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Repository Citation

Mary Brandt Jensen, *The Scope of Warrantless Searches Under the Automobile Exception: United States v. Ross*, 43 La. L. Rev. (1983)

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THE SCOPE OF WARRANTLESS SEARCHES UNDER THE AUTOMOBILE
EXCEPTION: *United States v. Ross*

On the evening of November 27, 1978, Detective Marcum had probable cause to believe that a man of a particular description, known as "Bandit," was selling narcotics from the trunk of a maroon Chevrolet Malibu in the area of Ridge Street, Washington, D.C.¹ Later that evening, Detective Marcum, accompanied by two other officers, stopped a maroon Malibu driven by a person fitting the description of "Bandit" in the area where Detective Marcum's informant had said the car was located. After the driver had been arrested and handcuffed, Detective Cassidy removed the keys from the ignition, unlocked the trunk, and opened a folded but unsealed paper bag.² The bag contained thirty glassine envelopes of heroin which were introduced into evidence after the defendant's motion to suppress was denied. The Court of Appeals for the District of Columbia,³ sitting en banc, reversed defendant's conviction on the grounds that it was inconsistent with the holding of *Arkansas v. Sanders*.⁴ The United States Supreme Court reversed the court of appeals and affirmed the original conviction, *holding* that when a warrantless search of a lawfully stopped vehicle is justified, the search may extend to every part of the vehicle and the contents therein that may conceal the object of the search. *United States v. Ross*, 102 S. Ct. 2157 (1982).

Under the fourth amendment to the United States Constitution, which protects individuals from unreasonable searches and seizures, warrantless searches are per se unreasonable, subject only to a few exceptions.⁵ The "automobile" exception was first enunciated in *Carroll v. United States*,⁶ which held that an officer lawfully could conduct a warrantless search of a vehicle stopped on a highway when

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1. An informant telephoned Detective Marcum and said that he had just observed "Bandit" complete a sale and "Bandit" had told him that additional narcotics were in the trunk. The informant gave Marcum a detailed description of "Bandit" and stated that the car was a "purplish maroon" Chevrolet Malibu with District of Columbia license plates. The informant had given Detective Marcum information in the past which had been reliable and which had led to other drug related arrests. *United States v. Ross*, 102 S. Ct. 2157, 2160 (1982).

2. A second search of the bag and a zipped leather pouch which also was found in the trunk was conducted later at the police station. The search of the leather pouch, which contained \$3,200, was not an issue before the Supreme Court since the government did not challenge that part of the court of appeals decision which held that the contents of the pouch were inadmissible. *Id.* at 2161 n.2.

3. *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (en banc).

4. 442 U.S. 753 (1979).

5. *Katz v. United States*, 389 U.S. 347, 357 (1967).

6. 267 U.S. 132 (1925).

there was probable cause to believe the vehicle contained contraband and the procurement of a warrant was not reasonably practicable.⁷ The *Carroll* doctrine was expanded in *Chambers v. Maroney*,⁸ in which the Court held that if probable cause to search was initially present when the vehicle was stopped, the vehicle could be searched later at the police station without a warrant.⁹ In the process of reaching this conclusion, the Court stated that there was no constitutional difference between seizing and holding a car until a magistrate could make a determination of probable cause and an immediate search of the car.

In *United States v. Chadwick*,¹⁰ the government argued that the rationale behind the automobile exception should be applied to a footlocker which was seized in a railroad station, but the Court rejected the argument, stating that luggage is not subject to the lesser expectation of privacy which characterizes automobiles. Two years later, in *Arkansas v. Sanders*,¹¹ the Court declared that a warrantless search of a suitcase, which was accompanied by no diminished expectation of privacy, was unconstitutional, even though the suitcase had been seized from the trunk of a taxicab. As soon as the police had seized the suitcase, the exigency caused by the suitcase being in an automobile ceased. Once removed from the car, the suitcase was like any other piece of luggage seized in a public place, and it could not be searched without a warrant. In *Robbins v. California*,¹² a plurality of the Court would have extended the holding of *Sanders* by finding that the (warrantless) search of any closed opaque container found during a warrantless search of a vehicle was unconstitutional.¹³

During the period in which the Court was expanding the automobile exception, it was limiting other exceptions through restric-

7. *Id.* at 153-54, 156. In *Carroll*, the officers were not looking for the defendants, but they knew that the defendants often transported contraband liquor in an Oldsmobile on the road upon which the officers were driving. When the officers spotted the Oldsmobile by chance, they stopped it and searched it, finding whiskey under the upholstery of the rear seat.

