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Crime Scene Searches and the Fourth Amendment

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Introduction

Crime scene investigation requires understanding and application of elements of criminal law, criminal procedure, constitutional law and evidence. Legal requirements are derived from the U.S. and State Constitutions, federal and state statutory law, court rules and a combination of federal and state appellate court decisions. This article focuses on issues related to the Fourth Amendment, exigent circumstances and crime scene searches. The article begins with a brief discussion of the Fourth Amendment search and seizure warrant requirement rule and generally recognized exceptions to the rule. I then focus on crime scene searches and the exigent circumstances exception to the warrant requirement rule. Key U.S. Supreme Court decisions are interpreted and analyzed. The parameters of exigent circumstances are explored. Other subject matter and materials are considered to provide context and clarify fundamental legal principles which impact practical decisions concerning crime scene searches. Differences in state law which may impact crime scene searches are also addressed. I conclude with recommendations to facilitate improved compliance with the Fourth Amendment as it relates to crime scenes.

Many of the legal issues associated with crime scene investigation are well-documented in the literature and case law. These issues include, but are not limited to, chain of custody, qualifications of experts and standards of admissibility for scientific testing. In general, these issues are aptly understood and applied by academics, the legal community and law enforcement professionals. However, one area of continuing confusion involves crime scene searches and the circumstances under which it is necessary to obtain a search and seizure warrant. Despite three clear U.S. Supreme Court opinions over the past three decades, experienced police officers,

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detectives and arson investigators are sometimes unaware that there is no "murder scene exception" to the Fourth Amendment. Some investigators and officers are unaware that in the absence of one of the commonly recognized exceptions to the search and seizure warrant rule, law enforcement officers must obtain a warrant to search a crime scene where a reasonable expectation of privacy exists. (Geberth, 2003).

Exceptions to the Fourth Amendment Search & Seizure Warrant Requirement Rule

Legal analysis of crime scene searches begins with the Fourth Amendment which established the warrant requirement and provides that:

> *AMENDMENT IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized.*

While the Fourth Amendment was originally intended to apply only to the federal government, those portions of the U.S. Bill of Rights considered "necessary to fundamental fairness and ordered liberty" have been applied to states through the doctrine of selective incorporation and due process clause of the Fourteenth Amendment. Clearly the protections of the Fourth Amendment fall within this category. See *Weeks v. U.S.* 232 U.S. 383 (1914), *Wolf v. Colorado* 338 U.S. 25 (1949) *and Mapp v. Ohio* 367 U.S. 643 (1961).

Search and seizure warrants are required under the Fourth Amendment unless the facts and circumstances surrounding the search and seizure fall within the boundaries of clearly established warrant exceptions recognized by the U.S. Supreme Court. Key exceptions relating to crime scenes, including exigent circumstances, search incident to arrest, consent and plain view are briefly described below. There is no separate exception for crime or murder scenes.

Exigent circumstances is, perhaps, the most important exception to the Fourth Amendment search and seizure warrant rule as it relates to crime scene searches The exigent circumstances exception to the Fourth Amendment search and seizure warrant requirement rule was created by the U.S. Supreme Court on a case by case basis in much the same way as the other exceptions to the search and seizure warrant requirement. In order to justify a warrantless entry and/or search and seizure based upon the exigent circumstances, law enforcement must demonstrate one or more of the following: threats to life or safety, sometimes referred to as the emergency situation doctrine; the risk of immediate destruction or removal of evidence; or escape or flight. In order to justify warrantless entry to prevent immediate destruction or removal of evidence or prevent flight or escape, the probable cause requirements for arrest and/or search and seizure must be satisfied. See, for example, *Warden v. Hayden*, 387 U.S. 294 (1967) involving an arrest and search based upon information provided by two taxi drivers who reported seeing an armed robber run into a residence. However, with regard to emergencies and emergency aid, probable cause need not necessarily be incorporated into the analysis. See,

Wayne v. U.S. 318 F 2nd 205 (1963); involving warrantless police entry into an apartment in response to an emergency call reporting a possible death resulting from an attempted abortion. See also, later discussion of emergencies, police responses and the Fourth Amendment. (Decker, 1999)

The plain view exception to the search and seizure warrant requirement rule is also particularly important in relationship to crime scene searches and often arises in concert with exigent circumstances.. The plain view doctrine holds that objects falling in the plain view of an officer who is lawfully in a position to view the object may be seized and introduced into evidence. See *Harris v. United States 390* U.S.234 (1968) upholding the seizure and admissibility of evidence related to a robbery discovered as the result of impoundment of a vehicle. Pursuant to the plain view doctrine, if police are lawfully in a position from which they view an object, if the incriminating character of the object is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. *Minnesota v. Dickerson* 508 U.S. 366 (1993), involving a *Terry v. Ohio* 392 U.S. 1 (1968) stop and frisk extended the plain view doctrine to include plain feel, although the facts of *Dickerson* did not justify the seizure of the crack cocaine. In situations involving search and seizure in private dwellings and other enclosed areas, there must be a prior valid intrusion, officers must not unreasonably intrude on an individual's expectation of privacy and the incriminating character of the object must be immediately apparent. The discovery need not be inadvertent. See *Horton v. California* 496 U.S. 198 (1990) upholding the seizure of weapons found in plain view during a search for the proceeds and instrumentalities of a robbery although the search and seizure warrant specified only the proceeds of the robbery.

