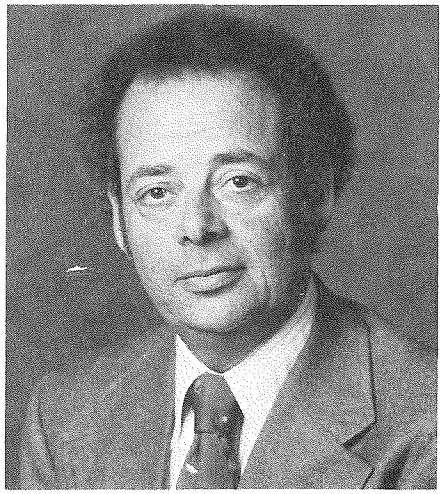
NOVEMBER-DECEMBER 1980

ALERT

MAINE DEPARTMENT OF THE ATTORNEY GENERAL

MAINE CRIMINAL JUSTICE ACADEMY



MESSAGE FROM THE ATTORNEY GENERAL RICHARD S. COHEN

Since this will be the last Alert issued during my tenure as Attorney General, I want to take the opportunity to express the personal and professional satisfaction I have derived from working with members of Maine's law enforcement community.

During my 17 years with the Department of the Attorney General, I have been privileged to come to know many of you who read the Alert. I have consistently been impressed with the confidence and dedication which you bring to your professional responsibilities. It has been especially gratifying to observe the eagerness of Maine law enforcement officers for additional education and training to improve their skills.

Because of our shared commitment to professional improvement, I have always viewed continuing education to be a priority of this Department. While financial restraints have occasionally frustrated my efforts, I look with considerable pride to the publications which this office has issued and the program in which we have participated. I sincerely hope that these efforts to achieve greater professionalism in law enforcement will continue.

While I have not yet finally decided upon my plans for the future, I fully expect that whatever road my career takes, I shall remain deeply interested and involved in Maine's crminal justice system.

Richard S. Cohen

RICHARD S. COHEN
Attorney General

HOMICIDE SCENE SEARCHES I

Critical to the successful investigation and prosecution of unlawful homicides (murder, manslaughter, felony murder — 17-A M.R.S.A. §§201-203) is the immediate security of the homicide scene and the proper seizure and processing of evidence at the scene. Crucial evidence as to some or all of the elements of the crime, identity of the perpetrator, cause of death, or culpable state of mind is frequently found at the place where the victim has been killed. However, lack of caution, failure to strictly observe procedures for the processing of homicide scenes, or disregard of Fourth Amendment principles relative to the obtaining of evidence at the scene may result in the inability of the State to present at trial evidence which is highly probative of a defendant's guilt. Thus, for example, evidence which is easily destructible, such as fingerprints, blood stains, and semen, may be lost or ruined for testing purposes if proper caution and adherence to correct evidence-gathering techniques are not observed. Even if the law enforcement officer has ensured preservation of the physical evidence, failure to observe the requirements of the Fourth Amendment may result in the inadmissibility of the evidence by the operation of the exclusionary rule.

Since 1978, substantial changes have occurred in the law pertaining to search and seizure and related police procedures at homicide scenes. These changes have come in the form of both court decisions interpreting the Fourth Amendment and legislative amendments to Maine's "Medical Examiner" statutes. This article will discuss these changes in the law concerning "homicide scene searches" and will outline for Maine law enforcement officers procedures which should be followed in conducting such searches.

The article will first discuss the application of the Fourth Amendment to searches at homicide scenes, with particular emphasis on *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L. Ed. 2d 290 (1978). The statutory provisions defining the role of the medical examiner, the Attorney General and other law enforcement officials at the homicide scene will then be presented and discussed. Finally, the article will prescribe, by way of a general outline, procedures pertaining to the search of the premises and the seizure of evidence to be followed by law enforcement officials who arrive at the scene of a homicide.

This article, therefore, will deal exclusively with the topic of searches and seizures of physical

evidence at homicide scenes. The article will *not* deal with police procedures generally in "medical examiner" cases — a topic discussed in the May-June 1977 ALERT. However, in view of the intervening statutory amendments and court decisions affecting homicide scene search procedure, that portion of the May-June 1977 ALERT which discussed procedures for searching homicide scenes is superseded by this article.

