

## Probable Cause, Reasonable Suspicion, or Mere Speculation?: Holding Police to a Higher Standard in Destruction of Evidence Exigency Cases

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*An exception to the Fourth Amendment's warrant requirement that may be established by a policeman's speculative fears can scarcely be described as "specifically established and well-delineated," it is better described as swallowing the rule.<sup>1</sup>*

### I. INTRODUCTION

The Fourth Amendment generally requires police to secure a warrant before conducting a search of a residence.<sup>2</sup> However, when there is an especially urgent need, police are sometimes able to enter and search without first obtaining a warrant.<sup>3</sup> Situations requiring immediate action on the part of law enforcement have been termed "exigent circumstances,"<sup>4</sup> and in such situations warrantless searches of residences may be permissible.<sup>5</sup> One type of exigent circumstance is the threat of the destruction or removal of evidence.<sup>6</sup> When the police fear evidence could be destroyed or removed if immediate action is not taken, they may be justified in making a warrantless search of a residence.<sup>7</sup>

The United States Supreme Court has been surprisingly reluctant to define the circumstances in which police may make a warrantless search of a residence to prevent the loss of evidence. In fact, no United States Supreme Court case has ever directly upheld a warrantless search of a residence based solely on the need to prevent the de-

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1. *United States v. Cuaron*, 700 F.2d 582, 592-93 (10th Cir. 1983) (Kelly, D.J., dissenting) (citations omitted).

2. U.S. CONST. amend. IV. The Fourth Amendment states:

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

*Id.*

3. *See generally* *Vale v. Louisiana*, 399 U.S. 30 (1970) (describing the circumstances under which a warrantless search is permitted).

4. *See* *Illinois v. McArthur*, 531 U.S. 326, 331 (2001).

5. *See id.*

6. *United States v. Lewis*, 231 F.3d 238, 241 (6th Cir. 2000). Other exigent circumstances include hot pursuit of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976), and when a suspect presents an immediate threat to officers or the public. *United States v. Morgan*, 743 F.2d 1158, 1162-63 (6th Cir. 1984).

7. *See* *Vale*, 399 U.S. at 34.

struction of evidence.<sup>8</sup> The validity of the destruction of evidence exigent circumstance exception to the Fourth Amendment's warrant requirement for residences has only been addressed in Supreme Court dicta.<sup>9</sup> Thus, the courts of appeals have been left to fashion their own criteria for determining under what circumstances a warrantless search of a residence is permissible.<sup>10</sup>

The criteria developed by the courts of appeals have been far from consistent.<sup>11</sup> Some circuits use a five-factor test first developed in *United States v. Rubin*.<sup>12</sup> Other circuits use a generally worded "reasonable belief that evidence was in danger of destruction"<sup>13</sup> test, while yet others simply look to the totality of the circumstances to determine whether the officers could have reasonably believed that evidence was about to be destroyed.<sup>14</sup> Moreover, some circuits explicitly require that any warrantless action be limited to securing the premises while police obtain a warrant.<sup>15</sup> However, at least one circuit has allowed more extensive warrantless searches and seizures.<sup>16</sup> The most important thing to glean from this disparity is that cases undoubtedly are decided differently depending on the circuit, or that different panels of judges within the same circuit might reach contradictory conclusions on similar facts due to the lack of an easily applied rule.<sup>17</sup>

The varied approaches and outcomes of the courts of appeals show the necessity for standardization by the United States Supreme Court. The Constitution demands that limitations on government intrusion be the same for all Americans regardless of which court of appeals happens to be the arbiter of the Constitution where they live.<sup>18</sup> The fundamental right to be free from unreasonable searches and seizures should not be subject to such a variance as now exists in the circuits.

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8. See 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 6.5 (3d ed. Supp. 2002). "Given the curious analysis in *Vale*, it is to be hoped that it will not be the last word from the Court on this important issue." *Id.*

9. See *infra* notes 20-52 and accompanying text.

10. See *infra* notes 86-177 and accompanying text.

11. See *infra* notes 88-177 and accompanying text.

12. 474 F.2d 262, 268-69 (3d Cir. 1973). For a list of the factors, see *infra* note 104 and accompanying text.

13. See, e.g., *United States v. Santa*, 236 F.3d 662, 669 (11th Cir. 2000); *United States v. Chavez*, 812 F.2d 1295, 1299 (10th Cir. 1987).

14. See, e.g., *United States v. McEachin*, 670 F.2d 1139, 1144 (D.C. Cir. 1981); *United States v. Flickinger*, 573 F.2d 1349, 1354 (9th Cir. 1978).

15. See, e.g., *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1513 (6th Cir. 1988); *United States v. Palumbo*, 742 F.2d 656, 659 (1st Cir. 1984).

16. See *McEachin*, 670 F.2d at 1145.

17. See *infra* notes 117-77 and accompanying text.

18. See Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 288 (1988).

Accordingly, the United States Supreme Court should remedy this situation by expounding clear rules under which police may make a warrantless entry into a residence to prevent the destruction of evidence. In so doing, the Court should adopt the requirements of a “probable cause-probable cause” standard for evaluating claims of exigent circumstances involving the destruction of evidence. This standard would require that 1) police have probable cause to believe that evidence of a crime is in the residence, 2) police have probable cause to believe that evidence is in imminent danger of destruction based on facts known to the police at the time of the warrantless entry, 3) police must not create the need for the search and should exercise reasonable care to avoid the necessity of a warrantless search, and 4) the search should be no more intrusive in time or scope than is necessary to safeguard the evidence while a warrant is obtained.

This rule would provide clarity as to the circumstances under which police could make a warrantless search. Moreover, it would bolster Fourth Amendment values by requiring strong indicia of destruction of evidence and not just suspicion or generalized possibility. This high level of proof of imminent destruction is most appropriate because of the nearly sacrosanct nature of the home as evidenced by the warrant requirement itself. Finally, it would encourage the use of warrants and discourage the manufacturing of exigent circumstances by police in order to circumvent the warrant requirement.

## II. THE UNITED STATES SUPREME COURT AND WARRANTLESS SEARCHES TO PREVENT THE DESTRUCTION OF EVIDENCE

The first references by the United States Supreme Court to destruction of evidence as an independent rationale for a warrantless search of a residence occurred in the late 1940s.<sup>19</sup> In *Johnson v. United States*,<sup>20</sup> police made a warrantless search of a hotel room after detecting the scent of burning opium coming from the room.<sup>21</sup> In affirming the suppression of the evidence, the Court found that there were no exigent circumstances that excused the failure to obtain a warrant.<sup>22</sup> The Court based its decision, in part, on its conclusion that “[n]o evidence or contraband was threatened with removal or destruction.”<sup>23</sup>

Similarly, in *McDonald v. United States*,<sup>24</sup> police heard what they believed was an adding machine coming from inside a rooming house

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19. See LAFAYE, *supra* note 8, at § 6.5.

20. 333 U.S. 10 (1948).

21. *Id.* at 12.

22. *Id.* at 15.

23. *Id.*

24. 335 U.S. 451 (1948).

in which a suspect they had been investigating for several months was staying.<sup>25</sup> Since it was an investigation of an illegal lottery, and adding machines were commonly used in such enterprises, police entered the rooming house and observed the defendant by looking through the transom.<sup>26</sup> The police saw paraphernalia commonly associated with an illegal lottery, arrested the defendant, and seized the contents of the room.<sup>27</sup> The Court suppressed the evidence, in part, because it found that the evidence was not “in the process of destruction nor as likely to be destroyed as the opium paraphernalia in the *Johnson* case.”<sup>28</sup>

In both *Johnson* and *McDonald*, the Court mentioned destruction of evidence while listing all of the exigencies that might have justified the failures of the police to obtain warrants before conducting the searches.<sup>29</sup> There also was no evidence that the suspects were aware of the investigations.<sup>30</sup> The potential destruction of evidence was not, therefore, the dispositive issue in either case; yet by mentioning it among other exigent circumstances, the Court provided a basis for lower courts to uphold searches conducted to prevent the destruction of evidence.<sup>31</sup>

The first<sup>32</sup> United States Supreme Court case to uphold a warrantless search conducted to prevent the destruction of evidence was *Schmerber v. California*.<sup>33</sup> In *Schmerber*, the Court upheld the taking of a blood sample, at the direction of police, from a man suspected of driving under the influence of alcohol (DUI).<sup>34</sup> The Court found that the officer “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the ‘destruction of evidence.’”<sup>35</sup> However, the Court went on to say that

[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. *Given these special facts*, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate *incident to petitioner’s arrest*.<sup>36</sup>

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25. *Id.* at 452.

