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### Back on the Road Again—The Mobility Exception in the 70's

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## BACK ON THE ROAD AGAIN—THE MOBILITY EXCEPTION IN THE 70's

The true test of law is not in its creation, but in its enforcement. The midwife has influence only once; the impact of one's keeper is felt many times. The Supreme Court gave birth to the *Coolidge*<sup>1</sup> doctrine with respect to the mobility exception<sup>2</sup> (an exception to the fourth amendment's<sup>3</sup> proscription against warrantless searches), but the development and application of the law fell to its keeper, the lower courts.

This Comment will attempt to identify the pattern of the application and development of the mobility exception in the lower courts since *Coolidge* and will reflect upon the potential impact of the more recent decision of *Cady v. Dombrowski*.<sup>4</sup> Prior to this examination, the judicial development of the mobility exception by the United States Supreme Court is reviewed.

### I. THE SPIRITUAL HERITAGE: AUTOMOBILES AND THE FOURTH AMENDMENT

The framers of the Constitution abhorred the prospect of continuing the tradition of the colonial period's indiscriminate "general warrant" search of persons and places.<sup>5</sup> The inclusion of the fourth amendment in the Bill of Rights consequently establishes the search warrant as a condition precedent to a "reasonable" search in the vast majority of cases:

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.<sup>6</sup>

In 1925, the United States Supreme Court, in *Carroll v. United States*,<sup>7</sup> promulgated an exception to the fourth amendment's search

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1. 403 U.S. 443 (1971).

2. See *Carroll v. United States*, 267 U.S. 132 (1925). See notes 7-12 *infra* and accompanying text.

3. U.S. CONST. amend. IV.

4. 413 U.S. 433 (1973).

5. See *Stanford v. Texas*, 379 U.S. 476, 480 (1965).

6. U.S. CONST. amend. IV.

7. 267 U.S. 132 (1925).

warrant requirement by allowing a warrantless search of an automobile when exigent circumstances existed. The Court defined exigent circumstances as those in which the mobility of the automobile renders it impracticable to secure a search warrant.<sup>8</sup> In *Carroll*, the defendant's automobile was stopped and searched as it was seen moving through the state by police who had probable cause to believe that it contained contraband liquor.<sup>9</sup> On the basis of evidence procured in the search, the defendants were convicted of violating the Prohibition Act.<sup>10</sup> The Supreme Court felt that, since the automobile was mobile and since the occupants had been alerted when the police stopped their car, an exigency was created which made the procuring of a warrant impracticable.<sup>11</sup> The focus of this "moving vehicle" exception was on the possible removal or destruction of evidence. Had the officers taken time to secure a warrant, the contraband liquor could have been removed from the vehicle or driven out of the jurisdiction.<sup>12</sup>

Crucial to the applicability of this exigent circumstances exception is the element of "mobility." It is significant that mobility has been given a special definition in the *Carroll* context. More than the mere capacity to be moved, as would be the ordinary connotation, it also necessitates the concurrence of other circumstances or events which render the opportunity for search a "fleeting"<sup>13</sup> one, such as the existence of "someone at large who has the power and ability to move [the car] before an officer can obtain a warrant."<sup>14</sup> Thus, it becomes clear that the foundation of the *Carroll* exception is the practicability of obtaining a warrant, which is itself dependent on the presence or absence of the element of "mobility."

In *United States v. Preston*,<sup>15</sup> the Court invalidated a warrantless search of an automobile at a police station because it was too remote in time to have been incidental to arrest<sup>16</sup> and because it was not within the *Carroll* exception since the vehicle was properly in police custody and not likely to be moved out of the jurisdiction.<sup>17</sup> The *Preston* de-

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8. *Id.* at 153.

9. *Id.* at 160.

10. *Id.* at 143-45. National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935).

11. 267 U.S. at 153, 161-62.

12. *Id.* at 153.

13. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

14. Murray & Aitkin, *Constitutional Limitations on Automobile Searches*, 3 Loy. L.A.L. REV. 95, 101 (1970).

15. 376 U.S. 364 (1964).

16. *Id.* at 367.

17. *Id.* at 368.

fendants were taken to the police station on a vagrancy charge,<sup>18</sup> along with the car in which they had been sitting.<sup>19</sup> After booking the defendants,<sup>20</sup> the car was searched for the first time,<sup>21</sup> and evidence was discovered which formed the basis for their conviction of another crime.<sup>22</sup> In invalidating the search, the Court said:

The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime . . . .<sup>23</sup>

Later decisions, however, so expanded the *Carroll* principle as to lose sight of its original justification—exigency resulting from mobility. In *Cooper v. California*,<sup>24</sup> decided three years after *Preston*, the Supreme Court upheld a warrantless search of an automobile at a police station one week after the defendant's arrest for selling narcotics.<sup>25</sup> Cooper's car had been impounded under a state statute relating to narcotics violations.<sup>26</sup> While the car was in police custody pending forfeiture proceedings,<sup>27</sup> the warrantless search was conducted, and narcotics were found.<sup>28</sup> The Court upheld the constitutionality of the search<sup>29</sup> despite the obvious ease with which a search warrant could have been obtained. The Court reasoned that, since the police had legal custody and since forfeiture proceedings would not commence for four months, it would be unreasonable to deny police the right to search.<sup>30</sup> The Court stated: "It is no answer to say that the police

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18. *Id.* at 365.

19. The arresting officers took his car to the station simply because they did not wish to leave it on the street. It was not suggested that they did this other than for Preston's convenience or that they had any right to impound the car and keep it from Preston or from whomever he sent for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him, as was their subsequent search of the car. See *Cooper v. California*, 386 U.S. 58, 61 (1967).

20. 376 U.S. at 365.

21. *Id.*

22. *Id.* at 365-66.

23. *Id.* at 368.

24. 386 U.S. 58 (1967).

25. *Id.*

26. CAL. HEALTH & SAFETY CODE ANN. § 11610 (West 1970). This section provides 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 and deliver it to the State Division of Narcotic Enforcement to be held as evidence until a forfeiture has been declared or a release ordered.

27. 386 U.S. at 60.

28. *Id.* at 60.

29. *Id.* at 62.

30. *Id.* at 60. The court added:

could have obtained a warrant, for '[t]he relevant test is not whether it is reasonable to procure a warrant but whether the search was reasonable.'"<sup>31</sup> It is true that the ultimate test of a search is its reasonableness.<sup>32</sup> Nevertheless, the *Cooper* Court ignored the principle that the impracticability of procuring a warrant is a necessary prerequisite to the determination that a warrantless search is "reasonable."<sup>33</sup>

The *Cooper* Court distinguished *Preston* on two grounds: first, the *Preston* search was not related to the alleged offense of vagrancy (*i.e.*, there are no instrumentalities or contraband involved in vagrancy), whereas the search of Cooper's car was related to the narcotics charge;<sup>34</sup> and, second, no state auto seizure statute existed in *Preston*.<sup>35</sup> Such factual distinctions are somewhat unconvincing. As Justice Douglas noted in his *Cooper* dissent, the reasoning and facts of *Preston* seemed to be on "all fours" with *Cooper*.<sup>36</sup> This would seem true even given the fact that the search in *Cooper* was related to the charged offense, while the search in *Preston* was not. Neither *Cooper* nor *Preston* involved a warrantless search *incident to an arrest*, and fears concerning destruction of evidence by the accused are justified only at that point in time. Furthermore, such fears are rarely justified in the auto situation even at the time of arrest, since the accused is in custody *outside* the auto and, therefore, does not have access to evidence *inside* the auto. For the same reason, searches of autos for weapons at the time of arrest are unjustifiable. As the *Carroll* Court made clear in originally creating the auto search exception, the sole justification is the mobility of the vehicle. In *Carroll*, the mobility justified a search for evidence related to the suspected offense based on probable cause existing *prior* to the arrest. In both *Preston* and *Cooper*, the searches occurred after the arrest and could only be justified if there were danger of evidence relating to the charged offenses

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This case is not *Preston* nor controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded . . . . The forfeiture of petitioner's car did not take place until four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their garage for such a length of time, had no right, even for their own protection, to search it.

*Id.* at 61-62.

31. *Id.* at 62, quoting *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

32. *Cooper v. California*, 386 U.S. 58 (1967).

33. See also *Chimel v. California*, 395 U.S. 752 (1969), which affirmed the continued vitality of the practicability principle delineated in *Carroll*. *Id.* at 764 n.9.

34. 386 U.S. at 61.

35. *Id.* at 59-61.

36. *Id.* at 65.

being destroyed by persons other than the accused. Such a danger exists only if the car cannot be retained in the custody of the police. In *Preston*, this mobility factor was arguably present since, as the *Cooper* Court recognized, the arresting officers took Preston's car to the station simply because they did not wish to leave it on the street. It was not suggested that they did this other than for Preston's convenience or that they had any right to impound the car and keep it from Preston or from whomever he sent for it. Even assuming that this theoretical mobility would justify a warrantless search, however, the *Preston* search was impermissible since it was totally unrelated to the charged offense—vagrancy. This second question of relatedness is irrelevant in *Cooper* since there was clearly no danger of insufficient police control of Cooper's vehicle. It had been impounded under a state statute because of its use in the narcotics offense charged. Thus, the second distinction between *Cooper* and *Preston*—the existence of the state auto seizure statute in *Cooper*—makes the warrantless search in *Cooper* even less justifiable than in *Preston* and renders the first distinction—the relatedness of the offense to the search—irrelevant. In both cases the possibility that evidence would be destroyed or taken from the jurisdiction was slight.<sup>37</sup> In addition, the time and space relations between seizure and search were very similar, there was sufficient time in each instance to secure a warrant, and, apparently, there was probable cause to search the automobiles in each case.<sup>38</sup>

On the face of it, then, *Cooper* appears to be inconsistent with *Preston* in holding that, where an automobile is validly within the custody of the police at the station and where probable cause for search exists, the search may be conducted without a warrant despite the lack of any existing urgency. The *Preston/Cooper* split was resolved in the view of some legal commentators<sup>39</sup> by *Chimel v. California*<sup>40</sup> and its rejection of the "reasonableness test" as a means for justifying searches incident to arrest.<sup>41</sup> The initiation of warrantless searches, accord-

37. See 52 MINN. L. REV. 533, 538 (1967).

38. See *Williams v. United States*, 412 F.2d 729, 735 (5th Cir. 1969); Annot., 26 L. Ed. 2d 893, 907 n.7 (1971).

39. Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A.L. REV. 626 (1970).

40. 395 U.S. 752 (1969).

41. In determining the validity of a warrantless search incident to arrest, the Supreme Court has held that the ultimate criterion is the "reasonableness" of the search. *Carroll v. United States*, 267 U.S. 132, 158-59 (1925). The Court has stated that incident to arrest, the seizure of items within the control of the arrestee is reasonable. *Agnello v. United States*, 269 U.S. 20, 30-31 (1925). The Court, however, has held that general exploratory searches and that warrantless seizures of evidence away from the place of

ing to *Chimel*, can be justified only by the necessities of the situation, and their scope must be similarly limited.<sup>42</sup> Searches were thus limited to an area from which the arrestee could obtain weapons or destroy evidence.<sup>43</sup> The Court also echoed the sentiment of *Katz v. United States*<sup>44</sup> regarding the sanctity of the warrant requirement under the fourth amendment:

[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.<sup>45</sup>

The *Chimel* Court's perception of the relative maturity of search and seizure decisional law was quickly dispelled, however, in *Chambers v. Maroney*.<sup>46</sup> In *Chambers*, a Gulf service station was robbed,<sup>47</sup> and one of the attendants was instructed to place the money in a right-hand glove.<sup>48</sup> Two teenage witnesses reported the incident to the police<sup>49</sup> who issued a bulletin with automobile and occupant descriptions.<sup>50</sup> The occupants were arrested,<sup>51</sup> and the car was driven to the station where it was searched.<sup>52</sup> The first search revealed nothing;<sup>53</sup> but after interrogating the suspects, the police conducted a second and more thorough search of the car which revealed revolvers, a right-hand glove filled with change, and credit cards bearing the name of another service station attendant who had been robbed earlier in the same area.<sup>54</sup> The Court held that the arresting officers had probable cause

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the arrest are unreasonable and proscribed by the fourth amendment. *United States v. Lefkowitz*, 285 U.S. 452 (1932). The reasonableness of a warrantless search incident to arrest depends upon the exigencies of the circumstances at the time of arrest. *Agnello v. United States*, 269 U.S. 20, 30-31 (1925). The test is whether it is reasonable for the police to secure a search warrant beforehand. *Trupiano v. United States*, 334 U.S. 699, 708 (1948). A more flexible criterion of reasonableness was declared by the Court in *United States v. Rabinowitz*, 339 U.S. 56, 65-66 (1950), where it was pointed out that the relevant test was not whether the police had time to secure a search warrant, but whether the search was reasonable.

42. 395 U.S. at 762-63.

43. *Id.*

44. 389 U.S. 347 (1967).

45. *Id.* at 357 (footnote omitted).

46. 399 U.S. 42 (1970).

47. *Id.* at 44.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

to make the arrest,<sup>55</sup> but that the *delayed* search could not be justified as incident to the arrest.<sup>56</sup> The *Chambers* Court then turned to an examination of potential exigencies arising out of the factual situation in order to determine if the warrantless search was satisfactory. As in *Preston* and *Cooper*, there is language in *Chambers* which suggests that the applicability of the *Carroll* exception necessitated something more than the mere fact that an automobile was involved.<sup>57</sup> Nevertheless, the *Chambers* Court felt that *both* the probable cause *and* the mobility factor continued at the station and was thus willing to permit a warrantless search either on the highway or at the station.<sup>58</sup> The highway search falls neatly into the *Carroll* "automobile exception" because of the substantial risk of losing the car to another jurisdiction. The same justification is apparently absent, however, when the automobile is in custody at the station, unless there is some presumption to be drawn from the inherent self-propelled mobility of an automobile.

