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WARRANTLESS SEARCHES OF AUTOMOBILES IN VIRGINIA

I. INTRODUCTION

Most people consider automobiles\(^1\) to be a safe place to store personal effects.\(^2\) But just as innocent articles can be kept in automobiles, so can contraband or other evidence of crime. Thus, courts have had to apply the law of search and seizure—which once spoke primarily to the security of the home\(^3\)—to a new setting. The courts' treatment has not always been consistent.\(^4\) With a proper warrant, the search of an automobile is valid;\(^5\) but the more perplexing question is, “When is such a search valid without a warrant?” This comment attempts to answer that question, in part, by surveying and cataloging the law in Virginia on warrantless searches and seizures of automobiles.

To be valid, any search or seizure must comply with the fourth amendment to the Constitution.\(^6\) Since \textit{Mapp v. Ohio}\(^7\) the amendment has been applied equally to state and federal law officials; evidence seized in violation of the amendment has been excluded from the trier of fact. A state could provide its citizens with more than the minimum protection,\(^8\) but so

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1. The term “automobile” is used inclusively to mean cars, trucks, vans, and other self-propelled vehicles for personal use. “Automobile” is used in place of the others only for the sake of familiarity and convenience.
2. With the advent of campers, vans, and the like, vehicles are expected to be private, especially since almost all are equipped with locks, glove compartments and trunks.
3. United States v. Chadwick, 97 S. Ct. 2476, 2481-83 (1977). The amendment was never limited to homes or offices, but “the searches and seizures which deeply concerned the colonists and which were foremost on the minds of the framers, were those involving invasions of the home . . . .” \textit{Id.} at 2482. Now, it is known that the fourth amendment “protects people, not places.” Katz v. United States, 389 U.S. 347, 351 (1967).

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far, Virginia has not done so. Thus, the sole governing language is that of the fourth amendment:

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. 10

There has been much debate on the construction of the amendment. For a time it was thought that, with or without a warrant, the search had only to be reasonable under all the circumstances to be constitutional. 11 Now, it is well settled that the second part of the amendment, the warrant clause, qualifies the first; thus, there is a "warrant requirement"—searches without a warrant are per se unreasonable (and therefore unconstitutional) subject to a few narrowly construed exceptions. 12


10. U.S. Const. amend. IV.


The general exceptions to the requirement of a warrant currently recognized by the Supreme Court include the following: warrantless search incident to a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967) (The "hot pursuit" exception has also been given the label of "emergency circumstances" exception, in recognition that the hot pursuit of a felon may be only one of many possible emergency circumstances requiring prompt attention. For a more thorough discussion see Bacigal, The Emergency Exception to the Fourth Amendment, 9 U. Rich. L. Rev. 249 (1975)); stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968); the plain view doctrine, Coolidge v. New Hampshire, 403 U.S. 443 (1971); consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and the Carroll doctrine, Carroll v. United States, 267 U.S. 132 (1925) (This exception is more generally recognized as the "automobile exception").

Most of these exceptions require the presence of exigent circumstances. The warrant requirement serves to further several constitutional objectives. First, the prior determination by a magistrate of the necessity of a search is intended to eliminate searches not based upon probable cause. Another objective is to eliminate the possibility of a general exploratory rummaging in a person's belongings. Coolidge v. New Hampshire, 403 U.S. 443, 467-68 (1971). In addition, the requirement of a warrant also serves to prevent hindsight from affecting the evaluation of the reasonableness of the search or seizure. United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976).
Automobiles have the benefit of the warrant requirement since they are "effects" under the fourth amendment. However, the courts have traditionally treated automobiles differently from homes and offices when judging the constitutionality of a search—warrantless searches of automobiles have been permitted where searches of homes or offices would not be. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."

In fact, there are two broad categories of cases in which warrantless searches of automobiles have been upheld. The "automobile exception" proper, or Carroll doctrine, involves the search of an automobile on the highway where there is probable cause to support the search and "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality . . . ." Warrantless searches of automobiles have also been upheld where the police had no probable cause and where there was no exigency. These cases do not fall within the true "automobile exception"; rather, the evidence is admitted under a variety of other, general exceptions to the warrant requirement as they apply to automobiles. Evidence may be seized when discovered in plain view or when found incident to arrest, or at other times when the Carroll doctrine does not apply.

