Exigent Circumstances For Warrantless Home Arrests

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In *Payton v. New York*,[1] the United States Supreme Court held that, absent exigent circumstances,[2] the fourth amendment prohibits warrantless entries into a home in order to make a felony arrest.[3] This decision reversed the common law rule that a police officer could make felony arrests without a warrant provided there was probable cause to arrest.[4] The *Payton* Court reasoned that the arrest of a person is essentially a seizure which must be reasonable under the fourth amendment.[5] Since physical entry into a person's home was the major evil addressed by the fourth amendment,[6] searches and seizures in a home without a warrant were presumptively unreasonable.[7] The Court also

1. 445 U.S. 573 (1980). *Payton* was consolidated with *Riddick v. New York*, a case involving similar issues of law.

2. The term "exigent circumstances" refers to instances in which police officers will be unable to make a search or arrest unless they act swiftly and without prior judicial approval. United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978); *see* Warden v. Hayden, 387 U.S. 294, 298 (1967); Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970).

3. 445 U.S. at 576. In *Payton*, six police officers entered the suspect's apartment intending to arrest him for murder. *Id.* Although the police had probable cause to believe Payton committed the murder, they did not obtain a warrant prior to entry. *Id.* The police broke open the apartment door after hearing no response to their knock. *Id.* Although no one was in the apartment, the police seized a .30-caliber shell casing and introduced it into evidence at Payton's trial. *Id.* at 576-77.

4. *See* United States v. Watson, 423 U.S. 411, 418 (1976), in which the Supreme Court stated, "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest." *Id. See also* 4 W. BLACKSTONE, COMMENTARIES 292-93; Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 DICK L. REV. 167, 168 (1977).

5. 445 U.S. at 585. The fourth amendment to the Constitution provides that:

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

6. *See* United States v. United States District Court, 407 U.S. 297, 313 (1972). On many previous occasions the Supreme Court has recognized that the fourth amendment was established to protect personal privacy against unnecessary governmental intrusion. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 304 (1967); Schmerber v. California, 384 U.S. 757, 767 (1966); Silverman v. United States, 365 U.S. 505, 511 (1961).

7. 445 U.S. at 586; *see* Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971).

emphasized the fact that before the *Payton* decision, courts of last resort in ten states,[8] as well as five United States Courts of Appeals,[9] had held warrantless arrests in the home unconstitutional absent exigent circumstances.

Underlying the decisions holding warrantless home arrests unconstitutional absent exigent circumstances is the idea that a person's privacy in the home must be carefully protected.[10] At the very core of the fourth amendment stands the right to retreat into one's own home and be free from unwarranted intrusions.[11] This freedom to escape the intrusions of society is all but absolute,[12] and must be afforded the most stringent fourth amendment protection.[13]

The Supreme Court in *Payton*, however, did not attempt to define "exigent circumstances" in the home arrest context. Instead, it explicitly refrained from discussing the issue.[14] Yet the Supreme Court has previously indicated certain instances when exigent circumstances, the immediate need for police action in response to an emergency,[15] could justify warrantless entries to search or arrest.[16]

The term exigent circumstances, however, is applied by lower courts in many different ways. Although the concept was intended to be limited,[17] it has often been applied in an overbroad and misleading

8. 445 U.S. at 575; *see, e.g.*, State v. Cook, 115 Ariz. 188, 194, 564 P.2d 877, 883 (1977); People v. Ramey, 16 Cal. 3d 263, 275-76, 545 P.2d 1333, 1340-41, 127 Cal. Rptr. 629, 636-37, *cert. denied*, 429 U.S. 929 (1976); People v. Moreno, 176 Colo. 488, 497, 491 P.2d 575, 580 (1971); State v. Jones, 274 N.W.2d 273, 276 (Iowa 1979), *cert. denied*, 446 U.S. 907 (1980); State v. Platten, 225 Kan. 764, 770-71, 594 P.2d 201, 205 (1979); Commonwealth v. Forde, 367 Mass. 798, 800-01, 329 N.E.2d 717, 722 (1975); State v. Olson, 287 Or. 157, —, 598 P.2d 670, 674 (1979); Commonwealth v. Williams, 483 Pa. 293, 300, 396 A.2d 1177, 1179 (1978), *cert. denied*, 446 U.S. 912 (1980); State v. McNeal, 251 S.E.2d 484, 488 (W. Va. 1978); Laasch v. State, 84 Wis. 2d 587, 592, 267 N.W.2d 278, 283 (1978).

9. 445 U.S. at 575; *see* United States v. Houle, 603 F.2d 1297, 1299 (8th Cir. 1979); United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978); United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978); United States v. Killebrew, 560 F.2d 729, 734 (6th Cir. 1977); Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970).

10. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); Warden v. Hayden, 387 U.S. 294, 304 (1967); Silverman v. United States, 365 U.S. 505, 511 (1961). *See generally* Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. ILL. L.F. 655, 670.

11. *See* Silverman v. United States, 365 U.S. 505, 511 (1961).

12. *See* Comment, *Watson & Ramey: The Balance of Interests in Non-Exigent Felony Arrests*, 13 San Diego L. Rev. 838, 858 (1976).

13. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976).

14. 445 U.S. at 583. The Court stated, "[W]e have no occasion to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstance,' that would justify a warrantless entry into a home for the purpose of either arrest or search." *Id.*

15. *See* note 2 *supra*, for a complete definition of exigent circumstances.

16. *See* Schmerber v. California, 384 U.S. 757, 768-70 (1966) (the possibility that evidence would be destroyed warranted extraction of blood from suspect).

