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Search and Seizure Under the Fourth Amendment (United States v. Candella)

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made by the defendant. Whether or not *Miranda* will be gradually emasculated by section 3501 is an open question. However, the factual discrepancies in the *Vigo* opinions highlight the ease with which the *Miranda* doctrine can be thwarted should a court decide to selectively view the facts.

SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT

United States v. Candella

One of the fundamental principles of the fourth amendment is that warrantless searches and seizures are per se unreasonable exclusive of a few exceptions which are "jealously and carefully drawn".[1] A prosecutor seeking to rely on evidence gathered in a warrantless search or seizure has the burden of proving that it was justified by one of the few authorized exceptions[2] to the warrant requirement.[3] In *United*

1 Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

2 One of the exceptions is a search or seizure performed with the consent of the individual who is the subject of the search. *See* Zap v. United States, 328 U.S. 624, 628 (1946). The consent must be "freely and voluntarily given," more than mere "acquiescence to a claim of lawful authority." Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968). "A consent is not a voluntary one if it is the product of duress or coercion, actual or implicit." United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963). The consent must be "unequivocal, specific, and intelligently given." *Id.*

The "plain view" doctrine is another exception to the requirement that seizure of evidence be supported by warrant. *See* Harris v. United States, 390 U.S. 234 (1968), which states that:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.

Id. at 236.

Evidence obtained under the "plain view" doctrine is not the product of a search. Bretti v. Wainwright, 439 F.2d 1042, 1046 (5th Cir.), *cert. denied*, 404 U.S. 943 (1971); United States v. Molkenbur, 430 F.2d 563, 566 (8th Cir.), *cert. denied*, 400 U.S. 952 (1970). To be valid a "plain view" seizure must have been "inadvertent." Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971).

Evidence seized by an officer in hot pursuit of a fleeing felon is also excepted from the warrant requirement. Warden v. Hayden, 387 U.S. 294, 298-300 (1967). Police may also lawfully seize evidence without a warrant when it is obtained incident to a lawful arrest. Chimel v. California, 395 U.S. 752 (1969). The arresting officer is restricted, however, to a search of the arrestee's person and the area "within his immediate control," by which is meant "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

An automobile, because of its mobility, may be searched without warrant when there is probable cause. Chambers v. Maroney, 399 U.S. 42, 48-52 (1970). However, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court emphasized that probable cause alone is not sufficient; there must also exist "exigent circumstances." *Id.* at 458-64, *quoting* Chambers v. Maroney, 399 U.S. 42, 51 (1970).

If there is an emergency a warrant is not required. *See* United States v. Jeffers, 342 U.S. 48, 52 (1951). A seizure without a warrant can also be made when evidence is about to be destroyed. McDonald v. United States, 335 U.S. 451, 455 (1948).

3 Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971); Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); United States v. Jeffers, 342 U.S. 48, 51 (1951); United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973).

States v. Candella[4] the Second Circuit, reversed a district court order suppressing certain evidence, finding that a warrantless seizure had been validated by consent.

In February of 1971, Robert Candella was arrested in his home for illegally transporting handguns across state lines.[5] The arrest was made by three federal agents pursuant to an arrest warrant. Significantly, they had failed to secure a search warrant. Upon advising Candella of his *Miranda* rights,[6] the federal agents asked him if he had any of the guns. Candella pointed to a carton nearby and said, "Some of them are there." The agents looked into the box and found a number of handguns which were seized. They then asked Candella if he had more. Candella, half-turning, directed the agents' attention to a desk. The agents opened one of the desk drawers and found additional handguns which were also seized as evidence.

Prior to trial the defendant moved to suppress the handguns which had been seized at his house. The district court conducted a suppression hearing which entailed a detailed inquiry into the seizure.[7] The prosecutor argued that probable cause and the plain view doctrine justified the search. These arguments were rejected by District Judge Dooling who ordered the handguns suppressed. On appeal to the Second Circuit the order was reversed.

