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THE "HOMICIDE SCENE" EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT: A DEAD ISSUE?

The Supreme Court traditionally has used very narrow language in cases involving warrantless searches. The Court has stated that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are unreasonable per se under the fourth amendment—subject only to a few specifically established and well-delineated exceptions."[1] Notwithstanding this precise language, the exceptions recognized by the Court have been neither "few" nor "well-delineated." Rather than adopt a narrow construction of the fourth amendment, the Court has liberally interpreted the amendment and expanded its exceptions in order to avoid inequitable results.[2] During the past ten years some lower federal and state courts, responding more to the practical results of Supreme Court warrantless search cases than to the Court's rhetoric, have recognized a significant new exception to the fourth amendment's[3] warrant requirement: the "homicide scene" exception.[4] This exception[5] allows police officers, who make a legitimate warrantless *entry* into a dwelling in response to reports of a death or great bodily injury, to conduct a warrantless *search* of the dwelling for suspects, victims, and evidence related to the crime.[6] The homicide scene exception has not received unanimous recognition by the lower courts,[7] and the Supreme Court in its first consideration of the exception in *Mincey v. Arizona*[8] appeared to decide against its recognition. Upon closer examination, however, it appears that the homicide scene exception has actually survived *Mincey* under the protection of other warrant exceptions and deserves recognition in its own right in certain cases. This comment will explore the emergence of the homicide scene exception, the effect of the *Mincey* decision upon the exception, its relationship to other exceptions, and the acceptable scope of a warrantless homicide scene search under present law.

I. THE ARGUMENT FOR THE HOMICIDE SCENE EXCEPTION

Before looking at the arguments for and against the homicide scene exception, it is necessary to examine the Supreme Court's test for establishing new warrant exceptions as expressed in dictum in

[1] Katz v. United States, 389 U.S. 347, 357 (1967).

[2] *See* Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & C. 198 (1977).

[3] The fourth amendment provides:

> 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 person or things to be seized.

U.S. CONST. amend. IV.

[4] *See* United States v. Birrell, 470 F.2d 113 (2d Cir. 1972); Brown v. Jones, 407 F. Supp. 686 (W.D. Tex. 1974), *rev'd on other grounds*, 489 F.2d 1040 (5th Cir. 1974); Stevens v. State, 443 P.2d 600 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); State v. Mincey, 115 Ariz. 472, 566 P.2d 273 (1977) (en banc), *rev'd sub nom.* Mincey v. Arizona, 437 U.S. 385 (1978); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974) (en banc); People v. Superior Court, 41 Cal. App. 3d 636, 116 Cal. Rptr. 24 (1974); People v. Wallace, 31 Cal. App. 3d 865, 107 Cal. Rptr. 659 (1973); People v. King, 54 Ill. 2d 291, 296 N.E.2d 731 (1973); State v. Chapman, 250 A.2d 203 (Me. 1969); Davis v. State, 236 Md. 389, 204 A.2d (1964), *cert. denied*, 380 U.S. 966 (1964); State v. Sutton, 454 S.W.2d 481 (Mo. 1970) (en banc); Geary v. State, 91 Nev. 784, 544 P.2d 417 (1975); Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971); Parsons v. State, 160 Tex. Crim. 387, 271 S.W.2d 643 (1953), *cert. denied*, 348 U.S. 837 (1954); State v. Oakes, 129 Vt. 241, 276 A.2d 18 (1971), *cert. denied*, 404 U.S. 965 (1971); Longuest v. State, 495 P.2d 575 (Wyo. 1972), *cert. denied*, 409 U.S. 1006 (1972).

[5] The controversy between the homicide scene exception and the warrant requirement only comes into play in areas where someone, usually a defendant, has a reasonable expectation of privacy. Rakas v. Illinois, 439 U.S. 128, 133–34 (1978). No such expectation of privacy exists when a body is found in a public place, and no question as to the right of the police to conduct a warrantless search of the public place arises. No cases have been found where the homicide scene exception arose other than in situations involving private dwellings or hotel rooms.

[6] The notion that a warrantless *entry* is justified in a life-threatening, emergency situation has become an accepted part of the fourth amendment doctrine. *See, e.g.*, Vale v. Louisiana, 399 U.S. 30 (1970); United States v. Barone, 330 F.2d 543 (2d Cir. 1964), *cert denied*, 377 U.S. 1004 (1964); Patrick v. State, 227 A.2d 486 (Del. 1967). Consequently, this comment is limited to the permissible scope of searches that occur *after* a justified warrantless entry.

[7] *See, e.g.*, Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972); Root v. Gauper, 438 F.2d 361 (8th Cir. 1971); People v. Williams, 192 Colo. 249, 557 P.2d 399 (1976) (en banc); State v. Pires, 55 Wis. 2d 597, 201 N.W.2d 153 (1972).

[8] 437 U.S. 385 (1978).

Camara v. Municipal Court.[9] Although *Camara* involved an administrative search, the test has general application:[10]

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.... Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.[11]

The key to the *Camara* test is the Court's concern with the "frustration of governmental purpose." The *Camara* test strikes a balance between the need to search and the invasion which results from the search. The length of time required to obtain a warrant is an important factor in determining whether the governmental purpose is likely to be frustrated,[12] but it is not the only factor courts must consider. Courts also must weigh public policy considerations in the balance.[13]

One element of public policy is the gravity of the offense. The Justices have discussed both sides of this issue. In his dissent in *Brinegar v. United States*,[14] Justice Jackson stated the argument for considering the gravity of the offense when creating exceptions to the warrant requirement:

> [I]f we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.[15]

Thus, in a murder scene situation, the discovery of the body may "heighten" the exigent quality[16] and justify a broader search than would be permissible if the victim merely were slightly wounded.