8. 399 U.S. 42 (1970).

9. *Id.* at 52. After the occupants of the vehicle were arrested, it was taken to the station and searched several hours later.

10. 433 U.S. 1 (1977). A footlocker had been seized at a railroad station when its owners were arrested on narcotics charges. The footlocker was then taken to FBI headquarters and later searched without a warrant.

11. 442 U.S. 753 (1979).

12. 453 U.S. 420 (1981).

13. Having probable cause to believe that the station wagon they had stopped contained marijuana, the officers searched its luggage compartment, and found two oblong bricks wrapped in opaque plastic bags and taped shut. Upon opening these packages, the officers found a substantial quantity of marijuana.

tions on the scope¹⁴ of searches pursuant to them. Specifically, a warrantless search was limited in scope to that which was required to meet the need which justified the exception. This idea appears to have been first expressed by Justice Fortas in *Warden v. Hayden*,¹⁵ in which he said that searches under each exception until that case had been limited to the extent necessary to fulfill the purpose of the exception. In *Terry v. Ohio*,¹⁶ the majority of the Court, quoting Justice Fortas, recognized that searches which were reasonable in their initiation could become unreasonable and unconstitutional if their intensity and scope exceeded that which was necessitated by the justification for the exception which allowed the initiation of the search. The Court stated that the fourth amendment protects people as much by limitations upon the scope of an intrusion as by imposing preconditions upon the initial intrusion.¹⁷

Terry limited the scope of searches under the "stop and frisk" exception¹⁸ to a pat down of the outer clothing when the officer believed that the suspect might be armed. Such a limited search was all that was necessary to protect the officer from weapons possibly possessed by the suspect which was the justification for the exception. A year later, in *Chimel v. California*,¹⁹ the Court limited the scope of a search "incident to an arrest" to the area within the immediate control of the arrestee from which he might gain access to weapons or destructible evidence. When, in *Coolidge v. New Hampshire*,²⁰ the

14. The word "scope" will be used in this Note to refer to the objects which may be searched for, the methods of search which may be used, and the amount of time and detail involved in the search.

15. 387 U.S. 294, 310 (1967) (Fortas, J., concurring). In *Warden* the Court upheld a warrantless search of a house for a man and weapons under the "hot pursuit" exception. The officers who responded to a robbery call saw the man whom they had been chasing run into a nearby house. Justice Fortas felt that the extent of the search for weapons approved by the majority of the Court was not justified since the basis of the exception was to prevent escape, not to collect evidence.

16. 392 U.S. 1, 17-19, 25-26 (1968). *Terry* created the "stop and frisk" exception, under which an officer who has reason to investigate and who believes the suspect is armed may stop him and conduct a limited frisk of his outer clothing for weapons in order to protect the officer.

17. *Id.* at 28-29.

18. Two views have been expressed as to whether or not *Terry* should be viewed as creating an exception to the warrant requirement. One view is that searches which are not based upon probable cause, such as "stop and frisk" searches, were never subject to the warrant clause of the fourth amendment and, therefore, such searches are not conducted pursuant to an exception. The other view is that all warrantless searches are per se unreasonable under the fourth amendment, unless they are justified by an exception. *Katz v. United States*, 389 U.S. at 347, 357 (1967). Therefore, any warrantless search which is constitutional must be supported under an exception. Under this view, *Terry* creates such an exception.

19. 395 U.S. 752 (1969).

20. 403 U.S. 443 (1971).

