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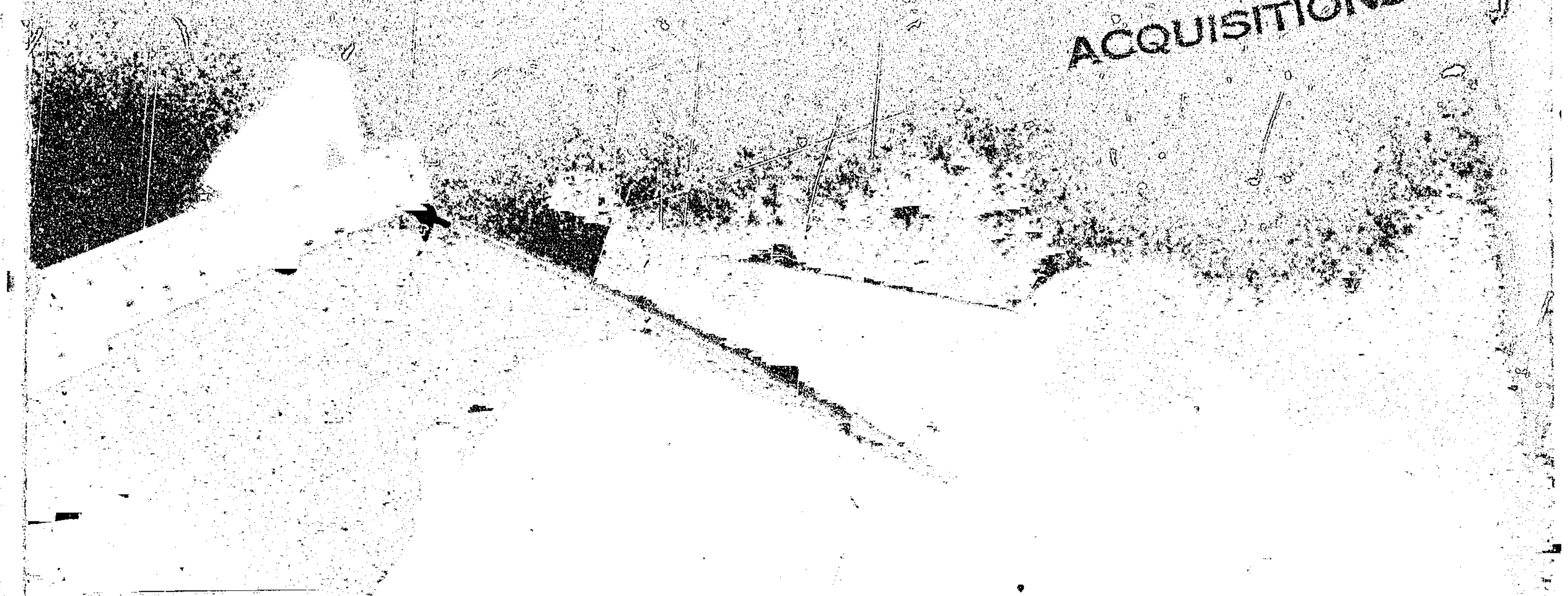

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THE COVER

Director William H. Webster's message concerns the problem of arson. Photo by William A. Gangloff, Fire Inspector, Washington, D.C., Fire Department.

The Warrant Requirement In Crime Scene Searches

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(Conclusion)

Part I of this article considered the applicability of the warrant requirement of the fourth amendment to the search of fire-damaged premises. Particular attention was given to the recent U.S. Supreme Court decision of *Michigan* v. *Tyler*,[37] dealing with the search of a fire-gutted furniture store. The conclusion of the article will continue the analysis of the application of the warrant requirement to crime scene searches, focusing on situations in which the premises to be searched are the *known scene of a violent crime.*

The U.S. Supreme Court has recently spoken on this issue in the factual context of a warrantless search of the scene of a homicide.

