JANUARY 1975

ALERT

CRIMINAL DIVISION

FROM THE OFFICE OF
THE ATTORNEY GENERAL
OF THE STATE OF MAINE

MESSAGE FROM THE ATTORNEY GENERAL JOSEPH E. BRENNAN

As Maine's newly-elected Attorney General, I look forward to working together with state, county and local law enforcement officers toward improving the efficient and just operation of the criminal justice system in Maine. To this end, I would like to call your attention to a matter of great concern to Maine's criminal justice community. As you may be aware, the continued existence of the Law Enforcement Education Section is in jeopardy. The Law enforcement Education Section, which has operated under an LEAA grant since its creation in 1970, will not be eligible for federal funding after April 1975. However, a bill, L.D. 444, funding and permanently establishing the Law Enforcement Education Section as a part of the Attorney General's office has been submitted to the current session of the Maine Legislature. If L.D. 444, is not enacted, the Law Enforcement Education Section and its services and programs will be discontinued. This would mean termination of the ALERT publication. Also, the recently published *Law Enforcement Officer's Manual* would not be regularly updated and would soon be obsolete. Furthermore, Maine's judges, prosecutors, and law enforcement officers would no longer have access to the research capabilities and services provided by the Education Section or to the training and seminar work performed by Section personnel.

I place a high premium on the need for continuing legal education for Maine's law enforcement officers and on the need for cooperation and open communication between members of the criminal justice community. Because the Law Enforcement Education Section serves as an excellent medium for attainment of these objectives, I urge all law enforcement officers to support L.D. 444 by contacting their legislators and the Governor.

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

ABANDONED PROPERTY

The Fourth Amendment to the U.S. Constitution guarantees "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches* and seizures..." U.S.C.A. Const. Amend. IV. (emphasis supplied). The word "searches" is italicized because the meaning of the term abandoned property depends upon court interpretation of the word "searches" in the Fourth Amendment. Courts have held that no search occurs when a law enforcement officer observes property voluntarily discarded by a person. And it is not an illegal seizure to pick up such property and use it as evidence against the person in court. The Fourth Amendment's protection does not extend to such property because when one abandons property, he brings his right to privacy in it to an end. A person cannot complain about the seizure of property no longer in his possession and its use as evidence in court.

Abandoned property is treated by the courts similarly to seizable property found lying in plain view. Since no search under the Fourth Amendment is involved, officers may lawfully seize such property without a warrant or probable cause. The main difference between the abandonment doctrine and the plain view doctrine centers around the nature of the place from which the officer seizes an object. Under the plain view doctrine, if a law enforcement officer, as the result of a prior *valid* intrusion into a constitutionally protected area, is in a position where he has a legal right to be, he may lawfully seize items of evidence lying open to view. The plain view doctrine is only applicable *after* the law enforcement officer has lawfully entered into a *constitutionally protected area.* If a law enforcement officer, acting lawfully, seizes objects that have been discarded on the street, in a public park, or in some other place *not* protected by the Fourth Amendment to the Constitution, the seizure is legal under the abandonment doctrine. The abandonment doctrine, unlike the plain view doctrine, involves *no intrusion into a constitutionally protected area.* It is important for the law enforcement officer to learn this distinction between the abandonment and plain view doctrines, because in order to lawfully seize items that have been discarded within a constitutionally protected area, the officer must be lawfully present in the constitutionally protected area. Otherwise, the plain view doctrine is not satisfied, and any item of

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evidence seized will be inadmissible in court.

When a law enforcement officer attempts to justify a seizure of property on the ground that it was abandoned, he must be prepared to prove it. Abandonment is never presumed by the courts but must be established by the prosecution. It is very important, therefore, for law enforcement officers to take careful notes on all the circumstances surrounding the seizure of property on the basis of abandonment. The officer may have to justify the seizure later at a trial or hearing.

In order to properly testify, the officer needs to know what factors the courts consider important in determining whether property has been abandoned. The remainder of this discussion of abandoned property will be devoted to specific facts and circumstances bearing upon the issue of abandonment, as illustrated by court decisions from throughout the country.

