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THE DURATION OF EMERGENCY SEARCHES: THE INVESTIGATIVE SEARCH AND THE ISSUE OF RE—ENTRY

EDWARD G. MASCOLO*

I. INTRODUCTION

Reasonableness is the cornerstone[1] 'and catalyst' of the fourth amendment.[2] Unfortunately, there exists "no ready litmus-paper test"[3] for reasonableness which, of necessity, involves a balancing of a legitimate public interest in promoting effective law enforcement against the protection of individual privacy from arbitrary governmental intrusion.[4] In explaining this somewhat esoteric concept with any degree of exactitude, the Supreme Court has made reference both to the more specific dictates of the warrant clause of the amendment,[5] and to the factual context of a search and seizure[6] — "the total atmosphere of the case."[7] Thus, the Court has mandated that, subject to certain exceptions, warrantless searches are *per se* unreasonable.[8]

Although these exceptions have been characterized variously

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1. Cady v. Dombrowski, 413 U. S. 433, 439 (1973), SEE Zurcher v. Stanford Daily, — U. S. —, —, 98 S. Ct. 1970, 1978 (1978); Pennsylvania v. Mimms, 434 U. S. 106, 108-09 (1977)(per curiam); United States v. Chadwick, 433 U. S. 1, 9 (1977).

2. U. S. CONST. amend. 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 persons or things to be seized.

Id.

3. United States v. Rabinowitz, 339 U. S. 56, 63 (1950).

4. Pennsylvania v. Mimms, 434 U. S. at 109.

5. South Dakota v. Opperman, 428 U. S. 364, 381 (1976)(Powell, J., concurring)(dictum); Cady v. Dombrowski, 413 U. S. at 451 (Brennan, J., dissenting); United States v. United States Dist. Court, 407 U. S. 297, 315 (1972).

6. *See* Cooper v. California, 386 U. S. 58, 59 (1967).

7. United States v. Rabinowitz, 339 U. S. at 66.

8. Katz v. United States, 389 U. S. 347, 357 (1967). This emphasis upon the need for a warrant has led to a certain tension with the reasonableness clause, for unless warrantless search activity falls

as "specifically established and well-delineated,"[9] "carefully defined,"[10] and "carefully drawn,"[11] they rarely have received analytical treatment from the Court. This has prompted the comment that the branch of the law dealing with the constitutionality of warrantless searches "is something less than a seamless web."[12] Thus, while the exceptions to the warrant requirement have been recognized explicitly, they have not always been analyzed thoroughly, thereby resulting in a blurring of the general rule and its exceptions. Recently, however, there has been a significant shift in this pattern.

The primacy of the warrant requirement is most pronounced in the home.[13] It is for this reason that the conflict between the requirement and its exceptions is most intense within this setting of sharp conflict between the legitimate needs of law enforcement and the right of the individual to be free from arbitrary interference by governmental officials. And it is here that this conflict is further aggravated by certain activities particularly favored by law enforcement agencies — the investigative search and the re-entry of the scene of a serious crime after an initial legal presence.

The focus of this study will be directed to an analysis of the duration of an important exception to the warrant requirement — the emergency doctrine — with particular emphasis devoted to the investigative search and the issue of re-entry in a manner that will demonstrate the crucial need for the preservation of individual privacy.

II. THE DURATION OF EMERGENCY SEARCHES

A. CHIMEL V. CALIFORNIA AND THE PRIMACY OF THE WARRANT CLAUSE

The emergency doctrine, which mandates that the scope of permissible search be correlated with the degree or type of exigency

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within one of the exceptions to the warrant requirement, it will be invalidated, even though it might otherwise have been reasonable. *See* People v. Smith, 7 Cal. 3d 282, 286, 496 P.2d 1261, 1263, 101 Cal. Rptr. 893, 895 (1972); State v. Brothers, 4 Ore. App. 253, —, 478 P.2d 442, 444 (1970).

9. Katz v. United States, 389 U. S. at 357.

10. Camara v. Municipal Court, 387 U. S. 523, 528 (1967).

11. Jones v. United States, 357 U. S. 493, 499 (1958).

12. Cady v. Dombrowski, 413 U. S. at 440.

13. United States v. Martinez-Fuerte, 428 U. S. 543, 561 (1967)(dictum). SEE Mincey v. Arizona, — U. S. —, —, 98 S. Ct. 2408, 2414 (1978); United States v. United States Dist. Court, 407 U. S. at 313.

confronting law enforcement officers[14] has particular relevance to the sanctity of the home, for it is there that the individual's expectation of privacy is most sensitive and pronounced. A man's house is more than just his castle: it is the repository of all of his most personal possessions, papers, and effects — the ultimate sanctuary from the prying eye of both stranger and government.[15] It is for these reasons that "physical entry of the home is the chief evil against which the wording of the [f]ourth [a]mendment is directed,"[16] and that [a]bsent some *grave* emergency,"[17] "a warrant traditionally has been required" for "the search of private residences. . . ."[18] Therefore, the "degree of intrusion upon privacy . . . occasioned by a search of a house" dictates "the strong [f]ourth [a]mendment interests that justify the warrant requirement in that context,"[19] for residences normally are accorded the maximum protection of privacy interests under the fourth amendment.[20] It is within this context that the case of *Chimel v. California*[21] has particular relevance.

Prior to *Chimel,* the Court, in *United States v. Rabinowitz,*[22] overruled the requirement laid down in *Trupiano v. United States,*[23] that a search warrant is required whenever it is practicable to obtain one, and substituted therefor a rule of reasonableness which placed primary emphasis upon the police conduct under attack by evaluating that activity in terms of "the total atmosphere of the case."[24] The Court framed the rule in the following terms: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances — the total atmosphere of the case."[25]

In deflecting the *Trupiano* emphasis upon the primacy of the warrant clause, the Court, in *Rabinowitz,* for the first time detached

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14. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414; Warden v. Hayden, 387 U. S. 294, 299 (1967).

15. *See generally* Boyd v. United States, 116 U. S. 616, 630 (1886) (dictum); J. LANDYNSKI, SEARCH & SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 60-61 (1966).

16. United States v. United States Dist. Court, 407 U. S. at 313.

17. McDonald v. United States, 335 U. S. 451, 455 (1948)(emphasis added).

18. United States v. Martinez-Fuerte, 428 U. S. at 565 (dictum).

19. *Id.*

20. *Id.* at 561 (dictum); Dorman v. United States, 435 F.2d 385, 389 (D. C. Cir. 1970); People v. Dumas, 9 Cal. 3d 871, 882 & n.8, 512 P.2d 1208, 1215-16 & n.8, 109 Cal. Rptr. 304, 311-12 & n.8 (1973)(dictum).

21. 395 U. S. 752 (1969).

22. 339 U. S. 56 (1950).

23. 334 U. S. 699 (1948).

24. United States v. Rabinowitz, 339 U. S. 56, 66 (1950).

25. *Id.*

the reasonableness clause from the warrant requirements and permitted the reasonableness of a warrantless search to be determined independently of the warrant clause.[26] Thus, the search incident to an arrest exception, under review, was justified as an integral part of the reasonableness clause rather than as an historical exception to the warrant requirement,[27] and could reasonably extend to 'and throughout' the area within the "possession" of or under the "control" of the arrestee.[28]

And so matters stood until 1969, when the Court was called upon to reassess the continued vitality of *Rabinowitz*. In that year it decided the case of *Chimel v. California,*[29] wherein it restricted the scope of the search incident exception to the person of the arrestee and the area within his immediate reach.[30] In doing so, however, the Court went beyond the specifics of the case and articulated, in broad strokes upon a slate wiped clean by its penetrating critique of *Rabinowitz* and its progeny, a rule of profound significance for the privacy of the home.

Concerned about the ever widening scope of the incidental search, a strong motivating factor behind delayed arrests in residences, and stressing the "crucial part" that the warrant requirements play in the constitutional scheme of preventing unreasonable searches, the Court overruled *Rabinowitz* and restored the primacy of the warrant clause.[31] It reasoned that unless meaningful restrictions were imposed upon the scope of incidental searches, fourth amendment protections would be reduced to "the evaporation point," thereby leading to the removal of any "rational limitation" upon such conduct.[32] Therefore, the scope of a search, supported, "whenever practicable," by a warrant, was to be correlated with the purpose for which it was intitially justified, and was to be determined by scrutinizing the surrounding facts and circumstances "in the light of established [f]ourth [a]mendment principles."[33]

These inherent restrictions, as well as the rationale of *Chimel,* that the warrant clause takes precedence over the reasonableness

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26. J. LANDYNSKI, *Supra* note 15 at 109.
27. *Id.*
28. 339 U. S. at 63-64. In the case of an arrest within a home, the rule would allow a full search of the residence. *See* Chimel v. California, 395 U. S. at 760, 766.
29. 395 U. S. 752 (1969).
30. *Id.* at 763.
31. *Id.* at 761, 762, 764-66, 768. The "total atmosphere" standard espoused in *Rabinowitz* was not rejected in *Chimel. See* 395 U. S. at 765. Rather, the Court chose to evaluate this standard in terms of the primacy of the warrant clause. *See id.* at 761, 763, 765, 768.
32. *Id.* at 765, 766.
33. *Id.* at 762, 765.

clause, in that the latter is but an exception to the warrant requirement rather than a co-equal standard by which the validity of a search is to be measured,[34] are relevant to the scope of emergency searches[35] and to their execution *after* an emergency has *ended.* Thus, *Chimel* will restrict emergency searches both in scope and in time, so that they will be limited to their initial justification, and will cease upon the termination of that purpose.[36]

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34. Farrar, *Aspects of Police Search and Seizure Without Warrant in England and the United States,* 29 U. MIAMI L. REV. 491, 525 (1975).

