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# Emergency Entries to Arrest Developments Since *Payton* (Conclusion)

“... the time necessary to obtain a warrant is clearly relevant to a determination of whether circumstances are exigent.”

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*Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*

Part I of this article reviewed the Supreme Court's decisions in *Payton* and *Steagald*. In *Payton*, the Court held that as a general rule, an arrest warrant is necessary to enter a suspect's premises to arrest him; whereas in *Steagald*, the Court held that when third party premises are involved, a search warrant is necessary. Both cases recognized that exigent circumstances would constitute an exception to these rules. Part I began an analysis of the factors which courts have considered when determining the existence of exigent circumstances to justify warrantless entries. Specifically, the gravity of the offense, the time between the establishment of probable cause and the arrest, and entries to prevent the destruction of evidence were reviewed. Part II completes the analysis by examining four additional factors.

### Likelihood of Escape—"Hot Pursuit"

Prior to the *Payton* and *Steagald* decisions, the Supreme Court had also recognized "hot pursuit" of a suspect as an exigent circumstance which would justify a warrantless entry into premises.<sup>49</sup> In *Warden v.*

*Hayden*,<sup>50</sup> police officers, acting without a search or arrest warrant, entered a house to arrest an armed robbery suspect who had been observed entering only minutes before. The Supreme Court upheld the warrantless entry and search as reasonable because to delay the entry would have endangered the lives of the officers and others and would have allowed the suspect time to effect his escape.<sup>51</sup> The Court described speed as being essential.

Similarly, in *United States v. Haynie*,<sup>52</sup> the U.S. Court of Appeals for the Fourth Circuit found that the warrantless entry of a residence was justified under the hot pursuit doctrine. In July 1977, the police in Hanson MA, received an anonymous tip that there was going to be a large drug drop at the residence of Mr. and Mrs. Bizier on 37 McQuan Street that night and the officers should note the position of the cars in the driveway. The police placed the Bizier residence under surveillance and noted that two vehicles were parked on the property in such a way that two more vehicles could enter and park between them. During the course of the surveillance, police observed Bizier on several occasions leave the house and look up and down the street. Later that night,



Special Agent Johnson

two vehicles arrived together, backed into the Bizier's driveway, and parked side by side. The police observed the drivers exit the vehicles and momentarily confer near the trunk of a white Duster. One person then restarted the white car and backed it further up the driveway to the corner of the garage. Four individuals were observed to then walk behind the house. Several minutes later, three returned to the white car and opened the trunk. One officer heard a rustling sound. The officers then walked to the driveway to arrest the suspects. As they approached, the trunk was shut. The officers noticed the smell of marijuana emanating from the trunk, and one officer noticed a substance which he believed to be marijuana on the rear bumper of the vehicle. Realizing that one of the four men was missing, one of the officers then proceeded to the house, entered, and arrested the fourth suspect inside the Bizier residence.

The court found that inasmuch as a large-scale narcotics operation was occurring and the fourth suspect had disappeared, the police were justified in entering the house without a warrant in "hot pursuit" of the suspect. The court stated that speed was essential for both the apprehension of the suspect and for the safety of the officers, and thus held that the evidence which was found in plain view during the protective sweep of the residence was admissible.<sup>53</sup>

Although the doctrine of hot pursuit gives rise to visions of an extended chase through the streets, courts have recognized that the pursuit can be just a momentary occur-

rence in time. For example, in *United States v. Martinez-Gonzalez*,<sup>54</sup> a DEA agent who had previously arrested a woman named Sanchez for involvement in a cocaine trafficking operation observed her in a vehicle with an unidentified male. She was temporarily detained and was subsequently arrested for violation of the immigration laws. In her purse the agents found a rent receipt for Apartment 7-F, as well as keys for Apartment 5-M. A consent search of Apartment 5-M revealed traces of cocaine and marijuana, as well as a weapon and currency. The agents, believing that Apartment 7-F might be a "stash pad," determined from the superintendent that Apartment 7-F had been rented a month before by Sanchez and a young Hispanic male, that only a folding cot had been moved into the apartment, and that the man was observed carrying several very heavy flight bags into the apartment. The agents contacted an assistant U.S. attorney in an attempt to obtain a search warrant for the apartment but were unable to do so because of the lateness of the hour. While maintaining surveillance of the apartment, the agents observed Martinez, the lessee of the apartment, approach. When they confronted him and identified themselves, Martinez ran into the apartment and locked the door.

