confused area of the law. *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. *Id.* Justice White, in dissent, merely noted that he would have maintained the reasoning of *Robbins v. California*, 453 U.S. 420 (1981) (plurality), and that he agreed substantially with Justice Marshall's dissent. *Id.*

¹⁶² *Id.* at 2174 (Marshall, J., dissenting).

¹⁶³ *Id.* at 2176.

cause alone is to equate the searching official with the normally required neutral and detached magistrate.¹⁶⁴ Justice Marshall noted that the two are not normally considered equals for purposes of the fourth amendment.¹⁶⁵

Justice Marshall indicated that historically the automobile exception has been limited by the factors of mobility and a reduced expectation of privacy.¹⁶⁶ He noted that the majority failed to base its decision on these justifications.¹⁶⁷ 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.¹⁶⁸

Justice Marshall rejected the majority's interpretations of past Court decisions concerning the automobile exception.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ 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.¹⁷²

Finally, the Justice indicated that the majority's rule would create anomalous results.¹⁷³ He questioned the majority's distinction between containers found during a probable cause search of an entire car and containers found in other contexts.¹⁷⁴ 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.¹⁷⁵

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,¹⁷⁶ 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.¹⁷⁷ This determination will not be limited by the circumstances which are necessary to justify the initiation of that warrantless search.¹⁷⁸ By equating the scope of a warrantless search under the automobile exception 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.¹⁷⁹ The *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.¹⁸⁰ Finally, 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" does not sufficiently account for the countervailing fourth amendment values which will be sacrificed through the implementation of the *Ross* Court's reasoning in the future.¹⁸¹

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

In *Ross* the Court concluded that the scope of the valid warrantless vehicle search under the automobile exception included the opening of two closed containers.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;"¹⁸³ the two factors necessary to justify the initiation of a warrantless search under the automobile exception.¹⁸⁴ Rather than limiting the extent of the warrantless search permissible under the automobile exception with those justifying factors, the *Ross* Court indicated that the scope of the warrantless search would be the same as a magistrate could authorize through a warrant.¹⁸⁵ The *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.¹⁸⁶

In carrying out his law enforcement function, a government official who is considering whether or not it is reasonable to undertake a search¹⁸⁷ necessarily

¹⁷⁷ *Id.* at 2172.

¹⁷⁸ *See id.* at 2170-72.

¹⁷⁹ *See infra* notes 182-204 and accompanying text.

¹⁸⁰ *See infra* notes 203-21 and accompanying text.

¹⁸¹ *See infra* notes 227-48 and accompanying text.

¹⁸² *See* 102 S. Ct. 2160, 2172-73.

¹⁸³ *See* *Arkansas v. Sanders*, 442 U.S. 753, 763-65 (1979).

¹⁸⁴ *See supra* notes 9-11 and accompanying text.

¹⁸⁵ *See* 102 S. Ct. at 2159, 2172.

¹⁸⁶ *See supra* notes 2-4 and accompanying text.

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.¹⁸⁸ In contrast, a neutral and detached magistrate's determination of when 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.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ These principles thus support the idea of obtaining prior judicial determination of probable cause.¹⁹²

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 warrant¹⁹³ must be obtained from a neutral magistrate before a search may be "reasonable" as required by the fourth amendment.¹⁹⁴ The Supreme Court

ment there must be *probable cause* to conduct a search. *See Chambers v. Maroney*, 399 U.S. 42, 51 (1970). 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.

¹⁸⁸ *See Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971) (plurality).

¹⁸⁹ *See Arkansas v. Sanders*, 442 U.S. 753, 758-59; *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). "Unreasonable assertions of the executive authority" will be avoided through a separation of governmental powers. *See Sanders*, 442 U.S. at 759; *United States v. United States District Court*, 407 U.S. 297, 317-18 (1972).

¹⁹⁰ *See Stone v. Powell*, 428 U.S. 465, 484, 486 (1976); *United States v. United States District Court*, 407 U.S. 297, 317-18 (1972).

¹⁹¹ *See Beck v. Ohio*, 379 U.S. 89, 96 (1964).

¹⁹² *United States v. Chadwick*, 433 U.S. 1, 9-10 (1977); *United States v. United States District Court*, 407 U.S. 297, 314-18 (1972).

¹⁹³ 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.

¹⁹⁴ *See Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz v. United States*, 389 U.S.

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."¹⁹⁵ While this "per se" rule is subject to exceptions, the Court has emphasized that they must be "specifically established and well-delineated."¹⁹⁶ 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.¹⁹⁷ In this way the benefits of requiring a judicial warrant¹⁹⁸ may be maintained except in particular situations where the need for a warrant would place an unreasonable burden upon law enforcement.¹⁹⁹

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,²⁰⁰ the *Ross* Court has contradicted the rationale behind a warrant standard of reasonableness. In essence, the *Ross* 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.²⁰¹ The *Ross* 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

347, 357 (1967); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

¹⁹⁵ *E.g.*, *United States v. Ross*, 102 S. Ct. at 2172 (quoting from *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting from *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted)). An alternative standard, the "reasonableness" standard, *see* *United States v. Rabinowitz*, 339 U.S. 56, 64 (1950) (holding that to be lawful under the fourth amendment a search need only be "reasonable" under the circumstances, with no constitutional requirement of a warrant), has been explicitly rejected by the Court. *Chimel v. California*, 395 U.S. 752, 765, 768 (1969); *see also* *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979); *United States v. United States District Court*, 407 U.S. 297, 315 & n.16 (1972). For an excellent analysis of the "warrant" approach versus the "reasonableness" approach, and a view that the court actually fluctuates between the two, *see* Bloom, *Warrant Requirement — The Burger Court Approach*, 53 U. COLO. L. REV. 691 (1982).

