

**DEFINING THE DESTRUCTION OF  
EVIDENCE EXIGENCY EXCEPTION: WHY  
COURTS SHOULD ADOPT A STRICT  
PROBABLE CAUSE STANDARD IN THE  
WAKE OF *KENTUCKY V. KING***

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## INTRODUCTION

Ensuring the privacy of citizens is just as important as pursuing legitimate investigations. The Fourth Amendment eloquently sets out this principle by stating that people have “the right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches.”<sup>1</sup> The challenge for the courts is to determine what an “unreasonable” search is.

Warrantless searches of a home have been held to be “presumptively unreasonable.”<sup>2</sup> However, since the “touchstone” of the Fourth Amendment is “reasonableness,” exigencies—emergency situations that require immediate entry—constitute an exception to the warrant requirement.<sup>3</sup> Police face a “now or never” situation with exigent circumstances, and it forces them to make a spur-of-the-moment decision, which leaves no time to obtain a warrant.<sup>4</sup> The main categories of exigent circumstances include the need to provide emergency aid, apprehend a fleeing suspect, and prevent the destruction of evidence.<sup>5</sup> Although each type of exigency presents its own problems and questions, this Comment concentrates almost exclusively on defining the destruction-of-evidence exigency, because it is the least dangerous and entails the greatest threat to privacy.

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<sup>1</sup> U.S. CONST. amend. IV

<sup>2</sup> *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)).

<sup>3</sup> *Id.* at 403 (citing *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999)) (per curiam); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *United States v. Hendrix*, No. CR-0-189-D, 2009 WL 2591656 (W.D. Okla. Aug. 19, 2009) (citing *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Lyons*, 510 F.3d 1225, 1239 (10th Cir. 2007)).

<sup>4</sup> *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973).

<sup>5</sup> *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011).

In the aftermath of the Supreme Court's recent case *Kentucky v. King*, the focus of the destruction of evidence exigent circumstance has shifted.<sup>6</sup> *King* concerned "police-created" exigencies. The Court held warrantless entry is allowed when there are exigent circumstances as long as the officers do not create the exigency by "engaging or threatening to engage in conduct that violates the Fourth Amendment."<sup>7</sup> Conduct that threatens to violate the Fourth Amendment includes threatening or demanding to enter a residence before a proper exigency arises.<sup>8</sup> As long as the officers only knock and announce their presence without more before entry, their actions do not impermissibly create an exigency regardless of their subjective intent.<sup>9</sup>

Before *King*, the lower courts directed much of their attention to whether or not the police improperly created an exigency by knocking and announcing their presence, and most courts placed severe limits on such police-created exigencies.<sup>10</sup> In the wake of *King's* approval of a broad range of police-created exigencies, the question of what circumstances actually constitute a true exigency has become much more important. As of now, different jurisdictions analyze exigencies in different ways.<sup>11</sup> For instance, the Fifth Circuit uses the *Rubin* Factors as a guide to determine whether an exigency exists.<sup>12</sup> The Third and Fourth Circuits apply the same approach as the Fifth Circuit.<sup>13</sup> Aside from the Sixth and Tenth Circuits, the remaining circuits employ a general reasonable standard.<sup>14</sup> The Sixth Circuit applies a two-part test,<sup>15</sup> and the Tenth Circuit applies a flexible four-part test paralleling

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<sup>6</sup> *See id.*

<sup>7</sup> *Id.* at 1858.

<sup>8</sup> *See id.* at 1858 n.4.

<sup>9</sup> *Id.* at 1862.

<sup>10</sup> *Warrantless Searches and Seizures*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 37 (2005); *see also* *United States v. Williams*, 354 F.3d 497, 504 (6th Cir. 2003) (stating officers cannot "manufacture exigent circumstances").

<sup>11</sup> *See* Geoffrey C. Sonntag, *Probable Cause, Reasonable Suspicion, or Mere Speculation?: Holding Police to a Higher Standard in Destruction of Evidence Exigency Cases*, 42 WASHBURN L.J. 629 (2003).

<sup>12</sup> *United States v. Thompson*, 700 F.2d 944, 948 (5th Cir. 1983) (citing *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973), *cert. denied*, 414 U.S. 833 (1973)).

<sup>13</sup> *See infra* notes 38-42.

<sup>14</sup> *See infra* notes 36-37

<sup>15</sup> *See infra* notes 43-35

the *Rubin* Factors.<sup>16</sup> This four-way circuit split produced inconsistent results in similar factual scenarios.

This Comment proposes an objective, yet stringent, two-part probable cause test to determine whether a destruction of evidence exigency exists when police knock and announce their presence and enter a house without a warrant. The police must have (1) probable cause that the evidence is present and (2) probable cause that the evidence is in imminent danger of destruction.<sup>17</sup> Further, if law enforcement officers determine an exigency exists, they may perform only a limited search and seizure in response to the exigency. A seizure of the premises is the least intrusive solution because it eliminates the exigency by removing the people who threaten the evidence and allows time to gain a warrant for the search.

On remand, in *King*, the Kentucky Supreme Court held that insufficient evidence existed to find an actual exigency.<sup>18</sup> If an officer enters a dwelling without a warrant or an exigent circumstance, courts suppress the incriminating evidence under the exclusionary rule, because the right to privacy under the Fourth Amendment outweighs investigation when it is wrongly conducted.

This Comment presents a new analysis for destruction-of-evidence exigencies because the risk to the public safety in such cases is typically low and the threat to privacy is often high. This new test will minimize abuse of the exigency exception and provide a uniform federal rule.

Part I looks specifically at the different ways the Fifth Circuit and other circuits defined an exigency pre-*King*. Part II defines the difference between a public-safety exigency and a destruction-

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<sup>16</sup> See *infra* notes 46-47.

<sup>17</sup> Destruction of evidence deals mostly with cases involving drugs, but this is not always the case. See *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (holding that exigent circumstances were not present to arrest the suspect for fear his blood-alcohol level would decrease before the officers obtained a warrant); *United States v. Anderson*, 981 F.2d 1560, 1567 (10th Cir. 1992) (finding that possibly warning someone of police investigation was not enough to constitute the destruction of the evidence of porn). Since the destruction of drugs is the most common example of the destruction-of-evidence exigency, this Comment and its two-part probable cause test will focus mostly on drug cases. However, the two-part probable cause test is applicable for other destruction-of-evidence cases.

<sup>18</sup> *King v. Commonwealth*, 386 S.W.3d 119, 123 (Ky. 2012).

of-evidence exigency and presents an adjusted quantum of suspicion for the destruction-of-evidence exigency. Part III illustrates the probable cause test and the catch-all cure if the test is satisfied. Finally, Part IV applies the probable cause test through case testing.

## I. BACKGROUND

### A. *Fourth Amendment Exigency Exception*

Swerving across the road, a car eventually stopped in the middle of a field. A witness called the police while the driver of the vehicle, Edward Welsh, emerged and walked home.<sup>19</sup> The police arrived at the scene, gathered the driver's information, and realized Welsh lived a short distance away.<sup>20</sup> The police went to Welsh's house, and after his niece answered the door, the police proceeded upstairs and arrested Welsh.<sup>21</sup> Under the pretense of hot pursuit, protection of the public, and destruction of the evidence of his blood-alcohol level, the police justified their actions as responding to an exigency.<sup>22</sup>

The Wisconsin Supreme Court found that exigent circumstances existed for the warrantless arrest, and the officer had probable cause to arrest Welsh.<sup>23</sup> On the other hand, the United States Supreme Court dismissed hot pursuit and protection of the public because the chase was not continuous, and Welsh was no longer on the road.<sup>24</sup> Considering the gravity of the underlying offense of drunk driving, the Court also concluded no destruction-of-the-evidence exigency existed.<sup>25</sup>

This landmark decision shaped the destruction of evidence exigency.<sup>26</sup> The Supreme Court clearly delineated the factors to

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<sup>19</sup> *Welsh*, 466 U.S. at 742.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 743.

<sup>22</sup> *Id.* at 748.

<sup>23</sup> *Wisconsin v. Welsh*, 321 N.W.2d 245 (1982), *vacated*, 466 U.S. 740 (1984).

<sup>24</sup> *Welsh*, 466 U.S. at 753.

