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THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT: SPEEDING AWAY FROM THE FOURTH AMENDMENT

I. INTRODUCTION

Any inquiry into the maze of search and seizure law must begin with the following basic premise enunciated by Justice Stewart in *Katz v. United States*:¹ "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the fourth amendment—subject only to a few specifically established and well-delineated exceptions."² Among the "specifically established" exceptions to the fourth amendment³ is the so-called "automobile exception," which generally provides for lawful warrantless vehicular searches where a two-part test can be met: (1) the officer must have probable cause to search the vehicle,⁴ and (2) there must be a showing of either exigent circumstances⁵ or a lesser ex-

¹ 389 U.S. 347 (1967).

² *Id.* at 357.

³ The fourth amendment states:

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.

Automobiles are protected under the fourth amendment as "effects." See, *United States v. Chadwick*, 433 U.S. 1, 12 (1977).

The generally recognized exceptions to the fourth amendment's warrant requirement are:

(1) A search incident to a lawful arrest. See, e.g., *Chimel v. California*, 395 U.S. 752 (1969).

(2) Hot pursuit. See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967).

(3) Stop and Frisk. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).

(4) Plain view. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

(5) Consent searches. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218. (1973).

(6) Automobile searches. See, e.g., *Carroll v. United States*, 267 U.S. 132 (1925).

This Note deals only with the automobile exception.

⁴ Generally, probable cause to search is present if the facts and circumstances would persuade a reasonably prudent person that a crime has been committed and that evidence of the crime can be found at the location to be searched. See, e.g., *Brinegar v. United States*, 338 U.S. 160 (1949).

⁵ See, e.g., *Carroll v. United States*, 267 U.S. 132 (1925), where a vehicle's

pectation of privacy.⁶

The original "automobile exception," as set forth in *Carroll v. United States*,⁷ provided an extremely narrow exception, an exception invocable only upon a showing of probable cause to search combined with exigent circumstances due to the vehicle's mobility and upon a further showing of the impracticability of procuring a search warrant. The modern "automobile exception" has been broadened so extensively that probable cause is the only active factor which remains from the *Carroll* test. Exigent circumstances receive mere lip service from most courts,⁸ and the impracticability requirement has been generally disregarded.⁹

Why has the exception been so extensively broadened? One possible explanation is that the courts are using the broadened "automobile exception" as a shield against the devastating social effect of the exclusionary rule.¹⁰ If a court deems a warrantless search violative of the fourth amendment, any evidence found during that search cannot be introduced into evidence at trial. Thus, many individuals who are obviously guilty are acquitted due to insufficient evidence. Justice Rehnquist, while upholding a warrantless vehicle search, recently wrote in *Rakas v. Illinois*:¹¹

mobility created an exigent circumstance which made the attainment of a search warrant impracticable.

⁶ See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974), where the Court stated that a vehicle has a lesser expectation of privacy than a home.

⁷ 267 U.S. 132 (1925).

⁸ See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970) (holding that exigent circumstances justifying a warrantless vehicle search exist even after the suspected criminals are arrested and the vehicle is in police custody).

⁹ See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974); *United States v. Mitchell*, 538 F.2d 1230 (5th Cir. 1976). In *Mitchell*, federal drug enforcement agents learned of a drug operation in the spring of 1973. By October of the same year, the agents' information was so detailed that they had videotape equipment set up around a parking lot where a major drug transfer was expected to take place. The agents watched as the transfer occurred, and as soon as it appeared the defendant was going to drive away, the agents arrested him and searched his vehicle. The agents did not have a warrant, yet the court upheld the planned warrantless search. Due to the advance detailed information the agents possessed, it is obvious that it would have been practicable for the agents to obtain a warrant. However, the practicability issue was ignored by the court.

¹⁰ The exclusionary rule generally provides that evidence gained during an unreasonable search or seizure must be excluded at trial. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

¹¹ 439 U.S. 128 (1978).

Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.¹²

In response, Justice White wrote for the dissenters:

If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases.¹³

There are two problems with justifying the broadened automobile exception on the basis of the negative social effects of the exclusionary rule: (1) If the harmful effects of the exclusionary rule are the sole cause of the new-look automobile exception, it would stand to reason that the Court would also broaden all the exceptions to the fourth amendment, but, in fact the warrant requirement is being strictly construed in many non-vehicle cases;¹⁴ and (2) the Court could easily dispense with the exclusionary rule's effect by reverting to the strict *Carroll* standard, which would result in officers procuring warrants unless truly impracticable, thereby eliminating the need to invoke the exclusionary rule.¹⁵

Whatever the reason for the broad automobile exception, this article will attempt to show why the automobile exception should

¹² *Id.* at 137.

¹³ *Id.* at 156.

¹⁴ See, e.g., *Ybarra v. Illinois*, 100 S. Ct. 338 (1979), wherein the Court held that law enforcement officers may not search patrons of a public establishment which is being searched pursuant to a warrant; and *Chimel v. California*, 395 U.S. 752 (1969), where the "search incident to a lawful arrest" exception was severely limited by the Court. It now only applies to those areas within the prisoner's immediate reach rather than to the general area in which the arrest took place.

¹⁵ As it presently stands, the automobile exception appears so broad that officers seldom attempt to procure a warrant to search a vehicle, even if they have plenty of time. As a result, evidence which could easily be obtained through the warrant procedure is suppressed because the officer failed to adhere to the fourth amendment requirement. See, e.g., *United States v. Chadwick*, 433 U.S. 1 (1977). See also *United States v. Morrow*, 541 F.2d 1229, 1232 (7th Cir. 1976), wherein the court stated, "[A]gents should attempt to secure search warrants whenever possible, thus obviating the necessity of litigating salient Fourth Amendment claims."

have been maintained in its original *Carroll* form. Interestingly, the Supreme Court has reiterated its support of the fourth amendment on numerous occasions, such as in *Johnson v. United States*,¹⁶ where the Court stated:

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.¹⁷

And in *Coolidge v. New Hampshire*,¹⁸ the Court said of the fourth amendment: "If it is to be a true guide to constitutional police action, rather than just a pious phrase, then '[t]he exceptions cannot be enthroned into the rule.'"¹⁹ As the following discussion indicates, these pronouncements appear to have little, if any, application to vehicle searches and seizures.

II. THE SUPREME COURT DECISIONS: A "LABYRINTH OF JUDICIAL UNCERTAINTY"²⁰

The United States Supreme Court initially encountered the issue of whether a warrantless search of an automobile could be lawful in the prohibition-era case of *Carroll v. United States*.²¹ In *Carroll*, the defendants were driving from Detroit to Grand Rapids when two federal prohibition agents stopped the vehicle.²² Based upon a previous incident between the parties, the agents had probable cause to suspect the defendants of transporting illegal liquor.²³ Upon conducting a warrantless search of the vehicle,

¹⁶ 333 U.S. 10 (1948).

¹⁷ *Id.* at 13, 14.

¹⁸ 403 U.S. 443 (1971).

¹⁹ *Id.* at 481.

²⁰ *People v. Brosnan*, 32 N.Y.2d 254, 263, 344 N.Y.S.2d 900, 907, 298 N.E.2d 78, 83 (1973) (Wachtler, J., dissenting). Justice Rehnquist, while addressing the issue of the warrantless search and seizure of vehicles, said, "this branch of the law is something less than a seamless web." *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973).

²¹ 267 U.S. 132 (1925).

²² Due to its proximity to the Canadian border, Detroit was a known center for illegal liquor traffic. *Id.* at 160.