FACTORS DETERMINING ABANDONMENT

The factors which the courts consider in determining whether property has been abandoned can be classified into four broad categories:

1. **Nature of the place where the property was left;**
2. **Indications of intent to abandon property;**
3. **Lawfulness of police behavior; and**
4. **Reasonable expectation of privacy in the property.**

Most cases dealing with the issue of abandonment will involve circumstances falling into more than one of the four categories. For example, the nature of the place where an object is left is usually a strong indicator of a person's intent to abandon the property and also of his expectation of privacy in it. Nevertheless, there are usually one or two circumstances in each case which provide the primary basis for a court's decision on the issue of abandonment. These are the circumstances which will be emphasized in the cases discussed under each category.

Nature of Place Where Property Left

The nature of the place where property is left is an important determinant of whether the property has been abandoned or not. In the case of *Hester v. U.S.* (summarized in the November 1974 ALERT at pages 1-2), the U.S. Supreme Court held that it was proper for law enforcement officers to retrieve property discarded by the defendant in an open field. The Court said that the protection of the Fourth Amendment did not extend to the open fields. Although it is not clear whether the primary basis for the Court's decision in *Hester* was abandonment or the "open fields" doctrine, it is clear that the place of discard had a bearing on the Court's determination that the containers were abandoned. The Court specifically noted that the evidence was not obtained by entry into the house.

It follows logically that if an object discarded in the open fields of a person's private property is considered abandoned, an object discarded in a public place will also be considered abandoned. An example is a case in which law enforcement officers had defendant under surveillance for violation of federal narcotic laws. As the defendant disembarked from an airplane at a public airport, he apparently recognized one of the officers, and he discarded contraband narcotics. The officers retrieved the narcotics and immediately arrested the defendant. The court held that the discarded narcotics were admissible in court. There had been no illegal search because the narcotics were abandoned. *Vincent v. U.S.*, 337 F.2d 891 (8th Circuit Court of Appeals, 1964).

In another case, the defendant threw a package of heroin into the courtyard of a six-story apartment building. The defendant's only rights in the courtyard were to use it in common with other tenants and with members of the public who had business there. The court held that the warrantless seizure of the abandoned package from the courtyard was legal. *U.S. v. Lewis,* 227 F. Supp. 433 (U.S. District Court, Southern District of New York, 1964).

When, however, an object is discarded in response to illegal police activity, and falls within the curtilage of a person's home or business, a warrantless seizure of the object will be illegal. In an illustrative case, officers went to a woman's residence to arrest her without a warrant for a narcotics violation. Her husband, the defendant, came to the door but retreated without opening it. Defendant's wife then came to the door, clad only in a slip, and asked the officer to wait until she dressed. Meanwhile, the defendant ran upstairs and threw a package out of the window into an enclosed backyard. The officers then broke into the house, allegedly to arrest the defendant's wife, and without knowing the contents of the thrown package. The package was seized by another officer stationed outside and was found to contain heroin. The court held that the seizure of the package was illegal, stating that the enclosed backyard in which the thrown package landed was part of the curtilage of the defendant's home and was entitled to the same protection as the home itself. It should be noted that a major reason for the court's holding the seizure illegal was the court's finding that the officers entered the residence illegally. If the police had entered legally, the seizure of the package would probably have been upheld under the plain view doctrine. *Hobson v. U.S.*, 226 F.2d 890 (8th Circuit Court of Appeals, 1955).

It therefore appears that if an object is voluntarily discarded outside the curtilage of a house, it will be considered abandoned; if discarded inside the curtilage, the legality of its seizure will be governed by the plain view doctrine.

Under certain circumstances, however, a law enforcement officer may search for and seize objects

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inside a house, without a warrant or probable cause and without satisfying any of the exceptions to the warrant requirement. When a person has abandoned or vacated premises, it is not unlawful for officers to search for and seize items of evidence or any other items left on the premises. The leading case on this point is the U.S. Supreme Court case of *Abel v. U.S.*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed. 2d 668 (1960). In the *Abel* case, officers of the Immigration and Naturalization Service arrested defendant in his hotel room under an administrative arrest warrant and charged him with being illegally in this country. Before he was escorted out of his room, defendant was permitted to pack his personal belongings. He packed nearly everything in the room except for a few things which he left on a window sill and put in a waste basket. He then checked out of the hotel, turned in his keys, and paid his bill. Shortly thereafter, an F.B.I. agent, with the permission of the hotel management, searched the defendant's room without a warrant. In the waste basket, the F.B.I. agent found a hollow pencil containing microfilm and a block of wood containing a "cipher pad."