17. The exigent circumstance exception to the warrant requirement was intended to be a narrow exception to the constitutional rule that a warrant must be obtained before entry. This exception was to apply only in emergency situations when there was a compelling need for police action. The exception was to be found only in a few well-defined cases. *See* Note, *supra* note 10, at 676-77.

manner.[18] As a result, courts have circumvented the warrant requirement by finding exigent circumstances in most warrantless home arrest cases.[19]

This Note proposes a narrow definition of exigent circumstances that will still allow a warrantless home arrest when justified. It suggests that a warrantless intrusion into the home to arrest is justified by exigent circumstances only when the state is able to point to specific and articulable facts that evidence a compelling need for immediate police action.[20]

Recognition of Exigent Circumstances by Lower Courts

The first major lower court case concerning exigent circumstances for warrantless home arrests was *Dorman v. United States*.[21] In *Dorman*, the court upheld the defendant's conviction after finding that exigent circumstances justified a warrantless home entry to arrest.[22] The court listed a number of factors to be evaluated in determining if exigent circumstances exist.[23] These included: 1) the gravity and violent nature of the crime involved; 2) whether it is reasonable to believe that the suspect is armed; 3) the degree of probable cause; 4) the strength of the belief that the suspect is on the premises; 5) the likelihood of the suspect's escape; and 6) whether the entry could be made peacefully.[24] The *Dorman* court analyzed each factor and concluded that the police acted reasonably in entering Dorman's apartment to arrest.[25]

Lower courts apply the *Dorman* criteria inconsistently.[26] Some

18. See text & notes 74-81, 97-102, and 119-23 *infra*.

19. *See* Comment, *supra* note 4, at 173. The author states that "deference to a more lax standard of general reasonableness in examining police action remained evident."

20. Part of the language used in this test was adopted from Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, the Court considered the problem of the stop and frisk of a suspect. *Id.* at 10. The Court held that in order to justify the intrusion of a stop and frisk, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

21. 435 F.2d 385 (D.C. Cir. 1970). In *Dorman*, four armed men robbed a clothing store. *Id.* at 387. Because a magistrate was not available, a warrant could not be obtained. *Id.* at 388. The police proceeded to Dorman's apartment and searched for the suspect. *Id.* Dorman was not home, but a blue suit taken in the robbery was seized and introduced into evidence. *Id.*

22. *Id.* at 393.

23. *Id.* at 392-93.

24. *Id.* The court also indicated that the time of entry into the home could be considered. An entry late at night could either highlight the impracticality of obtaining a warrant or indicate the unreasonableness of the entry. *Id.* at 393.

25. *Id.* at 393-94. The court found that each factor was present to some degree in the case. Further, the court stated that a great burden is placed on the police to prove the reasonableness of their entry into a home without consent. The court said, "Freedom from intrusion into the home and dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.* at 389. *See generally* Agnello v. United States, 269 U.S. 20, 32 (1925); District of Columbia v. Little, 178 F.2d 13, 16-17 (1949), *aff'd*, 339 U.S. 1 (1956).

26. *Compare* State v. Page, 277 N.W.2d 112, 117-18 (N.D. 1979) (*Dorman* criteria adopted but applied flexibly in each case) *with* Commonwealth v. Williams, 483 Pa. 293, 298-300, 396 A.2d

courts directly follow *Dorman*,[27] others emphasize only some of the factors,[28] and still others do not mention the *Dorman* criteria at all in determining exigent circumstances.[29] In courts that recognize them, the *Dorman* factors are applied flexibly and are not interpreted as cardinal maxims.[30] There is thus little "clarity and certainty" in this area[31]—most cases are decided on their particular facts.[32] Further, courts not following *Dorman* differ in their approach to the exigent circumstances question. They may adopt no specific test[33] or may look to the "totality of the circumstances" to see whether exigent circumstances are present.[34]

The major problem with the *Dorman* approach is that it offers no practical guidance to an officer on the street.[35] An officer confonted with a situation requiring a quick determination of exigency could not

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1177, 1178-80 (1978) (each *Dorman* factor analyzed separately and adopted), *cert. denied*, 446 U.S. 912 (1980).

27. *See, e.g.*, United States v. Scott, 578 F.2d 1186, 1190 (6th Cir. 1978) (court stated that the seven *Dorman* factors are material in determining whether a warrantless entry is justified); United States v. McKinney, 477 F.2d 1184, 1186 (D.C. Cir. 1973) (court tacitly approved the *Dorman* factors and analyzed them individually); State v. Max, 263 N.W.2d 685, 687-89 (S.D. 1978) (each *Dorman* criteria analyzed).

28. *See* State v. Page, 277 N.W.2d 112, 118 (N.D. 1979). The *Page* court indicated that all facts bearing on exigency would be evaluated in each case. The importance of each criterion may vary from case to case. *Id. Compare* United States v. Shye, 492 F.2d 886, 893 (6th Cir. 1974). The *Shye* court mentioned that another factor to consider is "the presence of more than one suspect, presumably armed, within the dwelling entered." *Id.* The presence of another suspect supports the justification for the officer's entry. *Id.*

29. *See, e.g.*, United States v. Flickinger, 573 F.2d 1349, 1354-56 (9th Cir. 1978); Cleaver v. Superior Court, 24 Cal. 3d 297, 303-06, 594 P.2d 984, 985-89, 155 Cal. Rptr. 559, 561-64 (1979); State v. McNeal, 251 S.E.2d 484, 488-89 (W. Va. 1978).

30. State v. Jones, 274 N.W.2d 273, 276 (Iowa 1979); State v. Page, 277 N.W.2d 112, 118 (N.D. 1979). The *Jones* court stated that the *Dorman* criteria are not conditions precedent to a valid warrantless home entry, but that they are important in deciding exigency. 274 N.W.2d at 276.