²³ Approximately six weeks before the stop of the *Carroll* vehicle, the agents

the agents found 68 bottles of liquor hidden behind the upholstery of the seats.²⁴ The defendants were then arrested and subsequently convicted of violating the National Prohibition Act.²⁵ On appeal, the defendants contended that the warrantless search and seizure of their vehicle was in violation of their fourth amendment rights, and that, therefore, the evidence found in the vehicle should have been excluded.²⁶

The United States Supreme Court disagreed, however, and upheld the warrantless search. Writing for a seven-member majority,²⁷ Chief Justice Taft noted the following critical distinction:

[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.²⁸

However, *Carroll* does not stand for the proposition that any mobile vehicle may be stopped and searched. Chief Justice Taft noted that the vehicle must not only be actually mobile, but the law enforcement officer must have probable cause to conduct a search of the vehicle.²⁹ While the probable cause requirement has remained intact in post-*Carroll* decisions, the actual mobility re-

had arranged to buy three cases of whiskey from the defendants, who were supposed to deliver the whiskey the following day. However, the defendants never completed the transaction. During the incident, the agents saw the defendants' vehicle, thereby enabling them to identify the vehicle they stopped between Detroit and Grand Rapids. *Id.* at 134-35.

²⁴ *Id.* at 136.

²⁵ *Id.* at 134.

²⁶ *Id.* at 136-42.

²⁷ Justice McReynolds, joined by Justice Sutherland, dissented. They believed the search could be valid only if the defendants were arrested prior to the search. *Id.* at 163-75.

²⁸ *Id.* at 153.

²⁹ "[I]f the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." *Id.* at 149.

quirement has been expanded to inherent mobility or, in some cases, mobility has not been considered a factor at all.³⁰

While Chief Justice Taft's two-pronged test for determining when a warrantless vehicle search should be upheld has received much attention in post-*Carroll* cases, one crucial statement made by the Chief Justice has been virtually ignored: "In cases where the securing of a warrant is reasonably practicable, it must be used. . . ."³¹ *Carroll* does not suggest that a warrant *should* be used by an officer, nor does it suggest that a warrant need be used only when it is convenient for the officer, but rather, any time attainment of a warrant is "reasonably practicable" the officer *must* procure a warrant.

Thus, a reasonable reading of *Carroll* reveals a very narrowly-drawn exception to the warrant requirement,³² one in which a warrantless search will be upheld only if (1) it is based upon probable cause, (2) the vehicle is mobile to the extent that it "can be quickly moved out of the locality or jurisdiction in which the warrant must be sought"³³ and (3) it is not "reasonably practicable" to obtain a warrant.³⁴ Half a century later, this original version of the so-called "automobile exception" to the fourth amendment can hardly be recognized.³⁵

Between 1925 and 1969 the automobile exception was addressed by the United States Supreme Court only three times, and in each instance, *Carroll* was merely affirmed with no further clarification or amplification.³⁶ During this period, most warrant-

³⁰ See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970) (holding a warrantless search valid where the police had sole control of the vehicle, thereby rendering it immobile for all practical purposes). For a case where the Court discarded the mobility factor in favor of a "lesser expectation of privacy" test, see *Cardwell v. Lewis*, 417 U.S. 483 (1974).

³¹ *Carroll v. United States*, 267 U.S. 132, 156 (1925).

³² In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court described *Carroll* as follows: "*Carroll*, on its face, appears to be a classic example of the doctrine that warrantless searches are *per se* unreasonable in the absence of exigent circumstances. Every word in the opinion indicates the Court's adherence to the underlying rule and its care in delineating a limited exception." *Id.* at 479.

³³ *Carroll v. United States*, 267 U.S. 132, 153 (1925).

³⁴ *Id.* at 156.

³⁵ See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970); *Cardwell v. Lewis*, 417 U.S. 483 (1974); and *Texas v. White*, 423 U.S. 67 (1975).

³⁶ See *Husty v. United States*, 282 U.S. 694 (1931); *Scher v. United States*,

less vehicle searches fell within the broad parameters of another exception to the warrant requirement—the “search incident to a lawful arrest” exception.³⁷ However, in 1969 the Supreme Court narrowed the search incident to a lawful arrest exception in *Chimel v. California*³⁸ so as to make it applicable to only those areas in the prisoner’s immediate reach, thereby removing vehicles from its scope. The *Chimel* limitation instigated a resurgence in the importance of the automobile exception, as evidenced by the Court’s decision to further develop the *Carroll* holding within a year of the *Chimel* decision.

In 1970, *Chambers v. Maroney*³⁹ set the automobile exception on a new and different road than that which *Carroll* had previously paved. The case arose from a situation where witnesses to an armed robbery provided police with a description of the vehicle used in the robbery. Shortly thereafter, a station wagon matching the description given the police, and in which an occupant was dressed in a manner similar to that described by the witnesses was stopped.⁴⁰ At this point in the scenario, assuming probable cause, *Carroll* would certainly support a warrantless search of the vehicle since it was capable of being “quickly moved.”⁴¹ However, the police chose first to arrest the occupants and then drive the vehicle to the police station,⁴² where a warrantless search revealed evidence subsequently used against the defendant. The search at the police station failed to meet *Carroll* standards in two respects: (1) With the vehicle in the sole control of the police, the vehicle was no longer actually mobile and therefore, there were no exigent circumstances on which to justify the warrantless search; and (2) since the vehicle was no longer actu-

305 U.S. 251 (1938); and *Brinegar v. United States*, 338 U.S. 160 (1949).

³⁷ Under this exception, an officer could search the place where the arrest was made in order to seize evidence connected with the crime. *See, e.g., United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947).

³⁸ 395 U.S. 752 (1969).

³⁹ 399 U.S. 42 (1970).

⁴⁰ *Id.* at 44.

⁴¹ *Carroll v. United States*, 267 U.S. 132, 153 (1925).

⁴² The Court stated: “It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, . . .” *Chambers v. Maroney*, 399 U.S. 42, 52 n.10 (1970).

ally mobile, it was "reasonably practicable"⁴³ for the police to procure a search warrant, an avenue which *Carroll* insists "must be used."⁴⁴

Yet, the Supreme Court in *Chambers*, with Justice White writing for the seven-member majority, upheld the warrantless search:

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car. . . .⁴⁵

The Court was clearly correct as to its holding that the probable cause factor still is "obtained at the station house." However, whether the vehicle's mobility still obtained is questionable at best. Justice White explained the majority's rationale:

Arguably, . . . , only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question. . . . For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.⁴⁶

In a *Carroll*-supporting dissent, Justice Harlan took exception to Justice White's "debatable question":

[T]he 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. . . . To be sure, one can conceive of instances in which the occupant, . . . , would be more deeply offended by a temporary immobilization of his vehicle than by a prompt search of it. However, such a person always remains free to consent to an immediate search, thus avoiding any delay. Where consent is not forthcoming, the oc-

⁴³ *Carroll v. United States*, 267 U.S. 132, 156 (1925).

⁴⁴ *Id.*

⁴⁵ *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

⁴⁶ *Id.* at 51, 52.

cupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure. . . . The Court's endorsement of a warrantless invasion of that privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment's mandate of " 'adherence to judicial processes.' " ⁴⁷

Unfortunately, Justice Harlan's plea was for naught. *Chambers* presented the Court with an opportunity to clarify *Carroll*, wherein the search was conducted prior to the arrest of the occupants. *Chambers* could have held that if the occupants are arrested prior to a search, the vehicle can only be searched with a warrant, because the police are then in control of the vehicle, thereby eliminating any true exigency. Such a holding would not only have been consistent with *Carroll*, but it also would be easy to apply.⁴⁸ But the Court chose instead to broaden the automobile exception to the extent that the need for mobility was thereafter questionable and the *Carroll* pronouncement that a warrant must be obtained when reasonably practicable was laid to rest. The test after *Chambers* was based merely on probable cause to search, as long as some degree of mobility existed at the time the car was seized.⁴⁹

The uncertainty as to the degree of mobility required, and the Court's failure in *Chambers* to enunciate a clear standard upon which warrantless vehicle searches could be judged, led the Court to an irreconcilable division in *Coolidge v. New Hampshire*.⁵⁰ The defendant was under investigation for the murder of a young girl.⁵¹ Approximately one month after the investigation

⁴⁷ *Id.* at 63, 64.

