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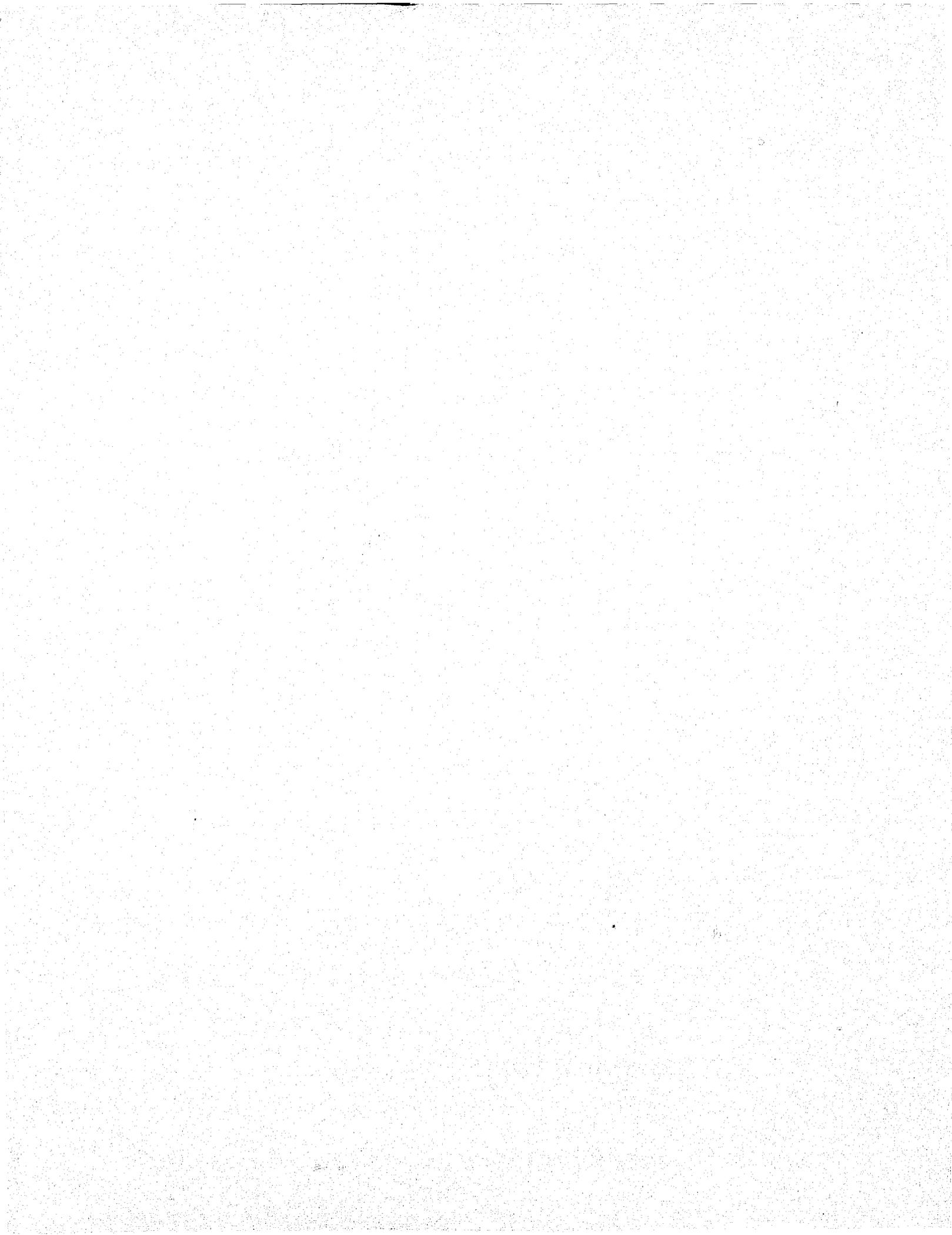
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2. Summaries of Recent Cases with a Suggested Application for Use in the Field.
3. Point of Law, a Direct Answer to Your Question.
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54405

The Plant In The Window

By D. Michael Ebert

It is not uncommon for police officers to come upon contraband in plain view while carrying out their routine duties. With increasing frequency, police officers observe from the outside of residences marijuana plants which are located inside the residences. The current laws regarding search and seizure and arrest raise a dilemma as to the proper course of action for the officer to take.

Of course, as in all cases of this sort, the particular facts of each case will determine what the officer will do. In this article several factors will be explored and a proper course of conduct will be suggested. However, it should be remembered that departmental policy should be the ultimate guide in whatever action is taken.