<sup>25</sup> *Id.* at 754. At this time, in Wisconsin, driving under the influence was a misdemeanor punishable by revocation of the driver's state driver's license for sixty days. *Id.* at 743.

<sup>26</sup> *Id.* Another landmark case dealing with the exigency exception was *Vale v. Louisiana* where the Supreme Court determined there was no exigency to enter the premises and perform a warrantless search but that there could be one in other

consider when analyzing an exigent circumstance. The Court stated that the government has the burden of proving an exigency when a suspect is arrested under the exigency exception.<sup>27</sup> The Court also put a great emphasis on the nature of the underlying offense in analyzing whether there was an exigency situation.<sup>28</sup> The Supreme Court did not state, in *Welsh*, that the destruction-of-evidence exigency can never be considered for ascertaining a suspect's blood-alcohol level, but the Court stated that each court should consider the gravity of the underlying offense in a state-by-state determination.<sup>29</sup> *Welsh* furthered the understanding of the exigency exception and it illustrated that exigency exceptions are "few in number and carefully delineated."<sup>30</sup>

### *B. Analyzing the Exigency pre-King: The Four Approaches*

Before *King*, circuit courts often focused on the issue of impermissible creation of the destruction-of-evidence exigency as opposed to whether exigency existed or not.<sup>31</sup> Circuit courts asked whether the police "permissibly or impermissibly created the exigency," and courts generally concluded that the police could not purposefully create an exigency.<sup>32</sup> Courts, however, did routinely confront the question of whether exigent circumstances existed in a given case, and disagreement exists in the circuits about how to analyze the actions of the police and how to weigh their subjective intent, if at all.<sup>33</sup> Much litigation has hinged on this issue, and the courts developed four different approaches for analyzing the actual exigency, rather than the creation of it.

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situations. *Vale v. Louisiana*, 399 U.S. 30 (1970). In *Vale*, the drugs "were not in the process of destruction" nor about to be removed because the suspect was arrested outside the residence, and the officers knew no one was in the residence. *Id.* at 35.

<sup>27</sup> *Welsh*, 466 U.S. at 749-50.

<sup>28</sup> *Id.* at 751.

<sup>29</sup> *Id.* at 754 n.14.

<sup>30</sup> *Id.* at 749 (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972)).

<sup>31</sup> See Bryan M. Abramoske, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 SUFFOLK U. L. REV. 561, 562 (2008); *Warrantless Searches and Seizures*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 37 (2005); see also *United States v. Williams*, 354 F.3d 497 (6th Cir. 2003).

<sup>32</sup> Abramoske, *supra* note 31, at 562.

<sup>33</sup> *Id.*

The four approaches used by the circuits all consider the exigency in light of the reasonable belief or fear the evidence would be destroyed.<sup>34</sup> The Third, Fourth, Fifth, Sixth, and Tenth Circuits expanded differently on the reasonable belief standard employed by the other circuits. This circuit split produces different holdings for similar factual scenarios, resulting in conflicting guidelines for police in determining whether or not an exigency exception exists.<sup>35</sup>

### 1. First Approach

In the first approach, courts only consider the Fourth Amendment reasonableness standard when analyzing an exigency.<sup>36</sup> The First, Second, Seventh, Eighth, Ninth, and Eleventh Circuits have adopted this approach, and it leaves much leeway for courts to reach different conclusions based on similar facts.<sup>37</sup>

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<sup>34</sup> See Sonntag, *supra* note 11, at 629 (researching the different Circuit approaches pre-*King* in his Comment).

<sup>35</sup> The two *Johnson* opinions from the Eighth Circuit illustrate this problem. In both cases, postal workers intercepted a drug package in the mail, changed the contents of the package, and then, after delivery, police entered the suspect's house without a warrant. See *United States v. Johnson*, 12 F.3d 760 (8th Cir. 1993) (finding no exigent circumstance because the officers were in the process of obtaining a warrant); *United States v. Johnson*, 904 F.2d 443 (8th Cir. 1990) (finding that warrantless entry was justified by an exigent circumstance because the address was not specific enough to guarantee the officer's ability to obtain a warrant).

<sup>36</sup> See Sonntag, *supra* note 11, at 644 (citing *United States v. Marshall*, 157 F.3d 477, 482 (7th Cir. 1998)).

<sup>37</sup> See *United States v. Samboy*, 433 F.3d 154, 159 (1st Cir. 2005) (finding the facts of the case gave rise to a reasonable belief that the drugs could be destroyed); *United States v. Ojeda*, 276 F.3d 486, 488 (9th Cir. 2002) (stating if an officer reasonably believes from the "totality of the circumstances" that evidence will be destroyed an exigency exists); *United States v. Marshall*, 157 F.3d 477, 482 (7th Cir. 1998) (stating exigent circumstances exist where there is a reasonable belief or fear drugs are about to be destroyed); *United States v. Young*, 909 F.2d 442, 446 (11th Cir. 1990) (considering whether a reasonable agent would consider the facts to lead to the imminent destruction of drugs); *United States v. Schaper*, 903 F.2d 891, 894 (2d Cir. 1990) (stating a warrantless entry is justified where officers have a reasonable belief suspects are present and drugs may be destroyed); *United States v. Clement*, 854 F.2d 1116, 1119 (8th Cir. 1988) (stating if a reasonable belief exists that the evidence is in immediate danger of destruction action can be taken).

## 2. Second Approach

The Fifth Circuit, along with the Third and Fourth Circuits, developed a second approach with a more detailed and definitive test. Known as the “*Rubin* Factors,” the test considers whether or not the possessors of the drugs knew the police were on their trail.<sup>38</sup> In *United States v. Rubin*, the court concluded that since a suspect yelled, “Call my brother,” when he was arrested, the officers had probable cause to believe the evidence was in danger of being destroyed.<sup>39</sup> In *Rubin*, the Third Circuit introduced five factors to consider when evaluating whether a destruction of evidence exigency existed:

- (1) [T]he degree of urgency involved and . . . time necessary to obtain a warrant;
- (2) reasonable belief that the contraband is about to be removed;
- (3) the possibility of danger to police officers . . .
- (4) information indicating the possessors of the contraband are aware that the police are on their trail; and
- (5) the ready destructibility of the contraband.<sup>40</sup>

In addition to the factor analysis, application of this approach emphasized that officers could not create the exigency.<sup>41</sup>

The Fifth Circuit has also focused on “the appearance of the scene of the search in the circumstances presented as it would

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<sup>38</sup> See *United States v. Webster*, 750 F.2d 307, 326 (5th Cir. 1984) (finding that since other suspects were arrested there was reason to believe the evidence was in imminent danger of destruction); see also *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (stating that probable cause existed because one suspect could have seen the arrest of another suspect).

<sup>39</sup> 474 F.2d 262, 269 (3d Cir. 1973), *cert. denied*, 414 U.S. 833 (1973). The Fifth Circuit first adopted the *Rubin* Factors in *United States v. Thompson* as a method to aid in the exigency determination. 700 F.2d 944, 948 (5th Cir. 1983).

<sup>40</sup> *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) (internal citations omitted); see also Sonntag, *supra* note 11, at 639. Not all factors need to be present. For instance, the court in *Webster* only considered three factors that were pertinent to the case. *Webster*, 750 F.2d at 326.

<sup>41</sup> Sonntag, *supra* note 11, at 640; see *e.g.*, *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004), *abrogated by Kentucky v. King*, 131 S. Ct. 1849 (2011) (finding that the officers did not act with the intent to create the exigency); *United States v. Richard*, 994 F.2d 244, 252 (5th Cir. 1993) (finding that the district court did not err in suppressing the evidence because of a police created exigency), *abrogated by United States v. Aguirre*, 664 F.3d 606 (5th Cir. 2011) (finding that the police-created exigency is no longer a question post *Kentucky v. King*).

appear to reasonable and prudent men standing in the shoes of the officers.”<sup>42</sup> This analysis does not act as another factor in addition to the *Rubin* Factors but as more of a guideline for courts to consider. Although it is vague, the guideline further follows the framework of the Fourth Amendment and the importance of reasonableness.

