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HOW FAR CAN THE AUTOMOBILE EXCEPTION GO? HOW SEARCHES OF COMPUTERS AND SIMILAR DEVICES PUSH IT TO THE LIMIT

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I. INTRODUCTION

Joe is stopped by police for a traffic violation and the sight of some drugs sitting on the front seat gives the police probable cause to search his car. They look in the glove box, the center console, and beneath the seats. Under the passenger seat is a brown paper bag full of cocaine. Next, an officer boots up Joe’s laptop, which was sitting in the backseat. Searching for further evidence of narcotics, he looks through the files on the hard drive. The officer comes across Joe’s family pictures, love poems he wrote to his wife, and investment records. Finally, he finds some damning evidence of participation in the narcotics trade on the computer. Joe seeks to suppress all of this evidence because it is the product of a warrantless search. The court will undoubtedly admit the bag of cocaine into evidence under the automobile exception. But should they interpret that exception to allow the warrantless search of the laptop as well?

Current Fourth Amendment jurisprudence permits police to search a vehicle and the containers within it without a warrant if they have probable cause to believe it holds contraband or evidence.1 While a laptop computer or other mass storage devices2 such as a flash drive found in a car may hold evidence of a crime, it also holds a vast and increasing amount of personal information.3

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1119
The potential intrusiveness of a search of a laptop or other mass storage device could not have been envisioned by Chief Justice Taft when he carved out the automobile exception in 1925.4

This Comment will examine the automobile exception and whether it should be applied to searches of laptops and other mass storage devices. Part II will introduce the warrant requirement of the Fourth Amendment, the origin, justification, and evolution of the automobile exception, and the problem posed by laptops that the Tenth Circuit recently had the opportunity to examine. Part III will analyze the Supreme Court's reasoning in automobile exception cases and examine how lower courts have dealt with the additional privacy concerns mass storage devices inevitably bring to warrantless searches.

Part IV proposes that warrantless searches of mass storage devices should not fall under the automobile exception. Law enforcement should only have the power to seize the device and suspend any search until a warrant can be obtained. An exception could be made in exigent circumstances, for example, when an immediate search of a laptop could stop a crime in progress or yield life saving information.

II. BACKGROUND

A. The Fourth Amendment Warrant Requirement

The Fourth Amendment secures the people with the right to be free from unreasonable searches and seizures and provides that no "[w]arrants shall issue, but upon probable cause . . . ."5 The Supreme Court consistently recognizes that searches conducted without a warrant are per se unreasonable.6 A warrant better

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5. U.S. CONST. amend. IV.
ensures that a search is proper because it is based on the probable cause determination of a "neutral and detached magistrate," instead of an on-the-spot determination by a police officer.\footnote{7}

There are several, "well-delineated" exceptions to the warrant requirement, one of which is the "automobile exception."\footnote{8} This

\footnote{7} Johnson v. United States, 333 U.S. 10, 14 (1948). Probable cause has been defined as "[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in belief that the party is guilty of the offence with which he is charged." Stacey v. Emery, 97 U.S. 642, 645 (1878).

\footnote{8} Acevedo, 500 U.S. at 570; Maryland v. Dyson, 527 U.S. 465, 466 (1999) (per curiam); Katz, 389 U.S. at 357 (referencing merely that there are "well-delineated" exceptions). There are several other exceptions to the requirement. For example, the Court has upheld a warrantless search by customs officials of international mail at a New York post office. United States v. Ramsey, 431 U.S. 606, 624-25 (1977). Customs officials suspected certain envelopes contained illegal narcotics and discovered heroin upon opening them. \textit{Id.} at 609-10. The Court stated the general principle that "searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border . . . ." \textit{Id.} at 616. The basis for this rule is the country's sovereign right to protect itself by searching persons and property entering the country. \textit{Id.} This principle has been applied by a lower court to allow the warrantless search of an international passenger's laptop at an airport. United States v. Arnold, 533 F.3d 1003, 1008 (9th Cir. 2008). Recently, the Court declined to expand another exception to the warrant requirement. \textit{Gant}, 129 S. Ct. at 1714. In that case, Rodney Gant was arrested on an outstanding warrant for driving on a suspended license. \textit{Id.} at 1715. Police arrested Gant in his driveway, after he had parked his car and exited the vehicle. \textit{Id.} After he was handcuffed and locked in the back of a squad car, police proceeded to search his vehicle, finding a bag of cocaine in a jacket pocket in the back seat. \textit{Id.} In reviewing Gant's motion to suppress evidence, the Court noted the exception was premised on concerns of officer safety and evidence preservation. \textit{Id.} at 1716. Finding no reasonable likelihood that Gant could have accessed any weapons or evidence in his own vehicle while handcuffed in the back of a squad car, the Court held the search unreasonable. \textit{Id.} at 1719.

Similarly, the Court defeated an attempt to create a new "murder scene exception" to the warrant requirement in a case involving the murder of a police officer. \textit{Mincey v. Arizona}, 437 U.S. 385, 392-93 (1978). It recognized
allows law enforcement to “search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.”

B. Origin of the Automobile Exception: Carroll v. United States

In 1921, federal prohibition agents stopped suspected bootleggers George Carroll and John Kiro, who were driving on a suspected bootlegging route. There was no evidence of contraband in the Oldsmobile roadster visible to the agents. One of the agents pounded his fist on the “lazyback” of the seat and noticed it was harder than usual. He then tore open the lazyback seat cushion and found it concealed sixty-eight bottles of liquor.

