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Warrantless Residential Searches to Prevent the Destruction of Evidence: A Need for Strict Standards

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WARRANTLESS RESIDENTIAL SEARCHES TO PREVENT THE DESTRUCTION OF EVIDENCE: A NEED FOR STRICT STANDARDS

INTRODUCTION

The fourth amendment to the United States Constitution guarantees the right of any individual to be free from unreasonable searches and seizures.[1] The United States Supreme Court has long recognized that, whenever practicable, the reasonableness of a search ought to be determined by a neutral and detached magistrate rather than an officer engaged in the competitive enterprise of ferreting out crime.[2] Without advance judicial approval through the warrant procedure, a search is considered *per se* unreasonable, subject only to a few narrow and well-delineated exceptions.[3] Warrantless searches have been deemed reasonable where "exigencies of the situation made that course imperative"[4]—that is, when the search is incident to a lawful arrest;[5] when the search is of a motor vehicle capable of being driven away before a warrant may be obtained;[6] when an item taken is in plain view;[7] when an individual is stopped and frisked;[8] where police are in hot pursuit of a criminal;[9] when consent is given for a search;[10] and where an "emergency" arises.[11]

Recent federal and state court decisions indicate the existence of another exception to the warrant requirement, permitting police to enter residences without a warrant and seize evidence *solely* to prevent the destruction of that evidence. The constitutionality of this exception has never been addressed directly by the United States Supreme Court. However, the lower federal and state courts have relied upon Supreme Court dicta to permit warrantless entries into homes to prevent the destruction of evidence. Significantly, homes traditionally have been accorded special fourth amendment protections.[12] Thus, unless courts develop strict standards for permitting these warrantless intrusions, this new exception may virtually swallow those special home protections.

This comment will review the federal and state court decisions which to varying degrees have permitted warrentless searches where evidence may be destroyed. First, this comment will set forth Supreme Court decisions containing dicta suggesting the existence of the destruction of evidence excep-

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

[2] *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948):
> 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 men 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.

See also United States v. Ventresca, 380 U.S. 102, 106-07 (1965) ("The fact that exceptions to the requirement that searches and seizures be undertaken only after obtaining a warrant are limited underscores the preference accorded police action taken under a warrant as against searches and seizures without one").

[3] Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (plurality opinion). *See also* Cleary, *Recent Development in the Law of Search and Seizure*, 1 NAT'L J. CRIM. DEF. 21 (1975).

[4] 403 U.S. at 455.

[5] Chimel v. California, 395 U.S. 752 (1969) (permitting a warrantless search incident to a valid arrest in the area immediately within the defendant's reach). *Chimel* modified United States v. Rabinowitz, 339 U.S. 56 (1950), which had permitted the search of the individual and the premises of the arrestee.

[6] Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

[7] Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion). *Coolidge* permits warrantless seizures of items in plain view if the officers have prior justification for the intrusion and if the circumstances bringing the items into plain view are inadvertant.

[8] Terry v. Ohio, 392 U.S. 1 (1968).

[9] Warden v. Hayden, 387 U.S. 294 (1967).

[10] Bumper v. North Carolina, 391 U.S. 543 (1968).

[11] Michigan v. Tyler, 436 U.S. 499 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967).

[12] At common law, the courts held that "a man's house is his castle for safety and repose to himself and family." FOSTER, CROWN CASES 318-22 at 319 (1762). The high regard for the home at common law was embodied in the fourth amendment. "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970) (en banc).

tion. Second, it will analyze the direction that federal and state courts have taken in applying the Supreme Court's language. Third, it will identify developing patterns and suggest guidelines to accommodate the realistic needs of law enforcement officials as well as the fundamental privacy interest of the individual. Finally, the comment will conclude that warrantless entries should be considered valid within certain carefully defined limitations.

I. Supreme Court Opinions on the Destruction of Evidence Exception

The Supreme Court has never directly considered whether a warrantless entry and search is permissible solely to prevent the destruction of evidence.[13] But in loosely reasoned dicta, the Court has opened the door for such an exception where evidence is "threatened with destruction," where there is a possibility of "imminent destruction" and where evidence is in the "process of destruction."

The Court first recognized that a warrantless entry might be justified where evidence was "threatened with destruction" in *Johnson v. United States*.[14] In that case, the defendant Johnson was convicted of violating federal narcotics laws after his hotel room was searched without a warrant.[15] Police officers had gone to the hotel room after receiving an informant's tip that opium was being smoked there. While walking through the hall, the officers smelled the strong odor of burning opium emanating from one room, knocked on the door and identified themselves as police. Upon hearing people in the room moving around, the officers entered the room, arrested the defendant, and confiscated opium and smoking apparatus.

On appeal, the Court found the warrantless search invalid and reversed the defendant's conviction. 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."[16] The Court explained that because no evidence or contraband had been threatened with removal or destruction,[17] the only possible reasons for not obtaining a warrant was mere inconvenience to the officers and slight delay.[18] Lower federal courts have interpreted this explanation to mean that if there had been a *threat of removal or destruction of evidence,* the warrantless search would have been approved.[19]

Giving further support to this interpretation, the Court upheld a warrantless search in *Schmerber v. California*,[20] where the evidence seized was "threatened with destruction"—this time by natural causes. In that case, the petitioner, suspected of drunken driving, was arrested at a hospital. After the petitioner refused to consent to a blood test, the officer directed the physician to take a blood sample. The report of the chemical analysis of the blood, which indicated intoxication, was admitted into evidence. The petitioner claimed that the evidence should have been excluded as the product of an unconstitutional search and seizure. However, the Court held that because the evidence of blood-alcohol content was threatened with destruction, police appropriately seized that evidence incident to the petitioner's arrest.[21]

Language in *Schmerber* indicates that if evidence is threatened with destruction, the same rationale that permits a warrantless search of the body may

[13] In fact, the Court has consistently denied certiorari, without comment, when petitioned to review lower court decisions which have recognized such an exception. One can only speculate as to the reason for the Court's reluctance to consider directly the validity of such an exception. That reluctance may reflect the Court's movement away from the exclusionary rule and represent an unwillingness to curb police action in this area. It is the position of this comment, however, that the Court needs to consider directly such an exception and set standards for its use to ensure the continued protection of the fourth amendment guarantees.

[14] 333 U.S. 10 (1948).

[15] The constitutional protection provided in the fourth amendment for homes has been extended in the case law to apartments, hotel rooms, garages, business offices, stores, and warehouses to the degree that these are closed to the public. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 357 (1970).

[16] 333 U.S. at 14–15.

[17] This was with the exception of perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to the court. The evidence of their 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.

Id. at 15.

[18] Similarly, in Chapman v. United States, 365 U.S. 610, 615 (1961), the Court disallowed the warrantless search of the petitioner's home in his absence and the seizure of an unregistered "distillery." The Court relied on the reasoning in *Johnson* that "[n]o evidence or contraband was threatened with removal or destruction, except the fumes which we suppose in time would disappear."

[19] *See* United States v. Curran, 498 F.2d 30 (9th Cir. 1974), notes 94–100 and accompanying text *infra;* United States v. Rubin, 474 F.2d 262 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973), notes 72–77 and accompanying text *infra.*

[20] 384 U.S. 757 (1966).