In more recent cases, the Supreme Court has refused to adopt the *Brinegar* dissent and consider the gravity of the offense. In *Katz v. United States*[17] the Court refused to exempt the surveillance of a telephone booth from the usual warrant requirements. The majority opinion sidestepped the issue of national security and gravity of the offense, relegating the subject to a footnote.[18] However, Justices Douglas and Brennan addressed the issue in a separate concurring opinion. The two Justices would require a warrant even where the crime involved was treason, the worst crime of all.[19] They intended to "respect the present lines of distinction and not improvise because a particular crime seems particularly heinous."[20] In *Mincey v. Arizona*, the Court again declined to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the fourth amendment justify a warrantless search.[21]

Thus, at present, the gravity of the offense alone will not justify creating an exception to the warrant requirement. However, the gravity of the offense can be considered as a factor within the *Camara* balancing test for the creation of new exceptions. When the offense is grave and the situation necessitates a quick police response, the argument for an exception to the warrant requirement is compelling. For example, where the police find a murdered body and have no immediate suspect, the fleeing felon gains valuable time while the police are in the process of obtaining a warrant. The

[9] 387 U.S. 523 (1967).

[10] Administrative searches differ from searches for evidence in criminal cases only in the amount of probable cause required to be shown. *See* note 93 *infra* and accompanying text. This difference does not destroy the applicability of the *Camara* test for the creation of new warrant exceptions because "searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment." Michigan v. Tyler, 436 U.S. 499, 506 (1978).

[11] Camara v. Municipal Court, 387 U.S. at 533-37.

[12] *See* Schmerber v. California, 384 U.S. 757, 770-71 (1966) (alcoholic content of blood would diminish if time were taken to secure a warrant).

[13] *Cf.* Camara v. Municipal Court, 387 U.S. at 537.

[14] 338 U.S. 160 (1948) (Jackson, J., dissenting).

[15] *Id.* at 183.

[16] State v. Epperson, 571 S.W.2d 260, 268 (Mo. 1978) (en banc). *See* note 94 *infra* and accompanying text.

[17] 389 U.S. 347.

[18] 389 U.S. at 358 n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the fourth amendment in a situation involving the national security is a question not presented by this case.").

[19] *Id.* at 360 (Douglas, J., and Brennan, J., concurring).

[20] *Id.*

[21] 437 U.S. at 394.

public interest in apprehending a murderer may tip the balance in favor of an immediate warrantless search of the premises to determine the identity of the suspect.[22]

The societal interest in allowing police to make a warrantless search in order to capture a murderer is necessarily premised on the belief that immediate police investigations are more likely to result in apprehension of the murderer than are later investigations. However, the modern Supreme Court does not attach substantial weight to the interest in police efficiency.[23] Police effectiveness is not the only policy consideration supporting an exception for homicide scene searches. There is also the long-run benefit of public confidence in the criminal justice system that inures when swift punishment is brought to bear on the perpetrators of a most serious crime—murder. The public needs to know that the system will work, and work swiftly and surely in such a case.

Furthermore, in certain instances requiring the police to obtain a warrant is impractical and counterproductive. A homicide scene exception is appropriate in such circumstances. Frequently, the police investigating an apparent homicide will not know how or why it was done, nor who did it. Consequently, the police will be unable to specify exactly what they want to seize or where they want to search with sufficient particularity to support the issuance of a warrant.[24] A federal district court was confronted with this problem,[25] and handled it succinctly:

> The pointlessness of obtaining a search warrant at this juncture is made clear by the fact that the authorities had no idea what they were looking for. Had a warrant been obtained, it would be a sham, since the object of the search would have been so broad as to be meaningless.[26]

Unless the issuing magistrate is willing to grant a search warrant without the specificity mandated by the fourth amendment, the police are forced to proceed with other time-consuming measures such as an autopsy to determine manner of death, from which they can begin their investigation. All of this may occur while the murderer is making good his escape.

Much use has been made by the lower courts of the idea that the police have an "inherent duty" to investigate a murder scene thoroughly.[27] The basis for such a principle seems to have sprung from the "emergency search" context. It is well established that, in an emergency, the police have a right to enter private property to search for injured persons. This right is inherent in the very nature of their duties as peace officers and derives from the common law.[28] Unlike the lower courts, the Supreme Court has never applied this "inherent duty" rationale to a search for evidence, but the Court has upheld searches for possibly injured persons.[29] In light of the Supreme Court's reluctance to create a new exception for homicide scene searches, stretching the inherent duty rationale so as to include homicide scene searches is a possible method of avoiding reversal, if not altogether true to the doctrine's origins. The Supreme Court's frequent denial of certiorari in cases where searches have been supported by the inherent duty rationale[30] provides implicit support for the "inherent duty" rationale as used in a homicide scene context.

Counterbalancing these arguments justifying warrantless homicide scene searches is the principle that the home deserves special protection from state intrusion. As William Pitt described it:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement![31]

[22] *See* Brown v. Jones, 407 F. Supp. 686.

[23] *See* Mincey v. Arizona, 437 U.S. at 393 ("The investigation of crime would always be simplified if warrants were unnecessary.").

[24] "And no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV. *See also* Berger v. New York, 388 U.S. 41 (1967); Stanford v. Texas, 379 U.S. 476 (1965).

[25] Brown v. Jones, 407 F. Supp. 686.

[26] *Id.* at 691. *See also* State v. Chapman, 250 A.2d at 211.

