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Don't Act Like You Smell Pot (At Least, Not in the Fourth Circuit): Police-Created Exigent Circumstances in Fourth Amendment Jurisprudence

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Don't Act Like You Smell Pot! (At Least, Not in the Fourth Circuit): Police-Created Exigent Circumstances in Fourth Amendment Jurisprudence*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

INTRODUCTION

You are a police officer. You are called to an inner-city apartment building to investigate a noise complaint and the smell of marijuana.[2] As you approach the door of the specified apartment, you hear music and smell burning marijuana.[3] You begin to knock on the door, and you hear movement inside the apartment. Knocking louder, you announce yourself as a police officer and your need to investigate.[4] The door is opened in response,[5] and, after a moment of conversation, you suspect the man in the doorway is holding a

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1. U.S. CONST. amend. IV.

2. The facts used in the example above are based on the facts set forth in *United States v. Mowatt*, 513 F.3d 395, 397–98 (4th Cir. 2008). The Fourth Circuit rejected the district court's conception of the exigent circumstances exception and concluded that the district court should have granted Mowatt's motion to suppress the evidence seized in his apartment. *Id.* at 400–03.

3. In *Mowatt*, the court noted that Officer Chick, one of the responding officers, testified during the trial that he "smelled a combination of burning marijuana." *Id.* at 397 & n.1. Officer Chick apparently smelled the marijuana as he was identifying the apartment specified in the complaint. *Id.* at 397.

4. In *Mowatt*, the officers heard not only movement inside the apartment but also the discharging of an aerosol can, presumably some sort of air freshener to mask the smell of marijuana. *Id.* The music was then turned down, and the officers announced themselves in reply to the person in the apartment, asking who was at the door. *Id.* At this point, the officers said, "It's the police. Open the door. We need to investigate something." *Id.*

5. The Fourth Circuit held that, after the "knock-and-talk" attempt, Mowatt's ultimate opening of the door was done "under the color of authority" and was not consensual. *Id.* at 400 (quoting United States v. Conner, 127 F.3d 663, 666 (8th Cir. 1997)). This constituted a search that was not justified by exigent circumstances. *Id.* at 401. The focus of this Recent Development, however, is the next argument considered by the Fourth Circuit—whether the possible destruction of evidence justified the warrantless entry. *See id.* at 401–03.

weapon behind his back.[6] After demanding that he show his hands, he refuses. Concerned for your safety,[7] you grab for his arm. A struggle ensues, and you force your way into the apartment and handcuff the man. After you quickly sweep through the apartment to ensure no one else is there,[8] you call for a search warrant so that you may lawfully seize the loaded handgun in plain view as well as dozens of pills scattered around the kitchen. Although you did not have a warrant to enter in the first instance, you have relayed the facts of your encounter with this man to a neutral magistrate who issues a search warrant.[9] You seize the gun and pills pursuant to the search warrant.

At trial, the suspect moves to suppress the evidence against him on the grounds that the gun and pills are fruits[10] of an unlawful search.[11] After his motion is denied, he is convicted,[12] but he appeals the conviction. You again think through the events of that night—is there a chance the appellate court will suppress the evidence taken from the apartment?

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6. The officers later determined that Mowatt did not have anything behind his back. *Id.* at 397.

7. In *Mowatt*, the government did not argue that the exigent circumstance justifying the officers' warrantless intrusion was the danger presented by the possibility that Mowatt was holding a weapon behind his back. *Id.* at 401–03. The only argument presented to show exigency was the possible destruction of evidence. *Id.*

8. For a full explanation of the permissible "protective sweep," see generally Maryland v. Buie, 494 U.S. 325 (1990).

9. The affidavit submitted in support of the warrant failed to describe how the officers first identified themselves and then demanded Mowatt to open the door. *Mowatt*, 513 F.3d at 398. "As far as the application reflects, Mowatt's decision to open his door could have been wholly voluntary." *Id.* at 405 n.10.

10. The use of the language "fruits" comes from the "fruit of the poisonous tree" doctrine used in Fourth Amendment jurisprudence. For further explanation of the "fruit of the poisonous tree" doctrine, see generally the seminal case Wong Sun v. United States, 371 U.S. 471, 484–88 (1963).

11. The district court denied Mowatt's motion to suppress the evidence obtained from his apartment. *Mowatt*, 513 F.3d at 399. The government argued and the district court agreed that a warrant was unnecessary to enter Mowatt's apartment because, once Mowatt realized the police were at his door, the real danger that Mowatt would destroy evidence of the marijuana possession created an exigent circumstance that justified the police entering. *Id.* Alternatively, the district court also accepted the government's argument that a warrant was unnecessary because the police were only knocking on Mowatt's door to resolve a noise complaint, not to investigate a drug crime. *Id.* The inconsistency of the government's arguments did not go unnoticed by the Fourth Circuit. *See id.* at 403 n.9 (putting the word exigency in quotation marks to emphasize the inconsistent positions the government argued below).

12. Mowatt was convicted of possession of ecstasy with intent to distribute and three different weapon possession offenses; he was sentenced to 197 months in prison. *Id.* at 399.

You identified yourself as a police officer, but was that before or after you smelled the marijuana? It matters.[13] Did you go to the apartment that night *only* to investigate a noise complaint, or were you aware that drugs might be found inside the apartment? In determining whether an exigent circumstance excused you from having a warrant, your awareness of the situation you were about to encounter makes a difference. This "awareness" matters in two contexts: (1) were you aware of what you may find after you entered the dwelling, and if so, did that knowledge influence your decision to announce yourself; and (2) were you aware of facts that would have enabled a magistrate to issue a warrant upon finding probable cause?[14] Whether your awareness matters in the warrant analysis will depend upon which federal circuit governs your jurisdiction. The only fact on which all circuits agree is that you, as a police officer, may not create your own exigent circumstance to justify a warrantless

13. *See* United States v. Grissett, 925 F.2d 776, 778 (4th Cir. 1991) (per curiam). In this case, officers were called to a motel to investigate a man who was allegedly in the lobby with a gun. *Id.* Officers arrived, patted down the suspect, and found a revolver and ammunition on his person. *Id.* Anthony Massey, the suspect, could not produce any identification, but he told police that a man staying in room 523 could identify him. *Id.* Officers proceeded to room 523, knocked on the door, and identified themselves as police officers. *Id.* Once the occupants opened the door, police could smell marijuana coming from the room. *Id.* The officers entered the room, found marijuana, and arrested the room's occupants. *Id.* The Fourth Circuit affirmed appellant's convictions, holding the police officers had a reasonable belief that the occupants would destroy the evidence, and the officers did not create this exigency because they announced themselves *before* smelling the marijuana. *Id.*