The *Chambers* Court had touched all the right *Carroll* bases but still found a circuitous path home. Strictly applied, *Carroll* would have conditioned the search upon a validly obtained warrant, since potential mobility alone was insufficient when the potential did not give birth to an exigency. An impounded vehicle is hardly a "fleeting target," "[n]or . . . was there any danger that the car would be moved out of the locality or jurisdiction."<sup>59</sup>

Justice Stewart in *Chimel* had noted that the scope of a warrantless search was to be circumscribed by the demands of the situation and was not to be freely expanded and that no search was to be conducted without a warrant despite the unquestionable existence of probable cause.<sup>60</sup> Contrary to the spirit of *Chimel*, *Chambers* went beyond the necessities of the situation in allowing a warrantless search when the police had the authority to temporarily immobilize the auto while a warrant was sought. The Court recognized the two alternatives avail-

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55. *Id.* at 46.

56. *Id.* at 37, citing *Preston v. United States*, 376 U.S. 364, 367 (1964).

57. *Carroll* . . . holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.  
399 U.S. at 51.

58. *Id.* at 51-52. The *Cooper* court justified the search on grounds of police safety and reasonableness since they had to keep the auto at least four months anyway, while the *Chambers* court was concerned with an ad hoc balancing of fourth amendment values.

59. *United States v. Preston*, 376 U.S. 364, 368 (1964).

60. 395 U.S. at 763, 765.



able to the police in such *Carroll*-like situations:

[E]ither the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.<sup>61</sup>

Prior to *Chimel*, decisions had adopted the view that a warrantless seizure, as opposed to a warrantless search, represented the lesser of the two intrusions.<sup>62</sup> In *Vale v. Louisiana*,<sup>63</sup> the defendant was arrested outside his home on a narcotics charge.<sup>64</sup> At that time there was probable cause to believe that the house contained narcotics;<sup>65</sup> however, the inside of the house was too remote from the point of apprehension for a search to be incident to the arrest.<sup>66</sup> The Court did not address itself to the validity of a limited intrusion of a cursory nature to determine if anyone was in the house who might destroy incriminating evidence;<sup>67</sup> it simply invalidated the extensive warrantless search of the house.<sup>68</sup> In *United States v. Van Leeuwen*,<sup>69</sup> the Court upheld the validity of the lesser intrusion; namely, a warrantless one day seizure of a suspicious package in the mails while a search warrant was obtained.<sup>70</sup> *Terry v. Ohio*<sup>71</sup> offers yet another example of the Court's disposition in favor of limited response by its enunciation of the limited frisk rule to defuse potential danger to police where a warrantless search is not permissible. Taken together, these decisions point to a strong judicial preference for restrained police response in cases which present fourth amendment questions. Thus, when an urgent situation may be answered by temporary seizure, police conduct should be confined until a warrant can be obtained.<sup>72</sup>

61. 399 U.S. at 51.

62. *Id.* at 61 (Harlan, J., dissenting). See notes 43-49 *supra* and accompanying text.

63. 399 U.S. 30 (1970).

64. *Id.* at 32.

65. *Id.* at 32, 34.

66. *Id.* at 34.

67. See generally *id.* at 35.

68. *Id.* at 34.

69. 397 U.S. 249 (1970).

70. *Id.* at 249.

71. 392 U.S. 1 (1968). *Terry* held that an officer may make a limited "frisk" of a suspect if he fears for his personal safety, but may not undertake a full warrantless search. *Id.* at 20, 30.

72. The debate was apparent even in *Chambers*. Justice White, speaking for the Court, noted that:

Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which is the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circum-

Viewed by some as a significant retreat from *Chimel*,<sup>73</sup> *Chambers* produced predictions of lower court confusion<sup>74</sup> and of the complete deletion of auto searches from the ordinary requirement of judicially sanctioned search warrants.<sup>75</sup> The inherent mobility of a car appeared sufficient to justify a warrantless search when probable cause existed to believe that a search would produce contraband or evidence of a crime.

In a case presenting perhaps the most detailed treatment of the subject, *Coolidge v. New Hampshire*,<sup>76</sup> some of the fears inspired by *Chambers* were eased, for the Court, in a sharply divided opinion,<sup>77</sup> seemingly returned to its original concept of mobility and the attendant requirement that conditions be such as to create a danger that the automobile would be removed or evidence destroyed before the police could obtain a warrant.

Defendant Coolidge had been a suspect in the murder of a fourteen year old girl for some time.<sup>78</sup> A week after her body was found, he was interrogated and then released after one night in jail,<sup>79</sup> only to be arrested at his home three weeks later.<sup>80</sup> His car was towed to

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stances.

399 U.S. at 51-52. Justice Harlan, concurring in part, countered: "I believe it clear that a warrantless search involves the greater sacrifice of Fourth Amendment values." *Id.* at 64.

73. See note 109 *infra*.

74. See *State v. Mehciz*, 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971); *Alcala v. State*, 487 P.2d 448 (Wyo. 1971).

75. See Note, *Search and Seizure Since Chimel v. California*, 55 MINN. L. REV. 1011, 1027 (1971); 46 NOTRE DAME LAW. 610, 615 (1971).

76. 403 U.S. 443 (1971).

77. The plurality opinion by Justice Stewart was joined in by Justices Douglas, Brennan and Marshall. *Id.* at 445. Justice Harlan concurred in the result and joined the plurality in Parts I, II-D and III of their opinion. He refused to concur in Parts II-A, II-B and II-C, which refuted state theories that the search was incident to arrest (*id.* at 455); that it was predicated on the automobile exception, without a showing of exigent circumstances (*id.* at 458); or that it was valid on a "plain view" theory of searching the car as an "instrumentality of the crime." *Id.* at 464. Chief Justice Burger joined the dissent of Justice White (who sought to defend his opinion for the Court in *Chambers*), and Parts II and III of Justice Black's dissent. Justice Blackmun also agreed with most of Part II and III of Justice Black's dissent, and he agreed with most of Part I of Justice Black's opinion, which argued that the fourth amendment supports no exclusionary rule.

78. *Id.* at 445-47.

79. *Id.* at 446.

80. The police had secured a search warrant, but it was held invalid. "[T]he State Attorney General, who had personally taken charge of all police activities relating to

the police station two and one-half hours after the arrest but was not searched until two days later.<sup>81</sup> At the time of the search there was probable cause to believe that a search might produce evidence since witnesses had connected the car with the crime.<sup>82</sup> Of course, the "mobility" of the car, to the same extent as in *Chambers*, continued while in police custody. The plurality opinion repudiated the search, however, since "the opportunity for search was . . . hardly 'fleeting,'"<sup>83</sup> and a majority of the Court endorsed this statement:

Since the police knew of the presence of the automobile and planned all along to seize it, there was no exigent circumstance to justify their failure to obtain a warrant.<sup>84</sup>

The Court thus refused the state's attempt to link *Coolidge* to the *Carroll/Chambers* chain. Quoting the *Carroll* rationale, the plurality added emphasizing italics to the phrase limiting the warrant exception in vehicle searches to instances "[w]here it is not practicable to secure a warrant."<sup>85</sup>

In this case, the practicability of securing a warrant seemed evident to the plurality, who noted that the police in the *Coolidge* investigation had known for some time prior to the search of the role of the vehicle in the crime.<sup>86</sup> *Coolidge* himself was aware that he was a suspect;<sup>87</sup> he had ample opportunity to destroy any incriminating evidence;<sup>88</sup> there was no indication that he ever contemplated flight;<sup>89</sup> and he cooperated fully with law enforcement authorities.<sup>90</sup> The arrest of the petitioner was secured; *Coolidge* could not have reached the car after arrest, and his wife was denied access to the car after it was seized.<sup>91</sup>

The plurality then emphasized that the exigent circumstances may arise when there is "an automobile *stopped on the highway*."<sup>92</sup> It

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the murder, and was later to serve as chief prosecutor at the trial . . . signed and issued [the warrants himself] acting as a justice of the peace." *Id.* at 447. The court agreed with the defendant's claim that the warrant authorizing the seizure and subsequent search of his automobile was invalid because it was not issued by a "neutral and detached magistrate." *Id.* at 449.

81. *Id.* at 447-48.

82. *Id.* at 446-47, 450.

83. *Id.* at 460.

84. *Id.* at 478.

85. *Id.* at 460.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 461.

92. *Id.* at 473. See text accompanying notes 102-119 *supra*.

observed, however, that there was no conceivable way Coolidge could have reached the car in the driveway after the arrival of the police.<sup>93</sup> The car was effectively under police control continually from the moment they appeared,<sup>94</sup> and not just when it was actually seized. Consequently, the plurality concluded:

Surely there is nothing in this case to invoke the rule of *Carroll v. United States*—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase . . . . In short, by no possible stretch of the imagination can this be made into a case where "it is not practicable to secure a warrant," . . . and the "automobile exception," despite its label, is simply irrelevant.<sup>95</sup>

Absent exigent circumstances, the plurality felt that there could be no delayed search under *Chambers* even though the police had probable cause:<sup>96</sup>

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93. 403 U.S. at 460.

94. *See id.* at 461-62.

95. *Id.* at 462.

96. Probable cause is enough evidence to induce a reasonable and prudent person to believe that there is contraband, weapons, or evidence of a crime in the vehicle to be searched. *Warden v. Hayden*, 387 U.S. 294 (1967), *as cited* in *United States ex rel. Johnson v. Johnson*, 340 F. Supp. 1368, 1373 (E.D. Pa. 1972). In the words of *Carroll*, probable cause is defined as reasonable cause to believe that the contents of the automobile "offend against the law." 267 U.S. at 159.

Though there has been a diversity of opinion on the question of whether a stop for a traffic violation is justification for a general search of the vehicle (*see Annot.*, 10 A.L.R. 3d 314 (1966)), the reported cases in the lower courts since *Coolidge* uniformly hold that a general search is not justified by a stop predicated on a traffic violation. *Cowdin v. People*, 491 P.2d 569 (Colo. 1971), excluded evidence secured in an auto search conducted after the driver was stopped for speeding. The court noted that:

[A]fter the police observed and obtained identifying information from the license plates, the make and serial number of the car, and the driver's license and automobile registration certificate, the constitutional limits of this search were exhausted.

*Id.* at 571. *Accord*, *United States v. Squires*, 456 F.2d 967 (2d Cir. 1972) (a noisy muffler); *Sayne v. State*, 279 N.W.2d 196 (Ind. 1972) (stop based on malfunctioning headlight); *Ison v. Commonwealth*, 471 S.W.2d 712 (Ky. Ct. App. 1971) (failure to dim headlights); *State v. Koen*, 487 S.W.2d 562 (Mo. 1972) (general traffic offense); *Commonwealth v. Lewis*, 275 A.2d 51 (Pa. 1971) (driving without lighted rear lights). A general search predicated on the absence of a registration certificate is unlawful (*Watts v. United States*, 297 A.2d 790 (D.C. Ct. App. 1972); *United States v. Day*, 331 F. Supp. 254 (E.D. Pa. 1971)), as is a general search prompted by the failure of the driver to produce his driver's license. *People v. James*, 194 N.W.2d 57 (Mich. Ct. App. 1971).

Probable cause to search an auto has frequently been supplied by a source other than the searching officer. *See United States v. Sprouse*, 472 F.2d 1167 (6th Cir. 1973) (an outstanding arrest warrant on a charge of interstate transportation of stolen property justified a general search of the vehicle without a search warrant); *State v. Poole*, 500 P.2d 726 (Ore. Ct. App. 1972) (an informant's tip on a burglary suspect ripened into

The rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified.<sup>97</sup>

This would seem to represent the essence of the *Coolidge* decision with respect to auto searches. Since *Coolidge* does not purport to overrule *Chambers*, the two decisions can only be reconciled by the mechanical proposition that the existence of unforeseeable exigent circumstances at the point of initial intrusion justifies later intrusions even though the exigencies have subsequently dissolved.

A variety of circumstances can qualify as exigent circumstances.<sup>98</sup> The location of a vehicle and its condition,<sup>99</sup> the proximity of the defendant and/or his confederates to the vehicle searched,<sup>100</sup> and the practicability of law enforcement officials securing a warrant<sup>101</sup> are all factors which, when balanced against the need for an immediate search, can confer upon an officer the right to conduct a warrantless search of the vehicle. With so many imponderables, it is no wonder that the decisions and supporting rationales of the lower courts are not entirely consistent; however, as this survey indicates, a general pattern of enforcement has emerged, and though it is stained by some exceptional decisions, the pattern is a generally reliable guide to the permissible scope of warrantless vehicle searches.

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probable cause when the description and make of car, the number of occupants, and the direction of travel corresponded to the vehicle observed by patrolling officers six minutes after they received the tip via broadcast); *accord*, *United States v. Leon*, 460 F.2d 299 (9th Cir. 1972) (a computer report identifying a specific automobile at a specific motel commonly used in Yuma for smuggling is probable cause when reinforced by suspicious comings and goings); *White v. United States*, 448 F.2d 250 (8th Cir. 1971); *United States v. Rothenberg*, 345 F. Supp. 1331 (E.D.N.Y. 1971); *Coyne v. State*, 485 S.W.2d 917 (Tex. Crim. App. 1972).

With respect to a search of a vehicle at a border, the test is not probable cause, but reasonable suspicion. *United States v. Maggard*, 451 F.2d 502 (5th Cir. 1971); *United States v. Tsoi Kwan Sang*, 416 F.2d 306 (5th Cir. 1969).

