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PEOPLE v. EICHELBERGER:*

POLICE-CREATED PROBABLE CAUSE AS AN EXIGENT CIRCUMSTANCE

The United States Supreme Court has proscribed warrantless nonconsensual arrest in a suspect's home absent exigent circumstances.[1] In *People v. Eichelberger*,[2] the Illinois Supreme Court considered whether the warrantless arrest of the defendant in his hotel room fell under the exigency exception because the offense was committed in the arresting officer's presence. The *Eichelberger* court liberally construed the exigency requirement by equating probable cause[3] with exigency,[4] and held the arrest valid.[5]

An informant, Michael Flavin, told Paxton, Illinois police officers that James Eichelberger was selling drugs from his room in a local hotel.[6] The officers decided to investigate, and Flavin

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* 91 Ill. 2d 359, 438 N.E.2d 140, *cert. denied*, — U.S. —, 103 S. Ct. 383 (1982).

1. Payton v. New York, 445 U.S. 573 (1980).

2. 91 Ill. 2d 359, 438 N.E.2d 140 (1982).

3. Probable cause exists where the facts and circumstances would warrant a person of reasonable caution to believe that an offense was or is being committed. Commonwealth v. Stewart, 358 Mass. 747, 267 N.E.2d 213 (1971). Illinois courts have consistently stated that, for purposes of arrest, "probable cause" and "reasonable grounds" are synonymous. *See, e.g.*, People v. Davis, 98 Ill. App. 3d 461, 464, 424 N.E.2d 630, 634 (1981); People v. Walls, 87 Ill. App. 3d 256, 262-63, 408 N.E.2d 1056, 1062 (1980); People v. Nolan, 59 Ill. App. 3d 177, 185, 375 N.E.2d 445, 452 (1978); People v. Denwiddie, 50 Ill. App. 3d 184, 189, 365 N.E.2d 978, 982 (1977).

4. Exigency has been broadly defined as an "emergency or dangerous situation." Payton v. New York, 445 U.S. 573, 583 (1980). *Accord* Warden v. Hayden, 387 U.S. 294 (1967) ("hot pursuit" of a suspect); State v. Anonymous, 34 Conn. Supp. 531, 375 A.2d 417 (1977) (officers must act quickly to prevent a suspect from fleeing); State v. Lloyd, 61 Hawaii 505, 606 P.2d 913 (1980) (authorities trying to capture a suspect who is armed or dangerous); State v. Rauch, 99 Idaho 586, 586 P.2d 671 (1978) (compelling need for immediate police response); State v. Trujillo, 95 N.M. 535, 624 P.2d 44 (1981) (need to act in order to prevent the destruction of evidence).

5. People v. Eichelberger, 91 Ill. 2d 359, 370-71, 438 N.E.2d 140, 145 (1982).

6. A warrant may be issued on the basis of a tip given by an informant if there is sufficient evidence to conclude that the informant's source of knowledge is reliable and that the informant himself is telling the truth. People v. Smith, 101 Ill. App. 3d 772, 775, 428 N.E.2d 641, 643 (1981). At trial, Eichelberger argued that the police should have obtained a warrant before arresting him because they had information about Eichelberger's suspected illegal activities more than 24 hours prior to the arrest. The trial court dismissed this argument, stating that it was "obvious" that there were no

agreed to assist them by staging a "controlled buy."[7] At a prearranged time, the police were to listen at the wall to Eichelberger's room[8] while Flavin led him into the sale. The investigation proceeded as planned, except that the officers' observation was facilitated because Eichelberger had left the door to his room slightly ajar.[9] When the conversation between Eichelberger and Flavin led the officers to believe that the sale was occurring, they entered the room and placed Eichelberger under arrest.[10] The trial court denied Eichelberger's motion to sup-

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grounds to obtain a warrant prior to the arrest. This unexplained conclusion was not an issue on appeal. People v. Eichelberger, 91 Ill. 2d 359, 364, 438 N.E.2d 140, 142 (1982).

7. Narcotics cases present peculiar problems for law enforcement agents. Drug-law violations usually involve secret transactions with willing participants, making detection difficult unless agents induce a sale. A tip from an informer may furnish the requisite probable cause upon which a warrant will be granted, but in most cases, if the officers then make a search, they will only be able to charge the defendant with possession; they will not be able to charge him with an illegal sale.

Staging a "controlled buy" is a common and generally accepted practice in this area. Although this type of police activity may raise the question of entrapment, the courts have generally upheld its validity. To successfully plead entrapment, the defendant must show that the intent to commit the crime originated with the officers and that, in the absence of this inducement, the crime would not have occurred. *See* United States v. Russel, 411 U.S. 423, 432 (1973). *See generally* H. LEVINE, LEGAL DIMENSIONS OF DRUG ABUSE IN THE UNITED STATES Ch. VI (1974) (enforcement of drug laws is complicated by invocation of the exclusionary rule after a defendant successfully pleads entrapment); Note, *Entrapment*, 73 HARV. L. REV. 1333 (1960); Annot., 62 A.L.R. 3d 110 (1975).

8. The Paxton police officers had the hotel owner's permission to use the room adjacent to the defendant's for surveillance purposes. Petition for Leave to Appeal at 6, People v. Eichelberger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982).

9. There was conflicting testimony as to how far the door had been left open. *Compare* Brief for Defendant-Appellee at 5, 13, People v. Eichelberger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982) ("door was only cracked open") *with* Petition for Leave to Appeal at 7, People v. Eichelbrger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982) (one officer visually observed the sale through the opening). In view of the court's finding, a resolution of this issue was unnecessary. *See infra* text accompanying notes 15-23.