14. For a discussion of when this first type of awareness is lacking because an officer did not expect an exigency to arise, see *id.* In *Grissett*, the court held the warrantless search permissible, noting that "the officers could not have known in advance that their conduct would precipitate an emergency involving the probable destruction of evidence." *Id.* The court found it important that the officers were sent to room 523 to establish Massey's identity, and there was no way they could have known drugs would be present. *Id.* As such, there was no way of knowing that their presence would create a situation in which the destruction of drugs was likely. *Id.* In terms of the second type of awareness, see, for example, Johnson v. United States, 333 U.S. 10, 12 (1948). In facts very similar to *Mowatt*, a police officer was called to a motel room to investigate possible opium use. *Id.* Upon smelling the opium and identifying the room from which the odor was coming, he knocked on the door, identified himself as a police officer, and then searched the room. *Id.* The Supreme Court held that the search violated the Fourth Amendment. *Id.* at 15. Because the police officer knew he was investigating a possible drug crime and then smelled the opium for himself, the police officer was aware of facts that could be used to obtain a warrant. *Id.* at 13. A neutral magistrate should make the decision whether a search may be done, not a police officer. *Id.* at 14. Likewise, the existence of an exigency alone will not be sufficient for a warrantless intrusion. The exigency must also be accompanied by probable cause. *See* United States v. Place, 462 U.S. 696, 721–22 (1983) (Blackmun, J., concurring) ("The Court correctly observes that a warrant may be dispensed with if the officer has probable cause and if some exception to the warrant requirement, such as exigent circumstances, is applicable.").

search.[15] How far you can go before you are considered to have "created" an exigency, however, varies according to the circuit.

The preceding facts were based upon a recent Fourth Circuit case, *United States v. Mowatt*,[16] which held that no exigent circumstances existed when police officers knocked on Mowatt's door, demanded access, and subsequently entered without a warrant.[17] The *Mowatt* facts illustrate the significance of the small details, circumstances, and police behavior that lead up to and continue through warrantless, in-home searches.[18] Although all circuits agree that police officers may not create their own exigent circumstances,[19] circuit courts are split on exactly what standard to use in evaluating whether a police officer has created her own exigency. For police officers, this means that their behavior is evaluated differently depending on which circuit governs their jurisdiction. In *Mowatt*, the Fourth Circuit relied on the fact that the officers became aware of the marijuana in the apartment before they decided to announce themselves as police officers.[20] Based on that fact, the officers essentially circumvented the warrant requirement.[21] By announcing themselves, they hoped the occupants would react by destroying the evidence, which would allow the officers to enter the apartment without a warrant to prevent the destruction of that

15. *See, e.g.*, United States v. Coles, 437 F.3d 361, 370 (3d Cir. 2006) ("[I]n order to determine whether the police impermissibly manufacture or create exigent circumstances, we must look to the reasonableness and propriety of their actions and investigative tactics *preceding* their warrantless entry."); United States v. Ojeda, 276 F.3d 486, 488 (9th Cir. 2002) ("Exigent circumstances created by improper conduct by the police may not be used to justify a warrantless search."); United States v. Rico, 51 F.3d 495, 505 (5th Cir. 1995) ("[W]e will not second-guess law enforcement tactics as long as those tactics are neither unreasonable nor employed with specific intent to create an emergency simply to circumvent the warrant requirement.").

16. 513 F.3d 395 (4th Cir. 2008).

17. *Id.* at 401.

18. This Recent Development will focus on in-home warrantless searches and excludes automobile and person searches taking place in public. Included in the in-home category are places treated as homes under the law, such as a friend's house if one is an overnight guest and hotel rooms. *See, e.g.*, Minnesota v. Olson, 495 U.S. 91, 96–97 (1990) (holding an overnight guest has a reasonable expectation of privacy in his host's home); Stoner v. California, 376 U.S. 483, 489 (1964) (finding defendant must give consent to search his hotel room).

19. *See supra* note 15 and accompanying text.

20. *Mowatt*, 513 F.3d at 402–03.

21. Scholars and judges alike debate whether the Fourth Amendment institutes a "warrant requirement" or simply directs us to explore the "reasonableness" of the police behavior. *See* JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 174–76 (3d ed. 2006).

evidence.[22] Although the Fourth Circuit found these actions impermissible, the Second Circuit likely would have reached the opposite outcome.[23]

In light of the *Mowatt* decision, this Recent Development argues that because the choices a police officer makes during an investigation determine whether a court will suppress the evidence, the Supreme Court should grant certiorari on such a case to ensure that the Fourth Amendment's protections, especially regarding exigent circumstances, are applied uniformly across jurisdictions. Part I of this Recent Development will explore police-created exigent circumstances by considering the exigent circumstances exception to the Fourth Amendment's warrant requirement, specifically the "destruction of evidence" exigency and how it is treated in each of the circuit courts.[24] Although it is important to note how differently the circuit courts deal with the presence of this exigency, the focus of this Recent Development is how police *create* their own exigency. At its center, Part II will identify the existing circuit split over what constitutes accepted criteria for determining whether police have created their own exigent circumstance in order to circumvent the warrant requirement. Part II will also discuss the policy considerations inherent in these determinations. Finally, after calling for the Supreme Court to grant certiorari, Part III will explore subjective intent in Supreme Court precedent and propose a practical objective standard encouraging uniformity and consistency among circuits in identifying when a police officer has created her own exigency.

I. START SIMPLE: A WARRANT IS (USUALLY) REQUIRED

A. *The "Requirement"*

A warrant guarantees that a neutral party has found probable cause for the search and that the search is not the product of overzealous police activity.[25] It is well established that a warrantless

22. *Mowatt*, 513 F.3d at 401–02.

23. *See infra* Part II.A.

24. In addressing the background material, it is important to note that each circuit's inquiries and determinations are very fact specific. At the risk of over-treating the individual decisions, central facts are laid out in text, with the accompanying secondary, yet interesting, facts in the footnotes.

25. *See* Johnson v. United States, 333 U.S. 10, 14 (1948) ("[The Fourth Amendment's] 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.").

search of the home is unreasonable: "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. In general a home may not be searched without a warrant notwithstanding probable cause."[26] Despite the presumption of unreasonableness in warrantless searches, the Supreme Court in *Minnesota v. Olson*[27] identified several categories of circumstances in which police would be justified in going into a home without a warrant.[28] The Court concluded that exigent circumstances exist when (1) the police are in "hot pursuit" of a felon, (2) the destruction of evidence is imminent, (3) there is a need to prevent a suspect from escaping, or (4) there exists a risk of danger to the policemen or persons inside or outside the dwelling.[29]

While the existence of the exigent circumstance exception means that warrantless entries are permissible at times, courts will "distinguish between cases where exigent circumstances arise naturally during a delay in obtaining a warrant and those where officers have deliberately created the exigent circumstances."[30] If, on the one hand, an exigent circumstance arises naturally while police are in the process of obtaining a warrant, then police are justified in a warrantless search.[31] For example, in *United States v. Campbell*,[32] police officers who observed a controlled drug buy were justified in their warrantless search when the suspect unexpectedly removed the package from the delivery location to his home, observed an unrelated marked police car outside his home, and opened the altered package immediately.[33] The officers were so justified because they "did not 'create' the various factors that converged to create the exigent circumstances."[34] On the other hand, police officers may not

26. Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970).

27. 495 U.S. 91 (1990).

28. *Id.* at 100 (approving the Minnesota Supreme Court's formulation of when exigent circumstances for a warrantless intrusion exist).