Search of Premises—Scene of a Known Crime

Mincey v. *Arizona*,[38] decided by the U.S. Supreme Court in June 1978, dealt with the legality of a 4-day search of an apartment where an undercover police officer was fatally wounded in a shootout with a suspected drug dealer. The facts, briefly, are as follows:

Working in an undercover capacity, the officer had arranged to purchase a quantity of heroin from Rufus Mincey. The transaction was to take place at Mincey's apartment. When the undercover officer arrived at the apartment to make the buy he was accompanied by several other plain-

clothes officers and a local prosecutor. One of the occupants of the apartment opened the door in response to the undercover officer's knock, but then observed the other officers in the hallway and attempted to slam the door. However, the undercover officer managed to slip into the apartment, and after a momentary delay, the other officers also were able to force entry. While the officers were subduing and handcuffing the occupant who had attempted to hold the door closed, the undercover officer and Mincey became engaged in a shootout in the bedroom of the apartment in which both were seriously wounded. The undercover officer emerged from the room and collapsed on the floor. Mincey was found on the floor of the bedroom, wounded and semiconscious.

Immediately after the shooting, thinking other persons in the apartment might have been injured, the officers looked about quickly for other victims. They found a wounded young woman in the bedroom closet as well as three acquaintances of Mincey in the living room, one of whom was also wounded. Emergency assistance was requested and first aid rendered to the wounded parties.

The officers present neither searched for nor seized any evidence, pursuant to a police department directive that officers should not investigate incidents in which they are involved. Within approximately 10 minutes, homicide detectives had arrived and taken charge of the investigation. After supervising the removal of Mincey, the wounded officer, and the other suspects, the investigating homicide detectives immediately began a search of the apartment. The undercover officer died a few hours later at the hospital.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

The search of the apartment lasted 4 days, during which time every item in the apartment was examined and inventoried. Photographs were taken, diagrams made, and all drawers, closets, and even the pockets of clothing in the apartment were thoroughly searched; 200 to 300 items were seized.

Mincey was later tried and convicted for murder, assault, and narcotics offenses. Much of the physical evidence introduced against him at trial was the product of the search of the apartment. At his trial and on appeal Mincey contended that the evidence gathered from his apartment, without a warrant and without his consent, was illegally seized.[39]

Although the Arizona Supreme Court reversed the murder and assault convictions on unrelated State law grounds, it affirmed the narcotics convictions, holding that the warrantless search of the scene of a recent homicide is permissible under the "murder scene exception" to the warrant requirement.[40] Therefore, the search of the apartment was lawful.[41]

The U.S. Supreme Court, in a unanimous opinion, reversed the decision of the Arizona Supreme Court with regard to the search of the apartment, holding instead that there is no categorical "murder scene exception" to the warrant requirement of the fourth amendment. The Court noted that "it is a cardinal principle that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the fourth amendment—subject only to a few specifically established and well-delineated exceptions." [42]

In reaching its conclusion, the Court considered and rejected several arguments advanced by the State to justify recognition of such a generic exception. A brief examination of two of these issues may be useful for the following reasons: (1) To assist in an understanding of the basis for the final conclusion of the Court that the 4-day search was illegal; and (2) to gain insight into the Supreme Court's view on several issues that regularly arise in crime scene search situations.

"In both *Michigan* v. *Tyler* and *Mincey* v. *Arizona*, the Supreme Court indicated that while officials are on the premises pursuing their legitimate emergency activities, any evidence in plain view may be seized."

Reasonable Expectation of Privacy

The argument was advanced by the prosecution that Mincey had forfeited any "expectation of privacy" [43] in his apartment when he shot the police officer. Alternatively, it was argued that given the substantial lawful intrusion into the apartment which was necessary to arrest and subdue Mincey and his companions, the additional relatively minor intrusion of the detailed search was of no constitutional significance. The Court rejected the first of these arguments by indicating that it would "impermissibly convict the suspect even before the evidence against him was gathered." [44] It found the second proposition was not tenable because of the extensive nature of the search. The Court noted that in previous cases it had rejected the argument that because an individual is lawfully taken into police custody he also has a reduced right of privacy in his entire dwelling.[45]

Emergency Search Doctrine

The State in *Mincey* contended that a possible homicide creates an emergency situation demanding an immediate search. The Supreme Court, as it did in *Michigan* v. *Tyler*,[46] indicated that it recognized clearly the validity of the emergency or exigent circumstances search doctrine, which allows a warrantless entry and search in a true emergency situation. The Court stated:

> "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. The need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency. And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." [47] [Citations omitted]

Turning to the facts of the *Mincey* case, the Court said that the search could not be justified as being necessary to protection of life or limb because all the persons in the apartment had been located and the situation was clearly under control before the homicide officers arrived and began the search. In short, the emergency was over. The Supreme Court, in rejecting the factual situation in *Mincey* as justifying a warrantless search under the emergency search doctrine, stated in part:

> "Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case, as, indeed, the Arizona Supreme Court recognized. There was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." [48] [Citation omitted]

The approach taken by the Supreme Court, i.e., carefully tying the time of search to the continuation of the emergency, and the scope (intrusiveness) of the search to the reasons justifying the original entry, is consistent with several prior Federal cases. For example, in *United States* v. *Young*,[49] officers were engaged in a shootout with a suspected bank robber who was barricaded inside his residence. After the suspect surrendered, police, believing other participants in the robbery might still be inside, fired tear gas into the residence and entered to search for other occupants. No other occupants were found, but in the course of their sweep, they did see large quantities of money, apparently loot from the robbery, in the kitchen of the residence. The raiding party departed, and as they were leaving, police evidence technicians entered the house to begin an extensive search of the premises. It was held that the initial entry to the residence by officers to search for other occupants was legal. However, the subsequent warrantless entry and search by evidence technicians was not proper, as "(t)he technicians were looking for evidence, not robbers, at a time when the house had already been secured and after appellant had been arrested. A search warrant should have been obtained before proceeding further." [50]

In *United States* v. *Goldstein*,[51] a police officer called to a hotel because of a fight found the shooting victim on the floor and was told by a witness that the suspect had fled upstairs. The officer's warrantless entry into a hotel room where the suspect was believed to have entered was held proper, but the officer's search of a closed suitcase, after he had determined the suspect was nowhere in the room, was held to be illegal.

Similarly, in *United States* v. *Davis*,[52] the search, without warrant, of a portion of the defendant's yard (conceded by the Government to be an area entitled to fourth amendment protection) 3½ hours after a shootout between defendant and Federal agents, was held improper. The Court reasoned that once both subjects were in custody, the emergency was ended, and a warrant should have been obtained prior to undertaking the search.

Although in *Mincey* the U.S. Supreme Court refused to recognize the "murder scene exception" urged by the State court, and also refused to validate the 4-day search under the emergency or exigent circumstances doctrine, it did not directly order all the evidence seized in the course of the search to be suppressed. Instead, the case was remanded to the State courts to determine what evidence, if any, taken from the apartment was properly seized under "established Fourth Amendment standards." [53]

Plain View Doctrine

In both *Michigan* v. *Tyler* and *Mincey* v. *Arizona*, the Supreme Court indicated that while officials are on the premises pursuing their legitimate emergency activities, any evidence in plain view may be seized. Although the "plain view" doctrine has been recognized by the Supreme Court for many years,[54] the best explanation of the principle is generally conceded to be the statement by Justice Stewart in *Coolidge* v. *New Hampshire:* [55]

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." [56]

The plain view doctrine has often been relied upon by State and Federal courts to uphold the seizure of evidence observed at the scene of a crime by an officer while pursuing his legitimate duties.[57]

Two limitations of the plain view doctrine that must be kept in mind in crime scene situations are: (1) It does not allow an officer to extend the *area* of the search or *length* of the search beyond that necessary to accomplish the purpose of his original entry, and (2) the item to be seized must be immediately apparent as evidence, fruits, contrabands, or an instrumentality of a crime.

Consent

The Supreme Court did not deal directly with the issue of consent in either *Tyler* or *Mincey*, because in each case the Court accepted findings of the State courts that the defendants had not consented to the searches.[58] However, in many cases this recognized exception to the warrant requirement may be the easiest and quickest manner of gaining lawful access to premises where a recent crime or a fire has taken place. In the majority of cases, the victim of a violent crime will be more than willing to give police access to his premises. In most cases of suspected arson, the individual having control of the premises—usually the owner or lessee—will be more than anxious to allow fire or police officials to enter the premises to determine the cause of the fire. In the case of a fire in which insurance fraud is the motive, the refusal by the owner or lessee to allow access to the premises to investigating authorities could provide the insurance company with a basis for resisting payment of the claim.[59] However, officers should insure any consent to search is truly voluntary.