10. The arresting officer testified that he overheard conversation about "grams" and "coke" which he knew from experience to be references to opium and cocaine, respectively. People v. Eichelberger, 91 Ill. 2d 359, 363-64, 438 N.E.2d 140, 142 (1982). The particular experience of an officer is admissible to show that probable cause had been established. United States v. Ortiz, 422 U.S. 891, 897 (1975) (experienced border agent detected smuggling); Johnson v. United States, 333 U.S. 10, 13 (1948) (officers on narcotics duty familiar with the odor of burning opium); People v. Handy, 44 Ill. App. 3d 835, 838, 358 N.E.2d 1230, 1232 (1976) (officer's experience in gambling unit led him to believe that suspect's collection of envelopes was part of a policy operation). "What constitutes 'probable cause' for searches and seizures must be determined from the standpoint of the officer, with his skills and knowledge, rather than from the standpoint of an average citizen under

press evidence obtained during the arrest[11] and convicted him of possession of a controlled substance.[12] The Illinois Appellate Court reversed and remanded, holding that the evidence should have been suppressed because it had been confiscated during a warrantless arrest which was not justified by exigent circumstances.[13]

The Illinois Supreme Court, in an opinion by Chief Justice Ryan, reversed the appellate court and held the arrest valid.[14] The court determined as a preliminary matter that Eichelberger had not waived his fourth amendment rights[15] by his status as a

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similar circumstances." People v. Symmonds, 18 Ill. App. 3d 587, 597, 310 N.E.2d 208, 215 (1974).

The officers in *Eichelberger* did not "knock and announce" their purpose as is generally required in search and seizure cases. People v. Eichelberger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982). *See* Miller v. United States, 357 U.S. 301, 308 (1958) (knock-and-announce rule applies to search and seizure cases). *But see* Ker v. California, 374 U.S. 23 (1963) (exception to requirement of compliance with the "knock and announce" rule). Although a "knock and announce" issue seems to be presented by the facts of *Eichelberger*, it was not discussed by the courts which ruled upon the case. For a discussion of the rule and its constitutional implications, see Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. PA. L. REV. 499 (1964).

11. The exclusionary rule was formulated as a remedy for violation of the fourth amendment proscription against unreasonable searches and seizures. Weeks v. United States, 232 U.S. 383 (1914). Under the exclusionary rule, evidence confiscated during an unreasonable search or seizure may not be introduced at trial as part of the prosecution's case-in-chief. *See* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621. Eichelberger argued that the contraband brought forward at his trial should have been suppressed because it had been obtained pursuant to a warrantless arrest allegedly violative of his fourth amendment rights. Brief for Appellee at 4, People v. Eichelberger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982).

12. Defendant was sentenced to eighteen months imprisonment pursuant to ILL. REV. STAT. ch. 56½, § 1402(b) (1979). 91 Ill. 2d 359, 362, 438 N.E.2d 140, 141.

13. People v. Eichelberger, 92 Ill. App. 3d 1199, 423 N.E.2d 995 (1981). The disposition of the case was ordered under Illinois Supreme Court Rule 23, which allows appellate courts to summarily rule on cases which have little precedential value. ILL. REV. STAT. ch. 110A, § 23 (1979). The appellate court opinion is not published, but is reproduced in the appendix to the Petition for Leave to Appeal, People v. Eichelberger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982).

14. 91 Ill. 2d at 362, 438 N.E.2d at 141.

15. Generally, one may waive any constitutional privilege or right as long as it inheres to the individual and is intended for his sole benefit, but the waiver must be voluntary. Singer v. United States, 380 U.S. 24, 34-35 (1964) (examples of permissible waiver of constitutional right). However, " 'the courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)). *See also* People v. Saponara, 94 Misc. 2d 936, 937, 405 N.Y.S.2d 895, 896 (1978); 15 AM. JUR. 2D *Constitutional Law* § 205 (1979).

hotel guest or by reason of the open door.[16] The court stated that, as a matter of Illinois law, an occupant of a hotel room is entitled to the same expectation of privacy and concomitant fourth amendment protection as a resident in a private home.[17] His expectation may be diminished, however, due to the nature of multiple occupancy dwellings.[18] Because common areas of the building may be accessible to the public, a resident cannot expect his right of privacy to include what may be perceived from those areas.[19] The court held that although Eichelberger's fourth amendment expectation of privacy was reduced because he was residing in a hotel and his door was ajar, it was not waived.[20] The court found that Eichelberger was also protected from warrantless entries to arrest unless the circumstances

16. In Katz v. United States, 389 U.S. 347 (1967), involving an allegedly unconstitutional search by governmental eavesdropping, it was held that it is the expectation of privacy, and not the place, which is determinative in search and seizure cases. *Id.* at 353. Whether one may claim fourth amendment protection depends on whether he exhibits an expectation of privacy and whether that expectation is one which society will recognize as reasonable. *Id.* at 361 (Harlan, J., concurring). In *Eichelberger*, the state appealed the court's ruling that Eichelberger maintained a reasonable and recognizable expectation of privacy, contending that he had "converted his room into a commercial center to which outsiders were implicitly invited to view him and others transacting unlawful business." Petition for Leave to Appeal, at 17, People v. Eichelberger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982). The prosecution argued that Eichelberger had thereby "dispensed" with his expectation of privacy and so lost his fourth-amendment *Payton* protection. *Id.* at 20.

