

**Criminal Court of the State of New York  
County of Borough : JHO (Cardozo)**

**People  
-against-  
Richard Jones**

**Indictment #: xxxx-200x**

**Memorandum of Law**

**Prepared For Judge Cardozo**

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**Submitted: April x, 200x**

**CC: Jane Johnson, Assistant District Attorney, Borough County  
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Courtesy Copy of *People v. Galak* Follows Memo

1. *People v. Galak*, 80 NY2d 715, 610 NE2d 362, 594 NYS2d 689 (New York Court of Appeals, 1993)

## Facts

On August x, 200x, a number of New York City Police officers responded to a radio call about shots being fired and/or assault at a location in Borough County.

Upon arrival, Police Officer Anderson interviewed three victims who claimed that they had been menaced by two individuals wielding guns. The information available to the police officers at the time that they arrived at the scene suggested that both shots had been fired and that a person was injured as a result of those shots fired. Upon arrival at the scene, the police learned the truth was that in fact no gun was fired and that the only person injured was injured by running away and running into a fence or bench with his leg.

The three victims indicated to Police Officer Anderson that the two individuals fled in a White Van and were able to provide the license plate number to the Van, as well as general descriptions of the two individuals.

One of the victims claimed to know one of the perpetrators. Significantly, the victims indicated to Police Officer Anderson that there was an ongoing dispute between the two families that had reached the level of criminal cross-complaints.

Furthermore one of the victim's claimed to know where one of the perpetrators lived. Police Officer Anderson's partner, Officer Alphonse, placed this victim (a female) into his marked patrol car

and was directed by her to the location where she claimed one of the perpetrators lived.

Officer Alphonse, along with numerous other officers who responded to the radio calls, then entered a particular building identified by the female victim and ascended the stairs to a particular third floor apartment. With the female victim waiting in a position of safety in the staircase, Officer Alphonse and the other officers knocked on the door to the apartment.

Mr. Miller, opened the door, and upon the police officers' request exited the apartment of his own free will. Once Mr. Miller exited the apartment, he was presented by the police to the female victim who positively identified Mr. Miller as one of the perpetrators. Officer Alphonse then accompanied Mr. Miller down the stairs and out of the building. Officer Alphonse testified that Mr. Jones was brought out of the building in handcuffs shortly thereafter, but he did not personally observe where Mr. Jones was apprehended or what was said, if anything, by the female victim that led to his being placed in handcuffs.

While Mr. Jones and Mr. Miller were standing outside the building in handcuffs, Police Officer Henry and her partner arrived. Officer Henry testified that she observed the defendants in handcuffs and overheard the female victim identifying each of the defendants as the two people who had menaced her earlier.

With both defendants under arrest and secured by the police officers at the scene, Officer Henry then was instructed to canvas the area for the White Van bearing the license plate number earlier described. Officer Henry was aware of the nature of the charges, the accusations involving the guns, and the descriptions of the individuals and what they were wearing.

As Officer Henry began her canvas of the area, neither she, nor any other police officer (as suggested by the testimony before the court) was aware that the white van in question was Mr. Jones's Van.

There is no testimony to suggest to the court that the police were aware that Mr. Jones had any connection to the white van in question, later observed by Officer Henry. In fact, testimony of Police Officer Anderson clearly indicates that Mr. Jones did not admit that the van was his until he was in custody in the Precinct with Officer Anderson.

Furthermore, Officer Henry was oblivious, or her testimony was devoid of mention of whether or not weapons were recovered from Mr. Jones and Mr. Reason or whether weapons had been recovered in the location from which they were arrested.

After approximately 5 minutes of patrolling the neighborhood in the police car, Officer Henry observed a white van parked in a nearby parking lot. Although on direct examination, the Assistant District Attorney elicited testimony from Officer

Henry that she thought the van might not have had the correct parking sticker for the parking lot in which it was parked, Officer Henry candidly conceded that her intentions with respect to investigating the white van had absolutely nothing to do with whether or not the van had the appropriate parking sticker for the lot.

Furthermore, Officer Henry quite frankly indicated that her investigation of the white van had everything to do with the fact that it appeared to match the description of the vehicle she was told to look for in connection with the instant case.

Whatever else the testimony at the hearing indicates, the candid testimony of Officer Henry and the failure of the Lieutenant even to mention the legality of the white van's parking spot clearly indicates that the actions of the police with respect to the white van were not motivated **one iota** by whether or not the van did or did not have the appropriate parking sticker for the lot in question.

