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## **A Delayed Search of an Automobile Makes for an Unconstitutional Seizure**

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## A Delayed Search of an Automobile Makes for an Unconstitutional Seizure

Cover Page Footnote

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**A DELAYED SEARCH OF AN AUTOMOBILE MAKES FOR AN  
UNCONSTITUTIONAL SEIZURE**

**CRIMINAL COURT OF NEW YORK  
NEW YORK CITY**

People v. Tashbaeva<sup>1</sup>  
(decided January 31, 2012)

**I. INTRODUCTION**

The judiciary's interpretation of the protections afforded by the Fourth Amendment to the United States Constitution has given rise to a complex and controversial area of law. From its express language, it would seem that the reasonableness of a search and seizure turns on whether it was executed pursuant to a warrant and supported by probable cause, as these two inquiries are used to justify an invasion into one's privacy, or alternatively, interference with one's security.<sup>2</sup> Nevertheless, as an extensive analysis of case law demonstrates that circumstances exist in which a warrantless search and seizure might be found reasonable, and thus, these circumstances have laid the foundation for judicially-crafted exceptions to the warrant requirement.<sup>3</sup>

The central issue before the court in *People v. Tashbaeva* was one of first impression.<sup>4</sup> Without clear precedent on the facts of the instant case, the plain view doctrine, the search incident to a lawful arrest exception, the concept of a preliminary investigation, and the ongoing crime scene rule guided the Criminal Court of New York in its adjudication.<sup>5</sup> After explaining the relevance and analyzing the rationale underlying each of these distinct concepts, the court ruled

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<sup>1</sup> 938 N.Y.S.2d 873 (Crim. Ct. 2012).

<sup>2</sup> U.S. CONST. amend. IV.

<sup>3</sup> W. MARK WARD, TENN. CRIM. TRIAL PRACTICE § 4:20 (2012-2013 ed.).

<sup>4</sup> *Tashbaeva*, 938 N.Y.S.2d at 879.

<sup>5</sup> *Id.*

on the issues before it.<sup>6</sup> The court held that “once the police have relinquished dominion and control over an automobile they are required to obtain a warrant in order to retrieve evidence therefrom, even though the evidence may have been initially seized lawfully under the plain view or other recognized exceptions to the warrant requirement.”<sup>7</sup> The court explained that although a police officer need not complete a search at the time an initial plain view observation is made, a seizure that is procured by a “delayed search” is unauthorized, unconstitutional, and therefore, will not stand in court.<sup>8</sup> The court reasoned that the mere fact a seizure *would have been legal* when the incriminating item was first observed is not sufficient to justify a seizure that is unduly delayed, occurring after the preliminary investigation has been completed.<sup>9</sup> Before arriving at this conclusion, the court thoroughly considered the applicable legal theories and cases involving similar facts, specifically, cases in which the warrantless search was lawfully conducted at the outset, but a delay in finishing the search of the crime scene gave rise to constitutional implications.<sup>10</sup>

## II. FACTUAL BACKGROUND

On April 12, 2011, three officers in an unmarked police vehicle accompanied Officer Tabora down Richmond Avenue.<sup>11</sup> Around 10:00 p.m., they observed a car recklessly swerving in and out of lanes.<sup>12</sup> After several efforts to pull the vehicle over, the officers finally succeeded in doing so.<sup>13</sup> Upon approaching the defendant’s vehicle, Officer Tabora observed Iryna Tashbaeva’s “physical manifestations of intoxication,” suggesting that she had consumed alcohol and was under the influence.<sup>14</sup> Prior to ordering the defendant to step out of the car, Officer Tabora made a plain view observation.<sup>15</sup> Of-

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 876.

<sup>8</sup> *Id.*

<sup>9</sup> *Tashbaeva*, 938 N.Y.S.2d at 879-81.

<sup>10</sup> *Id.* at 879.

<sup>11</sup> *Id.* at 876.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Tashbaeva*, 938 N.Y.S.2d at 876-77 (noting that Iryna Tashbaeva, the defendant, was the driver of the car).

<sup>15</sup> *Id.* at 877.

ficer Tabora noticed a “partially filled bottle of cognac” and a “Sprite” bottle on the center console of the car.<sup>16</sup> After complying with Officer Tabora’s orders to step out of the vehicle, the defendant was arrested and brought to an Intoxicated Driver Testing Unit (“IDTU”).<sup>17</sup> At the time of the arrest, Officer Tabora failed to “seize or voucher” the bottles observed in the defendant’s vehicle.<sup>18</sup> Another problem was that before the defendant was transported to IDTU, the officers failed to arrange for the “defendant’s vehicle [to be] taken into police custody,” and consequently, the vehicle remained unsecured on the side of the road where the arrest was made.<sup>19</sup> The next morning, Officer Tabora met with the Assistant District Attorney, and thereafter, proceeded to the defendant’s vehicle to collect the bottles.<sup>20</sup> Upon arriving at the scene of the arrest (where the car was left), the officer sniffed the Sprite bottle, determined it contained alcohol, and removed the Sprite bottle and the bottle of cognac from the vehicle with intent to use each item as evidence against the defendant.<sup>21</sup> Notably, the vehicle was at the site approximately eight to ten hours before the officer returned to seize the bottles.<sup>22</sup>

### III. RATIONALE OF THE COURT

The court engaged in a step-by-step analysis, ultimately concluding that Officer Tabora’s seizure of the two bottles was unauthorized and illegal.<sup>23</sup> Beginning with a discussion of the Fourth Amendment and the protections that it guarantees, the court observed that “warrantless searches are *per se* unreasonable.”<sup>24</sup> Thus, the court explained that the search must fall within one of the established exceptions in which the circumstances justify the search, and *perhaps*, also justify the subsequent seizure in order for the court to construe the conduct of law enforcement as reasonable.<sup>25</sup> As the court recog-

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Tashbaeva*, 938 N.Y.S.2d at 877.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 877-78.

<sup>22</sup> *Id.* at 877.

<sup>23</sup> *Id.* at 882.

<sup>24</sup> *Tashbaeva*, 938 N.Y.S.2d at 876.

<sup>25</sup> *Id.*; see WARD, *supra* note 3 (explaining all of the exceptions to the Fourth Amendment warrant requirement, including the plain view doctrine, the search incident to a lawful arrest

nized, the plain view doctrine is one exception to the Warrant Clause of the Fourth Amendment, which authorizes the police to proceed without a warrant in circumstances where illegal contraband is observed in open view.<sup>26</sup> The court noted however, that three requirements must be met in order to invoke the plain view doctrine: “(1) the police [must be] lawfully in a position from which they [can] view an object; (2) the incriminating character of the object [must be] immediately apparent, and (3) the officers [must] have a lawful right of access to the object.”<sup>27</sup>

In turn, the court first analyzed whether the immediate stop of the defendant was lawful.<sup>28</sup> Due to the reckless manner in which the defendant was driving her car, the court found sufficient facts on the record to show the officer had a reasonable suspicion that the defendant was driving illegally.<sup>29</sup> Thus, concluding the stop was justified under the circumstances, the court next had to decide whether the seizure was lawful.<sup>30</sup> Given “the officer’s warrantless retrieval of the incriminating items from the defendant’s vehicle,” the court turned to the plain view doctrine to determine whether it was applicable so as to prevent suppression of the evidence.<sup>31</sup> Although only reasonable suspicion is required to stop a vehicle, probable cause that the evidence is linked to criminal activity is necessary to preserve seized evidence under the plain view doctrine.<sup>32</sup>

At the outset, the court noted that if both bottles were seized at the time of or within close proximity to the time of arrest, the seizure would have undoubtedly been lawful under the plain view doctrine.<sup>33</sup> That is, if the officer retrieved the two bottles from the vehicle within close proximity to the arrest, as opposed to allowing for an eight to ten hour delay, the seizure would have been lawful under well-settled United States Supreme Court precedent.<sup>34</sup> The precedent

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exception, a valid consent based search, and so on).

<sup>26</sup> *Tashbaeva*, 938 N.Y.S.2d at 876.

<sup>27</sup> *Id.* (citations omitted).

<sup>28</sup> *Id.* at 877.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Tashbaeva*, 938 N.Y.S.2d at 876, 877.