II. WARRANTLESS SEARCHES OF AUTOMOBILES WHERE PROBABLE CAUSE IS NOT PRESENT

Although probable cause must ordinarily be present to support a search, there are instances of non-searches, limited searches, or justified searches where probable cause is not necessary.

A. Plain View

The theory of plain view underlies most of the legitimate searches conducted without probable cause. "What the 'plain view cases' have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Many of the other exceptions supply the justification for the intrusion, to which the inadvertence of plain view is added, to make the seizure legitimate.

The meaning of inadvertence has plagued the courts. The Virginia Supreme Court has not fully recognized it. In Cook v. Commonwealth, the court stated that it is "entirely lawful . . . for a police officer who is on a public street or sidewalk to look, either deliberately or inadvertently, into an automobile parked on the street and to observe what is exposed therein to open view." The court relied heavily on the fact that the automobile was parked in public and reasoned that any object which a person


20. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). The inadvertence requirement implies that the discovery of the incriminating object not be anticipated, so that it may be said that no search has been conducted for that particular object. *Id.* at 466-71.


21. Benign purpose searches, see part II.B. infra; inventory searches, see part II.C. infra; searches of forfeited automobiles, see part II.D. infra; and inspections of identification numbers, see part II.E. infra.


25. *Id.* at 73, 216 S.E.2d at 50. In Cook, the police officer had a warrant to search the defendant's apartment; he seized contraband from the apartment but had reason to believe that all of the contraband had not been found. The officer went to the defendant's car, which was parked in the street outside the apartment. Upon looking into the automobile, he observed a brown paper bag. Protruding from the bag was a "plastic face mask", of a type the officer had seen being used to smoke marijuana. The officer reached into the car and retrieved the bag. Inside the bag, he found nine foil packages containing hashish. The court held that when a police officer stands on a public street, looks into an automobile and sees incriminating evidence in plain view, he "does not . . . [conduct] a search in the constitutional sense." *Id.* at 73, 216 S.E.2d at 50. Compare Cook v. Commonwealth, 215 Va. 71, 216 S.E.2d 48 (1975) with Matthews v. Commonwealth, 218 Va. 1, 235 S.E.2d 306 (1977).

26. "There can be little, if any, expectation of privacy when one parks his automobile on a public street and leaves therein, openly exposed to view, items of contraband or other
"knowingly exposes to the public is not a subject of protection by the constitutional prohibition against unreasonable searches."27

More recently in Thims v. Commonwealth,28 the court extended its holding in Cook. In Thims the automobile was parked in a private driveway, not a public street, and should have been more protected. But since the vehicle was exposed to public view, the court assumed again that there was no reasonable expectation of privacy.29 In addition, the court stated that the inadvertence requirement of Coolidge was inapplicable because no search had occurred when the officer observed the automobile parked in the defendant's driveway.30

Evidence of crime." Id. at 73, 216 S.E.2d at 49. From this, it may be inferred that the court would have considered the inadvertence requirement, had the vehicle not been parked on a public street.

27. Id. at 73, 216 S.E.2d at 50. See also G. M. Leasing Corp. v. United States, 97 S.Ct. 619, 628 (1977); Cardwell v. Lewis, 417 U.S. 583 (1974).

In his concurring opinion, Justice Poff maintained:

The hashish, packaged in foil inside a bag within the brown bag on the floorboard, was not in open view, was not identifiable as contraband, and was not discovered except by an "exploratory investigation", an "invasion and quest", and a "prying into hidden places", i.e., by a search.

216 Va. at 74, 216 S.E.2d at 50 (Poff, J., concurring). Justice Poff suggested that the search and seizure could be upheld on the basis of the Carroll doctrine. Id. at 75, 76, 216 S.E.2d at 51-52 (Poff, J., concurring). Inasmuch as the inadvertence requirement was developed to prevent the conversion of a limited warrant into a general exploratory search warrant, Coolidge v. New Hampshire, 403 U.S. 433, 467 (1971), it would appear that the concurrence is the better reasoned opinion.

