

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN FISHER,
Plaintiff-Appellee,

vs.

CITY OF SAN JOSÉ, et al.,
Defendant-Appellant.

NO.: 04-16095

**CITY OF SAN JOSÉ'S PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC***

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INTRODUCTION AND STATEMENT OF COUNSEL

Plaintiff Steven Fisher was involved in a standoff with San Jose police after brandishing a rifle and threatening to shoot police officers. He remained in his apartment while officers surrounded his home, evacuated nearby apartments, and used various means, including numerous commands over a bullhorn to come outside, in order to force Fisher from the apartment. Finally, after the use of sirens and flash-bangs, the introduction of a “throw phone,” the cutting off of his power, and the deployment of tear gas into his apartment, Fisher emerged and was taken into custody.

After an eight day trial, a jury unanimously determined that San Jose police officers used a reasonable amount of force in forcing Fisher out of the apartment and in taking him into custody, and also specifically determined that under the circumstances, a warrant was not necessary in order to arrest Fisher.

On a renewed Rule 50 motion, the trial court determined that, as a matter of law, a warrant was necessary in order to arrest Fisher. A panel of this Court, in a split opinion, affirmed. (Opinion attached hereto.)

As the parties and courts all agree, coercive police activity that forces a person to leave his or her home is considered an arrest of that person in the home. The parties and courts also agree that a warrant is necessary to arrest a person in the home unless “exigent circumstances” excuse the requirement. In this case, the

parties agree, and the Court is willing to assume, that Fisher was arrested when the police surrounded his home and began to order him out of the apartment.

Additionally, the parties agree, and the Court is willing to assume, that at such point in time, the risk of danger to the community and the officers created by Fisher's actions and threats was sufficient to constitute an exigency, excusing the officers from obtaining a warrant. Therefore, when the officers surrounded the apartment and ordered him to leave, Fisher was under arrest, and if he had *complied* with the officers' orders, he would have been lawfully arrested even in the absence of a warrant.

The majority, however, went on to conclude that because Fisher did not comply, and remained in the apartment, later intrusions for the purposes of forcing Fisher from his home also triggered the warrant requirement. Because Fisher remained in his apartment, he either was not seized, or could be seized again. And even if a warrant was not required earlier, the later seizure became unconstitutional for lack of contemporaneous exigency. This conclusion followed from the majority's reading of *California v. Hodari D.*, 499 U.S. 621 (1991) involving a juvenile who, while pursued by police, threw down a rock of cocaine, but was not considered "seized" until he submitted to police authority.

Petitioner City of San Jose urges the Court to rehear this matter *en banc* for many of the reasons expressed in Judge Callahan's dissent. The majority's

misplaced analogy to *Hodari D.*, applied in an entirely different context, creates a “confusing, impractical, and unworkable” rule of law that seems to depend on the subjective actions of the suspect, rather than on an objective determination of when an arrest takes place. The published decision, as recognized by the dissent, directly conflicts with an existing opinions of the Sixth Circuit Court of Appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity. Additionally, the decision conflicts with decisions of this Court – including *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985).

FACTUAL AND PROCEDURAL BACKGROUND

The essential facts relating to this controversy are set forth in detail in both the majority and dissenting opinions herein. The short version is that on October 23, 1999, Steven Fisher, while standing just outside his apartment, brandished a firearm in the presence of a security guard, leading to the arrival of San Jose police officers. Fisher spoke briefly with officers, but refused to discuss the situation or come out of his apartment. He was intoxicated. During the discussions, Fisher threatened to shoot police officers and was later seen pointing his rifle at officers, loading more rifles, and placing numerous rifles in strategic locations about the apartment. After further attempts to talk with Fisher failed, San Jose’s SWAT team (known as the MERGE Unit) established an armed perimeter, evacuated

nearby apartments, and began to insist that Fisher come out. Over the course of hours, escalating tactics were employed in order to flush Fisher from the apartment. Police made repeated announcements over bullhorns, pulled an armored vehicle in front of the apartment blaring its sirens, broke out windows in the apartment, detonated flash bangs, turned off the electricity, threw in a dedicated portable telephone, and ultimately deployed tear gas. Finally, after about six hours of this activity, Fisher spoke with officers on the “throw phone” and agreed to come outside, at which point he was physically taken into custody. Officers in command did not attempt to obtain an arrest warrant, believing that such action was not required.

At the civil trial in November of 2003, Plaintiff Fisher advanced claims against San Jose and the officers of unconstitutional warrantless arrest, excessive force, failure to investigate misconduct, and negligent use of tear gas. After eight days of testimony, the jury unanimously found in favor of Defendants on all of these claims. Thereafter, Plaintiff filed a renewed motion for Judgment as a Matter of Law contending that Fisher’s arrest violated the Fourth Amendment due to the absence of a warrant. On April 16, 2004, the District Court granted Plaintiff’s Rule 50 Motion, entering judgment in Plaintiff’s favor and awarding nominal damages in the amount of one dollar. This appeal followed, resulting in a decision filed on January 16, 2007.

ARGUMENT

Cases in several circuits have evaluated Fourth Amendment seizure issues in the context of a standoff between an armed suspect in a home and police officers. When an armed SWAT team surrounds a person's home and demands that a suspect come out, these courts have uniformly determined that the arrest or seizure of the person is considered to have taken place inside the house rather than in public. *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989); *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985); *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002). That determination is important because under *Payton v. New York*, 445 U.S. 573 (1980), the Fourth Amendment "has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590.

The *nature* of the police action that constitutes a seizure or arrest in the home, giving rise to the warrant requirement of the Fourth Amendment, has also been examined in these cases. Because in a standoff situation, the subject is not physically under the direct control of authorities, the concept of when a person is "seized" or "arrested" must be examined. These standoff cases have analyzed the various formulations for determining when a seizure or arrest occurs. In *Maez*, *supra*, 872 F.2d at 1450, the court started with the formulation found in *Terry v. Ohio*, 392 U.S.1, 19 n.16 (1968) that "an arrest or seizure occurs 'when the officer,

by means of physical force or show of authority, has in some way restrained the liberty of a citizen....” The court also quoted from *Florida v. Royer*, 460 U.S. 491, 502 (1983) (“A show ‘of official authority such that ‘a reasonable person would have believed he was not free to leave’” indicates that an arrest has occurred.”) and *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“Examples of circumstances that might indicate a seizure ... would be the threatening presence of several officers, the display of a weapon by an officer... or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”) In *Maez*, and in this Circuit’s decision in *Al-Azzawy*, the courts concluded that the subject was seized and arrested when he was surrounded by SWAT officers with drawn weapons and told, through bullhorns, to leave the residence. *Al-Azzawy* quoted with approval from a Sixth Circuit case, *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984) as follows:

Nine officers converged on the home, surrounded it, flooded it with spotlights, and summoned Morgan from the house with a bullhorn.... These circumstances surely amount to a show of official authority such that “a reasonable person would have believed he was not free to leave.” [citing *Royer*] Viewed objectively, Morgan was placed under arrest, without the issuance of a warrant, at the moment the police encircled the Morgan residence.