Assume a police officer from outside a residence observes a growing marijuana plant inside that residence. What should the officer do?

Was the plant in plain view?

It must be remembered that the observation of an item falling in plain view of an officer rightfully in the position to have that view is proper.¹ Court decisions recognize the distinction between observations of a police officer who has positioned himself upon property which has been opened to common public use, and the observations of an officer who ventures onto property which has not been so committed.

A commonly used sidewalk, pathway, entrance or similar passageway offers implied permission to enter to the public, which necessarily negates any reasonable expectancy of privacy in regard to the observations made there. The officer who walks upon such "public" property does not wear a blindfold; the property owner must reasonably expect him to observe all that is visible. In substance, the owner has invited the public and the officer to look and to see. But by the same reasoning, the officer who intrudes upon property not open to the public enjoys no such prerogatives.²

When a police officer has observed a growing marijuana plant in plain view from a position where he had a right to be, the courts have consistently held that such an observation is not a search. The more troublesome issue in such a case is how the officer should seize the marijuana plant since it is growing inside a residence.

Should the officer obtain a search warrant?

In order to seize the marijuana plant, must the officer obtain a search warrant or may he rely upon the plain view doctrine? To answer this question, some legal gymnastics are necessary in order to arrive at a satisfactory conclusion.

First of all, we must analyze the case law as it relates to our hypothetical situation. Two cases decided by the United States Supreme Court are extremely helpful.

In one case, federal agents, enforcing the alcohol prohibition law in 1930, received information concerning illegal liquor sales at a certain address. The agents went to the premises, and as they approached the garage smelled the odor of whiskey coming from within. They looked through a small opening and saw many cardboard cases which they believed contained jars of liquor. The agents broke the lock on the door, entered and found 122 cases of whiskey.

The United States Supreme Court held that the seizure of the whiskey without a search warrant was unreasonable. The evidence was suppressed. The court ruled the agents had ample opportunity to obtain a search warrant after they smelled the odor of alcohol and observed the cardboard cases, and, furthermore, the agents could have easily maintain-



ed a watch over the garage while one of their number obtained a warrant.³

This case was the first United States Supreme Court decision to emphasize that even where the object in plain view is contraband, police officers may not enter a building or residence and make a warrantless seizure. The Court reasoned that the odor of alcohol and plain view observation of cardboard cases does not strip the owner of a building of constitutional guaranties against unreasonable search.

In a second, more recent United States Supreme Court case, the Court repeated the established federal rule: Absent "exigent circumstances," plain view alone can never justify a warrantless seizure on the premises.⁴ The Supreme Court stated:

"... No amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."⁵

The courts have implicitly recognized that a person requires some sanctuary in which freedom to escape the intrusions of society is all but absolute. Homes, apartments, hotel rooms and private offices clearly fall within this category of maximum protection. Such places have been held inviolate from warrantless searches except in emergencies of overriding magnitude, such as pursuit of a fleeing felon or the necessity of action for the preservation of life or property.⁶

Certain other places carry with them an *expectation* of privacy, which, although considerable, is less intense and insistent. These places may be searched upon probable cause alone under circumstances of less demanding urgency. This secondary degree of protection applies to automobiles.⁷

Still other sites are regarded as so public in nature that searches are justifiable without any particular showing of cause or exigency. This category includes places that may be classified as open fields, and places in which a suspect has not exhibited a subjective expectation of privacy or where such an expectation would be unreasonable.⁸

This hierarchy of protection arises not from the application of differing constitutional standards to various locales, but rather from an application of a single standard of reasonableness to all places in accordance with a fundamental understanding that a particular intrusion into one domain of human existence seriously threatens personal security, while the same intrusion into another domain does not.

In California, the Supreme Court in the *Ramey* case enunciated a new rule of law which requires that an arrest warrant must be obtained before a suspect may be arrested in a private dwelling unless

there exists either exigent circumstances or consent to arrest.⁹ The rationale underlying this rule is that a man's home is his castle and, as such, deserves maximum protection. The *Ramey* rationale seems equally applicable to searches and seizures conducted within a residence.

Applying the above-mentioned rules and the rationale for the rules to our hypothetical situation, the conclusion is: A search warrant must be obtained before the marijuana plant can be seized inside a private dwelling unless there exists either exigent circumstances or consent to enter to seize the plant. Hence, the officer must obtain a search warrant in order to seize the plant in the window.