The Court held that the search for and seizure of the pencil and block of wood was legal:

> "These two items were found by an agent of the F.B.I. in the course of a search he undertook of petitioner's hotel room, immediately after petitioner had paid his bill and vacated the room. They were found in the room's wastepaper basket, where petitioner had put them while packing his belongings and preparing to leave. No pretense is made that this search by the F.B.I. was for any purpose other than to gather evidence of crime, that is, evidence of petitioner's espionage. As such, however, it was entirely lawful, although undertaken without a warrant. This is so for the reason that at the time of the search petitioner had vacated the room. The hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made. Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with the crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were *bona vacantia*. There can be nothing unlawful in the Government's appropriation of such abandoned property . . . The two items which were eventually introduced in evidence were assertedly means for the commission of espionage, and were themselves seizable as such. These two items having been lawfully seized by the Government in connection with an investigation of crime, we encounter no basis for discussing further their admissibility as evidence." 362 U.S. at 241, 80 S.Ct. at 698, 4 L.Ed. 2d at 687-688.

It is important to note that if the defendant in the *Abel* case had not vacated his room, the hotel management could not have given consent to search the room. (See the April 1972 and May 1972 ALERTs on Consent Searches.) The key question, then, for the law enforcement officer who wants to search premises without a warrant, probable cause, or other justification, is whether the person residing there intended to abandon it. Various indications of intent to abandon, relied upon by the courts, are discussed in the next section.

Indications of Intent to Abandon Property

One of the main circumstances relied upon by courts in determining whether property has been abandoned is the *intent* of the person vacating or discarding property to relinquish all title, possession, or claim to it or abandon it. Sometimes, intent to abandon is fairly easy to establish, as when a person voluntarily throws an object away, without any inducement by the police. There are many situations, however, in which a person's intent to abandon property is not so easily established. In these situations, the law enforcement officer must carefully note all indications of intent to abandon, in case the search or seizure is later challenged at a trial or hearing. The following discussion will highlight the various indications of intent relied upon by the courts in determining abandonment. The discussion will be divided into three parts — premises, objects, and motor vehicles — because intent to abandon is determined in different ways for each kind of property.

Premises

In the case of *Abel v. U.S.* summarized above, the Court found that a hotel room had been abandoned when the person moved his personal belongings out of the room, paid his bill, checked out, and turned in his key. In another case involving a hotel room, a court found that the defendant had abandoned a room which he had rented on March 23, when he failed to pay his bill on March 28, and did not return to or communicate with the hotel prior to his arrest on April 8. At the time he rented the room, the defendant said he intended to stay only one night. A search of the defendant's baggage, left in the room, was therefore held not to violate his Fourth Amendment rights. *U.S. v. Cowan*, 396 F.2d 83 (2nd Circuit Court of Appeals, 1968).

In a case involving abandonment of an *apartment*, law enforcement officers were allowed to search defendant's apartment without a warrant, even though the defendant had three days to go on his lease period. The court said:

> "What were the circumstances showing abandonment? Baggett quit his job, received pay for one day's work, told several people that he was going to New Orleans to get a job, paid all bills that he owed except one, told his friends in Little Rock good-bye on the 11th, turned the apartment keys over to the owner, and took all personal belongings to New Orleans with him. Of course, had he returned within the two days before his rent came due, he could not have gone into his apartment for Ballard [the landlord] had the keys. The fact that the rent was

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paid up for three days after Baggett left does not mean that the apartment had not been abandoned." *Baggett v. State*, 494 S.W. 2d 717, 719 (Supreme Court of Arkansas, 1973).

