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# Warrantless Arrests in Police Standoffs: A Common Sense Approach to the Exigency Exception

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# WARRANTLESS ARRESTS IN POLICE STANDOFFS: A COMMON SENSE APPROACH TO THE EXIGENCY EXCEPTION

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## INTRODUCTION

The old adage "a man's home is his castle" reflects a bedrock principle of our nation: we are protected from unreasonable governmental intrusions behind the sanctity of our front doors.[1] This principle is embodied in the Fourth Amendment, which grants "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures."[2] But while we take comfort in the constitutional protection from unreasonable searches and seizures within our homes, the question remains — what is meant by the word "unreasonable"?

The Supreme Court provided the analytical framework for answering this question in the landmark case of *Payton v. New York*.[3] In *Payton*, the Court held that police must generally get a warrant in order for a search or seizure to be constitutionally reasonable, absent one exception.[4] If emergency circumstances exist, and due to these circumstances it is not possible

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[1] *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13 (1937); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1358 (1992) (quoting Legal Papers of John Adams, I, 137-38). This principle is traceable not only to English jurisprudence but even ancient law. *See* LASSON, *supra*.

[2] U.S. CONST. amend. IV. The Fourth Amendment's history reflects the value placed on the sanctity of the home. *See* Gormley, *supra* note 1, at 1358. Its inclusion in the Constitution was a direct result of the broad search and seizure powers held by the English monarchy at the time. *Id.* Seizures were indiscriminate, people and locations were not identified by warrant, and the government had the full power and range to effectuate almost any type of search. LASSON, *supra* note 1, at 26. In mid-seventeenth century England, however, critics began to speak out against general warrants and the general distrust of such pervasive police search and seizure power migrated to the American colonies. *Id.* at 58-60.

[3] Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

[4] *Payton*, 445 U.S. at 576. The process of obtaining a warrant is thought to impose order by requiring a specific procedure be followed, and, most importantly, by having "a neutral and detached magistrate" make an "'informed and deliberate'" de-

to obtain a warrant, the Supreme Court held that a search or seizure in the home may be lawfully made without one.[5] The question then becomes, what circumstances constitute exigency?

Herein lies the problem. The Supreme Court in *Payton* declined to identify what circumstances would qualify as exigencies, or what test should be applied by courts to determine if exigency exists.[6] Lower courts have been left to grapple with the issue, and in so doing, have created a rather large and extensive body of case law defining exigency. Exigency has been thoroughly examined in the context of hot pursuit, destruction of evidence, and protection of life and limb.[7] Unfortunately, a neglected area of inquiry has been the issue of exigency in police standoff situations. In a post-September 11th world, police standoffs showcase the conflict between police power that is necessary to diffuse deadly situations, and the Fourth Amendment values we as a society hold so dear.

Recently, the Ninth Circuit held as a matter of first impression that police must continuously reevaluate the presence of exigent circumstances during a standoff, and obtain a warrant if exigency abates at any time.[8] This differs from the Sixth Circuit's position on this issue, which is that a police exigency continues throughout the duration of a standoff if it is found to have existed at the start, completely excusing the warrant requirement.[9] With an emerging circuit split on the issue, and almost nothing in current scholarship to guide courts or police, the time has come to evaluate the exigency exception to the warrant requirement in the context of police standoffs.

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termination on the issue of whether probable cause exists. Johnson v. U.S., 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (quoting U.S. v. Lefkowitz, 285 U.S. 452, 464, 52 S. Ct. 420, 76 L. Ed. 877, 82 A.L.R. 775 (1932)). Police officers should not be the final determination on whether probable cause exists for a seizure, because of their inherent bias as they engage "in the often competitive enterprise of ferreting out crime." *Id.*

[5] *Payton*, 445 U.S. at 603.

[6] *Payton*, 445 U.S. at 749.

[7] *See generally* Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (holding that police can enter a home without a warrant to end violence); U.S. v. Santana, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976) (holding that a suspect cannot evade an arrest that starts in public by fleeing into his home); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) (holding that entering a home without a warrant to apprehend a fleeing suspect is justified through exigency); Ker v. State of Cal., 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963) (holding that if there is a substantial likelihood evidence will be destroyed, exigency justifies a warrantless entry).

[8] *See* Fisher v. City of San Jose, 509 F.3d 952 (9th Cir. 2007), reh'g en banc granted, 519 F.3d 908 (9th Cir. 2008), on reh'g en banc, 558 F.3d 1069 (9th Cir. 2009). Subsequent to this decision, a rehearing en banc was granted on March 14, 2008. Fisher v. City of San Jose, 519 F.3d 908 (9th Cir. 2008), on reh'g en banc, 558 F.3d 1069 (9th Cir. 2009). Ultimately, the issue will not be resolved until the Supreme Court decides to grant certiorari.

[9] *See* Bing ex rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555, 2006 FED App. 0270P (6th Cir. 2006).

In the discussion that follows, I argue that exigency in police standoff situations should be governed by the clearer, more common sense rule adopted by the Sixth Circuit — namely that exigency exists due to the inherent danger of a police standoff, and is not negated by the mere passage of time. Part I provides a backdrop for the discussion, presenting an overview of the Supreme Court's jurisprudence on exigency cases. Part II discusses the differing Sixth Circuit and Ninth Circuit approaches to exigency in police standoffs. Part III argues that the better position on exigency in police standoff situations is the Sixth Circuit approach, because it provides a clear rule for police and courts to apply. In the end, courts should give heed to common sense in recognizing that standoffs are inherently dangerous and as such constitute exigent circumstances.