This article will assume that the officer is familiar with the fundamental constitutional rules involving search and seizure. By way of review, the office may wish to reread those chapters of the *Maine Law Enforcement Officer's Manual* which discuss searches with warrants and warrantless searches.

FOURTH AMENDMENT CONSIDERATIONS

The Law Before Mincey v. Arizona

The law in Maine regarding the scope of warrantless searches at homicide scenes changed drastically in 1978 when the United States Supreme Court decided *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L. Ed. 2d 290 (1978). Prior to its decision in *Mincey,* the Supreme Court had never addressed the question of whether a warrant was required to search the premises where the victim of a homicide was found. However, prior to *Mincey* the Maine Law Court had decided this issue.

In *State v. Chapman,* 250 A.2d 203 (Supreme Judicial Court of Maine, 1969), a law enforcement officer was summoned to the defendant's home at 2:00 a.m. Entering the premises with the defendant's consent, the officer found the defendant's wife dead, slumped over in a chair. The defendant was taken to the police station, presumably because his story that his wife "fell down" and "hemorrhaged" did not appear to coincide with the condition of the body and the quantity and location of blood observed in the premises. Police maintained continuous security of the premises beginning with the initial 2:00 a.m. entry. By 5:00 a.m., a prosecuting attorney, members of the sheriff's office, the medical examiner, and State Police detectives had arrived at and left the apartment and the body had been removed. After an autopsy revealed that the instrumentality causing death could have been a blunt instrument, the detectives returned to the premises, which were still secured by a police officer. The detectives made a thorough search of the premises without a warrant and at approximately 12:45 p.m. found a whiskey bottle with coagulated blood and hair on its bottom.

The Maine Law Court ruled that the warrantless, thorough search of the premises and the seizure of the bottle were lawful. In so ruling, the Law Court adopted the so-called "homicide scene exception" to the search warrant requirement. Under this exception, the mere fact that a person had died under suspicious circumstances would permit a law enforcement officer, during the period of continuing police custody following initial entry, to conduct a warrantless search of the premises for evidence of an unlawful homicide. The court based its creation of the "exception" on the seriousness of the crime and the importance of promptly obtaining evidence at the scene to determine whether a crime had been committed and, if so, who committed it:

> There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether or not a human life has been taken, and if so, by whom, and by what method, is great indeed and may in appropriate circumstances rise above the interest of an individual in being protected from governmental intrusion upon his privacy...
>
> * * *
>
> We are satisfied that if the police cannot, after lawful entry, make the sort of prompt, orderly and methodical investigation of the scene of a violent death that is here shown, the protection of legitimate interests of society will be seriously weakened...250 A.2d at 210, 212.

The "homicide scene exception" recognized by *State v. Chapman* governed police practice at homicide scenes in Maine until *Mincey v. Arizona,* decided by the United States Supreme Court, rejected that practice.

Mincey v. Arizona

Prior to 1978, the State of Arizona, like the State of Maine and several other states, had adopted a "homicide scene exception" to the search warrant requirement. In 1978, the United States Supreme Court, in *Mincey v. Arizona,* 437 U.S. 385, 98, S.Ct. 2408, 57 L.Ed. 2d 290 (U.S. Supreme Court 1978), held that this so-called "homicide scene exception" was inconsistent with the Fourth Amendment of the United States Constitution. In *Mincey* a police officer was shot during a narcotics raid at the defendant's apartment. Shortly after the shooting, homicide detectives arrived, assumed control of the investigation, and supervised the removal of the wounded officer and suspects. The wounded officer was transported to a hospital where he later died. The detectives, relying on Arizona's "homicide scene exception" rule, proceeded to conduct an immediate and thorough warrantless search of the defendant's apartment for evidence. The Supreme Court described the scope of the warrantless search as follows:

"Their search lasted four days, during which period the entire apartment was searched, photographed, and diagrammed. The officers opened drawers, closets, and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination. Every item in the apartment was closely examined and inventoried, and 200 to 300 objects were seized. In short, Mincey's apartment was subjected to an exhaustive and intrusive search. No warrant was ever obtained." 437 U.S. at 389, 98 S.Ct. at 2412, 57 L.Ed.2d at 298.

