No. 13-_____

In The

Supreme Court of the United States

KENNETH PADILLA,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an inventory search can be sustained under the Fourth Amendment where the police officer conducting the search intentionally violated the governing protocols for such a search and admitted that he was searching for evidence of a crime during the course of his search.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Padilla respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App. a1) is published at ___ N.Y.3d ___, slip opinion No. 04042 (June 6, 2013). The opinion of the New York State Supreme Court, Appellate Division, First Judicial Department is published at 89 A.D.3d 505, 932 N.Y.S.2d 71 (1st Dept. 2011) (Pet. App. a12). The opinion of the New York State Supreme Court, New York County is published at 25 Misc.3d 1228(A), 901 N.Y.S.2d 909 (Sup. Ct. New York County 2009) (Pet. App. a14).

JURISDICTION

The judgment of the New York Court of Appeals was entered on June 6, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states that

> 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.

STATEMENT OF THE CASE

This case presents an important and frequently recurring constitutional issue regarding the propriety of warrantless inventory searches by the police, an issue that has produced divided results in the federal and state courts. In the majority opinion for the New York Court of Appeals, the Honorable Eugene F. Pigott, Jr. held that the search in this case was proper even though the police failed to follow their own procedures in conducting the search of the petitioner's vehicle following his arrest. In her dissenting opinion, the Honorable Jenny Rivera concluded that the failure of the police to follow their procedures invalidated the search and that the majority opinion could encourage officers to exercise discretion in such a way as to convert a valid vehicle inventory search into a constitutionally impermissible search.

1. In the early morning hours of June 7, 2008, the police observed a Lexus SUV with its engine running, parked by a fire hydrant in lower Manhattan. According to the police, the petitioner was seated in the driver's seat and appeared to be under the influence of alcohol. After the petitioner refused to take an

intoxication field test, he was arrested and transported to the police station. Another officer drove his SUV and parked it outside the station house.

Outside the station house, Police Officer Lanzisero began to search the petitioner's SUV, claiming that the NYPD Patrol Guide required him to ensure that the vehicle contained no personal belongings before it was sent to the impound lot. He acknowledged that he was looking for contraband during this search. In the midst of the search, the petitioner's sister, a police officer who had attended the police academy with Lanzisero, arrived at the police station. Though the Patrol Guide did not authorize him to return personal property found in a vehicle during an inventory search, Lanzisero decided to give the petitioner's sister two garbage bags filled with personal property. Lanzisero failed to make a list of the items of property he gave to the petitioner's sister.

When Lanzisero resumed his search of the SUV, he opened the trunk compartment and noticed that there were numerous stereo speakers affixed inside. Over the next hour, he proceeded to dismantle and remove the speakers. When he then observed the spare tire compartment that had been previously concealed by the speakers, he opened it and found a leather bag containing a gun. The petitioner was then charged with criminal possession of a firearm and operating a vehicle under the influence of alcohol.

2. After his motion to suppress physical evidence was denied at a pre-trial hearing, the petitioner

proceeded to a trial before a jury. However, when the jury announced that they could not agree to a unanimous verdict, a mistrial was declared. The State then elected to retry the petitioner and at the second trial, introduced essentially the same evidence as in the first. On the third day of their deliberations in the retrial, the jury found the petitioner guilty of the crime of criminal possession of a weapon in the second degree in violation of New York Penal Law § 265.03 but not guilty of the crime of operating a motor vehicle under the influence of alcohol in violation of New York Vehicle & Traffic Law § 1192. Thereafter, the petitioner was sentenced to a determinate term of imprisonment of seven years which he is currently serving.

3. The New York Supreme Court, Appellate Division, First Judicial Department affirmed, holding that the search produced a meaningful inventory list; that any deficiencies in the creation of that list did not warrant suppression, and that there was no evidence that the search was conducted as a ruse to discover incriminating evidence (Pet. App. a12-a13).

4. The New York Court of Appeals granted review and affirmed the petitioner's conviction by a divided vote. Writing for the majority, Judge Pigott held that the police officer's failure to itemize the property he released to the petitioner's sister did not invalidate the search because he had satisfied the primary objectives of an inventory search – to preserve the petitioner's property, to protect the police from claims of lost property and to protect the police and others

from dangerous instruments. And because the officer knew that contraband was often hidden by criminals in vehicle panels, his admission that he was searching the vehicle for concealed contraband did not invalidate the search either (Pet. App. a4-a5).

In her dissent, Judge Rivera noted that the police had violated the guidelines regarding inventory searches contained in the NYPD Patrol Guide in several material respects. First, Police Officer Lanzisero had released numerous items of property in the vehicle to the petitioner's sister. Second, he failed to make an itemized list of the property he gave to the sister. Third, he admitted that he was searching for contraband when he searched the vehicle. And fourth, he engaged in a lengthy and laborious process of disassembling stereo speakers that were affixed inside the trunk of the vehicle. Since none of the foregoing acts were authorized by the Patrol Guide, Judge Rivera concluded that the officer had far exceeded the scope of a permissible inventory search, and warned that the majority opinion sustaining the search had "the potential to encourage officers to ignore established written police protocols, and use the opportunity provided by circumstances supporting a valid inventory search to instead exercise discretion in such a way as to convert a valid vehicle inventory into a constitutionally impermissible warrantless search" (Pet. App. a5-a11).

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REASONS FOR GRANTING THE WRIT

In the majority opinion upholding the search of the vehicle in this case, the New York Court of Appeals held that the search satisfied the primary objectives for conducting an inventory search. Those objectives include the protection of the owner's property while it is in police custody, guarding against claims of lost, stolen or vandalized property, and protecting the police from dangerous instruments. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). However, this opinion virtually ignored the other prerequisites for a valid inventory search – that the search be conducted pursuant to a single familiar standard that guides police officers, and that the discretion of the police officer conducting the search be limited. *Id*. at 375. As such, the decision represented a dramatic departure from this Court's precedent. In contrast, the dissenting opinion correctly recognized that the officer's search did not satisfy the criteria required to sustain an inventory search as valid.

Moreover, many state and federal courts have struggled with the standards for determining the validity of an inventory search and have failed to identify satisfactory rules to ensure that this exception to the warrant requirement is used by the police for its intended purpose, and not as a pretext to find evidence of a crime. And the need to clarify those rules is greater than ever since this Court's decision in *Arizona v. Gant*, 556 U.S. 332 (2009) which limited the ability of the police to conduct a warrantless search of the passenger compartment of a vehicle

when the occupants of the vehicle have been arrested. After the decision in *Gant*, which significantly restricted the "search incident to arrest" exception, the police may be encouraged to circumvent constitutional limitations through the pretextual use of the inventory doctrine. For all of the foregoing reasons, this Court should use this case to make it clear that the police must comply with all of the prerequisites of a valid inventory search before it can be determined that the employment of such a warrantless search was reasonable.

This Court has held repeatedly that "the mandate of the [Fourth] Amendment requires adherence to judicial processes . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967), *quoting United States v. Jeffers*, 342 U.S. 48, 51 (1951). One such exception to the warrant requirement was recognized in *South Dakota v. Opperman*, 428 U.S. 364 (1976) in which this Court held that an inventory search of a vehicle was consistent with the Fourth Amendment. To establish the validity of an inventory search, the State must satisfy several criteria. First, it must establish that the police were authorized to impound the vehicle and conduct an inventory of its contents. *Bertine*, 479 U.S. at 374. In satisfying this requirement, the State need not show that the impoundment and subsequent inventory was

the least intrusive means of securing the vehicle and keeping it safe, nor show that the officers investigated possible alternatives to impoundment. *Id*., *quoting Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). Second, the search must be conducted according to a "single familiar standard [which] 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." *Id*. at 648, *quoting New York v. Belton*, 453 U.S. 454, 458 (1981). Third, the procedure must itself be reasonable in that it must be rationally designed to meet the objectives that justify the search in the first place. *Florida v. Wells*, 495 U.S. 1, 4 (1990). And fourth, the procedure must limit the discretion of the police officer conducting the search. *Id*.

