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Search and Seizure - Automobile Inventory Search Exception to the Fourth Amendment Expanded by State v. Williams

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INTRODUCTION

The fourth amendment to the United States Constitution guarantees to the people the right to be secure from unreasonable searches and seizures. The constitutionality of inventory searches of vehicles impounded by the police has become an increasingly complex and recurring issue. The theory underlying an inventory search is that a policeman, when he takes a motorist into custody, should make an inventory of the contents of the automobile. In theory, the inventory is not a search for evidence, but rather, is an effort to protect the personal property of the motorist against loss, protect the police against false claims of theft, and protect the police against potential danger. Before 1976, the United States Supreme Court had not ruled upon the specific issue of warrantless searches of vehicles. Resolution of the constitutional issues implicit in inventory searches requires inquiry into the purported administrative justification for the intrusion and a careful balancing of such justification against the individual’s right to privacy. This Note will consider the case history surrounding the inventory search of automobiles. The author will then analyze State v. Williams, a recent New Mexico Supreme Court decision upholding an inventory search, and will comment on what this decision may mean for the future.

STATEMENT OF THE CASE

On May 6, 1979, Richard Edward Williams displayed a gun at the checkout counter of a grocery store. He then instructed the cashier at

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1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

2. For purposes of this Note, “impounded” means a car which has been taken into custody for the purpose of storage or safekeeping until the owner is located or released. See State v. Vigil, 86 N.M. 388, 390, 524 P.2d 1004, 1006 (1974).


4. Id.

5. Id. at 376 (Powell, J., concurring).


7. 97 N.M. at 636, 642 P.2d at 1095.
the checkout counter to remove the cash from the register and put it into a grocery sack. Williams carried this sack to other cash registers in the store and directed the cashier to empty each register’s cash into it. While Williams was at one of the registers, a customer, wielding a gun, told Williams to put his gun on the counter. Williams complied. One of the cashiers called the police, who arrived and arrested Williams. One of the officers took Williams to the police station for booking. During booking, an officer found a set of keys in Williams’ pocket and, without obtaining a warrant, returned to the crime scene to look for Williams’ car.

The officer found a car on the street behind the grocery store. The car was locked and legally parked. The officer conducted an inventory search of the automobile’s contents. During the search, the officer seized an Albuquerque city map showing the location of three separate grocery stores in the area and indicating an “escape route.” The officer also found a checkbook which showed a negative balance.

Prior to trial, the defense moved to suppress these items as the fruits of an illegal search. The trial court denied the motion and admitted the items into evidence at trial. The jury found Williams guilty of armed robbery with a firearm enhancement.

Williams appealed his conviction claiming that the trial court committed reversible error in refusing to suppress the fruits of a warrantless illegal search. The New Mexico Court of Appeals found no probable cause to search the defendant’s car where it was found after the defendant was

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8. Id.
9. Id.
10. Id.
11. Defendant-Appellant’s Brief in Chief at 2, State v. Williams (available at the New Mexico Attorney General’s Office, Criminal Appeals Division, Santa Fe, New Mexico).
12. 97 N.M. at 636, 642 P.2d at 1095.
13. Id.
14. Id.
15. Id.
16. Id.
17. Defendant-Appellant’s Brief in Chief at 3.
18. 97 N.M. at 636, 642 P.2d at 1095.
20. 97 N.M. at 636, 642 P.2d at 1095.

Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence. Whoever commits robbery is guilty of a third degree felony.

Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.

22. 97 N.M. at 635, 642 P.2d at 1094.
23. Defendant-Appellant’s Brief in Chief at 5.
"well removed from the car and under arrest." Nor did the court find exigent circumstances, because the vehicle "could not be moved out of the locality in which a warrant must be sought." Because the facts did not "give rise to any reason for an inventory search," the court reversed the conviction and remanded the cause for a new trial.

The New Mexico Supreme Court reversed the court of appeals decision. The issue before the court was whether the search was a proper inventory search. The appellant argued that the trial court committed reversible error in refusing to suppress the fruits of a warrantless, illegal search. The state argued that the items were properly received because the search was a valid exception to the warrant requirement of the fourth amendment and that any error, if found, was harmless. The court held that the search was reasonable and permissible in light of the requirements for a valid inventory search set forth in State v. Ruffino. In a vigorous dissent, Justice Sosa concluded that although the defendant was probably guilty of the robbery, his fourth amendment rights had been violated.

