Brooklyn Law Review

Volume 57
Issue 2
The Second Circuit Review - 1989-1990 Term

Article 2

2-1-1991

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Recommended Citation

Jacqueline Bryks, *Exigent Circumstances and Warrantless Home Entries: United States v. MacDonald*, 57 Brook. L. Rev. 307 (1991).
Available at: https://brooklynworks.brooklaw.edu/blr/vol57/iss2/2

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EXIGENT CIRCUMSTANCES AND WARRANTLESS HOME ENTRIES: *UNITED STATES v. MacDONALD**

There is a consensus in this country that drug use is among the most serious domestic problems plaguing the nation. In fact, all levels of the United States government have declared a "war on drugs." Commentators have suggested that the "war on drugs" has had the effect of narrowing Fourth Amendment[1] protections for suspected drug criminals.[2] *United States v. Mac-*

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* 916 F.2d 766 (2d Cir. 1990) (in banc), *vacating* United States v. Thomas, 893 F.2d 482 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1071 (1991).

[1] U.S. CONST. amend. IV provides:

> 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 warrant shall issue, but upon probable cause supported by oath and affirmation and particularly describing the place to be searched, and the persons or things to be seized.

[2] *See, e.g.*, Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 2-3 (1986) (Salzburg suggests that the Fourth Amendment is a victim of the "war on drugs" in that Fourth Amendment protections suffer as the courts struggle to assist the other branches of government in the "war." Salzburg criticizes judges who "shade their eyes to avoid the limitations on law enforcement imposed by the Bill of Rights." He warns that "[f]ew constitutional doctrines can be confined to drug cases, and judicial toleration of improper practices thus cannot be reserved for these cases."). *See also* Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 905-06 (1987):

> In the past three or four decades, [people whose constitutional rights] were damaged by legislative or prosecutorial excesses could generally turn to the federal courts for protection. But the War on Drugs steamroller has flattened judicial activism. The Constitution's pivotal, even mythological place in our national consciousness is rapidly being eroded by a positivist, bureaucratic attitude that we can — must — do whatever is deemed necessary or expedient in waging the War on Drugs.

See also LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1223-24 (1983) (suggesting that the negative effects of drug trafficking may produce "atrophy in the fourth amendment").

Members of the judiciary also have warned against the evolving drug exception. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) ("there is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest"); United States v. Karo, 468 U.S. 705, 717 (1984) ("[those] suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses").

Donald[3] is a further indication that the judiciary is abandoning traditional Fourth Amendment safeguards in return for more efficient law enforcement. A close analysis of this case reveals a lack of sensitivity to core Fourth Amendment values when narcotics violations are at issue.

In *United States v. MacDonald* the Second Circuit undermined the warrant requirement for home entries when the police have probable cause to believe that narcotics trafficking is transpiring in a home. In *MacDonald* drug enforcement agents received a tip indicating that a drug trafficking business was operating out of an apartment.[4] Four months after receiving the tip, the agents set up a surveillance operation to investigate the allegation.[5] After observing a steady stream of individuals enter and exit the apartment, an undercover agent gained entry and bought a small quantity of drugs with a prerecorded five dollar bill.[6] While inside the apartment, the officer saw two weapons, piles of money, and a large quantity of what appeared to be drugs. The undercover agent did not recognize any of the individuals inside the apartment nor did they recognize him.[7] Moreover, the agent saw no security devices, lookouts or runners that would indicate that the suspects were alerted to the surveillance team's presence.[8]

Without discussing the possibility of obtaining a warrant, a group of officers reentered the apartment building and knocked on the suspects' door, ostensibly to obtain a consent for a warrantless search.[9] Immediately after identifying themselves as police officers, they heard the sound of shuffling feet and received a

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[3] 916 F.2d 766 (2d Cir. 1990) (in banc).

[4] *Id.* at 768.

[5] *Id.*

[6] Government agents often use "prerecorded" money in undercover drug operations. Agents record the serial numbers of the money, use the money to buy contraband, and try to recover the money at the time of the arrest. The prerecorded money will then be offered as evidence at trial.

[7] United States v. Thomas, 893 F.2d 482 (2d Cir. 1990) (panel).

[8] *Id.* Drug traffickers often use a range of procedures and devices to shield themselves from arrest. For example, they monitor police scanners and deploy lookouts and runners. Many of these security devices also serve as a defense against rival traffickers. It is significant that the occupants of the apartment were not believed to employ any of these protective techniques. *MacDonald*, 916 F.2d at 768. This omission suggests that the suspects in the instant case were not overly concerned about security or imminent violence.

[9] *Thomas*, 893 F.2d at 490.

report from the remaining officers on the street that the suspects were attempting to escape.[10] The police then gained access to the apartment with a battering ram, arrested MacDonald and seized the money, drugs and guns that were in plain view.[11] MacDonald objected to the warrantless entry at the suppression hearing, but the trial court found that exigent circumstances[12] justified the warrantless entry.[13] A panel of the Second Circuit reversed the trial court, but on rehearing in banc, the majority reinstated the trial court's decision.[14]

As a general rule, police must obtain a warrant before entering a home.[15] However, the Supreme Court has carved an exception to this rule that allows warrantless home entries when there

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[10] *Id.* at 485.

[11] *Id.*

[12] For a discussion of exigent circumstances see notes 100-33 and accompanying text *infra.*

[13] 893 F.2d at 482.

[14] *MacDonald*, 916 F.2d at 767.

[15] *See* Payton v. New York, 445 U.S. 573 (1980) (the police must obtain an arrest warrant before entering a suspect's home); Steagald v. United States, 451 U.S. 204 (1981) (the police must obtain both an arrest warrant and a search warrant before entering a home of a third party in order to arrest a suspect); Johnson v. United States, 333 U.S. 10 (1948) (the police must obtain a search warrant before entering a dwelling to search).

The courts have traditionally afforded the home the utmost protection. Indeed, according to Justice Powell, "physical entry into the home is the chief evil against which the fourth amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972). The warrant requirement is the major safeguard against government's unreasonable entry into the home. One of the most quoted explanations of the warrant requirement was penned by Justice Jackson. He wrote:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable people draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. 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 policeman, or government enforcement agent.

Johnson v. United States, 333 U.S. at 13-14 (Jackson, J., concurring).

is an emergency.[16] Recently the Court addressed and clarified the exigent circumstances exception. In *Minnesota v. Olson*[17] the Court held that a warrantless entry may be justified by hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent the suspect's escape, or the risk of danger to the police or community.[18] The crux of this analysis is whether ample time exists for the police to obtain a warrant. If there is no emergency, the police must obtain a warrant before entering a person's home.[19]

In *MacDonald* the Second Circuit held that exigent circumstances existed even before the agents knocked on the door and identified themselves.[20] The court announced that the "essential" question confronting it was whether under the totality of the circumstances the police had an objective "urgent need" to take immediate action.[21] Although the agents had no reason to

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[16] The Supreme Court has upheld warrantless entries into a home only six times. *See* Michigan v. Tyler, 436 U.S. 499 (1978) (warrantless entry to extinguish a fire justifiable); Mincey v. Arizona, 437 U.S. 385 (1978) (original entry during investigation of a murder permitted, subsequent "crime scene" search forbidden); United States v. Santana, 427 U.S. 38 (1976) ("hot pursuit" justified warrantless entry); Hill v. California, 401 U.S. 797 (1971) (warrantless entry on mistaken identity); Warden v. Hayden, 387 U.S. 294 (1967) (warrantless entry justified where armed suspect entered home less than five minutes before police arrived); Ker v. California, 374 U.S. 23, 40 (1963) (exigent circumstances justified foregoing "demand and explanation" requirement where suspect possessed drugs that could be easily destroyed and agents reasonably believed that the suspect was expecting them).

[17] 110 S. Ct. 1684 (1990).

[18] *Id.* at 1690.

[19] In this case, decided after the *Thomas* panel decision but before the rehearing in banc, the Court upheld the Minnesota Supreme Court's finding that exigent circumstances did not exist. *Id.* at 1690. In *Olson* the police received word that an armed robber had taken refuge in his girlfriend's apartment. *Id.* at 1686. The police surrounded the apartment building, telephoned the girlfriend's apartment, and heard a man's voice telling the woman to tell the police that he was not in the apartment. *Id.* at 1687. Even though the police had the apartment surrounded and there was little indication that the suspect would injure his girlfriend they entered the apartment without a warrant. *Id.* The Minnesota court found no justification for the warrantless entry. There was no fleeing felon, evidence was not in imminent danger of being destroyed, and there was no risk of danger to the police or other persons. The Supreme Court endorsed the test used and intimated that they upheld the application of the test in deference to the state court's findings. *Id.* at 1690. The implication of this is that at least some of the Justices would have affirmed a finding of exigent circumstances using the same test. *Id.* at 1691 (Kennedy, J., concurring) ("I interpret . . . Part III as deference to a State court's application of the exigent circumstances test to the facts of this case, and not as an endorsement of that particular application of the standard.").

[20] *MacDonald*, 916 F.2d at 770.

