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Warrantless Murder Scene Searches in the Aftermath of Mincey v. Arizona

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WARRANTLESS MURDER SCENE SEARCHES IN THE AFTERMATH OF *MINCEY v. ARIZONA*

In a series of cases culminating in *State v. Mincey*,[1] the Supreme Court of Arizona developed a "murder scene search exception" to the fourth amendment's warrant requirement.[2] Within broadly defined limits, the exception permitted warrantless searches at murder scenes[3] and locations of serious personal injury where foul play was suspected. Only Arizona explicitly attempted to fashion a specific murder scene search exception. Considerable case law from other jurisdictions, however, implicitly supports a general murder scene search exception.[4] In

1. State v. Mincey, 115 Ariz. 472, 566 P.2d 273 (1977), *rev'd and remanded sub nom.* Mincey v. Arizona, 437 U.S. 385 (1978).

2. U.S. CONST. amend. IV reads:

> 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.

Warrantless searches are "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). *See* Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). The Supreme Court has recently phrased this requirement in less absolute language. *See* Arkansas v. Sanders, 442 U.S. 753, 758 (1979) ("[T]his Court has interpreted the amendment to include the requirement that normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause."); Torres v. Puerto Rico, 442 U.S. 465, 471 (1979) ("[A] warrant is normally a prerequisite to a search unless exigent circumstances make compliance with this requirement impossible.").

There are numerous recognized exceptions to the warrant requirement. *See, e.g.,* United States v. Ramsey, 431 U.S. 606 (1977) (border search of first class letter mail); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search of automobile); United States v. Matlock, 415 U.S. 164 (1974) (third party consent search); United States v. Robinson, 414 U.S. 218 (1973) (search incident to custodial arrest); Almedia-Sanchez v. United States, 413 U.S. 266 (1973) (border search); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent search); Chambers v. Maroney, 399 U.S. 42 (1970) (search of moving vehicle); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Harris v. United States, 390 U.S. 234 (1968) (seizure of evidence in plain view); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit of fleeing suspect); Cooper v. California, 386 U.S. 58 (1967) (inventory search of automobile); Schmerber v. United States, 384 U.S. 757 (1966) (prevention of loss or destruction of evidence); United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) (airport searches). *See generally* Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause,* 68 J. CRIM. L.C. & P.S. 198 (1977) (arguing that exceptions to the warrant requirements are neither few nor well-delineated).

3. "Murder scene," in this note, refers to the general location where a murdered or severely wounded victim is found. Thus, when a victim is discovered in one room of a house, the "murder scene" encompasses the entire premises as well as the particular room.

4. *See* notes 15-52 *infra* and accompanying text.

Mincey v. Arizona,[5] the United States Supreme Court found Arizona's exception inconsistent with the fourth amendment.[6] *Mincey,* however, is factually atypical.[7] The case presents perhaps the least favorable record possible for sanctioning a warrantless murder scene search. Consequently, *Mincey*'s impact on the prior case law from other jurisdictions is uncertain.

Section I of this Note, in three parts, examines pre-*Mincey* murder scene search case law. Part A details the cases establishing implicit murder scene exceptions to the warrant requirement. Part B concerns the minority view, pre-*Mincey,* which more strictly enforced the warrant requirement. Part C reviews the emergence of Arizona's murder scene exception in the cases leading to *Mincey*. Section II, also in three parts, discusses *Mincey* itself: first, the treatment of the case by the Arizona Supreme Court, next, the reasoning of the United States Supreme Court, and third, the applicability of other warrant requirement exceptions to the facts of the case. Analyzing *Mincey's* impact on both prior and subsequent case law, Section III first considers the implications of *Michigan v. Tyler,*[8] an apparently inconsistent case decided just three weeks before *Mincey*. Parts B and C discuss the tensions between *Mincey* and *Tyler* in the context of the two principal issues presented by a murder scene search exception case—the basis for initial entry and the scope of the subsequent search. Part C concludes with a suggestion for reconciling *Tyler* and *Mincey*. Finally, Part D briefly discusses the possibility of *Mincey* as an obstacle to the issuance of search warrants to investigate murder scenes.

I. PRE-*MINCEY* MURDER SCENE SEARCH CASES

A. *Stretching the Emergency Exception: The Majority View*

Warrantless murder scene searches confront courts with two primary issues: (1) Is there any basis for the initial warrantless entry?[9] (2) Did the investigation at the murder scene exceed the allowable scope of a

5. 437 U.S. 385 (1978).

6. *Id.* at 395.

7. *See* note 259 *infra* and accompanying text.

8. 436 U.S. 499 (1978).

9. If the initial entry to the premises is illegal, subsequent seizures are also invalid. Thus, the entry issue can be dispositive of the search's validity. *See* Wong Sun v. United States, 371 U.S. 471, 479-87 (1963).

warrantless search following a legitimate emergency entry?[10] To sanction initial warrantless entry, pre-*Mincey* courts relied most frequently on an emergency doctrine.[11] The most common fact pattern presented by these cases comprises reports of homicide,[12] suicide,[13] or serious vio-

10. A search lawful at its inception may become invalid if it exceeds its allowable scope. *See* State v. Pires, 55 Wis. 2d 597, 605-06, 201 N.W.2d 153, 157-58 (1972).

11. Other than consent searches, all exceptions to the warrant requirement derive from a pragmatic recognition that exigent circumstances sometimes demand warrantless action. *See* McDonald v. United States, 335 U.S. 451, 455-56 (1948); note 2 *supra*. It is only recently, however, that the Supreme Court has recognized a specific "emergency" exception. *See* Mincey v. Arizona, 437 U.S. 385, 392-93 (1978); Michigan v. Tyler, 436 U.S. 499, 509 (1978). Despite the absence of a Supreme Court definition, lower courts employed an "emergency" exception to sanction warrantless entry and search. *See, e.g.*, Wayne v. United States, 318 F.2d 205 (D.C. Cir.) (Burger, J.), *cert. denied*, 375 U.S. 860 (1963); People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956). *See generally* Bacigal, *The Emergency Exception to the Fourth Amendment*, 9 U. RICH. L. REV. 249 (1975); Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFF. L. REV. 419 (1973); Note, *The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment*, 43 FORDHAM L. REV. 571 (1975).

Mascolo defines the emergency exception as follows:

> Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search.

Mascolo, *supra* at 426.

12. *See* United States v. Keeble, 459 F.2d 757, 759 (8th Cir. 1972); Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); Pope v. State, 367 So. 2d 998, 1000 (Ala. Crim. App. 1979); Retowsky v. State, 333 So. 2d 193, 195 (Ala. Crim. App. 1976); Knight v. State, 50 Ala. App. 39, 41, 276 So. 2d 624, 626 (1973); Stevens v. State, 443 P.2d 600, 602 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); State v. Sample, 107 Ariz. 407, 408, 489 P.2d 44, 45 (1971); People v. Superior Court, 41 Cal. App. 3d 636, 639, 116 Cal. Rptr. 24, 25 (1974); People v. Williams, 557 P.2d 399, 401 (Colo. 1976); Patrick v. State, 227 A.2d 486, 488 (Del. 1967); People v. Lovitz, 39 Ill. App. 3d 624, 626, 350 N.E.2d 276, 277-78 (1976); People v. Johnson, 32 Ill. App. 3d 36, 38, 335 N.E.2d 144, 147 (1975); Maxey v. State, 251 Ind. 645, 647-48, 244 N.E.2d 650, 652 (1969); State v. Lewisohn, 379 A.2d 1192, 1197 (Me. 1977); Fellows v. State, 13 Md. App. 206, 207-08, 283 A.2d 1, 2 (1972); State v. Thompson, 273 Minn. 1, 10-11, 139 N.W.2d 490, 499, *cert. denied*, 385 U.S. 817 (1966); State v. Sutton, 454 S.W.2d 481, 483 (Mo. 1970); State v. Gosser, 50 N.J. 438, 442-43, 236 A.2d 377, 379 (1967), *cert. denied*, 390 U.S. 1035 (1968); People v. Hodge, 44 N.Y.2d 553, 555-56, 378 N.E.2d 99, 100, 406 N.Y.S.2d 736, 737 (1978); People v. Danziger, 41 N.Y.2d 1092, 1092-93, 364 N.E.2d 1125, 1126, 396 N.Y.S.2d 354, 354-55 (1977); People v. Neulist, 43 A.D.2d 150, 151-52, 350 N.Y.S.2d 178, 180 (1973); Tocher v. State, 501 S.W.2d 921, 922 (Tex. Crim. App. 1973); Hunter v. State, 496 S.W.2d 44, 44-45 (Tex. Crim. App. 1973); Corbett v. State, 493 S.W.2d 940, 943 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938, 942 (Tex. Crim. App. 1971); Parsons v. State, 160 Tex. Crim. 387, 389-90, 271 S.W.2d 643, 646, *cert. denied*, 348 U.S. 837 (1954); State v. Oakes, 129 Vt. 241, 245-46, 276 A.2d 18, 21, *cert. denied*, 404 U.S. 965 (1971); Kelly v. State, 75 Wis. 2d 303, 307-08, 249 N.W.2d 800, 803 (1977); State v. Pires, 55 Wis. 2d 597, 600-01, 201 N.W.2d 153, 155 (1972); State v. Davidson, 44 Wis. 2d 177, 183, 170 N.W.2d

lence.[14] Courts also have included under the emergency doctrine less immediately dramatic circumstances that turned out, after police arrival, to demand urgent action.[15] Whenever it was remotely possible for police to reasonably believe that warrantless entry was necessary to save or protect life, courts invoked the emergency doctrine.[16] Even

755, 758 (1969); State v. Hoyt, 21 Wis. 2d 284, 290, 128 N.W.2d 645, 648 (1964); Lonquest v. State, 495 P.2d 575, 577 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972).

13. *See* State v. Duke, 110 Ariz. 320, 322, 518 P.2d 570, 572 (1974); Allen v. State, 536 S.W.2d 364, 368 (Tex. Crim. App. 1976).

14. *See* United States v. Goldenstein, 456 F.2d 1006, 1010 (8th Cir. 1972); People v. Hill, 12 Cal. 3d 731, 742, 528 P.2d 1, 10-11, 117 Cal. Rptr. 393, 402 (1974); People v. King, 54 Ill. 2d 291, 294-95, 296 N.E.2d 731, 734 (1973); State v. Brothers, 4 Or. App. 253, 254, 478 P.2d 442, 443 (1970).

15. Webster v. State, 201 So. 2d 789, 790-91 (Fla. Dist. Ct. App. 1967) (court found legitimate emergency search when police went to defendant's home to inform anyone there that defendant had been rescued from suicide and were unable to get any response from a person whose feet they could see through window); Davis v. State, 236 Md. 389, 392-93, 204 A.2d 76, 78-79 (1964) (discovering a body in the back yard of defendant's house and a trail of blood leading from the body to the house, police looked through a window, saw a person's feet, were unable to arouse that person, and forcibly entered); Geary v. State, 91 Nev. 784, 787-88, 544 P.2d 417, 420 (1975) (arresting defendant when he came to the door of his apartment, police noticed a bloodstain on the rug inside, entered and searched, observing more blood, bloody clothing, and bedding); State v. Sanders, 8 Wash. App. 306, 307-08, 506 P.2d 892, 894 (1973) (responding to an emergency call, police arrived, observed a person within the premises in obvious distress, failed to attract person's attention to gain entry, and entered).

Some courts have held that the possibility that the murderer might still be at large in the area of the murder scene was sufficient to permit warrantless entry. United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972) (responding to report of violent fight in a hotel, police arrived, found victim severely wounded, and received information that victim's companion had fled upstairs); Fellows v. State, 13 Md. App. 206, 283 A.2d 1 (1971) (police arrived and found victim lying in pool of blood and bloody footprints leading upstairs); People v. Hodge, 44 N.Y.2d 553, 378 N.E.2d 99, 406 N.Y.S.2d 736 (1978) (responding to report of fatal stabbing, police found bloodstains in snow outside an apartment building, found a bloody trail leading into the building, received reports from neighbors of fight in defendant's apartment, and entered defendant's apartment with a passkey).

16. It appears that only one court has held that the initial entry violated the fourth amendment. Root v. Gauper, 438 F.2d 361, 365 (8th Cir. 1971). Police, however, learned before entry that the victim had been removed by an ambulance driver and that there was no one else in the house. *Id.* Reports of a homicide, suicide, or serious violence, *see* notes 11-14 *supra,* are perhaps self-evident emergencies. This was the attitude of then Judge Burger in Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

> [T]he business of policemen and firemen is *to act,* not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response.

Id. (emphasis in original) (Burger, J., concurring).

Some courts held that entry was valid under the "emergency" exception, *see* note 11 *supra. See* People v. Hill, 12 Cal. 3d 731, 755-56, 528 P.2d 1, 20, 117 Cal. Rptr. 393, 412 (1974); People v. Eckstrom, 43 Cal. App. 3d 996, 1003-04, 118 Cal. Rptr. 391, 396 (1974); Patrick v. State, 227 A.2d

when police did not enter the murder scene premises immediately upon arrival, courts found the procrastinated entry valid under the emergency doctrine.[17]

486, 489 (Del. 1976); Webster v. State, 201 So. 2d 789, 792 (Fla. Dist. Ct. App. 1967); Maxey v. State, 251 Ind. 645, 650, 244 N.E.2d 650, 653 (1969); Davis v. State, 236 Md. 389, 395, 204 A.2d 76, 80 (1964), *cert. denied*, 380 U.S. 966 (1965); State v. Hardin, 90 Nev. 10, 12, 518 P.2d 151, 153 (1974); People v. Hodge, 44 N.Y.2d 553, 556-57, 378 N.E.2d 99, 101, 406 N.Y.S.2d 736, 737-38 (1978); State v. Sanders, 8 Wash. App. 306, 310-12, 506 P.2d 892, 896 (1973).

Other courts did not follow the "exception" analysis, *see* note 1 *supra,* but instead ruled that the emergency made the entry reasonable. *See* United States v. Keeble, 459 F.2d 757, 762 (8th Cir. 1972); United States v. Goldenstein, 456 F.2d 1006, 1011 (8th Cir. 1972); Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); Stevens v. State, 443 P.2d 600, 602 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); People v. King, 54 Ill. 2d 291, 300, 296 N.E.2d 731, 736 (1973); People v. Lovitz, 39 Ill. App. 3d 624, 630, 350 N.E.2d 276, 279 (1976); People v. Clayton, 34 Ill. App. 3d 376, 378-79, 339 N.E.2d 783, 784-85 (1975); People v. Brooks, 7 Ill. App. 3d 767, 776-77, 289 N.E.2d 207, 213-14 (1972); Wilson v. State, 247 Ind. 454, 458-59, 217 N.E.2d 147, 150 (1966); State v. Lewisohn, 379 A.2d 1192, 1197-1201 (Me. 1977); State v. Gosser, 50 N.J. 438, 444-45, 236 A.2d 377, 381-82 (1967), *cert. denied*, 390 U.S. 1035 (1968); People v. Mitchell, 39 N Y.2d 173, 177-80, 347 N.E.2d 607, 609-11, 383 N.Y.S.2d 246, 248-50, *cert. denied*, 426 U.S. 953, (1976); Hunter v. State, 496 S.W.2d 44, 45 (Tex. Crim. App. 1973); Corbett v. State, 493 S.W.2d 940, 945-48 (Tex. Crim. App. 1973); State v. Oakes, 129 Vt. 241, 250-51, 276 A.2d 18, 25 (alternative holding), *cert. denied*, 404 U.S. 965 (1971); State v. Pires, 55 Wis. 2d 597, 604, 201 N.W.2d 153, 157 (1972); State v. Davidson, 44 Wis. 2d 177, 194, 170 N.W.2d 755, 764-65 (1969); State v. Hoyt, 21 Wis. 2d 284, 295-97, 128 N.W.2d 645, 651-52 (1964).