17. 91 Ill. 2d at 364-65, 438 N.E.2d at 142. *See also* People v. Bankhead, 27 Ill. 2d 18, 187 N.E.2d 705 (1963).

18. *See, e.g.*, People v. Blount, 101 Ill. App. 3d 443, 428 N.E.2d 621 (1981) (guest in hotel corridor is not protected as he would be in a private dwelling). *See also* W. LAFAVE, SEARCH AND SEIZURE § 2.3, at 306-13 (1978).

19. *See* People v. Wright, 41 Ill. 2d 170, 242 N.E.2d 180 (1968) (police standing on C.T.A. right-of-way saw defendant gambling in his house) *cert. denied*, 395 U.S. 933 (1969). *Accord* Commonwealth v. Busfield, 242 Pa. Super. 194, 363 A.2d 1227 (1976) (officer obtained neighbor's permission to use his window to look into defendant's home). *But cf.* Pate v. Municipal Court, 11 Cal. App. 3d 721, 89 Cal. Rptr. 893 (1970) (violation of fourth amendment when police positioned themselves where neighbors or the general public would not ordinarily be); Cohen v. Superior Court, 5 Cal. App. 3d 429, 85 Cal. Rptr. 354 (1970) (remanding the case, the court indicated that the search would be unconstitutional where police observed suspect's activities from fire escape, which was not used unless there was an emergency).

20. People v. Eichelberger, 91 Ill. 2d 359, 365-66, 438 N.E.2d 140, 143 (1982). Eichelberger may not have reasonably maintained an expectation to be free from observation, but he retained a right to be free from entry and arrest. The court stated that "[w]hile defendant's 'cracked open' hotel room door may have facilitated the overhearing of activities carried on within the room by those outside, that fact by itself was in no way an invitation to or a justification for a warrantless entry." *Id.* at 366, 438 N.E.2d at 143. The court distinguished People v. Wright, 41 Ill. 2d 170, 242 N.E.2d 180 (1968), *cert. denied*, 395 U.S. 933 (1969), and other cases which the state cited in its brief because they dealt with objections to observation—not warrantless entry. The court noted that observation is a lesser intrusion upon one's privacy interest than

were exigent.[21] The court concluded that the exigency requirement was fulfilled because the officers witnessed the offense[22]—a circumstance which demanded prompt police action.[23]

Because the court found that Eichelberger had not forfeited his fourth amendment rights, the key issue was whether the warrantless entry and arrest were constitutional.[24] *Payton v. New York*,[25] a United States Supreme Court decision which dealt with the permissibility of warrantless home arrests, was recognized as controlling.[26] In *Payton*, the Court held that the fourth amendment to the Constitution prohibits warrantless nonconsensual[27] entry into a suspect's home to make a routine felony arrest absent exigent circumstances.[28] The Court, however, did not define what circumstances might be exigent,[29] leaving that determination to the lower courts.

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physical entry, and therefore objections to an observation are more easily dismissed. 91 Ill. 2d at 365-66, 438 N.E.2d at 143.

21. *Id.* at 366, 438 N.E.2d at 143.

22. Before the *Payton* decision, Illinois law allowed warrantless entries and arrests upon a showing of probable cause in controlled-buy narcotics cases. *See, e.g.*, People v. Marquis, 24 Ill. App. 3d 653, 321 N.E.2d 480 (1974) (after sale, undercover agent followed defendant into his residence); People v. Keelen, 130 Ill. App. 2d 52, 264 N.E.2d 753 (1970) (after receiving evidence from informant, police arrested defendant in his girlfriend's apartment); People v. Scott, 110 Ill. App. 2d 368, 249 N.E.2d 220 (1969) (officers entered and arrested defendant after informant had obtained heroin from him). *Eichelberger* was the first post-*Payton* case to rule upon the issue of whether a warrantless home arrest is permissible in controlled-buy cases. The court held that Eichelberger's arrest was valid, thereby indicating that warrantless home arrests would be upheld in spite of the exigency requirement set out in *Payton*. *See infra* text accompanying notes 63-65.

23. 91 Ill. 2d at 369, 438 N.E.2d at 145.

24. *Id.* at 365-66, 438 N.E.2d at 143.

25. 445 U.S. 573 (1980).

26. 91 Ill. 2d at 366, 438 N.E.2d at 143. Before *Payton*, it was unclear whether an officer could make a warrantless home arrest on probable cause alone. The states were divided on the issue, with growing numbers of them requiring exigent circumstances in addition to probable cause. Payton v. New York, 445 U.S. 573, 575 nn.2-4, 598-99 nn.46-48 (1980).

27. The vast majority of cases hold the warrant requirement inapposite in consent contexts. *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974) (consent may be given not only by the party to be arrested, but also by a third party of sufficient relationship); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (dicta suggesting that evidence would clearly be admissible if obtained pursuant to owner's consent). *See also* Gardener, *Consent as a Bar to Fourth Amendment Scope—A Critique of a Common Theory*, 71 J. CRIM. L. 443 (1980).

28. Payton v. New York, 445 U.S. 573 (1980).

29. *Id.* at 583. *Payton* was a consolidation of two New York cases presenting similar questions of law. In both cases, the prosecution relied solely on the officers' statutory authority to make the arrests and therefore did not try to justify the arrests as being made under exigent circumstances. Thus, what might be viewed as exigent and sufficient to justify a warrantless home arrest was not a question before the Court.