It is important, in light of *Tyler* and *Mincey*, to ask for and receive a *valid consent* from the *proper party* before the crime scene search begins.

Because a consent search is a voluntary relinquishment of a fundamental protection under the Constitution, it will be carefully scrutinized by the court if later attacked by the defendant. In any consent search there are

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two vital elements: (1) The consenting party must have the capacity or authority to waive the fourth amendment protection; [60] and (2) the consent must be freely and voluntarily given.[61] The party attempting to justify the search has the burden of proving both of these elements.

An individual may consent to the search of premises over which he has exclusive use and control. The Supreme Court, in several cases, also has allowed persons having mutual use or joint occupation of premises or property to consent to a search thereof, and allowed evidence disclosed to be used against the nonconsenting party.[62]

Although consent must be freely and voluntarily given, the Supreme Court has *not* required an individual to be specifically advised of his right to refuse before a valid consent to search is obtained.[63] The suspect's knowledge of his right to refuse, however, is one of the factors a court will consider in determining whether the consent was voluntarily given.

Because a consent search which results in the discovery of incriminating evidence is likely to be challenged by a defense attorney, it is a good practice to get the consent in writing. If there is any doubt about either the individual's authority to consent to the search of particular premises, or the voluntariness of the consent, a search warrant should be obtained.[64]

"Standing" To Object to a Search

An issue which was not reached by the Supreme Court in *Tyler* or *Mincey*, but which is important from a practical standpoint, is: Who may properly object to evidence which has allegedly been seized in an illegal manner? The general rule is that only a person whose reasonable expectation of privacy has been invaded by a search may object to evidence seized as a result of that search. Put another way, only the "victim" or one "aggrieved by" an unlawful search or seizure may be heard to complain.[65] This requirement, referred to as "standing," depends on the defendant's having a relationship to, or an interest in, the premises searched or the items seized sufficient to make him the victim of the search or seizure. A defendant with a possessory interest in the premises searched, such as an owner or renter of a house, is recognized as having standing to object, whether he was present at the time of the search or not.

No formal property right in the premises searched is necessary to have standing; therefore, a person having lawful possession or use of the premises will have standing.[66] The Supreme Court has also held that a guest legitimately on the premises at the time of the search may object to evidence offered against him.[67]

The Court has recognized that if the defendant is charged with a crime, one of the elements of which is possession of the item seized, he has "automatic" standing to object to the search or seizure.[68]

On the other hand, it is clear that a trespasser, burglar, or other person not legitimately on the premises, would not have standing to object to a search, regardless of whether he was present during the search.[69]

It should be recognized that some States have more liberal rules regarding standing than those stated above.[70]

Because of the requirement of standing, it is apparent that the *Tyler* and *Mincey* cases have their primary impact in situations where the defendant is able to establish some possessory interest in the premises searched or the items seized. Otherwise, he would not be able to object to the introduction of the evidence, regardless of the constitutional validity of the search. However, this should not be taken to indicate that the principles of *Tyler* and *Mincey* may be ignored when it appears the suspect has no legitimate interest in the scene

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of the search. The Supreme Court has made it clear that innocent victims of fires or crimes also enjoy fourth amendment protection as to their homes and businesses. These rights should not be disregarded.

Summary

The fourth amendment of the U.S. Constitution prohibits "unreasonable" searches and seizures. With regard to searches of private premises, the Court has consistently held that unless the situation falls within one of the few traditionally recognized and narrowly drawn exceptions to the warrant requirement, a warrantless search is *per se* unreasonable.

There is no categorical exception to the warrant requirement which permits the search of private premises, residential or business, simply because they were the scene of a recent crime or fire.

"There is no categorical exception to the warrant requirement which permits the search of private premises, residential or business, simply because they were the scene of a recent crime or fire."