When a driver is lawfully arrested *in* a vehicle, the officer has a right to search the vehicle as an incident to the lawful arrest. *Adams v. Williams*, 407 U.S. 143, 145 (1972); *Preston v. United States*, 376 U.S. 364, 367 (1963).

97. 403 U.S. at 463 n.20.

98. The term exigent circumstances has been defined as the existence of conditions which imperatively demand that the search proceed lest the delay necessary to obtain the magistrate's intervention present an immediate danger to the officer or permit the evanescent evidence of crime to be concealed or destroyed.

*United States v. Ragsdale*, 470 F.2d 24, 27 (5th Cir. 1972).

99. See notes 102-26 *infra* and accompanying text.

100. See notes 213-34 *infra* and accompanying text.

101. 403 U.S. at 478.

## II. CLEAR CASES OF MOBILITY

### A. *The Highway Stop*

The first section of the pattern is the clear situation of a mobile vehicle: the highway stop. Both state and federal courts have held that a mechanically operative vehicle stopped and searched<sup>102</sup> on the street or highway is mobile.<sup>103</sup> The rationale is that, even though the vehicle is stopped, it has the mechanical capability of movement and it is in a location that provides a ready access for flight.<sup>104</sup> An automobile stopped on the highway may be driven off before law enforcement officials can secure a search warrant.<sup>105</sup> His "opportunity to

102. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. *Erickson v. State*, 507 P.2d 508, 513 (Ala. 1973). With respect to an automobile, a routine check of the vehicle with the aid of a flashlight does not constitute a search. *Armour v. Totty*, 486 S.W. 2d 537, 539 (Tenn. 1972). A check of the serial number of a vehicle by opening a door or lifting a hood has been held not to be a search when the officer has a legitimate reason to identify the car. *Pasterchik v. United States*, 400 F.2d 696, 700 (9th Cir. 1968), *cert. denied*, 395 U.S. 982 (1969); *Cotton v. United States*, 371 F.2d 385, 392 (9th Cir. 1967). All jurisdictions have required both probable cause and exigent circumstances to exist in order for the warrantless search to be valid under the mobility exception. *E.g.*, *United States v. Pollard*, 466 F.2d 1, 4 (10th Cir. 1972); *United States v. Colbert*, 454 F.2d 801, 803 (5th Cir. 1972); *State v. Gerry*, 489 P.2d 288, 291 (Ariz. Ct. App. 1971); *People v. Eastin*, 289 N.E.2d 673, 678-79 (Ill. Ct. App. 1972); *State v. McReynolds*, 195 N.W.2d 102, 105 (Iowa 1972); *State v. Stone*, 294 A.2d 683, 691 (Me. 1972); *King v. State*, 298 A.2d 446, 449 (Md. Ct. Spec. App. 1973); *State v. Ratliff*, 189 S.E.2d 179, 183 (N.C. 1972); *State v. Richards*, 489 P.2d 422, 424 (Utah 1971); *State v. Morsette*, 502 P.2d 1234, 1236 (Wash. Ct. App. 1972).

103. *E.g.*, *United States v. Chapman*, 474 F.2d 300 (5th Cir. 1973); *United States v. Cohn*, 472 F.2d 290 (9th Cir. 1973); *Orricer v. Erickson*, 471 F.2d 1204 (8th Cir. 1973); *United States v. Weatherford*, 471 F.2d 47 (7th Cir. 1972); *United States v. Christophe*, 470 F.2d 865 (2d Cir. 1972); *United States v. Ragsdale*, 470 F.2d 24 (5th Cir. 1972); *United States v. Henderson*, 469 F.2d 1074 (5th Cir. 1972); *United States v. Anderson*, 468 F.2d 1280 (10th Cir. 1972); *Raffone v. Adams*, 468 F.2d 860 (2d Cir. 1972); *Stone v. Patterson*, 468 F.2d 558 (10th Cir. 1972); *Dell v. Louisiana*, 468 F.2d 324 (5th Cir. 1972); *United States v. McCormick*, 468 F.2d 68 (10th Cir. 1972); *United States v. Day*, 331 F. Supp. 254 (E.D. Pa. 1971); *State v. Lawson*, 491 P.2d 457 (Ariz. 1971); *State v. Hines*, 504 P.2d 946 (Ariz. Ct. App. 1973); *State v. Gerry*, 489 P.2d 288 (Ariz. Ct. App. 1971); *People v. Evans*, 34 Cal. App. 3d 175, 109 Cal. Rptr. 117 (1973); *Isaac v. State*, 274 N.E.2d 231 (Ind. 1971); *Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972); *Ashcraft v. Commonwealth*, 487 S.W.2d 892 (Ky. Ct. App. 1972); *People v. Burkhardt*, 195 N.W.2d 794 (Mich. Ct. App. 1972); *State v. Coy*, 200 N.W.2d 40 (Minn. 1972); *State v. Gurule*, 500 P.2d 427 (N.M. Ct. App. 1972); *Commonwealth v. Shaffer*, 288 A.2d 727 (Pa. 1972); *Coyne v. State*, 485 S.W.2d 917 (Tex. Crim. App. 1972); *State v. Lehman*, 506 P.2d 1316 (Wash. Ct. App. 1973); *cf.* *State v. Stone*, 294 A.2d 683 (Me. 1972).

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

105. *Id.*

search is fleeting.”<sup>106</sup> And the detention of the automobile by the officer is considered to be both impracticable and a sure source of discomfort to the detained driver and passengers. It is considered equally impracticable to require that the officer post a guard over the auto while a warrant is secured.<sup>107</sup> Thus, a vehicle stopped on the highway is mobile, and a warrant is not required prior to search.

The prevailing rationale for the mobility exception applied to vehicles stopped on the highway is thus clear. The exigent circumstances are: (1) the existence of the capability for movement; (2) the location of the vehicle, which confers ready access for flight; and (3) the perceived impracticability of securing a warrant.<sup>108</sup> The crucial factor which expands the use of the mobility exception with respect to a *highway stop* and, in effect, gives law enforcement officials a virtual blank check to conduct a warrantless search of a vehicle stopped on a highway, is not the requirement of exigent circumstances, which is easily satisfied, but the early point at which exigent circumstances are measured. This is the key to an understanding of the warrantless highway search. If exigent circumstances are measured *at the time of search*, the mobility exception is quite limited, but since exigent circumstances are evaluated at the time of the initial intrusion<sup>109</sup> (the stop of the vehicle), exigent circumstances are almost always found to exist, and thus a warrantless search of a vehicle on the highway is valid. The significance of when exigent circumstances are measured becomes clear upon analyzing *State v. Lehman*,<sup>110</sup> a typical highway stop and search case.

In *Lehman*, the defendant and his wife were driving on a street when law enforcement agents stopped the car and, with probable cause, placed the defendant under arrest.<sup>111</sup> Here, *at the time of stop*, the court found “exigent circumstances” to exist and upheld the

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106. *Id.*

107. *United States v. Curwood*, 338 F. Supp. 1104, 1115 (D. Mass. 1972); *State ex rel. Flournoy v. Wren*, 498 P.2d 444, 450 (Ariz. 1972).

108. See generally cases cited in note 103 *supra*.

109. *Coolidge v. New Hampshire*, 403 U.S. at 463 n.20. —*Accord*, *United States v. Carneglia*, 468 F.2d 1084, 1089-90 (2d Cir. 1972); *Suggs v. State*, 269 So. 2d 136, 139 (Ala. Crim. App. Ct. 1972); *State ex rel. Flournoy v. Wren*, 498 P.2d 444, 450 (Ariz. 1972); *Hunter v. State*, 194 S.E.2d 680, 683 (Ga. Ct. App. 1972); *People v. Canaday*, 275 N.E.2d 356, 360 (Ill. 1971); *People v. Babic*, 287 N.E.2d 24, 29 (Ill. Ct. App. 1972); *Williams v. Commonwealth*, 487 S.W.2d 891, 892 (Ky. Ct. App. 1972); Note *Auto Search: The Rocky Road From Carroll to Coolidge*, 17 S.D.L. Rev. 98, 112-13 (1973).

110. 506 P.2d 1316 (Wash. Ct. App. 1973).

111. *Id.* at 1318.

search.<sup>112</sup> The exigent circumstance was the fact that an operable vehicle was stopped on the highway and occupied by one (the defendant or his wife) capable of moving the vehicle.<sup>113</sup> Since an exigent circumstance clearly existed under prevailing interpretations, a warrantless search was valid. But what if the court were to evaluate the circumstances at the time of the actual search rather than at the time of the stop? If this were the law, then the Lehman vehicle would not be mobile. When it was searched, both the defendant (who was handcuffed) and his wife were removed from the vehicle.<sup>114</sup> At the time of search, neither the defendant nor his wife could move the vehicle; it was stationary and not going anywhere. If exigent circumstances are measured here, at the point of search, mobility does not exist. Since it is a frequent practice of law enforcement officers to search a car after an arrest has been made and after the defendant has been removed from his vehicle,<sup>115</sup> the measurement of exigent circumstances at the initial intrusion point removes the highway search from the warrant requirement. Whether the delay between the initial intrusion and subsequent search is one minute or one day,<sup>116</sup> the result is the same, since the existence of exigent circumstances at the point of initial intrusion is the controlling consideration.<sup>117</sup> Thus, the delayed search of a vehicle that is in police custody or locked in some storage facility is considered proper<sup>118</sup> *if ex-*

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112. *Id.* at 1320. The court is presumably referring to "mobility" when it speaks of exigent circumstances.

113. *Id.*

114. *Id.* at 1318.

115. See *United States v. Ragsdale*, 470 F.2d 24 (5th Cir. 1972); *Stone v. Patterson*, 468 F.2d 558 (10th Cir. 1972); *State v. Coy*, 200 N.W.2d 40 (Minn. 1972); *State v. Gurule*, 500 P.2d 427 (N.M. Ct. App. 1972).

116. *Gomez v. Beto*, 471 F.2d 774 (5th Cir. 1972) (search 15-30 minutes after arrest); *People v. Canaday*, 275 N.E.2d 356 (Ill. 1971) (search one hour after arrest); *People v. Babic*, 287 N.E.2d 24 (Ill. Ct. App. 1972) (search ten minutes after arrest); *Williams v. Commonwealth*, 487 S.W.2d 891 (Ky. Ct. App. 1972) (search the morning following the arrest).

117. *Coolidge v. New Hampshire*, 403 U.S. 443, 463 (1971). In analyzing *Chambers v. Maroney*, 399 U.S. 42 (1970), Justice Stewart made the following comment:

It is true that the actual search of the automobile in *Chambers* was made at the police station many hours after the car had been stopped on the highway, when the car was no longer movable, and "exigent circumstances" had passed, and, for all the record shows, there was a magistrate easily available. Nonetheless, the analogy to this case is misleading. The rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified.

*Id.* at 463 n.20.

118. *United States v. Chapman*, 474 F.2d 300 (5th Cir. 1973); *United States v. Castaldi*, 453 F.2d 506 (7th Cir. 1971); *Hunter v. State*, 194 S.E.2d 680 (Ga. Ct. App.



*igent circumstances existed at the time of the initial intrusion.*<sup>119</sup>

### *B. Other Locations Conferring Mobility*

In addition to the public street or highway, certain other locations are thought to confer mobility upon a vehicle. A vehicle parked in a public parking place<sup>120</sup> or near a place of residence of an arrestee<sup>121</sup> is considered mobile by virtue of its location. The logic of the law is the same as in the highway stop situation. The location and condition of the machine is such that it has the capability to move, and it enjoys ready access to routes of escape: "the opportunity to search is fleeting" and the exigent circumstance requirement is satisfied. The key to this category of clear mobility is the dual requirement of capability of movement and ready access to roads of escape. When these are present, the courts will find mobility. If novel situations can fit into this pigeonhole,<sup>122</sup> courts will find exigent circumstances to exist and

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1972); *King v. State*, 298 A.2d 446 (Md. Ct. Spec. App. 1973); *Issac v. State*, 274 N.E.2d 231 (Ind. 1971); *State v. Morsette*, 502 P.2d 1234 (Wash. Ct. App. 1972).

119. The requirement of exigent circumstances at the point of the initial intrusion has not been followed by many lower courts. Judge Brett of the Oklahoma Court of Criminal Appeals has held that an automobile followed by a policeman for six blocks and stopped on a highway was immobilized when the defendant was placed in the police car prior to the search. *Norton v. State*, 501 P.2d 877 (Okla. Crim. App. Ct. 1972). He reached a similar conclusion earlier in the case of *Henry v. State*, 494 P.2d 661, 669 (Okla. Crim. App. Ct. 1972). In both cases probable cause was also lacking for the search (494 P.2d at 665, 501 P.2d at 879), and the judge may have been engaging in an exercise of police wrist-slapping.

In *People v. Emert*, 274 N.W.2d 364 (Ill. Ct. App. 1971), an officer initially searched a vehicle for fruits of a robbery and for weapons. He found the weapons and a portion of the stolen money in a search of the vehicle conducted off the highway. The court ruled unconstitutional a second warrantless search conducted at a storage garage because it was practicable for law enforcement personnel to secure a warrant. *Id.* at 368. No mention was made of the existence of exigent circumstances at the point of initial intrusion. The court may have been influenced by the fact that a warrant for the second search had been issued, but not served. *Id.* See also *State v. Allen*, 190 S.E.2d 714 (N.C. Ct. App. 1972) (evidence secured in a delayed auto search was excluded on grounds of a lack of both probable cause and exigent circumstances and where a correct reading of the initial intrusion test would have resulted in a finding of mobility).

120. *State v. Ratliff*, 189 S.W.2d 179, 180 (N.C. 1972) (car in parking lot of a furniture store); *State v. Poole*, 500 P.2d 726, 728 (Ore. Ct. App. 1972) (car stopped in a metered parking area).