⁴⁸ As the automobile exception now stands, an officer must make legal judgments as to whether a warrant is needed. If the above suggested holding had been adopted by the Court, an officer would know he needed a warrant to search a vehicle, except in one narrowly-defined situation, i.e., where the vehicle is (1) actually mobile, (2) the officer has probable cause to search, but (3) he does not have sufficient probable cause to effectuate an arrest, and (4) it is impracticable to obtain a warrant prior to the search.

⁴⁹ The test is often expressed as condoning a warrantless vehicle search when there is both probable cause to search and exigent circumstances justifying the warrantless search. In regard to vehicles, inherent mobility is usually a sufficient "exigent circumstance." See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970).

⁵⁰ 403 U.S. 443 (1971).

⁵¹ *Id.* at 445.

had begun, police officers obtained warrants, which were later invalidated, authorizing them to arrest the defendant and to search his automobile.⁵² Following the arrest, the defendant's car was towed from his private residence to the police station where a search was conducted two days later.⁵³ Evidence⁵⁴ found in the car was used against the defendant at his trial, at which he was convicted of murder. On certiorari to the United States Supreme Court, Justice Stewart, in a plurality opinion,⁵⁵ evinced his belief that mobility of a vehicle was still a factor when applying the automobile exception, even after *Chambers*:

In this case, it is, of course, true that even though Coolidge was in jail, his wife was miles away in the company of two plainclothesmen, and the Coolidge property was under the guard of two other officers, the automobile was in a literal sense "mo-

⁵² Both warrants were later declared invalid because they had been issued by the state Attorney General, who acted as the chief prosecutor at the defendant's trial, rather than by a neutral and detached magistrate. Thus, the case was treated as one involving the warrantless search of a vehicle. *Id.* at 449-53.

⁵³ *Id.* at 447.

⁵⁴ The evidence gathered from the vehicle consisted of vacuum sweepings, including particles of gun powder, used in an attempt by the State to show by microscopic analysis that the deceased had been in the defendant's car. The trial judge referred the motion to suppress this evidence to the New Hampshire Supreme Court, which held the evidence admissible. *Id.* at 448.

⁵⁵ The *Coolidge* plurality opinion, with Justice Stewart writing, was broken down into three parts. In Part I, the warrant authorizing the search of the vehicle was declared invalid because it was not issued by a neutral and detached magistrate, but rather by the state Attorney General, who was involved in the investigation. Justice Stewart was joined by Justices Brennan, Douglas, Marshall and Harlan on this point.

Part II A of the opinion dealt with the rejection of the State's contention that the search of the vehicle was valid as "incident to a lawful arrest."

Justices Stewart, Douglas, Brennan, and Marshall joined in Part II B, holding that the warrantless search could not be validated under the automobile exception because of the absence of exigent circumstances which would make it impracticable to obtain a warrant. In Part II C, the same four Justices held that the doctrine of "plain view" could not justify the warrantless search of the vehicle.

In Part II D, Justice Harlan joined the aforementioned four Justices in holding that no exigent circumstances exist when police have planned the search well in advance.

Part III of the opinion did not deal with the search of the automobile.

Justice Harlan concurred in the Court's judgment and particularly with Parts I, II D, and III.

Chief Justice Burger and Justices Black, Blackmun, and White all filed separate dissenting opinions. 403 U.S. 443 (1971).

bile." A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility.⁵⁶

Not only did Justice Stewart reaffirm the *Carroll* mobility requirement, he also stressed the importance of *Carroll's* pronouncement that a warrant must be used where "reasonably practicable," a pronouncement which was ignored in deciding *Chambers*. Justice Stewart wrote, "[B]y no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant,' . . . and the 'automobile exception,' despite its label, is simply irrelevant."⁵⁷

The plurality's desire to return to *Carroll* was evident, as was the Court's realization that *Chambers* had extended the automobile exception far beyond its intended boundaries. Thus, Justice Stewart admonished lower courts and law enforcement officials, "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."⁵⁸

Unfortunately, Justice Stewart's admonishment was not followed in subsequent cases, just as the *Carroll* pronouncement was ignored in *Chambers*. Rather than returning to *Carroll*, as the language of the plurality would suggest, the post-*Coolidge* decisions continued the broadening process *Chambers* began.⁵⁹ As a result, *Coolidge* has been relegated to a holding limited to its specific facts, i.e., there must be truly exigent circumstances before the warrantless search and seizure of a vehicle will be upheld if the vehicle is located on private property.⁶⁰

⁵⁶ *Id.* at 461 n.18.

⁵⁷ *Id.* at 462. Had it not been for the confusion *Chambers* bestowed on the automobile exception, the Court probably never would have had the opportunity to apply *Carroll* to the *Coolidge* facts. It is difficult to believe the State of New Hampshire would have argued it was not practicable to obtain a warrant in this situation when in fact a warrant, though subsequently invalidated, had been obtained.

⁵⁸ *Id.* at 461-62.

⁵⁹ See, e.g., *Texas v. White*, 423 U.S. 67 (1975) (per curiam); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750 (2d Cir. 1975).

⁶⁰ See, e.g., *Cardwell v. Lewis*, 417 U.S. 583, 593 (1974). For another case in which the exigency requirement was strictly construed where a vehicle was searched on private property, see *United States v. Pruett*, 551 F.2d 1365 (5th Cir. 1977).

After *Coolidge*, the automobile exception was in a state of utter disarray, primarily because the lower courts were trying to reconcile *Chambers* and *Coolidge*, a goal which was not easily achieved.⁶¹ It should be noted, however, that if the rule from *Carroll* which required the attainment of a warrant where "reasonably practicable" had remained intact through *Chambers* and *Coolidge*, no confusion would have surfaced. Both cases could have easily been disposed of under such a test. Justice Stewart obviously sought to revive the *Carroll* test in *Coolidge*, but the Supreme Court's next pronouncement on the issue halted any such revival.

In *Cardwell v. Lewis*,⁶² the defendant was being questioned at police headquarters in regard to a murder. At the end of the questioning, the defendant was arrested, whereupon the police proceeded to seize, without a warrant, the defendant's automobile from a nearby commercial parking lot. The vehicle was moved to the police impoundment area where a warrantless search of the exterior of the vehicle was conducted, revealing incriminating evidence.⁶³ The defendant was convicted in state court, but upon a writ of habeas corpus, the United States Court of Appeals for the Sixth Circuit held that the warrantless seizure and search were in violation of the fourth amendment.⁶⁴

Upon certiorari, four Justices⁶⁵ agreed with the Sixth Circuit, while four other Justices⁶⁶ concurred in the state court's holding. The swingman, Justice Powell, voted to affirm the state court decision, but his decision was based on his belief that the case was not a proper one for habeas corpus relief. He did not address the search and seizure issue.⁶⁷

⁶¹ See, e.g., *United States v. McClain*, 531 F.2d 431 (9th Cir. 1976), cert. denied, 429 U.S. 835, wherein the court stated, "[W]e must attempt to reconcile the irreconcilable. . . ." *Id.* at 433.

⁶² 417 U.S. 583 (1974).

⁶³ *Id.* at 585-88.

⁶⁴ *Id.* at 585.

⁶⁵ Justices Stewart, Douglas, Brennan, and Marshall found the warrantless seizure violative of the fourth amendment. These Justices formed the plurality in *Coolidge* which was clamoring for a return to *Carroll*.

⁶⁶ Justices Blackmun, White, Rehnquist, and Chief Justice Burger found the search and seizure to be within the purview of the fourth amendment.

⁶⁷ *Cardwell v. Lewis*, 417 U.S. 583, 596 (1974). Justice Powell said a state prisoner's fourth amendment claims rarely bear on the question of innocence.