Consent is another well recognized and important exception to the search and seizure warrant requirement rule as it relates to crime scene searches. Consent searches must be voluntary and not coerced by force or threat of force. Consent cannot be based upon misrepresentation or deception. Individuals must have the right to refuse the request to consent. The individual consenting must have authority to do so. Consent may be limited in time, scope and revoked at any time. See, for example, *Schneckloth v. Bustamonte* 412 U.S. 218 (1973) for an extensive discussion of voluntariness in the context of a consent search of an automobile; see also, *Bumper v. North Carolina* 391 U.S. 543 (1968), a capital rape case involving police misrepresentation of the existence of a search warrant thereby nullifying consent; and, *Illinois v. Rodriguez* 497 U.S. 177 (1990); recognizing the validity of third party consent by an individual who police reasonably believed possessed common authority at the time of entry.

Search incident to arrest is another well recognized exception to the warrant requirement of the Fourth Amendment that may relate to crime scene searches. *Chimel v. California* 395 U.S. 752 (1969) involving the arrest of a burglary suspect in his home pursuant to an arrest warrant and the subsequent search of his home without a warrant, held that an arresting officer may search an arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction and may search the area "within his immediate control". *Chimel* established the permissible scope of a search incident to arrest to include both the person

arrested and the area within his or her immediate control, the area within which the person might grab a weapon or destroy evidence. Searches beyond the scope permitted by *Chimel* require either a warrant or must fall within another exception to the search and seizure warrant requirement rule.

Motor vehicles on a public road or highway are also subject to warrantless search and seizure provided that probable cause exists at the time of the search and seizure. Exigent circumstances are not required to justify a search and seizure of vehicles stopped on or off the road. See *Carroll v. United States* 267 U.S. 132 (1925). Vehicle searches are beyond the scope of this article.

Warrantless crime scene searches must fall within the ambit of one of these exceptions where a reasonable expectation of privacy exists. Note, there is no expectation of privacy in open fields or abandoned property. *Hester v. United States* 265 U.S.57 (1924).

Key U.S. Supreme Court Crime Scene Decisions

Exigent circumstances, plain view and consent are the exceptions which arise most often in the context of crime scene searches. Three key U.S. Supreme Court cases which directly address crime scene searches are *Mincey v. Arizona* 437 U.S. 385 (1978), *Thompson v. Louisiana* 469 U.S. 17 (1984) and *Flippo v. West Virginia* 528 U.S. 11 (1999). I review the facts, circumstances and legal rulings in each case as it relates to crime scene searches. I then discuss the legal and practical implications of the cases with regard to crime scene searches, after which I explore recent developments concerning exigent circumstances, and to a lesser extent plain view and consent. I conclude with practical recommendations to improve legal compliance with Fourth Amendment search and seizure requirement. Legal compliance, rapid response to exigencies and quality of crime scene investigations are entirely consistent and compatible with each other.

Mincey v. Arizona

In 1978, U.S. Supreme Court in *Mincey v. Arizona* (1978) unequivocally held that there is no "murder scene" exception to the Fourth Amendment. The *Mincey* case involved the shooting death of Barry Hendricks, an undercover police officer, by petitioner, Rufus Mincey, a suspected narcotics dealer on October 28, 1974. Henricks had arranged for the purchase of heroin from Mincey earlier in the day and returned with nine plainclothes police officers and a county attorney to raid the apartment. Three acquaintances of Mincey were in the living room of the apartment when Henricks knocked on the door. One of the acquaintances, John Hodgman, opened the door, Hendricks entered and went directly to a bedroom, while other officers pushed past Hodgman and entered the apartment. A volley of shots rang out from the bedroom, Officer Henricks emerged from the bedroom and collapsed on the floor.

Other officers immediately "looked" through the apartment for other victims. They found Mincey lying wounded and semi-conscious on the floor of the bedroom, a woman hiding in a closet in the bedroom, and Mincey's three acquaintances, one of whom had been shot in the head, in the living room. Officers requested medical assistance and rendered some aid to Hendricks who died several hours later at the hospital. Pursuant to a Tucson Police Department policy which prohibited officers from investigating incidents in which they were involved, the officers took no further investigative action. They did not search the premises or seize any evidence. They guarded the suspects and the premises.

Homicide detectives arrived ten minutes later in response to a radio report and took charge of the investigation. They supervised Officer Hendricks and the suspect's removal from the premises and proceeded to gather evidence. With regard to the search, the Court found:

> "Their search lasted four days,[n3] 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 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 200 to 300 objects were seized. In short, Mincey's apartment was subjected to an exhaustive and intrusive search. No warrant was ever obtained."