In *People v. Abney*,[30] the Illinois Supreme Court set forth several factors to be considered in determining whether exigent circumstances exist.[31] These factors include whether prompt action was necessary,[32] whether there was any delay during which a warrant might have been obtained,[33] whether the crime was violent,[34] whether the arrest was made peaceably,[35] and whether there was a clear showing of probable cause.[36] The *Eichelberger* court discussed the factors enumerated in *Abney*, but did not expressly apply them. Instead, the majority opinion distinguished the facts of the *Eichelberger* case from those in *Payton* and *Abney*;[37] in *Eichelberger*, the offense was committed in the presence of the officers,[38] while in both *Payton* and *Abney* the crime had been committed prior to the time of arrest.[39] The court based its opinion on this distinction.

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30. 81 Ill. 2d 159, 407 N.E.2d 543 (1980).

31. *Id.* at 169-73, 407 N.E.2d at 547-49. These guidelines appear to be derived from the leading pre-*Payton* case, Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), which required exigency in addition to probable cause to justify a warrantless home arrest.

32. Situations requiring a prompt police response include "hot pursuit" cases. *See, e.g.*, United States v. Santana, 427 U.S. 38, 43 (1976) (officials entered defendant's home when they saw her run back inside); Warden v. Hayden, 387 U.S. 294 (1966) (police entered residence a few minutes after receiving information that a suspected armed robber had just entered).

33. *Cf.* Dorman v. United States, 435 F.2d 385, 394-95 (D.C. Cir. 1970) (lengthy discussion of the fact that officers had tried unsuccessfully to obtain a warrant, supporting the position that the warrantless arrest was reasonable).

34. A situation involving an armed or violent felon is regarded as a grave threat to the community. In such cases, a court may dispense with the warrant requirement. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1966) (armed robbery); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (violent robbery). *Cf.* Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949) (no need to proceed without a warrant where a gambling offense is involved).

35. Although forcible entry may be justified under some circumstances, *see, e.g.*, Ker v. California, 374 U.S. 23, 38 (1963), it is generally evidence of the unreasonableness of the warrantless arrest. State v. McNeal, 251 S.E.2d 484, 488-89 (W.Va. 1979) (arrest unreasonable where police kicked the door down).

36. A clear showing of probable cause would include strong reason to believe that the suspect is on the premises and justification for the belief that the suspect is actually the criminal sought. People v. Abney, 81 Ill. 3d 159, 171-72, 407 N.E.2d 543, 549 (1980). *See generally* Donnino & Gierese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 ALB. L. REV. 90 (1980).

37. *See infra* text accompanying note 62.

38. The officers "observed" the offense by hearing the alleged drug sale in progress. 91 Ill. 2d at 368-69, 438 N.E.2d at 144-45.

39. In *Abney*, police went to defendant's residence after filling out a report and interviewing the victim at the hospital. People v. Abney, 81 Ill. 2d 159, 162, 407 N.E.2d 543, 544 (1980). *Payton* was a consolidation of two appeals. Payton v. New York, 445 U.S. 573 (1980). In one case, Payton's home was entered without a warrant two days after the occurrence of a homicide in which he was a suspect. *Id.* at 576-77. In Riddick v. New York, the com-

The *Eichelberger* court noted that, in Illinois, an officer is authorized to make a warrantless arrest when he reasonably believes that a crime is being committed in his presence.[40] It is not necessary that the belief be the result of direct visual observation; it may be based on evidence perceived by any of the senses.[41] The court concluded that "[t]he fact that the officers reasonably believed that a felony was being committed in their presence demanded prompt police action and constituted an exigent circumstance which justified the warrantless entry into the hotel room and the arrest."[42] The court went on to state that each case must be decided on its own facts, using a reasonableness standard,[43] but that an arrest made while a crime is being committed in the officers' presence conforms to the fourth amendment standard of reasonableness, and is, therefore, constitutional.[44]

Eichelberger was a four-to-three decision. The dissenters, in an opinion written by Justice Clark, objected to the majority's conclusion[45] that the mere observation of the narcotics sale alone was a factor which created sufficient exigency to justify a warrantless home arrest.[46] The dissent noted that the Court in *Payton* was "unequivocal in asserting that reasonable belief or probable cause is not enough to justify a warrantless entry,"[47] yet the majority found that the reasonable belief of the Paxton

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panion case, the defendant was arrested three years after the armed robbery he allegedly committed. *Id.* at 578-79.

40. People v. Eichelberger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982). Such conduct is authorized by statute in Illinois. ILL. REV. STAT. ch. 38, § 107-2(c) (1979). *Accord* People v. Phillips, 30 Ill. 2d 158, 160, 195 N.E.2d 717, 718-19 (1964) (warrantless arrest upheld where officers observed needle and syringe in the house when defendant opened the door); People v. Peak, 29 Ill. 2d 343, 347, 194 N.E.2d 322, 325 (1963) (arrest valid when officers saw defendant pick up a packet which they were told contained illegal narcotics).

41. *See* People v. Bradley, 152 Cal. App. 2d 527, 532-33, 314 P.2d 108, 111 (1957); Romans v. State, 178 Md. 588, 599, 16 A.2d 642, 647 (1940), *cert. denied*, 312 U.S. 695 (1940); Mathews v. State, 67 Okla. Crim. 203, 211, 93 P.2d 549, 553 (1939). *See also* 5 AM. JUR. 2D *Arrests* § 31, at 721-22 (1962) (collection of cases from various jurisdictions stating that evidence perceived by any of the five senses may be sufficient to supply the requisite probable cause).