Ironically, the definition of what constitutes a "single familiar standard" has produced varying and often contradictory decisions. Some courts have held that the prosecution must show strict compliance with written directives to uphold the validity of an inventory search while other courts have held that such compliance is not required. Indeed, in a recent decision, the Tenth Circuit noted that "the question of whether a police officer's catalog of an inventory search that lacks sufficient detail is violative of the Fourth Amendment has resulted in disagreement among the circuit courts." *United States v. Sitlington*, ___ Fed. Appx. ___, Docket No. 12-6273 (10th Cir.) (decided June 13, 2013). Similarly, the Texas Court of Appeals has noted that "research [of this issue]

revealed similar cases with differing outcomes." *State v. Stauder*, 264 S.W.3d 360, 364 (Tex. App. – Eastland 2008). And in *United States v. Hartje*, 251 F.3d 771, 775 (8th Cir. 2001), the Eighth Circuit declared that "[t]he central inquiry in determining whether such an inventory search is reasonable is a consideration of the totality of the circumstances", a standard so amorphous that it could produce different results from one case to the next.

To illustrate the division in our courts regarding how the "single familiar standard" requirement has been evaluated, the Eighth Circuit has held that where the police recovered hundreds of tools from a defendant's truck, an officer's description of "misc. tools" did not satisfy the requirement that a detailed, itemized inventory be created. *United States v. Taylor*, 636 F.3d 461, 464 (8th Cir. 2011). Moreover, that same court has held that an inventory search is invalid where the police itemized only property containing evidentiary value, a practice in conformity with their unwritten policy, but in contravention of their written policy requiring that all property be listed on the inventory. *United States v. Rowland*, 341 F.3d 774, 779-82 (8th Cir. 2003). Another court has invalidated an inventory search where an officer searched behind the door panel of a vehicle, concluding that such conduct does not qualify as a "standard police procedure." *United States v. Lugo*, 978 F.2d 631, 637 (10th Cir. 1992). And an inventory search has been invalidated where an agent searched a vehicle in conformity with local police procedures but was himself

unfamiliar with those procedures at the time of the search. *United States v. Hahn*, 922 F.2d 243, 247 (5th Cir. 1991).

On the other hand, many courts have upheld warrantless vehicle searches where the police failed to comply strictly with the directives applicable to inventory searches. Thus, in *People v. Walker*, 20 N.Y.3d 122, 957 N.Y.S.2d 272 (2012), the New York Court of Appeals sustained the search of the vehicle even though the state trooper's description of the policy governing such searches was vague and despite his description of the property recovered in the inventory form as "misc. items" and "paperwork". Similarly, in *United States v. Lopez*, 547 F.3d 364, 371-72 (2d Cir. 2008), the Second Circuit held that it would serve no useful purpose for the officer to separately itemize each item found, regardless of its value, since imposing such a requirement would hamper the police in performing their law enforcement duties. And in *United States v. Mundy*, 621 F.3d 283, 293-94 (3d Cir. 2010), the Third Circuit brushed aside the argument that the failure of the police to follow the policy regarding inventory searches invalidated the search, holding that the failure did not establish that the search was conducted as a pretext for seeking criminal evidence.

In this case, it appears that Judge Pigott, writing for the majority, adopted the line of cases that excuses a police officer's non-compliance with the written protocols governing inventory searches so long as the search meets the primary objectives of preserving

the property of the defendant, protecting the police from claims of lost property and protecting the police and others from dangerous instruments. However, in actuality, the officer's non-compliance with the governing protocols was, as Judge Rivera noted in her dissent, blatant, intentional and material.

For one thing, the NYPD Patrol Guide, which contained the written procedures required to be followed when conducting an inventory search, did not authorize Police Officer Lanzisero to give any of the property found inside the vehicle to the petitioner's sister. Moreover, Police Officer Lanzisero admitted that in doing so, he had violated the guidelines set forth in the NYPD Patrol Guide which direct officers to remove all valuables from the vehicle and voucher them on property clerk's invoice form. In addition, it could not be clearer that his decision to give the property to the petitioner's sister amounted to the type of uncanalized discretion that this Court has found constitutionally deficient. *Wells*, 495 U.S. at 4.

Furthermore, in giving the property found in the vehicle to the petitioner's sister, Police Officer Lanzisero utterly failed to create an itemized list of those items of property. His failure to produce such a list was another blatant violation of the guidelines in the NYPD Patrol Guide. More significantly, his failure to itemize that property violated the very policy governing inventory searches – to produce an inventory. *Id*. Thus, this was not a case where the police failed to complete a detailed, itemized inventory, a deficiency that might have been excused by

those courts that have declined to hold the police to a strict standard of compliance with the protocols governing inventory searches. In fact, this was a case where the officer made no effort to itemize the property that was given to a third party. Accordingly, under any standard that might have been applied, it cannot be concluded that the police created a meaningful inventory list, "the hallmark of an inventory search". *People v. Johnson*, 1 N.Y.3d 252, 256, 771 N.Y.S.2d 64 (2003). *See also United States v. Haro-Salcedo*, 107 F.3d 769, 773 (10th Cir. 1997) (an inventory search is "an administrative procedure designed to produce an inventory").

In the majority opinion affirming the petitioner's conviction, Judge Pigott made no attempt to justify Police Officer Lanzisero's intentional violation of the protocols applicable to inventory searches. Instead, he focused on the objectives served by inventory searches and found that all of those objectives were satisfied despite the officer's non-compliance with the protocols. But the majority opinion all but ignored one of the most important policies underlying inventory searches – the elimination of the exercise of discretion by the police in violation of standard criteria. *Bertine* at 375. *See also United States v. Marshall*, 986 F.2d 1171, 1175 (8th Cir. 1993) ("An inventory search is not constitutionally reasonable merely because it serves important government interests. To pass constitutional muster, the search also must be conducted pursuant to standard police procedures").

Here, writing in dissent, Judge Rivera recognized that Police Officer Lanzisero had violated the standard criteria set forth in the NYPD Patrol Guide when he gave the petitioner's sister two large bags containing property found in the petitioner's vehicle instead of vouchering the property, and when he failed to create a meaningful list of the items of property he gave to the petitioner's sister. Thus, Judge Rivera concluded, the officer had engaged in "[a]rbitrary decision-making about what to seize . . . [which gave rise to] unacceptable risks of unreasonableness in an inventory search policy" (Pet. App. a8), *quoting People v. Galak*, 80 N.Y.2d 715, 721, 594 N.Y.S.2d 689 (1993). It appears that Judge Rivera's evaluation of the search in this case was far more cogent than Judge Pigott's.

Standardized procedures and adherence to those procedures by the police form the very basis for permitting warrantless vehicle searches. An inventory search is reasonable under the Fourth Amendment only if it is done in accordance with standard procedures that limit the discretion of the police. *Opperman*, 428 U.S. at 384 (Powell, J., concurring). And while this Court held in *Wells* that police officers may be permitted some latitude as to the manner in which they conduct an inventory search, intentional violation of written protocols governing such a search, as the officer did in this case, cannot be considered a permissible "exercise of judgment based on concerns related to the purposes of an inventory search". *Id*. at 4.