The State made four arguments in support of its contention that a warrant was not necessary: (1) that Mincey had no privacy interest in his apartment; (2) that a homicide scene presents an emergency situation requiring immediate action; (3) the vital public interest in prompt investigation of the crime of murder; and (4) the Arizona Murder Scene Exception was constitutionally permissible.

The court addressed each of the four arguments in turn. First, the Court held that Mincey had a privacy interest in his apartment and the fact that he shot Officer Hendricks did not abrogate his privacy right (*Michigan v. Tyler* 436 U.S. 499 (1978)) nor did the fact the police were there to arrest him (*Chimel v. California* 395 U.S. 752 (1969)). Next, the Court held a homicide crime scene did not present a categorical emergency situation such as that described in *Michigan v. Tyler*, supra. Third, the Court held that crimes other than murder such as rape and robbery also require prompt investigation and that law enforcement efficiency cannot justify disregard the Fourth Amendment. Finally, the Court struck down the murder scene exception created by the Arizona State Supreme Court as violating the Fourth Amendment warrant requirement by replacing the judgment of a neutral detached magistrate with that of a police officer both with regard to reasonableness and scope of search.[2] The U.S. Supreme Court

[2] Note, state supreme courts may interpret their state's constitution, declarations of rights and other state constitutional guarantees and provide additional protections beyond those provided by the U.S. Constitution and Bill of Rights. However, these federal guarantees as interpreted by the U.S. Supreme Court set a minimum standard which must be followed by all states.

reversed the decision of the Arizona Supreme Court and remanded the case for further proceedings consistent with its opinion.[3]

Thompson v. Louisiana

Six years later, the U.S. Supreme Court returned to the issue of crime scene searches in *Thompson v. Lousiana* (1984). In *Thompson*, Jefferson Parish Sheriff's Department deputies responded to petitioner Thompson's home for a report of a homicide called in by her daughter. The daughter admitted several deputies into the home and directed them to the locations of petitioner and the victim. Deputies conducted a cursory search and discovered the body of the victim, petitioner's husband, dead from a gunshot wound and also found petitioner, unconscious from an apparent drug overdose. Petitioner's daughter indicated to the deputies that her mother had called her, indicated to her that she had shot and killed her husband and had taken an overdose of pills in an attempt to commit suicide but had changed her mind and was requesting help. The deputies immediately transported the unconscious petitioner to a hospital and secured the scene.

Two members of the Jefferson Parish Sheriff's Department homicide unit arrived approximately 35 minutes later for a follow-up investigation of the homicide and attempted suicide. They conducted what they described as a 'general exploratory search for evidence of a crime'. The search lasted approximately two hours and involved every room of the house. The petitioner was indicted for second degree murder and moved to suppress three key items of evidence discovered during the search:

> "a pistol found inside a chest of drawers in the same room as the deceased's body, a torn up note found in a wastepaper basket in an adjoining bathroom, and another letter (alleged to be a suicide note) found folded up inside an envelope containing a Christmas card on the top of a chest of drawers. All of this evidence was found in the "general exploratory search for evidence" conducted by two homicide investigators… By the time those investigators arrived, the officers who originally arrived at the scene had already searched the premises for other victims or suspects. The investigators testified that they had time to secure a warrant before commencing the search, see 448 So.2d, at 668, and that no one had given consent to the search, see App. C to Pet. for Cert. 7-8, 16, 19-20 (transcript of testimony of Detectives Zinna and Masson at suppression hearing)."

The Louisiana State Supreme Court attempted to distinguish between the facts and circumstances in the *Thompson* case from those involved in *Mincey*, supra. The Louisiana Court argued that the two hour search in this case was far less intrusive than the four day search in *Mincey*. The State also argued that Petitioner's telephone call and request for assistance resulted in a diminished expectation of privacy. Finally, the State suggested that an element of consent

[3] In addition to the search and seizure issues, the Court addressed Miranda issues which are beyond the scope of this analysis.

arising from the daughter's "apparent authority" lent further credence to the diminished expectation of privacy argument. However, the State did not argue a theory of express or implied consent to search.

The U.S. Supreme Court addressed all of these arguments. First, it reiterated it's holding in *Mincey* that there is no murder scene exception to the search and seizure warrant requirement exception. Next, while it agreed that the two hour search in Thompson was less intrusive than the four day search in *Mincey*, it nevertheless held that the two hour search represented a significant intrusion and invasion of privacy subject to Fourth Amendments protections, including the warrant requirement.

With regard to the diminished expectation of privacy argument, the U.S. Supreme Court noted the similarity between Louisiana's arguments and those made my Arizona in *Mincey*. Here again, it rejected a diminished expectation of privacy argument. In this case, the Court held that calling for medical assistance did not result in a reduced expectation of privacy. While the court noted that a plain view argument could have been made in the event that evidence was discovered and seized while rendering medical assistance or searching for other victims or suspects, this was not the situation in Thompson. Finally, the Court ruled against the diminished expectation of privacy argument based upon the daughter's "apparent authority to consent". The court stated that the issue of consent was a factual one not before the Court and noted that both Jefferson Parish Sheriff's Departments investigators indicated that there was no consent.