The *Cardwell* "plurality" became entrenched in American jurisprudence when it abandoned the troublesome "probable cause plus exigent circumstances" standard in favor of a "probable cause plus a lesser expectation of privacy" test.⁶⁸ Justice Blackmun wrote, "[I]nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry."⁶⁹ In short, the Court held that a vehicle does not have the necessary degree of privacy to invoke fourth amendment protections because "its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view."⁷⁰ However, the above language does suggest that certain areas in a vehicle, such as the glove compartment, the trunk, and the area under the seats are protected by the fourth amendment because they often serve as the "repository of personal effects" and their contents are not in "plain view." But, subsequent automobile exception cases have not so interpreted *Cardwell*.⁷¹ It should also be noted that *Cardwell* did not eliminate the "exigent circumstances" factor; rather, the Court created an either-or situation wherein lower courts could find warrantless searches lawful (assuming probable cause) on the basis of either a lesser expectation of privacy or exigent circumstances.⁷²

Therefore, on a writ of habeas corpus, the federal courts should only consider whether the petitioner was provided a fair opportunity to raise his fourth amendment claims in state courts. This position was later adopted by a majority of the Court in *Stone v. Powell*, 428 U.S. 465 (1976).

⁶⁸ See, e.g., *United States v. Newbourn*, 600 F.2d 452, 454 (4th Cir. 1979); *Haefeli v. Chernoff*, 526 F.2d 1314 (1st Cir. 1975).

⁶⁹ *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974).

⁷⁰ *Id.* at 590.

⁷¹ See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (holding that a passenger in a car does not have a legitimate expectation of privacy in the glove compartment or under the front seat); *United States v. Carr*, 584 F.2d 612 (2d Cir. 1978), *cert. denied*, 440 U.S. 935 (1979) (upholding the warrantless seizure of rifles from the locked trunk of defendant's car); *United States v. Edwards*, 577 F.2d 883 (5th Cir. 1978) (upholding the warrantless seizure of evidence found under the carpet in defendant's automobile).

⁷² For lower court cases decided under the probable cause plus exigent circumstances test, see, e.g., *United States v. Orozco*, 590 F.2d 789 (9th Cir. 1979); *United States v. Moreno*, 569 F.2d 1049 (9th Cir.), *cert. denied*, 98 S. Ct. 1615 (1978); *United States v. Woods*, 568 F.2d 509 (6th Cir.), *cert. denied*, 435 U.S. 972 (1978); *United States v. Peterson*, 549 F.2d 654 (9th Cir. 1977); *United States v.*

The *Cardwell* "dissenters,"⁷³ in an opinion by Justice Stewart, reiterated the adamant stance they took in *Coolidge*,⁷⁴ i.e., that the original *Carroll* doctrine should be retained substantially as Chief Justice Taft enunciated it in 1925:

[T]he *Carroll* doctrine simply recognizes the obvious—that a moving automobile on the open road presents a situation 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. . . . Where there is no reasonable likelihood that the automobile would or could be moved, the *Carroll* doctrine is simply inapplicable.⁷⁵

Unfortunately, the majority of the lower courts followed the *Cardwell* plurality opinion and continued ignoring the important language from *Carroll* that stated a warrant must be obtained

Kelly, 547 F.2d 82 (8th Cir. 1977); and *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977).

For a case which upholds a warrantless vehicle search on the basis of a lesser expectation of privacy, see *United States v. McLaughlin*, 578 F.2d 1180 (5th Cir. 1978).

For a case which uses a combination of the exigency test and the lesser expectation of privacy test, see *United States v. Alden*, 576 F.2d 772 (8th Cir.), cert. denied, 439 U.S. 855 (1978).

Not only did Justice Blackmun retain the exigency factor in *Cardwell*, but he also refined its meaning:

Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. . . . The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action. *Cardwell v. Lewis*, 417 U.S. 583, 595-96 (1974).

⁷³ The term "dissent" is misleading in this case since the Court split four to four on the issue of search and seizure. In fact, had Justice Powell not taken part in the case, as opposed to writing his concurrence which established Justice Blackmun's opinion as the plurality, the dissenters would have been the plurality. An equal split of the Supreme Court results in affirmance of the highest-level lower court which decided the case, thus, in this instance, the Sixth Circuit Court of Appeals would have been affirmed.

⁷⁴ The majority distinguished *Cardwell* from *Coolidge* on the ground that *Coolidge* only applied to private property. *Cardwell* dealt with a car located in a public parking garage. *Cardwell v. Lewis*, 417 U.S. 583, 593 (1974).

⁷⁵ *Id.* at 597-98.

when "reasonably practicable."⁷⁶

In 1975 the Supreme Court was given yet another opportunity to clarify its position regarding the automobile exception when it decided *Texas v. White*.⁷⁷ The defendant was arrested at a drive-in bank within 10 minutes of the police receiving a description of him from another bank where he had attempted to cash checks on a non-existent fund. The defendant's car, rather than being searched at the scene of the arrest, was taken to the police station where a warrantless search was conducted.⁷⁸ When confronted with the issue of the warrantless search of the defendant's car, the Supreme Court, rather than clarifying its prior position, proffered merely a per curiam opinion in which seven members⁷⁹ of the Court agreed that *Chambers* controlled and that therefore the search was lawful.

After *White*, it appeared that for all practical purposes all that was needed to validate a warrantless search or seizure of an automobile was probable cause. Exigent circumstances were no longer needed, because in their absence a court could justify a search on the "lesser expectation of privacy" test,⁸⁰ which effectively renders the search dependent upon probable cause alone. The one possible exception to this new standard was the *Coolidge* situation wherein the vehicle is on private property, thereby increasing its expectation of privacy, and there are no exigent cir-

⁷⁶ See, e.g., *United States v. Carr*, 584 F.2d 612 (2d Cir. 1978), *cert. denied*, 440 U.S. 935 (1979); *United States v. Abascal*, 564 F.2d 821 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978); *United States v. Chuke*, 554 F.2d 260 (6th Cir. 1977); *United States v. Mitchell*, 538 F.2d 1230 (5th Cir.), *cert. denied*, 430 U.S. 945 (1976); and *Haefeli v. Chernoff*, 526 F.2d 1314 (1st Cir. 1975).

For a case which relies on the *Carroll* impracticability requirement, see *United States v. Blanton*, 520 F.2d 907, 912 (6th Cir. 1975) (holding that the key determination in deciding whether a warrant is needed is whether it is practicable to secure a warrant).

⁷⁷ 423 U.S. 67 (1975).

⁷⁸ *Id.* at 67-68.

⁷⁹ Among the majority Justices in *White* was Justice Stewart, the writer of the majority opinion in *Coolidge* and the dissenting opinion in *Cardwell*. He wrote in *Coolidge* that *Chambers* merely extended the *Carroll* doctrine so that a warrantless search could be undertaken when it wasn't reasonable to conduct the search on the highway. *Coolidge v. New Hampshire*, 403 U.S. 443, 463 (1971). Such a reading of *Chambers* ignores the "impracticable" requirement of *Carroll*. The dissenters in *White* were Justices Marshall and Brennan.

⁸⁰ See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974).

cumstances upon which a warrantless search could be justified. The broadening process which occurred through *Chambers*, *Cardwell*, and *White* rendered the automobile exception a misnomer. The real exception was the case in which a warrant was required prior to the search or seizure of the vehicle.⁸¹

However, two recent Supreme Court cases can be read as an attempt by the Court to reverse the broadening process that *Chambers* began.⁸² In *United States v. Chadwick*,⁸³ the respondents removed a footlocker from a train and placed it in the trunk of their automobile. Onlooking officers, who had probable cause to believe marihuana was being transported in the footlocker, arrested the respondents and seized the car and the footlocker while the trunk of the car was still open and before the car's engine had been started. At the Federal building in Boston, an hour and a half after the initial seizure, officers opened the double-locked footlocker. They did not have a warrant to do so.⁸⁴ The district court granted the defendant's motion to suppress the evidence and the Court of Appeals for the First Circuit affirmed. On certiorari to the Supreme Court, the government argued that the footlocker was analogous to motor vehicles and that therefore the same principles should apply.⁸⁵ Chief Justice Burger, writing for a seven-member majority, rejected this argument, holding that luggage has a higher expectation of privacy than an automobile: "Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects."⁸⁶ Therefore, luggage is afforded a higher degree of protection by the

⁸¹ The Supreme Court further approved warrantless vehicle searches in *Cady v. Dombrowski*, 413 U.S. 433 (1973), and *South Dakota v. Opperman*, 428 U.S. 364 (1976). In both cases, the Supreme Court approved the routine inventorying of the contents of lawfully impounded vehicles, including locked compartments.