[21] *Id.* at 769 (citing Dorman v. United States, 435 F.2d 385, 391 (D.C. Cir. 1970) (in

believe that the suspects were aware of the surveillance, the court held that an emergency situation existed that compelled the police to act without a warrant. The court pointed to "the volatile mix of drug sales, loaded weapons and likely drug abuse" to show a "clear and immediate" risk of danger to the police and public.[22] The court virtually ignored the fact that the drug business had been operating steadily for at least four months, and there was no indication that business as usual would not continue. By so holding, the Second Circuit has essentially shaped a per se rule that empowers the police to enter a suspected drug dealer's home without a warrant.[23]

The in banc majority also put forward an alternate holding.[24] The court held that even if exigent circumstances did not

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banc decision)).

[22] *Id.* at 770.

[23] Other circuits have also established a per se rule. *See, e.g.*, United States v. One Parcel of Real Property, 873 F.2d 7, 9 (1st Cir. 1989) (presence of cocaine in house police entered created exigency that justified warrantless entry), *cert. denied sub nom.* La Traverse v. United States, 110 S. Ct. 236 (1989); United States v. Padilla, 869 F.2d 372, 379 (9th Cir. 1989) (arrest resulting from undercover drug transaction created exigent circumstances because timing of arrests is special urgency in narcotics cases), *cert. denied sub nom.* Percheitte v. United States, 109 S. Ct. 3223 (1989); United States v. Bonner, 874 F.2d 822, 824, 827 (D.C. Cir. 1989) (entry of home of drug dealers creates exigency making police vulnerable because this type of offendor is "unusually attuned" to and ready to respond to knocks at door); *but see* United States v. Stewart, 867 F.2d 581, 585 (10th Cir. 1989) (no exigency based on broad concerns about drug offenders in general nor on the particular facts of the situation).

[24] Actually, the court put forward two alternate holdings. In addition to finding that the police did not impermissibly manufacture the exigent circumstances, the in banc majority also held that because the undercover agent had the consent of the occupants to enter the apartment during the undercover buy, and thus could have lawfully arrested the occupants without a warrant, he did not have to obtain a warrant to reenter the apartment ten minutes later.

The court seemed to be saying two things. First, the court implied that the concept of consent can be extended to legitimize an entry made after the initial actual consent was retracted. Because the police have the consent of the occupants of the home to be on the premises, they do not require a warrant. Undercover agents can legally be used to obtain such consent. *See* Lewis v. United States, 385 U.S. 206, 212 (1966) (consent to conduct warrantless search valid when defendant invited undercover agent into home to sell drugs). Moreover, because they are lawfully on the premises, they may arrest and seize evidence and contraband in plain view without a warrant. Thus, because the undercover agent had the consent of the occupants to be in the apartment, he could have arrested them for selling him drugs. The court's first rationale is not persuasive. After he left the apartment the consent lapsed. The police ought not to be allowed to reenter the apartment based on the earlier consent. Allowing such entries will seriously undermine people's reasonable expectations of privacy. No one expects that consents last indefinitely. Ordinarily, after visitors leave someone's home, they must receive permission to

exist before the knock, they certainly did afterward.[25] Furthermore, the court held that the police did not improperly create the exigent circumstances by knocking for the ostensible purpose of receiving consent. The court stated that "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances."[26] The court refused to engage in what it called "futile" speculation about the agents' subjective states of mind and whether the police truly believed the occupants would give consent to the police to enter.[27] However, this is not a case that calls for painstaking speculation about motive or pretext. No reasonable police officer could have thought that the occupants of the apartment would consent to a search.[28] It is troubling that the police should be given broad license to create emergencies as a way to circumvent

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reenter. Thus, there is no principled way to justify the officers entry based on the earlier consent. *But see* United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987) (warrantless search valid when officer reentered home after summoning assistance when initial consensual entry of undercover agent established probable cause), *cert. denied*, 484 U.S. 857 (1987).

Second, the court suggested that because a high level of probable cause existed, the warrant requirement could be ignored, even in the absence of exigent circumstances. The court spent little time analyzing the implications of this broad statement. Although the court's creation of a variable standard for the warrant requirement seems principled, it is actually at loggerheads with the fundamental rationale for the warrant requirement. In order to properly protect privacy interests, officers should be allowed only limited discretion to enter a home. The rule should be simple and clear: in the absence of exigent circumstances or consent, officers should always obtain a warrant before entering a home. See note 15 *supra* for an explanation of the warrant requirement's purpose.

[25] *MacDonald*, 916 F.2d at 771. The alternate holdings were not necessary. The court could have simply summarily held that exigent circumstances existed before the knock and stopped there. However, the Second Circuit seemed determined to use this case to establish looser guidelines for police conduct. *See* notes 141-65 and accompanying text *infra*. Like government officials, the court is cognizant of the scope of the drug problem. Perhaps this awareness explains the alternate holdings.

[26] *Id.* at 772.

[27] *Id.*

[28] Police officers may enter a home without a warrant if the occupant of the home consents. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In order for there to be a valid consent, it must be voluntarily given. There can be no coercion. *Id.* It is quite possible that the police never even attempted to gain a consent. It is easy to imagine a scenario where the agents improperly entered the suspects' home, then testified that they attempted to get a consent as a way to sterilize their otherwise unlawful entry. It is hard to accept that seasoned narcotics officers would have attempted to gain a consent to search from armed drug dealers. However, this is pure speculation and unnecessary to the outcome of the case. For a discussion of police ethics in this area, see Maclin, Book Review, *Seeing the Constitution from the Backseat of a Police Squad Car*, 70 B.U.L. REV. 543 (1990).

the warrant requirement.

This Comment will demonstrate that the Second Circuit's decision in *MacDonald* is consistent with its recent decisions in this area. This Comment will argue, however, that the Second Circuit's analysis unduly erodes Fourth Amendment protections to the home in order to achieve more efficient law enforcement. Part I will recount the facts and procedural history of the case. Part II will review the exigent circumstances exception generally, with an emphasis on the Second Circuit's approach prior to *MacDonald*. Part III will critique the alternate holdings in this case. Finally, this Comment will conclude that the Second Circuit should revisit this area in order to shape an exigent circumstances exception more consistent with the Fourth Amendment.

I. *UNITED STATES V. MACDONALD*

A. *Background*

In May of 1988 a reliable confidential informant told agents of the New York Drug Enforcement Task Force ("Task Force") that she had recently spent several hours in apartment 1-0 at 321 Edgecombe Avenue ("the apartment").[29] While there she observed that narcotics, including marijuana and cocaine, were being stored in the apartment.[30] She also informed the Task Force that she was taken to a third floor apartment in the same building where more narcotics were stored.[31] Based on this information, six Task Force agents commenced surveillance of the apartment on the evening of September 8, 1988.[32]

The six agents began the surveillance of the premises at approximately 6:30 p.m. Using unmarked cars designed to blend in with the cars in the neighborhood, the agents arranged themselves around the building in order to watch the activity.[33] Al-

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[29] *Thomas*, 893 F.2d at 482, 483-84. Although the informant was described as reliable, there is no indication that probable cause existed to obtain a warrant just on the basis of the confidential information. See Illinois v. Gates, 462 U.S. 213 (1983), for an exposition of the probable cause standard and note 122 *infra* for a brief discussion.

[30] 893 F.2d at 484.

[31] *Id.*

[32] *Id.* Approximately four months elapsed between the time the agents received the tip and the beginning of the surveillance operation. This lag undermines the assumption that an emergency situation existed to justify a warrantless entry.

[33] The surveillance operation was done well. The agents blended into the neighborhood, seemingly unobserved. *Id.* at 489. During three hours of surveillance, the agents

though the agents had established through observation that probable cause existed to make an arrest without a controlled buy, they chose to proceed with an undercover investigation to gather more evidence.[34]

At approximately 9:50 p.m. Agent Agee of the Task Force ("Agee") entered the building shadowed by another agent.[35] Agee knocked at the apartment door and was admitted.[36] Agee saw six men in the apartment, one pointing a cocked 9 millimeter pistol in his direction.[37] He saw MacDonald, sitting on the couch counting money, within reach of a .357 Magnum revolver.[38] Agee also smelled marijuana in the apartment and saw what appeared to be bags of cocaine and marijuana on a table.[39] Agee did not recognize any of the men in the apartment and did not believe that any of the men recognized him.[40] While in the apartment Agee saw no indication that the suspects had any security devices present.[41] After purchasing a five dollar bag of marijuana, Agee exited the apartment.[42] The agent who shadowed Agee was so inconspicuous that even Agee did not see him enter or exit the building.[43]

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saw between 15 and 20 people drive up to the apartment. *Id.* at 484. Automobiles would double park, a passenger would enter the apartment, exit in a few minutes, and drive off. This pattern convinced the officers that the occupants of the apartment were engaged in drug selling. *Id.* Agent Agee telephoned his supervisor, and it was decided that they would go forward with a controlled buy. *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* While inside he observed that the apartment consisted of two rooms. Each room had one window that faced Edgecomb Avenue. He also noticed that there was only one door to the apartment. These facts suggest that the police could have secured the premises during the few hours it would have taken to obtain a warrant.

[37] *Id.* at 484-85.

[38] *Id.* at 483.

[39] *MacDonald*, 916 F.2d at 768. Although Agee claimed to smell burning marijuana, he did not actually see any of the occupants smoking. *Id.* at 775.

