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"Emergency Exception" Search Needs Articulable Facts Leading to a Conclusion that a Danger Exists to Be Reasonable under the Fourth Amendment

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broad waiver approach to inadvertent disclosure, it is submitted that further judicial guidance is necessary. Although a client may now avoid an automatic waiver of the attorney-client privilege where he utilizes reasonable precautions to prevent an inadvertent disclosure, it remains unclear what standard the New York courts will use to determine whether a screening procedure is reasonable. Hopefully, the Court of Appeals will soon provide appropriate guidelines.

Scott Lawrence Lanin

CRIMINAL PROCEDURE LAW

"Emergency exception" search needs articulable facts leading to the conclusion that a danger exists to be reasonable under the fourth amendment

The fourth amendment¹ requires the police to obtain a warrant before conducting a search and seizure.² There are a few "well-delineated exceptions" to this requirement, including the "emergency exception,"³ which is applied when a situation requires

¹ U.S. CONST. amend. IV. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

² See *Katz v. United States*, 389 U.S. 347, 357 (1967). The Supreme Court has held that warrantless searches are "per se unreasonable," subject to several recognized exceptions. *Id.*; see also *McDonald v. United States*, 335 U.S. 451, 453 (1948) (fourth amendment "stays the hands of the police unless they have a search warrant issued by a magistrate"); *People v. Vaccaro*, 39 N.Y.2d 468, 472, 348 N.E.2d 886, 889, 384 N.Y.S.2d 411, 414 (1976) ("strong judicial preference for search warrants").

The warrant clause of the fourth amendment ensures the protection of the people from "unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977). "The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search." *Steagald v. United States*, 451 U.S. 204, 212 (1981); cf. *Bloom*, *The Supreme Court and its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231 (1983) (criticizing Supreme Court for not adhering to this principle).

³ See *Katz*, 389 U.S. at 357. Other generally recognized exceptions include: "consent" to be searched, see *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973); "plain view," see *Washington v. Chrisman*, 455 U.S. 1, 5-6 (1982); "hot pursuit" of a fleeing felon, see *Warden*

an immediate police response.⁴ Recently, in *People v. Smith*,⁵ the Appellate Division, Second Department, held that for the warrantless search of a freight package to be constitutionally reasonable, the officer must have had "articulable facts leading to the conclusion that there was a danger to life or property."⁶

In *Smith*, the Federal Aviation Administration had issued a "terrorist alert" advising the airlines to screen shipments from non-regular customers.⁷ A few days later, the defendant, who was not a regular customer of the airline, delivered a package labeled "surgical instruments" to an airfreight counter.⁸ The airline agent shook the package and, upon hearing nothing, x-rayed it.⁹ The agent became suspicious and called the airport police when the x-ray indicated that there was no metal in the box.¹⁰ In x-raying the package, the police also saw no metal, only two opaque cylinders.¹¹

v. Hayden, 387 U.S. 294, 298-99 (1967); "automobile search," see *United States v. Ross*, 456 U.S. 798, 809 (1982); *Carroll v. United States*, 267 U.S. 132, 153 (1925); and "exigent circumstances," see *Steagald*, 451 U.S. at 213.

⁴ See P. POLYVIUO, *SEARCH AND SEIZURE* 189 (1982). The emergency exception has been applied to "cases where the authorities were responding to miscellaneous emergency situations demanding immediate action." *Id.* Courts have applied the doctrine to diverse situations involving warrantless searches. See, e.g., *United States v. Smith*, 797 F.2d 836, 838-39 (10th Cir. 1986) (search of suspicious small airplane); *United States v. Barone*, 330 F.2d 543, 544 (2d Cir.) (passing police officer searched house from where screams heard), *cert. denied*, 377 U.S. 1004 (1964); *People v. Calhoun*, 49 N.Y.2d 398, 402, 402 N.E.2d 1145, 1147-48, 426 N.Y.S.2d 243, 245 (1980) (search of house after fire).

The concept is generally supported by commentators, see generally 2 W. LAFAVE, *SEARCH AND SEIZURE* § 6.5(d), at 683-84 (2d ed. 1987) (warrantless search may be undertaken upon reasonable belief that death or bodily harm is imminent), and is included in the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 260.5 (1975).

⁵ 135 App. Div. 2d 190, 525 N.Y.S.2d 244 (2d Dep't 1988).

⁶ *Id.* at 193, 525 N.Y.S.2d at 246.