Flippo v. West Virginia

Fifteen years after *Thompson* and twenty one years *after Mincey*, the U.S. Supreme Court was again presented with the case of murder scene searches in *Flippo v. West Virginia* (1999). Here again, the U.S. Supreme Court upheld its finding in *Mincey*, that there is no murder scene exception to the search and seizure warrant requirement rule.

The facts of *Flippo* are as follows. Petitioner, Flippo, and his wife were vacationing at a cabin in West Virginia one night in 1996. Petitioner called 911 to report that he and his wife had been attacked. Police responded, observed Flippo waiting outside the cabin with injuries to his head and legs, questioned him and entered the cabin where they found the body of his wife with fatal head wounds. Petitioner was transported to the hospital and police cordoned off the area and searched for footprints and signs of forced entry. When a police photographer arrived at about 5:30 a.m., they re-entered the cabin to "process the crime scene." They "took photographs, collected evidence and searched the contents of the cabin" for 16 hours.

> "According to the trial court, "[at] the crime scene, the investigating officers found on a table in Cabin 13, among other things, a briefcase, which they, in the ordinary course of investigating a homicide, opened, wherein they found and seized various photographs and negatives…The photographs included several taken of a man who appears to be taking off his jeans… later identified as Joel Boggess… At trial, the prosecution

> introduced the photographs as evidence of petitioner's relationship with Mr. Boggess and argued that the victim's displeasure with this relationship was one of the reasons that petitioner may have been motivated to kill her"

The Petitioner filed a motion to suppress the photographs and negatives on the grounds that they were illegally seized without a warrant. Petitioner's motion was denied and he was convicted by the trial court. The trial court made no effort to distinguish the case from Mincey and indicated that the investigators "having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area." App. A to Pet. for Cert., at 3.

Despite the fact that the trial court made no effort to distinguish the *Flippo* case from *Mincey*, the State of West Virginia argued that the trial court's finding was legally supportable on theories of implied consent, plain view, exigent circumstances and inventory. The U.S. Supreme Court rejected these arguments in short order indicating that there was no evidence to suggest exigency at the secured crime scene; that it was unlikely the photographs were in plain - view in a closed brief case and that the crime scene search for investigative purposes was an inventory. They also indicated that the issue of consent was a factual one to be decided by the trial court in the first instance. The U.S. Supreme Court reversed the decision of the West Virginia Supreme Court and remanded the case for further proceedings consistent with its order.

Comparison and Analysis of *Mincey*, *Thompson* and *Flippo*

Mincey, Thomposon and *Flippo* reveal some remarkable similarities. In each case, the initial responding officers were faced with exigent circumstances. Based upon the recital of facts and Opinions of the Court in all of the cases, the responding officers addressed the initial exigency appropriately. They located and attended to the emergency medical care needs of victims, located and detained suspects, and otherwise abided by the legal requirements of the Fourth Amendment. In *Mincey* the record reflects that the plainclothes officers did not take action beyond that required to render aid to the gravely injured officer, detain suspects and secure the premises. Their actions were not guided by the Fourth Amendment but by compliance with Tucson Police Department policy concerning officers not investigating incidents in which they were involved. In *Thompson*, the Court's opinion reflects that the responding deputies secured the scene after the initial exigency passed and waited for homicide investigators. It is not clear why they waited for homicide investigators. However, the most likely explanation is that they acted in accordance with sheriff's department policies and practices. In two of the three cases, *Mincey* and *Thompson*, the warrantless crime scene searches were conducted by detectives or investigators who arrived after the initial exigency had passed.

The facts in *Flippo* are not entirely clear with regard to who conducted the crime scene search of the cabin but suggest that many hours passed between the initial response and the search of the cabin. The reason for the delay is that the officers were waiting for the arrival of the crime scene photographer.

All three cases involved exigent circumstances, one of the recognized exceptions to the search & seizure warrant requirement. Following the warrantless entry based upon exigent circumstances, the plain view exception arose in two of the cases. Consent was also a potential issue in two of the cases. In each case, the initial law enforcement response to the exigency was appropriate, albeit for different reasons.

Given the significance of exigent circumstances as it relates to crime scene investigation, I explore this exception to the search and seizure warrant requirement in detail and review recent U.S. Supreme Court case law on this issue. I also explore the plain view exception in the context of exigent circumstances and discuss issues concerning consent.

Probable Cause

Katz v. United States 389 U.S. 347 (1967) which established the reasonable expectation of privacy test used to determine whether law enforcement action constituted a search subject to the requirements of the Fourth Amendment, also created the presumption that searches conducted without warrants are constitutionally unreasonable. To obtain a warrant, law enforcement needs to establish probable cause that items subject to seizure are located in a particular place [at a particular time] and describe those items with sufficient particularity. *Illinois v. Gates* 462 U.S. 213 (1983). Items subject to seizure include evidence of a crime, fruits of a crime, instrumentalities used to commit a crime, contraband (items unlawful to possess, eg. controlled dangerous substances [cds], automatic weapons, etc.) and persons for whose arrest there is probable cause.

