Warrantless Investigative Searches and Seizures of Automobiles and Their Contents

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WARRANTLESS INVESTIGATIVE SEIZURES AND SEARCHES OF AUTOMOBILES AND THEIR CONTENTS AND OCCUPANTS

Steven G. Davison*

INTRODUCTION

Although the prohibition under the fourth amendment to the United States Constitution1 of any search or seizure that is unreasonable2 has been interpreted by the United States Supreme Court as generally requiring police to obtain a warrant prior to conducting a search or seizure,3 numerous exceptions to this rule have been recognized4 when the "exigencies of the situation" make a warrantless search or seizure "imperative."5 Warrantless seizures and searches of automobiles6 have been permitted by the courts in a number of situations. Warrantless

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1. The fourth amendment of the United States Constitution provides:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

   U.S. Const., amend. IV.


6. Certain inspections and examinations of automobiles and their contents do not constitute a "search" or "seizure" within the meaning of the fourth amendment. For the conduct of governmental agents to constitute a fourth amendment "search" or "seizure," the conduct must violate a person's actual (subjective) expectation of privacy. This subjective expectation of privacy must be one that the court believes society recognizes as "justifiable," "reasonable," or "legitimate." United States v. Knotts, 103 S. Ct. 1081 (1983) (use of electronic "beeper" to monitor movement of automobile on public streets and highways held not to be a fourth amendment search); Smith v. Maryland, 442 U.S. 735 (1979) (use of pen register device, which records the numbers dialed by a telephone but does not intercept the contents of telephone conversations, held not to be a fourth amendment search); Katz v. United States, 389 U.S. 347 (1967) (interception of contents of a person's conversation on a telephone in a public telephone booth, by placing an electronic listening device on the outside of the booth, held to be a fourth amendment search). If police conduct is not a fourth amendment search or seizure under this two-pronged test, such conduct is not subject to the warrant, probable cause, or reasonableness requirements of the fourth amendment. Smith v. Maryland, 442 U.S. 735 (1979).

   Whether particular police conduct violates a justifiable, reasonable or legitimate expectation of privacy is determined to a great extent by the subjective judgment of a judge deciding a particular case. See W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 2.1-2.7 (1978). It should be noted, however, that in making this determination the Supreme Court has con-
considered facts that establish that members of the public may have knowledge or reason to know that police or other persons may engage in the type of conduct that is being challenged as a search or seizure. Smith v. Maryland, 442 U.S. 735. In this case, the Supreme Court considered whether members of the public would know or have reason to know whether a telephone company records telephone numbers dialed on a person’s telephone in determining whether such conduct by a telephone company at the request of the police constituted a fourth amendment search. The Court did not limit its inquiry to whether members of the public would know or have reason to know that the police would record the numbers dialed from a person’s telephone. But if a person’s justifiable, reasonable, or legitimate expectation of privacy is violated by the conduct of private persons and not by the conduct of governmental agents, the fourth amendment is not implicated. See C. Whitebread, Criminal Procedure: An Analysis of Constitutional Cases and Concepts § 4.02 (1980). The Supreme Court has not, however, decided whether public opinion surveys or expert testimony indicating whether members of the public would consider particular conduct by police or other persons to violate a justifiable, reasonable, or legitimate expectation of privacy, can be or should be considered by a judge in determining whether such conduct is a fourth amendment search or seizure.

Because the determination of whether a particular type of police conduct violates a justifiable, reasonable, or legitimate expectation of privacy is to a great extent a subjective judgment by the judges deciding a particular case, judges often disagree as to whether a particular type of police conduct violates a justifiable, reasonable, or legitimate expectation of privacy. E.g., compare United States v. Shelby, 573 F.2d 971 (7th Cir. 1978), and People v. Krivda, 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), vacated and remanded, 409 U.S. 33 (1972), aff’d, 8 Cal. 3d 623, 105 Cal. Rptr. 521, 504 P.2d 457 (1973) (disagreement as to whether inspection of trash that has been set out on the curb of a public street is a fourth amendment search).

Under this two-pronged test for defining a search or seizure, courts hold that police do not engage in a fourth amendment search when they look through a window of an automobile that is in a public place and observe what is inside the automobile, e.g., Smith v. Slayton, 484 F.2d 1188 (4th Cir. 1973), even if the observations are made in the evening or night with the aid of a flashlight. E.g., State v. Bell, 62 Wis. 2d 534, 215 N.W. 2d 535 (1974); Marshall v. United States, 422 F.2d 185 (5th Cir. 1970). A search may be held to occur, however, if police open the door of an automobile and observe its contents, Tyler v. United States, 302 A.2d 748 (D.C. App. 1973), break into and enter a locked automobile and inspect its interior and contents, State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980), or trespass onto private property and observe the interior and contents of an automobile that is parked within the curtilage. United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974). A fourth amendment search, however, may not occur if police, although trespassing onto private property, are in an “open field” area rather than within the curtilage when they look into the interior of an automobile. See Hester v. United States, 265 U.S. 57 (1924); Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

Police have also been held not to engage in a fourth amendment search or seizure when they examine the exterior of an automobile that is located in a public place and take a small sample of the automobile’s paint and an impression of the tread of a tire mounted on the automobile. Cardwell v. Lewis, 417 U.S. 583 (1974) (plurality opinion).

On the other hand, no fourth amendment seizure or search occurs if police impound and inspect the interior and contents of an automobile that has been abandoned. See W. La Fave, supra note 6, § 2.5(a).

Furthermore, even if police conduct in impounding and inspecting an automobile constitutes a search or seizure that violates one person’s fourth amendment rights, such conduct may not violate the fourth amendment rights of other persons. A defendant in a criminal trial has standing to challenge the admissibility of information obtained or items seized by police on the grounds that the information or items were obtained as a result of an illegal search or seizure only if the illegal search or seizure violated his own personal fourth amendment rights (by violating an actual and legitimate expectation of privacy). A person cannot, however, challenge the admissibility of items or information obtained by police in violation of a third person’s constitutional rights. Rakas v. Illinois, 439 U.S. 128 (1978) (a passenger in an automobile that he does not own generally does not have standing.
searches of automobiles are permitted when voluntarily consented\textsuperscript{7} to either by the automobile's owner or by another person with common authority over or other sufficient relationship to the automobile.\textsuperscript{8}

under the fourth amendment to challenge a search of that automobile and the seizure of items that he does not own); United States v. Payner, 447 U.S. 727 (1980) (defendant in a criminal trial does not have standing under the fourth amendment to challenge the admissibility of evidence taken from a third person through an intentional violation of that third person's fourth amendment rights). Cf. United States v. Posey, 663 F.2d 37 (7th Cir. 1981) (defendant had "standing" to challenge search of automobile and seizure of guns discovered in an automobile owned by his wife because he was exercising exclusive control over the automobile pursuant to her permission at the time of the search, even though he admittedly had no property interest in either the automobile searched or the guns seized).

In addition, although evidence obtained either directly or indirectly in violation of a person's fourth amendment rights will not be admissible as evidence at that person's criminal trial under the exclusionary rule, Mapp v. Ohio, 367 U.S. 643 (1961), or under the corollary "fruit of the poisonous tree" doctrine, Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975), such evidence may be admissible in a grand jury proceeding, United States v. Calandra, 414 U.S. 338 (1974), and in a civil administrative proceeding. United States v. Janis, 428 U.S. 433 (1976). See also Stone v. Powell, 428 U.S. 465 (1976) (state prisoner may not bring federal habeas corpus suit alleging that evidence admitted at his state criminal trial was inadmissible because obtained in violation of the fourth amendment of the United States Constitution, when state prisoner had full and fair opportunity to litigate his fourth amendment claim in the state courts).

The Fifth Circuit has adopted a "good faith" exception to the exclusionary rule, under which an illegally-obtained item is not suppressed if the police officers who seized the item were acting in good faith and under a reasonable, although mistaken, belief that their actions were lawful. United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (per curiam en banc), cert. denied, 449 U.S. 1127 (1981). This Fifth Circuit exception is applicable both when police make an error of judgment concerning the existence of facts establishing probable cause and when police rely on a statute later held to be unconstitutional, a warrant later held to be invalid, or a court decision that is subsequently overruled. United States v. Williams, 622 F.2d at 840-46. But in order for this Fifth Circuit exception to apply, the prosecution must establish both the existence of actual, bona fide good faith in the police officers in question at the time of the disputed search and seizure, and the reasonableness of this good faith on an objective basis. \textit{Id.} at 843. This exception was justified on the grounds that the cost to society of freeing a guilty person outweighed any slight deterrence of illegal acts by individual police officers that would result from excluding evidence obtained by police officers acting in good faith. \textit{Id.} at 840. See United States v. Aviles-Porras, 643 F.2d 54 (2d Cir. 1981). Cf. Abell v. Commonwealth, 221 Va. 607, 272 S.E.2d 204 (1980). In a recent case, the Supreme Court, on its own motion, ordered the parties on reargument to address the question of whether the exclusionary rule "should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." Illinois v. Gates, 103 S. Ct. 436 (1982). The Court in \textit{Gates}, however, ultimately decided the case on other grounds, declining to address the question of whether a "good faith" exception to the exclusionary rule should be adopted because the issue had not been presented to or addressed by the state courts below and no factual record relevant to this question had been developed in the state courts below. Illinois v. Gates, 103 S. Ct. 2317 (1983).

The Supreme Court might recognize a "good faith" exception to the exclusionary rule on the grounds that the purpose of the exclusionary rule is to deter similar unlawful police conduct in the future, Stone v. Powell, 428 U.S. 465 (1976), and that this purpose is not furthered significantly by excluding evidence seized in violation of the fourth amendment by police who were acting in good faith. See Michigan v. Tucker, 417 U.S. 433 (1974).

Automobiles lawfully impounded by the police may be searched without a warrant when the search is conducted pursuant to standard police procedures and for the purposes of safeguarding the owner's property and protecting the safety of the police and public. There also exists some authority indicating that automobiles may be seized and searched without a warrant when there is probable cause to believe that the automobile is evidence of a crime. The courts have also permitted warrantless seizures and searches of automobiles and their contents under the "automobile exception" (also called the "Carroll doctrine"), which permits a warrantless seizure and search of an automobile and certain of its contents when police have probable cause to believe that it contains seizable items and circumstances make the obtaining of a warrant impracticable. In the last twelve years, the United States Supreme Court has decided a number of cases involving the automobile exception. In two recently decided cases, Robbins v. California and United States v. Ross, a deeply divided Court addressed the issue of the permissible scope of a search of luggage and other containers discovered in an automobile lawfully searched under the automobile exception. In New York v. Belton, a case decided at the same time as Robbins, the Supreme Court, in a 5-4 decision, adopted a rule separate from and independent of the automobile exception. This is a per se rule permitting the warrantless search of the interior of the passenger compartment of an automobile and of containers found therein when incident to the lawful arrest of the occupants of the automobile. The Supreme Court also recently held that police, when conducting an investigation of an automobile that has been lawfully stopped for a traffic violation or that has been involved in an accident, may make a warrantless search of areas of the passenger compartment of the automobile and containers therein in which a weapon could be placed or hidden, if the police possess a reasonable belief that a non-arrested suspect is potentially dangerous and may gain immediate control of a weapon.

10. See W. LaFave, supra note 6, § 7.3(a).
11. See infra note 150.
12. See infra notes 150-321 and accompanying text.
This article will analyze exceptions to the general rule requiring a warrant for the seizure and search of an automobile and its contents and occupants, giving particular attention to Robbins, Ross, and Belton.

I. WARRANTLESS SEARCHES INCIDENT TO LAWFUL ARRESTS: GENERAL PRINCIPLES

In the 1981 case of New York v. Belton, the Supreme Court for the first time explicitly addressed the issue of whether an automobile can be searched by police without a warrant simply because an occupant of the automobile has been lawfully arrested. At issue in Belton was whether a warrantless search of an automobile is permitted under the Chimel v. California exception to the general fourth amendment rule.

The Chimel exception permits police, without a warrant, to search the area adjacent to a person lawfully arrested if the arrestee could lunge or grasp for a weapon or for evidence that could be destroyed. In Chimel, after police had arrested the defendant in his home—an arrest the Court assumed was lawful—the police searched the entire home and discovered incriminating evidence. This evidence was introduced at the defendant's trial on two charges of burglary, and he was convicted. Overruling two earlier cases that would have permitted the warrantless search of the defendant's entire home, the Court held that a lawful war-

19. See infra notes 59-149 and accompanying text.
21. Id. at 763.
22. Id. at 755.
23. Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz, 339 U.S. 56 (1950). Harris had held that the warrantless search of the entire residential premises where the defendant had been lawfully arrested was a lawful search incident to the defendant's lawful arrest. Rabinowitz had upheld, as a lawful search incident to a lawful arrest, an extensive warrantless search of a one-room business office. Prior to Harris, however, in Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), and United States v. Lefkowitz, 285 U.S. 452 (1932)—cases which neither Harris nor Rabinowitz explicitly overruled—the Supreme Court had held unlawful the warrantless searches of the offices where the defendants had been lawfully arrested and the warrantless seizure of evidence in the offices. The holdings in Go-Bart Importing Co. and Lefkowitz were based on the Court's findings that the arresting officers had had sufficient information and time to obtain a search warrant and that the areas searched and items seized were not visible and accessible and were not in the arrestee's immediate custody. Go-Bart Importing Co. v. United States, 282 U.S. at 358; United States v. Lefkowitz, 285 U.S. at 565. Furthermore, in Trupiano v. United States, 334 U.S. 699 (1948), a case decided subsequent to Harris and prior to Rabinowitz, the Court held that the warrantless seizure of an illicit distillery found at the site where one defendant was lawfully arrested was unlawful and could not be upheld as a search incident to a lawful arrest, because the arresting officers had had more than enough time to obtain a warrant authorizing seizure of the distillery. Trupiano distinguished Harris on the grounds that in Harris the police knew in advance of
rantless search incident to a lawful arrest includes only the person of the arrestee and the area "within his immediate control"... from within the search where seizable evidence would be found. Rabinowitz, however, overruled Trupiano to the extent that it required a search warrant based solely upon the practicality of procuring it rather than upon the reasonableness of the search after the lawful arrest. In Chimel v. California, the Supreme Court attempted to resolve the "divergent results" which had been reached in "various factual situations." 395 U.S. at 760 n.4, citing other cases where "divergent results" were reached in "various factual situations."

24. 395 U.S. at 762-63. This statement was technically dictum, because in Chimel no search of the defendant's person occurred at the time of his arrest.

Subsequently, in United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973), the Court explicitly held that police, without a search warrant, may fully search the person of an individual they have lawfully arrested for the purposes of seizing any weapons on his person in order to take him into custody and preserving any evidence on his person for later use at trial. United States v. Robinson, 414 U.S. at 234. The Court in these two cases held that a warrantless search of the person of an individual lawfully arrested can be made every time a person is lawfully arrested and taken into custody to the police station. United States v. Robinson, 414 U.S. at 234-35. (The reasons for adoption of this rule are discussed infra notes 84-86 and accompanying text.)

This rule applies regardless of the triviality of the offense for which a person is arrested. Gustafson v. Florida, 414 U.S. at 263-64. (In Gustafson, the defendant was arrested after being lawfully stopped for failure to have his vehicle operator's license in his possession. In Robinson, the defendant was arrested after being lawfully stopped for driving after revocation of his operator's permit and for obtaining an operator's permit by misrepresentation.) The right to search the person of one lawfully arrested also does not require probable cause or even reasonable suspicion that the arrestee is armed or has evidence on his person. United States v. Robinson, 414 U.S. at 235; Gustafson v. Florida, 414 U.S. at 266. The Court also held that the police have the right to search the person of one lawfully arrested even when the nature of the offense for which the person is arrested makes it unlikely that the arrestee possesses a dangerous weapon, United States v. Robinson, 414 U.S. at 234, and even though there is no evidence that could be found on the arrestee's person relevant to the offense for which the person is arrested. 414 U.S. at 233; Gustafson v. Florida, 414 U.S. at 265. The Supreme Court in Gustafson also held that the lawfulness of a search of the person of an individual lawfully arrested does not depend upon whether the arresting officer is required by police regulations to take an arrestee into custody or whether there are police regulations or policies which establish the conditions under which a full-scale body search can be conducted. 414 U.S. at 265. (The Court, however, left open in Robinson the question of whether a warrantless search of the person of an arrestee will be upheld if the arrest was a mere "pretext" for the search. 414 U.S. at 221 n.1. See infra notes 114-18 and accompanying text.)

The Court in these two cases also held that a search of an arrestee's person is not limited to a frisk (pat-down of a person's exterior clothing), United States v. Robinson, 414 U.S. at 227-29, which can only take place when police have a reasonable suspicion that a person is armed and presently dangerous. Terry v. Ohio, 392 U.S. 1 (1968); Adams v. Williams, 407 U.S. 143 (1972); Pennsylvania v. Mimms, 434 U.S. 106 (1977); Ybarra v. Illinois, 444 U.S. 85 (1979). An officer conducting a frisk can reach inside a person's exterior clothing only when he feels an item that he reasonably believes is a weapon; in such a case he only can reach inside that person's clothing to seize the item he believes is a weapon and cannot make a full-scale search of the individual's person. Terry v. Ohio, 392 U.S. 1 (1968). The Court in Robinson held that the search of an arrestee's person is not subject to the limitations of a frisk on the grounds that "it is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical Terry-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification." 414 U.S. at 234-35. The only limits that the Supreme Court has
imposed on the scope of a search of an arrestee's person are that a body search cannot be extreme or patently abusive in violation of the due process clause of the fourteenth amendment. United States v. Robinson, 414 U.S. at 236. See Rochin v. California, 342 U.S. 165 (1952) (forcing enemetic solution through tube into stomach of arrestee to induce vomiting of swallowed drugs held to violate due process clause).

In Robinson and Gustafson the Court also appeared implicitly to authorize police to open any containers that they find on an arrestee's person and to seize and further investigate the contents of such containers. See Robinson v. California, 414 U.S. at 236 (warrantless inspection of crumpled-up cigarette package, and warrantless testing of 14 gelatin capsules containing white powder found in package (later determined to contain heroin), upheld as search incident to lawful arrest); Gustafson v. Florida, 414 U.S. at 266 (warrantless opening of cigarette box, and seizure of marijuana cigarettes found inside box, upheld as search incident to lawful arrest). Subsequently, in United States v. Chadwick, 433 U.S. 1, 15 (1977), the Supreme Court indicated that personal property "immediately associated with the person" can be searched without a warrant when incident to the lawful arrest of that person. See infra notes 51-54 and accompanying text. See also New York v. Belton, 453 U.S. at 460-61, discussed infra notes 52, 59-149 and accompanying text. Chadwick appears to allow police to open containers immediately associated with the person and found on an arrestee's person without a warrant even though the police have gained exclusive control of the container, People v. De Santis, 46 N.Y.2d 82, 412 N.Y.S.2d 838, 385 N.E.2d 577 (1978), and even though the police do not have probable cause to believe that the container contains items that have a nexus with criminal activity, such as fruits, instrumentalities, evidence of crime, or contraband. Cf. Warden v. Hayden, 387 U.S. 294 (1967). Thus, by appearing to authorize the police to seize the contents of containers found on an arrestee's person even without probable cause to believe that the contents have a nexus to criminal activity, Chadwick, Robinson and Gustafson, implicitly create an exception to the "immediately apparent" requirement of the plain view seizure doctrine, which requires police, when they first discover an item for which they were not searching, to have probable cause to believe it has a nexus with criminal activity in order to seize the item without a warrant. See infra note 57.

Some lower courts, however, have prohibited police from opening an opaque, closed container found on an arrestee's person and from seizing and further investigating its contents unless police have probable cause to believe that the container contains items having a nexus with criminal activity. State v. Elkins, 245 Or. 279, 422 P.2d 250 (1966). Contra United States v. Simpson, 453 F.2d 1038 (10th Cir. 1972); Wright v. Edwards, 343 F. Supp. 792 (N.D. Miss. 1972).

One reason for the holdings in Robinson and Gustafson that a search of an arrestee's person can occur in all cases when the arrest is lawful and that the search's legality does not depend upon the individual circumstances of each case is that "[a] police officer's determination as to how and where to search the person of a suspect whom he arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." United States v. Robinson, 414 U.S. at 235. The Court also supported this rule on the grounds that "a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the fourth amendment," and that, therefore, "a search incident to the arrest requires no additional justification . . . because it is the fact of the lawful arrest which establishes the authority to search. . . ." Id.