35. *See* Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment,* 22 BUFF. L. REV. 419, 432 n.56 (1973). *See also* People v. Mitchell, 39 N. Y.2d 173, 177-78, 179, 347 N. E.2d 607, 609, 610, 383 N. Y. S.2d 246, 248, 249 (1976), *cert. denied,* 426 U. S. 953 (1976).

36. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2413, 2414-15; United States v. Young, 553 F. 2d 1132, 1134 (8th Cir. 1977), *cert. denied,* 431 U. S. 959 (1977); State v. Brothers, 4 Ore. App. at —, 478 P.2d at 444-45.

Some comments on the continued vitality of *Chimel* are in order. It has been argued that the force of *Chimel's* endorsement of the primacy of the warrant clause has been severely impaired by subsequent decisions of the Supreme Court. Farrar, *supra* note 34 at 525;Comment, *Searches Incident to Arrest: The Expanding Exception to the Warrant Requirement,* 63 GEO. L.J. 223, 230-32, 237-38 (1974). This interpretation is accurate only as to place. For example, the warrantless searches and seizures upheld in following cases: United States v. Edwards, 415 U. S. 800 (1974)(search at jailhouse); Gustafson v. Florida, 414 U. S. 260 (1973)(arrest and search of motorist); United States v. Robinson, 414 U S. 218 (1973)(arrest and search of motorist), took place in either public or semi-public areas, and did not exceed the scope limitations imposed by *Chimel.* And the same can be said of subsequent decisions. *E. g.,* Pennsylvania v. Mimms, 434 U. S. 106 (1977)(ordering motorist out of vehicle for traffic offense); United States v. Watson, 423 U. S. 411 (1976)(arrest in public area); Cardwell v. Lewis, 417 U. S. 583 (1974)(examination of exterior of motor vehicle). However, in repeated dicta, the Supreme Court has recognized that the individual's expectation of privacy (which, while subjective, is objectively evaluated by the courts, United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976) *cert. denied,* 430 U. S. 966 (1977); *see* Katz v. United States, 389 U. S. at 361 (Harlan, J., concurring), in public areas is "significantly less than that relating to one's home. . . ." South Dakota v. Opperman, 428 U. S. at 367; Cardwell v. Lewis, 417 U. S. 583, 589-90 (1974)(plurality opinion); Coolidge v. New Hampshire, 403 U. S. 443, 474 (1971)(plurality opinion); Chambers v. Maroney, 399 U. S. 42, 48, 52 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U. S. 216, 221 (1968); Cooper v. California, 386 U. S. at 59; Preston v. United States, 376 U. S. 364, 366-67 (1964); Carroll v. United States, 267 U. S. 132, 153 (1925). SEE Brinegar v. United States, 338 U. S. 160, 176 (1949); Johnson v. United States, 333 U. S. 10, 15 (1948). Moreover, the type of protection that the fourth amendment affords the individual "requires reference to a 'place'." Katz. v. United States, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). Residences are accorded the maximum protection of privacy interests under the amendment. United States v. Martinez-Fuerte, 428 U. S. at 561 (dictum); Dorman v. United States, 435 F.2d at 389; People v. Dumas, 9 Cal. 3d at 882 ' n. 8, 512 P.2d at 1215-16 ' n.8, 109 Cal Rptr. at 311-12 & n.8 (dictum). Finally, the Court has recently and strongly intimated that it will not entertain a reduction of warrant standards for residential, and other private property, searches. *See* Mincey v. Arizona, — U. S. at —, 98 S.Ct. at 2414; United States v. Martinez-Fuerte, 428 U. S. at 561, 565 (dictum); South Dakota v. Opperman, 428 U. S. at 381 (Powell, J., concurring)(dictum); United States v. Watson, 423 U. S. 411, 433 (1976)(Stewart, J., concurring)(dictum); *id.* at 432-33 (Powell, J., concurring)(dictum); United States v. United States Dist. Court, 407 U. S. at 315 & n.16. In view of the foregoing, it would appear that *Chimel's* premise, that the warrant and reasonableness clauses are not co-equal standards, remains inviolate in the realm of warrantless searches of private premises.

Of final relevance to the scope of the search incident exception, and to the emergency search, is the presence of third parties at the scene of an arrest, and the concomitant issue of impoundment. In such an eventuality, it has been argued that only specific and well-dilineated searches extending beyond the scope of incidental searches should be permitted. Thus, to prevent police abuses and assure the preservation of an arrestee's fourth amendment rights, without unduly hampering the legitimate need of law enforcement officers to prevent the destruction of evidence, it has been urged that pat-down searches be permitted when the police have a reasonable suspicion that a third party is armed or dangerous, and that the area near third parties be accessible to the police for search purposes when they possess articulable and specific knowledge creating, again, a reasonable suspicion that such individuals may use or reach for a weapon. Aaronson & Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest,* 64 GEO. L. J. 53, 77-78 (1975). In the absence of

B. THE CONCEPT OF EMERGENCY

> A word [or doctrine] is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.[37]

Since an emergency presents such a myriad of variables,[38] and because some of the concepts embodied in it escape definition in the abstract, it does not lend itself to a simplistic meaning. In short, it is a word of art rather than of precision. Consequently, it has eluded a definitive explanation by the courts, and must be determined on an

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either of these factual criteria, no other warrantless searches of third parties should be sanctioned. *Id.* at 78. In sum, the requirement of probable cause should apply to all broad area searches to prevent the possible destruction of evidence by third parties, for the balance between society's interest in promoting effective law enforcement and the right of privacy guaranteed under the fourth amendment is identical whether the preservation of evidence is threatened either by the arrestee or by his confederates, friends, or relatives. *Id.*

To reduce police abuses arising from the potential threat of warrantless searches without probable cause, it has been proposed that impounding a dwelling where an arrest has been made would pose less of a threat to privacy. Note, *Police Practices and the Threatened Destruction of Tangible Evidence,* 84 HARV. L. REV. 1465, 1474-76 (1971). The suggested guidelines for such action are probable cause to search, restrictions as unobtrusive as possible and lasting no longer than the time required to obtain a warrant, and a specified time limit. *Id.* at 1477-81. To guard against potential harassment, it has also been proposed that the occupants should be free to remain within or to leave the dwelling unless, of course, the officers have probable cause to believe that they are removing or destroying weapons, contraband, or other evidence of crime, or pose a threat to do so. *Id.* at 1478. In either event, the officers may make an immediate emergency search. *See* United States v. Santana, 427 U. S. 38, 43 (1976). However, if the occupants exercise their right to depart, the police should be permitted to check immediately to see if anyone else has remained behind. 84 HARV. L. REV. at 1478 n.58.

Of particular relevance to the emergency doctrine are the time limitations for impoundment. As to these, the editors of the *Harvard Law Review* concede the strains that would be placed upon judicial administration in rural areas, and have proposed that police departments work toward modernizing procedures for obtaining warrants quickly enough to accomplish a lawful impoundment. *Id.* at 1478-79, 1481. However, while acknowledging a judicial reluctance to impose maximum time limitations, they have not addressed themselves to the issue of the limited funds available in many rural communities for adequate police resources to quickly effect impoundment; nor have they considered the possibility of multiple emergencies. *Id.* at 1479.

37. Towne v. Eisner, 245 U. S. 418, 425 (1918)(Holmes, J.).

38. *See* United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1972), *cert. denied,* 414 U. S. 833 (1973). Among the variables are the locale of a crime; the nature, gravity, and duration of the offense and its resultant investigation; the danger to investigating officers; the degree of urgency involved, and the time required to obtain a warrant; the type of evidence subject to seizure, and the threat that it will be, or is being, removed or destroyed; the mobility of the object to be searched; and the degree of availability of law enforcement and judicial resources. *See id.;* Stevens v. State, 443 P.2d 600, 602-03 (Alas. 1968), *cert. denied,* 393 U. S. 1039 (1969); State v. Mankel, 27 Ariz. App. 436, —, 555 P.2d 1124, 1127-28 (2d Div. 1976); People v. Sirhan, 7 Cal. 3d 710, 739, 497 P.2d 1121, 1140, 102 Cal. Rptr. 385, 404 (1972), *cert. denied,* 410 U. S. 947 (1973); Brown v. State, 475 S. W. 2d 938, 950 (Tex. Crim. App. 1971); State v. Oakes, 129 Vt. 241, —, 276 A.2d 18, 25, *cert. denied,* 404 U. S. 965 (1971). *See generally,* Cady v. Dombrowski, 413 U. S. at 447; *id.* at 453 (Brennan, J., dissenting); Brinegar v. United States, 338 U. S. at 183 (Jackson, J., dissenting)(dictum); United States v. Calhoun, 542 F.2d 1094, 1102 (9th Cir. 1976), *cert. denied,* 429 U. S. 1064 (1977); Virgin Islands v. Gereau, 502 F.2d 914, 928 (3rd Cir. 1975), *cert. denied,* 420 U. S. 909 (1975); Sample v. Eyman, 469 F.2d 819, 822 (9th Cir. 1972); Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN L. REV. 1027, 1036-37, 1046-49 (1974); Note, *Warrantless Searches and Seizures of Automobiles,* 87 HARV. L. REV. 835, 852, 853 (1974); Note, *Police Practices and the Threatened Destruction of Tangible Evidence,* 84 HARV. L.

ad hoc basis.[39] Therefore, to catch its import, the better practice is to fashion a definition tailored to the different factual circumstances in which an emergency has been recognized and applied judicially.