In *Maez*, under identical circumstances, the court held:

Given the presence of some ten officers, the drawn weapons of the SWAT team surrounding the trailer, the use of the loudspeakers, and the frightening circumstance his family faced, a reasonable person would have believed he had to come out of the home and submit to the show of authority. Accordingly, we hold that Maez was arrested while in his home.

[872 F.2d at 1450.] *See also Sharrar v. Felsing*, 128 F.3d 810, 819 (3rd Cir. 1997)

(“Under any of these tests [for determining when an arrest takes place] when a SWAT team surrounds a residence with machine guns pointed at the windows and the persons inside are ordered to leave the house backwards with their hands raised, an arrest has undoubtedly occurred. There was a clear show of physical force and assertion of authority. No reasonable person would have believed that he was free to remain in the house.”); *Ewolski v. City of Brunswick*, 287 F.3d 492, 506 (6th Cir. 2002) (seizure occurs when officer restrains liberty such that reasonable person would believe he or she is not free to leave; liberty of suspect surrounded by armed police is so restrained).

All of these cases, examining the warrantless arrest of a suspect in a house by means of police surrounding the house, have then evaluated whether such arrest was valid due to the existence of exigent circumstances *at the time of the arrest*. In these cases, the exigency is determined by the degree of danger to the police or others inside or outside of the dwelling. Depending on the circumstances, courts

have either felt the risk was sufficient to constitute an exigency – *Al-Azzawy*, *Ewolski* – or insufficient – *Morgan*, *Sharrar*. (In *Maez*, the government had waived this argument by failing to raise the issue below.)

In this case, however, the majority opinion concludes that even if Fisher had been arrested by the police upon being surrounded and ordered to leave, and even if the danger created by Fisher’s actions and threats constituted an exigency (all of which the jury clearly found) because Fisher did not submit to police authority, he was subject to being arrested or seized *again* at a later time. This conclusion allowed the majority to evaluate subsequent intrusions and to find a constitutional violation because such intrusions were not accompanied by any exigency at the time of the intrusion.

The majority’s analysis flowed directly from its interpretation of *California v. Hodari D.*, 499 U.S. 621 (1991). In *Hodari D.*, officers chased several suspects who fled at the sight of an approaching police car. Just before being tackled by an officer, Hodari tossed away a rock of crack cocaine. The issue was whether Hodari had been “seized” prior to the time he dropped the drugs, because if so, the seizure was without sufficient suspicion (the government having conceded that issue) and the evidence would be suppressed. Hodari argued that the “show of authority” accomplished by the chase and the commands of the officer to stop constituted a seizure. The Court held that it did not. “An arrest

requires *either* physical force ... *or*, where that is absent, *submission* to the assertion of authority.” *Id.* at 626 (emphasis in original). Therefore, Hodari was not arrested until he was physically subdued and the evidence, having been discarded prior to the seizure, was thus admissible. Based on this precedent, the majority concluded that Fisher, having not complied with the officers’ injunction to leave the house, did not *continue* to be arrested, and was subsequently seized again when force was later used to effectuate his arrest. Said the majority:

Fisher continued to go about his business in his apartment. His doing so was equivalent to the escape envisioned by *Hodari D.*: Like a fugitive who flees after application of physical force sufficient to constitute a seizure, as long as he remained in his apartment, Fisher was not under complete police control, despite attempts to bring him into such control. For that reason, Fisher remained subject to seizure or arrest – and related entries into his home – after the arrival of the MERGE team even if he had been seized earlier, just as would an individual shot by the police who continued to flee thereafter.

[Majority opinion 490-491.] Although the majority *assumes* that an arrest could have taken place when Fisher was surrounded, it then goes on to contradict every case that has preceded it by concluding that Fisher was *not arrested* until he emerged from the apartment.

As *Hodari D.* emphasizes, when a seizure is effectuated through a show of authority rather than through any sort of application of physical force, there is no seizure until there is a *submission* to authority by the suspect; *assertion* of authority alone by the police is not enough. 499 U.S. at 629. After *Hodari D.*, the officers’ show of authority and the “location of

the arrested person,” *Johnson*, 626 F.2d at 757, at the time of that show of authority remain significant under the Fourth Amendment, but it is the suspect’s actions in *response* to the show of authority that controls the timing of a seizure when the seizure is not accomplished through the use of physical force.

Following *Hodari D.*, we conclude that there was no evidence establishing that Fisher was arrested *pursuant to the officers’ show of authority* until he submitted to that show of authority by agreeing to emerge from his home and then doing so.

[Majority opinion 492.]

Aside from the seeming inconsistency within the opinion itself, the imprecise use of the words “seizure” and “arrest,” and the difficulty in attempting to apply it to a real life situation, the majority’s opinion is contrary to the only case that has explored the application of *Hodari D.* to this type of situation. In *Ewolski v. City of Brunswick, supra*, 287 F.3d 492, a man inside his house with a rifle, acting irrationally, was surrounded by police, who began a systematic attempt to force him out with incendiary devices and tear gas. The man withdrew into the house and eventually shot himself and his son. The court found that exigent circumstances, caused by the immediate threat presented, excused the necessity for a warrant. On the question of whether excessive force was used, the court necessarily had to determine whether a seizure had taken place. Defendants argued, and the district court had agreed, that under *Hodari D.* no seizure had taken place because decedent had not been successfully detained. The Sixth Circuit disagreed, stating:

The district court considered Mr. Lekan's case to be more closely analogous to that of a fleeing suspect, who is not under the control of official authorities....[I]n this case, although Mr. Lekan was never in police custody, the police surrounded the house and paraded an armored vehicle in front of the Lekan's house. These actions qualify as an intentional application of physical force and show of authority made with the intent of acquiring physical control. Moreover, this assertion of force and authority succeeded in restraining Mr. Lekan's liberty to leave his home. Unlike the fleeing suspects in *Hodari D.* ..., Mr. Lekan was not "on the loose." By way of illustration, Mr. Lekan clearly would have been seized for the purposes of the Fourth Amendment had the police nailed shut the doors and windows of his house with him inside. The actions of the police in the instant case were no less effective in restraining Mr. Lekan's movements and, therefore, should be considered a seizure.

[*Id.* at 506.] Thus, in *Ewolski*, the court specifically rejected the concept that under *Hodari*, a person involved in a standoff is not seized or arrested until he or she surrenders. Note also that in *Ewolski*, the court did not evaluate the exigency at the time of the later intrusions. Once Lekan was considered seized, by the restraint to his liberty occasioned by the police show of authority, and such seizure was performed under exigent circumstances, the later intrusions into his home were not considered invalid simply because they took place hours later.