## I. DOCTRINAL LANDSCAPE: THE SUPREME COURT'S INADEQUATE GUIDE TO EXIGENCY

Although the Supreme Court declined to provide a test or framework to determine exigency in *Payton*, it has taken a number of cases since that address the issue. These cases create a give and take of sorts, in that some of the cases grant police broad power to act without warrants, while other cases simultaneously impose limitations that restrict that power. Unfortunately, the cases are so fact specific that they offer little guidance for lower courts.

### A. The Supreme Court Gives

The Supreme Court since *Payton* has identified three specific exigent circumstances where a warrantless arrest in the home is constitutional. These exigency exceptions are: hot pursuit, the destruction of evidence, and serious threat of bodily injury.[10] If any of these delineated exigencies exist, police have broad authority to arrest without first obtaining a warrant. In fact, this authority is so broad that the Supreme Court has held an officer's subjective intent to be irrelevant if one of the exceptions exists.[11]

The first, and perhaps the most common exception to the warrant requirement is hot pursuit. The Supreme Court held in *Warden v. Hayden*[12] that when police start to make an arrest in public, but the arrestee flees into his or her home to avoid police, a warrantless arrest in the home is justified.[13] The public policy considerations of this exception are paramount.[14] First, police must be able to protect their own lives and those of the public by quickly ap-

[10] PAUL R. JOSEPH, WARRANTLESS SEARCH LAW DESKBOOK 19-9 to 19-16 (Clark, Boardman, Callaghan 1993) (1991).

[11] *See Brigham,* 547 U.S. at 398.

[12] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967).

[13] *Warden*, 387 U.S. at 298-99.

[14] *Warden*, 387 U.S. at 298-99.

prehending a fleeing arrestee.[15] Second, an arrestee should not be able to find safe harbor from police by fleeing into his home. The Constitution protects against unwarranted governmental intrusions in the home, not an arrestee's right to call "home base" as in a childhood game of tag. The Supreme Court in *United States v. Santana*[16] further clarified that the term hot pursuit, while requiring "some sort of chase," does not need to be "an extended hue and cry 'in and about (the) public streets.'"[17] The hot pursuit exception can be invoked in any situation in which a person evades arrest by retreating into the home.[18]

The hot pursuit exigency exception is generally not a good fit to justify a warrantless arrest during a police standoff. While it is true that an extensive police chase does not have to exist to invoke this exception, the minimum requirement is that the police attempt an arrest outside of the home, with the arrestee then fleeing inside. Therefore, in cases in which police do not first attempt the arrest outside of the home, this exception is not applicable.

Second, the Supreme Court has also carefully carved out an exigency exception to protect against the destruction of evidence. In *Ker v. California*,[19] police entered the home of a suspected narcotics dealer who was on notice that their arrival was imminent.[20] Police entered his home and arrested him without a warrant, as they were concerned that in the time it took to get a warrant, he would dispose of the drugs.[21] The Supreme Court found that exigency justified the warrantless arrest because of the large possibility that evidence would be destroyed.[22] While recognizing the protection that the Fourth Amendment provides against unreasonable seizures, the Supreme Court opined that "suspects have no constitutional right to dispose of or destroy evidence."[23]

This exception is not applicable in a police standoff situation. Generally, there is no evidence that is in danger of being destroyed in a police standoff. The general application of this exception will be cases in which there are narcotics present, as these are easy to dispose of quickly. Although there are weapons present in a standoff that are usually evidence of the crime, there would not feasibly be a way to dispose of them in the home.

Third, the Supreme Court has further recognized exigency when police

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[15] *Warden*, 387 U.S. at 298-99.

[16] U.S. v. Santana, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976).

[17] *Santana*, 427 U.S. at 42-43. In fact, the suspect in *Santana* was standing in the doorway to her home when police announced their presence. *Id.* at 40. She retreated into her home, and this was deemed sufficient for hot pursuit. *Id.* "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." *Id.* at 43.

[18] *See Santana*, 427 U.S. at 43.

[19] Ker v. State of Cal., 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963).

[20] *Ker*, 374 U.S. at 40.

[21] *Ker*, 374 U.S. at 40.

[22] *Ker*, 374 U.S. at 40-41.

[23] *Ker*, 374 U.S. at 39.

"need to assist persons who are seriously injured or threatened with such injury."[24] In *Brigham City v. Stuart,*[25] the Court examined the Fourth Amendment in relation to the preservation of life and protection of individuals from bodily injury.[26] Police saw a fight break out inside a home and entered, breaking up the altercation and arresting those involved.[27] The Supreme Court upheld the warrantless arrests, reasoning that police needed to intervene to protect the occupants.[28] The Court made clear that in balancing justifications, the need to protect life or avoid serious injury outweighs the protections of the Fourth Amendment, and to hold otherwise would be "silly."[29] Therefore, the Supreme Court has found that exigency vitiates the warrant requirement in such life or death situations.[30]

This exigency exception applies in police standoffs. The barricaded arrestee presents a real and serious threat of bodily injury, not only to themselves, but also to the public at large and officers on the scene. The issue in police standoffs really is not which exigency exception applies, as it clearly is the threat of serious bodily injury, but rather when is exigency assessed? Is the threat one that exists at the start and therefore throughout a standoff? Or as time passes, can the exigency abate to the point that a warrant is required? Later Supreme Court cases examine exigency over extended durations of time, and these cases are to some extent more useful for the standoff analysis than the basic threat of bodily injury cases.