<sup>32</sup> *Id.* at 877.

<sup>33</sup> *Id.* at 879.

<sup>34</sup> *See Arizona v. Gant*, 556 U.S. 332 (2009); *New York v. Belton*, 453 U.S. 454 (1981); *Chimel v. California*, 395 U.S. 752 (1969) (noting that each of these cases continued to build upon, clarify, and reaffirm the circumstances under which the search incident to arrest exception is applicable so as to justify a warrantless search and fruits seized therefrom).

to which the court referenced was initially set forth in *Chimel v. California*.<sup>35</sup> In *Chimel*, the Supreme Court held “that a search incident to arrest is valid when the arrestee is unsecured and within reaching distance of the passenger compartment . . . .”<sup>36</sup> The Court in *Chimel* limited the scope of the area that was searchable to only that which is within reaching distance of the passenger.<sup>37</sup> In doing so, the Court relied in part on how reasonableness in the context of the Fourth Amendment has been interpreted, considering “the history and experience which it embodies and the safeguards afforded by it against the evils to which it was a response.”<sup>38</sup> Thus, the Court explained that the search incident to arrest exception is limited in its scope, concluding that “[t]he search here went far beyond the petitioner’s person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him[.]” and therefore, “[t]here was no constitutional justification” to authorize the warrantless search.<sup>39</sup>

At first glance, “[t]his rule [appeared to] ‘. . . be stated clearly enough,’ but in the early going after *Chimel* it proved difficult to apply, particularly in cases that involved searches ‘inside [of] automobile[s] after the arrestees [we]re no longer in [them].’”<sup>40</sup> For this reason, the court in *Tashbaeva* also looked to *New York v. Belton*<sup>41</sup> to determine whether the search and seizure at issue in the instant case, occurring in a vehicle absent the defendant, could be upheld by falling within this “well delineated exception[.]”<sup>42</sup>

In *Belton*, the Supreme Court assessed the lawfulness of police actions, beginning with a routine traffic stop of the defendant for

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<sup>35</sup> 395 U.S. 752 (1969), *abrogated by* *Davis v. United States*, 131 S. Ct. 2419 (2011) (noting that the rule set forth by the Court in *Chimel* was later qualified and clarified by the Court in *Belton*, and then again, by the Court in *Gant*, and the abrogation of the Court’s ruling in *Chimel* occurred because the search had occurred years prior to, and the appeal was merely pending, when the decision in *Gant* was made). In *Davis*, the Court held that “[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.” *Davis*, 131 S. Ct. at 2429.

<sup>36</sup> *Tashbaeva*, 938 N.Y.S.2d at 878.

<sup>37</sup> *Chimel*, 395 U.S. at 768.

<sup>38</sup> *Id.* at 765 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting) (internal quotation marks omitted)).

<sup>39</sup> *Id.* at 768.

<sup>40</sup> *Davis*, 131 S. Ct. at 2424 (quoting *Belton*, 453 U.S. at 458-59) (alterations in original).

<sup>41</sup> 453 U.S. 454 (1981).

<sup>42</sup> *Tashbaeva*, 938 N.Y.S.2d at 876.

speeding.<sup>43</sup> At the time of the stop, the officer observed an envelope in the vehicle with language written on it referencing marijuana.<sup>44</sup> The lower court found this observation coupled with the smell of marijuana enough to give the officer probable cause to arrest the occupants of the car.<sup>45</sup> However, the lower court concluded, searching the car's backseat and seizing cocaine from the car was unreasonable.<sup>46</sup> Reversing the lower court's ruling on appeal,<sup>47</sup> the Supreme Court established that when a police officer makes a lawful arrest of "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."<sup>48</sup>

Nevertheless, the proper application of the aforementioned exception remained disputed, as some "courts read the decision to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee . . . was in reaching distance of the vehicle," while other courts rejected that interpretation of the precedent set forth in *Belton*.<sup>49</sup> Therefore, the court in *Tashbaeva* referred to one final Supreme Court decision, *Arizona v. Gant*,<sup>50</sup> explaining why the search incident to arrest was not applicable under the facts of the instant case.

In *Gant*, the police relied on an anonymous tip to investigate drug sales allegedly occurring in a home.<sup>51</sup> The police knocked on the door of the suspected residence and asked to speak to the owner.<sup>52</sup> The defendant, Gant, opened the door and explained to the officers that he expected the owner to return home later that day.<sup>53</sup> After leaving the residence, an investigative records check revealed that Gant had been driving with a suspended license.<sup>54</sup> Later that evening, the police returned to the home and arrested two people.<sup>55</sup> After se-

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<sup>43</sup> *Belton*, 453 U.S. at 455-56.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 456.

<sup>47</sup> *Id.*

<sup>48</sup> *Belton*, 453 U.S. at 460 (footnotes omitted).

<sup>49</sup> *Davis*, 131 S. Ct. at 2424.

<sup>50</sup> 556 U.S. 332 (2009) (explaining that the precedent set forth in *Belton* was to be limited and that the search incident to arrest doctrine only applies to certain circumstances regarding the vehicle context).

<sup>51</sup> *Id.* at 335.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 335-36.

<sup>54</sup> *Id.* at 336.

<sup>55</sup> *Gant*, 556 U.S. at 336.

curing the arrestees in different police cars, Gant arrived at the residence and was arrested for driving with a suspended license.<sup>56</sup> After arresting Gant, the police proceeded to search his vehicle, discovering and seizing one gun and one bag of cocaine found inside the pocket of Gant's jacket, which was retrieved from the backseat of the car.<sup>57</sup>

When the search and seizure was subsequently challenged in court, the Supreme Court found the search incident to arrest exception inapplicable under these facts.<sup>58</sup> The Court explained that because Gant was arrested at his place of residence and *not* while operating a vehicle, the "police could not reasonably have believed" that Gant could have accessed the car, or reasonably suspected that evidence of the offense would be found in the car.<sup>59</sup> The Supreme Court concluded that "[p]olice may search a vehicle incident to a recent occupant's arrest *only if* the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."<sup>60</sup>

Next, the court in *Tashbaeva* considered how the interval of time that the car was not in police custody affected the lawfulness of the search and seizure.<sup>61</sup> As there was no New York precedent on this specific question, the court looked to cases where an initial warrantless search was conducted lawfully, but the search was delayed.<sup>62</sup> The court in *Tashbaeva* summarily dismissed "[t]he concept of an unlimited ongoing crime scene [rule] to the warrant requirement [because it] has been rejected by the United States Supreme Court."<sup>63</sup>

Thereafter, the court turned to the concept of a preliminary investigation,<sup>64</sup> looking to an in-depth analysis provided by the Supreme Court, Second Department of the Appellate Division, in *People v. Cohen*.<sup>65</sup> The court in *Cohen* distinguished the facts before it

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 344.

<sup>59</sup> *Id.* (explaining that the two justifications for a search incident to arrest are safety concerns in protecting the officer when the arrestee is within reaching distance of the compartment, and when an officer reasonably believes there is a likelihood of finding evidence in the car that is relevant to the offense).

<sup>60</sup> *Gant*, 556 U.S. at 351 (emphasis added).

<sup>61</sup> *Tashbaeva*, 938 N.Y.S.2d at 879.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 879-80.

