

MODEL RULES

**SEARCHES
SEIZURES
AND INVENTORIES
OF MOTOR VEHICLES**

*Project on Law Enforcement
Policy and Rulemaking*

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Foreword

In 1967, the President's Commission on Law Enforcement and Administration of Justice called on the nation's police departments to "develop and enunciate policies that give police personnel specific guidance for the common situations requiring exercise of police discretion." The call was later echoed by the National Advisory Commission on Civil Disorders and by the National Advisory Commission on Criminal Justice Standards and Goals. The American Bar Association's Standards Relating to the Urban Police Function urged police administrators to "give the highest priority to the formulation of administrative rules governing the exercise of discretion"

While a number of police departments have made significant progress in the articulation and implementation of policies and rules, many police agencies still keep major policies ambiguous and invisible rather than risk discussion and controversy by developing overt administrative guidelines. It is, of course, not a problem unique to police agencies, since few of the other components of the criminal justice community give written guidance to their personnel in the exercise of discretion.

In 1972, the Project on Law Enforcement Policy and Rulemaking was established at the College of Law, Arizona State University, with a grant from the Police Foundation. Its purpose has been to assist law enforcement agencies in developing workable rules to govern their own conduct.

The project has prepared a number of model rules for law enforcement. This volume, an updated and revised version of earlier project drafts, is one of a series of these model rules to be published by the Police Foundation and the College of Law in 1974 and 1975.

Model rules, of course, are no substitute for the local policy formulation and rulemaking which each law enforcement agency should do to guide and regulate the activities of its personnel. Court decisions and statutes differ widely throughout the country. Today's police department rule may be rendered inapplicable by tomorrow's court opinion.

Nonetheless, the models can serve as a guide to local rulemaking efforts, and it is with that hope that this series is published.

Patrick V. Murphy
President
The Police Foundation

Contents

| | | | |
|---------------------|---|-------|------------|
| FOREWORD | | | i |
| INTRODUCTION | | | 1 |
| PURPOSE | | | 3 |
| SECTION I. | SEIZURE OF ITEMS IN PLAIN VIEW OR OPEN VIEW IN A MOTOR VEHICLE | Rules | Commentary |
| Rule 101 | Plain View; Open View | 3 | 18 |
| SECTION II. | WARRANTLESS SEARCHES RELATED TO MOTOR VEHICLES IN USE | | |
| Rule 201 | Full-Custody Arrest of Vehicle Occupant A. Search of Arrestee B. Limited Search of the Vehicle C. Weapons Search D. Wider Search of the Vehicle | 4 | 23 |
| [Alternate Rule 201 | Full-Custody Arrest of Vehicle Occupant A. Search of Arrestee B. Limited Search of the Vehicle C. Weapons Search D. Wider Search of the Vehicle] | 5 | 29 |
| Rule 202 | Full-Custody Arrest Absent A. Ordinary Circumstances B. Circumstances Indicating Danger | 6 | 34 |
| Rule 203 | Extensive Searches Based on Probable Cause A. When Permitted B. Scope of the Search | 6 | 36 |

| | Rules | Commentary |
|--------------|---|------------|
| | | |
| | A. When Permitted | |
| | B. Exception for Minor Traffic Offenses | |
| | C. Search Warrant Requirement | |
| | D. Inventory and Release Procedures | |
| Rule 603 | Prisoner's Property | 12 |
| | A. Definition | |
| | B. Disposition of Prisoner's Property | |
| | C. Initial Procedure with Respect to Prisoner's Property | |
| | [D. Procedure After 24 Hours] | |
| Rule 604 | Traffic or Parking Seizures [Removals] and Immobilization | 13 |
| | A. Definition | |
| | B. Alternatives | |
| | C. Procedure When Vehicle Is Immobilized [or Removed] | |
| | D. Procedure When Seizing Unlocked Vehicle | |
| | [E. Procedure After 24 Hours] | |
| Rule 605 | Seizure of Abandoned Vehicles | 14 |
| Rule 606 | Other Non-Criminal Seizures | 14 |
| | A. Definition | |
| | B. Procedure for Non-Criminal Seizure | |
| | [C. Procedure After 7 Days] | |
| Rule 607 | Procedure for Any Inventory | 15 |
| SECTION VII. | WHEN FOREGOING MODEL RULES MAY BE DISREGARDED | 15 |
| APPENDIX | CONSENT TO SEARCH OF VEHICLE FORM | 73 |

Introduction

The Model Rules that follow, and the commentaries that support them, have been prepared with the guidance of an advisory board of representatives of eleven police agencies from across the country. The Model Rules take into account a wide body of both case law and statutory law, and are intended primarily as guides for local law enforcement rulemaking efforts.

The Model Rules are structured in a way that facilitates their use both as training materials and as the basis for local rule development. Rules without commentary appear first; the Rules are then reproduced in the Commentary section, where their rationale and the law in support of them are described.

Brackets are used to set out optional provisions which the Project's advisory board felt should be clearly denoted as suggestive only.

Increased police rulemaking offers benefits not only to law enforcement agencies, but also to the entire system of criminal justice. Police rulemaking can provide guidance for officers in difficult situations, will promote uniformity of police practices, and serves to protect officers who follow the rules from departmental discipline. Most important, police rulemaking enables law enforcement agencies to seize the initiative in developing policy, and by reasoned exposition to win the support of courts, legislative bodies and the communities the agencies serve.

This volume is an up-dated version of an earlier approved draft which the Project on Law Enforcement Policy and Rulemaking printed and distributed. The project staff is grateful for the guidance and advice of the members of the advisory board in the formulation of the Model Rules: Carl Lind and Hugh Frost (Cincinnati); Walter Loughheed (Dade County); Edwin D. Heath, Jr. (Dallas); Frank A. Schubert (Dayton); Geoffrey Alprin and Vernon Gill (District of Columbia); Manfred Maier (Kansas City, Mo.); Ernie Smith (Oakland); Earl Campbell (Phoenix); Robert Allen (San Antonio); Eugene Gordon (San Diego); and Royce A. Fincher, Jr. (San Jose). Particular acknowledgement is due to the project's original director, Gerald Caplan, whose insight and direction proved invaluable in this effort.

John A. LaSota, Jr.
Project Director

Model Rules

Purpose

These Rules establish procedures for searches, seizures and inventories of motor vehicles. A *search* is an examination of a person, place, motor vehicle or any other thing with a view toward discovery of seizable items (contraband, weapons, loot, things used in committing a crime, and other evidence of crime). A *seizure* involves taking the vehicle itself into custody. An *inventory* is an examination of a motor vehicle in police custody to account for objects in the vehicle for which the police are responsible.

The Rules on searches are grouped in terms of common situations in which search opportunities arise: where evidence is found in plain view or open view; where an arrest, either non-custodial (i.e., a minor traffic case) or full-custody (i.e., the suspect is taken to a detention facility or before a judicial officer), is made; where a search of an unoccupied vehicle is desired; and finally, where consent from the owner or driver is sought.

The procedures contained in the Rules attempt to insure police effectiveness in controlling crime while simultaneously limiting invasions of privacy.

SECTION I. SEIZURE OF ITEMS IN PLAIN VIEW OR OPEN VIEW IN A MOTOR VEHICLE

Rule 101 Plain View; Open View.

An officer, who is lawfully in any place,¹ may, without obtaining a search warrant, seize from a motor vehicle any item

1. It is difficult to define precisely those places where an officer may lawfully be. Generally, however, police officers may lawfully be in: (1) any area of government-controlled property normally open for public access; (2) any place intended for public use, or normally exposed to public view; (3) any place with the consent of a person empowered to give such consent; (4) any place pursuant to a court order (i.e., arrest or search warrant); (5) any place where circumstances dictate immediate police presence to protect life, well-being, or property; (6) any place to effect a lawful arrest.

which he observes in plain view or open view (including items observed through the use of a flashlight), if he has probable cause to believe that the item is a weapon, contraband, loot, anything used in committing a crime, or other evidence of crime.² [If the vehicle is locked and keys are not available, the officer shall obtain instructions from a superior as to the method to be used to enter the vehicle.]

Example: An officer observes a heavily weighed-down automobile in a motel parking lot. The officer proceeds to the vehicle, flashes a light into the interior, and sees in the rear several cartons bearing the name of a television dealer in a nearby city. He checks over his radio and learns that the dealer was recently burglarized. The officer may immediately enter the car and seize the cartons.

SECTION II. WARRANTLESS SEARCHES RELATED TO MOTOR VEHICLES IN USE

Rule 201 Full-Custody Arrest of Vehicle Occupant.

A. Search of Arrestee. Whenever an officer makes a full-custody arrest³ of an occupant of a motor vehicle, he may make a full, warrantless search of the arrestee's person for weapons or any other seizable items. This search must occur at the time and place of arrest.

B. Limited Search of the Vehicle. The officer may also make a warrantless search of those areas in or about the vehicle into which the arrestee might readily reach for a weapon or any other seizable item at the time of his arrest. This search must occur at the time of arrest, in the immediate presence of the arrestee.

C. Weapons Search.

(i) Frisk of Other Occupants. If the officer reasonably suspects that another occupant of the vehicle is armed with a dangerous weapon, he may frisk that person.

(ii) Frisk of the Vehicle. If the officer reasonably suspects that a readily accessible area of the vehicle contains a dangerous weapon, he may frisk that area.

D. Wider Search of the Vehicle. If seizable items are found

2. These five categories of evidence are hereinafter referred to collectively as *seizable items*.

3. The taking of a person into physical custody for purposes of: (1) taking him before a judicial officer; or (2) transporting him to a police facility for incarceration or the posting of bond.

during a limited search—or a frisk—of the vehicle, Rule 203 may permit a more extensive search of the vehicle.

Example 1: An officer arrests the driver of a vehicle for a week-old strong-arm robbery. Before the suspect is transported to a police facility, those areas of the vehicle within his immediate control at the time of his arrest may be searched under Rule 203 (B) for weapons or other seizable items. No other part of the vehicle may be searched, because there is no probable cause to believe that seizable items are in the vehicle.

Example 2: An officer arrests the driver of a vehicle for a parole violation. A limited search under the driver's seat reveals a bottle cap cooker and syringe. The officer may now undertake a broader search under Rule 203 since there is probable cause to believe that other evidence of a crime may be in areas of the vehicle beyond the immediate control of the suspect.

[Alternate Rule 201 Full-Custody Arrest of Vehicle Occupant.

A. Search of Arrestee.

(i) Routine Traffic Offense. Whenever an officer makes a full-custody arrest of a person in a motor vehicle for a routine traffic offense, he may make a frisk of the arrestee's person for weapons.⁴ The frisk must occur at the time and place of arrest. The officer may also search the arrestee's person for any seizable item if the item is related to the offense for which the arrest is made.

(ii) Other Offense. Whenever an officer makes a full-custody arrest of a person in a motor vehicle for other than a routine traffic offense, he may make a full, warrantless search of the arrestee's person for weapons or any other seizable items. This search must occur at the time and place of arrest.

B. Limited Search of the Vehicle.

(i) Routine Traffic Offense. The officer may also make a warrantless search of those areas in or about the vehicle into which the arrestee might readily reach for any seizable item if the item is related to the offense for which the arrest is made. If the officer reasonably suspects a weapon is present therein, he may search those areas in or about the vehicle into which the arrestee might readily reach for a weapon.

(ii) Other Offense. The officer may also make a

4. See Project on Law Enforcement Policy and Rulemaking, MODEL RULES FOR LAW ENFORCEMENT: STOP AND FRISK, Section IV (Rev. April 1974).

warrantless search of those areas in or about the vehicle into which the arrestee might readily reach for a weapon or any other seizable item at the time of his arrest. This search must occur at the time and place of arrest in the immediate presence of the arrestee.

C. Weapons Search.

(i) **Frisk of Other Occupants.** If the officer reasonably suspects that another occupant of the vehicle is armed with a dangerous weapon, he may frisk that person.

(ii) **Frisk of the Vehicle.** If the officer reasonably suspects that a readily accessible area of the vehicle contains a dangerous weapon, he may frisk that area.

D. Wider Search of the Vehicle. If seizable items are found during a limited search—or frisk—of the vehicle, Rule 203 may permit a more extensive search of the vehicle.]

Rule 202 Full-Custody Arrest Absent.

A. Ordinary Circumstances. Whenever an officer either stops a vehicle or comes upon a stopped but occupied vehicle, but does not take any occupant into full-custody, he may not ordinarily search or frisk any occupant or the vehicle.

B. Circumstances Indicating Danger.

(i) **Frisk of Occupants.** If the officer reasonably suspects that an occupant of the vehicle is armed with a dangerous weapon, he may frisk that person.

(ii) **Frisk of the Vehicle.** If the officer reasonably suspects that a readily accessible area of the vehicle contains a dangerous weapon, he may frisk that area.

Example: Officers stop a vehicle for a defective tail light. The driver is issued a citation for a later court appearance or is asked to follow the officers in his own vehicle to police headquarters. The officers may not search the driver or the vehicle because they are not making a full-custody arrest.

Rule 203 Extensive Searches Based on Probable Cause.

A. When Permitted. Whenever an officer makes a full-custody arrest of a person in a motor vehicle, or of a person in close proximity to a motor vehicle from which he has just departed or into which he is about to enter, and the officer has probable cause to believe that the vehicle contains seizable items, he may search the vehicle for those items without a warrant as soon as practicable. This search should follow any protective searching authorized by Rule 201.

Example 1: An officer observes the vehicle described in a broadcast for a robbery which occurred one hour earlier, in which two men wearing ski masks and carrying pistols obtained an undetermined amount of money. The officer, after arresting the two occupants and searching them, may then search the entire vehicle because there is probable cause to believe that the money obtained and the pistols and ski masks used in the robbery are hidden in the vehicle.

Example 2: A plainclothes officer has had a man under observation for an hour for selling narcotics from a vehicle to individuals who approached the vehicle. He arrests the suspect who has just stepped outside the vehicle. The officer may search the entire vehicle since he has probable cause to believe that a supply of narcotics remains in other areas of the vehicle such as the trunk or glove compartment.

B. Scope of the Search. An officer searching under Rule 203(A) may search only those areas of the vehicle which could physically contain the seizable items sought.

Example: A suspect wanted in connection with a very recent homicide in which the deceased was struck with a baseball bat is stopped while driving. The officer is not permitted to search the vehicle's locked glove compartment because a baseball bat could not be found there. He may, however, search the trunk. If there is some other small item of missing evidence, such as a bloodstained shirt of the suspect, the glove compartment may be searched.

C. Manner of the Search. Whenever possible, an officer shall open a locked trunk or glove compartment by means of a key rather than by force. [If keys are not available, instructions shall be obtained from a superior as to the method to be used in opening the locked trunk or glove compartment.]

D. Time and Place of the Search. A search authorized by Rule 203(A) should occur at the scene of the arrest as soon as everyone arrested is in secure custody. It is not necessary to keep arrestees near the vehicle during the search.

When it is not practical to conduct a Rule 203(A) search at the scene of the arrest—for such reasons as a hostile crowd, bad weather, traffic conditions, lack of needed equipment, delay in order to obtain a search warrant, or unavailability of keys—the vehicle must be secured in police custody at all times until it is searched. The search should be conducted as soon as practicable.

E. Search of Vehicle Passengers. If, following a search of a motor vehicle under Rule 203(A), the officer has not found the seizable item sought, he may search the occupants of the vehicle if: (i) the item he is seeking could be concealed on the person

and (ii) he has reason to believe that a passenger has the item. This search may be made even though the officer does not have probable cause to arrest the passenger.

SECTION III. WARRANTLESS SEARCHES RELATED TO MOTOR VEHICLES NOT IN USE

Rule 301 Probable Cause Searches.

A. **General Rule.** Whenever an officer has probable cause to believe that a vehicle not in use at the time of the initial police contact contains seizable items, all those areas of the vehicle which could contain such items may be searched without a warrant.

B. **Exception.** A warrantless search shall not be conducted if it appears that there is no pressing need for a prompt search and it is practicable—considering the personnel, equipment and time involved—to safeguard the vehicle and its contents from removal or destruction while a search warrant is obtained.

Example: An officer is told by a neighborhood merchant that he observed a person placing a sawed-off shotgun in the trunk of a vehicle one-half hour earlier. The merchant accompanies the officer to the vehicle, which appears to be movable and is parked on the street. The officer may immediately search the trunk of the vehicle without a search warrant because he has probable cause to believe that the shotgun is there and the vehicle may be easily moved.

Rule 302 Other Warrantless Entries.

A. **Vehicle Has Been the Target of a Crime.** If an officer has probable cause to believe that a vehicle has been the subject of burglary, tampering, or theft, he may make a limited entry and investigation, without a search warrant, of those areas he reasonably believes to have been affected and of those areas he reasonably believes might contain evidence of ownership.

B. **Vehicle Is Parked Unlawfully.** If an unoccupied vehicle is parked in an illegal location, or is otherwise blocking traffic, an officer may search those areas he reasonably believes might contain evidence of ownership. If the vehicle is impounded an inventory search may be made under Rule 604 or Rule 605.

SECTION IV. CONSENT SEARCHES OF MOTOR VEHICLES

Rule 401 Use of a Consent Search.