One court relied on the "hot pursuit" doctrine to sanction warrantless entry. Fellows v. State, 13 Md. App. 206, 208-10, 283 A.2d 1, 3 (1971). *See* Warden v. Hayden, 387 U.S. 294 (1967).

Two Alabama courts held that report of a homicide and the police officers' observations at the scene on arrival established probable cause to make a warrantless entry, which, when coupled with statutory authority to make a warrantless entry to effect a felony arrest, justified the subsequent search. *See* Pope v. State, 367 So. 2d 998, 1001 (Ala. Crim. App. 1979); Retowsky v. State, 333 So. 2d 193, 199 (Ala. Crim. App. 1976).

In several cases, the court did not discuss the legitimacy of the initial entry although facts and circumstances sufficient to bring the entry within the emergency doctrine appeared in the record. *See* Stevens v. State, 443 P.2d 600, 601-03 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); People v. Superior Court, 41 Cal. App. 3d 636, 638-41, 116 Cal. Rptr. 24, 25-27 (1974); People v. Wallace, 31 Cal. App. 3d 865, 866-71, 107 Cal. Rptr. 659, 659-62 (1973); People v. Williams, 557 P.2d 399, 401-05 (Colo. 1976); People v. Johnson, 32 Ill. App. 3d 36, 40-41, 335 N.E.2d 144, 148-49 (1975); State v. Chapman, 250 A.2d 203, 210 (Me. 1969); Brown v. State, 475 S.W.2d 938, 948-50 (Tex. Crim. App. 1971).

17. *See* People v. Clayton, 34 Ill. App. 3d 376, 377-79, 329 N.E.2d 783, 784-85 (1975). The victim's mother reported her as missing and also reported the threatening behavior of the victim's estranged husband. Police went to defendant-husband's apartment but received no response to their knocks although they did hear some movement inside the apartment. Police then returned to the mother's apartment but brought her back with them to defendant's apartment when they discovered that she had a key to defendant's apartment. Using this key, they entered and searched. The court held this entry valid under the emergency doctrine. *Id.*

State v. Sutton, 454 S.W.2d 481, 483 (Mo. 1970). After arriving at the scene, the first arriving police officer, who already knew that an ambulance driver had removed the victim to a hospital

Often it was the eventual defendant who notified police of the homicide[18] or admitted police[19] to the murder scene. Courts in these cases

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and had reported that no one else was in the house, waited for the sheriff to arrive before entering. The court used the emergency doctrine to find the entry reasonable. *Id.*

State v. Gosser, 50 N.J. 438, 442-43, 236 A.2d 377, 379-80 (1967), *cert. denied*, 390 U.S. 1035 (1968). In response to the first arriving police officer's knock, defendant answered the door appearing groggy, crying, and wearing blood-caked pajamas. Defendant told this officer that he had killed his wife. The officer then went back to his patrol car and radioed for help. While waiting for the other officers to arrive, he kept watch outside the house. After the additional officers arrived, they knocked again at the front door. When defendant appeared at the door, the officers asked what had happened and where the victim's body was located. Only after defendant answered did police enter. The court found exigent circumstances to be one basis for the entry and search. *Id.* at 443-44, 236 A.2d at 381-82.

Corbett v. State, 493 S.W.2d 940, 943-44 (Tex. Crim. App. 1973). Police were initially alerted to the homicide at approximately 3:00 a.m. After some preliminary investigation at defendant's residence, police first entered the house and discovered the victim's body sometime before 6:30 a.m. At 10:30 a.m. they again entered, accompanied by a district attorney, observed the body, and departed. In the early afternoon, after defendant's arrest, police made a third entry and searched the house. All entries were warrantless. The court found that this last warrantless entry was within the rationale of the emergency doctrine. *Id.* at 945-48.

Two cases concern searches in hotels. In State v. Hardin, 90 Nev. 10, 518 P.2d 151 (1974), a murder victim was found in Room 83. After two and one-half hours of investigation and several attempts to rouse the occupant of Room 82, police used a passkey to enter the room and discovered defendant with evidence. *Id.* at 12, 518 P.2d at 152. The court found the entry valid under the emergency doctrine. *Id.* at 13, 518 P.2d at 152-55. The cause of the search in People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, *cert. denied*, 426 U.S. 953 (1976), was a missing hotel chambermaid. Helping the management of the hotel make several progressively more thorough searches, police entered defendant's room with a passkey and observed a reddish brown stain on the rug. Prompted to search further, they found the maid's butchered body in a closet. *Id.* at 175, 347 N.E.2d at 608, 383 N.Y.S.2d at 247. The court held that the entry was valid under the emergency doctrine. *Id.* at 177-80, 347 N.E.2d at 609-11, 383 N.Y.S.2d at 248-50.

People v. Brooks, 7 Ill. App. 3d 767, 289 N.E.2d 207 (1972), further indicates the pragmatic and expansive application of the pre-*Mincey* emergency doctrine. An apartment building manager and janitor reported smelling the odor of decomposing flesh. They also reported that one occupant of the building had been missing for some time under unusual circumstances. The court found that police entry into the apartment shared by the victim and defendant was a legitimate emergency entry because the odor could have been caused by the rotting flesh of a living person. *Id.* at 775-77, 289 N.E.2d at 213-14.

The court in Condon v. People, 176 Colo. 212, 489 P.2d 1297 (1971), took a contrary position. In declining to find a legitimate emergency entry, the court might have been influenced by the fact that the supposed smell of death turned out to be the odor of brewing mescaline. *Id.* at 214-15, 489 P.2d at 1298. The court held that the detection of an odor which might be that of a decomposing body does not create, in and of itself, an emergency sufficient to justify a warrantless search. *Id.* at 218-19, 489 P.2d at 1300.

The court in State v. Epperson, 571 S.W.2d 260 (Mo. 1978), a post-*Mincey* case, mentioned the smell of death as one factor in justifying forcible entry under the emergency doctrine. *Id.* at 263-69. *See* notes 186-90 *infra* and accompanying text.

18. Knight v. State, 50 Ala. App. 39, 41, 276 So. 2d 624, 626 (1973); State v. Duke, 110 Ariz. 320, 322, 518 P.2d 570, 572 (1974); People v. Wallace, 31 Cal. App. 3d 865, 865, 107 Cal. Rptr. 659,

sometimes held that a defendant thus consented to warrantless entry[20] or search or both.[21] Courts also found consent to enter and search if defendant initiated police investigation by contacting a third party who in turn notified police.[22] In addition, courts inferred consent to enter and search from defendants' cooperation with police or from their failure to object to the police investigation.[23]

A finding that a search was consensual also provides the basis for the second primary issue raised by a warrantless search, the permissible

659 (1973); People v. Danziger, 41 N.Y.2d 1092, 1092-93, 364 N.E.2d 1125, 396 N.Y.S.2d 354, 354-55 (1977); Allen v. State, 536 S.W.2d 364, 368 (Tex. Crim. App. 1976); Tocher v. State, 501 S.W.2d 921, 922 (Tex. Crim. App. 1973); State v. Oakes, 129 Vt. 241, 245-46, 276 A.2d 18, 21, *cert. denied*, 404 U.S. 965 (1971).

19. Knight v. State, 50 Ala. App. 39, 42, 276 So. 2d 624, 627 (1973); State v. Duke, 110 Ariz. 320, 322, 518 P.2d 570, 572 (1974); State v. Sample, 107 Ariz. 407, 408, 489 P.2d 44, 45 (1971); People v. Wallace, 31 Cal. App. 3d 865, 865, 107 Cal. Rptr. 659, 659 (1973); State v. Gosser, 50 N.J. 438, 442-43, 236 A.2d 377, 379 (1967); *cert. denied*, 390 U.S. 1035 (1968); People v. Danziger, 41 N.Y.2d 1092, 1092-93; 364 N.E.2d 1125, 1126, 396 N.Y.S.2d 354, 354-55 (1977); Allen v. State, 536 S.W.2d 364, 368 (Tex. Crim. App. 1976); Tocher v. State, 501 S.W.2d 921, 922 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938, 942 (Tex. Crim. App. 1971).

20. *See* cases cited notes 18-19 *supra*.

21. Knight v. State, 50 Ala. App. 39, 42, 276 So. 2d 624, 627 (1973); State v. Gosser, 50 N.J. 438, 445-47, 236 A.2d 377, 381 (1967), *cert. denied*, 390 U.S. 1035 (1968); Allen v. State, 536 S.W.2d 364, 369-70 (Tex. Crim. App. 1976).

When justifying initial entry on the basis of consent, courts did not inevitably justify the subsequent search on the same basis. *See* State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974); People v. Wallace, 31 Cal. App. 3d 865, 107 Cal. Rptr. 659 (1973); People v. Neulist, 43 A.D.2d 150, 350 N.Y.S.2d 178 (1973); Tocher v. State, 501 S.W.2d 921 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971); State v. Oakes, 129 Vt. 241, 276 A.2d 18, *cert. denied*, 404 U.S. 965 (1971); Lonquest v. State, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972). For the rationale authorizing the search in these cases, see notes 44-48 *infra* and accompanying text.

Persons other than the defendant may give consent to search. "[A] third party who possess[es] common authority over or other sufficient relationship to the premises or effects sought to be inspected," may consent to search. United States v. Matlock, 415 U.S. 164, 171 (1974). In two cases, the court found third party consent. In People v. Swansey, 62 Ill. App. 3d 1015, 1016-18, 379 N.E.2d 1279, 1280-81 (1978), defendant's nine-year-old brother brought police into the house and gave them permission to search. *Id.* The court in People v. Neulist, 43 A.D.2d 150, 151, 153-54, 350 N.Y.S.2d 178, 180, 183 (1973), relied on consent given by defendant's 20-year-old son to justify the initial entry. *Id.*

22. Lonquest v. State, 495 P.2d 575, 576, 578 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972) (defendant called local telephone operator who notified police); Kelly v. State, 75 Wis. 2d 303, 308, 309-10, 249 N.W.2d 800, 803, 804 (1977) (defendant requested the neighbors call police).

In Parsons v. State, 160 Tex. Crim. 387, 389-91, 406, 271 S.W.2d 643, 646-47, 656 (1953), *cert. denied*, 348 U.S. 837 (1954) the court indicated that notice by defendant's attorney, who discovered the killing, notified police, and brought defendant to the police station, could be construed as consent to enter and search. *Id.*

23. *See* Brown v. Jones, 407 F. Supp. 686, 690-91 (W.D. Tex. 1974); Thompson v. McManus, 377 F. Supp. 589, 595 (D. Minn. 1974).

scope.[24] The nature and content of the consent determine the allowable scope.[25] Resolution of the scope issue was even more straightforward when police seized evidence in plain view following a valid entry to the murder scene,[26] because operation of the plain view exception obviated any need to consider allowable scope.[27] When a court is unable to rely on plain view or consent, however, the exigencies that justify initiation of a warrantless search establish the constitutional limits on its scope.[28] Pre-*Mincey* case law reveals three facets to the scope of

24. *See* note 9 *supra* and accompanying text.

25. *See* cases cited note 21 *supra. See generally* 2 W. LA FAVE, SEARCH AND SEIZURE 624-35 (1978).

In People v. Superior Court, 41 Cal. App. 3d 636, 638-41, 116 Cal. Rptr. 24, 25-27 (1974), defendant consented to a police search for the murder weapon by telling police where the weapon could be found. The court, however, did not find that other items seized at the same time were seized pursuant to a consent search, but found an alternative basis for the other seizures. *Id.*

In State v. Johnson, 14 Or. App. 49, 50-57, 511 P.2d 1258, 1259-62 (1973), defendant gave police permission to search his residence. The court construed this to mean "dwelling" which by statutory definition did not include defendant's garage, and declared the search of the garage invalid. *Id.*

In State v. Pires, 55 Wis. 2d 597, 609, 201 N.W.2d 153, 160 (1972), the court held that defendant's husband's call for an ambulance did not constitute consent to an unlimited warrantless search of the house. *Id.*

26. Stevens v. State, 443 P.2d 600, 602 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); People v. Hill, 12 Cal. 3d 731, 755, 528 P.2d 1, 20, 117 Cal. Rptr. 393, 412 (1974); People v. Eckstrom, 43 Cal. App. 3d 996, 1003-04, 118 Cal. Rptr. 391, 396 (1974); Patrick v. State, 227 A.2d 486, 489-90 (Del. 1967); Webster v. State, 201 So. 2d 789, 791-92 (Fla. Dist. Ct. App. 1967); People v. Lovitz, 39 Ill. App. 3d 624, 628, 350 N.E.2d 276, 281 (1976); People v. Clayton, 38 Ill. App. 3d 376, 379, 339 N.E.2d 783, 785 (1975); People v. Brooks, 7 Ill. App. 3d 767, 777, 289 N.E.2d 207, 214 (1972); State v. Oakes, 129 Vt. 241, 250-51, 276 A.2d 18, 25, *cert. denied*, 404 U.S. 965 (1971). *See also* Davis v. State, 236 Md. 389, 396-97, 204 A.2d 76, 81 (1964) (plain view basis for only some of the evidence seized), *cert. denied*, 380 U.S. 966 (1965); State v. Gosser, 50 N.J. 438, 445-47, 236 A.2d 377, 381 (1967), *cert. denied*, 390 U.S. 966 (1968) (plain view an alternative holding); State v. Davidson, 44 Wis. 2d 177, 194, 170 N.W.2d 755, 764 (1969) (plain view applied to only one of three searches).

27. The plain view exception does not apply until a search is already in progress and cannot, by itself, validate initial intrusion into a person's reasonable expectation of privacy. Plain view supplements prior justification for the search; therefore, officers must be searching under authority of a search warrant, consent, or another warrant clause exception. Coolidge v. New Hampshire, 403 U.S. 443, 466-67 (1971). The rule is that "objects falling in the plain view of an officer who has the right to be in that position to have that view are subject to seizure and may be introduced into evidence." Harris v. United States, 390 U.S. 234, 236 (1968). A plurality of the Supreme Court has taken the view that the plain view exception is restricted to inadvertent discoveries. Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971). *See* State v. O'Herron, 153 N.J. Super. 570, 380 A.2d 728 (1977), *cert. denied*, 439 U.S. 1032 (1978). *See generally* 1 W. LA FAVE, SEARCH AND SEIZURE 240-48 (1978).