### 3. Third Approach

The Sixth Circuit developed a third approach that uses a two-part test to determine if the evidence is in imminent danger of being destroyed.<sup>43</sup> The two factor test of the Sixth Circuit creates an approach that falls between the more detailed *Rubin* Factors and the simple reasonableness standard. The court considers: (1) whether the subject is in the dwelling and (2) whether immediate action is necessary to stop destruction.<sup>44</sup> Police must first consider if time permits them to obtain a warrant. The police then consider if they have an “actual fear that the evidence is at risk of imminent destruction” based on whether the suspect knows of the police’s arrival or whether the suspect notices that the evidence has been tampered with by the police.<sup>45</sup> Finally, the police also consider the actions, sounds, and events of the situation to form a conclusion. In summary, under the Sixth Circuit test, the police consider: whether there is time to gain a warrant, whether the suspects are present and know the police are hot on their trail, and whether the ensuing situation, after the knock and announce, is imminent destruction.

### 4. Fourth Approach

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<sup>42</sup> *United States v. Alba*, 439 F. App’x 291, 293 (5th Cir. 2011) (per curiam) (quoting *United States v. Rodea*, 102 F.3d 1401, 1405 (5th Cir. 1996)); *see also* *United States v. Riley*, 968 F.2d 422, 425 (5th Cir. 1992).

<sup>43</sup> *United States v. Gaitan-Acevedo*, 148 F.3d 577, 585 (6th Cir. 1998); *see also* *Sonntag*, *supra* note 11, at 642.

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

<sup>45</sup> *United States v. Ukomadu*, 236 F.3d 333, 335 (6th Cir. 2001); John Mark Huff, *Warrantless Entries and Searches Under Exigent Circumstances: Why Are They Justified and What Types of Circumstances Are Considered Exigent?*, 87 U. DET. MERCY L. REV. 373, 389 (2010).

The Tenth Circuit also uses a more comprehensive test that considers more than an officer's reasonable belief. The test states that entry based on destruction of evidence must be:

(1) [P]ursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of evidence is likely, (3) limited in scope to the minimum intrusion necessary, and (4) supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.<sup>46</sup>

This approach is similar to the *Rubin* Factors, but is a more comprehensive test because it requires officers to have evidence of probable cause. However, in application, the Tenth Circuit test is flexible, and the courts do not religiously adhere to it.<sup>47</sup>

### C. *Kentucky v. King*

*Kentucky v. King* arose out of a motion to suppress the evidence obtained from the warrantless search of a residence.<sup>48</sup> The police set up a "controlled buy" of cocaine outside an apartment building.<sup>49</sup> After the buy, the suspect made it back to his room before the police apprehended him; the police only heard a door shut.<sup>50</sup> When they approached the area where the door shut, they smelled marijuana coming from the door on the left.<sup>51</sup> After knocking and announcing their presence, the police heard what sounded like people and things moving.<sup>52</sup> Believing the

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<sup>46</sup> *United States v. Carter*, 360 F.3d 1235, 1241 (10th Cir. 2004) (quoting *United States v. Aquino*, 836 F.2d 1268, 1272 (10th Cir.1988)); *see also* *United States v. Scroger*, 98 F.3d 1256, 1259 (10th Cir. 1996).

<sup>47</sup> In *United States v. Aquino*, the court concluded there was an exigency that allowed for a sweep of the premises based on the following two facts: (1) the suspect could have been informed that other individuals in the same drug connection were arrested; and (2) the police had reason to believe other individuals in the drug connection were suspicious. 836 F.2d at 1272; *see also infra* notes 156-61 and accompanying text.

<sup>48</sup> *Kentucky v. King*, 131 S. Ct. 1849, 1855 (2011).

<sup>49</sup> *Id.* at 1854.

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

<sup>51</sup> *Id.* The police were not aware at the time that the suspect had actually entered the door on the right. *Id.*

<sup>52</sup> *Id.*

suspects were destroying evidence of the drugs, the police announced their intent to enter and barged into the apartment on the left.<sup>53</sup> The officers performed a protective sweep of the residence and later performed a full search.<sup>54</sup> The suspected drug dealer actually lived in the apartment on the right, and the initial apartment they searched belonged to Hollis King.<sup>55</sup> During the search of King's apartment, the police found cocaine, cash, and drug paraphernalia.<sup>56</sup>

The Circuit Court of Fayette County found King guilty on a conditional guilty plea for "trafficking in controlled substance, possession of marijuana, and being a persistent felony offender."<sup>57</sup> The Court of Appeals affirmed.<sup>58</sup> The Supreme Court of Kentucky found that the exigency exception did not apply because the police created the exigency by knocking on the door.<sup>59</sup> The Supreme Court of the United States reversed and remanded the Kentucky Supreme Court decision.<sup>60</sup>

### 1. Majority

Justice Alito, writing for the eight-Justice majority, only addressed the issue of the "police-created exigency doctrine" and "assume[d] for purposes of argument that an exigency existed."<sup>61</sup> The Court stated, "[A] rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement."<sup>62</sup> Therefore, the Court stated that under the

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* During the protective sweep the police officers saw marijuana, and the later search turned up cocaine, money, and drug paraphernalia. *Id.*

<sup>55</sup> *Id.* at 1855

<sup>56</sup> *Id.* at 1854.

<sup>57</sup> *Id.* at 1849.

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

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

<sup>60</sup> *Id.* at 1864. On remand, the Kentucky Supreme Court held that the prosecution did not demonstrate the existence of the destruction of evidence exigency. *King v. Commonwealth*, 386 S.W.3d 119, 122-23 (Ky. 2012) (explaining that the sounds described at the suppression hearing were consistent with "ordinary household sounds" and vacating King's conviction).

<sup>61</sup> *Kentucky*, 131 S. Ct. at 1862.

<sup>62</sup> *Id.* at 1857.

reasonableness standard of the Fourth Amendment, the police must only act in a reasonable manner before the exigency.<sup>63</sup>

The new rule imposed by the Court rejected a number of arguments circuits used to justify not allowing the police-created exigency. The Supreme Court rejected the argument that courts should consider bad faith on the part of the police because it is a subjective consideration and therefore “fundamentally inconsistent with . . . Fourth Amendment jurisprudence.”<sup>64</sup> The new rule also did away with the “reasonable foreseeability” test—that it would be reasonably foreseeable for the police to conclude evidence would be destroyed.<sup>65</sup> The Court concluded that the test was too difficult for officers to decide in the field.<sup>66</sup> The Court also rejected the arguments that courts should consider the time the police had to secure a warrant and the standard of “good law enforcement practices.”<sup>67</sup> The Court reasoned that these considerations muddle with police investigation tactics and fail to provide solid guidelines for the police to follow.<sup>68</sup>

In holding that the exigency exception “applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment,” the Court acted to keep the rule as simple as possible for police to follow.<sup>69</sup> In *King*, the police officers did not violate the Fourth Amendment because, although their knock and announce may have caused people to react, they did not threaten to enter the house before the exigency existed.<sup>70</sup>

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<sup>63</sup> *Id.* at 1858.

<sup>64</sup> *Id.* at 1859.

<sup>65</sup> *Id.* at 1859-60.

<sup>66</sup> *Id.* at 1860.

<sup>67</sup> *Id.* at 1860-61.

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

<sup>69</sup> *Id.* at 1862.

<sup>70</sup> *See id.* at 1861. The respondent argued that the loud knock and announce by the police created an exigency because the reasonable person would believe that the police are about to enter the residence. *Id.* The Court decided that considering how loud they knocked and how the reasonable person would react was too difficult of a rule for police to follow and therefore rejected it. *Id.*

## 2. Dissent

Justice Ginsburg dissented, believing that the majority's rule would be manipulated by police to evade the warrant requirement.<sup>71</sup> She argued that the Court should consider the time the police had to obtain a warrant from a neutral magistrate.<sup>72</sup> Justice Ginsburg adopted the same conclusion of the Kentucky Supreme Court. She stated: "The urgency must exist, I would rule, when the police come on the scene, not subsequent to their arrival, prompted by their own conduct."<sup>73</sup> Justice Ginsburg fears that under the majority, the police could simply "knock, listen, then break the door down."<sup>74</sup> She reiterated that the Fourth Amendment requires police officers to obtain a warrant from a magistrate whenever possible, echoing the established principle that warrant exceptions are "few in number and carefully delineated."<sup>75</sup>

3. Potential Problems post-*King*

Since the *King* Court addressed the creation of the exigency issue, the new point of contention will be defining the exigency to address Justice Ginsburg's concern about the potential for abuse of the exception. Critics have argued that the Court's test presents a structural bias against criminal defendants.<sup>76</sup> Critics also express concerns about what rises to the level of a threat to violate the Fourth Amendment and what constitutes an exigent circumstance.<sup>77</sup> Deciding what sounds and other factors indicate

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<sup>71</sup> *Id.* at 1865 (Ginsburg, J., dissenting).