The majority's analysis, then, depends upon the action of the suspect. If the suspect submits to police authority, and exits the home, he is considered arrested and if an exigency exists, the arrest is valid. If however, the suspect does not

submit, he either is not arrested or is subject to further arrest, independently evaluated, only when he emerges or otherwise surrenders. Under the majority's opinion, if a suspect has barricaded himself in his house, and has shot and killed several passersby from a window, he may or may not be arrested when the police arrive, surround his house and order him to emerge. This depends entirely on whether he complies. If he doesn't comply, according to the majority opinion, it is as if he has escaped, and further intrusions on the house, such as the introduction of tear gas, require new evaluations for exigency. Under the majority's opinion, if the suspect emerges only after some time has passed, the police are liable for warrantless arrest if it is later determined that there was sufficient time to obtain a warrant.

This result is not compelled by *Hodari D.* That case involves a completely different context – a person fleeing in public – not a situation where a suspect is surrounded and restricted to his home. If *Hodari D.* can be interpreted to require *submission* in *all* arrests, then as the dissent suggests, submission should be found by the fact that the subject remains in the house and realizes (or objectively should realize) that there is no escape. *See also Sharrar, supra*, at 819 (finding that even under the standard for arrest in *Hodari D.* the siege of a home is an arrest, even without a surrender). The better, and constitutionally proper, rule involves an evaluation of the arrest (for exigency) at the time the subject is surrounded and

ordered to leave. After that point, as long as the tactics are designed to force the suspect to leave, those tactics should be evaluated for reasonableness, but not under the warrant requirement.

The majority opinion also contradicts established Sixth Circuit precedent as it relates to its evaluation of whether an exigency existed when Fisher was finally forced from his apartment. As the dissent explains, “the majority’s decision creates a clear circuit split on how to analyze the exigent circumstances in an armed standoff, because it cannot be reconciled with the Sixth Circuit’s decision” in *Estate of Bing v. City of Whitehall, Ohio*, 456 F.3d 555 (6th Cir. 2006).¹ Dissent at 516-517. In *Bing*, the suspect had fired a gun into the air and then retreated into his home. He was possibly intoxicated and had had altercations with the police in the past. The police were summoned, and surrounded the suspect’s home. After the suspect refused to comply with orders to come out, the SWAT team was called in. In a series of incursions quite similar to those involved in the instant case, over the course of several hours the SWAT team broke out a window and threw in a “bag phone,” deployed pepper gas into the house, rammed in the front door, and detonated a flash bang device, all with the intent of forcing the suspect out of the house. When all this proved unsuccessful, the police entered the house and under disputed circumstances, the suspect was shot and killed.

¹ *Bing* was decided after both the briefing and oral argument in this case.

The *Bing* court, as in all other cases, regarded the siege on Bing's home as a de facto house arrest. "The use of police coercion to exercise physical control over an armed, barricaded suspect while he is inside his home amounts to a Fourth Amendment seizure." *Bing* at 564. "The police were not however required to get a warrant before completing this de facto house arrest because Bing posed an immediate threat of serious injury to the police and the people in the street." *Ibid.*

In fact, in *Bing*, the court specifically addressed whether the exigency evaporated during the time the officers planned and executed the various stages of attempting to force Bing out of his house.

Moreover, that exigency did not terminate due to the passage of time or the police's actions. First, the exigency did not terminate due to the passage of time because Bing was at all times dangerous. Roughly two hours and twenty-four minutes passed from the time the police arrived at about 6:30 p.m. until they used the gas canisters at 8:45 p.m., but the passage of this much time did not itself terminate the exigency. The passage of time did not terminate the exigency because the ticking of the clock did nothing to cut off Bing's access to his gun, or cure him of his willingness to fire it.

[*Id.* at 565.] Indeed, in *Bing*, the actual entry into the house by SWAT officers did not occur until 11:20 p.m., some five hours after the police surrounded the home. The court specifically ruled that an "immediate-danger exigency" excused any warrant requirement even when the final entry took place after many hours of waiting. Nor did the *Bing* court consider the possibility that Bing, by not

submitting to the orders of the officers, escaped, or otherwise evaded arrest for purposes of the Fourth Amendment. That court did not conclude, as did the majority here, that each later intrusion is a separate incident for purposes of deciding whether a warrant is necessary. Once the court determined that an exigency existed, excusing the necessity of obtaining a warrant, it found that such exigency continued as long as the suspect continued to be an immediate danger.

In short, *Bing* differs in so many respects from the majority's decision that it constitutes a significant circuit split on these important issues.

CONCLUSION

On these grounds, petitioner San Jose requests that the panel, or the Court *en banc*, grant its request for rehearing. The majority's novel analytical approach is constitutionally unsound, and contradicts authority in this and other circuits.

DATED: JANUARY 30, 2007

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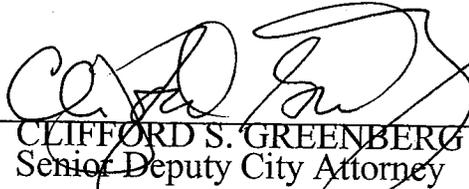
CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), the undersigned counsel certifies that this Petition for Rehearing with Suggestion for Rehearing *En Banc* of Appellant City of San José is double spaced, used a proportionately spaced 14-point New Times Roman type face, and contains 3944 words.

DATED: JANUARY 30, 2007

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN FISHER,

Plaintiff/Appellee,

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CITY OF SAN JOSE,

Defendant/Appellant.

United States District Court
for the Northern District of California
(San Jose)

Case No.: CV -01-21192-PVT

**On Appeal from the United States District Court
for the Northern District of California
Chief Magistrate Patricia V. Trumbull, Presiding**

**APPELLEE'S RESPONSE TO APPELLANTS'
PETITION FOR REHEARING WITH SUGGESTION FOR
REHEARING *EN BANC***

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INTRODUCTION

42 USC § 1983 invokes the power of the judicial branch of our federal government for the express purpose of reviewing and redressing violations of the United States Constitution by state actors. In most of these kinds of cases, the government has already acted and testimonial reconstruction of past events are used to ascertain questions of liability and remedy.

There is one Constitutional Right, which by its very language, invokes the power of the judicial branch before the government acts, in order to determine ahead of time if the state action contemplated is legal/reasonable. That right is secured by the Fourth Amendment:

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.

This Amendment, among all our Bill of Rights enjoys this unique characteristic of judicial oversight both before and after state action. Perhaps it is because:

At the very core of the Fourth Amendment stands the right of a man to retreat into this home and there be free from unreasonable governmental intrusion. . . .With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”

Kyllo v. U.S., 533 U.S. 27 (2001)

In case there is any question that the same scrutiny applies to seizures in a home:

It is axiomatic that the physical entry of the home is the chief evil against which the wording the Fourth Amendment is directed. And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest.

Welsh v. Wisconsin, 466 U.S. 740 (1984)

The simple truth is, this case would not be before this Court if the San Jose Police Department had not breached its duty under this Amendment.