31. State v. Peller, 287 Or. 255, —, 598 P.2d 684, 688 (1979). The *Peller* court concluded, "The nature of the problem and the diversity of factual situations in which the problem arises necessarily preclude the 'clarity and certainty' that might otherwise be desirable in this area." *Id. See also* Note, *supra* note 10, at 676-77.

32. *See* People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637, *cert. denied*, 429 U.S. 929 (1976). The California Supreme Court in *Ramey* stated, "There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers." *Id.*.

33. *See* State v. McNeal, 251 S.E.2d 484, 488-89 (W. Va. 1978) (court evaluated the particular facts of the case rather than emphasizing a particular test to be used in determining exigency).

34. United States v. Campbell, 581 F.2d 22, 26-27 (2d Cir. 1978) (points stressed by the court included the fact that there was an armed robbery, there was strong probable cause, and the possibility of escape or violence was high); United States v. Flickinger, 573 F.2d 1349, 1356 (9th Cir. 1978) (possibilities of escape, destruction of evidence, or possible violence validated warrantless entry).

35. Note, *supra* note 10, at 679.

> The *Dorman* test has no practical utility for a policeman forced to make a prompt decision as to whether exigent circumstances exist. Indeed, the prospect of a policeman checking the *Dorman* test to see if exigent circumstances justify his warrantless entry seems ludicrous . . . [A]n interpretation of fourth amendment reasonableness must be stated in terms readily comprehensible to the police in their day-to-day activities.

Id.

be expected to analyze each of the seven *Dorman* factors.[36] Further, the *Dorman* court did not indicate whether all or only some of the factors must be present before exigent circumstances could be found.[37]

Despite this inconsistency in their approach to the problem of exigent circumstances, courts generally agree on four situations where exigent circumstances for home arrests arise: 1) hot pursuit;[38] 2) destruction of evidence;[39] 3) possibility of violence;[40] and 4) possibility of flight.[41] Within each of these areas, however, there is still little consistency among the courts. Each case is decided on its particular facts, leading to confusion and lack of continuity in the law. The definition of exigent circumstances proposed in this Note will help clear up the law in each of these areas.

Hot Pursuit

Most courts recognize a hot pursuit exception to the warrant requirement.[42] This exception will continue to fall within the category of exigent circumstances under the proposed definition in this Note.[43] Courts, however, will find hot pursuit on fewer occasions. Under the proposed definition, in each case where hot pursuit is argued the state will have to show specific and articulable facts known to the police at the time of the incident that created a compelling need for immediate police action. Even though this standard is often currently applied, some attenuated cases of hot pursuit involving nonemergency situa-

36. *Id.*

37. 435 F.2d at 392-93.

38. *See, e.g.*, United States v. Santana, 427 U.S. 38, 42-43 (1976) (hot pursuit found when suspect retreated into her home as police approached); United States v. Scott, 520 F.2d 697, 700-01 (9th Cir. 1975) (hot pursuit justified police entry into apartment to arrest bank robbers), *cert. denied*, 423 U.S. 1056 (1976); State v. Love, 123 Ariz. 157, 159, 598 P.2d 976, 978 (1979) (hot pursuit found when suspect fled into house after police announced their presence).

39. *See, e.g.*, United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978) (court mentioned that the presence of evidence believed to be in danger of destruction is recognized as a circumstance permitting immediate police action); United States v. Gardner, 553 F.2d 946, 948 (5th Cir. 1977) (entry justified to prevent disposal of cocaine); United States v. Shima, 545 F.2d 1026, 1028 (5th Cir. 1977) ("imminent destruction, removal or concealment" of potential evidence may provide an exception to the warrant requirement).

40. *See* United States v. McLaughlin, 525 F.2d 517, 521 (9th Cir. 1975) (possibility that innocent persons could be harmed justified entry to arrest); State v. Smith, 123 Ariz. 231, 240, 599 P.2d 187, 196 (1979) (entry justified due to imminent peril of person within the building). Most courts also recognize the exigent circumstance of a crime of violence presently being committed. *See* United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978). Since this exigent circumstance involves violence, it will be considered along with situations involving potential violence. *See* text & notes 89-111 *infra*.

41. *See* United States v. Titus, 445 F.2d 577, 578-79 (2d Cir.) (exigent circumstances found when police believed suspect would flee upon hearing of cohort's arrest), *cert. denied*, 404 U.S. 957 (1971); People v. Ramey, 16 Cal. 3d 263, 275-76, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976) (court stated that the imminent escape of a suspect is an exigent circumstance).

42. *See* cases cited in note 38 *supra*. *See generally* Note, *United States v. Gaultney: The Fifth Circuit Redefines "Hot Pursuit,"* 25 LOY. L. REV. 406, 410 (1979).

43. *See* text & note 20 *supra*.

tions[44] will be clearly excluded under the proposed rule.

The exigent circumstance of hot pursuit was first developed by the Supreme Court in *Warden v. Hayden*.[45] In *Hayden*, an armed robber fled the scene of the crime after taking money from a cab company.[46] The police were notified within minutes and proceeded to the suspect's home,[47] where they entered and arrested him in an upstairs bedroom.[48] The Court held the entry to search valid because only a search of the house could ensure both that the suspect was the only person "present and that the police had control of all weapons" on the premises.[49] The Court emphasized that police officers need not delay an investigation if to do so would threaten the lives of others.[50]

The Supreme Court expanded the hot pursuit doctrine *United States v. Santana*.[51] In *Santana*, the Court found hot pursuit when a suspect standing at the entrance to her home retreated inside as police approached.[52] The Court stated that although hot pursuit involved a chase to some degree, "[i]t need not be an extended hue and cry 'in and about [the] public streets'."[53] The entry was justified even though the hot pursuit ended soon after it began.[54] The *Santana* decision thus seems to indicate that the Court will interpret hot pursuit broadly and find exigent circumstances even though a lengthy pursuit is not involved.