¹⁹⁶ *See* *Katz v. United States*, 389 U.S. 347, 357 (1967). *See supra* notes 5 and 6 and accompanying text.

¹⁹⁷ *See* *United States v. United States District Court*, 407 U.S. 297, 318 (1972); *see also* *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (plurality).

¹⁹⁸ *See supra* notes 187-92 and accompanying text.

¹⁹⁹ *See* *Arkansas v. Sanders*, 442 U.S. 753, 759-60 (1979).

²⁰⁰ 102 S. Ct. at 2159, 2172.

²⁰¹ *See id.* at 2170-72. The *Ross* 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 in 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 cause²¹² 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.

²⁰⁶ See *Arkansas v. Sanders*, 442 U.S. 753, 759-60 (1979); *United States v. United States District Court*, 407 U.S. 297, 318 (1972).

²⁰⁷ *Katz v. United States*, 389 U.S. 347, 357 (1967).

²⁰⁸ See *Arkansas v. Sanders*, 442 U.S. 753, 759-60 (1979).

²⁰⁹ See *supra* notes 31-66 and accompanying text.

²¹⁰ See *Arkansas v. Sanders*, 442 U.S. 753, 759-60 (1979); *Chimel v. California*, 395 U.S. 752, 762, 768 (1969); *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

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.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.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.²¹⁵ This is not necessarily to the full extent which the searching government official deems to be proper.²¹⁶

The *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.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,²¹⁸ the Court nonetheless allowed the scope of the warrantless search in *Ross* to proceed further than those circumstances could justify.²¹⁹ In *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.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.²²¹

²¹³ See, e.g., *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977); *Chimel v. California*, 395 U.S. 752, 766 (1969); *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

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).

²¹⁵ See *Chimel v. California*, 395 U.S. 752, 762 (1969). "The scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

²¹⁶ See *Coolidge v. New Hampshire*, 403 U.S. 443, 450-51 (1971) (plurality). "[Unjustified 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.

²¹⁷ See *supra* notes 210-16 and accompanying text.

²¹⁸ See *supra* notes 31-66 and accompanying text.

²¹⁹ See 102 S. Ct. at 2172.

²²⁰ See *supra* notes 187-92 and accompanying text.

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."²²² In essence, the Court asserted that "practical considerations," other than the justifying factors heretofore associated with the automobile exception,²²³ 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.²²⁴ 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.²²⁵ 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.²²⁶

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.²²⁷ 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.²²⁸ 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.²²⁹ 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.²³⁰ 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."²³¹ 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

²³² See *id.*

²³³ See *Arkansas v. Sanders*, 442 U.S. 753, 763-65 (1979).

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).

²³⁹ *California v. Robbins*, 453 U.S. 420, 423-29 (1981) (plurality) (effectively overruled by *United States v. Ross*, 102 U.S. 2157 (1982)).

scope of the warrantless search permissible under the automobile exception.²⁴⁰ No circumstance associated with closed containers makes it unreasonable to require 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 containers and set them aside until a warrant was obtained with little or no difficulty 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 simply 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 justifications²⁴⁸ 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 justifications for that exception,²⁵¹ the Court has departed from the supposed superiori-

²⁴⁰ See *infra* notes 245-48 and accompanying text.

²⁴¹ See 102 S. Ct. at 2179 (Marshall, J., dissenting); *Arkansas v. Sanders*, 442 U.S. 753, 763-64 (1979).

²⁴² See *United States v. Chadwick*, 433 U.S. 1, 1-16 (1977).

²⁴³ See *id.*

²⁴⁴ See *Robbins v. California*, 453 U.S. 420 (1981) (plurality) (effectively overruled by *United States v. Ross*, 102 S. Ct. 2157 (1982)); *Arkansas v. Sanders*, 442 U.S. 753 (1979).

²⁴⁵ See *supra* notes 187-92 and accompanying text.

²⁴⁶ See *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

²⁴⁷ See *Katz v. United States*, 389 U.S. 347, 357 (1967); see also *Arkansas v. Sanders*, 442 U.S. 753, 759-60 (1979).

²⁴⁸ See *supra* notes 9-11 and accompanying text.

²⁴⁹ 102 S. Ct. at 2172.

²⁵⁰ See *supra* notes 182-202 and accompanying text.