A further expansion of warrantless vehicle searches has recently occurred in the lower courts where the "stop and frisk" rationale of *Terry v. Ohio*, 392 U.S. 1 (1968), has been expanded to vehicles. See, e.g., *United States v. Rainone*, 586 F.2d 1132 (7th Cir. 1978), cert. denied, 99 S. Ct. 1787 (1979); and *United States v. Green*, 465 F.2d 620 (D.C. Cir. 1972), where the "frisk" of automobiles has been approved during the course of a *Terry* stop.

⁸² See *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 99 S. Ct. 2586 (1979).

⁸³ 433 U.S. 1 (1977).

⁸⁴ *Id.* at 3-5.

⁸⁵ *Id.* at 11-12.

⁸⁶ *Id.* at 13.

fourth amendment than an automobile. The Court further noted that the warrantless search could not be justified by the mobility factor, as "there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained."⁸⁷ Such reasoning would appear to apply with equal force to such cases as *Chambers* and *White* in which the searched vehicles were in the sole control of the police. However, the Court said in a footnote that absolutely secure storage facilities may not be available to store an automobile until a warrant can be obtained, thus, the automobile is subject to a warrantless search while the luggage found in the automobile is not.⁸⁸ Such weak, unsubstantiated reasoning for such an important distinction seems like a written invitation by the Court to the nation's defense lawyers, asking them to challenge the Court's prior position as to automobile searches.

Chief Justice Burger presented defense lawyers with further ammunition to gun down past automobile exception holdings when he wrote: "With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant."⁸⁹ In *Chambers*, the Court had expressly held that the search of a vehicle was no greater an intrusion than the seizure of the vehicle.⁹⁰ The Court explained its seemingly contrary *Chadwick* rule, again in a footnote, by stating that the defendant had a privacy interest in the contents of the footlocker, but no privacy interest in the footlocker as a whole, which was exposed to public view in the same manner as an automobile. Therefore, the search was a greater intrusion than the seizure.⁹¹ The Court failed to explain how a search of a vehicle's trunk or glove compartment is different than a search of the inside of a footlocker. Indeed, it appears to be an indistinguishable difference and again, one which defense lawyers should seize upon.

Further evidence of *Chadwick's* limiting nature in regard to the automobile exception is the following statement from Chief Justice Burger:

⁸⁷ *Id.*

⁸⁸ *Id.* at 13 n.7.

⁸⁹ *Id.* at 13.

⁹⁰ *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970).

⁹¹ *United States v. Chadwick*, 433 U.S. 1, 13-14 n.8 (1977).

Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority.⁹²

Arguably, once the occupants of a vehicle are arrested, the police have exclusive dominion over the vehicle, and therefore, a warrant must be obtained prior to any search of the vehicle.

While *Chadwick* certainly went a long way toward limiting the automobile exception, there remained much room for further limitation before the present automobile exception would be returned to its original *Carroll* form. In 1979, *Arkansas v. Sanders*⁹³ began that further limitation.⁹⁴ In *Sanders*, police officers received a tip from a reliable informant alerting them to the fact the defendant would be arriving at the Little Rock airport that afternoon, carrying a green suitcase full of marihuana. As pre-

⁹² *Id.* at 15.

⁹³ 99 S. Ct. 2586 (1979).

⁹⁴ In 1978, prior to *Arkansas v. Sanders*, the Supreme Court decided *Rakas v. Illinois*, 439 U.S. 128 (1978), wherein the fourth amendment protections available to automobile passengers were severely limited.

The defendants were stopped by an officer who recognized the vehicle the defendants were driving as one used in a robbery. The defendants were removed from the car, at which time a warrantless search of the vehicle revealed a box of rifle shells inside the glove compartment, which was locked, and a sawed-off rifle under the front passenger seat. The defendants did not own the car, nor did they assert a possessory interest in the items seized. The Supreme Court granted certiorari to determine whether the defendants had standing to challenge the warrantless search and seizure as a violation of their fourth amendment rights. Justice Rehnquist, writing for a five-member majority, held that since petitioners asserted neither a property nor a possessory interest in the vehicle or the items seized, and since they failed to establish that they had a legitimate expectation of privacy in the interior of the vehicle, they did not have standing to challenge the warrantless search and seizure.

While the decision is adverse to passengers in vehicles which are subjected to warrantless searches, the case can be beneficial to a defense lawyer who represents either the owner of the vehicle or one who asserts a possessory interest in the items seized. Justice Rehnquist repeatedly referred to the non-possessory interest of the defendants, thereby giving rise to the inference that an owner or one who has a possessory interest has a legitimate expectation of privacy in the glove compartment or under the seat, and therefore, a warrantless search of those areas, absent exigent circumstances, cannot be undertaken.

dicted, the defendant was at the airport and officers observed him place the suitcase in the trunk of a taxi, in which he then left. The cab was stopped a few blocks from the airport and the driver consented to a search of the vehicle's trunk. Officers removed the suitcase and conducted an immediate warrantless search of its contents, thereby finding the marihuana.⁹⁵

The trial court upheld the warrantless search, but the Arkansas Supreme Court reversed, apparently on the basis of the original *Carroll* rationale:

[T]here is nothing in this set of circumstances that would lend credence to an assertion of impracticality in obtaining a search warrant. . . . With the suitcase safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.⁹⁶

The United States Supreme Court affirmed, thereby extending *Chadwick*, which involved luggage seized from a stationary vehicle, to luggage seized from a moving vehicle. Underlying the Court's decisions in *Chadwick* and *Sanders* is the idea that objects taken from a vehicle, like luggage, are subject to a higher expectation of privacy than the vehicle itself. Thus, *Chambers* and *Cardwell* allow a warrantless search of the vehicle, but *Chadwick* and *Sanders* disallow a warrantless search of the objects found in the vehicle. The Court in *Sanders*, just as it had in *Chadwick*, declined to explain the difference between a locked trunk and a locked piece of luggage.

As to the Government's contention that the mobility of the luggage created an exigent circumstance which justified the warrantless search, Justice Powell, the majority writer, explained:

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.⁹⁷

Such language seemingly would preclude warrantless automobile

⁹⁵ 99 S. Ct. at 2588.

⁹⁶ *Sanders v. State*, 262 Ark. 595, 600-01, 559 S.W.2d 704, 706-07 (1977).

⁹⁷ 99 S. Ct. at 2593.

searches where the vehicle is in the sole control of the police. However, the Court disagreed, as it did in *Chadwick*, contending that seizure and control of a vehicle is too great a burden to impose upon police departments.⁹⁸ Again, such reasoning is certainly open to attack. It appears the Court has given too much weight to the convenience of the police and not enough weight to the fourth amendment rights of individuals who travel in vehicles.

III. THE FOURTH CIRCUIT

It is not surprising that the lower courts' decisions in regard to the automobile exception have been inconsistent in post-*Chambers* cases.⁹⁹ However, one would think the relatively clear, easy to apply *Carroll* doctrine would have been applied uniformly before *Chambers*. But, such was not the case in the Fourth Circuit, where *Carroll* was used to support whatever proposition the prosecution needed it to support. For example, in two 1931 cases, *Fisher v. United States*¹⁰⁰ and *Bess v. United States*,¹⁰¹ the Fourth Circuit dealt with *Carroll* only on the grounds of probable cause and the vehicle's mobility, thereby skirting the "reasonably practicable" requirement.