The U.S. Court of Appeals for the Second Circuit concluded that at the time the agents approached Martinez, they had only reasonable suspicion justifying a temporary stop. When he fled, however, based on all the circumstances, the agents then had probable cause to arrest him.<sup>55</sup> The court thus found that the warrantless entry was justified based on exigent circumstances which included hot pursuit and preventing the destruction of

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evidence. The court stated that Martinez could not retreat into the apartment to thwart an otherwise lawful arrest.<sup>56</sup>

Hot pursuit of a suspect is an exigent circumstance that in and of itself will ordinarily justify the warrantless entry, inasmuch as time is of the essence. There must, however, be some close proximity between the occurrence of the crime and the warrantless entry.<sup>57</sup>

In addition, warrantless entries have been justified by the courts, even where there is no hot pursuit, in order to prevent the escape of a suspect. In *United States v. Acevedo*,<sup>58</sup> DEA agents arrested Acevedo's associate, Ramos, after a narcotics transaction. Ramos then identified Acevedo as his heroin source and gave the agents the apartment number where he could be found. When a warrantless entry failed to locate Acevedo in that apartment, Ramos suggested another apartment in the same building where Acevedo had previously resided. Agents arrested Acevedo without a warrant in the second apartment.

The Seventh Circuit Court of Appeals upheld the warrantless entry to arrest based on the risk that Acevedo would escape during the time necessary to return with a warrant. The court reasoned that inasmuch as Acevedo's accomplice had been arrested and would not return with the proceeds, Acevedo would, in all likelihood, have been tipped off to the events at hand. Furthermore, the court found that although there were numerous agents at the scene, their ability to protect against Acevedo's escape was impeded by their incomplete knowledge of the building's layout and possible exits for escape.

In view of the above, the court found that exigent circumstances existed.<sup>59</sup>

In the absence of hot pursuit, it will be necessary that officers show the courts that other exigent circumstances existed—e.g., the suspect was alerted to the presence of the officers, the building could not be secured, or that threats to evidence or to the safety of police or the public prevented the obtaining of a warrant.

**Safety of Law Enforcement Officers and/or the Public**

Another well-recognized principle that may justify a finding of exigent circumstances is danger to arresting officers or the public from a suspect. In *Warden v. Hayden*,<sup>60</sup> the Supreme Court stated:

“The Fourth Amendment does not require officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed . . . was essential . . .”<sup>61</sup>

Courts, in numerous recent cases, have found that the safety of the police, informants, and/or the public were important factors justifying the finding of exigent circumstances.

In *United States v. Hultgren*,<sup>62</sup> an informant's transmitter abruptly ceased operation during a narcotics buy. Moments later, DEA agents entered the residence without arrest or search warrants. The U.S. Court of Appeals for the Fifth Circuit held that the unexplained failure of the transmitter raised the possibility of danger to the informant and the destruction of evidence if entry into the house was not promptly effected.

In *United States v. Farra*,<sup>63</sup> DEA agents arrested several suspects after a cocaine transaction. At approximately midnight, during the purchase negotiations, one of the suspects gave an undercover agent 5 grams of cocaine and told him that the remainder of his cocaine was at a Manhattan hotel. At his arrest, which occurred shortly after 1:30 a.m., a Ramada Inn room receipt was found. Another suspect who was arrested also had a Ramada Inn room receipt. The agents went to the Ramada Inn to secure the rooms and prevent the removal or destruction of evidence. Upon arriving at the hotel, the manager told the agents that the registrants of the rooms in question had moved to two other rooms earlier. At approximately 3:00 a.m., the agents proceeded to Room 320, where they observed light coming from under the door and heard an agitated discussion in Spanish taking place in the room. When the agent knocked on the door and announced his identity, the agitated conversation was augmented by the sounds of much stirring about and the slamming of drawers or doors. The agents opened the door with a pass-key and saw 22 pounds of cocaine in an open flight bag.

The evidence was suppressed at trial; however, on appeal, the U.S. Court of Appeals for the Second Circuit held that exigent circumstances justified the entry. Upon arriving at the hotel, the agents learned of the suspicious changing of rooms, which the court noted was a common technique used by people seeking to avoid detection. In addition, the court noted that the agents knew an unidentified collaborator of the suspects had not

yet been arrested, that his whereabouts were unknown, and also that the hotel management had temporarily blocked access to the third floor in order to protect other hotel guests, a situation that could not have been maintained for long. The court concluded that if the agents were forced to remain in the hallways until they were able to obtain a warrant in the middle of the night, there was a substantial risk that other innocent patrons at the hotel would be harmed or significantly inconvenienced.<sup>64</sup>