Judges Hays and Timbers constituted the majority, and held that Candella's response to the agents' inquiry constituted voluntary consent[8] to the seizure of the guns. They also reasoned that Candella's response was the equivalent of opening the containers for the agents, and, thus, the guns were lawfully seized since they were, in effect, in

4 469 F.2d 173 (2d Cir. 1972).

5 18 U.S.C. § 922(a)(3) (1970).

6 In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court was concerned about the inherently coercive effect of "incommunicado interrogation of individuals in a police-dominated atmosphere." *Id.* at 445. The Court ruled that specific warnings of constitutional rights are required in order to protect the accused's fifth amendment privilege against self-incrimination while he is subject to the compelling circumstances of in-custody interrogation. Custodial interrogation was held to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Prior to being questioned the individual must be informed of his rights to remain silent and to be represented by counsel, either retained or appointed, during questioning. *Id.* He must also be told that any statement he makes may be used as evidence against him. *Id.*

In Orozco v. Texas, 394 U.S. 324 (1969), the Court emphasized that these warnings are required whenever the individual is deprived of his freedom of action in any significant way, whether he be at a police station or on his own premises. Since the defendant in *Candella* had been placed under arrest, his freedom of action was taken from him and *Miranda* warnings were required prior to any interrogation.

7 *See* 469 F.2d at 176.

8 A search or seizure voluntarily consented to by the subject of the search need not be supported by warrant. *See* note 2 *supra.*

"plain view"[9] of the agents. The main thrust of the dissent, was that the court should not have considered the issue of consent since that issue had not been argued by the prosecutor at the district court suppression hearing.[10]

In holding that Candella had consented to the seizure of the guns, even though the issue of consent had not been argued before the district court, the court of appeals invaded the province of the trier of facts, thereby relieving the prosecutor of his burden of proving that the apparent consent was voluntary. The various circuits are generally in agreement that the issue of consent to a warrantless search or seizure is a question of fact better left to the trial court, which is in a position to judge the credibility of the witnesses.[11] An appellate court, on the other hand, must, as Judge Oakes pointed out, rely solely on the "cold transcript."[12] Thus, *Candella* should have been remanded in order for the trial court to make a determination as to consent.

Until a few months before *Candella*, the Second Circuit was in accord with the other circuits with respect to the superior position of the trial court on the issue of consent.[13] However, in *United States v. Rothberg*,[14] the court, in apparent violation of the Federal Rules of Civil Procedure,[15] reversed a district court finding of non-consent based

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9 Evidence in plain view of officers lawfully in position to obtain that view may be seized without warrant. *See* note 2 *supra*.

10 469 F.2d at 176 (Oakes, J., dissenting).

11 *See* United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Sheard, 473 F.2d 139 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); United States v. Young, 471 F.2d 109 (7th Cir. 1972), *cert. denied*, 412 U.S. 929 (1973); White v. United States, 444 F.2d 724 (10th Cir. 1971); United States v. Elrod, 441 F.2d 353 (5th Cir. 1971); United States *ex rel.* Harris v. Hendricks, 423 F.2d 1096 (3d Cir. 1970). *But see* United States v. Menke, 468 F.2d 20, 25 (3d Cir. 1970).

12 469 F.2d 173, 176 (2d Cir. 1972), *quoting* United States v. Rothberg, 460 F.2d 223, 225 (2d Cir. 1972) (Mansfield, J., dissenting).

13 *See* United States v. Gaines, 441 F.2d 1122 (2d Cir.), *vacated and remanded on other grounds*, 404 U.S. 878 (1971), *cert. denied*, 409 U.S. 883 (1972); United States v. Callahan, 439 F.2d 852 (2d Cir.) (Judge Hays joining in the opinion), *cert. denied*, 404 U.S. 826 (1971); United States v. Thompson, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966). In *Gaines*, Judge Hays stated that "whether the consent was voluntarily given is a finding of fact that should not be lightly overturned by the appellate court." 441 F.2d at 1123, *quoting* United States v. Bracer, 342 F.2d 522, 524 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965).

14 460 F.2d 223 (2d Cir. 1972).