26. *Id.* at 453.

27. *Id.*

28. *Id.* at 455-56 (emphasis added).

29. *McDonald*, 335 U.S. at 455; *Johnson v. United States*, 333 U.S. 10, 15 (1948).

30. *McDonald*, 335 U.S. at 456-58; *Johnson*, 333 U.S. at 12-15.

31. *See, e.g.*, *United States v. Palumbo*, 742 F.2d 656, 659 (1st Cir. 1984); *United States v. Rubin*, 474 F.2d 262, 265 (3d Cir. 1983); *State v. Peters*, 695 S.W.2d 140, 147 (Mo. Ct. App. 1985).

32. *See Salken, supra* note 18, at 292.

33. 384 U.S. 757 (1966).

34. *Id.* at 765.

35. *Id.* at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

36. *Id.* at 770-71 (emphasis added).

Because of these seemingly contradictory statements, the precise justification for the search was unclear. The Court seemed to limit its holding to the narrow circumstance of taking blood in a case of suspected DUI, but whether it was destruction of evidence, search incident to arrest, or a combination of the two that justified the warrantless search is not readily apparent. The facts of *Schmerber* are also not analogous to the search of a residence; however, the case does support the notion that a warrantless search may be permissible when there is threatened destruction of evidence.

*Vale v. Louisiana*<sup>37</sup> was the first and only United States Supreme Court case to directly address the destruction of evidence exigent circumstance exception in the context of a search of a residence.<sup>38</sup> In *Vale*, the police established surveillance of a house they believed was the residence of a man for whom they had two arrest warrants.<sup>39</sup> When the police witnessed Vale exit the residence and make an apparent drug transaction in front of the house, they arrested him.<sup>40</sup> The police then took Vale into the house and made a brief inspection to assure no one else was present.<sup>41</sup> Within three minutes, Vale's mother and brother returned to the home and the officers then made a full search of the house to preserve evidence.<sup>42</sup> The police found narcotics in one of the bedrooms.<sup>43</sup>

The Court held that the warrantless search of the house violated the Fourth Amendment.<sup>44</sup> Justice Stewart, writing for the majority, found that

only in 'a few specifically established and well-delineated' situations may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it. The burden rests on the State to show the existence of such an exceptional situation. And the record before us discloses none. There is no suggestion that anyone consented to the search. The officers were not responding to an emergency. They were not in hot pursuit of a fleeing felon. The goods ultimately seized were not in the process of destruction. Nor were they about to be removed from the jurisdiction.<sup>45</sup>

The circumstances in which a warrantless entry may be made seem clear from Justice Stewart's majority opinion, but the application of the law to the facts in *Vale* presents substantial challenges. Additionally, courts have not literally followed the language in *Vale*.

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37. 399 U.S. 30 (1970).

38. See *LAFAYE*, *supra* note 8, at § 6.5.

39. *Vale*, 399 U.S. at 31.

40. *Id.* at 32.

41. *Id.* at 33.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 34-35 (citations omitted).

First, it is not clear whether the initial search violated the Fourth Amendment or whether the only violation was the full search that produced the disputed evidence. If the initial search was permissible, courts could infer a preference for a limited search when police believe evidence is in danger of destruction. However, there was no basis for police to believe that evidence was in danger of destruction during the initial entry. The police had no knowledge that anyone else was in the house.<sup>46</sup> The Court stated that it “decline[ed] to hold that an arrest on the street can provide its own ‘exigent circumstance’ so as to justify a warrantless search of the arrestee’s house.”<sup>47</sup> This would seem to indicate that there were no exigent circumstances at all, and that both of the searches violated the Fourth Amendment.

In arguing against the legitimacy of the police’s fear someone would destroy evidence, Justice Stewart created confusion when he wrote that “[s]uch a rationale could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises.”<sup>48</sup> This might indicate that the Court approved of the initial entry, and that the police could have reasonably believed that evidence was in danger of destruction prior to satisfying themselves that no one was in the house. Because of these seemingly contradictory statements, there is uncertainty as to the proper interpretation of *Vale*.<sup>49</sup>

Second, language implying that no exigent circumstance existed because evidence was not “*in the process* of destruction”<sup>50</sup> would seem to impose a very strict standard on warrantless searches. Police will rarely be in a position to know the exact moment at which the destruction of evidence commences.<sup>51</sup> Thus, if this language in *Vale* were taken literally, the destruction of evidence exigent circumstance exception would rarely be invoked. However, the courts of appeals have not interpreted *Vale* to require that evidence actually be in the process of destruction.<sup>52</sup>

Because of the confusion generated by *Vale*, and because of the lack of other directly applicable United States Supreme Court precedent, it is necessary to discuss some of the Court’s decisions in analogous circumstances. Three circumstances involving the home are particularly relevant. The first involves the “knock and announce” requirement when police lawfully enter a residence to execute a search

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46. *See id.* at 31-32.

47. *Id.* at 35.

48. *Id.* at 34.

49. *See* LAFAVE, *supra* note 8, at § 6.5.

50. *Vale*, 399 U.S. at 35 (emphasis added).

51. *See* LAFAVE, *supra* note 8, at § 6.5.

52. *Id.* “Generally, it may be said that the lower courts have not accepted the *Vale* formulation as controlling.” *Id.*

warrant. The second deals with “protective sweeps” where officers are legally in a residence, but may not legally conduct a search. The third involves the warrantless seizure of a residence to prevent the destruction of evidence when the home is unoccupied.

The United States Supreme Court has held that when police enter a residence while executing a warrant, they must first knock and announce their presence and reason for entering.<sup>53</sup> However, police may be able to bypass this requirement under certain circumstances.<sup>54</sup> In *Richards v. Wisconsin*,<sup>55</sup> the Court held that “[i]n order to justify a ‘no knock’ entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”<sup>56</sup> In essence, circumstances that obviate the “knock and announce” requirement are those that would typically be deemed “exigent.” The Court also stated that the reasonable suspicion “standard — as opposed to a probable-cause requirement — strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.”<sup>57</sup>

In the context of destruction of evidence, *Richards* establishes that when police seek to bypass the “knock and announce” requirement when executing a search warrant, there must be a reasonable suspicion that evidence would be destroyed if police announced themselves before forcibly entering the residence.<sup>58</sup> However, this reasonable suspicion standard is inappropriate in the context of a warrantless search of a residence to prevent the destruction of evidence.<sup>59</sup>

First, there is a greater privacy interest implicated in a warrantless search than in a no-knock entry.<sup>60</sup> Second, in no-knock cases police already have obtained a warrant based on the judgment of a magistrate; however, in the case of a warrantless entry, those in the house have been deprived of such a determination. Therefore, when police search a residence without a warrant based on exigent circumstances, the justification should be subject to far greater scrutiny than the procedure followed in serving a warrant.<sup>61</sup> This greater scrutiny is accom-

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53. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

54. *Id.*

55. 520 U.S. 385 (1997).

56. *Id.* at 394.

57. *Id.*

58. *See id.*

59. The Court has, of course, never stated that a reasonable suspicion standard governs the destruction of evidence exigency. *See LAFAYE, supra* note 8, at § 6.5.

60. *Richards*, 520 U.S. at 393 n.5.

61. *See Payton v. New York*, 445 U.S. 573, 585-86 (1980). “When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a

plished by the proposed rule requiring police to have probable cause that the evidence is in danger of destruction.