Relying on this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), some courts have held that a police officer's failure to adhere to standardized procedures does not, by itself, invalidate an inventory search. For example, the Eighth Circuit has held that "'something else' must be present to suggest that the police were engaging in their criminal investigatory function, not their caretaking function, in searching the defendant's vehicle." *United States v. Taylor*, 636 F.3d at 465, *citing, United States v. Rowland*, 341 F.3d at 780-81. In *Taylor*, the "something else" element was the officer's testimony that she suspected that the defendant had narcotics in his vehicle and that she would not have effected the arrest, impounded the vehicle or searched it absent such suspicion. Conversely, relying on a broad reading of this Court's decision in *Bertine*, in which Chief Justice Rehnquist upheld the search while noting that there was no showing that the police had "acted in bad faith or for the sole purpose of investigation", *id*. at 372, some courts have held that an inventory search is not invalidated simply because the officers were motivated, in part, by the expectation that their search would reveal criminal evidence. *United States v. Lopez*, 547 F.3d at 371-72 ("if good faith is a prerequisite of an inventory search, the expectation and motivation to find criminal evidence do not constitute bad faith"); *United States v. Rodriguez-Morales*, 929 F.2d 780, 787 (1st Cir. 1991) ("the coexistence of investigatory and caretaking motives will not invalidate the seizure"); *United States v. Marshall*, 986 F.2d at 1176 (the police "may keep their eyes open for

potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime").

In this case, it appears that in his opinion affirming the petitioner's conviction, Judge Pigott adopted the line of cases holding that the police may "keep their eyes open" for criminal evidence when conducting an inventory search when he concluded that "the fact that the officer knew that contraband is often hidden by criminals in the panels [of vehicles] did not invalidate the entire search" (Pet. App. a5). However, the record reveals that Police Officer Lanzisero did much more than keep his eyes open to the possible presence of contraband in the petitioner's vehicle. In fact, at the suppression hearing, the officer admitted that he was engaged in a deliberate search for narcotics when he decided to open several closed vehicle panels and that when he came up empty, he continued his search and proceeded to the trunk where he spent up to an hour disassembling the stereo speakers that were affixed inside, a task that he described as "laborious". Under the circumstances, Judge Rivera correctly concluded in her dissent that the officer's warrantless search of the vehicle could not be considered a proper inventory search because "[w]hile incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (Pet. App. a9), *quoting People v. Johnson*, 1 N.Y.3d at 256.

Moreover, even if Judge Pigott was correct when he concluded that the search was not invalidated by Police Officer Lanzisero's admission that he was searching the petitioner's vehicle for narcotics, his decision was nevertheless flawed and in direct conflict with this Court's jurisprudence because he examined the officer's expressed intent in a vacuum. In *Bertine*, this Court made it clear that in all vehicle inventory search cases, the prosecution was required to establish not only that the police officers had acted in good faith in conducting the search but that they had acted in accordance with familiar and standardized procedures. *Id*. at 372. And while some courts have held that this Court's requirement of a standardized policy does not dictate the degree of detail that must be contained in the inventory compiled by the police, *United States v. Lopez*, 547 F.3d at 371; *United States v. Mundy*, 621 F.3d at 293-94, no court has sustained the validity of an inventory search with such blatant violations of standardized criteria for such a search, coupled with the searching officer's admission that he was searching for evidence of a crime, as was the case here.

Finally, this Court's clarification regarding the rules pertaining to inventory searches is more essential than ever in light of its ruling in *Arizona v. Gant*, 556 U.S. 332 (2009). In *Gant*, this Court restricted police officers' ability to search the passenger compartment of an automobile, holding that the police could "search a vehicle incident to a recent occupant's

arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search". *Id*. at 351. As a consequence of the decision in *Gant*, there is a strong likelihood that the police will routinely engage in subterfuge to avoid the restrictions imposed for warrantless vehicle searches by arresting individuals in order to impound and inventory their vehicles for the purpose of finding evidence of a crime. Such an expansion of the use of the inventory exception would, of course, directly undermine the rationale behind the doctrine – to allow the police to conduct a suspicionless, administrative search for the purpose of safeguarding items taken into custody. *Opperman*, at 368-69.

In sum, guidance from this Court is needed to clarify and resolve the conflicts regarding the rules for evaluating the validity of inventory searches, particularly in a post-*Gant* world in which the police may be encouraged to create after-the-fact justifications for what are actually constitutionally impermissible warrantless searches. This Court should therefore grant the petition for certiorari.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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State of New York

Court of Appeals

No. 114
The People &c.,
Respondent,
v.
Kenneth Padilla,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Randall D. Unger, for appellant.
Matthew T. Murphy, for respondent.

PIGOTT, J.:

The issue on this appeal is whether the People met their burden of establishing a valid inventory search of defendant's vehicle. We hold that they did.

On June 7, 2008, defendant was arrested for operating a motor vehicle while under the influence of alcohol. Pursuant to police protocol, defendant and his vehicle were taken to the police precinct. An officer conducted an inventory search of the vehicle, during which he recovered a loaded .357 Magnum revolver and ammunition. Defendant was charged with criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) in addition to operating a motor vehicle while under the influence of alcohol (Vehicle and Traffic Law § 1192 [3]).

Prior to trial, defendant moved to suppress the weapon as a result of an illegal search. At the suppression hearing, the officer who conducted the

inventory testified at length. He explained that it was custom and procedure for the police to impound a vehicle if the person arrested for driving while under the influence of alcohol is the registered owner. The officer, who had done "several, dozens" of inventory searches, testified that the purpose of the search was to inventory "everything" before the vehicle was taken to the impound lot.

Prior to completing the inventory, defendant's sister, a police officer, arrived at the precinct and the officer released some of the items from defendant's vehicle to her at her request. The officer recorded this in his memo book without specifically identifying each item. Defendant's sister then signed the memo book. The officer admitted at the hearing that no authority exists for an officer to remove property from a vehicle and give it to a family member, but explained that it was customary for him, and the New York City police in general, to give family members property, as a courtesy, in similar circumstances.

A copy of the relevant pages of the New York City Police Department's Patrol Guide was entered into evidence at the hearing. The officer explained that, pursuant to this procedure, the property recovered during the search that remained at the precinct was listed on a property voucher or in his memo book.

The officer then testified that, while searching the back seat, he noticed that panels were askew. He admitted that he looked into the panels because he was "looking for evidence of narcotics in a place

where [he knew] criminals hid narcotics." Nothing was found. When the officer opened the trunk, he found that audio speakers and an amplifier filled the entire cargo area, and he retrieved a screwdriver to remove the equipment. He testified that because the speakers were not "factory-issued" the vehicle would not be accepted at the impound facility unless they were removed. After removing the equipment, he checked the spare tire compartment where he found a black leather bag containing the gun and ammunition.

Supreme Court, finding the search to be valid, denied defendant's motion to suppress (25 Misc 3d 1228 [Sup Ct, New York County 2009]). Defendant was thereafter convicted, after a jury trial, of criminal possession in the second degree and sentence was imposed. The Appellate Division affirmed (89 AD3d 505 [1st Dept 2011]). A Judge of this Court granted defendant leave to appeal.

Defendant argues that the manner in which the officer conducted his inventory search was not proper and thus the entire search was invalid. He contends that the purpose of the search was not only to inventory its contents, but to search for contraband. He also claims that because the officer did not follow all the written standard procedures for conducting the inventory search, the entire search was illegal. We disagree.