15 *See* FED. R. CIV. P. 52(a) which states in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

See United States v. Rothberg, 460 F.2d at 225 (Mansfield, J., dissenting).

In United States v. United States Gypsum Co., 333 U.S. 364 (1948) the Supreme Court set down guidelines for the application of rule 52(a):

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

on inconsistencies in the testimony of the arresting officers, and the denials of the defendants. In holding that the defendants had indeed consented to a search of their premises, Judge Hays, writing for the *Rothberg* majority, attempted to resolve the conflicts in the testimony of the officers, and stated simply that the district judge did not believe the defendants' denials.[16] Judge Mansfield dissented because in his view the majority substituted its findings of fact for those of the district court even though the latter were not clearly erroneous and were supported by the district judge's personal observation of the witnesses.[17]

In *Rothberg* the prosecutor had made an effort to show that the search was validated by the consent of the defendants. No such attempt was made by the prosecutor in *Candella.* The *Candella* court, by finding consent without the benefit of fact-finding on the issue by a trial court, relieved the prosecutor of his burden of proof. Prior to and since *Candella,* the Second Circuit has held that a prosecutor can only establish voluntary consent to a warrantless search or seizure by presenting evidence which is "clear and positive,"[18] or "clear and convincing."[19] Moreover, the circuit has held that the prosecutor's burden is particularly heavy when the defendant, like Candella, had been placed under arrest before the search or seizure.[20] Such a burden can

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See Guizman v. Pichirilo, 369 U.S. 698, 702 (1962); Weaver v. United States, 334 F.2d 319 (10th Cir. 1964); United States v. Board of Educ. of Greene County, 332 F.2d 40 (5th Cir. 1964). *Cf.* United States v. Schultetus, 277 F.2d 322, 326 (5th Cir. 1960).

In Cole v. Neaf, 334 F.2d 326 (8th Cir. 1964) the Eighth Circuit considered the applicability of rule 52(a) in cases where the court is the trier of fact:

> In actions tried to a court without a jury, . . . 52(a) expressly places the responsibility upon the trial court for resolving doubtful fact issues. We are not privileged to . . . substitute our judgment for that of the trial court. Findings of fact can be set aside only upon clear demonstration that they are *without substantial evidentiary support* or that they are *induced by an erroneous view of the law.*

Id. at 329 (emphasis added).

16 460 F.2d 223, 224 (2d Cir. 1972).

The *Rothberg* court stated that it accepted the district court's findings of facts. 460 F.2d at 223. However, the court concluded:

> Contrary to the district judge, we think that the testimony credited by him leads to the conclusion that the defendants consented to the search of the basement. The judge did not believe the defendants' denials; rather he ruled solely on the basis of the "conflicting police testimony." We do not find these conflicts as "significant" as did the district judge.

Id. at 224.

17 *Id.* at 225.

18 United States v. Como, 340 F.2d 891, 893 (2d Cir. 1965); United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962).

19 *See* United States v. Mapp, 476 F.2d 67, 78 (2d Cir. 1973). *But see* United States v. Fernandez, 456 F.2d 638, 640 (2d Cir. 1972).

The Fifth Circuit also uses the "clear and convincing" standard. United States v. Jones, 475 F.2d 723, 728 (5th Cir. 1973); Bretti v. Wainwright, 439 F.2d 1042, 1045 (5th Cir. 1971). The Seventh Circuit requires "conclusive" proof that a voluntary consent was obtained. United States v. Gamble, 473 F.2d 1274, 1276 (7th Cir. 1973).

20 United States v. Mapp, 476 F.2d 67, 78 (2d Cir. 1973); *accord,* Gorman v. United

only be met by the testimony of witnesses at trial subject to the safeguards inherent in cross examination. Only then can it be determined whether the alleged consent of the defendant was "unequivocal, specific, and intelligently given," free from duress and coercion,[21] and thus a voluntary waiver of fourth amendment rights.