The “protective sweep” is another law enforcement practice endorsed by the United States Supreme Court under certain circumstances.<sup>62</sup> In *Maryland v. Buie*,<sup>63</sup> police made a lawful entry into a residence to execute an arrest warrant.<sup>64</sup> The officers were looking for two men who had committed an armed robbery, one of whom lived at the residence.<sup>65</sup> Police apprehended the suspect who lived at the house when he emerged from the basement in response to an order to surrender.<sup>66</sup> Police then searched the basement to ensure no one else was present and, in the process, seized evidence that was in plain view.<sup>67</sup>

The United States Supreme Court found that a “protective sweep” of a residence after the arrest of a suspect is justified when police “possess a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”<sup>68</sup> The Court also emphasized the need for officers “to take reasonable steps to ensure their safety after, and while making, the arrest. That interest is sufficient to outweigh the intrusion such procedures may entail.”<sup>69</sup> However, the sweep itself must be a cursory search that lasts no longer than is necessary to ensure officer safety.<sup>70</sup>

The reasonable suspicion standard, therefore, also governs protective sweeps of residences. However, a protective sweep is distinguishable from a warrantless search to prevent the destruction of evidence. Consequently, reasonable suspicion is an inappropriate standard for evaluating warrantless searches to protect evidence. Protective sweeps are usually used when police have already legally made an entry based on an arrest warrant.<sup>71</sup> Because police are already legally in the residence pursuant to a warrant, there is less intrusion in allowing a limited search to ensure officer safety than there is in allowing a warrantless entry and search to prevent destruction of evi-

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policeman or Government enforcement agent.” *Id.* at 586 n.24 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

62. *See Maryland v. Buie*, 494 U.S. 325, 334 (1990).

63. 494 U.S. 325.

64. *Id.* at 328.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 337.

69. *Id.* at 334.

70. *Id.* at 335-36.

71. *See id.* at 332-33. A protective sweep is also the means used to secure a residence when police fear destruction of evidence, but in that case a warrantless entry has been made instead of an entry based on an arrest warrant. *See United States v. Palumbo*, 742 F.2d 656, 659 (1st Cir. 1984).

dence.<sup>72</sup> It is reasonable to expect that a warrantless entry and search to protect evidence should be subject to a higher standard because it is a greater intrusion and the countervailing law enforcement interest in protecting evidence is less than when officer safety is involved.

The final situation to be addressed in this discussion is the seizure of a residence to prevent the destruction of evidence. In *Illinois v. McArthur*,<sup>73</sup> police accompanied a wife to the trailer home she shared with her husband so that she could peaceably remove her belongings.<sup>74</sup> When she was finished collecting her things, she told the officers that her husband had marijuana in the trailer.<sup>75</sup> The police then knocked on the door and asked to search the trailer.<sup>76</sup> McArthur refused, and, at that point, one of the officers departed with the wife to obtain a search warrant.<sup>77</sup> During this conversation, McArthur had stepped out of the trailer and was prevented from re-entering except under police supervision, which was maintained from just inside the doorway.<sup>78</sup>

The Court upheld the warrantless seizure of the trailer.<sup>79</sup> While a warrantless seizure of a residence is surely different from a warrantless search of a residence, the Court's analysis may still shed light on the latter issue. The Court considered four factors relevant to its decision. First, police had probable cause to believe that the trailer contained evidence of a crime.<sup>80</sup> Second, the Court held that the police "reasonably could have concluded that McArthur, . . . suspecting an imminent search, would, if given the chance, get rid of the drugs fast."<sup>81</sup> Third, it noted that the police invaded privacy no more than was necessary to secure the evidence.<sup>82</sup> The Court found it significant that police neither searched the trailer nor arrested McArthur before obtaining a warrant.<sup>83</sup> Fourth, it was also significant that the restraint imposed was "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant."<sup>84</sup>

As with "protective sweeps" and "no-knock" warrants, the reasonable suspicion standard the Court applied to warrantless seizures

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72. *Buie*, 494 U.S. at 336 n.3. Such searches "are permissible on less than probable cause only because they are limited to that which is necessary to protect the safety of officers and others." *Id.* This is not to say that preventing the destruction of evidence is not an important law enforcement interest, but it is certainly not as important as the safety of police officers.

73. 531 U.S. 326 (2001).

74. *Id.* at 328.

75. *Id.* at 329.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 331.

80. *Id.* at 331-32.

81. *Id.* at 332.

82. *Id.*

83. *Id.*

84. *Id.*

of residences in *McArthur* is inappropriate in the context of warrantless searches to prevent the destruction of evidence. The degree of intrusion in preventing someone from entering a residence is far less than the intrusion of a warrantless entry and search.<sup>85</sup> Thus, a warrantless seizure based on reasonable suspicion that evidence could be destroyed is appropriate; however, because of the far greater intrusion, probable cause is a more appropriate standard when police make a warrantless entry to protect evidence.

### III. THE COURTS OF APPEALS AND WARRANTLESS SEARCHES TO PREVENT DESTRUCTION OF EVIDENCE

The approaches of the courts of appeals to warrantless searches to prevent destruction of evidence do not literally require evidence to be “in the process of destruction”<sup>86</sup> as *Vale* ostensibly required.<sup>87</sup> There is, however, very little agreement and even less consistency in the way these cases are decided.<sup>88</sup> The most important factor in distinguishing differing outcomes is the level of scrutiny given to police claims of exigency.<sup>89</sup> A secondary factor is how far the police must go to avoid creating or contributing to the exigency.<sup>90</sup> Finally, courts usually require that the warrantless action taken by the police be limited in scope and duration, but there are exceptions.<sup>91</sup>

Because the circuits tend to be so inconsistent relative to both each other and their own decisions, it is very difficult to generalize.<sup>92</sup> Thus, this discussion will begin by grouping the circuits according to the stated rules the courts follow in evaluating police claims of exigency. This categorization is merely for the sake of convenience because the outcomes of the cases tend to vary regardless of the tests employed.<sup>93</sup> Then, it will be useful to compare and contrast a sam-

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85. *See id.* at 336. “Temporarily keeping a person from entering his home . . . is considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search.” *Id.*

86. *Vale v. Louisiana*, 399 U.S. 30, 35 (1970).

87. *See LAFAYE*, *supra* note 8, at § 6.5.

88. *See Salken*, *supra* note 18, at 300-02. Professor Salken writes that

[i]t is difficult to categorize and compare the approaches taken by the circuits. Some have never articulated a specific test or mode of analysis, while others have offered more than one formulation. Additionally, even among those circuits that have set up a specific test, typically worded as ‘reason to believe that evidence is threatened with imminent destruction,’ the results are often different, and among the circuits that employ [sic] different-sounding tests the results are often the same.

*Id.* at 301-02 (footnotes omitted).

89. *See id.* at 302.

90. *See id.*

91. *See, e.g.*, *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1513 (6th Cir. 1988); *United States v. Palumbo*, 742 F.2d 656, 658 (1st Cir. 1984). *But see United States v. McEachin*, 670 F.2d 1139, 1145 (D.C. Cir. 1981) (approving the warrantless seizure of a shotgun not in plain view subsequent to the warrantless entry of the suspect’s apartment to prevent the removal of the shotgun).

92. *See Salken*, *supra* note 18, at 301-02.

93. *Id.*

pling of the decisions in order to illustrate the disparity among the courts.

### A. *The Rubin Factors*

In *United States v. Rubin*,<sup>94</sup> customs agents learned of a crate coming into the country that contained hashish.<sup>95</sup> It was addressed to a specific doctor at a hospital.<sup>96</sup> The package was picked up and taken to a residence.<sup>97</sup> At that point, an officer was dispatched to get a warrant to search the premises.<sup>98</sup> Shortly thereafter, the man who had picked up and delivered the package left the residence.<sup>99</sup> Police followed him, and he soon began trying to evade them, at which point the officers pulled the car over and arrested the man.<sup>100</sup> The suspect then yelled to bystanders to “call my brother.”<sup>101</sup> Police, fearful that the bystanders would do as the man said and tip off the other suspects, entered the residence and arrested the occupants, who were in the process of packaging the drugs.<sup>102</sup>

The Third Circuit Court of Appeals upheld the search and stated five factors it found particularly relevant in determining whether there were exigent circumstances that justified a warrantless search of the home to prevent the destruction of evidence.<sup>103</sup> Those factors were

- (1) the degree of urgency involved and the amount of time necessary to obtain a warrant;
- (2) reasonable belief that the contraband is about to be removed;
- (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought;
- (4) information indicating the possessors of the contraband are aware that the police are on their trail; and
- (5) the ready destructibility of the contraband.<sup>104</sup>

The court found that the officers reasonably could have believed that the evidence was in danger of destruction.<sup>105</sup> It was significant that officers knew there were people in the residence.<sup>106</sup> The court also found that, because the bystanders at the arrest appeared to know the man and because the arrest occurred only six blocks from the resi-

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94. 474 F.2d 262 (3d Cir. 1973).