Our jurisprudence in this area is clear. Following a lawful arrest of a driver of a vehicle that is required

to be impounded, the police may conduct an inventory search of the vehicle. The search is "designed to properly catalogue the contents of the item searched" (*People v Johnson*, 1 NY3d 252, 256 [2003]). However, an inventory search must not be "a ruse for a general rummaging in order to discover incriminating evidence" (*id*.). To guard against this danger, the search must be conducted pursuant to an established procedure "clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably" (*id*., citing *People v Galak*, 80 NY2d 715, 719 [1993]). "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*Johnson*, 1 NY3d at 256). The People bear the burden of demonstrating the validity of the inventory search (*see People v Gomez*, 13 NY3d 6, 11 [2009]).

Here the People proffered written guidelines, the officer's testimony regarding his search of the vehicle, and the resulting list of items retained. Although defendant takes issue with the officer's removal of the speakers by arguing that such action was a ruse designed to search for drugs, the officer's testimony that it was police protocol to remove any owner-installed equipment, was accepted by the hearing court and we perceive no grounds upon which to overturn that determination. Thus, the People met their burden of establishing that the search was in accordance with procedure and resulted in a meaningful inventory list.

The fact that the officer did not follow the written police procedure when he gave some of the contents of the vehicle to defendant's sister without itemizing that property, did not invalidate the search. Notably, it was defendant himself who called his sister to come to the precinct to retrieve his property. The primary objectives of the search – to preserve the property of defendant, to protect the police from a claim of lost property and to protect the police and others from dangerous instruments – were met when the officer complied with defendant's request and gave the items to his sister and then prepared a list of the other items retained by the police.

Finally, it is clear the officer's intention for the search was to inventory the items in the vehicle. It was reasonable for the officer to check in the seat panels that were askew as part of his inventory. The fact that the officer knew that contraband is often hidden by criminals in the panels did not invalidate the entire search.

Having considered defendant's remaining contentions, we find them without merit.

Accordingly, the order of the Appellate Division should be affirmed.

RIVERA, J. (dissenting):

The officer's search of a vehicle which involved intentional violations of the police department's official vehicle inventory guidelines, the surrender of

property from the vehicle to a third party in abrogation of those guidelines, the exclusion of that property from the official inventory list, and a warrantless search for narcotics, and which culminated in the complete physical disassembly of the contents of the trunk compartment, exceeded the bounds of a permissible warrantless search. I therefore dissent from the majority opinion's conclusion that such conduct is permissible so long as part of an asserted "inventory" of an impounded vehicle.

It is well established that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions" (*Katz v United States*, 389 US 347, 357 [1967]; *see also United States v Jeffers*, 342 US 48, 51 [1951]). While an inventory search is an exception to the warrant requirement (*see People v Sullivan*, 29 NY2d 69, 77 [1971]), the term "inventory search" is not a euphemism for a fishing expedition for incriminating materials (*see People v Johnson*, 1 NY3d 252, 256 [2003]; *People v Galak*, 80 NY2d 715, 719 [1993]). For an inventory search to be valid it must "be conducted pursuant to 'an established procedure clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably'" (*Johnson*, 1 NY3d at 256, quoting *Galak*, 80 NY2d at 719). To protect against the conversion of a valid inventory search into a warrantless search, where police "rummag[e] in order to discover

incriminating evidence" (*Florida v Wells*, 495 US 1, 4 [1990]), "[t]he procedure must be standardized so as to 'limit the discretion of the officer in the field'" (*Johnson*, 1 NY3d at 256, quoting *Galak*, 80 NY2d at 719). Such cabining of the officer's discretion ensures that "[a]n inventory search is exactly what its name suggests, a search designed to properly catalogue the contents of the item searched" (*Johnson*, 1 NY3d at 256).

Here, the officer conducting the search admitted that when he turned over some of defendant's property to his sister, he did so without authorization, and in violation of the guidelines.[1] Further, he admitted that he failed to properly inventory all of the items he released to her, also a violation of the guidelines, which require that the officer conducting the inventory "[r]emove all valuables from the vehicle and voucher on a separate **PROPERTY CLERK'S INVOICE**" (NYPD Patrol Guide Procedure No. 218-13 ["Inventory Searches of Automobiles and Other Property"] [hereinafter "guidelines"]). The guidelines could not be clearer, given this unmistakable directive to produce a list on a specified official form.

The officer not only violated the guidelines' procedure for securing and listing property found in

[1] It is irrelevant that the officer released the property to defendant's sister. Nothing in the facts suggest that by permitting his sister to take some of his property defendant waived protections afforded under the Constitution against warrantless searches.

the vehicle, but he failed to create a meaningful inventory list – "the hallmark of an inventory search" (*Johnson*, 1 NY3d at 256). Although an inventory list may be meaningful even though not detailed (*see e.g. People v Walker*, 20 NY3d 122, 127 [2012]), it would defy logic to permit an officer to create an inventory list that explicitly excludes property turned over to a third party in contravention of official policy. It is one thing to summarize items, even in the most general of terms, and it is quite another to have a partial listing that intentionally excludes personal items removed in large bags from the vehicle and turned over to someone else. As we have stated previously, "[a]rbitrary 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*, 80 NY2d at 721).

If the officer's transgressions were limited to his violations of the guidelines by his release of defendant's property to his sister, and the failure to list that property, then this exercise of unauthorized discretion might very well be insufficient support for defendant's motion to suppress. However, there was other conduct which, along with this failure to comply with the guidelines, in my opinion, supports suppression.

Here, the officer admitted that his search for items to inventory transformed into a deliberate and typical warrantless search for drugs. The officer conducting the search testified, and the trial court found, that when he saw the vehicle's seat panels

were "askew" he specifically looked inside them for narcotics. Nothing in the record supports a conclusion that once the search for contraband in one section of the vehicle (the askew panels) proved fruitless, the search of any other section of the vehicle (i.e., the trunk) regained its status under the protective cover of a valid inventory. "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*Johnson*, 1 NY3d at 256).

Having failed to find any contraband in the interior of the vehicle during the admitted warrantless search, the officer then proceeded to search the trunk by fully disassembling its contents. This search of items attached to the vehicle's interior casts further doubt on the inventory nature of the vehicle search. There is no dispute as to the condition of the trunk, its contents and the officer's actions. The contents were described as speakers physically attached to the interior, large "[e]nough to take up the entire trunk space." The officer admitted that in order to remove the speakers he had to unscrew them, disconnect them and remove the wiring, a process that required him leaving the vehicle to find a screwdriver, and which took time and effort to complete. The officer described this process as "laborious." In other words, this was not a simple collection and removal of items for cataloguing purposes. Thus, the alleged "inventory" nature of the search of the remaining parts of the vehicle is questionable in light of the assiduousness of the officer's deconstruction of

the trunk, completed on the heels of his admitted search for narcotics in the interior of the vehicle.

As the majority notes, it is the People's burden to demonstrate the validity of the inventory search (majority op. at 4, citing *People v Gomez*, 13 NY3d 6, 11 [2009]). There is nothing in the record to support a finding that the officer here followed proper protocol in dismantling the trunk's contents. The trial court found that the officer testified he removed the speakers because they were not an original part of the automobile and would not have been accepted by the pound. Where the officer admitted to a flagrant digression from the guidelines, conducted a warrantless search for drugs in the seat pockets, followed by a time-consuming disassembling of the trunk's contents, I would require more than the officer's statements that he was following protocol, or that the property would not be accepted at the pound. After all, the guidelines contemplate that some items may be left in the vehicle.[2] Thus, his testimony and the written guidelines at least suggest that the officer did not have a full and correct understanding concerning items that could be left in the vehicle, and whether a

[2] The guidelines state that an officer may force open certain compartments, including the trunk, only if this can be accomplished with minimal damage, and also states that the officer may list "property of little value that is left inside the car," in the officer's activity log. Thus, it is not accurate that everything must be removed during the inventory.

full dismantling of an attached speaker system was permissible as part of the inventory.