DISCUSSION AND ANALYSIS

A. The Legal Background

The United States Supreme Court, in interpreting the fourth amendment to the United States Constitution, has held that an investigator must obtain a warrant issued by a "neutral and detached" magistrate or judge before intruding into a constitutionally protected area in search of evidence. The Court decided in Katz v. United States that "searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the fourth amendment—subject only to a

25. Id. at 2.
26. Id. at 3.
27. Id.
28. Id.
29. 97 N.M. at 638, 642 P.2d at 1097.
30. Id. at 636, 642 P.2d at 1095. The defendant also assigned error to the trial court's refusal to instruct the jury on the lesser included offense of attempted armed robbery. The defendant based this claim on the fact that he never actually possessed the money nor left the store with it. The implication was that the defendant never "carried away" the money, which is an essential element of armed robbery. The court held there was no error in refusing the instruction because the asportation element was satisfied when the cashier, under the defendant's coercion, removed the money from the register. Id. at 638, 642 P.2d at 1097. The defendant also assigned error to the trial court's refusal to instruct the jury on the definition of mental disease and as to the consequences of a verdict of not guilty by reason of insanity. Again, the court held there was no error because the instruction that the trial court gave adequately instructed the jury on insanity. Id.
31. Defendant-Appellant's Brief in Chief at 5.
32. Plaintiff-Appellee's Answer Brief at 1.
33. 94 N.M. 500, 612 P.2d 1311 (1980).
34. 97 N.M. at 638, 642 P.2d at 1097 (Sosa, J. dissenting).
few specifically established and well-delineated exceptions." 37 One of these recognized exceptions is the "automobile exception." 38

The automobile exception originated in 1925 in Carroll v. United States. 39 In Carroll, the lower court convicted the defendants for transporting liquor after federal agents and a state officer had conducted a search of the car. The defendant moved for suppression of the evidence found in the car on the basis that the search was illegal. 40 The United States Supreme Court concluded that a vehicle may be searched without a warrant on the basis of probable cause to believe that the vehicle contains contraband or illegally possessed goods. 41 This authority to search the vehicle exists independently of any arrest. The Court reasoned that an automobile's mobility presents an exigent circumstance that justifies an exception to the warrant requirement when probable cause to search exists. 42

Based originally upon practicability, the Supreme Court has expanded the Carroll exception. In the 1970 case of Chambers v. Maroney, 43 the Court permitted a warrantless search of a car when the search was conducted after the car had been removed from the scene of the arrest. Despite the fact that the automobile was under police control and in no danger of being moved as in Carroll, the Court upheld the search. The Court in Chambers indicated that the lapse of time between the arrest and the later search was immaterial. 44 The Court noted that "for purposes of the Fourth Amendment, there is a constitutional difference between houses and cars." 45 This difference has been attributed to the lessened expectation of privacy associated with an automobile. "Automobiles, unlike houses, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." 46

37. Id. at 357.
38. Exceptions to the warrant requirement also include: (1) search incident to valid arrest, Chimel v. California, 395 U.S. 752 (1969) (authorizing a warrantless search incident to lawful arrest of the person of the arrestee and the area within which the arrestee might reach weapons and/or destructible evidence); (2) hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967) (warrantless entry and search permissible when pursuing a felon); (3) plain view doctrine, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (warrantless seizure of evidence permitted where a) there has been a prior valid intrusion into a constitutionally protected area, b) there is then an inadvertent spotting of the evidence in plain view, and c) there is probable cause to believe that the thing spotted is evidence of a crime); (4) emergency, Michigan v. Tyler, 436 U.S. 499 (1978) (warrantless search incident to urgent need to preserve life or avoid injury justified); (5) stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968) (authorizing stop and frisk on grounds less substantial than probable cause but limited in intensity and scope to that necessary to detect weapons); (6) consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (warrantless search authorized when the owner of the object or place to be searched consents).
40. Id. at 134.
41. Id. at 153-59.
42. Id. at 153.
44. Id. at 52.
45. Id.
In *Cady v. Dombrowski*, the United States Supreme Court extended the "automobile exception" to searches that may be described as "caretaker searches." In *Cady*, the police searched a vehicle subsequent to an accident, and based their search upon the reasonable belief that the driver, an off-duty policeman, had been carrying a gun in the car. The police searched the trunk of the car and discovered evidence related to a homicide. The Supreme Court upheld the investigating officer's conduct for two main reasons. First, local police are frequently involved in "community caretaking functions" with respect to automobiles. In *Cady*, because the defendant was comatose and his vehicle constituted a nuisance on the highway, the police had a duty and a right to remove his car to a different location. Second, after removing the car, the police had a duty not only to themselves, but to the rest of the community, to remove the revolver. The Court looked at the totality of the circumstances in *Cady* and found that the search was reasonable. The reasonableness of the search was buttressed by the fact that the police had good reason to believe that the car contained a revolver.