See also Lugar v. Commonwealth, 214 Va. 609, 202 S.E.2d 894 (1974); Carter v. Commonwealth, 209 Va. 317, 163 S.E.2d 589 (1968). In Lugar, the defendant consented to the officers' entering the apartment to search for a fugitive. Upon entering, the officers observed controlled drugs in plain view on the floor. Although the officers had no search warrant, they searched the apartment for additional drugs. The court held that the consent to enter the apartment for the purpose of looking for the fugitive gave the officers the right to make a reasonable search of places where a fugitive might hide, but did not give the privilege to make a general warrantless search. The seizure of the drug discovered inadvertently on the floor was proper; however, the subsequent search of the entire premises was improper. Id. at 611-12, 202 S.E.2d at 897. Lugar indicates that the court will be stricter in applying the "plain view" doctrine when the seizure in question has been conducted on private premises, as opposed to an automobile parked on the street.

28. 218 Va. 85, 235 S.E.2d 443 (1977). An officer, who was given information by teenage girls implicated with the defendant, learned that a stolen stereo was placed in the trunk of a certain automobile, that the automobile was bought with a stolen and forged check, and that it was parked in the defendant's driveway. The officer proceeded to the defendant's residence, where he saw from the street what he reasonably believed to be the stolen automobile. The court held that the officer was justified in seizing the automobile as evidence of a crime.

29. Id., at 92-93, 235 S.E.2d at 447.

30. Id.
In his dissent in *Thims*, Justice Poff pointed out that *Cook* considered only whether a search was conducted; the validity of the resultant plain view seizure was not an issue. Thus, *Cook* could not validate the warrantless seizure of an automobile parked in a constitutionally protected zone. Justice Poff also maintained that the police knew of the presence of the automobile and planned to seize it long before it was spotted. Therefore, the failure to obtain a warrant was inexcusable.

On this analysis, it would seem that the holding in *Thims* rests upon shaky grounds.

**B. Benign Purpose Searches**

In the course of their jobs, police often perform "caretaking" functions with respect to automobiles. This frequent, non-criminal contact sometimes brings them within plain view of evidence or instrumentalities of crime. For example in *Cady v. Dombrowski*, the police believed that an officer's gun was in a car in their possession. They searched the car to keep the weapon from falling into the hands of vandals but found bloodstained clothing instead. The evidence was admitted. In *Harris v. United States*, the police opened the door of a car in their custody for the benign purpose of rolling up the window against the rain. When the evidence of a crime was subsequently and inadvertently discovered in plain view, its seizure was also allowed. The Supreme Court concluded that it would be unreasonable to require a warrant in these situations.

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31. *Id.*, at 94 n.1, 235 S.E.2d at 448 n.1. (Poff, J., dissenting).
32. *Id.*, at 94-95, 235 S.E.2d at 448-49 (Poff, J., dissenting).
34. An off-duty policeman was arrested for drunk driving after a late-night accident. The disabled car was towed to a private garage. The police, believing that the arrestee was required to carry his service revolver at all times, made a search of his car and discovered items in the trunk which eventually led to the defendant's conviction of murder. *Id.* at 435-39. The Court upheld the warrantless search on the grounds that it was made pursuant to the police department's non-investigative duties and motivated out of a concern for the safety of the public who might be endangered, should the gun be found and removed by an intruder. *Id.* at 447-48. See *87 HARV. L. REV.*, 835, 848-53 (1974).
36. The rule of *Cady v. Dombrowski*, 413 U.S. 433 (1973), that warrants are not required
Virginia has accepted the rationale which permits warrantless searches for legitimate, non-evidentiary purposes. In *Fox v. Commonwealth*, an officer encountered an unattended vehicle parked off the road on a remote secondary highway. Suspecting foul play, he investigated. The Virginia court said, "it was proper for him to have sought some identification of the vehicle, and to open the doors and look on the inside for that purpose. Such did not constitute an unlawful search." The discovery of marijuana on the floorboard was labeled a "plain view" discovery.

Benign investigations are necessary when the purpose is adequately substantiated. The officer in *Fox* would have been remiss not to have investigated what he found. Having no probable cause, he could not have gotten a warrant. The problem is that it is easy to conjure a benign reason to intrude either before or after the evidence has been discovered. A court should, therefore, seek strong proof of the legitimate, non-evidentiary purpose, before it admits evidence discovered during the benign intrusion.