Even if the consent issue were properly before the Second Circuit, Judge Oakes was of the opinion that upholding the validity of the seizure would encourage officers to forego application for search warrants notwithstanding ample opportunity and grounds for their issuance. This position is not supported by the relevant case law. A search or seizure conducted pursuant to the voluntary consent of a suspect or arrestee is presently valid even where the police might have obtained a search warrant.[22] The proper issue is whether the consent was voluntary.

The courts have often stated that arrest carries with it an "aura of coercion."[23] Nevertheless, courts have found that an arrestee, having been informed of his *Miranda* rights, may voluntarily consent to a warrantless search or seizure.[24] It has also been held that warnings of

States, 380 F.2d 158, 163 (1st Cir. 1967); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951).

21 *See* United States v. Mapp, 476 F.2d 67, 77 (2d Cir. 1973); Gorman v. United States, 380 F.2d 158, 163 (1st Cir. 1967); United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962); Judd v. United States, 190 F.2d 649, 650 (D.C. Cir. 1951).

22 *See* Schneckloth v. Bustamonte, 93 S.Ct. 2041 (1973), where the Supreme Court stated:

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. . . . In short a search pursuant to consent . . . properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

Id. at 2048.

The Court, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), took a similar position with regard to another exception to the warrant requirement, *i.e.*, the *Chimel* search incident to arrest:

> We . . . do not suggest here, that the police must obtain a warrant if they anticipate that they will find specific evidence during the course of such a search.

403 U.S. at 482.

23 *See* United States v. Mapp, 476 F.2d 67, 78 (2d Cir. 1973); United States v. Jones, 475 F.2d 723, 730 (5th Cir. 1973); United States v. Richardson, 388 F.2d 842, 845 (6th Cir. 1968); Gorman v. United States, 380 F.2d 158, 163 (1st Cir. 1967).

24 *See* United States *ex rel.* Lundergan v. McMann, 417 F.2d 519 (2d Cir. 1969):

> [T]he mere fact that a suspect is under arrest does not negate the possibility of a voluntary consent. Neither does the suspect's knowledge that the search will almost certainly demonstrate his guilt.

Id. at 521; United States v. Ellis, 461 F.2d 962, 968 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972). *See also* United States v. Jones, 475 F.2d 723 (5th Cir. 1973) (search upheld on the basis of consent even though search warrant was invalid); United States v. Wheeler, 459 F.2d 1228 (D.C. Cir. 1972); Faubion v. United States, 424 F.2d 437, 440 (10th Cir. 1970) (defendant did not necessarily consent to a search merely by revealing the location of the evidence—such a communication may only constitute probable cause for securing a search warrant).

specific fourth amendment rights, in addition to the *Miranda* warnings against self-incrimination, are not required.[25] However, the fact that *Miranda* warnings are given does not of itself establish the voluntary character of the consent. The Supreme Court, in *Schneckloth v. Bustamonte*,[26] has advised that knowledge of the right to refuse consent need not be established as the "*sine qua non* of an effective consent." Rather, the "totality of all the circumstances" should be examined in determining whether the consent was voluntary.[27] Included in this "totality of circumstances" is the "possibly vulnerable subjective state of the person who consents."[28] The *Candella* court, reading from the transcript of the suppression hearing, was not in a position to examine the possibly vulnerable subjective state of the defendant,[29] as well as many other relevant circumstances.

To bolster their opinion the majority applied the "plain view" exception to the fourth amendment's protection against unreasonable search and seizure. In *Coolidge v. New Hampshire*,[30] the Supreme Court established the rule that a warrantless "plain view" seizure of evidence is valid only when it is "inadvertent."[31] In other words, where police officers know in advance the location of the evidence, and have

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25 United States v. Jones, 475 F.2d 723, 731 (5th Cir. 1973); United States v. Sheard, 473 F.2d 139, 147 (D.C. Cir. 1972); Carpenter v. United States, 463 F.2d 397, 401 (10th Cir.), *cert. denied*, 409 U.S. 985 (1972); United States v. Noa, 443 F.2d 144, 147 (9th Cir. 1971); United States v. Goosby, 419 F.2d 818 (6th Cir. 1970); Gorman v. United States, 380 F.2d 158, 164 (1st Cir. 1967). In most of these cases the suspect was in custody at the time he consented to the search or seizure.