29. *Id.* In *Mowatt*, the Fourth Circuit explicitly considered the police officers' claim of exigency as falling into the second category of exigency, the imminent destruction of evidence. United States v. Mowatt, 513 F.3d 395, 401–02 (4th Cir. 2008) (finding that the officers were aware of the marijuana in the apartment before they "decided to alert Mowatt of their presence .... By not [obtaining a warrant], they set up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crimes.").

30. United States v. Webster, 750 F.2d 307, 327 (5th Cir. 1984).

31. *See id.* at 326–27.

32. 2001 FED App. 0276P, 261 F.3d 628 (6th Cir.).

33. *Id.* at 8–10, 261 F.3d at 633–34.

34. *Id.* at 10, 261 F.3d at 634. The Sixth Circuit specifically refused to find that officers altering the contents of a package had "created" the danger that the evidence inside will be destroyed when the alteration is discovered. *Id.* Instead, the court noted

create the exigency themselves in order to circumvent the warrant requirement. For example, when the police are aware that persons inside a dwelling house are using drugs, they cannot knock on the door and announce themselves as police, thereby intentionally creating a situation where the suspects would be motivated to try to destroy the drugs and the police would have their reason, or "exigency," for going in the house without a warrant.[35] Manufacturing an exigency is impermissible in all circuits, and evidence obtained from the warrantless search will be suppressed.[36] The problem then becomes the variety of ways courts interpret whether the destruction of evidence exigency exists.

B. Is There "Exigency"?

Although each circuit recognizes that the destruction of evidence may justify a warrantless search, the courts take different approaches when deciding whether the destruction of evidence exigency is present.[37] These approaches fall into three categories: (1) the examine-avoid approach, (2) the uncritical approach, and (3) the examine-only approach.[38] In the examine-avoid category—the most restrictive category,[39] courts examine the facts of the case, hold warrantless action suspect, and require the police to secure a warrant

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that the unrelated police car and the suspect's sudden relocation made it reasonable for the police to believe the evidence would be destroyed and that there was not time to obtain a warrant. *Id.* at 10–11, 261 F.3d at 634.

35. *Compare* United States v. Coles, 437 F.3d 361, 362–64 (3d Cir. 2006) (concluding that the police created their own exigency because they knew drugs were in the room before they announced their presence), *with* United States v. Grissett, 925 F.2d 776, 778 (4th Cir. 1991) (concluding exigency existed because the police only smelled marijuana after they knocked and announced themselves).

36. *See* United States v. Mowatt, 513 F.3d 395, 405 (4th Cir. 2008) (finding that the district court erroneously denied Mowatt's suppression motion).

37. *See generally* Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283 (1987) (exploring the circuit split in determining exigencies and proposing a uniform standard).

38. *See id.* at 302. The three categories are Salken's own creation. In Salken's groupings, the First, Third, and Fourth Circuits comprise the examine-avoid approach. *Id.* at 303. The uncritical approach grouping is composed of the Sixth, Eighth, and District of Columbia Circuits. *Id.* at 310–11. Finally, the examine-only approach is comprised of the Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. *Id.* at 314. These are Salken's original groupings of the circuits. However, more extensive analysis may reveal that circuits have shifted since the time of Salken's publication.

39. *Id.* at 303.

if possible in order to avoid such warrantless intrusions.[40] Thus, these courts are unlikely to condone warrantless police activity.[41]

The uncritical approach is the second method courts use for analyzing the existence of the destruction of evidence exigency.[42] These courts only inquire into whether the police had a reasonable belief that an exigency existed; they do not consider the time it would have taken to get a warrant or alternative avenues that the police could have explored instead of forging ahead with a warrantless search of a suspect's home.[43] These courts defer to police work and choose not to second-guess a police officer's reasonable belief that exigency exists.[44]

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40. *Id.* The Third Circuit adopted the examine-avoid standard in *United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973). *Rubin* identifies several factors for analyzing the existence of exigent circumstances, some of which include "the degree of urgency involved," the officer's "reasonable belief that contraband is about to be removed," and "the ready destructibility of the contraband." *Id.* at 268. The Fourth Circuit also adopted the *Rubin* standard. *See* United States v. Turner, 650 F.2d 526, 528 (4th Cir. 1981) (holding police were justified in warrantless entry of home because *Rubin* factors evidenced an exigency existed). In a similarly restrictive fashion, the First Circuit conducts an inquiry into exactly when the police had probable cause and how long the police waited to get a warrant after obtaining probable cause. *See* United States v. Samboy, 433 F.3d 154, 159 (1st Cir. 2005) ("First, at what time did the police finally have probable cause to search Samboy's apartment? Second, were the police justified in waiting as long as they did in obtaining a warrant after obtaining probable cause?"). The First Circuit mandates the government prove the existence of exigent circumstances by "particularized, case-specific facts," holding the police to a strict standard of compliance with probable cause and a strict standard of proving that a warrantless intrusion was justified. *Id.* at 158 (quoting United States v. Hidalgo, 747 F. Supp. 818, 828 (D. Mass. 1990)).

41. Salken, *supra* note 37, at 311.

42. *Id.* at 311–12.

43. *See* United States v. Valencia, 499 F.3d 813, 816 (8th Cir. 2007) ("[W]e evaluate the constitutionality of the search by looking only to whether [the police] 'had an objectively reasonable basis for believing' that exigent circumstances necessitated warrantless entry into the apartment." (citing Brigham City v. Stuart, 547 U.S. 398, 406 (2006))); Causey v. City of Bay City, 2006 FED App. 0112P, 4, 442 F.3d 524, 529 (6th Cir.) (finding the officers' belief reasonable that exigency existed when the officers were able to confirm gunfire at the residence, that no one had left the residence, and that no one was answering the door); United States v. Socey, 846 F.2d 1439, 1446 (D.C. Cir. 1988) ("[The government] contends that the lower court improperly required [them] to *prove* that the occupants in the Socey house were aware of the police presence . . . and that the suspects were attempting to dispose of contraband. We agree [with the government]. As noted, the police must have an objectively reasonable basis for concluding that the destruction of evidence is imminent.").