C. Inventory Searches

When police impound an automobile, they characteristically inventory the contents. This practice developed in response to three "distinct needs: the protection of the owner's property while it remains in police custody, . . . the protection of the police against claims or disputes over lost or stolen property, . . . and the protection of the police from potential danger . . . ." With these justifications, inventory searches might easily for searches conducted with a benign purpose, makes the need for a warrant dependent on the intent of the police conducting the search. Since intent poses difficult factual questions, there is danger of pretext. But even when conducted for a benign purpose, the search must be reasonable in light of the competing interests of the public and the individual.

38. 213 Va. 97, 189 S.E.2d 367 (1972).
39. *Id.* at 99, 189 S.E.2d at 369. Upon investigation, the officer noticed that the inside of the vehicle "was in disarray as if a scuffle had occurred." Hence, the search was not an unreasonable one. *Id.*
40. *Id.* at 100, 189 S.E.2d at 370.
41. Vehicles have been taken into temporary police custody for such purposes as removing an abandoned or disabled vehicle from the highway, towing an automobile after a parking violation, and impounding a vehicle for safekeeping pursuant to the driver's arrest. In these circumstances, the police often conduct inventory searches of the vehicles pursuant to statutory or departmental authorization. See, e.g., South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973); Annot., 48 A.L.R.3d 537 (1973).
42. South Dakota v. Opperman, 428 U.S. 364, 369 (1976). In the past, it has been argued that in view of the violation of privacy that an inventory implies, special circumstances ought to be shown to justify a warrantless inventory. See 87 HARY. L. REV. 835, 853 (1974). Mr. Justice Powell recognized that the "[r]esolution of this question requires a weighing of the
be considered a subset of the benign purpose searches. Consistent with that logic, the Supreme Court in *South Dakota v. Opperman*43 upheld the routine, warrantless inventory search of a lawfully impounded automobile. The procedure used by the policy in *Opperman* was found to be "standard throughout the country" and not just some pretext for a general investigatory search.44 The court also found that "it was not unreasonable to open the unlocked glove compartment, to which vandals would have ready and unobstructed access once inside the car."45

One of the cases cited in support of *Opperman* was *Cabbler v. Commonwealth*.46 *Cabbler* upheld the warrantless inventory of the defendant's vehicle which took place after he was arrested away from home while driving his automobile. Although *Cabbler* was decided prior to *Opperman*, the reasoning is very similar.

**D. Searches of Forfeited Automobiles**

Automobiles used to transport contraband are often statutorily subject to forfeiture.47 Virginia is no exception, permitting seizure and forfeiture of "motor vehicles . . . used in connection with the illegal . . . distribution of controlled substances . . . ."48 In *Cooper v. California*,49 the Supreme Court did not consider whether police should be allowed to open and search a locked glove compartment or a locked trunk. In such a case, the three "distinct needs" of the police would be substantially lessened as justifications. See note 42 and accompanying text supra.

In addition, the Court did not hold that the police may proceed with an inventory search when the owner expressly denies permission or is able to make other arrangements for the safekeeping of his belongings. The "reasonableness" of a search made under circumstances such as these would certainly be more questionable.

44. Id. at 376.
45. Id. at 376 n. 10. The Court did not consider whether police should be allowed to open and search a locked glove compartment or a locked trunk. In such a case, the three "distinct needs" of the police would be substantially lessened as justifications. See note 42 and accompanying text supra.

47. Cooper v. California, 386 U.S. 58, 60 (1967).
Court held that such a forfeiture justifies the warrantless intrusion of police for the purpose of a protective inventory.

A countering argument can be raised from the Code of Virginia. Under section 4-56 of the Code, the search of a vehicle believed to be carrying contraband requires a warrant. It is true that the state supreme court has carved out a set of "specifically recognized exceptions," but the exceptions do not include the mere occurrence of forfeiture.

Cooper supplies another reason to uphold the search. It may be justified in that the police obtain a possessory interest in the vehicle. For their own protection, the police should be allowed to search.

E. Inspection of Identification Number

When an officer has legitimate grounds for inquiry, he does not need full probable cause to inspect an automobile's identification number. In Fox v. Commonwealth, the Virginia Supreme Court held that an officer, when confronted with a set of "highly suspicious circumstances," had legitimate of the law. Under § 4-56, "it shall be the duty of such officer to obtain a legal search warrant . . . ."