[27] *See* Stevens v. State, 443 P.2d 600; People v. Wallace, 31 Cal. App. 3d 865, 107 Cal. Rptr. 659; State v. Chapman, 250 A.2d 203; State v. Oakes, 129 Vt. 241, 276 A.2d 18.

[28] *See, e.g.*, Mincey v. Arizona, 437 U.S. at 392; McDonald v. United States, 335 U.S. 451, 454–56 (1948); Johnson v. United States, 333 U.S. 10, 14–15 (1948).

[29] Mincey v. Arizona, 437 U.S. at 392.

[30] *See, e.g.*, Stevens v. State, 443 P.2d 600; Davis v. State, 236 Md. 389, 204 A.2d 76; Parsons v. State, 160 Tex. Crim. 387, 271 S.W.2d 643; State v. Oakes, 129 Vt. 241, 276 A.2d 18; Longuest v. State, 495 P.2d 575.

[31] Miller v. United States, 357 U.S. at 307 (quoting THE OXFORD ENGLISH DICTIONARY OF QUOTATIONS 379 (2d ed. 1953)).

The Supreme Court also affords special protection to the home:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[32]

The historical sanctity of the home and judicial protection of it may pose an insurmountable barrier to the creation of a new exception to the warrant requirement that necessarily intrudes upon the privacy of the home. However, the home's sanctity is already subject to a number of exceptions.[33]

Many factors should be taken into consideration when examining the need and the justification for a new exception to the fourth amendment warrant requirement. Some of these factors, such as those affecting the time element involved, are more in harmony with the fourth amendment theory expressed by the Supreme Court. This is because the necessity for speed lies at the heart of those exceptions for "exigent circumstances" to which the Court has given its blessing. Other factors, including the gravity of the offense and the lack of specificity in a warrant application, traditionally have been unimportant considerations by themselves, but have potentially strong appeal when accompanied by additional factors. In any given set of circumstances, the totality of the factors may support allowing a warrantless search of a homicide scene.

II. The Emergence of the Doctrine

Many searches of homicide scenes already fit into one of the existing exceptions to the warrant requirement. If "exigent circumstances"[34] exist, such as a life-threatening emergency[35] or the danger of evidence being destroyed,[36] policemen lawfully may enter a dwelling without a warrant. However, any search must be limited to serving the purpose of the initial entry.[37] For example, police responding to a report of a seriously injured person in a dwelling may conduct a warrantless search of the premises for the limited purpose of finding such injured person, other possible victims, and the perpetrator.[38] A search for evidence related to the crime ordinarily would be prohibited, but another exception to the warrant requirement permits seizure of evidence if it is in "plain view."[39] However, this exception only applies to evidence immediately viewable near the scene and does not permit searches into drawers and cabinets.

The "search incident to arrest" exception[40] also allows a limited search of a murder scene when a suspect is captured on the premises. *Chimel v. California*[41] allows the police to search the suspect and the immediate area for weapons. The Supreme Court has limited the scope of these exceptions because of the "favored status" of the home.[42] The Court has repeatedly overemphasized the necessity of a warrant at the expense of efficient law enforcement.[43] In part, it is the limitations on warrantless searches of homes that have caused lower courts to mold a new doctrine to correct some of the injustices of the existing rule.

Aware that exceptions to the warrant requirement are "jealously and carefully drawn" by the Supreme Court,[44] state and federal courts have not acknowledged that their decisions rely on a homicide scene exception. Therefore, the doctrine has evolved gradually as courts combined recognized exceptions with Supreme Court dicta to justify warrantless searches.[45] Perhaps the paradigm case illustrating this technique used by the courts is *State v. Chapman*.[46] In *Chapman*, police were called by the defendant to his home where the victim, the defendant's wife, was found dead in a chair with blood over her face, hands, and clothing. The defendant's conflicting stories as to the cause of death cast immediate suspicion on him, and he was taken into custody although no formal charges were filed. While the defendant was still in custody,

[32] Johnson v. United States, 333 U.S. at 14.

[33] *See generally* Vale v. Louisiana, 399 U.S. 30.

[34] *See* McDonald v. United States, 335 U.S. 451 for a definition of "exigent circumstances."

[35] *See, e.g.*, Patrick v. State, 227 A.2d 486.

[36] *See, e.g.*, Schmerber v. California, 384 U.S. 757.

[37] *See* Warden v. Hayden, 387 U.S. 294, 299 (1967).

[38] Mincey v. Arizona, 437 U.S. at 392.

[39] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[40] *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969).

[41] *Id.*

[42] Johnson v. United States, 333 U.S. at 14 ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."); United States v. Davis, 423 F.2d at 977 ("A person's home holds a favored position in the list of those areas which are protected from unreasonable searches and seizures.").

[43] *See* note 23 *supra* and accompanying text.

[44] Jones v. United States, 357 U.S. 493, 499 (1958).

[45] *See* cases listed at note 4 *supra*.

[46] 250 A.2d 203 (Me. 1969).

the police conducted a warrantless search of the home. The police seized various articles of clothing in plain view and found a whiskey bottle with blood on it, which later proved to be the murder weapon, in some garbage cans in the cellar. The defendant was convicted of the murder, and he appealed, claiming that the search and seizure of evidence in his home without a warrant violated his fourth amendment rights and that the evidence should have been excluded.

