

The Immediate Threat:  
Multiple Definitions of Exigency Create  
Conflicting Jurisprudence

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INTRODUCTION

The Fourth Amendment to the United States Constitution guarantees citizens the right to “be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>1</sup> Most Americans highly value this right, and the courts must afford it significant protection. To uphold the Fourth Amendment protection against unreasonable searches and seizures, police are expected to obtain a court-issued warrant in order to enter a citizen’s property without his or her permission. In rare instances, however, police officers circumvent this process in an effort to ensure security. One such “exigent circumstance” exists when the necessity of police action in the face of potential danger overrides that of a search warrant.<sup>2</sup> An exigent circumstance means that officers must conduct an immediate search even if they do not have time to obtain a warrant. During emergency situations, police must make instant judgment calls that could either save or end the lives of civilians, suspects, their fellow officers, or even themselves. In these highly critical moments, it may be extremely difficult to determine whether a true “exigency” exists.

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<sup>1</sup> U.S. Const. amend. IV, § 1.

<sup>2</sup> *Bing v. City of Whitehall*, 456 F.3d 555 (6th Cir. 2006).

The case of *Bing v. City of Whitehall* highlights a dispute over a police decision to enter an individual's home without a warrant. The background section of this article will lay out the key facts from *Bing*. The basic legal standard utilized by the court will then be presented, along with examples of how this standard has been applied in cases such as *Hancock v. Dodson*, *O'Brien v. City of Grand Rapids*, *Causey v. City of Bay City*, and *Bing*. This article will then demonstrate that varying definitions of the "immediate threat" exigency in court opinions have led to inconsistent court rulings, thereby showing why a more comprehensive definition would benefit law enforcement and courts by providing a uniform guideline for dealing with such situations.

### BACKGROUND<sup>3</sup>

The Estate of William Bing sued the City of Whitehall Police Department. The Estate claimed that police had violated Bing's Fourth Amendment rights by initially breaking his door and windows, and then entering his home without a search warrant.<sup>4</sup> The issue before the courts was whether the surrounding circumstances justified this warrantless behavior.

On the evening of October 14, 2002, the City of Whitehall Police Department responded to a complaint that William Bing had fired a gunshot into the ground and into the air. The police had previously visited the Bing residence in response to reported shots fired.<sup>5</sup>

Bing had reportedly gone on a three- to four-day drinking binge after losing both his job and girlfriend.<sup>6</sup> He informed his Alcoholics Anonymous sponsor, Richard Finton, of the problems he was facing and his plans to drink excessively.<sup>7</sup> Finton further believed that Bing had "more than likely consumed narcotics of some sort, [and] it was a possibility he was huffing some sort of

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<sup>3</sup> Some of the facts and claims raised in this case are disputed. Since William Bing is deceased, the district court refused to grant plaintiff's summary judgment request. This article will focus on the undisputed facts, with an emphasis on how the "immediate threat" exigency has been defined, rather than any commentary as to whether Bing's death resulted from an unconstitutional "use of force" once officers entered his home.

<sup>4</sup> *Bing v. City of Whitehall*, 373 F. Supp. 2d 770, 773 (S.D. Ohio 2005).

<sup>5</sup> *Bing*, 456 F.3d at 564.

<sup>6</sup> *Bing*, 373 F. Supp. 2d at 770, 773; *Bing*, 456 F.3d at 555, 561.

<sup>7</sup> *Bing*, 373 F. Supp. 2d at 773.

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inhalant.”<sup>8</sup> Bing’s neighbors reported that some teenage boys had been taunting him for most of the day. Bing had fired a gunshot into the ground and into the air to frighten the teens away.<sup>9</sup>

Detective Grebb, Officer Salyers, and Officer Adkins arrived first on the scene at 6:30 p.m. A crowd had gathered outside Bing’s home and neighbors refused to evacuate, which increased the officers’ level of concern.<sup>10</sup> Looking through the windows, Officer Salyers saw Bing move from room to room, and for approximately twenty minutes he yelled for Bing to surrender.<sup>11</sup>

When Bing did not respond, the on-scene officers pursued more extreme measures and contacted the Special Weapons and Tactics (S.W.A.T.) team to help evacuate Bing. The S.W.A.T. team arrived at around 7:30 p.m. and immediately began gathering information.<sup>12</sup> S.W.A.T. officers expressed concern that perhaps Bing had not merely fired his gun in the air, but had actually fired *at* the teens with intent to harm them.

At 8:43 p.m., the police inserted a throw-phone into Bing’s house in an effort to communicate with him.<sup>13</sup> The S.W.A.T. team breached Bing’s front door to ensure that the throw-phone was inserted in a location where Bing would see it. Bing, however, did not answer the phone when it rang.<sup>14</sup>

At 8:54 p.m., officers decided that Bing was not going to emerge, and subsequently threw a round of pepper gas through Bing’s front windows. At 9:50 p.m. the officers inserted a second round of pepper gas through the back windows. The police inserted a total of eighteen rounds of pepper gas into Bing’s home, but Bing still did not respond.

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<sup>8</sup> *Bing*, 456 F.3d at 561.

<sup>9</sup> *Id.* at 559.

<sup>10</sup> *Id.* at 559-60.

<sup>11</sup> *Id.* at 558.

<sup>12</sup> *Id.* at 560.

<sup>13</sup> “A throw-phone [or bag phone] is a portable phone with a very long cord. It is often used by hostage negotiators to establish contact with the perpetrator. Additionally, a throw-phone has a one-way microphone that allows the police to hear what is going on inside the house.” *Bing*, 373 F. Supp. 2d at 774.

<sup>14</sup> *Bing*, 456 F.3d at 561.

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After these initial attempts at communication failed, the police modified their tactics. At 10:48 p.m., Detective Grebb employed a “flashbang” device in an attempt to stun Bing.<sup>15</sup> The police allegedly heard Bing fire a gunshot in response to the flashbang; Detective Grebb claimed that Bing fired specifically at him.<sup>16</sup> When reinserting the throw-phone at 11:05 p.m., Officer Salyers reported that he saw a bullet hole near the window.<sup>17</sup> Based upon Detective Grebb’s and Officer Salyers’ reports, the police decided a raid of the home would be necessary.