95. *Id.* at 264.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 268-69.

104. *Id.* (citations omitted).

105. *Id.* at 269.

106. *Id.*

dence, it was reasonable for the police to fear that the arrested man's confederates would be alerted to his arrest and destroy the drugs.<sup>107</sup>

These five factors have been adopted by the Fourth and Fifth Circuit Courts of Appeals as well.<sup>108</sup> In applying the factors to individual cases, not all of the factors need to be present.<sup>109</sup> However, these courts tend to look most closely at the specific facts indicating that the suspects could be aware that police are on their trail.<sup>110</sup> For example, in *Rubin*, the fact that the arrestee told bystanders to call his brother was found to be highly significant because it supported the belief that those at the residence could soon be aware of the police surveillance.<sup>111</sup>

Likewise, in *United States v. Turner*,<sup>112</sup> the fact that police arrested a drug dealer within sight of the apartment where drugs were stashed supported the reasonable belief that contraband was in danger of destruction by confederates known by police to be in the apartment.<sup>113</sup>

In both of these cases, the courts focused on the specific information available to police from which the inference that contraband was likely to be destroyed arose. Because the police could articulate specific facts that led them to the belief that confederates, who were known to be in the residences, had been alerted to the investigation, it was reasonable for the police to conclude that they would destroy the evidence.

The three courts of appeals that use the *Rubin* test also state that police may not create the exigency that necessitated the warrantless action.<sup>114</sup> These courts look at the circumstances that led to the exigency to see whether it arose naturally while police were seeking a warrant or whether the police took affirmative steps that caused the exigency.<sup>115</sup> However, there is some disagreement about what constitutes "creation" of the exigency.<sup>116</sup>

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107. *Id.* It also should be noted, for illustrative purposes, that police could not have obtained a warrant for the residence prior to the package being brought there and that police did attempt to obtain a warrant as soon as probable cause arose. *Id.* The outcome could have been different if police had probable cause to search the residence before the package was taken there, or if police had delayed in seeking a warrant for an unreasonable amount of time and then claimed an exigent circumstance necessitated the warrantless search.

108. See *United States v. Richard*, 994 F.2d 224, 248 (5th Cir. 1993); *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981).

109. See *Turner*, 650 F.2d at 528.

110. See *Richard*, 994 F.2d at 249; *Turner*, 650 F.2d at 528-29; *Rubin*, 474 F.2d at 269.

111. See *Rubin*, 474 F.2d at 269.

112. 650 F.2d 526.

113. See *id.* at 528-29.

114. See *Richard*, 994 F.2d at 248; *United States v. Acosta*, 965 F.2d 1248, 1254 (3d Cir. 1992); *United States v. Collazo*, 732 F.2d 1200, 1204 (4th Cir. 1984).

115. *Richard*, 994 F.2d at 248; *Acosta*, 965 F.2d at 1254; *Collazo*, 732 F.2d at 1204.

116. Compare *Richard*, 994 F.2d at 248, with *Turner*, 650 F.2d 526, 528 (4th Cir. 1981).

In *United States v. Richard*,<sup>117</sup> officers, having evidence that a suspected drug smuggler might be in a motel room, went to the room and announced their presence.<sup>118</sup> Someone in the room said, “[w]ait a minute,” and the officers heard footsteps, hushed talking, and drawers slamming.<sup>119</sup> The officers kicked in the door, arrested the two occupants,<sup>120</sup> and searched the motel room.<sup>121</sup> The Fifth Circuit Court of Appeals found that the police had created the exigency by knocking on the door and announcing their presence.<sup>122</sup>

The court noted the significance of several facts in reaching its conclusion. First, the officers had no specific evidence that the room contained destructible contraband.<sup>123</sup> Second, the police had no evidence that any of the suspects were aware of the investigation prior to police knocking on the motel room door.<sup>124</sup> Third, several hours had passed since the police had learned that the individual might be in the motel room.<sup>125</sup> This provided sufficient time to get a warrant or at least start the process, but the officers never even sought a warrant.<sup>126</sup> Fourth, the officers could easily have maintained surveillance once they arrived at the motel while they were getting a warrant.<sup>127</sup> The court also indicated that, had an exigency arose during surveillance and while police sought a warrant, the officers would have been justified in making a warrantless entry into the room.<sup>128</sup>

In contrast, in *United States v. Turner*,<sup>129</sup> police arrested a suspect within 400 feet of an apartment from which drugs were being sold.<sup>130</sup> The fact that those in the apartment might have seen the arrest provided the basis for the belief that evidence was in danger of destruction.<sup>131</sup> The Fourth Circuit Court of Appeals did not even consider that, in making the arrest so close to the apartment, the police themselves had alerted the suspects to the surveillance.<sup>132</sup> It was unclear why the police could not have delayed the arrest until the suspect was in a location that would not have tipped off his confederates in the apartment. This lack of concern regarding police-created exigency seems to contrast sharply with the holding in *Richard*, where police

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117. 994 F.2d 244.

118. *Id.* at 246-47.

119. *Id.* at 247.

120. Neither of the two men was the suspect, but the suspect was staying in the room. *Id.*

121. *Id.*

122. *Id.* at 249.

123. *See id.*

124. *Id.*

125. *Id.*

126. *See id.*

127. *Id.*

128. *Id.*

129. 650 F.2d 526 (4th Cir. 1981).

130. *Id.* at 527.

131. *Id.*

132. *See id.* at 528-29.

actions that tipped off the suspects were found to have impermissibly created the exigency.<sup>133</sup>

In summary, the courts of appeals that use the *Rubin* test require police to articulate specific facts that satisfy some of the five factors used to evaluate the legitimacy of a warrantless search based on an exigent need. Not all the factors have to be satisfied, but at a minimum police have to show that there was reason to believe that evidence would be destroyed before a warrant could be obtained. In making that showing it is important that police knew that there were individuals in a position to destroy evidence, and that there was reason to think those individuals knew the police were investigating them. Police also may not cause the exigency they rely on to make a warrantless search, such as by intentionally and unnecessarily alerting the suspects that they are being investigated. However, there appears to be some disagreement as to what constitutes “creation” of the exigency within this group.

### B. *The Sixth Circuit Test*

The Sixth Circuit Court of Appeals has adopted a two-part test to determine whether sufficient exigent circumstances existed to justify a warrantless search of a residence.<sup>134</sup> The test requires police to have “1) a reasonable belief that third parties are inside the dwelling; and 2) a reasonable belief that these third parties may soon become aware the police are on their trail, so that destruction of evidence would be in order.”<sup>135</sup> This court has also stated that police may not create the exigency that is the basis for the warrantless search.<sup>136</sup> At times, the Sixth Circuit Court of Appeals has closely scrutinized whether specific facts known to police provided for an inference that a third party was in the home and that the third party would learn of the investigation.<sup>137</sup>

For example, in *United States v. Lewis*,<sup>138</sup> an informant told police that two brothers were selling drugs out of a house.<sup>139</sup> The informant also provided police with the time and date of a large drug delivery involving the brothers that was to occur down the street from the residence.<sup>140</sup> Police established surveillance and subsequently arrested one of the brothers making a drug transaction about a block from the

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133. *Richard*, 994 F.2d at 249.

134. *United States v. Lewis*, 231 F.3d 238, 241 (6th Cir. 2000).

135. *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1512 (6th Cir. 1988).

136. *See United States v. Haddix*, 239 F.3d 766, 768 (6th Cir. 2001).

137. *See, e.g., Lewis*, 231 F.3d at 241.

138. 231 F.3d at 238.

139. *Id.* at 239.