In *South Dakota v. Opperman*, the Court finally considered the right of the police to inventory a vehicle lawfully in their custody. In that case, the police twice ticketed the defendant's illegally parked automobile and then towed it to the city impound lot pursuant to a local ordinance. The police inventoried the contents of the car and the discovery of marijuana in the unlocked glove compartment resulted in the defendant's conviction for possession of marijuana. The Supreme Court, affirming the conviction, upheld the seizure of the car and its contents on the grounds that the police had unquestioned authority to remove the vehicle from the street and that the inventory was a routine, reasonable, and necessary aspect of the police caretaking function, conducted strictly in accordance with police department regulations. The Court made it clear that, just as with any other type of search, the scope of an inventory search must be reasonable.

**B. Inventory Searches**

The inventory of an automobile presents a unique problem in the area of warrantless searches. When an arrest is made of a subject who is in...
control of an automobile, the arrestee’s vehicle is usually impounded. Police agencies issue specific directions to their officers to search these vehicles as part of the impounding process. Police frequently find incriminating evidence during these inventory searches, and use the evidence against the arrestee at his trial on the charge for which he was originally arrested or in a separate prosecution resulting from the seizure of contraband or new evidence. Courts have balanced three major justifications for the inventory procedure against the diminished expectation of privacy associated with an automobile. These justifications are the protection of police against false claims of theft, the duty of the police to protect valuables left in the automobile during the owner’s absence, and the protection of the police against potential danger. These criteria have become the standard for reasonableness in inventory searches.

1. Claims of Theft.

The police may be liable for claims of theft if items left in their possession disappear. Such claims may be bona fide or spurious. Some courts have upheld inventories as constitutionally reasonable because the itemizing of the contents in an impounded vehicle affords protection against false claims. False claims are avoided by securing the listed valuables. Critics, however, have pointed out that an unscrupulous officer might simply avoid listing an item on the inventory, or an unscrupulous claimant might simply allege that the police took the item during the inventory procedure.

2. Protection of Property.

Courts have also justified inventories because of the protection they afford to the owner’s property. Many states generally charge police with the responsibility for protecting private property. In United States v.

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56. See, e.g., Albuquerque Police Department Standard Operating Procedures Manual, § 3-12 to 3-12-18 (Apr. 1982). Section 3-12-8 provides: “An inventory will be made of the property in a vehicle to be towed.”


58. See United States v. Johnson, 431 F.2d 441 (5th Cir. 1970).


60. See Cabbler v. Superintendent, 528 F.2d 1142, 1144 (4th Cir. 1975), cert. denied, 429 U.S. 817 (1976) (impoundment of defendant’s car held reasonable as sound police practice to protect both the defendant from loss and the city from damage claims).

61. Id.; United States v. Mitchell, 458 F.2d 960, 961 (9th Cir. 1972).

62. Justice Powell noted this possibility in his concurring opinion in South Dakota v. Opperman, 428 U.S. at 376 (Powell, J., concurring).

63. See United States v. Mitchell, 458 F.2d 960, 961–62 (9th Cir. 1972) (patrolman acted reasonably in placing valuables found on front seat of impounded car on the floor in front of passenger side of front seat).