[21] *Id.* at 770–71.

well permit a warrantless search of the home. Indeed, as the Court stated: "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned."[22] Since the Court considered the body to be no less protected than a home, this language suggests, by analogy, that a policeman can enter the home as well as the body to prevent the threatened destruction of evidence.[23] However, the facts of *Schmerber* may limit its broad assertions. Because the warrantless search was conducted incident to a valid arrest, the decision does not necessarily mean that a warrantless search may be conducted *solely* to prevent the destruction of evidence, where there is no other valid initial intrusion. Further, in *Schmerber,* the evidence—alcoholic content in the blood—was certain to diminish before a judicial warrant could have been obtained.[24] Thus, *Schmerber* does not directly establish an exception to the warrant requirement where evidence in the home is threatened with destruction.

The Supreme Court in *United States v. Jeffers* suggested that the "*imminent* destruction" of evidence may justify a warrantless search.[25] In *Jeffers,* a policeman and a hotel detective entered the defendants' room and seized narcotics. But, because the narcotics did not appear to be in imminent danger of being destroyed at the time of the search, the Court held that the search was illegal. As the Court explained:

> They [the occupants] were not even present when the entry, search and seizure were conducted; nor were there exceptional circumstances present to justify the action of the officers. There was no question of violence, no movable vehicle was involved, nor was there an arrest or an imminent destruction, removal or concealment of the property intended to be seized. In fact, the officers admit they could have easily prevented any such destruction or removal by merely guarding the door.[26]

The Court did not directly establish the destruction of evidence exception; it did so by negative inference only. Thus, one cannot be certain whether the *Jeffers* Court would have allowed a warrantless seizure if it had found "imminent destruction, removal or concealment" of evidence.

The Supreme Court has furthered indicated that it might allow warrantless entries into residences if it can be shown that the officers knew that the evidence was actually in the process of being destroyed. For example, in *McDonald v. United States,*[27] police forced their way into a room rented by the petitioner, who was suspected of engaging in an illegal lottery. The warrantless entry and seizure of machines, papers, and money, while in plain view, was found unjustified. The petitioner had been under surveillance for several months and when police heard the adding machine, they looked through the transom and saw the activities within. Thus, the Court found that the officer "certainly had adequate grounds for seeking a search warrant."[28] Further, the Court found that no exceptional circumstances justified foregoing the warrant requirement since the defendant was not fleeing or seeking to escape, "[n]or was the property in the process of destruction."[29] According to the Court, mere inconvenience was the reason police did not seek a warrant—but that reason was not considered sufficient to justify foregoing fourth amendment safeguards.

The Supreme Court again suggested that a warrantless entry might be permitted when evidence is "in the process of destruction" in *Vale v. Louisiana,*[30] the case most frequently cited in support of the destruction exception. There, the police had obtained arrest warrants for the defendant Vale[31] and were watching his house when they observed a suspected narcotics transaction outside the house. The defendant also noticed the police and quickly walked back toward the house, where the police arrested him on the steps of the home. Police made a cursory inspection of the house to see whether anyone was inside. Three minutes later, Vale's mother and brother were seen approaching the home. Police informed them of Vale's arrest and conducted a detailed warrantless search of the house for narcotics, which were found in the rear

[22] *Id.* at 770.

[23] *See* Cupp v. Murphy, 412 U.S. 291 (1973), where fingernail scrapings were taken from the defendant over his protest and without a warrant while he was being questioned in connection with a murder. The Court found that the warrantless search did not violate the defendant's fourth amendment rights, but was necessary in order to preserve the highly evanescent evidence which the officers found under the fingernails. *Id.* at 296. However, this case did not draw any analogy between the destruction of evidence located under the fingernails and that located in a residence.

[24] 384 U.S. at 770.

[25] 342 U.S. 48, 52 (1951) (emphasis supplied).

[26] *Id.* at 52.

[27] 335 U.S. 451 (1948).

[28] *Id.* at 455.

[29] *Id.*

[30] 399 U.S. 30 (1970).

[31] The arrest warrants were issued because the bond had been increased for an earlier narcotics charge pending against Vale. *Id.* at 40 (Black, J., dissenting).

bedroom.[32] The Louisana Supreme Court found that it would have been unreasonable "to require the officers under the facts of the case to first secure a search warrant before searching the premises, as time is of the essence inasmuch as the officers never know whether there is anyone on the premises to be searched who could very easily destroy the evidence."[33]

The United States Supreme Court reversed, noting that the police knew when they entered the house that no one was present to destroy the evidence. The Court found no exceptional circumstances justifying a search without a warrant, since the goods seized were not "in the process of destruction."[34] Finally, the Court emphasized that the impracticability of obtaining a search warrant was never established:

> The officers were able to procure two warrants for Vale's arrest. They also had information that he was residing at the address where they found him. There is thus no reason, so far as anything before us appears, to suppose that it was impracticable for them to obtain a search warrant as well.[35]

The Court's reasoning suggests that a warrantless search might have been justified if someone was in the house when the defendant was arrested, and if the evidence seized was "in the process of destruction." Thus, arguably, *Vale* implicitly recognized the destruction of evidence exception, but found its application to be inappropriate under the particular facts of the case.

Justice Black, dissenting in *Vale*, stated that there did exist exigent circumstances to uphold a warrantless search. He reasoned that the arrest of Vale in front of the house, "in a spot readily visible to anyone in the house,"[36] made an immediate search of the house necessary. The delay in obtaining a warrant would have given an accomplice time to destroy the narcotics. According to Justice Black, when the mother and brother arrived, "what had been a suspicion became a certainty: Vale's relatives were in possession and knew of his arrest."[37] In Justice Black's opinion, evidence was threatened with removal or destruction, and thus, according to *Johnson,* the warrantless search was justified.[38]

The strongest support for the destruction of evidence exception may be found in *United States v. Santana.*[39] There, an undercover agent passed marked money to a drug dealer, ostensibly for the purchase of heroin. Following the sale, the dealer was arrested and told the police that respondent Santana had the money. When police drove to Santana's home, they found her standing in the doorway with a brown bag in her hand. The officers yelled "police," and she retreated into her house. The police followed, catching her in the vestibule. As she tried to pull away, the bag was ripped and white powder, later found to be heroin, fell to the floor. Police searched Santana and found the marked money.

Santana's motion to suppress the heroin and marked money as evidence obtained from an illegal search was granted by the United States District Court for the Eastern District of Pennsylvania and affirmed by the Third Circuit Court of Appeals. In reversing, the United States Supreme Court characterized the warrantless entry as permissible within the "hot pursuit" exception:

> The fact that the pursuit here ended almost as soon as it began did not render it any the less a "hot pursuit" sufficient to justify the warrantless entry into Santana's house. Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence. Once she had been arrested the search, incident to that arrest, which produced the drugs and money was clearly justified.[40]

Thus, a warrantless entry and search was justified where officers were in "hot pursuit," where the entry and search were incident to a valid arrest, and where officers sought to prevent the destruction of evidence. Traditionally, each of the first two conditions would have been independently sufficient to allow a search without a warrant. Yet,

[32] *Id.* at 31-33.

[33] State v. Vale, 252 La. 1056, 1070, 215 So. 2d 811, 816 (1968).

[34] 399 U.S. at 35.

[35] *Id.* at 35. This reason for justifying the failure to uphold the warrantless search was criticized by Professor LaFave in *Warrantless Searches and the Supreme Court: Further Ventures into the "Quaqmire"*, 8 CRIM. L. BULL. 9, 16-17 (1972). Professor LaFave pointed out that the warrants concerned increases in Vale's bond and not the narcotics transaction. It was not until the police observed the narcotics transaction that probable cause came into being. Professor LaFave found the Court's reasoning baffling and criticized the Court for not clearly articulating the reasons for invalidating the warrantless search.

[36] 399 U.S. at 39 (Black, J., dissenting).

[37] *Id.* at 38.