In *United States v. Burgos*,<sup>65</sup> Alcohol, Tobacco and Firearms (ATF) agents received information that an individual named Kasha had purchased 192 weapons in a 7-month period without the proper firearms permit. The agents observed Kasha transfer two large boxes filled with arms to Burgos, and Burgos later was assisted by an unidentified man at his residence while unloading the weapons from his vehicle. The agents were unaware of the number of weapons or people located inside Burgos' residence when they entered to effect his arrest. The Court of Appeals for the 11th Circuit found that the warrantless entry was justified in that it was reasonable to conclude that the residence was an arsenal. The court stated that the threat of injury to the neighborhood and the arresting officers excused the agents' failure to obtain a warrant before the arrests. Furthermore, the quick action increased the likelihood that no one would be injured.

These cases clearly illustrate that courts are quick to find the existence of exigent circumstances if facts exist which indicate the likelihood of danger to either the police or the public.

**Prior Attempts to Obtain a Warrant**

Courts have long noted that the delay or inconvenience caused by attempting to obtain a warrant does not by itself justify bypassing the warrant requirement of the fourth amendment.<sup>66</sup> When examining the government's claim of exigent circumstances, consideration is given to whether law enforcement officers made reasonable efforts to obtain a warrant prior to entering private premises.

Courts have recognized that the time necessary to obtain a warrant is clearly relevant to a determination of whether circumstances are exigent.<sup>67</sup> In response to this problem, various legislatures have established procedures whereby law enforcement officers can obtain warrants by telephone. For instance, Federal magistrates are authorized under Rule 41(c)(2) of the Federal Rules of Criminal Procedure to issue search warrants based on telephone communications. The legislative history of that provision reflects that an important purpose for the rule was to encourage law enforcement personnel to obtain warrants.<sup>68</sup> As a general rule, in those jurisdictions where the procedure is available, trial courts now consider the time needed to obtain a telephonic warrant when assessing the urgency of a situation.<sup>69</sup> Although warrants obtained by telephone generally take less time to procure than traditional warrants based on a written affidavit, the time required for a telephone warrant will vary from case to case.

In *United States v. Baker*,<sup>70</sup> the district court found that 1 hour and 15 minutes was abundant time to obtain a telephonic warrant in that district and held that the evidence should be suppressed because the Federal

agents did not even attempt to obtain a telephonic warrant. In *Baker*, DEA agents arranged for the purchase of drugs at a suspect's home. The suspect subsequently changed his mind about the location of the transaction and sent his girlfriend to deliver the drugs to another person's home. The agents arrested his girlfriend when she arrived with the drugs and then drove to the suspect's home. Without a warrant, the agents entered and arrested the suspect and searched him and his home. The court held that exigent circumstances did not excuse their failure to obtain a warrant because there was adequate time to procure one by telephone. Rejecting the Government's unsupported assertion that obtaining a warrant by telephone would have taken almost as long as obtaining one in person, the court explained:

“At 3:00 p.m. or a few minutes thereafter, the agents had probable cause to arrest [the suspect], and they had reasonable grounds to believe that he might become alarmed and destroy evidence in his home and flee if [his girlfriend] did not return to his home by about 4:45 p.m. Deducting the 25 to 30 minutes time required to travel . . . to [the suspect's] home, the agents still had nearly an hour and 15 minutes left in which to seek and obtain a warrant. This was inadequate time to travel to Des Moines to get a warrant, but it was abundant time in which to seek and obtain a warrant from a federal magistrate by telephone.”<sup>71</sup>

**“. . . law enforcement officers should avoid the appearance that they created the exigency in an attempt to enter private premises without a warrant.”**

In *United States v. Steagald*, the Supreme Court noted that a telephonic search warrant would provide an alternative to a traditional warrant based on a written affidavit, if a magistrate was not located in close proximity.<sup>72</sup>

The courts have noted that there will be situations where the exigencies are so imperative that even the shortest possible delay in obtaining a warrant will be precluded.<sup>73</sup> For example, in *United States v. Hultgren*, the court held that the abrupt failure of the informant's transmitter during a narcotics transaction and the apparent threat to his safety created exigent circumstances which would have made even a telephonic warrant impracticable.<sup>74</sup>

In *United States v. Berick*,<sup>75</sup> DEA agents, upon receipt of informant information, located Berick's rural residence where a methamphetamine laboratory was believed to be in operation. A surveillance was instituted at the location at approximately 4:00 p.m. At approximately 5:00 p.m., an undercover agent met with a man who stated that he was a chemist and manufactured methamphetamine but that he was having trouble with the crystallization process. He agreed to sell the undercover agent methamphetamine oil which he would obtain from his lab and return in 30 to 40 minutes. The chemist, Culver, and his wife returned with the oil at approximately 6:00 p.m. and were immediately arrested. DEA agents learned that there were four people still at the lab and that Culver and his wife were expected to return very shortly. This information was transmitted to agents

maintaining the surveillance of the laboratory. Several minutes later, the agents at the scene entered the mobile home and shed (where the lab was located) and arrested the four individuals. Guns and other evidence were secured. Four hours later, the mobile home and lab were searched pursuant to a search warrant. At trial, the district court concluded that exigent circumstances justified the warrantless entries.