Why were the police aware of how exiting a football game was (ER III: 463-467), but they were not aware of their duty to pick up a phone to contact a 24 hour on-duty judge to secure a warrant? (ER VIII: 1607, ER II: 208-209, ER VI: 1127)

If the police had made an attempt to seek out a neutral and detached magistrate by phone, but were thwarted by non-stop threats from the suspect, the subsequent warrantless intrusion into Fisher's home would have insulated Appellants from any liability on this issue. But there was no evidence presented by the Appellants at trial that the police considered this protocol; despite the fact that an intoxicated Mr. Fisher managed to raise the issue of warrants during the stand-off. (See fn. 5, Order Granting Plaintiff's Motion for Judgment as a Matter of Law – Docket No.: 140)

The Appellants' request for rehearing and/or rehearing en banc should be denied.

STATEMENT OF THE CASE / AUTHORITY FOR THIS RESPONSE

Among other causes of action, Appellee sued Appellants for violations of his constitutional rights under the Fourth Amendment, specifically with respect to the warrantless arrest, which is the subject of this appeal.

At the close of the case and at the close of all evidence, Appellee brought a Motion for Judgment as a Matter of Law under FRCP 50(a). That motion was denied and the case was submitted to the jury on November 21, 2003.

Verdict was rendered by the jury in favor of all Appellants and against the Appellees on all causes of action. Judgment was entered in favor of the Appellants on Nov. 24, 2003.

Appellee renewed his Motion for Judgment as a Matter of Law under FRCP 50(b) as to the warrantless arrest in violation of the Fourth Amendment. He sought judgment as a matter of law because the Appellants had not presented sufficient evidence on any affirmative defense for a reasonable jury to have found for the Appellants on the warrantless arrest issues.

Appellee's Motion for Judgment as a Matter of Law was granted in an order filed on April 16, 2004. [Docket No.: 140] The Judgment was modified on the issue of warrantless arrest and Appellee was awarded nominal damages of one dollar (\$1.00). The Appellants were also ordered to conduct training on the requirements imposed by the Fourth Amendment with respect to residential arrests.

That Judgment was filed on April 20, 2004. [Docket No.: 141]

The Appellants filed a notice of appeal on May 19, 2004. The case was argued and submitted to the Ninth Circuit Court of Appeals on April 5, 2006. This Court rendered its decision in an Opinion filed on January 16, 2007.

On January 30, 2007, Appellees filed the: City of San Jose's Petition for Rehearing with Suggestion for Rehearing *En Banc*. On February 16, 2007, this Court issued an Order that Appellees file a response on or before March 9, 2007.

STATEMENT OF FACTS

For brevity's sake, Appellee would contend that the statement of facts set forth in this Court's Opinion of January 16, 2007, adequately sets forth the facts for purposes of this brief. See: *Fisher v. City of San Jose*, 475 F.3d 1049 (2007), which is also attached as an appendix to: City of San Jose's Petition for Rehearing with Suggestion for Rehearing *En Banc*.

ARGUMENT

Appellants are making two requests in their petition: (1) they request a rehearing by the same panel and (2) suggest that the Ninth Circuit sitting *en banc* ought to take up the case. Each request is dealt with separately, and in each case the request should be denied.

Panel Rehearing

Appellant's request for panel rehearing amounts to nothing more than a disagreement with this Court's Opinion filed on January 16, 2007. A request for a rehearing must state: "with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . ." See: FRAP Rule 40(a)(2). Thus a properly-drawn petition for panel rehearing serves a very limited purpose: "to ensure that the panel properly considered all relevant information in rendering its decision." See: *Armster v. United States Dist. Ct.*, 806 F.2d 1347, 1356 (9th Cir. 1986).

To make their case for panel rehearing, Appellants assert that the Court improperly interpreted and improperly applied the case of *California v. Hodari D.*, 499 U.S. 621 (1991). They also "introduce" a new case: *Estate of Bing v. City of Whitehall, Ohio*, 456 F.3d 555 (6th Cir. 2006) which was decided after this case was submitted, but before the Opinion was published.

Appellants read too much into the Majority Opinion's citation to *Hodari D.* In attacking that analysis, Appellants state the obvious, that physical force or a submission to authority constitutes an arrest under the facts of *Hodari D.* But, Appellants point out, *Hodari D.* was an arrest in a public place while this case deals with a warrantless arrest in a home. Appellants are correct on this distinction, but it doesn't alter the analysis or the holding of the decision.

The Majority's application of *Hodari D.* to the facts of this case, correctly points out that the show of force (surrounding the house) was ineffectual in getting Mr. Fisher to surrender. The later submission to authority (when Mr. Fisher emerged from his house 8 hours after any exigency had lapsed) was simply a second (or third, or fourth, ...) triggering event that defined a separate and distinct seizure under Fourth Amendment law. The other proposition that *Hodari D.* stands for, in the context of this case, is that multiple and successive arrests, for Fourth Amendment purposes, can occur in the same fact pattern.

To put this another way: If the police had believed that they were successful in achieving a valid warrantless arrest of Mr. Fisher the moment they surrounded his house, then why did the siege continue for another twelve (12) hours? Why didn't the police simply declare victory, withdraw from the scene, and leave a notice for Mr. Fisher to appear at an arraignment for the crimes they wanted to charge him with? It has to be because the police themselves did not believe that they had sufficient control of Mr. Fisher without a continuation of the stand-off.

Once the police made the determination that an escalation of force beyond merely surrounding the house was necessary (i.e., CS gas, water cannons and flash-bang grenades), and because Mr. Fisher had ceased his threatening behavior by then, the government was under a new and distinct duty to secure a warrant.

The Appellants' reliance on *Estate of Bing v. City of Whitehall, Ohio*, 456

F.3d 555 (6th Cir. 2006) is also without merit. Appellants claim that *Bing* and *Fisher* create a split between the Sixth and the Ninth Appellate Circuits on this issue. However the *Bing* case is cited and legally distinguished in the Majority's Opinion. See: *Fisher*, 475 F.3d 1049, fn. 19.

The *Bing* case can also be factually distinguished from *Fisher*. William Bing actually fired his gun at bystanders and at the police during the encounter that ultimately lead to his death. See: *Bing*, 456 F.3d at 558 – 562. While Mr. Fisher's conduct of merely handling/brandishing his weapons while intoxicated, and with the police outside his home cannot be excused, it simply serves to illustrate that there is a continuum of conduct that can arise in a barricade situation.

The police cannot declare an exigency merely because a firearm is present. See: *United States v. Gooch*, 6 F.3d 673 (9th Cir. 1993). After that, the progression/continuum of facts based on *Bing* and *Fisher* could be:

- Being intoxicated with a firearm present or available.
- Being sober and handling/brandishing a firearm.
- Being intoxicated and handling/brandishing a firearm. (This is *Fisher*.)
- Being sober and shooting the firearm harmlessly in the air or ground.
- Being intoxicated and shooting the firearm harmlessly in the air or ground.
- Being sober and shooting the firearm at someone or at the police.
- Being intoxicated and shooting at someone or at the police. (This is *Bing*.)