A. **General Rule.** Whenever an officer wishes to make a

vehicle search not otherwise authorized by these Rules, he may do so if the person or persons in control of the vehicle voluntarily gives consent. The officer shall not coerce consent by threat or force, or by claiming that he could conduct the search without consent.

B. Consenting Party in Full Custody. If the consenting party is in full custody, the officer must obtain written consent, using the departmental consent form.⁵

C. Consenting Party Not in Full Custody. If the consenting party is not in full custody, the officer may proceed after obtaining verbal consent if he is unable to obtain written consent.⁶

Example: An officer stops a vehicle for a traffic violation. The driver produces a valid operator's permit and proper vehicle registration. During the course of the stop, the officer develops a hunch that the vehicle may have been involved in a fairly recent robbery. Because a search is not otherwise authorized, the officer may request the driver's consent to search.

SECTION V. WARRANT SEARCHES OF MOTOR VEHICLES

Rule 501 Use of a Search Warrant.

Whenever an officer has probable cause to search a particular vehicle, and special circumstances are present, a search warrant must be obtained before beginning the search. Special circumstances are present when time is not of the essence, and there is no reason to fear that the vehicle or the seizable items will be removed or destroyed during the delay.

Example: A man flees in an automobile from the scene of a fatal shooting. Two miles away he is stopped and arrested for murder. A search of him under Rule 201 does not turn up the murder weapon. The vehicle is registered to him and can be impounded and secured with little difficulty. A search warrant should be obtained before the car is searched for the murder weapon.

SECTION VI. MOTOR VEHICLE SEIZURES

A motor vehicle is *seized* (impounded) when officers take custody of it and either remove it to a police facility or arrange for

5. A consent form is appended to these Rules.

6. The mandatory portion of the consent form appended to these Rules would be ideal for this use.

its removal to a private storage facility. An *inventory* is an administrative process by which items of property in a seized vehicle are listed and secured. An inventory is not to be used as a substitute for a search. Vehicles coming into custody of a police agency shall be classified for purposes of these Rules into six categories: seizures for forfeiture; seizures as evidence; prisoner's property; traffic seizures; abandonments; and other non-criminal seizures. The procedures for carrying out the seizure, the need for a warrant, the right to search or inventory a vehicle and the time and scope of any such inventory depend upon how the seized vehicle is classified.

Rule 601 Seizures for Forfeiture: Vehicle Used Illegally.

A. When Permitted. When an officer has probable cause to believe that a vehicle has been used [in the commission of any felony or] to transport narcotics or drugs illegally, he shall take the vehicle into custody and classify it as a "seizure for forfeiture" [if (a) a substantial amount of narcotics or drugs is involved; or (b) the owner of the vehicle is a significant drug or narcotics violator]. [In connection with illegal gambling, an officer shall take custody of a vehicle and classify it as a seizure for forfeiture only if the owner or operator has used it in a significant gambling enterprise.] No seizure for forfeiture shall be made without approval of a superior. If a vehicle used illegally cannot be seized for forfeiture under this Rule, it may not be inventoried unless it can be classified and inventoried under another Rule in Section VI.

Example 1: An officer stops an automobile and observes a glassine envelope containing a small amount of a substance which he has reason to believe is heroin in open view on the floor boards. The driver, who is the owner of the vehicle, is arrested for illegal possession of narcotics, and the rest of the vehicle is searched under Rule 203. No more drugs are found; the officer is informed that the driver has no previous narcotics record. The vehicle may not be seized for forfeiture. It may be classified, however, as prisoner's property under Rule 603, and seized and inventoried to the extent allowed under that Rule.

Example 2: After surveillance, officers develop probable cause to believe that a man is a *banker* in a numbers operation and that a vehicle he owns is being used to conduct the numbers operation. The officers arrest him in his vehicle. The vehicle may be seized for forfeiture.

B. Exception for Federal Offenses. When an officer has probable cause to believe that a vehicle has been used to violate a federal law which provides for forfeiture following violation,

as in the case of illegally transporting weapons, narcotics, or contraband liquor, he shall seize the vehicle regardless of the amount of contraband involved or the prior record of the owner or occupant, and shall seek instructions from a superior concerning federal forfeiture procedures.

C. Search Warrant Requirement. An officer shall obtain a search warrant prior to making a seizure for forfeiture whenever the vehicle to be seized is on the suspect's private property and it is not likely that the vehicle will be removed or tampered with while a warrant is being obtained. This is the only situation in which a search warrant is necessary for a seizure for forfeiture.

D. Inventory Procedure. An officer who seizes a vehicle for forfeiture shall completely inventory the contents under Rule 607 immediately upon its arrival at a police facility. Upon completion of the inventory, the officer shall obtain instructions from a superior relating to appropriate further processing of the vehicle.

Rule 602 Seizures as Evidence.

A. When Permitted. When an officer has probable cause to believe that a vehicle has been stolen or used in a crime or is otherwise connected with a crime, he may take the vehicle into custody and classify it as a seizure as evidence.

Example 1: A citizen is shot to death in an automobile. After appropriate on-the-scene processing by the homicide investigators, the vehicle may be seized because it is evidence in itself, and because it may contain other evidence of the offense.

Example 2: Two days after a bank robbery an officer locates an automobile which has been described by witnesses as the getaway vehicle. Whether or not an arrest has been made in the case, the vehicle may be seized as evidence because it was used in the bank robbery.

B. Exception for Minor Traffic Offenses. A vehicle involved in a minor traffic offense shall not be seized as evidence merely because it was used to commit the traffic offense.

C. Search Warrant Requirement. An officer shall obtain a search warrant prior to making a seizure as evidence whenever the vehicle to be seized is on the suspect's private property and it is not likely to be removed or tampered with while a warrant is being obtained. This is the only situation in which a search warrant is necessary for a seizure as evidence.

D. Inventory and Release Procedures. A vehicle seized as evidence shall be completely inventoried under Rule 607 as soon as practicable after its arrival at a police facility, unless such an inventory might damage or destroy evidence. Vehicles seized as evidence shall not be released to any person until the appropriate prosecutor or other official has signed a release form which indicates that the vehicle seized as evidence is found to be the property of a person having no criminal involvement in the offense. The vehicle shall then be returned to such person on an expedited basis.

Rule 603 Prisoner's Property.

A. Definition. When a person is arrested in or around a vehicle which he owns or has been authorized to use, and the vehicle is not otherwise subject to seizure, it shall be classified as prisoner's property.

B. Disposition of Prisoner's Property. A prisoner shall be advised that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner. In any case where a prisoner requests that his vehicle be lawfully parked on a public street, he shall be required to make his request in writing.

If the vehicle is found to be the property of a person having no criminal involvement in the offense, such person shall be notified of the location of the vehicle as soon as practicable.

C. Initial Procedure with Respect to Prisoner's Property. If a vehicle classified as prisoner's property is not taken into police custody, it shall not be inventoried. If it is necessary to take a prisoner's property vehicle into police custody, the vehicle should be taken to a police facility or a location in front of or near a police facility. Immediately upon arrival at a police facility, if the vehicle is not locked, the arresting officer shall remove from the passenger compartment all containers—such as boxes or suitcases—and any other personal property which can readily be seen from outside the vehicle and which reasonably has a value in excess of \$25. After removing any such property, the officer shall, if possible, roll up the windows and lock the doors and trunk. Any property so removed shall be brought into the police facility and appropriate entries and returns made. Containers shall not be opened [at this time]; however, they may be sealed to insure the security of their contents. No

other inventory or search of the vehicle shall be made at this time.

[D. Procedure After 24 Hours. If, within 24 hours of the time that the prisoner was arrested, a person authorized by the prisoner (or the prisoner himself, if released) does not claim a vehicle which was classified as prisoner's property and taken to a police facility, a complete inventory of its contents shall be made under Rule 607.]

Rule 604 Traffic or Parking Seizures [, Removals] and Immobilization.

A. Definition. Vehicles that, pursuant to traffic or parking regulations, are taken into police custody and taken to a police facility or private storage facility, or to a location in front of or near a police facility shall be classified as traffic seizures. No other vehicle shall be classified as a traffic seizure even though it is moved under police authority or immobilized by use of a "boot" or other device.

B. Alternatives. In exceptional circumstances an offending vehicle may be seized. [In all other situations when an officer causes a vehicle to be moved pursuant to traffic regulations, the vehicle may be moved to a location on a public street as close to the original location as possible, consistent with prevailing traffic conditions.] In appropriate circumstances, a vehicle may be immobilized by use of a "boot" or other device.

Example 1: A vehicle is unlawfully parked in front of a fire hydrant. A check discloses that there is a traffic arrest warrant outstanding for the registered owner in addition to ten unpaid traffic tickets. The vehicle shall be impounded and taken to a police facility or to a location in front of or near a police facility.

[Example 2: An illegally parked vehicle is disrupting traffic on a main artery during rush hour. The vehicle should be moved to a location as close to the original location as possible, consistent with prevailing traffic conditions.]

C. Procedure When Vehicle Is Immobilized [or Removed]. Vehicles immobilized [or moved but not impounded] shall not be inventoried or searched in any way. However, the officer who caused the vehicle to be immobilized [or moved] shall, if possible, roll up the windows and lock the doors before he leaves the vehicle. [In all cases where a vehicle is moved without the knowledge of its owner, he shall be notified within a reasonable time.]

D. Procedure When Seizing Unlocked Vehicle. If an unlocked vehicle is seized under this Rule, the officer responsible shall remove from the passenger compartment all containers—such as boxes or suitcases—and any other personal property which can readily be seen from outside the vehicle and which reasonably has a value in excess of \$25. After removing any such items, the officer shall, if possible, roll up the windows and lock the doors.

Removed items shall be taken to a police facility, and a written record made of the property. Closed containers should not be opened at this time, but they may be sealed to protect their contents. No other inventory or search of the vehicle should be made [at this time].

[E. Procedure After 24 Hours. If a vehicle which has been seized under this Rule is not claimed by the registered owner or a person authorized by him within 24 hours of the time that it was seized, a complete inventory of its contents shall be made under Rule 607.]

Rule 605 Seizure of Abandoned Vehicles.

When an officer takes a vehicle into custody because it is presumed abandoned under local law, he shall classify it as an abandonment, and make a complete inventory of its contents under Rule 607.

Example: Under local law, a vehicle left on a public highway 36 hours after a warning sticker has been attached is abandoned to the state. After expiration of that time, officers may arrange to have the vehicle towed away. They should inventory its contents before it is taken by a private wrecker. If a police wrecker does the towing, the inventory may be delayed until the vehicle arrives at a police facility.

Rule 606 Other Non-Criminal Seizures.

A. Definition. Whenever an officer takes a vehicle into custody because there is reason to believe that it is part of the estate of a deceased person, or the property of a person temporarily incapable of caring for it, or because it is property turned over to the police at the scene of a fire or disaster, he shall classify it as a non-criminal seizure.

B. Procedure for Non-Criminal Seizure. If an unlocked vehicle is seized under this Rule, the officer responsible shall remove from the passenger compartment all containers—such as boxes or suitcases—which can readily be seen from outside the vehicle and which reasonably have a value in excess of \$25.

After removing any such property, the officer shall, if possible, roll up the windows and lock the doors.

Removed property shall be taken to a police facility, and a written record made of the property. Closed containers should not be opened at this time, but they may be sealed to protect their contents. No other inventory or search of the vehicle should be made [at this time].

Example: A young woman is involved in a serious automobile accident, taken from the scene in an ambulance, and admitted to the hospital in critical condition. The officers on the scene may impound her automobile to preserve it, and her belongings contained in it, from vandalism. Upon its arrival at the police station they shall remove her belongings but may not search the suitcases or otherwise search the car [at the time].

[C. Procedure After 7 Days. If a vehicle which has been seized under this Rule is not claimed by the registered owner or a person authorized by him within 7 days from the time it was impounded, a complete inventory of its contents shall be made under Rule 607.]

Rule 607 Procedure for Any Inventory.

Whenever an officer is authorized to inventory a vehicle under these Rules, he may examine the passenger compartment, the glove compartment, and the trunk, whether or not locked. Any containers—such as boxes or suitcases—found within the vehicle may be opened. Immediately upon completion of the inventory, the officer shall, if possible, roll up the windows and lock the doors and the trunk.

SECTION VII. WHEN FOREGOING MODEL RULES MAY BE DISREGARDED.

Whenever it appears that any of the foregoing Rules should be modified or disregarded because of special circumstances, specific authorization to do so should be obtained from the department's legal advisor or (insert name of other appropriate police or prosecution official).

Model Rules with Commentary

Introduction

For purposes of these Model Rules, a *search* is defined as an examination of a person, place, motor vehicle or any other thing with a view toward discovery of seizable items (contraband, weapons, loot, things used in committing a crime, and other evidence of crime). This definition is derived from a series of Supreme Court decisions, culminating in *Katz v. United States*, 389 U.S. 347 (1967), which establish the general principle that the Fourth Amendment protects a citizen's "legitimate expectations of privacy." The Model Rules are premised on the assumption that in most instances there is a legitimate expectation of privacy in automobiles, and most examinations of vehicles will therefore be *searches*. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), established that vehicle searches are not *per se* outside general Fourth Amendment restrictions.⁷ These Rules, therefore, detail the specific

7. While *Coolidge* is often cited, in these Rules and elsewhere, as authoritative, its precedential effect on warrantless vehicle searches is very speculative. The lead opinion's conclusions regarding search incidental to arrest, exigent circumstances and plain view are supported by four justices. Four other justices disagreed with those conclusions, and the ninth (Harlan) was silent on those issued, but concurred in reversing the conviction.

Regarding the effect of *Coolidge*, a prominent jurist has recently noted:

In view of the plethora of opinions, it is hard to see how (save for the point discussed in Part III of Mr. Justice Stewart's opinion) this frequently cited case stands for anything except that *Coolidge's* conviction was reversed.

United States v. Santana, 485 F.2d 365, 369-70 n.8 (2 Cir. 1973) (Friendly, J.)

(Part III of the *Coolidge* lead opinion approved a third-party's consensual turning-over of seizable items to police.)

situations in which vehicle searches are authorized and the procedures by which the vehicles themselves may be seized.

There is some question as to whether standard inventory examinations of seized motor vehicles are searches under the Fourth Amendment; courts divide on this subject. Compare *Mozzetti v. Superior Court*, 484 P.2d 84 (Cal. 1971) (holding that an inventory was indeed a search, and in this case was unreasonable) with *People v. Sullivan*, 272 N.E.2d 464 (N.Y. 1971) (upholding an inventory as not governed by usual Fourth Amendment rules governing searches) and *United States v. Mitchell*, 458 F.2d 960 (9 Cir. 1972) (upholding an inventory for safeguarding purposes as reasonable). Because inventories present administrative problems different from those involved in most vehicle searches, the Model Rules treat inventories as a special problem arising when motor vehicles are seized.

Both traditional searches and inventories should be distinguished from vehicle or license inspection procedures. Such routine administrative examinations may constitute searches under the Fourth Amendment, but often do not. *California v. Byers*, 402 U.S. 424 (1971). In any event, they usually do not involve the kinds of procedures and considerations which are the subject of these Model Rules. See generally *Camara v. Municipal Court*, 387 U.S. 523 (1967); see also Model Rules for Law Enforcement: Stop and Frisk, Optional Rule 204 (Stopping Vehicles at Roadblocks).

In drafting this volume of Model Rules, considerable attention has been given to relevant United States Supreme Court and lower appellate court decisions. Where clear rules have been established by the courts, they have been incorporated in these Rules. More often, though, the Rules have been written in an attempt to provide standards where the case law is unclear, inconsistent or nonexistent. In these areas, primary attention has focused on the police officer's need for clear and understandable guidelines for his own conduct and his need for sufficient authority to carry out his law enforcement obligations.

In formulating both the general policies toward motor vehicle searches and the specific language of these Model Rules, the drafters have relied heavily upon parts of a similar order adopted by the Metropolitan Police Department of the District of Columbia, and upon the Manual on the Law of Search & Seizure, prepared by the Department of Justice and reproduced by the National District Attorneys Association (revised October 1972).

SECTION I. SEIZURE OF ITEMS IN PLAIN VIEW OR OPEN VIEW IN A MOTOR VEHICLE

Rule 101 Plain View; Open View.

An officer, who is lawfully in any place, may, without obtaining a search warrant, seize from a motor vehicle any item which he observes in plain view or open view (including items observed through the use of a flashlight), if he has probable cause to believe that the item is a weapon, contraband, loot, anything used in committing a crime, or other evidence of crime. [If the vehicle is locked and keys are not available, the officer shall obtain instructions from a superior as to the method to be used to enter the vehicle.]

Commentary

Courts have long noted that no search is involved when an officer fortuitously views evidence from a place in which he has a lawful right to be. *Harris v. United States*, 390 U.S. 234, 236 (1968). There being no search, such discoveries are not within the purview of the Fourth Amendment.

Some recent discussion of the above cited doctrine—which has been called *plain view*, *plain sight*, *open view*, *visible and accessible*—has concluded that the doctrine really encompasses two distinct situations: the view that follows an intrusion into a constitutionally protected area (called *plain view*); and the view that precedes any intrusion whatever (called *open view*). This dichotomy is perhaps best developed in *Brown v. State*, 292 A.2d 762 (Md. App. 1972), in which Judge Moylan draws heavily upon the discussion of the plain view doctrine in *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971).