The lower courts are fairly consistent in their application of the hot pursuit doctrine to the facts of particular cases.[55] This consistency

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44. *See* United States v. Gaultney, 581 F.2d 1137, 1147 (5th Cir. 1978), *cert. denied*, 446 U.S. 907 (1980), in which the court found hot pursuit even though there was no evidence of any kind of chase or pursuit at all.

45. 387 U.S. 294 (1967). Although the *Hayden* court did not use the words "hot pursuit", the term has since been associated with this case. *See* United States v. Gaultney, 581 F.2d 1137, 1147 (5th Cir. 1978). The Court instead used the term "exigencies of the situation." 387 U.S. at 298. The term "hot pusuit" initially appeared in connection with an automobile chase in Johnson v. United States, 333 U.S. 10, 16 n.7 (1948); Santana v. United States, 427 U.S. 38, 42-43 n.3 (1976); *see* Note, *supra* note 10, at 677.

46. 387 U.S. at 297.

47. *Id.* Less than five minutes elapsed between the time the police were notified and their arrival at the scene. *Id.* at 298.

48. *Id.* at 298.

49. *Id.* at 298-99. The Court said, "the exigencies of the situation made that course imperative." *Id.* at 298, *quoting* McDonald v. United States, 335 U.S. 451, 456 (1948).

50. 387 U.S. at 298-99.

51. 427 U.S. 38 (1976).

52. *Id.* at 42. The defendant, Santana, stood in the doorway with a brown paper bag in her hand. The police pulled to within fifteen feet of the suspect and left their vehicle, shouting "police." Santana withdrew into her home after the police got out of their van. *Id.* at 40.

53. *Id.* at 43.

54. *Id.*

55. *See* United States v. Stubblefield, 621 F.2d 980, 981-82 (9th Cir. 1980) (warrentless entry upheld when officers proceeded to house within minutes of robbery); United States v. Oaxaca, 569 F.2d 518, 520-22 (9th Cir. 1978) (garage entry permissible fifteen minutes after bank robbery); United States v. Honesty, 459 F.2d 1279, 1281 (D.C. Cir. 1971) (upholding entry into apartment twenty minutes after shooting).

is not surprising given the liberal majority view of hot pursuit expressed in *Santana*. For example, exigent circumstances are usually found if the police enter or arrest within one hour of the crime.[56] Further, the courts frequently consider other factors besides the time element in considering hot pursuit.[57] Often, the court will focus on the existence of a crime of violence or a possibility of destruction of evidence.[58] Strong evidence that the suspect perpetrated the crime is also frequently relied upon, including: 1) eyewitness testimony;[59] 2) pursuit by police after a high speed chase;[60] or 3) prior information that the suspect was about to commit the crime.[61]

Because courts are presently fairly consistent in their approach to the exigent circumstance of hot pursuit, the proposed definition will not affect this exigent circumstance as much as it will the other exigent circumstances.[62] The reason for this consistency is that most hot pursuit cases involve a chase of some kind,[63] which readily evidences an exigency.

Destruction of Evidence

The possibility that evidence will be destroyed is another exigent circumstance widely recognized by the courts.[64] Under the test pro-

56. *See* United States v. Oaxaca, 569 F.2d 518, 520-22 (9th Cir. 1978) (fifteen minutes); United States v. Honesty, 459 F.2d 1279-80 (D.C. Cir. 1971) (twenty minutes). In United States v. Houle, 603 F.2d 1297, 1300 (8th Cir. 1979), the court found no exigent circumstances because there was a delay of over four hours before the police entered a home to arrest a sleeping man with a shotgun.

57. *See* United States v. Stubblefield, 621 F.2d 980, 982 (9th Cir. 1980) (possibility that other participant in robbery remained in home); State v. McNeal, 251 S.E.2d 484, 489 (W. Va. 1978) (court considered practicability of securing a warrant in determining whether exigent circumstances existed).

58. *See* United States v. Santana, 427 U.S. 38, 43 (1976) (there was a realistic expectation that a delay would result in the destruction of evidence); Nilson v. State, 272 Md. 179, 185, 321 A.2d 301, 307 (1974) (both a crime of violence and a possibility of destruction of evidence were present). However, in United States v. Brightwell, 563 F.2d 569 (3d Cir. 1977) the dissent warned that "[w]ithout strong evidence of criminal involvement, the dangers of violence or escape are too speculative to justify an exception to the clear constitutional mandate that a neutral and detached magistrate determine the need for a search of a premise." *Id.* at 575 (Lord, J., dissenting).

59. Warden v. Hayden, 387 U.S. 294, 298 (1967); Dorman v. United States, 435 F.2d 385, 388 (D.C. Cir. 1970).

60. Salvador v. United States, 505 F.2d 1348, 1350 (8th Cir. 1974) (officers pursued suspects by vehicle and on foot).

61. *See* United States v. Holiday, 457 F.2d 912, 914 (3d Cir.) (investigating officer previously was told that persons were planning a bank robbery), *cert. denied*, 409 U.S. 913 (1972).

62. The other exigent circumstances of destruction of evidence, violence, and flight of a suspect are discussed in length later in this Note at text & notes 64-88, 89-111, and 112-24 *infra*.

63. *See generally* United States v. Santana, 427 U.S. 38, 40 (1976); Salvador v. United States, 505 F.2d 1348, 1350 (8th Cir. 1974).

64. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 768-70 (1966) (possibility that evidence would be destroyed warranted extraction of blood from suspect); United States v. Renfro, 620 F.2d 569, 574-75 (6th Cir. 1980) (suspects "ran upstairs and appeared to be in the process of destroying evidence"), *cert. denied*, — U.S. — (1981); United States v. Johnson, 561 F.2d 832, 843-44 (D.C. Cir. 1977) (possibility that narcotics-cutting operation would terminate and narcotics would be removed from premises). *See generally* Casenote, *Residential Searches to Prevent the*

posed in this Note,[65] exigent circumstances will no longer be found when there are mere possibilities or hunches that evidence will be destroyed.[66] Exigent circumstances will be found in emergency situations only, thus reaffirming the limited purpose of the exception.[67] Emergency situations will be found to exist only in those cases in which the police are able to point to specific and articulable facts compelling immediate police action to protect evidence.

The Supreme Court discussed the destruction of evidence exception in *Schmerber v. California*.[68] In *Schmerber*, a blood sample was drawn from a defendant after a traffic accident to determine whether he was intoxicated.[69] The blood sample indicated the defendant's intoxication level and was presented as evidence at trial.[70] The defendant argued that the withdrawal of blood and its introduction into evidence at trial denied him due process under the fourteenth amendment.[71] The Court, however, rejected this argument, holding that attainment of a warrant was unnecessary before the withdrawal of blood because of the possibility that the evidence would be destroyed during the lapse of time necessary to secure a warrant.[72] Similarly, the question of destruction of evidence is often confronted in home arrest or search situations.[73]

Lower courts have been liberal in finding the exigent circumstance of destruction of evidence. In many instances, exigent circumstances have been found even though an emergency situation did not actually exist.[74] Although there are a few cases in which the courts have limited

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Destruction of Evidence: An Emerging Exception to the Warrant Requirement, 47 U. COLO. L. REV. 517 (1976), for a complete analysis of the destruction of evidence exigent circumstance.

65. See text & note 20 *supra*.

66. See text & notes 74-81 *infra* for a discussion of such cases.

67. *See* text & note 17 *supra*.

68. 384 U.S. 757 (1966).

69. *Id.* at 758. The defendant was driving home from a tavern after drinking when his car skidded and struck a tree. *Id.* at 758 n.2. The defendant was injured and taken to the hospital, where the blood sample was drawn. *Id.*

70. *Id.* at 759.

71. *Id.*

72. *Id.* The Court noted that the alcohol level in the blood begins to diminish after one stops drinking. *Id.* at 770. There was a good possibility that the evidence of alcohol in the blood would disappear while the police sought a magistrate to issue a warrant. *Id.* at 770-72.

The Supreme Court also considered the possibility of destruction of evidence in Vale v. Louisiana, 399 U.S. 30 (1970). In *Vale*, the police arrested the suspect in front of his house after they observed a narcotics deal. *Id.* at 32-33. A search of the house revealed a quantity of narcotics. *Id.* at 33. The Court held that even though the suspect's family came home immediately after the arrest, there was no possibility of destruction of evidence. *Id.* at 35. Therefore, no exigent circumstances existed to justify a search. *Id.*

73. *See* text & notes 78-84 *infra*. The kinds of evidence generally destroyed include drugs, weapons, clothing, and other instrumentalities of crime.

74. *See, e.g.*, United States v. Johnson, 561 F.2d 843-44 (D.C. Cir. 1977) (exigent circumstances found even though there was only a possibility that narcotics would be removed or destroyed); United States v. Gardner, 553 F.2d 946, 948 (5th Cir. 1977) (exigent circumstances found even though there was no concrete evidence that drugs might be destroyed); United States v.

the destruction of evidence exception,[75] these instances are rare. Some courts find an emergency situation not only when evidence is being destroyed, but also when there is merely a possibility of its destruction.[76] For example, one court held that a warrantless entry 30-40 minutes after officers saw suspects packaging narcotics inside a home was justified in light of the mere possibility that the evidence would be destroyed.[77]

The courts have also found exigent circumstances when the police believed that their activities may have aroused a suspect's suspicion, possibly causing evidence to be destroyed. This has occurred when police outside a home had reason to believe they had been detected,[78] when there was a reasonable possibility that they had been detected,[79] and even when the police had no idea whether their presence had been detected.[80] Courts do not require that the police believe the suspects are actively destroying the evidence.[81] Courts further disagree on whether the exigent circumstance of destruction of evidence exists when noises are heard inside a home after police have announced their presence.[82] The exigent circumstance argument has been rejected when police heard scuffling movements and footsteps running from the door to the rear of the apartment,[83] yet has been accepted when the police heard the occupants barricading the door.[84]

Because courts find this exigent circumstance so often, the emergency exception has been permitted to "swallow the rule"[85] that war-

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Baltazar, 477 F. Supp. 236, 250 (E.D.N.Y. 1979) (possibility of destruction found although no evidence or imminent destruction in the record).

75. *See, e.g.*, United States v. Rosselli, 506 F.2d 627, 629-30 (7th Cir. 1974) (court found no exigent circumstances even though police heard scuffling movements inside apartment); State v. Platten, 225 Kan. 764, 770-71, 594 P.2d 201, 206 (1979) (court rejected argument that defendant would probably destroy evidence when his buyer returned to purchase drugs); State v. Parras, 43 Or. App. 373, —, 602 P.2d 1125, 1126 (1979) (court stated that the police officers had no basis for believing that the suspect was likely to destroy evidence).

76. *See* cases cited at note 74 *supra*.

77. *See* United States v. Johnson, 561 F.2d 832, 843-44 & n.13 (D.C. Cir.), *cert. denied*, 432 U.S. 907 (1977).