[40] *Thomas*, 893 F.2d at 489. The fact that none of the occupants of the apartment recognized Agee as a narcotics officer reinforces the belief that the suspects had no idea that they were being watched. Thus, escape or destruction of evidence probably was not imminent. Additionally, the fact that the suspects had no apparent security devices, and thus no knowledge of police surveillance, also undermines the assumption that exigent circumstances existed. Indeed, these facts suggest that the suspects were not aware of the police presence and would continue with business as usual.

[41] *Id.*

[42] *Id.* at 485.

[43] *Id.* at 489. The fact that even Agee did not see the agent who shadowed him into the building should have suggested to the officers that their surveillance was inconspicu-

After rejoining his compatriots Agee, along with his supervisor who had arrived on the scene, formulated a plan to gain access to the apartment.[44] An agent was to go to the apartment and speak with the person who sold Agee the drugs and seek consent for a search.[45] No effort was made to procure a search warrant.[46] Indeed, even though Agee testified at the suppression hearing that he had twice in the past obtained a search warrant by telephone,[47] none of the agents even discussed the possibility of obtaining a warrant.[48]

At approximately 10 p.m. Agee and six other agents returned to the apartment.[49] Other agents remained outside.[50] With guns drawn, the agents knocked on the door and identified themselves.[51] They received no response but heard sounds of movement and shuffling.[52] They then received a radio communi-

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ous. Far from indicating imminent destruction of evidence or escape, this fact also supports the belief that the suspects were unaware of the police presence.

[44] *Id.* at 485.

[45] *Id.* at 489.

[46] *Id.* at 485.

[47] *Id.* The Federal Rules of Criminal Procedure allow for telephonic warrants. FED. R. CRIM. P. 41(c). This process can take up to several hours in New York City. *See Thomas*, 893 F.2d at 483.

[48] *Id.* Officers should always think about getting a warrant before entering a home. Of course in an emergency situation there may not be enough time to discuss the possibility of obtaining a warrant. However, in the present case, the officers had enough time to formulate a plan of action. Thus, they had enough time to at least make a good faith attempt to secure a warrant. It is unclear why these particular agents found it unnecessary even to broach the subject of obtaining a warrant. The use of the exclusionary rule when the police do not make a good faith effort to obtain a warrant would reaffirm to police officers the importance of constitutional considerations before intruding into constitutionally protected areas such as the home. There is an unresolved conflict in the Ninth Circuit with regard to good faith attempts to secure warrants. *See* United States v. Alvarez, 810 F.2d 879, 883 (9th Cir. 1987) (A panel of the Ninth Circuit denied the applicability of the exigent circumstances exception where the police failed to attempt to secure a warrant. The panel held that a warrantless arrest was not justified where officers failed to make good faith effort to secure a warrant.); *but cf.* United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986) (Another panel of the Ninth Circuit held that a warrantless arrest was valid even though officer did not make good faith effort to obtain a warrant.).

[49] *Thomas*, 893 F.2d at 485.

[50] *Id.*

[51] *Id.* It is significant that the agents approached the door with their guns drawn and equipped with a battering ram. This belies the assertion that they went to the door to obtain a consent and not to precipitate exigent circumstances. Indeed, since the linchpin of a valid consent is its voluntariness, it is difficult to imagine a court upholding a consent given at the end of a pointed gun. *See* note 28 *supra*.

[52] 893 F.2d at 485.

cation from the agents outside informing them that the suspects were attempting to escape through the windows.[53] With a battering ram, the agents subsequently broke down the door.[54] There were five men in the apartment, all of whom were arrested.[55] The man who had sold Agee the drugs was not present.[56] The agents also seized the 9 millimeter pistol, the .357 magnum revolver, 443 grams of cocaine, approximately four and one-half kilograms of marijuana, a scale, a grinder, various packaging materials, and large amounts of cash.[57]

B. *The District Court Opinion*

Errol MacDonald was tried and convicted in the United States District Court for the Southern District of New York.[58] During the pretrial suppression hearing MacDonald argued that the evidence against him should be suppressed because it was seized in violation of his rights under the Fourth Amendment of the Constitution.

The court denied the motion to suppress on the ground that the government met the burden of showing that the warrantless entry was justified by exigent circumstances.[59] The court pointed to the fact that MacDonald was engaged in serious ongoing criminal activity that often involves violence and was in the position to use the weapons at his disposal.[60] Additionally, the court found that the agents had an urgent need to make a warrantless entry in order to prevent the destruction or loss of evidence or the flight of suspects.[61]

The court also argued that once the agents identified them-

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 482, 483. MacDonald was convicted of possession with intent to distribute cocaine and of using or carrying a firearm during a drug trafficking crime.

[59] *Id.*

[60] *Id.* at 485. This ability, according to the court, created an emergency situation justifying immediate entry.

[61] *Id.* at 486. At the time the agents made the entry, they knew the defendant controlled another apartment in the building. However, the agents had not been able to identify the location of this other apartment. Hence, according to the court, it would have been fairly simple for the defendant to remove himself or the contraband to this other unknown location, putting himself and the evidence beyond the reach of the authorities while they waited for a search warrant.

selves and the door was not opened, any delay in arresting the suspects would very likely result in the destruction of evidence, particularly the cocaine which could be flushed down the toilet in a matter of moments.[62] Finally, the court commented that the late hour supported the agents' reasonable belief that they could not wait for a warrant. Because the events took place at approximately 10:00 p.m., it would have taken at least a couple of hours for them to obtain a warrant.[63]

C. *The Second Circuit Panel Decision*[64]

MacDonald appealed his conviction and contended that the district court erred in denying his motion to suppress the evidence seized as a result of the warrantless entry into the apartment.[65] A two-judge majority agreed with MacDonald and remanded his case to determine whether MacDonald had the requisite standing to suppress the evidence.[66]

The panel began its discussion of exigent circumstances with the proposition that, in the absence of consent, "a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the government can show . . . the presence of exigent circumstances."[67] Furthermore, the panel asserted, the burden on the government is a heavy one, for the presumption of unreasonableness that attaches to warrantless home entries is not easily overcome.[68]

According to the panel, the fundamental question in determining whether sufficient exigency exists to make a warrantless home entry reasonable is whether the law enforcement officers had objective reason to believe there was an urgent need that

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[62] *Id.*

[63] *Id.* Nighttime warrants are more difficult to obtain because of the limited number of magistrates available at those hours.

[64] The panel decision was not unanimous. Judge Altimari, who wrote the in banc decision, dissented in the panel decision. This Comment will not recount this dissent because its points are more fully made in the in banc decision. *See* notes 86-99 and accompanying text *infra*.

[65] *Thomas*, 893 F.2d at 483.

[66] Up until this point, the threshold issue of standing had been assumed but never decided. Only an individual who has the proper standing may suppress unconstitutionally obtained evidence. *See* Rakas v. Illinois, 439 U.S. 128 (1978) (only individuals whose legitimate expectation of privacy is violated have standing to suppress evidence).

[67] *Thomas*, 893 F.2d at 486 (quoting Welsh v. Wisconsin, 466 U.S. 740, 749 (1984)).

[68] *Id.* at 486.

justified the entry.[69] Like many other courts, the Second Circuit has adopted the factors articulated by the District of Columbia Circuit in *United States v. Dorman* as the framework within which to analyze whether exigent circumstances exist.[70] Although the panel accepted the *Dorman* factors, it claimed that they are " 'illustrative, [and] not exclusive.' "[71] Hence, the exigent circumstances test is akin to a totality of the circumstances test with the *Dorman* factors acting as a "rough guidepost."[72]

According to the panel, the district court's finding that exigent circumstances justified the warrantless entry was clearly erroneous.[73] The court held that prior to the agents identifying themselves as police officers, there were no objective facts that raised any likelihood of imminent flight, destruction of evidence, transfer of evidence, or violence.[74]

The panel, although acknowledging that the gravity of the offense is an appropriate consideration in exigent circumstances analysis, refused to conflate the seriousness of the underlying offense with the existence of exigent circumstances.[75] According to the panel, "Some urgency, apart from the nature of these of-

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[69] *Id.* at 487. The cases make clear that officers require only reasonable suspicion that exigent circumstances exist to justify a warrantless search. *See* United States v. Agapito, 620 F.2d 324, 336 n.18 (2d Cir. 1980), *cert. denied*, 449 U.S. 834 (1980) (arresting officers need "a reasonable belief that third persons are aware of the arrest outside so they may destroy evidence"). In Minnesota v. Olson, 110 S. Ct. 1684 (1990), the Supreme Court approved a test requiring police officers to have probable cause to believe that an emergency exists. However, it is doubtful that the probable cause standard is constitutionally mandated. In *Olson*, the Court merely approved of one court's test; it did not hold that the test was the only legitimate approach. Moreover, given the seriousness of the risks implicated, there is no reason to demand that the police have a high level of suspicion before acting. Indeed, in other areas of Fourth Amendment jurisprudence, where risk of harm exists, only reasonable suspicion is needed before acting. *See* Terry v. Ohio, 392 U.S. 1, 2 (1967) (police need only reasonable suspicion that person is armed before frisking for weapons).

[70] 435 F.2d 385 (D.C. Cir. 1970). *See* text accompanying note 109 *infra*.