The point of this continuum is to illustrate that letting the police, at the scene of a barricade, attempt to divine when an exigency is sufficient to negate the requirement of a warrant is a recipe for having the exigent circumstance exception swallow the rule. Unfortunately, that rule would be the Fourth Amendment.

The better analysis is based on established Ninth Circuit precedent:

Exigent circumstances alone,(. . .), are insufficient as the government must also show that a warrant could not have been obtained in time. *United States v. Manfredi*, 722 F.2d 519, 522 (9th Cir. 1983).

United States v. Good; 780 F.2d 773 (9th Cir. 1986)

In cases where exigent circumstances truly exist, we recognize that the usual fourth amendment protection must give way. But because of the danger that exceptions pose for fourth amendment guarantees, we are most unwilling to excuse the government's failure to seek a warrant in cases where no necessity for "immediate action" can be demonstrated. See *United States v. Blake*, 632 F.2d 731, 733 (9th Cir. 1980).

We are even less willing to ratify the government's action where, as here, there has been not the slightest effort to comply with a clear, concise rule such as Rule 41(c)(2). Rule 41(c)(2) was designed to accommodate the needs of law enforcement while ensuring the preservation of constitutional rights. See Advisory Committee and Historical Notes to Fed. R. Crim. P. 41 (1977 Amendment); see also *McEachin*, 670 F.2d at 1146-48 (reviewing legislative history). The action of the agents and the Assistant United States Attorney in ignoring the telephone warrant procedure totally frustrates the accommodation approved by Congress. It cannot be sanctioned by us.

United States v. Alvarez; 810 F.2d 879 (9th Cir. 1987)

And the holding of this case:

Inherent in this standard are considerations regarding the time required, as a practical matter, to obtain a warrant. Where exigency is claimed, we have required "the government either to attempt, in good faith, to secure a warrant, or to present evidence explaining why a telephone warrant was unavailable or impractical." *United States v. Alvarez*, 810 F.2d 879, 883 (9th Cir. 1987) (footnote omitted). Here, none of the officers testified that there was any attempt to get a warrant at any point during the twelve-hour standoff, by telephone or otherwise. The City can therefore prevail only if it satisfactorily explains why a warrant was unavailable or impractical in the time available.

Fisher v. City of San Jose, 475 F.3d 1049 (2007)

Appellants have not met their burden to demonstrate that the Panel overlooked or misapprehended a point of law or fact, their request for Panel Rehearing should be denied.

Rehearing *En Banc*

The grounds for *en banc* review (FRAP 35) are: (1) Consideration by an *en banc* court is necessary to secure or maintain uniformity of the Ninth Circuit's decisions; or (2) The proceeding involves "a question of exceptional importance." See also: *Missouri v. Jenkins*, 495 U.S. 33, 49, fn. 14 (1990); *Hart v. Massanari*, 266 F.3d 1155, 1172, fn. 29 (9th Cir. 2001); and *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (J. Kleinfeld dissent.opn.) – *en banc* consideration appropriate only where conflicting precedents make application of law "unduly difficult," or to correct "egregious errors in important cases."

There is no lack of uniformity in the Ninth Circuit on this issue. The rule has always been that exigent circumstances must be the cause in fact of the government's failure/inability to secure a warrant; and that the burden is on the government to prove this causal relationship. *United States v. Good*, 780 F.2d 773 (9th Cir.), cert. denied, 475 U.S. 1111 (1986); *United States v. Alvarez*, 810 F.2d 879 (9th Cir. 1987). *Fisher* does not depart from this line of decisions.

With regard to the allegation that *Fisher* creates a “confusing, impractical, and unworkable” rule of law; as shown above (with the continuum/progression analysis), it is the Appellants’ theory of the case that injects an air of subjectivity and invests too much discretion in the police at the scene of a barricade. The practical application of *Fisher* is actually quite simple.

In advising a police department SWAT (MERGE) team on procedures and tactics after the holding in *Fisher*, a city attorney in the Ninth Circuit need only insert the following into the barricade protocol of the Police Department’s Policies and Procedures Manual:

Either on the way to the scene or once a parameter is established, and the suspect’s escape route is closed; evaluate the situation to determine if it is safe, and if there is time and personnel available to contact an on-duty judge to secure a residential arrest warrant. If you make the decision to proceed without a warrant, be prepared to explain why the situation at the scene prevented you from attempting to secure the warrant in your after-action report.

SWAT (MERGE) teams are para-military units within our police departments. They are almost never first responders, and are usually called out only after a situation has already “gone bad.” They know ahead of time that they are responding to a potentially dangerous situation. That is why they employ Special Weapons And Tactics. In fact no SWAT (MERGE) commander can possibly go wrong by calling for a warrant on the way to the crime scene. The City of San Jose has already implemented the same or similar policy, based on their experiences with this case.¹

CONCLUSION

There are no grounds under the Federal Rules of Appellate Procedure for granting either a Panel Rehearing or a Rehearing *En Banc* in this case. The matter was correctly decided by the current panel. Established Ninth Circuit precedent was followed. Substantial justice was achieved by denying to Mr. Fisher any financial advantage after he failed to carry the jury. The City of San Jose has already altered its residential barricade policy. What the case lacks is finality.

Respectfully Submitted, on March 7, 2007.



Donald E. J. Kilmer, Jr., SBN: 179986
Attorney for Appellee – Steven Fisher

¹ This fact was disclosed in newspaper stories about the case in the past couple of weeks and was confirmed to this lawyer by his counterpart in the San Jose City Attorney’s Office.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), the undersigned counsel certifies that this APPELLEE'S RESPONSE TO APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC* is double spaced, uses a proportionately spaced 14 point New Times Roman type face, and contains 2677 word.

NOTICE OF RELATED CASE (FRAP - CR 28-2.6)

Counsel for Appellee Fisher is not aware of any related cases.

Respectfully Submitted on March 7, 2007.



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PROOF OF SERVICE

CASE NAME: *Fisher v. City of San Jose*
CASE NO.: Court of Appeals: 04-16095 / District Court: CV-01-21192 PVT

I, Cally Van Drielen, declare that I am employed in the City of San Jose, County of Santa Clara, State of California. I am over the age of 18 years and not a party to this action; my business address is: 1645 Willow Street, Suite 150; San Jose, California 95125

On March 8, 2007, I served copies of the following documents:

APPELLEE'S RESPONSE TO APPELLANTS' PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

on the following interested party(s) in this action:

Richard Doyle, City Attorney
Clifford S. Greenberg,
Senior Deputy City Attorney
Office of the City Attorney - San Jose
200 East Santa Clara Street
San Jose, CA 95113
(Via Personal Delivery and U.S. Mail)

The Honorable Patricia V. Trumbull
United States District Court
280 South First Street
San Jose, CA 95112
(Via U.S. Mail Only)

[XX] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as stated above, and placing each for collection and mailing on the dated following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at San Jose, California, with postage thereon fully prepaid, that same day in the ordinary course of business.

[XX] By causing to be personally delivered a true and correct copy thereof at the addresses set forth above.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 8, 2007, at San Jose, California.