Obtaining a search warrant provides several advantages for the officer other than just the lawful seizure of the plant. First, the scope of a search under a search warrant is generally greater than a search conducted without a warrant. For instance, a search warrant usually authorizes the search and seizure of items establishing dominion and control of the residence. Furthermore, additional items of contraband not mentioned in the search warrant but observed in plain view during the execution of the warrant can be seized.

Second, by obtaining a search warrant before any entry is made into the residence, the police officer eliminates problems involving the unlawful occupation of a residence while awaiting the arrival of a search warrant.

Third, the existence of a search warrant for a residence gives a police officer judicial approval to enter the residence. If the officer, after having made a lawful entry, perceives evidence which gives him probable cause to arrest a person inside, he may make such an arrest without obtaining an arrest warrant.

Fourth, a person who has consented to a search can withdraw that consent at any time. Such termination of authority to search does not exist under a search warrant prior to completion of the search.

What information should the officer include in the search warrant?

When the officer seeks a search warrant for the marijuana plant, it is imperative that he present the magistrate with specific articulable facts indicating marijuana is being cultivated within the premises to establish probable cause for the issuance of the warrant.



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A similar situation, the case of *People v. Pellegrin*,¹⁰ can be used as an example. In that case, a search warrant for the defendant's home was issued on the affidavit of a police officer who had observed a marijuana plant growing in the defendant's backyard. The affidavit stated the plant did not appear to be growing wild. The appellate court held the magistrate who issued the warrant was not presented with any facts indicating marijuana was being cultivated by the defendant, and without a showing the marijuana was not growing wild, there were no facts from which it would be inferred contraband was in the defendant's home. The court held the officer's conclusionary statement that the plant did not appear to be growing wild was of no assistance to the magistrate.

Applying *Pellegrin* to our hypothetical situation, the search warrant affidavit should contain facts supporting a conclusion that the plant appeared to be cultivated. Such facts would include: (1) a description of the location of the plant within the premises, e.g., "next to east window, exposed to sunlight, placed on a table within the residence" and (2) a description of the container, the plant and anything else tending to show cultivation, e.g., "a 12-inch green marijuana plant is growing in a brown circular plant pot four inches high and six inches wide containing dirt and water on the surface."

With such specific facts the magistrate will be able to conclude the plant is being cultivated. Then the officer can state in his affidavit he knows that individuals who cultivate marijuana normally possess quantities of it for personal use, along with certain paraphernalia, and that these are often hidden within the residence, garages and out-buildings of the person cultivating marijuana, thereby establishing probable cause to search the entire home.

Should the officer secure the premises before obtaining the search warrant?

If the officer has probable cause to believe that a residence contains contraband, but has neither a search warrant nor probable cause to arrest anyone in the home, may he enter for the sole purpose of preventing the disposal of the contraband while other officers obtain a warrant?

In *Shuey v. Superior Court*, police officers had received information through an informer that marijuana was present in the defendants' apartment. Five days later several officers went to the address and requested consent to search the apartment. Defendant refused to converse or consent. To "secure" the premises while they obtained a warrant, the officers entered, uninvited, through an open door and remained inside while another officer left for the warrant. More than three hours later an officer returned with the desired warrant. During the interval, the occupying officers conducted no search but, in practical effect, "seized" everything in the apartment to prevent the destruction of the suspected contraband.

The court held that "prolonged warrantless police occupations of residences and the detention of persons found therein are a practice from which the police should be deterred. . . ." Even though police are encouraged to obtain warrants, "the fact that they do so in a particular case does not retroactively purify preceding misconduct."¹¹

However, where probable cause to arrest exists and there is danger that evidence may be destroyed pending arrival of the search warrant, officers are justified in securing the premises under the emergency doctrine, so long as the emergency is not of their own making.¹²

In the context of our hypothetical situation regarding the marijuana plant in the window, the general rule is the officer cannot secure the premises before obtaining the search warrant. This is so because the officer at this point only has probable cause to search. There is no probable cause to arrest anyone without more facts. Nor is there any emergency.

However, if the officer observes someone within the residence attempting to destroy the plant, it would be proper to secure the residence to preserve the evidence pending the arrival of a search warrant. In this instance, the officer would have probable cause to arrest this individual and because of the emergency (not created by the officer) it is necessary to secure the residence.

Let us assume the officer notices an individual walk up to the residence to make entry. What should the officer do? If the officer, while obtaining a search warrant, prevents this individual from making entry, he is, in essence, securing the premises from outside by preventing anyone from entering.