²⁵¹ See *supra* notes 203-21 and accompanying text.

ty of the neutral and detached magistrate in determining probable cause to search.²⁵² The "practical considerations" cited by the Court are insufficient to justify this departure.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 *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.²⁵⁴ This revised automobile exception would more consistently offer heightened fourth amendment protection²⁵⁵ 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,²⁵⁶ and allowing warrantless searches under the automobile exception only when problems related to mobility would unreasonably impair law enforcement.²⁵⁷

Because of the advantages of having a neutral magistrate determine whether there is probable cause to conduct a search,²⁵⁸ the current view of the fourth amendment asserts a requirement that warrants be used as a general rule.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.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.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,²⁶² a warrant should be used whenever it is reasonably practicable to do so.²⁶³

²⁵² See *supra* notes 187-92 and accompanying text.

²⁵³ See *supra* notes 222-48 and accompanying text.

²⁵⁴ See *supra* notes 193-99 and accompanying text.

²⁵⁵ See *supra* notes 187-92 and accompanying text.

²⁵⁶ See *infra* notes 267-72 and accompanying text.

²⁵⁷ See *infra* notes 273-80 and accompanying text.

²⁵⁸ See *supra* notes 187-92 and accompanying text.

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

²⁶⁰ See *Arkansas v. Sanders*, 442 U.S. 753, 759-60 (1979); *United States v. United States District Court*, 407 U.S. 297, 318 (1972).

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

²⁶² See *supra* notes 187-92 and accompanying text.

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.²⁶⁴ 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.²⁶⁵ The result is that some individuals lose the fourth amendment benefits provided by a judicial warrant,²⁶⁶ 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"²⁶⁷ should be dropped as a circumstance which can justify warrantless searches under the automobile exception. Even assuming its general applicability to motor vehicles,²⁶⁸ this factor has nothing to do with whether it is reasonably practicable to obtain a warrant.²⁶⁹ 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.²⁷⁰ It is anomalous to say that a motor vehicle displays a great enough expectation of privacy to deserve fourth amendment protection,²⁷¹ 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

United States v. United States District Court, 407 U.S. 297, 318 (1972); Terry v. Ohio, 392 U.S. 1, 20 (1968); Carroll v. United States, 267 U.S. 132, 156 (1925).

²⁶⁴ 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.

²⁶⁵ See United States v. Ross, 102 S. Ct. 2157, 2178-80 (Marshall, J., dissenting); Cardwell v. Lewis, 417 U.S. 583, 597-99 (1974) (Stewart, J., dissenting).

²⁶⁶ See *supra* notes 188-94 and accompanying text.

²⁶⁷ See United States v. Chadwick, 433 U.S. 1, 12-13 (1977).

²⁶⁸ 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).

²⁶⁹ 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).

²⁷⁰ See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Rakas v. Illinois, 439 U.S. 128, 143 & n.12 (1978). One's expectation of privacy in an item is also determinative of standing to challenge fourth amendment violations. See Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980); Rakas v. Illinois, 439 U.S. 128, 138-43 (1978).

²⁷¹ Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971) (plurality). "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* See *supra* note 268.

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).

²⁷³ 267 U.S. 132, 153, 156 (1925).

²⁷⁴ See *Arkansas v. Sanders*, 442 U.S. 753, 765 n.14 (1979); *Carroll v. United States*, 267 U.S. 132, 153, 156 (1925).

²⁷⁵ It is necessary that warrantless searches in both these contexts be limited. See *supra* notes 203-21 and accompanying text.

²⁷⁶ See *United States v. United States District Court*, 407 U.S. 297, 318 (1972); *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Carroll v. United States*, 267 U.S. 132, 156 (1925).

²⁷⁷ See *Arkansas v. Sanders*, 442 U.S. 753, 763-64, 765 n.14 (1979); *United States v. Chadwick*, 433 U.S. 1, 13 (1977).

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.

²⁸⁰ The justification for allowing the "larger" search may be totally inapplicable to the "smaller" search. Cf. *Robbins v. California*, 453 U.S. 420, 428 (1981) (plurality) (effectively overruled by *United States v. Ross*, 102 S. Ct. 2157 (1982)).

²⁸¹ See 102 S. Ct. at 2172.

determining the proper scope of a warrantless search under the automobile exception.²⁸² By doing so, the *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.²⁸³ Finally, the *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.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.²⁸⁵ This would entail dropping the expectation of privacy factor from the automobile exception analysis.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.²⁸⁷

The result of the *Ross* decision was to allow the warrantless search of closed containers during the scope of a warrantless search under the automobile exception.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 *per se* unreasonable — subject only to a few specifically established and well-delineated exceptions."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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²⁸² See *supra* notes 188-202 and accompanying text.

²⁸³ See *supra* notes 203-21 and accompanying text.

²⁸⁴ See *supra* notes 222-48 and accompanying text.

²⁸⁵ See *supra* notes 254-80 and accompanying text.

²⁸⁶ See *supra* notes 267-72 and accompanying text.

²⁸⁷ See *supra* notes 273-80 and accompanying text.

²⁸⁸ See 102 S. Ct. at 2172 (1982).

²⁸⁹ *Id.*