49. 386 U.S. 58 (1967). Cooper was convicted of the sale of heroin to a police informer. The evidence seized from his automobile was a small piece of a brown paper sack taken from the glove compartment. Id. at 58. It matched the brown paper in which the heroin had been wrapped. Id. at 63. At the time of Cooper's arrest, his automobile was seized and towed to a police garage, pursuant to a California statute which provided that "any officer making an arrest for a narcotics violation shall seize . . . any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics. Id. at 60. See note 36 supra.

Cooper may best be viewed as the "routine processing" of a car which the police were required by law to possess until forfeiture proceedings. Given this prior valid intrusion, the case could then be analyzed under the "plain view" exception. See generally Moylan, supra note 3, at 1037-43.


51. One 1963 Chevrolet Pickup Truck v. Commonwealth, 208 Va. 506, 158 S.E.2d 755 (1968). Those exceptions to the warrant requirement to which the court referred were: where there is consent to the search; search incident to a lawful arrest; search of abandoned property; and where that which is seized is in plain view. Id. at 508-09, 158 S.E.2d at 758.

52. Cooper v. California, 386 U.S. 58, 61-62 (1967). This justification overlooks the fact that a forfeiture involves an involuntary transfer of possession, giving the citizen no opportunity to protect his privacy interest in the car's contents, such as he would normally have in a voluntary transfer. Given the typical criminal setting that accompanies most forfeitures, it would seem that, upon balancing, the citizen's interest in secrecy outweighs the police department's justifications. Thus, a better rule may be to allow the citizen, in the absence of a warrant, to reclaim the contents of the car. See 87 Harv. L. Rev. 835, 848 (1974).

53. United States v. Powers, 439 F.2d 373, 375-76 (4th Cir. 1971). The search must be based on facts that would warrant a man of reasonable caution to believe that the search is appropriate. Id. at 376.

grounds to seek identification of the vehicle.\textsuperscript{55} In \textit{Shirley v. Commonwealth},\textsuperscript{56} the court stated that "[t]he search of that part of a vehicle on which serial or identification numbers are found has been regarded as such a minimal invasion of a person's privacy that such a search, if a search at all, need not be based on probable cause but on some lesser standard of belief."\textsuperscript{57} The standard is not very clear, but if it is met, any evidence of a crime discovered in plain view in the course of the search may be properly admitted in the subsequent trial.\textsuperscript{58}

F. Search Incident to Arrest

Unlike the exceptions so far discussed, a search incident to arrest does not merely serve as the justification for a plain view seizure. The arrest itself justifies a protective search, even if the search is "advertant."\textsuperscript{59}

The difficulty is establishing the permissible scope of the search. The search-incident-to-arrest doctrine was first thought to allow only the immediate search of the person of an arrestee for evidence of crime.\textsuperscript{60} Soon the doctrine was expanded to include a search of the premises where the arrest was made.\textsuperscript{61} The Supreme Court, reacting to the increasingly broad permissible scope, began placing limitations upon the incidental-search doctrine.\textsuperscript{62} Later decisions negated the effect of these limitations.\textsuperscript{63} This see-saw battle finally ended with \textit{Chimel v. California},\textsuperscript{64} where the Court chose to limit the search-incident exception to a search of the person and the areas within his immediate reach.

\textsuperscript{55} 213 Va. at 99, 189 S.E.2d at 369.
\textsuperscript{57} \textit{Id.} at 56, 235 S.E.2d at 436.
\textsuperscript{58} Fox v. Commonwealth, 213 Va. 97, 100, 189 S.E.2d 367, 370 (1972).
\textsuperscript{60} Weeks v. United States, 232 U.S. 383, 392 (1914) (dictum); see Carroll v. United States, 267 U.S. 132, 158 (1925) (dictum).
\textsuperscript{61} Marron v. United States, 275 U.S. 192, 199 (1927); Agnello v. United States, 269 U.S. 20, 30 (1925) (dictum).
\textsuperscript{64} 339 U.S. 722 (1969). The police, armed with an arrest warrant, arrested the defendant in his home for burglary. The defendant's entire house was searched and incriminating evidence was found. The Court invalidated the search by holding that it was unreasonable to search beyond the defendant's person and the area from which he might have gained possession of a weapon or destructible evidence. \textit{Id.} at 762-63, \textit{overruling} United States v. Rabinowitz, 339 U.S. 56 (1950).
Five years before *Chimel*, the Court had held that the warrantless search of the impounded car owned by a person arrested for vagrancy could not be justified as incidental to arrest. The Court considered the search too remote in time and place.\textsuperscript{65} *Chimel* revived this decision, and as a consequence, courts began holding *Chimel* applicable to automobile searches.\textsuperscript{66}