The difference between the two situations is not just academic. In a plain view situation, no warrant is needed in order to seize the evidence. A prior, valid intrusion has already occurred, and little or no further invasion of privacy will accompany the seizure. *Harris, supra*, involved a valid, warrantless plain view seizure. See also *State v. Ruiz*, 495 P.2d 516, 518 (Ariz. App. 1972), *rev'd on other grounds*, 511 P.2d 172 (Ariz. 1973): "The [plain view] doctrine applies when a police officer has a prior justification for an intrusion in the course of which he inadvertently comes across an item incriminating the accused."

In contrast, the open view situation involves no prior intrusion. If the seizure that follows occurs in a constitutionally-

protected area, only then will an intrusion be involved. The Fourth Amendment warrant requirement applies to the intrusion, and seizure of the observed item without a warrant is likely to be invalid unless an exception such as “incident to a lawful arrest” or “exigent circumstances” is applicable. See *Coolidge v. New Hampshire*, 403 U.S. 443.

Fortunately, since Rule 101 pertains only to motor vehicles, seizures following both plain view and open view situations can each occur without a warrant in all but a small number of cases. As noted above, plain view situations never require a warrant for the ensuing seizure, while in any open view situations involving a vehicle, “exigent circumstances” will almost always be present to excuse the lack of a warrant.

It is well established that an officer viewing the interior of a vehicle through its windows has not conducted a search. See, e.g., *Nunez v. United States*, 370 F.2d 538 (5 Cir. 1967); *Daygee v. State*, 514 P.2d 1159 (Alas. 1973). Such observation is an open view, regardless of whether it followed a forcible stop or not. The use of artificial light (typically, a flashlight) to enhance the observation is proper. *United States v. Lee*, 274 U.S. 559 (1927). Cf. *Marshall v. United States*, 422 F.2d 185, 189 (5 Cir. 1970):

The mere use of a flashlight does not magically transmute a non-accusatory visual encounter into a Fourth Amendment search The plain view rule does not go into hibernation at sunset.⁸

Equally proper is the discovery and seizure of a seizable item exposed to an officer outside the vehicle when a driver opens the glove box to remove the vehicle’s registration (open view plus exigent circumstances) or exposed during a search of the area within an arrested driver’s control (plain view). See *United States v. Santana*, 485 F.2d 365 (2 Cir. 1973), approving the seizure of narcotics seen in plain view when an officer opened a car door wider to ensure his safety in the course of a valid stop for interrogation, and *United States v. Cohn*, 472 F.2d 290 (9 Cir. 1973), upholding warrantless entry into a suspicious, unoccupied vehicle after officers smelled strong marihuana odor exuding from an open window of the car, and from outside the car saw part of a “brick” of marihuana under a front seat (open view plus exigent circumstances).

8. See also *People v. Whalen*, 213 N.W.2d 116, 121 (Mich. 1973): “[T]he rule does not slink away at sunset to emerge again at the break of day.”

For particular jurisdictions, the following cases discuss plain view or open view:

ARIZONA

State v. Brierly, 509 P.2d 203, 209 (1973). Open view of a truck's bed and cab revealed bloody clothing and a dagger. Seizure upheld, and the Court noted that "the use of a flashlight is comparable to the use of a searchlight, a marine glass or a field glass, and is not prohibited by the Fourth Amendment."

CALIFORNIA

People v. Block, 98 Cal. Rptr. 657, 659, 491 P.2d 9 (1971). Upheld plain view discovery of clear vial of marihuana as officer searched upstairs to determine if additional participants in a raided "pot party" had fled there. "We agree that *Chimel* does not preclude the seizure of evidence found in plain sight during the course of a lawful investigation."

DISTRICT OF COLUMBIA

United States v. Wheeler, 459 F.2d 1228 (1972). Followed *Harris v. United States*, *supra*, and predecessor opinion, *Harris v. United States*, 370 F.2d 477 (D.C. Cir. 1966), upholding plain view discovery and seizure of envelope which, when opened, contained heroin. Held that the size, color, bulk and location of the envelope, in light of the officer's experience, provided probable cause for belief that it contained contraband.

FLORIDA

State v. Holmes, 256 So.2d 32 (App. 1971). Approved open view discovery and warrantless seizure of fruits of burglary after motorist was stopped for traffic violation.

MISSOURI

State v. Wrose, 463 S.W.2d 792 (1971). Upheld open view discovery and warrantless seizure of pry-bar and fruits of daytime burglary as vehicle was parked at curb near scene of the crime.

OHIO

State v. Blevins, 256 N.E.2d 728 (Com. Pleas. 1969). At 1:00 a.m., two officers approached an out-of-state vehicle stopped on a private farm lane, observed one passenger trying to slip out of the car and another lying on the back seat. Using a flashlight, the officers observed two duffel bags, two walkie-talkies and an ax-handle in open view. The Court upheld this discovery, and the concomitant arrests for possession of burglary tools.

TEXAS

Jackson v. State, 449 S.W.2d 279 (1970). Approved plain view discovery of fruits of burglary exposed in apartment of burglary suspect, after suspect invited detectives inside.

Lewis v. State, 439 S.W.2d 351, 352 (1969). Upheld open view discovery and warrantless seizure of pistol seen on floorboard of car after driver was ordered to exit during a traffic stop—"It is well-established law that an officer may seize what he sees in plain sight or open view if he is lawfully where he is."

These Rules generally require that locked vehicles be entered by means of a key if one is available or can be obtained. Officers should avoid inflicting physical damage whenever possible—as a matter of public relations and to minimize department liability in the event of a mistake. If the vehicle must be broken into, an officer must obtain a superior's approval. See also Rule 203 (C).

Coolidge v. New Hampshire, 403 U.S. 443, has raised a number of questions concerning plain view seizures, but in circumstances different from those to which Rule 101 applies. In *Coolidge* the police seized the automobile itself, not evidence found in it; in addition, the car was on private property, not in a public place. After several weeks of investigation, officers had gone to the defendant's home with a search warrant later held invalid. In his yard, they found and seized his vehicle. The majority of the Court held this was not evidence "in plain view" because (a) the officers anticipated the evidence would be there; (b) they had adequate time to get a warrant; and (c) there was no likelihood that the vehicle would be moved or evidence in it removed in the meantime. See McCormick on Evidence (2d ed.), 390-91 (1972).

These Model Rules require a vehicle seizure and search of

the kind conducted in *Coolidge* to be made with a warrant. See Rule 602(C).

The *Coolidge* decision also set forth a general requirement that a plain view seizure be inadvertent. However, the Court specifically excepted the types of vehicle searches approved in *Carroll v. United States*, 267 U.S. 132 and *Chambers v. Maroney*, 399 U.S. 42, from that requirement. 403 U.S. at 482. Thus, no general inadvertence requirement has been included in this Rule. Until the courts specifically impose such a limitation on those motor vehicle plain view seizures that occur at public locations, there is no good reason for complicating the officer's job with an additional judgmental decision.

SECTION II. WARRANTLESS SEARCHES RELATED TO MOTOR VEHICLES IN USE

This Section applies both to vehicles stopped following police action, and to those stopped under some other circumstance. The former category is clearly the more common.

Police activity regarding occupied vehicles can take several forms:

- (i) No formal enforcement action is taken; or
- (ii) a citation (summons) is issued at the scene, and the driver is permitted to leave; or
- (iii) the driver is asked to follow the officer to the stationhouse (for issuance of a citation, or, in unusual cases, booking); or
- (iv) the driver is taken into full-custody for a vehicle code violation, and then taken before a judicial officer or to a detention facility; or
- (v) the driver (or a passenger) is taken into custody for a non-traffic offense, and probable cause for a full search of the vehicle is absent; or
- (vi) the driver (or a passenger) is taken into custody for a non-traffic offense, and there is probable cause for a full search of the vehicle.

As a result, this Section poses special analytical problems. Compounding the confusion are the distinctions to be made—in each of the above six situations—between the authority to search the vehicle itself and the authority to search the driver and other occupants of the vehicle.

These distinctions all play a part in the limitations contained in the following Rules.

Rule 201 Full-Custody Arrest of Vehicle Occupant.

A. Search of Arrestee. Whenever an officer makes a full-custody arrest of an occupant of a motor vehicle, he may make a full, warrantless search of the arrestee's person for weapons or any other seizable items. This search must occur at the time and place of arrest.

B. Limited Search of the Vehicle. The officer may also make a warrantless search of those areas in or about the vehicle into which the arrestee might readily reach for a weapon or any other seizable item at the time of his arrest. This search must occur at the time of arrest, in the immediate presence of the arrestee.

C. Weapons Search.

(i) Frisk of Other Occupants. If the officer reasonably suspects that another occupant of the vehicle is armed with a dangerous weapon, he may frisk that person.

(ii) Frisk of the Vehicle. If the officer reasonably suspects that a readily accessible area of the vehicle contains a dangerous weapon, he may frisk that area.

D. Wider Search of the Vehicle. If seizable items are found during a limited search—or a frisk—of the vehicle, Rule 203 may permit a more extensive search of the vehicle.

Commentary (Rule 201(A))

A *full-custody* arrest involves physical custody, rather than mere interference with freedom of movement. It very often is marked by the placing of restraints—such as handcuffs—on the suspect. A full-custody arrest always separates the suspect from the vehicle in which he is riding.

Rule 201(A) permits a full field search of the arrested person for weapons or other seizable items following his full-custody arrest. No distinction is made between felony arrests and misdemeanor arrests, nor between traffic arrests for the purpose of incarceration and traffic arrests for the purpose of appearance before a magistrate.

The leading case in point is *United States v. Robinson*, 414 U.S. 218 (1973). An officer made a warrantless, full-custody arrest of Robinson for driving after his license had been revoked. In accordance with departmental procedures, the officer made a search of Robinson's person; while doing so he found a crumpled-up cigarette package in the breast pocket of Robinson's overcoat. The

officer felt something other than cigarettes in the package, and opened the package and discovered 14 heroin capsules.

In upholding the validity of the seizure of the heroin, the Supreme Court held:

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which established the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

United States v. Robinson, 414 U.S. at 235.

The authority to search in a lawful full-custody arrest situation thus "does not depend upon what the court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *United States v. Robinson*, 414 U.S. at 235. As does *Robinson*, Rule 201 emphasizes the danger posed by the proximity of the officer to the arrestee, and not the nature or severity of the offense alleged.

The critical factor . . . is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer if in fact the person is armed. When it becomes necessary that an officer confine a traffic law violator within his police vehicle, the officer risks the danger that the violator may be armed with and draw a weapon.

People v. Superior Court (Simon), 101 Cal. Rptr. 837, 857, 496 P.2d 1205 (1972) (Wright, C.J., concurring).

Nor does the authority to search in a lawful full-custody arrest situation depend upon statutes or regulations that require particular offenders to be taken into full-custody. In *Gustafson v. Florida*, 414 U.S. 260 (1973), the Supreme Court, relying upon *Robinson*, held that a full-search following a full-custody arrest for a minor traffic offense was *per se* reasonable under the Fourth Amendment. See also *State v. Lohff*, 214 N.W.2d 80 (S.D. 1974), which treats *Robinson* and *Gustafson* as "decisive" in upholding a

full stationhouse search after a full-custody traffic arrest.

Nevertheless, police agencies should develop guidelines for determining whether to cite or to take into custody persons charged with minor traffic offenses. Several remarks from *Robinson* and *Gustafson* indicate the wisdom of such policy development:

[The officer's] placing [Robinson] in custody following that arrest was not a departure from established police department practice We leave for another day questions which would arise on facts different from these. *United States v. Robinson*, 414 U.S. at 218 n.1.

* * *

Gustafson would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search undertaken for collateral objectives. *United States v. Robinson*, 414 U.S. at 238 n.2 (Powell, J., concurring).

* * *

It seems to me that a persuasive claim might have been made . . . that the custodial arrest of [Gustafson] for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. *Gustafson v. Florida*, 414 U.S. at 266 (Stewart, J., concurring).

Commentary (Rule 201 (B))

Rule 201(B) permits a further search for seizable items, limited to those areas within the reach of the arrestee at the time of arrest. Most traffic offenses do not involve seizable items.⁹ And with some of the traffic offenses that can involve seizable items, probable cause to believe such items are in or about a particular vehicle may be absent. Searching in most instances is limited to those areas which

9. Notable exceptions include driving while under the influence of alcohol or other drugs, and offenses involving fraudulent or altered operators' licenses, registrations of license plates. Cf. *United States v. Robinson*, 471 F.2d 1082, 1094 n.16 (D.C. Cir. 1972); and Note, 59 VA. L. REV. 724, 727 (1973).

could contain a weapon and which are within reach of the arrestee.

All searches incidental to arrest that extend beyond the person of the arrestee are governed by *Chimel v. California*, 395 U.S. 752 (1969).¹⁰ The fact that an arrest has taken place in or near an automobile does not obviate the *Chimel* doctrine.

In *Chimel*, the Supreme Court authorized a search incidental to arrest of the area within the arrestee's immediate control—the area from which he might draw a weapon or within which he might destroy evidence. A search incidental is a reasonable procedure because of the need to protect the officer and preserve seizable evidence. Based on the authority of *Chimel*, Rule 201(A) establishes a uniform procedure for a limited search in every case in which a full-custody arrest is made of a person in a motor vehicle. The scope of the search is limited to its purpose: checking for weapons or seizable items which the suspect could reach.

An example of the kind of activity proscribed by *Chimel* and this Rule occurred in *People v. Koehn*, 102 Cal. Rptr. 102 (App. 1972). The driver of a station wagon was arrested for carrying a concealed weapon; his passenger was arrested on the same charge and pursuant to a traffic warrant as well. The arresting officers searched the vehicle's locked spare tire well, inside of which was a suitcase. The officers opened the suitcase; it contained marihuana and a locked box. The locked box was opened, and found to contain heroin. The Court promptly condemned the initial entry into the well; *a fortiori*, the other prying was invalid under *Chimel*. See also *Vale v. Louisiana*, 399 U.S. 30 (1970)¹¹ and *State v. Koen*, 487 S.W.2d 562 (Mo. 1972).

Rule 201(B) does not distinguish between searching for items the arrestee may wish to destroy, e.g., narcotics, and searching

10. Recently the Supreme Court referred to those of its cases that had addressed the extent of the area subject to a search incidental to an arrest. The Court listed *Chimel* as its last pronouncement on the subject. *United States v. Robinson*, 414 U.S. at 225.

11. In *Vale*, the Supreme Court rejected the application of search incidental doctrine to the facts before it. Police officers saw *Vale* sell narcotics on the street in front of his residence, and arrested him on his front porch. The officers then entered the house and searched for narcotics, fearing that *Vale's* brother and mother, who had just arrived, might dispose of any narcotics therein. While correctly holding that the search was not incidental to arrest because it went beyond *Vale's* reach, the Court illogically held that exigent circumstances similarly did not justify the search. This result has been severely criticized. See, e.g., LaFave, *Warrantless Searches and the Supreme Court*, 8 CR. L. BULL. 9, 15-17 (1971).

for items the arrestee may wish to produce, e.g., a weapon. Since such a distinction can only be made after the items are found, it does not provide guidance to the officer on the scene. The Rule therefore limits only the area that may be searched.

Rule 201(B) requires that the search be made at the immediate time and place of the arrest, and in the arrestee's immediate presence. The requirement of contemporaneity is crucial. A delay of a few minutes, during which an accused is removed from his vehicle, handcuffed, and placed in a police vehicle, may well preclude a subsequent search of the arrestee's vehicle. The reason, simply, is that the arrestee no longer has control of the vehicle. He cannot destroy evidence in it, nor draw a weapon from it.

In some jurisdictions, the prevailing rule is not quite so stringent. For example, in *Daygee v. State*, 514 P.2d 1159 (Alas. 1973), a search incidental to arrest conducted after the arrestees had been placed in police vehicles was held valid. The Court concluded:

We hereby adopt the view that a search is incident to arrest as long as it is made substantially contemporaneously with the arrest. The search of the vehicle should not depend on whether or not the person or persons arrested are in the car or have been recently removed from the car for the purposes of effectuating an arrest. We reach this conclusion because it would be an unusual situation for a police officer not to remove a suspect from a car while going through the arrest procedure, both for reasons of safety and because of the practical physical limitations of effecting an arrest in such a confined area.

Id. at 1165-66.

Contra, *People v. Garcia*, 340 N.Y.S.2d 35 (App. 1973); *Gonzales v. State*, 507 P.2d 1277 (Okla. App. 1973). Cf. Miles and Welfing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 Seton Hall L. Rev. 105, 110 (1972).

The contemporaneity rule predates *Chimel*. In *Preston v. United States*, 376 U.S. 364 (1964), an arrest for vagrancy following a vehicle stop on a highway was insufficient to justify a later warrantless search of the vehicles at a police station. The Court held that the delay prevented the search from in any way being considered incidental to the arrest. While part of the holding in *Preston* has been eroded by *Chambers v. Maroney*, 399 U.S. 42 (1970), its treatment of search incidental to arrest remains good law.