Upon closer inspection, Officer Henry noted that the license plate on the van matched the license plate of the van she was instructed to locate as having been used by the defendants to leave the scene of the crime.

Officer Henry, once she located the van, called out over the radio for further instructions. Her superior officer, Lieutenant Kelly, instructed her to wait for him to arrive before doing anything.

Officer Henry obeyed her instructions and merely waited for the Lieutenant to arrive.

Upon arrival at the parking lot, the Lieutenant verified that the van was indeed parked, there was nobody inside the van, and the engine was off. The Lieutenant did testify that he placed his hand over the area where the engine would be and it was his opinion that the metal over the engine was “red hot”.

At this point Lieutenant Kelly instructed Officer Henry to conduct an inventory search of the van. Both Lieutenant Kelly and Officer Henry testified to the fact that the Lieutenant ordered the inventory search. Officer Henry initially remembered discussions with the Lieutenant about “securing the van for towing” but later conceded that the Lieutenant ordered an inventory search. Thankfully, the Lieutenant himself resolved any confusion about the issue by affirmatively stating without the slightest difficulty or hesitation that he ordered Officer Henry to conduct an inventory search of the white van.

Officer Henry testified that she conducted the inventory search essentially according to her own judgment and assessment of the requirements of such a search. Officer Henry indicated that she had no formal checklist of any kind and either did not know of or did not employ any form of standard or regularized procedure for conducting an inventory search of a vehicle.

Officer Henry testified that she immediately ceased her “inventory search” once she discovered contraband, that in this case, included two guns, some ammunition, and a bullet proof vest, as well as a shirt that appeared to match one of the initial descriptions provided the police.

Officer Henry never finished her “inventory search”.

Officer Henry never prepared a written inventory for her “inventory search”.

Lieutenant Kelly, testified that he ordered the “inventory search” of the white van. Like Officer Henry, the Lieutenant did not order that a written inventory be prepared. The Lieutenant also confirmed that the “inventory search” was halted the moment the incriminating evidence was discovered.

Despite ordering the “inventory search” and despite being quite confident in the need for an “inventory search”, including the need to “safeguard” the defendant’s personal property, the Lieutenant was wholly ignorant of any of the facts that might have suggested that an inventory search had indeed taken place.

He could not identify one single other piece of property that was located and “secured” from inside the white van, aside from the cardboard box containing the incriminating evidence. The closest to being able to identify any property secured from inside the van that was not incriminating evidence the Lieutenant was able to come was to suggest that the back of the van contained “junk”. The

Lieutenant was unable, however, to identify with the remotest specificity what any of this junk was.

Indeed the Lieutenant's delayed responses of "I don't remember" and the tone with which he answered suggested that he was **perplexed** at questions from defense counsel that attempted to gain some insight into the results of the "inventory search" the Lieutenant claimed he ordered and in which the Lieutenant personally participated.

The Government failed to present any evidence of inventory checklists or procedures followed in this proposed "inventory search" or evidence of how those procedures satisfied the legal requirements for true inventory searches.

The Government introduced evidence at the hearing that Mr. Jones conceded that the van was his. Officer Anderson testified that Mr. Jones conceded that the van was his at the police precinct during the time that the officer was preparing paperwork related to the arrest.

The search of Mr. Jones's van will likely be defended first, as having been made pursuant to an "inventory search" and failing that, as having been conducted pursuant to one or more exceptions to the Fourth Amendment requirement to obtain search warrants.

#### A. Inventory Searches – Constitutional Framework

To take the Police Officers who testified at the suppression hearing at their words, they opened Mr. Jones's van in the course of conducting an "inventory search" of the van in preparation for the van being towed to the police impound lot. Although it is conceivable that the Government may advance a different argument, this memo will address the justification advanced by the Police for their own actions first.