## B. The Supreme Court Takes

While the Supreme Court has recognized a few exigency exceptions, and thus given broad powers to police to work without warrants, the Court has subsequently taken some of this power away by limiting the circumstances in which warrantless arrests can be effectuated. Namely, the Supreme Court has stated that the offense must be sufficiently serious in nature to justify a warrantless arrest in the home due to exigent circumstances.[31] In *Welsh v. Wisconsin,*[32] the Supreme Court examined the warrantless arrest of a man in his home after he left the scene of an accident he caused while driv-

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[24] Brigham City, Utah v. Stuart, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006).

[25] Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006).

[26] *Brigham*, 547 U.S. at 403.

[27] *Brigham*, 547 U.S. at 401.

[28] *Brigham*, 547 U.S. at 406.

[29] *Brigham*, 547 U.S. at 406 ("It would be silly to suggest that the police would commit a tort by entering . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur." (quoting Georgia v. Randolph, 547 U.S. 103, 118, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006))).

[30] *See Brigham*, 547 U.S. at 406.

[31] *See* Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

[32] Welsh v. Wisconsin, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

ing drunk.[33] The government argued that under the facts of the case, there were two exigencies to justify the warrantless arrest — hot pursuit and destruction of evidence.[34] The Supreme Court first rejected the hot pursuit argument, recognizing that "there was no immediate or continuous pursuit of the petitioner from the scene of a crime."[35] Also, since the arrestee had gone home and left his car, he was no longer a threat to public safety.[36] Interestingly, the Court did not expressly determine whether the need to quickly obtain the arrestee's blood alcohol level would qualify for the destruction of evidence exigency exception to the warrant requirement.[37] The Court recognized that even if the possibility of destruction of evidence existed, it would not, under the facts of this case, be sufficient justification for exigency without a more serious underlying offense.[38] While the Court found the seriousness of the offense to be one factor in a totality of the circumstances analysis, it simultaneously found that the government would rarely be able to prevail under exigency if the offense was minor.[39] Effectively then, the seriousness of the offense is not so much a factor in a totality of the circumstances analysis, but rather is a preliminary requirement for a claim of exigent circumstances.[40]

The Supreme Court in *Welsh* declined to articulate a bright line standard for what crimes qualify as "serious offenses."[41] In fact, while the Court noted numerous lower court decisions that considered the seriousness of the offense, it refused to approve of any of the holdings or address more factual scenarios.[42] In determining what crimes are serious enough to merit the exigency exception, however, most lower courts look to the legislative body of that jurisdiction to see how the crime is classified, as well as the punishment associated with the crime.[43] Generally, only violent crimes will qualify as serious enough to merit the exigency exception.[44] In both the Sixth Circuit and Ninth Circuit cases involving police standoffs discussed in this article, an underlying felony was committed to justify the claim of exigency.[45]

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[33] *Welsh*, 466 U.S. at 742-43.

[34] *Welsh*, 466 U.S. at 742-43.

[35] *Welsh*, 466 U.S. at 742-43.

[36] *Welsh*, 466 U.S. at 742-43.

[37] *Welsh*, 466 U.S. at 754.

[38] *Welsh*, 466 U.S. at 754.

[39] *Welsh*, 466 U.S. at 753. The Court did not provide any examples in which exigency would justify a warrantless home arrest for a minor offense. *See id.*

[40] *Welsh*, 466 U.S. at 759 (White, J., dissenting).

[41] *Welsh*, 466 U.S. at 753 (majority opinion).

[42] *Welsh*, 466 U.S. at 753.

[43] JOSEPH, *supra* note 10, at 19-2.

[44] JOSEPH, *supra* note 10, at 19-2.

[45] Fisher v. City of San Jose, 509 F.3d 952, 956 (9th Cir. 2007), reh'g en banc granted, 519 F.3d 908 (9th Cir. 2008), on reh'g en banc, 558 F.3d 1069 (9th Cir.

## C. Time Marches On

None of the Supreme Court's jurisprudence on exigency applies specifically to police standoff situations. One of the most notable problems in analyzing exigency for police standoffs is that standoffs involve a considerable passage of time. All of the previously noted exceptions involve a warrantless arrest following immediately on the heels of an emergency situation. What happens when exigency exists, but many hours pass? Does this time affect the exigency? Two cases addressed by the Supreme Court do concern exigency over a period of time, which is the closest the Supreme Court has come to giving guidance that could be used in determining whether exigency exists in a police standoff. The two Supreme Court cases, *Mincey v. Arizona*[46] and *Michigan v. Tyler*,[47] were heavily relied on by both the Sixth Circuit in *Bing v. City of Whitehall*[48] and the Ninth Circuit in *Fisher v. City of San Jose*[49] in their analyses of exigency during police standoffs. Unfortunately the Supreme Court cases, while not being directly on point, are also difficult to reconcile with one another, thus further exacerbating the confusion for lower courts.

In *Michigan v. Tyler*, the Supreme Court addressed the issue of whether the mere passage of time can negate exigency, thereby imposing the warrant requirement on a Fourth Amendment event that had previously not required a warrant.[50] The case involved a nighttime fire that was believed to be the result of arson.[51] After the fire had been reduced to mere embers, detectives arrived at the scene and began a search without a warrant.[52] Due to the heavy smoke and lack of light, the men left the scene and returned four hours later, in the daylight, continuing again without a warrant.[53] The second entry was a much more thorough search, which included removing portions of the carpeting and stairs.[54] First, the Court recognized that the fire qualified as an exigent circumstance that justified the initial warrantless entry.[55] The Court reasoned that an important function of firefighters is to determine the cause of a fire, and this must be done promptly to prevent reoccurrence as well as preserve

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2009); Bing ex rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555, 565, 2006 FED App. 0270P (6th Cir. 2006).