The Supreme Court has also indicated that the warrantless search of an arrestee's person can take place prior to the actual arrest if the arrest follows "quickly on the heels" of the challenged search of the arrestee's person and provided that probable cause for the arrest is not based upon items found on the arrestee's person during the search that occurred prior to the arrest. Rawlings v. Kentucky, 448 U.S. 98 (1980). Although not stated, the reason for this rule is probably to protect the arresting officer's safety if the person being arrested happens to be armed with a weapon and attempts to use it while the officer is placing him under custody. Cf. Holt v. Simpson, 340 F.2d 853, 856 (7th Cir. 1965) ("To hold differently would be to allow a technical formality of time to control when there has been no real interference with the substantive rights of a defendant." ) Similarly, the Supreme Court also has indicated that the warrantless search of an arrestee's person can take place at the police station prior to or shortly after the incarceration of the arrestee. United States v. Edwards, 415 U.S. 800 (1974). Cf. Illinois v. Lafayette, 51 U.S.L.W. 4829 (U.S. June 20, 1983).
which he might gain possession of a weapon or destructible evidence."\textsuperscript{25} The Court in \textit{Chimel} explained that the reason for allowing a search of an arrestee's person and the area within his "immediate control" is to remove any weapons that the arrestee "might seek to use to resist arrest or to affect his escape," to avoid endangering the officer's safety and frustrating the arrest,\textsuperscript{26} and to prevent the arrestee from concealing or destroying evidence.\textsuperscript{27} The Court further stated that "a gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."\textsuperscript{28}

In \textit{Chimel}, however, the Court made it clear that a "lunge or grasp" area search is limited to the area immediately adjacent to the spot at which the defendant is arrested.\textsuperscript{29} The police, for example, cannot arrest

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\textsuperscript{25} 395 U.S. at 763.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id. In a subsequent case, United States v. Chadwick, 433 U.S. 1, 14-15 (1977), discussed \textit{infra} notes 36-58 and accompanying text, the Court stated in dictum that a search of an arrestee is also for the purpose of protecting persons other than the arresting officers, and that a warrantless search under \textit{Chimel} of the area within an arrestee's immediate control can be made "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved." 433 U.S. at 14-15. (Earlier in the same opinion, the Court similarly stated that "when a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed." \textit{Id.} at 14.) This approach is the same as that applicable to the search of an arrestee's person. As noted earlier, the person of an arrestee can be searched in every case regardless of whether the officer has probable cause or a reasonable suspicion that the arrestee has a weapon or evidence on his person, and regardless of how trivial or minor the offense for which a person is arrested. \textit{See supra} note 24.

\textsuperscript{29} The Court stated that "there is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs. . . ." 395 U.S. at 763. \textit{Cf.} Washington v. Chrisman, 455 U.S. 1 (1982).
a person in his living room and then march that person through his home, searching areas adjacent to his path. Furthermore, the area within which the police can properly search is limited to that within which the arrestee can physically lunge or grasp.30

The Chimel Court also made it clear that the scope of the area that is within an arrestee's immediate control (and, therefore, that can be searched without a warrant incident to a lawful arrest) depends upon "the facts and circumstances—the total atmosphere of the case."31 A number of factors are considered by a court in making this determination,32 including the relative number of arrestees and arresting officers at the place where the arrest occurs,33 the extent to which the arrestee is physically restrained at the time of the search of the area,34 and the physical size, strength, and skills of the arrestees compared to those of the arresting officers.35

In a subsequent case, United States v. Chadwick,36 the Court placed limitations on the right of police to open without a warrant and search pieces of personal luggage discovered during a lawful search of the area within an arrestee's immediate control.37 In Chadwick, federal narcotics

30. In Chimel, the Court made this clear by referring to the area "in front of one who is arrested," 395 U.S. at 763, and the area within the reach of the person arrested, id. at 766; and by approvingly discussing, at 395 U.S. at 763-64, the Court's earlier decision in Preston v. United States, 376 U.S. 364 (1964). The Court in Chimel approvingly quoted language in Preston to the effect that a warrantless search of an automobile, after its occupants had been taken to jail and the automobile had been towed to a garage, could not be upheld as a search incident to a lawful arrest, because the search was remote from the place and not contemporaneous with the time of the arrest. 376 U.S. at 367.

In Chadwick, 433 U.S. at 14, the Court stated in dictum that a search under Chimel permits a "prompt" search of the area within an arrestee's "immediate control." The Chimel Court did not discuss the question of whether a search of that area may occur prior to when the individual actually is arrested. The Court subsequently held that the person of an arrestee may be searched without a warrant prior to his being arrested. Rawlings v. Kentucky, 448 U.S. 98 (1980). See supra note 24.


32. See generally, W. La Fave, supra note 6, § 6.3(c).

33. E.g., United States v. Jones, 475 F.2d 723 (5th Cir. 1973); People v. Williams, 57 Ill.2d 239, 311 N.E.2d 681 (1974).

34. Most courts hold that the area of immediate control is very limited when the arrestee's hands are cuffed behind his back at the time of the search of the area adjacent to him. E.g., United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Boca, 417 F.2d 103 (10th Cir. 1969).

Some courts, however, hold that the fact that an arrestee has his hands cuffed in front of him does not prohibit the police from searching the area adjacent to the arrestee. E.g., United States v. Jones, 475 F.2d 723 (5th Cir. 1973).

35. For example, the area within an arrestee's immediate control should be very small when the arrestee is unconscious, quadraplegic, or paraplegic and not in a wheelchair.


37. In Chadwick the Court did not itemize the types of containers and other items found on an arrestee's person subject to its holding. See supra note 24 and infra notes 55-56 and accompanying text.
agents lawfully arrested three persons and seized a footlocker in their possession. The agents had probable cause to believe that the footlocker contained contraband marijuana or hashish. The arrestees were taken to a federal building, and the footlocker was taken to another part of the building. Subsequently, federal agents opened the locked footlocker without a warrant and seized a large amount of marijuana.

The Court in *Chadwick* determined that the warrantless opening of the footlocker could not be upheld under the fourth amendment as a Chimel search of an area within an arrestee’s immediate control. The Court concluded that the fourth amendment protected the owners of the footlocker against unreasonable warrantless searches and seizures, because they had manifested an expectation that the contents would remain free from public examination by placing the contents inside a double-locked footlocker.

The Court then rejected the government’s argument that the fourth amendment’s warrant requirement protects only private homes, business offices, and private communications. It also rejected the argument that searches of containers are reasonable under the fourth amendment if there is probable cause to believe evidence of criminal conduct is present.

38. The Court’s opinion in *Chadwick* did not address the issue of whether all three arrestees had standing to challenge the legality of the warrantless opening of the footlocker. See supra note 6. The Court also stated that the fourth amendment “protects people from unreasonable governmental intrusions into their legitimate expectations of privacy.” 433 U.S. at 7. Thus, the Court implicitly found that the opening of the locked footlocker was a fourth amendment search. (A search occurs when police conduct violates a person’s actual and legitimate expectations of privacy. See supra note 6. If police conduct is not a fourth amendment search, such conduct is not subject to the warrant, probable cause, or reasonableness requirements of the fourth amendment. Smith v. Maryland, 443 U.S. 735 (1979)).

39. Although *Chadwick*’s reference to double-locking the trunk could be interpreted as requiring such manifestations of privacy in order for a container to be protected by the fourth amendment, the Court in *United States v. Cleary*, 656 F.2d 1302, 1303-04 (9th Cir. 1981), held that such a reading of *Chadwick* would be incorrect in light of the subsequent decision in *Arkansas v. Sanders*, 442 U.S. 753 (1979), analyzed infra notes 193-212 and accompanying text. In *Cleary* the Court noted that *Sanders*, in including an unlocked suitcase within the category of personal property protected by the fourth amendment, “did not rely on the types of precautions that indicate a subjective expectation of privacy (i.e., double-locking) found in *Chadwick*. Rather, the critical factor relied on was the objective nature of the suitcase as personal luggage, i.e., the inherent nature of the container itself rather than the behavior of its owner.” 656 F.2d at 1304. See infra note 47 and accompanying text. *Cleary* was implicitly modified by *United States v. Ross*, 456 U.S. 798 (1982), which held that the fourth amendment protects any container, whether “worthy” or “unworthy” (see infra note 224), the contents of which are not open to plain view, regardless of whether there are any subjective manifestations of privacy. See infra notes 250-321 and accompanying text.

40. 433 U.S. at 6-7. The Court rejected these arguments, stating that the warrant clause of the fourth amendment “does not in terms distinguish between searches conducted in private homes and
The Court further determined that the warrantless search of the footlocker could not be upheld under any of the exceptions to the rule generally requiring a warrant for a search or seizure, and that it thus violated the fourth amendment. The search was also determined not to be a lawful search incident to arrest under the *Chimel* immediate control doctrine. The Court pointed out that law enforcement officers had reduced the footlocker "to their exclusive control," with the result that there was no longer any danger that the arrestee might gain access to the footlocker to seize a weapon or destroy evidence.\(^41\) The Court stated that the footlocker's mobility was not sufficient to justify dispensing with the "added protections" of a warrant once federal agents had the footlocker under their exclusive control, because there was not "the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained."\(^42\) Furthermore, "once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest."\(^43\) The Court did,
however, indicate that personal property over which the police have gained exclusive control might be subject to a warrantless search in appropriate circumstances. The Court noted that a warrantless search might be justified “if officers have reason to believe that luggage contains some immediately dangerous instrumentality such as explosives, because it would be foolhardy to transport it to the station house without opening the luggage and disarming the weapon.”

The Court rejected the argument that searches of possessions within an arrestee’s immediate control should be permitted on the grounds that there is a reduced expectation of privacy caused by the arrest. The Court reasoned that “unlike searches of the person... searches of possessions within an arrestee’s immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents’ privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.”

For these reasons, the Court concluded that the warrantless search of the footlocker was not a legitimate Chimel search incident to arrest. This followed from the findings that at the time of the warrantless search of the footlocker, it was in the exclusive control of law enforcement officers, the arrestees were securely in custody, the search was conducted more than an hour after police gained exclusive control, and there was no other exigency justifying the warrantless search.

The Court’s discussion of the particular facts of the case indicates that the determination of whether exclusive control exists is to be made on a case by case basis, based on a consideration of all relevant facts. In New York v. Belton, the Supreme Court noted that the mere fact that a container and its contents have been seized by a police officer does not

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45. 433 U.S. at 15 n.9. See infra note 205 and accompanying text.  
46. Id. at 16 n.10.  
47. Id. at 15. Although not explicitly stated by the Court, the warrantless search of the footlocker also could have been held not to be a lawful search incident to arrest because it was not contemporaneous in time and place with the arrest, as required by Chimel. See supra note 30.  
48. As discussed infra notes 93-109 and accompanying text, New York v. Belton, 453 U.S. 454 (1981), has held that Chadwick’s exclusive control rule does not prohibit police from searching containers discovered in the interior of the passenger compartment of an automobile searched without a warrant incident to the lawful arrest of the occupants of the automobile. See infra notes 59-149 and accompanying text.  
49. 453 U.S. at 461-62 n.5.
mean that the officer has exclusive control of the container and its contents within the meaning of Chadwick.\textsuperscript{50}

As noted earlier,\textsuperscript{51} the Court in Chadwick indicated that personal property "immediately associated with the person of the arrestee" can be searched without a warrant even though the arresting officer has exclusive control of such property. The opinion did not define the types of personal property that might be within this "immediately associated" standard, and did not explain why such types of personal property should be excepted from Chadwick's exclusive control rule. "The Court's opinion does not explain why a wallet carried in the arrested person's clothing, but not the footlocker in the present case, is subject to 'reduced expectations of privacy caused by the arrest.' . . . Nor does the Court explain how such items as purses or briefcases fit into the dichotomy.

\textsuperscript{50} Justice Brennan, in his dissent in Belton, agreed that exclusive control of an article within the meaning of Chadwick does not occur simply because a police officer is holding the article in his hand. He stated that exclusive control means more; it requires that the officer have "sufficient control such that there is no significant risk that the arrestee or his confederates 'might gain possession of a weapon or destructible evidence'." 454 U.S. at 471 n.5 (quoting Chimel v. California, 395 U.S. at 763). Justice Brennan also argued in Belton that "the issue of exclusive control presents a question of fact to be decided under the circumstances of each case . . ." 454 U.S. at 471 n.5. See infra notes 95-105 and accompanying text.

Lower courts have agreed that exclusive control of an article is to be determined on a case by case basis, and that an arresting officer does not gain exclusive control of an article simply because he has taken the article into his hands. United States v. Mefford, 658 F.2d 588 (8th Cir. 1981). In Dawson v. State, 40 Md. App. 640, 395 A.2d 160 (1978), a warrantless search of an arrestee's pocketbook by the arresting officer was upheld as a search incident to a lawful arrest. The search of the pocketbook occurred after the arrest and after the pocketbook was seized and in the hands of the arresting officer, who had responded to a report of a shooting at an apartment complex. When the officer arrived at the complex's parking lot, he observed a man and a woman struggling over a pocketbook. After the man told the officer that the woman had done the shooting and had a gun in her pocketbook, the officer grabbed the pocketbook, opened it, and seized a gun that was inside. At this time, he was only a few feet from the woman and, according to the court, was "still involved in an uncontrolled and potentially life endangering situation." 40 Md. App. at 653, 395 A.2d at 167. The court consequently held that the warrantless search of the pocketbook was permissible under Chimel as a search of the area within an arrestee's control, because at the time of the search the woman was neither handcuffed nor under any physical restraints, and, being only a few feet from the officer, was therefore within "the Chimel perimeter of reachability, lungeability, or graspability, i.e., the area from within which she could gain access to the pocketbook and the gun." Id. (Although the court did not discuss whether the woman had been arrested prior to the search of the pocketbook, the warrantless search of the pocketbook could permissibly precede the actual arrest. See supra notes 24, 30. In Dawson the court also noted that Chadwick did not prohibit the warrantless search of the pocketbook, because the pocketbook was "immediately associated with the person of the arrestee" at the time of the search, and was thus "analytically akin to a search of an item found in an arrestee's clothing or pockets," and, alternatively, because "the uncontrolled and potentially life endangering situation" constituted "exigent circumstances" within the meaning of Chadwick. 40 Md. App. at 653, 395 A.2d at 167. See supra notes 43-45 and accompanying text.

\textsuperscript{51} See supra note 43 and accompanying text.
Perhaps the holding . . . will be limited in the future to objects that are relatively immobile by virtue of their size or absence of a means of propulsion." If the opening and inspection of the contents of a container or other item of personal property constitutes a fourth amendment search because it violates a person’s actual and legitimate expectation of privacy, if the police have exclusive control of the container and its contents when they open and inspect the contents of the container, and if there are no exigent circumstances, the fourth amendment should prohibit the warrantless opening and inspection of the contents of the container, regardless of whether the container is immediately associated with the person. In Chadwick, the Court offers no reasoning relating its immediately associated with the person distinction to the fourth amendment’s reasonableness requirement.

52. United States v. Chadwick, 433 U.S. at 20-21 (Blackmun, J., dissenting). As discussed earlier, see supra note 24, the Supreme Court in United States v. Robinson, 414 U.S. 218 (1973), and in Gustafson v. Florida, 414 U.S. 260 (1973), appeared to permit police, without a warrant, to open and inspect any items found on the person of an arrestee being searched incident to a lawful arrest. New York v. Belton, 453 U.S. at 461, stated in dictum that Robinson allows police to search containers located during the search of an arrestee’s person even though the container searched could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested. The Court in Bel/on, although citing with approval the holding in Robinson that the warrantless search of a crumpled-up cigarette package found on an arrestee’s person was permissible as a search incident to a lawful arrest, did not reach the question of whether Chadwick’s “exclusive control” and “immediately associated with the person” standards had modified the permissible scope of the search of the person of an arrestee under Robinson. See supra note 24.

One lower court has asserted that Chadwick only limits the search of items that are within an arrestee’s immediate control, such as luggage, but does not prohibit the police from searching an arrestee’s clothes, as occurred in United States v. Edwards, 415 U.S. 800 (1974), or items found in an arrestee’s pocket, as occurred in Robinson. United States v. Berry, 560 F.2d 861, 864 (7th Cir. 1977). In Berry the Court held that an attache case carried by an arrestee at the time he was arrested was not immediately associated with the arrestee’s person and was subject to Chadwick’s exclusive control rule.


53. See supra note 6.

54. The “immediately associated with the person” distinction is also inconsistent with the determination in Chadwick that there is no distinction under the fourth amendment’s warrant clause between searches of one’s person, home, office, private communications, and personal property. 433 U.S. at 6-7.

Without citing or analyzing Chadwick, the Supreme Court stated in dictum in United States v. Ross, 456 U.S. at 798, that “a container carried at the time of arrest often may be searched without a warrant and even without any specific suspicion concerning its contents.”
The Chadwick Court also did not describe the types of containers and other items of personal property, other than personal luggage, that are not immediately associated with an arrestee's person, and thus subject to its exclusive control and exigent circumstances standards. The Court, however, subsequently addressed, in automobile exception search cases, the issue of the application of Chadwick to the warrantless opening and inspection of the contents of closed, opaque containers.

The Chadwick decision thus limits the right of police to open without a warrant and inspect luggage and certain other types of containers and personal property discovered in the area within an arrestee's immediate control during a Chimel search incident to lawful arrest. Although Chimel may authorize a warrantless search of the area adjacent to a lawfully arrested individual, the right of the police to open and inspect the contents of luggage and certain other containers found within


56. As discussed subsequently, see infra notes 295-321 and accompanying text, the validity of a warrantless opening of a container and inspection of its contents by police should be determined by deciding first whether the police conduct constituted a search by violating an individual's actual and reasonable expectations of privacy, see supra note 6, and then, if the answer is affirmative, determining whether, under Chadwick, the police had exclusive control of the container and its contents; and finally, if the police had exclusive control, whether there were exigent circumstances. This approach should be followed regardless of whether the police attempt to justify a warrantless search of a container under the Chimel search incident to a lawful arrest exception or under the automobile exception, because the determination of whether warrantless police conduct is a fourth amendment search or seizure is separate and distinct from the determination of whether the warrantless police conduct was reasonable under the fourth amendment, see supra note 6, and because Chadwick indicates that the standards governing a warrantless search of luggage or personal property should be separate and distinct from the standards governing when luggage or personal property can be seized without a warrant and when an automobile can be searched without a warrant under Chimel or the automobile exception. In Chadwick, the Court gave no indication that the standard governing warrantless searches of luggage and other containers is dependent upon the justification for the warrantless seizure of the luggage or other container; in fact, the validity of the warrantless seizure of the footlocker was not challenged in Chadwick, 433 U.S. at 13. The Court in Chadwick also indicated that it was establishing general principles governing the search of luggage and other personal property, which did not depend upon the justification for the search of an automobile or other premises where the luggage or other personal property was discovered, by stating that "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." 433 U.S. at 15. United States v. Ross, 456 U.S. 798 (1982), modified this holding, by adopting a rule permitting police to open without a warrant and inspect the contents of any container in an automobile when they have probable cause to believe that seizable items are located somewhere in the automobile but not in any particular container therein, and when the automobile is being lawfully searched under the automobile exception. See infra notes 250-321 and accompanying text.
this area is limited by Chadwick's exclusive control, exigent circumstances, and immediately associated with the person standards.