⁷ *Id.* at 191, 525 N.Y.S.2d at 245. While neither the majority nor the dissent stated the reason for the "terrorist alert," it is an important factor. The events of the *Smith* case took place on June 29, 1985, see *id.* at 195, 525 N.Y.S.2d at 247 (Eiber, J., dissenting), and June 1985 had been fraught with terrorist activity against airports and airlines. In that month an airplane was blown up on the ground, see N.Y. Times, June 13, 1985, at A1, col. 3; an American airplane with 104 passengers was hijacked, see N.Y. Times, June 15, 1985, at A1, col. 4; an explosion occurred at Frankfurt Airport, see *id.* at col. 3; an airplane with over 300 passengers was blown up over the Atlantic Ocean, see N.Y. Times, June 24, 1985, at A1, col. 6; and an explosion occurred at Tokyo Airport, see *id.*

⁸ *Smith*, 135 App. Div. 2d at 191, 525 N.Y.S.2d at 245. The package was delivered to the freight desk of Eastern Airlines at La Guardia Airport in New York. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 191-92, 525 N.Y.S.2d at 245. The officer could not determine the contents of the package but thought it could have contained plastic explosives shipped without a detonator. *Id.* at 195-96, 525 N.Y.S.2d at 247 (Eiber, J., dissenting).

The officer opened the package and found cocaine in it.¹² The defendant was arrested the following day when he came to retrieve the package.¹³

At the suppression hearing, the lower court suppressed all the evidence gathered as a result of this warrantless search.¹⁴ The Appellate Division, Second Department, affirmed the suppression order,¹⁵ concluding that the officer's action did not fall within the emergency exception and, therefore, constituted an unreasonable search.¹⁶

Writing for the court, Justice Sullivan noted both the long-standing policy of subjecting warrantless searches to judicial scrutiny to determine their reasonableness¹⁷ and the prosecution's burden of justifying a warrantless search.¹⁸ Although the court recognized an "emergency exception" to the warrant requirement,¹⁹ it reasoned that the existence of the emergency must be established by "articulable facts leading to the conclusion that there was a danger to life or property."²⁰ The court further supported its decision by noting that the police had failed to "comply with established procedures" for an airport emergency.²¹

Justice Eiber, dissenting vigorously, argued that in determin-

¹² *Id.* at 192, 525 N.Y.S.2d at 245.

¹³ *Id.* at 196, 525 N.Y.S.2d at 248 (Eiber, J., dissenting).

¹⁴ *Id.* at 191, 525 N.Y.S.2d at 244. The suppressed evidence included the contents of the package, the defendant's post-arrest statements, and the identification of the defendant in a lineup. *Id.* at 191, 195, 525 N.Y.S.2d at 244, 247.

¹⁵ *Id.* at 193, 525 N.Y.S.2d at 246.

¹⁶ *Id.* at 195, 525 N.Y.S.2d at 247.

¹⁷ *Id.* at 191, 525 N.Y.S.2d at 244; *see also* United States v. Dowell, 724 F.2d 599, 602 (7th Cir.) (objective standard applied to determine reasonableness), *cert. denied*, 466 U.S. 906 (1984); *People v. Mitchell*, 39 N.Y.2d 173, 177, 347 N.E.2d 607, 609, 383 N.Y.S.2d 246, 248 (judges "detached from the tension and drama of the moment" can balance competing interests), *cert. denied*, 426 U.S. 953 (1976).

¹⁸ *Smith*, 135 App. Div. 2d at 191, 525 N.Y.S.2d at 244; *see also* *Dowell*, 724 F.2d at 602 (one factor in overcoming presumption against warrantless search was when identity of undercover informant subject to exposure); *People v. Hodge*, 44 N.Y.2d 553, 557, 378 N.E.2d 99, 101, 406 N.Y.S.2d 736, 738 (1978) (radio dispatch to police necessitating immediate inquiry into fatal stabbing overcame presumption against warrantless search). *See generally* P. POLYVIUO, *supra* note 4, at 199 (discussing burden on states to show proper justification).

¹⁹ *Smith*, 135 App. Div. 2d at 191, 525 N.Y.S.2d at 244.

²⁰ *Id.* at 193, 525 N.Y.S.2d at 246. The court downplayed the significance of the "terrorist alert" in its consideration of the circumstances, stating that "[t]he so-called terrorist alert . . . was an oral, nonspecific, warning concerning packages sent by nonregular companies or couriers." *Id.* at 192, 525 N.Y.S.2d at 245.