28. Mincey v. Arizona, 437 U.S. 385, 393 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Terry v. Ohio, 392 U.S. 1, 25-26 (1968). *See also* Warden v. Hayden, 387 U.S. 294

a warrantless murder scene search: (1) initiation, the interval between police arrival and entry and the beginning of the search; (2) duration, the length of time that the search may continue; and (3) extent, the areas that may be searched. In general, the courts did not require that the search begin immediately after entry.[29] Often the first arriving officers were not competent to investigate the crime fully.[30] Similarly, some courts approved searches delayed until an autopsy report was available.[31] Nevertheless, in the majority of the pre-*Mincey* cases police initiated the search almost immediately after entry[32] and termi-

(1967). "[W]e have refused to permit use of articles the seizure of which could not be strictly tied to and justified by the exigencies which excused the warrantless search." *Id.* at 310 (Fortas, J., concurring).

29. *See* Stevens v. State, 443 P.2d 600, 602-03 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971); People v. Superior Court, 41 Cal. App. 3d 636, 639-41, 116 Cal. Rptr. 24, 25-27 (1974); State v. Lewisohn, 379 A.2d 1192, 1197 (Me. 1977); State v. Chapman, 250 A.2d 203, 210 (Me. 1969); People v. Neulist, 43 A.D.2d 150, 151-52, 350 N.Y.S.2d 178, 181 (1973); Tocher v. State, 501 S.W.2d 921, 922 (Tex. Crim. App. 1973); Corbett v. State, 493 S.W.2d 940, 946-47 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938, 948-50 (Tex. Crim. App. 1971); Parsons v. State, 160 Tex. Crim. 387, 390-91, 398-99, 406, 271 S.W.2d 643, 647, 651-52, 656 (1953), *cert. denied*, 348 U.S. 837 (1954); State v. Oakes, 129 Vt. 241, 245-53, 276 A.2d 18, 21-25, *cert. denied*, 404 U.S. 965 (1971); Lonquest v. State, 495 P.2d 575, 577 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972).

30. *See* Knight v. State, 50 Ala. App. 39, 41, 276 So. 2d 624, 626 (1973); Stevens v. State, 443 P.2d 600, 601-03 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); Geary v. State, 91 Nev. 784, 788-89, 544 P.2d 417, 420-21 (1975); People v. Neulist, 43 A.D.2d 150, 151-52, 350 N.Y.S.2d 178, 180-81 (1973); Tocher v. State, 501 S.W.2d 921, 922 (Tex. Crim. App. 1973).

31. *See* State v. Chapman, 250 A.2d 203, 206 (Me. 1969) (second, separate search made after autopsy results known); People v. Neulist, 43 A.D.2d 150, 151-52, 350 N.Y.S.2d 178, 181 (1973) (same).

32. *See* Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); Pope v. State, 367 So. 2d 998 (Ala. Crim. App. 1979); Retowsky v. State, 333 So. 2d 193 (Ala. Crim. App. 1976); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974); 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. Williams, 557 P.2d 339 (Colo. 1976); People v. King, 54 Ill. 2d 291, 296 N.E.2d 731 (1973); People v. Lovitz, 39 Ill. App. 3d 624, 350 N.E.2d 276 (1976); People v. Johnson, 32 Ill. App. 3d 36, 335 N.E.2d 144 (1975); People v. Brooks, 7 Ill. App. 3d 767, 289 N.E.2d 207 (1972); Maxey v. State, 251 Ind. 645, 244 N.E.2d 650 (1969); State v. Lewisohn, 379 A.2d 1192 (Me. 1977); Davis v. State, 236 Md. 389, 204 A.2d 76 (1964), *cert. denied*, 380 U.S. 966 (1965); State v. Epperson, 571 S.W.2d 260 (Mo. 1978); Geary v. State, 91 Nev. 784, 544 P.2d 417 (1976); People v. Hodge, 44 N.Y.2d 553, 378 N.E.2d 99, 406 N.Y.S.2d 736 (1978); People v. Neulist, 43 A.D.2d 150, 350 N.Y.S.2d 178 (1973); Allen v. State, 536 S.W.2d 364 (Tex. Crim. App. 1976); Tocher v. State, 501 S.W.2d 921 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971); State v. Oakes, 129 Vt. 241, 276 A.2d 18, *cert. denied*, 404 U.S. 965 (1971); Kelly v. State, 75 Wis. 2d 303, 249 N.W.2d 800 (1977); State v. Pires, 55 Wis. 2d 597, 201 N.W.2d 153 (1972); State v. Davidson, 44 Wis. 2d 177, 170 N.W.2d 755 (1969); State v. Hoyt, 21 Wis. 2d 284, 128 N.W.2d 645 (1964); Lonquest v. State, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972).

nated it within several hours.[33] It appears that the practical requirements of the particular investigation were the effective limits on the duration of warrantless murder scene searches in these pre-*Mincey* cases. Some courts evidenced this pragmatic approach by approving more than one warrantless search of the murder scene.[34] Often these courts characterized the separate searches as part of a continuous investigation,[35] even when the police neglected to maintain control over the murder scene premises during the nonsearch period.[36] The needs of

33. *See* United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972); Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); Pope v. State, 367 So. 2d 998 (Ala. Crim. App. 1979); Retowsky v. State, 333 So. 2d 193 (Ala. Crim. App. 1976); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974); People v. Hill, 12 Cal. 3d 731, 528 P.2d 1, 117 Cal. Rptr. 393 (1974); 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); People v. Lovitz, 39 Ill. App. 3d 624, 350 N.E.2d 276 (1976); People v. Johnson, 32 Ill. App. 3d 36, 335 N.E.2d 144 (1975); People v. Brooks, 7 Ill. App. 3d 767, 289 N.E.2d 207 (1972); Maxey v. State, 251 Ind. 645, 244 N.E.2d 650 (1969); State v. Lewisohn, 379 A.2d 1192 (Me. 1977); State v. Chapman, 250 A.2d 203 (Me. 1969); Davis v. State, 236 Md. 389, 204 A.2d 76 (1964), *cert. denied*, 380 U.S. 966 (1965); State v. Epperson, 571 S.W.2d 260 (Mo. 1978); State v. Sutton, 454 S.W.2d 481 (Mo. 1970); State v. Gosser, 50 N.J. 438, 236 A.2d 377 (1967), *cert. denied*, 390 U.S. 1035 (1968); People v. Hodge, 44 N.Y.2d 553, 378 N.E.2d 99, 406 N.Y.S.2d 736 (1978); People v. Danziger, 41 N.Y.2d 1092, 364 N.E.2d 1125, 396 N.Y.S.2d 354 (1977); Allen v. State, 536 S.W.2d 364 (Tex. Crim. App. 1976); State v. Pires, 55 Wis. 2d 597, 201 N.W.2d 153 (1972); State v. Hoyt, 21 Wis. 2d 284, 128 N.W.2d 645 (1964); Lonquest v. State, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972).

34. Knight v. State, 50 Ala. App. 39, 41-42, 276 So. 2d 624, 626-27 (1973); Stevens v. State, 443 P.2d 600, 601-03 (Alaska 1968), *cert. denied*, 394 U.S. 1039 (1969); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971); People v. Superior Court, 41 Cal. App. 3d 636, 638-41, 116 Cal. Rptr. 24, 25-27 (1974); State v. Chapman, 250 A.2d 203, 208 (Me. 1969); State v. Thompson, 273 Minn. 1, 18-25, 139 N.W.2d 490, 504-08, *cert. denied*, 385 U.S. 814 (1966); People v. Neulist, 43 A.D.2d 150, 154-56, 350 N.Y.S.2d 178, 183-85 (1973); Tocher v. State, 501 S.W.2d 921, 923-24 (Tex. Crim. App. 1973); Corbett v. State, 493 S.W.2d 940, 947-48 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938, 948-50 (Tex. Crim. App. 1971); State v. Oakes, 129 Vt. 241, 248-52, 276 A.2d 18, 23-25, *cert. denied*, 404 U.S. 965 (1971); State v. Sanders, 8 Wash. App. 306, 313, 506 P.2d 892, 897 (1973).

35. State v. Chapman, 250 A.2d 203, 210 (Me. 1969); People v. Neulist, 43 A.D.2d 150, 154-55, 350 N.Y.S.2d 178, 184 (1973); Tocher v. State, 501 S.W.2d 921, 924 (Tex. Crim. App. 1973); Corbett v. State, 493 S.W.2d 940, 947 (Tex. Crim. App. 1973); State v. Oakes, 129 Vt. 241, 276 A.2d 18, 25, *cert. denied*, 404 U.S. 965 (1971).

36. *See* Corbett v. State, 493 S.W.2d 940, 947 (Tex. Crim. App. 1973); State v. Oakes, 129 Vt. 241, 251-52, 276 A.2d 18, 25, *cert. denied*, 404 U.S. 965 (1971).

Other courts held that police departure from the murder scene did not necessitate the issuance of a warrant before further searches. *See* Stevens v. State, 443 P.2d 600, 601-03 (Alaska 1968); *cert. denied*, 393 U.S. 1039 (1969); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971); People v. Superior Court, 41 Cal. App. 3d 636, 638-41, 116 Cal. Rptr. 24, 25-27 (1974); Brown v. State, 475 S.W.2d 938, 948-50 (Tex. Crim. App. 1971); State v. Sanders, 8 Wash. App. 306, 313, 506 P.2d 892, 897 (1973). *But see* Sample v. Eyman, 469 F.2d 819, 822 (9th Cir. 1972);

the particular investigation also seem to be the effective limit on permissible extent of a pre-*Mincey* warrantless murder scene search. Courts sanctioned searches of areas beyond the room where the body was discovered,[37] of drawers,[38] wastebaskets,[39] papers,[40] closets,[41] and entire houses.[42]

These pragmatically established limits on the scope of warrantless

State v. Brothers, 4 Or. App. 253, 256-60, 478 P.2d 442, 444-45 (1970); Kelly v. State, 75 Wis. 2d 303, 314-16, 249 N.W.2d 800, 806-07 (1977); State v. Davidson, 44 Wis. 2d 177, 195-96, 170 N.W.2d 755, 765 (1969).

37. *See* Wayne v. United States, 318 F.2d 205, 208 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); Knight v. State, 50 Ala. App. 39, 41, 276 So. 2d 624, 626 (1973); Stevens v. State, 443 P.2d 600, 601 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); State v. Duke, 110 Ariz. 320, 322, 518 P.2d 570, 572 (1974); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 45-46 (1971); People v. Hill, 12 Cal. 3d 731, 742 n.8, 756 n.25, 528 P.2d 1, 11 n.8, 20 n.25, 117 Cal. Rptr. 393, 403 n.8, 412 n.25 (1974); People v. Superior Court, 41 Cal. App. 3d 636, 638-39, 116 Cal. Rptr. 24, 25 (1974); People v. Wallace, 31 Cal. App. 3d 865, 866-67, 107 Cal. Rptr. 659, 660 (1973); People v. King, 54 Ill. 2d 291, 300-01, 296 N.E.2d 731, 737 (1973); People v. Brooks, 7 Ill. App. 3d 767, 772-73, 289 N.E.2d 207, 210-11 (1972); State v. Chapman, 250 A.2d 203, 205-06 (Me. 1969); Davis v. State, 236 Md. 389, 393-94, 204 A.2d 76, 79-80 (1964), *cert. denied*, 380 U.S. 966 (1965); Fellows v. State, 13 Md. App. 206, 208-09, 283 A.2d 1, 3 (1971); State v. Gosser, 50 N.J. 438, 444-45, 236 A.2d 377, 380-81 (1967), *cert. denied*, 390 U.S. 1035 (1968); People v. Neulist, 43 A.D.2d 150, 151-52, 350 N.Y.S.2d 178, 180-81 (1973); Tocher v. State, 501 S.W.2d 921, 924 (Tex. Crim. App. 1973); Corbett v. State, 493 S.W.2d 940, 944 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938, 942 (Tex. Crim. App. 1971); Parsons v. State, 160 Tex. Crim. 387, 389-90, 271 S.W.2d 643, 646-47 (1953), *cert. denied*, 348 U.S. 837 (1954); State v. Sanders, 8 Wash. App. 306, 313, 506 P.2d 892, 897 (1973); Kelly v. State, 75 Wis. 2d 303, 308-09, 249 N.W.2d 800, 803 (1977); State v. Hoyt, 21 Wis. 2d 284, 297-98, 128 N.W.2d 645, 652 (1964); Lonquest v. State, 495 P.2d 575, 577 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972).

38. *See* Knight v. State, 50 Ala. App. 39, 41, 276 So. 2d 624, 626 (1973); People v. Superior Court, 41 Cal. App. 3d 636, 638-39, 116 Cal. Rptr. 24, 25 (1974); People v. Wallace, 31 Cal. App. 3d 865, 866-67, 117 Cal. Rptr. 659, 660 (1973); State v. Lewisohn, 379 A.2d 1192, 1197 (Me. 1977).

39. *See* State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 45-46 (1971); State v. Chapman, 250 A.2d 203, 205-06 (Me. 1969); People v. Neulist, 34 A.D.2d 150, 151-52, 350 N.Y.S.2d 178, 180-81 (1973).

40. *See* People v. Danziger, 41 N.Y.2d 1092, 1092-93, 364 N.E.2d 1125, 1126, 396 N.Y.S.2d 354, 354-55 (1977); Parsons v. State, 160 Tex. Crim. 387, 389-90, 271 S.W.2d 643, 646-47, *cert. denied*, 348 U.S. 837 (1954).

41. *See* Fellows v. State, 13 Md. App. 206, 208-09, 283 A.2d 1, 3 (1972); State v. Gosser, 50 N.J. 438, 444-45, 236 A.2d 377, 380-81 (1967), *cert. denied*, 390 U.S. 1035 (1968); Corbett v. State, 493 S.W.2d 940, 944 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938, 942 (Tex. Crim. App. 1971).

42. *See* State v. Duke, 110 Ariz. 320, 322, 518 P.2d 570, 572 (1974); People v. Superior Court, 41 Cal. App. 3d 636, 638-39, 116 Cal. Rptr. 24, 25 (1974); People v. Lovitz, 39 Ill. App. 3d 624, 626, 350 N.E.2d 276, 278 (1976); State v. Chapman, 250 A.2d 203, 205-06 (Me. 1969); People v. Neulist, 43 A.D.2d 150, 151-52, 350 N.Y.S.2d 178, 180-81 (1973); Tocher v. State, 501 S.W.2d 921, 924 (Tex. Crim. App. 1973); Corbett v. State, 493 S.W.2d 940, 944 (Tex. Crim. App. 1973); Brown v. State, 475 S.W.2d 938, 942 (Tex. Crim. App. 1971); Parsons v. State, 160 Tex. Crim. 387, 389-90, 271 S.W.2d 643, 646-47, *cert. denied*, 348 U.S. 837 (1954).

murder scene searches plainly exceeded the demands of any reasonable emergency-in-fact—the period during which police actually knew or reasonably believed that immediate action was necessary to save or protect lives or to apprehend a dangerous criminal.[43] Instead, these pre-*Mincey* courts adopted a murder scene search doctrine based on the notion that homicide creates a hyper-emergency[44] demanding special police responses.[45] To justify the expansive scope of warrantless murder scene searches, these courts posited a "right and duty" doctrine—a general right to investigate, implicit in the duty of a police officer and derived from the grave and heinous nature of homicide.[46]

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43. *But see* notes 71-82 *infra* and accompanying text.

44. *See* note 28 *supra* and accompanying text.

45. *See, e.g.,* Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

> But a warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.

Id. at 212 (Burger, J., concurring). Thompson v. McManus, 377 F. Supp. 589 (D. Minn. 1974).