The U.S. Court of Appeals for the Fifth Circuit determined that exigent circumstances existed because probable cause that the premises were a laboratory did not arise until approximately 6:00 p.m. In addition, since the Culvers were expected to return very quickly, the remaining four occupants would have been alerted and either fled or destroyed evidence. The court also noted that since it was almost night and the remaining occupants were known to be armed, there was legitimate concern for the safety of the agents and the public. The court concluded that the circumstances were exigent and even resort to a telephonic warrant was excused.<sup>76</sup>

Law enforcement officers should be conscious of the availability of telephonic warrants in their jurisdictions, and when assessing the exigencies of a situation, telephonic warrants should be used, if feasible. When a telephonic warrant procedure is available but not used, courts will examine the circumstances surrounding the warrantless entry with close scrutiny.

**Was the Exigency Created by the Government?**

In determining whether exigent circumstances justified a warrantless entry, courts will examine the nature and origin of the exigency. A warrantless entry to arrest or search may not

be justified on the basis of exigent circumstances which are created by the government itself.<sup>77</sup>

In *People v. Wilson*,<sup>78</sup> at approximately 9:00 p.m., police received a call from a North Chicago Holiday Inn regarding the possible theft of a lamp from a particular room. The police went to the hotel and accompanied the security guard to the room. They knocked on the door but received no response. The officers left and instructed the security guard to call them when the occupants returned. Later, the hotel security guard entered the room with the passkey and confirmed that the lamp was missing. In addition, he saw a knife on the floor, bloody rags and cotton wads, a syringe, and a bottle of clear fluid. At approximately 11:00 p.m., the security guard called the police when he saw the two occupants of the room return, accompanied by two other individuals. When the police arrived, the security guard told the officers that he would sign a complaint against the occupants for theft. He also told the officers about the other objects that he had seen in the room. The officers and security guard went to the room where the security guard knocked on the door, identified only himself, and asked to speak with the occupants about the missing lamp. As the door began to open, the officers stepped in front of the door. One suspect shouted, "It's the police," and tried to close the door while the other suspect moved toward the bathroom. The police entered the room, found packets containing heroin, and arrested

the two occupants. At trial, the warrantless entry was justified on the grounds of exigent circumstances. On appeal, the Appellate Court of Illinois, Second Circuit, reversed and concluded that the exigency was created by the officers when they remained out of view until the occupants opened the door for the security guard. The court stated that no attempt was made to get an arrest warrant for the theft and that the purpose of proceeding to the room to further investigate the theft was merely a pretext used to induce the exigent circumstance which did, in fact, occur with regard to the drug-related activities.<sup>79</sup>

Another illustration of what courts might consider a police-created emergency is found in *People v. Klimek*.<sup>80</sup> Police responded to a disorderly conduct call wherein neighbors complained about the noise made by Klimek, the occupant of a downstairs apartment. They said they would file a complaint. Before the complaint was filed, the officers went to Klimek's apartment and knocked and announced their identity. A woman responded, and the police informed her of the complaint the neighbors planned to sign and asked to speak with Klimek. The woman opened the door, entered the hallway, and told the police they could not enter the apartment. She said that Klimek was ill and could not come to the door. The woman began to reenter the apartment, and a male voice from inside shouted that the police could not come in. The officers then forcibly entered the apartment, found marijuana in plain view, and arrested Klimek.

The Appellate Court of Illinois, Second Circuit, reviewed the trial court's suppression of the evidence. The appellate court noted that when one of the officers had positioned his foot across the threshold of the door, he had made an unlawful entry. The court stated that the subsequent entry to prevent further harm to the officer could not be justified as this was a classic case of a police-created exigency. The court found no additional factors which would justify the warrantless entry, inasmuch as this was a nonviolent crime and there was no reason to believe Klimek was violent or armed just because he was hostile.<sup>81</sup>

In order to use the exigent exception, law enforcement officers should avoid the appearance that they created the exigency in an attempt to enter private premises without a warrant.