Any analysis of the circumstances justifying an "inventory search" must begin with language of the Fourth Amendment (and Article 1 section 12 of the New York State Constitution). The Fourth Amendment of the United States Constitution prohibits state government agents (thanks to the incorporation of the 14<sup>th</sup> Amendment) from conducting "unreasonable" searches. Modern Fourth Amendment analysis of what constitutes an "unreasonable" search essentially turns on a weighing of the governmental and societal interests advanced by the search against the individual's right to be free from arbitrary interference by law enforcement officers. *People v. Galak*, 80 NY2d 715, 610 NE2d 362, 594 NYS2d 689 (New York Court of Appeals, 1993)

So called "inventory searches" are justified as advancing three specific government interest objectives:

1. They help to protect the police against claims of lost, stolen, or vandalized property
2. They help protect a property owner's property while in police custody

3. They help guard the police and others from dangerous instrumentalities that would otherwise go undetected. *Id.*

Weighing against these three government/societal interests is the individual's expectation of privacy in the area searched by the government. The individual's expectation of privacy in the area searched by the government is evaluated in terms of the risk that the search will exceed the scope of its purposes and therefore intrude without sufficient justification on the individual's privacy interest. *Id.* See also *Florida v. Wells*, 495 US 1, 110 SCt 1632 (United States Supreme Court, 1992)

In essence, this risk of "exceeding the scope" represents the practical fear that the "inventory search" will become the expedient excuse of government agents who simply want to see what they can find in situations where the law would otherwise prohibit their intrusions. Armed with multitudes of reasons why "inventory searches" might be permitted, the protections of the Fourth Amendment could simply be rendered almost meaningless.

In order to address the concerns that "inventory search" might become a tempting means to justify nearly any search, Courts have insisted that a proposed "inventory search" be conducted according to "a familiar routine procedure". Furthermore, a proposed "inventory search" must satisfy two requirements of reasonableness under the circumstances. *Id.* See also *Florida v. Wells*.

The two requirements of reasonableness under the circumstances of any proposed “inventory search” are:

1. the procedure must be rationally designed to meet the objectives that justify the search in the first place
2. the procedure must limit the discretion of the officer in the field *Id. Florida v. Wells*

The reason that Courts tolerate the “inventory search” exception to the warrant requirement of the Fourth Amendment (and parallel provision of the New York State Constitution) is founded in the assurance that these searches will be carried out in a consistent, established, predetermined manner in which the discretion of the individual officer is limited by the formal predetermined procedures.

The New York Court of Appeals clearly understood that so called “inventory searches” were ripe for abuse in the field and specifically indicated that they did not want “inventory searches” to **“become little more than an excuse for general rummaging to discover incriminating evidence.”** *Galak*.

Indeed the United States Supreme Court expressed grave concerns over the ease with which so called “inventory searches” could be exploited by police seeking to justify otherwise unlawful searches after-the-fact.

According the United States Supreme Court, “[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and

individual interests involved in the specific circumstances they confront" ' ' (*Colorado v. Bertine*, 479 U.S. 367, 375, 107 S.Ct. 738, 743, , quoting *Illinois v. Lafayette*, 462 U.S. 640, 648, 103 S.Ct. 2605, 2610, ; *New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768).

Officer Henry's search of the white van was not performed pursuant to any formal predetermined procedure designed to meet the three objectives of a real inventory search.

Applying the “inventory search” analysis to the instant case suggests that the proposed “inventory search” of Mr. Jones’s white van fails to meet the strict requirements for a valid inventory search. First the actual procedure employed by Officer Henry failed to sufficiently relate to the three objectives of a legitimate inventory search. Second, the level of discretion believed by Officer Henry to be available to her, and the level of discretion actually employed failed the requirement that the procedures employed in the “inventory search” limit the discretion of the officer in the field.

The Procedures Employed by Officer Henry failed to sufficiently relate to the three objectives of a valid inventory search. These objectives are clearly unmet when the hallmark of an “inventory search”, AN INVENTORY, is absent. The New York Court of Appeals has specifically stated on more than one occasion that a so-called “inventory search” MUST CREATE A USEABLE INVENTORY.

“Simply put, this procedure does not do what it must do: create a usable inventory. An inventory search is justified by the fact that a detailed and carefully recorded inventory protects the seized property while it is in police hands and insures against claims of loss, theft or vandalism.” *Galak*.

In the instant case, Officer Henry testified that she did not create a written list, otherwise known as an INVENTORY, in her “inventory search”. Likewise, Lieutenant Kelly, the officer who ordered the “inventory search” did not create a written list, otherwise known as an INVENTORY, in the “inventory search” he ordered. Furthermore, Lieutenant Kelly was unable to recall one single, solitary item that was inside the van aside from the cardboard box of incriminating evidence. Lieutenant Kelly did attempt to suggest that the back of the van contained “JUNK”, but he could not be more specific.