> It is frivolous to claim that in such an emergency situation with an assaulted and dying lady on their hands and a cooperating husband standing by, the police would have to go to court for a warrant to search the premises of the very person who was just assaulted there.

Id. at 595; Corbett v. State, 493 S.W.2d 940 (Tex. Crim. App. 1973). "The report of a homicide or the existence of circumstances in which an unnatural death could have occurred can . . . constitute an emergency . . ." triggering a right and duty of police to make a warrantless entry. *Id.* at 946-47. State v. Sanders, 8 Wash. App. 306, 506 P.2d 892 (1973). "[T]he mere presence of the woman's body broadened the permissible scope of a search to as broad as may be reasonably necessary to ascertain why, how, and by whom the crime had been committed." *Id.* at 313, 506 P.2d at 897.

See generally W. LAFAVE, SEARCH AND SEIZURE 458-66 (1978); Haddad, *Arrest, Search and Seizure: Six Unexamined Issues in Illinois Law,* 26 DEPAUL L. REV. 492, 505-10 (1977). *See also* notes 46-47 *infra* and accompanying text.

46. *See* United States v. Birrell, 470 F.2d 113, 116 (2d Cir. 1972); Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.) (Burger, J., concurring), *cert. denied*, 375 U.S. 860 (1963); Brown v. Jones, 407 F. Supp. 686, 690-91 (W.D. Tex. 1974); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971); People v. Superior Court, 41 Cal. App. 3d 636, 640-41, 116 Cal. Rptr. 24, 26-27 (1974); People v. Wallace, 31 Cal. App. 3d 865, 868-72, 107 Cal. Rptr. 659, 661-62 (1973); People v. King, 54 Ill. 2d 291, 300-01, 296 N.E.2d 731, 737 (1973); People v. Johnson, 32 Ill. App. 3d 36, 44-45, 335 N.E.2d 144, 152 (1975); Maxey v. State, 251 Ind. 645, 649-51, 244 N.E.2d 650, 653-54 (1969); Wilson v. State, 247 Ind. 454, 456-59, 217 N.E.2d 147, 149-50 (1966); State v. Chapman, 250 A.2d 203, 206-12 (Me. 1969); State v. Sutton, 454 S.W.2d 481, 484-86 (Mo. 1970); State v. Hardin, 90 Nev. 10, 12-17, 518 P.2d 151, 152-55 (1974); People v. Danziger, 41 N.Y.2d 1092, 1092-94, 364 N.E.2d 1125, 1126-27, 396 N.Y.S.2d 354, 354-56 (1977); People v. Mitchell, 39 N.Y.2d 173, 177-80, 347 N.E.2d 607, 609-11, 383 N.Y.S.2d 246, 248-50, *cert. denied*, 426 U.S. 953 (1976); People v. Neulist, 43 A.D.2d 150, 153-56, 350 N.Y.S.2d 178, 182-85 (1973); Tocher v. State, 501 S.W.2d 921, 924-25 (Tex. Crim. App. 1973); Corbett v. State, 493 S.W.2d 940, 945-48 (Tex. Crim.

This duty compels prompt and thorough investigation of a homicide and supersedes the warrant requirement.[47] These courts' recognition of the special seriousness of homicide was evident in their application of the general "right and duty" doctrine even when justifications based on the consent[48] and plain view[49] exceptions were available. Courts in

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App. 1973); Brown v. State, 475 S.W.2d 938, 948-50 (Tex. Crim. App. 1971); State v. Sanders, 8 Wash. App. 306, 312-13, 506 P.2d 892, 896-97 (1973); Lonquest v. State, 495 P.2d 575, 578-79 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972).

47. *See, e.g.*, People v. Wallace, 31 Cal. App. 3d 865, 107 Cal. Rptr. 659 (1973).

> [T]he officers entered defendant's home in response to his own request for aid. They were confronted with a potential homicide, and defendant furnished them with conflicting and improbable explanations of his wife's condition. Under these circumstances, both common sense and good investigative procedures dictated that the police retain possession of the premises and conduct a prompt and diligent investigation to ascertain the cause of the victim's death.

Id. at 870-71, 107 Cal. Rptr. at 662. Wilson v. State, 247 Ind. 454, 217 N.E.2d 147 (1966).

> [I]t would be an absurd interpretation of the law to say that a police officer informed of a homicide, should first have to obtain a search warrant to visit the apartment or home where the victim of the killing lay dead. . . . In this case a man lay dead as a result of violence inflicted upon him in his own apartment. Any police officer who sees or is informed of such a condition has not only the right, but the duty, to make an instant and prompt investigation.

Id. at 458, 217 N.E.2d at 149-50. People v. Neulist, 43 A.D.2d 150, 350 N.Y.S.2d 178 (1973).

> [I]n dealing with a homicide the police should be accorded a greater leeway both in terms of the element of time and in the permissible scope of their investigation. In the context of this case, the police were not limited to an examination and search of the immediate area where the body was found (i.e., the bedroom). On the contrary, they had the right, indeed the duty, to examine the "crime scene," which should be deemed to include the entire house.

Id. at 156, 350 N.Y.S.2d at 185. Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971). "[Police] were admitted to the Brown home by the appellant and ascertained that homicides had been committed. Under these circumstances, it became the officers' duty to conduct a thorough investigation into the circumstances. Certainly this duty carried with it the right to inspect the premises." *Id.* at 949.

48. *See* Brown v. Jones, 407 F. Supp. 686, 690 (W.D. Tex. 1974); Knight v. State, 50 Ala. App. 39, 42, 276 So. 2d 624, 627 (1973); People v. Wallace, 31 Cal. App. 3d 865, 869-71, 107 Cal. Rptr. 659, 661-62 (1973); People v. Neulist, 43 A.D.2d 150, 156, 350 N.Y.S.2d 178, 185 (1973); Tocher v. State, 501 S.W.2d 921, 924 (Tex. Crim. App. 1973); State v. Oakes, 129 Vt. 241, 250-51, 276 A.2d 18, 24-25, *cert. denied*, 404 U.S. 965 (1971); Lonquest v. State, 495 P.2d 575, 578-79 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972).

49. *See* Stevens v. State, 443 P.2d 600, 602 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); Patrick v. State, 227 A.2d 486, 489 (Del. 1967); Webster v. State, 201 So. 2d 789, 791-92 (Fla. Dist. Ct. App. 1967); People v. Lovitz, 39 Ill. App. 3d 624, 628-31, 350 N.E.2d 276, 279-81 (1976); People v. Clayton, 34 Ill. App. 3d 376, 377-79, 329 N.E.2d 783, 784-85 (1975); People v. Brooks, 7 Ill. App. 3d 767, 775-77, 289 N.E.2d 207, 213-14 (1972); State v. Oakes, 129 Vt. 241, 251, 276 A.2d 18, 24, *cert. denied*, 404 U.S. 965 (1971).

Even when pre-*Mincey* courts did not explicitly rule that seized evidence was in plain view, but the evidence challenged by defendant's motion to suppress appeared from the court's presentation of the facts to have been in plain view when the seizure was made, courts invoked the general "rights and duties" doctrine. *See* People v. Johnson, 32 Ill. App. 3d 36, 44-45, 335 N.E.2d 144, 152

New York[50] and Texas[51] further emphasized the special status of the murder scene by coupling the general "right and duty" to investigate with the statutory obligations of coroners and medical examiners.

Pre-*Mincey* case law thus reveals a rationale for warrantless murder scene searches predicated on a special concern for homicide. The virtually unanimous approval of warrantless entry when police had an even remotely reasonable awareness of homicide or possible homicide reflects this concern.[52] The expansive scope approved for warrantless murder scene searches also manifests this concern. Although only Arizona courts used the label "murder scene exception,"[53] the general "right and duty" doctrine employed by many pre-*Mincey* courts can only be understood with reference to the particular crime of homicide.

B. *Stricter Application of the Warrant Requirement: The Minority View*

When evaluating the constitutionality of warrantless murder scene searches, several courts adhered more strictly to the warrant requirement than the majority of pre-*Mincey* courts.[54] Only one of these decisions confronted the first primary issue present in a warrantless murder scene search, the justification for initial entry.[55] In *Root v. Gauper,*[56] the Eighth Circuit held that, given the circumstances presented, the state failed to demonstrate that the initial police entry was valid under the emergency exception.[57] Before police entered defendant's home, the murder scene, an ambulance driver informed them that he had re-

(1975); State v. Sutton, 454 S.W.2d 481, 484-86 (Mo. 1970); State v. Hardin, 90 Nev. 10, 13-16, 518 P.2d 151, 153-54 (1974).

50. People v. Neulist, 43 A.D.2d 150, 154, 350 N.Y.S.2d 178, 183 (1973).

51. Allen v. State, 536 S.W.2d 364, 369 (Tex. Crim. App. 1976); Tocher v. State, 501 S.W.2d 921, 924 (Tex. Crim. App. 1973); Parsons v. State, 160 Tex. Crim. 387, 398, 271 S.W.2d 643, 651 (1953), *cert. denied*, 348 U.S. 837 (1954).

52. *See* note 16 *supra*.

53. *See* State v. Mincey, 115 Ariz. 472, 482 n.4, 566 P.2d 273, 283 n.4 (1977).

54. *See* Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972); Root v. Gauper, 438 F.2d 361 (8th Cir. 1971); People v. Williams, 557 P.2d 399 (Colo. 1976); State v. Brothers, 4 Or. App. 253, 478 P.2d 442 (1970); Kelly v. State, 75 Wis. 2d 303, 249 N.W.2d 800 (1977); State v. Pires, 55 Wis. 2d 597, 201 N.W.2d 153 (1972); State v. Davidson, 44 Wis. 2d 177, 170 N.W.2d 755 (1969).

55. *See* note 9 *supra* and accompanying text.

56. 438 F.2d 361 (8th Cir. 1971). The decision affirmed the district court's grant of defendant's petition for a writ of habeas corpus, overturning her conviction for manslaughter. *Id.* at 363, 365. *See* State v. Sutton, 454 S.W.2d 481 (Mo. 1970).

57. 438 F.2d at 364-65.

moved the victim and that no one else remained in the house.[58] Further, the first arriving officer waited outside the house for the arrival of the sheriff before entering.[59] The court held that the emergency exception implicitly requires that police officers have an objectively reasonable belief in the existence of an emergency before initial entry and that no evidence in the record indicated the officers in fact believed or had reasonable cause to believe an emergency existed when they entered the murder scene.[60]

Four courts held that warrantless re-entry and search of the murder scene violated defendant's fourth amendment rights.[61] In two of these cases, police quit the murder scene almost immediately after arrival without pausing to search, but returned approximately two hours later for the specific purpose of searching.[62] Both courts ruled that the state

58. *Id.* at 363.

59. *Id.* at 365.

60. *Id.* at 364-65. In discussing the objective test of reasonableness, the court quoted the following language from Terry v. Ohio, 392 U.S. 1, 21-22 (1968):

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Id. 438 F.2d at 364-65. For a concise discussion of the objective test in search and seizure law, see Note, *The Minimization Requirement After* United States v. Scott: *Myth or Reality,* 1979 WASH. U.L.Q. 601, 620 n.96.

61. *See* Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972); State v. Brothers, 4 Or. App. 253, 478 P.2d 442 (1970); Kelly v. State, 75 Wis. 2d 303, 249 N.W.2d 800 (1979); State v. Davidson, 44 Wis. 2d 177, 170 N.W.2d 755 (1969).

62. In Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972), the court reversed the district court's denial of defendant's petition for a writ of habeas corpus. *Id.* at 822. The opinion by the court of appeals, however, does not provide the facts of the case. The Arizona Supreme Court's affirmance of defendant's conviction for aggravated assault details this information. State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971). A neighbor summoned police. When they arrived, they were met by defendant who spontaneously exclaimed, " 'My God, I killed my wife.' " Police checked the residence, discovered the corpse, placed defendant under arrest, and then left immediately to take defendant into custody. About two hours later, they returned to defendant's residence and made a warrantless search. *Id.* at 408, 489 P.2d at 45-46.

In State v. Brothers, 4 Or. App. 253, 478 P.2d 442 (1970), the local chief of police, acting in his off-duty capacity as an ambulance driver, responded to a call to go to defendant's residence. Defendant accompanied the victim, his wife, to the hospital in the ambulance. While at the hospital, the police chief arranged with the state police to have an officer go to defendant's apartment and lock it up. The state police made no search and brought the apartment key to the chief at the hospital. Approximately two hours later the chief returned to defendant's apartment to search for evidence. The chief had obtained neither a warrant nor defendant's consent. *Id.* at 254-55, 478 P.2d at 443.

failed to show that the warrantless re-entry fell within any recognized exception to the warrant requirement or that exigent circumstances otherwise excused the failure to obtain a search warrant.[63] In *Kelly v. State*[64] and *State v. Davidson,*[65] re-entry occurred, respectively, one and three days after prior, legitimate warrantless murder scene searches.[66] In *Davidson,* the court held the second search invalid, finding no exigent circumstances to justify the warrantless re-entry.[67] Rejecting the state's only argument supporting the warrantless re-entry, the *Kelly* court held that the third parties who consented to the re-entry and second search lacked authority to do so.[68]

In *People v. Williams,*[69] and *State v. Pires,*[70] the courts dealt with the second primary issue, the permissible scope of a murder scene search following a legitimate warrantless entry.[71] Both courts held that the emergency-in-fact[72] circumscribes the scope of a warrantless murder scene search.[73] In *Pires,* police responded to a report of a child's body and a semiconscious woman at defendant's address. Officers entered the house through an unlocked door, found no one in the house, and went to the front door to admit a detective. By the time the detective

63. *See* Sample v. Eyman, 469 F.2d 819, 821-22 (9th Cir. 1972); State v. Brothers, 4 Or. App. 253, 256-60, 478 P.2d 442, 443-45 (1970).

64. 75 Wis. 2d 303, 249 N.W.2d 800 (1977).

65. 44 Wis. 2d 177, 170 N.W.2d 755 (1969).

66. *See* Kelly v. State, 75 Wis. 2d 303, 309, 249 N.W.2d 800, 803 (1977); State v. Davidson, 44 Wis. 2d 177, 184, 170 N.W.2d 755, 759 (1969).

67. 44 Wis. 2d at 195-96, 170 N.W.2d at 765.

68. 75 Wis. 2d at 316, 249 N.W.2d at 805-07.

69. 557 P.2d 399 (Colo. 1976).

70. 55 Wis. 2d 597, 201 N.W.2d 153 (1972).

71. *See* note 10 *supra* and accompanying text. *See also* United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972). Goldenstein was not a murder scene search case, but an appeal of a conviction for aggravated bank robbery. Police responded to notice of a severe fight in a hotel lobby. On arrival they found the fatally wounded victim in the lobby. The desk clerk told them that defendant, apparently wounded, had gone upstairs after the fight, carrying a gun. The clerk accompanied police to defendant's room and let them in with a passkey. Police observed a bloody shirt on the bed, but defendant was not in the room. Police then made a thorough search of the room. Opening defendant's suitcase, they found $12,900 in currency, which was later identified as stolen from a bank. *Id.* at 1008, 1010. The court held that the search of defendant's suitcase could not be justified under the emergency exception, which permitted only the warrantless entry and investigation to discover defendant's absence. Finding that no other exception to the warrant requirement was applicable, the court ruled the seizure of the money unconstitutional. *Id.* at 1010-11.