121. *United States v. Pollard*, 466 F.2d 1, 3 (10th Cir. 1971) (vehicle parked near defendant's motel room); *United States v. Sutton*, 341 F. Supp. 320, 321 (W.D. Tenn. 1972) (vehicle parked near defendant's motel room); *Skinner v. State*, 293 A.2d 828, 831 (Md. Ct. Spec. App. 1972) (locked vehicle parked in apartment parking lot); *State v. Birdwell*, 492 P.2d 249, 253 (Wash. Ct. App. 1972) (microbus parked in front of residence).

122. In *United States v. Curwood*, 338 F. Supp. 1104 (D. Mass. 1972), an unoccu-

will uphold a warrantless search made upon probable cause. When a camper,<sup>123</sup> a trailer,<sup>124</sup> a mobile home,<sup>125</sup> and an airplane<sup>126</sup> have exhibited a capability of movement and have been located in a location that provides some access to routes of escape, exigent circumstances have been found to exist and a warrantless search has been upheld.

### III. CLEAR CASES OF IMMOBILITY

#### A. *The Disabled Vehicle*

While the vehicle stopped on a highway, or in a public parking lot, or near the residence of a suspect has almost uniformly<sup>127</sup> been held to be mobile, the lower courts have been in general agreement that, under certain circumstances, a searched vehicle is clearly immobile. One such circumstance is where the searched vehicle is disabled to such a degree that it cannot move under its own power. The typical disabled vehicle in this situation is usually approached by officers after it has been in an accident. Such a case is *People v. Railey*.<sup>128</sup> In *Railey*, a policeman heard an accident report concerning a vehicle, the driver of which was wanted for shoplifting.<sup>129</sup> He approached the vehicle, conducted a warrantless search,<sup>130</sup> and found marijuana residue in the bowl of a pipe.<sup>131</sup> In analyzing the situation, the Colorado court found no exigent circumstances.<sup>132</sup> It noted that there was no urgency

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pied vehicle was found to be mobile because it was backed against a building loading platform and because the defendants were standing in the vicinity of the vehicle. The vehicle was capable of movement and enjoyed ready access to roads leading away from the arrest scene. The dual test of capability for movement and access to routes of escape was satisfied in this situation.

In *United States v. Ortega*, 471 F.2d 1350 (2d Cir. 1972), mobility was assumed in an even more novel situation than that existent in *Curwood*. In *Ortega*, a warrantless search of an automobile enclosed in the hold of a ship was sustained as either a border search or as an auto search. *Id.* at 1360-61. Mobility was assumed. The search was conducted after the vessel had been made fast. The jaguar that was searched possessed the capability for movement, and the vehicle had ready access to routes of escape, since the vessel was alongside of a loading dock. Mobility did in fact exist.

123. *United States v. Henderson*, 469 F.2d 1074 (5th Cir. 1972).

124. *United States v. Leon*, 460 F.2d 299 (9th Cir. 1972).

125. *United States v. Miller*, 460 F.2d 582 (10th Cir. 1972).

126. *State v. McReynolds*, 195 N.W.2d 102 (Iowa 1972).

127. See note 103 *supra*. But cf. *Cady v. Dombrowski*, 413 U.S. 433 (1973). See also notes 312-34 *infra* and accompanying text.

128. 496 P.2d 1047 (Colo. 1972).

129. *Id.* at 1048.

130. *Id.*

131. *Id.*

132. *Id.*

to search,<sup>133</sup> and it pointed to the ease with which officers could have secured a search warrant,<sup>134</sup> but the primary basis for the court's conclusion was that the trial court found the vehicle immobile.<sup>135</sup> Thus, the court refused to apply the mobility exception, and it concluded that the evidence should have been suppressed.<sup>136</sup>

Other lower courts have come to the same conclusion when presented with a disabled vehicle.<sup>137</sup> The key factor upon which they rely to classify the vehicle as immobile is the vehicle's incapability of movement, when such incapacity is obvious to the investigating officer at the point of the initial intrusion.<sup>138</sup> When this situation exists, the officer must secure a warrant prior to search. It should be noted that an automobile which is only partly disabled may not be found to be immobile,<sup>139</sup> and even a totally disabled vehicle may be searched without a warrant if other circumstances exist which make an immediate search necessary.<sup>140</sup>

### B. Custodial Care and Other Situations of Immobility

The incapability of movement that is the key factor in requiring a

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133. *Id.*

134. *Id.*

135. *Id.* "[T]he trial court found that the defendant's automobile was immobilized, that the defendant was in custody, and that there was no danger that evidence would be removed." *Id.*

136. *Id.*

137. See, e.g., *United States v. Caraway*, 474 F.2d 25 (5th Cir. 1973) (boat disabled in that it was unoccupied and one of its engines was dismantled on the dock); *United States ex rel. Clark v. Mulligan*, 347 F. Supp. 989 (D.N.J. 1972) (automobile disabled because of missing battery); *State v. Richards*, 296 A.2d 129 (Me. 1972) (automobile badly damaged and inoperable when police arrived at scene of accident). *Contra*, *Nasiridden v. State*, 298 A.2d 490 (Md. Ct. App. 1973). In this case, exigent circumstances were said to exist when a car was disabled. The defendant was suspected of hit and run driving and was arrested walking away from his car. He was returned to his vehicle by the arresting officers. "The hood was completely smashed and up, the radiator was broken, the car was steaming, overheated, the fender was beating up against the side of the car, [in a] very wrecked condition.'" *Id.* at 493. The court found exigent circumstances without ever stating whether or not the vehicle could move under its own power. If it could, the court was remiss in neglecting to state this crucial fact. If the car could not move, the case is wrongly decided.

138. See cases cited in note 137 *supra*.

139. *State v. Bright*, 493 P.2d 757 (Ore. Ct. App. 1972) (auto searched on highway without driver present and with a flat tire is mobile).

140. *People v. Stafford*, 29 Cal. App. 3d 940, 106 Cal. Rptr. 72 (1973). Here, the exigent circumstance was that the defendant was still at large. Also note that this is a California case; therefore, the court required only probable cause to justify a warrantless automobile search. See text accompanying notes 261-301 *infra*. See also note 212 *infra* for a discussion of immobility with respect to a vehicle that is found in a ditch or stuck in the mud.

search warrant prior to the search of a disabled vehicle is also present when a vehicle is in a privately-owned closed structure or in police custody. The police custody situation is perhaps the more obvious of the two.

When the vehicle is not mobile at the point of initial intrusion,<sup>141</sup> the police may not take the vehicle into custody, conduct a warrantless search, and thereafter claim that a warrant prior to search was unnecessary because the search of a vehicle in police custody is an exception to the warrant requirement.<sup>142</sup> *Kaufman v. United States*<sup>143</sup> provides an example.

In *Kaufman*, the defendant robbed a savings and loan association and then fled by car.<sup>144</sup> The flight and police pursuit ended when Kaufman's vehicle crashed into a tree.<sup>145</sup> It is essential to note that, when the pursuing officers came upon the car, it appeared to have been incapable of movement and, therefore, was immobile at the initial point of intrusion.<sup>146</sup> Police took the defendant into custody, and his vehicle was towed to a private garage.<sup>147</sup> The next evening Kaufman admitted the robbery to an F.B.I. agent.<sup>148</sup> Thereafter, the petitioner was arrested on the federal charge,<sup>149</sup> and Bureau agents executed a warrantless search of the defendant's car, which was now safely stored in the garage.<sup>150</sup>

In holding that the evidence seized by the F.B.I. agents should have been excluded,<sup>151</sup> the Eighth Circuit Court of Appeals did not rely on the mechanical disability of the vehicle;<sup>152</sup> rather, it attached significance to the fact that the vehicle was held on private property.<sup>153</sup> The court noted that Kaufman was arrested on other charges by local officials at 4:40 p.m. and that the federal arrest was authorized shortly before 7:00 p.m. on the following day.<sup>154</sup> When the F.B.I. agents

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141. See notes 110-19 *supra* and accompanying text.

142. In certain circumstances, a warrantless search of an impounded vehicle has been upheld. These circumstances include police regulations prescribing a limited search to inventory the contents of the vehicle. See *Harris v. United States*, 390 U.S. 234 (1968).

143. 453 F.2d 798 (8th Cir. 1971).

144. *Id.* at 800.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 802.

152. *Id.* at 802-03.

153. *Id.* at 802.

154. *Id.*

searched the vehicle over two hours after Kaufman's arrest on federal charges, there was no danger of the car being removed and there was ample time to obtain a warrant.<sup>155</sup> Since probable cause for the search developed after Kaufman's arrest,<sup>156</sup> there was no legitimate reason to conduct a warrantless search of the vehicle at the time of the initial intrusion.<sup>157</sup> The court did not refer specifically to the point where the initial intrusion occurred, but the essence of the opinion is that, at the point of initial intrusion, whether it was at the crash sight or at the subsequent search conducted by agents on the federal charge, the vehicle was effectively immobilized, and, therefore, a warrantless search was not reasonable under *Coolidge*.<sup>158</sup>

Closely analogous to the *Kaufman* situation of police custody or police storage of a vehicle in a private facility is the situation in which the vehicle is maintained in a private facility over which the law enforcement officials have no control. In *Kaufman*, the police ordered the vehicle towed to a private garage. The auto was at its place of storage by direction of the police. Somewhat different is the situation in which the police first come upon a vehicle when it is parked in a private garage or in a private parking structure. Such a situation was presented in *Cook v. Johnson*.<sup>159</sup>

In *Johnson*, the defendant was arrested prior to the seizure of his vehicle.<sup>160</sup> The car was seized from his garage,<sup>161</sup> and a warrantless

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 803. *Accord*, *United States v. Lepinski*, 460 F.2d 234 (10th Cir. 1972) (search for the vehicle identification number while the vehicle was at the police station and the defendants were in police custody was illegal due to lack of exigent circumstances); *Leavitt v. Howard*, 332 F. Supp. 845 (D.R.I. 1971) (vehicle in a police garage when searched). The point of time in which police custody occurs is sometimes difficult to ascertain. In *State v. Ruiz*, 495 P.2d 516 (Ariz. Ct. App. 1972), the defendant accompanied a police officer to the scene of a recent robbery. Ruiz parked his car in front of the police station prior to his inspection of the robbery scene. Upon his return to the station, Ruiz was immediately arrested. Police then conducted a warrantless search of the defendant's vehicle. The court concluded that no exigent circumstances were present because Ruiz was in jail and the vehicle was going nowhere. *Id.* at 518. The court was obviously unimpressed by the fact that the vehicle was capable of movement and was parked on a city street. The court must have viewed the point of initial intrusion as taking place when Ruiz was arrested, not when he first parked the vehicle. It is as if the court considered the vehicle itself to be in quasi-police custody at the time of the search. After all, what was the probability of the movement of a vehicle parked in front of a police station with the driver in custody?

159. 459 F.2d 473 (6th Cir. 1972).

160. *Id.* at 474

161. *Id.*

search of the vehicle two days later revealed incriminating evidence subsequently introduced at trial.<sup>162</sup> The Sixth Circuit reversed the conviction, indicating that the facts were strikingly similar to the facts in *Coolidge*.<sup>163</sup> What it did not say, but what is implicit in this decision, is that, if the vehicle stored in a private structure is in no danger of being driven away by the defendant or his confederates (despite its capability for movement) and if the circumstances are such that it is not impracticable for the police to secure a warrant, then the vehicle is immobile and a search warrant is required.<sup>164</sup> This, after all, is no more than an application of the *Coolidge* rationale to a stored vehicle.<sup>165</sup> What is particularly significant is the fact that the defendant was arrested away from the structure in which the automobile was stored and away from the location of the vehicle itself. If it is on private property away from the arrest scene and if it is enclosed in a storage facility, the car may be immobile, but if it is on a public street or highway, the vehicle is considered mobile.<sup>166</sup>

#### IV. THE DIFFICULT CASES OF MOBILITY

The lower courts have displayed varying degrees of disagreement over the legality of a warrantless search of a vehicle conducted in situations where, at the point of the initial intrusion by law enforcement officials, the auto is on private property not in the vicinity of the defendant's residence. The vehicle may be enclosed in a private parking structure,<sup>167</sup> it may be left at a service station while the defendant is out of the area of immediate access to the vehicle,<sup>168</sup> or it

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162. *Id.*

163. *Id.* at 475.

164. See also *Lewis v. Cardwell*, 476 F.2d 467 (6th Cir. 1973). In this case the government did not assert that the mobility exception justified the warrantless search of the defendant's car. The vehicle was parked one-half block from state offices in a day parking facility; a wrecker had originally been secured to seize the auto; and the government had planned for several weeks to seize the vehicle.

165. See notes 72-101 *supra* and accompanying text.

166. See notes 102-19 *supra* and accompanying text. The emphasis that the Sixth Circuit places on the fact that the car is located in a private structure is misguided. The fact that a vehicle is located within a private structure does not necessarily negate the capability of movement. If confederates have keys to the vehicle or have any other means to move the vehicle, it would not appear to matter whether the vehicle is on the highway or in a private garage, but since there was no evidence of confederates in the *Johnson* case, the court did not have to deal with this issue.

167. *Cook v. Johnson*, 459 F.2d 473, 475 (6th Cir. 1972) (seizure of accused's vehicle from his garage after he was in police custody invalid).