²¹ *Id.* at 193, 525 N.Y.S.2d at 246. The court observed that it was "obvious from the officer's failure to call the bomb squad [the established procedure] in this instance that he did not consider that this package posed a serious threat." *Id.*

ing the reasonableness of a law enforcement officer's action "the governmental interest in conducting a warrantless search must be balanced against the privacy interests of the defendant and the invasion which occurs as a result of the search."²² Justice Eiber asserted that in light of the government's paramount interest in making airports and air transport safe,²³ the advisory "terrorist alert,"²⁴ and the other suspicious circumstances surrounding the package, the officer's action was reasonable.²⁵

There is general agreement among the courts and commentators that it is difficult to clearly delineate the parameters of the emergency exception.²⁶ In *People v. Mitchell*,²⁷ the New York Court of Appeals set forth a three-pronged test: 1) the police must reasonably believe there is an emergency requiring their assistance to protect life or property; 2) the primary motive of the search must not be the gathering of evidence; and 3) there must be some reasonable basis associating the place searched to the emergency.²⁸

In finding no emergency, the *Smith* court purported to follow this test.²⁹ It is suggested, however, that the court's requirement

²² *Id.* at 198, 525 N.Y.S.2d at 249 (Eiber, J., dissenting).

²³ *Id.* (Eiber, J., dissenting).

²⁴ *Id.* at 197, 525 N.Y.S.2d at 248 (Eiber, J., dissenting).

²⁵ *Id.*, 525 N.Y.S.2d at 248-49 (Eiber, J., dissenting). Justice Eiber further argued that the minimal intrusion was reasonable because "any expectation of privacy the defendant might otherwise have asserted was necessarily diminished by the fact that he willingly surrendered a package to a common carrier which bears the responsibility for monitoring what is shipped on its conveyances." *Id.* at 199, 525 N.Y.S.2d at 249-50 (Eiber, J., dissenting). Since the airline had a right to open the package without violating any constitutional rights of the defendant, the officer's opening of the package "at the behest of the airline employee" would not constitute a violation. *Id.* at 196, 525 N.Y.S.2d at 248 (Eiber, J., dissenting); see also *United States v. Sullivan*, 544 F. Supp. 701, 710-11 (D. Me. 1982) (officer's opening of package under similar circumstances ruled "technical assistance" to airline), *aff'd*, 711 F.2d 1 (1st Cir. 1983).

²⁶ See Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFFALO L. REV. 419, 426 (1973). "The doctrine of emergency in the law of search and seizure has never been defined in terms of its overall concept. The usual practice has been for a court to tailor its definition to the circumstances of each case." *Id.* (footnote omitted). See generally P. POLYVIU, *supra* note 4, at 189 (discussing exigent circumstances emergency exception and courts' application thereof); 2 W. LAFAYE, *supra* note 4, § 5.5(c), at 550 (same).

²⁷ 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, *cert. denied*, 426 U.S. 953 (1976). In *Mitchell*, the court observed that "[a]ppraising a particular situation to determine whether exigent circumstances justified a warrantless intrusion into a protected area presents difficult problems of evaluation and judgment." *Id.* at 177, 347 N.E.2d at 609, 383 N.Y.S.2d at 248.

²⁸ *Id.* at 177-78, 347 N.E.2d at 609, 383 N.Y.S.2d at 248.

²⁹ *Smith*, 135 App. Div. 2d at 195, 525 N.Y.S.2d at 247.

that there be "articulable facts leading to the conclusion" that an emergency exists³⁰ is an unwarranted gloss upon the *Mitchell* test, which requires only "reasonable belief." Had the *Smith* court applied the *Mitchell* test properly, it is submitted the court would have found that all three prongs were satisfied.³¹

Courts generally construe the exceptions to the warrant requirement narrowly in order to safeguard the rights guaranteed by the fourth amendment.³² To determine the reasonableness of a search, the public interest involved is balanced against the extent of the intrusion.³³ Courts also look for a level of information that

³⁰ *Id.* at 193, 525 N.Y.S.2d at 246.

³¹ It should be noted that the court implicitly indicated that the second and third prongs were not satisfied. *See id.* at 194-95, 525 N.Y.S.2d at 247. It would seem, however, that those prongs were satisfied, as the officer had no motive for gathering evidence and the package was clearly related to the emergency. The first prong of the *Mitchell* test presents a closer question. The *Mitchell* court assumed the emergency should be an imminent one, whereas the officer's conduct in *Smith* indicated no such imminence. *Compare Mitchell*, 39 N.Y.2d at 178, 347 N.E.2d at 610, 383 N.Y.S.2d at 249 with *Smith*, 135 App. Div. 2d at 193, 525 N.Y.S.2d at 246.