Carroll and Kiro were charged with violations of the National Prohibition Act, and the defendants sought to have the evidence of the liquor suppressed because the search lacked a warrant. The
Supreme Court held that the search was legal and announced that if a warrantless search and seizure of an automobile was supported by probable cause, the search of the automobile or other vehicle was valid.\textsuperscript{15}

In justifying this rule, the Court looked back to a customs act passed by the first Congress in 1789.\textsuperscript{16} That act allowed officials to conduct a warrantless search when they had probable cause to believe a ship or vessel concealed goods subject to duties.\textsuperscript{17} However, the act required agents to obtain a warrant prior to searching for the same goods in a dwelling-house, store, or other building.\textsuperscript{18} Chief Justice Taft postulated that the first Congress made the distinction between ships and homes because in movable vessels the contraband could easily be put out of reach of a search warrant.\textsuperscript{19}

The practical consideration of exigency was the impetus for creating the automobile exception.\textsuperscript{20} However, the Court was

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transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII (repealed 1933).

15. Carroll, 267 U.S. at 149, 162. The Court seemingly had to strain to find probable cause in this case. Justice McReynolds's dissent, joined by Justice Sutherland, took issue with the determination that the officers had probable cause to stop and search the defendants. Id. at 163 (McReynolds, J., dissenting). He argued that there was nothing suspicious about the defendant's activity that day, except that they were driving on a road known also to be a bootlegging route, and that they had, two and a half months before, tried to sell the arresting officers illegal liquor. Id. at 174.

16. Id. at 150-51. The first Congress was also the body that proposed the adoption of the Fourth Amendment, in addition to the rest of the Bill of Rights. Id. at 150. The Court strove to interpret the Fourth Amendment "in the light of what was deemed an unreasonable search and seizure when it was adopted . . . ." Id. at 149.

17. Id. at 150.

18. Id. at 151.

19. Id. The Court further noted that the Second and Fourth Congresses had passed legislation evincing a similar understanding. Id. at 151. The Court also looked at an 1815 statute that permitted officials to "stop, search, and examine any vehicle, beast, or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law . . . ." Id. at 151; Law of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232 1815.

20. See George M. Dery III, Missing the Big Picture: The Supreme Court's Willful Blindness to Fourth Amendment Fundamentals in Florida v. White, 28 FLA. ST. U.L. REV. 571, 577 (2001) (noting that "the automobile exception was a child of necessity and exigency . . . ."). Chief Justice Taft was concerned in general about a rise in crime he felt was attributed to the automobile. See Robert Post, Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era, 48 WM. & MARY L. REV. 1, 125 n.408 (2006) (quoting Taft as saying "the automobile is the greatest instrument for promoting immunity of crimes of violence that I know of in the history of civilization"). The Chief Justice remarked in an interview
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careful to note that more than mere inconvenience to the
government was necessary to create the exigency and fall under
the exception to the warrant requirement.\textsuperscript{21}

\section*{C. The Evolution of the Automobile Exception since Carroll}

In \textit{Husty v. United States}, the Court took up another
prohibition-era case involving bootlegging in Michigan just a few
years after \textit{Carroll}.\textsuperscript{22} The Court applied the rule from \textit{Carroll}
without question.\textsuperscript{23} Eighteen years later, despite the repeal of
Prohibition, the Court took up another case with facts similar to
\textit{Carroll}, in \textit{Brinegar v. United States}.\textsuperscript{24} The defendant was
convicted of illegally bringing liquor into Oklahoma in violation of
the Liquor Enforcement Act of 1936\textsuperscript{25} and sought suppression of
evidence of liquor found in his car.\textsuperscript{26} On facts in many ways
similar to the \textit{Carroll} case, the Court affirmed the trial court's
determination that the warrantless search of the car was valid.\textsuperscript{27}
In 1970, in *Chambers v. Maroney*, the Court departed from the exigency justification that inspired *Carroll*. Police in that case pulled the defendants over in their station wagon because they matched a description of suspects of an armed robbery committed just an hour before. The police did not search the vehicle at that time, but instead took the men into custody and later conducted a warrantless search of the vehicle at the station. Despite the apparent lack of exigent search of the vehicle at the station. Despite the apparent lack of exigent circumstances, the Court held that the search was valid because police had probable cause to seize the vehicle.

The Court faced the question of whether a movable container found within a car could be lawfully searched without a warrant in *Robbins v. California*. The plurality at that time declined to extend the automobile exception to containers. A year later, in *United States v. Ross*, the Court looked back at the *Carroll* decision and decided that the automobile exception to the Fourth Amendment also allowed the search of movable containers found within a vehicle. Justice Stevens limited this extension of the automobile exception with the probable cause requirement. He noted that “[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”

In *California v. Acevedo*, the Court reiterated its interpretation of the exception in *Ross* and held it to apply to containers that police suspect hold contraband, even if the suspicion is formed before the containers are ever placed in a car. The 6-3 decision abolished any distinction among containers that are just coincidentally placed in a car and "interpret[ed] *Carroll* as providing one rule to govern all automobile searches.”

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29. *Id.* at 44.
30. *Id.*
31. *Id.* at 52. The Court said it was debatable whether conducting an immediate search of the car was a greater intrusion of Fourth Amendment interests than seizing the car and holding it until a search warrant could be obtained. *Id.* at 51-52.
33. *Id.* at 425. Justice Powell’s concurring opinion in this case provided the basis for the Court’s holding in the next case considered.
34. 456 U.S. 798, 822 (1982).
35. *Id.* at 825.
36. *Id.*
37. *Acevedo*, 500 U.S. at 580. In two prior cases, the Court made a distinction between probable cause to search a vehicle and probable cause only to search a container. *United States v. Chadwick*, 433 U.S. 1, 16 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979). If such a container coincidentally was seized from an automobile, a warrant was required for police to search it. *Id.*
D. The Problem with Laptops and Other Mass Storage Devices that the Tenth Circuit Confronted in United States v. Burgess

In July, 2007, Wyoming state police pulled over David Burgess’s motor home on Interstate 80 to issue a citation for an expired license plate. The canine unit alerted the officers to the presence of narcotics, which initiated a search of the motor home despite Burgess’s request that they obtain a warrant. The search produced marijuana and cocaine, in addition to a laptop computer and two external hard drives.