72. *See* text accompanying note 43 *supra.*

73. *See* People v. Williams, 557 P.2d 399, 403-05 (Colo. 1976); State v. Pires, 55 Wis. 2d 597, 606, 201 N.W.2d 153, 156-60 (1972).

arrived, the officers were aware that an ambulance had taken the defendant, her husband, and the victim to the hospital. Returning to the bedroom, the officers seized a pad of paper containing inculpatory statements by defendant.[74] Both the trial court and the Wisconsin Supreme Court characterized the return to the bedroom as a "second search."[75] Because the sole justification for the initial entry and "first search" was emergency aid or apprehension of a criminal, the *Pires* court ruled that the "second search"—"[a]fter the officers determined no one was present, victim or otherwise"—was not within the purview of the emergency exception.[76] The court thus held the seizure of the pad invalid.[77]

The prosecution in *Williams* argued that an exigent circumstance or murder scene search exception to the warrant requirement justified seizure of defendant's diary from underneath clothing inside a dresser drawer.[78] Police discovered the diary after defendant had departed and after they had seized the murder weapon in plain view and secured the premises.[79] The record, according to the court, however, failed to demonstrate that police reasonably believed that an immediate general search of defendant's house was necessary to prevent others from being harmed, to prevent a dangerous criminal from escaping, or to prevent the loss or destruction of evidence.[80] In reaching this conclusion, the court specifically rejected Arizona's murder scene search exception.[81] Broadly stated, the *Williams* holding requires police to obtain a warrant to do more than seize evidence in plain view following a lawful emergency entry—absent other exigent circumstances—notwithstanding "a valid governmental interest in speedy investigation at the scene of a recent homicide."[82]

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74. 55 Wis. 2d at 600-05, 201 N.W.2d at 155-56.

75. *Id.* at 602, 201 N.W.2d at 156.

76. *Id.* at 606-07, 201 N.W.2d at 157-58.

77. *Id.* at 608-10, 201 N.W.2d at 158-60. The court also rejected the argument that the pad was in plain view and, therefore, legitimately seized. *See* note 26 *supra*. The court noted that the officers did not see the pad during the first search. Moreover, the inculpatory nature of the statements was in plain view only when the police picked them up and began reading. 55 Wis. 2d at 608-09, 201 N.W.2d at 159.

78. 557 P.2d at 403.

79. *Id.* at 401-02.

80. *Id.* at 403-05.

81. *Id.* at 404 n.11.

82. *Id.* at 404-05.

C. *Precursors of* Mincey *in the Arizona Courts*

Not fully articulated until the decision in *State v. Mincey,*[83] the Arizona Supreme Court's murder scene search exception emerged in three pre-*Mincey* cases, *State v. Sample,*[84] *State ex rel. Berger v. Superior Court,*[85] and *State v. Duke.*[86] Although the court failed to provide detailed analysis of the basis for the exception,[87] the Arizona doctrine is not simply a particularized application of the more general "emergency" exception.[88] The Arizona Supreme Court appeared to regard warrantless murder scene searches as per se reasonable under the fourth amendment.[89]

In *Sample,* defendant's neighbor summoned police. Pausing at the murder scene only long enough to locate the victim's body, police left immediately to take defendant into custody. Approximately two hours later, they returned to search defendant's residence.[90] Although the court found that a warrant was readily obtainable before the re-entry[91] it nevertheless held that the warrantless re-entry and search were reasonable.[92] Further, the court declined to approve the search under any recognized exception to the warrant requirement and rejected exigent circumstances as a basis for its holding.[93] Instead, the presence of the

83. 115 Ariz. 472, 566 P.2d 273 (1977).

84. 107 Ariz. 407, 489 P.2d 44 (1971).

85. 110 Ariz. 281, 517 P.2d 1277 (1974).

86. 110 Ariz. 320, 518 P.2d 570 (1974).

87. *See* State v. Mincey, 115 Ariz. 472, 482-83, 566 P.2d 273, 283-84 (1977); State v. Duke, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974); State *ex rel.* Berger v. Superior Court, 110 Ariz. 281, 281, 517 P.2d 1277, 1277 (1974); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971).

88. In both *Sample* and *Mincey,* the court held that exigent circumstances did not necessitate the warrantless search. *See* State v. Mincey, 115 Ariz. 472, 482, 566 P.2d 273, 283 (1977); State v. Sample, 107 Ariz. 407, 409, 489 P.2d 44, 46 (1971). The court did not refer to emergency or exigent circumstances in either *ex rel. Berger* or *Duke. See* State v. Duke, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974); State *ex rel.* Berger v. Superior Court, 110 Ariz. 281, 281, 517 P.2d 1277, 1277 (1974).

89. *See* State v. Duke, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974); State *ex rel.* Berger v. Superior Court, 110 Ariz. 281, 281, 517 P.2d 1277, 1277 (1974); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971). In *Mincey,* the court modified this per se approach by limiting the murder scene exception to searches to determine the cause of death. *See* State v. Mincey, 115 Ariz. 472, 482, 566 P.2d 273, 283 (1977). The expansive search conducted in *Mincey* itself, however, demonstrates the ephemeral nature of this limit. *See* Mincey v. Arizona, 437 U.S. 385, 389-90, 394-95 (1978); note 116 *infra* and accompanying text.

90. 107 Ariz. at 408, 489 P.2d at 45-46.

91. *Id.* at 409, 489 P.2d at 46.

92. *Id.* at 409, 489 P.2d at 46-47.

93. *Id.*

deceased's body in defendant's residence extinguished any reasonable expectation of privacy to which defendant might otherwise have been entitled.[94]

The specific holding in *Sample* did not survive federal habeas corpus review.[95] The Ninth Circuit held that failure to obtain a warrant before re-entry violated Sample's fourth amendment rights.[96] The Arizona Supreme Court did not, however, abandon its murder scene doctrine. Without providing the facts of the case, the court, in *State ex rel. Berger v. Superior Court,*[97] reversed a lower court's suppression of "the shell assertedly fired from the murder weapon."[98] In a cryptic, per curiam opinion, the court stated, "Where the police are called to the scene of a homicide, they may lawfully investigate such portions of the premises as are reasonably necessary to establish the true facts of the homicide."[99]

State v. Duke,[100] the final murder scene search case to precede *Mincey,* factually distinguished *Sample* but applied language from that case to approve a warrantless search.[101] Defendant summoned police, reporting the victim as a suicide. After removal of the body, police searched the dwelling.[102] Although defendant was apparently present during this search and police initially relied on his story of suicide, the court explicitly stated that police searched "without permission."[103] Because police presence at the murder scene was uninterrupted, the court distinguished *Duke* from *Sample* and therefore held the search legitimate.[104] Once again, the court made no attempt to justify the search on the basis of exigent circumstances.[105] Rather, the court again

94. *See* 107 Ariz. at 409, 489 P.2d at 46. "We find nothing in the Constitution or common sense which should prevent the police from making a warrantless search of the premises in which the victim is found dead . . . ." *Id.* "The traditional right of citizens to be free from unreasonable searches and seizures and unreasonable and unnecessary invasions of their privacy is not violated when the premises upon which a deceased victim is found are searched without a warrant." *Id.* at 409, 489 P.2d at 47.

95. *See* Sample v. Eyman, 469 F.2d 819, 821-22 (9th Cir. 1972).

96. *Id. See* notes 62-63 *supra* and accompanying text.

97. 110 Ariz. 281, 517 P.2d 1277 (1974).

98. *Id.* at 281, 517 P.2d at 1277.

99. *Id.*

100. 110 Ariz. 320, 518 P.2d 570 (1974).

101. *Id.* at 324, 518 P.2d at 574.

102. *Id.* at 322, 324, 518 P.2d at 572, 574.

103. *Id.* at 324, 518 P.2d at 574.

104. *Id.*

105. *Id.*

appeared to find a warrantless search at a murder scene inherently reasonable.[106]

In these three pre-*Mincey* murder scene search cases, the Arizona Court did not specifically consider the two primary issues—justification

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106. *Id.*

The victim's joint occupancy, with defendant, of the murder scene premises before the killing was significant in both *Sample* and *Duke*. *See* State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971):

> We find nothing in the Constitution or common sense which should prevent the police from making a warrantless search of the premises in which the victim is found dead and this is true even if the suspect exercised joint control of said premises along with the victim.
>
> . . . .
>
> . . . The need for all citizens and particularly potential victims such as this to effective protection from crime, particularly while in their own home, would indicate that a warrantless search of the premises is not made unreasonable or unconstitutional by the fact that the defendant exercises joint control over the premises.

Id. The court quoted part of this language in *Duke* and added: "[A] contemporaneous warrantless search of the scene of a crime at the time of the discovery of the body was, we believe, reasonable, and not made unreasonable and unconstitutional by the fact that the defendant may have shared possession of the premises with the deceased victim." State v. Duke, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974). One commentator reads the language from *Sample* to find:

> Although no court has put in these terms, it is almost as if there were an implied consent-in-advance by the deceased to enter his premises to investigate in the event of his death, corresponding to the consent which could be expected if the victim were only injured, so that even if the co-occupant is the prime suspect he may not by virtue of the death suddenly claim exclusive possession.

W. LAFAVE, 2 SEARCH AND SEIZURE 461 (1978).

The Arizona Supreme Court, however, seemed concerned in *Sample* and *Duke* with the rights of the recently dead rather than consent by the corpse. *See* W. LAFAVE, *supra* at 465. Defendants' new status as exclusive occupants of the premises could not suddenly have enlarged their reasonable expectations of privacy beyond pre-homicide expectations unless one assumes that defendants somehow acquired the victims' expectations of privacy that were not previously shared. Thus, defendants could gain no added constitutional rights merely by claiming exclusive possession. *See also* Katz v. United States, 389 U.S. 347, 361 (1967) (noting a twofold requirement that there be an actual, subjective expectation of privacy and that this expectation be one that society recognizes as reasonable) (Harlan, J., concurring). It is the inability of anyone else to legitimately consent to a search—a consequence of newly, and perhaps illegally, acquired exclusive occupancy—that theoretically enhances defendants' fourth amendment rights. Yet, regardless whether the homicide enhanced Sample's or Duke's fourth amendment rights, the Arizona Supreme Court appeared to find that the presence of an apparent homicide in defendants' residences extinguished all reasonable expectations of privacy. *See* notes 94 and 99 *supra* and accompanying text. That the victim was formerly a joint occupant of the premises with defendant was not crucial to the court's reasoning. The elaboration of the murder scene exception in *State v. Mincey,* in which the victim was an undercover police officer killed in a raid on defendant's apartment, makes this conclusion clear. *See* State v. Mincey, 115 Ariz. 472, 482-83, 566 P.2d 273, 283-84 (1977). Thus the language in *Sample* and *Duke* seems more correctly construed as holding that the rights of the victim to an investigation into the killing outweighed the defendants' fourth amendment rights.

for initial entry and permissible scope of the search.[107] It is unlikely, however, that either Sample or Duke could have challenged the initial police entry. The court, it would seem, could have relied on the emergency and consent exceptions to sanction initial entry in both cases.[108] In all three cases, the court failed to clarify the scope of a warrantless search permissible under the murder scene exception;[109] the court detailed neither the duration nor the extent of the searches in any of these decisions.[110]

II. *MINCEY V. ARIZONA*

A. *In the Arizona Supreme Court*

The decision in *State v. Mincey* emphatically demonstrates the expansiveness of the Arizona exception.[111] As in *Sample* and *Duke,*[112] the basis for initial entry was not at issue in *Mincey*;[113] the issue was the permissible scope of a search under the murder scene exception.[114] The warrantless search in *Mincey*[115] lasted four days, during which investigators examined and inventoried everything in defendant's apartment.[116]

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107. *See* notes 9-10 *supra* and accompanying text.

108. *See* notes 11-17 and 18-23 *supra* and accompanying text. *See also* State v. Duke, 110 Ariz. 320, 322, 324, 518 P.2d 570, 572, 574 (1974); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 45 (1971).

109. *See* State v. Duke, 110 Ariz. 320, 322, 324, 518 P.2d 570, 572, 574 (1974); State *ex rel.* Berger v. Superior Court, 110 Ariz. 281, 281, 517 P.2d 1277, 1277 (1974); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971). It is not obvious that the evidence seized in any of these cases was all in plain view.

110. *See* State v. Duke, 110 Ariz. 320, 322, 324, 518 P.2d 570, 572, 574 (1974); State *ex rel.* Berger v. Superior Court, 110 Ariz. 281, 281, 517 P.2d 1277, 1277 (1974); State v. Sample, 107 Ariz. 407, 409-10, 489 P.2d 44, 46-47 (1971).

111. *See* notes 115-19 *infra* and accompanying text.

112. *See* State v. Duke, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974); State v. Sample, 107 Ariz. 407, 409, 489 P.2d 44, 46-47 (1971).

113. *See* State v. Mincey, 115 Ariz. 472, 482, 566 P.2d 273, 283 (1977).

114. The Arizona Supreme Court's statement of its murder scene exception makes clear that the exception applies to searches rather than entries. The court stated that the exception applies "where the law enforcement officers were legally on the premises in the first instance." 115 Ariz. at 482, 566 P.2d at 283.

115. State v. Mincey, 115 Ariz. 472, 566 P.2d 273 (1977), *rev'd and remanded sub nom.* Mincey v. Arizona, 437 U.S. 385 (1978).

116. *Id.* at 476, 566 P.2d at 277. The United States Supreme Court opinion gives a more complete recitation of the facts of the search.

> Their search lasted four days, during which period the entire apartment was searched, photographed, and diagrammed. The officers opened drawers, closets, and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments

Police and narcotics officers had raided the apartment intending to arrest defendant,[117] and a gun battle ensued in which one of the raiders was fatally wounded.[118] Defendant and two other occupants of the apartment were also wounded.[119] The court, as it had in *Sample,* found that police had sufficient time to procure a warrant before the search and found the facts insufficient to justify the search under the emergency exception.[120] Approving the search nevertheless,[121] the Arizona Supreme Court held: When law enforcement officers are lawfully on the premises at the scene of a homicide or serious personal injury with the likelihood of foul play, a warrantless search to determine the circumstances of death, if begun within a reasonable period following the time officials learned of the murder or potential murder, is constitutional.[122]

B. *In the United States Supreme Court*

Before the United States Supreme Court, Arizona offered five arguments in defense of its murder scene exception. (1) A defendant by his crime forfeits reasonable expectations of privacy in the murder scene

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out of the walls and floors; they pulled up sections of the carpet and removed them for examination. Every item in the apartment was closely examined and inventoried, and two to three hundred objects were seized. In short, Mincey's apartment was subjected to an exhaustive and intrusive search.

Mincey v. Arizona, 437 U.S. 385, 389 (1978).

117. *See* ARIZ. REV. STAT. ANN. § 13-1403 (1972) (current version at ARIZ. REV. STAT. ANN. § 13-3883 (1978)) (authorizing warrantless arrests); ARIZ. REV. STAT. ANN. § 13-1411 (1972) (current version at ARIZ. REV. STAT. ANN. § 13-3891 (1978)) (authorizing forcible entry to effect a warrantless arrest).