In Schneckloth v. Bustamonte, 93 S. Ct. 2041 (1973), the Supreme Court refused to state unequivocally that specific warnings of fourth amendment rights in addition to *Miranda* warnings are never required. The Court held that such warnings are not required when the subject of the search is not in custody. The Court thus left the door open to the argument that before an individual under arrest can be said to have voluntarily consented to a search, he must have been advised of his right to refuse consent.

26 93 S. Ct. 2041 (1973).

27 *Id.* at 2047-48.

28 *Id.* at 2049.

29 In his dissent in *Candella*, Judge Oakes noted that the defendant was "nearly blind," and unable to read. 469 F.2d at 177. He insisted that the fear and confusion of an individual who is confronted by three strangers who claim authority to arrest him, but whose credentials he cannot check, must be taken into account. *Id.* The defendant's poor eyesight might well have constituted the "possibly vulnerable subjective state" which must be taken into account under Schneckloth v. Bustamonte, 93 S. Ct. 2041 (1973).

But cf. United States v. Stone, 471 F.2d 170, 173 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), where the court held that the mere condition of being upset at the presence of police officers in one's home is not enough to invalidate an otherwise voluntary consent.

30 403 U.S. 443 (1971).

31 *Id.* at 469. The "inadvertence" test has been cited by the various circuits, including the Second Circuit, in applying the "plain view" doctrine to warrantless seizures of evidence. *See, e.g.*, United States v. Mapp, 476 F.2d 67, 81 (2d Cir. 1973); United States v. Brown, 470 F.2d 1120, 1122 (9th Cir. 1972); United States v. Davis, 461 F.2d 1026, 1034-35 (3d Cir. 1972); United States v. Drew, 451 F.2d 230, 232 (5th Cir. 1971); United States v. Titus, 445 F.2d 577, 579 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971).

ample opportunity to obtain a search warrant, they may not make a "plain view" seizure.[32] In *Candella* the seizure of the guns was not inadvertent. As Judge Oakes noted, the agents may have had advance knowledge that the guns were in Candella's residence. Even if they had no advance knowledge, the fact that the "plain view" was obtained only after their inquiry as to the location of the guns indicates that the discovery was not "inadvertent." Moreover, it is difficult to justify a "plain view" seizure of evidence when, as in *Candella*, the police had no view of the evidence at all.[33]

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[32] In Coolidge v. New Hampshire, 403 U.S. 443, 470 (1971), the Supreme Court stated that police may not seize evidence under the "plain view" doctrine when they anticipate finding the evidence and intend to seize it. *See* United States v. Lisznyai, 470 F.2d 707, 710 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973) wherein the Second Circuit observed that:

> *Coolidge* teaches that where the police have ample opportunity to obtain a search warrant and the intention to seize the evidence is really the prime motivation for the arrest, the plain view exception does not apply.

See Martinez v. Turner, 461 F.2d 261, 264-65 (10th Cir. 1972); United States v. Molkenbur, 430 F.2d 563, 566-67 (8th Cir.), *cert. denied*, 400 U.S. 952 (1970). *But cf.* Dombrowski v. Cady, 471 F.2d 280, 285 (7th Cir.), *rev'd*, 93 S. Ct. 2523 (1973). In *Dombrowski* the Seventh Circuit reversed the trial court's admission of certain evidence seized in the defendant's car stating that no further evidence was necessary to sustain a drunken driving charge therefore any further search was not inadvertent under the "plain view" doctrine. 471 F.2d at 285. However, the Supreme Court, per Mr. Justice Rehnquist, held that the evidence was admissible because such a search was standard procedure designed to protect the public safety. 93 S. Ct. at 716, 718.