44. *But see* United States v. Duchi, 906 F.2d 1278, 1282–84 (8th Cir. 1990) (examining the nature of the police investigation and the tactics used). In *Duchi*, UPS called police to investigate an undeliverable package, and the police determined the package contained cocaine. *Id.* at 1279. The police replaced one cocaine brick with a book. *Id.* at 1280. Meanwhile, the police placed the suspects' home and place of work under surveillance. *Id.* Several hours after surveillance began, one of the suspects retrieved the package from

The last approach, the examine-only approach, is the most common.[45] This third category falls in the middle of the previous categories—not quite as restrictive as the examine-avoid approach but not as loose as the uncritical approach.[46] This seems to be a catch-all category, and the circuits in this group determine exigency in varied ways. Most courts in this category adhere to a "totality of the circumstances" standard.[47] The courts assess the urgency of the officer's need,[48] but they make no mention of avoiding warrantless intrusions at all costs, like the examine-avoid circuits.[49] Existing

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UPS. *Id.* Approximately thirty minutes after pick-up, police entered the suspects' home without a warrant and found the package unopened on the dining room table. *Id.* The government claimed exigency, justifying the officer's entry, existed once the suspect returned home with the altered package because the alterations would alert the suspects of the investigation and trigger destruction of the evidence. *Id.* The court was not persuaded. *Id.* at 1282. Instead, the court inquired into the length of time since the police had focused their investigation on the suspect, nearly six hours. *Id.* at 1282–83. The court ultimately dismissed the government's exigency argument because that result was exactly what the police intended. *Id.* at 1284. Viewing this case alone, it would seem that the Eighth Circuit belongs in the examine-avoid category, the most restrictive category. *See supra* notes 39–41 and accompanying text. However, this case seems to be an anomaly among a myriad of Eighth Circuit cases that simply inquire into the reasonableness of the officer's objective belief. *See, e.g.*, United States v. Hogan, 539 F.3d 916, 922 (8th Cir. 2008) (finding exigent circumstances existed when participant in a drug deal made "eye contact" with the police officers and then fled, thus giving officers a reasonable fear for both their safety and the destruction of evidence); United States v. Leveringston, 397 F.3d 1112, 1116 (8th Cir. 2005) (applying "an objective standard to evaluate the reasonableness of an assertion that exigent circumstances justified a warrantless entry").

45. Six circuits fall into this category. Salken, *supra* note 37, at 314. This category demands a critical evaluation of police claims of exigency; however, it does not require that police "avoid warrantless action by planning." *Id.* It is worth noting that one court in this group, the Seventh Circuit, may be shifting from the examine-only category into the uncritical category. *See* United States v. Bell, 500 F.3d 609, 614 (7th Cir. 2007). In *Bell*, the court dismissed the petitioner's argument concerning the time frame between his arrest and the search of a locked safe in his motel room. *Id.* at 613–14. Petitioner argued that police had time to obtain a warrant in the four hours between his arrest and the search of his hotel room. *Id.* at 614. The court said only, "[t]he question as to whether exigent circumstances exist is viewed through the eyes of a reasonable police officer." *Id.* at 613. The court's dismissal of petitioner's argument that no exigency existed may have been motivated in part by the circumstances of the investigation: a kidnapped man was being held for ransom, threats had been made on his life during the ransom period, and the police had little time to attempt to save the victim. *Id.* at 610, 612.

46. *Bell*, 500 F.3d at 612.

47. United States v. Maldanado, 472 F.3d 388, 395 (5th Cir. 2006) ("When determining whether an exigency exists, we look at the totality of the circumstances surrounding the officers' actions.").

48. Moore v. Andreno, 505 F.3d 203, 213 (2d Cir. 2007) (using factors such as whether the suspect is armed, the probability that the suspect will escape, and the peaceful circumstances of the entry to determine how urgent the officers' need was to act without a warrant).

49. *See supra* notes 39–41 and accompanying text.

scholarship has thoroughly explored this circuit split, focusing on the broader context of the destruction of evidence exigency.[50] The narrower issue, and the focus of this Recent Development, centers on the circuit split of determining when police officers have manufactured their own exigency.

II. NARROWING THE FOCUS: THE CIRCUIT SPLIT ON THE EXISTENCE OF POLICE-CREATED EXIGENCY

On the narrow issue of whether an officer has created her own exigency, the circuits are split into two camps: (1) the objective inquiry used by the Second Circuit; and (2) the subjective inquiry used by all other circuits, evidenced here by the Fifth Circuit. The Second Circuit reasons that "[t]he fact that the suspects may reasonably be expected to behave illegally does not prevent law enforcement agents from acting lawfully to afford the suspects the opportunity to do so."[51] Objectively, so long as the police act within the bounds of the law, no impermissible exigency is created. Delving deeper, the Fifth Circuit explores the officer's actions and whether they were taken with "bad faith intent to avoid the warrant requirement."[52] Even if the actions were not in bad faith, the court considers "whether [the officers'] actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement."[53] Each inquiry will be fully explored below.

Before moving to the circuit split, it is worth noting why this inquiry is not governed by the Supreme Court case *Johnson v. United*

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50. *See supra* notes 37–38 and accompanying text.

51. United States v. MacDonald, 916 F.2d 766, 771 (2d Cir. 1990) (en banc). For a discussion of the *MacDonald* decision and its effect on Fourth Amendment protections, see generally Amy B. Beller, *United States v. MacDonald: The Exigent Circumstances Exception and the Erosion of the Fourth Amendment*, 20 HOFSTRA L. REV. 407 (1991).

52. United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004).

53. *Id.* Both the Sixth and Eighth Circuits have adopted the reasonableness inquiry in the examination of police behavior and circumstances preceding the exigency. *Compare* United States v. Chambers, 2005 FED App. 0045P, 4–5, 395 F.3d 563, 568 (6th Cir.) (evaluating police knowledge, which included surveillance data and informant tips, and concluding the police created their own exigency when they knocked on the suspect's door before seeking a warrant), *and* United States v. Duchi, 906 F.2d 1278, 1285 (8th Cir. 1990) (concluding police created their own exigency when they altered the package's contents in a way that would alert the defendant to the investigation), *with MacDonald*, 916 F.2d at 772 (rejecting the suggestion that "a district court in reaching a determination about exigent circumstances should attribute any significance to the subjective state of mind of law enforcement agents. As previously mentioned, we have repeatedly held that the determination of exigent circumstances is an objective one . . . .").

States.[54] In resolving *Mowatt*, the Fourth Circuit relied heavily on the *Johnson* decision.[55] The *Johnson* decision, however, did not deal with police-created exigency.[56] In *Johnson*, the Supreme Court noted that, at the time the police demanded entry, they possessed enough evidence for a magistrate to make a probable cause determination; thus, the police should not have made that determination themselves.[57] Furthermore, the Court found that no evidence was at risk of being destroyed and held that dissipating fumes will never suffice as an exigency to justify a warrantless search.[58] Because *Johnson* never reached the question of police-created exigency, it does not govern this issue, and the circuits are left to their differing standards to determine when police in fact create their own exigent circumstances.

A. Objective: The Second Circuit

An examination of Second Circuit jurisprudence reveals that this circuit allows police officers more discretion in circumventing the Fourth Amendment's warrant requirement.[59] In adopting a more objective analysis, the Second Circuit rejects a subjective inquiry into the beliefs of the officer and instead looks to the totality of the circumstances surrounding the officer.[60] So long as the officer's conduct is lawful, the officer cannot create an impermissible exigent

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54. 333 U.S. 10 (1948).

55. *See* United States v. Mowatt, 513 F.3d 395, 401 (4th Cir. 2008) ("We see no basis for distinguishing *Johnson* from the case at bar.").

56. *Johnson*, 333 U.S. at 13–15. The Fourth Circuit even distinguishes its analysis from the *Johnson* decision on the point of the officer's subjective intention: "Nothing in Johnson, however, suggests that the result there depended on the subjective intentions of the officers at the time they gained access to the hotel or even indicates that the Court determined what those intentions were." *Mowatt*, 513 F.3d. at 401. Thus, the *Johnson* decision never addressed whether the police created the exigency; the Supreme Court concluded the search was impermissible without reaching the question of whether the officers created their own exigency. *Johnson*, 333 U.S. at 14–15.

