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Criminal Law—New York Adopts the Inevitable Discovery Exception—Upholds the Validity of Warrantless Arrests and Searches—Strikes Down Death Penalty Statute.

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will again be abandoned in favor of an absolute right.[81] Until this occurs, however, the impact on individual parolees will be disastrous. The decision not to require counsel at the preliminary hearing will result in more findings of probable cause. This, coupled with the parolee's inability to be released on bail or on his own recognizance in order to gather evidence on his own behalf, will result in more revocations. More revocations will in turn mean more reincarcerations which will result in a disruption of the rehabilitative process. This will occur because the parolee will be torn from his family and job and suffer damage to his already marred reputation. Thus, he will have difficulty in establishing in his employer, the community at large, and perhaps in himself as well, a confidence in his eventual rehabilitation. Moreover, the instant decision will increase the parole board's discretion, thereby increasing the parolee's perception that someone can deprive him of his liberty arbitrarily. Such a perception might very well do permanent damage to the parolee's chances for a rehabilitated belief in due process of law to the detriment of the very correctional process for which the parole system was designed.

PEGGY RABKIN

CRIMINAL LAW—NEW YORK ADOPTS THE INEVITABLE DISCOVERY EXCEPTION—UPHOLDS THE VALIDITY OF WARRANTLESS ARRESTS AND SEARCHES—STRIKES DOWN DEATH PENALTY STATUTE.

On the night of September 8, 1969, at approximately 9 p.m., petitioner robbed a service station attendant in Canastota, New York, fleeing with the attendant's wallet and the station's cash receipts in an automobile belonging to a friend. A few minutes after the holdup, two policemen identified the automobile and proceeded to stop and question the petitioner. Suddenly, he produced a revolver and fatally shot both police officers. Before losing consciousness, however, one of the officers transmitted the petitioner's last name and the car's license number to headquarters. Meanwhile, petitioner abandoned his friend's car and forced a woman to drive him in her own auto-

of the Bettes v. Brady, 316 U.S. 455 (1942) case-by-case approach as a continuing source of litigation in both state and federal courts.

81. *See* Gideon v. Wainwright, 372 U.S. 335 (1962).

mobile to Syracuse. He separated from her at a location near his house. That same night the Syracuse authorities traced the holdup vehicle to the friend of the petitioner. They learned that his full name was Martin Fitzpatrick and determined that an individual by that name owned a house not far from where the abducted woman had last seen the petitioner. At 8 a.m. the following morning police officers, acting without any warrant, surrounded the petitioner's home, knocked and identified themselves. Receiving no response, they proceeded to enter and search for their suspect. Petitioner, hiding in a closet, surrendered to the police who then took him into the hall a few feet away where he was handcuffed, advised of his rights, and questioned about the murder weapon. Petitioner disclosed that it was on a shelf in the closet where he had concealed himself. The police immediately searched for and seized the weapon. At a subsequent suppression hearing, the arresting officers testified that the petitioner had been given the *Miranda*[1] warnings, but the trial court ruled that it lacked sufficient information to find that the *Miranda* requirement had been met. Petitioner's oral statements to the police were accordingly excluded, but the revolver was admitted into evidence because "proper police investigation would (in any event) have resulted in a search of that closet and . . . discovery [of the weapon]."[2] At trial, the jury found the petitioner guilty of murder and the court imposed the death sentence. The petitioner appealed his conviction and sentence, contending that the revolver should not have been admitted into evidence and that New York's death penalty statute[3] was unconstitutional. *Held,* that the revolver was properly admitted into evidence as it would have inevitably been discovered in the normal course of a police investigation; that the entry and search of petitioner's residence and his consequent arrest by the police acting without war-

1. Miranda v. Arizona, 384 U.S. 436 (1966).

2. People v. Fitzpatrick, 32 N.Y.2d 499, 505, 300 N.E.2d 139, 140-41, 346 N.Y.S.2d 793, 795, *state's petition for cert. denied,* 42 U.S.L.W. 3291 (U.S. Nov. 12, 1973) (No. 73-442), *defendant's petition for cert. denied,* — U.S.L.W. — (U.S. Nov. 21, 1973) (No. 73-5370).