The Chadwick decision did not, however, limit the right of police, under the plain view seizure doctrine, to seize items having a nexus with criminal activity that are observed or discovered in plain view and within the Chimel immediate control area. In Chadwick, the Court held that the federal agents had no right to open the footlocker without a warrant; however, it seems reasonable to conclude that if the contents of the footlocker—marijuana—had been observed in plain view at the time of arrest, the marijuana would have been subject to seizure without a war-

57. A warrantless seizure of an item discovered or observed during a lawful search of an arrestee's area of immediate control under Chimel is permitted if the requirements of the plain view seizure doctrine are met. See Texas v. Brown, 103 S. Ct. 1525 (1983); Coolidge v. New Hampshire, 403 U.S. 443, 465 n.24 (1971) (plurality opinion). (Although three requirements of the plain view seizure doctrine were defined by only a plurality of the Supreme Court in Coolidge v. New Hampshire, lower federal courts and state courts have almost universally followed the Coolidge interpretation of that doctrine. See W. La Fave, supra note 6, § 4.11.) The first requirement is that the government agent making the seizure must have lawfully entered the premises where the seizure was made, whether pursuant to a warrant or under one of the exceptions to the warrant requirement, Coolidge, 403 U.S. at 465-66 (plurality opinion), Brown, 103 S. Ct. at 1540-41, 1545, and, at the same time the agent must discover or observe the item seized while he is in a place he has a right to be. Washington v. Chrisman, 455 U.S. 1, 5-6 (1982). This would require, in a warrantless search under Chimel, that the police be lawfully on the premises where the arrest was made and that the item seized be discovered or observed while the officer is within the area of the arrestee's immediate control. Coolidge v. New Hampshire, 403 U.S. at 465 n. 24. The second requirement is that it must be immediately apparent to an officer when he first observes or discovers the item seized that there is probable cause to believe that the item is evidence, contraband, or an instrumentality of crime, id. at 466 (plurality opinion); Illinois v. Andreas, 51 U.S.L.W. 5157, 5159 (U.S. June 28, 1983); Brown, 103 S. Ct. at 1542 (plurality opinion), or is another object seizable under the fourth amendment, see Warden v. Hayden, 387 U.S. 294 (1967), without any further testing or investigation of the item to determine if the item has a nexus with criminal activity. See C. Whitebread, supra note 6, § 11.04. Finally, the discovery of the item must be inadvertent and not anticipated, Coolidge, 403 U.S. at 469. (That is, the government agents must not have probable cause to believe the item seized would be on the premises searched, sufficient to have obtained a search warrant authorizing seizure of the item. See C. Whitebread, supra note 6, § 11.03.) The four dissenters in Coolidge, however, refused to accept the plurality's inadvertent discovery requirement under the plain view seizure doctrine, 403 U.S. at 505 (Black, J., concurring and dissenting), 403 U.S. at 514 (White, J., concurring and dissenting). See also Texas v. Brown, 103 S. Ct. 1535, 1543-44 (1983). The majority of lower federal and state courts, however, have accepted this requirement "as the law of the land." W. La Fave, supra note 6, § 4.11(d). The warrantless seizure of contraband, stolen, or dangerous objects may be permissible under the plain view seizure doctrine even when the police know in advance that they will find the objects in plain view on the premises and intend to seize them. Coolidge, 403 U.S. at 471. In addition, when exigent circumstances were present, a seizure may be upheld under the plain view seizure doctrine even though the discovery of the items seized was not inadvertent. Id. at 471.
rant, whether or not the footlocker was within the area of the arrestee's immediate control.58

II. WARRANTLESS SEARCH OF AN AUTOMOBILE INCIDENT TO A LAWFUL ARREST: NEW YORK v. BELTON

In New York v. Belton,59 the Supreme Court held for the first time that a warrantless search of an automobile could be permissible as a search incident to a lawful arrest under Chimel v. California. In Belton, a state policeman stopped a speeding automobile and requested the driver's license and the automobile's registration.60 The policeman discovered that none of the four men in the automobile owned it or was related to its owner. While making these determinations, the officer smelled burnt marijuana and saw on the floor of the automobile an envelope marked "Supergold," a term the officer associated with marijuana. He then ordered the occupants out of the automobile and placed all of them under arrest for unlawful possession of marijuana. After patting down each of the occupants, the arresting officer stood each occupant next to the sides of the automobile61 in positions such that mutual physical contact was impossible. The officer then seized the "Supergold" envelope, in which he found marijuana. He also searched the passenger compartment of the automobile and found a jacket belonging to Belton on the back seat. In a zipped pocket of the jacket, the officer found a quantity of cocaine. Belton's motion to suppress the cocaine as evidence was denied by the trial court, and he was convicted of a controlled substance offense involving possession of the cocaine.

The Court in Belton held that the warrantless search of Belton's jacket was lawful62 and that it did not violate the fourth and fourteenth amendments to the Constitution.63 Although the passenger compartment of the automobile might have been held to be within the immediate

58. In Arkansas v. Sanders, 442 U.S. 753, 764 n. 13 (1979), discussed infra notes 195-212 and accompanying text, the Court indicates that Chadwick does not require a warrant when the contents of a container are open to plain view.
60. The warrantless stop of the automobile and the request by the state policeman to see the operator's license and the automobile's registration were not challenged in Belton; however, these warrantless actions would have been upheld. Delaware v. Prouse, 440 U.S. 648 (1979).
61. See 453 U.S. at 456.
62. Belton did not challenge the lawfulness of his arrest. 453 U.S. at 460 n.2.
63. Because of this holding, the Court did not address the question of whether the search of Belton's jacket and the seizure of the cocaine in the jacket were permissible under the automobile exception. 453 U.S. at 462 n. 6.
control of the four arrestees at the time the arresting officer searched Belton's jacket, Justice Stewart, writing for a 5-4 majority, adopted a per se rule that now defines the permissible scope of the search of an automobile and its contents when the occupants of an automobile have been lawfully arrested.

The Court determined in Belton that whenever a police officer has made a lawful custodial arrest of the occupant of an automobile he may,
without a search warrant, conduct a Chimel search of the interior of the passenger compartment of the automobile (but not the trunk) and examine the contents of any containers found within the passenger compartment. The Court defined "container" as any "object capable of holding another object," and included in the definition "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like."66 The containers found to be subject to search under Belton may be closed or open.67 Justice Stewart, however, did not differentiate between locked and unlocked containers68 or between opaque and transparent containers.69 Furthermore, it appears that a container does not have to be one that could contain a weapon or evidence in order to be subject to a warrantless search;70 one such container, a crumpled-up cigarette package,71 was searched in United States v. Robinson.72

Although the Court adopted a per se rule defining the permissible scope of the search of an automobile incident to a lawful arrest under Chimel, Justice Stewart stated in Belton that this rule in "no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests."73 This statement implicitly permits, as does Chimel, a search of the passenger compartment of an automobile and any containers therein after its occupants are lawfully arrested, regardless of how trivial or minor the offense,74 regardless of the fact that the offense for which the automobile's occupants were arrested is not an offense for which evidence could exist,75 and

66. 453 U.S. at 460 n. 4. See Virgin Islands v. Rasool, 657 F.2d 582 (3d Cir. 1981) ("container" within the meaning of Belton includes a brown paper grocery bag).
67. 453 U.S. at 461.
68. Justice Brennan stated in dissent that "presumably" the majority would have reached the same result even if the four arrestees had been handcuffed and placed in the patrol car and if the search "had extended to locked luggage or other inaccessible containers locked in the back seat of the car." Id. at 468.
69. See infra notes 228-30 and accompanying text.
70. 453 U.S. at 461.
71. Id.
73. 453 U.S. at 460 n. 3. Justice Stewart also stated that "our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic context." Id. Michigan v. Long, 51 U.S.L.W. 5231, 5232 n. 1 (U.S. June 28, 1983), raised but did not decide the question of whether a search of an automobile can be made under Belton when the police have probable cause to arrest an occupant but do not actually effect the arrest.
74. See supra note 28.
75. Cf. supra note 24.
regardless of the lack of probable cause or reasonable suspicion that there are weapons or evidence in the automobile's passenger compartment. 76

Belton's per se rule departs from prior decisions interpreting the permissible scope of a search of the area within the immediate control of an arrestee. Previously the Court held that even though the police could search the area within the immediate control of an arrestee in every case where the arrest was lawful, 77 the scope of that area was to be determined on a case by case basis, taking into account all relevant factors. 78 Justice Stewart noted in Belton 79 that the per se rule being adopted was analogous to the one previously adopted in United States v. Robinson, 80 that allowed a full-scale search of an arrestee's person on all occasions when that individual has been lawfully placed under custodial arrest. 81

He stated that one reason for adopting this rule was the difficulties encountered by the courts in defining on a case by case basis, following Chimel, the permissible scope of a warrantless search of the interior of an automobile's passenger compartment incident to the lawful arrest of its occupants. 82 An additional reason was the desirability of notifying the public of how courts will define their constitutional protection in applying "a settled principle to a recurring factual situation" and of notifying police of the scope of their authority in "the recurring factual situation" of searches of automobiles after their occupants have been lawfully arrested. 83

In United States v. Robinson, 84 however, the Court adduced different reasons. These included the need to protect an arresting officer from possible danger if an arrested individual possesses a dangerous weapon, 85 and the fact that the decision by an arresting officer to search the person of an arrestee is "necessarily a quick ad hoc judgment" that should not be subject to later judicial review. 86 In Belton, the Court did

76. See supra note 28. In order for the police to make a warrantless search of an automobile under the automobile exception, however, the police must have probable cause to believe that the automobile contains seizable items such as weapons, contraband, or evidence of crime, see infra note 151 and accompanying text, although arrest of the occupants of an automobile is not a prerequisite for a warrantless search of the automobile under the automobile exception. See infra note 177 and accompanying text.

77. See supra note 28.

78. See supra notes 31-35 and accompanying text.

79. 453 U.S. at 459.


81. See supra note 24.

82. 453 U.S. at 459, 460.

83. Id. at 460.

84. 414 U.S. 218 (1973).

85. Id. at 234-35.

86. Id. at 235.
not refer to this argument in justifying its adoption of a per se rule and, in Robinson, the Court did not support its per se rule by referring to the arguments stated in Belton. Because the rule adopted in both Robinson and Chimel have the purpose of preventing lawfully arrested individuals from destroying or concealing evidence or from obtaining a weapon, it would seem that the reasons supporting the Belton rule should be the same as those provided in Robinson.

Justice Stewart in Belton also justified the warrantless search of containers found within an automobile’s passenger compartment on the grounds that if the passenger compartment is within the reach of an arrested occupant of the automobile, other containers inside the passenger compartment will also be within his reach. He concluded that the “justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.”

In dissent, Justice Brennan argued that an exception to the general requirement for a warrant should be based upon a careful consideration “of the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright line rule of general application.” He also argued that Chimel requires a case by case delineation of the area within an arrestee’s immediate control. The court should determine not “whether the arrestee could ever have reached the area that was searched but whether he could have reached it at the time of arrest and search.” Justice Brennan argued that the court’s per se rule was inconsistent with the rationale underlying Chimel because it “grants police officers authority to conduct a warrantless

87. 453 U.S. at 460.

88. Id. at 461. Justice Stewart in Belton drew an analogy to Chimel’s holding, 395 U.S. at 763, noting that police can search drawers within an arrestee’s reach, but not all drawers in the arrestee’s house. 453 U.S. at 461. The opinion in United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973), did not differentiate between the search of the person and the search of containers found on the person in defining the permissible scope of a search on one’s person incident to arrest. See supra note 24.

89. 453 U.S. at 464. Justice Brennan also approvingly quoted, id. at 464 n. 1, the following statements made in Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931): “There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.” Justice Brennan also referred, 453 U.S. at 469 n. 4, to the following statement in Chimel: “[The Court] cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.” 395 U.S. at 761 (citing McDonald v. United States, 335 U.S. 451, 456 (1948)).

90. 453 U.S. at 469. Justice Brennan also cited, 453 U.S. at 468, Cupp v. Murphy, 412 U.S. 291, 295 (1973), for the proposition “that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement.”
'area' search under circumstances where there is no chance that the arrestee 'might gain possession of a weapon or destructible evidence.' '91

Even if the Court in Belton was correct in adopting a per se rule defining the permissible scope of a warrantless search of an automobile under Chimel92 rather than requiring the permissible scope of searches to be decided on a case by case basis, the majority opinion in Belton, as noted by Justice Brennan in dissent,93 is difficult to reconcile with United States v. Chadwick.94 In addition, the rule will be difficult to apply to the varying factual situations confronting police when they arrest an occupant of an automobile.

The Court in Belton held that the seizure of the cocaine in Belton's jacket was not prohibited by Chadwick, because that case did not involve "an arguably valid search incident to a lawful custodial arrest."95 The Court distinguished Chadwick, wherein the Court noted that the challenged search of a footlocker had occurred "more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody."96 Thus, that search could "not be viewed as incidental to the arrest or as justified by any other exigency."97 Moreover, the Court argued, the police did not gain exclusive control of Belton's jacket and the cocaine in a jacket pocket within the meaning of Chadwick simply because a police officer searched Belton's jacket and seized its contents.98 Justice Stewart, however, did not explain why Belton's jacket and the cocaine in a jacket pocket were not within the exclusive control of the arresting officer within the meaning of Chadwick once the officer had taken possession of it;99 did

91. 453 U.S. at 468 (citing Chimel v. California, 395 U.S. at 763).

Prior to the Belton decision, Professor Wayne La Fave argued that the relevant facts in determining what areas of an automobile can be searched without a warrant under Chimel should be those "which show (i) what places it would be possible for the arrestee presently to reach, and (ii) perhaps of somewhat lesser importance, how probable it is that the arrestee would undertake to seek means of resistance or escape or to destroy evidence." W. LA FAVE, supra note 6, § 7.1 at p. 502.

92. This article will not analyze in depth the pros and cons of per se exceptions to the general rule requiring a warrant for search and seizures. See generally, La Fave, "Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127.

93. 453 U.S. at 469.


95. 453 U.S. at 462.

96. Id.

97. United States v. Chadwick, 433 U.S. at 15 (quoted in New York v. Belton, 453 U.S. at 462). Justice Stewart also quoted, id., a statement in Arkansas v. Sanders, 442 U.S. 753, 764 n. 11 (1979), discussed infra notes 195-212 and accompanying text, where the Court had stated that the warrantless search of a suitcase was not argued to have been a lawful search incident to a lawful arrest.

98. 453 U.S. at 461 n. 5.

99. Cf. supra notes 48-50 and accompanying text.
not explain why containers found within the interior of the passenger compartment of an automobile after its occupants have been arrested are always subject to a warrantless search; and did not explain why containers are never within the exclusive control of the arresting officer within the meaning of Chadwick\(^{100}\) and why a *per se* exception to Chadwick's exclusive control rule is necessary in Belton situations. He gave no reasons for adopting this exception to Chadwick's exclusive control standard.

Justice Brennan agreed with Justice Stewart that a police officer does not gain exclusive control of an item within the meaning of Chadwick "simply by holding it in his hand,"\(^{101}\) and stated in his dissent that "exclusive control" under Chadwick "means more than that. It means sufficient control such that there is no significant risk that the arrestee or his confederates 'might gain possession of a weapon or destructible evidence.' . . . The issue of exclusive control presents a question of fact to be decided under the circumstances of each case. . . ."\(^{102}\)

Justice Brennan is correct in interpreting Chadwick as requiring a case by case determination of whether an item is in the exclusive control of a police officer.\(^{103}\) Justice Stewart in Belton supported his analysis of Chadwick by quoting a passage from Chadwick that discusses exclusive control within the context of Chadwick's particular facts.\(^{104}\) Applying this argument to the facts of Belton, Justice Stewart implicitly, without any supporting analysis, created a *per se* exception to Chadwick's exclusive control standard with respect to containers\(^{105}\) discovered when police search the interior of an automobile's passenger compartment after lawfully arresting its occupants. Justice Stewart found this new rule to be consistent with Chadwick. In so doing, he failed to distinguish between two issues. The first involves the identification of areas adjacent to an arrestee that may be searched without a warrant (an issue governed by Chimel's immediate control standard). The second involves the criteria to be used to determine when a container or other item of personal property found within a searchable area, *i.e.*, that area adjacent to and within

\(^{100}\) Cf. *supra* note 48 and accompanying text.

\(^{101}\) 453 U.S. at 471 n. 5.

\(^{102}\) *Id.* (citation omitted) (quoting from Chimel v. California, 395 U.S. at 763).

\(^{103}\) *See supra* note 48 and accompanying text.

\(^{104}\) This passage from Chadwick, quoted in *Belton* at 453 U.S. at 462, reads as follows: "Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or justified by any other exigency." United States v. Chadwick, 433 U.S. at 15.

\(^{105}\) *See supra* notes 66-72 and accompanying text.
the immediate control of an arrestee, is within an officer's exclusive control within the meaning of Chadwick.

In justifying its per se rule, the majority in Belton referred to the difficulty courts had encountered in determining when passenger compartments of automobiles were within an arrestee's immediate control within the meaning of Chimel,106 but did not suggest that the courts had encountered any difficulty defining when police can search and inspect the contents of containers found within the passenger compartment of the automobile. This exception to Chadwick's "exclusive control" standard, however, is consistent with the other reason given by the Belton majority for adopting its per se rule: giving notice to the public of the scope of their constitutional rights and to the police of the scope of their authority.107

Justice Powell, who joined Justice Stewart's opinion for the Court in Belton, noted in his concurring opinion in Robbins v. California that the Belton rule is justified by the fact that "immediately preceding the arrest, the passengers have complete control over the entire interior of the automobile, and can place weapons or contraband into pockets or other containers as the officer approaches. Thus, practically speaking, it is difficult to justify varying degrees of protection for the general interior of the car and for the various containers found within. These considerations do not apply to the trunk of the car, which is not within the control of the passengers either immediately before or during the process of arrest."108 Justice Powell, however, did not discuss how this reasoning could be reconciled with the Court's determination in Chadwick that police cannot open and inspect the contents of a piece of luggage within their exclusive control even when they have probable cause to believe that the piece of luggage contains seizable items.109

The majority in Belton failed to explain why they would authorize police to search without a warrant all containers found within the passenger compartment of an automobile when that search is incident to the lawful arrest of its occupants, rather than requiring them to lock the articles in the trunk of the automobile or in the officer's police car and then to obtain a warrant to search containers. Such a procedure would promote the goals of preventing arrestees from obtaining weapons or concealing, removing, or destroying evidence, the goals underlying the

106. See supra note 82 and accompanying text.
107. See supra note 83 and accompanying text.
108. 453 U.S. at 431 (Powell, J., concurring).
109. See id. at 429-36 (Powell, J., concurring).
Chimel immediate control rule\(^\text{110}\) as well as the rule actually adopted by the Belton majority. This is so because the opportunity provided to an arrestee to lunge or grasp for a weapon or evidence in an automobile is not significantly different when the arresting officer takes time to lock containers in the trunk of an automobile than when that officer opens and inspects the contents of the containers. An arresting officer concerned that the arrested occupants might lunge or grasp for weapons or evidence in the automobile while he was locking containers in its trunk could be authorized to seize the automobile's keys and to lock the doors and trunk, without removing any containers from the automobile. He might then lock the arrested occupants inside his police vehicle or have the automobile towed from the scene of the arrest to a police impoundment or storage lot.\(^\text{111}\) Such alternative rules would be consistent with another of the reasons given by the majority in Belton for adopting its per se rule,\(^\text{112}\) because they would define the rights of members of the public and the scope of the authority of the police just as clearly as does the Belton rule.\(^\text{113}\)

Justice Stevens criticized Belton in his dissent in Robbins v. California.\(^\text{114}\) He argued that Belton would encourage police to arrest the operator of the automobile, and take him into custody even when they have the discretion simply to issue a summons or citation,\(^\text{115}\) only for the

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110. See also supra notes 36-58 and accompanying text.

If Chadwick's exclusive control standard is to be applied on a case by case basis to searches of containers discovered within the passenger compartment of an automobile searched incident to the lawful arrest of the automobile's occupants, courts first should determine whether particular containers and other items of personal property are the types of personal property to which Chadwick's exclusive control rule is applicable. See supra notes 51-56 and infra notes 291-321 and accompanying text. Although some types of containers, such as suitcases and briefcases, to which Belton's per se rule applies should be subject to Chadwick's exclusive control rule, other types of containers subject to Belton's per se rule, such as paper bags and plastic trash bags, in certain cases should not be subject to Chadwick's exclusive control rule. See supra notes 51-56 and infra notes 291-321 and accompanying text.

111. See supra notes 26-28 and accompanying text.

112. See W. La Fave, supra note 6, § 7.1(b) at 505-06. If police followed these alternatives, there would be the danger that unapprehended accomplices or members of the public might break into the automobile and remove evidence from the automobile or take the automobile (and any evidence therein); however, the automobile exception, see infra notes 150-61 and accompanying text, but not the Chimel doctrine, see supra notes 21-30 and accompanying text, is intended to permit police to act without a warrant to guard against such possibilities.

113. See 453 U.S. at 460. See also supra note 83 and accompanying text.

114. 453 U.S. at 450 (Stevens, J., dissenting).

purpose of searching the entire interior of the passenger compartment and the containers therein pursuant to Belton's per se rule. Justice Stevens suggested that a police officer with such discretion might act in this manner "whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation." Some state courts and lower federal courts would hold a warrantless search incident to an arrest to be unlawful when the arresting officer is shown to have arrested the defendant solely for the purpose of conducting a warrantless search incident to a lawful arrest. These courts would say that such a purpose made the search unreasonable and invalid under the fourth amendment. Although the Supreme Court has not explicitly addressed this issue, in Scott v. United States, the Court stated in dictum that fourth amendment violations are to be determined "under a standard of reasonableness without regard to the underlying intent or motivation of the officers involved."

As noted by Justice Brennan in his dissenting opinion in Belton, its per se rule will be difficult to apply to the myriad of factual situations in which police lawfully arrest a person while he is driving or riding in an automobile; furthermore, Belton "offers no guidance to the police officer seeking to work out these answers for himself."