Within this framework, the doctrine of emergency[40] may be defined as follows: Law enforcement officers may enter private premises without either an arrest or a search warrant in "hot (or prompt) pursuit" of a fleeing suspect;[41] to arrest, or to prevent the imminent escape of, a dangerous criminal, or to seize hazardous evidence, on the basis of probable cause to believe that either the suspect, the possessor, or the materials are within the premises, and time is of the essence so as to realistically preclude recourse to a warrant;[42] to prevent the actual, or imminently threatened loss, destruction, or removal of seizable evidence;[43] to preserve life or property or to render first aid and assistance, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a limited investigation involving a substantial and continuing threat of imminent danger to either life, health, or property, and provided, further, that they do not enter, in any such instance, with a predetermined intent either to arrest or to seach;[44] to protect the

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REV. 1465, 1478-79 (1971). As will be observed, the degree of availability of law enforcement *investigative* resources can be irrelevant to the concept of emergency. *See* text at —, *infra*.

39. *See* United States v. Morrow, 541 F.2d 1229, 1232 (7th Cir. 1976), *cert. denied*, 430 U. S. 933 (1977); People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Ca. Rptr. 629, 637 (1976), *cert. denied*, 429 U. S. 929 (1976).

40. It is synonymous with an exigency or exigent circumstances. United States v. Easter, 552 F.2d 230, 233 (8th Cir. 1977); Root v. Gauper, 438 F.2d 361, 364, 365 (8th Cir. 1971). *See* McDonald v. United States, 335 U. S. at 454, 455 (dictum); People v. Ramey, 16 Cal. 3d, at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637 (1976); People v. Mitchell, 39 N. Y.2d at 177, 347 N. E.2d at 609, 383 N. Y. S2d at 248. Although the Supreme Court has intimated a distinction between "emergency" or "exigent circumstances" and "hot pursuit," *e. g.*, United States v. Santana, 427 U. S. at 43 n.3; *see* G. M. Leasing Corp. v. United States, 429 U. S. 338, 358 n.21 (1977)(dictum); Vale v. Louisiana, 399 U. S. 30, 35 (1970)(dictum), it is submitted that the latter concept, which is premised upon urgency, the essence of any emergency, is but an example of the emergency doctrine.

41. United States v. Santana, 427 U. S. at 42-43; Warden v. Hayden, 387 U. S. at 298-99; McDonald v. United States, 335 U. S. at 455 (dictum); Johnson v. United States, 333 U. S. at 15 (dictum).

42. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414; Rice v. Wolf, 513 F.2d 1280, 1294, 1296 (8th Cir. 1975), *rev'd on other grounds subnom.* Stone v. Powell, 428 U. S. 465 (1976); United States v. Petty, No. 73-1582 (10th Cir. May 28, 1974), *cert. denied*, 419 U. S. 1009 (1974); Dorman v. United States, 435 F.2d at 390, 391, 392-93; People v. Ramey, 16 Cal. 3d at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637; Commonwealth v. LeBlanc, 367 N. E. 2d 846, 851 (Mass. 1977). *See also* United States v. Calhoun, 542 F.2d at 1102 (dictum).

43. Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414-15 (dictum); G. M. Leasing Corp. v. United States, 429 U. S. at 361-62 (Burger, C. J., concurring)(dictum); United States v. Guidry, 534 F.2d 1220, 1223 (6th Cir. 1976). *See* United States v. Santana, 427 U. S. at 43; Vale v. Louisiana, 399 U. S. at 35 (dictum); United States v. Jeffers, 342 U. S. 48, 52 (1951) (dictum); McDonald v. United States, 335 U. S. at 455 (dictum); Johnson v. United States, 333 U. S. at 15 (dictum); United States v. Brewer, 343 F. Supp. 468, 472-73 (D. Hawaii 1972). *See generally* Note, *Residential Searches to Prevent the Destruction of Evidence: An Emerging Exception to the Warrant Requirement*, 47 U. COLO. L. REV. 517 (1976). *See also* United States v. Wysong, 528 F.2d 345, 348 (9th Cir. 1976); Thomas v. United States, 352 A.2d 390, 391 (D. C. Ct. App. 1976).

44. Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2413-14; Geary v. State, 91 Nev. 784, — & n. 3, 544 P.2d 417, 421 & n. 3 (1975); State v. Hardin, 90 Nev. 10, —, 518 P.2d 151, 153-54 (1974);

premises against a felony in progress; [45] and to conduct a reasonable inspection to determine the cause of a fire while it is still burning, or reasonably following its suppression, and to seize evidence either relevant to the cause of the blaze or of an unrelated crime inadvertently discovered.[46]

As long as there is a reasonable basis for the belief upon which the entry is predicated, it will be sustained, even if it is later shown that no emergency existed.[47] Since time is crucial under the doctrine, it would be unreasonable to require a warrant prior to entry.

The doctrine will not permit the entry of, and search by, additional investigators immediately or shortly after the initial entry, while investigative control of the premises is still current, and after termination of the emergency, even though the subsequent intrusion is limited to the scope of (or the purpose for) the original invasion.[48]

By itself, probable cause is insufficient to justify either an emergency entry upon or search of private premises.[49] There also must be present exigent circumstances. Therefore, an emergency search of a private residence can be justified only when the police are confronted with both probable cause and an exigency.[50]

People v. Mitchell, 39 N. Y.2d at 177, 178-79, 347 N. E.2d at 609, 610, 383 N. Y. S.2d at 248, 249. *See* McDonald v. United States, 335 U. S. at 454 (dictum); United States v. Brand, 556 F.2d 1312, 1318 (5th Cir. 1977), *cert. denied*, — U. S. —, 98 S. Ct. 1237 (1978); United States v. Petty, No. 73-1582 (10th Cir. May 28, 1974), *cert. denied*, 419 U. S. 1009 (1974); United States v. Goldenstein, 456 F.2d 1006, 1010-11 (8th Cir. 1972), *cert. denied*, 416 U. S. 943 (1974); United States v. Barone, 330 F.2d 543, 545 (2d Cir. 1964), *cert. denied*, 377 U. S. 1004 (1964); Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963)(Burger, J., concurring)(dictum), *cert. denied*, 375 U.S. 860 (1963); People v. Ramey, 16 Cal. 3d at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637; People v. Smith, 7 Cal. 3d at 286, 496 P.2d at 1263, 101 Cal. Rptr. at 895; People v. Roberts, 47 Cal. 2d 374, 378-79, 303 P.2d 721, 723 (1956); Patrick v. State, 227 A.2d 486, 489 (Del. 1967); Davis v. State, 236 Md. 389, 395-98, 204 A.2d 76, 80-81 (1964), *cert. denied*, 380 U. S. 966 (1965); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 260.5, at 164-65 (1975). *See also* United States v. Jeffers, 342 U. S. at 52 (dictum); United States v. Smith, 515 F.2d at 1031; Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 702-03 (1924).

45. United States v. Estese, 479 F.2d 1273, 1274 (6th Cir. 1973); People v. Solario, 19 Cal. 3d 760, 763-64, 566 P.2d 627, 629, 139 Cal. Rptr. 725, 727 (1977).

46. *See* Michigan v. Tyler, — U. S. —, —, 98 S. Ct. 1942, 1950-51 (1978); United States v. Gargotto, 510 F.2d 409, 411-12 (6th Cir. 1974), *cert. denied*, 421 U. S. 987 (1975); Steigler v. Anderson, 496 F.2d 793, 797-98 (3d Cir. 1974), *cert. denied*, 419 U. S. 1002 (1974); United States v. Green, 474 F.2d 1385, 1389-90 (5th Cir. 1973), *cert. denied*, 414 U. S. 829 (1973). *See also* Bailey v. Michigan, 493 F.2d 1218, 1220 (6th Cir. 1974), *cert. denied*, 419 U. S. 858 (1974). For a comprehensive analysis of the problems confronting law enforcement officers who effectuate warrantless entries to conduct arson investigations, *see* People v. Tyler, 399 Mich. 564, —, 250 N. W. 2d 467, 473-77 (1977), *aff'd*, — U. S. —, 98 S. Ct. 1942 (1978). Since an emergency search is an exception to the warrant requirement, the burden of proof will rest with the prosecution to justify the same. United States v. Easter, 552 F.2d at 233; Root v. Gauper, 438 F.2d at 364.

47. Wayne v. United States, 318 F.2d at 212 (Burger, J., concurring)(dictum); Patrick v. State, 227 A. 2d 486, 489 (Del. 1967).

48. United States v. Young, 553 F.2d 1132, 1134 (8th Cir. 1977), *cert. denied*, 431 U. S. 959 (1977). *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414.

49. United States v. Rubin, 474 F.2d at 268.

50. United States v. Pacheco-Ruiz, 549 F.2d 1204, 1207-08 app. (9th Cir. 1976). *See* State v.

Finally, once an exigency has ended, no further emergency search-and-seizure activity will be permitted, and a warrant must be sought.[51]

In summary, the emergency doctrine permits quick responsive action on the part of law enforcement officers. Under its sanction, they are authorized to gain warrantless entry to private premises and to promptly conduct a limited investigation. This inquiry must bear "a material relevance to the initial purpose for their entry,"[52] and its scope must be reasonably correlated with such purpose.[53] Although the doctrine will sanction a prompt examination of the scene of an emergency, and will permit a limited search for and seizure of both individuals and incriminating evidence,[54] it will not authorize the police to substitute their judgment for that of an impartial magistrate *after* the exigency has ceased to exist; and this is no small distinction.[55] Therefore, upon the termination of the supporting basis for the warrantless presence, the police must cease any further search activity and must seek a warrant.