The officers did not search the computer or hard drives then, but instead towed the vehicle and requested a warrant to search for photographs of narcotics or coconspirators. A warrant was granted, and a search of the hard drives revealed child pornography. Because Burgess questioned the validity of the warrant, the government contended that the hard drives could be searched without a warrant under the automobile exception.

The government pointed to an earlier Tenth Circuit case that analogized the expectation of privacy in a computer to that of a suitcase or briefcase. Because the Supreme Court in Acevedo had

39. Like many others raising Fourth Amendment issues in their defense, Burgess was not a particularly sympathetic character. See United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (remarking “.../it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”). Burgess was a former owner of a Nevada brothel and charter member of a Nevada chapter of the Hells Angels. Former Brothel Owner Gets 15 Years in Child Porn Case, LAS VEGAS REV. J. (July 19, 2008), http://www.lvrj.com/news/25644904.html; Ben Neary, Appeals Court Upholds Brothel Owner’s Conviction, BILLINGS GAZETTE (Aug. 17, 2009), http://www.billingsgazette.com/news/state-and-regional/wyoming/article9f9d92c2-8b7a-11de-8f08-001cc4c03286.html.

40. Burgess, 576 F.3d at 1082. The officer was also aware that the motor home was associated with the Hell’s Angels motorcycle club, so he called for a drug canine unit to assist before pulling Burgess over. Id.

41. Id. at 1082-83.

42. Id.

43. Id. at 1083.

44. Id. at 1084. The police viewed 200-300 of Burgess’s personal digital photographs before discovering the illicit material. Id. The special agent examining the hard drives found at least 1,300 child pornography images. Id. Burgess was indicted for knowing transportation of child pornography across state lines (18 U.S.C. §§ 2252A(a)(1) and (b)(1)) and knowing possession of child pornography transported in interstate commerce (18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2)). Id.

45. Id.

46. Id. at 1087-88. The government focused on the Tenth Circuit’s language in United States v. Andrus, where they stated because “[a] personal computer is often a repository for private information the computer’s owner does not intend to share with others” and “intimate information is commonly stored on computers, it seems natural that computers should fall into the same category as suitcases, footlockers, or other personal items that ‘command a high degree
said the automobile exception allows, with probable cause, police to search containers found in an automobile—even locked briefcases—police may search laptops and hard drives found in an automobile. Burgess argued that this would be a “radical” expansion of the warrant exception that would “destroy a citizen’s expectation of privacy in his or her computer.”

The court examined the briefcase–computer analogy and highlighted the key distinctions between the two, mainly the massive amount of personal information a computer may contain. It cautioned against oversimplifying the Fourth Amendment analysis through analogy to other closed containers. Also, the court noted that authority to seize without a warrant may be greater than authority to search without one. The court of privacy.” Andrus, 483 F.3d at 718. The Andrus case also involved child pornography, but did not involve the automobile exception. Id. Instead, the warrantless search of the defendant’s computer was upheld on the basis of consent to search given by the defendant’s father. Id. at 712. The court considered the expectation of privacy in a home computer compared to a locked container such as a briefcase. Id. at 718. This will be discussed in Part III.

47. Burgess, 576 F.3d at 1088; Acevedo, 500 U.S. at 580.
48.Reply Brief for Defendant-Appellant at 2, United States v. Burgess, 576 F.3d 1078 (10th Cir. 2009) (No. 08-8053). Burgess also argued that because of the vast amount of information a computer can hold, it is a “virtual home,” not just a container. Id. He worried that applying the automobile exception in this way to his case would allow police to “conduct a general search of any computer found in any automobile which was subject to a valid search under the automobile exception.” Id. It may seem unlikely that, even given this power, police would use their finite resources to conduct such general searches whenever an opportunity presented itself. However, it seems more plausible when viewed in light of the law enforcement crackdown on child pornography in recent years. See U.S. GENERAL ACCOUNTING OFFICE, COMBATING CHILD PORNOGRAPHY: FEDERAL AGENCIES COORDINATE LAW ENFORCEMENT EFFORTS, BUT AN OPPORTUNITY EXISTS FOR FURTHER ENHANCEMENT 16 (2002), http://www.gao.gov/new.items/d03272.pdf (noting that at the federal level, the U.S. Department of Justice (the DOJ), the Treasury Department, and the U.S. Postal Service are all involved in combating child pornography); Wendy Koch, Financial Firms Attack Child Porn, USA TODAY (May 26, 2006), http://www.usatoday.com/tech/news/2006-05-25-firms-fightonline_x.htm (reporting that the DOJ is teaming up with companies such as Visa, Discover, and Bank of America, who will block transactions of online child porn and help the DOJ track sellers and buyers); Illinois Requires Pornography Data, N.Y. TIMES (Oct. 4, 2008), http://www.nytimes.com/2008/10/05/us/05illinois.html?_r=1&scp=2&sq=child%20pornography%20enforcement&st=cse (reporting that a new Illinois law requires computer technicians to report any customers whose computers contain child pornography to law enforcement); Declan McCullagh, FBI Posts Fake Hyperlinks to Snare Child Porn Suspects, CNET NEWS (Mar. 20, 2008), http://news.cnet.com/8301-13578_3-9899151-38.html (reporting on FBI’s use of sting operations to find users of child pornography).

49. Burgess, 576 F.3d at 1088.
50. Id.
51. Id. at 1089. The court quoted Justice Stevens concurrence in a plurality opinion of Texas v. Brown:
pondered whether the Supreme Court would treat a computer as it does a briefcase, but ultimately did not come to a conclusion as it ruled the search valid on other grounds. The court affirmed Burgess's conviction and upheld his fifteen-year prison sentence.

III. ANALYSIS

This section will analyze the Supreme Court's twin rationales driving automobile exception cases: practical mobility concerns and exigency, and the lesser-expectation of privacy in an automobile. Additionally, this section examines the expectation of privacy in mass storage devices in general.

