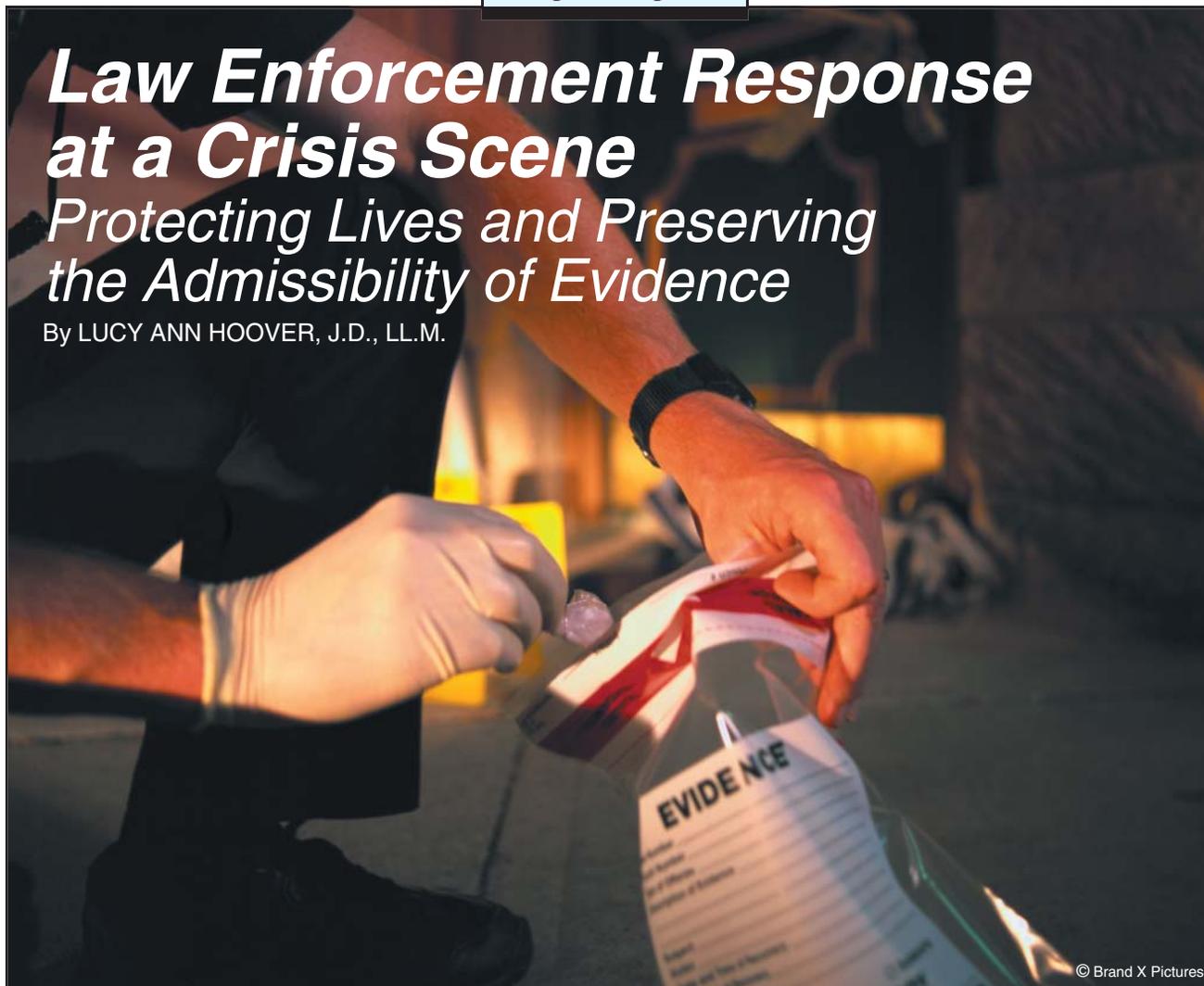


# Law Enforcement Response at a Crisis Scene

## Protecting Lives and Preserving the Admissibility of Evidence

By LUCY ANN HOOVER, J.D., LL.M.