III. THE INVESTIGATIVE SEARCH AND MINCEY v. ARIZONA

The investigative search is concerned with the circumstances leading up to and surrounding the incident that justifies the initial presence. Because of this nexus, it is a logical outgrowth of the emergency that gave rise to the police response. However, there is a critical difference between the two.

In an emergency, time is crucial to the health and welfare of both victim and officer. It is this unique quality of an exigency that justifies, and requires, prompt and immediate responsive conduct

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Mankel, 27 Ariz. App. 436, —, 555 P.2d 1124, 1127 (2d Div. 1976); Lohman v. Superior Court, 69 Cal. App. 3d 894, 905, 138 Cal. Rptr. 403, 409-10 (4th Dist. 1977).

51. United States v. Young, 553 F.2d at 1134; Sample v. Eyman, 469 F.2d 819, 822 (9th Cir. 1972); Root v. Gauper, 438 F.2d at 365; State v. Mankel, 27 Ariz. App. at —, 555 P.2d at 1127-28; People v. Williams, 557 P.2d 399, 404-05 (Colo. 1976); People v. Tyler, 399 Mich. —, —, 250 N. W. 2d at 474, 477; State v. Brothers, 4 Ore. App. at ___, 478 P.2d at 444; State v. Davidson, 44 Wis. 2d 177, ___, 170 N. W. 2d 755, 765. *See* Mincey v. Arizona, ___ U. S. at ___ 98 S. Ct. 2414-15.

52. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFF. L. REV. 419, 426-27 (1973). *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414; Terry v. Ohio, 392 U. S. 1, 19 (1968); Warden v. Hayden, 387 U. S. at 299.

53. Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414; United States v. Brand, 556 F.2d at 1318; Geary v. State, 91 Nev. at —, 544 P.2d at 421; People v. Mitchell, 39 N. Y.2d at 177-78, 347 N. E.2d at 609, 383 N. Y. S.2d at 248.

54. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2413-14; Warden v. Hayden, 387 U. S. at 298-99.

55. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2415; McDonald v. United States, 335 U. S. at 455-56; Trupiano v. United States, 334 U. S. 699, 710 (1948).

on the part of the police, in order to effectively *counteract the dangers inherent* in any exigent situation. In this posture, exigent circumstances take precedence over the warrant requirement.

An investigative search, however, is not concerned with foiling any dangers. It commences only *after* the termination of the exigency, and is concerned with *past,* not *current,* events and circumstances leading up to and surrounding the emergency. It is in this sense that the investigative search is to be distinguished from the emergency search, which is concerned with the natural consequences *flowing from* an exigency. It is further distinguishable, in that the investigative search frequently partakes of a gathering of evidence of crime. Although an emergency search can have an investigative purpose, it is one that can be rationalized only in terms of the legitimate concerns of the emergency itself. Thus, such a search is correlated with, and limited by, the exigency that justifies it. In the case of the investigative search, however, time is neither critical nor pressing, for the police are no longer confronted with a viable emergency. And it is within this context and time frame that the warrant requirement reassumes its precedence over the efficient and simplified demands of law enforcement.

In a decision of far-reaching significance for the primacy of the warrant requirement, the Supreme Court held, in *Mincey v. Arizona,*[56] that law officers may not engage in investigative searches without a warrant at the scene of a crime after an emergency has terminated, and in the absence of objective criteria pointing to the loss, destruction, or removal of evidence during the time required to obtain a warrant, or suggesting that a warrant could not easily have been obtained.[57] The facts revealed that Officer Headricks of the Tucson Metropolitan Area Narcotics Squad, in the company of nine other policemen, gained separate entry to petitioner's apartment to make a narcotics purchase. While in the bedroom, Officer Headricks was shot as the other policemen were forcing their way into the apartment. They discovered Headricks and petitioner, who was wounded and apparently unconscious, as well as some acquaintances of petitioner, and requested emergency assistance. However, they did not engage in any search or investigative activities, pursuant to a Tucson Police Department

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56. — U. S. —, 98 S. Ct. 2408.

57. *Id.* at 2414-15 (unanimous opinion as to the fourth amendment claim). The only exception to the termination of investigative searches will be in the case of determining the cause of a fire. *See* Michigan v. Tyler, 98 S. Ct. 1942, 1950 (1978), which also discusses the investigative search. *Id.* at 1950-51 & n.6.

directive prohibiting police officers from investigating incidents involving themselves.

Within ten minutes, homicide detectives, who had received a radio report of the shooting, arrived and took charge of the investigation. After supervising the removal of Headricks and the suspects, the detectives subjected petitioner's entire apartment to an exhaustive search, without benefit of a warrant, that stretched over a period of four days, and that involved the seizure of two to three hundred objects.

In affirming the denial of petitioner's motion to suppress, the Supreme Court of Arizona endorsed the search of a homicide scene to determine the circumstances of death as an additional, and separate, exception to the warrant requirement, provided the search was "reasonable," involved "the scene of a homicide — or of a serious personal injury with likelihood of death where there is reason to suspect foul play—," and was commenced within "a reasonable period" after the police first learned of the incident, and after they had legally arrived on the scene.[58]

The United States Supreme Court reversed. First, the Court reaffirmed the mandate of *Katz v. United States,*[59] that all warrantless searches are *per se* unreasonable, subject only to certain exceptions.[60] It then proceeded to examine the reasons advanced by the prosecution in support of the search.

The first contention made was that the search did not invade any constitutionally protected right of privacy, because either Mincey had forfeited any reasonable expectation of privacy in his apartment by shooting Officer Headricks, or "the additional intrusion caused by the search was constitutionally irrelevant" to the pervasive invasion of privacy resulting from his arrest.[61] The Court rejected out of hand the first prong of this argument by dryly observing that "this reasoning would impermissibly convict the suspect even before the evidence against him was gathered."[62] It found the second prong "hardly tenable in light of the extensive nature of this search."[63] Furthermore, although an arrestee may have "a lessened right of privacy in his person," this reduction

58. State v. Mincey, 115 Ariz. 472, 482, 566 P.2d 273, 283 (1977). The Supreme Court of Arizona did concede, however, that the search did not fall within any of the usual exigent circumstances exceptions to the warrant requirement. *Id.*

59. 389 U. S. 347, 357 (1967).

60. — U. S. at —, 98 S. Ct. at 2412.

61. *Id.* at —, 98 S. Ct. at 2413.

62. *Id.* (footnote omitted).

63. *Id.*

does not extend to his *entire* house — an argument explicitly rejected in *Chimel v. California.*[64]

The second argument advanced in support of "Arizona's categorical exception to the warrant requirement is that a possible homicide presents an emergency situation demanding immediate action."[65] The Court did not question "the right of the police to respond to emergency situations."[66] To the contrary, it endorsed their right, upon arriving at the scene of a homicide, to "make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises."[67] And the police, "during the course of their legitimate emergency activities," will be permitted to "seize any evidence that is in plain view. . . ."[68] However, it found the emergency contention inapposite and without premise, because "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,' "[69] and it could not be seriously argued that this search, conducted *after* all of the persons within the apartment had been located, and stretched over a period of four days, "was justified by any emergency threatening life or limb . . . [or could] be rationalized in terms of the legitimate concerns that justify an emergency search."[70]

The prosecution next pointed to the overriding public interest in the prompt investigation of murder. Again, the Supreme Court did not question the importance of this concern. It found, however, that the investigation of other serious crimes carries with it a comparable public interest. Thus, if the warrantless search of the scene of a homicide is reasonable, then the same would pertain to the warrantless search of the scene of a rape, a robbery, or a burglary. At this point, " '[n]o consideration relevant to the [f]ourth [a]mendment suggests any point of rational limitation' of such a doctrine."[71]

Construing the state's overall argument to be one in the name of efficiency and simplicity, the Court issued one of its most ringing and compelling endorsements of the warrant requirement:

64. 395 U. S. 752, 766 n.12 (1969). *See* — U. S. at —, 98 S. Ct. at 2413.
65. *Id.*
66. *Id.*
67. *Id.* at —, 98 S. Ct.at 2414.
68. *Id.*
69. *Id.*, *quoting with approval* Terry v. Ohio, 392 U. S. 1, 26 (1968).
70. *Id.*
71. *Id.*, *quoting with approval* Chimel v. California, 395 U. S. 752, 766 (1969).

> Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the [f]ourth [a]mendment. . . . The investigation of crime would always be simplified if warrants were unnecessary. *But the [f]ourth [a]mendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.* . . . For this reason, warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement *so compelling* that the warrantless search is objectively reasonable under the [f]ourth [a]mendment.[72]

Noting that except for the fact that a homicide was under investigation, the Court emphasized the absence of any exigent circumstances in this case. For example, 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."[73] In this posture, then, the Court was left with only the seriousness of the offense under investigation to justify a warrantless search under exigent circumstances. This it declined to do.[74]

The final argument advanced in support of the search was the protection afforded by the guidelines set forth in the decision of the Supreme Court of Arizona. The Court found this difficult to accept, "[i]n light of the extensive search that took place in this case. . . ."[75] Furthermore, it hardly found the "so-called guidelines" as "rigidly confining" as the state interpreted them to be. To the contrary, the Court interpreted them as conferring "unbridled discretion upon the individual officer to interpret such

72. *Id.* (citations omitted) (emphasis added). Among such "compelling needs" are the search incident exception, hot pursuit of a fleeing suspect, and the imminent destruction of evidence. *Id.* Since the need to conduct a warrantless search of a home must be "compelling," and since a home occupies a special position in the fourth amendment scheme of the protection of privacy interests, the burden of persuasion to justify such conduct should be equally compelling: by proof beyond a reasonable doubt.