In upholding the validity of the search and subsequent seizures, the Supreme Court of Maine emphasized two controlling facts: the initial lawful entry of the officers by the express consent and invitation of the defendant and the continued possession and control of the premises during the course of the investigation.[47] The court justified the seizure of the fruits of the search on a number of rationales. The court found that the clothes seized in various rooms of the home were plainly visible and thus were lawfully seized under the plain view doctrine.[48] However, the court held that the discovery of the bottle was the product of a further search and thus could not fall into the category of "plain view"; so it examined the totality of the circumstances to determine the reasonableness of the search and seizure.[49]

First, the court held that police have a right and an obligation to make a thorough investigation of premises on which a violent death has occurred.[50] The court emphasized the duty of the police rather than the fact of a homicide, citing extensively from the United States Supreme Court's opinion in *Terry v. Ohio*,[51] which described, in dictum, certain guidelines for proper police investigatory procedures that are free from any threatened application of the exclusionary rule.[52] The *Chapman* court noted that the entire rubric of police conduct under examination fell within the category of "proper police investigative procedures."[53]

Second, the court found that the discovery of the body created an "emergency," or an exigent circumstance, sufficient to justify pursuing the investigation further.[54] Although the typical emergency search is constitutionally limited to a search for other victims or suspects,[55] the *Chapman* court found that the search could be continued until the cause of death was uncovered because "the public had a right to expect and demand that the police would conduct prompt and diligent investigations"[56] of murder scenes.[57]

Next the court faced the question of whether the police should have been required to obtain a warrant before proceeding with the investigation. Answering in the negative, the court stated that no officer could have supplied the requisite factual affidavit supporting the request for a warrant, since all the police were looking for was some blunt instrument that could have been the murder weapon.[58]

Finally, the court found that the house contained evidence that could be destroyed easily, which created another "exigent circumstance" sufficient to justify the search for weapons.[59] Not only was the murder weapon located in a trash barrel that could have been emptied, but in case the weapon was not in the home, the police needed to determine that quickly so that other areas could be searched before the evidence was lost or destroyed.[60]

Thus, the combination of exigent circumstances and the duty of the police to promptly investigate this murder, using proper investigative procedures, support the *Chapman* decision. However, the court avoided using language that might have implied the creation of a new exception. Instead, the court employed rationales and rhetoric firmly established

[47] *Id.* at 205.

[48] *Id.* at 207.

[49] The issue of whether the fourth amendment's "reasonableness clause" or its "warrant clause" is dominant has puzzled many scholars. *See* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969). *See generally* Bacigal, *The Emergency Exception to the Fourth Amendment*, 9 U. RICH. L. REV. 249 (1975); Williamson, *The Supreme Court, Warrantless Searches, and Exigent Circumstances*, 31 OKLA. L. REV. 110 (1978); Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335 (1978). The controversy is minimized, however, by taking the more realistic approach that "the definition of 'reasonableness' turns, at least in part, on the more specific dictates of the Warrant Clause." South Dakota v. Opperman, 428 U.S. 364 (1976) (Powell, J., concurring).

[50] 250 A.2d at 208.

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

[52] *Id.* at 13–15.

[53] 250 A.2d at 210.

[54] *Id.*

[55] Mincey v. Arizona, 437 U.S. at 392.

[56] 250 A.2d at 211.

[57] The *Chapman* court states:

> There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether or not a human life has been taken, and if so by whom and by what method, is great indeed and may in appropriate circumstances rise above the interest in being protected from governmental intrusion upon his privacy. In our view this is such a case.

Id. at 210.

[58] *Id.* at 211.

[59] *Id.*

[60] *Id.*

in the opinions of the United States Supreme Court. However, the *Chapman* court extended those rationales beyond their intended reach to justify the search and seizure at issue. Few exigent circumstances cases decided by the United States Supreme Court have justified a search for weapons, and these were strictly limited.[61] Likewise, the "inherent duty" of police officers rationale and the "proper investigative procedures" rationale used by the *Chapman* court were taken from the Supreme Court opinion in *Terry v. Ohio*, but that case dealt with stop and frisk law, not searches of homicide scenes. The Supreme Court has never intimated any possible application of *Terry* to murder scene cases. Nevertheless, the technique of the *Chapman* court has become the norm for other courts[62] attempting to justify warrantless searches and seizures of homicide scenes using existing fourth amendment doctrines.

III. *Mincey v. Arizona*

In *State v. Mincey*,[63] the Arizona Supreme Court recognized the inapplicability of both the classic exceptions to the warrant requirement and the "inherent duty" rationale created by the *Chapman* court and others to the search of a homicide scene. Recognizing the United States Supreme Court's position that warrantless searches are per se unreasonable with only "a few specifically established and well-delineated exceptions,"[64] the court held that a warrantless search of a homicide scene, when conducted in accordance with the guidelines set forth in its opinion, was such an exception.[65]

The search in question in *Mincey* followed a narcotics raid of an apartment and a shootout between police and occupants, in which a police officer was killed. Two different searches were conducted, but only the second was at issue. In the first search, the officers at the scene conducted an immediate inspection of the premises for other persons, which is a legitimate emergency search.[66] Shortly thereafter, homicide detectives arrived at the apartment, sealed it off, and proceeded to conduct a second, four-day warrantless search of the premises, during the course of which over two hundred objects were seized.[67] In approving this search, the state court used a reasonableness standard to establish limits on police conduct.

> For the search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder). . . . Although [the] [o]fficer [was] not dead [yet], it was reasonable to believe that death was likely and that a murder charge a possibility. The search was aimed at establishing the circumstances of death.[68]

Although the language of the court is circumspect and limits the scope of the search to determining the circumstances of death, one must keep in mind that the court approved an "intensive, four-day warrantless search which included ripping up carpets and opening dresser drawers."[69] Nevertheless, the state high court sustained the search and the convictions of the defendants.