"Probable cause [for arrest] exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed" *Bringer v. U.S.* 338 U.S. 160, 175-6 (1949). To establish probable cause for search and seizure the facts must be sufficient to warrant a belief by a reasonable man that "contraband or evidence is located in a particular place" [at a particular time]. *Illinois v. Gates* 462 U.S. 213 (1983*). Illinois v. Gates*, supra, established the totality of the circumstances test for probable cause which superseded the prior *Aguilar v. Texas* 378 U.S. 108 (1964) and *Spinelli v. U.S.* 393 U.S. 410 (1969) two prong test requiring basis of knowledge and reliability for criminal informant testimony. The *Gates* case contained powerful language helpful to law enforcement with regard to probable cause:

> "Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).
>
> In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

It appears that the United States Supreme Court is taking a similar practical, non-technical approach to officer's initial determination of exigent circumstances. I discuss this further in the context of recent Supreme Court decisions on point.

In addition to the requirement of probable cause of search and seizure warrants, probable cause is also required for warrantless searches and seizures under most, though not all, of the exceptions to the search and seizure warrant requirement rule. For example, probable cause is not required for consent. Probable cause requirements for exigent circumstances depend upon the type of exigency and are more complex. I explore this further.

Exigent Circumstances and Emergency Aid

In order to justify warrantless entry to prevent immediate destruction or removal of evidence or prevent flight or escape, the probable cause requirements for arrest and/or search and seizure must generally be satisfied. See, *Warden v. Hayden* 387 U.S. 294 (1967), discussed earlier. However, actions arising out of the community caretaking function described by the U.S. Supreme Court in *South Dakota v. Opperman* 428 U.S. 364 *(*1976) typically do not require probable cause. *Opperman* involved inventory of an automobile subsequent to impoundment for parking violations. The Court ruled that probable cause was not relevant and unnecessary to justify an inventory of the vehicle. The inventory was conducted not for investigative purposes but rather part of the community caretaking function, safeguarding property, shielding municipalities form accusations of theft and protecting against dangerous instrumentalities that might be in the vehicle. Decker (1999) argues that although the U.S. Supreme Court has never expressly included the emergency aid doctrine within the community caretaking function described in *South Dakota v. Opperman* 428 U.S. 364 *(*1976), there is dicta in *Mincey v. Arizona, Michigan v. Tyler* and other cases to support this view.

The emergency aid doctrine is best described by Judge Burger (later Supreme Court Justice) of the United States Court of Appeals District of Columbia Circuit in *Wayne v. U.S.* 318 F 2nd 205 (1963):

> Breaking into a home by force is not illegal if it is reasonable in the circumstances. The standards controlling a breaking in without a warrant are those prescribed in § 3109. *Miller v. United States* 357 U.S. 301 (1958). 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. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in response to reports of "dead bodies," the police may find the "bodies" to be common drunks, diabetics in shock, or distressed cardiac patients. But the 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. A myriad of circumstances could fall within the terms "exigent circumstances" referred to in Miller v. United States, supra, e.g., smoke coming out a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.

The Evolution of the Exigent Circumstances Exception and Emergency Aid Doctrine

The recent U.S. Supreme Court case of *Brigham City v. Stuart* 547 U.S 398 (2006) supports Decker's (1999) view although it involves a mix of law enforcement action as well as application of the emergency aid doctrine and addresses the actions taken by police in terms of community caretaking. Dimino (2009) discusses *Brigham City* in the context of reducing the risk of law enforcement abusing the community care-taking doctrine to circumvent Fourth Amendment protections. The facts in *Brigham City* are as follows:

> "This case arises out of a melee that occurred in a Brigham City, Utah, home in the early morning hours of July 23, 2000. At about 3 a.m., four police officers responded to a call regarding a loud party at a residence. Upon arriving at the house, they heard shouting from inside, and proceeded down the driveway to investigate. There, they observed two juveniles drinking beer in the backyard. They entered the backyard, and saw—through a screen door and windows—an altercation taking place in the kitchen of the home. According to the testimony of one of the officers, four adults were attempting, with some difficulty, to restrain a juvenile. The juvenile eventually "broke free, swung a fist and struck one of the adults in the face." 2005 UT 13, ¶2, 122 P. 3d 506, 508. The officer testified that he observed the victim of the blow spitting blood into a nearby sink. App. 40. The other adults continued to try to restrain the juvenile, pressing him up against a refrigerator with such force that the refrigerator began moving across the floor. At this point, an officer opened the screen door and announced the officers' presence. Amid the tumult, nobody noticed. The officer entered the kitchen and again cried out, and as the occupants slowly became aware that the police were on the scene, the altercation ceased."

The officers arrested respondents who were charged with contributing to the delinquency of a minor, disorderly conduct and intoxication. Respondents filed a motion to suppress the evidence based upon their contention that the officers' warrantless entry violated the Fourth Amendment. The trial court granted the motion which was affirmed by the Utah Court of Appeals and Utah Supreme Court. They Utah Supreme Court held that the injury "was insufficient to trigger the emergency aid doctrine because it did not give rise to an objectively reasonable belief that an unconscious, semi-conscious, or missing person feared injured or dead was in the home." The Utah Supreme Court also suggested that the officers "had not sought to assist the injured adult, but instead had acted exclusively in their law enforcement capacity." The U.S. Supreme Court reversed and held the officers' actions were objectively reasonable and "plainly reasonable under the circumstances". Regardless of the seriousness of the offense, the officers "were confronted with ongoing violence within the home".