But one man’s junk is another man’s treasure. Armed with no more information than that the back of the van contained material labeled “junk” by Lieutenant Kelly, it is conceivable then that the back of the van contained a priceless Ming vase that Lieutenant Kelly perceived as worthless junk. While an obviously extreme possibility, in the absence of a useable inventory, the hallmark of an INVENTORY search, the police department is exposed to the argument by Mr. Jones that indeed his priceless Ming Vase is now missing.

The Court was presented with no evidence that any sort of written inventory was ever generated by anyone with respect to the contents of Mr. Jones's van. Instead, the police department is protected from claims by Mr. Jones of missing property only by Lieutenant Kelly's assurances that the back of the van only contained "junk".

Therefore, the first objective of the so-called "inventory search", the objective of guarding against claims against the police for loss, theft, or vandalism went completely unmet.

The absence of a useable inventory left the second objective, that of protecting the defendant's property, likewise unmet. The Government would be hard pressed to explain how it was going to protect property that it did not have a record of existing.

Finally, even the third objective of an inventory search, that of protecting against as yet undiscovered dangerous instrumentalities remained unmet, because the so-called "inventory search" was concluded once the incriminating evidence related to the accusations was recovered. An inventory search, if it is indeed an inventory search is not concluded once incriminating evidence is found. In theory there might be other dangerous instrumentalities to be safeguarded.

Therefore, the absence of a useable INVENTORY undermines significantly the concept that the search conducted in the instant case was in fact an INVENTORY SEARCH.

Additionally, Officer Henry was refreshingly candid about the procedures employed in conducting her “inventory search.” In fact, in the instant case, referring to her actions as a “procedure” is being kinder than the facts allow. Officer Henry testified to using no formal checklist for her “inventory search”. Officer Henry testified essentially that she was aware of no formal procedure that was to be employed at all.

Furthermore, the Government offered no evidence at all of what “procedure” police department guidelines required her to employ. In the instant case, the procedure was that there WAS NO PROCEDURE, or perhaps, an “un-procedure.”

In *Galak*, the New York Court of Appeals held that a proposed “inventory search” of a vehicle did not meet the standards required for a formal predetermined procedure in a case in which the police officer actually was able to testify that some procedure was actually used, and in a case in which there was evidence that some forms of some kind were actually prepared, although they may have been prepared not contemporaneously with the proposed “inventory search”.

In the instant case, the Court has no evidence of any kind of procedure or checklist or predetermined path whatsoever. The New York Court of Appeals in *Galak* found that the evidence presented about the procedure fell short of what would be required to substantiate an inventory search procedure. It would seem almost

elementary then, that in the instant case, the New York Court of Appeals would have even greater difficulty with evidence presented by Officer Henry of her “un-procedure.”

Furthermore, one of the prime difficulties that the New York Court of Appeals had with the procedure in evidence in *Galak* was that it failed to produce a useable inventory. In the absence of a useable inventory, the New York Court of Appeals specifically found that the three specific objectives of the inventory search cannot be met.

In the instant case, in addition to the fact that there was no formal procedure for the conduct of the “inventory search” presented to the Court, no evidence of any useable inventory was presented to the Court. Therefore, like the procedure employed by the police in *Galak*, the “un-procedure” employed by Police Officer Henry also failed to address the three objectives of a true “inventory search”.

In the absence of the formal, predetermined procedure that includes an actual useable inventory, the search presented to the Court cannot be distinguished, as it should be, from a “general rummaging” for incriminating evidence.

This is exactly what the United States Supreme Court, and the New York Court of Appeals fear in the context of proposed “inventory searches” and exactly why they have adopted the clear, strict standards discussed.

Therefore, whatever it was that Police Officer Henry did when she opened the door to the white van on August 20, 2003, it was most certainly NOT commencing a Constitutionally permissible inventory search. Officer Henry can truly only be said to have conducted a Constitutionally impermissible “un-procedure.”

The Level of Discretion Employed by Officer Henry Was Greater than What would be Permissible in a Constitutionally valid inventory search.

Officer Henry candidly described her mandate as her actions as governed by no set procedure. Officer Henry conceded that in her view she was guided by her own judgment in how to proceed during her “inventory search” of the white van.

It is instructive that the New York Court of Appeals, in *Galak*, specifically quoted a virtually identical exchange between defense counsel and the searching officer in *Galak*. The New York Court of Appeals quoted this exchange in the opinion to identify it as one of the critical reasons why the proposed “inventory search” was illegal.