At 11:20 p.m., the officers entered Bing’s home. Sergeant Martin asserted that Bing shot at him through a five-inch hole in a door during the police raid. The police officers opened fire at Bing, and claimed that Bing returned fire.<sup>18</sup>

The police deployed a second flashbang to distract Bing and prevent him from firing more shots. The second flashbang ignited some material in Bing’s home and forced officers to evacuate from the resulting flames. Responding firefighters later discovered Bing’s body inside the home. The county coroner reported that Bing had died of a shotgun wound to the back.<sup>19</sup>

The district court ruled that the City of Whitehall Police Department’s warrantless search and raid of Bing’s home violated Bing’s Fourth Amendment rights. The court found that no exigency had existed which would allow police officers to enter the home without a warrant. The Police Department appealed this ruling to the Sixth Circuit Court of Appeals.

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<sup>15</sup> “A flashbang is a ‘non-lethal’ device utilized by the police to startle and disorient people. It first lets out a very loud sound and produces a great deal of light.” *Bing*, 373 F. Supp. 2d at 775.

<sup>16</sup> *Id.* at 774.

<sup>17</sup> *Bing*, 456 F.3d at 561.

<sup>18</sup> *Id.* at 562.

<sup>19</sup> Forensic evidence left some room for doubt as to whether Bing had actually been firing his gun at all. This is one of the reasons the court was unwilling to dispose of the separate claim for wrongful death as a matter of summary judgment. *Id.* at 563.

## LEGAL STANDARD

### *General Legal Standard*

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>20</sup>

The Fourth Amendment guarantees that police cannot enter a private home without receiving prior consent or first securing a court-authorized search warrant. Police are required to obtain from a judge or magistrate a warrant that precisely specifies the particular object to be searched, and where police are to look for it.

An exception to the warrant requirement exists in the presence of “exigent” circumstances. The courts have referred to a general framework used to identify situations constituting an exigency. Under this framework, any one of the following conditions qualifies a situation as exigent:

- (1) when police officers are in hot pursuit of a fleeing suspect,
- (2) *when the suspect poses an immediate threat to arresting officers or the public, or*
- (3) when immediate police action is necessary to prevent the destruction of evidence or the escape of the suspect.<sup>21</sup>

This article will strictly focus on the second “immediate threat” form of exigency. This is the form of exigency at the heart of the *Bing*, *Hancock*, *O’Brien* and *Causey* cases. As analysis of these cases will show, inconsistency in the application of this short phrase can lead to variation in the outcome of cases with very similar facts.

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<sup>20</sup> U.S. Const. amend. IV, § 1.

<sup>21</sup> *Hancock v. Dodson*, 958 F.2d 1367, 1375 (6th Cir. 1992) (emphasis added).

*Application of Legal Standard in Other Cases*

*Hancock v. Dodson*

Joan Hancock filed suit against Officer Barry Dodson and other members of the Lake Orion Police Department on behalf of her husband, Danny Hancock. She claimed that the police violated her husband's Fourth Amendment rights by entering the home without a warrant.<sup>22</sup>

On July 19, 1986, Danny Hancock had a heated argument with his wife and subsequently stormed out to his barn with a gun in hand. Disturbed by his actions, his wife called Dr. Kostere, Mr. Hancock's psychologist, and told him that she "either heard a gun go off or thought she heard a gun shot."<sup>23</sup> Aware of Hancock's history of depression and his past threat of suicide, Dr. Kostere notified Oakland County Police because he felt the situation "posed a threat of severe danger."<sup>24</sup> A police dispatcher called the Hancock residence to assess the situation. Hancock responded that the situation was none of the police officers' business and threatened to "kill" any police officers who approached his home. The radio dispatcher informed police officers that Hancock was suicidal and possibly homicidal.<sup>25</sup>

Several officers soon arrived at the Hancock residence and planned out their course of action. Officer Dodson and Officer Schrah went toward the back of the house, while three officers remained in the front. Officer Dodson heard Hancock screaming in an "agitated, angry, [and] hostile" tone.<sup>26</sup> Peering into the house through the back door, Officer Dodson spotted a weapon close to the front door where Hancock stood. Officer Dodson then entered the home through the back door and moved toward the front door. Officer Pizzini motioned Hancock to come out onto the front porch, and Hancock complied. At that moment, Dodson opened the front door, drew his gun on Hancock and said, "We are the police, let's talk."<sup>27</sup> Hancock responded by striking Dodson in the thigh. After struggling with the police officers, Hancock was eventually arrested, taken to the police station, and charged with assault and battery.

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<sup>22</sup> *Id.* at 1369.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Several weeks after the arrest, Hancock was injured in a severe car accident, and treatment of his injuries revealed a subdural hematoma.<sup>28</sup> Hancock's doctors believed that the car accident alone could not have led to the severity of his head injuries and diagnosed the prior scuffle with the police as the cause.<sup>29</sup> Mrs. Hancock then sued the Lake Orion Police Department, claiming that the police violated her husband's Fourth Amendment rights through the warrantless entrance and search of his residence.<sup>30</sup>

The Sixth Circuit Court of Appeals disagreed with Mrs. Hancock and ruled in favor of the police on the Fourth Amendment claim. The court agreed that under normal circumstances a police officer is prohibited from entering a residence without a warrant. However, the court found that the circumstances in the *Hancock* case were "exigent" and justified the immediate action of the police officers.<sup>31</sup>

The court determined that the *Hancock* case was an example of the "immediate threat" form of exigency, because Hancock had threatened to harm police officers before they arrived at his residence. When the police dispatcher asked Hancock how things were going in his house, Hancock responded that it was of no concern to the police and if any police officers were sent to his residence he would "kill them." Officers had also been informed that they were dealing with a suicidal and possibly homicidal suspect. Additionally, Officer Dodson had seen a gun within Hancock's reach, and believed he had to prevent Hancock from using that weapon. For these reasons, the court viewed Hancock as an "immediate threat" to the arresting officers. Thus, the police did not violate Mr. Hancock's Fourth Amendment rights by entering his home without a warrant.<sup>32</sup>

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<sup>28</sup> *Id.* at 1370.