On appeal to the United States Supreme Court, the state defended its search in several ways, three of which are pertinent to the Arizona court's creation of a homicide scene exception to the fourth amendment's warrant clause.[70] The first of these attempted justifications involved an argument for inclusion of the murder scene search under the already existing emergency exception. Responding to this argument, the Court set out the boundaries

[61] *See* Chimel v. California, 395 U.S. 752 (search incident to arrest—search limited to suspect's person and immediate vicinity within his control); Warden v. Hayden, 387 U.S. at 299 ("hot pursuit" search of dwelling limited to finding occupants and any weapons which could be used by the suspect to escape).

[62] *See* cases listed in note 4 *supra*.

[63] 115 Ariz. 472, 566 P.2d 273 (1977) (en banc), *rev'd sub nom.* Mincey v. Arizona, 437 U.S. 385 (1978).

[64] Katz v. United States, 389 U.S. at 357.

[65] 115 Ariz. at 482, 566 P.2d at 283. First, it must be the scene of a homicide or of a serious personal injury with likelihood of death where there is reason to suspect foul play. Second, the search must be limited to determining the circumstances of death and the scope must not exceed that purpose. Third, the search must begin within a reasonable period following the time when the officials first learn of the murder or potential murder. *Id.*

[66] Mincey v. Arizona, 437 U.S. at 392.

[67] *Id.* at 389.

[68] 115 Ariz. at 482–83, 566 P.2d at 283–84.

[69] 437 U.S. at 389.

[70] The State also argued that no constitutionally protected right of privacy was invaded by the search of Mincey's apartment. 437 U.S. at 391. The first prong of this argument was that Mincey, by shooting a police officer, forfeited any reasonable expectation of privacy. The Court rejected this notion, citing its decision in Michigan v. Tyler, 436 U.S. 499 (1978). The second prong of the privacy argument advanced by the state was that the initial intrusion to arrest was so great that the subsequent search added little harm. Rejecting this argument, the Court cited its opinion in Chimel v. California, 395 U.S. 752.

of the emergency exception:

> Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.[71]

While these criteria justified the initial search of Mincey's apartment for suspects and victims of the shooting, the Court condemned the extensive four-day search because life and limb were not in jeopardy.[72] Although the Court refused to accept the Arizona court's broadening of the emergency exception, it did not question the right of police to respond to emergency situations.[73] Because the Court left the emergency exception intact, there remains room for the future development of a homicide scene exception.

The second argument raised by Arizona in defense of the new exception invoked the public interest in prompt investigation of crimes of this gravity. The state argued that because of the seriousness of the crime of murder, the public interest demanded prompt investigation and apprehension of the murderer. The usual warrant requirement delays investigation and may allow a murderer to escape. Therefore, the public interest in prompt investigation of homicides, supports a homicide scene exception.[74] A similar argument was made to, and accepted by, the Maine Supreme Court in *State v. Chapman*.[75] However, the Supreme Court in *Mincey* rejected this contention because there is a public interest in prompt investigation of all serious crimes, and "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the fourth amendment."[76] This rejection by the Court of the public interest and gravity of the crime argument has caused the greatest difficulty for the post-*Mincey* viability of a homicide scene exception, but as will be seen, does not dispense with the issue altogether.

Arizona's third argument is perhaps the most interesting from the viewpoint of warrantless searches in general. The state contended that the guidelines drawn up by the Arizona Supreme Court for warrantless searches of homicide scenes were sufficiently narrow to pass constitutional muster.[77] Since the Supreme Court has often reiterated how narrow the recognized exceptions are,[78] this argument for court-created narrow guidelines might have appealed to the Justices as consistent with the Court's general philosophy. Indeed, the extensive effort of the Court to refute the state's contention in this area at the very least shows the Court's interest in the argument. The Court attacked this proposition from two directions that, when analyzed conjunctively, reveal the weak link in the Court's attack on the homicide scene exception.

First, the Court looked at the effect of the court-authorized search. The Court held that the Arizona Supreme Court guidelines were not sufficiently narrow since they permitted a four-day, extremely intrusive search.[79] The Court did not discuss the permissibility of a more limited search and narrower guidelines. However, the Court's discussion of "effects" is significant because it shows a willingness to scrutinize a warrantless search under reasonableness standards as well as under the stricter requirements of the warrant clause.[80]

In its second attack on the "narrow guidelines" argument, the Court brought out its traditional arsenal, asserting that the Arizona Supreme Court's guidelines for the homicide scene exception did not afford sufficient protection to a person in whose home a homicide or assault occurs.

> They confer unbridled discretion upon the individual officer to interpret such terms as "reasonable . . . search," "serious personal injury with likelihood of death where there is reason to suspect foul play," and "reasonable period." It is precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amend-

[71] Mincey v. Arizona, 437 U.S. at 392.

[72] *Id.* at 393. "All the persons in Mincey's apartment had been located before the investigating homicide officers arrived there and began their search. And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search." *Id.* (citations omitted).

[73] *Id.* at 392.

[74] *Id.* at 393.

[75] 250 A.2d at 210. *See* note 57 *supra.*

[76] 437 U.S. at 393.

[77] *Id.* at 394. *See* note 65 *supra* for the list of guidelines drawn up by the Arizona court.

[78] *See, e.g.*, South Dakota v. Opperman, 428 U.S. at 381 (Powell, J., concurring); Coolidge v. New Hampshire, 403 U.S. at 481; Vale v. Louisiana, 399 U.S. at 34; Katz v. United States, 389 U.S. at 357; Trupiano v. United States, 334 U.S. 699, 705 (1948).

[79] Mincey v. Arizona, 437 U.S. at 393.