78. United States v. Bustamonte-Gamez, 488 F.2d 4, 8 (9th Cir. 1973) (the suspect had looked at the officers while making a U-turn in his automobile), *cert. denied*, 416 U.S. 970 (1974).

79. United States v. Renfro, 620 F.2d 569, 574 (6th Cir. 1980) (court indicated that there was a reasonable possibility that the suspect's suspicions had been aroused).

80. United States v. Gardner, 553 F.2d 946, 948 (5th Cir. 1977).

81. *See* United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978); United States v. Blake, 484 F.2d 50, 54-56 (8th Cir. 1973), *cert. denied*, 417 U.S. 949 (1974). In *Kulcsar*, the court stated that "officers were not required to wait until evidence was 'actually in the process of destruction' before entering." 586 F.2d at 1287.

82. *Compare* United States v. Rosselli, 506 F.2d 627, 628-29 (7th Cir. 1974) *with* Kleinbart v. United States, 439 F.2d 511, 513 (D.C. Cir. 1970).

83. United States v. Rosselli, 506 F.2d 627, 629-30 (7th Cir. 1974). The police also heard a voice from within call, "Don't open the door for anybody." *Id.*

84. Kleinbart v. United States, 439 F.2d 511, 513 (D.C. Cir. 1970). In *Kleinbart*, the police also saw something thrown out of a window by the suspects. *Id.*

85. Note, *supra* note 10, at 677. In People v. Smith, 7 Cal. 3d 282, 496 P.2d 1261, 1263, 101 Cal. Rptr. 893, 895 (1972), the court stated, "But the exception must not be permitted to swallow

rants must be obtained before an arrest or search. Often forgotten is the fact that an intrusion into the privacy of one's home is one of the most severe incursions of police power into the life of the individual.[86] The proposed definition of exigent circumstances will protect the sanctity of the home and be useful to police officers confronted with situations involving the possibility of destruction of evidence.[87] In such situations, the police must obtain a warrant unless they can point to contemporaneous specific facts evidencing the imminent or actual destruction of evidence.[88]

Violence

The possibility that violence will occur if the police do not act swiftly is considered an exigent circumstance.[89] Under the proposed definition in this Note, exigent circumstances will be found only when the police are certain that violent activity will occur or is actually occurring.[90] This would constitute a true emergency justifying the absence of a warrant. Thus, when a defendant fires shots from his apartment[91] or when the police witness an attempted homicide in a home,[92] exigent circumstances will be found. An unfounded fear of danger to the police, however, will not constitute exigent circumstances.[93]

The possibility of violence exception to the warrant requirement was alluded to by the United States Supreme Court in *Warden v. Hay-*

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the rule: in the absence of a showing of true necessity—that is, an imminent and substantial threat to life, health or property—the constitutionally guaranteed right to privacy must prevail." *Id.*

86. *See* People v. Ramey, 16 Cal. 3d 263, 275, 545 P.2d 1333, 1340, 127 Cal. Rptr. 629, 636, *cert. denied*, 429 U.S. 929 (1976), in which the court said: "Unrestricted authority in this area is anathema to the system of checks envisaged by the Constitution." *Id.*

87. This is in contrast to the *Dorman* criteria, which provide little help to a policeman on the street. *See* text & notes 35-37 *supra*.

88. Specific facts of destruction would include the police actually seeing evidence being destroyed or hearing sounds clearly indicating that destruction is imminent.

89. *See* cases cited at note 40 *supra*.

90. *See* United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978) (attempted homicide in home); State v. Max, 263 N.W.2d 685, 688 (S.D. 1978) (random shots fired from apartment window).

91. State v. Max, 263 N.W.2d 685, 688 (S.D. 1978). The courts differ on whether the exigent circumstance of violence exists when the police believe a suspect possesses a weapon in his home. *Compare* United States v. McKinney, 477 F.2d 1184, 1185-86 (D.C. Cir. 1973) (court found exigent circumstances when the police believed a suspect possessed a weapon) *with* United States v. Killebrew, 560 F.2d 729, 734 (6th Cir. 1977) (court refused to find exigent circumstances even though police reasonably believed suspect had a weapon).

92. United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978).

93. *See* People v. Mack, 27 Cal. 3d 145, 156, 611 P.2d 454, 459-60, 165 Cal. Rptr. 113, 119 (1980) (Bird, C.J., dissenting). The *Mack* dissent pointed out that,

> It is understandable that a police officer may fear assault or worse at any time when he is outside of a building and does not know what is inside of it, particularly in a society where the possession of weapons is widespread, but the reasonableness of the steps he takes pursuant to such fear must be assessed in the context of the constitutional right of citizens.

Id. at 156, 611 P.2d at 460, 165 Cal. Rptr. at 119.

den.[94] There, the Court stated that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[95] In cases involving violence, the inevitable delay in procuring a warrant thus causes the warrant requirement to give way to the urgent need for immediate police action.[96]

Lower courts have accepted the violence exception to the warrant requirement. As with the destruction of evidence exception,[97] however, they have applied the exception too broadly. As a result, exigent circumstances have been found not only in cases involving violent crimes,[98] but also in cases involving remotely possible reactions of suspects to police conduct.[99] One court rationalized a finding of exigent circumstances by reasoning that if there are many officers outside a suspect's home, there is a likelihood of bloodshed if quick action is not taken.[100] Exigent circumstances have also been found when police saw a large amount of cocaine inside a home and suspected that the occupants might try to shoot their way out for lack of other alternatives.[101] It has further been held that police could reasonably believe a suspect is armed and violent from the fact that he had a prior arrest file and was suspected of committing a felony involving the use of force.[102]

An important factor in determining whether this exigent circumstance exists is the possibility of violence and harm not only to police but also to others.[103] "Others" include both adjoining neighbors[104] and

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94. 387 U.S. 294 (1967).