3. N.Y. PENAL LAW §§ 125.30, .35 (McKinney 1967) provide in part that where a defendant has been convicted of the murder of a police officer who was killed in the performance of his official duties, any relevant evidence, not legally privileged, may be presented to the jury by the prosecution or defense at a so-called "penalty trial." The exclusionary rules are not applicable. The court will impose the death sentence if unanimous agreement is reached by the jury. *See* notes 70-71 *infra.*

rants did not violate petitioner's fourth amendment rights;[4] and that New York's statute which leaves infliction of the death penalty to the discretion of the jury constitutes cruel and unusual punishment violative of the eighth amendment.[5] *People v. Fitzpatrick,* 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *state's petition for cert. denied,* 42 U.S.L.W. 3291 (U.S. Nov. 12, 1973) (No. 73-442), *defendant's petition for cert. denied,* — U.S.L.W. — (U.S. Nov. 21, 1973) (No. 73-5370).[6]

THE EXCLUSION OF TAINTED DERIVATIVE EVIDENCE AND THE INEVITABLE DISCOVERY EXCEPTION

In order to enforce the provisions of the fourth amendment, the Supreme Court in *Weeks v. United States*[7] adopted the exclusionary rule. With that rule, federal courts have barred the admission at trial of any evidence obtained through illegal conduct on the part of federal law enforcement officers. The purpose of the exclusionary sanction is to prevent the prosecution from profiting by the government's own wrongdoing. The coincidental benefit to the defendant who successfully invokes the rule is a necessary consequence of the rule, but not an intended objective.[8]

The exclusionary rule was first applied to primary evidence which is that evidence acquired during an unlawful search and seizure. In *Silverthorne Lumber Co. v. United States,*[9] the Supreme Court extended the scope of the rule so that evidence derived from the

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

5. U.S. CONST. amend. VIII: "Excessive bail shall not be required nor cruel and unusual punishments inflicted."

6. Hereinafter cited as the instant case.

7. 232 U.S. 383 (1914). Mapp v. Ohio, 367 U.S. 643 (1961), mandated that the states apply the exclusionary rule in their own trial proceedings. *See* text accompanying note 23 *infra.*

8. Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule,* 55 J. CRIM. L.C. & P.S. 307, 308 (1964).

9. 251 U.S. 385 (1920). The government attempted to support a subpoena *duces tecum* with information derived from photographic copies of illegally seized documents. The originals previously had been returned to the petitioner under court order.

primary evidence was also subject to exclusion.[10] The Court stated the exclusionary rule for secondary evidence in the following manner:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. *If knowledge of them is gained from an independent source they may be proved like any others,* but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.[11]

This comment left an important loophole for prosecutors. If the government demonstrates that a lawful source disclosed the same facts which were developed from illegally obtained evidence, those facts could still be used at trial.

The decision of *Nardone v. United States*[12] became the first modification of the independent source rule. In *Nardone* evidence was procured by a wiretap in violation of § 605 of the Federal Communications Act.[13] The government argued that even though *Silverthorne* bars the introduction at trial of tainted derivative evidence, the prosecution remains free to make any other use of the proscribed evidence. The Supreme Court disagreed and remanded the case for a new trial. In doing so, the Court made the following comment:

> Sophisticated argument may prove a causal connection between information [derived from the unlawful conduct] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.[14]

Thus, prosecutors were left with a new exception. Besides showing an independent source, if the government could convince the trial court that the relationship between the primary and derivative evidence was attenuated, the latter would be admissible.

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10. Evidence derived from unlawfully seized evidence has been dubbed "fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341 (1939). The primary evidence is the poisonous tree; the secondary evidence is, of course, its fruit. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized,* 56 CALIF. L. REV. 579, 581 (1968). In the instant case the defendant's revelation of the gun's location is the primary evidence ("poisonous tree") and the pistol, the bullets, and the proof that two of the bullets used in the murder came from that pistol is the secondary evidence ("fruit").

11. 251 U.S. at 392 (emphasis added).

12. 47 U.S.C. § 605 (1934).

13. 308 U.S. 338 (1939).

14. *Id.* at 341.

In *Wong Sun v. United States*,[15] the Supreme Court made its most recent revision in the standard for the admissibility of derivative evidence. Federal agents had made an unlawful arrest and search which resulted in incriminating statements by the defendant. The Court stated that the relevant question in assessing the admissibility of derivative evidence was

> whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by means sufficiently distinguishable to be purged of the primary taint.[16]

This formulation of the standard is currently applied by the courts.[17]

In order for a defendant to take advantage of the "fruit of the poisonous tree" doctrine, he must first demonstrate that the conduct of the law enforcement officers was illegal. If the court agrees, it is the duty of the government to show that evidence introduced at trial is not the direct or indirect consequence of the illegality.[18] To accomplish this, the prosecution might establish that the evidence was obtained through an independent source,[19] or that the source was so attenuated as to dissipate the taint,[20] or that the information was developed through means that did not exploit the illegal conduct.[21] The evidence is excluded if the prosecution cannot meet this burden, and the trial proceeds.