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In today's world and the war on terrorism, law enforcement officers must be ever mindful of the fact that, as some predict, a suicide bombing on American soil may be simply a matter of time. Imagine a familiar scene, a young college student carrying a backpack while walking on campus and stopping to sit on a bench within 500 feet of a football stadium packed with over 84,000 people. What

happens next transforms this common occurrence on any campus in the nation into a terrible nightmare. Moments before halftime, the chemicals being carried by this young man detonate, causing an explosion heard almost 5 miles away. The detonation instantly kills the young student. Law enforcement officers sworn to protect the public will rush to the scene, ever ready to render aid and protect the innocent. Then, they

will direct attention to determining the identity of the bomber, the type of device used, where it was assembled, and whether the bomber received assistance in its assembly. In the aftermath of such an incident, officers cannot allow their emotions and good intentions to overshadow the restraints placed upon them by the Fourth Amendment of the U.S. Constitution.

This article discusses the U.S. Supreme Court's decisions



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addressing the parameters placed on the government by the Fourth Amendment in emergency situations and crime scene searches in general. It also addresses the pitfalls with which law enforcement officers wrestle based on motives ranging from a desire to solve the crime as quickly as possible to a lack of understanding as to how far the emergency exception to the warrant requirement of the Fourth Amendment extends.

### **REASONABLENESS REQUIREMENT**

For almost 40 years, the Supreme Court has held steadfast to its ruling in *Katz v. United States*<sup>1</sup> in which it created the presumption that all searches conducted without a warrant are unreasonable. In *Katz*, the government argued that it had, with good intentions, policed itself. That is, it proceeded with the search in such a way as to

ensure that the evidence collected was limited in scope and pertained only to the activities of *Katz*, the subject of the investigation. Irrespective of its intentions, the Supreme Court found that “although the surveillance was so narrowly circumscribed that it could constitutionally have been authorized in advance, it was not in fact conducted pursuant to the warrant procedure which is a constitutional precondition” and, therefore, deemed to be illegal.<sup>2</sup>

In subsequent rulings, the Supreme Court has made it clear time and time again that the phrasing afforded by America’s founding fathers to the Fourth Amendment of the U.S. Constitution is more than a mere litany of words:

“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 Warrant 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.”<sup>3</sup>

### **PRESUMED UNREASONABLENESS**

In *Katz*, the Supreme Court redefined the concept of what constitutes a search, focusing on privacy expectations rather than the physical intrusions by the government. The Court concluded that where such expectations exist, law enforcement officers are mandated to obtain a valid search warrant prior to proceeding with a search or the presumption that their actions were illegal will prevent them from introducing the fruits of their work.<sup>4</sup> To obtain a valid search warrant pursuant to the requirements set forth in the Fourth Amendment, officers must establish probable cause to believe that the location to be searched contains evidence of a crime and the evidence sought must be particularly described.

In traditional law enforcement, the Fourth Amendment is interpreted as requiring a warrant prior to infringing upon a person’s reasonable expectation of privacy. Of course, there are recognized exceptions to the warrant requirement, such as

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searches based on consent, those conducted pursuant to a lawful arrest or consistent with the motor vehicle exception, the need to inventory property, or an emergency necessitating a warrantless search.

Of the exceptions, the one that may be the most problematic for law enforcement is the emergency exception. That is, when responding to an emergency situation that turns out to be a crime scene, not only must officers be concerned about whether they may search without a warrant but also how far they can proceed before the Fourth Amendment requirements for a search warrant apply and all investigative activity must come to a halt until they obtain a warrant.

With a basic understanding of the rule of law and the guidelines provided by the Supreme Court, the law enforcement officer will be in a much better position to respond and process a crime scene, accomplishing the important goals of eliminating the emergency and preserving the integrity of the investigation and, ultimately, the prosecution. Indeed, the strictures of acceptable parameters of investigative activity at a crime scene may prove to frustrate the zealous investigator but failing to understand them may result in the exclusion of valuable evidence necessary to prove the case on

which one's zeal and passion was focused.

### **NO CRIME SCENE EXCEPTION**

The seminal case to rely upon for guidance regarding searches conducted at crime scenes is *Mincey v. Arizona*.<sup>5</sup> In *Mincey*, an undercover narcotics police officer was killed during a drug buy bust in Tucson, Arizona. On October 28, 1974, Officer Barry Headricks arranged to purchase a quantity of heroin from Rufus Mincey.