64. See, e.g., Albuquerque Police Department Standard Operating Procedures Manual, § 3-12 to 3-12-18 (Apr. 1982); United States v. Lawson, 487 F.2d 468, 469 (5th Cir. 1973).
Kelehar, the Fifth Circuit allowed the admission of evidence seized during an inventory search of the defendant's car. "The . . . search of defendant's car was in compliance with standard inventory procedure, fulfilling the . . . purpose of protecting the defendant's property and safeguarding the police from groundless claims for 'lost' possessions." 66

3. Protection from Danger.

The third justification for inventories, protection of the police from danger, has evolved from the Supreme Court's decision in Cooper v. California. 67 In Cooper, police arrested the defendant for selling heroin and impounded his car pending forfeiture proceedings. The police searched the defendant's car one week following the impoundment. The defendant's conviction rested in part on evidence seized from the glove compartment of the petitioner's impounded car. Even though state law authorized the search, the Supreme Court did not base its decision on that justification alone. "[T]he question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." 68 Justice Black stated: "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 69 Justice Black made this statement even though no danger was apparent. In Cady v. Dombrowski, the Supreme Court stressed solely the protection from danger rationale as the basis for the determination of reasonableness. 70

C. The Inventory Search in New Mexico

In State v. Vigil, the New Mexico Court of Appeals established inventory searches as an exception to the fourth amendment warrant requirement. In that case, police impounded the defendant's car subsequent to his custodial arrest on assault charges. Pursuant to police regulations, officers inventoried the contents of the vehicle. In the course of conducting the inventory, they found in the trunk a brown paper bag containing marijuana. The court of appeals held that where the initial intrusion into a vehicle lawfully in police custody is justified, an inventory of the contents, including closed containers, is justified. 71

65. 470 F.2d 176 (5th Cir. 1972).
66. Id. at 178.
68. Id. at 61.
69. Id. at 61-62.
70. 413 U.S. 433 (1973).
71. Id. at 447. See supra notes 47-51 and accompanying text for further discussion of Cady.
72. 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974).
73. Id. at 391, 524 P.2d at 1007.
The New Mexico Supreme Court recognized the validity of inventory searches in *State v. Ruffino*. In that case, defendant's vehicle was impounded following his arrest on a minor charge. An officer, pursuant to standard police regulations, inventoried the contents of the vehicle including the items in the trunk. These items included a shotgun and shells. The court held that the search was valid and set forth the requirements for a valid inventory search. First, the vehicle to be inventoried must be in police control and custody. The custody of the vehicle must be based on some legal ground and there must be some nexus between the arrest and the reason for the impounding. Second, officers must make the inventory pursuant to established police regulations. Third, the search must be reasonable. In addition, if during an inventory search police discover evidence or other seizable items, they should obtain a search warrant before they seize the evidence.

A comparison between *State v. Ruffino* and *South Dakota v. Opperman* indicates that the New Mexico Supreme Court and the United States Supreme Court use differing criteria to judge the reasonableness of an inventory search. Several of the requirements for a valid inventory search set forth by the New Mexico Supreme Court in *Ruffino* are similar to those set forth by the United States Supreme Court in *Opperman*. Both require the exercise of lawful police custody over the vehicle and an inventory conducted pursuant to established police regulations. Both cases state that the search must be reasonable. Both the Supreme Court and state court indicate that an inventory search will be held reasonable if it is aimed at protecting the car and its contents or protecting police from false claims or potential danger.

*Ruffino*, differing from *Opperman*, stated that "there must be some nexus between the arrest and the reason for impounding." The court gave no example of a valid nexus, but cited *Preston v. United States* and *United States v. Lawson*, two cases in which the United States Supreme Court and the Eighth Circuit, respectively, found no nexus.

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74. 94 N.M. 500, 612 P.2d 1311 (1980).
75. Id. at 502, 612 P.2d at 1313.
76. Id.
77. Id.
78. Id.
79. Id.
82. Opperman, 428 U.S. at 369; Ruffino, 94 N.M. at 502, 612 P.2d at 1313.
83. Opperman, 428 U.S. at 375; Ruffino, 94 N.M. at 502, 612 P.2d at 1313.
84. Opperman, 428 U.S. at 373; Ruffino, 94 N.M. at 502, 612 P.2d at 1313.
85. 94 N.M. at 502, 612 P.2d at 1313.
87. 487 F.2d 468 (8th Cir. 1973).
Opperman did not consider whether a nexus was required. In addition, Ruffino stated that "[i]f during an inventory search evidence of a crime is discovered, a search warrant should normally be obtained prior to seizing the evidence." These additional requirements in Ruffino indicate that New Mexico places greater restrictions on inventory searches than did the United States Supreme Court in Opperman. As noted in the next section of this Note, the court in Williams retained the requirement that there be a nexus between the arrest and the reason for impounding, but abandoned the requirement that a warrant be obtained prior to seizing evidence found during an inventory search.