140. *Id.* at 240.

house.<sup>141</sup> The police then entered the house and found drugs in a bedroom occupied by the other brother.<sup>142</sup>

The Sixth Circuit Court of Appeals suppressed the evidence and held there were no exigent circumstances present.<sup>143</sup> The police had “no reason to believe that third parties were inside the house at the time of the transaction.”<sup>144</sup> Moreover, the contention that the informant’s tip, that two brothers were running a drug business out of the house, provided the police with sufficient evidence to reasonably conclude that the other brother was in the house was rejected.<sup>145</sup> The court essentially found that specific evidence that a third person was in the house was necessary to meet the reasonable belief standard.<sup>146</sup> It is significant that the police were not allowed to rely on mere speculation or possibility, but rather were required to show specific proof that would support the required reasonable belief.<sup>147</sup>

At other times, the Sixth Circuit was far less demanding of the police. For example, in *United States v. Sangineto-Miranda*,<sup>148</sup> police had information from an informant that there was a large amount of cocaine in an apartment.<sup>149</sup> The informant had been negotiating a deal with two suspects and, when the informant and one of the suspects left to call a fictitious “money man,” the police arrested the suspect.<sup>150</sup> Officers then went to the apartment, arrested the other suspect, and secured the apartment while they obtained a warrant.<sup>151</sup>

The court upheld the warrantless entry because police knew there was an accomplice in the apartment, and it was reasonable for the police to conclude that he would be alerted to the investigation when his co-conspirator failed to return.<sup>152</sup> However, there was no specific evidence that the suspect in the apartment knew of his partner’s arrest or even that the partner was expected to make a hasty return to the apartment.<sup>153</sup> The court found that police did not require such specific information because that “impermissibly shifts ‘the inquiry from

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141. *Id.*

142. *Id.* The circumstances surrounding the entry into the house were highly disputed. *See id.* The police claimed a child voluntarily admitted them, but several witnesses testified that the police barged in without announcing themselves. *Id.* There were numerous other disputed facts as well. *See generally id.*

143. *Id.* at 241.

144. *Id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. 859 F.2d 1501 (6th Cir. 1988).

149. *Id.* at 1505.

150. *Id.*

151. *Id.*

152. *Id.* at 1512-13.

153. *See id.* at 1513.

what the experienced officers reasonably believed, to what the suspect[ ] actually knew of the events outside’.”<sup>154</sup>

In contrast, the *Lewis* court did not allow officers to speculate about whether there were others in the house who would destroy evidence. Although the informant told police that there were two brothers selling drugs out of a house, this was insufficient evidence from which the police could draw a reasonable inference.<sup>155</sup> By contrast, in *Sangineto-Miranda*, the police lacked specific evidence that the occupant of the apartment could be aware of the arrest of his partner, but officers were allowed to speculate that destruction was likely to occur.<sup>156</sup> While these cases are distinguishable insofar as they deal with different prongs of the test, the same reasonable belief standard applies to both. The amount of specific evidence required to satisfy the standard, however, seems to be highly variable.

### C. *The Remaining Circuits*

Some of the remaining courts of appeals<sup>157</sup> have adopted a generally worded test that requires a “reasonable fear that evidence is about to be destroyed.”<sup>158</sup> Similarly, other courts of appeals focus on whether the police action was reasonable under the totality of the circumstances.<sup>159</sup> These courts of appeals all essentially evaluate whether police had some factual basis for reasonably concluding that evidence was in danger of destruction.<sup>160</sup> These courts also all state that police may not create the exigency they rely upon to make a warrantless entry.<sup>161</sup>

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154. *Id.* (quoting *United States v. Socey*, 846 F.2d 1439, 1446 (D.C. Cir. 1988)).

155. *See United States v. Lewis*, 231 F.3d 238, 241 (6th Cir. 2000).

156. *See Sangineto-Miranda*, 859 F.2d at 1513.

157. *See, e.g.*, *United States v. Santa*, 236 F.3d 662, 669 (11th Cir. 2000); *United States v. Marshall*, 157 F.3d 477, 482 (7th Cir. 1998); *United States v. Cresta*, 825 F.2d 538, 553 (1st Cir. 1987); *United States v. Chavez*, 812 F.2d 1295, 1299 (10th Cir. 1987); *United States v. Kunkler*, 679 F.2d 187, 191-92 (9th Cir. 1982).

158. *Marshall*, 157 F.3d at 482.

159. *See, e.g.*, *United States v. Lopez*, 937 F.2d 716, 722 (2d Cir. 1991); *United States v. Johnson*, 904 F.2d 443, 446 (8th Cir. 1990); *United States v. McEachin*, 670 F.2d 1139, 1144 (D.C. Cir. 1981).

160. *See cases cited supra* notes 157, 159. Additionally, the Second Circuit uses a list of factors that it considers “illustrative” in determining the reasonableness of police actions in cases in which any exigent circumstance is claimed. *Lopez*, 937 F.2d at 722-23. The factors are:

- (1) the gravity or violent nature of the offense with which the suspect is to be charged;
- (2) whether the suspect “is reasonably believed to be armed”; (3) “a clear showing of probable cause . . . to believe that the suspect committed the crime”; (4) “strong reason to believe that the suspect is in the premises being entered”; (5) “a likelihood that the suspect will escape if not swiftly apprehended”; and (6) the peaceful circumstances of the entry.

*Id.* at 722 (quoting *United States v. Cattouse*, 846 F.2d 144, 146 (2d Cir. 1988)) (alteration in original).

161. *See, e.g.*, *Santa*, 236 F.3d at 671; *Marshall*, 157 F.3d at 483; *Johnson*, 904 F.2d at 447; *United States v. Timberlake*, 896 F.2d 592, 597 (D.C. Cir. 1990); *Cattouse*, 846 F.2d at 147; *Cresta*, 825 F.2d at 553; *Kunkler*, 679 F.2d at 191-92.

These general approaches are illustrated by *United States v. Limares*<sup>162</sup> where postal inspectors discovered a package containing \$18,000 in cash sent from Ft. Wayne, Indiana, to Fresno, California.<sup>163</sup> The next day, postal inspectors intercepted a package containing four pounds of methamphetamine bound to Ft. Wayne from Fresno.<sup>164</sup> Federal agents replaced most of the drugs with a look-alike and added a radio transmitter designed to signal police when the package was opened.<sup>165</sup> Agents obtained a warrant for the house to which the package was addressed and made a controlled delivery to that residence.<sup>166</sup> Almost immediately, the man who signed for the package left carrying a duffel bag that was big enough to hold it.<sup>167</sup> He entered a house a few blocks away.<sup>168</sup> Agents called an Assistant United States Attorney to begin the process of obtaining a telephonic warrant when the signaling device began indicating that the package had been opened.<sup>169</sup> The agents entered the house and arrested the man and several other occupants.<sup>170</sup> The agents then obtained a warrant and a subsequent search turned up the package and other evidence of narcotics trafficking.<sup>171</sup>

The Seventh Circuit Court of Appeals found that “[i]t was reasonable to enter and secure [the house] to prevent the destruction of evidence.”<sup>172</sup> Once the package was opened, it was reasonable to infer that the presence of the transmitter would have tipped off the suspects that they were under investigation and led to the destruction of evidence.<sup>173</sup> In reaching this conclusion, the court also noted that agents obtained a warrant for the house to which they made the controlled delivery.<sup>174</sup> It was also significant that agents had initiated the process of obtaining a telephonic warrant at the time the suspects opened the package.<sup>175</sup> The court found that the agents had not created the exigency, and that it was a legitimate investigatory tactic to allow the package to be moved to another location.<sup>176</sup> Finally, it was significant that agents delayed the full search of the house until they had obtained a warrant.<sup>177</sup>

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162. 269 F.3d 794 (7th Cir. 2001).

163. *Id.* at 796.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 797.

171. *Id.*

172. *Id.* at 799.

173. *See id.* at 798.

174. *See id.* at 799.

175. *See id.*

176. *See id.*

177. *See id.*

*Limares* is typical of the approaches of all of these circuits in evaluating claims of exigency. However, as will be shown below, it is not the general approach or test that is significant, but rather the amount of scrutiny to which police claims of exigency are subjected that results in divergent outcomes.