118. State v. Mincey, 115 Ariz. 472, 476, 566 P.2d 273, 277 (1977). Prosecutors used the evidence thus collected to obtain murder, assault, and narcotics convictions.

119. *Id.* The shooting incident precluded the raiding officers from searching the apartment. A local police policy prohibited the raiding officers from investigating their own actions. Brief for the Respondent at 24, Mincey v. Arizona, 437 U.S. 385 (1978). *See also* Mincey v. Arizona, 437 U.S. 385, 388 (1978). This departmental policy necessitated the arrival of a second squad of police to conduct the search.

120. The court stated that, "[defendant] alleges—correctly—that there were not sufficient facts to fit within the usual 'exigent circumstances' exception and that there was ample time to secure a warrant." *Id.* at 482, 566 P.2d at 283.

121. 115 Ariz. at 483, 566 P.2d at 283. The court characterized the issue as whether it should invoke stare decisis. State v. Mincey, 115 Ariz. 472, 482, 566 P.2d 273, 277 (1977). "Thus the issue is whether this Court will adhere to its previous rulings which hold the search of a murder scene under certain circumstances to be a valid exception to the constitutional warrant requirement." *Id.*, 566 P.2d at 283.

122. 115 Ariz. at 482-83, 566 P.2d at 283.

premises.[123] (2) The murder scene search, following legitimate entry, is a de minimis additional intrusion of a defendant's fourth amendment rights.[124] (3) A possible homicide presents an emergency situation demanding immediate action.[125] (4) A vital public interest demands prompt investigation of homicides.[126] (5) The narrow, confining guidelines imposed on the Arizona murder scene exception make it constitutionally valid.[127] Unpersuaded, the Supreme Court held: The Arizona murder scene exception is incompatible with the fourth and fourteenth amendments, and a warrantless search of a defendant's premises, simply because a homicide has recently occurred there, is unconstitutional; the seriousness of the offense under investigation cannot itself create exigent circumstances that justify a warrantless search.[128]

In reaching its decision, the Court did little more than refute each of the state's arguments. To contend that a defendant, by killing his victim, forfeits fourth amendment protected expectations of privacy would, according to the Court, impermissibly convict the defendant before the gathering of any evidence.[129] The Court controverted the state's second argument of de minimis additional intrusion in two ways. Under the search-incident-to-arrest exception established in *Chimel v. California,*[130] the lessened expectation of privacy in the arrestee's person resulting from the arrest does not extend to any area beyond the arrestee's control.[131] In addition, the Court found untenable the assertion that an intense four day search could qualify as a de minimis in-

123. Mincey v. Arizona, 437 U.S. 385, 391 (1978).

124. *Id.*

125. *Id.* at 392-93.

126. *Id.* at 393.

127. *Id.*

128. *Id.* at 395. Because the Court reversed defendant's conviction on the search and seizure issue and remanded the case to the Arizona courts for retrial, it reached another issue in the case. The Court found that statements by defendant made during an interrogation in the hospital the evening of the shooting incident were involuntary and, thus, inadmissible even to impeach. *Id.* at 401-02.

129. *Id.* at 391. The Court asserted that the state was in effect arguing that defendant had waived his fourth amendment rights. In rejecting this contention, the Court cited Michigan v. Tyler, 436 U.S. 499, 505-06 (1978), decided just three weeks before *Mincey.*

130. 395 U.S. 752 (1969). The search-incident-to-arrest rule established by this decision is: search of the arrested person and the area within his immediate control is permissible without a warrant, but any broader search of the place of the arrest must be made under authority of a search warrant. *Id.* at 763, 768.

131. 395 U.S. at 768. *See also* Mincey v. Arizona, 437 U.S. 385, 391 (1978).

trusion into defendant's fourth amendment rights.[132] Responding to the state's contention that a possible homicide generates an emergency justifying a warrantless murder scene search, the Court restricted the concept of emergency to include only situations in which police action is needed to protect or preserve life or to avoid serious injury.[133] The Court held that the emergency search doctrine could not encompass the exhaustive four day search in *Mincey,* and it specifically noted the absence of exigent circumstances at the time the search began.[134] Dealing with the state's fourth argument, the Court asserted that no criteria "relevant to the fourth amendment" distinguish the public interest in prompt solution of homicide from the public interest in prompt solution of any other serious crime.[135] Exigent circumstances, rather than public interest in efficient law enforcement, are the bases for exceptions to the warrant requirement. The Court again cited the state court's finding that no exigent circumstances were present when the search began.[136] The exhaustive four day search, according to the Court, rebutted the state's fifth argument, that the murder scene search exception was constitutional because of its narrow guidelines.[137] Further, the Court found that the Arizona exception, despite the state court's guidelines, allowed investigating officers to make judgments properly the function of a neutral and detached magistrate.[138]

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132. 437 U.S. at 391. *Cf.* Pennsylvania v. Mimms, 434 U.S. 106 (1977) (request by police officer that driver of car stopped for a traffic violation get out of car is incremental intrusion that can only be regarded as de minimis).

133. 437 U.S. at 392-93.

134. The Court stated:

> [I]t simply cannot be contended that this search was justified by any emergency threatening life or limb. 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. at 393.

135. *Id.*

136. *Id. See* note 116 *supra* and accompanying text.

137. 437 U.S. at 394-95.

138. The Court stated:

> Indeed, these so-called guidelines are hardly so rigidly confining as the State seems to assert. 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 Amendment requires to be made by a neutral and objective magistrate, not a police officer.

Id. at 394-95.

C. *Applicability of Other Warrant Requirement Exceptions*

Restricting itself to the merits of Arizona's murder scene exception, the Supreme Court left final resolution of the admissibility of evidence seized from Mincey's apartment to the Arizona courts on remand.[139] Yet none of the presently recognized exceptions to the warrant clause,[140] either singly or in combination, appear sufficient to provide a constitutional basis for the search. The Supreme Court noted that the record did not indicate that evidence in Mincey's apartment might be lost or destroyed,[141] and the Arizona Supreme Court held that there was ample time to obtain a warrant before the search.[142] Therefore, the loss-or-destruction-of-evidence exception is unavailing as a basis for the warrantless search.[143]

A second possibility, search-incident-to-arrest,[144] appears to have only limited usefulness. This exception, which operates only at the time of arrest and allows search of the arrestee's person and the area under his immediate control, could not sanction a four day search. Moreover, the underlying rationale of the exception is protection of the arresting officer.[145] All occupants of Mincey's apartment, however, were in custody when investigating officers arrived, and three of the occupants had been seriously wounded in the gun battle.[146]

The applicability of the plain view exception[147] is problematic. Uncertainty arises for two reasons: (1) Officers other than those of the raiding party made the search and all seizures;[148] and (2) The plain

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139. *Id.* at 395 n.9. "To what extent, if any, the evidence found in Mincey's apartment was permissibly seized under established Fourth Amendment standards will be for the Arizona courts to resolve on remand." *Id.*

140. *See* note 21 *supra* and accompanying text.

141. 437 U.S. at 394.

142. State v. Mincey, 115 Ariz. 472, 482, 566 P.2d 273, 283 (1977). Underscoring this point is the fact that the investigators could have obtained a search warrant by telephone from Mincey's apartment. *See* ARIZ. REV. STAT. § 13-3914(C) (1978).

143. *See* Schmerber v. California, 384 U.S. 757 (1966).

144. *See* note 130 *supra* and accompanying text.

145. Chimel v. California, 395 U.S. 752 (1969).

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

Id. at 762-63.

146. *See* note 119 *supra* and accompanying text.

147. *See* note 27 *supra*.

148. *See* note 119 *supra*.

view exception applies only when the seizing officer's presence on the premises is otherwise legitimate.[149] Under the emergency exception detailed in *Mincey,* the raiding officers could have seized any evidence in plain view encountered "during the course of their legitimate emergency activities."[150] Local police regulations, however, prevented the raiding party from investigating,[151] and the search of Mincey's apartment did not begin until after a second party of police arrived.[152] Arguably, the searching party had no "legitimate emergency activities" to perform. Neither the United States Supreme Court nor the Arizona Superior Court found exigent circumstances confronting the search party.[153] In addition, the Supreme Court appeared to confine "legitimate emergency activities" to assistance of persons in immediate need of aid and to searches to determine if the killer remained on the premises or to locate other victims.[154] The raiding officers, however, had accounted for all persons within Mincey's apartment before the arrival of the investigating team.[155] Only emergency assistance during removal of the wounded from Mincey's apartment might come within "legitimate emergency activities."[156] One could argue, therefore, that seizure of evidence observed in plain view during supervision of this removal would be valid under the plain view exception.

Even this narrow application of the plain view exception, however, may be improper. The exception does not, by itself, authorize entry into the premises to be searched.[157] The sole function of the investigat-

149. *See* note 27 *supra* and accompanying text.

150. 437 U.S. at 393. The Court did not define "legitimate emergency activities." *See id.* In the same paragraph of the opinion that contains the mention of "legitimate emergency activities," however, the Court stated, "when 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." *Id.* at 392.

151. *See* note 119 *supra.*

152. 437 U.S. at 388-89.

153. *Id.* at 394; State v. Mincey, 115 Ariz. 472, 482, 566 P.2d 273, 283 (1977).

154. *See* 437 U.S. at 392-93; note 150 *supra.*

155. *Id.* at 388, 393.

156. *Id.* Only one of the nine raiding officers was injured during the raid. Thus, there were sufficient police personnel in the apartment after the shooting to render what assistance could be given the wounded before medical help arrived. It was the raiding party that called for the ambulance. *See* Brief for the Respondent at 19-24, Mincey v. Arizona, 437 U.S. 385 (1978). Further, the search party began its investigation before removal of all the former occupants of the apartment. *See* 437 U.S. at 390; Brief for the Respondent at 25, Mincey v. Arizona, 437 U.S. 385 (1978).

157. *See* note 27 *supra.*

ing team was to search Mincey's apartment. They did not enter in response to an emergency and their only nonsearch function, supervising removal of the wounded and the arrested, was incidental to their search function.[158] Their very presence in the apartment without a warrant, therefore, might be invalid. Additional problems with the application of plain view arise on consideration of the requirement of "inadvertence"[159] posited by a plurality of the Supreme Court in *Coolidge v. New Hampshire*.[160] Not only did the investigating team anticipate the discovery of evidence, it knew its location and intended to seize it.[161] Indeed, it would seem improbable that any evidence would be discovered "inadvertently" when police, in a nonemergency situation, go to the scene of a homicide. In any case, the plain view exception could not possibly validate a four day search. At best, one can conclude that only a small portion of the evidence seized from Mincey's apartment would be admissible under the plain view exception.

III. IMPLICATIONS OF *MINCEY* FOR SUBSEQUENT MURDER SCENE SEARCH CASES

A. *Comparison of* Mincey *with* Michigan v. Tyler

Evaluation of Mincey's impact on pre-*Mincey* murder scene search doctrine requires examination of *Michigan v. Tyler*,[162] an arson case decided just three weeks before *Mincey*. Firefighters discovered evidence of possible arson while extinguishing the blaze. Before the firefighters departed at 4:00 a.m., a police arson investigator made a cursory search for evidence. Darkness and the condition of the building frustrated a more thorough search, although the investigator seized two plastic containers of inflammable liquid.[163] At 8:00 a.m. and 9:00 a.m. that same morning, a fire official charged with determining the origin of all fires made warrantless, nonconsensual entries into defendant's premises, accompanied on the second visit by the police arson investigator. The rubble was searched and evidence of arson seized.[164]

158. *See* 437 U.S. at 388, 393. *See also* Brief for the Respondent at 23-25, Mincey v. Arizona, 437 U.S. 385 (1978).

159. *See* note 27 *supra*.

160. 403 U.S. 443 (1971).

161. *See* Brief for the Respondent at 23-25, Mincey v. Arizona, 437 U.S. 385 (1978).

162. 436 U.S. 499 (1978).

163. *Id.* at 501-02.

164. *Id.* at 502.

Reviewing the defendant's conviction for arson, the Michigan Supreme Court adopted a narrow concept of emergency. The court held that once firefighters have left the premises they must obtain a warrant for subsequent entries unless the premises had been abandoned after the fire. Consequently, the state court suppressed evidence seized during the 8:00 and 9:00 a.m. searches.[165] The United States Supreme Court, however, ruled that the Michigan Supreme Court had an unrealistically narrow view of fire fighting.[166] Regarding the later morning entries as no more than a continuation of the initial legitimate entry to fight the fire, the Court held: the seizures made during those searches were legitimate because entry to fight a fire requires no warrant and once in the building, fire officials may remain for a reasonable time after the blaze has been extinguished to investigate its cause.[167]

In contrast to *Tyler*'s expansive "reasonable time to investigate" standard, *Mincey* narrowly circumscribes the scope of a legitimate, warrantless homicide investigation.[168] Examination of the three facets of the scope of a warrantless murder scene search—initiation, duration, and extent[169]—reveals the tension between *Tyler* and *Mincey*. After *Mincey,* the limits on initiation and duration appear straightforward. To be valid, a warrantless murder scene search following an emergency entry must be coterminous with the emergency-in-fact—the period during which the police know or reasonably believe that immediate action is necessary to save or protect lives or to apprehend a dangerous criminal.[170] No warrantless search may begin or continue after termination of the emergency-in-fact.[171] Thus, the nature of "legitimate emergency activity" circumscribes the allowable extent of a warrantless murder scene search post-*Mincey*. Police may look into and investigate such places as are necessary to render emergency aid, locate other victims, or

165. People v. Tyler, 399 Mich. 564, 583-84, 250 N.W.2d 467, 477 (1977).

166. 436 U.S. at 510.

167. 436 U.S. at 510-12.

168. *See* 437 U.S. at 392-93:

> [T]he 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. . . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.

Id.

169. *See* notes 29-51 *supra* and accompanying text.

170. *See* note 43 *supra* and accompanying text.

171. *See* 437 U.S. at 392-93; note 168 *supra*.

ascertain whether the killer remains on the premises.[172]

Tyler, in contrast, does not limit the scope of a warrantless fire scene investigation to the emergency-in-fact—the fire itself. Under its standard of a "reasonable" time to investigate, the Court sanctioned warrantless searches made four hours after the firefighters extinguished the blaze and departed.[173] Further, *Tyler* permitted investigators to leave and re-enter the premises without obtaining a search warrant in the interim.[174] Finally, nothing in the Court's holding appears to limit the areas at the fire scene that investigators may search during the reasonable time period.[175] Under *Tyler,* therefore, a valid, warrantless fire scene search is of much broader scope than a valid, warrantless murder scene search under *Mincey.*

B. *Initial Entry Cases After* Mincey

Neither *Mincey*'s narrowness nor *Tyler*'s expansiveness should affect the precedential value of pre-*Mincey* case law regarding the justification for initial police entry.[176] Although initial police entry was not at issue in *Mincey,*[177] the Court stated the standard for warrantless entry under the emergency exception: "[T]he 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."[178] Nothing in *Tyler* is inconsistent with this language.[179]

In the wake of *Mincey,* courts[180] have continued to apply broad no-

172. *See* 437 U.S. at 392-93; note 168 *supra.*

173. *See* 436 U.S. at 510-12.

174. *Id.* at 511.

175. *See id.* at 510-12.