The following quote from a case involving a warrantless search of a house illustrates other indications of intent to abandon:

> "It is undisputed that the Mannings' rental period had expired on May 5 and that the owner of the premises gave the F.B.I. permission to search the car. Furthermore, it was clearly established that even though the Mannings had rented the . . . house for thirty days, they departed after the first day leaving no personal belongings. The door was unlocked, food was on the table, and dishwater was in the sink. Thirty days later the same condition prevailed. Moreover, the decayed food created a stench, the grass was uncut, and the weeds had grown high.
>
> These circumstances strongly indicate that the Mannings had abandoned the house and car." *U.S. v. Manning*, 440 F.2d 1105, 1111 (5th Circuit Court of Appeals, 1971).

We have seen that the non-public areas of a business office come within the Fourth Amendment's protection against unreasonable searches and seizures. If the office is abandoned by its occupant, however, it no longer has this protection. The indications of intent to abandon an office are similar to those for a room or house. An example is a case in which U.S. postal inspectors, without a warrant, searched for and seized business records from an office which had previously been rented by the defendant. The defendant claimed that the search and seizure was illegal, because he did not intend to abandon the office and the records kept there. The court found that the facts indicated an intent to abandon. The search and seizure were made on June 12, 1972. Defendant had rented the office from May 1, 1971 through October 31, 1971, but had left the state in August 1971. No rent had been paid for the office beginning November 1, 1971, nor did defendant, his wife, or any business associate or employee visit the office after November 1, 1971. Finally, the office had been padlocked by the U. S. District Attorney during February 1972. *Mullins v. U.S.*, 487 F.2d 581 (8th Circuit Court of Appeals, 1973).

It should be noted that the mere absence of a person from premises does not make the premises abandoned, unless the person had an *intent* to abandon the premises. Therefore, in a case in which the defendant's absence from his apartment was involuntary because of his arrest and incarceration, the court held that the prosecution should bear an especially heavy burden of showing that he intended to abandon the apartment. The prosecution did not satisfy this burden by merely showing defendant's absence without showing any other indications of intent to abandon. *U.S. v. Robinson*, 430 F.2d 1141 (6th Circuit Court of Appeals, 1970).

Objects

Some of the indications of intent to abandon premises are also applicable to objects. Objects, however, can be moved from place to place, and many can be carried on the person. Therefore, courts consider different factors in determining intent to abandon objects.

A strong indication of a person's intent to abandon property is a person's leaving the property unattended and unclaimed for a long period of time. An example is a case in which two men left a U-Haul trailer at a service station, asking permission to leave it there for two or three days. The men stated that "everything we own is in the trailer." Ten days later, the men not having returned, the service station attendant called law enforcement authorities. The trailer was searched without a warrant and stolen whiskey was found. The court held that the search was legal because the property had been abandoned. *U.S. v. Gulledge*, 469 F.2d 713 (5th Circuit Court of Appeals, 1972).

In other cases involving warrantless searches and seizures of objects, the object is often picked up by a law enforcement officer immediately after it is dropped, thrown away, or otherwise discarded by a person. In these cases, courts cannot rely on the length of time the object has been left alone to determine whether it has been abandoned. Courts must look to other circumstances such as the conduct of the defendant and the manner of disposal of the object. In an illustrative case, a police officer, without probable cause to make an arrest, approached the defendant, and the defendant dropped a tin box to the ground. The officer immediately picked up the box, opened it, and found heroin. The court held that the evidence was insufficient to constitute an abandonment:

> "There is no proof that the defendant threw it away or attempted to dispose of it in any manner which might have manifested the requisite intention to abandon. Moreover, the police officer's testimony reveals that he picked up the box so soon after it had been dropped that it is impossible to determine whether or not the defendant, if given the opportunity, would have picked up the box himself. Absent any such proof, the seizure of the tin box under the circumstances of this case cannot be sustained." *People v. Anderson*, 246 N.E. 2d 508, 509 (Court of Appeals of New York, 1969).