Commentary (Rule 201(C))

The legality of a police frisk was first confirmed by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). More recently, in upholding the frisk of a vehicle occupant based on reasonable suspicion derived entirely from an informant's tip, the Court held:

So long as the officer is entitled to make a forcible stop and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.

Adams v. Williams, 407 U.S. 143, 146 (1972).

In *United States v. Green*, 465 F.2d 620 (D.C. Cir. 1972), the Court considered the validity of a frisk of the underside of a driver's seat after the driver had made furtive movements during the officers' efforts to curb his vehicle. The Court upheld the frisk, finding it reasonable under the circumstances,¹² stating:

We hold the search conducted in the instant case was sufficiently limited in scope to satisfy constitutional requirements . . . [The] search was not general or exploratory, but rather limited to the danger at hand. The search under the driver's seat of an open-door vehicle to which the driver will return is an area under the immediate control of the driver.

Id. at 624-25.

See also *State v. Boone*, 277 A.2d 414 (N.J. Super. 1971) and George, *Constitutional Limitations on Evidence in Criminal Cases* 73 (1969). Compare *United States v. Santana*, 485 F.2d 365 (2 Cir. 1973) and *United States v. Thomas*, 314 A.2d 464 (D.C. App. 1974) with *United States v. Johnson*, 463 F.2d 70 (10 Cir. 1972) and *Commonwealth v. Pollard*, 299 A.2d 233 (Pa. 1973).

Commentary (Rule 201(D))

Rule 201(D) alerts the reader to the propriety of a wider

12. *I.e.*, it was 2 a.m.; a frisk of the driver at the outset revealed no weapon; the officers stopped their vehicle an unusual distance behind Green's, and ordered Green out of his car via their public address system.

vehicle search in certain circumstances. Rule 203 would supplement—or supplant—the limited search authority of Rule 201 in either of the following cases:

(i) The particular offense for which arrest is made involves seizable items, and there is probable cause to believe the vehicle contains those items.¹³

(ii) There was not probable cause for a search for seizable items at the time the vehicle was stopped, but ensuing events have caused probable cause to develop.¹⁴

[Alternate Rule 201 Full-Custody Arrest of an Occupant.¹⁵

A. Search of Arrestee.

(i) **Routine Traffic Offense.** Whenever an officer makes a full-custody arrest of a person in a motor vehicle for a routine traffic offense, he may make a frisk of the arrestee's person for weapons. The frisk must occur at the time and place of arrest. The officer may also search the arrestee's person for any seizable item if the item is related to the offense for which the arrest is made.

(ii) **Other Offense.** Whenever an officer makes a full-custody arrest of a person in a motor vehicle for other than a routine traffic offense, he may make a full, warrantless search of the arrestee's person for weapons or any other seizable items. This search must occur at the time and place of arrest.

B. Limited Search of the Vehicle.

(i) **Routine Traffic Offense.** The officer may also make a warrantless search of those areas in or about the vehicle into which the arrestee might readily reach for any seizable item if the item is related to the offense for which

13. See, *e.g.*, *Chambers v. Maroney*, 399 U.S. 42, and the Commentary to Rule 203 below.

14. See, *e.g.*, *State v. Reynolds*, 290 N.E.2d 557 (Ohio 1972). Reynolds was arrested out of his vehicle on an outstanding traffic warrant. The vehicle fit the description of a car used in some recent robberies, and the officers saw in open view ski masks and a portable police-band radio on the front seat. The subsequent full search of the vehicle was held proper under *Chambers v. Maroney*, 399 U.S. 42, and *Carroll v. United States*, 267 U.S. 132.

15. This alternative is for jurisdictions that either require or desire a more restrictive approach to searches of traffic law violations.

the arrest is made. If the officer reasonably suspects a weapon is present therein, he may search those areas in or about the vehicle into which the arrestee might readily reach for a weapon.

(ii) Other Offense. The officer may also make a warrantless search of those areas in or about the vehicle into which the arrestee might readily reach for a weapon or any other seizable item at the time of his arrest. This search must occur at the time and place of arrest, in the immediate presence of the arrestee.

C. Weapons Search.

(i) Frisk of Other Occupants. If the officer reasonably suspects that another occupant of the vehicle is armed with a dangerous weapon, he may frisk that person.

(ii) Frisk of the Vehicle. If the officer reasonably suspects that a readily accessible area of the vehicle contains a dangerous weapon, he may frisk that area.

D. Wider Search of the Vehicle. If seizable items are found during a limited search—or frisk—of the vehicle, Rule 203 may permit a more extensive search of the vehicle.]

Commentary (Alternate Rule 201)

Alternate Rule 201 places additional restrictions upon a search incidental to arrest for a routine traffic offense. Some jurisdictions may wish to adopt this standard voluntarily, believing that the use of the full authority granted by *United States v. Robinson*, 414 U.S. 218, is unnecessary. Other jurisdictions may be uncertain of the effect of *Robinson* upon a state court opinion that reached a contrary result. For example, in *People v. Superior Court (Simon)*, 101 Cal. Rptr. 837, 496 P.2d 1205 (1970), the California Supreme Court held that an extensive search incidental to a full-custody arrest for a traffic offense is unreasonable. But very recently a California appellate court has held that *Robinson* and *Gustafson* have overruled the *Simon* case by implication, on the theory that:

[S]omething more than personal disagreement with the decision of the United States high tribunal on search and seizure is required if the persuasion of that court is not to be followed.

[T]he state system should accept the interpretation of the United States Supreme Court of language in the federal Constitution as controlling of our interpretation of essentially identical language in the California Constitution unless conditions peculiar to California support a different meaning.

People v. Norman, 112 Cal. Rptr. 43, 49 (App. 1974).

But see *People v. Kelly*, 353 N.Y.S.2d 111 (N.Y. City Crim. Ct. 1974), disagreeing with *Robinson* and *Gustafson*, and continuing to follow earlier, contrary New York case law from *People v. Adams*, 346 N.Y.S.2d 229, 229 N.E.2d 653 (1973) and *People v. Marsh*, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967).

The Alternate Rule, then, is for jurisdictions that either require or desire a more restrictive policy than that expressed in Rule 201. The drafters rejected an even stricter formulation in which there would not be an automatic or *per se* right to conduct a limited weapon search of a person taken into full-custody for a routine traffic offense. The Model Code of Pre-Arrestment Procedure § 230.2 (O.D. 1972) precludes even a frisk if the arrest is for a “‘violation,’” or a “‘traffic offense or other misdemeanor, the elements and circumstances of which involve no unlawful possession or violent, or intentionally or recklessly dangerous, conduct” and the officer lacks reasonable belief “that his safety or the safety of others then present so requires.” In addition, *dictum* in *People v. Superior Court (Simon)* could easily be regarded as prescribing this highly restrictive rule. 101 Cal. Rptr. at 852 n.13, 496 P.2d at 12, citing *People v. Marsh*, 281 N.Y.S.2d at 793, 228 N.E.2d at 786, which held:

[N]o search for a weapon is authorized as incident to an arrest for a traffic infraction . . . unless the officer has reason to fear an assault or probable cause for believing that his prisoner has committed a crime [other than the infraction].

However, this restrictive approach certainly found no support in the United States Supreme Court; even the Justices who dissented in *Robinson* noted approvingly that

The Court of Appeals [in *United States v. Robinson*, 471 F.2d 1082, 1098 (D.C. Cir. 1972)] unanimously affirmed the right of a police officer to conduct a limited frisk for

weapons when making an in-custody arrest, regardless of the nature of the crime for which the arrest was made.
414 U.S. at 250.

The dissent then explained why custodial arrests—in contrast with street detentions—may permit frisks in every case:

[A] stop involves a momentary encounter between officer and suspect, while an in-custody arrest places the two in close proximity for a much longer period of time. If the individual happens to have a weapon on his person, he will certainly have much more opportunity to use it against the officer in the in-custody situation. The prolonged proximity makes it more likely that the individual will be able to extricate any small hidden weapon which might go undetected in a weapons frisk, such as a safety pin or razor blade. In addition, a suspect taken into custody may feel more threatened by the serious restraint on his liberty than a person who is simply stopped by an officer for questioning, and may therefore be more likely to resort to force.
414 U.S. at 253, 254.

As mentioned previously, several state courts have ruled contra to the *Robinson* holding. Whether those courts will reiterate their conclusions—relying upon their state constitutional equivalent of the Fourth Amendment—is highly conjectural. In addition to the California and New York cases cited above, some of the state decisions perhaps now undermined by the *Robinson* holding are:

People v. Thomas, 20 N.E.2d 413 (Ill. 1964) (*dicta*).
Shelton v. State, 239 A.2d 610 (Md. App. 1968) (*dicta*).
People v. Zeigler, 100 N.W.2d 456 (Mich. 1960).
State v. Curtis, 190 N.W.2d 631 (Minn. 1971).
State v. O'Neal, 444 P.2d 951 (Or. 1968).
Barnes v. State, 130 N.W.2d 264 (Wis. 1964).

Finally, it should be mentioned that there is a middle-ground between Rule 201 and Alternate Rule 201: A policy that permits both a broad search incidental to a full-custody arrest and the seizure of any suspicious containers found during that search, but that prohibits the opening of such containers without probable cause. By placing the container beyond the arrestee's reach the

officer's interest in self-protection is served. Thus, it is argued, there is no need to open the container to examine its contents. This was the position of Judge Wright in the Court of Appeals decision in *Robinson*. 471 F.2d at 1089-90, n.9 (D.C. Cir. 1972). This is also the position of a number of state courts; see, e.g., *State v. Florance*, 515 P.2d 195 (Or. App. 1973).

The Model Rules have not adopted this point of view because (1) the Court of Appeals decision in *Robinson* was overturned by the Supreme Court;¹⁶ and (2) other Supreme Court cases suggest that the Fourth Amendment permits such investigation into the contents of seized containers. In *Peters v. New York*, 392 U.S. 40 (1968), the defendant was stopped and frisked by a police officer who suspected him of burglary. The officer removed a hard object enclosed in an opaque envelope. Upon opening the envelope the officer discovered burglar tools. In upholding the search the Supreme Court focused solely on the issue of whether the frisk itself was reasonable and never questioned the officer's right to open the envelope. In *Chimel v. California*, 395 U.S. 752 (1969), the Court, while defining the permissible area of search incidental to arrest, used as an example a gun in a drawer in front of the arrestee as dangerous and within the permissible area. 395 U.S. at 762-63. See also *United States v. Harrison*, 461 F.2d 1127 (5 Cir.), cert. denied, 409 U.S. 884 (1972) (upheld warrantless opening of a cigar box that had been within an arrestee's reach); and *United States v. Mehciz*, 437 F.2d 145 (9 Cir.), cert. denied, 402 U.S. 974 (1971) (warrantless search of a suitcase taken from an arrestee held proper under *Chambers* rationale).

There are other practical reasons for not including this restriction in the Model Rules. An on-the-scene examination of a container removed from an arrestee's person or reach eliminates a requirement that the officer retain all confiscated containers in his own possession throughout the trip to the stationhouse following a full-custody arrest. In many instances the officer might otherwise have to cope with a myriad of items taken from many individuals including wallets, purses, envelopes, cigarette packages, etc. If he has examined the containers, however, returning most or all of them to the arrestee will pose no threat to the officer. Moreover, if officers

16. At least one court has already cited *Robinson-Gustafson* as controlling on the issue of examining closed containers taken from an arrestee. *State v. Dubay*, 313 A.2d 908 (Me. 1974) (upheld examining a wallet taken from arrestee, and opening ball of tinfoil found within the wallet, following an arrest for intoxication).

other than the arresting officer provide transportation to the stationhouse, it would require a burdensome system of accountability to protect the officers against claims of loss. Furthermore, the search and return of a container may allow the arrestee the use of that item if he or she wants, as with a compact in a purse, or a pack of cigarettes. While an individual department may wish to include in its policy a rule against searching containers at the scene absent probable cause, for the foregoing reasons the drafters have not added this prohibition to the Model Rules. See also Note, 59 Va. L. Rev. 724, 740 (1973).

Rule 202 Full-Custody Arrest Absent.

A. Ordinary Circumstances. Whenever an officer either stops a vehicle or comes upon a stopped but occupied vehicle, but does not take any occupant into full-custody, he may not ordinarily search or frisk any occupant or the vehicle.

B. Circumstances Indicating Danger.

(i) **Frisk of Occupants.** If the officer reasonably suspects that an occupant of the vehicle is armed with a dangerous weapon, he may frisk that person.

(ii) **Frisk of the Vehicle.** If the officer reasonably suspects that a readily accessible area of the vehicle contains a dangerous weapon, he may frisk that area.

Commentary

Rule 202 strictly limits searches of persons and vehicles in non-custodial situations. It covers traffic “stops,” which some jurisdictions consider “arrests.” In these situations, no one is deprived of his liberty by being handcuffed, or forcibly placed in a police vehicle, or otherwise restrained. A traffic stop—even one in which the driver is required to follow the officer to a police facility—is the most common example of non-custodial detention.

The inherent danger a police officer faces when he takes a person into full-custody is simply not present in an ordinary traffic stop. Whether the officer gives a verbal warning, a written warning, a citation, or an order to have the stopped vehicle driven to a police facility does not change the comparatively safe nature of an ordinary traffic stop. If there are circumstances that point toward danger to the officer, he has clear authority under the Rule to protect himself

by conducting a frisk.¹⁷ An ordinary non-custodial traffic stop—even those accompanied by the issuance of a citation—is very much akin to the stop permitted by *Terry v. Ohio*, 392 U.S. 1 (1968). While the Supreme Court in *Robinson* specifically avoided discussing search authority in routine traffic stop cases, see 414 U.S. at 236 n.6, the Court did differentiate between limited street detentions and full-custody arrests:

It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop.
414 U.S. at 234, 235.

While a myriad of cases discuss searches incidental to traffic offenses, very few touch on the issue of searching when the police response is fleeting and non-custodial. Most involve either full-custody arrests for traffic offenses or searches when additional suspicious circumstances are present.¹⁸

Any police interest in aggravating and prolonging non-custody detentions is absolutely minimal when neither a threat to an officer nor suspicion of additional crime is present. Routine traffic stops involve vast numbers of “good citizen”-types who resent unnecessary police intrusion. Automatic searches predicated solely on a traffic stop would take large amounts of police time and energy, with only sporadic results.

For the above practical and legal reasons, Rule 202 forbids any form of search during routine traffic stops, while permitting

17. “[T]he arresting officer in an ordinary traffic violation case cannot reasonably . . . expect to find weapons [in the offender’s vehicle] [A] warrantless search for weapons, like a search for contraband, must be predicated in traffic violation cases on specific facts or circumstances giving the officer reasonable ground to believe that such weapons are present in the vehicle he has stopped.” *People v. Superior Court (Kiefer)*, 91 Cal. Rptr. 729, 744, 478 P.2d 449, 464 (1970).

18. Two noteworthy cases directly in point but with opposing conclusions are *People v. Zeigler*, 100 N.W.2d 456 (Mich. 1960), which adopted the same restrictions as Rule 202, and *Lane v. State*, 424 S.W.2d 925 (Tex. 1967), *cert. denied*, 392 U.S. 929 (1968), which permitted a full vehicle search immediately following a routine traffic stop, unaccompanied by either a full-custody arrest or suspicious circumstances.

frisks during the unusual traffic stop when the officer reasonably fears for his safety. The drafters feel that the Rule provides considerable latitude to the officer who reasonably feels that his safety is in jeopardy. Case law is replete with examples of considerable deference being accorded to an officer's judgment that he was in danger. For example, in *State v. McCrary*, 478 S.W.2d 349 (Mo. 1972), an officer writing out a citation for a taillight violation was alarmed by the motorist's suddenly reaching for his own right hip pocket. After grabbing the motorist's arm and handcuffing him, the officer then reached into the pocket. He withdrew not a weapon, but two condoms containing heroin. The Court upheld the seizure. See also *State v. Coles*, 249 N.E.2d 553 (Ohio Com. Pl. 1969) and *State v. Quintana*, 376 P.2d 130 (Ariz. 1962).

Nothing in this Rule alters the validity of plain view and open view discoveries and seizures during valid traffic stops. See Rule 101 above; cf. *People v. Whalen*, 213 N.W.2d 116, 119-21 (Mich. 1073).

Rule 203 Extensive Searches Based on Probable Cause.

A. When Permitted. Whenever an officer makes a full-custody arrest of a person in a motor vehicle, or of a person in close proximity to a motor vehicle from which he has just departed or into which he is about to enter, and the officer has probable cause to believe that the vehicle contains seizable items, he may search the vehicle for those items without a warrant as soon as practicable. The search should follow any protective searching authorized by Rule 201.

Commentary (Rule 203 (A))

Following a full-custody motor vehicle arrest, in most cases there will be a search of the area within the accused's immediate control under Rule 201. This search is intended to protect the officer and preserve evidence; it must be conducted immediately, if it is to be conducted at all.