The majority in Belton stated that their decision "does no more than determine the meaning of Chimel's principles in this particular and problematic context" and that "it in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches inci-

116. 453 U.S. at 452 (Stevens, J., dissenting). Justice Stevens also noted that persons apprehended for traffic violations are frequently not required to accompany the arresting officer to the police station before they are permitted to leave on their own recognizance or by using their driver's licenses as a form of bond. It is also possible that state law or local regulations may in some cases forbid police officers from taking persons into custody for violation of minor traffic laws. As a matter of constitutional law, however, any person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody.


119. Id. at 138 (footnote omitted).

120. 453 U.S. at 469 (Brennan, J., dissenting).

121. Id. at 470 (Brennan, J., dissenting).
dent to lawful custodial arrests.\footnote{122} Justice Brennan disagreed. He noted in dissent that, although the majority "concludes that a warrantless search of a car may take place even though the suspect was arrested outside the car, it does not indicate how long after the suspect's arrest that search may validly be conducted. Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours?\footnote{123}

In Belton, the majority stated that the search of an automobile's passenger compartment must be a "contemporaneous incident of that arrest,") but they did not address the issue raised by Justice Brennan because the arresting officer searched the automobile's passenger compartment immediately after placing the occupants under arrest.\footnote{124} The Court had indicated in Chadwick\footnote{126} that a search of a container that took place an hour after arrest was not a contemporaneous search and could not be upheld under Chimel. The decision in Belton, however, does not indicate how long a delay, short of an hour, is permissible between arrest of an automobile's occupants and the search of an automobile's passenger compartment. The permissible length of delay may depend upon the reasons for it.\footnote{127} A long delay might be permitted, for example, when the arresting officer must custodially arrest, physically restrain, and search the person of a number of individuals, or when the officer must wait for police dispatchers to determine whether an automobile is stolen or whether any of the arrestees had criminal records or were wanted as fugitives.

Although the majority in Belton said that its per se rule does not alter the fundamental principles of Chimel v. California,\footnote{128} it did not say whether the applicability of its per se rule is dependent upon the physical proximity to the automobile of an arrested occupant of the automobile at the time of the search of the automobile's passenger compartment.\footnote{129}

\footnote{122. 453 U.S. at 460 n. 3. See supra notes 73-76 and accompanying text.}
\footnote{124. 453 U.S. at 460.}
\footnote{125. Id. at 456. The Court noted that the search of Belton's jacket "followed immediately upon that arrest." Id. at 462.}
\footnote{126. See supra note 47 and accompanying text. See also United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981) (warrantless search of purse at police station more than an hour after police had seized it from an automobile and when police had exclusive control of it not permissible under Belton and Chadwick).}
\footnote{127. Cf. Michigan v. Summers, 452 U.S. 692 (1981) (permissible length of investigative stop of suspect for questioning depends upon nature of crime being investigated and types of questions that are necessary in a particular situation to make a reasonable investigation) (dictum).}
\footnote{128. See supra notes 73-76 and accompanying text.}
\footnote{129. Justice Brennan raised this issue in his dissent in Belton. 453 U.S. at 470.}
The opinion also failed to indicate whether the per se rule applies regardless of the amount of physical restraint to which the arrested occupants are subjected when the automobile's passenger compartment is searched. Justice Stewart did not address these two issues in Belton, apparently because none of the arrested occupants of the automobile was handcuffed or otherwise physically restrained when police searched the passenger compartment. Furthermore, all of the arrestees were standing next to the automobile. 130 The majority in Belton did make it clear, by distinguishing Chadwick131 from Belton on the grounds that in Chadwick the search took place after the arrestees were securely in custody, 132 that a warrantless search of an automobile would not be permitted if the arrestees had been jailed. But Belton did not address whether a warrantless search of the passenger compartment of an automobile is permitted when the arrested occupant of the automobile has been handcuffed and locked in the back seat of a police car (which has a metal screen between the front and back seats) or handcuffed to a police officer. 133 In such situations, the passenger compartment of an automobile would not seem to be within the lunge, grasp, or immediate control of an arrested occupant and therefore should not, under Chimel, be subject to a search without a warrant. Nevertheless, Belton's per se rule does seem to authorize a warrantless search of the passenger compartment of an automobile in such situations. 134

Justice Brennan's dissenting opinion in Belton also raised the question of whether Belton's per se rule applies only to automobiles. 135 The majority in Belton did not indicate whether their rule applies as well to vans, recreational vehicles, pickup trucks, trucks, and buses.136

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130. See 453 U.S. at 456, 467.
132. 453 U.S. at 462. The majority in Belton did not cite or discuss Preston v. United States, 376 U.S. 364 (1964) or Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968), cases in which the Court stated that a warrantless search of an automobile cannot be upheld under Chimel as a search incident to a lawful arrest when the automobile is not searched until after its occupants have been taken from the automobile to jail or to a courthouse. See supra note 30.
133. Justice Brennan stated in dissent that "the result would presumably be the same even if [the arresting officer] had handcuffed Belton and his companions in the patrol car before placing them under arrest. . . ." 453 U.S. at 468. See State v. Alston, 88 N.J. 211, 235 n.15, 440 A.2d 1311, 1323 n.15 (1981).
134. Additional problems in applying Belton's per se rule may be presented when police grant an arrestee permission to secure the automobile and its contents before being taken to jail, or to drive his automobile to the police station or other government office where bail will be posted. See W. LAFAVE, supra note 6, § 7.1(c).
135. 453 U.S. at 470 (Brennan, J., dissenting).
136. The court in United States v. Wiga, 662 F.2d 1325 (9th Cir. 1981), noted "the physical differences between typical passenger automobiles and motor homes," id. at 1332 n. 7, but concluded that Belton authorized the warrantless search of the interior passenger areas of a motor home
Even if this problem is resolved by limiting the rule to automobiles (which is the way Justice Stewart stated it137), it will often be difficult to distinguish the "interior" of an automobile's "passenger compartment" (which is subject to a warrantless search under Belton's per se rule) from the automobile's "trunk" (which cannot be searched under Belton without a warrant). The majority in Belton stated that closed containers, including closed glove compartments, can be searched without a warrant,138 but as Justice Brennan noted in dissent, the majority did not indicate whether that ruling applied to a locked glove compartment, the interior of door panels, or the area under an automobile's floorboards.139 An even more troublesome problem noted by Justice Brennan140 is that the Court does not define the passenger compartment of a station wagon, hatchback, or taxicab with a glass panel separating the driver's compartment from the rest of the taxi's interior.141 Similar problems will arise in defining the "interior of the passenger compartment" of a van, recreational vehicle, and bus (if such vehicles are

because the search was "directly related to the same fundamental justifications which dictate the results in . . . Belton—i.e., the preservation of evidence and the discovery of weapons that the arrestee may use to escape or harm the arresting officer." Id. at 1332.

Justice Brennan also asked in his Belton dissent whether the majority's per se rule permits police to enter and search a house without a warrant upon arresting a suspect they saw walking out of the house after they had probable cause to believe a crime was being committed in the house as a result of peering into the house from the outside. 453 U.S. at 470 (Brennan, J., dissenting). The Court, however, in Vale v. Louisiana, 399 U.S. 30 (1970), held that Chimel does not permit a house to be searched without a warrant when a person is arrested outside the house. The Court in Vale stated that "if a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, . . . not somewhere outside—whether two blocks away, . . . twenty feet away, . . . or on the sidewalk near the front." 399 U.S. at 33-34 (citations omitted). The majority in Belton did not cite or discuss Vale.

137. See 453 U.S. at 460.
138. Id. at 460 n. 4.
139. Id. at 470 (Brennan, J., dissenting). The majority in Belton also did not indicate, as noted earlier, whether other types of locked "containers" can be opened without a warrant. See supra notes 66-68 and accompanying text.
140. 453 U.S. at 470 (Brennan, J., dissenting).
141. United States v. Russell, 670 F.2d 323 (D.C. Cir. 1982), held that a hatchback automobile's luggage storage area, which is accessible from inside the automobile, is the "interior of the passenger compartment" of such an automobile within the meaning of Belton's per se rule. Conceivably under the Russell rationale the entire interior of a station wagon, likewise accessible from the inside of the vehicle, is the "interior of the passenger compartment" within the meaning of the Belton rule. Professor Yale Kamisar agrees with Professor Wayne La Fave, see W. La Fave, supra note 6, § 7.1 (1982 Supp.), that under Belton "the 'interior' or 'passenger compartment' of a vehicle included all space 'reachable' without exiting the vehicle." Kamisar, 4th Amendment Hatchback, Washington Post, Oct. 15, 1981, at A29, col. 3. Under this theory, some areas of the bed of a pickup truck that can be reached from the cab through a sliding window or panel might be defined as the "passenger compartment" of the pickup, and subject to a warrantless search under Belton assuming that a pickup truck is an "automobile" within the meaning of Belton.
"automobiles" in the Belton sense). If the Court's goals are to provide clear-cut guidelines delimiting the authority of the police, to protect the police and the public from arrestees using weapons carried in an automobile, and to prevent arrestees from concealing, destroying, or removing evidence that may be in an automobile, it follows that the entire interiors of station wagons, hatchbacks, and vans, and both the cabs and the cargo areas of pickup trucks and trucks, should be subject to warrantless searches under Chimel and Belton. If the Court's goal is to infringe upon rights of privacy only to the extent reasonably necessary to protect the police and the public, and to prevent the destruction, concealment, or removal of evidence that may be in an automobile, it seems inescapable that the determination of whether a particular area of a station wagon, van, hatchback, truck, pickup truck, or recreational vehicle is within an arrestee's lunge, grasp, or immediate control should be based upon a case by case weighing of all relevant facts. 142

An additional problem in applying the Belton rule will occur when not all of the occupants of an automobile are arrested. 143 If police stop for a traffic violation an automobile with more than one occupant and arrest only the driver, locking him in the sealed-off rear passenger compartment of a police car, a search of the automobile's passenger compartment is difficult to justify under Chimel's immediate control standard. 144 In such a situation, the automobile's passenger compartment would not seem to be within the lunge, grasp, or immediate control of the arrested driver of the automobile. The fact that the automobile's passenger compartment is within the lunge, grasp, or immediate control of those passengers not arrested would not justify a warrantless search of the passenger compartment under Chimel, because Chimel does not authorize the warrantless search of an area within the immediate control

142. See supra notes 31-35, 89-91 and accompanying text.

Justice Powell, however, who joined Justice Stewart's opinion in Belton as one of the five members of the majority, stated in his concurring opinion in Robbins v. California, 453 U.S. 420, 431 n. 2 (1981), that a recessed luggage compartment at the rear of a station wagon was a "trunk" and not a "passenger compartment" within the meaning of Belton's per se rule.

The Court in Belton, by referring to the "interior of the passenger compartment" in its opinion, also appears not to include a portable luggage container or rack affixed to the top of an automobile within the scope of its per se rule, cf. Arkansas v. Sanders, 442 U.S. 753, 771 (1979) (Blackmun, J., dissenting), although such a rack may be subject to a warrantless search under a case by case application of Chimel.

143. Belton only refers to making a warrantless search of an automobile's passenger compartment when "the occupant" has been lawfully arrested. 453 U.S. at 460.

144. See supra notes 126-32 and accompanying text.
of a person who has not been lawfully arrested. Another problem in applying Belton when not all of the occupants of an automobile are arrested may occur when the arresting officer searching the automobile's passenger compartment discovers a container that is owned or claimed by one of the non-arrested occupants. The police should be able to

145. 395 U.S. at 755. See C. Whitebread, supra note 6, § 6.02. But if police conducting a lawful investigation of an automobile that has been stopped for a traffic violation or that has been involved in an accident have a reasonable belief, based on specific and articulable facts and rational inferences from those facts, that a non-arrested suspect is potentially dangerous and may gain immediate control of a weapon, they may, without a warrant, search areas of the automobile's passenger compartment and containers therein in which a weapon could be placed or hidden. Michigan v. Long, 51 U.S.L.W. 5231 (U.S. June 28, 1983). The holding in Long is based upon the reasoning in Terry v. Ohio, 392 U.S. 1 (1968) (which authorizes police to make a protective search for weapons (frisk) of a suspect's person when they have a reasonable suspicion that the suspect is armed and dangerous to the police or others), Chimel, and Belton. In order to search an automobile without a warrant under Long, police are not required to have a reasonable belief that a non-arrested suspect is both armed and dangerous (which is required in order to frisk the person of the suspect under Terry v. Ohio). The warrantless searches authorized by Long are for the purposes of protecting police (and other persons near the automobile) in case a non-arrested suspect re-enters the automobile during the police investigation after breaking away from police control or re-enters the automobile after the police conclude their investigation, and gains access to a weapon that he might use to injure the police or others nearby. 51 U.S.L.W. at 5236-37. In Long, the Supreme Court determined that the police had a reasonable belief that the suspect in question was dangerous because the investigation occurred near midnight in a rural area, the police had observed a large knife in the interior of the automobile as the suspect was about to re-enter the automobile, and the suspect appeared to be under the influence of an intoxicant and had driven his automobile into a ditch while driving erratically at an excessive speed. Id. at 5236. The Court in Long stated that this finding was not affected by the fact the suspect lawfully possessed the knife that the police observed in the automobile, id. at 5237 n. 16, but the Supreme Court did not otherwise define when police would have a reasonable belief that a non-arrested occupant of an automobile is dangerous. The majority in Long rejected Justice Brennan's argument in dissent that police in such cases should pursue "less intrusive, but equally effective, means of insuring their safety," 51 U.S.L.W. at 5240 (Brennan, J., dissenting), (such as detaining the suspect outside the automobile, asking him where the automobile's registration is, and retrieving the registration themselves, id. at 5240 n. 7), on the grounds that police officers, "faced with having to make quick determinations about self-protection and the defense of innocent citizens in the area," should not have to "also decide instantaneously what 'less intrusive' alternative exists to ensure that any threat presented by the suspect will be neutralized." 51 U.S.L.W. at 5237 n. 16. But the searches authorized under Long are solely for the purpose of finding weapons; such searches are not for the purpose of finding evidence. Id. at 5236 n. 14.

146. If the officer opens such a container and discovers an item in the container that incriminates only another occupant, that incriminated occupant probably would not have standing to challenge the admissibility of the item unless he established a right of joint possession or use in the item. See Rakas v. Illinois, 439 U.S. 128 (1978), and United States v. Payner, 447 U.S. 727 (1980), discussed supra note 6; and Rawlings v. Kentucky, 448 U.S. 98 (1980). Whether an occupant of an automobile would have standing to challenge the search and seizure of a container and its contents when he does not own or have a present possessory interest or right of use in the container or its contents, but does own the automobile in which the container was found, has not been addressed explicitly by the Supreme Court. Whether an occupant of an automobile would have standing to challenge the opening by police of a container he does own when that container is found within an automobile he does not own or lease also is unclear. See Rakas v. Illinois, 439 U.S. 128 (1978).
conduct a warrantless search of such containers under Chimel if such containers are within the actual lunge, grasp, or immediate control of an arrested occupant of an automobile, because Chimel does not limit police searches of the immediate control area to items of personal property owned by the arrestee. Still, Chadwick should prohibit the warrantless search of such containers when the containers are within the exclusive control of the police and there are no exigent circumstances.

III. WARRANTLESS SEARCHES OF AUTOMOBILES UNDER THE "AUTOMOBILE" EXCEPTION (CARROLL DOCTRINE)

Under the "automobile exception" to the general requirement that a warrant precede a search or seizure (also known as the Carroll doctrine), police may stop and search an automobile without a warrant if two criteria are met. First, they must have probable cause to believe that the automobile contains contraband or other items that can be seized under the fourth amendment. Second, there must be exigent circumstances.

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147. See supra notes 21-28 and accompanying text.
148. See supra notes 42-43, 48-49 and accompanying text.
149. See supra notes 44-45 and infra note 205 and accompanying text.
150. This reference is to Carroll v. United States, 267 U.S. 132 (1925), in which the Supreme Court first recognized this exception. This exception should be called the Carroll doctrine rather than the automobile exception, because it extends beyond automobiles to airplanes, ships, and motorboats to the extent that they are inherently mobile and can be quickly moved out of the jurisdiction before a warrant can be obtained. See id. at 153; W. LaFAVE, supra note 6, § 7.2 at 508-09 n. 2.

United States v. Chadwick, 433 U.S. 1, 11 (1977), however, refused to extend this exception to authorize warrantless searches of movable personal property, such as luggage. See supra note 41.

The automobile exception has also been held inapplicable to motor homes on the grounds that they have tinted glass or shades so that passers-by cannot peer in and are "in some senses more akin to a house than a car." United States v. Williams, 630 F.2d 812 (5th Cir. 1978).


The Supreme Court recently has adopted a "totality of circumstances" test for determining when there is probable cause to believe that seizeable items will be found in a particular place. Illinois v. Gates, 103 S. Ct. 2317 (1983). The Gates Court abandoned the stricter "two-pronged test" for probable cause of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), which required the prosecution to establish both the basis of knowledge and the veracity of
circumstances making it impracticable or dangerous for them to await the issuance of a warrant.\textsuperscript{152} The reasons for the "automobile exception" are that "the inherent mobility of automobiles often makes it impracticable to obtain a warrant" and "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property."\textsuperscript{153}

Although the Court has not said so explicitly, the presence of exigent circumstances within the meaning of the automobile exception is determined on a case by case basis.\textsuperscript{154} Exigent circumstances exist under the automobile exception when it would be impractical or dangerous for one officer to guard the automobile while other officers obtain a warrant, because the automobile's occupants, unapprehended accomplices, or members of the public might remove contraband or other seizable items from the automobile, or might remove the automobile itself.\textsuperscript{155} Factors relevant in making this determination include the location of the automobile when it is first stopped or found prior to the search, the number of law enforcement officers present, and the number of occupants, if any, in the automobile.\textsuperscript{156} Exigent circumstances "do not

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A warrantless search of an automobile is permitted under the automobile exception if these two criteria are met even when the police do not seize the automobile. United States v. Modica, 663 F.2d 1173 (2d Cir. 1981), cert. denied, 456 U.S. 989 (1982).


\textsuperscript{156} Coolidge v. New Hampshire, 403 U.S. 443, 458-64 (plurality opinion), 478-80 (1971).
dissipate simply because the particular occupants of the vehicle may have been removed from the car, arrested, or otherwise restricted in their freedom of movement. . . . The car is readily moveable until such time as it is seized, removed from the scene and securely impounded by the police. Until then it is potentially accessible to third persons who might move or damage it or remove or destroy evidence contained in it.\textsuperscript{157} Furthermore, exigent circumstances are not limited to those occasions when the defendant has been alerted to police actions taken against him, because of the possibility that unapprehended accomplices or members of the public might remove evidence from the automobile or take or drive it away.\textsuperscript{158} The Court has always found exigent circumstances when an automobile is stopped by law enforcement officers while being operated on a public road or highway.\textsuperscript{159} This situation, however, is not the only


In United States v. Ross, 456 U.S. 798 (1982), the Court noted that "historically warrantless searches of vessels, wagons, and carriages—as opposed to fixed premises such as a home or other building—had been considered reasonable by Congress," id. at 805, because in the case of "a search of a ship, motorboat, wagon or automobile, for contraband goods, . . . 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." Id. at 806 (quoting Carroll v. United States, 267 U.S. at 153). "Thus, since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods. (In light of this established history, individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.) It is this impracticability, viewed in historical perspective, that provided the basis for the Carroll decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable." United States v. Ross, 456 U.S. at 806-07.

United States v. Ross, 456 U.S. at 807 n. 9, stated that "the decision in Carroll was not based on the fact that the only course available to the police was an immediate search. . . . [A]lthough a failure to seize a moving automobile believed to contain contraband might deprive officers of the illicit goods, once a vehicle itself has been stopped the exigency does not necessarily justify a warrantless search. . . ." The Court in Ross noted that in Chambers v. Maroney, 399 U.S. 42 (1970), the Court "refused to adopt a rule that would permit a warrantless seizure but prohibit a warrantless search. The Court held that if police officers have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct an immediate search of the contents of that vehicle. ‘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.’ Chambers v. Maroney, 399 U.S. at 52.” 456 U.S. at 807 n. 9. See infra note 176.