A. The Exigency and Mobility Rationale

The Supreme Court in Carroll looked to exigency and practical policing issues in justifying the automobile exception and did not discuss the lesser expectation of privacy individuals have in their automobiles. To ascertain the meaning of the Fourth Amendment, Chief Justice Taft considered statutes concerning customs duties passed by the first Congresses. He explained the

[If there is probable cause to believe [an object] contains contraband, the owner's possessory interest in the container must yield to society's interest in making sure that the contraband does not vanish during the time it would take to obtain a warrant. The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot. Once the container is in custody, there is no risk that evidence will be destroyed. Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate.]


52. Burgess, 576 F.3d at 1090. The court ultimately found the search warrant for Burgess' computer and hard drives valid. Id. Burgess had argued that the warrant, authorizing a search of "computer records," was overbroad. Id. Specifically, he sought to strictly impose the Fourth Amendment's particularity requirement for a warrant. Id. The court noted the unique nature of a computer search prompted special considerations for this issue as well. Id. at 1091. The requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized," was especially important considering a computer's ability to store a vast amount and array of personal information in one place. Id.; U.S. CONST. amend. IV. Due to these concerns, the Tenth Circuit mandates that computer search warrants are limited to "specific federal crimes or specific types of material." Burgess, 576 F.3d at 1091 (quoting United States v. Otero, 563 F.3d 1127, 1132 (10th Cir. 2009).

53. Id. at 1103.

54. Carroll, 267 U.S. at 153; Dery, supra note 20, at 577.

55. Carroll, 267 U.S. at 151. For example, The Act of 1789 authorized duty collectors to enter, without a warrant, any ship or vessel where concealed goods subject to duty were suspected. Law of July 31, 1789, ch. 24, 1 Stat. 29 (1789). The same statute, however, required a warrant for a similar search of houses, stores, and other buildings. 1 Stat. at 43. The Second and Fourth Congresses passed laws with similar distinctions for warrants. Collection of
distinction those statutes made between searches of fixed dwellings and searches of movable vessels by noting that the latter could be easily "put out of reach of a search warrant," not through any distinctions in expectations of privacy. The dissent in Carroll took issue not with the exigency and mobility rationale, but with the seemingly low level of suspicion needed to stop Carroll and Kiro.

The Supreme Court continued to rely on the exigency rationale of the automobile exception for decades. It was not until Chambers, in 1970, that the Court made a break with the exigency requirement. While the criminal defendants did not prevail, the Court began expressing a consideration of private Fourth Amendment interests, namely the extent of the government's intrusion on the individual.

B. The Lesser-Expectation of Privacy Rationale

The Court explained its Chambers decision in the 1985 case of California v. Carney. There, the Court retained the mobility and exigency arguments as part of the rationale, but also noted that an automobile search has a relaxed warrant requirement because there is a lower expectation of privacy in an automobile, as compared to a home or office. For example, Chief Justice Burger pointed to pervasive regulation of automobiles.

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56. Carroll, 267 U.S. at 151. Indeed, the word "privacy" does not appear once in the lengthy opinion. See generally Carroll, 267 U.S. 132.

57. Id. at 169 (McReynold's, J., dissenting). There is a hint of a privacy concern in Justice McReynold's opinion where he says "[e]vidently Congress regarded the searching of private dwellings as matter of much graver consequence than some other searches . . . ." Id. at 167.

58. The Court did not question the exigency rationale when it revisited the exception in Husty or Brinegar. Husty, 282 U.S. at 700; Brinegar, 338 U.S. at 171. In Brinegar, the Court primarily relied on Carroll to determine whether the officers had probable cause to stop the defendants, which was the main issue. Brinegar, 338 U.S. at 170.

59. Chambers, 399 U.S. at 52.

60. Id. The Court considered whether an immediate search was a greater intrusion than seizing the car and holding it until a search warrant could be obtained. Id. Though the case was not explicitly mention in the opinion, this consideration of the private interests follows from the Court's watershed Fourth Amendment case, Katz, three years earlier. There the Court said that "the Fourth Amendment protects people, not places." Katz, 389 U.S. at 351.


62. Id. The Court found the basis of its expectation of privacy reasoning in South Dakota v. Opperman, 428 U.S. 364, 367 (1976). That case involved the routine inventory search of an automobile that had been impounded for multiple parking ticket violations Id. at 365-66.

63. Id. at 392. Specifically, the opinion cited "periodic inspection and
The court also explained the lower expectation of privacy through the "obviously public nature of automobile travel." The pervasive regulation of automobiles serves to put the populace on notice that the government's interests will outweigh the private interests, obviating the need for a search warrant.

It is against this backdrop that the holding in *Ross*, allowing the warrantless search of containers pursuant to the automobile exception, makes more sense. In *Ross*, police stopped an individual suspected of selling drugs kept in the trunk of his car. In the trunk they found a closed brown paper bag. Instead of seizing the bag and requesting a search warrant, the officer opened the bag and discovered heroin. The police also found and searched a zippered red leather pouch that contained 3,200 dollars in cash.

The D.C. Circuit Court of Appeals analyzed the search of the containers separately from the search of the car. The three-judge panel that first heard the case considered whether the owner of the container has a reasonable expectation of privacy in it to determine the constitutionality of a warrantless search. It concluded that the search of the paper bag was legal, but the search of the leather pouch was not. Upon rehearing en banc, the court held that closed containers should not be treated differently, but that a warrant should be obtained for any search of a closed container.

64. Opperman, 428 U.S. at 368. The *Opperman* opinion quoted an earlier case which reasoned automobiles had a lower expectation of privacy "because its function is transportation and it seldom serves as . . . the repository of personal effects . . . . It travels through public thoroughfares where both its occupants and its contents are in plain view." *Id.* (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974). The reasoning in *Cardwell* is less convincing today where a motor home such as the one in *Burgess* certainly might serve as a repository of personal effects and the contents of a computer inside would rarely be in plain view in any literal sense. In any case, the *Carney* opinion did not rely on this reasoning. *Carney*, 471 U.S. at 392.