The U.S. Supreme Court ruling *in Michigan v. Jeremy Fisher* 558 U.S. _____ (2009) cited *Brigham City v. Stuart* (2006) and appeared to expand the emergency aid doctrine even further. Briefly, the facts in *Michigan v. Fisher* (2009) are as follows:

> "Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door. The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. Officer Goolsby then pushed the front door partway open and ventured into the house. Through the window of the open door he saw Fisher pointing a long gun at him. Officer Goolsby withdrew."

Although the Michigan Courts held that the injury was too minor to be considered an emergency, the U.S. Supreme Court overturned its decision as requiring more than the Fourth Amendment and held that the officer actions under the circumstances were reasonable and in accord with Brigham City.

In Brooks v. Rothe (2009), the U.S. Circuit Court of Appeals for the 6th Circuit addressed the issue of exigency in the context of a federal civil rights suit for money damages under 42 U.S.C. 1983. The facts set forth in the Opinion of the Court included the following. Brooks was an employee of Safe Place, a domestic violence shelter in Huron, Michigan. Brooks called 911 to obtain emergency medical care for a shelter resident suspected of a drug overdose. Lt. Rothe of the Bad Axe, Michigan Police Department was the first to arrive on the scene in response to the call. Pursuant to Safe House policy and a call to her supervisor, Brooks repeatedly refused to provide details to Lt. Rothe or allow him to enter or search "the crime scene" for drugs. Following calls to his chief, Rothe arrested Brooks for resisting arrest and obstruction of justice. The charges were later dropped. Brooks subsequently sued Lt. Rothe for civil rights violations under 42 U.S. C. 1983 and related state claims. The U.S. District Court dismissed the case and found that no constitutional violation had occurred. The Court held that the warrantless entry into the shelter was justified under exigent circumstances to prevent imminent destruction of evidence. The U.S. Court of Appeals for the Sixth Circuit affirmed the decision of the District Court on the basis that the arrest did not constitute a constitutional violation. It also stated that the warrantless entry was justified on the basis of exigent circumstances.

Most recently, in *Kentucky v. Hollis Deshaun King* 563 U.S. _____ (2011), decided in May of this year, the U.S. Supreme Court made a finding of exigent circumstances in a potential destruction of evidence case. The Court also held that officers knocking on the door and announcing their presence did not constitute creating the exigency and was consistent with the Fourth Amendment. Briefly, the facts of the case are as follows: officers smelled the odor of marijuana smoke emanating from the apartment. The officers banged on the door and announced their presence. The officers heard sounds of individuals moving inside the apartment

and feared they were destroying evidence. They then kicked in the door and entered without a warrant. "The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain view. In a subsequent search, they also discovered crack cocaine, cash, and drug paraphernalia." The police later discovered the narcotics dealer who was the original subject of their investigation in an apartment nearby. The U.S. Supreme Court overturned the decision of the Kentucky Supreme Court and remanded the case for further proceedings. The case appears to further expand the conduct the U.S. Supreme Court considers exigent circumstances.

The U.S. Supreme Court appears to be significantly expanding the types of incidents and conduct considered to be exigent circumstances, both in terms of conduct justifying warrantless entry to render emergency aid and facts and circumstances which would justify warrantless entry to prevent imminent destruction of evidence. Hoover (2006) cites *U.S. v. Grey* 71 F. Supp2d 1081, 1084 (D. Kan, 1999) and argues that there is no absolute test of exigency as the determination ultimately rests on the unique facts and circumstances of each case. Crawford (1999) suggests that virtually every crime scene will constitute an emergency which justifies warrantless entry to the scene based upon either threats to life or safety, destruction or removal of evidence or escape. As long as officers' actions are objectively reasonable, the warrantless entry to render aid and secure the crime scene will be upheld.

Scope of the Emergency

Perhaps, even more difficult to determine are the parameters of the emergency, specifically, when does the emergency end. This is especially important in the context of crime scenes where once the emergency has otherwise ended; a warrantless search is no longer permissible. Crawford (1999) argues that "problems arise, however, when officers exceed the scope of the particular emergency that justified the initial entry." In *U.S. v. Johnson* 22 F.2d 674 (6th Cir., 1994) decided by the United States Court of Appeals for the Sixth Circuit, held that although a warrantless entry into an apartment to rescue the victim of a kidnap and rape was permissible under the doctrine of exigent circumstances, the subsequent search of a closet for weapons exceeded the scope of the exigency given that the defendant was not present at the time and the victim did not have the authority to give a valid consent. In *Zimmerman v. State* 552 A2d 47 (Md. App., 1989), the Maryland Court of Special Appeals cited *Mincey* 437 U.S. at 393 (1978) with regard to the fact that "a warrantless search must be strictly circumscribed by the exigencies which justify its initiation..." and held that while a warrantless entry and visual sweep of the defendant's home by officers responding to his call for a stabbing was legitimate under the emergency exception, reading and seizing his diary (which revealed unlawful activity) without a warrant exceeded the scope of the exigency.