168. *United States v. Bozada*, 473 F.2d 389 (8th Cir. 1973) (trailer in a deserted part of private property was hitched to an unoccupied tractor with the air brake set); *United States v. Ellison*, 469 F.2d 413 (9th Cir. 1972) (vehicle parked at loading dock and ready to be moved); *Bailey v. State*, 294 A.2d 123 (Me. 1972) (search of a vehicle

may be a getaway car simply abandoned at the time it is discovered by the police. In these situations, the lower courts have usually upheld the warrantless vehicle search on the ground that exigent circumstances justified the police search.<sup>169</sup> Courts disagree as to the existence of exigent circumstances (1) when an unoccupied vehicle is parked on private property with the suspect not within the immediate area of the vehicle,<sup>170</sup> (2) when a vehicle is seemingly abandoned,<sup>171</sup> (3) when confederates, friends, or relatives of the suspect continue to have access to the vehicle after the police withdraw from the scene,<sup>172</sup> and (4) when the subject of the search is not a mechanized vehicle, but a suitcase or container.<sup>173</sup>

#### A. *The Vehicle Parked on Private Property*

A vehicle parked on private property has usually been considered mobile.<sup>174</sup> Here again the dual test of mobility—capability for movement and ready access for flight to the open highway—is met. In *Bailey v. State*,<sup>175</sup> a more difficult assessment of mobility with respect to an enclosed vehicle was avoided. In *Bailey*, the police made an initial search of the vehicle when the car was parked on a service station lot at 3:30 a.m.<sup>176</sup> A second warrantless search at 9:30 a.m. was conducted while the car was in a closed repair bay and under the protective watch of a service station attendant.<sup>177</sup> The court did not attempt to judge the mobility of the automobile at the time of the second search, since it concluded that, at the time of this search, the vehicle had been effectively seized by the police. Thus, the second search was legitimate because based on the justified initial intrusion (the 3:30 a.m. search).<sup>178</sup>

Had this warrantless search not been upheld on the basis of the prior

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parked on the grounds of a service station); *State v. Johnson*, 490 S.W.2d 20 (Mo. 1973) (vehicle leaving loading dock at time of stop). *Contra*, *State v. Bertram*, 504 P.2d 520 (Ariz. 1972) (vehicle parked on private property and defendant not in proximity of the vehicle); *State v. Pound*, 508 P.2d 118 (Mont. 1973) (defendant locked in a trailer and denied access to his vehicle, which was parked on private property).

169. See cases cited in note 168 *supra*.

170. See notes 174-200 *infra* and accompanying text.

171. See notes 200-13 *infra* and accompanying text.

172. See notes 213-34 *infra* and accompanying text.

173. See notes 235-60 *infra* and accompanying text.

174. *United States v. Ellison*, 469 F.2d 413 (9th Cir. 1972).

175. 294 A.2d 123 (Md. Ct. Spec. App. 1972).

176. *Id.* at 134.

177. *Id.* at 135.

178. *Id.*

search, would it have been valid under the *Coolidge* rationale? The basis of lower court opinions indicates that the outcome would not have been different had the police made the initial intrusion when the car was in the closed bay. The vehicle still retained the capability for movement: it was mechanically sound and it enjoyed ready access for flight. Service station repair bays are usually constructed with doors that easily roll open, and one could walk up to the vehicle, raise the closed door, and drive away in seconds. *An enclosed vehicle is not made immobile by the fact of enclosure.* In this situation, the repair bay would have to be locked for the car to be considered immobile.

Where the vehicle is not enclosed, but is simply locked and unoccupied at the time of the initial intrusion, lower courts have considered the vehicle to be mobile. In *Harris v. State*,<sup>179</sup> "Cadillac Joe" was arrested inside the China Doll Lounge.<sup>180</sup> With probable cause to believe Joe was transporting heroin, the officers searched him but did not find the contraband.<sup>181</sup> They subsequently took Joe back to his Cadillac, which the officers knew to be locked and unoccupied, and there they conducted a warrantless search of the vehicle.<sup>182</sup> Heroin was found,<sup>183</sup> and Joe was convicted.<sup>184</sup> In upholding the search, the Texas court concluded that the vehicle was mobile within the meaning of *Carroll*.<sup>185</sup> *Coolidge* was distinguished from the case at bar in that the defendant in *Coolidge* was already in jail when the search of his Pontiac was conducted.<sup>186</sup> No evaluation of the point of initial intrusion was attempted. Instead, Commissioner Davis argued that to arrest the suspect without searching the car or to conduct a search only after a search warrant was obtained, would have been an intrusion upon the appellant's rights.<sup>187</sup>

The analysis in *Harris* appears to be an extreme departure from the plurality opinion in *Coolidge*, with Justice Stewart's emphasis on the importance of the warrant requirement and the narrowness with which

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179. 486 S.W.2d 88 (Tex. 1972).

180. *Id.* at 89.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 90.

186. *Id.*

187. *Id.* Commissioner Davis noted:

Having searched appellant and found no contraband, would the officers have been justified in taking appellant into custody to await the procuring of a search warrant for the car and the execution of same? Such a course of action would have clearly been an intrusion upon appellant's constitutional rights.

*Id.*



the exceptions to the requirement are to be viewed.<sup>188</sup> But the lower courts have given far broader reading to what constitutes exigent circumstances than can be envisioned from a reading of the *Coolidge* plurality. The fact that a car is locked and its owner is not near the vehicle at the time of search does not make the car immobile.<sup>189</sup> Other circumstances must exist for the vehicle to be immobile for fourth amendment purposes. Such circumstances are illustrated by *In re J.R.M.*<sup>190</sup>

In *J.R.M.*, the police located a vehicle in the defendant's driveway and identified it as that allegedly involved in a murder.<sup>191</sup> The defendant and his father, however, were not questioned until the next day.<sup>192</sup> Subsequent to that questioning, the vehicle could not be located for three days.<sup>193</sup> It was ultimately found by police officers in a parking space rented by the defendant's father.<sup>194</sup> At no time prior to or after the questioning did the police attempt to obtain a search warrant.<sup>195</sup> Instead, upon advice of the prosecuting attorney's office that the evidence was insufficient for the issuance of a warrant, they executed a warrantless search.<sup>196</sup> Reliance here was on the mobility exception to the warrant requirement as discussed in *Chambers*.<sup>197</sup> Thirteen days after the seizure of the vehicle the defendant was arrested.<sup>198</sup>

The *J.R.M.* facts, on close analysis, are strikingly similar to the facts in *Coolidge*. In both cases, the vehicle was located on private property, and, more importantly, in both situations *the police knew prior to the initial intrusion* that the vehicle was directly connected to the crime being investigated and they knew that a search of the vehicle would be a necessary part of the investigation. Police knowledge thus provided the ability to secure a warrant. The opportunity to search was not "fleeting." In applying *Coolidge* to invalidate the search, the court significantly relied upon the factor of police knowledge. The opinion concluded:

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188. 403 U.S. at 453.

189. *People v. Bukoski*, 200 N.W.2d 373 (Mich. 1972). In upholding the warrantless search, the court relied on the fact that the defendants were at large at the point of initial intrusion. *Id.* at 377. The Court looked "not to the fact of movement, but to the ease of movement." *Id.*

190. 487 S.W.2d 502 (Mo. 1972).

191. *Id.* at 503.

192. *Id.* at 503-04.

193. *Id.* at 504.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

We are unable to distinguish the *Coolidge* case from the one with which we here deal. Here the police knew of the red Corvair from the beginning and knew of its possible connection with the crime. They traced the car and observed it at the home of appellant on the day the body was found. They talked to appellant and his father about the crime. Necessarily, appellant knew that he was a suspect. An opportunity to dispose of the car or destroy any evidence existed if there was an inclination to do that, but there was no evidence of flight by appellant or of an effort to destroy evidence. At the time the car was seized it was parked and locked on a downtown lot regularly rented by appellant's father. The police knew of this parking space belonging to appellant's father because on previous occasions they had helped him start his car on that very lot. The car was not being driven on the highway, as in *Chambers*, where the court felt that the situation was such that if the officers had not seized the car at that time, it could and probably would have been driven away and subsequently not been available for seizure under a search warrant if obtained. The officers did not claim that the automobile contained any contraband or stolen articles.<sup>199</sup>

This case is precedent for the position that a warrant should be secured prior to a search when a vehicle is parked on private property, when law enforcement officials possess the knowledge that the vehicle is to be searched as part of the investigation, and when the police subsequently locate the vehicle prior to the initial intrusion. Here the mobility exception may not lie. A court might read the *Coolidge* opinion as invalidating the warrantless search. Under such circumstances, a vehicle, locked or unlocked, *may* be immobile in the eyes of the law.<sup>200</sup>

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199. *Id.* at 511.

200. See also *Caldwell v. Canady*, 340 F. Supp. 835 (N.D. Tex. 1972); *Stoddard v. Texas*, 475 S.W.2d 744 (Tex. Ct. Crim. App. 1972). In *Stoddard*, the police possessed knowledge of the location of the defendant's vehicle (a parking lot on the campus of the University of Texas at Austin) 2½ hours prior to the initial intrusion, and they knew that the defendant was already in custody. *Id.* at 751. The court reasoned that it was practicable for the officers to secure a warrant prior to the search (*id.* at 752), which was the initial intrusion. The vehicle was judged immobile and the conviction was reversed. In this situation, where the time lapse (2½ hours) between reception of the information and the subsequent search was relatively brief and where friends and associates of the defendant had access to the vehicle, the court might have been influenced by the defendant's personal character and potential sentence. The defendant enjoyed office space on campus; he was thus likely to be either a teacher or graduate student. The sentence he faced was severe. Texas law at this time mandated an automatic prison sentence of two years to life for marijuana possession for first offenders and an automatic 10 year minimum sentence for second offenders. TEX PENAL CODE art. 725b § 23 (1961), *as amended*, 725b § 23 (1973). Given these circumstances the judge may have stretched the *Coolidge* rationale to reach what he considered a merciful disposition of the case.

*B. The Abandoned Auto*

A second situation in which mobility may not exist involves circumstances which indicate that the vehicle has been abandoned by potential suspects to a crime. This circumstance runs through a line of cases<sup>201</sup> in which judges have been faced with factual situations in which the mobility of the vehicle that was the subject of a warrantless search is open to serious question. Unsure of the reach of the *Coolidge* opinion, yet unwilling to rule for the suppression of evidence that would allow criminal acts to go unpunished, several courts have circumvented *Coolidge* by contending that, if the vehicle has been abandoned, no one had standing to object to the search.<sup>202</sup> In each of these decisions, all handed down in 1972<sup>203</sup> (the year following *Coolidge*), the court found that the vehicle had been abandoned, thus avoiding the impact of *Coolidge* and ultimately upholding the searches.<sup>204</sup> These courts thus avoided the mobility issue by pigeonholing facts of a case beneath the umbrella of abandonment.

A case which exemplifies this line of judicial withdrawal is *Kurtz v. People*.<sup>205</sup> In *Kurtz*, police arrived upon a robbery scene to find a body lying beside a vehicle identified as belonging to the robbers, who had already fled the scene of the crime.<sup>206</sup> The victim was one of two people who had tried to contain the robbers within the store until the police arrived.<sup>207</sup> Inside his pocket the police found the keys to the getaway car.<sup>208</sup> Police then searched the car without a warrant.<sup>209</sup>

Faced with these facts, the court could have reasoned that the car was mobile at the initial intrusion by police, or at least it could have concluded that, since armed robbers were still at large in the early morning darkness and since the vehicle possessed the capability of movement and of ready access to routes of escape, exigent circumstances existed which justified a warrantless search. But the decision was written in 1972, and the court may have been reluctant to rely

201. *United States v. Gullledge*, 469 F.2d 713 (5th Cir. 1972); *Kurtz v. People*, 494 P.2d 97 (Colo. 1972); *People v. Smith*, 278 N.E.2d 73 (Ill.), *cert. denied*, 409 U.S. 1022 (1972); *Love v. State*, 487 S.W.2d 677 (Tenn. Crim. App. 1972).

202. 469 F.2d at 715; 494 P.2d at 102-03; 278 N.E.2d at 73; 487 S.W.2d at 677.

203. 469 F.2d at 713; 494 P.2d at 97; 278 N.E.2d at 74; 487 S.W.2d at 677.

204. 469 F.2d at 718; 494 P.2d at 103; 278 N.E.2d at 75; 487 S.W.2d at 677.

205. 494 P.2d 97 (Colo. 1972).

206. *Id.* at 100.

207. *Id.*

208. *Id.*

209. *Id.* at 102.

on *Coolidge* and subsequent cases to justify this search on mobility grounds. The court might have been unwilling to stretch the definition of mobility to the situation in which law enforcement officials had obtained keys to the car at the point of initial intrusion. The defendant contended that the evidence was improperly seized as the result of a warrantless search of an immobile vehicle,<sup>210</sup> but the court refused to consider the substance of the argument. The refusal was founded upon defendant's lack of standing to raise the defense,<sup>211</sup> which was predicated on the court's finding that the vehicle was abandoned.<sup>212</sup>

### C. Confederates and Family Not in Custody

Whereas the conclusion that a vehicle is abandoned avoids the need to determine whether or not a vehicle is mobile, the finding that confederates or family members are out of custody at the point of the initial intrusion and will remain out of custody when the police depart is justification for considering the vehicle mobile.<sup>213</sup>

Typical of the cases in which a family member in the area of a vehicle justifies a warrantless search is *United States v. Menke*.<sup>214</sup> In *Menke*, a parcel containing marijuana was uncovered in a warrantless search of appellant's car, which was parked on his property.<sup>215</sup>

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210. *Id.*

211. *Id.*

212. *Id.* *Accord*, *People v. Smith*, 278 N.E.2d 73 (Ill.), *cert. denied*, 409 U.S. 1022 (1972). In *Smith*, police pursued a Plymouth until it skidded off the road and into a ditch. By the time police came upon the vehicle, the defendants had fled into a nearby field. The car was removed to a garage, the defendants were arrested, and the Plymouth was searched six hours later. *Id.* at 74. The opinion upheld the introduction of evidence secured in the search by labelling the car abandoned. *Chambers* was cited, but *Coolidge* was not mentioned, and a discussion of the mobility of a vehicle left in a ditch with no potential driver within sight was not attempted. The court apparently did not want to deal with the question of when a car that is mechanically capable of movement becomes immobile by virtue of its physical environment. For an opinion that did deal with this difficult question, see *United States v. Babich*, 347 F. Supp. 157 (D. Nev. 1972), *aff'd*, 477 F.2d 242 (9th Cir. 1973). In *Babich*, the court held that a truck embedded in a dry lake and abandoned by its driver and passengers could still be the subject of a warrantless search. The logic here was that the truck could be dug out and towed away without great difficulty. *Id.* at 160. In this type of situation, where it is impossible for a court to determine the difficulties of the movement of a vehicle which is mechanically sound, courts are likely to find the vehicle mobile, as the court did in this case. Natural elements such as mud, snow, wind, rain, etc., will not induce the courts to consider a vehicle immobile for fourth amendment purposes unless objective data indicate that the vehicle could not move.