[38] *Id.* at 39-41. The majority of the Court, however, did not look to whether the evidence was "threatened with destruction," as suggested in *Johnson*; rather, the majority concluded in dicta that the warrantless search was not justified because the "goods ultimately seized were not in the process of destruction." *Id.* at 35.

[39] 427 U.S. 38 (1976).

[40] *Id.* at 43 (citation omitted).

it is not altogether clear that, in the absence of hot pursuit and a valid arrest, police could have made a warrantless entry and search for the sole purpose of preventing the possible destruction of evidence. Without squarely deciding that issue, the Court, in its discussion of *Vale,* seemed to recognize the destruction of evidence exception. Indeed, even Justice Marshall in his dissent recognized a destruction exception: "[T]he danger that the evidence would be destroyed and the suspects gone before a warrant could be obtained would ordinarily justify the police's quick return to Santana's home and the warrantless entry and arrest."[41]

In sum, the United States Supreme Court has not expressly established an independent "destruction of evidence" exception to the fourth amendment warrant requirement. Although the existence of that exception may reasonably be inferred from ample dicta, the application of the exception is somewhat less clear. The Supreme Court's loosely reasoned dicta suggest approval for warrantless entries when evidence is "threatened with destruction,"[42] when there is a possibility of "imminent destruction,"[43] or when the evidence is "in the process of destruction."[44] The Court has treated these situations separately, but has never explained how, if at all, they are different. Indeed, there may be considerable overlap. For instance, if evidence is not threatened with imminent destruction, it is doubtful that police could show the impracticability of obtaining a warrant—a burden created by *Vale.*[45] Thus, while opening the door for warrantless searches to prevent the destruction of evidence, the Supreme Court has not provided clear guidance for application of that exception to fourth amendment guarantees.

II. Lower Federal and State Court Application of the Supreme Court Dicta

Despite the fact that the United States Supreme Court has not expressly recognized a destruction of evidence exception to the fourth amendment, lower federal and state courts have done so in two main categories of cases. The first is where the destruction or removal of evidence is *certain* or *highly probable* unless police act promptly. This category includes situations in which the evidence is being destroyed by natural causes and in which officers actually witness the destruction or removal of evidence. The second major category is where the destruction of evidence is *merely possible*—for instance, where evidence could be destroyed or removed from the jurisdiction by the defendant or third parties. These two basic categories, with the representative subcategories, will serve as the organizational framework for the analysis of the lower court decisions. A major concern throughout the analysis will be whether police created or exacerbated the exigent circumstances in order to justify the warrantless entry.

A. Where the Destruction or Removal of Evidence Is Certain or Highly Probable

1. *Evidence Being Destroyed by Natural Causes*

Where evidence is certain to be destroyed by natural causes, lower courts have found exigent circumstances sufficient to permit warrantless entry into a residence solely to prevent the destruction of evidence. These cases are not unlike the situation faced by the police in *Schmerber v. California,*[46] where the United States Supreme Court held that it was proper to take blood from an arrested individual to determine intoxication becaue the percentage of alcohol would have diminished rapidly in the time needed to obtain a warrant. The Court characterized this as an exigent circumstance and allowed the warrantless "search" of the defendant's blood.

Lower courts have permitted warrantless entries into residences where, without immediate action, evidence would have been destroyed by nature. For instance, in *United States v. Gargotto,*[47] gambling evidence was seized during a warrantless search of the defendant's offices during a fire in the building. Police had entered the flaming building to search for evidence of arson and found wagering forms in plain view. They proceeded to look for more evidence of gambling and found it in file cabinets. Meanwhile, firemen were chopping walls, hosing the area with water, and discarding flammable material.

The Sixth Circuit Court of Appeals denied the defendant's motion to suppress the evidence, finding that a real danger of water damage and possible destruction of evidence existed if the officers took time to obtain a warrant. The court cited *Johnson*

[41] *Id.* at 48 (Marshall, J., dissenting).

[42] Johnson v. United States, 333 U.S. 10, 15 (1948); *see* notes 14–24 and accompanying text *supra.*

[43] United States v. Jeffers, 342 U.S. 48, 52 (1951); *see* notes 25–26 and accompanying text *supra.*

[44] McDonald v. United States, 335 U.S. 451, 455 (1948); *see* notes 27–38 and accompanying text *supra.*

[45] *See* note 35 and accompanying text *supra.*

[46] 384 U.S. 757 (1966); *see* notes 20–24 and accompanying text *supra.*

[47] 510 F.2d 409 (6th Cir. 1974), *cert. denied,* 421 U.S. 987 (1975).

v. United States[48] for the proposition that a search is justified where evidence is "threatened with destruction." Thus, the court concluded that an emergency existed "regardless of whether the flames were still live or had been extinguished, in light of the fact that active and necessary fire-fighting procedures continued to take place which could reasonably have been found to *threaten destruction* of the evidence."[49]

Similarly, the legality of a warrantless seizure of arson evidence at the scene of a fire in the defendant's home was upheld in *Steigler v. Anderson*.[50] In that case, the district court cited several reasons for permitting the search, including the possibility that the evidence of arson would be destroyed by the fire. The court found that "under the circumstances then existing, some of it [the arson evidence] being of a highly volatile nature, might have caught on fire or the contents of the containers overturned, and, thus, valuable evidence of a crime destroyed."[51] While the Third Circuit Court of Appeals relied on different grounds in upholding the warrantless search,[52] that court did suggest that one reason for allowing the warrantless seizure was the possibility of the destruction of evidence by fire. Without identifying upon which Supreme Court language it was relying, the Third Circuit Court of Appeals stated that "much of the evidence was highly flammable (*e.g.*, containers filled with gasoline and rugs soaked with gasoline) rendering it imperative that they [sic] be seized and removed."[53]

Similarly, where wet boots and denim pants if allowed to dry would have lost their probative value as evidence, the Colorado Court of Appeals approved a warrantless search and seizure of that evidence in *People v. Clark*.[54] While police were investigating a rape, they received a description of the assailant and observed two sets of boot prints in fresh snow. One set led to the residence of the victim and the other set of similar size and tread led away from the victim's residence to the defendant's residence. The officers knocked at the defendant's door and entered the apartment in search of the boots. The police found a pair of wet boots which had similar tread and seized them along with a pair of wet denim pants. Relying on *Schmerber*[55] and *Vale*,[56] the court denied the defendant's motion to suppress, reasoning that where circumstances suggest to officers "that the physical condition of [the] evidence having probative value will not be ascertainable if the investigation is delayed in order to obtain a search warrant, then a warrantless search and seizure are permissible."[57] The court found that there was a certainty—not just a probability—that relevant, probative evidence would have been destroyed if the boots dried. Thus, although there would have been probable cause to obtain a warrant, the Colorado court concluded that the danger of evidence being lost made the warrantless entry permissible.

In sum, only a few cases have considered whether sufficient exigent circumstances exist to support a warrantless entry when evidence could have been lost by natural causes if time had been taken to obtain a warrant. However, those courts that have addressed the issue have upheld the constitutionality of such entries. By definition, warrantless entries in this situation are not based on emergencies contrived by police. Thus, regardless of which Supreme Court language is applied, the absence of a warrant does not pose a great threat to the defendant's fourth amendment rights. On balance, the need for immediate action to preserve the evidence may well outweigh the individual's right to privacy. *United States v. Gargotto*[58] demonstrated that in case of fire, the police needed to act immediately or else the evidence most probably would have been destroyed by the fire. Likewise, in *Clark*, although probable cause to obtain a warrant existed, time was of the essence in seizing the wet

[48] 333 U.S. 10 (1948); *see* notes 14–19 and accompanying text *supra*.