57. *Johnson*, 333 U.S. at 14 ("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.").

58. *Id.* at 15 ("The evidence of [the fumes'] existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.").

59. Other circuits have commented that the Second Circuit allows for greater latitude in dispensing with the warrant requirement. *See* United States v. Coles, 437 F.3d 361, 369 (3d Cir. 2006). Adding to the commentary, the Third Circuit distinguishes the Second Circuit's approach from the approach of other circuits: "Contrary to the Fifth Circuit, the reasonableness of police investigative tactics precipitating the exigency does not seem to figure into the Second Circuit's analysis." *Id.*

60. *See* United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (en banc).

circumstance.[61] As the court reasoned in *United States v. MacDonald*,[62] "[l]aw enforcement agents are required to be innocent but not naive."[63] *MacDonald* is the Second Circuit's seminal exigency case; although nearly twenty years old, the case's logic is still cited favorably today.[64]

In *MacDonald*, a police task force began surveillance of a Manhattan apartment building after they learned some of the residents were possibly running a drug operation inside the building.[65] After purchasing marijuana with a prerecorded bill,[66] the undercover agent returned to the Task Force to report his observations.[67] Ten minutes later, the undercover agent, along with other agents, returned to the apartment, knocked on the door, and identified themselves.[68] The agents heard "shuffling feet" inside and also received a radio transmission that the occupants of the apartment were escaping through a back window.[69] The agents subsequently used a battering ram to force entry, arrested the occupants of the apartment, and seized the guns and drugs in plain view.[70] MacDonald appealed his subsequent conviction, alleging the district court erred in admitting the evidence seized from the apartment.

In an *en banc* decision, the Second Circuit found the agents' conduct to be lawful and that exigent circumstances—not ones of the

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61. *See id.*

62. 916 F.2d 766 (2d Cir. 1990) (en banc).

63. *Id.* at 772.

64. *See, e.g.*, United States v. Klump, 536 F.3d 113, 117–18 (2d Cir. 2008) (relying on *MacDonald* for the proposition that the determination of exigency is an objective one, centering on the totality of the circumstances facing the officer); United States v. Brown, 52 F.3d 415, 422 (2d Cir. 1995) (same).

65. *MacDonald*, 916 F.2d at 768. The court mentions, but makes no issue of, the fact that the Task Force was informed of this operation in May yet did not set up surveillance on the apartment building until September. *Id.*

66. For a civilian-friendly explanation of "prerecorded bill," see DAVID FEIGE, INDEFENSIBLE 215 (2006) ("[Prerecorded money is] really just a bunch of regular fives, tens, and twenties that are Xeroxed before a [controlled] buy. The point is to record the serial numbers of the bills . . . .").

67. *MacDonald*, 916 F.2d at 768. Specifically, the undercover agent saw a man who was pointing a semi-automatic weapon at the floor, another man who was in easy reach of a .357 caliber revolver, and the agent also smelled the "distinct odor of marijuana smoke." *Id.*

68. *Id.*

69. *Id.* Several agents remained outside the building and were able to observe the occupants who were attempting to escape through a bathroom window. *Id.* Ironically enough, the only man to successfully escape was the man who sold marijuana to the undercover agent. *Id.*

70. *Id.* Specifically, two loaded weapons, several thousand dollars, and large quantities of both cocaine and marijuana, along with drug paraphernalia and packaging materials, were seized. *Id.*

agents' own creation—justified the warrantless entry.[71] By knocking and announcing themselves as law enforcement, the agents had acted in accordance with the requirement of notice before forced entry.[72] After observing the guns and drugs in the apartment via an undercover agent, the agents had information sufficient for a neutral magistrate to find probable cause and issue a warrant. They also had ample time to secure a warrant. Instead of securing that warrant, the agents chose to proceed without one on their own knowledge. Acknowledging that the "exigency was intensified when, ten minutes after the controlled buy, law enforcement agents knocked on the apartment door and announced themselves[,]"[73] the court here admitted that the agents' own conduct caused the scrambling inside and, thus, led to the attempted destruction of evidence.[74] The court refused, however, to hold that the agents manufactured the exigency, turning their analysis on the simple point that the agents' knock and announcement was lawful.[75]

According to the Second Circuit, the agents' actions were lawful because they complied with the notice requirement before forcing entry.[76] The court reasoned that it does not matter if the agents "may be 'interested' in having the occupants react in a way that provides exigent circumstances."[77] In fact, if an officer expects a suspect will act unlawfully, the officer may act in a way that encourages the

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71. *Id.* at 773. In deciding that exigent circumstances justified the warrantless entry, the court considered these ten factors:

> (1) the grave nature of the ongoing crimes; (2) the presence of loaded weapons; (3) a likelihood that the suspects were themselves using narcotics; (4) a clear and immediate threat of danger to law enforcement agents and to the public at large; (5) not only more than the minimum probable cause to believe, but actual knowledge, that the suspect committed the crime; (6) at least strong reason to believe the suspects were on the premises; (7) a likelihood turned to reality that a suspect might escape if not quickly apprehended; (8) an urgent need to prevent the loss of evidence; (9) the additional time required to obtain a warrant at the late hour of day; and (10) an attempt by the agents to enter peacefully.

Id.

72. *Id.* at 771; *see also* Dorman v. United States, 435 F.2d 385, 393 (D.C. Cir. 1973) (en banc) (including peaceable entry as a consideration in the exigent circumstance analysis).

73. *MacDonald*, 916 F.2d at 770–71.

74. *Id.*

75. *Id.* at 771.

76. *Id.* For a discussion of the notice requirement, see generally Miller v. United States, 357 U.S. 301 (1958).

77. *MacDonald*, 916 F.2d at 772. The Second Circuit refused to look into the officers' minds at the time of the exigency. *Id.* at 771–72. Instead, the court examined only the objective behaviors of the officers and whether these behaviors were lawful. *Id.* at 771.

suspect's unlawful behavior.[78] So long as the agents' actions are lawful, they do not impermissibly manufacture their own exigency.[79] The *MacDonald* court goes so far to say that, even if there were no exigent circumstances before the knock, the agents did not impermissibly create the circumstances justifying a warrantless entry.[80]

Consider for a moment the facts presented in the introductory hypothetical based on *United States v. Mowatt*.[81] If Mowatt had lived in the Second Circuit's jurisdiction rather than the Fourth Circuit's, the outcome would probably have been very different—Mowatt would not have been able to suppress the evidence found in his apartment. Most likely, the Second Circuit would have held that the officers' acts were lawful and, as a result, the officers did not impermissibly create their own exigency. In *Mowatt*, the officers were called to investigate a noise complaint and the smell of marijuana; once they identified the specific apartment, they knocked and announced themselves.[82] The officers in *Mowatt* followed the knock-and-announce rule that the *MacDonald* court relied on to justify the lawfulness of the agents' conduct.[83] Upon hearing the movement and discharge of an aerosol can in Mowatt's apartment—analogous to the "shuffling feet" in *MacDonald*—the police could seemingly enter Mowatt's apartment without a warrant, justified by the urgent need to preserve evidence.[84] Under the Second Circuit's objective standard, the police may use lawful conduct to allow Mowatt the opportunity to

78. *Id.* at 771 ("Exigent circumstances are not to be disregarded simply because the suspects chose to respond to the agents' lawful conduct by attempting to escape, destroy evidence, or engage in any other unlawful activity.").