73. *Id.* at —, 98 S. Ct. at 2414-15 (emphasis added).

74. *Id.* at —, 98 S. Ct. at 2415.

75. *Id.*

terms as 'reasonable search,' 'serious personal injury with likelihood of death where there is reason to suspect foul play,' and 'reasonable period.' "[76] And it was "precisely this kind of *judgmental assessment* of the reasonableness and scope of a proposed search that the [f]ourth [a]mendment requires be made by a neutral and objective magistrate, not a police officer."[77]

In conclusion, the Court reiterated that even if the circumstances described by the lower court would usually warrant a constitutional search "of substantial scope," the fourth amendment required that *"this judgment in each case be made in the first instance by a neutral magistrate."*[78] Thus, *Mincey* stands for the proposition that if an individual is arrested in his residence and removed therefrom, a subsequent warrantless search thereof under circumstances which pose no threat either to the safety of the searching officers or of the removal or destruction of incriminating evidence, and which demonstrate that the police have sufficient manpower available to adequately secure the premises while a readily obtainable warrant is sought, is unreasonable.

A number of guiding principles and criteria emerge from *Mincey*. The first of these is the rejection of the "crime scene" exception to the warrant requirement. Simply put, there is no correlation between the seriousness of a crime and exemption from the warrant requirement.[79] Second, the duration of an emergency search will be limited strictly to the continued existence of the exigencies which justified its initiation. This will effectively preclude warrantless investigative searches after the scene of an emergency has been secured and during the period required to seek an easily obtainable warrant. Third, the Court will particularly scrutinize any claims of reasonableness attaching to warrantless searches of private residences, and will not entertain a reduction of warrant standards for residential searches.[80] And, finally, among the recognized criteria for determining the existence of an emergency are the immediate — and urgent — need at the scene of a crime for the police to search for both victims and suspects; the search incident exception; "hot pursuit" of a fleeing suspect; the imminent loss, destruction, or removal of evidence, either prior to seeking a warrant or while one is being obtained; the degree of

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76. *Id.*

77. *Id.* (emphasis added).

78. *Id.* (emphasis added). *Accord*, Johnson v. United States, 333 U. S. 10, 13-14 (1948)(Jackson, J.).

79. This will effectively remove a crucial underpinning of authorities supporting the "right" of re-entry.

80. *See* United States v. Martinez-Fuerte, 428 U. S. at 561, 565 (dictum).

availability of law enforcement officers to secure the premises and preserve the evidential integrity of the scene; and the degree of availability, and accessibility, of a magistrate.

Although *Mincey* left open the question of what, if any, evidence was seized reasonably under established fourth amendment standards,[81] the opinion of the Court indicated very clearly that there can be no emergency justification for search-and-seizure activities that cannot be "rationalized in terms of the legitimate concerns that justify an emergency search."[82] Since the Court spelled out those "concerns" in great detail, the lower courts will be required henceforth to examine the legality of any claimed emergency search against the standard of reasonableness announced in *Mincey*.

In line with *Mincey*, the Eighth Circuit, relying upon *Chimel*, has ruled that police evidence technicians may not gain warrantless entry immediately or shortly after the initial entry, while investigative control of the premises is still current, and *after termination* of the emergency, even though the subsequent intrusion is limited to the scope of or the purpose for the original invasion.[83] A contrary position has been adopted by the Fifth Circuit, arguing that the justification for such an investigative search is that since an emergency sanctions an official invasion of individual privacy, the individual thereby loses his reasonable expectation of privacy to the extent of the invasion.[84]

This position taken by the Fifth Circuit is untenable. In the first place, it can no longer withstand analysis as a result of the Supreme Court's holding in *Mincey*. Secondly, it confuses an emergency with an investigative search. As has been noted,[85] each involves a separate, although sequentially related, set of factors. Therefore, the reasonable expectation of privacy lost to an emergency is unrelated to that which would be breached by an investigative search, and is immediately restored *after* the termination of the exigency and *prior* to the initiation of the search. Thirdly, there does not appear to be any logical limit to the number of such searches. The only precondition is that investigative control

81. — U. S. at —, 98 S. Ct. at 2415 n.9.
82. *Id.* at —, 98 S. Ct. at 2414.
83. United States v. Young, 553 F.2d 1132, 1134 (8th Cir. 1977), *cert. denied*, 431 U. S. 959 (1977).
84. United States v. Brand, 556 F.2d 1312, 1317 & n.9 (5th Cir. 1977), *cert. denied*, — U. S. —, 98 S. Ct. 1237 (1978). *See* People v. Superior Court, 41 Cal. App. 3d 636, 640-41, 116 Cal. Rptr. 24, 26-27 (2d Dist. 1974); People v. Wallace, 31 Cal. App. 3d 865, 871 107 Cal. Rptr. 659, 662 (1st Dist. 1973); Lonquest v. State, 495 P.2d 575, 578-79 (Wyo. 1972), *cert. denied*, 409 U. S. 1006 (1972).
85. See text at — supra.

of the premises remain current. Such a situation is too pregnant with the potential for abuse and harassment. Finally, such a doctrine does violence to one of the cardinal tenets of fourth amendment law: The decision to search, in the absence of an emergency, requires that a neutral magistrate be interposed between the citizen and the police, and that in each case this judgment be made in the first instance by only a detached judicial officer.[86] Thus, in the absence of evidence demonstrating the unfeasibility of obtaining a warrant, warrantless investigative searches, after the termination of an emergency, should not be sanctioned.

IV. THE ISSUE OF RE-ENTRY

Re-entry of the scene of a crime represents either a delayed or a resumed investigative search, for, invariably, it has as its prime purposes a determination of the circumstances pertaining to the incident that justified the initial presence, and a search for evidence of crime. As such, then, it will be governed primarily by the same principles that attach to the investigative search, with due regard given to certain factors of geography and available law enforcement resources that particularly impact upon re-entry. It will not always be effected by the same officers who gained initial entry. Since it results either from a joint effort of two or more investigative agencies, or from those of members of the same department, it will be viewed as representing a successive presence. And, since factual issues are so crucial to a proper assessment of this problem, it particularly lends itself to a case-by-case analysis. Finally, in approaching and analyzing these cases, it will behoove the reader to keep uppermost in mind the crucial role played by the warrant requirement in preserving the privacy of the home.

Although a variety of reasons has been advanced in support of the "right" of re-entry, the primary one appears to be the seriousness of the crime under investigation. Thus, in *State v. Oakes,*[87] the police entered the defendant's residence in response to a call from him in which he stated, "She's here on the floor, dying." As they approached the house by way of the kitchen entrance, the police could see the defendant through the glass in the

86. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2415; McDonald v. United States, 335 U.S. at 455-56; Johnson v. United States, 333 U.S. at 13-14.

87. 129 Vt. 241, 276 A.2d 18 (1971), *cert. denied*, 404 U. S. 965 (1971).

upper part of the door. He was kneeling over a woman lying on the kitchen floor. The officers entered through the unlocked kitchen door and were informed by the defendant that he had accidently shot his wife "with a 22-410 over and under."

One of the officers went into an adjoining room to look for something to cover the glass in the kitchen door. He observed that an ironing board was set up there and on it was a 22-410 over and under rifle. A short time later a physician arrived and examined the body. When he pronounced the woman dead, the defendant became violent and had to be subdued with handcuffs. Approximately an hour later, he was removed to the police station, along with the rifle, ammunition, and a cartridge belt.

The police returned to the residence twice the next day to continue their investigation. The first time, some seven hours after their initial entry, they effected a warrantless entry and took additional photographs, as they had exhausted their supply of flash bulbs during the initial visit. The second re-entry was made approximately five hours after the first, and was secured under the authority of a search warrant. During this last visit, the police seized an expended shell casing and photographed it.

Although the defendant conceded the legality of the initial entry, he attacked the police presence the following day, arguing that the first re-entry required a warrant, and that justification for the search warrant issued for the second re-entry was defective and invalid.

In sustaining the denial of suppression, the Supreme Court of Vermont agreed that the initial entry was valid,[88] and recognized that the issue of the legality of the subsequent entries hinged on whether the initial legality terminated before the return visits. Certainly, during the initial visit, the officers, being confronted with a corpse that had been the victim of a gunshot wound, had a duty to initiate and conduct an investigation on the premises. Attendant upon this duty was the right to conduct a search for and seizure of the weapon, ammunition, and any spent shells.[89] Since the officers were there with the consent of the defendant, the issue of unreasonable invasion of privacy under the fourth amendment was irrelevant. Therefore, the evidence seized during the initial presence was properly admissable at trial.[90]

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88. *Id.* at —, 276 A.2d at 24.
89. *Id.*
90. *Id.* at —, 276 A.2d at 25. The rifle, which was crucial to a conviction and which was not discovered as the result of an investigative search for evidence and the circumstances surrounding the shooting, was also admissable under the doctrine of "plain view" during the performance by the police of emergency duties. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414.