[80] *See* note 49 *supra.*

> ment requires be made by a neutral and objective magistrate, not a police officer.[81]

Taken in isolation, this statement would indicate that the State's argument for the homicide scene exception failed to penetrate the rubric of the Court's traditional fourth amendment emphasis on the warrant requirement. However, with the Court's examination of the effects of the search, which is necessarily a reasonableness scrutiny, one could conclude that the Arizona court merely went too far in giving police officers unbridled discretion.[82] The Supreme Court did not specifically condemn what could be called "bridled discretion," or in other words, narrower guidelines that would result in a more reasonable search.

IV. Aftermath of *Mincey*

Sensing that the Supreme Court had not closed the book on homicide scene searches with *Mincey*, the Missouri Supreme Court in *State v. Epperson*[83] added yet another chapter in the continuing effort of lower courts to alleviate the harshness of the warrant requirement. In *Epperson*, there were actually three police searches that came under judicial scrutiny. The first was an emergency search generated by the victim's unexplained public absence and the odor of decomposing flesh emanating from her residence. According to the *Epperson* court, these facts indicated foul play and justified the officers' entry without a warrant to search for her body.[84] Once the body was found, a second search of the house was also justified as a continuation of the emergency search for other victims, since the decedent's two children were also missing.[85] Any evidence seized during the initial entry and the continued search for victims was admissible under the plain view doctrine.[86]

However, in *Epperson* the police conducted a third search of the premises and seized additional evidence which led to the conviction of the defendant for the murder of his wife and children. He challenged this third search on appeal, and the Missouri court held that this third search did not fall within any of the recognized exceptions to the warrant requirement:

> This evidence was discovered as the result of Sergeant Duffner's search of the rest of the house immediately following the initial search for defendant (a source of potential danger) or other victims by Officer Schindler and Epperson's father. If the evidence had been found moments earlier during Schindler's cursory search, it would clearly have been admissible under the plain view theory.[87]

Since the court could not justify this third search under any recognized warrant exception, it had to face squarely *Mincey's* apparent prohibition against warrantless searches of murder scenes. Nevertheless, the court upheld the validity of the third search by distinguishing *Mincey*[88] and relying on the Supreme Court's previous decision in *Michigan v. Tyler*.[89] In *Tyler*, fire officials conducted a warrantless search of a burned-out building for evidence of arson immediately after the fire was extinguished. This investigation continued for some hours, was interrupted by smoke and poor light, and then resumed a few hours later.[90] The Court upheld the warrantless search as reasonable even though the fire officials possibly could have procured a warrant.[91] Although the *Tyler* case involved an administrative search[92] which may be subject to different standards of probable cause,[93] the *Epperson* court found it relevant to a determination of

[81] 437 U.S. at 394–95.

[82] The Supreme Court intimated that if the fact situation had not involved such an aggravated search, and the Arizona court had not attempted to create a new exception, it would have done its utmost to justify the search. "It may well be that the circumstances described by the Arizona Supreme Court would usually be constitutionally sufficient to warrant a search of substantial scope." 437 U.S. at 395. *Mincey* was remanded for a determination of which evidence found in the apartment was permissibly seized under established fourth amendment standards. *Id.* at 395 n.9.

[83] 571 S.W.2d 260 (Mo. 1978) (en banc).

[84] *Id.* at 264.

[85] *Id.* at 266.

[86] *Id.*

[87] *Id.*

[88] The *Epperson* court distinguished the limited nature of the search in question from the four-day search in *Mincey*. *Id.* at 268 n.2.

[89] *Id.* at 268 (citing Michigan v. Tyler, 436 U.S. 499).

[90] Michigan v. Tyler, 436 U.S. at 501–02.

[91] Justice Stewart, writing for the court, noted:

> On the facts of this case, we do not believe that a warrant was necessary for the morning re-entries [of the building and seizure of evidence] on January 22.... We find that the morning entries were no more than an actual continuation of the first [entry, which was hampered by poor visibility], and the lack of a warrant thus did not invalidate the resulting seizure of evidence.

Id. at 511.

[92] *See generally* Camara v. Municipal Court, 387 U.S. 523.

[93] "The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search, but the necessity for the warrant persists." 436 U.S. at 506.

the scope of a warrantless police search. Noting that the exigent quality[94] of the situation in *Epperson* was heightened by discovery of the brutally murdered bodies, the court stated:

> The limited superficial search that followed and the removal of the bodies, the taking of the photographs of a few scenes in the house and the removal of the few items of personal property not located in the bedroom were within the reasonable time, spatial scope and limited intensity approved by *Tyler*.[95]

The *Epperson* court limited this type of murder scene search to finding only "readily accessible evidence of the crime."[96] But even this restriction cannot blur the result of its holding: a serious erosion of *Mincey's* prohibition of warrantless searches for evidence at a homicide scene. The Missouri Supreme Court in *Epperson* acknowledged the constitutional problem created by the search it was asked to validate, but it extended the scope of the search exception to include other victims or suspects by sidestepping *Mincey* and relying on *Tyler*.[97]

It remains to be seen whether the limited homicide scene search for evidence permitted in *Epperson* will be adopted by other state courts in the same manner that the "inherent duty of police" rationale was adopted after *State v. Chapman*.[98] The more important issue is how the Supreme Court will react to a lower court decision resting on the *Epperson* case. The greater limitations of the *Epperson* search will probably satisfy the Supreme Court where the limitations in *Mincey* did not. In fact, if the hesitation discernible in the *Mincey* opinion toward invalidating properly limited guidelines is genuine, then the lower courts may not have to rely on *Tyler* as the *Epperson* court did. Instead, the lower courts may develop a homicide scene exception acceptable to the Supreme Court.