Today's decision has the potential to encourage officers to ignore established written police protocols, and use the opportunity provided by circumstances supporting a valid inventory search to instead exercise discretion in such a way as to convert a valid vehicle inventory into a constitutionally impermissible warrantless search. Therefore, I dissent.

* *

Order affirmed. Opinion by Judge Pigott. Chief Judge Lippman and Judges Graffeo, Read and Smith concur. Judge Rivera dissents in an opinion. Judge Abdus-Salaam took no part.

Decided June 6, 2013

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5983 The People of the State of New York Ind. 752/09
Respondent,

-against-

Kenneth Padilla,
Defendant-Appellant.

Randall D. Unger, Bayside, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel Conviser, J. at hearing; Wayne M. Ozzi, J. at jury trial and sentencing), rendered September 8, 2010, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a revolver recovered from his impounded car. The police conducted a proper inventory search, which was supported by sufficient documentation. The search produced a "meaningful inventory list" (*People v Johnson,* 1 NY3d 252, 256 [2003]), even though the searching officer did not record every item he released to defendant's sister (*see People v Black,* 250 AD2d 494 [1998], *lv denied* 92 NY2d 922 [1998]), and we do not find there were any deficiencies of any

kind that would warrant suppression of the revolver. Regardless of whether the officer suspected that contraband might be present, there was no evidence that the search was conducted as a ruse to discover incriminating evidence (*see Johnson,* 1 NY3d at 256). Defendant did not preserve his argument that the police improperly impounded his car, and we decline to review it in the interest of justice. As an alternate holding, we reject it on the merits.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson,* 9 NY3d 342, 348-349 [2007]), particularly when viewed in light of the statutory presumption of possession by all occupants of a vehicle (*see* Penal Law § 265.15[3]). Moreover, defendant was the owner, driver, and sole occupant, and the evidence, even without the automobile presumption, warrants the inference that he knew there was a firearm in his car (*see People v Reisman,* 29 NY2d 278, 285-286 [1971], *cert denied* 405 US 1041 [1972]). Defendant's remaining claims do not warrant reversal.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2011

/s/ [Illegible]
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY CRIMINAL TERM: PART-95

THE PEOPLE OF THE STATE OF NEW YORK	**Ind. No.: 752/09**
-against-	**DECISION & ORDER**
KENNETH PADILLA,	
Defendant.	

DANIEL P. CONVISER, J.

The Defendant is charged with one count of Criminal Possession of a Weapon in the Second Degree in violation of Penal Law § 265.03(3) and one count of Operating a Motor Vehicle Under the Influence of Alcohol in violation of Vehicle and Traffic Law § 1192(3). A hearing was conducted before this Court to determine whether the arrest of Mr. Padilla was supported by probable cause and whether physical evidence recovered by law enforcement, specifically a loaded gun, may be introduced against Mr. Padilla at trial. The prosecution called two witnesses – Police Officers Christopher White and William Lanzisero. The Defendant also called two witnesses – Ms. Luz Martinez, Defendant's girlfriend and Police Officer Evette Vasquez, the Defendant's sister.

The Court found the testimony of Officer White, Officer Lanzisero and Evette Vasquez to be credible. For the reasons stated below, the Court did not find the testimony of Luz Martinez to be credible. For the

reasons stated below, Defendant's suppression motion is denied.

STATEMENT OF FACTS

Police Officer Christopher White, an employee of the NYPD since 2006, testified that he was driving a marked police vehicle while on routine patrol duty in New York County with his partner Police Officer Iones Cercel on the evening of June 6, 2008 into the early morning of June 7, 2008. Officer White stated that at approximately 2:15 A.M. on June 7, 2008 in the vicinity of Henry and Clinton Streets he observed a Lexus SUV illegally parked at a hydrant with the rear of the vehicle impeding the flow of traffic northbound on Clinton Street.

Officer White put on his turret lights and proceeded to check the license plate of the Lexus. He stated that he observed a white male in the driver's seat of the Lexus with the door closed. Upon exiting his patrol vehicle Officer White approached the Lexus. At the same time, the male in the driver's seat, identified as the Defendant, exited the Lexus. Though Officer White did not touch the vehicle's hood or observe the individual drive the Lexus, he stated that he was able to hear the engine of the Lexus running as he approached it and saw the lights of the vehicle turned on. Officer White stated on direct examination that at a later time he noticed keys in the ignition of the Lexus in the on position. On cross examination, however, Officer White acknowledged

that he did not recall whether the Lexus had a key or a button. A female and other civilian witnesses were also present on the corner.

Officer White stated that he told the Defendant to re-enter the Lexus, but was unable to recall whether the Defendant was holding a soda or iced tea in his hand. Though Officer White stated that the other civilian witnesses present began yelling, he was unable to recall their exact words. The Defendant refused repeated requests by Officer White to get back into the Lexus and became belligerent, though Officer White was unable to recall the exact words he spoke. Officer White also said the Defendant had signs of intoxication in that his eyes were bloodshot and watery, his speech was slurred, and he was unsteady on his feet. Several civilian witnesses were also present during the encounter between the Defendant and the police.

When Officer White determined the Defendant to be intoxicated he tried to handcuff him. Officer White stated that he issued no summonses for traffic infractions because the Defendant was going to be taken into custody for operating a motor vehicle under the influence of alcohol. The Defendant refused to place his hands behind his back and Officer White stated that it took three police officers to handcuff him. During this period the Defendant yelled obscenities. Subsequent to being placed under arrest the Defendant's shoes were removed to search for weapons. In addition to refusing orders to be compliant the Defendant was offered and refused to submit to a

portable breath test. Officer White stated that he had been filling in for Officer Cercel's regular partner on his shift that evening.

Officer White testified that he had not had any contact with the Defendant prior to the incident and Officer Cercel never mentioned having had any prior contacts with the Defendant at the time of the stop. Officer White acknowledged that he testified before the Grand Jury that Officer Cercel had previously arrested the Defendant for gun possession and that this was the reason he and Officer Cercel did not take the arrest of the Defendant that evening. During his initial hearing testimony, however, he indicated that he and Officer Cercel did not take the arrest on that evening because they would not earn cash overtime. He explained this inconsistency by asserting that the information about Officer Cercel's prior history with the Defendant and Officer Cercel's motivation for not being the arresting officer only became known to him after the events of June 7, 2008.

When questioned on cross-examination regarding a videotape, CD or DVD that may have been inside the Lexus, Officer White stated that he personally did not look inside the vehicle. Officer White denied viewing any video footage from security cameras of the incident. He also stated that he did not observe any of the other officers at the scene look inside the Lexus and that he never went to speak to any of the civilian witnesses present.

Police Officer William Lanzisero, a six-year employee of the NYPD, was also driving on uniformed patrol duty with his partner Sergeant Walsh in the early morning hours of June 7, 2008 when he received a radio call at 2:15 A.M. for back-up at the intersection of Henry and Clinton Streets. Upon arriving at the location he observed Officer White and Officer Cercel attempt to place the Defendant under arrest. Officer Lanzisero stated that he assisted in handcuffing the Defendant and placing the Defendant in the rear of his patrol car. Officer Lanzisero stated that the Defendant had bloodshot eyes, smelled of alcohol, and was agitated. Officer Lanzisero testified that he believed that it was Officer Zito who ended up driving the Lexus back to the precinct between 2:20 and 2:35 A.M. so it could be vouchered and an inventory search conducted. As the arresting officer on the case Officer Lanzisero was required to remain with the Defendant and conduct an inventory search of the Lexus at the 7th precinct.