79. *Id.* at 772 ("[W]e hold that when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances.").

80. *Id.* at 771.

81. 513 F.3d 395 (4th Cir. 2008); *see also supra* notes 1–12 and accompanying text.

82. *Mowatt*, 513 F.3d at 397.

83. *See supra* note 72 and accompanying text. In *Mowatt*, the Fourth Circuit held that, when the officers announced themselves and demanded that Mowatt open the door, the subsequent opening of the door was an impermissible search. *Mowatt*, 513 F.3d at 400. The officers' demand, under the color of authority, negated any argument of consent the government put forth. *Id.* However, pursuant to the *MacDonald* decision, the police in *Mowatt* seemingly could have barged in when they heard "shuffling feet" and the sound of an aerosol can being sprayed as such noise would have indicated the possible destruction of evidence. *See supra* note 4.

84. In *MacDonald*, the evidence the police needed to preserve was the prerecorded bill used in the undercover transaction for marijuana. *MacDonald*, 916 F.2d at 770. Apparently, the agents were concerned that the bill might be used in another transaction or otherwise taken out of the apartment in the ten minutes between the undercover transaction and the warrantless entry. *Id.*

act in a way that gives rise to an exigency, namely the possible destruction of evidence.[85]

What good is achieved through this standard? Admittedly uncritical of and deferential to police conduct, this standard allows the police more freedom in their behaviors. Presumably, less evidence would be excluded because fewer intrusions would be deemed to violate the Fourth Amendment.[86] In a similar vein, this objective standard also seems easier to govern and might offer more uniform protection of Fourth Amendment rights, as courts are not forced to look into the mind of the searching officers. Instead of sparring over hypothetical motives, the officers' actions will be examined at face value.

B. Subjective: The Fifth Circuit (and Everyone Else)

Most circuits use a subjective test[87] to analyze whether police have created their own exigent circumstances. This approach has two levels of inquiry. The first asks whether the circumstances giving rise to the exigency were deliberately created by the police with "the bad faith intent to avoid the warrant requirement."[88] Second, the court will ask, notwithstanding bad faith intent, if the actions taken by the police in creating the exigency were unreasonable.[89]

In *United States v. Richard*,[90] the Fifth Circuit used the subjective test to determine whether police created their own exigency.[91] In

85. *See supra* notes 75–80 and accompanying text.

86. For a full discussion of the merits of the exclusionary rule, see 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 379–83 (4th ed. 2006).

87. The approach taken by the Fifth Circuit is labeled the "subjective test" because it contains a subjective component, namely the "bad faith" inquiry. *See infra* note 88 and accompanying text. In general, circuits using this standard look to the officers' actions and ask if they were done intentionally to avoid the warrant requirement. *See* United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990). Courts will also consider what information the officers *knew* when approaching the suspect's door. *See, e.g.*, United States v. Munoz-Guerra, 788 F.2d 295, 298 (5th Cir. 1986).

88. United States v. Coles, 437 F.3d 361, 368 n.11 (3d Cir. 2006) (quoting United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004) (en banc)).

89. *Id.*

90. 994 F.2d 244 (5th Cir. 1993).

91. *Id.* at 248–50. The *Richard* decision, although fifteen-years-old, is still heavily cited for its discussion of exigent circumstances. *See* United States v. Fabian, 220 F. App'x 340, 342 (5th Cir. 2007) (citing *Richard* for the proposition that police-created exigent circumstances "will not pass Fourth Amendment muster"); United States v. Chambers, 2005 FED App. 0045P, 3, 395 F.3d 563, 566 (6th Cir.) ("*Richard* stand[s] firmly for the proposition that warrantless searches are not permitted when the only exigency is one that is of the officer's creation.").

Richard, federal agents had received a tip that a boat would arrive in one of Louisiana's ports with drugs attached to the hull.[92] After surveilling the port and identifying the boat in question, federal agents spotted a van parked in the area.[93] Around 6:00 a.m. the next morning, agents observed a man going from the port to the van and subsequently pulled him over and searched the van.[94] Inside the van, the agents found a card in the name of Dani Gonzalez and a beeper with the number of the Superdome Motor Inn in New Orleans locked into the device.[95] Upon further investigation, the agents ascertained that a man named Johnny was staying in Room 214 of the Inn and that Johnny was involved with trafficking drugs.[96] At this point, the agents called for backup and drove to the Superdome Motor Inn.[97] They reached the Inn at 9:00 a.m.[98]

The agents, after speaking with the clerks of the motel and confirming that two men were staying in Room 214, went to the room and knocked on the door.[99] After announcing that they were police officers, the agents heard people talking, movement in the room, and drawers slamming.[100] At this point, the agents kicked in the door and entered the room.[101] A .45 caliber pistol was recovered from one of the occupants of the room.[102] The trial court suppressed the evidence found in the motel room, and the government appealed.[103]

The Fifth Circuit affirmed the district court's decision, finding that the agents had impermissibly created the exigent circumstances, so the exigency could not justify their warrantless entry.[104] In holding that the exigent circumstances did not arise until the agents knocked and announced themselves, the court reasoned that the police could

92. *Richard*, 994 F.2d at 246.

93. *Id.* The van contained a diving tank and a VHF marine radio, apparently alerting the surveilling agents to the possibility that the van and the boat were linked. *Id.*

94. *Id.* The man in the van was defendant Richard, who was wearing a diving suit. *Id.*

95. *Id.* The agents had previously suspected Gonzalez of involvement in the smuggling of marijuana. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* This fact is relevant to the inquiry of whether the agents had time to secure a warrant. From the facts listed above, Richard was arrested and searched at 6:00 a.m., three hours before the agents arrived at the Superdome Motor Inn.

99. *Id* at 246–47.

100. *Id.* at 247. The facts indicate that the agents heard the occupants respond "Okay. Okay. Wait a minute." *Id.* However, the door did not open immediately, and it was then that the agents heard the movement and slamming of drawers. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 249–50.

have secured the hotel room undetected and delayed their entry until they could obtain a warrant.[105] "Instead, the warrantless entry became a foregone conclusion once officers knocked."[106] Because the government failed to show that the occupants of Room 214 were destroying evidence, or even that they were suspicious because of Richard's absence, the government's arguments were "pure speculation" and could not be used to justify the warrantless intrusion.[107] Although the court did not find specifically that the agents acted in bad faith, the court found that the officers acted unreasonably because they had time to obtain a warrant.[108] The court noted that the agents had three hours to secure a warrant and that, if these hours were not enough, the police could have secured the outside of the motel room while a warrant was obtained.[109] It was the agents' activity—namely the knocking and announcing—that gave rise to the exigent circumstances, and thus, the warrantless entry did not pass Fourth Amendment muster.[110]

Given the circuit split on police-created exigency, the range of behavior a court will conclude is permissible varies greatly according to the circuit in which one finds herself. Unlike the Second Circuit, the Fifth Circuit will not allow law enforcement agents to announce themselves, all the while expecting the room's occupants to respond by attempting to destroy the evidence contained therein, and then enter the premises to stop that destruction without a warrant.[111] *MacDonald* demonstrates the Second Circuit's willingness to defer to police conduct regardless of whether that conduct was intended to

105. *Id.* at 249.