By virtue of *Chimel*, the warrantless search of an entire automobile, trunk included, should not be allowed solely under the search-incident-to-arrest exception.\textsuperscript{67}

The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to arrest.\textsuperscript{68}

Traffic arrests present their own problems. Police may conduct a full search of a person incident to an arrest for a traffic violation only in instances involving "full custodial arrests."\textsuperscript{69} Where the officer intends only to issue a traffic citation or warning, a limited "pat-down" search is justified if the officer maintains a reasonable suspicion that his personal safety is in jeopardy.\textsuperscript{70}

There are few post-*Chimel* Virginia decisions dealing with the search-

\textsuperscript{67} But see 87 Harv. L. Rev. 835, 836 n.8 (1974).
\textsuperscript{70} Pennsylvania v. Mimms, 98 S.Ct. 330 (1977). (A bulge in the jacket of an automobile operator stopped for a traffic violation permitted the officer to conclude that the man was armed and therefore dangerous to the safety of the officer. Thus, a limited "pat-down" search was justified.)

It has been established that a stop-and-frisk search may be made of an occupant of an automobile, just as it may be made of a pedestrian, if there are reasonable grounds for the stop. United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972). Because the stop and frisk is a lesser intrusion than a search and seizure, it may be permitted on predicates less substantial than probable cause. There must, however, be at least a reasonable suspicion. Terry v. Ohio, 392 U.S. 1 (1969); Sibron v. New York, 392 U.S. 40 (1968). \textit{See also} Simmons v. Commonwealth, 217 Va. 552, 231 S.E.2d 218 (1977).
incident-to-arrest exception as it applies to automobiles. In one case, the
Virginia Supreme Court was unclear whether the search of an entire
pickup truck was conducted pursuant to the search-incident exception or
the *Carroll* exception. Another decision provided dictum to the effect that
the *Chimel* limitations would be "applicable where the predicate for the
warrantless search is a lawful arrest." Finally, in *Hollis v. Commonwealth*,
the court stated that "[i]ncident to . . . arrest, the officers could make a warrantless search of Hollis's person and of the area
within his reach where he might obtain a weapon or destroy evidence." Therefore, it seems that Virginia courts must apply *Chimel* standards to
search-incident-to-arrest cases in which the arrestee is in an automobile.

G. Consent Searches

Searches with consent are the final category of valid, warrantless
searches without probable cause. Consent searches are not so much an
exception to the warrant requirement as a waiver of rights. If consent has
been voluntarily given by the person subjected to the search or someone
else with a possessory interest in the automobile, the automobile may be
searched.

71. Kirby v. Commonwealth, 209 Va. 806, 167 S.E.2d 411 (1969), was decided prior to
S.E.2d 894, 898 (1974), the court recognized *Chimel* as controlling precedent for search-
incident doctrine. But, *Lugar* involved the search of an apartment, rather than an auto-
mobile, and cannot be relied upon to show that the court will apply *Chimel* standards to an
automobile. *Id.* at 610, 202 S.E.2d at 896. See also *Lawson v. Commonwealth*, 217 Va. 354,
228 S.E.2d 685 (1976).


73. Westcott v. Commonwealth, 216 Va. 123, 125, 216 S.E.2d 60, 63 (1975). An officer who
had probable cause to believe that narcotics were being transported in an automobile driven
by the defendant stopped and conducted a warrantless search of the entire vehicle. The court
held that police officers are entitled to stop and search a moving vehicle if they have probable
cause to believe that it contains contraband. *Id.* at 125-26, 216 S.E.2d at 62.

74. 216 Va. 874, 223 S.E.2d 887 (1976). An officer, acting on an informant's tip, observed
the defendant, who was seated in an automobile, remove what appeared to be a hand-rolled
cigarette from his mouth and throw it to the floor. The court held that after opening the car
door and detecting an odor of marijuana the officer could, incident to arrest, make a warrant-
less search of the defendant and the area within his immediate reach. *Id.* at 878, 223 S.E.2d
at 890.