213. See note 228 *infra*.

214. 468 F.2d 20 (3d Cir. 1972).

215. *Id.* at 21-22.

In upholding the admission of the parcel into evidence,<sup>216</sup> the court based its finding of exigent circumstances on the presence of the defendant's mother, father, and sister at the place of search.<sup>217</sup> Since they were not taken into custody,<sup>218</sup> they could have moved the car or removed the evidence from the vehicle. When family members will remain in the vicinity of the vehicle, it is clear that a warrantless search will be upheld.<sup>219</sup> The fact that those related to the defendant may not be involved in the crime to which he is accused will not deter courts from finding exigent circumstances to justify the warrantless search. Of course, where there is any suspicion that those in the area of the vehicle are confederates of the suspect, lower courts will rely upon such facts to uphold a warrantless search.<sup>220</sup>

Typical of this reliance is *United States v. Ellis*.<sup>221</sup> In *Ellis*, a vehicle suspected of being used in a bank robbery was located in the bank parking lot.<sup>222</sup> The car was locked;<sup>223</sup> the police were in possession of the key to the ignition;<sup>224</sup> and there was no evidence that the vehicle had been recently driven.<sup>225</sup> The court concluded that the vehicle was mobile.<sup>226</sup> The basis for the decision was that persons acting for the defendants could have removed the car or evidence contained in the car since two of the robbers were still at large and since the vehicle would be left unattended while police secured a warrant.<sup>227</sup> Other courts have relied on the fact that confederates of the defendant are still at large to justify a conclusion that exigent circumstances or mobility justified a warrantless search.<sup>228</sup> In several instances, judges

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216. *Id.* at 20.

217. *Id.* at 23.

218. *Id.*

219. See *United States v. Pointer*, 348 F. Supp. 600 (W.D. Mo. 1972) (defendant's father was present when a truck was searched on the lot of a service station); *People v. Hurley*, 293 N.E.2d 341 (Ill. Ct. App. 1973) (mother not present at scene of search, but her ownership of vehicle was evidence that she could move the vehicle or remove the evidence); *People v. Dockery*, 278 N.E.2d 147 (Ill. Ct. App. 1971) (an uncle actually tried to move the vehicle before the police could search it); *State v. LaPorte*, 301 A.2d 146 (N.J. 1973) (fact that defendant's wife drove the car often and possessed a duplicate key provided enough evidence to conclude the car is mobile).

220. See cases cited in note 228 *infra*.

221. 461 F.2d 962 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972).

222. *Id.* at 965.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 966.

227. *Id.*

228. *United States v. Castaldi*, 453 F.2d 506 (7th Cir. 1971), *cert. denied*, 405 U.S.

have assumed confederates of the defendant existed without any corroborating evidence before the court.<sup>229</sup>

One case in which this assumption was made is *Peterson v. State*.<sup>230</sup> In *Peterson*, all passengers and a driver of a vehicle parked in a parking lot were arrested prior to a search of the vehicle.<sup>231</sup> Instead of a discussion of mobility at the point of initial intrusion, the court emphasized the fact that the automobile was located in a high crime area.<sup>232</sup> The vehicle was mobile because:

[I]t was vulnerable in its position to confederates in the well-organized underworld of the narcotics traffic. Its suspected contents were readily destructible. In that bustling marketplace of narcotics users, it was further an inviting target for theft by any tempted or opportunistic "junkie."<sup>233</sup>

No evidence other than the nature of the crime itself was offered to indicate that confederates of those arrested were outside of custody. Two other courts have accepted mobility arguments based on confederates at large (but without direct evidence to support such allegations) to help justify affirming convictions based on a warrantless vehicle search.<sup>234</sup> Though these cases that seem to "manufacture" confederates appear to be rare, the factor of confederates at large is usually not determinative of the result, because usually mobility could be upheld on other grounds. With respect to the search of containers and suitcases, however, this is not the case.

#### D. *The Container Search: A Clear Case of Confusion*

The warrantless search of containers (*e.g.*, suitcases) has often been upheld by the mobility exception.<sup>235</sup> Although the lower courts are in substantial disagreement with respect to the requirement of a search warrant prior to the search of a suitcase,<sup>236</sup> the majority of challenged suitcase searches reported since *Coolidge* have been upheld.<sup>237</sup> This outcome is somewhat predictable, given the two-pronged test for

917 (1972); *State ex rel. Flournoy v. Wren*, 498 P.2d 444 (Ariz. 1972); *People v. Munoz*, 21 Cal. App. 3d 805, 98 Cal. Rptr. 758 (1971).

229. See note 234 *infra*.

230. 292 A.2d 714 (Md. Ct. Spec. App. 1972).

231. *Id.* at 717.

232. *Id.* at 718.

233. *Id.* at 722.

234. *United States ex rel. Johnson v. Johnson*, 340 F. Supp. 1368 (E.D. Pa. 1972); *Scales v. State*, 284 A.2d 45 (Md. Ct. Spec. App. 1971).

235. See notes 250-51 *infra*.

236. See notes 250-57 *infra* and accompanying text.

237. *Id.*

mobility established above—capability for movement and ready access to an avenue of flight so as to make the opportunity to search a fleeting one for law enforcement personnel.

*People v. McKinnon*<sup>238</sup> is perhaps the most notable case upholding a warrantless container search. In *McKinnon*, an air freight agent of United Airlines became suspicious of five cardboard cartons scheduled for air shipment.<sup>239</sup> Upon his examination of the contents of the cartons, he found bricks of marijuana.<sup>240</sup> The agent left the cartons open so as to avoid the possibility of an unlawful search and seizure<sup>241</sup> and then notified the police.<sup>242</sup> The defendant was subsequently arrested when he attempted to board his plane.<sup>243</sup> In upholding the seizure, the California Supreme Court applied the logic of the mobility exception to the search and seizure of the cartons. It interpreted the mobility doctrine as applying to "motorcars or other things readily moved."<sup>244</sup> The containers consigned to the common carrier were thus mobile. The court discussed *Coolidge*<sup>245</sup> and noted that, in the case at bar, the police had *not* known for some time of the packages or what they contained.<sup>246</sup> The packages were scheduled for flight out of the jurisdiction, thus making the opportunity to search fleeting.<sup>247</sup> Since the agent of the airline was acting as a private individual (thus not requiring a warrant to search),<sup>248</sup> probable cause was legitimately obtained by the police, and the search was justified.

This application of the *Coolidge* rationale appears to be consistent with prevailing interpretations. By itself, a container cannot move, but once it is in the possession of a common carrier, it has the capability for movement. The ready access to an avenue of flight is the result of the scheduled departure of the container. If the scheduled departure from the jurisdiction is so immediate as to make it impracticable to secure a search warrant, the opportunity to search is fleeting and a warrantless search is valid.<sup>249</sup> In *State v. Fassler*<sup>250</sup> and *United*

238. 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

239. *Id.*

240. *Id.* at 900, 500 P.2d at 1100, 103 Cal. Rptr. at 900. For an analysis of the *McKinnon* decision, see *The Supreme Court of California, 1971-1972*, 61 CALIF. L. REV. 287, 497 (1973); 41 FORDHAM L. REV. 1034 (1973).

241. 7 Cal. 3d at 904, 500 P.2d at 1100, 103 Cal. Rptr. at 900.

242. *Id.*

243. *Id.*

244. *Id.* at 909, 500 P.2d at 1104, 103 Cal. Rptr. at 904.

245. *Id.* at 910-11, 500 P.2d at 1105, 103 Cal. Rptr. at 905.

246. *Id.* at 911, 500 P.2d at 1105, 103 Cal. Rptr. at 905.

247. *Id.*

248. *Id.* at 911-12, 500 P.2d at 1105, 103 Cal. Rptr. at 905.

249. *Contra*, *United States v. Valen*, 348 F. Supp. 1163 (W.D. Pa. 1972). In *Valen*,

*States v. Johnson*,<sup>251</sup> as in *McKinnon*, the mobility exception of *Coolidge* was used to uphold the warrantless search of a suitcase. A suitcase found in a search of a mobile vehicle, of course, may be searched without warrant<sup>252</sup> because, at the time of the initial intrusion, the suitcase

a warrantless search of suitcases by a customs official at an Arizona airport was invalidated because there were no exigent circumstances. The court rested its decision on the grounds that the suitcases were transported, not by the passenger, but by an independent carrier, that there was no possibility of an en route variance and that officials could have notified officials at either New York (the place of departure) or Scranton (the destination) in time to secure a warrant. Given these circumstances and the presence of a government official to prevent reclamation at the Arizona airport, a warrant was required for the search. *Id.* at 1167-68. The logic here seems strained. The fact that the route of the airplane was known is not significant. Often the route of an automobile on roads in rural areas can be predicted, yet this does not negate the vehicle's mobility. To allow the suitcases on the flight is to risk the loss of the suitcases and their contents by theft or baggage loss, diversion of the flight, or diversion of the suitcase on a subsequent flight. Even if such a risk of loss were to be discounted, the suitcase, once in the hands of the common carrier, possessed the capability for movement and for direct access to other jurisdictions. That it was impracticable to secure a warrant in *Valen* was not in dispute. The agent testified that it would have taken from four to six hours to secure a warrant in Tucson. This testimony was not disputed. *Id.* at 1165. For customs officials at the Tucson airport, the opportunity to search was fleeting. The later opportunity to search by unidentified law enforcement officials in Scranton or in New York is immaterial to the right of agents in Tucson to search the suitcases. The *Coolidge* test appears satisfied, and, therefore, the evidence should not have been suppressed.

250. 503 P.2d 807 (Ariz. 1972).

251. 467 F.2d 630 (2d Cir. 1972). In *Johnson*, police officers apprehended one suspect to a bank robbery at an apartment located in the vicinity of the bank. Another suspect was apprehended as a result of a telephone tip from an informant. The informant also tipped the police that two suitcases belonging to one of the suspects could be found outside of a ghetto building near a rear door and that one of the suitcases contained a shotgun. The police, without a warrant, rushed to the specified location, seized the suitcases, and conducted an immediate search, which uncovered a sawed-off shotgun. *Id.* at 634. In upholding the search, the court cited *Coolidge* (*id.* at 639) and concluded:

[I]t was not practical to secure a warrant because the suitcases could have been removed from their position outside the apartment building at any moment. The suitcases in this situation were similar to mobile automobiles. It was therefore likely that the opportunity to seize the suitcases would have passed if the officers had waited to secure a warrant.

*Id.* The court then stated that the police properly opened the suitcase to see whether they were holding a dangerous weapon of which they had no control in a high crime area. *Id.* at 639. Although the application of *Coolidge* in this unique case is a strained attempt to uphold a snap decision of law enforcement officials in a situation of great potential danger, it should be noted that mobility is inferred by location—the suitcase was mobile because it rested in a high crime area with probable visibility to bystanders. *Id.* Access for flight is supplied by location. Since one must infer that the capability for movement is supplied by a high likelihood of theft, the mobility rationale seems inappropriate. The correct police response would have been to seize the suitcases, but refrain from opening them until a warrant could be secured.

252. See *United States v. Rothberg*, 345 F. Supp. 1331 (E.D.N.Y. 1971); *Soles v.*



possesses both the capability for movement and an access to routes of escape. Once again, it is the point of initial intrusion at which exigent circumstances are evaluated. If the container is not mobile at the point of the initial intrusion, the exigent circumstance requirement of *Coolidge* is not met and a warrant prior to search is necessary.

In *Erickson*,<sup>253</sup> for example, a locked suitcase was delivered to the police station by a citizen.<sup>254</sup> An officer opened the suitcase in the presence of two other policemen, a district attorney, and a district court judge,<sup>255</sup> but he did not secure a warrant.<sup>256</sup> The search was not conducted to determine the ownership of lost property since the police knew the owner of the suitcase.<sup>257</sup> The court reasoned that:

[S]uitcases can be analogized to automobiles in search and seizure cases. The United States Supreme Court in *Coolidge v. New Hampshire* . . . made it clear that the presence of an exigency exception to the warrant requirement must be determined under the factual circumstances of the search rather than the abstract potential for mobility or destruction of the thing to be searched.<sup>258</sup>

The court concluded that the search was unreasonable,<sup>259</sup> the implication being clear that the suitcase was not mobile. And indeed it was not. At both the point of the police reception of the suitcase and at the point of search, the suitcase was immobile. It had no capability for movement unless law enforcement personnel chose to provide the capability. The presence of a judge at the search of the suitcase establishes that a warrant could easily have been secured. It was therefore required for this search.<sup>260</sup>

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State, 299 A.2d 502 (Md. Ct. Spec. App. 1973). For a case upholding a suitcase search as valid under an inventory prior to a vehicle's storage in a police garage, see *People v. Sullivan*, 272 N.E.2d 464 (N.Y. 1971). *Contra*, *State v. Gwinn*, 301 A.2d 291 (Del. 1972) (search of a closed satchel found in trunk of inventoried auto was improper).