42. People v. Eichelberger, 91 Ill. 2d 359, 369, 438 N.E.2d 140, 145 (1982).

43. *Id.* at 371, 438 N.E.2d at 145.

44. *Id.* at 370, 438 N.E.2d at 145.

45. The dissent agreed with the majority that the defendant had retained a reasonable expectation of privacy even though he was a hotel guest and had his door "cracked open," and that *Payton* was controlling. *Id.* at 371-72, 438 N.E.2d at 145-46 (Clark, J., dissenting).

46. The dissent reasoned that "law enforcement officials cannot set up a controlled buy of drugs and then attempt to justify an unannounced warrantless entry into a private hotel room by asserting that because the drug sale was in their presence it constituted an exigent circumstance." *Id.* at 374, 438 N.E.2d at 147 (Clark, J., dissenting).

47. *Id.* at 373, 438 N.E.2d at 146 (Clark, J., dissenting).

officers created exigent circumstances in and of itself. The dissent rejected that conclusion as inconsistent with the *Payton* decision.[48]

Analysis of *Eichelberger* indicates that the majority employed circular reasoning in reaching its conclusion. The court was correct in its initial determination that Eichelberger had a reasonable expectation of privacy[49] and that *Payton* was controlling.[50] *Payton* evinced a pervasive concern with protecting an individual's right to privacy. The Court stated that "[t]he physical entry of the home is the chief evil against which the wording of the [f]ourth [a]mendment is directed."[51] The warrant clause was inserted in the Constitution to protect the sanctity of the home.[52] The requirement that a warrant be issued by an objective magistrate before a home arrest insures that one's fourth amendment rights will not be abridged at the discretion of police officers.[53] The clause aims to balance the competing interests of the individual in being free from unreasonable searches and seizures and that of society in being free from criminal activity.[54]

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48. "[T]he majority misses the point of *Payton* in allowing the extent of fourth amendment protections to turn on the reasonable beliefs of law enforcement officials." *Id.* at 374, 438 N.E.2d at 147 (Clark, J., dissenting).

49. *See supra* notes 17-20 and accompanying text.

50. People v. Eichelberger, 91 Ill. 2d 359, 366, 438 N.E.2d 140, 143 (1982).

51. Payton v. New York, 445 U.S. 573, 585-86 (1980) (warrantless home arrests are presumptively unreasonable). *Accord* Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable").

52. *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-78 (1937).

53. *See, e.g.*, Stanford v. Texas, 379 U.S. 476, 481-82 (1965); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949); Johnson v. United States, 333 U.S. 10, 13-14 (1948); Boyd v. United States, 116 U.S. 616, 625 (1886).

54. The United States Supreme Court has repeatedly acknowledged the need to weigh the valid interest of society in being free from criminal activity with an individual's interest in privacy and freedom from unreasonable searches and seizures. The Court has, however, recognized the individual's interest as overriding in most cases. *See, e.g.*, United States v. United States District Court, 407 U.S. 297, 315-17 (1972). In a case involving domestic security surveillance, the Court's task was "to examine and balance the basic values at stake . . .: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy. . . ." *Id.* at 314-15. *See also* Miller v. United States, 357 U.S. 301, 313 (1958) (although unauthorized police action may be directed at achieving law and order, if traditional procedural requirements are not complied with, such action is unconstitutional); Johnson v. United States, 333 U.S. 10, 14-15 (1948) (in rare instances "on balancing the need for effective law enforcement against the right of privacy," the warrant requirement may be disregarded). In United States v. Watson, 423 U.S. 411 (1976), the Court upheld warrantless public arrest as constitutional on the grounds that such practice was accepted at common law and that there was evidence of a congressional determination that these arrests were valid. Inherent in the *Watson* Court's reasoning was the determination that although the suspect's

The Supreme Court recognized that under certain circumstances it might be impracticable to obtain a warrant.[55] This is the exception to the rule, however, and *Payton* sought to limit its impact by requiring "exigent circumstances" before dispensing with the warrant requirement. Although *Payton* never addressed the issue of what circumstances are exigent,[56] it did equate the word exigency with an "emergency or dangerous situation."[57] The individual states were left the task of filling in the particulars encompassed by this broad definition.

In *People v. Abney*,[58] the Illinois Supreme Court harmonized the *Payton* decision with existing state law. The constitutionality of the Illinois statute conferring power upon police officers to make warrantless home arrests, without expressly requiring exigent circumstances, became questionable as a result of *Payton*.[59] The *Abney* court upheld the law as constitutional, reasoning that the exigency requirement had been "judicially engrafted" upon the statute.[60] By its own detailed analysis of the *Abney* case and enumeration of relevant factors,[61] the *Ab-*

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rights may be somewhat impaired by the warrantless public arrest, that impairment is outweighed by the strong interest of the state in effective apprehension of criminals. *Id.* at 431 (Powell, J., concurring). The *Payton* court found these arguments inapposite; in the case of warrantless home arrests, the balance was tipped in the other direction. Payton v. New York, 445 U.S. 573, 587-88 (1980). The *Payton* Court found that it is doubtful that warrantless entries to arrest were accepted at common law. *Id.* at 598. The Court also found that there was no unanimity among the states on this point and no indication of a congressional determination that warrantless home arrests are reasonable. *Id.* at 598-601.

55. Payton v. New York, 445 U.S. 573, 583 (1980).

56. *See supra* note 29 and accompanying text.