[49] 510 F.2d 409, 412 (6th Cir. 1974) (emphasis supplied). Arguably, the court could have upheld the constitutionality of the search by applying the stricter "in process of destruction" language of Vale v. Louisiana, 399 U.S. 30 (1970), since the officers knew that the evidence was being destroyed as a result of the fire and the firemen's activities. *See* notes 30–38 and accompanying text *supra*.

[50] 360 F. Supp. 1286 (D. Del.), *aff'd*, 496 F.2d 793 (3d Cir. 1973), *cert. denied*, 419 U.S. 1002 (1974).

[51] 360 F. Supp. at 1293. Among the other reasons for its decision, the court found that an emergency, the fire, caused the warrantless investigation. Furthermore, the court found the search justified under the plain-view doctrine.

[52] 496 F.2d 793 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974). The warrantless residential search was upheld because the fire, an emergency, justified the firemen entering the residence without a warrant.

[53] 496 F.2d at 797 n.12.

[54] 37 Colo. App. 188, 547 P.2d 267 (1976). *See also* Note, *Residential Searches to Prevent the Destruction of Evidence: An Emerging Exception to the Warrant Requirement*, 47 U. COLO. L. REV. 517 (1976).

[55] *See* notes 20–24 and accompanying text *supra*.

[56] *See* notes 30–38 and accompanying text *supra*.

[57] 548 P. 2d at 271.

[58] 510 F.2d 409. *See* notes 47–49 and accompanying text *supra*.

boots and pants. Consequently, as long as police can prove the necessity of immediate seizure without a warrant, any infringement of individual rights will be reasonable and permitted by the fourth amendment.[59]

2. *Officers Witnessing the Destruction or Removal of Evidence*

Exigent circumstances are similarly evident where an officer witnesses the destruction or removal of evidence. In this situation, not only do the officers have probable cause to conduct a search, but they also have direct knowledge that a crime is being committed. Here, the officer must determine whether to allow the evidence to be destroyed or removed during the time needed to obtain a warrant or to enter the premises to prevent the destruction of the evidence. Generally, the lower courts have permitted warrantless searches of this type solely to prevent the destruction of evidence.

For example, the court in *United States v. Blake,*[60] applied the "imminent removal or destruction" langugage of *United States v. Jeffers*[61] in finding that exigent circumstances existed to justify a warrantless entry to prevent the destruction of evidence. In *Blake,* while officers were executing an arrest warrant in the front of an apartment building, another officer in the rear of the building observed the defendant come onto the balcony and start throwing a white change purse over the side. The officer, suspecting that the purse contained narcotics, identified himself and ordered the defendant to stop, but the defendant quickly moved into the apartment. Thus, the officer actually witnessed the defendant's attempt to remove or destroy evidence. Immediately following the observation of the defendant, the officers entered the apartment without a search warrant, conducted a search, and found the white coin purse containing heroin.

The Eighth Circuit Court of Appeals[62] held that when narcotics are threatened with "imminent removal or destruction," a warrantless search is permitted.[63] The court rejected the "in process of destruction" language of *Vale v. Louisiana,*[64] reasoning that "to wait until contraband is actually in the process of destruction could possibly forego the opportunity to seize the narcotics."[65] The court found that the *Jeffers* standard satisfied both the need for a prompt warrantless entry and the need to protect an individual's right to privacy against nonjudicially approved searches.[66]

The "imminent destruction or removal of evidence" language of *Jeffers* was also applied by the Sixth Circuit Court of Appeals in *United States v. Delguyd.*[67] There, the defendant fled from federal agents when they attempted to serve him with a warrant and drove to the apartment complex of a confederate. Both were suspected of being involved in loan-sharking activities. While arresting the defendant in the parking lot, one agent noticed the confederate watching the activities from an apartment window, and then disappearing from sight into the apartment. The agents rushed to the apartment door and demanded entry. Upon hearing rustling noises and a flushing toilet, the agents broke into the apartment where they found the confederate tearing up papers and flushing them down the toilet.[68] The officers seized the papers from the toilet and left them drying in the living room, secured the apartment, and proceeded to obtain a search warrant. The appellate court concluded that this warrantless entry was permissible since evidence of a federal crime probably would have been found on the premises and that such

[59] Particularly important in this respect is a study of the Los Angeles Police Department, which found that an average of six hours was needed to obtain a search warrant. The study supports the conclusion that a search warrant should not be required where there exists the necessity of immediate seizure. *See* Man Hour, Cost Study Re: Chimel Decision, Addenda II, Sept. 24, 1969 (unofficial departmental report), *discussed in* Note, *Police Practices and the Threatened Destruction of Tangible Evidence,* 84 HARV. L. REV. 1465, 1478-79 n.61 (1971).

[60] 484 F.2d 50 (8th Cir. 1973).

[61] 342 U.S. 48 (1951); *see* notes 25-26 and accompanying text *supra.*

[62] The court relied upon United States v. Jeffers, 342 U.S. 48 (1951) in its decision.

[63] United States v. Blake, 484 F.2d 50, 54 (8th Cir. 1973).

[64] 399 U.S. 30 (1970); *see* text accompanying notes 30-38 *supra.*

[65] 484 F.2d at 55.

[66] Since the police officer saw the defendant attempt to remove the evidence from the apartment before the officers decided to enter, arguably the evidence was in the process of destruction and the *Vale* language could have been applied. The court, however, was concerned with the type of evidence that the defendant was destroying. Thus, since drugs can be quickly removed or destroyed, the court may have found that the *Vale* language imposed too high of a burden.

[67] 542 F.2d 346 (6th Cir. 1976).

[68] The Sixth Circuit noted that loan sharking requires the keeping of detailed records; so when the agents heard the rustling noises and the toilet flushing, the court concluded: "[W]hile other explanations can be proposed for these events, under the circumstances we find that a reasonable person could conclude from the events that evidence in the apartment was most probably being destroyed." *Id.* at 351.

evidence probably would have been destroyed if the officers had to obtain a warrant.[69]

Arguably, if the Sixth Circuit Court of Appeals had applied the stricter language of "in the process of destruction," the court could still have upheld the validity of the warrantless search. The officers knew that the confederate was an associate of the defendant who, they had probable cause to believe, was involved in loan-sharking activities.[70] In addition, the officers heard the rustling noise and the flushing toilet. These facts strongly suggested that the evidence was in the process of being destroyed. The Sixth Circuit Court of Appeals however, adopted the *Jeffers* language in upholding the constitutionality of the search.

These decisions[71] approve the destruction of evidence exception where, in the court's opinion, the evidence would have been destroyed if the officers had taken the time needed to procure a warrant. Clearly, the officers' decision not to obtain a warrant were based on their knowledge of the immediate threat and the need for prompt police action. In these decisions, police themselves did not create the emergency to justify their warrantless search. However, despite the general appropriateness of permitting searches in these situations, the possibility of police misconduct is not nonexistent. Thus, courts must carefully review the facts in each case to determine whether official misconduct prompted the attempt to destroy the evidence.

B. WHERE THE DESTRUCTION OF EVIDENCE IS MERELY POSSIBLE

1. *Evidence Could Be Destroyed by a Third Person*

Lower courts also have permitted warrantless searches where evidence might be destroyed by a third person who is associated with the defendant. The risk of violating the defendant's rights is increased in these situations, for the officers' determination of whether third parties are on the premises or will destroy the evidence is somewhat more speculative.