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

<sup>73</sup> *Id.*

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

<sup>75</sup> *Id.* (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972)).

<sup>76</sup> The Supreme Court, 2010 Term: Leading Cases, 125 HARV. L. REV. 211, 220 (2011).

<sup>77</sup> See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 38 (2011). The *King* decision does not answer the question about what to do when the police officers "implicitly" create an exigency by approaching a house and knock on the door, saying:

"This is the police! Open up!" The statement to "open up" is not a direct threat—the police didn't say, "open up or else we will do X"—but it is a form of an order. A police order to take certain conduct may or may not count as a "seizure" of the person who is commanded to take the step. The cases on that are actually quite unclear . . . . And even then, the seizure doesn't occur until

an exigent circumstance is a fact-intensive analysis; therefore, it is important to have an established test for trial courts to base their analysis.<sup>78</sup>

## II. RETHINKING THE EXIGENCY ANALYSIS

### A. Reclassifying Exigencies

The three-way circuit split results in inconsistent results.<sup>79</sup> To remedy this division, in light of the Court's new guidance, the circuits should adopt a test going forward that applies a high quantum of suspicion. Since there is a low danger to the public with evidence-destruction exigencies, this higher standard is feasible, and a consistent approach will make it less likely that police will abuse this exigency exception.

#### 1. The Traditional Approach

To overcome the Fourth Amendment warrant requirement, there are “only . . . a few specifically established and well delineated exceptions.”<sup>80</sup> These exceptions to the Fourth Amendment exist because “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”<sup>81</sup> The court, in *King*, defined the three main exigency exceptions: emergency aid, hot pursuit, and destruction of evidence.<sup>82</sup> Courts seem to define exigencies in different terms, but the different terms mean essentially the same thing. For example, emergency aid is sometimes defined as

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the person actually complies with the order . . . . So can the police yell to “open up”? It's not clear.

Rachel Levick, “*Knock, Listen, then Break the Door Down?*” *The Police-Created Exigency Doctrine After Kentucky v. King*, 161 U. PA. L. REV. PENNUMBRA 1, 17 (2012)

<sup>78</sup> See Levick, *supra* note 77, at 11.

<sup>79</sup> Unlike in *Kentucky v. King* on remand, the Fifth Circuit reached an opposite result in *United States v. Aguirre*, even though the cases involved similar fact situations. See *supra* note 35 and accompanying text; see also *infra* notes 142-48 and accompanying text.

<sup>80</sup> *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971)).

<sup>81</sup> *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006)).

<sup>82</sup> *Id.*

protection of third parties, the public, and officers.<sup>83</sup> However, other courts have defined a fourth category for exigencies: to prevent the escape of a suspect.<sup>84</sup> This fourth category is only sometimes listed because it could be lumped into the category of emergency aid. Essentially, in the traditional approach to defining exigencies, most courts list three main types of exigencies even though some courts prefer to delineate a more specific fourth category leaving much confusion and ambiguity.

## 2. An Alternative Approach: Public Safety Versus Evidence Gathering

To cut down on the ambiguity of the different exigency classifications, this Comment proposes that there should be only two simple categories to classify exigencies: (1) public-safety exigencies and (2) evidence-gathering exigencies.

### *a. Public-Safety Exigencies*

Public-safety exigencies concern the safety of third parties. This includes but is not limited to: (1) emergency aid to or protection of a third party, (2) hot pursuit of a suspect, and (3) preventing a suspect from escaping.

An emergency-aid exigency deals with protecting someone in a home or helping someone who has been injured.<sup>85</sup> These situations usually deal with “a report of a disturbance” where the police are called to investigate.<sup>86</sup> Hot pursuit of a suspect involves similar split-second decisions by the police and could potentially

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<sup>83</sup> See *Brigham City*, 547 U.S. at 403 (“The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.”) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)); *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (finding that the suspect was not in danger of hurting the public); see also *United States v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006) (stating that the third exigency is “danger to the lives of officers or others”).

<sup>84</sup> See *United States v. Washington*, 573 F.3d 279, 287 (6th Cir. 2009); *United States v. Rohrig*, 98 F.3d 1506, 1515 (6th Cir. 1996); *United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994).

<sup>85</sup> *King*, 131 S. Ct. at 1856 (quoting *Brigham City*, 547 U.S. at 403).

<sup>86</sup> *Michigan v. Fisher*, 558 U.S. 45 (2009) (finding that the police correctly entered to protect a third party from the defendant throwing things); see also *Brigham City*, 547 U.S. at 406-07 (finding that the defendant throwing punches was violent; and therefore, the police were acting reasonably to enter).

lead to danger to third parties.<sup>87</sup> Therefore, it falls into the public-safety category. Similarly, preventing a suspect from escaping falls into the public safety category because preventing the escape protects the public.<sup>88</sup> An escaped suspect could cause a hot pursuit chase or other dangers to the public.

Under these emergency situations, the police may have to act in a moment's notice to enter a domain without a warrant to ensure the protection of the people involved. Therefore, the standard the police abide by under the Fourth Amendment for these exigencies is objective reasonableness or a reasonable basis for believing someone is in need or crime is afoot.<sup>89</sup>

### *b. Evidence-Gathering Exigencies*

Evidence-gathering exigencies include all the exigencies categorized as the destruction of evidence. Under this category, public safety is not the immediate concern; but rather, the issue is whether the destruction of evidence is imminent.<sup>90</sup> Because the public is not in danger, the reasonable basis for believing standard under the Fourth Amendment is too low a standard, and it does not ensure there will be no manipulation of the warrant exception.<sup>91</sup> Therefore, courts should adopt a new standard.

## *B. Adjusting the Quantum of Suspicion*

An individualized quantum of suspicion is generally required under the Fourth Amendment reasonableness standard; however,

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<sup>87</sup> *United States v. Santana*, 427 U.S. 38, 41-42 (1976), *United States v. Jones*, 204 F.3d 541, 543 (4th Cir. 2000); *Illinois v. Wardlow*, 528 U.S.119 (2000); *United States v. Johnson*, 106 F. App'x 363, 366 (6th Cir. 2004); *see also Welsh*, 466 U.S. at 741 (finding that a hot pursuit must be "continuous").

<sup>88</sup> *See King*, 131 S. Ct. at 1864.

<sup>89</sup> *Mincey v. Arizona*, 437 U.S. 385 (1978).

<sup>90</sup> *Brigham City*, 547 U.S. at 403.

<sup>91</sup> *See generally Welsh*, 466 U.S. at 751-52 (finding that the underlying offense should be considered when dealing with the destruction of evidence exigency exception). *Welsh* is one of the first cases to require more than objective reasonable basis for believing when determining whether it was proper for the police to enter a residence under the destruction of evidence exigency exception. The Third, Fourth, Fifth, Sixth and Tenth Circuits have also defined more guidelines above the reasonableness standard for the police to abide by the destruction of evidence exigency. *See supra* notes 36-47 and accompanying text.

this generality has a few exceptions.<sup>92</sup> An individualized quantum of suspicion requires that the police have some sort of suspicion to perform a warrantless search or seizure.<sup>93</sup> Different types of warrantless searches call for different standards of suspicion. The three main standards of suspicion used in conjunction with the Fourth Amendment are: (1) probable cause, (2) objectively reasonable basis for believing, and (3) reasonable suspicion.<sup>94</sup> These three standards afford much overlap and are inconsistently applied under the Fourth Amendment jurisprudence.

Probable cause is the most used standard of suspicion because it is a high standard that protects the private citizen but allows for investigation of a “fair probability” of wrongdoing.<sup>95</sup> Probable cause is used in many different cases including: determining if a search or an arrest is valid,<sup>96</sup> determining if the totality of buying certain materials warrants a probability of wrong doing,<sup>97</sup> and determining if there is a First Amendment violation.<sup>98</sup> More specifically, courts have found that law enforcement officers need probable cause in place of a warrant as well as an exigency exception for a warrantless search and seizure.<sup>99</sup> Courts have also required probable cause for an arrest

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<sup>92</sup> See generally *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (finding that requiring all students participating in competitive extracurricular activities to submit to a suspicionless drug test constitutional); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (finding a suspicionless school drug test constitutional); *Mich. Dep’t. of State Police v. Sitz*, 496 U.S. 444 (1990) (finding suspicionless sobriety checkpoint constitutional because it was aimed at reducing the drunk drivers on the road); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (finding a suspicionless stop near the border constitutional because it aided in border control).