253. 507 P.2d 508 (Alas. 1973).

254. *Id.* at 512.

255. *Id.*

256. *Id.*

257. *Id.* at 511-12.

258. *Id.* at 516.

259. *Id.*

260. See *United States v. Colbert*, 454 F.2d 801 (5th Cir. 1972). In this case, police officers observed two men carrying expensive brief cases outside of a nightclub. The officers then proceeded to stop, question, and frisk the two men. With no basis to detain the men, the officers did not prevent them from walking away. But in walking away, both men left their briefcases on the sidewalk. At that point the officers again stopped the two defendants, and the men were arrested when they failed to comply with a request to produce their Selective Service cards. While the defendants were in the squad car,

The cases involving the container search, the abandoned auto, the vehicle parked on private property, and the identification of confederates at large (as an indicator of mobility) all exemplify the extent to which some lower courts have gone in allowing warrantless searches. These cases highlight the analysis of individual courts, but the cases do not indicate the evolution that occurred within each jurisdiction as the courts struggled to apply *Coolidge*. Perhaps the most unique evolution has occurred in California.

## V. CALIFORNIA: SOMETIMES A DIFFERENT NOTION

Unlike other jurisdictions,<sup>261</sup> California has substantially deviated from the *Coolidge* requirement that a warrantless search of a vehicle is valid only upon a showing of both probable cause and exigent circumstances.<sup>262</sup> The progression of these California cases displays a general resistance to the *Coolidge* requirements for a legal warrantless search; it is as if the California courts were denying by outcome what the Supreme Court had mandated by decision. The Supreme Court had proposed the policy; the California courts followed with a different practice.

The California cases decided immediately after the *Coolidge* opinion display a hesitancy to tackle the confused question of mobility.<sup>263</sup>

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the briefcases were searched. Each was found to contain a sawed-off shotgun with an illegal barrel length. In invalidating the search, the court noted that neither of the defendants had access to the briefcases at the time of search and that the briefcases were not within their immediate control at the time of arrest. *Id.* at 803-04. The court concluded that the briefcases were immobile under *Coolidge* and that it was "practicable" to secure a warrant prior to the opening of the briefcases. *Id.* at 804. However, the court erred in its conclusion that it was irrelevant that a search could have been conducted at the precise time of frisk or arrest (*id.* at 803-04), for as previously noted (see text accompanying notes 108-19 *supra*), the point of initial intrusion is the key to an evaluation of whether exigent circumstances exist. The court seemed to sense its own mistake, and in an en banc rehearing, the court avoided the mobility issue by classifying the suitcases as abandoned. In so holding, the defendants were denied standing to challenge the introduction of the evidence secured via the search.

261. See cases cited in note 103 *supra*.

262. *Id.*

263. In *People v. Munoz*, 21 Cal. App. 3d 805, 98 Cal. Rptr. 758 (1971), defendants were arrested a short distance away from their vehicle. The court dwelled on the probable cause question, not on the exigent circumstances requirement. In emphasizing the reasonableness of the search and the factors that distinguished this case from *Coolidge*, the court refrained from a statement of the *Coolidge* requirements for a warrantless search. *Id.* at 810, 98 Cal. Rptr. at 761. In *Mestas v. Superior Court*, 22 Cal. App. 3d 736, 99 Cal. Rptr. 581 (1972), the defendant was arrested for burglary. His car was parked around the corner from the scene of arrest (the distance from the car to the point of arrest was estimated at a distance of about four houses). *Id.* at 742, 99 Cal. Rptr. at

*People v. Munoz*<sup>264</sup> and *People v. Farley*<sup>265</sup> both suggested that the test of the warrantless search of a vehicle was the general test of reasonableness.<sup>266</sup> However, neither opinion attempted an incisive analysis of the *Coolidge* case.

The first such analysis of the *Coolidge* two-pronged test of a warrantless search was delivered by Justice Fleming in *Brantner v. Superior Court*.<sup>267</sup> In *Branter*, the defendant was arrested at the scene of a car accident for being under the influence of narcotics.<sup>268</sup> His van was towed out of the mud to a police storage area,<sup>269</sup> where it was then searched and found to contain restricted dangerous drugs.<sup>270</sup> Although the search was held valid as a search incident to arrest,<sup>271</sup> the court stated that the key to a search of a vehicle in California was the test of reasonableness.<sup>272</sup> Based on a test of reasonableness, this search, conducted ten to fifteen minutes after arrest in a storage area a few miles away from the scene of arrest, was not too remote to be improper.<sup>273</sup> A later search of the auto was justified by the initial right to search.<sup>274</sup> The court did not stop there; it went on to distinguish the California approach to the search of a vehicle from the approach taken by the United States Supreme Court.<sup>275</sup> In Justice Fleming's view, California courts, in a line of cases both preceding and subsequent to *Coolidge*, held that facts which justify an arrest also justify the search of a vehicle.<sup>276</sup> The Supreme Court's view is that the facts must justify the search of a vehicle independent of a justifica-

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590. Approximately thirty minutes subsequent to the arrest, the vehicle was impounded, and an inventory of the unlocked truck revealed evidence later used to secure the defendant's conviction. The court upheld the search of the vehicle. It relied on *Chambers* as requiring probable cause at the initial intrusion, but the court refused to discuss the mobility aspect of the case. The court remanded the case for further hearing in light of *Coolidge* without giving the trial court guidance as to what *Coolidge* required for a valid warrantless search. *Id.* at 581.

264. *Id.*

265. 20 Cal. App. 3d 1032, 98 Cal. Rptr. 89 (1971).

266. *Id.* at 1037, 98 Cal. Rptr. at 92; *People v. Munoz*, 21 Cal. App. 3d 805, 810, 98 Cal. Rptr. 758, 760 (1971).

267. 100 Cal. Rptr. 515 (1972), *rehearing granted*, Apr. 19, 1972.

268. *Id.* at 516.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 518.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

tion to arrest the defendant.<sup>277</sup> The opinion then concludes: "[O]nly when the vehicle search has no immediate relationship to the facts which justify the arrest does this theoretical difference between state and federal law assume practical importance."<sup>278</sup> The result of the California view (as interpreted in *Brantner*), that the facts that justify the arrest (probable cause) also justify a warrantless search of the auto, effectively excludes the requirement of exigent circumstances; any vehicle, mobile or not, can be immediately searched. Following this logic, a car without a motor or a plane without an engine could be searched without a warrant because the question of exigent circumstances, *i.e.*, the question of mobility, is never reached. The *Coolidge* decision is thus effectively ignored and a general test of reasonableness is the criterion to judge a warrantless vehicle search.<sup>279</sup> But how can most of the California courts resist the logical force of Supreme Court precedent? This question was answered by the California Supreme Court in *People v. McKinnon*.<sup>280</sup>

Speaking for the *McKinnon* majority, Justice Mosk argued that the entire discussion of the mobility doctrine in *Coolidge* was not binding on the California courts:

[T]hat portion of Justice Stewart's plurality opinion which purports to narrow the *Carroll-Chambers* rule was in any event signed by only four members of the court (Stewart, J., Douglas J., Brennan, J. and Marshall J.). Although concurring in the judgment, Justice Harlan declined to join Part II B of the opinion . . . and the four remaining justices expressly disagreed with Justice Stewart on this point. It follows that the

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277. *Id.*

278. *Id.*

279. The *Coolidge* decision was not ignored by all California courts. The court of appeal of the fifth district attempted to follow *Coolidge* in *People v. Koehn*, 25 Cal. App. 3d 799, 102 Cal. Rptr. 102 (1972). In this case, the defendant was stopped by the police while driving on a city street. The stop was justified by the existence of an outstanding arrest warrant for the passenger riding with the defendant. Both were arrested for carrying a concealed weapon when an officer observed a gun in plain view on the floorboard. The car was then immediately searched without a warrant. Using a bar, the police opened a locked tire well and found a fiberboard suitcase. The opening of the suitcase disclosed marijuana and a locked metal box, and inside the box the officers found heroin. *Id.* at 802. The court invalidated the search, denying the applicability of both the search incident to an arrest and the mobility exceptions to the warrant requirement. With specific reference to *Coolidge* and *Chambers*, the court concluded that exigent circumstances are required for a warrantless auto search. *Id.* at 803. The analysis here is that the warrantless search of the tire was not needed for the safety of the officers and that there was no danger of the vehicle being moved, since the suspects were handcuffed and in the squad car at the time of search. *Id.* at 805.

280. 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

*Carroll-Chambers* issue raised by the plurality opinion in *Coolidge* was in fact considered by an equally divided court, and hence was not actually *decided*: under settled doctrine, the judgment of an equally divided United States Supreme Court "is without force as precedent." Thus we are bound to apply the *Carroll-Chambers* rules according to our present understanding of its scope.<sup>281</sup>

But Justice Mosk's analysis ignored the fact that five members of the court signed section II-D of Justice Stewart's opinion,<sup>282</sup> a portion of the opinion which specifically required the existence of exigent circumstances to justify a warrantless search.<sup>283</sup> On the other hand, Justice Stewart's opinion in part II-B inexplicably left open the question of whether or not *Coolidge* principles would apply to a search for contraband, stolen goods, or dangerous material.<sup>284</sup> Thus, the *McKinnon* court was free to apply the *Carroll-Chambers* rule and the court proceeded to formulate the rule that a warrantless search of a vehicle or mobile container for contraband, weapons, or stolen goods could be based upon a showing of probable cause<sup>285</sup> without a further showing of exigent circumstances.

The response of the lower court cases to the *McKinnon* rule was generally one of compliance—only probable cause being required to search a vehicle for contraband, stolen goods, or weapons.<sup>286</sup> But now the lower courts have a more recent statement of law from the Cali-

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281. *Id.* at 911, 500 P.2d at 1105, 103 Cal. Rptr. at 905, *quoting* *Eaton v. Price*, 364 U.S. 263, 264 (1960) (citations omitted). In dissent, Justice Peters argued that five members of the United States Supreme Court joined in Section II-D of the *Coolidge* opinion and that this section adopted exigent circumstances as a requirement of a warrantless vehicle search. *Id.* at 921, 500 P.2d at 1112, 103 Cal. Rptr. at 912.

282. 403 U.S. at 444.

283. *Id.* at 478.

284. *Id.* at 458-64.

285. 7 Cal. 3d at 911, 500 P.2d at 1105, 103 Cal. Rptr. at 905. The position that exigent circumstances are required to search a vehicle only if the material sought is not contraband, not weaponry, or not stolen, is in accord with the view of Justice White in his dissenting opinion in *Coolidge*. 403 U.S. at 519. He argued that, since the vast majority of vehicular searches are aimed at the discovery of weapons, contraband, or stolen goods, the test of the legitimacy of a warrantless vehicle search becomes one of probable cause (often referred to as reasonableness). *Id.*

286. *People v. Laursen*, 8 Cal. 3d 192, 201, 501 P.2d 1145, 1151, 104 Cal. Rptr. 425, 431 (1972); *North v. Superior Court*, 8 Cal. 3d 301, 305, 307, 502 P.2d 1305, 1307, 104 Cal. Rptr. 833, 835 (1972); *People v. Hill*, 32 Cal. App. 3d 18, 107 Cal. Rptr. 791 (1973); *People v. Stafford*, 29 Cal. App. 3d 940, 947, 106 Cal. Rptr. 72, 77 (1973); *People v. Medina*, 26 Cal. App. 3d 809, 816, 103 Cal. Rptr. 337, 342 (1972). In *Hill*, the fourth district court of appeal relied on the *McKinnon* analysis to validate both an onscene search of a vehicle at the point of arrest (*id.* at 38, 107 Cal. Rptr. at 807) and a later search of the car after it had been impounded (*id.* at 41, 107 Cal. Rptr. at 810).

fornia Supreme Court with respect to the warrantless search of an automobile; the different notion of *McKinnon* has seemingly been abandoned. This new statement is made in *People v. Dumas*.<sup>287</sup>

*People v. Dumas* is an extraordinary opinion. It bears close analysis because of its amazing extension of the valid warrantless search; an extension that goes far beyond the limits of the auto search and far beyond the warrant requirement of the fourth amendment. *Dumas* also bears inspection because the court, although abandoning the *Coolidge* theory in application, suddenly and without explanation seems to adopt it in principle. In *Dumas*, law enforcement officials secured a search warrant to search defendant's apartment and trash for stolen railroad bonds and bank checks, narcotics, and narcotics paraphernalia.<sup>288</sup> A search of the premises specified in the warrant revealed only a young woman, an auto registration certificate, and a set of car keys.<sup>289</sup> A car matching the description of the certificate was found parked on the street about one hundred feet away from the defendant's apartment.<sup>290</sup> Although the vehicle was not mentioned in the warrant, it was searched, and stolen bonds and narcotics were seized.<sup>291</sup> In a rather strained opinion the search was upheld.<sup>292</sup> Justice Mosk began his opinion by stating the general proposition that the test of whether or not a warrant is required is one of reasonableness;<sup>293</sup> the same test that was used by *McKinnon*.<sup>294</sup> But then Mosk discussed *Carroll* as requiring probable cause and *exigent circumstances* for a

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The case involved a defendant stopped by an officer for running a stop sign. Since the defendant had run several stop signs and had driven at high speeds to avoid citation, he was arrested, handcuffed, and placed in the squad car after his vehicle was stopped. The court upheld the warrantless search in that most of the material seized (marijuana cigarettes, a pouch containing marijuana, several wallets, and a large roll of money) was in plain view. In reference to the warrantless vehicle search at the scene of the stop, the court cited *People v. Laursen*, 8 Cal. 3d 192, 501 P.2d 1145, 104 Cal. Rptr. 425 (1972), and held that only probable cause was needed for this search. 32 Cal. App. 3d at 38, 107 Cal. Rptr. at 807. *Coolidge* was not mentioned. A later search of the Pontiac at a private garage where the car had been impounded was held to be valid, although the search was aimed at evidence linking Hill with a crime different from the crime for which he was originally charged. Mobility was concluded to exist (*id.* at 42, 107 Cal. Rptr. at 810), but exigent circumstances were not discussed and *Coolidge* was not mentioned. Probable cause was the key to the justification of the search. *Id.*

287. 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973).