[71] *Thomas*, 893 F.2d at 487 (quoting United States v. Martinez-Gonzalez, 686 F.2d 93, 100 (2d Cir. 1982)).

[72] 893 F.2d at 487.

[73] *Id.* at 490. The court found that the record, taken in the light most favorable to the government, did not reveal that the agents had insufficient time to obtain a warrant.

[74] *Id.* at 489. These factors mirror those approved by the Supreme Court in Minnesota v. Olson, 110 S. Ct. 1684 (1990). *See* notes 104-07 and accompanying text *infra*.

[75] *Thomas*, 893 F.2d at 489.

fenses, must be demonstrated."[76] Furthermore, the panel refused to accept the district court's finding that the ease with which the suspects could transfer the narcotics necessitated the immediate entry into the apartment.[77] The panel acknowledged that it may have been simple for the defendants to effect a transfer. However, "[s]implicity is not the touchstone, because there was no reason to believe they would change the four months operation now when they hadn't been alerted to the September 8 surveillance."[78]

Before the police revealed their presence to the suspects there was no objective urgency compelling the agents to forego obtaining a warrant.[79] Furthermore, the court noted with disbelief Agee's explanation of the reasons for returning to the apartment.[80] Agee testified that it was "[j]ust to talk to the person. Hopefully the person that sold me the marijuana would still be there and try to obtain a consent to search the apartment."[81] The court found this to be nothing more than a pretext, a way for the police to manufacture exigent circumstances in order to circumvent the warrant requirement.[82] The court noted that because Agee observed two weapons in the apartment, "any notion that the occupants might docilely consent to a search seems at best surreal."[83] In addition, the way in which the agents approached the door belied the suggestion that they thought they could obtain a consent to search. They approached en masse, equipped with a battering ram, with their guns drawn.[84] The court concluded by warning that "[i]f the circumstances shown here may properly be deemed 'exigent,' we doubt that agents who have compelling evidence of an ongoing narcotics operation will ever find it necessary to obtain a warrant."[85]

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 490.

[84] *Id.*

[85] *Id.*

D. *In Banc Decision*[86]

The court granted rehearing in banc[87] to consider whether a warrantless entry was lawful pursuant to the exigent circumstances exception to the Fourth Amendment, and if so whether the law enforcement officials improperly created the exigent circumstances.[88] The court, sitting in banc, vacated the panel's decision and reinstated the district court's decision.[89]

Like the panel, the in banc majority asserted that the essential inquiry is whether there was an "urgent need" for the officers to take action.[90] The in banc majority agreed that the test is an objective one that turns on the totality of the circumstances.[91] Furthermore, the in banc majority employed the *Dorman* factors as an analytical tool to determine whether under the totality of the circumstances exigent circumstances existed at the time the entry was made.[92]

Unlike the panel, however, the in banc majority applied the *Dorman* factors and found that the district court was "far from clearly erroneous."[93] According to the majority, all of the factors were met. First, narcotics trafficking is a grave offense. Second, the agents knew that there were at least two weapons in the apartment. Third, the agents had firsthand knowledge that an ongoing crime was transpiring. Fourth, the agents knew that the suspects were in the apartment. Fifth, the likelihood that the perpetrators might escape was confirmed because the actual seller of the contraband escaped during the ten minute interval after the controlled buy and before the entry. Sixth, the officers

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[86] Although there was a vigorous dissent, most of the arguments were put forward in the panel decision and need not be repeated. *See* note 64-85 and accompanying text *supra*.

[87] Traditionally the Second Circuit grants the fewest in banc rehearings of all the circuits. Indeed, between 1984 and 1988 the court sat in banc only 1.4 times a year. This is in sharp contrast to the other eleven circuits which averaged seven cases per circuit per year. *See* Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOKLYN L. REV. 355, 356 (1989). A majority of the judges on the circuit must vote to grant rehearing in banc. Ordinarily, rehearing in banc is granted when a case presents significant legal issues that must be resolved or clarified. *Id.*

[88] *MacDonald*, 916 F.2d at 767.

[89] *Id.*

[90] *Id.* at 769.

[91] *Id.*

[92] *Id.* at 769-70.

[93] *Id.* at 770.

acted lawfully by first attempting a peaceful entry by knocking and announcing themselves. Because the requisite factors had been met, the in banc majority determined that exigent circumstances existed even before the agents knocked at the door.[94]

The court also argued that even if there were no preexisting exigency, the entry was justifiable. First, the court stated that a controlled purchase by undercover agents " 'is a recognized and permissible means of investigation' " useful to gather information and make lawful arrests.[95] Because it certainly would have been legal for Agee to make an arrest during the initial controlled buy, it follows that he could reenter the apartment within ten minutes without a warrant with fellow agents retained as back-up and protection.[96] Second, the court announced that so long as the police act in accordance with the law, the court will not find that they have impermissibly manufactured exigent circumstances.[97] Thus, because the agents attempted a peaceful entry within the bounds of the law, the court would not invalidate that entry simply because it was foreseeable that exigent circumstances would flow from that activity. The court refused to attribute any significance to the subjective states of mind of the officers.[98]

Finally, the majority answered the panel's warning that to allow a warrantless entry in this circumstance would obviate a need for a warrant in practically all narcotics operations. The court stated:

> If it is true that ongoing retail narcotics operations often confront law enforcement agents with exigent circumstances, we fail to see how such a said reality constitutes a ground for declaring that the exigen-

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[94] *Id.*

[95] *Id.* at 771 (quoting United States v. Russell, 411 U.S. 423, 432 (1973)).

[96] For a discussion of consent, see note 28 *supra.*

[97] *MacDonald*, 916 F.2d at 772. For a discussion of this aspect of the decision see notes 148-54 and accompanying text *infra.*

[98] *MacDonald*, 916 F.2d at 772. The court cited a First Circuit case to illuminate the lack of importance of subjective intent in exigent circumstances analysis. In United States v. Rengifo, 858 F.2d 800 (1st Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989), agents telephoned suspects and wrongfully informed them that the police had arrested their compatriots. The suspects, after receiving the call, started to scurry about their apartment. As a result, the agents claimed that they had reason to believe that the suspects were attempting to destroy evidence. Thus, the agents effected a warrantless entry. The suspects argued that the agents should not be allowed to engage in such contrived conduct as a way to bypass the warrant requirement. The First Circuit did not agree, calling the technique "creative investigative" work. *Id.* at 803.

> cies do not, in fact, exist. To disallow the exigent circumstances exception in these cases would be to tie the hands of law enforcement agents who are entrusted with the responsibility of combatting grave, ongoing crimes in a manner fully consistent with the constitutional protection afforded to all citizens.[99]

II. EXIGENT CIRCUMSTANCES

A. *Scope of the Exigent Circumstances Exception*

The Fourth Amendment requires that police officers obtain a warrant before entering a home to search or to arrest.[100] However, if exigent circumstances arise, the police may lawfully enter a dwelling without a warrant or consent. The Supreme Court has recognized an exigent circumstances exception in both the arrest and search contexts.[101] Indeed, the test for exigent circumstances is essentially the same in both instances.[102] Simply stated, exigent circumstances exist when under the totality of the circumstances there is a "compelling need for official action and no time to secure a warrant."[103]

In *Minnesota v. Olson*[104] the Supreme Court approved the Minnesota Supreme Court's test to determine whether exigent circumstances exist to justify a warrantless entry. The Minnesota court listed four factors that may justify a warrantless entry: 1) the "hot pursuit" of a suspected felon; 2) probable cause to believe that there is the risk of imminent destruction of evidence; 3) probable cause to believe that immediate action is necessary to prevent the suspect's escape; and 4) probable cause to

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[99] *MacDonald*, 916 F.2d at 772-73.

[100] *See* note 15 *supra*.

[101] *See* Warden v. Hayden, 387 U.S. 294 (1967) (threatened destruction of evidence by a person for whom probable cause to arrest existed justified a warrantless entry when there was no time to secure a warrant); United States v. Santana, 427 U.S. 38 (1976) (in a classic hot pursuit case, the Court stated that a "suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place"); McDonald v. United States, 335 U.S. 451 (1948) (negative implication to the effect that "exceptional" circumstances may dispense with the need for a search warrant).

[102] *See* Donnino & Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 ALB. L. REV. 90, 91 (1980) ("the occasional broad language used by the Court to give meaning to the term "exigent circumstances" in a search context provides us with insight into the meaning of the term in an arrest context").

[103] Michigan v. Tyler, 436 U.S. 499, 509 (1978).

[104] 110 S. Ct. 1684 (1990).

believe that there is risk of danger to the police or to the community if immediate action is not taken.[105] The court also explained that when assessing the risk of danger, the gravity of the crime and the likelihood the suspect is armed should be considered.[106]

The *Olson* test is a refinement of the standard crafted by the Court of Appeals for the District of Columbia in *Dorman v. United States*.[107] *Dorman* was one of the earliest and most important cases in exigent circumstances analysis.[108] In that case,

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[105] *Id.* at 1690. The Minnesota court's test is a conglomerate of the factors that the Supreme Court has announced in the past to be relevant to exigent circumstances analysis. When reviewing prior Supreme Court cases in the area, it is clear that the Court had "definitive thoughts" on what constitutes a compelling need for action. Donnino & Girese, *supra* note 102, at 96. For example, in Johnson v. United States, 333 U.S. 10 (1948), one of the earliest cases dealing with exigent circumstances, the Court stated:

> There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for a search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to the magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. *No suspect was fleeing or likely to take flight . . . . No evidence or contraband was threatened with removal or destruction . . . .*

Id. at 14-15 (emphasis added).