Crawford (1999) indicates "what officers may do, where they may look and how long they may stay on the premises is dictated by the particular exigent circumstances that permit the warrantless entry." She states that "officers are authorized to do whatever is reasonably necessary to resolve the emergency. Once the emergency is resolved, however, the officers'

justification for being there is negated and they must have a warrant or one of the other exceptions… to either remain on the premises or continue the search."

Exigent circumstances arise from the unique facts and circumstances of each particular case *U.S. v. Grey* 71 F. Supp 2d 1081 (D. Kan., 1999). *Bingham City* (2006) and *Fisher* (2009) broadened the nature and extent of exigencies which would justify responding officers in making a warrantless entry. As Hoover (2006) indicates, it is difficult to make specific rules concerning the parameters or scope of the emergency, at what point the exigency ceased and officers and detectives needed to secure the premises and obtain a warrant. It is clear from the previous analysis, that the U.S. Supreme Court held the initial responding officers' conduct reasonable in *Mincey*, *Thompson* and *Flippo*. However, it also clear that the U.S. Supreme Court found that the exigency had long since past before the investigators began their extensive crime scene searches in *Mincey*, *Thompson* and *Flippo*. The problem appears to be that the detectives were under the mistaken impression that they did not need exigency to continue their searches. The irony is that in all of these cases there was more than sufficient probable cause to obtain a search and seizure warrant. It would not have been difficult for officers to secure the crime scenes while detectives obtained a search and seizure warrant. New electronic and telephonic warrant application procedures in many jurisdictions have made obtaining warrants easier than ever before.

Fire and Arson Cases

Fire and arson cases raise particularly difficult issues. Rogers (1996) discusses arson investigation, the relationship between law enforcement and firefighters, crime scene investigation and legal issues. Fire and arson investigators appear even more likely than police officers and investigators to feel that they do not need a warrant. Perhaps this arises from firefighters' responsibilities to not only put out the fire but also determine cause. Two cases, *Michigan v Tyler* 436 U.S. 499 (1978) and *Michigan v Clifford* 464 U.S. 287 (1984), provide some guidance as to exigency and the need for warrants in fire and arson cases.

In *Tyler* (1978), a fire broke out at Respondent's furniture store late one evening and was extinguished by early the next morning. The fire chief observed plastic containers containing a flammable liquid and summoned a police detective to investigate possible arson. The detective photographed the scene but was unable to investigate further due to smoke and steam, left the scene by about 4:00 a.m. and returned at 9:00 a.m. and met with the Fire Chief who returned about an hour earlier. A state police arson investigator retuned about three weeks later.

The U.S. Supreme Court found that fire victims have a reasonable expectation of privacy in their damaged property, whether the search is conducted by firefighters or police. It upheld the finding of the Michigan Supreme Court, "that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches." In this case the Court

held that the return of the Fire Chief and detective about four hours later was a continuation of the initial investigation to determine the cause of the blaze and that a search and seizure warrant was not required. However, the entry three weeks later by state police arson investigators required a warrant or other exception to the search and seizure warrant requirement rule.

In *Clifford* (1984) the U.S. Supreme Court held that once the fire has been suppressed and firefighters have left the scene, a warrant is necessary to search fire-damaged premises. An administrative warrant suffices if the primary object of the search is to determine the cause and origin of the fire, but a criminal search warrant, based upon a showing of probable cause, is required if the primary object of the search is to gather evidence of criminal activity. pp. 291-295. In *Clifford* (1984) "firefighters extinguished the blaze at [a private residence] at 7:04 a.m. at which time fire officials and police left the scene. Five hours later arson investigators arrived at the scene for the first time." Here, the U.S. Supreme Court ruled that the warrantless search of the fire damaged residence was unreasonable and violated the Fourth Amendment. The fact that firefighters extinguished the blaze at 7:04 am and a team of arson investigators first arrived at the scene five hours later, led the Court to conclude that the search was not a continuation of the initial search such as that in *Tyler*, and therefore a warrant was necessary in the absence of another exception to the search and seizure warrant requirement rule.

Analysis of *Tyler* and *Clifford* indicates that firefighters and arson investigators do not need a warrant to search a fire scene as part of an ongoing response to an active fire. As long as reasonable efforts to determine the cause and origin of a fire arise out of initial fire suppression efforts and emergency response and continue uninterrupted, it appears clear that a warrant is not necessary. However, once fire fighters and investigators have left the scene, absent special circumstances such as those set forth *in Tyler*, they may not return and search the scene without a search and seizure warrant. Any break or interruption between fire suppression and emergency response efforts and investigation of cause or origin should serve as a warning that a search and seizure warrant will likely be required in the absence of one of the clearly established exceptions to the search and seizure warrant requirement rule such as consent or continuing exigency. It is unlikely that investigators will have any difficulty obtaining a warrant once they established the existence of the fire scene and surrounding circumstances. What limits exist concerning the permissible extent of a fire scene search is not entirely clear. *Tyler* addresses the issue in terms of reasonableness. Would a four day search such as that described in *Mincey* be reasonable? There is little guidance directly on point. As a general rule, when in doubt, it is best to obtain a warrant.