Cally Van Drielen

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN FISHER,
Plaintiff-Appellee,

vs.

CITY OF SAN JOSÉ, et al.,
Defendant-Appellant.

NO.: 04-16095

CITY OF SAN JOSÉ'S PETITION FOR REHEARING *EN BANC*

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INTRODUCTION AND RULE 35(a) DETERMINATION

This petition readily satisfies the standards for *en banc* reconsideration by this Court pursuant to Federal Rule of Appellate Procedure 35(b)(1)(A). The published panel decision directly conflicts with decisions of this Court and the United States Supreme Court including *Michigan v. Tyler*, 436 U.S. 499, 510-11 (1978); *United States v. Lindsey*, 877 F.2d 777, 782-83 (9th Cir. 1989); *United States v. Allard*, 600 F.2d 1301, 1304 (9th Cir. 1979) (“*Allard I*”); *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975); and *United States v. Echegoyen*, 799 F.2d 1271, 1279-1280 (9th Cir. 1986). Consideration by the Court *en banc* is therefore necessary to secure and maintain uniformity of the Court’s decisions.

The petition also involves questions of exceptional importance because:

1) the panel decision conflicts with authoritative decisions of other United States Courts of Appeals that have addressed similar issues, namely with *Estate of Bing v. City of Whitehall*, 456 F.3d 555 (6th Cir. 2006), *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002), and *United States v. Maez*, 872 F.2d 1444, 1450 (10th Cir. 1989); and 2) the panel decision announces *a new arrest warrant requirement* absent from and unsupported by decades of Fourth Amendment jurisprudence.

Not only is the majority’s application of a new Fourth Amendment arrest warrant analysis to an already seized and arrested person misplaced, it has

significant implications in multiple law enforcement contexts. The majority establishes a confusing, impractical, and unworkable rule of law not based on legal precedent that depends on the length of time and amount of effort required to take physical custody of a legally arrested person. Application of the rule announced by the panel majority will require police to engage in unreasonable and dangerous hesitation when an in-home standoff suspect refuses immediately to comply with police demands. In addition, reviewing courts will rely on ill-conceived second guessing rather than established legal precedent surrounding in-home, warrantless arrest. The *en banc* Court should reject such a new and significant rule of constitutional criminal procedure.

FACTUAL AND PROCEDURAL BACKGROUND

The essential facts are set forth in both the majority and dissenting opinions herein. On October 23, 1999, Steven Fisher, while standing just outside his apartment, brandished a firearm in the presence of a security guard, who summoned San Jose police officers. Fisher spoke briefly with officers, but refused to discuss the situation or come out of his apartment. He was intoxicated. During the discussions, Fisher threatened to shoot police officers and was later seen pointing his rifle at officers, loading more rifles, and placing numerous rifles in strategic locations about the apartment. After further attempts to talk with Fisher failed, San Jose's SWAT team (MERGE Unit) established an armed perimeter,

evacuated nearby apartments, and began to insist that Fisher come out. These legally significant events occurred by 6:30 a.m. on October 24, 1999. Fisher did not come out.

Over the course of hours, escalating tactics were employed to extricate Fisher from the apartment. Police made repeated announcements over bullhorns, pulled an armored vehicle in front of the apartment blaring its sirens, broke out windows in the apartment, detonated flashbangs, turned off the power, threw in a dedicated portable telephone because Fisher's phone was busy, and ultimately deployed tear gas. After about six hours, Fisher agreed to come outside and was physically taken into custody. Officers in command did not attempt to obtain an arrest warrant.

At the civil jury trial, Fisher advanced claims against San Jose and the officers of unconstitutional warrantless arrest, excessive force, failure to investigate misconduct, and negligent use of tear gas. The jury unanimously found in favor of Defendants on all claims. The jury determined that San Jose police officers used a reasonable amount of force in forcing Fisher out of the apartment and in taking him into custody, and also specifically determined that under the circumstances, a warrant was *not* necessary to arrest Fisher.

Fisher filed a renewed motion for Judgment as a Matter of Law contending that his arrest violated the Fourth Amendment due to the absence of a warrant.

The District Court granted Fisher's Rule 50(b) motion, entered judgment in his favor and awarded nominal damages in the amount of one dollar. The District Court held that, as a matter of law, a warrant *was* necessary to arrest Fisher.

A panel of this Court, in a split opinion, affirmed. (Opinion I attached hereto.) The City of San Jose filed a Petition for Rehearing With Suggestion For Rehearing En Banc. Thereafter, the same panel withdrew its opinion and replaced it with a second split opinion, again affirming. (Opinion II attached hereto.) Simultaneously, the Court denied the Petition For Rehearing En Banc as moot.

ARGUMENT

The parties, the Court, and precedent agree that coercive police activity commanding a person to leave his or her home is considered an arrest of that person in the home. Thus, the parties agree, and the Court must assume, Fisher was arrested in the eyes of the law when police surrounded his home and began to order him out. While the parties and the Court agree that such an in-home arrest requires a warrant absent "exigent circumstances," there is no dispute that exigent circumstances existed at that time. By 6:30 a.m., at the point armed officers surrounded the apartment and ordered Fisher to leave, the facts and all Fourth Amendment precedent dictate that Fisher was lawfully arrested in his home, no warrant was required, and no Constitutional violation occurred.

Yet the panel majority goes on to impose a new and unprecedented Fourth Amendment arrest warrant analysis to the already lawfully arrested Fisher. The panel majority now demands that police seek an arrest warrant for a lawfully arrested person, or articulate new exigent circumstances, to justify any subsequent coercive actions necessary to turn the lawful in-home arrest into perfected *physical* custody. This conclusion flies in the face of precedent on in-home arrests in the Supreme Court, this Circuit, and other Circuits. Because the question is one of recurring importance and significance to standard law enforcement practices, rehearing *en banc* is warranted.

I. THE PANEL'S DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT

A. Supreme Court Cases Hold That An Arrest Had Already Occurred

The panel majority's judgment is in direct conflict with *Michigan v. Tyler*, 436 U.S. 499, 510-11 (1978). In *Tyler*, the Supreme Court held that once a warrantless entry is justified by exigent circumstances, no warrant is required for subsequent entries, despite a passage of time, if the subsequent entries are no more than an actual continuation of the first. *Id.* In *Tyler*, the Supreme Court rejected the unrealistically narrow view that the exigency justifying a warrantless entry to fight and investigate a fire ends, and the need for a warrant begins, with the dousing of the last flame. *Id.* at 510. Rather, the Court found that the firemen's

second warrantless re-entry four hours after leaving the scene was a valid continuation of the initial lawful entry. *Id.* at 511. Here, there can be no reasonable dispute that all of the police conduct after Fisher was initially lawfully arrested was merely a continuation of that initial lawful seizure. Police must be allowed reasonable time and tactics to safely complete the work that justified the original seizure, in this case arresting Fisher, and only actions that are “clearly detached from the original exigency and warrantless entry” should be subjected to new Fourth Amendment warrant scrutiny. *Id.* at 511.