<sup>29</sup> When Mr. Hancock had visited the hospital after his release from jail, no special treated was recommended. However, it was noted that Mr. Hancock had taken some harsh blows to the head. *Id.*

<sup>30</sup> Joan Hancock raised several other claims against the Lake Orion Police Department that are beyond the scope of this article.

<sup>31</sup> *Id.* at 1375.

<sup>32</sup> *Id.* at 1376.

*O'Brien v. City of Grand Rapids*

In another Fourth Amendment case, Joseph O'Brien sued the City of Grand Rapids Police Department, alleging violation of his Fourth Amendment rights when police searched his home without a warrant.<sup>33</sup> After the district court ruled in favor of O'Brien, the police department appealed to the Sixth Circuit Court of Appeals.<sup>34</sup>

On the morning of October 6, 1987, police were sent to Joseph O'Brien's home to satisfy a civil judgment by seizing his truck. Aware that O'Brien had shot at someone in his yard in the past, Officer Baker requested additional police assistance, and Officer Johnson arrived at the scene. The officers knew that O'Brien was at home and knocked several times to inform him of the impending truck seizure.<sup>35</sup>

O'Brien did not respond, so officers proceeded with the truck seizure as originally planned. Once the tow-truck driver attempted to secure O'Brien's vehicle, Officer Johnson noticed O'Brien standing behind his front screen door with a rifle in hand. Officer Johnson ordered O'Brien to drop the rifle, but O'Brien refused and insisted that the police "leave [his] truck alone" and depart from his premises.<sup>36</sup> O'Brien did not point his rifle at anyone or verbally threaten to use it.

The police then took several measures to communicate with O'Brien. Officer Johnson requested back-up on scene to stabilize the situation, since O'Brien had a "history of violence and mental problems."<sup>37</sup> The police then evacuated all of O'Brien's neighbors and secured the perimeter around O'Brien's home. Negotiators arrived at 12:30 p.m. and unsuccessfully talked with O'Brien for six hours. By late afternoon, commanding officers decided

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<sup>33</sup> O'Brien also claimed that excessive force was used in his arrest. This article will not discuss the excessive force claim. *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 992 (6th Cir. 1994).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Members of the Neighborhood Patrol Unit (NPU) were the main officers that responded to Johnson's call. NPU officers focus on "critical incidents" involving "barricaded gunmen." *Id.*



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that it was time to utilize investigatory probes to allow them a better view inside O'Brien's home.<sup>38</sup>

The Grand Rapids Police Department conducted three probes of O'Brien's house, the third of which triggered a violent response from O'Brien.<sup>39</sup> At 4:29 p.m., Officer Ingalls performed the first probe by attaching mirrors to the living room window to get a better view of what was going on inside the house. At 5:25 p.m., Officer Ingalls performed the second probe by breaking the living room windows with a sledgehammer. Neither probe was successful. Around 5:51 p.m., O'Brien yelled, "I do not want to go to jail," and at 5:55 p.m., Officer Ingalls performed the third probe by breaking the remaining part of the living room window, to which O'Brien responded by firing ten shots at the police.<sup>40</sup> This was the first time O'Brien had shown any form of physical threat.

At 6:27 p.m., the police chief issued a "shoot-to-kill" order against O'Brien because he had physically threatened officers by firing at them.<sup>41</sup> For the next two hours, police officers unsuccessfully continued to attempt communication with O'Brien. At 8:43 p.m., almost nine hours after negotiators first arrived on scene, Officer Lis saw O'Brien's silhouette in the kitchen and shot him in the neck. The bullet severed O'Brien's spinal cord and rendered him a quadriplegic.

The Sixth Circuit Court of Appeals upheld the ruling of the district court. The court found that the searches carried out on O'Brien's home by the police officers were a violation of his Fourth Amendment rights, because there was no exigent circumstance.<sup>42</sup> The court ruled out the presence of an

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<sup>38</sup> *Id.* at 994.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> The police also argued that "other exigent circumstances" justified their actions to search O'Brien's home. According to established exigency standards, the police had to show that these "other exigent circumstances" fell under one of the three categories previously listed (with the "immediate threat" form of exigency being the second of these three categories). The police also argued that the O'Brien situation qualified under the first category as "hot pursuit" of a suspect, since O'Brien had confronted Officer Johnson with his rifle earlier in the day. The court disagreed with this argument because Officer Johnson did not deal with O'Brien on his own, but called for more backup, which eliminated the possibility of a "hot pursuit." The court also ruled out

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“immediate threat” exigency because O’Brien had not posed any immediate threat *before* the search.<sup>43</sup> The police had not tried to arrest O’Brien until the first shots were fired in response to the third police probe. The court found that a warrant could have been obtained within the four and half hours between the arrival of the first officer and the use of the first probe.<sup>44</sup> Therefore, the court found that O’Brien’s Fourth Amendment rights were violated since no exigent circumstances had existed to justify the warrantless searches.

*Causey v. City of Bay City*

Choice Causey sued the Bay City Police Department, claiming that officers violated his Fourth Amendment rights when they entered his backyard and residence without a search warrant. At 7:30 p.m. on New Year’s Eve, 2001, Officer Doyle and Officer Sporman responded to a complaint from Causey’s neighbor that several gunshots had been fired from the Causey residence.<sup>45</sup> The neighbor added that she had not seen anyone enter or leave the residence since, and that the Causeys had fired shots on past New Year’s Eve and Fourth of July holidays.<sup>46</sup> The officers entered Causey’s fenced backyard and discovered several bullet casings in the snow. The officers first knocked on the back door of the house, and later a dispatcher called the house, but in each instance no one responded. Earlier in the day, police had actually received two calls from the Causey residence. The first caller simply hung up and the second one explained that the previous call was a child’s prank. However, Causey’s neighbor told police that she did not think there were any children in the house.

Based on the uncertainty of the situation, police were authorized to make a “warrantless, forcible, entry into the [Causey] residence to check for any injured persons inside.”<sup>47</sup> The officers at the scene waited “an estimated ‘15 to 30’ minutes” for backup.<sup>48</sup> Once backup arrived, Officer Doyle knocked on the door again and yelled that the police would enter the home very soon.

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category three (preventing destruction of evidence) because there was no sign that O’Brien was going to destroy any evidence or try to escape. *Id.* at 997.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 998.