<sup>93</sup> *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (stating that suspicionless searches are ordinarily unreasonable).

<sup>94</sup> These standards are aside from the narrow exception of suspicionless searches. See *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971)).

<sup>95</sup> *Illinois v. Gates*, 462 U.S. 213, 214 (1983).

<sup>96</sup> *Id.*; *Hill v. California*, 401 U.S. 797 (1971).

<sup>97</sup> *United States v. Groff*, No. 10-CR-50-WMC, 2010 WL 3122628 (W.D. Wis. July 13, 2010).

<sup>98</sup> *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986).

<sup>99</sup> *Illinois v. McArthur*, 531 U.S. 326, 326 (2001). Probable cause was not needed to show there was an imminent destruction of the drugs. *Id.* at 337. As in *McArthur*, under the warrant exception, the officers must have probable cause for a warrant, reasoning that exigent circumstances leave no time to obtain a warrant. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002); *King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky.

of a suspect without a warrant even if the arrest occurs after a stop under the “automobile exception” which is generally based on a reasonable suspicion of wrongdoing.<sup>100</sup> In situations garnering a warrant exception, the warrant exception only extends so far without probable cause.

The next standard used—“an objectively reasonable basis for believing”—is a vague standard that seems to fall between the high standard of probable cause and the lower standard of reasonable suspicion.<sup>101</sup> The reasonable basis standard is commonly used to determine if there is an exigency exception to the warrant requirement for both public safety exigencies and evidence gathering exigencies.<sup>102</sup>

The third standard of “reasonable suspicion” is the lowest standard of proof. When an officer has a reasonable suspicion that a crime is occurring or could occur, the officer may perform a “Terry Stop.”<sup>103</sup> Moreover, in the school setting, the Supreme

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2012). However, probable cause absent exigent circumstances does not permit a warrantless search. *Horton v. California*, 496 U.S. 128, 137 n.7 (1990).

<sup>100</sup> *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (“If the ‘stop’ and the ‘frisk’ based on suspicion “give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal ‘arrest.’”).

<sup>101</sup> Justice Brennan first mentioned the belief of the officer as playing into the determination of an exigent circumstance in *Schmerber v. California*, arguing the officer “might reasonably have believed that he was confronted with an emergency.” 384 U.S. 757, 770 (1966). Justice Black used this analysis to argue in his dissent, in *Vale v. Louisiana*, that “the police had every reason to believe that someone in the house was likely to destroy the contraband if the search were postponed.” 399 U.S. 30, 41 (1970) (Black, J., dissenting). Therefore, the search should have been upheld. *Id.* The arguments from Justices Brennan and Black offer the groundwork for the objectively reasonable basis for believing standard that is not probable cause nor a reasonable suspicion.

<sup>102</sup> *McArthur*, 531 U.S. at 337 (finding that the police “reasonably believed” the evidence was in imminent danger of destruction); *see also*, *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) (stating that the police must have a “reasonable belief that contraband is about to be removed”). This standard is also implied for public safety exigency exceptions. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 399 (2006) (holding that the officers had a reasonable basis for believing a victim was in need of aid); *State v. Edmonds*, 47 A.3d 737, 746-47 (N.J. 2012) (finding that an objectively reasonable basis for believing is needed to show imminent danger); *United States v. Martinez*, 686 F. Supp. 2d 1161, 1195 (D. N.M. 2009).

<sup>103</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968). A “Terry Stop” is a stop and frisk of a person’s outer clothing if the police officer feels crime is afoot, and his safety is therefore compromised. *Id.*; *see also* *Illinois v. Wardlow*, 528 U.S. 119 (2000) (finding reasonable suspicion based on the suspects unprovoked flight to stop and frisk him). *But see* *State v. Nicholson*, 188 S.W.3d 649 (Tenn. 2006) (holding that the unprovoked

Court has found that reasonable suspicion is the applicable test for searching a school child's belongings.<sup>104</sup>

Although this is not an exhaustive list, it illustrates the interplay between the different standards of suspicion. Generally, for each type of warrant exception courts hold officers to a certain standard of proof.

### 1. The Unified Standard

Courts may have adopted the objectively-reasonable standard for warrantless searches and seizures of a residence because this open-ended standard can be lenient for public-safety exigencies and stricter for evidence-gathering exigencies.<sup>105</sup> Moreover, for evidence gathering exigencies, courts have clearly required both probable cause that evidence such as drugs are present in the place to be searched and also a reasonable basis for believing the evidence is in danger of destruction.<sup>106</sup>

### 2. The Varying Standard

Under the varying standard, the quantum of suspicion adversely relates to the risk posed to the public safety; meaning

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flight of the suspect without more did not create a reasonable suspicion that crime was afoot). Both of these courts used the same standard, but yielded different conclusions.

<sup>104</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985) (holding that the school officials had a reasonable suspicion that cigarettes were present in the purse after a report that the suspect was smoking). Suspicionless searches have even been found to be constitutional in the school setting. *Kentucky v. King* 131 S. Ct. 1849, 1856 (2011) (quoting *Brigham City*, 547 U.S. 398).

<sup>105</sup> *Michigan v. Fisher*, 558 U.S. 45 (2009) (finding that for an emergency aid exception there must a reasonable basis for believing someone is in need of immediate aid); *People v. Troyer*, 246 P.3d 901, 905 (2011), *cert. denied*, 132 S. Ct. 105 (2011) (same); *United States v. Campbell*, 261 F.3d 628, 632 (6th Cir. 2001) (finding a reasonable basis for believing someone is in the house who would likely destroy evidence); *Modrell v. Hayden*, 636 F. Supp. 2d 545, 559 (W.D. Ky. 2009) (same). For cases dealing with a public safety exigency exception, the reasonable basis for believing standard only asks whether someone is in need. This allows the police to make quick and effective decisions in times of danger or need. Whereas, for the evidence gathering exigencies, the reasonable basis for believing is based on knowing whether someone was in the house and whether they would destroy the evidence. The court in *King* on remand, stated that an exigency must be based on more than a mere "possibility" that evidence is being destroyed. *King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky. 2012). *See also supra* note 91 and accompanying text.

<sup>106</sup> *See Illinois v. McArthur* 531 U.S. 326 (2001) (finding that there was probable cause that drugs were present in the residence).

the higher the risk, the lower the quantum of suspicion and vice versa. This standard provides for an individualized quantum of suspicion based on the facts of the situation. The inspiration for the varying standard comes from Judge Learned Hand's *United States v. Carroll Towing Co.* opinion.<sup>107</sup> In *Carroll Towing*, Judge Hand applied a varying standard to determine when the owner of a barge was liable for damages caused by the barge when the barge attendant was not present.<sup>108</sup> Judge Hand stated that courts should consider three variables to determine liability.<sup>109</sup> The three variables are: (1) the probability that a danger will occur, (2) the seriousness of the resulting injury, and (3) the burden of protecting against the injury.<sup>110</sup> Judge Hand also employed a formula: the probability and the injury together must be less than the burden to prevent it in order to impose liability.<sup>111</sup>

Judge Hand's variables and formula are applicable in a number of situations because they employ a sliding scale. Applying this sliding scale to exigencies, one can conclude that the higher the probability and the danger (i.e., the risk), the lower the burden (i.e., quantum of suspicion) needed. On the other hand, the lower the risk of danger, the higher the quantum of suspicion needed.

The higher the risk to the public safety, the lower the quantum of suspicion needed to constitute an exigency. Public-safety exigencies generally deal with situations that present a high risk to the public health and safety.<sup>112</sup> In *United States v. Johnson*, the court states that the officers needed to decide what would "reasonably be necessary to prevent the danger" presented by a fleeing suspect.<sup>113</sup> The danger a fleeing suspect presents is

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<sup>107</sup> 159 F.2d 169, 173 (2d Cir. 1947).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* The original three variables dealing with the barge were: (1) the probability that the barge will break away; (2) the gravity of the resulting injury if the barge does break away; and (3) the burden of adequate precautions. *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See *supra* notes 86-89 and accompanying text.