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***...a warrantless entry in response to an emergency situation is valid only as long as the emergency exists.***

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The purchase was to take place in the apartment in which Mincey resided. Officer Headricks arrived with backup officers, but, once he was inside the apartment, Mincey's associates slammed the door on them. As the backup officers forced their way into the apartment, a volley of gunfire ensued. Officer Headricks was shot and, though rushed to the hospital, died a few hours later.

Immediately after the shooting, the undercover officers conducted a sweep of the apartment for anyone else in need of medical attention. They found five gun-shot victims: a young woman in the bedroom closet, three of Mincey's acquaintances, and Mincey himself. Emergency assistance was requested, and Mincey was taken to the hospital where he was treated for his injuries. Mincey survived and was charged with murder, assault, and three counts of narcotics offenses.

Once the backup narcotics officers found the five additional victims in the apartment, they halted their investigative activity. Their actions were in accordance with a Tucson Police Department directive that police officers should not investigate incidents in which they are involved, a policy driven by concerns about conflicts of interest as opposed to the Fourth Amendment. They did not seize any evidence or conduct any searches; they simply guarded the suspects and secured the premises. Within a matter of minutes, homicide detectives who heard about the shooting over the radio arrived and took charge. The detectives began an exhaustive search for evidence that lasted 4 days. Though this search could not be characterized as anything less than intrusive and the emergency situation clearly had

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dissipated once all victims were accounted for and attended to, a search warrant never was obtained.

The defendant sought to have evidence suppressed, arguing it was seized in violation of his Fourth Amendment rights. The lower court agreed with the government's argument that the search should stand as the failure to secure a warrant for the exhaustive, intrusive, protracted 4-day search was to retrieve evidence to establish the circumstances of Officer Headrick's death.<sup>6</sup> The Supreme Court, however, could not agree with the Arizona court's rationale. As in *Katz*, the law enforcement officers in *Mincey* argued that due to the exceptional situation there was justification for a new exception to the warrant requirement. The Court rejected that argument. It is important to remember Justice Brandeis' concern when, in 1925, he stated, "Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent.... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."<sup>7</sup>

In *Mincey*, the Supreme Court made it clear that the Fourth Amendment does not bar law enforcement officers from making warrantless entries and

searches when they have a reasonable belief that someone is in immediate need of aid or a killer is still on the premises. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."<sup>8</sup> Regardless of the circumstances, including the murder

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of a fellow law enforcement officer, the Supreme Court refused to recognize a murder scene exception justifying a warrantless search.

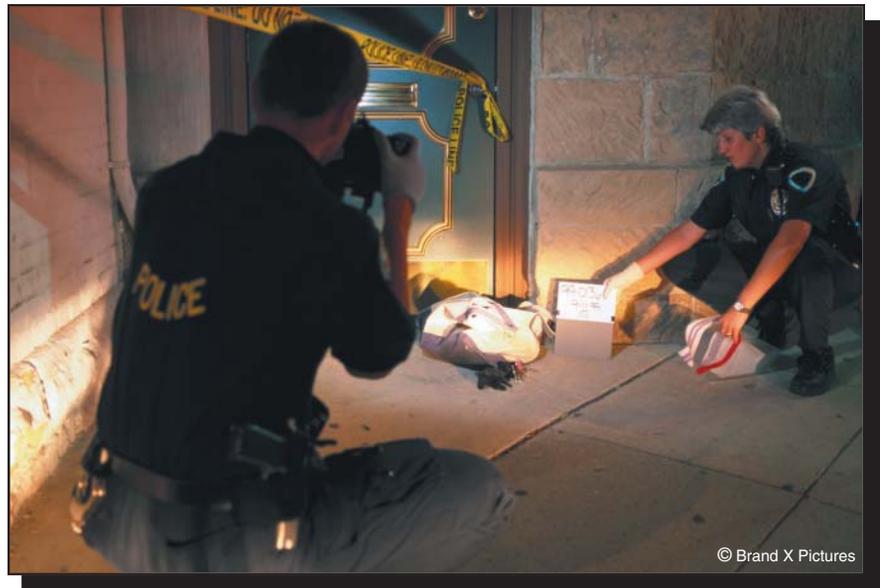
Years later, in 1984 and again in 1999, the Supreme Court underscored their holding in *Mincey*. In *Thompson v. Louisiana*,<sup>9</sup> a despondent woman decided that the best way to resolve her unhappy existence was to murder her husband and then take her own life. While her husband lay dead, she took an overdose of sleeping pills. As she began to grow weary, she came to the realization that she did not want