Court refused to uphold a search of an automobile in a driveway as incident to the arrest of a man inside his home, the majority²¹ of the Court reiterated the rule that searches based upon exceptions must be limited in scope to that which is necessitated by the justification for the exception involved. Since the car was not within the area from which the arrestee might gain access to weapons or destructible evidence, the scope of the search exceeded that which was justified by the arrest.²²

The limited scope rule also had been applied to a search of a person for evidence where no formal arrest has been made. When a suspected strangler was being questioned voluntarily at a police station and began to rub his hands together behind his back after refusing to consent to the taking of samples from his fingernails, a very limited search was allowed to preserve the evidence which the suspect was obviously attempting to destroy.²³ Since there was no arrest or stop, the justifications for a search incident to arrest, for a search for weapons, and for a search to preserve destructible evidence did not necessarily apply, and a search of all areas within the suspect's immediate control was not permissible. But since the suspect obviously was attempting to destroy evidence, the "exigent circumstances" doctrine applied, and a more limited search was permissible to preserve the evidence which was in the process of being destroyed.

The Court also has applied scope limitations to searches initiated under the "emergency" doctrine. Although a fire provided an emergency which justified a limited search immediately after the fire was put out to determine the cause of the blaze and to prevent a recurrence of the fire, the Court, in *Michigan v. Tyler*,²⁴ would not sanction a continuation of the search without a warrant to gather evidence after the cause had been determined to be arson. A shoot-out also created an emergency which was sufficient to justify an entry and a cursory search for victims in need of aid, but a four day search

21. *Id.* at 478. Justice Harlan joined part II-D of the opinion, giving it the support of a majority of the Court.

22. [I]t is doubtful whether the police could have carried out a contemporaneous search of the car under *Rabinowitz* standards. For this Court has repeatedly held that, even under *Rabinowitz*, "[a] search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. . . .'" These cases make it clear beyond any question that a lawful pre-*Chimel* arrest of a suspect outside his house could never by itself justify a warrantless search inside the house. There is nothing in search-incident doctrine . . . that suggests a different result where the arrest is made inside the house and the search outside and at some distance away.

403 U.S. at 456-57 (citations and footnotes omitted).

23. *Cupp v. Murphy*, 412 U.S. 291 (1973).

24. 436 U.S. 499 (1978).

of the scene which included ripping up carpets and digging bullets out of walls exceeded the scope and intensity justified by the emergency. The Court also has rejected the idea that an emergency involving a serious crime necessarily justifies an extensive warrantless search.²⁵

Administrative searches also are subject to limitations on scope which are commensurate with the justification for the exception to the warrant requirement. A statute which mandated periodic warrantless inspections of underground and surface mines was upheld because the statute specifically stated the frequency of the searches and the areas which could be searched.²⁶ The statute also prohibited forcible entry and contained provisions which allowed a mineowner to prevent any specific search which he felt was outside the federal regulatory authority until the investigators procured a court order authorizing the search.²⁷ Three years earlier, in *Marshall v. Barlow's Inc.*,²⁸ the Court had invalidated a section of the Occupational Safety and Health Act which did not adequately define the areas which could be searched or the frequency of warrantless searches. A statute which authorizes warrantless administrative searches must delineate limitations on the scope of such searches which will provide an adequate substitute for the magistrate's determination of a reasonable scope when a warrant is issued.²⁹

United States v. Ross constitutes a reconsideration of the issue of the scope of warrantless searches conducted under the automobile exception. Justice Stevens, writing for a six member majority,³⁰ reasoned that the authorized scope of a warrantless search based on probable cause is the same as a magistrate could authorize when issuing a search warrant, because only the prior determination of probable cause by the magistrate is being waived when exceptions are granted for searches based on probable cause. The search is otherwise what a magistrate could authorize. Since the scope of a search authorized by a magistrate is determined by the object of the search and the places where there is probable cause to believe that the object may be found, the scope of a warrantless search based on probable cause also should be determined by the object of the search and the places where there is probable cause to believe it may be found. If a magistrate issued a warrant to search a vehicle, the scope of the search would extend to all parts of the vehicle and any containers

25. *Mincey v. Arizona*, 437 U.S. 385 (1978).

26. *Donovan v. Dewey*, 452 U.S. 594 (1981).