The "inevitable discovery" exception is a recent refinement of *Silverthorne* and its progeny. In practice, a court following this exception will receive questioned evidence if the prosecution can prove that, in the absence of objectionable police conduct, the evidence

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15. 371 U.S. 471 (1963).

16. Professor Pitler argues that the more cogent inquiry should be whether or not the purpose of the exclusionary rule will be served by admitting the evidence. In other words, will illegal police conduct be deterred? Pitler, *supra* note 10, at 588-89.

17. Violation of the fourth amendment guarantee against unlawful searches is not the only area to which *Silverthorne* has been applied. The *Nardone* decision illustrates that the Court will exclude evidence derived from information procured in violation of a statute. *Wong Sun* indicates that information obtained as a result of an unlawful arrest is also inadmissible. *See also* Harrison v. United States, 392 U.S. 219 (1968) (violation of *McNabb-Mallory* rule); United States v. Wade, 388 U.S. 218 (1967) (lineup identification procedure).

18. Nardone v. United Staes, 308 U.S. 338, 341 (1939); Maguire, *supra* note 8, at 309-10; Pitler, *supra* note 10, at 647-49.

19. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

20. Nardone v. United States, 308 U.S. 338 (1939).

21. Wong Sun v. United States, 371 U.S. 471 (1963).

would have been discovered through lawful means.[22] The United States Supreme Court has yet to pass upon this exception.

Mapp v. Ohio[23] imposed the use of the exclusionary rule upon the states. Prior to *Mapp,* New York courts did not exclude primary evidence obtained by illegal means nor evidence derived from such primary evidence.[24] *People v. Rodriguez*[25] presented the first opportunity for the New York Court of Appeals to consider the admissibility of tainted secondary evidence. In *Rodriguez,* the court held that where a defendant makes incriminating statements as a result of being confronted with illegally seized evidence, those statements may not be admitted at trial in accordance with *Silverthorne.*[26]

The court of appeals has continued to face the problem of admissibility of derivative evidence since *Rodriguez.*[27] The standards used by the court were direct applications of the rules handed down in *Silverthorne, Nardone,* and *Wong Sun.* However, in *People v. Mendez*[28] the court established a new exception to the derivative evidence rule. The court held that a witness' testimony is admissible at trial even if the name of the witness was discovered as a result of unlawful police conduct.[29] This result was an incursion into the "fruit of the poisonous tree" doctrine, and foreshadowed the incorporation of the inevitable discovery exception into New York case law.

In the instant case the petitioner contended that it was reversible error for the court to have admitted into evidence the revolver tainted by the defective *Miranda* warnings. If the court were to accept the evidence under the inevitable discovery exception, the exclusionary

22. Maguire, *supra* note 8. *E.g.,* Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964); Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied,* 375 U.S. 860 (1963); People v. Ditson, 57 Cal. 2d 415, 369 P.2d 714, 20 Cal. Rptr. 165 (1962).

23. 367 U.S. 643 (1961).

24. *See, e.g.,* People v. Variano, 5 N.Y.2d 391, 157 N.E.2d 857, 185 N.Y.S.2d 1 (1959); Application of Silfa, 18 Misc. 2d 800, 162 N.Y.S.2d 75 (Sup. Ct. 1957); People v. Fay, 182 Misc. 358, 43 N.Y.S.2d 826 (Sup. Ct. 1943).

25. 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962).

26. *Id.* at 286, 183 N.E.2d at 653-54, 229 N.Y.S.2d at 357. *See also* Cleary v. Bolger, 371 U.S. 392, 402-03 (1963) (Goldberg, J., concurring).

27. *See,* People v. Paulin, 25 N.Y.2d 445, 255 N.E.2d 164, 306 N.Y.S.2d 929 (1969); People v. Dentine, 21 N.Y.2d 700, 234 N.E.2d 462, 287 N.Y.S.2d 427 (1967), *cert. denied,* 393 U.S. 967 (1968); People v. Ballott, 20 N.Y.2d 600, 233 N.E.2d 103, 286 N.Y.S.2d 1 (1967); People v. Chennault, 20 N.Y.2d 518, 232 N.E.2d 324, 285 N.Y.S.2d 289 (1967); People v. Robinson, 13 N.Y.2d 296, 196 N.E.2d 261, 246 N.Y.S.2d 623 (1963).