The basic central purpose behind the rules governing inventory searches is precisely to ELIMINATE individual officers’ particular judgments about how to conduct inventory searches. It is the elimination of that individual judgment and strict adherence to a formal predetermined procedure that makes the difference to the New York Court of Appeals (and the United States Supreme Court)

between requiring the authorization of a neutral and detached magistrate and permitting the search.

In the instant case, Officer Henry quite candidly affirmatively stated that her search of the van was governed by her own judgment and “assumptions” about how to proceed. Faced with such an affirmative statement, there can be little debate that Officer Henry’s personal discretion and assumptions were being employed in the context of this so-called “inventory search.”

Interestingly, the so-called inventory search ceased once the incriminating evidence was recovered. Incriminating evidence is not, in theory, the focus of a true inventory search. Incriminating evidence and innocuous evidence together are inventoried. If indeed a true inventory search is being conducted, the discovery of incriminating evidence, while certainly interesting to the police, does not end the inventory. If indeed an inventory search is what is motivating the police, the inventory search will continue until the ultimate goal of the inventory search is fulfilled – AN INVENTORY.

The inventory itself, the culmination of the inventory search, provides objective evidence that the search was indeed motivated by a desire to create an inventory. In the absence of the INVENTORY, there is the problem that the underlying permissible goals of the inventory search are not met as well. Furthermore, the absence of the inventory draws one to the conclusion that the stated claim of “inventory search” was merely that, a stated claim

advanced as a means to justify what really amounted to a “general rummaging for incriminating evidence”.

In the instant case, the absence of the inventory, the police officer’s stated mission to use her own discretion, which included the search for incriminating evidence, suggest precisely that what happened in the instant case was in fact a general rummaging for incriminating evidence and not the “inventory search” claimed.

The leaving of the decisions about what, where, and how to search to the individual judgment of the searching officer, leads, according to the New York Court of Appeals, essentially to arbitrary decision-making in the field, something that inherently misses the point of true inventory searches.

Arbitrary decision-making about what to seize, no less than arbitrary decision-making about what to **search**, creates unacceptable risks of unreasonableness in an **inventory search** policy. *Galak*.

Therefore, not only was the search employed in the instant case conducted in the absence of any identifiable standard inventory procedure (the “un-procedure”), but the Officer who conducted the search employed a level of personal discretion that failed to meet the Constitutional requirements limiting the discretion of a government agent in the conduct of a true inventory search.

Therefore, when Officer Henry opened the door to the white van and therefore commenced her search of the white van, she was

not doing so pursuant to a lawful inventory search. Officer Henry's action in opening the door to the van cannot be justified as valid under an "inventory search" exception to the warrant requirement of the Fourth Amendment to the United States Constitution.

Therefore, the incriminating evidence recovered from the brown cardboard box, including the two guns, the bulletproof vest, the ammunition, and the shirt, ought to be suppressed.

#### Part Two – Alternative Theories of Justification

Defense counsel anticipates that the Government, upon failure of the "inventory search" justification of the search of the white van will attempt to advance alternative legal theories in support of the police action taken. Three potential, equally unavailing, possibilities spring to mind: the search was incident to a lawful arrest, the search was made pursuant to the automobile exception, and finally, the property was recovered because it was in plain view.

Each potential theory will be dealt with in turn. Conveniently, the United States Supreme Court, in a landmark decision directly relevant to the instant circumstances advanced compelling arguments suggesting that each of the three potential arguments are unavailing and inconsistent with the Fourth Amendment to the United States Constitution. *Coolidge v. New*

*Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (United States Supreme Court, 1971)

In *Coolidge*, police arrested the defendant in his house for murder. His car was parked in the driveway to the property. The police impounded the car, and searched it, locating evidence later used at trial to obtain a conviction. The police had obtained a warrant, but the court held that the warrant was invalid. Therefore, the Government sought to justify the search of the vehicle as either 1) incident to a lawful arrest, 2) pursuant to the automobile exception, or 3) plain view. The Supreme Court did not agree with any of the proposed justifications.

The search was not incident to a lawful arrest

In addressing the issue of search incident to a lawful arrest, defense counsel will assume, for the sake of argument, that Mr. Jones's arrest in the building described by Officer Damatto was valid.

Assuming a valid arrest, then, we are left with an argument that the search of Mr. Jones's van was "incident" to this valid arrest. For reasons of timing of the events in *Coolidge*, the Supreme Court analyzed this aspect of the Government's argument from the perspective of the law before *Chimel v. California*. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685.