In *People v. Freund*, officers' observations of marijuana plants growing outside a residence—coupled with other facts, such as the smell of marijuana coming from the residence and actions of defendants—justified a detention of nearly four



hours, which was equivalent to arrest, while another officer obtained a search warrant.¹³

In *Freund* the occupants were arrested outside the premises, thereby securing the premises from the outside pending arrival of the search warrant. The court found the officers had probable cause to arrest at the beginning of the detention. However, in the context of our situation, a prolonged detention of the individual attempting to make entry into the premises, while awaiting the arrival of the search warrant without probable cause to arrest him, would be improper as a method of securing the premises from the outside.

When should the officer advise the occupant of his *Miranda* rights?

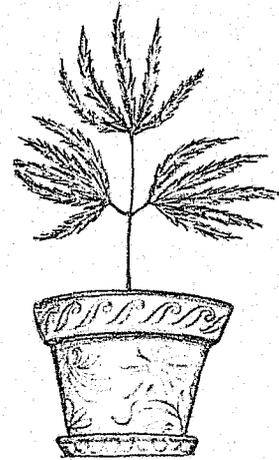
At the time the officer serves the search warrant, he complies with the knock-and-notice requirements of Penal Code Section 1531. The officer asks the individual answering the door, "Do you live here?" so that he may serve a copy of the warrant on the occupant of the premises. This individual responds, "Yes, I live here." The officer is then tempted to ask the occupant, "Does the marijuana plant belong to you?" or "Who owns the marijuana plant?" The problem that arises is whether the officer must advise the occupant of his *Miranda* rights before such a question is asked.

This situation presents in almost classic form the dilemma faced by police officers in the field. If the officer investigates by asking too many questions, he risks running afoul of the proscriptions of *Miranda*. If the officer arrests too soon, he faces the prospect that the evidence will be suppressed under the exclusionary rule because he did not have probable cause to arrest.

Probable cause for arrest is not a matter solely of the arresting officer's subjective intent. Probable cause has long been defined by the courts essentially as a state of facts known to the arresting officer which would lead him as a man of ordinary care and prudence to believe that the person he is arresting has committed an offense. Once the investigating officer has probable cause to believe that the person being detained for questioning has committed an offense, the officer cannot be expected to permit the suspect to leave. At that point, at the latest, the interrogation becomes custodial and prior to any further questioning the suspect must be warned of his rights.¹⁴

For example, in one case an officer had probable cause to suspect the defendant of driving a stolen vehicle and possessing dangerous drugs and marijuana at the time he asked the defendant to identify the contents of a paper bag. The officer's prior questioning could have led defendant, as a reasonable person, to believe that he was not free to depart. Therefore, the court held the defendant was in custody and should have been warned of his *Miranda* rights before being asked any further question.¹⁵

However, *Miranda* does not prevent police from carrying out their traditional investigatory functions. Where suspicion of an unsolved crime has not yet focused on a defendant, there is no requirement



of the *Miranda* warnings because normally the police are still engaged in the investigative stage. Usually in circumstances where police officers are attempting to establish the relationship between suspects and the contraband involved, and are giving the suspects an opportunity to explain their relationship, if any, with the contraband, the courts have held that this does not constitute "a process of interrogations that lends itself to eliciting incriminating statements."

It must be remembered that each case rises or falls on its own particular set of circumstances. Therefore, officers must be extremely careful when treading the treacherous midline of *Miranda* and its application. These examples might be helpful.

In one case, an officer testified that when he first saw the television set in the defendant's car, he suspected it might have been stolen, but since the defendant had telephoned the police and reported the theft of her car, there was some doubt in the officer's mind as to whether somebody else had been in possession of the car and might have placed the set there. Therefore, he rightly believed he did not have grounds to take the defendant into custody at that point. Thus, he was not obliged to advise the defendant of her *Miranda* rights. Rather, the officer gave the defendant the opportunity to explain the presence of the set, if she could.¹⁶

In another case, the defendant was found in a house with \$200,000 worth of stolen furs where two other men (whom the defendant obviously knew) had attempted to dispose of them. The defendant's presence was suspicious, although his reason for being in the house could have been consistent with innocence. When an officer told the defendant he wanted him to tell about the burglary, he was giving the defendant an opportunity to explain what, if any, connection he had with the furs. The court held a *Miranda* warning was not required under these circumstances.