Of course, if a fire is underway, or if officers have reason to believe that a person is in need of aid within particular premises, officials may make an immediate warrantless entry and search under the emergency or exigent circumstances doctrine.

With regard to entries to fight a fire, the fire-service personnel may remain on the premises for a reasonable time after the fire is extinguished to search for the cause of the fire. During the course of fighting the blaze and searching to determine the cause, any evidence observed may be lawfully seized. Generally, after this initial search or inspection is completed and officials leave the premises, any later reentries of the premises, either to determine the cause of the fire or to search for evidence of arson, must be made pursuant to either: (1) Consent of a person having a possessory interest in the property; or (2) under the authority of a search warrant. Although a search warrant will be required to reenter fire-damaged premises, the level of proof necessary to justify issuance of the warrant will depend on the purpose of the reentry. If officials simply wish to reenter to search for the cause of the fire, the reduced probable cause standard which is necessary for issuance of an administrative search warrant will suffice. This requires no showing that a crime has been committed or that evidence of a crime will probably be found within the premises to be searched.

If, on the other hand, officials have probable cause to believe arson has occurred and wish to reenter to collect evidence of that crime, a criminal investigative search warrant must be obtained, issued upon the traditional showing of probable cause.

If an emergency entry is justified by hot pursuit of a fleeing suspect, or the belief that someone within the premises is in need of immediate aid, the scope and duration of the search which may be conducted is limited by the reasons for the initial entry. In most situations this will mean that once the suspect is arrested, or the situation is otherwise under control, a further search of the premises will not be justified without either a warrant or consent of the proper party. Of course, any evidence observed in plain view while the officer is pursuing his legitimate emergency functions may be lawfully seized without a warrant.

If a person having a possessory interest in the premises gives a free and voluntary consent to search, no warrant will be required since consent is a recognized exception to the warrant requirement. Consent, to be valid, must be: (1) Obtained from a person having a possessory interest in the premises to be searched, and (2) freely and voluntarily given. If possible, consent should be written.

It is generally recognized that in order for a defendant to object to a search, he must be able to establish some possessory interest in either the premises searched or the property seized. Therefore, the principal impact of the *Mincey* and *Tyler* decisions is in situations where the defendant can establish some legitimate relationship to the premises searched or the property seized. However, innocent victims of fires or other crimes who have a possessory interest in the property to be searched also have fourth amendment rights which should be respected.

When in doubt, get a warrant!

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FOOTNOTES

[37] 56 L.Ed.2d 486 (1978).

[38] 57 L. Ed.2d 290 (1978).

[39] *State* v. *Mincey*, 566 P.2d 273 (Ariz. 1977).

[40] Id.

[41] This holding was consistent with previous rulings of the Arizona Supreme Court, e.g., *State* v. *Sample*, 489 P.2d 44 (Ariz. 1971); *State* v. *Duke*, 518 P.2d 570 (Ariz. 1974). Some additional cases which directly or by implication also recognized such an exception are: *Stevens* v. *State*, 443 P.2d 600 (Alaska 1968), *cert. denied*, 393 U.S. 1039 (1969); *State* v. *Sanders*, 506 P.2d 892 (Wash. App. 1973); *State* v. *Oakes*, 276 A.2d 18 (Vt. 1971), cert. denied, 404 U.S. 965 (1971).

[42] *Mincey* v. *Arizona*, *supra* note 38, at 298–9.

[43] *Katz* v. *United States*, 389 U.S. 347 (1967), established the expectation of privacy test to determine if a "search" within the meaning of the fourth amendment has occurred. See note 16.

[44] *Mincey* v. *Arizona*, *supra* note 38, at 299. The U.S. Supreme Court noted it had rejected a similar argument in *Michigan* v. *Tyler*, *supra* note 37.

[45] *Mincey* v. *Arizona*, *supra* note 38, at 299, citing *Chimel* v. *California* 395 U.S. 752 (1969).

[46] *Supra* note 37.

[47] *Mincey* v. *Arizona*, *supra* note 38, at 300.