The Court has continually relied on the factors enunciated in *Johnson* whenever it has revisited the exigent circumstances area. *See* Vale v. Louisiana, 399 U.S. 30 (1970) (confirms by implication the importance of destruction of evidence as justification for a warrantless home entry). Additionally, the Court has also held that risk to human life and hot pursuit of a fleeing felon are also situations that give rise to exigent circumstances. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation *if to do so would gravely endanger their lives or the lives of others.*") (emphasis added); United States v. Santana, 427 U.S. 38, 43 (1976) (a suspect may not invalidate an arrest by escaping to a private place). *See also* Johnson v. United States, 333 U.S. 10, 16 n.7 (1948) ("[W]e find no element of 'hot pursuit' in the arrest of one who was not in flight, was completely surrounded by agents before she knew of their presence . . . and who made no attempt to escape.").

[106] *Olson*, 110 S. Ct. at 1690.

[107] 435 F.2d 385 (D.C. Cir. 1970) (in banc).

[108] In *Dorman* the police had probable cause to believe that the suspect was involved in an armed robbery, based on evidence found on the scene of the crime. The suspect had left his probation papers at the scene of the crime, thereby identifying himself. The police feared that the suspect might realize his error and attempt to escape or destroy evidence if they did not arrest him quickly. Because of the late hour and difficulty in finding a magistrate, the police entered the suspect's home without a warrant. The court upheld the entry and formulated the six factors as a way to analyze the myriad of factual situations that can arise in the street. The factors were thus offered not as

the court listed six factors pertinent to a finding of exigent circumstances: 1) the gravity of the offense; 2) that the suspect is reasonably believed to be armed; 3) a clear showing of probable cause to believe the suspect committed the crime involved; 4) a strong reason to believe the suspect is in the premises being entered; 5) a likelihood that the suspect will escape if not apprehended; and 6) that the police attempt a peaceful entry.[109] These factors are intended to facilitate the critical determination of whether an objective urgency compelled the warrantless entry. Although the *Dorman* factors have severe limitations as an analytic tool,[110] many courts still employ them when analyzing exigent circumstances.[111] Given the inherent limitations of the *Dorman* factors, the formulation of the exigent circumstances exception put forward in *Olson* should replace the current reliance on the *Dorman* factors. The *Olson* decision does not lose sight of the total picture by atomizing the analysis.[112]

B. *Second Circuit's Approach Prior to MacDonald*

The Second Circuit initially adopted the *Dorman* factors without modification in *United States v. Reed*.[113] Then in *United States v. Campbell*[114] the Second Circuit clarified its approach and stated that "circumstances which, when viewed as of

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a talisman of exigent circumstances, but rather as a framework within which police officers and trial judges can make the fundamental determination of whether an urgency existed that justified the warrantless entry.

[109] 435 F.2d at 391-92. The *Dorman* factors are not without their detractors. They have been criticized as being impracticable, demanding "a complicated weighing and balancing of a multitude of imprecise factors." W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 390 (1978). More important, it is possible for many of the *Dorman* factors to exist in cases where there is no exigency. *See, e.g.*, United States v. Lindsay, 506 F.2d 166 (D.C. Cir. 1974); Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975); Commonwealth v. Williams, 483 Pa. 293, 396 A.2d 1177 (1978), *cert. denied*, 446 U.S. 912 (1980). *See also* Donnino & Birese, *supra* note 102, at 99-106; Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. ILL. L. REV. 655, 678-80.

[110] *See* note 109 *supra*.

[111] *See, e.g.*, United States v. Standridge, 810 F.2d 1034, 1037 (11th Cir.), *cert. denied*, 481 U.S. 1072 (1987); United States v. Baldacchin, 762 F.2d 170, 176 (1st Cir. 1985); United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978); United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974); United States v. Shye, 492 F.2d 886, 891 (6th Cir. 1974).

[112] *See* note 109 *supra*.

[113] 572 F.2d 412 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978).

[114] 581 F.2d 22 (2d Cir. 1978).

the time of the entry, would lead a reasonable person to believe that unless an entry and arrest are made immediately the suspect may escape, destroy essential evidence or continue the commission of an on-going crime, represent exigencies of the type justifying immediate police action on probable cause without first obtaining a warrant."[115] The court went on to explain that the *Dorman* criteria are "[a]mong the factors deemed relevant in determining whether the circumstances are sufficiently exigent to permit a warrantless entry."[116]

As the Second Circuit developed the law in this area it announced its intention to move away from the mechanical application of the *Dorman* factors in favor of a "totality of the circumstances" approach.[117] The court claims to employ the *Dorman* factors as mere guideposts for police and judges to use when determining the existence of exigent circumstances.[118] Hence, the court announced that the presence or absence of one factor is not conclusive.[119] Rather, the reviewing judge must look at all the facts from the vantage point of the officer at the time of the entry, keeping in mind that "[t]he essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an 'urgent need' to render aid or take action."[120] Thus, the Second Circuit's purported methodology jibes with the recent *Olson* decision.[121]

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[115] *Id.* at 26. This test is identical to the one approved in *Olson*. 110 S. Ct. 1684, 1690 (1990).

[116] 581 F.2d at 22.

[117] *See* United States v. Crespo, 834 F.2d 267 (2d Cir. 1987); United States v. Cattouse, 846 F.2d 144 (2d Cir.), *cert. denied*, 488 U.S. 929 (1988); United States v. Zabare, 871 F.2d 282 (2d Cir.), *cert. denied*, 110 S. Ct. 161 (1989).

[118] *MacDonald*, 916 F.2d at 769.

[119] *Id.* at 770.

[120] *Id.* at 769.

[121] Acceptance of a single standard to analyze exigent circumstances does not guarantee uniform results. Exigent circumstances analysis remains a fact-sensitive enterprise. As a result, the scope of the exception expands and contracts as different courts apply the standard. Indeed, even in *Olson*, some members of the Court implied that they would have found that exigent circumstances existed under the facts of the case using the same test employed by the Minnesota Supreme Court. *See Olson*, 110 S. Ct. at 1690. *See also* United States v. Cattouse, 846 F.2d 144, 146 (2d Cir. 1988) (a district court's determination that exigent circumstances exist is fact-specific and will not be overturned unless clearly erroneous).

C. *Timeframe to Secure a Warrant*

The underlying issue in all exigent circumstances cases is whether the police had enough time to secure a warrant before effecting an entry. It is necessary therefore to determine at what point in an investigation a warrant should be sought. A warrant may be issued only upon a showing of probable cause.[122] However, courts do not demand that police officers obtain and execute a warrant at the earliest showing of probable cause.[123] The quantum of evidence sufficient to give rise to probable cause is often insufficient to lead to a conviction. Hence, it may be more efficient for the police to develop their case before effecting an immediate entry. This leeway, in a sense, conflicts with the general proscription against warrantless entries. The longer the police investigate and refrain from obtaining a warrant, the greater the likelihood that exigent circumstances will develop, triggering the justification for a warrentless entry.

The Supreme Court has offered little guidance to lower courts on this aspect of exigent circumstances analysis. In *Cardwell v. Lewis*[124] the Court held that the police will not be barred automatically from acting on an exigency even if they could have obtained a warrant earlier. However, this case failed to set up workable guidelines to determine how the police should conduct themselves during this interim period. The Second Circuit at-

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[122] The Constitution establishes probable cause as the appropriate level of suspicion required to obtain a warrant. U.S. CONST. amend. IV, § 2. *See* note 1 *supra*. Probable cause is an objective standard measuring whether law enforcement officials have sufficient evidence to make a reasonable person think the arrest or search justified. There is probable cause to arrest when more likely than not the person named in the warrant committed or is committing a crime. *See* Payton v. New York, 445 U.S. 573, 602-03 (1980). There is probable cause to search when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983).

[123] The police are not constitutionally required to search or arrest just because probable cause exists. In the context of arrests, the Supreme Court has held that: "Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." Hoffa v. United States, 385 U.S. 293, 310 (1966), *reh'g denied*, 386 U.S. 940 (1967). The same rationale supports the conclusion that police may refrain from searching in order to promote their investigation.

[124] 417 U.S. 583, 595-96 (1974) ("the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action").

tempted to shape such a guideline in *United States v. Segura*.[125] The *Segura* court ruled that " 'when the emergency justification is advanced, we believe it is appropriate to appraise the agents' conduct during the entire period after they had a right to obtain a warrant and not merely from the moment when they knocked at the front door.' "[126] The *Segura* court further held that the police may not deliberately manufacture the exigency.[127] The court refused to expand the exigent circumstances exception to include unnecessary police conduct designed to give rise to emergencies.[128]

After *Segura*, defendants unsuccessfully challenged warrantless entries when the investigatory techniques used foreseeably gave rise to exigent circumstances, and the agents could have obtained a warrant earlier in the day.[129] In *United States v. Cattouse*[130] the court addressed this issue and held that agents may "wait 'until such time as events ha[ve] proceeded to a point where the agents could be reasonably certain that the evidence would ultimately support a conviction' " before obtaining a warrant.[131] The court also quoted *Cardwell*, stating, " 'the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's ne-

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[125] 663 F.2d 411 (2d Cir. 1981), *aff'd on other grounds*, 468 U.S. 796 (1984). In this case, agents arrested a co-conspirator in the lobby of a building. The agents then brought the suspect up to his co-conspirator's apartment, causing a scene. The agents then made a warrantless entry, claiming that because the occupants of the apartment were aware of the arrest, exigent circumstances existed. The court refused to allow the officers to manufacture exigencies in that way and suppressed the evidence.