106. *Id.*; *see also* United States v. Munoz-Guerra, 788 F.2d 295, 298–99 (5th Cir. 1986) (concluding the officers warrantless entry was inexcusable because no exigency justified the officers' approach of defendant's patio). The *Richard* court agreed that, like *Munoz-Guerra*, there was no justification here for approaching the suspects because no exigent circumstances existed. *Richard*, 994 F.2d at 249.

107. *Richard*, 994 F.2d at 249. The government advanced the argument that the two men in the room could have been tipped off by a phone call or by the lone fact that Richard did not return. *Id.* However, the court seemed unwilling to allow the police to use speculation to justify a warrantless entrance of a home, be it an actual house or a motel room. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 249–50. *But see* United States v. Rico, 51 F.3d 495, 504 (5th Cir. 1995) (holding that the police did not impermissibly create their own exigency by abandoning their undetected surveillance to arrest a man driving a vehicle right in front of the house they were surveilling).

111. *See supra* notes 73–80 and accompanying text.

bring about the possible destruction of evidence and, thus, provided the exigency to enter without a warrant.[112]

The Fifth Circuit explicitly rejected the government's reliance on *MacDonald* and its argument that the possibility of the destruction of evidence justified the officers' warrantless entry,[113] concluding "*MacDonald* is inapposite."[114] The Fifth Circuit distinguished *MacDonald*, noting that the Second Circuit found exigent circumstances existed *before* the knock-and-announce and the occupants then responded to the lawful knock with an escape attempt that further justified the officers' entrance.[115] By contrast, in *Richard*, the exigencies did not arise *until* the police announced themselves.[116] In distinguishing *Richard* from *MacDonald*, however, the Fifth Circuit ignored this very important statement by the Second Circuit: "[A]ssuming *arguendo* that there were no exigent circumstances before the knock, the agents' conduct did not impermissibly create the circumstances occurring thereafter."[117] Thus, the two cases cannot fully be distinguished based on when the exigent circumstances arose. Assuming (as the Second Circuit did) that in both cases no exigent circumstances existed until police officers knocked and announced, the Fifth Circuit found that knock impermissible while the Second Circuit did not. The different outcomes can be attributed to the type of analysis the circuit uses; the Fifth Circuit inquires into the officers' intentions while the Second Circuit only looks objectively at whether the officers' conduct was lawful.[118]

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112. The *MacDonald* majority relied on the Supreme Court's "reject[ion of] the inadvertence requirement for a valid plain view seizure" in *Horton v. California* for support. United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (en banc) (" 'The 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.' " (quoting Horton v. California, 496 U.S. 128, 138 (1990))); *see also* United States v. Coles, 437 F.3d 361, 373 (3d Cir. 2006) (Roth, J., dissenting) ("In contrast [to the Third Circuit], the Second Circuit, whose precedent, I believe, is more consistent with our Circuit's in this area, relies on an objective test .... In this regard, the Second Circuit's focus is truer to Supreme Court precedent." (internal citations omitted)).

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

114. *Id.*

115. *Id.*

116. *Id.*

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

118. As evidence of the subjective inquiry, the Fifth Circuit established that the police officers did not think they had enough evidence for a magistrate to find probable cause, so they did not seek a warrant. *Richard*, 994 F.2d at 248. In fact, the court explicitly noted that the officers' supervisor said "the agents intended to enter the room one way or another to further that investigation." *Id.*

III. COMPROMISE

In determining how best to craft a compromise among the circuits, it is informative to consider how the Supreme Court has treated subjective inquiries in other contexts. The subjective intent of police officers is irrelevant in cases concerning automobile stops, compliance with statutes, and *Miranda* warnings.[119] The Supreme Court rejected such inquiries into the minds of police officers because of the evidentiary difficulty in establishing subjective intent.[120] Even a "good faith" inquiry is not a subjective one; the Court has taken pains to objectify the "good faith" exception to the warrant requirement.[121] The Supreme Court has stated that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."[122]

Judging from precedent, it seems that the Supreme Court will not be receptive to a subjective inquiry into the minds of police officers when determining whether the officers manufactured their own exigent circumstance. This rejection stems from the difficulty in ascertaining officer motives as well as the reluctance to center Fourth Amendment "reasonableness" on anything but objective measurements. As it stands now, however, the Fifth Circuit and its followers use a subjective inquiry when determining police-created exigency while the Second Circuit conducts a purely objective inquiry. The Supreme Court should identify one standard for determining

119. *See* Missouri v. Seibert, 542 U.S. 600, 623 (2004) (O'Connor, J., dissenting) (agreeing with the plurality's decision not to consider the subjective intent of the interrogating officer and instead to formulate an objective test); Whren v. United States, 517 U.S. 806, 813 (1996) (holding that the actual motivations of individual officers do not affect the constitutional reasonableness of traffic stops); Scott v. United States, 436 U.S. 128, 136–38 (1978) (rejecting a "good faith" exception for statutory compliance, instead focusing the inquiry on the police officers' actions, not their motives).

120. *Whren*, 517 U.S. at 813–14.

121. United States v. Leon, 468 U.S. 897, 919 n.20 (1984) ("We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers.").

122. *Id.* at 922 n.23 (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting)). The Supreme Court, however, has used a subjective inquiry outside the police officer context. In *California v. Ciraolo*, 476 U.S. 207 (1986), the Court allowed for a subjective inquiry into the minds of *individuals* when considering the expectation of privacy. *Id.* at 211–12. In determining whether the respondent had a reasonable expectation of privacy in his fenced-in but uncovered marijuana garden, the Court found that he "has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits." *Id.* at 211. Although this does not end the inquiry, clearly one prong is the manifestation of the individual's subjective intent to preserve privacy.

when a law enforcement officer creates his own exigency to eliminate such varied interpretations of the Fourth Amendment.[123] The Fourth Amendment should be interpreted the same way in New York and Louisiana, and law enforcement should strive for uniformity across jurisdictions. Keeping in mind the Supreme Court's distaste for subjective inquiries into the minds of police officers, a compromise is suggested below.

In examining the preceding circuit split, both the objective and subjective standards have their respective merits. The Second Circuit, in making clear that lawful behavior does not impermissibly manufacture exigency, also assumes that unlawful behavior *will be* impermissible.[124] This premise should remain. As with the exclusionary rule, the impermissibility of unlawful conduct circumscribes police behavior and better protects citizens' constitutional rights.[125] The problem with all lawful conduct being permissible, subjective intent notwithstanding, is its inherent deceptiveness. Unless a court inquires into the officer's motivation, the court will always consider lawful conduct to be benign. Arguably, behaviors undertaken in "bad faith" are not benign. Considering the Fifth Circuit's standard, there exists obvious difficulty in ascertaining someone's subjective intentions. Subjective intentions are only measurable through their outward expression.