65. See *Carney*, 471 U.S. at 392 (noting "[t]he public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation.").

67. *Id.* at 800-01.
68. *Id.* at 801.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 802.
73. *Id.*

74. United States v. *Ross*, 655 F.2d 1150, 1172 (D.C. Cir. 1981). The court was concerned that determining the constitutionality of a search based on the
The Supreme Court agreed that distinctions should not be made based on the quality of the container. It broadly framed the issue as a conflict "between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement." While at first confirming that the decision in Carroll was based on practical and exigency considerations, the Court in its next breath said "subsequent cases make clear that the decision in Carroll was not based on the fact that the only course available to the police was an immediate search." The cases cited, however, did not provide further illumination on Carroll to justify the statement.

The Ross court considered the argument that an individual's expectation of privacy may be greater in a container in a car than in the car itself. It also considered that the practical mobility problems were not as great in a container as in an automobile, as the former could be seized and more easily stored by the police. The Court was not persuaded by these arguments, however, and purported to base its holding on a mix of practical and privacy concerns.

durability or quality of a particular container would be unmanageable for courts and police. Id. It mused that this would draw police and courts into the task of parsing out distinctions between a cotton purse and a silk one, a paper container from leather, or a sack closed by a zipper instead of buttons. Id. at 1170. Future Supreme Court Justice Ruth Bader Ginsburg authored the opinion. Id. at 1159.

75. See Ross, 456 U.S. at 822 (arguing that search rules should apply to all containers evenly). The Court was concerned with the same practical problems as the Court of Appeals below. Id. It also worried that such distinctions could lead to unequal treatment of people based on means of transporting items. Id. It remarked "a traveler who carries a toothbrush and few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case." Id.

76. Ross, 456 U.S. at 804.

77. Id. at 806.

78. Id. at 807 n.9. The opinion cited Chambers and Texas v. White, 423 U.S. 67 (1975) (per curiam), which held that if an immediate warrantless search of a car is permissible, then a warrantless search soon after at the police impound lot is also permissible. Ross, 456 U.S. at 807 n.9.

79. White, 423 U.S. at 68. The brief per curiam opinion did not refer to Carroll at all. See generally id. Instead, the Court relied entirely on Chambers. Id.


81. Id.

82. Id. at 822-23. It determined that the Carroll exception would be largely useless if it was not permissible to include the search of containers within the scope of an automobile search. Id. at 820.

The Court explained that the contraband for which the police would be searching are, by their very nature, items that need to be concealed and will likely be in closed containers when found in an automobile. Id. After a quick
The Court also felt that individual privacy interests were actually better served by allowing the search of containers when probable cause supported it. It theorized situations where the police, looking for drugs, would have to set aside suspicious packages until a warrant could be issued and continue searching the rest of the car to see if the object of their search could be found outside of a container. The Court found 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." Thus, unwilling to make a distinction between the expectation of privacy of an automobile and of a container found in an automobile, the Court held it is permissible to search both as long as probable cause exists to believe there was contraband in the vehicle.

Survey of history, the Court made the amazingly broad claim that: 

[During] virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search. 

Id. at 820 n.27. It apparently ignored its own prior cases with contrary holdings. Chadwick, 433 U.S. at 12; Sanders, 422 U.S. at 766; Robbins v. California, 453 U.S. 420, 425 (1981).

83. Ross 456 U.S. at 821.
84. Id. at 822. To bring this argument to its logical ending, while waiting for a warrant for a container, the police could never be certain that the suspected contraband was not hidden in some other part of the car, necessitating the seizure of the car as well. Id.
85. Id. at 823. The Court noted that the Fourth Amendment offers different protection depending on the setting. Id. For example, a customs officer may conduct a random search of a briefcase at the border, where the same container and individual would be protected from this interference while walking down the street. Id.
86. Id. at 825. The dissent in Ross opined that the majority not only removed any limitations on warrantless automobile searches, but "repeal[ed] the Fourth Amendment warrant requirement itself." Id. at 827 (Marshall, J., dissenting). Justice Marshall argued that a police officer's on-the-spot determination of probable cause was no substitute for that of a "neutral and detached magistrate." Id.

The dissent also highlighted the inconsistencies in the majority's reasoning on mobility and expectation of privacy. Id. at 832. While the majority purportedly relied on the mobility rationale of Carroll in its holding, it did not explain how that can apply in the same way to a movable container, which can be simply seized and immobilized until a warrant is granted. Id. at 828. The dissent also failed to see how the Court could find that a closed container has a lesser expectation of privacy simply because it is in an automobile. Id. at 832.
C. Searches of Computers and Other Electronic Mass Storage Devices

While the Supreme Court has not squarely faced the issue of whether a laptop or similar device could be the object of an automobile exception search, lower courts have had to deal with some of the same concerns such a case would bring. For instance, in the context of cell phone searches, some courts have decided to treat them differently than other searchable items; other courts have not.

1. Cell Phone Searches Incident to Arrest

In United States v. Park, the district court suppressed warrantless searches of cell phones that were found incident to arrest. The police did not search their phones immediately at the time of the arrest, but waited until the defendants were in custody and their personal items had been seized as part of the booking process. The government argued that the searches were lawful as incident to arrest and that the cell phones should be considered part of the person, and thus subject to a search even later on at the jail. However, the court instead treated the phones as “possessions within an arrestee's immediate control.” The court based this decision entirely on the special nature of modern cell phones and their immense storage capacity, taking judicial notice that the phones involved had features such as cameras, text-messaging, email, and address books. The court declined to extend the search incident to arrest warrant exception further because it would permit the warrantless search of “a wide range of electronic storage devices.”