<sup>45</sup> *Causey v. City of Bay City*, 442 F.3d 524, 526 (6th Cir. 2006).

<sup>46</sup> *Id.* at 527.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

After receiving no response, Officer Souser broke the door down with a battering ram.

Causey later disagreed with these police reports, arguing that he had responded to the knocks on the door and assured the police that everything was fine inside, and that the officers had no justification to enter his home without a warrant. The Sixth Circuit Court of Appeals ruled in favor of the police.<sup>49</sup> The court held that there was no violation of Causey's Fourth Amendment rights due to the exigent nature of the situation.<sup>50</sup> The majority used *Commonwealth of Massachusetts v. Morrison* and *Dickerson v. McClellan* to support its reasoning.<sup>51</sup>

The *Causey* Majority used the "immediate aid" provision of *Commonwealth of Massachusetts v. Morrison* to determine that officers made a lawful entry into Causey's home based on the likelihood that someone in the Causey residence needed immediate police aid. In *Morrison*, the Supreme Court of Massachusetts had previously ruled that officers could lawfully enter a home without a warrant if:

- (1) The plaintiffs were concealing another person ... inside the house, or
- (2) The plaintiffs were being intimidated into giving assurances by an unseen attacker inside the residence.<sup>52</sup>

In *Morrison*, officers entered an apartment in which the defendant (Morrison) was hidden inside, holding a young woman at gunpoint, and forcing her to assure officers that nothing inside the apartment was wrong. The Massachusetts Supreme Court held that officers could lawfully enter the young woman's apartment because they believed that Morrison was forcing her to give this false reassurance.<sup>53</sup>

The *Causey* Court applied similar logic and determined that even if Causey reassured officers that everything was fine, officers made a valid

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<sup>49</sup> *Id.* at 528.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 529-31.

<sup>52</sup> *Id.* at 530 (referencing *Commonwealth v. Morrison*, 710 N.E.2d 584, 587 (Mass. 1999)).

<sup>53</sup> *Causey*, 442 F.3d at 530.

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“immediate aid” assessment of the situation. This would mean that they executed a lawful warrantless entry into the Causey residence under the suspicion that someone in the home was injured or being coerced by an unseen gunman. Because officers in *Causey* believed that someone in Causey’s home needed immediate aid, the court viewed the case as an “immediate threat” form of exigency.<sup>54</sup>

The *Causey* Majority also utilized the *Dickerson* opinion to illustrate that “an exigency exists when an officer can demonstrate that a suspect has a willingness to use a weapon.”<sup>55</sup> The *Dickerson* case involved an individual who had shown the willingness to use a weapon by firing nine gunshots.<sup>56</sup> The *Dickerson* Court also ruled that waiting for back-up for less than an hour does not take away from the exigency of such a situation.<sup>57</sup> The *Causey* Majority determined that the *Dickerson* logic showed the same willingness of Causey, who had already fired six shots, to use his weapon.<sup>58</sup> In *Causey*, the first two officers at the scene waited for backup for less than half an hour. Consequently, the *Causey* Court ruled that this interim time did not extinguish the immediate threat, and the circumstances were therefore exigent.<sup>59</sup>

Judge Karen Nelson dissented. Nelson argued that a mere “shots-fired call” was not enough to constitute immediate threat.<sup>60</sup> She argued that other evidence must be provided to determine the dangerousness of the shooter. She referenced *Hancock v. Dodson* as an example. As previously discussed, Danny Hancock had access to a weapon and had showed the willingness to use it, but it was the additional evidence that he was suicidal and possibly homicidal that made the situation *exigent*. Applying *Hancock* to *Causey*, Judge Nelson believed that additional evidence was necessary to justify the warrantless police entrance into the Causey home. To Judge Nelson, there was no presence of an exigent circumstance, so Causey’s Fourth Amendment rights were violated by the police.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 529-31 (referencing *Dickerson v. McClellan*, 101 F.3d 1160 (6th Cir. 1996)).

<sup>56</sup> *Causey*, 442 F.3d at 529-30.

<sup>57</sup> *Id.* at 530-31.

<sup>58</sup> *Id.* at 529.

<sup>59</sup> *Id.* at 531.

<sup>60</sup> *Id.* at 532 (Nelson, J., dissenting).

*Application of Legal Standard in Bing's Case*  
*Majority Opinion*

In *Bing v. City of Whitehall*, the Sixth Circuit Court of Appeals ruled that Bing's Fourth Amendment rights were neither violated by the officers' use of search probes on his home, nor by the subsequent S.W.A.T team invasion of his home. The majority felt that Bing's behavior had created an "immediate threat" form of exigency.<sup>61</sup>

The *Bing* Majority referenced the three established exigency criteria to determine the existence of an exigency in this case.<sup>62</sup> The court ruled that Bing's behavior fell under the "immediate threat" category because it created an immediate threat to arresting officers and the public. Bing had "discharged a firearm near neighborhood minors" and "continued to have access to a gun inside the house"; "police had been called to Bing's residence on previous occasions because he previously had fired shots"; "the police could see Bing move from room to room, demonstrating that police and bystanders were probably within range of Bing's gun"; "people in the street reported that Bing appeared intoxicated, making it reasonable to expect he would act unstably"; and lastly, "a crowd was gathered in the street near Bing's house, and people in the neighborhood refused to evacuate."<sup>63</sup>

The court then compared the *Bing* case to the events of *Causey v. City of Bay City*. The *Causey* Court had concluded that immediate threat exigency could be measured by the willingness of the suspect to use a weapon. The *Bing* Majority believed that Bing was also willing to use his weapon, since he had already fired into the air and around teens. *Causey* also inspired the *Bing* Court to discuss the issue of timing and whether on-the-scene investigations terminate exigent situations. The *Causey* Majority had held that "exigent circumstances terminate when the factors creating the exigency are negated."<sup>64</sup> The *Bing* Court took this to mean that that the two hours and twenty-four minutes of

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<sup>61</sup> *Bing*, 456 F.3d at 564.

<sup>62</sup> The three established exigency criteria consists of: (1) when police are in hot pursuit of a fleeing suspect, (2) when the suspect poses an immediate threat to arresting officers or the public, or (3) when immediate police action is necessary to prevent destruction of evidence or escape of the suspect.