³² *See Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz v. United States*, 389 U.S. 347, 357 (1967); *People v. Taggart*, 20 N.Y.2d 335, 340, 229 N.E.2d 581, 585, 283 N.Y.S.2d 1, 6 (1967). In *Taggart*, the court clearly stated that "[t]he discussion is not whether exigent circumstances justify a departure from constitutional limitations. That view is impermissible. The point is that the constitution forbids 'unreasonable' searches and what is reasonable is determined by the circumstances and the exigencies are not to be ignored." *Id.*

The courts' strict construction is to safeguard individual rights against abuse by the state. *See United States v. Chadwick*, 433 U.S. 1, 11 (1977). To apply the emergency exception, courts require actual exigent circumstances; "mere inconvenience and delay attendant upon the procurement of a warrant will not qualify as an exigent circumstance." *Mascolo, supra* note 26, at 428. What will qualify as an exigent circumstance sufficient "to justify seizure of evidence without a warrant must be determined on a case-by-case basis." *United States v. Morrow*, 541 F.2d 1229, 1232 (7th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977).

³³ The Constitution protects persons against "unreasonable" searches only. U.S. CONST. amend. IV; *see also Chadwick*, 433 U.S. at 7 (warrant clause of Constitution "protects people from unreasonable government intrusions into their legitimate expectations of privacy"); *McDonald v. United States*, 335 U.S. 451, 453 (1948) (guarantee of protection is for guilty and innocent persons).

In deciding whether a case fits within the emergency exception, the courts have used a balancing approach. *See, e.g., United States v. Sullivan*, 544 F. Supp. 701, 718 (D. Me. 1982) (court observed that "[t]he governmental interest in conducting an immediate warrantless search must be balanced against the privacy interest of the defendant in the package"), *aff'd*, 711 F.2d 1 (1st Cir. 1983); *Mitchell*, 39 N.Y.2d at 180, 347 N.E.2d at 611, 383 N.Y.S.2d at 250 (in homicide case, "[c]onstitutional guarantees of privacy and sanctions against their transgression do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life"); *People v. Fritschler*, 81 Misc. 2d 106, 111, 364 N.Y.S.2d 801, 806 (Sup. Ct. Onondaga County 1975) (airport x-ray search in which court observed that it was "only a limited invasion of defendant's rights which was more than warranted by the nature of the harm sought to be prevented—a possible bomb explosion on an aircraft").

would approximate "probable cause" to determine the reasonableness of the police response.³⁴ While this requirement is necessary to deter law enforcement agents from acting on mere suspicion, it is suggested that when important public places are involved, such as airports or other generally accessible public buildings, courts should be satisfied with a lower level of information because of the potentially great harm to life and property.³⁵ The government's in-

The determination of reasonableness is significant because if a search cannot withstand this test the evidence seized in that search is suppressed. The Supreme Court adopted this exclusionary rule for the enforcement of the fourth amendment in *Weeks v. United States*, 232 U.S. 383, 398 (1914), and through the fourteenth amendment extended its application to the states in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

³⁴ See, e.g., *Carroll v. United States*, 267 U.S. 132, 155-56 (1925) (measure of legality of search and seizure is reasonable or probable cause). The Constitution requires "probable cause" for the issuance of warrants. U.S. CONST. amend. IV. The Supreme Court has established that reasonably trustworthy evidence must be shown to establish "probable cause." See *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). The same threshold level of information has generally been required in determining the reasonableness of warrantless searches as well. See *United States v. Peisner*, 311 F.2d 94, 100-01 (4th Cir. 1962); *United States v. Lawrence*, 434 F. Supp. 441, 444-45 (D.D.C. 1977).

Courts have allowed greater latitude to police officers when their own safety, or the public safety, is involved. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (officer's safety outweighs *de minimis* intrusion on rights); *Taggart*, 20 N.Y.2d at 339, 229 N.E.2d at 584, 283 N.Y.S.2d at 6 (information inadequate to establish probable cause can be sufficient for search when "exigencies affecting life, limb, or grave property damage" are involved). Courts have, however, closely scrutinized officers' actions to deter abuses. See, e.g., *Chadwick*, 433 U.S. at 15 (searching footlocker several hours after arrest not reasonable because danger had passed); *Chimel v. California*, 395 U.S. 752, 763 (1969) (police need to search only area under "immediate control" of person).