In a third case a different conclusion was reached by the court. In this case, the officer asked the defendant whether there were any narcotics on the premises. Before asking the question, the officer knew the defendant lived in the apartment and was a narcotics user. Consequently, in asking the question under these circumstances the officer was ask-

ing the defendant in effect to confess to the crime of possession of narcotics, which required a *Miranda* warning.¹⁸

Returning to our hypothetical situation, it is strongly recommended that when an officer determines the individual inside the premises is an occupant, he should be advised of his *Miranda* rights before asking the question, "Does the marijuana plant belong to you?" or "Who owns the marijuana plant?" Admittedly, this is a gray area subject to different interpretation, and particularly dependent upon the circumstances. Through an abundance of caution based on our specific hypothetical, the *Miranda* rights should be administered.

When should the officer arrest the occupant?

Suppose the officer has completed his search and seizure of the marijuana plant in the window pursuant to a search warrant and has developed sufficient probable cause to arrest one or more occupants of the premises. Should he make an arrest at this time?

Two different doctrines come into play at this juncture. On the one hand, if the officer, after having made a lawful entry pursuant to the search warrant, sees evidence which gives him probable cause to arrest a person inside, he may make such an arrest without obtaining an arrest warrant. On the other hand, the *Ramey* doctrine states warrantless arrests within the home are per se unreasonable in the absence of consent or exigent circumstances. However, *Ramey* is limited to warrantless entries of dwellings for the purpose of making arrests within those dwellings.¹⁹

Since the entry into the occupant's home is pursuant to a search warrant for the purpose of seizing the marijuana plant and not for the purpose of making an arrest, the *Ramey* doctrine does not apply. Hence, with respect to our situation, if the officer

develops probable cause to arrest one or more occupants during the course of his search, he need not obtain an arrest warrant.

However, within the framework of our hypothetical regarding a marijuana plant in the window, which becomes the only contraband seized, it might be more prudent to forego immediate arrest of one or more individuals on the premises and present the case to the District Attorney's Office for the issuance of a criminal complaint and a notify letter of arrest.

CONCLUSION

Some general principles should be kept in mind when an officer observes a marijuana plant growing inside a window of a residence:

1. In order for the plant to fall within plain view the officer must be in a lawful position to have that view;

2. Since the marijuana plant is inside a residence, obtain a search warrant for its seizure;

3. When obtaining the search warrant the affiant-officer must state specific, articulable facts indicating the marijuana plant is being cultivated.

4. The officer should avoid securing the premises from inside pending the arrival of a search warrant unless probable cause to arrest and emergency, not of the officer's own making, exist;

5. The officer should avoid securing the premises from the outside unless probable cause to arrest someone outside exists;

6. After the officer determines an individual is an occupant of the residence and before the officer questions the occupant regarding ownership of the marijuana plant, the occupant should be advised of his *Miranda* rights;

7. Even though the officer does not need an arrest warrant to arrest individuals on the premises at the time of his seizure of the plant pursuant to a search warrant, the better course of action would be to seek a criminal complaint and a notify letter of arrest for those charged, unless there is some impelling reason to arrest the suspects within the residence.

FOOTNOTES

1. *Chimel v. California*, 395 U.S. 752 (1969).
2. *Lorenzana v. Superior Court*, 9 Cal.3d 626 (1973).
3. *Taylor v. United States*, 286 U.S. 1, 52 S.Ct. 466; 76 L.Ed. 951 (1932).
4. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).
5. *Coolidge v. New Hampshire*, *supra*, at page 584.
6. *People v. Dumas*, 9 Cal.3d 871 (1973).
7. *People v. Dumas*, *supra*.
8. *People v. Dumas*, *supra*.
9. *People v. Ramey*, 16 Cal.3d 263 (1976).
10. *People v. Pellegrin*, 78 Cal.App.3d 913 (1977).
11. *Shuey v. Superior Court*, 30 Cal.App.3d 535 (1973).
12. *People v. Slocum*, 52 Cal.App.3d 867 (1975).
13. *People v. Freund*, 48 Cal.App.3d 49 (1975).
14. *People v. McLean*, 6 Cal.App.3d 300 (1970).
15. *People v. Ceccone*, 260 Cal. App.2d 886 (1968).
16. *People v. Atkins*, 10 Cal.App.3d 1042 (1970).
17. *People v. Webb*, 243 Cal.App.2d 179 (1966).
18. *People v. Wright*, 273 Cal.App.2d 325 (1969).
19. *People v. Ramey*, *supra*, 275, fn. 5.