The United States Supreme Court reversed the defendant's conviction because the warrantless search was illegal. The Court held that the mere fact that the crime involved was a homicide was not an adequate reason to permit a warrantless search. That is, the seriousness of the offense itself did not create "exigent circumstances" sufficient to justify a warrantless search. The Court, therefore, held that because the "homicide scene exception" created by the Arizona courts — like that created by the Maine court in *State v. Chapman* — is inconsistent with the Fourth Amendment of the United States Constitution, a warrant would be necessary to search the premises at a homicide scene.

To understand the impact of *Mincey v. Arizona* on homicide investigations, the law enforcement officer must understand what *Mincey* did and did not hold. *Mincey* did *not* hold that law enforcement officers may not enter private premises when they have probable cause to believe that a homicide victim is within the premises. Likewise, the Court did not hold that law enforcement officers who have entered premises in which a homicide may have occurred are prohibited from making an immediate warrantless security check of the premises. The Court in *Mincey* specifically recognized that the Fourth Amendment does *not* bar law enforcement officers from "mak[ing] a prompt warand searches when they reasonably believe that a person within is in need of immediate aid" or, when officers have come upon the scene of a homicide, from "mak(ing) a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises." 437 U.S. at 392, 98 S.Ct. at 2414, 57 L.Ed.2d at 300.

Furthermore, the Court stated that when police have come upon the scene of a homicide they "may seize any evidence that is in plain view during the course of their legitimate emergency activities." 437 U.S. at 393, 98 S.Ct. at 2414, 57 L.Ed.2d at 300. The *Mincey* Court thus made clear that when officers observe evidence in plain view after they have entered the scene of a homicide or during the course of a legitimate security check for victims or perpetrators, such evidence may be seized without a warrant if all the requirements of the plain view doctrine are satisfied. (For a review of the requirements of the plain view doctrine see Chapter III-C of the Law Enforcement Officer's Manual.) What *Mincey* did prohibit at homicide scenes was a warrantless *search* for evidence which is *not* in plain view. Thus, under *Mincey,* officers who have entered the scene of a homicide may not search without a warrant, for evidence of the homicide in drawers, under carpets, in articles of clothing, etc., *unless* the Fourth Amendment does not apply to the particular area or *unless* a recognized exception to the warrant requirement (e.g., a consent to search) would justify the warrantless search. (Whether the Fourth Amendment applies to a particular homicide scene and the applicability of the various exceptions to the warrant requirement will be discussed later in this article.)

Mincey, therefore, prohibited warrantless searches at homicide scenes; it did not prohibit a warrantless entry, a warrantless security check, or a warrantless seizure of items observed in plain view upon entry or during the security check. Similarly, *Mincey* did not prohibit examination of the body, removal of the body, or diagramming of the area without a warrant. Nor did *Mincey* prohibit the taking of fingerprints from items seized in plain view at the scene. However, because *Mincey* authorized the warrantless seizure of "any evidence that is in plain view during the course of...legitimate emergency activities", a question not specifically answered by *Mincey* was whether the warrantless seizure of such plain view evidence could occur *after* the "legitimate emergency activities" had ended, that is, whether the plain view evidence although first observed during the security check, could be seized *after* the security check of the premises had been completed. This question was answered by the Maine Law Court in *State v. Johnson,* 413 A2d 931 (Maine Supreme Judicial Court, 1980).

State v. Johnson

In *State v. Johnson,* 413 A2d 931 (Maine Supreme Judicial Court, 1980), decided after the decision in *Mincey v. Arizona,* the Maine Law Court addressed the issue whether police could seize without a warrant, after the security check of a homicide scene had *ended,* evidence observed in plain view upon entry or during the security check. In *Johnson,* a member of the Waterville Police Department was called to a private residence and was informed that there appeared to be a dead body

inside the house. Finding the residence locked, the officer forced his way into the dwelling and proceeded through the kitchen and into the den where he, accompanied by three other officers, found the body of the victim. The officer checked the victim for vital signs and found none. The officer then entered each of the rooms in the house to determine whether other victims or the perpetrator was still on the premises. During the course of this security check, the officer observed in plain view knives, blood stains, and several other items which he had probable cause to believe were related to an unlawful homicide. Neither the officer nor any of his fellow officers touched or seized any of these items. Having been in the house for approximately five minutes, the officer and his fellow officers went outside the house, secured the premises, notified the Maine State Police of the homicide, and awaited their arrival. Approximately two hours later, after the medical examiner had arrived and examined the body, the State Police evidence technician arrived at the scene. The Waterville police officer escorted the evidence technician through the house and pointed out the various items of evidence. The evidence technician then photographed the scene, seized only that physical evidence which was in plain view, and dusted this evidence for latent fingerprints. The technician spent approximately five hours at the scene, two thirds of which was spent collecting and marking evidence and the rest dusting for latent fingerprints and taking photographs. The only evidence which was seized from the residence by the technician was items which were in plain view. On the following day, officers returned to the house with a warrant and searched the premises for evidence relating to the homicide.