[94] The attempt to bring a search under an existing exception by use of recognizable fourth amendment language taken out of context is plainly discernible. *See generally* cases cited in note 4 *supra*. No Supreme Court decision has ever supported the notion that discovery of the body "heightens" the exigent quality of the emergency and justifies a more expansive search than one to find other victims or suspects.

[95] State v. Epperson, 571 S.W.2d at 268.

[96] *Id.* at 266 (citing Michigan v. Tyler, 436 U.S. 499).

[97] The *Epperson* court never considered that perhaps *Michigan v. Tyler* was inapposite, since administrative searches are a species unto themselves. However, even the *Mincey* court cited *Tyler* in its opinion on the subject of reasonable, limited scope searches. 437 U.S. at 392.

[98] 250 A.2d 203. *See* cases cited in note 4 *supra*.

V. The Relationship of the Homicide Scene Search to Existing Exceptions

Regardless of the impact of *Epperson*, the homicide scene exception is assured of continuing vitality despite *Mincey* because of its interrelationship with the exigent circumstances exceptions to the warrant requirement. Since the homicide scene creates an exigent circumstance, it is necessary to examine the rationales supporting the exigent circumstances exception. The first discussion of the subject by the Supreme Court came in 1948, in *McDonald v. United States*.[99] The Court, emphasizing the importance of the warrant requirement, stated: "We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the *exigencies of the situation* make that course imperative."[100] Basically, this means that the necessity for the search must outweigh the privacy interests of the individual, or alternatively, that the governmental purpose for the search will be frustrated by the requirement to procure a warrant.[101]

Theoretically, such a rule sounds fair enough, but as one court noted, "a myriad of circumstances could fall within the terms 'exigent circumstances'. . . ."[102] The difficulty with such a rule arises in its application to the facts of any particular case. Therein lies the opportunity for lower courts to justify warrantless searches of murder scenes under an existing doctrine recognized by the Supreme Court. While some lower courts emphasize the reasonableness of the search given the exigencies of the situation, other courts have refused to examine the reasonableness question when the practicability of obtaining a warrant is evident.[103]

The emergency exception, a subcategory of the exigency rule, allows police to enter and search the premises without a warrant when police have reason to believe that an unnatural death has occurred or may occur.[104] The emergency exception supports the case for a homicide scene exception. In the typical emergency situation, the police will enter a home in response to a report of a dead body or injured person. The entry, as well as any search for the reported victim, is justified by the emergency

[99] 335 U.S. 451 (1948).

[100] *Id.* at 456 (emphasis added).

[101] Camara v. Municipal Court, 387 U.S. at 536–37.

[102] Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 860 (1963).

[103] *See* State v. Williams, 192 Colo. 249, 557 P.2d 399 (1976) (en banc). *See also* note 42 *supra*.

[104] Mincey v. Arizona, 437 U.S. at 392.

exception.[105] The exception also will support an additional search for other victims or perpetrators. Even though such a search must be limited only to a search for persons and does not justify looking in areas where a person could not be, any other evidence out in the open can be seized under the plain view doctrine.[106] Consequently, if the police receive a report of a body at a certain residence, they are able, without a warrant, to enter the premises, conduct a search for the body, conduct a further search for other victims or suspects, and seize any evidence in plain view during any of these searches. In such cases, the police are apt to find the murder weapon during the search if it is still on the premises. Therefore, in many cases involving a murder in a dwelling, there is no need to rely on any homicide scene exception, because the critical evidence will be found pursuant to existing exceptions. Since the homicide scene is being searched to a large degree already, there is very little further sacrifice of fourth amendment protection in creating a full, homicide scene exception to the warrant requirement.

In some cases, the need to search a homicide scene thoroughly may be justified by invoking the exigent circumstances exception for evidence that is being destroyed, might be destroyed, or might be moved out of the jurisdiction.[107] In many cases this exception involves a search for the suspect because he is the only person likely to destroy or remove evidence, but this is not always the case. As the Supreme Court noted in the administrative search case of *Michigan v. Tyler*:[108] "Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction."[109] The concern for possible destruction of evidence noted in *Tyler* applies only to administrative searches of fire scenes for the causes thereof. In criminal cases, however, the Court is much stricter. For example, in *United States v. Johnson*,[110] the Court forbade officers to enter a room where opium was detected, even though the evidence was literally going up in smoke.[111] If and when the Court is ready to follow the lead of lower courts[112] and sanction a search upon possible destruction of evidence in a criminal case, the door may be opened to more extensive homicide scene searches.

The exigency exception for easily destroyed evidence was given an enlarged scope in *People v. Superior Court*.[113] There, police conducted a warrantless search of the premises where a murder reportedly occurred. Because the owner of the premises was not in custody, the police feared that the evidence would be destroyed before a warrant could be obtained. The court supported this warrantless action: "In these circumstances we consider it both the right and the duty of the police, in the interest of society and of potential suspects, to conduct a prompt and diligent investigation at the scene of the homicide for clues to its cause and its perpetrator."[114] Although the *Superior Court* decision conflicts with previous Supreme Court decisions,[115] it still evidences an attempt to extend the permissible scope of a homocide scene search.

Whether the warrant clause or the reasonableness clause of the fourth amendment is the ultimate standard in determining the applicability of one of the warrant exceptions,[116] it is clear that some subjective consideration of the circumstances must be taken into account in each case.[117] Any time the facts and circumstances are taken into account, there is much room for extending any given exception beyond its present limits. Indeed, this has been the result in a number of cases. In *People v. Sirhan*,[118] the court extended the emergency exception to include public emergencies. There the police conducted a warrantless search of the apartment of Robert Kennedy's assassin soon after the murder. The California Supreme Court affirmed the validity of the search on the theory of a "public emergency" in the wake of the assassination because it was in the public interest to quell any rumors of a conspiracy to kill a number of political leaders.[119] Similarly, in *United States v. Melville*[120] police cap-

[105] *Id.*

[106] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443.