#### D. *The Inconsistency of the Circuits' Decisions*

The courts of appeals, while in some cases having different tests, all essentially require that police have some reason to conclude evidence is in danger of destruction.<sup>178</sup> The difference in the circuits, or perhaps more precisely the difference between any two cases with seemingly disparate outcomes, depends on how closely the court scrutinizes the claimed exigency and the police conduct leading up to it.<sup>179</sup> As will be shown, nearly identical facts often lead to differing conclusions regarding the existence of sufficient exigency to justify warrantless action.

*United States v. MacDonald*<sup>180</sup> stands as probably the most curious and out-of-line court of appeals decision in the exigent circumstances arena.<sup>181</sup> In *MacDonald*, an informant told police that there was a narcotics ring operating out of two units in an apartment building.<sup>182</sup> The police commenced surveillance and observed activities consistent with narcotics sales originating from one of those units.<sup>183</sup> An officer then went to the apartment to attempt to purchase narcotics.<sup>184</sup> The officer was admitted to the apartment, saw several armed individuals inside, and eventually bought five dollars worth of marijuana.<sup>185</sup> Ten minutes later, police knocked on the door, announced themselves, and, after receiving a radio report that suspects were fleeing the apartment through a window, gained entry by using a battering ram on the door.<sup>186</sup> The police arrested those in the apartment and seized drugs, guns, money, and other paraphernalia in plain view.<sup>187</sup>

Surprisingly, the Second Circuit Court of Appeals upheld the warrantless entry.<sup>188</sup> It found that, once the officer was actually in the apartment and able to buy drugs, exigent circumstances existed.<sup>189</sup>

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178. See Salken, *supra* note 18, at 320.

179. See *id.*

180. 916 F.2d 766 (2d Cir. 1990) (en banc).

181. For an analysis of this case, see Peter E. Donohue, Comment, *The Second Circuit's Interpretation of Exigent Circumstances in United States v. MacDonald: The Erosion of the Warrant Requirement*, 65 ST. JOHN'S L. REV. 1163 (1991).

182. *MacDonald*, 916 F.2d at 768.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 770.

189. *Id.*

The court stated that “[c]onsistent with well settled law . . . once the undercover agent had firsthand knowledge of the suspects’ undertakings inside the apartment, exigent circumstances were present.”<sup>190</sup> This statement is rather remarkable considering the court cited no authority for its assertion.<sup>191</sup> In fact, Judge Kearsse’s dissent stated that “I know of no law, settled or otherwise, that mere firsthand knowledge of a crime constitutes exigent circumstances permitting a warrantless entry.”<sup>192</sup>

The *MacDonald* court also found it significant that the officer who made the purchase could have arrested the suspects at that time because the officer was already legally in the apartment.<sup>193</sup> The court reasoned that the officer left to get reinforcements and, since only ten minutes had passed, reentry did not violate the Constitution.<sup>194</sup> The court stated that “[t]his is not the kind of scenario that needs the detached judgment of a neutral magistrate to determine whether there is probable cause for an arrest and search.”<sup>195</sup> This statement is nearly as remarkable as the previous one because it is not the need for the detached judgment of a magistrate in finding probable cause that is excused by the existence of exigent circumstances.<sup>196</sup> Rather, the exigency makes it reasonable for police to take warrantless action to prevent the destruction of evidence *until* a warrant may be obtained from a magistrate.<sup>197</sup>

The *MacDonald* court also found that, even if it was assumed that no exigent circumstances existed before the police knocked on the door, the police did not impermissibly cause the exigency by so doing.<sup>198</sup> Contrast that finding with the previously mentioned holding of *United States v. Richard*,<sup>199</sup> where police, who were searching for a suspect, knocked on a motel room door and then claimed the ensuing commotion in the room justified a warrantless entry.<sup>200</sup> The *Richard* court found that police had caused the exigency and could not rely on it to justify the warrantless entry into the hotel room.<sup>201</sup> In both of these cases, the suspects had no idea they were under investigation.<sup>202</sup> It was the officers themselves who alerted the suspects to the surveil-

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190. *Id.*

191. *Id.*

192. *Id.* at 773 (Kearsse, J., dissenting).

193. *Id.* at 771.

194. *Id.*

195. *Id.*

196. *See* *United States v. McDonald*, 335 U.S. 451, 455-56 (1948).

197. *See id.*

198. *MacDonald*, 916 F.2d at 771.

199. 994 F.2d 244 (5th Cir. 1993).

200. *See id.* at 247.

201. *See id.* at 249-50.

202. *See id.* at 249; *MacDonald*, 916 F.2d at 771.

lance.<sup>203</sup> The only difference is that in *MacDonald* the police were aware that there was destructible evidence in the apartment.<sup>204</sup> However, this has no bearing on whether police may create the exigency. In *Richard*, the court distinguished *MacDonald* because the *MacDonald* court had found there were exigent circumstances *before* the police knocked and announced their presence.<sup>205</sup> The *Richard* court, however, stated no opinion as to the validity of the initial finding of exigent circumstances in *MacDonald*.<sup>206</sup>

The *MacDonald* court also made no inquiry into the failure of police to obtain a warrant when probable cause arose.<sup>207</sup> It is unclear why police could not have maintained surveillance while they obtained a warrant after the controlled purchase.<sup>208</sup> Moreover, the court did not point to any facts that would lead the police to reasonably believe evidence was in danger of destruction.<sup>209</sup> The suspects had no idea they were under investigation, nor was there any reason for police to think that the suspects would soon be aware of the investigation.<sup>210</sup> The court presumed that, where police have firsthand knowledge that drugs and guns are in an apartment, exigent circumstances exist. However, it is hardly true that every case involving the presence of drugs and guns represents an emergency requiring immediate action by police.<sup>211</sup>

Another striking instance of inconsistency in exigent circumstances jurisprudence can be found in the Eighth Circuit Court of Appeals cases of *United States v. V.L. Johnson*<sup>212</sup> and *United States v. J. Johnson*.<sup>213</sup> Both of the *Johnson* cases involved controlled delivery of drug-containing packages intercepted by the postal service. In *V.L. Johnson*, postal inspectors discovered a package containing cocaine.<sup>214</sup> They replaced the drugs with a transmitter and objects similar in size and weight to the drugs.<sup>215</sup> The transmitter was designed to signal when the package was opened.<sup>216</sup> The address on the package contained errors that made it impossible for the federal agents to definitively know where the package was supposed to be delivered, but they

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203. See *Richard*, 994 F.2d at 249; *MacDonald*, 916 F.2d at 771.

204. See *MacDonald*, 916 F.2d at 768.

205. See *Richard*, 994 F.2d at 249.

206. See *id.*

207. See *MacDonald*, 916 F.2d at 769-773.

208. See *id.*

209. See *id.*

210. See *id.*

211. See *Richards v. Wisconsin*, 520 U.S. 385, 392-93 (1997). “[W]hile drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree.” *Id.* at 393.

212. 904 F.2d 443 (8th Cir. 1990).

213. 12 F.3d 760 (8th Cir. 1993).

214. *Johnson*, 904 F.2d at 444.

215. *Id.*

216. *Id.* at 445.

decided that Vernon Johnson's (Vernon) address was the most likely one.<sup>217</sup> Agents delivered the package, which was accepted, and Vernon arrived at the house about ten minutes later.<sup>218</sup> Soon thereafter, the agents completely lost the signal from the transmitter.<sup>219</sup> They feared that the transmitter had been discovered and disabled.<sup>220</sup> The agents decided to enter and, upon knocking and announcing themselves, heard rapid footsteps.<sup>221</sup> The agents then broke down the door and found the open package along with drug paraphernalia.<sup>222</sup>

The court upheld the search.<sup>223</sup> It found that the failure of the transmitter led police to reasonably believe Vernon was aware of the investigation and, thus, the contents of the package were likely to be destroyed.<sup>224</sup> The court also found that because of the intentional mislabeling of the package it would have been impossible for police to obtain an anticipatory warrant for Vernon's house.<sup>225</sup> The court rejected Vernon's contention that police created the exigency by placing the transmitter in the package.<sup>226</sup> It found that police did not create the exigency, and that the foreseeability of exigent circumstances arising because of the removal of the drugs and the insertion of the transmitter was irrelevant.<sup>227</sup>

In *United States v. J. Johnson*,<sup>228</sup> postal inspectors discovered a package that contained eighteen bags of crack cocaine.<sup>229</sup> They replaced all but one of the bags with bags of taffy, and inserted a transmitter that would indicate the opening of the package.<sup>230</sup> The postal inspectors then made a controlled delivery of the package, which was accepted at the residence to which it was addressed.<sup>231</sup> There was a postal inspector waiting at the federal courthouse to apply for a warrant as soon as the delivery was completed.<sup>232</sup> Minutes after the package was delivered, and before the issuance of a warrant, the transmitter indicated that the package had been opened.<sup>233</sup> Inspectors feared that evidence would be destroyed since those inside the home were bound to be alerted to the investigation due to the taffy and the

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217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 444.