The fact that the investigation which was interrupted at 1 a. m. and the premises locked up, then resumed at 6 a. m. the same morning, was without constitutional moment to the court, for the investigation remained, for practical purposes, "continuous and sequential." Therefore, based on those facts and the fact that the 6 a. m. investigation involved routine matters associated with charges connected with the shooting, neither it nor the 11 a. m. return required the authority of a warrant.[91] In short, the officers were not conducting a search either for secreted objects or for evidence of other crimes.

The opinion reiterated the importance attaching to homicide invesigations and recognized that the emergency nature of the situation would have permitted a forced warrantless entry to conduct a thorough investigation into the suspicious circumstances surrounding the discovery of the body. This being so, the officers had authority to enter and "a duty to complete their investigation of the occurrence."[92]

Finally, the court took note of the fact that the discontinuity of the investigation was due in some measure to the limitations on manpower and expertise implicit in criminal investigations in most Vermont villages. Additionally, the presence of a prosecutor is often required, and this usually means a trip from some other part of the county in which the investigation is being conducted. These limitations, although they result in unavoidable delays and interruption of police presence at the scene of the crime, will not "undercut" the right of the police to complete their investigation within a reasonable period, or require a renewed authority to re-enter.[93]

The reasoning in *Oakes* is faulty for a number of reasons. In the first place, it confuses an emergency with an investigative search. The emergency justified the initial presence, and would have permitted an examination of the premises for other victims. However, once the emergency had ended, the defendant was in custody, and the premises locked up, no further warrantless searches pursuant to either an emergency or consent were justified. Certainly, an invitation to enter does not extend to a full-blown search of a residence, or to re-entries.[94] The emergency is the cause for the investigative search, but does not justify it in the absence of

91. 129 Vt. at —, 276 A.2d at 25.
92. *Id.*
93. *Id. Accord,* Brown v. State, 475 S. W. 2d 938, 949-50 (Tex. Crim. App. 1971).
94. The court in *Oakes* attempted to distinguish *Chimel* on the basis of consent.

a separate set of exigent circumstances, such as the actual or threatened imminent loss, destruction, or removal of evidence, or the unavailability of a magistrate. In short, an emergency search is "strictly circumscribed by the exigencies which justify its initiation,"[95] and must end with the termination of its supporting basis. The investigative search, without benefit of a warrant, will not be permitted to take its place and resume where it has left off. Thus, there is no continuity, as the opinion in *Oakes* implicitly assumed, between the end of an emergency search and the initiation of a warrantless investigative search.

The attempt in *Oakes* to form a correlating nexus between the seriousness of a crime and exemption from the warrant requirement must fail also. This argument rests on nothing more than an apperal to maximumize efficiency and simplicity in the investigation of crime. The net result will be the total sacrifice of the privacy of the individual's home and property in favor of the unbridled discretion of law officers.[96]

Finally, the attempt to justify the re-entries on the basis of meager investigative and manpower resources will not stand. Again, it represents but an appeal to efficiency and simplicity without regard to the sanctity of the home or the availability of a neutral magistrate. Furthermore, it attempts to forfeit basic constitutional protections in the name of economic necessity. It is difficult to conceive of a more pernicious doctrine in the law of search and seizure.

An issue relative to both re-entry and the investigative search concerns the availability of a magistrate. In *Stevens v. State,*[97] the issue raised was whether a re-entry some ten hours after the initial legal entry in response to an emergency call was constitutionally fatal to the admissibility of evidence thereby obtained.

A local chief of police of an isolated frontier village located on an island off the coast of southeastern Alaska, in response to a telephone call early in the morning from a neighbor advising that there had been a shooting in the defendant's home, proceeded to the residence and was admitted after knocking on the door. The chief found the defendant who was sobbing and who stated that he had shot his "buddy." Thereupon, the chief placed the defendant under arrest and removed him from the scene. Later, the chief returned and viewed the body of the decedent. After conducting a

95. Terry v. Ohio, 392 U. S. 1, 26 (1968). *Accord,* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414.
96. — U. S. at — 98 S. Ct. at 2414-15.
97. 443 P.2d 600 (Alaska 1968), *cert denied,* 393 U. S. 1039 (1969).

superficial inspection, he locked the house with a padlock. The chief then conferred with the mayor, who placed a telephone call to the state police in Juneau. The time of the call was 3 a. m., and the state police advised that the premises should remain locked. At the first winter daylight, which was at approximately 10 a. m., state troopers and the district attorney departed Juneau by air for the defendant's residence and entered to search the same after the chief of police had unlocked the door. During this interval, access had been denied to both the defendant and his wife. The residence was subjected to a thorough investigative search notwithstanding the lack of a warrant.

The defendant unsuccessfully moved to suppress the evidence seized during the second re-entry, and was subsequently convicted. On appeal, the Supreme Court of Alaska affirmed.[98]

The defendant did concede that the initial entry was legal. With this concession, the appellate court agreed, observing that an emergency existed which justified a warrantless entry. [99] Thus, the fact that the chief had not been invited into the home was without constitutional significance.[100] Since he was confronted with a homicide, it was the chief's duty to conduct an investigation and to inspect the premises. This inspection would have included all of the police activities conducted some ten hours later. Thus, there could be no question but that if these activities had been executed then and there, no fourth amendment interests would have been violated.[101]

The issue, then, centered on the ten-hour interval between the initial entry and the eventual seizure. The court resolved this against the defendant, arguing that the chief of police of a small frontier village is not necessarily a competent officer to conduct the type of investigation of a homicide which is required to protect the interests of society.[102] Furthermore, in the more populous urban areas an officer discovering a homicide could remain at the scene until the arrival of trained investigators within a short period of time. Therefore, in the usual case, the interval between the initial legal entry and the commencement of the investigation will not be so unreasonable as to affect the legality of the subsequent warrantless presence.[103]

98. Stevens v. State, 443 P.2d 600 (Alaska 1968), *cert denied*, 393 U. S. 1039 (1969).
99. *Id.* at 602.
100. *Id.*
101. *Id.*
102. *Id.* at 602-03.
103. *Id.* at 603.

The court felt that the situation confronting the chief of police was not at all typical. Here, the homicide was discovered during the early hours of the morning in an isolated frontier village located on an island off the coast of southeastern Alaska. Neither a magistrate, a coroner, nor trained police assistance was readily available.[104] The chief had no alternative but to lock the premises and take the defendant into custody. The state police departed by air for the island at the first winter daylight, and, upon arrival, immediately commenced their investigation at the scene of the crime. Thus, the court concluded, there was neither an avoidable delay in initiating the investigation nor a violation of the defendant's constitutional right to privacy.[105]

The court in *Stevens* was quite correct in noting that a magistrate was not available on the island. But this does not mean that a magistrate was unavailable to the chief of police. The chief was conducting a joint investigation with the state police. Both the state police and a magistrate were available in Juneau. Telephone contact had been made with the state police in Juneau. Therefore, at that time, the information relayed by the chief could have been incorporated into an affidavit by the state police as the hearsay information and observations of another officer engaged in a joint criminal investigation, and would have formed an adequate basis for the issuance of a search warrant *before* the investigating party was dispatched to the scene of the crime.[106] In short, a magistrate was as readily available as were the state police. If it was reasonable for the latter to have effected warrantless re-entry some ten hours after the initial entry, it was equally reasonable to have sought a warrant during this interval from a readily available magistrate. In reality, then, it could not be argued that a warrant was not readily obtainable.[107]

Stevens represents but another attempt by a court to find a correlation between the seriousness of a crime and exemption from the warrant requirment. The court made no attempt to differentiate between an emergency search and an investigative search. The opinion did, however, add a new wrinkle to this argument. It attempted to further justify exemption from the warrant requirement in the name of police incompetence. This is

104. Both a magistrate and state police experts, however, were available in Juneau, from where, in fact, the investigating party was dispatched to the scene of the crime. *Id.*

105. *Id.* The concurring opinion characterized the second re-entry as but a continuation of the search begun during the initial entry. *Id.* at 606 (Rabinowitz, J., concurring).

106. *See* United States v. Ventresca, 380 U. S. 102, 111 (1965).

107. Or not easily obtainable. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2415.

analogous to the argument, rejected in *Mincey* that attempted to justify such exemption in the name of police efficiency.[108] If, in fact, the chief of police was incompetent to conduct the investigation of a homicide, that is not the fault of the defendant; and it is certainly no justification for penalizing one accused of crime by attempting to impair his basic constitutional protections.

Furthermore, there was no indication that evidence would have been lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the facts pointed to the contrary, demonstrating that throughout the interval the evidential integrity of the scene of the crime had been preserved. The premises had been, and remained, locked, and both the defendant and his wife had been denied access thereto.

Finally, the absence of sufficient investigative resources misses the point. Once the emergency involving the homicide terminated, the premises locked, and the defendant placed in custody, the justification for the warrantless presence ceased; and re-entry, which could "hardly be rationalized in terms of the legitimate concerns that justify an emergency search,"[109] could be sanctioned only under authority of a warrant. Otherwise, the warrant requirement would be dependent upon the degree of availability of *investigative* resources *after* the termination of an exigency, which would reduce the requirement to a nullity.[110]

The desire to sustain the validity of the investigative search and the right of re-entry has led one court to expand them into a judicially created doctrine of extended or continued investigative presence and control. Thus, in *People v. Neulist,*[111] the appellate court reversed an order of suppression on the ground that since the premises were secured by the posting of police guards throughout the period of the interval, the warrantless re-entry and searches were "but an extension or continuation of the initial investigation" of the scene of the crime over which the police had maintained a continued and proper presence and control.[112]

The facts revealed that the police effected an initial warrantless

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108. *Id.* at —, 98 S. Ct. at 2414.