27. *Id.* at 604-05.

28. 436 U.S. 307 (1978).

29. *Cf. Donovan v. Dewey*, 452 U.S. 594, 603-05 (1981).

30. Justices White, Marshall, and Brennan dissented.

therein which could contain the object described in the warrant; therefore, the Court held that when a warrantless search based on probable cause is conducted pursuant to the automobile exception, the scope of the search extends to all parts of the vehicle and allows the opening of any container found in the vehicle which could contain the object of the search.³¹

This holding necessitated the overruling of *Robbins v. California* and the rejection of the majority reasoning in *Arkansas v. Sanders* to the effect that as soon as a piece of luggage or other container is seized from the vehicle and is in the officer's exclusive control, the exigency which justified the initial intrusion into the vehicle and the seizure of the luggage or container ceases and, therefore, the right to search ceases. According to *Ross*, since a magistrate, in possession of all the facts known to the officer on the scene, could have concluded that there was probable cause to search the luggage or container found in the vehicle and could have authorized such a search, the officers could continue their search by opening and searching the luggage or container. The Court, however, reiterated³² its earlier position in *United States v. Chadwick*³³ that the rationale justifying the warrantless search of a vehicle under the automobile exception does not apply with equal force to any movable container that is found in a public place and believed to contain an illicit substance.³⁴ Nor does the mere fact that such a container has been placed in a moving vehicle (where there is no chance for the contraband to be removed from the container and secreted elsewhere in the vehicle) justify the warrantless search of the container.³⁵

The Court has rejected much of the reasoning of the majority opinion in *Arkansas v. Sanders* and apparently has adopted that of

31. 102 S. Ct. at 2172.

32. *Id.* at 2165-66.

33. 433 U.S. at 13.

34. The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

Nor does the [luggage's] mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents [have] seized it . . . and [have it] under their exclusive control, there [is no danger that it] or its contents could [be] removed before a valid search warrant could be obtained.

Id. at 13.

35. 102 S. Ct. at 2166.

the concurring opinion of Chief Justice Burger, in which Justice Stevens joined. The majority in *Arkansas v. Sanders* held that

the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations. Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway.³⁶

Justice Powell based this holding on the reasoning that once the police have seized the luggage, the extent of its mobility is not affected by the fact that it was seized from a vehicle and a person's expectation of privacy in the contents of luggage is not lessened by placing the luggage in a vehicle for transport.³⁷ Justices Burger and Stevens, however, said that *Sanders* was a container case which did not invoke the automobile exception at all. According to their reasoning, the luggage being transported in the cab at the time of the arrest, not the automobile in which it was being carried, was the suspected location of the contraband.³⁸ Such cases, according to Justices Burger and Stevens, are governed by *United States v. Chadwick*, and the fact that the suspected container coincidentally was located in an automobile did not turn the case into an automobile exception case. Therefore, they did not conclude that the automobile exception never could justify a search of luggage found in a vehicle and that some other basis always would have to be found to justify searches of luggage seized from automobiles. They would have limited the holding of *Sanders* to requiring warrants only where a suspect piece of luggage which could not have been searched without a warrant was placed in an automobile which the police did not otherwise have probable cause to believe contained contraband,³⁹ which is how *Ross* limited *Sanders*. Apparently, the only connection between *Sanders* type cases and the automobile exception is that the automobile exception allows the police to stop a moving vehicle carrying the suspected container and search the vehicle for the container without acquiring a warrant to search the vehicle. The object of this automobile search is the container and not the contents of the container; therefore, the warrantless search for the container based on the automobile exception cannot justify a warrantless search of the container after it is found.

36. 442 U.S. at 766.

37. *Id.* at 763-64.

38. *Id.* at 766.