176. *See* notes 11-23 *supra* and accompanying text.

177. *See* note 113 *supra* and accompanying text.

178. 437 U.S. at 392.

179. 436 U.S. at 509.

180. *See* United States v. Presler, 610 F.2d 1206, 1210 (4th Cir. 1979) (entry at request of defendant's landlady who reported defendant missing for several days and an unusual odor coming from his apartment); Grant v. State, 374 So. 2d 630, 631 (Fla. Dist. Ct. App. 1979) (defendant reported killing to police); People v. Kepi, 65 Ill. App. 3d 327, 327-30, 382 N.E.2d 642, 643-44 (1978) (attempting to substantiate defendant's explanation of his gunshot wound, police observed bloodstains on floor through an open door); State v. Rogers, 573 S.W.2d 710, 713 (Mo. Ct. App. 1978) (police received report of dead body at defendant's address). *See also* United States v. Miller, 589 F.2d 1117, 1121-22 (1st Cir. 1978) (entry of yacht found fouled in moorings and apparently abandoned in circumstances that indicated owner might have drowned); United States v. Haley, 581 F.2d 723, 725 (8th Cir. 1978) (search of briefcase found in car parked by curb next to man lying unconscious in street).

tions of reasonableness and emergency when considering the basis for initial warrantless entry.[181] Although the police in *State v. Martin*[182] appeared to act with little haste and had seemingly reliable information that the victim was dead before they entered defendant's house, the court held the initial entry valid under the emergency exception.[183] Police learned of the homicide from defendant's therapist. After picking up the therapist, they drove to defendant's house. The therapist entered the house alone. After a short interval, he came out and advised police that he had found the body. Police then entered the house. Defendant returned home shortly after police entered his house and was arrested immediately.[184] The *Martin* court held that police were acting in an emergency situation that fully justified their entry, despite the therapist's report that the victim was dead and that no one else was in the house.[185]

Similarly in *Sallie v. North Carolina*,[186] the court did not require police to rely on an informant's observations. A police officer went to defendant's trailer park residence after hearing of defendant's arrival at a hospital with a dead child. The officer learned from the trailer park manager that no one knew the whereabouts of the dead child's sister.[187] The court held that a warrantless entry to check on the safety of the missing sister was valid under the emergency exception,[188] even though the trailer park manager testified that she told the officer she had already checked defendant's trailer.[189] The court found that the officer was not "required to rely on the thoroughness of her search or the accuracy of her report."[190]

To justify initial police entry, the court in *State v. Epperson*[191] ap-

181. *See* notes 16-17 *supra* and accompanying text.

182. — S.D. —, 274 N.W.2d 893 (1979).

183. *Id.* at —, 274 N.W.2d at 896-97.

184. *Id.* at —, 274 N.W.2d at 894.

185. *Id.* at —, 274 N.W.2d at 897.

186. 587 F.2d 636 (4th Cir. 1978).

187. *Id.* at 638.

188. *Id.* at 641. This case is a federal habeas corpus attack on a state conviction. The court held that Stone v. Powell, 428 U.S. 465 (1976), barred habeas corpus review of fourth amendment claims because defendant received a full and fair hearing on these claims in the state courts. The court, however, found that the search was constitutional, reaching the issue on sixth amendment effective assistance of counsel grounds. 587 F.2d at 639-41.

189. 587 F.2d at 641.

190. *Id.*

191. 571 S.W.2d 260 (Mo. 1978).

plied an extremely broad notion of emergency. The Missouri Supreme Court held that forcible entry into Epperson's home was valid under the emergency exception despite a delay of two and one-half hours after police were first summoned.[192] Police spent the two and one-half hours attempting to locate defendant, investigating the inconsistent and unlikely stories he had given during the previous several days to account for his missing wife and children, and persuading defendant's father to break into the house for them.[193] Procrastinated entry notwithstanding,[194] the court ruled, "the exigent circumstances

192. *Id.* at 262-65. Defendant's mother-in-law alerted police. For several days before discovery of the homicide, she had been attempting to get an explanation for the absence of her daughter and grandchildren. She had gone to defendant's home on the morning of the police break-in at defendant's invitation. She left, however, after defendant began behaving suspiciously and went to a neighbor's home to call police. *Id.* at 262. She told police that she had "detected an odor in the house which, from prior experience, she associated with death." *Id.* When police arrived, no one responded to their knocks, the doors were locked, and all windows were covered with blinds or drapes. *Id.*

193. 571 S.W.2d at 262-63. Shortly after first arriving at defendant's house, the police, after consulting with their chief, decided that they did not have "legal authority to break into and search." Brief for Appellant at 5, State v. Epperson, 571 S.W.2d (Mo. 1978). At the hearing on defendant's motion to suppress, one of the officers testified that the chief had given orders not to break into the house. *Id.* at 272 (Seiler, J., dissenting); Brief for Appellant at 10, State v. Epperson, 571 S.W.2d 260 (Mo. 1978).

194. In the reasoning that supports its finding that police entry into Epperson's house was valid under the emergency exception, the court never referred to the two and one-half hour delay between summons and entry. *See* 571 S.W.2d 263-65. The court employed a two part analysis to reach its holding. First, the court considered "whether the facts were sufficient to establish exigent circumstances justifying a warrantless entry." *Id.* at 263. The court ruled that police were aware of sufficient facts to establish probable cause that a crime had been committed:

> These facts include (1) the defendant's wife and children had been missing several days; (2) defendant had given false and inconsistent explanations for their absence; (3) defendant's unusual, suspicious and nervous manner in the days following the disappearance of his family; (4) an odor of decomposing flesh had been detected in the house; and (5) defendant's unexplained disappearance, though he had been in the house with Mrs. Smith [the mother-in-law] shortly before the police arrived.

Id. Although no one but defendant's mother-in-law detected the odor of death, the court found that this smell, plus the other facts amounting to probable cause, justified entry under the emergency exception. *Id.* at 264. In the second part of its analysis, the court dismissed defendant's challenge that police did not, in fact, believe that they were confronted with an emergency at Epperson's house. The officers who broke in with defendant's father were, at best, uncertain that they were facing an emergency. Even the court acknowledged that the officers believed they were dealing with a missing persons investigation, although the officers "also *considered* the medical emergency factors involved." *Id.* at 265 (emphasis in original). The court, however, concluded that the officers' subjective beliefs were irrelevant.

The second part of the court's analysis is troubling. The police officers who broke into defendant's house certainly knew the facts that the court found amounted to probable cause to believe a crime had been committed. Yet it is not apparent—and the court does not hold—that the officers, in fact, believed that their knowledge amounted to probable cause or indicated that an emergency

presented by this record justified the entry . . . as 'reasonable' under the Fourth Amendment."[195]

C. *Scope-of-Search Cases After* Mincey *And* Tyler

How post-*Mincey* courts will resolve the tension between *Tyler* and *Mincey* when considering the permissible scope of a warrantless murder scene search is less certain. Pre-*Mincey* courts that approved searches unconfined by the emergency-in-fact[196] seem plainly inconsistent with *Mincey*.[197] Certainly *Mincey* overrules decisions permitting more than one warrantless search of the murder scene.[198] Yet, *Tyler*'s "reasonable time" holding[199] is consonant with the pragmatic approach of pre-*Mincey* courts that considered the scope of warrantless murder scene searches.[200]

1. *Cases Adopting the* Tyler *Standard*

Predictably, two post-*Mincey* courts have invoked *Tyler* to justify warrantless murder scene searches. Both cases, *State v. Epperson*[201] and *State v. Martin,*[202] concerned searches following valid emergency entries.[203] In *Epperson,* police discovered the victims immediately

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confronted them. When considering the constitutionality of a warrantless search and seizure, a court must consider the beliefs of the officers making the search. *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968); Draper v. United States, 358 U.S. 307, 313 (1959); Note, *supra* note 60, at 620 n.96. Although a court might find that the officers knew a collection of facts establishing an emergency, it would be a nonsequitur to conclude that officers therefore believed they were faced with an emergency. Even if a reasonable, prudent person would inevitably conclude that an emergency existed from the facts that the court found the officers breaking into Epperson's house knew, it does not necessarily follow that the officers believed in the existence of an emergency. The court, however, apparently believed that the situation amounted to an emergency per se. *See* 571 S.W.2d at 271-72 (Seiler, J., dissenting).

The dissent in *Epperson* focused squarely on the two and one-half hour delay and concluded that the emergency exception was inapplicable. *See* 571 S.W.2d at 269-73 (Seiler, J., dissenting). "A true emergency does not invite delayed action. The two are mutually inconsistent." *Id.* at 271 (Seiler, J., dissenting).

195. 571 S.W.2d at 264.

196. *See* notes 28-51 *supra* and accompanying text.

197. *See* notes 168-72 *supra* and accompanying text.

198. *See* notes 34-36 *supra* and accompanying text.

199. *See* notes 173-75 *supra* and accompanying text.

200. *See* notes 28-51 *supra* and accompanying text.

201. 571 S.W.2d 260 (Mo. 1978).

202. — S.D. —, 274 N.W.2d 893 (1979).

203. *See* State v. Epperson, 571 S.W.2d 260, 264 (Mo. 1978); State v. Martin, — S.D. —, 274 N.W.2d 893, 897 (1979).

upon entry, seized instrumentalities of the crime from the bedroom where the bodies were found, and checked the rest of the house, without seizing any other evidence, to verify that no one else was there.[204] The court held that this initial search was a valid emergency investigation for injured or missing persons and ruled that the seizures made in the bedroom were valid under the plain view exception.[205] Police, however, made a second search of the house after they had ascertained that neither defendant nor additional victims were in the house and seized more plain view evidence.[206] *Epperson* held that the second search was "within the reasonable time, spatial scope and limited intensity approved by *Tyler*."[207] The court, therefore, found the second seizures legitimate, summarily distinguishing *Mincey* on its facts.[208]

The great disparity in the intensity of the searches in *Mincey*[209] and *Epperson* makes it difficult to consider the second search in *Epperson* unreasonable. Yet, this second search does not seem to fall within *Mincey*'s concept of legitimate emergency activities.[210] The only purpose of the second search appears to have been the collection of more evidence. Police must have been fairly certain before this search that no one was in need of emergency assistance and that defendant was not present. Moreover, the record does not indicate any threatened loss or destruction of evidence.[211] Apart from the less intrusive nature of the searches, however, *Epperson* is distinguishable from *Mincey* in that the same officers who made the initial entry made both searches of Epperson's house. In addition, the officer who stayed with the victim during the first search made the second search.[212] Finally, it seems quite reasonable to construe "legitimate emergency activities" to encompass a second check of the murder scene to verify that neither a well concealed victim nor murderer has been overlooked.[213] This argument ap-

204. 571 S.W.2d at 263.

205. *Id.* at 266.

206. *Id.* at 263.

207. *Id.* at 268.

208. *Id.* at 268 n.2. "The facts in *Mincey* were clearly distinguishable from those in *Tyler*, or those in the case at bar." *Id.*

209. *See* note 116 *supra*.

210. *See* note 150 *supra*.

211. *See* 571 S.W.2d at 263, 268.

212. *Id.* at 263.

213. *See* note 150 *supra* and accompanying text. *See also* Mincey v. Arizona, 437 U.S. 385, 406-07 (1978) (Rehnquist, J., concurring).

pears especially persuasive when both searches are as limited as they were in *Epperson* and the evidence seized was in plain view.

In *Martin,* the court cited *Tyler* to justify a warrantless murder scene search of broader scope than the second search in *Epperson*.[214] Although the court detailed neither the precise duration nor extent of the search, police appear to have searched the entire house for approximately four to five hours.[215] The search began after police found the victim's body, determined that there were no other victims, and arrested defendant.[216] The court ruled that the murder weapons were in plain view during legitimate emergency activity immediately following entry.[217] As to all other evidence, the *Martin* court held that it was seized during a search that, under *Tyler,* was a permissible continuation of the initial search to locate the victim.[218] In its conclusory application of *Tyler*, the court made no attempt to distinguish *Mincey* or to explain why it was inapplicable.[219] Given *Martin*'s manifest inconsistency with *Mincey*[220] and its citation of *Mincey* as support for the validity of the initial entry,[221] this less than careful analysis is perplexing.

The cursory treatment of *Mincey* in *Epperson* and *Martin* is disappointing. Not only did these courts leave the tension between *Tyler* and *Mincey*[222] unresolved, they created new ambiguities of practical significance as well. When the emergency-in-fact—the period during which police know or reasonably believe that immediate action is necessary to save or protect lives or to apprehend a dangerous criminal—circumscribes the allowable scope of a warrantless murder scene search, the boundaries of permissible scope are relatively precise.[223] When a warrantless murder scene search may continue for a reasonable time after the initially valid emergency entry, searchers may have difficulty knowing what is permissible. As Justice White, dissenting in

214. *See* State v. Martin, — S.D. —, —, 274 N.W.2d 893, 894 (1979).

215. *Id.*

216. *Id.*

217. *Id.* at —, 274 N.W.2d at 897.

218. *Id.*

219. *See id.* at —, 274 N.W.2d at 897. In its laconic discussion of the scope of the search, the court does not mention or cite *Mincey.*

220. *See* notes 168-72 *supra* and accompanying text.

221. *See* — S.D. at —, 274 N.W.2d at 896. The court cites *Mincey* for the following proposition: "Equally settled law is the proposition that warrantless searches are permissible in emergency situations." *Id.*

222. *See* notes 168-75 *supra* and accompanying text.

223. *See* notes 168-72 *supra* and accompanying text.

Tyler, observed, "Those investigating fires and their causes deserve a clear demarcation of the constitutional limits of their authority."[224] To the extent the imprecise "reasonable time" standard of the scope of a warrantless murder scene search makes it difficult for police to conform their behavior to the requirements of the fourth amendment, the standard is undesirable.

Arguably, the holding in *Tyler* is peculiar to fire scene investigations and should not be applied to warrantless murder scene searches. Although the decision in *Tyler* preceeded *Mincey* by three weeks, a unanimous Court in *Mincey* chose not to apply the "reasonable time" notion to warrantless murder scene searches.[225] The *Tyler* Court offered three reasons for its conclusions that a warrantless search for a reasonable period following the extinguishment of a fire is constitutional: (1) the need to prevent accidental or intentional loss or destruction of evidence; (2) the need to minimize the interference with the owner's privacy; and (3) the need for prompt determination of the fire's origin in order to prevent possible recurrence.[226]

The first reason announces no new constitutional doctrine; preservation of evidence is an existing exception to the warrant requirement.[227] In *Mincey,* the Court noted that there was no threatened loss or destruction of evidence but cited this warrant requirement exception in its enumeration of previously recognized exceptions.[228] Especially in the context of a murder investigation, *Tyler*'s second reason, safeguarding the owner's privacy, argues equally for the protections of a neutral and detached magistrate[229] and of a warrant "particularly describing the place to be searched, and the persons or things to be seized."[230] Only the third reason, preventing a recurrence of the fire, seems persuasive

224. 436 U.S. at 516 (White, J., dissenting).

225. *See* 437 U.S. at 390-95. Justice Rehnquist both concurred and dissented, but concurred in the part of the majority's opinion concerning the murder scene exception. *See id.* at 405 (Rehnquist, J., concurring and dissenting).

226. *See* 436 U.S. at 510.