57. Payton v. New York, 445 U.S. 573, 583 (1980). *See also* Donnino & Girese, *supra* note 36, at 91-99 (catalogues previous Supreme Court cases permitting search and seizure due to exigency which required that course of action).

58. 81 Ill. 2d 159, 407 N.E.2d 543 (1980). *See* Note, *Search and Seizure—Home Arrest—Where Offense Occurs One and a Half Hours Before Entry, Police do not Deliberately Delay and Suspect is Armed, Exigent Circumstances Render Warrantless Police Entry Constitutional*, 1981 So. Ill. U.L.J. 313.

59. In *Payton*, the Court denounced a New York statute, New York Crim. Proc. Law § 140.15(4) (McKinney 1971) (similar to the Illinois statute, Ill. Rev. Stat. ch. 38, §§ 107-1—107-14 (1977)), as unconstitutional because it authorized warrantless home arrests, by force if necessary, without exigent circumstances. Payton v. New York, 445 U.S. 573, 576, 599 (1980).

60. 81 Ill. 2d at 167-68, 407 N.E.2d at 546-47.

61. The factors singled out as exigent circumstances in *Abney* were: 1) the need for prompt action; 2) the absence of any deliberate or unjustified delay by the officers during which time a warrant could have been obtained, and 3) the belief that the suspect was armed and exhibited some sign of a violent character. In addition, other factors were identified which suggested that the officers had acted reasonably . . .[:] 1) the officers were acting on a clear showing of probable cause based on reasonably trustworthy information, 2) the defendant was clearly

ney court also clarified the issue of what circumstances might be considered exigent in Illinois.

The *Eichelberger* court cited both *Payton* and *Abney* as controlling, but never discussed the facts of the case at bar in terms of the aims or considerations embodied in those cases. Instead, Justice Ryan stated that "[t]he case now before us is factually different from *Payton* and *Abney*. In those cases, the crime had been committed sometime prior to the arrest. In our case a crime was being committed in the presence of the officers who made the arrest in response thereto."[62] Concluding that *Payton* and *Abney* were factually different from *Eichelberger*, the court expanded the exigency exception by holding that the probable cause derived from the observation of the offense[63] created an exigency which justified the warrantless arrest.[64] However, the court failed to explain adequately why such observation alone would be the equivalent of exigency.[65]

Prior to the decision in *Eichelberger*, Illinois appellate courts, following the authority of *Payton* and *Abney*, had come to the conclusion that the commission of a crime in an officer's presence did not automatically create an exigent circumstance. In *People v. Pakula*,[66] an appellate court considered whether the direct observation of a crime justified warrantless entry and arrest under the "plain view" exception.[67] In *Pakula*, the state argued that since the officers could see marijuana growing in the

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identified, 3) there was strong reason to believe that the defendant was present on the premises, and 4) the entry was peaceful.

People v. Eichelberger, 91 Ill. 2d 359, 367-68, 438 N.E.2d 140, 144 (1982) (paraphrasing People v. Abney, 81 Ill. 2d 159, 407 N.E.2d 543 (1980)) (citations omitted).

62. 91 Ill. 2d at 368, 438 N.E.2d at 144.

63. When an officer witnesses a crime in progress, probable cause requirements are necessarily met. *See supra* note 3.

64. People v. Eichelberger, 91 Ill. 2d 359, 369, 438 N.E.2d 140, 145 (1982).

65. In support of its position, the court cited the Illinois statute conferring power upon officers to make arrests. ILL. REV. STAT. ch. 38, ¶ 107-2(c) (1979). The court also cited as support Annot., 76 A.L.R.2D 1432 (1961). This article, dealing with a police officer's power to enter a private house or enclosure to make an arrest without a warrant for a suspected misdemeanor, predates *Payton* by twenty years. In light of *Payton*, it is doubtful whether the cases cited in the annotation are still good law. Finally, the court cited two Illinois cases, People v. Phillips, 30 Ill. 2d 158, 195 N.E.2d 717 (1964), and People v. Peak, 29 Ill. 2d 343, 194 N.E.2d 322 (1963). Both of these cases also predate *Payton*.

66. 89 Ill. App. 3d 789, 411 N.E.2d 1385 (1980).

67. This exception is generally applied when an officer is effecting a valid arrest and goes beyond his authority by seizing objects found in a suspect's residence. If such objects were in plain view or within the suspect's control when seized, the courts will dispense with the warrant requirement. *See, e.g.*, Chimel v. California, 395 U.S. 752, 768 (1969); Ker v. California, 374 U.S. 23, 42-43 (1963); Marron v. United States, 275 U.S. 192, 199 (1927); Agnello v. United States, 269 U.S. 20, 30 (1925) (dicta). *Cf.* Hester v. United

defendant's yard from their vantage point on the street, an offense was being committed in their presence, and, therefore, the warrantless arrest was valid.[68] The court rejected this theory, holding that "plain view" alone did not create exigency.[69]

People v. Wilson[70] illustrates the same point[71] and raises the related issue of purposeful police circumvention of the warrant requirement.[72] In *Wilson*, the police covertly looked into defendant's hotel room and maintained that the observed activity provided an exigency which justified the warrantless entry.[73] The court noted that whatever exigency was present was the wholly forseeable consequence of police behavior.[74] The *Wilson* court stated, "[t]o approve the consequences of such an arrest would

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States, 265 U.S. 57 (1924) (justifiable confiscation of evidence found in "open fields").