<sup>65</sup> 450 N.Y.S.2d 497 (App. Div. 2d Dep't 1982).

from those ruled upon in *Mincey v. Arizona*<sup>66</sup> wherein the United States Supreme Court rejected the lawfulness of “an exhaustive and intrusive [warrantless] search” executed over the course of a four-day period,<sup>67</sup> emphasizing the Supreme Court’s reliance on the fact the search was made “for the purpose of finding and seizing evidence to support a prosecution.”<sup>68</sup> Nevertheless, the court in *Cohen* was neither persuaded that the death at the premises, nor allegations of murder was sufficient to give the police legal justification for returning to the unsecured premises and conducting a subsequent warrantless search.<sup>69</sup>

In *Cohen*, the police received a phone call that a shooting occurred at the condominium apartment owned by the Cohen’s.<sup>70</sup> Upon the first responding officer’s arrival at the apartment, the officer encountered the defendant, Patricia Cohen.<sup>71</sup> She led the officer into a bedroom of the apartment where the victim, Doctor Cohen, laid bleeding from a “gunshot wound to [his] head.”<sup>72</sup> The police found an automatic pistol by Doctor Cohen’s side.<sup>73</sup> The defendant claimed that Doctor Cohen had shot himself while they were sleeping.<sup>74</sup> While removing and preparing to transport Doctor Cohen to the hospital, the police seized several items including the gun that was found next to Doctor Cohen, live ammunition, a shell casing, and two notes.<sup>75</sup> The police left the apartment several hours later without locking the door.<sup>76</sup> Yet, after what seemed a haphazard attempt to secure the scene, the police did “arrange to have officers on patrol in the area to keep an eye on the apartment . . . .”<sup>77</sup>

The following day, the Medical Examiner found evidence to suggest that the incident might have been a homicide, as opposed to a suicide.<sup>78</sup> Subsequent to receiving this information, the officers re-

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<sup>66</sup> 437 U.S. 385 (1978).

<sup>67</sup> *Id.* at 389-90.

<sup>68</sup> *Cohen*, 450 N.Y.S.2d at 500 (quoting *People v. Dancy*, 443 N.Y.S.2d 776, 778 (1981)) (internal quotation marks omitted).

<sup>69</sup> *Id.* at 501.

<sup>70</sup> *Id.* at 498.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Cohen*, 450 N.Y.S.2d at 498.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Cohen*, 450 N.Y.S.2d at 498.

turned to the apartment and conducted a “top to bottom” search and seized several more items.<sup>79</sup> The police did not obtain a warrant or even make any effort to do so.<sup>80</sup> In turn, the court suppressed the evidence the police retrieved from the apartment.<sup>81</sup> In making its ruling, the court first turned to *Mincey*, agreeing with the court’s rationale:

We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. . . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.<sup>82</sup>

Accordingly, the court in *Cohen* observed that “when a constitutionally protected area becomes the scene of a crime, the police may subject the premises to a preliminary search and inspection whose scope and duration must be limited by and reasonably related to the exigencies of the situation.”<sup>83</sup> Nevertheless, as the Supreme Court likewise concluded in *Mincey*, the court in *Cohen* found that “[o]nce that preliminary investigation has come to an end . . . no further searches for evidence may be conducted on the premises unless authorized by a warrant.”<sup>84</sup>

The court in *Cohen* explained that while police are authorized to conduct a preliminary investigation on the premises of a crime scene, this initial investigation is “limited by and [must be] reasonably related to the exigencies of the situation.”<sup>85</sup> The court further acknowledged that the lack of an ongoing police presence after the officers initially left the scene was a significant factor in its determi-

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<sup>79</sup> *Id.* (internal quotation marks omitted).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 499.

<sup>82</sup> *Id.* at 500 (quoting *Mincey*, 437 U.S. at 392-93) (citations omitted).

<sup>83</sup> *Cohen*, 450 N.Y.S.2d at 501.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

nation because the crime scene was left unattended and not protected from undue interference.<sup>86</sup> Thus, the court in *Cohen* held that it was unlawful for the police to have left the crime scene, leaving it unguarded for several hours, and then returning to the scene without a search warrant and collecting incriminating evidence.<sup>87</sup>

Accepting the reasoning set forth in *Cohen*, but seeking further guidance on the impact of and precedent governing an ongoing crime scene and a preliminary investigation, the court in *Tashbaeva* then turned to *People v. Neulist*<sup>88</sup> for guidance.<sup>89</sup> In *Neulist*, the police responded to the scene of an alleged accident and the preliminary investigation revealed that the victim died as a result of an aneurysm; however, several hours later, an autopsy revealed a bullet, which led the police to believe that a homicide occurred.<sup>90</sup> While the initial responding officers did not remain present at the crime scene, another officer safeguarded it.<sup>91</sup>

Relying heavily on the ongoing police presence at the crime scene, the court concluded that the subsequent search and seizure was lawful, and therefore the evidence seized from the scene was admissible against the defendant.<sup>92</sup> The court explained, “Although the initial police intrusion was for the purpose of investigating the scene and the cause of a death, the subsequent search, once criminality had been established, was but an extension or continuation of the initial investigation.”<sup>93</sup> In arriving at this conclusion, the court rejected “the line drawn by the County Court in scale or scope between the initial investigation of the decedent’s death and the subsequent search of the premises . . . .”<sup>94</sup> Instead, the court in *Neulist* looked to “the broad and indisputably necessary and proper authority granted to a medical examiner” whose duty it is to review the evidence and draw conclusions based upon it, and thus, was persuaded that the police acted within their authority to return to the scene and conduct a subsequent

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<sup>86</sup> *Id.* (noting that the officers’ patrol outside of the apartment building did not suffice to safeguard the crime scene).

<sup>87</sup> *Id.*

<sup>88</sup> 350 N.Y.S.2d 178 (App. Div. 2d Dep’t 1973).

<sup>89</sup> *Tashbaeva*, 938 N.Y.S.2d at 880.

<sup>90</sup> *Neulist*, 350 N.Y.S.2d at 181.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 183.

<sup>93</sup> *Id.* (footnote omitted).

<sup>94</sup> *Id.*

search.<sup>95</sup> While at first glance, the facts in *Neulist* seem to resemble those in *Cohen*, in which the court arrived at the opposite conclusion, pertinent to the court's decision was "[t]he posting of a police guard at the bedroom door [which] served not only to prevent the destruction or removal of any potential evidence but also to establish a continued and legally proper police presence on the scene."<sup>96</sup>

In turn, giving weight to the lack of an ongoing police presence at the scene in the instant case, the court in *Tashbaeva* finally turned to *People v. Dancey*,<sup>97</sup> distinguishing the facts relied upon in *Dancey* from those before it.<sup>98</sup> Specifically, although the motion to suppress pertained to evidence seized in a subsequent warrantless entry and exploration of a crime scene whereby "the investigating detective went to the apartment . . . already occupied by a police guard," the court's ruling in *Dancey* was less reliant upon the ongoing police presence or the continuum of a preliminary investigation; instead, the court found the evidence was not seized by a search since the evidence "was [discovered] in plain view."<sup>99</sup>

In *Dancey*, the defendant told the police that her baby was locked inside her apartment and was in a plastic bag.<sup>100</sup> The police found the baby in a closet "apparently deceased" and despite "rush[ing] the baby to the hospital," the attending doctor was unable to save its life.<sup>101</sup> Thereafter, upon taking the defendant to the local precinct where she was subjected to routine questioning about the incident, the defendant confessed that she had attempted to kill the child.<sup>102</sup> During the interval of time between when the baby was initially brought to the hospital and the defendant was brought to the precinct, an officer guarded the crime scene at the apartment.<sup>103</sup> At trial, it was attested that "[a]s a crime scene, the police believed it was necessary [for an officer to stand guard] to prevent any possible intrusion into, or disruption of, the apartment which might result in the loss of relevant evidence."<sup>104</sup>

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<sup>95</sup> *Neulist*, 350 N.Y.S.2d at 183.

<sup>96</sup> *Id.*

<sup>97</sup> 443 N.Y.S.2d 776 (App. Div. 2d Dep't 1981).

<sup>98</sup> *Tashbaeva*, 938 N.Y.S.2d at 880.

<sup>99</sup> *Dancey*, 443 N.Y.S.2d at 777-78.

<sup>100</sup> *Id.* at 777.

<sup>101</sup> *Id.* (internal quotation marks omitted).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Dancey*, 443 N.Y.S.2d at 777.