28. People v. Mendez, 28 N.Y.2d 94, 268 N.E.2d 778, 320 N.Y.S.2d 39, *cert. denied,* 404 U.S. 911 (1971).

29. For a detailed analysis of this exception, see Pitler, *supra* note 10, at 621-24.

rule would be subject to erosion. The court of appeals rejected the position of the petitioner. Chief Judge Fuld, writing for the court,[30] noted that the inevitable discovery exception had been adopted by other jurisdictions on the basis of *Wong Sun*. He espoused the view that the police would have discovered the gun even without the petitioner's statement. "[I]t was entirely fortuitous that the police delayed the search of the immediate area where the defendant was discovered until they had begun questioning him . . . ."[31] The court countered the contention that the exclusionary rule would be eroded by noting that as long as the government must show that the illegal act was not a *sine qua non* of the discovery of the evidence, the exclusionary rule would remain intact.

The fashioning of an acceptable standard by which courts can apply the inevitable discovery exception presents difficulties. Under the "independent source" rule of *Silverthorne,* courts have only to examine past events in order to determine whether the secondary evidence was the result of a lawful lead. Under the inevitable discovery exception, courts are forced to forecast the future in order to decide whether a lawful lead would have arisen. At present, under the inevitable discovery exception, the only guideline is the necessity of finding that the evidence *would,* rather than *could,* have inevitably been found. As the scholar cited by the court of appeals in the instant case explains:

> The significance of the word "would" cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it *would* have acquired the evidence in any event. In order to avoid the exclusionary rule, the government must establish that it *has not* benefitted by the illegal acts of its agents; a showing that it *might not* have so benefitted is insufficient.[32]

The problem involves drawing a line between *would* and *could.* Some reasonable test must be formulated so that courts are not forced in

30. It is perhaps ironic that Chief Judge (then Judge) Fuld authored the *Rodriguez* case ushering into New York case law the derivative evidence exception to the exclusionary rule.

31. Instant case at 507, 300 N.E.2d at 142, 346 N.Y.S.2d at 797.

32. Maguire, *supra* note 8, at 315 (emphasis in original).

each case to drift from the realm of certainty to the domain of probability.[33]

One of the attractions of the exclusionary rule is that it should act as an incentive to law enforcement officers to raise their levels of professionalism and to better their methods of investigation. Without carefully defined limits, the inevitable discovery exception will significantly diminish this incentive. Police will not perform investigations under constitutional standards as announced by the courts; instead, their own predictions as to what is inevitable will guide their conduct.

In the final analysis, whether the inevitable discovery exception is valid must be weighed against the purpose of the exclusionary rule: will unlawful police conduct be deterred?[34] The answer lies in the limits of the exception itself. If the exception is given a very broad scope, it would be capable of swallowing the exclusionary rule. If carefully defined standards could be found for application of the exception,[35] the purpose of the exclusionary rule might be preserved. In the instant case, no such standards were considered and, as a result, the exclusionary rule in New York is susceptible to further erosion.

WARRANTLESS SEARCHES AND ARRESTS AND THE SCOPE OF SEARCH INCIDENT TO ARREST

Apart from being "fruit of the poisonous tree," the petitioner argued that the gun should have been suppressed from evidence on grounds that it was located outside the scope of a permissible search incident to arrest. The United States Supreme Court's position on the boundaries of a search incident to arrest has fluctuated greatly. In *Go-Bart Importing Co. v. United States,*[36] the Court took a very narrow view of what was permissible. There, papers taken from the

33. Judge Wachtler, in a concurring opinion to the instant case, suggests that the exception should include only sources that would have arisen by ordinary requirements of the law, rather than probabilities of individual actions. This standard might have enough specificity that courts could apply it generally. Instant case at 513, 300 N.E.2d at 146, 346 N.Y.S.2d at 803.

34. *See* Broeder, *Wong Sun v. United States: A Study in Faith and Hope,* 42 NEB. L. REV. 483, 548-49 (1963); Pitler, *supra* note 10, at 627-29. *See also,* United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962).