However, when the manner of disposal indicates that the defendant intended to permanently relinquish possession of the property, because of consciousness of guilt or fear of potential apprehension, the courts usually find abandonment. One example is a case in which officers were lawfully at the residence of one Hammond, waiting to arrest her under a warrant. The defendant came to the residence at the invitation of Hammond's husband. When the defendant recognized one of the officers, he began to run

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toward the front of the house, discarding several packets into a pantry. The packets were seized and were found to contain narcotics. The court held that the defendant's voluntary act of throwing the packets into the pantry was an abandonment of the packets. *U.S. v. Martin,* 386 F.2d 213 (3rd Circuit Court of Appeals, 1967). (Although the court spoke in terms of abandonment in this case, the seizure of the packets could also have been justified under the plain view doctrine.)

Another example of disposal of objects out of consciousness of guilt or fear of apprehension is a case in which defendant threw packages out of an automobile he was driving when he noticed he was being pursued by a car with flashing lights and a siren. Law enforcement officers were lawfully chasing defendant's auto because they had seen it pick up a man whom the officers had probable cause to arrest. The packages were recovered and were found to be stolen goods. The court found the seizure legal and allowed the introduction of the packages in evidence against the defendant. *Stack v. U.S.,* 368 F.2d 788 (1st Circuit Court of Appeals, 1966). It should be carefully noted that there was no illegal activity on the part of law enforcement officers in either of the above cases.

When there is evidence that an object was intentionally concealed, courts will usually find there was no intent to abandon the object and therefore no abandonment. In an illustrative case, officers seized a bottle in a barrel located in a garage under the main house where the owner dwelt. The prosecution claimed the bottle had been abandoned. The court disagreed saying that "(t)he position of the bottle well down in the barrel and covered with trash and paper strongly suggests that it was intentionally hidden and concealed there." *State v. Chapman,* 250 A.2d 203, 212 (Supreme Judicial Court of Maine, 1969).

Sometimes courts find an intent to abandon property when the defendant fails to protest or take any other affirmative action, but merely allows evidence to be seized in the ordinary course of events. Defendant was in jail, having been arrested for bank robbery. He was given a haircut pursuant to routine jail procedures, and the hair clippings were turned over to the F.B.I., at their request, and used as evidence. In response to defendant's claim of an illegal search and seizure, the court said:

> "At no time has defendant objected to the legality of the prison procedures under which he received his haircut. He has never claimed that the haircut was illegally or improperly given. The thrust of his contention is rather that a warrant should have been obtained before the shorn locks were appropriated by the state officer for analysis. Cox, however, never indicated any desire or intention to retain possession of the hair after it had been scissored from his head. Clippings such as those preserved in the instant case are ordinarily abandoned after being cut. Cox in fact left his hair and has never claimed otherwise. The deputy sheriff was not obliged to inform him that, if abandoned, his hair would be taken and analyzed. Having voluntarily abandoned his property, in this case his hair, Cox may not object to its appropriation by the government." *U.S. v. Cox,* 428 F.2d 683, 687-688 (Seventh Circuit Court of Appeals, 1970).

Before seizing a discarded object without a warrant then, law enforcement officers should attempt to determine whether the *discarding person* intended to abandon the property. Courts usually find an intent to abandon when an object has been left unattended and unclaimed for an unreasonable length of time, or when the object was discarded out of consciousness of guilt or fear of apprehension. However, when the facts indicate that the person accidentally dropped or intentionally concealed an object, courts will usually not find an intent to abandon. No particular affirmative action is required to indicate an intent to abandon, and such an intent may be found when a person merely fails to object to the seizure of his property in the ordinary course of events.

Motor Vehicles

Motor vehicles are unique for purposes of abandonment in that they are treated both as premises and as objects. In a case in which the defendant, who was tampering with a cigarette machine, left his car in the street and fled on foot to avoid apprehension by an officer, the court said:

> "Sometimes an automobile takes on the characteristics of a man's castle. Other times an automobile takes on the characteristic of an overcoat — that is, it is movable and can be discarded by the possessor at will. If appellant in his endeavors to avoid the clutches of the law had discarded his overcoat to make his flight more speedy, no one would think that an officer was unreasonably invading his privacy or security in picking up the overcoat and searching it thoroughly. In that situation most people would agree that the fleeing suspect had abandoned his coat as a matter of expediency as well as any rights relative to its search and seizure. What difference can there be when a fleeing burglar abandons his automobile to escape the clutches of the law? We can see no distinction and consequently hold that when property is abandoned officers in making a search thereof do not violate any rights or security of a citizen guaranteed under the Fourth Amendment." *Thom v. State,* 450 S.W. 2d 550, 552 (Supreme Court of Arkansas, 1970).