The defendant, who lived in the house and who was charged with the murder of the victim, his mother, argued that the seizure of the evidence by the evidence technician was illegal. He contended that although the items seized were in plain view, because the evidence technician entered the house and seized the items *after* the security check was over and police had secured the premises, there did not exist an emergency or exigency, at the time of the seizure and under *Mincey* the police should have obtained a warrant before seizing the plain view evidence.

The Maine Law Court rejected the defendant's argument and held that the warrantless seizure of the items in plain view was lawful. The Court noted the requirement of 22 M.R.S.A. §3027(1) (A), which prohibits the moving or altering of the body or any objects at the scene of death in a medical examiner case prior to the arrival, or without the approval, of the medical exainer. (This statute and the other statutes relating to search and seizure at homicide are discussed later in this article.) The Court then said that although the Waterville officer had gone outside the house and although two hours had elapsed until the State Police evidence technician arrived, the technician's entry and his seizure of the plain view evidence were lawful because his entry and presence were nothing more than an "actual continuation" of the Waterville officer's lawful entry. Therefore, since the Waterville officer lawfully could have seized the evidence, the technician could lawfully seize it. The Court said,

> [The Waterville officer] was by law prohibited from moving the body or seizing any evidence on the premises until the medical examiner arrived and took over the direction of the investigation. No purpose would have been served by his remaining in the house until [the evidence technician] and the medical examiner arrived. We conclude that [the evidence technician's] entry was no more than an 'actual contiuation' of [the Waterville officer's] and 'the lack of a warrant thus did not invalidate the resulting seizure of evidence.'" 413 A.2d at 933-34.

The Maine Court further observed that the seizure in the *Johnson* was unlike the seizure held unlawful in *Mincey.* Whereas in *Mincey* the warrantless search lasted four days and much of the evidence seized resulted from a thorough and intrusive warrantless search, in *Johnson* (1) the officers were present at the scene for a reasonable time, approximately five hours, (2) the officers did not conduct a thorough search of the premises without a warrant, but obtained a warrant before conducting the thorough search for evidence, and (3) the only items seized by the officers without a warrant were items seizable under the plain view doctorine.

After the decisions in *Mincey v. Arizona* and *State v. Johnson,* therefore, the authority of a law enforcement officer to search for and seize evidence at a homicide scene has drastically changed. These cases indicate that the Fourth Amendment will permit law enforcement officers to do the following at a homicide scene without a warrant:

1. Enter private premises when the officer has reason to believe that someone inside is in need of immediate aid or is the victim of a homicide.

2. Once inside the premises, locate the victim, check for vital signs, and take appropriate action as to the victim.

3. Conduct a security check of the premises for other victims or the perpetrator(s). Of course, in conducting the security check the officer may enter or examine only those areas in which a body could

be located (e.g., a closet but not a dresser drawer).

4. Secure the premises for a reasonable period until the medical examiner and the Maine State Police have arrived and until these officials have performed their duties.

5. Seize evidence lying in plain view. For such a seizure to be lawful under the plain view doctrine, it must be apparent to the police when they discover the item that it is subject to seizure, that is, the officer must have probable cause to believe, when he discovers the item, that it is evidence of either the criminal activity or the identity of the perpetrator. An evidence technician may seize the plain view item even though it was initially observed by another officer. Evidence which is observed during the initial entry of the premises or during the security check may be seized without a warrant under the plain view doctrine and may also be seized without a warrant *after* the security check has ended and after the police have secured the premises, *if* the police presence at the premises has been continuous and of a reasonable duration.