³⁵ There is general agreement that these areas are "critical zone[s]" where special considerations apply" because of the magnitude of the potential damage. See *State v. Johnson*, 529 S.W.2d 658, 662 (Mo. Ct. App. 1975). There is also a consensus that "[m]any of the existing exceptions to the warrant requirement clearly have no relevance to airport searches." Note, *The Constitutionality of Airport Searches*, 72 MICH. L. REV. 128, 137 (1973). However, as one commentator has stated:

[A]s courts have candidly acknowledged, such searches seem, especially in view of the necessity for and the overwhelming public acceptance of anti-hijacking systems, to be reasonable; and there is little doubt that currently used airport procedures have had considerable success in reducing the number of successful hijackings and hijacking attempts. Courts have therefore made valiant efforts to uphold the basic constitutionality of airport security procedures.

P. POLYVIU, *supra* note 4, at 254 (footnotes omitted). But see *McGinley & Downs, Airport Searches and Seizures—A Reasonable Approach*, 41 *FORDHAM L. REV.* 293, 313-24 (1972) (arguing that airport searches are both unreasonable and unconstitutional). For a discussion of the airport security changes and their constitutional ramifications, see *Abramovsky, The Constitutionality of the Anti-Hijacking Security System*, 22 *BUFFALO L. REV.* 123, 127-44 (1972).

Courts have generally been sympathetic to proper, but intrusive, security measures in public places. See *McMorris v. Alioto*, 567 F.2d 897, 899 (9th Cir. 1978) (security search entering courthouse reasonable because introduced in response to violence).

terest in the continued beneficial use of such places justifies this reasonable limitation upon an individual's rights.³⁶

In light of the paramount interest of public safety, it is submitted that the *Smith* court failed to balance the predicament faced by the officer with the extent of his violation of the defendant's fourth amendment rights. The court's holding, with its unnecessarily stringent requirements for the determination of the existence of an emergency, will hamper the ability of police to protect society against potentially great harm to life and property.

Simon Yeznig Balian

CPL § 195.10: Criminal defendant may not waive grand jury indictment and consent to be prosecuted by superior court information after indictment is filed

Traditionally, the New York Constitution has mandated that the prosecution of all capital or otherwise infamous crimes be initiated by grand jury indictment.¹ This right was designed to safe-

³⁶ See *People v. Kuhn*, 33 N.Y.2d 203, 210, 306 N.E.2d 777, 780, 351 N.Y.S.2d 649, 654 (1973). The governmental interest tends to be paramount to the individual right of privacy in these places, and often the level of exigency required will be less than in other circumstances. See *United States v. Licata*, 761 F.2d 537, 543 (9th Cir. 1985) ("[o]rordinarily, in the airport setting, exigent circumstances are apparent"). See generally Halbrook, *Firearms, The Fourth Amendment, and Air Carrier Security*, 52 J. AIR L. & COM. 585 (1987) (comprehensive discussion of screening practices and legislative history of government regulations). The extent of the governmental interest is succinctly illustrated in the following observation of a distinguished judge: "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness . . ." *United States v. Bell*, 464 F.2d 667, 675 (2d Cir.) (Friendly, J., concurring), *cert. denied*, 409 U.S. 991 (1972).

¹ See N.Y. CONST. art. 1, § 6; see also *People v. Miles*, 289 N.Y. 360, 362, 45 N.E.2d 910, 911 (1942) ("fundamental principle of our government" that indictment precede prosecution for infamous crime); *People ex rel. Battista v. Christian*, 249 N.Y. 314, 317, 164 N.E. 111, 111 (1928) ("organic law decrees that no one shall be held to answer for an infamous crime until after a grand jury shall have considered the evidence against him"). Prior to the 1973 amendment, the New York Constitution had provided: "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on presentment or indictment of a grand jury." N.Y. CONST. art. 1, § 6 (1894, amended 1973).

Under the CPL an indictment is defined as "a written accusation by a grand jury, filed with a superior court, charging a person . . . with the commission of a crime." CPL § 200.10 (McKinney 1982). A grand jury hearing serves "chiefly [as] an accusatory instrument; its indictment carries no presumption of guilt, but is merely a means of informing the accused