to die after all and telephoned her daughter for help. Her daughter telephoned the sheriff's office and rushed to her parents' home. When the deputies arrived, the daughter admitted them into her parents' house where they discovered her father's body and had her mother transported to the hospital for immediate medical attention. After conducting a search for other victims or suspects, the deputies secured the house. As in the *Mincey* case, once the emergency situation was under control, the deputies secured the premises, yet failed to get a search warrant prior to returning inside to look for evidence as part of their criminal investigation. Though the state of Louisiana couched the purpose of the reentry into the secured crime scene as an exploratory search,<sup>10</sup> the U.S. Supreme Court wasted no words in declaring it as a clear violation of the Fourth Amendment leading to suppression of the evidence seized.

In 1999, *Flippo v. West Virginia*<sup>11</sup> came before the U.S. Supreme Court and, once again, the Court took the opportunity to remind law enforcement that a warrantless entry in response to an emergency situation is valid only as long as the emergency exists. Once the scene is secured, searches conducted without a warrant are presumed unreasonable and, therefore, in

violation of the Fourth Amendment. In *Flippo*, the defendant and his wife were renting a vacation cabin in the mountains of West Virginia. The defendant placed a 911 call to report that he and his wife had been attacked. Law enforcement responded to find that the wife had succumbed to fatal head wounds and the defendant was suffering from injuries to his head and legs. “The officers closed off the area, took [the defendant] to the hospital, and searched the exterior and environs of the cabin for footprints or signs of a forced entry.”<sup>12</sup>

When the police photographer arrived at the cabin, the law enforcement officers, who had yet to secure a search warrant, reentered the crime scene. The Supreme Court concluded that this was in violation of the Fourth Amendment. The cost of this constitutional violation was the exclusion of the evidence found during their thoroughly intrusive, 16-plus hour search of the cabin. During the search, they found a closed, though unlocked, briefcase, which they opened and found an envelope containing photographs and negatives. The photographs, which “included several taken of a man who appears to be taking off his jeans,”<sup>13</sup> were later used during the prosecution of the defendant on charges that he murdered his wife.



The West Virginia courts denied the defendants’ motion to suppress the photographs seized in the warrantless search on the grounds that the police are entitled to thoroughly search a homicide crime scene and the objects found there. The U.S. Supreme Court again reminded law enforcement that “*Mincey* controls here.”<sup>14</sup> In so doing, the Court made clear that it continues to reject any general crime scene exception, to include a murder scene, as being inconsistent with the requirements of the Fourth Amendment.

The government’s response to critical incidents, such as that described in the beginning of this article, will include not just law enforcement but also other public safety personnel, such as those from fire departments. While it is true that regardless of the nature of the incident the Supreme Court rejects the

notion that there must be a crime scene exception, there are special circumstances surrounding fire scenes and arson investigations that have been recognized by the Court.

In both *Michigan v. Tyler*<sup>15</sup> and *Michigan v. Clifford*,<sup>16</sup> the Court was called on to address the admissibility of evidence discovered during a search of a fire scene following reentry by the government after the fire had been extinguished. In *Tyler*, the Court upheld a warrantless search of a furniture store after the fire was extinguished, designating it as a continuation of a valid search “begun as the last flames were being doused, but could not be completed because of smoke and darkness. The search was resumed promptly after the smoke cleared and daylight dawned. Because the post-fire search was interrupted for reasons that were evident,

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[the Court] held that the early morning search was no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.”<sup>17</sup>