In Michigan v. Thomas, 102 S. Ct. at 3081, the Supreme Court observed that its prior decisions had established the rule "that when police officers have probable cause to believe there is contra-
example of exigent circumstances.\textsuperscript{160} The Court has also permitted a warrantless search of an automobile under the automobile exception when a lone police officer encountered the operator and two passengers of an automobile he had been following.\textsuperscript{161}

In \textit{Cardwell v. Lewis},\textsuperscript{162} a plurality of four members of the Supreme Court found exigent circumstances to have been present at the time an unoccupied automobile parked in a public lot was searched and seized by police without a warrant. Exigent circumstances were present, because there "was incentive and potential for the car's removal"; the automobile's owner had been arrested; he was aware that the police believed that the automobile itself was incriminating evidence;\textsuperscript{163} and, he

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  \item \textsuperscript{160} Justice White argued in his concurring and dissenting opinion in \textit{Coolidge} that police should be able to search an automobile under the automobile exception when there is probable cause, whether an automobile is stopped while moving, parked on the street, or in a person's driveway, because "in both situations the probability of movement at the instance of family or friends is equally great. . . ." 403 U.S. at 525 (White, J., concurring and dissenting).
  \item \textsuperscript{161} Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam). The Court in \textit{Bannister} did not explicitly discuss why the facts of the case satisfied the exigent circumstances requirement of the automobile exception. It simply upheld the warrantless seizure of evidence the officer observed inside the car after he approached it and which he had probable cause to believe were seizeable items. \textit{Id.} at 4. \textit{See} Scher v. United States, 305 U.S. 251 (1938) and the analysis of Scher in \textit{Coolidge} v. New Hampshire, 403 U.S. 443, 459 n. 17 (1971) (plurality opinion).
  \item \textsuperscript{162} 417 U.S. 583 (1974).
  \item \textsuperscript{163} The automobile had been used to push another automobile containing the body of a murder victim over an embankment. \textit{Id.} at 586.
\end{itemize}
had requested his attorney to see "that his wife and family got the car." 164 (The plurality in Cardwell, however, did not state that the police overheard the defendant making this request to his attorney.) The plurality found exigent circumstances, despite the fact that "for some time prior to arrest" 165 the police had had probable cause to believe that the automobile in question constituted evidence and an instrumentality of crime:

[T]he right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are not foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. . . . 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. 166

164. Id. at 595.
The plurality stated that the subsequent examination of the exterior of the automobile, during which a sample of paint and an imprint of a tire were taken, was not a search within the meaning of the fourth amendment, so that a warrant was not required for this exterior examination. Id. at 588-92. See supra note 6. Justice Powell concurred in the judgment on different grounds. Four Justices dissented, primarily on the grounds that there were no exigent circumstances within the meaning of the automobile exception, 417 U.S. at 596-99 (Stewart, J., dissenting). See infra notes 167-69 and accompanying text.

See also England v. State, 274 Md. 264, 334 A.2d 98 (1975), in which exigent circumstances were found justifying the search of an unoccupied automobile parked on the street in front of the defendant's house. In England, the Court based its conclusion on the facts that, although the defendant was in custody, an accomplice was at large and the automobile appeared unexpectedly in front of the defendant's house after the police had been searching for it for three days.

165. 417 U.S. at 595.
166. Id.

The Supreme Court has never held that exigent circumstances will not be found if it is established that the police waited until an item was placed in an automobile as a pretext for taking advantage of the automobile exception. See United States v. Ross, 456 U.S. 798, 840 (1982) (Marshall, J., dissenting). In Scott v. United States, 436 U.S. 128 (1978), the Court suggested that the subjective motive of police officers is irrelevant in determining whether their conduct was unreasonable in violation of the fourth amendment.

See Husty v. United States, 282 U.S. 694 (1931), discussed supra note 159; Nair v. State, 51 Md. App. 234, 442 A.2d 196 (1982) (exigent circumstances held to be present even though police had probable cause to obtain a warrant authorizing search of automobile two days earlier on the grounds that police were under no obligation to conclude an investigation or arrest the defendants at the time that probable cause was first obtained); Commonwealth v. Burgwin, 292 Pa. Super. 273, 437 A.2d 41 (1981) (exigent circumstances held to be present when police inadvertently came upon an automobile while they were on the way to obtain a warrant authorizing search of that automobile, even though police voluntarily delayed seeking the warrant until two and one-half hours after they had acquired probable cause to search the automobile). Cf. State v. Ercolano, 79 N.J. 25, 397 A.2d 1062 (1979) (no exigent circumstances held to be present when police had probable cause to obtain a warrant authorizing search of an automobile in advance of search of the automobile and also knew well in advance of the search that it would be found outside an apartment which they had a warrant to search).
Justice Stewart’s dissenting opinion, joined by three other Justices, argued that exigent circumstances were not present, because the defendant (the owner of the automobile) and the keys to his automobile “were securely within police custody . . . well before the time the automobile was seized,” and thus “there was . . . absolutely no likelihood that the respondent could have either moved the car or meddled with it during the time necessary to obtain a search warrant. And there was no realistic possibility that anyone else was in a position to do so.” 167 Justice Stewart also pointed out that the defendant had been aware for several months that the police were investigating him and had known for at least a day before the seizure of his automobile that the police wished to question him.168 Furthermore, the police had had time to obtain an arrest warrant for the defendant based upon a showing of probable cause that also would have supported issuance of a search warrant authorizing search of the automobile. 169

In contrast with Cardwell is Coolidge v. New Hampshire,170 another case dealing with the seizure and search of a parked and unoccupied automobile, and the only such case in which a majority of the Justices on the Supreme Court have held that there were no exigent circumstances within the meaning of the automobile exception. In Coolidge, the automobile in question was seized, searched two days later, held over a year, and then searched again twice. All of this police conduct was conducted pursuant to a search warrant that was held invalid by the Supreme Court. This holding placed the burden on the State to establish that the (now) warrantless seizure and search of that automobile was valid. The majority in Coolidge determined that the automobile in question was seized while it was parked in the driveway of the owner’s home and was not being used for an illegal purpose, and at a time when the police had probable cause and had had sufficient opportunity to obtain a warrant. The Court thus concluded that there were no exigent circumstances justifying the warrantless seizure and search of the automobile under the automobile exception. 171 A plurality of four Justices also noted, as additional bars to application of the automobile exception, that the defendant, the automobile’s owner, had been arrested, and that his wife, the only other possible driver of the automobile, had been removed from the scene by police officers who stayed with her until after the warrantless

167. 417 U.S. at 598 (Stewart, J., dissenting).
168. Id. at 599.
169. Id. at 598.
171. Id. at 479, 484.
seizure of the automobile. Justice Black, in a concurring and dissenting opinion joined by Justice Blackmun, argued that the plurality incorrectly assumed that "the police should, or even could, continue to keep petitioner's wife effectively under house arrest," and that the police did not act unreasonably in refusing to assume "that no one else had any motivation to alter or remove the car." Justice White, in a concurring and dissenting opinion joined by Chief Justice Burger, argued that the automobile exception should permit police to conduct warrantless searches of automobiles they have probable cause to believe contain seizable items in two situations: first, when an automobile is in motion prior to being stopped and searched and, second, when an automobile is unattended and parked on the street or in the driveway of a person's home, because "in both situations the probability of movement at the instance of family or friends is equally clear."

As these decisions indicate, exigent circumstances under the automobile exception are determined on a case by case basis. This conclusion is supported by the fact that each time the Court has applied the automobile exception, it has analyzed in great detail the particular facts of the case before determining whether exigent circumstances were present. In substance, the Court appears to approach the exigent circumstances issue by determining whether the police could have obtained a warrant before seizing or searching an automobile, and what the consequences would have been if the police, after stopping or encountering the automobile, had sought a warrant before seizing and searching it.

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173. 403 U.S. at 505 (Black, J., concurring in part and dissenting in part).
174. Id. at 525 (White, J., concurring in part and dissenting in part).
175. See supra notes 154-74 and accompanying text.
176. The interpretation of the exigent circumstances element of the automobile exception by lower federal courts and by state courts is analyzed in depth in W. LaFAVE, supra note 6, §§ 7.2 (b), (c); this article will not duplicate that analysis.

When exigent circumstances justifying a warrantless automobile exception search of an automobile are present at the time the vehicle is stopped or first encountered by law enforcement officials, the officials are permitted by the automobile exception to tow or drive it to a police station or an impoundment lot and search it there without securing a warrant. Chambers v. Maroney, 399 U.S. 42 (1970); Texas v. White, 423 U.S. 67 (1975) (per curiam). The Court in these two cases has permitted such delayed searches without requiring law enforcement officials to explain or establish good cause as to why they delayed searching the automobile until well after it was initially stopped or
found by them. See Texas v. White, 423 U.S. at 69 (Marshall, J., dissenting). Justice Harlan, concurring in part and dissenting in part in Chambers, disagreed with this per se rule permitting such delayed automobile exception searches on the grounds that an exception from the rule generally requiring a warrant for a search should be permitted only when the actual facts of the case before the court establish exigent circumstances. 399 U.S. at 61 (Harlan, J., concurring in part and dissenting in part). Cf. supra notes 1-5 and accompanying text. The Court also has imposed no limits on the length of the delay permissible between the seizure of an automobile and its search at the station house or impoundment lot. See People v. White, 68 Mich. App. 348, 242 N.W.2d 579 (1976) (warrantless search next morning 18 hours after automobile seized late the afternoon of the preceding day upheld under the automobile exception); People v. Emer, 1 Ill. App. 3d 993, 274 N.E.2d 364 (1971) (warrantless search three days after seizure of automobile held invalid under automobile exception). In support of this per se rule permitting delayed automobile exception searches, the Court reasoned that it is a "debatable question" as to whether seizure and immobilization of the automobile until a search warrant is obtained is a greater or lesser intrusion than immediately searching the automobile at the station house by law enforcement officials; thus, for fourth amendment purposes, there is "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." Chambers v. Maroney, 399 U.S. at 51. Ross reaffirmed the holdings in Chambers v. Maroney and Texas v. White on the following grounds:

These decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests. Given the scope of the initial intrusion caused by a seizure of an automobile—which often could leave the occupants stranded on the highway—the court rejected an inflexible rule that would force police officers in every case either to post a guard at the vehicle while a warrant is obtained or to tow the vehicle itself to the station. Similarly, if an immediate search on the scene could be conducted, but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street—at no advantage to the occupants, yet possibly at certain cost to the police. The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference.

United States v. Ross, 456 U.S. 798, 807 n. 9 (1982). Justice Harlan, however, concurring in part and dissenting in part in Chambers v. Maroney, argued that the majority's reasoning in Chambers did not support the per se rule it adopted, because the majority, "unable to decide whether search or temporary seizure is the 'lesser' intrusion, in this case authorized both." 399 U.S. at 63 n. 8 (Harlan, J., concurring in part and dissenting in part). He also noted that the Court approved the warrantless searches of the automobile at the police station, after the warrantless temporary seizure of the automobile, "without even an inquiry into the officers' ability promptly to take their case before a magistrate." Id. See also Texas v. White, 423 U.S. at 69 (Marshall, J., dissenting). Justice Harlan concluded his opinion in Chambers by arguing that the "lesser intrusion" would be the "simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a warrant," 399 U.S. at 63, and that temporary seizure and immobilization of an automobile, without a warrantless search of the automobile, would prevent removal of evidence while a warrant was obtained. Id. He conceded, however, that when it would be impracticable to immobilize the automobile for the time necessary to obtain a warrant, such as when a single police officer arrests the occupants of an automobile and must take them to the police station, the automobile exception should permit the officer to make a warrantless on-the-spot search of the automobile if there is probable cause to believe it contains seizable items. Id. at 64 n. 9. (He also noted that if his theory was followed, a person could consent to the warrantless search of his automobile in order to avoid temporary seizure of his automobile while police obtain a search warrant.)

A majority of lower federal and state courts have refused to interpret the automobile exception as requiring police, when they have probable cause to believe that an automobile contains seizable items and there are exigent circumstances, to post a guard and to deny use and access to the automobile while other police obtain a warrant authorizing the search of the automobile. See W. La Fave, supra note 6, § 7.2(c).
Unlike a warrantless search of an automobile incident to a lawful arrest under *Chimel* and *Belton*, the warrantless search of an automobile under the automobile exception does not require as a prerequisite that an occupant of the automobile have been arrested contemporaneously with the search of the automobile.\(^{177}\) In fact, there need not be any occupants in an automobile for the automobile exception to apply,\(^ {178}\) although the absence of occupants in an automobile may cause a court to invalidate the warrantless search on the grounds that no exigent circumstances were present.\(^ {179}\) A warrantless search of an automobile under the automobile exception is permitted when there is probable cause to believe that there are seizable items in the automobile that may be removed or destroyed before a warrant is obtained (not necessarily by the occupants of the automobile; possibly by unapprehended accomplices or members of the public). A warrantless search of an automobile as a search incident to a lawful arrest under *Chimel* and *Belton*, on the other hand, does not require probable cause to believe or even suspect that there are seizable items such as weapons or evidence in the automobile. Under *Belton*, a warrantless search of an automobile is permitted to prevent evidence from being concealed, removed, or destroyed, and to protect the safety of the arresting officers and nearby members of the public in the event that the automobile contains evidence or a weapon and an arrested occupant lunges or grasps for such evidence or weapon.

When the police do not have reason to believe that the item to be seized is in a specific area of or container within the automobile, the automobile exception permits police to search areas of an automobile where they could reasonably expect to find the items.\(^ {180}\) A warrantless

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\(^{180}\) United States v. Ross, 456 U.S. 798 (1982). In *Ross*, the Court indicated that police may rip open upholstery without a warrant, *id.* at 818, 823 (at least when the upholstery feels harder than is ordinarily the case, *id.* at 804, quoting from Carroll v. United States, 267 U.S. at 174), and may search concealed compartments under the dashboard, 456 U.S. at 818, 825, and the glove compartment. *Id.* at 821, 823.

See, e.g., Daugherty v. State, 40 Md. App. 535, 392 A.2d 1165 (1978) (opening by game warden of paper bag and seizure by him of three plastic bags filled with marijuana, after he determined by feeling the outside of the bag that it did not contain anything sufficiently hard or heavy to be game, held to exceed the permissible scope of an automobile exception search); Madonado v. State, 528 S.W.2d 234 (Tex. Crim. 1975) (examination of identification numbers and search of glove compartment, floorboards, and rear area of truck believed to be stolen, where documents or other items that would disclose the true owner's identity might be found, permissible under the automobile exception, but ripping up the floorboards of the rear area of the truck (under which packages of marijuana were found), held to exceed the permissible scope of an automobile exception search).
search of the trunk of an automobile, therefore, may be permitted under the automobile exception when police have probable cause to believe that a seizable item is located somewhere in the automobile, but do not know where in the automobile it is. A warrantless search of the trunk of an automobile, however, is not permitted as a search incident to a lawful arrest under Belton. Furthermore, the scope of a search of an automobile under the automobile exception is not limited to the area within the lunge, grasp, or immediate control of an arrested occupant of the automobile. If law enforcement officials, however, have probable cause to believe that a seizable item is located in a specific area of an automobile (which might be the case if probable cause is based on an informant’s tip), then, under the automobile exception, they usually should be required to search without a warrant only that specified area of the automobile. It is possible, however, that police officers in such a situation might approach an occupied automobile and observe a furtive gesture by an occupant adjacent to the area of the automobile believed by the officers to contain seizable items. In such a case, and if they do not find the seizable items in the specific area in which they have probable cause to believe the items will be found, they should be permitted to search the area within that occupant’s immediate control. Another example might involve police officers who, having probable cause to believe that a specific quantity of a particular type of seizable item will be found in a specified area of an automobile, find less than such specific quantity in that specified area. In this situation, they should be permitted to search other areas of the automobile where the additional unseized quantities of that item might be hidden. Such additional searching should be permitted, because suspicious criminals might decide, at some time after the police obtained the information upon which they based their probable cause, to transfer some or all of the seizable items to a different


182. See supra notes 64-66 and accompanying text.


184. Cf. United States v. Ross, 456 U.S. 798 (1982), discussed infra notes 250-321 and accompanying text; Arkansas v. Sanders, 442 U.S. 753 (1979) (police who had probable cause to believe that a particular suitcase located in an automobile contained seizable items permitted to seize the suitcase without a warrant, but needed a warrant to open the suitcase and seize its contents), analyzed infra notes 195-212 and accompanying text.


area of the automobile to reduce the likelihood that the entire quantity might be intercepted by the police or criminal adversaries.\textsuperscript{187}

The automobile exception, however, does not authorize the warrantless search of an occupant of an automobile that the police have probable cause to believe contains seizable items when that search is to determine if the occupant has concealed such seizable items on his person.\textsuperscript{188} The reason for this prohibition is twofold: first, police cannot obtain a search warrant authorizing the search of the person of an occupant of an automobile when they have probable cause to believe only that seizable items are located somewhere in the automobile; and, second, the scope of a warrantless search under the automobile exception should not be greater than would be permitted under a search warrant.\textsuperscript{189}

A recurring problem with respect to the permissible scope of a search under the automobile exception occurs when police officers, while searching an automobile which they reasonably believe contains a particular type of seizable item, discover some of that type of item but have no information as to the quantity of that type of item in the automobile or where in the automobile to find it. The Court has not explicitly decided whether police in such a situation can continue to search the automobile for additional quantities.\textsuperscript{190} A further search should be permitted only if the circumstances of the particular case give the police probable cause to believe that there are within the automobile additional quantities of the type or kind of seizable items already discovered and seized within the automobile.\textsuperscript{191}

\textsuperscript{187} Robbins v. California, 453 U.S. at 449 n. 9 (Stevens, J., dissenting); and Arkansas v. Sanders, 442 U.S. at 770 n. 3 (Blackmun, J., dissenting), discussed infra note 206.

\textsuperscript{188} United States v. Di Re, 332 U.S. 581 (1948).

\textsuperscript{189} Id. In Commonwealth v. Burgwin, 292 Pa. Super. 273, 437 A.2d 41 (1981) the court held that if police have probable cause to believe that the driver of an automobile is carrying a weapon or another seizable item on his person, and if there are exigent circumstances, the automobile exception authorizes police, without a warrant, to stop the automobile and search the person of that individual. The Burgwin court, however, did not cite or distinguish Di Re.

\textsuperscript{190} Such a factual situation was presented in Robbins v. California, 453 U.S. 420 (1981), wherein a police officer, after finding marijuana in the passenger compartment of a station wagon he had stopped because it had been driven erratically, opened the wagon's tailgate and lifted up the recessed luggage compartment, in which he discovered 15 pounds of marijuana in two bundles wrapped in green opaque plastic. The Court in Robbins, however, did not address the issue of whether the officer exceeded the permissible scope of a search under the automobile exception, and decided the case on other grounds. See infra notes 215-49 and accompanying text. See also Michigan v. Thomas, 102 S. Ct. 3079, 3081 n. 1 (1982), wherein the Court noted that a lower appellate court "apparently assumed" that the discovery of marijuana in an automobile's glove compartment "provided probable cause to believe there was contraband hidden elsewhere in the vehicle."

\textsuperscript{191} In State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981), two police officers, while chasing a speeding automobile, observed "three of the four occupants moving about in the vehicle, as if attempting to conceal something." Id., 440 A.2d at 1313. After stopping the automobile, one of the
The most troublesome issue for the Court, however, has been the issue of whether police may open and inspect the contents of luggage and other closed opaque containers discovered during an automobile exception search. This issue has been addressed recently by the Court in three cases\textsuperscript{192} that present questions about the extent to which Chadwick's\textsuperscript{193} exclusive control and exigency standards\textsuperscript{194} regulate the warrantless opening and inspection of the contents of luggage, containers, and other items of personal property discovered in an automobile during an automobile exception search; the types of personal property subject to Chadwick's exclusive control standard; and, the permissible scope of the warrantless search of an automobile under the automobile exception.

In \textit{Arkansas v. Sanders},\textsuperscript{195} police officers had probable cause to believe that a particular suitcase carried by a disembarking airline

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police officers observed shotgun shells in the glove compartment, which had been opened by the automobile's driver in response to a request by one of the officers for the automobile's registration. The police then ordered the occupants to leave the automobile, following which one of the officers entered the automobile to seize the shotgun shells. While doing so, the officer observed an opaque plastic bag lying on the floor, protruding about 12 inches from under the seat. The bag felt as if it contained a gun, so the officer opened it. He discovered and seized a sawed-off shotgun. The officers then made a further search of the passenger compartment, finding and seizing several revolvers. The court found that the presence of the "shotgun shells in the glove compartment and the sawed-off shotgun under the front passenger seat, coupled with defendants' furtive and unusual movements in the back seat before the vehicle was stopped," gave the police probable cause to conduct the search of the passenger compartment that revealed the two handguns. \textit{Id.}, 440 A.2d at 1321, 1322.