D. Application of the Ruffino Test to State v. Williams

In State v. Williams, the New Mexico Supreme Court restated the Ruffino requirements for a valid inventory search. Applying the first requirement, the court found that Williams' vehicle was in police custody. Interestingly, the court stated that the defendant did not assert that his vehicle was not in police custody. As noted in the dissenting opinion, the defendant alleged that the search and seizure of his automobile was "not valid as an inventory search because the automobile was lawfully parked and there was no necessity to remove it into police custody." Because the majority dismissed this allegation without discussion, the inference is that police custody over the defendant's keys bestows custody and control over whatever the keys unlock. The dissenting opinion addressed the weakness of this custody argument. Justice Sosa noted that the police did not know of the existence of the automobile nor of its location at the time of the arrest and that under this circumstance, police exercise of control and custody over the automobile was questionable.

The majority next examined whether a nexus existed between the arrest and the reason for impounding the vehicle. The majority cited Preston v. United States in discussing the nexus issue. In Preston, police arrested the defendant and two other men for vagrancy and took them to police headquarters. An officer then drove the defendant's car, which had not been searched at the time of arrest, to the police station, and later to a garage where police searched the car. During the search, police discovered evidence which was later used in the defendant's trial.
United States Supreme Court held that the evidence seized was inadmissible because it was too remote in time or place to be treated as incidental to arrest and therefore it failed to meet the test of reasonableness under the fourth amendment.\textsuperscript{98}

In \textit{Ruffino}, the New Mexico Supreme Court had cited \textit{Preston} to illustrate that there must be some nexus between a person’s arrest and the reason for impounding that person’s vehicle.\textsuperscript{99} In \textit{Williams}, the court repeated this illustration and further stated that: “The only relevance of \textit{Preston} to inventory search cases is in its example of a nexus between the arrest and the impoundment.”\textsuperscript{100} The \textit{Williams} court indicated that \textit{Ruffino} cited \textit{Preston} to demonstrate that no compelling need must be present to justify impoundment of a vehicle incident to an arrest.\textsuperscript{101}

The court’s characterization of \textit{Preston} is incorrect. \textit{Preston} did not raise the issue of an inventory search, but dealt with a search incident to an arrest. \textit{Cooper v. California},\textsuperscript{102} which followed \textit{Preston} in a line of United States Supreme Court cases involving warrantless searches, pointed out that \textit{Preston} had refuted any notion that the police could routinely seize or search a vehicle after having arrested the driver and passengers. In \textit{Cooper}, the Supreme Court in its analysis of \textit{Preston} stated that:

\begin{quote}
\textit{Preston} was arrested for vagrancy. An arresting officer took his car to the station rather than just leaving it on the street. It was not suggested that this was done other than for Preston’s convenience \textit{or that the police had any right to impound the car} . . . . The fact that the police had custody of Preston’s car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car.\textsuperscript{103}
\end{quote}

\textit{Preston}, therefore, does not give an example of a nexus between an arrest and the impounding of a vehicle. The New Mexico Supreme Court’s reliance on \textit{Preston} in \textit{Williams} was unhelpful and confusing.