[46] Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

[47] Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978).

[48] Bing ex rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555, 2006 FED App. 0270P (6th Cir. 2006).

[49] Fisher v. City of San Jose, 509 F.3d 952 (9th Cir. 2007), reh'g en banc granted, 519 F.3d 908 (9th Cir. 2008), on reh'g en banc, 558 F.3d 1069 (9th Cir. 2009).

[50] *Tyler*, 436 U.S. at 511.

[51] *Tyler*, 436 U.S. at 502.

[52] *Tyler*, 436 U.S. at 502.

[53] *Tyler*, 436 U.S. at 502.

[54] *Tyler*, 436 U.S. at 502.

[55] *Tyler*, 436 U.S. at 509.

evidence.[56] The Court noted that to require a warrant as soon as the last flame was extinguished would put too much of a burden on fire investigators.[57] The issue then was whether a warrant was needed for the second entry, as four hours had passed since the initial exigent entry into the building.[58] The Supreme Court held that since the original warrantless search of the building was reasonable due to the exigency of the fire, the later entry was also reasonable, and was simply a continuation of the first.[59]

Just less than a month after the decision in *Tyler*, the Supreme Court decided *Mincey v. Arizona*, another case that examined whether exigency dissipates due to the passage of time. In *Mincey*, the Supreme Court declined to apply the exigency exception to a warrantless homicide search that began with an initial sweep for safety, but lasted for over four days.[60] Police had arranged an undercover drug bust of an apartment, which did not go according to plan, and an officer was shot and killed in a fire exchange inside the apartment.[61] Immediately after the officer was shot, police quickly looked about the apartment for other victims, but refrained from conducting a full scale search of the crime scene at that time.[62] Within ten minutes however, homicide investigators were on the scene, and so began a four-day search of the apartment.[63] During this period, police did not obtain a warrant.[64] The Supreme Court rejected the government's argument of exigent circumstances.[65] The Court did not question the general right of police to respond to emergency situations without a warrant, but reiterated that a homicide investigation presented no such emergency.[66] While a prompt, warrantless sweep of a crime scene is appropriate to protect life, a four-day search is not appropriate without a warrant.[67] The Court opined, "[a]ll the persons in Mincey's apartment had been located before the investigating homicide officers arrived there and began their search. And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search."[68]

Unfortunately, the decisions in *Tyler* and *Mincey* are difficult to

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[56] *Tyler*, 436 U.S. at 510.

[57] *Tyler*, 436 U.S. at 509-10.

[58] *Tyler*, 436 U.S. at 510-11.

[59] *Tyler*, 436 U.S. at 510-11.

[60] Mincey v. Arizona, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

[61] *Mincey*, 437 U.S. at 395.

[62] *Mincey*, 437 U.S. at 388.

[63] *Mincey*, 437 U.S. at 388-89.

[64] *Mincey*, 437 U.S. at 389.

[65] *Mincey*, 437 U.S. at 392-93.

[66] *Mincey*, 437 U.S. at 393.

[67] *Mincey*, 437 U.S. at 395.

[68] *Mincey*, 437 U.S. at 395. In fact, the search was so thorough that:
the entire apartment was searched, photographed, and diagrammed. The officers opened drawers, closets, and cupboards, and inspected their contents; they

reconcile. *Tyler* stands for the principle that once exigency justifies a warrantless search, the search can continue over a period of hours, even if interrupted, without a warrant.[69] Alternatively, *Mincey* requires a warrant immediately after exigency abates.[70] In terms of applying this precedent to police standoffs, the application of each case results in different conclusions. *Tyler* would not require a warrant, as long as exigency is found to exist at the start of a police standoff, even if considerable time passes from the inception of the standoff until the arrest. However, *Mincey* would mandate that as soon as the initial exigency dissipates, a warrant is required. The analysis under the precedent in *Mincey* would hinge on whether or not exigency is found to be continuous throughout the duration of a standoff. Given these two conflicting Supreme Court cases, it is no surprise that lower courts are reaching different conclusions regarding exigency during police standoffs.

## II. A TALE OF TWO CIRCUITS: DOES EXIGENCY NEED TO BE CONTINUOUSLY EVALUATED DURING A POLICE STANDOFF?

Recently, both the Sixth Circuit and the Ninth Circuit were confronted with the question of whether exigency exists during a police standoff. In a police standoff, the safety of the officers and the public comes into direct conflict with the barricaded arrestee's constitutional rights, thus showcasing the delicate balance that exists between protecting Fourth Amendment rights and protecting public safety. While the facts of both cases are reasonably similar, the rulings the courts reached are not, resulting in an emerging circuit split.

### A. The Sixth Circuit Standard: *Bing v. City of Whitehall*

In 2006, the Court of Appeals for the Sixth Circuit addressed the issue of exigency during a police standoff.[71] On October 14, 2002, William Bing left his house in an intoxicated state and fired a gun into the air and ground outside of his home.[72] Witnesses called police, who upon arrival, learned that Bing had retreated into his home.[73] Within minutes, police surrounded

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emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination. Every item in the apartment was closely examined and inventoried, and 200 to 300 objects were seized. In short, Mincey's apartment was subjected to an exhaustive and intrusive search. *Id.* at 389.