<sup>63</sup> *Bing*, 456 F.3d at 564.

<sup>64</sup> *Id.* (referencing *Causey*, 442 F.3d at 530).

passed time between the initial arrival of the police and their use of the first investigatory probes did not extinguish the exigency.<sup>65</sup> According to the *Bing* Majority, the fact that police “waited for backup” and “gathered” perimeter reports did not eliminate the presence of an immediate threat.<sup>66</sup>

The *Bing* Majority also referenced *Hancock v. Dodson* and *O’Brien v. City of Grand Rapids* in support of its holding. The majority believed that *Hancock* was similar to *Bing*, because *Hancock* was potentially homicidal and *Bing* displayed similar characteristics in his decision to fire his gun in the presence of teens.<sup>67</sup> The *Bing* Majority, however, found the *O’Brien* case to be distinguishable because *Bing* posed a more “immediate threat” than *O’Brien* had.<sup>68</sup> *O’Brien* did not point his weapon at anyone or verbally threaten to use it, and *O’Brien* also refrained from taking action against the officers until they performed the third probe. *Bing*’s behavior, according to the majority, had been more threatening from the outset. The majority therefore concluded that *Bing*’s Fourth Amendment rights were not violated by the City of Whitehall Police Department due to the exigent nature of *Bing*’s situation.

#### *Dissent*

Judge Ronald Gillman dissented from the majority opinion, arguing that *Bing*’s Fourth Amendment rights had been violated.<sup>69</sup> Judge Gillman did not recognize the presence of an immediate threat. Unlike the majority, Judge Gillman viewed *O’Brien* as similar to *Bing*, and *Hancock* as distinguishable from *Bing*.<sup>70</sup> He argued that although *O’Brien* had shown a willingness to shoot at an individual by yelling at officers from his front door with a rifle in hand, the *O’Brien* Court *still* concluded that *no* exigent circumstance existed.<sup>71</sup> Using this reasoning, Judge Gillman argued that *Bing*’s situation should not have been viewed as an immediate threat because *Bing* had only shown a willingness to shoot his gun into the air, and not at an individual.

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<sup>65</sup> *Bing*, 456 F.3d at 566.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 565.

<sup>68</sup> *Id.* at 568.

<sup>69</sup> *Id.* at 572 (Gillman, J., dissenting).

<sup>70</sup> *Id.* at 573-74.

<sup>71</sup> *Id.* at 573.

Judge Gillman also viewed the situation in *Bing* as less exigent than that in *Hancock*, because Danny Hancock had actually threatened to “kill” any police officers who came to his house.<sup>72</sup> William Bing had never made any verbal threat.<sup>73</sup>

Judge Gillman also expressed dissatisfaction with the majority’s emphasis on the presence of neighbors as a contributing factor to the immediacy of the situation. Judge Gillman found this logic problematic, because police could take advantage of such situations by not evacuating neighbors in order to “justify a warrantless entry on the basis of exigent circumstances.”<sup>74</sup> He argued that the lack of police effort in evacuating Bing’s neighbors should not justify the failure to obtain a search warrant. For these reasons, Judge Gillman disagreed with the majority ruling, and did not see sufficient exigency to justify the officers’ warrantless entry into Bing’s home.

### ANALYSIS

The three circumstances that courts have generally defined as an *exigent* circumstance include:

- (1) when police officers are in hot pursuit of a fleeing suspect,
- (2) when the suspect poses an *immediate threat* to arresting officers or the public, or
- (3) when immediate police action is necessary to prevent the destruction of evidence or the escape of the suspect.<sup>75</sup>

The following analysis will focus on the second scenario, namely the “immediate threat” concern that has been applied in the cases previously discussed. Inconsistent interpretation of this phrase has resulted in varying definitions of an exigency, and the courts must now reduce this inconsistency. Although each court has considered separate (yet individually important) elements of an immediate threat, they have yet to collectively consider all these elements in a holistic and thorough manner.

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<sup>72</sup> *Id.* at 574.

<sup>73</sup> The claim that Bing fired at the police once they entered his home remains open to dispute. The district court received forensic testimony that Bing’s gun, recovered from the scene, did not bear his fingerprints. *Id.* at 570.

<sup>74</sup> *Id.*

<sup>75</sup> *Hancock*, 958 F.2d at 1367, 1375 (emphasis added).

The latter portion of this analysis will propose the adoption of a consolidated and more comprehensive understanding of the immediate threat exigency, by incorporating all of the factors that the *Bing*, *Causey*, *Hancock* and *O'Brien* Courts found to be determinant. Each form of “red flag” raised as a potential exigency should be parsed out and analyzed in isolation; this approach will promote consistency and reduce blurring of the issues. This analysis of individual “red flags,” when applied consistently by all the courts as a package, will serve to promote uniformity in future decision-making by both police and the courts.

*Identifying an “Immediate Threat” Exigency*

When arresting officers must balance an individual’s Fourth Amendment rights with their own safety and that of the public, it becomes difficult to identify a legally recognized “immediate threat.” Because there is no single definition of an immediate threat as a form of exigency, judges must use their discretion (and case precedents that they deem factually relevant) in determining whether the officers have crossed a constitutional line. Under the current standard, one judge’s perception of an immediate threat may differ from another judge’s view. As a result, inconsistent rulings can be seen by comparing the *Bing* case with the *Causey*, *Hancock*, and *O'Brien* cases.

*Red Flag 1: “Immediacy”*

An “immediate threat” exigency exists when a “suspect represent[s] an immediate threat to the arresting officers and public.”<sup>76</sup> This exigency arises when police must abandon the requirement of obtaining a warrant due to what they perceive as an “immediate” need to contain a threat to themselves or the surrounding public. This red flag (“immediate” need for intervention), with its emphasis on the timing of events, can be analyzed in each case through a careful review of the pertinent facts.