In *Fisher*, officers had advance information, including the license number, that a certain vehicle was being used in the unlawful transportation of whiskey. The officers went on patrol looking specifically for the vehicle and upon locating it, the defendant was arrested and the vehicle was searched.¹⁰² The Fourth Circuit justified the warrantless intrusion by relying on *Carroll*.¹⁰³ However, the court did not address the *Carroll* pronouncement that a warrant must be used when reasonably practicable. If it had, the evidence against the defendant would have been excluded, since it would certainly have been practicable for the officers to procure a search warrant for the vehicle before they ever went on patrol

⁹⁸ *Id.* at 2594 n.14.

⁹⁹ Compare *United States v. Bradshaw*, 490 F.2d 1097 (4th Cir. 1974), with *United States v. Newbourn*, 600 F.2d 452 (4th Cir. 1979).

¹⁰⁰ 46 F.2d 994 (4th Cir. 1931).

¹⁰¹ 49 F.2d 884 (4th Cir. 1931).

¹⁰² 46 F.2d at 994-95.

¹⁰³ *Id.* at 995. In *Carroll*, the officers were not specifically looking for the defendant's vehicle. *Fisher* involved a planned warrantless search, which *Carroll* certainly did not condone.

in search of the vehicle.

A similar fact situation ended in a similar result in *Bess*, where again the officers had advance information concerning a certain vehicle which would be used in an illegal liquor delivery.¹⁰⁴ Just as in *Fisher*, although the officers did not secure a warrant prior to searching the vehicle, the planned warrantless search was upheld by the Fourth Circuit under the supposed authority of *Carroll*.¹⁰⁵ Again, the practicability issue was not addressed in a situation, where if it had, the defendant would not have been convicted.

The Fourth Circuit seemed to rediscover the "impracticability" requirement of *Carroll* in 1952 in *Godette v. United States*.¹⁰⁶ Agents, after destroying an illegal still, saw the defendant driving a truck containing 120 one-hundred pound bags of sugar toward the location of the still. The agents knew the defendant as one having a reputation for dealing in illegal whiskey, and therefore they seized the truck and its contents.¹⁰⁷ The Fourth Circuit again upheld the warrantless seizure under the authority of *Carroll*. However, the court cited, for the first time, the "impracticability" requirement of *Carroll*.¹⁰⁸ Thus, in *Fisher* and *Bess*, where it was not impracticable to obtain a warrant, the court ignored *Carroll's* requirement of impracticability. But when a case such as *Godette* surfaced, where the obtaining of a warrant was truly impracticable, the court focused on the "forgotten" *Carroll* rule. This method of analysis allowed the court to justify warrantless searches of vehicles on the grounds of probable cause and vehicular mobility, which are only two-thirds of the *Carroll* test.

The impracticability requirement was again adhered to in *Harmon v. United States*¹⁰⁹ where officers were presented with a situation similar to the *Godette* facts.¹¹⁰ In upholding the war-

¹⁰⁴ *Bess v. United States*, 49 F.2d 884, 884-85 (4th Cir. 1931).

¹⁰⁵ *Id.* at 885. For two different views concerning planned warrantless searches, compare, *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968), with *United States v. Mitchell*, 538 F.2d 1230 (5th Cir. 1976).

¹⁰⁶ 199 F.2d 331 (4th Cir. 1952).

¹⁰⁷ *Id.* at 332.

¹⁰⁸ *Id.*

¹⁰⁹ 210 F.2d 58 (4th Cir. 1954).

¹¹⁰ In *Harmon*, police surrounded an area in which they believed illegal liquor

rantless search and seizure of a truck carrying moonshine, the Fourth Circuit held: "When the officers of the law have probable cause for believing that the law is being violated in their presence and it is impracticable to obtain a search warrant they may proceed with the search without it."¹¹¹ Such a clear pronouncement of the law would seem to entrench in the Fourth Circuit the impracticability requirement as originally dictated by *Carroll*. However, just four years later, in *Ray v. United States*,¹¹² the court failed to adhere to the *Harmon* holding. In *Ray*, the defendant, a known illegal liquor trafficker, was seen parked at a known source of contraband liquor. Thereafter, agents staked out her motel and when she arrived, a warrantless search of her vehicle was conducted.¹¹³ The Fourth Circuit upheld the warrantless search, saying merely: "There is no longer any doubt that a search warrant is not a prerequisite to a legal search of an automobile being operated upon the highways."¹¹⁴ The issue of practicability was not addressed, despite the clear pronouncement of *Harmon*.

Although *Harmon* was not ignored in the Fourth Circuit's next decision on the issue, it was in fact not followed. In *United States v. Haith*,¹¹⁵ the defendant contended that once he was arrested and the officers had sole control over his vehicle, it was not practicable to conduct a search of the vehicle without first obtaining a warrant.¹¹⁶ The Fourth Circuit disagreed:

In all of the automobile cases, once the officers have seized the vehicle and obtained exclusive possession of it, it becomes practical, in a sense, to postpone the search until a warrant has been obtained. Probable cause being present, however, the cases unanimously sustain the legality of an undelayed search,

was being transported. At 4:00 a.m. a truck was seen leaving the area. Upon seeing the police, the truck driver abandoned the vehicle. Thereupon the police searched the truck and located the illegal whiskey. *Id.* at 59.

¹¹¹ *Id.*

¹¹² 255 F.2d 473 (4th Cir. 1958).

¹¹³ *Id.* at 474.

¹¹⁴ *Id.* at 475. Compare *Ray* with *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968) (holding a search violative of the fourth amendment where officers had time to procure a warrant prior to the search).

¹¹⁵ 297 F.2d 65 (4th Cir. 1961), *cert. denied*, 369 U.S. 804 (1962).

¹¹⁶ *Id.* at 67. The defendant was relying on the *Carroll* "impracticability" requirement.

and none suggests the distinction the defendant urges.¹¹⁷

When considering the Fourth Circuit's pre-*Chambers* automobile search cases it is apparent that the exception is premised on probable cause and vehicular mobility. Only in those cases where it was truly impracticable to obtain a warrant prior to the search, was impracticality of obtaining a warrant considered a factor.

Subsequent to the United States Supreme Court's decision in *Chambers* in 1970, the Fourth Circuit has decided two major automobile exception cases. First, in 1974, the court attempted to reconcile *Carroll*, *Chambers*, and *Coolidge* in *United States v. Bradshaw*.¹¹⁸ In *Bradshaw*, agents went to the residence of the defendant, a known moonshiner, in order to locate a still. After an unsuccessful search for the still, the agents were preparing to leave when they saw the defendant drive up and enter his home. The agents knocked on the front door and when the defendant did not answer, they began to walk around the house to check the back door. While walking by a truck parked next to the house, the agents could smell the strong odor of moonshine whiskey. The agents, without a warrant, entered the truck and seized a large quantity of moonshine whiskey.¹¹⁹ In a decision which elevated the warrant requirement in the Fourth Circuit to a height far greater than that of the Supreme Court or any other circuit, the Fourth Circuit held the search violative of the fourth amendment. The court stated that the only reason the agents had for not obtaining a search warrant was that the vehicle would have to be guarded while an officer went after a warrant, otherwise there was a risk that evidence would be lost.¹²⁰ In direct conflict with the

¹¹⁷ *Id.*

¹¹⁸ 490 F.2d 1097 (4th Cir. 1974).

Other Fourth Circuit cases dealing with the automobile exception include the following: *United States v. Powers*, 439 F.2d 373 (4th Cir. 1971) (holding that there is not a reasonable expectation of privacy concerning the identification of the vehicle, although in certain situations the search for identification numbers may become unreasonable); *United States v. Gomori*, 437 F.2d 312 (4th Cir. 1971) (holding that an officer possessing information sufficient to constitute probable cause to search may stop and search a moving vehicle without being required to obtain a search warrant). See also *United States v. Stanley*, 597 F.2d 866 (4th Cir. 1979); *United States v. Colclough*, 549 F.2d 937 (4th Cir. 1977); *Hilleary v. Wallace*, 519 F.2d 786 (4th Cir. 1975); and *Meade v. Cox*, 438 F.2d 323 (4th Cir. 1971).