[69] *See* Michigan v. Tyler, 436 U.S. 499, 510-11, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978).

[70] *See Mincey*, 437 U.S. at 394-95.

[71] Bing ex rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555, 558, 2006 FED App. 0270P (6th Cir. 2006).

[72] *Bing*, 456 F.3d at 559.

[73] *Bing*, 456 F.3d at 559.

the house and established a perimeter.[74] Police called in a SWAT team, who tried unsuccessfully to communicate with Bing.[75] Fearing for the safety of the community, the police advised neighbors to evacuate their homes, but the neighbors refused to comply.[76] The police further learned that they had previously been to Bing's home in response to shots fired, thus increasing their concern about the situation.[77] Shortly after using a flashbang device, police heard shots from inside the home.[78] They entered and shot and killed Bing in an exchange of fire.[79] By this time, the standoff had lasted for over five hours, and no police action during that time was conducted pursuant to warrant.[80] The lawsuit, filed by Bing's estate, alleged a violation of Bing's Fourth Amendment rights when police entered his home without a warrant.[81] The government countered by claiming that exigent circumstances negated the warrant requirement.[82]

In conducting its analysis, the Sixth Circuit in *Bing* first looked to when the arrest took place.[83] The court determined that "[b]y laying siege to Bing's house, breaking his door and windows, and employing pepper gas, the police accomplished a de facto house arrest, i.e., a Fourth Amendment seizure."[84] Bing was considered seized when his home was surrounded, because while not formally arrested, he was barricaded in his home and police coercion exercised physical control over him.[85] At the time police surrounded Bing's home, placing him under de facto arrest, the court found that exigent circumstances were present, due to the immediate threat Bing posed to both police and innocent bystanders.[86] Therefore, the court held that a warrant was not required at that particular juncture.[87]

The court in *Bing* then looked to the more difficult question of whether the mere passage of time negated the original exigency.[88] The court opined that because Bing was dangerous at all times during the standoff, the exigency did not expire.[89] The court explained, "[t]he passage of time did not terminate the exigency because the ticking of the clock did nothing to cut

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[74] *Bing*, 456 F.3d at 559.
[75] *Bing*, 456 F.3d at 560.
[76] *Bing*, 456 F.3d at 559-60.
[77] *Bing*, 456 F.3d at 560.
[78] *Bing*, 456 F.3d at 561.
[79] *Bing*, 456 F.3d at 562.
[80] *See Bing*, 456 F.3d at 562.
[81] *Bing*, 456 F.3d at 558.
[82] *See Bing*, 456 F.3d at 564.
[83] *Bing*, 456 F.3d at 564.
[84] *Bing*, 456 F.3d at 564.
[85] *Bing*, 456 F.3d at 564.
[86] *Bing*, 456 F.3d at 564.
[87] *Bing*, 456 F.3d at 564.
[88] *Bing*, 456 F.3d at 565.
[89] *Bing*, 456 F.3d at 565.

off Bing's access to his gun, or cure him of his willingness to fire it, or move to safety the people nearby who refused to evacuate.''[90] The court looked to the Supreme Court's decision in *Mincey*, which stated ''[e]xigent circumstances terminate when the factors creating the exigency are negated.''[91] Since Bing continued to be a dangerous threat, the exigency never abated during the police standoff.[92]

Ultimately, the Sixth Circuit in *Bing* found that the arrest occurred when Bing's house was surrounded, and exigent circumstances justified that warrantless arrest.[93] Since the threat Bing posed did not cease throughout the standoff, the court found that neither did the exigency.[94] In short, the court held that the later actions of the police were justified by the same exigency that justified the original arrest, or surrounding of Bing's home.[95] Therefore, the Sixth Circuit held that Bing's Fourth Amendment rights were not violated — it was reasonable for the police to act without a warrant.[96]

## B. The Ninth Circuit Standard: *Fisher v. City of San Jose*

In 2007, the Ninth Circuit decided *Fisher v. City of San Jose*,[97] a very similar case to *Bing* involving exigency during a police standoff. On October 23, 1999, a security guard was investigating a complaint of noise emanating from the apartment above that of Steven Fisher.[98] Fisher's ground floor apartment had a sliding glass window that led to an enclosed patio, into which passersby could see.[99] The guard saw Fisher and motioned him outside so the two men could speak.[100] The guard asked Fisher about the noise, but Fisher was generally unresponsive.[101] Fisher seemed to be intoxicated, and instead of answering the guard's questions, began rambling about his Second Amendment rights.[102] During this conversation, Fisher was holding his rifle in various positions.[103] Feeling uncomfortable, the guard notified his supervi-

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[90] *Bing*, 456 F.3d at 565.

[91] *Bing*, 456 F.3d at 565 (citing Mincey v. Arizona, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)).

[92] *Bing*, 456 F.3d at 565.

[93] *Bing*, 456 F.3d at 564.

[94] *Bing*, 456 F.3d at 565.

[95] *Bing*, 456 F.3d at 564-65.

[96] *Bing*, 456 F.3d at 569.

[97] Fisher v. City of San Jose, 509 F.3d 952 (9th Cir. 2007), reh'g en banc granted, 519 F.3d 908 (9th Cir. 2008), on reh'g en banc, 558 F.3d 1069 (9th Cir. 2009).

[98] *Fisher*, 509 F.3d at 954.

[99] *Fisher*, 509 F.3d at 954.