68. People v. Pakula, 89 Ill. App. 3d 789, 792, 411 N.E.2d 1385, 1385-88 (1980). *See generally* LAFAVE, *supra* note 18, at 589.

69. 89 Ill. App. 3d at 794, 411 N.E.2d at 1389-90.

70. 86 Ill. App. 3d 637, 408 N.E.2d 988 (1980).

71. The *Wilson* court held the arrest invalid in spite of the officers' direct observation of the crime in progress. *Id.* at 643, 408 N.E.2d at 992-93.

72. In 1976, Justices Marshall and Brennan discussed the issue in their dissenting opinion in United States v. Santana, 427 U.S. 38 (1976). In *Santana*, after undercover agents had set up a controlled buy, they returned to the scene of the buy without a warrant and attempted to arrest the defendant. When the defendant realized that she was about to be arrested, she ran into her house. The majority held that, under the exigencies presented by this situation, the warrantless entry to arrest was justified. *Id.* at 43. The dissent maintained that consideration of whether "the exigency presented in [the] case was produced solely by police conduct" and whether this "police conduct was justifiable or was solely an attempt to circumvent the warrant requirement" was necessary. *Id.* at 45 (Marshall, J., dissenting). The dissenters found that "[t]he exigency that justified the entry and arrest was solely a product of police conduct" and that they would, therefore, have held the arrest invalid. *Id.* at 48 (Marshall, J., dissenting). *Accord* United States v. Houle, 603 F.2d 1297, 1300 (8th Cir. 1979) (holding the arrest invalid, stating that "[a]ny exigency that arose by virtue of the presence of the rifle near the bed could have been anticipated by the officers and does not excuse their earlier failure to obtain a warrant. . ."); United States v. Curran, 498 F.2d 30, 34 (9th Cir. 1974) (disapproving of the police conduct, a unanimous court stated that "[k]nowing that marijuana was present and knowing that [the police] would make their presence known to the occupants, the officers consciously established the condition which the government now points to as an exigent circumstance. . ."); United States v. Bell, 488 F. Supp. 371, 374 (D.D.C. 1980) ("Exigency under the [f]ourth [a]mendment must be a product of external events, not police ingenuity."); Commonwealth v. Forde, 367 Mass. 798, 803, 329 N.E.2d 717, 721 (1975) ("[W]here the exigency is reasonably foreseeable and the police offer no justifiable excuse for their prior delay in obtaining a warrant, the exigency exception to the warrant requirement is not open to them."); State v. Canby, 252 S.E.2d 164, 166 (W. Va. 1979) ("[I]n order for police officers to make an arrest without a warrant, . . . there must be exigent circumstances not of the police officers' creation.").

73. People v. Wilson, 86 Ill. App. 3d 637, 639-40, 408 N.E.2d 988, 990 (1980).

74. *Id.* at 640, 408 N.E.2d at 990-91.

render Fourth Amendment protections vulnerable to possibly even more imaginative government-created exigencies and quickly render the warrant requirement a nullity."[75] The controlled buy set up by the officers in *Eichelberger* exemplifies the artificial exigency which the *Wilson* opinion warned against. Since the Paxton officers set up the sale, any resultant "exigency" was forseeable, if not planned. The *Eichelberger* majority, however, never discussed the issue of possible police circumvention of the warrant requirement presented by the case.[76] This omission may indicate a lack of concern with an individual's fourth amendment rights in a controlled buy context. The *Eichelberger* holding seems to allow police to circumvent the warrant requirement by staging a crime and then allowing the prosecution to claim that the commission of the crime was an exigent circumstance which justified a warrantless home arrest.

In *Commonwealth v. Huffman*,[77] the Massachusetts Supreme Court considered a situation similar to that in *Eichelberger*, yet came to the opposite conclusion. In *Huffman*, police, by looking through defendant's apartment window, witnessed him bagging a green herb believed to be marijuana.[78] The police went directly to defendant's door, found it partially open, entered, and made the arrest.[79] The court held there was no exigency even though there was probable cause to believe that the offense was still in progress.[80] The court maintained that the essence of exigency is the existence of circumstances which would render an attempt to obtain a warrant impraticable and found

75. *Id.* at 643, 408 N.E.2d at 992.

76. The issue was not raised or addressed by the state's or the defendant's briefs in the lower courts. However, defendant's petition for certiorari, denied by the United States Supreme Court, focused its argument on this theory. Eichelberger's petition framed the issue as follows: whether the "Fourth Amendment allows the police to enter a private dwelling without a warrant if the police witness an illegal transaction, occurring inside, *which they arranged and control*, which does not threaten life, limb, property or the peace of the community and where there are no exigent circumstances." Petition for Writ of Certiorari, at 6, People v. Eichelberger, 91 Ill. 2d 359, 438 N.E.2d 140 (1982) (emphasis added).

77. 385 Mass. 122, 430 N.E.2d 1190 (1982).

78. *Id.* at 123, 430 N.E.2d at 1191.

79. *Id.*

80. *Id.* at 124, 430 N.E.2d at 1192. *See also* State v. Dias, 609 P.2d 637 (Hawaii 1980). In *Dias*, police were notified by an informer of the defendant's alleged illegal activity. They arrived at the scene and observed the defendant gambling illegally. *Id.* at 639. The Supreme Court of Hawaii held that the observation of the crime in progress did not create sufficient exigency to justify the warrantless home arrest. *Id.* at 641.

no such circumstances under the facts presented.[81] The court pointed out that the police could have left a guard on the premises while they obtained a warrant.[82] There were two officers on the scene when Eichelberger was arrested. The *Eichelberger* court, unlike the *Huffman* court, did not suggest that one of the officers might have obtained a warrant after the observation of the crime while the other officer was left to stand guard.[83] By failing to examine this alternative to the warrantless arrest which actually took place, the *Eichelberger* court was able to conclude that the course taken by the officers was imperative under the circumstances.