Officer Lanzisero testified that he had conducted dozens of inventory searches in the past, that it was common to conduct an inventory search of a vehicle for which forfeiture may be sought in connection with a drunk driving case, and that the reason for conducting an inventory search in this case was to remove and protect the Defendant's property so that the vehicle could be vouchered for asset forfeiture purposes.

A two-page copy of the guidelines from the NYPD Patrol Guide, pursuant to which Officer Lanzisero

conducted the inventory search was introduced into evidence as People's Exhibits 1A & 1B. Officer Lanzisero, reading from the guidelines, stated that an inventory search is undertaken to protect property, guard against claims of theft by the police and protect the police against dangerous instruments.

Regarding the search of the Lexus, Officer Lanzisero said that he started removing items from the front driver's seat and worked his way to the rear of the vehicle. Officer Lanzisero stated that he had in fact started the inventory search prior to asking the Defendant to submit to the intoxilyzer test. He testified that he stopped searching the vehicle and locked it at approximately 3:15 A.M. to determine whether the Defendant would submit to an intoxicated driver's test. The Defendant refused to submit to the test.

At approximately 4:00 A.M. the Defendant's sister arrived at the precinct and identified herself as the Defendant's sister and also as an MTA Police Officer. Officer Lanzisero believes that he may have attended the police academy with Defendant's sister but was not acquainted with her prior to June 7th. Officer Lanzisero stated that he afforded Officer Vasquez the opportunity to speak with the Defendant. After speaking to her brother, Officer Vasquez was accompanied to the Lexus by Officer Lanzisero. Together, Officer Lanzisero and Defendant's sister removed personal items from the vehicle and placed them in large plastic bags. Officer Lanzisero testified that he allowed the Defendant's sister to remove and take the personal items as a courtesy, but that the

patrol guidelines governing an inventory search do not explicitly provide for property to be turned over to a third person. Officer Lanzisero stated that he had extended a similar courtesy to friends and family members of arrestees on other occasions in the past.

Officer Lanzisero testified that he released diapers, child care items, Defendant's cell phone, $62.75 of United States currency, an IPOD and house keys to Defendant's sister. He said that he recorded these items in his memo book and then had Defendant's sister sign the memo book to acknowledge that she had received the items. Officer Lanzisero's memo book was received in evidence as People's Exhibits 3A, 3B, 3C & 3D. The memo book memorializes items turned over to Defendant's sister. These memo book entries also indicate that a wallet was turned over to Defendant's sister. A property clerk's invoice filled out by Officer Lanzisero on June 7th, lists 26 additional separate items retrieved from Defendant's car and vouchered by the police department. (People's Exhibits 2A, 2B & 2C.)

As he resumed his search of the Defendant's vehicle Officer Lanzisero stated that the entire trunk area of the Lexus contained a speaker system. Officer Lanzisero stated that since the speaker system was not the one that originally came with the vehicle it was considered personal property and had to be removed. He further stated that the process of removing the system took approximately 45 minutes – 1 hour because the process of locating a screwdriver and disconnecting the wires was laborious. In

addition to the speaker system the trunk also contained an amplifier and a socket wrench set.

In the area underneath the speaker system Officer Lanzisero testified that he recovered a black bag. When he looked inside the bag he recovered the loaded gun that is the subject of this hearing. The gun was recovered at approximately 7:00 A.M. Officer Lanzisero attributed the length of time it took to complete the inventory search to the volume of paperwork he is required to prepare in connection with a drunk driving arrest, the fact that he was required to be present with the Defendant during the request for testing, the significant amount of personal items that had to be removed from the Lexus and the laborious process of extricating the speaker system from the trunk of the Lexus. Officer Lanzisero stated that it was necessary to remove anything that did not originally come with the vehicle because otherwise the vehicle would not be accepted for commencement of civil forfeiture proceedings. Since the Defendant had already been sent to Central Booking to be arraigned on charges related to operating the Lexus while under the influence of alcohol, Officer Lanzisero stated he had to be re-arrested to add charges related to the weapon recovered. Officer Lanzisero testified that at no time did he seek to obtain a warrant to search the Lexus.

Officer Lanzisero testified that he was familiar with the above-mentioned NYPD Patrol Guide procedures governing inventory searches and that the actions he took in conducting the search were consistent

with the Patrol Guide. He did admit, however, that in giving a number of Defendant's personal items to his sister he deviated from the Guide's policy. He acknowledged that he also deviated from the Patrol Guide in not noting the quantity of the diapers he returned to Defendant's sister. He acknowledged that he filled a garbage bag with a number of items for her. He said that he vouchered Defendant's EZ Pass but admitted that he had told the Grand Jury that he had returned the EZ Pass to Defendant's sister. He speculated that this may have meant there were two EZ Passes in the car. He did not recall whether he returned gold bracelets to Defendant's sister. He did not recall returning any credit cards to Ms. Vasquez although he did return Defendant's wallet and cash to her. Officer Lanzisero was certain that neither he nor anyone else recovered or played a vacation video or DVD belonging to the Defendant.

Officer Lanzisero's testimony appeared to recount a time line in which he searched the Defendant's car at three different times. The initial search began around 3:00 A.M. and was interrupted when Officer Lanzisero accompanied the Defendant for his intoxilyzer test at approximately 3:15 A.M. The search then resumed, with Defendant's sister, at about 4:00 A.M. Defendant's sister signed Officer Lanzisero's memo book acknowledging the receipt of Defendant's property at approximately 4:30 or 4:50 A.M. Officer Lanzisero then returned to the precinct. He then went back for his final search of the car at approximately

6:30 A.M. The gun was then discovered at approximately 7:00 A.M.

Officer Lanzisero testified that when he went to search the car the final time, he noticed that the back panels of the front seats were askew and he looked in them. He acknowledged that drugs are sometimes hidden in such compartments but said his purpose at that point was to retrieve the car's speakers. In response to leading questions concerning his looking into the back panels of the seats which he saw were askew, he admitted that he was looking for evidence of narcotics when he looked into the space between the back panels of the front seats and the seats themselves. He testified, however, that he found no items in those spaces.

Regarding his documentation of the car's inventory, Officer Lanzisero claimed that his voucher contained a complete listing of the items recovered from the car which were not returned to the Defendant's sister. He acknowledged that his listing of the items returned to the Defendant's sister, which he listed in his memo book, may not have been a complete list of the returned items. Officer Lanzisero testified that it is customary to return personal items of a defendant to family members, that he had done it before and since the incident in question and that it was customarily done by the NYPD. He said that it would not matter to him, in determining whether to return a defendant's personal property, whether the family member property was returned to was a police officer (as was the case here) or a civilian. He

testified that the only thing the police pound will accept in a car are items which originally came with the car. Items installed in a car by an owner (like the stereo system here) will not be accepted. He testified that he disabled the car during the inventory search but could not recall the precise manner in which he had done that.

Luz Martinez, the Defendant's girlfriend, testified that she has known him for 20 years and was with the Defendant at the time he was arrested. She stated that she was the one driving the Lexus and that she and the Defendant had stepped out of the vehicle to get something to drink from a bodega in the vicinity of Henry and Clinton Streets. Ms. Martinez stated that while she was inside the store the Defendant was outside on the street speaking with friends. She further stated that she observed police officers arrive at the location and begin to harass the Defendant who was at no time seated in the Lexus driver's seat.