35. *See* note 33 *supra.*

36. 282 U.S. 344 (1931).

arrestee's office desk and safe were suppressed because no crime was committed in the officers' presence and the officers had plenty of time to obtain a warrant. One year later, the Court again liberally construed the fourth amendment in *United States v. Lefkowitz*[37] and affirmed *Go-Bart. Harris v. United States*[38] manifested a new shift in the Supreme Court's approach. In that case a search uncovered evidence of a crime unrelated to that for which an arrest warrant had been issued. The Supreme Court allowed the evidence to be introduced strictly on the grounds that the search of the petitioner's four room apartment was "incident to his arrest" under warrant. *Trupiano v. United States*[39] indicated a new change in the position of the Court. Evidence seized by federal agents during a raid was suppressed because the Court found that a search warrant was necessary wherever reasonably practical, and that the agents had more than enough time to secure one.

The current stance taken by the Supreme Court on the permissible scope of a search incident to arrest was promulgated in *Chimel v. California.*[40] In that case Santa Ana police officers served a valid arrest warrant on the petitioner and searched his three bedroom home despite his protestations. Mr. Justice White, writing for the majority, set the outer perimeter of a search incident to an arrest at the "area into which an arrestee might reach in order to grab a weapon or evidentiary items."[41] The Court was concerned not only for the safety of the arresting officer, but also with the prevention of the destruction or concealment of evidence by the individual under arrest.[42]

New York has incorporated the *Chimel* restrictions into its case law.[43] A remark in *People v. Floyd,*[44] however, while nominally accepting the *Chimel* rule, introduced a new interpretation. In *Floyd,* the court of appeals determined that petitioner's arrest was unlawful and excluded evidence discovered in conjunction with the arrest. Nonetheless, Judge Breitel, in reference to petitioner's argument

37. 285 U.S. 452 (1932).
38. 331 U.S. 145 (1947).
39. 334 U.S. 699 (1948).
40. 395 U.S. 752 (1969).
41. *Id.* at 763.
42. *Id.*
43. *E.g.,* People v. Floyd, 26 N.Y.2d 558, 260 N.E.2d 815, 312 N.Y.S.2d 193 (1970); People v. Gonzalez, 33 App. Div. 2d 762, 305 N.Y.S.2d 927 (1969).
44. 26 N.Y.2d at 558, 260 N.E.2d at 817, 312 N.Y.S.2d at 196 (1970).

that the evidence was also inadmissible under *Chimel,* left open the question of "grabbing distance":

> It suffices that it is not at all clear that the "grabbing distance" authorization in the *Chimel* case is conditioned upon the arrested person's continued capacity to grab.[45]

Until the instant case, no court in New York has taken upon itself the burden of clarifying Judge Breitel's doubts.

Turning aside from the *Chimel* rule, the petitioner also urged that the warrantless entry, search and seizure rendered the weapon inadmissible at trial. At present, the United States Supreme Court requires that a law enforcement officer obtain a search warrant in order to enter an individual's home for the purpose of seizing evidence.[46] On the other hand, the Court follows the common law rule that an officer does not need an arrest or search warrant to enter a home for the purpose of making an arrest.[47] The government defended this apparent inconsistency in *Jones v. United States.*[48] The Supreme Court disposed of the case on other grounds and thereby avoided the issue of whether any warrant was necessary. However, Mr. Justice Harlan, writing for the Court, did raise some doubt on the subject:

> These contentions . . . would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within upon probable cause that he had committed a felony under the circumstances where no reason appears why an arrest warrant could not have been sought is consistent with the Fourth Amendment.[49]

A direct confrontation has not yet materialized,[50] and state courts continue to follow the common law principle.

The Supreme Court has indicated that it may be ready to eliminate the present dichotomy of treatment between entry to make a

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45. *Id.*

46. Vale v. Louisiana, 399 U.S. 30 (1970); Chapman v. United States, 365 U.S. 610 (1961); Agnello v. United States, 269 U.S. 20 (1925).

47. *See* Note, *The Neglected Fourth Amendment Problem in Arrest Entries,* 23 STAN. L. REV. 995 (1971).

48. 357 U.S. 493, 499 (1958).

49. *Id.* at 499-500.