88. Id. at *2. Police, acting on a warrant to search the defendants' residence, found evidence of marijuana cultivation and arrested Park and two others. Id. at *5.
89. Id. at *11.
90. Id. at *5.
91. See id. at *8-9 (concluding that cell phones found on an arrestee should be classified as “possessions within an arrestee's immediate control”). This meant that the police could have only conducted a warrantless search of the phones at the time of the arrest, not later at the jail; see also id. at *1 (stating a delayed “search of the person” is lawful but a delayed search of “possessions within an arrestee's immediate control” is not).
92. Id. at *9. The government had argued at the suppression hearing that, although the police officers only searched the phones' address books, they had the authority to search anything stored on the phone, including emails and messages. Id. at *8. The court saw that this kind of search, here looking for evidence of marijuana trafficking, would extend the original rationale for searches incident to arrest: to remove weapons for officer safety and prevent the destruction of evidence. Id.
93. Id. at *9. In a similar case, the Ohio Supreme Court held that police...
The Fifth Circuit, however, took the view that police could search a cell phone incident to arrest because it found the phone to be part of the arrestee's person, and not just a possession within the arrestee's immediate control. The court did not explain its decision except by finding that the phone was literally on his person, and therefore not like the container in *United States v. Chadwick*.

2. Laptop Searches at the Border

*United States v. Arnold* provides a good example of the different approaches courts have taken to reconcile an individual's Fourth Amendment privacy interests with countervailing government interests. There, the district court ruled to suppress the fruit of a warrantless laptop search of the defendant, Michael Arnold, which was conducted by the Customs and Border Patrol. The district court recognized that the government's interest in preventing entry to unwanted persons and effects justifies the warrantless search of things such as luggage, purses, and pockets with no suspicion. However, the court noted that this interest is not all-powerful, and some suspicion is required for highly intrusive searches, such as strip-searches.

The district court likened the intrusiveness of a computer search to a strip-search and imposed a reasonable suspicion requirement at the border. The court cited the immense amount of information that computers can hold and the variety of personal information people store on them. Thus, a computer search is

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cannot conduct a warrantless search a cell phone seized during an arrest. Ohio v. Smith, 124 Ohio St. 3d 163, 170 (2009). The court refused to place cell phones in the same category as closed containers which can be searched without a warrant incident to an arrest. Id. at 168. It found that the amount of personal information cell phones can hold gives them a higher expectation of privacy. Id. at 169.

94. *United States v. Finley*, 477 F.3d 250, 259-260 (5th Cir. 2007). In this case, the police searched the phone's text messages and found messages that were suggestive of narcotics distribution. Id. at 254.

95. Id. at 260.

96. *United States v. Arnold*, 454 F. Supp. 2d 999, 1001, 1007 (C.D. Cal. 2006). Arnold's laptop was searched when he arrived at LAX airport, returning from a trip to the Philippines. Id. at 1001. The customs officer asked Arnold to turn on his computer to see if it was functioning. Id. Once it was booted up, another officer clicked on desktop folders labeled "Kodak Pictures" and "Kodak Memories." Id. The officer found pictures displaying nude women, detained Arnold, and a more extensive warrantless search turned up images suspected as child pornography. Id.

97. See id. at 1002 (recognizing a distinction for "border searches").

98. Id. at 1006-07.

99. Id. at 1003-04. The court noted several situations where highly sensitive information might be kept on a computer: confidential client information on an attorney's computer, trade secrets on an inventor's or
"substantially more intrusive than a search of the contents of a lunchbox or other tangible object."  

On appeal, the Ninth Circuit reversed, holding that reasonable suspicion was not needed for a laptop search at the border. The court was not convinced that the search of a computer was logically distinguishable from the search of a piece of luggage. Citing the Supreme Court's reluctance to distinguish between "worthy" and "unworthy" containers, the court said that a container should not be treated differently on the basis of its storage capacity.

3. Other Computer Searches

While the Ninth Circuit did not afford computers any more protection at the border, it did find the unique nature of mass storage devices critical in evaluating the lawfulness of computer searches conducted with warrants. The court was alarmed that what should have been a targeted and limited search of computer records had turned into a general search of the kind the Fourth Amendment was intended to prohibit. Thus, even a search of computer hard drives authorized by a warrant deserves higher protection.

101. United States v. Arnold, 533 F.3d 1003, 1008 (9th Cir. 2008). The Ninth Circuit expressly rejected the district court's analogy of the intrusiveness a body cavity search requiring heightened suspicion to the intrusiveness of a computer search. Id. at 1007-08.

103. Id. at 1009.

104. Id. at 1009-10. The court looked to Carney for guidance on worthy and unworthy containers. Id. at 1009. The Court of Appeals did not give much weight to Arnold's arguments on the volume and types of information a computer could hold. Id. Whatever privacy interests a computer search impinges upon, the important government interest in border security prevails. Id. at 1007, 1009. The government argued that it was illogical to treat electronically stored information differently than the same information in hardcopy. Government's Opening Brief at 19, United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008) (No. 06-50581). If Arnold had carried photographs portraying child pornography in a briefcase, there would be no problem with the border search. Id. The government also highlighted the very personal information that may be carried in a traveler's luggage, such as intimate clothing, contraceptives, prescription medications, all of which may be found in a legal search without any suspicion. Id. at 20.

105. United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989, 1004 (9th Cir. 2009). The government, investigating the use of illegal substances by Major League Baseball players, obtained a warrant to search a diagnostic facility for the drug test records of ten specific players. Id. at 993. In executing the warrant, however, government agents seized and searched computer records of hundreds of other baseball players and individuals for which they had no probable cause (aside from the ten players listed specifically in the warrant). Id.