**CONCLUSION**

In the aftermath of the *Payton* and *Steagald* decisions, there was considerable concern in the law enforcement community about the impact of the warrant requirement on entries of private premises to make an arrest. This concern existed even though the Supreme Court noted in *Steagald* that few situations would require search warrants because of the presence of exigent circumstances.

The cases that have been examined in this article confirm that view and provide some guidance as to the factors which the courts have considered in justifying warrantless entries. Law enforcement officers should be aware of these factors so that when they arise and warrantless entries become necessary, the justifications can be accurately communicated to the courts.

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**Footnotes**

- <sup>49</sup> *United States v. Santana*, 427 U.S. 38 (1976).  
<sup>50</sup> *Warden v. Hayden*, 387 U.S. 294 (1967).  
<sup>51</sup> *Id.* at 298, 299.  
<sup>52</sup> 637 F.2d 227 (4th Cir. 1980), cert. denied 451 U.S. 972 (1981).  
<sup>53</sup> *Id.* at 235, 236.  
<sup>54</sup> 686 F.2d 93 (2d Cir. 1982).  
<sup>55</sup> *Id.* at 99.  
<sup>56</sup> *Id.* at 101, 102.  
<sup>57</sup> *Scott v. Maggio*, 695 F.2d 916 (5th Cir. 1983), cert. denied, 103 S.Ct. 3544 (warrantless entry proper where minutes after robbery victim gave description and direction of flight of defendants and bystander indicated what house they entered). *Archibald v. Mosel*, 677 F.2d 5 (1st Cir. 1982) (entry no more than 20-25 minutes after robbery and victim indicated which apartment robber fled to). *United States v. Stubblefield*, 621 F.2d 980 (9th Cir. 1980).  
<sup>58</sup> 627 F.2d 68 (7th Cir. 1980), cert. denied, 449 U.S. 1021 (1980).  
<sup>59</sup> *Id.* at 71.  
<sup>60</sup> 387 U.S. 294 (1967).  
<sup>61</sup> *Id.* at 298, 299.  
<sup>62</sup> 713 F.2d 79 (5th Cir. 1983).  
<sup>63</sup> 725 F.2d 197 (2d Cir. 1984).  
<sup>64</sup> *Id.* at 199.  
<sup>65</sup> 720 F.2d 1520 (11th Cir. 1983).  
<sup>66</sup> *Johnson v. United States*, 333 U.S. 10 (1948).  
<sup>67</sup> *United States v. Allison*, 639 F.2d 792, 794 (D.C. Cir. 1980) (difficulty of obtaining a search warrant during the night adds to the finding of exigent circumstances).  
<sup>68</sup> *United States v. Hendrix*, 595 F.2d 883, 886 (D.C. Cir. 1979) (exigent circumstances exist where it would take at least several hours to obtain a warrant).  
<sup>69</sup> *United States v. McEachin*, supra note 19, at pp. 1146, 1147.  
<sup>70</sup> *United States v. Cuaron*, supra note 40. *United States v. McEachin*, supra note 19. *United States v. Berick*, supra note 41. *United States v. Jones*, 696 F.2d 479 (7th Cir. 1982), cert. denied, 103 S.Ct. 2453 (1983). *United States v. Hackett*, 638 F.2d 1179 (9th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).  
<sup>71</sup> 520 F.Supp. 1080 (S.D. Iowa, 1981).  
<sup>72</sup> *Id.* at 1083.  
<sup>73</sup> *Steagald v. United States*, supra note 8, at p. 222.  
<sup>74</sup> *United States v. McEachin*, supra note 19, at p. 1146.  
<sup>75</sup> *United States v. Hultgren*, supra note 32, at p. 88.  
<sup>76</sup> 710 F.2d 1035 (5th Cir. 1983), cert. denied, 104 S.Ct. 286 (1983).  
<sup>77</sup> *Id.* at 1039, 1040.  
<sup>78</sup> *United States v. Scheffer*, 463 F.2d 567 (5th Cir. 1972), cert. denied, 409 U.S. 984 (1978). *United States v. Acevedo*, supra note 32. *United States v. Hultgren*, supra note 32. *United States v. Meja*, supra note 48.  
<sup>79</sup> 508 N.E.2d 988 (Ill. App. 2d Dist. 1980). It should be noted that the court concluded that the occupant of a motel room is likewise entitled to fourth amendment protection against unreasonable searches and seizures.  
<sup>80</sup> *Id.* at 990, 991.  
<sup>81</sup> 427 N.E.2d 598 (Ill. App. 2d Dist. 1981).  
<sup>82</sup> *Id.* at 602.

**END**