In order to strike a compromise, the standard should be an objective one that inquires into the officer's awareness as measured

123. This is not, however, the first call for certiorari on a circuit split regarding a subjective inquiry. The Petitioner's Brief in *United States v. Zukas* called for the Supreme Court to grant certiorari to determine the significance of an officer's subjective intent in evaluating whether an arrest has occurred. Brief of Petitioner on Jurisdiction at 8, Zukas v. United States, 490 U.S. 1019 (1989) (No. 88-291). Although certiorari was ultimately denied, *Zukas v. United States*, 490 U.S. 1019 (1989), the brief highlighted the differing standards the circuits used to evaluate when a police officer makes a de facto arrest. Brief of Petitioner on Jurisdiction, *supra*, at 10–11. The varying standards allowed for very different police conduct when making arrests, wholly dependent on the jurisdiction. *Compare* United States v. Lueck, 678 F.2d 895, 900 (11th Cir. 1982) (holding the subjective intent of the officer is a factor to be considered in determining whether a custodial interrogation occurred), *with* United States v. Beck, 598 F.2d 497, 500 (9th Cir. 1979) (stating that the subjective intent of the officer has no place in determining whether an arrest has occurred). These differing standards are just another example of a question that must be answered by the Supreme Court so that police behavior will be examined uniformly across jurisdictions.

124. *See supra* notes 75–79 and accompanying text.

125. For a discussion of the exclusionary rule and police behavior, see generally Bradley Canon, *Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police*, 62 JUDICATURE 398 (1978–79), and Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 119 (2003).

by tangible evidence. The facts the officer is aware of should be presumed to inform his intentions. For example, if an officer is aware that he will be investigating a possible drug crime, it will be presumed that his intentions are to capture that evidence by the least cumbersome avenue possible. Consider the *Mowatt* fact pattern. The Fourth Circuit only briefly notes that the complaining phone call also mentioned the smell of burning marijuana.[126] More emphasis is placed upon the officer smelling the marijuana once arriving and his then (supposed) belief that marijuana would be found in the apartment.[127] The complaining phone call is an objective measure as to what the officer was aware of at the time of dispatch. At that moment, the officer knew that drugs might be found on the premises. Although an uncorroborated complaint is not sufficient for a probable cause issuance of a warrant,[128] the officer is on notice that drugs may be present. Upon arrival to the specified premises, the officer may then take into account any corroborating information—loud music coming from the apartment, location in a "high crime area,"[129] or, as in *Mowatt*, the smell of marijuana. Armed with these facts, the officer must then call and request a telephone warrant.[130] The officer can then place the apartment under surveillance until the warrant is approved. The officer *could* knock and announce himself

126. *See supra* notes 3, 11 and accompanying text.

127. *Id.*

128. Illinois v. Gates, 462 U.S. 213, 227 (1983).

129. *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (noting that a suspect's presence in a "high crime area" is a relevant, though not determinative, factor when an officer considers whether reasonable suspicion exists to justify stopping the suspect). For a discussion of how flight in a high-crime area may be a reaction to hostile and abusive governmental presence, rather than indicative of criminal activity, see Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135 (2002).

130. FED. R. CRIM. P. 41(c)(2). In pertinent part, the Rule provides that a federal magistrate may issue a warrant based on oral testimony communicated by telephone. FED. R. CRIM. P. 41(c)(2)(A). The person requesting the warrant prepares a document which will serve as the duplicate warrant and shall read that document over the phone to the magistrate. FED. R. CRIM. P. 41(c)(2)(B). The magistrate will then copy the document verbatim, and the magistrate's copy serves as the original warrant. *Id.* In the *Mowatt* case, a telephone warrant would have allowed the police officers to stay on the premises, relay their information, and then use a warrant to enter and arrest Mowatt. The Tenth Circuit requires that trial courts consider the availability of a telephone warrant in determining whether exigent circumstances existed. *See* United States v. Cuaron, 700 F.2d 582, 589 (10th Cir. 1983). The Tenth Circuit encourages police officers to procure telephone warrants where "the existence of exigent circumstances is a close question and the police might otherwise conduct a warrantless search." *Id.* at 588 (quoting United States v. McEachin, 670 F.2d 1139, 1146 (D.C. Cir. 1981)). The Tenth Circuit, however, has refused to extend this analysis to cover the conduct of state officials. *See* United States v. Chavez, 812 F.2d 1295, 1300–01 (10th Cir. 1987).

and his need to speak with someone, but in the event that someone opens the door and the smell of marijuana emanates from inside, this lawful police behavior cannot then be used to justify a warrantless entry into the home. Through the objective measure of the complaining phone call, the court would already know that the officer expected to find drugs on the premises. As mentioned previously, objective facts will be presumed to inform the officer's intentions. In this case, his knowledge of possible drugs is presumed to mean that the officer wants to capture the drugs in the least burdensome way. If the officer then creates an exigency without calling for a warrant first, this presumption tells us that he did so only to circumvent the warrant requirement.

The telephone warrant requirement offers another layer of protection to the individual incurring the possible warrantless entry. In addition to the objective measures suggested previously, requiring police to call for a telephone warrant if possible is another objective measure proscribing police officer conduct that could be taken with bad intentions. Because those intentions are difficult to measure and must be objectified, this requirement puts one more obstacle in the way of an overzealous police officer intent on making a warrantless entry.

CONCLUSION

As this Recent Development has argued, the Supreme Court should grant certiorari to ensure that the exigent circumstance exception to the warrant requirement is interpreted uniformly across the circuits. Whether an officer, like the one in *Mowatt*, creates his own exigency should not turn on whether his circuit uses *MacDonald*'s objective or *Richard*'s subjective test to evaluate his actions. As the Supreme Court seems to suggest, courts should not inquire into the subjective intent of an individual officer. Instead, as this Recent Development proposes, courts should measure his awareness objectively and decide whether, given that awareness, he manufactured the exigency. A presumption should exist that, where objective measures show the officer is aware of drug activity in the home, an announcement of law enforcement presence followed by a warrantless entry into the home creates exigent circumstances, namely the need to prevent evidence from being destroyed. This presumption is rebuttable but only at the behest of the government offering objective evidence evincing another exigency.

This compromise addresses only the narrow exigency of destruction of evidence. The ready destructibility of narcotics should not be used as a proxy to intrude into someone's home without a

warrant. It is beyond the scope of this Recent Development to propose a standard when other exigent circumstances are offered to excuse warrantless action, namely, the officer's safety. One thing is clear—an officer in one circuit should not be required to ignore the smell of marijuana while her fellow officer in a neighboring circuit can use that smell, knock and announce, and assert the possible destruction of evidence as justification for her warrantless entry. Until the Supreme Court specifies a single standard to determine when police have manufactured their own exigency, officers in the Fourth Circuit should consider themselves warned: don't act like you smell pot *before* you announce yourself.

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