75. *Id.*

76. See also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407
U.S. 143 (1972).


H. Summary

To have a valid search, the police must usually have both probable cause and a magistrate's warrant. As the above sections indicate, there are instances when officers may search an automobile or seize evidence from it even though there is neither probable cause nor a warrant. The courts have typically justified these decisions by pointing to the necessity of efficient law enforcement. But since these instances are furthest away from the basic construction of the amendment, the courts should apply them cautiously.

III. Warrantless Searches of Automobiles Where Probable Cause is Necessary

In *Carroll v. United States*, the Supreme Court recognized that the presence of exigent circumstances, coupled with the existence of probable cause, made the requirement of a search warrant unreasonable. Whenever these two criteria are satisfied, the warrantless search of an automobile may proceed under the *Carroll* doctrine.

The criteria of probable cause is uniform. Officers have probable cause to search whenever "the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that . . . [contraband] was being transported in the automobile which they stopped and searched." Thus, when the police observed a vehicle matching the description of an automobile allegedly used in a recent burglary, they had probable cause to search. But, probable cause was found lacking

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80. See notes 6-12 and accompanying text supra.
81. 267 U.S. 132 (1925). Two federal officers stopped a vehicle which they believed to contain contraband alcohol. A search on the highway revealed the contraband stashed behind the back seat of the automobile. The Court upheld this warrantless search on the basis of the exigency involved—the officer had probable cause to search, and the car was mobile. Since the automobile could easily be driven away, it was impracticable to require the officer to obtain a search warrant. *Id.* at 153.
82. The presence of "exigent circumstances" implies the existence of need sufficient to override the interests of a private citizen. The *Carroll* doctrine is only one application of exigency searches. *See Warden v. Hayden*, 387 U.S. 294 (1967); 87 *Harv. L. Rev.* 835, 836-37 (1974); note 12 *supra*.
when the warrantless search of an automobile was predicated solely upon a trooper's observation of a brown paper bag and a "pack of cigarette wrapping papers" on the floorboard of the defendant's car.\textsuperscript{8} Just as the fourth amendment requires that all searches and seizures, including those made with a warrant, be reasonable,\textsuperscript{87} the determination of probable cause must also be based on the concept of reasonableness.

The criteria of exigency is more troublesome. \textit{Carroll} held that a moving vehicle in a public place creates exigent circumstances,\textsuperscript{88} but the decision was unclear as to the degree of mobility necessary. This question was partially answered in \textit{Chambers v. Maroney}\textsuperscript{89} when the Court extended the scope of \textit{Carroll} to allow an automobile to be searched at the station house after the driver's arrest.\textsuperscript{90} Though it would seem that there would no longer be any exigent circumstances after the occupants were under arrest and the car under police control, Mr. Justice White maintained that "[t]he probable cause factor still obtained at the station house and so did the mobility of the car. . . ."\textsuperscript{91}

\textsuperscript{8} a report of a burglary was broadcast over the police radio, the police observed a car matching the description of the suspect's vehicle as it arrived at the residence of a "known fence". After watching the occupants of the vehicle go into the "fence's" residence and remain there for a short time, the police had probable cause to conduct a search of the vehicle. \textit{Id.} at 500, 211 S.E.2d at 75.

\textsuperscript{86} Matthews v. Commonwealth, 218 Va. 1, 235 S.E.2d 306 (1977). After stopping the defendant for speeding, a trooper observed a pack of cigarette papers on the floorboard of defendant's car. The trooper looked further, and discovered a brown paper bag tucked beside the driver's seat. Upon opening the bag, he found what appeared to be marijuana. The defendant argued cigarette papers are "intrinsically lawful objects", and could not alone provide sufficient probable cause for the search or the seizure. The court reasoned:

\[ \text{The cigarette papers were in plain view in the automobile, and perhaps, so was the brown bag itself; but the contents of the bag were not visible. And although the police officer did make "some connection" between the cigarette papers and the brown bag, the connection was not combined with any other circumstance which might have justified a rational belief that the bag contained contraband drugs.} \]

\textit{Id.} at 2, 235 S.E.2d at 307. \textit{But see} Cook v. Commonwealth, 214 Va. 686, 204 S.E.2d 282 (1924) (police had knowledge of the defendant's reputation).

\textsuperscript{87} \textit{See} text accompanying notes 10-12 \textit{supra}.