Post-*Payton* Illinois cases which have dealt with the issue of warrantless home arrest have stated that probable cause alone will not justify the police action; exigent circumstances must also be present.[84] Yet the *Eichelberger* majority found that probable cause—the officers' observation of the crime in progress—created an exigency.[85] This interpretation narrowly construes the fourth amendment protections which have been guaranteed by the Constitution and rigorously upheld by the United States Supreme Court.

Courts in Illinois,[86] as well as in other jurisdictions,[87] cogni-

81. Commonwealth v. Huffman, 385 Mass. 122, 124, 430 N.E.2d 1190, 1192-93 (1982). *Cf.* Michigan v. Tyler, 436 U.S. 499, 509 (1978) (warrantless search legal where there is compelling need).

82. Commonwealth v. Huffman, 385 Mass. 122, 126, 430 N.E.2d 1190, 1192-93 (1982). The majority of cases invalidating warrantless home arrests for lack of sufficient exigency note that the police could have dealt adequately with the situation by leaving a police guard on the scene while a warrant was obtained. This would protect against the threat of flight by the suspects or destruction of evidence. *See, e.g.*, United States v. Jeffers, 342 U.S. 48, 52 (1951).

83. The court did note that "the events occurred on a Sunday morning, in a small city, which made it highly unlikely that a warrant could be readily procured." People v. Eichelberger, 91 Ill. 2d 359, 370, 438 N.E.2d 140, 145 (1982). This treatment seems cursory in view of the substantial rights involved.

84. *See, e.g.*, People v. Harris, 104 Ill. App. 3d 833, 842, 433 N.E.2d 343, 350 (1982); People v. Henderson, 96 Ill. App. 3d 232, 235, 421 N.E.2d 219, 222 (1981); People v. Thompson, 93 Ill. App. 3d 995, 1003, 418 N.E.2d 112, 119 (1981); People v. Robinson, 91 Ill. App. 3d 1138, 1143, 415 N.E.2d 585, 589 (1980); People v. Wormack, 91 Ill. App. 3d 169, 171, 414 N.E.2d 177, 179 (1980); People v. Haynes, 89 Ill. App. 3d 231, 236, 411 N.E.2d 876, 881 (1980).

85. 91 Ill. 2d at 369, 438 N.E.2d at 145.

86. *See, e.g.*, People v. Patrick, 93 Ill. App. 3d 830, 417 N.E.2d 1056 (1981); People v. Wormack, 91 Ill. App. 3d 169, 414 N.E.2d 177 (1980); People v. Pakula, 89 Ill. App. 3d 789, 411 N.E.2d 1385 (1980); People v. Rembert, 89 Ill. App. 3d 371, 411 N.E.2d 996 (1980); People v. Boehm, 89 Ill. App. 3d 176, 411 N.E.2d 1192 (1980); People v. Wilson, 86 Ill. App. 3d 637, 408 N.E.2d 988 (1980).

87. *See, e.g.*, State v. Dias, 609 P.2d 637 (Hawaii 1980); Commonwealth v. Huffman, 385 Mass. 122, 430 N.E.2d 1190 (1982); Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975); State v. Canby, 252 S.E.2d 164 (W.Va. 1979).

zant of the grave constitutional issues presented, have cautiously invalidated warrantless home arrests similar to those in *Eichelberger*.[88] Those courts have not allowed police to take matters into their own hands when another course of action could have adequately protected legitimate state interests.[89] They have suggested that, in order to dispel the fear that evidence might be destroyed or that the suspect might flee, a police guard be set up while another officer obtains a warrant.[90]

The *Eichelberger* court might have pursued this course and thereby conformed with other post-*Payton* cases. In *Payton*, the Supreme Court spoke out against state encroachment on individual fourth amendment rights. The *Eichelberger* decision ignores this pro-individual emphasis. Although it seems logical that officers would be authorized to arrest after observation of the commission of a crime, under the *Eichelberger* facts, such a holding presents dangerous ramifications. By allowing possible police circumvention of the warrant requirement and expansion of the parameters of the exigency requirement, the *Eichelberger* decision seriously undermines the practical effect of *Payton*.[91]

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88. *See supra* note 72 and note 80 and accompanying text.

89. In cases concerning constitutional rights, the Court has often forbidden a means of obtaining a societal goal because there exists an alternative, less intrusive means to the same end. See cases discussed in Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

90. *See, e.g.*, People v. Vogel, 58 Ill. App. 3d 910, 914-15, 374 N.E.2d 1152, 1156 (1978); Commonwealth v. Huffman, 385 Mass. 122, 125, 430 N.E.2d 1190, 1193 (1982).

91. This note does not reflect, however, any opinion on the desirability of upholding Eichelberger's arrest under a possible "good faith" exception to the exclusionary rule. For discussion of this exception, see Leonard, *The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice*, 4 WHITTIER L. REV. 33 (1982); Note, *Is It Time for a Change in the Exclusionary Rule?* United States v. Williams *and the Good Faith Exception*, 60 WASH. U.L.Q. 161 (1982).