In this case, the majority opinion concludes that, even if Fisher had been arrested by police upon being surrounded and ordered to leave, and even if the danger created by Fisher’s actions and threats constituted an exigency (all of which the jury clearly found), because it took time and numerous police officers to ultimately take Fisher peacefully into police custody, he was subject to being arrested *again*. This conclusion does not follow from, nor can it be reconciled with, the long line of in-home standoff cases.

The panel majority dissects the continuous arrest process by applying a Fourth Amendment warrant analysis to subsequent coercive actions to perfect physical custody as if a duplicate Constitutional seizure were necessary. The panel majority further errs by categorizing these subsequent actions as “further intrusions into the home.” Opinion at 15059. The panel majority fails to

recognize that at the time of the original lawful arrest, the government was already in Fisher's home, in law, if not in fact. This concept is the foundation of this and every other court's standoff, in-home arrest jurisprudence.

B. The Panel Cited No Authority For Its Additional Arrest Warrant Requirement

The majority acknowledges there is no case law imposing such a burden on police. Recognizing, as it must, that Fisher was lawfully arrested in his home by 6:30 a.m., and finding no termination of that initial seizure, the majority promulgates the erroneous notion that Fisher could be essentially seized again. The majority would subject this duplicate in-home seizure to new Fourth Amendment scrutiny requiring probable cause and either a warrant or a newly articulated exigency. In essence, the majority requires police to do again that which has either been done already, or at least, that which has already begun and need only reasonably run its course.

Moreover, the need to be seized again could only arise through Fisher's failure immediately to submit to physical custody. In these circumstances, the suspect's failure to comply with lawful police conduct should not *increase* his Fourth Amendment protection and unduly burden the police. Fisher cannot have it both ways--Fisher cannot be lawfully arrested and then demand the protections of a subsequent arrest warrant when nothing has occurred to terminate the initial

arrest and probable cause exists. Here, the arrest of Fisher was in process and continuous. Only his submission to physical custody was delayed by his own refusal to comply.

II. THE PANEL'S DECISION CONFLICTS WITH DECISIONS OF THIS AND OTHER CIRCUITS

A. Other Circuits Have Held That No Additional Warrant Is Required In These Circumstances

The panel majority decision conflicts with cases in several circuits that have evaluated Fourth Amendment seizure issues in the context of a standoff between an armed suspect in a home and police officers. Because in a standoff situation, the subject is not initially physically under the direct control of authorities, standoff cases have analyzed the various formulations for determining when a seizure or arrest occurs. These cases establish that physical custody is not a requirement of arrest. When an armed SWAT team surrounds a person's home and demands that a suspect come out, these courts have uniformly determined that an arrest has occurred and the arrest is considered to have taken place inside the home regardless of where physical custody is perfected. *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989); *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002). That determination is important, of course, because under *Payton v. New York*, 445 U.S. 573 (1980), the Fourth Amendment "has drawn a firm line at

the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *Id.* at 590.

In *Maez*, 872 F.2d at 1450, the Tenth Circuit started with the formulation found in *Terry v. Ohio*, 392 U.S.1, 19 n.16 (1968) that “an arrest or seizure occurs ‘when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen....’” The court also quoted from *Florida v. Royer*, 460 U.S. 491, 502 (1983) (“A show ‘of official authority such that ‘a reasonable person would have believed he was not free to leave’” indicates that an arrest has occurred.”), and *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“Examples of circumstances that might indicate a seizure ... would be the threatening presence of several officers, the display of a weapon by an officer... or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”).

In *Maez*, under identical circumstances to those presented here, the Sixth Circuit held:

Given the presence of some ten officers, the drawn weapons of the SWAT team surrounding the trailer, the use of the loudspeakers, and the frightening circumstance his family faced, a reasonable person would have believed he had to come out of the home and submit to the show of authority. Accordingly, we hold that Maez was arrested while in his home.

[872 F.2d at 1450.] *See also Sharrar v. Felsing*, 128 F.3d 810, 819 (3rd Cir. 1997) (“Under any of these tests [for determining when an arrest takes place] when a SWAT team surrounds a residence with machine guns pointed at the windows and the persons inside are ordered to leave the house backwards with their hands raised, an arrest has undoubtedly occurred. There was a clear show of physical force and assertion of authority. No reasonable person would have believed that he was free to remain in the house.”); *Ewolski v. City of Brunswick*, 287 F.3d 492, 506 (6th Cir. 2002) (seizure occurs when officer restrains liberty such that reasonable person would believe he or she is not free to leave; liberty of suspect surrounded by armed police is so restrained). In *Ewolski*, the Sixth Circuit specifically rejected the concept that a person involved in a standoff is not arrested until he or she surrenders. *Id.* at 506. Further, the *Ewolski* court did not evaluate the exigency at the time of the later intrusions to obtain physical custody of the suspect. Once the suspect was seized by the restraint to his liberty occasioned by the police show of authority, and such seizure was performed under exigent circumstances, the later intrusions into his home were not considered invalid simply because they took place hours later.

The majority opinion also conflicts with the Sixth Circuit’s decision in *Estate of Bing v. City of Whitehall, Ohio*, 456 F.3d 555 (6th Cir. 2006)¹ by

¹ *Bing* was decided after both the briefing and oral argument in this case.

appearing to require a new exigent circumstances analysis for every activity that is part of a continuous armed standoff. In *Bing*, after the possibly intoxicated suspect fired a gun into the air and into the ground and retreated into his home, the police surrounded the home. After the suspect refused to comply with orders to come out for an hour and a half, the SWAT team came. In a series of incursions similar to those involved in the instant case, over the course of several hours the SWAT team broke out a window and threw in a “bag phone” because Bing’s phone line was busy, broke more windows and deployed three series of six canisters each of pepper gas into the house, rammed in and removed the front door, and detonated a flashbang device, all with the intent of forcing the suspect out of the house. When this proved unsuccessful, the police entered the house and under disputed circumstances, the suspect was shot and killed, and the house burned down from a second flashbang device.

The *Bing* court, as in all other cases, regarded the siege on Bing’s home as a de facto house arrest. “The use of police coercion to exercise physical control over an armed, barricaded suspect while he is inside his home amounts to a Fourth Amendment seizure.” *Bing* at 564. The police were not required to get a warrant before completing this de facto house arrest. The *Bing* court specifically addressed whether the exigency dissipated during the time the officers gathered intelligence, waited for backup, planned, and executed each of the various stages

of attempting to force Bing out of his house over several hours.

Moreover, that exigency did not terminate due to the passage of time or the police's actions. First, the exigency did not terminate due to the passage of time *because Bing was at all times dangerous*. Roughly two hours and twenty-four minutes passed from the time the police arrived at about 6:30 p.m. until they used the gas canisters at 8:45 p.m., but the passage of this much time did not itself terminate the exigency. The passage of time did not terminate the exigency because the ticking of the clock did nothing to cut off Bing's access to his gun, or cure him of his willingness to fire it.