In *Clifford*, the Court recognized that “in many cases, there will be no bright line separating the firefighters’ investigation into the cause of a fire from a search for evidence of arson.”<sup>18</sup> In arson cases, the scope of the initial warrantless search is limited to that reasonably necessary to determine its cause and origin and to guard against rekindling. In recognition consistent with *Mincey* and its progeny, the Court stated that the initial investigative search—the primary purpose of which is to ascertain the cause of the fire and, therefore, deemed necessary to ensure that the emergency is under control—is not a “license to roam freely”<sup>19</sup> throughout the premises. “There is no diminution in a person’s reasonable expectation of privacy or in the protection of the Fourth Amendment simply because the official conducting the search is a firefighter rather than a policeman....”<sup>20</sup> Whether a warrant is required is determined by the purpose of the search—“whether the object of the search is to determine the cause and origin of the fire or to gather evidence of criminal activity.”<sup>21</sup> Once the exigent

circumstances have been extinguished and the purpose of the scene’s examination has evolved into one in which evidence to be used in a criminal proceeding is being sought, the warrant requirement of the Fourth Amendment is reestablished and must be scrupulously honored.

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***Before crossing the threshold, officers must consider the implications and the application of the Fourth Amendment.***

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## **POLICY CONSIDERATIONS**

### **Initial Response**

Given the potential ramifications of continuing to take action in response to an emergency after it has been dealt with, policy should be reviewed to assess whether it provides adequate guidance. Guidance should be provided to officers on what constitutes an emergency or exigent circumstances. While courts have concluded that “emergency situations involving endangerment to life fall squarely within the exigent circumstances exception,”<sup>22</sup>

there is “no absolute test for determining whether exigent circumstances are present because such a determination ultimately depends on the unique facts of each case.”<sup>23</sup> Consideration of the specific facts of each case, which are “so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.”<sup>24</sup>

On January 6, 2006, the Supreme Court agreed to hear *Brigham City v. Stuart*,<sup>25</sup> a case involving a warrantless entry into a home based upon what the responding law enforcement officers claimed were exigent circumstances.<sup>26</sup> In this case, four police officers responded to a 3 a.m. complaint of loud noises at a residence where a party was being held. Upon arrival, the officers walked to the back of the house to investigate the noise and saw two underage males drinking alcohol. The officers entered the backyard and, from their vantage point, had a clear view into the back of the house where they saw four adults restraining a juvenile. The juvenile broke free and struck one of the adults in the face. At this point, the officers entered the house,

identified themselves, and arrested the adults for contributing to the delinquency of a minor, disorderly conduct, and intoxication. The Utah Supreme Court held that the police officers' warrantless entry into the private residence was not justified as the facts known to the officers would not lead a reasonable officer to believe that immediate entry was necessary to prevent physical harm.<sup>27</sup> The question now before the U.S. Supreme Court is whether the intrusion by law enforcement was necessary based on a need, as described by the Court in *Mincey*, "so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."<sup>28</sup>

### **Address and Eliminate the Emergency**

The authority of officers without a warrant to take action that may interfere with an individual's expectation of privacy to address and eliminate a threat to life or safety should be clearly stated. Equally important is to stress the need to keep the response within the scope of that necessary to address the emergency.

### **Secure the Location**

Regardless of the type of incident encountered by investigators, maintaining a presence at a secured crime scene while making application for a search

warrant is an exercise that law enforcement officers routinely practice. While it involves patience, time, and effort, constitutional guarantees must prevail over mere convenience to increase the likelihood of producing admissible evidence at trial.<sup>29</sup>

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The opening scenario of the young college student blowing himself up within 500 feet of a packed football stadium actually happened just a few months ago on October 1, 2005, at the University of Oklahoma.<sup>30</sup> First responders to the crime scene included state and federal investigators and bomb technicians. As investigators approached the bench on which lay the remains of the bomber, they noticed a black backpack still on the ground. Fearing that the backpack contained a second improvised explosive device, responding bomb technicians neutralized the package. After bomb technicians had made the

scene safe for the investigators, the bomber's name and address was determined through identifying information found in his wallet.