Thus, while prior knowledge and intent to seize will not vitiate a search made pursuant to a voluntary consent or "incident to an arrest," it will invalidate a search under the "plain view" doctrine. This apparent incongruity is reconciled by noting that safeguards exist when considering consent and "incident to arrest" searches. Specifically, courts will scrutinize the voluntariness of the consent and require that the search "incident to arrest" be limited to the physical area within the control of the arrestee. *See* note 2 *supra*. However, the only check on the "plain view" doctrine is that the search be "inadvertent." Therefore, the "inadvertent" requirement must be strictly interpreted in order to preserve fourth amendment rights.

[33] *See* Lewis v. Cardwell, 476 F.2d 467, 470 (6th Cir. 1973).

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court commented that:

> [I]t is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

403 U.S. at 465.

The plain view of the guns obtained by the agents in *Candella* was nothing more than the "normal concomitant" of a seizure based on the alleged consent of the defendant. If it was later determined that Candella's consent had been coerced, the plain view doctrine would offer no independent justification for the warrantless seizure of the guns. *Cf.* United States v. Gamble, 473 F.2d 1274 (7th Cir. 1973). In *Gamble* the prosecutor attempted to justify a warrantless seizure as being the product of a lawful search incident to arrest, and also on the "plain view" doctrine. After finding that the search went beyond the scope of the search incidental to an arrest allowed by Chimel v. California, 395 U.S. 752 (1969), the court refused to permit the application of the "plain view" doctrine, stating that:

> Having ruled that the . . . police violated the fourth amendment by entering Gamble's bedroom, we conclude that the doctrine of "plain view" provides no independent justification for the admission of the seized shotgun into evidence.

Since its decision in *Candella*, the Second Circuit has shown that it will not readily find that fourth amendment rights have been waived, and that it will require the prosecutor to satisfy his burden of proving that a voluntary waiver was made.[34] Hopefully, the *Candella* and *Rothberg* decisions are merely aberrations in a Second Circuit policy of carefully guarding fourth amendment rights.

FEDERAL IMMUNITY OF WITNESSES ACT

Goldberg v. United States

Under the Federal Immunity of Witnesses Act[1] the Government[2] may compel testimony considered "necessary to the public interest"[3] from unwilling witnesses, in exchange for a grant of immunity.[4] The grant is calculated to circumvent a witness' assertion of his fifth amendment privilege against self-incrimination[5] and thus provide the prose-

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Absent a legitimate prior intrusion, plain view of evidence cannot serve to justify its seizure.

473 F.2d at 1277.

34 *See* United States v. Mapp, 476 F.2d 67 (2d Cir. 1973) wherein the Second Circuit reversed a district court denial of a motion to suppress evidence, holding that the defendant had not voluntarily consented to the search. The court indicated that the government must prove voluntary consent by "clear and convincing" evidence, *id.* at 78-79, and held that the consent was not "unequivocal, specific and intelligently given" because it was nothing more than "submission to official authority under circumstances pregnant with coercion." *Id.* at 77.

In United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973), the court, in reversing the denial of the motion to suppress, held that the Government had shown "no more than acquiescence to apparent lawful authority." *Id.* at 728. Judge Hays, dissenting, was of the opinion that the defendant had consented to the search. *Id.* at 730.

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1 Organized Crime Control Act of 1970, Title II, 18 U.S.C. § 6001-05 (1970).

2 This act is applicable to proceedings before a federal court or grand jury, federal agency, and either house of Congress or its committees. 18 U.S.C. § 6002. For definitions of the above see *id.* § 6001. For the procedures used to obtain an immunity order see *id.* § 6003-05.

3 *Id.* at § 6003. This phrase incorporated the idea that Congress may now apply for the immunity procedure for any matter which is within its authority. Previous immunity applications were limited to "national security matters." *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., 292 (1960) [hereinafter cited as *Measures Relating to Organized Crime*].

4 18 U.S.C. § 6002.

5 "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. A grand jury proceeding is a "criminal case" to which the fifth amendment privilege applies. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). For discussions of the historical foundation of the fifth amendment see E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

Constitutional attacks on the practice of compelling testimony under immunity grants on any basis other than the fifth amendment have had little success. "Until now the only