[100] *Fisher*, 509 F.3d at 954-55.

[101] *Fisher*, 509 F.3d at 955.

[102] *Fisher*, 509 F.3d at 955.

[103] *Fisher*, 509 F.3d at 955.

sor, who in turn contacted police.[104] The first officer on the scene also attempted to communicate with Fisher, but again, he seemed intoxicated and not particularly coherent.[105] Police surrounded the apartment, and numerous officers came to the scene during the standoff.[106] Shortly after arriving at the scene, police discovered that Fisher had been drinking and had eighteen rifles in his apartment.[107] A few hours into the standoff, Fisher threatened a tactical negotiator, and police determined the act to be the commission of a felony.[108] Soon after, Fisher pointed his rifles at police, and moved around the apartment with the rifles.[109] Police concern regarding public safety was particularly high, so all of the nearby residents were evacuated from their apartments about six hours into the standoff.[110] After about twelve hours of standoff, Fisher emerged from his apartment and was arrested, without a warrant.[111] Ultimately, Fisher brought suit, claiming that his warrantless arrest was an unreasonable seizure and a violation of his Fourth Amendment rights.[112]

The Ninth Circuit in *Fisher* first examined whether the *Payton* warrant requirement applied to the facts of the case.[113] While Fisher's formal arrest took place outside of his home, the court recognized that this was not in fact a public arrest, but rather an in home arrest, thereby requiring a warrant.[114] The court reasoned that "every court that has considered the issue, including our own, has concluded that if the police force a person out of his house to arrest him, the arrest is deemed to have taken place *inside* his home, and the *Payton* warrant requirement applies."[115] The court, upon determining that the *Payton* warrant requirement applied, then looked to whether exigency existed to excuse the lack of warrant.[116]

In examining the issue of exigency, the Ninth Circuit recognized that time was worthy of consideration.[117] The court articulated that implicit in exigency is the idea that the interest of time in an emergency hampers the

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[104] *Fisher*, 509 F.3d at 955.

[105] *Fisher*, 509 F.3d at 955.

[106] *Fisher*, 509 F.3d at 956.

[107] *Fisher*, 509 F.3d at 955.

[108] *Fisher*, 509 F.3d at 955. Despite the fact that Fisher committed a felony, was pointing rifles at police, and moving the rifles around his apartment, no officer communicated to Fisher that he was under arrest. *Id.*

[109] *Fisher*, 509 F.3d at 955.

[110] *Fisher*, 509 F.3d at 955-56.

[111] *See Fisher*, 509 F.3d at 956.

[112] *Fisher*, 509 F.3d at 956.

[113] *Fisher*, 509 F.3d at 958; *see also supra* notes 3-5 and accompanying text.

[114] *Fisher*, 509 F.3d at 959-60.

[115] *Fisher*, 509 F.3d at 959 (citing U. S. v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980), judgment aff'd, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)).

[116] *Fisher*, 509 F.3d at 960.

[117] *Fisher*, 509 F.3d at 961.

ability to obtain a warrant.[118] The Ninth Circuit in *Fisher* agreed with the reasoning of the Sixth Circuit in *Bing* that the appropriate moment to assess "whether the requirements for the exigency exception are met is the moment at which any entry to effect an arrest or to conduct a search occurs."[119] This appears to be the last place where the two courts reach the same conclusions.

Following the Sixth Circuit's basic examination of exigency, and after agreeing with the Sixth Circuit's exigency definitions, the Ninth Circuit in *Fisher* took a drastic turn from the reasoning employed by the Sixth Circuit in *Bing*. The Ninth Circuit, after recognizing that a suspect is seized at the time police surround his home, drew a distinction between this seizure and the subsequent formal arrest.[120] The court reasoned:

> [D]espite having been seized, it is indisputable that Fisher had not yet been placed under formal arrest and brought into the custody of the police. Because Fisher remained in his house, not free to leave but not in the custody of police, he continued to be subjected to entries into his home for the purpose of forcing him outside to arrest him, and the *Payton* warrant requirement continued to apply.[121]

Since the court in *Fisher* did not consider a formal arrest to have occurred at the time Fisher's home was surrounded, it opined that every subsequent seizure or entry into Fisher's home required a separate analysis of whether exigency existed at the time of that entry or seizure.[122] According to the Ninth Circuit, exigency could dissipate if the danger posed by the suspect decreased, or if through the passage of time, resources became available to police to allow them to maintain safety while obtaining a warrant.[123]

Ultimately, the court in *Fisher* held that exigency must be continuously examined throughout the duration of a police standoff to justify warrantless police action.[124] While the court considered a seizure to have taken place at the time Fisher's home was surrounded, they made a distinction between this seizure and a formal arrest.[125] Since the court found that the formal arrest was a separate and distinct Fourth Amendment event from the informal seizure of the home, this subsequent event was subject to a new Fourth Amendment exigency analysis.[126] The distinction between the court's holding and the Sixth Circuit approach, the court maintained, was not in the standard articulated, but rather the application of the standard to distinct facts.[127]

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[118] *Fisher*, 509 F.3d at 961.
[119] *Fisher*, 509 F.3d at 961.
[120] *Fisher*, 509 F.3d at 965.
[121] *Fisher*, 509 F.3d at 965.
[122] *Fisher*, 509 F.3d at 965-66.
[123] *Fisher*, 509 F.3d at 968.
[124] *Fisher*, 509 F.3d at 965.
[125] *Fisher*, 509 F.3d at 965.
[126] *Fisher*, 509 F.3d at 967-68.
[127] *Fisher*, 509 F.3d at 967-68.