50. Ironically, Mr. Justice Harlan was again able to note 13 years later that the issue, though discussed by the majority and minority opinions, remained unanswered. Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (concurring opinion).

warrantless arrest and entry to make a warrantless search. In *Warden v. Hayden*,[51] the petitioner was seen entering a home after committing an armed robbery. Within five minutes, the police converged on the home and proceeded to enter and search for the petitioner. The Supreme Court found the entry, search, and arrest valid, but relied upon the "exigencies of the situation,"[52] rather than common law principles. The problem left unresolved by the decision is what constitutes "exigency"? The United States Court of Appeals for the District of Columbia Circuit has attempted to fashion some guidelines.[53] To determine whether exigent circumstances existed, the court suggested a consideration of the following factors: whether the crime involved was one of violence; whether the police officer had reason to believe his suspect was armed; whether something more than probable cause existed to lead the police officer to believe his suspect had committed a crime; whether there was strong reason to believe the suspect was inside; whether there was strong likelihood of escape by the suspect if not swiftly apprehended; whether the entry was made peacefully.[54] These factors were not intended to be conclusive on the issue of whether "exigency" existed, but rather they are an aid to the court in making a case-by-case evaluation of the situation at the time the entry was made.[55]

New York's Criminal Procedure Law[56] embodies the common law rule and defines the circumstances under which an entry may be made to perform a warrantless arrest.[57] A police officer making an entry to arrest without a warrant has no greater restrictions imposed on his conduct than an officer making an entry to arrest with a warrant.[58]

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51. 387 U.S. 294 (1967).
52. *Id.* at 298.
53. Dorman v. United States, 435 F.2d 385, 391-96 (D.C. Cir. 1970) (en banc).
54. *Id.* at 392-93.
55. *Id.* at 392.
56. N.Y. CRIM. PRO. LAW (McKinney 1971) (hereinafter cited as CPL).
57. *Id.* § 140.15.
58. *Id.* § 120.80 states:

(1) A warrant of arrest may be executed on any day of the week and at any hour of the day or night. (2) Unless encountering physical resistance, flight or other factors rendering normal procedure impractical, the arresting police officer must inform the defendant that a warrant for his arrest for the offense designated therein has been issued. Upon request of the defendant, the police officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show it to the defendant upon request as soon after the arrest as possible. (3) In

In the instant case, the court of appeals disagreed with the petitioner's contention that the revolver was outside the boundary created by *Chimel.* The court stated that the gun in the closet was certainly within a "grabbable" area. The fact that the closet was not searched until after the petitioner was handcuffed had no effect whatsoever on the validity of the search. Quoting from the *Floyd* opinion, the court reiterated its doubts about the restrictions on a search incident to arrest: "it is not at all clear that the 'grabbing distance' authorized in the *Chimel* case is conditioned upon the arrested person's continued capacity 'to grab.' "[59]

The court of appeals found that the absence of search and arrest warrants did not affect the admissibility of the pistol either. The court noted that a man named Fitzpatrick had shot two policemen; that the getaway car belonged to a friend of Martin Fitzpatrick; and, that the petitioner's home was near the spot where he had last been seen. For these reasons, the court stated that the police had more than probable cause to arrest the petitioner and that it was reasonable to believe that the petitioner was inside the house. The court went further, however, in justifying the entry, search, and arrest by noting that speed was essential, and that the police were authorized to act without warrants in the interest of public safety.

In *Chimel,* the Supreme Court narrowly defined the limits of search incident to arrest. The Court specifically stated that the arresting officer was permitted to search for weapons within a "grabba-

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order to effect the arrest, the police officer may use such physical force as is justifiable pursuant to section 35.50 of the penal law. (4) In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will: (a) Result in the defendant escaping or attempting to escape; or (b) Endanger the life or safety of the officer or another person; or (c) Result in the destruction, damaging or secretion of material evidence. (5) If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary.

CPL § 140.15(4) provides:

In order to effect such an arrest [without warrant], a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

59. Instant case at 508, 300 N.E.2d at 143, 346 N.Y.S.2d at 799.

ble" distance to insure his own safety.[60] The Court also reasoned that the officer was permitted to search for evidence within the same limits to prevent its destruction.[61] Mr. Justice Stewart went on to declare that

> [t]here is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers *or other closed or concealed areas* . . . . Such searches, in the absence of exceptions,[62] may be made only under the authority of a search warrant.[63]

A logical conclusion to be drawn from the Court's analysis is that if the arresting officer's safety obviously is not endangered, or if no evidence is subject to destruction, no search may be made. Consequently, once the arrestee is forcibly subdued, the threat posed to evidence and personal safety ceases to exist and further searching becomes impermissible.

The *Fitzpatrick* opinion is clearly incompatible with the *Chimel* rationale. To reach the result in the instant case, one must assume that a closet, a number of feet away, was within the "grabbable" range of a handcuffed man. Perhaps to counter the criticism that it had assumed too much in the instant case, the court based its decision on the *Floyd* remark that the term "grabbing distance" is not dependent on the arrestee's continued capacity to grab.[64] From the very superficial treatment given to *Chimel* in that case, it is obvious that the court had not intended its statement to be definitive. Nonetheless, the court of appeals in the instant case accepted it as such without providing a logical explanation as to why the *Chimel* restrictions should be diluted.