[126] 663 F.2d at 415 (quoting United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 1974)).

[127] 663 F.2d at 411. Many courts have agreed that the police may not themselves create an exigency. *See, e.g.*, United States v. Hernandez-Cano, 808 F.2d 779, 782 (11th Cir.) (no exigent circumstances where police could have removed the exigency by arresting the suspect), *cert. denied*, 482 U.S. 918 (1987); United States v. Munoz-Guerra, 788 F.2d 295, 298 (5th Cir. 1986) (no exigent circumstances when the police intentionally confronted suspect not aware of the surveillance when they could have secured the premises); United States v. Driver, 776 F.2d 807, 810-11 (9th Cir. 1985) (no exigent circumstances because the police would not have feared for their safety had they not entered warehouse where the suspects were located).

[128] 663 F.2d at 415.

[129] *See, e.g.*, United States v. Zabare, 871 F.2d 282 (2d Cir. 1989); United States v. Cattouse, 846 F.2d 144 (2d Cir. 1988).

[130] 846 F.2d 144 (2d Cir. 1988).

[131] *Id.* at 147 (quoting United States v. Montiell, 526 F.2d 1008, 1010 n.1 (2d Cir. 1975)).

cessitating prompt police action.' "[132] Moreover, in *Cattouse* the Second Circuit allowed the police to utilize investigatory techniques that tend to give rise to exigencies as long as "they were appropriate and were not adopted for the purpose of creating exigent circumstances."[133] Thus, prior to *MacDonald*, the trend in the Second Circuit was to expand the scope of the exception to include preventable warrantless entries.

III. ANALYSIS

A. *Exigent Circumstances Before the Knock*

1. The Application of the *Dorman* Factors

The majority in *MacDonald* employed a somewhat mechanistic jurisprudence in concluding that exigent circumstances existed in *MacDonald* to justify the warrantless entry. Notwithstanding its assertion that exigent circumstances analysis demands a totality of the circumstances approach, the court employed the *Dorman* factors in a checklist fashion.[134] Because the

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[132] 846 F.2d at 147 (quoting Cardwell v. Lewis, 417 U.S. 583 (1974)).

[133] 846 F.2d at 148. *See also* United States v. Zabare, 871 F.2d 282 (2d Cir. 1989). In *Zabare* the FBI had been alerted to a ticket scalping conspiracy. The FBI placed undercover agents who "sold" the defendant counterfeit tickets. The FBI marked the tickets void in case something went wrong with the operation and the defendant disseminated the tickets to the public. Immediately after completing the sale, the FBI entered the suspect's apartment without a warrant. The government argued that the agents could reasonably have believed that as soon as the defendant discovered the void markings, he would warn the other members of the conspiracy and thus endanger the lives of the other undercover agents. The defendant argued that the government should not be able to invoke the exigent circumstances exception because the agents created the exigency by their own actions. The court upheld the warrantless entry because it found that the government's decision to mark the tickets void was "reasonable" in light of the concern that the tickets might have reached the public. In reaching this conclusion, the court relied on *Cattouse*. Quoting from that opinion, the court stated that " 'the investigative techniques were appropriate and were not adopted for the purpose of creating exigent circumstances.' " *Zabare*, 871 F.2d at 290 (quoting *Cattouse*, 846 F.2d at 148).

Cattouse and *Zabare* reveal the readiness of the Second Circuit to accept police investigative techniques that foreseeably give rise to exigent circumstances. The only apparent limitation to police discretion in this area lies in the "reasonableness" of their activity. The court is willing to uphold police investigatory techniques that give rise to exigent circumstances as long as they were not adopted for the purpose of creating exigent circumstances. Thus, if the police can put forward a plausible explanation for their conduct, the court will sanction it, even if it tends to give rise to exigent circumstances. *Id.*

[134] According to the majority, all the *Dorman* factors indicating the existence of exigent circumstances were present. The suspects were armed and the police had strong

court was able to pigeonhole the facts of *MacDonald* into the *Dorman* framework, it found that there was a legitimate emergency that justified police action. This approach is insufficient because of the limitations inherent in the factors themselves. The presence of all the factors does not necessarily mean that exigent circumstances exist.

Moreover, the majority was simply wrong when it asserted that all the *Dorman* factors were met. The dissent correctly stated that there was absolutely no indication that the dealers would attempt to escape before the police identified themselves. The majority applied flawed logic to conclude that there was a legitimate risk of escape that justified the police action. The fact that one of the suspects was not in the apartment when the police entered does not mean that the police had an objective basis before the entry to think that there was an imminent risk of escape especially when the police did not yet know that the seller was not in the apartment. Whenever there is an ongoing criminal activity there is a risk that suspects will temporarily remove themselves from the premises. But this risk does not always rise to the level of an emergency. Here, the dealers were engaged in running an ongoing and profitable business enterprise. They had no idea they were being watched and appeared to be lax in their security.[135] If facts such as these indicate an objective belief that imminent escape will occur, it is hard to see when such an emergency will not be deemed to exist. If such an

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reason to believe the suspects were in the apartment to be entered. Furthermore, narcotics offenses are considered among the gravest infractions confronting society, and the police had first hand knowledge that the suspects were engaged in such conduct. Additionally, the police attempted a peaceful entry before forcing their way into the apartment. Finally, the court held that the risk that a suspect might escape was borne out by the fact that the individual who actually sold Agee the narcotics was not present in the apartment when the police entered. *MacDonald*, 916 F.2d at 770, 773.

It is important to note that risk of escape is the only *Dorman* factor that corresponds with the justifications for warrantless entries that was put forward by the *Olson* Court and prior Supreme Court cases. Because the suspects were unaware of the surveillance, the risk of escape was not of emergency proportions.

[135] The Task Force did an exceptionally good job blending into the area. The agents were of the same racial group as members of the neighborhood. Furthermore, Agent Agee testified that he did not recognize any of the suspects, nor did they give the slightest indication of recognizing him. Moreover, even Agee did not recognize the other agent who shadowed him into the building. *Thomas*, 893 F.2d at 489. Thus, it is doubtful that the suspects were aware of that agent's presence. Finally, Agee saw no security devices or runners that could tip the suspects off to the surveillance. *Id.*

analysis is allowed to persist, the rule in favor of obtaining a warrant before entering a home will become a nullity.

2. Additional Indicia of Exigency

The in banc court did not rely solely on the *Dorman* factors to establish the existence of exigent circumstances. It also looked to see whether there was an imminent risk that evidence would be lost or destroyed as well as whether there was an imminent risk of danger. This examination properly encompasses the risks that the Supreme Court has found to justify the exigent circumstances exception. However, although the in banc court correctly framed the analysis, its application of the analytical framework to the facts reveal serious deficiencies.

The majority concluded that the agents risked losing the evidence had they failed to act immediately. The court based this conclusion on the existence of the unidentified apartment. This conclusion is, however, unwarranted because there was no objective reason to believe the suspects would suddenly transfer their stash to the other apartment. Mere speculation is not tantamount to reasonable suspicion and should not be sufficient to assume the presence of exigent circumstances.[136]

A more sensitive analysis of the facts shows that no objective emergency existed that justified the warrantless entry. The suspects were unaware of the police presence and gave no indication that "business as usual" would not continue.[137] Thus, there was no reason to believe that this potential transfer of contraband would occur. If the exigent circumstances exception is to remain an exception and not be allowed to swallow the rule, enforcement agents and reviewing courts will have to apply more stringent controls on the use of the exception than was evidenced in *MacDonald*.

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[136] United States v. Munoz-Guerra, 788 F.2d 295 (5th Cir. 1986) ("without reason to believe that a defendant was aware of police surveillance, mere presence of firearms or destructible, incriminating contraband did not create exigent circumstances"); United States v. Morales, 737 F.2d 761 (8th Cir. 1984) (mere fear or apprehension that evidence may be destroyed did not justify warrantless motel room entry based on exigent circumstances).

[137] In most instances where courts have upheld a warrantless entry based upon fear of loss of evidence the suspects have been aware of the police presence. *See, e.g.*, United States v. Cattouse, 846 F.2d 144 (2d Cir. 1988); United States v. Munoz-Guerra, 788 F.2d 295 (5th Cir. 1986).

B. *Objective Risk of Danger*

In *MacDonald* the Second Circuit shaped a per se rule that narcotics trafficking always gives rise to an imminent risk of danger. This rule is based on judicial notice of the violence associated with drug trafficking. However, this rule does not require that there be particularized suspicion that the suspect in any given case will become violent. Outside the context of the narcotics trade, probable cause to believe a suspect is armed, standing alone, does not qualify as an exigent circumstance.[138] The police must know of some other independent fact that would lead them to suspect that violence will occur unless they move in.