A leading federal decision in this area is *United States v. Rubin*,[72] where the Third Circuit Court of Appeals reversed the district court and held that exceptional circumstances existed to justify a warrantless entry of a home. There, a statue containing hashish, which was under constant surveillance, was taken by the defendant to his home. The defendant subsequently was arrested in a gasoline station six blocks from his home and at that point yelled "call my brother." Shortly thereafter, the officers entered the defendant's home without a warrant in order to protect the evidence.

The district court invalidated the search, finding that a warrantless entry was not permissible unless the officers had knowledge that the evidence was actually being destroyed. The Third Circuit Court of Appeals concluded, however, that the officers did not need actual knowledge of the removal or destruction before they could act.[73] In allowing the admission of the evidence, the court stated that recent Supreme Court cases only required a reasonable belief that the evidence was threatened with destruction.[74] Importantly, the court enunciated five factors to consider in determining the reasonableness of a warrantless search to prevent the destruction of evidence:

> (1) [T]he degree of urgency involved and the amount of time necessary to obtain a warrant.
>
> (2) [The] reasonable belief that the contraband is about to be removed.

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[69] *Id.* at 350–51.

[70] *Id.* at 351. The FBI had also intercepted phone conversations which, althought somewhat ambiguous, were certainly suspicious in nature and could reasonably have been interpreted as indicating that loan transactions involving the defendant and confederate had taken place.

[71] *See also* Gaines v. Craven, 448 F.2d 1236 (9th Cir. 1971) (per curiam), where the Ninth Circuit Court of Appeals upheld the seizure of evidence without a warrant. In *Gaines*, the officers witnessed the defendant attempt to prevent the police from confiscating the evidence by throwing it back into the house. No Supreme Court language was mentioned in the decision. *See also* Commonwealth v. Phillips 244 Pa. Super. Ct. 42, 366 A.2d 306 (1976), where officers, investigating an informant's tip, witnessed drugs being removed from the defendant's table after the door was voluntarily opened by one of the occupants of the house. There, the officers entered and seized the evidence without a warrant. The court upheld the legality of the warrantless search, but did not specify the Supreme Court language upon which it was relying.

[72] 474 F.2d 262 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973).

[73] *Id.* at 266–68. The district court had relied on Chimel v. California, 395 U.S. 752 (1969); Coolidge v. New Hampshire, 402 U.S. 443 (1971) (plurality opinion); and Vale v. Louisiana, 399 U.S. 30 (1970).

[74] The Third Circuit Court of Appeals based its conclusion on *Johnson*, *McDonald*, and *Vale*. It recognized that *Vale* spoke of evidence "in the process of being destroyed" whereas the Supreme Court had spoken of "threatened" destruction or removal of evidence in previous cases. The Third Circuit Court of Appeals concluded, however, that "the omission of a single word should not be given such significance" for the court found that the facts in *Vale* did not even support a belief "that there was even a 'threatened' destruction or removal of the narcotics." 474 F.2d at 267.

(3) [T]he possibility of danger to the police officers guarding the site of the contraband while a search warrant is sought.

(4) [The] information indicating the possessors of contraband are aware that the police are on their trail.

(5) [T]he ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic."[75]

After weighing these factors, the court found that sufficient exigent circumstances existed to forego the warrant requirement.[76] The Third Circuit court emphasized that there is a strong preference for searches pursuant to a warrant, but concluded: "Our vigilance in protecting the privacy of the individual in his home must not absolutely preclude officers of the law, when they are confronted with exigent circumstances, from effective criminal investigation and law enforcement in curbing illegal narcotics traffic."[77]

Where evidence may be easily destroyed by third parties suspected of being present, various factual situations have been found to justify warrantless entries. For instance, in *United States v. Gardner*,[78] a suspected cocaine dealer and an informant-buyer were conspicuously arrested in front of the suspect's home after five police cars moved in and the agents emerged with their guns drawn. Police were told by the informant that a female was in the home, but they were not certain that anyone actually had observed the arrests and would attempt to destroy the evidence. Nevertheless, police conducted a warrantless search which the Fifth Circuit court upheld on the basis of exigent circumstances.[79] The court dismissed the argument that the warrantless entry was justified only if the agents *knew* that the defendant's wife, a partner in the drug trade, was on the premises. According to the court:

> The agents could rely on the reasonable forecast that anyone in the house at the time the defendant and Gunn (the informant) were there might know cocaine was present and, seeing the major arrest activity in front of the house immediately upon their departure, might be expected to dispose of it.[80]

The Ninth Circuit Court of Appeals has gone further and upheld a warrantless entry where police did not even have actual knowledge that someone was on the premises. In *United States v. Fulton*,[81] a suspected drug dealer was arrested in the parking lot of a motel. Following the arrest, an informant

[75] *Id.* at 268; *see* notes 108-09 and accompanying text *infra* for further discussion of these factors.

[76] The agents actually possessed more than probable cause that hashish was in the premises. Their inspection of the crate at the airport, which the defendant subsequently picked up and delivered to his garage, revealed that hashish was inside. Furthermore, the house had been under surveillance by the government agents who were aware that at least one of the men had been seen with the defendant when the narcotics were brought to the house. Therefore, it was not unreasonable for the agents to believe that at least one of the occupants was involved with the defendant in the drug business. Even though the police had no knowledge that the defendant had a brother or that a phone call was made, the court found that it was not unreasonable to believe that the defendant, who had intentionally driven to the gas station in the neighborhood and was apparently known to the individuals there, was attempting to alert persons in the house. *Id.* at 269. *See also* State v. Pope, 192 Neb. 755, 224 N.W.2d 521 (1974) (warrantless search justified since the defendant upon arrest called out the telephone number known to be the number of her house which was under surveillance for narcotics); Winter v. State, 332 So. 2d 46 (Fla. App. 1976) (warrantless search justified since defendant's confederate yelled: "It's a raid. It's a raid," while blowing the vehicle's horn); People v. Fraser, 62 Ill. App. 3d 142, 379 N.E.2d 10 (1978) (warrantless search justified since persons leaving an empty store suspected of housing illegal gambling yelled "police" towards the inside of the store. The court also concluded that the police officers' conduct did not create the exigent circumstances. Rather, the police were merely following proper procedures to confirm hearsay information provided by an informant when their presence was detected).

[77] 474 F.2d at 270.

[78] 553 F.2d 946 (5th Cir. 1977); *cert. denied*, 434 U.S. 1011 (1978).

[79] The Fifth Circuit Court of Appeals observed:

> When Gunn told the agents someone was in the house, an immediate entry became necessary to prevent the disposal of the cocaine, a powder which can easily be flushed down a toilet. The agents could logically have suspected that anyone inside the house would be well aware of the five police cars ringing the premises and the arrest of the defendant and Gunn. The danger that someone would dispose of the illicit drugs was especially great in this case because the agents knew the person in the house might be Susan Gardner, the defendant's wife and partner in the drug trade. Accordingly, the agents justifiably acted "now or never" to preserve the evidence of a crime.

[80] *Id.* at 948. *See also* United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976), where a warrantless search for marijuana was conducted following an arrest in front of the premises. Individuals were known to be on the premises, and the arrest increased the likelihood that they would become aware of the surveillance. Although no one was actually seen observing the arrest, the Ninth Circuit reasoned that the likelihood of the discovery of the surveillance increased the chance of the destruction of the evidence and justified the warrantless entry.