\textsuperscript{88} 237 U.S. 132 (1925); \textit{see note} 81 \textit{supra}.

\textsuperscript{89} 399 U.S. 42 (1970).

\textsuperscript{90} \textit{Id.} Four men in a station wagon, whom the police had probable cause to believe had recently committed armed robbery of a gas station, were stopped late at night in a dark parking lot. All four were arrested and taken to the police station. A warrantless search took place while the car was in police custody. \textit{Id.} at 52. The Court held that the search was proper. \textit{See} Texas v. White, 423 U.S. 67 (1975).

\textsuperscript{91} \textit{Chambers} v. Maroney, 399 U.S. 42, 52 (1970). A better rationale for the result in \textit{Chambers} is that since \textit{Carroll} would have permitted a search of the car prior to arrest, there is really no distinction in allowing the search to be made after arrest.

Arguably, because of the preference for a magistrate's judgment, only the immobili-
WARRANTLESS SEARCHES OF AUTOMOBILES

In *Coolidge v. New Hampshire*, the Supreme Court pointed to a lack of exigent circumstances as the chief reason for invalidating a search of an automobile. Even though the police had probable cause to search the car parked in the defendant's driveway, the defendant was arrested in his house, and there was no way in which he or anyone else could conceivably have gained access to the vehicle after the police had arrived. *Coolidge* served to halt the rapid expansion of the *Carroll* doctrine by requiring that there be a real possibility of the car's being moved.

The Supreme Court of Virginia has applied the *Carroll* doctrine in numerous decisions. One typical case involved stopping and searching a moving vehicle believed to be carrying historical documents stolen from a museum. A more recent case involved the warrantless search and seizure of an automobile by an officer who had reason to believe that the car might be stolen and contain stolen property.

*Id.* at 51-52. In any event, *Chambers* can be applied only to situations in which the initial confrontation between the policeman and the citizen was on the open highway, with the officer having probable cause to search. *Coolidge v. New Hampshire*, 403 U.S. 443, 463 n. 20 (1971). Under these circumstances, a warrantless search of the vehicle may be conducted either at the place where it was stopped or shortly thereafter at the police station. *Schaum v. Commonwealth*, 215 Va. 498, 501, 211 S.E.2d 73, 75 (1975).

92. 403 U.S. 443 (1971). In *Coolidge*, the police seized the defendant's car from his driveway after arresting him in connection with a murder. The police had known all along of the car's involvement in the crime, but they failed to procure a search warrant. The Court held the seizure and search of the car unconstitutional, and found that a valid warrant was necessary, since there was no reason to believe that the car would be moved. *Id.* at 458-64.

93. *Id.* at 462-64.

94. *Id.* For a more thorough discussion see *Moylan*, *supra* note 1, at 1004-08; 87 Harv. L. Rsv. 835, 837-45 (1974).


In his dissenting opinion, Justice Poff claimed that the majority discovered the exigencies "in hindsight":

The "inherent mobility" doctrine is viable only when mobility poses a realistic danger
Patty v. Commonwealth indicates that the court will look diligently to find exigent circumstances "where the police . . . [are] dealing with contraband goods concealed and about to be transported . . . in . . . [an] automobile. . . ." The court held that a car which was "momentarily inoperable," because the ignition coil had been removed, was still moveable and could be warrantlessly searched and seized because "[a]nother car loaded with more of defendant's companions, one of whom may have had another key to the . . . ignition, could have arrived at any time, paid the repair bill, required . . . [the attendant] to replace the ignition coil, and driven the load of marijuana away." This decision was made in spite of the defendant's contention that there was ample time to obtain a warrant during the five-hour interval between the arrival of the police at the scene and the defendant's arrest.

IV. Conclusion

For purposes of the fourth amendment, there is a constitutional difference between homes and automobiles. Many people, however, harbor an
expectation of privacy with respect to their automobiles as great or greater than as to their houses. "The Fourth Amendment protects people, not places."102 It is true that individuals must sacrifice part of their privacy in exchange for the privilege of using public roads, but this does not excuse the failure to procure a warrant when it could easily be obtained.

Courts should strictly enforce the warrant requirement. If the exceptions to the warrant requirement were narrowly construed, the rules would be more certain. Consequently, police officers would be more certain of when a warrant should be obtained. The ultimate effect would be to have fewer claims of having been subjected to an unreasonable search.

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