The government, in its brief on rehearing in banc, presented statistics showing the relationship between drug selling and violence.[139] There is no escaping the reality that drug trafficking often results in violence. However, in *MacDonald* the Second Circuit has seemingly created an irrebuttable presumption that all drug trafficking operations may at any time explode into violence.[140] This presumption stands, notwithstanding specific indications that a particular drug operation is indeed stable.

In *MacDonald* the police knew before the entry that the operation had been in existence at least four months prior to their active investigation. During that four-month period there was no outbreak of violence. Furthermore, during the few hours the police watched the operation they witnessed a steady stream of buyers. At no time was there any indication that violence would erupt. Finally, Agent Agee did not observe any runners, scan-

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[138] *See* United States v. Munoz-Guerra, 788 F.2d 295 (5th Cir. 1986).

[139] The government presented one study that examined 414 randomly selected homicides in New York City. That study found that 52.7% of these homicides were drug related. The authors of this study found that the violence was associated with "territorial disputes among rival dealers, assaults and homicides committed within particular drug dealing operations in order to enforce normative codes, robberies of drug dealers, elimination of informers, punishment for selling adulterated or bogus drugs, [and] assaults to collect drug related debts." Brief for Appellee at 17, *MacDonald*, 916 F.2d at 766 (Nos. 89-1262, 89-1263) (quoting P. GOLDSTEIN, H. BROWNSTEIN, P. RYAN & T. BELLUCCI, CRACK AND HOMICIDE IN NEW YORK CITY (1988)).

[140] Given prior case law, this presumption may even stand when enforcement agents have no indication that the particular drug dealers are armed. The Second Circuit has "often . . . taken judicial notice that, to substantial dealers in narcotics, firearms are as much tools of the trade as are the most commonly recognized articles of narcotics paraphernalia." United States v. Crespo, 834 F.2d 267, 271 (2d Cir. 1987) (citations omitted).

ners, or other security devices. This refutes the inference that these particular suspects were overly security conscious. Whenever armed criminals engage in criminal activity, violence may erupt. The mere fact that suspects are armed, however, does not rise to the level of an emergency. Furthermore, in the absence of an emergency situation, the Fourth Amendment puts a premium on protecting privacy interests as opposed to promoting efficient law enforcement.

As a result of the court's analysis in this case, the exigent circumstance exception may be used to justify all warrantless home entries whenever there is mere probable cause to believe that an ongoing drug trafficking operation exists. This is a clear misreading of the scope of the exception. The court's analysis is tantamount to creating a drug trafficking exception to the warrant requirement. The Fourth Amendment allows no such exception. Rather, the Fourth Amendment demands a case-by-case adjudication to determine whether an objective emergency compelled the warrantless entry. When, as here, there was no objective emergency requiring immediate action, the police should have obtained a warrant. This simple rule should apply even in drug cases, even when the government is engaged in a war against drugs.

C. *Manufacturing of Exigency*

The most chilling aspect of the *MacDonald* opinion was the cavalier attitude the majority took to the manufacturing by the police of the exigent circumstances.[141] The court limited its analysis in this area to a conclusory statement that subjective intent is irrelevant to Fourth Amendment analysis as long as police act in an objectively lawful manner.[142] As a result, creative police officers now have discretion to choreograph events so as to bypass the Fourth Amendment's warrant requirement. This result conflicts with the underlying policy of the Fourth Amendment, which is to limit government intrusions.

The Fourth Amendment reflects a "profoundly anti-govern-

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[141] This alternate holding is even more chilling because it was unnecessary. The court did not need to reach this issue because it found that exigent circumstances existed before the agents knocked on the apartment door. *See* note 25 *supra*.

[142] *MacDonald*, 916 F.2d at 772.

ment" vision.[143] Historically, it was a response to the colonial writs of assistance and general warrants.[144] It reflects a fundamental dissatisfaction with the ability of government officials to search and seize without restraint.[145] The Fourth Amendment, with its warrant requirement, attempted to limit the excesses of government power by placing a necessary check on government actors. By allowing police officers to consciously manipulate events and sidestep the warrant requirement, the court is empowering the police to enter homes without prior judicial review.[146] Although it would be hyperbole to suggest that this decision returns us to the excesses of the colonial period, it is fair to point out that this decision is an unnecessary step in that direction.

The majority essentially argues that since a police officer may lawfully attempt to obtain a consent to enter a home, it is legitimate for officers to try to get such a consent even if they know that the attempt will be unsuccessful and give rise to exigent circumstances.[147] This analysis reflects the current trend in the Second Circuit to retreat from cases like *Segura* which severely limited law enforcement agents' ability to manufacture exigent circumstances.[148] Indeed, *MacDonald* goes far beyond

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[143] Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974).

[144] *See, e.g.*, Stanford v. Texas, 379 U.S. 476, 481-82 (citing the writs of assistance as a driving force behind the inclusion of the Fourth Amendment in the Bill of Rights), *reh'g denied*, 380 U.S. 926 (1965); United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (the Fourth Amendment provides a "safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution"). Both general warrants and writs of assistance permitted unrestrained searches of homes. The bearer of these warrants and writs were vested with complete discretion to enter and search private places. *See* W. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-78 (1937).

[145] The colonists had a long history of opposition to the writs. Indeed, James Otis resigned as Attorney General of Massachusettes to fight the writs. *See* Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 361-65 (1921). Otis decried the writs as " 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law . . . .' " Boyd v. United States, 116 U.S. 616, 625 (1886) (quoting James Otis). This language helped stir the 1776 Revolution. Otis's 1761 speech in Boston was "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Id.*

[146] *See generally* Jonas, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791 (1989).

[147] *MacDonald*, 916 F.2d at 770-71.

[148] Examples of other cases are: United States v. Zabare, 871 F.2d 282 (2d Cir. 1989) (agents did not impermissibly create exigent circumstances when, as part of an under-

prior case law by condoning activity designed solely to manufacture emergencies in order to circumvent the warrant requirement.

The majority stated that a police officer's subjective intent should play no role in analyzing whether his or her conduct violates the Fourth Amendment as long as the conduct is otherwise lawful.[149] The Court relied on *Horton v. California*[150] as authority for its holding. In *Horton* the Court abandoned the inadvertence requirement for a valid plain view seizure.[151] It held that "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement."[152] The Court went on to say, however, that police officers have no incentive to "deliberately omit a particu-

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cover operation directed at scalpers, they "sold" voided tickets to the suspect which was sure to alert the suspect to the existence of the sting operation and create exigent circumstances); United States v. Gallo-Roman, 816 F.2d 76 (2d Cir. 1987) (agents did not impermissibly create exigent circumstances when they intercepted mailed photographs that were being used to smuggle cocaine since a controlled delivery was subsequently made and the suspect was likely to notice that the photographs had been tampered with); United States v. Martinez-Gonzalez, 686 F.2d 93 (2d Cir. 1982) (agents reasonably sought to question a suspect outside his doorway and exigent circumstances existed after the suspect dashed into his apartment).

It is interesting to note that each of these cases can be characterized as ones where the suspect police behavior was reasonable to further the investigation. *MacDonald* was a departure because the behavior of the agents should not as a matter of law be deemed reasonable. Moreover, unlike in *MacDonald*, the agents in these cases clearly did not act solely to circumvent the warrant requirement. However, these cases do demonstrate that the court is becoming extremely deferential when it comes to judging police practices. Indeed, these cases condone police conduct that foreseeably gives rise to exigent circumstances. Commentators have often criticized courts for validating this kind of police conduct. *See* W. LAFAVE, *supra* note 109, § 6.1(f), at 600-02 (in planned arrests, agents should provide for all foreseeable consequences of the planned aspect of the operation). *MacDonald* can be seen as a culmination and extension of cases denigrating the importance of foreseeability in exigent circumstances analysis.

[149] *MacDonald*, 916 F.2d at 772.

[150] 110 S. Ct. 2301 (1990).

[151] Under the plain view doctrine a police officer who is lawfully on the premises may seize an item in plain view without a warrant if its incriminating character is immediately apparent to the officer. Prior to *Horton*, the discovery of an item in plain view needed to be inadvertent. In other words, if the officer expected to find and seize the item, it did not fall within the plain view doctrine and could not be seized without a warrant. *See Horton*, 110 S. Ct. at 2303; Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[152] *Horton*, 110 S. Ct. at 2309.

lar description of the item to be seized from the application for a search warrant."[153] Indeed, the Court stated that " '[o]nly oversight or careless mistake would explain the omission in the warrant application . . . .' "[154]

Using *Horton* as an analogy, the majority stated, "the fact that the agent may be 'interested' in having the occupants react in a way that provides exigent circumstances and may 'fully expect' such a reaction does not invalidate action that is otherwise lawful."[155] This analysis, however, ignores the fact that the officers in *MacDonald* had a clear incentive to trigger the exigent circumstances—the desire to circumvent the warrant requirement. By failing to examine the agents' subjective intent, the *MacDonald* court broadened the discretion of law enforcement agents to enter homes without obtaining a warrant. This stands in stark contrast to *Horton*, where a failure to examine the officers' state of mind can be justified by the lack of any police motivation to abuse the warrant process.