227. *See* Schmerber v. California, 384 U.S. 757 (1966); Ker v. California, 374 U.S. 23 (1963).

228. *See* 437 U.S. at 394.

229. *See* Johnson v. United States, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14.

230. U.S. CONST. amend. IV.

of the need for a reasonable time period for investigation, but this reason is clearly irrelevant to warrantless murder scene searches.[231] *Tyler,* therefore, offers no compelling reason for incorporating a "reasonable time" notion into *Mincey*'s adumbration of the permissible scope of a warrantless murder scene search.

2. *Cases Adopting the* Mincey *Standard*

Three recent decisions have held that warrantless searches following legitimate emergency entries exceeded the limits fixed by the emergency-in-fact and *Mincey*. In *Grant v. State,*[232] police seized guns from the floor near the victim's body in the living room, from under a bed in an adjacent room, and from a closed dresser drawer in a bedroom.[233] Applying *Mincey,* the court ruled that the legitimate concerns that permit a warrantless murder scene search could not justify the search of the dresser drawer.[234]

United States v. Presler[235] did not involve a murder scene search. Concerned for defendant's well-being, his landlady summoned police to investigate. She had not seen defendant for some time and had detected an unusual odor emanating from his apartment. Police entered the apartment and found defendant alive, showing no sign of injury, but covered with blood that he apparently had vomited. After defendant was removed to the hospital, police exhaustively searched the apartment.[236] The court held that, under *Mincey*, the search was invalid from its inception.[237] According to the court, the exigencies terminated once defendant had been taken to the hospital. The court found that the absence of any evidence indicating that a crime had occurred in the apartment—as well as the absence of any reason to suppose that defendant was a criminal—precluded any search.[238]

231. This reason is analogous to a search of a murder scene to determine whether the murderer is still on the premises. *Mincey*, however, allows police to verify that the murderer is no longer present. *See* 437 U.S. at 392.

232. 374 So. 2d 630 (Fla. Dist. Ct. App. 1979). Defendant, who had been involved in an altercation with his son that resulted in the son's death, summoned police. *Id.* at 631.

233. 374 So. 2d at 631.

234. *Id.* at 632.

235. 610 F.2d 1206 (4th Cir. 1979). Defendant was indicted and convicted of wire fraud based on evidence seized during the search of his apartment following a legitimate emergency entry by police.

236. *Id.* at 1209.

237. *Id.* at 1210.

238. *Id.* at 1211. A crucial piece of evidence seized in defendant's apartment was a box con-

The court in *State v. Rogers*[239] also applied *Mincey* strictly. Police, responding to a report of a dead body in defendant's home, entered and verified that the victim was dead. After ascertaining that no one was home, they called for an ambulance and then left the house to question a small group gathered outside. Approximately twenty minutes after police first arrived, a second police contingent arrived and conducted a thorough, three and one-half hour search of the house.[240] The court ruled that the emergency-in-fact terminated before the arrival of the search party. In addition, the court held that nothing in the record indicated a possibility of loss or destruction of evidence.[241] Holding that the search exceeded the limits fashioned in *Mincey,*[242] the court rejected the state's argument that a warrantless murder scene search is constitutional if it follows a legitimate entry in response to a report of a dead body and is both prompt and continuous.[243] *Rogers,* even more explicitly than *Mincey,* circumscribed the scope of a warrantless murder scene search by the emergency-in-fact.[244] "Where the exigency is a homicide, the entry is justified to find the victims and perpetrators by a scan of the premises, and in the absence of other unusual circumstances, ends there."[245]

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taining money wrappers with bank identification numbers on them. The court held that the plain view exception would not permit seizure of the wrappers. The court found that, even if the requirement that evidence seized in plain view be immediately apparent as contraband or evidence of a crime allowed a "brief perusal" of the box seized here, this perusal would still not indicate that the money wrappers were evidence of a crime. Therefore, the plain view exception was inapplicable. *Id.* at 1211-12.

239. 573 S.W.2d 710 (Mo. App. 1978).

240. *Id.* at 713.

241. *Id.* at 714-15. "At the time the search by officers began, the premises were known to be clear of occupants and were secure. There was no threat to the contents of the residence and no cause for search without a warrant." *Id.*

242. *Id.* at 714-17.

243. *Id.* at 714.

244. The *Rogers* court stated:

> [A]s a matter of constitutional principle, the emergency doctrine is not just another means to justify a warrantless search but for entry into private premises to respond to urgent need for aid or protection, promptly launched and promptly terminated when the exigency which legitimates the police presence ceases. . . . The entry must be without accompanying intent to search or arrest . . . and the investigation must be only as broad as the exigency to which it responds.

Id. at 716.

245. *Id.*

3. *Reconciling* Mincey *and* Tyler

Rogers derived its holding not only from *Mincey* but from *Tyler* and *Epperson* as well.[246] The court characterized both *Tyler* and *Epperson* as approving seizures of plain view evidence before the emergency-in-fact terminated.[247] *Rogers* does not detail precisely the basis for its conclusions about *Tyler* and *Epperson*, but its analysis evidences implicit inferences about the reasoning in these cases.[248] *Rogers* reads *Epperson* as holding that the emergency-in-fact persisted through the second search.[249] Language in *Epperson* supports *Rogers* reading of that case. *Epperson* asserted that the seizures during the second search could not be justified under the plain view exception unless the second search was a "continuation of the emergency search for injured or missing persons."[250] Moreover, *Epperson* found that discovery of the victims heightened "the exigent quality of the moment."[251] Yet *Epperson* never explicitly stated that the emergency authorizing the initial entry persisted through the second search.[252] Rather, the court found that the search and plain view seizures were within the "reasonable time, spatial scope and limited intensity approved by *Tyler*."[253] Although it seems plausible to believe that the emergency-in-fact in *Epperson* endured beyond the initial check of the house,[254] the *Epperson* Court did not explicitly draw that conclusion.

In *Tyler,* the Supreme Court did not expressly state that the emergency authorizing initial entry to fight the fire continued through the later re-entries and searches.[255] Rather, the Court held that the re-entries and searches were within the "reasonable time" permitted for searches following a fire.[256] Therefore, *Rogers'* assertion that "[i]n *Tyler* . . . the exigency continued when the evidence in plain view was taken," is an inference about the Court's implicit reasoning.[257] This

246. *See id.* at 715-16.
247. *Id.* at 716.
248. *See id.* at 715-16.
249. *Id.* at 716.
250. State v. Epperson, 571 S.W.2d 260, 266 (Mo. 1978).
251. *Id.* at 268.
252. *See id.* at 266-68.
253. *Id.* at 268.
254. *See* notes 212-13 *supra* and accompanying text.
255. *See* 436 U.S. at 509-12.
256. *See id.* at 509-11.
257. 573 S.W.2d at 716.

inference, however, is plausible. In *Tyler's* pragmatic approach to fire scene searches, both need to prevent loss or destruction of evidence and need to prevent recurrence of the fire required a "reasonable time" to search following a fire.[258] Thus, *Tyler* bases its holding, at least in part, on a recognition of the possibility of exigent circumstances. Further, the Court stated that "[i]n determining what constitutes a 'reasonable time to investigate,' appropriate recognition must be given to the exigencies that confront officials serving under these conditions."[259] Finally, the view that the "reasonable time to investigate" following a fire encompasses a notion of continuing emergency accords with the often cited statement of the limits of a warrantless search: "[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.' "[260]

Rogers' reading of *Tyler* and *Epperson,* therefore, seems a permissible construction of the holdings in those decisions. More importantly, the court's analysis reconciled the tension between *Tyler* and *Mincey*.[261] A warrantless fire scene search, like a warrantless murder scene search, is circumscribed by the emergency that justified initiation of the search. In *Rogers'* analysis the differences between *Tyler* and *Mincey* concern the distinction between the emergency created by a fire and the emergency created by a homicide. In the latter, the emergency-in-fact comprises the period during which police know or reasonably believe that immediate action is necessary to save or protect lives or to apprehend a dangerous criminal. With respect to a fire, the emergency-in-fact continues beyond the dousing of the flames; it endures for a "reasonable time" following extinguishment of the fire. In *Rogers'* view, therefore, *Tyler's* specific holding is apparently confined to fire scene searches. *Mincey,* however, is the applicable precedent for a murder scene search.

D. Mincey *as an Obstacle to Obtaining a Warrant*

Because police were involved in the shooting in *Mincey*, it is unlikely that they would have lacked information sufficient to establish the req-

258. *See* 436 U.S. at 510. *See also* notes 226-31 *supra* and accompanying text.

259. 436 U.S. at 510 n.6.

260. Mincey v. Arizona, 437 U.S. 385, 393 (1978) (citing Terry v. Ohio, 392 U.S. 1, 25-26 (1968)). *See* note 28 *supra* and accompanying text.

261. *See* notes 168-75 *supra* and accompanying text.

uisite probable cause for a search warrant to issue.[262] Apparently in only one other murder scene search case,[263] however, were police present when the crime was committed. *Mincey,* therefore, is the exceptional case. When discovery of a dead body does not make it immediately apparent that a crime has been committed,[264] the limited warrantless murder scene search permitted by *Mincey* might make it difficult for police to acquire sufficient information to establish probable cause for further search.[265] Similarly, the information police gather during their "legitimate emergency activities," might fail to indicate how, or by whom, the victim was killed, even if the police observe signs of foul play. In this situation, the inability to particularly describe the object of a proposed search[266] might prevent issuance of a valid warrant.

One pre-*Mincey* decision, *State v. Chapman*,[267] posed this probable inability to obtain a warrant as one reason for sanctioning, under the "right and duty" doctrine, warrantless murder scene searches of broad scope.[268] *Mincey,* however, apparently overruled the general "right and duty" doctrine employed by pre-*Mincey* courts,[269] regardless whether one finds *Mincey*'s holding tempered by *Tyler*. The basis for

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262. *See* 437 U.S. at 368-69. *See also* note 142 *supra.*

263. People v. Eckstrom, 34 Cal. App. 3d 996, 998, 118 Cal. Rptr. 391, 392 (1974).

264. The corpus delicti of homicide requires proof that the alleged victim was killed by the criminal act of some other person. This proof requires that the deceased not be the victim of natural or accidental causes or a suicide. *See* Perkins, *The Corpus Deliciti of Murder*, 48 VA. L. REV. 173 (1962).

265. Probable cause comprises facts and circumstances within the knowledge of police of which they have reasonably trustworthy information and that are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been committed. *See* Draper v. United States, 358 U.S. 307, 313 (1959).

266. U.S. CONST. amend. IV states in part: "[N]o 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."

267. 250 A.2d 203 (Me. 1969).

268. *Id.* at 211. Although police in *Chapman* had strong evidence of foul play, they were initially uncertain whether the victim had actually been murdered. *Id.* The court, in using the "right and duty" doctrine to justify the warrantless search, concluded that an attempt to obtain a warrant would have been futile. *Id. See also* Brown v. Jones, 407 F. Supp. 686, 691 (W.D. Tex. 1974):

> 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.

Id.

269. *See* notes 44-51 *supra* and accompanying text.

the general "right and duty" doctrine was the idea that murder created a hyper-emergency demanding special police action.[270] *Mincey* does recognize homicide as an exigent circumstance per se.[271] To the extent that report of a homicide permits the reasonable belief that warrantless entry is necessary to preserve or protect life or to apprehend a dangerous criminal,[272] this exigent circumstance has significance under the fourth amendment.[273] Nevertheless, the Court was unwilling "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."[274] In addition, *Mincey* declined to recognize the public interest in the prompt investigation of homicide as an exigent circumstance sufficient to justify a warrantless murder scene search.[275] Consequently, pre-*Mincey* case law offering the general "right and duty" doctrine as the basis of warrantless murder scene searches of broad scope appears no longer to be good law. Thus, the *Mincey* limitations on the scope of warrantless searches may apply to some situations, such as in *Chapman,* in which police might have difficulty demonstrating probable cause to obtain a valid warrant.

If police obtain consent to search, however, they can avoid both the narrow limits set by *Mincey* and potential inability to obtain a search warrant.[276] As the Court noted in *Schneckloth v. Bustamonte,*[277] "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."[278] Nothing in *Mincey* appears to restrict the application of the consent exception to murder scene searches.[279] Post-*Mincey* courts, therefore, are likely to scrutinize the record for evidence of consent to search, especially in situations in which the defendant and victims were

270. *See* notes 44-45 *supra* and accompanying text.

271. *See* 437 U.S. at 394.

272. *See id.* at 392.

273. *Id.* at 394.

274. *See id.* at 393-94.

275. *Id.*

276. *See* notes 18-23 *supra* and accompanying text. It is possible that the Maine court in *Chapman* could have found consent to search as a basis for its holding. Not only did defendant admit police to the murder scene, but he also gave police permission to look around. Moreover, defendant initially asserted that the victim died as a result of a fall. 250 A.2d at 205.

277. 412 U.S. 218 (1973).

278. *Id.* at 227.

279. *See* 437 U.S. at 388-95.

joint occupants of the murder scene. Obviously, however, consent searches are not possible in every situation.

IV. CONCLUSION

It remains to be seen whether *Mincey* has so circumscribed warrantless murder scene searches that effective murder investigations will be frustrated. One commentator suggests that *Mincey* might not prevent "prompt and limited warrantless investigation by a coroner or medical examiner . . . [of] the cause of a death."[280] This approach finds support in some pre-*Mincey* cases.[281] The same commentator also finds language in *Mincey* suggesting less stringent particularity requirements when search warrants are sought for a murder scene.[282] The practicability of these suggestions, like the application of *Mincey's* narrow holding, no doubt, will be tested by future litigation.

Michael Dwyer

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280. 2 W. LAFAVE, SEARCH AND SEIZURE 465 (1978). Given *Mincey*'s narrow limits, warrantless searches by coroners or medical examiners might also be unconstitutional. The Court in *Tyler,* however, proposed a type of administrative warrant for fire scene searches after the reasonable time for warrantless searches has expired. *See* 436 U.S. at 511-512. This fire scene administrative warrant is something of a hybrid. Unlike a conventional administrative warrant, this warrant would issue on a showing of specific knowledge about the place to be searched and would be responsive to individual events. *See id.* at 506-08. *See also* Camara v. Municipal Court, 387 U.S. 523, 538 (1967); Note, *The Law of Administrative Search Warrants,* 58 MINN. L. REV. 607 (1974); Note, *The Law of Administrative Inspections: Are* Camara *and* See *Still Alive and Well?,* 1972 WASH. U.L.Q. 313. The *Tyler* Court indicated, however, that the showing required for the fire scene warrant would not be equivalent to the showing of probable cause traditionally needed to obtain a warrant to search for evidence of a crime. *See* 436 U.S. at 505-09. *See also* note 265 *supra.* Theoretically, it might be possible for coroners and medical examiners to obtain a similar type of warrant to search a murder scene when the permissible warrantless investigation leaves the police unable to obtain a conventional search warrant.

281. *See* notes 50-51 *supra* and accompanying text.

282. 2 W. LAFAVE, SEARCH AND SEIZURE 466 (1978). *See also* State v. DeGraw, 26 Ariz. App. 595, 599, 550 P.2d 641, 645 (1976) (indicating that Arizona's pre-*Mincey* murder scene exception had some relevance to the showing required for a search warrant for a murder scene).