After the defendant confessed, a detective returned to the apartment, allegedly “to better view the physical layout of the place in order to better understand the statements that [had been] given to him.”<sup>105</sup> When the purported search was later challenged at trial, the investigating detective contended that “[h]is purpose [in returning to and entering the apartment] was [neither] to search the premises, nor to gather evidence.”<sup>106</sup> Arguably, as such purpose was in part, the basis in *Mincey* for the Supreme Court rejecting the constitutionality of the subsequent search challenged therein, such contention was made strategically to avoid suppression.<sup>107</sup>

Nevertheless, while the detective was inside of the apartment, he observed a note in plain view that contained information incriminating the defendant, and thus, the note was seized.<sup>108</sup> Thereafter, when back at the precinct, the detective asked the defendant if she wrote the note that he retrieved from the apartment and “[s]he acknowledged that she had.”<sup>109</sup> Thus, upon review, a dual inquiry was required in order for the court to determine whether the note was admissible.<sup>110</sup> First, the court in *Dancey* had to determine whether a search had occurred, and second, if it had, whether the fruits seized without a warrant were admissible, falling within one of the recognized exceptions to the warrant clause.<sup>111</sup> At the outset, it is noteworthy that the court considered both *Neulist* and *Mincey*, observing that the police presence justified the search under *Neulist* and the facts before it differed from those in *Mincey* because unlike in *Mincey* the detective was not “there for the purpose of finding and seizing evidence to support a prosecution.”<sup>112</sup> However, it was neither the police presence nor the intent of the investigating detective that justified its rul-

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<sup>105</sup> *Id.* at 777-78.

<sup>106</sup> *Id.* at 777.

<sup>107</sup> Compare *Mincey*, 437 U.S. at 395 (holding that “the warrantless search of [the defendant’s] apartment [for the purpose of gathering evidence to substantiate the crime suspected] was not constitutionally permissible simply because a homicide has recently occurred there”), with *Dancey*, 443 N.Y.S.2d at 777-78 (noting that the detective alleged and the court accepted that “[t]he detective was not there to search the premises, nor to gather evidence,” but that he nevertheless returned to the scene, entered the apartment, and seized evidence that helped him to *understand* the defendant’s incriminating statements).

<sup>108</sup> *Dancey*, 443 N.Y.S.2d at 778.

<sup>109</sup> *Id.* at 778.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

ing.<sup>113</sup> Rather, the court in *Dancey* concluded that the detective's subsequent "entrance into the apartment constituted no more of an intrusion into defendant's privacy than did the legitimate presence of the police guard" at the premises.<sup>114</sup> Moreover, the court found that the note discovered therein was not seized "pursuant to a search" because "[i]t was in plain view."<sup>115</sup> Therefore, construing "the police presence in the apartment [as a legitimate response to the exigent need to safeguard the crime scene," the court in *Dancey* determined that "the detective's appearance [at the scene] and activities [therein] did not exceed the ambit of that presence, [and thus] the detective had the right to seize evidence in plain view."<sup>116</sup>

#### IV. THE HOLDING IN *TASHBAEVA*

After carefully reviewing each of the relevant doctrines and the applicable precedent, as set forth above, the court in *Tashbaeva* explained:

[While m]indful of the automobile exception, which often allows the warrantless seizure of an automobile itself due to its inherent mobility, and that the incriminating evidence in the instant case was observed in plain view during the preliminary investigation . . . the officer's previous plain view observation of the bottles did not provide the predicate for a warrantless seizure on the following day.<sup>117</sup>

In addition, the court took note that "there was no impediment to Officer Tabora's ability to obtain a warrant since [in fact] he had been to the District Attorney's office and met with an Assistant District Attorney [to discuss the case] before returning to [the crime scene] to secure the evidence."<sup>118</sup> Therefore, the court concluded that "[o]nce there is an interruption in their control and custody of a crime scene the police are required to obtain a warrant in order to retrieve any evidence therefrom[,] and thus, the seizure of the two bottles was un-

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<sup>113</sup> *Dancey*, 443 N.Y.S.2d at 778.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

<sup>117</sup> *Tashbaeva*, 938 N.Y.S.2d at 881.

<sup>118</sup> *Id.* at 881-82.

lawful.<sup>119</sup>

This holding was consistent with both federal and state precedent, as the court justified its ruling based upon three pertinent observations supported by the case law it explored.<sup>120</sup> First, the court considered “the fact that the vehicle remained unsecured by a police presence during the entire interval between defendant’s arrest and the seizure . . . .”<sup>121</sup> Second, the court recognized “the [unnecessary and unwarranted] lapse of time between the plain view observations and the seizure of the bottles . . . .”<sup>122</sup> Finally, the court observed that the seizure was made in “the absence of any exigent circumstances,” as the prosecution put forth no facts to suggest that the circumstances surrounding the defendant’s arrest and/or Officer Tabora’s preliminary investigation impeded his ability to seize the evidence observed in plain view.<sup>123</sup> In fact, the notion of immediacy tending to support a finding of exigent circumstances, such as a threat to the preservation of evidence, was not served by, but rather, put at risk by Officer Tabora’s “delayed retrieval of evidence.”<sup>124</sup> Accordingly, directing that “a warrantless seizure may not . . . be predicated upon an earlier plain view observation of the subject evidence[,]” the court in *Tashbaeva* upheld the defendant’s right to privacy and security in the contents of his vehicle, as guaranteed by the Fourth Amendment.<sup>125</sup>

This Note will explore the federal and New York State precedent regarding each of the renowned exceptions to the warrant clause, including exigent circumstances, the plain view doctrine, and the search incident to a lawful arrest, as well as consider the scope and duration of a preliminary investigation and ongoing crime scene rule, which rule has been rejected by the United States Supreme Court, but nevertheless, relied upon by New York State courts in limited circumstances. While the federal and state approaches are similar, these doctrines are neither applied nor interpreted precisely the same in state and federal court. All of these doctrines, when viewed in the aggregate, assisted the court in *Tashbaeva* in making its ruling. Thus, in order to understand the constitutional implications of the subse-

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 881.

<sup>121</sup> *Id.*

<sup>122</sup> *Tashbaeva*, 938 N.Y.S.2d at 881.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 876.

quent search and seizure that was at issue in *Tashbaeva*, it is imperative to analyze each of these concepts independently.

## V. FEDERAL PRECEDENT

The Fourth Amendment of the United States Constitution protects

[t]he 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.<sup>126</sup>

The Fourth Amendment exists for the purpose of protecting the American citizenry from “unreasonable searches and seizures” conducted by officers acting in their official capacity.<sup>127</sup> As a general rule, government officials need both probable cause and a warrant in order to conduct a valid search under the Fourth Amendment.<sup>128</sup>

Since the United States Supreme Court rendered its decision in *Katz v. United States*,<sup>129</sup> the Court has endeavored to carefully limit the types and the scope of searches and seizures that will be found reasonable without a warrant. In *Katz*, the defendant was suspected of transferring illegal gambling and wagering information in violation of a federal statute.<sup>130</sup> Thus, in order to confirm or dismiss these suspicions, FBI agents attached an electronic surveillance device to the outside of a telephone booth in which the defendant used regularly.<sup>131</sup> In doing so, the FBI agents were able to listen to and record all of the conversations of the defendant occurring within the telephone booth.<sup>132</sup> When the defendant challenged the police action, seeking to suppress the evidence obtained as a result, the Supreme Court observed that the police unconstitutionally obtained information by tap-

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<sup>126</sup> U.S. CONST. amend. IV.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> 389 U.S. 347 (1967).

<sup>130</sup> *Id.* at 348.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

ping a public phone booth.<sup>133</sup>

While the Court explained that “the Fourth Amendment protects people, not places,” the Court further emphasized that the place in which a person occupies does in fact affect the degree and/or expectation of privacy that a person shall possess.<sup>134</sup> Moreover, the Court observed that as a general rule “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>135</sup> Nevertheless, looking to the facts in the instant case whereby the defendant was viewable by the public from within the booth, but purposefully made entry and closed the door behind him, the Court concluded that “what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>136</sup> In turn, the precedent set forth by the Court in *Katz* set the stage for search and seizure jurisprudence.<sup>137</sup>

#### A. Exigent Circumstances and the Plain View Doctrine

The Supreme Court in *Terry v. Ohio*<sup>138</sup> narrowly interpreted the Fourth Amendment, providing the police with more leeway in conducting searches and seizures.<sup>139</sup> In doing so, the Court in *Terry* did not discount the deep-rooted history of the Fourth Amendment, but cognizant to the fact that societal changes have an inevitable effect on the enforcement of the law, the Court recognized that circumstances exist in which it impracticable for the police to secure a warrant.<sup>140</sup> As a result, the Court established an “exigent circumstances” exception under which a search and seizure in the absence of probable cause or a warrant may be found lawful.<sup>141</sup> The Court reasoned

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<sup>133</sup> *Id.* at 359.