Assuming the validity of this interpretation of *Chimel,* the court finds strong foundation for the legality of the entry, arrest and search. The opinion cites numerous factors which provided more than probable cause to search and arrest.[65] Furthermore, it found warrants to be unnecessary for the officers' conduct. The common law rule em-

60. 395 U.S. at 763.

61. *Id.*

62. *E.g.,* Warden v. Hayden, 387 U.S. 294 (1967) ("hot pursuit"); *see* Katz v. United States, 389 U.S. 347, 357-58 (1967).

63. 395 U.S. at 763 (emphasis added).

64. People v. Floyd, 26 N.Y.2d 558, 563, 260 N.E.2d 815, 817, 312 N.Y.S.2d 193, 196 (1970).

65. Instant case at 509, 300 N.E.2d at 143, 346 N.Y.S.2d at 799.

bodied by the New York Criminal Procedure Law would seem to justify amply the position of the court of appeals in the instant case. Nevertheless, it is surprising to note that the court did not mention the statutory authorization for the officers' actions. An explanation for this "omission" is that the court of appeals has unexpressed doubts about the constitutionality of a warrantless entry and arrest in the absence of "exigent" circumstances. Since Justice Harlan's statement in *Jones,* the issue has been left unresolved by the Supreme Court. *Warden v. Hayden* is indicative of the Supreme Court's drift towards placing entry and arrest on the same plane as entry and seizure of evidence where a warrant is normally required unless certain, specified circumstances exist. This drift explains why the United States Court of Appeals for the District of Columbia Circuit considered the factors contributing to "exigency."[66] By grounding its opinion on those same factors, the New York Court of Appeals indicates that it has also perceived the same trend.

NEW YORK'S DEATH PENALTY STATUTE

The United States Supreme Court has assumed, if not asserted, the validity of the death penalty whenever the issue has arisen.[67] The Court completely reversed its position on the death penalty by a vote of 5-4 in *Furman v. Georgia.*[68] The petitioner's sentences as imposed under Texas[69] and Georgia[70] legislation were overturned on the basis of two theories. Justices Brennan and Marshall based their opinions on the grounds that capital punishment was per se "cruel and unusual" and therefore prohibited by the eighth amendment. Justices Douglas, Stewart and White noted that the statutes left the imposition of the death sentence to the unfettered discretion of the jury thereby creating the possibility that the penalty would be applied discriminatorily. The discretionary aspect of the statute, rather than the severity of the punishment, was found to violate the eighth amendment. The dissent

66. Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).

67. Note, *The Death Penalty—The Alternatives Left After Furman v. Georgia,* 37 ALBANY L. REV. 344, 346-50 (1973).

68. 408 U.S. 238 (1972).

69. TEX. PENAL CODE, art. 1189 (1961). Texas has adopted a new penal code effective January 1, 1974 which no longer provides for capital punishment.

70. GA. CODE ANN. §§ 26-1005, -1302 (Spec. Supp. 1971) (effective for crimes committed prior to July 1, 1969), *as amended,* GA. CODE ANN. §§ 26-1101, -2001 (1971).

accused the majority of usurping the powers of the legislatures and of failing to exercise proper judicial restraint.

Under the New York Penal Law, the death penalty may be imposed only for the crime of murder and only in certain circumstances.[71] If those circumstances exist, the convicted defendant is subjected to a "penalty trial"[72] where the jury decides whether capital punishment will be imposed.

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71. N.Y. PENAL LAW § 125.30 (McKinney Supp. 1972):
(1) When a defendant has been convicted by a jury verdict of murder as defined in subdivision one or three of section 125.25 the court shall, as promptly as practicable, conduct a further proceeding, pursuant to section 125.35, in order to determine whether the defendant shall be sentenced to death in lieu of being sentenced to the term of imprisonment for a class A felony prescribed in section 70.00, if it is satisfied that: (a) Either: (i) the victim of the crime was a peace officer who was killed in the course of performing his official duties, or (ii) the victim was an employee of a local jail, penitentiary or correctional institution performing his official duties, or (iii) at the time of the commission of the crime the defendant was confined in a state prison or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or having escaped from such confinement or custody the defendant was in immediate flight therefrom; and (b) The defendant was more than eighteen years old at the time of the commission of the crime; and (c) there are no substantial mitigating circumstances which render sentence of death unwarranted. (2) If the court conducts such a further proceeding with respect to a sentence, the jury verdict of murder recorded upon the minutes shall not be subject to jury reconsideration therein.