Thereafter, the officers should consider whether they have probable cause to believe that seizable items—connected or unconnected with the crime for which the arrest is made—are in the vehicle. If so, they may conduct a further, broader search for such items. A Rule 203 search is clearly permitted by *Chambers v. Maroney*, 399 U.S. 42 (1970) and *Carroll v. United States*, 267 U.S. 132 (1925). And while the plurality opinion in *Coolidge v. New*

Hampshire, 403 U.S. 443 (1971), is of limited value as precedent, it too is not in conflict with Rule 203:

As we said in *Chambers* . . . 'exigent circumstances' justify the warrantless search of 'an automobile stopped on the highway,' where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. . . . [T]he opportunity to search is fleeting.' 403 U.S. at 460 (emphasis supplied by the *Coolidge* plurality).

In *Carroll*, officers stopped a vehicle for suspected violation of the National Prohibition Act. They had probable cause to believe bootleg liquor was in the vehicle. After securing the occupants, they proceeded to search the vehicle. The Supreme Court upheld the search, emphasizing the mobility and accessibility of vehicles as creating exigent circumstances relieving officers of the need to get a warrant. *Carroll* itself thus authorized an immediate full-scale vehicle search whenever probable cause exists to believe a seizable item is in an ambulatory vehicle. See *Brinegar v. United States*, 338 U.S. 160 (1949); cf. *People v. Dumas*, 109 Cal. Rptr. 304, 312, 512 P.2d 1208 (1973).

Limitations on the *Carroll* doctrine were created by later decisions. *Preston v. United States*, 376 U.S. 364 (1964), voided a search of a motor vehicle after it had been taken into police custody following the arrest of its driver for vagrancy. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), similarly invalidated a vehicle search at a police station following a speeding arrest. *Preston* and *Dyke*, when coupled with *Chimel v. California*, 395 U.S. 752 (1969), suggested substantial inroads on the *Carroll* doctrine.

But several later decisions have revived and perhaps expanded the *Carroll* rule. *Cooper v. California*, 386 U.S. 58 (1967), allowed a delayed vehicle search after a narcotics arrest, when a state statute compelled taking the vehicle into custody for forfeiture proceedings. *Preston* was distinguished on the grounds that the offense there involved only vagrancy, which does not imply the presence of weapons or other seizable items in the vehicle.¹⁹ *Dyke*,

19. The Supreme Court has again interpreted *Preston* narrowly. "[W]e hold that [*Preston*] stands only for the proposition that the search challenged there could not be justified as one incident to arrest." *Cady v. Dombrowski*, 413 U.S. 433, 444 (1973).

which involved speeding, may be similarly distinguished. The *Carroll* doctrine was further approved in *Chambers v. Maroney*, where robbery suspects were stopped on the highway, and their vehicle was searched later after being towed to a police facility. Although the vehicle was no longer mobile and time permitted obtaining a warrant, the Supreme Court upheld the search. As a general rule, the Court held that a vehicle stopped on the open highway can be searched whenever probable cause arises. The Court could perceive no substantial advantage for defendants in requiring that a vehicle merely be impounded until a warrant is obtained; such a requirement would be substantially inconvenient for law enforcement without providing any greater protection of privacy. The Court also upheld the delay in conducting the search. Its reasoning was that since the search for evidence could have been conducted on the highway it was equally reasonable to tow the vehicle and conduct the search at a more convenient time and place. The *Chambers* doctrine was reiterated in *Coolidge*, 403 U.S. at 460. Rule 203(A) focuses on vehicles that have very recently been—or are about to be—occupied. Realistically, such vehicles should be regarded as “ambulatory.”²⁰ In other words, “there is a reasonable likelihood that the automobile would or could be moved,” something that even a strict view of the “automobile exception” to the Fourth Amendment’s warrant requirement recognizes as permitting an immediate, warrantless search.²¹

Rule 203(A) gives two examples where a search would be appropriate. In Example 1, a vehicle described as being involved in a recent robbery is stopped; quite clearly it should be searched for evidence of the crime. Example 2 involves an arrest in or near a vehicle from which there is reason to believe narcotics sales are being made; again, the vehicle should be searched for evidence. The policy reasons supporting warrantless probable cause searches of vehicles—mobility and accessibility—are also present in those cases when an accused is arrested very near his vehicle. However, *Coolidge v. New Hampshire* struck down such a search when the arrestee was in his

20. “The constitutional difference between searches of . . . houses and . . . [of] vehicles stems [in part] from the ambulatory character of the latter . . .” *Cady v. Dombrowski*, 413 U.S. at 442.

21. “[W]here . . . there is no reasonable likelihood that the automobile [subjected to a warrantless] search would or could be moved, the ‘automobile exception’ is simply irrelevant. *Coolidge v. New Hampshire*, 403 U.S. at 461; *Carroll v. United States*, 267 U.S. at 156.” *Cady v. Dombrowski*, 413 U.S. at 451 (dissenting opinion).

house, and the vehicle was in his yard. Rule 203(A) therefore limits warrantless search authority to cases in which the defendant has just departed from or is about to enter the vehicle; that is, where intent to use the vehicle is apparent.

These two examples are quite different from those used to illustrate Rule 201. In the Rule 201 examples, no probable cause to search existed, and thus only a limited, *Chimel*-type search could be made. Here, the nature and recency of the offenses reasonably imply the existence of seizable items. A broader, probable cause search, tailored in time and scope to those implications, is therefore appropriate. The limits on this broader search are set forth below in Rule 203(B) through 203(E).

Support for the procedure of Rule 203(A) can be found in the following cases:

Orricer v. Erickson, 471 F.2d 1204 (8 Cir. 1973). (Held that a warrantless search of an automobile was justified when it was stopped during early morning hours within a short time after a burglary attempt, and the officer identified the driver by size and clothing as one of the men seen behind the burglarized store.)

State v. Lawson, 491 P.2d 457 (Ariz. 1971). (Held that *Chambers* and *Carroll* apply to search of vehicles on the open highway; *Coolidge* distinguished on its facts.) (See also *State v. Brierly*, 509 P.2d 203 (Ariz. 1973) which relied upon *Chambers* in approving a warrantless search of an impounded vehicle "several days" subsequent to an arrest.)

Mestas v. Superior Court, 102 Cal. Rptr. 729, 731 n.3, 498 P.2d 977 (1972). (*Dicta*—" [*Chimel* and *Chambers*] clearly hold that circumstances surrounding an arrest will justify a search of the car after the defendant has been removed from the scene . . . if those circumstances show probable cause to search for contraband or evidence.")

United States v. Free, 437 F.2d 631, 635 (D.C. Cir. 1970). (Emphasized two considerations which frequently permit warrantless searches of vehicles: the inefficient employment of scarce police resources if a car is secured while a warrant is sought; and the lessened expectation of privacy in a vehicle operated on a thoroughfare.)

Mace v. State, 458 S.W.2d 340 (Mo. 1970). (*Chambers* followed; involved circumstances similar to *Chambers*.)

State v. Reynolds, 290 N.E.2d 557 (Ohio 1972). (Applied *Chambers-Carroll* doctrine to warrantless search of vehicle for robbery evidence after driver was arrested on an outstanding traffic warrant.)

Commonwealth v. Smith, 304 A.2d 456 (Pa. 1973). (Upheld warrantless vehicle search conducted at a police facility two hours after the arrest of the driver, since there was probable cause to believe that seizable items were in the vehicle; *Chambers* held controlling.)

Rule 203 Extensive Searches Based on Probable Cause.

B. Scope of the Search. An officer searching under Rule 203(A) may search only those areas of the vehicle which could physically contain the seizable items sought.

Commentary (Rule 203(B))

When an arrest has been made, and the officer believes there may be seizable items in the vehicle, he may search wherever such items might be. The scope of the search is limited only by the nature of the items sought. Thus, the example used in the Rule would allow a broader search for a shirt than for a baseball bat. Similarly, narcotics could be hidden anywhere in a vehicle, and officers might be justified in conducting a detailed search for narcotics, even to the extent of going into upholstery or under carpeting. Such an extensive search, however, would be clearly improper if the item sought was a stolen television set.

These factors govern vehicle searches because they are inherent in the probable cause justifying the search. *Preston v. United States*, 376 U.S. 364, and *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, support this approach. The stop and frisk cases are similarly relevant. In *Terry v. Ohio*, 392 U.S. 1 (1968) and *Peters v. New York*, 392 U.S. 40 (1968), the Supreme Court held that an officer may stop and frisk a person, although probable cause does not exist for his arrest, if the officer is engaged in a lawful investigation and reasonably fears harm from weapons possibly possessed by that person. But the scope of the search is limited by its rationale. Thus, a frisk may consist only of a pat-down of the exterior

of clothing since this is sufficient to reveal a weapon. This same approach limits vehicle searches in Rule 203(B).

Rule 203 Extensive Searches Based on Probable Cause.

C. Manner of the Search. Whenever possible, an officer shall open a locked trunk or glove compartment by means of a key rather than by force. [If keys are not available, instructions shall be obtained from a superior as to the method to be used in opening the locked trunk or glove compartment.]

Commentary (Rule 203(C))

Officers should avoid inflicting physical damage whenever possible during any search. Locked vehicles or vehicle compartments should be entered with a key if one is available or readily obtainable. Making an effort to minimize damage is good public relations, and minimizes liability in the event of a mistake. See also Rule 101.

Rule 203 Extensive Searches Based on Probable Cause.

D. Time and Place of the Search. A search authorized by Rule 203(A) should occur at the scene of the arrest as soon as everyone arrested is in secure custody. It is not necessary to keep arrestees near the vehicle during the search.

When it is not practical to conduct a Rule 203(A) search at the scene of the arrest—for such reasons as a hostile crowd, bad weather, traffic conditions, lack of needed equipment, delay in order to obtain a search warrant, or unavailability of keys—the vehicle must be secured in police custody at all times until it is searched. The search should be conducted as soon as practicable.

Commentary (Rule 203(D))

Chambers v. Maroney, 399 U.S. 42, specifically approved an extensive, probable cause search of a car during which the arrestees were not physically present. As a result, Rule 203(D) permits a more flexible police procedure than does Rule 201's search-incidental-to-arrest provision.

However, Rule 203(D) requires conducting the search as soon as possible and, ordinarily, at the scene of the arrest. This is so because administrative and evidentiary considerations are better served by a prompt search. This minimizes claims that items have

been taken from the vehicle improperly, or that items have been tampered with or planted.

Rule 203(D) permits moving a vehicle prior to the search, but requires securing the vehicle at all times until the search is conducted in order to maintain continuous custody. A later search might be necessitated, for example, because of bad weather, *Maltos-Roque v. United States*, 381 F.2d 130 (5 Cir. 1967); hostile crowds, *United States v. Evans*, 385 F.2d 824 (7 Cir. 1967); or because of heavy traffic or unavailability of keys. In *Chambers v. Maroney*, a vehicle search was permitted at a time subsequent to the arrest although no particular reason was shown for the delay, but the delay was only a few hours.

Rule 203 Search of Vehicle Passengers.

E. If, following a search of a motor vehicle under Rule 203(A), the officer has not found the seizable item sought, he may search the occupants of the vehicle if: (i) the item he is seeking could be concealed on the person and (ii) he has reason to believe that a passenger has the item. This search may be made even though the officer does not have probable cause to arrest the passenger.

Commentary (Rule 203(E))

Rule 203(E) permits the officer to search passengers in a motor vehicle when he has probable cause to believe evidence of a crime is in the vehicle, and further believes that such evidence is in the possession of one or more of the passengers. He need not have probable cause to arrest the passenger.

There is scant judicial authority supporting this Rule. Indeed, *United States v. Di Re*, 332 U.S. 581, 589 (1948), is apparently to the contrary. Nevertheless, several lower courts have upheld such searches and inferentially distinguished *Di Re*. In *Meade v. Cox*, 438 F.2d 323 (4 Cir.) cert. denied, 404 U.S. 910 (1971), a vehicle was stopped following a police radio broadcast that the driver was carrying a pistol and trying to sell it. The driver and his wife acted suspiciously, but a search of him and the passenger compartment did not produce the pistol. The officer then looked inside the wife's purse and found a pistol. The Court of Appeals upheld this search. In *State v. Boykins*, 232 A.2d 141 (1967), a *dictum* of the New Jersey Supreme Court adverted to suspicious conduct of passengers following a vehicle stop:

Such behavior strongly suggests a probability that the occupants had on their persons or in the car contraband or instruments or the fruit of crime. It seems to us that in such circumstances the public interest requires that the men and the vehicle be searched even though at that stage the officers know of no specific offense, other than a traffic violation upon which an arrest could be made. 232 A.2d at 143.

See also *State v. Gray*, 285 A.2d 1 (N.J. 1971).

This section of Rule 203 is almost identical to the American Law Institute's Model Code of Pre-Arrest Procedures § 260.3 (Official Draft, 1972). The ALI also recognized that case law supporting their suggestion "... is lacking and clouded by the apparently contrary determination in *Di Re*." *Id.* at 76. Nevertheless, the ALI noted that under the *Carroll* rule concerning warrantless vehicle searches, it is

... both illogical and impractical to exempt from the search the occupants themselves. If they were not in the vehicle, and there was probable cause to believe that they were in unlawful possession of things, they would be liable to arrest on probable cause. Why should there be a different result if they are in a vehicle, assuming probable cause to believe that within the vehicle—whether in the trunk or in their pockets—seizable things are to be found? *Id.* at 209.

SECTION III. WARRANTLESS SEARCHES RELATED TO MOTOR VEHICLES NOT IN USE

Rule 301 Probable Cause Searches.

A. General Rule. Whenever an officer has probable cause to believe that a vehicle not in use at the time of the initial police contact contains seizable items, all those areas of the vehicle which could contain such items may be searched without a warrant.

B. Exception. A warrantless search shall not be conducted if it appears that there is no pressing need for a prompt search and it is practicable—considering the personnel, equipment and time involved—to safeguard the vehicle and its contents from removal or destruction while a search warrant is obtained.

Commentary

Rule 301 permits the warrantless search of a vehicle not in use when there are both probable cause to believe the vehicle contains seizable items and exigent circumstances. This is the basic, *black letter law* rule, as easy to state as it is difficult to apply. The difficulty has two facets: the Supreme Court has never precisely defined the term "search" as it applies to official intrusions into vehicles;²² and the Court has failed to be consistent in defining "exigent circumstances." Compare *Chambers v. Maroney*, 399 U.S. at 52 (exigency even though search site was under police control) with *Vale v. Louisiana*, 399 U.S. at 35 (no exigency even though search site was not under police control, and likelihood of contraband destruction was high). Compare *Coolidge v. New Hampshire*, 403 U.S. at 460-62 (no exigency even though search site was not under police control) (plurality opinion) with *Cady v. Dombrowski*, 413 U.S. at 447 (exigency even though search site was under police control).

"Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office." *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 222 (1968). In a majority of "in-use" vehicle searches, no search warrant is needed; the mobility of the vehicle very often establishes the exigent circumstances that justify quick action and excuse the failure to obtain a search warrant. This is the rationale of *Carroll v. United States*, 267 U.S. 132. The "fleeting target" approach was reiterated in *Chambers v. Maroney*, 399 U.S. at 52,²³ and is reflected in Rule 203 above.

But the *Carroll* decision also recognized that "in cases where the securing of a warrant is reasonably practicable, [a warrant] must be used." 267 U.S. at 156. When a vehicle is not in use, its mobility may be open to considerable doubt—and the opportunity to search it may not be fleeting at all. The result of ascribing mobility to a vehicle, and then searching it without a

22. See Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974).

23. The holding in *Chambers* has no direct application to Rule 301, since the Rule does not apply to vehicles in use at the time of initial police contact. See *Coolidge v. New Hampshire*, 403 U.S. at 463 (*Chambers* "held only that, where the police may stop and search an automobile under *Carroll*, they may also seize it and search it later at the police station") (plurality opinion.) Cf. Note, 87

warrant, may well be the suppression of the items seized if the reviewing court disagrees that mobility existed. The Rule takes the cautious path, and requires that unless there are exigent circumstances—i.e., reasoned concern that delay will result either in seizable items being lost or in substantial inconvenience to law enforcement officers—a search warrant should be obtained.²⁴

Factors for determining exigent circumstances are catalogued in *Coolidge v. New Hampshire*, 403 U.S. at 462 (plurality opinion). Those relevant to Rule 301 are an “alerted criminal bent on flight,” “confederates waiting to move the evidence,” and the “inconvenience of a special police detail to guard the [vehicle].”

Courts have taken a sympathetic view of police officers’ determinations that exigent circumstances justified a particular warrantless vehicle search. Some examples are:

State v. Phillips, 492 P.2d 423 (Ariz. App. 1972), in which police entry into a car and removal of a loaded pistol from under the seat was held proper. The car had been involved in an accident, and a bystander stated he had seen the operator of the car conceal the pistol. The Court analogized the situation to that in *Terry v. Ohio*, 392 U.S. 1.

People v. Dumas, 109 Cal. Rptr. 304, 512 P.2d 1208, where officers had a search warrant specifying Dumas’ apartment and other areas, but not specifying any vehicles. While searching the

HARV. L. REV. at 845; Miles and Welfing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105, 128 (1972).

24. This cautious approach may soon be regarded as overly timid. Very recently the Supreme Court has retreated from the general requirement that a warrant be obtained before conducting any search if the warrant could reasonably be procured. *United States v. Edwards*, ___ U.S. ___, 94 S.Ct. 1234 (1974). *Edwards* can be regarded as a search-incident-to-arrest case, holding merely that legitimate delay in conducting such a search does not act to invalidate the search. But it is much more likely to be seen as resurrecting the “overall reasonableness” test of *United States v. Rabinowitz*, 339 U.S. 56 (1951):

The Court says that the relevant question is ‘not whether it is reasonable to procure a search warrant, but whether the search itself was reasonable.’