<sup>134</sup> *Katz*, 389 U.S. at 351.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (observing the move from protecting property rights to protecting privacy rights, as exemplified by the famous quote, “[T]he Fourth Amendment protects people, not places”).

<sup>137</sup> See *Coolidge*, 403 U.S. at 443 (observing the scope and limitations of the plain view doctrine); see also *Arizona v. Hicks*, 480 U.S. 321 (1987) (holding that probable cause is required to seize an item in plain view); *Mincey*, 437 U.S. at 385 (holding that a prompt warrantless search can be made for the purpose of protection).

<sup>138</sup> 392 U.S. 1 (1968).

<sup>139</sup> *Id.* at 30.

<sup>140</sup> *Id.* at 20.

<sup>141</sup> *Id.*

that there are certain times where the immediacy of a situation requires that an officer conduct a search of a person, recognizing that the immediate safety of the officer in his or her investigation is one justification.<sup>142</sup> However, the Supreme Court attempted to refrain from creating a broad exception to the warrant clause, explaining that in order to invoke the exigent circumstances exception, an officer must have reasonable suspicion before proceeding with the search of a person when less than probable cause is present, or no warrant has been obtained.<sup>143</sup>

The Court in *Coolidge v. New Hampshire*<sup>144</sup> explored a number of exceptions to the warrant requirement.<sup>145</sup> In *Coolidge*, the defendant was arrested after an investigation ensued regarding the murder of a young fourteen-year-old girl.<sup>146</sup> The police spoke with the defendant at his home subsequent to the murder, and the defendant, upon request, produced three guns he owned.<sup>147</sup> He also agreed to submit to a lie detector test regarding his whereabouts on the night of the murder to be held later that week.<sup>148</sup> On the day of the test, two plain-clothed officers went to the defendant's home and spoke with his wife, who eventually produced four guns and clothes that might have linked the defendant to the murder.<sup>149</sup> After obtaining this evidence, the police continued their investigation until a hearing between the police and the State Attorney General was held in order for the police to get an arrest and search warrant.<sup>150</sup> Upon arrest later that day, pursuant to a search warrant for the vehicles, the police impounded the vehicles and on several occasions performed a sweep of them for evidence.<sup>151</sup> The Court agreed that the warrant was invalid, and therefore, observed that the search and seizure of the vehicles would not be upheld unless an exception was found to be applicable.<sup>152</sup>

The Government argued several exceptions applied, including

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<sup>142</sup> *Id.* at 27.

<sup>143</sup> *Terry*, 392 U.S. at 30.

<sup>144</sup> 403 U.S. 443 (1971).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 445-46.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 446.

<sup>149</sup> *Coolidge*, 403 U.S. at 446.

<sup>150</sup> *Id.* at 446-47.

<sup>151</sup> *Id.* at 447.

<sup>152</sup> *Id.* at 449, 453.

the search incident to arrest exception and the plain view doctrine.<sup>153</sup> The law has long recognized “that under certain circumstances the police may seize evidence in plain view without a warrant.”<sup>154</sup> Thus, the State proposed that because the car seized was in plain view, both the warrantless seizure and subsequent search at the police station did not undermine the rights guaranteed by the Fourth Amendment.<sup>155</sup> However, the Supreme Court explained that two requirements must be met for a plain view observation to be reasonable.<sup>156</sup> First, the Court expressed “that plain view alone is never enough to justify the warrantless seizure of evidence.”<sup>157</sup> Second, the Court reiterated the inadvertence requirement, meaning that the item seized cannot be the focus of the search, or anticipated before the search commences.<sup>158</sup> Hence, the Court explained that the police may only rely upon the plain view exception when the items were observed incidentally as a result of a justified search.<sup>159</sup> The Court directed that this exception is not intended to justify a search on its own with nothing more, and “no amount of probable cause can justify a warrantless search or seizure absent ‘exigent circumstances.’”<sup>160</sup> Therefore, the seizure of the car in this particular case was unlawful because the officers could have and should have obtained a valid warrant.<sup>161</sup>

In *Horton v. California*,<sup>162</sup> the Court looked at the second limitation set forth in *Coolidge*, one of inadvertence, determining that this limitation to a plain view observation was not necessary to make a lawful seizure of an item, so long as the other conditions are satisfied.<sup>163</sup> In *Horton*, an officer acted upon probable cause to search the defendant’s home for the proceeds of a robbery and any weapons that might have been used during the crime.<sup>164</sup> The search warrant that was granted did not enumerate any weapons, but did specifically au-

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<sup>153</sup> *Id.* at 453-55, 464.

<sup>154</sup> *Coolidge*, 403 U.S. at 465.

<sup>155</sup> *Id.* at 464.

<sup>156</sup> *Id.* at 468.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 469-70.

<sup>159</sup> *Coolidge*, 403 U.S. at 469-70.

<sup>160</sup> *Id.* at 468.

<sup>161</sup> *Id.* at 472-73.

<sup>162</sup> 496 U.S. 128 (1990).

<sup>163</sup> *Id.* at 130.

<sup>164</sup> *Id.* at 130-31.

thorize police to search for the proceeds from the robbery.<sup>165</sup> During the search, the police found several guns in plain view and seized them.<sup>166</sup> The defendant argued that the discovery of the weapons was not inadvertent because although the search warrant failed to enumerate weapons, a supporting affidavit from the police officer mentioned them.<sup>167</sup> In turn, the Court concluded inadvertence is not a necessary condition to a plain view observation and subsequent seizure.<sup>168</sup>

The Court in *Horton* also refined the precedent of the plain view doctrine.<sup>169</sup> In addition to the limitation set forth by *Coolidge* “that plain view alone is never enough to justify the warrantless seizure of evidence[,]”<sup>170</sup> the Court in *Horton* set forth three conditions that must be met in order to invoke the doctrine.<sup>171</sup> First, the officer must have lawfully arrived at the place where the evidence was plainly viewed.<sup>172</sup> Second, it is not enough that the item is in plain view, but “its incriminating character must also be ‘immediately apparent.’”<sup>173</sup> Third, the officer must “have a lawful right of access to the object itself.”<sup>174</sup>

In *Arizona v. Hicks*,<sup>175</sup> a man was injured in his apartment when a bullet was fired through the floor and hit him.<sup>176</sup> The police entered the respondent’s apartment where they found and seized three weapons.<sup>177</sup> While in the apartment, Officer Nelson observed stereo components that seemed expensive and looked displaced.<sup>178</sup> He suspected that it may have been stolen, so he moved the items to view the serial numbers, and then proceeded to write the information down.<sup>179</sup> After tracing the serial numbers, the police discovered they

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<sup>165</sup> *Id.* at 131.

<sup>166</sup> *Id.*

<sup>167</sup> *Horton*, 496 U.S. at 131.

<sup>168</sup> *Id.* at 136-37.

<sup>169</sup> *Id.* at 136.

<sup>170</sup> *Coolidge*, 403 U.S. at 468.

<sup>171</sup> *Horton*, 496 U.S. at 136.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (quoting *Hicks*, 480 U.S. at 326-27).

<sup>174</sup> *Id.* at 137.

<sup>175</sup> 480 U.S. 321 (1987).

<sup>176</sup> *Id.* at 323.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

were linked to an armed robbery.<sup>180</sup> The Supreme Court in *Hicks* further clarified the scope of the plain view doctrine, explaining “probable cause is required” to seize an item.<sup>181</sup> The court explained that although seizing an item requires probable cause, “the *search* of objects in plain view that occurred here could be sustained on lesser grounds.”<sup>182</sup> The State conceded that Officer Nelson only had reasonable suspicion, even though the court said that moving the components would have been a valid plain view observation under these circumstances.<sup>183</sup> Although the *search* could have been found proper on lesser grounds, the *seizure* nonetheless required probable cause.<sup>184</sup> Due to the State’s concession that the officer only had reasonable suspicion, the Court ruled that the seizure was unlawful.<sup>185</sup> The Court decided this because it wanted to maintain that police officers can seize objects in plain view, but at the same time, it wanted to afford protections against arbitrary seizures. The Court therefore required probable cause to seize the item in plain view, a higher standard than the reasonable suspicion the officer conceded.