It follows, then, that in order to determine whether an automobile is abandoned, law enforcement officers should apply the same considerations as those discussed above under *Premises* and *Objects.* It should be noted, however, that if an officer has probable cause to search a vehicle and the vehicle is movable, he may conduct a warrantless search of it under the *Carroll* doctrine, whether or not it is abandoned. (See the November

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1970 ALERT on Search and Seizure of Vehicles Without a Warrant.)

Lawfulness of Police Behavior

In many of the cases discussed above, property was left or discarded in response to either the presence or the activities of law enforcement officers. In determining whether such property is abandoned, courts examine very closely the lawfulness of the law enforcement officer's role in each incident. It can be safely stated that if a person discards evidence as a direct result of the unlawful presence or activity of a law enforcement officer, the courts will not consider his act a voluntary abandonment, but rather a forced response to the unlawful police behavior.

There are numerous examples of cases in which a person discarded an object in response to the lawful activities of the police, and courts have considered the object abandoned, and therefore seizable without a warrant or other justification. Examples include the following situations:

1. Officers arrested defendant on authority of a warrant and, while escorting him to the police car, defendant threw away a marijuana cigarette. *Oliver v. State,* 449 P. 2d 252 (Supreme Court of Nevada, 1969).
2. An officer with probable cause to arrest defendant was pursuing defendant's car and contraband was thrown from the car. *Capitoli v. Wainwright,* 426 F.2d 868 (5th Circuit Court of Appeals, 1970).
3. Officers were lawfully approaching defendant for questioning, and defendant dropped a bundle of marijuana cigarettes. *People v. Blackmon,* 80 Cal. Rptr. 862 (Court of Appeal of California, 1969).
4. Officers, attempting to execute a valid search warrant, temporarily detained defendant at the scene of the search, and defendant discarded a package containing incriminating evidence. *State v. Romeo,* 203 A.2d 23 (Supreme Court of New Jersey, 1964).

Examples should also be given of cases in which unlawful police activity caused the court to rule that a discarded object was not voluntarily abandoned. In a case involving an arrest and search, a law enforcement officer received an anonymous phone call informing him that defendant could be apprehended at a given place and time with narcotics in his possession. Officers went to the designated place and observed the defendant in his car. The officers told him he was under arrest and to get out of his car and place his hands on top of it. As defendant did this, he flipped into the street a plastic vial containing narcotics, which the officers retrieved.

The court held that the arrest was unlawful for lack of probable cause. The court also refused to find that the plastic vial was abandoned, because it was thrown away as a result of a *threat* of an illegal search:

> "Had the appellant here thrown the item away before the search had been threatened the argument of abandonment might well be persuasive. Here however he threw the vial away only after being told to turn and place his hands atop his vehicle, the position commonly known to be employed by police in searching a suspect for weapons. The vial, as evidenced by the record, was not seen by the officers until it was thrown by appellant. Had it been seen before the threat of an illegal search had been made, even in appellants hands, the plain view doctrine *may* have applied. But that is not this case. The vial was seen and secured only as a result of the threat of a search, an illegal search. Clearly it was the fruit of illegal activity by the police and ought to have been excluded." *Bowles v. State,* 267 N.E. 2d 56, 59 (Supreme Court of Indiana, 1971).

In another case, an officer was investigating a window smashing incident at a hotel. He spotted at another motel a car believed to be involved in the incident, and he went to the room occupied by its owner in order to interview the owner. The officer had neither a warrant nor probable cause to arrest, and he did not intend to make an arrest. After knocking twice and receiving no response, the officer kicked in the door, only to find that the defendants had escaped through a window. They were apprehended shortly. Stolen jewelry was found beneath the window where it had been thrown when the officer began kicking down the door.

The court held that there was no voluntary abandonment of the jewelry:

> "(S)ince the initial entry was improper and the items were thrown out of the window as a direct result of that illegality, the police were not entitled to the fruits and the admission of the jewelry in evidence was reversible error. To hold otherwise would abort the deterrent policy behind the exclusionary rule." *Fletcher v. Wainwright,* 399 F.2d 62, 64-65 (5th Circuit Court of Appeals, 1968).