The *Hancock* Court found an immediate threat because Danny Hancock, known to be mentally unstable, fired a weapon out of anger, explicitly threatened police officers before they arrived, and continued to shout at officers during and after their arrival. In response to this threat, Oakland County Police arrived at Hancock’s property, entered his house, and arrested

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<sup>76</sup> *Id.*



him right away. However, the issue of “immediacy” in *Bing* is considerably less evident when considering the threat William Bing posed to the police and the public. The *Bing* Majority held that there was a stronger case of an immediate threat because police were concerned about the “safety of bystanders and neighbors.”<sup>77</sup>

The *Bing* Court, however, did not acknowledge that Bing fired his gun early in the evening; it was not until approximately 11 p.m. – four and a half hours after officers had arrived in response to the several investigatory probes on his home – that Bing fired his gun again (after remaining completely dormant for an extended period of time).<sup>78</sup> Unlike Hancock, Bing acted violently only as a reaction to the *provocations* of police officers. There was no evidence of an “immediate” threat that mandated police to search his home without taking the time to obtain a warrant. For this reason, Bing’s behavior should not have triggered a specific red flag requiring “immediate” police action.

In his dissent, Judge Gillman argued that the situation in *O’Brien v. City of Grand Rapids* was more similar to *Bing* than the other cases referenced by the *Bing* Majority. The *O’Brien* Majority found that O’Brien’s Fourth Amendment rights had been violated by the police officers’ performance of searches on his home, and further held that the lack of an immediate threat was evidenced by the fact O’Brien had remained non-threatening until the officers instituted a series of probes six hours after their arrival.<sup>79</sup>

The time disparity in *O’Brien* is just as applicable to *Bing*. In the *O’Brien* case, four and a half hours passed before the officers decided to carry out their first investigatory probe on O’Brien’s house. According to the *O’Brien* Majority opinion, this lapse in time extinguished any immediate threat, and the police could have sought a warrant during this delay. Similarly, in *Bing*, two hours and thirteen minutes passed between police arrival and the first probe on Bing’s home. Later, four hours had elapsed by the time Bing reacted to the flashbang device and canisters of pepper gas. Within this amount of time, the police could have sought a warrant.

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<sup>77</sup> *Bing*, 456 F.3d at 565.

<sup>78</sup> *Id.* at 561. This assumes that Bing did actually fire his gun at police later in the evening (a disputed fact).

<sup>79</sup> *Id.*

It is true that the police may have needed time to plan an appropriate course of action in response to Bing's intoxication, his non-responsiveness, and his use of a weapon around young people in his neighborhood. However, Bing did not act violently toward the police until *after* the first flashbang was inserted at 10:20 p.m. – nearly four hours after police initially arrived. The *Bing* Majority believed the passage of time did not terminate the immediate threat, because Bing was a “continuous immediate danger.”<sup>80</sup> The majority held that the passage of time did not change Bing's access to his gun, reduce his willingness to fire it, or eliminate the persisting threat he posed to the neighbors.

Here, the *Bing* Majority should have been more precise. The passage of time indicates that although Bing posed a “continuous” threat, he did not pose an “immediate” threat. After the initial gunshot was reported, Bing had completely retreated into his home without further incident until police deployed a flashbang. The police could have safely evacuated Bing's neighbors while waiting for the S.W.A.T. team and planning a raid of Bing's house. The officers in *Bing* may have created their own exigency by not properly evacuating the neighbors, thus exposing them to any perceived threat. Even after evacuating the neighbors, the police could have waited for Bing to respond or obtained a warrant to enter his home. However, the police in *Bing* did neither. For the court to condone this behavior is, as Judge Gillman pointed out, extremely troubling.

*Red Flag 2: “Need for Aid”*

The *Causey* Court also considered the immediate need for “aid” as a determining factor in identifying an immediate threat. The court stated, “[This] permits officers to make a warrantless entry into a residence ‘when they reasonably believe that a person within is in need of immediate aid.’”<sup>81</sup> Under this standard, if officers could reasonably infer that “(1) the plaintiffs were concealing another person (perhaps incapacitated by the gunshots) inside the house, or (2) the plaintiffs were being intimidated to give assurances by an unseen attacker in the residence,” then police may enter the suspect's home without a warrant.<sup>82</sup>

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<sup>80</sup> *Id.* at 565 (quoting *Michigan v. Tyler*, 436 U.S. 499, 510 (1978)).

<sup>81</sup> *Causey*, 442 F.3d at 529 (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)).

<sup>82</sup> *Causey*, 442 F.3d at 530.

The responding officers in *Causey* entered Choice Causey's residence, despite assurances from Causey that there was nothing dangerous in his home, because they were concerned that someone in the residence needed immediate aid.<sup>83</sup> Several circumstances made officers suspicious: (1) they received reports that no one had left the residence since the shots had been fired, (2) they made several failed attempts to contact the residents in the house, and (3) police dispatchers had earlier received a 911 hang-up call from inside the home under suspicious circumstances.<sup>84</sup> The *Causey* Court agreed that the police officers' suspicions were enough to constitute an "immediate threat" form of exigency, which justified their entry into the home without a warrant.<sup>85</sup>

Though the immediate aid determination may seem highly subjective, officers must be allowed to make such findings in a potentially exigent circumstance. Valid arguments can be made regarding the potential for officers to misuse this standard. The circumstances of *Causey*, however, are relatively unique and unlikely to occur often. Unlike the *O'Brien* and *Bing* cases, in which officers confronted known combatants, officers in *Causey* relied on the discovery of freshly-fired shell casings to substantiate claims that someone had fired shots near the house in question.<sup>86</sup> *Causey* officers were also unable to identify a gunman or make contact with anyone inside the house. The 911 call from the residence, made earlier in the evening, also heightened the officers' concern that something may have gone awry within the Causey residence. In the *Causey* case, responding officers could not reasonably discount the possibility that someone inside may be in need of immediate aid. In order to apply the immediate aid exigency as applied in *Causey*, officers must have reasonable suspicions that an unseen gunman or victim is inside a residence.

Delaying or failing to act on reasonable suspicions of an unknown gunman or victim would deny victims of desperately needed assistance. The *Hancock* case serves as another example where this form of an immediate threat exigency could have been reasonably applied. Danny Hancock had just been involved in a heated dispute with his wife and was very upset when he left the house. Hancock's wife called her husband's psychologist because she said she heard (or thought she heard) gunshots being fired from the couple's nearby

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<sup>83</sup> *Id.* at 527.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 530.