Similarly, the majority in \textit{Williams} incorrectly cited \textit{United States v. Lawson}\textsuperscript{104} as an illustration of a nexus between an arrest and an impoundment. In \textit{Lawson}, police arrested the defendant on a charge of writing checks based on insufficient funds. The police impounded the defendant’s car, which was legally parked in a motel parking lot, and took it to the police station. The police inventoried the contents of the car and found a revolver in the locked trunk of the car.\textsuperscript{105}

\begin{itemize}
\item \textsuperscript{98} \textit{Id.} at 368.
\item \textsuperscript{99} 94 N.M. at 502, 612 P.2d at 1313.
\item \textsuperscript{100} 97 N.M. at 636, 642 P.2d at 1095.
\item \textsuperscript{101} \textit{Id.} at 637, 642 P.2d at 1096.
\item \textsuperscript{102} 386 U.S. 58 (1967).
\item \textsuperscript{103} \textit{Id.} at 61 (emphasis added).
\item \textsuperscript{104} 487 F.2d 468 (8th Cir. 1973).
\item \textsuperscript{105} \textit{Id.} at 469.
\end{itemize}
Circuit, relying on the test of reasonableness, struck down the inventory search. The court stated that it did not wish to create an exception for "searches incident to police custody and control." The court did not specifically address the issue of a connection between the arrest of the defendant and the impoundment of the defendant's car.

Although not cited by the New Mexico Supreme Court in Williams, Cooper v. California gives the best illustration of a nexus between an arrest and the impounding of a vehicle. In Cooper, a California state court convicted the defendant of a narcotics violation partly based on evidence seized in a warrantless search of the defendant's car one week after his arrest. Pursuant to a statutory provision requiring the seizure and forfeiture of vehicles used in violation of the narcotics laws, police had impounded the defendant's car as evidence. The United States Supreme Court upheld the search and carefully showed why a nexus existed between the defendant's arrest and the reason for impounding the vehicle:

> Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had "legal title" to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained.

In Williams, the court found that the possible use of the defendant's vehicle as evidence of a crime supplied the nexus between the arrest and the impounding of the vehicle. The state argued that the vehicle was evidence of a means of escape. The defendant's car, parked behind the grocery store, could lead to the inference that the defendant had formulated a plan of escape, thereby indicating consciousness of guilt. This evidence, however, is at best only tenuous. The existence of the defendant's locked and legally parked car might aid in the proof of theft of a motor vehicle, but adds nothing to the state's burden of proof of armed robbery: "the theft of anything of value from the person of another . . . by use or threatened use of force or violence . . . while armed with a deadly weapon." Justice Sosa, in his dissent, noted that "[s]ince the police did not even know whether a vehicle existed . . . or whether the vehicle could be evidence of a crime, there could be no nexus between the arrest and the impoundment."

106. Id. at 476.
108. Id. at 61.
109. 97 N.M. at 637, 642 P.2d at 1096.
111. 97 N.M. at 638, 642 P.2d 1097 (Sosa, J., dissenting).
In *Opperman*, the United States Supreme Court made it clear that an inventory search would be held reasonable if it is made to further the protection of the owner's property, the protection of the police from false claims, or the protection of police from potential danger. There was no assertion in *Williams* that the inventory search was conducted for any of these reasons, but the court found the search to be reasonable. The majority entirely disregarded these requirements for an inventory search. In addition, *Ruffino* stated that if evidence of a crime is discovered during an inventory search, a search warrant should normally be obtained prior to seizing the evidence. In *Williams*, the officer did not obtain a warrant prior to seizing the items. The supreme court, by failing to mention this requirement, seemed to indicate that this requirement is not of constitutional dimension and only expresses a preference for obtaining a warrant under such circumstances. This requirement is, therefore, meaningless, and it appears that during any inventory search in which police find evidence, they need not obtain a warrant prior to seizing that evidence.

*Ruffino* also required that police conduct the inventory search pursuant to established police regulations. The police department standard operating procedure allowed the owner of the vehicle, prior to its being towed, to select a wrecker of his choice, or to release his vehicle to a qualified driver present at the scene, or to legally park the car, unless the police needed the vehicle as evidence of a crime. In *Williams* the police apparently made no attempt to obtain the defendant's consent before they took the vehicle into protective custody. The court found that because the vehicle was evidence of a crime, there was no need to give the defendant a choice as to the disposition of the car. Furthermore, one of the reasons alleged by the officer for locating the defendant's automobile was that he believed he would find additional evidence in the automobile. This reason directly contradicts the Supreme Court's requirements for an inventory search. Justice Powell pointed out in his concurring opinion in *Opperman* that:

112. 428 U.S. at 373–74.
113. 94 N.M. at 502, 612 P.2d at 1313.
114. Id.
115. Albuquerque Police Department Standard Operating Procedures Manual § 314.02 (Nov. 1977). The current procedures manual provides that a vehicle may be towed 1) if the vehicle is found to be in violation of any city ordinance; 2) when the driver of the vehicle has been found to be incapacitated by the use of alcohol or drugs; 3) when the driver has been hospitalized or arrested; or 4) when the vehicle has been abandoned, wrecked or vandalized or parked in such a manner as to cause a traffic hazard.