¹¹⁹ *United States v. Bradshaw*, 490 F.2d 1097, 1099-1100 (4th Cir. 1974).

¹²⁰ *Id.* at 1103.

Ninth Circuit decision in *United States v. Connolly*,¹²¹ the Fourth Circuit held that the inconvenience of posting a guard was not a sufficiently exigent circumstance to permit the suspension of the fourth amendment.

According to the Fourth Circuit, the automobile exception after *Carroll*, *Chambers*, and *Coolidge* was applicable only in the "presence of circumstances indicating the risk of loss of evidence."¹²² The holding is basically a reversion to the original *Carroll* pronouncement that where a warrant may be reasonably secured, it must be used. While the court should be commended for recognizing the "third criteria" of the *Carroll* holding, no such applause is in order for its application of the rule to these facts. The facts of *Bradshaw* indicate that the defendant was still in the house when the agents searched the truck. Such a situation certainly makes the attainment of a search warrant impracticable since the defendant could have been armed, thereby putting the lives of the guards in jeopardy. Had the defendant already been arrested, the *Bradshaw* holding would have been far more reasonable. Regardless of whether *Bradshaw* was a correct application of *Carroll*, it cannot be controverted that *Bradshaw* required a stricter adherence to the fourth amendment than any case decided in the federal courts after *Chambers*.¹²³

Unfortunately, the Fourth Circuit has recently abandoned its strict adherence to the fourth amendment. In 1979, in apparent response to the Supreme Court's carte blanche attitude toward vehicle searches,¹²⁴ the Fourth Circuit issued an opinion evincing views similar to those enunciated by the Supreme Court. *United States v. Newbourn*¹²⁵ is a classic example of a planned warrantless search which was subsequently approved by the court. In *Newbourn*, a reliable informant relayed information to the police concerning the upcoming sale of stolen firearms by the defendants to the informant. Based upon the informant's information,

¹²¹ 479 F.2d 930 (9th Cir. 1973).

¹²² *United States v. Bradshaw*, 490 F.2d 1097, 1103 (4th Cir. 1974).

¹²³ See, e.g., *United States v. Abascal*, 564 F.2d 821 (9th Cir. 1977); *United States v. Chuks*, 554 F.2d 260 (6th Cir. 1977); *United States v. Moody*, 485 F.2d 531 (3rd Cir. 1973); and *United States v. Carneglia*, 468 F.2d 1084 (2d Cir. 1972).

¹²⁴ See, e.g., *Texas v. White*, 423 U.S. 67 (1975); *Cardwell v. Lewis*, 417 U.S. 583 (1974).

¹²⁵ 600 F.2d 452 (4th Cir. 1979).

police watched as the defendants drove down a road in a truck, followed by the informant in another vehicle. The vehicles eventually stopped along the side of the road and the parties began negotiating the sale of the firearms. During the course of the negotiations, the police arrived, arrested the defendants, and then took the keys to the defendants' vehicle. The officers then opened the locked trunk of the vehicle and discovered the stolen firearms.¹²⁶ The officers did not have a search warrant.

The district court, in obvious reliance upon *Bradshaw*, concluded that it would have been practical for the officers to have obtained a search warrant, and since they failed to do so, the search was unlawful.¹²⁷ The district court stated that the defendants were arrested prior to the search, thus, there was no danger in delaying the search until a warrant could be obtained.¹²⁸

The Fourth Circuit, with Chief Judge Haynsworth¹²⁹ writing the decision, agreed that the officers could have procured a warrant.¹³⁰ However, the court disagreed as to whether such a factor removed the case from the automobile exception.¹³¹ The court initially established what it considered the automobile exception not to be:

The mobility of automobiles *was* recognized as a crucial factor. . . . More recently, it has been recognized that the automobile exception rests upon other considerations than mobility of the vehicle and the possibility that it and its contents may be concealed or removed from the jurisdiction.¹³² (emphasis supplied).

The court then pointed to the lesser expectation of privacy in vehicles as the current key factor to a determination of whether a

¹²⁶ *Id.* at 453.

¹²⁷ *Id.*

¹²⁸ *Id.* But see *United States v. Haith*, 297 F.2d 65 (4th Cir. 1961), wherein the court rejected the defendant's argument that a warrant should have been obtained while other officers guarded the vehicle.

¹²⁹ *Newbourn* was heard in the Fourth Circuit before a panel consisting of Chief Judge Haynsworth, Circuit Judge Butzner and Circuit Judge Phillips.

¹³⁰ *United States v. Newbourn*, 600 F.2d 452, 453 (4th Cir. 1979).

¹³¹ "We agree the officers could have gotten a warrant after defendants were arrested. That fact doesn't remove the case from the automobile exception." *Id.*

¹³² *Id.* at 454.

warrantless search is justified.¹³³

Chief Judge Haynsworth relied heavily upon *Cady v. Dombrowski*¹³⁴ in upholding the search in *Newbourn*. In *Cady*, an off-duty police officer was involved in a car wreck. After the car had been towed to a storage lot, a policeman remembered that there was probably a gun in the car, so he went to retrieve it. When he opened the trunk, without a warrant, he found blood stains which eventually led to the conviction of the injured officer for murder.¹³⁵ The Fourth Circuit, relying primarily on the fact that both searches were undertaken for the purpose of locating guns, said the *Newbourn* search should be upheld just as the *Cady* search had been upheld.¹³⁶ The court concluded that a warrantless search should be upheld "if the objective facts present a reasonable basis for a belief that there is a potential danger similar to or greater than that presented in *Cady*, which danger should be inactivated."¹³⁷

Does this mean the search in *Newbourn* would have been invalid if it had been for anything except firearms? Apparently not. The court, after its discussion of *Cady*, stated that the search was also valid under the authority of *Chambers*. "If a warrantless search of the vehicle after its impoundment and removal to the police station was authorized, so was a warrantless search on the roadside. . . ."¹³⁸ This view is premised on the *Chambers* theory that the search is not a greater intrusion into an individual's privacy than the mere seizure. Unfortunately, the Fourth Circuit chose not to adopt the more sensible position taken by Justice Harlan in his *Chambers* dissent, wherein he stated a search is more intrusive than a mere seizure.¹³⁹

¹³³ "There is a diminished privacy interest of a motorist operating a vehicle on our public streets and highways." *Id.* at 454, citing *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1975).

¹³⁴ 413 U.S. 433 (1973).

¹³⁵ *Id.* at 435-38.

¹³⁶ *United States v. Newbourn*, 600 F.2d 452, 455 (4th Cir. 1979).

¹³⁷ *Id.* at 456.

¹³⁸ *Id.* *Chambers* stated that if an immediate roadside search would be valid, so would a subsequent search at the police station. The Fourth Circuit in *Newbourn* has re-worded this holding, stating that a roadside search is valid if the vehicle could have been impounded and lawfully searched at the station.

¹³⁹ *Chambers v. Maroney*, 399 U.S. 42, 63-64 (1970) (Harlan, J., concurring in part and dissenting in part).

As for *Bradshaw*, *Newbourn* did not expressly overrule it. However, *Bradshaw* was relegated to a holding applying only to warrantless searches of vehicles located on private property, just as *Coolidge* was limited by *Cardwell*.¹⁴⁰

Thus, *Newbourn* places the Fourth Circuit in compliance with the Supreme Court, *i.e.*, a warrantless search of a vehicle is lawful in nearly all cases where probable cause is present, the one exception being when the search is conducted on private property.

IV. WEST VIRGINIA

Consider the following situation: A reliable informant tells the police the defendant will be in the parking lot of a local restaurant at 11:00 on a designated morning to complete a drug sale to the informant. The informant describes the defendant, the vehicle he will be driving, and the type and quantity of drugs he will be carrying. On the designated morning, the defendant drives into the parking lot as predicted by the informant. He is immediately surrounded by police who take his car keys, unlock the trunk and glove compartment, and confiscate the drugs contained therein. The officers do not have a search warrant.

