Is the Exigent Circumstances Doctrine an Exception to the Warrant Requirement, or Something More?

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I have long thought of the exigent circumstances doctrine as an exception to the warrant requirement – it allows a search to be conducted when probable cause is present but it is impractical for officers to take the time to obtain a search warrant. That understanding was shaken when I read Phil Dixon's summary of *United States v. Curry*, 937 F.3d 363 (4th Cir. 2019). The majority in *Curry* ruled that exigent circumstances allowed officers to search several men without probable cause or even reasonable suspicion because they were walking away from an area where shots had just been fired. In other words, the court took the position that exigent circumstances excused not only the lack of a warrant, but also the lack of individualized suspicion. Have I been mistaken all these years?

The facts of *Curry*. Officers in Richmond, Virginia were patrolling a residential area that was the "site of frequent gun violence." They "heard several gunshots close by" and drove in the direction of the shots, arriving less than a minute later. They encountered a number of people, some remaining in the area and others, including a half-dozen men, not necessarily together, walking away. Although the officers had no specific reason to believe that any of the men had been involved in the shooting, the proximity in time and place to the gunshots led the officers to "shine[] flashlights on the men and instruct[] them to stop, raise their hands, and then lift their shirts to expose their waistbands for any concealed weapons. Only Curry failed to comply, leading to a pat down that revealed a silver revolver." It seems that Curry was eventually cleared of any involvement with the shooting, but he was charged with being a felon in possession of a firearm. He moved to suppress, arguing that the officers' order to raise his shirt was an unlawful warrantless search. A federal district court judge agreed and suppressed the gun, concluding that "the exigencies [of the] situation" did not excuse the lack of individualized suspicion.

The majority's view of exigent circumstances. The Fourth Circuit reversed. The majority began by noting that the "touchstone" of Fourth Amendment analysis is reasonableness, which requires a balancing of the government's various interests against the individual's privacy interests. The majority stated that under this balancing analysis, "law enforcement officers often need some suspicion of criminal activity to reasonably search or seize an individual." But individualized suspicion is not always required. Sometimes "special governmental needs, beyond the normal need for law enforcement," allow searches without individualized suspicion. Examples of these kinds of searches include drug testing for law enforcement officers and public transit operators, and security screening at airports and courthouses.

The majority described exigent circumstances as a type of special needs, citing cases like *United States v. Taylor*, 624 F.3d 626 (4th Cir. 2010) (holding that an officer did not violate the Fourth Amendment when he entered a residence in an attempt to find a caregiver for a four-year-old who was wandering the streets), and *United States v. Harper*, 617 F.2d 35 (4th Cir. 1980) (holding that officers did not violate the Fourth Amendment when they stopped all vehicles on a remote road that provided the only access to the site of a foiled drug shipment: "A serious crime had been committed involving numerous participants, some of whom were known to be fleeing the scene along a route reasonably expected to be used for their escape. Stopping all cars there was, under such circumstances, a necessary means of law enforcement, and as such, justifies the minimal intrusion on privacy rights posed to passing motorists."). Conducting a balancing of interests, the majority then determined that on the facts of this case, the officers were justified in stopping

the men and searching them, despite the lack of individualized suspicion: "They were rushing to respond to shots fired just seconds earlier in a densely populated residential neighborhood. That presented the officers with the prospect that [an] active shooter might continue to threaten the safety of the public . . . as well as the prospect of retaliation from other shooters . . . . The immediate purpose of the stop and flashlight search was the need to protect the public and the officers from these dangers. Even though one purpose of the [officers'] actions that night may have included ordinary law enforcement, the immediate objective of their stopping these individuals puts this case squarely within the special-needs doctrine."

The dissent. The dissenting judge argued that "the majority's analysis blurs the lines that have heretofore defined the exigent circumstances exception, conflating exigent circumstances with the special needs exception. . . . Special needs and exigent circumstances are separate doctrines of Fourth Amendment jurisprudence animated by very different concerns and applied in different contexts." Specifically, the dissent contended that special needs searches are typically "programmatic" searches unrelated to crime control, while searches justified by exigent circumstances typically involve individualized suspicion of criminal activity.

The majority's view doesn't have much support. I couldn't find much support for the majority's idea that the exigent circumstances exception is part of the special needs doctrine. As one commentator has explained, "[t]he [Supreme] Court has long made clear that exigent circumstances are an exception to the Fourth Amendment's warrant requirement but not the probable cause requirement." Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. Mich. J.L. Reform 615 (2019).

Certainly the appellate division in North Carolina has described exigent circumstances as an exception to the warrant requirement:

"Exigent circumstances" form the basis of another recognized exception to the warrant requirement. The exception applies where "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.'' *Mincey v. Arizona*, 437 U.S. 385 . . . (1978) . . . . Exigent circumstances include the need to "prevent the imminent destruction of evidence," *Brigham City v. Stuart*, 547 U.S. 398 . . . (2006) . . . , whereby officers may "conduct an otherwise permissible search without first obtaining a warrant," *Kentucky v. King*, 563 U.S. 452 . . . (2011).

To be sure, "the scope of the warrantless search ... is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Ross*, 456 U.S. at 825 . . . . It must be supported by probable cause. *Id.*; *King*, 563 U.S. at 455.

State v Pigford, __ N.C. App. __, 789 S.E.2d 857 (2016). *See also State v. Woods,* 136 N.C. App. 386 (2000) ("To justify a warrantless entry of a residence, there must be both probable cause and exigent circumstances which would warrant an exception to the warrant requirement.").

Most of the cases I found in other jurisdictions are to the same effect. *See, e.g., United States v. Alaimalo*, 313 F.3d 1188 (9th Cir. 2002) ("Even when exigent circumstances exist, police officers must have probable cause to support a warrantless entry into a home."); *United States v. D'Andrea*, 648 F.3d 1 (1st Cir. 2011) (stating that "exigent circumstances is an exception to the warrant, not the probable cause, requirement"); *Roberts v. Spielman*, 643 F.3d 899 (11th Cir. 2011) ("For this exception to apply, the officer must have both exigent circumstances and probable cause."). *But cf. People v. Sirhan*, 7 Cal.3d 710 (Cal. 1972) (search of defendant's home for evidence relating to the assassination of Robert Kennedy did not violate the Fourth Amendment; "Although the officers did not have reasonable cause to believe that the house contained evidence of a conspiracy to assassinate prominent political leaders, [given the gravity of the offense and the possibility of additional assassinations] we believe that the mere possibility that there might be such evidence in the house fully warranted the officers' actions.").

What about the emergency doctrine? Although I don't think the majority's conception of the *exigent circumstances doctrine* is correct, is there an argument that the *emergency doctrine*, about which I wrote here, supports the search

conducted in this case? The emergency doctrine is related to the community caretaking doctrine, in that it emphasizes the first responder role of law enforcement. It holds that an officer may conduct a search to protect members of the public if the officer has an "objectively reasonable basis for believing" that there is an imminent threat of serious injury. *Brigham City v. Stuart*, 547 U.S. 398 (2006). That may be a lower and/or more flexible standard than probable cause. And many of the factors the majority identified, including the risk to the public from an active shooter and the risk of retaliatory shootings, would be pertinent to an emergency doctrine argument. I may be quibbling about words in suggesting that the majority was relying on the wrong doctrine. But in the law, words matter. And I wouldn't want officers and others to think that exigency, without probable cause, will normally support a search.