Subsequent to the Defendant being taken into custody Ms. Martinez testified that she was driven to the 7th precinct in the Lexus by one of the police officers. She stated that the Lexus was parked across the street from the precinct, where she remained for 4-5 hours. While waiting at the precinct Ms. Martinez stated that she observed 4-5 officers with flashlights search through the Lexus. She stated that all the doors to the vehicle were open as well as the trunk and the hood. Ms. Martinez surmised that she was observed watching the officers by a female officer

participating in the search and that she and the other officers ceased searching the Lexus upon spotting Ms. Martinez. She testified that Mr. Padilla was involved in a long-term relationship with another woman whom he lives and shares children with. She stated that she was not aware that this other woman is aware of the relationship she has with the Defendant.

Police Officer Evette Vasquez, the Defendant's sister, stated she has been employed as an MTA police officer for six years. She stated that upon learning that her brother had been arrested she went to the 7th precinct. Officer Vasquez stated that she arrived at the precinct at approximately 4:20 A.M., identified herself as both the Defendant's sister and a police officer, and met Officer Lanzisero. She said that she had attended the Police Academy with Officer Lanzisero and that Officer Lanzisero acknowledged being in her graduating class. Officer Vasquez was afforded the opportunity to speak with her brother by Officer Lanzisero. The Defendant gave his sister his wallet and other unspecified items he had in his pocket. Officer Vasquez stated that she did not recall Officer Lanzisero count any credit cards.

Officer Lanzisero then accompanied the Defendant's sister to the Lexus and proceeded to assist her in removing the Defendant's personal items from the vehicle. Officer Vasquez stated that Officer Lanzisero provided two large clear plastic garbage bags in which the items removed from the Lexus were placed. She stated that Officer Lanzisero was

not documenting anything while they were placing items in the plastic bags. Subsequent to filling the two plastic bags Officer Vasquez stated that she signed Officer Lanzisero's memo book to acknowledge receipt of some of the personal property. Among the items that were removed from the vehicle and given to Officer Vasquez were some baseball bats, a baseball glove, baseball cleats, balls, a booster seat, flip flops, CDs, a PSP game unit, a charger, and clothing. (None of these items were recorded either in Officer Lanzisero's memo book as being given to Defendant's sister or recorded on the property voucher Officer Lanzisero filled out). Once the items had been removed from the vehicle Officer Vasquez stated that she locked one of the car's doors manually and that in doing so all the other doors of the vehicle lock up as well.

CONCLUSIONS OF LAW

The police are authorized to stop a motor vehicle without a warrant if there exists probable cause to believe a traffic infraction has been committed, irrespective of whether the primary motivation of the police is to conduct a separate investigation. *People v. Robinson*, 97 NY2d 341 (2001); *People v. Webb*, 291 AD2d 319 (1st Dept 2002). When the police observe a vehicle that is unlawfully parked it is proper for the police to approach the vehicle to make a limited inquiry so that they may conduct a computer check and draw up a summons. *People v. May*, 52 AD3d 147 (1st Dept 2008); *People v. Speckman*, 157 AD2d 599

(1st Dept 1990). The police will also be justified in stopping a motor vehicle on grounds that a traffic infraction has been committed if it is observed blocking traffic for a period of time. *See People v. Dennis*, 144 AD2d 381 (2d Dept 1988), *app denied*, 73 NY2d 920 (1989). Here, Officer White's testimony that he observed the Lexus illegally parked in the vicinity of Henry and Clinton Streets in such a manner that it was obstructing the regular flow of traffic provided probable cause to believe a traffic infraction was being committed. Upon making these observations it was proper for the police to approach the vehicle and make inquiry for at least the limited purpose of conducting a computer check.

When a suspect is observed exiting a vehicle by the police and is then observed to demonstrate multiple signs of intoxication such as glassy or watery bloodshot eyes, dilated pupils, difficulty standing or balancing, slurred speech, an odor of alcohol emanating from the suspect's breath or profuse sweating those observations provide probable cause to arrest the suspect for operation of a motor vehicle under the influence of alcohol. *People v. Gibeau*, 55 AD3d 1303 (4th Dept 2008), *lv denied*, 12 NY3d 758 (2009); *People v. Grow*, 249 AD2d 686 (3d Dept 1998); *People v. Sawinski*, 246 AD2d 689 (3d Dept 1998), *app denied*, 91 NY2d 930.

In the instant matter, the police had probable cause to arrest the Defendant for operating a motor vehicle under the influence of alcohol when he was observed by Officer White exiting the driver's side of

a Lexus SUV manifesting such signs of intoxication as bloodshot watery eyes, slurred speech, being unsteady on his feet and acting in a belligerent manner. Upon arriving at the scene and assisting in the arrest, Officer Lanzisero also testified that the Defendant had bloodshot eyes, smelled of alcohol and was agitated.

In this case, Defendant's girlfriend, Luz Martinez, testified that the Defendant was at no time in the driver's seat of the Lexus and that the police simply arrived at the scene and began harassing Mr. Padilla. Thus, her testimony was in direct contradiction to the testimony of Officer White. The Court did not credit the testimony of Ms. Martinez for a number of reasons. As Defendant's girlfriend, she was an interested witness. She also testified about being in a romantic relationship with the Defendant which is apparently being concealed from the woman the Defendant lives and shares children with. This deceptive relationship, in the Court's view, increased the unreliability of her testimony. Finally, there was no persuasive evidence at the hearing, in the Court's view, that Officer White had a motive to commit perjury and harass and then arrest the Defendant for no reason. There was evidence that Officer Cercel had arrested the Defendant on another occasion. But this fact alone did not, in the Court's view, serve to make Officer White's testimony incredible. Finally, as noted supra, the Court found Officer White's testimony credible. His testimony was flatly irreconcilable with the testimony of Ms. Martinez.

It is well-settled that the police are authorized to take custody of and commence civil asset forfeiture proceedings with respect to property that is the instrumentality of a crime. It is also clear that such forfeiture proceedings may be brought in drunk driving cases. *County of Nassau v. Canavan*, 1 NY3d 134, 140 (2003); *Property Clerk of the New York City Police Department v. Ber*, 49 AD3d 430 (1st Dept 2008). *See also, Property Clerk of the Police Department of the City of New York v. Harris*, 9 NY3d 237 (2007); *Property Clerk of the Police Department of the City of New York v. Brown*, 58 AD3d 452 (1st Dept 2009).

Validity of Purported Inventory Search

The most significant issue which arose at the hearing, in the Court's view, was the subsequent search of the vehicle by the police. While the People claim that this was a valid inventory search, Defendant argued, *inter alia*, that because the search clearly violated some of the rules established by the New York City Police Department for inventory searches, the police did not conduct a valid inventory search and Defendant's gun must therefore be suppressed.

An inventory search is a well-established exception to the Fourth Amendment's warrant requirement and is justified by three purposes. These purposes are protecting an owner's property while in police custody, providing a record the police may use to defend

against claims of lost, stolen or vandalized property and protecting the police against any dangerous instruments in a vehicle which would otherwise go undetected. *People v. Galak*, 80 NY2d 715 (1993). In order for an inventory search to be valid, it must be rationally designed to meet the objectives of an inventory search and must limit an officer's discretion in conducting that search. *Id.* at 719; *People v. Pompey*, 63 AD3d 612 (1st Dept 2009). At a suppression hearing, the People bear the burden of demonstrating that a valid inventory search was conducted. *Galak, supra; Pompey, supra*.