109. *Id.*

110. The opinion in *Stevens* appeared to contain undercurrents of a geographic approach to the doctrine of emergency, so that the more isolated the locale of a crime, the greater the duration of the exigency. However, this could have relevance only to the degree of availability of a magistrate. Since the opinion revealed that the magistrate was as available as the state police were, there would have been no basis for proposing such an approach.

111. 43 A. D.2d 150, 350 N. Y. S.2d 178 (Sup. Ct., App. Div., 2d Dept. 1973), *rev'g*, 72 Misc. 2d 140, 338 N. Y. S.2d 794 (Nassau Cty. Ct. 1972).

112. People v. Neulist, 43 A. D.2d 150, —, 350 N. Y. S.2d 178, 183 (Sup. Ct., App. Div., 2d Dept. 1973).

entry in response to a telephone call from the decedent's son reporting his mother's death. The medical examiner was called, and he made a preliminary diagnosis of an aneurysm as the cause of death. It was necessary, however, for the body to be removed in order that an autopsy might be performed. After leaving the scene, but keeping an officer posted at the premises to stand guard, with instructions to allow no one to enter the bedroom where the body had been discovered, the remaining officers returned to headquarters, where they subsequently learned from the medical examiner that the decedent, who had been found in bed, her face and head in a pool of blood, had been shot. In the meantime, the defendant-husband had gone to his mother's home. Realizing for the first time that they were dealing with a homicide, the police officers returned to the scene, after an absence of less than an hour, and again on the following day, and conducted intensive warrantless searches of the residence. Throughout this whole period, the premises remained posted. Although no fewer than four search warrants had been obtained on the day the body was discovered to search for the murder weapon,[113] no warrant was ever sought to search the residence. The issue raised was the legality of the warrantless searches after the police realized that they were conducting a homicide investigation involving the use of firearms.

The appellate court reasoned that the initial absence of the officers, for less than an hour during which the body had been removed for the purpose of an autopsy, did not signify that the investigation had been completed or that the police had relinquished control over the premises. Since the preliminary diagnosis of an aneurysm as the cause of death was merely tentative and had not ruled out the possibility of foul play, it could not be said that the investigation of the scene had been completed. Certainly, if the bullet wound had been discovered before rather than after the officers had absented themselves, a complete and thorough search of the premises would have been warranted. Discerning no viable legal distinction between the two situations, the court concluded that "[c]ommon sense calls for the same result in both cases."[114]

This conclusion was reinforced by the continued police presence through the posted guard and the relatively brief interruption of the investigation, which immediately resumed after the cause of death had been established through the results of the

113. The warrants authorized the police to search for the weapon in the home of the defendant's mother, in his two offices, and in his automobile. 72 Misc. 2d at —, 338 N. Y. S2d at 808.
114. 43 A. D.2d. at —, 350 N. Y. S.2d at 184.

autopsy.[115] Therefore, it could not be claimed that there had in fact been a re-entry, and the posting of the guard did not constitute an act of trespass.[116] Additionally, on the facts presented it could not be claimed that the police had resorted to the device of the "delayed search."[117]

Finally, the court recognized that in homicide cases the police should be accorded great leeway "both in terms of the element of time and in the permissible scope of their investigation." This mandated a duty on the part of the investigating officers to thoroughly examine the scene of the crime, which, in this case, the court deemed to encompass the entire house.[118] Such an examination would constitute both reasonable and restrained investigative activity.[119]

In contrast to the position adopted by the appellate court, the trial court argued that there was a distinction between an emergency search and an investigative search. It acknowledged that when law enforcement officers are engaged in a search prompted by an emergency quest for a body, then may seize any relevant evidence in open view which is "upon" or "near" the body.[120] Thus, they may lawfully enter private premises without benefit of a warrant to investigate and to render first aid.[121] In fact, the trial court recognized the circumstances of gaining entry for the purposes of rendering aid and investigating a reported death as qualifying under the emergency exception as a matter of law.[122] Initially, the authorities had thought that the defendant's wife had died from natural causes. After the majority of them had left the scene and subsequently learned that she was the victim of a gunshot wound, they recognized the potential criminal implications of the incident. It was at this point that a new area of inquiry developed, one that flowed away from the emergency and first aid aspects that predominated during the first visit.[123] The police now became involved in the possible detection and apprehension of a criminal. Furthermore, the trial court rejected the argument advanced by the prosecution that the re-entry and search could be justified under

115. *Id.*

116. *Id.* at —, 350 N. Y. S.2d at 184-85. Although the court attempted to disavow the presence of a re-entry, its theory of "extension or continuation of the initial investigation," *id.* at —, 350 N. Y. S.2d at 183, would certainly have legitimated such an occurence.

117. *Id.* at —, 350 N. Y. S.2d at 185. Even if this were conceded, the fact remains that the police had engaged in warrantless investigative searches *after* the termination of the emergency.

118. *Id.*

119. *Id.*

120. 72 Misc. 2d at —, 338 N. Y. S.2d at 807.

121. *Id.*

122. *Id.* at —, 338 N. Y. S.2d at 807-808.

123. *Id.* at —, 338 N. Y. S. 2d at 808.

the theory of continued "on-the-scene" search, reasoning that the posting of the policeman was for the purpose of preserving the scene of the crime in an undisturbed state and to prevent the unauthorized removal of evidence while a warrant might be sought.[124] And, since they had sought, and obtained, four warrants to search for the weapon, they certainly had enough time and probable cause to have obtained one for the defendant's home, the scene of the crime.[125] The trail court was thus left with the fruits of a general exploratory search for anticipated evidence of an incriminating nature.[126] In conclusion, the trial court, while acknowledging the gravity of a murder investigation, cautioned that "the gravity of a crime is not the criteria [sic] for a warrantless search under the exception of the exigent circumstances rules."[127] In any event, "the processes of law enforcement must at all times conform to constitutional standards and not seek shortcuts which inevitably result in the legal spoilage of otherwise important evidence."[128]

Neulist represents an excellent example of how courts can arrive at diametrically opposite conclusions depending on the degree of their allegiance to the teachings of *Chimel.* The appellate opinion is clearly at odds with *Chimel.* At the time of re-entry, no emergency existed. It is true that the police realized for the first time that they were faced with a homicide—one appearing to involve "foul play." However, the premises had already been secured by the posting of the guard, the defendant had gone to his mother's home, and the guard was instructed to allow no one to enter the bedroom where the body had been discovered.[129] Thus, there was no threat of destruction or removal of evidence. Furthermore, the argument that the scene of the crime "should be deemed to include the entire house,"[130] when it was obvious that the crime had taken place in the bedroom, defies logic and represents an open invitation to the general search in the name of a general emergency that, in fact, was limited both as to place and duration. Finally, the appellate opinion confused the differing periods and roles of the emergency search and of the investigative

124. *Id.*
125. *Id.*
126. *Id.* at —, 338 N. Y. S.2d at 809.
127. *Id.* at , 338 N. Y. S.2d at 810, clearly presaging the rule announced in Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414-15.
128. 72 Misc. 2d at —, 338 N. Y. S.2d at 810. The trial court was impelled to its order of suppression by its interpretation of the current fourth amendment principles of privacy espoused in *Chimel. Id.* at —, 338 N. Y. S.2d at 811.
129. 43 A. D.2d at —, 350 N. Y. S.2d at 181.
130. *Id.* at —, 350 N. Y. S.2d at 185.

search. In sum, sanctioning the unbridled investigative search amounts to an endorsement of the general exploratory search for evidence of crime.

Re-entry is such a drastic intrusion upon the sanctity of the home, and is so pregnant with the potential for abuse and harassment, due to the fact that it confers upon the individual officer the right to substitute an unbridled discretion for the detached judgment of the neutral magistrate, that it should be rejected by the courts in the absence of a compelling justification.[131] This justification, however, will require more than an *appearance* of necessity. Thus, in *Norman v. State*,[132] the court premitted a re-entry after a search incident to an arrest had ceased upon the discovery of two bombs. The police exited the residence while awaiting the arrival of an army bomb squad, but did post the premises. After the squad had removed the devices, one of the officers re-entered the dwelling, conducted a further search, and seized additional evidence.

In sustaining the admissibility of this evidence, the appellate court acknowledged that re-entry after the lapse of an unreasonable period of time is illegal.[133] The court reasoned, however, that the delay was caused by the discovery of the bombs, and that the search incident to the defendant's arrest was promptly resumed and completed after the devices had been removed. In short, "[t]he final portion of the search after re-entry was merely a continuation of the original search... ."[134]

The facts demonstrated a compelling need to vacate, but not to re-enter, the building. The right to conduct a search incident to an arrest is a very limited one. It is based upon a compelling need to protect the arresting officer and to prevent the defendant from escaping or destroying evidence.[135] Here, however, the defendant was already in custody and did not have access to the residence, which was secured throughout the period of the interval.

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131. As, for example, the unavailability of a magistrate, and the need to call in police technicians and forensic experts to prevent the loss of certain types of evidence prior to the reavailability of the magistrate. *See* Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414-15 (dictum); *id.*at —, 98 S. Ct. at 2421 (Rehnquist, J., concurring & dissenting)(dictum). Re-entry, after a reasonably brief period, will be permitted, however, for the purpose of allowing fire officials to complete their investigation *of the cause of a fire* (and not to seek evidence of crime) that is interrupted because visibility is "severely hindered by darkness, steam, and smoke." Michigan v. Tyler, 98 S. Ct. 1942, 1951 (1978). In such a situation, the re-entry will be considered but "an actual continuation" of the initial investigation. *Id.*

132. 302 So. 2d 254 (Miss. 1974), *cert. denied*, 421 U. S. 966 (1975).