224. *See id.* at 448.

225. *See id.* at 446.

226. *See id.* at 447.

227. *See id.* at 447-48.

228. 12 F.3d 760 (8th Cir. 1993).

229. *Id.* at 762.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

transmitter.<sup>234</sup> Postal inspectors made a forced entry to prevent the destruction of evidence.<sup>235</sup> The warrant was issued ten minutes later, and inspectors then searched the house and found narcotics paraphernalia.<sup>236</sup>

The court held that the warrantless entry was not supported by exigent circumstances because postal inspectors had created the exigency.<sup>237</sup> The court faulted the investigative strategy employed by the inspectors because “[h]ad they not altered the package’s contents, there would have been little or no danger of evidence being destroyed before they obtained the search warrant.”<sup>238</sup> This rationale was, however, expressly rejected in the *V.L. Johnson* case decided only three years earlier.<sup>239</sup> The court distinguished *V.L. Johnson* on the ground that agents could not be sure about the address on the package in that case, so they could not obtain a warrant as easily as the postal inspectors could in *J. Johnson*.<sup>240</sup> Discussing *V.L. Johnson*, the court stated that “[i]n contrast to the facts in *Johnson*, the package in the present case was addressed to a clearly identifiable address, and the inspectors were able to obtain a search warrant shortly after it was delivered.”<sup>241</sup> This statement is strange because, in reality, the agents in either case could have gotten a warrant very quickly *after* the packages were delivered. The key fact in *V.L. Johnson* seems to have been the inability to obtain an anticipatory warrant due to the address problem, but the court never expressly stated that failure to obtain an anticipatory warrant was the reason for its decision in *J. Johnson*.<sup>242</sup> In any event, the agents in *V.L. Johnson* still could have stationed an agent at a courthouse with an affidavit already filled out, or officers could have had a magistrate on the telephone to issue a warrant as soon as delivery was completed. The agents did neither in that case, and yet, the search was upheld.

The foregoing discussion is simply meant to illustrate the disparity in destruction of evidence cases. There are other such apparent conflicts in the decisions of the courts of appeals. The courts apply various tests that seem different, but actually focus on the factual basis for the belief that evidence is in danger of destruction. Some cases have required strong, specific factual evidence, while others have allowed police to justify a search on little more than speculation. The

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234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 764.

238. *Id.* at 765.

239. *United States v. Johnson*, 904 F.2d 443, 447 (8th Cir. 1990).

240. *Johnson*, 12 F.3d at 765.

241. *Id.*

242. *See id.*

courts all say that police may not create the exigency, but what constitutes “creation” varies widely from case to case. This variance in outcomes has existed for at least thirty years,<sup>243</sup> and it is, quite simply, time for the United States Supreme Court to provide better guidance to the courts of appeals.

#### IV. THE UNITED STATES SUPREME COURT SHOULD ADOPT THE PROPOSED “PROBABLE CAUSE-PROBABLE CAUSE RULE”

The United States Supreme Court should remedy the lack of agreement among the courts of appeals as to what constitutes exigent circumstances and what the role of the police should be in causing or avoiding such circumstances. The lack of consistency is largely attributable to the scarcity of guidance offered by the Court.<sup>244</sup> Moreover, *Vale*,<sup>245</sup> the one Court decision from which the circuits have tried to develop rules, is actually very poor precedent.<sup>246</sup> Thus, the United States Supreme Court should clarify the standard under which destruction of evidence exigency cases are evaluated and explain the factual circumstances under which a warrantless search is permissible.

In so doing, the Court should adopt a standard called the “probable cause-probable cause” rule. This rule would first require that any search conducted to prevent destruction of evidence be supported by the existence of probable cause to believe that evidence of a crime is in the residence. Probable cause is already universally required in destruction of evidence exigency cases, so this part of the proposed rule represents no departure from current jurisprudence.<sup>247</sup>

The proposed rule would also require that police have probable cause to believe that evidence is in imminent danger of destruction based on articulable facts known to police at the time of the warrantless entry. Probable cause is said to exist when “facts and circumstances within the officer’s knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”<sup>248</sup> To apply this standard to destruction of evidence cases, police could simply substitute “destruction of evidence” for the language regarding the commission of an offense. This standard would generally be more strict than those currently em-

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243. The variance has essentially existed since *Vale v. Louisiana*, 399 U.S. 30 (1970).

244. See LAFAYE, *supra* note 8, at § 6.5.

245. 399 U.S. 30.

246. See *supra* text accompanying notes 45-52.

247. See LAFAYE, *supra* note 8, at § 6.5.

248. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

ployed by the courts of appeals, but not more so than what some courts have required.<sup>249</sup>

Probable cause is the appropriate standard for several reasons. First, police are familiar with probable cause, and most can likely identify a set of facts that constitutes probable cause without too much difficulty. Mere suspicion or speculation would not suffice.<sup>250</sup> Police must offer specific reasons why they believe evidence is in danger of destruction. Generally, those reasons should include evidence that third parties are in a position to destroy evidence, and those third parties could be aware of the investigation and, therefore, motivated to destroy evidence.<sup>251</sup> Second, given the high level of respect afforded the home, it seems more appropriate to require a relatively high degree of certainty as to the reason for abridging that respect.<sup>252</sup> It makes little sense to have a warrant requirement if conjecture and speculation on the part of law enforcement can bypass the requirement.<sup>253</sup> Moreover, since the Court has required reasonable suspicion for no-knock entries, security sweeps, and temporary seizures of the home, which are far less intrusive than a warrantless search, probable cause is a more appropriate standard.<sup>254</sup> Third, by requiring the officers to base their decision to make a warrantless entry on the specific articulable facts known to them at the time of the entry, courts will more easily be able to evaluate the legitimacy of a search.<sup>255</sup>

The proposed rule would also require that police not create the need for the warrantless search and impose on them the obligation to exercise reasonable prudence in anticipating the need for a warrant when probable cause to obtain one already exists.<sup>256</sup> The most basic reason police conduct should not be allowed to “force the issue” is that it permits police to circumvent the warrant requirement by manufacturing situations in which a warrantless search would be justified.<sup>257</sup>

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249. See *supra* notes 143-47 and accompanying text.

250. See *United States v. Lewis*, 231 F.3d 238, 241 (6th Cir. 2000).

251. This basic idea is embodied in the Sixth Circuit's two-prong test. *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1512 (6th Cir. 1988). “[A] warrantless entry into the home of a suspected drug trafficker, effected without an objectively reasonable basis for concluding that the destruction of evidence is imminent, does not pass constitutional muster.” *United States v. Haddix*, 239 F.3d 766, 768 (6th Cir. 2001).

252. See *Payton v. New York*, 44 U.S. 573, 585 (1980). “The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.” *Id.* at 589.

253. *United States v. Cuaron*, 700 F.2d 582, 592-93 (10th Cir. 1983) (Kelly, D.J., dissenting).

254. See *supra* notes 53-85 and accompanying text.

255. See *Salken*, *supra* note 18, at 327.

256. See *id.* at 330-31.

257. See generally *United States v. MacDonald* 916 F.2d 766 (2d Cir. 1990) (en banc) (stating that knocking on a suspect's door, when he has no knowledge of the investigation, does not impermissibly create the exigency). Police clearly created the exigency by knocking on the door. See *id.* at 768-69. Moreover, the fact that they went to the door with battering ram in hand shows that they intended to enter the apartment whether consensually admitted or not. The “exigency” was no more than a pretext for a warrantless search.