The danger which these requirements guard against is a search which is a "ruse for a general rummaging in order to discover incriminating evidence". *People v. Johnson* 1 NY3d 252 2003), *quoting Florida v. Wells* 495 US 1, 4 (1990). As an important part of the analysis, courts may take judicial notice of a standardized police procedure for conducting an inventory search and an officer's compliance with the terms of that procedure. *People v. Gomez* 13 NY3d 6 (2009).

In this case, in the Court's view, it is clear that the purpose of Officer Lanzisero's search of Defendant's car was prepare an inventory because the car had been seized for forfeiture. The evidence established that the New York City Police Department through its Patrol Guide has a written policy for conducting inventory searches which comports with due-process and if complied with will result in a valid inventory search being conducted. (People's Exhibit

1A). It is clear that Officer Lanzisero complied with the requirements of the Patrol Guide in fundamental respects. It is also clear that Officer Lanzisero's conduct deviated from the requirements of the Patrol Guide in certain respects. The question, under the facts and circumstances here, is whether those deviations are of a sufficient magnitude to warrant a finding that the search of Defendant's vehicle was not a valid inventory search. In the Court's view, such a finding is not warranted here.

Officer Lanzisero testified credibly that he inventoried the contents of the Defendant's car pursuant to the NYPD's standard policy for inventory searches. He testified about the purposes for such an inventory as provided by the Guide and described the methodical procedure he used in conducting the search. At one point during his testimony, Officer Lanzisero noted that when he saw that the back panels of Defendant's front seats were askew he looked inside them to see if narcotics were present. Officer Lanzisero's motivation for that one action, however, prompted by his happenstance viewing of two suspicious compartments in the car, did not transform his extensive inventory search into a pretextual search for incriminating evidence. As noted *supra*, moreover, no incriminating evidence was in fact recovered from those panels.

The Patrol Guide's detailed procedures for conducting an inventory search are rationally designed to meet the objectives of an inventory search and limit an officer's discretion by requiring that officers

comply with the Guide's provisions. In the Court's view, Officer Lanzisero was justified in removing the speakers from the car because, as he testified, they were not an original part of the automobile and would not have been accepted by the police pound. He was also justified in opening the closed bag he found in the trunk. This is explicitly authorized by both the Patrol Guide and controlling case authority. *See People v. Gonzalez*, 62 NY2d 386 (1984).[1]

He then prepared a detailed inventory of the items which were vouchered by the police department, listing 26 separate items retained by the police on a department invoice form, as required by the Patrol Guide. The uncontradicted evidence at the hearing indicated that this was a complete list of all of the items found by the police in Defendant's car which were retained by the police. In preparing this list, Officer Lanzisero thus completed the "hallmark of an inventory search: a meaningful inventory list". *Johnson, supra*, at 256. In short, there was nothing in Officer Lanzisero's motivations or general actions in conducting the search which failed to comport with the requirements governing inventory searches.

Officer Lanzisero also failed to comply with the Patrol Guide procedures when he turned over a

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[1] As noted *supra*, Defendant's girlfriend, Luz Martinez, testified that 4 or 5 officers searched Defendant's car, in flat contradiction to the testimony of Officer Lanzisero. The Court did not find her testimony credible, for the reasons stated *supra*.

number of Defendant's personal items to his sister and did not make a complete or proper inventory of those items. The evidence at the hearing, in the Court's view, in this regard, indicated that Officer Lanzisero simply entered the car with Defendant's sister and filled up some garbage bags with the Defendant's personal items. He noted the most significant, noteworthy or valuable items he had given her in his memo book, which she then signed, but failed to make any notation at all with respect to a number of the other items he gave her.

The Patrol Guide allows non-valuable personal items to remain in a car after an inventory search is conducted. It also provides that such items, "within reason" be listed not on a voucher but in an officer's activity log. *See* People's Exhibit 1A, second "Note". Thus, in not vouchering a number of the items he found in the car and noting some of these items in his memo book, Officer Lanzisero was complying, to some extent, with the Patrol Guide.

There can be no doubt, however, that he violated the provisions of the Patrol Guide in giving these items to the Defendant's sister and not keeping a complete record of them. Officer Lanzisero testified that the fact that Defendant's sister was a fellow police officer and Police Academy classmate had no impact on his willingness to provide Defendant's personal items to her. The Court does not believe that Officer Lanzisero intentionally testified falsely in this regard. At the same time, however, the Court does believe that a reasonable inference can be drawn that

Officer Lanzisero, consciously or not, may have been more willing to accommodate Defendant's sister than a person who was not a fellow police officer. Put another way, his discretionary actions in this case may well have been impacted by the status of Defendant's sister.

There are a number of salient facts concerning this violation, however, which, in the Court's view, indicate that it should not be the basis for suppressing the evidence in this case. The primary evil which the law governing inventory searches guards against is the danger that a police officer acting outside established procedures, with unrestrained discretion and no record keeping could use the pretext of an administrative inventory to go on a general fishing expedition, without probable cause, to uncover incriminating evidence. The violations committed by Officer Lanzisero here do not in any way implicate these concerns. In the Court's view, his purpose in conducting the search was clearly administrative. This case is thus distinguishable from cases in which inventory searches were found to be invalid because a search was conducted for the purpose of uncovering evidence of a crime. *See Johnson, supra; People v. Acevedo-Sanachez*, 212 AD2d 1023 (4th Dept 1995).

Suppressing the evidence in this case would also lead to a result under which the serious charges against the Defendant would be thrown out because the police attempted to help and accommodate him by returning personal items to his family. That is, suppression, if granted here, would result not because

Defendant's rights were violated – but because he was provided with more beneficial treatment by the police than the law allowed. Courts have refused to suppress evidence in other cases where officers engaged in similar conduct.. For example, in *People v. Blair*, 45 AD3d 1443 (4th Dept 2007), *lv denied*, 10 NY3d 838 (2008), suppression was denied where an inventory search of a car was conducted but the police allowed the Defendant's friend to take a chainsaw and tools in the car and did not make a record of those items. As is true here, the Court reasoned that the officer's vouchering of the items which were retained by the police meant that the objectives of an inventory search had been met. Similarly, in *People v. Salazar*, 225 AD2d 804 (2d Dept 1996), *lv denied*, 88 NY2d 969 an inventory search was upheld despite the failure of the police to record every item which was in the vehicle.

Finally, the Court would note that this case would seem to indicate that a revision of the Patrol Guide might be appropriate to explicitly provide a procedure for the return of personal items during an inventory search to a Defendant, or his family or friends. Officer Lanzisero testified that it was common practice for the NYPD to return personal items to a Defendant's friends or family after an inventory search. Indeed, this would appear to be an obviously appropriate procedure where property had no evidentiary value and might be needed immediately by a defendant. In this case, for example, there would appear to be no reason why diapers in a car which

might be needed by Defendant's child would have to be vouchered and retained by the police after an inventory search rather than simply returned to his family. The Patrol Guide allows personal items to be left in a Defendant's car. Inexplicably, however, the Guide sections introduced into evidence during the hearing do not allow such items to be returned to a Defendant's family or friends or provide any procedures or record keeping practices with respect to such returned items. If this useful practice is indeed standard among the NYPD, the Court does not understand why it is not provided for in the department's written guidelines for the conduct of inventory searches.

In any event, however, the Court holds that the search of the Defendant's car here was a valid inventory search. For all of these reasons, Defendant's motion is denied in its entirety.

Dated: New York, New York
November 18, 2009

/s/ Daniel P. Conviser
Daniel P. Conviser, A.J.S.C.