Fourth Amendment implications were certainly under consideration as the investigators approached the young bomber's residence. Consent to search the common areas of the apartment that the bomber shared was provided by his roommate. The roommate also gave the investigators and the bomb technicians consent to search his own bedroom and his personal computer.<sup>31</sup>

As the bomb technicians peered through the open door of the bomber's bedroom, it was evident that he had utilized his private space as a laboratory for the manufacture of explosives. Investigators and experts in the handling of explosive devices and their chemical components discussed a range of possibilities with respect to the volatility of the situation and whether exigent circumstances would justify the government engaging in a warrantless search. Ultimately, they decided to wait for judicial authority to search by applying for and obtaining a search warrant before entering the bomber's bedroom.

Steps taken to control the situation, such as evacuating the apartment building, aided in their decision to downgrade the situation from one that could

have been characterized as an emergency to one that in their judgment, was under sufficient control, allowing them to seek judicial authority.

## CONCLUSION

The lessons learned from the University of Oklahoma bombing and the constraints on warrantless crime scene searches clearly articulated by the U.S. Supreme Court should serve as a constant reminder to law enforcement officers that the Fourth Amendment does apply in crime scenes. Clearly, there are exceptions, such as consent, emergency, search incident to arrest, motor vehicle, and inventory, as there are special circumstances in fire cause and origin investigations. However, law enforcement officers must not allow themselves to be overcome by the nature of the crime, whether a fellow officer is the victim, whether it was the result of a terrorist attack, or whether officers argue that immediate entry is necessary to prevent physical harm. Before crossing the threshold, officers must consider the implications and the application of the Fourth Amendment. The next conviction could depend upon the decision made at that moment in time. ♦

## Endnotes

- <sup>1</sup> *U.S. v. Katz*, 389 U.S. 347 (1967).
- <sup>2</sup> *Katz*, 389 U.S., at 354-359.
- <sup>3</sup> U.S. Const. amend. IV.
- <sup>4</sup> *Katz*, 389 U.S. at 358.
- <sup>5</sup> *Mincey v. Arizona*, 437 U.S. 385 (1978).

- <sup>6</sup> *Mincey*, 437 U.S. at 390.
- <sup>7</sup> *Olmstead v. U.S.*, 277 U.S. 438 at 479 (1925).
- <sup>8</sup> *Mincey*, 437 U.S. at 393.
- <sup>9</sup> *Thompson v. Louisiana*, 469 U.S. 17 (1984).
- <sup>10</sup> *Thompson*, 469 U.S. at 18.
- <sup>11</sup> *Flippo v. West Virginia*, 528 U.S. 11 (1999); *State of West Virginia v. Flippo*, 212 W. VA 560, 575 S.E.2d 170 (2002). The Supreme Court of Appeals of West Virginia held that the state failed to meet the burden of showing that photographs were seized either during the implied consent search or during the limited express consent search.
- <sup>12</sup> *Flippo*, 528 U.S. at 12.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Flippo*, 528 U.S. at 14.
- <sup>15</sup> *Michigan v. Tyler*, 436 U.S. 499 (1978).
- <sup>16</sup> *Michigan v. Clifford*, 464 U.S. 287 (1984).
- <sup>17</sup> *Tyler*, 436 U.S. at 511.
- <sup>18</sup> *Clifford*, 464 U.S. at 299.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Tyler*, 436 U.S. at 501.
- <sup>21</sup> *Clifford*, 464 U.S. at 291.
- <sup>22</sup> *U.S. v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002).
- <sup>23</sup> *U.S. v. Gray*, 71 F.Supp2d 1081, 1084 (D. Kan. 1999).
- <sup>24</sup> *U.S. v. Banks*, 540 U.S. 31, 36 (2003).
- <sup>25</sup> *Brigham City v. Stuart*, 122 P.3d 506, cert. granted, 126 S. Ct. 979 (2006).
- <sup>26</sup> *Id.*
- <sup>27</sup> *Id.* at 516.
- <sup>28</sup> *Mincey*, 437 U.S. at 394.
- <sup>29</sup> 35A AmJur 2d, Section 8, page 17.
- <sup>30</sup> U.S. District Court, Western District of Oklahoma, search warrant (M-05-159-CH).
- <sup>31</sup> *Id.*

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

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## Wanted: Photographs



The *Bulletin* staff is always on the lookout for dynamic, law enforcement-related photos for possible publication in the magazine. We are interested in photos that visually depict the many aspects of the law enforcement profession and illustrate the various tasks law enforcement personnel perform.

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