<sup>113</sup> 106 F. App'x 363, 367 (6th Cir. 2004) (quoting *Warden v. Hayden*, 387 U.S. 294, 299 (1967)).

high; therefore, the quantum of suspicion needed is only a showing of a reasonable basis for believing the public is at risk.<sup>114</sup>

The lower the risk to the public safety, the higher the quantum of suspicion needed to constitute an exigency. For an evidence gathering exigency, the danger to the public is nearly non-existent. Therefore, the quantum of suspicion that an exigency exists must be higher than for public-safety exigencies. On remand, the Kentucky Supreme Court, in *King*, refused to find for an exigency, suggesting that courts should adopt a higher quantum of suspicion to define an exigency.<sup>115</sup> Recently, other courts have also held law enforcement to a higher standard.<sup>116</sup> The higher standard of probable cause some courts are adopting would prevent abuse of the evidence-gathering exigency and further protect the privacy of citizens under the Fourth Amendment.

### III. EVIDENCE GATHERING EXIGENCIES—A NEW ANALYSIS

#### A. *The Need For a New Standard to Define an Exigency*

When determining if an exigency exists, the circuits are split between a general reasonableness standard,<sup>117</sup> the five-factor *Rubin* Factors,<sup>118</sup> the Sixth Circuit subjective, fact specific two-part test,<sup>119</sup> or the Tenth Circuit four-factor test.<sup>120</sup> Therefore, no perfect or simple test exists. A two-part probable cause test with a cure-all seizure element is the best option because probable cause

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<sup>114</sup> STEPHEN A. SALTZBURG, DANIEL J. CAPRA & ANGELA J. DAVIS, *BASIC CRIMINAL PROCEDURE* 194-95 (6th ed. 2012).

<sup>115</sup> *King v. Commonwealth*, 386 S.W.3d 119 (Ky. 2012)

<sup>116</sup> *United States v. Ramirez*, 676 F.3d 755, 763 (8th Cir. 2012) (finding no exigent circumstance because the police did not hear a “toilet flushing or a shower or faucet running” or people moving around); *United States v. Khut*, 490 F. Supp. 2d 35, 40 (D. Mass. 2007) (finding that a presumption that the other suspects could have heard of another suspect’s arrest does not warrant an exigency); *United States v. Hendrix*, No. CR-0-189-D, 2009 WL 2591656 (W.D. Okla. Aug. 19, 2009), *aff’d*, 664 F.3d 1334 (10th Cir. 2011) (finding that an exigency exception existed because of the toilet flushing, movement, and police action of waiting for the occupants to answer).

<sup>117</sup> *See supra* notes 36-37.

<sup>118</sup> *See supra* notes 38-42.

<sup>119</sup> *See supra* notes 43-45.

<sup>120</sup> *See supra* notes 46-47.

is already part of the jurisprudence of the Fourth Amendment, and a unified test will ensure the same result across all circuits.

*B. The Exigency Determination: Two-Part Probable Cause Test*

On remand, in *King*, the Kentucky Supreme Court found that the facts known to the officers did not constitute a destruction of evidence exigency.<sup>121</sup> Moreover, post-*King*, in *United States v. Aguirre*, the Fifth Circuit delineated the *Rubin* Factors in determining whether the police had probable cause to enter the residence.<sup>122</sup> The court found that probable cause existed by considering the well-established five-factor test but also by concluding that the test delineates whether probable cause exists, not a reasonable basis for believing.<sup>123</sup> In a post-*King* world,<sup>124</sup> the courts should search for a higher, more concrete standard for the destruction-of-evidence exigency exception, and since it is not a public-safety exigency, a higher quantum of suspicion is needed to prevent abuse of the exigency exception.<sup>125</sup>

In order to determine if an evidence gathering exigency exists courts must find: (1) probable cause that drugs are present and (2) probable cause that the destruction of evidence is imminent. Also, if an exigency exists, the solution is to seize the premises and eliminate the exigency allowing time to obtain a warrant.

1. Prong 1: Probable Cause Drugs Are Present

Probable cause requires a “practical, common sense decision” whether there is a “fair probability” the evidence gathered is true.<sup>126</sup> This means that probable cause does not require certainty

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<sup>121</sup> *King v. Commonwealth*, 386 S.W.3d 119 (Ky. 2012).

<sup>122</sup> 664 F.3d 606, 611 (5th Cir. 2011).

<sup>123</sup> *Id.*; see also *supra* notes 38-42, 91 and accompanying text.

<sup>124</sup> Even before *King*, a higher standard was starting to be employed in *McArthur*. See 531 U.S. 326 (2001). However, since the police-created exigency doctrine is no longer an issue, a higher exigency standard is even more important now.

<sup>125</sup> Geoffrey C. Sonntag also called for a higher standard of a double probable cause, pre-*King* in his comment. Sonntag, *supra* note 11. However, Sonntag’s claim differs from this Comment because he wrote his comment prior to the shift to a post-*King* world, and he did not argue for an all-inclusive “cure” of performing only a seizure before a warrant is obtained. This Comment also focuses more on case testing and the importance of the flexibility of a probable cause standard.

<sup>126</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

but requires that plausible explanations for the suspect's conduct do not outweigh the probability.<sup>127</sup> Similarly to reasonable suspicion and a reasonable basis for believing, probable cause is not a strict legal rule.<sup>128</sup> It is a "fluid-concept" that follows an evaluation of the situation based on "particular factual contexts" and the totality of the circumstances.<sup>129</sup> The totality of the circumstances can include the accumulation of facts of the situation, the police's expertise, and the police's past experiences.<sup>130</sup> Therefore, probable cause allows for a high standard that is open for interpretation based on the facts of the case and surrounding circumstances.

If the police have concrete evidence that drugs are present, for instance, through an anonymous tip, drugs located in the mail, a controlled buy, or an investigator on the inside, it is less likely that the totality of the circumstances will need to be considered.<sup>131</sup> However, if the only evidence is circumstantial and easily refutable, considering the totality of the circumstances is more important because probable cause is based on probabilities and fairness.<sup>132</sup>

## 2. Prong 2: Probable Cause Destruction of Drugs Is Imminent

Under the current standard, police decide whether an evidence gathering exigency exception exists based on if the suspect is in the residence or if suspects usually destroy the evidence in similar situations.<sup>133</sup> Probable cause requires more

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<sup>127</sup> See generally SALTZBURG, CAPRA, & DAVIS, *supra* note 114, at 132-33.

<sup>128</sup> *Gates*, 462 U.S. at 232. Courts seem to have a general opposition toward strict legal rules or long factored tests because they are not reasonable for the police to consider in an emergency situation. See, e.g., *Kentucky v. King*, 131 S. Ct. 1849, 1858-61 (rejecting the additional requirements courts imposed to determine if there was a police-created exigency because they were confusing and "unsound").

<sup>129</sup> *Gates*, 462 U.S. at 232.

<sup>130</sup> See SALTZBURG, CAPRA & DAVIS, *supra* note 114, at 133-35.

<sup>131</sup> See *United States v. Ukomadu*, 236 F.3d 333 (6th Cir. 2001); see also *United States v. Morales*, 171 F.3d 978 (5th Cir. 1999).

<sup>132</sup> *United States v. Aguirre*, 664 F.3d 606, 610 (5th Cir. 2011) (considering the totality of the circumstances to determine if probable cause exists).

<sup>133</sup> See *id.* at 611 (considering the police officer's past experiences); *United States v. D'Armond* 80 F. Supp. 2d 1157, 1168 n.6 (D. Kan. 1999) (concluding that because there is always a danger of destruction of drug evidence in a drug trafficking case and because the occupants knew of the police's presence there was an exigency exception); *United States v. Cuaron*, 700 F.2d 582, 586-87 (10th Cir. 1983) (considering exigent

considerations including the totality of the circumstances and the fluidity of the situation.<sup>134</sup> *United States v. Hildago* correctly calls for “case-specific facts, not simply generalized suppositions about the behavior of a particular class of criminal suspects” to determine if an exigent circumstance exists.<sup>135</sup> The second part of the probable cause test requires finding articulable facts that illustrate the destruction of drugs is imminent. The application section of this Comment will provide examples of situations with articulable facts.