United States v. Edwards, 94 S.Ct. at 1241 (dissenting opinion).

apartment officers discovered a set of car keys and an automobile registration certificate in Dumas' name. A car meeting the description in the registration was found on the street about 100 feet away and a search of it yielded stolen securities, a loaded revolver and narcotics. The Court, citing *Carroll* and *Chambers*, held the search proper since both exigent circumstances and probable cause were present. And in *People v. Deutschman*, 100 Cal. Rptr. 330 (App. 1972), officers suspected Deutschman of trying to sell stolen office equipment in a pawnshop. The officers found his car outside the shop; it contained additional office equipment in plain view. The Court stated: "A right to search an unoccupied automobile exists where there is reasonable cause to believe it contains stolen property."

United States v. Moore, 459 F.2d 1360 (D.C. Cir. 1972), upheld the warrantless search of a vehicle wrecked after being used to flee a robbery, even though the suspect had already been taken into custody some distance away.

In *People v. Brosnan*, 344 N.Y.S.2d 900, 298 N.E.2d 78 (1973), the suspect in a rape and attempted murder case upon request led officers to his truck parked in a public garage. Through the windows the officers saw evidence of the crimes and immediately arrested the defendant and placed a guard at the truck. The search took place about 30 minutes later, when an evidence technician arrived at the scene. No attempt was made to get a warrant. The Court of Appeals held that the seizure of the truck was simultaneous with Brosnan's arrest and upheld the search. Citing *Chambers*, the Court found no requirement that police do all their searching at one time promptly upon seizure incidental to arrest.

In *Smith v. State*, 504 S.W.2d 875 (Tex. 1974), the Court held police testimony based upon the search of a billfold admissible as the fruit of a valid search. Officers observed an unoccupied car in back of a business which had been burglarized on several occasions, and while investigating inspected the contents of the billfold observed in plain view on the seat.

In *State v. Brown*, 476 S.W.2d 519 (Mo. 1972), the Court upheld the search of an unoccupied vehicle when items in the vehicle fit the description of items stolen recently in a burglary. The Court speculated that since no suspects had been apprehended, it was possible the suspects might return to the vehicle and drive it away.

United States v. Castaldi, 453 F.2d 506 (7 Cir. 1971), cert. denied, 405 U.S. 992 (1972), relied heavily on *Chambers v. Maroney* in validating the search of a vehicle seized shortly after a bank

burglary while the suspects were still at large. The search, however, was not begun until 2-1/2 hours after the seizure, and following capture of the suspects. The Court adopted the *Chambers-Edwards* view of delayed searches:

Under the circumstances which faced the police at 3 a.m., a search of the Cadillac at that time would have been reasonable as an extension of the rule in *Carroll* . . . and accordingly under *Chambers, supra*, the delayed search at 5:25 a.m. was justified.
453 F.2d at 509-10.

In *United States v. Bozada*, 473 F.2d 389 (8 Cir.) cert. denied, 411 U.S. 969 (1973), the Court *en banc* cited exigent circumstances in upholding the warrantless search of an unoccupied trailer unit. The trailer was reasonably believed to contain stolen merchandise, it was hooked up and ready for transport, and reliable information indicated it was about to be moved.

In *United States v. Cohn*, 472 F.2d 290 (9 Cir. 1973), the Court found exigent circumstances justifying the warrantless search of an automobile which had recently been parked on a public street after being driven from the rear of a residence of a known marihuana-trafficker. In addition, a strong odor of marihuana drifted from an open window of the vehicle, and part of a kilogram brick was open to plain view inside. And in *United States v. Evans*, 481 F.2d 990 (9 Cir. 1973), the same Court held proper the warrantless entry into a car trunk, and the search of a footlocker in the trunk, when officers had reasonable concern that Evans or his confederate might move the vehicle or destroy the evidence contained in the trunk.

Two recent Texas cases illustrate the importance of exigent circumstances to warrantless vehicle searches. In *Stoddard v. State*, 475 S.W.2d 744 (Tex. 1972), the Court found no exigent circumstances when the suspect was in custody at the time his car was searched and the police were in possession of at least one set of keys to the car. There was nothing to indicate that the car was about to be moved or that a confederate might move it. Furthermore, the suspect was in the presence of the officers and had no opportunity to contact another person, and the car had been placed under guard.

Within months of the *Stoddard* opinion, the same Court

decided *Harris v. State*, 486 S.W.2d 88 (Tex. 1972). There officers with probable cause to believe Harris possessed contraband, arrested him in a bar. A search of Harris revealed nothing, and he was taken outside to his car. The officers then made a warrantless search of the car and discovered heroin. The Court found exigent circumstances to justify the search; *Stoddard* and *Coolidge v. New Hampshire* were distinguished as involving defendants incarcerated at the time the search began. Here, having searched Harris without success, the officers could not have retained him in custody while they proceeded to obtain a search warrant. The Court noted the officers could have seized the car and held it while a search warrant was obtained—but that this would have been at least as great an intrusion as the immediate search, and under *Chambers* either course was reasonable.

Rule 302 Other Warrantless Entries.

A. Vehicle Has Been the Target of a Crime. If an officer has probable cause to believe that a vehicle has been the subject of burglary, tampering, or theft, he may make a limited entry and investigation, without a search warrant, of those areas he reasonably believes to have been affected and of those areas he reasonably believes might contain evidence of ownership.

B. Vehicle Is Parked Unlawfully. If an unoccupied vehicle is parked in an illegal location, or is otherwise blocking traffic, an officer may search those areas he reasonably believes might contain evidence of ownership. If the vehicle is impounded an inventory search may be made under Rule 604 or Rule 605.

Commentary (Rule 302(A))

There is relatively little case law on this topic, perhaps because the officer is acting to assist the vehicle's owner, and not to gather evidence against anyone entitled to possess the vehicle.

In *People v. Drake*, 52 Cal. Rptr. 589 (App. 1966), officers suspected that a vehicle had been stolen because it was parked in an odd position on the street, with one door slightly ajar, and its registration showed the owner lived two miles from the scene. While trying to determine if the car had been "hot wired," the officers discovered marihuana under the ignition. The Court held that the examination was proper to determine if the vehicle had been stolen. Recently the California Supreme Court has adopted the rationale of *Drake*. *People v. Gale*, 108 Cal. Rptr. 852, 511 P.2d 1204 (1973). The Court will "permit officers to enter an unoccupied vehicle

whenever the circumstances surrounding the entry reasonably indicate the possibility of burglary or tampering.” 511 P.2d at 1210-11.

Entry and investigation under this Rule are limited to areas the officer reasonably believes have been affected by the criminal conduct. In appropriate cases, investigating for indications of ownership may also be reasonable on-the-scene investigation. In *State v. Taras*, 504 P.2d 548 (Ariz. App. 1972), as a patrol car approached a parked vehicle at night, the vehicle was driven into the desert without headlights. The driver then jumped out of the vehicle, and fled a short distance before he was captured. He failed to produce a vehicle registration, and, in searching for that document in the glove compartment, the police found marihuana. The Court held that if a driver is unable to produce proof of vehicle registration, an officer may conduct a limited search of the vehicle for evidence of ownership.

Commentary (Rule 302(B))

Once again, the absence of much case law on this topic might be explained by its non-adversary, public service nature.

In *People v. Grubb*, 47 Cal. Rptr. 772, 408 P.2d 100 (1966), officers came upon an unattended vehicle parked so as to impede travel on a two-lane highway. They entered the vehicle to search for its registration slip, and in so doing found a contraband billy-club. Seizure of the weapon was upheld by the California Supreme Court, which noted that:

A requirement that under circumstances such as these the officers must leave the car on the highway while they obtain a search warrant would abort their efforts to protect the safety of the highways.
408 P.2d at 104.

An in *People v. Kapple*, 33 Cal. App. 3d 371 (1973) (publication withdrawn), a parked mini-bus was blocking an alley. In the course of filling out an impoundment form, officers entered the vehicle to look for its registration; they then observed a plastic bag of marihuana in the glove compartment. The Court held that the officers had the right and the duty to look for registration records in order to notify the owner that the vehicle was not stolen but in fact impounded at a designated location. Thus the plain view seizure of the marihuana was proper.

SECTION IV. CONSENT SEARCHES OF MOTOR VEHICLES

Rule 401 Use of a Consent Search.

A. General Rule. Whenever an officer wishes to make a vehicle search not otherwise authorized by these Rules, he may do so if the person or persons in control of the vehicle voluntarily gives consent. The officer shall not coerce consent by threat or force, or by claiming that he could conduct the search without consent.

B. Consenting Party in Full Custody. If the consenting party is in full custody, the officer must obtain written consent, using the departmental consent form.

C. Consenting Party Not in Full Custody. If the consenting party is not in full custody, the officer may proceed after obtaining verbal consent if he is unable to obtain written consent.

Commentary

The Model Rules do not encourage consent searches of motor vehicles. The reasons are both legal and practical.

Consent searches are disfavored by many courts. Consent to a search is essentially a waiver of constitutional rights, *Stoner v. California*, 376 U.S. 483 (1964), and such waivers are not lightly inferred. *Rosenthal v. Henderson*, 389 F.2d 514 (6 Cir. 1968), Moore, Federal Rules of Criminal Procedure, 41-70. This is particularly true when a waiver relates to areas where the defendant knew evidence would be found. *Higgins v. United States*, 209 F.2d 819 (D.C. Cir. 1954). The issue of a voluntary waiver is always open to uncertainty and thus to litigation. The prosecution has the burden of proving that the consent was in fact freely and voluntarily given when it seeks to rely upon someone's consent to justify the lawfulness of a search. *Schneekloth v. Bustamante*, 412 U.S. 218 (1973). Of all forms of searches, the consent type therefore entails the highest legal risk of being held improper under the Fourth Amendment.

Another objection arises from consideration of police practice. Consent to search is sometimes seen as a way to shortcut lengthier but more proper search procedures. Often consent searches substitute for more thorough preparation and investigation. The use of consent searches in circumstances where other search methods could be used may reveal a lack of police professionalism.

Furthermore, the problems with consent searches are

compounded by the question of who may give binding consent. Compare *Frazier v. Cupp*, 394 U.S. 731 (1969) with *Stoner v. California*, 376 U.S. 483 (1964).

The question whether a consent to a search is truly voluntary is a question of fact to be determined by all the circumstances—including the characteristics of the accused and the details of the request for consent. Some of the factors to be taken into account include the age of the accused, his lack of education or low intelligence, and the lack of any advice to the accused of his constitutional rights. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as an indispensable requisite or condition of an effective consent. In other words, an officer need not warn a person of his right to refuse to consent to a search as a prerequisite to securing valid consent, at least in instances where the consenting party is not in full custody. *Schneckloth v. Bustamante*, 412 U.S. at 249; see also *United States v. DeMarco*, 488 F.2d 828 (2d Cir. 1973); *United States v. McCann*, 465 F.2d 147 (5 Cir. 1972); *Martinez v. State*, 484 S.W.2d 706 (Tex. 1972).

In *Schneckloth*, the Court distinguished the requirements of a custodial interrogation from those of a request for consent to search. The strictures upon knowing and intelligent waiver of the privilege against self-incrimination or of the right to counsel protect the fairness of the trial itself. But the Fourth Amendment protects different constitutional values and there is no likelihood of unreliability or coercion present in a search-and-seizure case to jeopardize the fair ascertainment of truth at a criminal trial. *Schneckloth v. Bustamante*, 412 U.S. at 241. Under *Schneckloth*, when the subject is not in custody, a *Miranda*-type warning is not essential prior to obtaining consent to search.

Schneckloth specifically did not decide if a person in custody must be informed of his right to withhold consent before his consent can be deemed valid. 412 U.S. at 240-41 n.29 and 247 n.36. Courts have long recognized the possibility of coercion when consent to a search is given by a person in custodial circumstances. See, e.g., *Channel v. United States*, 285 F.2d 217 (9 Cir. 1960) and *Judd v. United States*, 190 F.2d 649 (D.C. Cir. 1951). But since *Schneckloth*, there has been no clear indication whether the courts, in seeking to minimize such coercion, will require that persons be warned of their right to refuse consent. In *United States v. Heimforth*, 493 F.2d 970 (9 Cir.), *cert. denied*, _____ U.S. _____, 94 S.Ct. 1615 (1974), one panel of the Court held that failing to give such warning was merely one factor to be considered in determining

valid consent, and while failure to advise of the right to refuse consent was significant, it did not vitiate the consent at issue. Yet in *United States v. Watson*, _____ F.2d _____, No. 73-1539 (9 Cir., December 12, 1973), a different panel of the same Court had stated:

We hold that in an in-custody situation, the prosecution must show that a defendant either knew of, or was advised of his right to refuse to consent to a search.
(Slip Opinion at 6.)

The Model Rules regard written consent, recorded on a form containing particular language, as absolutely essential in custodial situations. Because jurisdictions may differ on the necessity of warning the person that he may withhold consent, language providing such warning is made optional on the Model Consent form.

The Model Rules regard written consent as highly desirable—but not essential—when the person from whom consent is sought is not in full-custody. Rule 401(C) therefore requires that an attempt be made to have the consenting party reduce his consent to writing.

The example to Rule 401 is one circumstance in which a request for consent would be proper. The officers seek consent from suspicious persons; they have no lawful alternative other than a request for consent.

Finally, two California Supreme Court cases illustrate the probable outer limits of acceptable language in requesting consent to search from persons not in full-custody. In *People v. Stout*, 57 Cal. Rptr. 152, 424 P.2d 704 (1967), after stopping a vehicle and receiving an evasive answer to a question about a suspicious blue bag, a police officer said, “Well, you wouldn’t mind then if I take a look in the bag?”, and started walking toward the bag’s general location. The Court found that this conduct was not tantamount to initiating a search:

[The officer had] merely voiced a request to look in the bag. . . . At that point he started walking toward the passenger’s side of the car. Conceivably his request could have been met with a refusal upon his reaching his destination. [Instead, it was met by flight.] At no time did he inform the defendants that he *was going* to search the bag, and we cannot say as a matter of law that what was outwardly only a request, even when conjoined with his conduct, amounted to an announced intention to search.”
424 P.2d at 709 (emphasis in original).

The holding in *Stout* was recently found applicable in *In re V.*, 111 Cal. Rptr. 681, 517 P.2d 1145 (1974). The Court held:

The question ‘Okay, boys, why don’t you empty your pockets on the car?’ is no more indicative of an intent to pursue an unlawful search and is no more inherently coercive in impact than the question [asked in *Stout*]. Indeed, the threat of a search appears to have been more imminent in *Stout* than in the present case, inasmuch as the officer in *Stout* coupled his communication with a movement in the direction of the object mentioned.
517 P.2d at 1148.

SECTION V. WARRANT SEARCHES OF MOTOR VEHICLES

Rule 501 Use of a Search Warrant.

Whenever an officer has probable cause to search a particular vehicle, and special circumstances are present, a search warrant must be obtained before beginning the search. Special circumstances are present when time is not of the essence, and there is no reason to fear that the vehicle or the seizable items will be removed or destroyed during the delay.

Commentary

The notion that officers may undertake the warrantless search of a vehicle whenever probable cause for such search exists was laid to rest in *Chambers v. Maroney*, 399 U.S. at 51. There the Court upheld a warrantless vehicle search, but reiterated the rule that “only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.” See also *Coolidge v. New Hampshire*, 403 U.S. at 463-64. A plurality of the Court, noting that “the word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away,” once again stated that absent exigent circumstances, warrantless vehicle searches violate the Fourth Amendment.

Rule 501 is a corollary of Rule 301; the discussion of exigent circumstances in the commentary to the latter will not be repeated here. “Special circumstances” are the converse of exigent circumstances. Because most vehicle searches do involve exigency, the authors felt that the term “special” should apply to the less-frequent situations, i.e., where time is not of the essence, where

no exigency exists. Thus Rule 501 requires obtaining a warrant when officers have ample time to plan and carry out a vehicle search without risking the loss of the items sought. The Rule follows the teaching of the Department of Justice Search and Seizure Manual:

As a general rule, if it is practical to obtain a warrant then one should be obtained While the great mobility of vehicles often makes it impossible to get a warrant, in some situations it may be required if there is time to get one.

Id. at 33.

A warrant obtained to search a vehicle should include some explicit description of the particular vehicle or of the place where the vehicle is to be found. See *People v. Dumas*, 109 Cal. Rptr. 304, 512 P.2d 1208, 1214 (1973).

The Rule is intended to apply to, among other vehicles, those in actual or constructive police custody. When time is not of the essence, a warrant should be obtained when there is probable cause to search a vehicle in police custody. This Rule is more restrictive than the view expressed in *Chambers v. Maroney*, 399 U.S. 42. The warrantless search of the impounded vehicle in *Cady v. Dombrowski*, 413 U.S. 433, is not in conflict with the Rule, however. The belief that the vehicle's trunk contained a deadly weapon, and that the trunk was vulnerable to vandals, made time of the essence.