116. See 97 N.M. at 636, 642 P.2d at 1095.
117. See supra notes 109–110 and accompanying text.
118. 97 N.M. at 637, 642 P.2d at 1096.
119. Id. at 638, 642 P.2d at 1097 (Sosa, J., dissenting).
Inventory searches . . . are not conducted in order to discover evidence of a crime. The officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized.120

Further, the majority in Opperman stated that "there is no suggestion whatsoever that this standard procedure . . . was a pretext concealing an investigatory police motive."121

The majority in Williams openly approved a search as an inventory search which would otherwise be classified as an investigatory search. If such reverse justification is permissible, the current limitations on police authority to conduct an inventory search may become meaningless: in every situation where incriminating evidence is found in an inventory search, an admittedly investigatory search could become justifiable under the pretext of this exception.

CONCLUSION

New Mexico was among a growing number of jurisdictions which recognized that a threshold prerequisite to any inventory search of an automobile is, at the very least, an initial lawful and reasonable impounding of that vehicle.122 In State v. Williams, however, the New Mexico Supreme Court allowed the prerequisite to erode. The court failed to demonstrate adequately the necessity for impounding the defendant's automobile. At the time police arrested the defendant inside of the grocery store, his car was legally parked on a street behind the store.123 There was no apparent danger to the car or to its contents and the car, in turn, posed no irremediable danger to the flow of traffic.

Furthermore, the court, by this opinion, allows the police to have lawful custody of a car before they are even aware of its existence. As Justice Sosa noted in his dissenting opinion:

Control and custody of keys is not sufficient to have control and custody of the items the keys will open. The logical extension of the majority's holding is that a police officer who legally obtains the keys of an accused may then proceed to open a locked suitcase, safety deposit box, and possibly a house.124

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120. 428 U.S. at 376, 383 (Powell, J., concurring).
121. Id. at 376.
123. 97 N.M. at 636, 642 P.2d at 1095.
124. 97 N.M. at 638, 642 P.2d at 1097 (Sosa, J., dissenting).
The potential ramifications of the New Mexico Supreme Court decision illustrate that expansion of the inventory search exception was not justified by the facts presented in this case. One of the chief bases for an inventory search is to protect the police who arrest the driver of a vehicle from later claims by that driver of lost or stolen property. As Justice Sosa noted in his dissent, although police are presently not liable for any vehicle that ultimately may be connected to the arrestee, the use of the community caretaking rationale to justify the search here may well create such liability.\textsuperscript{125} Extended liability, while detrimental to any police officer engaged in the performance of his duties, does not serve to benefit society as a whole, and emphasizes the overbreadth of the application of the inventory search exception to the facts of \textit{Williams}.

Furthermore, the failure to consult the wishes of the defendant, as was done in \textit{Williams}, belies the claim that an inventory search is conducted, in part, to protect the defendant’s personal property. To permit an otherwise prohibited intrusion because it is “routine police policy” is to allow the fourth amendment protection of privacy to “approach the evaporation point.”\textsuperscript{126} The essential test of the validity of a search is reasonableness, yet the standard of reasonableness should be evolved in light of the fourth amendment, not in light of what the police think reasonable procedures might be.

The operation or possession of an automobile does not destroy a person’s right to keep property contained therein free from unreasonable searches and seizures.\textsuperscript{127} After \textit{State v. Williams}, police will be allowed wide latitude in conducting an inventory as long as they are acting pursuant to a police regulation. Police regulations, however, should not be a constitutional touchstone unless we are willing to entrust our liberties to the discretion of the police commissioner, rather than to a detached and neutral magistrate.

ROBERTA BEYER

\textsuperscript{125} \textit{Id.}
\textsuperscript{127} United States v. Lawson, 487 F.2d 468, 472 (8th Cir. 1973).