### B. The Search Incident to Arrest Exception

In addition to the plain view exception, another controversial and complex area is the search incident to an arrest exception.<sup>186</sup> The seminal case in this area is *Chimel v. California*.<sup>187</sup> In *Chimel*, police officers arrived at the defendant’s home with a valid arrest warrant due to their belief that he was connected to a recent burglary of a coin shop.<sup>188</sup> The defendant’s wife gave the police permission to enter their home.<sup>189</sup> However, the defendant was not home at the time.<sup>190</sup> The police waited approximately ten to fifteen minutes for the de-

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<sup>180</sup> *Hicks*, 480 U.S. at 3263.

<sup>181</sup> *Id.* at 326.

<sup>182</sup> *Id.* at 327-28 (observing that unlike a seizure which now requires probable cause, the search leading up the a potential seizure could be upheld in the future on lesser grounds than probable cause).

<sup>183</sup> *Id.* at 326.

<sup>184</sup> *Id.* at 327-28.

<sup>185</sup> *Hicks*, 480 U.S. at 327-28.

<sup>186</sup> WARD, *supra* note 3.

<sup>187</sup> *Chimel*, 395 U.S. at 752.

<sup>188</sup> *Id.* at 753.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

fendant to return, at which time they made the arrest.<sup>191</sup> The police then requested permission to search and the defendant expressly refused.<sup>192</sup> The police, without a search warrant, searched the home regardless of the lack of consent, and seized several incriminating items.<sup>193</sup> The Court identified two significant instances that might justify a search incident to arrest.<sup>194</sup> First, a warrantless search may be upheld if necessary for the protection of the police officer or others nearby.<sup>195</sup> Moreover, the search might be found lawful if necessary to safeguard evidence that could be destroyed.<sup>196</sup> The Court held that “[t]here is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”<sup>197</sup>

The Court expanded and clarified the precedent set forth in *Chimel in Belton*, addressing the issue of how a search incident to arrest applies in the automobile context.<sup>198</sup> In *Belton*, a state trooper pulled over a vehicle that contained four people.<sup>199</sup> The trooper determined that neither the passengers nor the driver owned the car or were even related to the owner of the car.<sup>200</sup> The trooper sensed the smell of marijuana and saw an item in the car that was commonly linked to drugs.<sup>201</sup> He removed the occupants from the car, placed each under arrest, and patted them down.<sup>202</sup> The trooper then split them apart far enough so that they physically could not reach the other.<sup>203</sup> Thereafter, the trooper entered the vehicle in order to search the passenger compartment and open the pocket of a jacket on the back seat, at which time the trooper discovered cocaine.<sup>204</sup> When the search and seizure was challenged as unconstitutional at trial, the Court observed that as an incident to an arrest, an officer may search

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<sup>191</sup> *Id.*

<sup>192</sup> *Chimel*, 395 U.S. at 753-54.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 763.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Chimel*, 395 U.S. at 763.

<sup>198</sup> *Belton*, 453 U.S. at 454.

<sup>199</sup> *Id.* at 455.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 455-56.

<sup>202</sup> *Id.* at 456.

<sup>203</sup> *Belton*, 453 U.S. at 456.

<sup>204</sup> *Id.*

the passenger compartment of a vehicle and all of the containers in the vehicle, even if the arrestee could not gain access to the vehicle during the time of the search.<sup>205</sup> The Court concluded, consistent with the precedent in *Chimel*, that the jacket was within the immediate control of the arrestee, and therefore, the search and seizure was lawful and reasonable under the circumstances.<sup>206</sup>

However, as a result of the varying applications of the rule as set forth by the Court in *Belton*, the Supreme Court in *Gant* granted certiorari, and in turn, limited the scope of the search incident to arrest exception.<sup>207</sup> In *Gant*, the defendant was arrested for driving with a suspended license.<sup>208</sup> After being handcuffed and locked in a patrol car, the police searched the defendant's car and found cocaine in the pocket of a jacket.<sup>209</sup> The Court held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."<sup>210</sup> The Court further explained that this rule exists for police safety and the preservation of evidence, without which the "search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or . . . another exception to the warrant requirement applies."<sup>211</sup>

### C. Preliminary Investigation Concept

In *Flippo v. West Virginia*,<sup>212</sup> the Court addressed an issue with regard to preliminary investigation. In *Flippo*, the petitioner called the police, informing them that he and his wife were attacked.<sup>213</sup> When the police arrived, they found the petitioner severely injured.<sup>214</sup> The petitioner's wife was discovered dead with head wounds.<sup>215</sup> Without a warrant, for the following sixteen hours, the

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<sup>205</sup> *Id.* at 457.

<sup>206</sup> *Id.* at 462-63.

<sup>207</sup> *Gant*, 556 U.S. at 347.

<sup>208</sup> *Id.* at 335.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 351.

<sup>211</sup> *Id.*

<sup>212</sup> 528 U.S. 11, 14 (1999).

<sup>213</sup> *Id.* at 12.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

police searched for, photographed, and seized evidence in the cabin in which the body was found.<sup>216</sup> Thereafter, the petitioner sought to suppress the evidence retrieved from the cabin, “argu[ing] that the police had obtained no warrant, and that no exception to the warrant requirement justified the search and seizure.”<sup>217</sup> The Court rejected to observe the purported “ ‘crime scene exception’ to the warrant requirement of the Fourth Amendment.”<sup>218</sup> The Court further explained that the police could not justify a warrantless search of the cabin based solely on the fact that a crime occurred in that area.<sup>219</sup> The Court held that the “police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises.”<sup>220</sup>

In *Mincey*, a narcotics raid resulted in the death of an officer at the defendant’s home.<sup>221</sup> The narcotics agents raided the house, secured the scene, and performed a brief search in an effort to look for other individuals.<sup>222</sup> Thereafter, homicide agents arrived and commenced a four-day long search.<sup>223</sup> The Court explained that officers may only “make a prompt warrantless search of the area” for their protection and the protection of possible victims or civilians in that house.<sup>224</sup> The Court further recognized that a four-day warrantless search of the home was entirely unreasonable.<sup>225</sup> The Court noted that the search conducted was not prompt and overly exhaustive.<sup>226</sup> Thus, the evidence seized from the scene was suppressed.<sup>227</sup>

## VI. NEW YORK STATE PRECEDENT

“[A]lthough the history and identical language of the State and Federal constitutional privacy guarantees . . . generally support a

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<sup>216</sup> *Id.*

<sup>217</sup> *Flippo*, 528 U.S. at 12.

<sup>218</sup> *Id.* at 13.

<sup>219</sup> *Id.* at 14.

<sup>220</sup> *Id.*

<sup>221</sup> *Mincey*, 437 U.S. at 387.

<sup>222</sup> *Id.* at 388.

<sup>223</sup> *Id.* at 388-89.

<sup>224</sup> *Id.* at 392.

<sup>225</sup> *Id.* at 393.

<sup>226</sup> *Mincey*, 437 U.S. at 389.

<sup>227</sup> *Id.* 389-90.

‘policy of uniformity,’ [the New York Court of Appeals] has demonstrated its willingness to adopt more protective standards under the State Constitution.”<sup>228</sup> As the New York Court of Appeals has observed, “It is fundamental that warrantless searches and seizures are per se unreasonable unless they fall within one of the acknowledged exceptions to the Fourth Amendment’s warrant requirement.”<sup>229</sup>

### A. The Plain View Doctrine

New York State Courts have recognized several exceptions to the warrant requirement. One of the most controversial, complex, and comprehensive exceptions is the plain view doctrine. In order to invoke the plain view doctrine as an exception justifying a warrantless seizure, three requirements must be met: “(1) the police [must be] lawfully in the position from which the object is viewed; (2) the police [must] have lawful access to the object; and (3) the object’s incriminating nature [must be] immediately apparent.”<sup>230</sup>

In *People v. Spinelli*,<sup>231</sup> two trucks were reported as hijacked.<sup>232</sup> The trucks were later found in the rear of the defendant’s place of business through a confidential informant.<sup>233</sup> An officer from a public spot observed the two trucks and determined that they were the stolen vehicles.<sup>234</sup> The police then arrested the defendant on unrelated charges.<sup>235</sup> After the arrest, they verified the vehicles were stolen, proceeded to the back of the business without a search warrant, and searched the cars for information.<sup>236</sup> The court in *Spinelli* adopted the following rule from the United States Supreme Court decision in *Coolidge*.<sup>237</sup> The court reiterated two caveats to the plain view doctrine including: (1) a plain view observation is never suffi-

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<sup>228</sup> *People v. Torres*, 543 N.E.2d 61, 63 (N.Y. 1989) (citations omitted).