### *C. The Cure: Seizure of the Premises*

Deciding whether an exigency exists or not under the circumstances of the situation will never be a perfect test that will trigger the same exact result every time. Although discrepancies between cases will be less common with the test this Comment proposes than with the different standards employed by circuits as of now, discrepancies are inherent, because the police must make decisions quickly, and, under the probable cause standard, courts allow police to make reasonable mistakes.<sup>136</sup>

To ensure the ultimate outcome of the situation is reasonable and generally the same, the cure requires that the police do a cursory sweep of the premises for people, seize the premises, and obtain a warrant before the search for all evidence-gathering exigencies. This cure eliminates the exigency, is the least intrusive and simplest response to the exigency, and allows time to gain a warrant.

In *Illinois v. McArthur*, the officers did not search the trailer without a warrant even though they had probable cause to believe that drugs were present, and a reasonable basis to believe they were in imminent danger of destruction.<sup>137</sup> The officers seized the premises and then obtained a warrant.<sup>138</sup> The court upheld the warrantless seizure. The court applauded the actions of the police

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circumstances to be determined if there are people in the dwelling and those people have a reason to grow suspicious that the police are on their trail).

<sup>134</sup> See *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

<sup>135</sup> 747 F. Supp. 818, 828 (D. Mass. 1990).

<sup>136</sup> SALTZBURG, CAPRA & DAVIS, *supra* note 114, at 133.

<sup>137</sup> 531 U.S. 326, 331-32 (2001).

<sup>138</sup> *Id.* at 328.

officers saying they “imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests.”<sup>139</sup>

In *United States v. Aquino*, the Court held that the evidence was collected reasonably because it was collected with a search warrant after a warrantless seizure and protective sweep.<sup>140</sup> Under *Aquino*, a warrantless entry and protective sweep is necessary while obtaining a search warrant when: (1) clear evidence of probable cause exists; (2) the crime is serious and in circumstances where the destruction of the evidence is likely; (3) a limited intrusion is necessary to prevent the destruction of evidence, and (4) clearly defined indicators of an exigency exist that are not subject to police manipulation or abuse.<sup>141</sup> These factors establish that a protective sweep and a warrantless seizure are generally always necessary with an evidence-gathering exigency exception.

Adding the requirement of a protective sweep serves to simplify the process of determining if there is an evidence-gathering exigency. The sweep is a catch-all that keeps the abuse of the exigency exception to a minimum.

#### IV. APPLICATION

Probable cause that the destruction of drugs is imminent requires articulable facts that the drugs are about to be destroyed. But, what are examples of articulable facts that rise to the level of probable cause? An examination of several cases sheds light on this question and provides the ground work for further determining when similar situations constitute an exigency exception to the warrant requirement.

##### *A. Inconsistent Results Due to Lack of an Established Test*

In *King*, on remand, the Kentucky Supreme Court concluded that there was no exigency.<sup>142</sup> The court considered the following

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<sup>139</sup> *Id.* at 337. Performing a warrantless seizure and not a search is not required, but the court found that the “restraint met the Fourth Amendment’s demands.” *Id.*

<sup>140</sup> 836 F.2d 1268 (10th Cir. 1988).

<sup>141</sup> *Id.* at 1272.

<sup>142</sup> *King v. Commonwealth*, 386 S.W.3d 119, 120 (Ky. 2012).

facts: the marijuana odor emanating from the residence; the sound of movement of some kind after police knocked; and the fact that no one answered the door in response to the police.<sup>143</sup> The court concluded that unidentifiable sounds coupled with the officers' belief that the destruction of evidence was only "possible" did not constitute an exigency.<sup>144</sup>

On the other hand, in *United States v. Aguirre*, the Fifth Circuit came to the opposite conclusion when confronting similar facts.<sup>145</sup> In *Aguirre*, the officers determined exigent circumstances existed because the police had just arrested the drug dealer who had recently left the residence; therefore, they had reason to believe drugs were present.<sup>146</sup> Moreover, when the officers knocked, they heard "shuffling" and "scuffling" inside the trailer and then entered the trailer without a warrant based on the exigency exception.<sup>147</sup> The court upheld the warrantless entry because there was probable cause for drugs to be present and the noises that the officers heard in prior experience meant that the drugs were being destroyed.<sup>148</sup>

The only difference between these two cases rests in the fact that in *Aguirre* the police knew the drug dealer frequented the residence whereas in *King* the police smelled marijuana through the door. Both situations establish probable cause that drugs are present. However, the events following the knock and announce lead to inconsistent results because of a lack of an established test for the exigency exception. Under the new analysis and test this Comment sets forth, in both cases no exigent circumstances would exist without more identifiable sounds than "shuffling." Police would need to hear sounds more closely linked to the likely disposal of drugs such as a sink running or a toilet flushing in order to have probable cause.

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 122-23.

<sup>145</sup> 664 F.3d 606 (5th Cir. 2011).

<sup>146</sup> *Id.* at 611.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 612.

*B. Fact Situations Not Constituting an Exigency*

In *United States v. D'Armond*, the court came to the incorrect conclusion that exigent circumstances existed to enter a residence without a warrant.<sup>149</sup> Although the court says it was a close call, it concluded that exigent circumstances existed because (1) D'Armond had been arrested during the night before, (2) a friend of D'Armond knew he had been arrested, (3) the officers knew someone was in the trailer, and (4) the manufacturing of methamphetamine is dangerous.<sup>150</sup>

When the officers knocked on the trailer door, they did not hear any movement or any other sounds.<sup>151</sup> Therefore, no articulable facts existed to constitute the imminent destruction of drugs. Moreover, D'Armond had not just been arrested; he had been arrested out of sight of the residence during the night before.<sup>152</sup> The friend's knowledge of his arrest does not constitute an important factor in determining if the destruction of drugs was imminent because the friend knew of the arrest for hours before the police arrived at the residence.<sup>153</sup> The imminence of destruction of the evidence had long since expired based on this factor. One of the officers had returned to the station to obtain a search warrant to search D'Armond's residence and, prior to obtaining one, dispatched officers to secure the residence.<sup>154</sup> Finally, the danger of manufacturing methamphetamine is not a factor in determining whether exigent circumstances exist, and it has nothing to do with whether the drugs will be destroyed while the officers obtain a search warrant.<sup>155</sup> Although probable cause

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<sup>149</sup> 80 F. Supp. 2d 1157, 1168 (D. Kan. 1999).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1162

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1168.

<sup>154</sup> *Id.* at 1162.

<sup>155</sup> The same court concluded differently in *United States v. Anderson*, 981 F.2d 1560, 1567 (10th Cir. 1992). The court concluded that the fact that one of the suspects could have possibly warned someone at the residence of the police officers presence and that someone at the residence may then destroy the evidence (of child pornography) was not enough to rise to the level of an exigent circumstance. *Id.* The court, in *D'Armond*, argued *Anderson* did not apply because *D'Armond* dealt with the manufacture of methamphetamine which was more immediately dangerous than child pornography. 80 F. Supp. 2d at 1168 n.6. Also, *D'Armond* dealt with a small house as

existed to believe drugs were present in the home, an exigent circumstance was not present to justify a warrantless entry. The officers could have easily waited for a search warrant to be obtained.

Similarly, in *United States v. Aquino*, the court concluded that an exigent circumstance existed without any articulable facts that the drugs were in imminent danger of destruction.<sup>156</sup> The court concluded that exigent circumstances existed to enter Aquino's home without a warrant because (1) individuals in the same drug connection were arrested and released; therefore, they could have told Aquino of the police investigation; and (2) one suspect's phone rang while he was in custody and told police the call could be drug-related illustrating that people in the drug connection were suspicious.<sup>157</sup> The court then focused most of its analysis on the fact that the officers failed even to begin to obtain a search warrant when they should have obtained one.<sup>158</sup> However, this failure did not affect the court's exigent circumstances determination.

When the officers arrived at Aquino's residence and knocked, a woman answered the door.<sup>159</sup> Immediately after telling the woman who answered the door that they had come in response to a noise complaint, two officers ran in the house with guns drawn.<sup>160</sup> The officers did not wait for any articulable facts of imminent destruction, which did not exist because when the officers barged into the house, they found Aquino sitting on the couch with a baby.<sup>161</sup> The court incorrectly failed to consider the events of the actual warrantless entry and search in determining if an exigent circumstance existed. The scintilla of incorrect evidence used by the court to find for an exigency exception clearly failed to illustrate that the drugs were in imminent danger of destruction.