39. *Id.*

As Justice Marshall suggests in his dissent, the analysis of the majority opinion in *United States v. Ross* departs from the analysis traditionally applied to scope of search questions under the fourth amendment.⁴⁰ The majority opinion makes no reference to the long line of cases concerning almost every exception to the warrant requirement which limits the scope of any warrantless search to that which is necessitated by the justification for the exception under which the search is conducted.⁴¹ The opinion also fails to discuss one of the magistrate's traditional functions—to serve as a safeguard against searches which are unreasonable in scope. If a warrant is applied for, the magistrate can perform this function through a specific description of the object sought and the area to be searched. In the past, the Court has limited the scope of warrantless searches in an effort to provide substitutes for the safeguards provided by a warrant, while accommodating the necessity for such searches under special circumstances.⁴² This effort appears to have been abandoned by the majority in *United States v. Ross*.

The magistrate traditionally has performed at least two important functions:⁴³ (1) he makes a neutral and detached determination of the existence *vel non* of probable cause and (2) he determines the scope of the search necessitated by the governmental interests involved and limits the scope of the search through a specific description in the warrant of the object sought and the place to be searched. The majority opinion recognizes the first function, which necessarily must be waived when a warrantless search is permitted. The reasoning of the Court, however, rests upon the premise that the object and necessary scope of all searches, including all warrantless searches, already are defined *precisely* when the search begins.⁴⁴ The object and scope of searches based on warrants are defined precisely when the search begins because the magistrate has defined them and recorded them in the warrant. For searches conducted under most exceptions to the warrant requirement, the class of objects which may permissibly be sought and the limits on the permissible scope of the search also are defined precisely, but only because the Court has defined them in judicially developed rules which restrict the objects which may be sought, and limit the scope of such searches to that which is necessitated by the justifications for the exceptions. The

40. 102 S. Ct. at 2173.

41. See text at notes 14-28, *supra*.

42. See *Donovan v. Dewey*, 452 U.S. 594 (1981); *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967).

43. *Mincey v. Arizona*, 437 U.S. 385, 395 (1978); *Sibron v. New York*, 392 U.S. 40 (1968); *Katz v. United States*, 382 U.S. at 347, 356-57 (1967).

44. 102 S. Ct. at 2170-71.

Court, in the past, has substituted specific rules for the magistrate's determination of the proper scope of searches pursuant to warrants.⁴⁵ Such specific rules, however, did not exist for the automobile exception, and the Court in *Ross*, unlike the Court in cases concerning other exceptions, has chosen not to create them.⁴⁶ The Court provided no substitute under the automobile exception for the protection provided by the magistrate's determination of the proper scope of a search.

The rule which the Court adopted is that the scope of a warrantless search based upon probable cause is no narrower and no broader than a magistrate could authorize.⁴⁷ The advance determination by the magistrate of the proper scope of the search has been removed, and the determination of a police officer, whose view may be unconsciously tainted by his desire to find evidence to justify his actions,⁴⁸ has been substituted. A substitution of the police officer's determination of probable cause for the magistrate's neutral determination has been accepted under the traditional exceptions to the warrant requirement because there appears to be no alternative. There is an alternative, however, to substituting the officer's determination of the proper scope of a search for the magistrate's neutral determination.⁴⁹ The alternative, utilized by the Court in the past, is for the courts to lay down specific rules of scope which match the limited justifications for the exceptions. When a lawful search has been initiated, it is far more likely that it will not exceed reasonable bounds if it is conducted pursuant to a judicial declaration of the proper scope of the search.⁵⁰ When this judicial declaration cannot be provided by a magistrate because of the impracticality of obtaining a warrant, it

45. See *United States v. Chadwick*, 433 U.S. 1 (1977).

46. In *Arkansas v. Sanders*, the Court had begun the task of defining the scope of the search under the automobile exception in such a way as to provide a substitute for the protection of the magistrate's determination by reasoning that when the search concerned luggage, the exigency provided by the automobile ceased once the luggage was in the officer's exclusive control; therefore, the right to search ceased. 442 U.S. at 763. In *Robbins*, a plurality of the Court would have extended the rule of *Sanders* to provide a substitute for the protection provided by the magistrate's determination of the permissible scope and extent of the search when any container was found during the search of a vehicle under the automobile exception. 453 U.S. at 428. These two cases represented the beginning of the process of creating surrogate rules for the automobile exception, but the task was by no means complete. No limits had been set upon searches which did not involve containers. The overruling of *Robbins* and the rejection of the reasoning of *Sanders* by *Ross* undoes what progress the Court had made toward creating rules which would provide an adequate substitute for the protection provided by the magistrate for searches under the automobile exception.