In \textit{Wimberly v. Superior Court}, 16 Cal. 3d 557, 128 Cal. Rptr. 641, 547 P.2d 417 (1976), a police officer, after stopping an automobile that he had observed being driven erratically, observed a pipe and approximately 12 marijuana seeds on the automobile's floor. Smelling the odor of burnt marijuana, he searched the passenger compartment, and found a small quantity of marijuana in the pocket of a jacket. He then searched the trunk and found a suitcase containing several pounds of marijuana. The court ruled that the search of the passenger compartment for additional marijuana was permissible under the automobile exception, because "the observation of even an unusable quantity of marijuana has been deemed sufficient to justify the search of a vehicle for additional contraband." \textit{Id.}, 547 P.2d at 421. See \textit{Hill v. State}, 516 S.W.2d 361 (Tenn. App. 1974) (warrantless search of glove compartment upheld under automobile exception after police officer had discovered plastic bag of marijuana in plain view on the front seat of the automobile). The court in \textit{Wimberly}, however, held that the warrantless search of the automobile's trunk was not permissible under the automobile exception in the absence of "specific articulable facts which gave reasonable cause to believe that seizable items are, in fact, concealed in the trunk." 547 P.2d at 424. The \textit{Wimberly} court concluded that the officer's observations and the discovery of a small amount of marijuana in the jacket in the passenger compartment only would give the police reasonable grounds to believe that the occupants were users of marijuana, not dealers of marijuana, and it was thus not reasonable to infer that additional marijuana was hidden in the trunk.


\textsuperscript{193} 433 U.S. 1 (1977).

\textsuperscript{194} See supra notes 36-58 and accompanying text.

\textsuperscript{195} 442 U.S. 753 (1979).
passenger contained marijuana. The person carrying the suitcase entered a taxicab, which the police pursued and stopped several blocks from the airport. Without a warrant or the consent of the owner, the police seized the suitcase and opened it. The Court held that, although the warrantless seizure of the suitcase was permissible under the automobile exception because the police had probable cause to believe that it contained contraband and that it was being driven away, the opening of the suitcase and the seizure of its contents without a search warrant violated the fourth amendment to the Constitution. After reiterating the general rules that a warrant usually is required for a search or seizure, and that the “few” exceptions to the usual requirement of a warrant are “jealously and carefully drawn,” the Court determined that the police, after seizing the suitcase, should have taken it and its owner to the police station and then obtained a warrant authorizing the search of the suitcase and the seizure of its contents. The Court in Sanders held that Chadwick prohibited the police from opening and searching without a warrant luggage discovered during a warrantless automobile exception search once they have the luggage within their exclusive control. The search would be prohibited even if the police have probable cause to

196. Id. at 761. See United States v. Place, 51 U.S.L.W. 4844, 4845 (U.S. June 20, 1983) (“Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present”). Cf. Husty v. United States, 282 U.S. 694 (1931), analyzed supra note 159. Chief Justice Burger argued in his concurring opinion in Sanders that the case did not involve an application of the automobile exception, because, as in Chadwick, the relationship between the suitcase and the taxicab “was purely coincidental.” 442 U.S. at 767. He argued that the case simply involved an application of Chadwick’s rule, which generally requires a warrant in order to inspect the contents of luggage. Id. at 766. This analysis was quoted approvingly by a majority of the Court in United States v. Ross, 456 U.S. at 811-12.

197. 442 U.S. at 765-66. Consequently, the Court held that the trial court should have suppressed as evidence the marijuana seized in the suitcase at the suitcase owner’s state criminal trial on charges of illegal possession of the marijuana with intent to deliver. See id. at 756, 766.

198. Id. at 758.

199. Id. at 759 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

200. The Sanders Court implicitly assumed that the opening by the police of the unlocked suitcase was a fourth amendment search, which requires a finding that such conduct violates the owner’s actual and reasonable expectations of privacy. See supra note 6. If such police conduct had been held not to be a fourth amendment search, the opening of the suitcase would not have been subject to the warrant, probable cause, or reasonableness requirements of the fourth amendment. Id.; see infra note 208 and accompanying text.

201. 442 U.S. at 766.


203. 442 U.S. at 762. See text accompanying notes 48-50.
believe that the luggage contains seizable items unless "special exigencies of the situation justify the warrantless search." 204 In Sanders, the Court concluded that Chadwick's exclusive control standard required this result even though the suitcase at issue was not locked and was "comparatively small" (when compared with the locked, 200-pound footlocker involved in Chadwick), because the suitcase, as "a repository for personal, private effects," was entitled to the protection of the fourth amendment's warrant requirement. 206

204. Id. at 765.

205. 442 U.S. at 763 n. 11. The Court stated that "generally . . . such exigencies will depend upon the probable contents of the luggage and the suspect's access to those contents—not upon whether the luggage is taken from an automobile." Id. The Court suggested that such an exigency would exist if the police had reason to suspect that a suitcase contained a weapon. Id. The Court's reference to the "suspect's access to those contents" implies that the determination of whether exigent circumstances are present also might be based upon Chimel's immediate control standard. Cf. supra notes 21-35, 44-45, and accompanying text. This latter definition of exigency, however, appears to be simply a situation in which the suitcase would not be within the exclusive control of the police within the meaning of Chadwick. See supra notes 48-50 and accompanying text. Sanders' tests for defining exigency in cases involving the automobile exception, however, should be more broadly defined to apply to situations in which the suitcase or other container and its contents are within the immediate control of any occupant of the automobile, whether or not an occupant has been arrested, because an automobile exception search does not require any occupants of the automobile to have been arrested. See supra note 177 and accompanying text.

206. 442 U.S. at 762 n. 9.

Chief Justice Burger argued in his concurring opinion in Sanders that the case did not present "the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located somewhere in the vehicle, but when they do not know whether, for example, it is inside a piece of luggage in the trunk, in the glove compartment, or concealed in some part of the car's structure." 442 U.S. at 767 (Burger, C. J., concurring). He said that he was "not sure whether that would be a stronger or weaker case for requiring a warrant to search the suitcase when a warrantless search of the automobile is otherwise permissible." Id. He added that "it would be better to await a case in which the question must be decided." Id. (Such a case was presented in United States v. Ross, 456 U.S. 798 (1982), analyzed infra notes 250-321 and accompanying text). The majority in Sanders, however, did not make any distinction between the hypothetical situation raised by Chief Justice Burger and the situation presented by the facts of Sanders (wherein the police had probable cause to believe seizable items are in a particular piece of luggage). See supra notes 180-87 and accompanying text. The Court did draw such a distinction subsequently in United States v. Ross, 456 U.S. 798 (1982), limiting Sanders to cases in which police have probable cause to believe that a seizable item is located in a specific piece of luggage or container. See infra notes 250-321 and accompanying text.

Justice Blackmun argued in Sanders that, contrary to what he asserted were the implications of these statements by Chief Justice Burger, the automobile exception might permit the warrantless search of luggage discovered in an automobile when the police do have probable cause to believe only that seizable items are somewhere in the automobile, but do not have probable cause to believe that the items are in any specific container. He argued:

[The intrusion on privacy, and consequently the need for the protection of the Warrant Clause, is, if anything, greater when the police search the entire interior area of the car, including possibly several suitcases, than when they confine their search to a single suitcase. Moreover, given the easy transferability of articles to and from luggage once it is... ]
The majority in *Sanders* supported the application of *Chadwick*'s exclusive control standards to luggage discovered in automobiles during a warrantless automobile exception search for two reasons: first, once police have seized a suitcase and have it securely within their control the extent of its mobility is not affected by the fact that it was taken from an automobile; and, second, a suitcase in an automobile is not attended by any lesser expectation of privacy than is associated with luggage taken from other locations. This is so, because "the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them." The *Sanders* Court did suggest in dictum, however, that some containers and packages other than suitcases and luggage would not be subject to *Chadwick*'s exclusive control standard requiring a warrant to place in a vehicle, the police would be entitled to assume that if contraband was not found in the suspect suitcase, it would likely be secreted somewhere else in the car. The possibility the opinion concurring in the judgment would preserve for future decision thus contemplates the following two-step ritual: first, the police would take the targeted suitcase to the station for a search pursuant to a warrant; then, if the contraband was not discovered in the suitcase, they would return for a warrantless search of other luggage and compartments of the car. It does not require the adjudication of a future controversy to reject that result.

442 U.S. at 770 n. 3 (Blackmun, J., dissenting). Justice Blackmun concluded by arguing that the Court should adopt a rule permitting the warrantless search and seizure of any personal property found in an automobile that permissibly was seized and is being searched under the automobile exception. *Id.* at 772. See infra note 208. The Court subsequently did adopt a rule authorizing police to search any containers that might contain the items to be seized when the police have probable cause only to believe that the items are located somewhere in the automobile. United States v. Ross, 456 U.S. 798 (1982). See infra notes 250-321 and accompanying text.

207. 442 U.S. at 763.

208. *Id.* at 764. The Court also stated that "one is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored." *Id.* These latter two statements in *Sanders* implied that the opening and inspection of the contents of a suitcase discovered in an automobile are a fourth amendment search. See supra note 200.

The majority in *Sanders* rejected an argument applying by analogy a statement in *Chambers* v. Maroney, 399 U.S. 42 (1970) (analyzed supra note 176), that suggested there is no constitutional difference between a situation in which police search an automobile stopped on a highway without a warrant under the automobile exception and one in which they hold the automobile but delay the search until a warrant is obtained. 442 U.S. at 765 n. 14. Application of the analysis to luggage discovered in an automobile during a search under the automobile exception would have permitted its warrantless search, but this argument was rejected on the grounds that requiring police to hold a seized vehicle until a warrant is obtained would impose "severe, even impossible, burdens on many police departments;" burdens that would not be imposed if police departments are required to seize and hold personal luggage until a warrant is obtained before opening and searching the contents of the luggage. *Id.* (By implication, the Court in *Sanders* was stating that warrantless searches of automobiles such as those involved in *Chambers* (where a moving vehicle was stopped) are not unreasonable searches because the adverse impact upon law enforcement if a warrant were required outweighs the intrusions upon personal privacy resulting from such searches. See infra notes 269-73 and accompanying text).
open containers and inspect their contents. Sanders suggests that two
types of containers can be opened without a warrant: containers, such as
a kit of burglar tools or a gun case, that by "their very nature cannot sup­port
any reasonable expectation of privacy, because their contents can be
inferred from their outward appearance;" and containers whose con­tents are open to "plain view." The Court stated that "our decision in
this case means only that a warrant generally is required before personal
luggage can be searched and that the extent to which the Fourth Amend­
ment applies to containers depends not at all upon whether they are

Justice Blackmun also argued in dissent in Sanders that police should be permitted under the
automobile exception to search luggage and similar containers found in an automobile without a
warrant, because luggage, like an automobile, is mobile. 442 U.S. at 769, because "the expectation
of privacy in a suitcase found in the car is probably not significantly greater than the expectation
of privacy in a locked glove compartment," id., and because the additional intrusion of a search of
personal property is incidental "given the significant encroachment on privacy interests entailed by a
seizure of personal property. . . ." Id. at 770. (This last comment by Justice Blackmun, however,
was made in a case wherein the warrantless seizure of the suitcase did not violate the fourth amend­
ment, because the police had probable cause to believe it contained contraband and because it might
have disappeared to an unknown location if police had delayed seizure until a warrant was obtained.
See supra note 194 and accompanying text.)

209. 442 U.S. at 764 n. 13.
210. Id. By implication, the Court was stating that the opening of such a container would not
be a fourth amendment search. See supra note 200, and infra note 228 and accompanying text.
211. 442 U.S. at 764 n. 13. See infra notes 229-31 and accompanying text. By implication, the
Court was saying that the contents of containers observed in plain view during the warrantless search
of an automobile under the automobile exception can be seized without a warrant under the plain
view seizure doctrine. See supra note 57. The Court has not, however, explicitly held that the
warrantless seizure of items discovered during an automobile exception search must comply with the
plain view seizure doctrine in order to be upheld under the fourth amendment. But see Texas v.
Brown, 103 S. Ct. 1535 (1983). If, however, the plain view seizure doctrine must be complied with to
make such warrantless seizures valid under the fourth amendment, then the prior valid intrusion
requirement of the plain view seizure doctrine would not be satisfied when the warrantless search of
the automobile is permissible in scope, see supra notes 180-91, because the warrantless entry of the
automobile would be valid under the automobile exception. See supra note 57. The inadvertent
discovery requirement of the plain view seizure doctrine would be satisfied only if the police did not
have probable cause to believe that the item seized would be discovered within the automobile. See
supra notes 57 and 151 and text accompanying note 151. The inadvertent discovery requirement may
not have to be complied with, however, when the item seized is contraband or a dangerous or stolen
item, or when exigent circumstances are present. See supra note 57. (A warrantless search of an
automobile, of course, is not permitted under the automobile exception unless exigent cir­
cumstances are present. See supra notes 152-76 and accompanying text.)

The exigent circumstances that justify a warrantless seizure and search of an automobile under
the automobile exception, see supra notes 152-76 and accompanying text, however, are different
from those that justify the warrantless opening and inspection of the contents of a container under
Chadwick and Sanders. See supra notes 44-45, 207 and accompanying text.

The third requirement of the plain view seizure doctrine, the immediately apparent require­
ment, would be satisfied if the police had probable cause to believe that the item seized had a nexus
with criminal activity at the time they first discovered or observed the item. See supra note 57.
seized from an automobile." In so doing, the Court implied that this dictum might be regarded as persuasive in all cases where the issue is whether, under Chadwick, a warrant is required to search an item of personal property.

In two subsequent cases, Robbins v. California and United States v. Ross, the Court has had to distinguish the types of containers and items of personal property subject to Chadwick's exclusive control standard and, therefore, requiring a search warrant from those not generally requiring a warrant.

A majority of the Court in Robbins could not reach agreement on this issue. In Robbins, California Highway Patrol officers stopped an erratic driver of a station wagon. After one of the officers asked the driver of the stopped automobile, who had walked towards the patrol car, for his driver's license and the automobile's registration, the driver "fumbled with his wallet." Apparently the driver then returned to his automobile (the plurality's opinion is unclear on this point) accompanied by one of the officers and opened the door to get the automobile's registration. When he opened the door, the officer noticed the odor of burnt marijuana. An officer then patted down the automobile's owner, discovering and seizing a vial of liquid. He searched the interior of the station wagon, and discovered marijuana, as well as equipment for using

212. 442 U.S. at 764 n. 13.

In United States v. Ross, 456 U.S. 798 (1982), the Court limited the implications of this statement to searches of automobiles under the automobile exception where police have probable cause to believe that a seizable item is in the personal luggage or container whose warrantless opening and inspection is at issue. See infra notes 250-321 and accompanying text. See also United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981). Chadwick precludes police from opening and inventorizing the contents of "personal baggage" such as purses that are discovered during an inventory search of an automobile pursuant to South Dakota v. Opperman, 428 U.S. 364 (1976). Cf. United States v. Modica, 663 F.2d 1173 (2d Cir. 1981) (fourth amendment's protection does not apply to articles the finding of which in an automobile made the automobile subject to statutory forfeiture, because defendant lost any expectation of privacy as to that article once it was seized).

The Sanders Court did not address the issue of whether the suitcase could have been searched without a warrant as incident to the lawful arrest of its owner, although the Court did state that it "appears that the [suitcase] was not within his 'immediate control' at the time of the search." 442 U.S. at 763 n. 11. Consequently, the Court did not address the application of Chadwick's exclusive control standard to the search of luggage or other containers discovered within an area within the immediate control of an arrestee during a warrantless search of that area incident to a lawful arrest. Cf. supra notes 36-42 and accompanying text.

215. In this situation, such a request is lawful without a warrant. See Delaware v. Prouse, 440 U.S. 648 (1979).
216. 453 U.S. at 422.
it. Then, after placing the automobile’s driver in their patrol car, the officers opened the tailgate of the station wagon and lifted up a handle set flush in the deck, revealing a recessed luggage compartment. The officers discovered inside this compartment two packages, each about the size of an "oversized, extra-long cigar box with slightly rounded corners and edges." The packages were wrapped in green opaque plastic and sealed on the outside with at least one strip of opaque tape. Without a warrant, the officers unwrapped these two packages and discovered about 15 pounds of marijuana in each. The station wagon’s owner was convicted of various drug offenses after his motion to suppress the marijuana as evidence was denied by the trial court. Six members of the Court agreed that the warrantless opening of the two packages in which marijuana was found, and the warrantless seizure of this marijuana, violated the fourth amendment, but a majority could not agree on the legal principles or the reasoning supporting this judgment.

Justice Stewart, in a plurality opinion joined by Justices Brennan, White, and Marshall, although assuming that the warrantless stopping and search of the station wagon itself was permissible under the automobile exception, concluded that Chadwick and Sanders prohibit the warrantless opening of such closed containers as the two packages wrapped in green opaque plastic at issue in Robbins, even though the containers are discovered during a search of an automobile permissible in scope under the automobile exception. Justice Stewart rejected

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217. The patdown and seizure of the vial and the placing of the driver in the patrol car may arguably have constituted a lawful arrest of the driver and a lawful search of the driver's person incident to that arrest, see supra note 24, such that the warrantless search of the station wagon arguably may have been permissible as a search incident to a lawful arrest under New York v. Belton, see supra notes 59-149 and accompanying text. However, the State in Robbins did not argue that the subsequent warrantless search of the interior of the station wagon and containers therein was incident to the lawful custodial arrest of the station wagon's driver. 453 U.S. at 429 n. 3.

218. Id. at 422 n. 1 (citation omitted).

219. Id. at 422 and 422 n. 1.

220. Id. at 423. See supra notes 150-51 and accompanying text. Justice Stewart did not address the issue of whether the search of the recessed luggage compartment in the rear of the station wagon, after marijuana had been found in the wagon's passenger compartment, exceeded the permissible scope of a warrantless search of an automobile under the automobile exception. Justice Rehnquist implied in dissent in Robbins that the search of the recessed luggage compartment was permissible, because of the attendant circumstances: while the officers were retrieving the marijuana and other drug paraphernalia from the front of the car, the defendant said, "What you are looking for is in the back." 453 U.S. at 442 (Rehnquist, J., dissenting). (Justice Stewart did not mention or analyze these facts in his plurality opinion in Robbins). See supra notes 190-91 and accompanying text.

221. 453 U.S. at 428-29.

Prior to Robbins, the vast majority of lower federal and state courts had held that the fourth amendment protects closed containers, but not open containers. See United States v. Cleary, 656 F.2d 1302, 1307 (9th Cir. 1981) (Wright, J., dissenting).
arguments that Chadwick and Sanders require warrants only for the search of such "containers commonly used to transport 'personal effects'" as "'sturdy' luggage (including suitcases), briefcases, duffle bags, backpacks, and tote bags," but permit warrantless searches of flimsier containers, such as cardboard boxes, paper bags, and plastic bags. The Justice asserted that the fourth amendment, as interpreted in Chadwick and Sanders, prohibits the warrantless opening of any closed opaque container, whether the container is "'personal'" or "'impersonal,'" because such containers "reasonably 'manifested an expectation that the contents would remain free from public examination.'" He did refer approvingly, however, to dicta in footnote 13 of Sanders to the effect that a warrantless search of a container is permitted if the contents of the container can be inferred from the container's shape, including, for example, a kit of burglar's tools or a gun case, or if the contents of the container are in "'plain view.'" Justice Stewart asserted that "in short, the negative implication of footnote 13 of the Sanders opinion is that, unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment." Justice Stewart then applied this reasoning to the facts in Robbins, concluding that the evidence presented at the defen-
dant's trial did not "reliably" indicate that the green plastic used to wrap the two packages "could only contain marijuana," and, conse-

231. Id. at 428. Justice Stewart stated that the testimony at the defendant's trial of one of the officers who searched the defendant's automobile was "vague" and "somewhat" obscure, and did not establish that marijuana is ordinarily packaged as were the two packages in question. Id. (In the quoted testimony that Justice Stewart found to be vague, the officer, in response to a question as to whether there was anything about the two packages which attracted his attention, stated: "I had previous knowledge of transportation of such blocks. Normally contraband is wrapped this way, merely heresy [sic]. I had never seen them before." The officer then replied "yes" when asked: "You had heard contraband was packaged this way?" Id. Justice Rehnquist noted in dissent in Robbins, id. at 442, that after the officers had found marijuana in the passenger compartment of the station wagon, the defendant said to the officer: "What you are looking for is in the back." (Justice Stewart did not refer to this fact in his opinion in Robbins.) Justice Rehnquist argued that this remark by the defendant, combined with the testimony at the defendant's trial of one of the officers who searched the defendant's station wagon that he was aware that contraband was often wrapped in plastic garbage bags, as were the two packages in question, created a permissible inference as to the contents of the two packages and denied the defendant a reasonable expectation of privacy in the contents of the two packages, with the result that their contents could be inspected without a warrant. Id.