288. *Id.* at 875, 512 P.2d at 1211, 109 Cal. Rptr. at 307.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 881, 512 P.2d at 1215, 109 Cal. Rptr. at 311.

293. *Id.* at 883, 512 P.2d at 1216, 109 Cal. Rptr. at 312.

294. 7 Cal. 3d at 912, 500 P.2d at 1109, 103 Cal. Rptr. at 908.

valid warrantless auto search.<sup>295</sup> Though retaining the test of reasonableness voiced in *McKinnon*, the California Supreme Court was seemingly embracing the *Coolidge* requirement of exigent circumstances as a prerequisite to the mobility exception.<sup>296</sup> The exigent circumstance here was that there was another person in the apartment, the young woman, who could remove or destroy the evidence.<sup>297</sup> Probable cause was predicated on the testimony of a reliable informant that, four days prior to the search, a buyer for the bonds had not been found.<sup>298</sup> Justice Mosk thus concluded that it was reasonable to believe that the defendant still retained possession of the bonds,<sup>299</sup> and since they were not in the apartment or the trash, there was a reasonable belief to assume that the bonds were in the defendant's automobile.<sup>300</sup> How this established justification for the subsequent warrantless search of the vehicle is not clearly disclosed by the opinion, but the logic with respect to the probable cause is dubious. How could the officers legally go beyond the "places to be searched"<sup>301</sup> requirement of the fourth amendment with respect to a valid search warrant? Justice Mosk responded as follows:

The bonds might have been secreted elsewhere, of course, but we cannot disregard the likelihood that a person who holds stolen property he wishes to sell will attempt to conceal it in a place under his control that is nearby and apparently secure . . . . When the officers were unable to discover the bonds in defendant's apartment, his automobile parked outside on the street, quite naturally became an object of strong suspicion. Upon completing this search the officers "were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge."<sup>302</sup>

With probable cause thus established, the exigent circumstances requirement was satisfied by the presence of the woman in the apartment. The car was mobile and a warrantless search was permissible. The court apparently assumed that the failure of the police to list the car in the warrant was justifiable because the police did not know that the defendant had a car on the premises. But for policemen to discover that a California adult has a car nearby his apartment could

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295. 9 Cal. 3d at 885, 512 P.2d at 1218, 109 Cal. Rptr. at 314.

296. *Id.* at 883, 512 P.2d at 1216, 109 Cal. Rptr. at 312.

297. *Id.* at 885, 512 P.2d at 1218, 109 Cal. Rptr. at 314.

298. *Id.*

299. *Id.*

300. *Id.*

301. U.S. CONST. amend. IV.

302. 9 Cal. 3d at 887, 512 P.2d at 1219, 109 Cal. Rptr. at 315.

hardly be described as an inadvertent surprise. *Coolidge* would seem to require that police, when possible, secure advance approval from a magistrate for automobile searches.

Instead, a unanimous court has in effect said that, once the officers have a warrant to seize certain objects, they can disregard the "place to be searched" requirement of the fourth amendment if they do not find the sought-after material in the place that they expect it to be. Securing of a warrant was, in this case, the equivalent of writing a blank check to the police to find the stolen bonds wherever they were, as long as the places to be searched were "reasonable." Justice Sullivan expressed this fear in his concurring opinion: "I fear this broad statement may be interpreted by some as authorizing the wholesale transformation of unsuccessful searches by warrant into fishing expeditions in other areas not covered by warrant."<sup>303</sup>

Justice Sullivan's fear is exceedingly well-founded. Since there is a very real possibility that this case may later be used to justify the introduction of evidence secured with a warrant but either not covered by the warrant or else discovered in a place not designated as a place to be searched in the warrant, one must speculate on the value of *Dumas*. As precedent the case can be confined to a situation in which each of the following factors is present: a search warrant is secured but does not include the automobile; there is some showing of reasonableness in inferring that the sought-after evidence is in the car; and there is a danger that the evidence will be destroyed or removed if the car is not immediately searched.

But if *Dumas* can be so confined, what of its adoption of the *Coolidge* requirement of both probable cause and exigent circumstances prior to a warrantless search? The continued adherence to the *Coolidge* test is far from assured. Perhaps what will occur is that California lower courts will continue their division in using exigent circumstances as a requirement for the mobility exception. The general test will remain one of reasonableness with the exigent circumstances doctrine used when it will fit the judges predisposition in the case at bar. In short, it is difficult to determine at this point whether *Dumas* re-

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303. *Id.* One unique factor of the *Mosk* opinion is the statement that an "independent guarantee of personal privacy is set forth in Article I, Section 19, of the California Constitution." *Id.* at 879, 512 P.2d at 1218, 109 Cal. Rptr. at 310. He then stated that the expectation of privacy is defined by the test of reasonableness. *Id.* at 883, 512 P.2d at 1220, 109 Cal. Rptr. at 312. The same test was used by the court in *McKinnon* to define the limits of a valid search of vehicles. The court then viewed the warrantless search as reasonable (*id.* at 885, 512 P.2d at 1222, 109 Cal. Rptr. at 314), and impliedly concluded that the defendant's right to privacy was not violated.



flects conservatism with lip service to liberal language, or whether *Dumas*' conservative result is a cloak for an attempt to substantially liberalize California's approach to the mobility exception.

#### VI. THE PATTERN OF COOLIDGE AND THE CLOUD OF CADY

For three years the lower courts digested *Coolidge*. And as we have seen, a general pattern of application has developed, and although this pattern is flawed by some opinions, the pattern is clear. A vehicle stopped on a highway is mobile.<sup>304</sup> An auto, a trailer, or any vehicle stopped in the proximity of an open road will be adjudged mobile.<sup>305</sup> Even a vehicle parked on private property<sup>306</sup> or a container in the possession of a common carrier<sup>307</sup> will be mobile if it is capable of movement and enjoys access to a route of escape. But if the vehicle is disabled to the extent that it cannot move,<sup>308</sup> or if the vehicle is in some form of custodial care<sup>309</sup> which neutralizes its capability for movement at the point of initial intrusion, then a search warrant will be required prior to search. When confederates are still at large or close relations will remain near the auto when the police depart, this condition supplies the exigent circumstance that legitimizes the warrantless search.<sup>310</sup> Finally, where a vehicle has been deserted, or where a court shirks from a difficult question of mobility, the defendant may be denied standing to raise an objection to the admission of evidence seized in a warrantless auto search by the court's finding that the vehicle was abandoned.<sup>311</sup>

While the lower courts have thus appeared to have developed a consistent approach to the mobility exception, there now exists a cloud over this area—*Cady v. Dombrowski*.<sup>312</sup> On September 10, 1969, Dombrowski's disabled car was towed to his brother's farm.<sup>313</sup> Late that evening, the defendant rented a Ford and began to drive to his brother's farm.<sup>314</sup> The Ford crashed and police were summoned.<sup>315</sup> When the defendant told them that he was a Chicago policeman, one

304. See notes 102-19 *supra* and accompanying text.

305. See notes 123-25 *supra* and accompanying text.

306. See notes 174-99 *supra* and accompanying text.

307. See notes 235-60 *supra* and accompanying text.

308. See notes 127-40 *supra* and accompanying text.

309. See notes 147-73 *supra* and accompanying text.

310. See notes 213-34 *supra* and accompanying text.

311. See notes 201-13 *supra* and accompanying text.

312. 413 U.S. 433 (1973).

313. *Id.* at 433.

314. *Id.*

315. *Id.* at 435-36.

of the officers searched the front seat and the glove compartment for the defendant's service revolver.<sup>316</sup> The revolver was not found.<sup>317</sup> The vehicle was towed to a privately owned service station and was left outside without police guard.<sup>318</sup>

The defendant was taken directly to the police station at around 11:30 p.m., where he was subsequently arrested for drunk driving.<sup>319</sup> Officer Weiss returned to the Ford at 2:00 a.m. to look for the revolver,<sup>320</sup> his justification being that it was the belief of the local law enforcement officials that Chicago police were required to carry their weapons at all times.<sup>321</sup> This effort to retrieve the revolver was standard procedure in the officer's department.<sup>322</sup>

Police were later directed to the brother's farm where they found the victim of a murder.<sup>323</sup> The defendant's disabled Dodge was towed to the station on September twelfth pursuant to a warrant, and a search of the vehicle was made on the thirteenth.<sup>324</sup>

In upholding the warrantless search of the disabled Ford, Justice Rehnquist's opinion adopts an auto search standard for local and state officials different from that required of federal officials.<sup>325</sup> Local and state officials are to be given more leeway in deciding the reasonableness of their warrantless searches because these officials have far greater contact with vehicles and because this contact is often related to the operation of the vehicles, and not to the investigation of crime.<sup>326</sup> Justice Rehnquist reasoned as follows:

[L]ocal police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to a violation of a criminal statute.<sup>327</sup>

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316. *Id.* at 436.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 437.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 438.

325. *Id.* at 440-41.

326. *Id.*

327. *Id.* at 441.

The court then made the evaluation that the difference between the search of a house and an automobile

stems both from the ambulatory character of the latter as well as from the fact that the extensive, and often noncriminal contact with automobiles that will bring local officials in "plain view" of evidence, fruits, or instrumentalities of a crime or contraband.<sup>328</sup>

The opinion then attempted an unconvincing recitation of precedent to show that the court has a tradition of distinguishing between searches of local and federal authorities.<sup>329</sup> The response of the lower courts to this opinion, and its effect on the pattern of application of the mobility exception that has been outlined above, is as yet unclear. The potential for a change in the pattern is great, and it is possible (although highly improbable) that warrantless searches of any vehicle, no matter how incapable it is of movement, may be upheld. It is possible that *Coolidge* has been made judicially comatose only three years after birth. The extent of this possibility can be recognized by a brief review of the pattern of enforcement of the mobility exception previously outlined.

It is clear that, prior to the *Cady* opinion, the warrantless search of vehicles on the highway was upheld.<sup>330</sup> It is equally clear that a disabled vehicle incapable of movement was not considered mobile, and, therefore, a warrant has been required to legitimize the search of such a vehicle.<sup>331</sup> But the Ford in *Cady* was so disabled that it was required to be towed away,<sup>332</sup> yet a warrantless search over two hours after the initial intrusion of law enforcement officials was upheld.<sup>333</sup> At the point of initial intrusion, the car was openly immobile. The same reasoning that allowed the warrantless search of the Ford (increased justification of the contact of local officials with vehicles and the contact was consistent with standard police procedure) could justify almost any warrantless search conducted by state or local authorities. Any car in police custody could be the subject of a warrantless search,

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328. *Id.* at 442.

329. *Id.* at 442-48. The case relied on for this distinction is *United States v. Biswell*, 406 U.S. 311 (1972) (plain view exception to warrant requirement utilized in warrantless search of pawnshop under federal statute). Two other cases relied upon by *Cady* bear noting: *Harris v. United States*, 390 U.S. 234 (1968) (petitioner arrested for robbery while entering his car and the police impounded the vehicle and searched it); *Cooper v. California*, 386 U.S. 234 (1967) (upheld a warrantless search of a glove compartment where police were required to impound the vehicle).

330. See notes 102-19 *supra* and accompanying text.

331. See notes 127-40 *supra* and accompanying text.

332. 413 U.S. at 436.

333. *Id.* at 446.

as long as the authorities are not federal and the custody involves a "caretaker function." The requirement that the warrantless search be justified at the point of the initial intrusion vanishes if this logic is applied. Likewise, the minority criterion that police must secure a search warrant where they have advance knowledge of the need to search a vehicle (to the extent that the opportunity to search is not fleeting)<sup>334</sup> will fail if local authorities are given such leeway in conducting warrantless auto searches. In summation, there is potential that the effect of *Coolidge*, which is that an automobile may not be the subject of a warrantless search simply because it is an automobile, will be negated.

In the final analysis, it would appear that the lower courts have been struggling to accommodate two fundamentally different conceptions of the fourth amendment warrant requirement. One view holds that the fourth amendment's warrant requirement can be excused only if exigent circumstances are presented. The other view postulates a difference of constitutional significance between the searches of houses and the searches of cars: the former requiring a warrant, the latter not. Neither of these views has been accepted in the line of cases extending from *Carroll* to *Chambers* to *Coolidge* to *Cady*. And since the Supreme Court has been unable to produce a definitive response, the lower courts have not been required to follow, but have instead been allowed to lead. This leadership will continue until the Supreme Court definitively resolves the permissible scope of warrantless vehicle searches under the fourth amendment.<sup>335</sup>

Shelly Jay Shafron  
Charles R. Imbrecht

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334. *Id.* at 453.

335. Subsequent to the submission of this Comment to the printer, the "mobility" exception was once again encountered by the Supreme Court in *Cardwell v. Lewis*, 94 S. Ct. 2464 (1974). No viewpoint was able to command a majority, thus *Cady* remains the most recent Supreme Court holding on the fluid problem of automobile searches.