The court found that the standoff in *Fisher* involved significantly less danger than the standoff in *Bing*.[128] Because it held that the formal arrest was a separate Fourth Amendment event, and the exigency had abated by this time, the court held a warrant was required for the arrest.[129]

While the majority opinion in *Fisher* saw its holding as paralleling the Sixth Circuit's holding in *Bing*, in reality, these two cases cannot be reconciled.[130] The first approach, adopted by the Sixth Circuit in *Bing*, presumes that if exigency exists at the start of a standoff, it is presumed to exist for the duration, because standoffs are inherently dangerous.[131] The second standard, adopted by the Ninth Circuit in *Fisher*, requires an examination of exigency not only at the commencement of a standoff, but also with every police action throughout the duration of the standoff.[132] With this emerging circuit split, the question becomes, now what?

## III. WHERE TO FROM HERE: COMMON SENSE MAKES SENSE

In examining a police standoff, the courts are attempting a balancing act between the guarantees of the Fourth Amendment and the safety of society. With the Sixth Circuit position emphasizing the former, and the Ninth Circuit position emphasizing the latter, determining which of these positions, and therefore societal ideas, should prevail in the instance of a police standoff is difficult. But in assessing the relative strengths and weaknesses of these approaches, although the Ninth Circuit's standard does have its benefits, the Sixth Circuit standard is ultimately the better reasoned, more common sense rule for the reasons discussed below.

### A. The Ninth Circuit Rule: The Good, the Bad, and the Ugly

The Ninth Circuit standard — requiring exigency to be continually assessed throughout the duration of a police standoff — does have the notable

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[128] *Fisher*, 509 F.3d at 967-68. These facts clearly distinguish this case from *Bing*, a case that is in some respects quite similar to this one. Bing had fired his gun in the vicinity of neighborhood children, 'police had been called to Bing's residence in the past [because] he previously had fired shots,' neighborhood residents refused to evacuate thereby increasing the danger, and police had reason to believe that Bing had fired a shot at police officers before they raided his apartment. Bing ex rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555, 558-62, 2006 FED App. 0270P (6th Cir. 2006). None of these factors existed in Fisher's standoff with police. Moreover, as far as appears in the *Bing* opinion, none of the police on the scene returned to the station during the standoff. The level of danger in *Bing* was thus considerably higher than here, while the officers' opportunity to obtain an arrest warrant was not obvious. *Fisher*, 509 F.3d at 967.

[129] *See Fisher*, 509 F.3d at 965-66.

[130] *Fisher*, 509 F.3d at 976 (Callahan, J., dissenting).

[131] *Fisher*, 509 F.3d at 976.

[132] *See Fisher*, 509 F.3d at 976.

benefit that it is a better check on police power. By requiring a warrant if exigency dissipates, the Ninth Circuit standard does a better job of protecting the Fourth Amendment's special protection of the home — chiefly by requiring a warrant unless police *cannot* obtain one. By requiring the input of a neutral and detached magistrate, the Ninth Circuit provides a constraint on police power that the Sixth Circuit does not.

Although the Ninth Circuit standard does have these benefits, there are three significant drawbacks to the standard. First, and perhaps most worrisome, application of the Ninth Circuit standard by police in the field is problematic, if not virtually impossible. The decision in *Fisher* is unclear in articulating exactly when police are required to get a warrant.[133] Police officers, while using their judgment to end a standoff safely, must also use judgment to try and avoid future litigation.[134] While most would think a police standoff is dangerous and exigent from start to finish, this is not the standard the Ninth Circuit applies. Instead, police are to "obtain a warrant . . . if the initial exigency dissipates sufficiently."[135] At what point did exigency sufficiently dissipate during the Fisher standoff? After Fisher had been in his apartment for two hours, three hours? When he stopped moving? When the neighbors had been evacuated? It seems desperately unfair to hold police to a standard that even legal professionals cannot articulate.

Second, the Ninth Circuit's approach flies in the face of precedent.[136] If a warrantless arrest is justified by exigency, no warrant is later required for that same arrest.[137] While the Ninth Circuit conceded that surrounding the home was an arrest, the court failed to confront the problem of requiring a warrant to justify a seizure that already occurred.[138] The Fourth Amendment does not require retroactive or post-hoc warrants, as to do so would be unreasonable.[139] The entire idea behind exigency is to make a Fourth Amendment event constitutionally valid.[140] In fact, the dissent in *Fisher* recognized that

> in every case where exigent circumstances justified an initial intrusion, the exigency 'dissipated' in some manner —whether because the suspect is arrested after a hot pursuit, the premises are secured to prevent an escape or destruction of evidence, or a danger to the public is neutralized. We have *never* required the officers to, after the fact, go back and obtain a warrant to justify the initial lawful intrusion.[141]

A standoff is a continuation of the original arrest, the first and only Fourth

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[133] *See Fisher*, 509 F.3d at 977.

[134] *See Fisher*, 509 F.3d at 977.

[135] *Fisher*, 509 F.3d at 962 (majority opinion).

[136] *Fisher*, 509 F.3d at 974-76 (Callahan, J., dissenting).

[137] *Fisher*, 509 F.3d at 971.

[138] *Fisher*, 509 F.3d at 971.

[139] *Fisher*, 509 F.3d at 972.

[140] *See Fisher*, 509 F.3d at 972.

[141] *Fisher*, 509 F.3d at 972.