In a third case involving illegal police activity, the defendant was walking down the street when he observed police officers in an unmarked car. Defendant quickened his pace, and one of the officers got out of the car and began to pursue him. Defendant then began to run, and the officer while giving chase, observed defendant throw a cigarette pack under a parked automobile. Defendant was apprehended, and the cigarette pack was recovered and found to contain heroin.

The court held that the officers had no justification to arrest the defendant or to seize him under the *Terry* rule. The only conduct of the defendant observed by the police was his quickening pace when he observed the officers. This alone could not provide probable cause to arrest nor would it justify a stop of the defendant, because it was not

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sufficient to give rise to a reasonable belief that criminal activity was afoot. (See the November 1971 and December 1971 ALERTs on Stop and Frisk.) Since the discarding of the cigarette pack was a direct result of the unlawful and coercive action of the police in chasing the defendant, the court held there was no voluntary abandonment. *Commonwealth v. Jeffries,* 311 A.2d 914 (Supreme Court of Pennsylvania, 1973).

Reasonable Expectation of Privacy

As we have seen in the discussion of the open fields doctrine, since the U. S. Supreme Court decision in *Katz v. U.S.,* the courts increasingly have analyzed the legality of warrantless searches and seizures in terms of whether they are intrusions upon the defendant's reasonable expectation of privacy. This trend has extended also to cases involving vacated or discarded property. In a case involving supposedly vacated premises, law enforcement officers were investigating a possible arson in a building gutted by fire. The fire occurred on April 14, 1968, and evidence showed that the house was boarded up the same day. Thereafter the owner went to the house every day, and both she and defendant kept some of their personal effects in the house. On April 24, 1968, officers entered the building, made observations, and took photographs. Defendant claimed that the observations and photographs of the officers were a product of an illegal search and seizure.

The court said:

"The uncontradicted evidence before the court was that the building was not abandoned. On April 24, 1968, it still contained personal effects and had been boarded up to keep the public out.

"The test to be used in determining whether a place is a constitutionally protected area within the meaning of the Fourth Amendment is . . . 'whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion.' In the instant matter the owner of the dwelling house clearly demonstrated her expectation of privacy as to the interior of the house and its contents by boarding up the doorways, which were damaged by fire. That expectation was violated by the intrusion of the police on April 24, 1968." *Swan v. Superior Court County of Los Angeles,* 87 Cal. Rptr. 280, 282 (Court of Appeal of California, 1970).

The extent of a person's reasonable expectation of privacy in discarded *objects* has recently been the subject of differing opinions by the courts. The controversy has centered around the search and seizure of trash or garbage by law enforcement officers. In one of the leading cases in this area, law enforcement officers, acting without a warrant, found marijuana in a trash can in the open back yard area of defendants' residence. The court held that the marijuana in the trash can was not abandoned for the following reasons:

"As we have seen, the trash was within a few feet of the back door of defendants' home and required trespass for its inspection. It was an adjunct to the domestic economy. . . Placing the marijuana in the trash can, so situated and used, was not an abandonment unless as to persons authorized to remove the receptacle's contents, such as trashmen. . . The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash has lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." *People v. Edwards,* 458 P. 2d 713, 718 (Supreme Court of California, 1969).

Other courts have generally agreed with the holding in the *Edwards* case and have found a violation of the defendant's reasonable expectation of privacy when the trash can was located within the curtilage of defendant's house. *Ball v. State,* 205 N.W. 2d 353 (Supreme Court of Wisconsin, 1973).

When the trash can is placed adjacent to the street for collection, however, courts have differed greatly as to whether a person has a reasonable expectation of privacy in the trash. One court, relying on the *Edwards* case, has said that placement of trash on the sidewalk for collection is not necessarily an abandonment of it to the police or the general public. Among the court's reasons for not considering the contraband found in the barrels abandoned was that the contraband was concealed in paper sacks within the barrels and it was not visible without emptying or searching through the barrels. Also, the court said that many municipal ordinances prohibit unauthorized persons from tampering with trash containers, refuting the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection. *People v. Krivda,* 486 P.2d 1262 (Supreme Court of California, 1971).