For example, if knocking on the suspect's door allows police to claim exigent circumstances, the warrant requirement itself could be rendered pointless.<sup>258</sup> Cases like *United States v. MacDonald*,<sup>259</sup> where no real exigency existed prior to police knocking on the suspects' door, should not be allowed because police can abuse such situations and circumvent the warrant requirement altogether.

Requiring police to anticipate the need for a warrant serves Fourth Amendment values. It does so by safeguarding the sanctity of the home and reducing the number of warrantless searches.<sup>260</sup> If police are forced to anticipate the need for a warrant, then surely they will be more likely to "think warrant" and thus avoid warrantless searches.<sup>261</sup> Police will not always be required to obtain a warrant whenever there is probable cause, but when the failure to do so results in a warrantless search there should be greater scrutiny of police conduct.<sup>262</sup> It may only be one factor in deciding whether officers exercised reasonable prudence, and the police should be given credit for trying to obtain a warrant. In general, however, failure to obtain a warrant when there is a good chance that an investigation will require a search of a residence should be viewed with suspicion.<sup>263</sup> As an example, in controlled delivery cases, if possible, police should obtain an anticipatory warrant. In addition, since police control the time and manner of delivery, if an anticipatory warrant is unavailable, the courts should not countenance a delay in obtaining a warrant after delivery has been made.

The proposed rule would also require that warrantless searches be no more intrusive than necessary in time or scope to secure the evidence.<sup>264</sup> The goal of a warrantless entry into a residence is to maintain the status quo.<sup>265</sup> Therefore, such searches should be limited to cursory checks of the interior to make sure no one has access to the evidence.<sup>266</sup> Any further search is beyond the purpose of the exception and should be beyond the limits of the Fourth Amendment.<sup>267</sup> Police should also move with diligence to obtain a warrant and con-

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258. *See id.*

259. 916 F.2d 766.

260. *See Payton v. New York*, 44 U.S. 573, 602 (1980).

261. *United States v. Cuaron*, 700 F.2d 582, 592-93 (10th Cir. 1983) (Kelly, D.J., dissenting).

262. *See United States v. Johnson*, 12 F.3d 760, 765 (8th Cir. 1993). The court considered the failure to get an anticipatory warrant a factor in the general reasonableness of the inspectors' actions. *See id.*

263. *See id.*

264. *See United States v. Palumbo*, 742 F.2d 656, 659 (1st Cir. 1984). "When such an exigency is found . . . the least restrictive intrusion is to be adopted, or the whole constitutional requirement for obtaining a warrant would be defeated." *Id.*

265. *See LaFAVE*, *supra* note 8, at § 6.5.

266. *See id.*

267. *See id.*

duct a search.<sup>268</sup> It seems reasonable to expect that a warrantless intrusion into a home would only be sustained for a minimal amount of time.<sup>269</sup>

#### V. TEST CASE APPLYING THE “PROBABLE CAUSE-PROBABLE CAUSE RULE”

The proposed rule will now be applied to a hypothetical case so that its significant facets can be explored. In the hypothetical, police have intercepted a package containing drugs, inserted a transmitter, and made a controlled delivery to Residence A. The police have obtained an anticipatory warrant to search Residence A. Shortly after delivery, the man who signed for the package exits Residence A, places the package in a car, and drives to Residence B. He removes the package from the car and enters that residence. Almost immediately, another man exits Residence B and drives away in the same car with police following him. At this point, police begin the process of seeking a telephonic warrant for Residence B. The man who is now in the car begins driving erratically, and police feel they need to pull him over. The man is arrested, but says nothing to police. The transmitter indicates the package is unopened. The police become nervous and worry that the suspect in Residence B is expecting the suspect who is in custody to return. They decide that he might be aware of the investigation and make an entry into the house to prevent the destruction of evidence. The police arrest the suspect, find the unopened package in plain view, and find drugs, cash, and other paraphernalia in a dresser in an unoccupied bedroom.

In applying the first part of the proposed rule, there is no doubt that police had probable cause to believe evidence of a crime was in the residence. The police knew that the package containing drugs was in Residence B. They observed the suspect take the package to that location.

The second part of the test requires that police have probable cause to believe that evidence is in danger of imminent destruction. This should be based on “facts and circumstances within the officer’s knowledge,”<sup>270</sup> which must be “sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that”<sup>271</sup> evidence is in danger of being destroyed.

In the hypothetical, probable cause of destruction is not satisfied. The police did not have a sufficient basis for believing the evidence

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268. *See Illinois v. McArthur*, 531 U.S. 326, 332 (2001).

269. *See id.*

270. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

271. *Id.*

would be destroyed. First, the package had not been opened. Thus, the package itself could not have alerted the suspects to the investigation. Second, the concern that the arrested suspect's late return to Residence B would tip off the suspect still at Residence B was too speculative to suffice on its own. It certainly was a possibility, but, without more specific evidence, the police could not satisfy the probable cause standard.<sup>272</sup> Supposing the arrested suspect told police that he was due back at Residence B at a certain time, however, his delayed return could have been sufficient evidence to establish probable cause. It would have to be considered in light of the amount of time that it would take to obtain the telephonic warrant. If the warrant was likely to be issued within a short time from when the suspect was expected back, it still might not have been proper for police to make a warrantless entry because they should wait for the warrant, if possible.<sup>273</sup>

The third part of the test requires police to avoid creating the exigency and to exercise reasonable prudence in anticipating the need for a warrant. The police did everything required of them under this part of the rule. First, they obtained an anticipatory warrant for Residence A. Second, they sought a warrant for Residence B as soon as they had probable cause. Third, they did not pull the car over in front of Residence B, thereby alerting the suspect inside that the police were on his trail. Fourth, his erratic driving arguably necessitated pulling the suspect over. Even if police knew pulling him over could have tipped off the suspect in Residence B, danger to the public could make it reasonable for the officers to make the traffic stop.

The final part of the proposed rule requires that the warrantless intrusion be as limited as possible. The police probably failed on this prong, and the evidence in the unoccupied bedroom dresser would have been suppressed even if the warrantless entry had been justified. The goal of the warrantless entry is not to search the residence, but rather to prevent the destruction of evidence. Once the suspect was in custody and the house was secure, police should have waited to search. If a suspect had been in the room, it is possible the search would have been justified as incident to arrest, but that is a different analysis requiring more facts.<sup>274</sup>

The proposed rule differs from the existing approaches in two important ways. First, it requires probable cause to believe that evi-

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272. These facts are similar to *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1507 (6th Cir. 1988), where police had no specific information that the suspect knew of the investigation, but the warrantless search was upheld.

273. See Salken, *supra* note 18, at 328-30.

274. See generally *Chimel v. California*, 395 U.S. 752 (1969) (holding that search incident to arrest in a residence only extends to areas immediately surrounding arrestee).

dence is in danger of destruction. This is a higher standard than what is generally required now, but it really only requires that police have objective facts that make it probable or substantially likely that evidence is in danger of destruction. Second, it requires police to exercise reasonable prudence by not alerting the suspects to the existence of the investigation and by obtaining a warrant before the exigency arises, when appropriate. While most courts claim to require something like this, in reality police are often not held accountable for failing to avoid or anticipate the exigency. Thus, the proposed rule should encourage police to seek warrants, which is faithful to the Fourth Amendment's preference for searches based on probable cause as determined by a magistrate.

## VI. CONCLUSION

The destruction of evidence exigent circumstance exception to the warrant requirement has created a great deal of confusion within the circuit courts of appeals. This confusion has led to widely varying standards for evaluating the constitutionality of warrantless searches of residences. This wide variation is not expressed so much in the banal phrasing of black letter tests, but rather the disparity lies in the outcomes of cases that send one person to prison for many years and let another go free. The United States Supreme Court should clarify the factual circumstances under which warrantless entries are permissible. In so doing, the Court should adopt the proposed rule as the simplest and most faithful way to preserve and encourage Fourth Amendment values.