[48] *Mincey* v. *Arizona*, *supra* note 38, at 301.

[49] 553 F.2d 1132 (8th Cir. 1977), *cert. denied*, 431 U.S. 959 (1977).

[50] Id. at 1134.

[51] 456 F.2d 1006 (8th Cir. 1972), *cert. denied*, 416 U.S. 943 (1974).

[52] 423 F.2d 974 (5th Cir. 1970), *cert. denied*, 400 U.S. 836 (1970); *accord*, *Root* v. *Gauper*, 438 F.2d 361 (8th Cir. 1971). *Contra*, *United States* v. *Keeble*, 459 F.2d 757 (8th Cir. 1972), *rev'd other grounds*, 412 U.S. 205 (1973).

[53] *Mincey* v. *Arizona*, *supra* note 38, at 302 and n.9, also the concurring opinion of Justice Rehnquist at 308–9.

[54] The "plain view" doctrine was recognized, at least by implication, in several U.S. Supreme Court cases decided many years ago. E.g., *United States* v. *Lee*, 274 U.S. 559 (1927) (holding that "no search" occurred when cases of liquor were discovered on the deck of a motorboat by use of a searchlight); *United States* v. *Lefkowitz*, 285 U.S. 452 (1932) (Search of desks and cabinets were different from the seizure of objects in "plain view").

[55] 403 U.S. 443 (1971).

[56] Id. at 466.

[57] *Patrick* v. *State*, 227 A.2d 486 (Del. 1967); *State* v. *Hardin*, 518 P.2d 151 (Nev. 1974); *United States* v. *James*, 528 F.2d 999 (5th Cir. 1976), *cert. denied*, 429 U.S. 959 (1976); *People* v. *Hill*, 528 P.2d 1 (Cal. 1974), *United States* v. *Young*, *supra* note 49.

[58] But note that Mr. Justice Rehnquist's dissenting opinion in *Tyler* seems to suggest that Mr. Tyler's acquiescence in prior searches of the store could be taken as consent. *Michigan* v. *Tyler*, *supra* note 37, at 503–4.

[59] Standard fire insurance policies often require the insured to cooperate in the investigation of the loss by exhibiting the property to the insurer's representatives and their designees. The insured has a fourth amendment right to refuse such a request by law enforcement officials. However, by doing so, he may be violating one of the conditions of his insurance contract, thereby giving the company a basis to deny the claim. See, Jackson, "The Insurer's Role in Arson Prevention," *The Fire and Arson Investigator*, Vol. 27, No. 3 (Jan–Mar, 1977).

[60] *Stoner* v. *California*, 376 U.S. 483 (1964); *Chapman* v. *United States*, 365 U.S. 610 (1961).

[61] *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

[62] *United States* v. *Matlock*, 415 U.S. 164 (1974); *Frazier* v. *Cupp*, 394 U.S. 731 (1969).

[63] *Schneckloth* v. *Bustamonte*, *supra* note 61.

[64] For a more detailed discussion of the legal considerations with regard to consent searches, see "Search by Consent," by SA Donald J. McLaughlin, published in the December 1977 thru May 1978, issues of the *FBI Law Enforcement Bulletin*.

[65] *Jones* v. *United States*, 362 U.S. 257 (1960); *Alderman* v. *United States*, 394 U.S. 165 (1969).

[66] *Mancusi* v. *Deforte*, 392 U.S. 364 (1968).

[67] *Jones* v. *United States*, *supra* note 65.

[68] Id.

[69] Id. at 267; cf. *Cotton* v. *United States*, 371 F.2d 385, at 391 (9th Cir. 1967).

[70] The California Supreme Court in *People* v. *Martin*, 290 P.2d 855 (Cal. 1955) established a "vicarious exclusionary rule" for that State which allows a defendant to object to evidence illegally seized from a third party. This rule was reaffirmed in *Kaplan* v. *Superior Court*, 491 P.2d 1 (Cal. 1971), appeal dismissed, 407 U.S. 917 (1972).

[71] *Michigan* v. *Tyler*, *supra* note 37, at 495; *Mincey* v. *Arizona*, *supra* note 38, at 299 and n.5.

END