[81] 549 F.2d 1325 (9th Cir. 1977).

who had just delivered drugs to the suspect's motel room told the arresting agent that while in the motel room he had noticed that the bathroom door was closed. Extensive surveillance had revealed that a woman was involved in the drug scheme and had been observed entering that room on several occasions. The arresting agent was not aware that the woman had in fact left the room after the defendant had gone to the parking lot. The Ninth Circuit court did not find it unreasonable for the agent to believe that the woman was still in the room and would attempt to destroy the evidence if she knew of the impending police intervention.[82] Thus, the court permitted the agent's search.

Generally, in this situation, police may well have probable cause to believe that evidence is on the premises. However, police may not be certain that the evidence is being or will be destroyed, or that an individual is actually present to carry out the destruction. Therefore, a higher degree of speculation will inevitably be involved. Additionally, there is greater potential for official abuse since police may have created or added to the emergency arising at the time a suspect is arrested or detained outside his residence. Because the exigency justified the warrantless entry, a consideration of police conduct is imperative to determine if the emergency that developed could have been reasonably avoided. In view of the degree of speculation involved and the potential for official abuse in these cases, the risk of violating the defendant's fourth amendment rights is increased.

2. *Evidence Could Be Destroyed by the Defendant*

Most courts which have permitted warrantless entries to prevent destruction of evidence have done so where the defendant himself is in a position to destroy the evidence. The risk of violating the defendant's rights is greatest in these situations, for police could intentionally alert the defendant to their presence and thus create the exigent circumstances necessary to conduct a warrantless search. While a few courts have recognized the potential for police abuse and have invalidated the warrantless entry upon finding that the emergency that prompted the warrantless entry could have been avoided,[83] warrantless entries nevertheless have been generally permitted.[84]

Concern that defendants would destroy all evidence of a counterfeit money scheme in the time needed to obtain a warrant was found to justify the warrantless search in *United States v. Guidry*.[85] There, the defendant's residence had been under surveillance during an investigation of the counterfeiting scheme. An undercover agent concluded at the end of his second visit with the defendants that they had become aware of his identity and real purpose. Approximately fifteen minutes later a fire was started on the carport of the residence. Believing that the fire was intended to destroy the evidence, a warrantless search of the home was conducted.

The Sixth Circuit Court of Appeals accepted the findings of the district court that the printing press and the plate would not have been destroyed in the time necessary to obtain a warrant,[86] but that the counterfeit money easily would have been destroyed by the fire. The court found it reasonable for the police to have concluded that the defendants on the premises were aware of the impending police intervention and were attempting to destroy the counterfeit money by fire. Under these conditions, the warrantless search was upheld because there was no alternative way to preserve the evidence.

[82] If the agents had known in fact that the suspected woman partner was not in the room, a different result would probably have been reached. In Eng Fung Jem v. United States, 281 F.2d 803 (9th Cir. 1960), the defendant's hotel room was searched after police had received information that the defendant was leaving town shortly. The court held that the warrantless search in the defendant's absence was not justified. The Ninth Circuit court stated that the officers knew that the defendant was not in the room at the time they entered and searched it and that the officers could have prevented removal or destruction by merely guarding the door. In *Fulton*, however, the agents did not in fact know that the room was vacant but did believe that the woman, if inside, would most probably have taken action on her own behalf or on behalf of her partner. *See also* Ferrara v. State, 319 So. 2d 629 (Fla. Dist. Ct. App. 1975), where a warrantless search was invalidated upon a finding that no exigent circumstances existed. The court concluded that there was no evidence that anyone else had access to the defendant's apartment and that there was no reason why the police could not have secured the area while a warrant was obtained. The court found that a speculative fear of investigating officers is not sufficient to overcome the strong presumption of invalidity accompanying a warrantless search.

[83] *See* notes 102–06 and accompanying text *infra*.

[84] *See* notes 85–101 and accompanying text *infra*.

[85] 534 F.2d 1220 (6th Cir. 1976).

[86] Relying on similar reasoning, the Fifth Circuit Court of Appeals in Walker v. United States, 225 F.2d 447, 450 (5th Cir. 1955), had invalidated the warrantless search of a barn containing an illegal still because "no removal of the contraband was possible, the officers being present and able to place guards at all exits."

The Fifth Circuit Court of Appeals, upon finding that drug evidence was threatened with imminent destruction, similarly upheld a warrantless entry in *United States v. Shima.*[87] There, following the arrest of one suspect for drug possesion, the agents returned to the apartment where they knew that two men were awaiting their confederate's prompt return. The agents, upon seeing drugs through a window and realizing that the evidence would most probably be destroyed in the time needed to obtain a warrant, conducted a warrantless search and seized the drugs. As in *Guidry,* the officers in *Shima* did not create the emergency, but conducted the warrantless search when circumstances beyond their control necessitated the immediate action.

Some circuits have gone further, however, and have permitted warrantless searches when circumstances which necessitated the immediate action were not completely beyond the control of the police officers. In *Thomas v. Parett,*[88] a warrantless entry was found justified by the presence of exigent circumstances caused by the police's own delay. There, during an around-the-clock surveillance of an apartment, police overheard the defendants indicate that the heroin had been cut, wrapped, and just needed to be placed in plastic bags before being distributed. Believing that the evidence would have been removed during the hour needed to obtain the warrant, the officers entered the apartment without a warrant. In upholding the validity of the entry, the Eighth Circuit Court of Appeals accepted the findings of the Nebraska Supreme Court[89] that if the defendants left the apartment separately and only one was arrested at a time, the others would have been warned and would have destroyed the evidence.[90]

The *Thomas* decision demonstrates the risks inherent in upholding the validity of warrantless searches and seizures in this category. By the court's own admission, the evidence was safe so long as the operation was undetected.[91] Clearly, a warrant could have been sought. If the defendants did leave, they could have been arrested; if the defendants did not leave at the same time, a warrantless entry might *then* have been justified to preserve the remaining evidence. As Judge Lay noted in dissent, the officers could have prevented any removal by guarding the door;[92] if the occupants left, "there were enough officers to detain them quietly and far enough from the apartment so as not to alert the remaining confederates."[93]

Similarly, in *United States v. Curran,*[94] government agents had received information that marijuana would be shipped out of the defendant's home in small quantities. Agents subsequently stopped two of three cars leaving the home and found marijuana in one. "[B]efore midnight, the surveillance crew decided to raid the Cooley Road house."[95] The government agent testified that when he approached the door to make inquiries, he smelled marijuana and saw it in plain view. Fearing that the defendants would dispose of the evidence while a warrant was being obtained, the agents conducted a warrantless search and confiscated the drugs.

The Ninth Circuit court recognized that the agents came "too close to creating their own emergency."[96] However, the court reasoned that the delay in getting a a warrant was justified since two cars had already been stopped and "[b]y the time a warrant could be obtained, much or all of the marijuana *could* have been loaded into cars for transportation."[97] According to the court, "many more cars *might* arrive and depart";[98] that "[a]n arriving car *might* pass by the departing one stopped by the agents";[99] and the officers "*might* have to release a driver who cooperated with the house occupants but whose car had no evidence inside."[100]

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[87] 545 F.2d 1026 (5th Cir.), *aff'd en banc,* 560 F.2d 1287 (5th Cir.), *cert. denied,* 434 U.S. 996 (1977).

[88] 524 F.2d 779 (8th Cir. 1975).

[89] The Nebraska Supreme Court in State v. Patterson, 192 Neb. 308, 220 N.W.2d 235 (1974), had affirmed the defendants' convictions for possession of heroin with intent to distribute. Having exhausted their state court remedies, federal habeas corpus petitions were filed, challenging the validity of the warrantless search of the apartment, and culminating in the Eighth Circuit decision in *Thomas.*

[90] 524 F.2d at 782.