SECTION VI. MOTOR VEHICLE SEIZURES

A motor vehicle is *seized* (impounded) when officers take custody of it and either remove it to a police facility or arrange for its removal to a private storage facility. An *inventory* is an administrative process by which items of property in a seized vehicle are listed and secured. An inventory is not to be used as a substitute for a search. Vehicles coming into custody of a police agency shall be classified for purposes of these Rules into six categories: seizures for forfeiture; seizures as evidence; prisoner's property; traffic seizures; abandonments; and other non-criminal seizures. The procedures for carrying out the seizure, the need for a warrant, the right to search or inventory a vehicle and the time and scope of any such inventory depend upon how the seized vehicle is classified.

Commentary

A seizure occurs when the police take a motor vehicle into custody. These Rules also use the term “impoundment” to describe some forms of seizures. Law enforcement officers are required or allowed to seize or impound motor vehicles for a wide variety of reasons. The Model Rules divide them into six categories— forfeiture, evidentiary purposes, protection of prisoner’s property, traffic seizures, abandonment, and other non-criminal seizures. See, e.g., California Vehicle Code § 22850. See also *State v. Singleton*, 511 P.2d 1396 (Wash. App. 1973), which lists several circumstances when “reasonable cause for impoundment” is present.

The police interests in such seizures vary widely. Seizures for forfeiture and as evidence often play an essential role in investigation and prosecution. Their purposes are to aid in criminal prosecutions and in the case of forfeitures to punish and deter.²⁵ Seizure of prisoner’s property, traffic impoundments and non-criminal impoundments may also provide evidence of criminal activity, but their only legal justification is to protect the citizen and his property and to insulate the police from liability in the event of loss. Seizures following abandonment may also occasionally produce evidence of crime, but their function is efficient management of property forfeited to the state. Regarding these “non-adversary” vehicle seizures, the Supreme Court has recently observed that:

Local police officers . . . frequently . . . engage in what, for want of a better term, may be described as community caretaking functions totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady v. Dombrowski, 431 U.S. at 441.

The procedures and safeguards required to seize a vehicle depend on the purpose of the seizure. So also does the police authority to enter it for purposes of an inventory. An inventory is an administrative process for listing and securing items of property. As

25. “Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws, fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.” *Calero-Toledo v. Pearson Yacht Leasing Company*, ___ U.S. ___, 94 S.Ct. 2080, 2093-94 (1974).

the Section VI introductory material notes, an inventory is not to be used as a substitute for a search. Inventories are exploratory in the most real sense: they focus on everything in general and nothing in particular. When an automobile comes into police custody, it may be searched under the preceding Model Rules dealing with vehicle searches, or pursuant to seizure as evidence under Rule 602. However, if a search is not permitted, an inventory may not be used to achieve the same result. An inventory is limited to its own purposes, which do not include a general search for criminal evidence. See Rule 607.

The propriety of inventories and the procedures for them are currently surrounded with uncertainty and will probably be the subject of considerable litigation in the near future. Their legitimacy seems most clear when a vehicle is seized for forfeiture purposes, as in *Cooper v. California*, 386 U.S. 58 (1967), or as evidence, *Harris v. United States*, 390 U.S. 234 (1968).²⁶ They seem most questionable when police custody is purely adventitious, as when a driver is being booked for vagrancy, *Preston v. United States*, 376 U.S. 364 (1964) or speeding, *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968). Even in traffic cases, however, an inventory would seem permissible if police custody becomes protracted. And at the very least, *Cady v. Dombrowski* permits inventories that seek to preserve the safety of the general public. In that case, police had seen to it that an injured suspect's damaged vehicle was towed to a garage. Later intrusion into the vehicle's trunk was upheld because the officer reasonably believed it to contain a gun and the trunk was vulnerable to intrusion by vandals.

Whether *Cady* can be read more broadly has already divided the courts. Compare *United States v. Lawson*, 487 F.2d 468, 471 (8 Cir. 1973) (*Cady* limited by its compelling facts) with *People v. Trusty*, 516 P.2d 423, 426 (Colo. 1973) (*Cady* said to permit all reasonable inventories).

Some courts have indicated that once a vehicle is in custody, a search of the interior is not a further trespass or invasion of privacy. *Westover v. United States*, 394 F.2d 164 (9 Cir. 1968). Others have said that any inventory is reasonable to protect police from liability or to protect the property of the accused. See generally *United States v. Boyd*, 436 F.2d 1203 (5 Cir. 1971); *State v. Undorf*, 499 P.2d 1105 (Kan. 1972); *People v. Robinson*, 320 N.Y.S.2d 665 (App. Div. 1971); *Godbee v. State*, 224 So.2d 441 (Fla. App. 1969);

26. *Harris* involved neither search nor inventory, but only entry to protect the vehicle from weather damage.

St. Claire v. State, 232 A.2d 565 (Md. App. 1967); *Heffley v. State*, 423 P.2d 666 (Nev. 1967). Essentially, these cases seem to hold there is little right to privacy in automobiles. Such reasoning is questionable in light of the decision of the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967). There, the Court held privacy can attach even to a public telephone booth, and bugging might come within the Fourth Amendment's prohibition on unreasonable search. The Court's emphasis on "legitimate expectations of privacy" embraces automobiles, as the *Preston* and *Dyke* cases establish.

A thorough discussion of vehicle inventorying is found in *Mozzetti v. Superior Court*, 94 Cal. Rptr. 412, 484 P.2d 84 (1971). There, officers inventoried the defendant's vehicle after an accident which resulted in her hospitalization. Inside a suitcase on the rear seat they found marihuana. The Court invalidated the search, saying that an inventory is a search under the Constitution. Protection of property could not justify a full-scale search of *Mozzetti's* vehicle, since even she herself could have protected it merely by locking the doors. At most the officers might have been justified in putting up the convertible top and locking the vehicle, or, as an alternative, removing her personal effects and locking them in the trunk. The limited liability of police as involuntary bailees did not justify exploring the interior of the vehicle or objects found within it.

The *Mozzetti* rule is now well-established in California. See *People v. Miller*, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972), which involved an arrest on a traffic warrant, following which officers took custody of property in the arrestee's vehicle in spite of his expressed statement that he preferred the property be left behind. Cf. *Mestas v. Superior Court*, 102 Cal Rptr. 729, 498 P.2d 977 (1972). It has, however, received mixed treatment in other jurisdictions. It was followed in *United States v. Lawson*, 487 F.2d 468 (8 Cir. 1973), *State v. Keller*, 510 P.2d 568 (Or. 1973), and *Embree v. State*, 488 P.2d 588 (Okl. App. 1971), but rejected in *In re One 1965 Econoline*, 511 P.2d 168 (Ariz. 1973) and *People v. Sullivan*, 323 N.Y.S.2d 945, 272 N.E.2d 464 (1971). See also *United States v. Gravitt*, 484 F.2d 375 (5 Cir. 1973), cert. denied, 94 S.Ct. 879 (1974) and *United States v. Mitchell*, 458 F.2d 960 (9 Cir. 1972). The District of Columbia appears to take an approach similar to *Mozzetti*, closely scrutinizing inventories but allowing them in limited circumstances. See *Mayfield v. United States*, 276 A.2d 123 (D.C. App. 1971) and *Pigford v. United States*, 273 A.2d 837 (D.C. App. 1971).

If inventories are to be treated as searches under the Fourth Amendment, they are valid only if reasonable.

Rule 601 Seizures for Forfeiture: Vehicle Used Illegally.

A. **When Permitted.** When an officer has probable cause to believe that a vehicle has been used [in the commission of any felony or] to transport narcotics or drugs illegally, he shall take the vehicle into custody and classify it as a seizure for forfeiture [if (a) a substantial amount of narcotics or drugs is involved; or (b) the owner of the vehicle is a significant drug or narcotics violator]. [In connection with illegal gambling, an officer shall take custody of a vehicle and classify it as a seizure for forfeiture only if the owner or operator has used it in a significant gambling enterprise.] No seizure for forfeiture shall be made without approval of a superior. If a vehicle used illegally cannot be seized for forfeiture under this Rule, it may not be inventoried unless it can be classified and inventoried under another Rule in Section VI.

B. **Exception for Federal Offenses.** When an officer has probable cause to believe that a vehicle has been used to violate a federal law which provides for forfeiture following violation, as in the case of illegally transporting weapons, narcotics, or contraband liquor, he shall seize the vehicle regardless of the amount of contraband involved or the prior record of the owner or occupant, and shall seek instructions from a superior concerning federal forfeiture procedures.

C. **Search Warrant Requirement.** An officer shall obtain a search warrant prior to making a seizure for forfeiture whenever the vehicle to be seized is on the suspect's private property and it is not likely that the vehicle will be removed or tampered with while a warrant is being obtained. This is the only situation in which a search warrant is necessary for a seizure for forfeiture.

D. **Inventory Procedure.** An officer who seizes a vehicle for forfeiture shall completely inventory the contents under Rule 607 immediately upon its arrival at a police facility. Upon completion of the inventory, the officer shall obtain instructions from a superior relating to appropriate further processing of the vehicle.

Commentary (Rule 601(A))

The Model Rule prescribes procedures in forfeiture cases when vehicles have been used in narcotics or gambling violations. Statutes in various jurisdictions provide for forfeiture proceedings in

such instances, as well as others, such as counterfeiting, *Drummond v. United States*, 350 F.2d 983 (8 Cir. 1965), and illegal transportation of alcoholic beverages. Indeed, this last ground was involved in the earliest and most significant motor vehicle search case, *Carroll v. United States*, 267 U.S. 131 (1925). A narcotics forfeiture statute and subsequent inventory were held valid in *Cooper v. California*, 386 U.S. 58 (1967)—although California has since repealed its forfeiture statute.

Statutes authorizing forfeiture of vehicles in narcotics offenses are typically very broad. The Model Rule proposes, as an alternative position, that police should seize vehicles only where a substantial amount of narcotics or drugs is involved, or where the owner of the vehicle is a significant drug violator. This approach would exclude, as the optional first example in Rule 601 indicates, a mere user of narcotics. But dealers and pushers would be subject to seizure for forfeiture proceedings. The effect of the Rule should be to lighten the administrative burden on the police while effectuating the statutory purpose of impeding the traffic in drugs. Since the Rule contemplates discretion in narcotics forfeitures, it provides that such discretion must be exercised with approval of a superior officer.

Rule 601 optionally takes the same approach with gambling as with narcotics offenses. For those jurisdictions with gambling forfeiture statutes, the Rule permits limiting police seizures to those cases involving the most serious offenders and requires that a decision on whether or not to seize the vehicle be made by an official of the gambling branch or bureau of the department. As with narcotics, such limitation and centralization provide for consistency in decision-making and lessen the administrative burden on the department, while still giving effect to the statutory purpose of deterring gambling.

Of course, even where a drug or gambling forfeiture is not contemplated, a vehicle may be seized for another reason. The vehicle might be prisoner's property, for example. But the scope of the inventory would then be narrower. A complete inventory of narcotics-related vehicles is allowed immediately under Rule 601 (D) whereas prisoner's property is subject only to a limited inventory under Rule 603 (C) after twenty-four hours have passed.

Commentary (Rule 601(B))

Various federal statutes authorize seizure of a vehicle used to transport illegal weapons, narcotics, illegal liquor and other

contraband. The Rule here departs from the approach used in Rule 601(A), and authorizes seizure of the vehicle without regard to the nature of the offense or offender. But the officer must then be advised by a superior officer on the policy of the appropriate federal agency, since that agency has responsibility for ultimate disposition of the vehicle.

Commentary (Rule 601(C))

It is clear from *Cooper v. California*, 386 U.S. 58, that a motor vehicle on the open highway may be seized pursuant to a state forfeiture statute without a warrant. The factors of vehicular mobility and accessibility establish exigent circumstances justifying a warrantless search and seizure. See *Carroll v. United States*, 267 U.S. 132 and *Chambers v. Maroney*, 399 U.S. 42 and the discussions of Rules 203 and 301, *supra*. However, it is also apparent from *Coolidge v. New Hampshire*, 403 U.S. 443, that every vehicle seizure does not automatically fall within the exigent circumstances category. Although the *Coolidge* fact situation was indeed unusual, both Rules 601(C) and 602(C) require a warrant to be obtained when the seizure requires entry upon private property, unless the vehicle is likely to be moved or tampered with in the meantime. The Rules also note that warrants are not needed in other seizure situations.

Commentary (Rule 601(D))

When a vehicle is seized for forfeiture purposes, the Model Rule requires an immediate and complete inventory upon arrival at a police facility. The nature of the inventory is discussed below (see Rule 607). The inventory is distinct from any search which might have already occurred. A limited search of the vehicle is permitted by Rule 201 whenever someone is arrested out of a vehicle. But officers could not confiscate non-criminal objects (e.g., phonograph records or clothing) unrelated to the purpose of that search. In contrast, the later inventory could encompass every object in the vehicle.

The Rule contains no specific authorization for a further search of the vehicle following seizure. Rule 203 provides such authorization in every conceivable case, because of the nature of the offenses involved in forfeiture statutes.

Rule 602 Seizures as Evidence.

A. When Permitted. When an officer has probable cause to believe that a vehicle has been stolen or used in a crime or is

otherwise connected with a crime, he may take the vehicle into custody and classify it as a seizure as evidence.

B. Exception for Minor Traffic Offenses. A vehicle involved in a minor traffic offense shall not be seized as evidence merely because it was used to commit the traffic offense.

C. Search Warrant Requirement. An officer shall obtain a search warrant prior to making a seizure as evidence whenever the vehicle to be seized is on the suspect's private property and it is not likely to be removed or tampered with while a warrant is being obtained. This is the only situation in which a search warrant is necessary for a seizure as evidence.

D. Inventory and Release Procedures. A vehicle seized as evidence shall be completely inventoried under Rule 607 as soon as practicable after its arrival at a police facility, unless such an inventory might damage or destroy evidence. Vehicles seized as evidence shall not be released to any person until the appropriate prosecutor or other official has signed a release form which indicates that the vehicle seized as evidence is found to be the property of a person having no criminal involvement in the offense. The vehicle shall then be returned to such person on an expedited basis.

Commentary (Rule 602(A))

Motor vehicles may often be seized as evidence of an offense. See *Harris v. United States*, 390 U.S. 234 (1968); Moore, Federal Rules of Criminal Procedure, 41-70. Rule 502 gives two examples, involving a homicide in a vehicle and a bank robbery where a vehicle was used to escape. In such instances the vehicle may be considered as evidence or an instrument of the crime, and the vehicle may be needed as part of the prosecution's case. It must therefore be seized. In contrast, there would be no need to seize a vehicle in which a suspect was riding at the time of arrest if the particular vehicle was unrelated to the offense.

A typical case upholding seizure and search of a vehicle as evidence is *Johnson v. State*, 209 A.2d 765 (Md. App. 1965). There, a rape had taken place in a car. A later inventory and thorough search were upheld, since the vehicle was properly in custody, and further evidence might be found in it. In *Coolidge v. New Hampshire*, 403 U.S. 443, a murder case involving a vehicle, the automobile was seized and minutely examined, even to the point of being vacuumed. The seizure was held void, due to lack of a warrant under the circumstances, but the implication was clear that a proper seizure

and search were possible. See also, *Harris v. United States*, 390 U.S. 234.

Certainly stolen vehicles would be within the ambit of this part of the Model Rules. Many jurisdictions have specific authority for seizures of such vehicles. Even where there is no such authority, officers would seem justified in seizing them. And a subsequent inventory, akin to *Cooper*, would be justified, *United States v. Kucinich*, 404 F.2d 262, 266 (6 Cir. 1968); *Schoepflin v. United States*, 391 F.2d 390 (9 Cir.), *cert. denied*, 393 U.S. 865 (1968); McCormick on Evidence (2d ed.), 385-86. The seizure would be proper even though the officer stopping the vehicle did so for another reason if evidence that the vehicle was stolen developed thereafter. *People v. Upton*, 65 Cal. Rptr. 103 (App. 1968).

Commentary (Rule 602(B))

There is no need to seize a vehicle involved in a minor traffic offense, even though the vehicle may have some limited evidentiary value. Rule 602(B) eliminates this type of seizure in order to lessen police administrative problems and also to limit the hardship imposed on citizens from loss of a motor vehicle.

Commentary (Rule 602(C))

This section is included in light of *Coolidge v. New Hampshire*, 403 U.S. 443, which involved a seizure of an automobile as evidence in circumstances similar to those covered in this Rule. See the Commentary to Rule 601(C), above.

Commentary (Rule 602(D))

As is required in forfeiture seizures, Rule 602(D) requires an officer seizing a vehicle as evidence to inventory it immediately and completely upon arrival at a police facility. Here, however, the inventory must be such as not to affect the value of the vehicle as evidence. The language of the Rule also notes the propriety of a full search of the seized vehicle for evidentiary purposes immediately after the inventory is completed. The scope of the inventory is discussed below in Rule 607.

No vehicle may be released unless the appropriate prosecutor gives a written release. Since the reason for retention is evidentiary in nature, the decision is therefore properly one for the prosecutor.

The requirement that release be expedited when the vehicle belongs to an innocent party is included to minimize the inconvenience to such party.

Rule 603 Prisoner's Property.