It might be argued that Justice Stewart meant that if the police have probable cause or reason to believe that the contents of a container, although not in plain view, are seizable items because they have a nexus with criminal activity, they may not only seize the container without a warrant but may also open and inspect the contents of the container without a warrant. Such an interpretation, however, is precluded by the determination in United States v. Ross, 456 U.S. 798 (1982) that Chadwick and Sanders govern the legality of a warrantless search of a container discovered in an automobile during a lawful automobile exception search when the container's contents are not in plain view and when the police have probable cause to believe there are seizable items within the container. See infra notes 250-321 and accompanying text.

In Blair v. United States, 665 F.2d 500, 507 (4th Cir. 1981), the court concluded that this plain view exception actually contains two parts. "First, if the container is open and its contents exposed, its contents can be said to be in plain view. Second, if a container proclaims its contents by its distinctive configuration or otherwise and thus allows by its outward appearance an inference to be made of its contents, these contents are similarly considered to be in plain view. . . . In either instance, an investigating authority need not obtain a warrant to search the container, the reasoning behind the exception being that a warrant under those circumstances would be superfluous." Marijuana in burlap-covered bales on a vessel was held to be in plain view within the meaning of Robbins by the majority in Blair, because some of the bales were split open and marijuana exposed to view prior to the opening and sampling of the bales by law enforcement officials, because the other bales were almost identical in appearance to those that were split open, and because some of these other bales had marijuana residue on top of them. Thus authorities had sufficient evidence to infer "that the bales not split open also contained marijuana." Id. at 507. Judge Murnaghan, dissenting in part and concurring in part in Blair, argued that the evidence established that bales were broken open by government agents, not by the occupants of the vessel, and that they were not broken open until the day after they were seized. Id. at 512 n. 11 (Murnaghan, J., dissenting in part and concurring in part). He also argued that to be in plain view under the plurality opinion in Robbins, a package must be open or have a configuration that is distinctive as to its contents, and that the contents of a package are not in plain view under the Robbins plurality opinion when the police have probable cause to believe that the contents of a package are seizable items, but the contents are not "revealed to the naked eye." Id. at 513. Applying this test to the facts, he concluded that the marijuana in the bales in question was not in plain view. Id. at 513-14.
quently, that the marijuana inside the closed, opaque containers could
not be opened without a warrant under *Chadwick* and *Sanders*.\(^{232}\)

Chief Justice Burger concurred in the judgment in *Robbins* but did
not issue an opinion explaining his reasons for concurring.\(^{233}\) His major-
ity opinion in *Chadwick*, and his concurring opinion in *Sanders*,
however, indicate that he would apply *Chadwick’s* exclusive control stan-
dard to personal property other than personal luggage. In his opinion in
*Chadwick*, he referred not only to luggage, but also to "personal posses-
sions,"\(^{234}\) "other personal property,"\(^{235}\) and "letters and sealed
packages"\(^{236}\) as containers that generally require a warrant before they
can be opened and inspected. The Chief Justice, in his concurring
opinion in *Sanders*, referred to "receptacle,"\(^{237}\) in addition to "trunk"
and "suitcase," in discussing the application of *Chadwick’s* exclusive
control standard. Although these references in *Chadwick* and *Sanders*
do not make explicitly clear how Chief Justice Burger would apply
*Chadwick’s* exclusive control standard to the various types of personal
property and containers, they do indicate that he would generally require
warrants to open at least some type of containers of personal property
other than suitcases and luggage.

Justice Powell also concurred in the *Robbins* judgment, but indi-
cated that he would permit warrantless searches of some types of
containers that Justice Stewart would prohibit. Justice Powell argued
that a warrant should be required to open and examine the contents of a
container only if the container is one that generally serves as a repository
for personal effects, or is an opaque, closed and sealed container
manifesting an actual and reasonable expectation of privacy.\(^{238}\) He
expressed disagreement with the theory advocated in Justice Stewart’s
plurality opinion, which would, he asserted, require a warrant to open
and inspect the contents of any closed, opaque container, regardless of its
size or shape, or other evidence suggesting that the container’s owner was
asserting a privacy interest in the contents.\(^{239}\) Justice Powell argued that
his approach "resembles in principle the inquiry courts must undertake

\(^{232}\) None of the Justices in *Robbins* argued that the two packages were not in the exclusive
control of the police or that there were exigent circumstances present; in either of these situations,
under *Chadwick* and *Sanders*, a warrant would not have been required to open the two packages.
See [*supra* notes 36-58 and 195-212 and accompanying text.]

\(^{233}\) 453 U.S. at 429.

\(^{234}\) 433 U.S. at 11.

\(^{235}\) *Id.* at 15.

\(^{236}\) *Id.* at 10 (quoting *Ex parte* Jackson, 96 U.S. 727, 733 (1878)).

\(^{237}\) 442 U.S. at 767.

\(^{238}\) 453 U.S. at 432-33.

\(^{239}\) *Id.* at 429 n.1.
to determine whether a search violates the Fourth Amendment rights of a complaining party,"\textsuperscript{240} but that Justice Stewart's approach "departs from this basic concern with interests in privacy, and adopts a mechanical requirement for a warrant before police may search any closed container."\textsuperscript{241} According to Justice Powell, application of Justice Stewart's approach would result in the unjustified expenditure of time and effort of police and magistrates in obtaining warrants authorizing the search of the "most trivial container,"\textsuperscript{242} such as a "cigar box" or "a Dixie cup,"\textsuperscript{243} and the detention in some cases of suspects and vehicles for "hours."\textsuperscript{244}

Justice Powell indicated that he would not require the police to have a warrant to inspect the contents of a plastic cup or a brown paper grocery sack.\textsuperscript{245} As noted earlier, Justice Stewart and the three other members of the plurality had indicated that they would require a warrant to search a closed paper bag.\textsuperscript{246} Justice Powell indicated, on the other hand, that cardboard boxes and laundry bags are ambiguous containers which may or may not, depending upon the circumstances of each case, manifest a reasonable expectation of privacy in the contents of the container.\textsuperscript{247} Under his approach, a court, in determining whether a warrant is needed to inspect the contents of an ambiguous container, should consider "the size, shape, material, and condition of the exterior, the context within which it is discovered, and whether the possessor had taken some significant precaution, such as locking, securely sealing, or binding the container, that indicates a desire to prevent the contents from being displayed upon simple mischance."\textsuperscript{248} Applying this test to the facts in Robbins, Justice Powell argued that a reasonable expectation of privacy had been manifested in the two packages in question, because they had been securely wrapped and sealed, and, therefore, that a warrant was required to open and inspect the contents of the two packages.\textsuperscript{249}

\textsuperscript{240} Id. at 432.
\textsuperscript{241} Id. at 433.
\textsuperscript{242} Id. at 433-34.
\textsuperscript{243} Id. at 433.
\textsuperscript{244} Id.
\textsuperscript{245} Id. at 434 n.3.
\textsuperscript{246} 453 U.S. at 426. In Ross v. United States, 456 U.S. 798 (1982), the Court was required to determine if a warrant is required to open and inspect the contents of a closed paper bag. See infra notes 250-321 and accompanying text.
\textsuperscript{247} 453 U.S. at 434 n. 3.
\textsuperscript{248} Id. at 435.
\textsuperscript{249} Id. Justice Powell indicated that he might be willing in the future to adopt the viewpoint of the three dissenters (Justices Blackmun, Rehnquist and Stevens) that police, under the automobile exception, should be permitted to open and inspect the contents of every container found within an automobile. He declined to do so, because the "parties have not pressed this argument in this case
Less than a year after *Robbins*, a majority of the Supreme Court, in *United States v. Ross*,\(^{250}\) rejected "the precise holding in *Robbins*"\(^{251}\) and the approaches used by Justices Stewart and Powell to determine when the opening and inspection of a particular container are regulated by the fourth amendment. *Ross* held that under the automobile exception, when police have the right to make a warrantless search of an automobile they have probable cause to believe contains seizable items but do not know where in the automobile the items will be found, they may search without a warrant all areas of the automobile and all containers therein which could contain the items. In *Ross*, the police had probable cause, based on an informant’s tip, to believe that the defendant’s automobile contained narcotics in the trunk, although the informant did not identify a specific container in which the narcotics would be found.\(^{252}\) Soon after receiving this tip, the police stopped the

and it is late in the term for us to undertake *sua sponte* reconsideration of basic doctrines."

*Id.* at 435. Justice Powell did, in fact, change his position in this manner less than a year later, by concurring and joining in the Court’s opinion in *United States v. Ross*, 456 U.S. 798 (1982). See *infra* notes 250-321 and accompanying text.

Justice Stevens argued in dissent in *Robbins* that, because police obtain a warrant authorizing them to search any container in an automobile when they have probable cause to believe seizable items are hidden in them, then, under the automobile exception, the police should be allowed to conduct such a search without a warrant. 453 U.S. at 444 (Stevens, J., dissenting). He argued that "the scope of any search that is within the exception should be just as broad as a magistrate could authorize by warrant if he were on the scene; the automobile exception to the warrant requirement therefore justifies neither more nor less than could a magistrate’s warrant." *Id.* at 448-49. He stated, however, that this container rule should apply only when the police have probable cause to believe that a seizable item will be found somewhere in an automobile, but not when the police have probable cause to believe that the seizable item is in a specific container in the automobile (which, he noted, was the case in *Chadwick* and *Sanders*). *Id.* at 449. He implied that the automobile exception should apply only when the police have probable cause to believe that an item is located somewhere in the automobile, but not when the police have probable cause to believe that the item is located in a specific container. *Id.* Justice Stevens’ dissent in *Robbins* became the position of a majority of the Court less than one year later in *United States v. Ross*, 456 U.S. 798 (1982). See *infra* notes 250-321 and accompanying text.


251. *Id.* at 824.

252. *Id.* at 817 n.22. The Court, however, did not address the question of whether the informant’s tip satisfied the probable cause standard that was applicable at the time — the "two-pronged" basis of knowledge and veracity requirements of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). See Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974). The Court subsequently decided to "abandon the ‘two-pronged test’ established by our decisions in *Aguilar* and *Spinelli*," *Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1983), adopting in its place a less strict "totality of the circumstances analysis" for determining when there is probable cause to believe that seizable items will be found in a particular place. *Id.*
automobile without a warrant on a public street and arrested the defendant. They then searched the trunk, in which they found a brown paper bag. A police officer opened the bag and discovered in it several glassine bags containing a white powder that a police laboratory later determined to be heroin. At the police station, the police, still without a warrant, discovered in the trunk a zippered red leather pouch. They opened the pouch and discovered $3,200 in cash, which they seized. The defendant was charged with the crime of possession of heroin with intent to distribute, a violation of 21 U.S.C. § 841(a) (1976). Prior to his trial, the defendant made a motion to suppress as evidence the heroin seized from the paper bag and the money seized from the leather pouch. The district court denied this motion, after which the defendant was convicted of the crime.

A majority of the District of Columbia Court of Appeals, sitting en banc, held that the warrantless opening and inspection of the contents of both the paper bag and the leather pouch violated the fourth amendment. The court justified its holding on the grounds that warrants are generally required, and that there is no exception to this rule that would permit the warrantless opening and inspection of "unworthy" containers. The majority further argued that determining the validity of a warrantless search of a container on the basis of the container's durability would impose "an unreasonable and unmanageable burden on police and courts," and that the fourth amendment should protect

253. The Court in Ross did not discuss whether the exigent circumstances requirement of the automobile exception was satisfied. The Court, however, has always found this requirement to be satisfied when police stop an automobile on a public road, even when the police have probable cause to believe that the automobile would be found in a specific location (see supra note 159 and accompanying text, and Husty v. United States, 282 U.S. 694 (1931), discussed therein) as was the case in Ross, 456 U.S. at 801.

254. Id. The Court in Ross did not discuss the issue of whether the seizure of the heroin complied with the plain view seizure doctrine, see supra note 57. Arguably, the immediately apparent requirement of the plain view seizure doctrine may not have been satisfied, because the facts of Ross indicate that the white powder was not determined to be heroin until tested later by a police laboratory. See supra note 57.


This decision followed an unreported decision by a divided three-judge panel of the United States Court of Appeals for the District of Columbia. United States v. Ross, No. 79-1624 (D.C. Cir. April 17, 1980). This decision was later vacated and a rehearing en banc was held on October 23, 1980. United States v. Ross, 655 F.2d 1159, 1161 n. 3 (D.C. Cir. 1981). The three-judge panel concluded that the fourth amendment validity of the warrantless search of a container discovered during an automobile exception search depends on whether the owner possesses a reasonable expectation of privacy in its contents. Applying this test, the majority of the panel held that the warrantless opening and inspection of the contents of the leather pouch violated the fourth amendment, but that the opening and inspection of the contents of the paper bag did not. Id.

256. Id. at 1161.
all persons, not just persons "with the resources or fastidiousness to place their effects in containers that decision makers would rank in the luggage line." The majority rejected the argument that the warrantless searches of the paper bag and leather pouch were valid because the warrantless search of the automobile was permissible under the automobile exception.

The Supreme Court reversed, holding that the warrantless opening and inspection of the contents of the paper bag and leather pouch did not exceed the permissible scope of a warrantless search of an automobile under the automobile exception. Justice Stevens, in an opinion joined by the Chief Justice and four other Associate Justices, reasoned that the automobile exception permits police, when they have probable cause to believe only that seizable items are located somewhere in the automobile, to search without a warrant all areas of the automobile and containers within the automobile within which the items could be hidden. He stated, however, that "probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." Justice Stevens explained that the permissible scope of a warrantless search under the automobile exception "is no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search," and that in previous automobile exception cases before the Supreme Court and lower federal courts it had never been argued or held, until Chadwick, Sanders, and Robbins, that police could not open and inspect containers discovered within areas of an automobile lawfully searched under the automobile exception.

He further indicated that permitting a warrantless search of the vehicle itself (including its upholstery) while prohibiting the warrantless opening and inspection of the contents of all wrapped articles found within the vehicle "would actually exacerbate the intrusion on privacy

257. Id.

258. Justice Stevens indicated that under the automobile exception, police, in addition to searching containers found within the automobile, may rip open upholstery without a warrant, 456 U.S. at 818, 823 (at least when the upholstery feels harder than is ordinarily the case, id. at 804 quoting from Carroll v. United States, 267 U.S. at 174), and may also search concealed or hidden compartments, 456 U.S. at 818, 825, and the glove compartment. Id. at 821, 823.

259. Id. at 824.

260. Id. at 818. Justice Stevens also stated that the Court's holding "neither broadened nor limited the scope of a lawful search based on probable cause," id. at 820. He noted that a search warrant explicitly authorizing only the search of a building permits a search of desks, chests, cabinets, and drawers, and that a warrant authorizing search of a vehicle permits "a search of every part of the vehicle that might contain the object of the search." Id. at 821.

261. Id. at 819.
interests" and would interfere with the "prompt and efficient completion" of the search of the vehicle. He reasoned here that "the vehicle would need to be secured while a warrant was obtained," since "until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle."

It could be argued contra, however, that although exigent circumstances may justify the warrantless stopping and search of an automobile and the seizure of containers found therein, a warrant should be required to search such containers once they are within the exclusive control of the police unless exigent circumstances are present. As noted by Justice Marshall in his dissent in *Ross*, although integral compartments of a car are just as mobile as the car, moveable containers located within the car are not, and do not present the same practical problems of safekeeping as does the car. The rule adopted by the majority in *Ross* does not allow police searching an automobile to make a warrantless search greater in scope than would be permitted by a warrant. Still, there remains the danger noted by Justice Marshall in his dissent: if probable cause is determined after, rather than prior to, the opening and inspection of the contents of a container, probable cause will be found in borderline situations where highly probative items were seized during the warrantless search of the container, even though information available prior to the search would have been insufficient for such a find-

262. *Id.* 821 n.28.
263. *Id.* at 821.
264. *Id.* at 821 n.28.
265. *Id.* Justice Marshall argued in dissent that the police would only have to seize the container while a warrant is being obtained, *id.* at 831 (Marshall, J., dissenting). He failed to note, as did the majority in *Ross*, that the car would also have to be detained until the container was searched, because of the possibility that the items to be seized were in unsearched areas of the car rather than in the container. Justice Marshall also stated that police could continue to search a car for seizable items even though a container was found to have seizable items inside, *id.* at 838, but cited no authority for this position. See *supra* notes 190-91 and accompanying text. He did state later in his dissent that "if police open a container within a car and find contraband, they may acquire probable cause to believe that other portions of the car, and other containers within it, will contain contraband," *id.* at 842 n. 14 (Marshall, J., dissenting) (which would allow such other portions and containers to be searched without a warrant, see *supra* note 200 and accompanying text), but he did not explain how such probable cause would be acquired. See *supra* note 191.
266. See *supra* notes 48-50 and accompanying text.
267. See *supra* notes 44-45, 205 and accompanying text.
268. *Id.* at 837-38.
269. *Id.* at 829.
Justice Marshall also argued that the majority erred in permitting the scope of a warrantless search under the automobile exception to be as broad as the scope of a search authorized by a magistrate pursuant to a warrant. He noted that "an officer on the beat who searches an automobile without a warrant is not entitled to conduct a broader search than the exigency obviating the warrant justifies,"\textsuperscript{270} but he failed to note that, although the general rule is that warrantless searches and seizures are permitted only when exigent circumstances are present,\textsuperscript{271} warrantless searches and seizures are permitted in some circumstances when exigent circumstances are not present if the interests served by such warrantless searches sufficiently outweigh the infringements upon privacy interests resulting therefrom. Such warrantless searches do not violate the fourth amendment.\textsuperscript{272} Although exigent circumstances may not be present in most cases when the warrantless opening and inspection of containers take place under the holding of \textit{Ross}, that case may authorize searches reasonable under the fourth amendment under this balancing test, because, as argued by Justice Blackmun\textsuperscript{273} and Powell\textsuperscript{274} in their concurring opinion, it provides clear guidance to police, courts, and the public as to the authority of police to act without a warrant under the automobile exception, while interfering only to a limited extent with a person's privacy.\textsuperscript{275}

The Supreme Court also said in \textit{Ross} that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view."\textsuperscript{276} This statement authorizes the warrantless

\textsuperscript{270} \textit{Id.} at 833.
\textsuperscript{271} \textit{See supra} notes 1-5 and accompanying text.
\textsuperscript{272} \textit{See United States v. Martinez-Fuerte}, 428 U.S. 543 (1976) (warrantless stopping of an automobile and brief investigative questioning of occupants by immigration officials at fixed checkpoint away from international border, when there was no reason to believe the automobile contained illegal aliens, upheld as not in violation of the fourth amendment because law enforcement needs outweighed minimal intrusions on privacy); \textit{Donovan v. Dewey}, 452 U.S. 594 (1981) (warrantless administrative inspection searches of "pervasively regulated" industries pursuant to statutory authorization permitted when there is clear notice of when and under what procedures such searches will take place.)
\textsuperscript{273} 456 U.S. at 825 (Blackmun, J., concurring).
\textsuperscript{274} \textit{Id.} at 826 (Powell, J., concurring).
\textsuperscript{275} Such an argument is similar to that of the majority of the Supreme Court in \textit{New York v. Belton}, 453 U.S. 454 (1981), in support of its \textit{per se} rule authorizing the warrantless search of the passenger compartment of an automobile and the containers therein when that search is incident to the lawful arrest of an occupant of the automobile. \textit{See supra} notes 82-91 and accompanying text.
\textsuperscript{276} 456 U.S. at 822-23. Justice Stevens did not explain when the contents of a container would be in plain view, but the reference is probably meant to refer to the definition of this term in Justice Stewart's plurality opinion in \textit{Robbins}, 453 U.S. at 427 (plurality opinion), which Justice Stevens identified as the source of his conclusion that the fourth amendment applies to all containers that conceal their contents from plain view. \textit{See supra} notes 215-32 and accompanying text.
search of all containers within an automobile under the automobile exception, regardless of whether the container is "worthy" or "unworthy" even when the police have probable cause only to believe that the items to be seized are somewhere in the car, but not in any specific container within the automobile. 277 This overrules Robbins. 278 Justice Stevens' opinion in Ross also implicitly rejects Justice Powell's approach in Robbins on the issue of when the fourth amendment regulates the opening and inspection of containers, when it states that "the central purpose of the Fourth Amendment forecloses . . . a distinction" 279 which is "based on the proposition that the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy." 280 The Court noted that if such a distinction were adopted, "the propriety of a warrantless search necessarily would turn on much more than the fabric of the container. A paper bag stapled shut and marked 'private' might be found to manifest a reasonable expectation of privacy, as could a cardboard box stacked on top of two pieces of heavy luggage. The propriety of the warrantless search seemingly would turn on an objective appraisal of all the surrounding circumstances." 281 By rejecting a "reasonable expectation of privacy" test for determining the application of the fourth amendment to the opening and inspection of the contents of containers, the majority in Ross implicitly rejected Justice Powell's concurring opinion in Robbins, which advocated such a test. 282 In support of the conclusion that the fourth amendment foreclosed a distinction between worthy and unworthy containers and a test based on an objective appraisal of all surrounding circumstances, Justice Stevens in Ross stated that "just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a

277. Id. at 822. Although the Court in Ross did not say so, the effect of this statement is to make the containers subject to search under Ross pursuant to the automobile exception identical to those subject to search under New York v. Belton, 453 U.S. 454 (1981), pursuant to the search incident to a lawful arrest exception. See supra notes 66-72 and accompanying text.