72. *Id.* at § 125.35 (McKinney 1967):
Any further proceeding authorized by section 125.30 with respect to a sentence for murder shall be conducted in the manner provided in this section. (2) Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose. (3) In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence. (4) The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the maximum and possible release on parole of a person sentenced to a term of imprisonment for a class A felony. (5) The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the sentence of imprisonment, the court shall discharge the jury and shall impose such sentence. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence of imprisonment.

In the instant case, the court of appeals agreed with the petitioner that the New York statute providing for the death sentence was unconstitutional. In reviewing *Furman v. Georgia,* Chief Judge Fuld concluded that the plurality's objection to capital punishment was based upon the fact that imposition of the penalty was left solely to the discretion of the jury. Finding that the New York Penal Law contained this same defect, the court overturned the sentence.

The legislative response to *Furman* might take a variety of forms.[73] A constitutional amendment is one possibility.[74] Alternatively, legislation might be drafted to limit the discretionary power of the judge and jury.[75] A return to a system of mandatory death penalties for certain serious crimes is a third solution.[76] Finally, states might wait and let the Supreme Court review their individual death penalty statutes on the assumption that only those which are wholly discretionary will be invalidated.

Assuming that the legislature of New York desired to reinstitute capital punishment in the state, two immediate possibilities exist: a mandatory death sentence for certain offenses;[77] or, the creation of specified guidelines to be taken into account by the judge and jury.[78] Of these two the latter would appear to be more desirable. Mandatory sentencing is regressive and whether it eliminates discretion is questionable. Prosecutors who make the decisions on what charges are to be brought would select which defendants are to face capital punishment.[79]

CONCLUSION

People v. Fitzpatrick signifies several important developments in New York criminal law. It heralds the arrival of the inevitable dis-

73. *See* Vance, *The Death Penalty After Furman,* 48 NOTRE DAME LAWYER 854-57 (1973); Note, *supra* note 67.

74. Vance, *supra* note 73, at 854.

75. State v. Dixon, 13 CRIM. L. RPTR. 2495 (Fla. July 26, 1973) (upholding constitutionality of Florida statute); FLA. STAT. ANN. SESS. LAWS 1972, ch. 72-724, § 921.141; S. 1400, 93d Cong., 1st Sess. (1973).

76. California has recently enacted such a statute. Washington Post, Sept. 25, 1973, § A, at 2, col. 1.

77. *E.g., id.*

78. *E.g.,* FLA. STAT. ANN. SESS. LAWS 1972, ch. 72-724, § 921.141; S. 1400, 93d Cong., 1st Sess. (1973).

79. Schwartz, *The Proposed Federal Criminal Code,* 13 CRIM. L. RPTR. 3265, 3271 (1973).

covery exception; it foreshadows the replacement of the common law principle governing entry to make a warrantless arrest with an "exigent circumstances" rationale; and, it expunges capital punishment from the New York Penal Law. It will be interesting to see whether the courts limit *Fitzpatrick* to the very difficult fact situation that it presented, or whether the expansive search and seizure principles articulated therein will be applied regularly.

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CRIMINAL LAW—SUBDIVISION OF NEW YORK LOITERING STATUTE HELD UNCONSTITUTIONALLY VAGUE—THE EFFECT OF CONSIDERATIONS WHICH ARE COLLATERAL TO THE "VAGUENESS" PROBLEM.

Defendant observed standing behind a tree in front of a temporarily unoccupied house at one o'clock in the morning was questioned by police concerning his presence. Subsequently, he was arrested upon his failure to identify himself or to give a reasonably credible account of his behavior and convicted of loitering under New York Penal Law § 240.35 (6).[1] The appellate division affirmed and defendant appealed, by permission of an associate judge, to the court of appeals. In a four to three decision, the court reversed, *holding* that section 240.35 (6) violates due process of law in that its language is so vague as to fail adequately to inform an individual of the conduct which it prohibits. *People v. Berck,* 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33 (1973).

The court in the instant case was called upon to settle an issue which had caused considerable turmoil among lower tribunals in New York. In the five prior instances when local courts had undertaken to determine the constitutionality of subdivision six, two had

1. N.Y. PENAL LAW § 240.35(6) (McKinney 1967):
A person is guilty of loitering when he:

. . . .

6. Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonable credible account of his conduct and purposes . . . .

Id.