47. 102 S. Ct. at 2172.

48. The Court recognized this inherent problem with on-the-spot judgments by police officers in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

49. *Terry*, 392 U.S. at 17-18, 28-29.

50. *Chadwick*, 433 U.S. at 9.

can be provided by appellate courts through rules of law limiting the scope of warrantless searches to that which is necessitated by the reason behind the particular exception.

Developing clear rules applicable to the wide variety of fact situations which may arise under the exceptions to the warrant requirement and which also provide substitutes for the protection provided by a magistrate's neutral determination of the proper scope of a search is a time consuming and difficult task. The Court, however, has taken the time in the past to develop rules which provide substitutes for the protections which a magistrate provides against overbroad searches.

The Court has created rules which limit the object and scope of stop and frisk searches to that which is necessitated by the reason behind that exception. In *Terry v. Ohio*,⁵¹ the Court limited the object of such a search to weapons and restricted the scope to a pat down of the outer clothing of a suspect. Since the purpose behind this exception is to protect the officer and a limited patdown would reveal any weapons, a more extensive search would not be justified under the *Terry* exception. This rule also discourages overbroad searches by substituting a court rule for the magistrate's judicial determination of the proper object and scope of a search.

In *Chimel v. California*,⁵² the Court created rules which protect against overbroad searches incident to arrest by limiting the object and scope of such searches to that which is required to prevent injury to the arresting officer and the destruction of evidence. The general rule, set out in *Chimel*, is that searches incident to an arrest may include only the area within the immediate control of the arrestee.⁵³ When special circumstances surrounding the arrest of an occupant of an automobile required elaboration upon this rule, the Court, in *New York v. Belton*,⁵⁴ held that when the arrestee was the recent occupant of an automobile, the entire passenger compartment of the automobile, including containers, could be searched. These rules discourage overbroad searches incident to arrest in the same manner that a magistrate discourages overbroad searches, by limiting the object and scope of the search.

The majority opinion in *Sanders* and the plurality opinion in *Robbins* appeared to indicate that the Court had begun to work on the task of developing rules which would provide adequate substitutes for the protections provided by a magistrate when a warrantless

51. 392 U.S. 1 (1968).

52. 395 U.S. 752 (1969).

53. *Id.* U.S. at 768.

54. 453 U.S. 454 (1981).

search was conducted pursuant to the automobile exception. *Sanders* had limited the scope of such searches by denouncing the opening of luggage found during a warrantless search of an automobile. The plurality in *Robbins* would have extended the holding of *Sanders* to protect any opaque container found during a warrantless search conducted pursuant to the automobile exception.

The analysis used by the majority in *Ross*, however, appears to contradict the indication in *Sanders* and *Robbins* that the Court intended to develop limiting rules for the scope of warrantless searches under the automobile exception. The Court's ruling provides no substitute for the protections against overbroad searches provided by a magistrate's neutral determination of the object and proper scope of a search. Furthermore, as noted by Justice Marshall in his vehement dissent,⁵⁵ by rejecting the reasoning of *Sanders* and overruling *Robbins*, the Court undermined prior effects to limit the scope of searches under the automobile exception and all other exceptions to that which is justified by the purpose behind the particular exception. At least in the area of automobile searches, a majority of the Court apparently has decided not to pursue the effort to provide substitutes for the protections of a warrant.

While *Ross* was an automobile exception case, the general rule articulated therein and the reasoning behind it seem to have broader applicability to all searches based upon probable cause and the impracticality of obtaining a warrant. Arguably, the same rationale could be applied to searches under the exigent circumstances and emergency doctrines, as well as any other exception for which the Court has not yet articulated limiting rules. If this is the case, the Court may have laid aside any attempt in the near future to provide further judicial substitutes for the protections provided by a magistrate's neutral determination of the object and proper scope of a search.

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55. 102 S. Ct. at 2173-74 & 2176.