<sup>86</sup> *Id.* at 527.

barn. Hancock's psychologist, Dr. Kostere, called the police because he felt the situation "posed a threat of severe danger."<sup>87</sup> Furthermore, the police dispatcher informed the police officers that Hancock was suicidal and possibly homicidal. Given all this information, officers could have reasonably concluded that Hancock posed a threat to his wife, and that immediate action was needed to ensure her safety. The police and future courts would have been better served if the *Hancock* Court, like the *Causey* Court, had expressly taken this red flag indicator of the "need for aid" into account.

*Red Flag 3: "Willingness to Use a Weapon"*

The *Causey* Majority also provided the following definition that the *Bing* Majority later used in reaching its own decision: "an exigency exists when officers can demonstrate that a suspect has a willingness to use a weapon."<sup>88</sup> In *Causey*, the police officers demonstrated that Choice Causey showed a willingness to use a weapon, because his neighbor reported that Causey had fired several shots in his yard. The officers responded with a "warrantless, forcible entry" into Causey's home.<sup>89</sup> The majority ruled in favor of the police because Causey had already shown the willingness to fire his weapon nine times.<sup>90</sup>

Along the same lines, the *Bing* Court held that an immediate threat existed because "the police received a report of shots fired."<sup>91</sup> This implied that Bing had access to a gun and was willing to use it. It was reported that Bing had fired his weapon in response to taunts by neighborhood teens, and police worried that Bing was actually firing *at* the youth.

This "willingness" factor is objectively grounded; since an armed person could potentially hurt someone, a police officer must act quickly to prevent such harm. However, the willingness to use a weapon should not be viewed as enough, on its own, to prove the existence of an immediate threat unless officers know more about the *motives* behind any such willingness to use a weapon.

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<sup>87</sup> *Hancock*, 958 F.2d at 1369.

<sup>88</sup> *Causey*, 442 F.3d at 529.

<sup>89</sup> *Id.* at 527.

<sup>90</sup> *Id.* at 530.

<sup>91</sup> *Bing*, 456 F.3d at 565.

As Judge Nelson argued in her *Causey* dissent, additional evidence is required alongside fired shots to confirm the dangerousness of the shooter. She referenced *Hancock*, arguing that although Hancock had access to a weapon and showed the willingness to use it, what made the situation exigent was the additional fact that he was suicidal and possibly even homicidal. By contrast, the *Causey* Court noted that Causey's firing of nine shots on New Year's Eve was not a unique event; his neighbor had heard "shots from [Causey's] residence on the previous Fourth of July and New Year's Eve."<sup>92</sup> With such a history, it can be reasonably assumed that the motive behind Causey firing nine gunshots was to once again commemorate the New Year, and this was *not* enough to assume that he was willing to fire his weapon at individuals.

The events in *Bing* also merit a closer look at the reasons behind the willingness to use his weapon. As mentioned earlier, the *Bing* Court used the "willingness to use a weapon" justification to rule in favor of the police. The court was swayed by the fact that Bing was willing to fire his gun in the presence of teens, and concluded that since Bing was possibly "homicidal," the police did not violate his Fourth Amendment rights by entering his home without a warrant.<sup>93</sup> According to Bing's Alcoholics Anonymous sponsor, Richard Finton, Bing was on an extended drinking binge and had probably used narcotics as well.<sup>94</sup> In addition to his altered state of mind, Bing had been taunted by these neighborhood teenagers.<sup>95</sup> Officers received reports suggesting that Bing fired shots in the presence of these teens in an effort to be left alone, not to harm them. However, because Bing was heavily intoxicated and agitated, officers expressed concern over his mental state and his willingness to use a weapon.<sup>96</sup>

Of all the cases discussed, only *O'Brien* demonstrated a court ruling in favor of the plaintiff on this factor. Whereas Bing, Hancock, and Causey initially fired their weapons at will, *O'Brien* fired his weapon only in response to multiple police probes on his home, in defense against invasive actions. This distinction among the cases is important, because it shows that individuals may (and do) fire their weapons for different reasons. Thus, for purposes of

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<sup>92</sup> *Causey*, 442 F.3d at 529.

<sup>93</sup> *Bing*, 456 F.3d at 565.

<sup>94</sup> *Id.* at 561.

<sup>95</sup> *Bing*, 373 F. Supp. 2d at 773.

<sup>96</sup> *Bing*, 456 F.3d at 559.

determining an immediate threat, the sole action of firing a weapon is insufficient without taking into consideration surrounding circumstances.

With all of this information in mind, the court should have directly analyzed the circumstances under which Bing was willing to fire his weapon, instead of merely noting the fact that he did fire it. Firing a weapon may not be legal behavior, but it alone does not imply the intent to harm other individuals. The reasons why someone is willing to fire a weapon are crucial for determining whether a case should be deemed an immediate threat exigency. This additional “red flag” should be considered in every case, consistently, before concluding that a “shots fired” situation should automatically be viewed as an exigency justifying the warrantless entry into a home.

*Red Flag 4: “History of Instability”*

In *Hancock*, the court determined that consideration of Danny Hancock’s past and continuing psychological state was an important element for identifying an immediate threat. In the past, Hancock had threatened to commit suicide.<sup>97</sup> He had been seeing a psychologist to help him deal with his depression. The police were familiar with Hancock’s unstable history and acted immediately to keep his actions in line. The court found that Hancock’s history of instability increased the immediate threat of the situation at his home, and ruled in favor of the police, holding that entry into Hancock’s residence was not a violation of his Fourth Amendment rights.

Like the *Hancock* Court, the *O’Brien* Court also took the suspect’s past unstable behavior into account in reviewing the existence of an immediate threat exigency. Not only was O’Brien uncooperative with the police, but he had also shot at an individual on his premises in the past. Furthermore, O’Brien had mental problems that made him more unpredictable and unstable. Officers were aware of each component of O’Brien’s unstable history, but despite these details, the *O’Brien* Court ruled that the police officers’ warrantless entry still violated O’Brien’s Fourth Amendment rights.<sup>98</sup>

To maintain consistency with the other courts’ decisions, the *Bing* Court should have expressly considered whether Bing had a history of unstable behavior when determining the presence of an immediate threat. The police had already visited the Bing residence before in response to reports of shots

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<sup>97</sup> *Hancock*, 958 F.2d at 1369.