95. *Id.* at 298-99. The Court indicated that only a search of the premises could ensure that there were no weapons in the home which could be used against the police. *Id.* at 299.

96. *See* United States v. Flickinger, 573 F.2d 1349, 1355 (9th Cir. 1978). "Such is the case where police know or reasonably believe that a suspect is armed, for quick action increases the likelihood that the suspect may be disarmed without injuring others." *Id.*

97. *See* text & notes 74-85 *supra*.

98. *See* text & notes 91-92 *supra*.

99. *See, e.g.*, United States v. Gaultney, 581 F.2d 1137, 1147 (5th Cir. 1978) (mere possibility that suspects would "shoot their way out" if police had followed routine warrant arrest procedures); United States v. Scott, 578 F.2d 1186, 1190 (6th Cir. 1978) (warrantless search allowed because possibly precluded gunbattle); United States v. Shye, 492 F.2d 886, 892 (6th Cir. 1974) (possibility of violence if quick action were not taken).

100. *See* United States v. Shye, 492 F.2d 886, 892 (6th Cir. 1974). *Shye* involved suspects believed to be armed who were previously involved in a violent crime. However, there was no concrete evidence to support the court's conclusion that there was a substantial likelihood of bloodshed if entry were not made. The court merely reasoned that since a crime of violence was committed, the likelihood of violence upon entry was substantial. *Id.*

101. United States v. Gaultney, 581 F.2d 1137, 1147 (5th Cir. 1978). The *Gaultney* court's finding of exigency was based on the possibility of violence and, to a lesser extent, because a hot pursuit was involved. *Id.*

102. State v. Jones, 274 N.W.2d 273, 276 (Iowa 1979).

103. *See, e.g.*, United States v. McLaughlin, 525 F.2d 517, 521 (9th Cir. 1975); United States v. Perez, 440 F. Supp. 272, 292 (N.D. Ohio 1977), *aff'd*, 571 F.2d 584, *cert. denied*, 435 U.S. 998 (1978); State v. Smith, 123 Ariz. 231, 240, 599 P.2d 187, 196 (1979).

104. *See* United States v. McLaughlin, 525 F.2d 517, 521 (9th Cir. 1975) (court found exigent circumstances based partly on the fact that neighbors might be injured if entry were delayed); United States v. Perez, 440 F. Supp. 272, 292 (N.D. Ohio 1977) (search of residence reasonable

persons who may be present in the home or building into which the suspect enters.[105] Exigent circumstances have also been found where delayed entry would increase the possibility that innocent persons would be injured or significantly inconvenienced.[106]

Exigent circumstances should not be found when there is merely a remote possibility of harm to police or to others.[107] Although almost all cases involve a possibility of violence, many do not involve emergency situations.[108] Under the proposed definition, police would have to show that the suspect was highly likely to be violent or was actually violent.[109] Only situations involving a compelling need for police action to avoid violence would justify a warrantless home entry.[110] Generalizations based on a suspect's past actions will not suffice.[111]

Flight of a Suspect

Another exigent circumstance recognized by the courts is the possibility that a suspect will escape.[112] Under the proposed definition of exigent circumstances, the state would have to provide definite evidence of high risk of an escape.[113] Examples of situations providing definite evidence of potential escape would be when the police know a suspect is raising money for immediate flight[114] or if, after a knock on a

due to possibility of physical harm to innocent citizens), *aff'd*, 571 F.2d 584, *cert. denied*, 435 U.S. 998 (1978).

105. *See* State v. Smith, 123 Ariz. 231, 239, 599 P.2d 187, 195 (1979) (police officer held in shop by defendant against her will).

106. United States v. McLaughlin, 525 F.2d 517, 520-21 (9th Cir. 1975) (court found exigent circumstances to enter home and arrest drug dealers). The court emphasized the "legitimate interests of the neighbor whose surroundings should not be impressed with a state of seige, innocent persons who might be injured accidently as a consequence of a large number of armed and mobile men, and the interests of the general public in efficient law enforcement and certain punishment for wrongdoers." *Id.* at 521.

107. *See* cases cited at note 99 *supra*.

108. Cases in which it seems that no emergency situation was present or that a warrant reasonably could have been obtained before entry include United States v. Gaultney, 581 F.2d 1137, 1147 (5th Cir. 1978); United States v. Shye, 492 F.2d 886, 892 (6th Cir. 1974); State v. Jones, 274 N.W.2d 273, 276 (Iowa 1979). These cases are discussed at text & notes 100-02 *supra*.

109. *See* United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978) (attempted homicide in home) and State v. Max, 263 N.W.2d 685, 688 (S.D. 1978) (random shots fired from apartment window), for cases which certainly would pass the proposed test.

110. *See* text & notes 91-92 *supra*.

111. For example, solely because a suspect committed a violent crime does not mean that there will be exigent circumstances for his arrest. The police must show a contemporaneous high possibility of violence or actual violence in order to justify arrest without a warrant.

112. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 15 (1948); United States v. Calhoun, 542 F.2d 1094, 1102 (9th Cir. 1976); United States v. Titus, 445 F.2d 577, 578-79 (2d Cir. 1971).

113. *See* People v. Lopez, 99 Cal. App. 3d 754, 766, — P.2d —, —, 160 Cal. Rptr. 774, 779 (1979); State v. Lloyd, 61 Hawaii 505, 513, 606 P.2d 913, 918-19 (1980). In *Lloyd*, the police heard crashing sounds after they knocked on the suspect's door. *Id.* The court commented that "the police were fully justified in believing from the sounds heard within the residence that flight was in progress. . . ." *Id.* at 613, 606 P.2d at 919.