[91] At the time of the raid, the officers did not know that the defendants would be leaving in a few minutes, but conducted the raid on "the assumption [that] there would be insufficient time to obtain a warrant." *Id.* at 781. Although probable cause existed at the time the raid was conducted and, additionally, it was known that the defendants were themselves on the premises, the defendants were not aware of any impending police intervention so the evidence was not threatened with destruction or removal as a consequence of any such knowledge.

[92] *Id.* at 784 (Lay, J., dissenting).

[93] *Id.* at 786 (Lay, J., dissenting).

[94] 498 F.2d 30 (9th Cir. 1974).

[95] *Id.* at 32.

[96] *Id.* at 34.

[97] *Id.* at 35 (emphasis supplied).

[98] *Id.* (emphasis supplied).

[99] *Id.* (emphasis supplied).

[100] *Id.* (emphasis supplied).

Nevertheless, these speculative concerns did not justify the emergency action taken by the officers. Many more cars had not arrived and an arriving car had not passed a departing car. Moreover, there was no evidence that the surveillance had been discovered. Thus, there was no immediate need to proceed without the warrant. Unless and until a more affirmative act occurred to justify foregoing the warrant requirement, the agents should not have taken the action which created the emergency.

Other decisions have similarly tolerated warrantless searches in a broad range of circumstances.[101] However, some courts have recognized the potential for abuse and have invalidated the warrantless entries and seizures of evidence. In *United States v. Rosselli*,[102] for example, the Seventh Circuit Court of Appeals invalidated a warrantless search for marijuana conducted on the belief that the drug was about to be destroyed. There, police had arrested the defendant but left his brother's girlfriend and children behind while the defendant led police to the apartment of a codefendant. Shortly thereafter, without attempting to obtain a warrant, police announced themselves to the codefendant, heard running footsteps inside, and proceeded to knock down the door. The government claimed that exigent circumstances existed to conduct a warrantless search because of the risk that the girlfriend could have called ahead to warn the codefendant and because of the codefendant's reactions at the time of the knock.

However, the Seventh Circuit court found that the agents easily could have prevented the risk of a call by leaving an agent with the woman while a warrant was being obtained.[103] The Seventh Circuit court focused on the fact that officers knocked on the door instead of attempting to obtain a warrant. While the court did not explicitly suggest that the emergency was contrived,[104] the court clearly was concerned that if permitted once, this kind of situation might arise with more frequency and could permit easy avoidance of the constitutional requirement that probable cause generally be assessed by a neutral and detached magistrate before a citizen's privacy is invaded. The court further indicated that the emergency could have been avoided in several ways:

> In this case, the evidence does not adequately explain why no attempt to obtain a warrant was made, or why no consideration was given to placing the defendant's apartment under surveillance while an attempt to secure a warrant was being made. Had [the] defendant sought to leave during such a period, he could have been arrested forthwith; and prior to the knock at the door a conclusion that marijuana was being destroyed could not have been justified.[105]

Consequently, despite the findings that probable cause existed and that individuals were on the premises and in possession of marijuana which could be easily disposed of, the Seventh Circuit court concluded that the officers had no justification for foregoing the warrant requirement.[106]

[101] *See* United States v. Davis, 461 F.2d 1026 (3d Cir. 1972), where a warrantless search was upheld on the word of an informant that heroin was in the defendant's apartment and would soon be moved, even though the informant's information was not tested by the stringent standard developed in Aquilar v. Texas, 378 U.S. 108 (1964). In State v. Wiley, 522 S.W.2d 281 (Mo. 1975), a tip from an anonymous informant, which was verified, regarding drugs in a refrigerator in an apartment which would be removed shortly was held to justify the warrantless entry into the apartment and search of the refrigerator where the drugs were found, even though the defendant was in the apartment under arrest. This decision was criticized in Note, *Search and Seizure—The Destruction or Removal of Evidence Exception to the Warrant Requirement Adopted in Missouri, State v. Wiley*, 41 Mo. L. Rev. 291 (1976). In United States v. Bustamante-Gamez, 488 F.2d 4 (9th Cir. 1973), *cert. denied*, 411 U.S. 970 (1974), a reasonable belief that the defendant had discovered the stake-out or might at any time learn of the officer's presence, was held to justify the warrantless entry into the defendant's garage to prevent the destruction of the evidence. The court noted that the officers were not creating exigent circumstances and that "[a] different case would be presented if there were the possibility of abuse." 488 F.2d at 8 n.4. In United States v. Doyle, 456 F.2d 1246 (5th Cir. 1972), where a strong reason to believe that the defendant realized "the heat was on" was held to justify the warrantless entry and seizure of the drugs. Additionally, the officers stated that it would have taken about one hour and 20 minutes to obtain a warrant, a delay which the court believed would have very likely resulted in the destruction of the evidence and the departure of the defendant.

[102] 506 F.2d 627 (7th Cir. 1974).

[103] The court distinguished United States v. Rubin, 474 F.2d 262 (3d Cir. 1973), where upon being arrested the defendant had yelled: "Call my brother." In *Rubin*, the court found that there was no way for agents to prevent such a call. *See* notes 72–77 and accompanying text *supra*.

[104] "They had a right to pursue their investigation by seeking voluntary cooperation from a suspect." But certainly the emergency which did ensue was forseeable. 506 F.2d at 630.

[105] *Id.*

[106] *See also* United States v. Griffin, 502 F.2d 959 (6th Cir. 1974), where the court rejected a government argument that sufficient exigent circumstances existed to justify the entry into an apartment where drugs were

In sum, courts have permitted warrantless entries in a variety of situations in which evidence could be destroyed by a suspect. When circumstances beyond the officers' control necessitate immediate action, the need to preserve evidence may well justify the warrantless entry. However, such situations also present some potential for official abuse, and if police were able to forego the warrant requirement by creating an emergency, then the fourth amendment would become a nullity.

III. The Emerging Exception and the Need for Strict Standards

Warrantless residential searches have sharply focused attention on the competing needs of privacy in one's home and effective law enforcement. Lower courts have approved warrantless entries and searches in a broad range of cases and the absence of clear and concrete Supreme Court guidance seriously threatens to interfere with the guarantees of the fourth amendment. Thus, strict guidelines must be developed to govern the initiation and scope of warrantless entries and searches.

A. The Development of Guidelines for Warrantless Entries

Most lower courts have applied either the "threatened with destruction" language or the "imminent destruction" language in evaluating whether police had reasonable grounds to believe that immediate action was necessary to protect evidence from destruction or removal.[107] For instance, the Third Circuit Court of Appeals in *United States v. Rubin*[108] stated that the Supreme Court has only required a reasonable belief that evidence was "threatened with destruction," and thus set forth five factors to consider in determining the validity of a warrantless entry:

> (1) [T]he degree of urgency involved and the amount of time necessary to obtain a warrant.
>
> (2) [The] reasonable belief that the contraband is about to be removed.
>
> (3) [T]he possibility of danger to the police officers guarding the site of the contraband while a search warrant is sought.
>
> (4) [The] information indicating the possessors of contraband are aware that the police are on their trail.
>
> (5) [T]he ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic."[109]

These *Rubin* factors while applied specifically to contraband in that case can be applied generally and represent a useful starting point for determining the propriety of a warrantless entry and search. However, it is further imperative to consider police conduct and whether the ultimate emergency reasonably could have been avoided.