[107] *See, e.g.*, Michigan v. Tyler, 436 U.S. 499 (arson investigation); Schmerber v. California, 384 U.S. 757 (blood sample). *Cf.* Johnson v. United States, 333 U.S. 10 (odor of burning opium).

[108] 436 U.S. 499.

[109] *Id.* at 510. *Tyler* was an administrative search case, and the fire scene was a unique situation calling for the "easily destroyed evidence" exception.

[110] 333 U.S. 10. *See also* Vale v. Louisiana, 399 U.S. 30.

[111] Johnson v. United States, 333 U.S. 10, 15 (1948).

[112] *See, e.g.*, cases listed in note 4 *supra*.

[113] 41 Cal. App. 3d 636, 116 Cal. Rptr. 24 (1974).

[114] *Id.* at 641, 116 Cal. Rptr. at 27.

[115] *See* Vale v. Louisiana, 399 U.S. 30 (narcotics raid); Johnson v. United States, 333 U.S. 10 (narcotics raid).

[116] *See* note 49 *supra*.

[117] The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

[118] 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972) (en banc).

[119] *Id.* at 739, 497 P.2d at 1140, 102 Cal. Rptr. at 404.

[120] 309 F. Supp. 829 (S.D.N.Y. 1970).

tured a suspect in connection with a rash of bombings in New York City. The court upheld a warrantless search of the defendant's dwelling on the theory that an emergency existed since more bombs might be planted somewhere and immediate detection was imperative.[121] Neither the *Sirhan* nor the *Melville* searches were for wounded victims or suspects on the premises, as is usually required in an emergency search.[122] Nevertheless, those courts used the nomenclature of "emergency" to justify the searches. Although these were not searches of homicide scenes, the doctrines supporting the searches could be employed to extend the present boundaries of a homicide scene search.

The emergency exception doctrine was extended differently in *Brown v. Jones*.[123] In *Brown*, police responded to an emergency call, entered a house, and found a body. They searched further and found bloody clothes in a hamper. The clothes led to the conviction of the victim's son. In upholding the search, the court emphasized the necessity for quick action: "Time was of the essence in this case since the unknown assailant might be fleeing further away with every passing moment, and possible evidence leading to identification might be laying at hand."[124] This type of evidentiary search could easily pass Supreme Court scrutiny as a narrow homicide scene exception, since the only known occupant was dead, and the fourth amendment "protects people not places."[125] This type of evidentiary search constitutes another possible extension of the present scope of homicide scene searches.

The expansion of existing exceptions relate to the homicide scene exception in two ways. First, they indicate that should the Supreme Court be unwilling to recognize even a limited homicide scene exception, then the lower courts will employ the existing exceptions to ameliorate the harsh results of existing doctrine. Second, as the lower courts continue their expansion of the homicide scene doctrine by alternate means, the Supreme Court may be convinced to examine the wisdom of its views concerning the homicide scene exception. According to one commentator, the results in warrant exception cases have been much more reasonable than the Supreme Court's language would suggest, indicating that the "well-delineated exceptions" principle is a myth.[126] Perhaps it would require only a small impetus for the Court to expressly create such a homicide scene exception.

VI. Conclusion

The law concerning warrantless searches has always fluctuated. Before *Mincey*, this was especially true of warrantless searches of dwellings where a murder had been committed. Despite contrary Supreme Court opinions in this area, for at least ten years prior to *Mincey*, some state and lower federal courts expanded existing exceptions to the warrant requirement. Lower courts upheld homicide scene searches based upon rationales of the "inherent duty" of police to search a murder scene, the use of "legitimate investigative procedures," and general notions of reasonableness. The sheer number of these cases suggested the presence of a vacuum in this area of fourth amendment theory. In filling that vacuum, the lower courts failed to establish a "well-delineated" exception as required by the Supreme Court. However, the Court encouraged this process by foregoing opportunities to review those lower court decisions. As a result of the Court's inaction, a line of lower court cases rested upon the same reasoning and analysis.

The *Mincey* Court appeared to resolve the issue when it refused to recognize the creation of a homicide scene exception by the Arizona courts. There were indications in the *Mincey* opinion, however, that suggested that the egregious nature of the search involved was the main determinative factor in the Court's reversal, rather than the attempted establishment of the exception by the Arizona court. Such was the conclusion of the Missouri Supreme Court in *Epperson*, which distinguished *Mincey* solely on the basis of the outrageous search involved there.

While the Supreme Court may not sanction any search justified as a homicide scene exception, the doctrine will not atrophy, because of its close relationship with the exigent circumstances exceptions. The homicide scene exception grew out of the inadequacies of the existing exceptions. If not allowed a place as a recognized exception in its own right, it will continue to surface as an extended emergency search or as a search to preserve easily destroyed evidence. The *Mincey* decision may have slowed the growth of the homicide scene exception but by no means has it resolved the issue.

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[121] *Id.* at 831.

[122] *See* Mincey v. Arizona, 437 U.S. at 392.

[123] 407 F. Supp. 686 (W.D. Tex. 1974), *rev'd on other grounds*, 489 F.2d 1040 (5th Cir. 1974).

[124] *Id.* at 691.

[125] Katz v. United States, 389 U.S. at 351.

[126] Haddad, *supra* note 2, at 199.