133. Norman v. State, 302 So. 2d 254, 258 (Miss. 1974).

134. *Id.* This argument is highly analogous to those advanced in Stevens v. State, 443 P.2d 600 (Alaska 1968), *cert. denied*, 393 U. S. 1039 (1969). See notes 97-104 *supra* and accompanying text.

135. Chimel v. California, 395 U. S. 752, 762-63 (1969).

Furthermore, the time required to obtain the services of the bomb squad could have been utilized to seek a warrant, as there was no suggestion that a "warrant could not easily and conveniently have been obtained."[136] Additionally, "[t]here 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 [dwelling] minimized that possibility."[137]

The appearance of necessity in this case was based on the fact that prior to the discovery of the bombs there had been a "shoot out" on the premises while the police were attempting to execute certain arrest warrants,[138] and that one of the persons for whom the police had arrest warrants was considered by them to be dangerous.[139] However, a number of the occupants, including the defendant, were already in custody prior to the initial cessation of the search upon the discovery of the bomb devices, and were denied access to the residence by the external posting of the premises while the police awaited the arrival of the bomb squad. Even if the potential for the destruction of evidence by occupants not yet in custody existed, that threat was at its apogee during the interval between the discovery of the devices and the re-entry. As to the individual considered to be dangerous, this alleged danger existed prior to and after the discovery of the bombs, and would have remained so throughout the period of the interval. Yet, this potential danger did not prevent the officer from re-entering the dwelling and conducting an additional search. Again, if this threat existed, it was at its apogee during the "shoot-out" *prior* to the initiation of the first search, and not *after* its interruption. In short, the actions of the police belie any such fear, and it is difficult to understand why, or how, the obtainment of a search warrant would have increased the danger to them.[140]

The Court acknowledged that re-entry after the lapse of an unreasonable period of time is illegal.[141] This will not serve to invalidate a re-entry. What does is the transfer of the decision to search from the magistrate to the officer.

Finally, it may well be that since the officer was only trying to complete what he had started, this circumstance "would usually be constitutionally sufficient to warrant a [resumption of the] search...

136. Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2415.
137. *Id.* at —, 98 S. Ct. at 2414-15.
138. None of which was for the defendant.
139. 302 So. 2d at 257.
140. This reasoning would apply equally to other dangerous criminals at large.
141. 302 So. 2d at 258.

But the Fourth Amendment requires that this judgment in each case be made in the first instance by a neutral magistrate.''[142]

The authorities that have denied re-entry appear to recognize the primacy of the warrant clause, and have refused to subvert the purposes of the warrant requirement in the name of ''common sense''[143] or an exaulted sense of police efficiency and investigative simplicity.[144]

In *State v. Brothers,*[145] the local chief of police, acting in his capacity as an off-duty hours ambulance driver, answered a call for help from the defendant's residence. Upon entering, he observed the wife of the defendant with a gunshot wound in her right arm. The chief accompanied the defendant and his wife to a hospital, where the latter died. While at the hospital, the chief called the state police, who went to and examined the premises. They then delivered a key to the residence to the chief while he was still at the hospital. Later that evening, the chief and other officers returned to the residence, gained entry with the key, and proceeded to conduct a photographic investigation and seize evidence of a crime. The defendant was not present during the search and was not arrested until two days later. Although some of the evidence seized was in plain view, a rifle that was seized was discovered concealed in a closet, and was subsequently offered at trial as the murder weapon.

A motion to suppress was denied on the theory that the chief had authority to effect a warrantless re-entry as an authorized medical investigator.

In reversing the denial of suppression, the appellate court reasoned that under *Chimel* the police are required to obtain a search warrant ''in *all* but *exceptional* cases. A search can *no* longer be justified by a finding that it was 'reasonable.'''[146] Applying this test to the facts at hand, the court observed that the police had probable cause to search the defendant's residence. However, it was equally clear that no emergency existed which would have obviated the necessity of obtaining a warrant.[147] The burden rested with the prosecution to excuse the need for a warrant. There was no indication that an attempt had been made to contact a magistrate, or that any evidence would have been disposed of while a warrant

142. Mincey v. Arizona, 98 S. Ct. at 2415.
143. As one court has done. *See* People v. Neulist, 43 A. D.2d 150, 350 N. Y. S.2d 178, 184 (Sup. Ct., App. Div., 2d Dept. 1973).
144. This the Supreme Court will not countenance. Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414.
145. 4 Ore. App. 253, 478 P.2d 442 (1970).
146. State v. Brothers, 4 Ore. App. 253, —, P.2d 442, 444 (1970) (emphasis added).
147. *Id.*

was being sought. The residence was locked, the defendant was at the hospital, and the police waited two-and-one-half hours before making the search. There was no basis, therefore, for justifying an emergency or an immediate search.[148]

In *Sample v. Eyman,*[149] the court ruled that a warrantless re-entry into an empty residence two hours after the defendant had been removed on probable cause to the police station, and during which period the premises had been posted with a police guard, was unreasonable, as there was no danger that incriminating evidence would have been concealed or destroyed.[150] Furthermore, there was no other evidence pointing to an emergency, and the search had not been conducted contemporaneously with the arrest.[151]

Although conceding the absence of exigent circumstances and the availability of a magistrate, which would have made a search warrant easily obtainable, the dissent nevertheless argued that under "the total atmosphere" of this case, it was reasonable for the police to have conducted a warrantless search of a dwelling where a homicide had been recently committed.[152]

And, in *State v. Davidson,*[153] a case which involved a prosecution for murder, the court invalidated a warrantless police re-entry three days after the discovery of the victim because of the absence of any compelling reasons therefor.[154] This was especially so in view of the fact that the police possessed sufficient probable cause for the issuance of a search warrant, and the evidence seized during the re-entry was merely cumulative of what the police had discovered and seized during the initial entry.[155]

Finally, In *State v. Hardin,*[156] the court, in reversing an order of suppression, had that a warrantless entry into a hotel room some two-and-one-half hours after the commencement of a homicide investigation in an adjacent room, qualified under the emergency doctrine because the perpetrator was still at large and constituted "'a substantial threat of imminent danger' to life"[157] sufficient to

148. *Id.*

149. 469 F.2d 819 (9th Cir. 1972)(one judge dissenting).

150. Sample v. Eyman, 469 F.2d 819, 822 (9th Cir. 1972).

151. *Id.*

152. *Id.* at 824-25 (Jertberg, J., dissenting). It suffices here to say that this argument was rejected in Mincey v. Arizona, — U. S. at — 98 S. Ct. at 2414-15.

153. 44 Wis. 2d 177, 170 N. W. 2d 755 (1969).

154. State v. Davidson, 44 Wis. 2d 177, —, 170 N. W. 2d 755, 765 (1969).

155. *Id.* This latter reasoning is not persuasive. A warrantless re-entry will not be invalidated because the police have sufficient probable cause to obtain a warrant, or because the evidence is merely cumulative. It will be rejected because there is no compelling need for it, and because the police have seen fit to needlessly substitute their discretion for the judgment of an impartial magistrate.

156. 90 Nev. —, 518 P.2d 151 (1974).

157. State v. Hardin, 90 Nev. —, —, 518 P.2d 151, 154 (1974).

justify the entry for the purpose of conducting an interview and, implicity, to determine the condition of the occupant and the potential presence of the assailant.[158]

At the subsequent trial, it was revealed for the first time that the entry, which the Supreme Court of Nevada had sustained as a reasonable exception to the warrant requirement, represented the second, and not the first, entry; and that the results of the first entry, having been made some two to two-and-one-half hours prior to the re-entry for the purpose of checking on the safety of the occupant, revealed that he, the subsequent defendant, was asleep and in no apparent danger. It was only after an intensive investigation of the other rooms on both the floor of the crime and of that below, as well as an examination of the outside premises, that the police returned to the defendant's room.

The case went to the jury, which could not agree upon a verdict, leading to a mistrial. Prior to the second trial, the defendant renewed his motion to suppress, based upon the trial testimony concerning the re-entry, and was successful in having the fruits of the search suppressed on the ground that at that point in time the emergency had terminated.[159] This order led to the dismissal of all charges against the defendant.

V. CONCLUSION

Within the sanctity of the home, *Chimel v. California* and *Mincey v. Arizona* stand as a bulwark against the unbridled investigative search. Once an emergency has come to an end, no investigative search activity, whether engaged in immediately thereafter, or on a delayed or deferred basis, should be countenanced in the absence of a compelling justification. To do so would do violence to the command that *searches must be conducted within the judicial processes.*

As this study has demonstrated, the duration of an emergency search must be rationalized in terms of the duration of the legitimate concerns of "the exigencies which justify its initiation."[160] Finally, the investigative search and the drastic remedy of re-entry *must not be sanctioned after the termination of an*

158. *Id.* at —, 518 P.2d at 154-55.

159. State v. Hardin, No. 24269 (8th Dist. Ct., Dep't 6, Clark County, August 23, 1974). Furthermore, at this point the search had taken on the aspects of a general exploratory search for primarily evidential purposes.

160. Terry v. Ohio, 392 U. S. at 26. *Accord*, Mincey v. Arizona, — U. S. at —, 98 S. Ct. at 2414.

exigency, in the absence of a compelling need based upon a demonstrated showing of either the imminent or threatened destruction, loss, or removal of seizable evidence or of the unfeasibility of obtaining a search warrant.