The Project on Law Enforcement Policy and Rulemaking[110] recognized the possibility of officers creating the exigent circumstances to justify warrantless entries. "Failing to obtain a warrant when time permits, then seeking consent to search, and ultimately maintaining that an emergency arises when consent is refused, has been referred to as a 'do-it-yourself' emergency and has been thoroughly criticized."[111] The model rule formulated to govern warrantless residential searches recognized this concern. Project Rule 502 adopted the "imminent destruction" language and provided:

> A. Residential Premises. When an officer has probable cause to search for seizable items on residential premises and also has probable cause to believe that such items are in imminent danger of being destroyed or consumed, he may enter such premises without a warrant, but may search only to the extent necessary to recover the endangered seizable items [and for no longer than twenty minutes].[112]

The guidelines in *Rubin* and the Project Rule should be considered together in determining the validity of warrantless residential searches. In this process, courts must carefully consider whether police action in any way prompted or accelerated

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found. The officers knew, based on surveillance, that no one was in the apartment to destroy the evidence and thus the state had failed to prove that the evidence was in any danger of destruction.

[107] As stated above, it is possible that the two phrases may overlap so that a warrantless search would be justified when evidence is *threatened* with *imminent destruction*. *See* text accompanying note 45 *supra*.

[108] 474 F.2d 262 (3rd Cir.), *cert. denied*, 414 U.S. 833 (1973). *See also* notes 72–77 and accompanying text *supra*.

[109] *Id.* at 268.

[110] Project on Law Enforcement Policy and Rulemaking, Model Rules for Law Enforcement—Warrantless Searches of Persons and Places (Approved Draft, 1974).

[111] *Id.* at 40.

[112] *Id.* at 10.

efforts to destroy the evidence. Such misconduct may be least likely to create "exigent circumstances" where evidence is certain to be destroyed by nature; it may be somewhat more likely where police actually witness the efforts to destroy the evidence or where police think the evidence might be destroyed by the suspect or third parties.

Unless the Supreme Court adopts clear standards to guide law enforcement officials, probable cause and the decision to enter a residence may be determined in increasing numbers of cases by a police officer and not by the detached magistrate as mandated by the fourth amendment. The Court could strike a reasonable balance between law enforcement concerns and the fourth amendment safeguards if it permitted warrantless entries and searches of residences only where the evidence is "*threatened* with *imminent destruction,*" where the guidelines set forth in *Rubin* are met, and where police establish that their conduct did not create or add to the emergency which resulted in the entry. Further, the Supreme Court must emphasize the importance of scrutinizing police conduct in each warrantless entry. Absent strict and clear guidelines, especially where police are not certain that the evidence will be destroyed, the destruction of evidence exception could swallow the fourth amendment.

B. LIMITATIONS ON THE SCOPE AND DURATION OF THE WARRANTLESS ENTRIES

Rule 502 of the Project on Law Enforcement Policy and Rulemaking would limit the duration and scope of warrantless searches by permitting a search "only to the extent necessary to recover the endangered seizable items [and for no longer than twenty minutes]."[113] Decisions which have upheld warrantless entries have similarly shown a clear preference for limiting officer's freedom to search until a warrant has been obtained. These decisions permit a limited search to secure the premises and to seize criminal evidence only if it is in plain view.[114] Obviously, once the officers have made a warrantless entry and alerted the occupants, it may not be feasible for all officers to leave to get a warrant, and thereby give the occupants the opportunity to destroy the evidence. If all of the occupants are arrested and officers have insured that no one else is inside, then arguably *Chimel v. California,*[115] which permits a warrantless search incident to a valid arrest in the area immediately within the defendant's reach, would require that officers obtain a warrant before conducting a full search of the premises.[116] If the defendants are arrested and removed from the premises, then the premises can be guarded to prevent confederates or others from entering and destroying the evidence.

A more difficult situation arises, however, when police do not arrest any or all of the occupants but nevertheless make a valid warrantless entry. If the officers leave to obtain a warrant, it may be reasonable to believe that the evidence will be destroyed. If one officer leaves to obtain a warrant and others remain to keep the premises secure and to watch the occupants, then the occupants are being detained without being subject to arrest. Thus far, no decision has considered the scope of a search when none or not all of the residents are arrested following a warrantless entry. Possibly, the unarrested individuals should be given the option to leave the premises since the primary focus is on preventing the destruction of evidence. However, given the circumstances that prompted the warrantless entry, police should be able to maintain control over the premises to ensure that the evi-

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[113] *Id.*

[114] *See* United States v. Curran, 498 F.2d 30 (9th Cir. 1974), where a motion to suppress was granted for marijuana found in a closed cupboard and a tire, but was denied for marijuana found in plain view on a table during the time officers were securing the premises and accounting for all the occupants. The marijuana in the cupboard was not discovered until after all the occupants had been arrested and the house had been secured. Therefore, the Ninth Circuit concluded that the search had not followed the limitations imposed by Chimel v. California, 395 U.S. 752 (1969), when searches incident to arrest are involved. *See also* United States v. Delguyd, 542 F.2d 346 (6th Cir. 1976) and which justified entries to arrest and secure the premises to the extent necessary to prevent the destruction nor removal of evidence.

[115] 395 U.S. 752 (1969). *See also* note 5 and accompanying test *supra.*

[116] *See* People v. Freeny, 37 Cal. App. 3d 20, 112 Cal. Rptr. 33 (1974), where the defendant's wife was arrested in their residence following a warrantless entry by police to prevent the destruction of narcotics contained therein. There, the defendant's wife's arrest occurred at 5 p.m. and she remained detained for more than seven hours before a search warrant was obtained. Although officers had offered to take her to the station and book her in the interim she chose to remain in the home until the search warrant arrived. In commenting on the time it took to obtain a search warrant, the court observed:

> A fair reading of the majority opinion in *Chimel* is that the search must be deferred until the warrant is obtained, but that in the interim between arrest and execution of the warrant the police may do what is reasonable to prevent the destruction of evidence of the crime.

Id., 112 Cal. Rptr. at 43.

dence is not destroyed. Thus, police should be able to secure the premises and seize evidence in plain view. In addition, the *Chimel* doctrine should be applied to limit the scope of the valid warrantless search until a warrant is obtained, even though that may take several hours.[117] By limiting the scope of the search until a warrant is obtained in those situations where none or not all of the occupants can be arrested, a balance is struck between individual rights and the state's interest in preserving the evidence of a crime.

IV. Conclusion

Warrantless entries into residences to prevent the destruction of criminal evidence are being permitted in increasing numbers of cases under a newly emerging exception to the warrant requirement of the fourth amendment. Such entries should be considered valid if officers actually witness evidence being destroyed or if the evidence is "threatened with imminent destruction" by nature, the defendant, or third parties—but only where the guidelines set forth in *Rubin* have been met and where trial courts, after critical examination of police conduct, conclude that police did not create or add to the emergency which resulted in the entry. Once a valid warrantless entry is effected, equally careful consideration must be given to the scope and duration of the warrantless search. Project Rule 502 strikes a reasonable balance of conflicting interests by limiting the warrantless search to the extent necessary to recover the evidence, and for no longer than twenty minutes. Moreover, *Chimel v. California* should be applied to limit the scope of the search until a warrant is obtained.

The United States Supreme Court has not yet established clear, workable guidelines to govern residential searches which are conducted without a warrant in order to prevent the destruction of evidence. However, the Court's dicta has been used by lower courts as the basis for approving these searches in a broad range of cases. Thus, absent strict guidelines, the propriety of entering a residence will increasingly be determined by a police officer in the heat of an investigation, and not by a neutral and detached magistrate. If that situation results, the destruction of evidence exception could swallow the general rule that searches and seizures are "reasonable" under the fourth amendment only if previously authorized by a neutral and detached magistrate.

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[117] *See* note 59 and accompanying test *supra.*