Before *Chimel*, the standards of what constituted a search “incident” to a lawful arrest were actually broader than what the Supreme Court ultimately determined in *Chimel*. In *Chimel*, the United States Supreme Court held that a search justified as “incident to a lawful arrest” can extend only to the 'arrestee's person and the area 'within his immediate control'--construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' *Chimel* at 395 U.S., at 763, 89 S.Ct., at 2040.

In the instant case, the van in question was parked at such a distance from where Mr. Jones was being detained by multiple police officers that it took Officer Henry five minutes to get there by automobile. This is clearly not the same or even similar to a situation in which an automobile is stopped by the side of the road and the person is arrested in the custody of police officers. In such a situation the suspect is at least within some sort of reasonable proximity to the car, even if the likelihood of an arrestee being able to break free, overpower the police and drive away in the vehicle is remote.

Furthermore, at the time that the police searched the van to conduct what THEY THOUGHT was an inventory search, the police had no idea to whom the car belonged. No evidence before the court suggests that at the time the police opened the door to the van, they were aware of even the name of the registered owner.

Mr. Jones's extreme distance from the white van, and the undetermined nature of Mr. Jones's relationship to the white van reduce to absurdity the concept that the search of the van was "incident" to the arrest. The search of the van was an independent event from Mr. Jones's arrest, and to suggest that it had something to do with the arrest of Mr. Jones is to suggest something that we know not to be true – that the Government knew at that moment that the van was Mr. Jones's van.

To attribute an area with a diameter equal to that of a five minute drive to Mr. Jones's "immediate control" is to attribute super-human powers to Mr. Jones. The evidence most certainly did not suggest that Richard Jones was endowed with "powers and abilities far beyond those of mortal men." Certainly constitutional legal analysis cannot be based upon the theory that some citizens are super-human.

The Supreme Court has specifically held, "(o)nce an accused is under arrest and in custody, then a search (of his car) made at another place, without a warrant, is simply not incident to the arrest." *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777, at 367, 84 S.Ct., at 883. Few things are ever simple to the United States Supreme Court, but the concept that a search of an arrested subject's car made at another place, without a warrant is not incident to the arrest is apparently one of the few things that the Court believes is simple.

Therefore, the police actions in searching the van are not actions that can be excused because they were “incident” to Mr. Jones’s arrest.

The search of the van was not a proper use of the Automobile Exception

Likewise, the Government would be equally wrong to suggest that the search of the van fell under the so-called “automobile exception” to the warrant requirement of the Fourth Amendment to the United States Constitution.

Before entering the world of the so-called automobile exception to the Fourth Amendment warrant requirement, it is important to remember what the Supreme Court said in *Coolidge*.

The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. *Coolidge* 403 US at 461, 91 SCt at 2035.

It is easy to fall into the trap of assuming that almost any government search done in connection with, or within a twelve mile radius of an automobile is somehow going to be covered by the so-called automobile exception. As the Supreme Court reminds us in *Coolidge*, it is the automobile *exception to*, not the automobile *exemption from* the Fourth Amendment.

The Supreme Court in *Coolidge* identified the central theme of the automobile exception by drawing a logical distinction between a fixed structure like a store or a dwelling and a vehicle

that can be quickly moved out of the locality or jurisdiction. Being incapable of being moved, the theory goes, a fixed structure will likely still be there when the police return with a proper warrant. A vehicle, however, could be long gone in the time it would take to obtain a lawful warrant. Therefore, the exigencies of the moment dictate that a search may take place without a warrant, as long as there is probable cause.

Typically this concept of exigent circumstances is applied, in the context of warrantless searches of vehicles that are stopped on a highway, where there is probable cause to believe that a crime may have been, is being, or is about to be committed. The car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Key to this analysis is the fact that the opportunity to search is "fleeting".

In the instant case, like in *Coolidge*, the facts were completely inconsistent with the underlying principles behind the automobile exception. The van in question in the instant case was located in a distant parking lot with the engine off and unoccupied. Therefore, the primary concerns behind the automobile exception are accounted for. There were no "occupants" to be alerted to the fact that the police were interested in the van, the van was not movable in the sense that the engine was off and the van was being guarded by Officer Henry and her partner (and later by other officers, including Lieutenant Kelly). The van would most certainly

have been still present and under the watchful eye of the police had the police chosen to take the proper course and seek a warrant to search the van.