278. As noted by Justice Marshall in his dissent in Ross, the application of this definition of containers subject to the fourth amendment's protection to the rule adopted in Ross results in a loss by all citizens of the protection of the fourth amendment's warrant requirement. 456 U.S. at 843. (Marshall, J., dissenting). On the other hand, the Ross Court's holding with respect to the fourth amendment's applicability to containers extends the protection of the fourth amendment's warrant requirement in other contexts. See supra note 226 and accompanying text.

279. 456 U.S. at 822.

280. Id. at 822 n. 30.

281. Id.

282. See supra notes 238-49 and accompanying text. Justice Powell also implicitly rejected his concurring opinion in Robbins by concurring in Justice Stevens' majority opinion in Ross.
traveler who carries a toothbrush and a few articles of clothing in a paper
bag or knotted scarf claim an equal right to conceal his possessions from
official inspection as the sophisticated executive with the locked attache
case.\textsuperscript{283} Although Justice Stevens in Ross rejected Justice Powell's case
by case approach in Robbins, he did note that "the protection afforded
by the Fourth Amendment varies in different settings."\textsuperscript{284} More
specifically, he stated that "an individual's expectation of privacy in a
vehicle and its contents may not survive if probable cause is given to
believe that the vehicle is transporting contraband. Certainly the privacy
interests in a car's trunk or glove compartment may be no less than those
in a movable container. An individual undoubtedly has a significant
interest that the upholstery of his automobile will not be ripped or a hid­
den compartment within it opened. These interests must yield to the
authority of a search, however, which—in light of Carroll—does not
require the prior approval of a magistrate."\textsuperscript{285}

The Court in Ross did adhere to the holding in Sanders,\textsuperscript{286}
distinguishing Chadwick and Sanders, in which cases the police had
probable cause to believe that seizable items were located in the locked
footlocker and the suitcase, respectively, from Ross, wherein the police
had probable cause to believe only that the seizable items were located
somewhere in the automobile's trunk, but did not have reason to
believe that the seizable items were located in any specific container.\textsuperscript{287}
Justice Stevens, in fact, approvingly quoted and adopted Chief Justice
Burger's argument in his concurring opinion in Sanders\textsuperscript{288} to the effect
that the automobile exception under Carroll was not applicable to the
facts in Sanders. Consequently, because the fourth amendment
regulates the opening and inspection of any container discovered within

\textsuperscript{283} 456 U.S. at 822 (footnote omitted).
\textsuperscript{284} Justice Stevens elaborated on this statement as follows:
The luggage carried by a traveler entering the country may be searched at random by a
customs officer; the luggage may be searched no matter how great the traveler's desire
to conceal the contents may be. A container carried at the time of arrest often may be
searched without a warrant and even without any specific suspicion concerning its con­
tents. A container that may conceal the object of a search authorized by a warrant may be
opened immediately; the individual's interest in privacy must give way to the magistrate's
official determination of probable cause.

456 U.S. at 823.

\textsuperscript{285} Id.
\textsuperscript{286} Id. at 824. See supra note 196 and accompanying text.
\textsuperscript{287} Id. at 816. See United States v. Place, 51 U.S.L.W. 4844, 4845 n.3 (U.S. June 20, 1983)
(the Court's holding in Sanders that "... the police violated the Fourth Amendment in immediately
searching the luggage rather than first obtaining a warrant authorizing the search ... was not
affected by ... United States v. Ross, 456 U.S. 798 (1982).")
\textsuperscript{288} 442 U.S. at 766-67. See supra note 196.
an automobile (provided its contents are not in plain view),\textsuperscript{289} police will continue to need a warrant to open and inspect the contents of a container they have probable cause to believe contains seizable items and whose contents are not in plain view\textsuperscript{290} unless the container is not within the exclusive control of the police\textsuperscript{291} or there are exigent circumstances present.\textsuperscript{292}

Furthermore, because \textit{Ross}' holding with respect to the fourth amendment's applicability to the opening and inspection of the contents of containers is not limited to the specific factual situations involved in that case, it implicitly extends the \textit{Chadwick} and \textit{Sanders} exclusive control and exigent circumstances standards to containers whose contents are not in plain view when they are discovered within the area of immediate control of a person lawfully arrested.\textsuperscript{293} The Court in \textit{Ross}, however, did not cite or discuss the applicability of its holding to the rule established in \textit{Belton}\textsuperscript{294} that authorized the warrantless search of all containers within the passenger compartment of an automobile when an occupant has been lawfully arrested.\textsuperscript{295} The definition of container under \textit{Belton}, however, is identical to the definition of container under \textit{Ross}.\textsuperscript{296}

Some aspects of Justice Powell's approach in his concurring opinion in \textit{Robbins}, such as the requirement that a container be sealed as well as closed in order to be protected by the fourth amendment\textsuperscript{297} and the statement that the opening of a paper bag never requires a warrant,\textsuperscript{298} will not receive universal acceptance. On the other hand, his approach to determine when the opening of a container and the inspection of its contents will be considered to violate a legitimate expectation of privacy and thus

\begin{itemize}
  \item \textsuperscript{289} The determination in \textit{Ross} that the fourth amendment regulates the opening and inspection of the contents of any container, whether worthy or unworthy, whose contents are not in plain view, was not limited to the situation presented by the facts in \textit{Ross}, but appears to be intended to apply to all situations where the legality of the search of a container is at issue. \textit{See infra} notes 291-94 and accompanying text.
  \item \textsuperscript{290} \textit{See supra} notes 228-31 and accompanying text.
  \item \textsuperscript{291} \textit{See supra} notes 48-50 and accompanying text.
  \item \textsuperscript{292} \textit{See supra} notes 44-45, 205 and accompanying text.
  \item Justice Marshall asserted in his dissent in \textit{Ross} that \textit{Ross} requires the Government to "show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located." \textit{456 U.S. at 840} (Marshall, J., dissenting) (quoting United States v. Ross, 655 F.2d 1159, 1202 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting)).
  \item \textsuperscript{293} \textit{See supra} notes 36-58 and accompanying text.
  \item \textsuperscript{294} \textit{453 U.S.} 454 (1981).
  \item \textsuperscript{295} \textit{See supra} notes 59-149 and accompanying text.
  \item \textsuperscript{296} \textit{See supra} note 275.
  \item \textsuperscript{297} \textit{See supra} note 238 and accompanying text.
  \item \textsuperscript{298} \textit{See supra} note 245 and accompanying text.
\end{itemize}
constitute a fourth amendment search, might be better received.\textsuperscript{299} This approach focuses on the location of a container within an automobile and the circumstances under which it was discovered by police, as well as the nature and design of the container. This view is more consistent with traditional fourth amendment principles than Justice Stevens' majority opinion in \textit{Ross} or Justice Stewart's plurality opinion in \textit{Robbins}. In his concurring opinion in \textit{Robbins}, Justice Powell properly recognized that the initial issue presented in such cases is whether the warrantless opening and inspection of the contents of a container or other item of personal property is a fourth amendment search \textit{(i.e., violates an actual and reasonable expectation of privacy)}\textsuperscript{300}, regardless of which exception to the rule generally requiring a warrant justified the warrantless search of the automobile in which the container was found. The fourth amendment "protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures",\textsuperscript{301} containers or other items of personal property are not themselves protected by the fourth amendment,\textsuperscript{302} as Justice Stewart's opinion in \textit{Robbins} implied.\textsuperscript{303}

Although the plurality opinion in \textit{Robbins} refers to reasonable expectations of privacy,\textsuperscript{304} that opinion ultimately concluded that particular types of containers and items of personal property—closed, opaque containers—are protected by the fourth amendment,\textsuperscript{305} regardless of the circumstances present at the time the container is seized and searched.\textsuperscript{306} Justice Stevens' majority opinion in \textit{Ross}, although it referred to the fourth amendment's protection for "the owner of every container that conceals its contents from plain view,"\textsuperscript{307} adopted a \textit{per se} rule making the fourth amendment applicable to all containers whose contents are not in plain view, regardless of "an objective appraisal of all the surrounding circumstances."\textsuperscript{308} Justice Stewart in \textit{Robbins}, Justice Powell in \textit{Robb-
bins,309 and Justice Stevens in his majority opinion in Ross, failed to consider that a person may have a reasonable or legitimate expectation that a container will not be opened and its contents inspected in some circumstances, but not in other circumstances. For instance, a person has no actual or legitimate expectation of privacy in property that he has abandoned,310 with the result that governmental opening, inspection, and seizing of the contents of an abandoned container discovered in an abandoned automobile are not regulated by the fourth amendment.311 Similarly, the majority of courts hold that a person has no legitimate expectation of privacy in the contents of trash that has been set out on a curb for collection and disposal, and a fourth amendment search therefore does not occur if police open and inspect the contents of containers set out for trash.312 By analogy, and as implied by Justice Powell's reference in Robbins to "the context in which [an ambiguous container] is discovered,"313 a person might legitimately have a greater expectation of privacy in a container placed in a locked trunk or glove compartment of an automobile than in a similar container placed on the seat of an unlocked passenger compartment of an automobile with the windows rolled down.314 As noted by Justice Powell in Robbins, the determination of whether the opening and inspection of the contents of a particular container constitutes a fourth amendment search should be based upon a consideration of "the size, shape, material, and condition of the exterior of the container, the context within which it is discovered, and whether the possessor had taken some significant precaution, such as locking, securing, sealing or binding that container, that indicates a desire to pre-

310. See W. LAFAVE, supra note 6, § 2.6 (b).
311. See id., § 2.5 (a).
312. E.g., United States v. Shelby, 573 F.2d 971 (7th Cir. 1981); United States v. Alden, 576 F.2d 772 (8th Cir. 1978), cert. denied, 439 U.S. 855. A minority of courts hold that people have a reasonable expectation that the contents of trash will be handled only by trash collectors, not inspected by police; and will be mingled with other trash and incinerated or otherwise disposed of, not retained and sifted by law enforcement officials. See People v. Krivda, 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), vacated and remanded, 409 U.S. 33 (1972), aff'd after remand, 8 Cal. 3d 621, 105 Cal. Rptr. 521, 504 P.2d 457 (1973), cert. denied, 412 U.S. 919 (1973). See W. LAFAVE, supra note 6, § 2.6 (c).
313. 453 U.S. at 434 n. 3 (Powell, J., concurring).
314. Similarly, the majority of courts hold that a person has a legitimate expectation that police will not look into the passenger compartment of an automobile parked within the curtilage of his home, see, e.g., United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974), but does not have a legitimate expectation that police will not look into the inside of an automobile's passenger compartment when the automobile is located in a public place, e.g. Smith v. Slayton, 484 F.2d 1188 (4th Cir. 1973), even if the policeman's observations are made at night with the aid of a flashlight. E.g., State v. Bell, 62 Wis. 2d 534, 215 N.W. 2d 535 (1974).
vent the contents from being displayed upon simple mishance.\textsuperscript{315} This approach should be followed regardless of whether the container in question was found during a warrantless search of an automobile pursuant to the automobile exception, Belton's search incident to a lawful arrest exception, or some other exception to the rule generally requiring a warrant for a search. It should be noted, however, that the exception that justified the warrantless search of the automobile in question may be relevant to the determination of whether a person had a legitimate expectation of privacy in the container and its contents.\textsuperscript{316}

Justice Stewart's opinion in Robbins also failed to distinguish between the issue of whether the opening and inspection of the contents of a container is a fourth amendment search and the issue of whether such conduct by the police without a warrant violates the fourth amendment. Justice Stevens' analysis in Ross fails, as did Justice Stewart's analysis in Robbins, to distinguish two superficially similar but actually distinct issues. The first is whether the opening and inspection of the contents of a container constitute a fourth amendment search; and the second is whether such conduct is an unreasonable search that violates the fourth amendment. The various situations cited by Justice Stevens in Ross as examples of how the protection afforded by the fourth amendment varies in different settings\textsuperscript{317} are situations in which a search with or without a warrant was held not to be unreasonable in violation of the fourth amendment. They are not situations in which the police conduct was held not to be a search within the meaning of the fourth amendment.

Only if the opening and inspection of the contents of a container are determined to constitute a fourth amendment search is a court required

\textsuperscript{315} 453 U.S. at 434 n. 3 (Powell, J., concurring). See Sharpe v. United States, 660 F.2d 967 (4th Cir. 1981); Virgin Islands v. Rasool, 657 F.2d 585 (3d Cir. 1981); United States v. Pillo, 522 F.Supp. 855 (M.D. Pa. 1981). In addition, as noted earlier, see supra note 6, the opening and inspection of the contents of a container may violate one person's fourth amendment's rights, but not those of a third party. See United States v. Payner, 447 U.S. 727 (1980) (defendant in a criminal trial does not have standing to challenge the admissibility of evidence obtained from a third person's briefcase through an intentional violation of that third person's fourth amendment rights).

\textsuperscript{316} For example, the driver of an automobile who had robbed a bank, put the proceeds in a paper bag, and put the bag in his car, should have a correspondingly lesser legitimate expectation of privacy in that bag than the driver of an automobile arrested for speeding would have in the privacy of the contents of paper bags discovered in the automobile during a search incident to his lawful arrest under Belton. Cf. Graham v. State, 47 Md. App. 287, 421 A.2d 1385 (thief of recently stolen container has no legitimate expectation of privacy in that container and consequently has no standing to challenge police seizure and inspection of the contents of that container).

\textsuperscript{317} See supra notes 284-85 and accompanying text.
to determine if such police conduct was reasonable under the fourth amendment, and if a warrant and probable cause were required and were present if required.\textsuperscript{318} If the opening and inspection of the contents of a container by police do amount to a fourth amendment search, and such a warrantless search is not lawful under \textit{Ross}, the determination of whether the search was reasonable under the fourth amendment should be determined by application of \textit{Chadwick}'s and \textit{Sanders}' exclusive control and exigent circumstances standards\textsuperscript{319} regardless of whether the container was discovered during an automobile exception search or a search under \textit{Belton}. The exigent circumstances that justify the warrantless stopping and seizure of an automobile,\textsuperscript{320} do not, however, necessarily establish an exigency that justifies the warrantless search of a container that is within the exclusive control of the police.\textsuperscript{321}

\textbf{IV. CONCLUSION}

There can be cases where police officers without a search or arrest warrant have probable cause to believe that an automobile contains seizable items, under circumstances such that a warrantless stop and search of the automobile is permissible under the automobile exception, but where the occupants of the automobile cannot be arrested without a warrant.\textsuperscript{322} In such cases, because the occupants of the automobile cannot be arrested lawfully, the automobile cannot be searched without a warrant incident to a lawful arrest under \textit{Chimel} and \textit{Belton}, although it can be searched without a warrant under the automobile exception.\textsuperscript{323}

\textsuperscript{318} Smith v. Maryland, 442 U.S. 735 (1979). If such police conduct is not a fourth amendment search, such conduct is not regulated by the fourth amendment's reasonableness, warrant or probable cause requirements. \textit{Id}.

\textsuperscript{319} See supra notes 36-58, 195-212 and accompanying text.

\textsuperscript{320} See supra notes 152-76 and accompanying text.

\textsuperscript{321} See supra notes 44-45, 205 and accompanying text. As noted earlier, see supra notes 195-212 and accompanying text, the Court in Arkansas v. Sanders, 442 U.S. 753, 766 (1979), ruled that whether the warrantless opening and inspection of the contents of containers discovered in an automobile were reasonable under the fourth amendment is determined by application of the general rules developed under the fourth amendment's warrant clause and not the exception to the rule.

\textsuperscript{322} An arrest warrant is required in many jurisdictions when the police have probable cause to believe that the occupants committed a misdemeanor out of their presence. See W. LA FAVE, supra note 6, § 5.1 (b), (c).

\textsuperscript{323} This was apparently the situation in Carroll v. United States, 267 U.S. 132 (1925). See W. LA FAVE, supra note 6, § 7.2(a) at 511.
When a warrantless search of an automobile is permitted under the automobile exception, a prompt search of the automobile may result in the seizure of contraband or evidence, fruits, or instrumentalities of crime that otherwise would not be recovered by law enforcement officials. When a warrantless search of an automobile is permitted under *Chimel* and *Belton* because the occupants of the automobile have been lawfully arrested, a warrantless search of the automobile may prevent the loss of evidence or forestall injury to the arresting officers or members of the public. The arrested occupants might, for example, reenter the automobile to obtain evidence or weapons hidden inside. Consequently, to prevent loss of evidence and other seizable items and to protect the safety of police officers and members of the public, there are reasonable grounds for recognizing these two independent exceptions to the rule generally requiring a warrant for a search or seizure—the "automobile exception", and *Belton*’s search incident to a lawful arrest exception.

Under either of these two exceptions, the validity of a warrantless search of an automobile should be decided on a case by case basis. The validity of a warrantless search under the automobile exception should depend on a finding of probable cause to believe there were seizable items in the automobile and the presence of exigent circumstances that would make it impracticable or dangerous for the police to have obtained a warrant. The validity of a warrantless search when incident to the lawful arrest of one or more occupants of the automobile should depend on a finding that there was a reasonable likelihood that the arrested occupant(s) may have been able to enter the automobile and seize a weapon or evidence prior to being transported to a police station or jail. This determination should be based upon the number of arrested occupants, the number of arresting officers, the degree of physical restraint to which the arrested occupants were subject at the time of the search, the geographical location of the arrested occupants in relation to the automobile at the time it was searched, and the design of the automobile that was searched. Although the *Belton* and *Ross* rules may provide clear-cut guidance to police as to their lawful authority and to members of the public as to their constitutional rights, these rules also authorize searches of areas of automobiles and containers in the automobile when there is absolutely no danger that an occupant of the automobile or anyone else could gain access to that area or container.

There are, however, practical alternatives to the *Belton* rule that would protect the safety of the police and members of the public and preserve evidence that may be in the automobile. They include authorizing police to handcuff all lawfully arrested occupants of an automobile and lock the persons in a police vehicle; to take any containers found
within the automobile and temporarily lock them in the trunk of that automobile or a police vehicle until a warrant is obtained or until the arrested occupants are released from police custody; to lock the automobile and have it towed to a police impoundment lot; and to have one of the arresting officers (if there is more than one) or a police officer in a back-up unit drive the automobile to a police impoundment lot. In addition, for the purposes of protection of human safety and preservation of evidence, police also might be authorized to lock occupants of an automobile not arrested in a police vehicle temporarily, or to otherwise restrain those occupants until after arrested occupants of the automobile are removed from the scene or additional police officers arrive. A rule authorizing such alternate types of warrantless conduct by police after lawfully arresting occupants of an automobile would provide clear-cut guidance both to the police and to the public as to the authority of the police; would protect the safety of police and members of the public; and would prevent evidence that may be in the automobile from being concealed, removed, or destroyed by arrested occupants, non-arrested occupants, or members of the public. Moreover, it would prevent unnecessary invasions of personal privacy to a greater extent than does the Belton rule, and would, therefore, be more consistent with the fourth amendment’s prohibition of unreasonable searches and seizures than is the rule adopted in Belton.

Furthermore, the validity of police conduct in opening and inspecting without a warrant the contents of a container found within an automobile during a lawful warrantless search under Belton should be based on a determination of whether such conduct violated an actual and legitimate expectation of privacy. That is, the validity of the conduct will depend on whether it constituted a fourth amendment search, and, if so, whether the police had the container within their exclusive control and whether there were exigent circumstances.

On the other hand, in the case of an automobile exception search, the standard adopted in Ross should determine the validity of a warrantless fourth amendment search of a container. The effect of this would be that Ross would govern cases in which the police have probable cause to believe only that seizable items are located somewhere in the automobile, and Sanders would govern situations in which the police have probable cause to believe the seizable item is in a specific container. When Ross applies, it will be reasonable to allow police to open and inspect without a warrant the contents of containers which could hold seizable items, because the alternative of having police impound the automobile and the containers until a search warrant is obtained would place an unreasonable burden on police and magistrates, and would
interfere with privacy interests to an equal or greater extent than would the immediate warrantless search of the containers. Although there is the danger under *Ross* that probable cause may be found after a search when it would not be found prior to the search, neutral and detached magistrates should be trusted to avoid such consequences.