6. Photograph and diagram those areas and items which are in plain view.

7. Obtain fingerprints from items which are to be seized under the plain view doctrine and from those areas, such as door knobs, where fingerprints can be easily and accidentally destroyed if not removed immediately. Because it is not clear whether police may lawfully dust for latent fingerprint *areas* such as countertops (rather than seizable items) at a homicide scene without a warrant, it is suggested that such areas be dusted for latent fingerprints only pursuant to a warrant.

8. Arrest any perpertrator or perpetrators found on the premises.

9. Remain on the premises for a "reasonable time" to accomplish the foregoing objectives. As always, what will constitute a reasonable time will depend upon all of the circumstances of the particular case, including such factors as the number of plain view items to be collected and the distance the medical examiner and State Police must travel to arrive at the premises.

Mincey and *Johnson* make equally clear that the law enforcement officers may *not* conduct a *search* of the premises at a homicide scene for evidence unless a warrant is obtained authorizing the search or unless one of the other exceptions to the warrant requirement, discussed below, would authorize the warrantless search. As a result of the *Mincey* and *Johnson* decisions, the homicide scene exception established in Maine by *State v. Chapman* is no longer the law.

NOTE: This article will be continued in the next issue of ALERT.

MAINE COURT DECISIONS

SEARCH AND SEIZURE

A §2.4 Automobiles—Without a Warrant

The defendant told a friend, who was employed at a pizza shop, that he was considering "hitting" or "robbing" the shop. The friend told the proprietors of the shop to be prepared for a robbery, and the proprietors, in turn, notified the police. While patrolling in the area of the pizza shop at 1:50 a.m., an officer observed that the shop had customers and that a jeepster occupied by two men was parked near the shop and facing toward it. As the officer drove past, the driver ducked down and the passenger watched the officer closely. The officer drove around a corner and radioed another officer for help. As the other officer arrived, the jeepster drove past the pizza shop, both occupants peering into the shop. The officers eventually stopped the jeep and while doing so, observed the driver appear to stuff a black object under the seat. The driver said that he was adjusting the emergency brake, but the brake was located left of the steering wheel. One of the officers then looked under the seat and seized a ski mask wrapped around a pistol. The suspects were arrested and escorted away by other officers who had arrived at the scene. The two arresting officers searched the jeepster further and found a zippered "gym bag." They unzipped the bag and found other incriminating evidence. The defendant was convicted of conspiracy to commit armed robbery and appealed contending that the evidence was illegally seized.

The Law Court held that the ski mask and pistol were legally seized under the "automobile exception" to the search warrant requirement. Probable cause to search was established by the following facts:

1) the officers had information that the pizza shop would soon be burglarized and/or its proprietors robbed;

2) two persons were seen in a motor vehicle watching that establishment in the wee hours of the morning;

3) the occupants of the vehicle acted in a suspicious manner; and

4) when stopped, they apparently engaged in activity which indicated that they were secreting or hiding something under the seat of the automobile.

Exigent circumstances were supplied by the movability of the jeepster.

The court found, however, that the seizure of the evidence from the zippered gym bag was illegal. Under the ruling of the recent U.S. Supreme Court case of *Arkansas v. Sanders,* 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979), when an automobile is validly though warrantlessly stopped and searched, an item of personal luggage found within the automobile may not under normal circumstances be immediately opened and searched even when the police have probable cause to believe that it contains fruits, instrumentalities, or evidence of crime. In such a case the police may lawfully seize the luggage but must await the issuance of a warrant before opening it.

The erroneous admission of the evidence from the gym bag was harmless error beyond a reasonable doubt, however, and did not require a reversal of the conviction. The defendant's guilt was proven by overwhelming convincing evidence independent of the illegally seized evidence which was only cumulative of the facts already in evidence. *State v. Hassapelis,* 404 A.2d 232 (Maine, July 1979).

COMMENT: See the summary and COMMENT *for the case of* Arkansas v. Sanders *on page 8 of the November-December 1979 issue of* ALERT.

Comments directed toward the improvement of this bulletin are welcome. Please contact the Criminal Division, Department of the Attorney General, State House, Augusta, Maine 04333.

ALERT

Richard S. Cohen — Attorney General
John S. Gleason — Deputy Attorney General
John N. Ferdico, Esq. — Editor

ALERT
Maine Criminal Justice Academy
93 Silver Street
Waterville, Maine 04901

BULK RATE
U.S. Postage
P A I D
Permit #8
Augusta, Me.