<sup>229</sup> *People v. Diaz*, 612 N.E.2d 298, 300 (N.Y. 1993), *abrogated by* *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (relying on the same reasoning set forth by the Court in *Katz*, 389 U.S. 347).

<sup>230</sup> *Id.* at 301 (citations omitted).

<sup>231</sup> 315 N.E.2d 792 (N.Y. 1974).

<sup>232</sup> *Id.* at 793.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Spinelli*, 315 N.E.2d at 793.

<sup>237</sup> *Id.* at 794 (stating that when a law enforcement official observes an item in plain view, it does not follow that the officer can conduct a warrantless search and seizure without any restrictions).

cient by itself to “justify a warrantless search and seizure,” and (2) a plain view observation must be inadvertent, and in no way anticipated.<sup>238</sup> The court further held that “it makes no difference if the article seized is ‘mere evidence,’ contraband or evidence of the crime or fruits of the crime.”<sup>239</sup>

In *People v. Wasserman*,<sup>240</sup> the defendant was charged with the murder of his wife.<sup>241</sup> He reported her missing to the police and her body was ultimately found behind the defendant’s place of business.<sup>242</sup> During a lawful search of his apartment, a detective who specialized in serology and blood-related evidence found five pieces of evidence allegedly in plain view, seizing them for further inspection.<sup>243</sup> The court found that four of the five seized items were admissible, and that the fifth was inadmissible because it was not in plain view.<sup>244</sup> The court in *Wasserman*, as a result, did away with the inadvertence condition, which meant that the object seized could not have been the item being specifically searched for.<sup>245</sup> The court observed that “the element of inadvertence, required when *Spinelli* was decided, is no longer necessary in New York to seize evidence pursuant to the plain view exception.”<sup>246</sup>

In *People v. Brown*,<sup>247</sup> the defendant allegedly stole a tractor.<sup>248</sup> He requested the help of a friend in switching the vehicle identification numbers with another tractor, but that friend refused to participate.<sup>249</sup> The friend reported the defendant’s plan to the police, and the police ultimately obtained a search warrant for “the stolen tractor’s ignition key, the missing VIN plate, [a] steel chain, the top link bar” and anything else that may be considered contraband.<sup>250</sup> While searching for the items, the police discovered several guns.<sup>251</sup> The

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (citations omitted).

<sup>240</sup> 668 N.Y.S.2d 314, 315 (Sup. Ct. 1997).

<sup>241</sup> *Id.* at 315.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 317.

<sup>244</sup> *Id.* at 318.

<sup>245</sup> *Wasserman*, 668 N.Y.S.2d at 317 (explaining that the condition of inadvertence is unnecessary and impractical).

<sup>246</sup> *Id.* at 317.

<sup>247</sup> 749 N.E.2d 170 (N.Y. 2001).

<sup>248</sup> *Id.* at 172.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 173.

<sup>251</sup> *Id.*

court explained that the legal presence of the police to physically view and seize the evidence in question was critical to its determination of whether the search could be upheld under the plain view doctrine.<sup>252</sup>

The court further emphasized that the warrant is what defines “the permissible scope and intensity of the search.”<sup>253</sup> There are two conditions that the court sets out that must be satisfied for this kind of seizure to be lawful.<sup>254</sup> These conditions include: “(i) f[inding] the item in a place where one reasonably would have expected to look while searching for an object particularly described and (ii) f[inding] it before they found all the objects described in the valid portion of the warrant.”<sup>255</sup> In turn, the court determined that the seizure of the guns was lawful because the police sufficiently proved the two conditions required in meeting their burden of introducing this kind of plain view evidence.<sup>256</sup>

In *People v. Batista*,<sup>257</sup> the plain view doctrine was again explored and further clarified.<sup>258</sup> In *Batista*, the police got a search warrant for an apartment, which they suspected was being utilized for the possession, packaging, and selling of cocaine and crack-cocaine.<sup>259</sup> During the search, the doorbell for the apartment rang.<sup>260</sup> The police permitted the person to enter into the apartment, but did not notify him of their presence.<sup>261</sup> When the person entered into the apartment, the police sprung out and ordered him to put his hands up.<sup>262</sup> As a result of his arms being raised, a brown paper bag fell to the floor.<sup>263</sup> The officer immediately concluded it contained narcotics.<sup>264</sup> The officer then opened the bag and discovered cocaine.<sup>265</sup>

When the seizure of the drugs obtained in the course of the search was challenged, the court reviewed the facts surrounding the

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<sup>252</sup> *Brown*, 749 N.E.2d at 177.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 178.

<sup>257</sup> 690 N.Y.S.2d 536 (App. Div. 1st Dep’t 1999).

<sup>258</sup> *Id.* at 538.

<sup>259</sup> *Id.* at 537.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Batista*, 690 N.Y.S.2d at 537.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 538.

search and seizure by analyzing the three conditions to the plain view exception.<sup>266</sup> In turn, the court concluded that the first two requirements were satisfied; however, the third condition begged for a more scrutinized analysis.<sup>267</sup> To determine whether the incriminating nature of the package was immediately apparent, the court established a standard setting forth that probable cause is required in associating the property with criminal activity.<sup>268</sup> Probable cause existed because the police were in an area lawfully sanctioned by a warrant, and while in that area, were conducting a search for drugs.<sup>269</sup> Therefore, the search and seizure of the bag was reasonable because probable cause existed.<sup>270</sup>

In *People v. Johnson*,<sup>271</sup> while lawfully investigating a radio report regarding an assault, an arresting officer noticed, in plain view, the handle of a gun in the back of the defendant's double-parked car.<sup>272</sup> The court first acknowledged that the invocation of the plain view exception was not precluded, merely because the officer admitted that he was initially unsure of what the black object was.<sup>273</sup> The court reiterated that near certainty is not required to invoke the plain view doctrine, but rather if the circumstances of the case would lead a person of reasonable caution to believe that the item may be contraband.<sup>274</sup> As part of the officer's testimony, he stated that the defendant spoke of "want[ing] . . . vengeance" on certain people.<sup>275</sup> In turn, this observation was sufficient to find that the officer acted with probable cause to seize the weapon, even though he was not entirely sure of what the object truly was.<sup>276</sup> There was also sufficient evidence provided that a "factfinder could infer that [the] defendant exercised dominion and control over the gun that was found behind the driver's seat of his nearby car."<sup>277</sup> Therefore, the court properly de-

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<sup>266</sup> *Id.*

<sup>267</sup> *Batista*, 690 N.Y.S.2d at 540.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> 802 N.Y.S.2d 830 (App. Div. 1st Dep't 2005).

<sup>272</sup> *Id.* at 831.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Johnson*, 802 N.Y.S.2d at 831.

<sup>277</sup> *Id.* (citations omitted).

nied the defendant's motion to suppress.<sup>278</sup>

In *People v. Ballard*,<sup>279</sup> the defendant was charged and convicted with the criminal sale of a controlled substance.<sup>280</sup> The court resolved the first issue of when handcuffs were placed on the defendant.<sup>281</sup> In reviewing the record, the court found it sufficient to support a finding that the officer had probable cause to arrest the defendant.<sup>282</sup> After the arrest was made, an officer with narcotics experience made a plain view observation of a bag that resembled cocaine.<sup>283</sup> The court held that the plain view doctrine justified the seizure of the bag, and that the motion to suppress the evidence was properly denied.<sup>284</sup>

In *People v. McEniry*,<sup>285</sup> the defendant appealed a conviction including the possession of a controlled substance and the operation of a motor vehicle under the influence of drugs.<sup>286</sup> The defendant's van had collided with a police car that was extended into the street.<sup>287</sup> After the collision, the police officer entered the van lawfully, thereafter making a plain view observation of drugs.<sup>288</sup> The police officer then seized the drugs.<sup>289</sup> The court determined that "[s]ince the officer was lawfully present in the van and inadvertently saw the drugs, [the drugs] were properly admitted under the plain view doctrine."<sup>290</sup>

In *People v. Dobson*,<sup>291</sup> the defendant, a passenger in a car that the police pulled over, was observed to be putting something down his pants.<sup>292</sup> In turn, the officer patted down the defendant for weapons in order to ensure his safety.<sup>293</sup> One officer noticed a plastic bag sticking out of the back of the defendant's pants.<sup>294</sup> Through her experience and training, she was able to conclude that there were

<sup>278</sup> *Id.*

<sup>279</sup> 869 N.Y.S.2d 413 (App. Div. 1st Dep't 2008).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 413-14.