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compared to a big building, ensuring that the possible occupants would hear the police.  
*Id.*

<sup>156</sup> 836 F.2d 1268 (10th Cir. 1988).

<sup>157</sup> *Id.* at 1273.

<sup>158</sup> *Id.* at 1273-74.

<sup>159</sup> *Id.* at 1270.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

The court in *United States v. Ramirez* found no exigency exception to the warrant requirement for two main reasons.<sup>162</sup> (1) When the police knocked on the door, there was

[N]o dead bolt lock being engaged, no toilet flushing or a shower or faucet running, and no shuffling noises or verbal threats emanating from the room; nor did the officers have any information that an occupant . . . had attempted to escape through a window, nor any indication that these individuals were armed or dangerous.<sup>163</sup>

(2) The court concluded that a suspect's knowledge of the imminent arrival of police due to the arrest of the accomplice was too circumstantial.<sup>164</sup> This case follows the second part of the probable cause test because it first considers concrete facts that illustrate there was no imminent destruction of drugs, and then considers whether the suspect knew of the police on his trail as further support for an exigency.

### *C. Fact Situations Constituting an Exigency*

In *United States v. Hendrix* an informant tipped off the police as to the location of drugs.<sup>165</sup> When they arrived and knocked at the hotel room, the officers first lied about their identity and then identified themselves properly.<sup>166</sup> No one answered the door before the officers properly identified themselves, and after the officers identified themselves, they heard much movement, doors opening, and a toilet flushing.<sup>167</sup> After trying again to identify themselves and no response, the officers had the door opened because "based on their law enforcement experience involving drug-trafficking crimes" these were signs of destruction of the evidence.<sup>168</sup>

The court first determined that there was probable cause to believe drugs were present.<sup>169</sup> Although the court stated the police

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<sup>162</sup> 676 F.3d 755 (8th Cir. 2012).

<sup>163</sup> *Id.* at 763.

<sup>164</sup> *Id.* at 764.

<sup>165</sup> No. CR-0-189-D, 2009 WL 2591656, at \*1 (W.D. Okla. Aug. 19, 2009), *aff'd*, 664 F.3d 1334 (10th Cir. 2011).

<sup>166</sup> *Id.* at \*2.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at \*6. This is part one of this Comment's two-prong probable cause test.

must have at least a reasonable belief (not probable cause) that the destruction of evidence is imminent, the articulable facts of the situation actually rise to the level of probable cause. The court also states that prior knowledge and experience with the type of crime involved is “not, *alone*, sufficient to justify a warrantless entry.”<sup>170</sup> Therefore, the court correctly concluded that an exigency exception existed.

In *United States v. Parra*, the court notes that the officers were correct in determining that exigent circumstances justified a warrantless entry because (1) they thought the suspect was destroying evidence, and (2) the arrest of the suspect may have been seen by the other suspects through the open door.<sup>171</sup> The CI informed the police that drugs were present in the room, and the first suspect exited the room carrying a brown paper bag.<sup>172</sup> The police believed the suspect was destroying evidence in preparation to flee.<sup>173</sup> They arrested the suspect and assumed the other suspects saw the arrest and could be destroying the evidence.<sup>174</sup>

This case perfectly lays out the need for a flexible test in determining if probable cause exists. The destruction of evidence in this case is imminent because the suspect left the room with a suspicious bag and threw it away. Although this action does not fall into the normal categorized actions of destruction of evidence, probable cause does exist to believe the destruction of evidence is imminent. Therefore, since destruction is imminent, determining if the other suspects witnessed the arrest is less important than in other cases.

While dealing with defining an exigency, many courts have taken many different avenues. However, many courts have found that in order to have an exigency exception, officers must be able to list “articulable facts” that illustrate the drugs are being destroyed or are in imminent danger of destruction. Examples of articulable facts include: (1) running water,<sup>175</sup> (2) toilet

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<sup>170</sup> *Id.* (emphasis added) (quoting *United States v. Aquino*, 836 F.2d 1268, 1273 (10th Cir. 1988)).

<sup>171</sup> 2 F.3d 1058, 1064 (10th Cir. 1993).

<sup>172</sup> *Id.* at 1063.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *United States v. Garza*, 125 F. App'x 927, 933 (10th Cir 2005). The court says, “[O]fficers did not smell drugs or hear running water, which might indicate the possible

flushing,<sup>176</sup> (3) doors slamming,<sup>177</sup> (4) specific facts or words indicating a fleeing suspect.<sup>178</sup> Moreover, prior knowledge and experience that drugs are normally destroyed in similar situations and a presumption that the drugs may be destroyed is not enough in and of itself to justify an exigency.<sup>179</sup> Under the second part of the probable cause test, to raise the suspicion to the level of probable cause, the articulable facts must indicate drugs are being destroyed or about to be destroyed. However, the standard is flexible; for instance, if proof exists that drugs are being destroyed, whether sounds and articulable facts of the destruction exist is virtually unimportant.<sup>180</sup>

### CONCLUSION

Since *Welsh*, the exigency exception to the warrant requirement is constantly undergoing change. After *King*, the determination of whether the police subjectively created the exigency ceased to be a consideration of the courts. Courts must now focus their analysis on defining the type of exigency and whether or not an exigent circumstance exists.

Traditionally, courts have used the “reasonable basis for believing” standard to determine the existence of an exigency. This standard has been used for public safety exigencies and for evidence gathering exigencies. Since evidence gathering exigencies offer no imminent danger to officers or the public, the quantum of

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disposal of narcotics.” *Id.* at 932; *see also* United States v. Leveringston, 397 F.3d 1112, 1116 (8th Cir. 2005) (finding that exigency existed when the officers heard the slamming of pans and the water and garbage disposal running).

<sup>176</sup> United States v. Hendrix, No. CR-0-189-D, 2009 WL 2591656, at \*2 (W.D. Okla. Aug. 19, 2009) (stating that the officers heard much movement in the residence including doors slamming and a toilet flushing); *see also* United States v. Ramirez, 676 F.3d 755, 763 (8th Cir. 2012) (finding that prior to when the officers entered the room there was no sign of movement or running water or a toilet flushing).

<sup>177</sup> *Hendrix*, 2009 WL 2591656, at \*2.

<sup>178</sup> United States v. Scroger, 98 F.3d 1256, 1259 (10th Cir. 1996) (finding that an exigency existed because someone yelled “go out the back,” and the suspect answered the door with a hot plate used for production of methamphetamine, stained fingers, and the smell of methamphetamine wafted out of the residence).

<sup>179</sup> United States v. Khut, 490 F. Supp. 2d 35, 40 (D. Mass. 2007); United States v. Ramirez, 676 F.3d 755, 764 (8th Cir. 2012). However, these factors may weigh into the determination of the exigency. *Hendrix*, 2009 WL 2591656, at \*6 (quoting United States v. Aquino, 836 F.2d 1268, 1273 (10th Circuit 1988)).

<sup>180</sup> United States v. Parra, 2 F.3d 1058, 1063-64 (10th Cir. 1993).

suspicion to prove the destruction of evidence should be higher. The balancing test behind the *Carroll Towing* formula suggests the standard for determining if an exigency exists should vary with the danger presented by the exigency. This Comment proposes the higher standard of probable cause should apply to evidence gathering exigencies and that the lower standard of reasonable basis to believe should apply to public safety exigencies.

Thus this analysis presents a two-part probable cause test for evidence gathering exigencies: (1) probable cause that drugs are present and (2) probable cause that drugs are in imminent danger of destruction. When this test is met, police should only sweep the premises to protect the evidence until a warrant is obtained. The probable cause two-part test and the seize-and-sweep cure will prevent abuse of the exigency exception, and it will ensure different courts and circuits with similar factual situations come to the same conclusion.

This new approach and higher standard will not impede law enforcement any more than required by the Fourth Amendment while still allowing law enforcement to conduct legitimate investigations. This new approach will ensure unanimity among jurisdictions by providing one simple, two-part test for officers to follow; one that uses the familiar probable cause standard. Lastly, this new approach will ensure the privacy of citizens under the Fourth Amendment.

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