This approach to the manufacturing by the police of exigent circumstances can be seen as an extension of cases like *United States v. Cattouse*.[156] In *Cattouse* the court held that the police did not impermissibly create exigent circumstances when they sent an all-white undercover team into a black and Hispanic neighborhood to stake out a suspected drug dealer.[157] In that case, the police justified their warrantless entry by claiming that there was imminent risk of escape and destruction of evidence because the suspects could have easily detected the surveillance team.[158]

The defendant unsuccessfully argued that because the exigent circumstances were foreseeable the police should not have been able to invoke the exigent circumstances exception. The defendant relied on *Segura*, arguing that the police may not willfully create exigent circumstances. The *Cattouse* court distinguished *Segura*, holding that the investigatory technique the police used was reasonable and not designed to create exigent

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[153] *Id.*

[154] *Id.* at 2309 n.9. (quoting Coolidge v. New Hampshire, 403 U.S. 443, 517 (1971) (White, J., dissenting)).

[155] *MacDonald*, 916 F.2d at 772 (citing *Horton*, 110 S. Ct. at 2309).

[156] 846 F.2d 144 (2d Cir. 1988).

[157] *Id.* at 147.

[158] *Id.*

circumstances.[159] As a result, even though the emergency was foreseeable, because the agents did not engage in the behavior for the purpose of manufacturing the exigency, a warrantless entry was justified. Thus, although the court was extremely deferential when reviewing the appropriateness of sending an all-white surveillance team,[160] it implicitly used a subjective standard to condone the police activity. The negative implication of *Cattouse* was that if the police employ an investigatory technique for the sole purpose of creating exigencies, a warrantless entry will not be upheld.[161]

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[159] *Id.* at 147-48. Even this holding is open to criticism. In *Cattouse* the police planned a substantial controlled buy of narcotics. The police had probable cause to arrest the suspect before the "buy" and thus could have obtained a warrant. However, the police failed to do so. After the "buy" was completed, the agents entered the suspect's apartment because they feared the suspect would destroy the prerecorded money. This fear was based on the fact that the surveillance team was all white, and the observed neighborhood was predominantly black. The court upheld the warrantless entry. *Cattouse*, 846 F.2d 144, 148 (2d Cir. 1988).

The defendant in *Cattouse* argued that because the investigatory technique foreseeably gave rise to exigent circumstances, the police should have been required to obtain a warrant before commencing the "buy." *Id.* Although this argument did not win the day, it does find support among commentators. Professor LaFave makes the distinction between planned police activity and unplanned investigations. When an operation is planned, the police should not be able to justify a warrantless entry based on exigent circumstances where the exigencies are foreseeable. Professor LaFave argues that this limitation is necessary to insure against the deliberate manufacture of exigencies through planned surveillance or police delay tactics. W. LAFAVE, *supra* note 109, § 6.1(f), at 600-02.

Although the *MacDonald* court spent little time examining this aspect of exigent circumstances, it did allude to the fact that the possibility of the loss of the prerecorded five dollar bill may have justified the warrantless entry. *MacDonald*, 916 F.2d at 770. This scenario is analogous to what transpired in *Cattouse*. The police had probable cause to arrest before they undertook the controlled buy. Furthermore, the prospect of losing the prerecorded bill was foreseeable. Thus, under Professor LaFave's approach, the police should have obtained a warrant before commencing the undercover buy.

[160] The court found that an all-white surveillance team in a black neighborhood is a reasonable investigatory tool. The *Cattouse* court suggested that although it would not demand that officers justify all reasonable activity that gives rise to exigent circumstances, it would not sanction unreasonable activity that gives rise to exigent circumstances. Although the court did not articulate a clear definition of reasonable or unreasonable behavior it seemed to focus on the subjective intent of the agent. Had the *Cattouse* court thought that the agents chose an all-white surveillance team purposefully, when African American and Hispanic agents were readily available, in order to create exigent circumstances, it would have invalidated the warrantless search. However, absent evidence of bad faith the Court would not second-guess police procedure.

[161] Thus, *MacDonald* is quite a jump from cases like *Cattouse*. In *MacDonald* the court suggested that even if the police intentionally engage in conduct in order to manufacture exigencies, they can still invoke the exception. *MacDonald*, 916 F.2d at 770-71.

MacDonald reflects a thorough retreat on the part of the Second Circuit from the rule first announced in *Segura*. Indeed, the court effectively overruled *Segura* in this case.[162] The court will no longer examine the purpose behind police activity that tends to give rise to exigent circumstances. As long as the police do not violate any law, they may engage in any activity for the sole purpose of sidestepping the warrant requirement. This rule unnecessarily creates incentives for the police to abandon the warrant requirement. If the court actually follows the approach announced in *MacDonald* there will be little left of the warrant requirement for home entries in this circuit.

After *MacDonald*, all the police need to enter a suspect's home without a warrant is probable cause. Armed with probable cause, the police may go to the suspect's home and identify themselves as police officers. The occupants have two options. They may invite the officers in or refuse to allow entry. If they invite the officer in, they are by definition relinquishing their privacy rights. On the other hand, if they refuse to open their home to the police, they leave themselves open to the prospect of a forcible entry since the police can claim that exigent circumstances exist.[163] This rule does not lend itself to the serious

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[162] *MacDonald*, 916 F.2d at 772.

[163] This is the exact dilemma the court tried to avoid in United States v. Reed. 572 F.2d 412 (2d Cir. 1978). In that case, agents knocked on the suspects' door and identified themselves. Although there was probable cause, the police had not obtained a warrant. Furthermore, there were no exigent circumstances that would have justified a warrantless entry had they not identified themselves. The court in that case noted:

> We do not believe that the fact that Reed opened the door to her apartment in response to the knock of three armed federal agents operated in such a way as to eradicate her Fourth Amendment privacy interest. To hold otherwise would be to present occupants with an unfair dilemma, to say the least-either open the door and thereby forfeit cherished privacy interests or refuse to open the door and thereby run the risk of creating the appearance of an "exigency" sufficient to justify a forcible entry. This would hardly seem fair in situations that present no exigent circumstances in the first place.

Id. at 423 n.9 (citations omitted).

The implication in *Reed* was that the mere refusal to open one's door to agents will trigger exigent circumstances when probable cause exists. Thus, the purest of verbal refusals, without other indicia of exigency, e.g., flushing toilets or scurrying feet, may be sufficient justification for agents to claim exigency. Indeed, this conclusion is borne out by the case law. In *Cattouse*, 846 F.2d 144 (2d Cir. 1988), the agents justified their warrantless entry by arguing that there was a high probability that the suspects would detect them and either escape or destroy the evidence. *Id.* at 148. That fact alone justified the warrantless search. Here, the danger is just as great. Indeed, the emergency is of an even greater magnitude because the suspects know for certain that agents are investigat-

business of protecting people's privacy interests in the same way as interposing a neutral magistrate between the police and the citizen.

Although the driving force behind the court's abandonment of the rule against manufacturing exigent circumstances seems to be the underlying narcotics offense, this approach is not limited to narcotics.[164] Rather, this new rule can be employed by police whenever they have probable cause to enter a person's home. As a result, the warrant requirement will become mere verbiage, protection without substance.[165]

CONCLUSION

In order to more fully serve the purpose of the Fourth Amendment the Second Circuit must completely revamp its exigent circumstances analysis. To begin with, the court should refrain from employing the *Dorman* factors in its analysis. The limitations of the standard demand that a more effective test be used. The test suggested in *Olson* should replace the old standard. It has the benefit of not atomizing the analysis while pinpointing all the risks that justify warrantless entries. Furthermore, when applying the *Olson* test, the court should engage in a particularized analysis. It should not rely on mere generalities regarding the propensity of violence associated with drug crimes

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ing them. Once the agents identify themselves it is fairly simple to argue that they have objective reason to believe that exigent circumstances exist.

[164] As long as the underlying crime is serious, any time the police have probable cause to enter a person's home, they may identify themselves in order to trigger exigent circumstances. *See* Welsh v. Wisconsin, 466 U.S. 740 (1984) (exigent circumstances cannot justify a warrantless entry where the underlying offense is not serious). If there is a risk that the supect will escape, destroy evidence or become violent, the agents may effect a warrantless entry. Narcotics are not the only type of contraband that may be easily destroyed. *See, e.g., Zabare*, 871 F.2d at 282 (counterfeit tickets). Furthermore, narcotics dealers are not the only individuals prone to violence nor are they the only suspects who attempt to escape.

[165] This will be unfortunate, because the warrant process does offer both concrete and symbolic protection. For a good discussion of the value of the warrant process see White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 182 n.34 (This article lists four factors which favor the warrant requirement: first, it freezes the affiant's story before the search or seizure; second, to the extent magistrates are independent, certain impermissible intrusions will be prevented; third, even if the magistrate is not entirely independent, he or she still has a valid function to play by ensuring that at least the particularity requirement of the warrant clause is met; and finally, to require the police to obtain a warrant is to remain at least one symbolic step away from a police state.).

to establish exigent circumstances. Finally, the court should rethink its alternate holding and forbid police to engage in conduct whose sole purpose is to trigger an emergency.

Jacqueline Bryks