<sup>283</sup> *Id.* at 414.

<sup>284</sup> *Ballard*, 869 N.Y.S.2d at 414.

<sup>285</sup> 659 N.Y.S.2d 487 (App. Div. 2d Dep't 1997).

<sup>286</sup> *Id.* at 487.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *McEniry*, 659 N.Y.S.2d at 487.

<sup>291</sup> 838 N.Y.S.2d 128 (App. Div. 2d Dep't 2007).

<sup>292</sup> *Id.* at 129.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

drugs in the bag.<sup>295</sup> She pulled out the bag from the defendant's pants, determining afterwards that it contained crack cocaine.<sup>296</sup> The defendant argued, and the court agreed, that the plain view doctrine was not applicable under the facts of this case.<sup>297</sup> The court explained that "[t]he plain view doctrine . . . establishes an exception to the requirement of a warrant not to search for an item, but to seize it."<sup>298</sup> The contents of the bag were only revealed after the officer pulled it out of the defendant's pants.<sup>299</sup> The court further noted two circumstances, which would have otherwise justified the invocation of the plain view doctrine.<sup>300</sup> First, the court stated, "[T]he plastic bag, by its very nature, could not support any reasonable expectation of privacy because its content [being illegal contraband] could be inferred from its outward appearance."<sup>301</sup> Second, the court stated, "[I]f the distinctive configuration of the bag proclaimed its contents[,] such a circumstance would likewise justify the court to apply the plain view doctrine."<sup>302</sup> Neither of these two circumstances was found in this case, therefore the lower court ruling to suppress the evidence was affirmed.<sup>303</sup>

### B. The Ongoing Crime Scene Rule and Preliminary Investigation Concept

The courts have also discussed and analyzed other exceptions to the warrant requirement, and although recognized in limited circumstances notwithstanding the United States Supreme Court rejection of the doctrine, the ongoing crime scene rule remains valid in New York state courts to justify a warrantless search. The concept of preliminary investigation is in a symbiotic union with the ongoing crime scene rule and the two are often inseparable.

In *People v. Cohen*,<sup>304</sup> Doctor Cohen was found in his con-

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<sup>295</sup> *Id.*

<sup>296</sup> *Dobson*, 838 N.Y.S.2d at 129.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* (quoting *Diaz*, 612 N.E.2d at 301) (emphasis in original).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Dobson*, 838 N.Y.S.2d at 129.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 129-30.

<sup>304</sup> 450 N.Y.S.2d 497 (App. Div. 2d Dep't 1982).

dominium with gunshot wounds.<sup>305</sup> The defendant told the police that Doctor Cohen had shot himself, but after investigating the crime scene and processing its findings, the medical examiner's office told the police that a homicide was the more likely result of Doctor Cohen's death.<sup>306</sup> After the last police officer left the scene at 3:00 a.m., the crime scene remained unoccupied by the police.<sup>307</sup> Once the police were notified of a possible homicide, they conducted a warrantless search of the condominium and found incriminating evidence.<sup>308</sup> The police did not obtain a warrant or even make an effort to do so.<sup>309</sup> The court subsequently suppressed the evidence, holding that the police can conduct a preliminary investigation on the premises that is the crime scene, but this initial investigation is "limited by and reasonably related to the exigencies of the situation."<sup>310</sup>

In *Neulist*, David Lucas reported that he had found his mother dead in her bedroom.<sup>311</sup> The police arrived at the crime scene and began their preliminary investigation.<sup>312</sup> Based on the circumstances and evidence present, the police were led to believe that the mother died of natural causes, specifically, an aneurysm.<sup>313</sup> Several hours later, an autopsy revealed a bullet in the mother's head, and the same officers returned to the scene to conduct a search.<sup>314</sup> When the initial responding officers were away from the crime scene, one police officer guarded the crime scene while other officer's secured the bedroom in which the body was found.<sup>315</sup> Upon returning to the scene, the officers who were a part of the preliminary investigation completed their search and found incriminating evidence.<sup>316</sup> The court found the search and seizure lawful based on the fact that there had been a police officer guarding the scene, "thereby establishing a continuing police presence on the scene."<sup>317</sup>

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<sup>305</sup> *Id.* at 498.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* (noting that although there were officers outside the apartment on patrol, such presence was insufficient to safeguard the crime scene).

<sup>308</sup> *Id.*

<sup>309</sup> *Cohen*, 450 N.Y.S.2d at 498.

<sup>310</sup> *Id.* at 501.

<sup>311</sup> *Neulist*, 350 N.Y.S.2d at 180.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 181.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Neulist*, 350 N.Y.S.2d at 181.

<sup>317</sup> *Id.* at 184-85.

In *Dancey*, the defendant reported to the police that she had been locked out of her apartment and that her baby was locked inside.<sup>318</sup> She claimed that the defendant's husband put the baby into a plastic bag.<sup>319</sup> After the police broke into the apartment, they found the baby.<sup>320</sup> The baby was taken to the hospital, but was pronounced dead soon thereafter.<sup>321</sup> While the defendant was in the precinct, she admitted to putting the baby in the plastic bag.<sup>322</sup> During the interval of time between when the baby was brought to the hospital and the defendant was at the precinct, an officer guarded the crime scene at the apartment.<sup>323</sup> As this officer guarded the scene, a detective entered the apartment to get a better view of the crime scene.<sup>324</sup> However, in plain view, the detective saw incriminating evidence, and seized it.<sup>325</sup> This seizure was upheld in court because of the ongoing police presence, the lawful presence of the detective at the crime scene, and the incriminating items being found in plain view.<sup>326</sup>

## VII. CONCLUSION

The court in *Tashbaeva* addressed a question of first impression—whether subsequent to a plain view observation, an officer may leave the scene of a crime and return at a later time to seize the evidence previously observed. Notwithstanding some minor differences in the manner in which the exceptions to the warrant clause discussed herein are interpreted and applied, the protections afforded in the context of search and seizure jurisprudence at both the state and federal level are consistent. However, as the states maintain an inherent police power to create new law and enforce historical guarantees such as the protection individuals maintain against unreasonable searches and seizures to the degree necessary to safeguard its citizenry, the trend among New York State courts is to afford more privacy rights than those recognized among the federal courts. Yet all courts, at both the state and federal level, adhere to the view that warrantless

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<sup>318</sup> *Dancey*, 433 N.Y.S.2d at 777.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Dancey*, 433 N.Y.S.2d at 777.

<sup>324</sup> *Id.* at 777-78.

<sup>325</sup> *Id.* at 778.

<sup>326</sup> *Id.*

searches, as that conducted in *Tashbaeva*, are per se unreasonable. Therefore, unless the prosecution presents a case so as to justify invocation of an exception to the warrant clause, courts will suppress the fruits of an unlawful search in order to uphold those guarantees that the Fourth Amendment mandates.

The court in *Tashbaeva* did as any court must in reviewing an issue of first impression, considering any and all plausibly relevant doctrines in light of the distinct set of facts before it. While the facts in the case law explored herein may only differ slightly, including, *inter alia*, by the scope and duration of the search conducted and/or by the interim of time that passed from the preliminary investigation until the subsequent search and seizure, the divergent holdings in each case demonstrate that close scrutiny of these variables is imperative to limit the authority of law enforcement and preserve the right to privacy that the framers of the constitution so intended.

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