Another court has taken the opposite view, and in a similar fact situation, held that the defendant abandoned the property. "The town ordinance simply cannot change the fact that he 'threw (these articles) away' and thus there 'can be nothing unlawful in the Government's appropriation of such abandoned property.' " *U.S. v. Dzialak,* 441 F.2d 212, 215 (2nd Circuit Court of Appeals, 1971).

It is difficult to set forth any definite guidelines for the law enforce-

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ment officer with regard to the determination of when a person has a reasonable expectation of privacy in discarded or vacated property. Suffice it to say that before an officer conducts a warrantless search and seizure of such property, he should look for any indications that a person expects privacy in the property, and determine as best he can whether that expectation is reasonable. It is strongly recommended that officers obtain a search warrant before searching for and seizing objects in trash cans which are located within the curtilage of a house. The same advice applies to trash cans located outside the curtilage or which have been set out for collection, unless there is an emergency, or there are clear indications that the trash has been completely abandoned.

SUMMARY

A law enforcement officer, without probable cause, warrant, or other legal justification, may retrieve items of evidence which have been abandoned by their owners, without violating Fourth Amendment rights. Property has been abandoned when the owner has voluntarily relinquished all title, possession, or claim to it. Among the factors which the courts rely on in determining whether a given object has been abandoned by its owner are the following:

1. Place where property was left — As a general rule, if an object is voluntarily discarded inside the curtilage, it will not be considered abandoned; its seizure will be governed by the plain view doctrine. If an object is discarded outside the curtilage, it will be considered abandoned. Objects left on premises, however, may be considered abandoned, if the premises themselves have been voluntarily vacated or abandoned.

2. Indications of intent to abandon — Indications of intent to abandon *premises* can be divided into positive acts and omissions. Positive indications of intent to abandon include removing personal belongings, paying final rent and other bills, turning in keys, quitting local employment, and taking leave of friends. Omissions indicating intent to abandon include failing to pay rent for a long time, long absence from premises, failure to communicate with anyone regarding premises, and failure to attend to or care for premises. Intent to abandon an *object* is indicated by leaving the object unattended for an unreasonable period of time, discarding the object out of consciousness of guilt or fear of apprehension, and allowing the object to be taken away in the ordinary course of events without objection. Intentional concealment of an object is not considered an indication of intent to abandon. Intent to abandon *vehicles* is determined by the same considerations as those for premises and objects.

3. Lawfulness of police behavior — Objects discarded as a direct result of the unlawful presence or activity of a law enforcement officer will not be considered voluntarily abandoned.

4. Reasonable expectation of privacy in the property — Even though property has been vacated or thrown away, under certain circumstances a person may reasonably retain an expectation of privacy with respect to the property. Such property is not considered abandoned and a search and seizure of it, without a warrant or without satisfying one of the exceptions to the warrant requirement, will be illegal.

Determining whether property is abandoned is similar to determining whether it is in the open fields, in that both require a consideration not only of a person's property rights, but also of his rights of privacy. Such determinations will always be difficult for the courts as well as for law enforcement officers. It is recommended that in the absence of an emergency, officers obtain a search warrant whenever possible.

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Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.

IMPORTANT RECENT DECISIONS

SELF-INCRIMINATION:
B§3.1 Nontestimonial Evidence
DEFENDANT'S RIGHTS/ DEFENSES:
D§1.1 Right to Counsel-Pretrial

Defendant was convicted of murder. He appealed, claiming among other things, that his right against self-incrimination and his right to counsel were violated by his being fingerprinted outside the presence of his court appointed lawyer.

The court held that the right against self-incrimination protects the accused only against being compelled to give testimonial evidence. It does not protect against compulsory submission to purely physical tests such as fingerprinting, body measurements, handwriting and voice exemplars. The court also held that the right to counsel attaches only at critical stages of criminal proceedings. Fingerprinting, being a perfunctory administrative procedure, is not such a critical stage. *Frances v. State,* 316 N.E.2d 364 (Supreme Court of Indiana, September 1974).

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