<sup>98</sup> *O’Brien*, 23 F.3d at 999.

fired. The police were also aware that Bing was intoxicated, and had also probably used narcotics.<sup>99</sup> Because Bing was likely under the influence of substances and experiencing emotional stress, the police were justifiably concerned that Bing may be unpredictable and psychologically unbalanced.

Despite the fact that all three men (Bing, Hancock, and O'Brien) had a history of instability, the courts ruled that O'Brien had his Fourth Amendment rights violated, while Hancock and Bing did not. Ultimately, the courts have been inconsistent with regard to adopting a standard for reviewing "immediate threat" exigencies. The *O'Brien* and *Hancock* opinions carefully accounted for the unstable histories of the suspects, while the *Bing* Majority barely discussed it. It is difficult to imagine any court ignoring the importance of this red flag when determining the severity of the "threat" that a citizen may pose to the police or others in the vicinity.

#### *Exigency Redefined*

Consistency should be the goal of all legal proceedings, to ensure that police, judges, and the public at large have a common understanding of acceptable legal behavior. Consistency is particularly important when it comes to defining an exigent circumstance, so that the guarantees of the Fourth Amendment will be appropriately upheld. Although each exigent circumstance may include different factual elements, a fixed package of cues for identifying an "immediate threat" form of exigency would allow both police and judges to achieve uniformity. To prevent debate over which definitions to use, the courts should adopt a comprehensive standard of an immediate threat that includes all the red flags identified by the *Hancock*, *O'Brien*, *Causey*, and *Bing* courts. These "red flags" include:

- 1) Immediacy – i.e., the amount of time available to ensure public safety and to obtain a warrant,
- 2) the possibility of an injured person requiring immediate aid,
- 3) the suspect's objective *and subjective* willingness to use a weapon, and
- 4) the suspect's past history of violent or unstable behavior.

This comprehensive approach will allow multiple red flags to be combined in a variety of ways to ensure that the "threat" at hand is truly "immediate."

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<sup>99</sup> *Bing*, 456 F.3d at 561.

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In assessing the possible existence of an “immediate threat,” police should first account for the amount of time they have to respond, thereby prioritizing the safety of both the public and themselves. If police reach the scene of a potential emergency and find themselves with a significant amount of time to plan out their actions (as in *O’Brien*), then the threat is not truly “immediate” (factor #1). If the situation does not require immediate police action, officers should seek a search warrant, thereby bringing a neutral magistrate judge into the process as envisioned by the Fourth Amendment.

If, however, an injured person might require immediate aid, the courts must recognize a substantial reason for the police to override the warrant requirement (factor #2). While the *Causey* Court appropriately applied this factor, none of the other courts expressly included this element in their analyses. At the very least, the *Hancock* Court should have considered whether Hancock’s wife (with whom Hancock was in a heated dispute) could have possibly been hurt.

In the case of a suspect who demonstrates the willingness to use a weapon, the police and courts must look for further cues to determine whether an immediate threat exists (factor #3). Even though Hancock and Bing arguably fired their weapons in a violent context, Causey did not. Bing fired his weapon around teens while intoxicated, and later (allegedly) fired at the police. Hancock, in a suicidal and possibly homicidal state, had fired his weapon out of anger and verbally threatened the police. Causey, on the other hand, had fired his weapon into the air, consistent with past celebratory actions taken on previous holidays. Despite these differences, all of these respective courts ruled that the shots fired supported the conclusion that the situation was exigent. If the court had taken Causey’s *subjective* motivation into account, his case likely would have been treated differently than the others on this point, as it should have been.

The “history of instability” factor also provides necessary context behind the exigency of a situation (factor #4). Bing, Hancock and O’Brien all shared histories of instability, but the *O’Brien* Court used this to rule in favor of O’Brien, while the *Bing* Court ignored this element. When the suspect has a criminal or mentally unstable history, the courts and the police must consider this history as a supplemental factor in the larger scheme of an immediate threat.

To avoid conflicting court rulings and confusion for police officers, the courts must revise their approach to the immediate threat form of identifying



exigent circumstances and methodically take all four of these “red flag” factors into account. Such a revision would create a more uniform understanding of the concept of an immediate threat. This revised standard would also create a more useful guideline for police officers when they find themselves in questionable situations.

Some may argue that such a fixed standard would limit police discretion. Police should have a substantial amount of leeway in measuring the exigent nature of a situation; such discretion is good when a police officer is able to perform an objective evaluation. However, the very nature of an immediate threat puts heightened stress on the officers who must make quick decisions in order to protect lives. A uniform standard will assist officers by providing a comprehensive guideline to identify crucial elements of an immediate threat during these tense and stressful situations.

## CONCLUSION

In each of the cases discussed in this article, the Fourth Amendment provided the rule of law at issue, but the courts relied on a larger three-part framework that overrides the warrant requirement: (1) during the hot pursuit of a fleeing suspect, (2) during an *immediate threat* to police officers and public, or (3) to prevent the destruction of evidence or escape of the suspect. By isolating and focusing on the second scenario, this article has demonstrated that varying definitions of the words “immediate threat” have led to inconsistencies in legal proceedings.

This article therefore calls for a more comprehensive definition of the “immediate threat” form of exigency. By adopting a comprehensive definition of an immediate threat that is inclusive of all the past “red flags” of immediacy previously utilized by different courts, greater uniformity would be achieved in court rulings and police protocol. If executed effectively, the redefinition of exigency proposed in this article would also balance civil rights and public security, in accordance with the letter and spirit of the Fourth Amendment.

There are, however, two other forms of exigency that are susceptible to the same amount of inconsistency in definition and application (“hot pursuit” and “destruction” of evidence). Just as this article has done with the “immediate threat” form of exigency, courts must take similar action to standardize a formula of review for the other two forms of exigency.

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While it is crucial for courts to interpret laws in a uniform manner and for police to enforce these laws consistently, it is of equal importance for individual citizens to have a full grasp of the laws under which they live. Citizens cannot possibly understand their constitutional protections when courts and law enforcement officers fail to reach a common understanding of these rights. As demonstrated by the cases in this article, uniform understanding of the law is of tremendous importance when public safety, individual lives, *and* our constitutional values are at risk.