Conclusion, Policy Implications and Recommendations

Geberth (2003) indicates that law enforcement "did not get" the holdings in *Mincey v. Arixona*, *Thompson* v. *Louisiana* and *Flippo v. West Virginia*. Why, despite the fact that the U.S. Supreme Court has explicitly held that on three separate occasions over a twenty year period that there is no crime scene or murder scene exception to the Fourth Amendment search & seizure warrant requirement rule, does there appear to be confusion among experienced law enforcement

and legal professionals? Brian R. Lemons (2000), Senior Legal Instructor for FLETC, raises this very question and suggests that the "misconception can most likely be attributed to the concept of standing". To prevail on a motion to suppress illegally obtained evidence, a defendant must demonstrate that he or she had a reasonable expectation of privacy (REP) in the item or place to be searched. Lemons (2000) argues that most intruders who break into someone's home and commit a murder do not have a reasonable expectation of privacy and that therefore, even though a subsequent warrantless crime scene search is not permissible, evidence obtained as a result of the search will be admissible due to defendant's lack of standing. FBI Special Agent Kimberly Crawford (1999), a legal instructor at the FBI academy also suggests lack of a privacy interest and standing as reasons for the confusion. She cites *Rakas v. Illinos* (1978) on the issue of standing.

What can be done to remedy the confusion? Crawford (1999) indicates that many law enforcement agencies do not have policies with regard to training officers on the need to obtain search and seizure warrants or consent prior to conducting in-depth searches of crime scenes. Crawford (1999) recommends policy changes, including:

- Instructions regarding the officers' ability to make a warrantless entry of the crime scene to make an initial assessment of the danger to life or safety and the destructibility of evidence;
- Guidance with respect to the steps that can be taken within the scope of the emergency, such as protective sweeps, searches for destructible evidence, diagramming, photographing, videotaping and preserving the scene;
- Written consent to conduct a thorough search from a person who has clear authority over the area; and
- A search warrant when consent is denied or there is no one who can provide a clearly lawful consent.
- Use of forensic scientists to help with particularity requirements of search warrants involving different types of crime, rape, robbery, burglary, etc. describing the items to search for, typically related to this type of crime.

Hoover (2006) agrees with Crawford (1999) on the need for policy changes and focuses on the need to provide guidance on "what constitutes emergency or exigent circumstances." She also argues that it is equally important to keep the scope of the response within the scope of exigency.

Law enforcement agencies need to review existing policies and procedures before drafting new ones. (Hoover, 2006). Policy changes must reflect recent developments in state and federal law and relevant court rules and administrative regulations. Police department counsel and prosecutors should work closely with police planning and research personnel and the command staff to ensure that new policies and procedures are consistent with the developing body of law concerning exigent circumstances. Management and rank and file officers need to

be informed of legal developments and the new policies and procedures incorporating them pursuant to established departmental channels of communication. If for any reason these channels do not exist, they need to be designed and implemented, as well. Entrance level, in-service and specialized training concerning criminal and crime scene investigation need to address the need for search and seizure warrants and the exceptions to the warrant requirement rule. Presumably, much of this material is already covered, at least to some extent in existing training. These materials need to be reviewed, supplemented or modified, as necessary. Special attention should be paid to the training needs of detectives, crime scene investigators and their supervisors.

To a certain extent, U.S. Department of Justice guidelines concerning legal aspects of crime scene investigation are somewhat misleading in that they suggest legal issues arise only after the exigency has passed, the crime scene has stabilized and investigators have arrived and will conduct a scene assessment. (NIJ, 2000). To the contrary, legal decisions are made during both the emergency itself and once the scene as stabilized. In fact, legal decisions are made prior to, during and after establishment of the crime scene. Policies, procedures and training need to reflect the different types of decisions made at different stages of the emergency response and subsequent investigation. In an era involving increasing risks of terrorism, gang violence and other crises, exigent circumstances are expected to play an increasingly important role in decision-making concerning emergency response and crime scene investigation.

Interestingly, *Mincey*, *Thompson* and *Flippo*, suggest that the problem lies less with responding officers confronting the actual emergency and more with detectives and investigators who respond after the fact. To a certain extent this is counter-intuitive. One would think that officers responding to a crisis and having to make immediate judgments would be more likely to make a mistake. Yet this does not appear to be the case, at least based on all three key crime scene search cases decided by the U.S. Supreme Court over the past three decades and discussed here. This issue needs to be explored further and researched to determine best practices consistent with evidence based policing. (Sherman, 1998). If, in fact, as the case law suggests, the problem lies primarily with specialized detectives and investigators, targeting these units for specialized training should require far fewer resources than focusing on the entire department. Compliance with Fourth Amendment search and seizure warrant requirements at crime scenes could be significantly improved at reasonable cost.

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