106. Id. at 998.
judicial scrutiny because of the privacy concerns of the individual targeted and the common risk that other peoples' information, totally uninvolved in an investigation, may be intermingled with the target of the search.\footnote{Id. at 1005-06. The court set out several guidelines for magistrate judges overseeing the execution of such a warrant. Id. Those include, but are not limited to, insisting that the government waive any argument that the plain view doctrine will apply (which would allow them to use as evidence anything that they come across in their computer search) and having a third-party or government employee not involved in the investigation separate the files on the computer that are the object of the search and those that are not, giving the investigators only the information relevant to the warrant. Id.}

Given the unique privacy concerns implicated by warrantless searches of mass storage devices, many of the lower courts have carved out specific exceptions and novel ways to deal with the potential for government abuse that these searches present.\footnote{\textit{E.g.}, United States v. Mann, 592 F.3d 779, 785-86 (7th Cir. 2010) (eschewing the Ninth Circuit's approach in \textit{Comprehensive Drug Testing} in favor of a case-by-case approach; cautioning officers only to describe with particularity the places to be searched in and things to be seized from a computer); United States v. King, 693 F. Supp. 2d 1200, 1229-30 (D. Haw. 2010) (noting that evidence seized pursuant to a warrant that does not comport with the "guidelines" laid out in \textit{Comprehensive Drug Testing} should not be excluded).} The Supreme Court, in \textit{Acevedo}, signaled its disfavor of special exceptions for different kinds of containers.\footnote{\textit{E.g.}, \textit{Acevedo}, 500 U.S. at 579 (noting that "dual regimes" for automobile searches that uncover containers are confusing, and that a clear-cut rule is preferable).} Much has changed in the digital world since 1991, however, when the Court decided \textit{Acevedo}.

IV. PROPOSAL

Whether one views the Fourth Amendment as requiring a warrant or only evincing a warrant preference, the potential intrusiveness of mass storage device searches demands that a warrant be required for a search in the automobile context. An exception to the automobile exception is called for. Computers are different than briefcases, and a distinction should be made between them and other containers. The burden of a warrant requirement on law enforcement is low, and technology is making that burden lower still. Because exigency was the original rationale for the automobile exception, police should be free to do a limited search without a warrant where such a search could stop a crime in progress or provide some life-saving information.
A. An Exception to the Exception

The automobile exception to the warrant requirement should not apply to computers and other mass storage devices. Instead, if police have probable cause to believe a mass storage device contains criminal evidence, they should seize the device and not search it unless and until they obtain a warrant. If a magistrate rejects the warrant request, police must promptly return the device to its owner. In the unlikely situation that there is a truly exigent circumstance, like a life-threatening emergency that could possibly be remedied with information on the device, an immediate search could be undertaken. In this way, individuals' special privacy interests in mass storage devices remain protected while the needs of law enforcement and public safety are still met.

B. Mass Storage Devices Are "Worthy" Containers

In Ross, the Supreme Court refused to make a distinction between "worthy" and "unworthy" containers when considering whether containers found in an automobile could be searched without a warrant pursuant to the automobile exception. While a person may use a laptop to store the same kind of information that is stored in a briefcase, the manner of storage and the capacity are entirely different. Further, unlike any other container heretofore imagined, technological advances continually give mass storage devices greater capacity while they continue to

110. Of course, an individual has the ability to consent to a warrantless search and could do so if he or she did not want to be burdened by a seizure of their property. See Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528-29 (1967) (stating "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant"). However, police should be required to advise the individual that he or she does not have to consent and the device will not be searched until a warrant is granted if no consent is given. E.g., Carol A. Chase, Privacy Takes a Back Seat: Putting the Automobile Exception Back on Track After Several Wrong Turns, 41 B.C. L. REV. 71, 98-99 (1999) (arguing that this practice also prevents claims that consent was not given voluntarily). Otherwise, law enforcement will have less incentive to speedily obtain a warrant, putting more pressure on the individual to give his consent to the search.


112. See supra note 3 and accompanying text (describing the storage capacity of modern mass storage devices); Orin Kerr, Searches and Seizures in a Digital World, 119 HARV. L. REV. 531, 538-40 (2005) (discussing the dynamics and technical aspects of a computer search as compared to a more traditional home search).
get smaller physically. Finally, unlike most containers, the amount of historical information that computers hold is enormous. For example, documents that a user thought he had deleted can be recovered by forensic computer technicians, and operating systems and web browsers store information on how and when a computer was used. Thus, a skilled forensic analyst could reconstruct computer activity, in effect conducting backward-looking surveillance.

In short, computers are different, and searches of them should be treated differently. Even if the Supreme Court refuses to abandon its reasoning in Ross and Acevedo that the expectation of privacy in a container is suddenly diminished when placed by its owner in an automobile, the proposed treatment of mass storage devices is not foreclosed. There are still sufficient reasons to place mass storage devices in a class by themselves. Because of the privacy concerns outlined above, the expectation of privacy in mass storage devices is so high that even after being placed in an automobile, it is still unreasonable to search without a warrant. However, in light of the concerns raised by Ross about distinguishing amongst containers, the exception should cover all mass storage devices, from laptops to portable hard drives to cell phones. This will make the rule clear and easy for police to execute, a virtue the Supreme Court previously extolled.

C. Requiring a Warrant for Searches of Mass Storage Devices Is Not Overly Burdensome for Law Enforcement

The burden of getting a warrant is significantly lower than it was at the time Carroll was decided. In the electronic age, a

113. See Orin Kerr, Digital Evidence and the New Criminal Procedure, 105 COLUM. L. REV. 279, 302 (2005) (noting that electronic storage capacity doubles approximately every two years). Professor Kerr likens a computer search to the search of an entire city block, and in the near future it will be more like a search of an entire city because of further advances in technology. Id. at 303.
114. Kerr, supra note 112, at 542.
115. Id. at 542-43. Microsoft Word creates temporary files from which an analyst can reconstruct the evolution of a particular document. Id. at 543. Web browsers track and store very specific use information, such as actual search terms. Id.
116. See supra notes 80-86 and accompanying text (discussing the Supreme Court's reasoning in Ross).
117. See supra notes 3, 111, 112, 113 and accompanying text (detailing the capacity and nature of personal information kept in mass storage devices).
118. Part of the Court's justification for extending the automobile exception further in Acevedo was to provide a clear rule for law enforcement officers. Acevedo, 500 U.S. at 577 (quoting Arizona v. Roberson, 486 U.S. 675, 682 (1988)) (recognizing the importance of providing "clear and unequivocal guidelines to the law enforcement profession").
119. See Chase, supra note 110, at 87 (stating that in the 1920s it may have
search warrant can be obtained in minutes instead of days.\textsuperscript{120} Federal law provides for telephonic search warrants,\textsuperscript{121} which are also available in many states.\textsuperscript{122} California even allows for proposed warrants and supporting declarations to be sent to the magistrate via email.\textsuperscript{123} In some instances, courts have rejected an exigency justification for a warrantless search due to the availability of a telephonic warrant request.\textsuperscript{124}