[*Id.* at 565, emphasis added.] Indeed, in *Bing*, the actual entry into the house by SWAT officers did not occur until 11:20 p.m., some five hours after the police surrounded the home. The court specifically ruled that an "immediate-danger exigency" excused any warrant requirement even when the final entry took place after many hours of waiting, while Bing failed to surrender. Nor did the *Bing* court conclude, as did the majority here, that each later intrusion was a separate incident for purposes of deciding whether a warrant is necessary. Once the court determined that an exigency existed, excusing the necessity of obtaining a warrant, it found that such exigency continued during the armed standoff. Thus, *Bing* stands for the proposition that once exigent circumstances exist at the beginning of an armed standoff, that exigency continues throughout the standoff until it is resolved, and therefore, constitutes a clear circuit split on how to analyze exigent circumstances during a multiple-hour armed standoff where police use various

intrusions into the home to force the suspect out of the home.

All of these cases, examining the warrantless arrest of a suspect in a house by means of police surrounding the house, have then evaluated whether the absence of a warrant was excused due to the existence of exigent circumstances *at the time of the arrest*. In that respect as well, the panel majority decision cannot be squared with the law in other Circuits.

B. The Panel's Decision Is Inconsistent With Other Ninth Circuit Cases

The panel's judgment departs from prior decisions of this Court, and that conflict further warrants *en banc* review. In *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), this Court concluded that the subject was seized and arrested when surrounded by SWAT officers with drawn weapons and told, through bullhorns, to leave the residence. *Al-Azzawy* quoted with approval from a Sixth Circuit case, *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), as follows:

Nine officers converged on the home, surrounded it, flooded it with spotlights, and summoned Morgan from the house with a bullhorn.... These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.' [citing *Royer*] Viewed objectively, Morgan was placed under arrest, without the issuance of a warrant, at the moment the police encircled the Morgan residence.

[*Al-Azzawy* at 892.] See also *United States v. Lindsey*, 877 F.2d 777, 782-82 (9th

Cir. 1989) (Exigent circumstances must be viewed from the circumstances known to the police prior to the warrantless action, and therefore, a one-hour delay after the initial warrantless action cannot be used by the Court to determine exigency.).

The majority's insistence that officers must obtain a warrant to justify an arrest that has already occurred and that officers are simply seeking to complete is contrary to *United States v. Allard*, 600 F.2d 1301, 1304 (9th Cir. 1979) (holding that later obtained warrants could not retroactively authorize the entry), and *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975) (once an exigency exists, officers are allowed to enter a home to arrest suspects and secure the premises without a warrant). Once exigent circumstances excuse the initial intrusion, officers are allowed to continue with activities until, the intrusion in this case--the arrest of Fisher--is complete. *See also United States v. Echegoyen*, 799 F.2d 1271, 1279 (9th Cir. 1986) (holding that where a second warrantless entry is found to be a continuation of the initial lawful entry, a warrant is not required).

III. THE ISSUE PRESENTED IS IMPORTANT TO LAW ENFORCEMENT

Law enforcement officers face enormous risks in dealing with armed standoff situations such as those presented in this case. It is vital for the courts to provide clear guidelines to law enforcement that allow them to manage armed standoffs without the fear that, at some undetermined point, they will be subject to

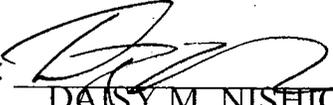
liability. Whereas it is accepted in other circuits (and had been in this Circuit) that a persons in Fisher's position was under arrest, the panel majority's decision creates uncertainty for officers in discharging their duties. Under the majority's opinion, if the suspect fails to emerge until some time has passed, the police are liable for warrantless arrest if it is later determined that there was sufficient time or a sufficient number of police officers involved to obtain a warrant. The better, and constitutionally proper, rule involves an evaluation of the arrest (for exigency) at the time the subject is surrounded and ordered to leave. After that point, as long as the tactics are a continuation of the original lawful warrantless seizure, the tactics should not be evaluated under a new warrant requirement.

CONCLUSION

On these grounds, petitioner San Jose requests that the Court *en banc* grant its request for rehearing. The majority's novel analytical approach is constitutionally unsound, and contradicts authority in this and other circuits.

DATED: December 11, 2007

RICHARD DOYLE, City Attorney

By: 

DAISY M. NISHIGAYA
Deputy City Attorney

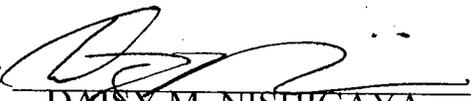
Attorneys for CITY OF SAN JOSE

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), the undersigned counsel certifies that this Petition for Rehearing *En Banc* of Appellant City of San José is double spaced, used a proportionately spaced 14-point New Times Roman type face, and contains 3729 words.

DATED: December 11, 2007

RICHARD DOYLE, City Attorney

By: 

DAISY M. NISHIGAYA
Deputy City Attorney

Attorneys for CITY OF SAN JOSE

1 **PROOF OF SERVICE**

2 CASE NAME: *Steven Fisher, et al. v. City of San José, et al.*

3 CASE NO.: Court of Appeals No. 04-16095; USDC #C01-21192 PVT

4 I, the undersigned declare as follows:

5 I am a citizen of the United States, over 18 years of age, employed in Santa
6 Clara County, and not a party to the within action. My business address is 200 East
7 Santa Clara Street, San Jose, California 95113-1905, and is located in the county
8 where the service described below occurred.

9 On **December 11, 2007**, I caused to be served the within:

10 **CITY OF SAN JOSE'S PETITION FOR REHEARING *EN BANC***

11 by MAIL, with a copy of this declaration, by depositing them into a sealed
12 envelope, with postage fully prepaid, and causing the envelope to be deposited
13 for collection and mailing on the date indicated above.

14 I further declare that I am readily familiar with the business' practice for
15 collection and processing of correspondence for mailing with the United States
16 Postal Service. Said correspondence would be deposited with the United
17 States Postal Service that same day in the ordinary course of business.

18 by PERSONAL DELIVERY, with a copy of this declaration, by causing to be
19 personally delivered a true copy thereof to the person at the address set forth
20 below.

21 Addressed as follows:

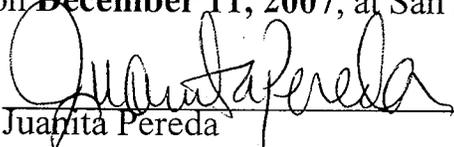
22 Mr. Donald E. J. Kilmer, Jr.
23 Attorney at Law
24 LAW OFFICES OF DONALD KILMER
25 1645 Willow Street, Ste. 150
26 San Jose, CA 95125

The Honorable Patricia V. Trumbull
United States District Court
280 South First Street
San Jose, CA 95112

27 **(VIA HAND-DELIVERY)**

(VIA U.S. MAIL)

28 I declare under penalty of perjury under the laws of the State of California that
the foregoing is true and correct. Executed on **December 11, 2007**, at San Jose,
California.


Juanita Pereda