A. **Definition.** When a person is arrested in or around a vehicle which he owns or has been authorized to use, and the vehicle is not otherwise subject to seizure, it shall be classified as prisoner's property.

B. **Disposition of Prisoner's Property.** A prisoner shall be advised that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner. In any case where a prisoner requests that his vehicle be lawfully parked on a public street, he shall be required to make his request in writing.

If the vehicle is found to be the property of a person having no criminal involvement in the offense, such person shall be notified of the location of the vehicle as soon as practicable.

C. **Initial Procedure with Respect to Prisoner's Property.** If a vehicle classified as prisoner's property is not taken into police custody, it shall not be inventoried. If it is necessary to take a prisoner's property vehicle into police custody, the vehicle should be taken to a police facility or a location in front of or near a police facility. Immediately upon arrival at a police facility, if the vehicle is not locked, the arresting officer shall remove from the passenger compartment all containers—such as boxes or suitcases—and any other personal property which can readily be seen from outside the vehicle and which reasonably has a value in excess of \$25. After removing any such property, the officer shall, if possible, roll up the windows and lock the doors and trunk. Any property so removed shall be brought into the police facility and appropriate entries and returns made. Containers shall not be opened [at this time]; however, they may be sealed to insure the security of their contents. No other inventory or search of the vehicle shall be made at this time.

[D. **Procedure After 24 Hours.** If, within 24 hours of the time that the prisoner was arrested, a person authorized by the prisoner (or the prisoner himself, if released) does not claim a vehicle which was classified as prisoner's property and taken to a police facility, a complete inventory of its contents shall be made under Rule 607.]

Commentary (Rule 603(A))

A vehicle may be taken into custody if it is the property of a person taken into full-custody arrest, and the arrest removes that person from close proximity to his car. Unlike the seizures authorized by Rules 601 and 602, a seizure under this Rule is proper only when no other disposition of the vehicle is reasonable.

Commentary (Rule 603(B))

Rule 603 restricts prisoner's property seizures to vehicles closely related with the arrested person at the time of the arrest. Officers are sometimes overly concerned about impounding vehicles as prisoner's property when the vehicle is minimally involved. In *State v. Bertram*, 504 P.2d 520 (Ariz. App. 1972), the Court held that a seizure as prisoner's property—and an inventory—were improper, because the defendant's automobile was located on private property and not on a public right-of-way, and the arrest had not occurred in the proximity of the car. The Court held that in these circumstances the officers were not justified in conducting an inventory of the vehicle "absent a request by the defendant to secure his personal property." Cf. *United States v. Lawson*, 487 F.2d at 471. (Arrests occurred at some distance from the vehicle, and there was no indication that the arrested persons could not have made arrangements for the vehicle's safekeeping during their time in custody.) But see *United States v. Gravitt*, 484 F.2d 375 (5 Cir. 1973), where the Court assumes the validity of a prisoner's property seizure, even though the arrests were far removed from the vehicle.

The Rule adopts the view that the police may not search a prisoner's vehicle simply because it is available to them. Absent some other justification for a search or another reason for an inventory, mere possession of a prisoner's property does not authorize invasion of his legitimate expectations of privacy. Particularly is this true where the accused is booked for traffic violations and his vehicle is left on the street. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216. And it may be true even where the vehicle is in custody following a vagrancy arrest, *Preston v. United States*, 376 U.S. 364, or towed from the scene of an accident, *Mozzetti v. Superior Court*, 94 Cal. Rptr. 412, 484 P.2d 84 (1971). In *United States v. Pannell*, 256 A.2d 925 (D.C. App. 1969), a person was arrested for driving without a permit. His vehicle was parked in a police lot, where he said a friend would pick it up. An inventory of the car was held invalid. See also *People v. Miller*, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972). There,

police arrested Miller on an outstanding traffic warrant after finding him asleep in his vehicle, which was located on an abandoned private parking lot. In response to a police request, Miller refused to permit the arresting officers to impound certain items in the vehicle for safekeeping. The Court held the Fourth Amendment was violated when the officers failed to honor Miller's desire that they leave the items undisturbed.

While some cases can be read as eliminating entirely the authority of the police to inventory prisoner's property, the Model Rule takes an intermediate position. It provides the prisoner with a realistic opportunity to make a disposition of his property other than having it retained in police custody. After the passage of 24 hours, when it is likely that the police have a long-term storage problem on their hands, they are authorized to make a complete inventory for security and administrative purposes.

A written record is required in cases where the prisoner asks that his car be parked on a public street, in order to avoid later claims of police negligence if it is damaged or stolen.

Commentary (Rule 603(C))

If a prisoner's vehicle cannot be otherwise disposed of, the police may take it into custody. The vehicle shall be placed in or near a police facility. There, an officer shall immediately remove from the passenger compartment any personal property which is readily seen and which has an apparent value in excess of twenty-five dollars. There is no particular reason for settling on twenty-five dollars as the dividing line—twenty or thirty dollars would serve as well—but it was felt necessary to draw some distinction based on value as the basis for taking custody of the property. In addition, where unusual requirements of public safety are present, the inventory can be extensive enough to reveal threatening items. See *Cady v. Dombrowski*, 413 U.S. at 445. ("Concern for the safety of the general public who might be endangered" justified a special inventory of the trunk of a vehicle seized as prisoner's property.)

As with any inventory, the scope of the intrusion under Rule 603 is limited. Except in the public safety situation, a search of the trunk or glove compartment would be improper, as would a search under the seats. Items which might be incriminating but which are not evidence in plain view, such as personal papers or clothing, may not be seized unless their value exceeds the specified amount. Boxes and suitcases shall be removed from the vehicle for safekeeping but not searched.

The Rule limits the police intrusion to what is necessary to protect the prisoner's property. It cannot be used as an opportunity to conduct an otherwise forbidden search. A citizen's legitimate expectation of privacy in his vehicle is not dispelled when he is arrested for an offense that by its nature does not warrant a more extensive search.

It would be possible to limit further the scope of the security check by requiring the officers simply to lock the vehicle, leaving the contents alone, or moving contents only from the passenger compartment to the trunk, which would then be locked. But the former procedure would leave the arrested person's goods exposed, and might run counter to permissible seizures under the plain view rule. And the latter, suggested by the court in *Mozzetti v. Superior Court*, would require intruding into a person's privacy by viewing the contents of his trunk, the place a person would most frequently use to protect his privacy most securely. The procedure adopted by the Rule is thus a preferable accommodation of the competing considerations. Support for this approach can be found in *United States v. Mitchell*, 458 F.2d 960 (9 Cir. 1972), and cases cited therein at 962; and *United States v. Fuller*, 433 F.2d 533 (D.C. Cir. 1970).

Commentary (Optional Rule 603(D))

This Optional Model Rule directs a full inventory of a prisoner's vehicle after twenty-four hours have passed and the vehicle remains in police custody. The scope of the inventory is discussed below (Rule 607). An inventory becomes necessary to protect not only the citizen but also the department, in the event of real or imagined loss of property. An alternative which remains to the prisoner would be to leave the automobile in custody, but to direct another person to remove his property. With proper authorization, the Model Rule would allow such a procedure.

Rule 604 Traffic or Parking Seizures [, Removals] and Immobilizations.

A. Definition. Vehicles that, pursuant to traffic or parking regulations, are taken into police custody and taken to a police facility or private storage facility or to a location in front of or near a police facility shall be classified as traffic seizures. No other vehicle shall be classified as a traffic seizure even though it is moved under police authority or immobilized by use of a "boot" or other device.

B. Alternatives. In exceptional circumstances an offending vehicle may be seized. [In all other situations when an officer causes a vehicle to be moved pursuant to traffic regulations, the vehicle may be moved to a location on a public street as close to the original location as possible, consistent with prevailing traffic conditions.] In appropriate circumstances, a vehicle may be immobilized by use of a “boot” or other device.

C. Procedure When Vehicle is Immobilized [or Removed]. Vehicles immobilized [or moved but not impounded] shall not be inventoried or searched in any way. However, the officer who caused the vehicle to be immobilized [or moved] shall, if possible, roll up the windows and lock the doors before he leaves the vehicle. [In all cases where a vehicle is moved without the knowledge of its owner, he shall be notified within a reasonable time.]

D. Procedure When Seizing Unlocked Vehicle. If an unlocked vehicle is seized under this Rule, the officer responsible shall remove from the passenger compartment all containers—such as boxes or suitcases—and any other personal property which can readily be seen from outside the vehicle and which reasonably has a value in excess of \$25. After removing any such items, the officer shall, if possible, roll up the windows and lock the doors.

Removed items shall be taken to a police facility, and a written record made of the property. Closed containers should not be opened at this time, but they may be sealed to protect their contents. No other inventory or search of the vehicle should be made [at this time].

[E. Procedure After 24 Hours. If a vehicle which has been seized under this Rule is not claimed by the registered owner or a person authorized by him within 24 hours of the time that it was seized, a complete inventory of its contents shall be made under Rule 607.]

Commentary

A number of jurisdictions authorize the police to impound vehicles for traffic offenses. Such impoundment may take place at a police facility; if so, Rule 604(E) authorizes an inventory after 24 hours. But when the impoundment is at a private facility, no immediate inventory is permitted. Similarly, a vehicle which is only immobilized or moved—but not impounded—for traffic purposes

may not be inventoried. When the police assume no responsibility, they cannot justify an inventory on the grounds of protecting the citizen's interests.

The Model Rules authorize an officer to move a vehicle which is impeding the flow of traffic,²⁷ but not to search or inventory it. An impoundment for traffic purposes, and a subsequent inventory, is permitted only in exceptional circumstances. Examples 1 and 2 demonstrate two instances of such exceptional circumstances.

When a vehicle is immobilized or moved, but not taken to a police facility, the department assumes no responsibility for its safekeeping. Thus, the officer is instructed only to take the steps which ordinary prudence dictates; to roll up the windows and lock the doors and, as a matter of courtesy, to notify the owner.

When a seized vehicle arrives at the police facility, the Model Rules require the officer to remove personal property which can be easily seen from outside and which could reasonably be valued in excess of twenty-five dollars. No other search or seizure is allowed. Following this, the windows are to be rolled up and the vehicle locked, if possible.

As with prisoner's property, after twenty-four hours an inventory is required to protect the police and the owner.

Rule 605 Seizure of Abandoned Vehicles.

When an officer takes a vehicle into custody because it is presumed abandoned under local law, he shall classify it as an abandonment, and make a complete inventory of its contents under Rule 607.

Commentary

Many court decisions authorize police seizure of abandoned property. Items left in an unprotected area, such as an open field, may be taken into custody, *Hester v. United States*, 265 U.S. 57 (1924), since there can be no legitimate expectation of privacy. Thus, for example, abandoned trash may be examined at will without running afoul of the Fourth Amendment. But compare *United States v. Minker*, 312 F.2d 632 (3d Cir. 1963) and *People v. Edwards*, 80 Cal. Rptr. 633, 458 P.2d 713 (1969) and *People v.*

27. When traffic flow is impeded as the result of an accident, impounding is often necessary because of the condition of a vehicle. See *Cady v. Dombrowski*, 413 U.S. at 444; *State v. Raymond*, 516 P.2d 58, 60 (Ariz. App. 1973).

Krivda, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), 105 Cal. Rptr. 521, 504 P.2d 457 (on remand), *cert. denied*, 412 U.S. 919 (1973). Similarly, abandoned vehicles may be taken into custody and fully searched without warrant or probable cause. See *United States v. Edwards*, 441 F.2d 749 (5 Cir. 1971); *United States v. Angel*, 201 F.2d 531 (7 Cir. 1953); *State v. Childs*, 519 P.2d 854 (Ariz. 1974); and *Croker v. State*, 150 S.E.2d 294 (Ga. App. 1966). Seizure of abandoned property is, of course, permissible only if the abandonment is not the product of police illegality, *Wong Sun v. United States*, 371 U.S. 471 (1963), and is done in an unprotected area, *Rios v. United States*, 364 U.S. 253 (1960), as where evidence is thrown from a vehicle as an officer approaches. *Stack v. United States*, 368 F.2d 788 (1 Cir. 1966).

Whether or not a vehicle has been abandoned is often a difficult factual issue. For instance, in *Croker v. State*, *supra*, an automobile parked at midnight which could not be identified by neighboring residents was held abandoned where its license plates indicated the owner lived seventy miles away. But in *People v. James*, 259 N.Y.S.2d 241 (Sup. Ct. 1965), the Court held that merely leaving a vehicle at a place for two days does not establish abandonment.

Most jurisdictions, by state law or municipal ordinance, establish a procedure for determining when a motor vehicle shall be deemed abandoned. Many entail some sort of formal notice, such as a sticker affixed to the back window followed by a grace period of 24 to 72 hours. At the end of that time, the vehicle is deemed abandoned.

Rule 605 merely uses the term abandoned; its precise meaning should be fixed by reference to local law. Once abandonment has occurred, a full inventory follows. The vehicle is now the property of the state, to be dealt with as the state pleases.

Rule 606 Other Non-Criminal Seizures.

A. Definition. Whenever an officer takes a vehicle into custody because there is reason to believe that it is part of the estate of a deceased person, or the property of a person temporarily incapable of caring for it, or because it is property turned over to the police at the scene of a fire or disaster, he shall classify it as a non-criminal seizure.

Commentary

Rule 606 incorporates all other situations in which police

come into custody of a motor vehicle. None of them is connected with criminal conduct. The Rule recites some of the more usual situations: death, insanity, or hospitalization of the driver, or loss of property in circumstances tending to show that an abandonment has not occurred. It is in these cases that the most substantial objections to police inventories arise because citizens object to the police rummaging through their personal belongings merely because they have been taken to a hospital. See *Mozzetti v. Superior Court*, 94 Cal. Rptr. 412, 484 P.2d 84 (1971). In addition, it is in these situations that the police have the least investigative interest in making a full inventory. Considerable administrative inconvenience is created and little evidence of crime is uncovered.

Rule 606 Other Non-Criminal Seizures.

B. Procedure for Non-Criminal Seizure. If an unlocked vehicle is seized under this Rule, the officer responsible shall remove from the passenger compartment all containers—such as boxes or suitcases—which can readily be seen from outside the vehicle and which reasonably have a value in excess of \$25. After removing any such property, the officer shall, if possible, roll up the windows and lock the doors.

Removed property shall be taken to a police facility, and a written record made of the property. Closed containers should not be opened at this time, but they may be sealed to protect their contents. No other inventory or search of the vehicle should be made [at this time].

[C. Procedure After 7 Days. If a vehicle which has been seized under this Rule is not claimed by the registered owner or a person authorized by him within 7 days from the time it was impounded, a complete inventory of its contents shall be made under Rule 607.]

Commentary (Rule 606(B) and Optional Rule 606(C))

As with Rules 603 and 604, this Rule permits only minimal security arrangements until a grace period passes. Optional Rule 606(C) establishes a seven-day, rather than a 24-hour, period before an inventory is to be made. Because of the circumstances in which these impoundments occur, it is not reasonable to assume that the owner, relatives or friends will contact the department within a day in most cases in which they intend to pick up the vehicle. A seven-day period provides a more accurate indication of the potential need for long-term police custody of the vehicle. Of course, the

department may honor an authorized request to conduct a full inventory prior to the expiration of the seven-day period, if, for instance, an executor wishes to know the contents of the vehicle, or a hospitalized person requests that such security measures be taken.

Rule 607 Procedure for Any Inventory.

Whenever an officer is authorized to inventory a vehicle under these Rules, he may examine the passenger compartment, the glove compartment, and the trunk, whether or not locked. Any containers—such as boxes or suitcases—found within the vehicle may be opened. Immediately upon completion of the inventory, the officer shall, if possible, roll up the windows and lock the doors and the trunk.

Commentary

This Rule governs a full inventory under Model Rules 601(D), 602(D), 603(D), 604(D), 605 and 606(C). It does not apply to limited security measures taken under Rules 603(C), 604(D), and 606(B).

Rule 607 provides that the inventory shall embrace the full area of the vehicle. This includes the passenger compartment, the trunk and the glove compartment, whether locked or unlocked. It also includes containers, such as suitcases, and their contents.

There is some authority that a police inventory must be conducted by an officer or by someone who has been deputized for this purpose. See *Gonzales v. State*, 507 P.2d 1277 (Okl. App. 1973).

SECTION VII. WHEN FOREGOING MODEL RULES MAY BE DISREGARDED

Whenever it appears that any of the foregoing Rules should be modified or disregarded because of special circumstances, specific authorization to do so should be obtained from the department's legal advisor or (insert name of other appropriate police or prosecution official).

Commentary

Section VII recognizes that there will be unanticipated situations where the application of the foregoing Rules will interfere

with or impede reasonable law enforcement action. For these unusual circumstances it provides for flexibility whereby certain designated high officials have the authority to suspend application of the Rules.

CONSENT TO SEARCH OF VEHICLE

_____ Date

_____ Location of Search

_____ Vehicle I.D.

_____ Case Number

I freely and voluntarily give my consent to officers of the (insert name of agency) to conduct a search of (insert description of vehicle to be searched) for evidence of (insert common name of crime being investigated).

I understand that the officers have no search warrant authorizing this search [and that I have a constitutional right to refuse permission for them to conduct the search].

(signed)

Witnesses: _____