In addition, the nature of how information is stored on a computer makes an on-the-spot search ineffective. Often, it will need to be conducted by a forensic computer technician at a laboratory or the police station.\textsuperscript{125} This necessarily implies that many searches will be delayed, so obtaining a warrant to search the computer will probably not result in a significant hindrance to the police.

taken several hours or days to obtain a warrant and return to the place to be searched).

\textsuperscript{120} Id. at 89.

\textsuperscript{121} “A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including reliable electronic means.” Fed. R. CRIM. P. 41(d)(3)(a). Federal courts have estimated that it may take as little as twenty minutes to obtain a telephonic search warrant. United States v. Baker, 520 F. Supp. 1080, 1084 (S.D. Iowa 1981).


\textsuperscript{123} Cal. Penal Code § 817(c)(2) (West 2009).

\textsuperscript{124} E.g., United States v. Patino, 830 F.2d 1413, 1416 (7th Cir. 1987) (finding lack of exigent circumstances where officer could have requested warrant telephonically during thirty minute wait for back-up); United States v. Manfredi, 722 F.2d 519, 522 (9th Cir. 1983) (holding that when using an exigency exception, the government’s burden is to show that warrantless entry was imperative, and this burden is not met unless it shows that it did not have time to get a warrant telephonically); but see United States v. Reid, 929 F.2d 990, 993 (4th Cir. 1991) (rejecting defendant’s argument that potential availability of telephonic warrant eliminated the exigency of the situation).

Many state courts have also considered the availability of a telephonic warrant when evaluating exigency arguments. See State v. Flannigan, 978 P.2d 127, 131 (Ariz. Ct. App. 1998) (noting that the involved police department was able to obtain a warrant in as little as fifteen minutes); Saper v. State, 869 N.E.2d 1273, 1279 (Ind. Ct. App. 2007) (suppressing the fruits of a warrantless search where no telephonic warrant was requested in part because the State’s telephonic warrant statute “lessen[s] the need for warrantless searches”).

\textsuperscript{125} Kerr, supra note 112, at 537 n.20; see also Burgess, 576 F.3d at 1090 (“Practically speaking, the forensic search of a hard drive . . . will rarely be conducted at the ‘site’ while searching an automobile, given the potential to corrupt or lose evidence.”).
D. Expediency Only Goes So Far

Although it may be more convenient for the police to conduct the search right then and there, police expediency must give way to privacy at some point. The unique qualities of mass storage devices highlight that point. The Fourth Amendment is not an inconvenience for the police to overcome; rather, it is “a restraint on Executive power.” As technology allows people to carry more of their personal effects in their vehicles, the potential for abusive and intrusive searches increases. It is important that a detached and neutral magistrate, not a law enforcement officer “engaged in the often competitive enterprise of ferreting out crime,” makes the determination of whether there is probable cause to invade a person’s privacy through a search.

E. The Proposal Applied

When faced with a situation like that in Part I, the police should handle the situation differently. Upon making a probable cause determination to search the laptop in the backseat, the officer would ask Joe for his permission to conduct a search, advising him that if he declines they will request a warrant. Assuming he does not give permission, the officer would, if possible, request a warrant telephonically. If it appears to the officer that he will have an answer on the warrant request within a relatively brief period of time, he would hold Joe at the scene (in this case he will already be under arrest for the cocaine possession).

If the warrant request is granted, he can conduct a brief search on the scene or back at the station. If the request is denied he obviously cannot search. If a telephonic warrant is not available, the officer should seize the laptop, secure it at the station, and search it only if a warrant is granted later.

126. Acevedo, 500 U.S. at 586 (Stevens, J., dissenting). Justice Stevens further commented that “the Court has recognized the importance of this restraint as a bulwark against police practices that prevail in totalitarian regimes.” Id.
128. In other contexts, the Court has looked with disfavor on government arguments that a search should be held valid because it would have been sanctioned by a warrant had they requested one. See id. at 12, 17 (search of hotel room for drugs); Katz, 389 U.S. at 348, 356 (search of public telephone through wiretaps for evidence of illegal gambling).
130. The Fourth Amendment also prohibits unreasonable seizures. U.S. CONST. amend. IV. The Court in Chambers would only say that it was “arguable” that an immediate search is more intrusive than seizing and holding the car until a warrant is issued. Chambers, 399 U.S. at 51-52. The Court was referring to the seizure and immobilization of an automobile, not just a container within it. Id. The seizure of the laptop will at least be
V. CONCLUSION

If courts use the automobile exception to justify warrantless searches of mass storage devices, the exception will be stretched much further than originally imagined. With computer technology becoming ever more pervasive in our lives, the potential for highly intrusive searches also increases. There has already been judicial recognition that electronically stored information is worthy of special precautions during police searches and seizures. The Supreme Court, when presented squarely with the issue, should err on the side of caution, making sure privacy interests in mass storage devices outweigh the interest in police expediency and convenience. The spirit and continued vitality of the Fourth Amendment require no less.

supported by the officer's determination of probable cause because he will have necessarily made one in order to request a warrant. See U.S. CONST. amend. IV. (stating "no Warrants shall issue, but upon probable cause . . .").