In the instant situation, the van was far more like the fixed structure or dwelling than it was like the readily movable vehicle occupied by people with keys who might at any moment speed off into the sunset, never to be seen again.

The van in question was actually more like that fixed structure than the car in the Coolidge case. Mr. Coolidge's car was parked in his own driveway. Mr. Jones's car was parked in a parking lot at some distance from the building in which he was arrested.

Furthermore, it can hardly be said that the police had probable cause to enter the van. Even the police did not suggest that they had probable cause to enter the van. The police came to court and attempted to justify their actions by claiming that they were motivated by a desire to conduct an "inventory search". Defense counsel would suggest, therefore, that the Government's own witnesses did not believe that they had probable cause or else they would not have been so fixated on identifying their search as an "inventory search".

And it is easy to see why the police officers did not believe that they had probable cause. The information at their disposal at the time they performed their "inventory search" was not

considerable. They did not even know at the time that the van belonged to Mr. Jones or Mr. Reason, and could not have been certain even that Mr. Jones or Mr. Reason had ever been in the van. All the police knew at the time was that one of the complainants believed that the perpetrators of a crime had fled in the van. And the details of the situation were far from clear and certainly subject to some skepticism.

The police testified that they were informed by one of the complainants that there was some sort of ongoing dispute between one of the perpetrators and one or more of the complainants.

Armed with information that there are pending disputes between the parties, the police cannot rely without question on further allegations. Furthermore, the police were already aware that the initial reports they received were erroneous. Initial reports included allegations of “shots fired” and of “people assaulted”. Yet the brief interactions the responding officers had with the complainants revealed that 1) No shots were ever fired and 2) there were no injuries caused directly by the alleged gun-wielders.

Therefore, confusion about what actually happened was what the police were acting on. Certainly in a situation in which there were already accusations between the parties, and in a situation in which two serious accusations were immediately discovered to be false, the credibility of the entire claimed events was called into question.

Therefore, even if the court were to determine that the automobile exception might apply regardless of the fact that the van was located parked and unoccupied a substantial distance from the location of arrest, probable cause to search under the circumstances did not exist. At the early stage of the investigation the police simply did not have enough reliable, credible information to justify the search.

#### Plain View Does Not Apply

The plain view doctrine equally does not apply to the situation. All evidence recovered by the Government is in plain view at the point it is recovered. A police officer who kicks down a person's locked bedroom door without a warrant, and upturns the person's bed locating a box, and who then opens the box and finds a kilo of cocaine could make the plain view argument. After all, the cocaine is right there in front of him, "in plain view".

Clearly plain view is meant to describe a narrow exception to the Fourth Amendment warrant requirement rather than simply to dispense with the Fourth Amendment altogether.

The question in any plain view case always must be, therefore, whether or not the police officer was justified to be where he was doing what he was doing at the time he makes the plain view observation.

In the instant case, for the reasons previously stated, there is no justification, absent a warrant, for the initial action of Officer Henry to open the door of the van and commence her purported “inventory search”. Therefore, any allegedly plain view observations made by Officer Henry were made only after the officer was in a place she was not supposed to be.

Therefore, the plain view doctrine would not apply to the instant case either.

### Conclusion

The Government’s position that the search of Mr. Jones’s van was justified as an inventory search should be rejected. The search as described by the police was not an inventory search at all, but an impermissible “general rummaging” based on the candid testimony of Officer Henry.

Furthermore, in the event that the District Attorney’s Office seeks to justify the police action in ways that the police did not contemplate, those arguments should be rejected as well. Specifically, the search of Mr. Jones’s van was not incident to a lawful arrest, the search of Mr. Jones’s van was not a legitimate automobile exception case, and the plain view doctrine is inapplicable.

Therefore, the search of Mr. Jones’s white van was conducted in violation of the Fourth and Fourteenth Amendments

to the United States Constitution and Article 1 Section 12 of the New York State Constitution. Property recovered by the Government in violation of the Fourth Amendment of the United States Constitution and Article 1 Section 12 of the New York State Constitution is inadmissible at trial by the Government in its case in chief against the aggrieved defendant.

**WHEREFORE**, defense counsel, on behalf of Mr. Richard Jones, respectfully requests that the Court preclude the Government from introducing at trial evidence of the guns, ammunition, bullet proof vest, and shirt recovered from the interior search of the van.

# Courtesy Copy of People v. Galak