114. People v. Lopez, 99 Cal. App. 3d 754, 766, — P.2d —, —, 160 Cal. Rptr. 774, 779 (1979). The defendant in *Lopez* had previously fled the state after the commission of an offense in Texas. *Id.*

door, the police hear scurrying and crashing noises from within.[115] If there is no evidence at all that a suspect intends to flee, a warrantless entry to arrest would not be excused.[116]

Where there is a possibility of flight, courts dispense with the warrant requirement if there is a strong likelihood that the suspect will escape if not swiftly apprehended.[117] The suspect's right to privacy is thus outweighed by the need for effective law enforcement.[118] Some courts, however, have found exigent circumstances where there was no true emergency situation.[119] These courts have not required concrete evidence of an intent to flee.[120] The reasons given by these courts, which would not satisfy the proposed test, include the possibility that the delay necessary to obtain a warrant might permit escape,[121] and that escape was likely because the suspect in the past had fled the scene of the crime.[122] By finding exigent circumstances in these non-emergency situations, the exception to the warrant requirement has been "enthroned into the rule."[123]

Under the proposed test, exigent circumstances will be found only if the police have specific reason to believe that the defendant intends to flee. The mere possibility that a defendant could flee, a possibility

115. State v. Lloyd, 61 Hawaii 505, 513, 606 P.2d 913, 919 (1980).

116. *See* United States v. Parras, 45 Or. App. 373, —, 602 P.2d 1125, 1126-27 (1979). In *Parras*, a rape victim reported that the defendant was still in his apartment. There was no sign of activity in the apartment, the defendant's car was parked outside, and the drapes were entirely closed. Based on these facts, the court held there was no possibility of escape and the entry was not justified. *Id.*

117. *See* Dorman v. United States, 435 F.2d 385, 393 (D.C. Cir. 1970). The *Dorman* court stated that a likelihood of escape was one criterion to consider when evaluating whether exigent circumstances exist for a warrantless home arrest. *Id. See* text & note 24 *supra*.

118. *See* Johnson v. United States, 333 U.S. 10, 14-15 (1948).

119. *See* State v. Jones, 274 N.W.2d 273, 276 (Iowa 1979). In *Jones*, the court found exigent circumstances to enter and arrest a suspect for breaking and entering. *Id.* at 275. The police entered at night. *Id.* at 273. Exigency was found even though there was no hot pursuit, the suspect was not known to possess weapons, and there was no indication that immediate action was necessary to prevent violence or escape. *Id.* at 275-76. In short, there was no evidence indicating that this was an emergency situation. *Id.*

120. *Id.*; State v. Timmons, 574 S.W.2d 950, 951 (Mo. 1978). Due to the diversity of factual situations in these cases, there is no clarity or continuity among decisions. *But see* State v. Peller, 287 Or. 255, —, 598 P.2d 684, 688-89 (1979) (reversing a finding of exigent circumstances based on the mere possibility of flight).

121. *See* State v. Timmons, 574 S.W.2d 950, 955 (Mo. 1978). The *Timmons* court could find no more than "a likelihood that a delay might permit an escape." *Id.* A likelihood of escape from delay alone would not satisfy the proposed test. In *Timmons*, however, there were other factors that created exigency, including the fact that a crime of violence had been committed and there was a high degree of probable cause. *Id.* Also, the mere fact that many police officers surround the home of a suspect has been held not to be a guarantee against escape. United States v. Gaultney, 581 F.2d 1137, 1147 (5th Cir. 1978).

122. *See* State v. Jones, 274 N.W.2d 273, 276 (Iowa 1979).

123. Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971). In *Coolidge*, the Supreme Court, in considering the warrant requirement, stated that "[i]f it is to be a true guide to constitutional police action, rather than just a pious phrase, then '[t]he exceptions cannot be enthroned into the rule.'" *Id.*, *quoting* United States v. Rabinowitz, 339 U.S. 56, 80 (1950) (Frankfurter, J., dissenting).

probably present in most criminal cases, will not suffice.[124] Thus, the flight exception to the warrant requirement will be properly limited to cases involving a compelling need for immediate police action.

Conclusion

In *Payton v. New York*, the Supreme Court held that, absent exigent circumstances, a warrant must be obtained before a suspect may be arrested in his home. The *Payton* court did not attempt to define which exigent circumstances would justify a warrantless entry. Although the courts agree on the major categories that comprise exigent circumstances—hot pursuit, destruction of evidence, threat of violence, and possibility of flight—there has been little uniformity among decisions in each of these areas. Instead, each case is decided on its particular facts, leading to a lack of continuity in this area of the law.

The exigent circumstances exception to the warrant requirement is intended to apply only in emergency situations. Courts have often found exigent circumstances, however, even though an emergency situation did not exist. For this reason, a narrow definition of exigent circumstances is necessary. Exigent circumstances should be found only when the state can point to specific and articulable facts which indicate a compelling need for immediate police action. The focus of this analysis is on the facts as contemporaneously known to the police in each case, not on considerations based on speculation or past circumstances. Courts will be more reluctant to find emergency situations with this stricter definition of exigent circumstances. The presence of exigent circumstances should once again be the exception rather than the rule in warrantless home arrest cases.

124. *See* State v. Peller, 287 Or. 255, —, 598 P.2d 684, 689 (1979). "We do not agree, however, that the mere possibility that defendant could make a break if he were so inclined gives rise to exigent circumstances when there is no indication that he is, in fact, so inclined." *Id.*