Amendment event, and that warrantless arrest was justified due to exigency.[142]

Third, and finally, the Ninth Circuit standard engages in "arm-chair quarterback[ing]."[143] It seems inherently unfair for judges, in the safety of chambers, to question police decisions made in the heat of the moment.[144] The dissent in *Fisher* argued that "[s]uch post-game analysis is disconnected from reality and leads to the puzzling determination in this case that San Jose police officers need training despite . . . [doing] nothing wrong."[145] This "arm-chair quarterback[ing]" is even evidenced by the phraseology used throughout the case. Many of the facts cited were facts known to the officers only after resolution of the matter. In fact, one of the first paragraphs of the opinion describes facts that were not readily available to officers during the standoff, but rather were facts from the viewpoint of Fisher himself. The Ninth Circuit begins its recitation of the facts with, "[o]n the afternoon of Saturday, October 23, 1999, Fisher bought two twelve-packs of beer and settled in at home for an evening of watching the World Series and cleaning rifles from his collection of approximately eighteen World War II-era firearms."[146] From the police perspective at the time of the standoff, Fisher was not your average baseball watcher. He was an intoxicated, gun wielding man who was an extreme danger to the community. To later question police decisions is ludicrous, particularly with access to facts unknown at the time.

## B. The Sixth Circuit Rule: The Good or Just Better?

The Sixth Circuit rule also has its shortcomings. First, it allows police power to go essentially unchecked during a police standoff. By removing the power of the detached magistrate, we "permit officers to invade the sanctity of the home indefinitely and in new, and more intrusive ways."[147] The purpose of a warrant is to limit the actions of police. Theoretically, if a standoff continues for many hours, the police can continue to do whatever is necessary to force a subject out of his home, and have no warrant for any activity. The Sixth Circuit standard also fails to consider the ease with which warrants can be obtained. Only one officer would have to leave the scene of a standoff.[148]

All things being equal, however, the Sixth Circuit standard is the better

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[142] *Fisher*, 509 F.3d at 972.

[143] *Fisher*, 509 F.3d at 969.

[144] *Fisher*, 509 F.3d at 969.

[145] *Fisher*, 509 F.3d at 969.

[146] *Fisher*, 509 F.3d at 954 (majority opinion).

[147] *Fisher*, 509 F.3d at 964.

[148] In fact, in *Fisher*, the majority opinion articulates this point, saying:
> [s]ome of the original officers left the scene at 7 a.m. and returned to the station house, where they or their colleagues could have initiated warrant proceedings. By 1 p.m., many officers had been at Fisher's apartment complex for several hours; in total, more than 60 officers participated over the course of the standoff between the police and Fisher.

reasoned, easier to apply, more bright-line rule. First, it is simple common sense that there is a threat of serious bodily injury throughout the entire duration of a police stand off, thus the standoff constitutes exigent circumstances from start to finish. In fact, if there was no threat of bodily injury, to either police or the public, there wouldn't be a police standoff in the first place. Police would leave the scene, because there would be no immediate reason to arrest. It is ridiculous logic to claim that a police standoff is not dangerous the entire time. If one finds that a standoff constitutes exigent circumstances from start to finish, then no warrant is required, as under the Sixth Circuit standard.

Second, the Sixth Circuit standard is superior to that of the Ninth Circuit because it does not overly regulate police. Police are skilled at defusing potentially deadly situations. There is reason to believe they have good judgment. Not only do police complete numerous hours of training, but they also have on the job experience. It seems a bit ridiculous for judges or common citizens to overanalyze police action in such situations, when neither has the training or experience to form such judgments. Using hindsight to question police on their proficiency at handling standoffs is a fruitless and unreasonable exercise.

Third and finally, the standard articulated by the Sixth Circuit is clear. Police in the field know what actions are allowed and what actions are not. Police will be aware that once a decision is made regarding exigency, they are justified in using reasonable means to effectuate a formal arrest and take the arrestee into custody. It is the job of the courts to articulate legal standards and clarify what actions will subject a person to litigation. It would be somewhat useless to have a standard that is impossible to apply, such as that of the Ninth Circuit. What purpose would such a rule have?

## CONCLUSION

The danger that exists in a police standoff is incredible. Officers are called upon to make tactical decisions that may determine life or death. Simultaneously, the Fourth Amendment is implicated during police standoffs as the lone barrier to unchecked police power. The Fourth Amendment's key phrase, however, is "reasonable." When other demands outweigh the reasonableness of protecting a person from seizure within his home, the Fourth Amendment still allows the police action. Interestingly, both cases examined by the Sixth Circuit and the Ninth Circuit ended with no innocent fatalities. One could wonder, if the cases had ended differently, how that would have affected the outcomes. The protection of life is ultimately a reasonable justification for allowing police the power to arrest without a warrant in a police standoff.

Unfortunately, there are two different approaches to dealing with exigency during a police standoff situation. While the issue is anything but clear for courts, the likelihood of either *Bing* or *Fisher* being successfully

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*Fisher*, 509 F.3d at 967.

appealed to the Supreme Court is low. The Supreme Court has previously had numerous chances to define and explore exigency, all of which the Court has openly dismissed. Unfortunately, this leaves lower courts to struggle in defining and applying exigency in all contexts, as well as in police standoffs. In the absence of Supreme Court guidance, lower court jurisprudence should parallel what common sense dictates. Police standoffs are exigent from their inception until the arrestee is finally in police custody, and as such, a warrant should not be required.