If this case came before the United States Supreme Court or any of the federal circuit courts, including the Fourth Circuit, the warrantless search would probably be upheld on the basis of *Cardwell's* "lesser expectation of privacy" test or under *Chambers' "probable cause plus exigent circumstances"* test.¹⁴¹

As previously discussed, a vehicle receives very little protection in the federal courts from warrantless intrusions. However, the individual state courts are only obligated to meet the minimum constitutional standards set by the Supreme Court. Thus, West Virginia is free to afford greater fourth amendment protections to defendants by deciding its cases under Article 3, Section 6 of the West Virginia Constitution,¹⁴² as opposed to the fourth

¹⁴⁰ *United States v. Newbourn*, 600 F.2d 452, 457 (4th Cir. 1979).

¹⁴¹ See, *e.g.*, *United States v. Mitchell*, 538 F.2d 1230 (5th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977) (holding that the fact there was ample time after probable cause had arisen for the obtaining of a warrant does not invalidate a search where an exigency exists at the time of the seizure of the vehicle).

¹⁴² W. VA. CONST., art. 3, § 6, provides:

amendment to the Constitution of the United States.

As a result, when the above fact situation came before the Circuit Court of Logan County,¹⁴³ West Virginia, the drugs were properly suppressed upon motion by the defense counsel. The court reasoned that the officers had ample opportunity to procure a search warrant prior to the search, and that failure to do so rendered the search violative of the general warrant requirement.¹⁴⁴ Whether this reliance on the original *Carroll* doctrine would be affirmed by the West Virginia Supreme Court of Appeals is left to mere speculation, since the West Virginia court has never directly addressed the automobile exception issue.

The West Virginia Supreme Court of Appeals has, however, recognized the existence of the automobile exception. In *State v. Angel*,¹⁴⁵ the court stated there are certain narrow instances in which a suspect may be searched without a warrant, such as "an automobile in motion. . . ."¹⁴⁶ West Virginia's decisions in regard to warrantless searches generally indicate the Supreme Court of Appeals is very protective of an individual's fourth amendment rights.¹⁴⁷ There is no reason to believe this attitude would not carry over to vehicles when an automobile exception case appears before the court. Illustrative of this point is *State v. Frisby*.¹⁴⁸ In *Frisby*, while discussing unwarranted intrusions during routine police stops of vehicles, Justice Neely wrote:

[R]egardless of length of hair, color of skin, political convic-

The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

¹⁴³ See *State v. Koegel*, Felony Nos. 79-F-125, 79-F-126, 79-F-127 (Logan Co. Cir. Ct., W. Va. Aug. 17, 1979).

¹⁴⁴ See Record, at 10-11, *State v. Koegel*, Felony Nos. 79-F-125, 79-F-126, 79-F-127 (Logan Co. Cir. Ct., W. Va. Aug. 17, 1979).

¹⁴⁵ 154 W. Va. 615, 177 S.E.2d 562 (1970).

¹⁴⁶ *Id.* at 628, 177 S.E.2d at 570.

¹⁴⁷ See, e.g., *State v. McNeal*, 251 S.E.2d 484 (W. Va. 1979) (wherein the Supreme Court of Appeals narrowly construed exigent circumstances in regard to warrantless arrests); and *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973) (holding that a *Terry* stop and frisk does not apply to crimes which are traditionally non-violent in nature).

¹⁴⁸ 245 S.E.2d 622 (W. Va. 1978).

tions, eccentricity of life-style, or any of the other standard grounds which inspire people to make the lives of others miserable, a person in West Virginia is free to go about his business at all hours of the day and night unencumbered by the need to relate his life's story to every passing, underemployed agent of the State.¹⁴⁹

And in *State v. Canby*,¹⁵⁰ Justice Neely, while addressing the analogous issue of warrantless arrests, stated, "The rarity of justifiable warrantless arrests is increased by the requirement under the new magistrate court system that a magistrate be available twenty-four hours a day."¹⁵¹

The most illuminating example of West Virginia's protective attitude is *State v. Tomey*,¹⁵² wherein *Arkansas v. Sanders*¹⁵³ was taken one step further. In *Tomey*, the defendant was arrested after putting a suitcase in the back seat of his car, but before the car was started. The arresting officer then conducted a warrantless search of the suitcase, finding twelve packages of marihuana.¹⁵⁴ The Supreme Court of Appeals ordered the marihuana suppressed, thereby stretching *Sanders* from covering suitcases seized from trunks to suitcases taken from plain view in the back seat of a vehicle.¹⁵⁵ In an opinion written by Justice Neely, the court noted that the prosecution attempted to justify the warrantless search on the basis of *Chambers*. Justice Neely rejected the argument, stating that *Chambers* is inapplicable because it was not intended to apply to "closed containers."¹⁵⁶ This leaves one very important question open in West Virginia: is a trunk or a glove compartment a "closed container" for the purposes of the warrant requirement? The United States Supreme Court would obviously say "no." The distinguishing factor between a locked trunk and a locked piece of luggage, according to *Chadwick*, is the degree of dominion and control the officers can exert over the article in question. In *Chadwick*, the Court stated that a vehicle,

¹⁴⁹ *Id.* at 625.

¹⁵⁰ 252 S.E.2d 164 (W. Va. 1979).

¹⁵¹ *Id.* at 167.

¹⁵² 259 S.E.2d 16 (W. Va. 1979).

¹⁵³ 99 S. Ct. 2586 (1979).

¹⁵⁴ *State v. Tomey*, 259 S.E.2d 16, 17 (W. Va. 1979).

¹⁵⁵ *Id.* at 18.

¹⁵⁶ *Id.*

including its trunk, is subject to an immediate warrantless search, whereas luggage, which can easily be secured safely in a building, cannot be searched until a warrant is obtained.¹⁵⁷ Whether West Virginia will follow the above *Chadwick* rationale remains to be seen. Certainly, a counter-argument can be made. It is difficult to fathom a police department so small or so under-staffed that it cannot safely secure a vehicle for the short period of time it takes to procure a search warrant. Thus, once officers have exclusive control of a vehicle, *i.e.*, the occupants are arrested, it is not unreasonable to expect the Supreme Court of Appeals to require that a search warrant be obtained prior to the search of the vehicle. Such a holding would be consistent not only with *Carroll*,¹⁵⁸ but also with *Cardwell* since people do have an expectation of privacy in their trunks and glove compartments.¹⁵⁹

V. CONCLUSION

The original *Carroll* doctrine was very simple, clear, and most importantly, easy to apply. It condoned warrantless searches of vehicles only where the vehicle was actually mobile, it was impracticable to obtain a search warrant, and the officers were acting upon probable cause. Following the United States Supreme Court's decisions in *Chambers*, *Cardwell*, and *White*, all that remains of *Carroll* is the probable cause requirement. As a result, law enforcement officials continue conducting warrantless searches of vehicles, leading to suppression motions by defendants which often end in an appellate review. The *Carroll* "impracticability" requirement would go a long way toward dissolving the above cycle. If law enforcement officials were informed that *Carroll* was the law, they would not conduct a warrantless search except in the most exigent of circumstances. This would lead to fewer suppression hearings and fewer appellate cases, while at the same time maintaining the fourth amendment rights of the defendant.

The Supreme Court's decisions, beginning with *Chambers* in

¹⁵⁷ See *United States v. Chadwick*, 433 U.S. 1, 13 n.7 (1976).

¹⁵⁸ In *Carroll*, the vehicle's occupants were not arrested prior to the warrantless search.

¹⁵⁹ It is not at all uncommon for a person to keep valuables in his trunk or glove compartment, where he presumes they will be free from public inspection.

1970, have greatly increased search and seizure litigation because of the confusion the cases have created. A clear pronouncement of a reversion back to the original *Carroll* doctrine is much needed. In the meantime, West Virginia could adopt the *Carroll* doctrine, thereby setting an example for the United States Supreme Court to follow.

Gene W. Gardner

